

CHRISTCHURCH CITY COUNCIL

INTERNAL MEMORANDUM

5 November 1992

From: OFFICE SOLICITOR

To: GROUP MANAGER TECHNICAL SERVICES

Copy To: ROADING MANAGER

STRUCTURES ON LEGAL ROAD KING EDWARD TERRACE

1. INTRODUCTION

You have sought my advice on the legal position regarding fences and gates which have been erected on King Edward Terrace and Long Street in the Woolston Loop. King Edward Terrace and Long Street are legal roads owned by the Council under the Local Government Act 1974.

The immediate situation concerns two gates erected by _____ over King Edward Terrace and Long Street and a taranaki gate and a fence with a small gate in it erected by _____ over King Edward Terrace.

I record that I have visited the properties owned by _____ and _____ and seen the fences and gates concerned.

Commencing with _____ a wire netting fence has been erected across King Edward Terrace near Staunton Street. The fence is approximately 2 metres high and extends down to the riverbank so that by itself it physically obstructs public access along King Edward Terrace. A gate sufficient for one person to pass through at a time has been installed in the fence and the company stated at the time of our inspection that the gate was left open during the day but was locked during the hours of darkness.

_____ has also erected what is referred to as a taranaki gate across King Edward Terrace near the boundary of the land owned by _____ and land owned by _____. This gate can be opened and again physically obstructs passage along the road as it is across the whole of the road.

Continuing around the Woolston Loop _____ have erected a large swing gate across King Edward Terrace near a settling pond on the land that it owns. This gate is locked all of the time although apparently it can be unlocked by the company. Once again the gate extends from the company's legal boundary to the riverbank so that it is physically impossible for a person to pass along King Edward Terrace.

There is also a swing gate near the office of _____ which has been erected by the company over Long Street and which is left open during the working day but is closed at night and on Sundays when the company presently does not operate any shifts. There is a notice on the gate that if a person wishes the gate to be opened then they should ring a security firm and a phone number is given. There is a small personnel gate adjoining the swing gate near the office of _____ but this personnel gate is located on land owned by _____ and is not available as of legal right to members of the public to use.

I understand that none of these gates nor the fence have been authorised by the Council.

In addition to erecting a fence and a taranaki gate has also physically formed part of King Edward Terrace, again without the Council's consent.

Consequently it is necessary to consider the legal position regarding these four separate obstructions on legal road and the Council's powers in relation to these obstructions. As a preliminary comment in this opinion I am dealing with the Council's powers as owner of legal roads. I understand there is a proposal to stop King Edward Terrace whereupon it may become an esplanade reserve under the Reserves Management Act. If the road becomes an esplanade reserve that would raise separate issues relating to the Council's powers in dealing with esplanade reserve which would require a further legal opinion.

2. GENERAL PRINCIPLES

All roads and the materials of which they are composed, with the exception of state highways and motorways, are owned by the Council and are under the control of the Council (sections 316 and 317 Local Government Act 1974).

Although the Council owns the roads in its district roads retain their character as highways so that ownership by the Council is subject to the rights and passage in the highway enjoyed by the public and separately the right of access to the highway by adjoining landowners.

These rights of passage and access apply to all legal roads in the Council's district whether or not those roads are physically formed as road and whether or not they are in actual use as road by the public. So that the legal rights attach to what are popularly referred to as "paper" roads as much as to principal roads in the Council's district. The fact that a paper road may not have been used as such for many years or at all does not in any way derogate from the legal rights of the public and adjoining landowners to use and have access to that paper road.

The law relating to the use of roads is a mixture of statutory provisions, principally in the Local Government Act 1974, and the common law, that is, the law as developed through cases decided over the years.

As different statutory provisions apply to fences and gates I will consider each of these separately.

3. FENCES

(a) Statutory Provisions

The Council's statutory powers in relation to fences on roads are largely contained in Part XXI of the Local Government Act 1974.

As noted above Sections 316 and 317 of that Act provide that all roads and the materials of which they are composed vest in fee simple in the Council of the district in which they are situated and all roads in the district shall be under the control of the Council, except for state highways.

The powers given to the Council are generally of two types. Firstly general powers in respect of roads such as construction, diversion, the alteration and stopping of roads.

Secondly particular powers given in furtherance of those general powers and which may interfere with private rights. Examples of these are cycle tracks (section 332), the erection of monuments and facilities on roads (section 334), pedestrian malls (section 336) and the erection of transport shelters (section 339). Also of particular relevance to present purposes is section 357 which provides in part:

(1) *Every person commits an offence who, not being authorised by the council or by or under any Act -*

(a) *Encroaches on a road by making or erecting any building, fence, ditch or other obstacle or work of any kind upon, over or under the road, or by planting any tree or shrub thereon;*

and is liable to a fine not exceeding \$200 and, where the offence is a continuing one, to a further fine not exceeding \$20 for every day on which the offence has continued and may be ordered to pay the cost incurred by the Council in removing any such encroachment, obstruction, or matter, or in repairing any damage caused as aforesaid:

Provided that no fine shall be imposed unless the information is laid by authority of the council or by any officer thereof.

(2) *The Council shall not authorise or suffer any encroachment on a road if the encroachment would or might interfere with or in any way obstruct the right of the Crown, or of any person so authorised by any Act, to construct, place, maintain, alter, remove or otherwise deal with any electric wires, telephone wires, telegraph wires, pneumatic tubes, or gas pipes on, over, or under the road, except with the prior written consent of the Minister of the Crown, the person, or principal administrative officer of the body, who or which is responsible for any such services or utilities."*

Clearly the implication of section 357(1)(a) and (2) is that it provides a statutory power to the Council to permit the erection of a fence on a road. However if the Council does not authorise the fence it is a criminal offence to construct one on legal road and the Council can remove the fence and recover the cost from the person erecting the fence.

I will now turn to consider the case law as it has been interpreted by the Courts in considering questions of structures on legal road.

(b) Case Law

The first case, and the leading case today, in which the question of constructions on legal road came before the Courts was in the Court of Appeal's decision in:

R v. Wellington City (~~1896~~) 15NZLR72 C.A.

In that case the Wellington City Council had constructed transport shelters on a legal road and this action was challenged by the Crown. The Court assumed for the purposes of that case that the shelters, and more particular the poles which supported the shelters, did not materially obstruct the right of passage along the road.

The Court found that the Council had the legal power to construct the shelters and held that whether or not structures on legal road unreasonably or unnecessarily interfered with traffic was a question of fact. In delivering its decision the Court stated (at page 90):

"Every person is not necessarily entitled to unrestricted access to every part of a street. All streets within a borough, with their soils and materials, are vested in the corporation of the borough, and are under the control of the Council (section 234). Section 240 forbids any person, not being authorised by the Council, to encroach on a street by making any obstacle thereon. An obstruction by or with the authority of the Council is therefore legal unless it is a public nuisance or interferes with individual rights ...

As to the structure in the middle of the street, the right to construct it must depend upon whether it is or is not a public nuisance, interfering unduly with the reasonable use, under the circumstances, of the street. That is an issue of fact which must be decided, if necessary, in the usual way."

So here the Court clearly found that section 240 of the then Municipal Corporations Act, now section 357(1)(a) of the Local Government Act, empowered the Council to authorise the obstruction provided it was not a public nuisance.

The next case is
The Mayor, Councillors and Citizens of the City of the Christchurch v. Shah (1902) 21NZLR578

In that case the Christchurch City Council had granted a licence to Mr Shah to sell icecream on the corner of Hereford and Colombo Streets. A dispute subsequently arose concerning the payment of the licence fee and Mr Shah argued that the Council did not have the authority to grant him the licence.

In its judgment the Court stated (at page 583):

"Section 212 of the Municipal Corporations Act 1900 provides that the streets in a municipality, and the soil thereof, shall by force of the Act vest in fee simple in the corporation. Subject to the right in the public, in whose interests they are held and controlled, to prevent by indictment or otherwise the creation of a public nuisance, the control of the corporation is absolute.... I know of nothing to prevent a corporation allowing the exclusive occupation of a part of its streets to a particular person or persons so long as such occupation does not constitute a nuisance to the general public."

The next decision is that of the Supreme Court in
Attorney General ex rel Shaw v. New Plymouth Borough [1920] NZLR761

In that case the New Plymouth Borough Council was proposing to erect a public toilet in the main street and adjoining residents argued that the proposed structure would seriously interfere with the use of the street. In respect of this particular argument the Court stated:

"A physical obstruction is or may be a nuisance, but its existence does not alter what for convenience may be called the legal status of the land set out as a street. In the case of a physical obstruction of a highway the maintenance of the erection causing it must and may be justified by reference to the considerations which came under discussion in the Queen v. The Mayor etc of Wellington."

The Court considered the factual circumstances surrounding the location of the toilet in relation to the width of the street and the passage of vehicular traffic and stated:

"In these circumstances there is in the first instance power vested in the Municipal Council to decide upon the propriety of constructing and maintaining such an edifice. To call upon the Court to interfere with the exercise of its discretion by the Borough Council requires a very strong case, especially as it is always open to the burgesses to replace the Council by one more disposed to carry out the wishes of the inhabitants if these have been disregarded."

The Court consequently dismissed the application for an injunction by the adjoining residents.

The question of a local authority's powers in respect of roads has more recently come before the Courts in the Court of Appeal decision in **Lower Hutt City Council v. Attorney General Ex Rel Moulder [1977] 1NZLR184.**

In that case the Court of Appeal stated (at page 188):

"Although all streets and the soil thereof are by section 170(1) vested in the local corporation they nevertheless retain their character as highway so that the ownership by the corporation is in general subject to the rights in respect of highways enjoyed both by the public and by adjoining owners."

Again the Court stated (at page 191):

"Mr Shire has relied in the first place on the provisions of subs (1) and (2) of section 170 of the Municipal Corporations Act 1954. Those subsections provide that all streets and the soil thereof are vested in fee simple in the local corporation and are under the control of the council. It is, however, clearly established by the Queen v. Wellington City Corporation (1896) 15NZLR72, being the case referred to by Chapman J. in Attorney General v. New Plymouth Borough that the 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". This is made clear in the judgment of the court at page 90. This limitation on the power of control of a council is recognised in Christchurch City Corporation v. Shah (1902) 21NZLR578, 583, and Invercargill Borough v. Hazelmere (1905) 25NZLR194, 202. 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: R v. Bartholomew [1908] 1KB554. It may also be noted that it is no defence that the obstruction, though a nuisance, is in other ways beneficial to the public."

In that case the Court found that as the local authority had completely blocked off a street to vehicular traffic by the erection of a grassed area that there was an appreciable interference with the use of the road by vehicular traffic and consequently a public nuisance had been created which was not authorised by the statute.

The next case in chronological order is the Supreme Court decision in **Moore v. McMillan [1977] 2NZLR81**

In this case cattle yards had been inadvertently constructed on legal road by an adjoining landowner and were subsequently demolished by a third party. The person who had constructed the cattle yards sued that third party in trespass for the demolition of the cattle yards and the removal of the material.

"Not only does each and every member of the public have the right vested in him to pass and repass on a road without hindrance but the legislature has taken care to protect the title of the Crown or local authority, as the case may be, against claims to adverse user and also against mistakes resulting in a road being included in a certificate of title of any landowner.

I have come to the conclusion that a road is incapable of being possessed by anyone to the exclusion of the right of each and every member of the public to assert his right to pass and repass without hindrance over every part of it. This is no mere exercise in theory: I understand that in more remote parts of New Zealand, notably in the South Island, it is a common practice amongst hunters, deer stalkers, mineral prospectors and the like to use paper roads much to the consternation of the landowners who have incorporated the roads within their farms. The Plaintiff, no matter how firm his animus possidendi, could not exclude any member of the public (including the defendant) from exercising his right to pass and repass. Alternatively, the matter can be looked at another way as title to a road is incapable of being acquired by adverse possession the possessor cannot exclude the true owner. The right of each and every member of the public to pass and repass without hindrance is an incident of the peculiar nature of the title of the Crown or local authority. That right cannot be denied to any person by the Crown or the local authority."

The next case is the Court of Appeal decision in **Fuller v. MacLeod [1981] 1NZLR390**

That case, while not dealing directly with the powers of a local authority in respect of roads, is noteworthy because there the Court referred in passing to the **Queen v. Wellington City Corporation (1896)** without disapproval.

The last case is the 1991 High Court decision in **Paprzyk v. Tauranga District Council (1991) 1NZRMA73**

In that case the Court was considering an application for an injunction by shopowners to prevent the Tauranga District Council from granting mobile shop licences in the district. The Court considered the common law principles relating to the use of roads.

In its decision relating to common law rights on the use of roads the Court stated (at page 83):

"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 upon others not to substantially and unreasonably impede it. 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 publicly dedicated 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."

(c) **Summary of Statute and Case Law**

From the statutory provisions, particularly section 357(1)(a) and (2) and the cases referred to above, in my opinion the following propositions can be established:

- (i) The roads and the materials of which they are composed are owned by the Council;
- (ii) Although the Council owns the roads, the roads retain their character as highways so that the ownership by the Council is subject to the rights in the highway enjoyed by the public and rights of access to the highway by adjacent landowners;
- (iii) The Council's primary function in relation to roads is to facilitate the passage which the word "highway" imports and for this purpose the roads are vested in the Council and the general power set out in the Local Government Act are conferred on the Council.
- (iv) The fact that a road is a paper road does not affect its legal status nor the rights of the public to pass and repass along that road.
- (v) The Council is empowered by section 357(1)(a) and (2) of the Local Government Act 1974 to authorise the construction of a fence on a legal road so long as that fence does not amount to a public nuisance.
- (vi) What constitutes a 'public nuisance' will be a question of fact to be decided upon by the Council depending upon the particular circumstances of each case. In general terms the Courts have held that a public nuisance will be established where the obstruction constitutes an appreciable interference' to the right of the public to pass along the road;
- (vii) In respect of the fence erected by _____ it will be necessary for the Council, should it be minded to permit the fence to remain, to make a judgment as to whether or not that fence, with a gate open 24 hours a day, seven days a week, will constitute a public nuisance.

If the Council is of the view that it will constitute a public nuisance then the Council does not have the authority to authorise the fence to be on the legal road and should require its removal.

If the Council concludes that the fence with the gate in it will not constitute a public nuisance then in my opinion the Council is authorised, under section 357(1)(a) of the Local Government Act and the cases I have referred to above, to grant a licence on terms satisfactory to the Council authorising the fence to remain on the legal road.

(viii) In considering whether or not the fence constitutes a public nuisance it is submitted that the following factors are relevant:

- That the legal road is a paper road and is not intended to be formed by the Council for vehicular traffic. Consequently the likely use of the road is for pedestrian traffic, not vehicular traffic;
- Physical size and nature of the road;
- The volume of pedestrian traffic likely to make use of the road;
- Does the fact that there is a gate in a fence across one part of that road unreasonably impede pedestrian traffic walking along the road?

4. GATES

As I noted in my introduction one of the obstructions is a fence. The remaining three obstructions are effectively gates, one being a taranaki gate and the others being types of swing gate.

Section 344 of the Local Government Act provides in part:

"(1) The council may, in writing, permit the erection of a swing gate or a cattle stop or both across any road, where -

- (a) In the council's opinion it is not practicable or reasonable to fence the road; or*
- (b) By agreement the road has been taken or may be constructed through private lands and the owner or occupier requests that a gate or a cattle stop or both be erected on the outer boundary at the cost (including maintenance) of one or both parties as may be agreed.*

(2) Where a gate is erected across a road under subsection (1) of this section, a board with the words "Public Road" legibly painted thereon in letters of not less than 75 millimetres in height shall be fixed upon each side of the gate and at all times maintained thereon by the person authorised to erect the gate, or at whose cost it has been agreed that the gate shall be erected and maintained."

The section goes on to provide that where a gate or cattle stop is considered redundant or an inconvenience either by the Council or by a petition supported by 20 or more residents then the Council may serve notice upon the person authorised to erect the gate of the Council's intention to remove it. The person who erected the gate is entitled to have a hearing before the Council on whether or not the gate should be removed.

It is also provided that no gate shall be erected until plans of the gate have been approved by the Council and the Council may require the erection of such protective or warning devices as the Council considers necessary. The person who erects the gate under a permit granted by the Council is obliged to maintain the swing gate to the satisfaction of the Council. The Council is also empowered to make bylaws regulating the use of the swing gate and prohibiting the causing of damage to the swing gates and the leaving open of such swing gates. Further it is provided that the Council is not liable for damages in respect of any accident arising out of the existence of the gate erected under the permit.

The power to erect and maintain the swing gate is deemed to include a power to fence the road up to that gate and to maintain that fence.

In my view section 344(1)(a) is the only relevant provision in the present situation as no road has been constructed through private land as provided in section 344(1)(b).

As Parliament has expressly provided a system in section 344 for swing gates across legal road the Council is impliedly prohibited from relying on its more general powers under section 357(1) so that any swing gates must comply with section 344.

There has been promulgated a Gates and Cattle Stops Order 1955 but that is not relevant in the present situation as it only applies in circumstances where a swing gate is adjacent to a cattle stop.

Clearly section 344 provides the Council with the statutory power to permit the erection of a swing gate across a legal road. The first question to be answered is what type of gate will constitute a swing gate. There has been no case law at all considering this question.

Dictionaries provide no real assistance in defining a "swing gate" in the New Zealand context. In my view a swing gate within the meaning of section 344(1) would typically be a wooden or metal gate on hinges and which can be swung open by a person wishing to pass along the road and then closed, perhaps with a chain, securing the gate. Section 344(6) provides the Council must approve the type of gate.

It would appear from this definition that certainly a taranaki gate would not fall within the words "swing gate". Whether or not a particular gate falls within the words "swing gate" is a decision for the Council to make.

The Council's power to permit the erection of the gate, in relation to the present situation, is that the Council must legally form the opinion that "... it is not practicable or reasonable to fence the road" If the Council forms that opinion then it may go on and decide whether or not it should grant a permit in a particular case. If it does not reach the opinion that it is not practicable or reasonable to fence the road then it should require the removal of any gates already erected on the road.

Although section 344 has recently come before the High Court there has been no real assistance in terms of deciding what is "practicable or reasonable" for present purposes.

In a recent High Court decision in **Hanning v. Cooke (1988)** the Court observed when discussing section 344 (at p 6):

"As I read the Section as a whole, the territorial authority can permit the erection of a specified or approved gate where it is not practicable or reasonable to fence the road. The section on its face does not provide for that to be done upon condition. It does not specifically indicate obligations or responsibilities which arise therefrom. It is an indulgence granted to owners of land adjoining a public road to avoid the obligation they otherwise have to fence the roadway. Its intention is to avoid fencing. I am persuaded by Mr Withnall's contention that it was not open to the territorial authority to place conditions or restrictions or rights or obligations. Having determined that the permit should be granted then it is, in my view, a necessary consequence without further stipulation that the permit holder can require that the gate be left in the position in which a person lawfully using the road found it."

Later in the judgment the Court observed (at p 9):

"The Act itself is clear on the point and if a permit to have a gate so as to avoid fencing is granted then, in my view, it necessarily follows as a matter of statutory interpretation that the permit holder can control the resting place of the gate at any time and persons who are enjoying that right to pass and repass on a public road must accept that limitation and honour the integrity of the permit."

In a subsequent High Court decision in 1991 between the same parties the Court observed (at p 10):

"By virtue of the Local Government Act, the appellants had the right to fence the road and as a consequence of that right to expect other users of the road to leave the gates in the way in which they found them. The respondents had a right along with other members of the public to use this road for passage and repassage, but because there was a lawfully erected gate across the road their obligation was to leave the gate in the same position in which they found it. The right to use a public road which exists in the public is a right to do so long as the user does so in a manner with reasonable care for others who have rights to use the highway."

These decisions by the High Court in relation to the gate in question clearly establish that a person who is granted a permit by the Council under section 344 to erect a gate has their own legal rights by way of injunction against third parties who do not leave the gate in the position in which it is found.

In the present situation therefore the Council is empowered under section 344 to permit the erection of swing gates across King Edward Terrace and Long Street by _____ and by _____ if the Council concludes that it is "not practicable or reasonable" to fence that part of King Edward Terrace and Long Street which adjoins their land.

Whether or not it is "practicable or reasonable" for those companies to fence their land is a judgment for the Council to make in light of the amount of land fronting on to the legal road owned by the two companies involved. It may be relevant to bear in mind whether the situation facing the two companies here is different from other commercial landowners in the city and it is also relevant to bear in mind that the Council is not liable to pay any share of the costs of erecting a fence fronting on to a legal road.

For completeness I would also refer to section 353 of the Local Government Act which empowers the Council, whenever the public safety or convenience renders it expedient, to require the owner or occupier of any land not separated from a road by a sufficient fence to enclose the same by a fence to the satisfaction of the Council.

5. RELATIONSHIP BETWEEN SS 344 AND 357

It will be clear from my comments above that I have concluded that the gates and the fence raise different legal issues depending on whether one is looking at section 344 or section 357.

While I appreciate others may have different views (for example, that the fence should be dealt with under section 344 given the fact that under section 344(11) part of the road may be fenced) in my view section 344 is dealing primarily with vehicular traffic such as is the case with the gate on Long Street.

There has not been any judicial consideration of the relationship between section 344 and section 357. That both sections could potentially cover the same factual situation highlights one of the difficulties in interpreting the Local Government Act which has been amended many times since its enactment.

Historically section 357 (or its equivalent predecessors) has been contained in the Local Government Act (or the earlier Municipal Corporations Act) since the beginning of this century.

The predecessors to section 344 were in the Public Works Act from 1900 and section 344 was placed in the current Local Government Act in 1978. As tends to happen when statutory provisions are transported from one statute to another this can give rise to interpretation problems as here.

However notwithstanding this, it is necessary to reach a view as to the correct interpretation of the two provisions and on the facts of this case the gate, where no vehicular traffic is involved, should, in my opinion, be primarily as a fence across a legal road and dealt with by the Council under section 357. The gates erected by fit more consistently into the scheme of section 344 and in my opinion should be dealt with by the Council under that section.

If the Council permits any form of fence or swing gate to remain then there must always be 24 hour access available to the public to pass along the road. The gates can never be locked and a situation where a member of the public is required to call someone to unlock the gate is unlawful.

6. LIABILITY OF COUNCIL

As a general rule if the Council permits any person to erect a structure, such as a fence under section 357, on a legal road then the Council will be liable for any damage to any third party if the fence becomes a legal nuisance.

It will be remembered that section 344 expressly provides that the Council shall not be liable for any damages in respect of any swing gate for which a council has granted a permit.

With regard to the liability in respect of the fence it is difficult to predict in advance when the fence may become a legal nuisance or held to be negligently placed so as to contribute to an accident. If the Council authorises or condones the erection of the fence by granting a licence then it must ensure that the landowner properly maintains the fence.

The Council should be aware that in granting permission for the fence to stay on the legal road there is a potential liability, although difficult to identify at the present time, that if the fence should fall into a state of disrepair or otherwise cause damage to any third party the Council may be liable for such damage. A potential solution to this difficulty would be for the Council to require the person to whom it is granting the licence to indemnify the Council against any such claim in the future.

7. OPTIONS

In my opinion the Council legally has a number of options open to it. As a fence and a swing gate raise different legal issues I will consider each separately.

(a) Fence with a Gate

- (i) The Council can take down, or require _____ to take down, the fence with the gate near Staunton Street.
- (ii) The Council can also prosecute _____ for committing an offence against section 357(1) of the Local Government Act and seek recovery of any costs incurred by the Council in removing the fence.
- (iii) If the Council agrees that the present and likely future use of the road is for pedestrian traffic and the Council forms the view that the fence with the gate does not appreciably diminish the public's right to pass along the road then it may grant a licence, with a rental and on terms satisfactory to the Council, to _____ to permit the continuance of the fence and the gate. Any licence would be on the basis that the public have continuous access to the road through the gate. Effectively the gate could never be locked so as to prevent public access.
- (iv) An alternative that has been suggested is for the Council to grant _____ a licence to occupy that part of the legal road the company has formed with the company erecting a fence on the outside physical boundary of that road. The company would then take down the existing fence and gate.

Again the Council is empowered under section 357(1)(a) to permit this provided the Council concludes that such a fence would not appreciably diminish the public's right to pass along the road.

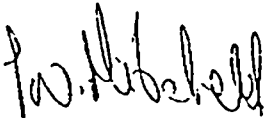
(b) Taranaki Gate

- (i) In my opinion the taranaki gate does not comply with section 344 as a 'swing gate' and as it constitutes a physical obstruction must be removed.
- (ii) If the Council was to conclude that the provisions of section 344(1)(a), namely that it is not reasonable or practicable to fence the road, applied then it could consider granting a swing gate permit for the erection of a swing gate.

(c) **Swing Gates**

If the Council considers the gates erected by _____ are swing gates within the meaning of section 344(1) and if the Council forms the opinion within section 344 that it is not reasonable or practicable to fence the road then it go on and decide whether to grant a swing gate permit to _____ .

This will necessitate the swing gate being unlocked at all times for public use and complying with the requirement to place a "Public Road" sign on the gates.



P W Mitchell
OFFICE SOLICITOR

EXT 8549

PWM:NAM