

LANDSCAPE LAW
Landscape legislation and policy

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Diane Menzies has qualifications in landscape architecture, horticulture, business administration and resource management. She completed a doctorate in resource studies in 1999: studying perceptions of environment and the relationship of this to environmental management; and started a consultancy in 2000. She has recently drafted the landscape section of an environmental law handbook. She has had twenty-five years experience in landscape planning and management for government in New Zealand and Britain. Dr. Menzies is a past president of the New Zealand Institute of Landscape Architects and Secretary of the Eastern Region of IFLA.

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Di Lucas is a landscape planner with qualifications in natural science as well as landscape architecture and landscape planning. She has run a small practice in New Zealand for more than 21 years. The practice is involved in policy and planning as well as design and restoration projects, often with community, in rural and urban, mountain, lowland and coastal environments. Di also chairs a contestable government fund for the voluntary protection of indigenous ecosystems on private land.

Abstract

The protection of outstanding natural features and landscapes is a matter of national importance in New Zealand environmental legislation. The Resource Management Act 1991 also requires that decision makers have particular regard to the maintenance and enhancement of amenity values. This paper describes the legislation, and effect after ten years, on the landscape, landscape practitioners and the community. The conclusion drawn is that the law provides for landscape protection, but the profession has been slow to seize this opportunity. Practices are now developing a range of landscape assessment and interpretation skills that are enabling a broader understanding of landscape values.

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1. Introduction

Landscape and environmental planners in New Zealand were presented with an exciting opportunity for landscape protection and enhancement with the enactment of the Resource Management Act 1991 (RMA). Previously 54 separate Acts had dealt with environmental issues: now they are incorporated into one over-riding law. The purpose of the Act is to promote the sustainable management of natural and physical resources. The Act identifies the protection of outstanding natural features and landscapes as a matter of national importance. Such landscapes are to be protected from inappropriate subdivision, use, and development. In addition, the natural character of the coastal environment, wetlands, lakes and rivers and their margins is to be preserved. The definition of environment includes, among other things, ecosystems and aesthetic and cultural conditions. The legislation specifically includes Government and all other 'players' in the development and management of the environment of New Zealand and its coastline. No one is exempt. However, while the sustainable management of natural and physical resources is the aim of the law, not all practitioners, communities and sector groups have found the results of the legislation to their liking, and after ten years the Government is investigating changing some elements of the Act.

This paper considers the key concepts of the Act, its implementation, the effects on landscape and communities and the role of landscape architects. Two case studies are presented to illustrate problems issues and solutions. The first case is of Rotorua, an area with an iconic landscape that is an important tourist destination, where protection of the natural landscape is being put into practice through the District Plan. The second case is also of a tourist destination: Queenstown, a small urban center beside a crystal clear lake, surrounded by stark mountains. It is a rapidly expanding town where developers and conservationists have battled over the objectives and means to protect the landscape.

Although the RMA could be seen as hugely helpful to the profession of landscape architecture in New Zealand, practitioners have been slow to take advantage of the opportunities. In addition, at times those advising the Courts have seemed to abrogate an ethical stand in order to support a client's proposal. The paper concludes that action is now being taken to develop landscape assessment and interpretation skills and to communicate this understanding to the Courts and communities of New Zealand.

The objective of this paper is to describe the legislation and the New Zealand experience after ten years, to share this experience with the landscape architecture profession.

2. Key concepts of the RMA legislation

The RMA is concerned with the environmental **effects** of an activity rather than the activity itself. In other words, in seeking to achieve sustainable management of land and water, decision makers must consider the negative and positive impacts of what is proposed. If the adverse effects are likely to be 'no more than minor' then the presumption is that the change proposed will be allowed. While this might seem a straight-forward concept it presents a number of problems. For instance, while effects are considered to be:

'actual or potential effects; positive or adverse; temporary or permanent; past present or future; cumulative over time or in combination with other effects; regardless of the scale, intensity, duration, or frequency of the effect; and includes an effect of high probability, or of low probability with a high potential impact;'

in dealing with environmental issues, there is uncertainty about cumulative effects, 'thresholds' over which impacts may have a spirally effect, and the time horizon contemplated. In addition, resource managers have been reluctant to contemplate an environmental vision for the future rather than react to change proposals. In other cases, the plans proposed have been a very blunt instrument and have not, at least initially, led to community understanding of the effects of change, or need for limits on change.

There are two means of addressing effects in the Act. The first is at a regional or district level where policies based on resource issues are developed, and plans set out the rules for undertaking activities. The second approach is the requirement for ALL change proposals to undertake an environmental impact report: termed an Assessment of Effects on the Environment (AEE). The legislation states that:

'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...'

The legislation provides for the issuing of enforcement or abatement orders to halt such impacts.

Concerns over controls on activities have been expressed most volubly in the rural area where previous prescriptive planning permitted almost all agricultural activities without question. Now the effects of, for instance, forestry on soil erosion, water supply, water quality, stream health, and visual perception are matters to be assessed.

Another key concept of the RMA is the requirement of all decision makers to recognize and provide for the preservation of the natural character of the coastal environment, wetlands, lakes and their margins and the protection of them from inappropriate subdivision, use and development. This has preeminence in the Act. What this actually implies and requires has been debated in considerable detail for marine farming, marina proposals, and other building development on the coast. Decisions of the courts are forming a range of definitions as well as criteria for how new developments should be assessed, such as for natural character.

*'The word 'natural' does not necessarily equate with the word 'pristine' except in so far as landscape in a pristine state is probably rarer and of more value than landscape in a natural state. The word 'natural' is a word indicating a product of nature and can include such things as pasture, exotic tree species (pine), wildlife ... and many other things of that ilk as opposed to man-made structures, roads, machinery etc.'*¹

Natural character is regarded as part of a spectrum ranging from pristine to cityscape and the presence or absence of original landform, vegetation cover and other ecological patterns, water bodies, remoteness, and built elements and human influences does not mean that the landscape is or is not natural, but it may indicate that it is less natural.² 'Natural' is used as a comparative term.³ Landscape elements, patterns and processes are recognized rather than 'naturalness' being in the eye of the beholder.⁴

Another concept which has priority for resource management decision making is the protection (as opposed to preservation) of outstanding natural features and landscapes from inappropriate subdivision, use and development. Again, case law is providing increasing guidance on what 'outstanding' and 'inappropriate' is likely to mean in particular circumstances.

'Landscape' is not defined in the RMA. However, court decisions have made it clear that landscape is not a concept that is restricted to the visual, or visible landscape. The perception of landscape and the effects of aspects such as noise and history on appreciation of the landscape are relevant. The landscape may be treated as a land system. This then provides for landscape being considered both as a biophysical entity and as a cultural resource.

Landscape assessment is an evolving science, but the Court has endorsed criteria for assessing landscape, which include:

- a) *'the natural science factors – the geology, topography, ecological and dynamic components of the landscape; (which can make it remarkable or unremarkable)*
- b) *its aesthetic values including memorability and naturalness;*
- c) *its expressiveness (legibility): how obviously the landscape demonstrates the formative processes leading to it;*
- d) *transient values: occasional presence of wildlife; or its values at certain times of the day or of the year;*
- e) *whether the values are shared and recognized*
- f) *its value to tangata whenua;*
- g) *its historic associations.'*⁵

¹ Harrison v Tasman District Council, 1994, NZRMA 193, page 197.

² Whakatipu Environment Society Inc. v Queenstown Lakes District Council, C180/99, page 52.

³ McLaren v Marlborough District Council W179/96; Chance Bay Marine Farms Ltd v Marlborough District Council, W70/99; Trio Holdings and Marlborough District Council; J. Crooks and Sons Ltd v Invercargill City Council, C24/97.

⁴ Browning v Marlborough District Council, W20/97, page 7; Brook Weatherwell-Johnson v Tasman District Council (1996).

⁵ Whakatipu Environment Society Inc. v Queenstown Lakes District Council, C180/99, paragraph 80, page 46, as modified from Pigeon Bay Aquaculture Ltd v Canterbury Regional Council, C32/99, pages 46-47

Decision makers must also address the maintenance and enhancement of amenity values, as well as the quality of the environment, when contemplating change. Amenity values are defined as:

'those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.'

A further underlying and important concept of the RMA is the democratic approach to decision making. While decisions may have political influence at a local government level, as the decision makers are politicians, the final decision level is the environment court and further courts of appeal, and this modifies political influence. In addition, the Act specifically provides for taking account of the values of tangata whenua, the people of the land, indigenous tribes. Further, the inclusive nature of the Act, applying as it does to all tiers of Government, to all sectors and to all people, further supports the egalitarian thrust. Those with an interest in a plan or proposal may make a submission to decision makers: there is no limitation such as proximity or ownership. This open approach has allowed community and conservation groups to take matters about which they are concerned as far as the environment court for a decision.

Finally, the difference between the purpose of the RMA legislation, which is sustainable **management**, and the concept promoted in the Bruntland Report of sustainable **development**, should be noted. There is no inference in the RMA that development is implicit in resource decision making.

The RMA is not the only law that deals with environment or conservation in New Zealand. The Conservation Act, National Parks Act, QEII National Trust Act, Historic Places Act and Reserves Act (which deals with ecosystem and landscape protection) also apply to management of particular cultural and/or natural heritage resources.

3. Implementation of the RMA

The law is put into effect by local authority decision makers, by developers and others in communities and by interpretation of the Courts. The framework for this is national, regional and district planning as well as environmental effects assessment required for policies and plans as well as for all developments.

Apart from the Act itself the main tools for national level planning are the ability to issue a national policy statement, to introduce regulations and to 'call in' a particular project that may have national implications. Governments have been reluctant to apply these tools and the main application has been a coastal policy, although a national biodiversity policy is currently being formulated.

Regional policies and plans deal with broad scale issues including water management. The district plan is the document where provisions for landscape protection against inappropriate subdivision, development and use may be found. This level of planning specifically deals with land use activities. A district must recognize outstanding natural landscapes and their values and consider issues, objectives, policies and methods relating to landscapes. There are a variety of means to protect valued landscapes such as conservation zoning, rules that specify standards, local area guidelines, or through non-statutory means such as education and awareness raising. Districts must take a coherent and consistent approach to landscape protection.

At the project level the tool used is a resource consent process. A developer must apply, in specified circumstances, for a consent for water use, discharges likely from an activity, building or earthworks, or a particular use. A consent may be refused in order to protect a landscape, but measures such as restrictive covenants to protect features and vegetation, or modification of the use through consent conditions, may instead be applied to protect landscapes from effects that are 'more than minor.' Examples of consent conditions to protect landscape elements are requirements to reduce the scale or extent of a development; to leave landform features exposed when developing forest plantations; to provide landform or vegetation screening to hide buildings; or, to curve roads around significant landscape features.

Communities have a role in contributing to the formulation of district or other plans, and in making submissions on proposals. Examples are a Port Hills Focus group, convened by nomination of community representatives for a section of a rural plan, and community involvement in waterfront planning for the city of Wellington.

4. Outcomes of the RMA

a. Effects on landscapes

Over ten years ago protection of the **townscape**, including landforms and other landscape elements and processes, was possible through planning legislation. Now the focus has turned to the wider New Zealand landscape and some significant decisions are allowing incremental protection measures to be taken. Such change owes much to increasing appreciation and understanding of landscape both as a bio-physical entity as well as a cultural value. Landscape is now understood more widely as a complex, fragile and dynamic resource rather simply than as a static scene.

It is difficult to evaluate the benefits to landscape of the legislation, as some of the more notable decisions have protected existing features and involved no, or minimal change. In some examples the 'wins' for landscape have seemed small in comparison to massive pressure for development and change. For example, in marine farming, where without any rates or rentals being required for use of this public resource, as well as market demand, has led to a 'gold rush' of applications for approval. Assessments of effects on natural landscape and seascape character now provide major contributions to marine farm application decisions.

Landscapes though have been protected ?? and considerably more care is being taken by developers of visual and environmental issues in outstanding landscape areas. In addition there has been much more emphasis on remedial design aspects associated with development such as restorative planting to screen and stabilize slopes, and to re-establish indigenous biodiversity.

b. Effects on communities

The initial effect of the RMA, especially in rural areas, was one of conflict and consultation overload. Communities which had previously led planning control-free lives were astounded that others could be concerned and should have a right to modify what farmers could do on their own land. Gradually though a greater understanding of the purpose of the Act is developing and sector groups are expanding their understanding of landscape management issues. While planners have been reluctant to look to the long term future rather than at more immediate effects, some communities are now taking on this role, and employing landscape architects to work with them. Such communities, which include Banks Peninsula??, Glenorchy and Arrowtown, must then ensure that their visions are incorporated into the planning legislation to ensure that there is legal support for their values. This in turn is leading to communities which are more united as well as skilled in resource management.

Legal aid to support non-government organization involvement in legal cases has recently been introduced. In two notable cases in the past, the court apportioned costs against voluntary community groups amounting to over \$10,000US and this constrained participation in the otherwise democratic system. The Government funded legal aid will allow groups to be less hesitant in taking up issues that have concerned them, when they may not have large cash resources.

5. The role of landscape architects in resource management

Landscape architects in New Zealand have mainly seen their role in landscape design, and few have worked in the landscape planning field especially in the courts. However, those who have done so have developed skills and have helped to increase the understanding of judges and local government decision makers of landscape issues. Greater experience in landscape assessment techniques and communication of the relevant issues is now having increasing benefits to both the practitioners involved and the wider communities.

Decision makers have commented that landscape architects with opposing views appearing in court against each other have tended to cancel out each other and decisions have then been made on non landscape issues. Practitioners are reluctant to standardise methodologies as this could be very constraining when the range and scale of projects, values and perspectives is so diverse.

6. Case example: Rotorua

A local community group lodged a submission objecting to the local government, the Rotorua District Council's lack of protection for the natural character of a sequence of 6 lake catchments centred on Tarawera, near Rotorua city in the central North Island. With volcanic mountains and very clear lakes, the Tarawera area is highly natural having just two small settlements in existence following volcanic eruptions which dramatically transformed the nature and culture of the area just over a century ago. Much of the land is again clothed in native forest. Some is farmland. This beautiful lakes area is under pressure for

residential and tourist development. Also, the Maori people formerly of the area, who left with the eruption, say it is now time to return.

The RMA requires (section 6(a)) that the natural character of lakes and their margins be preserved from inappropriate subdivision, use and development. The Tarawera lakes are considered very vulnerable to degradation from disturbance and nutrients in their catchments. Whilst popular for recreation, such as fishing and walking, the scarcity of accommodation and facilities means that the naturalness, the peace and tranquillity are highly valued.

As the community group's objection did not result in the local government amending their plan to better protect the lakes areas, the group referred their case to the Environment Court. A lawyer, resource planner and landscape architect were commissioned to present their case. The Court provided an interim decision (A7/98) that the plan indeed provided inadequate protection and invited the Council to develop a Variation. The Council proceeded to prepare this and commissioned the same landscape architect in an advisory role and to assist their staff landscape architect. A public workshop was held to identify the values, issues and appropriate directions for the lakes area. A draft Variation was eventually advertised and submissions received and will shortly be heard (Proposed Variation 12 to the Proposed Rotorua District Plan - Lakes A Zone).

The approach taken in the Variation demonstrates the principles of the RMA in setting the preservation of the natural character of the lakes as of over-riding importance, and in providing controls for potential adverse effects on this naturalness. The Variation allows for some limited extensions to the settlements. However development beyond the settlements is controlled by rules addressing their potential effects. The Variation does not list what is or is not appropriate in the rural and natural surrounds to the settlements and lakes. Instead, it requires riparian protection and limits visibility, density, scale and colours of structures, and severely limits vehicle movements in relation to a site. This approach is intended to allow for some small-scale localised change, but to retain the general principle of people visiting the lakes area for recreation rather than to stay there, to retain the tranquillity through avoiding becoming very occupied, and to retain intact the natural qualities of the lands and waters.

7. Case example: Queenstown

The local government for a South Island lakes area, the Queenstown Lakes District Council, issued a Proposed District Plan in 1995 which sought to limit development out in the rural lands around the dramatic Lake Wakatipu. Following local elections, the controls in the plan were largely removed in 1998. The local environment group, WESI (Wakatipu Environment Society Incorporated), referred these changes to the Environment Court. After lengthy hearings, with all parties represented by landscape architects, the Court has begun to re-introduce substantial controls.

In its decisions, the Court (C180/99, C) has recognised a range of landscape criteria that go well beyond the visual and visibility realm. The landscapes of the Wakatipu basin have been divided into a hierarchy of most outstanding to most ordinary. That is, Outstanding Natural Landscapes and Features (ONL and ONF), the mountains and lakes, where development is intended to largely not occur. A second tier of Visual Amenity Landscapes has been identified where development is to be carefully managed and integrated. The third category is Other Landscapes, where development is to generally be allowed. Whilst a further decision is awaited to specify the details of the landscape management for each of these categories, the Court has allowed for development in an ONL to be "reasonably difficult to see".

Di, I've got stuck. What do you think????

8. Conclusions

The RMA was introduced into New Zealand with much pride and 'hype.' New Zealand was said to be at the 'cutting edge' of environmental management. The landscape architecture profession was pleased to see landscape recognized as significant for the first time in law and were hopeful that this would lead to an increasing appreciation of the landscape resource. However, while the intent of the legislation was to enable and make for a better functioning planning system, the result has largely been a planning vacuum. Resource managers have seen their role as managing effects, in other words, reacting, rather than planning. Further, although the intent of the legislation was integration the difficulties of defining effects (where the resources and community aspiration must first be identified) has had the result of separation rather than integration. The result has often been a defensive reaction from communities rather than a proactive approach.

However, not all is gloom, even though, after initial innovation the 'cutting edge' is appearing blunter.
**Landscape assessment skills, greater role than before, diversification of profession
Community understanding and involvement MORE**

9. References

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