THE EXTENT TO WHICH REGULATORY CONTROL OF LAND USE IS JUSTIFIED UNDER THE RESOURCE MANAGEMENT ACT

A discussion paper commissioned by the Minister for the Environment.

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INTRODUCTION

THE REGULATORY CONTROL OF LAND USE

The creation of the world – said Plato – is the victory of persuasion over force. ... Civilization is the maintenance of social order, by its own inherent persuasiveness as embodying the nobler alternative. The recourse to force, however unavoidable, is a disclosure of the failure of civilization, either in the general society or in a remnant of individuals...

Now the intercourse between individuals and between social groups takes one of these two forms: force or persuasion. Commerce is the great example of intercourse by way of persuasion. War, slavery, and governmental compulsion exemplify the reign of force.

"From Force to Persuasion," from *Adventures of Ideas*
by Alfred North Whitehead

If my argument in this book is right .we are not so nasty that we need to be tamed by intrusive government, nor so nice that too much government does not bring ut the worst in us, both as its employees and as its clients.

p 262 Matt Ridley *The Origins of Virtue*

Ostrum's [experimental] conclusions are that communication alone can make a remarkable difference to people's ability and *willingness to exercise environmental restraint: indeed communication is more important than punishment. Covenants without swords work: swords without covenants do not.*

p 240 *Ibid*

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INTRODUCTION

Intro 1 The brief

The press has widely reported that I have been commissioned to review the Resource Management Act and that the report would be ready for publication in early March. A total review of this complex and highly integrated piece of legislation would demand much more time and skill than is available to me; indeed the Ministry has other more comprehensive studies, managed by people with wider ranging expertise, currently under way. The Minister's brief was more specific. I have been asked to write a 'think piece', to promote public discussion on the public's expectations of the Act regarding control of land use and similar matters which lie outside the Act's primary focus on the sustainable management of natural and physical resources. He is also concerned that the interpretation and implementation of the Act is generating far more, and wide ranging rules and regulations than was intended by legislation which was introduced as part of the programme of deregulation of the total economy.

The Act is intended to address the environmental effects of land based activity and development and in particular to manage those effects which impact on the natural and physical environment. Many find the intentions of the Act laudable but are puzzled by the fact that District Plans continue to dictate which stores can can sell white goods, what colour people can paint their house, and whether they can work from home. The Minister shared this puzzlement in a speech to the New Zealand Resource Management Law Association conference last year:

> *I can illustrate the point very simply by referring to the Ashburton Plan in which we find a mind-numbingly detailed prescription for protecting retailers in the central business district. Isn't it comforting to know that the good people of Ashburton must proceed in orderly fashion to the fringes of the CBD to find awnings, blinds and curtains, equestrian supplies, sewing machines and spa pools?*

Intro 2 Recent Fads override existing Plans

A host of planning theories,currently in vogue overseas, have found their way into District Plans even though the legislation was intended to protect us from such 'grand planning.' Such theories presume that a wise and elite few know far better than the rest of us how we should live out our lives.

For example, the recent American planning fad, known as *New Urbanism*, may have been too late arriving here to be written into the current generation of plans, but it is actively imposed on developers by staff in their daily interpretation of their own plans. Their attitude is simply that "If you don't do it the *New Urbanist* way, you will not get a consent." Alternatively, developers and subdividers are told that they must refer their designs to 'approved' consultants, who are adherents to the new fad. Councils (or their newly converted staff) get their way regardless of the rules and policies in the plan.

One of the most common complaints, which is endorsed by my personal experience, is that the rule of law no longer applies and that the whole process of gaining a resource consent is now ethically, if not financially, corrupt.

Intro 3 The Approach

I have been asked to stimulate public debate by writing a 'think piece' which will generate public interest and comment. Standard reports and academic treatises often fail to seize public attention precisely because they are measured and impersonal while striving for some form of value and judgment free neutrality. The Minister knows I have a point of view and expects me to clearly express it. Many of the case studies have revealed practises which I find horrifying and I have no hesitation in saying so.

A review essay by Richard Pipes in a recent edition of the *Times Literary Supplement* discussed this matter within a commentary on history, but the argument is equally valid for analysis of public policy. Pipes wrote:

> *Science and scientific methodology have exerted a profound impact on the discipline of history ... On the positive side, scientists have taught historians to examine scrupulously the authenticity and reliability of documentary sources, to subject judgments to statistical proof, to keep emotion and moral sentiment out of the analysis of the evidence.*
>
> *The impact of science, however, has also had its debit side in that it has influenced many scholars to avoid emotion and moral judgment also in the assessment of historical events. It is one thing to be dispassionate in establishing, say, the number of victims of a genocidal policy, and another to withhold judgment of the policy itself. The historian can be expected to render an opinion, otherwise he conveys the impression that historical phenomena are beyond human volition and hence beyond value judgment.*[1]

Hence this paper is a personal statement. I have neither the time nor the resources available to travel round the country interviewing a statistical sample of local bodies and applicants. My views on the interpretation of the legislation and the experience of applicants is based on my own work and that of my clients and other case studies. Since the day the Minister announced the project scores of people have telephoned or written to me offering their own experiences as examples of both what is right and what is wrong with the Act and its implementation.

1 Richard Pipes "Without the People" review article, *Times Literary Supplement*, February 13 1998.

A key problem remains. Many want their story on record but wish to remain anonymous because they fear the repercussions both on present applications or on those which they might lodge in future. Their fears are quite justified.

The limitations of this approach may attract criticism from some. But I believe that my personal position, clearly stated, as argued in this document, and supported by a wide range of case studies from all over the country, will promote useful debate and will hence serve the Minister's purpose.

Intro 4 The Source of Complaint

4.1 The 'Little People' are the most Aggrieved

Many of those who protested that I was an unsuitable person to write this paper, claimed that the whole project was part of a campaign by big business, the multinationals, the forestry industry, federated farmers and the international new-right conspiracy, to undermine the Act and hence allow greedy developers to avoid any responsibility for their impact on the environment.

As it happens the phone calls, faxes, letters and parcels, which flooded into my office were almost all from individual property owners, small enterprises, and ordinary farmers who are in most cases small family businesses. The large companies who are already entrenched in New Zealand have tended to be less discomforted by the Act if only because it provides something close to a one-stop shop for their major projects. Also, they have used it to prevent competition from newcomers. Any application for a new supermarket or service station will fill a hearing room with legal representatives of existing owners of supermarkets or service stations who have suddenly discovered a passionate concern for the environment. In fact anyone who spends time in such hearings would come to believe that supermarket and service station operators are among the nation's most committed defenders of the natural and physical resources, the amenities of the neighbourhood, the cultural vitality of communities in the country, and indeed the future of the world. Maybe they are – maybe they are indeed all honourable men and women. In 1776, (around the time Captain Cook was reporting on his discovery of New Zealand in the southern oceans) Adam Smith pointed out that when merchants seek to promote their self interest within an unconstrained market then 'the invisible hand' works to promote the interests of us all. But he was also shrewd enough to remind us, without any thought or knowledge of New Zealand's future legislation, that:

> *The interest of the dealers[2] however, in any particular branch of trade, is always in some respects different from, and even opposite to, that of the public. To widen the market and to narrow the competition, is always the interest of the dealers. To widen the market may frequently be agreeable enough to the interest of the public; but to narrow the competition must*

[2] i.e. merchants.

always be against it, and can serve only to enable the dealers, by raising their profits above what they naturally would be, to levy, for their own benefit, an absurd tax upon the rest of their fellow citizens. The proposal of any new law or regulation of commerce, which comes from this order, ought always to be listened to with great precaution, and ought never to be adopted until after having been long and carefully examined, not only with the most scrupulous, but also with the most suspicious attention.
It comes from an order of men whose interest is never exactly the same with that of the public, who have generally an interest to deceive, and even to oppress, the public, and who accordingly have, upon many occasions, both deceived and oppressed it.[3]

Every hearings committee listening to how a new supermarket or service station in the area will destroy all that the community holds dear should have Smith's admonition burned indelibly into their memory.

4.2 More Material than I can Use

Needless to say I have not been able to report directly on all these case studies in this report. I have also been unable to respond to all of those who sent me material in as much detail as I would have preferred – otherwise the report would never have been written. I have taken note of all the information and much of the general commentary is based on this material even if not mentioned in detail or recognition given to its source. In some cases the sources wished to remain confidential. Others demanded that I give their case as much publicity as possible. I hope I have got it right.

4.3 A Few Councils cause the Most Problems

While I have been deluged with faxes, phone calls, letters, and parcels of documents they could be sorted into a few piles.

Many councils are administering the Act in a manner which causes little distress among their citizens. The greatest offenders, according to my correspondence, are the Auckland and Christchurch Regional Councils, and Auckland City in the Gulf Islands, Rodney, North Shore and Waitakere City in Auckland, with Waitakere a clear winner in creating anger and grievance among its citizens and professionals. As a recent refugee from that city's jurisdiction, I know how they feel.

While the Far North has endured considerable trauma it has effectively withdrawn the offending plan and other plans have been similarly treated by other small local authorities.

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3 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations.* Chapter XI, "The Rent of Land", The Conclusion of the Chapter.

4 *op cit*

My experience suggests that the simple minded view that further amalgamation or that Regional Councils should take over the RMA function is strongly refuted by the experience recorded in these case studies.

Smaller local authorities are less likely to attract staff with a global mission, and their councillors are more responsive to the views of their electorate. Also there are no economies of scale in the civil service. The largest cities have the most bureaucrats per head, and earlier research of my own suggests that the optimum size for common sense is a body is some 50,000 to 70,000.

This may not be the case if planning consents were contestable in the same manner of building consents. But to my mind, the evidence is overwhelming that placing the RMA procedure in the hands of a smaller number of very large local authorities would be disastrous if contestability has not been introduced beforehand. It may well prove that contestability alone will solve many, if not all, of the present problems, in which case the community could maintain the benefit of small accountable local government rather than succumb prematurely to the view that bigger is necessarily better.

Intro 5 A Note on Terminology

A host of people administer the Act. In Section 6 and elsewhere the Act covers the multitude.

> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognize and provide for ...etc.*

Which is something of a mouthful and would obstruct the flow of argument. Hence I have chosen to use the word ‘councils’ to capture all those who administer the legislation.

In reality we are talking about Regional and District Councils, the Department of Conservation, the Ministry for the Environment and many other organisations. We are also talking about both the elected politicians and the bureaucrats who serve them, and even the pressure groups who have so much influence on some councils’ decision making.

It is fair to say that many councillors feel out of control and admit that the planning staff seem to be totally in charge. But it would be as unfair to consistently blame or praise the bureaucrats as it would be to praise or blame the politicians. Hence I have chosen to use the generic term ‘councils’ to cover all those involved. Where I wish to be specific I refer to District or Regional Councils by name, or the appropriate Ministries. But ‘councils’ with a lower case ‘c’ refers to all those ‘entities’ described in Sections 6, 7 and elsewhere.

Intro 6 The Format

The full brief supplied by the Minister is attached as Appendix I, to this Introduction. The format follows this brief. Hence it is in three parts, and each part follows the sequence of issues identified in the brief. Some matters come up for discussion under one or more parts. Where this is so, I have had to make a decision as to where to place the major discussion. If this is later than Part 1, I refer readers to the appropriate paragraphs in Parts 2 or 3.

Intro 7: General Thrust – Enhancing Focus

The Minister's brief carries the implicit message that the Act has lost its focus because its scope is too wide. This belief is endorsed by my own analysis and the numerous case studies which have flowed into my office from the time I wrote the report for the Reserve Bank in 1996.

The lack of focus has allowed councils to prepare widely varying District Plans and to interpret the legislation in unpredictable ways. There is almost universal agreement that the direct costs of compliance are too high while the holding costs and opportunity costs are now so great as to be seriously hindering both economic and employment growth.

My general response through this paper is to slim the legislation down and to regain its focus by removing from its ambit anything which is not clearly within the purposes set out in Section five. This carries its own risks; the end result may be that some of the baby's digits are thrown out with the bathwater.

But as someone wedded to the principle of incremental rather than radical reform and who admires the centuries old development of common law it seems to me that it is sound public policy to begin with minimal and highly focused legislation, which we add to, only when experience proves we must. Certainly the costs are almost certain to be lower than carrying on with the legislation in its current form. For example I recommend that Heritage and Historic Places issues deserve their own legislation outsidethe RMA. This is not because I believe that such matters are unimportant. On the contrary I believe that the certain of these matters to be dealt with are so different that they need their own highly focused legislation, which is administered by people who focus on nothing else.

Intro 8: General Trust – Limiting the Scope

When I was studying at the Berkeley School of Public Policy in the late sixties I proudly announced to the Dean, Professor Aaron Wildavsky, that I had just read in the newspapers from home that New Zealand had become the first country in the world to appoint a Minister for the Environment. After some twenty minutes Aaron paused, as he strode past my desk, and in one of his famous throw-away lines, said:

> *You know, if you are Minister of the Environment, you are eventually Minister of Everything.*

Thirty years later a group of us who discuss matters of environmental law on the Internet agreed that it is now being recognized around the world that legislators need to place boundaries around the scope and extent of environmental management and law.

After all, the definition of environment in the Act extends into almost every field of human endeavour as Wildavsky predicted all those years ago. Section 5 may focus on natural and physical resources but District Plans refer to the cultural vitality of shopping centres and 'enriching the magic of the Coromandel experience' or the need to make sure that small satellite dishes cannot be seen from the road.

Commercial contracts frequently impose limits on the scope of an agreement with clauses which begin "Nothing in this contract shall be interpreted to mean ... " or that "Nothing in this contract shall give either party the power to ... "

Many practitioners agree that the Act probably needs certain clauses which establish similar areas which are out of bounds to councils and their plans. If councils feel that they can declare that "an inappropriate subdivision is one which is carried out for pecuniary gain" then maybe it is time for the Act to say "nothing in this Act gives councils the power to favour only those activities which operate at a loss."

Of course this particular phrase looks nonsensical as a piece of law but only because of the nonsensical nature of the kind of policy it seeks to eradicate.

This report indicates several places where such 'boundary' clauses appear to be required. I am not a law draughtsman and accept that such clauses may be regarded as lacking in elegance or whatever. But the problem is a genuine one and needs to be addressed.

Intro 9: Why Control Effects rather than Land Use?

Many practitioners and academics continue to argue that it is **necessary** to control land use to achieve the goals of sustainable management. This is not the time or place to go into their arguments in detail. But it is worth taking the time to explain why parliament chose to revoke the old Town and Country Planning Act (TCPA) which promoted the control and direction of land use and to replace it with legislation designed to manage environmental effects.

Parliament recognized that the rapid rate of change in both the activities of business and the means of controlling their environmental effects made the old prescriptive approach of the TCPA both unworkable and hostile to the process of innovation itself.

For example a factory which used to make shellac 78 rpm records in pre-war days may well have made a lot of noise, produced much smoke and other emissions and dumped considerable waste.

These days, plants which manufacture optical discs require facilities as clean or cleaner than surgical theatres and their pollution control systems mean that they could live quite comfortably alongside a residential zone.

Hence a Town Plan which classifies 'record manufacture' as a use which must be in an industrial zone is made rapidly obsolete both by changes in recording and changes in pollution control.

Hence the new legislation was designed to focus on the **effects** of the record manufacturing operation rather than the label on its letterhead.

Similarly the environmental effect of a coal burning steam engine of the thirties is quite different from the effect of a diesel electric locomotive and different again from the effect of an electric system powered by overhead lines suspended from pylons. The potential effects of a railway line running through forest, suburb or pristine scenery is dependent on the motive power rather than the transport use itself.

Similarly, an old code might require that septic tanks need so much area of land to operate effectively and this area would be specified according to the technology of the time and the worst case soil condition.

But new technologies can be used to treat waste and the area required is dependent on intensity and nature of use and the soil conditions and other variables. But as long as the fixed rule remains in place the innovator sees no benefit in innovation because the rules favour the existing solution. Indeed the rules seriously discriminate against innovation because the innovation must meet the cost of changing the rules.

This was the attraction of moving from a regime based on the planning of land use to one based on the management of environmental effects. The same arguments were used to encourage a move away from regulatory building codes which specified acceptable solutions to codes based on performance standards and hence encouraged new building methods and techniques. However, just as building codes continue to lay out simple and proven 'means of compliance' (such as the standard stud frame) to be used by those who want simplicity and low compliance costs, the RMA similarly encourages 'permitted uses' as a means of providing low cost simple 'means of compliance'.

Unfortunately, while the new Building Act has been a great success the RMA is widely held to have failed to deliver on its promise.

The Minister has asked me to present what I perceive to be some of the reasons why, and where appropriate to recommend the necessary changes.

I am not a law draughtsmen and my recommendations are not intended to be dropped into the legislation as written. There are intended to set a direction. I leave it to those with greater expertise than me, to decide how best to give these directions the force of law.

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PART ONE

THE EXCESSIVE REGULATION OF USE

Sometimes it is said that man cannot be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the form of kings to govern him? Let history answer this question.

Thomas Jefferson
From his *First Inaugural Address*
March 1801

We have to ask whether legislation should be cast in terms that rely on angels for its implementation or take a less charitable view of human nature.

The Hon Simon Upton,
Minister for the Environment
Environet March 16, 1998

Although s.32 of the Act is couched in terms which indicate that interference by means of plan provisions should be kept to a minimum Councils have, to a degree, brushed this to one side and produced plans running to many volumes of unbelievable complexity .... Some plans are so complex that the average man in the street cannot understand them. To produce such a plan is inexcusable.

Judge Treadwell
from Address to Environmental Health Officers
Reported in *Environet*, March 16 1998

1 INTRODUCTION

One of the Minister’s concerns is that, in spite of the intention of the Resource Management Act (RMA) to replace the Town and Country Planning Act (TCPA) with more permissive legislation, there is now widespread agreement that:

(i) the use of land,

(II) the introduction of new technologies and novel activities,

(iii) the layout of residential subdivisions, and

(iv) the design of buildings and their surroundings

are more regulated than ever before.

This report will argue that certain sections of Act, and in particular, certain words and phrases, are contributing to the tendency for many councils to to carry on as though the RMA were simply an addition to the TCPA rather than a replacement.

However, no legislation operates in a vacuum. The famous US declaration that ‘all men are created equal’ meant one thing when it was written in the late eighteenth century, (i. e. it excluded women and slaves) but means something quite different today. The old TCPA was as silent as the RMA on the control of aesthetics. But those who lectured students in the administration of the TCPA made it clear that the design and colour of buildings were out of bounds to councils and their plans. One can only conclude that such strictures are no longer part of most such courses being offered today.

Similarly, some Government Departments seem to be slow to catch up with the spirit of Parliament’s own legislation. For example the Department of Conservation, in a brief for a planning study of Mangawhai, identified five matters to be investigated.
The list included

> *Land which has potential for more intensive use, particularly horticulture, is to be identified using above mentioned databases. Information is to be also presented on current use of such land and the likely effects of coastal zoning.*

This paragraph sits comfortably within the concerns of the old TCPA but its focus on the productivity of land, land use and zoning, conflicts with the spirit of the RMA. The consultants were then asked to evaluate alternative growth strategies for Mangawhai.

The general tenor of that brief reinforced the belief that councils have the ability to choose between alternative land use patterns and general strategies of urban growth. Given that most analysts cannot decide whether we should recycle paper or incinerate it for its energy, it seems unlikely that they will be able to evaluate the overall environmental effects generated by different patterns of urban growth.
It should come as no surprise that following this brief the first conclusion of the Mangawhai report is that:

> *The Resource Management Act governs the use of land, water and other natural resources.*

Surely the RMA governs the **environmental effects** of the use of land, water and other natural resources, but not the use itself.

These and many other documents, statements and decisions indicate to me that it will not be sufficient to clarify the intentions of the Act by refining its wording. Those who teach students of Resource Management within different tertiary programmes will have to gain a better understanding of the spirit of the RMA. So will those Government departments and agencies who are empowered to intervene in the operations of Local Government and to participate in the resource consent process.

Even the Ministry for the Environment confuses the message with some of its own publications. For example a booklet produced for schools by the Ministry is titled *People, Policies and Plans* and is subtitled *Planning Resource Management in New Zealand.* This subtitle reinforces the view that the RMA is about planning the use of resources, and about planning in general.

Finally, Mr Hugh Pavletich of Christchurch made some pertinent commentary on the name of the legislation itself. He writes:

> *I am increasingly of the view that one of the main problems with the Act may well lie in its very title “The Resource Management Act.” This name creates the impression that those involved with its adminis-tration somehow have a key role in managing*

> *resources when in fact they do not (or should not) be actually 'managing' them at all.*
>
> *The people who should be charged with the responsibility of actually managing the resources are the private or public owners and developers of their properties. After all, they are responsible for the proper performance (social, environmental and economic) of the property and should they fail to manage their property properly they should be held accountable.*
>
> *The Resource Management Act presently allows other people, including 'the community', administrators and interest groups to cross this important line and impose all manner of conditions and costs without having to take on any of the responsibilities for the outcomes of their interventions. ...*
>
> *I believe the name of the Act should be changed to something like "The Environmental Protection Act' or better still "The Environmental Administration Act"..*
>
> *Then the legislation should be changed to clarify the respective roles and responsibilities of the owners and developers (the resource managers) and the councils and their planners (the environmental administrators).*

Mr Pavletich's argument has much appeal. Parliament saw fit to change the name of the Planning Tribunal to the Environment Court for similar reasons. Similarly, a change in the title of the Act would be a logical next step.

2. SECTION 7 - OTHER MATTERS

2.1 Section 7(a): Kaitiakitanga

This matter is causing a proliferation of procedural problems as well as some problems with rules and their interpretation. I have chosen not to deal with this clause because;

(i) It probably falls outside the brief, if only because it would divert the debate away from the Minister's intended focus.

(ii) It is so complex and involves so much other legislation that it would be impossible to address the issue within the time available.

However, I believe that the general restructuring of the legislation which I recommend at the end of this part of the report would address at least some of the regulatory problems and frustrations arising out of this section.

2.2 Subsection 7(b): Who manages the resources?

Mr Pavletich's observation reminds us that the name of the Act encourages councils to believe that they are responsible for managing the resources of the economy. Many have found further comfort in this belief within Section 7(b) which requires those exercising powers under the Act to have regard for:

The efficient use and development of natural and physical resources.

Parliament inserted this clause to remind councils and others that they should not unduly interfere with the operations of the market which is the most efficient means of allocating resources. Any economist who reads this clause will understand it to mean just that. Unfortunately there are few economists working within councils, with the result that this clause has been taken to mean that councils themselves have a responsibility to manage all resources in the most efficient way. This has encouraged some councils to make economic resource allocation decisions such as preventing a new shopping centre from being developed because it might lead to others closing, and that such empty centres would be an inefficient use of resources.

No government agency has ever been given the power to say that aircraft should not be allowed to fly into New Zealand because it would put shipping lines out of business and send some ships to an 'inefficient' early grave. And yet such decisions are routinely made concerning the allocation of land-use within District Plans.

If this clause is to remain, then the legislation should spell out that nothing in the legislation gives councils the power to allocate resources or otherwise indulge in economic planning. The legislation is willing to talk about 'inappropriate subdivision, use and development' by the private sector. Parliament should be prepared to make equivalent declarations about inappropriate activities by those charged with the Act's administration.

To make the point even more strongly, this clause should somehow be linked to Section 32 which establishes the procedures which have been designed to ensure that councils have regard to general economic efficiency.

Economic and social planning are discussed in more detail below.

2.3 Section 7(c): Amenity Values

This clause refers to the maintenance and enhancement of amenity values and is discussed in more detail below.

2.4 Section 7(d): Intrinsic Values

This clause refers to the intrinsic values of ecosystems and is discussed in more detail below.

2.5 Section 7(e): Heritage Matters

2.5.1. The broad scope of Heritage

Section 7(e) requires councils to have particular regard to:

> *the recognition and protection of the heritage values of sites, buildings, places or areas;*

This clause has almost certainly justified a rash of rules and regulations which allow councils to become architectural and artistic censors. Auckland City has designated an entire suburb as a heritage area and imposes rigid censorship on design of new buildings, alterations and additions, right down to the details of window joinery. The compliance costs imposed on families attempting to do no more than build a bedroom for a new baby are massive.

Resource Management should properly be concerned with protecting the foothills of the Southern Alps and the water within our major rivers. Given that the Act gives councils the power to grant or withhold consents to buildings and the change of use of private property it seems unwise to allow 'heritage' such wide scope for use and abuse.

2.5.2 Give Heritage Issues their own 'Legislation'.

The New Zealand Historic Places Trust has its own legislation. This legislation is being revisited and should be rewritten to become the single vehicle for protecting significant aspects of New Zealand's natural heritage and its archeological and architectural history. The powers granted by such heritage and historic places legislation should be those which are necessary and sufficient to do the job. Heritage processes and procedures could continue to be accommodated within the hearings and appeal jurisdictions of the RMA while the RMA documentation could record the sites which have been designated as being of heritage, historical, architectural and archeological importance.

But given that the intentions of any form of heritage legislation are so different from those embodied within Section 5 of the RMA it seems inappropriate to give heritage issues two bites at the regulatory cherry.

Practitioners are adamant that matters of aesthetics and similar individual judgements take up, and waste, most of their time. They are also unanimous that, more than anything else, these 'Heritage' based rules and regulations cause the most distress to ordinary citizens and do most to bring the legislation into disrepute.

2.5.3 Recommendation

References to heritage should be removed from the Resource Management Act or, failing that, the Act should limit its scope by inserting a clause which says (inter alia):

> *Nothing in this legislation gives councils powers to regulate or control matters of architectural, artistic, or aesthetic judgement except where acting under separately empowering legislation.*

Separate legislation for heritage and related issued could continue to be accommodated within a 'one stop shop' consent procedure as described in Section 12 which concludes this part of this report.

2.6 Section 7(g): Finite Resources

2.6.1 What are these Finite Resources?

Section 7(g) requires councils to have regard to:

> *the finite characteristics of natural and physical resources.*

The Ministry's booklet for schools[4] claims:

> *Mineral and fossil fuel resources are being rapidly used up.*

This may be true locally, but is not true on a global scale and indeed minerals (which includes fossil fuels) are excluded from consideration of 'the reasonably foreseeable needs of future generations' under Subsection 5(2)(a).

The notion that mineral resources are being depleted is a widely held myth among the planning community and is used to justify all manner of economic intervention, especially when combined with the perverse interpretation of Section 7(b) which deals with the efficient use of natural and physical resources.

This subsection has been used to justify restraints on the subdivision of rural land on the basis that land is a finite resource and hence must be rationed.[5]

These documents often grudgingly recognize that the RMA, unlike the TCPA, makes no requirement on councils to protect highly productive land. However, they then argue that land is a finite resource and that therefore highly productive land is a finite resource. These arguments are then used to justify quite draconian interventions in the development of rural land for urban or other purposes are justified. These plans continually refer to 'the finite rural land resource' and demand that the rural land must be 'managed' principally for activities relating to primary production.

Land is finite in some theoretical sense that the earth is a sphere of fixed dimensions. But when land changes its use it is not 'used up'. People simply change the way they use it.

Similarly, many councils use this clause to justify claims that human activity is depleting the supply of natural and physical resources. Part I of the Act defines natural and physical resources to include:

land, water, air, soil, minerals and energy. all forms of plants and animals (whether native to New Zealand or introduced), a and all structures.

When this definition is used within a clause referring to finite qualities it inevitably leads to excessive regulation.

5 For example, see Western Bay of Plenty District Plan incorporating Proposed Variation No 1 November 1997

Living species can suffer extinction, many have so suffered, and many are now at risk.[6] Hence it is right and proper that a Resource Management Act have regard to the possibility of such extinction.

2.6.2 Mineral Resources are Human Inventions

Unlike living species, those natural resources which are minerals or fossil fuels can never 'run out'. These resources are human inventions and if their prices rise because of local shortages we human beings increase our exploration efforts or invent substitutions.

The idea that mineral resources are human inventions comes as a surprise to most people. But bauxite was just clay until the invention of high power electrolysis. Pitchblende was just another form of clay until the invention of the nuclear reactor. And until someone develops efficient nuclear fusion plants the isotopes of hydrogen and their molecular equivalents will be of no commercial value as an energy source. Petroleum has no value until it was discovered to be a substitute for spermaceti oil as a machine tool lubricant.

The projected crisis in the supply of copper was overcome by the discovery of fibre optics and the development of satellite transmission. Therefore we can only be concerned about running out of resources of this kind if we believe that humanity is running out of its ability to invent. There is no evidence that this is so.[7] The human mind is indeed the 'ultimate resource'.

While the soil, the water, and the air, cannot 'run out' it is true that they can be seriously degraded, especially at the local or regional level. This is recognized by Subsection 5(b) of the Act which recognizes that the local soil, water and air are with us forever, and are not subject to substitution or extension by exploration. Hence this section requires that they are properly managed. The concern for soil, water and air is legitimate and deserves legislative recognition.

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6 Contrary to popular opinion the great extinctions caused by human beings took place some 40,000 years ago as humans spread rapidly around the g lobe. The great extinction of the Moa took place in recent times because New Zealand was so recently inhabited. As always it it the large animals which succumb because they suffer from being to large and dangerous to bring under private ownership. See *The Future Eaters*, by Flannery, *Guns Germs and Steel* by Diamond, and others which point out that contemporary extinctions are minor by comparison.

7 For further discussion of such matters see Julian Simon, *The Ultimate Resource*, Princeton University Press, 1981; and Julian Simon and Harman Kahn, *The Resourceful Earth*, New York: Basil Blackwell, 1984.

However, the notion that mineral resources are finite leads to nonsensical policies and rules which promote the widespread belief that the human population of the world is facing an imminent crisis of shortages of vital minerals and ores. In reality **all** such resources are cheaper than they have ever been. Known reserves are greater than ever, and continue to grow by the day. The known reserves of fossil fuels, at present rates of consumption and at present prices are sufficient for about 750 years, and these known reserves are growing by the day. The cartels have to work hard to keep supply under control.

2.6.3 The Inequity of Intergenerational 'Equity'

Some argue that 'inter-generational equity'[8] requires that we save our mineral resources for future generations rather than use them today. This is flawed economics for many reasons, not the least of which is that such policies demand that the poor people of today sacrifice their own present and future wealth for the benefit of future generations. And yet we can surely be confident that future generations will be richer than we are given the record of human history to date. One certainly needs to be a convinced catastrophist to be able to wag one's finger at the disadvantaged of today while demanding they sacrifice their own wellbeing so that Captain Kirk will have more toys to play with on the bridge of the *Starship Enterprise.* Those who persist in such claims have to recognize that the population explosion is over and that the most recent publications from the United Nations indicate that from around the middle of the 21st century population pressures will be negative not positive. This remarkable turnaround in human history is only about half a century away.[9]

Finally, if we save resources for future generations, when and how do we decide that these worthy and deserving future generations have finally arrived? Or do these future generations continually disappear over the horizon while resources pile up around us? In reality their needs disappear for the same reason that any perceived need to preserve quill pens in the 12th Century disappeared with the invention of metal-cast moveable type. Fortunately the people of the 12th century had the good sense to neither store away their quill pens or pass laws requiring that goose farms be preserved for all time. We could learn something from their confidence in the innovative capacity of human thought.

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8 The Act does NOT mention intergenerational equity. Some interpret 'the reasonably foreseeable needs of future generations" to justify policies based on inter-generational equity. This represents a great leap in interpretation.

9 For example *The Spectator* of 7 February 1998, p22 in as essay by John Vincent titled 'Scots Away' reports that birth rate in Scotland is now only 1.55 while a rate of 2.1 is needed to maintain a population. Presumably there will soon be a massive surplus of scotch, bagpipes and tartans.

The belief in an imminent crisis in resource depletion presumes that humanity has run out of the power to invent. Anyone who owns computing hardware and software will find this presumption difficult to accept.

Inter-generational equity is a legitimate concept when applied by economists to the appropriate circumstance. The economists' notion of 'inter-generational equity' requires that major expenditure on capital assets such as roads and sewage treatment should be recovered over the useful life of the asset rather than on day one. On the other hand, the same principle of inter-generational equity requires that expenditure on non-durable goods or services should be recovered at the time of purchase or consumption. The first few shoppers at a new supermarket would be surprised if they were charged $100 dollars for their groceries and $3 million for the new building. Such inter-generational equity has nothing to do with deferring the use of the minerals and energy which build the supermarket so that they will be available for use by future generations.

Many plans and policies take on sound economic notions and then distort them to serve non-economic agendas.

2.6.4 Natural Features are 'Finite'; Built Structures are Not

It may be that Parliament included this clause in order to protect locally finite resources such as the scoria in Auckland's volcanic cones. But such 'shortages' lie not so much in the scoria as in the cone itself. If the scoria lay outside such significant natural features there would be little resistance to its use.

The reference to structures in this context leads to the nonsensical decisions which support anti-competitive submissions on the grounds that a closed shop or service station represents a waste of a finite resource (the structure). In reality shops change their use (they are recycled) and indeed the shops themselves are renewable.

2.6.5 The Hostility to 'Exploring for More'

One would have thought that if councils are so concerned about the finite nature of resources in New Zealand they would encourage mineral exploration within their territory so as to ensure a plentiful supply of such resources in the immediate future. In practise, the reverse is the case. The New Zealand Minerals Industry Association complains that there is a lack of consultation between regional and district councils to ensure that development and growth does not pre-empt or prohibit exploration or the mining of valuable mineral resources. Many plans (The Thames-Coromandel District Plan for example) effectively prohibit prospecting, exploration and/or mining, based on the most slender Section 32 analysis. This industry group complains that other activities with no more environmental impact are catered for while mineral related business is treated much more harshly. For example, they ask why a farmer wishing to drill for water will be granted an immediate consent while the same drilling process for exploration purposes has to be notified and become subject to all the costs associated with the public submissions procedure.

These policies are applied differently from region to region. Geotechnical drilling is a controlled and publicly notified activity in the Waikato Region but is a permitted use in the same zones when administered by the Auckland Regional Council. One wonders how the Waikato District Council deals with geotechnical drilling required to establish ground foundation conditions for a major construction project. Do these drillings require public notification? If not, why not? And what happens if such a geotechnical drilling strikes gold? Does everyone sign a contract to look the other way?

2.6.6 Learning from the Australians

The Minerals Association recommends that the we learn from the Australians who have much experience in these matters[10]. In the meantime councils need to reconcile the fact that their planning documents make so many references to a world running out of resources, and then proceed to ensure that we do not find any more, at least in their own back-yards.

2.6.7 Recommendation

Clause 7(g) should be removed and replaced with a clause which makes reference to the vulnerability of species which is a legitimate concern of Resource Management. On the other hand running out of minerals and land, and protecting private structures from obsolescence is not.

3. SECTION 9

3.1. Introduction

From his brief it is clear that the Minister believes this section is contributing to excessive regulation and my instinct is to agree. The several problems with Section 9 are discussed below.

10 While it is tempting to explore their recommendation further, the topic then goes beyond my brief.

3.2 Are property rights held or reluctantly granted?

Section 9 sits uncomfortably within an Act which is intended to be **enabling**. That is, Section 5, which spells out the purpose of the Act, establishes that people have a right to provide for their social, economic, and cultural wellbeing and for their health and safety **provided they do not abuse the environment.** This sentiment is uniformly endorsed by any member of a reasonably wealthy post-industrial society such as our own.[11] Starving people are likely to put survival before any other concern.

And yet Section 9 begins

> *No person may use any land in a manner that contravenes any rule in a district plan or proposed district plan unless the activity is -*
>
> *(a) expressly allowed by a resource consent etc.*

To be fair, this is an advance on the position of the TCPA which held out no expectation of property rights of use at all. All uses were to be determined by the political process.

But those who remain instinctively wed to the philosophy of the TCPA probably find that this turn of phrase implies that the land owner has no rights other than those which the council graciously chooses to bestow. The use of the word 'consent' carries its own mimesis associated with such phrases as 'the royal consent', and 'by your gracious consent'. Most students of language would deduce that a 'consent' is harder to come by than a 'permit', and carries different connotations.

If Section 9 tells councils that owners have only the rights granted by council's rules then it may well encourage councils to believe that all rules are legitimate in spite of the protestations of Section 32.

The notion that planning permission is a privilege may have been reinforced by the High Court in *Electricity Corporation of New Zealand Ltd & Ors v Manawatu-Wanganui*

[11] Contrary to popular Romantic mythology, anthropologists can find no evidence that any pre-industrial society has had any concern for the environment as we now express and understand it. The speech by the Great Chief Seattle, quoted by Al Gore and others as being evidence of the sensitivity of such indigenous peoples, was written by a television script writer in Hollywood. Which is why the Chief's speech sounds so contemporary. It is.

Regional Council (Planning Tribunal 3 June 1992 AP302/90) The Electricity Corporation (ECNZ) argued that they had a legitimate expectation to a continued minimum flow based on existing water rights, which had status as existing property rights. Later, Judge Jeffries in rejecting this contention, (Jeffries J Frieswijk v Auckland City Council, Planning Tribunal Auckland 26 April 1995A40/95] held:

> *To my mind the first major hurdle the appellant must pass is that legitimate expectations have only limited scope in planning law – there is a strong implication in the judgment of the Court of Appeal in Auckland Acclimatisation Society Inc v Sutton Holdings Ltd that the grant of a water right is a privilege.*

While this decision is frequently quoted by those who insist than land use is a privilege, this decision relates to use of water which has always been owned by the crown. This should set no precedent for decisions which relate to the use of private property.

This concern with Section 9 may be a matter of tone and style rather than real content, and legal analysts may dismiss such matters as 'emotional' or whatever. However, the feminists have taught us that words are important and have forced many changes in use. Given the number of names given to those folk who were living in North America prior to European settlement, others obviously agree.

One solution would be to incorporate Section 32 into, or at least place it immediately ahead of, Section 9, which in turn should be reworded to begin along the lines of:

> *Any person may make any use of their land or carry out any activity provided that such use or activity does not contravene a rule in a district plan ... etc.*

Otherwise we are inevitably drawn to the situation where a Mayor can state that the District's residents had nothing to fear from their proposed District Plan provided they did not do anything new. Such an attitude is hardly conducive to an innovative and vibrant economy, society or culture.

3.3 The Chimerical 'Permitted Use'

Whether it is the result of Section 9 or not, many plans have now regulated use so much that land owners may have no guaranteed rights of use at all. For example, Waitakere City's Proposed District Plan recognizes that a dwelling in certain Natural Areas is a permitted use but negates this right by the fact that the owner cannot remove any significant vegetation without council's consent. In many parts of the city this regime makes it illegal to pitch a tent, park a car or even make a path onto a residential property without first obtaining the consent of a council officer. By a process of self-selection the officers are likely to be remarkably zealous and eager to exercise their considerable power.

There is some parallel with the debate between those who believe, on the one hand, that our income is our own and that we agree to hand some portion of it over to Government for the sake of civilisation, and those who believe, on the other hand, that the state owns all our income and that we are entitled only to what the state graciously consents to leave in our hands.

Whether this clause is to blame or not, one of the most frequent complaints passed on to me during the course of this work is that:

> *I don't own my land any more. Council staff have all the rights – but they expect me to keep meeting all the obligations. I have to pay the rates, control noxious weeds, kill pests and fence my swimming pool but ...*

The sentiment is frequently more pungently expressed.

3.4. 'Land Use', 'Activity' and 'Effects'

Section 9 also carries over wording which seems more appropriate to the old TCPA with its focus on land use planning. The RMA is supposed to have no view on the proper use of land provided the environmental effects are properly managed in the terms laid down by the Act.

Once again this may be a matter of semantics, but the persistent and repetitive reference to 'land use' in this section must encourage councils to believe that the legislation is concerned with determining and controlling 'use' rather than the **effects** which result or follow on from such use or activity.

Replacing the word 'use' with 'activity' may help to break these memory links and help recast council's mindset in favour of environmental protection rather than land use planning.

Similarly the opening paragraph could be further amended to read:

> *Any person may make any use of their land or carry out any activity provided that such use or activity, which has the potential to effect the natural and physical environment, does not contravene a rule in a district plan ... etc.*

3.5 The Need for 'Land Use' Consents

3.5.1. The Problem of High Up-Front Costs

This analysis of Section 9 brings us up against the fact that the RMA is unique in the world and that much of the economic activity in New Zealand is funded or even initiated by foreign investors. Such investors seek an early decision as to whether their proposal is generally 'approved in principle'.

Under the TCPA an applicant would deposit a sketch plan and once it had been checked for bulk and location requirements etc, it would be approved or disapproved. The applicant could challenge the decision but the information required was still little more than that of the sketch plan, supported by some reports on traffic and parking and a few other amenity issues. For many applications, such as commercial offices in a commercial area this remains essentially true.

But the investor in a tourist resort or timber processing plant now faces quite a different situation.

By definition the proposed tourist resort is likely to be sited in a feature of great beauty and within a coastal area or mountain chain or other wilderness. Similarly, the timber mill is likely to be in a remote rural area possibly surrounded by extensive vegetation or farmland deemed by some to be of significant 'natural character'. Many councils have opted to classify all such uses as 'non complying' or as 'uses not provided for' which has the same effect. The plan may well, however, reassure applicants that if the proposal complies with the environmental policies of the plan then all will be well.

Investment in any new or innovative venture, whether it is building a new resort, developing new software, or developing a new pharmaceutical, requires that the initial investments, which suffer the highest risk, must be small, while expenditure can increase as the outcome becomes more certain. Regulatory regimes must recognize this fact and most do.

However, the investors in the resort , or the timber processing plant, now find that before they can have any degree of certainty regarding the acceptability of their project they must:

(a) consult with the community (whoever they are);

(b) consult with the local iwi whose identification frequently baffles Maori and Pakeha alike.

(c) prepare comprehensive reports on:

Air discharges
Water discharges
Soil contamination
Effects of earthmoving
Visual effects
Landscaping effect
Contingency plans in case of failure
Treatment of wastes
And so on and so on.

These applicants then find that, having received these reports, councils then commission their own experts to peer review the applicants' own experts' reports. Being ordinary human beings, these experts naturally demonstrate their superior expertise by identifying endless shortcomings in the information supplied by the applicants and their experts.

A cycle begins which soon makes a day in the life of Proust seem like an eye-blink.

In the mean time, the applicant is paying for all the consultations, the council's own expert reviews, and the holding costs for the operation. This process is now routinely taking two to three years before the applicant is finally granted as much as a hearing before the council. The hearing is of course subject to appeal before the Environment Court. Many international investors regard this 'environmental tariff barrier' as far too high and opt out in favour of more receptive territory.

The Appendix which deals with Section 92 contains a few sample pages of questions asked of an applicant after three years' discussion of their proposal. They seem to represent both a war of attrition waged against the applicant and a debate between the councils' consultants designed to keep them in paid employment for as long as possible. The applicant has no say in this matter and many councils now require that applicants keep the account in credit so that there can be no delay in payments caused by disputes over the validity of the advice.

3.5.2 The Risk/Investment Equation is turned on its Head

The obvious response is that New Zealand does not want its environment despoiled by these overseas companies (or local developers) who do not respect our laws. But their refusal to participate has nothing to do with respect for our laws or indeed lack of respect for the environment.

It is simply that this process turns the risk/investment equation which disciplines any investment in novelty, innovation or any other risky enterprise entirely on its head. A small tourist resort of thirty rooms can face consent processing costs of up to five hundred thousand dollars before it gets to a council hearing. A major engineering plant can face costs of over one million dollars, while a typical supermarket application runs somewhere between the two.

Local and foreign investors alike do not mind spending these sums of money on environmental compliance once they know that their right to the proposed use is guaranteed. But these local and foreign investors are being required to spend hundreds of thousands of dollars, and to wait two or three years for a first hearing date, without anyone being prepared to say “Yes you can build your resort, or your factory, or your timber mill, provided you meet our environmental standards.” The problem is further compounded by the fact that if the applicant asks to read the environmental standards none are available and all that Council will say is that they will be established by the hearing process.

This is a critical matter. Professor Richard Higham’s ground-breaking work at the University of Auckland demonstrates that only innovation creates new jobs to replace those that gradually disappear as existing industries become more capital intensive and labour efficient.

We are putting massive road blocks in the way of innovation and should therefore not be surprised when unemployment continues to grow.

3.5.3 The Tension between Managing Effects and the Need for ‘Land-use’ Consent

There is a tension regarding the wording and requirements of Section 9. On the one hand the repeated reference to ‘land use’ tends to maintain the traditional TCPA mind-set of land use planning with its associated practises of direction and control. This contributes to excessive and inappropriate regulation.

And yet, the innovators, investors and developers, on whom we all depend to generate economic growth and employment, universally require an early and low cost 'land use consent' of the kind available in virtually every other jurisdiction in the world.
This problem is one of the most serious and most difficult to address within the context of the philosophy of resource or environmental management as opposed to land use planning.

3.5.4 Is Section 5 Sufficiently Clear?

While the content or intentions of Section 5 fall outside my brief I believe that the choice of words used to express its purpose is not. The word **enable** seems to have proved too 'weak' in that many councils assume that they are the ones who **enable** activity by a grudging consent, rather than working to enable the **applicants'** activities, while actively assisting them to properly manage their environmental effects. Section 5 reads:

> *Sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well being and for their health and safety*
> *while ...*

and then lists the environmental issues to be managed.

The words 'while' and 'enable' are sufficiently vague as to have attracted a host of interpretations, and no doubt will continue to do so. My brief requires that I take this no further.

3.5.6 Recommendation

(i) Section 92 of the Act should be more precisely interpreted and administered. This matter is discussed further later in this report.

(ii) The whole category of 'non-complying activities' and 'prohibited activities' should be removed from the hierarchy of consents. (See the discussion below)

(iii) The present council monopoly on resource consent administration should be broken by allowing public and private organisations to compete for the business.

(iv) Section 5 should be reworded to clarify its intentions.

4. SECTIONS 30 AND 31: REGIONAL AND DISTRICT COUNCILS

4.1 The Functions of Regional Councils.

A region is an area safely larger than the one whose problems you could not solve the last time.

Planning Lore

Section 30 sets out the functions of Regional Councils. The relative roles of Regional Councils and the other local authorities are discussed in Part 3 of this report. The discussion which follows is limited to a few specific issues relating to regulation of land use rather than environmental effects.

4.2 Section 31

4.2.1 Definition of Effects

This section sets out the functions of territorial authorities (which includes District and City Councils). Section 31 (a) requires councils to achieve

the integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district.

The definition of effect which is found in Section 3 does not place any restrictions on the meaning of effect itself. The focus of the Act would be improved if ‘effects’ were defined as ‘effects on the natural and physical environment’.

The definition also refers to past effects, which encourages some councils to use the Act to remedy the assumed sins of our forefathers. While it is right and proper to consider the present effects of identifiable activities from the immediate past when assessing the present and future effect of changes in activity, the notion that district plans should set out to remedy the effects of activities of previous generations can lead to excessive and punitive regulation unless proper compensation programmes are in place. This matter is discussed in more detail in section 6 below.

4.2.2 Positive and Negative Effects

The definition of effects refers to both positive and negative effects. Yet it is a rare District Plan or officer's report which addresses the positive effects of an activity or of an application, especially in relation to subdivision. (Subdivision is dealt with in more detail in part 2 of this report.)

Most District Plans assume that the effects of subdivision are always negative and fail to recognize that subdivision creates private property with a certificate of title on which people can build their houses, raise their families and live out their lives as they prefer.

On the other hand, serious restrictions on subdivision prevent an increase in supply of new housing sites to respond to increased demand. This in turn leads to a rise in prices which either prices people out of their preferred market or forces them to buy less with what resources they have. This rationing of building lots grants a monopoly 'rent' to those who are fortunate enough to already own property. Hence, analysts of housing markets around the world universally agree that rationing of housing land serves the interests of the comfortable and established while being detrimental to the interests of the poor and newcomers. Newcomers are usually people seeking a start in life as first home buyers. In Part two of this report I argue that the hostility to subdivision has already priced new home buyers out of the market in Auckland and elsewhere and that this has little to do with the size of Auckland, or its growth, or of Chinese immigration.[12]

The adage that an 'environmentalist' is someone who built their beach house last year, while a 'greedy developer' is someone who wants to build one now, seems a reasonable perception, given the behaviour of many councils and their statements regarding environmental effects.

4.2.3 Avoid the Trade-off Mentality

The difficulty is that if councils are required to have regard to the positive effects of human activity they are likely to then adopt the stance of the TCPA which was to weigh up the positives against the negatives as they relate to the land use itself. The Act intends that there be no such trade-offs. I do not know how to resolve this problem and look to those more skilled in the writing of legislation for assistance. I remain convinced that the rational

[12] When the plans of centralists go awry they tend to blame an ethnic minority. In Western Europe the targets were Jews; in this part of the world they tend to be Chinese.

focus on negative environmental effects tends to encourage the view that all human activity is a negative effect and indeed that if human beings disappeared all environmental problems would disappear too[13]. This is not true. Humans have modified the landscape so much that the hands-off approach is no longer viable, as was found in Yellowstone Park when an explosion of Elk followed such a 'leave it to nature' policy, with catastrophic results on the vegetation.

4.2.4 Recommendation

(i) That effects be defined as environmental effects.

(ii) That the legislation be re-worded to require councils to recognize that human activity is legitimate, that we are now nature's managers, and that the promoting the absence of human activity is no longer a legitimate approach to environmental management.

5. SECTION 76 – THE ACTIVITY HIERARCHY

5.1 From Permitted to Prohibited Activities

Section 76 empowers councils to promulgate rules in order to carry out their functions under the Act.

In particular, Subsection 76(3) allows for rules which provide for permitted activities, controlled activities, discretionary activities, non-complying activities,and prohibited activities. This means that some uses, subject to a few clear and unambiguous controls are permitted uses, – at one extreme – while others are completely prohibited and may not be applied for under any conditions – at the other.

The procedures and decisions which manage the effects of controlled, discretionary and non-complying activities are subject to the objectives, policies and rules of the Plan.

Most plans contain the encouraging statement that the RMA assumes that all but prohibited uses and activities will win a resource consent unless they have a significant negative impact on the environment. However, Section 76 (4) says that:

[13] I have heard more than one senior planning officer voice this view with total confidence.

> *a rule may require a resource consent to be obtained for any activity not specifically referred to in the plan.*

This innocent subsection has generated a whole range of problems because so many plans contains a rule which reads:

> *Any use not provided for will be treated as a non-complying activity.*

This declaration is quite different from Section 76 (4) which says only that such a rule **may** be written and certainly does not require that such uses **must** be treated as non-complying. This rule is a powerful impediment to innovation because anything novel to the district or genuinely innovative is directed into the most difficult and costly consent procedure, regardless of its potential effect on the environment.

5.2 The 'million dollar tariff' on innovation[14]

Such a rule imposes a heavy tax on novelty and innovation. A project may be for 'a use not provided for' and yet have no more environmental impact that existing uses, or uses which are permitted, discretionary, or controlled. Why should novelty or innovation be so actively discouraged? The applicant with a novel use or activity is confronted with major hurdles. Richard Higham's work demonstrates that we discourage innovation at our economic and social peril because we close off future growth in employment. Higham's work demonstrates that firm size is not the key indicator – the key is whether the firm, whether small, medium or large, is innovative. Many councils claim to be concerned for future generations. Unfortunately employment seems to be well down on the list of priorities.

If we are to be confident of employment growth in the future we must ensure that councils do not needlessly inhibit innovation. Innovation is also the key to sustainable management. If we had not invented fibre optics and satellites the supply of copper would be genuinely under pressure and copper prices would consequently be much higher than they are today. The petroleum industry was developed in response to the near extinction of the spermaceti whales, while the first motor cars were designed to reduce the dreadful pollution caused by horse drawn traffic in major cities. Later developments in the use of oil and natural gas made power generation and heating much cleaner. London's tree moths turned back from black to their original white.

[14] At last count Olivine New Zealand had spent $1.3 million dollars preparing for its Council hearings.

Many councils use this rule governing ‘uses not provided for’ to catch all but the most inoffensive uses in whole districts. For example essentially everything other than a single family dwelling is a non-complying activity in large areas of Titirangi and the West Coast of Auckland. This means that any application for tourist accommodation from a thirty room eco-resort (as was proposed by Aman resorts for Piha) to a four hundred room hotel is faced with the same height of compliance hurdle.

5.3 The same ‘tariff’ falls on projects large and small

The thirty room eco-resort was proposed for a site of 200 acres which has residential development on three of its boundaries. The eco-resort would have represented a lower intensity of use than the surrounding residential areas and would have complied with every policy in the District Plan, and indeed would have enhanced the management of the natural and physical environment, if only by preventing the fires which race through the area at regular intervals.

Yet a four hundred room hotel on the same site would face the same compliance hurdles because the Plan treats both as a non-complying activity. Now, it may be that the Aman resort is unsuited to Piha for reasons which are not immediately apparent. But the point of this discussion is that the costs of the non-complying consent procedure fall much more heavily on a thirty room establishment than on one of four hundred or more rooms. Indeed it is difficult to imagine how such a tiny resort could carry early application costs of say $15,000 a room. And if the 30 room resort on 100 hectares has to bear these massive costs why not the five bedroom house on the 800 sq metre on the boundary? Is this really ‘effects-based’ management of natural and physical resources? Or is the Council simply trying to use zoning to confiscate 100 hectares of prime land for a public park without the ratepayers being burdened with the costs of compensation?

The legislation should be modified to allow that a ‘use not provided for’ can to be dealt with as easily and fairly as possible. An applicant should be able to apply to Council and, if necessary, to the Environment Court, for an assessment of the use and to have it declared a permitted, controlled, or discretionary use by reference to the policies in the Plan. (Proposed or Operative.)

The legislation should make it clear, too, that no activity, can be rejected on grounds which have nothing to do with environmental effects. Once an application is declared non-complying many people seem to believe that they can object on any grounds ranging from 'it's only for the rich', to 'it's foreign investment' or that 'it will increase values and hence rates'.

5.4 Is there any need for Non-Complying Activities?

The bold, and probably the most sensible decision would be to dispense with 'non-complying activities' altogether so that any use becomes a discretionary use at most rigorous. Even 'prohibited uses' could be eliminated from the hierarchy – in most cases they appear to reflect no more than a council's particular phobias, from ferret farming to nuclear power plants.

The existence of non-complying activities in the consent hierarchy reinforces the practice of TCPA zoning which the Act was intended to replace with the RMA's focus on environmental effects. The idea that all but a few uses are 'non-complying' strongly implies a zone **from which all but a few land-uses are excluded,** whereas the Act is intended to enable all land uses unless their environmental effects cannot be satisfactorily managed.

On the other hand the category of 'permitted use' is essential and legitimate, if only because it establishes a base line of use and makes valuation possible. The permitted use is somewhat akin to the speed limit. The limit is set to make compliance easy and certain. However the permitted use must be exactly that.

There is no point, and much hazard to the land owner, in claiming that, say, a residential dwelling is a permitted use (subject to a simple set of bulk and location requirements and so on) only to find that a line by line reading of the plan (which may take two or three days of careful scrutiny and analysis) reveals that the permitted use is actually subject to rules governing site clearance, vegetation clearance, restraints on removal or pruning of indigenous vegetation, or that any development can interfere with the *mauri* (the life force) of the land.

Under such conditions (and they are widespread in District Plans) there are no genuinely 'permitted uses'. Therefore they present a trap for the unwary who are accustomed to the Predominant Uses in old plans and who understandably cannot believe that they cannot park their car off the road without running the risk of a fine for unlawfully clearing vegetation on their own land.

5.5 Recommendation

(i) That non-complying and prohibited activities be removed from the activity hierarchy.

(ii) That the legislation be rewritten to ensure that plans do not put in place processes which **inherently** discriminate against innovation or novelty.

(iii) That the legislation be modified to ensure that a permitted use, once defined within a Plan, is genuinely permitted without further risks of fines from rules which are distributed throughout long and complicated documents which demand professional skills for their interpretation.

6. SECTION 85: COMPENSATION - OR A FREE RIDE

6.1. Compensation not Payable

Unlike the TCPA which expressly provided for compensation for district scheme restrictions in certain circumstances, the RMA expressly denies compensation in Section 85 which carries the heading **Compensation not payable in respect of controls on land.** The *Acts Interpretation Act* demands that those who interpret legislation must take no notice of such headings. However, many of those who administer the Act are probably unaware of such niceties and take the heading as a directive which means what it says.

Such an interpretation means that regulation comes 'free' to the regulatory authority.[15] Section 85(1) makes the general position plain when it reads:

> *An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.*

Subsection (2) then appears to impose some discipline, at least during the preparation of plans, reading:

> *Notwithstanding subsection (1) any person having an interest in land to which any provision or proposed provision of a plan or*

[15] General administration, processing of applications and monitoring the plan incur significant costs, and councils accept that they must employ staff to meet these responsibilities. The staff show no hesitancy in receiving their weekly pay packets. Furthermore, councils are required to charge the users, who are generally assumed to be the applicants. Hence regulation becomes a means of generating and guaranteeing employment within any regulatory authority.

> *proposed plan applies, and who considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds.*

Subsection (6) which defines reasonable use as one which has no significant environmental effects seems to add further reasonableness to the whole Section.

However, the issue of compensation has become highly vexatious and the Act needs to clarify council's right to regulate and to seize development rights without cost and to more clearly establish the reasonable rights, expectations and obligations of property owners and developers.

6.2 Impact of Rules which Constrain Existing Uses or Expectations

6.2.1 Unexpected Outcomes

The problem becomes apparent when land owners find that rules have unexpectedly restricted their existing use rights, even when the owners have made no application for any kind of change in use or activity.

For example, the appellants in *Frieswijk v Auckland City Council*, referred certain provisions of the proposed Auckland City district plan, which prohibited vegetation clearance and earthworks on Great Barrier Island, to the Environment Court. The appellants argued for a more co-operative approach such as financial and resource incentives, rentals for privately owned land managed as part of the conservation estate, bonus subdivision, rate relief, assistance with fencing or planting costs, free planning and management advice and

outright financial assistance. The appellants considered that normal farm management may well lead to conflict between what is perceived as community interest and the interest of an individual landowner. They submitted that any such conflict must be resolved by negotiation and that a regulatory approach is not appropriate and is *ultra vires,* relying on section 10 (existing use rights).

The court held, relying on s.85(3) that relief is limited to **deletion of an offending provision or rule** and that, as the provision of incentives and resources is a matter for the discretion of local bodies, the court could not order these to be provided. The court rejected the requests for relief, noting that local authorities are able to provide incentives to occupiers of land by way of rates relief under Parts XIIA and XIIB of the Rating Powers Act 1988 for development and for natural or historic or cultural conservation purposes respectively. The court held that the question was a question for the local community and its elected council, and outside the Tribunal's purview.

This approach presumes that all citizens are actively involved in the planning process and further that councils have taken notice of what the ordinary citizens (as opposed to active pressure groups) seek from their councils through their plans. In real life this is seldom the case. Frequently, it is only when people run foul of the plan that they become aware that such a plan even exists.

6.2.2 Does the Community Speak? Is it heard?

Many decisions of councils and the court tend to assume that the contents of councils plans represent the voice of the community and by implication that individual applicants who want to 'break the rules' are running against a groundswell of public opinion.

This view is also dangerously close to a present day endorsement of the notion of "the general will' of the French Revolution. I have asked several lawyers and resource managers how the court would react to a plan which contained an obvious falsehood such as that the earth is flat or that section prices are not affected by the law of supply and demand. Most shift uncomfortably and express general uncertainty about the outcome.

The notion that every objective, policy and rule in a district or regional plan or policy has the sanction of the general will is dangerous and should be subject to challenge. The legislation should make this clear. Otherwise critically important projects could be stopped in their tracks by uninformed contents of the plans.

One of the most striking characteristic of officers' reports written in support of proposed plans and written in response to submissions by residents during the hearings is that so many appear to be singularly free of, and uninformed by, scholarship of any kind. Most simply proclaim planning lore as part of an irrefutable creed. Reports claim that 'the motor car is unsustainable' or that 'we are running out of fossil fuels' or that 'subdivision closes off future options for productive land use' or that 'the current city form is unsustainable' with absolute confidence and without reference to any supporting evidence. This would be bad enough if the claims were true. It is even more distressing when they are demonstrably false at worst or untestable at best.
Anyone reading these reports must conclude that the officers are not presenting the outcome of rigorous research and analysis but are simply reiterating the strongly held beliefs of some secular religion.

The second most striking aspect of officer's reports on pre-hearings submissions is how they consistently reject submissions from the community even when the submissions number in the hundreds or even thousands.

I have not had time to carry out a systematic analysis but I have perused a fair sample of reports on submissions received and have formed the general hypothesis that the number of submissions has no relationship to the outcome of the recommendation included in the pre-hearing reports written by the officers of councils. Therefore it becomes difficult to assume that the objectives, policies and rules within the District Plan represent 'the voice of the community'. It might be held that the community is finally represented by the councillors and that the submissions will carry more weight after the hearings. But interviews with councillors consistently reveal that they feel overwhelmed by the complexity of the issues, the novelty of the legislation and the self confidence and qualifications of the planning staff.

6.2.3 Some Affirmations

For example a report to the Waitakere City Council Hearings Committee dealing with submissions on Vegetation Clearance, in response to several hundred submissions protesting against the new rules contained many extraordinary claims and statements, of which the following are a representative sample:

> *Council does not believe that tea tree and other second growth species are of less value than species such as kauri.*

Does Council really believe this? If so the councillors must come from another planet where the theory of value is markedly different from our own. The ratepayers of Waitakere can only hope that the city does not go into the timber merchant business. When a Maori leader dies no mourner says "A mighty tea tree has fallen". Kauri is more valuable than manuka on the grounds of relative scarcity/availability alone.Such statements give little comfort to those who believe that Section 32 analysis is central to the successful administration of the RMA.

More importantly, has the Council really sat down and decided that this is so? Has there been some formal resolution which records:

> ***RESOLVED:*** *That tea tree and other second growth species are as valuable as kauri*

It seems highly improbable although words to this effect may have been buried in some lengthy report to an council committee operating under delegated powers. The report goes on:

> *It is not reasonable for people who live in bush situations to expect to be able to clear vegetation to provide themselves with outdoor living space.*

Is this the voice of the community of people who live in the Waitakeres, or is it the personal view of this officer alone? Who gave this officer, or indeed who gave the Council, the right to consider what are the 'reasonable rights' of people who have chosen to live in the bush? In other parts of the report the officer rules on what is a 'reasonable size' of house. Surely what is reasonable is for the owner to decide unless their reasonable actions have a major negative impact on the natural and physical environment. Can only small families live in the bush? And then:

> *The trimming and pruning of vegetation for whatever purpose, including maintaining sunlight and air around a house, is a permitted activity. In the general Natural Area, the Ecological Linkage Restoration Natural Area resource consents could be obtained for cutting native and exotic vegetation for this purpose. In other parts of the Green Network resource consent will generally not be given to cut native vegetation for this purpose, but there is some provision for the cutting of exotic vegetation.*

So Waitakere residents who live in the bush or in vegetated areas can trim and prune vegetation to let in light and air but not cut it. But what of those cases where cutting is necessary – and it frequently is. British common and case law has established the right to light and air over the last hundred years or more. This officer denies the right to light and air on one's own property. What would Plunket say?

In response to the complaint that these rules force people to accept dead, dying and dried out trees to remain dangerously close to their houses, and given that the West Coast beach areas are regularly prey to scrub fires, the officer wrote:

> *Council's rural fire officers inform Council that no house has been lost to forest fire in this City and the threat is not considered sufficiently great to allow vegetation clearance for this purpose.*

The bureaucratic passive voice strikes again. One wonders precisely **who** does not consider the threat sufficiently great? Is it the planning officer or the fire officers? Their opinion carries a different weight. Maybe no houses have been lost because up until now people have been able to clear dead and dying vegetation from around their dwellings. Who will accept liability for the first disaster?

An article in the *New Zealand Herald* early this year reported on a fire officers' report that increasing tragedies from fires were partly the result of people living in close proximity to inflammable vegetation.

The hundreds of submissions from the Titirangi Residents and Ratepayers Association and many others were rejected almost in their entirety by the officer writing the pre-hearing report. The community has spoken but so far does not seem to have been heard. Of course the hearings may have their impact and the councillors may indeed listen and exert their authority. The Minister has frequently expressed the view that councillors must 'own' their plans. I can only hope that the debate which this report is intended to stimulate will encourage more of them to do so.

6.2.4 Recommendation

Before bringing down any judgment based on the notion that an objective, policy or rule represents the voice or opinion of 'the community', (with the implication that compensation is not payable) councils and the courts should be required to look at both the submissions received on that issue and the officers' reports. They might be surprised at just whose voice has been expressed. 'The community' seems normally to come a distant last.

6.3 The Costs of Internalizing the External Costs of Pollution

The general thrust of the Act is to recognize that the market will allocate resources more efficiently than a political process can, but that the market can have in-built failure if those operating within the market do not bear the full cost of their activities. The whole purpose of the RMA is to 'internalise these negative externalities' to use the economists' jargon. The intention is clear and simple – the RMA is intended to prevent people from dumping their rubbish or pollution in their neighbours' yard or in the public domain. If these externalities are sensibly controlled then the market is improved and efficiency and equity is enhanced.

As far as I know, no one has seriously objected to the principle that economic benefits should not accrue to the developer or land owner at the expense of the neighbours or the public. This underlying premise of the Act has always enjoyed widespread acceptance. However, many rules which have been imposed within plans appear to fail the 'market improvement' test.

6.4 Restraints based on 'Amenity Values'

The first group are those which impose aesthetic or amenity standards which are not subject to any form of rational analysis. Instead they reflect the biases or values of the regulator rather than making any contribution to the management of natural and physical resources, and the management of environmental effects on air water and soil. Many plans dictate what colour people can paint their houses, or what materials they can use to clad their buildings, simply because someone has decided that certain colours or materials offend their personal taste. Plans have proposed rules which require:

* that satellite dishes should be concealed from view from a public road and
* that farm machinery is not repaired in public view, and
* that joinery details must be in keeping with those which prevail in the neighbourhood, and
* that hay most not be mown when it can be seen from a major road.

Property owners can legitimately query whether such rules, which appear to have little to do with the sustainable management of natural and physical resources, are legitimate. The problem is made worse by the fact that such rules can be vexatious and infuriating but do not cause sufficient economic 'damage' to justify the costs of legal redress. People simply have to grit their teeth, and bear it.

6.5 Private Takings to Benefit the Public Good

The more important abuse occurs when regulations are imposed to benefit the general public but which impose all the costs on private land owners.

The most common example has been the use of the RMA to seize large tracts of private land so as to incorporate them into the conservation estate. Not only do many plans offer no compensation for these takings, but frequently the rules require that the land owner accept the burden of maintaining and protecting this new 'conservation estate' by fencing out stock and providing buffer zones which can add up to many hectares of land. These impositions are not the result of an application to carry out new work or development but are imposed on land owners who have not themselves contributed in any way to the loss of native species or clearance of the native forest.

These rules have nothing to do with internalising externalities but are simply seizing land for the public benefit at no cost to the public but at significant cost to the owner.

Subsection (6) with its reference to plans which render land incapable of reasonable use appears to address this problem but in practise almost always fails to do so. The land owner may object to the provision of the plan on the grounds of unreasonable taking, but the council can respond to such an objection by reducing the 'taking' by some small percentage. The applicant must then object again, and the council can change its position again. The fact that land has been devalued and its earning capacity reduced frequently makes it difficult for the owner to incur the costs associated with an appeal.

Some plans contain a clause to the effect that landowners whose use has been unreasonably restricted may present 'comprehensive development proposals' for consideration by the council. Unfortunately such clauses are widely regarded as a device to avoid compensation, especially when the development proposal, which by definition will be novel, is almost always treated as a non-complying activity.

The end result is that the owner is likely to be locked into an endless cycle of 'comprehensive development proposals' which are rejected by the council.

If the public genuinely wants to prevent any significant development of a piece of land, in whole or in part, so as to bring the land into the public domain, then the owner should be able to demand an 'injury assessment' and then, if some alternative cannot be negotiated, the owner should be able to demand immediate compensation from the court without further reference to the RMA process. This would impose a cost on those who write such regulations and would lead to more careful regulation.

In her wide ranging paper on takings and compensation, K Ryan[16] makes the point well, when she says:

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16 Ryan, Kathleen. "Incorporation of a Takings Regime into the RMA?" to be published in (1998) 1, *New Zealand Journal of Environmental Law*. I am deeply grateful to Ms Ryan of McCabe Environmental Consultants, Hamilton for making this paper available prior to publication. I have

> *Compensatory takings legislation may actually improve the quality of regulation, not 'gut it', by regulating the regulators or by creating incentives for government to design rules more carefully and maximise the environmental benefits of regulatory investments. A former General Counsel of the US Environmental Protection Agency, Donald Elliott, argues that greater sensitivity to property rights actually achieves better regulation without sacrificing environmental goals.*

Public choice theorists argue that any activity which imposes no costs on the person undertaking the activity will tend to be over-consumed, because that person will be able to enjoy the benefits while passing on the costs. This argument applies equally well to both the discharge of wastes onto public property, and to the seizure of other people's property for the public good. The general aim of the RMA is to prevent such unpaid 'over-consumption' by developers by requiring them to meet the costs of their pollution or other forms of environmental damage where the market fails to do so.

Public choice theory applies the same argument to the regulators. If government regulators can appropriate the political credit for their regulatory actions but are able to externalise most of the costs as uncompensated losses to property owners, **they will have incentives to over-consume regulation** in the same way that polluters have an incentive to over-consume air, soil or water.

6.6 Building Owners and Land Owners Treated Differently

It is surely an anomaly that compensation is payable to building owners where rights in a building are severely constrained but an owner of land cannot receive compensation for similarly restrictive controls on that land, particularly where these restrictions relate to controls for amenity purposes.

For example, in *Shell Oil New Zealand Ltd v Wellington City Council,* Shell Oil appealed against a decision of the respondent council refusing consent to the demolition of an historic building and to the construction of a large Shell Service Station.

Judge Treadwell held that

drawn on her work for many of the cases and arguments presented here. All those with an interest in the topic should read this comprehensive work.

> *It is not for this Tribunal to force a land owner to expend money upon a*
>
> *building it does not want or to continue to pay rates and outgoings on a building which in its view is unusable. The whole structure of the Historic Places Act 1980 and the structure of the new heritage provision of the Resource Management Act both indicate that owners who are placed in this position have redress by way of compensation and/or land acquisition. It is unacceptable for councils and/or other public bodies to seek to achieve preservation without compensation where mechanism exists, namely s.198 of the RM Act whereby the owner can be relieved of the building for the public good.*

The heritage section of the Act sets up one set of conditions for compensation while section 85 sets out a different set. Either both should be brought into line or Heritage compensation issues should be withdrawn from the RMA so that the Act be properly focused.

6.7 Proposed Amendments

Ryan makes a case for amending both Section 32 and Section 85 of the Act. She argues that one of the problems which must be addressed by any amendment is that many councils cannot be bothered fully determining what other reasonable alternatives to relatively draconian land restrictions are available. They tend to claim that all restrictions are necessary to ensure ‘ecological sustainability’ or certainty or efficiency. Therefore, Ryan argues that Section 32 should be amended to make provision for a takings assessment, as follows.

> *(1A) Where an interest in land may be deemed to have been taken or injuriously affected pursuant to section 85, the owner of that interest in land may require a takings assessment specific to that piece of land from the person exercising any function described in subsection (2) which shall specify with all due particularity:-*
>
> > *(i) the adverse effect that the control seeks to avoid, remedy or mitigate; and*

(ii) alternative land controls not amounting to a taking or injurious affect.

The difficulty lies in framing an amendment which permits non-compensatable prohibitions for activities that can be defined as a nuisance under the common law and for protection of endangered species (where there is no reasonable alternative to prohibitions or penalties) but which allows compensation for re-zoning and prohibitions for amenity values that pose no risk to the ecology or public health.

Ryan suggests this can be achieved by repealing section 85(1) and replacing it with:

Compensation payable in respect of controls on land -

(1A) An interest in land shall be deemed to be taken or injuriously affected under a provision in a plan where-

(a) The owner suffers an unreasonable burden in the circumstances and the provision does not relate to avoidance of common law nuisance; or

(b) Where a control on land is for the purpose of the preservation of ecological sustainability, that could be reasonably addressed by such other incentives, co-operative land management options, conservation easement, or other policies as may be considered appropriate in the circumstances and the provision precludes or significantly reduces reasonable uses for that type of land by the existing landowner.

(1B) Where an interest in land is deemed to be taken or injuriously affected under a provision in a plan under subsection (1), the relevant person exercising functions under section 32(2) shall endeavour to devise with the affected owner(s) an alternative land management plan for that particular parcel not involving a taking or injurious affection of the land.

(1C) For the purpose of mediating or facilitating resolution of any matter under subsection (1B), the parties shall conduct a meeting in accordance with section 99.

This group of amendments, or something similar, would force councils to consider the alternatives to seizure by regulation and force councils to abandon their present proclivity to seize land for the public good at no cost to the public but at heavy cost to the private land owners.

6.8 The Poor Stand to Gain

An immediate riposte to these arguments in favour of compensation is that "the greedy rich developers will benefit at the expense of the general public". However, Peter Davis and Chris Cocklin[17] argue that the costs of present 'takings' for environmental gains fall most heavily on those least able to pay. The affluent middle class who belong to Forest and Bird Societies and the like win the benefits while the poor, mainly Maori, landowners pay the costs. Davis and Cocklin say in their abstract:

> *Those with the highest proportion of the land providing habitats; marginal landowners and Maori, are least financially able to carry these additional responsibilities. Reducing habitat loss by placing additional responsibility on habitat owners penalises the very landowners who are providing the desired public good.*

Later in the paper they point out where the benefits arise and the costs fall. The Far North has the third lowest per capita income for the whole country and yet the greatest demands for takings falls on the private property owners of the Far North.

Their paper also points out that the councils in Northland collect around one million dollars of rates from the 200,000 hectares of significant habitats on private land. DoC has identified key sites of international and national significance covering 70,000 hectares which they consider are in greatest need of protection. If DoC acquired that land the rates currently collected from that land would be foregone because the DoC currently pays no rates. This alone would necessitate the redistribution of some $300,000 across the ratepayers of this low income region. Therefore there is good reason to ask whether the costs of protecting these habitats should rest with local government and finally the local ratepayers, or whether the national interest should be paid for from the national purse.

Davis and Cocklin conclude:

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[17] Davis, Peter, and Cocklin, Chris; *Who Pays? Habitat protection on private land*, a paper presented to "The Nature Conservation in Production Environments Conference", 1997, Taupo, NZ.

> *The current approach to reducing the loss of habitats on private land is based on the premise that those with habitats on their properties have obligations to provide public environmental benefits, obligations which owners of cleared land avoid. By penalising those who, intentionally or otherwise, provide conservation benefits, the current approach creates injustices, provokes unnecessary conflict and undermines the potential of achieving the desired goal. The fact that income levels and habitat levels tend to show opposite trends exacerbates these inequities and undermines the potential to achieve the goal of no net habitat loss.*

A combination of a takings regime which recognized real damage and a policy whereby the national benefit was paid for out of the nation's purse would encourage a more efficient and a more equitable approach to the management of the environment.

The present approach is both inefficient and inequitable. Nothing much worse can be said of any public policy.

7 AMENITY VALUES

7.1 The Requirement

Section 7(c) requires councils to have particular regard to:

> *the maintenance and enhancement of amenity values.*

The definition of amenity values in Part I reads:

> *Amenity values means 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:*

This definition of amenity values, and in particular the reference to 'aesthetic coherence' within the Act has probably done more to dilute and diffuse the environmental focus of the legislation that any other single word or phrase. It represents a major extension of the amenities which have been traditionally protected under the common law. In in the headstrong environment which prevails today councils have used this definition to promulgate rules which:

(i) lock farmland into past modes of production,

(ii) keep bach neighbourhoods as bach neighbourhoods even when land values have multiplied by ten-fold and building codes no longer allow baches to be built anyway.

(iii) allow councils to operate censorship regimes controlling colour and other matters of personal taste and preference

(iv) allow councils to decline subdivisions and other developments on the grounds of their visual impact

This is one of those areas where a 'regulatory boundary' should be established by inserting a clause to the effect that "nothing in this legislation shall be interpreted as giving Councils the power to control matters relating to the aesthetics or design of built structures."

The TCPA was underpinned by an assumption that a profession known as town planners could not only wisely direct and control the use of land but could also regulate to maintain or protect the amenities of the neighbourhood.
While the belief that the political process can efficiently direct and control the best use of land has fallen into disrepute, especially since the fall of the Berlin Wall, there remains a solid case for rules which protect the amenities of property owners, although not necessarily of 'neighbourhoods' as a whole.

Common law has established that property owners have a right to be protected from truly noxious activities and should also enjoy a 'right to light'. These genuine and well established common law rights must continue to be enjoyed and enforced. They need not, and should not, be diluted by the proposed removal of controls based on highly subjective judgments relating to 'the amenities of the neighbourhood'.

Section 5 refers to the sustainable management of natural and physical resources but does not concede that there is a need to address the impact of activities on the human environment. And yet patently people can suffer from excess noise, vibration, fumes, smells and overshadowing.

Presumably this is why the reference to amenity values was inserted in Section 7. However, the combination of Subsection 7(c) with the wide-ranging definition of amenity values seems to have brought the bathwater back in with the baby.

It would be more useful, and the Act would be less prone to abuse, if these references to amenity values were removed and a whole section of legislation developed which directly and specifically addresses the potential for adverse effects of activities on the **human** environment. (See the discussion under section 12 which concludes this part of this report.

7.2 The Case for some Simple Rules

Land is unusual as a form of property in that one owner's use of the land can damage the value or 'amenities' of the adjoining owner. Hence over the last few hundred years, simple rules have been developed in almost all urban economies to protect the neighbours' rights to light and air and to give some protection against fire, general nuisance, public health risk, noise, and so on.

These developed into the codes of ordinances common in the Planning Documents produced under the TCPA in New Zealand. In the United States these kinds of rules have frequently been imposed by the subdivider/property developer and administered by the neighbourhood committees, much as the amenities within a large apartment building are initially established by the developer and then administered by a Building Owners Association or similar. This has much merit and could well be promoted in New Zealand.

The codes which establish 'permitted use' rights presently work to protect common law amenities in that they establish, bulk and location requirements and the like. These should be sufficient to achieve the legitimate concerns of adjoining owners. If not then the plans could be modified at the margin as the case is proven in practise.

Finally, policy makers must recognize that councils and communities are faced with hard choices about the human environment. As the Minister said in the *Environet* of 16 March:

> *Those who advocate a total free market approach to land use usually change their minds with the prospect of a sex offenders' unit moving in next door.*

The sex offenders' unit does no more damage to the natural and physical environment that any other similar form of accommodation; equally, it is no more likely to cause noise, vibration or noxious fumes. But the neighbours have some valid apprehensions which need to be addressed. These are the classic NIMBY cases (Not In My Back Yard).

There needs to be a process which allows the community to express its concerns and to be given suitable reassurances. Whether RMA type legislation is the most appropriate vehicle is open to question. But the issue must be addressed.

7.3 The Role of Neighbourhood Associations

The Victorian Subdivision Act specifically refers to Owners Associations as being legitimate agents for the control of local amenities[18]. Councils and their staff continue to resist such developments in New Zealand. The use of neighbourhood associations to control the amenities of local communities should be encouraged. An example of American practise is included in Appendix 2.

7.4 Recommendation

The reference to amenity values should be withdrawn from Section 7 along with the definition in Part I. A whole new section of 'legislation' designed to specifically address environmental effects on people and their communities should be developed to target the traditional nuisances and to guarantee the traditional rights to enjoy one's property. This may generate some 'amenity' costs. But it is highly unlikely that these costs would be anywhere near as great as those currently generated by the present legislation which has opened the door to intervention on many grounds which do not relate to the impact of activities on the natural and physical environment. Furthermore, the case study which follows demonstrates that some councils are granting highly personal views on amenity value much greater weight than the sustainable management of natural and physical resources.

7.5. Case Study – Triumph of Amenity over Section 5

The case of the Application by Arrigato Investments Ltd to subdivide land on land near Pakiri Beach in Rodney District Council is a remarkable demonstration of a decision to allow concern for amenity values to override the key purpose of the Act as established in Section 5.

The applicant sought to subdivide 6 existing titles to create 15 new sites suitable for dwellings on a site of some 150 ha (approx. 375 acres). The new sites would range in size from 2.6 ha to 22.8 ha. (6.5 to 57 acres) The land is currently in pasture grazed by sheep

[18] For example a neighbourhood association at Russell in the Bay of Islands could well manage its local heritage issues and be much more flexible and responsible than a distant council.

and cattle. The application included proposals for extensive planting of native vegetation over a major part of the area especially on the slopes overlooking Pakiri Beach. All the lots would include some properly planned and managed native planting. A bond of 873,000 dollars has been offered to ensure the planting programme is completed as specified. The applicant sought consent for the extra five lots created (as opposed to the 10 lots permitted by the rules in the plan).

The Auckland Regional Council was the sole objector to the proposal. The NZ Historic Places Trust supported the application because the archeological site on the property would be preserved. Council declined the application on grounds which are summarised in paragraph 47 of the report by the Rodney Council reporting officer (Marlene Oliver) which reads:

> *The proposed revegetation will not mitigate the significant adverse effect of the row of building to be located on the top of the ridge line and the suburban nature of the density of buildings and entranceways.*

Fifteen dwellings on 150 ha (375 acres) or an average lot size of ten hectares, (twenty five acres) hardly seems suburban, given that the average lot in a suburban development is typically around 800 sq metres

But the intriguing aspect of this report is the low rating given to the proposal for extensive planting of native vegetation on what is currently low grade pasture. The report went on to acknowledge that the potential beneficial effects of the major planting programme included:

> *Landscape and visual amenity*
> *Soil conservation*
> *Improved land stability*
> *Improved water quality*
> *Enhanced wildlife and natural habitat*
> *Sustainability.*

And conceded that:

> *If the proposed revegetation were successfully implemented then it would have a beneficial effect on the stability of the land and also regulate the rate of run off and improve water quality:*

And

> *If the proposed revegetation were successful it could have a beneficial effect by increasing the area and linkages or corridors for wildlife and natural habitat.*

At this point one would reasonably expect the proposal would bolt home, given the purpose of the Act as set out in Section 5, which includes ‘safeguarding the life-supporting capacity of air, water, soil and ecosystems’.

The officer then advanced her own definition of ‘relevant’ sustainability (Not ‘sustainable management’) so as to suit her recommendation, within the following curious discussion:

> *In terms of the purpose of the Act it is relevant to evaluate the revegetation process for its achievability and sustainability. A relevant sense of the verb ‘to sustain’ being to endure without failing or giving way: In this case it is reasonable to consider sustainability as including ecologically, financially (sic) and long-term commitment.*

The officer then assessed the nature of the site, the plant material, the need for follow up, maintenance and monitoring, and concluded:

> *All of these factors will influence survival rate and growth rate, with the aim being to match the planting and management regime to the characteristics of a specific site. Even if all factors are favourable, it could still be a minimum of five years before intensive maintenance (similar to gardening) can be replaced by a more ‘hands off’ management of a revegetation project.*

In other words, because it takes five years for revegetation to do its ‘amenity’ job, there is no point in doing it. And yet planners and their advocates are always claiming that the private sector and the market place fails to take the long term view. Yet when it does, it evidently does not count. The report concludes with a recommendation to decline the application on the following grounds:

> *Despite the potential positive effects on the environment resulting from the proposed revegetation of native bush, if it is successfully*

implemented and maintained, there will be significant adverse effects on the environment. These include;

* *The significant detraction from the landscape and visual qualities resulting from the location of buildings along the top of the ridgeline and along the road frontage; and*

* *the urban-like effect of the scale, intensity and form of development, combined with the high visibility of the development; and*

* *the loss of public confidence in consistent administration of the planning strategies for the coastal environment and countryside living; and*

* *the unsuitability of some of the proposed lots because of unstable building sites.*

This recommendation takes one's breath away. The officer recognizes that the proposal will address the requirements of Section 5 and that the developer is prepared to lodge a bond of over $800,000 to guarantee that the programme is completed as specified. She then argues that because the owners may not continue to manage the planting properly, (presumably being willing to write off their bond) and that five years is too long to wait for the benefits, the proposed development should be declined.

The reasons given for declining the application are purely aesthetic and heavily biased against any form of human activity. It seems that buildings must not be built on ridges or road frontages. This does not leave much room left to move. Also we should be thankful that these sorts of rules did not apply in Pericles' Athens. Otherwise the Athenian District Council would have taken one look at the plans for the Parthenon on the Acropolis and said "Sorry, it's a reflective building on a sensitive ridge. Application declined."

Such rules would also have prohibited every cathedral in Europe, not to mention the Auckland War Memorial Museum. Also, to claim that the proposed development is 'urban-like' because of its scale, intensity and form, is simply contrary to any common sense judgment of the facts.

But it seems the developer cannot win. District Plans routinely oppose scattered, sporadic development in coastal areas requiring that buildings be grouped to minimise their impact. This developer takes a huge area of land and then groups the buildings to leave the majority of the area free for revegetation and is accused of promoting an urban like development.

The question has to be asked "would anything satisfy this council?" Sadly, the answer is probably no.

Doris Lessing in one of her novels, and in her autobiographical essays, records the time when she realised that her communist friends (the *economic utopians)* loved humanity but hated people. Many reports by contemporary planners (by those who are *environmental utopians)* give the impression that this new religion has moved up a notch – its adherents hate humanity as well as people. There seems to be no recognition that human activity can have any worth. You can build a house in the country only provided that you hide it in a valley, paint it green and surround it with trees.

Councils also seem to take the view that no human activity is worth the slightest degradation of the environment. Venice was built on a wetland. Was this a wrong decision? Or did Venice's benefit to humanity exceed the environmental cost of the lost wetland?

After reading the submissions from the Rodney District Council staff and the Auckland Regional Council (the ARC were the only objectors) one can only conclude that the real agenda was to keep the land in question absolutely free of human settlement and that no semantic gymnastics were too tortuous in order to achieve this object. Indeed some of the arguments would force Kafka to concede that he had met his match. For example, Ms Oliver, in her report, points out that:

> *Under [the rules] there are provisions to subdivide rural-residential sites in association with the legal protection of significant stands of native bush or significant natural features.*

But

> *As stated in the application this land is 'devoid of significant vegetation' being in grass with a few individual mature trees, mostly exotic species. Hence none of the proposed lots comply with the essential elements of these rules.*

I would have thought that the rules were designed to protect vegetation from the effect of subdivision, not to argue that if there is no vegetation then there is no right to subdivide. The great Clarence Darrow would have enjoyed the role of advocate in such hearings. He once said "I don't like spinach and I'm glad I don't, because if I liked it I'd eat it, and I just hate it."

One might conclude that this perverse decision is the result of a single aberration in the system. However, the ARC consistently opposes similar applications (See Part 2 of this report dealing with subdivision) and presented remarkably similar arguments which overturned the requirements of section 5 in favour of the officer's perception of amenity values. For example, Hugh Jarvis, senior planning coordinator for the ARC, concluded his submission with:

> *While the proposed revegetation of the subject land is likely to have positive on-site effects, the cumulative adverse effects of countryside living in the locality and the wider Rodney District are considered to be significant.*[19]

Loise Gobby, as Senior Planner, Coastal Resources, for the ARC, also opposed the application on the grounds of the following aesthetic argument:

> *I believe that within the context of the coastal environment of Pakiri Beach the coastal slopes and cliffs to the south of Pakiri Beach are a critical component, forming as they do, the southern 'bookend' to the physical and visual unit of Pakiri Beach. It is on this coastal ridgeline that Arrigato Investments Ltd proposes to erect eight new dwellings.*

Ms Gobby then argues that residential dwellings are aesthetically unacceptable as follows:

> *While there are undoubtedly long-term ecological, soil conservation and stability benefits associated with a revegetation programme, if it is successful, I believe these potential benefits have to be weighed up against the introduction of a row of eight highly visible dwellings on this significant coastal ridgeline.*

[19] By whom? Should the legislation ban the use of the passive voice in report writing? It could represent a great leap forward in the integrity of the arguments.

As Judge Jackson acknowledged in the Marlborough Ridge decision, tourists flood to Tuscany, where rows of dwelling on ridgelines are a major element of the rural landscape. Ms Gobby's argument then draws on a strange perception of 'natural' character:

> *Although not having a pristine level of naturalness, the absence of significant numbers of buildings ensures that the area still has a significant level of natural character. ... Therefore the concentration of additional dwellings on the southern side of the M. Greenwood Road, particularly in areas where they are visible from the roads, will change the natural character and the landscape and general amenity*
>
> *values of the coastal environment in this part of Pakiri and will form an inappropriate density of development.*

How does second rate farmland have 'natural' character? Farming is a business, and pastoral farming promotes monocultural land use dependent on chemical fertilizers and clover. The applicant wants to replace this bland pasture with a major native revegetation programme around a few dwellings. Ecologists such as Burdianski[20] point out that all landscapes are now man made and that no 'state of nature' exists. Therefore we have to manage the land as gardeners, making the most sensible decisions we can.

Some people fall into the trap of believing that our existing stands of native bush are in a state of nature, whereas, in reality, since the extinction of the great moa, their character has changed dramatically – the bush is now full of undergrowth which these avian 'giraffes' would have almost totally cleared, up to few metres in height.

But even those who fall into the 'natural bush' error would not describe pastoral farming as being in some 'state of nature' – but the officers of the ARC evidently do so, at least in this case. They are prone to shift their ground.

Penelope Doorman's evidence as a Natural Resource Planner with the ARC, in opposing a small subdivision in Kumeu, with similar proposals for a major revegetation programme, provides further evidence that the ARC staff must all attend a special course in Kafkian thought.

20 Burdianski, *Nature's Managers,* Dr Timothy Flannery, *The Future Eaters,* et al.

She argues that while the ARC supports enhancement of vegetation programmes that in this case, **because there is no existing vegetation on the property there is nothing for the revegetation programme to enhance**! She concedes that there could be some ecological benefits, but that these:

> *... have to be assessed against the adverse effects of subdivision, including loss of natural or rural character, loss of productive land and pressure on infrastructure etc ... .*

How many Environment Court decisions do we need before these so called expert witnesses cease lamenting the loss of productive land?

So there we have it. Developers seek certainty and planning reports consistently comment on the need to preserve the integrity of the plan. The developers who presented the Arrigato project had every reason to believe that they would be successful because of their compliance with the objectives of Section 5. But the council rejected the proposal because:

* pastoral land is more 'natural' than large scale native revegetation and that

* houses on a ridge (even when screened by mature vegetation) are an intolerable eyesore, and that

* five years is too long to wait for plants to have an impact on the visual amenity and ecological sustainability.

This case is an excellent example of a concern for a particular, and curious view on amenity values, being used to undermine the clear intentions of the Act as expressed in Section 5.

8. SOCIAL AND ECONOMIC PLANNING

8.1 The General Intention

The Act was intended to replace controls based on the notion that local councils should indulge in social and economic planning, with controls which focused exclusively on environmental effects. In practise, District Plans continue to promote social and economic planning and many politicians and bureaucrats continue to insist that this is their right and proper duty.

8.2 The Definition of Environment

Councils are encouraged to intervene in economic and social planning by the definition of 'environment' in Part I of the Act which reads:

> Environment includes _
>
> (a) ecosystems and their constituent parts, including people and communities; and
> (b) all natural and physical resources; and
> (c) amenity value: and
> (d) the social, economic, aesthetic and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters;

Which is just about everything.

This may well be an elegant dictionary definition of the environment, but it causes problems in the interpretation and administration of the Act. Earlier discussions have made the point that a universal problem with environmental law is that the environment is so all-encompassing that it is difficult to limit the scope of environmental law, both in content and scope.

The key words in interpreting the Act are probably 'significant' and 'minor' if only because they resist consistent definition. Most would agree that it is not worth covering a major wetland to extend a car-park, because the effect on the wetland is not minor and impacts on a significant habitat. But, as has been asked earlier, would we reject a plan to build Venice because Venice extinguishes a wetland? Would we build the Parthenon on the Acropolis? Closer to home, what would be the fate of a proposal to build Tamaki Drive today?

Any present proposal for development poses some threat to the environment, and this damage is seen to be effecting something which is there and can be readily understood and appreciated. On the other hand, any benefit has yet to be experienced. The public and media attitude to *Te Papa* moved from rage and fury, in response to the drawings, to public and media adulation when confronted with the real thing. How can we expect councils, and the public, to make such leaps of faith? Such leaps are especially scarce at a time when the general population seems more attracted to pessimism than optimism. Indeed, Wildavsky and others have characterised the present debate regarding economic growth and environmental protection as a war between the 'cornucopians' and the 'catastrophists'.[21]

In *The State of Humanity*[22] the late Julian Simon made two predictions for the coming century. One was that "humanity's condition will improve in just about every material way" whether it is life expectancy, the price of a natural resource, or the number of telephones in China. His other prediction was that "humans will continue to sit around complaining about everything getting worse."

8.3 Economic and Social Planning and the Act

8.3.1 Section 5 (2)(c).

Section 5 defines the purpose of the Act as being 'the sustainable management of natural and physical resources'. Subsection (2) c then empowers councils to control the activities of people and communities by requiring them to avoid, remedy, or mitigate any adverse effects of activities on the **environment.** The Act's definition of the environment is not limited to natural and physical resources and so councils legitimately claim the right to have regard to the 'the social, economic, aesthetic and cultural conditions which affect the matters stated in paragraphs (a) to (c) of the definition or which are affected by those matters'. This is sufficiently resistent to clear interpretation as to allow councils to indulge in economic and social planning when preparing their plans.

8.3.2 Dealing with Applications

While the Act may have been intended to place social and economic planning outside the preparation of plans and policy statements Subsection 2(a) of the Fourth Schedule requires applicants, and those considering an application, to consider economic and social effects when it says:

> *Any person preparing an assessment of the effect on the environment should consider the following matters:*

21 Douglas, Mary and Wildavsky, Aaron, *Risk and Culture – an essay on the selection of technological and environmental dangers,* UC California Press, 1982. See also *Searching for Safety* and *But is it True?* by Wildavsky et al.

22 Julian Simon died February 8th, 1998 aged 65. *The State of Humanity* was published in 1996. The predictions were recorded in the obituary in *The Economist* of February 21, 1998.

> *(a) Any effect on those in the neighbourhood and, where relevant, the wider community including any socio-economic and cultural effects:*

Finally, Subsection 1(b) of the Fourth Schedule says that when assessing the effects on the environment (again presumably as broadly defined in Part I) councils should include the following as part of the assessment:

> *where it is likely that an activity will result in any significant adverse effect on the environment, a description of any possible alternative locations or methods for undertaking the activity.*

This clause was probably designed to cover applications which might have truly significant effects, such as power stations, hydro dams, nuclear power plants and similar major projects. But given that North Shore Council, for example, (see below) has decided that covering a culvert drain (redefined as a stream) is a significant environmental effect, this clause can be used, and is being used, to turn down applications on the grounds that the activity should go somewhere else or that the applicant should have considered other locations. Councils can then use this requirement for applicants to consider other locations or other methods to endlessly extend the pre-hearing time by demanding further information under section 92. It is quite common for the time between first approach and the hearing date to extend to two or three years.

For example, the ARC submission by Penelope Doorman to Rodney County recommending that an application by R Dye for a revegetated housing development at Kumeu be declined, included the following:

> *The PARPS provides for enhancement through Policy 6.4.10 which states that 'significant ecosystems that have been damaged or depleted should be protected and restored to the stage where their continued viability is no longer under threat'. The ARC therefore supports initiatives for ecological restoration. However the Dye application has only considered (sic) one method for achieving restoration; subdivision for countryside living.*

This begs several questions. First, how does Ms Doorman know that the applicant has considered only one method of achieving restoration? Second, what other method is likely to win approval from ARC and Rodney County given that this residential application was declined? It would seem that unless the owner is prepared to bequest the whole property as a public park any proposal would be unlikely to win approval.

This comes back to the question raised by Mr Pavletich of Christchurch. He makes the point that it is owners who are responsible for managing their land and Section 5 is intended to enable owners to promote their economic, social and cultural welfare provided they properly manage their effects on the environment. Once councils have the power to recommend alternative sites or methods, as the Fourth Schedule seems to imply, then councils clearly have the power to direct, control and specify land use. Which puts the TCPA back in the driving seat.

One of the most powerful planning tools available to direct and control land use is the power of veto. Many councils are using the power of veto so that only development which suits their implicit or explicit plans can win approval, regardless of how well the applicant addresses the purpose of the Act.

8.3.3 The Outcome

Councils can legitimately argue that the definition of environment gives them power to veto proposals which have adverse effects on the social, economic, aesthetic and cultural conditions which affect the ecosystems and their constituent parts, including people and communities; and all natural and physical resources; and amenity values. Which finally allows councils to veto just about anything – and my personal experience in hearings is that they do.

8.3.4 Case Study: A Supermarket in North Shore

The North Shore City Council declined an application to build a supermarket in Wairau Road industrial area, giving as its reasons that:

> *The Council is not satisfied that the adverse effects on the environment will be minor. The adverse effects of this proposal concern traffic and transportation impact, effects on the economic viability of existing retail centres, and effects on the Wairau Stream.*

Notice that the management of traffic circulation is treated as an environmental effect, which is the present convention. While traffic can have a serious effect on the local human environment, giving rise to noise, vibration and fumes, it is not clear that the effect of a proposal on traffic service on existing roading networks falls within the same category. We would not expect a proposal for a new school to be turned down on the grounds that the demand for pies would overload the tuck shop on the corner. The proposed road reforms should remove traffic circulation and service matters out of the consideration of 'environmental effects' leaving the RMA to focus on genuine impacts on the human environment.

At the other extreme, major road works such as new motorways and the like have a genuine effect on the natural and physical environment and fall within the ambit of Section 5. But councils seem prone to decline too many applications for development on the grounds that some nearby intersections will become overloaded and even grid-locked. Traffic in such neighbourhoods is a largely self regulating system. If people find they cannot enter or leave a parking lot because of congestion they will take their business somewhere else.

Also, the impact on traffic circulation is a favourite device of competitors who wish to keep out competition. In this case the four existing supermarket owners who opposed the application had all developed a fine sensitivity for the discomfort of people waiting at traffic lights and intersections. One wishes they were as sensitive to the time we customers spend waiting at their check-outs.

The problem with the Wairau Stream (which I am sure most people would describe as a drain) was expressed as a significant impact on the environment thus:

> *The capping of the Wairau Stream for its entire length across the site shall restrict entry of surface runoff, limit the capacity of the waterway and restrict maintenance. This is likely to result in an adverse effect on the stormwater function of the Wairau Stream.*

Fortunately the early settlers in Auckland did not have to apply for a resource consent from the North Shore City Council. Otherwise they could never have closed in the stream running down the middle of Queen Street for most of its length. How does Auckland City cope with this significant environmental impact. Should Auckland relocate?
Are these people serious?

Any decent drainage engineer, and I suspect the Council's own drainage inspectors, could solve these trivial problems in few minutes.

Then council ruled that it had to protect existing shopping centres;

> *Given the great importance of the viability of retail centres to the social and economic wellbeing of communities, in the face of conflicting evidence, the Council must act conservatively. The Council does not consider that it would be responsible resource management practice to relying (sic) on some as yet unknown activity taking over vacant space left by a closed foodmarket to continue or return viability to a shopping centre.*

The Council has decided that Resource Management demands that private structures must remain in constant and continuing use. Have they not noticed that movie theatres became furniture stores, that churches become restaurants, that factories become fitness centres and council chambers become offices? Have they not noticed that many stores provide services which did not exist twenty years ago? Should councils ban video libraries because movie theatres might close?

Or could the whole decision have much to do with the fact that Council has a major investment in both the Northcote shopping centre and the new major centre at Albany?

Councillors always deny that they have any conflict of interest or that they allow such conflicts to impact on their RMA consent procedures but when asked whether they would put their money into a major proposal in Auckland which would compete head on with the Britomart project – most smile ruefully and concede the point. Also, most councillors I have spoken to tell me that conflicts of interest are a problem which only other councils have.

Again, if applicants are not to believe that council decisions are frequently motivated by conflicts of interest either councils must get out of property investment and business activity or the processing of consents must be opened up to competition, from other councils and from private consent processors. Commissioners are not the answer. Councils too frequently appoint commissioners without reference to the applicant, and insist on their right to do so. It might be a help if the process was made subject to the Arbitration Act.

8.3.5 Recognizing the Economic/Environmental trade-off.

If we treat the North Shore City's concern with retail hierarchies and traffic congestion as irrelevant to genuine environmental issues[23] it would appear that the environmental effect of the proposed supermarket on a roadside drain was considered to be more important than the fact that the development would employ about 250 people during and after construction, would lower the price of groceries in the area, and promote general economic and employment growth.

Whether one agrees with this decision or not, it makes the point that whether an environmental effect is 'significant' or not must be decided within the context of the countervailing benefits. As I argued earlier most of us would not sacrifice a major wetland in order to extend a carpark, but would probably consider that Venice would be a fair trade-off.

Hence we **cannot** exclude economic, employment and social and cultural effects from the decision making process.

Section 32 requires councils to have regard for such matters when drawing up their plans although this requirement is frequently ignored as we have seen, and shall see again.

But when deciding on whether the effects of a specific application are significant, or major or minor, the overall context of the proposal is critically important. Such decisions can not be made in a vacuum and it would be foolish to pretend otherwise.

A careful reading of the Act suggests that the legislation was intended to make this distinction. However, this interpretation requires a careful, and unbiased reading of the Act. All too often the legislation is read and interpreted by people who are determined to impose their own view of what the Act should say, or to read it selectively so as to further their own view of how the world should look and operate.

Therefore there is no room for subtlety in this particular piece of legislation. The Act needs to be re-written to spell out that, when deciding on whether an environmental impact is

[23] This may be an arguable presumption, but I have made it in order to make a point about environmental law rather than to win an argument regarding this particular application.

major or minor or significant, councils must take account of the total context of the proposal. However, this section of the legislation must then contain another 'boundary clause' to the effect that:

> *Nothing in this legislation shall be interpreted to mean that council can use this section to force applicants into following or meeting the needs of council's own plans for economic or social development.*

The reality of the North Shore decision on the *Pac'N Save* supermarket was that council wanted to protect is own 'retail hierarchy' which is a central plank of council's own economic plan for the development of retailing in North Shore City. The legislation should have made it clear that while it was right and proper for the Council to consider the economic, employment and similar effects of the proposal when deciding whether the covering of the drain was a minor or major environmental effect, the Council's own economic theories of retail economics should not have been a consideration in granting or withholding consent.

8.3.6. Recommendation

The definition of Environment in Part I could be allowed to stand provided that wherever the term 'environment' it appears in the text (such as in 5(2) c the modifiers 'natural and physical' be inserted before the generic term. The alternative is to restrict the definition in Part I to refer only to natural and physical resources.

(ii) The Fourth Schedule should be modified to restrain councils from exercising land use planning by veto.

(iii) Councils should be permitted to consider economic and social effects when determining whether an environmental effect is significant or not but should not be used to force applicants to fit into councils' own economic and social theories.

(iv) Much of the present nonsense would be eliminated by permitting competitive consent processing by either public or private organisations. At present councils are clearly abusing their monopoly power, or are open to such accusations even when innocent.

9 THE STRANGE AND FASCINATING CASE OF AQUAMARINE AND DEEP COVE

9.1. Background

On the 15th of December, 1997, the Environment Court, under Judge Skelton, brought down its decision on the Appeal by Aquamarine Limited against the decision of the Southland Regional Council to refuse planning consent for the exporting of water from Deep Cove. Aquamarine Ltd had applied for four coastal permits as follows:

(i) to lay, fix and use a water pipeline from the Lake Manapouri tailrace at Deep Cove in Doubtful Sound to a support vessel;
(ii) to install and use mooring for vessels in Deep Cove;

(iii) to occupy part of the coastal marine area in deep cove with vessels; and

(iv) to take water from the tailrace outfall plume.

All four consents were refused by Southland Regional Council and the appeal to the Environment Court followed. The Appeal by Aquamarine was disallowed in the court's decision of 15th December 1997.[24]

I am not attempting to second guess this decision of the Environment Court. But I find this case is an excellent illustration of the need to make trade-offs between economic and social benefits, and environmental damage. The arguments which support the decision, raise, and illustrate, some fundamental issues which surround the RMA and its philosophical position regarding the relative merits of human activity and effects on the environment.

9.2 The Analysis of Risk

This case, and the decision which flowed from it, is an excellent case study in the analysis and appraisal of risk. What appears to be a simple issue of allowing or not allowing a ship to load up abundant fresh water and transport the water to overseas markets becomes a rich backdrop for the assessment of a host of possible risks. The definition of effect in Section 3 of the Act includes 'any potential effects of low probability which has a high potential impact.' Cases which need to consider such matters are rare in the day to day administration of the Act. In this case the Environment Court had to assess the effects of a

[24] Appeal RMA 822/95, decision C126/97, 15th December, 1997.

range of events of low probability, but which might prove to have a high potential impact on the natural and physical environment.

Different witnesses presented different assessments of the probability of the risks and equally different assessments of the potential impacts of those events. The case was a minor clash between catastrophists and cornucopians,[25] although one has to say, that on the basis of the evidence recorded in the decision, most, if not all of the witnesses went out of their way to be fair and reasonable.

The court must have found the whole exercise fascinating. This is well captured in Judge

Skelton's lucid decision which reads like a finely crafted detective story[26], and one which is hard to put down even though it runs to over 150 pages.

This decision should be required reading in any education programme on the RMA, if only for the rare good sense it speaks on the so called 'precautionary principle' which people are always trying to force onto the agenda at consent hearings. For example:

> *In this case we are not faced with scientific uncertainties or ignorance about the nature or scope of environmental harm. There are, of course, differences of opinion about whether there will be environ-mental harm but we did not understand any of the witnesses with relevant expertise, whether as scientists, landscape architects, noise experts or resource management assessors to be in doubt about the potential for environmental harm if certain events were to occur.*[27]

And earlier

> *We have to say that we have some difficulty understanding the place of the precautionary principle or the precautionary*

25 Research by Stephen Bath of Cosgrove University finds that 'cornucopians' are typically engineers, consultants, directors, managers, marketing and sales people, or industrial scientists. 'Catastrophists' are typically research scientists, academics, doctors, teachers, clergy, social workers, writers, actors and artists.

26 Hence the title of this section.

27 *Op cit* p 147.

> *approach in proceedings under the Resource Management Act, if as appeared from Mr Cameron's submission,*[28] *it is to be understood as supporting a no risk regime. We do not think this is compatible with the definition of sustainable management in section 5(2) of the Act.*

This review is a timely reminder that the RMA was not intended to give massive power to government to regulate the citizen and to suppress all innovation. Judge Skelton appears to be alert to the underlying threat to liberty posed by excessive enthusiasm for the so called 'precautionary principle'. The late Aaron Wildavsky made an equally valid observation:

> *[The precautionary principle holds that] if all is not known – that is if a product or practice is not proved safe – then it must be banned or restricted. The immensity of the change requires re-emphasis: private action requires proof of the absence of harm; governmental action requires no proof of harm. The relative role of the citizen and the state has been reversed. In the past it was the citizen who was entitled to act and the state that had to justify its intervention. Now it is the state that intervenes by right and the citizen who has to give reasons for acting.*

Later in this report I will argue that many councils are using Section 92 to require that applicants must prove that their activities will be absolutely safe and free of every kind of risk (including financial risk), because otherwise consent will be denied. **This approach is bringing many innovative technology-based projects to a halt in New Zealand**. If persisted with, New Zealanders are doomed to be technological followers rather than leaders, and timid, hesitant and uncompetitive followers at that. We need to remind councils that risk is the other side of safety. Someone has to the first to trial the most potent vaccine. And Higham's work warns us that future generations will not thank us for waking up to find there are no jobs, because we have stifled all innovation.
Finally the judgment concluded that the risks to the environment were too great to justify compared to the evident benefits to the people and community. An important aspect of the risk calculation was that the ships would be taking on their cargo at 'great frequency', i.e. once a week, or 52 times a year. Most readers will probably find that the decision is not unreasonable, and indeed I am not taking a stand on the final **decision** either way.

[28] Mr A F D Cameron appeared for the Director-General of Conservation and Southland Conservation Board.

9.3 The Contrasting Approach to Risk

In spite of the rigour of the analysis, after I had put the decision aside for a few hours some disturbing thoughts came to mind. The Deep Cove project was not allowed to proceed because there was a faint probability of shipwreck within the Sounds which might release oil from the fuel tanks with consequent damage to the eco-systems. Combined with some other possible catastrophes the proposed activity was ruled to present an unacceptable level of risk.

But the Wahine ran aground within Wellington harbour during the Wahine storm while a Soviet cruise ship went to the bottom of Cook Straight because of human error. Human lives were lost (and presumably some oil was spilt) and many hundreds of lives were put at risk by these accidents which have **actually taken place** and hence do not depend on any speculative assessment of risk in the future. Of course Deep Cove is a totally different environment to Wellington Harbour and Cook Straight. I emphasise again that I am not arguing that the court’s decision was right or wrong. Rather I seek to use this decision as a case study which throws into high relief some of those philosophical issues which those outside the milieu of the planning and environmental management find puzzling or disturbing.

The point is that so far, no one has suggested that because of these known disasters of the recent past, we should cancel all inter-island ferry trips or that cruise ships should no longer be allowed to pass through Cook Straight. Similarly we know that planes crash and kill people, as do cars, trains and buses, frequently with some damage to the surrounding environment.

Presumably, if one of the Aquamarine water tanks ran aground in Deep Cove, and spilled oil into the ecosystem, the lives of the crew and the rescue teams would be at risk, if only because such events are likely to happen when weather conditions are at their worst. Their lives did not enter the risk equation which determined the judgment.

How can this be? We must remember that every major construction project has inevitable fatalities and accidents. When we decide to build a multi storey building, a bridge, a tunnel, or a hydro dam we know that some people will die in the process. But we do not deny building consents because of these risks to human life – and nor should we. We accept a level of risk and do our best to minimise accidents by training, regulation, inspection and good practice. Why do RMA hearings place no value on the risk to human life or alternatively why do we accept risk to human life while demanding a much lower level of risk to the environment?

The Aquamarine decision encapsulates a disquiet frequently expressed in more mundane disputes between councils and farmers in particular. Farmers around the country find themselves on the receiving end of fines of hundreds of thousands of dollars for carrying out work which they did not know offended a rule in their new Proposed District Plan. One farmer has been heavily fined for work on a river bank even though everyone agreed that the work was well carried out and caused no environmental damage. In Northland a farmer faces a heavy fine for grading his farm road – he had moved more than 30 cubic metres of earth. When people tell me these tales their concluding comments frequently say something like:

> *How come I have been fined a hundred thousand dollars or more while some hoon can run over a school kid and get no more than community service and a slap on the wrist?*

The comparisons may be exaggerated (the complainants are often convinced that Her Majesty's prisons are luxury hotels) but they reflect a genuine and widespread unease about our relative concerns for harm to people and damage to the environment.

Would we refuse to grant consent to set up an international airport on the grounds that planes might crash and that in doing so they would upset the ecology of say, the Manukau Harbour? If we applied the precautionary principle, and demanded perfect safety, we would certainly not allow any planes to fly, especially when they fly in and out of airports much more frequently than 52 times a year and carry hundreds of people on each and every flight.

I have no answer to the implied question – but I have encountered widespread unease among those who have spoken to me during the preparation of this report. The parliamentarians, councils and courts will soon have to come to terms with the perceived mismatch between the relative worth of human life and the value placed on the eco-systems around us.

9.4 Exporting Doesn't Count

I have called this section of the report 'the strange case' of Aquamarine because, if it sets a precedent which, if widely followed by councils and the courts, will stand our economic policies on their head and we must surely face economic collapse – unless I am completely missing something in the court's decision. Indeed, I hope I am.

The second paragraph of the conclusion to the judgment leads into a comparison of the potential economic benefits of the project with the possible negative effects on the environment as follows:

> *The coastal permit to take water does not by itself present any major problems. As we said earlier, there is an abundance of water; there is no opposition to the taking as such; and there is no evidence that there will be any adverse effects if the water is taken at the rate proposed by the appellant. ...*
>
> *However, as we also said earlier t**here is no evidence of benefit to New Zealand if the taking is permitted.***[29] *In this context we are reminded that it was Mr D J Anderson's opinion that the whole of the appellant's proposal, including of course the taking, would enable communities, by which he obviously meant communities beyond the shores of New Zealand, to make provision for their economic wellbeing and possibly their health, and therefore the proposal accords with the purpose of the Act.*
>
> *Whether the Resource Management Act is intended to foster the social, economic and cultural wellbeing, and the health and safety of people and communities beyond New Zealand is not a matter on which we received any assistance from counsel and accordingly we are reluctant to determine this question in these proceedings. We rather doubt that this was Parliament's intention, bearing in mind that it is a domestic statute and did not arise, at least explicitly, out of New Zealand's obligations under any international conventions.*
>
> *In any event ... there is insufficient evidence to enable us to determine what benefits there would be for foreign communities*

Earlier in the decision the court had concluded

29 My emphasis

> *At this point we record that we do not have sufficient evidence to make a finding that this proposed export of freshwater is of national significant in the sense that the nation is likely to benefit from it ... .it's value to the nation as an export commodity remains unknown.*[30]

The applicant was unwilling to divulge his pricing structure and financial projections to the court because of commercial sensitivity and probably because it is difficult to establish markets before one has consent to start up a business. Furthermore we have seen that a company like Olivine, which has published its financial projections in a prospectus, has had to deal with organisations like Greenpeace and other councils questioning and challenging the company's financial projections and using possible financial failure as a basis for their objections.

But Section 92 does not require disclosure of financial projections and it is reasonable to assume that the investors are determined to seek a good return on the capital they intend to invest. In any case numbers such as $90,000,000 a year in export business had been floated in the public domain and we must presume that, before someone spends a few hundred thousand dollars putting together such a proposal and taking it to the environment court, they expect to make some healthy profits.

The country has a serious balance of trade problem at the moment and I am sure that Treasury and the Reserve bank would both regard a $90,000,000 a year export business as making a contribution to the national economy.

But it is the argument presented in the first quoted paragraphs which could set a remarkable precedent. It seems to me (again, unless I am missing something) that the court is ruling that because exports satisfy only the needs of overseas communities exports do not count in the benefit/risk equation. This is a throw-back to the mercantilist position of the 17th century which required that economic activity should serve the state rather than the consumer. Jean Baptiste Colbert, Minister of Finance to the Court of Louis XIV, would have recognized this immediately as part of his economic policy which bewailed the loss of 'valuables' to overseas markets. The main function of the works of Adam Smith, who pointed out that wealth was created by the people's efforts not by accumulating

[30] *Op cit*p 27

bullion,[31] and of Ricardo, who firmly established the principle of 'gains from trade', was to set these mercantilist notions to rights. However, they remain widely held even today and so it is not too surprising to find them resurfacing within a court which has been seldom exposed to economic thought.

If we are to presume that benefits to overseas consumers do not count as a benefit to New Zealand then any major export oriented project has slim chances of surviving the RMA consent process because all major projects must have some negative effects on the environment. If the exports from say a Dairy Factory cannot be counted in assessing the trade-off between economic and social gain against the inevitable negative effects on the environment then how can they ever gain a consent? We seem to be heading down a route where only those project which do **not** export and serve only the **local** market stand any chance of proceeding to completion. New Zealand is a trading nation – or it has been, up until now.

Once again some principles of economics seem to be absent from the debate. Those overseas communities who would have drunk the water from Deep Cove would have paid for it with their overseas funds. The money would return to New Zealand and New Zealanders would use the money to buy food, drink, health, education and even to pay for resource consents. God knows they need it.

Should we need to write into the legislation something to the effect that exports do count? I would not have thought it necessary, but it seems I may have been wrong.

10 PROBLEMS WITH OTHER DEFINITIONS AND TERMS

10.1 District, Regional, Coastal and other Plans.

10.1.1 Do Plans require Planning?

The Act makes no reference to planning as a verb, but makes a host of reference to Plans. When anyone mounts the case that the Act makes no mention of planning, as such, the immediate forthcoming defence is that the Act does require councils to prepare plans, and that surely the preparation of plans involves and demands the practise of planning.

Parliament has seen fit to change the name of the Planning Tribunal to the Environment Court, presumably to demonstrate that the Court had no 'planning' function. It would be equally valid and useful to remove all reference to Plans from the Act and to replace

31 *An Enquiry into the Nature and Causes of the Wealth of Nations,* First published in 1776 the same year as the American Revolution.

District Plans with District Environment Manuals (DEMs) or similar. As long as Councils are required to prepare Plans they will continue to be tempted to Plan.

10.1.2 Coastal Plans – Do we need them?

M J Garland of of Robson Garland Ltd, Resource Management Planning Consultants, makes the point that:

> The 'coastal environment' causes much difficulty and I suspect it could be said that all of New Zealand is coastal in a sense. This is providing an excuse for the courts to make decisions hinging totally on 6(a) when in my view to do so is contrary to Section 5. The words 'in achieving the purpose of this Act' presumably meant that Subsection 6(a) is subject to Section 5. This subservience should be made more clear.

My own observation is that coastal plans are being used to introduce TCPA type planning into coastal areas and given Mr Garland's observation that most, if not all of New Zealand is coastal to some extent, the end result is that much land is subject to the direction and control of land use in a manner antithetical to the intentions of the RMA.

If the RMA is properly interpreted and its intentions applied according to the actual situation rather than in some arbitrary manner it should not be necessary to generate coastal plans as such. Certainly, many of the case studies in which amenity values override Section 5 are drawn from coastal areas, which are subject to Coastal Plans.

10.2 Intrinsic Values

10.2.1 The Requirement

Subsection 7(d) requires councils to have particular regard to the intrinsic values of ecosystems and these are defined in Part I of the Act, as follows:

> *Intrinsic values in relation to ecosystems, means those aspects of ecosystems and their constituent parts which have value in their own right, including –*
>
> > *(a) their biological and genetic diversity;and*
> >
> > *(b) the essential characteristics that determine an ecosystem's integrity, form, functioning and resilience.*

(*The Shorter Oxford English Dictionary* defines intrinsic (in this context) as “inward, secret, private, belonging to a thing in itself or by its very nature; inherent, essential, natural”).

By referring to constituent parts of ecosystems which have value ‘in their own right’ the definition in Part I of the Act presents the notion that intrinsic values have an **existence** in their own right, which means they are independent of human value.That is to say these ‘values’ exist in the same way that the electric charge of a proton, or the tensile strength of steel exists, that they are ‘out there in the world’. Unfortunately, and somewhat perversely, this leads us down a desperately metaphysical path, in which we have to conclude that intrinsic values are a primitive or irreducible objective **non-natural** property of some entities. Natural properties may be recognized or discovered empirically or by reason based on experience. On the other hand truly ‘intrinsic values’ can be discovered only by some mystical intuitive faculty.[32]

Which brings us dangerously close to the notions which support fascism.

The other route to dealing with these ‘objective’ values is to compare them to Plato’s ‘form of the good’ or the ‘essence of goodness’.

But Plato’s perfect forms could be known only to the gods and only priests can claim to know the minds (or the intrinsic values) of the gods. Hence this reference to intrinsic values encourages those who claim to have special knowledge and wisdom to use their special insights to exert power over the behaviour and lifestyles of the rest of us. Intrinsic values, like power, tend to corrupt, and are prone to corrupt absolutely when in the hands of those with monopolistic bureaucratic power.

The second part of the definition, which refers to measurable and testable qualities of an eco-system are actually ‘instrumental values’ and do not contain the same potential hazard to promote regulation based on moral absolutism.[33]

[32] For an excellent and comprehensive discussion of intrinsic values see *Ethics and Ecosystems* by Barry Maley published by the Centre for Independent Studies.

[33] The Conservation Act also says that the purpose of DoC is to preserve the ‘intrinsic value’ of the conservation estate. Once again the term can be interpreted to give the DoC whatever powers it seeks, or to create total confusion as to its purpose.[34] I have not named the District because that would imply that this case is unique to that jurisdiction; it is widespread.

10.2.2 Recommendation

References to ‘intrinsic values’ should be replaced with ‘instrumental values’ and these instrumental values should take the place of the definition currently allocated to intrinsic values. Little would be lost and much could be gained, especially if it encouraged the view that environmental damage is a cost of production and other activities, rather than a moral sin which must be avoided at all costs rather than properly and sensible managed.

11 THE FEASIBILITY AND CONSEQUENCES OF RESTRICTING SECTION 9

11.1 The feasibility

Restricting Section 9 to limit the mandate to impose land use controls so as to exclude matters that do not bear directly on the quality of the biophysical environment and the integrity of ecosystems is one way of winning back the intended focus of the Act.

This may seem a bold step. Indeed, without allowing the normal ‘amenity ordinances’ associated with permitted uses, land owners could be deprived of restraints on their neighbours’ use of land which they have come to expect over many decades.

Even the most ardent supporter of Section 5 would find it difficult to argue with conviction that the absence of a 2 metre side yard is a threat to the sustainable management of the biophysical environment or the integrity of the nation’s ecosystems.

It should be possible (although I concede that this may be the view of someone with no experience in drafting legislation) to amend the Act to allow such ‘amenity ordinances’ to regulate ‘permitted activities’ while ensuring that controls over controlled and discretionary activities are restricted to managing their effects on the natural and physical environment.

If the focus of the Act is to be restored, drastic measures are required. If experience should later prove that the boundaries have been too tightly drawn, it should be easy to extend those limits based on real experience and case law. This is how common law has developed and it is almost certainly preferable to begin to regulate from a position of minimum restraint than to grant excess powers which finally threaten to bring the whole thrust of the legislation into disrepute.

11.2 Other Consequences

Some officials have expressed the fear that limiting controls so as to focus on environmental effects might limit the ability of local government to recover costs associated with service delivery. I find it difficult to see why this should be so.

Many Councils in the United States and elsewhere operate without any such legislation (either of the TCPA or the RMA variety) and they do not appear to have problems in charging for the services they deliver. Indeed it seems probable that their charging is more direct and more honest because they can not hang such charges on land use or other consents.

As councils become less responsible for the direct delivery of services other pricing and charging mechanisms will have to be developed anyhow.

Central government, too, will need to continually revise its means of raising revenue as innovation impacts on the traditional tax base. For example, the rapidly increasing fuel efficiency of modern motor vehicles means that fuel taxes are no longer rising in line with increased vehicle ownership and use. Surely nobody argues that the motor vehicle manufacturers should **decrease** the fuel efficiency of their vehicles in order to maintain the revenue streams required to build and maintain the roads.

Sound public policy requires that legislation is designed to do its job with maximum efficiency and with minimum compliance costs. Legislation should not be used as a vehicle for carrying unrelated levies and charges. There have been recent trends in this direction.

Rodney District and the Western Bay of Plenty District are proposing to impose major levies on subdivision and/or construction largely as a means of collecting revenues for roads. This seems a remarkably inefficient means of raising roading revenue in that it is quite disconnected from the service being charged for. It assumes that newcomers generate costs without commensurate benefits and that only the newcomers benefit from roading improvement. Such fund raising schemes should become obsolete in the event that the proposed road transport reforms are implemented. Indeed they appear to be a good reason to implement the reforms as soon as possible.

11.3 Landowners’ expectations of property rights and investment certainty.

These have already been eroded by the current practises of many councils and the complex rules within their plans. A ‘permitted use’ must be just that. The rules surrounding a permitted use must be clear, comprehensible to non-experts, and contained in a page or two within a plan. The rules which govern permitted use must not be subject to other rules spread throughout complex and cross referenced documents.

For example, if it is a permitted use to build a house on a site within the building envelope prescribed on that page then this building envelope must not be subject to other controls elsewhere in the plan which relate to such matters as site clearance of vegetation or other controls on the trimming and clearance of vegetation or on effects on the *mauri* of the land.

If the Act regained its focus on the management of environmental effects while restoring the integrity of the permitted use (to more closely resemble the old predominant use) expectations of property rights would be restored along with investment certainty. It might even be possible to properly value a piece of land.

11.4 Alternative Means of Pursuing Social and Community Goals.

If Councils wish to pursue Social and Community goals they can do so using their own funds and their own land and drawing on the host of individuals and organisations including major 'not for profit' organisations which constitute the civil society. Using legislation designed to protect the natural and physical environment to pursue social and community goals is bound to be both inefficient and ineffectual even to the point of being counter-productive. The resentment, hostility and inter-group warfare promoted by such misuse of the Act is highly disruptive of communities. When neighbours have been set against neighbours over some tree pruning dispute they are prone to remain hostile for many years and to be unwilling participants in neighbourhood watch and other community-based projects.

Christchurch City now seems to be recognizing that there are genuine alternatives to using rules within the RMA as a means of achieving social goals; the Council is also recognizing that alternatives to rules may the best means of achieving the goals of the RMA.

Transferable development rights seem to be about to solve the long standing problem of how to manage the use and development of the Port Hills.

Rules may be the lazy approach to sustainable management. They are also the most likely to be counter-productive. The simple fact is that a host of rules and regulations do not 'carry' the public along with the vision. It is all very well for councils to be proud of their vision but if the citizens are protesting against the arbitrary imposition of rules then the vision will not be realized, if only because eventually the people will have their way through the ballot box.

History is full of attempts to achieve noble goals through the unbridled exercise of power. Their history is a history of failure.

The people of New Zealand are highly committed to protecting the environment in which they live and which they hold dear. They become resentful when people with no stake in the land, and with little life experience, suddenly descend on them, armed with a rule book, and attempt to push them around.

12 RESTRUCTURING THE ACT

12.1 One Stop Process vs Unitary Legislation

One of the goals of Parliament in introducing the RMA was to bring a whole raft of legislation into one omnibus act in order to simplify the total consent procedure. This was an admirable goal and insofar as it has been achieved should not be abandoned lightly. However, we need to be clear about the difference between the goal of establishing one consent procedure and the goal of trying to write one single piece of legislation which must address many diverse objectives.

In this report I have recommended that matters such as Heritage, Historic Place and Archeological Sites be given their own legislation. But this does not mean that someone seeking consents for an activity which involved Heritage matters should first seek an RMA consent before seeking a Heritage consent or vice versa. It does seem to me that many of the failings of the Act are the result of this confusion between the thrust of legislation and the need to provide a one stop **processing procedure** for consents. Furthermore, the RMA documents are an obvious place to record any Heritage, Historic Places or Archeological Sites.

12.2 The Recommended Form of New Legislation

If the general thrust of the recommendations in this report are carried through to a conclusion (including the Report on Subdivision which follows) a set of legislation would emerge structured as follows:

12.2.1 The Management of Effects on the Natural and Physical Environment.

This Act (or part of the Act) would deal with the sustainable management of the natural and physical environment with a tight focus on

(i) managing the effect of activities on the life supporting qualities of the soil, water and air,

(ii) managing the effect of activities on eco-systems.

This Act (or this part of the Act) would have a tight definition of the natural and physical environment and an equivalent definition of effects. It would have no reference to Heritage, Historic Places or to Amenity Values, or Katiakitanga.

This legislation should seldom generate demands for compensation because it sets out to 'internalize the negative externalities'.

12.2.2 The Management of the Effects of Activities on the Human Environment

This Act, (or section of the Act) would focus on the effects of activities on the human environment and would recognize that certain activities have effects such as noise, vibration, and smells, which pose little or no threat to the natural and physical environment.

This Act (or Section of the Act) would also recognize and have regard for the traditional rights to light and air, and the enjoyable use of one's own property. This Section of the Act would address those 'amenity issues' which have been protected and recognized over generations, but would not give councils the right to indulge in architectural censorship and otherwise impose their tastes. This legislation should involve few matters requiring compensation.

12.2.3 The Management of Heritage, Historic Places and Archeological Sites.

This Act (or Section of the Act) would deal with the need to protect and manage our national heritage, historic buildings and archeological sites, for both Maori and Pakeha and other communities of cultural interest. This legislation would routinely involve compensation or other exchanges because it necessarily requires takings of private property for public benefit.

This legislation alone would refer to *Kaitiakitanga* because it is difficult, if not impossible, to argue that Pakeha activities have any different effects on the natural, physical or human environment than the effects of the activities of Maori, or any other cultural or ethnic group.

However, the Maori have their own heritage, history and archeological sites. This legislation would provide Maori with suitable avenues to identify, present, register and protect their special interests alongside everyone else.

Of course if an activity has an effect on the natural and physical environment, the human environment and the three heritage issues, then they could all be dealt with at a single hearing, but the arguments would be separately argued and the separate compensation issues clearly identified and established.

12.2.4 Management of Subdivision

Subdivision as such has no environmental effect and is simply a means of creating private property rights and issuing certificates of title. Part 2 of this report argues that many councils seem to regard subdivision itself as having major environmental effects rather than the activities which follow. Many subdivisions have no environmental effects and many simply create permitted titles on which activities can then take place. But the perception is that subdivision itself is an environmental problem; indeed many councils seem to suffer from 'subdiphobia'.
Much of this appears to stem from a confusion between the technical term 'subdivision' and the common usage which describes a large residential development as a 'subdivision'. Public policy would be enhanced if residential development was described and defined as such rather than as a 'subdivision'.

Furthermore subdivision controls have been used as means of promoting all manner of theories about how cities should grow, how people should live, and generally to severely restrain the operation of the market. The end result is a massive rationing of land with consequent impacts on the price of new housing. The social effects of these policies are extremely high. It is essential that this 'subdiphobia' be curbed and that those who administer environmental law should focus on the effects of activities and not spend most of their time preventing people from properly using their assets and gaining access to land at a reasonable price. Almost all of the 'horror stories' which have flooded into my office relate to unreasonable and even vindictive attempts to prevent subdivision.

12.3 The Result

The RMA attempted to address at least four separate land management issues within one piece of legislation. It would seem that the Act started as a pure piece of legislation dealing with the effect of activities on the natural and physical environment. But then, as people realized that people would expect their own living environments to continue to have the protection long established under common law, terms like 'amenity values' were added and hence diluted the vision while also allowing amenity values to override concerns for the life supporting qualities of ecosystems. Heritage issues and subdivision were then added to the list and because of the desire for unified legislation the definitions applied to one aspect of activity management spread to all the others. The end result is, as so many have identified, that instead of replacing the Town and Country Planning Act with a Resource Management Act we now have an Act which combines the two and has multiplied the number of rules and regulations by the fourth power or more following McShane's 'fourth power law of the law' which says that regulations expand by the fourth power of the number of issues any piece of legislation is required to address.

The aim of the one-stop-shop for consents is admirable and should be held dear. However, the idea that every kind of land use management issue, from the management of ecosystems to the protection of historic places, can be gathered into any one legislative framework has proven to be a fiction, which cannot be realised in the actual world. It is time to abandon this assumption before the economy finally grinds to a halt, unemployment rises even further and more and more people lose their faith in our democracy. Major issues are at stake and demand courageous but quite simple solutions

None of these reforms will have any major impact unless the consent monopoly of councils is finally broken. Councils have been given great power and their record to date demonstrates that many, especially the largest ones who impact on the largest populations, have chosen to abuse that power.

It is sad that many councils who seem to have restrained themselves and their staff will no doubt be tarred by this brush. My personal experience is that those councils where councillors have worked hard to understand the legislation rather than accepting the assertions of others with their own axes to grind, have managed to implement the Act in a manner which achieves the aims and objectives of the legislation without causing anger and anguish among their people.

They know who they are and I commend them for it. However, I believe that the changes I am recommending would make life easier for them and they could retire when they decide to, without the fear that the lunatic fringe will then move in and undo all their good work.

****

PART TWO

SUBDIVISION CONTROLS

DO THEY BELONG IN THE RMA?

The German Nazis and the Russian Communists came very close to us in their methods, but they never had the courage to recognize their own motives. They pretended, perhaps they even believed, that they seized power unwillingly and for a limited time, and that just round the corner there lay a paradise where human beings would be free and equal. We are not like that. We know that no one ever seizes power with the intention of relinquishing it. Power is not a means; it is an end. One does not establish a dictatorship in order to safeguard a revolution; one makes the revolution in order to establish the dictatorship. The object of persecution is *persecution. The object of torture is torture. The object of power is power. Now do you begin to understand me?*

Chapter Three, Part III, of George Orwell's *1984*
O'Brien is interrogating/torturing Winston Smith.

1. IS SUBDIVISION CONTROL NECESSARY FOR PROMOTING THE CAUSES OF THE ACT?

1.1. Subdivision *per se* has no Environmental Effect.

Subdivision is simply the means of establishing legal title to a piece of land. As such, neither subdivision or the reverse amalgamation of title, have no environmental effects in their own right. The effects of subdivision or amalgamation are in reality the effects of land use or activities which can exist, and in most cases, do exist quite independently of the act of subdivision itself.

1.2 An Example

A farmer in an Auckland District[34] has spent many years on a farm, living in his own house, while his son, who jointly owns the farm, has been living in another. The father now wishes to retire and to hand clear title to his son by subdividing off a piece of land around the house. The District Council has refused consent. The farmer quite properly asks how the act of subdividing (which simply establishes title to the land) can have any environmental effect, given that he has been living in the house for decades and plans no change in activity? He has received no satisfactory answer.

1.3. Other Jurisdictions have Separate Legislation

The actual act of subdivision has no environmental effect; it is the activities which subsequently take place which do so. But because subdivision is dealt with under Section 11 within the Act, and the legislation makes a host of references to 'inappropriate' and 'appropriate' subdivision, many councils use controls over subdivision as one of their major tools in maintaining their control over direction and control of the use of land. An equal number use the control of subdivision as a means of aspiring towards grand planning goals, such as urban containment, increased transport efficiency, the control of 'urban sprawl', the saving of soils, reduced travel times and reduced use of fossil fuels.

I will argue that these goals are based on faulty analysis and the rules fail to achieve them anyhow.

Australia has been moving towards RMA type legislation within its body of Town Planning law but manages to get along with a separate Subdivision Act and evidently sees no need to change this approach.[35]

Therefore it is not necessary to have subdivision controls for the purposes of promoting the sustainable management purposes of the Act. Many councils and planners would be shocked if Section 11 was withdrawn but the result would be to force them to focus on the effects of activities rather than on arbitrary rules controlling the size and disposition of sites at the time of subdivision. More importantly it might discourage councils from trying to shape cities into pre-determined forms and forcing people into lifestyles which are contrary to their wishes.

1.4 Present Rules lead to waste and inefficient use of Land

There is copious evidence that the ever-popular (with planners) 4 hectare lot is about the least popular with purchasers, and the least efficient size of lot for a piece of land intended for countryside living or small scale farming. People prefer smaller lots or larger lots. The 4 hectare lot now has the guise of rationality but is no more than a conversion of the old 10 acres (counting the fingers of two hands) which once established whether land was subject to Drainage Board levies and the like. It must never have been subject to any genuine Section 32 analysis. Presumably if we had six fingers on each hand the minimum size for life style blocks would be 12 acres or 4.8 hectares (although we would still notate this area as 10 acres under a duodecimal system). Presumably those planners who favour 8 hectare lots have counted their toes (in acres) as well.

Finally, restrictive subdivision rules, and in particular those which set large lot sizes outside the urban area, have been proven to be counterproductive wherever they have been tried. United States research reveals that those states which impose the most stringent 'anti-sprawl' rules, have the highest rates of 'urban sprawl'.

For example the highly praised cities of Oregon sprawled faster, relative to their population growth, than the cities of California, Washington Arizona, Nevada or Texas – all states infamous for their 'urban sprawl' and minimal land-use laws.[36]

35 According to personal discussion on the net and interviews with those involved in the present process. Of course such policies can change as a result of the process.

The reason for this contrary behaviour is that land prices are escalated by the rationing process so that those who seek larger lots have to go further out, while requiring people to buy sections larger than they need or desire, is naturally wasteful of peripheral land. Also the purchaser tends to set the price so that if a minimum size for rural subdivision is increased from 4 to 8 hectares, or even to 20 hectares then the price remains almost the same for the larger piece of land. The purchaser is normally buying no more than the one or two hectares needed for a generous house site, but if a large area of extra land comes with it, it costs very little more, but makes the lifestyle choice possible, because it satisfies the arbitrary rule laid down in the plan.

Councils must recognise that people do not waste their resources, and, if left to themselves, they will not waste their time, which is now their most precious resource. Hence, if someone wants about one hectare of land to support the family lifestyle on the urban fringe, – growing some vegetables, and raising a dog or two – then they will buy only what they need if the plan will simply let them. On the other hand, if the rules force them to by 8 hectares, then they will do so too. But they will under-use the land which is surplus to their real requirement.

Those with the most basic understanding of economics and markets are totally mystified as to why so many councils are so determined to force their citizens to waste their time and their money and to impose a regime which results in such a highly inefficient and inequitable use of land.

Of course, if the rules are strict enough, people will leap-frog right out of the region; which is why my wife and I finally chose to live in Kaipara District. We simply had to escape from the Auckland Region to live the life we wanted to live. We started out wanting to set up an olive grove a short distance away from our house in Piha on some existing pastoral land. But we found that the explicit and implicit rules forced us to look further and further afield. So here we are on the shores of the Kaipara Harbour, north of Wellsford, where the olives, lavender, and grapes, as well as the chooks, bantams and dogs, are doing very well. And so are we.

1.5 Subdivision Rules cause much Frustration

It is probably because so many subdivision rules fly in the face of economic rationality and are contrary to peoples' legitimate preferences, that most of the case studies, phone calls and letters which flooded into my home, following the Minister's announcement that he

36 Research reported by the Thoreaux Institute of Portland, Oregon.

had commissioned this report, were from family groups, small businesses, small-scale farmers and people planning their retirement. In the vast majority of cases their complaint related to a refusal to allow what seemed a reasonable subdivision, and which complied with the policies of the plan.

For many decades, investment in the family property has been the way most New Zealanders have saved for their retirement. When councils suddenly change the rules to make large properties unavailable for subdivision they are stealing people's life savings. The young people who make and administer these rules have little understanding of how shattering this experience can be.

1.6 The Need for Care in the Regulation of Land

My own work for the Reserve Bank in 1996[37] concluded that the major impact of the legislation on the housing and construction index was on the price of new residential sections. The cost of building houses had remained constant or fallen as had the costs of 'constructing' residential sections. Increased compliance costs, massively increased holding costs and the high price of raw land had led to an escalation in the price of the final section available to the market. The regulation of the supply of land is a complex matter which deserves debate beginning from first principles, rather than reference to the present legislation and current practise. Therefore I have attached to this part of the report an appendix titled *A General Discussion of the Regulation of the Supply of Land.* This sets the foundation for the discussion which follows.

2 THE LEGITIMACY OF THE OBJECTIVES FREQUENTLY SOUGHT BY SUBDIVISION CONTROL

2.1. Many Objectives of Subdivision Control are *Ultra Vires.*

2.1.1 Subdivision Controls are used to Promote Economic and Social Planning

Subdivision controls are presently used to promote a wide range of objectives which are almost certainly *ultra vires.* The most common aim, although seldom explicitly addressed in any plan, is simply to control population growth in rural areas by limiting or effectively prohibiting subdivision. Another is to contain urban development within the context of theories of *New Urbanism.* Many plans and regional policy statements take the view that 'urban sprawl' must be prevented at almost any cost. These plans encourage tiny sections within the 'urban limits' and force people onto very large sites beyond the urban limits. The

[37] *The Effects of the RMA on the Housing and Construction Components of the Consumer Price Index.* Prepared for the Reserve Bank, 1996.

end result is that New Zealanders, possibly more than any other people in the world, are forced to live on sites which are either too large or too small. We also pay far too much for the land we are allowed, or are forced, to live on.

2.1.2 Does the Housing Market Matter?

Councils are normally enthusiastic and dedicated economic and social planners when it comes to subdivision – in fact the mention of the word 'subdivision' seems to switch on 'the planning gene' in every officer working in local government. For example, District Plans and Regional Policy statements have been replete with the need to ensure that rural subdivision will support 'an economic farm unit'[38] and that rural subdivision should not extend onto 'productive farm land'[39] or claims that 'rural subdivision will destroy rural employment'.[40].

Many of these policies have been withdrawn or modified as a result of strong submissions by the Minister for the Environment and the Ministry of Commerce. But the process of argument has been described by one of those involved as 'dragging the planners kicking and screaming to where they have grudgingly accepted their more limited powers.'

Given this bias towards economic intervention it comes as some surprise when an officer reports that their council has absolutely no concern for certain economic and social matters when considering their subdivision rules. But in response to my own submission to the Waitakere Proposed District Plan, requesting more flexible standards on the fringes of Waitakere City, the officer's report argued as follows:

> *Owen Mcshane seeks that council relax subdivision controls, especially on the rural fringe, so as to facilitate supply in the housing market. The submitter claims that rising housing costs in the Auckland area are having an inflationary impact on the national economy. This submission is opposed by the Auckland Regional Council.*
>
> *Comment*
> *The RMA is permissive legislation. The intent is to allow the 'market' (in all its social, economic and other forms) to perform uncompromised by environmental legislation unless management is required for specified environmental (and particularly, natural and physical environment) needs.*

38 The proposed Regional Policy Statement of the ARC

39 Plan after Plan after Plan

40 The Western Bay of Plenty Proposed Plan Change

> *Therefore although the RMA requires that account be taken of economic effect, it is not the purpose of the*
>
> *Act to facilitate the housing market or to attempt to manipulate the national or regional economies.*[41]

One has to admire people who are so nimble on their regulatory feet.

It seems to me that the officers' statements are contrary to two important requirements of the Act. Section 5 requires councils to manage 'the use etc of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social economic and cultural well being and for their health and safety while ... etc'. Surely this means that councils through their plans must **enable** people to provide for their social and economic well being and that furthermore they should be enabled to do so at the appropriate **rate**. Most people would believe that an adequate supply of housing sites is at the core of social and economic well-being for all New Zealanders.

Furthermore Section 32 requires that, when preparing their plans and establishing rules, Councils have a duty to consider alternatives and to assess **the costs and the benefits** of their proposed regulatory regime.

Later the officer claims that the subdivision rules in the Proposed District Plan were subject to a proper section 32 analysis. Evidently such analysis had no regard for the impact of the rules on the housing market or on the national and regional economy. If so, one wonders what the cost and benefit analysis found worth considering. I may be misinterpreting the argument but the position of the Waitakere City planning officer seems to be that **any environmental benefit is justified regardless of the cost it imposes on people and communities.** This interpretation completely denies the assertions of Section 32

The impact of a rule which rations the supply of land available to the housing market, and which therefore necessarily increases the price of new sections, must be subject to the cost and benefit analysis required by Section 32. The house building industry has now agreed

[41] From the *Officer's Report accompanying Notice of Hearing, Waitakere City Proposed District Plan, General Subdivision Rules,* 9 February 1997. These reports give the council's views on submissions received prior to council hearings on the matter. The hearings can modify the council view and of course council's decisions are subject to Appeal. These reports do not represent council's final decision on such matters.

that the price of raw sections is now beyond the reach of the average first home buyer in the Auckland region. Councillor Hucker of Auckland City has suggested that government should therefore intervene to subsidise home purchase. I would have thought it would be more cost-effective to relax the supply of sections and hence lower their price to everyone. New section prices are discussed more fully in section 11 of this part of this report.

2.1.3 The Leap to Regulate

In a discussion within a report responding to submissions seeking to remove the term *mauri* and other terms relating to spirituality from the policies and rules within the proposed Waitakere City District Plan, Terry Baxter, a council Environmental Policy Analyst, described the relevance of Section 32 to subdivision rules generally:

> *The Section 32 process analysed the costs and benefits of six different methods for achieving the Part II provision of the RMA in relation to Tangata Whenua. These methods were (1) take no action (2) education/information (3) economic assistance via the annual plan process including rates relief, (4) land acquisition, (5) council operations and (6) regulation. Method 6 is the most cost effective in terms of certainty of outcome relative to the costs of implementation. They are the most appropriate means available to implement the objectives and policies and are consistent with part II of the RMA.*

The reporting officer makes it unclear whether this logic demands a 'therefore' before the last sentence or whether the last sentence is a simple declaration. However, the report places an undue emphasis on certainty, (especially when in practise, uncertainty seems to be the most frequent outcome of the subdivision process) while there is a host of academic literature which refutes the general assumption anyhow.

The conclusion that regulations are the most cost-effective means of implementing the objectives and policies, is a consistent theme throughout these reports for Waitakere City, and for most other district plans which I have seen or which have been reported to me. The reasons advanced in most cases and in officers' reports in particular is that the alternatives would mean that council would **lose control**. Again this approach is widespread.

3 SECTION 11

3.1 The same approach as Section 9[42]

Section 11 has some of the problems of style and tone already identified in the discussion of Section 9 controlling land use.

Section 11 requires that no person may subdivide land unless the subdivision is expressly allowed by a rule in a District Plan. Understandably, and no doubt correctly, the Waitakere City planning officer reporting on submissions on the proposed subdivision rules comments:

> *Hence, the Act creates an expectation that rules regarding subdivisions will be inherent in a district plan.*

It no doubt creates an equal expectation that Council staff should write them, because the same officer observes:

> *Section 31 (c) of the RMA requires a territorial authority to control the subdivision of land. It should be noted that the word control is used, as opposed to a less directive terminology such as 'manage' or 'achieve'. Thus the Act creates the expectation that, in order to achieve*
>
> *integrated management of the effects of land use, an authority will need to institute a system of subdivision controls.*

One is reminded of André Gide who observed "Victor Hugo is, without doubt, France's greatest novelist – alas!"[43]

Section 32 requires Councils to examine alternatives to control and rules as the best means of achieving the purpose of the Act. But the officer's observation is correct in that almost every other section of the Act slides into the assumption that 'control by rule' is 'the way to go'. Furthermore the section on compensation makes such controls by rules 'cost-free' which further encourages what is, after all, the laziest approach to environmental

42 See the discussion of Section 9 of the Act in Part 1 of this Report

43 The story comes in diverse forms. For example Raymond Carr writing in the *Spectator* records it thus: When Andre Gidé was asked who was the most important French poet of the 19th century he replied "Hugo – helas." The form may change but the point remains.

management.[44] Slaves may be easier to manage than free people. Unfortunately for the long term viability of slave economies, slaves are also remarkably inefficient. Indeed they do their best to be counter-productive.

The preceding page contains a useful summary of the preferences expressed by Section 32 of the Act and well argued in the Ministry for the Environment's own publication *Guidelines to Section 32 Analysis.* This single page summary is provided by M J Garland, a practitioner of Christchurch.

However, Waitakere's planners consistently favour rule making over any other means of achieving the purposes of the Act. Their Section 32 analysis which support the current Proposed District Plan is over 400 pages in length, and includes 160 chapters. Each chapter, except for a few relating to Maori issues, comes down in favour of rules as the preferred means of achieving the purposes of the Act. One has to wonder whether this represents a failure of imagination, or a determination to exercise detailed control over people's daily lives. On the evidence presented to me, which reinforces my own personal experience, the residents of Waitakere are in little doubt. I suspect this penchant for rule-making, and the response of the people, is widespread throughout New Zealand.

3.2 The Rules are Typically Not 'Effects Based'

Many District Plans claim that the four hectare size (or whichever size has been chosen) has been adopted because it provides sufficient space for the disposal of stormwater and sewage. Given that the four hectare rule has its origins in an accident of physiology it seems a remarkable coincidence. And of course such a rule is not effects-based. Whether four hectares is sufficient to dispose of stormwater and sewage depends on the activity on the site, the porosity of the soil and a host of other factors which are specific to the location and the activity.

4 THE APPROACH IS ILL-FOUNDED AND BOUND TO FAIL

4.1. The Widespread Use of Subdivision Rules to achieve control of 'Urban Form' or 'Growth Management'

Subdivision controls are frequently claimed to be necessary to support councils' policies of urban consolidation or containment. The term 'consolidation', generally refers to the policy of meeting the demand for new housing sites within the existing boundaries of the city,

44 See the discussion on compensation in section 6 of Part 1 of this report.

using unused land, or the subdivision of larger sites into smaller ones. This policy of consolidation is generally intended to serve the objective of 'containment', which in turn reflects a desire to limit or prevent the spread of the urban area beyond pre-determined boundaries.

Regional Policy Statements and Plans, and District Plans around the country seek to use control of subdivision, and in particular, the control of section size, to manage the direction and form of urban growth. The problem is that these 'Growth Management' objectives frequently have no rational justification, while the methods sought to achieve them either fail or are counter productive. Furthermore they depend on processes which are in themselves *ultra vires*.

There should by now be widespread agreement that the Act does not give councils, or anyone else for that matter, the power to manage or direct people's private investment decisions under the guise of the management of the region's resources. In his recent speech in Queenstown, the Minister for the Environment made the point that many councils have seriously misinterpreted Section 7(b) of the Act which requires them to 'have regard for the efficient use and development of natural and physical resources'. He explained:

> *Put very simply, one interpretation [of section 7(b)] casts councils in the role of determining what an efficient use of resources might be, and drawing up rules and regulations to secure that outcome. The other has councils merely considering the effect their policies and plans have on the efficient use of resources which would occur in the absence of regulatory controls. It seems to me that the chasm between these interpretations is one of the continuing barriers to consistent implementation of the Act, and a major hidden cause of frustration with the Act by resource users who are happy to embrace its environmental goals.*

The Minister then went on to say:

> *Many councils do, however, allow themselves to speculate on the socio-economic and perceived inter-generational costs and benefits associated with particular uses in a way that goes far beyond their environmental responsibilities. For example, it is*

> *common for councils to make judgments about whether it is 'efficient' for rural land to be used for urban purposes ... .*

If the Minister's interpretation is correct then many of the goals which are discussed below demand the use of regulation which is *ultra vires*. Furthermore I will argue that there is copious evidence that these goals are ill conceived, and that the methods used to implement them are counter productive, even in their own terms.

Quite simply, people refuse to be planned.

4.2 The Demand for Country Living

In the recent past, much of the increase in urban populations has been provided for within the urban areas and even within downtown itself. Central areas have been revitalised as planning restrictions on inner city living have been relaxed, or even abolished, in the general spirit of deregulation, and supported by the planning theories of both Jane Jacobs (*The Death and Life of Great American Cities*) and the *neo-traditionalists*. Young adults, in particular, are enthusiastic participants in the urban 'Café Society.' Overseas experience already warns us that while this pattern will continue, it will be matched, or even overtaken, by a second wave of decentralisation, (second to the post-war decentralisation to the suburbs driven by the motor car and the planning theories of the time) which will demand low density living in general, and semi-rural occupancy of life-style blocks in particular.

This represents a major change in migration habits. During the eighties, 1.6 million US families migrated into major cities. By the middle of the nineties 1.8 million US families had migrated to the outskirts of regional centres – a massive shift in living preferences.

4.3 The Attractions of Ex-urban Living

The causes of this preference for country living are many, but are already familiar to New Zealanders who are beginning to respond to the same stimuli, and to make the same decisions. Almost every report on domestic real estate in the major cities features some comment on the demand for life-style blocks in the outer areas, usually recording that no matter what happens to demand in any other sector, this one continues to boom. Prices for lifestyle blocks continue to escalate because so many Regional Planning Policies, and District Plans have artificially restricted their supply.

The reasons for this demand are well documented in the United States and appear to be similar in New Zealand. They include:

(i) The general trend towards ‘nature’ and environmental awareness which encourages families to raise their children in rural surroundings.

(ii) Many parents would prefer their children to play with horses and dogs if only because horses and dogs do not sell drugs or play pornographic videos.

(iii) Serious gardening is becoming a major pastime among both young and old, and is becoming an ‘environmental’ activity in its own right. New Zealanders are buying 1.6 million trees a year from garden centres, and 65% of these purchases are of native species. Many gardens become ‘tourist gardens’ which are self-supporting through takings at the gate.

(iv) The invention of the ‘boom box’ has placed a high priority on aural privacy. In both the UK and the US, low-cost high volume music equipment, with bass boost, is emerging as a major factor driving housing location.

(v) Today’s aging population remains fit and well, long after official ‘retirement’ age, and certainly beyond ‘redundancy’ age. Many couples in their fifties recognize that they have another thirty years of active life ahead of them and are not about to spend those years sitting in an inner city flat, listening to multiple sources of head banging music and fearing burglars at the front door. A large country estate, well removed from burglar territory is increasingly attractive, especially as large sites provide opportunities to earn supplementary revenue from growing horticultural produce such as honey, eggs, olives, chestnuts, macadamia nuts, flowers and herbs.

(vi) The computer, fax and internet combine to allow many knowledge workers to earn high income without any need to commute to, or live close to, the central city.

(vii) Many knowledge businesses and their workers regard the University as a more important employment focus than the Central Business District and the Universities are moving to the urban fringe in response.

This means that cities like Auckland and Christchurch have to deal with two kinds of growth:

(i) The rapid growth of inner-city areas, which are magnets for young people enjoying the café society, and elderly people who have both a city apartment and a country house..

(ii) The growth of rural areas, where semi-retirees, *Country Cottage* families, telecommuters, and cyber-professionals are attracted by scenery, open space, low population densities, and a 'natural' lifestyle, distant from the perceived 'social malaise' of the high density central city. (Ironically many of the disadvantages of inner city life are the direct result of planning policies – such as promoting excessive infill housing – which are aimed at reducing country living. Once again, people will not be planned.)

The end result is that the old distinction between rural and urban life, and between rural and urban economies is breaking down. People grow and export primary produce from urban locations and people run international businesses from rural properties. Urban fences can no longer be justified on any grounds relating to lifestyle or economics.

5 URBAN CONSOLIDATION AND CONTAINMENT

5.1 Diverse Housing Provides Choice

Many councils have adopted subdivision rules as part of a grand plan to prevent their cities from expanding and to force people to live within the urban limits at higher densities than they would normally prefer. Of course many people enjoy higher density living and during the mid-sixties I was part of a group within the Auckland City Council that introduced townhousing and in-fill housing and enabled high rise apartment development as a means of increasing housing diversity and choice. The market responded rapidly. Town houses, in-fill housing and central city apartments are now a routine part of urban life. However, I soon found that while these alternative housing forms enhanced choice, they could make no contribution towards modifying urban form or promoting urban containment or any of the other goals of new urbanism.

If councils focus on promoting choice in the market place they are on firm ground. As soon as they begin to advocate higher order goals and force people to make decisions contrary to their preferences then they promote both inefficiency and inequity. Furthermore they will have to deal with a whole range of unexpected outcomes as people work to counter these unpopular regulations.

The general objective of Urban Consolidation, and the policies which surround it, are based on flimsy evidence. The track record of these policies in cities of North America such as Portland, Omaha and others, where they have been tried for some time now, is that they are highly counter-productive and impose massive costs on the economy. The end result is increased congestion, increased pollution, increased use of fossil fuels, overloaded infrastructure, and, of course, inflated land prices.[45]

5.2 The Rules Don't Work

In the mid-sixties, when I was working in the Auckland City Council, I carried out a rough and ready calculation, in which I transformed Auckland into a nominal circle[46] and then doubled the net residential density on the isthmus. From memory, the end result was to reduce the diameter of greater Auckland by a couple of hundred yards.

More recently, (1993) Brian McLouglin, Professor of Town and Regional Planning at University of Melbourne has published a paper called *Urban Consolidation: a Modern Urban Myth.* The Professor examined Perth, which has introduced consolidation policies similar to those promoted in Auckland and Christchurch. His analysis was more sophisticated than mine; he plotted the impact of different levels of density increase on the overall diameter of Perth and the savings in rural land. His concluding summary is salutary:

> *To sum up, under reasonable but quite demanding assumptions about urban consolidation through increasing net residential densities, about 2 percent of land would be saved in 15 years and the city might be 200 meters less (in 26 or 27 km) in its diameter.*

Given these trivial outcomes, can any exercise in regulated containment be possibly worth the costs? Australian politicians seemed to have learned the lesson. In 1993 the House of Representatives Standing Committee concluded:

> *The Committee's perception of the issues changed in the course of its inquiry ... at the outset it was inclined towards a favourable view of the then fashionable policy of urban consolidation. Close*

45 See McShane, Owen. "The Prospect for Rail in Cities of 1 - 2 Million People", Prepared for the IPENZ 1998 conference *The Sustainable City,* Auckland February 1998. This paper contains a host of references to studies of transport forms and their impact on fuel consumption, air pollution and similar. An excellent route to these studies is through the Web sites of the Thoreaux Institute of Portland and the Cascade Institute.

46 I am well aware of the apocryphal economist who began his report on agricultural efficiency with the words "Take a spherical cow."

> *examination of the evidence, however, revealed that too much was expected of urban consolidation and that it was no panacea. ... The Committee's most important discovery was that there is no ideal urban form that will solve urban problems ... no amount of tinkering with the balance between high, medium and low density will have much impact.*

In a free society, regulations which have serious impacts on people's property rights and other freedoms, and which add to the cost of ownership and development, and which are known to be unable to achieve their ends, should surely be abandoned.

6 Using Subdivision Controls to Save Soil.

6.1 The Limited Notions of Productivity

One of the most curious claims is that by using subdivision controls to prevent the spread of urban development into the countryside the 'life supporting qualities of the soil' will be enhanced. New Zealanders are keen gardeners and given the chance will turn their properties into valuable assets, while adding to the soil quality and productivity around their homes. Domestic gardens make a significant contribution to total food production, especially among the retired who supplement their income with home grown fruit and vegetables. There are also people exporting special beans to Japan off plots about 60 feet by 100 feet. The traditional idea that farm land is productive while urban land not, is simply not credible. It also depends on an extraordinarily limited definition of 'productive', one which is unacceptable to most economists. Even 'tiresome' economists actually believe that providing the resources for families to live the life of their choice is a proper use of those resources.

6.2 Soil is not Land

The Act spells out that it is the life supporting capacity of soil which is to be sustained, and not the land itself. While this differentiation may seem pedantic, the use of 'land' instead of 'soil' soon leads to further extensions of the original definition, so that 'rural land' or 'farmland', or even 'farming' as an activity, become included in a list of 'resources to be protected' within many plans.

In my opinion, the limited scope implied by the use of the word 'soil' in the Act was deliberate and should not be abandoned lightly.

Pastoral farmland is now a surplus commodity. The most recent predictions indicate that we can feed the world's population, which is now expected to double to a peak around the middle of the next century, while removing large amounts of agricultural land from production. This is good news because the main threat to species and general biodiversity is loss of habitat. In the past the main cause of lost habitat has been the clearance of land for agricultural production.

6.3 Soils are Protected by Residential Development

Soils are lost if they are washed or blown away in a natural climatic disaster, but are not lost if they are turned from agricultural use to use as a bowling green, cricket field or domestic garden. All of these and similar activities demand the life-supporting quality of the soil. Large areas of housing are much less prone to such natural disasters because the crops and gardens of housing developments are seldom ploughed under; and it is traditional ploughing which leaves the soil exposed to the ravages of wind and drought. The housing and trees of suburban developments significantly reduces wind speeds, while gardeners water their gardens, so that the soil is less prone to blow away.

It can be argued that large commercial or industrial development, which covers the soil with buildings, parking lots, general pavement and storage areas do take the soil out of use. Hence it may be sensible to protect the best soil from such commercial and industrial development, or to ensure that it is sold to other people who will value it. But the argument that a change to urban use means automatic loss of the soil itself has little application to residential use in which gardening plays such a significant role.

6.4 Why not protect Urban Soil from Rural Encroachment?

If councils can demonstrate that domestic gardens are environmentally 'destructive' while farms are environmentally 'harmless' then there may be a *prima facie* case to introduce policies and rules which favour farming activity over gardening. Casual observation suggests that such an argument is not readily sustainable .

If we are to believe that urbanisation leads to the automatic loss of soils it must be because soils are not valued by urban people. Yet when urbanites are forced on to poor soils they are willing to pay a high price for high quality soils to be imported into the neighbourhood and onto their sites. Does not this suggest that the residents should be allowed to occupy quality soils in the first case?

There is a general presumption in many District Plans that rural use protects soils while urban use constitutes a major threat. This is contrary to history and to fact. For example, a Christchurch City planning officer's report reads:

> *A second and even more significant issue is the degree to which high quality soils can, or should, be protected from "non-rural" use.*

This sentence can be 'inverted' to read:

> A second and even more significant issue is the degree to which high quality soils can, or should, be protected from 'non-urban' or 'rural' uses.

Remarkably, or unremarkably to anyone familiar with the history of New Zealand farming, the inverted form actually makes more sense. The major cause of erosion in New Zealand has been over-grazing of pastures, indiscriminate bush clearance, uncontrolled rabbit populations, supplementary minimum price schemes and other subsidies which have encouraged the over intensive use of the hill country which is most susceptible to erosion.

7 LIMITING PRIVATE VEHICLE USE

7.1 Urban form and Travel Times

Many plans claim that managing urban form is a means of limiting traffic demand. This seems to be a self-evident truth, and at the local scale of neighbourhood design, it almost certainly is. If a city has many opportunities for aged pensioners, unable to drive, to live in close proximity to shopping facilities, libraries, and medical centres then such people will be advantaged. But this will have little impact on travel patterns within the greater region, as United States statistics make abundantly clear.

Many New Zealanders are reasonably familiar with the diverse urban forms of cities such as New York, Chicago,Washington, Philadelphia, Los Angeles, San Francisco, San Diego, Portland, Seattle and Houston. No one would suggest that these cities are of identical size, or of similar form, or have similar transport systems, or street networks, or housing types. We would expect the statistics about congestion, vehicle trips and commuting times in these cities to vary widely, especially if the Urban Form theory is correct. The following figures suggest otherwise:

CITY	Pub Tran %	Car %	Ave Commuting time (mins)
New York	26.5	65	31
Washington	13.7	81	30
Boston	10.7	82	24
Philadelphia	10.3	83	24
Chicago	13.7	81	28
Dallas Fort Worth	2.3	95	24
Houston	3.7	93	26
Atlanta	4.7	93	26
St Louis	2.9	94	23
Denver	4.3	91	22
Los Angeles	4.7	90	26
San Francisco/Oakland	9.5	84	26
San Diego	3.4	89	22
Seattle	6.5	88	24
Portland	5.6	89	22
Sacramento	2.4	92	22
Honolulu	9.4	81	25

NOTE: This table features vehicle commuter time. Any of the many statistics relating to vehicle use show a similar consistency of driver behaviour and vehicle use.

San Francisco and Los Angeles, which exhibit the classic contrast in urban form, have identical average commuting times.

The existence of a well established public transport system affects the modal split between public transport and car but has little effect on commuting time.

The percentage of people who walk or bicycle to work is always less than ten percent. In New York, 8.5% and in San Diego 7.6 percent. Clearly, any impact on the number who walk or bicycle within a modern city is going to have only a trivial impact on the overall patterns of traffic and emissions.

The end result is that urban form is no predictor of commuter trip time, which in large new world cities tends to be constant at around 25 minutes. Human beings are not passive in their response to the city environment. They adapt their behaviour to settle on a universal average commuting time. If commuting times rise much above about 25 minutes they change their house or their job.

Furthermore, commuter trips are typically no more than 25% to 35% of total vehicle trips and all other trips in a modern metropolis are better described as a spider's web rather than by the conventional spokes meeting at a hub. An emphasis on public transport and draconian rules governing urban form impact only on those who will make the modal shift from private car to public vehicle and this is no more than 1% or 2% of the commuters. Hence the urban form managers are modifying a margin on a margin.

The most useful way to reduce fuel emissions and energy use is to design more efficient engines (and we are making truly dramatic gains in this area) and to clean up exhausts at the exhaust pipe. Managing urban form to achieve such ends is what economists call 'feeding the sparrow through the horse'. The 'unexpected outcomes' are likely to impose costs which far exceed any claimed benefits. A Section 32 analysis of proposals to direct and control urban form and which recognizes the requirements of Section 7(b) (i.e. to have regard to the efficient use and development of natural and physical resources) should kill these proposals stone dead.

7.2 Why do travel times not change?

Most people are surprised by the findings that urban form has negligible impact on commuter trip times. However, a recent study[47] reported in the *Scientific American* of October 1997 explains why this should be so.

This research reveals that all through history, and in all human cultures, people spend about the same amount of time travelling per day. This 'travel-time budget' is universally about 1.1 hours a day. This means that pre-industrial African tribespeople might walk a few kilometres each day, with the occasional longer trip to the market. On the other hand the resident of the down-town apartment might spend little time commuting but will escape to the countryside in the weekends and take their vacations in Tahiti or Paris.

47 Andreas Schafer and David Victor. *The Past and Future of Global Mobility*. pps 36 to 39. This issue was dedicated to the future of transport and should be required reading for all those involved in transport policy. It gives little support to the conventional wisdom expressed in our Plans and Policy Statements.

So even if planners change the urban form and transport modes believing this will reduce trip distances and travel times the residents simply compensate by using their 'travel-time' budget in some other way.

Once again, if policies are designed to enhance human choice they serve a genuine social function. But attempting to push people into preconceived modes of life in order to change the way they allocate their resources of time and money is futile. The people overturn the best laid plans.

7.3 Conclusion

City form has little impact on major patterns of vehicle use, except at the local scale and this will be compensated for by other transport movements. The same argument applies to reduction in use of fossil fuels and other transport related effects. Hence using subdivision rules as a means of directing and controlling urban form is a pointless but costly exercise. It would also appear to be *ultre vires.*

8 SUBDIVISION DOES NOT CLOSE OFF OPTIONS

Probably one of the silliest pieces of planning lore is that subdividing rural land closes off the options of future generations. I have been unable to track down the source of this nonsense but it is repeated in plan after plan after plan. The claim usually reads something like the following;

> *Subdivision of rural land down to small lots leads to less flexibility to respond to changes in agricultural technologies, crop types and markets:*

Or more vaguely:

> *The subdivision of rural land is to be managed so that the ability of rural resources to meet the needs of future generations is maintained.*

Which is Orwellian speech for 'no rural subdivision'.

A few moments' thought should reveal to anyone that these claims are contrary to history, to present day experience, to basic economic theory, to any theory of markets, and finally to observation and common sense.

The history of developed economies is marked by the subdivision and amalgamation of land to match the changing economies, technologies and markets of the time. If small lots are not productive then they are amalgamated. If large lots are not productive they are subdivided. The attempts to freeze land into the existing pattern of subdivision inhibits diversification and innovation. Subdivision is frequently used to get the right size of lot and to provide the capital to finance the diversification.

The servicemen who returned to New Zealand after WWII were granted 50 acre farms which were soon amalgamated to 100 acres or more. The present rural economy is characterised by the amalgamation of **pastoral** farming units to achieve economies of scale and the simultaneous subdivision of pastoral land into smaller lots to permit horticulture and more intensive uses. Three tomato growers in Waimauku bought a 4 hectare lot and then subdivided it into three small lots so that each of them could run his own hydroponics tomato farm. **They now produce 42 kilos of tomatoes off each square metre.**[48] This hardly seems like a loss of productive capability. But had they not been able to subdivide they would have lost their competitive independence and freedom to finance each operation.

The rural countryside is in a remarkable state of flux as the rural population moves to reduce dependency on world prices for single commodities. Unless their land is within enlightened territory they find their attempts to design the land-holding to suit the economics of their innovative ventures are blocked at every turn by planners who claim to know better than these farmers how the rural economy should respond to changing markets.

Or they simply want to freeze the whole rural environment into the *status quo* to protect some notion of heritage and natural character.

The rural economy is a changing and dynamic economy – not a theme park for tourists.

48 *Horticulture News,* February 1998. The three growers bought the land in 1993 and have invested a total of $3.5 million in their high technology hydroponics ventures.

9 THE CONSEQUENCES OF REMOVING OR LIMITING THE ABILITY TO CONTROL SUBDIVISION WITHIN DISTRICT PLANS.

9.1 Loss of Cost Recovery and Infrastructure Planning

One response to a proposal to remove subdivision as such from the ambit of the Act is that it would inhibit the ability of local government to recover costs associated with service delivery, the ability to plan for infrastructure, and investment certainty.

None of these fears should be realized in practise. Indeed it appears to me that the expression of these fears is in itself an indication that the control of subdivision within the legislation is confusing and diluting its purpose.

9.2 The Purpose of the Act

Section 5 does not say that the purpose of the Act is to promote cost recovery, or the ability to plan for infrastructure. These matters should be addressed within the context of funding local body activities and planning and delivering infrastructure. The private sector is increasingly responsible for providing infrastructure and just as telephone companies and satellite TV companies deal with urban development without needing or depending on a host of rules in District Plans, so too can other providers of urban services.

I am frequently told that providers of such services would like their councils to lay down clear plans because it provides certainty. While this sounds gratifying to councils they should regard such submissions as no more than special pleading to make the managers' jobs easier and the businesses more profitable. For many years manufacturers were pleased to operate in a world of import licensing and widespread government controls which provided certainty and comfort for our so called 'captains of industry'. It takes some skill to fail to acquire wealth if you hold the exclusive right to manufacture toilet paper in a market protected from import competition. The promotion of innovation depends on business operating in a world were certainty and comfort are guaranteed by no one, least of all by local government.

10 ALTERNATIVES

The possible alternatives are too wide ranging to include in this short paper. However, many jurisdictions have Subdivision Acts which control the actual subdivision process as a means of forming title. The Ministry of Agriculture has made submissions to councils seeking that a code of practise replace the standard subdivision rules within their District Plans.

I am not suggesting that the management of large scale residential development be removed from the control of local authorities. I am simply arguing that the legal process of subdivision itself sit uncomfortably within legislation whose purpose is defined by Section 5.

In Part 1 of this report I argued that subdivision control should be contained within a separate piece of legislation or within a well defined section of legislation which sat within a much broader Land Management Act.

11 WHAT IS THE PROBLEM?

11.1 Why does Subdivision generate such strong emotions?

Any analyst with an interest in the implementation of the RMA must wonder why it is that the business of subdivision of land causes so much aggravation and leads to so many extraordinary statements in district plans and regional policy statements.
Why it is that people seeking to subdivide their property for quite legitimate reasons run up against the most bizarre interpretations of the law, or indeed interpretations which seem to ignore or undermine the law altogether.

Why is it that councils seek to use subdivision control to promote economic objectives and yet passionately deny that their activities have any negative economic outcomes. One is reminded of the advertisers of cigarettes who argue so persuasively that their advertising does not work. If it does not work then why do they do it?

11.2 Subdivision is an Empowering Activity

Since I first became involved in these matters during the preparation of my report to the Reserve Bank I have read countless documents and plans relating to subdivision control. It is clear that any proposal to subdivide land brings out the worst in the politicians and the bureaucrats who administer such things. Planners make public statements that subdivision is motivated by greed. Rules in Plans are ignored or bypassed to ensure that any subdivision is blocked. Extraordinary claims are made for the effects of subdivision control.

Why is this?

I have now formed the view that the planning staff of councils are almost universally hostile to subdivision because it **empowers** both the subdivider and the purchaser. We have already noted that the planners instinctively prefer rules and regulations to other less coercive means of achieving the purpose of the Act and quite openly say in their reports that the alternatives mean a 'loss of control'.

Such people are fixated by the need to control land use and this usually means maintaining its present use and state. Even pastoral land is described as 'natural' so that it can be kept in its pure 'natural' state and hence undeveloped.

But when land is subdivided for sale the sellers gain cash, which empowers them to expand their lives and do other things. Similarly, the purchaser gains access to a legal title which gives them borrowing power and hence enables them to do something with the land and enjoy their lives.

Two previously 'unempowered' citizens have been turned into that scourge of planners the world over – they have become potential 'developers' or people with the funds to finance a change in lifestyle.

No wonder they get such a rough time. The popular perception is that 'subdividers' are major land developers and some of them are. But the great majority are ordinary people trying to turn their major asset into some liquid cash.

12 A CASE STUDY: THREE NEW LOTS IN ORATIA

12. 1 The Proposal and the Evidence

During February and March of this year the Waitakere City Council heard an application from an elderly couple who wished to subdivide their 6.9 hectare lot to generate three new building sites, resulting in four lots in all, with an average area of 1.7 hectares each. The typical pattern of subdivision in the neighbourhood along Forest Hill Road is a mix of farmland and houses on 0.8 hectare lots. The owners of the land are willing to covenant the bush, which covers 65% to 70 % of the property, in perpetuity and to ensure that no houses are visible from the road[49].

49 Such 'anti-architecture' positions are now taken for granted.

The plan now imposes a minimum of 4 hectares on subdivision, but the plan also is very thorough in laying out its policies regarding ‘effects-based’ applications. These encourage applicants to believe that their case will be fairly heard.

In practise, in case after case after case, applicants find that what they believed to be well founded applications, well supported by expert evidence, and supported by their neighbours, are blocked, often by officers’ reports which make the most catatrophist claims and which refuse to recognize that there could be any positive effects associated with any proposal to subdivide. The ARC continues to be involved in these minor applications, in this case, evidently on the grounds that the presence of three new houses on land already cleared poses a risk of flooding 100 residences further down the valley.

The submission by Anne Beverley Grace is telling. Ms Grace is well qualified by both education and experience,[50] but her thoroughly professional evidence cannot conceal her exasperation at what she perceives to be the sheer bloody-mindedness of the planning officers who submitted evidence at the hearing.

Ms Grace writes:

> *The [officer’s] report lists some activities (in the guise of ‘impacts’) which ‘would be introduced’ if development proceeded on this site. I cannot see any certainty of these activities taking place and I consider the list represents a bad case of catastrophising. The list constitutes a personal affront to everyone who lives in the bush ... .*
>
> *I must refute this list in detail. Firstly firewood collection, weed introduction, and the creation of domestic gardens containing unsuitable exotic species. These activities are controlled by rules in the Proposed District Plan (unless there is some problem with the pines in the ‘outstanding’ vegetation being used for firewood!). ...*

[50] B. Sc. in zoology, M. Sc. (1st class honours) in Geology. General Manager of the QEII Trust, Manager (Resource Planning and Design) for the ARC Parks Service, member of Auckland Botanical and Ornithological Society. Ms Grace does not appear to be motivated by greed.

> *It is totally out of order to be recommending refusal of the van de Walters' application on the assumption that people are going to break the law.*[51]

Ms. Grace then argues that other 'catastrophic' activities such as humus removal, owning pets, dumping rubbish, and trampling of undergrowth are equally unlikely to pose serious negative effects in this semi-urban area. She goes on:

> *The effects of these potential activities are* ***trivial*** *by comparison to the effects of inappropriate agricultural use of the land – which can occur as of right at present. The Royal Forest and Bird Protection Society submission alluded to the effects of goats on vegetation. ... If the subdivision is not approved the landowner is* ***perfectly entitled*** *to farm goats on the property.*

In conclusion Ms Grace argues that 'the proposal will, on balance, provide a better environmental outcome that the status quo'. All in all, the proposal and its reception are reminiscent of the proposed subdivision at Pakiri discussed in Part I of this report.

Ms Grace then makes an eloquent plea, introducing the human side of the equation, by drawing on the first part of Section 5. She writes:

> *My concern is for the wellbeing of the local community as a whole. The Van de Walters have lived at 182 Forest Hill Road for 38 years. If the proposed subdivision does not proceed, we will lose them from our community along with all their knowledge of the history of our community.* ***I want to live in a community that values its older residents.*** *I object in the strongest possible terms to forcing our 'kaumatua' to move out because they can no longer afford to live on and care for larger properties. Subdivision of the type proposed is a way of providing for our social and cultural wellbeing.*
>
> *I was deeply affected by the recent 'loss' from our community of the owner of another Forest Hill road property. She resided here for 33 years. She told me all about the history of my property ... . This fit and healthy woman would not have to move out if she*

51 We would sell very few cars or carpenters' tools if we adopted this policy.

could have subdivided her large property. As it was, the district plan rules forced her not only to sell up her land, but also to give up the comfort and memories of the home where she raised her children and to sell her beloved pet donkeys and other animals.

She actively contributed to the wider community for many years (e.g. through her profession as teacher and subsequently as a volunteer at

Arataki Visitor Centre[52]*). Now she has to start over in a relatively alien environment – a totally unnecessary trauma that the community at large has visited on her! So much for valuing our elders! The district plan is changing our demographics.*

In spite of this plea, Council declined the application.

12.3 The Plan is a Deceit

The reason so many people are upset about subdivision in Waitakere City is that the plan says one thing but the real policy is quite different. In 1996 I proposed to set up a group of houses set among olive groves, on pasture land near my house at Piha. The idea was to 'tune' the groves so that they were irrigated and fertilized by the rainwater and sewage treated by a transpiration field. The whole estate would have been surrounded by native shelter-belt planting. I took advice from a local surveyor who said "Forget it. No matter what the plan says your proposal will never be allowed, because they just don't want any more people out here." I took his advice.

But many other people in the West Coast/Titirangi/Oratia area, have taken their effects-based plan seriously and have consulted with experts who agree. They spend large sums of money developing proposals supported by expert evidence and which appear to meet the policies of the plan. But then they hit the roadblock.

A letter from the Mayor makes the reality quite clear. On 11 July 1996 Mayor Harvey writes to another disgruntled resident:

52 Which is a splendid piece of architecture designed by Harry Turbot, and handsomely occupies a sensitive ridge. Many residents are puzzled by its position but are delighted that it is there. But how come their own houses are prohibited from ridges which are much less 'sensitive'?

> *Dear Mr Whittaker*
>
> *Your correspondence is reaching a level of anguish and personal abuse that I would have to say is now unacceptable. You are obviously vitally concerned with your own property and in the way Council is dealing with our District Plan. ...*
>
> *I believe this Council is setting a visionary and highly applauded plan second to none in New Zealand and so I am totally in support of what we are trying to do t**o save the Waitakere Ranges from subdivision.***[53] *It is as simple as that.*
> *....*
> *Mayor of Waitakere City*

And indeed it is. The Mayor is being true to form in that he has always been disarmingly frank and honest. Whether the foothills around Forest Hill Road are part of the Waitakere

Ranges is a moot point, but it seems that this letter honestly spells out Council's genuine policy which is to prevent all future subdivision in the ranges and their foothills. The plan tells a different story but my surveyor friend had obviously got it right and saved me and my friends from wasting a considerable sum of money and suffering dreadful frustration and mental anguish.

The Waitakere City Council plan is highly applauded from afar and the Mayor and Deputy Mayor are now on the international speaking circuit. The enthusiasm diminishes as one gets closer to home. The plan, as written, does deserve some praise. But it is not the **real** plan, which exists only in some wilful bureaucratic minds. The Mayor himself has found these double standards equally frustrating in his attempts to promote the area as a film location.

Once again someone needs to take control so that council and its plan speaks with a unified and comprehensible voice.

13 WHAT IS THE PRICE OF OUR 'SUBDIPHOBIA'?

13.1 New Section prices in Auckland

[53] My emphasis.[54] Typically the District and City Councils

There is now widespread agreement among builders, residential development companies and real estate agents that section prices in the Auckland region are out of reach of the first home buyer. They tell me that new sections are now reported to be averaging $120,000 which is almost 3.5 times the average Auckland household income, which is about $35,000. These figures can be debated. Naturally people with higher incomes will seek out more expensive sections in more expensive neighbourhoods. Lower income people will try to find cheaper properties in cheaper neighbourhoods. There may be new sections between $75,000 and $100,000 but they are very hard to find and there will be a good reason why they are so cheap.

But as best as I can establish the ratio of something over 3 to 1 is about right. New home buyers expect to pay about three times their income for a new section.

More importantly these new section prices are rising more rapidly than inflation and incomes, so that new house prices are moving steadily out of reach of more and more people.

I have argued that the reason for these high new section prices is that the supply of land is being rationed by the 'subdiphobia' which is so widespread among our politicians and bureaucrats. The situation is exacerbated by the high holding costs associated with the lengthy consent procedure.

The typical response to my arguments has been that I am talking nonsense and it is only natural that Auckland section prices should be rising steeply because:

(i) Auckland is such a big city

(ii) Auckland is such a rapidly growing city

(iii) Auckland has so many immigrants

(iv) Auckland is running out of land.

In reality of course none of these claims are true. Auckland is a middling sized city which is growing quite slowly and with no more immigration pressures than most major cities in the developed world. I have heard there is a city in China which is growing at the rate of 4 million people a year. Now that's a problem.

Of course Auckland is not running out of land. We are running out of land inside the Metropolitan Urban Limit. But that is simply a line which has been invented by the ARC so that their planners can claim that we are running out of land.

The answer is to get rid of the line, and eventually we will have to. The problem is that the poor who will have suffered from inflated section prices in the meantime will be hurt a second time round as section prices fall, once supply is freed up. The poor, as always, will have suffered the most during the rationing and will suffer again when rationing stops. The best sections will hold their value because they have some genuine scarcity. This is the present crisis in Portland Oregon where the city planners are finally having to release the city from their bondage.

The other arguments used to oppose my findings is that I have not proved that rationing land increases prices. Why should I? An engineer writing today does not have to prove that water does not run up hill. A surveyor does not have to prove that the earth is not flat. One of the few universal laws of economics is that if you reduce the supply of a product in the face of constant or rising demand the price of the product must increase. It is not a difficult concept to grasp.

But the enthusiasts for the management of urban form are convinced that their work will have a positive impact on economic efficiency but on the other hand refuse to recognize any economic effects which are less attractive.

13.2 New Section prices in Christchurch

The Institute of Valuers in Christchurch has estimated that as a result of that city's urban consolidation policies (which similarly ration land) the price of the typical sections in that city is, on average, some $30,000 higher than if a 'normal' land market prevailed. These increases have priced new sections out of reach of low to middle income earners according to the normal rules of thumb. The council's Growth Manager has recognized that this is an inevitable outcome of such policies but the Council's current response has been to intervene by subsidising low cost housing using ratepayers' funds. The city now wishes to bring much land into the market but realizes that this will take several years. The Canterbury Regional Council has opposed such expansion plans on the grounds that low density cities are 'unsustainable'.

If anything, the situation in Christchurch is worse than in Auckland because it is a single city within a single region and hence there is no competition between cities. Manukau City is trying to maintain a land bank and Papakura is trying to allow sensible subdivision. ARC planning staff continue to intervene to try and prevent such subdivisions, continuing to uphold their containment policies even though these policies have been officially abandoned.

Again, it is time for the councillors to take control.

13.3 New Section prices in Dallas/Fort Worth

13.3.1 The Dallas/Fort Worth Urban Economy

The US metropolis of Dallas/Fort Worth has a population of about 4.5 million.

The city is creating about 100,000 new jobs a year and its annual growth rate has been between 2% and 4% over the last decade. Because of its economic performance Dallas/Fort Worth is highly attractive to immigrants from the surrounding areas and from Mexico – both legal and illegal.

The average family income is about US$35,000 a year, or about NZ$60,000 a year at the present exchange rate. Mortgage finance costs about 7%.

Therefore if the pundits are correct a section for a new home buyer in Dallas/Fort Worth should cost at least three times the average household income of about US$105,000 or about NZ$180,000.

13.3.2 The First Home Buyer Market in Dallas/Fort Worth

The section at the bottom end of the market will have a 40 to 50 foot frontage and the new house will be about 1450 sq ft. The house at the top end of this market sector will be on a 55 to 60 ft frontage lot and be about 2,200 sq ft.

These houses will be timber framed with about 50% brick veneer, a fully landscaped front yard, six foot high cedar fence and all footpaths and driveways complete. The interior will be fully carpeted or vinyl covered, with oven/range, microwave, dishwasher and central heating and air conditioning.

13.3.3 The Medium/Average Market

The typical house in this market will occupy a lot with a 65 to 75 foot frontage with a total area of 8,000 to 10,000 sq ft. (Their sections tend to be more square while ours are narrow and deep.)

This house will have all the standard features of the low cost house but will be from 2,100 to 2,800 square feet and possibly larger. It will have ceramic tiles in the entry foyer, home security, a marble or brick mantle fireplace, and some vaulted ceilings and walk in wardrobes. A whirlpool tub in the bathroom and dual ovens in the kitchen are likely to be included.

13.3.4 What do these homes cost?

The 'first home buyer' low cost house with all the standard fittings and landscaping will typically sell for about US$115,000, within a range of from $95,000 to $125,000.

The section price will be about 20% of this price, which means that the first home buyer in Dallas/Fort Worth pays about $23,000 for the new section which is less than the average household income. The cheapest land will be about $17,000 or about **half** the average household income.

And yet in Auckland the typical low cost section is about **three times** the average household income! In these price/income terms the price discrepancy is about six to one.

Dallas/Fort Worth has no 'containment' policies. There is a plentiful supply of residentially zoned land and land can be brought rapidly from greenfields to titled sections.

Very simply, the councils of Dallas/Fort Worth do not ration their land.

The benefits are obvious.

14 THE IMPACT ON THE ECONOMY

Needless to say, the impact of these needlessly high prices on the people of Auckland and Christchurch and other cities which are adopting similar 'subdiphobia' policies is devastating.

Not only are New Zealanders being forced to live on sections which are either to large or too small but they are being required to pay a massive premium for the privilege.

The impact on the national economy is equally great. The Governor of the Reserve Bank has been arguing that New Zealanders invest far too much of the country's meagre savings pool in residential real estate. The reason we tend to do so is that over many decades of high inflation and an under-performing business sector, residential real estate and been the safest and most effective means of saving.

But we have also been paying too much. Furthermore those who have invested in large properties on the basis that they can liquidate their savings by subdividing now find that their savings have been destroyed by the stroke of a planner's pen.

The major residential development companies are now withdrawing from the market because the holding costs are so great and processing times so long that the risks of releasing overpriced sections into a stagnant or falling market are too great. Hence the under supply is likely to get worse before it gets better.

The need for reform is urgent.

15 HOW WOULD IT WORK?

We have become so used to using subdivision rules as planning tools that many find it hard to imagine a system operating sensibly without them. But a simple piece of legislation could control the subdivision process and would contain a few rules relating to land use and environmental effects. These rules would address two major issues.

First one section of the legislation would **prohibit** councils from setting minimum or maximum lot sizes. The subdividers would have to judge the preferences of the market.

A second section **require anyone** proposing to subdivide land to have regard for the bulk and location and other performance standards laid down in the other legislation controlling land use, activity and effects.

This would mean that sections would have to be large enough to accommodate a house within the simple bulk and location and other rules laid down in the plan. However, a proposal for a comprehensive development could still be designed to deal with performance standards and be totally effects based, thus encouraging innovation.

For example if stormwater and sewage treatment standards are based on an existing technology and the subdivider is working with a developer who has new technology to deal with such matters then the proposal can take the new technology into account.

The legislation would prohibit the use of subdivision control as a means of managing environmental effects.

This might mean that a new section in Auckland could cost less than the average household income.

It is surely worth a try.

16 CONCLUSIONS

(i) **The control of subdivision must become independent of land use and other planning activities.**

(ii) **The process needs its own legislation so that councils cannot impose arbitrary restraints on the supply of sections to serve 'higher order' planning goals.**

(iii) **The 'higher order' goals are without foundation.**

(iv) **The rules do not work and the outcomes are damaging to every sector of the economy.**

(v) **The poor, the homeless, and the unemployed are the major victims of these misguided policies.**

(vii) **Present practise is wiping out lifetime savings and preventing farmers from funding diversification.**

(vii) **The need for reform is urgent.**

(viii) **Contestability will be an immediate benefit while major reforms are implemented because councils are abusing their monopoly power.**

PART 3

INTEGRATED MANAGEMENT

An organisation is effective only if it concentrates on one task. Diversification destroys the performance capacity of an organ-ization, whether it is a business, a labour union, a school, a hospital, a community service or a house of worship. Society and community must be multidimensional; they are environ-ments. An organisation is a tool. And, as with any other tool, the more specialised it is, the greater its capacity to perform its given task.

Peter Drucker
Managing in a Time of Great Change
Truman Talley Books/Dutton, New York, 1995.

1 INTRODUCTION

Sections 31 and 31 allocate responsibilities between Regional Councils and the Territorial Local Authorities,[54] which they encompass. The legislature seemed to have no clear idea of what their relative roles should be and this confusion is reflected in a lack of clarity in the Act which has generated overlapping tasks, duties and responsibilities. Such overlaps offend against all principles of good management.

2 POLICIES AND PLANS

Regional Councils are required to produce Regional Policies while District and City Councils are required to produce District Plans. However, there is also provision for Regional Councils to produce Regional Plans, possibly to cover the situation where no District Council exists.

Section 30(1)(a) requires that the Regional Councils should achieve **integrated management** of the natural and physical resources. Some, but not all, Regional Councils have assumed that this means that they are responsible for **the actual management** of natural and physical resources (rather than leaving this function to the private and civil sectors).

Some have also taken this phrase to mean that they are 'super planners' who integrate the total social, economic and cultural activity in their region.

People are prone to create hierarchies, even where none need exist. The uncertainties in the legislation have encouraged some regional councils to see themselves as the 'super planners' who oversee the activities of the lesser district and city councils. They believe this permits them to intervene in city and district affairs when they believe they know best.

The legislation certainly does not prohibit such activity and can be interpreted to endorse it.

The Ministry for the Environment's document *People, Policies and Plans,* published for 7th formers, gets this right. Its diagram of the governing functions and organisations under the RMA shows the regional councils and the territorial local authorities (TLAs) occupying the same 'layer' in the hierarchy. They have equal power but presumably different responsibilities.

The difference between these two views of the world is stark.

In the 'super planner' model the regional council has the same skills, duties and responsibilities as the TLAs but operates at a higher level of authority.

In the second 'partnership' model the regional councils and the TLAs have different skills, duties and responsibilities, but neither has rank over the other. I suspect that in most

jurisdictions both models exist in the minds of different people to different degrees of purity. The outcomes of the super planner model are costly, confusing and inequitable.

For example, some regional councils have made a regular practise of objecting to routine consent processing by their district and city councils. When these cases are appealed to the Environment Court the Court has frequently chastised the regional council and even awarded costs against the regional council. But of course the regional council recovers these costs out of a levy imposed on the district or city.

This is clearly unjust and provides no restraint on regional councils' repeating this behaviour because it continues to be without cost.

This seems to represent a situation where clear legislative prohibition is required. Many families, with plans to subdivide, abandon their plans on the strength of a phone call from a regional council planning officer advising that the application will be opposed right through to the environment court. For most people the prospect of such high costs forces them to withdraw.

3 WHO MANAGES THE RESOURCES? (AGAIN)

3.1 Management of Resources or Effects?

Subsection 30(1)(a) which deals with the functions of regional councils reads:

> *The establishment, implementation and review of objectives policies and methods to achieve* ***integrated management***[55] *of the natural and physical resources of the region.*

The equivalent clause in Section 31 (relating to the functions of territorial local authorities) reads:

> *The establishment, implementation and review of objectives, policies and methods to achieve integrated management* ***of the effects***[56] *of the use, development, or protection of land and associated natural and physical resources of the district.*

This implies quite strongly that the duty of the regional councils is to **manage the resources themselves** while the duty of the TLAs is to manage only the environmental effects.

Is this what Parliament really intended? If so then we seem to have set up the potential for a soviet style economy where an arm of local government has been given the power to manage all the resources of the region. Given that we must presume that the resources will remain in private ownership for the most part this is more akin to the fascist economy where property remains in private hands but must be used only to serve the purposes of the state. At least the socialists were more direct – they promoted state ownership as well.

3.2 Management of Activities or of Effects?

Even setting aside the difference between resources and effects, these two clauses are subject to two quite different interpretations. One interpretation presumes that councils know how to allocate, direct and control the economic and other resources of the region.

55 My emphasis
56 My emphasis

The other is that the market is most efficient at this task and the job of the councils is to manage the environmental effects.

While the Act takes a stand in favour of the second interpretation in Section 5, we have already seen (In parts 1 and 2 of this Report), that this stance is muddled and confused by further sections and definitions encourage the first 'TCPA' interpretation.

3.3 The Push Towards 'Comprehensive Planning'

Furthermore, the Act is implemented by many who regard 'integrated management' as no more than an updated version of 'comprehensive planning'. Indeed there is an international movement to promote the notion of 'Strategic Environmental Assessment' (SEA) as it is sometimes called. McKenzie[57] records that SEA has been defined as:

> *The formalised systematic and comprehensive process of evaluating the environmental impacts of a policy, plan or programme and its alternatives, including the preparation of a written report on the findings of that evaluation using the findings in publicly accountable decision making.*

The general thrust of the article is that the RMA and Section 32 is too narrow, and that 'Strategic Environmental Assessment' should be part of a process which allows planners to decide whether an application for use is the **best or most appropriate,** or whether it should be rejected in favour of some alternative which has been identified through the processes of their comprehensive review. I find it strange that the idea of such 'comprehensive' planning has resurfaced in the late nineties. I thought it had been mortally wounded by the time I had completed my graduate studies at Berkeley in the late 60s, and had been well and truly buried under the debris of the Berlin Wall.

Such SEAs are part of a process of controlling and directing the use of land. If they are incorporated into an RMA process we reintroduce the whole philosophy of the TCPA. Of course, for many that is either the implicit or explicit aim. Centralist planners are like rust – they never sleep.

3.4 Sustainable Management or Sustainable Development?

57 See Stephen McKenzie, Strategic Environmental Assessment and Section 32 of the RMA, *Resource Management Bulletin*, July 1997 pps 41 - 43.

The concept of 'sustainable management' can also be extended to promote a wider agenda using the definition of 'sustainable development'.

Professor Fudge, Dean of the Faculty of the Built Environment, UWE Bristol, was the keynote speaker at this year's IPENZ conference, *The Sustainable City.* The Professor strongly advocated central and comprehensive planning as the only way to solve our environmental problems. His preferred definition of sustainable development was as follows:

> *Sustainable development is development that delivers basic environmental, social and economic services to all residents of a community without threatening the viability of the natural, built and social systems upon which the delivery of these services depends.*

This definition of sustainable development is a long way from the definition of sustainable management in the Act, and yet I am sure it is the definition that many councils have in mind when they interpret and administer the legislation. Notice that this definition (produced by the International Council for Local Environmental Initiatives - 1994) claims that sustainable development **delivers** all these outcomes but is not clear as to who is in charge of the delivery. Our own Act puts these functions in the hands of the people. Judging by the number of committees of which Professor Fudge is a member, he, like many in Europe, seems to believe that only endless committees can keep the wheels turning rather than accepting that the modern democratic society, and its economy, are almost totally self organising and self regulating systems.[58]

Those who believe in this 'European' central planning model, interpret Section 30 as granting regional councils a mandate to **integrate the management of all aspects of the economy** in order to achieve desirable management of environmental effects. The further implication is that TLAs (and presumably their staff) are **below** the regional councils in the planning hierarchy and hence their activities need to be 'integrated' by the superior wisdom of the regional councils above them. In some regional council offices the term 'integrate' or 'integrated' surfaces so frequently in conversation that visitors might well believe they have stumbled into some conference on social calculus by mistake.

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58 These committees and their members seem to be on an endless tour but their conclusions always seems to be, as in the last sentence of Professor Fudge's paper that "cities cannot be sustainable if the inhabitants live unsustainable life-styles." The other inhabitants, presumably, not the members of these Brussels and Geneva based committees.

4 DEVELOPING REGIONAL STANDARDS

4.1. Environmental Standards the Key Role

An alternative view is that the Regional Council has no planning function as such, but should focus on generating appropriate environmental standards for the region. Regional councils' only 'integrating' function would be to ensure that these standards are

administered with some degree of uniformity by the TLAs within the region. For example, a regional council should ensure that a river which runs through several districts or cities within the region should be evenly treated so that stringent controls on one stretch of the river are not undone or made meaningless by less stringent controls above or below the discharge.

This model presumes, quite sensibly, that national environmental standards are less appropriate than regional standards for a country like New Zealand. For example, air contamination standards for Christchurch should clearly differ from those applied in Wellington.

A common complaint is that central government has not laid down environmental standards for air water and soil etc. Maybe this complaint should more fairly be directed at the regional councils.

Under this model regional councils have no role in administering applications but would limit their functions to overseeing the application of standards, and should delegate any implied responsibilities in these areas to local councils.

The present confusion of roles, duties and responsibilities promotes many anomalies.

4.2 Septic Tanks vs Cow Shed Wastes

Farmers in Wellsford (within the territory of the ARC) can build a house and have their septic tanks approved and monitored by the local office of Rodney District Council. A local inspector who knows the territory and the soil can visit the site, walk over the land and talk through the proposal, offering alternatives and recommendations in consultation with the owner and the local tradesmen. The costs of such local administration and monitoring are low.

Yet the same farmer who wishes to install a system for processing the dairy waste from the cowshed has to apply for a discharge consent from the ARC, whose offices are near upper Queen Street in central Auckland.

Farms and their cowsheds come in all shapes and sizes, occupy different soils, and operate within widely differing topographies. In order to deal with this reality, coupled with the remoteness of so many of the installations, the ARC has prepared a 'planning' document which is almost as thick and as detailed as some district plans. Because the specification has to deal with so many contingencies it contains a host of rules relating to slopes and other physical characteristics. But real ground does not have a slope of precisely 15 degrees, in only one plane.[59] The human brain is the best integrator of such variables we know of, and an experienced engineer walking on the land and knowing the territory can reach a decision in a few minutes which no book of rules can begin to match.

Surely, the Regional Council should lay down the environmental standards (along with some proven means of compliance in the manner of the building codes) for dealing with dairy waste, and then leave it to the TLAs to administer those standards, just as they presently administer the installation of septic tanks.

4.3 Encouraging Innovative Technologies

This approach would also encourage innovation. The present ARC document for treating Dairy Waste established the best known technology as a 'permitted use', but requires that new technologies (as 'uses not provided for') be treated as non-complying or similar. This puts a high price on innovation as was discussed at length in Part 1.The argument in Part 1 applied to buildings and general development but applies equally well to waste management and similar technologies.

Ironically the ARC had hardly published its document when *Landcare*[60] came out with a totally novel system based on new principles. This new taxpayer-funded innovation will now face the barrier of the cost of being a 'non-complying activity'. We do not need such tariffs on innovation.

59 Just as all coastlines are of the same length - infinity. The length normally measured depends on the length of the ruler. The shorter the ruler, the longer the length.

60 One of New Zealand's Crown Research Institutes 61 Which is about the same as here in New Zealand 62 I am indebted to Randall O'Toole of the *Thoreaux Institute* of Portland Oregon, for making available this description of neighbourhood associations which is part of the Insitute's *People 2000* programme which proposes a range of alternatives to regulatory planning. Randall O'Toole is not to be confused with James O'Toole, the highly confused comunitarian whose 'thoughts' are evidently popular among many within the planning profession.

By producing these 'standards' as part of the RMA process the problems of introducing and trialling innovation have probably been hugely increased. It does not take long to change a standard or a means of compliance in the building industry, and the analysis will focus on technical issues. Changing a planning document takes years and the debate involves all and sundry and is probably more open to anti-competitive lobbying.

5 SEPARATION OF SKILLS AND POWERS

Because the regional councils have special duties to protect air water and soil they quite properly employ specialists in these fields. However, because regional councils become deeply involved in planning functions the staff with these specialist skills become involved in the planning and the implementation of plans. A clear separation of skills would allow these specialists to develop standards and stick to their knitting, while the properly qualified resource administrators would prepare, administer and monitor the resource management plans.

At present some regional councils spend much of their time objecting to minor TLA consent applications which are more to do with the management of the effects of the built environment in general rather than enforcing environmental standards relating to soil water and air. (See Part 1 and Part 2) It is difficult to see that minor subdivisions are of regional importance and deserve the attention of three or more regional planning staff. These submissions massively increase the cost to the applicant who has to meet the costs of the hearing which is greatly extended because of the long winded evidence these officers prepare.

6 THE PROPOSED ROLE FOR REGIONAL COUNCILS

Regional councils should focus on:

(i) surveying the region to help identify the issues which the District Plans should deal with;

(ii) establishing environmental standards for those issues,

(iii) monitoring the environment to check on the success or otherwise of the implementation.

TLAs should administer all consents under delegated authority from regional councils where appropriate.

This would represent a major reform of the relationship between the regional councils, the TLAs and the people. But it would make sense and would reduce the costs of the huge duplication of effort and the present confusion of roles which are the result of contradictory approaches by these two tiers of organisation.

This reform would eliminate the notion of a hierarchy of skill, knowledge and power and would replace it with a separation of function based on responsibility, duty and skill.

The Regional Councils would have **no** function in the management of the effects of the built environment. This duty would be totally devolved to the TLAs.

The administration of subdivision would also be entirely managed by TLAs.

Certain aspects of the Heritage, Kaitiakitanga, Historical and Archeological legislation could be managed by the Regional Councils, in conjunction with any appropriate Trusts, and neighbourhood organisations, but the sites would be designated within District Plans. This would complement regional council's traditional role in promoting regional parks and reserves.

6 RECOMMENDATIONS

(1) The confusion between the roles of the regional councils and the TLAs must be resolved.

(2) The two organisation should be equal in status but have clearly differentiated roles, duties, responsibilities and skills.

(3) Regional councils should have no planning functions.

(4) Regional councils should:

(i) identify environmental issues affecting the region

(ii) generate regional environmental standards suited to each region

(iii) ensure that TLAs properly administer these standards within their plans

(iv) monitor the regional environment to check performance

(5) Regional Councils should administer, or be involved in, the Heritage, Kaitiakitanga, Historic Places and Archeological
sites legislation in conjunction with any appropriate Trusts and
other neighbourhood organisations.

(6) All consent processing should be dealt with by TLAs, or private organisations.

(7) The TLAs and private companies who operate could draw on Regional Council expertise, as necessary.

(8) Regional councils should be able to appeal only decisions involving the failure to properly administer environmental standards.

(9) The present overlap in functions, duties, tasks and responsibilities offends against every principle of good management. This causes confusion and excessive costs.

(10) The need for reform is urgent.

APPENDIX ONE

THE DIVERGING INTERPRETATIONS OF SECTION 92

Section 92 determines what information councils can seek prior to a hearing. The subsection relevant to this discussion reads:

> *(4) Further information my be required under this section only if the information is necessary to enable the consent authority to better understand the nature of the activity in respect of which the application for a resource consent is made, the effect it will have on the environment, or the ways in which any adverse effect may be mitigated.*

This section places limits on the information which can be required to be provided. Note that while the consent authority may require information to understand the activity itself (i.e. a supermarket, hotel, or power station) nothing in the subsection appears to allow councils to enquire as to how the activity actually works. In other words nothing would appear to allow councils to delve inside the 'black box.'

And there is no need to. If the applicant claims that its 'black box' will saw wood, or will grow tomatoes or will generate power without infringing council's environmental standards, then that is all a council needs to know. If the saw mill is built, or the tomatoes grown, or the power station switched on, the council must monitor the effects. If the activity breaches the rules then council can close the plant down.

However, many councils are enthused by the precautionary principle (to which the Act makes no reference) and hence set out to collect information to prove that the saw mill, tomato farm or power station **will never fail.** In other words the applicant must prove absolute safety.

Some councils (and Wellington Regional Council commendably is one) have realised that delving into the 'back box' is not only *ultra vires* this subsection but also that by implying a 'guarantee of perfection' councils expose themselves to a wide range of liabilities. Many staff believe that by collecting massive information they are protecting councils against civil actions. In reality they are increasing their exposure.

The following pages are a sample of questions asked of Olivine prior to the council hearings. These questions delve deeply into the 'black box'. If a company wishes to keep its technology secret it is difficult to see how it could begin to enter such a process. Many of the questions require remarkable detail, some of which is no more than standard engineering practise. The company had only a couple of weeks to respond.

Does a council really need the engineering specifications for a pipe before it can grant a resource consent? Remember too that the applicant pays for these questions to be asked.

APPENDIX 2

A GENERAL DISCUSSION OF THE REGULATION OF THE SUPPLY OF LAND

1. The Supply and Demand of Land, and Related Issues

1.1 Supply of Land and the Supply of Sites

Simple ‘primer’ economic texts often present the case that land is a unique factor of production because, being a "gift of nature’ the supply of land is fixed. Many administrators and commentators, therefore, fail to distinguish between the availability of **raw land,** which is fixed, and the supply of serviced, ready to occupy, **building sites,** which is not.

The ‘natural resources’ such as land, water and air, are frequently subject to similar misunderstandings and those who stand to benefit from their commercial exploitation tend to attract more than the normal levels of adverse critical comment. Similar arguments are frequently applied to land and those who trade in it. Many district plans appear to take a hostile attitude to subdivision listing all the effects of subdivision as adverse in they necessarily degrade the environment. Few of these documents appear to recognize that the main ‘effect’ of subdivision is to provide a section which people can buy, and on which they can build a house in which they can lead their lives.

In *Power and Market,* the economist Professor Murray Rothbard points out that:

> *The developers of raw land perform an important productive service. They bring sites into use and allocate them to the most value-productive bidders.*

The total stock of raw land may well be fixed at any time, because (to the delight of real estate agents ever since) Mark Twain observed, “they are not making any more of it”. In the case of sections or lots, as with all other goods, it is not only the physical goods which are sold, but also the bundle of services which accompany them. Genuine ready-to-occupy building sites, with accompanying certificates of title, zonings, services, and street frontages do not exist in nature; they must be provided to the user by the owner/developer. Rothbard notes:

> *The view that bringing sites into use and deciding on their location is not really 'productive' is a vestige of the old classical view that service which does not tangibly 'create' something physical is not 'really' productive. Actually, this function is just as productive as any other, and a particularly vital function it is. To hamper and destroy this function would have grave effects on the economy.*

Many District Plans appear to be based on the curious assumption that the process of residential subdivision takes productive land out of meritorious primary production and irreversibly commits it to some trivial, unworthy and polluting use, such as providing sections for families to live on.

1.2 Costs of Supply of Land

The owners of land who decide to subdivide must meet many costs along the way. These include the following:

(i) surveying the land,
(ii) building the roads,
(iii) providing for infrastructure services,
(iv) providing water supply, drainage, and sewerage.
(v) sales and marketing
(vi) interest and other finance charges
(vii) taxation
(iix) legal costs associated with title.
(ix) professional design and engineering fees
(x) general administration

In developed economies, subdivisions require some form of consent under some form of town planning or land use legislation. In New Zealand this procedure, under the RMA, generates a further package of costs which may include, for example:

(i) specialist reports on environmental impacts,
(ii) consultation with adjoining owners and iwi,
(iii) applications for consents under the District Plan,
(iv) dealing with the process of objection and appeal,
(v) reserve contributions (either in land or in cash).

While these costs of physical development and Resource Management Consents are met by the developer or subdivider, they are finally passed on to, and met by, the final purchaser of the land or the house which has been built on the site. If not, they must be absorbed by the developer at the cost of reduced profits. Most Council budgets reveal that many of the costs of administration of the RMA are met out of the general rate. Hence, increases in these procedural costs directly contribute to the CPI, either as housing and construction costs, which are met by the purchasers, or as government charges, which are met by ratepayers.

1.3. The Time Costs of the Process

In addition to these direct costs, the developer or subdivider must meet the holding costs incurred during the process of gaining consents and carrying out the work. These can be significant, especially as the process of moving land from the 'greenfields state' to a fully serviced section, ready for sale, can be a long one. Manukau City records that this process typically takes at least six years, and endeavours to maintain a land bank of six years supply in recognition of this state of affairs. Recent Planning Tribunal hearings in New Zealand have dealt with cases in which rezoning procedures alone, have taken over eight years. Even if the land is freehold to begin with, the opportunity costs associated with such delays are significant and must finally be met by the end user. Such lengthy procedures are particularly sensitive to the costs of finance.

If these costs are believed to be excessive, subdividers or developers will be discouraged from even beginning the process. This factor becomes increasingly important if the final outcome is highly uncertain. It may well be worth spending $200,000 on application procedures if a positive outcome is reasonably certain, and if this level of certainty can be established early in the proceedings. On the other hand, if the probability of the outcome cannot be determined until considerable time has passed, and when most of the budget has been spent, then the risk of starting the process becomes much higher.

Casual observers frequently regard land subdividers as lucky folk who have been handed immense wealth without any effort of their own, and who have profited by urban growth, which is generated by the activities of 'the community'. But for every subdivision project which is highly profitable there is likely to be one which mis-timed the entry to the market, and found the profits dissipated by the interest costs associated with holding unsold, fully-developed sections for months, or even years. Contrary to popular belief the process of subdivision requires a considerable measure of skill, know-how, tenacity, and entrepreneurial drive.

1.4 Dynamics and Supply

The speed with which land can be brought to market has an effect on costs as noted in paragraph 1.3 above. The dynamics of supply have a further potential impact on inflation, which is independent of these costs.

If there is an increase in demand for land in a city and no new land can be made available within a reasonable time, then the demand for existing sections increases, and prices will rise on all available sections. Unlike price rises, which are a direct response to increased costs incurred during the development process, these area-wide price increases reflect the increased scarcity value of the serviced land itself, and will be reflected in all section prices in the area, and not just the price of developers' land waiting to be brought to market. When the new land is brought to market its prices will influence other prices. If land remains scarce then it may raise 'the benchmark'. If the new land relieves a major shortage it may reduce prices overall. Or it may do both at once, which is commonly observed when new office accommodation is built. It may set new standards and hence a new high price, but at the same time the prices of available office space in older buildings will fall.

The 'scarcity effect' is possibly the most damaging outcome of a shortage of sections in the face of increased demand. **Therefore local government has a responsibility to ensure that its actions do not prevent an adequate supply of land being available to meet rapid and unforeseen increases in demand.**

1.5 The Different Status of Available Land

The land and sections available to meet demand will be in a variety of readiness and will typically include:

(i) existing vacant sites, ready to occupy – the "on demand" supply.
(ii) infill subdivision sites.
(iii) rural or other fringe land which is in a greenfields condition but which can be made ready for occupancy at short notice.
(iv) Greenfields land intended to be fully serviced and incorporated into the urban area.

The "On-demand" supply may include:

(i) infill and higher density sites, already approved and ready for building. (e.g. a large backyard subdivided and ready to receive a new bungalow or a group of town-houses titles which have replaced an old single family home.

(ii) vacant sites, scattered throughout the area which may have been held as investment properties but which become available for development as prices rise.

(iii) developed sites which become available for clearance and redevelopment as land prices rise.e.g. the holiday bach which is cleared for a new house.

(iv) existing major subdivisions with sections remaining on the market.

This land in the "on demand" category may be able to respond to increases in demand sufficiently quickly to avoid any adverse impact on the CPI, provided that regular land and building consent times are not excessive. Furthermore, this is the only land which can be **guaranteed** to be immediately available to the market.

1.5.2 Land potentially available within the medium term – say six to eighteen months, may include:

(i) Infill sites in neighbourhoods which have been zoned for infill housing, but not yet subdivided.

(ii) Land in rural or coastal fringe areas which has been zoned for residential purposes and which can be subdivided with minimal servicing. (i.e. with sewage treated and water collected on site.)

There can be no guarantee that in-fill sites will prove to be available. The recent increase in demand in Auckland led to a boom in in-fill development which caused an intense backlash against such in-fill development, even though the new District Plan had dramatically reduced the number of sections ‘zoned’ as being suitable for such treatment. Similarly, the proposed North Shore City District Plan zoned large areas of the peninsula for a higher density (three story) residential development zone but was forced by public pressure to retrench this zone to a few nodes of urban, as opposed to suburban, development. There has been a similar reaction against in-fill housing in Christchurch, which can be expected to increase rather than diminish over time.

One advantage of sections in rural, bush or coastal areas, is that they require little servicing. The owners expect to be serviced by metal roads, and to collect their own water, treat their own sewage and deal with their own drainage. If this land is ‘locked up’ under a strong conservation ethic, one of the most flexible channels of supply is lost to the marketplace.

1.5.3 Land available in the long term – say 18 months to two years – which may include:

(i) infill sites in neighbourhoods which have not yet been zoned for infill housing.
(ii) Land which could be zoned for higher density with a review of the District Plan.
(iii) Greenfields land which has not been zoned for residential use and which will require full servicing. (Land in ‘urban growth corridors’ etc.)

In the present regulatory environment, land which has not been zoned for new residential, or infill use, cannot be depended on to respond rapidly to an increase in demand.

It would seem to be sound public policy for any city to ensure that there is at least two years supply of on-demand residential sites, and a total supply of six years or more of land "zoned" for residential subdivision and development. Infill housing can make some contribution to this ‘land-bank’ but should best be regarded as available to deal with the margin oferror in forward estimates of growth rather than as a solid and reliable source of supply. **Councils should not ‘plan’ to make this happen. They should ensure that they do not prevent it.** There is no need to balance supply against demand. Just let the market operate.

1.6 The Vicious Cycle

Unless sufficient sections are available and ready for occupancy, an increase in demand can lead to a vicious cycle, whereby, at the end of the cycle, the land-bank is no better supplied than at the beginning. The following scenario illustrates the process:

(i) An increase in demand leads to a sharp increase in prices.
(ii) Landowners consider subdivision which these high prices have now made viable and begin the application process.
(iii) The high prices impact on the CPI and boost inflation.

(iv) The Reserve Bank moves against the inflationary trend and interest rates rise.
(v) The higher interest rates and the dampening of the economy combine to persuade land developers that the financial risks are too great and they withdraw their applications.

In addition to the sequence spelled out above, the sudden impact of a rash of new higher-density house construction within the established urban environment may lead to resident groups mobilising to stop the process using all the legal devices and political processes at their disposal. The result (as occurred in Auckland City and North Shore City) may be the 'down-zoning' of large areas of the city and a real reduction in the supply of sections available next time round.

When increases in demand lead to sudden escalation in section prices, real estate agents report that it is not uncommon for vendors to remove land from the market because "it is now such a good investment". The real estate market demonstrates some unexpected patterns of behaviour. We should be wary of declaring these activities to be 'irrational'. Such decisions often reflect the values and dynamics of the family, an institution which is as subtle and complex as any other economic market-place. A North Shore City survey revealed that as general economic conditions rose and land values increased accordingly, the number of people willing to release their back yards to the market for in-fill housing diminished rather than increased as a simple demand equation would have indicated. The residents valued the ongoing amenity value of the land rather than its short term value as a sold asset.

2 The Costs of Land Regulation

2.1 The Efficiency Costs of Land Regulation

Economic efficiency requires that all participants in a market face the same marginal costs. This cannot be the case in the land market, which has always been regulated to some extent. In particular, those who happen to own land which is already subdivided under earlier regimes, have a great advantage over those whose land remains unsubdivided. While there may be reasons to control the large scale development of land, economic efficiency requires that the costs of such control be kept to a reasonable minimum. Otherwise serious misallocation of resources must result.

2.2 The Equity Costs of Land Regulation

When land is regulated so as to limit the ready availability of new sites, a monopoly privilege is granted to those who already occupy subdivided and serviced land. If local authorities choose to force land out of the market on the grounds of conservation or heritage values, they should be aware that their actions inevitably lower the supply of sections available on the market, and just as inevitably confer a monopoly gain and a restrictionist price on the existing landowners. These existing ‘monopolists’ are frequently able to identify themselves as ‘the community’ at any subsequent District Plan or Resource Consent hearings, and are understandably highly motivated to protect their monopoly interests.

Hence, the regulation of land creates winners and losers. Those who already own land will benefit from increased capital value and will tend to encourage and support moves to impose even more restrictive zoning in their own neighbourhood. Council officials are well aware that the most vociferous ‘guardians of the coastal environment’ are frequently those who already own their beach house. Some may find the consequent increase in rates to be a burden, but the increased capital value, and hence borrowing power, is frequently an adequate compensation. On the other hand, those who lose are those who are standing, unseen and unheard, in the wings, waiting to buy a piece of suitably zoned and serviced land. They are required to pay more to enter the market, and may indeed be priced right out of it. Such people typically include:

(i) young people leaving home and wanting to set up their own household.
(ii) newly married couples wishing to build a house in which to raise a family.
(iii) those who seek to leave a family unit because of divorce or violence and set up a new home.
(iv) those seeking to build the traditional New Zealand bach or crib for weekend or holiday use by the family and friends.
(v) those seeking a change in life-style or occupation.
(vi) immigrants, from within or outside New Zealand.

2.3 Costs of Lost Activity

Procedural costs should be kept to a minimum in order to minimise the most difficult to measure, and yet potentially the most important negative effect, which is the cost of withdrawal from the land development and construction process. If high procedural costs, or the risk of incurring such costs, deter potential applicants from even beginning the process, then the losses associated with buildings not built, land not subdivided, premises not let, and offices, shops, factories and houses not put to good and efficient use, can be much higher than any of the costs which are, or can be, actually measured. A significant increase in costs and risks associated with applications for building and development may deter people from undertaking building and development.

2.4 Conclusion – Regulation of land should be Light Handed

There has never, in any society on record, been a completely free market in land. Even during the most *laissez faire* period of 19th century England, brothels were not permitted to be built opposite the front door of a church. New Zealand is not about to abandon all controls over the use of land.

Well established economic theory demonstrates, however, that excessive regulation of land imposes significant costs on the economy as a whole, and fails to serve both efficiency and equity goals. Even in the absence of statistical, or even anecdotal evidence, there are sound economic reasons to avoid unnecessary or ill-founded restraints on the supply of land. On the contrary, both evidence and theory strongly indicate that regulation should be as light-handed as possible.

Those who administer such regulations must be made keenly aware of the costs of such regulation and of how and where they fall.

3 Conservation laws

3.1 Saving for the Future

Conservation laws aim to restrict the use of depleting resources and to force owners to invest in the maintenance of replaceable "natural" resources or to invest in maintaining sustainability. The effect of both cases is similar: present production and use is restricted by regulation for the supposed benefit of future production and use.

One outcome of such conservation laws is to force the ratio of consumption-to-saving down to a lower level than the market would prefer. In short, governments decide that the present generation must be forced to allocate more of its resources to the future than it otherwise would do. Presumably these valued resources must be used at some time, and some balance must always be struck between present and future production. Rothbard asks:

> *Why does the claim of the present generation weigh so lightly in the scales? Why are future generations so worthy that they can compel present generations to carry a greater load? What did the people of the future ever do to deserve such privileged treatment? Indeed, since future generations are likely to be wealthier than those of the present, the reverse might well apply.*

Will our District Plans, on some future day, finally decide that the 'the future generations' have finally arrived, and that these stored up resources should become suddenly available for their use? Or, as Rothbard argues:

> *Do 'the future generations' always retreat to a more distant time, so that the benefits never accrue to anyone? There can be no rational basis for penalising consumption in one 'present', while granting privileges to a single future 'present'. There is even less reason to restrict all 'presents' in favour of some 'future' that can never appear, and which lies always beyond the horizon.*

The Limits to Growth published by the "Club of Rome" predicted, in 1972, that the world would:

-- run out of gold by 1981.
-- run out of mercury by 1985.
-- run out of tin by 1987.
-- run out of zinc by 1990.
-- run out of oil by 1992.
-- run out of copper by 1993.
-- run out of lead by 1993.
-- run out of natural gas by 1993.

In reality all of these natural resources are now cheaper, in real terms, than they were in 1972, which is clear evidence that rather than depleting resources these are all more plentiful than they were in 1972.

3.2 Tomorrow's Soils

Many conservation laws focus on the need to conserve farmland because of a widespread perception that 'we are running out of land'.

This perception is probably based on the the fact that, historically, cities were built in fertile valleys because it was essential that the population lived in close proximity to arable fertile land. In the days before refrigeration and other means of preservation and sterilization food had to be brought to the market within hours. In spite of the fact that refrigeration and high speed transport have largely severed these links, these attitudes and beliefs are deeply ingrained among the citizens of many cities all around the world, and appear in many planning documents.

When people buy their food and produce from a modern supermarket chain they are unlikely to know where these products have come from. Most people also underestimate the contemporary use of soil within the confines of heavily built up urban areas. The Chinese are able to produce much of the food they eat within their own city boundaries, because they are expert at using every piece of unused ground, including window boxes and roof gardens. The once splendid gardens of Christchurch reflect the fact that the 'Garden City' occupies fertile soil. Home gardens make a major contribution to many dining tables – especially among the retired. Home gardens were an important source of food to the people of Britain during WWII – encouraged by the 'Dig for Victory' campaign.

The Minister for the Environment argued against the narrow focus on 'productive farmland' as being the sole legitimate use of soil in his address to the Planning Institute Conference of 1995, where he said:

> *With the changing use of soils and the growing recognition of the potential of non-elite soils (grape growing is a good example) this argument [the need to protect good soils] is starting to lose its traction. The emphasis now is more on the versatility of soils to retain choice for future generations. It is not to assume these soils must be retained for food production. Yet the Planning Tribunal has indicated that the loss of rural land for food production still concerns them. As Section 3 of the Town and Country Planning Act can no longer be used as a justification for this view we now see a reliance on the protection of the life supporting capacity of the soil and a need to ensure future generations can produce food.*
>
> *I can't see how we can sustain this argument today. Retaining access to local food supplies is not something that is or should be planned for. The food production sector is undergoing relentless change as new technologies and production systems are introduced.*

Indeed if cities around the world set out to produce all their food needs in the immediate environs, New Zealand's agricultural sector would be in serious difficulties. There can be no good reason to impose a discipline on ourselves which we would oppose if acted upon by others.

3.3 Who Makes the Decisions?

Any discussion among those who administer the RMA will soon revolve around 'Who should be given the right to do what?' Environment Court judges spend much of their time pondering whether the planning process has bestowed its benefits on those who most deserve to receive them. Sometimes they draw on some economic theory, or will attempt to distribute justice. Hayek points out:

> *Nor must the classical formula be interpreted, as is it sometimes is, as referring to what is called 'distributive justice' or as aiming at a state or a distribution of things which, apart from the question of how it has been brought about, can be described as just or unjust. The aim of the rule of law is merely to prevent as much as possible, by drawing boundaries, the actions of different individuals from interfering with each other; they cannot alone determine, and also therefore cannot be concerned with, what the rules for different individuals will be.*

These matters of allocation and distribution become even more contentious when applied to 'the needs of future generations'. The Minister for the Environment has seen these processes at work, and is suitably disturbed by them. He observes:

> *One [Tribunal] decision I am aware of, went so far as to refuse consent even though the lot proposed for residential use was conceded to be presently unsuitable for agricultural purposes. But the judge went on to muse that economic conditions might change in the future, and, given its high quality soils, it had a sufficient potential value for primary production for him to disallow residential use.*
>
> *In another instance ... a proposed commercial use of rural land, already used for lifestyle purposes, was turned down because it would have made its reversion to an agricultural use even less likely [in future].*

3.4 The Limits to Knowledge

Richard Epstein, Professor of Law at the University of Chicago and Editor of the *Journal of Law and Economics,* argues that good law comes out of Judges ruling on the facts before them, while refusing to be trapped into believing, or being required to assume, that they possess unique wisdom about complex activities within the modern economy. Within a recent decision the Planning Tribunal recorded that:

> *In terms of development strategy under section 12.1.2 of this [District] plan it is clear the development may not proceed until the council is satisfied that a clear demand exists.*
>
> *From the evidence we heard we are satisfied that a clear demand [for residential land] exists but the situation has not yet been reached where that demand is becoming critical.*

These observations raise several questions regarding the interface between planning, economics, and the law. For example should a District Plan be concerned with ‘whether a clear demand exists’? An earlier Tribunal decision emphasised that the Act says nothing about the RMA process ‘being a licensing procedure to allocate land use’ on some procedural basis. The Minister has expressly denied that he ever envisaged this role for the RMA.

The next question is whether any Council, or Tribunal can make such an assessment any better than a private citizen or company. How were the experts able to present evidence that the demand was critical? What determines criticality? If the Tribunal was presented with evidence that a shortage of land for residential building was contributing to inflation and hence to interest rates which negatively impacting on the trading sector, would this constitute criticality, or would the Tribunal then have to consider what constituted an excessive rate of interest, or an excessive demand for currency, and then enter a new debate on what monetary, or other conditions, might impact negatively on the profitability, and the ‘internationally competitive performance of the trading sector’?

These questions suggest that the Tribunal would make better decisions if it were not asked to consider such matters, which are outside its own, and, almost certainly, anybody else's competence to adjudicate. If there is no demand for such land then the project will fail and the development company will lose money. That is the company's right.

4 The International Experience

4.1. The McKinsey Report on Employment Performance

In November 1994, the McKinsey Global Institute published its report *Employment Performance.* The authors studied the employment performance of France, Germany, Italy, Spain, Japan,and the US from 1980 to the early 1990s. They conducted their analysis at the economy wide level and also within seven industries: automotive, computers, furniture, construction, banking, general merchandise retailing and film/TV/video. The principal findings of the report were:

(a Japan and the US have lower unemployment than Europe because they have created jobs in the market part of the economy whereas European countries have experienced net job destruction there.

(b) Product market restrictions were as important, if not more important, than work force rigidity in explaining why job creation in Europe was below the US, especially in high growth service industries

(c) The creation of large numbers of service sector jobs in the US has **not** hurt the quality or the wages of jobs.

The McKinsey report on *Employment Performance,* as its name indicates, focused on employment outcomes rather than on prices *per se.* However, in many cases, including the construction sector, the negative impact of a particular policy on employment was the result of a direct impact of other policies on prices.

4.2 Significance of Government Policy in Construction

The McKinsey Report comments on the role of government policy in effecting differences in employment performance as follows:

> *Governments are the primary reason why this process [of employment performance] is working better in some countries than in others. Their actions to control and manage the evolution of their economies are the most important factors explaining differences in employment performance. Most of these government actions regulate individual service sector industries through restrictions in the product market. These product market restrictions hurt either productivity or employment or both. If wages are free to fall, then employment can be maintained, but the loss of productivity keeps real wages low. If wages are maintained then restrictions show up in unemployment. ...*
>
> *The manufacturing sector is less subject to government influence than services [including construction] because market pressure coming from trade and foreign direct investment influences manufacturers more.*

The chapter dealing with the construction sector found that, among those countries studied, different government policies studied led to marked differences in prices in the construction sector. The opening paragraph of the "Construction Case Summary" reads:

> *The myriad rules and regulations governing the construction industry in Europe and Japan, provide an excellent example of how product market restrictions stifle output. Faster output growth – together with slower gains in productivity – resulted in a better employment performance for the US.*

The report noted that the construction industry is one of the largest sectors in developed economies, representing between 5.5% and 10% of total civilian employment, and total GDP. Residential construction is usually the largest subsector accounting for 30% to 50% of total construction volume. The industry structure is characterized by a large number of small companies and self-employed people. Firms with less than 20 employees and the self employed generally account for over 50 percent of total employment. Importantly the construction industry employs large numbers of unskilled young males. When large numbers of unskilled males remain unemployed they create major social problems and make a major and disproportionate contribution to the crime rate.

4.3 National Differences in Performance

The McKinsey "Construction Case Study" revealed that product market barriers have an important influence on construction outputs in that they influence price, the number, and the characteristics of housing units being built. In the United States, residential construction grew, despite the low number of units per capita. This high output was characterized by a high share of single family homes, which further increased over the decade from 65% to 75%. Consequently, the United States has by far the highest floor area per unit and the highest floor area per person. This high value-added leads to high employment performance. Output growth in the United States has been further aided by relatively low and declining real prices for construction.

Germany and Japan on the other hand had relatively high construction prices even if comparisons were made using GDP corrected for Purchasing Power Parity. Prices continued to increase during the 1980s which resulted in a low and often decreasing number of housing units being built, and in a lower share of single family homes. Although single family homes on individual lots are most people's preferred housing form, wherever they are available and affordable, many regulators prefer multiple housing lots as being more ‘efficient’ and more aesthetically and socially preferable. Hence the proliferation of tower blocks in the UK council housing estates. Many people prefer town houses and high rise apartments because they suit their particular lifestyles and city regulatory regimes should provide for a wide range of choice. But in many cities it is becoming increasingly difficult to separate genuine preference from cognitive dissonance driven by affordability and availability.

The McKinsey Report attributes the difference in employment performance in the construction sector to regulations such as zoning laws, building codes, tenant protection and tax rules. On the other hand, the authors found exogenous demand factors to be less important in explaining output growth differences.

4.4 Significance of Zoning Laws in Particular

The report found that zoning laws (of one form or other) had been introduced due to concerns about agriculture, the environment and population density. The goal of at least partial independence in agricultural production has promoted the maintenance of farmland at the expense of other uses. Farmers are generally strong defenders of this process. In recent years concerns about the environment have also led to a strengthening of zoning laws in many countries.

The severity of the zoning laws varies strongly [between countries], with Germany and Japan having the toughest laws. In Germany it can take up to 10 years to get land rezoned and individual rezoning is almost impossible; changes only happen if the town supports an overall plan for a larger development. In the US, courts tend to uphold the rights of property owners to do what they deem adequate.

The report has few reservations about the linkage between such restrictive laws and final prices. It says:

> *Restrictive zoning laws affect growth rates of residential construction. They result in high land prices by suppressing supply. Zoned lots are increasingly used up and new ones do not come on the market. At the same time, demand for land continues to increase due to rising population and income levels.*
>
> *Also zoning laws result in higher construction costs, again raising prices and suppressing output. With smaller lots, construction becomes more expensive e.g. due to fire protection, noise reduction or two storey*

> *construction. Thus the mere existence of zoning laws limits the rate of expansion in residential construction.*
> *In addition interviews and anecdotal evidence also suggest that in all countries, but especially in Europe, the stringency of zoning laws has increased during the 1980s. This happened not through new laws but through a stricter application of existing rules.*

The report examined the impact of exogenous factors (population and household growth, land scarcity, income and savings, mobility, and government demand for infrastructure etc) and found that, while these were important in explaining Japan's and Spain's strong output performance, the overall conclusion was that 'either differences across countries are relatively small or that some of the factors offset each other'. Therefore, the report attributed a lower weight to these demand factors than to the effects of the regulatory environment.

4.5 Bias towards the Demand Side of Equation

The authors of the McKinsey Report noted the widespread assumption in the countries surveyed, that changes in demand were important, while little if any weight was given to the regulations which controlled supply. This bias towards demand pressure has been evident in New Zealand, where increases in land prices in Auckland and Christchurch continue to be attributed to immigration and other demand factors with little, if any, consideration given to changes in the regulatory environment. When the supply side of the equation is raised, many express the belief that there is 'obviously' an absolute scarcity of land.

The McKinsey report dismissed this view, even for countries as highly populated as Germany and Japan. For example:

> *Many people attribute differences in construction output to an absolute scarcity of land. However, as we have seen, high land prices are, to a significant degree, influenced by zoning laws, not just by absolute scarcity. Around many European cities there are significant areas of agricultural land available. In Nordrhein-Westfalen, for example, the most populous German state, residential areas represent 5.5% of the total surface, while agriculture accounts for over 53%. Zoning laws prevent the use of these properties for residential purposes.*

4.6. Flow-on Effect

The McKinsey Report concludes that these restrictive zoning practices in Germany, in particular, have raised residential and commercial land prices and have inflated construction costs, thus reducing employment in construction. Furthermore, these price increases have indirectly increased the cost of most service sector firms by making floor space more expensive. The authors point out that if zoning makes land unavailable for residential construction or prevents the creation of retail centres then there will be lower employment in the construction industry, mortgage banking and retailing. The report is in no doubt that "Market restrictions such as these make an economy less productive at the aggregate level, and reduce the number of jobs that are above the reservation wage".

4.7 Argument for Light Handed Regulation and Understanding of Trade-offs

The strong implication is that a lighter hand in the regulatory environment surrounding the construction industries of Europe would be likely to lower prices and increase construction output. The United States, and to some extent Spain, which both have relatively weak barriers to entry, and a more flexible regulatory approach, illustrate this potential increase. These conclusions raise the issue of fundamental policy trade-offs. The authors of the McKinsey report recognize that maintaining an agricultural base and preserving natural 'green zones' around metropolitan areas is a high priority for residents and governments in many countries. The authors do not claim that such priorities should be abandoned. They do argue, however, that policy makers must recognize, and must explain to their constituencies, that such policies carry a burden of heavy and significant economic and social costs. They affect prices, construction output and finally employment. Furthermore the costs may fall on those least able to deal with them. Those already comfortably settled benefit from the increased capital value of their properties and the absence of development on surrounding properties. Those struggling to become established, find themselves paying higher prices for housing, or are priced out of the market altogether.

4.8. Implications for New Zealand

Within New Zealand, regulatory policies which distort prices to the extent that they impact continually on the CPI will raise interest rates and damage the whole economy. These 'effects' are not limited to the local region. Unfortunately these economic 'effects' are seldom, if ever, considered by local authorities when developing these policies and setting up the mechanisms which enforce them in the marketplace. Of if they are, they do not appear in the District Plans and Policy Documents produced under the terms of the Resource Management Act. Given that a damaged economy has fewer resources to deal with environmental impacts than a growing one and that increased farming costs can lead directly to over-grazing and hence erosion and other negative environmental effects councils would seem to have a duty of care in such matters even if they are expressed in documents or plans prepared outside the jursdiction of the Resource Management Act itself.

The McKinsey report suggests that, at the very least, policy makers should assess the real trade-offs involved and question whether all the restrictions really do improve ‘the public good’ or whether they merely protect the vested interests of small, comfortable and vociferous minorities. While the McKinsey report focused on employment as the key outcome, prices were an important mechanism for establishing the output level and hence overall economic performance.

Councils could well consider adopting a policy that new section prices should not increase at a rate significantly greater than the CPI. This would encourage the monitoring of the supply of residential land and the sustained maintenance of a suitable and flexible supply of land for new sections.

5 The US Presidential Commission

In 1981, the US President apointed a 30 member Commission on Housing to seek ways to increase the supply of housing and to lower its cost. The Commission's final report urged that municipalities retain ‘**only such powers over the development of private housing as are necessary to preserve vital and pressing government interests.’**

The Commission argued that these vital and pressing interests included

- (i) requiring adequate sanitary sewer and water services and flood protection,
- (ii) ensuring that topographic conditions permit safe construction and accommodate septic tank effluents,
- (iii) protecting drinking water aquifers,
- (iv) avoiding nuisance or obnoxious uses,
- (v) separating seriously incompatible uses
- (vi) requiring off-street parking and
- (vii) avoiding long term damage to the vitality of historically established neighbourhoods.

The Commission further recommended that in litigation the governmental body seeking to maintain or impose any regulations should bear the burden for proving that the regulations complied with the standard set by the above ‘vital and pressing interests’ and that the proper role of government is to protect the public from harm and not to prohibit or diminish production, competition and creativity. The Commission wrote:

> *Erecting barriers to travel and occupancy interferes with a free society's ideals of mobility and opportunity. Without a vital and pressing justification, growth control lacks equitable or philosophical roots in a legal system that is essentially dedicated to maximizing liberty.*

The vital and pressing standard set by the Commission would allow a community to limit development in order to remedy 'unique environmental problems' but the burden would be on the community to prove that conditions have reached **an unusually adverse level demanding application of growth restrictions.** In addition, the community would have to show that the primary purpose of the regulation was to ameliorate this specific problem and not to exclude people, since as the Commission concluded "Exclusion is clearly not an acceptable governmental interest."

The Report generally recognized that land is a precious and scarce natural resource which should be used to best provide for the needs and desires of the people. Many District Plans recently prepared in New Zealand seem to regard land as a resource which must be denied to the people at almost any cost. As the US Commission noticed, these prohibitions, no matter what their declared intentions, always seem to work in favour of the comfortable and the established, while acting against the interests of the struggling and the newcomers.

The Commission put it thus:

> *In our society, States and municipalities are part of a political union and not walled enclosures serving solely their own interests. They are expected to develop and grow to serve the divere demands of the population. To exclude people and limit development to a level that is not consistent with these ordinary expectations would unfairly grant special benefits to certain residents.*

6 Malaysia – the World Bank report

A recent appraisal by the World Bank concluded that newly built housing prices in Malaysia increased by an annual rate of 18.9 percent between 1972 and 1982, a rate about triple the overall increase in consumer prices (World Bank 1989). According to the Bank report, the reason for the rise in Malaysia's housing prices was the combination of high government-imposed housing standards, overly complex and time-consuming housing project approval procedures, the sluggish response of the housing industry to increases in housing prices, and high housing demand. The Bank found that it took between five and eight years[61] to obtain all the necessary permits from 15 to 20 government agencies for a subdivision approval.

The World Bank concluded that with a five to eight year lag in housing supply response, housing prices would increase rapidly with a growing demand and that Malaysia's most critical housing policy issue was **the lack of housing supply responsiveness to price increases.**

7 Conclusions

7.1 The developers of raw land perform an important productive service. They bring sites into use and allocate them to the most value-productive bidders.

7.2 Cities should ensure that there is at least two years supply of ‘on-demand’ residential sites, and a further supply of six years of land "zoned" for residential subdivision and development. Infill housing can make some contribution to this supply but should best be regarded as available to deal with the margin or error in forward estimates of growth rather than as a solid and reliable source of supply.

7.3 The McKinsey Report shows that price rises which result from product market regulations are both inflationary and bad for output growth, and hence bad for employment performance.

7.4 The New Zealand environment, in which those same price rises make a significant contribution to the CPI, and hence force a response from the Reserve Bank, can mean that these distortions impact on the whole of New Zealand's trading sector. These effects are felt throughout the country because the changes in money supply and exchange rate are national in scope and impact.

7.5 Restrictive zoning laws affect growth rates of residential construction. They result in high land prices by suppressing supply. Zoned lots are increasingly used up and new ones do not come on the market. At the same time, demand for land continues to increase due to rising population and income levels.

7.6 Restrictive zoning laws result in higher construction costs, again raising prices and suppressing output. With smaller lots, construction becomes more expensive e.g. due to fire protection, noise reduction or two storey construction. Thus the mere existence of restrictive zoning laws limits the rate of expansion in residential construction.

7.7 There is no longer any need to protect 'productive rural land' from urban growth.

7.8 Councils could well consider adopting a policy that section prices should not increase at a rate significantly greater than the CPI. This would encourage the monitoring of the supply of residential land and the sustained maintenance of a suitable and flexible supply.

7.9 General economic theory and international practice and experience indicates that land regulation should be light-handed and well understood.

APPENDIX 3

NEIGHBOURHOOD ASSOCIATIONS[62]

The problem with land use is that the value of a person's land is influenced both by how they use their land and by how nearby landowners use and take care of their land. Zoning was originally conceived as a way for neighbourhoods to protect land values by prohibiting uses on adjacent properties that would bring down property values.

The problem with coercive tools such as zoning is that they often lead to unintended consequences. One such consequence is that zoning does not allow for a reasonable transition to other land uses when changes in tastes and property values might call for such a change. Another is that idealistic planning agencies can use zoning to force their particular vision on people and neighbourhoods rather than let people choose what they want their neighbourhood to be like.

One solution is to create a large number of neighbourhood associations, each consisting of the property owners in that neighbourhood. Each association would have the authority to determine land uses in the neighbourhood and to make improvements to the area.

Each association would write their own protective covenants similar to those used in most Houston neighbourhoods. According to the Nobel-prize winning economist Robert Coase, Houston's system "not only secures many of the advantages which are supposed to be achieved only with zoning but manages to do so without some of the disadvantages that zoning brings with it."

In his book on Houston, Bernard Siegan writes,

> There is a temptation to say that economics is not enough; there should be some additional limitations, perhaps just enough to insure that the strips along roads and highways will be more aesthetically pleasing. One might then ask: aesthetically pleasing to whom? But the bigger problem comes from entrusting this power to some person or some groups who necessarily have their own values and beliefs--and this is the reason why no one could possibly qualify

> for this trust in the areas of speech, press, religion. Better zoning is no more the answer to no zoning than better censorship is to no censorship.

Rather than entrust neighbourhood protection to a distant council or an even more distant regional council, this proposal would vest authority solely in the hands of the property owners in each neighbourhood. Such neighbourhood associations are extremely common in many parts of the United States, particularly southern California, Arizona, and other sunbelt states. Joel Garreau describes them as ‘shadow governments’ because they have many of the powers of government but are run solely by neighbourhood residents.

Neighbourhood associations would work by having local jurisdictions outline tentative boundaries for all neighbourhoods. For six months after the tentative boundaries were drawn, any borderline property owner could change their property to an adjacent neighbourhood. Borderline owners could continue to change neighbourhoods after the six months, but only with the permission of adjacent property owners.

Neighbourhoods would range from a few acres to a few tens of acres in size and would be largely homogeneous. A neighbourhood of quiet streets, for example, would not include any commercial or busy streets.

Property owners in each neighbourhood would be encouraged to meet to decide how to structure their association. Alternative structures might include a board of directors, ‘town meetings’, or no structure at all.

The association would then be free to write any and all rules for neighbourhood use and development. The rules might be as simple as zoning with a minimum of 5,000-square-foot lots, or they might be much more specific, requiring people to tend their lawns and not to leaving motor vehicles in their front yards. Preexisting uses would be ‘grandfathered’ in so no one would be required to tear down a building others don't like without compensation.

The neighbourhood association would also receive funds from a real estate transfer fee. These funds would be dedicated to neighbourhood improvements, such as the purchase of land for parks, the purchase and obliteration of pre-existing eyesores, or the installation of footpaths or other pedestrian-friendly facilities. The association could also decide to use some of the fees to purchase scenic easement elsewhere in the region.

Neighbourhood transition could take place with the consent of the neighbourhood association. Suppose someone wants to build a multifamily dwelling in a single-family neighbourhood. The neighbourhood association might allow such a development provided the developer pays each of the other members of the association a fee. Commercial uses might also be brought in, with fees varying to the extent that the property owners agree that such uses benefit or harm their area.

An alternative that is worth considering is a system of tradable development rights. Under this system, every property owner is given a tradable development credit, based perhaps on existing zoning. Anyone who wants to develop their property beyond existing zoning would have to purchase development credits from someone else.

Under this system, certain areas could be protected from further development by downzoning them, yet leaving the tradable credits in the hands of property owners. While the owners could not develop their land, they could sell their credits to others who have the right to develop other lands.

The problem with tradable credits is that it still requires a central planning authority to monitor credits, determine zoning, and decide which areas need further protection. The neighbourhood association program is much more decentralized and more responsive to local desires to protect livability.

In sum, such neighbourhood associations would completely replace zoning. They could protect neighbourhoods not only from unwanted new developments on private property but from government imposition of developments that the neighbourhood does not want. Yet they could allow orderly neighbourhood transitions without people feeling that their land had been devalued without compensation.

This approach may seem radical and yet this is how people who live in multi storey apartments routinely organise their 'neighbourhoods'.

The developer normally sets up the original framework of the 'body corporate' and then hands it over to a residents association once the residents move in.

It is difficult to see why people who live above each other should be allowed to organise their own neighbourhoods while those who happen to live alongside each other on the ground should be subject to bureaucratic rule by a remote local authority.