EXISTING USES AND NON-CONFORMING BUILDINGS UNDER THE 1977 ACT

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INTRODUCTION
In the early days of town planning, the legislation endeavoured to restrict existing uses in the expectation that that would lead to their being eventually eliminated. This principle is still of course appropriate in many circumstances.

However, experience has induced more realism because it has been found that existing uses do not disappear quickly and if too restricted during their period of continued existence become nuisances by reason of the enforced decay. Robert M. Anderson, "American Law of Zoning" (New York), puts it as follows:

"Provisions limiting non-conforming use are based, in large part, on the premise that if non-conforming uses are restricted as to change, expansion, alteration and the like, they will lose vitality and ultimately will expire. The assumption is that a use of land thus limited will not long survive the forces of economic attrition, obsolescence, physical decay, and acts of God. Aside from the fact that experience has proved that the assumption is false in that it fails to reckon with the resiliency of nonconforming uses, the most striking feature of the common restrictions is their inattention to the problem of preserving the neighbourhood during the life of the non-conforming use. Non-conforming users are commonly without authority to remodel their premises or to make major repairs. Consequently, although it is almost axiomatic that old uses never die, the restrictions ensure their becoming more disreputable. They survive to become progressively more incompatible with adjacent uses."
As a result, recent legislation has been directed at controlling or managing existing uses and existing structures rather than suppressing them.

THE 1953 PROVISIONS

The "existing use" provisions of the 1953 Act have been the object of judicial criticism on a number of occasions. McCarthy P. in Stewart Investments Limited v. Invercargill City Corporation [1976] 2 N.Z.L.R. 362, 363 summarised the position as follows:

"In Ashburton Borough v. Clifford (1969) N.Z.L.R. 927, this court strongly criticised the draftsmanship of s 36(1) of the Town and Country Planning Act 1953, as it then was. North P. said that the section was ineptly drawn and that it was high time that the intention of the legislature should be clearly expressed as to the circumstances in which "existing use" is protected. Turner J. described the section as being execrably arranged and little better worded. I said that there was no wonder that problems arose in its application.

The legislature took some notice, for in 1971 it rearranged the section, but regrettably it left remaining the amorphous language on which we had commented. In particular, it did not come to grips with the vague word "substantial". The present case is a product of the uncertainties which bedevil the section."

In the Ashburton case North P. observed that Section 36 was expressed as an offence section. Nevertheless, the definition subsection afforded to the owners substantive rights.

The 1953 Act did not distinguish clearly between use or activity on the one hand, and buildings or structures on the other hand. The term "existing use" was used in a rather loose way to cover both. The 1953 Act simply defined the term "existing use" and then proceeded to prescribe penalties for those persons who did things which were not "existing uses". The Act was entirely negative in that it established controls to deal with those activities which were not existing uses or existing structures and it ignored the rights or means of control of those
activities which were existing uses.

THE 1977 ACT
The 1977 Act deals with existing use problems in a much more logical way. It has attempted to meet many of the criticisms made of the earlier Act.
(a) It distinguishes clearly between the provisions relating to uses or activities on the one hand, and buildings on the other hand. Section 90 deals with uses. Section 91 deals with buildings.
(b) It specifically gives substantive rights to existing uses and non-conforming buildings.
(c) The sections giving those substantive rights are separate from the sections which create offences in respect of the illegal use of the land and buildings (Section 92), offences in respect of illegal building activities (Section 93), and which give additional powers for the enforcement of District Schemes (Section 94).

However, for reasons outlined hereunder there remain serious and real problems of interpretation and administration of the provisions. I shall examine each Section in turn. The full text of Sections 90 to 94 inclusive is set out in the appendix hereto.

SECTION 90 - EXISTING USES MAY CONTINUE
This section is intended to give to an existing use the right to continue subject to certain limitations as to change. This, in essence, is a development from the definition section of the 1953 S.36(3). In interpreting Section 90 it is fundamental to remember the definition of the words "character" and "amenities" in Section 2:-

"The term "character", in relation to the use of any land or buildings, shall be construed with regard to the effect of that use upon the amenities of the neighbourhood."
"Amenities" means those qualities and conditions in an area which contribute to the pleasantness, harmony, and coherence of the environment and to its better enjoyment for any permitted use."

Section 90 does not define "existing use" as did Section 36 (1953 Act). Instead, it declares that land or buildings may be used in a manner not in conformity with the Scheme in force for the time being in certain defined circumstances each/which warrants separate discussion.

S. 90(1)(a)(i)

The use may continue if it was established before the relevant provision became operative. The only limitation is that the use was lawfully established before the relevant provision of the Scheme became operative. There is no limitation as to change of character, intensity or scale. In my view this is a serious omission. Provided that the use remains the same it is unrestricted as to any change to the effect that use may have on the amenitites of the neighbourhood.

For example, if I have for many years carried on in the basement of my house a business of making wooden furniture, I am entitled to continue that use even though the character, intensity and scale of that use has changed by, say, my employment of two assistants and by my installing a lathe and two circular saws. The use remains the same and can expand free of limitation.

S. 90(1)(a)(ii)

The use may continue if it is the same as or similar to the character, intensity and scale of the use lawfully established before the provision of the Scheme became operative. This clause is broad enough in its terms to govern the same uses as well as similar uses having the same or similar characteristics. However, because subclause (i) deals specifically with the same use, subclause (ii) must be interpreted as dealing with similar uses which have the same or similar characteristics. To take the previous example, I could change my furniture manufacturing business to the business of manufacturing wooden rowing boats because the use would be of the same or similar character. I could not, however, then increase the intensity and scale of the boat manufacturing business.
I am of the view that Section 90(1)(a)(i) should not have been included. It allows an existing use to change as to character intensity and scale so long as it remains the same use. If sub-paragraph (i) had been omitted the subsection would have effectively permitted either the same or a similar use to continue so long as its character intensity and scale did not change. That, I believe, was the intention of the legislature and that intention can only be achieved by the repeal of Subparagraph (i).

Section 90(1)(b)
This Subsection is very similar to Section 36(3)(b) (1953 Act) but it has the addition of Subclause (ii). This subsection is intended to allow a building in the course of its erection to be used for its intended purpose notwithstanding a Scheme change coming into effect during the course of the erection of the building and before the use is established. I find the second half of the subsection difficult to interpret. It prohibits the commencement of a use after the expiry of two years from the date the Council consents to the erection of the building unless:

(i) The Council certifies substantial building progress within the two year period; and

(ii) The building has been used for the purposes for which it was to be erected or a similar purpose since the erection or completion of the building.

This provision does not contemplate a situation when a building is completed within the two year period but remains unoccupied or not used until after the expiration of the two year period. Although it would be a little strange, a Council could certify that substantial progress has been made within the two year period when the building was in fact completed within the two year period.

Subparagraph (ii) is rather more difficult. I confess that I do not really understand what is meant or intended. I suspect that what was really intended was a proviso along the following lines (commencing after "by the Council"):

"provided that if such use is not commenced within

* See new Town and Country Amendment Act 1980, s.24.
53.

a period of two years after the date on which the Council consented to the erection of the building then that use shall not be allowed unless -

(i) In the case of a building not completed within such two year period the Council certifies that substantial progress has been made within the two year period towards the erection or completion of the building, and upon the erection or completion of the building that use or a use that is of the same or of a similar character, intensity and scale is commenced within six months (?) or twelve months (?)) after erection or completion of the building; or

(ii) In the case of a building completed within such period of two years the Council has on application made within three months after the expiry of that period determined that that person has made and is continuing to make substantial progress towards establishing the use or a use that is of the same or a similar character intensity and scale."

I would recommend that Section 90(1)(b) be amended in accordance with the above draft.

Section 90(1)(c)
This subclause reconfirms the right of a use established pursuant to an application under the/1977 Acts to continue notwithstanding that it is not in conformity with the Scheme.

Section 90(2)
This subsection is similar to Section 36(4) (1953 Act) and provides for the lapsing of existing use rights if the use is discontinued for a period of 6 months unless the Council on an application made within 12 months after the use is first discontinued consents to that first period of 6 months being extended. The provision is carefully examined in Dr. Kenneth Palmer's "Planning Law In New Zealand" on pages 152 to 154. He concludes that if there is to be a discontinuance within the meaning of the subsection there must be more than physical
cessation simpliciter and concludes that it is "a matter of determining in all the circumstances whether the use has been effectively abandoned". With respect, I concur with his reasoning and his conclusions.

SECTION 91 - RECONSTRUCTION, ETC., OF NON-CONFORMING BUILDINGS

Section 91 confers the right for the reconstruction alteration or addition to existing non-conforming buildings subject to certain limitations. This right can be further limited by the district scheme only in relation to the matters set out in Clause 8(a) of the Second Schedule to the Act which relates to avoiding or reducing danger nuisance etc. arising from earthquake and like natural causes and objectionable elements like noise, fumes etc.

Although the Section refers to "buildings" only, in my opinion that term is broad enough to include structures not of the type normally referred to as buildings, such as billboards, signs, walls, fences, etc.

The non-conformity governed by the section must relate to the building. For example, a shop cannot be forced to provide offstreet car parking space in accordance with a code if the owner wished to make alterations. In those circumstances it is not the building which fails to conform to the Scheme.

S. 91(1)
Existing non-conforming buildings may be reconstructed altered or added to if -
(a) The work does not increase the degree by which the building fails to comply with the Scheme; and
(b) The current market value of the building is not increased by more than 60%.

Both of these conditions warrant close examination.

S. 91(1)(a)
What is meant by increasing the "degree by which the building fails to conform"? There will be obvious cases as for example when a building already excessive in height, is increased in height. There will be other cases which will be less clear
cut. For example: a non-conforming house is located on a site governed by a typical yard requirements of 6 metres for the front yard and rear yard and 1.22 metres for the side yards. It is non-conforming as to its front yard as illustrated but the owner wishes to make certain additions or alterations:

Extension (a): The owner wishes to extend the house to the rear. The result of him so doing is that his next-door neighbour is faced with a side view of a building of greater length that would be permitted on that lot by the operative code. Nevertheless, the degree to which the building fails to conform to the Scheme has not increased because its non-conformity is in relation to the front yard requirements. The building continues to fail to conform to the Scheme only to the same degree and is therefore permitted under this subclause.

Extension (b): The owner wishes to close in an open sunporch which infringes into the front yard space. Although this may make more substantial that part of the building that infringes the scheme, it does not increase the degree by which the building fails to conform. Such alteration is therefore permitted.

Extension (c): The owner wishes to add a room to the front of the house which does not increase the distance by which the building intrudes into the front yard. Nevertheless,
more of the front yard is occupied by non-conforming building and therefore the addition does increase the degree by which the building fails to conform to the Scheme. It would not be permitted.

Extension (d): The owner wishes to add a second storey over the sun porch. Unlike Extension (c) this does not increase the extent of the non-conformity, but does increase the substance of the non-conforming part of the building. It does not increase the degree of non-conformity and it therefore is permitted.

**Section 91(1)(b)**

The reconstruction etc. would not increase the market value of the building by more than 60%. Subsection 2 provides that the current market value shall be taken as the value of the building in the condition it was in before the reconstruction etc., less the value of any work completed during the preceding 5 years.

The provision is concerned with the current market value of the building not the property. I believe that major difficulties will arise out of the problem of assessing the current market value of a building. The provision governs every alteration to a non-conforming building from, say, the renovation of a house located a little too near the side boundary, to the major reconstruction of a city office building or a factory complex. It would appear that before a building permit can be uplifted to carry out alterations to any building a Council will be required to obtain particulars of the current market value of the building together with an assessment of the likely increase in that value as a result of the proposed alterations. A few examples will demonstrate some of the difficulties which will arise. The answers I suggest are at best tentative.

1. An average family home:

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Land value</td>
<td>$12,000.00</td>
</tr>
<tr>
<td>House value</td>
<td>$18,000.00</td>
</tr>
<tr>
<td>Amount by which value of building is permitted to increase</td>
<td>$10,800.00</td>
</tr>
</tbody>
</table>
This is not to say that $10,800.00 may be expended on improvements. The expenditure of $10,800 on improvements can be expected to increase the market value of the house by more than $10,800.00.

2. A sound but run down Ponsonby home:

<table>
<thead>
<tr>
<th>Land value</th>
<th>$10,000.00</th>
</tr>
</thead>
<tbody>
<tr>
<td>House value</td>
<td>$8,000.00</td>
</tr>
<tr>
<td>Amount by which value of building is permitted to increase</td>
<td>$4,800.00</td>
</tr>
</tbody>
</table>

We are all aware of the major rejuvenation of many central city residential areas. Nearly all these houses are non-conforming in that they are too near a boundary, or their height in relation to a side boundary is too great etc. In many cases the amount by which the value of the buildings are being increased by their renovation is substantial.

In nearly all cases the renovation is commendable, in the public interest, and to be encouraged. If, as I shall later submit, the effect of Section 91 is to prohibit such extensive renovation of old housing stock, it is an unfortunate provision. It is, however, capable of amelioration by means of an ordinance which I suggest.

3. A single storey house with the potential of a harbour view if an upstairs room was added:

<table>
<thead>
<tr>
<th>Land value</th>
<th>$20,000.00</th>
</tr>
</thead>
<tbody>
<tr>
<td>House value</td>
<td>$25,000.00</td>
</tr>
<tr>
<td>Amount by which value of building permitted to increase</td>
<td>$15,000.00</td>
</tr>
</tbody>
</table>

The addition of an upstairs room may well cost no more than $15,000.00. Nevertheless, it may have the effect of boosting the value of the property to, say, $75,000.00, but such increase is in the current market value of the property and not the building. The increase in value arises out of the potential of the section and the proper method of calculation of the value of the building alone is on a bricks and mortar basis.
4. A factory investment:-

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Land value</td>
<td>$40,000.00</td>
</tr>
<tr>
<td>Building value</td>
<td>$70,000.00</td>
</tr>
</tbody>
</table>

However, such a property is capable of a high rental return which may be capitalised at say $140,000.00. On the market, such a building may fetch say $125,000.00 being somewhere between its land, bricks and mortar value of $110,000.00 and its capitalised return of $140,000.00. It would be an artificial calculation to apportion the rental return between the land and the buildings. In such circumstances although the value of the property exceeds the sum of the value of the land and the value of the building, I would suggest that the amount by which the building value could be increased is 60% of $70,000 - $42,000.00.

It may be that we shall need some litigation to resolve this difficult question of how one values a building as opposed to a property. The object of the legislation is to define with certainty the owner's rights but I fear that that object has not been achieved.

I have one suggestion for people who want to renovate a non-conforming house. The terms "reconstruct", "alteration" or "addition" would not appear to include repainting or wallpapering of a house. An owner might therefore usefully paint and paper his house before seeking consent to carry out alterations. His base value would then be higher.

**PROCEDURE IN RELATION TO S. 90 and S. 91**

Under the 1953 Act there was no provision for the appeal Board to make a decision in the form of a declaratory Judgment. An interested party was required to resort to the Supreme Court.

Section 153 of the 1977 Act provides that the Tribunal may declare "whether any specified use in relation to that land is permitted under Section 90 or Section 91 ... of this Act". This Section uses the words "any specified use" but it refers to Section 91 which is not concerned with uses but with non-conforming
buildings. I would submit that Section 153 should be broadly interpreted so as to give the Tribunal power to make declarations in respect of reconstructions etc. of non-conforming buildings. It would, nevertheless, be more satisfactory if Section 153 were to be amended so that the last part of Subsection 1 read as follows:

"... "or whether any specified use in relation to that land or any reconstruction, alteration or addition to a building on that land is permitted under Section 90 or 91 or Part V of this Act".

SECTION 92 - OFFENCES IN RESPECT OF USE OF LAND FOR BUILDINGS
Subsection 1 makes it an offence to use land in a manner not in conformity with the Scheme.
Subsection 2 gives the Council power to obtain an injunction to restrain continuing offences.
Subsection 3 provides that the intermittent repetition of any actions shall be deemed to be a continuing offence. This subsection is directed at overcoming the difficulty Council encountered in Potter v. East Coast Bays Borough [1975] 1 NZLR 627. In that case the Court of Appeal held that there was not a continuing offence when a house was used as a boarding house for periods of a few days during every second or third week. Under the new Act the Council would have succeeded in obtaining an injunction.

SECTION 93 - OFFENCE IN RESPECT OF LAND OR BUILDINGS
This Section is similar in form to Section 92 and is directed at restraining the construction or reconstruction etc. of non-conforming buildings.

SECTION 94 - ADDITIONAL POWERS FOR ENFORCEMENT OF DISTRICT SCHEME
This Section is much the same as the enforcement subsections of Section 37 (1953 Act). It gives the Council the power to require the owner to remove buildings erected in contravention of the Act and if necessary to obtain Court orders to enforce the requirements.
EARLIER DECISIONS RECONSIDERED UNDER THE 1977 ACT

It is useful to re-examine decisions decided under the 1953 Act to see whether the result would have been different under the 1977 Act.

Ashburton Borough v. Clifford /1969/ NZLR 927

The owner of an existing apartment house wished to convert several rooms into two flats. The Council refused a building permit on the grounds that the flats were not permitted within the zone. It would appear that both the use and the building were non-conforming. It was held that there was no change in the character of the use and the question which the Court had to decide was whether the use required substantial alteration to the building. It was held that the alterations were not substantial and that the Council should have issued a building permit.

Under the 1977 Act the question of use would be considered under Section 90. It would appear that the use of part of the building as flats was of the same or similar character, intensity and scale as the previous use as an apartment house and therefore, as was the case under the 1953 Act, the change in use was permitted.

The alterations to the non-conforming building would be considered under Section 91 of the 1977 Act. So far as can be determined from the facts as stated by the Court there would have been no change in the degree by which the building failed to conform to the Scheme and the market value of the building would not have been increased by more than 60%. Accordingly, under Section 91, the owner would be entitled to make the alterations. The result of the case would have been the same.

O'Sullivan v. Mt. Albert Borough /1968/ NZLR 1099

The O'Sullivans owned a residentially zoned property which backs on to Eden Park on which was erected a small grandstand. After the scheme became operative the grandstand was extended several times. The Court held that the extensions
had to be removed but that the original grandstand building retained its existing use rights.

The result would be the same under the 1977 Act. Section 91 would govern the position. The building would have increased as to the degree by which the building failed to conform to the Scheme and the increase in value would exceed the permitted limit. The extensions would give rise to an offence under Section 93 and the Council could exercise its powers to require demolition pursuant to Section 94.

This case can be used to demonstrate the difficulty arising from Section 90(1)(a)(i) discussed on page 51 above. Suppose that the O'Sullivans had been able to use their backyard as a vantage point for viewing football matches rather than having to erect a grandstand. Suppose that by the grassing over of their large vegetable garden they were able to increase the capacity of their backyard vantage point from 25 persons to 250 persons. The character, intensity and scale of the use would have changed but in my submission the use could continue pursuant to Sub-clause (i) because it was the same use as the use established before the Scheme became operative. If sub-clause (i) were removed from the Section subclause (ii) would be effective in preventing such uncontrolled expansion of the existing use.

**Potter v. East Coast Bays Borough /1975/ 1 NZLR 627**

As outlined above on page 59 the result of this case would now be different because the activities would be deemed to be a continuing offence pursuant to Section 92(3). The Council could now get its injunction.

**Christchurch, Regional Planning Authority v. Waimari County Council**

A supplier of building materials occupying a building of 5,600 sq. ft. in a rural zone wanted to build an additional building of 2,800 sq. ft. contrary to the zoning. He was required to apply for a specified departure.

In the 1977 Act he would still be required to apply for a
specified departure. It is to be noted that Section 91 refers only to reconstruction, alteration or addition to "any existing building". It does not permit the erection of a separate building, however small, and however closely related to the existing non-conforming building.

The decision provides a useful summary of the matters to be taken into account by the Council in assessing an application for specified departure to expand a non-conforming existing use or enlarge non-conforming buildings. In broad terms, the criteria discussed in the decision will remain applicable under the 1977 Act although I would submit that the inference to be drawn from the new Act is that it is rather more liberal as to the continuance of non-conforming uses and buildings than is the 1953 Act. The Board's view "that the substantial reconstruction or alteration of any building in which (non-conforming uses) are carried on or the construction of additions to a new building is not to be permitted" must now clearly be modified to the extent that non-conforming buildings can be substantially altered so as to increase their value by up to 60%.

Stewart Investments Limited v. Invercargill City Corporation /1976/ 2 NZLR 362, 363
A large factory, non-conforming both as to use and buildings, consisted of two buildings. The east building was 6,475 sq. ft. with an indemnity value of $51,350.00 and a replacement value of $97,400.00. The west building was damaged by fire. It was 23,584 sq. ft. of which 6,475 sq. ft. was damaged by fire. Its replacement value was $392,200.00. Its indemnity value was $88,600.00. The reinstatement cost of the damaged portion was $97,400.00 and its indemnity value was $26,129.00.

The Court of Appeal found that Section 36 (1953 Act) was directed primarily at non-conforming uses and not non-conforming buildings. The substantial reconstruction was required not by the use but as a result of the fire. Accordingly, the reinstatement was not prohibited by the Section and the Court declared that the owner was entitled to a building permit. The Court left unanswered the question of whether reinstatement would have
been permitted if the building had been totally destroyed.

Surprisingly the 1977 Act has failed to make express provision for reinstatement following accidental destruction. Under Section 36 (1953 Act) the Court was able to give an interpretation generous to the property owner by construing the Section as being directed primarily at governing uses rather than buildings. That opportunity is not available under the 1977 Act. Section 91 is clearly directed at governing the reconstruction of buildings. In my submission the decision under the 1977 Act would have been that the reinstatement could not have been permitted because the market value of the building "in the condition it is or was in before the reconstruction" (S.91(2)) would be increased by more than 60%. Nearly $100,000.00 was required to reinstate the building, the indemnity value of which was $88,600.00 prior to the fire. Its market value immediately prior to reconstruction would not have exceed $62,500.00 ($88,600 less $26,129) and after the expenditure of nearly $100,000.00 its value would have been increased by more than 60%. The building owner would not have been entitled to a permit allowing it to reinstate.

ASSESSMENT OF THE 1977 ACT AND PROPOSALS AS TO AMENDMENT
It is unfortunate to find oneself, 8 days before an Act is to come into force, to be advocating amendments to certain provisions of it. Nevertheless, that problem will continue so long as our politicians insist on rushing important legislation through the House, when, as in the case of this Act, less hasty consideration during the parliamentary recess would have been both feasible and useful. The parliamentary draftsmen must be working under virtually siege conditions towards the end of our Parliamentary sessions and one can but sympathise with the pressure under which they must work. The "existing use" provisions in the Act underwent drastic changes between the Bill's introduction and its enactment. The changes have done much towards tidying and clarifying the legislative provisions relating to existing uses. Nevertheless, further tidying is necessary and I outline hereunder how I believe the Sections could be improved and how District Schemes
may be changed to meet problems arising under the Act. I have identified certain amendments which I consider necessary.

1. The repeal of Section 90(1)(a)(i). I have discussed the reasons for this on pages 51 and 52.

2. An amendment to Section 90(1)(b). I have discussed the reasons for this on pages 52 and 53 and have suggested an amendment to meet difficulties I have identified.

3. An amendment to Section 153. A draft of that amendment is on page 59.

4. Provision for reinstatement following fire. The present legislative silence on this question is unsatisfactory. In my view under the 1977 Act, the Stewart Investments case will no longer be good law. A non-conforming building partially destroyed by fire could not be reinstated without application for consent to conditional use; specified departure, or waiver (as is appropriate). The delays and the uncertainties inherent in this are commercially unacceptable. An American writer, Anderson, "American Law of Zoning" page 432 has noted that a provision "which depends for its effectiveness upon the happening of an event which none can foresee does not appear to be the most dependable device for implementing a community plan. (The Act) permits the use to remain until some misfortune befalls the use, commonly a fire or flood. The happening of the event activates (the Act) which in turn compounds the injury of the non-conforming user." On an application to reinstate the owner tends to have the Tribunal's sympathy because "since he seeks to restore his property he is not the scourge of the neighbourhood but the unfortunate victim of fire or flood."

It is reasonable that a non-conforming building which is totally destroyed or very seriously damaged should not be reinstated. In the United States a common provision is to allow reinstatement if the damage does not exceed a certain percentage of
I would suggest 2 alternative subsections which could be added to Section 91.

"S.91(3). Notwithstanding the provisions of Subsection (1)(b) of this Section a building may be reconstructed to restore it if it has been damaged by fire, tempest, earthquake, other natural causes or accident to an extent not exceeding 75% of its market value immediately preceding the damage."

That proposal gives a blanket right of reinstatement to a damaged building. The following subsection could be adopted as an alternative if it were felt that the Council should retain a residual control over the right to reinstate.

"S.91(3). Notwithstanding the provisions of Subsection (1)(b) of this Section the Council may consent to reconstruction to restore a building which has been damaged by fire, tempest, earthquake, other natural causes or accident to an extent not exceeding 75% of its market value immediately preceding the damage. The application for consent may be made without notice but subject to the provisions of Sections 76 of this Act as if it were an application for dispensation or waiver provided for in the District Scheme."

Pending an appropriate amendment to the Act it would be possible to include a suitable ordinance in District Schemes and a suggested draft is set out on pages 68 and 69.

5. Control of Existing Uses and Non-conforming Buildings. The philosophy behind the Sections is that there must be a balance between the public interest in achieving the general purposes of the District Scheme, and the private interest of the property owner to have certainty in his right to continue his use or retain his building. The price the public must pay is to accept indefinitely into the community an activity or building which does not conform to its planning Scheme. In my view the
The non-conforming owner is not bound to give sufficient in return for that privilege. Subject only to the constraints as to change imposed by Sections 90 and 91 and to the duty not to give rise to objectionable elements (Section 77), the owner may continue without any concession to the zoning or performance standards governing his neighbours. He is under no obligation to provide parking space even although he may be able to do so and it is desirable that he do so; he may refuse to screen fence his untidy yard; he may operate at any hour of the day and night. If he had had to apply for consent to a conditional use or specified departure, the Council, acting in the public interest, would have had a chance to impose conditions controlling those things. The non-conforming owner has the benefit of statutory protection of his right to continue and it is not unreasonable that he be obliged to take reasonable steps to mitigate adverse effects caused by his use. Neither the 1953 Act nor the 1977 Act, except in Sections 34A and 77 respectively, recognises the several middle courses available between on the one hand allowing existing uses and non-conforming buildings to remain unmodified, and on the other hand the exercise of the right of compulsory acquisition vested in Councils under Section 47 (1953 Act) and 81 (1977 Act). There are a number of middle courses available to the legislature.

(a) Existing uses and non-conforming buildings may continue without control.

(b) Owners may, after a hearing, be directed to mitigate adverse effects.

(c) Councils may direct the amortisation of the use or building over a specified period. This technique has been used extensively in the United States but many writers have reservations about its general effectiveness.

(d) Councils may undertake compulsory purchase of developments rights or the existing use rights. That is, the Council may upon payment of compensation, require a building to be demolished or a use to terminate but the owner retains the land for redevelopment in accordance with the zoning.
67.

(e) Councils may compulsorily purchase the land.

These proposals are a relatively minor advance of the powers continued in Sections 34A and 47 of the 1953 Act and Sections 77 and 81 of the 1977 Act. Councils have only rarely had to resort to the use of Section 34A because the mere threat of the use of the Section has usually been enough to persuade an owner to take reasonable steps to reduce or eliminate the cause of complaint. In a similar way, I would expect that if our legislation were to include powers of a kind I advocate, the powers would be used more frequently as a bargaining weapon than a legal one.

I have not attempted to draft a full section but the following is an example of a provision empowering the mitigation of adverse effects. The procedural subsections, which I have not included, would be similar to those contained in S.77.

"Regulation of Existing Uses and Non-conforming Buildings. The Council may require the owner of any land or building which is being used in a manner which or on which there is an existing building which is not in conformity with the District Scheme or any part or provision of it as in force for the time being notwithstanding that it is permitted under Section 90 or Section 91 of this Act to mitigate adverse effects of the use or building on property in the vicinity or on the public generally. Without limiting Council's power, the Council may require the erection of a fence or other screening, the construction of parking facilities, the regulation of the emission of smoke, fumes or noise and the hours when the use may be conducted or the building used."

6. Suggested District Scheme Provisions. I have suggested that the provisions of Section 91 restricting the extent to which non-conforming buildings may be reconstructed may be more restrictive than is desirable and in the public interest.

It is not hard to imagine a sound but rather run down 60 year
old house being renovated so as to increase the value of the building by more than 60%, and in my view it is most desirable that such rejuvenation of existing housing stock be encouraged. Unless suitable provisions are made in District Schemes, Councils will be obliged to consider the valuation question whenever an application is lodged for a building permit to renovate an existing non-conforming building. This seems administratively inconvenient and unnecessary for at least some categories of uses.

Is it intra vires the Act to make provision in the District Scheme which are less stringent than Section 91 for the reconstruction etc. of non-conforming buildings? Can a District Scheme permit, as a predominant use, the reconstruction or alteration of, say, a non-conforming house in a residential zone irrespective of the increase in the market value of the building?

In my opinion Section 91 is not inserted to restrict absolutely the right to reconstruct alter or add to non-conforming buildings. It is inserted principally for the benefit of the owners of such buildings and gives them a minimum statutory right to reconstruct etc. It is open to a District Scheme to be more liberal in its treatment of non-conforming buildings so as to permit their reconstruction irrespective of the increase in value.

The drafting of a suitable ordinance is not entirely straightforward. An ordinance which simply provides that an existing non-conforming building can be reconstructed so as to increase its value up to 75% would be in direct conflict with the provisions of Section 91. The ordinance must deal with the more fundamental problem of removing the building from the category of being a building which is "not in conformity with a District Scheme". I would suggest that the following ordinance would be a suitable starting point.

"An existing building which but for the provisions of this ordinance would not be in conformity with this Scheme or any part or provision of it shall be exempt from the bulk and location requirements
of the zone in which it is located for the purposes of permitting its reconstruction or alteration (but not an addition thereto) if:-

(a) The use to which the building is being put is a predominant use within the zone in which the building is located; and

(b) The reconstruction or alteration does not increase the degree by which the building would but for this ordinance fail to conform to the Scheme or any part or provision of it; and

(c) The reconstruction or alteration will not detract from the amenities of the neighbourhood and will have little town or country planning significance beyond the immediate vicinity of the land on which the building is located; and

(d) Either -

(i) The reconstruction or alteration would encourage better use of the building for a permitted purpose; or

(ii) The reconstruction or alteration is for the purposes of restoring a building which has been damaged by fire, tempest, earthquake, other natural causes or accident to an extent not exceeding 75% of its market value immediately preceding the damage."

This ordinance would also overcome the deficiencies of the Act in relation to the restoration of a building damaged by fire etc. Some Councils may feel that the ordinance as drafted is too broad in its application. It could easily be modified to provide that it applies only to permit reinstatement following fires, and to, say, residential uses.

CONCLUSION
The new Act has laid the foundation for the development of satisfactory provisions governing existing uses. It has overcome many of the problems inherent in the 1953 Act but it has created some new problems of its own. I have suggested some amendments
which I would expect will assist in improving the administration of the new Sections. It is not, however, entirely a matter for the parliamentary draftsmen. The local authorities through their planning staff will need to clarify their attitude to existing uses and non-conforming buildings. As I have suggested it is open to Councils to make provision in their District Schemes to meet at least some of the problems I have discussed. Unless some modification is made of a kind I have suggested, Councils will experience difficulties in administering applications for building permits to renovate non-conforming buildings.
90. Existing use may continue—(1) Any land or building may be used in a manner that is not in conformity with the district scheme or any part or provision of it as in force for the time being if—
(a) The use of that land or building—

(i) Was lawfully established before the district scheme or the relevant part or provision of it became operative; or
(ii) Is of the same character, intensity, and scale as, or of a similar character, intensity, and scale to, that for which it was last lawfully used before the date on which the district scheme or the relevant part or provision of it became operative; or
(b) In the case of a new building, whether proposed, partly erected, or erected, which has not been used before the date on which the district scheme or the relevant part or provision of it became operative, the use is for any purpose for which approval for its erection was given by the Council; but any use of such new building which commenced after the expiry of a period of 2 years after the date on which the Council consented to the erection of the building shall not be lawful unless—
(i) The Council certifies that substantial progress has been made within the 2-year period towards the erection or completion of the building; and
(ii) The building has been used for the purpose for which it was to be erected or for any purpose that is of the same or a similar character, intensity, and scale since the erection or completion of the building; or
(c) The use is pursuant to an application granted under this Act or the Town and Country Planning Act 1953 either before or after the date on which the district scheme or the relevant part or provision of it became operative.

(2) Notwithstanding the provisions of subsection (1) of this section, if at any time after the date on which the district scheme or the relevant part or provision of it became operative the use of any land or building authorised under subsection (1) of this section is discontinued for a period of 6 months, no use of that land or building shall at any subsequent time be regarded as permitted by this section unless the Council, on application made to it within 12 months after the use first being discontinued, consents to that period of 6 months being extended to a period coinciding with the period during which the use was discontinued.

91. Reconstruction, etc., of non-conforming buildings—
(1) Except as otherwise provided by any provision in the
district scheme relating to the matters set out in clause 8 (a) of the Second Schedule to this Act, where any existing building is not in conformity with a district scheme or any part or provision of it as in force for the time being, then the building may be reconstructed, altered, or added to if—

(a) The reconstruction, alteration, or addition does not increase the degree by which the building fails to conform to the scheme or any part or provision of it; and

(b) The reconstruction, alteration, or addition would not increase the current market value of the building by more than 60 percent.

(2) In assessing the current market value of a building for the purposes of subsection (1) (b) of this section, that value shall be taken as the value of the building in the condition it is or was in before the reconstruction, addition, or alteration in question took place less the value of any prior reconstruction, addition, or alteration which was completed during the period of 5 years preceding the commencement of the reconstruction, alteration, or addition in question.

92. Offences in respect of use of land or buildings—

(1) Every person commits an offence against this Act who, otherwise than as authorised by or under this Act, after a district scheme or any part or provision of it becomes operative, uses or permits to be used any land or building in a manner that is not in conformity with the scheme or any part or provision of it as in force for the time being.

(2) The Council in whose district the offence has been committed may, in respect of a continuing offence (whether or not a conviction has been entered in respect of the offence), apply to the Supreme Court, or, if the capital value as appearing in the district valuation roll of the property concerned does not exceed $40,000, to a Magistrate’s Court, for an injunction to restrain the continuance of the offence.

(3) The continued existence of any thing in a state, or the intermittent repetition of any actions, contrary to any provision of this Act shall be deemed to be a continuing offence.

Cf. 1953, No. 91, s. 36

93. Offences in respect of land or buildings—(1) Every person commits an offence against this Act who, after a district scheme or any part or provision of it becomes operative, otherwise than as authorised by or under this Act—
(a) Constructs any building that is not in conformity with the district scheme or any part or provision of it as in force for the time being; or

(b) Reconstructs, alters, or adds to any building in such a way that the building does not conform with the district scheme or any part or provision of it as in force for the time being; or

(c) Alters any land in a way that is not in conformity with the district scheme or any part or provision of it as in force for the time being.

(2) The Council in whose district the offence has been committed may, in respect of a continuing offence (whether or not a conviction has been entered in respect of the offence), apply to the Supreme Court, or if the capital value as appearing in the district valuation roll of the property concerned does not exceed $40,000, to a Magistrate's Court, for an injunction to restrain the continuance of the offence.

(3) The continued existence of any building in a state contrary to any provision of this Act shall be deemed to be a continuing offence.

Cf. 1953, No. 91, s. 36 (1), (2)

94. Additional powers for enforcement of district scheme—

(1) Where it appears to the Council that any work has been done, or any building has been erected, or any material or thing has been placed, on any land in its district which is in contravention of any provision of the operative district scheme or of any relevant decision of the Council or of the Tribunal and which is not authorised under section 90 or section 91 of this Act, the Council may cause to be served on the owner and on the occupier of the land a notice requiring such steps as may be specified in the notice to be taken for the purpose of restoring the land to its condition before the work was done or the building was erected or the material or thing was placed on the land, as the case may be, and in particular any such notice may, for that purpose, require the demolition or alteration of any building or work, or the removal of any material or thing.

(2) Every notice given under subsection (1) of this section shall specify a period (being a period of not less than 28 days after the service of the notice) within which the notice shall
be complied with, and shall state that if the requirements of the notice are not complied with the Council may apply—
(a) To the Supreme Court; or
(b) To a Magistrate's Court, if the capital value as appearing in the district valuation roll of the property concerned does not exceed $40,000 or if the value of the material or thing placed on the land does not exceed $3,000, as the case require—
for an order under this section.
(3) If within the period specified in the notice, or within such further time as the Council may in its discretion allow, all the requirements of the notice are not complied with, the Council may apply to the Supreme Court or (if the capital value as appearing in the district valuation roll of the property concerned does not exceed $40,000 or if the value of the material or thing placed on the land does not exceed $3,000, as the case may require) to a Magistrate's Court for an order authorising the Council, by its officers, agents, or employees, to enter on the land and do or complete the doing of any act or thing required by the notice, and to remove any material or thing from the land, for the purpose of restoring the land to its condition before the work was done or the building was erected or the material or thing was placed on the land, as the case may be.
(4) For the purpose of hearing and determining the application the Court shall, subject to subsection (5) of this section, have all the powers vested in it in its ordinary civil jurisdiction.
(5) On hearing any such application the Court, if satisfied that the notice was duly given and that the work was done or the building was erected or the material or thing was placed on the land, as the case may be, in contravention of any relevant provision of the operative district scheme or of any relevant decision of the Council or of the Tribunal, may if it thinks fit make such order it considers necessary to enable the Council to do any of the things specified in subsection (3) of this section.
(6) If the Court is satisfied that the requirements of the notice exceed what is reasonably necessary for the purpose of restoring the land to the condition referred to in subsection (3) of this section, it may vary the notice in such manner as it thinks proper for that purpose and make such order as it thinks fit.
(7) The Council may recover as a debt due to it from the person who is then the owner of the land any expenses
reasonably incurred by the Council in doing or completing any act or thing, or removing any material or thing, pursuant to any order of the Court under this section.

(8) If at any time any money is due to the Council in respect of expenses incurred in accordance with subsection (7) of this section, the Council may, on payment of the proper fee, deposit with the District Land Registrar or the Registrar of Deeds, as the case may be, in the land registration district in which the land is situated a certificate signed on behalf of the Council describing the land and specifying the amount due and unpaid, and the Registrar shall thereupon register the certificate in respect of that land, and the amount of money specified in the certificate shall until payment be a charge on the land. The charge shall be deemed to have been created at the time of the registration of the certificate, and that registration shall be deemed to be registration of the charge for the purposes of the Statutory Land Charges Registration Act 1928.

(9) Where pursuant to any such order the Council removes any material or thing from any land, the person to whom the material or thing belongs may claim it and take it away on payment to the Council of the amount of any expenses recoverable under subsection (7) of this section. If that person does not so claim and take away any such material or thing, not being refuse, within 7 days after its removal by the Council, the Council may sell or otherwise dispose of it, and in any such case shall pay the net proceeds (if any) of the sale or disposition to that person, after deducting the amount of such expenses.

(10) Any expenses reasonably incurred by the owner or occupier of any land for the purpose of complying with a notice served on him under subsection (1) of this section, and any sums paid by the owner of any land under subsection (7) of this section in respect of the expenses of the Council, shall be deemed to be incurred or paid for the use and at the request of the person by whom the work was done or the building erected or the material or thing placed on the land, as the case may be, in contravention of the scheme, and shall be recoverable accordingly.

(11) If on an application made by the owner of any land to the Court it appears to the Court that the occupier of the land prevents the owner from doing any act or thing required for the purposes of complying with a notice under this section, the Court may order the occupier to permit the doing of that act or thing.

(12) The provisions of this section are in addition to and not in derogation of the provisions of sections 92 and 93 of this Act.

Cf. 1953, No. 91; s. 37