

IN THE MATTER Decision No. W21/2003
of the Local Government Act 1974

AND

IN THE MATTER of an application under clause 6 of the
Tenth Schedule to the Act

BETWEEN THE UPPER HUTT CITY COUNCIL
(MIS012/02)

Applicant

AND AKATARAWA RECREATIONAL
ACCESS COMMITTEE
INCORPORATED

Objector

BEFORE THE ENVIRONMENT COURT

Environment Judge D F G Sheppard (presiding)
Environment Commissioner W R Howie
Environment Commissioner H A McConachy

HEARING at Wellington on 17,18 and 19 February 2003

Counsel:

B R Dodson for the Upper Hutt City Council
G D S Taylor for the Akatarawa Recreational Access Committee

DECISION

Introduction

[1] Johnsons Road extends from Whitemans Valley over a ridge into Moores Valley, Wainuiomata. The road was surveyed and vested in the local authority in the 1870s, but most of it has never been formed or used as road. The Upper Hutt City Council, supported by the owners of the land through which it passes, now proposes that the unformed section of the road in its district be stopped as road, and the land sold to the adjoining landowners. The Council's case is that the road is impassable in its present state, it will never be required as road, it allows access to private lands by unwanted intruders, and the Council does not want responsibility for safety of people using it.

[2] A committee of various outdoor recreation groups oppose the stopping of the road. They want the unformed section of the road to remain as public road so it can be used for hiking, horse trekking, four-wheel driving, and similar activities. They

also contended that the Council had unlawfully decided to stop the road to oblige the owners of private land through which it passes; and that stopping it would land-lock the end section of the road. No one suggested that the road should be formed to full road standards for use by conventional traffic.

[3] We will outline the proposal, identify the extent of the Environment Court's jurisdiction over the dispute, and consider the cases for stopping the road and for keeping it, before coming to our decision.

The proposal

[4] The Council's proposal was made under section 342 of the Local Government Act 1974, which empowers a council to stop a road in its district in the manner provided in the Tenth Schedule to that Act. The prior consent of the Minister of Lands is needed to stop a road in a rural area.

[5] As required by clause 2 of the Tenth Schedule, the Council published notice of its proposal to stop the unformed section of Johnsons Road. In that notice the Council stated this:

The Council has resolved to stop this section of Johnsons Road because it is an unformed road which is not now required for road and will never be formed for use as a road. Once the road is stopped, the Council intends to dispose of it by selling it to the Woodhill Partnership, which owns the surrounding land.

[6] The Tenth Schedule provides that objections may be lodged to a proposal for stopping a road. The Upper Hutt City Council received objections to its proposal for stopping the unformed section of Johnsons Road, including one lodged on behalf of the Akatarawa Recreational Access Committee Incorporated, the Cross Country Vehicle Club (Wellington) Incorporated, and the New Zealand 4WD Association (Central Zone).

[7] The Council's hearings committee considered the proposal and the objections and heard submissions made by a representative of those objectors, Mr D A Cockroft, and by a representative of another objector. The committee resolved to confirm the Council's decision to stop the section of road, and did not allow the objections to the proposal. As required by the Tenth Schedule, the Council sent the objections to the Environment Court, and requested that the Court confirm its decision to stop the road.

[8] The Court held a public hearing at which both the Council and the Akatarawa Recreation Access Committee were represented by counsel. Seventeen witnesses gave evidence in person, and all but one were cross-examined.¹ The members of the Court, accompanied by agreed representatives of the parties, visited the route of the section of road in question to assist in understanding the evidence about it.

What is a 'paper road'?

[9] The unformed section of Johnsons Road in question was referred to as a 'paper road'. That is an informal way of referring to road that has not been formed.

[10] There are many paper roads in this country. Many of them have been fenced and are used as if part of the private property through which they pass. Yet a 'paper road' remains a public road, even if the territorial authority has acquiesced in it being fenced and used as if it is private land. At law the public still have the right to pass along it.

The unformed section of Johnsons Road within Upper Hutt City

[11] Part of Johnsons Road within the Upper Hutt City district, leading south from Blue Mountains Road, has been formed and sealed, and is in use as road. The sealed section provides access to several properties, including land owned by the Woodhill Partnership. From the end of the formed section, Johnsons Road continues generally south through the Woodhill land, following the contours and rising from an elevation of about 360 metres to a ridge which forms the boundary between the Upper Hutt City district and the Hutt City district at an elevation of about 500 metres. Beyond that boundary the unformed road continues into the Crowther Creek subcatchment in the Hutt City district through land owned by P E and G Owles, then through land

1 A registered surveyor, Mr B E Lendrum, was called to produce a survey plan as an exhibit. He was not cross-examined.

owned by the Scout Association of New Zealand, and then into land owned by a Mr and Mrs Adam, where it ends.

[12] The unformed section of road in the Upper Hutt City district is 20 metres wide. Its route through the Woodhill land is not marked or otherwise evident on the ground. Its position can only be identified reliably by survey, or by use of global positioning system equipment. The only exception is a short section on a saddle in the ridge where a farm track follows the same alignment to cross the ridge.

[13] To the east and south of the unformed section of Johnsons Road lies land owned by the Wellington Regional Council for water supply catchment. There is a formed track along the ridge from Johnsons Road to the Regional Council land. The track passes through private land owned by Messrs Owles between the unformed road and the Regional Council land.

[14] The Woodhill Partnership land was formerly farmed but is now being subdivided to create 36 rural-residential lots ranging in size from 4 hectares to 40 hectares. Ten of those lots are crossed by Johnsons Road.

[15] A new road has been constructed into the Woodhill land to provide access to the rural-residential lots being created, and the Council has accepted that as public road. Access from that road to the Owles' property is provided by rights-of-way over parts of the Woodhill land.

[16] By the Upper Hutt City proposed district plan 2001, the land in that district occupied by the unformed section of Johnsons Road is in the Rural Hill subzone of the Rural zone.

[17] Neither the transitional district plan nor the proposed district plan deals directly with the future of unformed or paper roads, or with public access. Walkways and bridle paths are classified as passive recreation and are permitted activities in the Rural Hill subzone. Motorised activities are classified as active recreation and are controlled activities in that subzone.

The scope of the Court's jurisdiction

[18] Clause 6 of the Tenth Schedule directs that the Environment Court is to consider the district plan, the plan of the road proposed to be stopped, the council's explanation, and any objection made by any person; and confirm, modify or reverse the council's decision-

[19] In this case the Council submitted that the Court has to consider whether the public benefit from the stopping is outweighed by the private injury that would follow,² and must be satisfied that there is reasonable cause to justify the road stopping.³ It also submitted that the issue is the need for the road, not the need for the stopping,⁴ and that the need should be a public need.

[20] The opponents submitted that the issue is the public benefit of continuing or

stopping the road, not any private benefit of doing so.⁵ In particular, their counsel submitted that Planning Tribunal decisions that there is no requirement on local authorities to keep roads open for recreational use should no longer be followed, having been based on an earlier version of clause 6.⁶ Counsel submitted that the recent Environment Court decision in *Re application by Ruapehu District Council*⁷ is in keeping with the current version of clause 6, and should be followed.

[21] When the Planning Tribunal decisions cited by counsel were given, clause 6 confined the Tribunal to considering objections by persons likely to suffer injury by the stopping. That version of clause 6 was repealed in 1991, and the current version substituted.⁸ The current version directs the Court to consider any objection by any person. From that, we understand it is the Court's duty to consider objections on any relevant ground, whether of public interest or of private interest. That could include a wish by people to use for recreation the road proposed to be stopped. So with respect we do not follow the decisions based on the earlier law, but follow the decision in the Ruapehu District case in that respect.

[22] We accept the Council's submission that to confirm a proposed road stopping, the Court should be satisfied that there is reasonable cause to Justify it. That accords with the usual practice of expecting cause to be shown to alter the status quo. We hold that this ultimate decision should only be made after

² Citing *Re Auckland City Street Stopping Proposal (1974)* 5 NZTPA 203.

³ Citing *Reference by Auckland City Council (1980) Planning Tribunal Decisions C847*.

⁴ Citing *Re application by Ruapehu District Council Environment Court Decision A83/2002*.

⁵ Citing *Re application by Butter District Council Environment Court Decision C29/98*; *Re application by Ruapehu District Council, supra*.

⁶ *Re proposal by Waitakere City Council (1990) 15 NZTPA 1*; *Re application by Upper Hull City Council Planning Tribunal Decision W151/95*.

⁷ *Decision A83/2002*,

⁸ *Resource Management Act 1991, s 362*.

considering in totality all material grounds that support the proposed stopping, and all material grounds that indicate that the road should not be stopped.

[23] The scope of the Environment Court's jurisdiction is to decide whether or not the road is to be stopped, that is, whether or not it is to continue to have the status of public road. Parliament has not conferred on the Environment Court power to decide whether or not a public road should be formed, or the standard to which it is to be formed. Those are executive matters for the territorial authority to decide.

[24] So we approach our duty in this case on the basis that even if the Council's decision to stop the section of Johnsons Road is reversed, it would be for the Council to decide what (if any) formation work is to be carried out on it, and when, or whether it is to be left in its current unformed state. Nothing in this decision should be understood as implying any opinion by the Court on those questions.

Defective procedure

[25] The Tenth Schedule sets out a series of steps to be taken for stopping roads. Clause 1 directs (among other things) that the council is to prepare a plan of the road proposed to be stopped and lodge the plan in the Chief Surveyor's office. Clause 2 directs that on receipt of the Chief Surveyor's notice of approval and plan number, the Council is to open the plan for public inspection and give public notice of the proposal.

[26] In this case, the Council acknowledged that it had not correctly followed the procedure prescribed by the Tenth Schedule, in that it had publicly notified the road stopping proposal before the survey plan of the section of road to be stopped had been approved as to survey. It submitted that the only difference (a discrepancy in the area of the portion to be stopped) was not so material as to affect anybody's rights.

[27] Counsel for the opponents submitted that the Council had decided to stop the road without having a plan before it of the road to be stopped, and that this vitiated the whole process.

[28] However the evidence of a Council planning officer, Mr P C Eyies, showed that when it decided to proceed with the Tenth Schedule procedure, the Council did have before it a plan showing the road to be stopped. Apart from the discrepancy over the area, the plan described the section of the road proposed to be stopped in the same way as did the plan that ultimately received the Chief Surveyor's approval. The requirement for a plan having that approval is one to be complied with prior to public notification, not prior to the decision to proceed with a proposal according to the Tenth Schedule procedure.

[29] Parliament described the steps stated in the Tenth Schedule as "conditions as to stopping of roads". Plainly it intended that they are to be complied with carefully, and in the correct sequence. The importance of having a survey plan of the road to be stopped, appropriately accredited, available for inspection prior to public notification of the stopping proposal is obvious.

[30] In this case, however, the plan available for public inspection gave the same information as the approved plan ultimately did, in all material respects. It is not plausible that in this case the incorrect statement of the area of the section of road in question would have deterred anyone from objecting who would have objected if the area had been correctly stated. So, without condoning the Council's failure to comply strictly with clause 2 of the Tenth Schedule in that respect, we hold that it did not render the stopping proposal invalid.

The case for stopping the road

[31] The Council relied on three main grounds for stopping the unformed section of road:

- That it is impassable in its present state;
- That it is not required as road; and
- That keeping it as road has disadvantages for the Woodhill subdivision, in allowing access by unwanted intruders, and in the Council's responsibility for safety of users.

[32] We now review the evidence and make our findings on those grounds.

Is the unformed road impassable in its present state?

[33] The Council contended that although not necessarily impassable throughout, the unformed section of the road within its district is impassable at a number of points. The opponents contended that the unformed section is passable, even in its present state, for some recreational users, and that it could readily be improved to make it passable by more members of the public. We review the evidence on the point before stating our findings.

[34] The Council's reading manager, Mr H Parker, gave the opinion that there are several sections of the alignment where the cross-slope of the land would not be safe for any vehicle to traverse, and that it would be dangerous and foolhardy to try the manoeuvre over them. In cross-examination he agreed that his experience of four-wheel drive vehicles was limited.

[35] Mr B S McGuinness, a member of the Woodhill Partnership, gave his belief from 28 years of farming the land, that the paper road as it is cannot be used for any form of conveyance because it runs across the slope of the land which in many cases is dangerously steep, crosses several permanent swampy areas, goes down into and out of a number of steep sided gullies, and goes through plantation forestry, native regrowth, and older macrocarpa windbreaks, as well as numerous watercourses.

[36] In cross-examination Mr McGuinness stated that he had not walked the paper road, but in several places he knew where the route is. He accepted that the road is passable for walkers, but considered that there are many areas where it would be unsafe for horse riders or motorcyclists to use.

[37] Mr P T McCombs, traffic engineer, gave the opinion that the unformed section of Johnsons Road cannot be accessed by vehicles except over private property because there is a large swamp at the end of the formed section. This witness described other barriers to physical passage by vehicles along the unformed section. He referred to a slumped embankment with a crossfall of 36 degrees, which he considered could be traversed only by specialised four-wheel-drive vehicles. He described a water supply pond as physically impassable to vehicles- He referred to a slumping steep bank with side slopes of 50 degrees as impassable to motor vehicles. Then there is a drop down a 25-degree slope into a gully of gum trees and dense scrub, which he considered is not passable by vehicle. Then the route winds in and out of a pine forest with dense gorse, crossing gullies with slopes of 25 degrees which could only be traversed by specialised four-wheel-drive vehicles.

[38] In cross-examination Mr McCombs agreed that the entire paper road could be walked, with sufficient will, time and effort. He maintained that the paper road goes close to the water supply pond he had referred to.

[39] Mr A D Le Maitre agreed that in its present state there are areas that mountain bikes cannot get through. Mr S G Purdie accepted that fences across the route and trees planted in it are obstacles to its use by four-wheel-drive vehicles, and that there are sections of steep sideways slope that could be improved. He reported that crossing swampy land is a regular feature of four-wheel-driving competitions.

[40] Mr K D McAdam gave evidence that he had walked over the route of the unformed section, using a global positioning system to identify it. He considered that in its present state it is suitable for adventurous walkers.

[41] It was Mr McAdam's evidence that the ability to pass over swampy ground can differ according to the season, and that the week before the hearing he had been able to drive across the swamp near the start of the unformed section, but in winter he would lay planks to cross it by vehicle. He considered that in dry conditions a family four-wheel-drive vehicle could pass over the sections with cross-falls mentioned by Mr McCombs, but that when wet a specialised four-wheel-drive vehicle would be needed. He would only go around the bank with 50-degree slopes in its present shape with a specialised four-wheel-drive vehicle. He agreed that there is a section where the scrub needs clearing to pass by vehicle, but he considered that a vehicle can work its way around the gorse in the pine plantation.

[42] Mr D A Cockroft stated that he had walked across the swamp, and that it would be easily driven through, although in some seasons it may require a specialised four-wheel-drive vehicle. Concerning the steep stretches of the unformed road, Mr Cockroft stated that modern four-wheel-drive vehicles can handle slopes of 40 degrees with ease, Land Rovers 46 degrees, and more specialised vehicles 50 degrees. In respect of the water-supply pond, this witness stated that the road passes on the upper side of it, not through it. He agreed that the pine trees would be an impediment to vehicles, though not to pedestrians.

[43] Mr Cockroft gave the opinion that the unformed section is passable by pedestrians, and with clearing, would be passable by other recreational users. He did not consider that a track would have to be formed, as long as there is an indication where the route goes, but it could be made safer for some users by benching in certain places.

[44] We have reviewed the evidence in the light of our own observations on visiting parts of the route in the company of Mr Eyies, Mr McGuinness, Mr McAdam, Mr Cockroft and Mr Norton. We find that in its present state the unformed section is passable on foot by determined hikers. We also find that if a track is cut through some dense scrub, a few trees removed, and the occasional steep cross-slope is benched, it would also be passable on horseback, on four-wheel drive quad bikes, mountain bikes, motor bikes and other recreational vehicles. The swampy sections and cross-slopes would be regarded as challenges of skill, rather than as impassable stretches.

[45] In short, the current impediments to passage along the unformed section could readily be attended to if the Council approved. The present condition of the unformed section is not a ground for stopping it as road.

Is the unformed section required as road?

[46] The Council contended that the unformed section has never been used as road, and is not now, and will never be, required for use as road. In addition, the Council claimed that the road for the Woodhill subdivision is an alternative, and new rights-of-way from it serve all the lots created by the subdivision, and also the adjoining property owned by the Messrs Owles. There is no property that is reliant on the unformed section for access.

[47] The opponents disputed the claim that the unformed section has not been used as road, and that it is not required for use as such. They contended that parts of it have been used for recreation, and that it is required for recreation now and in the future.

[48] A considerable amount of evidence was directed to this issue, but it is not necessary to report it in detail. There was evidence of recreational users passing along what they understood to have been Johnsons Road. In nearly all cases they had not reliably established the route of the road, and there were reasons for doubting that the routes they had taken had passed entirely along it.

[49] The evidence did support the claim that there are people who wish to use the unformed section of Johnsons Road for recreation if its route can be identified. There was direct evidence of desire by clubs to use the unformed section as road for tramping, horse riding, mountain bike riding, four-wheel quad-bike riding, and cross-country four-wheel-driving. Most of those activities would require some marking of the route of the road and removal of fences across the road, or replacement with gates.

[50] On the totality of the evidence we find that there is a requirement by sections of the public to use the unformed section of Johnsons Road as public road for

recreation. Whether or not the minimal works necessary to make it usable by more of the public should be carried out is for the Council to decide. There is a prospect that, if the Council approved, the recreation access committee would raise the funds to meet the cost.

Are there disadvantages to the Woodhill subdivision from keeping the road?

[51] Mr McGuinness gave evidence that the paper road is an impediment to the Woodhill subdivision. In future it will have housing close to it.

[52] We accept that the sale of the ten lots in the Woodhill subdivision through which the unformed section of Johnsons Road passes would be enhanced if the road is stopped.

Are there disadvantages of unwanted intruders from keeping the road?

[53] The proposed stopping was supported by owners of land that is accessible by unwanted intruders using the unformed road.

[54] Mr Eyies gave the opinion that if the route is identified and uncontrolled public access becomes possible, the possibility of unauthorised access along existing tracks on private land would increase the risk to the safety of the public water supply. In cross-examination he agreed that the road does not present a hazard to the headwaters as long as people use the road itself. He considered that the potential for unauthorised access would be increased if the road is formed.

[55] A Wellington Regional Council Manager, Mr M D Kennedy, gave evidence that the Regional Council restricts public access to its water-catchment forest to strictly controlled circumstances; and that the road stopping would assist in its management. Upgrading the road would increase opportunity to access the catchment area. In cross-examination he agreed that there is a network of public roads at the other end of the catchment, but stated that there is no public access to the water catchment land.

[56] A representative of the Scout Association, Mr W T Bell, gave evidence about the Association's property 'Brookfield' in the Hurt City district at the northern end of Moores Valley, having an area of 255 hectares of native vegetation used for outdoor educational and recreational activities. Mr Bell stated that the part of Johnsons Road in the Association's property has never been formed. He explained the Association's interest in discouraging potential public access by trail bikes and other vehicles for safety and security reasons. In particular he regarded shooting as a safety risk.

[57] Mr P E Owles, an owner of land adjoining the Woodhill and Brookfield properties, gave evidence that it is used for forestry operations, and that logs are taken out through the Woodhill land to the formed section of Johnsons Road. In cross-examination Mr Owles confirmed that the paper road had never been used.

[58] We understand the wish of the owners of those properties to keep them remote from uncontrolled access by potential intruders. Having seen the relative steepness of the ground in the locality, and the challenge that use of the unformed section of Johnsons Road presents, we consider that the risk of uncontrolled access to those properties from Johnsons Road is remote, even if minor works are carried out to make it more suitable for recreational use.

Is there a disadvantage from keeping the road in responsibility for safety?

[59] It was Mr Barker's evidence that if the road is formed as a track, the Council would have a duty to ensure that it is safe to be used, and there would be an onus on the Council to contribute to its maintenance.

[60] We accept that if the unformed section is not stopped the Council would continue to have responsibility for the safety of users. If it is asked to approve any work that would facilitate use of the road for recreation, such as replacing fences with gates, draining swamps, cutting scrub, removing trees, or benching cross-slopes, the Council would of course have a duty to make decisions that would ensure that the road is safe to be used. Professional advice from Mr Parker and, if thought appropriate, from Mr McCombs, would assist the Council to discharge that duty.

[61] However we do not accept that the Council would have a duty to ensure that the unformed road reaches the same standard of safety or serviceability as a road fully formed to its standards for roads carrying conventional traffic. The standard of care would be related to the unformed state of the road for recreational use. The Council might even consider it appropriate to erect signs warning that the unformed road is suitable only for defined classes of recreational activities.

The case for keeping the road

[62] We now consider the grounds for keeping the road, rather than stopping it. First there is the question whether the Council's proposal to stop the road was to promote the private benefit of the Woodhill Partnership for the subdivision of its land, rather than the public benefit. Secondly there is the question whether stopping the section in question would landlock the unformed end of Johnsons Road in the Hutt City district.

7s the Council's proposal for promoting a private benefit?

[63] Counsel for the opponents submitted that the stopping proposal is unlawful because it was made to promote the private benefit of the Woodhill Partnership, not the public benefit. He also submitted that the Council had erred in not having regard to the wish of the recreation committee to use the unformed road for recreational purposes.

[64] The Council confronted this directly. Its counsel announced to the Court that the stopping proposal had been instigated at the request of Woodhill Partnership, and that if the road is stopped, it would sell the land to the Partnership for incorporation into the new lots being created by subdivision of its land.

[65] The record starts with a letter dated 6 July 1999⁹ by a surveyor, Mr R E Lendrum, on behalf of the Kakariki Partnership (which became the Woodhill Partnership) to the Council, that:

My clients the Kakariki Partnership have instructed me to ask the Upper Hutt City Council to close that part of Johnsons Road (Legal but not formed) which passes through their property.

[66] There followed exchanges of correspondence concerning the attitudes of the owners of land affected. By letter dated 30 May 2000 to Mr Lendrum,¹⁰ the City Solicitor made these enquiries:

Neither of your letters mention the question of cost. Is the Kakariki Partnership prepared to meet all Council's costs involved in processing the proposal to stop the road, including survey costs?

Finally there is also the question of disposal of the stopped road, and there would seem little point in going through the procedure unless there was an agreement to dispose of the land when stopped and the only logical purchaser would be Kakariki Partnership. It would be appropriate to agree on the terms, including consideration, for such acquisition now (but subject to Council approval) on the basis that the proposal to stop the road and the proposed sale when stopped should be put to the Council in one complete package.

[67] Mr Lendrum responded by letter dated 2 June 2000:¹¹

In respect of costs, the Kakariki Partnership are prepared to purchase the portion of road that runs through their property at a negotiated valuation. In respect of other costs, ie legal, survey and public notification, the Partnership have asked me to enclose a copy of a letter received from the Upper Hutt City Council in 1Q93 which did not mention other costs when inquiring as to the Partnership's interests in acquiring the closed paper road.

[68] By reply dated 12 June 2000¹² the City Solicitor said this:

It is your clients who want the road to be stopped. The Council itself has not made any decision about the matter. If it was to take action to stop the road it would only be doing so to oblige your clients. I anticipate that the Council would be prepared to take the necessary action to stop the road (although I emphasis that the Council itself must make the decision) provided it is not put to any expense in the matter. In other words I see the Council entertaining the request to stop the road provided there is a commitment on your clients part, firstly to meet the costs involved and secondly to purchase the land when stopped.

⁹Exhibit 3.

¹⁰Exhibit 5.

¹¹Exhibit 6.

¹²Exhibit 7, emphasis added.

[69] Mr Lendrum wrote on 1 May 2001 :¹³

*My clients wish to pursue the closing of the ... road.
Could you initiate the necessary procedures so this can take place without further delay.
I would like to make the following points:
1) My clients are agreeable to pay all reasonable costs incurred by the Upper Hutt City Council in carrying out the process.
2) My clients agree to purchase the area of closed road after a valn has been carried out.*

[70] Mr Eyies was asked in cross-examination whether Woodhill's request was the only reason for stopping the road, and he replied that Woodhill had made the request, so that followed. Asked if there was anything in the Council files that countered the statement that the Council would take action to stop the road only to oblige Woodhill, Mr Eyies responded "I suppose that's true at that stage." Counsel put to this to the witness: "The Council was not saying that the road should be stopped and we do it now because you ask?" and he answered "No."

[71] The Council submitted that this correspondence had been no more than preliminary negotiations, that the Council had not been privy to those letters, that Woodhill's interest had been disclosed to the Council, and that there had been no contract at the time the decision to stop was made. However in his report to the Council committee,¹⁴ the City Solicitor stated:

The Kakariki Partnership has asked for the paper road to be stopped and sold to it for amalgamation into its farm. That would be in accordance with the Council's usual practice of disposing of stopped road to adjoining property owners. However, sale terms should be finalised before the procedure to stop the road is commenced.

...

the costs involved in stopping the paper road are to be met by the Kakariki partnership which will, in addition, pay to purchase the land.

[72] The report does not mention any public interest in stopping the road.

[73] On the evidence we find that the Council would not have proposed stopping the unformed section when it did if Woodhill had not asked it to do so, and agreed to meet the costs incurred, and to purchase the land.

¹³ Exhibit 8.

¹⁴ Produced as an exhibit by Mr Eyies.

[74] We hold that the exercise of the statutory power to stop the road for Woodhill's private benefit was not consistent with the legal principle that such powers are to be exercised for public purposes, not to benefit private interests.¹⁵

[75] Although matters of that kind might have been the subject of judicial review proceedings in the High Court, that does not prevent the Environment Court from taking them into account in deciding proceedings within its jurisdiction. We consider that the Council's promotion of the stopping for the benefit of a private interest, is a matter that we can and should take into account in deciding these proceedings.

[76] Counsel for the opponents raised two other legal objections: that the Council's expectation that on stopping the road it would be paid for the land prevented it from doing natural justice to the objectors; and that although there was correspondence to that effect, the Council was not informed that there were recreational interests who wished to use the unformed road.

[77] The Council could have avoided the first problem by appointing an independent commissioner to hear and decide the objections (as is common practice in such situations) but that was not done. The failure to inform the Council of the correspondence from the recreation committee was ascribed (somewhat implausibly) to a breakdown of communication.

[78] However both these points are 'cured' by the full rehearing de novo of the stopping proposal and the recreational access committee's objection to it in this Court.

Would stopping the section in question leave public road land-locked?

[79] The recreation access committee contended that stopping the unformed section of road in the Upper Hutt City district would leave the remainder of the unformed section in the Hutt City district landlocked.

[80] It is true that the Hutt City Council supports the proposed stopping. We do not know whether it proposes to stop the remainder, nor we do not know whether such a proposal deserves to succeed.

¹⁵ *Sydney Municipal Council v Campbell* [1925] AC 338 (PC); *Bartrum v Manurewa Borough* [1962] NZLR21;

[81] Be that as it may, it is clear on the facts that the remainder of Johnsons Road in the Hutt City district is currently public road (though unformed), and that it would be landlocked if the unformed section in the Upper Hutt City district is stopped. That is an appropriate consideration for us to take into account in deciding these proceedings.

Consideration

[82] A public road, even one that is unformed, may be an asset. It would be difficult to replace. If a public road is valued by the public, or sections of it, for use within the scope of the purpose of a public road, that value deserves to be weighed against whatever cause is shown for stopping it as road and disposing of the land.

[83] In respect of the section of Johnsons Road in question, the Council's case was that the road is impassable, is not required for road now, and will not be in the future. We have found that although in its present state the road is impassable by ordinary traffic, it is passable by some users, and could readily be made passable by more members of the public if the Council decides to carry out minor works to remove impediments to passage. We have also found that the section in question is required now as public road by some members of the public for use for recreational purposes. That is likely to continue in future.

[84] We accept that the existence of the road through the Woodhill land is an impediment to the proposed subdivision of it. However the road was surveyed some 130 years ago, long before the present owners of the land acquired it; and those responsible for designing the subdivision were not entitled to assume that the road would necessarily be stopped. Although the owners of blocks of land to which access might be obtained from this section of public road would benefit if it is stopped, that would be a consequential benefit rather than a substantial ground for disposing of this public asset.

[85] We do not consider that the Council's responsibility for the safety of users of public assets under its control provides an independent ground for disposing of this asset.

[86] It is within the jurisdiction of the High Court, not that of the Environment Court, to decide whether the Council's proposal to stop the section of road was unlawful by contravening the principle that public powers are not to be exercised to benefit private interests. However our finding that the proposal contravened that principle is a matter that the Environment Court is entitled to take into account in deciding whether to confirm, modify or reverse the Council's decision. Without determining that the proposal was unlawful on that ground, we take into account in making our judgement that the Council's decision was made to benefit private interests. We also take into account that the proposed stopping would leave landlocked the remainder of the unformed section of this public road that lies within the Hutt City district.

[87] In short, it is our judgement that there is a public need for this section of road, and a public benefit from it continuing to have the status as public road; and that adequate cause has not been made out for stopping it.

Determination

[88] Having considered the district plan, the plan of the section of road proposed to be stopped, the Council's explanation, and the objections made by the parties who appeared before the Court, for those reasons this Court reverses the decision of the Council to disallow the objections and stop the unformed section of Johnsons Road in the Upper Hutt City district.

[89] The question of the costs of the objectors is reserved. If agreement cannot be reached, written submissions may be lodged and served.

DATED at Wellington this 9th day of April 2003.

For the Court:

D F G Sheppard
Environment Judge