

QLDC Council
28 July 2016

Report for Agenda Item: 9

Department: Planning & Development

Vesting of Roads and Reserves Policy

Purpose

The purpose of this report is to seek formal adoption of the 'Vesting of Roads and Reserves Policy 28 July 2016' for dealing with requests for the vesting of roads and reserve land with Council where interests remain registered on the Computer Freehold Register.

Recommendation

That Council:

1. **Note** the contents of this report; and
2. **Adopt** the Vesting of Roads and Reserves Policy dated 28 July 2016 [appended as **Attachment A**].

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13/07/2016

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Background

- 1 Interests registered on a Computer Freehold Register include matters such as:
 - a. Easements
 - b. Encumbrances
 - c. Covenants
- 2 An example of a Computer Freehold Register with interests registered on it is shown in Figure 1 below:

Identifier	645665
Land Registration District	Otago
Date Issued	10 June 2014
Prior References	
625245	625247
Estate	Fee Simple
Area	5462 square metres more or less
Legal Description	Lot 1 Deposited Plan 472825
Proprietors	
Aviemore Corporation Limited	
Interests	
Subject to Section 8 Coal Mines Amendment Act 1950 (affects part formerly Section 50 SO 459748)	
Subject to Part IVA Conservation Act 1987 (affects part formerly Section 50 SO 459748)	
Subject to Section 59 Land Act 1948 (affects part formerly Section 50 SO 459748)	
Subject to Section 11 Crown Minerals Act 1991 (affects part formerly Section 50 SO 459748)	
Land Covenant in Deed 5285272.3 - 17.7.2002 at 9:00 am (affects part formerly Section 118 SO 459748 and Lot 18 DP 304345)	
Land Covenant in Easement Instrument 6642552.1 - 10.11.2005 at 9:00 am (affects part formerly Section 118 SO 459748 and Lot 18 DP 304345)	
Land Covenant in Easement Instrument 6863718.3 - 12.5.2006 at 11:15 am (affects part formerly Section 118 SO 459748 and Lot 18 DP 304345)	
Land Covenant in Easement Instrument 7067811.18 - 12.10.2006 at 9:00 am (affects part formerly Section 118 SO 459748 and Lot 18 DP 304345)	
7098676.2 Consent Notice pursuant to Section 221 Resource Management Act 1991 - 3.11.2006 at 9:00 am (affects part formerly Section 118 SO 459748 and Lot 18 DP 304345)	
Land Covenant in Easement Instrument 7098676.32 - 3.11.2006 at 9:00 am (affects part formerly Section 118 SO Plan 459748)	

Figure 1: Example of interests registered on a Computer Freehold Register

- 3 Under section 239 of the Resource Management Act, roads and reserves should vest in Council completely free of any interests. Applicants who seek to subdivide and vest roads and reserves with Council occasionally have difficulty removing all relevant interests from the Computer Freehold Register (the certificate of title).
- 4 Council does have discretion under section 239(2) to issue a certificate that certain interests may remain with the land. The Council in its sole discretion may accept land to vest subject to existing interests only in special circumstances.
- 5 Special circumstances are likely to involve situations where there are a large number of different registered proprietors with an interest in the land whose consent must be obtained, or where such registered proprietors are uncooperative.
- 6 In these circumstances, the applicant must be able to demonstrate to the satisfaction of the Council that it is not feasible for it to obtain the requisite approvals.
- 7 The policy appended as **Attachment A** sets out the following factors that will be taken into account:

- a. Whether the land is suitable to vest in the Council;
 - b. Whether vesting this land in the Council is for the “public good”;
 - c. In relation to land to vest as road, whether the road meets all Council and statutory standards applying to roads;
 - d. In relation to land to vest as road or reserve, whether or not the existing interests in the land will prejudice the use of the land as a reserve;
 - e. In relation to land to vest as reserve, whether or not the existing interests in the land will compromise the Council’s ability to fully comply with the provisions of the Reserves Act 1977 or other applicable statutes or regulations;
 - f. An explanation from the applicant of what interests have been removed;
 - g. The reasons why the land cannot be vested in the Council free from all existing interests;
 - h. The nature of the outstanding interests that remain on the land;
 - i. An explanation from the applicant of what they have done to try and remove these interests, why certain interests could not be removed and whether the applicant has taken all practicable steps to remove the interests;
 - j. An explanation from the applicant why the remaining interests in the land will not prejudice the Council;
 - k. A legal opinion from the Council’s external counsel regarding the risk to the Council in accepting the land subject to existing interests; and
 - l. Any other factors that the Council, in its complete discretion, deem relevant.
- 8 The proposed policy in **Attachment A** goes on to identify high, medium and low risk instruments. High risk interests will not be accepted, whereas medium and low risk interests may be accepted if special circumstances exist.

Comment

- 9 The proposed policy will provide certainty and clarity for both Council and applicants as to what type of interests may be acceptable to remain on land that is being vested in Council as road or reserve.
- 10 It also confirms the existing arrangements with regards to Councils’ costs associated with the legal check of any interests that are to remain. The approach is a user pays regime whereby the applicant covers the Council’s legal costs associated with checking the interests that are to remain on land being transferred to Council.
- 11 The policy will fill a gap in that this matter comes up infrequently but can have significant implications for Council and applicants if roads or reserves are not able to be vested.
- 12 The driver for the policy was a situation arising from the development of ‘The Tiers’ residential development above Frankton Road. In that case, the

subdivision consent (RM050520) that was approved showed a private access road that was *not* going to vest in Council. The private access road did not meet Council's engineering standards and was affected my multiple interests.

- 13 It appears from the Commissioners' decision in RM050520 that one of the principal reasons the road was not proposed to be vested in Council at the time of the original consent application was because the Applicant had been unable to negotiate removal of the dominant interests that would remain on the title to the road.
- 14 A section 127 application was subsequently received to vary the consent, with one change sought to replace the words 'private road' with 'road to dedicate'. i.e. the developer sought that the Council take the road, despite it not meeting Council standards, with the interests remaining on the title. This was also despite the Council declining to accept the vesting of the road as proposed by this application in its role as roading controlling authority.
- 15 The application was notified and Council was forced to submit in opposition, stating that it did not wish to accept the road due to it not meeting council standards, and due to the interests remaining on the land which had not been examined.
- 16 Commissioners sought legal advice regarding the interests remaining on the land, and concluded that dedication of the road would result in a number of adverse consequences or legal burdens being placed on Council if the existing easements were to remain in place
- 17 The Commissioners therefore granted the variation subject to the removal of the easements. The applicant was not able to obtain the agreement of the parties and the road did not dedicate.
- 18 The proposed policy would help avoid situations like that described above, and will provide certainty and clarity for both Council and applicants as to what type of interests may be acceptable to remain on land that is being vested in Council as road or reserve. It will not avoid the possibility of future hearings if an applicant is determined to try and get a land dedicated with Council, however it will protect Council to a degree as the policy will be able to be considered as an 'other matter' when making decision under the Resource Management Act.

Options

- 19 This report identifies and assesses the following reasonably practicable options for assessing the matter as required by section 77 of the Local Government Act 2002.
- 20 Option 1 – Adopt the 'Vesting of Roads and Reserves Policy'.

Advantages:

- 21 Clearly states land should be free of all interests when vesting with Council.

22 Provides certainty and clarity for applicants as to what type of interests *might* be acceptable to remain on land that is being vested in Council.

23 Confirms current practice and cost arrangements.

Disadvantages:

24 No known disadvantages.

25 Option 2 – Not Adopt the ‘Vesting of Roads and Reserves Policy’.

Advantages:

26 No known advantages.

Disadvantages:

27 Lack of clarity means Council may end up with land that has interests registered on it that are not matters the Council wants to be involved in or subject to, for example a non-objection covenant or membership of a Residents’ Association.

28 Ongoing debate with parties wanting Council to take land with interests that are not acceptable to Council.

29 This report recommends Option 1 for addressing the matter because it formalises an existing ‘informal’ approach and will provide greater clarity for Council and applicants.

Significance and Engagement

30 This matter is of medium significance, as determined by reference to the Council’s Significance and Engagement Policy because it relates to a relatively small number of applications each year. However when the policy does come in to play, it can be extremely important to an applicant trying to complete their development.

Risk

31 This matter relates to the strategic risk SR1 - ‘Current and future development needs of the community (including environmental protection)’, as documented in the Council’s risk register. The risk is classed as low. This matter relates to this risk because creating new roads and reserves are part of wider development projects that affect the current and future development needs of the community.

32 The recommended option considered above mitigates the risk by treating the risk – putting measures in place that directly impact the risk.

Financial Implications

33 The proposed policy establishes a user pays regime for the checking of interests that are proposed to remain when the land is transferred to Council ownership.

- 34 An applicant who is requesting that the Council accept land subject to existing interests must provide certain information and pay an advance payment of an amount specified by the Council, from which the Council's costs relating to the request to vest land in Council subject to existing interests, will be deducted.
- 35 Costs include the cost of obtaining the advice contemplated in clause 3.3(k) of the policy, all Council staff time, research costs, legal costs and all professional fees or any other expenses incurred by the Council associated with the request for the Council to accept land subject to existing interests. If the costs are less than the pre-paid amount, then the remaining sum shall be returned to the applicant. A Solicitor's undertaking to pay the Council's reasonable costs is necessary.

Council Policies, Strategies and Bylaws

36 The following Council policies, strategies and bylaws were considered:

- Operative District Plan
- Proposed District Plan

37 The recommended option is not inconsistent with the principles set out in the named policy/policies.

38 This matter is not included in the 10-Year Plan/Annual Plan

Local Government Act 2002 Purpose Provisions

39 The recommended option:

- Will help meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses by clarifying the Council's policy around the vesting of roads and reserves with interests registered on them;
- Can be implemented through current funding under the 10-Year Plan and Annual Plan;
- Is consistent with the Council's plans and policies; and
- Would not alter significantly the intended level of service provision for any significant activity undertaken by or on behalf of the Council, or transfer the ownership or control of a strategic asset to or from the Council.

Consultation: Community Views and Preferences

40 The persons who are affected by or interested in this matter are developers proposing to vest roads or reserves with interests still registered on the Computer Freehold Register.

41 The Council has not specifically consulted on this proposal, as it reflects and documents current practice. Formal adoption will give it greater weight, particularly with regard to ensuring Council costs are met by the applicant and not the ratepayer.

Legal Considerations and Statutory Responsibilities

42 The proposed policy has been legally reviewed.

Attachments

A Proposed 'Vesting of Roads and Reserves Policy - 28 July 2016'

Vesting of Roads and Reserves Policy

28 July 2016

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1. Policy Statement and Purpose

- 1.1. This policy applies to all transfers of land into the Council's ownership as road or reserve.
- 1.2. The purpose of this policy is to minimise prejudice to the Council from the transfer of land to the Council by establishing guidelines for assessing requests to transfer land to the Council, in particular requests for land to be transferred subject to existing interests.

2. Issue

- 2.1. The Council receives requests from resource consent applicants that:
 - a. land to be vested as road is transferred to the Council by way of dedication rather than vesting; and/or
 - b. the Council sign a section 239(2) certificate in relation to vesting of land as reserve in the Council.
- 2.2. If such requests are accepted by the Council, the land transferred to the Council (either as road or reserve) remains subject to existing interests registered on the land. This is an effective solution from an applicant's perspective because:
 - a. it does not require the applicant to obtain consents from all registered proprietors with an interest in the land; and
 - b. it allows the land to be transferred to the Council subject to the interests registered against it without the applicant having to address issues associated with such interests continuing to apply to the road or reserve.
- 2.3. However, from the Council's perspective accepting land (either for road or reserve) subject to existing interests may be prejudicial depending on the nature of those interests, their legal repercussions, and the extent to which the Council is bound by them.

3. Land Subject to interests

- 3.1. All land transferred to the Council (whether as road or reserve) should vest in the Council free from all existing interests. Any such interests are to be removed by the applicant (and all relevant consent obtained), at their cost, and prior to the vesting of the land.
- 3.2. The Council in its sole discretion may accept land to vest subject to existing interests only in special circumstances. Special circumstances are likely to involve situations where there are a large number of different registered proprietors with an interest in the land whose consent must be obtained, or where such registered proprietors are uncooperative. In these circumstances, the applicant must be able to demonstrate to the satisfaction of the Council that it is not feasible for it to obtain the requisite consents.
- 3.3. In determining whether to accept land (whether as road or reserve) subject to existing interests the Council will take into account the following factors:
- a. Whether the land is suitable to vest in the Council;
 - b. Whether vesting this land in the Council is for the “public good”;
 - c. In relation to land to vest as road, whether the road meets all Council and statutory standards applying to roads;
 - d. In relation to land to vest as road or reserve, whether or not the existing interests in the land will prejudice the use of the land as a reserve;
 - e. In relation to land to vest as reserve, whether or not the existing interests in the land will compromise the Council’s ability to fully comply with the provisions of the Reserves Act 1977 or other applicable statutes or regulations;
 - f. An explanation from the applicant of what interests have been removed;
 - g. The reasons why the land cannot be vested in the Council free from all existing interests;
 - h. The nature of the outstanding interests that remain on the land;
 - i. An explanation from the applicant of what they have done to try and remove these interests, why certain interests could not be removed and whether the applicant has taken all practicable steps to remove the interests;
 - j. An explanation from the applicant why the remaining interests in the land will not prejudice the Council;
 - k. A legal opinion from the Council’s external counsel regarding the risk to the Council in accepting the land subject to existing interests; and
 - l. Any other factors that the Council, in its complete discretion, deem relevant.

High Risk Interests

- 3.4. The Council will not accept land subject to any of the following interests:
- a. No Complaints Covenants
 - b. Appointment of Grantee as Power of Attorney for the Council
 - c. Encumbrance Requiring Membership in Residents Society

Medium Risk Interests

- 3.5. Provided that the Council has confirmed that special circumstances exist, and after taking into account the factors in paragraph 3.3, the Council may accept land subject to the following interests in its sole discretion:
- a. Private water easements:

- (i) **Roads:** In relation to land to be dedicated as road the Council requires confirmation that the location of services is acceptable in the road reserve (i.e. not necessarily in the middle of the road) and whether there is a body corporate/society set up for a single point of contact, i.e. not dozens of separate lot owners.
 - (ii) **Reserves:** In relation to land to be vested as reserve any easements that are not consistent with the use of the land under its reserve classification and/or may interfere with the use of the land by the public or otherwise will not be accepted. Refer to Section 48 of the Reserves Act 1977 for guidance.
- b. Utility Service Easements in Favour of Utility Operators:
- (i) **Roads:** It should not be difficult for the applicant to obtain the consent to surrender such easements as they should be dealing only with one party. Furthermore the utility operators should be amenable to surrendering such easements as they will be able to rely on their statutory right to construct works on legal roads in any event.
 - (ii) **Reserves:** The position is as per 3.5(a)(ii) above.
- c. Right of way easements:
- (i) **Roads:** If these are on standard implied terms then they are unlikely to adversely affect the use of the road and accordingly are of low risk to the Council. However, if the easement contains non-standard terms that interfere with normal road usage (e.g. a right to park) then the risk to the Council will be higher.
 - (ii) **Reserves:** The position is as per 3.5(a)(ii) above.
- d. Building Control Covenants:
- (i) **Roads:** If these are unlikely to adversely affect the construction of the road then they may be of low risk to the Council.
 - (ii) **Reserves:** The Council should not accept this interest if the covenant places any restriction on the use of re-locatable buildings, fencing requirements or restrictions, limits on uses, signage prohibitions and any similar matters.

Low Risk Interests

3.6. The Council will likely accept land subject to the following interests subject to confirmation that the risks are acceptable. Refusal to accept land subject to these interests is in the Council's sole discretion:

- a. Appurtenant Easements:
 - (i) These are of minimal risk to the Council as they will simply benefit the land.
- b. Interests which expressly do not apply:
 - (i) Any interest that expressly provides that it does not apply to land vested in the Council as road and/or reserve is of minimal risk to the Council provided that the instrument has been correctly drafted and there is no risk that the interest will apply to the land and/or bind the Council.
- c. Interests that the Council is a party to:

-
- (i) If the Council is a party to an instrument then it should be removed with the applicant meeting any costs incurred by the Council in removing the interest.

Other Encumbrances or Interests

- 3.7. These should be assessed by the Council on an instrument by instrument basis taking into account all relevant factors including (but without limitation):
- a. In relation to roads, the impact of the instrument on normal road usage;
 - b. In relation to reserves, the impact of the instrument on the use of land as a reserve;
 - c. In relation to reserves, the impact of the instrument on the Council's obligation as administering body under the Reserves Act 1977;
 - d. Any restriction on the Council's ability to make decisions;
 - e. Any liability incurred by the Council as owner of the land;
 - f. Any obligations (positive or negative) that the Council is required to comply with.

4. Costs

- 4.1. This policy establishes a user pays regime for the transfer of land to Council ownership.
- 4.2. An applicant who is requesting that the Council accept land subject to existing interests must:
- a. provide information referred to in 3.3(f), (g), (h), (i) and (j) above to the Council;
 - b. pay an advance payment of an amount specified by the Council from which the Council's costs ("Costs") relating to the request to vest land in Council subject to existing interests, will be deducted. Costs include the cost of obtaining the advice contemplated in clause 3.3(k) above, all Council staff time, research costs, legal costs and all professional fees or any other expenses incurred by the Council associated with the request for the Council to accept land subject to existing interests. If the Costs are less than the pre-paid amount then the remaining sum shall be returned to the applicant; and
 - c. provide a solicitor's undertaking to pay the Council's reasonable costs (to the extent they are not already covered by the advance payment) which the applicant agrees to pay to the Council immediately on request from the Council
- 4.3. The advance payment is to be paid at the time of the request for the Council to accept land subject to existing interests and prior to the Council commencing any work or incurring any costs relating to the request.

5. Timing

- 5.1. In order to ensure the most efficient resource consent process, where an applicant is seeking to vest land in Council, it is recommended that the Applicant take all necessary steps to remove any interests from land intended for vesting prior to making an application under the RMA.
- 5.2. Any application for the Council to accept land subject to existing interests is required to undergo consultation with Council prior to an application for an outline development plan, a plan change, a

resource or subdivision consent being lodged. It is the responsibility of the applicant to ensure that all issues relating to the vesting of land in Council are resolved prior to lodgement of an application.

- 5.3. A decision of whether the Council will accept land should be made prior to lodgement of a consent application.

6. Contacts

- 6.1. Council's Subdivision Planner OR Council's Duty Planner.

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