

**3. ANGELA STREET SERVICE LANE
REQUEST FOR ENCROACHMENT LICENCE**

RR 11262

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INTRODUCTION

The purpose of this report is to consider an application by Growers Direct Market (1974) Limited (“Growers”) for a licence under clause 5A of the Public Places and Signs Bylaw 1992 to use part of the service lane running off Angela Street, for the storage of pallets of produce delivered to Growers premises at 26 Yaldhurst Road.

The 1992 bylaw authorises the Council, in its discretion, to grant such licences and this report is to enable the Community Board to make a recommendation to the Council.

Growers are seeking an intrusion into the service lane.

This application for the licence has a lengthy background to it and I will now set out key factors in that background.

BACKGROUND

In 1955 Mr H G Wright purchased land (being 30 Yaldhurst Road) adjoining the land in Yaldhurst Road which now adjoins the Growers site at 26 - 28 Yaldhurst Road and Mr Wright built three shops on that land which are in existence today.

In 1969 the land now occupied by Growers was subdivided by a Mr Thomas and a fruit and vegetable market retailing business was established. At the time of subdivision in 1969, the Growers land was zoned Commercial C in the then Waimairi District Scheme. That district scheme required that commercial land be provided with a service lane for vehicular access to the rear of the premises and this is how the service lane from Angela Street came into existence. Ownership of the service lane was vested in the Waimairi District Council upon subdivision and today the service lane is owned by the City Council.

At the time of subdivision a link strip of one square metre was created at the end of the service lane adjoining Mr Wright’s land. It was intended that ownership of this link strip was to vest in the Waimairi District Council, but for reasons which are now unknown, this did not occur and the original subdivider, Mr Thomas, retained ownership of this link strip. It would appear that the intention behind the creation of the link strip was that Mr Wright would not be able to utilise the service lane from Angela Street until it had been extended across his land to Peer Street. This extension never occurred and today it appears unlikely it will occur.

In the 1974 review of the Waimairi District Scheme the land now occupied by Growers and Mr Wright's land, was rezoned Residential B so that the shops on Mr Wright's land and the Growers Market itself, until the current City Plan, had to rely on existing use rights in resource management terms. Also in 1974 the current owners of Growers, Mr and Mrs McClintock, took over the business and they continue to run the Growers business today.

In 1988, as a result of complaints arising out of its operation concerning the storage of waste produce, Growers applied to the Waimairi District Council for a planning consent to "...utilise the adjoining service lane for commercial purposes." At that time Growers intended to extend their existing building over the service lane.

Mr Wright objected to that application but in 1989 the Waimairi District Council granted Growers' application subject to a number of conditions, one of which was the successful completion of road stopping procedures for the service lane under the Local Government Act 1974. This condition was imposed because technically service lanes have the same legal status as roads and so for the Council to be able to transfer ownership to Growers, the Council had to carry out the road stopping procedures under the Local Government Act 1974.

In the meantime, Mr Wright had appealed the District Council's decision to grant the planning consent to the Planning Tribunal.

The issue of the road stopping was inherited by the new City Council upon amalgamation in 1989 and in 1991 the City Council conducted a hearing in respect of the road stopping to which Mr Wright and his three tenants were objectors. The Council dismissed those objections and resolved to stop the road and in accordance with the Local Government Act, applied to the Planning Tribunal for confirmation of its decision to stop the service lane.

In April 1992 the then Planning Tribunal heard both Mr Wright's appeal against the grant of the planning consent and also heard at the same time, the City Council's application to stop the service lane.

After that hearing the Tribunal issued an interim decision in September 1992. In that decision, while recognising the adverse environmental effects caused by Growers in relation to its neighbours, the Tribunal declined to uphold the granting of the planning consent for Growers to use the service lane and indicated that it would be unlikely to support the Council's decision to stop the service lane.

The Tribunal's decision in relation to refusing to uphold the grant of the planning consent was that it considered the granting of a planning consent did not meet the criteria for specified departures as the law then was, and the Tribunal was not satisfied with some of the conditions on that planning consent regarding the provision of a public footpath if the service lane was to be stopped.

The Court was reluctant to grant Growers' application because it considered it would encourage the continuation of its non-conforming use in circumstances where the district scheme clearly contemplated otherwise by virtue of the Residential B zoning at that time. However, the Tribunal noted that as matters then stood, the service lane was something of an anomaly. It was not recognised or provided for in the district scheme and the purpose for its creation, namely to provide vehicular access to commercially zoned land, had not been fulfilled.

The Court stated:

“On reflection we think the reality of the situation is this:

The time has come, for a firm planning policy decision to be made about the future of the whole block with frontage to Yaldhurst Road lying between Angela Street and Peer Street that currently contains commercial activities. If it is to remain zoned residential then the commercial occupants must be given the clear message that they will be confined to their “existing uses”. The Court did not see that it was appropriate to grant a planning consent simply to ameliorate adverse amenity effects.”

The Court noted that if the Council was to decide that the existing uses such as Growers were to be recognised in the district scheme then it would be premature to stop the service lane.

The Court therefore issued its decision as an interim one and asked the parties to consider their respective positions.

Subsequently the City Council resolved in April 1993 that the Yaldhurst Road/Angela Street/Peer Street block be confirmed as residential for the district plan review, and that the service lane from Angela Street be closed.

Given the tenure of the Tribunal's interim decision, the Council subsequently resolved later that year to withdraw its application to stop the service lane in Angela Street. The Tribunal subsequently awarded costs to Mr Wright against the Council.

In 1999 the Ombudsman carried out an investigation as a result of a complaint by Mr Wright into the activities of Growers Direct Market on the service lane.

As a result of information obtained during the course of that investigation, the City Council, late last year, filed an application for an injunction in the District Court in Christchurch to restrain Growers Direct Market from using the service lane for the storage of its produce without a licence being granted by the Council.

This application has been adjourned until 7 March 2000 to await the decision of the Council with regard to the present application by Growers for a licence to use the service lane for storage of its produce.

Since 1993 the planning issues have been considered again in the new City Plan and as at today the situation is that the Growers land and Mr Wright's land have been rezoned for commercial uses, both parts being given a Business 1 zoning. The service lane is in the Special Purpose (Road) Zone. The proposed encroachment under the bylaw sought by Growers does not require a separate resource consent.

Regarding the legal position with Growers' present application, the Legal Services Manager advises that as the service lane is legal road, the Council has the legal power to permit encroachments on the service lane so long as those encroachments do not constitute a public nuisance.

The legal test for what constitutes a public nuisance is that the encroachment does not "appreciably diminish" the public's ability to pass and repass on the service lane.

So in the present context, there would have to remain sufficient width in the service lane for vehicular access to and from the land owned by Mr Wright. Such vehicular access would include passage by heavy trucks.

The Board may hear representations regarding ownership of the link strip which adjoins Mr Wright's land, but in reality today that is not a highly relevant factor. The issue before the Board is similar to that before the Planning Tribunal in 1992 in that should the Board effectively approve an extension of the activities of Growers Direct Market onto the service lane by permitting the storage of produce and activities associated with that such as the cutting of vegetables which creates adverse environmental effects upon the neighbours and particularly the block of townhouses to the north of the service lane.

Attachments

- Location Plan
- Growers Direct Market Licence Application
- Christchurch City Council Public Places and Signs Bylaw 1992

Chairperson's

Recommendation: For discussion.