



REPORT OF THE COUNCIL HEARINGS PANEL

PART A - MATTERS REQUIRING A COUNCIL DECISION

1. APPLICATION FOR THE CONSTRUCTION OF A PRIVATE DRAIN THROUGH PRIVATE PROPERTY: SECTION 460 OF THE LOCAL GOVERNMENT ACT 1974

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| <b>Officer responsible</b><br>Environmental Services Manager | <b>Author</b> |
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INTRODUCTION

An application has been received from Mr L B and Mrs A M McKeever (“the McKeever’s”), the owners of 120 Dyers Pass Road, Christchurch, requesting that the Council exercise its powers under Section 460 of the Local Government Act 1974. This section would allow Council to construct a private storm water drain through adjacent private properties in order to convey storm water from 120 Dyers Pass Road through those properties and into a nearby public drain. Some of the owners of the adjacent private properties have refused their consent to the laying of the private drain. Section 460 allows the Council to do this work itself if it is satisfied that the route of the proposed drain is the only practical route and it has given the owners of the private properties an opportunity to have their objections heard. If the Council decides to construct the drain then the cost of the drain, together with any compensation payable to the adjacent landowners, is to be met by the McKeever’s.

RELEVANT STATUTORY PROVISIONS

Section 460 of the Local Government Act 1974 provides:

**“460 Construction of private drains through adjoining premises**

- (1) *Where, in the opinion of the council, the only practical route of any new private drain is through one or more adjoining premises, and any owner or owners of any of those premises will not consent to its construction, the council may, pursuant to a resolution on that behalf, of which notice shall be given to the owner or owners withholding his or their consent as aforesaid, enter upon his or their premises and execute, provide, and do all or any of the works, materials, and things which the council considers necessary, in order that the drain shall be laid in an efficient manner.*
- (2) *Before passing a resolution under subsection (1) of this section, the council shall give to every owner refusing his consent as aforesaid an opportunity to be heard before a committee of the council.*
- (3) *The cost incurred by the council in carrying out the said work, including the payment of compensation for injurious affection to any premises through which the drain is laid, shall be payable by the council in the first instance, and may be recovered by it from the owner of the land to be served by the private drain; and section 465 of this Act shall apply with respect to the amount so recoverable as if it were an advance made by the council under section 463 of this Act.*
- (4) *If agreement cannot be reached between the council and any claimant for any such injurious affection, the matter shall be determined as if the work were a public work and the claim were a claim for injurious affection in respect thereof under the [Public Works Act 1981].”*

Section 461(1) the Act provides, amongst other things:

**“461 Further provisions with respect to private drains**

- (1) *Where any private drain constructed with the consent of the owners of all the lands affected or constructed by the council pursuant to section 460 of this Act passes through or serves separately owned premises, there shall be attached to each and all of the lands served by that private drain the following rights, namely:*

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- (a) *A right to the free and uninterrupted use of that private drain; and*
- (b) *A right for the occupiers or any of them to enter upon all lands served by that drain, or through which it passes, for the purpose of relaying or effecting necessary repairs to the drain; and*
- (c) *A right to contribution from the owners or occupiers of other lands so served by that drain towards the cost of executing, providing, and doing all or any of the things required in respect of the drain by this Part of this Act or any bylaw; and*
- (d) *A right to contribution from the owners or occupiers of those other lands towards the cost of all necessary relaying of or repairs to the drain; and*
- (e) *A right to the recovery from the owners or occupiers of other lands through which that drain passes but which are not served by the drain of the cost of any repairs to the drain necessitated by any wilful or negligent act of those owners or occupiers,— ”*

**DETAILS OF APPLICATION**

The McKeever's wish to construct a private storm water drain to convey storm water from the foot of their property into a public storm water drain situated in a gully below their property. That gully is upon private land known as 15 Kiteroa Place. In order to reach this public drain the proposed private drain must pass through 7 Kiteroa Place, then under a driveway which serves 11, 13, 13A and 15 Kiteroa Place ("the driveway"). The driveway is comprised of a number of strips, all of which form a right of way. The route of the proposed drain is shown on the attached plan marked "Appendix 1".

The McKeever's consider that the proposed route is the most practical route for the drain. The route takes the shortest distance to the public drain. The only other option is to pump the stormwater from the foot of the McKeever's property up to the public stormwater on drain on Dyers Pass Road. This would be a considerably more expensive option and certainly not fail-safe in the event of a power failure. Staff in both the Council's Greenspace Unit and Environmental Services Unit concur with the applicants view that the only practical route for the drain is that shown on the attached plan.

The owner of 7 Kiteroa Place has consented to the laying of the drain through his property. However, the owners of 11, 13, 13A and 15 Kiteroa Place have all refused their consent for the proposed drain to pass under the driveway.

**BACKGROUND TO APPLICATION**

On 30 January 2001 a resource consent was granted to the McKeever's to subdivide their property at 120 Dyers Pass Road into two allotments. Following that it became necessary that provision be made for the discharge of stormwater from those allotments.

The most appropriate outfall for stormwater from this land is the public stormwater drain in the gully below which passes through 124 Dyers Pass Road, under the driveway and then through 15 Kiteroa Place. The only practicable route for a drain from 120 Dyers Pass Road to this public drain is through 7 Kiteroa Place and under the driveway as detailed on the attached plan.

In 2002 the McKeever's approached the owners of 7, 11, 13 and 13A Kiteroa Place for permission to lay a private drain through those properties and into an existing private stormwater drain and sump on the driveway. That existing private drain in turn discharges into the public drain in the gully. The owner of 7 Kiteroa Place gave the McKeever's permission to lay a drain through his property. However, the owners of 11, 13 and 13A Kiteroa Place refused their permission.

Subsequently, the McKeever's applied to the Council requesting that it exercise its powers under Section 460 and construct a private stormwater drain which would connect the drain laid through 7 Kiteroa Place with the sump. That application was considered on 19 March 2002 by a subcommittee of the Regulatory and Consents Committee. The owner of 11 Kiteroa Place, Mr Lindsay Eagle, appeared before the subcommittee in opposition to the application. He stated that he also represented the owners of 13, 13A Kiteroa Place. He expressed concern regarding the impact of the additional connection upon the existing private drain, access across his property for inspection, maintenance of the existing private drain and the liability for future maintenance of that drain.

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He indicated that he would be amenable to the construction of a drain through his property which would connect directly to the public stormwater drain a few metres below his property instead of connecting to the private stormwater sump and drain on his land. After considering the report and submissions the Subcommittee concluded that Section 460 should not be used on that occasion. Its recommendations, which were subsequently adopted by Council, were that:

1. *The Council decline to exercise its powers under Section 460 of the Local Government Act to construct a private stormwater drain on 11 Kiteroa Place which would connect the stormwater drain from 120 Dyers Pass Road to the private stormwater sump on 11 Kiteroa Place.*
2. *That the owner of 120 Dyers Pass Road be advised:*
  - (a) *To consider the construction of a private stormwater drain directly from his property to the public stormwater drain situated on 15 Kiteroa Place and for this purpose to seek the consent of each of the property owners through whose properties such drain must pass; and*
  - (b) *That any future application by him to the Council to exercise its powers under Section 460 in respect of recommendation 2 (a) above should be made only after he has attempted to seek, by way of reasonable negotiation, the consent of the property owners affected.*

The Council has now received advice from the McKeever's, through their solicitor, Mr Murray Withers of Murray Withers & Associates, that the McKeever's have been unable to obtain the consent of the owners of 11, 13, 13A and 15 Kiteroa Place, to lay a drain along the route shown on the plan marked Appendix 1. The McKeever's have requested that the Council now exercise its powers under Section 460 to construct the drain itself.

The owners of 11, 13, 13A and 15 Kiteroa Place were all invited to attend and present their objections to the application to the Council's Hearings Panel which would meet for that purpose on Friday 6 August 2004.

### RECOMMENDATION OF HEARINGS PANEL

#### HEARING OF OBJECTIONS

The Council has delegated to the Hearings Panel the power to hear and determine any objections by the affected property owners to the exercise of the Council's power under Section 460. Once the panel has heard and determined any such objections it must report to the Council. The final decision whether or not to proceed with the construction of such a drain rests with the Council.

A Hearings Panel comprising Cr L Keast, Cr P Harrow and Community Board member Mr G Hampton met to consider objections from the affected property owners on 6 August 2004 and reports as follows:

The Hearings Panel heard submissions from Mr Murray Withers, the McKeever's' solicitor, who advised the Panel of the efforts made to seek consent from the owners of 11, 13, 13A and 15 Kiteroa Place in accordance with the recommendation contained in the Council's resolution of 28 March 2002. He advised that the owners of 7 Kiteroa Place had agreed to an easement however consent had still not been obtained from 11, 13, 13A and 15 Kiteroa Place. He submitted that the proposed route was the only practical option as it was impractical to pump stormwater back up onto Dyers Pass Road. He submitted that as an alternative the McKeever's had attempted to gain the consent of the owners of 124 Dyers Pass Road to lay a drain through that property in order to discharge their stormwater into the natural stormwater course which past through that property. That request was refused.

The Hearings Panel then heard from Mr Anthony Spoors of 13A Kiteroa Place who objected to the application. He expressed concern in regard to the subdivision which has already been granted for 120 Dyers Pass Road. He advised he would prefer the section to remain underdeveloped and considered the proposed new dwelling would have a negative visual effect on his outlook by spoiling what was a semi-rural outlook.

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Mr Lindsay Eagle, the owner of 11 Kiteroa Place, also presented a written submission objecting to the application. Mr Eagle advised that in his opinion there were other practical options for the stormwater route. He suggested that a more practical route for the discharge of stormwater from the McKeevers' property was through 124 Dyers Pass Road. He also expressed concern in regard to the earlier subdivision consent. In answer to a question he considered that there may be consequential problems with the extra amount of water in the drainage system. He advised that the McKeevers presently discharge their stormwater into his private stormwater drain on his driveway unlawfully as he has never granted his consent for this.

The Panel also considered written objections from the owners of 13 and 15 Kiteroa Place. The owners of 13 Kiteroa Place objected to further housing development on McKeevers' property. They expressed concern at the potential effects of any blockage of the proposed drain on their driveway and the effects of increased flows in the public drain. The owners of 15 Kiteroa Place expressed concern that an increase in water flow in the public drain which passed through their property would result in damage to their property.

The Hearings Panel also noted the report from Council staff who supported the McKeevers' application. Staff considered that the proposed route of the drain, as shown on the plan marked Appendix 1, was the only practical route. The total length of the proposed drain from 7 Kiteroa Place to the existing public drain on the other side of the right of way was approximately 15 metres. The existing public drain was considered to be the most practical outfall for stormwater from the McKeevers' property. Staff did not consider that the presence of the proposed drain would result in any detriment to the land through which it would pass. The Council's engineer advised that he did not consider that the increased flow in the public drain which would result from the addition of the McKeevers' stormwater would cause damage to 15 Kiteroa Place.

The Panel asked a number of questions in regard to other possible options including the pumping of stormwater up to Dyers Pass Road, or piping across adjoining land, either through 124 Dyers Pass Road (Cullen property) or wholly through 7 Kiteroa Place (Powell property).

### **RECOMMENDATION**

After considering the submissions from the applicant, the objections and the report from staff the Hearings Panel considers that the Council should proceed with the construction of the drain as proposed in the application. In the Panel's view the public stormwater drain which passes through 15 Kiteroa Place is both the most appropriate and most practical outfall for stormwater from 124 Dyers Pass Road. The Panel considered that the only practical route for a drain to convey stormwater from 120 Dyers Pass Road into that public drain was that shown in Appendix 1. They noted that it was the shortest route as the easement had already been consented to over 7 Kiteroa Place and the distance which remained to connect to the existing public drain was only some 15 metres.

The Panel also considered other options discussed at the hearing but agreed that they were not as practical. They considered that pumping stormwater up hill to Dyers Pass Road would not only be more expensive but would be more of a risk due to the possibility of a power failure. It was noted that the building code provided that drainage systems for the disposal of surface water shall be constructed to convey surface water to an appropriate outfall using gravity flow where possible. They noted that the other options of crossing neighbours properties would result in a longer drainage system. There was no agreement with the owners of 124 Dyers Pass Road and even if this could be obtained piping could not then be connected into a public drain, as required under the Act. Nor did they consider it to be a practical option to lay piping over the length of the property at 7 Kiteroa Place up to the road because of the distance and the potential disruption to the existing building on the land.

The Panel also noted that the drain would be constructed by the Council at the cost of the McKeevers. This would give the Council complete control over the design and execution of the works. It would result in the removal of the present unlawful connection into Mr Eagle's private drain and provide a new private drain protected by statutory easement, with the McKeevers having sole responsibility to maintain it.

The Hearings Panel concluded that Section 460 of the Local Government Act 1974 should be used.

**26. 8. 2004**

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**Recommendation:** That the Council resolve –

1. That the only practical route for a drain to drain stormwater from 120 Dyers Pass Road into the public drain on 15 Kiteroa Place is that shown on the plan appended and marked Appendix 1.
2. That pursuant to Section 460 of the Local Government Act 1974 a private stormwater drain be constructed through Nos. 11, 13, 13A and 15 Kiteroa Place generally along the route shown on the abovementioned plan.

**CONSIDERED THIS 26TH DAY OF AUGUST 2004**

**MAYOR**