

**MINUTE EXTRACT FROM THE NON-PUBLIC MINUTES OF THE COUNCIL MEETING HELD ON
MONDAY 1 MAY 2017**

C4 PROPOSED ROAD STOPPING - PART INGS AVENUE, DUNEDIN

A report from Civic and Legal and Transport provided details of a dispute involving 22 properties in Ings Avenue, and recommended a possible means of resolving the dispute. There was a disparity between the legal and physical boundaries of the affected properties.

Staff responded to questions from Councillors.

Moved (Cr Lee Vandervis/Cr Damian Newell):

That the Council:

- 1
 - a) **Resolves** pursuant to sections 116, 117 and 120(3) of the Public Works Act 1981, to stop that part of Ings Avenue between the legal boundary of individual properties and the formed footpath, on the condition that a sufficient number of landowners in Ings Avenue agree to purchase the stopped road so that the Council can recover the road stopping costs through the purchase price of the stopped land.
 - b) **Resolves** to meet the valuation, survey, and legal costs associated with the road stopping.
 - c) **Agrees** to sell or lease each part of the stopped road to the adjoining landowner upon the terms and conditions outlined in the report, including the following:
 - i) The Council requires that the stopped road is amalgamated with the adjoining title upon sale of the portion of stopped road;
 - ii) Easements will be registered over the stopped portion of the road for the benefit of any utility companies that have assets located on, over, or under that land;
 - iii) The standards contained within the Dunedin City Council Code for Subdivision and Development will apply to the stopped road.
- 2 If the condition in (1) above regarding the requirement to recover the costs up front is not met within six months, then Council Officers will give effect to Option Two (which is the same as Option One above but with the condition in paragraph (1)(a) above deleted).

Motion carried (CNL/2017/103)

PROPOSED ROAD STOPPING - PART INGS AVENUE, DUNEDIN

Department: Civic and Legal and Transport

REASONS FOR CONFIDENTIALITY

Grounds:	S48(1)(a) - The public conduct of the part of the meeting would be likely to result in the disclosure of information for which good reason for withholding exists under section 7.
Reason:	S7(2)(g) - The withholding of the information is necessary to maintain legal professional privilege.
In particular:	This report is confidential because it provides details of the Council's legal position, which may need to be relied on if the Council cannot obtain affected landowners' agreement.

EXECUTIVE SUMMARY

- 1 This report provides details of a dispute involving 22 properties in Ings Avenue, and recommends a possible means of resolving the dispute.

RECOMMENDATIONS

That the Council:

- a) **Resolves** pursuant to section 116, 117 and 120(3) of the Public Works Act 1981, to stop that part of Ings Avenue between the legal boundary of individual properties and the formed footpath, on the condition that a sufficient number of landowners in Ings Avenue agree to purchase the stopped road so that the Council can recover the road stopping costs through the purchase price of the stopped land.
- b) **Resolves** to meet the valuation, survey, and legal costs associated with the road stopping.
- c) **Agrees** to sell or lease each part of the stopped road to the adjoining landowner upon the terms and conditions outlined in this report, including the following:
 - i) The Council requires that the stopped road is amalgamated with the adjoining title upon sale of the portion of stopped road;
 - ii) Easements will be registered over the stopped portion of the road for the benefit of any utility companies that have assets located on, over, or under that land;
 - iii) The standards contained within the Dunedin City Council Code for Subdivision and Development will apply to the stopped road.

BACKGROUND

- 2 Ings Avenues is located in St Clair, Dunedin. It connects with Forbury Road at one end and Pretoria Avenue/Hargest Crescent at the other end. A photographic map is attached as Attachment A.
- 3 The map overlays the legal boundaries of the properties in Ings Avenue. It is apparent from the map that, although the road has been physically formed to the same width along its entire length, the legal width of the road changes about half way along Ings Avenue.
- 4 The width of the legal road is 15 metres at the Forbury Road end but 20 metres at the Pretoria Avenue/Hargest Crescent end.
- 5 There are 22 properties in Ings Avenue ("Affected Properties") where there is a disparity between the legal and physical boundaries. These 22 Affected Properties are all at the Pretoria Avenue/Hargest Crescent end of Ings Avenue.
- 6 The owners of the Affected Properties have encroached onto the land between their legal frontage and the physical formation of the footpath ("Road Encroachment Land"). They have built a variety of fences, garages and gardens on the Road Encroachment Land.
- 7 It is unclear why the width of the legal road varies, but it probably relates to the fact that the legal road was created at two different times. The first half of Ings Avenue, at the Forbury Road end, was created as legal road in 1900. The second half of Ings Avenue, at the Pretoria Avenue/Hargest Crescent end, was created as legal road in 1911.
- 8 Although this situation in Ings Avenue has existed for over 100 years, it has only come to the fore in the last few years. Property owners have always been able to determine the correct boundary of their properties since the original survey and subdivision by consulting a surveyor or by checking the relevant plans with LINZ, but the practical reality is that this has often not been done.
- 9 The development of modern aerial photography and computer mapping has meant that these sorts of boundary issues are now more easily identified and are becoming a greater issue when a landowner goes to sell their land.
- 10 In 2014, the Council wrote to some landowners in Ings Avenue pointing out that the land at the front of their property was in fact legal road. In that letter, the Council advised the landowners that, in accordance with the Council's Road Encroachment Policy, they would:

"need to carry out one or more of the following:

 - *Remove any modifications (fences and carport) encroaching on public road reserve.*
 - *Apply for an Encroachment Licence (Licence to Occupy Road Reserve).*
 - *Apply to have the road stopped and amalgamated with the adjoining property".*
- 11 The landowners were also told that any costs in relation to the above options would be their responsibility.

- 12 Those letters generated some publicity and resistance from the Ings Avenue landowners. The Otago Daily Times published a few stories and photos relating to the issue. The newspaper articles quoted owners of the Affected Properties as saying that they felt that the Council was "revenue gathering" and that the Council was adding further stress to landowners when they come to sell their properties.
- 13 The owners of the Affected Properties maintain that the current situation in Ings Avenue is one that the Council has created and perpetuated. They argue that the Council should therefore fix the situation, at the Council's cost.

DISCUSSION

Legal Situation

- 14 The Council's solicitors have advised that the Council does not have a legal obligation to fix this issue in Ings Avenue. A copy of Anderson Lloyd's opinion of 29 July 2016 is attached as Attachment B.
- 15 The key points from the legal opinion are:
 - Although the Council does not have a legal obligation to fix this issue in Ings Avenue, it can choose to use its statutory powers if it so wishes to fix the issue.
 - The Council is the only entity in the position to stop the Road Encroachment Land.
 - If it chooses to stop the Road, it is sensible to stop all (as opposed to a part or parts) of the Road Encroachment Land.
 - If it chooses to stop the Road, the Council may choose to either:
 - follow its policy of requiring all costs to be met by the landowners; or
 - depart from its policy if the Council believes that the circumstances warrant this.
 - If it chooses to stop the Road, the Road Encroachment Land cannot be sold at a price less than valuation, however it can be leased to the adjoining landowners on such terms and conditions as the Council sees fit.

Transport Considerations

- 16 The Council's Transport team supports any proposal to stop the Road Encroachment Land as it has no current or foreseeable need for the land.
- 17 The Road Encroachment Land, if stopped, would after being sold to the adjacent property owner, be amalgamated with the title to the adjoining land and would have the same zoning.
- 18 Legal road is used by utility companies for their assets. There has been consultation with utility companies and there will be easements required to cover existing utilities. There is no objection from utility companies as long as easements are provided.

Policy Considerations

- 19 The Council adopted a Road Encroachment Policy in January 2012. The policy records that landowners must pay an annual encroachment fee for encroachments on road reserve. A copy of that policy is attached as Attachment C.
- 20 The owners of the affected land are not currently paying an annual encroachment fee and they do not have a current encroachment licence.

- 21 The Council also has a Road Stopping Policy that was created in January 2012. A copy of that policy is attached as Attachment D. The policy specifies that the applicant is required to pay to the Council:
- a) An administration fee (currently \$870 including GST) to process the road stopping proposal;
 - b) The actual costs involved in the stopping (such as the valuation, survey and legal costs);
 - c) The value of the land.
- 22 The Council needs to review both the Road Encroachment Policy and Road Stopping Policy, as each policy specifies that it will be reviewed three years from the date of adoption.
- 23 The Transport Team plans to review these policies during the 2017/18 year.
- 24 Although a decision regarding Ings avenue could be deferred until after the review of the Road Encroachment and Road Stopping Policies, the review is likely to take some time and landowners are likely to find this option unacceptable.

Context

- 25 The Council does not actively seek out encroachments on legal road. Typically, the issue is identified by the Council when a third party (such as a prospective purchaser) makes inquiries about a property. At that point, the Council seeks to resolve the issue either through the grant of an encroachment licence, or a road stopping process.

Cost Considerations

- 26 The costs of completing a road stopping can be high. The valuation, survey and legal costs for each individual property are typically around \$6,000 plus GST.
- 27 The Council has obtained estimates in relation to the LINZ accredited agent's costs, the costs of valuing the land, legal and survey costs. The total cost for all 22 properties is likely to be \$56,000 plus GST and disbursements (which is \$2,545 plus GST and disbursements for each property).
- 28 The above costs do not include the Council's standard administration fee of \$870 including GST to process the road stopping proposal. The Council may choose to require that payment or waive it.

Potential Revenue

- 29 If the road encroachment land is stopped as legal road and sold to the adjoining property owners, then the sale price must be that set by a registered valuer. The normal valuation process is on a "before and after" basis, meaning the value is the difference between what the property was worth before it included any stopped road land and what it will be worth once the stopped road is included within the property.
- 30 If the Council resolved to stop the road encroachment land, then full valuations would be carried out.
- 31 As a preliminary step, to provide guidance on the likely land values, the Council has obtained initial desktop estimates for indicative purposes only.
- 32 The likely sale price for the stopped road encroachment land would be around \$4,000 to \$8,000, depending on the length of the frontage of the individual properties. For three of the properties however, the price of any sale is likely to be assessed at \$0. This is

because those three properties are all leg-in sites and therefore there is no real benefit to them in purchasing the additional frontage.

- 33 In addition to any revenue generated through the sale of the various parcels of stopped road, the Council will generate a very small increase in the rates revenue in relation to each of the 22 affected properties.
- 34 If the landowners do not elect to purchase the stopped road then the Council would have the option of leasing the land to an adjoining landowner at such prices as the Council considers fit (ranging from \$0 per annum to current market rental).

Legislation

- 35 The Council may choose to stop the road encroachment land under either the Public Works Act 1981 or the Local Government Act 1974. Given the number of properties involved and the fact that the land is already occupied by adjoining landowners, it seems that there would be little advantage in going through the notification process under the Local Government Act 1974. Accordingly, Council officers are recommending the use of the Public Works Act 1981 in this instance.

OPTIONS

- 36 There are a number of options available to the Council. These include the following:
- a) Do nothing or defer the decision until after the Road Encroachment and Road Stopping Policies have been reviewed;
 - b) Enforce the Council's Road Encroachment Policy and Road Stopping Policy;
 - c) Agree to stop the road, upon the basis that:
 - i) The Council waives the usual administration fee;
 - ii) The Council pays for the valuation, survey and legalisation fees;
 - iii) Where an adjoining landowner agrees to purchase, the Council sells the stopped road to the adjoining landowner at a price fixed by a registered valuer; and
 - iv) Where the adjoining landowner does not agree to purchase, the Council grants a lease to allow the landowner to continue in occupation of the stopped road at an initial rental of zero dollars per annum. However, it would be made clear to existing landowners that if they sell the property then the new purchaser would need to either purchase the land at valuation, or sign a fresh lease upon the Council's then standard terms and conditions (including standard rental fees).
 - d) Agree to stop the road, as per c) above, but make this conditional upon a sufficient number of landowners agreeing to purchase the stopped road so that the Council can recover the road stopping costs through the purchase price of the land.
- 37 There are a number of variations on the above four options, but these are seen as the four practicable options.
- 38 A targeted rate was considered by Council officers, but this is not seen as a practicable option as this situation is not contemplated by the Local Government (Rating) Act 2002.

Option One – Recommended Option – Agree to Road Stopping on the condition that a specified number of landowners agree to purchase the stopped road

39 Agree to stop the road, upon the basis that:

- a) The Council waives the usual administration fee;
- b) The Council pays for the valuation, survey and legalisation fees;
- c) Where an adjoining landowner agrees to purchase, the Council sells the stopped road to the adjoining landowner at a price fixed by a registered valuer; and
- d) Where the adjoining landowner does not agree to purchase, the Council grants a lease to continue using the stopped road land at a rental of zero dollars per annum. It would be made clear to existing landowners that if they sell the property then the new purchaser would need to either purchase the land at valuation, or sign a fresh lease upon the Council's then standard terms and conditions.
- e) A sufficient number of landowners in Ings Avenue agreeing to purchase the stopped road so that the Council can recover the road stopping costs through the purchase price of the stopped land.

Advantages

- This option has the potential to resolve a long outstanding issue.
- This proposal allows property owners to legalise the existing encroachment should they choose. It also means that Council retains control of a process which can become protracted and expensive if individual property owners apply for stoppings separately.
- This option will increase (by a small amount) the rateable area of land.
- This option creates economies of scale and avoids the need for Council officers to:
 - i) Write 22 separate reports on an ad hoc basis as this issue arises for each individual property; and
 - ii) Avoids the needs to have 22 separate surveys, 22 separate valuations and 22 separate legalisation processes.
- The LINZ disbursement costs for this transaction will be less as, for some LINZ charges, the cost is the same whether the plan relates to one property or 22 properties.
- By having a condition requiring a sufficient number of landowners to sign an agreement for sale and purchase so as to enable the Council to recover its costs, there is a further incentive for landowners to purchase the property rather than selecting the lease option.

Disadvantages

- This option arguable creates a precedent, but it is an unusual situation and there are significant advantages to the Council in resolving this matter as one overall file through significant savings on staff time.

- This option involves an initial capital outlay by the Council, but the whole of this cost (or a significant portion of it) will be recovered over time through the sale of the portions of stopped road.
- The land would be unavailable for use by members of the public (although this is the situation in practice anyway).
- The Transport team would need to pay rates on the stopped road pending a sale of the land.

Option Two – Agree to Road Stopping, without requirement for a specified number of landowners to purchase

- 40 This option is the same as Option One, but removes the requirement to have a sufficient number of landowners sign-up to an Agreement for Sale and Purchase at the outset so as to cover the Council's initial capital outlay.

Advantages

- The advantages are the same as Option One, except there is the additional advantage that the project will proceed even if landowners do not have funds available to purchase the land at this point in time.

Disadvantages

- The disadvantages are the same as Option One, except there is the risk that the Council will not recover its legalisation costs for many years.

Option Three – Status Quo or defer the decision until after the Road Encroachment Policy and Road Stopping Policy have been reviewed

- 41 Do nothing or defer the decision until after the Road Encroachment Policy and Road Stopping Policy have been reviewed

Advantages

- This option would avoid the initial costs associated with a road stopping.

Disadvantages

- This does not solve the problem or, at least, does not solve the problem in the short term.
- On-going encroachment and the loss of future rates from the stopped road.
- This issue is likely to create adverse publicity as it has previously been raised through the Otago Daily Times.
- This creates difficulties for landowners when they come to sell their properties.

Option Four – Enforce Council's Policies

- 42 Enforce the Council's Road Encroachment Policy and Road Stopping Policy.

Advantages

- This option is fully consistent with the Council's Road Encroachment and Road Stopping policies.
- It does not create a precedent.

- May in time result in collection of fees for encroachment (but note that under the Council's current policies the existing owners only have to pay the application fee and \$0 per annum until the property changes hands).
- May result in some landowners agreeing to meet their own costs and have a part of the road stopped.

Disadvantages

- This issue is likely to create adverse publicity as it has previously been raised through the Otago Daily Times.
- This creates difficulties for landowners when they come to sell their property.
- This option is likely to require 22 separate reports, with 22 separate valuations, 22 separate survey plans and 22 separate legalisation processes.
- Will create enforcement issues and there will be costs associated with that enforcement.

NEXT STEPS

- 43 If Council resolves to stop the road encroachment land, Council officers will prepare agreements for signing by the owners of the affected properties. If a sufficient number of landowners agree to purchase the road encroachment land so as to allow Council to recover at least half of its road stopping costs, Council officers will complete the legalisation processes outlined in this report. If there is an insufficient number of landowners who are willing to sign agreements to purchase so as to allow Council to recover at least half of its road stopping costs, this matter will be referred back to Council.
- 44 Alongside this process, Council officers will work towards having the Road Encroachment Policy and Road Stopping Policy reviewed, with a report back to Council on these policies.
- 45 It is noted that the Council's Chief Executive Officer has the delegation to authorise a road stopping under the Public Works Act 1981, but not under the Local Government Act 1974. This is because Public Works Act road stoppings (as opposed to Local Government Act road stoppings) are generally only used to address historic anomalies where no person is likely to have any objection to a stopping. Although the Chief Executive Officer could have used her delegation here, she has chosen to refer this report to Council as it is more complex and involves more costs than usual Public Works Act stopping. The intention however is that the Chief Executive Officer will use her delegation for Public Works Act road stoppings in the future where the purpose of the road stopping is to solve an historic anomaly and she considers that it does not warrant a full report to Council.

Signatories

Author:	Karilyn Canton - In - House Legal Counsel Michael Tannock - Transport Network Team Leader
Authoriser:	Richard Saunders - Acting Group Manager Transport Ruth Stokes - General Manager Infrastructure and Networks

Attachments

	Title	Page
A	Aerial Map of Ings Avenue	

- B Legal Opinion dated 29 July 2016 from Anderson Lloyd
- C Road Encroachment Policy, Adopted January 2012
- D Road Stopping Policy, Adopted January 2012

SUMMARY OF CONSIDERATIONS***Fit with purpose of Local Government***

This decision/report/proposal relates to providing local infrastructure and it is considered good-quality and cost-effective.

Fit with strategic framework

	Contributes	Detracts	Not applicable
Social Wellbeing Strategy	☒	☐	☐
Economic Development Strategy	☒	☐	☐
Environment Strategy	☐	☐	☒
Arts and Culture Strategy	☐	☐	☒
3 Waters Strategy	☐	☐	☒
Spatial Plan	☐	☐	☒
Integrated Transport Strategy	☒	☐	☐
Parks and Recreation Strategy	☐	☐	☒
Other strategic projects/policies/plans	☐	☐	☒

Any of the options involving a road stopping promotes the Social Wellbeing Strategy and the Economic Development Strategy. None of the options would affect the transport network as the land is already occupied.

Māori Impact Statement

There are no known impacts for tangata whenua.

Sustainability

Proactive management for the transportation network supports social and economic sustainability.

LTP / Annual Plan / Financial Strategy / Infrastructure Strategy

There are no known implications.

Financial considerations

If the Council elects to meet all or any of the road stopping costs, the Council will need to pay for those costs from the Council's existing transport budget. In due course, those costs will be off-set if the stopped road is sold to adjoining landowners.

Significance

Under the significance and engagement policy this is considered of low significance.

Engagement – external

The Council has been engaged with the landowners in Ings Avenue through their spokesperson, Mr Ian Thomson. The utility companies have been consulted and none have any objection to the proposed road stopping provided that they are granted an easement if they have infrastructure within the land to be stopped.

Engagement - internal

Transport Group, Planning and Urban Design, Property and Water and Waste Services where engaged with.

Risks: Legal / Health and Safety etc.

There no significant risks.

Conflict of Interest

There are no known conflicts of interest.

SUMMARY OF CONSIDERATIONS
<i>Community Boards</i>
There are no known implications for Community Boards.