

Policy on Rentals for Encroachments on Council Land

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***Western Bay of Plenty
District Council***

Decisions Story August 2017





The Policy on Rentals for Encroachments on Council Land sets out a framework for how Council may charge rental for the private use of unformed roads and reserves, where there is financial benefit for the user.

Read on for the decisions on our Policy on Rentals for Encroachments on Council Land...

An introduction

Council has significant land holdings, including unformed roads and reserves. Historically, leases and licences to occupy have been granted to enable the use of some of this land, subject to an application fee and no ongoing rental. A number of paper roads and esplanade reserves have (with or without lease/licence) been planted in higher value crops, such as kiwifruit or forestry.

In some cases this use of public land is providing revenue to the occupier, but not to Council or the wider community. Such private benefit may have been ongoing for a number of years, and can be significant monetarily. There are also a range of other uses of Council land that derive different levels of benefit to the user, such as forestry, dairy grazing or occupations by buildings.

Council requested the development of a policy which sets out the conditions under which it would charge an annual rental for encroachments on unformed roads and reserves, where there is a significant private benefit to the occupier. The policy became effective on 1 August 2017, following consultation earlier this year.

There are two key parts of the policy:

1. The setting of market rental rates for different types of land use through Council's annual Schedule of Fees and Charges.
2. Discounts to the market rates that may be applied. This will help reflect that some occupiers may not have exclusive use of the land (particularly on an unformed road) and recognise maintenance carried out on the land (which would otherwise be at a cost to Council).





What's the goal?

The policy provides a framework for staff to apply in a range of different scenarios for the use of Council land. This policy is intended to apply only to those using Council land that are deriving a significant private financial benefit from their occupation.

The policy is not intended to seek a rental from those adjacent property owners simply maintaining Council land through non-intensive grazing, mowing or gardening. So if there is no significant income generated then under the policy, the rental amount will be deemed trivial and/or the potential maintenance costs of that land to Council will outweigh any rental charge payable. Council will not charge a rental where this is assessed to be \$250 or less per annum.

Your feedback

We wrote to those people on our database that we know have an existing use or interest in Council land, and provided an online forum for you to have your say. Consultation on our draft policy ran between 7 April and 5 May 2017 and we received 65 pieces of feedback both online and as letters to Council. Overall, 14 people supported the draft policy while 51 opposed – either entirely or in part. Council considered all feedback received in its deliberations on a final policy. The key issues raised in your feedback are set out below with the decisions made by Council.

The decisions

Market rates

We received opposition to the market rates defined in the draft Schedule of Fees and Charges, including objections to the proposed method of charging on a land use basis, rather than the land value.

The rates in the draft Schedule of Fees and Charges were provided by an independent valuer with significant experience in the kiwifruit industry. NZKGI also submitted that while Gold kiwifruit yields better returns, the licencing costs need to be taken into account, which ultimately means that Gold kiwifruit generates a similar benefit to the grower as Green.





Given that the market rental rates were contested, Council has sought further advice. An alternative view was that horticultural land (Gold Kiwifruit, Green Kiwifruit, Avocados) could be charged the same market rental of \$6000/hectare (less any discounts under the policy), or alternatively at 5% of the adjoining unimproved land value.

Council decided that it would set the rental for horticultural land at 5% of the adjoining unimproved land value, less any discounts under the policy. Council considers this to be consistent with horticultural industry practice and recognises the variation in horticultural land value across the district.

Minimum financial benefit

In total 17 submissions highlighted concerns that Council's administrative cost to implement the policy, in terms of the leasing/licencing arrangements, would outweigh the financial benefits received. Furthermore, there was concern that the cost of maintenance for the user plus the proposed rental rate will mean it is not economically viable to use the land.

Several submitters suggested that Council considers nominating a minimum rental fee to ensure only a licence/lease which realises significant financial benefit to Council would be charged.

Council will not charge a rental where this is assessed to be \$250 or less per annum. This will ensure that administrative costs are not incurred on trivial amounts.

Access/exclusive use

Several submissions were concerned about the exclusive use of land, and commented that Council should only lease land on an exclusive basis, or offer a discount on market rates if Council cannot guarantee exclusive use. Other submitters were concerned that access would be compromised by enabling encroachments on unformed roads, where Council is legislatively required to ensure the public has a right of access.

Council decided to make no changes to the policy, as it recognises non-exclusivity of use for unformed roads through discounting the market





rate, and reinforces that public access must be retained on unformed roads (or where there is a non-exclusive lease of a reserve).

Fencing

Some submissions included a request for Council to build or maintain fences along paper road boundaries. Council is required under the Fencing Act 1978 to pay 50 per cent of the costs of fencing on land with recreation reserve status, but not unformed roads and esplanade reserves.

Council decided to continue fencing in accordance with the Act to avoid additional costs that would fall on ratepayers, should Council go above and beyond the legal requirements.

Tenure

Feedback, particularly from the forestry sector, raised concern about the need for guaranteed tenure such that a crop (trees) may reach maturity before needing to be harvested. It was submitted that a term of 35 years is required for forest maturation. Other submissions on horticultural uses noted that avocados are biennial and new kiwifruit orchards can take 'years' to mature before a first harvest.

In order to address the different and specific factors that may influence income generation by different land users, a further policy criteria was added in part 6 of the policy as a 'catch all' to address matters such as orchard maturity, limitations on access etc.

Council decided to include the provision for case-by-case assessments of minimum guaranteed tenure. Council will consider rebates on early termination of a lease, calculated on a pro-rata basis. This will give more certainty to those horticultural uses that require crop maturity to realise the benefit of using the land e.g. forestry, kiwifruit, avocados.

Lack of clarity/information

A number of submissions raised concern on a lack of information provided by the policy, such as how market rates are determined, any emission trading liability (in relation to deforesting), and questions on the exact coverage of reserve areas. The intent of the policy is to provide a framework for lease and licence negotiations. If the policy criteria





become too prescriptive, then this may have the adverse effect of being too limiting in some scenarios.

Council decided that the adopted policy will be explicit its assessment framework of case-by-case assessments, including Council acting in good faith, and additional policy criteria to take into account any matter that may impact on the rental value of the land.

Below are some frequently asked questions regarding this policy:

How much will I have to pay?

This will be determined on a case by case basis under the policy. Firstly, it depends what you are using the land for – this links to the applicable market rate. Then Council will consider discounts to the market rate under the criteria set out in the policy.

Is it possible that I won't have to pay anything?

Yes. This policy is intended to apply to those occupiers of Council land that are deriving a private financial benefit from their occupation. The policy is not intended to seek a rental from those adjacent property owners simply maintaining Council land through non-intensive grazing, mowing or gardening. So if there is no income generated then under the policy the rental amount will be deemed trivial and/or the potential maintenance costs of that land to Council will outweigh any rental charge payable.

What if I don't agree to paying a rental?

Where any existing encroachments exist and the person responsible for that encroachment refuses to enter into a new lease or licence to occupy under the terms of this policy, Council will require the removal of any structures or vegetation from the land within a specified time period. If not undertaken, Council can remove the encroachments or assume responsibility for them at its sole discretion. If provided for in an existing licence to occupy or lease, Council may require the person responsible for the encroachment to reimburse Council for the cost of removal.





What if I don't want to continue my lease or licence to occupy?

You can choose to terminate your lease or licence to occupy under the terms of your existing agreement.

I have effectively maintained Council's land at my cost for some time. Can I invoice the Council for this, or get a credit on my rental going forward?

No. The current value of maintenance by an adjacent landowner will be taken account of in the calculation of any future rental charge payable. Unless you have had a previous maintenance agreement with Council, you cannot invoice Council for maintenance you have undertaken in the past.

I have used an unformed road or reserve for some time. Will the rental be backdated?

No, it will only apply going forward and where incorporated into a lease or licence to occupy agreement.

I have a licence to occupy an unformed road. If I pay a rental then will I have exclusive use of that land?

No. Council cannot enable exclusive use of unformed roads. Section 357 of the Local Government Act 1974 imposes a duty on Council to ensure the road is not obstructed and the public has a right of access. There is no obligation for Council or the occupier to facilitate public access, but the occupier cannot lock gates or erect signs restricting access. This can be at odds with the views of occupiers who wish to have exclusive use. This tension has resulted in disputes between parties - often being escalated to Council for mediation, but Council has no ability to enable exclusive use of unformed roads.

What happens to my existing licence to occupy or lease?

It will continue to apply subject to the current terms, until it expires or either party gives notice to terminate it. You will have the choice as to whether or not you wish to enter into a new lease or licence to occupy (as applicable) with new terms, such as the inclusion of a rental charge.





What is the process going forward to implement the policy?

Council will be progressively implementing the policy, commencing with the higher value or more intensively used areas and will work through all encroachments. Council will contact you in due course if it wishes to discuss your encroachment with you. Should you wish to have the encroachment clarified or formalised sooner then please contact us. Note that if you are selling your property you should notify the prospective purchasers of the encroachment and it may be beneficial to formalise the encroachment prior to sale.

