



23. 9. 2004

REPORT OF THE COUNCIL HEARINGS PANEL

PART A - MATTERS REQUIRING A COUNCIL DECISION

2. PROPOSAL TO CONSTRUCT A PRIVATE DRAIN THROUGH PRIVATE PROPERTY: SECTION 460 OF THE LOCAL GOVERNMENT ACT 1974

<b>Officer responsible</b> Environmental Services Manager	<b>Author</b> Report of the Council's Hearings Panel
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INTRODUCTION

A request has been received from Mr L B and Mrs A M McKeever ("the McKeever's"), the owners of 120 Dyers Pass Road, Christchurch, that the Council exercise its powers under Section 460 of the Local Government Act 1974 to construct a private stormwater drain through several adjacent private properties in order to convey stormwater emanating from 120 Dyers Pass Road through those properties and into a nearby public drain. The owners of the adjacent private properties have refused their consent to the laying of the proposed 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 refusing their consent 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 land owners refusing their consent, 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,-"*

The Council has delegated to the Council's Hearings Panel the function, under section 460(2), to hear any objections from any owner refusing his or her consent to the laying of a private drain through his or her property. Once the Panel has heard all such objections it must make a recommendation to the Council in respect of those objections. The final decision whether or not to proceed with the construction of such a drain rests with the Council.

**DETAILS OF PROPOSAL**

The McKeever's have asked that the Council exercise its powers under section 460 to construct a private stormwater drain through numbers 11, 13, 13A and 15 Kiteroa Place in order to convey storm water emanating from their property at 120 Dyers Pass Road into a public stormwater drain situated in a gully below their property. That gully passes through 15 Kiteroa Place. The route of the proposed drain is shown on the attached plan marked "Appendix 1".

Before reaching 11 Kiteroa Place the stormwater must first pass through 7 Kiteroa Place. The owner of 7 Kiteroa Place has granted the McKeever's consent to lay a drain through that property for this purpose. That section of drain has been laid.

The proposed drain through 11, 13, 13A and 15 Kiteroa Place will be approximately 15 metres in length. It will pass through a number of narrow and adjacent strips of land each of which forms part of one of the four properties in question. These strips together form a right of way which serves each of those four properties. Upon this right of way is a sealed driveway, approximately 4.5 metres in width ("the driveway"). The proposed drain will pass under this sealed driveway.

The proposed drain is a 100 millimetre diameter upvc plastic pipe. It is proposed that it be buried under the surface of the properties in question.

The McKeever's consider that the route of the proposed drain is the only practical route for the drain. The public drain on 15 Kiteroa Place is the closest public stormwater outfall to the foot of their property. They have the right to convey stormwater through 7 Kiteroa Place. The route of the proposed drain takes the shortest distance to that public outfall. It uses gravity. It does not involve disturbance to trees or shrubs on the properties in question.

Council engineering staff in both the Greenspace Unit and the Environmental Services Unit concur with the McKeever's' view that the only practical route for the drain is that shown on the attached plan. They support the McKeever's' proposal.

In considering the McKeever's' proposal Council staff examined other options for the disposal of stormwater from the McKeever's' property. These are outlined below.

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### OTHER OPTIONS CONSIDERED IN LIEU OF PROPOSAL

In assessing the McKeevers' proposal Council staff considered three other options for the disposal of stormwater from the McKeevers' property.

1. Pumping stormwater up to the public drain on Dyers Pass Road.

This option involved disposing of stormwater from 120 Dyers Pass Road by pumping it up to the side channel on Dyers Pass Road. This option would mean that a stormwater collection chamber would need to be constructed and installed along with a submersible pump at the foot of 120 Dyers Pass Road. All stormwater from the roof and hardstand areas of the site would be reticulated to this stormwater collection chamber and an electric pump would then pump the stormwater up to the side channel on Dyers Pass Road. Approximately 65 metres of pipe would need to be laid from the pump site to Dyers Pass Road at a cost estimated to be over \$5,000.

Council staff did not consider this to be a practical option because of the amount of reticulation and stormwater storage involved, the maintenance required to ensure the system remained efficient, the high costs involved, and the risk of overflow to adjoining neighbours' properties should there be a pump failure.

2. Drainage through 7 Kiteroa Place to the side channel in front of 7 Kiteroa Place

This option would mean laying a drain approximately 45 metres long from the southern boundary of 120 Dyers Pass Road through the property at 7 Kiteroa Place and out to the side channel in front of 7 Kiteroa Place. It was noted, however, that the ground levels at the southern boundary of 120 Dyers Pass Road were similar to the levels of the kerb outside 7 Kiteroa Place meaning that there was very little fall to drain stormwater. The site also has a paved driveway and concrete retaining walls upon the path that such a drain would have to take.

Council staff did not consider this to be a practical option because of the lack of gradient and therefore fall for the drainage system, the obstruction caused by the concrete retaining walls, and the paved driveway.

3. Drainage across 124 Dyers Pass Road to the public drain passing through 124 Dyers Pass Road.

This option would involve laying a pipe of approximately 23 metres across the southern boundary of 124 Dyers Pass Road to the public drain located in the gully passing through 124 Dyers Pass Road. While the gradient here would be sufficient the steepness of the slope and the extensive established vegetation would make trenching and laying a pipe a very difficult exercise. It is likely that trees would be damaged and this may result in consequential slope instability.

Council staff did not see this as a practical route for the drain because of the difficulties which would be encountered in trenching and laying a pipe through the trees and shrubs, the steepness of the slope and the concern over slope stability should the vegetation be disturbed.

### BACKGROUND TO PROPOSAL

On 30 January 2001 a resource consent was granted to the McKeevers 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 natural 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.

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In 2002 the McKeevers 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 upon the driveway. That existing private drain in turn discharges into the public drain in the gully upon 15 Kiteroa Place. The owners of 7 Kiteroa Place gave the McKeevers' permission to lay a drain through their property. However, the owners of 11, 13 and 13A Kiteroa Place refused their permission.

Subsequently, the McKeevers applied to the Council requesting that it exercise its powers under Section 460 and construct a private stormwater drain which would connect the drain already laid through 7 Kiteroa Place to the private 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 and 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. 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 adopted by the Council on 28 March 2002, 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.”*

Earlier this year the Council received advice from the McKeevers, through their solicitor, Mr Murray Withers of Murray Withers & Associates, that the McKeevers had been unable to obtain the consent of the owners of 11, 13, 13A and 15 Kiteroa Place, to lay a drain along the route referred to in the Council's resolution. This route is in fact the proposed route shown on the attached plan marked Appendix 1. The McKeevers requested that the Council exercise its powers under Section 460 to construct the drain upon the proposed route. They submitted that this is the only practical route for the drain.

On Friday 6 August 2004 the Council's Hearings Panel heard objections to the proposal from the owners of 11, 13, 13A and 15 Kiteroa Place. The Panel's report and recommendations in respect of those objections was placed on the agenda for the meeting of the Council on Thursday 26 August 2004. As a result of legal advice the Council, on 26 August 2004, declined to consider the proposal and the recommendations of the Hearings Panel. Instead it resolved that the Hearings Panel rehear the objections and report back to the Council with its recommendations.

The rehearing took place on Friday 17 September 2004.

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**RECOMMENDATION OF HEARINGS PANEL**

**Hearing of Objections**

On 17 September 2004 a Hearings Panel comprising Councillor D Cox, Councillor M Evans and Councillor G Sheriff met to consider objections from the affected property owners and reports as follows:

The Hearings Panel heard from Mr Murray Withers, solicitor acting for the McKeever's, who submitted that the only practical route for stormwater from 120 Dyers Pass Road was under the driveway owned by the owners of 11, 13, 13A and 15 Kiteroa Place and then into the public drain on 15 Kiteroa Place. He also read a letter from the McKeever's on the drainage issue and the consultation that had occurred with the affected property owners. Mr David Falloon, a registered civil engineer, then presented evidence for the McKeever's detailing the drainage history of the site. He concluded that the proposed route (as shown in Appendix 1) was the only practical route for the drain. He advised that it followed the natural fall line and was the shortest maximum gradient run to open discharge. It also had the advantage of minimal nuisance to adjoining property owners in the event of blockage or partial failure.

The Hearings Panel then heard from Mr Ewan Chapman, solicitor, who appeared for the owners of 11, 13, 13A and 15 Kiteroa Place. He stated that there were other possibilities for the disposal of stormwater from the site at 120 Dyers Pass Road and he requested that the Council decline to exercise its powers under Section 460. He considered that the Council was not legally able to exercise its powers under Section 460 if there were other practical routes available for stormwater disposal. He submitted that there were other practical routes.

Mr Lindsay Eagle, the owner of 11 Kiteroa Place, also presented a written submission objecting to the application. He considered there were other effective routes for stormwater drainage from the McKeever's property. He asked that the application be declined. He submitted that there was a further option, in addition to those three considered by Council staff and referred to above. That option was to connect into the public stormwater channel on his property by means of a drain from 7 Kiteroa Place directly through his property. In answer to a question from the Panel, however, he considered that the matter was unlikely to be resolved by consultation as negotiations between the parties had broken down. He stated that he would not grant his permission for such a drain through his property.

The Hearings Panel then heard from Council staff who supported the McKeever's application. Mr Andrew Stewart, Subdivisions Engineering Officer, discussed four separate options for disposal of stormwater, concluding that three of these were impractical. Those he considered were impractical were the pumping of stormwater up to Dyers Pass Road; laying a drain approximately 45 metres from the southern boundary of 120 Dyers Pass Road through 7 Kiteroa Place to the side channel in front of 7 Kiteroa Place; or laying a drain approximately 23 metres across the southern boundary of 124 Dyers Pass Road to the public drain on that property. In his view the only practical route for the drain was the route proposed by the McKeever's and detailed in Appendix 1. It was the shortest and most direct route. This option would involve laying a pipe from the southern boundary of 7 Kiteroa Place for approximately 15 metres across the right of way to connect into the public stormwater drain on 15 Kiteroa Place. He also commented on the further option suggested by Mr Eagle. He considered that this was not a practical route because there was vegetation along the route, he was doubtful there was sufficient fall from the drain already laid to the boundary between 7 Kiteroa Place and 11 Kiteroa Place and it would involve crossing a sealed carparking area adjacent to the driveway.

After hearing from the applicant, the objectors and the staff the Hearings Panel carried out a site visit.

**Recommendation**

After considering the submissions and assisted by their site visit the Hearings Panel recommends that the Council should proceed with the construction of the drain as shown in Appendix 1.

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They noted the other options discussed at the hearing, however, they could not agree that these were practical for a number of reasons. The pumping of stormwater up to Dyers Pass Road would involve ongoing maintenance and, with the large storage of water required, would pose a greater risk of inundation to adjoining property owners in the event of pump failure. The Panel also noted the very steep gradient of the site and did not consider it practical to require all stormwater to be collected at the foot of the site and then pumped back up to the top.

They also considered the option of laying a drain to the side channel in front of 7 Kiteroa Place to be impractical mainly due to the lack of sufficient gradient which would not allow for enough fall. They noted that the ground levels outside the front of 7 Kiteroa Place were very similar to the ground levels at the southern boundary of 120 Dyers Pass Road. In addition they noted there were a number of existing obstacles, for example retaining walls and a paved driveway, which lay in the path of such a drain.

In regard to the option of laying a drain along the southern boundary of 124 Dyers Pass Road the Panel agreed that this also was impractical given the extensive existing plantings and the steepness of the slope which may become unstable should vegetation be disturbed. They agreed that it would be difficult to find a drainlayer who would be willing to undertake this drainage work because of the dense planting and the steep slope.

Nor did the Panel consider that the option raised by Mr Eagle was practical. They noted there were doubts expressed at the hearing in regard to there being a sufficient gradient and there was no agreement between the parties on an easement, nor likely to be according to Mr Eagle. On their site visit the Panel noted that there appeared to be insufficient fall for this to be a practical option. In addition they noted that this route would also involve removal of vegetation as well trenching through a large sealed carparking area.

In the Panel's view the only practical route for the drain was that shown on the plan in Appendix 1, that is a drain from the end of the southern boundary of 7 Kiteroa Place under the right of way and connecting in to the public stormwater drain which passes through 15 Kiteroa Place. This distance was approximately 15 metres, with only approximately 4.5 metres of that being the sealed driveway. In addition there would be little disturbance to planting. The Panel also noted that this drain would be constructed by the Council with the cost being paid by 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 to construct the proposed drain shown in Appendix 1 as this was the only practical route for the drain.

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**Recommendations:** That the Council resolve:

1. That the only practical route for a drain to convey stormwater emanating from 120 Dyers Pass Road from the point of termination of the existing stormwater drain at the boundary between 7 and 11 Kiteroa Place to the public drain on 15 Kiteroa Place is that shown on the attached plan 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 along the route shown on the abovementioned plan.

**CONSIDERED THIS 23RD DAY OF SEPTEMBER 2004**

**MAYOR**