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IS THE CROWN BOUND OR NOT ?

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1. INTRODUCTION

The short answer to the question as applied to the Town and Country Planning Act 1977 is in effect "yes and no". The Crown is bound by some procedures and provisions but is not bound by others. The most advantageous method of considering the position of the Crown is to make a comparison of the position under the 1953 Act with the position under the 1977 Act.

2. General Principle

As a matter of general constitutional principle, the Crown is presumed to be not bound by an Act of Parliament and this principle finds expression in section 5(k) of the Acts Interpretation Act 1924 which states "no provision or enactment in any Act shall in any manner affect the rights of Her Majesty ... unless it is expressly stated therein that Her Majesty shall be bound thereby." The common law provides that an Act may in fact bind the Crown not only expressly but by necessary implication from the context of the statute but such implication is not lightly to be drawn by the Courts. A question has arisen as to what are the rights of Her Majesty but it has been accepted that property rights are clearly covered and under this approach the Crown is not bound by any local authority by-laws: see Lower Hutt City v Attorney-General [1965] NZLR 65; and the Crown is not bound by the general obligation under the Town and Country Planning Act 1953 to observe ordinances in a district scheme even where construction is carried out by an independent contractor for a separate corporate body provided that the building is erected on Crown Land with funds provided by the Crown: see Wellington City Corporation v Victoria University of Wellington: Attorney-General [1975] 2 NZLR 301.

Having stated the general constitutional and legal position in brief, the legal position of the Crown under the 1953 and 1977 Acts can be outlined as follows.

3. Town and Country Planning Act 1953.

(a) Regional Planning

Under section 10 of the 1953 Act, the Regional Planning Authority sub-

mits a recommended scheme to the Crown and the Minister may make requirements for public works which must be incorporated in the scheme to his satisfaction subject to appeal to the Appeal Board. It may be assumed that if the Appeal Board decides against the Minister then the Crown is bound to the extent of that particular decision as a matter of necessary implication. This possibility is alluded to with respect to district schemes in the Victoria University case (page 309). However there would be nothing to prevent the Minister submitting a new scheme and working outside the requirement provisions which are not mandatory. In this event there is nothing in the Act to bind the Crown and Section 4 which requires public authorities to observe the provisions of an operative regional scheme does not apply to the Crown. It is common knowledge that public works such as motorways and railways have not been incorporated in operative regional schemes and these works have a major impact on the development of an area and appearance of the landscape.

(b) District Planning

There is an obligation under section 33A of the Act to zone all land which is designated for a public work and clause 1 of the second schedule contemplates the zoning generally of all other land in a district. Accordingly Crown Land will have a zoning or underlying zoning where designated and the legal affect of the scheme may be considered under three sub-headings.

(i) Housing schemes under section 2A. Where the Crown acquires land to be designated for a housing development scheme under the Housing Act 1955, the provisions of the district scheme apply to the development. Where no requirement concerning the state housing development is issued, it would appear that the scheme does not bind the minister and the development could occur on land not appropriately zoned.

(ii) Requirements. Where the Crown decides to make a requirement under section 21 with respect to a proposed public work, the Appeal Board might set the requirement aside or delete it upon appeal, and it was contemplated in the Victoria University case as stated that such a decision could bind the Crown as a matter of necessary implication following its commitment to use the requirement procedure. In any event, under section 33A(1) the underlying zoning does not affect the development of the public work and it would not be subject to any bulk and location restrictions, unless imposed by way of conditions following an appeal to the board or by agreement with the Crown.

(iii) Public utilities. Section 21(9) of the 1953 Act allows predominant use status for every public utility in any zone. The term "public utility" was given a wide definition in Hamilton City v Waipa County [1969] NZLR 867 to include a city sewage plant, and in Auckland City v Auckland Education Board (1969) 3 NZTCPA 155 to include a training college. The section accordingly conferred a substantial privilege upon the Crown in the development of a public utility, subject however to appeal by the local council against the siting of the utility. It would seem that on such an appeal the appeal board would have under its general powers the ability to impose development conditions where it allowed the proposed location to be maintained.

The general position outlined, and the approach of the appeal board to appeals concerning requirements is considered in greater detail in the authors book, Planning Law in New Zealand (1977) pages 23-26. In sum, the involvement of the Crown under the 1953 Act is permissive in all areas and the Crown could choose as a matter of policy to ignore the Act totally or to abide by the procedures as it thought fit.

4. Town and Country Planning Act 1977.

(a) Regional Planning. The system of regional planning adopted under the 1977 Act follows closely the recommendations of the 1973 review committee that the Crown should take a much greater role in establishing regional planning schemes, that it should be bound by the final scheme but that approval would be by the minister, and the Crown should make some financial contribution towards regional planning activities.

(i) Crown Bound. Section 17(1) states unequivocally "the Crown and every local authority and public authority shall adhere to the provisions of an approved regional planning scheme". Prior to approval of the scheme, under section 22 a proposed scheme must be taken into account in determining matters arising at a district level.

With reference to existing operative regional schemes, the existing regional planning authorities continue in existence unless taken over by a united or regional council (except that the Auckland Regional Authority continues unchanged), and under section 23(6) the existing scheme remains governed by the 1953 Act unless and until it is wholly reviewed under the provisions of the 1977 Act and then takes effect as

a scheme approved under the latter Act; see section 21(3).

(ii) Approval process. Whereas the 1953 Act required the regional planning authority to incorporate requirements of the minister to his satisfaction, section 12 of the 1977 Act does not include an equivalent directive and the minister's involvement in settling a proposed regional scheme at the stage of negotiation between local authorities is limited to a right to raise matters affecting the interest of the Crown at any tribunal enquiry requested by a local authority. In practice one would assume the regional planning authority would take into account Crown requirements seriously as the Minister, after referral of the scheme to him for approval under section 13(2), may reject the scheme. However the power to refuse approval is not a general one and is limited to matters "of national importance and having significance beyond the boundaries of the region". If the authority or council refuses to make changes to accommodate the minister's decision, the matter is referred to the tribunal again for recommendation and the minister may after receiving the tribunal's report recommend or request that the council make an amendment as appropriate. The council may once more decline the request and in this event the minister has a final power of decision to direct an amendment within the next three months. The scheme is then approved by order in council although approval is not mandatory. This is surprising when one considers the comparable mandatory duty to recommend approval of an area scheme prepared by the local government commission.

Although the minister would appear to lack the power under section 12 or 13 to refer a matter to the tribunal which is not of national importance and having significance beyond the boundaries of the region, he could with agreement with the council refer any matter of regional planning for enquiry under the disputes section 163. Lacking agreement however there is still a very effective backdoor method ofamending the regional scheme to provide for public works of a local nature. Where the minister makes a requirement at district level and the requirement is incorporated in the district scheme, under section 118(10) the regional planning scheme, if at variance at this stage, must be amended without any formality to show the requirement as approved at local level. Thus the regional council would be obliged to take a very

active part in watching requirements of the Crown or another local authority for that matter made at local level where any variance could conflict with the provisions of the operative regional scheme. The problem of variance of course raises the much larger question as to how specific the regional scheme will be and how a regional authority will in fact interpret the obligations set out in the first schedule to the Act.

(iii) Government Contribution. One strong incentive for preparing a regional planning scheme is the discretionary power of the government to appropriate money towards the costs of the scheme and also for any work or development carried out under the scheme. For example the Crown might be persuaded to advance funds for forestry development and the acquisition of regional reserves.

(iv) Exemptions. The binding affect of the regional scheme on the Crown is subject to two exemption provisions. Under section 116(2) the construction or undertaking of any public work may be exempted from the designation process or from approval under a district scheme where the Governor-General by order in council "considers it in the national interest to construct or undertake any public work without delay". In the first reading of the Bill the test was simply whether the work might be "in the public interest", whereas the Act restricts such authorisations to works of national interest which cannot wait. One can only speculate as to whether this exemption could be used to authorise the construction at any stage of a major power station. Legally such exemption could not be reviewed successfully by a Court unless it was proved the minister was not acting in good faith or was acting without any facts or justification in an objective sense. The other exemption is under section 176 whereunder the minister of defence may authorise any work or activity to proceed where necessary for reasons of national security. This power is very broad and one would hope that it would not be used to authorise the development of dwellings for servicemen or depots in areas which are not properly zoned for the type of development.

(b) District schemes.

(i) Housing Development Schemes. Section 62(2) states clearly now that every district scheme shall have full force and effect in relation to development schemes undertaken under the Housing Act 1955. Whether a

scheme comes under that Act is not easy to determine in practise unless the land is clearly appropriated for a scheme under that Act. Some doubt remains as to Crown Land which might have buildings or facilities erected on it either under the powers of the Housing Act or under the general public works powers of the Crown.

(ii) Preparation of the scheme and review. Again it is not mandatory for the minister to make any requirements during the preparation of a scheme or review, but section 43 does give the minister the opportunity to make requirements for public works. As it is not mandatory, the present system whereby a proclamation may define the centre line of a motorway may continue without that proclamation being entered on a district scheme. Accordingly where the motorway proclamation is noted on titles under the Land Transfer Act and blights the saleability of the property, the rights of a landowner under section 82 to obtain an order that the property be purchased will not apply until such time as the land is designated within the district scheme. The landowners rights have therefore not been improved unless the Crown resolves as a matter of practice to use the designation provisions at the earliest opportunity.

(iii) Public Works to proceed. The major change under the 1977 Act is to place a mandatory obligation on the Crown to obtain the designation of land to be used for the construction or undertaking of any public work, or to obtain a planning consent in accordance with predominant or conditional use rights. Accordingly the Victoria University case could not occur under the 1977 Act unless the exemption provisions were invoked.

(iv) Designation procedure. The 1977 Act designation procedure applies to public works only and does not apply to development by private owners which might be for the public benefit.

a. Conventional system. Where a requirement is made during the preparation of the proposed scheme (or during the operation of a scheme) section 48(8) invokes the provions of section 118 and the procedure enables the persons and bodies having standing to make objections under section 2(3) to object to the requirement. The council may not allow the objections but under the procedure makes a recommendation to the minister or local

authority concerned and the minister or local authority then advises the council of its final decision. In the event of an adverse decision the council or any objector may appeal to the tribunal, and the tribunal must consider the criteria set out in section 118(8). The criteria appears to follow the Donald Reid & Co v Dunedin City (1971) 4 NZTPA 75 approach, being an enquiry whether the proposed work is reasonably necessary for achieving the objectives and whether the site is suitable for the work and also the general planning effects of the proposal. However it is clear that the council must make its recommendation in light of the objectives in sections 3 and 4 of the Act and such objectives would still be relevant to the decision of the tribunal as involving a stage in the preparation or administration of the district scheme. It may still be arguable before the appeal board whether alternative sites are relevant to the enquiry, but it would seem clear that where matters of national importance are involved under section 3, it would be competent for evidence to be given and appropriate for the board to consider alternative sites, such an approach being taken in the decision Downing v Upper Hutt City Council (1976) 5 NZTPA 353 (siting of airport on productive farmland).

Under this procedure the tribunal has the final decision.

b. Inquiry alternative. A new alternative procedure allows the minister after receiving the recommendation of the local council on the objections to refer the matter to the tribunal for inquiry under section 119. The inquiry is to report on the same objectives as under 118, but again the appeal board must take into account the objectives of planning under sections 3 and 4. The inquiry may be heard together with an inquiry concerning a proposed acquisition of land under the Public Works Act 1928 and following the procedure under that Act the tribunal makes a recommendation to the minister. The minister then has the final say as to whether the recommendation is adopted or not, and the council is advised of the minister's decision and any conditions which he wishes to impose. No appeal lies from the recommendation of the tribunal or decision of the minister but the ability to apply for review to the Supreme Court would still remain where the decision were based on irrelevant matters or arrived at otherwise than in good faith. At this point in time, it is difficult to speculate as to the practical and policy factors which might lead the

minister to referring a matter to inquiry rather than risking an adverse decision under section 118. The inquiry procedure places the Crown in a strong position, subject to the political ability to override an adverse recommendation from the tribunal. It also places an onus on the tribunal to face up to the responsibilities of making a recommendation knowing that the matter of choice of site may involve policy factors which the tribunal may not wish to shoulder.

(v) Designation affect. As already stated under section 118(10) the designation at district level takes affect and may result in the amendment of the regional scheme without further formality if there is any variance. Thus approval by a council without any appeal being lodged could result in amendment to the regional scheme. One would expect in these circumstances the regional authority would support the designation.

With reference to the underlying zoning, section 121 states that the underlying zoning does not affect the construction of the work or the use of the land for the designated purpose and accordingly no bulk and location provisions applicable to the underlying zoning would apply. The actual landowner must obtain permission from the designating authority to carry out any work, subject to a new appeal right, as set out in section 124. A new obligation is to submit an outline plan of the work before actual construction begins under section 125, and this provides a further opportunity for the council to object to the bulk and location aspects of the work. If the council objects to the plans and agreement is not reached, there is an appeal right to the tribunal or the minister may refer the matter for enquiry under section 119 where he wishes to retain the final power of decision. A notable exception from the duty to submit the outline plan relates to hydro-electric installations, dams, and bridges, it is presumed that the bridges are those used for hydro-electric purposes rather than all bridges.

(vi) Total exemptions. As set out with respect to regional schemes, the possible exemption under section 116(2) of any public work which must be preceded with without delay where in the national interest remains, and also the exemption under section 176 concerning works or activities of the armed forces which are necessary for reasons of national security.

(vii) Partial exemptions. The former public utility exemption under section 21(9) of the 1953 Act has been narrowed under section 64 of the 1977 Act to give predominant use status to power lines, telephone lines, and water and sewage services but the local authorites (other than the Crown) must give notice of the works to the council and the council may appeal against the location of the works. Outline plans are not required for these works and there is no appeal against the siting of works erected by the Crown. These may include transformers, high voltage lines and pylons, which is a significant exemption.

(viii) Crown activities not involving a public work. There is nothing in the Act to require the Crown at district level, except in the case of Housing Act developments, to observe a district scheme where the construction or undertaking of any public work is not involved. Thus the acquisition or use of an existing building for a use not authorised in the zone, such as a prerelease centre, periodic detention centre, or office activity in a residential zone, does not involve the Crown in the breach of the district scheme as it is not bound in simple terms by the district scheme. Whether any significant alteration to a building or landscape work would involve the undertaking of a public work and thus requiring designation of property could be a difficult question to resolve. One would expect that merely shifting furniture around within a building would not involve the undertaking of a public work.

(ix) Prosecution of the Crown. The decision of Quilliam J in Southland Acclimatization Society v Anderson and Miller of Mines (5 October 1977) to the effect that the Crown may not be prosecuted under the Water and Soil Conservation Act 1967 even though that Act states "this Act shall bind the Crown", indicates the general immunity of the Crown from prosecution as it is not bound by the Summary Proceedings Act which must be invoked to bring the Crown before a court. It must therefore follow that the offence provisions under section 92 relating to the use of land or buildings contrary to a scheme or under section 172, being offences generally against the Act, cannot be invoked against the Crown. At best where the Crown was bound, a declaration might be obtained that the Crown had not complied with its statutory obligations.

(x) Clean Air Act 1972. Formerly this Act, under section 29(9), provided that the Crown was to be bound by regional and district planning schemes and local authority by-laws in any case where the Crown was seeking a licence for a scheduled process. This sub-section has been repealed by the 1977 Act, and the position now is that the Crown may be refused a licence only to the extent that the process would contravene the Planning Act or by-laws, as outlined. As by-laws do not apply to the Crown, a licence could not be refused now on that ground.

(c) Maritime Planning Schemes.

(i) Crown not bound. Under section 108, public bodies and other persons are bound to observe the scheme but the Crown is a significant omission from this provision. Areas of land may be included in the Maritime Planning Scheme, in particular land included within wharf limits whether the local council consents or not, and where so included the land comes out of the district scheme. Thus, if the Devonport Naval Base was included in an Auckland Maritime Planning Scheme, there would be no control under that scheme over the development of the area by the Crown.

(ii) Regional level. Under section 19 of the Act the Maritime Planning area is deemed to be included within any region under the control of a regional council or regional planning authority and the Crown would accordingly be bound at regional level as far as the regional scheme regulates the development of the Maritime area. The first schedule of the Act, under clauses 5 and 6 , contemplates that the scheme will identify the general regional needs for sea facilities and water recreation, but whether a scheme would plan in detail the nature, location and extent of these developments is in doubt at present. If the scheme states policies only, there will be little control over Crown activities.

4. Conclusion

The Town and Country Planning Act 1977 reflects a compromise concerning the ideal that the Crown should be bound by the planning process. The Crown will participate in the process to a greater extent at regional level and through the designation procedure for public works. But the Act also confers on the Crown significant new powers, being vested in the Minister, to make final decisions on policy grounds and to totally exempt works in the public interest. In essence the Crown has consolidated its position of strength.

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