



New Zealand
Historic Places Trust *Pouhere Taonga*

SUSTAINABLE MANAGEMENT OF HISTORIC HERITAGE

Discussion Paper No. 6

Heritage at Risk: Addressing the Issue of the Demolition by Neglect of Historic Heritage in New Zealand



3 August 2007

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Sustainable Management of Historic Heritage Guidelines

Discussion Paper No.6

Heritage at Risk: Addressing the issue of demolition by neglect of New Zealand's Historic Heritage

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While the NZHPT acknowledges the contribution of other agencies and organisations, the opinions and views expressed in this guide are those of the NZHPT only.

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Introduction

Under the Resource Management Act 1991 (RMA), regional and district plans regulate changes to listed heritage places. These changes normally involve proposals such as alterations, relocation and demolition. Regional and district plans, however, do not regulate the issue of lack of maintenance that leads to demolition by neglect. There are also limitations in other legislative tools such as heritage covenants and heritage orders.

This report acknowledges the role of incentives to support owners of heritage places. The provision of guidance and incentives is the first and primary method of encouraging on-going maintenance of heritage places.

Sometimes, however, guidance, incentives, listing, heritage covenants and heritage orders are not enough. An owner may still choose to abandon a heritage place and long term lack of maintenance works will lead to demolition (or demolition by neglect).

Currently, the Crown lacks a legislative tool to intervene in these situations when a place of national importance is threatened. Heritage orders under the RMA are limited to restricting land use as defined in section 9(4) of the Act, restricting subdivision and activities that 'change the character, intensity or scale of the use of the land.' In other words, a heritage place subject to a heritage order could still be left to decay as part of an existing use.

The Historic Places Act 1980 and the Town and Country Planning Act 1977 provided for protection orders with the added tool of issuing notices to fix. This method allowed the NZHPT to issue a protection order and notice to fix and provided a mechanism to claim compensation to the Town Planning Appeals Board. This legislative tool was removed by the Historic Places Act 1993 and the RMA. The removal was made despite an explicit acknowledgement in the 1988 historic places legislation review that 'there is obviously little to gain from statutory protection if owners can allow buildings to deteriorate without hindrance.'

Nearly twenty years since the 1988 historic places legislation review, it appears that owners can still allow heritage buildings to deteriorate without hindrance.

Demolition by neglect in New Zealand – An overview

Demolition by neglect is defined as the destruction of a heritage place or area through abandonment or lack of maintenance. There are a number of circumstances that contribute to the neglect of historic properties, including impoverished owners, absentee landlords, loss of utility value, an uncaring attitude on the part of the owner, or a combination of the above.¹ This report is concerned with intentional demolition by

¹ 'Demolition by Neglect', *Connecticut Trust for Historic Preservation*
<http://www.cttust.org/index.cgi/1050> (13 March 2007).

neglect when an owner or community refuses to maintain a heritage property despite having the financial or other means to do so, including the availability of financial assistance.

In terms of the wider issue of maintenance of heritage places and areas, the state of the economy has a significant influence. Economic and social activity is not geographically even and the prosperity of urban and rural centres can rise and fall depending on national and international trends. Government policy can also influence the economic health of the urban and rural environment

There is a close relationship between historic heritage and the economy. With the establishment of the National Historic Places Trust in 1955, the heritage movement in New Zealand focused on 'saving' particular significant places and establishing a network of historic sites. The largest and the earliest of these historic sites projects were associated with Captain James Cook-related landing places. During the 1970s and 1980s, the NZHPT led the research and classification of a large number of buildings deemed to be of historic interest. Rebecca O'Brien has traced the history of NZHPT registration and the work of the Classification of Historic Buildings Committee. This Committee was responsible for the classification of some 3,414 historic buildings by 1984.² These buildings make up the core of the NZHPT's Register today.

The building of the Register during the 1970s and 1980s, however, was not just an exercise in architectural research. It developed in response to the changes in the New Zealand economy and the arrival of widespread geographic restructuring. During this time, rural communities, in particular, felt threatened as local landmarks were closed such as post offices and schools and in the cities, the property boom of the early 1980s was responsible for the unprecedented changes in the central business districts and widespread removal of historic commercial buildings from places like Lambton Quay. David Hamer touched upon this historical context of historic preservation in 1997 in reflection of his personal efforts to save historic areas such as upper Cuba Street from the Inner City Bypass designation.³

Changes in regional economies continue to influence the identification and state of historic heritage. Generally, periods of low economic growth contribute towards lower rental or occupancy rates for commercial buildings (including heritage buildings), and lower rate intake places pressure on communities to retain the upkeep of community-owned buildings. These trends are apparent in many small rural towns of New Zealand, particularly in the North Island.

Demolition by neglect however implies that the owner or group responsible for a heritage place has intentionally not carried out maintenance despite having the means to do so. This contrasts with heritage places that suffer from lack of maintenance due to circumstances beyond the control of owners such as inability to generate sufficient income or lease arrangements. Generally, the provision of incentives or promotion of economic activity will assist most cases of poor maintenance and repair. However, in some intentional cases of demolition by neglect, all assistance may be refused.

² O'Brien, R, 'Registration under the Historic Places Act 1993' unpublished paper for NZHPT Heritage Planning Summer School, January 2005, p 3

³ Hamer, D, 'Historic Preservation in Urban New Zealand, An Historian's Perspective' *NZ Journal of History*, Vol 31(2), 1997

Further, in some circumstances, a developer may intentionally use demolition by neglect to circumvent regulation aimed at protecting historic properties. This occurs when owners or developers of heritage buildings allow them to deteriorate and then apply for resource consent to demolish on the grounds that it is too expensive to restore, or because they are dangerous or unsanitary in terms of what is regulated under the Building Act 2004.

Demolition by neglect in Arrowtown

The case of demolition by neglect at Arrowtown involved three former miner's cottages, 59, 61 and 65 Buckingham Street, built between the early to mid 1870s out of rudimentary local materials or red beech timber and schist rock, set against sycamores, cork elms and oaks planted between 1867-1877. The cottages were owned by property developer Eamon Cleary.⁴ Cleary owned two of the cottages outright but only the building of the third cottage which stood on council leasehold land.⁵ Cleary allowed the buildings to fall into disrepair in the four years he owned them. There was no statutory requirement for Cleary to maintain the cottages, and clearly, he lacked the local empathy, and sentiment of custodial responsibility that is so much a part of the Arrowtown community. Cleary planned a large-scale accommodation complex behind the three buildings incorporating replicas of the 150 year old cottages.⁶

The situation came to a head when local carpenter John Currie carried out his threat to start restoring the cottages, against the wishes of the owner. One Saturday afternoon in December 2005, Currie (brandishing tools and new timber boards painted and cut to length), was met by members of the public and media and supportive cottage tenants, but no sign of the owner. Currie spent about thirty minutes ripping out rotten exterior boards from one of the deteriorating cottages, and replacing them with freshly-painted new boards. Currie insisted he did not fear prosecution for the action he had taken.⁷

Consequently, community members enraged at how the buildings were being left to rot, were pivotal in encouraging the Queenstown Lakes District Council to take action, which ultimately resulted in the council's purchase of the cottages. By letter, email and fax more than 60 readers of the local newspaper *Mountain Scene* took a stand and vented their anger at the steady 'drip-drip' of demolition by neglect.

QLDC's successful negotiation to buy the 2000 square metre Arrowtown site for \$1.9 million – which includes 59, 61 and 65 Buckingham Street, together with 6 Merioneth Street was conducted on behalf of the council by local developer John Martin.⁸ Martin said he managed the neutral transaction 'as a community service' because he felt the cottages should be preserved.⁹ After the purchase of the cottages, QLDC called on members of the public to put their names forward as members of a new charitable trust responsible for the future of the buildings. However while the fate of the three cottages was safeguarded, QLDC remains powerless to protect the future of other cottages and sites of historic significance in Arrowtown.

⁴ *Mountain Scene, Queenstown*, 1 February 2007, p 5

⁵ *Southland Times*, 9 February, 2007, p 1

⁶ *The Dominion Post*, 21 February 2007, p 11

⁷ *Otago Daily Times*, 18 December 2006, p 1

⁸ *Gisborne Herald*, 10 February 2007, p 13

⁹ John Martin, quoted in *Southland Times*, 10 February 2007, p 1

Lakes District Museum Director, David Clarke remarked 'It would appear the District Plan is toothless, the New Zealand Historic Places Act equally as gummy.'¹⁰ Clarke continued in his assessment by claiming that the cottages are 'national treasures – like the Stone Store in Kerikeri, Pompallier House in Russell and Totara Estate near Oamaru. National treasures need national protection.'¹¹



Schou's Barn, 2003. Photo, R. O'Brien, NZHPT

Schou's Whare, Mauriceville¹²

Schou's whare originally belonged to Lars Anderson Schou and is located in Masterton on Mt. Munro Road in Mauriceville. Schou was one of many Danish settlers who came to New Zealand in the 1870s as part of the planned immigration from the northern hemisphere. As Dorothy Ropiha recounts:

The decision of the Government in planning special Scandinavian settlements was that only forested land was made available. For some reason it was considered that Scandinavians were particularly inured to hardship and would be quite at home in the wilderness.¹³

Once in New Zealand, Schou worked at a number of labouring jobs to earn enough money to purchase land in Mauriceville where many of his countrymen were established in the Seventy Mile Bush. Schou eventually proved himself as an adept and skilful farmer, despite the harsh conditions, and expanded his holdings with land, sheep, cattle and poultry. It is believed that Schou never married, but poured his heart out in verse for a girl he loved back in Denmark, but was rejected by. The first of Schou's poems, 'En Ny

¹⁰ David Clarke, quoted in *Mountain Scene*, Queenstown, 1 February 2007, p 5

¹¹ *ibid*

¹² The Schou's Whare case study was prepared by Lorie A. Mastemaker, Post-Graduate Masters Student at Museum and Heritage Studies Programme, Victoria University

¹³ Dorothy Rophia, 'Scandinavian Settlement', *Historic Places Magazine*, July 1994, p.4.

Sang' (A New Song) was published in Masterton in 1891, and later passed down through generations as a song, which was sung in the village as late as the 1950s. Another poem, 'Fremad Paany', was published in Wellington in 1910.¹⁴

Schou's whare is possibly the last surviving example of a 'slabs-hus' construction and recognizable link with buildings of early Danish settlement. The whare is currently not registered by the NZHPT; however, its companion Schou's Barn, is located nearby. The barn was classified as a group A historic building (now Category I historic place) under the Historic Places Act 1980 in 1988. The registration of the barn brought attention to both the barn and the whare in the local community and the 'urgent' need for their protection – predominately the whare because it was an actual residence. In 1989, the Wairarapa Branch Committee approved a grant for \$3,000 subject to a 'heritage covenant' to build fencing around the whare which was being trampled by cattle and breaking into pieces. A heritage covenant involves a legal agreement between the NZHPT and the property owner, and once signed, is permanently attached to a property's land title; therefore binding all subsequent owners. The covenant places conditions or restrictions on the use of the registered property and any breach of this is considered a legal offence under the Historic Places Act 1993.¹⁵

The owner was dilatory about signing the covenant and by September 1991, the Wairarapa Branch Committee resolved that the grant should lapse if the fence was not built by 30 June 1993. On 12 March 1993, the terms of the heritage covenant were agreed upon and signed between the NZHPT and the owner. It stipulated in Clause eight that,

The Owner agrees to erect and maintain a good and sufficient stock proof fence around the trees referred to in Clause 6 hereof and around the barn and whare, and further agrees not to do or permit anything or undertake or permit any activity which will render the fence inadequate for that purpose.¹⁶

Despite the signed terms of the covenant and a warning on 15 June 1993 that the grant was about to lapse, the Committee was still having difficulty getting the owner to keep his promise to fence in the whare, which was continuing to be worn down by cattle and general neglect. However by January 1994, it was reported that the owner 'hasn't done a scrap of work out there since'.¹⁷

In March of the same year, criticism of the condition of the whare came from a Swedish visitor, Gundla Carlsson, to the Wairarapa who was quoted in the *Wairarapa Times-Age*, stating, 'what a tragic state Lars Schou's old property was in. Cattle had trod over it; the cottage was in pieces and windows and chimneys, which had until recently been intact are now in ruin'.¹⁸ At this stage the Scandinavian Society came forward and expressed their interest in Schou's whare and their wishes to have the whare conserved with financial assistance from the Swedish Government. The following May, a well

¹⁴ *ibid*, pp.8-9.

¹⁵ 'Heritage Covenants', at http://www.historic.org.nz/heritage/heritage_covenants.html, accessed on 12 July 2007.

¹⁶ 'Heritage Covenant', 1993, New Zealand Historic Places Trust, Central Office, Wellington, File#12012-051

¹⁷ Letter from Ralph Hopkins, Secretary, Wairarapa Branch Committee, to P. Adams, 1 January 1994, New Zealand Historic Places Trust, Central Office, Wellington, File#12012-051

¹⁸ *Wairarapa Times-Age*, 18 March 1994

respected Conservation Architect, Chris Cochran, was contacted by the Wairarapa Branch Committee to prepare a formal report on the condition of the whare and to provide recommendations for its preservation. On 3 July 1995, Cochran submitted a 'repair specification' which noted that:

The aim of the work is firstly, to provide a sound and weatherproof building by careful repair of all structural elements and sheathing, and secondly, to return the exterior to the form and detail that shows in the early photographs by rebuilding the lost window and collapsed chimney.¹⁹

Despite the preparation of the repair specification, the Wairarapa Time-Age (almost a year later) reported that work still had not begun and the Wairarapa Branch Committee was still trying to get 'a more accurate idea of the cost of the restoration project'.²⁰ It was also noted in the minutes of the Wairarapa Branch Committee that Schou's whare was 'not' registered by the NZHPT and that this should be a 'priority'.

Today Schou's whare remains the last surviving example of the type of residence erected by Scandinavian settlers – even more so than its neighbour, Schou's barn, currently registered as a Category I historic place. It is unknown if any recent work has been carried out on the building. It appears that despite protection by a heritage covenant, the building is only just surviving.

Reporting on the condition of the historic environment

Despite some high profile issues such as the Arrowtown cottages, there is a lack of statistical data about the condition of listed or registered heritage places. For example, there may be many places that suffer from demolition by neglect in areas that are not publicly accessible or within the public domain and which do not generate public interest. As noted by Associate Professor Peter Skelton, it is difficult to obtain evidence that the practice of demolition by neglect is actually taking place, and therefore, it is difficult to specify how widespread the practice may be.²¹

While local authorities have the responsibility of preparing state of the environment reports (SER) under the RMA, few reporting or monitoring projects have attempted to record the state or condition of historic heritage. In 2005, the NZHPT and the Greater Wellington Regional Council attempted to rectify this lack of information by undertaking a regional state of the historic environment report.

The project adopted the Organisation for Economic Co-operation and Development Pressure-State-Response model or PSR. PSR can be conceptualised where Pressures are the threats on the environment caused by both human and natural interventions; State is the condition of the entire historic heritage environment including the condition of our knowledge of that environment; and Response is the actions of the government and communities to manage pressures and to improve the conditions of the historic heritage

¹⁹ Chris Cochran, 'Schou's Whare Repair Specification' 2005, New Zealand Historic Places Trust, Central Office, Wellington, File# 12012-05

²⁰ Wairarapa Times-Age, 7 May 1996

²¹ Associate Professor Peter Skelton, "Proposals for Legislative Amendments to Enable the New Zealand Historic Places Trust to Engage More Effectively in Various Statutory processes Involving Heritage Values," 21 March 2005

environment. Changes in the environment were measured by indicators, or aspects of pressure, state, or response. Indicators are intended to:

- Produce and simplify the most important information about the historic heritage environment;
- Reduce the number of measurements required to give an 'accurate' representation of historic heritage outcomes;
- Illustrate trends and allow comparisons;
- Ensure responses are triggered when historic heritage thresholds are approached; and
- Make information gathered by specialists more easily understood by the public, the media, resource users, and decision makers.²²

The Wellington SER historic heritage report proposed historic heritage indicators for the Wellington region based on the Australian National State of the Environment programme and the core set endorsed by the Australian and New Zealand Environmental Conservation Council in 1999 with some modifications (see the table below). The indicators were presented as a paper to the Central Region's NZHPT Summer School in January 2005.

²² Department of the Environment, *Environmental Indicators for National State of the Environment Reporting, natural and historic heritage*, Commonwealth of Australia, 1998, p 9

Proposed Historic Heritage Indicators: Wellington Region				
Issue		Indicator	Source	State (S) Pressure (P) Response (R)
Knowledge of the historic heritage resource	I.1	Number and distribution of identified heritage places	NZHPT Register NZAA, DOC District/Regional Plans District Inventories Iwi Inventories Other	S R
	I.2	Number and type of heritage places assessed using best practice assessment standards	As above	S R
Condition of heritage	I.3	Number of places destroyed or whose values have been severely diminished	NZHPT Register NZAA Local Authority Resource Consent database	S P
	I.4	The proportion of places being in good, fair or poor condition, based on physical condition, integrity, occupation, use and conservation activity	Survey	S P
Protection by Central Government and Local Government		Number of statutory mechanisms actively used to protect heritage places	Legislation NZHPT Local Authorities District and Regional Plans DOC	R
		Number of places protected by formal statutory instruments	As above	R
Resources and Training	I.5	Funds provided and allocated for maintaining and enhancing heritage values and provision of heritage advice	NZHPT Lottery Grants Board Local Authorities Other	R
	I.6	Amount of funding provided to heritage agencies responsible for heritage places	Government budget Local authorities	R

The Wellington regional SER historic heritage report concluded that “the total state of the historic heritage environment cannot be measured in a physical or mathematical sense. By nature, historic heritage is defined and redefined by people whose values about heritage environment change with time and place.”²³

²³ New Zealand Historic Places Trust *Wellington Region SER Historic Heritage Technical Report*, 2005, p 56

Systematic criteria for identifying historically significant places should be adopted for each region as has been adopted in Auckland and Bay of Plenty.

While the Wellington survey was limited by the small number of places visited for each district, tentative conclusions were:

1. The condition and integrity of most of the surveyed heritage buildings was generally positive. Many buildings show evidence of recent repair and maintenance and had uses compatible with their heritage value. There did not appear to be any major differences between Category I and Category II with regard to condition and integrity.
2. The integrity of private residential buildings tended to be healthier than commercial and public buildings. However, in some cases public and commercial buildings were in better condition. A number of residential dwellings are cause for alarm, especially those houses that have lost their original usage. In this regard, Taylor-Stace Cottage (Porirua) is a key concern. This building is a Category I Historic Place and the oldest cottage in the Wellington region. The cottage is used as an office and pipe store and is threatened by flooding and general decay.
3. The condition of outbuildings associated with rural buildings is a key concern. With changes in farm practices and management, these buildings often become 'redundant' with a loss of utility value. An example is Sayers Slab Whare (Category I) which was a historic family home and then used farm storage shed. The Whare is at serious risk of collapse and is threatened by a neighbouring tree. The building has been the subject of an NZHPT Heritage Incentive Fund grant and work to remove the tree commenced in April 2005.
4. The integrity of commercial buildings is a key concern, especially in the main towns. While, the condition of many of these buildings is good, most have been modified (especially at the ground-level) for new shop fit outs and renovations. For many commercial premises, the remaining heritage fabric is often limited to the main street façade above the veranda. This finding is supported by the WCC heritage monitoring project. If these trends continue, Wellington Region will have few remaining heritage commercial buildings in the main urban areas that could be described as in an original state. In rural areas, there are a number of original commercial premises that remain and continue to operate. However, many of these buildings require ongoing repair and maintenance.
5. Most heritage buildings in the public domain have high integrity and are in good condition. These buildings are also often open to the public for functions and meetings. Examples include Gear Homestead (Porirua) and Norbury House (Hutt). Both of these dwellings were private residential dwellings that have been acquired by the respective local authorities for public use. Other public buildings of high integrity and good condition include Petone Settlers Museum (Hutt), Carterton Public Library (Carterton), St Mary's Catholic Church (Carterton); St Joseph's Church (Porirua), St Alban's Church (Porirua).
6. In some cases, former buildings associated with the Government, hospital etc remain at risk as a result of restructuring and Government land reorganisation.

Both the Mental Health Museum (Porirua) and the Wallaceville Animal Research Centre (Upper Hutt) are in this situation. Both buildings are Category I, are at risk, and are in poor condition. There has been recent progress to manage and repair the Mental Health Museum thanks to the hard work of museum volunteers. The situation of the Wallaceville Animal Research Centre is not so positive and the building has effectively been abandoned.

7. As a general observation, a limited number of heritage buildings have been converted into museums (either general museums or house museums). Examples of museums within heritage buildings in the Wellington Region include Cobblestones (Greytown), Fell Museum (Featherston), Nairn Cottage (Wellington), Katherine Mansfield House (Wellington); Waikanae Museum (Kapiti) and Golder's Cottage (Upper Hutt).²⁴

The Wellington regional SER historic heritage highlighted the need for a national SER framework for heritage. This framework has now been developed by the NZHPT as part of this guidance series (see Guide No.5 SER – historic heritage). This framework also provides for the assessment of integrity and condition of historic sites (including archaeological sites) in addition to buildings.

Despite promotion of the SER historic heritage framework, limited reporting and monitoring is taking place at the regional and district level. It is a major recommendation of this report that more statistical research is undertaken on the condition of historic heritage. The major method to achieve this is the preparation of SER reports at the regional and district level. This will require the cooperation of territorial authorities, regional councils and the NZHPT, in addition to stakeholder groups, iwi and communities.

International initiatives in addressing demolition by neglect

Demolition by neglect is a recognised heritage planning issue globally. Overseas state and national legislation contains a range of methods to manage demolition by neglect. In many overseas regimes, registered places of national or state importance are protected in legislation. As a result, heritage orders similar to New Zealand's RMA provisions are not common. Instead heritage orders overseas provide a mechanism that enables governments to intervene in instances of demolition by neglect and issue repair notices.

In England and Wales, 'listed buildings' are those structures which have been entered onto a list designating them as having special architectural or historic interest. Listed buildings are protected by the Planning Act 1990 which is designed to control change and prevent neglect, inappropriate alteration, extension, or demolition. Local governments are responsible for enforcing the national rules and taking action when appropriate.

According to the Planning Act 1990, a permit for work known as Listed Building Consent must be obtained from the local planning authority (district, borough, or city council). If the character of a listed building is altered without consent, criminal charges will be brought against the offending parties. Archaeological sites and monuments are also

²⁴ NZHPT, *Wellington Region SER Historic Heritage Technical Report*, 2005, pp 39-40

protected as scheduled ancient monuments. Any deliberate or reckless activity on these sites, as well as using a metal detector or removing objects from them without consent is all considered to be a criminal offence.²⁵

Additionally, if reasonable repairs are not carried out to preserve a listed building the local authority can serve the owner with a repairs notice. This will identify the work required to be carried out and the time period in which it is to be completed. Failure to comply can result in compulsory purchase by the authority. If unauthorised work has taken place to a listed building an enforcement notice can be served. This may require the work to be remedied or reversed.²⁶

In the State of Victoria, Australia, the Heritage Act 1995 protects heritage places on the Victorian Heritage Register. This means that a permit is required to remove, demolish, damage, develop, alter or excavate a registered place. The Heritage Act 1995 also requires the owners of registered places to carry out maintenance works. Section 160 of the Act states that an owner of a registered place or registered object must not allow that place or object fall into disrepair or fail to maintain the place or object to the extent that its conservation is threatened. If Heritage Victoria considers that a place has fallen into disrepair or conservation is threatened, it can issue section 161 repair orders. Failure to comply with the order could result in a conviction and up to five years imprisonment.

The Australian heritage protection system was reviewed by the Productivity Commission in 2005-2006. The review terms of reference included an examination the positive and/or negative impacts of heritage regulation.²⁷ The draft report of the Productivity Commission highlighted the negative 'red tape' consequences of heritage regulation and promoted voluntary methods of conservation such as heritage agreements. While this focus was 'toned down' the final report still emphasised the need for more incentives and less regulation to achieve heritage outcomes.

In relation to maintenance and repair orders, the commission stated:

In response to 'demolition by neglect' most Heritage Acts include a power for the responsible Minister, or the Heritage Council, to order an owner to conduct maintenance or repair on the listed property. For example the New South Wales Heritage Act provides for the setting by regulation of minimum standards of maintenance and repair and creates an offence of not maintaining a listed property up to those standards.²⁸

While the commission did not examine in detail the repair order system, it made a general comment that the system in Australia contains too many 'sticks' and not enough carrots.²⁹ To achieve more 'carrots', the commission promoted the adoption of heritage conservation agreements between State heritage agencies and owners. As a

²⁵ Jonathan Taylor *The Building Conservation Directory, 2004* "Heritage Protection In Brief" (Cathedral Communications Limited, 2005)

<http://www.buildingconservation.com/articles/heritageprot/heritageprot.htm>

²⁶ Suffolk Coastal District Council "Essential repairs and unauthorised work to listed building", English Heritage 2007 <http://www.suffolkcoastal.gov.uk/yourdistrict/devcontrol/listed/default.htm>

²⁷ Australian Government, Productivity Commission, *Conservation of Australia's Historic Heritage Places*, 2006

²⁸ *ibid*, p 66

²⁹ *ibid*, p 73

recommendation, the commission stated that private owners of heritage places should be able to appeal the statutory listing of their properties on the basis of unreasonable costs. These unreasonable costs, in part, resulted from ‘maintenance, repair or restoration costs required to continue a property’s heritage significance.’³⁰

Samuel Tredwell Skidmore House – New York

In a landmark case brought against neglectful owners, the first ever legal requirement of ‘good repair of a landmark’ was upheld in New York City’s legal courts in December of 2004. An official New York City landmark located on the Lower East Side of the City since 1845, the Greek Revival style Samuel Tredwell Skidmore House was ‘on the verge of catastrophic deterioration’ including boarded-up windows, an open roof which collapsed in 2002, and deteriorating brickwork. Various fires and the collapse of interior walls meant the demise and looting of significant original 19th century features.³¹

After many years of pleading with the owners to maintain the building, the New York City Landmarks Preservation Commission took legal action after it became clear that the owner refused to care for the building. According to the Commission’s website, Landmarks Law in New York City ‘requires that designated properties be kept in good repair. This provision is similar to the Buildings Department’s requirement that all New York City buildings must be maintained in a safe condition.’

United States Supreme Court Justice Walter Tolub, who presided over the case, described the building ‘to be in a dismal state of disrepair and ordered the owners to make all the repairs required by the Commission in order to stabilize and preserve it. The Court’s order directs the owners to make the repairs currently needed and to maintain the building in the future.’³²

The hope is that the precedent set by this case will help the City protect buildings from the harm caused by neglectful owners who intentionally allow landmark buildings to fall into disrepair, despite efforts by the Commission to work with them.

The Skidmore House has since been leased by the Atlantic Development Group who as of July of 2005 had not yet completed repairs.

³⁰ *ibid*, p XXXIV

³¹ David W. Dunlap *The New York Times* “Court Steps in to Try to Save a City Landmark on the Brink”, December 28, 2004

³² New York City Law Department Press Release “In A Legal First, City Landmarked Building Is Saved From “Demolition By Neglect” (New York, 2004)

Legislative Overview

Historic Places Act 1980 and Protection Notices

The Historic Places Act 1980 empowered the NZHPT to classify buildings, having regard to their heritage values, and once classified the NZHPT could issue protection notices in accordance with Sections 125A to 125H of the Town and Country Planning Act 1977.³³

Where the Trust has classified a building as having such historical significance or architectural quality as to justify its permanent preservation, it may, at any time, with the approval of the Minister, issue a protection notice declaring that building and all or part of its associated land to be protected for the purposes of this Act.³⁴

The protection notice was served on the territorial authority, the owner and the occupier, and was to be included in the appropriate district scheme.³⁵ It would continue in effect until such time as it was cancelled by the NZHPT. Section 37 provided that while a property was the subject of a protection notice, no building was to be demolished, altered or extended without the consent of the NZHPT. Therefore alteration or outright destruction of all or part of any building subject to a protection notice without the NZHPT's consent was declared illegal.³⁶

The most significant protective provision of the Historic Places Act 1980 was the NZHPT's ability to issue a notice to fix. Section 41 provided that where a building was subject to a protection notice and was in need of urgent works in order to be maintained or preserved, the NZHPT could, in writing, draw this matter to the attention of the owner of the building, outlining the work the NZHPT considered to be necessary and requesting the owner to advise the NZHPT of the steps they intended to take. If the owner failed to satisfy the NZHPT that they were doing all that was necessary to maintain or preserve the building, the NZHPT, with the approval of the Minister of Internal Affairs, could issue a repairs notice to the owner requiring the work to be undertaken within three months of receipt or such longer period as the NZHPT specified. Where an owner did not carry out the work required, the NZHPT was empowered to execute the works itself on one months notice and recover the cost from the owner.³⁷

³³ Associate Professor Peter Skelton, "Proposals for Legislative Amendments to Enable the New Zealand Historic Places Trust to Engage More Effectively in Various Statutory processes Involving Heritage Values," 21 March 2005, p 22

³⁴ Sec 36(1), Historic Places Act 1980

³⁵ Sec 36(2), Historic Places Act 1980

³⁶ Shelley Richardson, '1975-84 New Directions', from *Heritage New Zealand*, Winter 2005, <http://www.historic.org.nz/magazinefeatures/2005Winter/Decade3.htm>. (2 May 2007)

³⁷ Associate Professor Peter Skelton, "Proposals for Legislative Amendments to Enable the New Zealand Historic Places Trust to Engage More Effectively in Various Statutory processes Involving Heritage Values," 21 March 2005, p 23

The Historic Places Act 1980 also sanctioned the NZHPT to advance money or render assistance to an owner for the protection and maintenance of the building subject of the protection notice.³⁸

The owner had the right of appeal to the Planning Tribunal on the grounds that the work was unnecessary, or the amount being charged was unreasonable or on the ground of financial hardship. However, there was no appeal against the notice itself. The power to issue a protection notice was independent of the state of planning in a district, and accordingly, the NZHPT could issue a notice before or after a district planning scheme became operative. For this action to be successful there needed to be a level of consultation between territorial authorities and the NZHPT.³⁹ Despite provision in the legislation for notices to fix, this method was never used by the NZHPT because of the possible financial implications for the organisation.

Historic Places Legislation Review, 1988

In the late 1980s the government set out proposals for a single integrated resource management statute that would replace the many existing statutory procedures. The Resource Management Law Reform (RMLR) resulted in the repeal of the Town and Country Planning Act 1977 and the introduction of the Resource Management Act (RMA) in 1991. Part VIA of the Town and Country Planning Act was not transferred in the RMA and the statutory provisions for notices to fix ceased to exist.

In conjunction with the RMLR, a historic places legislation review was undertaken by the government in 1988. This review examined the protection for historic places under the Historic Places Act 1980 and the Antiquities Act 1975.⁴⁰ In response to the question 'what is the best means of ensuring that protected places are repaired and maintained?' the review discussion document commented:

Enhanced protection measures for buildings imply a conscious commitment to conserving that which is protected. This aspect of heritage protection has, however, received little attention to date in New Zealand. The Historic Places Act does recognise the need for maintenance by providing for 'Repair Notices' to be issued where required on buildings subject to protection notices. The owner has the right to appeal to the Planning Tribunal if the work is considered to be unnecessary or unreasonable.

The repairs notice procedure has very limited application and has not yet been used. There is obviously little to gain from statutory protection if owners can allow buildings to deteriorate without hindrance. A proper standard of conservation could be made mandatory for all important buildings or other historic places, with repair notice procedures or their

³⁸ Sec 39, Historic Places Act 1980

³⁹ Associate Professor Peter Skelton, "Proposals for Legislative Amendments to Enable the New Zealand Historic Places Trust to Engage More Effectively in Various Statutory processes Involving Heritage Values," 21 March 2005, p 23

⁴⁰ Department of Conservation, *Historic Places Legislation Review: Issues for public comment*, December 1988

equivalent available to enforce this. In addition a range of assistance and incentive measures could be made available.⁴¹

Despite acknowledgement for retention of legislative tools to prevent demolition by neglect in the historic places review, the RMLR promoted a limited compensatory planning regime.⁴² As a result, the RMA resulted in providing for heritage orders (within compensatory provisions) but without associated notices to fix powers.

Historic Places Act 1993

The historic places legislation review resulted in the development of the Historic Places Act 1993. This cemented the national significance status of historic heritage in New Zealand with special legislation outside of, but related to, the RMA .

The purpose of the Historic Places Act 1993 is promotion of the identification, protection, preservation and conservation of the historical and cultural heritage of New Zealand. The Historic Places Act 1993 also promotes the additional requirements that all persons exercising functions and powers under the Act must recognise that historic places have lasting value in their own right and that they must take into account material and cultural heritage value and involve the least possible alteration or loss of it.⁴³

Methods for the protection and conservation of historic heritage under the Historic Places Act 1993 include property ownership and management, heritage covenants, registration, archaeological authorities, and advocacy. For the purpose of protecting heritage places, the Historic Places Act 1993 also establishes the NZHPT as a heritage protection authority under the RMA (see section below).

Under the Historic Places Act 1993 heritage covenants are an important tool to promote the conservation of historic heritage. Heritage covenants are voluntary agreements between the NZHPT and the owner or lessee of land to preserve and maintain a historic place. The covenant establishes a long-term relationship between the NZHPT and the owner of the heritage property which in turn provides a lasting form of protection as a means of safeguarding the long-term retention and maintenance of historic properties not owned by the NZHPT. Heritage covenants are specifically drawn up to meet the needs of the particular property owner, and can protect all significant features of the property, including some that are not registered by the NZHPT. Each covenant contains provisions ensuring continued maintenance, and in most instances they bind successive owners to positive terms such as putting an obligation on one party to do something in respect of the property. A heritage covenant may be executed to have effect in perpetuity or for fixed term, and such a covenant runs with the land and the burden binds successors in title. However, with the covenant process being voluntary, the NZHPT has no right to force another party to enter into a heritage covenant.⁴⁴

A review of the heritage covenant process by the NZHPT in September 2000 concluded that the heritage covenant is an especially powerful ally for the NZHPT in heritage

⁴¹ *ibid*, p 16

⁴² MFE, *RMLR, Compensation: An examination of the law, Working Paper No.14*, November 1988

⁴³ Sec 4, Historic Places Act 1993

⁴⁴ NZHPT, 'Heritage Covenants: What Are They? Answers to some commonly asked questions.' May 2001, p 2

protection, yet it is a tool that with some modification could be better utilised. The review recommended that the covenant programme required development. Consideration needed to be made of the strategic use of the heritage covenant as a preservation tool and perhaps an ability to increase protection for properties that are marginally protected at present. The report proposed a consideration of the desirability of covenants over properties as conditions of resource consents.⁴⁵ While heritage covenants have a few issues that need to be remedied they carry a great deal of potential as a useful preservation tool. The review highlighted need for strengthened support networks for the management of covenanted properties.

Resource Management Act 1991

The Resource Management Act 1991 (RMA) promotes sustainable management of natural and physical resources. The concept of sustainable management recognises that there are limits to the use of natural and physical resources and there is a need to balance the desire for growth and activity with the need to protect the resources and values the environment provides.⁴⁶ The RMA Amendment Act 2003 provided a definition of the term 'Historic Heritage' and, most importantly, moved protection of historic heritage as a resource management principle from section 7 to section 6. With this change, the protection of historic heritage from "inappropriate subdivision, use, and development" became a principle of national importance in achieving the promotion of sustainable development of resources.⁴⁷

The RMA has particular regard to the maintenance and enhancement of amenity values and the quality of the environment, and taken with the above inclusion of historic heritage into the RMA, these statutory provisions confirm a strong intention by Parliament that the country's historic heritage is to occupy a very important place within New Zealand society.

Section 9(1) of the RMA states no person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is:

- (a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
- (b) an existing use allowed by section 10 or section 10A.⁴⁸

Use of land includes:

- (a) any use, erection, reconstruction, placement, alteration, extension, removal, or demolition of any structure or part of any structure, in, on, under, or over the land;⁴⁹

⁴⁵ NZHPT, 'Heritage Covenant Review', September 2000, p 29

⁴⁶ Sec 5, RMA 1991

⁴⁷ Sec 6(f), RMA 1991

⁴⁸ Sec 9, RMA 1991

⁴⁹ Sec 4(a), RMA 1991

Land use under the RMA is, therefore, a permissive activity – in the absence of any constraints in a district plan, land use can proceed without the need to obtain resource consent. Section 77B(1) confirms this status:

If an activity is described in this Act, regulations or a plan or proposed plan as a permitted activity, a resource consent is not required for the activity if it complies with the standards, terms or conditions, if any, specified in the plan or proposed plan.

Under the earlier legislation of Town and Country Planning Act 1977 ‘use of land’ was subject to a protection notice for any purpose that was not permitted as of right in the particular zone and was deemed to be a conditional use of the land.⁵⁰ Under this Act ‘use of land’ was interpreted to include not only a use or activity as such, but also any development or work on the land.⁵¹

Under Section 31(b) of the RMA territorial authorities have a statutory responsibility to recognise and provide for the protection of land by setting conditions on inappropriate use and development in the context of sustainable management, and therefore they have a duty to gather information and monitor the state of the environment in their region or district.⁵²

(1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

(a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:

(b) The control of any actual or potential effects of the use, development, or protection of land, including for the purpose of –

(i) the avoidance or mitigation of natural hazards; and

(ii) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances; and

(iia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:

(iii) the maintenance of indigenous biological diversity

The implementation and administration of district plans assists territorial authorities to carry out their functions in order to achieve the purpose of the RMA. The district plan must state the objectives of the district and the policies to implement the objectives and the rules to implement the policies. A district plan may state the significant resource

⁵⁰ K. A. Palmer, *Planning and Development Law in New Zealand*, Vol I, New South Wales, The Law Book Company Limited, 1984, p 254

⁵¹ *ibid.*, p 366

⁵² Sec 35, RMA 1991

management issues for the district and the methods other than rules for implementing the policies, in addition to the principal reasons for adopting the policies and methods. In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect on the environment.⁵³

Regional and district plans prepared under the RMA provide for the protection of listed heritage places and areas. This normally means that resource consent is required for activities such as alterations and additions, relocation, subdivision and demolition. In other words, consent is triggered by proposed activities. Regional or district plans do not provide regulation in instances when activity is not proposed or in relation to an existing use. Therefore, lack of maintenance of a heritage place does not trigger resource consent or the provisions of the district plan. If a consent for an activity is required, there is some scope to provide for maintenance work. Resource consent may include any one or more of the following conditions:

- (a) Subject to subsection (10), a condition requiring that a financial contribution be made:
- (b) A condition requiring provision of a bond (and describing the terms of that bond) in accordance with section 108A:

These provisions, however, are only effective if an activity requires resource consent in a regional or district plan.

Some district plans do contain general zoning provisions that provide some regulatory response to instances of neglect in the urban environment. For example, the Waimate District Plan contains issues, objectives and policies to maintain the pleasantness and amenity of the residential areas. This is regulated by a permitted site standard which states that 'all buildings shall be maintained in a safe and non-derelict state. Non-derelict state in the district plan means that the building is 'not in a state as if it had been abandoned by its occupants and/or owners.'

In relation to the Waimate District Plan provision, in 2003 an abatement notice was issued concerning a residential building that was in a state of disrepair. The property was located on High Street in the Waimate township, a central thoroughfare with other significant heritage buildings situated in the area. Members of the community made a complaint about the property, and Waimate District Council was left with no other option but to issue an abatement notice under section 322 of the Resource Management Act with the reasons for the notice including:

- (b) The building does not comply with the rules for the Residential Zone under the District Plan. In particular, the building has not been maintained in a safe and non-derelict state.
- (c) The non-compliance of the building has not been permitted by any resource consent

⁵³ Sec 76(3), RMA 1991

- (f) The building is causing, or is likely to cause, adverse effects on the environment, including adverse visual effects.

The enforcement officer was acting under section 17, the “duty to avoid, remedy, or mitigate adverse effects”, and section 322 in terms of the scope of abatement notices, of the Resource Management Act 1991

The Waimate District Council required the owner to undertake works to restore the building to a safe and non-derelect state, with works including: replacement of rotten timbers and panels, fixing of gutters, replacement of broken windows, replacement of barge board and painting the exterior of the building; or demolition.⁵⁴

Instead of carrying out repair works the owner decided to demolish. In December 2004 an application for demolition consent for the residential property was approved. The building has been demolished and the site is now vacant.

While most district plans provide additional regulation for historic heritage in relation to other non-heritage places and areas, a number of district plans include ‘positive’ regulatory provisions for historic heritage. These provisions normally provide dispensations or flexibility for the need to comply with other district plan standards in order to achieve historic heritage objectives. For example, Christchurch City Plan contains three positive regulatory provisions which involve:

- A plot ratio bonus for developments retaining heritage items within the Central City zone. This clause enables the floor area of any retained heritage buildings to be excluded from the permitted plot ration for the site up to a stated maximum for developments in certain zones.
- Exemption from the need to comply with car parking and loading standards in the central city zones.
- Allowance for non-residential use of heritage buildings in residential zones.⁵⁵

Auckland City Council is the only local authority in New Zealand that operates a transferable development rights scheme in the CBD. This scheme means that, rights of development that are foregone as a result of retaining a heritage building can be used elsewhere in the CBD.

Some local authorities also have positive regulatory methods in relation to subdivision. Hastings District Plan contains provisions to create a conservation lot on sites containing a heritage item. This provision allows subdivision that does not meet some of the subdivision standards of the plan, but ensures conservation by the use of a covenant.

The NZHPT considers that positive regulatory methods are an important method of encouraging maintenance and conservation of heritage places. All methods should be carefully assessed for their effectiveness and the range of costs/benefits be considered in

⁵⁴ Waimate District Council Abatement Notice, 14 October 2003

⁵⁵ Christchurch City Council, *Issues and Option Paper, City Plan Provisions*, December 2005, p 63

terms of the unique context of each particular region or district. As summarised in the Christchurch City Council's *Issues and Option Paper, City Plan Provisions*:

'Positive' regulatory methods such as exemptions from certain standards and bonuses for others have considerable merit in situations where the benefits of the retention and reuse of heritage items significantly outweighs the potential adverse effects that may arise from these standards being exceeded.⁵⁶

In addition to regional and district plan provisions, the RMA contains a general requirement that the public must not do anything that is likely to be 'noxious, dangerous, offensive, or objection to such an extent that it has or is likely to have an adverse effect on the environment.'⁵⁷ Under section 17(a):

Every person has a duty to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of that person, whether or not the activity is in accordance with a rule in a plan...

If a person does not adhere to this provision, they may be issued with an enforcement order or abatement notice.

An enforcement order ensures compliance under the RMA. It can require a person to cease, or prohibit them from commencing, anything that might be in breach of the RMA, or any other regulations, such as a rule in a district plan; in addition to anything which is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment.⁵⁸ Enforcement orders are issued by the Environment Court rather than territorial authorities, and anyone can apply for an enforcement order to obstruct another person from doing something that may be affecting the environment. Enforcement orders are best suited to ongoing nuisance rather than urgent problems that need to be addressed immediately; although an interim enforcement order can be dealt with quickly by the Court and will protect the environment while the Court considers the full enforcement order.

Similar to the enforcement order, an abatement notice requires compliance with the RMA within the time specified in the notice, requiring the person to cease or prohibit them from commencing anything that might contravene the RMA. Yet unlike the enforcement notice, only territorial authorities can issue abatement notices. Enforcement orders and abatement notices are presently the 'heavy hand of the law', and appear to be only employed as a last resort.

Heritage orders provide another opportunity for the recognition and protection of historic heritage in terms of the RMA, and they have similar provisions to the earlier protection notices of the Historic Places Act 1980. However, unlike the protection notices of the Historic Places Act 1980, the RMA's heritage orders do not include repair notices.

⁵⁶ *ibid*, p 65

⁵⁷ Sec 17(3)(a), RMA 1991

⁵⁸ Sec 314, RMA 1991

Under a heritage order, no person may, without the prior written consent of the relevant heritage protection authority, do anything which would wholly or partly nullify the heritage order. This includes:

- (d) Undertaking any use of land described in section 9(4); and
- (e) Subdividing any land; and
- (f) Changing the character, intensity, or scale of use of any land⁵⁹

A requirement for a heritage order is processed in the same manner as a resource consent application with the exception that instead of making a decision on the requirement, the territorial authority recommends that the requirement be confirmed, with or without modifications or be withdrawn. In making this decision the authority must have particular regard to:

- Whether the place merits protection.
- Whether the requirement is reasonably necessary for protecting the place.
- The contents of policy statements and plans.
- Management strategies approved under any other Act.

The heritage protection authority then decides whether to accept or reject the recommendation. The decision made by the authority is publicly notified and can be appealed. When the order is confirmed it is included in the district plan.⁶⁰ However the heritage order provisions of the RMA have had limited use since the Act came into force in 1991, because of the compensatory provisions in the legislation, including the possibility that the heritage protection authority may be required to purchase the land subject to an order.⁶¹

There are also provisions relevant to heritage orders under the Historic Places Act 1993. Section 5 of the Historic Places Act 1993 states:

Without limiting any of the provisions of the Resource Management Act 1991, the Trust or the Minister may give notice to the relevant territorial authority of a requirement for a heritage order in accordance with that Act to protect—

- (a) The whole or part of any historic place, historic area, wahi tapu, or wahi tapu area; and
- (b) Such area of land (if any) surrounding that historic place, historic area, wahi tapu, or wahi tapu area as is reasonably necessary for the purpose of ensuring the protection and reasonable enjoyment of it.

⁵⁹ Sec 193, RMA 1991

⁶⁰ Christopher D A Milne, 'Historic Places', in *Handbook of Environmental Law*, Christopher D A Milne (ed), Wellington, Royal Forest and Bird Protection Society, 1992, p 240

⁶¹ Associate Professor Peter Skelton, "Proposals for Legislative Amendments to Enable the New Zealand Historic Places Trust to Engage More Effectively in Various Statutory processes Involving Heritage Values," 21 March 2005, p 25

Further, section 105 of the Historic Places Act 1993 provides for suspension of development rights if an owner or occupier of land subject to a heritage order or interim registration notice is convicted of an offence under section 338(1) of the RMA. While a suspension remains in force, the following maintenance provisions relating to the upkeep of the land apply:

The holder shall—

(i) Carry out pest and weed control measures on the land in accordance with the heritage order (if any) applying to the land; and

(ii) Take such other measures as may be necessary to maintain the land in a clean and safe condition; and

(iii) Take such other measures as may be necessary to protect either—

(A) The place and surrounding area specified in the requirement for a heritage order or specified in the heritage order; or

(B) The place or wahi tapu for which interim registration is proposed.

Responses in addressing demolition by neglect under the RMA

Since the arrival of the RMA and Historic Places Act in 1991 and 1993 respectively, the historic heritage legislative framework has been reviewed in 1996 and 1998. In 1996, the review was conducted by the Parliamentary Commissioner for the Environment (PCE). The report of the commissioner, *Historic and Cultural Heritage Management in New Zealand*, found that there was a need for effective protection mechanisms for historic and cultural heritage. There was, however, little attention given in the report to demolition by neglect issues. Instead, the report maintained that heritage orders were very effective as emergency protection measures, if the heritage protection authority could afford the process.⁶² However, the report also found that heritage orders are rarely utilised because of the financial responsibility placed upon heritage protection authorities. The report reasserted that the RMA was the 'primary instrument for communities to provide for the sustainable management of heritage'.⁶³

Following the PCE report, the government's 1998 historic heritage management review highlighted issues relating to identification, Maori heritage, property management, and the status and role of the NZHPT.⁶⁴ The review report again promoted the principal role of the RMA for the protection of historic heritage and encouraging voluntary protection

⁶² Parliamentary Commissioner for the Environment (PCE), *Historic and Cultural Heritage Management in New Zealand*, Wellington: Parliamentary Commissioner for the Environment, 1996, pp 44-45

⁶³ *ibid*, p 47

⁶⁴ DOC, *Historic Heritage Management Review, Report of the Ministerial Advisory Committee*, October 1998

and financial incentives. As with the PCE review, there was no detailed examination of demolition by neglect issues or legislative tools to manage the issue.

Demolition by neglect issues have featured strongly in high profile heritage appeals to the Environment Court. In 1999 the community of Gisborne managed to stop the Gisborne District Council from demolishing the Peel Street toilets by seeking an enforcement order in the Environment Court.⁶⁵ The order was sought on the grounds that the activity is or is likely to be offensive or objectionable to such an extent that it has, or is likely to have, an adverse effect on the environment (section 314 of the RMA). The proposed demolition was permitted since the toilets were not listed in the district plan for protection. The Environment Court considered that the toilets did have significant heritage value and architectural merit and worthy of preservation. To demolish the building would mean 'its heritage values would be lost forever to the community.'⁶⁶ For this reason, the Court found that demolition was within the scope of section 314 and would cause an adverse effect on the environment.

Other Environment Court cases involving privately-owned buildings have not been so supportive of preservation arguments. The *A A McFarlane Family Trust* case involved three prominent buildings in central Christchurch; Warners Hotel, the Lyttelton Times building and the Old Star building, which were all faced with demolition by their owner. The buildings had deteriorated to a dilapidated state and they generally did not comply with current earthquake and building code standards. Accordingly, the owner wanted to replace the heritage buildings with a new and modern building complex providing for residential and commercial activities.

The NZHPT and the Christchurch City Council were opposed to the demolition of the buildings confirming that they were all recognised as Group 2 buildings in the proposed district plan. The Lyttelton Times building was also assigned Category I status and the Old Star building and Warners Hotel were registered as Category II historic places on the NZHPT Register.⁶⁷ Yet extensive evidence suggested that the buildings were in such a state of disrepair that it would be uneconomic to expect the owner to remedy the situation.⁶⁸

The Environment Court granted resource consents for all three buildings to be demolished save for one façade – 'the purpose of the retention and restoration is to preserve the heritage values of that façade but the purpose of the consent is to authorise demolition of the remainder of the building.'⁶⁹ To ensure the façade retention took place there was to be a further condition requiring the consent holder to enter into a bond with Council in the sum of \$450,000 to maintain the façade of the Old Star building pending the exercise of the consent to demolish the rest of that building. The consent holder had five years in which to exercise the demolition consent. Skelton suggests that this

⁶⁵ *Donnelly v Gisborne District Council*, A013/99

⁶⁶ *ibid*, p 4

⁶⁷ *AA McFarlane Family Trust v Christchurch City Council* [1999] C46/99, p 12-13

⁶⁸ Associate Professor Peter Skelton, "Proposals for Legislative Amendments to Enable the New Zealand Historic Places Trust to Engage More Effectively in Various Statutory processes Involving Heritage Values," 21 March 2005, p 27

⁶⁹ Decision C.33/2000, quoted in Skelton, p 29-31

proposal is akin to, although not quite the same as, the provision in the Historic Places Act 1980 authorising the NZHPT to give notice requiring repairs to be carried out.⁷⁰

The Court delayed the commencement of these consents for a period of six months to enable negotiations to continue between the various parties, some of whom had strong interests in having the buildings retained.

Christchurch City Council expressed an interest in a continuing involvement in the retention of the building and gave evidence of attempts that had been made to avoid demolition by finding alternative uses. However Council did not have the necessary resources to protect and preserve the buildings, and it was submitted that the Council had never given consideration to acquiring these buildings through heritage order procedures, or in any other way. Nevertheless, in the end negotiations proved to be successful and the buildings were retained and redeveloped and used for various purposes including travellers' accommodation.⁷¹

During the *A A McFarlane Family Trust* case, a range of evidence was presented concerning public and private goods. Economic consultant, Philip Thomas Donnelly, gave evidence to the court on the economic assessment of the buildings and discussed the public and private good characteristics of built heritage. Donnelly submitted that some aspects of heritage buildings have characteristics of public good, yet whether a heritage building has public good status is only relevant when its utility value in its current location is less than what is required to sustain its productive use.⁷²

Donnelly argued that financial contributions from the community was the only real way of ensuring buildings like those in the *A A McFarlane* case would not be lost over time through neglect. Donnelly also claimed that while public funding of most public goods like law and order and street lighting is taken for granted the public good characteristics of heritage buildings are often overlooked for several reasons, which included:

- Heritage value being subjective and therefore there may not be universal agreement as to the need for protection.
- Unlike other public goods heritage buildings frequently start as private goods and only through age gain heritage status.
- Heritage buildings are frequently in private ownership and therefore public funding of private assets is viewed by many as an enigma.⁷³

Donnelly's evidence suggested that the issue of demolition by neglect is irritated by a lack of financial resources. He argued that once the utility value of a building is no longer adequate to sustain its use, financial resources rather than rules are required to sustain its heritage values. Rules do nothing to stop owners walking away from heritage

⁷⁰ Associate Professor Peter Skelton, "Proposals for Legislative Amendments to Enable the New Zealand Historic Places Trust to Engage More Effectively in Various Statutory processes Involving Heritage Values," 21 March 2005, p 29

⁷¹ Associate Professor Peter Skelton, "Proposals for Legislative Amendments to Enable the New Zealand Historic Places Trust to Engage More Effectively in Various Statutory processes Involving Heritage Values," 21 March 2005 p 27-29

⁷² *AA McFarlane Family Trust*, p 32-33

⁷³ *ibid.*

buildings or allowing them to decay through lack of maintenance.⁷⁴ Heritage rules that force private funding for public benefits will not promote the enabling provisions of section 5(2), managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety.⁷⁵ “The community cannot have a public benefit and not bear the cost of retention.”⁷⁶ In Donnelly’s opinion, the enabling provisions require resource managers to discharge their functions in a manner that minimises the adverse economic and social impacts on individuals and communities. He suggests that there are better and more enabling alternatives than forcing private owner provision of heritage values, with the examples given of purchase, public or trust ownership and compensation.⁷⁷

In the *A A McFarlane Family Trust* case information was presented maintaining the view that the Christchurch public recognised a public obligation to make a financial contribution to maintenance of their historic building stock. Results from a residents’ survey in 1998 showed a strong preference for retention of historic buildings and that some 89% of respondents were prepared to pay as much or more than they were then paying in rates to achieve this. However Christchurch City Council were not prepared to meet the cost of retention despite the results of the public survey. There was no evidence to the contrary and consequently the public benefit has not been shown to equal or exceed the private cost faced by the applicant.⁷⁸

The Environment Court found there was no outright requirement which required the owner to maintain the historic properties. While in the *New Zealand Historic Places Trust* case the Court rejected any suggestion of demolition by neglect, noting that there was no statutory obligation on landowners to undertake some unspecified level of maintenance in respect to their buildings.⁷⁹

In *New Zealand Historic Places Trust Pouhere Taonga and the Christchurch Methodist Mission v Christchurch City Council* the matter of proposed demolition of heritage buildings was again before the Environment Court. This time the buildings were Fleming House and McKellar House, both situated on a prominent site at the corner of Park Terrace and Bealey Avenue, Christchurch. The NZHPT advanced a number of arguments in favour of retention of the buildings and refusal of consent for demolition. The NZHPT argued for the ethic of stewardship as an owner’s duty under the RMA in addition to bringing to the court’s attention the issue of demolition by neglect. It was noted by the Court that the ethic of stewardship did not give rise to an implied obligation upon the owner to maintain the heritage item in all circumstances, and could not be interpreted as placing an obligation on a council to purchase a heritage item when it was no longer suitable for use by its owner.⁸⁰ And in regards to demolition by neglect the Court concluded:

⁷⁴ *AA McFarlane Family Trust v Christchurch City Council* C46/99, p 35

⁷⁵ *ibid*

⁷⁶ *ibid*, p 38

⁷⁷ *ibid.*, p 34

⁷⁸ *ibid.*, p 43

⁷⁹ *New Zealand Historic Places Trust/Pouhere Taonga and the Christchurch Methodist Mission v Christchurch City Council* [2001] C173/01, p 126

⁸⁰ *New Zealand Historic Places Trust/Pouhere Taonga and the Christchurch Methodist Mission v Christchurch City Council* [2001] C173/01 p124

Contrary to the assertions by the Historic Places Trust we conclude that the buildings are in a relatively good condition, largely as a result of ongoing improvement and expenditure to the buildings over the last 40-50 years...We strenuously reject any suggestion that there is “demolition by neglect” in this case.⁸¹

Having made this finding it was not appropriate for the Court to say anything more about the practice of demolition by neglect which, at least impliedly, it accepted as being a possibility. The Court also regarded as “alarming” the suggestion by counsel for the NZHPT that there was an obligation under the RMA on the owners of heritage buildings to undertake some unspecified level of maintenance in respect of their buildings. The Court went on to record that in later submissions counsel for the NZHPT had accepted that there was no statutory obligation placed on a landowner under Part II of the RMA but had gone on to argue by analogy that individuals have obligations under Part II when undertaking their activities. The Court rejected both assertions as being wrong both in principle and in law. It referred to section 9 of the RMA which it said “indicates that restraint on the use of land can be justified in certain circumstances where such constraint is contained within a rule in a District Plan”. It then observed that there was no such rule in the relevant district plan in that case.⁸²

Both *A A MacFarlane Trust* and *New Zealand Historic Places Trust* judgements were informed by the earlier *Shell Oil New Zealand Limited v Wellington City Council* case. This appeal concerned the proposed demolition of a building known as “the Dalgetys building” in Wellington, and was a case concerning an application for consent to a discretionary activity. The Court took the view that the preservation of historic buildings is a matter of public finance. Towards the end of the decision it noted

...the public must realise that preservation of many buildings which are presently economically marginal can only take place with community participation and funding to acquire and refurbish such buildings. Essentially in the present case it is not a question of values but rather a question of who pays for the preservation of such values. In the present circumstances we have reached the firm conclusion that it would be grossly unfair to impose this burden on the landowner.⁸³

Building Act 2004

The Building Act 2004 regulates all buildings and structures to safeguard the health, safety and amenity of people, to facilitate efficient energy use, and to protect property from damage; all in ways that promote sustainable development.⁸⁴ While enforcing certain health and safety standards under the Building Act 2004, territorial authorities must also take into consideration:

⁸¹ Paragraph 87, quoted in Associate Professor Peter Skelton, “Proposals for Legislative Amendments to Enable the New Zealand Historic Places Trust to Engage More Effectively in Various Statutory processes Involving Heritage Values,” 21 March 2005, p 33

⁸² *ibid*, p 34

⁸³ Quoted in *AA McFarlane Family Trust*, p 58

⁸⁴ Sec 3, Building Act 2004

- (d) the importance of recognising any special traditional and cultural aspects of the intended use of a building,
- (l) the need to facilitate the preservation of buildings of significant cultural, historical or heritage value.⁸⁵

The Building Act 2004 relates to the Historic Places Act 1993 through Project Information Memoranda (PIM) and building consent processes, with Section 39 of the Building Act 2004 requiring a territorial authority to advise the NZHPT after it receives an application for a project information memorandum when:

- (a) the application affects a registered historic place, historic area, wahi tapu, or wahi tapu area; and
- (b) the territorial authority has not previously issued a project information memorandum for the building work to which the application applies.⁸⁶

The links between the Building Act 2004 and the Historic Places Act provide an “early warning system” to enable the NZHPT to fulfil its statutory function to advocate the protection of historical and cultural heritage in the public interest. The NZHPT has a statutory responsibility under the Historic Places Act (sections 34 and 35) to notify territorial authorities of entries on the Register for the purposes of the Building Act, and territorial authorities have a statutory responsibility under the Building Act (sections 30(4), 31(5) and 33(6)) to notify the NZHPT of receipt of a building consent or PIM relating to an entry on the Register.

On receipt of a Building Act notification, the NZHPT has the opportunity to liaise with owners, developers and territorial authorities to advocate good outcomes for historical and cultural heritage in the public interest. Yet it is the role of the territorial authority (not the NZHPT) to grant or refuse an application for a building consent based largely on compliance with the building code. The territorial authority is required to “have due regard” to any special historical or cultural value of that building when formulating conditions. This does not require, or authorise, the territorial authority to refuse the building consent, but conditions might be imposed irrespective of whether the building is registered or not.

Sections 124 and 125 of the Building Act 2004 address the problems that arise when a building becomes a hazard in terms of public safety. However, the terms used in section 124 (which take meaning from sections 121, 122, and 123) and also in section 131 about formulating policies, are directed to hazardous situations, not to the need for heritage protection. In formulating policies the need for heritage protection would be considered pursuant to the principles.

Section 125 of the Building Act 2004 requires that the NZHPT is to be given notice when a heritage building is involved. This provision enables the NZHPT to be involved in any remedial action that might be necessary to comply with the notice so as to protect heritage values. However, these provisions do not provide for a requirement to maintain those heritage values relating to the exercise of the powers contained in sections 124 and

⁸⁵ Sec 4(2), Building Act 2004

⁸⁶ Sec 39, Building Act 2004

125.⁸⁷ Section 164 of the Building Act does contain provisions to require an owner to maintain a property if the regulations of the Act are not complied with. Section 164 states:

(1) This section applies if a responsible authority considers on reasonable grounds that—

(a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or

(b) a building warrant of fitness or dam warrant of fitness is not correct; or

(c) the inspection, maintenance, or reporting procedures stated in a compliance schedule are not being, or have not been, properly complied with.

(2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—

(a) to remedy the contravention of, or to comply with, this Act or the regulations; or

(b) to correct the warrant of fitness; or

(c) to properly comply with the inspection, maintenance, or reporting procedures stated in the compliance schedule.

The Department of Building and Housing has released a discussion document on possible amendments to the building code. *Building for the 21st Century: Review of the Building Code Synopsis of Submissions* summarises submissions received in response to the Building Code review, with the report including the views of submitters on the scope and content of the Building Code with additional feedback from focus groups and workshops.⁸⁸ The Building Code review is taking place over three years and, upon its completion will include recommendations setting out any necessary or desirable amendments to the Building Code. A major observation made was the need for some kind of alignment between the Building Code and other legislation, particularly the RMA. Concerning the issue of sustainable management, submitters generally supported the idea of a maintenance plan for buildings, yet there was acknowledgement that such a measure would be difficult to enforce. Suggestions were also made about enforcing maintenance plans with many noting that educating homeowners on home maintenance was a necessary step.⁸⁹ Submitters recommended that maintenance should be carried out at regular intervals which would cause maintenance to be easier in the long-term. Different suggestions were proposed for how the maintenance plans could be monitored; these included:

⁸⁷ Associate Professor Peter Skelton, "Proposals for Legislative Amendments to Enable the New Zealand Historic Places Trust to Engage More Effectively in Various Statutory processes Involving Heritage Values," 21 March 2005, p. 37

⁸⁸ Department of Building and Housing Te Tari Kaupapa Whare, *Building for the 21st Century: Review of the Building Code, Synopsis of Submissions*, Wellington: Department of Building and Housing, 2007, p 1

⁸⁹ *ibid*, p 7

- A maintenance manual for all buildings with an electronic copy lodged with the building consent authority. It would be updated when buildings are altered. It would record material suppliers, inspection requirements, maintenance requirements, supplier's guarantees and installers/contractors for current and future owners.
- Details of suppliers, inspection requirements, maintenance requirements, suppliers guarantees and installers/contractors for current and future owners.
- A maintenance plan supported by a warrant of fitness regime. The designer, builder, or existing owner could provide a maintenance manual for the original as-built home.
- A maintenance plan could be used as basis to accept or reject a building proposal and attached as a condition to a building consent.⁹⁰

However it was noted that owners and occupiers of residential dwellings may adopt maintenance plans but withhold from taking remedial actions, with some complying with the recommendations and others waiting until a building element failed and needed replacing to comply. Those against the provision of a maintenance plan in the building code felt that owners of buildings should be responsible for their own maintenance. Regulation, it was stated, 'is not a substitute for people taking responsibility for their choices.' Besides it was argued the building consent process does not guarantee ongoing building compliance without appropriate maintenance. It was also felt that the identification of future maintenance requirements will be difficult because there are so many possibilities. This could lead to an increasingly litigious environment and, as a result, increasing risk aversion, leading to excessive conservatism in materials, design and construction, with increased costs.⁹¹ Other suggestions included a building warrant of fitness regime applying to all buildings.⁹²

Through the submission process, many submitters agreed that historic, heritage and cultural buildings needed to be treated differently to preserve their value. Many submitters thought that existing buildings with historic or heritage value must comply with the building code only if reasonably practicable, and that these buildings must be treated on a case-by-case basis. Submitters suggested that concessions must be made to allow these buildings to retain their value, while complying with building code requirements as much as possible. A few submitters identified that the current processes for dealing with cultural, historic or heritage buildings result in the value of the buildings being compromised by strict application of building code requirements.⁹³

Towards legislative change?

The repair and maintenance of heritage places is enhanced by the provision of incentives for owners at the local, regional and national level. The role of incentives has been highlighted in the PCE 1996 review report, the 1998 historic heritage management

⁹⁰ *ibid*, p 112

⁹¹ *ibid*

⁹² *ibid*, pp 111-112

⁹³ *ibid*, pp 133

review, and the establishment of the National Heritage Preservation Incentive Fund in 2004. Heritage incentives have been further highlighted in the Productivity Commission Inquiry report in Australia in 2006. The importance of incentives in supporting owners of heritage buildings is particularly important in relation to earthquake-prone heritage buildings. This issue is the subject of a separate report in this guidance series (Discussion Paper No.6 Implications of Earthquake-Prone buildings policies, Building Act 2004).

The provision of guidance and incentives is the first response to assisting owners maintains and repair heritage places. As outlined in Discussion Paper No. 6, the provision of incentives across New Zealand is patchy and inadequate. This situation will result in poor outcomes for heritage.

Guidance and incentives, however, do not solve all situations of demolition by neglect. Some owners choose to reject any assistance and continue to allow the heritage place to fall into disrepair. New Zealand lacks the necessary legislative tools to deal with these situations. Even under a heritage order issued under the RMA, heritage places can suffer from lack of maintenance and repair. Addressing this issue will require legislative change. Until this change is made, communities will feel powerless to save heritage places at risk.

Any change in legislation will raise issues over property right interests. In the early days of the RMLR, the MFE engaged Dr Daniel W. Bromley to develop a paper on property rights and the environment. Dr Daniel W. Bromley suggested that environmental policy is about two central concepts:

- (1) deciding socially acceptable entitlement structures; and
- (2) searching for the boundary between autonomous (market-like) and collective decision making.

The first choice is dominated by concern for what sort of world we want to have, whereas the second choice is dominated by concern for the operating efficiency of alternative entitlement structures. The structures of entitlements can be considered in four broad types of regimes:

- (1) state property regimes
- (2) private-property regimes
- (3) common –property regimes, and
- (4) non-property regimes (or open access).⁹⁴

The most familiar property regime is that of private property. Bromley argued that there are pervasive duties that attend the private control of land and related resources, and therefore few owners are entirely free to do as they wish with such assets.⁹⁵ Bromley submitted that individuals have a *right* to property under socially acceptable uses, and

⁹⁴ Dr Daniel W. Bromley, *Property Rights and the Environment: Natural Resource Policy in Transition*, Wellington, Ministry of the Environment, April 1988, pp 13-14

⁹⁵ *ibid*, p 14

have a *duty* to refrain from socially unacceptable uses. Other “non-owners” have a *duty* to refrain from preventing socially acceptable uses, and have a *right* to expect only socially acceptable uses will occur.⁹⁶

The need to ensure that only ‘socially acceptable uses’ to occur for non-owners is relevant to demolition by neglect. In this area, the RMA provides section 17 which involves the ‘duty to avoid, remedy, or mitigate any adverse effect on the environment’. This general duty is supported by the enforcement order procedure of section 314(b) of the RMA. Together these provisions can be adopted to support general obligations on owners of heritage places to ensure that their properties do not deteriorate to the point where it is causing an adverse effect on the environment. Associate Professor Peter Skelton notes that there have been cases where the Environment Court has made enforcement orders or upheld abatement notices requiring people to clean up their properties, as for example the “junkyard” cases involving private properties in residential areas. There has also been at least one case where the owner of a partially completed dwelling was required to complete or demolish it because it was creating an adverse effect on the local residential environment.⁹⁷

Enforcement orders and abatement notices are of limited usefulness in cases of demolition by neglect of heritage places since it may take many years for a neglected place to cause an adverse effect on the environment. In fact, the effect in an isolated rural area or on private land may not be acknowledged at all. Further regional and district plan provisions are of limited use since they are designed to regulate undesirable activities or proposals such as relocation or demolition. They have limited ability to require owners to maintain heritage places. Further if such a provision was introduced into a regional or district it would no doubt result in opposition from owners unless the provision was supported by sufficient and substantial financial support.

There is a need for an additional legislative tool to ensure heritage places of national significance are maintained. There are circumstances of registered Category I historic places that are eligible to receive funding assistance that are decaying by neglect. The Crown is unable to effectively intervene to save these heritage places. This report proposes that the heritage order provisions of the RMA should be amended to add a ‘notice to fix’ power not unlike the provision that existed under the Town and Country Planning Act 1977. This method would enable action be taken in extreme cases and owners to file to appeal to the Environment Court and file for compensation under the current heritage order provisions.

⁹⁶ *ibid*, p 15

⁹⁷ Associate Professor Peter Skelton, “Proposals for Legislative Amendments to Enable the New Zealand Historic Places Trust to Engage More Effectively in Various Statutory processes Involving Heritage Values,” 21 March 2005, p. 35-36