

USING AND STOPPING UNFORMED LEGAL ROADS

Abstract This paper describes the role of unformed legal roads (paper roads) in providing for public access to and through land. With increasing demands for more access to land, the Walking Access Commission has identified unformed roads as a convenient and secure way of enhancing public use of land for access. The new mapping system (WAMS) provides an effective way of informing the public and promoting access. But adjoining land proprietors may seek to stop these roads to acquire private control of them and councils may wish to dispose of them as surplus to requirements. A recent Environment Court ruling examines the arguments for and against stopping unformed legal roads, and determines that such decisions should not be based on reasons for stopping, but on potential public benefits of retention.

Keywords Walking access, road stopping

INTRODUCTION

Roads provide a vital physical link between people and the land. The communication and movement needs of our society have always been of paramount importance. 'Rural roading is the historical foundation of rights of access to the outdoors in New Zealand, and appropriately, the Crown has always been its guardian' (Hayes 2008:140). In the early years of settlement when land parcels were granted (and most particularly in relation to Maori land parcels), provision was made for land to be taken for roads without requiring compensation. Furthermore, roads are readily taken under the Public Works Act 1981, being perhaps the least contentious public work. The requirement to extend public access continues in the provisions to set aside Marginal Strips under the Conservation Act 1987 and Esplanade Reserves under the Resource Management Act 1991 (again without compensation), and in developing government policy and legislation like the Walking Access Act 2008. Generally, roads are the most permanent land use category, and they are not easily stopped or disposed of in spite of the stopping process established under the Local Government Act 1974. A recent Environment Court decision in Central Otago has reiterated the legal priority of the public interest in roads which contributes to public access to and through land.

UNFORMED LEGAL ROADS FOR ACCESS

There is an extensive network of unformed legal roads (often colloquially referred to as paper roads) throughout New Zealand: by the reckoning of the Ministry of Agriculture and

Forestry (MAF), about 56,000 kilometres of them (Hayes 2008). This amounts to 112,000 hectares. Most of this area will be occupied and used by adjoining landowners, providing a significant windfall benefit for those proprietors – free use of land, not subject to rates charges. Since an amendment of the Counties Amendment Act 1972, this land is vested in the territorial authorities, but they are usually relieved of the practical duty of caring for that land – they have no responsibility to form such roads, and only vaguely defined responsibility to keep them clear of obstructions. Unformed legal roads, therefore, have significant value attaching to them, and while it may be convenient for the landowner to support the *status quo* and retain the unencumbered use of the land, it is possible that local authorities could capitalise on the land value, undertake to stop these roads, and sell the land to adjoining owners. However, the difficulty of this course of action is that unformed legal roads provide a very valuable public access resource in the current era of calls for more public access to and through public and private land.

The Walking Access Commission is charged under the Walking Access Act 2008 to promote walking access to public land that is free, certain, enduring and practical. One of the major issues identified in previous public consultation¹ was the problem of identifying public land that could be utilised for walking access. This was partly a mapping problem – there were no maps that satisfactorily distinguished between public and private lands. The Commission has therefore established a Walking Access Mapping System² (WAMS) to serve the public need to identify public access. This system overlays cadastral, topographic, and photographic data and usefully illustrates the legal status of land, the nature of the topography, land occupation and use,

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and the nature and extent of any formation. From a survey point of view this is hardly accurate in defining boundaries between private land and a legal road, and the use of handheld GPS, while being a useful approximate guide, is not decisive in differentiating between public and private, but it does illustrate the existence of legal access routes.

Unformed Legal Roads become very obvious on the WAMS and indeed they have been identified by the commission as the most productive way to enhance public access. The legal rights over this land are exactly the same as for any formed road. The public have the right to pass and repass for unobstructed access (Hayes 2007: 4). Now that the public can more conveniently identify the existence of an unformed road across open farmland, there is every chance that user conflicts will escalate. Farmers, who to date have probably enjoyed uninterrupted use of the road, will perhaps feel that their farming operations (safety of stock and equipment) are threatened, while assertive countryside walkers, newly aware of their public rights, may more aggressively assert their rights of access. The Walking Access Commission has therefore also prepared a Code of Conduct to guide appropriate and considerate behaviour by everyone. This code is sensible and logical, and provides useful advice about rights and responsibilities. Even more practical, concise and relevant to actual behaviour while enjoying outdoor recreation is the Department of Conservation's New Zealand Environmental Care Code.³ Application of, and compliance with both these codes should mitigate potential conflicts.

Rural proprietors have enjoyed the benefits of the use of unformed legal roads through their land, and have often expected that that longstanding occupation and management of the land has developed into a set of exclusive or protected rights, but recent legal and policy clarifications have dispelled such expectations. However, that is not to say that farmers do not have legitimate and understandable concerns about freeing up and indeed promoting public access over unformed legal roads. Such roads may have been imperfectly delineated in early compass and chain surveys, so their actual location may indeed be doubtful. They are unlikely to be identified on the ground by survey pegs or even fences. They are also very likely to pass over difficult terrain and not correspond to convenient pathways. The intrusion of the public onto these lands may well disrupt farming operations. Stock may be disturbed, fences may obstruct access and be damaged when crossed, there may be bio-security risks from invading organisms, and rubbish and debris may be left behind. For all these reasons several attempts to have such roads stopped have come before the Environment Court: a recent example follows.

STOPPING UNFORMED LEGAL ROADS – THE CENTRAL OTAGO CASE

In a recent Environment Court case; *In re Central Otago District Council*, the Court heard an appeal by a party interested in

outdoor access – Central Otago Recreational Users' Forum (CORUF), against a district council decision to stop an unformed road traversing Moutere Station just north of Alexandra. It is informative to examine the issues and arguments made both for and against the stopping.

Presumably, the Moutere Station applied for the stopping of several roads in order to formalise their longstanding use and occupation of the roads. This would allow them to purchase the road reserve from the council, formally incorporate the land into the farm, and be assured of the privacy and protection of the farming operations on that land. Among the claimed private benefits were included; the integrity of farming operations especially the separation of groups of animals; the ability to exclude biosecurity risks; the protection of stock from disturbance (e.g. the risk of mis-mothering); and the reduction of fire hazard caused by smoking by potential users.

The council defended their decision to stop the road by asserting that it would rationalise the regional roading infrastructure; remove council responsibility for maintenance (e.g. weed control); and provide some income from the sale of the land to the adjoining proprietor.

The Council followed the process for road stopping as set out in the Tenth Schedule of the Local Government Act 1974; having a survey plan prepared showing 'Road to be Stopped'; providing justification for the road stopping including provision of alternative access; notifying affected parties; and advertising (on the land and in public notices) the intention to stop the roads. The council considered that the roads in question were no longer a necessary part of the roading network; the road in question was never used; no one would be denied access to their property; the council would never form the road; there were appropriate alternatives for recreational users; and other land could better provide for recreational needs. The council subsequently confirmed a decision to stop the roads.

The access group (CORUF) objected to the stopping, and it was referred to the Environment Court to confirm or decline the road stopping proposal. In the event, there seemed to be some uncertainty about which roads were included in the objection, so two sections of road stopped by the council were not considered and they remain stopped. The remaining section of road therefore needed examination by the Court.

The approach of the court followed precedent,⁴ but is particularly instructive now that there is such a strong policy-driven focus on the use of unformed legal roads to cater for the increasing demands for more and better public (walking) access to the outdoors. In spite of all the logical reasons and benefits accruing to both the council and the adjoining proprietor for the road stopping, the Court made it quite clear that 'the issue is the need for the road, not the stopping' (para15), and:

'Therefore the effects of the road on the operations of [the adjoining proprietors] are of little relevance in the

consideration of this road stopping. If there is a reason and purpose for the road to remain, then an inconvenience to them is not the Court's concern. The roads themselves are the important consideration and for the road stopping to be appropriate those roads must be able to be seen as serving no public purpose.⁴⁵

In response to the various arguments that were brought to support the stopping, the Court decision has highlighted the following issues:

Lack of past use. It is likely that most unformed paper roads are used and occupied by adjoining owners; they are likely to be fenced off and apparently as publically inaccessible as the surrounding private property. For this reason, non-use in the past is to be expected, especially given the barriers to access; the land presents as if it is private, with no ground marking or other evidence of its public character, and therefore "there is no indication of any public right of users" (para 27), and a lack of readily available public records to indicate public rights. The record now available, notably the online WAMS, has highlighted these public roads, both for the benefit of the public user, and also to the apparent concern of the adjoining owners. Thus, future use patterns are likely to be very different from past use.

Access to property. There is every likelihood that all adjoining 'ownership blocks'⁶ have practical, reasonable and legal access,⁷ so the stopping of an unformed legal road through the land will have little impact on other ownership blocks, and the council may consider that therefore, an unformed legal road serves no purpose. That situation may change, however, in the future, if or when individual parcels or titles within an ownership block are separated from the block in some future subdivision.

Rationalising council roading infrastructure. Council responsibility for its roading network is a considerable concern for most district councils. For example, it was stated in this case that roads accounted for 21.5% of the council's budget (para 31). It is unlikely that council will consider adding to that burden by forming more roads, unless there is a strongly identified need. Unformed legal roads usually do not unduly burden councils; 'expenditure on unformed roads is confined to addressing issues relating to access when they are raised by road users or ratepayers and spraying noxious plants when these are identified by the Otago Regional Council' (para 32). Furthermore, the value of the stopped road is likely to be relatively low and will not contribute significantly to council income (in this case the proposed stopped road was worth \$12,000). There would only be one possible purchaser of the land, and while that purchaser may have increased security of tenure over the road space and enable the owner to enforce his/her exclusive use, it would merely confirm and settle the existing (informal) use and occupancy, and contribute little to the farming operation's financial position. A council's evidence about the need for, or likelihood of, future formation

is irrelevant to retaining the road for walking access. It may be argued that too much access may impose too high a cost on councils, but in most situations the cost is not high and 'the public benefit of retaining the road for recreational purposes is greater than the public cost of doing so' (para 44).

Recreational use of the road. Roads remain the most secure way to provide for public rights of use and passage – more secure than walkways, marginal reserves, easements, and the like. Formed roads serve vehicular traffic well, but are often dangerous, noisy, and far from relaxing for a walker. The outdoor walking access experience is usually enhanced by being in natural surroundings (open grasslands, or varied green landscapes – i.e. on unformed legal roads) rather than built environments, although some level of amenity may be beneficial (including boardwalks, stile, and trimmed vegetation). Except where unformed roads are draped over very intimidating landscapes (like canyons, cliffs, swamps), there is every likelihood that they will provide for recreational use, especially so if they link to other accessways, lead to special places or form a convenient recreational circuit. It is the unformed road network that provides the best opportunities for walking access (a point made clear by the Walking Access Commission's policy). The availability of alternative routes, that may suggest that a road is non-essential and should be stopped, is not necessarily an argument to support stopping – in fact, as the Environment Court highlighted in this case, the existence of choice and variety of routes may protect and enhance the public purpose by adding to 'the variety of opportunities available, particularly for those seeking gentler exercise off formed roads and in a clearly rural setting' (para 42).

Negotiating new road alignments. It is certainly true that many unformed legal roads may not provide the most direct, convenient or easiest route through the land, and it may be possible for landowners to provide more convenient routes (for both the land owner and for public passage) in exchange for stopping an inconvenient route. This would be acceptable when the road alignment could be shifted from a position bisecting a working landscape to a perimeter alignment especially if the way was more user friendly, and entry, exit and way points were more conveniently traversed, but this would best be achieved by negotiation with local interested parties to avoid objections to any road stopping. There are also many routes and places to get to (landmark features, viewing sites, or places of historic or scientific interest), which are not accessible by the existing road network. If proprietors can offer additional access through their land to such sites, then they may think they have a bargaining tool to facilitate the stopping of other roads. However the Court may not accept such an exchange if there appears to be too great a separation between what is being gained and what is being lost, and again if there is any objection then the court has no power to enforce or offer alternatives, make deals, or impose conditions (para 45) when confronted with a road stopping case. This concept of environmental compensation (e.g. accepting some compromise to public access in return for

the provision of more valuable access elsewhere) is similarly beyond the scope of the court's jurisdiction although it may feature between owners, councils and public stakeholders. Indeed the Walking Access Commission reports that this type of negotiated exchange is often done. In the Ruapehu District, in substitution of an overgrown unformed legal road, a landowner has provided practical access that is acceptable for the farming operations, serves the public need, and the Walking Access Commission has funded construction of a stile and access signs (NZWAC 2011b). Such alternative access is, however, not protected by any mechanism within the title, so cannot be viewed as providing any legal rights or adverse possessory claims.

CONCLUSION

In response to the arguments discussed above, the Court reversed the council's decision to stop the unformed legal road. Recent decisions of the Environment Court, including the case described herein, indicate that it is unlikely that any stopping of unformed legal roads will be successfully applied if any objector can support the future utility of the road for recreational use, even if vehicular use will never be available. In other words, it does not matter if the road has never been used before, the Court will protect the public roading infrastructure despite landowner or council desires to stop roads.

Unformed legal roads will continue to be promoted by NZWAC to enhance public access to the outdoors. Roads are increasingly likely to be further protected in the future for the recreational benefits they can provide. Free, certain, enduring and practical access is likely to be further enhanced.

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Counties Amendment Act 1972 (since repealed).

Local Government Act 1974 No 66 (as at 20 June 2011), Public Act.

Public Works Act 1981 No 35 (as at 01 May 2011), Public Act.

Resource Management Act 1991 No 69 (as at 01 October 2011), Public Act.

Walking Access Act 2008 No 101, Public Act.

(Endnotes)

- 1 Land Access Ministerial Reference Group 2003, and Walking Access Consultation Panel 2006.
- 2 <http://wams.org.nz/wams/>
- 3 <http://www.doc.govt.nz/upload/documents/parks-and-recreation/plan-and-prepare/environmental-care-code/environmental-care-code-checklist.pdf>
- 4 Previous Town Planning Appeal and Environment Court cases have reached similar conclusions. E.g. *Proposal by Matamata County Council* 1998 and *Re an application by Waitaki District Council* 2006.
- 5 Para 17 – quoting *Re an application by Waitaki District Council C74/2006*
- 6 Land held under single ownership which may nevertheless be in multiple parcels and/or multiple titles.
- 7 If that was not the case then the Property Law Act provides a remedy for landlocked land.