



CHRISTCHURCH CITY COUNCIL

INTERNAL MEMORANDUM

3 March 1995

From: OFFICE SOLICITOR

To: GROUP MANAGER ADMINISTRATION

Copy to: Councillor Alpers
Group Manager Technical Services
Water Services Manager
Parks Manager
Environmental Planning & Policy Manager
Roading Manager
Community Manager, Beckenham Service Centre

OMBUDSMAN'S COMPLAINT RIVERLAW TERRACE

1. INTRODUCTION

You have sought my advice on matters raised in a letter from the Office of the Ombudsman to the City Manager dated 20 January 1995

You have forwarded to me previous correspondence from the Office of the Ombudsman together with a file containing the background to this matter.

In a letter dated 20 September 1994 from the Ombudsman to the City Manager, the Ombudsman advises that Mr Ken Sibley has complained that the Council has unreasonably delayed in taking action to remove an obstruction to a public road, namely Riverlaw Terrace.

There has been subsequent correspondence between the Council and the Office of the Ombudsman culminating the Ombudsman's letter of 20 January 1995. That letter refers to a number of legal decisions and you have sought my advice on whether they are relevant to the present situation.

From the material that you have forwarded to me, it is apparent that there is an unformed part of Riverlaw Terrace adjacent to the Heathcote River. This land is legal road owned by the Council and apparently has not been available for public access for many years by adjoining residents whose properties front onto Centaurus Road.

This part of Riverlaw Terrace is also crossed by two drains which I assume are controlled by the Council. The drain at the western end has vertical concrete sides with support being provided by cross beams. The drain at the eastern end does not have concrete sides but the Waste Management Unit advises it has timber banks. There are also a number of large plants such as pampas grass situated adjacent to the eastern drain. The western drain cannot be easily crossed by pedestrians and the eastern drain can only be crossed with some difficulty.

I record that I have visited the site of both drains and can appreciate the difficulties that a member of the public would encounter in attempting to walk along the road.

Apparently the Council has received complaints from members of the public as to the difficulty of access along the road and for approximately twelve months the Spreydon/Heathcote Community Board has been attempting to resolve the issue of public access along the road.

In reading the file there appear to the writer to be two separate issues involved in this matter :

- (a) a short-term issue of public access to the unformed legal road in essentially its present form; and
- (b) a long-term issue of how the Council is to manage this unformed legal road and future development of the road bearing in mind the opposition which is apparent from the adjoining landowners.

In this memorandum I intend to discuss principally the short-term issue and the legal considerations surrounding that issue.

With regard to the long-term issue, clearly I believe the residents will need to become involved and as the file indicates, there are worthwhile benefits in that from a security point of view for public using the road.

I also note in the file that there are suggestions that the Council stop the legal road under the Local Government Act 1974 whereupon it will vest in the Council as an esplanade reserve. At this point I do not intend to comment on that proposal and the views I set out below are on the basis of the legal position as it exists in relation to legal road.

I will now turn to consider the legal situation regarding the public's rights of access to road.

2. LEGAL PRINCIPLES

All roads and materials of which they are composed, with the exceptions of state highways and motorways, are owned by the Council and are under the control of the Council (ss.316 and 317 of the Local Government Act 1974).

Although the Council owns the roads in its district, these roads retain their character as highways so that this ownership by the Council is subject to the rights and passage in the highway enjoyed by the public, and separately the right of access to the highway by adjoining landowners.

These rights of passage and access apply to all legal roads in the Council's district whether or not those roads are physically formed as road and whether or not they are in actual use as roads by the public. So that the legal rights attach to what are popularly referred to as "paper roads" as much as to principal roads, such as Colombo Street, in the Council's district. The fact that a paper road may not have been used as such for many years, or at all, does not in any way derogate from the legal rights of the public to use and adjoining landowners to have access to that paper road.

The law relating to the use of the roads is a mixture of statutory provisions, principally in the Local Government Act 1974, and the common law, that is the law as developed through Court cases decided over the years.

As a preliminary point I would note that s.357 of the Local Government Act 1974 provides that it is a criminal offence for any person, not authorised by the Council or by or under any Act of Parliament, to encroach on a road by making or erecting any building, fence, ditch or other obstacle or work of any kind upon, over or under the road, or by planting any tree or shrub on the road.

Further it is an offence to place or leave on a road any timber, earth, stones or other thing or to dig up, remove or alter in any way the soil or surface of a road.

Upon conviction a person committing any of these offences is liable to a fine not exceeding \$200 and where the offences are continuing, to a fine not exceeding \$20 a day. The Court can also order that person to pay the costs incurred by the Council in removing any encroachment, obstruction or matter or in repairing any damage.

The implication of s.357 is that the Council does have a power to permit encroachments on a legal road such as structures or planting but that is a decision for the Council to make. Where no such consent has been given then an offence is committed.

The Council's powers in relation to roads have been considered by the Courts on a number of occasions and including the cases referred to in the letter from the Ombudsman's Office dated 20 January 1995.

In addition to those cases I would also refer to the Court of Appeal decision in—

Lower Hutt City Council v Attorney General ex rel Moulder (1977) 1NZLR184.

In that case the Court of Appeal stated :

"Although all streets and the soil thereof are by section 170(1) (of the former Municipal Corporations Act 1954) vested in the local corporation they nevertheless retain their character as highways so that the ownership by the corporation is in general subject to the rights in respect of highways enjoyed both by the public and by adjoining owners.

...the fact that streets are vested in and are under the control of the local authority does not entitle a council to erect or authorise the erection of a structure in a street if that structure amounts to what is technically described as a "public nuisance" ...At common law a permanent construction erected upon a highway without lawful authority, and which renders the way less commodious than before to the public, is a "public nuisance" provided that the construction constitutes an appreciable interference with the traffic in the street...It may also be noted that it is no defence that the obstruction, though a nuisance, is in other ways beneficial to the public."

The question of the public's right of access to roads was recently considered by the High Court in—

Papzrik v Tauranga District Council (1992) 3NZLR176

In that case which dealt with common law rights on the use of roads by the public, the Court stated :

"Once land is dedicated as a public road members of the public have, with certain qualifications, a right of passage over it. That general right of passage is supported by correlative duties imposed upon others not to substantially and unreasonably impede it. Effect is given to those duties by the laws of nuisance, trespass, negligence...But the ordinary citizen's common law right to use a publicly dedicated highway is not absolute. In addition to any limitations in the terms of the original dedication, it is qualified by the fact that it is a right of passage only, for the reasonable requirements of other road users, and any superimposed legislation."

3. SUMMARY OF STATUTE AND CASE LAW

From the statutory provisions, particularly s.357, and the cases referred to above and other cases, in my opinion the following propositions can be established :

- (a) The roads and materials of which they are composed are owned by the Council;
- (b) Although the Council owns the roads, the roads retain their character as highways so that the ownership by the Council is subject to the rights of the highway enjoyed by the public and rights of access to the highway by adjacent landowners;
- (c) The Council's primary function in relation to roads is to facilitate the passage which the word "highway" imports and for this purpose the roads are vested in the Council and the general powers as set out in the Local Government Act are conferred on the Council;
- (d) The fact that a road is a paper road does not affect its legal status nor the right of the public to pass and re-pass along that road;
- (e) The Council is empowered by s.357 of the Local Government Act 1974 to authorise encroachments on a legal road so long as those encroachments do not amount to a public nuisance;
- (f) What constitutes a "public nuisance" will be a question of fact to be decided upon by the Council depending upon the particular circumstances of each case. In general terms the Courts have held that a public nuisance will be established where the obstruction constitutes an "appreciable interference" to the right of the public to pass along the road.
- (g) Such a right to pass along the road exists 24 hours a day seven days a week so that the Council cannot effectively permit the public access only at certain times of the day.
- (h) If the Council is of the view that a particular situation constitutes a public nuisance then the Council does not have the authority to authorise that situation to continue so as to impede legal access to the public road and should rectify the situation.
- (i) If the Council fails to take action to remedy a situation of a public nuisance in respect of any road then any member of the public has the right to apply to the High Court for an order requiring the Council to rectify the situation.

Residents have suggested that a number of options must be considered by the Council before the short-term issue of access can be resolved, including an option of "no access". As will be clear from this opinion, "no access" is not an option open to the Council. Indeed the law directs the Council to provide public access.

Further, the genuine concerns by the residents such as loss of privacy and security, cannot stand against the clear legal rights the public have to access along this legal road. The situation the residents face is one similar to many property owners around the city where their properties adjoin paper roads and I believe the residents' interests would be best served by working in conjunction with the Council to ensure that their concerns can be addressed as far as reasonably possible by the Council when public access is provided.

5. SUMMARY

I would advise that this opinion be referred to the next meeting of the Spreydon/Heathcote Community Board with a recommendation that the Council take action within a reasonable time frame, e.g. 2 months, to provide public access for pedestrians along the paper road. This will involve providing bridges across the two drains at either end of the paper road and removing some plants on the paper road itself. Clearly the Council should advise the residents before any bridging work or plant clearing is carried out.

In my view the Council has a clear legal obligation at the present time to carry out this work.

From a practical point of view the Council will also need to continue the ongoing discussions with the local residents as to the permanent development of the paper road.



P W Mitchell
OFFICE SOLICITOR

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PWM:GAM

**BURWOOD/PEGASUS COMMUNITY BOARD
DISCRETIONARY EXPENDITURE 1997/98**

Opening Balance**\$18,100**

	Date of Resolution	Allocation \$	
Janet Stewart Community Planting Day	4 August 1997	400	
Burwood Playcentre Grant	1 September 1997	1,000	
Terry Conley Park Planting Ceremony	1 September 1997	700	
All Saints Church - Scree Garden	1 September 1997	2,000	
Te Ropu Tamahine	3 November 1997	2,500	
Neighbourhood Week	2 February 1998	250	
Janet Stewart Community Planting Day 1998	2 February 1998	250	
Add deleted project: Heritage Video, Wainonii/Aranui Recreation Co-ordinator	17 February 1998		14,500
Travis Wetland Development	17 February 1998	3,800	
Bottle Lake Forest Management Plan	17 February 1998	8,000	
Mainstreet New Brighton (initial advance)	17 February 1998	10,000	
Ouruhia Residents' Association	3 March 1998	2,500	
Balance as at 6 April 1998			\$1,200

Subcommittee/Working Party	Purpose	Date Established	Members	Status
Agenda 21 Working Party	To look at ways in which Agenda 21 can be advanced at the local level.	16.11.93	Evans, Duff, Rowlands, Williams, James plus appropriate officers and representatives of community groups	Current
Brighton Mall Working Party	Liaise with the New Brighton District Business Association and consideration of matters pertaining to New Brighton Mall.	17.11.92	East, Travis, James, Sheriff	Current
Community Funding Assessment Committee	To consider funding applications.	17.11.92	East, Williams, Rowlands plus community representatives	Current
Community Awards Working Party	To evaluate nominations and make recommendations to the Board on Community Service Awards as well as for Councils Civic Awards.	18.2.93	Rowlands, Williams, Evans, Duff	Current
Of Liquor Act Working Party	To consider applications for liquor licences under the Sale of Liquor Act.	17.11.92	Sheriff, James, East	Current
Advisory Council	Established to administer youth development project.	8.3.94	Duff (amended 1/7/96)	Current
Community Affairs Committee	To consider major issues relating to the Burwood/Pegasus community.	26.1.93	All Board members and Cr Close	Current
Community Centres Working Party	To comment on the suitability of the existing Community Centres for modern day use.	4.4.95	Rowlands, East, Duff, Evans	Current
Education Working Party	To collate information on the needs of schools and preschools to develop a strategy that will encourage the Ministry of Education to address the problems.	4.7.95	All interested Board Members	Current
Community Arts Working Party	To consider the formation of a Burwood/Pegasus Community Arts Council.	5.2.96	Dobbie, Evans, James, Williams	Current
Wood Playcentre Working Party	To assist and facilitate site investigations.	5.2.96	Dobbie, Evans, Sheriff, Duff, Rowlands, East, Williams	Current

Subcommittee/Working Party	Purpose	Date Established	Members	Status
Maori Street Names Working Party	To investigate the use of Maori street names in future subdivisions.	26.6.96	Williams, Rowlands, James	Current
Speed Limit Questionnaire Working Party	To consider responses to the speed limit questionnaire before submitting firm proposals to the August meeting of the City Services Committee.	1.7.96	Dobbie, East, Travis	Current
Neighbourhood Support and Residents' Groups Working Party	To discuss the nurturing of Residents' and Neighbourhood Support Groups with a view to producing at workable long-term strategy.	1.7.96	Dobbie, Sheriff, Francis, McLaughling, Taylor	Current
Joint Agenda 21 Working Party	Joint Burwood/Pegasus - Hagley/Ferrymead Working Party to co-ordinate Agenda 21 projects.	5.8.96	Williams, Evans, O'Brien, Brown	Current
Joint Cycleways Working Party	Joint Burwood/Pegasus - Shirley/Papanui Working Party to discuss cycleways impinging across boundaries, especially at Marshland/New Brighton/Shirley/North Parade intersection.	30.9.96	Travis, Evans, Rowlands, Bruce, Carroll, Wright, Dodge, Moore	Current
Parklands Development Team	Team to facilitate co-ordination and planning of the Parklands area.	3.2.97	Sheriff, Evans, Rowlands	Current
Broad Park Working Party	Set up to investigate options for the siting of a half basketball court and other facilities in Broad Park.	1.4.97	Dobbie, Williams, Evans, East	Current
Project 2000 Working Party	Working Party set up to address community contributions to celebrations/projects to commemorate the year 2000.	24.11.97	All Board members	Current

**BURWOOD/PEGASUS COMMUNITY BOARD PROGRAMME
1998**

APRIL	MAY	JUNE	JULY	AUGUST	TO BE DECIDED
Monday 6, 4.00 pm Board Meeting Tuesday 7, 4.00 pm Joint Seminar Bromley Treatment Plant Shirley Service Centre Tuesday 7, 6.00 pm Community Affairs Ctte Thursday 16, 7.00 pm Public Meeting Government's Code of Social and Family Responsibility Wednesday 29, 4.00 pm Project 2000 Working Party	Monday 4, 4.00 pm Board Meeting	Tuesday 2, 4.00 pm Board Meeting	Monday 6, 4.00 pm Board Meeting	Monday 3, 4.00 pm Board Meeting	
SEPTEMBER Monday 7, 4.00 pm Board Meeting	OCTOBER	NOVEMBER	DECEMBER		

PEDESTRIAN ACCESS - ALL SAINTS CHURCH, BURWOOD SCHOOL

A meeting of the Working Party to assess the viability of pedestrian access through the All Saints Church and Burwood School was held on Thursday 5 March 1998 in the Boardroom, Shirley Service Centre at 7.00 pm

PRESENT: David Dobbie, Dave East, Carole Evans, Don Rowlands, Gail Sheriff, Mike Thomson (City Streets), Doug Watkinson (Principal, Burwood School), Arthur Miller (All Saints Church)

APOLOGIES: Nil

The meeting began with Doug Watkinson outlining the history of vandalism at Burwood School. Doug noted that the school used to allow pedestrian access through its premises, however vandalism became prevalent. Compounding the problem was the fact that multiple access and exit routes through the school allowed easy escape routes for young offenders when being apprehended. People in the area were intimidated by the youths and the school had to invest a lot of money into its security measures.

Likewise, the church was of the opinion that vandalism had decreased markedly since pedestrian access was prohibited through the school. They too were not overly happy about opening up a pedestrian route through both premises.

Doug Watkinson went on further to explain that half a dozen residents in the area possess a key to the gate from Loughton Street.

The Working Party agreed with the sentiments of both the church and the school and agreed not to pursue a pedestrian accessway through either sites.

The meeting closed at 7.15 pm

**BURWOOD/PEGASUS COMMUNITY BOARD
SEMINAR**

18 MARCH 1998

**A seminar meeting of the Burwood/Pegasus Community Board was held on
Wednesday 18 March 1998 in the Boardroom, Shirley Service Centre,
36 Marshland Road at 4.00 pm**

PRESENT: David Dobbie (Chairman), Clare Duff, Dave East, Carole Evans, Gail Sheriff, Jack Travis and Chrissie Williams

APOLOGIES: Alister James, Don Rowlands

The purpose of this seminar was to discuss the North New Brighton War Memorial Hall interim evaluation report, which had been compiled by the City Design Project Manager, the Community Activities Officer Shirley and the Property Projects Manager.

John Park, City Design Project Manager, began the meeting by outlining the major points in the interim evaluation report. John noted that it was the Board's responsibility to make the final decision on the future of the Community Centre. He reported that the interim evaluation report was a four stage process and was compiled within the Council's Management Guidelines for Community Facilities. The process was in four stages as follows:

1. Assessing how the facility is meeting community needs.
2. Factors affecting the capacity of the hall to meet community needs.
3. Assessing options for meeting community needs.
4. Degree of support for the options.

1. ASSESSING HOW THE FACILITY IS MEETING COMMUNITY NEEDS

At this stage John outlined the results of surveys distributed to regular hall users comments received included; that non-Council facilities were not accessible, not enough entertainment, the hall did not meet needs, hall users were generally satisfied with the facility, rental charges were low but if they increased many groups would not be able to afford the use, and the hall was currently outdated and in need of modernisation.

2. FACTORS AFFECTING THE CAPACITY OF THE HALL TO MEET COMMUNITY NEEDS

Once again John outlined the results of the survey from regular hall users. These included that; the physical condition of the building was prohibiting its use, it does not meet evacuation or disabled access requirements, a minimum of \$515,000 was required to bring it up to the building standards, potential users were discouraged by the state of the building, the cost of an equivalent new building would be around \$900,000, there is a need for community facilities to be closer to shopping centres, and maintenance costs are higher because it is close to the beach.

3. ASSESSING OPTIONS FOR MEETING COMMUNITY NEEDS

John noted that there were three options that were open to the Board with regards to the North New Brighton Community Centre. These options were as follows:

1. Redevelop the centre as it is (new/existing).
2. Redevelop as a joint use commercial and community facility.
3. Withdraw support, ensuring that existing users have somewhere to go.

At this point the Board queried whether it did have the authority to make a decision on the future of the North New Brighton Community Centre. It was the understanding of some Board members that the hall had been maintained by the Christchurch City Council for a number of years but that it was still legally owned by the community. If this was the case then members felt that the Board would not have the authority to make a decision on the building's future.

It was therefore **resolved** that the Board continue to support funding of the North New Brighton Community Centre until further information on legal matters pertaining to the building's ownership are clarified.

The meeting closed at 5.15 pm