

Conference Paper

Property Rights – Do You Have Any?

David Kirkpatrick*

THE SHORTEST DISTRICT PLAN IN THE WORLD

I would like to start this paper by outlining to you my contribution to resource management planning, the 2 Rule Plan:¹

- 1. A person may do whatever he or she likes with his or her own property.*
- 2. A person may prevent any other person from doing something that he or she doesn't like on that person's property.*

Part of the exercise which I have undertaken in preparing this paper has been to see whether that 2 Rule Plan, if made operative, would be deficient in any way in relation to the specific issues that I will address. I invite you to consider the same question and offer your views at the conclusion of this presentation.

* Partner, Simpson Grierson, Auckland.

This paper was presented by the author to the Fourth Annual Conference of the Resource Management Law Association of New Zealand Inc held at Auckland in October 1996. It is available as an Occasional Paper from the Association and is reprinted here with the permission of the Association. Copyright is reserved by the Association.

1 ©, ™, Pat. Pend.

I: INTRODUCTION

I take as a starting point a general approach to property outlined by Waldron,² that the concept of property is the concept of rules governing access to and control of material resources, rather than merely the assigning of particular objects to particular individuals.

This is an approach which ought to be readily understood by government politicians and officials (central and local) who routinely deal in other people's property with only the most abstract form of consent. It is, however, an approach which is not only unfamiliar to many people (including many lawyers) but, once identified, represents a fundamental threat to their way of dealing with property, both their own and other people's.

In this paper I will be focusing on the material resources associated with land, as distinct from other forms of property. I will also be focusing on the distinctions between public rights and private rights in the context of resource management, rather than any analysis of specific rights in either sphere. While I want to provide some examples which I think highlight some of the property issues which face the development of resource management law in New Zealand, it is nonetheless necessary to examine some underlying principles in order to clarify the terms of my argument.

My interim conclusion is that it is impossible to separate the control of the effects of the use of resources from the property rights in those resources, and that "integrated management of resources" requires a broader regime than we currently have. It follows, in my view, that the rhetoric about the Resource Management Act 1991 being used incorrectly to allocate resources is misplaced. Instead, I agree with Krueckberg that "property" is

2 Waldron, J., *The Right to Private Property* (1986). I have borrowed heavily from Waldron's work in this discussion of the nature of rights.

a key concept in planning.³ The tension is highlighted by the inherent conflict between the 2 rules of my 2 Rule Plan.

II: THE MEANING OF “PROPERTY”

1. Definitions

What is “property”? The word is derived from the Latin *proprius*, meaning “own or proper”. As well as the common meanings of something which is owned or the condition of such ownership, it also has the meaning of an attribute, characteristic or quality of a thing or a person. The derivation is also linked to the Latin *proprietas*, meaning “of quality”. This is the origin of our word “propriety”, which, as well as having various meanings similar to “property” also has the more common usage (if not existence) as correctness of behaviour or “properness”. This link between the character of things and the character of people has been advanced a great deal in the discussion of what property is.

John Locke went to great lengths to argue that a person’s identity is, if not based on, then at least inextricably linked to material objects. At the outset, you own your own body. When you interact with things, and in particular when you work with them, those things become connected to you. That is the basis for property. As well, the value of those things is enhanced by that interaction. This is the labour theory of value. Beyond simply adding value as an economic result, your labour becomes the basis of a property right in the thing laboured on, as an extension of yourself.

This is the foundation for property rights as “special rights”, that is,

3 Krueckberg, D., “The Difficult Character of Property” (Summer 1995) 61(3) *Journal of the American Planning Association* 301.

in H.L.A. Hart's sense, those rights which one must qualify for or have conferred, rather than hold on some inalienable basis.

Hegel, so far as he can be understood, argued for property rights as "general rights", that is, those that arise, like liberty and the pursuit of happiness, and attach to people merely through existence and the recognition by others that such rights are due out of respect for people as free moral agents. This obviously attracted Marx and was amplified considerably in his development of communism.

The differences are important for any understanding of political economy and its ramifications in both property and resource management law, given their completely different distributional implications. As Waldron puts it:⁴

Politicians and theorists alike often try to bring the two strands together in a single case, saying for example, that those who have acquired private property ought to be able to keep it since property is an indispensable condition for the development of a sense of individual responsibility. That juxtaposition needs to be exposed as fraudulent eclecticism, aligning as it does considerations that pull in different directions from utterly different and in fact mutually incompatible theoretical directions.

Waldron goes on to note that the two approaches still have contributions to make to the debate, but cautions against attempting to deal with them in any mechanical fashion. As I suggest below, the absence of any guiding philosophy of property causes confusion in our law of resource management.

4 Waldron, *supra* note 2, at 444.

2. Use and Exchange

The importance of the issue for present purposes lies in the moral or philosophical underpinning of property rights. Why do people have property? On what basis do they claim property rights?

The incidents of “the full liberal concept of ownership” are:⁵

- (a) The right to possession of a thing;
- (b) The right to use a thing;
- (c) The right to manage a thing (i.e. its use by others);
- (d) The right to income derived from others’ use of a thing;
- (e) The right to the capital value of a thing;
- (f) The right to security against expropriation of a thing;
- (g) The power to sell, give or bequeath a thing;
- (h) Lack of any term on the possession of those rights in respect of a thing;
- (i) The duty to refrain from using the thing in a way that harms others;
- (j) The potential liability that judgments may be executed against the thing; and
- (k) The expectation that any rights which others may have in the thing will revert on termination of those rights.

Some distinction can be drawn between “use” or “control” rights and “exchange” or “income” rights. “Use” includes possession or management, security and avoiding harm to others. “Exchange” includes rights to income and capital as well as the power to transfer. As Waldron notes, these are not

5 *Per* Waldron, *supra* note 2, at 49 quoting Honoré.

conditions of ownership, but simply assist in identifying the elements that make it up.

An important feature to note is that these elements make up a bundle of rights. There is no single right which encompasses ownership. Instead, the concept of *dominium* is a compendium of ideas, not a single, black or white matter. Whether this has always been the case makes for an interesting and probably inconclusive argument. At least during history, it would appear that many if not all social systems had complex property systems that supported political and financial systems. The variety of those systems includes not only private property but also systems of property which are collective or common. They are not mutually exclusive. Indeed, in any given system the “bundle” of rights that results is likely to be a compromise because of the existence of both private and public goods. For example, sunlight and air resist being other than common property while people resist letting their personal things be other than private. Public works tend to be treated as collective property.

Within those generalisations, there remains ample scope for the incidents of ownership to be split and traded, to limits governed only by the ingenuity of the market or the tolerance of the State.

Also important is to note that property rights are not rights of people in respect of property: they are really rights of people against other people. Legal relations cannot exist between people and things, because things cannot have rights or duties or be bound by or recognise rules. Legal relations exist between people. Thus when we say that someone owns a car, while we think of a simple bilateral relationship between that person and their car, we are really referring to a complex web of rights and duties which that person has with many others: rights against all others (except perhaps the finance company) to immediate possession; duties to other road users; the liberty to drive on public roads and the obligations to observe the Road Code and to have and display at all times a current registration and warrant of fitness.

The difference between “use” rights and “exchange” rights is a current issue in resource management, with debate over whether the Resource Management Act requires or permits an “allocative” or exchange function as well as its more obvious “effects control” function. The suggestion appears to be that an allocative function was abandoned with the Town and Country Planning Act 1977 and its “directed development” bias and that sustainable management is intended to fit within a market regime where exchange issues are left unregulated or at least only regulated to the extent necessary to safeguard “environmental bottom lines”.⁶

My own view is that any practicable model of effects control must have regard to and be responsive to allocative or exchange issues, even to the extent of regulating the market for resources either to avoid, remedy or mitigate certain effects or to redress any exchange imbalances (“market failure”) on a policy basis. The lack of a coherent legislative approach to effects control and allocation of resources simply results in an incomplete and often misguided method of planning. The examples in this paper are intended to show the practical difficulties that arise from the effects control of the Resource Management Act without corresponding legislative attention to the exchange and income rights inherent in private property.

Much is made of the Resource Management Act’s objective of “integrated management” as a function of local authorities.⁷ Leaving to one side the jurisdictional problems which beset that (which could, in an ideal world, be resolved by appropriate transfers of power or joint exercise

6 Most recently, see McShane, O., *The Impact of the Resource Management Act on the “housing and construction” components of the Consumer Price Index* (1996), but the same animus appears to inform the Hon. Simon Upton’s Stace Hammond Grace lecture, (1995) *Waikato Law Review* 17 and its precursor, his speech to the House on the third reading of the Resource Management Bill.

7 Resource Management Act 1991 ss 30 and 31.

of powers between or among local authorities), there remain significant problems resulting from the piecemeal approach of the legislation. For a start, the Building Act 1991 is still, after several subsequent amendments, only poorly related to the Resource Management Act. Certain significant public resource controls, including those in the Local Government Act 1974 concerning civil infrastructure, remain largely untouched by the Resource Management Act. The Resource Management Act is ambiguous at best on economic effects, and there is no required connection between rating and resource management, although significant work is being done by some councils to develop systems of financial contributions to bridge that gap.

The real world raises differing and difficult issues in areas such as resource management, property and public revenue. We presently have different legislative approaches to address those issues. We are unlikely to have a satisfactory resource management regime until we have integrated it with those other areas.

III: THE DEVELOPMENT OF PROPERTY RIGHTS

1. Early Developments

None of our legal regimes is immutable. They have changed within our own country over the past one hundred and fifty six years. They have changed in English law over a much longer period. They are different in other countries, sometimes in ways that are clearly indicative of choices that we ourselves could make and other times in ways that are simply odd.

The limits on private property are clear and sometimes stark. Magna Carta 1297 (and still in force!) guarantees property rights but makes it clear that freemen can lose their property if that occurs according to the law:

25 EDW 1, c 29 (1297)

29. Imprisonment, etc contrary to law. Administration of justice

NO freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

In the law's inimitable habit of saying the same thing in different ways, later Parliaments felt it either necessary or desirable to repeat that basic tenet:

25 EDW 3 STAT 5 (1351)

4. None shall be taken upon suggestion without lawful presentment; nor disfranchised, but by Course of Law.

ITEM, Whereas it is contained in the Great Charter of the Franchises of England, that none shall be imprisoned nor put out of his freehold, nor of his franchises nor free custom, unless it be by the Law of the Land; it is accorded assented, and stablished [sic: established], that from henceforth none shall be taken by petition or suggestion made to our Lord the King, or to his Council, unless it be by indictment or presentment of good and lawful people of the same neighbourhood where such deeds be done, in due manner, or by process made by writ original at the common law; nor that none be out of his franchises, nor of his freeholds, unless he be duly brought into answer, and forejudged of the same by the Course of the Law; and if any thing be done against the same, it shall be redressed [sic: redressed] and holden for none.

And as soon as three years later:

28 EDW 3 (1354)

3. None shall be condemned without due process of Law.

ITEM, that no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.

Then, on the brink of Civil War it was felt helpful to restate the principle for the King's benefit:

PETITION OF RIGHTS

3 CHA 1, c 1 (1627)

4. 28 Edw III c 3

And in the eight and twentieth yeere of the raigne of King Edward the third it was declared and enacted by authoritie of Parliament, that no man of what estate or condicion that he be, should be put out of his land or tenements nor taken nor imprisoned nor disherited nor put to death without being brought to aunswere by due processe of lawe ...

8. The Petition

They doe therefore humblie pray your most Excellent Majestie, that no man hereafter be compelled to make or yeild any guift loane benevolence taxe or such like charge without comon consent by Acte of Parliament, and that none be called to make aunswere or take such oath or to give attendance or be confined or otherwise molested or disquieted concerning the same or for refusall thereof ...

It was apparently not thought necessary when enacting the New Zealand Bill of Rights Act 1990 to restate the position again. Parliament (presumably unable even to improve on the spelling) contented itself to declare that:

[A]n existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.⁸

8 New Zealand Bill of Rights Act 1990 s 28.

2. Indefeasibility of Title

A doctrine of almost Great Charter proportions in New Zealand is the indefeasibility of a registered interest in land. Pursuant to the Land Transfer Act 1952:⁹

Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, but subject to the provisions of Part I of the Land Transfer Amendment Act 1963, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever,-

- (a) Except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act; and
- (b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and
- (c) Except so far as regards any portion of land that may be erroneously included in the grant, certificate of title, lease, or other instrument evidencing the title of the registered proprietor by wrong description of parcels or of boundaries.

*Frazer v Walker*¹⁰ is authority for the proposition that title is indefeasible as soon as it is registered, but with exceptions. One of the clearest is the right of the Crown and certain other authorities to take property for public works, subject to a threshold of reasonable necessity and the payment of compensation. Others, which I will touch on below, include a variety of statutory provisions which essentially enable public works to

9 Section 62 - Estate of registered proprietor paramount.

10 [1967] NZLR 1069; [1967] 1 AC 569 PC.

exist notwithstanding a lack of any registered interest to support them. Indefeasibility does not prevail over a statute.¹¹

An Act of Parliament can do no wrong, though it may do several things that look pretty odd.

One such statute is the Resource Management Act.

3. Eminent Domain

All of that serves to remind us that our title to land is in the form of an estate held from the sovereign and ultimately subordinate to the needs of the sovereign, essentially the same as the feudal titles held 800 years ago.

Republicanism will not be likely to change that, other than in name: it is central to the United States constitution that the government has “eminent domain” (i.e. a better right) to take property in certain circumstances. You may rationalise it as a necessary mechanism to enable certain things to get done. Alternatively you may see it as the reality of power and its unchanging nature.

Perhaps more worrying is the increasingly unravelling fringe of the ambit of eminent domain. Taking powers are not confined to the Public Works Act 1981. The Local Government Act contains numerous provisions in relation to drains and watercourses which are not limited by a registered interest in land. A landowner’s home may be his or her castle, but the local authority could redirect the moat if that were necessary for the efficient drainage of the district. The Historic Places Act 1993 generally limits

11 *Per* Holt CJ in *City of London v Wood* (1701) 12 Mod. 669, 688; 88 ER 1592, 1602. Cf. *Miller v Minister of Mines* [1961] NZLR 820(CA), affirmed [1963] AC 484, [1963] NZLR 560, [1963] 1 All ER 109 (PC).

activity on historic places. On one interpretation that could be the whole country. Various network utility operators, when they were agents of the Crown, used to have powers under various Acts to do things on, in, under or over private property without easements. Some still have the power to undertake work in relation to existing networks, notwithstanding their recently acquired private character.¹²

This is not new. In 1936 W. I Jennings wrote that “the fundamental assumption of modern statute law is that the landowner holds his land for the public good”.¹³ Has that changed? It suggests that the second rule of my proposed district plan is bound to prevail over my first, in that public rights are likely to prevail over private rights without any compensation or other redress of the reallocative effects of such controls on the use of land. Is that a form of resource management we are prepared to accept?

In the United States, the extent to which a government’s “police” powers in relation to the control of the use of land (which, as here, do not give rise to compensation) may turn into the exercise of eminent domain to take property (which, again as in NZ, gives rise to compensation) has led to a raft of state and federal legislation requiring state governments to consider whether any legislation results in a taking of property. In some cases, the requirement goes no further than a report; in others, something more akin to our section 32 process must be undertaken. In a few cases, the new laws require compensation for such “takings”.¹⁴

12 For example, Part III of the Electricity Act 1992 and Part III of the Gas Act 1992.

13 (1936) 49 *Harvard Law Review* 426, 436 (quoted in Megarry, *Manual of the Law of Real Property* (7th ed 1993) 506).

14 See Thomas, D., “The Illusory Restraints and Empty Promises of New Property Protection Laws” in *The Urban Lawyer* (Spring 1996) 28(2) ABA 223-261.

IV: PROPERTY RIGHTS AND RESOURCE MANAGEMENT

1. Resource Management Controls and Consents

More to the present point, we have the clear provision of controls on the use of property and especially resources under the Resource Management Act. The primary restriction on the use of land is contained in section 9,¹⁵ requiring compliance with rules in the District Plan:

- (1) No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is-
 - (a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
 - (b) An existing use allowed by section 10 or section 10A.

This obligation does not relieve the owner or user from other statutory obligations:¹⁶

- (1) Compliance with this Act does not remove the need to comply with all other applicable Acts, regulations, bylaws, and rules of law.
- (2) The duties and restrictions described in this Part shall only be enforceable against any person through the provisions of this Act; and no person shall be liable to any other person for a breach of any such duty or restriction except in accordance with the provisions of this Act.
- (3) Nothing in subsection (2) limits or affects any right of action which any person may have independently of the provisions of this Act.

Consistent with the approach that resource management controls are an exercise of what Americans call the “police” powers of the state, the restrictions of the Act or the relevant plan do not carry with them any right of compensation: instead, there is a limited right to seek relief where land is

15 Resource Management Act 1991 - Restrictions on use of land.

16 Resource Management Act 1991 s 23 - Other legal requirements not affected.

rendered incapable of reasonable use and an unfair and unreasonable burden is placed on those with an interest in the land by such controls.¹⁷

In the case of designations, where compensation is only available when the land is actually taken for, or is injuriously affected by, a public work, there is a limited right to apply for the land to be taken.¹⁸ Given the limited scope of sections 85 and 185, it is not surprising that cases under them are few.

The Resource Management Act is a consent regime, not an ownership model. It is not meant to allocate resources. Instead it is meant to control the effect of the use of those resources. Any person may apply for any resource consent,¹⁹ and there is no prerequisite (as there is in the Building Act²⁰) of ownership.

I could, if I wished, apply to turn your property into a toxic waste dump, assuming that is neither a permitted activity (or, perhaps, has existing use rights) nor a prohibited one under the district plan. The Act appears to indicate that the consent authority would be obliged to hear and determine my application, even though you may swear that you will never allow me to buy or otherwise have access to the property to do so. I have sometimes heard it suggested that the Environment Court might refuse to hear an appeal in circumstances where the applicant had no apparent ability to undertake the consent. While that may be sensible in relation to cases such as my example, I respectfully suggest that such an approach is not supported by the Act and that ownership is irrelevant to resource management matters. It does, however, indicate yet again the degree to which ownership and resource management are linked in people's minds.

However, despite the purposes of the Resource Management Act, in

17 Resource Management Act 1991 s 85.

18 Resource Management Act 1991 s 185.

19 Resource Management Act 1991 s 88.

20 Building Act 1991 s 33.

practical terms ownership is unavoidably involved in resource management matters. In my experience, and in the cases, the interests of landowners appear to be considered significant. That, I suggest, is the Lockean approach: the inherent importance of property as an element of identity manifesting itself. While we may seek to distinguish rights based on use or exchange attributes, in practical terms the two aspects are always linked, sometimes in ways that lead to significant conflicts where the law seeks a result based on one analysis or outcome without adequate regard for the impact it will have on others. The control of effects on the use of land in resource management terms almost invariably has implications on the extent of individual property rights, which are presently not addressed.

I suggest that this dichotomy, this unanalysed conflict underlying the management of “private” resources, is a major hurdle to planning in its current form. The examples I offer below are intended to show that. In my view, the issues of effects control cannot be considered in isolation without proper regard for the implications on income and exchange rights. I can offer no solution at the moment except to urge those involved in the process to undertake a more careful examination of the effects of planning, as well as of the effects of the activities that are being planned for. This goes beyond section 32 of the Act: indeed, I am suggesting that section 32 itself could usefully be treated with the same scepticism (in philosophical or jurisprudential terms) as it is meant to bring to proposed planning objectives, policies, methods and rules.

2. Trees

Our legal and cultural systems are ambivalent in relation to trees. They are often like W.C Field’s elephants: we like to look at them, but we wouldn’t want to own one. Alternatively, as Ronald Reagan put it, referring to the redwoods of California (of which he was Governor at the time): “A tree’s a tree. How many more do you need to look at?”

In legal terms the starting point to considering property rights in trees is the maxim *cujus est solum, ejus est usque ad coelum et ad inferos* (the person who owns the soil owns everything up to the sky and down to the centre of the earth). Of course, as technology has enabled us to actually get to the sky, the law has retreated somewhat, to guarantee us only so much as we actually need for the ordinary use and enjoyment of land and the structures on it, letting aircraft manoeuvre more easily. Similarly, the Crown has found it increasingly desirable to limit just how much of the nether world we do own, generally taking for itself the most valuable things below the surface.

Because the neighbouring landowner also owns up to the near sky, things which overhang or pass over land at low altitude can be both a trespass and a nuisance. Branches of trees are included in this. At common law, a landowner may remove overhanging branches. As I understand this arcane area of law, one may keep the wood which has been so trimmed, but one must return any fruit which was attached to those branches, other than windfalls.

A property owner also owns the trees on the property. Indeed, land, at least for valuation purposes, is, by statute, deemed specifically to include trees:²¹

“Land” means all land, tenements, and hereditaments, whether corporeal or incorporeal, in New Zealand, and all chattel or other interests therein, and all trees growing or standing thereon.

It follows that those Councils which levy rates based on land or capital value are entitled to treat those values as being increased by the presence of trees. As we shall see below, the restrictions which may be placed on the removal of trees may decrease the development potential of the land and

21 Section 2 Valuation of Land Act 1951.

hence its value on a “highest and best use” basis.

As owner, at common law the landowner can do whatever he or she likes with the trees on the land. But various public bodies may cross the boundary and, in certain circumstances, prune or remove trees or plants, e.g.:

1. Local Government Act 1974 s 355 (where overhanging a road or obscuring visibility);
2. Local Government Act 1974 ss 468 and 511-515 (where obstructing a drain or watercourse);
3. Public Works Act 1981 ss 133-135 (obscuring visibility or interfering with a road or public work);
4. Transit New Zealand Act 1989 s 55 (obscuring visibility or interfering with a road or public work);
5. Telecommunications Act 1987 s13 (where likely to cause damage to lines, subject to agreement or Court order).

To a more limited extent, neighbours can also cut down trees on neighbouring properties, pursuant to an order of the District Court.²²

22 The power is given in s 129C(5) Resource Management Act 1991 - On any such application the court may make such order as it thinks fit, if, having regard to all the circumstances of the case, and, where required, to the matters specified in subsection (6) of this section, the Court considers the order to be fair and reasonable, and to be necessary to remove or prevent, or to prevent the recurrence of-

- (a) Any actual or potential danger to the applicant’s life or health or property, or to the life or health of any person residing with the applicant; or
- (b) Any undue obstruction of a view that an occupier would otherwise be able to enjoy from the applicant’s land or from any building used for residential purposes erected on that land; or
- (c) Any other undue interference with the reasonable enjoyment of the applicant’s land for residential purposes.

The circumstances are fairly rigorous, although most lawyers will have had some experience, acting either for an applicant or a respondent, of applications that were brought simply on the basis of dislike of a neighbour's tree (sometimes, merely of the neighbour). There have been recent suggestions that similar results might be achieved by the use of district plan rules which limit the maximum height to which trees may be allowed to go: any higher and they must either be topped or removed. Such a general rule would undo most of the benefit which the encouragement of trees in an urban setting has achieved over the years and would undermine the existing tree protection rules. Still, it is an ominous reminder of how the pendulum can swing.

A little while ago, the *New Zealand Herald* reported that an occupier of an inner city apartment in Auckland had complained to the Council that birds were making too much noise in the morning. The birds were in the habit of perching in trees planted in a small Council park next to this apartment building when greeting the dawn. The apartment dweller suggested removing the trees to drive the birds away. The suggestion was summarily dismissed, but for it to have been made at all raises questions as to the extent to which people can be trusted to look after their own interests in a manner that does not significantly damage others.

3. Tree Protection

Against those odds, it must be pointed out how much people like trees, for environmental and aesthetic reasons. That has been translated into District Plan provisions protecting trees (and even s 129C(6) of the Property Law Act contains criteria which echo planning concerns, even if there is, as yet, no requirement to have regard to the District Plan before making an order in respect of a tree).

Generally speaking, there are two levels of tree protection in district plans:

1. Specific protection, usually by scheduling individual trees pursuant to the heritage protection provisions of the plan on the basis of their botanic, historic or special landscape value;
2. General protection, by rules which protect all or most trees of a certain size.

I don't wish to say too much about the first type of protection. In the same way that we treasure buildings or sites that have special significance, so we treasure trees associated with those sites or with special events. It is remarkable how often certain events have been marked by the planting of a tree: a tour through the grounds of Old Government House reveals not only some trees found (in New Zealand at least) only there, but also how often public figures picked up a spade. Similarly, there are a number of trees which have become great landmarks: the case of One Tree Hill is a clear one where the tree has a special character, far more significant than any intrinsic value it may have.

More questions arise in relation to the general protection of trees. An increasing number of district plans contain general tree protection rules. The usual format for such rules is a restriction on anything more than maintenance where trees have attained a certain height or a certain girth. There may be distinctions drawn, depending on whether the trees are native or exotic. There are often exceptions, say for fruit trees or for species which are considered not to have much value or to be pests.

In Auckland City for example, all native trees over 6 metres in height or with a trunk diameter of 600 millimetres or more (measured 1.4 metres above ground level) are protected. For most exotic trees, the threshold is higher, at 8 metres high or 800 millimetres in diameter. Fruit trees, acmena, privet and plants listed under the Biosecurity Act 1993 are not protected, and nor is any tree which is the subject of an order under section 129C of the Property Law Act. The protection of phoenix palms and Norfolk pines is subject to appeal.

Consent to do anything more than maintenance work in other than emergency circumstances requires consent as a restricted discretionary activity. There have been applications where every aspect of the development of the site has been a permitted activity, but the presence of a tree in the middle of the building platform or the proposed driveway has led to an application for resource consent. At this point, the issues become murky and attitudes become polarised.

The provisions of the Plan relating to the General Tree Protection Rule contain a number of conflicting elements. On the one hand, the contribution of the tree to the amenity of the neighbourhood and its water and soil conservation function is noted as important. On the other hand, there is recognition of the landowner's need for a practicable building site and provision of access and services.

The provision for removal or significant pruning of a tree as a discretionary activity means that in any case where the effects of the work are likely to be more than minor and the written approval of all those likely to be affected has not been obtained, the application must be publicly notified: s 94 Resource Management Act. Given the provisions in the Plan which (properly) recognise the public benefit which trees provide, it is not surprising that notification may occur. What is more surprising, in my view, is the attitude which many submitters take, tending towards a concept of displacing the landowner's rights and substituting their own under the guise of a public interest.

While there are a number of cases where the developers of land, or the designers of houses, appear either to be ignorant of the options available for retaining trees while achieving a good development solution or committed to a "bare site" approach to development, there are many more cases, particularly with the increasing density of urban living, where the removal of certain trees in the middle of sites is unavoidable. My personal view is that such cases can usually be treated quite adequately by appropriate new plantings. Indeed, in some cases it may be an improvement to remove

trees which are poor neighbours and replace them with trees which are better suited to the “urban forest”. I say that without any botanical expertise and acknowledging the time it may take new plantings to achieve the height or bulk of old trees, but simply in the hope that the number of “tree cases” may be reduced.

4. Rate Relief?

I mentioned earlier the treatment of trees as “land” for valuation purposes. It would seem to follow that if the trees are protected by the District Plan, then their value to their owner may be reduced, at least in circumstances where those trees inhibit development. I appreciate that in many cases the presence of trees which are of good quality and which are appropriate to their surroundings may add to the value of the land, so that individual cases will be different. Assuming, for the sake of argument, that a particular tree is protected in some way, then perhaps there would be a case for rating relief, pursuant to Part XIIB of the Rating Powers Act 1988, which enables rates to be remitted or postponed in accordance with a policy in a Council’s Annual Plan under the Local Government Act. The factors to be considered are:²³

- (a) The desirability of preserving particular natural or historic or cultural features within the district; and
- (b) Whether, and to what extent, the preservation of particular natural or historic or cultural features might be prejudicially affected if rates relief is not granted in respect of the land on which they are situated; and

23 Rating Powers Act 1988 s 180G(4).

- (c) Whether, and to what extent, preservation of particular natural or historic or cultural features are likely to be encouraged by the granting of rates relief; and
- (d) The extent to which the preservation of different types of natural, historic, and cultural features should be recognised by different criteria and conditions for rates relief, and whether different levels of rates relief should apply; and
- (e) The extent to which rates relief should be available where the preservation of natural or historic or cultural features does not restrict economic utilisation of the land; and
- (f) Such other matters as the local authority considers relevant.

The worrying thing about these general tree protection rules is that as more people become aware of their potential impact, there appear to be increasing numbers who try to avoid any impact by either planting only species which are unlikely to grow above the thresholds or by removing trees as they approach those thresholds. It is a case of unwanted outcomes from over-stringent regulation and inflexible attitudes on the part of participants, including submitters. The position may be exacerbated should the Urban Trees Bill become law, further emphasising the “rights” of people who do not own trees. If the Member of Parliament for Eden were to stand atop Maungawhau and look down, she might not be so concerned that her city is running a risk of losing its trees.

There are important issues of obligation and risk. In living according to district plan rules which restrict property rights, for example in relation to trees, a private individual is forced to assume responsibility over goods with public elements. On the other hand, that person remains the owner of the property and still carries certain private risks as a result. A common question in relation to trees is, will the Council pay for any damage which this protected tree may cause? The usual answer is no, on the basis that the rules ordinarily provide exemptions where a tree is known or likely to cause

damage, and the owner's liability in respect of a tree is not strict, but depends on negligence.

Again, the policy choices appear to favour the second rule in my proposed plan, at the expense of the first rule and the private property owner's interest. The tension between use and exchange is resolved in favour of use.

5. Views

While the common law has long recognised rights (in the form of easements, rather than natural rights) to light and air, it does not protect views for "the law does not give an action for such things of delight".²⁴

The social purposes of planning law have recognised the benefit to health and well-being of access to light and air, and most district plans contain some methods to ensure such access. The usual mechanisms are bulk and location controls involving height and height in relation to boundary limits or daylight indicators. The policies underlying those make the link clear, showing that they are not intended to protect views, but rather:

- (i) to reduce the prospect of overdominance;
- (ii) to secure the admission of daylight and sunlight to sites; and
- (iii) in some situations, to secure a measure of privacy.

In fact, it is more likely to be the height control which is effective in protecting views, although, again, that is not the usual purpose of height controls.

While the loss of views has been a subject of complaint by affected

24 *William Aldred's Case* (1611) 9 Co.Rep. 57b, at 58b; 77 ER 816, at 821 per Wray CJ.

persons for many years, the views obtained from individual properties are normally not protected by district plans. Auckland's plan specifically refers to views, but only to special views.

There are some planning controls which seek to protect views, but they are almost always views to landmarks from public places. Good examples in Auckland are the viewshaft protection methods for views of the volcanic cones and the Museum. These protection measures form part of the heritage provisions of the Auckland District Plan and a reading of the plan provisions relating to them makes it clear that they are not intended to protect views from private property.

A byproduct of controls which limit the bulk and location of buildings is the ability to see around or over them, but in almost all cases it is only a byproduct, and not an intended result. This has been recognised by the Courts: see *Anderson v East Coast Bays* where the High Court said:²⁵

Within a local body area contours and vistas will vary infinitely and a building of conforming height may make serious inroads upon the view of an existing neighbour because of topography but with no room for objection, and equally buildings of non-conforming height might, for the same reason, have no effect on neighbourhood views.

There are significant practical difficulties of protecting views, given:

- (i) Their subjective nature;
- (ii) The impact of topography;
- (iii) The extent to which complying buildings can limit views.

All of the foregoing is fundamental to the common law and will be found in any primer on land law. It is also, apparently, completely alien to

25 (1981) 8 NZTPA 35, 37 per Speight J.

the understanding which landowners have of their “right” to maintain an existing view. In almost all cases where new development is proposed and certainly on any land which is not flat, neighbours are likely to make submissions raising loss of view as a reason for declining consent or complain if they are not given that opportunity. This occurs even where the proposed development fully complies with the relevant bulk and location controls and the application is necessary because some other unrelated rule requires it.

Such complaints are sometimes linked to objections based on lack of privacy: this, in a city of some 305,000 people living generally on sites of between 300 and 1,000 square metres. Again, the loss of privacy is usually not specifically protected by district plans. As noted above, it is sometimes acknowledged that the height in relation to boundary rules can, in some situations, protect privacy as part of the more specific objective of avoiding overdominance. One can add that in a densely developed urban situation, the scope for maintaining a high degree of privacy is limited by the sheer intensity of development.

It has sometimes been argued that views should be protected as part of “amenity values”, pursuant to section 7(c) of the Resource Management Act. However, the definition of amenity values is:

Those natural or physical qualities and characteristics of an area that contribute to people’s appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

It is not immediately apparent that views from a single private property come within that definition, which appears to relate more to the neighbourhood as a whole. In my view, this paragraph is intended to call attention to public benefits, rather than private ones.

People want to be able to look out without others looking in: this corresponds with the fashion for mirrored glass not only in buildings but also in sunglasses. I am still hopeful, though, as my suggestions for mirrored contact lenses still generate negative responses. Perhaps the idea of a city as a place where people can interact with one another on a human and civil level is not completely dead.

6. Historic Buildings

In much the same way as certain trees and special views are protected for heritage reasons, so are certain buildings. Often these are public buildings, or private buildings with some significant level of use by the public, such as major commercial buildings.

Increasingly, however, concern is being expressed about the conservation of the heritage qualities of areas of housing. This has resulted in Auckland in the special character residential zones, the most restrictive of which is the Residential 1 zone, covering 386 hectares or 5.4% of the residentially zoned land in the city. In this zone, development which may affect the appearance of existing buildings, including exterior alterations or additions, requires resource consent as a restricted controlled activity.

I should say at the outset that I live in one such house and am presently contemplating a significant alteration to the rear and the roof of the house. I am generally comfortable (at this stage - I have not yet obtained the necessary consent) with the controls in the Residential 1 zone: I suspect that my architect is not. But I recognise the value to the city of maintaining the form and character of its older residential areas and I hope there is a value to me and my successors in title in such maintenance.

The purpose of raising this issue is not therefore to complain about it, but to identify yet another area of resource management control where private owners must bear the costs of providing certain public benefits.

Again, there is the opportunity for rates relief under Part XIIB of the Rating Powers Act, although Auckland City has not introduced the necessary policy for that. I have stayed in small bed and breakfast hotels overseas where such rate relief policies have enabled marvellous old houses to be retained and maintained. I expect more will be said about this in New Zealand in the future.

Recently, the Prime Minister announced a financial incentive fund as part of the proposed restructuring of the Historic Places Trust. Private owners wanting to conserve their historic buildings will be able to seek assistance from the Trust. While everyone involved in dealing with historic buildings will welcome any assistance in that area, the amount in the fund, of \$500,000, is unlikely to go very far.

7. Esplanade Reserves

My final example is one that is of more application outside the cities than in them.

In her instructions dated 5 December 1840 to Governor Hobson, Queen Victoria directed that the Surveyor-General be required to report:²⁶

[W]hat particular lands it may be proper to reserve ... for public roads and other internal communications, whether by land or water ... or as the sites of quays or landing-places which it may at any future time be expedient to erect, form, or establish on the sea coast or in the neighbourhood of navigable streams, or which it may be desirable to reserve for any other purpose of public convenience, utility, health, or enjoyment ...

In instructions issued under regulations made under the Land Act 1877, the Surveyor-General required a reserve of one chain to be provided

²⁶ Series of British Parliamentary Papers: *Colonies New Zealand 3* (1835-42) 156-164, held at the National Library, Wellington.

along the banks of navigable rivers. By 1886 this requirement had been extended to settlement surveys of Crown land in coastal areas. By 1892 the Land Act required one chain of land to be set aside along rivers, lakes and the coast for the purpose of access, subject to the discretion of the Commissioner of Crown Lands or the Minister of Lands.

Since then, various statutes have regulated the provision of esplanade reserves, gradually expanding the ambit of the controls, leading to the current regime under the Resource Management Act. The foundation of the Resource Management Act regime is expressed in Part II of the Act, and those provisions place a high value on the esplanade, particularly in section 6 - Matters of National Importance, which requires all persons exercising functions and powers under the Resource Management Act to recognise and provide for, among other things:

(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development ...

(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers ...

Specifically in relation to esplanade reserves and strips, the Resource Management Act declares their purpose to be for protecting conservation values, maintaining public access or enabling recreational use which is compatible with conservation values.

The situation with esplanade reserves is similar to the preceding ones, insofar as the public generally has a profound misunderstanding of the legal position, but different insofar as such reserves are actually acquired by a public body so that property rights do pass.

The misunderstanding is heightened because in many cases the public believes that all coastal and riverine frontage is vested in the Queen. The proposed "Queen's chain" legislation, while limited to marginal strips

obtained from land alienated from the Crown, appears to be misunderstood by many to cover all land.

Many point to the provisions of sections 6 and 7 of the Resource Management Act to justify an argument that esplanade areas are special, and few would doubt that. It is another matter, however, to go further and use those provisions as a basis for saying that all esplanades should be in public ownership. What is the point of doing so, where public access is unlikely or would have significant adverse results, for example on certain cliff tops and in estuarine areas?

As I understand the argument, it runs along the lines that even these inaccessible areas should be protected and preserved. That is again a fair enough statement, but if we turn to look at some of these areas, we have to ask who is going to maintain them? Will the Council, as the owner of the reserve, regularly come to check on its state? Who will deal with the behaviour of those who arrive on those reserves, and light fires or leave rubbish? Who will protect improvements on adjoining land from erosion?

The answers to all of those questions are, in very many cases, the adjoining property owners, sometimes the same people who had the land taken from them as a result of a subdivision or development. Many do not complain: they are content that they pay no rates on that land and, for most of the year, get to enjoy it without interruption by others or interference by the local council or the Department of Conservation.

But is this the best model for such land? We have legislation that speaks inordinately briefly of *kaitiakitanga*²⁷ and defines it as the principle of stewardship, and then leaves that concept hanging without any implementation. I understand it to convey a situation somewhere on the continuum between private and public ownership. In that role, it may provide

27 This is defined in s 2 RMA 1991 as meaning “the exercise of guardianship; and, in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself:”. See also reference in s 6 RMA - Matters of national importance.

a workable arrangement which can maximise the benefits attendant on public access to the coastline and riverbank, while limiting the costs which accompany the public taking of land. Some indication of a willingness to address property issues was apparent when Parliament amended the Act to provide for esplanade strips, to achieve the same objectives without taking land. Perhaps further consideration of these issues could address the use and exchange problems which exist.

V: CONCLUSION

Proudhon said property is theft. He was, presumably, someone's neighbour. A host of philosophers, from Rousseau to Waldron, have amplified that exclusivity in relation to property is likely to be self-defeating. We have to share to survive. The reality of this was meant to be driven home by the Brundtland Report "Our Common Future" and the concept of sustainable management.

Whether one prefers Locke's argument that property must be earned in some way, or Hegel's that we have an inherent right to it, we cannot pretend that use controls are separate from property rights. It is simply not valid to say that resource management should leave the allocation or exchange of those resources to the market on an unregulated basis. To do so ignores the effects of use controls on the allocation of resources and creates an unbalanced resource regime which, because of its tensions, is unlikely to be sustainable.

The problem is the converse of the more apparent one, of dealing with negative externalities. We can all appreciate how private use may have an adverse effect on public property, how a factory's discharge may pollute an estuary. An important part of sustainable management is trying to balance those externalities in an acceptable way. There is much talk of compensation, quotas and taxes on public resource use: the idea of a "carbon

tax” is part of this.

The other side of that problem concerns private rights over private property, and the adverse effect on those of the exercise of public rights. To what extent should that be treated simply as a windfall, justified by an absolutist belief in public benefits as superior in all respects to private benefits? If we maintain that view and still leave resource allocation to the market, then to what extent are we merely encouraging selfish behaviour?

If our rules are not neutral in terms of incentives to act in ways that maximise utility, then a potential result is inefficient or otherwise undesirable resource use. This is especially so where our rules favour public rights over private rights. An example is where a landowner cuts down all trees before they reach 6 metres in height, simply to avoid the effect of the general tree protection rules. The result is a peculiar form of market failure where behaviour turns spiteful. The landowner does not necessarily want the trees removed: he or she simply wishes to avoid having to obtain resource consent, possibly on a notified basis. The objective of the rules is thus defeated before they even apply and nobody gains the benefit of achieving those objectives. Most importantly, for this discussion, the private landowner suffers interference with his or her property rights without any corresponding benefit to anyone.

One of the few advantages of my 2 Rule Plan is that it avoids any policy decision about the relative merits of each rule: it leaves the outcome to be balanced having regard to all the circumstances of the case. I am well aware of how time consuming and expensive such a balancing exercise would be and, contrary to my own interest in litigious solutions to resource issues, am trying to suggest that a broader approach is necessary, to identify better who the “winners” and “losers” are. By doing so, perhaps the “zero sum” approach to resource use and allocation can be avoided in favour of something truly sustainable.

Do you have any property rights? Yes, and perhaps your interests in resources are more extensive than those you control yourself. In managing those interests, you should bear in mind the interests of others in the expectation that they will do the same. Hopefully, this principle can guide reform of a truly holistic resource management regime.