

1. 13 HAMILTON AVENUE COVENANT

General Manager responsible:	General Manager City Environment
Officer responsible:	Greenspace Manager
Authors:	Eric Banks, Parks and Waterways Planner, DDI 941-8285, Chris Gilbert, Legal Services Manager, DDI 941-8561

PURPOSE OF REPORT

1. To assist Board and Council consideration of an application by the owners of 13 Hamilton Avenue, Fendalton, for an amendment to the existing conservation covenant over part of the property by presenting values associated with the existing and proposed covenants.
2. The owners of 13 Hamilton Avenue have requested a variation to the existing conservation covenant over part of their property.
3. A decision to cancel or vary such a covenant rests with the Council upon receipt of recommendations from the Board.

EXECUTIVE SUMMARY

4. A conservation covenant agreement between the Council and the previous owner Dr Van Loon Perry of 13 Hamilton Avenue covering a significant portion of the property was signed in 2000 and registered on the Certificate of Title in 2002.
5. Conservation covenants are an important means of helping to achieve community outcomes for the Greenspace Unit, particularly when purchase is not possible. A possible decision making conundrum is that if the Council is seen to consider a reduction or cancellation in a covenant then why would a land owner consider protecting their property in this way, but at the same time, if the Council is seen as being inflexible land owners may be deterred from this form of protection if they perceive a reduction in future sales value.
6. Council officers considered Dr Perry's request to vary the covenant in May 2004 and advised her that "... *The existing covenant would remain against the title for any purchaser of this property. However, if a new owner wished, the Council would be prepared to enter into a new conservation covenant agreement with that party. The maximum reduction in the covenant area the Council would be prepared to make would be approximately 200m² and is shown in the attached plan SM 1349-01. The northern boundary of the modified covenant is intended to follow that of the waterway setback of 10 metres which applies to this stretch of the stream...*", and on this representation she marketed and eventually sold the property on the basis that the Council had agreed to reduce the covenanted area. Council officers agreed to that variation but have no authority to do so.
7. New owners have purchased the property believing that the Council had agreed to reduce the covenanted area and paid a market value for the land with the smaller covenanted area.
8. The new owners now seek to have the covenant varied to give effect to the agreement that they believe was assented to by the Council and in order to allow them to proceed with their intended development of the site which is stalled until this issue is resolved.
9. The social, ecological and cultural values recognised by the Council's Greenspace Unit in the area proposed to be removed from the covenant are less significant than those of the area proposed to remain under covenant. The area to be released is further back from the Waimairi Stream the margin of which is considered to be the primary area worthy of protection.
10. If the reduction in covenanted area were to be made and it was deemed appropriate to purchase a similarly sized parcel of land in the vicinity to compensate for the loss in benefits afforded, the cost of that purchase based on the value of the land area in question is estimated to be \$70,000. This is based on the rateable value of the whole property as at 1 August 2004.

FINANCIAL AND LEGAL CONSIDERATIONS

11. The total economic value of the planting of the whole area under covenant is estimated to be \$14,000. This includes plants, planting, maintenance and landscape architect fees, legal and survey fees. Planning time is not quantified. Dividing costs based on area, planting in the area proposed to be removed from covenant is estimated to be valued at \$5,500 in the same respects.
12. If the reduction in covenanted area was to be made and it was deemed appropriate to purchase a similarly sized parcel of land in the vicinity to compensate for the loss in benefits afforded, the cost of that purchase based on the value of the land area in question is estimated to be \$70,000. This is based on the rateable value of the whole property as at 1 August 2004.
13. Section 77 of the Reserves Act 1977 allows private land to be protected from development by its owner so as to protect its amenity, ecological or other values considered worthy of special protection. Importantly it is the land owner who initiates the covenant which is then registered as a restriction on the legal title. It is possible to register a S 77 Covenant over part of a land title, this is not considered a subdivision.

S. 77 Reserves Act - Conservation covenants

(1), any local authority,, if satisfied that any private land should be managed so as to preserve the natural environment, or landscape amenity, or wildlife or freshwater-life or marine-life habitat [, or historical value,] and that the particular purpose or purposes can be achieved without acquiring the ownership of the land, for a reserve, may treat and agree with the owner or lessee for a covenant to provide for the management of that land in a manner that will achieve the particular purpose or purposes of conservation.:

14. Once registered the Council has a statutory role to ensure that the terms of the covenant are complied with.
15. With a S.77 Covenant, the land is not a public reserve. Public access is not generally permitted. The land remains in the ownership of the land owner but its use is prescribed by the terms of the covenant.
16. After creation of the covenant in 2002 and completion of some planting at the Council's cost, Dr Perry tried to sell the property but discovered that the area protected by the covenant was having an adverse impact on the sale prospects. She then requested the Council to vary the covenant by a reduction of the area involving the removal of 217 square metres from the covenant.
17. This area was seen by Council officers to be of lesser importance in terms of the values that the covenant was created to protect. Accordingly by letter dated 21 May 2004 (attached) Council officers agreed to reduce the covenanted area.
18. The property was sold to the new owners who state that they acted in reliance upon the Council officers 'approval' to reduce the area of the covenant.
19. There are several important legal issues arising:

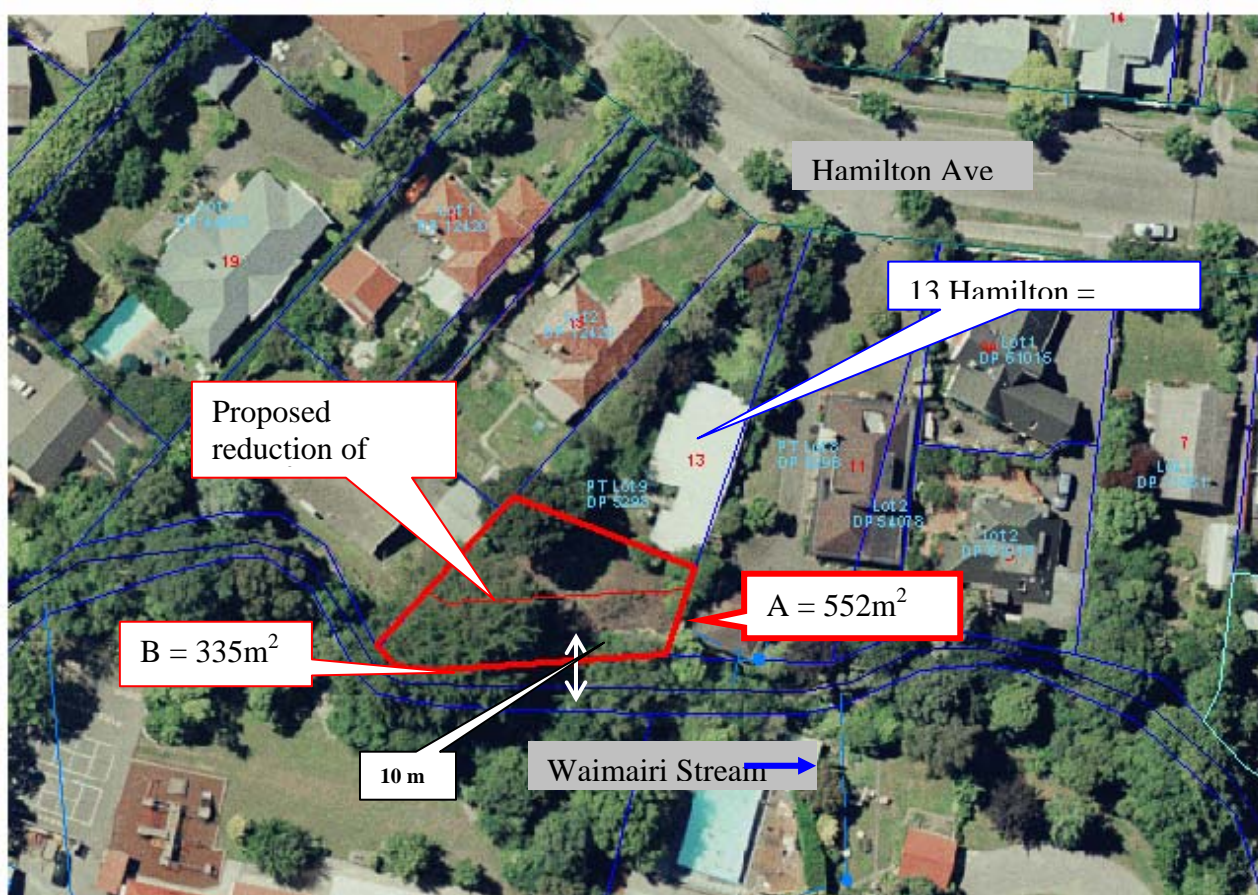
Fairness & Equity:

The Council tends to adopt a co-operative role as the creation of these covenants is entirely voluntary on the part of the covenanter apart from some cases where they are imposed as part of a wider subdivision application which was not the case in this instance. The Council co-operated with a landowner who was prepared to covenant her land but later realised she had made a mistake and not unreasonably sought to alter the area. It is not unreasonable to accept that the Council could accept the variation given the short duration that the covenant had existed, its adverse effect and the lesser values in the released area and the "commitment" made by officers.

Fiduciary role:	The Council has been entrusted by the owner to ensure that the terms of the covenant are complied with. This is a fiduciary or trustee type role with an expectation that the Council will ensure the covenant remains to protect the land. However, the original owner requested the Council to reduce the size of the covenanted area. It is not unreasonable to accede to that request where the primary values that the covenant protects are in the land remaining covenanted.
Reserves Act obligations:	The Council has a statutory role to ensure that the terms of the S.77 covenant are complied with. While the obligations on the Council are not as prescribed or as formal as if the land was formally classified as a reserve any variation needs to be carefully considered having regard to effect of the variation on the values protected by the covenant.
Terms of the Covenant:	The covenant has contractual effect as between the parties. There are no explicit provisions in the covenant that permit the covenant to be varied solely at the request of the landowner. The Council may agree to vary a covenant and if this course of action is consistent with the wishes of the party that registered the covenant which in this instance is clear.
Agency, lack of authority:	The Council officers cannot commit the Council to reduce the covenanted area in the absence of a direct delegation from the Council. There is no delegated authority to officers to make such a commitment. Only the Council can make such a decision. The Council is not bound by the acts of officers acting on behalf of the Council and as its agent where such acts are not within the delegated authority of officers.
Contract, Lack of consideration:	The new owners may assert that there is a contract between them and the Council which they can enforce. There is clearly no contract as one of the essential elements of a contract namely consideration [i.e. price or value] is absent.
S.138 Local Government Act 2002:	This section provides that a local authority proposing to sell or otherwise dispose of a park or part of it follow a consultation process. This section does not apply to "Reserves" under the Reserves Act 1977. This land is not a reserve so the section will apply. The section defines "park" as land <u>acquired</u> or used for community, recreational, <u>environmental</u> , cultural or spiritual purposes. The Council has not acquired the land, it does not own it, it acts as covenantee to uphold the terms of the covenant. It is considered that provided the Council determines that the environmental values intended to be protected by Dr Perry remain substantially protected then there is no need for consultation as the core values protected by the covenant will remain unaffected.

BACKGROUND ON 13 HAMILTON AVENUE

20. The property at 13 Hamilton Avenue (PT Lot 9 DP 5298) has a conservation covenant registered on the certificate of title. The authority to create a covenant agreement by the Council is provided by the Reserves Act 1977.
21. The existing covenant occupies an area of 552m²; the proposed covenant being 335m². The proposed covenant is aligned with the 10 metre waterway setback which is a discretionary rule in the City Plan and is primarily designed to protect the waterway by restricting excavation and filling. Waterway conservation covenants legally protect the planting within the covenant area. The practical result of this legally binding protection for planting is to also assist in the protection of the waterway by means described below.



22. The planting consists of a variety of species native to the area. The purpose of the planting as a whole was to improve biodiversity by increasing stocks of vegetation endemic to the area and by providing habitat for birds and insects at the site and as stepping stone to other similar planted areas thus providing a more tangible habitat overall within the city. The planting on the area in question would contribute to the habitat capacity of the stream bank planting to a small extent by way of bulk and minimising edge effects.
23. The bank of the Waimairi Stream occupies the majority of the area of the proposed covenant area. The purpose of bank planting was, in particular, to contribute to bank stabilisation, to provide habitat for birds and insects which use the stream as a part of their habitat and to contribute to water quality and quantity improvement.
24. Water quality improvement is assisted by overhanging vegetation to maintain lower water temperatures in the summer, by reducing silt run-off to the stream and by trapping silt and contaminants already in the water. Contaminants originate from road run-off, domestic detergent and fertiliser use and misuse of stormwater grates and other inappropriate disposals which can become concentrated and are more difficult to remove in larger water bodies downstream.

25. Stream-side planting benefits water quantity by slowing water flows during storm events thus helping to reduce peak flows downstream which may result in flooding. The trapping of silt is also beneficial in this respect particularly and particularly important considering the high number of properties being developed at present.
26. This part of the Waimairi Stream is a receiving water, or "urban waterway" as defined in the Natural Resources Regional Plan. The implications are that water quality and quantity standards set out in the plan for this class of waterway must be achieved. Water quality standards set out in the Regional Coastal Environment Plan for heavy metals entering the Estuary (via the Avon and Heathcote Rivers) are currently not being met.
27. The City Plan (Policy 2.2.4) states that measures should be undertaken to reduce, avoid or mitigate stormwater contamination. Also, the catchment flows to the Avon River and this project, in combination with others, would assist in achieving the Greenspace Unit's target level of service for flood hazards.
28. There is no public access across the covenant although passive recreation may benefit from improved views from the adjacent school grounds and by contributing to a reduction in waterway siltation and wider habitat as described. It is important to recognise the cumulative effect of all such planting projects and their wider benefits rather than just the obvious individual contribution.
29. The purpose of covenanting the planting was to protect the public monetary investment, as described in paragraph 3 and to protect the values and benefits described above which the Greenspace Unit has a responsibility to achieve via agreed outcomes in the LTCCP given wider Council obligations under the RMA and the City Plan.
30. The previous owner was enthusiastic in creating a covenant over her property as she also wanted to preserve what had been created and understood some of the benefits described above. It was only when she received advice from her real estate agent, at the time she had decided to sell her property, that she sought a statement from the Council that a reduction in the covenanted area would be made if requested by a subsequent owner. This statement was provided by Council officers following a period of negotiation with the previous owner.

OPTIONS

31. Option A: Variation to covenant as requested.

The conservation covenant would be reduced in area from 552m² to 335m². The covenant would be bounded by the stream boundary to the south, the neighbours' property boundaries on both sides, as it is currently, and follow the line of the 10 metre waterway setback as indicated on the survey plan.

Option B: Status quo. No variation to current covenant.

Option C: Variation as requested with compensation.

As for Option A, but compensation sought for the loss of public investment and use of private land to achieve community outcomes. Compensation would be a condition of covenant modification and could be either -

1. The monetary value of the difference in the value of the land had it been purchased with the proposed reduced covenant area and the price paid by the current owners as valued by an independent registered valuer, or,
2. The value of planting of the area in question as outlined in paragraph 11.

ASSESSMENT OF OPTIONS

Option A: Variation to covenant as requested

33. Removal of area in question from covenant protection.

	Benefits (current and future)	Costs (current and future)
Social		Less relief from built environment for residents and adjacent school to a minor extent.
Cultural		Reduction in contribution to biodiversity of interest to tangata whenua.
Environmental		Habitat loss on site and indirectly downstream to small extent.
Economic		Lose economic value of (past) public investment. Similar amount would be required for any compensatory planting elsewhere. Land cost and availability especially in same area may not be forthcoming.
<p>Extent to which community outcomes are achieved: This option would contribute negatively to the outcomes listed under the status quo.</p> <p>Impact on Council's capacity and responsibilities: Small reduction in capacity in terms of biodiversity and habitat provision. Ideally compensate with planting elsewhere in the neighbourhood.</p> <p>Effects on Maori: Removal of native vegetation particularly in vicinity of waterway inconsistent with their values. Overall effect negligible however.</p> <p>Consistency with existing Council policies: This option would be inconsistent with the Council policies listed under the status quo option</p> <p>Views and preferences of persons affected or likely to have an interest: This option would be inconsistent with the 2004 Annual Residents' Survey, in which residents expressed concern about the loss of green areas and thought that more should be spent on waterways and land drainage.</p> <p>Other relevant matters:</p>		

Option B: Status Quo. No reduction in current covenant.

34. These relate to the area which would be removed from the covenant if application successful, ie costs and benefits of not removing this area from the covenant.

	Benefits (current and future)	Costs (current and future)
Social	Relief from the built environment.	
Cultural	Biodiversity an identified value of tangata whenua.	
Environmental	Habitat and landscape values of area in question remain. Planted area in question assists habitat function of waterside area.	
Economic	Do not lose economic value of public investment. Do not have to spend public money elsewhere if compensatory planting were deemed appropriate.	
<p>Extent to which community outcomes are achieved: Primary alignment with community outcome a <i>“Our City’s natural resources, biodiversity, landscapes and ecosystem integrity are protected and enhanced”</i> Also contributes to <i>“Our City’s infrastructure and environment are managed effectively, are responsive to changing needs and focus on long-term sustainability.”</i> and <i>“Our City provides the natural and built environments that enable people to enjoy long and healthy lives.”</i></p> <p>Impact on Council’s capacity and responsibilities: No change.</p> <p>Effects on Maori: Biodiversity an identified value of tangata whenua.</p> <p>Consistency with existing Council policies: This proposal is consistent with a number of policies outlined in the Councils Environmental Policy document and in particular, Natural Environment of the City: <i>“To maintain and enhance the integrity and diversity of natural ecosystems and habitats within the City”</i> and <i>“To enhance the amenity and natural values of waterways.”</i> and <i>“To enhance the role of the City’s waterways, surface water resources and coastal margin both for conservation and for environmentally compatible recreational uses”.</i></p> <p>City Plan policies - Policy: Aquatic habitats - 2.2.7 To enhance the City’s waterways as habitats for fish and other aquatic species and plants. Policy: Waterway margins - 2.2.8 To enhance the margins of waterways in terms of their natural, amenity and access values. Policy: Enhancement - 2.4.3 To promote environmental enhancement and rehabilitation of natural areas. Policy: Natural features and habitats - 2.9.1 To encourage greater public awareness of important natural features and habitats within the City, particularly waterways, the coast and their margins, the Port Hills and indigenous grasslands. Policy: Estuaries, waterways and wetlands - 4.1.7 To recognise and promote the estuary, lagoon, waterways and wetlands as significant habitats and natural features and enhance their cultural significance.</p> <p>Views and preferences of persons affected or likely to have an interest: In the 2004 Annual Residents’ Survey, residents expressed concern about the loss of green areas and thought that more should be spent on waterways and land drainage. Current owners views (but existing legally binding agreement).</p> <p>Other relevant matters:</p>		

Option C: Variation to covenant as requested with compensation

35. Removal of area in question from covenant protection.

	Benefits (current and future)	Costs (current and future)
Social		Less relief from built environment for residents and adjacent school to a minor extent.
Cultural		Reduction in contribution to biodiversity of interest to tangata whenua.
Environmental		Habitat loss on site and indirectly downstream to small extent.
Economic	Compensation as described above.	Lose economic value of (past) public investment. Similar amount would be required for any compensatory planting elsewhere. Additional land cost and availability especially in same area may not be forthcoming or affordable.
<p>Extent to which community outcomes are achieved: This option would contribute negatively to the outcomes listed under the status quo.</p> <p>Impact on Council's capacity and responsibilities: Small reduction in capacity in terms of biodiversity and habitat provision. Ideally compensate with planting elsewhere in the neighbourhood.</p> <p>Effects on Maori: Removal of native vegetation particularly in vicinity of waterway inconsistent with their values. Overall effect negligible however.</p> <p>Consistency with existing Council policies: This option would be inconsistent with the Council policies listed under the status quo option</p> <p>Views and preferences of persons affected or likely to have an interest: This option would be inconsistent with the 2004 Annual Residents' Survey, in which residents expressed concern about the loss of green areas and thought that more should be spent on waterways and land drainage.</p> <p>Other relevant matters:</p>		

STAFF RECOMMENDED OPTION

Option C: Variation as requested with compensation amounting to the value of planting of the area in question as outlined in paragraph 12 (\$5,500).

BOARD DISCUSSION

Pat Harrow asked that the Board recommend to the Council that the policy on covenants be reviewed by the Environmental Diversity Portfolio Group. The Board agreed that it would be more appropriate for Councillor Harrow to raise this at the Council meeting when this report is considered.

Cheryl Colley asked that the Board convey to the Council the Board's strong disapproval of how this matter has been dealt with throughout the process and its concerns about the delays and frustration imposed upon the applicants.

It was agreed that the Board would include these requests as explanatory notes in its report to the Council.

BOARD RECOMMENDATION

It is recommended that the Council agree to Option A: Variation to covenant as requested, in which the conservation covenant would be reduced in area from 552m² to 335m². The covenant would be bounded by the stream boundary to the south, the neighbours' property boundaries on both sides, as it is currently, and follow the line of the 10 metre waterway setback as indicated on the survey plan.