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South Wairarapa District Council
By email haveyoursay@swdc.govt.nz

PAPER ROAD BYLAW

Introduction

Herenga ā Nuku Aotearoa Outdoor Access Commission (“the commission”) is the Crown agency responsible for providing leadership on outdoor access issues. Our role is to provide New Zealanders with free, certain, enduring and practical access to the outdoors. We administer a national strategy on outdoor access, including tracks and trails. We map outdoor access, provide information to the public, oversee a code of responsible conduct in the outdoors, help resolve access disputes and negotiate new access. We work with groups and individuals with outdoor access interests and aspirations, and we advocate for public outdoor access.

Overview

The council proposes to create a bylaw (“Paper Road Access Bylaw 2025”) to prevent public use of an unformed legal road. The commission’s view is that the proposed bylaw is legally invalid, as it goes beyond the permissible limits of a bylaw. The council is using the bylaw as a de facto way of controlling people on adjacent non-council (private and ahu whenua) land. It would not consider that to be an appropriate measure where a formed road was involved. The bylaw also intends to protect the environment, but goes beyond the mechanisms necessary and appropriate to do so.

The correct process for stopping all public use of a road is contained in the Local Government Act 1974. If the council wishes to prevent public use of the road, it should follow that process and not attempt to do so by an approach such as the proposed bylaw.

Unformed Legal Roads

There is a body of case law affirming that unformed legal roads (“ULR”, sometimes historically called “paper roads”) are legal, with the same status as formed roads. Further, courts have confirmed that unformed roads are legal, notwithstanding that they may not have been marked out on the ground. A leading case from the Privy Council is *Snushall v Kaikoura County*¹.

Land Transport Act 1998

The principal statute for controlling road users (as distinct from administering and maintaining roads) is the Land Transport Act 1998, which sets out the relevant law and provisions for regulations and rules governing road user behaviour. Section 22AB authorises councils to make specific bylaws restricting the use of motor vehicles on unformed legal roads — to protect the environment, the road and adjoining land, and the safety of road users². It does not authorise a bylaw prohibiting use of the road generally, and makes no reference to controlling or prohibiting pedestrians.

Local Government Act 1974

The Local Government Act 1974 sets out “General powers of councils in respect of roads”. This includes the power to “to stop or close any road or part thereof in the manner and upon the conditions set out in section 342 and Schedule 10”³. Stopping a road is permanent. When that happens the road no longer exists as a road. If the council wishes to prohibit public use of a road, this is the appropriate mechanism.

Section 342 and Schedule 10 allow for the temporary closure of a road to “any specified type of traffic (including pedestrian traffic)” when specified circumstances exist, including road works, public disorder, and sporting events. The reasons given by the council for prohibiting use of the road do not fall within those provisions and, if they did, are ongoing and so could not be considered to be temporary.

Effect on adjacent properties

The consultation page says that “the bylaw will limit and regulate public access to the paper road to ensure safety and prevent access to the neighbouring private property” and “recognises that paper roads can adversely impact nearby property owners — through issues like trespassing, biosecurity risks, or disrupted land use”. However, that intent needs to be measured against whether it is the council’s responsibility or within its powers to control those activities and whether, if it is, doing so by prohibiting public access along a road is the appropriate mechanism.

A starting point for that analysis is whether the council would consider similar action appropriate if a landowner in, say, Jellicoe St in Martinborough requested it. It is extremely unlikely that a council would seriously entertain such a proposal. There is no legal distinction between an unformed road in a rural area and a formed urban street, so it follows that the legal, policy and political solutions to any perceived problems should be legally consistent. If someone with a legal right to be on a road moves from the road to adjacent private land and causes a nuisance or damage, that person’s actions are subject to the provisions of civil and criminal law relating to trespass, intentional damage, unauthorised fires and the like. It is not appropriate for the roading authority to limit use of the road to meet those ends. In addition to legal remedies, landowners can use fences or other mechanisms to define their property and prevent or discourage unauthorised access from a road.

¹ *Snushall v Kaikoura County* (1923) NZPCC 670

² Land Transport Act 1998, section 22AB (1)(g)

³ Local Government Act 1974, section 319(h)

We note that s22AB(1)(g) of the Land Transport Act 1998 does allow bylaws to control motor vehicles “to protect the ... the road and adjoining land ...”. That would only apply to damage done by motor vehicles, as distinct from people who travelled in those vehicles.

Protection of the environment

Another stated reason for the bylaw is that “off-road vehicles have caused serious harm to the land, including deep ruts and erosion”. In the case of such damage within the road parcel, the council is within its powers to create a bylaw designed to stop or limit motor vehicles using the road⁴. Those powers do not extend to prohibiting use by non-powered means of travel, and, of course, pedestrians and cyclists do not cause “deep ruts and erosion”, so preventing their use of the road, even if permissible, would not be justified on those grounds.

Legal access vs practical access

We emphasise that our submission relates entirely to the question of whether it is appropriate to restrict or prohibit use of the legal road that is within the surveyed road parcels. We note that there are vehicle tracks that lead around the coastal platform between Cape Palliser and Stonewall Scenic Reserve, which are not always within the road parcel. We accept that anyone on those tracks where they are outside the road parcel will be on private land (including ahu whenua land) and thus outside the council’s direct jurisdiction. Such people will, as noted above, be subject to legal provisions governing trespass, intentional damage, unauthorised fires and the like.

It will be incumbent on anyone using the road to stay within the road parcel at all times, unless they have permission from the adjacent landowners to be on their land. This will likely mean that access is not particularly practical for some users, but that is not of concern to the council or the adjacent landowners. Tools, such as our Pocket Maps app⁵, can assist users in determining whether they are on the road parcel.

Connectivity

The unformed legal road continues north, through the Stonewall Scenic Reserve and on to Ngapotiki Road. The effect of the bylaw would be to lose that connectivity between Cape Palliser and White Rock. This is a recognised bikepacking route.

Foreshore access alternative

A further stated reason for preventing access is that “ongoing sea erosion has already claimed part of the paper road and surrounding coastal areas, making access unsafe and unsustainable in some locations”. However, the FAQ page says “the foreshore is accessible from the carpark, where you can walk to the surf”. Such access is inherently more dangerous than walking on the legal road. Prohibiting pedestrian access on the road is for public safety while promoting a less safe alternative is contradictory. Further, if pedestrian access on the road is causing issues for adjacent landowners, then the same holds for pedestrian access on the foreshore. Prohibiting pedestrian access on the road will not achieve the stated aims.

Use of road stopping provisions

If the council wishes to prohibit use of the road, it should use the stopping provisions set out in the Local Government Act 1974. We note that if, after notification, there are objections but the council still wishes to proceed, the matter is referred to the Environment Court. The Court has consistently declined to allow stopping where doing so is for a private benefit but at the expense of a public benefit. In this instance,

⁴ Land Transport Act 1998, section 22AB (1)(g)s.

⁵ <https://www.herengaanuku.govt.nz/maps/pocket-maps>

stopping the road would benefit the adjacent private landowners at the expense of the right of the public to use the road.

Is bylaw most appropriate?

Section 155 of the Local Government Act 2002 requires a council to determine whether “a bylaw is the most appropriate way of addressing the perceived problem” and, if so, “whether the proposed bylaw is the most appropriate form of bylaw”. The perceived problems can be summarised as damage to the road, damage and related issues on adjacent land, and public safety.

Regarding damage to the road, if the council intends to prohibit all public use, a specific legal process for prohibiting public use of a road already exists (the Local Government Act 1974 procedure. This shows that the answer to the first question in s155 is “no”. However, if council intends to prevent damage to the road, then a bylaw that only prohibits vehicles may be appropriate.

If it were necessary to consider the second question in s155 (which, as result of the answer to the first and in the draft bylaw’s present form, it is not), then the overreach contained in the proposal, where pedestrians are to be banned ostensibly to prevent damage to the road surface, shows that answer to be “no” as well.

Regarding damage and related issues on adjacent land, again, the answer to the first question is “no”. The bylaw would control use of the road. It does not control any behaviour or actions on adjacent land, and it is not the role of the council to do so. That is the role of the landowners, who already have recourse to existing civil and criminal legal remedies.

Regarding safety, the courts have held that if the council carries out no work on an unformed legal road, there is no liability⁶. The council also has no role in protecting members of the public from natural hazards or from their own actions and judgements so, yet again, the answer to the first question is “no”.

Precedent

The council’s proposed approach is novel and has not been used before. Roads exist to provide public access, but the bylaw seeks to prohibit public access. It is therefore likely that it would be subject to judicial review. We note that, within the last year, a council has had a bylaw quashed because, in the submission of the applicant, it was *ultra vires*⁷. On the facts of this case, we believe that a similar outcome is likely.

Term of bylaw

Without implying that we accept that the proposed bylaw is appropriate or valid, we note that the website FAQ page states that the bylaw has a term of three years. This is misleading, as the draft bylaw merely states that it will be reviewed within three years.

Conclusion

The effects of the proposed bylaw are:

- to bypass the process outlined in Schedule Ten of the Local Government Act 1974,

⁶ Hocking v Attorney- General (1963) NZLR 513 (CA); Tombleson v Far North District Council [2020] NZDC 12171.

⁷ New Zealand Motor Caravan Association Incorporated v Queenstown Lakes District Council [2024] NZHC 2729

- to use a bylaw to control activities on land adjacent to the road that should be controlled by the landowners,
- to seek to control damage to the road (which, in itself, may be appropriate) by attempting to control people (such as walkers and cyclists) who cannot damage the road, and
- to mistakenly assume that the council has responsibility for the safety of individuals on an unformed legal road.

We therefore strongly oppose the enactment of this bylaw.

We wish to be heard in support of this submission.

Ngā mihi,

David Barnes

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