IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA107/2024
[2026] NZCA 138

BETWEEN	OURS NOT MINES LIMITED Appellant
AND	HAURAKI DISTRICT COUNCIL First Respondent
	OCEANA GOLD (NEW ZEALAND) LIMITED Second Respondent

Hearing:	28 May 2025
Court:	French P, Courtney and Katz JJ
Counsel:	T P Mullins and A W McDonald for Appellant D J Neutze and L M Wansbrough for First Respondent S V McKechnie and B S Clifford for Second Respondent
Judgment:	21 April 2026 at 3.00 pm

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is granted.

B The appeal against the decision in [2024] NZHC 63 is allowed. That judgment is set aside.

C We make a declaration that the decision of the Hauraki District Council to grant the licence to Oceana Gold (New Zealand) Ltd was unlawful. That decision is set aside.

D The appeal against the judgment in [2025] NZHC 931 is allowed. That judgment is set aside and costs in the High Court are remitted to that Court to be determined in light of this judgment.

E The first and second respondent must pay the appellant usual disbursements for this appeal on a joint and several basis.

F Leave is reserved to file memoranda on costs, not exceeding five pages in length. Any memorandum from the appellant is to be filed within five working days of delivery of this judgment. Any memoranda from the first and second respondent are to be filed within a further five working days. A decision on costs will then be made on the papers. If no memoranda are filed, costs are to lie where they fall.

REASONS OF THE COURT

(Given by Katz J)

Introduction

[1] On 15 September 2021 the Hauraki District Council (the Council) granted a 40-year licence to Oceana Gold (New Zealand) Ltd (Oceana Gold) over part of an unformed or paper road the Council owns in the Wharekirauponga Forest. The licence permits Oceana Gold to construct ventilation shafts for a proposed mine it intends to develop underneath the forest.

[2] The Wharekirauponga Forest (apart from the unformed road) is Crown land held for conservation purposes under the Conservation Act 1987. It forms part of the Coromandel Forest Park and is administered by the Department of Conservation (DOC). As for the unformed road, apart from its legal designation as a road, there is nothing to distinguish it from the surrounding forest. It is not accessible to vehicles and even foot access is challenging.

[3] Ours Not Mines Ltd (Ours Not Mines), an environmental interest group, applied to the High Court for judicial review of the Council's decision to grant the licence on the grounds that:

(a) the Council had no statutory or common law power to grant the licence;

(b) even if there was such a power, the licence was unlawful as it failed to adequately protect the public's right of passage over the road (and thereby authorised a public nuisance);

(c) the licence was granted for an improper purpose; and

(d) the licence was in substance a lease (which is not permitted by statute).

[4] Harvey J declined the judicial review application on all grounds.[1] Ours Not Mines now appeals that decision. It also appeals the High Court's costs decision.[2]

Background

[5] The vast majority of roads in New Zealand are owned by local councils in fee simple, pursuant to s 316 of the Local Government Act 1974 (LGA 1974).[3] Such roads are placed under the "control" of the relevant council, pursuant to s 317 of the LGA 1974.[4]

[6] Oceana Gold holds a mining permit pursuant to the Crown Minerals Act 1991 covering the "Wharekirauponga orebody", which is located directly underneath the Wharekirauponga Forest. The permit covers exploration and mining activities that occur beneath the land but does not authorise mining activities on the surface. A separate permit would be required for such activities.[5]

[7] Oceana Gold has entered into an access arrangement with DOC that enables it to access the Wharekirauponga Forest land for exploration purposes. This access arrangement is governed by detailed conditions designed to preserve and safeguard the conservation and recreational values of the Coromandel Forest Park. Oceana Gold

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1 *Ours Not Mines Ltd v Hauraki District Council* [2024] NZHC 63, [2024] 2 NZLR 456 [judgment under appeal].

2 *Ours Not Mines Ltd v Hauraki District Council* [2025] NZHC 931 [costs decision].

3 Section 316(4) of the Local Government Act 1974 specifies that for the purposes of council ownership, the term "road" does not include: any government road; any State highway (or part of a State highway) situated in the district; any road in respect of which the Minister of Local Government is the council; and any regional road (as defined in Part 22) which is vested in the regional council.

4 Judgment under appeal, above n 1, at [20].

5 See Crown Minerals Act 1991, s 54(2).

carried out exploration activities pursuant to this access arrangement. It now wishes to develop a mine to extract gold and silver ore from the Wharekirauponga orebody, for refinement.

[8] To access the proposed mine without the need to cross conservation land, Oceana Gold plans to construct an underground "dual-decline" access tunnel approximately seven kilometres long. The access tunnel will commence from adjacent privately owned land and travel beneath the forest to reach the orebody. In addition to the accessway, the mine also requires up to four ventilation and escape shafts, for health and safety purposes. Installation of an approximately eight-metre-high funnel-like structure, called an evasé, at the top of each vent will be required.

[9] A number of restrictions apply to mining activities on conservation land. To access the Wharekirauponga Forest land for mining (as opposed to exploration) purposes, an access arrangement from the Minister of Conservation would be required.[6] In deciding whether to grant access, the Minister is required to consider and balance: the objectives of the conservation estate; the purpose for which the land is held by the Crown; any relevant conservation management strategies or plans; the safeguards against potential adverse effects; the direct net economic and other benefits; and any other matters the Minister considers relevant.[7]

[10] It was initially envisaged that Oceana Gold would submit an access arrangement application to the Minister to enable the construction of the ventilation shafts in the Wharekirauponga Forest. This did not happen, however. Instead, Oceana Gold decided to apply to the Council for a licence to construct the ventilation shafts on the Council-owned unformed road. DOC advised the Council that it considered that granting such a licence would undermine DOC's legislative mandate to conserve the Wharekirauponga ecosystem. The Council disagreed, on the basis that the ecological effects and wider environmental impacts of the proposed activity would be assessed separately, through the Resource Management Act 1990 (RMA)

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6 Pursuant to ss 59–61.

7 Section 61(2). See also *Royal Forest and Bird Protection Society of New Zealand Inc v Rangitira Developments Ltd* [2018] NZCA 445, [2019] NZRMA 233 at [62].

consenting process. The Council accordingly granted the requested licence, conditional on Oceana Gold obtaining the necessary RMA approvals.

[11] The licence provides for two stages of development. The first stage, known as the "construction period", allows for the construction of the ventilation shafts in "temporary licensed areas" on the unformed road under a "temporary licence". During the construction period, temporary licensed areas up to 400 square metres will be used. It is also required to provide a five-metre unobstructed margin for safe public passage within the temporary licensed areas.

[12] The second stage requires the temporary licence to be relinquished and provides for the operation of the vents on more limited "licensed areas". There is a maximum of four licensed areas of approximately 100 square metres each. Oceana Gold is required to erect fences and gates in or around the licensed areas to prevent access by animals or people. It is expressly provided that the licensee shall carry out activities in a manner that does not prevent the Council and the public from passing or repassing over the road. The licence term is 40 years unless terminated or surrendered earlier.

Application for leave to adduce further evidence

[13] Oceana Gold applied to adduce an updating affidavit from Alison Paul, a senior employee at Oceana Gold, for the purposes of the appeal.[8] This was unopposed. The parties also consented to Ours Not Mines filing reply updating evidence, which it did.

[14] Ms Paul's evidence indicated that the land at one of the proposed vent sites may be unsuitable for construction, and therefore the development of the vents may be abandoned. Her affidavit further explained that Oceana Gold had applied for approval under the Fast Track Approvals Act 2024. If approved, that could potentially render this appeal moot although, as far as we are aware, it has not yet done so. Rather, following the filing of the updating evidence, Ours Not Mines advised that it wished to continue with its appeal.

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8 Pursuant to r 45 of the Court of Appeal (Civil) Rules 2005.

[15] We consider that the updating evidence that has been filed is fresh, credible and cogent and grant leave accordingly.[9]

[16] We now turn to consider the lawfulness of the licence. To determine this, it is necessary to first consider the scope of the Council's powers over roads in its ownership and control. We will then consider whether granting the licence fell within the scope of those powers.

What is the scope of the Council's powers over roads?

The High Court decision

[17] The Judge acknowledged that the general powers in relation to roads set out in s 319 of the LGA 1974 do not expressly include the power to grant licences.[10] However, he rejected Ours Not Mines' submission that the LGA 1974 is a code in respect of the Council's roading powers.[11] Rather, he accepted the Council's submission that the power to grant licences over roads is derived from the Council's general rights as a landowner, rather than from statute.[12] Specifically:[13]

> [21] … the power to grant a licence is a right any landowner has over their land and is not a regulatory function. A landowner may grant a licence over its land which grants the licensee permission to do actions which would otherwise be unlawful (such as entering or doing other acts contrary to a landowner's rights). In this regard, [the Council] is no different from any other landowner.

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[9] See *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 1)* [2006] NZSC 59, [2007] 2 NZLR 1 at [10]; and Jessica Gorman and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [CR45.01].

[10] Judgment under appeal, above n 1, at [20].

[11] At [21] and [25].

[12] At [21] and [24]–[25], citing *Mayor of Christchurch v Shah* (1902) 21 NZLR 578 (SC) at 583: "The power to make by-laws is auxiliary to and in extension of its right as owner (as trustee for the public)".

[13] Footnote omitted, citing DW McMorland and others *Hinde McMorland and Sim Land Law in New Zealand* (online ed, LexisNexis) at [18.001], and *Thomas v Sorrell* (1674) Vaugh 330 at 351, (1674) 124 ER 1098 at 1109 per Vaughan CJ.

[18] The Judge made a number of points in support of this conclusion, including that:

(a) The text of the LGA 1974 does not itself confer on councils the power to grant licences over roads, but clearly acknowledges that such a power exists (see for example ss 357 and 341(3)).[14]

(b) The inclusion of various express roading powers in the LGA 1974 (including the power to authorise various obstructions and encroachments on roads) does not indicate that the LGA 1974 is intended to be a code in respect of roading powers. Rather, the legislation provides for a range of powers that extend beyond what a landowner could otherwise lawfully do in reliance on their common law powers, including permitting the Council to authorise certain activities or obstructions that would otherwise constitute a nuisance at common law.[15]

(c) To the extent that the powers of the Council have a relevant statutory overlay, this arises from the general competence provision in s 12 of the Local Government Act 2002 (LGA 2002), which provides that a council "has full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction".[16] (Albeit this is not the source of the power to grant a licence, but merely facilitates the exercise of the pre-existing common law power).

[19] Importantly, the Judge found that while the Council's right to grant a licence over roads arises from its status as a private landowner, this is limited by the Council's public responsibilities under statue and common law, including those relating to the character of the land as a road.[17] Specifically, there is, in principle, a common law right for the public to pass and repass over any part of a road.[18] The Judge observed,

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14 Judgment under appeal, above n 1, at [22].
15 At [25] and [28]–[32].
16 At [23].
17 At [26], citing *Lower Hutt City Council v Attorney-General ex rel Moulder* [1977] 1 NZLR 184 (CA) at 188.
18 At [28].

however, that all rights are subject to limits.[19] The Council's powers, both as landowner and as road controlling authority, cannot reasonably be confined to actions that cause no interference whatsoever with the public's right to pass and repass.[20] Rather, at common law an obstruction on a road will be a public nuisance (and therefore impermissible) if it unreasonably interferes with the right to pass and repass. Citing the decision of this Court in *Lower Hutt City Council v Attorney-General ex rel Moulder*, the Judge articulated the relevant test as being that an obstruction erected upon a highway will be a public nuisance if it constitutes "an *appreciable* interference with the traffic in the street".[21] Courts will not interfere if an obstruction is so trivial that it does not practically interfere with the public's exercise of their rights.[22]

[20] As the Council cannot authorise a public nuisance, any licence that has that effect will be invalid. While the Judge accepted that the legal principles of public nuisance apply to unformed "paper" roads just as they do to established roads, he expressed the view that "context, as always, is relevant".[23] Hence the principles applicable to busy urban streets cannot simply be transposed to infrequently used, unformed roads in dense bush.

[21] Finally, the Judge rejected Ours Not Mines' submission that any common law landowner rights the Council may have can be exercised only for roading-related purposes. Rather, the Judge found that because the power to grant a licence to occupy is a common law landowner right and not derived from statute, it is not inherently restricted to roading purposes.[24]

Ours Not Mines' submissions

[22] In its written submissions, Ours Not Mines largely mirrored the position it had taken in the High Court, namely that the LGA 1974 is a code in respect of the Council's roading powers. Hence, as there is no express statutory provision authorising the

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19 At [28].
20 At [28].
21 At [41], citing *Moulder*, above n 17, at 190 (emphasis added).
22 At [43], citing *Attorney-General v Wilcox* [1938] Ch 934 at 940 per Farwell J.
23 At [42], citing *Harper v GN Haden & Sons Ltd* [1933] Ch 298 (CA) at 308 per Lawrence LJ.
24 At [65]–[66].

Council to grant licences, no such power exists. In oral submissions, however, Ours Not Mines' position was somewhat more nuanced. Counsel emphasised that roads are held on trust for a public purpose.[25] By the conclusion of the hearing, Ours Not Mines accepted that the Council did have the power to issue a licence at common law, as long as it did not create an "appreciable" interference. The parties differed significantly, however, as to what would constitute an appreciable interference. Ours Not Mines submitted that the right of the public to pass and repass over *all parts* of a road is paramount and is limited only by:

(a) any statutory exceptions in the LGA 1974 or other legislation;

(b) the reasonable requirements of other road users;

(c) the Council's right to permit temporary obstructions of a *de minimis* nature that would not meet the threshold for public nuisance;[26] and

(d) the Council's right to undertake activities "connected" with the road, or that constitute a reasonable and ordinary use of the road, even if that activity or use is not expressly authorised by statute.

[23] Ours Not Mines further submitted that the Judge erred in finding that a licence over part of a road may be granted for a purpose that is not roading related.

Analysis

[24] The Judge was correct to find that the LGA 1974 is not a code in respect of the Council's roading powers, as Ours Not Mines ultimately accepted.[27] The fee simple ownership of roads (with limited exceptions such as State highways and government roads) is vested in the relevant council through the LGA 1974.[28] The Council's powers in respect of roads derive from both the common law and a range of statutory

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25 *Fuller v MacLeod* [1981] 1 NZLR 390 (CA) at 414.

26 Citing *Paprzik v Tauranga District Council* [1992] 3 NZLR 176 (HC) at 185, *Wildtree Hotels Ltd v Harrow London Borough Council* [2001] 2 AC 1 (HL) at 14 per Lord Hoffmann and *Lingké v Mayor of Christchurch* [1912] 3 KB 595 (CA) at 602 per Vaughan Williams LJ.

27 *Police v Abbott* [2009] NZCA 451, [2009] NZAR 705 at [26] is an example of where this Court has rejected that view.

28 Local Government Act 1974, s 316.

sources.[29] Neither the LGA 1974, nor the LGA 2002, extinguished (expressly or by necessary implication)[30] the common law powers of local authorities in relation to roads in their ownership.[31] As the Judge noted (see [18](a) above) both s 357 and s 341(3) of the LGA 1974 are consistent with that view. Those sections reflect that the Council has a pre-existing common law power to grant licences over roads, rather than being the source of that power.

[25] Critically, however, council roads are not held for "general" purposes and councils cannot treat them as such. Rather, the purpose for which roads are held is to facilitate the public right of passage over the relevant land. This context significantly qualifies the scope of a council's common law rights and powers relating to roads. As this Court observed in *Fuller v MacLeod*:[32]

> … the vesting of streets in a corporation is in their character as highways and that the general powers conferred, as in s 170(4), are for the purpose of enabling the corporation in the interests of citizens to facilitate that passage which the word highway itself imports. And it is because that is the Council's primary function, and the purpose of the vesting and the conferring of general powers, that it was necessary to give particular powers to permit what might otherwise be obstructions on the highway. The primary purpose of a street is passage. The Council holds the land and its general powers as *upon a trust for a public purpose.*

[26] That position was reiterated by a full Court of this Court in *Man O'War Station Ltd v Auckland City Council*:[33]

> [22] … Despite the vesting in the local authority [by the LGA 1974, s 316] 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.*

[27] As the council in which a road is vested holds the title to the road on trust for the public, it is required to ensure that the right to pass and repass over the road is preserved, for the benefit of the public at large. Once a road has been established as a

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29 Including the Local Government Act 1974; Local Government Act 2002; Land Transport Act 1998; Resource Management Act 1991; and Public Works Act 1981.
30 See *R (Rottman) v Commissioner of Police of the Metropolis* [2002] UKHL 20, [2002] 2 AC 692 at [75] per Lord Hutton.
31 This can be contrasted with, for example, s 115 of the Contract and Commercial Law Act 2017: "This subpart has effect in place of the rules of the common law and of equity relating to …".
32 *Fuller*, above n 25, at 414 (emphasis added). See also *Moulder*, above n 17, at 188.
33 *Man O'War Station Ltd v Auckland City Council* [2000] 2 NZLR 267 (CA) (emphasis added), citing *Fuller*, above n 25, at 414.

public road, the public's right to use it persists indefinitely unless it is lawfully discontinued through proper legal procedures — reflecting the principle that "once a highway always a highway".[34]

[28] Given that roads are held upon trust for the purpose of allowing public passage, local authorities cannot authorise any obstructions on a road that would appreciably interfere with that right of passage. To do so would be to authorise a public nuisance, which is beyond a council's common law powers as landowner. As this Court stated in *Lower Hutt City Council v Attorney-General ex rel Moulder*:[35]

> … It is, however, clearly established … that 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 obstruction 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 obstruction 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 …

[29] The requirement for an "appreciable" interference[36] means that not every encroachment or obstruction will automatically qualify as an actionable nuisance. For example, the common law has traditionally allowed for temporary obstructions that are part of the normal "give and take" of using a road.[37] Because ordinary uses of roads inherently cause some (generally minor) interference with other users, the law accommodates everyday domestic and commercial activities as long as they are connected with the "reasonable and lawful user of the highway".[38]

[30] The Judge was also correct to reject Ours Not Mines' submission that the common law only permits local authorities to permit roading-related uses on roads,

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34 *Man O'War Station,* above n 33, at [24], citing *Permanent Trustee Co of New South Wales Ltd v Council of the Municipality of Campbelltown* (1960) 105 CLR 401 at 422 per Windeyer J.

35 *Moulder*, above n 17, at 190 (footnotes omitted).

36 This requirement has sometimes been referred to by different names. See, for example, *Harper*, above n 23, at 304 per Lawrence LJ and 317 per Romer LJ ("unreasonable"); *R v the Mayor, Councillors, and Citizens of the City of Wellington* (1896) 15 NZLR 72 at 88–89 ("materially"); *Wilcox*, above n 22, at 940 per Farwell J ("substantial"); and *Paprzik*, above n 26, at 184 ("substantially and unreasonably"). We note that the parties in the High Court and before us ultimately agreed on the test as being one of "appreciable" interference (see above at [19]). Where the parties differed was on the application of that test, including the extent to which context was relevant.

37 *Harper*, above n 23, at 304 per Lord Hanworth MR, 308 per Lawrence LJ and 320 per Romer LJ.

38 At 304 per Lord Hanworth MR, 308 per Lawrence LJ and 320 per Romer LJ.

not private commercial uses. Because the power to grant a licence to occupy arises from general property ownership, rather than a council's statutory powers, an authorised use need not serve a transportation objective. Hence, Courts have long recognised the ability of local authorities to grant licences over road reserves for private or commercial purposes, provided the activity does not amount to a public nuisance. For example, in *The Mayor, Councillors and Citizens of City of Christchurch v Shah* Denniston J upheld a decision of the Christchurch city authorities that allowed a private individual to occupy part of a street for the purposes of an ice cream stall.[39] Similarly, in *The Mayor, Councillors and Burgesses of the Borough of Invercargill v Hazlemore* Cooper J found that the council, as owner of the fee simple, was entitled to permit a business to occupy part of the road, provided its occupation did not amount to a nuisance.[40] In *Paprzik v Tauranga District Council* (a case involving mobile shops) the Court noted that roads are frequently used for ancillary commercial and social purposes, such as street trading and mobile shops, and there is no rationale to strictly limit road use to transport.[41]

[31] It is also common for unformed road reserves to be fenced off and licensed for private uses;[42] temporary scaffolding or hoardings may be erected on the street to protect the public during construction works;[43] and skips may be permitted to be placed temporarily on roads. Private commercial encroachments like cafe seating, structural awnings, or shop displays on footpaths are common features in urban environments. The crucial limitation, however, is that any private or commercial use must not appreciably interfere with the public's right of passage over the road.

[32] In assessing what constitutes an appreciable interference with the right of passage it is necessary to consider both the quantum and duration of an obstruction. An obstruction will only be lawful (in other words, not an actionable nuisance) if it is "reasonable in quantum and in duration".[44] If an obstruction takes up an unreasonably

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39 *The Mayor, Councillors and Citizens the City of Christchurch v Shah*, above n 12.

40 *The Mayor, Councillors and Burgesses of the Borough of Invercargill and Wright, Stephenson, & Co v Hazlemore* (1905) 25 NZLR 194 (SC).

41 *Paprzik*, above n 26, at 181. See also *R v Clark (No 2)* [1964] 2 QB 315 (CA).

42 See *Upper Hutt City Council v Akatarawa Recreational Access Committee Inc* [2003] NZRMA 405 (EnvC) at [10]. For example, the evidence before the Court indicates that granting licences to occupy for stock grazing on rural unformed road reserves is a common practice.

43 See *Harper*, above n 23.

44 At 304 per Lord Hanworth MR and 319 per Romer LJ; and *Paprzik*, above n 26, at 184.

large area (quantum) or is prolonged for an unreasonable amount of time (duration), it will cross the threshold into becoming a wrongful public nuisance.

[33] Importantly, the public right to pass and repass does not depend on how often a road is used, or whether a road is formed. An unformed or long-unused "paper road" carries the same legal public right of passage as any busy city street.[45] The council owner, or adjoining landowners, have no right to exclude the public from it. As Chilwell J observed in *Moore v McMillan* — in the context of a rural paper road — a road cannot be "possessed" by anyone to the exclusion of the public's right to pass; this is "no mere exercise in theory".[46]

[34] That said, in our view the Judge was correct to find that the standard of "appreciable" interference is necessarily context dependent.[47] As counsel for Oceana Gold observed, dining tables may not appreciably interfere with the public right of passage if placed in the Cuba Street mall but would if placed in the middle of Transmission Gully. Hence, the degree of hindrance required to be appreciable may vary with the road's nature, location, and usage. This does not mean, however, that significant and permanent obstructions will be permitted simply because a road is remote and infrequently used. The public right to pass and repass remains the paramount consideration. Unformed roads have full legal status and the public may not be unreasonably obstructed even if the road is unformed and seldom used.

[35] A further aspect of the broader statutory context that has some potential relevance is that when title to unformed roads was transferred from the Crown to councils in 1972, the Crown retained some controls which qualify the title of the council in relation to certain roads.[48] One of these is the Crown's right to resume the ownership of unformed roads, without consideration.[49] Another is that roads in rural

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45 It has consistently been held that the definition of "road" depends on the legal status of the road, not its physical presence. See *Snushall v Kaikoura County Council* [1923] AC 459 (PC); and *Wellington City Corporation v McRea* [1936] NZLR 921 (CA).

46 *Moore v MacMillan* [1977] 2 NZLR 81 (SC) at 91.

47 See *Harper*, above n 23, at 308 per Lawrence LJ; and *Wilcox*, above n 22, at 940–941 per Farwell J.

48 BE Hayes *Roading law as it applies to unformed roads* (MAF Policy Publications, Wellington, 2007) at 52–53.

49 Local Government Act 1974, s 323(1).

areas cannot be stopped without the consent of the Minister of Lands.[50] As former Registrar-General of Land Brian Hayes explains, these controls reflect the Crown preserving its interest as guardian of the roading network.[51] Such statutory restrictions ensure that these public assets are not permanently disposed of by local councils without central government oversight. The Crown's residual rights and powers appear to be linked (at least in part) to the overarching public interest in unformed roads as "recreational highways" that serve as vital routes to the conservation estate and other natural areas for recreational activities.[52] Unformed roads (covering an estimated 55,000 kilometres of New Zealand) are recognised as playing a vital role in providing "an unqualified guarantee" of access to the outdoors for everyone.[53]

[36] In summary, councils' powers over roads do not derive solely from the LGA 1974, but rather from a combination of statutory provisions and general common law rights as landowner. The power to grant a licence over roads, however, is derived solely from councils' common law rights as landowner. The power is subject to the important qualification that roads are held on trust for a public purpose, namely, to enable the right of public passage. While licences may be granted for private or commercial purposes (and not solely for roading purposes) councils cannot authorise obstructions that appreciably interfere with the public's right of passage. To do so would be to authorise a public nuisance, which councils have no power to do. The assessment of whether an obstruction is appreciable is context dependent. The quantum and duration of the obstruction are relevant, as are the nature, location and use of the road. What is acceptable in a pedestrian mall may be unacceptable on a major highway. Nevertheless, significant and enduring obstructions cannot be justified or permitted simply because a road is unformed, remote or rarely used.

Did granting the licence fall within the scope of the Council's roading powers?

[37] We now turn to consider the key issue in this appeal, which is whether granting the licence fell within the scope of the Council's roading powers.

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50 Section 342(1). "Stopping" is the process of changing the status of a road to fee simple land.
51 Hayes, above n 48, at 54.
52 BE Hayes *Roads, water margins and riverbeds: the law on public access* (Faculty of Law University of Otago, Dunedin, 2008) at 1–3.
53 At 3.

The High Court decision

[38] Applying the appreciable interference test to the licence at issue here, the Judge placed considerable emphasis on the inaccessibility of the unformed road.[54] He acknowledged that a structure taking up 10 metres out of a 28- to 30-metre road was relatively severe (especially given the temporary licensed area, to construct the vents, would be even larger, leaving only a five metre unobstructed margin for pedestrians).[55] Additionally, a 40-year licence term could not be considered "temporary", at least if the structure was on a frequently used street.[56] However, the unformed road is situated in dense bush, is impassable by vehicles, and is difficult for pedestrians to access.[57] The construction of the vents would not materially alter the public's right of passage, given the highly infrequent use of the road.[58] The Judge also noted that the intrusion is not permanent. Oceana Gold is required to restore the area after the 40-year licence term expires.[59] Having regard to these factors, the obstruction was deemed reasonable in size and duration. The Judge accordingly concluded that the licence did not authorise a public nuisance and was lawful.

Analysis

[39] The respondents supported the Judge's finding that no public nuisance arose, and the licence was therefore lawful, largely for the reasons given by the Judge. They emphasised the need for a contextual assessment. Factors such as the road's location, topography, accessibility, and frequency of use are highly material. The road is remote, unformed and densely vegetated. There is no formed track, no vehicular access, and pedestrian access is difficult and infrequent. Nearby DOC tracks are closed or unmaintained. The respondents submitted that it is highly unlikely the road will ever be formed. Having regard to this context, the respondents argued, the mining vents will not render passage on the unformed road any less "commodious" than it was before.

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54 Judgment under appeal, above n 1, at [42]–[46].
55 At [44].
56 At [45].
57 At [45].
58 At [46].
59 At [45].

[40] The Council noted that it had expressly considered the public's right of passage when granting the licence, and had included specific provisions to preserve that right:

(a) A five-metre unobstructed margin must be maintained to enable safe public passage.

(b) The licensed use must not prevent the Council or the public from being able to pass or repass over the land.

(c) Oceana Gold is required to take steps to prevent or remedy any circumstance that could give rise to a nuisance or impede access.

[41] The Council accordingly submitted that while the licensed works, structures and associated fencing will prevent access over part of the road, ample space remains for pedestrian passage. Further, the licence requires restoration following its expiry. Any interference with the public right of passage is therefore not appreciable but limited and temporary. The Judge was therefore correct to find that the licence does not authorise a public nuisance and is lawful.

[42] This is a difficult case, and good arguments can be (and have been) made both for and against the proposition that the licence is unlawful. However, applying the contextual test of an appreciable interference with the right of passage that we have outlined above, we have reached a different conclusion to that reached by the Judge. In our view, the licence does appreciably interfere with the public right of passage over the unformed road and is therefore unlawful, for the reasons we explain below.

[43] First, in terms of the quantum of the obstruction, the licence permits the construction and operation of up to four ventilation and escape shafts that, once completed, will be about eight metres high. The physical footprint of the fenced off areas containing the final structures will be approximately 100 square metres each (and potentially up to 150 square metres). The works involve excavation and long-term installation of substantial steel and concrete infrastructure. During construction the temporary licensed areas will cover the majority of the road's width, leaving only a five-metre unobstructed margin to act as a clear passageway for

pedestrians. Once the construction period is over, the final structures and perimeter fencing will traverse about 10 metres of the 28- to 30-metre width of the road (in other words, about one third of the road's width). As the Judge acknowledged, such intrusions are "relatively severe" and constitute a "great deal of the road" in the licensed area.[60]

[44] Turning to the duration of the obstructions, the licence has been granted for a term of 40 years. On any assessment, this is a very lengthy term.

[45] The saving factors, on the Judge's analysis, arose from the broader context, including the remoteness of the road, the fact that it is infrequently used, and that there are no plans for the road to be formed or used in the foreseeable future.[61] While we accept that context is relevant, there are obviously limits to this (as the Judge accepted). The road is held by the Council on trust for a public purpose, and the right of passage is paramount. No matter how remote the road, or how infrequently it is used, it is still, in law, a road. If the Council is of the view that the land is no longer required for roading purposes, and never will be so required (which appeared to be implicit in some of its submissions), the Council could embark on the formal process of stopping the road. Alternatively, the Council could advise the Minister of Conservation of its view, to enable him to consider whether the Crown wished to exercise its right to resume ownership of the unformed road. The outcome of either process would likely be that the road would then become part of the Wharekirauponga Forest and subject to the same constraints as the surrounding conservation land.

[46] Ultimately, while we acknowledge that the road's remoteness and limited current use provide important context, in our view the duration, scale and semi-permanence of the licensed structures are the decisive factors. The effect of the licence is the functional removal of a significant part of the unformed road from public use for four decades. Infrastructure of such scale and longevity fundamentally alters the character and availability of the road. The licence authorises obstructions that are materially different to the relatively minor or temporary encroachments typically

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60 At [44].
61 At [42].

tolerated on roads at common law. The interference with the public right of passage is properly characterised as appreciable. The fact that some pedestrian access will remain does not negate the existence of a public nuisance. The land within the licensed areas is rendered unavailable for any other use, including public passage, for decades. There is no requirement that a remote or unformed road must be completely blocked before an obstruction can constitute a public nuisance.

[47] Although not critical to our analysis, the qualified nature of the Council's title over the unformed road further supports the conclusion that the grant of a licence for such a lengthy term was inappropriate. The Crown's right to resume ownership of the unformed road at any time, without consideration, reflects the Crown's overarching role as guardian of the unformed roading network, in the public interest. Authorising the construction of significant infrastructure on an unformed road for a period of four decades rests uneasily with the Crown's residual interest in the road. That is particularly so here, where the Crown is the owner of the conservation land (the Wharekirauponga Forest) through which the unformed road runs and has expressed concern (through DOC) regarding the granting of the licence.

[48] In conclusion, for the reasons we have outlined, we are satisfied that the licence authorises activities and infrastructure that will appreciably interfere with the public right of passage along the unformed road. The licence is therefore unlawful, as it purports to authorise a public nuisance, which the Council has no power to do.

Did the Council use its powers for an improper purpose in granting the licence?

[49] In the alternative, Ours Not Mines challenged the Council's decision to grant the licence on the basis that it had done so for an improper purpose, namely to circumvent the stringent requirements of the access regime for mining on conservation land (namely, the Wharekirauponga Forest). Given our conclusion that the Council acted outside its powers in granting the licence, it is not necessary for us to consider this alternative ground.

Does the licence amount to a lease?

[50] Ours Not Mines also argued that the Judge had erred in finding that the licence is a licence and not (in reality) a lease. The significance of this is that s 341 of the LGA 1974 only permits the leasing of airspace and subsoil of a road, not the surface of the land. Again, it is not necessary for us to determine this issue, given that we have found that the Council acted outside its powers in granting the licence.

The costs appeal

[51] Given that Ours Not Mines has succeeded in its substantive appeal, it necessarily follows that the High Court's costs judgment must also be set aside.[62] The appropriate course is for the issue of costs in the High Court to be remitted to that Court for reconsideration in light of this judgment.

Costs in this Court

[52] In its written submissions, Ours Not Mines sought scale costs for a standard appeal, but did not address the costs implications of the fact that it is represented by counsel on a pro bono basis. Based on counsel's oral submissions, it appeared that Ours Not Mines may be seeking an award of disbursements only, not costs. However, as the position was not entirely clear, we propose to award disbursements in Ours Not Mines' favour at this stage, but reserve leave to file memoranda if Ours Not Mines also intended to seek costs. In that event, counsel should address the impact on the appropriate costs award (if any) of Ours Not Mines being represented on a pro bono basis.[63] If at all possible, however, counsel should endeavour to resolve any costs issues between themselves.

Result

[53] The application for leave to adduce further evidence is granted.

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[62] Costs decision, above n 2.

[63] See, for example, *Manuka Doctor Ltd v Hill* [2025] NZCA 516, [2025] 3 NZLR 412 at [89]; *Commissioner of Police v Apanui* [2024] NZCA 307 at [54]; *Claims Resolution Service Ltd v Smith* [2020] NZCA 664 at [50]; *Marino v Department of Corrections* [2017] NZCA 2 at [3]; and *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 at [360].

[54] The appeal against the decision in [2024] NZHC 63 is allowed. That judgment is set aside.

[55] We make a declaration that the decision of the Hauraki District Council to grant the licence to Oceana Gold (New Zealand) Ltd was unlawful. That decision is set aside.

[56] The appeal against the judgment in [2025] NZHC 931 is allowed. That judgment is set aside and costs in the High Court are remitted to that Court to be determined in light of this judgment.

[57] The first and second respondent must pay the appellant usual disbursements for this appeal on a joint and several basis.

[58] Leave is reserved to file memoranda on costs, not exceeding five pages in length. Any memorandum from the appellant is to be filed within five working days of delivery of this judgment. Any memoranda from the first and second respondent are to be filed within a further five working days. A decision on costs will then be made on the papers. If no memoranda are filed, costs are to lie where they fall.

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