

2. RESPONSIBILITY FOR MAINTENANCE AND RENEWAL OF SERVICES LOCATED IN PRIVATE RIGHTS-OF-WAY

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The purpose of this report is to review the Council's policy on maintenance and replacement of services located in private lanes/rights-of-way in response to a petition from private lane residents seeking relief from such responsibilities

BACKGROUND

Council policy, set out in more detail below, simply affirms what is the legal position that property owners who gain access to their property via a privately owned right-of-way (ROW) are jointly responsible for the maintenance and replacement of the services located in the ROW including the carriageway, berm, footpath and kerb (if any), water supply, main/submain, sewer, stormwater facilities, planting and lighting. This is a generalisation because, as explained below the situation may differ slightly from lane to lane, but the generalisation is largely correct and adequate for this background discussion.

Historically, rights-of-ways have been used by developers to provide access to a limited number of lots where the laying out of a public road is seen to be an unnecessary expense and use of land. As set out in section 348 of the Local Government Act, Council approval is required for the creation of rights of way, and the section also allows the Council to impose conditions relating to widths, levels, courses, formation, etc. Purchasers of lots in such a development benefit from lower section prices because of the savings achieved by providing a right-of-way standard of access. The ROW remains in the ownership of the residents served by it and accordingly they become responsible for the maintenance of the lane and the services it contains. This is the quid pro quo for the benefit received at purchase.

With the passage of time, as the properties change hands two effects occur that lead the residents to a rather sceptical view of this benefit/cost explanation. First, the on-going value of the property often does not continue to reflect the initial savings, meaning that a subsequent owner may not pay that lower price. Indeed many such properties may have a premium value because of the privacy they afford. Second, the maintenance arrangements and various rights and responsibilities taken up by a new owner, as set out in the easements and memoranda associated with the title may not be fully explained to a subsequent purchaser so that it comes as a surprise to learn that they are jointly responsible for patching the lane surface or renewing the water submain or whatever.

THE PETITION

The petition signed by the owners of 12 lots in Karen Lane, Beckenham, essentially requests that the Council undertake the maintenance of water, drainage, sewerage and roading services contained within the lane. It notes that *"in view of the fact that we pay the same rates as households on so-called public streets we feel we are entitled to the same services. The alternative is a state of affairs we are also no longer responsible or prepared to tolerate"*.

RIGHT-OF-WAY PROCESSES AND CURRENT COUNCIL POLICY

In 1991 the Council reaffirmed its policy of not maintaining services located in or on private rights-of-way. This principle is followed for water supply, stormwater, sewerage, lighting, carriageway, berms, footpaths and kerb and channel. However, historical practice which is still in place leads to some exceptions and it is these differences that can give rise to confusion for the resident. The exact situation for a given right-of-way is defined by the easements and memoranda recorded against the title at the time of subdivision. These will generally reflect the principle of joint responsibility for maintenance but could also reflect the following exceptions:

1. Long standing practice for stormwater and sewer pipes is that for pipe diameters of 150 mm or above (and this is the size at which manholes are required) the Council will require them to be laid within an easement in favour of the Council, will accept ownership of the facility as a public drain and will maintain and replace the drain as necessary.
2. Practice for water supply mains is that if any right-of-way property is located more 135 metres from a public street hydrant the Council will require installation of a hydrant in the right-of-way, protect the main supplying the hydrant by way of an easement in favour of the Council and own and maintain the line up to and including the hydrant.

A pipe which is owned by the Council and which is installed in a right-of-way principally for water supply networking purposes (with or without an easement in favour of the Council) is maintained by the Council. (See Council Policy decision 26 April 2001).

The Council also maintains and services water connection boxes whether installed on private property or public land (See Council Policy decision 26 April 2001).

3. Current practice for street lighting is that the Council will not maintain street lights on rights-of-way. (See Council Policy decision 23 July 1990). However, the Council has inherited some historic situations where the cost of power and maintenance needs are covered by the Council and these 'existing rights' have not been rescinded.
4. The Council has agreed to travel down rights-of-way to pick up rubbish and recyclables where the right-of-way meets certain criteria relating to ROW width, grade, trees, negotiability, number of dwellings, (must be 5 or more), length, (must be 80m or more) and lane must be a mutual ROW.

OPTIONS AND COSTS

The options would seem to be to:

1. Stay with the current policy and practice, but do work with the legal profession to ensure purchasers are properly briefed about their responsibilities when buying property serviced by a right-of-way or to;
2. Undertake an investigation of the legality and practicality of carrying out some or all of the maintenance and renewal of the services listed above.

Information that defines the length, width and number of lots serviced by each right-of-way in Christchurch city is not available and a lengthy and costly exercise is required to obtain it. However, an analysis has been carried out that provides information sufficiently accurate to work out the costs that would be involved in maintaining and renewing the various services.

The Council's Property database indicates that of the 144,600 properties within the city boundaries, 23,193 are back section lots. Analysis of a large sample of named private lanes shows that the average length of right-of-way required per lot is about 15 metres. This in turn implies that the total length of private right-of-way in Christchurch is approximately 348 km.

On this basis the cost of maintaining and replacing the services contained within the right-of-way is:

MAINTENANCE AND REPLACEMENT COSTS OF RIGHT-OF-WAY SERVICES		
Roading	Annual Maintenance	Annual Replacement
Pavement (1.75 km ²)	\$ 875,000	
Kerb and channel	\$ 21,500	
Street lighting (1200)	\$ 132,000	
Cleaning, sump cleaning, flooding (348 km)	\$ 525,000	
Accessways	\$ 50,000	
Subtotal	<u>\$1,603,500</u>	\$1,365,000
Water Supply		
Submains maintenance (348 Km, 60 year life)	\$150,000	\$300,000
Sewerage	\$196,000	\$364,000
Stormwater	\$234,000	\$175,000
Total	\$2,183,500	\$2,204,000

Raising the finance to fund these works presents its own set of issues. If funding were to be found from the rates gathered to finance each of the services on public roads we would have a situation where ratepayers were providing for the maintenance and renewal of assets on private property and serving a sub group of the population. On the other hand if an attempt was made to raise the funds by way of a special rate from those properties that gain access from rights of way the Council would have a huge task identifying and maintaining such a rating base. Comment from the Council's Legal Services has been sought and they report as follows:

"The obligations regarding maintenance of a right of way will depend on the words used in the instrument creating the particular right of way. However, section 126B Property Law Act 1952 provides that the rights set out in the Ninth Schedule of the Act shall apply to every grant of a vehicular right of way. These rights apply only so far as a contrary intention is not expressed in the instrument creating the right of way. Under the Ninth Schedule occupiers of the land for the benefit of which, and the land over which, the easement is granted have a right to a contribution from all other occupiers for the cost of maintenance, upkeep and repair of the right of way. In effect this means that the occupiers who benefit from the right of way share the cost of maintenance.

The instrument creating the right of way is registered against the certificates of title to the land for the benefit of which the easement is created. It is the responsibility of professional advisors to ensure that purchasers are made aware of the implications (including maintenance obligations) of any easements registered against the certificate of title to the property their client intends to purchase.

SUMMARY

If the Council was able to take over the maintenance and replacement of right-of-way services and it so decided, it could expect an additional annual operating cost of \$2,183,500 and an additional \$2,204,000 in annual replacement costs. However there are real impediments if the Council were to attempt such a course of action. The first is the lack of general powers to undertake such maintenance and the second is the difficulty of defining the rateable properties. Furthermore the Council would be setting aside existing legal instruments that provide for such work.

Should the Council decide to affirm its current policy it would be helpful if the detail of this policy was set out in an accessible form for the information of residents, developers, solicitors, surveyors and consultants and an effort made to ensure that property purchasers were made fully aware of the commitments relating to the right-of-way access.

- Recommendation:**
1. That the Council re-affirm its general policy of not maintaining right-of-way services reflecting the legal situation established at ROW formation.
 2. That the detail of the policy for each service be clearly set out for subsequent approval by the Council and promulgation to the community.
 3. That steps be taken to encourage the legal profession to be careful to advise property purchasers of the commitments attached to any property gaining access from a right-of-way.

(Councillor Helen Broughton requested that her vote against the above recommendation be recorded. Councillor Barry Corbett declared an interest in respect to the above clause and retired from voting and discussion thereon.)