BY **BRENT NAHKIES,** DIRECTOR, BRENT NAHKIES & ASSOCIATES LTD, CHRISTCHURCH.

HERITAGE PROTECTION AND THE COMPENSATION ISSUE

ACHIEVING A BETTER BALANCE BETWEEN PRIVATE PROPERTY RIGHTS AND THE PUBLIC GOOD – THE NEED FOR CASE LAW TO ESTABLISH AN APPROPRIATE "REASONABLE USE" TEXT THAT WILL ENCOURAGE THE RETENTION OF HERITAGE BUILDINGS.

The *Resource Management Act 1991* (RMA) is a significant piece of recent legislation which has redefined private property rights in New Zealand. Much of the debate on the RMA therefore revolves around the degree to which the current interpretation of the RMA restricts private property rights and whether such restrictions should be compensated. The call for compensation has been the inevitable outcome of the increased heritage protection introduced into new district plans prepared under the RMA. Critics of the RMA, such as Owen McShane (McShane, 1998) and Philip Donnelly (Minister for the Environment's Reference Group), consider this increased protection has created an imbalance between private property rights and the public good. Compensation is being promoted as a way of redressing this perceived imbalance.

COMPENSATION

Rights to compensation for owners of heritage properties are currently limited to those owners whose property is subject to a heritage order. These owners are able to apply for relief to the Environment Court under section 198 of the RMA. In order to get relief they must prove that they are unable to put their property to reasonable use and they have been unable to sell it for market value. The Environment Court can order that the Heritage Protection Authority acquires the property from the owner at market value or remove the heritage order.

However, where the heritage controls are due to a rule in a district plan, rather than a heritage order, then there are no rights to compensation. Section 85 of the RMA states that compensation is not payable in respect of controls on land.

Although monetary compensation is denied by section 85, this section of the RMA nevertheless provides significant protection to private property rights by allowing an owner to challenge a provision in a plan where:

"Sec 85(3)... a provision or proposed provision of a plan or a proposed plan renders any land incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in the land..."

The private property rights of the owner of a heritage property may also be safeguarded by the resource consent process itself. The degree of protection afforded will vary depending on the provisions of the particular district plan in force. Some plans provide a high degree of protection to private property rights by requiring the local authority to explicitly consider the economic impact on the owner of the heritage controls before granting or refusing a resource consent.

ARGUMENTS FOR COMPENSATION

Compensation will promote economic efficiency.
Suppressing rights to compensation is said to encourage the regulator/community to treat the taken property right as a free good and encourage over-consumption. This will mean that the total (private) costs of protection are likely to exceed the (public) benefits gained and there will be an over-supply of heritage property.

Compensation will reduce reliance on regulation.
An important objective of compensation is to encourage regulators to consider non-regulatory alternatives such as financial incentives to promote heritage preservation.

Compensation is equitable.
It is argued that regulation without compensation is not equitable for the private property owner as it removes the win-win situation of bargained solutions. In addition, it is argued that site-specific rules are highly discriminatory and can impose considerable welfare losses on property owners, including high opportunity costs in some cases.

ARGUMENTS AGAINST COMPENSATION

Compensation will encourage rent-seeking and opportunist behaviour.
There is concern that compensation will provide opportunities for individuals to use the political system to their advantage or to exploit the

Above: The now demolished Kiapoi Woollen Mill.

inefficient nature of the property market at the expense of the public purse.

It is difficult to quantify and administer compensation.

The rules for compensation as set out in section 62 of the *Public Works Act 1981* could be adapted for heritage compensation, although the technical problem of defining the "specified date" on which compensation was assessable could be a thorny issue. Litigation relating to the assessment of compensation will undoubtedly occur and is an example of transaction costs that will decrease the economic efficiency of any compensation regime.

The betterment issue.

It is not inconceivable that a heritage listing might enhance the values of some properties, in which case is the owner to pay betterment? Where incentives are offered to the owners of heritage properties, which have the effect of increasing the values of those properties, should betterment be claimed? What of the owner who receives dispensation in relation to section 46 of the *Building Act 1991*, on account of the building being historic?

The issue of betterment needs to be explicitly addressed as part of any compensation regime to be introduced.

Compensation claims will spread to other land use controls.

A further practical consideration is the extent to which having given rights to compensation under the RMA that these rights do not expand to totally destroy the ability of city councils to regulate land use for the common good.

Suggestions that the solution is to limit compensation to "site-specific rules" are naive as owners who are negatively affected by general amenity rules will be encouraged to also claim for compensation. There is also a real danger that TLAs will respond to a compensation regime targeting site-specific regulations by generalising their rules. This would be unfortunate as Heritage Schedules serve a valuable function in aiding the market to identify those sites which are environmentally unsuitable for development.

Cost to the community.

There is concern that the introduction of compensation for heritage will force TLAs to withdraw from heritage protection rather than meet the costs of compensation. This may occur for those TLAs that have a low rating base and particularly if large numbers of owners attempt to claim compensation.

If compensation in the form of compulsory purchase is introduced it will increase the public ownership of heritage properties. The ownership of such properties will incur holding costs, but of even greater concern is whether public ownership will facilitate effective long-term conservation. For example, is a city council likely to have the innovation and property development skills to be best able to adapt a heritage property to an alternative use? Writers such as Tom Bethell (Bethell, 1998) argue that private ownership is more conducive to careful stewardship than public ownership and less subject to political whim.

CONCLUSIONS

Many of the current problems associated with heritage controls appear to be the result of poorly drafted district plans based on inadequate section

32 analysis. A rigorous analysis of the costs and benefits of the various regulatory and non-regulatory options for promoting heritage retention needs to be carried out by local authorities. There will also need to be ongoing education of resource managers as to what constitutes "best practice" in achieving the heritage objectives of the RMA.

Current legislation, if implemented correctly, should allow for the appropriate balancing of public benefit against private loss to take place both as part of section 32 analysis and as part of the resource consent process. If this balance is not being achieved then heritage agencies have recourse to the use of heritage orders while private property owners can seek relief under section 85(3) of the RMA.

Section 85(3) would appear to be a significant check on any tendency by councils to over-regulate. As yet there is little case law relating to section 85(3), although in the case *Prudence Anne Steven v Christchurch City Council* (RMA 358/97) it was used successfully by an owner to challenge the heritage controls placed on her property. It is interesting to note that the owner used section 85(3) in the first instance rather than applying for resource consent to demolish, despite the fact that this resource consent may well have been granted anyway. This case would tend to indicate that section 85(3) is an effective and potent means of challenging onerous heritage controls.

The Environment Court has a key role to play in giving direction to owners and resource managers as to what an appropriate balance should be. It is premature to say that this balance is not being achieved, as the key threshold test of "reasonable use" has yet to be established by case law.

If this threshold test is set too low, then it will encourage opportunistic behaviour from some owners and will likely lead to an emphasis on litigation aimed at achieving maximum compensation, rather than successful heritage outcomes based on cooperation between TLAs and heritage owners. There are already many examples of such successful heritage outcomes being achieved by local authorities working with owners to achieve voluntary protection.

However, if the threshold test is set too high then the long-term impact on our built heritage will be negative. There is well-founded concern that over-reliance on regulation will alienate owners and will encourage a lack of investment in heritage properties, leading to demolition by neglect and a steady decline of urban areas which contain large concentrations of heritage buildings. Central city areas, which are already fighting to retain their position in the face of the forces of decentralisation, will suffer in particular, and private investment in heritage buildings will be discouraged.

There will be situations where economic efficiency and equity make it necessary for a TLA to purchase a heritage property that fails the reasonable use test. In such situations, it is only right that the community grant relief to the private property owner if the building is of such heritage value that its retention is justified for the public good.

There appears to be no good reason why the avenues for relief available to an owner of a property subject to a heritage order preventing reasonable use, should be different to an owner similarly affected by a district plan. It would appear logical to have similar purchase requirements put into section 85 as are in section 198. The requirement to potentially purchase a heritage building will ensure that a rigorous cost/benefit analysis is carried out by the TLA on behalf of the community and will prevent free-riding at the expense of the private property owner.

However, there should also be an onus on the private property owner to take all reasonable steps to mitigate adverse effects on the environment. The onus of proof will be on the private owner to show that the property cannot be put to reasonable use and that compulsory purchase is necessary to achieve relief. Thus they must show that they have been unable to sell the property and that they have genuine investment-backed expectations that cannot be fulfilled by the retention of the heritage building/s.

If the relief sought by the owner is the demolition of a heritage building in order to erect a new building, then the demolition should be conditional on the new building being erected within a reasonable timeframe. To ensure compliance with the condition, a bond could be entered into that would be forfeited if the specified new building was not completed. This would prevent the demolition of heritage buildings to facilitate speculative building that never takes place, and as a deterrent to compensation claims based on proposed buildings that are in reality a fiction.

For further details contact Brent Nahkies, tel 0-3-325 4394; email nahkiesb@ihug.co.nz.

Top: Dunedin Railway Station – now converted to a Valentines Restaurant.

Centre: Warners Hotel, Christchurch Square, under threat of demolition – currently subject to Environment Court appeal.

Bottom: The Lyttelton Times Building, under threat of demolition – currently subject to Environment Court appeal.

REFERENCES

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