Property rights and land management

Rodney P. Hide

Centre for Resource Management
May 1988
Property Rights and Land Management

Introduction
Land use planning statutes, such as the Town and Country Planning Act 1977, the Clean Air Act 1972, and the Noise Control Act 1982, attenuate private property rights and enable land use to be collectively (i.e. politically) directed. The Clean Air Act 1972, for example, removes the right of landowners to carry on scheduled processes and establishes a licensing procedure by which local authorities decide who may and who may not carry on such processes.

At the heart, therefore, of the searching review of land use planning statutes currently underway¹ lie questions about what rights private landowners should have vis-à-vis the state, the extent to which land use decisions should be politically decided and the extent to which they should be privately decided, and the extent to which markets and prices should be relied upon to plan land use.

To assist that searching review this paper critically examines existing land use planning statutes and proposes major reform. It argues that land use planning statutes serve a valuable function in providing for the clearer definition of property rights, but that this function is compromised by present planning procedures that allow these rights to be adjusted coercively, and it argues further that the removal of this second (although major) function would provide for greater prosperity and enhanced environmental quality, with resources allocated openly and consistently, with a greater range of values considered, and, that in thereby allowing Maori people to exercise their lawful rights without restraint, full effect would be given to the Treaty of Waitangi. The paper suggests, in short, that present planning procedures are inimical to the wise use of resources, i.e. that they are incompatible with their statutory purpose.

The paper is in three parts. The first part considers the characteristics of the land resource, the need for property rights, and the problems that bedevil collective attempts to direct its use; the second part summarises existing planning law, and the third part describes the reform that is proposed.

Land and its Allocation
Land comprises a resource complex able to be put to a great range of uses. It consists not only of the land surface but also the soil and the minerals below, the animal and plants and other resources supported, and the space and at-

mosphere above. Land is used to provide space and support for buildings, to grow crops, to supply minerals, to store wastes, and so on, and people value land for the contribution it can make to satisfying their material wants and desires. Land, and the resources it supports, also have aesthetic and spiritual value. Buildings are valued, for example, not only for the purposes to which they may be put but also for their beauty and the sense of history that they provide.

Measured against the large and varied demands of people, land and its associated resources are scarce; they are insufficient to satisfy all wants and aspirations. Scarcity means that conflict exists not only over the use that resources will be put but also over who will benefit from that use.

Resolving the conflict of interests that inevitably exists over resources in a peaceful way requires favouring one set of interests with a legally enforced set of property rights. Private property, for example, favours the interests of the owner over the interests of others; it provides him with exclusive rights to use or to benefit from his land in certain ways, and hence allows him to form expectations about how he will be allowed to use his land and how he will be allowed to benefit from that use. Property rights thus allow individuals to plan. I have the legal right to enjoy my house and section undisturbed and thus I can plan improvements knowing that it is I who will benefit from them.

Private property comprises not a single right but a complex bundle of rights. I have the right to decide what to grow in my garden, the right to any produce, the right to sell that produce, and so on. A private property owner's rights are not unlimited, however. Under common law, for example, a private property owner does not have the right to use his land in such a way so as to substantially and unreasonably annoy his neighbours. This duty upon a private property owner establishes his neighbours' right to enjoy their land without such annoyance, and vice versa.

The rights of private property owners are also attenuated by land use planning statutes. Certain uses of land are prohibited, and other uses require consent from planning authorities. Land use planning statutes thus enable planning authorities to direct land use to some extent. In so doing they adjudicate resource use conflicts and decide whose interests will be favoured. For example, will a developer's interest, and the interests of those for whom he acts, in demolishing an historic building be favoured over my interest in having the building preserved?2

---

2. For example, s. 35 of the Historic Places Act 1980 empowers the Historic Places Trust to classify buildings according to their historical significance, or architectural quality; s. 36 provides for the Trust, with the approval of the Minister of Internal Affairs, to issue a protection notice declaring a classified building to be protected, requiring thereby that no demolition or alteration or extension be made without the consent of the Trust (s. 38).
Land use planning statutes thus shift the locus of planning away from the private property owner to the public or, more correctly, representatives of the public. In the example above, it is not the landowner alone who decides the fate of the building on his land. Land use planning statutes thus enable land use decisions to reflect interests other than those of individual landowners.

Shifting the locus of planning away from the landowner to a planning authority has a number of implications that are best illustrated by a simple example. Consider the case where Jones wants to grow potatoes upon a parcel of land that Smith wants to grow turnips on. Assume that the resulting conflict is to be adjudicated not privately but publicly; that the local planning authority will decide on the merits of the case whether to grant Jones the right to grow potatoes or whether to grant Smith the right to grow turnips.

The authority will no doubt wish to decide the case in the best interests of society as a whole. It will, therefore, need to decide whether society will be better off if potatoes were grown on that land or whether it will be better off if turnips were grown. In short, the authority will need to know what crop will have the greatest net social product.

In order to decide the best crop the authority will need a great deal of information. It will need to know something of the land's suitability for each crop, something of the future market supply and demand of the potential produce, and also something of the comparative diligence that Jones and Smith will likely exercise in pursuing their proposed projects.

No doubt Jones and Smith will each like to put their case before the authority, and having done their own research into the viability of their respective ventures, they are a potentially valuable source of information.

In making their respective cases as strong as possible, however, they are likely to somewhat overstate them. Assume, for example, that the true net social product of the potatoes that the land will produce is expected to be $100 and that the true net social product of the turnips that the land will produce is expected to be $150, i.e. the right is worth $100 to Jones and $150 to Smith. If Jones gains the right, he will be $100 better off; if Smith gains the right, he will be $150 better off. Although society will as a whole be better off if Smith gains the right, Jones himself will be worse off, and he will no doubt state his case as forcefully as he can in an at-
tempt to secure the right for himself.\textsuperscript{3} It will thus prove difficult for the authority to learn the true net social product of each crop and to make the appropriate decision.

It might be too that the best decision is not to give one or other the right to use the entire parcel of land but to split the right amongst the two. It might be, for example, that the value of allowing Jones to farm the northern half of the block is $70 and the value of allowing Smith to farm the remaining southern half is $110. By splitting the right between them the expected net social product will be $180; rather than $100 or $150. However, such an arrangement will mean Jones will be worse off than if he had the entire right; and Smith will be worse off than if he had the entire right. A compromise maximising the net social product will not only be difficult to identify but it will also be difficult to achieve.

It will also be necessary to balance the need to provide some security of tenure, and hence certainty for the

\textsuperscript{3} Such rent seeking behaviour is equivalent to profit seeking behaviour but whereas the latter is socially desirable in that it facilitates the movement of resources to their highest valued uses and thereby creates wealth, the former is socially undesirable as it creates no value while using scarce resources. The seminal papers on rent seeking are those by Tullock, \textit{The Welfare Costs of Tariffs, Monopolies, and Theft}, 5 WESTERN ECON. J. 224 (1967); Tullock, \textit{The Cost of Transfers}, 24 Kyklos 629 (1971); Kreuger, \textit{The Political Economy of the Rent-seeking Society}, 64 AM. ECON. REV. 291 (1974); and Posner, \textit{The Social Costs of Monopoly and Regulation}, 83 J. POL. ECON. 807 (1975).

property right holder, against the need to have some flexibility in the use to which the land is put. Suppose Smith obtained the right. He may wish to invest in irrigation to improve the land's productivity but he is unlikely to do so if his right to grow turnips must be renewed annually. Providing a longer term right, on the other hand, will make it difficult to adjust the use of the resource in light of changed circumstances. It might be that after the first season the demand for potatoes greatly expands but that the right to use the land is restricted to turnips, and is committed to Smith for the next five years.

The consequences of resolving that same conflict privately rather than publicly are quite different. Jones and Smith could then negotiate a price for the exchange of the right. If Jones, for example, owns the land, he will willingly sell it for anything more than $100, and Smith will willingly buy it for anything up to $150. Through private negotiations the right could be quickly and effectively transferred to its highest valued use. It is also likely that through negotiations the right to the land will be split; both Jones and Smith will be better off if Smith pays Jones between $30 and $110 for the right to the southern half of the land.

Prices thus provide information on the value of resources in alternative uses (i.e. their opportunity cost) and provide an incentive for people to respond to that information. They also allow mar-
ginal adjustments in resource allocation (i.e. for Smith and Jones to evaluate slight adjustments in their respective holdings) and for adjustments to be made in response to changed circumstances, such as price changes or technical developments.

It is not surprising that decisions such as what crop to grow are left by and large to private individuals.

Consider the case, however, of a landowner constructing a building and thereby blocking a neighbour’s house from the sun. Should Jones have the right to construct the building or should Smith have the right to receive the sun unimpeded? And should the right be tradable? One or other interest certainly has to be favoured. But having decided what interest to favour and to what extent (i.e. to what height the restrictions apply) it would seem inappropriate to allow the planning authority to adjust its decision in light of new circumstances.

If I buy my section on the understanding that my neighbour cannot block out the sun, it would seem unfair to grant subsequently a right to my neighbour to do just that even though the business he were proposing was deemed to be in the “national/regional interest.” I would have lost one of my rights without compensation. A public hearing into whether a consent should be granted will also suffer the same problems described above in trying to resolve whether Jones should have the right to grow potatoes or Smith should have the right to grow turnips.

Flexibility could be achieved by allowing trade in the respective rights. My neighbour and I should be allowed to negotiate a trade whereby he buys my right to receive the sun unimpeded from me and thence constructs his building. Both he and I would be better off as a consequence, and as long as the exchange is recorded in the title what can be the harm? And if the initial allocation of rights is reversed what possible justification can there be to prevent me from buying his right to construct a tall building on his land? Allowing such trade makes consent procedures unnecessary.

There is another implication of changing property rights through regulation or consent procedures. Consider the case of an historic building. The conflict of interest in this example is between the developer who wants to demolish the building and the general public who would rather the building preserved. Assume further that the potential developer has the right to demolish the building but that under public pressure that right is removed. Although this would appear somewhat unfair to the potential developer, who may well have bought the site for the sole purpose of development, it might nevertheless be considered justifiable as a much needed measure to preserve something of our shared heritage.
The removal of the right to pull the building down, however, renders every historic building a potential liability. Their owners might lose opportunities to develop their land unless they immediately proceed to do so. There is an incentive for them to demolish historic buildings while the opportunity to do so remains.

Our shared heritage might well be better protected not by regulation but by facilitating the removal of the right to demolish historic buildings through private negotiations. The buildings will be then seen by their owners not as potential liabilities but as assets, which is what they are. Private groups funded by public subscription could be encouraged, perhaps through tax concessions, to buy covenants on the titles of land supporting historic buildings, and thereby be made to have regard to the opportunity cost of preservation, i.e. the cost of the opportunities thereby forgone.

Very hazardous uses of land, such as the storage of explosives and the disposal of toxic wastes, are invariably considered special uses justifying the need to seek planning consent. What must be considered, however, is the extent to which a statutory consent reduces its holder’s liability. Are those engaged in hazardous activities liable for any damage that may result or are they only liable if negligent? The advantage that strict liability has is that those who are engaged in hazardous activities are made to take into full account the hazard that their activities impose on others, and policy to limit the hazard to which people and their property are exposed need not rely solely on consent procedures.

The brief analysis of the foregoing examples provides some guidance for the analysis of existing property right arrangements and for the reform of those statutes concerned with land use planning. It illustrates that with well defined tradable property rights, resources are allocated through private co-operation rather than public confrontation, and further, that the resulting prices provide information on opportunity cost while providing the incentive for individuals to have regard to this information. The analysis also highlights the problems created when property rights are adjusted by regulation, or by consent procedures, rather than through private negotiation.

**Existing Arrangements**

All rights in respect of land in New Zealand derive from the Crown. British sovereignty over New Zealand was proclaimed on the 21 May 1840 and the Crown thereby acquired title to the entire territory. Notwithstanding the common law doctrine that the Crown is

---

4. The point is recognised by those concerned with the protection of historic places, see Reeves, *The Whys and Wherefores of Historic Places Legislation*, 1983 NZLJ 172.


6. *Id.* at 13.
the "original proprietor" of all land and that a valid title can be acquired from the Crown, the acquisition of sovereignty did not, at common law, involve the abrogation of the Maori title of possession and occupancy.\(^7\)

The Crown has powers of compulsory acquisition, but the extent of its prerogative is uncertain, as is the position with regard to payment of compensation if the prerogative power is exercised.\(^8\) Compulsory acquisition is, however, invariably effected under statutory powers, the principal empowering statute being the Public Works Act 1981.\(^9\)

In New Zealand who has rights to and over land is recorded by registration of title.\(^10\) The system involves, first, the accurate identification of each parcel of land that is to be made subject to it, and secondly, the accurate recording of all the interests subsisting in each parcel of land.\(^11\) The main source of statute law relating to the registration of title to estates and interests in land is the Land Transfer Act 1952.\(^12\)

The largest estate granted by the Crown is the fee simple. When people say they "own" or "own the freehold of" a certain parcel of land they almost invariably mean that they own an estate in fee simple in that land. The owner of an estate in fee simple in land free from encumbrances has the right to exclusive possession of the land and, subject to a number of statutory restrictions of a general nature, such as planning legislation, may do upon it anything that does not constitute a tort.\(^13\)

An example of a tort is a private nuisance, \textit{i.e.} an invasion of an occupier's interest in the beneficial use and enjoyment of land.\(^14\) Typical situations that may give rise to liability involve incursions by water, smoke, odours, fumes, gas, noise, heat, vibrations, electricity, animals and vegetation.\(^15\) In judging what constitutes a nuisance:

A balance has to be maintained between the right of the occupier to do what he likes with his own and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is what is reasonable according to the ordinary usages of mankind living in society or more correctly in a particular society.\(^16\)

\begin{itemize}
  \item \textit{Id.} at 333.
  \item HEUSTON & BUCKLEY, SALMOND AND HEUSTON ON THE LAW OF TORTS 59 (19th ed. 1987).
\end{itemize}

\(^7\) \textit{Id.}\n\(^8\) \textit{Id.} at 21.
\(^9\) \textit{Id.}\n\(^10\) \textit{Id.} at 45.
\(^11\) \textit{Id.}\n\(^12\) \textit{Id.} at 48.
A public nuisance occurs when a person performs some act that constitutes a source of annoyance to the public at large.17 The proper remedy is either criminal proceedings or an information by the Attorney-General on the part of the public asking for an injunction.18

Also important is the rule in Rylands v. Fletcher that may be formulated thus:

The occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even if he has been guilty of no negligence.19

The occupier is thus strictly liable for all inherently dangerous substances that escape from his land.

The onus of strict liability and nuisance, however, has in large measure been withdrawn from undertakings carried out under statutory authority. Legislative authorisation has been interpreted as not only legalising the enterprise itself and thereby removing the spectre of having it enjoined as a nuisance, but also of conferring immunity for any harmful consequences that occur, without negligence, in its normal operation.20

There is the added problem too in New Zealand that the Accident Compensation Act 1982 has abolished the right of civil action with respect to personal injury and as a consequence regulations and consent procedures must be relied upon to ensure personal safety; there is no threat of civil action following personal injury.21

Rights over land may be granted by landowners in a number of ways, for example, by contract, by licence, by covenant, or by easement. However, it is only when a legal easement has been created that the right granted is permanent.22 Contracts and licences do not normally bind successors in title, and covenants are enforceable in equity only and hence do not bind bona fide purchasers for value without notice.23 It is therefore necessary to distinguish an easement from some inferior right.

The general rule at common law is that the owner of the soil is presumed to be "the owner of everything up to the sky and down to the centre of the earth" according to the principle cujus est solum ejus est usque ad coelum et ad inferos ("To whom belongs the soil, his it is, even to heaven, and to the middle of the earth").24 There is the principle too that whatever is attached to the soil, for example buildings and structures on

18. Id.
19. Id. at 355.
23. Id.
24. Id. at 550.
land, becomes part of it (*quicquid plantatur solo, solo cedit*).\(^{25}\)

A landowner's rights to airspace above the property, however, do not extend to an unlimited height, but are probably restricted "to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it."\(^{26}\) Above that height a landowner has no greater rights in the airspace than any other member of the public. The direct invasion of the airspace over land by artificial objects and projections such as wires and cables, advertising signs, or the jibs of cranes amounts to a trespass and is therefore actionable *per se*.\(^{27}\)

At common law a tenant in fee simple was *prima facie* entitled to all minerals under the land except mines of gold and silver, which belonged to the Crown by prerogative right, but rights to most minerals have now been resumed by the Crown by statute.\(^{28}\) Similarly, although at common law landowners had certain rights to use natural water, the Water and Soil Conservation Act 1967 vests in the Crown the sole right to divert, take, or use natural water.

The rights of fee simple owners have been further attenuated by land use planning statutes. Chief amongst these is the Town and Country Planning Act 1977. It provides the law relating to the preparation, implementation, and administration of regional and district planning, and also makes provision for maritime planning.

The purpose of planning is stated to be the wise use and management of resources, and the direction and control of development in such a way as will most effectively promote and safeguard the health, safety, convenience, and the economic, cultural, social, and general welfare of the people,\(^{29}\) and certain matters deemed of national importance to be especially recognised and provided for are detailed in the Act.\(^{30}\)

Regional planning provides only the planning framework for the region, and it is district schemes that provide the various controls, prohibitions and incentives to direct resource use as are necessary and desirable to promote their purposes and objectives.\(^{31}\) District schemes are prepared by local councils\(^{32}\) and may distinguish those uses permitted as of right, subject to specified conditions, restrictions and prohibitions; those that require approval as conditional uses; and those that require permission as controlled uses,\(^{33}\) and upon which regulations for a wide range of purposes may be placed.\(^{34}\)

---

25. *Id.* at 551.
26. *Id.* at 552.
27. *Id.*
30. *Id.* s. 4(3).
31. *Id.* s. 36(3).
32. *Id.* s. 38.
33. *Id.* s. 36(4).
34. *Id.* s. 36(5).
Public objection to proposed plans, and appeals against decisions, are provided for by the Act. 35

Subject to broad rights of appeal, a council may change any provision of its district scheme at any time, 36 and schemes must be renewed as soon as any provision has been in operation for five years. 37

As well as application to undertake conditional uses, 38 specified departures 39 and dispensations or waivers 40 may be applied for, and the council in granting a consent may impose conditions. 41 Rights of objection are also widely conferred, 42 along with rights to be heard, 43 and of appeal. 44

As well as the Town and Country Planning Act 1977, there are the Clean Air Act 1972 and the Noise Control Act 1982. These place general duties of care upon the occupiers of any premises to adopt the best practicable means to control the emissions of air pollutants and to ensure the emission of noise does not exceed a reasonable level. 45 The Clean Air Act 1972 also provides for the making of clean air zones to control pollution 46 and specifies processes that may be carried out only by those having the necessary licence. 47 The Noise Control Act 1982 similarly provides for regulations specifying limits of permitted noise. 48


**Proposed Reform**

As described above existing land use statutes serve two functions. First, they provide for a clearer definition of property rights; landowners know, for example, that their neighbours may not undertake a controlled use without first securing the necessary consent. Second, land use planning statutes provide for the coercive direction of land use through regulation and the granting or withholding of consents.

That first function is a proper and justifiable one. A landowner's rights (and similarly his duties) are thereby more clearly established, and he therefore knows with greater certainty how he may use his land, and, in turn, how his enjoyment of his land may be affected by his neighbours. This greater certainty contrasts to the situation at common law where a landowner's rights are determined by what is judged at any

---

35. *Id.* ss. 44-50.
36. *Id.* ss. 54-55.
37. *Id.* s. 59.
38. *Id.* s. 72(2).
39. *Id.* s. 74(2).
40. *Id.* s. 36(6).
41. *Id.* s. 67(1).
42. *Id.* s. 66(1).
43. *Id.* s. 66(2).
44. *Id.* s. 69.
45. Clean Air Act 1972 s. 7(1); Noise Control Act 1982 s. 5.
47. *Id.* ss. 23-31.
time to be "...the ordinary usages of mankind living ... in a particular society."

In more clearly defining the rights and duties of landowners, however, performance standards have advantages over declaring certain uses acceptable and others conditional.\(^49\) An area might be zoned, for example, for predominant use A with use B declared conditional to protect occupiers from, amongst other things, excessive levels of noise. Use C, however, that does involve excessive noise, is permitted and the protection of residents is not complete, i.e. their rights are not as clearly defined as they might be. Similarly, there may well be a use B that would not prove a nuisance but that is nonetheless prohibited. Specifying rights in terms of performance, rather than allowed uses, thus provides a clearer definition of rights and allows more flexible land use while encouraging otherwise unacceptable activities to be undertaken in ways that they do not prove nuisances.

The same advantages would be had if the Clean Air Act 1972, rather than specifying scheduled processes, specified unacceptable (or conversely acceptable) air quality standards.

There would also be an advantage if these rights (and duties) were included in land titles rather than confined to planning schemes. This would make it easier for landowners to know their rights in respect of their land.

Rights, and portions of rights, should also be freely tradable. This would allow private individuals and groups to negotiate for their exchange. As discussed above, there can be little objection to allowing two neighbours to voluntarily exchange rights as both will be better off as a consequence, and society as a whole will benefit if resources are allowed to move to their most highly valued uses.\(^50\) Allowing trade would thereby not only allow wealth to be created but would also allow environmental and conservation groups to act to protect what they value.

Achieving flexibility through trade has much to commend it. People and groups can place their own value on the rights they have and the rights that they desire. It is unnecessary for others to judge these values on their behalf.

\(^{49}\) The advantage of performance standards was recognised by Mr Antony Hearn, OBE, QC, in his recent review, see HEARN, REVIEW OF THE TOWN AND COUNTRY PLANNING ACT 1977 60-61 (1987).

\(^{50}\) Notwithstanding his guarded support for performance standards, Mr Hearn foresaw difficulties in defining rights to such things as clean air, and argued that the necessary negotiations for their trade would prove too costly (see Hearn, supra note 49, at 25-26). Rights have to be defined one way or another, however, and it is not at all clear that defining acceptable (or conversely unacceptable) air quality standards would prove any more difficult than defining acceptable (or conversely unacceptable) air polluting processes, and although it may prove costly for the parties involved to negotiate a trade that is no reason to prohibit them from doing so, particularly considering the many submissions Mr Hearn received urging the need for greater flexibility in present planning procedures (id., at 29).
Once what rightfully belongs to the Maori is returned, for example, it is unnecessary for Europeans to judge Maori values; Maori people can do it for themselves.\(^{51}\) Trade also means that people have regard to the values other people place on things. That Maori people are not prepared to sell at any price that land that is sacred to them will force Europeans to recognise the value the Maori place on that land. Trade also allows private co-operation to determine compromise in such a way that none lose. Maori people may, for example, allow certain uses of their land in return for payment; such compromise is decided by them and not by others on their behalf, and because the trade has been voluntarily entered into, no party is made worse off, and indeed both parties must as a consequence be better off.

The second function of existing land use planning statutes, that of providing for the coercive direction of land use, not only conflicts with the first function but is in itself improper and unjustifiable.

Through the use of regulations and the withholding and granting of consents, planning authorities can direct land use, and indeed, under section 3 of the Town and Country Planning Act 1977, are charged with doing so. Planning authorities thus not only define property rights more clearly but they also redefine them through changes to planning schemes and the granting of planning consents. They thus have the power to grant rights, and to remove them, and they can do so, moreover, without their owner’s consent and without the need to compensate.\(^{52}\)

The second function of directing land use, and the associated power to remove rights compromises, the first function of providing more clearly defined property rights. A landowner cannot be sure that he will not be annoyed by his neighbours undertaking conditional uses or carrying out processes in Schedule 2 of the Clean Air Act 1972 because consent to do either can, if considered justifiable by the planning authority, always be granted. Similarly, his expectations on how he may use his land may be disappointed where there are pressing public reasons.\(^{53}\) Rights can be removed from individuals or groups for the “public interest” without the need for compensation; property rights are not at all clearly defined.

That rights are thereby not secure is not the only problem. In adjusting property rights difficult judgements must be made on behalf of others. Would a stall


\(^{52}\) See, for example, *Auckland Acclimatisation Society v. Sutton Holdings* [1985] 2 NZLR 94; 11 NZTPA 33 (CA).

\(^{53}\) See, for example, *Argus Management v. Takapuna City* D No. A87/81 C3389 at C3400.
sells pottery rather than farm produce destroy rural harmony? Does a proposed development offer benefits that outweigh its effect on the physical environment? Is the construction of a private school an unwise use of New Zealand’s resources in that classrooms in a state school would thereby be vacated? Should a consent be refused because the proposed use would offend the Maori customary way of life? And so on.

And although decisions may be appealed against, the values that the planning process support rule; ultimately it is not the values of the participants that count, but the values of the decision makers, and, as the values of these decision makers differ, and vary through time, it is too much to expect that rights to resources will be allocated consistently by a planning process, and, given the necessary legal complexity of the planning process itself, there are limits to how open it can ever be.

Moreover, because rights are removed by regulation, and not by negotiation with their owners, there is no process by which the true opportunity cost of decisions is revealed, and there is little incentive to have regard to opportunity cost, but instead to concentrate on the technicalities of planning law. Is horse breeding the production of food? Is a safari park or an ammonia/urea fertiliser manufacturing complex a form of urban development? What does “sporadic subdivision and urban development” mean?

A further problem is that planning decisions fail to consider marginal changes. In establishing the protection of land for food production as a matter of national importance, for example, recognition is given to the total value of land for food production, which is very large, when what is important to land use decisions is the marginal value of land for food production (i.e. the value of the piece of land in question), which may be very small.

Furthermore, because conflicts of interest are resolved through regulation, or through the granting of consents, there is no mechanism for those who gain to compensate those who lose. Land use planning is played as a zero sum game; there are losers and there

58. Although those injuriously affected have rights to compensation (Town and Country Planning Act 1977 s. 126(1)), those rights are all but extinguished by provisos (id. ss. 126(5) & (6)).
63. See, for example, Minister of Works & Development v. Levin Borough (1978) 6 NZTPA 429.
are winners, with no provision for compensation for those who lose. The outcomes of such games can never be fair or just. And because it is a win or lose situation, the parties involved may commit considerable resources to the contest, resources that in total value may exceed the value placed by either party upon the rights at stake, i.e. they will seek rent, and land-use planning is a negative sum game in that it dissipates and wastes resources. 64 The hearing before the Planning Tribunal to consider whether a Maximart store should be allowed in the Shirley Shopping Centre, Christchurch, for example, took one week. 65

The problems described above can be overcome by removing the power of planning authorities to remove and reallocate landowner’s rights. As long as rights are fully tradable, any reallocations that are socially desirable can occur through negotiation, 66 and the future realisation of the sort of achievements currently attributed to planning 67 need not be compromised.

Conclusions
The proposed reform is simple but major:

- Specify landowners’ rights (and duties) in terms of performance standards;
- Specify those rights (and duties) on land titles;
- Allow those rights to be freely traded;
- Remove the power of planning authorities to extinguish those rights.

Providing secure rights would facilitate long term planning; allowing trade would provide for wealth creation, including environmental protection, and communities of people having shared interests would be able to express and have those interests recognised, with a greater range of values thereby taken into account; while allowing Maori people to exercise their lawful rights without restraint would give full effect to the Treaty of Waitangi.

Acknowledgements
The argument presented herein was developed in discussion with Professor Terry L. Anderson of Montana State University, and Mr Peter Ackroyd, Mr Errol Costello and Dr Basil Sharp, all of the Centre for Resource Management. Responsibility for the finished product, however, rests with the author alone.
Appendix: Land Use Planning Statutes


The Town and Country Planning Act 1977 provides the law relating to the preparation, implementation, and administration of regional and district planning, and also makes provision for maritime planning. The purpose of regional, district, and maritime planning is defined as being: 68

\[\text{The wise use and management of the resources, and the direction and control of the development, of a region, district, or area in such a way as will most effectively promote and safeguard the health, safety, convenience, and the economic, cultural, social, and general welfare of the people, and the amenities, or every part of the region, district, or area.}\]

The following matters are deemed of national importance to be especially recognised and provided for: 69

- The conservation, protection, and enhancement of the physical, cultural, and social environment;
- The wise use and management of New Zealand's resources;
- The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development;
- The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food;
- The prevention of sporadic subdivision and urban development in rural areas;
- The avoidance of unnecessary expansion of urban areas into rural areas in or adjoining cities;
- The relationship of the Maori people and their culture and traditions with their ancestral land.

Regard must also be had to the principles and objectives of the Soil Conservation and Rivers Control Act 1941 and the Water and Soil Conservation Act 1967. 70

Part I of the Act provides for a system of regional planning that is the responsibility of the united and regional coun-

---

68. Town and Country Planning Act 1977 s. 4(1).
69. Id. s. 3(1).
70. Id. s. 4(3).
Regional planning schemes approved by Government must be adhered to by the Crown and every local authority and public authority, and district schemes must conform with them.

Regional planning provides the planning framework for the region, and its influence on the use and management of resources in the region is broad and indirect.

Regional planning schemes must include a statement of the objectives and policies for the future development of the region and of the means by which they can be implemented having regard to national, regional, and local interests, and of the resources available, and they must make provision for such of the matters referred to in the First Schedule of the Act as are appropriate to the circumstances and to the needs of the region. The First Schedule is reproduced below.

FIRST SCHEDULE
MATTERS TO BE DEALT WITH IN REGIONAL SCHEMES

1. Social—
Provision for social and economic opportunities appropriate to the employment, housing, and welfare needs of the people of the region.

2. Economic—
Development of the regional economy, including growth of and balance between primary and other basic industries and service industries.

3. Natural resources and environment—
The identification, preservation, and development of the region's natural resources, including water, soil, air, and other natural systems, farmlands, forests, fisheries, mineral (including sand, metal, and gravel), and areas of value for the enjoyment of nature and the landscape.

4. Type and general location of development—
(a) The regional pattern and general form of urban and rural development.
(b) General identification of areas for urban growth including urban expansion, new urban growth, urban renewal, and areas for comprehensive planning, and of land to be acquired for any of those purposes. Determination of programmes for land assembly, development, and disposal.
(c) General identification of areas to be excluded from future urban development, including land of high productive capability, land subject to hazards such as flooding and earth movement, land with high aesthetic or recreational value, and land to separate and to enhance the appearance and setting of cities and towns.
(d) General identification of the regional pattern of industrial and commercial employment centres.

5. Public works, utilities, and facilities—
Regional needs for the provision and protection of—
(a) Drainage and sewerage facilities;
(b) Water supply, including catchment areas;
(c) Production and distribution of power and fuel;
(d) Health and education facilities;
(e) Air, road, sea, and rail transport facilities; and
(f) Other public utilities and public works.

6. Recreation—
Regional needs for land and water based recreation.

7. Communications and transport—
Provision for communications and transport to structure and support the regional pattern of development and provide access to the resources, employment, housing, shopping, and commercial areas, and the community and recreational facilities within, and outside, the region.

8. Community facilities—
Regional needs for—
(a) Civic and commercial facilities, including conference centres and halls; and
(b) Refuse disposal sites and systems.
9. Cultural facilities and amenities—
Regional needs for—
(a) Cultural facilities, including libraries, auditoriums, museums, art galleries, theatres, cinemas, and public halls;
(b) Tourist resort areas, camps and sporting facilities, including sports stadia and racecourses;
(c) Zoological and botanical gardens; and
(d) Marae and ancillary uses, urupa reserves, pa, and other traditional and cultural Maori uses.

10. Regional planning—
In presenting policies and strategies on any of the matters listed in clauses 1 to 9 of this Schedule the scheme may include the scale, sequence, timing, and relative priority of development.

11. Implementation—
In presenting regional policies the scheme may indicate such of the following as may be appropriate:
(a) Levels of service and operating policies for public utilities, services, and facilities;
(b) Amount, type, and source of financial and other resources necessary;
(c) Identification of the bodies or agencies responsible for implementation.

Regional planning is undertaken by regional planning committees. Draft plans are prepared and submissions invited, and after consideration of the submissions and such amendments as considered necessary the scheme is adopted by the council as a proposed regional planning scheme. The Minister of Works and Development or any local authority within or adjacent to the region may request the Planning Tribunal to conduct an inquiry into any specific parts of the scheme. The Tribunal then conducts an inquiry and reports to the Minister. The Minister may require amendments and the scheme is then approved by the Governor-General by Order in Council.

The regional or united council may from time to time and at any time change any approved regional planning scheme, and it is mandatory for the council to review the entire scheme whenever any part of it has been in force for ten years.

Part III of the Act deals with the contents, preparation and public notification of district schemes, and Part IV deals with their administration. Every City, Borough, County, District and Town Council is obliged to provide and maintain an operative district scheme in respect of its District unless exempted by the Minister of Works and Development. The matters of national importance and the purposes of planning described above apply to district schemes and schemes must make provision for the matters set out in the Second Schedule of the Act. The Second Schedule is reproduced below.

SECOND SCHEDULE
MATTERS TO BE DEALT WITH IN DISTRICT SCHEMES

1. Provision for social, economic, spiritual, and recreational opportunities and for amenities appropriate to the needs of the present and future inhabitants of the district, including the interests of children and minority groups.
2. Provision for the establishment or for carrying on of such land uses or activities as are appropriate to the circumstances of the district and to the purposes of the objectives of the scheme.

3. Provision for marae and ancillary uses, urupa reserve, pa, and other traditional and cultural Maori uses, and Maori reservations set apart under section 439 of the Maori Affairs Act 1953.

4. Provision for the safe, economic, and convenient movement of people and goods, and for the avoidance of conflict between different modes of transport and between transport and other land or building uses.

4A. Provision for the establishment and operation of such tourist facilities and services as are appropriate to the circumstances of the district and the purposes and objectives of the scheme.

5. The preservation or conservation of—
   (i) Buildings, objects, and areas of architectural, historic, scientific, or other interest or of visual appeal:
   (ii) Trees, bush, plants, or landscape of scientific, wildlife, or historic interest, or of visual appeal:
   (iii) The amenities of the district.

6. Control of subdivision.

7. The design and arrangement of land uses and buildings, including—
   (a) The size, shape, and location of allotments:
   (b) The size, shape, number, position, design, and external appearance of buildings:
   (c) The excavation and contouring of the ground, the provision of landscaping, fences, walls, or barriers:
   (d) The provision, prohibition, and control of verandahs, signs, and advertising displays:
   (e) The provision of insulation from internally or externally generated noise:
   (f) The location, design, and appearance of roads, pedestrian malls, tracks, cycleways, pathways, accesses, and watercourses:
   (g) Access to daylight and sunlight:

8. The avoidance or reduction of danger, damage, or nuisance caused by—
   (a) Earthquake, geothermal and volcanic activity, flooding, erosion, landslip, subsidence, silting, and wind:
   (b) The emission of noise, fumes, dust, light, smell, and vibration:
   (c) The storage, transport, and disposal of hazardous substances.

9. The relationship between land use and water use.

10. The scale, sequence, timing and relative priority of development.

A district scheme must contain a statement of the particular objectives and purposes of the scheme and the policies to achieve them, an indication of the means and sequence by which this will be done, a code of ordinances and maps to illustrate the proposals and any other material necessary to explain the scheme. The district scheme must also contain such controls, prohibitions and incentives as are necessary or desirable to promote the purposes and objectives of the scheme.

District schemes may distinguish between classes of use or development in any one or more of the following ways:

- Those that are permitted as of right provided that they comply in all respects with all conditions, restrictions, and prohibitions specified in the scheme;
- Those that are appropriate to the area but that may not be appropri-
ate on every site or may require special conditions, and that require approval as conditional uses;

- Those that would be permitted as of right but that require permission as controlled uses.

With regard to controlled uses, any district scheme may provide for such specified controls and powers as are necessary to achieve the policies and objectives contained in the scheme relating to:

- The design and external appearance of buildings;
- Landscape design and site layout;
- The location and design of vehicular access to and from the site;
- Such other matters as may be specified in that behalf by any regulations in force under the Act;

And any district scheme may confer on the council such specified powers and discretions in respect of controlled uses as are necessary or desirable to give effect to the policies and objectives contained in the scheme relating to:

- The preservation and conservation of trees, bush, plants, landscape, and areas of scientific, wildlife, or other interest, or of visual appeal;
- Areas of special character or amenity value;
- The avoidance or reduction of danger, damage, or nuisance caused by earthquake, geothermal or volcanic activity, flooding, erosion, landslip, subsidence, silting, and wind, and
- Such other matters as may be specified in that behalf by any regulation in force under the Act.

District schemes are prepared as follows. An initial scheme is approved by the council and the Minister of Works and Development and any local authority empowered to carry out public works are entitled to require that provision be made for public works. Following incorporation of any requirements, the council public notifies the existence of the proposed scheme and calls for submissions and objections, with rights to make objections and submissions broadly conferred. The council or an appointed committee must hear any objector who wishes to be heard, and decisions may

93. Id. s. 36(5).
94. Id. s. 36(5A).
95. Id. s. 42.
96. Id. s. 43.
97. Id. s. 44.
98. Id. s. 45.
99. Id. s. 46(2).
be appealed against at the Planning Tribunal\textsuperscript{100} whose decision is final\textsuperscript{101} subject to High Court rulings on points of law.\textsuperscript{102} Following necessary amendments, the scheme is approved by the council.\textsuperscript{103}

Existing lawful uses of land and buildings that do not conform to the district scheme may nevertheless continue.\textsuperscript{104}

Subject to broad rights of appeal, the council may introduce a change to any provision of its district scheme at any time,\textsuperscript{105} and schemes become due for renewal as soon as any provision of it has been in operation for five years.\textsuperscript{106}

If provision is made in the scheme, the council has the power to grant a dispensation or waiver\textsuperscript{107} if it is satisfied that it would encourage better development or that it is not reasonable or practicable to enforce the provision in respect of the site and that the dispensation or waiver will not detract from the amenities of the neighbourhood and will have little town and country planning significance beyond the immediate vicinity of the land in respect of which the dispensation or waiver is sought.\textsuperscript{108}

In considering an application for consent to a conditional use the council must have regard to matters of national importance (as described above), the suitability of the site for the proposed use as determined by reference to the provisions of the operative district scheme, and the likely effect of the proposed use on the existing and foreseeable amenities of the neighbourhood, and on the health, safety, convenience, and the economic, cultural, social, and general welfare of the people of the district.\textsuperscript{109}

Specified departures may also be applied for and, subject to regard to matters of national importance, may be granted if the effect of the departure will not be contrary to the public interest and will have little town and country planning significance beyond the immediate vicinity of the land concerned, and the provisions of the scheme can remain unchanged, or the departure is in accord with the effect of a resolution that the council has passed initiating a change or variation in the scheme, but that is of such urgency as to warrant its immediate authorisation in the public interest without waiting the time involved in completing the change or variation.\textsuperscript{110}

The general power of the council to consent to a planning application includes the power to impose condi-

\begin{itemize}
  \item \textsuperscript{100} Id. s. 49.
  \item \textsuperscript{101} Id. s. 159.
  \item \textsuperscript{102} Id. s. 162.
  \item \textsuperscript{103} Id. s. 52.
  \item \textsuperscript{104} Id. s. 90.
  \item \textsuperscript{105} Id. s. 54-55.
  \item \textsuperscript{106} Id. s. 59.
  \item \textsuperscript{107} Id. s. 36(6).
  \item \textsuperscript{108} Id. s. 76(2).
  \item \textsuperscript{109} Id. s. 72(2).
  \item \textsuperscript{110} Id. s. 74(2).
\end{itemize}
Property Rights and Land Management

...tions, and the power of objection is widely conferred along with rights to be heard and of appeal.

Two other major land-use planning statutes are the Clean Air Act 1972 and the Noise Control Act 1982. The Clean Air Act places the duty upon the occupiers of any premises to adopt the “best practicable means” to:

- collect, contain and control, and to minimise the emission of air pollutants; and
- render any air pollutants harmless and inoffensive.

An “air pollutant” means anything of harmful odorous or offensive character that can be carried in the atmosphere and includes smoke, gases, fumes, mists and dusts.

The Governor-General may by Order in Council declare the whole or part of a district to be a clean air zone. A proposal for a clean air zone may be initiated by the local authority, or the Clean Air Council (established by section 6 of the Act principally to make recommendations to the Minister of Health on matters relating to the prevention and control of air pollution) if the local authority does not. Provision is made for public notification and objections to the Minister of Health before the making of an Order. In a clean air zone it is an offence for the occupier of any premise to emit light smoke as defined in section 2 of the Act. It is also an offence to acquire or sell unauthorised fuel in a clean air zone. The clean air zone order may also regulate the types and classes of fuel and fuel burning equipment or the manner of operation of certain fuel burning equipment.

A person may carry on a process specified in the second schedule to the Act only if he has a licence. There are three classifications of licence according to the air pollution potential and the quantity of air pollutants. Processes in Part A are subject to licensing by the Department of Health after application to the local authority; processes in Part B are subject to licensing by local authorities; and processes in Part C require notification to the local authority and may be subject to licensing pursuant to bylaws. Conditions may be imposed on licences.

Under the Noise Control Act 1982 a local authority may designate any of its...

111. Id. s. 67(1).
112. Id. s. 66(1).
113. Id. s. 66(2).
114. Id. s. 69.
115. Clean Air Act 1972 s. 7(1).
116. Id. s. 2(1).
117. Id. s. 12(1).
118. Id. ss. 12(2), 14(1).
119. Id. s. 12(3&4).
120. Id. s. 16.
121. Id. s. 17.
122. Id. s. 13(3).
123. Id. s. 23(1).
124. Id. Second Schedule.
125. Id. s. 26.
officers to be noise control officers and in any event the Health Inspectors and Engineer of the local authority are deemed to be noise control officers.\textsuperscript{126} It is the duty of the occupier of a premise to adopt the "best practicable means" of ensuring that the emission of noise from the premise does not exceed a reasonable level.\textsuperscript{127} Where a noise control officer believes on reasonable grounds that the occupier of premises is failing to comply with this duty or is contravening regulations or any noise being emitted is such as to constitute a nuisance, he may serve an abatement notice on the occupier requiring him to abate the noise within 7 days.\textsuperscript{128} Where the abatement notice is not complied with the noise control officer is empowered to take all reasonable steps to cause the noise to be abated to a reasonable level.\textsuperscript{129} The police are authorised to assist a noise control officer on request.\textsuperscript{130} Provision is also made for the making of regulations.\textsuperscript{131}

\begin{itemize}
  \item specifying limits of permitted emission of noise;
  \item prescribing standards for alarms;
  \item specifying times at which noise may or may not be emitted.
\end{itemize}

\begin{footnotes}
\textsuperscript{126} Noise Control Act s. 4.
\textsuperscript{127} Id. s. 5.
\textsuperscript{128} Id. s. 6.
\textsuperscript{129} Id. s. 7.
\textsuperscript{130} Id. s. 8.
\textsuperscript{131} Id. s. 17.
\end{footnotes}