



**NAPIER**  
CITY COUNCIL  
*Te Kaunihera o Ahuriri*

# Napier City Council Due Diligence: 17 Clark Avenue, Pirimai March 2021



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## Quality control

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## Executive summary

The purpose of this report is to provide due diligence and property advice on the potential acquisition of 17 Clark Avenue, Pirimai, Napier (School Property). The potential acquisition has resulted from an offer-back to Napier City Council (Council) in accordance with section 40 Public Works Act 1981 (PWA) in which Council was identified as the former owner of the School Property prior to its acquisition for a public work.

The Council was advised on 28 January 2021 by Land Information New Zealand's (LINZ) Accredited Supplier, WSP New Zealand Limited (WSP), that the School Property was surplus to requirements and was being offered back to the Council. Under such offer-back circumstances, the recipient has 40 working days to confirm its acceptance to the offer.

The Council requested an extension to the original 40 working day period, to enable sufficient time to undertake due diligence and obtain the necessary internal approvals to purchase the School Property. An extension was approved by LINZ until 12 May 2021.



The Property Group Limited (TPG) has undertaken due diligence on the potential purchase and has completed the following:

- Property Review and Confirmation of Acquisition History
- Review of Market Valuation
- Review of Sale and Purchase Agreement
- Summary of LINZ's disposal process including the next steps should Council elect not to purchase the School Property

- Resource Management Act 1991 (RMA) Planning Review
- Review of Allen Berry Avenue Playground Reserve.

Further information on each of the above areas is provided further in this report. However, based on the due diligence undertaken and in combination with the recommendations outlined below, the offer provided by the Crown is considered fair and reasonable. As such, and subject to Council's internal approval process, the high-level due diligence has not revealed any significant risk that would prevent the Council from acquiring the land and developing it in accordance with its strategic objectives.

## **Summary**

We have provided recommendations throughout this report, but for ease of review, the key points from each section are summarised below:

### **Property Review and Confirmation of Acquisition History**

Council owned the School Property following acquisition from the Harbour Board. It did not own the land for a public work. None of the memorials that will be registered on the title are an impediment to development. Recommendations have been made on removing several redundant memorials.

### **Valuation Review**

The valuation assessment of market value of the School Property as at 1 September 2012 is considered fair and reasonable.

### **Sale and Purchase Agreement Review**

The offer is in order should Council decide to purchase the School Property.

### **Summary of LINZ Disposal Process and Māori Interests**

The process for disposing surplus Crown property is summarised further in this report. Council as the former owner has the first right (of non-Crown entities) to purchase the land as the recognised former owner. Ahuriri Hapū may have an ability to purchase the property through the Māori Protection Mechanism however, there is no legal mechanism for them to be offered the School Property directly should Council not purchase it.

### **Commentary on Designation and Underlying Zoning**

Once the designation is lifted from the School Property, the underlying zoning allows for residential development. Access to the School Property is restricted and limits the development potential. There is potential to provide alternative access across the adjoining Council owned reserve which would unlock more development potential.

## **High Level Review of Allen Berry Avenue Playground Reserve**

The reserve is classified as Recreation Reserve subject to the provisions of the Reserves Act 1977. It is owned by Council. It was identified that Pirimai Kindergarten operates on part of the reserve. Under the reserve's current classification, a kindergarten does not meet the classification requirements. As such, consideration should be given to amending the reserve classification for the part of the reserve that the kindergarten occupies.

There are several options available which could be used to provide access to the adjoining School Property.

## **Property Review and Confirmation of Acquisition History**

### **Acquisition History**

The School Property was transferred from the Napier Harbour Board to The Mayor Councillors and Citizens of the City of Napier by Transfer 220559. The Transfer does not record that consideration was paid. The land is recorded as being transferred pursuant to an agreement between The Napier Harbour Board and The Mayor Councillors and Citizens of The City of Napier dated 31 October 1962 made under the authority of The Napier Harbour Board and Napier Borough Enabling Act 1945.

Prior to the 1931 earthquake, the land formed part of the Ahuriri Lagoon. The land that now forms the suburb of Pirimai was uplifted by the earthquake and became dry land, which vested in the Napier Harbour Board. The Napier Harbour Board and Napier Borough Enabling Act 1945 provided for the Harbour Board to vest land in the Napier Borough Council for the purpose of providing areas for housing and the expansion of the Borough of Napier. Land would be vested in the Borough Council In consideration of the Council developing and subdividing the land.

DP 11689, dated 1967, defines a 34-Lot subdivision of a portion of the former Lagoon. We understand that the Public Works file D.O. 13/139 records that, in 1965, The Education Board of the District of Hawke's Bay approached Council looking for a site for a School in the Pirimai area. Agreement was reached between the parties in 1967 and the School Property was defined as Lot 125 on DP 11689, with title raised for this parcel in the name of the Harbour Board.

Although the transfer does not record consideration, we are informed the Public Works file records that the land was sold by the Harbour Board to the Council in May 1968 for \$12,150.

In October 1968, the Crown registered a compensation certificate against the title to protect their agreement to acquire the land. We understand the consideration paid was \$12,150 (the same consideration Council paid to the Harbour Board).

By Gazette Notice 224567, Lot 125 DP 11689 was taken for a Public School.

### **Registered Interests**

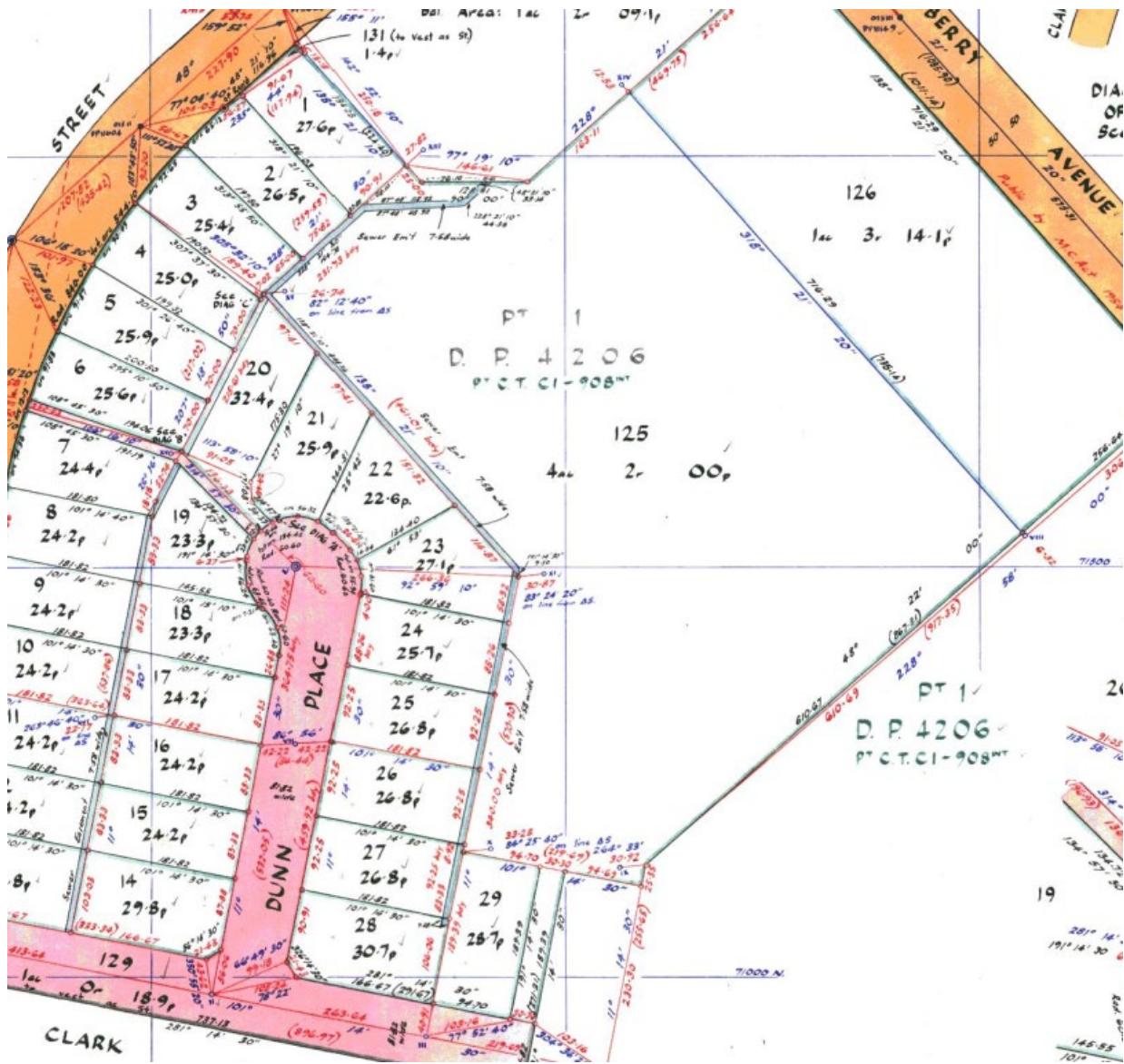
The School Property forms part of the land contained in Record of Title (Gazette Notice) 94033.

RT 94033 is subject to the following registered interests:

- Sewerage easement in gross to Napier City Council granted by Transfer 219867
- The easements created by Transfer 219867 are subject to Section 351E(1)(A) Municipal Corporations Act 1954
- 5601115.1 Certificate that a building consent has issued in respect of a building on the land that is described in Section 36(2) of the Building Act 1991; and
- 5694299.1 Certificate that a building consent has issued in respect of a building on the land that is described in Section 36(2) of the Building Act 1991.

The School Property was acquired subject to a (now expired) fencing covenant, and subject to the sewerage easement in gross to Napier City Council granted by Transfer 219867.

The easement is shown as the area coloured blue on DP 11689, running along the western boundary of Lot 125 from the adjoining shopping centre, towards Clark Avenue. The School Property remains subject to this easement and is shown as Area C on SO 539821.



Two subsequent memorials are recorded on the Title:

- a. Building Consent 5601115.1, dated 2003, noting that Council had granted a building consent pursuant to the provisions of Section 36(2) of the Building Act 1991; and
  - b. Building Consent 5694299.1, dated 2003, noting that Council had granted a building consent pursuant to the provisions of Section 36(2) of the Building Act 1991.

Certificates under section 36(2) Building Act 1991 are registered in circumstances where the land is subject to erosion, avulsions, alluvion, falling debris, subsidence, inundation, or slippage but that Council considers that building works will not accelerate or worsen these risks.

It is unclear whether these Certificates apply to the buildings that have been removed from the area now defined as Section 2 on SO 430975, or whether it applies to the buildings constructed on the area now defined as Section 1 on SO 430975.

Upon the issue of title for Section 2 SO 430975, the notices will be brought forward onto the new title. As any buildings on this parcel have been removed, the notices will not be relevant and Council could attend to registration of documents to have these consents removed from that title.

### **Recommendations**

- Council confirm whether the sewerage easement in gross in favour of Napier City Council is still required. If not, the easement could be surrendered following the issue of title
- Following issue of the new title, Council attend to the removal of the two Building Consent notices.

## **Valuation Review**

The offer price is based on a retrospective market valuation as at 1 September 2012.

We have reviewed the sales of development properties from circa 2012 and we consider the offer price to be supported by the market evidence.

The local real estate market was relatively subdued in 2012, and values have increased significantly since then. We consider it highly likely that the 2021 value of School Property will be significantly higher than the offer price.

We note the School Property has a 2020 Rating Value of \$1,429,000, which seems excessive given the School Property has a narrow access corridor that restricts development potential. This is discussed further in the Planning Review section of this report.

Our analysis of the local market indicates that the School Property may have a current value 'as is' of about \$500,000 to \$600,000 plus GST, if any.

Further, there is potential to add value to the School Property by creating wider vehicle access, which may enhance the development potential of the School Property. Access could potentially be provided over the adjoining recreation reserve, which would likely increase the value of the School Property to more than of \$1,000,000 plus GST, if any.

## **Recommendations**

- The Council accepts the offer price
- The Council considers the optimum location to provide alternative vehicle access to the School Property to maximise development potential.

## Sale and Purchase Agreement Review

The Council has received an offer back of the School Property pursuant to section 40 PWA as the former owner of the School Property.

We have reviewed the Offer of Sale (Offer) and comment as follows:

- The Offer is on the standard LINZ template for offers pursuant to section s40 PWA
- The School Property contains 1.6983 hectares and is shown as Section 2 on SO 539821 being part of the land contained in Record of Title 94033. A copy of SO 539821 showing Section 2 is attached to the Offer. Access to and from the School Property is from Clark Avenue
- The purchase price is \$320,000 plus GST (if any) which is the market value of the School Property as at 1 September 2012
- GST is discussed below
- A Deposit of \$32,000 is payable on execution of the Agreement
- Vacant possession will be given on the settlement date
- The School Property remains at the risk of the Crown until the settlement date or until possession is given to the Council (whichever is the earlier)
- The settlement date is 20 working days following the acceptance of the Offer
- The Offer remains open for acceptance until 12 May 2021 (being the date agreed to pursuant to a request for an extension to the 40 working day period)
- The Crown makes no guarantee that the School Property is suitable for any particular purpose and gives no warranties in respect of the School Property. The Council would be purchasing the School Property as is
- Interest Rate for late settlement (17.3) is not specified in Clause 17.3 but is noted on page 2 as being 10%
- A title for the School Property will issue contemporaneously with the registration of the transfer to the Council after settlement. A title for the School Property will not be available prior to settlement. We do not see any issues with this
- The School Property is sold subject to:
  - A fencing Covenant (Clause 10)  
*The Crown is not liable to contribute towards the cost of the erection or maintenance of any fence between the Property and any contiguous property held by the Crown*
  - Part IVA Conservation Act (Clause 11)  
*This part of the Conservation Act reserves from disposition by the Crown a strip of land abutting the landward margin of certain water boundaries. There are no water boundaries affecting this land so this will have no effect*
  - Section 10 Crown Minerals Act 1991 (Clause 11)  
*This provision has the effect of reserving, in favour of the Crown, every mineral existing in its natural condition in the land*

- The Offer also records that the non-statute minerals remain in a previous title Record of Title for the land (HBC3/34(now cancelled)) and are not included in the sale.
- GST - Clause 19 states that the Offeror is registered for GST and has used the land for taxable supplies. If the Offer is accepted, Council will need to complete the table detailing the GST information at Appendix A. Given Council is registered for GST and will be using the School Property to make taxable supplies the transaction will be zero-rated
- There are no conditions in the Offer.

### **Acceptance of Offer**

Council has the right to accept the Crown's Offer until 12 May 2021 subject to the price being determined by the Land Valuation Tribunal, if applicable.

If the Offer is accepted, a binding agreement will be reached between the Crown and the Council and the Council will be bound to complete settlement in accordance with the Offer. The deposit will also be payable on acceptance of the Offer.

### **Purchase Price**

If the Council wishes to make a counter offer to the purchase price, any new price in a counter offer must be supported by a market valuation as at 1 September 2012. Note that the Crown may consider and respond, but not necessarily agree, to a counter offer. If the difference between the valuations cannot be resolved between the parties, then the price has to be determined by the Land Valuation Tribunal pursuant to section 40 (2A) of the Public Works Act 1981.

Alternatively, Council may execute the agreement agreeing to purchase the School Property at a price to be determined by the Land Valuation Tribunal (Clause 1.2). If Council wish to have the purchase price determined by the Land Valuation Tribunal, then this would need to be included as a special condition in the Offer and initialled by the Council.

### **Counter Offer**

If Council wish to either alter the terms of the Offer or insert any further terms or conditions (other than a counter offer to the purchase price set out above) this becomes a counter offer. The Crown can consider such counter offer and respond, but is not obliged to accept any such counter-offer. The Crown may accept the counter offer, reject the counter offer or make another offer and continue negotiations.

If the Crown accepts any such counter offer, a binding agreement will be reached and the Council will be bound to complete settlement in accordance with the counter offer. If the Crown rejects any counter offer, the Crown is under **no obligation** to keep negotiating with the Council.

### **Recommendations**

- The Offer is in order if the Council decides to accept the Offer
- If Council does decide to accept the Offer, the GST Schedule needs to be completed

## Summary of LINZ Disposal Process and Māori Interests

The School Property has been offered to Council in accordance with section 40 PWA.

The Crown's disposal process under the PWA is as follows:

1. The vendor agency (in this case the Ministry of Education) completes due diligence
2. The property is declared surplus by the Ministry of Education at an operational level
3. The disposal is allocated to a LINZ Accredited Supplier to process the disposal
4. Surplus Ministry of Education properties, such as this, are formally declared surplus pursuant to section 561 of the Education and Training Act 2020, formerly section 71B (previously section 70A) of the Education Act 1989.
5. Clearance to the disposal is sought from other Crown agencies and, in some cases, local councils. The Crown agencies involved in this step are typically Department of Conservation, Heritage NZ, Kainga Ora and the Ministry of Housing and Urban Development. These agencies may either acquire the land or, if there are conservation or heritage values associated with the land, they may seek protection of those values.
6. Offer back to former owners or their successors under sections 40 and 41 PWA is then considered. This involves identifying who the property was acquired from when it was first acquired for a public work. If there are no grounds for exemption from offer back, and the former owner can receive an offer then an offer must be made. If the former owner is not capable of receiving an offer, e.g. they are deceased, then their successors may be entitled to receive an offer to acquire the property.

As part of this step, consideration must be given to the effective date of valuation to set the offer price. Ordinarily the valuation can be at current market value. However, if there have been delays in the disposal process for whatever reason, the valuation may have to be back-dated to a date closer to when the property became surplus to requirements. Note, a property can be practically surplus well-before it is declared surplus.

The decision regarding offer back and date of valuation sits with LINZ Crown property Clearances as the Crown agency that administers the PWA.

7. Once the offer is made the offeree has 40 working days to consider the offer. **This is the step Council is currently in as the offeree.** During this period, the offeree may:
  - sign the offer 'as is', in which case it becomes a binding contract
  - make a counter offer by inserting new terms and amending the price based on valuation advice
  - accept the offer subject to the price being determined by the Land Valuation Tribunal
  - decline the offer
  - not respond to the offer, in which case the offer will lapse at the end of 40 working days from the date it is received
  - request an extension of the offer period.

8. If the offer expires or is not accepted, or there is an exemption from s40 PWA as determined by LINZ, then the next step is to consider Māori interests. This is done either by way of right of first refusal (RFR) in areas where there is a settled Treaty of Waitangi claim or, in areas where there are unresolved claims, via the Māori Protection Mechanism (MPM) which is administered by Te Arawhiti.

The MPM process involves publicly advertising the property. Iwi and Hapū may then make an application to Te Arawhiti to have the property land banked by the Crown for use in future Treaty settlements.

RFR requires the Crown to make a formal offer to sell the property to the entity nominated by the relevant Iwi to receive RFR offers. The offer may be accepted, declined or negotiated by the Iwi. The Iwi may also nominate a third party to acquire the property. The offer price is current market value based on a valuation from a Registered Valuer. The offer does not need to be back-dated.

If the property is in an area that has a Deed of Settlement for a Treaty claim, but the legislation has not yet been enacted, then it is likely that the disposal process will need to go on hold until the legislation is in force.

9. If the property does not sell at MPM or RFR, then it may be sold on the open market. This is typically done by way of tender with at least four weeks of print and online advertising. The vendor agency will seek to achieve current market value for the property.

For the School Property, Council is the former owner and offeree under section 40 PWA. Council has sought an extension of the offer period to 12 May 2021, which was granted by LINZ.

Council can now either accept the offer, decline the offer, or make a counter offer.

- If Council accepts the offer, i.e. Council signs the offer which has already been signed by LINZ on behalf of the Crown, it becomes a binding agreement. Council is then committed to the purchase
- If Council makes a counter offer based on price then it will need to be supported by valuation, or can be referred to the Land Valuation Tribunal
- If Council declines the offer then WSP, as the Accredited Supplier, will move to the next step in the disposal process – MPM.

## Māori Interests

The School Property is within the area of interest of Ahuriri Hapū.

Ahuriri Hapū have signed a Deed of Settlement with the Crown and the Ahuriri Hapū Claims Settlement Bill has had its first reading and has been through Select Committee.

However, we understand progress has stalled due to an inquiry into the mandate of the Mana Ahuriri Trust.

The School Property is not on the list of RFR land attached to the Deed of Settlement and does not meet the definition of “RFR land” in the Ahuriri Hapū Claims Settlement Bill. Therefore, if the Council does not acquire the School Property at the current step in the disposal process, the Crown, via WSP, will submit

the School Property to Te Arawhiti to consider whether it should be processed through the MPM.

By letter dated 22 February 2021 Te Arawhiti advised WSP that “the supporting legislation [to the Deed of Settlement between the Crown and Ahuriri Hapū] has yet to be enacted” and that the School Property “is not listed in the Ahuriri Deed of Settlement and note that the Deed of Settlement does not have an Area RFR.” This confirms our advice above.

Should Council not accept the section 40 PWA offer and the School Property is then submitted to Te Arawhiti, we anticipate that Te Arawhiti may advise that the disposal needs to be paused until the Ahuriri Hapū settlement is resolved. Alternatively, if Te Arawhiti is satisfied that the School Property is not required for any future Treaty settlement claims then they may grant an exemption from MPM. This will not be known until the School Property is submitted to Te Arawhiti.

We understand from Council that Mana Ahuriri have expressed interest in the School Property. However, there is no current legal mechanism for the Crown to sell the School Property directly to Mana Ahuriri.

Regardless, the offer to Council as the former owner precedes the Crown’s obligations to consider Māori interests when disposing of surplus Crown properties.

If Council does not accept the offer, there is no guarantee that Mana Ahuriri, or any other Māori entity, will be able to acquire the School Property.

Therefore, if Council is considering Māori interests as part of its decision-making process for the School Property, then we consider the best approach is for Council to accept the offer to ensure the land is secured and to enable discussions/collaboration with Iwi/Hapū.

## **Commentary on Designation and Underlying Zoning**

The School Property is located within the “Main Residential” Zone in the Napier City District Plan. It is also affected by an overlying Designation for School purposes (Designation Reference: D112). We understand that the Ministry of Education (MoE) will request the removal of the Designation under Section 182 of the Resource Management Act 1991 (RMA), meaning the underlying (residential) zoning applies.

Land development and/or subdivision of the School Property is enabled under the District Plan but requires resource consent as a Discretionary Restricted Activity under Rule 5.12. There is no minimum lot size but for any allotment below 350m<sup>2</sup> a concept plan must be provided at the time of subdivision to demonstrate that a house could be constructed to comply with all relevant District Plan rules.

The narrow (approximately 5.8m) width of the access from Clark Avenue is a major constraint for the future development of the School Property. This width is not sufficient to accommodate a public road in accordance with the requirements of the District Plan or the Council’s Code of Practice for Subdivision and Land Development (CPSLD). No more than eight residential lots are permitted to utilise the existing access as a private right of way. We also note that the physical condition of the accessway will need to meet all engineering requirements in the Council’s CPSLD and a turning head must be provided within the right of way area.

The provision of an alternative vehicle access, such as over the adjoining reserve, could unlock an opportunity for the comprehensive residential development of the School Property. This could be in the form of either a private right of way or a public road.

A summary of the potential access/development options include:

- A private right of way off Clark Avenue – resulting in a maximum of eight lots
- An alternative access is provided via a private right of way off Allen Berry Avenue – an additional eight lots can be accommodated (8 per access or a maximum of 16 in total)
- A public road is provided (e.g. from Allen Berry Avenue), as either the sole access or in addition to the existing access from Clark Avenue – no limit on the number of allotments.

The School Property is not subject to any natural hazard or other notations in the District Plan which could constrain development. Nonetheless, we suggest confirming whether future development could be impacted by natural hazards at either subdivision or building consent stage, particularly given the two memorials recorded on the Record of Title (Building Consent 5601115.1 and 5694299.1).

## **Recommendations**

- Ensure that the designation is uplifted from the School Property under Section 182 of the RMA
- Discuss with Council’s Planning Team and Land Development Advisors whether more than eight lots could be accommodated from this accessway way, if authorised by resource consent
- Investigate with Council’s Building Department whether natural hazards could affect future development at building consent stage

- Investigate options for providing alternative access to the School Property. Options could include a right of way over the adjoining reserve or providing a public road.

## High Level Review of Allen Berry Avenue Playground Reserve

### Reserve Status

The Playground is located on Lot 126 DP 11689. This land shares a similar acquisition history to the School Property. The land was held by the Napier Harbour Board and ownership of both Lots 125 & 126 was transferred to Council by Transfer 220559.

Council held this parcel of land without purpose until 1983. By NZ Gazette 1983 page 3334 (GN 435386.1), Lot 126 DP 11689 was declared to be a recreation reserve in accordance with section 14 Reserves Act 1977. By NZ Gazette 1983 page 4070 (GN 429033.1) the land was classified as Recreation Reserve subject to the provisions of the Reserves Act 1977. We acknowledge both these gazette notices complete the same action - it appears that whilst the first notice declared the land to be recreation reserve, it did not specifically classify the land as recreation reserve; this was remedied by the second notice.

Recreation reserves are administered in accordance with section 17 Reserves Act 1977. Reserves classified as recreation reserve are held for “the purpose of providing areas for the recreation and sporting activities and the physical welfare and enjoyment of the public, and for the protection of the natural environment and beauty of the countryside, with emphasis on the retention of open spaces and on outdoor recreational activities...”. It is required that the public shall have freedom of entry and access to the reserve (subject to the protection and well-being of the reserve).

It is noted that Pirimai Kindergarten is located on a portion of the recreation reserve. Section 16(8) Reserves Act requires that reserves be held and administered for the purpose for which they are classified and for no other purpose. Section 54 sets out the criteria for leasing land held for a recreation reserve; we note that the lease of a kindergarten does not fall under this section. Rather, the lease of a kindergarten is specifically mentioned in section 61(2A)(a), being a lease of a local purpose reserve (rather than a lease of a recreation reserve). Section 61 grants delegation to the administering authority of a local purpose reserve - it is therefore not necessary to obtain the consent of Department of Conservation before granting such a lease.

### Easements

Section 48 Reserves Act permits the administering body, with the authority delegated by the Minister in 2013, to grant a right of way and other easements over any part of a reserve for specific purposes, being:

- a. Any public purpose, or
- b. Providing access to any area included in an agreement, lease, or licence granted under...this Act, or
- c. The distribution or transmission by pipeline of natural or manufactured gas, petroleum, biofuel, or geothermal energy, or
- d. An electrical installation or work as defined in Section 2 of the Electricity Act 1992 [being the fittings beyond the point of supply used to convey electricity, but not including an electrical appliance, or fittings associated with the generation of electricity or in association with distribution or transmission lines], or
- e. The provision of water systems, or

- f. Providing or facilitating access or supply of water to or drainage of any other land not forming part of the reserve or for any other purpose connected with any such land.

It is therefore possible for the grant of easements over the reserve to provide access and electricity, water, drainage and telecommunication services to adjoining properties.

Where the reserve is likely to be materially altered or permanently damaged by the easements, or the rights of the public to use the land for recreation purposes are impacted, Council are required to give public notice of the proposed easements and call for objections and submissions. It is likely that the construction of a right of way would significantly impact the public's ability to utilise the reserve for the purpose for which it was intended (recreation) and public notification would be required. Easements that run under the reserve are unlikely to have any public impact and public notification would not be required.

As an alternative to granting a right of way easement over the recreation reserve, Council could consider:

- g. revoking the reserve status of a portion of the reserve and declaring this portion to be legal road.  
Any proposed revocation would need to be publicly advertised and authorised by Department of Conservation.
- h. completing an exchange under section 15 Reserves Act 1977, with Council exchanging a portion of the School Property for an equivalent portion of the existing recreation reserve (sufficient to form a legal road). Reserve exchanges must be publicly notified and authorised by the Department of Conservation.

### **Recommendations**

- That Council survey the recreation reserve into two parcels and re-classify the land upon which the Kindergarten is located as Local Purpose Reserve (community buildings) or similar.
- Council consider whether a right of way easement (or road) is required over the recreation reserve and determine the appropriate mechanism under the Reserves Act 1977 to achieve this.

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