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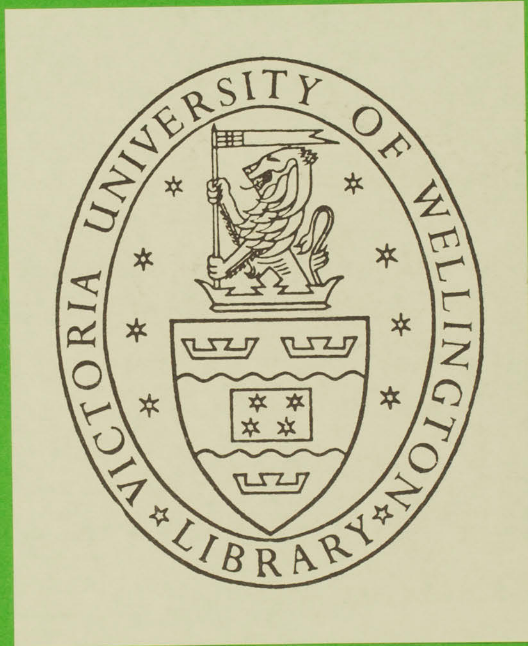
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MELISSA A. POLE

LEANING TOWARD GREEN; ALTERNATIVES FOR PROTECTING NATIVE FOREST IN PRIVATE OWNERSHIP

Submitted for the LLB (Honours) Degree at the
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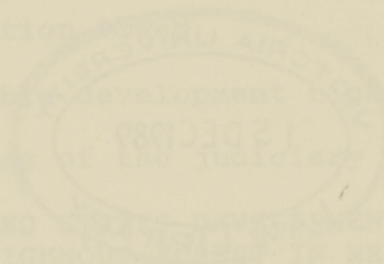

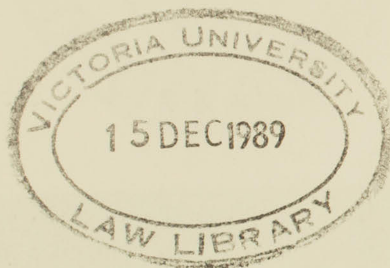
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I INTRODUCTION

There are compelling reasons for enacting or amending legislation to address the question of the protection of native forests. First, on the broader issue of forestation, there is increasing evidence to show that large-scale deforestation has a permanent detrimental effect on the environment. The absence of trees exacerbates erosion. Following Cyclone Bola in March 1988, there were calls for the allocation of government funds for reafforestation to prevent slips and flooding on a similar scale in the future. 1 There is also increasing agreement that deforestation may contribute to a reduction in precipitation. This is a problem of global proportions.

Secondly, and more specifically for the purposes of this article, there is the issue of the preservation of New Zealand's unique indigenous forest, the habitat of equally unique wildlife. A recent "Insight" programme on National Radio stated that some 200,000 hectares of native forest is logged per annum. In the last 150 years, the country has gone from being 50% covered by native forest to approximately 21% coverage. 2 The current rate of deforestation throws into question the survival of some of the endangered or vulnerable species peculiar to those forests.

The purpose of this article is to examine current methods of protecting native forest in private ownership and the apparent shortcomings in this area of the Town and Country Planning Act 1977 (the Act). The issue of regulatory controls over land use and compensation for loss suffered under excessive controls will be the focus of the examination. Two recent cases which discuss

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these issues within the framework of the Town and Country Planning Act will be considered. The next part of the article will discuss the police power/eminent domain distinction drawn in the United States. There, the land-use regulation issue has been extensively debated against the background of protections enshrined in the Constitution for the owners of property rights. That debate has given rise to a number of trends increasingly apparent in American case law. The applicability of those developments in the context of New Zealand's native forests will be evaluated.

Much of the attention of the conservation groups' work is now focused on native forest in private ownership. It is a difficult issue. On one side of the scales there is the growing awareness of the long-term damage from excessive exploitation of natural resources. This has lead to increasing pressure for protection for what remains of those resources. To be balanced against that are the concerns of those with an interest in the consumption of those resources. They argue that such exploitation is a property owner's right which should not be restricted by those with no direct proprietal interests unless full compensation is paid. It is important to note that those arguing for the continued exploitation of indigenous forest resources are not all wealthy forestry corporations. This issue also involves individuals and small groups faced with unpleasant economic realities. Often to meet the cost of rates and taxes the landowner must generate some income from the property, usually through the sale of logging rights to a forestry company. Outright prohibition of logging of indigenous forests would be a severe economic restriction.

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Through the course of this article it is important to bear in mind those conflicts between public interests and private property rights, and between global and national interests. As well, regard must be had of the policy apparent in the current Resource Management Law Reform (RMLR) exercise. The professed goal of the reform is to give increased management responsibility for resources to regional authorities. 3 The capacity of the regional authorities to pay compensation for economic loss consequent upon forest protection measures is limited, and may result in councils having to refrain from taking such measures.

II THE CURRENT SITUATION IN NEW ZEALAND

Currently, most land use regulation in New Zealand is exercised under the provisions of the Town and Country Planning Act 1977. The two New Zealand cases which will be considered involved the impostion through a district planning scheme of conditional use procedures on the logging of native forest. Conditional use procedures are a provision of the Town and Country Planning Act.

A <u>The Town and Country Planning Act 1977</u>.

Section 38 of the Town and Country Planning Act requires every council to provide and maintain a district scheme. Section 36(4), as amended in 1983, provides that

> every district scheme may distinguish between classes of use or development in all or any part or parts of the district in any one or more of the following ways or any combination of them:
> (a) Those which are permitted as of right provided that they comply in all respects with all controls, restrictions, prohibitions and conditions specified in the scheme:

(b) Those which are appropriate to the area but which may not be appropriate on every site or may require special conditions and which require approval as conditional uses under section 72 of this Act:

(c) ...

Activities coming within (a) above are predominant uses. Those coming within (b) are conditional uses. Section 72 provides that all applications to the Council for consent to a conditional use of any land or building shall be by way of a notified application. In considering such an application the council is to have regard to -[4]

(a) The suitability of the site for the proposed use determined by reference to the provisions of the operative district scheme:

(b) The likely effect of the proposed use on the existing and foreseeable future amenities of the neighbourhood, and on the health, safety, convenience, and the economic, cultural, social and general welfare of the people in the district.

Section 72 is subject to section 3 of the Act, which defines matters of national importance which shall be recognised and provided for by councils in their preparation, implementation, and administration of the regional, district, or maritime schemes. Two of those considerations could be relevant to the question of preservation of indigenous forest. They are ;

(a) The conservation, protection, and enhancement of the physical, cultural, and social environment:

(b) The wise use and management of New Zealand's resources.

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B Compensation Under the Town & Country Planning Act.

It is appropriate at this juncture to examine briefly the compensation provisions of the Act . Section 126(1) states

> Every person having any estate or interest in any land taken for any purpose authorised by section 81 of this Act or otherwise for the purposes of an operative district scheme, or in any land, buildings, or other improvement injuriously affected by the operation of any such scheme or of any refusal or prohibition under Part II of this Act, shall, subject to the provisions of this section, be entitled to full compensation for all loss thereby sustained by him.

Compensation is evaluated and awarded under the procedures of the Public Works Act 1981. Section 126(5) then details a number of instances in which compensation is not payable, namely;

> (i) The operation of any provision in the district scheme;
> (ii) The operation of any refusal or prohibition under Part II of this Act-
> if the provision, refusal or prohibition could have been made and enforced without liability to pay compensation by any local authority or public authority independently of the Act.

The subsection goes on to list a number of other exceptions which are not relevant. Subsection 6 then provides

> Notwithstanding anything in subsection (5) of this section, compensation shall be payable under this section in respect of the operation of any provision in any operative district scheme regulating the use of buildings or land by prescribing areas to be used exclusively or principally for specified purposes or classes of purposes, or in respect of the operation of any refusal or prohibition under Part II of this Act, if ... the owner or occupier shows -
> (a) That the provision deprives him of the right to continue to use the land or building for the purpose for which it is already used, and that that use does not detract from the amenities of the neighbourhood ...; or

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> (b) That the provision, refusal, or prohibition deprives him of the right to change from the existing use of the land or building to any other use which would not do any of the following things-
> (i) Detract from the amenities of the neighbourhood....

The subsection continues, listing a number of other things which would serve to disqualify a claimant under that subsection.

It is an "unintelligible, conflicting and confusing" 5 section. The scope of the provisions remains unclear. Time could be devoted to examining all the possible permutations of attempts under a district scheme to preserve indigenous forest and how or where such attempts would fit within the provisions and exceptions of section 126. The outcome would be largely speculation.

Texts on planning law refer to the existence of compensation provisions, but there is little detailed analysis of the effect of the contents of those provisions. They tend to be regarded as primarily a function of the compulsory acquisition procedures. The 1987 review of the Town and Country Planning Act noted that it was unlikely that a claim for compensation could succeed unless it arose from a public works designation. 6 In 1988, a RMLR discussion paper on the laws of compensation stated that full compensation is payable for land taken or acquired, or for injurious affection caused to land by a taking or acquisition of other land in the same ownership for the purposes of an operative district scheme.7 Injurious affection, it noted, is limited to depreciation of land value. Anything else is arguably beyond the compensation provisions.

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There are few cases on compensation under the Act. Most of them can be classified as claims arising either from the imposition of a district scheme where there had previously been none, or from the denial of consent to an application for a building permit. Several cases are important because they illustrate that restrictions on land use, as opposed to absolute prohibition, are non-compensable. Thus the refusal of a permit to subdivide rural land, 8 the refusal of water rights claimed in respect of wetlands,9 and district scheme ordinances designed to prevent buildings blocking sunlight from an urban shopping mall, 10 have all been found to be non-compensable. These cases establish that within the Town and Country Planning Act there is provision for privately-owned rights to be subject to the requirements of the broader public interest without compensation. The cases contain a hint of the police power/regulatory taking distinction which has been the source of much litigation in the United States.

The nature of the public interest is important, as is the degree of restriction placed upon it. For the purposes of this article, it is argued that the protection and preservation of native forest is central to the public interest on ecological, regional, national and global levels, and therefore restrictions on the logging and clearing of such forest are desirable. Further, restrictions short of total prohibition should not attract traditional compensation requirements because of the public interest element.

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III THE CONDITIONAL USE PROCEDURES IN OPERATION

A Nelson Pine Forests Ltd. v. Waimea County Council.

The first of the two New Zealand cases involving procedures under the Act is Nelson Pine Forests Ltd. v. Waimea County Council. 11 The situation in Waimea arose at the time of the proposed Review No. 4 by Waimea County Council of its District Planning Scheme No.3. The review contained, in the ordinance for Rural C Zone, a provision which made "commercial forestry and the growing of trees for any purpose" 12 a predominant use in any such zone. In June 1984 the proposed review was publicly notified by the Council. The Native Forest Action Council, among others, objected.

As a result of the objection, the scheme was amended. The amendment consisted of a provision 13

> [recognising] the importance of the remnant native forests within the county both on Crown-owned and private land. Much forest is being cleared with the aim of firm development or exotic forestry but there is a need for such objectives to be balanced against other land use values and opportunities....

The logging or clearance of native forest in all Rural C zones was made a conditional use, subject to the appropriate application procedures. The predominant use ordinance was amended to exclude the logging or clearing of any areas of native forest. The Council viewed the conditional use procedure as an opportunity for developers and objectors to explain and justify their positions with respect to each area of forest to be logged, and in turn enable the council to carefully evaluate the conflicting interests and consider all the factors before making a decision. 14 To

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assist the council in that process, an application was required to contain a management plan in which the applicant would outline in some detail the logging operations and their potential results.

The New Zealand Forest Owners' Association Inc. and Nelson Pine Forest appealed to the Planning Tribunal under s.49 of the Town and Country Planning Act. Nelson Pine Forests sought to have the felling and clearing of native forest removed from the conditional use category and restored to predominant use. The New Zealand Forest Owners' Association, while not opposing the conditional use, wanted the definition of "native forest" amended to exclude any areas which were predominantly scrub, secondary growth or immature forest. The Forest Owners' were supported in this by N.Z. Federated Farmers, who sought to avoid the need for farmers to incur the inconvenience and expense of the conditional use application procedure every time they wished to clear small areas of scrub as a part of general farm management.

In an interim decision the Planning Tribunal noted that the district scheme showed a "considerable swing in emphasis towards protection but with the main thrust of the scheme statement and ordinances still relating to development control rather than preservation.". [15]

The Tribunal commented that this was no doubt because a policy of preservation could involve financial liability for the Council under section 126 of the Act. [16] Noting an earlier decision of the Planning Tribunal on a similar attempt to control logging by the conditional use device, Treadwell J. drew a distinction between preservation, in the form of development prohibition or paramountcy accorded to preservation, and conservation, which he

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saw as a control measure over forestry development. [17] Preservation allowed no development; conservation merely excluded development in the nature of clear-felling operations. The former "might have resulted in compensation liability under section 126.". [18] The latter, in the form of the conditional use procedure, was a development control and in that sense was similar to restraints imposed on an urban developer. Such controls did not attract compensation liability. Treadwell J. noted that the Court of Appeal had in two recent cases "indicate[d] a move away from the concept of compensation rights where land use is curtailed or interfered with in some way.". [19]

The Tribunal found that it was appropriate to control native bush clearance by the conditional use procedures. It proposed a definition of an exception to the conditional use [20]

> along the lines of ... except logging or clearance of areas of native forest not exceeding 5 ha. in total over a period of five years and the clearing of isolated stands of manuka or kanuka or stands of those trees contiguous with other native forest.

Finally, the Tribunal recommended some conditions to be incorporated in the scheme. They primarily dealt with the format required for an application under the conditional use procedures. Before an application was publicly notified the applicant would be obliged to submit a management plan containing a site plan showing areas to be logged or retained, preferably illustrating the topography of the area. In addition it required a statement

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i) estimated duration of logging;

ii) whether it involved staged logging, clear felling, selective logging, or a combination;

iii) the programme of restoration or subsequent proposed use;

iv) existing potential or capability of soil in terms of production and any change expected after restoration;

v) expected increase in productivity as a result of the additional land being brought into production;

vi) proposals for protection of any forest in relation to the edge of rivers, streams, roads, areas prone to erosion or areas of wetland as required by any catchment board report;

vii) an outline of any proposal for protection of the visual amenities with respect to tourist routes or resorts in the areas.

The Tribunal invited further submissions as to additional conditions.

Nelson Pine Forest appealed against the interim decision, asking for the Tribunal's determination to be set aside. The appellant asked the High Court to refer the matter back to the Tribunal with a direction that because the classification of the use as a conditional use and the proposed criteria were based upon errors of law, those parts of the decision should be treated as reversed. The Planning Tribunal should then bring down a final decision dealing with matters vi) and vii) "in the context of the limited object of the scheme...". 21

In essence, they sought to have commercial forestry returned to a predominant use unfettered by a conditional use status on the

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logging or growing for commercial purposes of native forests. The appellant argued, inter alia, that it was not a bona fide use of the powers in s.36 to classify logging as a conditional use given the object of the scheme. The thrust of the argument was that, in the absence of planning legislation, an owner of land could do what he or she liked with that land constrained only by common law rules of nuisance, and that as a result the Court should be reluctant to take away that right without compensation.22 Although the Act did not intend compensation for every restriction imposed, the appellant argued, the Court should be reluctant to resolve any ambiguity in such a way as to deprive an owner of a right without compensation.23

Holland J dismissed the appeal, finding that in the circumstances of this case zoning with the ordinances proposed by the Tribunal, including the additional provisions yet to be added, was a proper and bona fide use of the powers given to the Council under section 36 of the Act.24 With respect to the question of compensation the Court recognised that control of felling of native bush could have taken the form of a total prohibition requiring compensation, but that the Council (with the Tribunal's blessing) deliberately sought to avoid liability. 25 Such action is within the ambit of the Act and is lawful.

The case may appear to present a solution to the problem of unrestricted logging of native forest. The conditional use procedure enables a District Council to impose a control mechanism. The applicant can be required to provide a site management plan with relevant details of the proposal which enable the Council to consider all the facts before logging is permitted.

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The Council is not influenced in its decision nor is its hand forced by the possiblity of the financial burden of compensation. Farmers wishing to tidy up straggling clumps of native bush or secondary growth are exempt from the provisions. Unfortunately the conditional use procedure is not the ultimate weapon in the environmentalists' armoury.

The major weakness in using the conditional use procedure to protect native forest is the limitations in its scope. Section 36 defines a conditional use as one which is appropriate to the area but which may not be appropriate on every site or may require special conditions. In Waimea, the forestry industry has a major role in the local economy, and in the Rural C zone attracts a predominant use classification. The council was able to attach a conditional use classification to the logging of native forest because such logging for commercial use is an activity which until then was carried out as a predominant use. It was legitimately regarded as appropriate in the area but not necessarily appropriate on every site, or as requiring special conditions. The conditional use procedure is not able to be used where commercial logging of native forest is not already a predominant use. Neither does it afford large-scale protection for native forest, requiring as it does a site-by-site evaluation of the appropriateness of such logging. If a council simply found that such logging was inappropriate on every site for which it received an application, it would leave itself open to judicial review for operating a rigid policy and failing to exercise a discretion.

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B Tasman Forestry Ltd. v. Opotiki District Council.

The shortcomings of the conditional use procedure rapidly became obvious.In November 1988 the Planning Tribunal heard an appeal by the New Zealand Forest Owners' Association Inc. and Tasman Forestry Ltd. against the Opotiki District Council's decision to make the clearing of indigenous forest (as defined within the scheme) a conditional use. 26 The Council said its actions were recognition of the value of existing native forests to the district and the need to consider the wise use of finite resources.

The Planning Tribunal took the view that in the Opotiki district, wise use of the resource was an either/or situation. The tracts of indigenous forest could either be totally preserved by creating scenic or scientific reserves, or they could be cleared to enable the land to be used for farming or exotic forestry. 27 As no preparatory clearance could be undertaken without consent, the effect of the conditional use classification on clearing indigenous forest was to place all forestry, a predominant use, in the conditional use category.

Treadwell J. distinguished the Waimea case on the facts, pointing out that in Waimea the concern was with the conservation of a rapidly diminishing timber resource, a commercial resource in its own right. The issue there, he said, was with the use of that resource, not the prevention of the use. 28 In fact, those who objected to the original Waimea District Scheme and sought to have the conditional use procedures adopted were concerned about the scale of destruction of native forests in the area.29 Their objections were not primarily aimed at the judicious use of a

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commercial resource, but at the protection of a natural resource which was being destroyed because of its commercial value. The distinction is more than semantic, because the true concerns in the Waimea case were the same as in Opotiki, and the latter situation is therefore arguably less distinguishable.

However, Treadwell J. found that unlike Waimea, the timber in Opotiki was of little commercial value. He concluded that there was no possibility of sustained yield indigenous forestry. 30 Felled native forest is usually just burned before the planting of exotic forests. In addition, he noted that large tracts of highland indigenous forest are already under the control of the Minister of Conservation, and other areas are set aside by forestry interests and Maori owners. Furthermore, when clearance takes place, a large percentage of the indigenous forest is left in place for either water or soil conservation reasons or because of the intrinsic value of the particular forest. 31

The effect of the Planning Tribunal's rulings in these two cases is that it is now not possible to use the land use provisions of the Town and Country Planning Act as a blanket method of protecting indigenous forest. The warning sounded in the <u>Waimea</u> case, that the conditional use procedure was inappropriate for preservation and that the Council may find itself unable to stop the logging of some of the more valuable stands of native bush,32 has been borne out. At best the conditional use procedures will enable councils to exercise some control over the rate of consumption of indigenous forest if the forest is a commercial resource in its own right. But when, as in Opotiki, the

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indigenous timber is regarded as having no commercial worth and is simply burned to enable planting of exotic timber, the Council has no control. Although the burning itself was conceded to be a use, (because any change to the original status is a use whether or not it is the end use), 33 the Tribunal's ruling means that unless logging of native forest is conducted as a commercial exercise, the conditional use procedures will not be available to control the permanent clearance of such forests.

Even if one accepts the Planning Tribunal's finding that native forest in the Opotiki District is in no danger of being totally depleted, the two cases illustrate the real limitations of the present planning legislation as applied by the Tribunal. In spite of the provision in section 3 of the Act that regional, district, and maritime schemes must recognise and provide for the conservation, protection, and enhancement of the physical environment, and the wise use and management of New Zealand's resources, there is not sufficient recognition of serious environmental concerns and the increased need to take positive steps to ameliorate environmental destruction. There is, then, no effective method of protecting native forest on private land without Councils incurring liability for compensation. In Waimea, the County Council simply could not afford to pay the price of outright preservation.

In the Opotiki ruling, Treadwell J. noted that "cases such as Nelson Pine Forest are not enunciating a general principle that land uses of a certain type should or should not be treated in a particular way." 34 He stated that such cases serve only to set out the limits of a local Council's power under the Town & Country

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Planning Act. In the absence of any judicial inclination to examine the wider issues or adopt principles favouring preservation, the provisions of the Town and Country Planning Act appear insufficient to enable the preservation of indigenous forests by any method short of outright acquisition with full compensation. Most District councils are not in a position to pay full compensation for areas of indigenous forest taken by compulsory acquisition or by agreement with the land-owner. The market value of commercially viable forest or land is such that most Councils would simply not be able to comtemplate such action.

There is, also, the question of whether a district council should pay. So far, the issue of preserving native forest has been dealt with by the Tribunal only in the narrow context of the control of logging of a commercial resource. There is, however, the broader view embracing the environmental issues. Viewing native forest as either a commercial resource or of no particular value, fails to account for the inherent value of such forests as the natural habitat of native species of flora and fauna. It is important though to note the comment of Treadwell J. in the Opotiki case, acknowledging the need to balance the retention of native flora and fauna against the economic survival of an area "inextricably entangled with the capacity of world-scale plants to consume timber". This is a global issue, it is of national importance; can it be properly resolved at a local level?

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IV RIGHTS IN LAND, POLICE POWERS AND REGULATORY TAKINGS

The next question must be, "how do we strike the balance?". This article proceeds with two basic presumptions. First, that the question of balance now goes beyond the assumption of the paramountcy of rights of individual land owners. Secondly, that in many instances the authorities in a position to ensure protection do not have sufficient financial resources to do so. The exercise of weighing the balance must be conducted within those parameters.

A. The History of Police Powers.

Historically, the law has recognised two separate concepts of governmental power over land. First, if land was seized, i.e. taken from the owner it must be done for public use, (not for the personal benefit of the Crown), and compensation must be paid. 36 Co-existing with that principle is the recognition of the validity of "police powers" over land use. 37 Such powers exist as necessary controls to protect public interests, as in public health, safety and welfare. Fencing requirements, roofing regulations and laws preventing the keeping of pigsties on the streets of London represent some of the earliest police power regulations. 38 The sixteenth century produced legislation and Royal Proclamations prohibiting the construction of housing in an attempt to curb urban sprawl beyond the heart of that City. 39 Legislation introducing zoning and restricted housing density was introduced in increasingly desperate attempts to deal with overcrowding, and the consequent crisis in shortages of food and fuel and the threat of illness. 40 Land use regulations were also

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introduced to deal with flooding in many low-lying parts of England. The needs of the whole community were recognised and the individual land-owner or tenant was compelled to construct sea-walls and drainage works on their property at their own expense. 41 If the purpose of such a regulation was to ensure some public benefit, there was no violation of the individual's rights.

Those police powers continue to exist and be upheld by the courts in many common law jurisdictions as a valid exercise of government. The Town and Country Planning Act is an example of those powers in New Zealand. But the question when a regulatory land-use restriction becomes a "taking", attracting an obligation to compensate, has become a crucial one. It has been debated with particular vigour in the United States, where the constitution guarantees that no private property shall be taken for public use without just compensation.42 The point at which land use control becomes a regulatory taking has been the issue in a huge number of cases at both federal and state level.

1. Pennsylvania Coal v. Mahon.

The case which set the standards and provided the "test" for the question of taking is Pennsylvania Coal Co. v Mahon. 43 The Mahons owned a house in Pittston, Pennsylvania. Pittston is located in the heart of the anthracite coal region. Much of that region had been mined since the early 1700's but the change in technology enhanced the speed and scale of mining operations. As a result, many areas in the anthracite region suffered large scale subsidence, resulting in the loss of lives, homes, businesses and

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land. As a consequence of a Governor's Commission into the issues of surface support, legislation was passed which prohibited coal mining in a manner so as to cause caving-in, collapse or subsidence of any building or place, including streets and cemetaries. Shortly after the passage of the legislation, the Mahons received notice that the coal company was about to begin mining operations under their house. The Mahons sought to have the mining operations beneath the property permanently enjoined, relying on the Act to show that such activity was illegal.

The case eventually came on appeal before the United States' Supreme Court. The Court viewed the issue as a question of whether the Act was an exercise of police power to protect the public health and safety, or a means of taking the coal company's property, consisting of the mineral rights and the rights of support for the surface.44 Justice Holmes for the majority recognised that police powers must exist to enable the exercise of government functions, but those powers must be kept within reasonable limits. 45 If the regulations render commercial mining of the coal impracticable, it has the same effect as appropriating or destroying it. "If a regulation goes too far it will be recognised as a taking." 46

The "too far" test, with its examination of economic loss, remained unchallenged for almost fifty years. Time and again, attempts to limit a property owner's use of his land was found to be a "taking" because restricting the activity involved some financial loss or inability to make a financial gain from the development of the property.

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Since the early 1970's there have been changes which see the Holmes' ruling increasingly distinguished. The change in the United States offers two options which have significant potential for controlling the logging of native forest in New Zealand.

B The Accommodation Power.

The "accommodation" power, as it has been called,47 is a concept designed to fill in the grey zone between police powers and powers of eminent domain. It recognises the need to control, and in some cases eliminate activities and developments which affect or damage the environment. It postulates that the model of economic efficiency, when applied to the management and development of resources, must be widened to include values such as environmental quality and community welfare. 48 The accommodation power exceeds the acceptable limits of the police power and accordingly attracts some compensation liability. But not full or "just" compensation based on the highest or best use of the land unrestricted by regulation. Compensation is evaluated on the basis of a reasonably beneficial use.49

A reasonably beneficial use allows development or exploitation to a degree which affords sufficient economic return to avoid classification as a taking. It is significantly less than maximum commercial exploitation, but greater than a total prohibition on development.50 This achieves, in essence, sustainable development, a concept which is becoming increasingly prominent in conservation arguments. Sustainable development is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".51

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Fair compensation under the accommodation power has two important characteristics. First, it is calculated on the difference between the reasonable beneficial use and the restriction, rather than the full price of the property or the maximum potential economic loss. 52 Secondly, it envisages, where appropriate, non-monetary compensation in the form of a "market-worthy alternative".53

An example of non-monetary market-worthy compensation is the concept of transferrable development rights.

1 <u>Transferrable development rights</u>.

Transferrable development rights have evolved out of urban zoning and the increasing premium attached to land in heavily populated centres. Essentially, if the inner-city zoning permits high-rise buildings to a maximum of twenty storeys, the owners of a fifteen storey building can transfer the difference, five storeys, to another site or in some instances, sell the "air space" to other developers.

The concept was implemented initially in New York. In New York the system permits owners of historic buildings or undeveloped land to transfer the difference to other sites owned by them within a certain radius of the first site.54 In other cities in the United States and Canada similar systems have evolved with different details as to whether the transferrable rights may be sold, traded or "banked" in a development rights bank. The bank system was developed for Chicago, 55 although it was never implemented. It envisaged the bank, controlled by the city, holding excess development rights which the city would buy up, or "deposit"

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itself from properties owned by the municipality. The rights could then be sold at profit to developers of lots within similar high-rise zones in the city.

The importance of the transferrable development rights to the question of police power regulations is demonstrated by the 1978 case of Pennsylvania Central Transport Co. Ltd. v. City of New York.56 Penn. Central, the owners of the Grand Central Terminal in New York City, sought approval to construct a 59 storey high-rise tower on top of the registered historic building. The city denied consent. Penn. Central took the city to court, arguing that the refusal caused the company significant economic loss. The United States Supreme Court restated the test for regulatory takings, saying a "... statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a `taking'".57 A regulation restricting development will be acceptable so long as the owner still has some reasonable return from the property without development. In the Grand Central Terminal situation, the company was able, under the transferrable development ordinance, to transfer the air-space rights to another of its sites nearby. The Court said that an evaluation of the economic impact of a regulation must examine the property as a whole.58 The development rights, or the airspace above the old terminal, had to be included in the weighing-up of factors. As a result, the Court concluded (Justice Rehnquist dissenting) that the statute protecting historic buildings did not in this instance frustrate expectations so as to amount to a taking.59

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The concept of transferrable development rights is a flexible one which offers a number of possible permutations for the native forest issue.

2 The greening of the judiciary.

The other development in the United States has been the increasing trend on the part of the judiciary to attribute greater weight and significance to environmental factors when weighing the property rights/public interest scales.

Arguably this trend would be encouraged if the accommodation power was given explicit recognition by the legislature and the judiciary. As it is, the Courts are saying with increasing frequency that it is permissible to regulate to a point which has some economic impact on the property owner if environmental issues are involved. In one case, the Maryland Court of Appeals ruled that it is "within the purview of the police power for the state to preserve its exhaustible natural resources.". 60 The court went on to apply the test originally defined in an 1844 case, which states: 61

> to justify the State in ... interposing its authority in behalf of the public, it must appear:
> (1) that the interest of the public generally, distinguished from those of a particular class, requires such interference;
> (2) that the means are reasonably necessary for the accomplishment of the purpose; and
> (3) that the means are not unduly oppressive upon individuals.

In Steel Hill Development Inc. v. Town of Sanbornton,62 the court found that rezoning provisions which were intended to create a forest preserve district and maintain the open space and rural character of the town were valid. The reduction in return from

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development of a subdivision under the new zoning was not a regulatory taking because 63

> ...at this time of uncertainty as to the right balance between ecological and population pressures, we cannot help but feel that the town's ordinance, which severely restricts development, may properly stand for the present as a legitimate stop-gap measure.

The San Francisco Bay Conservation and Development Commission, set up under the McAteer-Petris Act of 1969, recognised the public interest in preserving the Bay and the obvious consequences of land-fill activities continuing unchecked.64 The Commission was responsible for the preparation of an overall scheme to protect the bay and shoreline, and to control the permit system for development activities involving filling or dredging. Candlestick Properties Inc. owned land on the shoreline which was below the high-tide line. Their investment-backed expectation was to involve filling the site with matter excavated from other construction sites, and eventually developing the shoreline site. The Commission denied a permit, and Candlestick took them to court, alleging that as the land had no value for any other purpose, denial of a permit amounted to a taking.

The California Court of Appeals upheld the Commission's decision, stating that police powers "[are] not confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and control present day conditions... " 65

The court went on to say that as a commonwealth develops politically, economically and socially, the police power must also develop in order to address the changing conditions. 66 This

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echoes the judicial sentiment expressed in a case decided four years after Pennsylvania Coal v. Mahon , when the court acknowledged that the zoning ordinance which it upheld would have been struck down fifty years earlier for being "arbitrary and oppressive." 67

Another example of the increasing importance of environmental issues is the Wisconsin Shoreland Protection Act (1966), which required local governments to impose zoning restriction on shoreland areas to protect the lakes and waterways. Marinette County passed an ordinance based on the model provided by the state, which created conservancy districts. Within those areas the permitted land uses were restricted to a limited number of activities but residential, commercial or industrial development was prohibited.

A couple who owned lakefront property within the conservancy district began dumping landfill at the waterline, in contravention of the ordinance. Marinette County obtained an injunction to stop them, and the ensuing legal battle went to the Supreme Court of Wisconsin. The Court agreed that when restriction under police power is "so great that the land-owner ought not to bear such a burden for the public good, the restriction has been held to be a constructive taking ...". 68

Then, in an interesting analysis, the Court found that when the state takes property because it is useful to the public, it is a taking by eminent domain, requiring compensation. When it is "taken" under regulation it is done because the proposed use of the land is harmful. Where there would be resultant public harm, no compensation need be paid.69

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The waters of Wisconsin had once been clean and unpolluted, and the state was under an obligation of trust to restore it to the original condition, the court said. When a regulation sought to prevent further harm to "the natural status quo of the environment" it is not in fact seeking to create a public benefit of the nature encompassed by the concept of eminent domain. 70 The Court stated that we cannot continue to do with our land as we like, and that the public rights can be protected by means of the police power to the extent that private land is restricted to its natural uses.71 The court went on to say "[t]oo much stress is laid on the right of an owner to change commercially valueless land when that change does damage to the rights of the public."72

Finally, in a case which has yet to be reported, the Courts have upheld legislation passed to protect the endangered spotted owl. The natural habitat of the creature is in an area of dense commercially valuable forest in the north-west of the United States. The legislation permits the land-owners to log the forest, only after they have conducted thorough surveys of their property and identified every nesting place within their boundaries. Logging will then be approved only on an undertaking by the land-owner to leave untouched a minimum of 100 hectares of forest surrounding each nesting site. 73

V APPLYING THE UNITED STATES DEVELOPMENTS TO THE PROTECTION OF INDIGENOUS FOREST IN NEW ZEALAND.

What does all this mean for those seeking to protect native forest in New Zealand? It offers viable alternatives to preservation requiring either full compensation, or a real economic loss to the

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land-owner. Realistically, any new system must recognise the economic loss facing those suddenly denied any right to use their land and resources for profit. Whether logging is an "investment-backed expectation", or a question of economic necessity for an individual land-owner, a total prohibition would in present day terms be seen as a taking without compensation, and by any test would be unduly oppressive. In the present Resource Management Law Reform exercise being conducted by the Ministry for the Environment, the balance is being struck by seeking to achieve "sustainable development".74 What is required is a system or systems which enable the intelligent use of exhaustible resources at a rate which will not devastate the ecosystems within or dependent upon those resources.

A. <u>Transferrable Development Rights</u>.

The transferrable development rights concept could be applied to logging of native forest in three ways.

The first option is more of a trading of rights. For example , if a land-owner had 400 hectares of native bush, he or she could by negotiation with either the district council or a conservation authority, trade the development rights for 300ha for the forbearance from objection or denial of consent to logging of the remaining 100ha. The negotiation would enable the conservation authority to identify the 300ha. most valuable in environmental terms, and the developer could "haggle" for an arrangement which was agreeable to both parties. The benefit to the developer is that the commercial worth of the 100ha. could be realised

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immediately, without the possible nine-month delay of the hearing of objections against the application. A recently announced agreement struck between Tasman Forestry and several conservation groups illustrates the possibility.75 Tasman Forestry has agreed to protect 40,000 hectares of native forest from logging. In return, the conservation groups have agreed to abstain from objecting to logging of less environmentally significant native forest. Within the 40,000 hectares are the habitats of a number of endangered or "vulnerable" native bird species.

The second option for transferrable development rights is based on the first, but adopts the Chicago Plan rights bank concept.76 It would operate on the same co-operative basis as the first option, but would involve a bank of rights held by an appropriate conservation authority. The bank would buy up and hold forestry development rights for both native and exotic forests. Land-owners with environmentally valuable native forest would be offered an exchange of the rights to their forest for rights to exotic forest of similar commercial value. This would be a more complex option, of course, but the advantage would be that eventually very little native forest would remain in private hands and most commercial forestry would be of exotic species only. The bank could also increase its holdings by buying up pastoral land and developing it for forestry uses for future exchanges. The conservation authority and its bank would require government funding to get established, but would function independently from then on. It must be acknowledged that this proposal is in direct conflict with current Government policy of privatisation of forestry resources.

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The third option under transferrable development rights would involve the setting of quotas. Owners of native forest would be given an annual logging quota, subject to regeneration conditions. For example the owner of 10,000 ha of native forest might be permitted to log at the rate of 2,000 ha. per annum. While this reduces the immediate commercial return, it does not deprive the owner of all return on the property. If a 2000 ha. annual maximum acted as a disincentive to log, the owner could sell that year's quota to other forestry interests or to the conservation authority. The conservation authority would manage the quota system. It would also identify and buy up the quotas for areas of native forest of high conservation value, for example areas which are home to native birds or other species whose habitat is in need of protection.

The disadvantage of the quota system is that it might prove to be administratively complex. The advantage is that a quota system might have the same effect as down-zoning in an urban area.77 If our hypothetical land-owner is restricted to logging at the rate of 2000 ha per annum, the commercial value of that land is diminished by the enforced delay in realising its economic potential. The reduction in value will obviously be reflected in the price the owner could expect if he sold the land. This would enable the conservation authority to step in and purchase all 10,000 ha. at a lower rate of compensation. Both parties benefit; the landowner by realising the value for the whole property some five years in advance of his expectation if he chose to log under the quota system, and the conservation authority obtains the title to the entire property at a lower cost than it would probably have to pay under current legislation. This is the monetary face of

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reasonable beneficial use compensation.

It is significant that the Planning Tribunal has already upheld such down-zoning as appropriate for ecological reasons, and because of the risk of damage to any buildings on an erosion-prone site.78 The Mt. Maunganui Borough Council downzoned to Recreation A category an area of land in private ownership which had until then been zoned Residential A. The land in question was a 90 metre wide strip of sand dunes, which the council also designated Proposed Foreshore Reserve. The property owners objected, claiming that the zoning was too restrictive and did not permit any use of the land likely to be of value to the owners. They also argued that compensation for acquisition resulting from the designation would be for the lower value reflecting the restrictions.

The Tribunal found that the Council's powers provided no other method of attaining its objective, and therefore the zoning was not unreasonable.79 Sheppard J. commented 80

> Reasonableness must be judged in the circumstances of the case, and in this case it would be unreasonable for the private owners of the ... land to insist on residential development which would be likely to imperil the natural form and function of the foredune, and to imperil the property of their purchasers.

This may be seen as an indication that the Planning Tribunal is able to be convinced of the need to place environmental concerns higher than the property owners' rights in instances where scientific evidence can establish the reality of the likely ecological damage. One of the problems for those arguing for the preservation of native forest and maintenance of forestation in

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general is the question of proximity between cause and effect. It can take many years for the climatic, pedological and topographic effects of deforestation to become obvious. It can take years to establish that a particular bird species endangered or extinct. The delay is even greater when the global effects are considered. How much damage will be required to establish, under present Planning Tribunal approaches, appropriate conclusive scientific evidence of the effects of the destruction of native forests?

B. Shifting the Balance in Favour of Environmental Considerations.

Mindful of the principle of sustainable development, the planning legislation and the district schemes established under it should begin to reflect the overseas trend to give greater weight to environmental considerations. The schemes, while recognising that there are still limits to police powers, could adopt the position of the various United States' courts discussed above, that it is "within the purview of the police power of the state to preserve its exhaustible natural resources.". 81 So long as the scheme was not unduly oppressive, the balance could be shifted in favour of environmental concerns.

For example, in Opotiki, where the Planning Tribunal found that attempting to control logging of native forest was not appropriate in the circumstances, the new planning legislation would attribute paramountcy to the sustainable development principle, and recognise that such controls are appropriate everywhere, irrespective of other factors such as the commercial value of the

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forest or the amount of native forest already under the protection of the Department of Conservation.

1 Injurious affection.

The accommodation power could be regarded as analogous to injurious affection, which is already recognised in the Town & Country Planning Act.82 Injurious affection is compensation for loss in the form of economic depreciation, as distinct from physical damage or an outright acquisition, of the property interest. The Act, under its confusing compensation provisions, allows for full compensation for injurious affection, but only where it arises from the acquisition of any other land of the property owner.

In New Zealand, full compensation is calculated on the basis of a willing seller/willing buyer on an open market. 83 This is probably a lower valuation than the "highest and best use" rule in the United States, although it may not be in all instances. If injurious compensation was divorced from the prerequisite taking or acquisition, the present Act could allow for compensation for injurious affection caused by the operation of a district scheme; i.e., monetary compensation for the loss of profits from logging of native forest assuming the logging was conducted at a level appropriate for sustainable development. The willing seller/willing buyer valuation should be calculated on the value of the land with the restrictions in place. This would bring the compensation provision within the definition of fair compensation under the accommodation power.

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A tentative move to increase the flexibility of compensation rules in this country is seen in Cockburn v. M.W.D.,84 where the definition of "damage" in the Public Works Act was extended to include economic loss. This is a significant departure from the long-standing rule that damage must be physical. The Court of Appeal distinguished their earlier rulings to that effect. Cockburn was allowed to claim compensation because he had, as a result of a change in the district scheme while his land was frozen under designation for acquisition, suffered loss from the depreciation in value.85 The significance for forest preservation purposes of the decision in Cockburn's case is the judicial recognition that restrictive rules of such as that requiring physical damage "are not immutable and must yield to the statutory context.". 86

A minor change to the provisions of section 126 of the Town & Country Planning Act could render injurious affection appropriate for use in situations where a district scheme prohibition or restriction depreciates the value of land by withholding or limiting the right to log indigenous forest. Even more desirable is the replacement of the Act with new RMLR legislation which adopts the concept as part of the new sustainable development policy.

2) Sustainable development and Resource Management Law Reform.

The type of considerations recommended by the Tribunal in the Waimea case, the management plan and the statement of staging of work, 87 are appropriate considerations for logging operations in every district. It appears that the Resource Management Law Reform

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project currently underway will see environmental impact assessment procedures incorporated into the new planning legislation and procedures. The impact assessment procedures offer an excellent opportunity to allow the environmental consequences of each application to be fully considered by the consent authority. The legislation would empower, if not oblige, the district council to examine the applications in the wider context of conservation of native forest and the need for sustainable development. It would be appropriate for the council to impose limitations on the degree of logging activity, and attach enforceable conditions to the operation, for example, compulsory regeneration. 88 An application to conduct clearance for exotic forestry development or for pastoral grasslands could validly be denied, because it is not sustainable development of the native forest, nor does it consider the environmental impact of forest destruction.

Such restrictions would not constitute a constructive or regulatory taking, because looking at the whole of the property, the land-owner is not denied altogether the opportunity to receive financial returns from his land. As in the Penn. Central case, the land-owner can still enjoy some economic advantage without totally destroying a valuable environmental asset.

VI. CONCLUSION

These developments in American judicial approaches offer opportunities for the future protection of New Zealand's native forests. There is some need to move rapidly on this issue before decisions like the Opotiki case result in accelerated destruction of native forests.

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A number of other points need to be made. First, the issue of Maori ownership is obviously a crucial one. Full, exlusive and undisturbed possession of, <u>inter alia</u>, the forests, is guaranteed to the Maori people under the Treaty of Waitangi. 89 In a number of cases, attempts to prevent Maori land-owners from logging their forests have resulted in allegations of pakeha interference affronting the mana of the Maori.90 The Planning Tribunal has in at least one instance upheld this argument, saying that while Maori land was still subject to the Town and Country Planning Act, planning controls "should be very carefully applied and only after giving consideration to criteria wider than land use and management ...".91 The mana of the Maori people and their feelings and opinions were factors which should be weighed up with other factors in hearing an application.92 In that instance, the conditional use attached to logging of native forest was struck down by the Tribunal. The issue is a major one which cannot be addressed within the confines of this paper. However, any legislation to be put in place will obviously have to take account of the interests guaranteed under the Treaty of Waitangi. It is appropriate to note that currently Maori owners are voluntarily foregoing an estimated $1 million per annum by not exploiting commercially valuable land presently covered by native bush and forest.93 Certainly, under the systems proposed above, those who undertake such voluntary committments could at least receive some compensation by way of sale of logging rights or quotas.

As noted earlier, current Government policy is geared toward privatisation of forestry resources and regionalisation in resource management. A number of ideas discussed in this paper are

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obviously not in harmony with that policy. Many of the issues involved in the protection of native forests (and of forestation generally) may not be able to be satisfactorily resolved when the policy is fully implemented.94 While not all private forestry corporations are irresponsible in their attitude to the resource, the absence of governmental controls may make it impossible to enforce reafforestation requirements or regulate logging practices. District or regional bodies simply do not have the resources to implement preservation schemes to which full compensation requirements attach. One American court described as fatuous an attempt to deal at a local level with what was clearly a regional problem. 95 It must be recognised, in the face of growing evidence of global climatic change and environmental crisis, that this is an issue which must be addressed at the appropriate level. It is crucial that, while upholding the private property rights which are fundamental in western society, we are cognisant of the changes taking place which require a change in our attitude. In the same way that throwing sewage in the streets or dumping toxic chemicals on land were made illegal because information became available which established the danger to public health in such practices, it is essential that wholesale destruction of native forest is made illegal. The balance of rights must be shifted slightly to reflect the true scale of the impact of an individual property owner's activities on the welfare of the whole population, present and future.

It should be pointed out that support is sometimes forthcoming from what might be regarded as unexpected quarters. In the Waimea case, Federated Farmers by and large took the side of the Native Forest Action Council, because of increasing concern of the damage

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to streams and land caused by large-scale land clearance logging operations.96 The commercial forestry giants are increasingly willing to co-operate with conservation groups and undertake voluntary protection of particularly important blocks of native forest. One long-time conservationist has commented that much damage is done by government departments spearheading pro-development government policies.97 This, along with increasing disillusionment with the efficiency and attitude of the new Department of Conservation, has lead to calls for an independent statutory conservation authority, run along the lines of the Historic Places Trust. It would have government funding but also dues-paying public membership, and possibly corporate sponsorship. The Authority would be comprised of representatives of existing conservation and outdoor activity groups, exercising complete control over the quota/permit/transferrable rights schemes, and accountable to the conservation groups rather than the Cabinet.98

It is interesting to note that much of the native timber logged in Waimea is destined for Japanese industry.99 Japan, the world's greatest importer of logs, consumes some 100 million cu. metres of wood per annum, only 1/3 of which comes from domestic sources.100 Japan itself has 70% forest coverage, because since 1868 there has been a nationally administered policy of sustained yield forestry. The policy was implemented out of recognition of the crucial role of forestation in land conservation.101

There are alternatives to the present limited provisions of the Town and Country Planning Act. The recognised police powers can and must be adapted to protect a rapidly dwindling unique

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indigenous resource. The current Resource Management Law Reform exercise offers the ideal opportunity to implement a viable scheme for the long-term protection of native forests. There is room between the alternatives of acquisition for full compensation and total destruction, for an long-term, well-balanced compromise which will be of benefit to all New Zealanders, and may serve to reverse the global trend of full-scale destruction of native forests.

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FOOTNOTES

1 Final Report of Disaster Recovery Co-ordinator, East Coast/Wairoa Cyclone Bola Region, p 13.

2 "Insight", interview with Gerald McSweeney of the Royal Forest and Bird Protection Society, National Radio, Sunday, 23 April 1989.

3 People, Environment, and Decision-making: the Government's Proposal for Resource Management Law Reform, Ministry for the Environment, Wellington, December 1988, pp 6,17,24.

4 Section 72(2)

5 Resource Management Law Reform, Compensation: An Examination of the Law, Working Paper Number 14, Ministry for the Environment, Wellington, November 1988, p 30.

6 Hearn, A., Q.C., Review of the Town and Country Planning Act 1977, Department of Trade and Industry, Wellington, August 1987, pp 17, 122-124.

7 Above n 5, pp 22-33.

8 Allison v. Piako County [1957] NZLR 1214,1220

9 Auckland Acclimatisation Society Inc. v. Sutton Holdings [1985] 2 NZLR 94 (CA). Although this case involved an application under the Water and Soil Conservation Act 1967, the Court noted that that Act must operate in conjunction with the Town and Country Planning Act 1977. The case is significant because it examines the question of evaluating economic benefits as compared with protecting environmentally sensitive wetlands.

10 Christchurch City Council v. Riley 10 NZTPA 45 (HC); T&G Mutual Life Society Ltd. v. Christchurch City Council 11 NZTPA 71 (CA). See also Tauranga Branch of Royal Forest and Bird Protection Society (Inc.) v. Tauranga City Council 11 NZTPA 398.

11 13 NZTPA 69 (HC)

12 Above n 11, 70.

13 Above n 11, 71.

14 Above n 11, 71.

15 12 NZTPA 321,323.

16 Above n 15, 324.

17 Above n 15, 326.

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18 Above n 15, 327.

19 Above n 15, 327; see also above nn 8,9,10.

20 Above n 15, 332.

20A Above n 15, 332.

21 Above n 11, 71.

22 Above n 11, 77.

23 Above n 11, 77.

24 Above n 11, 79.

25 Above n 11, 80.

26 New Zealand Forest Owners Association Inc. and Tasman Forestry Ltd. v. Opotiki District Council Unreported, 9 November 1988, Planning Tribunal, W23/89.

27 Above n 26, 6.

28 Above n 26, 2.

29 Above n 15, 321,328.

30 Above n 26, 9.

31 Above n 26, 8,12.

32 Above n 15, 324.

33 Attorney-General ex rel Mundy v. Cunningham [1974] NZLR 737,742.

34 Above n26, 9.

35 Above n26, 10.

36 F Bosselman, D Callies, J Banta, The Taking Issue (Council on Environmental Quality, Washington D.C. 1973) p 51.

37 Above n 36.

38 Above n 36, p 62.

39 Above n 36, p 64.

40 Above n 36, pp65-67.

41 Above n 36, p 69.

42 See the Fifth Amendment to the United States Constitution.

43 260 U.S. 393.

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44 Above n 43, 414.

45 Above n 43, 413.

46 Above n 43, 415.

47 Professor John Costonis, "Accommodation Power" (1975) 75 Columbia Law Review, p 1021.

48 Above n 47, p 1031.

49 Above n 47, pp 1043,1051.

50 Above n 47, pp 1043,1051.

51 Gro Harlem Brundtland (Chairman) Our Common Future (World Commission on Environment and Development, Oxford University Press, Oxford, 1987) p 43.

52 Above n 47, p 1052

53 Above n 47, p 1052-3.

54 R. Boast, "Transferrable Development Rights", [1984] NZLR 339; see also New York City Zoning Resolution Art. I, Ch. 2, s.12-10 (1978)

55 Above n 54.

56 (1978) 438 U.S. 104, 57 L Ed 2d 631.

57 Above n 56, 650.

58 Above n 56, 652.

59 Above n 56, 657.

60 Potomac Sand & Gravel Co. v. Governor of Maryland 226 Md 358, 293 A 2d 241 (1972), 248.

61 Above n 60, 249.

62 469 F. 2d 956 (1972).

63 Above n 62, 962.

64 F Bosselman, D Callies, J Banta, The Taking Issue (Council on Environmental Quality, Washington D.C. 1973) p 51.

65 Candlestick Properties Inc. v. San Francisco Bay Conservation and Development Commission, Cal. App. 2d 89 Cal Rptr 897, (1970) 905.

66 Above n 65.

67 Village of Euclid v. Ambler Realty Co, 272 U.S. 365 (1926) 387.

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68 Just v. Marinette County, 201 NW 2d 761 (1972) 767.

69 Above n 68.

70 Above n 68, 769. Note that "eminent domain" is the American term which describes the right of the state to compulsorily acquire private property for public use. It is also known as "condemnation" or "expropriation".

71 Above n 68, 768.

72 Above n 68, 770.

73 Interview with Guy Salmon, Maruia Society (Native Forest Action Council) Wellington, 20 June 1989. The case was brought by the Washington chapter of the Environmental Defense Society.

74 People, Environment, and Decision-making: the Government's Proposal for Resource Management Law Reform, Ministry for the Environment, Wellington, December 1988. pp 6,17,24.

75 The Dominion, Wellington, New Zealand, 20 June 1989,3.

76 See above Para IV B 1 Transferrable Development Rights.

77 Down-zoning is re-zoning to a category of less value. A suburban street zoned to allow only single family dwellings (Residential A) would be considered down-zoned if it was re-zoned to Residential C which might allow multi-unit residential dwellings and light commercial activities (a corner dairy). Such developments might lower the market value of the residential dwellings in the immediate vicinity. Another example is seen below n78.

78 Troughton v. Mount Maunganui Borough Council (1982) 8 NZTPA 388.

79 Above n 78, 395.

80 Above n 78, 393.

81 Potomac Sand & Gravel Co. v. Governor of Maryland 226 Md 358, 293 A 2d 241 (1972), 248.

82 See above Para II B Compensation Under the TCPA.

83 Resource Management Law Reform, Compensation: An Examination of the Law, Working Paper Number 14, Ministry for the Environment, Wellington, November 1988, p 41.

84 [1984] 2 NZLR 466.

85 Richardson J, 468,471.

86 Richardson J, 472.

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87 See above Para III A Nelson Pine Forests Ltd. v. Waimea County Council.

88 This is currently an issue in the process of privatisation of State Forestry Assets. The Opposition has proposed that compulsory regeneration clauses be written into the contracts. The Dominion, Wellington, New Zealand, 23 August 1989.

89 The Treaty of Waitangi, Article the Second.

90 Royal Forest and Bird Protection Society of New Zealand (Inc.) and Ors. v. Clutha County Council (1985) 10 NZTPA 449; Pouto 2F Trust (1985) 10 NZTPA 462.

91 Above n 90, 459.

92 Above n 90, 459.

93 Bush Telegraph, Newsletter of the Maruia Society, no. 32, May 1988, 5.

94 The Dominion, Wellington, New Zealand, 23 August 1989, 8.

95 F Bosselman, D Callies, J Banta, The Taking Issue (Council on Environmental Quality, Washington D.C. 1973) pp 226-228.

96 Nelson Pine Forests Ltd. v. Waimea County Council 12 NZTPA 321, 328.

97 Salmon, above n 73.

98 Above n 73.

99 Above n 95, 321.

100 Kodansha Encyclopaedia of Japan, (Kodansha Ltd, Tokyo, 1983) Vol. 2, "Environment", p 326.

101 Above n99.

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