

29 July 2010

Submission to Wellington City Council

by Con Flinkenberg

on

Proposed Changes to the Road Encroachment and Sale Policy

Status of Submitter

1. My name is Con Flinkenberg. I live at 29a Grass St, Oriental Bay. I am the holder of a current Encroachment Licence.

Position

2. In the Consultation Document dated June 2010 on Council's proposed changes, I oppose:

- The new fee setting formula
- The proposal to deem fences and hedges "structures"
- The abolition of the 50m² exemption
- The rules for air space (*not covered in this submission*)
- The timing of the change (*not covered in this submission*)

3. I oppose the proposals on both general and personal grounds.

Introduction

4. This is a bad policy. Too little thought has been given to the ramifications of its proposals and too little consideration has been given to the full range of encroachments which it must cover. It has too many loose applications, all of which produce potential stumbling blocks – or worse – for the Council. In places, it seems simply illogical. It will almost certainly produce bad and unforeseen results.

Points of Objection

5. I would like to make the following observations:

A. The Policy assumes that all encroachments are the same and can therefore be treated the same. A short list of encroachment types will immediately disprove that assumption:

| | | |
|---------|----------------|-------------|
| fence | retaining wall | eave |
| hedge | garage | planter box |
| balcony | car deck | cable car |

Under the formula, this very wide range of encroachments is to be differentiated only by their square meterage. So, a car deck and a garage encroachment of identical square meterage will attract the same charge, though conferring vastly different values on the property. Yet, your policy seems to be based on making charges reflect the added value that the

encroachment brings to the property owner. There seems little consistency in the logic here. One size surely does not fit all.

- B. There is an implicit assumption that all encroachments benefit only the encroacher. This is not so. The policy in fact recognises public benefit as a criterion for agreeing an encroachment but makes no provision for such recognition in the fee charged. Again, the logic seems hardly consistent.
- C. The policy makes no provision for the application of a discretion by Council (except in two very narrow circumstances). This is almost certainly unwise of itself and in cases where there is mutual benefit to the parties, surely unjust.
- D. The document openly states that the differentiated fee structure is favoured "*as a pragmatic approach*" to "*reduce the administrative burden*". Administrative convenience is not usually considered adequate reason to adopt policies which treat citizens crudely. Whether from the left or right of the political spectrum, Councillors should be ashamed to let individual citizens pay a price for council's unwillingness to be 'administratively inconvenienced'.
- E. The policy may well prove legally challengeable, because
 - i. It makes no provision for rights of appeal, even though one of the principles adopted is that persons "*who are materially affected...should be consulted and their views considered*". Admittedly, the licence is an arrangement between parties, but one of them is a body with regulatory powers and there is no equal status between the parties. A Court may well intervene in such circumstances.
 - ii. There is no evidence that alternative approaches to the management of encroachments have been considered – for instance, one based on the nuisance value to the public, or loss of public access. The strong thrust of the document is one of placing a cash value, rather than a public benefit/loss value, on the encroachment. This is so even though Councillors asked for a review of objectives and principles.
 - iii. No evidence is provided as to how an overall discount factor of 94% came to be applied to the general rateable land value of the land, or whether that discount is valid across the city. Why is 6% of the rateable land value the value of an encroachment both in Ohariu and in Oriental Bay?
 - iv. Council has established criteria for evaluating road-encroachment proposals (Section 5.5) but has no criteria for evaluating the rate to be applied once the proposal is approved (other than the 'criterion' of administrative convenience).
 - v. The policy does not treat like with like. Is a balcony on Oriental Parade more or less of an encroachment than a balcony on Willis Street or Wakefield Street? It will attract more than double the fee, even though each balcony may be attached to a property valued at a million dollars.
- F. The policy leaves citizens vulnerable to future hazard, since exemptions currently enjoyed can be removed at will. In my own case, Council has shifted its ground three times in 17 years, blandly reversing its first position without any right of recourse for me (See attached letters of 14 Jan 1993 and 25 Aug 2004) and now proposing an entirely radical charging policy.

In my case, the legally-defined encroachment in the Licence Agreement is 10.76m². It consists of three different 'encroachments', only 1m² of which actually attracts a fee at the present time. The other two are currently forgiven (see photos attached).

However, if at some future date, it is decided to charge the full amount, then under the proposed regime my encroachment fee would jump from \$169.96 to \$1828.77. This, on a property whose overall rateable value is \$3883.08. I would be required to pay an amount equivalent to 47% of my total rate for 10.76m² of harmless encroachment onto a zig-zag walkway.

Even the proposed basic charge of \$169.96 represents 4.4% of the total rateable value of the property for 1m² of eave overhang on the walkway.

This example shows the imbalances the rule can generate and the potential for dispute that may arise once so sweeping and indiscriminate a rule is applied. And, given that Council has already changed the rules three times to its advantage and my disadvantage, there is no surety that such an increase will not occur in the future.

Conclusion

6. The proposed policy is slick, quick, easy and lazy. It will lead to many scenarios that are manifestly unjust or foolish. Once its impact is felt by individual property owners, it will be a fertile breeding ground for complaint and litigation. It needs to be made more alert and responsive to the situations posed by individual cases.

Recommendations

7. I recommend that:

- i. A less sweeping rule be established which makes better provision for individual circumstances and the differing nature of individual encroachments.
- ii. Council demonstrate that it has considered other encroachment formulae in addition to one based on the value of the property and state the reasons why it has considered them inappropriate, in particular in cases where the fee charged for the benefit derived is disproportionate to the overall rateable value of the property.
- iii. Council make provision for rights of appeal against its decisions as to the value of an encroachment.
- iv. Council give itself a broader discretion to waive than that contained in Section 5.9.3 of the Consultation Document.
- v. Council demonstrate why a general 'encroachment' value of 6% of rateable land value for all suburbs is considered appropriate when the fees themselves are specifically differentiated by suburb.
- vi. Council ensure that no application of the proposed formula will lead to an encroachment charge that is manifestly disproportionate to the rateable value of the property.

- vii. Council ensure that assessments of encroachment impact will also include assessment of public benefit gained and that the fee applied reflects that assessment.
- viii. The 50m² exemption be retained as a discretion for Council.
- ix. Where fences and hedges serve only as boundaries, with no significant loss of public benefit, they be exempted from the encroachment regime.
- x. Undertakings by Council as to the nature/status of an encroachment, once given, should not be subject to change at will.

Attachments

- 1. Photos of encroachments at 29a Grass St
- 2. Letter from WCC dated 14 January 1993
- 3. Letter from WCC dated 25 August 2004

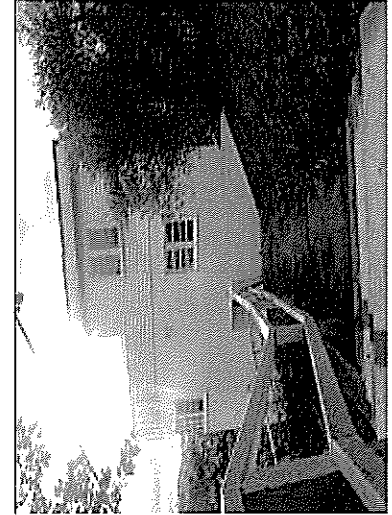
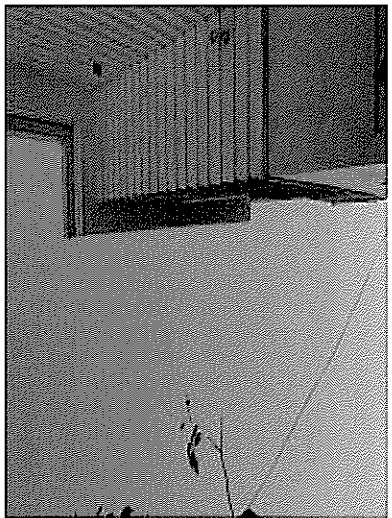
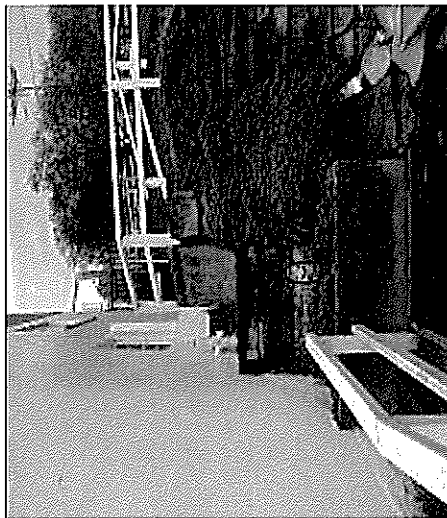
Attachment to Flinkenberg Submission on Proposed Changes to Encroachment Policy



↑ Fence encroachment (presently not charged)

Encroachments at 29a Grass St

← Planter Box encroachment (presently not charged)



← Eave encroachment (charged)

Wellington City Council

Te Kaunihera o Poneke



File Reference TC 15/9
Enquiries to: Mr T. Limpus
Ext. 3526

ENVIRONMENT

14 January 1993

Mr C N Flinkenberg
29a Grass Street
Oriental Bay
WELLINGTON 1

Dear Sir,

RETAINING WALL: 29A GRASS STREET

I refer to your application for an encroachment licence to construct a retaining wall, approximately 1.8 metres high maximum, between your house and the existing retaining wall on Grass Street.

I am pleased to advise you that you may construct the above wall and are not required to enter into an encroachment agreement with Council. However you will still be required to obtain a Building Consent for the wall from the Building & Development Services of the Council.

I am returning enclosed your cheque, photos and the letters from the service authorities.

Yours faithfully,

A handwritten signature in cursive script that reads "M A Brownie".

M A Brownie
MANAGER
SURVEY & LAND INFORMATION SERVICES

Absolutely

POSITIVELY

100 MARKS FOR BUSINESS
100% MORE FROM YOUR COMPANY

Wellington

File Ref:480/47/6813

25 August 2004

CR and P A Flinkenberg and SJ Peacock
33 Bay Street
Petone
Lower Hutt

Dear Mr and Mrs Flinkenberg and Ms Peacock

PROPOSED EAVES ENCROACHMENT AND RETROSPECTIVE LAND OWNER CONSENT FOR EXISTING PLANTER BOX, TRELLIS FENCE AND ACCESS STEPS AT 29A GRASS STREET

Thank you for your application for an eaves overhang encroachment which we received on 26 July 2004. All information required was supplied by 25 August 2004. This included consultation with:

- Wellington City Council (WCC) business units (Roading and Traffic)
- Service Authorities (WCC Street Lighting, TelstraClear Communications, Telecom, and United Networks Electricity).

Your application was discussed with the Senior Roading Engineer on 2 August 2004 and 9 August 2004.

We are pleased to advise you that your application has been successful for the following reasons:

- o The proposal does meet the criteria for allowing road encroachments listed in the Council's Encroachment Policy 2001 (pg8), namely
 - a. the Council must be satisfied that the private use of the road reserve will not result in:
 - damage or removal of any significant trees, or to the habitat of indigenous species;
 - significant public or private views being compromised;
 - the amenity of the area being compromised.
 - b. Structures to be used for exclusive private purposes cannot be located on legal road where the structure can reasonably be located on private land.
 - c. Encroachment licences will not be issued for any purpose where the use may be long-term and likely to be practically or administratively difficult to remove. Except where the encroachment is into airspace above the legal road, and will not constrain movement, and Council does not believe that there is any likelihood of there being any need to remove the encroachment.

Land Owner Consent has been granted subject to:

- Obtaining all other required regulatory consents,
- acceptance of the attached terms and conditions
- entering into the attached standard Council Licence Agreement.

With regard to the existing planter box, trellis fence and access steps located on the legal road, thank you for your letter of 24 August 2004 and for sending in the requested plans that are indicative of these structures. These will be added to your Licence Agreement and will not attract an annual fee.

I acknowledge the letter dated 14 January 1993 from the Manager of the Council's Survey and Land Information Services Team that says that an Encroachment Licence would not be required for the retaining wall. However the current Encroachment Policy has changed and requires all structures that are located on or above the legal road to be licensed, including planter boxes and retaining walls.


I have attached two copies of the Licence Agreement that must be signed by all property owners and witnessed by someone other than the owners (can be a friend or relative). Both Licence Agreements are to be returned to the Council by 25 September 2004. The Council will then sign both copies and return one copy for your records.

I have also attached a Detail Form which must be completed and returned with a cheque for the \$250 bond.

An invoice for the annual rental will be sent shortly after you receive your copy of the Licence and should be paid by the due date on the invoice.

Also, please note clauses 4 and 11 of the Terms and Conditions and advise if these timeframes pose any problems.

Yours sincerely



David Shaw
Encroachment and Road Stopping Advisor
Property and Standards

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