The Adequacy of Legislation in Respect of the Preservation of Historic Places, Objects (Including Trees) and Places of Scientific Interest or Natural Beauty

by

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I. INTRODUCTION

After researching this topic it became increasingly apparent that the requirements of adequate legislation must include the following factors:

(a) provision for effective expression of public opinion;

(b) proper safeguards against inadequate or biased consideration on preservation matters;

(c) provision for sufficient finance to make preservation measures effective;

(d) provision for proper enforcement machinery to secure preservation.

A comparison has been made between the New Zealand legislation and that of three other countries, the United Kingdom, the United States of America, and Australia (Victoria and New South Wales only). This comparison leads to the conclusion that this country has adequate legislation for the protection of places of natural beauty, i.e., national parks, scenic reserves, domains and coastal shorelines, and also historic reserves. On the other hand the legislation concerning the perservation of historic places and objects is seriously defective, though on the surface seemingly well intentioned. The conclusion is reached that in New Zealand we require a special Act of Parliament to cover this topic separately, with the Minister for the Environment to administer it, together with suitable amendment

of the Town and Country Planning Act 1953 to reflect co-ordination provisions with local bodies.

II. New Zealand Legislation

The preservation of places of historic or scientific interest or natural beauty is specifically provided for by sections 6(3) and 21(1) of the Town and Country Planning Act in conjunction with the First and Second Schedules thereto. These enactments place that responsibility on regional planning authorities and local councils respectively. In the case of the latter organisations preservation of historic places, etc. is covered in the Code of Ordinances for each local district scheme in accordance with the format set out in the Fourth Schedule to the Town and Country Planning Regulations (Suggested Form of Code of Ordinances) Ordinance VII Clause 1. The ordinances generally include a policy statement on preservation, a council register of historic places and provision for cancellation of entries in the register with the consent of the council.[1] Under section 33 of the Act an operative district scheme has the force and effect of a regulation made under the Act.

The Historic Places Act 1954 set up the Historic Places Trust with the functions set out in section 8 thereof of fostering public interest, furnishing information and advice on, and participating in, the maintenance of places and things of national or local historic interest. Various powers are contained in section 9 but in practice the Trust is severely handicapped by a lack of finance notwithstanding provision under section 14(a) for Parliamentary grants or section 15(a) which enables local authorities to contribute "as they think fit". What finance is available to the Trust has apparently been put to good use. By the end of 1973 the Trust had obtained, or was in the process of obtaining, fee simple title to eight properties throughout New Zealand. Additionally they held a lease on one Auckland property (Ewelme Cottage) and had been appointed to control and manage a further nine properties (principally historic reserves) under the Reserves and Domains Act 1953. A full list of these properties is set out in the Appendix to this Article.[2] Also the Historic Places Trust has been able to assist a number of private property owners of historic places with grants for upkeep and maintenance.[3] At this stage mention should be made of the Estate and Gift Duties Act

[1] E.g., *City of Auckland District Scheme* (1970), Code of Ordinances, no. 203. See also Scheme Statement, para. 10.1 on council policy for the preservation of trees.

[2] The writer is indebted for this information to Mr J. R. S. Daniels, Director, N.Z. Historic Places Trust.

[3] *N.Z. Official Year Book* (1972), 1001.

1968, section 33 of which frees from liability for estate duty any historic real property devised to the Historic Places Trust.

More positive protection is to be found in the National Parks Act 1952, the Reserves and Domains Act 1953 and the Counties Amendment Act 1961, once lands have been designated for the specific purpose under the relevant Act. Section 3 of the National Parks Act stipulates that the Act shall have the effect of *preserving in perpetuity* as national parks certain areas in the national interest. The Act also provides for strong administration of national parks and wide powers to enforce compliance with the protective requirements of the Act. Similarly, with the Reserves and Domains Act, section 63 has the effect of preserving in perpetuity as historic reserves land associated with early settlement or events of national or local importance and including therein buildings, trees, sites, earthworks, rocks and outcrops and objects associated with legend and mythology. Scenic reserves are likewise protected and with both historic and scenic reserves revocation may only take place with the consent of the Minister of Lands in accordance with section 18.

In 1971 New Zealand had ten national parks, 935 public scenic reserves, sixty-three historic reserves and 886 public domains. National parks alone covered thirteen percent of the New Zealand land mass.[4] While these figures are impressive and while these places appear to be adequately protected there is no room for complacency. Legislation can always be introduced to interfere with places of natural beauty and a good example is the recent plan to raise the level of Lake Manapouri in Fiordland National Park which was postponed only through the pressure of public opinion.

In comparing the legislation provided for the protection of historic buildings with that of places of natural beauty (and historic reserves) the former suffers principally, in my view, from the fact that historic places in urban areas must of necessity compete for attention along with a multitude of other planning considerations in the Town and Country Planning Act. The Historic Places Act is able to protect places such as the Missionary House in Waimate North and others unlikely to be the subject of town planning conflict. Similarly, places of natural beauty are less likely to be subjected to planning pressures than urban historic places. Above all, places of natural beauty and historic reserves are, by virtue of their enactments, matters of nation-wide concern under ministerial protection; whereas historic places in urban areas are in reality at the mercy of interested local bodies. Even assuming good faith on the part of local councils (and there has been considerable evidence of this), various commercial pressures,

[4] Ibid., 361-363.

particularly in these days of inflated land prices, can easily have an adverse effect unless stronger legislative measures are adopted which include effective provision for the expression of public opinion. The following extract is given from *Regent Theatre Co. Ltd* v. *Dunedin City Council*:[5]

> The [Appeal] Board recognises that the preservation of objects and places of historical or scientific interest or natural beauty is a proper planning objective and that it is one of the matters set forth in the Second Schedule to the Act. But it says that the selection of the specific objects and places in a district to be preserved is essentially a matter for community itself . . . . The protection afforded by a district scheme to registered objects is of a negative kind. A district scheme can do no more than prohibit certain actions. It cannot positively take care of registered objects and places; only persons or a group of persons can do that.

It is submitted that legislative provision for community participation in matters of preservation requires re-examination. Recent Supreme Court decisions have extensively examined the question of the *locus standi* of groups of persons to appear and be heard on planning matters when scheme changes are being considered.[6] In the *Highland Park Progressive Association* case[7] Wild C. J., applying the rule of *expressio unius est exclusio alterius,* held that the rights of objection under the relevant sections of the Town and Country Planning Act were limited to the classes of persons specifically mentioned in each of the sections in question, i.e., sections 23, 24, 28C, 30B, 35 and 38A, which individually provide for separate aspects of town and country planning procedure before council planning committees and the Town and Country Planning Appeal Board. Of these sections only section 24 appears to give rights of objection to groups of persons organised for (say) the purpose of protection of historic buildings. Rights of objection under section 24 are seemingly wide as they apply to

> . . . every organisation or society of persons engaged in any profession, calling, or business, or of persons associated with the promotion of any sport or recreation, or associated for any other purpose of public benefit or utility. . . .

Such persons may object to the matters set out in sections 23(1) and 24(1) which mainly refer to a proposed district scheme and proposed change or review of an operative district scheme. It has been made clear that this class of persons has no rights of objection under

[5] (1971) 4 N.Z.T.P.A. 101 at 103 per Turner S.M.

[6] *Attorney-General* v. *Birkenhead Borough* [1968] N.Z.L.R. 383 at 389 per Richmond J.; *Station Realty Ltd.* v. *Henderson Borough Council* (1972) 4 N.Z.T.P.A. 190; *Highland Park Progressive Association (Inc.)* v. *Barry-Martin and Mayor etc. of Wellington* [1974] 1 N.Z.L.R. 108; *Blencraft Manufacturing Co. Ltd.* v. *Fletcher Development Co. Ltd.* [1974] 1 N.Z.L.R. 295.

[7] [1974] 1 N.Z.L.R. 108.

other sections of the Act unless they can fairly claim to have an interest greater than the public in general.[8]

The Town and Country Planning Act and Regulations provide for proposed changes to district schemes to be publicly advertised.[9] This requirement is satisfied by insertion of a classified advertisement in the "Public Notices" column of a daily newspaper circulating in the district concerned.

III. Developments Overseas Compared With Protective Powers Under Present New Zealand Legislation

1. *Registration at national level of places of historic, etc. interest*

In the United Kingdom there are a number of Acts of Parliament concerned with the preservation of historic buildings and places of natural beauty. Under the Town and Country Planning Act 1962[10] provision was made for a statutory list of buildings and places requiring protection compiled by the Minister of Housing and Local Government. Buildings are now graded in four categories as follows:[11]

Grade I —buildings of outstanding interest;

Grade II *)—buildings of special interest warranting every effort to

Grade II) preserve them, particularly starred buildings;

Grade III —buildings not qualifying for statutory listing but important enough to be drawn to the attention of local authorities so that the case for preservation could be considered.

Unlisted buildings which appear to a local planning authority to be of special architectural or historical interest and are threatened with demolition or alteration may be saved temporarily by a *building preservation notice*. This gives such buildings six months protection pending application to the Minister for permanent protection under section 58 of the 1971 Act. By 1966 over 90,000 buildings in England and Wales had been listed, but on the other side of the coin destruc-

[8] Town and Country Planning Regulations 1960, r. 32(2), as amended and cases listed ante, n. 6. It seems that, conversely, rights of objection under s. 23 do not necessarily confer rights also under s. 24: *Evans* v. *Gisborne City Council* (1962) 2 N.Z.T.C.P.A. 25; *Rogers* v. *Special Town and Country Planning Appeal Board* 1 [1973] N.Z.L.R. 529 at 532 per Wild C. J.

[9] Sections 22, 23(2), rr. 9, 18 and First Sch. forms B, D and O.

[10] This Act was substantially repealed and/or embodied in later legislation particularly the Town and Country Planning Acts of 1968 and 1971.

[11] Section 32 of the 1962 Act. Current enactment is now s. 54 of the 1968 Act. See also G. Ashworth, "Contemporary Developments in British Preservation Law and Practice" (1971) 36 Law and Contemporary Problems 348, 349. Provision is also made in the United Kingdom for the protection of trees by means of tree preservation orders. Current enactment for this is now s. 59 of the 1968 Act.

tion of various historic buildings had, for various reasons, reached an alarming proportion of 400 per year.[12] Since 1966 five separate Acts were passed to provide additional measures.[13] The Town and Country Planning Act 1968 introduced a new set of expressions designed to give listed buildings greater protection. These were subsequently incorporated in the 1971 Act. Some examples may be given. A *listed building consent* may be issued by the local planning authority or by the Minister which empowers the owner of a listed building to destroy or alter it only after a careful examination by the authority concerned and conclusion that the building cannot be reasonably preserved. Punishment by fine, imprisonment or both can be imposed under section 55 of the 1971 Act for any destruction or alteration carried out without a listed building consent. If an owner has applied for and been refused a listed building consent he can serve a *listed building purchase notice* under section 190 on the local planning authority requiring it to purchase the building subject to a successful claim that the listed building has become incapable of reasonable beneficial use. In addition to prosecution for breaches of the law a local planning authority may enforce a *listed building enforcement notice* under section 96 where unauthorised work is being carried out on a listed building.[14]

In the United States of America the Secretary of the Interior maintains a National Register of districts, sites, buildings, structures and objects significant in American history, architecture, archaeology and culture under the National Historic Preservation Act of 1966.[15] The word "districts" should be noted. It was found that one of the deficiencies of the United Kingdom 1962 Act was the limitation of preservation to specific buildings. Since then both the United Kingdom and the United States have officially recognised the need to conserve whole areas in the interests of greater protection.[16]

It is observed that both the Auckland and Dunedin city councils have made some move in the light of overseas trends. The Dunedin

[12] Ashworth, loc. cit., 350.

[13] Civic Amenities Act 1967, Transport Act 1968, Housing Act 1969 and the Town and Country Planning Acts of 1968 and 1971. The 1971 Act repealed and consolidated much of the first four of these Acts.

[14] *Encyclopaedia of the Law of Town and Country Planning* (1959), 1093 (Release 31, 28 July 1969) with reference to the 1968 Act.

[15] Section 470 (a) (1). See also O. S. Gray, "The Response of Federal Legislation to Historic Preservation" (1971) 36 Law and Contemporary Problems 315, 316.

[16] Civic Amenities Act 1967 (U.K.), s. 1(6), now Town and Country Planning Act 1971, s. 277; Ashworth, loc. cit., 352; Gray, loc. cit., 317. Before the 1967 Act was passed judicial recognition was accorded to the need to consider a historic building in the context of its setting, e.g., a terrace or a square: *Iveagh (Earl of)* v. *Minister of Housing and Local Government* [1961] 3 All E.R. 98 at 103-104 per Megaw J. (affirmed on appeal [1964] 1 Q.B. 395).

City District Scheme has a not dissimilar grouping of buildings, etc. to that of the United Kingdom.[17] Informal discussion with the Town Planning Department of the Auckland City Council indicates that a similar grading of buildings is being considered for this city. In Auckland a proposed change of scheme in 1973 under section 29 of the Town and Country Planning Act to preserve all the old group of properties in Renall Street, Freeman's Bay has now become operative.

2. *Involvement in preservation at national level*

Apart from the trend towards national registers the impressive aspects of the United Kingdom and United States legislation would seem to lie in the involvement of preservation matters at ministerial level and also with national policy. Much of the value of recent U.K. legislation lies in the regulations and ministerial guidelines issued under the authority of the Civic Amenities Act 1967.[18] A decision on the destruction of a listed building may in certain circumstances be referred to the Minister himself under the Historic Buildings and Ancient Monuments Act 1953 (and also under the 1968 legislation) where a building is too dilapidated to be worth restoration and the site is needed for essential development.[19]

In the United States the National Historic Preservation Act of 1966 provides (at section 470i) for the establishment of an Advisory Council with the duties of encouraging studies and education, liaison and co-ordination of activities with state and local agencies. The Council is required to furnish an annual report to the President and also to Congress.[20] The U.S. National Environmental Act of 1969 establishes historic preservation as a national environmental objective. Part of this policy requires all federal public work projects to contain certain procedural steps where any historic buildings or sites could be affected by the project. While environmental damage is not specifically prohibited there is an obligation to provide a detailed advance study of the implications and hence

> . . . provides strong incentives towards an honest search for alternatives for any public official who would prefer not to brand himself a vandal . . . a further advantage is the readiness of the courts to enforce such requirements.[21]

Examination of the relevant legislation in Victoria and New South Wales has not revealed much that is relevant to the trends set out in

[17] *District Scheme City of Dunedin*, Scheme Statement, para. 1401. The interior of the Regent Theatre is classified under Group 2.
[18] Ashworth, loc. cit., 352.
[19] Ibid., 351.
[20] Gray, loc. cit., 316.
[21] Ibid., 326-327. This procedure is an "environmental impact statement" which is discussed post in this article.

the legislation of the United Kingdom and the United States. It is understood that a national register has now been compiled in Australia.[22] One drawback of the Victoria and New South Wales Acts is the wording that a planning scheme "may" (not must) provide for historic, etc. preservation.[23] One interesting feature of the Victorian Act is the general power of the Governor-General in Council to revoke the whole or any part of any planning scheme (but not with specific reference to historic or scenic preservation).[24]

In New Zealand the Town and Country Planning Act places town and country planning matters in general almost entirely in the hands of regional and local authorities. Admittedly there is provision for the Minister of Works to make his requirements known to planning authorities. When considering objections to proposed schemes or changes of schemes, however, the Minister has no greater powers than those of any other objector.[25] In considering the more limited field of historic buildings and sites, etc. it is submitted that overseas developments have shown the need for involvement at national level.

3. *Financial aspects of preservation*

The United Kingdom Government has been paying increasing attention to the economics of preservation. Their Housing Act 1969 provides for ministerial grants to local bodies and owners of listed historic property. The Local Authorities (Historic Buildings) Act 1963 empowers local authorities to pay for the upkeep of any buildings of architectural or historic interest and the 1968 Town and Country Planning Act empowers grants to be made in certain circumstances without ministerial approval. Exchequer grants under the Historic Buildings and Ancient Monuments Act 1953 have been paid on a rapidly increasing scale, from £500,000 in 1967–1968[26] to £1,000,000 in 1971–1972.[27] In the United States the Housing and Urban Development Department is empowered under the Demonstration Cities and Metropolitan Development Act 1966 to provide finance for the acquisition and restoration of historic properties if the latter meet the criteria comparable to those required for the National Register. Also, the Secretary of HUD can grant up to $90,000 per structure for costs

[22] *The Victorian Town Planning Handbook* (2nd ed. 1961), 134.
[23] Local Government Act 1919 (N.S.W.), s. 342G(3)(o) and (p); Town and Country Planning Act (Vic.), s. 9(2)(a).
[24] Town and Country Planning Act (Vic.), s. 32(4).
[25] Sections 4(2), 10(2), 21(5), 24(1), 28C(2), 30B(4), etc. It is submitted that the validity of this argument is unaffected by the powers of the Crown, statutory corporations and local bodies on planning matters under the Town and Country Planning Act and other Acts of Parliament.
[26] Dame Evelyn Sharp, *The Ministry of Housing and Local Government* (1969), 157.
[27] [1971] Journal of Planning and Property Law 426.

incurred by the National Trust in renovating or restoring structures.[28]

Both the United Kingdom legislation and that of New Zealand provide for compensation for properties compulsorily acquired by local authorities, the former specifically includes acquisition of historic properties and the latter only in a general context of town planning.[29] This power of course could work in a negative way by discouraging local bodies from expending money on historic property.

4. *Publicity aspect of preservation*

This aspect is bound up with notification to interested parties on planning matters affecting historic properties. The New Zealand position has already been discussed and examination of U.K. and U.S. legislation revealed only minor improvements over the New Zealand position in terms of public notification or status of persons to appear and be heard before tribunals. Where the U.K. and U.S. legislation does have a marked advantage, however, is in the field of watchdog bodies with specific legislative powers. For instance New York has a Landmarks Preservation Commission with certain powers once a building is listed in the State Register. There, listed buildings may only be destroyed with the Commission's approval and after a public hearing.[30] The National Council has already been mentioned but should be noted in a similar context. In the United Kingdom the National Trust established under an Act of 1907, while not having much specific legislative power has considerable influence. Also, in the United Kingdom the machinery for listed building consent applications includes provision for the service of notice on local amenity and civic societies.[31] Another safeguard is the Town and Country Planning (Inquiries Procedure) Rules 1969 governing the holding of public local inquiries and which is regarded as a well known and accepted part of the administrative process to planning control over land development. Originally there was no provision under those rules for interest groups as such to appear and be heard.[32] This position may have altered on the Town and Country Planning Act 1971 coming into force. Section 29(2) of that Act read in isolation refers to "any representations" relating to a planning application but section 27 refers to "owners and agricultural tenants" only as persons entitled to make representations. Support for the view that the 1971 Act

[28] Gray, loc. cit., 325.

[29] Sections 44 and 47 of the Town and Country Planning Act 1953. See also *Arundale Centre Inc.* v. *Waitemata County Council* (1972) 4 N.Z.T.P.A. 344 for discussion on the question of compensation to an owner injuriously affected by the listing of his property as a historic building.

[30] Gray, loc. cit., 344, 367-368.

[31] Town and Country Planning Act 1971, s. 55 and Sch. II.

[32] *Encyclopaedia of the Law of Town and Country Planning,* op. cit., 1109.

imposes no restrictive qualification for persons who may make applications is given by Cooke J. in the *Blencraft Manufacturing* case.[33] In any event, the publicity effect merely of holding the inquiry must be of considerable benefit.

One certain publicity aspect to emerge from the 1971 Act is to be found in section 26(3)(a) which provides for a notice in prescribed form to be posted on the property affected by the planning application, to be left there for seven days and to be clearly legible to members of the public without the necessity of entering upon land.

One interesting development regarding interest groups to be found in the United States case of *Scenic Hudson Preservation Conference* v. *Federal Power Commission*,[34] where the Court of Appeals for the Second Circuit held:[35]

> In order to ensure that the Federal Power Commission will adequately protect the public interest in the aesthetic conservational and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved parties' under s. 313(b). . . .

While the above judgment may accord with section 24 of our own Town and Country Planning Act it also appears to widen the scope of interest groups to other planning procedures as well and might therefore be of some persuasive authority in the reform of planning law in New Zealand.[36] Such reform could eventuate in one way by the inclusion of historic buildings and places of historic interest as subjects for environmental impact reports, legislation for which is now under consideration in New Zealand.

IV. Conclusions to be Drawn

It will have been noted that this article has principally concerned itself with places of historic interest (particularly buildings) and that little mention by comparison has been made of places of natural beauty. In explanation it was found that legislation overseas could not give much lead as to any improvements in our own legislation in this regard. The U.K. National Parks and Access to the Countryside Act 1949, as strengthened by the Countryside Act 1968, appears to have less force than our own Acts on scenic preservation.[37] Of course,

[33] [1974] 1 N.Z.L.R. 295 at 313.

[34] 354 F. 2d. 608 (1966).

[35] Ibid., 616.

[36] A case in point is provided by the Dunedin City Code of Ordinances, 701-702 which allows any person claiming to be injuriously affected by the fact of property appearing in the register to make application to the council for cancellation or modification of the registration, such application being deemed a Conditional Use application. Under 28C of the 1953 Act there is no provision for group objections.

[37] Halsbury, *Laws of England* (3rd ed. 1952-1964) xxviii, 183-189, 195-198, 204-208. See also Sharp, op. cit., 159-162.

one may point to a greater problem in the United Kingdom of population, industry and available space, problems not existing (yet) in New Zealand to anything like the same extent. In the field of historic places however it is submitted that there is much to be gained by the adoption of some of the measures taken in recent years by the United Kingdom and the United States of America. Only by situating the subject of historic places entirely on a proper national level, away from local planning considerations solely, can we hope to achieve a reasonably secure means of preservation. By this means one envisages a greater attention being drawn to the need for preservation among the general public; there is more chance of finance being made available for historic preservation. It is conceivable that the Historic Places Trust would be armed with more coercive and financial powers to achieve its aims. One can also foresee the appointment of (say) regional commissions to hold inquiries and to liaise with local bodies while also supervising their activities over historic places. Such a commission should be widely represented among relevant professional and business interests. The existence of such commissions should encourage the activities of interest groups for whom more specific legislative status should be enacted.

Almost as a postscript mention should be made of the Town and Country Planning Amendment Act 1973 which recently introduced a new section 2B into the principal Act. The relevant part reads as follows:

> 2B. The following matters are declared to be of *national importance* [emphasis added] and shall be recognised and provided for in the preparation, implementation, and administration of regional and district schemes:
>
> (a) The preservation of the natural character of the coastal environment and of the margins of lakes and rivers and the protection of them from unnecessary subdivision and development
>
> (b) . . .
>
> (c) . . .

No doubt this is encouraging but seemingly it is an illustration of already existing concern for the preservation of places of natural beauty at national level.

Following the lead provided in the United States, historic and scenic preservation should be specifically brought within the environmental portfolio of government under a completely separate Act. By this means the whole of the public would become involved and greater supervision of our national heritage achieved.

APPENDIX

PROPERTIES CONTROLLED BY THE N.Z. HISTORIC PLACES TRUST
(as at 18 December 1973)

Properties Owned by the Trust in Fee-Simple

Mission House, Waimate North
Mission House, Mangungu
Clendon House, Rawene
'Alberton', Mt Albert, Auckland
Bell House, Pakuranga
Pirongia Redoubt, Pirongia
'Hurworth', New Plymouth
Timeball Station, Lyttelton

Property Leased by the Trust from the Auckland City Council
Ewelme Cottage, Parnell

Historic Reserves Controlled by the Trust under the Reserves and Domains Act 1953

Pompallier House, Russell
Rangiriri Historic Reserve, Rangiriri
Te Wheoro Redoubt Historic Reserve, Rangiriri
Taupo Redoubt Historic Reserve, Taupo
Runanga Redoubt Historic Reserve, Napier/Taupo Road
Pouto Lighthouse Historic Reserve, North Kaipara Head
Kakahu Lime Kiln Historic Reserve, South Canterbury
Gabriel's Gully Reserve, Lawrence
Te Porere Historic Reserve, Tongariro National Park (part of this reserve is a Maori Reserve under the Maori Affairs Act 1953).