

23 May 2022

MEMORANDUM TO:

MEMBERS OF THE HEARINGS COMMITTEE

Commissioner Ros Day-Cleavin

Resource Consent Application LUC-2020-631, 30 Tunnel Beach Road, Green Island

Please find enclosed the following:

Applicant's response to minute 1 issued on 10 May 2022

- a) Legal Submissions on behalf of DCC and DOC
Refer to pages 1 – 6
- b) Additional Information from Senior Acoustic Consultant (Brendon Shanks)
Refer to pages 1 – 3
- c) Additional Information from Beca (Wade Robertson)
Refer to pages 1 – 10

Thank you

Wendy Collard

GOVERNANCE SUPPORT OFFICER

Encl

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

Applicant's solicitors:

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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

18 May 2022

Dunedin City Council
c/o Anderson Lloyd
Level 12, Otago House
477 Moray Place
Dunedin 9016

Attention: Michael Garbett

Dear Michael

TUNNEL BEACH (LUC-2020-631) - RESPONSE TO MINUTE 1 FROM COMMISSIONER

The Commissioner has issued a Minute (1) requesting additional information on the impact of noise from the proposed track realignment. This letter responds to the Commissioner questions and confirms that the conclusions of my noise assessment have not changed.

The proposed alignment brings the track closer to the site boundary but not sensitive areas

The Commissioner has asked that I confirm:

- that the proposed track realignment would bring the track to within approximately 10m of the site boundary of 40 Tunnel Beach Road, and
- that, based on this, my assessment properly considers the impact of the modified walkway and viewpoints 1 and 2 on the property at 40 Tunnel Beach Road.

I can confirm that I agree that the proposed track realignment would bring the track to within approximately 10m of the site boundary of 40 Tunnel Beach Road. However, it is important to distinguish between the distance to the site boundary and the distance to appropriate assessment locations. My assessment is based on predicted noise levels received at the notional boundary of the dwelling and the horse paddocks that were identified as sensitive by the submitter Anya Durling in her submission and evidence.

The 2GP requires compliance at the notional boundary

The Dunedin City Council (DCC) Second Generation District Plan (2GP) requires compliance with the noise rules at the notional boundary of a dwelling in the Rural Residential zone (20m from any side of a residential building, or the site boundary where this is closer to the residential building). This requirement acknowledges that not all areas of a site in a rural/residential environment are sensitive to noise, and they should not be assessed in the same way. The notional boundary is indicated on Figure 1.

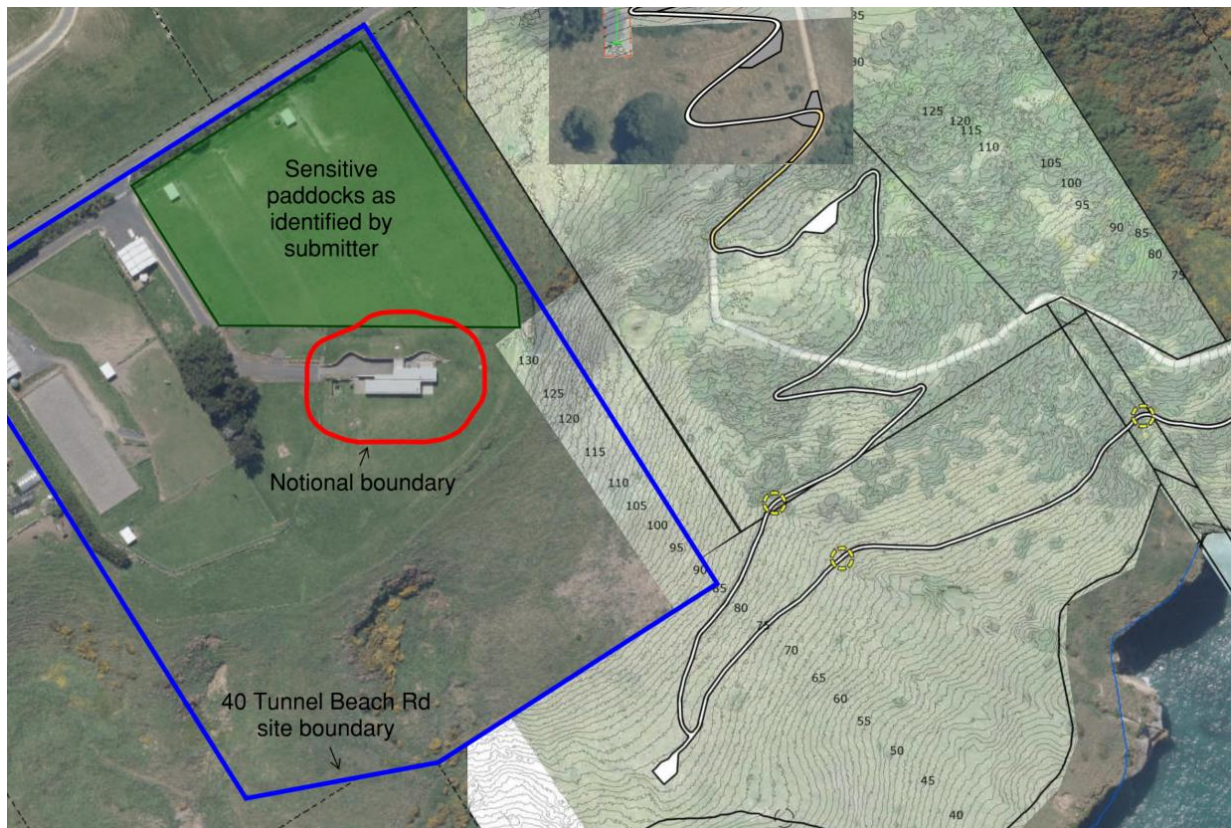
I have assessed noise to other sensitive areas of the site identified by the submitter

Anya Durling has raised concerns about the effect of noise on their horses and identified paddocks used for breeding and training racehorses. While compliance with the 2GP noise limits is not required at these locations, I have included these horse paddocks in my assessment to address the potential effects on horses.

In my evidence I referred to the walking track not coming closer to “the paddock or the notional boundary of 40 Tunnel Beach Road”. I acknowledge that the distinction between the horse paddocks and other parts of the site that are not sensitive to noise was not clear.

For clarity, Figure 1 shows the site boundary and the sensitive areas used in my assessment. This shows that the track does come closer the site boundary, but not the areas of the site that have been considered sensitive in my assessment.

Figure 1: Indicative assessment areas and site boundary



Noise at the closest part of the site would still comply with daytime noise limits

To provide some assurance that noise levels will still be reasonable, I have predicted the noise level at the closest point of the site boundary (even though this is not a sensitive area and compliance with 2GP limits is not required here).

I predict that noise from people on the track would still be below the daytime noise limit (55 dB L_{Aeq}) at the closest part of the site (approximately 10m from the track). Viewpoint (VP2) is located around 50m from the site boundary. I predict that noise from people at VP2 would be 35-40 dB L_{Aeq} .

Based on the lack of sensitivity in these areas, I consider that this level of noise is reasonable and that there would be no adverse noise effects to this part of the site.

I do not consider that requiring a 1.8m barrier is a suitable consent condition

The submitter has suggested a consent condition that requires a 1.8m high timber fence around the viewing platforms to mitigate adverse noise effects. The Commissioner has asked that I provide advice on the suitability of this condition.

I do not believe that a noise barrier is suitable or necessary for two reasons:

- 1) To provide a significant reduction in noise, the barrier would need to block line of sight between the people on the platform and the receiver. Based on the topography, I do not believe that a 1.8m high barrier would block line of sight to the full area of the platform. Further analysis of the cross sections would be required to determine how high the barrier would need to be to block line of sight.
- 2) As stated in my evidence and in the hearing, I have used a group of people in an outdoor dining area as a conservative (high) estimate of the potential noise from groups walking on the track. Even with this assumption, the predicted noise level from people on the track received at the notional boundary and horse paddocks (as shown on in Figure 1) is less than 30 dB L_{Aeq} . This is more than 25

decibels below the daytime noise limit. I consider that any noise effects from people on the track would be negligible, regardless of the existing noise level. Therefore, it is not appropriate to require a timber fence because of noise mitigation.

Based on this, I do not consider that a 1.8m high barrier represents the best practicable option to reduce noise effects.

Yours faithfully

MARSHALL DAY ACOUSTICS LTD



Brendon Shanks
Associate

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477 Moray Place
Dunedin 9016

19 May 2022

Attention: Michael Garbett

Dear Michael

Response to Commissioner Questions

The following is in response to the further information and specific questions asked by the Hearing Commissioner in Section 2 of Minute 1 issued 10 May 2022. I copy the questions in italics and provide my response below.

Did you visit the property located at 40 Tunnel Beach Road for the purpose of informing your assessment of the landscape (including rural-residential amenity and natural character), visual effects and cumulative visual effects of the walkway modifications on this property?

1. No. I did not access 40 Tunnel Beach Road during my site visit.

If yes, please explain how any landscape, visual, and any cumulative effects of the walkway modifications on this property were considered. If not, please advise me of the implications of this on your assessments and conclusions.

2. Based on the Commissioner's own site visit observations and the photos attached to Anya Durling's evidence I accept that parts of the proposed walkway modifications are visible from 40 Tunnel Beach (the Property).
3. On that basis I accept that the assertion made in Paragraph 35 of my Evidence is incorrect and the proposed walkway modifications are visible, to varying degrees, from the southernmost portion of Ms Durling's property, proximate to the existing fence line and steep hill faces immediately to the South.
4. From an assessment methodology perspective, the utilisation of a 'reverse view' approach to visual assessment (i.e. looking from a proposal back towards a potentially affected dwelling or property) is not an uncommon approach to assessing visual effects when access to a particular property has not occurred.
5. The use of representative viewpoints to assess visual effects of a proposal on multiple locations (e.g. using a public road to represent several dwellings or properties that share a similar outlook) is another accepted approach to assessing visibility and subsequent visual effects of a proposal on a particular property without having direct access to that property.

6. Both approaches carry an element of risk and while neither are ideal or preferred over direct access, they reflect accepted industry practice and can provide a sound approach/ methodology to visual assessment.
7. Acknowledging that portions of the proposed walkway modifications are visible from the Property I turn now to the implications on the assessment and conclusions provided in Paragraphs 61 – 73 and 86 (b) of my evidence.

ASSESSMENT OF EFFECTS:

8. My assessment of the **physical effects** of the proposed walkway on the coastal landscape is unchanged – they will be very low. (Paragraphs 61 – 67 of my Evidence)
9. **Associative effects** will remain positive in line with Paragraph 72 of my Evidence.
10. Regarding **perceptual effects**, it is important to firstly address the matter of ‘viewpoint sensitivity’ that exists across the Property. Namely, how sensitive to the introduction of the walkway is a particular viewpoint.
11. This matter is traversed in Paragraph 31 and 32 of Bridget Irving’s legal submission. For clarification, the comments in my evidence regarding rural-residential dwellings weren’t implying that dwellings are the *only* location on a property that matter when assessing visual effects. However, in my experience it is generally accepted that dwellings and immediate outdoor living areas tend to be the *most* sensitive locations regarding perceptual effects. These are followed by areas that are regularly used but perhaps in a more periodic and transient way and then areas that are of lower amenity and/ or located far away from a proposed change in the landscape.
12. When assessing the potential effects of the proposed walkway there are notable differences in the nature and sensitivity of the elevated, flat pastureland where Ms Durling has taken photos from, which includes the immediately adjacent hill slope and the steeper hill faces that slope away to the southernmost property boundary. An indication of these areas are shown in red and blue below:

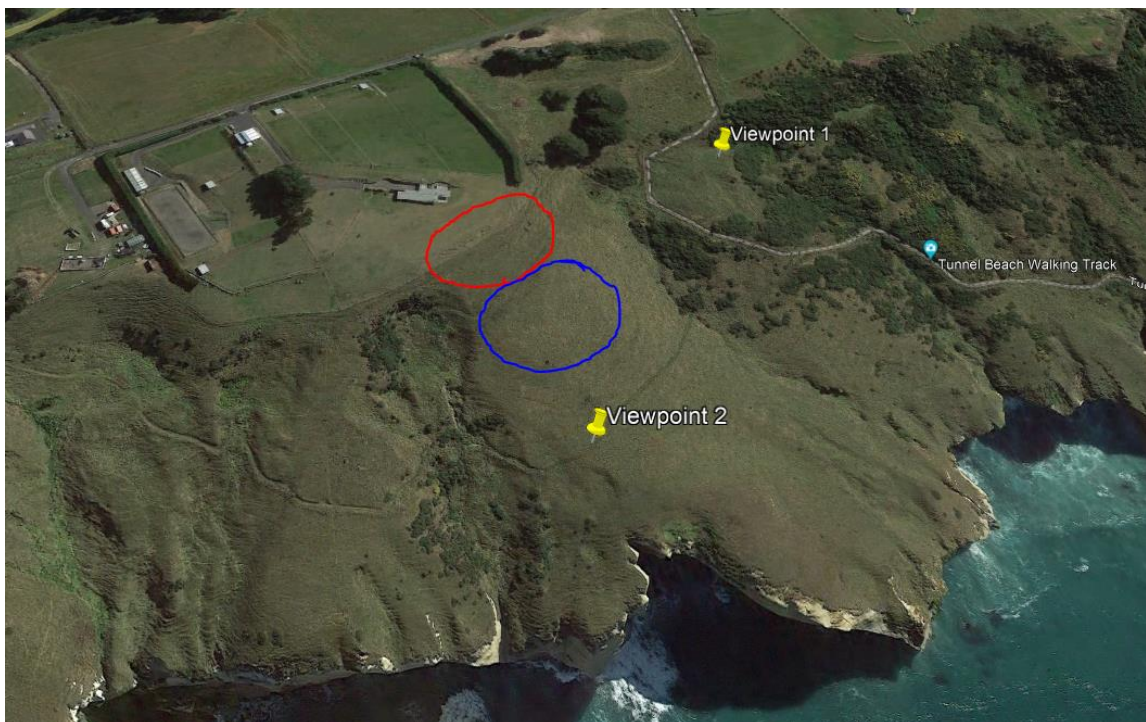


Figure 1: General distinction between flat and upper slopes (red) and steep lower slopes (blue).

13. In my view the **flat areas to the south of the existing dwelling exhibit a moderate high sensitivity to change**, owing to their proximity to outdoor living areas and use for grazing and working horses. As Ms Durling has indicated in her evidence these areas are regularly used and enjoyed.
14. Conversely **the steep hill faces to the south exhibit a lower level of sensitivity to change** because they aren't accessed, used, and enjoyed in the same manner and frequency as the flatter land to the north. Clearly there is nothing stopping Ms Durling and her partner from accessing this land and potentially standing in relative proximity to the proposed walkway and Viewpoint 2. However, I think the fact that Ms Durling has emphasised (in text and photos) the importance of the flat pasture land to the north and said very little about the potential visual effects on steeper hill faces to the south emphasises the difference in sensitivity to change between these areas.

VIEWPOINT 1:

15. Based on the photos provided by Ms Durling and further desktop analysis I do acknowledge that there is the potential for **perceptual effects** resulting from **Viewpoint 1** and immediately adjacent sections of the proposed walkway.
16. Aspects that *contribute* to an increase in adverse perceptual effects include:
 - a. An increase level of modification/ disturbance resulting from the expanded viewing platform and small-scale structures.
 - b. The absence of any intervening landform and vegetation to screen and/ or soften views.
 - c. Elevation – the proposed viewpoint is at a similar elevation (approximately 10m lower) to areas of the Property where views are obtainable, meaning that it has the potential to be in line of sight.
 - d. The potential for people to congregate at the viewpoint and increased background noise and resulting impacts on the “*quietness and tranquillity*” highlighted in Paragraph 68 of Ms Durling’s evidence.
 - e. The potential impact on a sense of privacy as the result of an increased number of people congregating and looking towards 40 Tunnel Beach Road.
 - f. The sensitivity of the portion of the Property that has views to this section of the proposed walkway. In my assessment, there is a moderate high level of sensitivity associated with the pastureland to the south of the existing dwelling. While an increased level of sensitivity might exist for the upper portions of the adjacent hill face this is limited to areas of an equal or higher elevation to the viewpoint itself.
17. Aspects that *mitigate* potential adverse perceptual effects include:
 - a. Distance – Viewpoint 1 and the adjacent visible sections of the walking track are approximately 120m+ away.
 - b. Complexity – The coastal landscape exhibits a complex landscape pattern and the resulting level of visual ‘busyness’ is more accommodating to small scale intervention than a simpler or more visually homogenous landscape would be my comparison.
 - c. Expanse – one of the defining characteristics of the wider landscape is its expanse, and this is particularly relevant to views. In this setting the eye is drawn to the expansive ocean view and (horizontally) along the land/water interface, which serve to highlight the highly exposed coastal escarpments and high degree of associated natural character.
 - d. Sections of the existing walkway are visible, which establishes a level of comparable modification in the landscape i.e. it’s not entirely foreign.
 - e. The photos provided by Ms Durling suggest that Viewpoint 1 does exist when standing on the southern flat pastureland, where views are not screened by the existing macrocarpa

shelterbelt, and the upper steep hill face to the south of the existing fence line (see Figure 1). Viewpoint 1 is not visible from most of the Property including the existing dwelling which (in practice) carries the highest level of sensitivity when considering impacts on amenity. It is unlikely that Viewpoint 1 is visible from the lower hill slopes due to the viewer being lower in elevation and it being screened by landform and vegetation.

18. Taking both contributing and mitigating aspects of the proposal and existing landscape into account, **adverse perceptual effects** resulting from Viewpoint 1 and the immediately adjacent section of the proposed walkway will be **low moderate** in my assessment and not significant.
19. In line with Paragraph 69 of my evidence, there is potential for perceptual effects to be heightened during construction when machinery is operating, and construction works look 'raw'. These construction effects will be short lived and in my assessment they will be low in degree.
20. Cumulative effects in this context relate to the visual impact of seeing the decommissioned existing walkway and the proposed viewpoint and adjacent section of new walkway at the same time. Like construction effects, cumulative effects will be low in degree and only experienced in the short term.

VIEWPOINT 2:

21. Based on the photos provided by Ms Durling and further desktop analysis I do acknowledge that there is the potential for **perceptual effects** resulting from **Viewpoint 2** and immediately adjacent sections of the proposed walkway.

Upper pastureland and immediately adjacent hill slope:

22. Aspects that *contribute* to an increase in adverse perceptual effects on the upper pastureland and immediately adjacent hill slope include:
 - a. An increase level of modification/ disturbance resulting from the modified track, expanded viewing platform and small-scale structures.
 - b. The absence of any intervening landform and vegetation to screen and/ or soften views from the lower, southernmost part of the Property (i.e. coastal hill faces).
 - c. These sections of the walkway are new to the landscape and will introduce additional modification development into the view.
 - d. The potential for people to congregate at the viewpoint and increased background noise and resulting impacts on the "*quietness and tranquillity*" highlighted in Paragraph 68 of Ms Durling's evidence.
 - e. The potential impact on a sense of privacy as the result of an increased number of people congregating and potentially looking towards 40 Tunnel Beach Road.
 - f. The moderate high level of sensitivity of the portion of the Property that has views to this section of the proposed walkway.
23. Aspects that *mitigate* potential adverse perceptual effects include:
 - a. Distance – Viewpoint 2 and the adjacent visible sections of the walking track are approximately 120m+ away.
 - b. Elevation – viewpoint 2 and adjacent sections of the walking track are approximately 50m lower in elevation than the upper pastureland, which means they will appear in the lower foreground of a view. This is preferable to a situation where an element is in 'line of sight'.
 - c. Expanse – one of the defining characteristics of the wider landscape is its expanse, and this is particularly relevant to views. In this setting the eye is drawn to the expansive ocean view and (horizontally) along the land/water interface, which serve to highlight the highly exposed coastal escarpments and high degree of associated natural character.

- d. While the steep hill faces to the south are increasingly proximate to proposed Viewpoint 2 and immediately adjacent sections of the walkway (as close as 10m in one location) they carry a lower level of sensitivity to change because they aren't accessed, used, and enjoyed in the same manner and frequency as the flatter land to the north.
- g.
- 24. Taking both contributing and mitigating aspects of the proposal and existing landscape into account, **adverse perceptual effects** resulting from Viewpoint 2 and the immediately adjacent section of the proposed walkway will be **low** in my assessment and certainly not significant. Both elevation and expanse play a significant mitigating role in this instance and the proposal will be more of a 'footnote' when viewed in this context.
- 25. Again, there is potential for perceptual effects to be heightened during construction when machinery is operating, and construction works look 'raw'. These construction effects will be short lived and very low in degree.
- 26. Cumulative effects in this context relate to the visual impact of seeing this new section of walkway in conjunction with other proposed sections of walkway. For example, it may be possible to see Viewpoint 1 in the periphery of a view at the same time as seeing Viewpoint 2 in the lower foreground. Given the degree of physical separation between the two elements I think the likelihood of them being viewed together is low and resulting cumulative effects will be low to very low in degree.

Lower hill slope:

- 27. Aspects that *contribute* to an increase in adverse perceptual effects on the lower hill slope include:
 - a. An increase level of modification/ disturbance resulting from the modified track, expanded viewing platform and small-scale structures.
 - b. The absence of any intervening landform and vegetation to screen and/ or soften views from the lower, southernmost part of the Property (i.e. coastal hill faces).
 - c. Proximity to the proposed walkway modifications e.g. approximately 30-40m from Viewpoint 2 at the property boundary and 10-20m from the walkway.
 - d. These sections of the walkway are new to the landscape and will introduce additional modification development into the view.
 - e. The potential for people to congregate at the viewpoint and increased background noise and resulting impacts on the "*quietness and tranquillity*" highlighted in Paragraph 68 of Ms Durling's evidence.
 - f. The potential impact on a sense of privacy as the result of an increased number of people passing by in close proximity to the property boundary, congregating and potentially looking towards 40 Tunnel Beach Road.
- 28. Aspects that *mitigate* potential adverse perceptual effects include:
 - a. Expanse – one of the defining characteristics of the wider landscape is its expanse, and this is particularly relevant to views. In this setting the eye is drawn to the expansive ocean view and (horizontally) along the land/water interface, which serve to highlight the highly exposed coastal escarpments and high degree of associated natural character.
 - b. While the steep hill faces to the south are increasingly proximate to proposed Viewpoint 2 and immediately adjacent sections of the walkway (as close as 10m in one location) they carry a lower level of sensitivity to change because they aren't accessed, used, and enjoyed in the same manner and frequency as the flatter land to the north.

29. Taking both contributing and mitigating aspects of the proposal and existing landscape into account, **adverse perceptual effects** resulting from Viewpoint 2 and the immediately adjacent section of the proposed walkway will be **low** in my assessment, and certainly not significant. This degree of effect is owing largely to the level of sensitivity discussed previously and while I acknowledge that the proposal is in close proximity to the southern property boundary, I do not think that the impacts of this proximity will be experienced frequently.
30. Again, there is potential for perceptual effects to be heightened during construction when machinery is operating, and construction works look 'raw'. These construction effects will be short lived and very low in degree.
31. Cumulative effects will be very low because it is unlikely that the existing, decommissioned, and rehabilitated sections of the walkway will be visible at the same time as any new sections. Should there be glimpses of the existing track, they will be distant and likely screened by intervening vegetation and landform.

ADDITIONAL MITIGATION

32. Despite a relatively low degree of effect, and certainly less than significant, I do see benefit in additional planting being undertaken in the indicative areas shown in Figures 2 – 4 below and recommend the Crown consider this assessment in their development plans. The purpose of this planting is not necessary to achieve the 'less than significant' test in s4(3), rather it is to respond to the perceived impacts of the proposal on Ms Durling and her property and to provide screening of the proposed works.
33. In my opinion 'block planting' of predominantly ngaio (*Myoporum laetum*) would be the most effective approach to achieving a visual screen in these locations. It is widespread on the coastal hill faces and grows to a favourable height and density. There is also potential to supplement with other lower growing species so these areas are consistent with the 'Highbank Planting Mix' identified on the current Track Alignment Concept Plans.

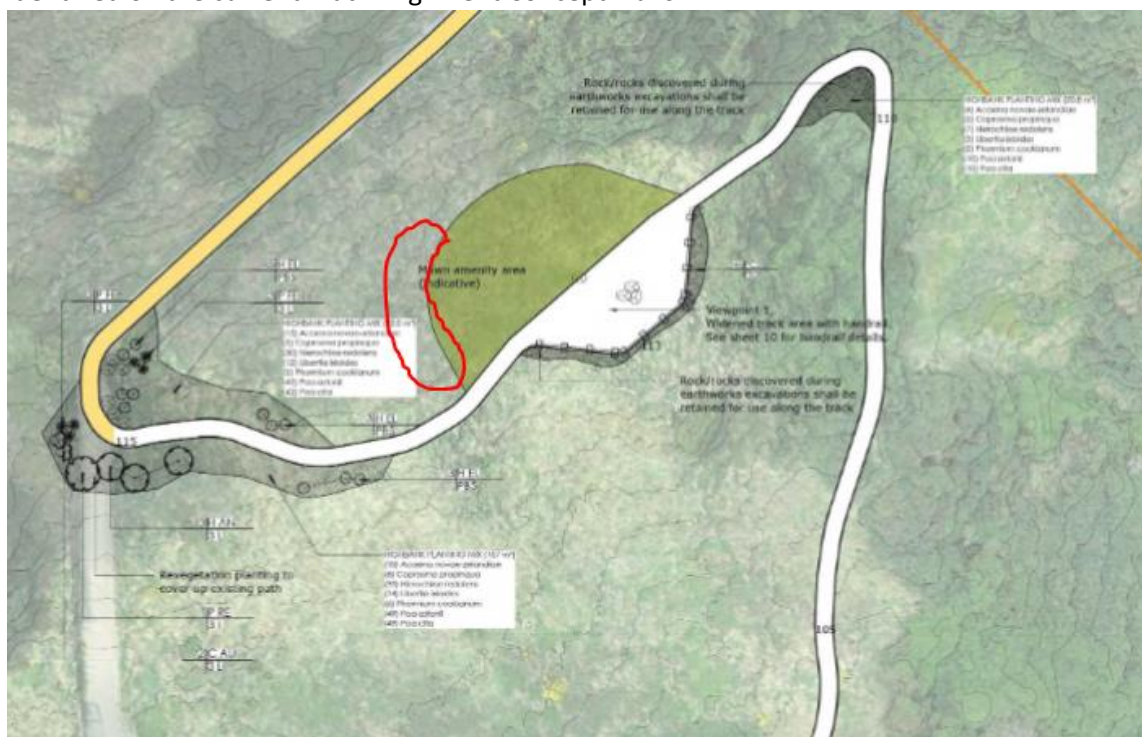


Figure 2: Additional planting adjacent to Viewpoint 1



Figure 3: Additional planting adjacent to track closest to southeastern property boundary

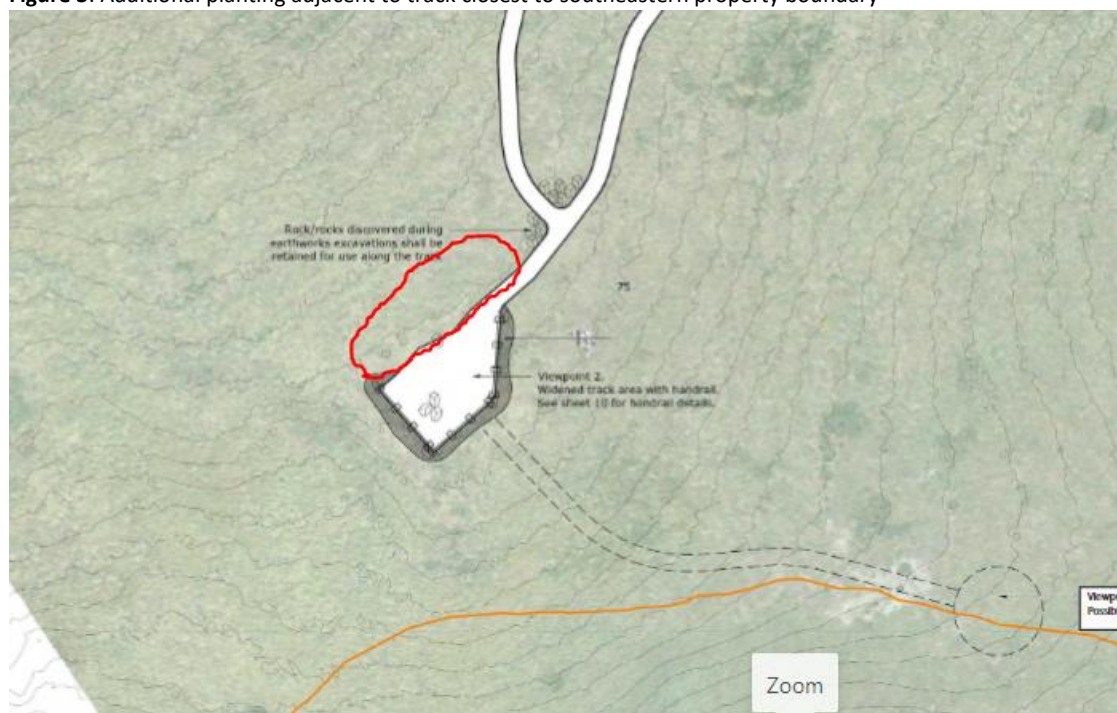


Figure 4: Additional planting adjacent Viewpoint 2

SUGGESTED CONDITIONS:

The commissioner has sought advice regarding the suitability of the following suggested conditions:

- *Requirement for a Landscape Management Plan (Refer Condition 7)*
- *Requirement for the annual review of the Landscape Management Plan by a suitably qualified professional (Refer Condition 8)*
- *Requirement for the outcome of the annual review to be submitted to the Council (Refer Condition 9)*

34. In my experience, LMPs are effective in framing and managing large scale and/or long-term initiatives where significant change is anticipated in the future. Examples where an LMP is very effective include:
- a. Quarry rehabilitation – an LMP is an effective tool to require and enable long term management and implementation of mitigation measures in response to quarry expansion. Often this kind of expansion is anticipated in the future, but the precise nature of that change is unknown at the time of consenting. An LMP allows for specific design responses to be developed over time in response to this change.
 - b. Large scale landscape rehabilitation – an LMP is often used to frame planting strategies where specific outcomes are sought in the long term. An example might be the approach to successional planting that sought the establishment of pioneer species and subsequent introduction of successional and climax species into the future.
35. In this situation, I am more in favour of Condition 7 requiring a **landscape specification** to accompany final planting plans.
36. The plans and specifications could be subject to review by a suitably qualified person and specific matters that are relevant to this situation can be required to be addressed.
37. For example, the condition might require the specification to include provisions regarding:
- a. the establishment and on-going maintenance of planting
 - b. retention and replacement of existing vegetation into the future
 - c. inspection and potential replacement of dead/ dying plants
 - d. pest management
 - e. submission of annual condition assessments of planting to Council
 - f. criteria to achieve final sign off and potential for extension of the maintenance/ management period.
38. I do not support the suggestion of a 10 year (minimum) period for landscape maintenance in **Condition 7**, because I think a high degree of certainty regarding planting establishment and long term survival can be achieved in an initial 5 year period.
39. The requirement to extend this initial period should be tied to a performance criterion within the specification that underpins practical completion and subsequent sign off of works.
40. I propose an amendment to proposed **Condition 7a)** to achieve a plant survival rate of “... 90% at the end of the 5 year maintenance period.”
41. The specification should then include a criterion that requires for the extension of the maintenance period beyond 5 years and in 2 year increments until the survival of any replacement planting is sufficient to achieve an overall 90% survival rate.
42. I do not support the inclusion of **Condition 7c)** and the requirement to provide for irrigation as a condition of consent. I acknowledge Ms Durling’s commentary regarding planting she has undertaken on her property and agree that the site in general does provide challenging growing conditions.
43. However, in my opinion the installation of site wide irrigation is impractical and would be very costly to achieve. In addition, the inclusion of a performance criteria that establishes the ‘gateway’ for final sign off of the planting (i.e. 90% survival) means the risk of not irrigating the proposed planting falls to the Consent Holder. In practice, if the planting struggles to achieve 90% survival rate due to lack of water, then the Consent Holder will be required to continue with establishment and maintenance into the future.
44. I do not support the inclusion of **Condition 7d)** because “...a high level of tidiness and amenity...” is an entirely subjective measure.

45. I agree with the intent of **Condition 7e)** but rather see it as a matter to be addressed in the planting specification and not by way of consent condition. It is a typical requirement of specifications to include provisions relating to monitoring and maintenance.
46. I do not support the inclusion of **Condition 8 and 9** because I see little to no value in reviewing the overarching maintenance document (whether LMP or specification) with such regularity. I see this process as redundant given the Council will have a role in reviewing and certifying the landscape specification and associated establishment and maintenance requirements. The responsibility then falls to the Consent Holder to achieve the outcomes and performance criteria that have been established in the specification.

- *No stockpiles are permitted within the ONF (Refer Condition 22)*

47. My assessment includes the likelihood of short term and small-scale (e.g. no longer than 30 days and no more than 2m high) stockpiles being required during the construction period and I do not foresee any significant effects arising as a result. Similarly, given the nature of works I think it is impractical to implement a blanket exclusion of stockpiles in the ONF because it would require the constructor to transport excavated material, however small the amount, from the site on a daily basis.

- *The installation of a deer fence along any currently unfenced areas of the legal boundary with 40 Tunnel Beach Road (Refer Condition 28)*

48. While a deer fence would restrict access to the Property for track users, it would serve no role in mitigating landscape and visual effects of the proposal. My understanding is that Ms Durling could erect a deer fence as of right as fences are anticipated within rural-residential land and the 2GP ONF overlay. On that basis I don't see the introduction of a deer fence being inconsistent with the anticipated character of the ONF.

- *A 1.8m impermeable wooden paling fence must be established around Viewpoints 1 and 2 between them and the boundary of 40 Tunnel Beach Road (Refer Condition 29)*

49. I do not support this condition because it would introduce an element into the ONF that is inconsistent with existing character. The fence itself would generate adverse effects. I am more in favour of planting in these areas. While accepting that it will take longer for screening to occur planting is more in keeping with exiting landscape character.

- *Landscape plantings between the track and the boundary of 40 Tunnel Beach Road (Refer Condition 30).*
- *Additional landscape planting for screening ViewPoint 1 & 2 from 40 Tunnel Beach Road (Refer Condition 32d)*

50. If s4(3) does not apply, these conditions should be amended to align with my assessment in Paragraph 32 and 33 above.

- *Landscaping implemented in accordance with the Landscape Management Plan shall be maintained (Refer Condition 37)*

If s4(3) does not apply, then I support intent of this condition, being the retention of new planting in perpetuity. As suggested in Paragraph 40 and 41 the target plant survival rate for these areas is 90%.

Should wholesale loss of plants occur in the future then they should be re-established and subject to a new maintenance period and plant replacement requirements as suggested above.

- *Existing Macrocarpa Trees located to the south of the carpark shall be retained (Refer Condition 38)*

51. Due to the provision to replace the trees if they are required to be removed, I do not oppose this condition.

Yours sincerely



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on behalf of

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