

"GET OFF MY PATCH"

Road Encroachments

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Overview

- Legal roads: both formed/in use, and paper roads
- If formed/in use, includes all land up to the boundaries on either side (“road reserve”)
- Subject to common law rights
 - For members of the public to pass and repass
 - For owners of properties having frontage to the road to get access to road

Overview

- Obstructions that interfere with common law rights are allowed by statute
 - bus shelters (s336 LGA 1974)
 - street furniture eg benches, planter boxes (s334 LGA 1974)
 - utility operators eg phone booths, equipment boxes (Telcos Act 2001)
- Common law allows some “give and take”
 - eg roadside stalls (*Paprzik v TDC*)
 - eg garages (*Frecklington v WCC*)

Overview

- But see stricter approaches in *Fuller v MacLeod*, *Moore v MacMillan*
- Questions:
 - What is the scope of councils to permit encroachments and other private use of the road?
 - What is the scope of councils to charge for that use?

Power to authorise encroachments

- Extent of power
- Not an easy or obvious answer
- Will typically depend on a number of factors, such as
 - To what extent are the common law rights interfered with?
 - What is the topography, ie does this tend to dictate the location of eg a driveway or retaining wall?
 - How long has the encroachment existed?
 - Was the encroachment consented to by the local authority and other landowners?

Interference with common law rights

A. Right of passage

- Interference may constitute a public nuisance
- Compare cases
- *Paprzik v TDC* (1991)
 - Council issued licences for mobile shops under bylaws
 - Held: the customary uses of urban streets included a wide range of public activities, including commercial activities
 - Operation of mobile shops did not unreasonably interfere with public right of passage
 - The ordinary citizen's right of passage was not an absolute one, and some degree of obstruction may be acceptable if limited in extent and duration

Interference with common law rights

Right of passage (cont)

- *Moore v MacMillan (1977)*
 - Cattle yards were built over a paper road
 - Held: the public have an absolute right at common law to pass and repass over the highway without hindrance
 - no person may have exclusive possession of a road, to the exclusion of the public
 - Therefore owner of cattle yards could not maintain a trespass claim

Interference with common law rights

B. Frontager's right of access

- Interference with this right may constitute a private nuisance
- Compare cases:
- *Fuller v MacLeod*
 - Proposed driveway would run right along the frontage of neighbour's property
 - Held the proposed driveway would interfere with the neighbour's right of access as frontager

Interference with common law rights

Frontager's right of access (contd)

- *Frecklington v WCC*
 - Proposed garage the subject of a licence granted by WCC
 - Licences are provided for under bylaw
 - Neighbour was still able to access road reserve
 - Proposed garage would not be an unreasonable interference with public right of access along road
 - Facts distinguished from *Fuller v MacLeod*
 - No challenge to validity of bylaw

Powers to deal with encroachments

- Local Authorities have the following powers to deal with encroachments on legal road surface
- These powers are subject to the limits as to interference with common law rights referred to above

Legislation

- Section 357, of the Local Government Act 1974: Penalties for damage to roads
- Section 45 Public Works Act 1981: Land held for public work may be leased etc

Legislation (contd)

Section 357 Local Government Act 1974

- (1) Every person commits an offence who, **not being authorised by the council** or by or under any Act,—
- a) encroaches on a road by making or erecting any building fence, ditch, or other obstacle or work of any kind upon, over, or under the road, or by planting any tree or shrub thereon; or
 - b) places or leaves on a road, any timber, earth, stones, or other thing; or
 - c) digs up, removes, or alters in any way the soil or surface or scarp of a road; or
 - d) damages or, except with the consent of the council, removes or alters any gate or cattle stop lawfully erected across any road; or

Legislation (contd)

- e) allows any water, tailings, or sludge, or any filthy or noisome matter, to flow from any building or land in his occupation on to a road; or
- f) wilfully or negligently causes or allows any oil, or any liquid harmful to sealed or paved road surfaces or likely to create a danger to vehicles on such surfaces, to escape on to any road having a sealed or paved surface; or
- g) causes or permits any timber or other heavy material, not being wholly raised above the ground on wheels, to be dragged on a road; or
- h) causes or negligently allows any retaining wall, foundation wall, or fence erected on any land, or any batter or slope of earth, or any building, erection, material, or thing, to give way or fall so as to damage or obstruct a road; or
- i) digs up or removes any stone, gravel, sand, or other material from a river bed within 50 metres of a bridge or ford on any road or any dam on which a road is constructed; or
- j) does or causes or permits to be done any act whatsoever by which any damage is caused to a road or any work or thing in, on, or under the same

Legislation (contd)

- Fine \$1000 plus \$50 per day for continuing offence, and council may recover cost of removal of encroachment/ obstruction and repairing any damage
- Section 357 provides council with the power to carry out enforcement of removal of encroachments, and to authorise encroachments, but subject to the limits referred to above
- A further power that may be relevant is section 45 Public Works Act 1981
- **Section 45 Public Works Act 1981**
- 45 Land held for public work may be leased, etc

Legislation (contd)

- (1) If any land is held for any public work under this or any other Act or in any other manner, the Minister or local authority, as the case may be, may grant a lease or tenancy of the land or a licence to occupy the land on such terms and conditions as he or it may think fit
- Arguably section 45 PWA does not add anything to the general power to authorise encroachments in section 357 above, and to grant appropriate contractual (licence) rights under the power of general competence
- Bylaws: territorial authorities have the power to pass a bylaw to regulate the occupation of the road surface
- Role of Policy

Legislation (contd)

- Ad hoc: risky approach, as this leads to inconsistent decisions, and is more easily challenged
- Regulatory: a well devised regulatory framework helps in guiding consistent decision making, and reduces the risk of challenge
- Bylaws and policies: contrasting approaches
 - Former NSCC bylaws and policy sought to avoid/remove encroachments and other private use of roads in general
 - Policy contained a matrix of setting out criteria for assessing severity of encroachment

Legislation (contd)

- WCC bylaws and policy expressly contemplate use of road reserve for garages and carports, and policies set out create detailed rules regarding licensing
- This includes rationale based on unique topography with steep hills, little flat land and inherited street layout
- States that unformed road, airspace and subsoil may be used for other activities provided this does not unreasonably interfere with existing or possible future uses of legal road
- Contains evaluation criteria, and a fee structure to reflect private and public benefits

Charging

- In principle the power of general competence includes the right to charge for the use of the road in the same way as any other local authority asset
- Three issues:
 - There may be specific statutory framework that limits or prohibits charging eg under Electricity Act, Telcos Act
 - The charging if allowed should be transparent and consistent. This should be supported by policy, and bylaws where appropriate
 - Need to avoid risk of challenge to grant of exclusive possession of road surface: may be mitigated by allowing termination on reasonably short notice

Encroachment Types

- **Minor Encroachments**
- These are encroachments that do not impede or obstruct the public's right of passage, or obstruct access to another private property
- They may provide public benefit, eg:
 - By improving amenity and landscape value e.g. controlled plantings within the berm
 - By removing parked vehicles off roads which are narrow and where there are safety issues e.g. parking platforms or pads

Encroachment Types (contd)

- **Substantial Encroachments**
- Substantial encroachment such as houses, buildings, swimming pools etc. illegally occupying legal road
- Possible reasons:
 - Historical reasons eg before regulatory consents were required, or before plans were sufficiently accurate
 - Error in plans, or insufficient information provided in consent application
 - Public's misunderstanding of two different roles of territorial authorities:
 - Compliance role ie building consents, resource consents
 - Landowner consent role as road controlling authority

Encroachment Types

- Applicant may mistake a consent granted by a council i.e. a building consent as also being a landowner consent to occupation of part of the road corridor
- Building consents: applicants must provide site plan (and sometimes survey plan), and title to prove ownership
- When such substantial encroachment occurs which takes away the public rights of unimpeded access along road, or private right of access, and it is not appropriate to allow the situation to remain, there are two ways to deal with this:
 1. Enforcement of removal of the structures under section 357 LGA 1974
 2. Road stopping and sale if the land is no longer required for road. This may be subject to the realignment of the road to provide an alternative route

Licensing

- Leasing of the road surface is arguably not permitted as it entails exclusive possession, and is therefore in conflict with the general public's right of passage
- Licensing which does not give exclusive rights of possession can be used to authorise encroachments
- However a licence that is in substance a lease, will be treated as a lease in law
- Any licence should ensure that the local authority can terminate on reasonably short notice, for any public work or for any other reason
- Where appropriate a licence fee or other charge can be made

Licensing (contd)

- Where the structure is permanent such as a retaining wall, or a raised driveway, it is prudent to require an encumbrance instrument to be registered against the applicant landowner's title
- This ensures that any future landowners have notice of the licence, and are bound to maintain (and ultimately remove) the structure in accordance with the licence

Ownership of Structures

- In some cases ascertaining the actual owners of structures on unformed road can be difficult where there is no obvious adjoining landowner
- The Property Law Act can be utilised to follow process to [advertised](#) for structure owners
- If they cannot be identified or ownership cannot be proved, the structure's ownership reverts to the territorial authority

Case Study “South Coast Baches”



4688
17731

177317

PLAN OF
LAND TO BE PROCLAIMED UNDER SECTION 101^d
OF THE PUBLIC WORKS ACT, 1908

& N.R. IN
SEC^s 5, 6 & 37 BLK^s XII & XIII PORT NICHOLSON S.D.

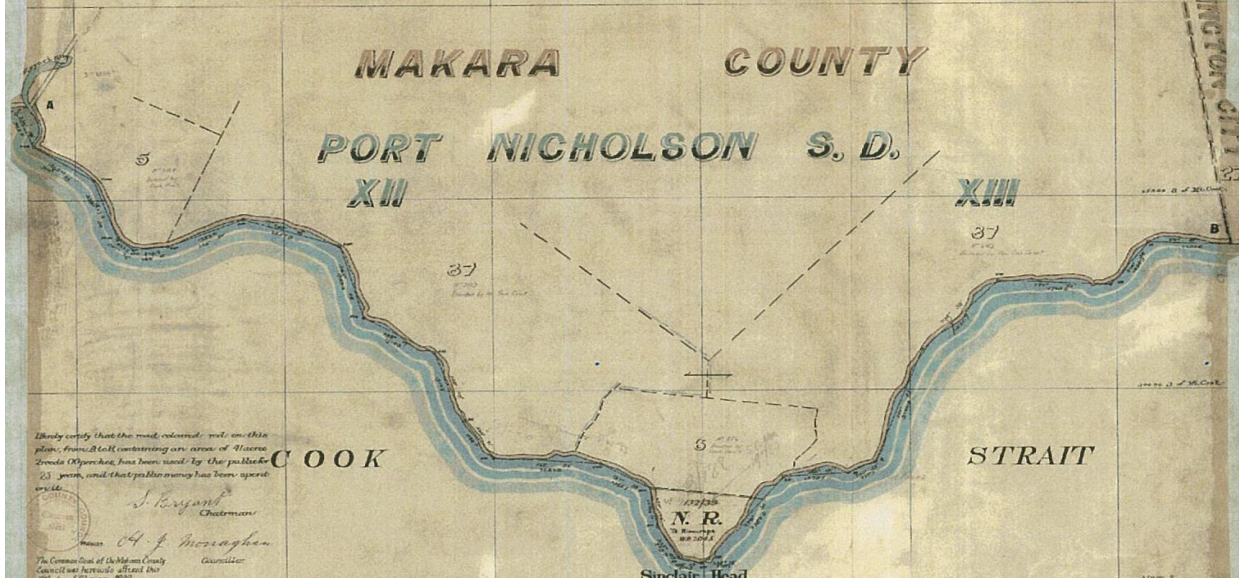
TERAWHITI REGⁿ DIST^t

Scale: 10 Chains to an Inch

MAKARA COUNTY

PORT NICHOLSON S. D.
XII XIII

WELLINGTON CITY



I hereby certify that the road, coloured, red, on this plan, from A to B, containing an area of 4 acres 2 roods 0 perches, has been used by the public for 23 years, and that public money has been spent on it.

J. Kavanagh
Chairman

James O'Connell
County Clerk

The Common Council of Makara County Council has heretofore assented to this plan, this 15th day of February, 1911.

Wilfred A. Beeth
County Clerk

Area: 41ac. 2r. 00p.

LEGALISATION NOTE
Pursuant to Section 101^d of the Public Works Act 1908 the Minister proclaims that the above area of land is required for a public work.

Approved
C. J. ...
1911

17731
Ref Plans B 1772 & 1809
L 111
1911

17731
1911
60

South Coast Baches case study (contd)



South Coast Baches case study (contd)

- Within the Wellington City Council territorial area lies the rugged south coast which has an unformed legal road which runs along the shoreline
- Situated partially on part of this unformed road are two of the historic South Coast baches
- These baches were built on what was private land which was originally part of the Owhiro Station. The baches are now situated partially on legal road and partially on reserve land
- These baches were built in the early 20th century and have designations under the Historic Places Trust so therefore cannot be removed or modified without the Trust's prior consent
- The legal road on which the baches are partially situated is within 20 metres of the line of mean high water springs

South Coast Baches case study (contd)

- Therefore, if road stopping were to occur it would result in the land becoming an esplanade reserve
- The road stopping would be required to be carried out under the Local Government Act 1974 due to its proximity to water and reserve, to ensure public transparency
- Once the road stopping has occurred a further legislative process would be required under the Reserves Act to either revoke the reserve status, or to reclassify the land to a status which would allow continued occupation of the dwellings
- When all legislative process have been successfully completed a lease of the baches' footprint could be drawn up

Salient Points

- It is for the territorial authority to decide whether to allow the encroachment to remain, instigate enforcement for removal, or carry out a road stopping, depending on the type and extent of the encroachment, and other circumstances
- It must be made clear in building and resource consents that the approval is given in council's capacity as a "regulatory" authority, and not in council's capacity as a "landowner"
- The public's right of unimpeded access over legal road must be maintained

Tips

- Ensure that before you grant a licence, there is no obstruction to road frontage access for all adjoining landowners (except with consent, and where that consent will bind future owners)
- Public interest must always prevail over private interest in the occupation of public land
- Ensure that you develop a road encroachment policy so there is a consistent, fair, transparent approach to dealing with encroachments

Acknowledgments

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