

Heritage Protection – Redefining Highest and Best Use?

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Key Words

Resource Management Act 1991, Historic Places Act 1993, heritage buildings, heritage protection, compensation, highest and best use

Abstract

The Resource Management Act 1991(RMA) is a key statute in defining private property rights in New Zealand. There is much current debate about the role and purpose of the RMA with critics of the Act suggesting it has taken away traditional private property rights in order to create and protect public goods. One example is the increased protection of heritage buildings in most new District Plans. This protection has resulted in calls for compensation from owners who are saying that a “taking” has occurred. In contrast environmentalists are saying that a paradigm shift has occurred with the enactment of the RMA that has redefined the “bundle of rights” enjoyed by property owners. As a result they argue that no compensation is necessary or appropriate. This paper examines both arguments in the context of current legislation and case law. It also discusses the resultant impacts on the “highest and best use” of heritage properties.

Introduction

Contained within the Resource Management Act 1991 (RMA) and the Historic Places Act 1993 (HPA) are both the mandate and legislative mechanisms to protect heritage in New Zealand. The appropriate use and administration of both Acts have been the subject of considerable political debate and resulted in the Historic Heritage Management Review that was conducted in 1998 by central government. Both Acts are currently under review and the RMA remains an area subject to political debate with differences in opinion as to the appropriate balance between private property rights and heritage controls.

One area of debate is centred on the bundle of rights enjoyed by the property owner. Traditionally one of these rights has been the ability to modify or demolish buildings when they reached the end of their economic life. This right no longer exists for the

owners of heritage buildings that are now subject to heritage protection under district plan rules.

Many of these owners believe that the right to demolish and modify buildings is an unalienable property right. Flowing from that position is the argument that to deprive an owner of that right constitutes a “taking” which should therefore attract compensation. The call for compensation is based on a number of philosophical and economic arguments including the following:

- Compensation will promote economic efficiency.
- Compensation will prevent an over reliance on regulation.
- Compensation is equitable and protects the property owner from highly discriminatory rules that lead to significant financial losses.

Such arguments were raised by Philip Donnelly in the Report of the Minister for the Environment’s Reference Group, which was convened in late 1997 to review and recommend changes to the RMA. With the change in Government at the last election their recommendations appear destined to be ignored.

At the other end of the compensation debate are heritage advocates that argue that there are a number of sound reasons not to compensate. For example:

- Compensation will encourage opportunist and what is known in economic terms as “rent seeking” behaviour.
- It is difficult and therefore expensive to quantify and administer.
- If you compensate for heritage then you should compensate for all land use controls, which will undermine the RMA.
- The RMA expressly forbids compensation under sec 85.
- Why pay the polluter not to pollute?
- There is no need to protect property rights because they are protected under section 85(3) of the RMA.
- Owners accept windfalls from planning so why not wipeouts?

They dispute the inviolate nature of property rights and point out that they are an evolving entity that ultimately derive value from the community within which they are located. This point was articulated by the American preservationist Donovan D. Rypkema (1992), as follows:

“...it is not a case of the public versus the private sector: it is about the communal economic benefit of all of the owners versus the economic windfall of a single owner. The value of real estate comes primarily from the investments others have made: taxpayers, other property owners, employers....The owner is certainly entitled to a return on his or her investment. But the investment that others have made ... also merits a return. This is the economic justification for land use controls. It is not an issue of property rights: it is a question of equity, fairness, and a return on everybody’s investment....”

This argument states that the generation of economic value in real estate is largely external to the property boundaries and it is the community context that creates value. This therefore gives community the right to 'interfere' or place controls on private property for the common good of the community. In terms of heritage controls they argue that such controls are just one of many land use controls such as zoning, height restrictions, or density controls. As such they should not be treated any differently in terms of compensation requirements.

Without doubt compensation remains a key issue for the RMA. Heritage protection in particular remains a key area of contention between property owners and town planners. This paper seeks to analyse and discuss the way in which the RMA in particular addresses the issue. It also analyses how this issue has been addressed by the Environment Court and the resultant impact this will have on the "highest and best use" of properties.

Heritage Legislation in the Past.

To a large extent calls for compensation are an attempt to return to the era prior to the RMA where there was little effective protection for heritage buildings. The introduction of strong heritage controls into new district plans is clearly a change in the status quo hence the calls for compensation and the provoking of political debate. The imposition of effective heritage controls is a reasonably new phenomenon that has come about by Councils using their powers under the RMA and the mandate given to them by Section 7(e) of the Act. It is also due to increased community support for heritage protection that resulted from the wide scale destruction of heritage buildings that took place during the 1980's property boom.

It is therefore appropriate to consider what the status quo was in terms of heritage protection prior to the RMA and to do this it is necessary to consider the role of the Historic Places Act (HPA) and the Town and Country Planning Act 1977(TCPA).

The Historic Places Act 1993

The 1954 Historic Places Act was the first significant recognition by central government of the need to conserve built heritage. It provided for no statutory protection however and it was not until the passing of the 1980 Historic Places Act that statutory protection was available to preserve heritage buildings. This Act allowed for Protection Notices to be issued by the Historic Places Trust (HPT). However due to the financial obligations that could result from the issuing of a protection notice the HPT were loathe to use them and they became something of an empty threat in terms of preventing demolition. In 1993 another Historic Places Act was passed as it was considered timely to introduce new legislation relating to historic places which complimented the Resource Management Act 1991. Despite the political rhetoric at the time the 1993 HPA did not signal any major change in heritage protection in New Zealand. It contained tougher penalties for owners acting illegally under the HPA but essentially carried forward the same powers of protection that were introduced under the 1980 Act. The HPT have failed to use their statutory powers either widely or effectively in the past and are unlikely to invoke their powers as a Heritage Protection Authority other than in a very limited way. The HPT now

see their primary role being that of advocacy and education. Although the HPA is currently being reviewed there are no major changes being introduced that will alter this role.

Heritage Protection under the Town and Country Planning Act 1977.

Although in theory there was heritage protection under the Town and Country Planning Act 1977 it was effectively hamstrung by a compensation doctrine that was clearly articulated by the Planning Tribunal. Under the TCPA 1977 the Planning Tribunal was highly protective of private property rights in relation to heritage. A number of decisions established the following broad principles:

- Heritage protection should be done by a ‘designation’ process as using planning rules to protect heritage was a ‘taking’ by stealth and not appropriate.
- The owner should not suffer financial loss.
- The owner should be compensated.

Judge Treadwell in particular is very definite in his decisions that compensation in regards to heritage was an important issue that had to be addressed. He also indicated that the use of rules in a District Scheme was not appropriate means, as it did not address this issue. For example in the case *Goldfinch v Ohakune Borough Council [1985]* (Decision No. W15/86) he said:

“The interlocking provisions of the Historic Places Act 1980 and the Town and Country Planning Act 1977 demonstrate that there is a procedure affording protection to all parties if modification to a building is to be prevented. In the present proceedings if the council and/or tribunal were to refuse a conditional use to enable the modification, of this building then the effect would be to give to a regulation (that being the effect of the district scheme) a more draconian result than is permitted under the provisions of the Act governing historic buildings.”

Also: *“It would be wrong for the Tribunal by its decision to impose a degree of protection under the district scheme which was not available for the building under the relevant statute”*.

In the case *Trustees of the Christchurch Club v Christchurch City Council [1977]* he said:

“The model ordinance and the proposed ordinance were both ultra vires as they proposed a restriction on the rights of an individual to use his property without a consequent duty upon the council to pay compensation”

“Where it was desired to preserve buildings of historical or architectural merit the council if it chose to keep a register of such buildings must combine that register with an appropriate designation procedure”.

An early case that was conducted soon after the passing of the RMA is indicative of a continuation of this line of argument and is typically quoted to justify compensation.

Once again Judge Treadwell was presiding and he had the following to say in the case *Shell Oil NZ Ltd v Wellington City Council [1993] (Decision No. W034/93)*:

It is not for this Tribunal to force a landowner 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 provisions of the RM Act both indicate 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 a mechanism exists namely s.198 of the RMA whereby the owner can be relieved of a building for the public good. In making that comment we make it clear that it is restricted to land or buildings which are rendered either useless or uneconomic by the actions of the authority concerned with resource management or building protection.

It is clear that based on decisions such as those quoted above that the Historic Places Act was seen as the appropriate mechanism for heritage protection and that a designation type process which explicitly addressed compensation was to be preferred. The question now remains as to whether this view is now out dated and whether the RMA represents a paradigm shift in terms of heritage protection?

The current situation under the RMA.

With the introduction of the RMA the protection of historic places was seen as part of the wider issue of resource management. It appears to be now largely accepted that heritage protection is the responsibility of local authorities with clear statutory authority being derived from the RMA.

Proposed changes to the RMA will reinforce this philosophy as it is intended to make a change to Section 6 of the RMA, which sets out those matters of “national importance.” It is proposed that the following will be added to Section 6:

(f) The protection of historic heritage from inappropriate subdivision, use and development.

Currently the mandate for heritage protection is contained in Section 7 of the RMA which deals with “Other Matters” which must be given particular regard to and is expressed in (7e) “Recognition and protection of the heritage value of sites, buildings, places, or areas:”

This proposed change is a clear signal that heritage protection should receive more emphasis in the RMA and will increase the mandate for local authorities to use the RMA to protect heritage.

The Historic Places Act is complimentary legislation that sets up the Historic Places Trust as a watchdog and partner to local authorities. This has not been the case in the past where attempts to introduce strong heritage controls under town planning legislation were thwarted by the Planning Tribunal.

Since the Shell Oil case there have been a number of subsequent cases which would tend to indicate that the Shell Oil case and previous cases under TCPA have limited force or relevance. These cases indicate that there may well have been a paradigm shift in terms of the three principles established by earlier cases and legislation.

Each of these principles are examined below in light of the new case law:

Heritage protection should be done by a ‘designation’ process as using planning rules to protect heritage was a ‘taking’ by stealth and not appropriate?

In the case *AA McFarlane Family Trust v Christchurch City Council [1999]* (Decision No. C46/99) the Court discusses both the Shell Oil case and the *New Zealand Suncern Construction Limited v Auckland City Council [1996]* case. In particular it recognises the force of the conclusion in Suncern where the Court said that economic use and development does not necessarily imply maximum financial yield and that “By implication this is recognition that although the Act provides for heritage orders as a method of protecting heritage values, it also provides for these to be recognised and protected, even at the owner’s expense, through the objectives, policies and rules of a district plan.”

Although the Shell Oil case would appear to contradict this point of view the precedent setting strength of this case is limited. This point was noted in the McFarlane case where the Court acknowledged that the Shell case involved a building that had not been recognised in the district plan as having heritage values.

There still remains the vexing question however as to the appropriate role of heritage orders in the heritage protection process. The provision of the heritage order process would indicate that the heritage preservation is seen to be different to ‘normal’ land use controls. Based on the arguments that were advanced by Judge Treadwell under the TCPA it could still be argued that heritage rules in District Plans could be considered ultra vires. Under the RMA heritage still has a separate section in the RMA which follows the designation process and explicitly provides for compensation. It could thus be argued that heritage orders are the correct protection mechanism to use and it is inappropriate and unnecessary to have district plan rules to protect heritage.

However there is a strong counter argument that heritage orders can be differentiated from district plan rules in a number of ways.

(1) They empower community groups and the Historic Places Trust (HPT) to protect heritage if necessary. This situation might occur where a Territorial Local Authority (TLA) was providing inadequate protection or had a conflict of interest. It is possible that a community group may be in conflict with the Council over heritage protection. For an example reference can be made to “The Friends of Mount St Cemetery” who became a Heritage Protection Authority in September 1993. They subsequently used a heritage order in March 1996 to protect the Mount Street Cemetery.

It is interesting to note that a proposed amendment to the Act (Transport and Environment Committee Resource Management Amendment Bill (No.3) Feb 1998)

which would have made 'community' Heritage Protection Authorities subservient to Councils was dropped.

(2) Heritage Orders allow a higher level of control than that allowed in District Plans. This reasoning is contained in the pamphlet "Heritage Protection under the RMA" which is distributed by the Ministry for the Environment and which contains the following references to heritage orders.

"Local authority policies and rules can only go so far in restricting activities on private land."

And that heritage orders should be used

"Where the degree of protection sought goes beyond what can be provided for in a district or regional plan."

(3) Heritage Orders are a measure of last resort for TLAs available where other mechanisms have failed or are not readily available. This idea is articulated by the Christchurch City Council in their Proposed District Plan (Page 10/9 Reason for Rules) as follows:

"The use of heritage orders is restricted in the plan review process, and is seen as a "last resort" measure by the Council when other avenues (or urgency) justifies its use from time to time particularly for Group 1 items and possibly some in Group 2"

Auckland City Council also states the following in their Proposed District Plan – Central Section (Page 10/9):

"A heritage order may be imposed...in a situation where a valuable heritage property is in imminent danger of damage or inappropriate alteration or destruction.....Generally, items are scheduled in the Plan at the Council's initiative"

(4) A Heritage Order provides interim protection once the Heritage Order has been applied for and by its nature differs from a resource consent. Refer to the case C125/99 where the Heritage Order on the Mount St Cemetery was cancelled. The Court said that a Heritage Protection Authority is not given any right to go on land: the right appears to be one of veto rather than a right to positively carry out any work.

Note that heritage orders are based on the designation process. The purpose of a designation is to halt development and lead to eventual taking of some land. The heritage order process provides a number of potential remedies to the owner such as:

- Reimbursement of extra ownership/management costs.
- Ability to appeal against heritage controls where the owner can prove severe hardship and lack of any reasonable use.
- The owner can 'sell' to HPA if the owner has been unable to sell at an unaffected price, the land is incapable of reasonable use and the current owner had the heritage order imposed on them.
- Removal of heritage order by the Environment Court.

Based on the above discussion it can be argued that Heritage Orders have a limited and special application in terms of heritage protection. They can be seen as a complimentary process for use in special circumstances rather than as an alternative to district plan rules.

The owner should not suffer financial loss?

In terms of the McFarlane case the Court found that one of the three buildings had sufficient heritage value to warrant the retention of the façade even though this retention was going to cost the owner in the order of \$200,000. It also found that the façade of a second building was worthy of retention but that the additional costs to the owner of such retention was going to be in the order of \$800,000. This was considered too high a private cost in relation to the public benefits in terms of heritage value and if done should be done at public expense. The Court said

If this façade goes and for ourselves we hope the heritage authorities will find a way to avoid this, there will be at least one other and we accept better example of the “Chicago style” remaining in the form of the New Zealand Express building.

The owner should be compensated?

In the case *Leith v Auckland City Council* which was a Reference appealing against the Hauraki Gulf Section of the Auckland City Proposed District Plan the appellants argued the need for compensation . The Court had this to say:

We think it is significant that, unlike the former Town and Country Planning Acts which expressly provided for compensation for district scheme restrictions in certain circumstances (see section 44 of the 1953 Act and section 126 of the 1977 Act), the Resource Management Act expressly provides (by section 85) that an interest in land is not taken or injuriously affected by reason of any provision in a plan. Instead of providing for compensation, the section provides that where a plan provision renders land incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in the land, the Tribunal can delete or direct deletion of the provision.

The appellants also called for incentives as an alternative or supplement to compensation and the Tribunal had this to say:

The Planning Tribunal is a judicial body. It does not have any relevant executive functions, and is not responsible to an electorate. We understand that the Tribunal has no authority to interfere with local authorities in such matters, either directly by ordering the offering of incentives, or indirectly by directing amendments to district plans on the basis of the existence or absence of any policy to grant incentives.

Therefore we decline jurisdiction to consider Mr Leith’s assertions that the proposed district plan should provide financial incentives in compensation to landowners whose development opportunities are restricted by the rules of the proposed district

plan. That does not mean that the respondent should not be considering what (if anything) it should do in that respect.....

As the Court states the RMA while not providing for compensation however does provide an avenue for relief which is contained in section 85(3). In my view it will be how this section is interpreted by the Environment Court that is of great significance to heritage protection and will ultimately indicate whether a paradigm shift has indeed occurred or not.

Section 85(3).

This section of the RMA gives a potential remedy to the owners of a property that is subject to an onerous heritage rule. The owner can apply to the Environment Court as was the case for *Prudence Anne Steven v Christchurch City Council [1998] (Decision No. C38/98)*.

To qualify for a remedy requires that the applicant to show that the plan provision:

- (a) renders the land incapable of reasonable use
- (b) places an unfair and unreasonable burden on any person having an interest in the land.

The two tests are considered to be:

- Onerous (for the applicant)
- Objective
- Conjunctive

The question as to what constitutes “reasonable use” is one that has little case law to give guidance. Based on the Suncern case it may be less than optimum. In the case *Prime Investments Ltd v Gisbourne District Council [1995] (Decision No.W121/95)* the Court held that demolition for a carpark was not a reasonable use when the heritage building in question appeared to have alternative uses? Both these cases would appear to set a high threshold for “reasonable use”.

However in the Stevens case the Court appeared to take a somewhat more benevolent attitude to the applicant. The case is notable for the one sided nature of the evidence. Only superficial evidence was presented by the Historic Places Trust, and no evidence was presented by the Christchurch City Council. The Court itself recognised the one sided nature of the proceedings by saying:

“We do not think this case will open the flood gates to a flood of applications to the Court. Apart from the inherent stringency of the section 85(3) tests, there is an unusual factor in this case that would distinguish it from other requests to cancel an urban heritage listing, which is that the Council has neither opposed the application nor called evidence, and so it has been relatively easy for the applicant to show that the listing is an unfair and unreasonable burden”.

As yet there is no clear case law to indicate the ease with which owners would be able to use Section 85 (3) to gain relief from heritage rules. In particular a number of issues are still unclear such as:

- Should demolition be allowed to aid speculative developments and reduce holding costs?
- What is reasonable loss?
- Is loss of development potential unreasonable?
- Does investment backed expectations carry any weight?
- Does private loss equate to hardship? Is the particular circumstances of the owner important?

Clearly if a low threshold test is applied to section 85(3) then owners will have a high chance of successfully challenging heritage rules which restrict their land use. This might ultimately force local authorities to amend or revoke their current heritage rules due to them being effectively unenforceable.

Highest and Best use

Having considered the philosophical and legal debates on heritage protection the question must be asked as to what are the practical ramifications for the property consultant charged with putting a value on a heritage property? On a more theoretical basis does the current definition of highest and best use need amendment?

Some land economists such as Barlowe (1986) argue that there may be two alternative highest and best uses for a particular property. One highest and best use is market derived or economic in nature and is the concept traditionally applied by valuers. In addition there may be a social or community derived "highest and best use" for a property. Barlowe uses the example of a forest which alternatively could be either cut down or retained. From the land owner's point of view cutting the forest may clearly be the highest and best use in economic terms. This may bring the property owner into conflict with environmental groups that promote a "social highest and best use" of the property that requires that the forest be retained. Often this conflict is fought out in the political arena such as we are observing with the RMA. If such environmental groups gain enough community support then laws will be passed which will superimpose the social highest and best use on the economic highest and best use. For example in New Zealand we have had Part IIIA of the Forests Act 1949 which was enacted in 1993 and which prevented owners from felling native forests on private land. Social highest and best use reflects the varying aspirations, goals and value judgements of different individuals and groups which must then be balanced against the property rights of the individual.

The correct definition of highest and best use has been a source of debate in real estate circles for many years. Academics such as Graaskamp for example argued that highest and best use analysis should seek to incorporate or accommodate the reality of community politics. He argued that town-planning controls may have significant impacts on the property development process and that in many instances the optimum or most profitable development may be the one that takes the line of least resistance in

terms of recognising the concerns of the public. From this argument he developed the concept of “most fitting use”.

In terms of New Zealand valuation methodology “highest and best use” is defined in the New Zealand Institute of Valuers Technical Handbook (NZIV, 1995) as :

The most probable use of an asset which is physically possible, appropriately justified, legally permissible, financially feasible, and which results in the highest value of the asset being valued.

In my opinion this definition already accommodates the reality of heritage controls in terms of looking at both the “probable use” and “legally permissible use” components of the definition.

Although the definition of ‘highest and best’ use theoretically accommodates heritage controls there are still significant practical difficulties in applying it. In the case of considering whether a heritage site is ripe for demolition and redevelopment the valuer must weigh up the chance of obtaining the required resource consent. This chance is something that will vary from city to city. For example councils such as Christchurch City have signalled their willingness to grant compensation or allow demolition under certain circumstances for some categories of heritage properties.

Christchurch City Council states the following as part of their heritage strategy

“...and if necessary pursue purchase or compensation where loss of development rights cannot be adequately resolved.”

In addition in their heritage rules they state that when considering whether to grant a resource consent they will consider amongst other things the following:

(j) The ability of the applicant to economically develop the site without demolition, alteration or removal of the protected building, place, object or heritage feature, with regard to opportunities otherwise permitted on the site.

(k) Whether the retention of the heritage features or form of the protected building, place, or object causes significant additional costs, or reduction in its range of potential uses.

(l) The availability and suitability of incentives or other options including the weight given to development or community standards when considering a resource consent, where the retention of a protected building place or object would be secured by the applicant’s proposal.

By contrast Auckland City Council has Prohibited Activity for demolition or substantial demolition of a Category A item. It is a restricted discretionary activity for alterations to Category A items or for alterations and demolition of Category B items. There is no explicit consideration given to the economic situation of the building or owner other than whether any changes to the buildings are necessary to foster adaptive reuse and conservation. They are allowed if they are considered vital to the retention or on going use of the heritage building.

At the other extreme Lower Hutt City allow the demolition of heritage buildings as a permitted activity so clearly there is differing levels of protection in different parts of the country.

In some cases it should be comparatively straightforward to assess “highest and best use” where there is certainty as to the impact of the heritage controls. For example where demolition is a prohibited activity then a property should not be valued as potential redevelopment site. However even in this situation there is currently uncertainty introduced into the process by the as yet untested potential for a challenge to the rule under section 85(3)

Conclusions.

The RMA has been used by communities to considerably increase heritage protection. This increased protection has provoked controversy and debate, much of which revolves around the need or equity of compensation

The RMA has been under review since 1997 looking at these and a number of other significant issues. The likely outcome of the RMA review took a significant change of direction with the change in Government. Previously proposed changes such as compensation requirements, which would have weakened heritage protection, have been removed. The current proposed changes should strengthen heritage protection.

It appears that the Environment Court unlike its predecessor the Planning Tribunal accepts that it is entirely appropriate to protect heritage by use of district plan rules. It also appears that owners may well be expected to carry some of the cost of heritage preservation for the common good. How much will vary according to the facts of each case and the context of the District Plan itself. Future case law may give more guidance as to what the Courts see as an appropriate balance.

However as District Plans becomes operative it will become a lot harder for owners to make subsequent claims for relief particularly if they have purchased the property with a heritage control in place. Over time the values of properties will reflect their heritage controls and also any heritage incentives.

As a general rule there will be no need to compensate for losses resulting from heritage provisions in plans as heritage will be treated no different to other planning controls. The owner will be expected to accept a ‘reasonable loss’ as long as “reasonable use” remains with protection given by section 85(3). How the Courts will interpret this section will be pivotal in terms of heritage protection.

The only monetary compensation as such currently available to owners is the purchase of a property subject to a heritage order. In this situation the owner is effectively compensated for any loss in value attributable to the heritage order as the property is purchased at a price excluding the effect of the heritage order.

In other situations such as resource consent hearings and appeals, and section 85(3) applications, the owner is granted relief rather than compensation. In other words the

controls are relaxed or waived rather than compensation (money) given to the owner. The Environment Court cannot force the Council to compensate or give incentives to the owner.

Valuers need to become familiar with the particular heritage controls in the district plan, relevant case law and resource consent precedents. Highest and best use will need to be analysed in an informed manner giving due weighting to heritage controls. Spurious valuations that ignore heritage controls should be avoided, as they will only lead to litigation that will ultimately prove expensive to their clients.

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