

27 March 2020

Heidi O'Callahan
Point Chevalier
AUCKLAND

Auckland Transport Berm Enforcement

You have asked us as policy consultants to consider the question whether Auckland Transport can ticket vehicles parked on grass verges or berms on the basis that those places are zones of the footpath, and therefore the vehicles can be ticketed under Rule 6.14 of the Land Transport (Road User) Rule 2004.

Background

You have provided us with a letter from John Strawbridge of Auckland Transport dated 8 May 2019 regarding illegally parked vehicles on grass berms. In that letter, Auckland Transport state that:

“AT recently reviewed the management of parking on berms and the necessary legal pre-requisites i.e. signage. Following this review, it was established that AT could not, in good faith, issue infringement notices for berm parking, as specific signage is required to enforce vehicles parking on berms.”

In an email dated 13 May 2019, you requested information from Auckland Transport about illegal parking, including a copy of the review mentioned by John Strawbridge. You have provided us with a letter from John Strawbridge dated 17 June 2019 responding to that request. In that letter, Auckland Transport state that:

“The legal advice regarding AT's decision not to issue infringements to vehicles parked on the berm is refused under section 7(2)(g) of the Local Government Official Information and Meeting Act 1987 (LGOIMA). Please refer to the Traffic Control Devices (TCD) Rule 4.2(2) and 4.2(3).”

It would appear from this correspondence that the position of Auckland Transport is that it cannot issue infringement notices for vehicles parking on a berm as Auckland Transport believe specific signage is required. We do not understand Mr Strawbridge's reference to Rule 4.2 of the Traffic Control Devices Rule 2004.

Rule 6.14 of the Land Transport (Road User) Rule 2004 – Parking on footpaths

Part 11 of the Land Transport Act 1998 sets out the powers of the Minister to make land transport subordinate legislation, including ordinary rules. Pursuant to sections 152, 153 and 157 of the Land Transport Act 1998, the Minister made the Land Transport (Road User) Rule 2004 as an ordinary rule which came into force on 27 February 2005.

Rule 6.14 of the Land Transport (Road User) Rule 2004 provides that:

6.14 Parking on footpaths or cycle paths

- (1) A driver or person in charge of a vehicle must not stop, stand, or park the vehicle on a footpath or on a cycle path.
- (2) Subclause (1) does not apply to cycles if a road controlling authority indicates otherwise by means of signs or markings or if it installs facilities for the parking, standing, or storage of cycles on a footpath or cycle path.
- (3) Nothing in subclause (1) prevents a person from stopping, standing, or parking a cycle, mobility device, or wheeled recreational device on a footpath if doing so does not unreasonably obstruct any other user of the footpath.

Compare: SR 1976/227 r 35(2)(k)

“Footpath” is defined in Rule 1.6 of the Land Transport (Road User) Rule 2004 to mean:

footpath means a path or way principally designed for, and used by, pedestrians; and includes a footbridge

Neither the term “path” nor “way” used in the definition of footpath are defined in the Land Transport (Road User) Rule 2004.

“Footpath” is also defined in related legislation. For example, the Traffic Regulations 1976 (though largely revoked) define footpath in precisely the same way as the Land Transport (Road User) Rule 2004. The Local Government Act 1974 (section 315) defines “footpath” as follows:

footpath means so much of any road as is laid out or constructed by authority of the council primarily for pedestrians; and includes the edging, kerbing, and channelling thereof

For completeness, the term “berm” does not appear in any relevant legislation and the term “verge” appears once in the Government Roading Powers Act 1989, without definition.

In terms of judicial consideration of Rule 6.14 of the Land Transport (Road User) Rule 2004 and the definition of “footpath”, we note the High Court decision: *Wellington City Council v McCrone* (CRI 2010-485-78).¹ That decision concerned an appeal by the Wellington City Council against the dismissal of charges laid against Mr McCrone for parking his Vespa on a footpath contrary to Rule 6.14(1) of the Land Transport (Road User) Rule 2004. At paragraph [5], the High Court stated that:

“It is common ground that where Mr McCrone parked his Vespa was a footpath. It is apparently classified as an “extended footpath”. It is an area where there are seats, bike stands and the like. It is also common ground that the area is not intended to be for parking of motor vehicles. There can be no doubt therefore that the respondent did breach r 6.14 when he parked his Vespa on a footpath.”

We accept, however, that although the High Court gave consideration to where Mr McCrone parked his Vespa, because it was common ground that this was a footpath, the High Court did not have to determine whether where Mr McCrone parked his Vespa was a footpath or not.

In our view, the definitions of “footpath” in the Land Transport (Road User) Rule 2004 and the Local Government Act 1974 (section 315) suggest that on most urban and suburban roads a “footpath” is the entire space in a road between the roadway and the adjacent property boundary. In urban areas, the limit or edge of a roadway will typically be that where the kerbing and channelling is located. We note that pedestrians use footpaths as a path or way not only parallel to the kerbing and channelling or roadway, but they also use or cross-over footpaths or use them as paths or ways in a multitude of other directions. For

¹ Also of note, but of less relevance are *Police v T Riini*, CRI-2009-088-000955 (DC); *Gallagher v Police* A 143/00 and A 159/00 (HC); and *Jennings v Auckland City Council* AP 173/91 (HC).

example, pedestrians will use footpaths to walk from properties to enter vehicles parked on the roadway (in a direction that is more or less perpendicular to the kerbing and channelling or roadway), or to walk from properties in a more or less perpendicular fashion to a roadway to cross a roadway, or just to stand or walk on a grass surface (where laid-out) rather than a paved surface part of a footpath (or to go barefoot comfortably or to run on a grassed softer surface), or to pass by other pedestrians .

In highly urbanised areas, such as town centres, footpaths will be sealed from the kerbing and channelling all the way to the adjacent property boundary (perhaps of a retail premise). There may or may not be trees or shrubs laid out or planted occasionally in such a fully sealed footpath. In more suburban areas, there may be grass laid out or planted in the footpath adjacent and parallel to the kerbing and channelling together with a sealed path between the grassed area and the adjacent property boundary. In common parlance these grassed areas are referred to as 'berms' or 'verges'. In our view, these grassed areas must, in the way "footpath" is defined and used in the Land Transport (Road User) Rule 2004, be part of the footpath as pedestrians use these grassed areas to walk on.

As a consequence, in our view, in accordance with Rule 6.14 of the Land Transport (Road User) Rule 2004, a driver or person in charge of a vehicle must not park that vehicle on a footpath (which includes the whole of that area between the roadway and the adjacent property boundary (and any grassed areas – or 'berms' or 'verges')).

Rule 6.2 of the Land Transport (Road User) Rule 2004 – Parking vehicles off roadway

As noted earlier, although we do not have the benefit of Auckland Transport's legal advice regarding its decision not to issue infringements to vehicles parked on the 'berm' without there being signage, it appears from discussion with you that this is likely because of Auckland Transport's interpretation of Rule 6.2 of the Land Transport (Road User) Rule 2004 and its belief that it applies in these situations.

Rule 6.2 of the Land Transport (Road User) Rule 2004 provides that:

6.2 Parking vehicles off roadway

- (1) A driver or person in charge of a vehicle must not stop, stand, or park the vehicle on a roadway if he or she can stop, stand, or park it on the road margin without damaging ornamental grass plots, shrubs, or flower beds laid out or planted on the margin.
- (2) Subclause (1) does not apply if the road controlling authority provides signs or markings, or makes a bylaw, indicating that a rule different from the one in subclause (1) applies.

Clause 6.2: substituted, on 1 November 2009, by clause 19 of the Land Transport (Road User) Amendment Rule 2009 (SR 2009/253).

Rule 6.2 of the Land Transport (Road User) Rule 2004 provides that a driver or person in charge of a vehicle must not stop, stand, or park a vehicle on a roadway if he or she can stop, stand, or park it on the road margin. However, this does not apply if the road controlling authority provides signs or markings, or makes a bylaw, indicating that a rule different to that applies.

The terms "roadway" and "road margin" are defined in Rule 1.6 of the Land Transport (Road User) Rule 2004.

roadway means that portion of the road used or reasonably usable for the time being for vehicular traffic in general

road margin includes any uncultivated margin of a road adjacent to but not forming part of either the roadway or the footpath (if any)

We could find no references to "road margin" in any other legislation nor any relevant caselaw.

The definition of “road margin” explicitly excludes the footpath. If we are correct that in the typical urban area the footpath includes the entire area between the kerb and the adjacent property boundary, then this area is not part of a road margin.

For completeness, we will examine what road margins might and might not be.

The term “roadway” is used frequently throughout the Land Transport (Road User) Rule 2004 to mean that portion of the road used or reasonably usable for vehicular traffic.

By contrast the term “road margin” is used only in Rules 6.2, 11.4 and 11.5 of the Land Transport (Road User) Rule. In the case of Rules 11.4 and 11.5, these concern use of the road by riders of animals as follows:

11.14 Use of road

- (1) A rider of an animal on a road must, when a reasonably adequate road margin is available, keep the animal on the road margin as far as practicable.
- (2) A rider of an animal must, when travelling on a roadway, keep the animal as close as practicable to the rider’s left of the roadway.
- (3) Unless passing, a rider of an animal must not travel on a roadway on the right of more than 1 other ridden animal proceeding in the same direction as the rider or on the right of any vehicle proceeding in the same direction as the rider.
- (4) A rider of an animal must not ride along a footpath, or on any lawn, garden, or other cultivation adjacent to or forming part of a road.
- (5) A person moving untethered animals from place to place along or across a road must exercise due care towards other road users, and must ensure that any disruption to traffic is minimised.

Compare: SR 1976/227 r 45

11.15 Method of leading animal by rider

A rider who leads any animal by rope, rein, or other similar means of guidance must,—

- (a) when travelling on a roadway, keep the led animal on the left of the rider; and
- (b) when travelling on the road margin, ride between the led animal and the roadway; and
- (c) at all times exercise care to avoid undue harm to other road users.

Compare: SR 1976/227 r 46

We note that Rule 11.4(1) of the Land Transport (Road User) Rule provides that a rider of an animal on a road must, when a reasonably adequate road margin is available, keep the animal on the road margin as far as practicable. Further, Rule 11.4(4) provides that a rider of an animal must not ride along a footpath, or on any lawn, garden, or other cultivation adjacent to or forming part of a road.

Turning back to the definition of “road margin” in Rule 1.6 and the fact that the term “road margin” is only used in Rules 6.2, 11.4 and 11.5 of the Land Transport (Road User) Rule (and especially Rules 11.4 and 11.5), its use would suggest that a “road margin” and the rules that reference the road margin have most relevance to roads in non-urban areas (that is, roads in rural areas).

This is particularly the case when Rule 6.2 of the Land Transport (Road User) Rule 2004 is considered.

It makes sense that a driver of a vehicle in a rural area must not park a vehicle on a roadway if he or she can park the vehicle on the road margin. Most rural roads have a narrow paved (or safe) driving surface, but wider ‘shoulders’. The paved surface forms the roadway, while in our view, the ‘shoulders’ are road margin. Parking a vehicle on the road margin, rather than on the roadway in a rural area will be safer (especially if the speed limit for passing vehicles is high).

Another important feature of the definition of “road margin” in Rule 1.6 of the Land Transport (Road User) Rule 2004 is that a road margin includes any “uncultivated” margin of a road and therefore presumably excludes any cultivated margin in a road (though we accept that the use of the word “includes” rather than “means” may indicate that the definition intends for “road margin” to include cultivated margins from time to time). Again, for rural roads with a narrow paved driving surface, but wider shoulders, it would appear that the definition intends for the road margin to only include that part of the shoulder that is uncultivated. Typically, this would be the shoulder of the road (often a gravelled area). In this regard, we also note Rule 11.14(4), which provides that the rider of an animal must not ride on any lawn, garden or other cultivation adjacent to or forming part of a road.

Road margins might also be found in urban areas. However, most urban and suburban roads do not have a road margin. Most urban and suburban roads have roadways and footpaths only, with the kerb separating the area primarily intended for vehicles and the area primarily intended for pedestrians. This accords with the only other relevant use of the term “footpath” in the Local Government Act 1974.

According to Rule 6.2, on these typical urban and suburban roads, cars may park in the roadway as there is no road margin for them to park on. If they park in the roadway, they must observe Rules 6.1, 6.3 to 6.13 and 6.15 to 6.20, which all envisage parking in the roadway. Parking vehicles considerably on the roadway is a behaviour that the scheme of the Land Transport (Road User) Rule 2004 and the previous Traffic Regulations 1976 required.

In our view, in urban areas, grass verges and berms are part of the footpath. They are areas of the road principally designed for or primarily for pedestrians. The definition of “road margin” excludes any area of the road that is part of the footpath and appears to exclude any cultivated areas. Consequently, we believe verges and berms are not part of a road margin and Rule 6.2 does not encourage or require drivers to park their vehicles on the berm or verge. Avoiding parking vehicles on the verge or berm is a behaviour that drivers have been taught to follow and have practised for decades.

Other interpretations of “footpath” to mean only the paved area of that part of a road between the roadway and an adjacent property boundary do not accord with the definitions of footpath, the objective or the scheme of the Land Transport (Road User) Rule 2004.

If “footpath” is to be interpreted as only including paved areas (or to exclude grassed areas such as verges or berms), we still cannot see how grassed areas such as verges or berms can be defined as “road margin” because the definition of road margin appears to be intended to exclude cultivated margins. In addition, Rule 6.2 would require drivers of vehicles to park on berms or verges where they exist and it would require enforcement against drivers parking vehicles beside a kerb on an adjacent roadway. This would contradict decades of common practice.

Where one interpretation accords with long held common practice and understanding, we believe a contrary interpretation, such as that seemingly now held by Auckland Transport, should be treated very cautiously.

Should Auckland Transport be interpreting Rule 6.2 of the Land Transport (Road User) Rule 2004 to say it cannot issue infringements in urban areas to vehicles parked on the ‘berm’ without there being signage (because the ‘berms’ are ‘road margins’), we believe this is incorrect.

Conclusions

As noted earlier, it would appear from the correspondence you have had with Auckland Transport that the position of Auckland Transport is that it cannot issue infringement notices for vehicles parking on a berm as Auckland Transport believe specific signage is required.

In our view, where ‘berms’ (or grassed areas) are laid out adjacent to the kerbing and channelling of a roadway and between the roadway and the adjacent property boundary, they form part of the footpath.

In our view, where laid out, a footpath is that entire area between the roadway of a road and the adjacent property boundary.

As a consequence, in accordance with Rule 6.14 of the Land Transport (Road User) Rule 2004, a driver or person in charge of a vehicle who parks a vehicle on a footpath (including any 'berm' forming part of a footpath) infringes against Rule 6.14 of the Land Transport (Road User) Rule 2004.

If you have any further questions, please let me know.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Grant Hewison', written over a light grey rectangular background.

Dr Grant Hewison
Director, Grant Hewison & Associates Ltd (Policy Consultancy)
300 Richmond Road, Grey Lynn
PO Box 47397, Ponsonby Auckland 1011
grant@granthewison.co.nz
Mob: (021) 577-869