

Before the Commissioner
Appointed by the Dunedin City Council

Under the Resource Management Act 1991 (**RMA**)

In the matter of an application by **Dunedin City Council** and the **Department of Conservation** for consent to construct and operate a carpark at Tunnel Beach, Dunedin

Dunedin City Council and **Department of Conservation**

Applicants

Legal submissions on behalf of Dunedin City Council and the Department of Conservation on the scope of section 4(3) of the RMA

20 May 2022

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May it please the Commissioner:

- 1 These submissions respond to the Commissioner's Minute of 10 May 2022, requesting the applicant to provide legal submissions on the scope of s 4(3) of the RMA, in response to counsel for the submitter's submission that s 4(3) only relates to the actual construction works and subsequent maintenance by the Crown, and not subsequent activities that take place, being the use of the track by the public.
- 2 Counsel submit s 4(3) applies to the construction and maintenance of the track by the Crown, as well as to its subsequent use by DOC, and its subsequent use by the public. Counsel refer to the applicant's earlier submissions on the application of s 4(3) in full.
- 3 Section 4(3) relevantly provides:

4 Act to bind the Crown

...

- (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.
- 4 Section 4(3) provides an exemption to the requirement to have a resource consent where the work or activity to be undertaken is on any land held or managed under the Conservation Act 1987 (or any Act in Schedule 1 of the Act, which includes the Reserves Act), where the work or activity would ordinarily require a land use consent.
- 5 Section 4(3) only applies to works and activities of the Crown.
- 6 There is no dispute s 4(3) can apply to the construction and maintenance of a track. The use of a track by the Crown is also capable of being

considered an “activity of the Crown” for the purposes of s 4(3). So, for example, use of a track by DOC staff would be an activity of the Crown.

- 7 Counsel submit s 4(3) is to be broadly construed, such that subsequent use of the track is also within the Crown’s activity. The activity is making the Crown land available for a public walking track. Because the land in question is a reserve, the Crown is legally obliged to allow the public to walk over it.¹ There is a strong legislative direction to allow public access over the reserve.²
- 8 Broadly, use of land for a track is capable of being an “activity” that can be regulated by planning documents. It is submitted that whether use of the land for a track is an activity needs to be considered by reference to s 9 of the RMA.³
- 9 But for s 4(3), resource consent is required to do something that would otherwise contravene section 9. Section 9 is permissive in that it allows uses of land unless regulated in a district plan. While rules in a plan may require resource consent for activities not specifically referred to in a plan,⁴ plans do not provide rules for every conceivable activity.
- 10 The RMA does not define “work” or “activity”. The words “use” and “activity” in s 9 are interchangeable.⁵ “Use” is a bundle of activities.⁶ “Use” is broadly defined,⁷ and includes to use a structure in, on over land, and “any other use of land”. It is the Crown’s intended use of the land that is relevant.
- 11 In *Ngataranga Bay 2000 Incorporated v Minister of Defence (No 2)*,⁸ the High Court considered the application of s 4(2) of the RMA in the context of a decision by Minister of Defence that works and activities on Devonport Naval Base as being for “defence purposes” were necessary for national security. Anderson J stated that the terms “work” and “activity” are broadly abstract and may reasonably be applied to the totality of works or activities

¹ Reserves Act 1977, s 17(2)(a).

² Resource Management Act 1991, s 6(d); New Zealand Coastal Policy Statement, policies 18 and 19.

³ The meaning of legislation must be ascertained from its text and in the light of its purpose and its context: Legislation Act 2019, s 10.

⁴ Resource Management Act 1991, s 76(4)(e).

⁵ *Shell Oil New Zealand Limited ad Rodney District Council* (1993) 2 NZRMA 545 (PT), at 7; *Donkin v Board of Trustees of Sunnybrae Normal School* (1997) 3 ELRNZ 126, [1997] NZRMA 342, at 11.

⁶ *Donkin v Board of Trustees of Sunnybrae Normal School* (1997) 3 ELRNZ 126, [1997] NZRMA 342, at 12.

⁷ Resource Management Act 1991, s 2.

⁸ *Ngataranga Bay 2000 Incorporated v Minister of Defence (No 2)* (1992) 2 NZRMA 308.

comprising that which may fairly be regarded as a comprehensive work". The Court found that there can be no hesitation in applying the terms broadly to a project, however aptly one component of it might itself be a work or activity.⁹ In the same way, the construction of the track is one activity that comprises a more comprehensive activity, which includes the Crown making use of the land to provide a public walkway.

- 12 Theoretically, a rule in a plan could regulate the use of a track or road. If such a use of land is described as an activity in a district plan, then resource consent may be needed (depending on the status of that activity).¹⁰ It is submitted that the word "activity", when read in this wider statutory context, should be given a broad meaning. It can include the use of land for a public walking track.
- 13 Accordingly, counsel submit that DOC's intended use of the recreation reserve as a public walkway, including the consequential intended use of the track by the public as a walkway, is an "activity of the Crown", on this land.¹¹
- 14 It is further submitted that this large and liberal interpretation will best attain the statutory purpose, which includes avoiding, remedying, or mitigating any adverse effects of activities on the environment.¹² That was the approach taken by the Planning Tribunal in *Cooke v Auckland City Council*,¹³ in which it was held that although to call a building an "activity" strained the statutory language, it was an "activity" within the meaning of s 17 of the RMA in that case.
- 15 It is submitted the same reasoning should be applied here. When read in the context of s 9, it is an activity within the meaning of s 4(3).
- 16 In the present situation, if the use of the recreation reserve for a public walking track was not able to be considered as an "activity of the Crown", adverse affects that could arise from the use of the track by the public would be outside of the ambit of statutory scheme. If the use of track was not able

⁹ At 12.

¹⁰ Resource Management Act 1991, s 87A.

¹¹ The relevant land is managed by DOC under a plan established under the Conservation Act 1987, and in accordance with the Reserves Act 1977. It is DOC's function under s 6 of the Conservation Act to administer the Reserves Act, and to manage the land for conservation purposes; and to foster the use of natural and historic resources for recreation, and to allow their use for tourism.

¹² Resource Management Act 1991, s 5.

¹³ *Cooke v Auckland City Council* A063/96 [1996] NZRMZ 511 2 ELRNZ 271, at 19.

to be part of the bundle of activities undertaken by the Crown, effects arising from its use would not be relevant to the s 4(3)(b) consideration.

- 17 Overall it is submitted both constructing and making the track available for use by the public (consistent with the land's status as a recreation reserve administered by the Crown) are works and activities of the Crown on this land. These activities are exempted from any s 9(3) requirement by s 4(3).
- 18 The Commissioner has requested further information from the applicant under s 41C(3) of the RMA, including further information from the Senior Acoustic Consultant Brendon Shanks, regarding his noise assessment of users of the track in relation to the submitter's property. This information would not be relevant to the s 4(3)(b) assessment, if a narrow interpretation was favoured.
- 19 Section 4(3) contemplates a situation where if adverse effects such as those arising from the use of a track on public conservation land will be significant, DOC's activity is to be regulated under the RMA. Any other adverse effects can be addressed under conservation legislation.
- 20 Crucially, if the use of the public walking track was not an "activity of the Crown" for the purposes of the RMA, then it would not be something that could regulate the Crown's use of the land by planning provisions at all.
- 21 In other words, it is not possible to have it both ways: it cannot be case that the track (and the use of it) is not an "activity of the Crown" for the purposes of s 4(3) of the RMA; but that it is an "activity of the Crown" for the purposes of s 9(3) of the RMA the Dunedin Second Generation District Plan (**2GP**).
- 22 A narrow interpretation could lead to absurd results. In a situation in which resource consent was needed to use a track, DOC would be enabled to build and maintain the track on public conservation land, but only DOC staff would be able to use the track, unless members of the public sought resource consent to use it as well.
- 23 To require DOC to obtain resource consent to allow the public to use the track would require a finding that the track is an activity DOC needs consent to perform, in other words, an "activity of the Crown". Conversely, if the Commissioner was to find that the use of the track was not an "activity of the Crown", the Crown could not obtain consent to undertake the activity.
- 24 Here, while it is submitted s 4(3) applies to the track, the use of the track would not require resource consent in any event, as the activity does not fall within the definition of "Sport and Recreation" in the 2GP, as set out in paragraphs 76-84 of the applicant's submissions of 5 May. In particular,

the walking track is not a “use of land ... for organised indoor and outdoor sport or recreation activity...”, nor is the separately defined term “walking track” a part of the “Sport and Recreation” definition, indicating there was no intention to regulate the use of public walking tracks as a Sport and Recreation activity.

Conclusion

- 25 Counsel submit s 4(3) of the RMA applies to the track in the present case. The intended use of land for a public walking track is an “activity of the Crown” on this land.
- 26 If the Commissioner is minded to conclude that the use of the track is not an activity of the Crown, it follows that the Crown cannot be required to seek resource consent for its use under s 9(3) either.
- 27 Even if the track was considered not to be an activity of the Crown, the 2GP does not restrict the use of the walking track, and so no resource consent is needed for its subsequent use in any event.

Dated 20 May 2022