BEFORE THE NEW PLYMOUTH DISTRICT COUNCIL
INDEPENDENT HEARINGS COMMISSIONER

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an application section 88 of the Act by K Kearns for consent to subdivide 249C Tukapa Street, New Plymouth

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RIGHT OF REPLY FOR THE APPLICANT K.E. KEARNS

CONNECT LEGAL TARANAKI
LAWYERS
Private Bag 2031
DX NX10021
NEW PLYMOUTH
Telephone No. 06 769 8080
Fax No. 06 757 9852
Lawyer acting: SWA Grieve
Email: scottg@connectlegal.co.nz

SWG-189927-3-332-V1:SWG

MAY IT PLEASE THE INDEPENDENT HEARINGS COMMISSIONER

Reply to Issues/Queries Raised at Hearing

Fencing

1. ***Query***: if the Applicant removed the hedge (such hedge being perfectly adequate for privacy as accepted by Mr Woods at the Hearing, and also being beyond the scope of his original submission (as noted by counsel at the Hearing)) – and wanted to build a new fence – what are the Woods' obligations to contribute?

2. ***Response***: Under section 9 of the Fencing Act 1978 ("Fencing Act"), neighbours ordinarily share the cost of fencing equally where - "*adjoining lands [are] not divided by an adequate fence*".

3. An adequate fence is - "*a fence that, as to its nature, condition, and state of repair, is reasonably satisfactory for the purpose that it serves or is intended to serve*" (section 2, Fencing Act).

4. Such a fence can include a - "*live fence*" - like a hedge (section 2, Fencing Act; see also Thompson *v* Higgins[1] - where the High Court considered whether a dying hedge amounted to an adequate fence – copy **attached**).

5. As the Applicant and Mr Woods both acknowledged at the Hearing – the well-established existing hedge between the two properties is considered by both parties to be an adequate fence.

[1] M 1856 HC Nelson, 9 November 1981

6. The above requirement of equal sharing (under section 9, Fencing Act), however, changes where an existing adequate fence is damaged or destroyed by one neighbour - "*in circumstances in which, apart from this Act, an occupier would be liable*"; and, in this situation - that neighbour is responsible for the whole cost of the new fence (section 17, Fencing Act).

7. Therefore, if the Applicant destroyed/removed the hedge (being an existing adequate fence) - to build a new fence without the consent of Mr & Mrs Woods (or any successors in title) - then the Applicant would be responsible for the whole cost of the new fence under section 17, Fencing Act.

Further Consents Required for Right of Way (ROW) Upgrades?

8. ***Query***: if consent was granted - and conditions imposed to require the upgrade of the ROW – are any further consents required for the actual upgrade itself other than under the RMA - and if so, can those frustrate the undertaking/fulfilment of the consent condition imposed under the RMA?

9. ***Response***: as Mr Balchin confirmed at the Hearing – Mr Matt Sanger, Council's expert engineer in this context, advised him that in his experience and knowledge no such further consent is required - and its simply a matter of making sure the upgrades comply with the Council's engineering approval processes to meet relevant applicable Council requirements and standards.

10. This also accurately reflects Counsels, and Ms. McLay's (and her firm's Lead Surveyor's), understanding of the position;

there are no other consents required for the upgrade works for the ROW.

11. However, as the Commissioner will be aware - a section 223 - 224 Resource Management Act 1991 certification/approval is required from the Council - to ensure that work is done to relevant applicable Council requirements and standards - and that it has been satisfactorily completed – and that consent conditions in this context have been complied with by the Applicant/subdivider - prior to effecting subdivisions and the issue of new titles.

12. Further, as the subdivision cannot be completed - and new titles issued - unless that section 223 - 224 certification has been obtained from the Council - the Council has a strong lever for quality control in his context.

Right of Reply in Respect of matters raised by Submitters

Sight visibility issues leaving Right of Way (ROW)

13. Mr Woods contended at the Hearing that parked cars cause issues with entry/exit from the ROW onto Tukapa Street - particularly when cars are coming from the CBD - and alleged the subdivision will cause further conflict and exacerbate the situation – and thinks that the entrance needs widening to mitigate this issue.

14. Prior to this, during the Hearing, Mr Skerrett was asked about by this issue by the Commissioner (before Mr Woods' presented his submission). Mr Skerrett responded essentially that parked cars do obstruct visibility to some degree

(especially to the north in this case) – but that its a normal situation with ROW's/driveways/intersections (and presumably some car parks) around New Zealand - but people do have visibility beyond - and can see through parked car windows etc.

15. For the purposes of this right of reply (and in further response to Mr Woods) - Mr Skerrett further comments as follows:

> "Immediately adjacent to the RoW is the drive to 249 Tukapa St, vehicles parked on the shoulder would have to be parked to the north of this driveway some 5.5m. Further to the north there are no stopping lines leaving a space of approximately 11m in which a maximum of two vehicles can park, as shown in the attached aerial photograph.
>
> I therefore believe the visibility to and from the RoW to the north is unlikely to be affected significantly by vehicles parking on the shoulder. To change this situation would require Council to extend the "No stopping" lines to the south, which has a particular process to following requiring consultation and a Council resolution to amend By Law and success cannot be guaranteed, making it not suitable as a consent condition.
>
> In terms of conflicts between vehicles entering and exiting the RoW, the proposed widening of the RoW brings it up to the standard and the situation is no different to any other RoW or private drive accessing a Collector Rd.
>
> In fact with the adjacent driveway pushing parked vehicles further to north it is better than many. In my opinion there is sufficient space for a vehicle wishing to enter the RoW to pull onto the shoulder in front of 249 Tukapa St and wait for a vehicle exiting the RoW to clear the access before entering the RoW."

The above-mentioned aerial photograph provided by Mr Skerrett is **attached** to this right of reply.

16. Further – Ms Kearns and her partner Mr Alsweiler, who attended the Hearing, comment from their perspective (of living there and

entering/exiting the ROW onto Tukapa Street on a daily basis) as follows:

"From our personal non-expert viewpoint as a ROW user in terms of an obstructed view:

The significance of the issue raised by the Woods really does seem to be completely disproportionate to the actual risk.

I consider us to be very lucky due to the large no parking zone that is in place that extends from several metres north of the driveway entrance, all the way to the next intersection.

As well as being able to look "through" the maximum of two parked vehicles, the no-parking zone serves to give a very good view of any traffic heading up Tukapa Street towards the ROW entrance.

It is straight forward to see the approaching traffic by looking behind any parked ones.

As long as the standard expected safe driving practices that any driver should observe are used (such as stopping and looking before you pull out onto the road), it is a very safe place to enter the road.

I've attached some photos [below] to try to illustrate the driving and drivers' perspective.

In terms of cars trying to exit and enter:
In the entire time we have lived there (from early 2021) we can recall this happening to us twice, and on each of the two occasions, basic road courtesy easily resolved the situation by one of the vehicles giving way."

Figure 1: The black car is exiting 249 Tukapa ROW. The red marked area indicates the only area cars are able to park. A maximum of two vehicles can park due to yellow marked no parking zones.

Figure 2: Drivers view exiting and looking toward CBD from 249 Tukapa driveway. The red area indicates the only parking spaces. The yellow area indicates a no parking zone. The green area indicates completely unobstructed vision

Lawn Mowing of ROW

17. Another issue Mr Woods' raised was that Ms Kearns and Mr Alsweiler do not mow the lawn down the ROW outside their property to his satisfaction.

18. In response Ms Kearns advises as follows:

> "Mr Woods raised a failure of 249c mowing the ROW lawns/grass as a verbal issue in his submission.
>
> Since I have owned the property, I have been of the understanding that there was a longstanding agreement that the owners of 249c pay the electricity costs associated with the streetlight that is situated on the ROW that provides the lighting (which I do), and that the other two property owners mow the grass strips.
>
> It had not until the hearing ever been raised by the Woods."

Insufficient Information

19. In respect of Mr Woods' contentions that he had insufficient details and information from the Applicant – that is not accepted; the Application (and evidence for the Applicant) clearly detail the lengths the Applicant went to in order to genuinely consult with Mr & Mrs Woods, all relevant information was provided to them - including legal advice from the Applicant's lawyers (back as far as June 2020 and July 2020) in response to their various queries throughout that consultation process (at my client's expense); and other information they may have sought (for example right of way upgrade standards) is publicly available from, for example, the Council.

20. Ms Kearns further comments in response:

"Commitment was always there and clear that we would upgrade the right-of-way to the council specifications/recommendations. Exactly what the finished outcome would be (for example chip seal), really is not within my area of expertise, rather an outcome of the council's consent process.

It was clear from the outset however that improvements may be needed, and information is available on this and easy to access by anyone."

Future ROW Maintenance

21. In respect of ROW maintenance in the future – Counsel notes that Mr & Mrs Woods were, inter alia, advised by letter from his law firm (the Applicant's lawyers) dated 29 July 2020 as follows:

"Thank you for your correspondence dated 12 July 2020 (received 20 July 2020).

I have spoken to Scott and Kelsey regarding the concerns addressed in your most recent correspondence and can reply as follows:

1. If 249C Tukapa Street is subdivided to form two lots then the existing right of way provisions will carry down and apply to both new titles. Accordingly, the new additional lot will have the benefit of the existing right of way. The existing right of way arrangements do not refer to any specific maintenance provisions or how maintenance costs are to be split between users so the maintenance obligations default to the provisions of the Land Transfer Regulations 2002. The default provisions essentially state that any title which has the benefit and use of an easement facility shall contribute to the costs of any repair or maintenance in equal shares. If the proposed subdivision is completed, then any future maintenance costs would be shared equally between the four lots which have the benefit of the right of way but this would not require any amendment to your title."

22. It was also noted by Mr Woods at the Hearing that, to his knowledge, no maintenance of the ROW has been required to date since it was formed and established in about 1955.

23. Mr Skerrett also noted that new chip seal, for example, generally has good longevity of at least 17 years from installation before maintenance is anticipated to potentially be required.

24. As requested by the Commissioner – also **attached** to this right of reply are the relevant provisions of the Property Law Act 2007 and the Land Transfer Regulations 2018 (made under the powers in section 111 of the Land Transfer Act 2007) in this context.

Concluding comments

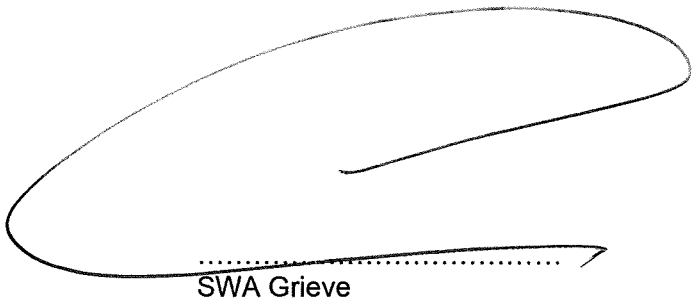
25. It is submitted that all other issues raised in the Hearing have already been thoroughly canvassed in the Application, the Applicant's evidence (and evidence of others such as Mr Balchin) and discussions during the course of the Hearing.

26. Finally, an agreed version of the consent conditions following joint witness conferencing by the planning experts (Ms McLay and Mr Balchin) are included and filed with this right of reply as directed (**attached** - and also forwarded as a word document).

27. Ms McLay advises that they did not track changes – as the changes are clearly obvious (when compared with the version of the conditions in the section 42A Report dated 6 July 2022 prepared by Mr Balchin).

28. First, the change to Condition 1 as set out in evidence provided to, and discussed with, the Commissioner at the Hearing.

29. And, secondly, an extra bullet point, as recommended by Mr. Skerrett to the planning experts in his expertise (which was considered appropriate to obtain from Mr Skerrett by the planning experts in the circumstances), has been added into Condition 15 - to the effect that any new surface to the sealed portion of the ROW is homogenous, free from exposed joints, and meets industry standards.



SWA Grieve
Counsel for Applicant
12 August 2022