
REPORT 1
(1215/53/IM)

**PROPERTY FOR DISPOSAL UNDER THE PUBLIC WORKS ACT
1981 AND THE LOCAL GOVERNMENT ACT 1974: LEGAL ROAD
ADJACENT 218 EVANS BAY PARADE, HATAITAI**

1. Purpose of Report

The purpose of this report is to obtain agreement that an area of Council owned legal road adjoining 218 Evans Bay Parade, Hataitai is no longer required for Council's operational requirements, and to authorise officers to proceed with the offer back investigation, and eventual road stopping and sale.

This approval is requested as stipulated in section 40 of the Public Works Act 1981 (PWA) (refer Appendix 3), and sections 342 and 345 of the Local Government Act 1974 (LGA74).¹

2. Recommendations

It is recommended that the Committee:

1. *Receive the information.*
2. *Recommend that the Council, pursuant to section 40 of the Public Works Act 1981:*
 - a) *Agree that approximately 158.91m² of unformed legal road adjoining 218 Evans Bay Parade, Hataitai is not required for a Public Work (refer Appendix 1).*

Note: 218 Evans Bay Parade, Hataitai is described as Part Lot 1 DP 9805, being Computer Freehold Register WN6A/1219.

- b) *Authorise Council officers to commission a section 40 report from suitably qualified consultants to identify whether the land must be offered back to its former owner or their successor, or whether an exemption from offer back applies.*

¹ The relevant provisions in the 1974 Act were not repealed when the 2002 Act came into force.

3. *Note that once the section 40 report has been received, a report will be presented to the Chief Executive Officer for approval under delegated authority to either offer the land back to its former owner or their successor, or to approve the exemption from offer back.*
4. *Authorise Council officers to initiate the road stopping process in accordance with Section 342 and the Tenth Schedule of the Local Government Act 1974.*
5. *Subject to all statutory and Council requirements being met and no objections to the road stopping being received, Council delegates to the Chief Executive Officer the power to formally approve the road stopping and issue the public notice to declare the road stopped.*
6. *Note that if objections are received and the proponent wishes to continue with the road stopping, a further report will be presented to the Committee for consideration.*
7. *Delegate to the Chief Executive Officer the power to negotiate the terms of sale and enter into a sale and purchase agreement, provided any such agreement is conditional upon the road being stopped.*

3. Background

The application to stop this area of road was submitted by Tania Devereux and Richard Pemberton (Proponents). They are the owners of the adjoining property at 218 Evans Bay Parade, Hataitai (Part Lot 1 DP 9805, being Computer Freehold Register WN6A/1219).

Under the LGA74 (s 342 and s 345) local authorities are permitted to sell portions of legal road which they no longer require for roading purposes or another public work. As this Act is not exempt from the PWA, the Council is required to carry out section 40 investigations to establish whether the land needs to be offered back to the previous owner or their successor in title (refer Appendix 3).

In most cases legal road is exempt from an offer back under either:

1. Section 40 (2) PWA where the local authority considers that:
 - a. It would be impractical, unreasonable or unfair to offer the land back;
 - or
 - b. There has been a significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or held; or
2. Section 40 (4) PWA where the local authority believes on reasonable grounds that, because of the size, shape or situation of the land that it could not be expected to be sold to any person who did not own land adjacent to the land that is to be sold. Then the land may be sold to an adjoining owner.

These exemptions are due to the fact that legal road is generally the road frontage of the existing property. In some circumstances however, portions of legal road may not be exempt from offer back, for example if the area is of significant size.

If on receipt of the section 40 investigation report, the Chief Executive Officer (CEO) agrees with the recommendations of the report, officers will proceed with the road stopping and sale process prescribed under s 342 and s 345, and the Tenth Schedule of the LGA 74 (see Appendix 2).

4. Discussion

4.1 The road stopping process

The proponent (i.e. the party who has applied to the Council to buy the legal road) is responsible for most of the costs involved in processing their request to change the designation of the legal road and then purchase the freehold land to amalgamate with their adjoining property title.

The proponent is provided with as much information as possible at the start of the road stopping process. This ensures they are fully aware of the road stopping and sale requirements, timeframes and costs that may be incurred as part of this process. The proponents have agreed in writing to meet all of these requirements and costs.

The next steps in the road stopping and sale process are as follows:

- S 40 report commissioned
- CEO approval of s 40 report recommendations
- Valuation and sale & purchase agreement
- Survey and public notification of intent to stop the road
- Objections considered (if any) and Environment Court hearing (if required)
- Public notification that road is stopped
- Final valuation (if required)
- Settlement and transfer

4.2 This application

The area of legal road proposed to be stopped is a near rectangular parcel of land, approximately 158.91m² in size, as shown on the aerial photograph (refer Appendix 1), adjoining the north eastern boundary of the proponents land.

The owners of 218 Evans Bay Parade, Hataitai wish to purchase the area to create a recreational area and garden.

If the road stopping and sale are successful, the legal road will be amalgamated with the adjoining property comprised in Computer Freehold Register WN6A/1219.

4.3 Consultation

As part of the road stopping process the neighbouring property owners are given an opportunity to provide comments concerning the road stopping application. Typically, these are the adjacent property owners and the owners opposite the area proposed to be

stopped. In this case, owners of the properties surrounding 218 Evans Bay Parade, Hataitai were consulted.

The owners of 220 Evans Bay Parade have a number of concerns about the proposed road stopping (refer to Appendix 4) and have mistaken their right to provide comments, as a right to consent to the proposed road stopping. Council officers believe that the owners of 220 Evans Bay Parade are not affected by the proposed road stopping but advise that they will not consent to the proposed road stopping unless the Council and the owners of 218 Evans Bay Parade adhere to the conditions set out in Option 1 below or alternatively the conditions set out in Option 2:

Option 1:

- The joint boundary between the owners of 218 and 220 Evans Bay Parade be extended in the same line/direction across the road reserve to be purchased by the owners of 218 Evans Bay Parade;
- the Council not let the owners of 218 Evans Bay Parade build levels on top of their balcony; and
- no excavation material is to be dumped on the land to be purchased or under the house or behind the existing garages at 218 Evans Bay Parade.

Option 2:

- The owners of 218 Evans Bay Parade undertake to give their consent to the owners of 220 Evans Bay Parade purchasing the road reserve adjoining their property;
- the main joint boundary to extend over the road reserve; and
- the owners of 218 Evans Bay Parade give their consent to the owners of 220 Evans Bay Parade extending their living area.

It is important to note that the Council's Development Guidance Team (Resource Consents) have already approved the proponent's plans for a proposed balcony, retaining wall and fenced encroachment. This means that the proponent's are able to execute their proposed plans now.

Council officers are of the view that a number of these objections are dealt with through the District Plan and Resource Management Act 1991 and therefore should not affect the decision to declare the legal road adjoining 218 Evans Bay Parade surplus at this stage of the process. The remaining conditions put forward by the owners of 220 Evans Bay Parade do not form part of this road stopping application. If the owners of 220 Evans Bay Parade submit their own road stopping application, it will be assessed on its own merits.

Consultation with the relevant Service Authorities and Internal Business Units was also sought as part of this application.

Conditional consent has been obtained from:

| Service Provider | Condition |
|--|--|
| Powerco (gas) | Has no objection provided as Powerco's gas network structure does not impede on the area proposed to be stopped. |
| United Networks' Limited (electricity) | Has no objection provided that: <ol style="list-style-type: none"> 1. Siemens Energy Services are contacted to obtain plans of the lines. 2. Any relocation of the lines will be at the proponents cost & Siemens Energy Services must be contacted. 3. If any of United Networks lines are to be located on private land, an easement must be granted to United Networks. 4. No building, fence or other structure can be placed on top of United Networks' underground cables. 5. If, during construction any underground electricity cables are noticed or an electricity outage is caused, construction must be halted immediately and United Networks must be contacted. |
| WCC Parks and Gardens | Approve the road stopping on the condition that the Pohutukawa tree closest to the road is not removed and is to be retained in its current state. |
| WCC Rooding | Approve the road stopping on the condition that the new boundary is not closer than 6 metres in from the kerb line at the side boundaries. |

Unconditional consent has been obtained from:

- Capacity
- WCC Drainage
- WCC Street Lighting
- WCC Resource Consents
- WCC Urban Design
- Telstra Clear
- Telecom
- Nova Gas

Officers are satisfied that if the above Service Authority requirements are met, the proposed portion of legal road at 218 Evans Bay Parade, Hataitai can be stopped and sold, provided all statutory and Council requirements are met. Please note if the neighbour at 220 Evans Bay Parade makes a submission during the public notification process, these submissions will be presented to Council to decide on whether the objections will be allowed or not.

4. Conclusion

In considering our obligations under the PWA, LGA and assessing comments received from neighbouring land owners, Council officers believe that the Council owned legal road adjoining 218 Evans Bay Parade, Hataitai is no longer required for the Council's operational requirements and should be declared surplus.

It is therefore recommended that the Regulatory Processes Committee recommends to Council that officers should proceed with the road stopping and sale process under the Public Works Act 1981 and the Local Government Act 1974.

Contact Officer: *Hanita Shantilal, Property Advisor, Property & Parking Services*

Supporting Information

1) Strategic Fit / Strategic Outcome

In line with the Council's financial principles, assets that are declared surplus to strategic or operational requirements are sold.

The sale of legal road, where surplus to strategic requirements, is mandated under the Council's 2004 Road Encroachment and Sale Policy.

2) LTCCP/Annual Plan reference and long term financial impact

Provision for undertaking this work is contained within the overall organisational budget.

This report is a step towards the possible sale of the legal road. At this stage, the expected income from the sale of the road to the proponent has not been quantified as valuations are carried out at a later stage in the road stopping process. Many proponents decide not to proceed further with the purchase of the legal road once they have received a valuation from the Council.

There are no adverse financial implications imposed on the Council arising from this road stopping proposal. Most of the costs associated with this proposal will be met by the proponent including all survey, administration and legal costs. This proposal will benefit Council in financial terms as the proponent will purchase the stopped road from the Council at market value, and will then pay rates on it in the future.

3) Treaty of Waitangi considerations

There is no Treaty of Waitangi implications.

4) Decision-Making

This is not a significant decision. This report sets out the Council's options under the relevant legislation and under the Council's 2004 Road Encroachment and Sale Policy.

5) Consultation

Consultation with the relevant Internal Business Units has been carried out as part of this application. They have all advised that they have no objection to the proposed road stopping, with Urban Design, Roading and Parks and Gardens consent subject to conditions.

Neighbours and Service Authorities have been consulted and a number of conditions have been noted.

The proponents have agreed in writing to these conditions.

6) Legal Implications

The legal implications of the proposal are discussed in section 3.

AERIAL PHOTOGRAPH



LOCAL GOVERNMENT ACT 1974

[342 Stopping and closing of roads]

(1) The council may, in the manner provided in Schedule 10 to this Act,—

(a) Stop any road or part thereof in the district:

Provided that the council (not being a borough council) shall not proceed to stop any road or part thereof in a rural area unless the prior consent of the Minister of Lands has been obtained; or

[[(b) Close any road to traffic or any specified type of traffic (including pedestrian traffic) on a temporary basis in accordance with that Schedule and impose or permit the imposition of charges as provided for in that Schedule.]]

(2) Repealed.]

[345 Disposal of land not required for road]

(1) Subject to subsection (3) of this section, where in forming a new road, or in diverting or stopping or diminishing the width of any existing road, any part thereof is no longer required as a road, the council may—

(a) Either—

(i) Sell that part to the owner or owners of any adjoining land for a price to be fixed by a competent Valuer appointed by the council to value that part; or

(ii) Grant a lease of that part to the owner or owners of any adjoining land for a term and at a rental and subject to such conditions as the council thinks fit;—

and, if no such owner or owners is or are willing to purchase the land at the price fixed or, as the case may be, take a lease of that part for the term and at the rental and subject to the conditions fixed, the council may ... sell or lease the land by public auction or private tender; and a conveyance, transfer, or lease under the seal of the council shall constitute a valid title to the land; or

(b) Apply that part, or any part thereof, to any purpose to which the council may apply land, either under this Act or any other enactment; or

(c) Grant a lease of that part, or any part thereof, for such term and on such conditions as it thinks fit for use for any purpose to which the council may apply land, either under this Act or any other enactment; or

(d) Transfer that part, or any part thereof, to the Crown for a public reserve or for addition to a public reserve or for any purpose of public convenience or utility or as Crown land subject to the Land Act 1948.

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[[(1A) to avoid doubt, this section does not apply to the public foreshore and seabed within the meaning of the Foreshore and Seabed Act 2004.]]

(2) Where the council pursuant to subsection (1)(a)(i) of this section sells the land to the owner or owners of any adjoining land, it may require, notwithstanding the provisions of any other enactment, the amalgamation of that land with the adjoining land under one certificate of title. The District Land Registrar may, if he thinks fit, dispense with any survey that would otherwise be required for the purposes of the issue of a certificate of title under this section, and may issue a certificate of title limited as to parcels.

[[(2A) Where the council acting under subsection (2) of this section requires the amalgamation of the land sold with the adjoining land under one certificate of title—

(a) The separate parcels of land included in the one certificate of title by virtue of that requirement shall not be capable of being disposed of individually or of again being held under separate certificates of title, except with the consent of the council:

(b) Where that adjoining land is already subject to a registered instrument under which a power to sell, a right of renewal, or a right or obligation is lawfully conferred or imposed, the land sold shall be deemed to be and always have been part of the land that is subject to that instrument, and all rights and obligations in respect of, and encumbrances on that adjoining land shall be deemed also to be rights and obligations in respect of, or encumbrances on, that land sold.]]

[[(2B) On the issue of a certificate of title to the land referred to in subsection (2A) of this section, the District Land Registrar shall enter on the certificate of title a memorandum that the land to which it relates is subject to paragraph (a) of that subsection, and, if the circumstances so require, that it is subject to paragraph (b) of that subsection.]]

[[(3) Where any road or any part of a road along the mark of mean high water springs of the sea, or along the bank of any river with an average width of 3 metres or more, or the margin of any lake with an area of 8 hectares or more is stopped, there shall become vested in the council as an esplanade reserve (as defined in section 2(1) of the Resource Management Act 1991) for the purposes specified in section 229 of the Resource Management Act 1991—

(a) A strip of land forming part of the land that ceases to be road not less than 20 metres wide along the mark of mean high water springs of the sea, or along the bank of any river or the margin of any lake (as the case may be); or

(b) The full width of the land which ceases to be road—

Whichever is the lesser.]]

[[(4) The obligation under subsection (3) of this section to set aside a strip of land not less than 20 metres in width as an esplanade reserve is subject to any rule included in a district plan under section 77 of the Resource Management Act 1991.]]

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[[(5) On the issue of any certificate of title for land which has become vested in the council as an esplanade reserve under subsection (3) of this section, the District Land Registrar shall enter thereon a memorandum that the land is subject to that subsection.]]

[[(6) Repealed.]]

[Schedule 10 Conditions as to stopping of roads and the temporary prohibition of traffic on roads]

- 1 The council shall prepare a plan of the road proposed to be stopped, together with an explanation as to [why the road is to be stopped and] the purpose or purposes to which the stopped road will be put, and a survey made and a plan prepared of any new road proposed to be made in lieu thereof, showing the lands through which it is proposed to pass, and the owners and occupiers of those lands so far as known, and shall lodge the plan in the office of the Chief Surveyor of the land district in which the road is situated. [The plan shall separately show any area of esplanade reserve which will become vested in the council under section 345(3) of this Act].
- 2 On receipt of the Chief Surveyor's notice of approval and plan number the council shall open the plan for public inspection at the office of the council, and the council shall at least twice, at intervals of not less than 7 days, give public notice of the proposals and of the place where the plan may be inspected, and shall in the notice call upon persons objecting to the proposals to lodge their objections in writing at the office of the council on or before a date to be specified in the notice, being not earlier than 40 days after the date of the first publication thereof. The council shall also forthwith after that first publication serve a notice in the same form on the occupiers of all land adjoining the road proposed to be stopped or any new road proposed to be made in lieu thereof, and, in the case of any such land of which the occupier is not also the owner, on the owner of the land also, so far as they can be ascertained.
- 3 A notice of the proposed stoppage shall during the period between the first publication of the notice and the expiration of the last day for lodging objections as aforesaid be kept fixed in a conspicuous place at each end of the road proposed to be stopped:

Provided that the council shall not be deemed to have failed to comply with the provisions of this clause in any case where any such notice is removed without the authority of the council, but in any such case the council shall, as soon as conveniently may be after being informed of the unauthorised removal of the notice, cause a new notice complying with the provisions of this clause to be affixed in place of the notice so removed and to be kept so affixed for the period aforesaid.
- 4 If no objections are received within the time limited as aforesaid, the council may by public notice declare that the road is stopped; and the road shall, subject to the council's compliance with clause 9 of this Schedule, thereafter cease to be a road.

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- 5 If objections are received as aforesaid, the council shall, after the expiration of the period within which an objection must be lodged, unless it decides to allow the objections, send the objections together with the plans aforesaid, and a full description of the proposed alterations to the [Environment Court].
- 6 The [[Environment Court]] shall consider the district plan, the plan of the road proposed to be stopped, the council's explanation under clause 1 of this Schedule, and any objection made thereto by any person, and confirm, modify, or reverse the decision of the council which shall be final and conclusive on all questions.]
- 7 If the [Environment Court] reverses the decision of the council, no proceedings shall be entertained by the [Environment Court] for stopping the road for 2 years thereafter.
- 8 If the [Environment Court] confirms the decision of the council, the council may declare by public notice that the road is stopped; and the road shall, subject to the council's compliance with clause 2 of this Schedule, thereafter cease to be a road.
- 9 Two copies of that notice and of the plans hereinbefore referred to shall be transmitted by the council for record in the office of the Chief Surveyor of the land district in which the road is situated, and no notice of the stoppage of the road shall take effect until that record is made.
- 10 The Chief Surveyor shall allocate a new description of the land comprising the stopped road, and shall forward to the District Land Registrar or the Registrar of Deeds, as the case may require, a copy of that description and a copy of the notice and the plans transmitted to him by the council, and the Registrar shall amend his records accordingly.

SECTION 40 OBLIGATIONS UNDER THE PUBLIC WORKS ACT 1981

Section 40 Obligations under The Public Works Act 1981

The Public Works Act 1981, and its predecessors, has played a large part in the development of New Zealand's infrastructure. It has enabled land to be acquired, either by agreement or by compulsion, for the construction of local or public works.

The main intention of the Public Works Act 1981 regarding surplus land is that it must be offered for repurchase to the person from whom it was acquired, or the successor of that person, if it is not exempt under the grounds set out in the Act.

Section 40 of the Public Works Act 1981 deals with the disposal of land that is no longer required for the public work for which it is held, or any other public work.

Under section 40 Council is required to:

- (a) identify what land is subject to section 40;
- (b) determine when the offer-back obligations under section 40 are triggered;
- (c) investigate the circumstances surrounding the acquisition, use and characteristics of the land in order to determine whether any exceptions to the offer-back requirement apply as per section 40 (2); and
- (d) determine the appropriate course of action in relation to any affected land.

What Land is Subject to section 40?

All land held by Council for any public work will be subject to section 40. The land need not have been acquired specifically for a public work nor does it need to be designated formally as such.

Local and public works are:

"Local work" means a work constructed or intended to be constructed by or under the control of a local authority, or for the time being under the control of a local authority:

"Public work" means every Government work or local work that the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain. It also includes every use of land and anything else required directly or indirectly for any such Government work or local work or use, including those required by any Education Authority within the meaning of the Education Act 1964 and any university within the meaning of the Universities Act 1961 (abridged definition).

The purpose for which Council holds any particular land needs to be considered objectively.

When is an Offer-Back Triggered Under section 40?

Council must proceed under section 40 when the pre-conditions in Section 40(1) are satisfied, namely when the land in question:

- (a) is no longer required for the public work for which it is held; and

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- (b) is not required for any other public work; and
- (c) is not required for any exchange under s105 of the Public Works Act 1981.

The Courts have not yet defined the phrase “required for any other public work”. However Council’s legal advisors have recommended that the Land Information New Zealand guideline be followed to interpret this requirement. Their interpretation is as follows:

- The land has been designated for another public work; or
- Written notification has been given of another public work requirement; and
- Council has demonstrated that there is an actual need for the land, or
- Council has demonstrated that the land will be used for the purpose, within a reasonable timeframe.

Council is legally obliged to follow the sales process with due expedition once it has established that the three pre-conditions in section 40 (1) have been satisfied. Having satisfied the above pre-conditions, Council is under a duty (subject to the discretion of section 40 (2) and section 40 (4)) to endeavour to sell the land back to the former owner or their successors, in a timely manner.

Exemptions to Offer-Back Requirements – Section 40(2) and (4)

Once the affected land has been declared surplus, a decision must be made as to whether or not the land must be offered back to its former owner(s) in accordance with section 40. This is a decision for Council and must be made after suitably qualified agents have made full investigations.

Land can be exempted from an offer-back where:

- (a) It would be impracticable, unreasonable or unfair to do so; or
- (b) There has been a significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or held; or
- (c) It is believed on reasonable grounds that, because of the size, shape or situation of the land that it could not be expected to be sold to any person who did not own land adjacent to the land being sold. Hence the land may be sold to an adjoining owner.

Sale of Land

If a property is not exempt under section 40(2) or (4), the property must be offered back to the previous owner(s) or their successors as per section 40(2). This may require further investigation to locate the appropriate person(s) for the offer-back to occur. Once the offer-back is made, the offeree has a certain amount of time to accept the offer.

Where an offer under Section 40(2) is not accepted within the timeframe or is declined outright, or where an exemption to offer-back applies, the land may be sold to the owner of adjacent land, or by public auction, public tender or by private treaty.