HERITAGE ORDERS AND THE RMA

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The Act adds new dimensions to the preservation of historic buildings.

New Zealand legislation regarding historic buildings now has the new Resource Management Act 1991 (RMA) to add to the Historic Places Act 1980 (HPTA) and the Conservation Act 1987 which presently, with the Town and Country Planning Act 1977 (TCPA), govern the preservation of historic buildings. As before, the balance sought is between the previous untrammelled enjoyment of land and its structures, and the claims of society on such land, for heritage reasons.

RMA repeals TCPA, and as a result the protection notice provisions of S125A-H which were inserted by the HPTA in 1980 are replaced by provisions for heritage orders. A heritage order is defined in S189(1) and (2) as being an order for:

(1) the purpose of protecting:
   a. any place of special interest, character, intrinsic or amenity value or visual appeal, or of special significance to the tangata whenua for spiritual, cultural or historical reasons;
   b. such area of land (if any) surrounding that place as is reasonably necessary for the purpose of ensuring the protection and reasonable enjoyment of that place.
(2) For the purpose of this section, a place may be of special interest by having special cultural, architectural, historical, scientific, ecological or other interest.

For the purposes of that section S188 defines "place" as including any feature or area and the whole or part of any structure.

The definition is wider than under HPTA. For the first time the ecological criteria of a resource are available as candidates for protection. Two major changes to the previous regime are that protection is provided by S194(1) from the moment a heritage protection authority has given notice to a territorial authority of a requirement for a heritage order and S140's ability in the Minister to declare a proposal to be of national significance and therefore to direct that he or she rather than a heritage protection authority will decide any particular applications for resource consents under S141 of the Act.

REASONABLE USE

However, the Act proscribes greatly the ability of a person desiring to destroy a building of merit on its own account or with others in a precinct. By S87 a resource consent (known in that section as a land use consent) is required to use land in a way which per S9(1) contravenes a rule in a dis trict plan or proposed district plan unless such use amounts to one of the existing uses protected by S10, or which (per S9(3)) contravenes a rule in a regional plan or proposed regional plan unless such use amounts to one of the existing uses protected by S20.

S9(4) defines "use" of land as including any "removal, or demolition of any structure or part of any structure in, on, or over the land".

In applying for a resource consent an applicant must provide an assessment of any "actual or potential effects that the activity may have on the environment". Moreover, any person exercising functions and powers under the Act in relation to the protection of physical resources (defined as including all structures – probably meant as being all types of structures – must (by S7) inter alia have regard to kaitiakitanga and the maintenance and enhancement of amenity values.

Most importantly, for the first time a local authority officer must give consideration to the "finite characteristics of physical resources". It is a step forward for a society which previously had not seen any great benefit in its historic built heritage now to recognise that that heritage may be finite.

Once a person (not necessarily an owner or occupier as under HPTA) has been unsuccessful in attempts to obtain unconditional consent from a heritage protection authority, he or she can appeal to the Planning Tribunal.

By S195 the Tribunal is required to have regard to questions of serious hardship being likely to be caused to the appellant, whether the land which is subject to the order is being rendered "incapable of reasonable use" [S195(3)(b)], and the extent to which the authority's decision can be modified without "wholly or partly nullifying the effect of the requirement or order".

The reasonable use test is new, and echoes the "reasonable return" ordained in the 1977 US Supreme Court's leading *Penn Central* case regarding Grand Central station: if a "reasonable return" (from rents, transferrable development rights, tax relief or incentive, etc) were still possible from a listed building, the owner could not expect compensation or have the heritage restriction removed.

Penn Central's requirement that a reasonable return be achieved would be more owner-favourable than "reasonable use", which more easily begs the question: reasonable to whom? Does "reasonable use" mean for an old customhouse or ferry building, or for some other use totally unrelated to that for which the building was built? Or does it mean a use for which some sectors of society would differently want to see it preserved – or for which the heritage order was first obtained: to retain it as an historic building in its present state? Whereas the reasonableness of a return is something which can be valued in dollar terms in the marketplace, a reasonable use may be more subjective.

As with S125C HPTA, such owner or spouse of an owner has to satisfy the Tribunal of all of the following:

(i) Ownership at the date the heritage order was included in the district plan. Because it is implied that they "came to the nuisance" subsequent purchasers of structures (defined in S2 RMA as meaning "any building, equipment, device or other facility made by people and which is fixed to land") cannot apply.

(ii) Attempts by that applicant owner etc to sell the land subject to the order or requirement at a price not less than the market value which the land would have had, had it not been subject to such restrictions. (That is similar to S125C of HPTA except that before an order in favour of removing a protection notice could be made or compensation paid in lieu a protection "noticed" property had to be placed on the market and offered for at least six months ("or such shorter period as the Tribunal [considered] reasonable because of any special circumstances") in an "adequate manner". Then if it were not sold at least at market value the owner (in the case of a residence) had to prove financial loss or, in the case of

commercial buildings "serious financial hardship" – all to the satisfaction of the Tribunal.)

Also (as under S125C) an owner under S198 has to prove that the existence of the heritage order or requirement was the reason why an owner or spouse has been unable to sell at the market value which would have existed had there been no such order. By S125(2)(c) however, the owner etc also had to satisfy the Tribunal that the protection notice was the principal reason why an agreement had not been entered into.

Even though such matters had been proven, by S125C(3) the Tribunal could still have sent the owner back to the marketplace in a manner directed by the Tribunal until it had been satisified by eventual non-sale that a statutory "taking" of the property had occurred and hence compensation in the form of compulsory acquisition should follow. (That discretion is repeated in S198's direction to the owner (but not a spouse of an owner) to take "further action" to try to sell the estate or interest in the land.)

Previously, only if no sale had occurred could the owner then have alleged financial loss or hardship and sought the help of the Tribunal. If satisfied that the future use of a protected building was likely to have been affected by the notice, the Tribunal could have ordered its removal or required the trust to have taken it.

By its S125D, HPTA also separately allowed an owner to apply at any time for an order that the Historic Places Trust take the land concerned, and pay compensation on the grounds that such owner was prevented by a protection notice from "future use of the land for every purpose for which the owner or occupier but for the notice could lawfully have used it without detracting from the amenities of the neighbourhood", ie existing use rights within the applicable district scheme. The Tribunal was required to have regard to the imminence or otherwise of any change in the use of the land and any other restrictions on its use which the owner had to suffer without benefit of compensation.

Now, apart from evidence of ownership and of unsuccessful sales attempts, by RMA's equivalent S198 the Tribunal must be satisfied that the heritage order or requirement will render the land concerned "incapable of reasonable use". Unlike S125C and S195 there is no separate concern which would require the Tribunal to receive or have regard to S125C's questions of "financial loss" or "serious financial hardship".

S125D did not include the hardship criteria of S125C. Instead the applicant owner sought simply an order that the trust take the land. The only criteria appear to be that a protection notice would have prevented future use etc of the land and that no other restrictions existed.

The Tribunal's Discretion

What other evidence can or should the Tribunal receive before either removing an order or requiring the payment of compensation? The Tribunal's decision under both S125C and 125D was always discretionary. It did not for instance have to order the trust to take the land. It could have declined an order because other avenues open to the trust allowed it to defend an owner's appeal/application on the grounds that that owner could already have been receiving "just compensation" either by incentives etc or that a re-design of the building's uses could have provided compensation.

The availability of TDRs, tax relief etc could have required the Tribunal to have explored those forms of compensation assistance to an owner before agreeing that the protection notices had to go or the land be taken and cash compensation paid.

In the discharge of its general duty the trust may have been obliged to have informed the Tribunal and adduced evidence of current thinking in heritage building retrofitting, recycling and restoration techniques.

It could also have been obliged to have advanced arguments as to tax incentives available to the applicant owner to mitigate hardship – although such may not expressly have been a criterion of S125D. The most obvious one was land tax for which (for a brief period until recently) a building which had been noticed for the HPTA protection could have qualified.

The trust could also have been bound by the S125D discretion to have provided a set of figures to show that the existing protected building had been or could have been as commercially viable as any planned replacement. For example, it could obtain a revaluation from Valuation New Zealand pursuant to S25F of the Valuation of Land Act 1988, which provided for special valuations of land subject to a protection notice under the HPTA, and which now will provide for heritage orders under the new Act. The revaluation would be carried out on the assumption that the actual use to which the land is being put will be continued, taking into account "any restriction on the use that may be made of the land imposed by the mandatory preservation of any existing . . . buildings, other improvements and features".

The trust could also have been obliged to have examined the availability of TDRs to a building subject to the notice and to have provided the Tribunal with evidence that the land was enjoying such rights which were available to be transferred to another site elsewhere.

There may have been a further obligation on the trust to adduce evidence of alterations to the building which have been incorporated into the existing structure in order to have achieved the same return for the owner as is presently received. To that end a quantity surveyor's report could have been mandatory evidence.

If the Tribunal were to have heard such evidence it may have felt able (aided by a fair, large and liberal interpretation of S125D by 5.5(1)(j) of the Acts Interpretation Act 1924) to have exercised its discretionary "may" in favour of the trust retaining the notice without it having to take the land, and in a way which could have required the owner and others to have taken steps to redesign and revalue the building protected.

It is hoped that the new provisions of S195 and 198 will likewise allow, even require, the Tribunal to seek (and a heritage protection authority to provide) evidence of such availability and of better returns from a property.

Private Ownership Limited

We have recently confirmed the limited nature of private ownership in the recent Court of Appeal case of *Auckland Acclimatisation Society v Sutton Holdings Ltd,* (1985) NZLR 94, where a landowner was denied as an absolute right a permit to take the natural water falling on his land. The court talked of "privileges" rather than of "rights" and found that a denial of a permit carried "no moral claim to or expectation of compensation in the event of a refusal".

Likewise, in *Nelson Pine Forest Ltd v Waima County Council* 13 NZTPA 69, Holland J held that in cases of the old Planning Act's S3's and 4's matters of national importance, a council could, by S36(5) and the second schedule of the Town and Country Planning Act 1977, regulate by conditional use procedure without the owner (in the case of a native forest) necessarily being compensated. In *Recent Law,* May 1988 p132, on *Wellington City Council v Norwich Union Life Insurance Society* CA 97/87 20.11.87, D K A Palmer argued that, by its S6, the Conservation Act 1987 added significant weight to the Court of Appeal view that there was no longer a presumption in favour of development to be met by compensation where the status quo was maintained.

Public Input

There is no provision under SS125C or 125D, or SS195 or 198 for any public input to a hearing by the Tribunal following ►

◄ the imposition of the heritage protection order after public notification under S125A or S190 respectively. Why the public should be involved in getting protection, but cannot demand to be heard in its removal is unclear.

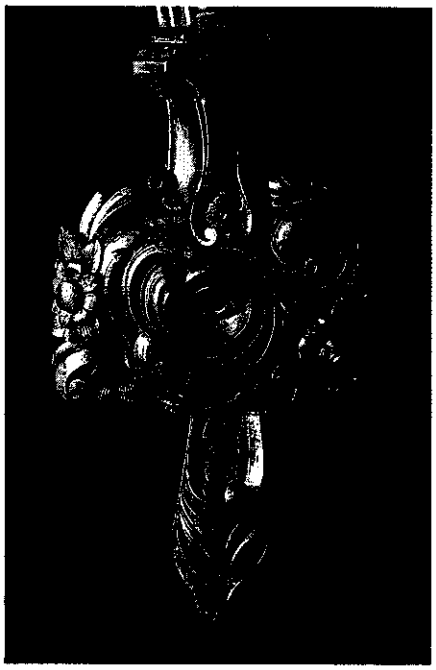
It could be argued that the Minister of Conservation and the Department of Conservation have had an obligation under S125D to defend, in the public interest, any application because of their statutory duties and because the Minister not only is responsible for the administration of the HPTA – and hence for the due performance of expressed or implied statutory duties contained in S125D – but because by S6(b) of the Conservation Act 1987 the Minister also remains an advocate for the conservation of historic resources generally (including historic places within the HPTA, which itself defines "historic places" to include historic buildings).

By S6(a)(i) of the Conservation Act 1987 the Minister of Conservation is also charged with the promotion of the benefits of historic resources to present and future generations.

In addition, by the definition in S2 of the Conservation Act 1987 of the word "conservation", the Minister of Conservation is charged with the *protection* of historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations.

Consequently, the Minister may always have had a duty to preserve the position of the trust when the trust was unable to respond to such an application. Maybe as an advocate pleading the case for an historic building the Minister could have claimed standing – if not a decision in favour of the resource – in the case of such S125D and S198 hearings, and present those alternatives to the Tribunal on behalf of the trust. Presumably that standing has been enhanced by the widening of the category of heritage guardians from the trust to heritage protection authorities which include the Minister of Conservation "acting on his or her own motion". The Conservation Act provisions remain in place.

Auckland High Court. Through the RMA, society now recognises that its historic built heritage is finite.



CONCLUSION

RMA recognises that an owner must expect some regulation of property in the name of heritage, but it is at the same time prepared to remove protection if a reasonable use cannot be found. The criteria referred to should be the subject of Tribunal assessment in each case, either before a property is taken (in order to protect the public purse), or before protection is lifted (in order to ensure that other alternatives have been fully explored).

To be credible, that assessment should be only as part of a publicly notified hearing to which those previously notified under S93(1)(c), (e), (f) and (g). Presently neither S125C, 125D nor 198 even requires or allows the Historic Places Trust or the Heritage Protection Authority to take part in such applications – let alone the interested public pressure groups or individuals who could present such evidence to assist the Tribunal. Perhaps the forthcoming reform of the Historic Places Act 1980 will remedy that mischief. ■