

ROSS DOWLING MARQUET GRIFFIN

B A R R I S T E R S A N D S O L I C I T O R S

Telephone: (03) 477-8046
Facsimile: (03) 477-6998
Website: www.rossdowling.co.nz
Postal Address: P.O. Box 1144, Dunedin 9054, New Zealand
DX YP80015
Office Address: Second Floor, Savoy Building, 50 Princes Street,
Dunedin 9016, New Zealand

Partners: Alastair Logan BA (Hons) LLB
Simon Anderson LLB (Hons)
Nathan Laws BA LLB
Clare Toomey LLB
Associates: Adam Keith BA LLB
Kate Logan BA (Hons) LLB
Thea Sefton LLB
Diane Hubbard LLB (Hons)

Email: Phil.Marshall@dcc.govt.nz

22 April 2022

Dunedin City Council
PO Box 5045
DUNEDIN 9054

For: Phil Marshall

Dear Phil,

Tunnel Beach Carpark and Walkway

Introduction

1. I refer to your email of 24 February 2022 and our subsequent correspondence and oral communications.

Background

2. The Dunedin City Council's Parks and Reserves Department applied for resource consent for a carpark for the Tunnel Beach walkway. The application was subject to limited notification. One opposing submission called into question the lawfulness of the walkway.
3. The application was amended.
4. As far as material, the amendments added the Department of Conservation as an Applicant, and sought, if necessary, consent to changes to the alignment of the Tunnel Beach walking track.

Applicant's Position

5. The Applicant relies on section 4(3) of the Resource Management Act ("RMA"). In summary section 4 provides that the RMA binds the Crown, with exceptions set out in that section.
6. As far as material, section 4(3) reads:

- "(3) Section 9(3) does not apply to any work or activity of the Crown within the boundaries of any area of land held or managed under the Conservation Act 1987 or any other Act specified in Schedule 1 of that Act (other than land held for administrative purposes) that—*
- (a) is consistent with a conservation management strategy, conservation management plan, or management plan established under the Conservation Act 1987 or any other Act specified in Schedule 1 of that Act; and*

- (b) *does not have a significant adverse effect beyond the boundary of the area of land.*"
7. The land which the Tunnel Beach track crosses, from Tunnel Beach Road to the sea, is Crown land. The land is a recreation reserve under the Reserves Act 1977. The Reserves Act is one of the pieces of legislation listed in Schedule 1 of the Conservation Act 1987.
 8. The Department of Conservation has made the Otago Conservation Management Strategy 2016. Appendix 1 of that strategy is headed "*Work or activities of the Department of Conservation that may meet the requirements of section 4(3) of the Resource Management Act 1991 for exemptions from land use consents in Otago*". Beneath this heading, the strategy adds "*this table is presented to meet the requirements for enabling exemptions under section 4(3) of the Resource Management Act 1991*".
 9. Tunnel Beach and the coast south of Dunedin is a location specifically identified in that appendix.
 10. The works and activities listed in Appendix 1 include "*tracks, roads and car parking areas for visitor purposes*".
 11. The activity scope includes, so far as might be relevant :
 - "1. *Upgrade of existing tracks and roads to meet current departmental service standards using current alignment.*
 2. *Service standard upgrades of existing tracks and roads through partial or complete realignment to take advantage of better grades and terrain features or to incorporate elements of natural or historic landscape.*
 4. *Improvements to any existing track as considered necessary in order to mitigate any environmental impact, health and safety concern or visitor risk or to provide improved access for any management purpose.*"
 12. As the alignment of the walkway is to change, only 2 and 4 of this list can apply.
 13. Management actions listed include:
 - "1. *Construction of tracks ... using cut to fill excavation, cut to waste excavation and levelling using hand tools, motorised equipment and machinery.*
 2. *Excavation of batter slopes to a maximum height of 1.5 metres.*
 3. *Vegetation removal from the full width of the track corridor and discretionary removal of any vegetation beyond the track ... that is considered hazardous or that may adversely impact upon track components such as batter slopes, drainage or track surface materials.*"
 14. The amended application describes the modification of the track as follows:
 - 14.1. 1.1, page 1: "*... to modify the Tunnel Beach Walkway to provide a more appropriate grade for track users and establish additional viewing platforms to improve the user experience and reduce risks to users and the environment*".

- 14.2. At 2.6, page 7: *“Due to the steep grade of the track and lack of viewing platforms and other basic visitor facilities the current walking track and facilities do not provide an opportunity to adequately mitigate visitor risks, or protect the coastal herb field ecosystem present on the tunnel beach headland. The track is not adequate for the two visitor groups who use this site: being the day visitor and short stop traveller.*

In order for DOC to continue exercising its functions under the Conservation Act 1987 interventions are required to the existing track, particularly in the context of demand from up to 110,000 visits per year and the associated requirements of the OCMS to provide recreational opportunities to cater for this demand after OCMS [Otago Conservation Management Strategy].

- 14.3. At 4.1, page 12, DOC proposes to:

- 14.3.1. Realign the track to a more suitable grade, less than 10 degrees;
- 14.3.2. Establish new viewpoints described at 4.2, pages 12-13;
- 14.3.3. Install seating;
- 14.3.4. Erect interpretation panels; and
- 14.3.5. Provide access to the *“coastal zone and view shafts to multiple, prominent features of cultural significance”*.

- 14.4. At 4.3, pages 13-14, planting and remediation are also proposed.

- 15. DOC claims that the realigned track will not have a significant adverse effect beyond the boundary of the reserve; in particular because of topography, neither the track nor people using the track, can be seen from adjoining residences.
- 16. DOC argues that section 9(3) RMA does not apply. That subsection provides that no one may use land in a manner which contravenes a district rule without a resource consent.
- 17. If a resource consent is required, it would be, under 2GP, for a full discretionary activity with the activity being *“Community and Leisure - Large Scale”*.
- 18. DOC's primary position is that the modifications to the Tunnel Beach track are within the scope of section 4(3) and no resource consent is required. DOC contends the track re-alignment is anticipated by and consistent with Appendix 1 of the OCMS and there will be no significant adverse effect beyond the boundary.

Opponents

- 19. The opponents Michael Varsanyi and Anya Durling live at 40 Tunnel Beach Road, a property which adjoins both the proposed car park and the Tunnel Beach walking track.
- 20. They have lodged a submission opposing resource consent being granted to both the carpark and the track upgrade.
- 21. In the submission, they assert:

- 21.1. The existing track was not lawfully established at its current usage.
- 21.2. They do not accept that the track has been lawfully established at all or that any of the effects of the use of the track can be excluded under section 104 of the Act.
- 21.3. DOC cannot rely on section 4(3).
- 21.4. While the track itself is not a concern to them, the scale and intensity of both existing and proposed track usage has significant adverse effects on their amenity and privacy and on their enjoyment of the natural character of the coast.
- 21.5. They object to the increase in usage which they anticipate from improved car parking facilities and an easier track gradient: *"if all these limitations are removed, the use of the track will increase significantly"*.

History

- 22. DOC advises that on 18 October 1982 an agreement was made between the Commissioner of Crown Land and the then owner of the property, a Mr Walker, to allow the creation of a walkway from Tunnel Beach Road. The track was to be open to the public.
- 23. The track was formed. Public use commenced in 1983.
- 24. In 1989 survey of the track alignment was completed. Eventually, an easement in gross in favour of the Crown was registered over the Walker property. The easement permits public use of the track.
- 25. In 1992, the Tunnel Beach walkway was formally gazetted under the New Zealand Walkways Act 1990.
- 26. In late 2019, the Crown acquired the whole of the property. It is now a recreation reserve. As such is it managed by DOC under the Reserves Act 1977.

Legal History

- 27. When the track was formed the Town and Country Planning Act 1977 was in force. That statute came into effect on 1 June 1978.
- 28. The 1977 Act repealed and replaced the Town and Country Planning Act 1953.
- 29. At that time, the Walker land was in the Taieri County (not Dunedin City).
- 30. In accordance with the 1953 Act, the Taieri County Council had notified a proposed District Scheme on 24 November 1967. That scheme became operative on 2 November 1970.
- 31. In that scheme the site was zoned Rural B.
- 32. Under ordinance 11, conditional uses in the Rural B zone included *"buildings and land for or connected with indoor or outdoor recreation"*.
- 33. In accordance with the 1953 Act, a conditional use could not be undertaken without a planning consent.

34. On 8 October 1977, the Taieri County Council was merged with other local authorities to form the Silverpeaks County Council.
35. The Taieri County District Scheme remained in place.
36. On the repeal of the 1953 Act, the Taieri District Scheme was deemed to be wholly operative under the 1977 Act: section 178(3) Town and Country Planning Act 1977.
37. In addition, the 1977 Act provided that where there is an operative District Scheme, the undertaking of any public work by the Crown which was not permitted as of right could not be commenced until either the public work had been designated in a District Scheme or planning consent obtained: section 116 of the 1977 Act.
38. There was no designation in the Taieri District Scheme for the Tunnel Beach track.
39. There is no evidence that planning consent was granted for the track.
40. In 1981, the Silverpeaks County Council notified the Silverpeaks District Scheme. The land in which the site is located is zoned Rural G. Ordinance 12.3 provided that buildings and land used for or connected with indoor or outdoor recreation was a conditional use, for which planning consent would have been required. In this respect, the Silverpeaks scheme mirrored its Taieri County predecessor. Silverpeaks County Council's proposed District Scheme did not become operative until 1986.
41. It therefore appears that at the time the Tunnel Beach track was formed, planning consent was required under the operative Taieri district scheme but not obtained. If that is correct, then the track was not lawfully established.
42. From a planning law perspective, the contractual and other arrangements between the Crown and Mr Walker are immaterial. Likewise, the registration of the easement and the subsequent Gazettal of the track as a walkway under the New Zealand Walkways Act 1990 are irrelevant. They do not mean the track was lawfully established under the 1977 Act. On the evidence available, it was not. For completeness, I note this question is not addressed in the amended application. The applicants may be able to provide further information.

The Implications

43. Assuming the analysis that the track was not lawfully established is correct, then it is necessary to consider the implications.

Section 4 RMA

44. The first matter to consider is section 4 of the RMA.
45. Section 4(3) is not contingent on the original work being lawfully established.
46. Section 4(3) applies:
 - 46.1. Within the boundaries of any land held or managed under the Conservation Act or any statute specified in Schedule 1 of that Act: the track is within a recreation reserve held by the Crown and managed by it under the Reserves Act 1977 which is an enactment specified in Schedule 1 of the Conservation Act; and

- 46.2. If the work or activity is consistent with (as far as relevant) a Conservation Management Strategy: the upgrading of the track is consistent with the Otago Conservation Management Strategy: in particular Appendix 1, activities 2 and 4; it is unclear whether what is proposed is within the management actions and environmental impacts set out in Appendix 1; these matters need to be explicitly addressed by the applicants in order to be able to rely on s4(3); it is important to note that the work or activity does not have to give effect to the OCMS; it must be “*consistent with*” the OCMS; s4(3) does not demand strict compliance; it is sufficient if the work or activity is broadly of the kind, scale, intensity and effect envisaged by the OCMS; ultimately that is factual inquiry for the decision-maker; and
- 46.3. Only if the work or activity does not have a significant adverse effect beyond the boundary of the area of land on which the work or activity is to take place. Here that means outside the recreation reserve. Whether there is a significant adverse effect is a fact specific enquiry for the decision-maker. That evaluation will depend, in this case, on the evidence adduced by the applicants and submitters.
47. If the decision-maker considers all the requirements of s4(3) are not met, then resource consent is required for a full discretionary activity.

Section 104 RMA

48. That application must be considered in accordance with section 104 of the RMA.
49. One matter that must be considered is any actual or potential effects on the environment of allowing the activity.
50. Conventionally, the Environment Court has not taken into account existing usage of land and its effects on the environment if that use was not lawfully established.
51. To put it another way, if the track was not lawfully established under the Town and Country Planning Act 1977, then, the track and all its effects must now be considered as if the activity did not in fact exist. All effects of track usage will need to be considered, not just the incremental increase in effects compared to current usage.

Conclusion

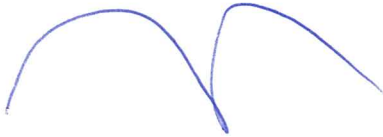
52. From the information which is available, the track was not lawfully established in compliance with the Town and Country Planning Act 1977. Planning consent was required under the Taieri County District Scheme for outdoor recreation. No planning consent was obtained. There was no designation for the track. It was not, in today’s parlance, a permitted activity.
53. However, section 4(3) of the RMA does not make lawful establishment of an activity which is the subject of that subsection a prerequisite.
54. Section 4(3) may apply because the track is within the boundaries of land held by the Crown under the Reserves Act 1977, as a recreation reserve, with the Reserves Act being an enactment specified in Schedule 1 of the Conservation Act 1987.

55. To rely on section 4(3), it is necessary for the Applicants to establish that the work (that is the realignment of the track), is consistent with the Otago Conservation Management Strategy 2016.
56. It is unclear from the application whether what is proposed is within the management actions and environmental impacts set out in Appendix 1 of that strategy. Evidence will be needed to address these points. If this decision-maker is not satisfied that the work is consistent with the strategy, then resource consent is necessary.
57. Section 4(3) does not apply if there will be a significant adverse effect outside the recreation reserve. There are competing contentions by the Applicants and opposing submitters. These will need to be evaluated by the decision-maker. If the decision-maker considers there will be a significant adverse effect or effects from use of the track (not from the carpark-which cannot rely on s4(3)), then a resource consent is required by the Applicants for the track and its use.
58. In considering whether there is a significant adverse effect, the assessment must be carried out as if the track had not been established and is not in use.

Yours faithfully

ROSS DOWLING MARQUET GRIFFIN

Per



A J Logan

Partner

Email: alastair.logan@rossdowling.co.nz