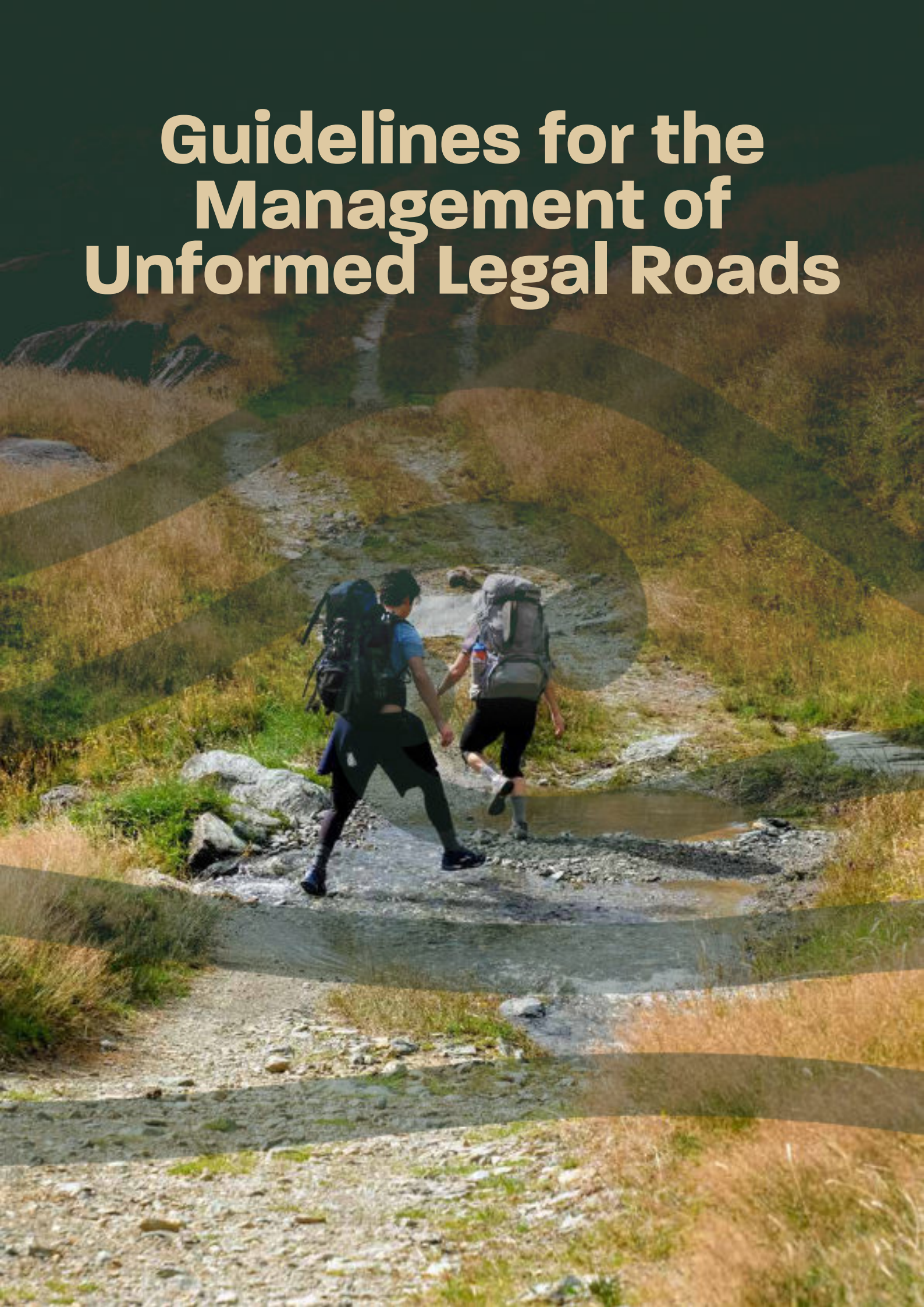


# Guidelines for the Management of Unformed Legal Roads



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**Te Kāwanatanga  
o Aotearoa**  
New Zealand Government

# Forward

The *Guidelines for the Management of Unformed Legal Roads* was first published in 2011 by Herenga ā Nuku (the New Zealand Walking Access Commission at that time) as a practical way of bringing the law into focus for the range of people who deal with unformed legal roads.

The first edition proved to be a valuable resource for both administrators tasked with addressing issues concerning unformed legal roads and their general management, and also for those members of our communities who are interested in establishing or protecting public access.

This new edition has been informed by the many issues that Herenga ā Nuku and local authorities have faced over the past 11 years. And, like its predecessor, it is informed by the seminal research undertaken by the former Registrar-General of Lands, Brian Hayes, including *Water Margins and Riverbeds: the law on public access*.

The role of unformed legal roads, as part of New Zealand's "recreational highways" (a term coined by Brian Hayes) holds even greater relevance today than it did when the first edition was published, as public access for outdoor recreation and active transport is increasingly important.

It is therefore important that councils, which hold roads in fee simple in trust on behalf of the public, have access to the best practice material available for administering unformed legal roads.

This new edition of the Guidelines, developed with input from councils, will continue to enhance the working partnerships between councils and Herenga ā Nuku and will help standardise administrative processes to reduce impediments that might otherwise hinder public access over unformed legal roads.



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# 1. Introduction

Enjoying free and enduring access to New Zealand's unique and spectacular outdoors is part of our culture and identity. A rich recreational heritage, enabled by access to rivers, lakes, beaches, and alpine areas, has contributed significantly to our health and wellbeing – as well as enhancing our awareness of our natural environment. Unformed legal roads provide significant public access routes to the outdoors.

However, changing attitudes, more intensive land use and increasing private development in rural areas can compromise access opportunities. Further, public access to some recreational areas is not always clear and understood which, for a few, can cause unnecessary conflict – especially when access previously available is stopped.

The Walking Access Act 2008 established Herenga ā Nuku to provide, among other functions, national leadership on walking access at a strategic level and also local and regional leadership on walking access in collaboration with local authorities.

Herenga ā Nuku has developed a strong reputation for facilitating public access dispute resolution – often related to unformed legal roads.

The resources that Herenga ā Nuku has developed include its highly valued mapping system, information about land over which there is public access and guidelines – including *Guidelines for the Management of Unformed Legal Roads*, published in February 2011.

This 2nd edition of the Guidelines is a revised and updated resource providing an overview of unformed legal roads from both common law and legislation perspectives and includes administration guidance. This resource is designed to facilitate a greater understanding of unformed legal roads and to improve standardisation and consistency in their administration and issues resolution.



Stock grazing sign at the start of a fenced in unformed legal road – Kurow River, 2013

# 2. Background

Herenga ā Nuku developed its mapping system in 2010 – one of the first national digital mapping and information systems in New Zealand. Using the Herenga ā Nuku current digital maps,<sup>1</sup> and assisted by smart technology, users may now more readily identify public access including the general locality of unformed legal roads.<sup>2</sup> Herenga ā Nuku's mapping system helped enhance people's understanding of the extent of New Zealand's unformed legal road network and the public access opportunities that network provides.

Herenga ā Nuku published the first edition of *Guidelines for the Management of Unformed Legal Roads* in 2011 to facilitate a greater awareness of unformed legal roads by both road users and administrators.

This 2022 revised and updated edition has been informed by a decade of issues and questions fielded by Herenga ā Nuku and local authorities – broadly summarised as:

- concerns over unformed legal roads being publicly identified in mapping systems

- disputes over the legal status and location of unformed roads
- obstructions preventing public access along unformed legal roads
- responsibility for maintaining and controlling unformed legal roads and council's liabilities, and
- issues around consistency – standardising administration of unformed legal roads including road stopping.

For any reader wishing to delve deeper into the background and law relating to public access and unformed legal roads, the following authoritative publication is available on the Herenga ā Nuku website:

B.E. Hayes Road, *Water Margins and Riverbeds: The Law on Public Access* (2008).

For readers wishing to reference related court case decisions, many are available at: [www.nzlii.org/databases.html](http://www.nzlii.org/databases.html)

# 3. Disclaimer

Every effort has been made to ensure that this publication is accurate and current at date of publication. However, this guideline is not a substitute for legislation or council policy and bylaws. The courts remain the final arbiter.

1 <https://herengaanuku.govt.nz/maps>

2 Appendix A identifies navigation challenges arising from varying positional accuracies of unformed roads as spatially represented in geographic information systems.

Image by David Mark from Pixabay

# 4. Unformed legal roads – a legacy and a taonga

Unformed legal roads are an infrastructural legacy from early New Zealand development. They resulted from necessity, as reflected by Justice Williams when he said:

In nearly every case where land is Crown granted, and described as bounded by a road, the road at the time when the land was granted was not made.<sup>3</sup>

Many of these unformed roads were established in the period of provincial government, 1854 to 1876, with the majority in place by 1905.<sup>4</sup> In managing the demand for land during this early settlement period, not only were most rural roads not constructed at the time the adjoining land was granted, but many roads were only identified in the (paper) survey records – hence the colloquial name ‘paper roads’.<sup>5</sup> Some such roads have subsequently been found to follow totally impractical

alignments as they were included on maps with little or no supporting field reconnaissance.

Over one and a half centuries later, an estimated 56,000 kilometres of legal road remain unformed with the majority of them in rural areas.<sup>6</sup> Most of these roads remain unfenced (or fenced on one and sometimes two sides if abutting separate titles) and are generally indistinguishable from the adjacent rural land.

While they are a legacy from the past, these unformed roads are increasingly valued for their recreational opportunities. These include new horse and cycle trails as well as additional public access routes to the conservation estate, rivers, lakes and the coast. Unformed legal roads are a taonga, and the national and regional economic development opportunities they provide cannot be overstated.

<sup>3</sup> *Mueller v Taupiri Coal Mines Ltd* (1900) 20 NZLR 89, (1901) 3 GLR 138 (CA) at 147 per Williams J.

<sup>4</sup> Hayes B. E. (2008) *Roads, Water Margins and Riverbeds: The Law on Public Access* at page 49.

<sup>5</sup> In this context their existence is only identifiable on ‘paper’ plans and maps. Unless quoting from a court case, the term ‘unformed road’ or ‘unformed legal road’ is used in this document.

<sup>6</sup> Ministry of Agriculture and Forestry (2007). Internal paper.



# 5. The law and unformed legal roads

The law relating to highways (roads) is embodied in centuries of common law inherited from England. Since 1876, this has been included in New Zealand statutory law. Yet, as Lord Briggs noted recently in *London Borough of Southwark and another v Transport for London*:

The word highway has no single meaning in the law but in non-technical language it is a way over which the public have rights of passage, whether on foot, on horseback or in (or on) vehicles.<sup>7</sup>

## 5.1 Public highways at common law

Halsbury's Laws of England describes a highway at common law as:

...a way over which all members of the public are entitled to pass and repass; and, conversely, every piece of land which is subject to such public right of passage is a highway or part of a highway.<sup>8</sup>

...The common law maxim or rule is "once a highway always a highway." The public cannot release rights once acquired by them, no authority can bind them in purporting to release such rights, and there is no extinctive presumption or prescription arising from non-exercise thereof.<sup>9</sup>

Under common law, a way (public right of way, highway, or road) may be established through express or implied dedication (offer and acceptance of a public right of way). The offer may be made by the Crown<sup>10</sup> or by other rightful owners of the land. This common law process to dedicate roads is still good law that continues to be used in New Zealand – the *Man O' War Station Ltd v Auckland City Council* decision being a recent example.<sup>11</sup>

However, New Zealand Statutes that define what is a road<sup>12</sup> rebut the common law presumption that the

owner of land adjoining a highway is the owner also of the soil of one half of the highway.<sup>13</sup>

Legal roads established by express or implied dedication under common law will need to have been marked on record maps and captured into the cadastre, or shown on approved survey plans if they are to be identified in the official digital cadastral record. Roads need to be identified in the digital cadastral record to enable importing to generic mapping systems such as those of Herenga ā Nuku and local authorities.

## 5.2 Meaning of 'road' is set out in two key statutes

In addition to the common law meaning of a public highway, two principal statutes – the Local Government Act 1974 and the Government Roading Powers Act 1989 expand on the meaning of a legal road.

### 5.2.1 Meaning of road as defined in the Local Government Act 1974

The statutory authority for the control and management of legal roads vested in local authorities is the Local Government Act 1974, which states in the interpretation section 315(1):

**road** means the whole of any land which is within a district, and which –

- (a) immediately before the commencement of this Part was a road or street or public highway; or
- (b) immediately before the inclusion of any area in the district was a public highway within that area; or
- (c) is laid out by the council as a road or street after the commencement of this Part; or

<sup>7</sup> *London Borough of Southwark and another v Transport for London* [2018] UKSC 63, per Lord Briggs SCJ at 6.

<sup>8</sup> Halsbury's *Laws of England* (1911) vol 16, Highways Streets and Bridges, at [1].

<sup>9</sup> *Ibid* at [103].

<sup>10</sup> *Ibid* at [46].

<sup>11</sup> *Man O' War Station Ltd v Auckland City Council* (2002) 2 NZLR 267.

<sup>12</sup> s80 Public Works Act 1876 and subsequent acts include the soil under a road in the definition of a road.

<sup>13</sup> Halsbury's *Laws of England* (1911) vol 16, Highways Streets and Bridges, [71].



- (d) is vested in the council for the purpose of a road as shown on a deposited survey plan; or
- (e) is vested in the council as a road or street pursuant to any other enactment;—<sup>14</sup>

Section 315 also addresses status of accretion and erosion to road.

Section 315(4) states:

Every accretion to any road along the bank of a river or stream or along the mean high-water mark of the sea or along the margin of any lake caused by the action of the river or stream or of the sea or lake shall form part of the road.

Section 315(5) states:

Where any road along the bank of a river or stream or along the mean high-water mark of the sea or along the margin of any lake is eroded by the action of the river or stream or of the sea or lake, the portion of road so eroded shall continue to be a road.

### 5.2.2 Meaning of road clarified by the Government Roading Powers Act 1989

The interpretation of 'road' is made clearer, particularly in the context of unformed legal roads, by the Government Roading Powers Act 1989 which, in section 43(1), states:

**road** means a public highway, whether carriageway, bridle path, or footpath; and includes the soil of –

- (a) Crown land over which a road is laid out and marked on the record maps:
- (b) land over which right of way has in any manner been granted or dedicated to the public by any person entitled to make such grant or dedication:
- © land taken for road under the provisions of this Act, the Public Works Act 1981, or any other Act or Provincial Ordinance formerly in force:
- (d) land over which a road has been or is in use by the public which has been formed or

improved out of the public funds, or out of the funds of any former province, or out of the ordinary funds of any local authority, for the width formed, used, agreed upon, or fenced, and a sufficient plan of which, approved by the Chief Surveyor of the land district in which such road is situated, has been or is hereafter registered by the District Land Registrar against the properties affected by it; and the Registrar is hereby authorised and required to register any such plans accordingly, anything in any other Act notwithstanding, when the plans are presented for registration by or on behalf of the Minister:

- (e) land over which any road, notwithstanding any legal or technical informality in its taking or construction, has been taken, constructed, or used under the authority of the Government of any former province, or of any local authority, and a sufficient plan of which is registered in the manner provided for in paragraph (d), –

and, unless repugnant to the context, includes all roads which have been or may hereafter be set apart, defined, proclaimed, or declared roads under any law or authority for the time being in force, and all bridges, culverts, drains, ferries, fords, gates, buildings, and other things thereto belonging, upon the line and within the limits of the road.

Section 43(1) Government Roading Powers Act 1989 also states:

**stopping**, in relation to a road, includes diverting.

### 5.2.3 Historical statutes defining road

The first national statute applying to the control and management of roads was the Public Works Act 1876 which defined a road under section 79 as:

The word "road" means a public highway, whether carriage way, bridle path, or footpath, and includes the soil of –

<sup>14</sup> Refer to section 315 of the Local Government Act 1974 for the full list of sub-clauses relating to the interpretation of "road".

- (1) waste lands of the Crown over which a road is laid out and marked on the survey maps
- (2) lands over which right of way is granted to the public by deed by any person entitled to make such grant;
- (3) lands taken for roads under the provisions of this or any other Act or Ordinance;

and includes also all bridges, culverts, drains, ferries, fords, gates, buildings, and other things thereto belonging, upon the line and within the limits of the road.

This initial statutory definition of road was enhanced by the Public Works Act 1882 which added a catch-all provision which is shown in bold below. Under section 78 the expanded definition of “road” became:

Throughout this Act, the word “road” means a public highway, whether carriage-way, bridle-path, or footpath, and includes the soil of–

- (1) Crown lands over which a road is laid out and marked on the survey maps;
- (2) Lands over which right of way has in any manner been granted or dedicated to the public by any person entitled to make such grant or dedication;
- (3) Lands taken for roads under the provisions of this Act or any other Act or Ordinance:

**and, unless repugnant to the context, includes all roads which have been or may hereafter be set apart, defined, proclaimed; or declared roads under any law or authority for the time being in force,** and all bridges, culverts, drains, ferries, fords, gates, buildings, and other things thereto belonging, upon the line and within the limits of the road.

This enhanced definition continued unchanged (but with additional subsections) in the subsequent Public Work Acts and is now contained in the current Government Roding Powers Act 1989, as set out above under [5.2.2](#).

### 5.3 Public areas referred to as road in legislation are not always legal road

The following statutes refer to roads – but only for the purpose and in the context of that specific legislation. Some are not legal roads in terms of being a public highway, or road as referred to in the Local Government

Act 1974 and the Government Roding Powers Act 1989.

#### 5.3.1 Land Transport Act 1998

Section 2 – Interpretation

(1) In this Act, unless the context otherwise requires,—...

**road** includes–

- (a) street; and (b) a motorway; and (c) a beach; and (d) a place to which the public have access, whether as of right or not; and (e) all bridges, culverts, ferries, and fords forming part of a road or street or motorway, or a place referred to in paragraph (d); and (f) all sites at which vehicles may be weighed for the purposes of this Act or any other enactment

Refer to section [5.7](#) for contextual use in this guideline.

#### 5.3.2 Impounding Act 1955

Section 2 – Interpretation

(1) In this Act, unless the context otherwise requires,—...

**road**–

- (a) means any place open to or used by the public as of right; and (b) includes a river bed and riparian land under the control of any local authority or regional council, unless any occupier of land adjoining the river bed or riparian land is also the lawful occupier of that river bed or riparian land

Refer to section [6.3.3](#) for contextual use in this guideline.

### 5.4 Councils hold title to roads – in trust for the public

Initially all roads were vested in the Crown under the Public Works Act 1876. In 1973, the ownership of county roads (and therefore most unformed legal roads) transferred to the then county councils.<sup>15</sup>

Since 1979, by force of section 316 of the Local Government Act 1974, all roads (other than government roads or state highways) and the soil under the roads and the materials laid on any road now vest in fee simple in the relevant council.

<sup>15</sup> Counties Act 1956, section 191A as inserted by s2 of the Counties Amendment Act 1972.

The context of this vesting in trust on behalf of the public is clarified in *Man O' War Station Ltd v Auckland City Council* in which Blanchard J states:

...Despite the vesting in the local authority the right of passage over a road is one possessed by the public, not the local authority, which holds its title and exercises its powers in relation to a road as upon a trust for a public purpose...<sup>16</sup>

This puts the onus on councils to ensure, among other things, that the rights of public access along unformed legal roads are protected in perpetuity from obstruction or other nuisance<sup>17</sup>.

#### **5.4.1 No rights of ownership to unformed legal road through occupation**

Many unformed legal roads appear to be incorporated into adjoining farms and forests.

But adjoining landholders have no rights of occupation or ownership of unformed legal roads, irrespective of how many years they have been utilising the land as their own. The right of the general public to pass and repass over any road is held in perpetuity.

Legislation (Land Act 1948 and Land Transfer Act 2017) prevents claims of adverse possession of a road, Crown land or other land vested in trust for public use.<sup>18</sup>

Further, a person may not acquire title to a public road if the road has been included in a record of title unlawfully or acquired under an unauthorised instrument. The legal road remains in existence.<sup>19</sup>

#### **5.4.2 The Crown holds residual rights in roads in certain circumstances**

Notwithstanding the Crown, in 1979, vesting roads in fee simple in councils, the Crown retains some residual rights and control as noted in the following section and also under [Section 7](#).

### **5.5 Statutes refer to unformed roads**

There is no statutory definition for an unformed legal road but they are referred to in legislation.

Section 2 of the Local Government Act 1974 does provide a definition of formation:

**“Formation**, in relation to any road, has the same meaning as the construction of the road, and includes gravelling, metalling, sealing, or permanently surfacing the road...”

Therefore an unformed road may be taken to be a road that has not been constructed or improved by the council by adding metal, seal or any other type of surface.

While the law relating to the use of roads does not differentiate between formed and unformed roads the Local Government Act 1974, Land Act 1948 and Land Transport Act 1998 provide for specific administrative actions relating to unformed roads:

- the Crown may resume certain unformed roads<sup>20</sup>
- unformed roads and unused roads intersecting or adjoining certain Crown land may be closed (in this context meaning stopped) and declared Crown land<sup>21</sup>
- road controlling authorities have the power to make bylaws that restrict the use of vehicles on unformed roads to protect the environment, the road, adjoining land or for the safety of road users.<sup>22</sup>

### **5.6 Courts recognise unformed roads as public highways vested in councils**

Concerns, issues and disputes, including the origin and proof of undefined and unformed roads being public highways, have arisen since colonisation.

This has resulted in a body of case law confirming unformed roads are legal with the same status as formed roads. Further, courts have confirmed that unformed roads are legal notwithstanding they may not have been marked out on the ground. A leading case often referred to, which went up to the Privy Council, is *Snushall v Kaikoura County*.<sup>23</sup>

16 *Man O' War Station Ltd v Auckland City Council* (2002) 2 NZLR 267, 22.

17 *Halsbury's Laws of England* (1911) vol 16, Highways Streets and Bridges, at [265] states that it is a nuisance at common law either to neglect any legal duty in respect of a highway, or to hinder or prevent the public from passing freely, safely and conveniently along it...

18 Land Act 1948 section 172(2) – No title by user or adverse possession.

19 Land Transfer Act 2017 section 53 – No title to public road or reserve unless authorised.

20 Local Government Act 1974. Section 323(1)&(2).

21 Land Act 1948. Section 43 (1).

22 Land Transport Act 1998. Section 22AB (1)(g).

23 *Snushall v Kaikoura County* (1923) NZPCC 670.

Referring to the Snushall case, in *Tauranga City Council v Faulkner*, Whata J said

....section 78 (Public Works Act 1882) states “throughout the Act road means a public highway”, and includes “Crown Land over which a road is laid out.” Tautology aside, it is obviously a deeming provision, intended to encompass all roads laid out on Crown land so as to bring them within the public works umbrella. It was not necessary for them to be expressly set aside for, or in, public use, or even physically laid out at the time. That has been the settled position since decision of the Court of Appeal in *Kaikoura County v Snushall*.<sup>24</sup>

... The effect of this is that the strip was treated in fact as a public road, as shown on subsequent survey plans, and subject to the Public Works Act 1882 with the result that it was deemed to be a public highway. Subsequent legislation, culminating in the Local Government Act 1974, meant that the strip was vested as a paper road in the Council.<sup>25</sup>

## 5.7 Statutory authority for controlling road users

The principal statute for controlling road users (as distinct from administering and maintaining roads) is the Land Transport Act 1998 which sets out the relevant law and provision for regulations and rules governing road user behaviour.

It defines, for the purposes of enforcing traffic rules, a wider definition of ‘road’ over which the public may have access (such as carparks and beaches) but which are not ‘public highways’ as defined under the Local Government Act 1974.


It also authorises councils to make specific bylaws prohibiting or restricting the use of vehicles on beaches<sup>26</sup> and restricting the use of motor vehicles on unformed legal roads – to protect the environment, the road and adjoining land, and the safety of road users.<sup>27</sup>

<sup>24</sup> *Tauranga City Council v Faulkner* [2016] NZHC, 45.

<sup>25</sup> *Ibid*, 50.

<sup>26</sup> Land Transport Act 1998 section 22AB (1) (f).

<sup>27</sup> Land Transport Act 1998 section 22AB (1) (g).



An unformed legal road near Hurunui, North Canterbury. Photo credit: Mary-Anne Baxter.

# 6. General powers of councils in respect of roads

The Local Government Act 2002 sets out, among other things, a council's purpose and powers of general competence and includes powers for making bylaws. Councils must meet current and future needs of communities for good quality local, network and community infrastructure – appropriate to present and anticipated future circumstances.<sup>28</sup> Infrastructure includes existing unformed legal roads which can provide current and future recreational opportunities – contributing to the health and wellbeing outcomes of local communities.

Councils' general powers in respect of roads are set out under section 319 of the Local Government Act 1974. These powers include construction, maintenance and repair of roads. Councils' powers also extend to stopping or temporarily closing a road, in the manner and upon the conditions set out in section 342 and Schedule 10.

Except for permitting utilities or granting a lease of airspace or subsoil, as discussed under section 6.2, there is no express statutory power for a council to lease part of a road surface for private benefit. However, as discussed under section 6.3, there is an inferred and general authority for a council to permit temporary occupation or encroachment of part of a road – providing such occupation or encroachment does not interfere with the public's right to pass and repass along the road or create some other nuisance.

## 6.1 Councils may restrict access on a road

In their proper control and administration of roads a council may, in certain circumstances, restrict public access along a road. Such restrictions, which may only be initiated under specific statutory powers, include:

- determining, under section 319(1)(f) Local Government Act 1974, what part of a road shall be a carriageway, and what part a footpath or cycle track only;

- temporarily closing a road, under section 342(1)(b) of the Local Government Act 1974; and
- restricting use of motor vehicles on unformed legal roads under a bylaw authorised by section 22AB(1)(g) of the Land Transport Act 1998.

## 6.2 No express statutory power for councils to grant lease of road

Apart from the following instances, a council has no express statutory powers to grant a lease or licence over part of a road for private benefit.

Section 341 of the Local Government Act 1974 provides explicit statutory powers to grant a lease of airspace or subsoil of a road. But that is subject to the council ensuring sufficient airspace above the surface of the road for the free and unobstructed passage of vehicles and pedestrians lawfully using the road.

Under section 338, a council may grant an easement or other right for the laying of conduit pipes along or under a road. Such agreements may only be for periods not exceeding 50 years.

The Tramways Act 1908 provided express powers authorising councils to grant licences for private tramways on roads. This Act was repealed in 1992.<sup>29</sup>

Section 340 of the Local Government Act 1974 authorises a council to issue a permit to erect a private motor garage between the building line and the road line, but this is adjacent to, not over a legal road. Notwithstanding, some councils provide in their by-laws that parking pads, for example, may encroach onto a legal road.

The clear absence of a council's express statutory authority to lease an unformed legal road can be compared with the following express authority the Crown holds to lease unformed highway.

<sup>28</sup> Local Government Act 2002 sections 5 and 10.

<sup>29</sup> The Tramways Act 1908 was repealed by the Railway Safety and Corridor Management Act 1992.

### 6.2.1 Crown may lease unformed State highways – but road status suspended

Under the heading of State highways, section 61A of the Government Roading Powers Act 1989, (previously section 45(2) Public Works Act 1981) provides for the leasing of part or all of any Government road or State highway while it is unformed. While leased (until needed for construction of State highway, for example) the status of the land as a road or highway is suspended.

Given this specific wording and also the principles set out in the Interpretation Act 1999, it is clear that this unformed road leasing provision may only apply to State highways<sup>30</sup> and Government roads, not unformed legal roads vested in councils.

### 6.3 Councils' general authority to permit occupation of part of a road

Notwithstanding that there is no express statutory power for councils to grant a lease of a road surface, the Local Government Act 1974 section 341(3), in providing for leases of airspace or subsoil of roads, confirms that:

Nothing in this section shall be construed so as to restrict any right a council may have to permit any person to use for a temporary period any part of the surface or of the airspace above the surface of any road.

In addition to section 341(3), a general authority to authorise encroachments may also be inferred from section 357(1)(a) which states:

Every person commits an offence who, not being authorised by the council or by or under any Act, encroaches on a road by making or erecting any building, fence, ditch, or other obstacle or work of any kind upon, over, or under the road, or by planting any tree or shrub thereon...

Also, as seen in the following two decisions, the courts confirm that as the owner of the fee simple of legal roads councils do have a general authority to authorise occupation of part of a road. But that authority does

not extend to cause interference with the public's right to pass and repass or to cause a public nuisance.

Denniston J stated:

I know of nothing to prevent a Corporation allowing the exclusive occupation of a part of its streets to a particular person or persons so long as such occupation does not constitute a nuisance to the general public.<sup>31</sup>

Cooper J stated:

...the Borough Corporation had no express power to consent...but that as owner of the fee simple ... it had the general authority to allow W.S. and Co. to occupy a portion of Tweed Street, with this limitation, that the occupation permitted must not amount to a nuisance, or interfere with individual rights...<sup>32</sup>

Applications for road encroachments, such as for electric vehicle charging stations, tourist operator utilities and car parking pads, will principally relate to formed roads in urban areas.

Most encroachments over rural unformed legal roads are farm buildings, fences, ditches and irrigation channels.

Many of the encroachments over unformed legal roads may require retrospective approvals as they are only recently being identified through overlaying modern imagery with the digital cadastral road parcel record in councils' geographic information systems.

Comprehensive policies enable councils to address applications for road encroachments in a consistent and transparent manner.<sup>33</sup>

To address exceptional situations, section 80 of the Local Government Act 2002 provides for decisions to be made that are inconsistent with council policy – provided that the inconsistency, reason and intention is clearly identified.

Authorised encroachments or occupation of part of a road must be for a fixed term and able to be terminated by the council, with conditions to ensue protection of the general public's right to pass and repass along the road without the encroachment causing a nuisance.

30 Interpretation Act 1999 Section (2): The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment. Section (3): Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

31 *The Mayor of Christchurch v Shah* SC Christchurch (1902) 21 NZLR 578.

32 *Mayor, Councillors, and Burgesses of Borough of Invercargill and Wright, Stephenson, & Co v Hazlemore* SC Invercargill (1905) 8 GLR 252 (25 September 1905).

33 Wellington City Council's Consolidated Bylaw 2008 and Christchurch City Council's Structures on Roads Policy 2020, for example, provide for road encroachments.

Historic structures encroaching a legal road may still leave sufficient space to allow practical public access, otherwise the council would have to require the obstruction to be removed or, alternatively, require the establishment of new practical public access.

### **6.3.1 Fencing, gates and cattle stops on unformed legal road**

In addressing public safety and convenience, councils may require a landholder to take appropriate mitigation action including fencing the boundary of the road or any dangerous place, as provided for under section 353 of the Local Government Act 1974.

To manage, protect and contain livestock, a landholder may construct gates and cattle stops across unformed legal roads, but only with the council's written permission. Section 344 of the Local Government Act 1974 and the Gates and Cattle Stops Order 1955 provide for this.

Any gates across a road must not be locked and a board with the words "Public Road" legibly printed must be affixed to each side of the gate.

Any authorised structures on a road must not create a nuisance or prevent the public from using the road. With the council's permission, a land holder may erect a temporary fence across a road for the purpose of stock control – but it must not inhibit public access.

In addition, a local authority may pass a resolution providing for stock depasturing on a road, as noted in [6.3.3](#).

### **6.3.2 Offence to damage or for structures to obstruct an unformed legal road**

Local councils have a duty to ensure roads are free of obstructions and damage. Section 357 of the Local Government Act 1974 sets out the enforcement provisions and penalties in detail, including for damage to or encroachment over a road. Offences include making or erecting an obstruction or work that has not been authorised by the council.

Obstructions on unformed legal roads include fences, locked gates, buildings and trees – which the council may request be removed.

Section 133 Public Works Act 1981 provides an additional authority for roading authorities to require the owner or occupier of any land adjoining a road to

trim or cut down vegetation that may obstruct the lawful use of a road or damage a road or be detrimental to the road.

In exceptional circumstances the police may be able to help deal with a person deliberately obstructing an unformed legal road – as it is an offence under section 22 of the Summary Offences Act 1981 to obstruct a public way. But it requires a clear and specific warning by police before it becomes an offence under this provision.<sup>34</sup>

### **6.3.3 Offence if livestock obstruct road – unless council resolves otherwise**

Section 33 of the Impounding Act 1955 provides for the impounding of livestock wandering or tethered on any road in such a manner as to obstruct or be reasonably likely to obstruct the road. Further, the definition of road in the Impounding Act 1955 means any place open to or used by the public as of right, including riverbed and riparian land under the control of any local authority or regional council – unless any occupier of land adjoining the riverbed or riparian land is also the lawful occupier of that riverbed or riparian land.

Notwithstanding, section 34 provides that the local authority may, by resolution publicly notified, declare that the provisions of section 33 shall not apply to any road or any portion of a road where depasturing stock create little inconvenience or danger. In such cases warning notices, to the effect that stock is depasturing on or adjacent to the road, are required. These notices must be displayed in a form and locations approved by the local authority which may also require, subject to section 344 of the Local Government Act 1974, construction of gates or cattle stops.

## **6.4 Maintenance and liabilities for unformed roads**

The responsibilities and liabilities of councils in relation to unformed legal roads, as summarised by Brian Hayes, are drawn from the general law relating to roads and are:<sup>35</sup>

- The council has no obligation to form or maintain an unformed legal road.<sup>36</sup>
- If the council carries out no work there is no liability.<sup>37</sup>

<sup>34</sup> See *Langford v Police* [2015] NZHC 2424 for the requirement for warning.

<sup>35</sup> Hayes B. E. (2008) *Roads, Water Margins and Riverbeds: The Law on Public Access* at page 83.

<sup>36</sup> *Inhabitants of Kowai Road Board v Ashby* (1891) 9 NZLR 658; *Tuapeka County Council v Johns* (1913) 32 NZLR 618.

<sup>37</sup> *Hocking v Attorney-General* (1963) NZLR 513 (CA); *Tombleson v Far North District Council* [2020] NZDC 12171.



**CAUTION  
UNMAINTAINED  
PUBLIC ROAD  
PROCEED AT OWN RISK**





- The council's immunity from liability on unformed roads has been held to extend to the filling of holes on part of a long line of unformed road, but there is no duty to repair the whole road.<sup>38</sup>
- The council is immune from liability for the operation of natural causes.<sup>39</sup>
- If the council undertakes any artificial work such as a culvert or bridge on a road which is generally unformed it has a duty of reasonable care in construction, and also a duty of ongoing reasonable observation of that work to ensure that any dangerous change in condition is discovered and remedied.<sup>40</sup>
- The council may require the occupier of any land that contains a hole or other place dangerous to people passing along any road to fill in, cover, or enclose the danger.<sup>41</sup>
- Whenever the safety or convenience of the public applies, the council may require the owner or occupier of any land not separated from a road by a sufficient fence, to enclose the land with a fence that complies with council requirements.<sup>42</sup>

There are additional responsibilities applying to secondary-use roads,<sup>43</sup> such as old 'ferry roads' leading to a river but no longer maintained by the council.<sup>44</sup>

In summary, councils are not liable for repair and maintenance of unformed legal roads or for any damage to the unformed road through erosion, degradation or general wear and tear.<sup>45</sup>

## 6.5 Maintenance of roads by adjoining landholders or third parties

Unformed legal roads are generally in a natural state, or in pasture where the adjoining landholder has incorporated the road into their farming operation.

Although they have no legal right of ownership or occupation, landholders adjoining unformed legal

roads may sometimes improve them by laying down gravel, for example.

Third parties, such as conservation groups, tramping clubs, horse trekking groups, mountain bike clubs or 4WD groups may also desire to develop sections of unformed legal roads to improve public access.

Councils, in addressing such requests, should ensure that their policies, by-laws and maintenance standards clearly set out responsibilities including, where appropriate, the level of council's reasonable observation of such work in order to mitigate possible risks and liabilities.

A council may decline any request to undertake work on an unformed legal road.

38 *Inhabitants of Kowai Road Board v Ashby* (1891) 9 NZLR 658; *Tuapeka County Council v Johns* (1913) 32 NZLR 618.

39 *Tarry v the Taranaki County Council* (1894) 12 NZLR 487 (CA); *Hokianga County v Parlane Brothers* (1940) NZLR 315; *Newsome v Darton Urban District Council* (1938) 3 All ER 9; *Hocking v Attorney-General* (1963) NZLR 513 (CA).

40 *Hocking v Attorney-General* (1963) NZLR 513 (CA).

41 Local Government Act 1974. Section 353 (b).

42 Local Government Act 1974. Section 353 (c).

43 In this context, a secondary-use road is one which is generally superseded by another newer road but which retains its legal status as a public road. It reverts to use which is largely recreational. A ferry access road down to the water replaced by a bridge, for example.

44 Hayes B. E. (2007). *Roading law as it applies to Unformed Roads* – at page 84.

45 *Tarry v the Taranaki County Council* (1894) 12 NZLR 487 (CA); *Hokianga County v Parlane Brothers* (1940) NZLR 315; *Newsome v Darton Urban District Council* (1938) 3 All ER 9; *Hocking v Attorney-General* (1963) NZLR 513 (CA).

# 7. Stopping of roads

The principle of the perpetual nature of a road may only be rebutted if the road is legally stopped.

In his decision in *Dawes v Hawkins*, Byles J said:

There can be no dedication of a way to the public for a limited time, certain or uncertain.

If dedicated at all, it must be dedicated in perpetuity.

It is also an established maxim 'once a highway always a highway' for the public cannot release their rights, and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are, either by the old writ of *ad quod damnum*, or by proceedings before magistrates under the statute.<sup>46</sup>

The early Public Works Acts from 1876, which vested all roads in the Crown, set out very prescriptive conditions for stopping roads,<sup>47</sup> including for stopping of roads solely for the convenience of a private person.<sup>48</sup> In this latter case, that private person was required to pay all the costs incurred, including the costs of constructing a new replacement road, if necessary. In all cases, detailed public notification and public participation was required to be undertaken by the road controlling authority before a road could be stopped.

Various Land Acts, from 1877, provided a separate and different authority for taking and closing (stopping) roads – for the purposes of settlement and development – to enable the Crown to effect road alterations, deviations, closing and exchanges by consent.<sup>49</sup>

Hayes,<sup>50</sup> outlines in detail the chronological development of these statutory road stopping authorities and notes that:

...the legislative history of the separate processes shows that they were intended for use in different circumstances.<sup>51</sup>

The Native Land Act 1909 (as amended 1928) also provides for road stopping.

These three but separate road stopping processes of the early Public Works Acts, the Land Acts and the Native Land Acts served three very different purposes which continue into current statutes.

The current statutory powers for stopping roads are vested in:

- the Minister of Lands under the Public Works Act 1981 (previously the Land Acts);
- councils under the Local Government Act 1974 (previously the Public Works Acts and the Counties Act 1956); and
- the Māori Land Court under Te Ture Whenua Māori Act 1993 (previously the Native Land Acts).

## 7.1 The Minister may stop a road under the Public Works Act 1981

Under section 116 of the Public Works Act 1981, subject to conditions including the Minister of Lands giving the relevant council at least 10 working days prior notice – but not requiring public notification – the Minister may declare any road or part of a road to be stopped.

Section 116 does not provide a statutory power or authority for councils to initiate and stop an unformed legal road at the request and solely for the convenience of any private person. (Compare section 152 of the Public Works Act 1928 which road stopping powers are mostly now incorporated into the Local Government Act 1974).

As B E Hayes states:

The powers of the Minister, which may be exercised on the election of the Minister, but not on that of the territorial authority, are indicative of an administrative role which places the public interest as an overriding consideration. As an alternative to stopping unformed legal roads continue to be subject to return to the Crown on the request of the Minister

46 *Dawes v Hawkins* [1860] EngR 968; (1860) 8 CB NS 848; 144 ER 1399.

47 Public Works Act 1876. Section 93 lists 12 prescriptive conditions for stopping a road.

48 Public Works Act 1928. Section 152 – road stopped for private benefit.

49 Land Act 1877, section 162, Land Act 1892 section 13.

50 Hayes B. E. (2008) *Roads, Water Margins and Riverbeds*, pages 85-90.

51 *Ibid* at page 87.

of Lands under s 323 of the Local Government Act 1974.<sup>52</sup>

### **7.1.1 Esplanade reserves and marginal strips required**

When the Minister stops any road or portion of a road under section 116, and the road is along the mark of mean high-water springs of the sea, or along the bank of any river, or the margin of any lake, then Section 118(1) of the Public Works Act 1981 mandates that the provisions of:

- (a) section 345(3) of the Local Government Act 1974 (relating to esplanade reserves) shall apply if that land was formerly road vested in the local authority, and
- (b) Part 4A of the Conservation Act 1987 (relating to marginal strips) shall apply if that land was formerly a Government road or a State highway or other road vested in the Crown.

## **7.2 Councils may stop roads under the Local Government Act 1974**

Section 319(1) (h) sets out the statutory authority and power for a council to stop a road. (Section 319 (1) (d) also gives Councils the power to divert or alter the course of any road).

A council electing to stop an unformed legal road will have made its decision in terms of its policies and general statutory decision making framework developed according to the Local Government Act 2002. Section 342 and schedule 10 of the Local Government Act 1974 set out the specific manner and conditions for progressing the road stopping.

The road stopping process includes detailed public notification with robust objection and appeal requirements. In the event of the council disallowing a public objection, and the objector not subsequently withdrawing their objection, the road stopping proposal and objections must then go to the Environment Court for a final decision.

### **7.2.1 Stopping a road for private benefit – managing wider public interest**

Most requests to stop unformed legal roads are initiated by adjoining landholders, not councils.

Stopping roads for private convenience and benefit was specifically provided for in the early legislation – but with requirement to construct new road, if necessary, and with stringent public notice requirements.<sup>53</sup> Those public notice requirements are now incorporated into the Local Government Act 1974. Public notification is particularly important when it comes to stopping unformed legal roads which are generally invisible and absorbed into the rural working

<sup>52</sup> Hayes B. E. (2008) *Roads, Water Margins and Riverbeds*, at page 85 (Local Government Act 1974 - section 323(1) clarifies which unformed roads may be resumed by the Crown).

<sup>53</sup> Compare section 99 Public Works Act 1882 and section 152 Public Works Act 1928 – road stopped for private convenience and benefit was at the cost of applicant, including costs for constructing new road.



landscape. New recreation opportunities may only become apparent from public feedback arising from the public notification of a private land holder's request to stop a road.

The statutory decision making framework of the Local Government Act 2002 and the detailed road stopping processes and controls of the Local Government Act 1974 help councils to place the wider interests of the public ahead of private interests.

The courts uphold the priority of the public's right of passage over private interests.

Blanchard J emphasised this in the *Man O' War* case when he stated:

The integrity of the roading infrastructure is of such importance to the economic and social welfare of any society that it is to be anticipated that the public right to the use of roads will be given a measure of priority when it comes in conflict with private claims.<sup>54</sup>

### **7.2.2 Minister's prior consent required before proceeding to stop rural roads**

Section 342(1) (a) of the Local Government Act 1974 directs that a council shall not proceed to stop any road (or part) in a rural area without the prior consent of the Minister of Lands. This reflects the Crown's residual interest in rural roads and the statutory

provision enabling the Crown to resume unformed legal roads, which are generally rural.

### **7.2.3 Stopped roads along water bodies vest as esplanade reserves**

Stopped roads with river, lake or coastal boundaries must vest as an esplanade reserve. That is for stopped roads along rivers of average width 3m or more, or around the margins of any lake with an area of 8 ha or more, or along the coast. The esplanade reserve shall be 20m wide, or the full width of the stopped road whichever is the lesser.<sup>55</sup> Any accretion that has added to a road being stopped also needs to be accounted for.<sup>56</sup>

## **7.3 Unused road over Māori land may be stopped by court**

Section 324 of the Te Ture Whenua Māori Act 1993 enables the Māori Land Court to make an order to stop a road constituted over any Māori freehold land – or any defined portion of it. Prior to making such an order, the court must have written consent to stop the road, from both the Minister of Transport and the authority having control of the road. The local authority will follow its standard consultation/public notification processes before giving such consent.

54 *Man O' War Station Ltd v Auckland City Council* (2000) 2 NZLR 267, at p286.

55 Local Government Act 1974 section 345 (3) and (4). The esplanade reserve width may be subject to a district plan rule.

56 Section 315(4) Local Government Act 1974 confirms that accretion shall form part of the road.

Wharekai – Te Kau Walkway in Jackson Bay closely follows an unformed legal road.

# 8. Appendix A – Locating unformed legal roads

The public's right to pass and repass over unformed legal road does not extend to crossing private land adjoining the road – unless landholder's permission is given. Therefore people need to navigate unformed roads carefully, as they may be indistinguishable from the surrounding countryside – unless fenced or identified by regular use.

Property boundaries, including most unformed legal roads, are identified in the official cadastral survey record held by Toitū Te Whenua Land Information New Zealand (LINZ). This information is publicly available and forms one of the core mapping layers ubiquitous in most geographic information systems (GIS) including those of Herenga ā Nuku, local authorities, and Google Map applications.

People can deduce the position of most unformed legal roads, with varying degrees of accuracy, by overlaying current imagery with property boundary lines.

Given the quality and accuracy of new imagery, much of the variability between image features and digital cadastral boundary lines can be explained by the historic method of capturing rural property boundaries which was by digitising paper record maps.

Notwithstanding subsequent efforts to improve the accuracy of previously digitised boundaries, many unformed legal road parcels, depicted in the various GIS mapping applications, may differ from their correct position – up to tens of metres in some cases.

Recreational hand-held navigation and positioning technology will typically achieve a 5-10 metre accuracy range. This navigation accuracy is improving as technology develops. But the challenge remains

in coordinating unformed legal roads from GIS applications given the absence of physical boundary marks and other physical structures to correlate against.

We may estimate the mapping accuracy of a road, in the vicinity of the area of interest, using a GIS application. We do this by observing the correlation between boundary fence lines identified on imagery and the corresponding cadastral property boundary lines from the digital cadastral boundary layer.

Landholders have the right of undisturbed possession of their land and the public have the right to pass and repass over an unformed legal road. The challenge is how to navigate these respective rights when the existence of the road is acknowledged but the boundary positions are disputed.

In the event of a significant dispute a cadastral land surveyor may be required to confirm the legal road alignment.

In practice, the precise location of boundaries may not be critical. Rather, an acknowledgement by all parties of the road's existence, providing legal public access from 'A' to 'B', may be enough to achieve pragmatic agreement on a practical public access route.

Landholders, concerned about road users straying onto their land, may wish to identify their property boundary with appropriate markers.

Any issues should be raised with the roading authority, the council, in the first instance.

Depending on the circumstances, Herenga ā Nuku and local recreation groups may also be able to assist.



