IXR1 RIDDIFORD, D.T.S Protection of and access to the countryside

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PROTECTION OF AND ACCESS TO THE COUNTRYSIDE

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In the last few years there has been mounting concern about sporadic development in rural areas and the need to protect the countryside for public enjoyment. The problem of sporadic development has been aggravated by the declining income of farmers and counties (through their rates) in relation to the town and the consequent pressure on them to subdivide. This has been one unremarked result of a rising rate of inflation.

Subdivision has traditionally been controlled in New Zealand through the subdivision restrictions in (1) the Counties Act and (2) the Town and Country Planning Act, but these have appeared insufficient. The 1973 Amendment to the Town and Country Planning Act stressed the need to protect the countryside. It embodied in statutory form (S2) [1] certain principles which were declared to be of "national importance" in the "preparation...and administration of regional and district schemes." They were...

S2 (a) The preservation of the natural character of the coastal environment and of the margins of lakes and rivers and the protection of them from unnecessary subdivision and development.

(b) 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.

(c) The prevention of sporadic urban subdivisio and development in rural areas.

1 These principles had already been elaborated in decisions of the Town and Country Planning Appeal Board "...it is a sound town planning principle that wherever possible the coastline should be kept free from commercial or residential occupancy" (New Plymouth City Council v.

Combined Committee of the City of New Plymouth and the County of Taranaki (1961) Decisions p.2079

"...The preservation of agricultural and pastoral lands of high fertility for the purpose of primary production is a fundamental principle of town planning." (Dunedin Metropolitan Regional Planning Authority v. Otago Catchment Board (1961) B.20(Vol.2)

"That to approve of these subdivisions would involve approving in principle sporadic urban development in rural areas. Such development is contrary to accepted town and country planning principles" (Hailes v. Waitemata County Council (1956) B.20)

Access to Public Land

The public has access as of right to certain types of public land. (S56(2)(c) of the Reserves and Domains Act 1953 declares that subject to the provisions of...[the] Act and to...such conditions and restrictions as may be necessary for the preservation of the natural features of the reserves...the public shall have freedom of entry and access to the reserves." The Act allows the public to be charged for entry into historic reserves (S68) and recreation reserves (S33).

S63 A(1) of the Forests Act 1949 states that "For the purpose of facilitating public recreation and the enjoyment by the public of any area or areas of State forest land in conjunction with the other purposes for which it is managed, the Governor-General may...by Proclamation

(a) Set apart any area...of State forest land as a State forest park.

S63 B(1)(b) of the Forests Act however gives the Governor-General power to regulate "the conduct of any State forest park and the rights of the public to enter and use any State forest park..."

S3(2)(d) of the National Parks Act 1952 declares that "Subject to the provisions of this Act and to the imposition of such conditions and restrictions as may be necessary for the preservation of the native flora and fauna...the public shall have freedom of entry and access to the parks, so that they may receive in full measure the inspiration, enjoyment, recreation, and other benefits that may be derived from mountains, forests, sounds, lakes, and rivers."

A 1960 Amendment to the Reserves and Domains Act enabled the National Parks Authority to exercise general supervision over the Reserves covered by the Reserves Act. The Amendment stated that the powers in the Act, which were delegable by the Minister to a committee, could be delegated to the Parks Authority.

This raises the question whether Reserves and National Parks shouldn't be brought under more centralized supervision along with the proposed walkways (later discussed). Co-ordination already occurs to some extent as all three fall under the aegis of the Department of Lands and Survey. It is also worth considering whether public access to the countryside should be governed by a single code rather than a proliferation of competing legislation.

Trespass Act 1968

Public access to the countryside is governed by the 1968 Trespass Act, which created a variety of criminal offences involving trespassing. Nothing in the language of the Act expressly or impliedly abrogates the common law rules regarding trespass to land. The tort of trespass was little used even before the 1968 Act, because of the

difficulty of initiating an act and the minimal damages recoverable unless the trespass caused tangible loss to the landowner. The 1968 Act S9) provides that a constable may conduct proceedings on the informant's behalf and lays down criminal penalties.[2]

Coastal Development Pamphlet

It has been felt in Government circles that conventional planning procedures were insufficient to cope with the onslaught from the town and that provision should be made for legitimate public enjoyment of the land. Much of the policy behind the recent legislative changes in this field emanate from a 1972 publication of the Town and Country Planning Division of the Ministry of Works entitled "Coastal Development." It states the problem of sporadic coastal and lakeside development, suggests planning measures that Local Bodies may take within the existing legal framework and outlines possible future reforms of the law. The recent amendment to S29 of the Counties Act, dealing with reserves along coasts, lakes and rivers and Mr Moore's shortlived Coastal Moratorium and Management Bill, proposing the establishment of a Coastal Commission may both have had their genesis in this document.

The Town and Country Planning Division present a range of alternative legislative proposals ranging from centralized Governmental planning controls to more localized ones, which it regards as less desirable. The proposed amalgamation of local powers into Regional Authorities is in part designed to meet this criticism of Local Bodies as being too parochial in their decisions and

2 See post pp 8,9.
See article in 1968 VUWLR on Trespass Act.

financially weak. The pamphlet however failed to point up the important role of inflation in increasing sporadic rural development by fueling land speculation and reducing Local Body rating revenue. The solution to the problem is obviously for the beneficiary of inflation, the Central Government to give financial aid to impoverished rural Local Bodies to acquire reserves where necessary and prevent undesirable subdivisions. This is now being done to a limited extent.[3]

The Legislative Reforms

The Government is now attempting to deal with the problem in a variety of ways

(1) By vesting considerable planning authority in the hands of Regional Councils, which it is hoped will not be subject to the same degree of local pressure as the Counties.

(2) By amending the Counties Act to provide controls on subdivision of rural land into allotments of 50 acres or more.

(3) By requiring (under the amended S29 Counties Act) chainwide strips of land (often called "Esplanade Reserves") to be dedicated on subdivision along the banks of certain rivers and lakes and where subdivision is not proposed to take them compulsorily under the Public Works Act.

(4) By introducing a Walkways Bill to guarantee public rights of way across state and private land.

3 See p3 of the Statement by the Minister of Works on Coastal Planning and Development August 1974.

(5) The Minister of Works has declared his intention [4] "to intervene at all stages of the planning process where public works or the public interest are materially affected. S2(c) of the 1968 Amendment to the Town and Country Planning Act extended the definition of a "public work" to include "any public reserve within the meaning of the Reserves and Domains Act 1953." This would include chainwide strips of land taken along coasts, lakes and rivers, (later discussed).

A further 1975 Amendment(S2) to the Town and Country Planning Act proposes to clarify that the Minister (or Local Authority) has power to impose any restrictions he may specify in a district scheme "to ensure the adequate functioning or operation of the existing or proposed public work," in respect of which he (or it) has "financial responsibility." The Minister (or Local Authority) may now unilaterally impose planning restrictions on areas adjoining Esplanade Reserves.

This article shall concentrate on the problem of public recreational enjoyment of the countryside provided by the Counties Act (S29, amended 1974) and the Walkways Bill.

1974 Amendment to S29 Counties Act (1963)

There has in the last two years been considerable agitation in farming circles about proposed changes to S29 of the Counties Amendment Act 1961. S29(1) required in every subdivisional scheme the reservation of a chain wide strip along the mean high water mark of coasts, lakes in excess of 20 acres and (unless exemption was granted by the Council and Minister of Lands) along all rivers having an average width "not less than 10 feet."

4 See p7 August 1974 Statement by Minister of Works.

The principal qualification to S29(1) was contained in S29 (1A), which specified that the strip should only be reserved in respect of land, which "abuts on the sea, lake, river or stream as aforesaid and adjoins any allotment having an area of less than 10 acres."

S28 of the Counties Amendment Act 1974 created concern by removing the proviso of S29(1A) except for rivers 3 to 5 metres in width. The effect of S28 was to extend the Local Bodies power on subdivision to acquire without compensation chainwide strips along lakes, coasts and rivers. There was considerable alarm that all the land a farmer owned could become subject to the reserve taking provisions even if the area being subdivided was a small section. Doubtless the Government intended these subdivisional chainwide strips, to eventually be joined with "Esplanade Reserves" designated in various district schemes (to be taken under the Public Works Act) and with riverbanks owned by River Boards to give the public access as of right to a substantial part of the countryside.

Why the first Amendment to S29 failed

The first amendment to S29 of the Counties Act failed, because of a lack of consultation with farming groups. There was much criticism by the Parliamentary opposition of the way it was introduced by Supplementary Order Paper (March 6 1974). The Minister of Agriculture, (Mr Moyle) explained however that the subdivisions clauses were inserted late to avoid a stampede of eleventh hour subdivisions and profit through speculation. Many of the objections from farmers centred around the difficulty of protecting stock, crops and land from ill behaved members of the public. The amendment to the Counties Act

and the designation of chainwide reserves to be taken under the Public Works Act by Local Bodies was felt by farmers to assume that all members of the public were reasonable and well behaved, while farmers were forever unreasonable.

Many rivers are unstable and the constant shifting of their courses would soon have resulted in a series of disjointed reserves spaced indiscriminately along a river bank. Some farmers alienated by the lack of consultation from their Local Bodies or the Central Government would have refused the public access to the intervening pieces of land, so that the amendment would have failed in its purpose of extending public access as of right.

The recently introduced Walkways Bill (later discussed) however is laid on a much sounder foundation. It provides for negotiation and consultation with the individual farmer. The Local Walkways Committee having gained the co-operation of the particular farmer would be able to plan with him an access route best suited to the needs of the public.

The Present Position of S29

Clause 8 of the Counties Amendment Bill (No.3) modifies the position of the 1974 Act. Clause 8(1) specifies that the reserve shall be "within the land proposed to be subdivided" so that a strip of land need not also be set aside out of contiguous land of the sub-dividing owner.

Clause 8 (3) states that a strip need not be set aside adjoining an allotment of 4 hectares or more, which "in the opinion of the Council...is intended to be used

wholly or principally in a manner conforming with accepted farming or management practices, for agricultural or horticultural or silvicultural or pastoral purposes..."

Clause 3 (4) removes the words "of an average width of less than 10 metres" enabling the Minister of Lands to exclude any river from the operation of S29 irrespective of its width.

The modification of the Amendment Bill does not alter the position in the 1974 Act regarding the seashore and lakes in excess of 8 hectares.

What is the legal status of Esplanade Reserves?

Although "Esplanade Reserves," a recent concept in N.Z. Town and Country Planning are not mentioned by the Reserves and Domains Act, their legal status and the rights of the public and adjoining landowners must be determined by reference to it.

Chain wide strips required on subdivision by S29 of the Counties Act are reserves under the Reserves and Domains Act since they are "private land set apart as a reserve in accordance with the provisions of any Act" (S2 (f) Reserves Act). It is an open question who holds the legal title to these reserves. One may consider either (1) that the landowner has given the land to the Local Authority, who holds title, or (2) that the landowner holds the title as trustee for the local authority. His use of the land would be limited by the terms implied in such a trust.

Esplanade Reserves designated in district schemes along the banks of rivers to be taken under the Public Works Act do not fall within the definition of a reserve

in the Reserves and Domains Act, as they are not taken under the Public Works Act for one of a specified list of purposes (see S2 (k) Reserves Act).

S55(1) of the Reserves Act defines a "scenic reserve" sufficiently broadly to include the majority of "Esplanade Reserves." It states that "Any land... hereafter reserved acquired, or set apart in any manner under any Act...or for the preservation of scenery shall be deemed a scenic reserve subject to this part of this Act." The title of "Esplanade Reserves" however implies that public walking is as important a reason for their creation as is preservation of the scenery."

What then is the legal status of these "Esplanade Reserves" taken under the Public Works Act? The answer seems to be that land may not be taken for "Esplanade Reserves" directly under the Public Works Act, but only under S15 (1)(b) of the Reserves and Domains Act 1953 using the procedure of the Public Works Act. This interpretation gains support from the fact that the River Boards Act similarly gives a power to "take" land, but specifies that the procedure of the Public Works Act should be used.

The Reserves and Domains Act is sufficiently broad to include "Esplanade Reserves." S15(1) of the Reserves Act gives the Crown a wide power to acquire land "under the Public Works Act" "for the purposes of a public reserve" and S2, the interpretation section is wide enough to include an "Esplanade Reserve."

Moreover S14(2) gives the Minister a power to "define the purpose to which any public reserve...is dedicated in any case where doubt exists as to that purpose." Esplanade Reserves would presumably be a type of public reserve (discussed generally in SS 2-27) and consequently the offence provisions (later discussed) would apply to them.

What rights do adjoining landowners have over Esplanade Reserves?

(1) Trespass

S16 of the Reserves and Domains Act states that in certain circumstances the Minister or the administering body as the case may be, may grant rights of way and easements over any part of the reserve. S27 provides for the leasing of public reserves. A member of the public or a landowner may thus be able to commit trespass on an Esplanade Reserve under S3 of the Trespass Act, (trespass after a warning to leave) and S4, (trespass after a warning to stay off) if the person giving the warning can be considered to be acting under the "express or implied authority of the owner." The other sections of the Trespass Act limited to "private land" only apply if the landowner could be considered as a trustee of the reserve. A member of the public or a landowner may also be able to commit the civil tort of trespass. A farmer whose stock encroached upon an Esplanade Reserve could thus be technically liable for trespass.

Fencing

As is the case with other reserves, a landowner adjoining a chain wide Esplanade Reserve would be liable to a demand to contribute half the cost of a fence along a boundary (S11 Fencing Act) and could in turn make such

a demand on the authority, in whom the reserve is vested. The Fencing Act does not apply to public reserves not vested in any person or local authority.

Reserves and Domains Act Offence Provisions

Since Esplanade Reserves are public reserves the offence provisions of S84 of the Reserves and Domains Act 1953 would apply somewhat inappropriately to them. S84 provides inter alia that a person commits an offence who "without being authorised...by the administering body",

(a) Lights any fire on a public reserve except in a fireplace...established by...the administering body.

(b) Causes or allows any cattle, sheep, horses, or other animals to trespass on any public reserve.

(d) Plants any tree, shrub or plant of any kind, or sows or scatters the seed of any tree, shrub or plant of any kind, or introduces any substance injurious to plant life, on any public reserve. (In other words a farmer would be technically unable to carry out any farming activities on an Esplanade Reserve running through the middle of his property!).

(g) Wilfully digs, cuts or injures the sod on any public reserve (S89(1) places the onus of proving a lack of wilful intent on the defendant. A farmer may thus not fence across an Esplanade Reserve).

(i) Is in possession of any firearm on any public reserve, or discharges any firearm on or into any public reserve.

It can only be hoped that the possible absurdities resulting from Esplanade Reserves being regarded as public reserves will be obviated by legislative clarification or a common sense administration of the law. (S88 of the

Reserves Act limits the people, who may lay any information under the Act).

The Walkways Bill

The N.Z. Walkways Bill establishs a tripartite structure to initiate by negotiation with landowners and administer a walkway system throughout the country.

(1) The New Zealand Walkways Commission, chaired by the Director-General of Lands and consisting of representatives of 6 other named organisations is to give "effect to the policy" communicated to it by the Minister of Lands (Clause 10(2)).

(2) District Walkway Committees are to be chaired by the particular Commissioner of Crown Lands for the land district in which the Committee operates. Each committee comprises 6 other representatives of the named organisations.

(3) Provision is made (Clause 26) for the appointment of statutory bodies to act as controlling authorities for particular walkways. Clause 28 provides for the appointment of ordinary and honorary rangers. Clause 36 provides that the Governor-General may make regulations by Order in Council to give full effect to the Act. Clause 37 enables the Commission to make bylaws "not inconsistent" with the Act or any regulations, and to be approved by the Minister (Clause 38).

The Bill in operation

The Bill will be administered in accordance with its general purpose (Clause 3(2)), which is to create walkways "for walking purposes only unless otherwise provided for in respect of any particular walkway" and to administer these walkways so that "the rights of

property owners...shall be fully respected." The Bill will not give deerstalkers and other hunters further access to the backcountry than they now have.

Clause 39 provides a comprehensive list of offences from carrying a firearm within 100 metres of a walkway, to having a horse or dog on or adjacent to a walkway, (without the consent of the adjoining landowner). They are similar to those in the Trespass Act. Most of these provisions were however included to satisfy the farmers and will be lifted by regulation or bylaw to allow the carrying of firearms on those public lands, where it is customarily permitted.

Clause 22 provides for the establishment of walkways by private negotiation and the inclusion in the notice in the Gazette of any conditions stipulated by the landowner. There is no reason why a farmer should not stipulate that he should be made an honorary ranger. In fact the Lands Department will have to appoint many more rangers to administer the walkways as their current staff of rangers is fully extended.

Clause 42 declares that a walkway is not a public work for the purposes of the Public Works Act 1928, so that land or an interest in land may not be compulsorily acquired from a reluctant landowner.

Clause 25 specifies that nothing in the Act "shall exclude or limit the liability of any member of the public to any person under any rule of law for any act done or omission made by that member of the public on or in respect of a walkway." This clause means that the Trespass Act and the tort of Trespass (inter alia) will apply to

walkways, except for the public's right to "pass and repass on foot" specifically provided in Clause 25. Clause 25 of the Act is unclear as to whether the public may stop to picnic. The Lands Department with the agreement of the landowner concerned, will probably follow its usual practice and designate certain sites as picnic spots.

Fencing and Stock

The Walkways Bill seems to contemplate that the walkways through private farmlands should be unfenced and open for grazing. Sub-clause (k) of Clause 39, the offences provision, makes it an offence to "Wilfully interfere with or disturb any livestock depasturing on or adjacent to a walkway." This is very similar to S5(b) of the Trespass Act 1968. Many farmers, who are now creating double fenced laneways through their farms to make droving easier may wish to incorporate a laneway in the walkway. Such a farmer might stipulate (under Clause 22) as a condition for his consent that the walkway be fenced. If the Commission purchases or leases land for a walkway under Clause 22(2) rather than merely acquiring an easement, it might become liable for a demand to contribute half the cost of fencing under the Fencing Act S11.

Public Access to the countryside in Britain

The public in England have always enjoyed greater legal rights of access to the countryside, in a multiplicity of customary rights of way across the countryside and along river banks and a large number of disused railway lines and canal ways.

At common law however the public only had the right to repass from one point to another across open space, but not to enjoy recreational use of the land. Only the inhabitants of a particular place could acquire such a right.[5] Furthermore the law did not recognise a right to wander at large or remain for any purposes (ivs spatiandi vel manendi).[6]

The 1939 Access to the Mountains Act sought to secure greater public access to the countryside by enabling the making of access orders over land. None were made and the Act was replaced by the National Parks and Access to the Countryside Act 1949. Part V (Ss59-83) of this later Act allows complete public access to "open country" (widely defined) in respect of which access agreements have been made or compulsorily acquired. An access agreement may contain particular conditions or restrictions. Local planning authorities are in general required to carry out a survey of the access requirements of their areas and are empowered to enter access agreements, make access orders and if necessary compulsorily acquire land for this purpose. The Minister of Housing and Local Government and the Minister of Agriculture may also acquire land compulsorily for public access under S77.

Compensation is payable for depreciation of the value of any interest in land following the operation of access orders (S70). S60 declares that a person entering land, subject to an access order for the purpose of open air recreation, without breaking any wall, fence, hedge or gate is not a trespasser.

5 Bourke v. Davis (1889) 44 Ch D 110

6 Attorney-General v. Antrobus [1905] 2 Ch 188

The position in N.Z.

The effect of the N.Z. Land Transfer system of registration has been to limit rights of access. Legal easements and access routes were not often created in the back-country due to the large size of land holdings. "Paper roads" do however exist in some parts of New Zealand. These were roads declared under the Public Works Act, but never formed, which were intended to service small back-country blocks of land. Small holdings were often set aside, as in Taihape, for men working in the road gangs, but these soon proved uneconomically small. A District Walkway Committee may be able to make use of these "paper roads," where local landowners are reluctant to enter an access agreement.

The need for public access to the countryside has not in the past been felt as strongly in New Zealand as in Britain due to a smaller population, concentrated in a handful of major cities and the dedication of a large proportion of New Zealand to National Parks.

Conclusion

The pace of urban development of the countryside is however accelerating with the improvement of public roads, the greater prevalence of cars and the continuing popularity of holiday baches in the country. The challenge this poses for protection of the countryside will best be met by adopting flexible tactics. Local farmers should be consulted where access is required and Local Bodies provided with sufficient funds from the Central Government to acquire reserves and enter covenants with landowners to preserve natural features,

where a change of land use is proposed. Compulsory tactics under the Public Works Act can be justified only as a backstop measure, to prevent an undesirable change of land use, where consultation with the parties concerned has failed. Compulsion and lack of consultation breeds ill will between Local Bodies and landowners, which in the long run is counter-productive to sound town and country planning.

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