

24 July 2017

Christchurch City Council
PO Box 73014
CHRISTCHURCH 8154

Novo Group Limited
Level 1, 279 Montreal Street
PO Box 365, Christchurch 8140
0 - 03 365 5570
info@novogroup.co.nz

Attention: [REDACTED]

Dear Sarah,

APPLICATION FOR FORMED ACCESS TO 9021 ROTHESAY ROAD

1. The purpose of this letter is to apply, on behalf of Mr Brent Falvey, for permission to form a driveway, and associated landscaping, from Aston Drive over unformed legal road to 9021 Rothesay Road in Waimairi Beach. Mr Falvey requests speaking rights should there be a need for a hearing to decide the application.
2. Before setting out the details of the proposal, the following section outlines the context and background to this application. We consider this is particularly important to Christchurch City Council's considerations.

Context and Background

3. 9021 Rothesay Road ('**the site**') is a 599m² section that was subdivided in 1924. The site is owned by Elizabeth Thompson and has been in her family since it was created. Mr Falvey has entered into a binding sale and purchase agreement for the property subject to obtaining resource consent to build a dwelling on the site.
4. On 23 September 2015 Mr Falvey applied for the resource consent that is required to authorise residential use of the site (Christchurch City Council reference: RMA92031024). The application was publicly notified and received 28 submissions; 12 in support and 18 in opposition. The application was declined and subsequently appealed to the Environment Court.

The Site and Surrounds

5. The site is legally described as Lot 11 Deposited Plan 5121 and is identified in Figure 1 and Figure 2 over the page. Rothesay Road in this location is an unformed paper road that branches off from the formed Aston Drive.
6. The perimeter of the property is fenced with 2-metre-high deer style fencing. The fencing is covered in black wind cloth. Hurricane mesh (chain link) gates extend along the short northwest boundary.
7. The adjoining Waimairi Beach residential area, located between the local golf course and the coast, is a relatively recent addition to suburban Christchurch. The neighbourhood is characterised by a diversity of modern architectural styles, public spaces punctuated with seaside motifs, and a lack of street trees.

AJS-802577-2-915-V1

8. Bottle Lake Forest Park occupies a large area of land immediately north of Aston Drive and the site. It is a production forest which is also used as a recreational area and is owned by Christchurch City Council ('Council'). A block of the forest north and northwest of the site has recently been replanted following the last harvest. The trees are located no closer than 30 metres from Aston Drive/Rothesay Road. The newly planted pines are now up to 3 metres in height. Harvesting in Bottle Lake Forest Park generally operates on a 30-year rotation which this block is over two years into.



Figure 1 - Site location (Source: Canterbury Maps - image captured in 2012)



Figure 2 - Site location (Source: Canterbury Maps – image captured in 2016)

9. To the east, the site is separated from Waimairi Beach by the coastal dunes that stretch along much of the Christchurch coastline.
10. In close proximity to the site there is an undeveloped triangular shaped property (hereon referred to as The Wedge and marked by a yellow star in Figure 2) that has no access except via the unformed Rothesay Road. It is zoned Residential Suburban in the Christchurch District Plan.

Rothesay Road

11. Rothesay Road between Aston Drive and Whiskey Road is a 20-metre-wide unformed legal road with a generally flat ground contour. The ground cover is mostly grass and there is a gravel public footpath that provides access to the coastal environment. At the intersection of Aston Drive and Rothesay Road, vehicle access is prevented by a combination of bollards, a steel vehicle gate and a pedestrian gateway feature which appears to have been established by the developer of the Waimairi Beach subdivision (see Figure 3).



Figure 3 - Photo looking east from Aston Drive along Rothesay Road

Engagement with Council Staff

12. The applicant, through his solicitor, engaged with Council staff in August 2015 prior to lodging the resource consent application. He was advised that approval of the proposed driveway could be authorised through a licence considered against Council's *Structures On Roads* policy and that Mr Falvey would be responsible for its construction and maintenance. He was also advised that landscaping ought to be proposed to reduce the visual impacts of the proposed driveway, and that a post and rail fence and a gate be proposed to prevent access to coast.
13. Following this advice, Mr Falvey applied to Council on 5 November 2015 to approve the proposed driveway and associated landscaping. We note that the proposed coastal dune ecosystem plant species were selected from the *Otautahi Christchurch Indigenous Ecosystems* guide.
14. After the submission of the application, Council asked some questions of clarification, which were answered, and requested changes to the proposal so that emergency vehicles would not be impeded. These changes were made and it was understood that Council staff were satisfied with the proposed driveway and associated landscaping. The final access and planting plan is included at **Appendix 1**. Please note that this not the plan that is the subject of this application.
15. On 26 November 2015, [REDACTED] (Council's Transport Policy Engineer) advised that the licence application would "rest" until the resource consent application was decided. The email chain included at **Appendix 2** records all the written correspondence on the matter.



Environment Court Proceedings

16. The development proposal that is currently before the Environment Court includes the driveway and associated landscaping within Rothesay Road. The driveway and landscaping within the unformed road is integral to proposal.
17. The appellant (Mr Falvey) has volunteered a condition of consent requiring Council's authorisation of the driveway and associated landscaping within Rothesay Road before the consent can be implemented. This means that if the resource consent is granted, the consent holder could not implement the proposed residential activity if authorisation of the driveway and associated landscaping outside the site was not obtained.
18. Mr Falvey has also volunteered a condition of consent requiring the consent holder to establish the proposed landscaping and maintain it in perpetuity. We note that, under the proposed condition, the requirement to maintain the landscaping would expire if Council decided to form Rothesay Road.
19. In his evidence in chief for Council, ██████████ (Senior Planner) suggested that approval would likely to be given by Council to form the proposed driveway and associated planting¹ and that public access would be unimpeded². However, during the Environment Court hearing Council provided a supplementary brief of evidence which provided a different view on the matter of the proposed occupation of Rothesay Road. The supplementary evidence is included at **Appendix 3**.
20. In summary, the evidence sets out that the proposed driveway requires the approval of the Council (elected members) following consultation, and that Council staff would not recommend the approval of the proposed landscaping because it would interfere with public access. The evidence is supported by a legal opinion prepared by ██████████ ██████████ (Council Senior Solicitor) which is also included at **Appendix 3**.
21. This opinion came as a complete surprise to Mr Falvey, who before then had felt assured, based on the advice from Council staff, that approval of the driveway and associated landscaping would be forthcoming, and that Council staff had the delegated authority to make the decision.
22. Unsurprisingly, the Court was unimpressed by the receipt of the advice from Council so far into the hearing. Not wanting to potentially approve a resource consent that could not be implemented, the Court adjourned the hearing until November this year to provide Mr Falvey the opportunity to obtain approval for the proposed driveway and associated landscaping.
23. Had Mr Falvey been advised by Council from the outset (i.e. in late 2015) that the proposed landscaping was unlikely to gain approval, he may have decided not to pursue the resource consent application. Having now expended a considerable sum of money on the resource consent application and subsequent appeal, Mr Falvey is eager to find a solution that resolves Council's concerns and mitigates the potential adverse effects of the proposed residential activity.

¹ Paragraph 195 of Mr Ward's evidence in chief for the Environment Court (ENV-2016-034)

² Paragraph 108 of Mr Ward's evidence in chief for the Environment Court (ENV-2016-034)



Further Engagement with Council Staff

24. Considering the revised advice from Council and the direction from the Court, Mr Falvey engaged with Council staff again as part of the process of making this second application to authorise the driveway and associated landscaping.
25. Several alternative access and planting proposals have been discussed with Council staff representatives from the Transport Asset Planning, Regional Parks and Legal Services teams. We summarise their feedback as follows:
 - a. Transport Asset Planning are concerned that providing access to Rothesay Road will create a demand for car parking within the unformed legal road. It was suggested that signage and/or broken yellow lines be used to prevent parking along the driveway, and that bollards and/or planting be used along the length of the driveway to physically prevent informal parking within the remainder of the road reserve;
 - b. Regional Parks are concerned that providing access to Rothesay Road will result in vehicles driving into the coastal area, including along Whiskey Road. The Parks team would support measures to prevent vehicle access to the coastal area. They are also concerned that the proposed planting may increase the risk of the spread of fire from the forest to the residential area to the south; and
 - c. Legal Services considers that there is no issue with planting along the periphery of the road but that planting in the centre of the road (especially trees) would hinder public passing and repassing of the road when considered in combination with the existing gateway feature.
26. As you will appreciate, it is difficult to reconcile the conflicting positions of Council staff. On the one hand, the Transport and Parks teams prefer that vehicle access is restricted to authorised vehicles only (as is currently the case), whereas the advice from the Legal team is that obstructing vehicle traffic is unlawful (as is currently the case given vehicle access is prevented by bollards, a steel gate and the gateway feature).

The Proposal

27. Mr Falvey has developed two proposed options for the Coastal-Burwood Community Board and the Council to consider (see **Appendix 4**). We note that the owners of 98A and 100 Aston Drive have also been consulted on the proposed options but have not provided any feedback preferring to wait, we infer, for the public consultation that is expected to occur.
28. Both options show the proposed driveway in the same location along the northern side of Rothesay Road. The sealed driveway is 3.5 metres wide and will be constructed to the relevant vehicle crossing standards in Part 6 2015 (roads) of the Council's Construction Standard Specifications ('**CCS**'). The realigned sections of the gravel walking track will be constructed to the standards for construction of gritted footpaths which are also set out in Part 6 2015 of the CCS.



29. Both options involve a proposed sign reading 'Emergency and ranger vehicles only' and 'No parking' to be installed at the Aston Drive end of the driveway. The driveway will also be marked either side with broken yellow lines.
30. The preferred option includes bollards along the southern side of the driveway to discourage informal car parking in Rothesay Road, and a curb at the end of the driveway to discourage vehicles entering the coastal area. A vehicle access width of at least 5.2 metres is provided along the length of Rothesay Road. This width reflects the formed width of Aston Drive at its narrow point at the pedestrian crossing at the intersection with Rothesay Road. This means that any vehicle able to travel along Aston Drive would also be able to travel along Rothesay Road.
31. Both options include a strip of planting along the northern periphery of the road to a depth of approximately 3.4 metres except where the driveway enters 9021 Rothesay Road. Both options also include a strip of planting along the western side of Whiskey Road along the boundary with 9021 Rothesay Road.
32. The preferred option includes an island of planting in the centre of the road reserve near the Aston Drive intersection, a small area of planting on the northeast side of the gateway feature, and a small area of planting adjacent the northwest boundary of 100 Aston Drive. The alternative option does not include the central island of planting. Instead, it includes a larger area of planting to the northwest of 100 Aston Drive.
33. The proposed planting species include low ground cover grasses and shrubs, shrubs up to 2 metres in height along the boundary with 9021 Rothesay Road and selected stands of cabbage trees and *Hoheria angustifolia*. The cabbage trees are expected to grow to approximately 4 metres in height and will be the tallest growing plant species. Detailed planting plans are included at **Appendix 4**.

Discussion

34. Firstly, we consider the original access and planting plan before the Environment Court could be approved by the Council except perhaps for the vehicle gate shown at the end of the driveway. We disagree with the legal advice of [REDACTED] appended to [REDACTED] supplementary evidence for the reasons set out in the legal opinion attached at **Appendix 5**. In essence we do not believe any nuisance can result where the ability to freely traverse along the paper road is maintained, as it would be under the proposed landscaping. The determination of a nuisance is a matter of fact and degree. Currently vehicles have no access along the paper road. The proposal provides that access while retaining the ability of pedestrians and other non-motorised traffic to utilise the paper road. There is no nuisance created, rather any current nuisance is removed.
35. Despite this, Mr Falvey has attempted to alleviate [REDACTED] concerns by significantly reducing the amount of proposed planting and removing the proposed vehicle gate. In our view, both proposed options continue to provide unimpeded public access and the proposed landscaping does not create any sort of nuisance. In fact, we consider the proposed landscaping will improve the amenity and ecology of the access.
36. We consider that the preferred option most effectively balances the desire to keep vehicles out of the road reserve, with the legal requirement to maintain unimpeded public access.



Further, we consider the proposed signage mitigates a potential perception that the land has been privatised.

37. While the resource consent application before the Environment Court provides the context for this access and planting application, it should not, in our view, have any bearing on Council's considerations. The Environment Court process will determine whether or not the proposed residential activity is appropriate. In terms of this application, Council must decide whether it is appropriate to authorise a sealed driveway to provide access to 9021 Rothesay Road and associated landscaping which will improve the amenity and ecology of the road reserve.
38. We ask that Council consider what its decision would be if a substantially similar application was sought to approve a driveway and associated landscaping to The Wedge property. We understand that the owner does intend to develop that site at some stage in the future. When that happens, the proposed driveway can be extended to also provide access to The Wedge.
39. A potential additional benefit of the proposal is the ability to use the driveway to provide public access to a formal car parking area for people visiting the coast. The Regional Parks team has advised that such a facility is part of its future planning.
40. If Council remains concerned about allowing unrestricted vehicle access over the road, it could consider imposing a Pedestrian Mall designation to limit motor access to property owners, Council rangers and emergency services. That would be a decision for the Council and would be one that Mr Falvey would support.

Yours sincerely,

Novo Group Limited

Tim Walsh

Consultant

M: 027 267 0000 | **O:** 03 365 5570

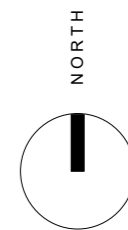
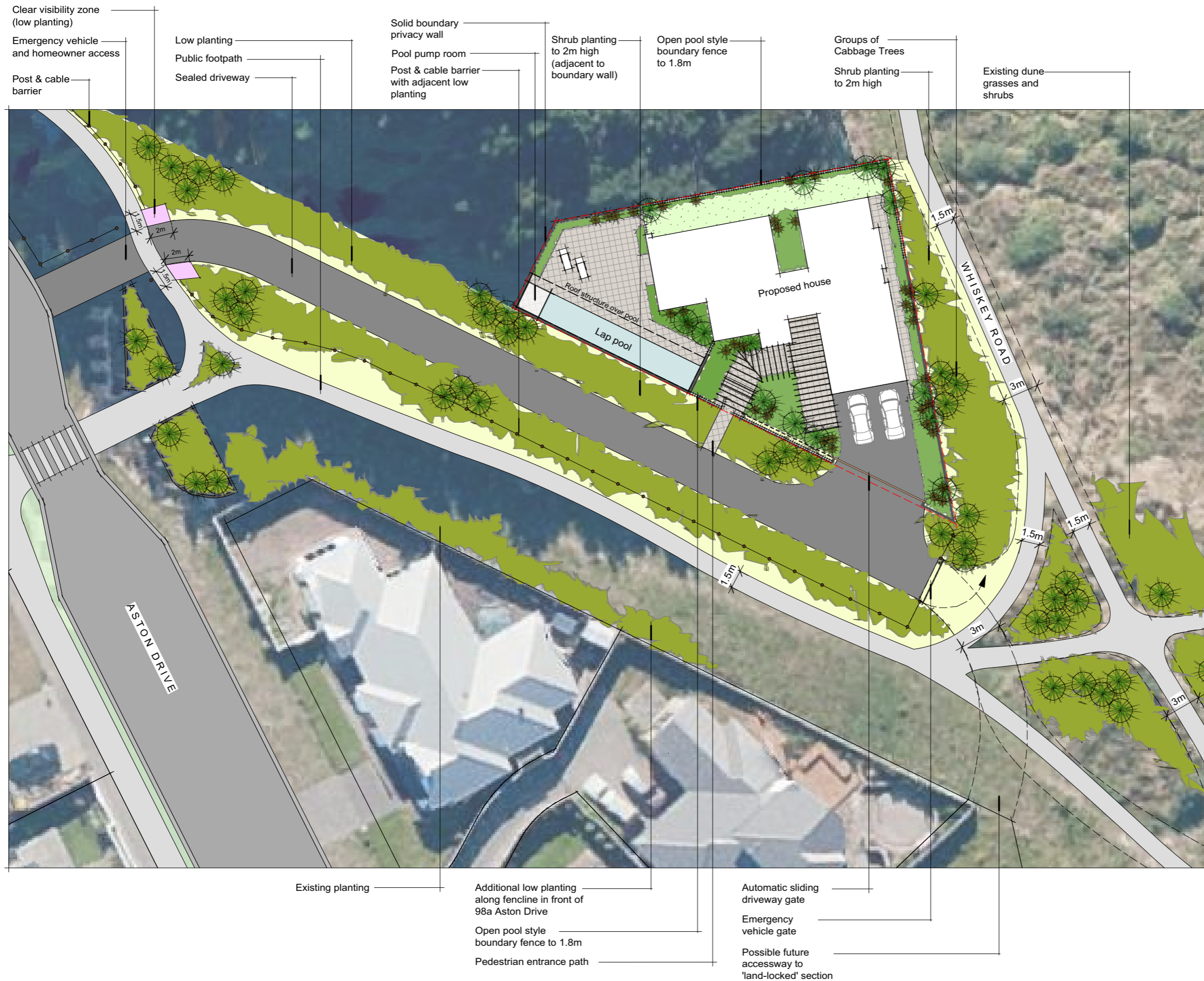
E: tim@novogroup.co.nz | **W:** www.novogroup.co.nz

[405001]



Appendix 1: Resource consent access and planting proposal

ISSUE	DATE	STATUS
0	06/07/15	FOR REVIEW
A	21/07/15	FOR REVIEW
B	10/09/15	FOR REVIEW
C	21/09/15	FOR REVIEW
D	17/11/15	FOR REVIEW
E	27/01/16	FOR REVIEW
F	09/02/16	FOR REVIEW
G	23/03/16	FOR REVIEW
H	16/11/16	FOR REVIEW



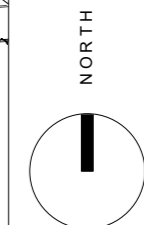
rough & milne landscape architects
 Level 2, 69 Cambridge Terrace
 PO Box 3764, Christchurch 8140
 New Zealand
 Tel +64 3 366 3268
 Fax +64 3 377 8287
 info@roughandmilne.co.nz

**ACCESS PROPOSAL
 PROPOSED FALVEY HOUSE
 CNR ASTON DRIVE & WHISKEY ROAD
 WAIMARI BEACH, CHRISTCHURCH**

JOB No.	15088
SCALE	1:300 @ A3
DATE	16/11/16
DESIGNED	PETER ROUGH/GERRARD THOMSON
DRAWN	GERRARD THOMSON
CHECKED	PETER ROUGH
STATUS	FOR REVIEW
DRAWING No.	REVISION
L 1.0	H
SERIES	
1 of 1	

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ISSUE	DATE	STATUS
O	23/10/15	FOR REVIEW
A	19/11/15	FOR REVIEW
B	27/01/16	FOR REVIEW
C	09/02/16	FOR REVIEW
D	23/03/16	FOR REVIEW
E	30/03/16	FOR REVIEW
F	16/11/16	FOR REVIEW



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PLANTING PLAN - CCC LAND
PROPOSED FALVEY HOUSE
CNR ASTON DRIVE & WHISKEY ROAD
WAIMARI BEACH, CHRISTCHURCH

JOB No.	15088
SCALE	1:300 @ A3
DATE	16/11/16
DESIGNED	PETER ROUGH/GERRARD THOMSON
DRAWN	GERRARD THOMSON
CHECKED	PETER ROUGH
STATUS	FOR REVIEW
DRAWING No.	REVISION
L 1.0	F
SERIES	
1 of 1	

PLANT SCHEDULE

Code	Botanical Name	Common Name	Grade	Quantity
Ap s	Apodasmia similis	Oioi	PB3	10
Au t	Austroderia toe toe	NZ toe toe	PB3	18
Co a	Cordyline australis	Cabbage tree	PB3	44
Co c	Corokia cotoneaster	Corokia	PB3	28
Co p	Coprosma propinqua	Mikimiki	PB3	11
Cop a	Coprosma acerosa	NZ coprosma	PB3	14
Cy u	Cyperus ustulatus	Umbrella sedge	PB3	148
Ho a	Hoheria angustifolia	Narrow leaved lacebark	PB3	3
Mu c	Muehlenbeckia complexa	Small leaved pohuehue	PB3	27
Ph c	Phormium cookianum	Dwarf flax	PB5	102
Ph t	Phormium tenax	Harakeke NZ flax	PB5	10
Ps c	Pseudopanax crassifolius	Lancewood	PB5	15
So p	Sophora prostrata	Dwarf kowhai	PB3	18

KEY



Depicts areas where low native groundcover plants may already exist or can be added to using the following species:
Austrofestuca littoralis sand fescue
Carex pumila sand sedge
Ficinia nodosa knobby clubrush
Muehlenbeckia axillaris mat pohuehue
Spinifex sericeus spinifex



Clear visibility zone (selection of plants will not exceed 1m in height when mature)



Appendix 2: Access proposal correspondence

Tim Walsh - Novo Group

From: [REDACTED]
Sent: Thursday, 26 November 2015 8:23 a.m.
To: Lisa Williams - Novo Group; [REDACTED]
Cc: Tim Walsh - Novo Group
Subject: RE: Falvey - amended access plan

Lisa,

Both [REDACTED] and me believe there is no need to submit a vehicle crossing application at this time and this and the structure on road deed of licence can now rest until the resource consent has been resolved.

Thanks

[REDACTED]
Transport Policy Engineer
Asset & Network Planning Transportation Group
Christchurch City Council
PO Box 73014
53 Hereford Street
Christchurch, 8154
New Zealand

+64 (0)3 941 8605

From: Lisa Williams - Novo Group [mailto:lisa@novogroup.co.nz]
Sent: Wednesday, 25 November 2015 2:11 p.m.
To: [REDACTED]
Cc: Tim Walsh - Novo Group
Subject: RE: Falvey - amended access plan

Hi [REDACTED]

Thanks for sending that through. I am hoping that they may not need to apply for this aspect until they are certain of obtaining resource consent. Particularly, they won't have this level of detail regarding contractors and location of services available until at least building consent stage. Understandably they do not want to progress the building consent components until there is certainty regarding achieving a resource consent approval.

My understanding is that the vehicle crossing application is more around construction design and therefore not likely to affect resource consent approval. Compared to the need for access to the paper road which is critical to the design proposed for resource consent.

[REDACTED] could you discuss between yourselves and confirm whether the vehicle crossing application is necessary for progressing the resource consent?

Cheers,

Lisa Williams | Transport Planner

Novo Group - Planning | Traffic | Environmental Health

027 2929825 | 03 365 5596 | www.novogroup.co.nz

10 Bishop Street, St Albans | PO Box 38 123 | Christchurch 8842

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From: [REDACTED]

Sent: Tuesday, 24 November 2015 8:29 AM

To: Lisa Williams - Novo Group <lisa@novogroup.co.nz>

Cc: Tim Walsh - Novo Group <tim@novogroup.co.nz>; [REDACTED]

Subject: RE: Falvey - amended access plan

Lisa,

I have been made aware that it will also be necessary for a vehicle application to be made in respect of the proposal to the Falvey property. This is mainly to ensure it meets the Council's construction standards. Therefore, I am attaching an application form and a link to the Council Construction Standards for more information.

<http://www.ccc.govt.nz/consents-and-licences/construction-requirements/construction-standard-specifications/>

Thank you

[REDACTED]
Transport Policy Engineer

Asset & Network Planning Transportation Group

Christchurch City Council

PO Box 73014

53 Hereford Street

Christchurch, 8154

New Zealand

+64 (0)3 941 8605

From: Lisa Williams - Novo Group [<mailto:lisa@novogroup.co.nz>]

Sent: Sunday, 22 November 2015 8:04 p.m.

To: [REDACTED]

Cc: Tim Walsh - Novo Group; [REDACTED]

Subject: RE: Falvey - amended access plan

Hi [REDACTED]

Yes they have already applied for resource consent – [REDACTED] is processing it. I'm not sure what stage they are up to re the building consent but I assume they will include it in the consent drawing for the dwelling.

I believe [REDACTED] has provided a planting list of recommended species which the landscape architect has worked from.

Kind regards,

Lisa Williams | Transport Planner

Novo Group - Planning | Traffic | Environmental Health
027 2929825 | 03 365 5596 | www.novogroup.co.nz
10 Bishop Street, St Albans | PO Box 38 123 | Christchurch 8842

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From: [REDACTED]
Sent: Friday, 20 November 2015 9:52 AM
To: Lisa Williams - Novo Group <lisa@novogroup.co.nz>
Subject: RE: Falvey - amended access plan

Lisa,

Thank you for the revised plans which look good to me. I am making enquires with colleagues to determine what else could be required?

I have a couple of questions:

- I assume that your client will be seeking resource and building consent which will include the proposed driveway and landscaping?
- Have you been in contact with anyone from the Council concerning the landscaping and planting proposals?

Thank you

[REDACTED]
Transport Policy Engineer
Asset & Network Planning Transportation Group
Christchurch City Council
PO Box 73014
53 Hereford Street
Christchurch, 8154
New Zealand

+64 (0)3 941 8605

From: Lisa Williams - Novo Group [<mailto:lisa@novogroup.co.nz>]
Sent: Thursday, 19 November 2015 11:19 a.m.
To: [REDACTED]
Subject: RE: Falvey - amended access plan

Hi [REDACTED]

Please see attached final plans showing the 3.0m width and the landscaping plan has been amended to match.

Please let me know if there is anything else you require.

What is the process / likely timeframes from this point?

Lisa Williams | Transport Planner
Novo Group - Planning | Traffic | Environmental Health
027 2929825 | 03 365 5596 | www.novogroup.co.nz
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From: [REDACTED]
Sent: Tuesday, 17 November 2015 3:53 PM
To: Lisa Williams - Novo Group <lisa@novogroup.co.nz>
Subject: RE: Falvey - amended access plan

Lisa,

This revision looks good and I agree that it is for access north and south on Whiskey Road. I was concerned that a large vehicle like an Ambulance could get damaged and slowed down by the planting.

I am sorry I didn't mean to imply that Brent and his visitors would obstruct the driveway. I am more concerned about the drive encouraging other visitors for the dunes and beach to park there. I believe what you have suggested will minimise this potential problem.

Thank you

[REDACTED]
Transport Policy Engineer
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PO Box 73014
53 Hereford Street
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New Zealand

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From: Lisa Williams - Novo Group [<mailto:lisa@novogroup.co.nz>]
Sent: Tuesday, 17 November 2015 2:08 p.m.
To: [REDACTED]
Subject: FW: Falvey - amended access plan

Hi [REDACTED]

Please see attached a draft plan to allow for the 3.0m emergency vehicle access. I note that a vehicle couldn't cross directly east towards the ocean due to the boardwalks and steps so they have not shown that section as 3.0m. Can you please confirm if what is shown is ok and we will get the plan finalised and a planting plan updated.

Also re car parking they are happy to provide no-parking / no stopping signs or markings as you see fit. Note the dwelling has a garage and spare car parking space in front of this too for visitors.

Kind regards,

Lisa Williams | Transport Planner

Novo Group - Planning | Traffic | Environmental Health

027 2929825 | 03 365 5596 | www.novogroup.co.nz

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From: Tim Walsh - Novo Group

Sent: Tuesday, 17 November 2015 2:02 PM

To: Lisa Williams - Novo Group <lisa@novogroup.co.nz>

Cc: Peter Rough <peter@roughandmilne.co.nz>

Subject: Fw: Falvey - amended access plan

Hi Lisa,

See attached the draft amended access plan. Can you check with [REDACTED] that he is happy with this. If he is, I'll ask Peter Rough to amend the planting plan too.

Note: the amended access plan allows the 3m clearance for emergency vehicles to access Whiskey Road (paper road) but not straight through to the beach. A vehicle couldn't cross the dunes (due to terrain, boardwalks and steps).

Cheers

Tim Walsh | Senior Planner

Novo Group - Planning | Traffic | Environmental Health

ddi: 03 421 7787 | mobile: 027 267 0000 | office: 03 365 5570

www.novogroup.co.nz | PO Box 38 123 | Christchurch 8842

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From: Peter Rough <peter@roughandmilne.co.nz>

Sent: Tuesday, 17 November 2015 12:13 p.m.

To: Tim Walsh - Novo Group

Subject: FW: Falvey - amended access plan

Hi Tim

Please check this out and if OK I will get the planting plan amended.

Regards

Peter Rough | Director



Registered Landscape Architect (NZILA)

rough & milne landscape architects

Level 2, 69 Cambridge Terrace, PO Box 3764, Christchurch 8140
Tel +64 3 366 3268 Mob +64 21 111 3351 DDI +64 3 961 4210
peter@roughandmilne.co.nz www.roughandmilne.co.nz

From: Gerrard Thomson
Sent: Tuesday, 17 November 2015 11:55 a.m.
To: Peter Rough
Subject: RE: Falvey - amended access plan

Hi Pete,

Falvey plan updated. Let me know if this is OK.

Regards,

Gerrard Thomson
Landscape Architect | BLA Hons | BCom

rough & milne landscape architects

Level 2, 69 Cambridge Terrace, PO Box 3764, Christchurch 8140
Tel +64 3 366 3268
Fax +64 3 377 8287
DDI +64 3 961 4219
gerrard@roughandmilne.co.nz
www.roughandmilne.co.nz



Please consider the environment before printing this e-mail

From: Peter Rough
Sent: Monday, 16 November 2015 10:22 p.m.
To: Gerrard Thomson
Subject: RE: Falvey - amended access plan

Gerrard – that will be fine.

Regards

Peter Rough | Director



Registered Landscape Architect (NZILA)

rough & milne landscape architects

Level 2, 69 Cambridge Terrace, PO Box 3764, Christchurch 8140
Tel +64 3 366 3268 Mob +64 21 111 3351 DDI +64 3 961 4210
peter@roughandmilne.co.nz www.roughandmilne.co.nz

From: Gerrard Thomson
Sent: Monday, 16 November 2015 4:46 p.m.

To: Peter Rough
Subject: RE: Falvey - amended access plan

Hi Pete,

I can make amendments tomorrow if that's OK.

Regards,

Gerrard Thomson
Landscape Architect | BLA Hons | BCom

rough & milne landscape architects

Level 2, 69 Cambridge Terrace, PO Box 3764, Christchurch 8140

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www.roughandmilne.co.nz



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From: Peter Rough
Sent: Monday, 16 November 2015 3:14 p.m.
To: Gerrard Thomson
Subject: FW: Falvey - amended access plan

Hi Gerrard

We need to make some changes to the layout and planting plans. 3.0 m wide tracks are required as per the attached drawing, which I sent to Tim Walsh and he has come back confirming what I have shown would be good. Would attend to these when you can please. Perhaps do the layout plan first and I'll send that to Tim before we proceed with amending the planting plan.

Regards

Peter Rough | Director



Registered Landscape Architect (NZILA)

rough & milne landscape architects

Level 2, 69 Cambridge Terrace, PO Box 3764, Christchurch 8140

Tel +64 3 366 3268 **Mob** +64 21 111 3351 **DDI** +64 3 961 4210

peter@roughandmilne.co.nz www.roughandmilne.co.nz

From: Peter Rough
Sent: Monday, 16 November 2015 11:59 a.m.
To: 'Tim Walsh - Novo Group'
Subject: RE: Falvey - amended access plan

Hi Tim

Have a look at this. Perhaps check with Lisa.

I expect that an emergency vehicle will need to be able to sweep around to the north to gain access onto Whiskey Road and also be able to head south onto the road from beyond the end of the driveway, so I will show that being possible. As well, I will show Whiskey Road being 3.0 m wide.

I don't think it is worth showing the track to the beach as being widened as a vehicle wouldn't get very far in that direction because of a boardwalk and I think steps.

Once you have confirmed these changes I will get this plan and the planting plan amended.

Regards

Peter Rough | Director



Registered Landscape Architect (NZILA)

rough & milne landscape architects

Level 2, 69 Cambridge Terrace, PO Box 3764, Christchurch 8140
Tel +64 3 366 3268 Mob +64 21 111 3351 DDI +64 3 961 4210
peter@roughandmilne.co.nz www.roughandmilne.co.nz

From: Tim Walsh - Novo Group [<mailto:tim@novogroup.co.nz>]
Sent: Monday, 16 November 2015 10:42 a.m.
To: Peter Rough
Cc: Lisa Williams - Novo Group; Brent Falvey
Subject: Fw: Falvey - amended access plan

Hi Pete,

See the correspondence below regarding the planting plan outside Brent's site (i.e. in the paper road). Can you please provide an amended plan reflecting the changes requested by Council?

Brent - see the comments from Council re no parking in the driveway.

Best regards,

Tim Walsh | Senior Planner
Novo Group - Planning | Traffic | Environmental Health
ddi: 03 421 7787 | mobile: 027 267 0000 | office: 03 365 5570
www.novogroup.co.nz | PO Box 38 123 | Christchurch 8842

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From: Lisa Williams - Novo Group
Sent: Monday, 16 November 2015 9:44 a.m.
To: Tim Walsh - Novo Group
Subject: FW: Falvey - amended access plan

Hey Can you get the appropriate people to make sure the planting between the driveway and the ocean is a minimum of 3.0m wide and also confirm that no parking is intended over the driveway.

Cheers,

Lisa Williams | Transport Planner
Novo Group - Planning | Traffic | Environmental Health
027 2929825 | 03 365 5596 | www.novogroup.co.nz
10 Bishop Street, St Albans | PO Box 38 123 | Christchurch 8842

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From: [REDACTED]
Sent: Monday, 16 November 2015 9:42 AM
To: Lisa Williams - Novo Group <lisa@novogroup.co.nz>
Subject: RE: Falvey - amended access plan

Lisa,

I am sorry I haven't got back to you sooner.

I suggest that the a minimum width of 3 metres is maintained for the paths on the ocean side of the locked gate.

I do not know the proposed width of the driveway, but it may be necessary to prevent parked vehicles from blocking it in case of an emergency?

Thank you

[REDACTED]
Transport Policy Engineer
Asset & Network Planning Transportation Group
Christchurch City Council
PO Box 73014
53 Hereford Street
Christchurch, 8154
New Zealand
+64 (0)3 941 8605

From: Lisa Williams - Novo Group [<mailto:lisa@novogroup.co.nz>]
Sent: Tuesday, 10 November 2015 9:17 a.m.
To: [REDACTED]
Subject: RE: Falvey - amended access plan

Hi [REDACTED]

I will get them to have a look, what minimum width do they need to keep clear for emergency vehicle access?

Lisa Williams | Transport Planner

Novo Group - Planning | Traffic | Environmental Health

027 2929825 | 03 365 5596 | www.novogroup.co.nz

10 Bishop Street, St Albans | PO Box 38 123 | Christchurch 8842

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From: [REDACTED]
Sent: Monday, 9 November 2015 3:46 PM
To: Lisa Williams - Novo Group <lisa@novogroup.co.nz>
Subject: RE: Falvey - amended access plan

Lisa,

I haven't really looked at the plans, but one thing I noticed was that although the gate is provided (or moved) to allow access by emergency vehicles the proposed planting could narrow the paths passed the gate. This may impeded emergency vehicle access to the dunes and beach?

Thanks

[REDACTED]
Transport Policy Engineer
Asset & Network Planning Transportation Group
Christchurch City Council
PO Box 73014
53 Hereford Street
Christchurch, 8154
New Zealand
+64 (0)3 941 8605

From: Lisa Williams - Novo Group [<mailto:lisa@novogroup.co.nz>]
Sent: Thursday, 5 November 2015 2:03 p.m.
To: [REDACTED]
Subject: RE: Falvey - amended access plan

Yes – see numbers in the email footer

Lisa Williams | Transport Planner

Novo Group - Planning | Traffic | Environmental Health

027 2929825 | 03 365 5596 | www.novogroup.co.nz

10 Bishop Street, St Albans | PO Box 38 123 | Christchurch 8842

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From: [REDACTED]
Sent: Thursday, 5 November 2015 2:01 PM
To: Lisa Williams - Novo Group <lisa@novogroup.co.nz>
Subject: RE: Falvey - amended access plan

Lisa,

Thanks, but I also need a phone number can I use Novo's?

[REDACTED]
Transport Policy Engineer
Asset & Network Planning Transportation Group
Christchurch City Council
PO Box 73014
53 Hereford Street
Christchurch, 8154
New Zealand
+64 (0)3 941 8605

From: Lisa Williams - Novo Group [<mailto:lisa@novogroup.co.nz>]
Sent: Thursday, 5 November 2015 1:57 p.m.
To: [REDACTED]
Subject: RE: Falvey - amended access plan

Hi [REDACTED]

This should be addressed to Brent Falvey under the address of 9021 Rothesay Road but can be send c/o Novogroup.
If you can email this through to me I will ensure it is passed on to Brent.

Kind regards,

Lisa Williams | Transport Planner
Novo Group - Planning | Traffic | Environmental Health
027 2929825 | 03 365 5596 | www.novogroup.co.nz
10 Bishop Street, St Albans | PO Box 38 123 | Christchurch 8842

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From: [REDACTED]
Sent: Thursday, 5 November 2015 1:53 PM
To: Lisa Williams - Novo Group <lisa@novogroup.co.nz>
Cc: Tim Walsh - Novo Group <tim@novogroup.co.nz>; [REDACTED]
Subject: RE: Falvey - amended access plan

Lisa,

Thank you this application and the plans.

I can raise an invoice for the fee of \$596, can you confirm that it should be in favour of Novo Group or the client? If the client can I have his address, and phone number?

Thank you

[REDACTED]
Transport Policy Engineer

Asset & Network Planning Transportation Group
Christchurch City Council
PO Box 73014
53 Hereford Street
Christchurch, 8154
New Zealand
+64 (0)3 941 8605

From: Lisa Williams - Novo Group [<mailto:lisa@novogroup.co.nz>]
Sent: Thursday, 5 November 2015 12:07 p.m.
To: [REDACTED]
Cc: Tim Walsh - Novo Group; [REDACTED]
Subject: RE: Falvey - amended access plan

Hi [REDACTED]

Please see attached the application for a structure on the street to create the driveway and associated landscaping. I have also attached the layout plan and a planting plan showing what is proposed.

The Policy and application form do not indicate who applications are to be made to - if it is not yourself who will process this then please let me know who this should be sent to / forward this email to the appropriate person. I understand there is also a processing fee so I assume an invoice will be generated so this can be paid by the applicant?

Note RMA92031024 is being processed by [REDACTED] in respect of the resource consent for the dwelling.

I have also cc'd to [REDACTED] who I was passed onto in respect of planting species etc – [REDACTED] in the absence of any response from you the Council's list of preferred species has been used to prepare the attached landscaping plan.

Kind regards,

Lisa Williams | Transport Planner
Novo Group - Planning | Traffic | Environmental Health
027 2929825 | 03 365 5596 | www.novogroup.co.nz
10 Bishop Street, St Albans | PO Box 38 123 | Christchurch 8842

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From: [REDACTED]
Sent: Thursday, 8 October 2015 2:27 PM
To: Lisa Williams - Novo Group <lisa@novogroup.co.nz>
Subject: RE: Falvey - amended access plan

Lisa,

Yes I have had a meeting with Andrew Schulte in August about this issue.

It was felt that the applicant would be better served by applying to obtain the Council's approval as the road controlling authority to allow the driveway to occupy the unformed (paper) road land. I sent the relevant policy and

application form (see attached email). The application to occupy road land is not automatically part of the resource consent or building consent processes, and a separate deed of licence would be drafted if the application is approved. The cost would be \$596 for the application process and about \$400 for the Deed of Licence. There would also be an annual rent which is usually a nominal sum.

I am also send you a copy of the policy and the application form.

It will also be necessary to approve the proposed landscaping and other matters as the paper road is an important access to the neighbouring reserve. I provided contact details on these matters to Andrew given in my attached email from August.

It may be useful to meet to discuss this issue?

I hope this is all useful.

Many thanks

██████████
Transport Policy Engineer
Asset & Network Planning Transportation Group
Christchurch City Council
PO Box 73014
53 Hereford Street
Christchurch, 8154
New Zealand
+64 (0)3 941 8605

From: Lisa Williams - Novo Group [<mailto:lisa@novogroup.co.nz>]

Sent: Thursday, 8 October 2015 11:19 a.m.

To: ██████████

Subject: FW: Falvey - amendede access plan

Hi ██████████

I believe you may have already had some discussions with the applicant and their solicitor regarding 9021 Rothesay Road – paper road from Aston Drive. Initially they were considering a road stopping but I understand they are now wishing to seek to just form a driveway over a short section of the paper road as attached. This plan allows emergency vehicle access and also pedestrian access.

I am wondering firstly whether you have any comments on the design / layout proposed and secondly what process is required to get this approved? They will need resource consent for the development and I have a recollection that you can provide such approvals through the resource consent process rather than also requiring a separate process – is this correct? If not what forms do they need to fill out to seek approval for this? Does it need to go through a community board or Council approval?

Cheers,

Lisa Williams | Transport Planner
Novo Group - Planning | Traffic | Environmental Health
027 2929825 | 03 365 5596 | www.novogroup.co.nz
10 Bishop Street, St Albans | PO Box 38 123 | Christchurch 8842

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Andrew,

██████ has passed your email dated 21 July to me as I deal with requests for road stopping. Following our phone conversation I attach links to the relevant policies.

<http://resources.ccc.govt.nz/files/RoadStoppingPolicy-streetsroads.pdf>

There are two processes to road stop a plot the Local Government Act 1974 and the Public Works Act 1981. The Public Works Act is used when the proposal is relatively simple (only one property adjoining or fronting the road proposed to be stopped) and there is the written consent of all adjoining (neighbouring) land owners. However, I suspect in this case we would use the Local Government Act process as there is another adjoining property albeit owned by the Council. It is also possible that other factors may intervene too.

<http://resources.ccc.govt.nz/files/StructuresOnRoadsPolicy.pdf>

The structures on roads are mainly used in the Hill Suburbs. If this path were chosen the driveway would remain on legal road and therefore could be used by any member of the public. It would however, be constructed and maintained by your client.

As I mentioned the road stopping process is more expensive, time consuming and if there any objections it can go to the Environment Court for resolution.

I am also attaching the application forms:
Structures on Roads

<http://resources.ccc.govt.nz/files/StructureOnStreetApplication-docs.pdf>

The form for road stopping is attached as an electronic copy. The initial application fee in both cases is \$596, as they have been revised since 2009.

I think it is probably something you will need to discuss with your client and they may wish get some legal advice too.

Please get back to me if you need any further information and I am happy to meet with you to discuss this matter further.

Many Thanks

██████████
Transport Policy Engineer
Asset & Network Planning Transportation Group
Christchurch City Council PO Box 73014
53 Hereford Street
Christchurch, 8154
New Zealand
+64 (0)3 941 8605

From: Peter Rough <peter@roughandmilne.co.nz>
Sent: Monday, 21 September 2015 11:24 a.m.
To: Andrew Schulte
Cc: Tim Walsh - Novo Group
Subject: Falvey - amended access plan

Hi Andrew

Access plan amended as per our discussion on Friday.

Regards

Peter Rough | Director



Architect (NZILA)

Registered Landscape

rough & milne landscape architects

Level 2, 69 Cambridge Terrace, PO Box 3764, Christchurch 8140
Tel +64 3 366 3268 **Mob** +64 21 111 3351 **DDI** +64 3 961 4210
peter@roughandmilne.co.nz www.roughandmilne.co.nz

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Architects

Rough & Milne
Landscape
Architects is a
Christchurch based
practice that has
developed a
reputation for



Appendix 3: Council supplementary evidence

In the Matter of the Resource Management Act 1991
And
In the Matter of an appeal under section 120 of the Act

Between **Brent Falvey**

Appellant

And **Christchurch City Council**

Respondent

**SUPPLEMENTARY STATEMENT OF EVIDENCE OF SEAN MICHAEL
WARD ON BEHALF OF THE RESPONDENT**

Dated 28 April 2017

INTRODUCTION

1. My full name is [REDACTED] I have prepared evidence in chief in this matter dated 9 December 2016. My qualifications and experience are as set out in that evidence in chief in paragraphs 1-4.
2. I have read the Code of Conduct for Expert Witnesses contained in the Environment Court Practice Note (dated 1 December 2014) and I agree to comply with it. My qualifications as an expert are set out above. I confirm that the issues addressed in this statement of evidence are within my area of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions expressed.
3. I here provide supplementary evidence in relation to the Council's decision making process for the planting in the roads that is proposed in this application.

OCCUPATION OF COUNCIL LAND

4. In paragraphs 194 to 201 of my evidence in chief I explained my opinion that there could be no "in perpetuity" protection of the proposed planting in public land. As the Court gave some attention to this topic during the first part of this hearing, I have made further enquiries of Council staff as to whether that is still the case.
5. Attached as Appendix A is a copy of legal advice dated from the Council's property lawyer to the Council's Property Unit dated 24 April 2017 on the lawfulness of the Council approving that planting under the Local Government Act, either in perpetuity or at all.
6. It is my understanding that this legal advice would be followed in any staff report to the Council on whether to approve that planting.
7. I have sought comment from Council's Transport Asset Planning team and Council's Regional Parks team regarding the proposed planting, driveway and fencing within the legal road corridor.
8. The Transport Asset Unit notes that Council's Policy on Structures on Roads does not apply to landscaping. It is only applicable to transport related structures. The Transport Assets Unit considers (consistent with the

attached legal advice) that the driveway constitutes formation of the unformed road and would require a decision of Council (elected members) following consultation with any affected persons. If there was also a request to the Council to allow the planting in the road, the attached legal advice - recording that given the nature and the scale of the proposed planting in the road it could not be approved by Council lawfully - would be part of any staff recommendation to Council.

9. The Regional Parks team considers that the proposal sets a negative precedent for incursion into a buffer zone around the forest park, privatises the legal road area subject to development, potentially impedes access for heavy vehicles, and foreshortens options for use of the road in future for vehicular access to this side of the park. They would not support it.

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Sean Ward

28 April 2017

**Christchurch City Council
Legal Services Unit**

MEMORANDUM

Legal Privilege Applies

Not to be distributed without approval of Legal Services Manager

Date: 24 APRIL 2017

From: [REDACTED] (Senior Solicitor, Legal Services)

To: [REDACTED] (Manager Property Consultancy)

ISSUE: PRIVATE USE OF LEGAL ROAD 9021 ROTHESAY ROAD LEX18445

Issue

1. I have seen the graphic supplement to the evidence of Peter Rough in the Environment Court hearing of the appeal against the decline of resource consent for Mr Falvey's proposed dwelling.
2. You sought my advice on the process for Council decision making about authorising the planting shown in that graphic supplement.
3. Given that the "land" in question is legal road (albeit unformed) my view is that the application by Falvey raises three issues as follows:
 1. **Can the Council authorise the formation of part of the legal road as a driveway to the proposed Falvey house?**
4. In general terms the answer to that question is that the Council, as the owner of the legal road, is empowered to authorise the owner of the Falvey house to form a driveway on the legal road.

5. However, as with any decision of the Council, the Council must comply with its decision-making obligations under the LGA 2002 and, in general terms, consider options and the views and preferences of persons likely to be affected or have an interest. It is therefore likely that some form of public engagement or consultation with the neighbours and members of the community would be required before the Council could safely make a decision on the matter.
6. There is also the question of whether a decision to authorise the formation of an hitherto unformed legal road could be made at a staff level, or is required to be made at an elected member level. I note that there don't appear to be any express delegations to staff to decide such matters. In addition, in the Port Levy example in 2010 (where a staff decision to allow formation in similar circumstances was challenged, the staff decision withdrawn and the application referred to elected members after a consultation process was undertaken) the view was adopted that such a decision was not of an operational nature that could be decided by staff and that an elected member decision was required.
7. I also note that the Council adopted its 'Policy on Structures on Roads' in 2010, which is intended to covers only "non-habitable" structures. As this Policy is likely to cover the proposed driveway, any Council decision to authorise the driveway would need to have regard to the requirements of this Policy.
8. I am also aware of the Council's 'Public Streets Enclosure Policy' which was adopted in 2006. However, the scope of this policy appears to be limited to regulating the use of legal road public space for outdoor dining.

2. Can the Council authorise the proposed planting on the legal road?

9. The relevant general principle applying to legal road is, subject to the express provisions in Part 21 of the LGA 1974, that the Council is unable to authorise a use of the legal road that would unreasonably impinge on the common law right of the public to pass along the legal road unhindered.
10. Consistent with this, there is accordingly no express power in the LGA 1974 allowing the Council to lease or licence the surface of legal road.
11. However, Council's across NZ have adopted the view, as does this Council, that it is possible to grant by licence limited rights to occupy areas around the periphery or edge of legal road for a "non-roading" purpose where no unreasonable impediment to the public's right to pass along the legal road is created and where the Council retains the ability to cancel the licence on a relatively short period of notice. This essentially represents Councils adopting a pragmatic approach in a situation where there is a lack of a specific statutory power to guide them.
12. I also note that whilst the Council's 'Policy on Structures on Roads' adopted in 2010 is intended to covers only "non-habitable" structures, and would not strictly apply to the proposed planting, it does contain some useful background commentary which would be of relevance in considering whether the proposed planting could be authorised or not. In particular, I note the following:

1. INTRODUCTION

Roads are first and foremost for vehicular and pedestrian use by the community at large, and only by exception will the Council consider applications for structures on or over roads, as set out in this policy.

Permitting structures on or over roads can contribute to a more flexible approach to building design that adds to the character of the city and its outlying areas. This policy presents a pragmatic approach to address the functional and service requirements generated by the public or individuals.

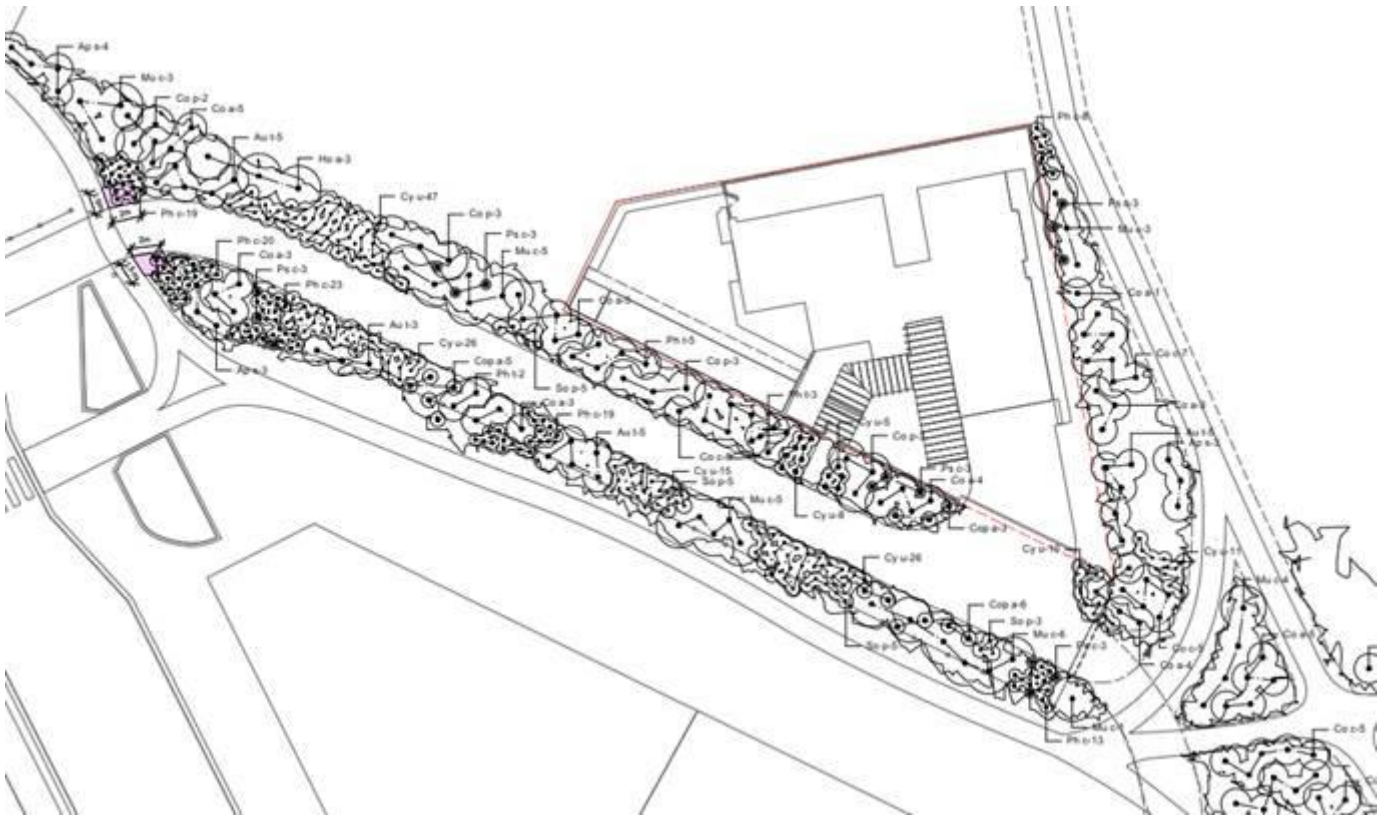
Purpose

The purpose of this policy is to enable Council to reasonably control the use of:

- Public road airspace and to protect the public from nuisance and inconvenience that may arise from these commercial activities (structures encroaching on airspace of roads).
- Public roads for private and commercial activities to occur without creating undue inconvenience to the public (structures encroaching on and under roads).

13. In order to establish whether the Council could enter into a binding to authorise the proposed planting on the legal road in perpetuity it is necessary to consider the detail of the planting proposal.
14. The drawings below prepared by Rough & Milne Landscape Architects show the scale and density of the proposed planting:





- 15. It is apparent from these drawings that the proposed planting appears to be very dense and is intended to act as a barrier or screen. I also understand that the planting is intended to comprise of some 448 plants of varying species, some of which will grow to a height of up to 4m. It also appears from these drawings that it is likely that the proposed plantings will operate in such a manner as to effectively enclose the proposed driveway and to actively discourage public access along it. It is also clear from these drawings that the proposed driveway and plantings will occupy together approximately one half of the width of the legal road corridor and that the remaining half of the legal road corridor would remain available for public use.

16. Therefore, in deciding whether it could authorise Falvey to undertake the proposed planting the Council would need to consider whether such would unreasonably impinge on the common law right of the public to pass along the legal road unhindered. In this regard, the typical approach of local authorities in NZ, in the absence of an express power in the LGA 1974 to authorise certain acceptable "non-roading" uses of legal road, is to authorise uses around the periphery or edge of legal road on the basis that such would not unreasonably impinge on the common law right of the public to pass along the legal road unhindered. What will unreasonably impinge on the common law right of the public to pass along the legal road unhindered, and what will not, will be a question of fact and degree. It is certainly arguable that as the proposed driveway and planting will occupy only approximately 50% of the width of the legal road corridor at the site that the balance of the corridor will continue to be available for public use, and that this balance is sufficient to accommodate the expected public use required in the form of a public footpath. However, applying the principles outlined above and considering the absence of any express power in the LGA 1974, my preferred view is that on balance a use which for all practical intents and purposes is intended to occupy 50% of a legal road corridor essentially to the exclusion of the public is a use that could not be authorised by the Council.
17. There is also the question of whether a decision to authorise the planting could be made at a staff level, or is required to be made at an elected member level. Given my advice above that there would be a need for an elected member decision on the formation question, and the planting and formation issues are intertwined, my view is that any formal decision required (if any) on the planting question should also be taken by elected members, and not staff, at the same time as considering the formation question (and after complying with LGA consideration of options and views and preferences).

3. If the Council can authorise the proposed planting, can the Council enter into a legal agreement with Falvey (and Falvey's successors) to give effect to that in perpetuity?

18. Given my view expressed above that the Council could not lawfully authorise the proposed planting, the answer to this question may be somewhat redundant. However, for completeness, I will answer it.
19. Whilst there is an express power in s341 of the LGA 1974 to grant leases of the subsoil under and the airspace above legal road, there is no express power in the LGA to grant leases of the surface of legal road. Notwithstanding this, as a pragmatic response to the perceived need or desirability for there to be some private use of legal road in certain circumstances, the typical approach of local authorities in NZ is to grant short term licences affecting areas around the periphery or edge of legal road.
20. The reason that local authorities use short term licences as an instrument to grant a form of limited legal tenure is to recognise two factors; first, the absence of an express legal power to grant a lease of the surface of a legal road, and second, the need to retain the ability to bring the arrangement to an end swiftly if the legal road is required for a roading purpose.
21. Accordingly, my view is the Council would not be able to lawfully grant a licence for the planting in perpetuity or even for a fixed term equal to the life of the dwelling on the site (presumably 50 or more years). Even if the Council considered that it was able to grant a licence for a relatively long term, which I do not advise, it would nevertheless need to retain the ability to cancel that at any time on relatively short notice if the legal road was required for roading purposes.

Conclusion

22. In view of the above, my advice is that staff respond as follows:
- (1) It would be possible for Council to consider an application to form the proposed driveway on the road, but that would need to be a decision of elected members, not Council staff, made after considering options and the views and preferences of affected persons, and
 - (2) It would not be possible, on legal advice, for the Council to authorise the proposed planting, and
 - (3) Even if it was possible for the Council to authorise the proposed planting, any contractual arrangements flowing from that decision would need to be by way of licence only, and short term in nature. It would certainly not be possible for the Council to commit contractually in perpetuity.
23. In my view the only way that the applicant's wishes could be accommodated is if that part of the legal road required by them was formally stopped. That would require detailed additional analysis as to whether that was supported or indeed possible; however, whether a road stopping was supported or was possible, or not, cannot be determined at the time of writing this memorandum as the following process steps and decisions would first need to occur:
- (a) Application to the Council to stop the road;
 - (b) Analysis of the application and determination by relevant Transport staff as to whether it could be supported from a staff perspective by reference to the Council's Road Stopping Policy;
 - (c) Identification of the relevant road stopping process recommended by staff to be adopted (i.e. Local Government Act process or the Public Works Act process) in accordance with the Council's Road Stopping Policy;
 - (d) Council staff report to the relevant-decision maker (either staff in very limited circumstances or the Community Board otherwise)
 - (e) Decision by the relevant decision-maker to support the application and to determine the road stopping process to be used;
 - (f) If the Local Government Act process is adopted - proposal to be advertised, submissions to be heard, decision made. If the decision is made to stop the road against the views of objectors, then the application must be referred to the Environment Court for final decision.
 - (g) If the Public Works Act process is adopted - an application is made to the Minister of Lands for approval, which may or may be forthcoming.
24. Accordingly at the time of writing this memo it is not possible to offer any certainty as to the outcome of any road-stopping process.


Senior Solicitor
Legal Services Unit

Extension 8575



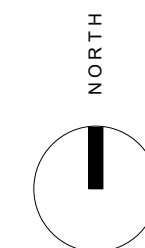
Appendix 4: Access and planting proposals

ISSUE	DATE	STATUS
O	06/07/15	FOR REVIEW
A	21/07/15	FOR REVIEW
B	10/09/15	FOR REVIEW
C	21/09/15	FOR REVIEW
D	17/11/15	FOR REVIEW
E	27/01/16	FOR REVIEW
F	09/02/16	FOR REVIEW
G	23/03/16	FOR REVIEW
H	16/11/16	FOR REVIEW
J	19/12/16	FOR REVIEW



Mix of Cabbage trees and Hoheria angustifolia

Timber bollards installed between path and drive (no cable)



PREFERRED

rough & milne landscape architects
 Level 2, 69 Cambridge Terrace Tel +64 3 366 3268
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**ACCESS PROPOSAL OPTION A
 PROPOSED FALVEY HOUSE
 CNR ASTON DRIVE & WHISKEY ROAD
 WAIMARI BEACH, CHRISTCHURCH**

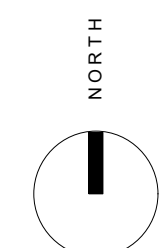
JOB No.	15088
SCALE	1:300 @ A3
DATE	20/06/17
DESIGNED	PETER ROUGH/GERRARD THOMSON
DRAWN	GERRARD THOMSON
CHECKED	PETER ROUGH
STATUS	FOR REVIEW
DRAWING No.	REVISION

L 1.0 J
 SERIES
1 of 1

ISSUE	DATE	STATUS
O	06/07/15	FOR REVIEW
A	21/07/15	FOR REVIEW
B	10/09/15	FOR REVIEW
C	21/09/15	FOR REVIEW
D	17/11/15	FOR REVIEW
E	27/01/16	FOR REVIEW
F	09/02/16	FOR REVIEW
G	23/03/16	FOR REVIEW
H	16/11/16	FOR REVIEW
J	19/12/16	FOR REVIEW



Mix of Cabbage trees and *Hoheria angustifolia*



ALTERNATIVE

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**ACCESS PROPOSAL OPTION B
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 WAIMARI BEACH, CHRISTCHURCH**

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L 1.0	J
SERIES	
1 of 1	



Appendix 5: Applicant's legal opinion

7 July 2017

Mr B Falvey
By email only: bkfalvey@gmail.com
Christchurch

Dear Brent

Opinion on issue of whether your access proposal at Rothesay Road is likely to create a public nuisance

1. You have asked us to consider the opinion provided by the Christchurch City Council Legal Services Unit Senior Solicitor, Mr Rob O'Connor, on the likelihood that the access and landscaping proposal that you provided as part of your resource consent application¹ creates a public nuisance and should, as a result, be rejected by the Council.
2. Based on the discussion below, it is our opinion that:
 - 2.1 The public has a right to pass and repass along a public road, which includes paper roads, but that right is not unlimited;
 - 2.2 Land which adjoins public roads also enjoys common law frontage rights, which means that access to 9021 Rothesay Road (**the site**) cannot be refused but may be subject to conditions, in particular, in relation to formation of the access;
 - 2.3 The Council is empowered under Part 21 of the Local Government Act 1974 (**LGA'74**) to grant approval to occupy land within a **paper road**², provided the public's right of passage is unimpeded;
 - 2.4 Whether any occupation of part of a paper road creates an impediment to the right of passage is a matter of fact and degree. It is not determined by reference to impressions or perceptions but whether passage will be impeded as a matter of fact;
 - 2.5 Public nuisance rights attach to the public at large and any person bringing an action for public nuisance must show how the nuisance has impacted upon their rights;

¹ Copy attached marked 'A'.

² Such as Rothesay Road adjacent to the site.

AJS-802577-2-916-V1
GC02

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- 2.6 It is arguable whether plantings on parts of a paper road qualify as structures, however the Council is empowered to authorise such plantings in the same way as it would a structure subject to the public's right of passage; and
- 2.7 The proposed access arrangement, which leaves approximately half the paper road clear of any planting and provides for vehicular access along the paper road (where no public vehicle access currently exists), will not impede the public's right of passage along the paper road as a matter of fact. As to degree, the access proposed for any vehicle is far greater than what is currently provided.

Background

3. You are seeking resource consent to build a dwelling at the site. In order to obtain such a consent you need to be able to show that you can access the site. In addition, part of the rationale for the acceptability of the dwelling development is the ability to integrate the site with the adjoining residential zoned land.
4. A proposal for access was discussed prior to lodging the application for resource consent. The outcome of those discussions was an understanding that, in principle, access to the site would be possible over the paper road and that a condition of such access would be the provision of landscaping within the paper road.
5. Your application proceeded on the basis of that understanding and further a plan was prepared (plan **A**) that showed the access and landscaping that was proposed³. Further, conditions of consent in respect of the forming of the accessway and the maintenance of the landscaping have featured in the resource consent application (in part as a result of issues raised by Council experts⁴).
6. Your application was declined by the Council – though not on account of the access arrangement – and appealed to the Environment Court. The Council's planning evidence-in-chief confirmed that access would likely be granted but questioned whether an agreement to maintain the plants in perpetuity could be approved.
7. Subsequently, in a supplementary brief of evidence provided prior to the resumption of the hearing before the Environment Court, an opinion from the Council's Legal Services Unit was presented which concluded (*inter alia*) that in view of the discussion in the opinion on whether the Council can authorise "*the proposed planting*" on the paper road:

It would not be possible, on legal advice, for the Council to authorise the proposed planting[.]

8. This is the important finding in the opinion that you seek our opinion on as to whether it is a correct summation of the law, in particular, as it relates to the proposed planting.

³ We note that the opinion did not refer in detail to the second plan which showed – using variations of colour - how the landscaping was expected to look: attached marked **B**.

⁴ For example, when a condition requiring the maintenance of the planting for 10 years was queried as being potentially too short a timeframe, you offered a perpetual guarantee on the plantings - subject to the Council's right to remove them as part of its powers and/or obligations as roading authority.

The opinion of the Council's legal services unit

9. We note at the outset that the Council's opinion, while referencing the Council's powers under the LGA'74 and its policy on *Structures in Roads* and applying those to its view of the proposed planting, offers little in the way of legal authority regarding how the ability to approve occupation in paper roads should be applied, or subsequently, for the conclusion it reaches.
10. The opinion also contains some conclusions that we question but which we understand are accepted, such as the need for the decision relating to the planting to be made by full Council and not being the subject of any delegated powers.
11. However, more fundamentally, the opinion involves comments relating to the facts of the proposal that are considered inaccurate (based on our understanding of the proposal), and which provide the basis for conclusions that we do not consider are justified. For example:
 - 11.1 The opinion comments on the density of the planting and that it would "*effectively enclose the proposed driveway and actively discourage public access along it*". The facts are that the planting design includes plants of various heights and densities, and that while the applicant has adopted the current position, which sees a gate restricting the entry of motorised vehicular traffic to the paper road, by moving that gate to the beach-end of the accessway⁵, there has never been any intention to 'discourage' public access. It is clear that the applicant is, and was, aware that this could not be achieved owing to the status of the paper road and that public access along it could not be restricted. Similarly, the proposed planting has no impact on access by emergency vehicles or park rangers; and
 - 11.2 Further, the opinion describes the proposal as one "*which for all practical intents and purposes is intended to occupy 50% of a legal road corridor essentially to the exclusion of the public*" (my underlining). This description relies on the earlier statement that "*the proposed driveway and plantings will occupy together approximately one-half of the legal road corridor*" with the implication that only the remaining half "*would remain available for public use*". Again, the fact is that if the public wished to use the accessway then they could, so the portion of the paper road available for public use would be approximately 65-70% of the legal road corridor.
12. These interpretations of the facts from the opinion are also considered problematic as they introduce notions such as "*discouraging*", and value judgements such as "*effectively enclose*" and "*essentially to the exclusion*" into a situation where the test is one of *fact and degree* rather than of impressions or perceptions (see discussion below).
13. The perception issue arises in particular in relation to the position taken in the opinion that, while planting at the edges of the paper road is considered acceptable, planting in the middle of the paper road is not. The opinion purports to support this

⁵ A feature that permits only 'approved' vehicular access such as emergency vehicles and park rangers, which the applicant is and was happy to omit if that is the Council's preference.

aversion to such planting by reference to the perception of a blockage. That is despite passage along the paper road on either side of the planting being maintained. No particular authority is offered supporting that position.

14. But even if the proposition that approximately 50% of the legal road corridor is taken up by the driveway and planting, the opinion goes no further than to "*prefer the view*" that this amounts to an "*exclusion... that could not be authorised by the Council*" (my underlining). As discussed below, there is no legal principle that requires a finding that 50% occupation will automatically represent a nuisance, nor is there support for the idea that any mathematical formula will determine the question. It is axiomatic that the greater the *degree* of occupation or encroachment then the greater the likelihood that a nuisance may be created, for example where the exclusion is absolute, which the exclusion of public vehicular traffic along the paper road is now.
15. Finally, while it is recognised that the advice of a Council's legal advisor will carry weight before the Council as decision maker, it seems to be going too far to suggest that a legal officer's view of the facts of a matter (i.e. not a question of law) must be determinative to the extent that the opinion suggests. That would be to fetter the discretion that the Council itself must exercise and, in our view, is not justified on a principled basis.

Legal framework

16. The opinion refers to the Council's powers under the LGA'74 (Part 21), which we infer include the fee simple ownership of roads by Councils⁶, and the exclusion of unauthorised encroachment of a road⁷, and states the relevant general principle that:

"[T]he Council is unable to authorise a use of the legal road that would unreasonably impinge on the common law right of the public to pass along the legal road unhindered."

17. While the statement of principle is couched in the negative, it nevertheless represents the position that the Council has taken in respect of other encroachments onto or occupations of legal road⁸. This is considered consistent with case law which both recognises the public's right to pass and repass along a road, while noting that this right is not itself unfettered as it does not "*necessarily entitle... unrestricted access to every part of a street*"⁹, must recognise the frontage rights of adjoining landowners and other road users, and that "*some degree of obstruction to passage may be acceptable if reasonable in quantum and duration*"¹⁰.
18. Relevantly, Fisher J also observed in *Paprzik* that:

Once land is dedicated as a public road members of the public have, with certain qualifications, a right of passage over it. That general right of passage is supported by correlative duties imposed on others not to substantially and unreasonably impede it.

⁶ Section 316, LGA'74.

⁷ Section 357, LGA'74.

⁸ In particular, in the cases and the numerous opinions sought, from time to time, in respect of the occupation of road reserve by baches at Taylors Mistake.

⁹ *The Queen v The Mayor, Councillors and Citizens of Wellington* [1896] 15 NZLR 72 at 90, Dennison J (CA).

¹⁰ *Paprzik v Tauranga District Council* [1992] 3 NZLR 176.

Effect is given to those duties by the laws of nuisance, trespass and negligence: ... But the ordinary citizen's common law right to use a public highway is not absolute. In addition to any limitations in the terms of the original dedication, it is qualified by the fact that it is a right of passage only, the reasonable requirements of other road users, and any superimposed legislation.

[underlining added]

19. In relation to the placement of structures in a road, the Court of Appeal in *Lower Hutt City Council and Another v Attorney-General ex rel Moulder* [1977] 1 NZLR 184 said:

[T]he fact that streets are vested in and are under the control of the local authority does not entitle a council to erect or authorise the erection of a structure in a street if that structure amounts to what is technically described as a "public nuisance". ... At common law a permanent obstruction erected upon a highway without lawful authority, and which renders the way less commodious than before to the public, is a "public nuisance" provided that the obstruction constitutes an appreciable interference with the traffic in the street[.]

[underlining added]

20. Accordingly, whether the Council could authorise the landscaping proposed in the paper road requires consideration (by the Council) of whether the proposed planting would "*substantially and unreasonably impede*" the public's right of passage to the extent that it "*constitutes an appreciable interference with the traffic in the [road]*" and might therefore be a public nuisance. We note that the applicant is seeking "*lawful authority*" by its access application.
21. We say "*might... be a public nuisance*" as, while the Council is not entitled to act in such a way as to create a nuisance¹¹, the existence of a public nuisance still needs to be proven. In addition, a plaintiff in such a case needs to show damage to them resulting from the nuisance.
22. This also suggests that the nature of the particular road is relevant when considering whether the public's right of passage have been or will be interfered with. This was one of the considerations in *Attorney-General v New Plymouth Borough*¹² where the Court was deciding whether erection of a public convenience/toilet in the middle of a street amounted to a public nuisance. In that case a motor vehicle could pass on either side of the structure, which was relevant to the finding that no nuisance was created. While a vehicle stopping on either side would block passage the Judge said that did not determine the question:
- "...though it would afford a strong argument if this were a main street."
23. In the case of this paper road the proposed access and landscaping, including the plantings in the middle of the paper road, would not, in our view, materially affect the ability of the public to pass and repass along the road as they are currently able to do. In fact, the *existing* nuisance would be removed by the removal of the gate at the Aston Street (western) access to the paper road.

¹¹ For example under s.191 of the Local Government Act 2002 (**LGA'02**).

¹² [1920] NZLR 761.

Terms of any licence

24. It is common ground that any occupation or encroachment of the paper road can only be authorised by a licence of specific duration (but with rights of renewal) in favour of the owner for the time being, with any replacement licence in the future subject to approval by delegated authority.
25. However, it is also acknowledged that such a licence may also be subject to additional conditions as to the nature of the occupation or encroachment. This provides the Council with ability to address issues that it considers problematic. For example, any plantings can be limited to the extent shown on plans provided. Maintenance of plantings, including pruning and limitations as to their extent can also be the subject of conditions.
26. Another important potential condition that may (arguably) be imposed or could be volunteered might be a condition that indemnifies the Council for any damages in nuisance.

Relevance of issues at Taylors Mistake?

27. One significant example of a situation where licences have been used to authorise the occupation of a part of a paper road is the case of the baches at Taylors Mistake. These have been the subject of numerous rounds of argument as to the lawfulness of their continued existence, including the issues surrounding occupation/encroachment of the paper road on which many of the baches are located.
28. The significance of the Taylors Mistake example to the present case is in the position, accepted by the Council in those cases – on legal advice – that the occupation of 50% (or 1 chains width – 10m) of the paper road was acceptable in that it did not impede reasonable access by the public along that paper road.
29. Similarly here, but to a lesser extent since we consider that, as a matter of fact, the overall occupation/encroachment is less than 50%, the proposed accessway and plantings within the paper road will not impede public access along the paper road. Therefore, on this basis, there is no nuisance.

Perceptions or impressions

30. In discussing the possibilities for the plantings in the paper road with Council staff, the issue frequently raised was that the proposed planting gave a *perception* or the *impression* that the public were excluded from the paper road. With respect, we say that this is not the test for whether the planting will create a nuisance.
31. The test, as the opinion states, is one of fact and degree. Will, as a matter of fact, the plantings restrict public access and to what degree does that restriction exist. Even if the perception is that the accessway is a driveway not a road, this does not stop a member of the public using the accessway to reach the dunes. In any event, any perception issues could be alleviated by appropriate signage, such an option being similar to that for gates and cattle stops across roads¹³.

¹³ See: section 344(2), LGA'74.

32. The same comment applies to issue of the height of plantings which, it has been suggested, increase the impression that there is a restriction to public access. The relevance of the height of planting to the existence of a restriction is not, in our view, clearly established. A group of taller plants, that does not unreasonably impede passage, is no greater nuisance than a shorter plant.
33. However, even if it were considered relevant, it seems just as, if not more, likely that the perception created by: the completion of the proposed development; the formation of the access; and the establishment of the landscaping, would be to confirm that access in the form of the paper road in fact exists at this location where previously the open nature of site and the existence of the gate restricting access to the beach provide no clear indication that the paper road was present.

Challenges to the Council decision

34. Discussions with Council officers have indicated a wariness over challenges to any decision to allow the planting proposal to proceed. As noted above, if that challenge was to be by way of a claim in nuisance that would involve the plaintiff proving the nuisance and that they suffered damage or loss because of the nuisance. Based on the facts of the proposal, and the high bar for success, such a challenge appears unlikely.
35. Another possible challenge could be by judicial review. However, a formal application process is being instigated that will include consultation with parties considered effected. Any grounds for judicial review are likely to be as a result of that process, which will be in the Council's hands. Provided that process is fair, provides an opportunity for community comment and properly addresses the issues, the vulnerability to judicial review will be limited.
36. So while legal action can never be totally discounted because it can be taken for ulterior reasons, accepting the original access and landscaping proposal (following due process) would not be subject to a greater likelihood of challenge than any other Council decision. And, in our view, such a challenge could be resisted successfully so should not be a determinant factor in the acceptability of the proposal.

Relevance of duration of maintenance condition in resource consent application

37. While not strictly necessary in answering the question of whether a nuisance is created by the proposed landscape plantings, the Council's opinion does labour under the assumption that the applicant's suggested perpetual maintenance condition would fetter the Council's powers in a manner that was unlawful.
38. The first point is that the condition itself was proposed as a requirement on the consent holder, not the Council, to maintain the plantings, as long as required to do so. Also, the condition can specifically provide that it is subject to the Council's powers and obligations as roading authority.
39. The point being that a change in the use of the paper road by the Council can be accommodated under the proposed access arrangement and any approved plantings can make way for such changes. Here it is relevant that the issue is plants not permanent structures as might otherwise be the subject of a licence to occupy.

Conclusions

40. In all the circumstances, we do not agree with the Council advice that the proposed planting is likely to create a public nuisance and must therefore be declined.
41. The nature of the proposal, the Council's discretion in such matters, and the ability to tailor any licence to the circumstances, along with a consideration of previous case law and examples, suggests that sufficient provision is and would be made to maintain the public's right to pass and repass along the paper road. In fact, an ability to do so would be created for vehicles that currently does not exist.
42. However, in order to alleviate the concerns of the Council's lawyers the proposal has been amended by removing substantial parts of the originally proposed planting. Having reviewed the revised options, our view that there is no issue with the creation of a public nuisance, is reinforced.

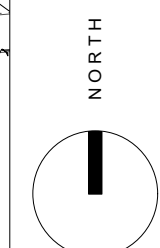
Yours faithfully

**Andrew Schulte**

PARTNER | RESOURCE MANAGEMENT | CHRISTCHURCH

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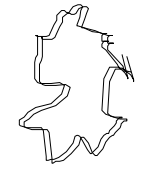
**PLANTING PLAN - CCC LAND
 PROPOSED FALVEY HOUSE
 CNR ASTON DRIVE & WHISKEY ROAD
 WAIMARI BEACH, CHRISTCHURCH**

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PLANT SCHEDULE

Code	Botanical Name	Common Name	Grade	Quantity
Ap s	Apodasmia similis	oioi	PB3	24
Au t	Austroderia toe toe	NZ toe toe	PB3	18
Co a	Cordyline australis	Cabbage tree	PB3	44
Co ac	Coprosma acerosa	NZ Coprosma	PB3	17
Co c	Corokia cotoneaster	Corokia	PB3	35
Co p	Coprosma propinqua	Mikimiki	PB3	11
Cy u	Cyperus ustulatus	Umbrella sedge	PB3	159
Ho a	Hoheria angustifolia	Narrow leaved lacebark	PB3	6
Mu c	Muehlenbeckia complexa	Small leaved pohuehue	PB3	15
Ph c 'EG'	Phormium cookianum 'Emerald Green'	Dwarf flax	PB5	39
Ph t	Phormium tenax	Harakeke NZ flax	PB5	27
Ps c	Pseudopanax crassifolius	Lancewood	PB3	15
So p	Sophora prostrata	prostrate kowhai	PB3	18

KEY

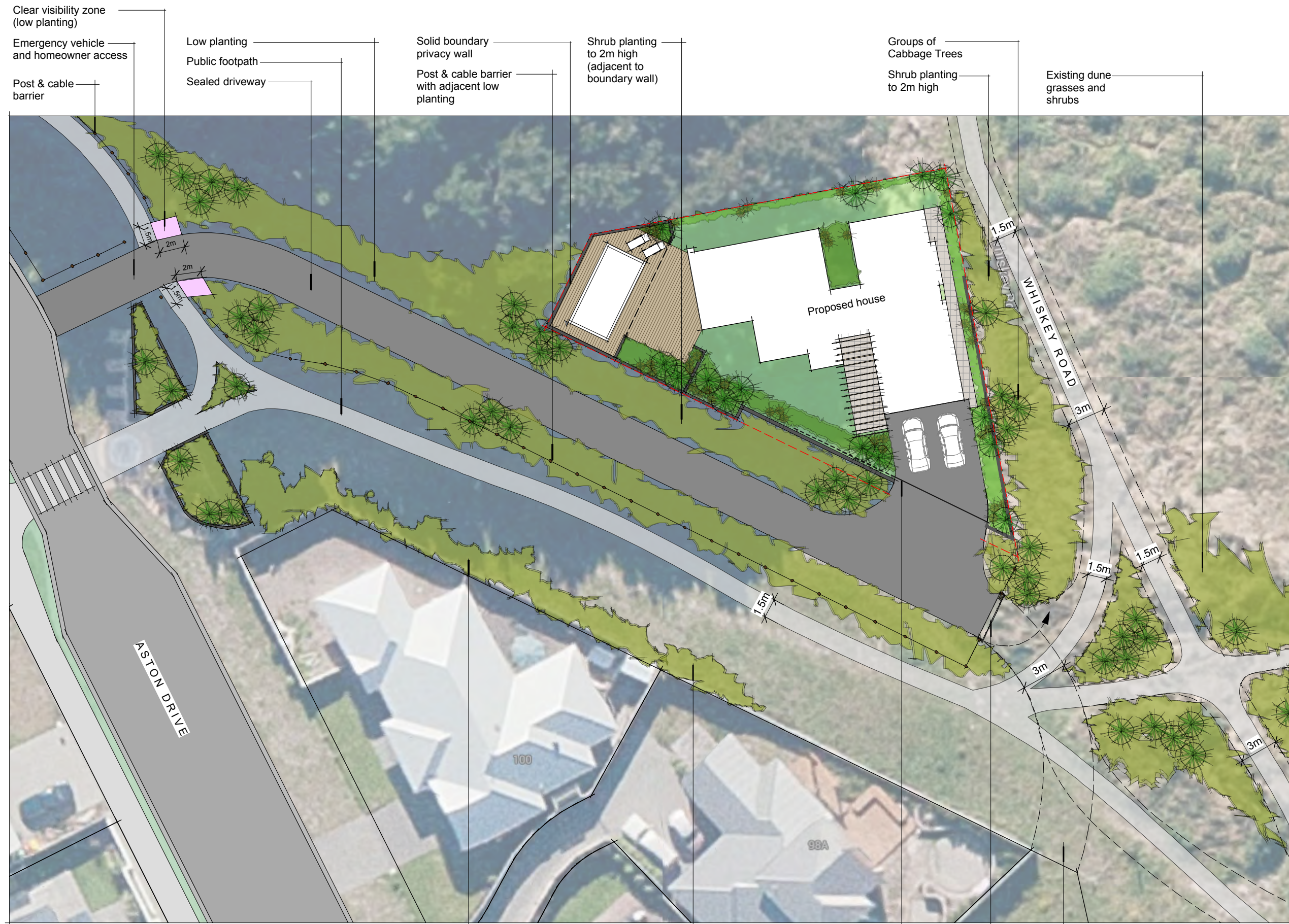


Depicts areas where low native groundcover plants may already exist or can be added two using the following species:
Austrofestuca littoralis sand fescue
Carex pumila sand sedge
Ficinia nodosa knobby clubrush
Muehlenbeckia axillaris mat pohuehue
Spinifex sericeus spinifex



Clear visibility zone (selection of plants will not exceed 1m in height when mature)

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Clear visibility zone (low planting)
 Emergency vehicle and homeowner access
 Post & cable barrier

Low planting
 Public footpath
 Sealed driveway

Solid boundary privacy wall
 Post & cable barrier with adjacent low planting

Shrub planting to 2m high (adjacent to boundary wall)

Groups of Cabbage Trees
 Shrub planting to 2m high

Existing dune grasses and shrubs

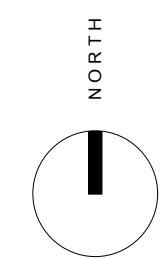
Existing planting

Additional low planting along fence line in front of 98a Aston Drive

Automatic sliding driveway gate

Emergency vehicle gate

Possible future accessway to 'land-locked' section



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