

Report to the Policy and Finance Committee  
from Peter O'Brien, O'Brien Property Consultancy

## **Clarification of Resolution to Grant a Right of Way**

### **1. Purpose**

To seek Council approval to confirm and clarify an earlier Council resolution passed in 1991.

### **2. Background**

In 1991 the Council resolved to grant a right of way, but the resolution did not specifically refer to the requirements of Section 235 of the Local Government Act 1974, ie that the right of way would not interfere with the proper use of the land over which the right of way was granted. It is now proposed that a further resolution be passed to ensure the legal robustness of the earlier resolution, and the subsequent agreement entered into by the Council.

### **3. Some History**

Council owns the land in Certificate of Title, Volume 35A Folio 726.

On the dissolution of the Wellington Harbour Board in 1989, Harbour Board land assets were transferred to the Wellington Regional Council under the Local Government (Wellington Region) Reorganisation Order 1989.

One of the land assets transferred to the Council was the land at Beacon Hill which the Harbour Board had subdivided to create residential sites.

The approval to subdivide had been obtained from the Wellington City Council. One of the conditions of subdivision was the reserve fund contribution which comprised the land now described as Lot 36 DP 66805 being the land in CT 35A/726.

The City Council required Lot 36 to be transferred to it as three allotments, two to be shown as “Reserve to Vest” and one to be shown as “access and service easements”. The reason for the subdivision of the reserve was in recognition of the City Council requirement to cater for physical access to the land in CT A4/696 being part Lot 1 DP 6560 held then in the name of MWD Hodder.

The Hodder site had legal frontage to Breaker Bay Road but had no practical access. The City Council believed that Hodder had a strong case under Section 129C of the Property Law Act 1952 (Court can grant access to land locked land), and therefore required the creation of the allotment for access and service easements.

It was agreed between the Wellington City Council and the Wellington Regional Council that the land in CT 35A/726 would not transfer to the City until the Regional Council had received payment for, and had issued, the easement for right of way. As an interim measure the Wellington City Council registered against CT 35A/726 Compensation Certificate B.017155.1 to record and protect its interest.

The Regional Council entered into negotiations with Hodder for the issue of a right of way. By Report PE91.274, the Council resolved on 28 May 1991 to grant Hodder an easement for the consideration of \$44,000 plus GST. The Council resolution read “(1) *The Council approves the grant of an easement over Lot 2 LT 69016 in favour of Mr Hodder (pt Lot 1 DP 6560) for the consideration of \$44,000 plus GST. (2) That Council’s seal be affixed to the necessary documents.*”

Hodder never developed the land and never paid the agreed sum. The title therefore remained in the name of the Wellington Regional Council.

In 1996 the Council was approached by a prospective purchaser of the Hodder Property, Mr L De Bes. Mr De Bes wished to enter into a similar agreement for a right of way easement with the Council and agreed to pay the consideration of \$50,000 plus GST. This proposal was placed before the Council and approved.

The subdivision proposal of Mr De Bes has faced opposition. To date the matter has been heard at the Wellington City Council and the City Council granted consent. The matter was then appealed to the Environment Court and the appeal was dismissed. The appellants have now issued proceedings in the High Court, effectively challenging the right of the City Council to permit the grant of the right of way.

In the interim, after the dismissal of the appeal to the Environment Court, the Regional Council entered into a formal agreement with Mr De Bes to grant the right of way.

The proceedings to the High Court allege that the Regional Council is unlawful in that it does not comply with the requirements of Section 235 of the Local Government Act 1974. That section empowers the Council to grant any easement so long as it resolves that the easement will not interfere with the use of the balance land holding.

The land comprises open space on the south east slope of Beacon Hill. The Wellington City Council and the Environment Court considered in detail the effects of the subdivision and the right of way on the amenity values and consistently supported the proposal. The matter was also considered by the Regional Council in 1991.

Council solicitors, Oakley Moran, can see no merit, legal or moral, in the claim of the appellant and do not believe that the Court will grant relief to the appellant. Oakley Moran is however concerned that a potential legal loophole may exist which should be rectified. Oakley Moran recommend that Council pass a resolution, under Section 235, confirming the grant of right of way will not interfere with the proper use of the balance of Lot 36.

Whereas the original requirement of the Wellington City Council was for the reserve to pass to it as three allotments, the City Council in 1997 required that the land pass as one lot, all to be reserve, and subject to a right of way. The transfer of the land to the City Council as one lot does not materially alter the proposal to grant a right of way as the land use and its effect will be the same.

When the land over which the right of way passes is transferred to the City Council as the reserve, rather than as access and service easement, the City Council will have far greater control over any future requests for the use of the land to be altered or intensified. Any alteration will need to then pass the tests applied by the Reserves Act.

It is clear, by their actions of approval, that the City Council and the Environment Court do not perceive the issue of the right of way as being detrimental to the proper use of the balance of lot 36 and not to the immediately surrounding properties either. It is therefore relevant for the Council, at the time of considering the new right of way proposal, to consider the implications of Section 235 of the Local Government Act.

#### **4. Recommendations**

- (1) *That the report be received and the contents noted.*
- (2) *The Council, being satisfied that the grant of a right of way over Lot 36 DP 66805 being the land in CT 35A/726 held in the name of the Wellington Regional Council in favour of the registered proprietor for the time being of part Lot 1 DP 6560 being the land in CT A4/696, will not interfere with the proper use of Lot 36 DP 66805 and hereby confirms the agreement between the Council and LA De Bes Building Developers Limited dated 21 July 1998, and ratifies the actions of the Council Secretary in executing that agreement under seal.*

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Approved for Submission:       GREG SCHOLLUM  
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