

J Williams
3 February 2011 /
Public Forum

Applicable legal principles

This land is "public" land, not ordinary Council's land to do with what it wishes. These reserve lands are owned on behalf of the public with administration responsibilities only delegated to Councils within specific parameters set out in legislation and in common law. Ordinarily, while Council may permit a modest encroachment on road reserve for the erection of a private motor garage between the boundary of the formed road and the building line so long as public access and movement is not unreasonably impeded, Council cannot lease it for, or permit the erection of a private dwelling, boatshed, or other related buildings. The Council is not legally empowered to arbitrarily alienate this land from access and use by the public.

The Council's powers in relation to roads have been considered by the Courts on a number of occasions resulting in the following principles of the public right of passage and access to and from adjoining land:

- It is an absolute right to pass and repass without hindrance, exercisable by all.
- The customary uses of roads extend beyond mere passage from one point to another. They include ancillary activities, including recreation, so long as these do not conflict with the passage of others to an unreasonable degree.
- The right of assertion, including removal of appreciable interferences (i.e. obstructions) and/or legal action against those creating or authorising such nuisances.
- A road is incapable of occupation to the exclusion of the public.
- Rights of vehicle use can be assumed unless dedication of a road is expressly confined to horses or foot. Use of vehicles cannot however cause nuisance by damaging the road surface.
- Territorial local authorities are obliged to see that the right of passage is preserved.
- These rights continue until such time as a road is stopped.
- Frontagers have rights of access between their properties and public roads, which are not absolute, and involve an accommodation of private rights with the rights of passage of the public.

the following cases are relevant

1896. *Queen v. Mayor, Councillors, and Citizens of Wellington*

1977. *Lower Hutt City v. AG ex Moulder*

1977. *Moore v. MacMillan*

1981. *Fuller v. MacLeod*

1988. *Frecklingham v. Wellington City Council*

1992. *Paprzik v. Tauranga District Council*

2002. *Re Ruapehu District Council*

2003. *Re Upper Hutt City Council v. Akatarawa Recreational Access Committee*

In the Court of Appeal decision regarding *Lower Hutt City Council v Attorney General ex rel Moulder* (1977) 1NZLR184.

the Court of Appeal stated :

"Although all streets and the soil thereof are by section 170(1) (of the former Municipal Corporations Act 1954) vested in the local corporation they nevertheless retain their character as highways so that the ownership by the

corporation is in general subject to the rights in respect of highways enjoyed both by the public and by adjoining owners.

...the fact that streets are vested in and are under the control of the local authority does not entitle a council to erect or authorise the erection of a structure in a street if that structure amounts to what is technically described as a "public nuisance"...At common law a permanent construction erected upon a highway without lawful authority, and which renders the way less commodious than before to the public, is a "public nuisance" provided that the construction constitutes an appreciable interference with the traffic in the street...It may also be noted that it is no defence that the obstruction, though a nuisance, is in other ways beneficial to the public."

The question of the public's right of access to roads was also considered by the High Court in *Paprzyk v Tauranga District Council* (1992) 3NZLR176. In that case which dealt with common law rights on the use of roads by the public, the Court stated :

"Once land is dedicated as a public road members of the public have, with certain qualifications, a right of passage over it. That general right of passage is supported by correlative duties imposed upon others not to substantially and unreasonably impede it. Effect is given to those duties by the laws of nuisance, trespass, negligence

From all of the above it is clear that:-

- a) Although the Council owns the roads, the roads retain their character as highways so that the ownership by the Council is subject to the rights of the highway enjoyed by the public and rights of access to the highway from adjacent land;
- b) The Council's primary function in relation to roads is to facilitate the passage which the word "highway" imports and for this purpose the roads are vested in the Council and the general powers as set out in the Local Government Act are conferred on the Council;
- c) The fact that part of a road is unformed as carriageway does not affect its legal status nor the right of the public to use that part of the road;
- d) The Council is empowered to authorise encroachments on a legal road only so long as those encroachments do not amount to a public nuisance;
- e) In general terms the Courts have held that a public nuisance will be established where the obstruction constitutes an "appreciable interference" to the right of the public to pass along or across the road or to access the road from adjacent land.
- f) If a particular situation constitutes a public nuisance then the Council does not have the authority to authorise that situation to continue so as to impede legal access to the public road and should rectify the situation.

- g) If the Council fails to take action to remedy a situation of a public nuisance in respect of any road then any member of the public has the right to apply to the High Court for an order requiring the Council to rectify the situation.

2

STAFF REPORT

TO: The Chairman and Members of the Community Services Committee

FROM: Manager Property

DATE: 7 September 2004

SUBJECT: Buildings on Esplanade Reserves

PURPOSE

To establish a policy regarding private buildings on local purpose (esplanade) reserves.

BACKGROUND

Esplanade reserves have generally been created through subdivision processes and vested in the Council. They extend throughout parts of the coastline as well as waterways.

Recently complaints have been received regarding either the occupation or condition of buildings situated on esplanade reserves. There is no provision in the Reserves Act 1977 for buildings or dwellings on these reserves.

COMMENT/DISCUSSION

There are known buildings on esplanade reserves at Rangihaeata, Ligar Bay, Tapu Bay and Stephens Bay (note there are also known instances of buildings erected within legal road throughout the district. These will be addressed in a separate report as they are not subject to the Reserves Act 1977).

The structures situated within the esplanade reserve are mostly baches with the occasional shed. The structures were probably all in place when the Council acquired ownership of the reserves and, apart from the odd negative comment from time to time, have been allowed to remain where they are for the last 50 years or so. In two instances it is believed that the baches were built in the wrong place in that the bach owner owned adjacent property and may have misinterpreted the position of the boundary.

One of the principles of providing esplanade reserves is to provide the public with access and it is probably for this reason that the Reserves Act 1977 specifically

excludes any provision for the Council to allow the erection or lease (or licence) of buildings. It is known that one property which is not connected to any reticulated service (water, sewage, stormwater, electricity) is being used as a permanent residence. One other building was observed recently to have power and a sky television receiver.

OPTIONS

To comply with the law, there is only one option which is to require the removal of these structures and, by referring to the provisions of the Resource Management Act 1991 and the Reserves Act 1977, which refer to the purpose of which local purpose (esplanade) reserves are provided, the argument in support of this option is quite clear. However, while this should be the stated intention of the Council it may be appropriate to provide a sunset clause which would allow the buildings to be removed over time and for strict conditions to be put in place regarding use and maintenance.

These baches and other buildings seem to remain in the same families and be passed through from one generation to another. When they are used strictly for short term holiday stays they are probably not too much of an issue but when they are used on a regular basis, or let out for monetary compensation, they may be considered to be abusing the purpose for which they were originally provided and their occupation of the Council's land. It would be preferable to impose a sunset clause which would see these buildings disappear from the Council's land within a specific timeframe, say, five to eight years rather than have them linked to the life of the present owner. Included in such an option could be the requirement that the buildings are to be maintained to an acceptable standard, that no further additions or alterations are to be made, that occupation is restricted to the immediate family of the "owner" and then for a maximum of three weeks at any one time with a maximum of six months occupation in any year. A ground rent based on adjoining residential land would be payable to the Council.

SIGNIFICANCE

This issue is not regarded as significant under the Council's policy on significance.

AFFECTED PARTIES

While the specifically affected persons are the bach and building owners, the people of Tasman District have an equal say as far as their rights to enjoy this land, particularly those properties which adjoin esplanade reserves which are being used for that purpose. Although these buildings have been in place for many years and may have been erected with a previous land owner's consent, the owners of those buildings should have no more right to occupy esplanade reserves than any other member of the public.

RECOMMENDATION

That Council notify known owners of buildings on local purpose (esplanade) reserves:

That they will be granted rights to occupy the envelope only of the buildings situated on those reserves.

That any buildings which are considered to be unsafe or a health risk are to be removed forthwith either by the owner or by the Council at the owner's expense.

That the term of occupation be for a maximum of eight years expiring on 30 September 2012.

That no further additions or improvements to the buildings are permitted other than a reasonable standard of maintenance.

That a market rental for the land based on the value of adjoining land be established.

That occupation is restricted to the immediate family of the "owner" and then for a maximum of three weeks at any one time with a maximum of six months in any year.

That as an alternative the building owners be given an opportunity of removing any structures from the land to the satisfaction of the Council by 30 June 2005.

J K Frater
Manager

g:\tara\agendas\community services\september 04\rca040915 report buildings on esplanade reserves.doc

MINUTES

TITLE: Community Services Committee
DATE: Wednesday 15 September 2004
TIME: 9.30am
VENUE: Beechwoods Meeting Room, Beechwoods, Murchison

PRESENT: Cr P F Sangster (Chair), Mayor J C Hurley, Crs B J Cashman, E E Henry, M J Higgins, D J Ogilvie, E M O'Regan and J C Rogers.

IN ATTENDANCE: L L Kennedy (Community Services Manager), J K Frater (Manager Property) and B D Moore (Administration Officer)

1 PUBLIC FORUM

Cr O'Regan spoke of a block of land containing two cottages in Murchison where Council had completed a subdivision and that the health board may wish to buy it.

Mr P Topping provided a brief progress report on the Murchison Recreation and Sport Centre Development Proposal. The chairman of the committee for the proposed development, Mr T Peacock, also attended the public forum.

2 CONFIRMATION OF MINUTES

Moved Crs Sangster/O'Regan
CS04/09/01

THAT the Minutes of the meeting of the Community Services Committee, held on 15 July 2004; containing resolutions CS04/07/01 to CS04/07/27 be approved as a correct record.

CARRIED

3 ACTION SCHEDULE

Mr Kennedy reported on the matters contained within the action schedule in the agenda.

4 CHAIRMAN'S REPORT

Cr Sangster thanked all Councillors and staff for their support and encouragement to the Community Services Committee during this term of Council.

Moved Crs Henry/Rogers
CS04/09/02



- Lesley Abrey, 3 Everett Street, Motueka
- North Street Developments (R and M Lockhart), 11 North Street, Motueka
- V J and J Hill and A Glasgow, 5 North Street, Motueka
- T Knowles, 7 North Street, Motueka
- Trustees of the Estate of Mrs F A Scott, 9 North Street, Motueka
- J and K Drummond, 95 Wharf Road, Port Motueka
- J C Challies, Redwood Valley Road, Appleby
- D C and N I Charlett, Landsdowne Road, Richmond.

CARRIED

5.8 Buildings on Esplanade Reserves

The Property Manager's Report of 7 September 2004 was contained within the agenda. The report sought to establish a policy regarding private buildings on local purpose (esplanade) reserves.

Moved Crs Henry/O'Regan
CS04/09/10

THAT where adjacent land in private ownership exists, that a covenant be a prerequisite to a licence to occupy a building on esplanade reserves.

CARRIED

Mayor Hurley suggested that the term of occupation include reference to the lifetime of the principal owner. The Property Manager suggested that occupiers be unable to assign rights of occupation of buildings on local purpose reserves.

Moved Crs Henry/O'Regan
CS04/09/11

THAT Council notify known occupiers of buildings on local purpose (esplanade) reserves:

That they will be granted rights to occupy the envelope only of the buildings situated on those reserves.

That any buildings which are considered to be unsafe or a health risk are to be removed forthwith either by the owner or by the Council at the owner's expense.

That the term of occupation be at the same date and terms as those on the legal road at Ligar Bay or the life of the main occupier whichever is the earliest.

That no further additions or improvements to the buildings are permitted other than a reasonable standard of maintenance.

That a market rental for the land based on the value of adjoining land be established.



That occupation is restricted to the immediate family of the "owner" with no rights of assignment, and then for a maximum of three weeks at any one time with a maximum of six months in any year.
CARRIED

5.9 Revised Delegation of Powers under Reserves Act 1977

The agenda contained a list of delegations under the Reserves Act 1977 for inclusion in the delegations register.

Moved Crs Henry/Higgins
CS04/09/12

THAT the Community Services Committee recommends to Council that the list of delegations under the Reserves Act 1977, be approved and included in the delegations register.
CARRIED

5.10 Saxtons Field Funding Agreement

The report of 9 September 2004 from the Community Services Manager was contained within the agenda together with a proposed deed between Nelson City Council and Tasman District Council. The Mayor said that this is a matter of some debate by Nelson City Council and it is necessary to consolidate this proposal.

Moved Cr Ogilvie/Mayor Hurley
CS04/09/13

THAT the Saxton Field deed with Nelson City Council be approved and the document be executed.
CARRIED

6 TASMAN COMMUNITY MULTI PURPOSE CENTRE AT TASMAN SCHOOL

A report of 7 September 2004 from the Community Services Manager quoted the recommendation from the Moutere/Waimea Ward Councillors. Cr Higgins advised that the three Moutere/Waimea Ward Councillors had met with the principal of the Tasman School and investigated this proposal.

Moved Crs Higgins/O'Regan
CS04/09/14

THAT a grant of \$40,000.00 be made to the Tasman School Community Multi Purpose Centre from the Moutere/Waimea Reserve DIL's account and that this be subject to:

The facility being available for hire by the community outside of school hours.





CAWTHRON

Laboratory Report

3

Certificate of Analysis: Final

Cawthron Contract Number: 14952

Project Number: S61520

**Jim Williamson
69 Brooklands Road
NELSON**

Attention: Jim Williamson

Email Recipients: Jim Williamson
Date Project Started: 18/01/2011 15:24

Sample Details

Laboratory ID: S61520-1 **Sample Type:** Water **Date Sampled:** 18/01/2011 09:15
Description: Sea water - Channel tide coming in **Date Received:** 18/01/2011 14:30
Customer ID: 1

Analysis	Result	Units	Method
Enterococci	10	MPN/100mL	Quanti Tray Idexx Laboratories Enterolert

Sample Details

Laboratory ID: S61520-2 **Sample Type:** Water **Date Sampled:** 18/01/2011 10:30
Description: Sea water - Estuary beach East **Date Received:** 18/01/2011 14:30
Customer ID: 2

Analysis	Result	Units	Method
Enterococci	<10	MPN/100mL	Quanti Tray Idexx Laboratories Enterolert

Sample Details

Laboratory ID: S61520-3 **Sample Type:** Water **Date Sampled:** 18/01/2011 10:30
Description: Sea water - Estuary beach middle **Date Received:** 18/01/2011 14:30
Customer ID: 3

Analysis	Result	Units	Method
Enterococci	10	MPN/100mL	Quanti Tray Idexx Laboratories Enterolert

Sample Details

Laboratory ID: S61520-4 **Sample Type:** Water **Date Sampled:** 18/01/2011 10:30
Description: Sea water - Estuary Beach West **Date Received:** 18/01/2011 14:30
Customer ID: 4

Analysis	Result	Units	Method
Enterococci	344	MPN/100mL	Quanti Tray Idexx Laboratories Enterolert

Normally 35 is about the maximum for swimming Enterococci



This laboratory is accredited by IANZ
Unless specified all tests reported herein
have been performed in accordance with
the laboratory's scope of registration.

This document may only be reproduced with permission
from Cawthron. Part reproduction or alteration of the
document is prohibited.

Report Number: 368289
Project Number: S61520
V15.32
SL:M



Sample Details

Laboratory ID: S61520-5 **Sample Type:** Water **Date Sampled:** 18/01/2011 10:40
Description: Sea water - Channel tide going out **Date Received:** 18/01/2011 14:30

Customer ID: 5

Analysis	Result	Units	Method
<i>Enterococci</i>	10	MPN/100mL	Quanti Tray Idexx Laboratories Enterolert

Sample Details

Laboratory ID: S61520-6 **Sample Type:** Water **Date Sampled:** 18/01/2011 09:30
Description: Domestic well water - 1134 Abel Tas Drive **Date Received:** 18/01/2011 14:30

Customer ID: 6

Analysis	Result	Units	Method
Total coliforms	>23	MPN/100mL	APHA 9223B. D.W. Stds for NZ 2005 (rev.2008)
Faecal coliforms	4	MPN/100mL	APHA 9223B. D.W. Stds for NZ 2005 (rev.2008)
<i>E.coli</i>	4	MPN/100mL	APHA 9223B. D.W. Stds for NZ 2005 (rev.2008)

Results apply to samples as received

Our routine detection limits for chemical testing relate to samples with a clean matrix.
Reported detection limits may be higher for individual samples if there is insufficient sample or the matrix is complex.

< means less than, > means greater than

Date Generated: 19/1/11

Authorised by: Mark Englefield (LAS)

Position: Senior Technician, Microbiology Laboratory

Signature:



This laboratory is accredited by IANZ
Unless specified all tests reported herein
have been performed in accordance with
the laboratory's scope of registration.

This document may only be reproduced with permission
from Cawthron. Part reproduction or alteration of the
document is prohibited.

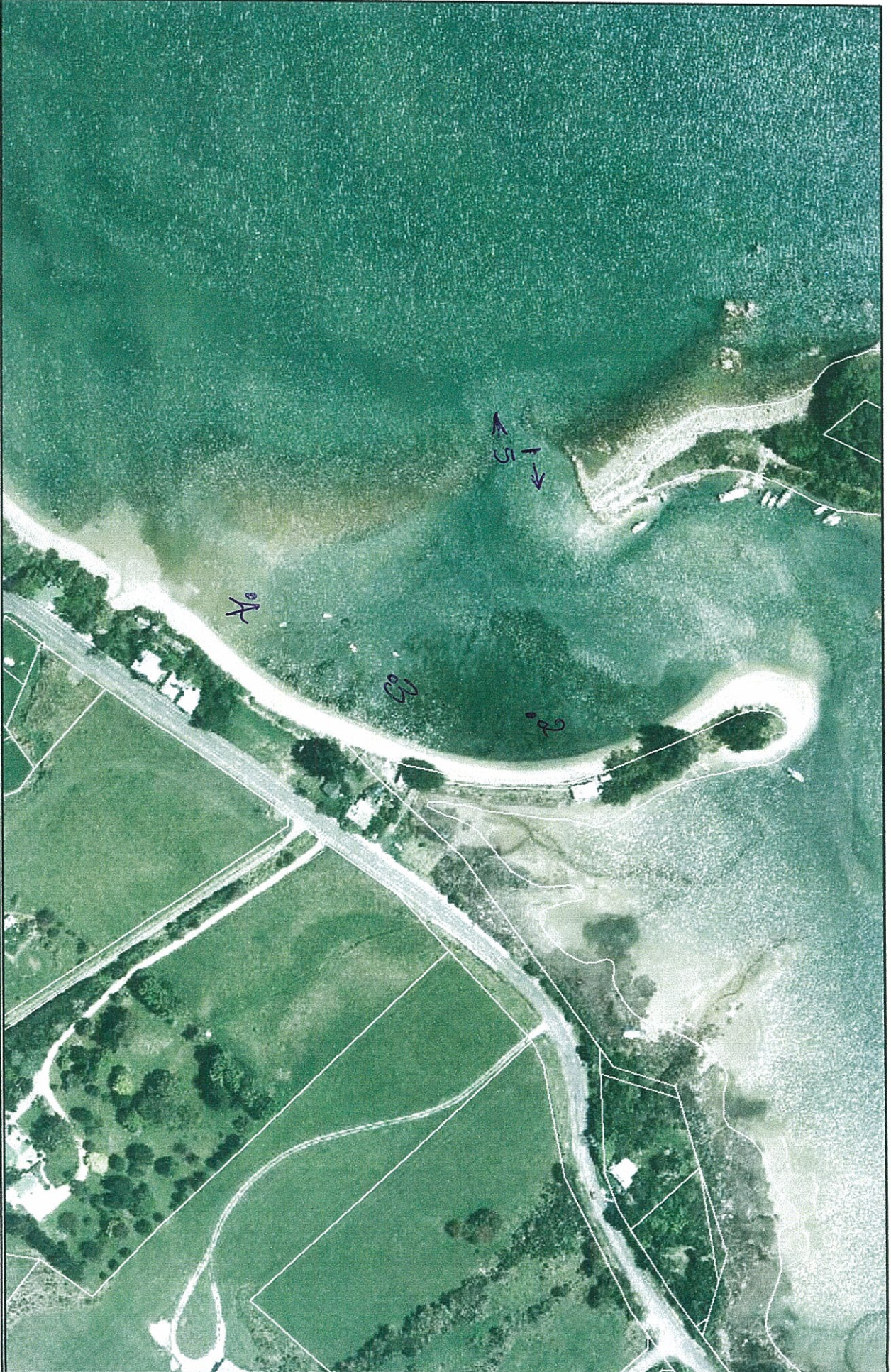
Report Number: 368289
Project Number: S61520
V15.32
SL:M



Cawthron

98 Halfax St East, Private Bag 2, Nelson, New Zealand. Ph. +64 3 548 2319, Fax +64 3 546 9464. www.cawthron.org.nz
Grovetown Park SH 1, Private Bag 1007, Blenheim, New Zealand. Ph. +64 3 579 2270, Fax +64 3 579 2210.

Page
2 of 2



Top of the South Maps



22 January 2011

The map is an approximate representation only and must not be used to determine the location or size of items shown, or to identify legal boundaries. To the extent permitted by law, the Tasman District Council and Nelson City Council, their employees, agents and contractors will not be liable for any costs, damages or loss suffered as a result of the data or plan, and no warranty of any kind is given as to the accuracy or completeness of the information represented by the GIS data. While reasonable use is permitted and

Office of the Ombudsmen



Te Tari-o-Ngā Kaitiaki Mana Tangata

Our Ref: 301712
Contact: John Haynes

28 January 2011

Mr JO Williamson
69 Brooklands Road
Atawhai
Nelson 7010

Dear Mr Williamson

I refer to your complaint of 29 November 2010 against the Tasman District Council. Briefly summarised, it is that the Council has failed to remove obstructions from road reserve in Ligar Bar.

I have noted that when you telephoned the Office you advised that a Council committee on 3 February 2011 is due to consider whether or not it to require the removal of obstructions from the road reserve.

If the Council decides to remove the obstructions this will resolve the complaint, and, with that being a possibility, an investigation has not been commenced pursuant to section 17(1)(a) of the Ombudsmen Act.

Following the meeting you can ask the Council under the Local Government Official Information and Meetings Act about the outcome. If information is withheld an Ombudsman can be asked to investigate the decision. In the event that the Council decides not to remove the obstructions, it is open to you to write to me further enclosing copies of Council minutes and other relevant papers.

Yours sincerely

Christopher Littlewood
Assistant Ombudsman