Rethinking Land Use Rights and Restrictions under the RMA

Author:
Daniel Shao,
Principal, Haines Planning

Part 3 of the Resource Management Act 1991 (RMA) sets out duties and restrictions in relation to the use of resources. The starting point is that a person may use land (i.e. private property) as they see fit unless the use contravenes a regulation (s 9). In relation to "common" resources, uses are generally restricted unless they are expressly allowed (ss 12–15). These contrasting presumptions require policymakers and plan-writers to justify constraining any land use and to define the circumstances in which access to and use of common resources are allowed.

Despite Parliament's intention to make land use 'permissive', in practice, this presumption has been all but reversed by councils through their plans. This is achieved using 'catch-all' rules which require resource consent for activities that are not expressly allowed. These rules contrast with the intent of s 9 and raise issues of a constitutional nature. However, their existence has largely been tolerated. This article argues that a rewriting of s 9 is needed to remedy an obvious and persistent disconnect between theory and practice.

STATUTORY PRESUMPTIONS UNDER PART 3

The RMA brings together a number of conceptually distinct but related functions (i.e. land use planning, resource allocation and pollution control) under one statutory framework. Part 3 of the RMA sets out the legislative presumptions in respect of these functions. In general, the RMA imposes a 'restrictive' presumption for its resource allocation and pollution control functions and a 'permissive' presumption in respect of land use. The Resource Management Bill 1989 (224-1) explains the contrasting presumptions and the corresponding roles of planning agencies as follows (at v):

> *In many existing statutes it is difficult for individuals to find out what it is that the law expects of them. In resource management legislation, which affects many aspects of people's daily lives, it is important that they can readily find out what their rights and obligations are.*

Continued

> *The Bill attempts to achieve this in Part III, which spells out duties and restrictions relating to different aspects of resource use. There are some significant changes from existing law. One is the reference to uses of land being permitted unless they contravene a plan. This is intended to ensure that planning agencies make clear the specific controls they intend to impose.*
>
> *There are also differences in the presumptions relating to use of land and other resources. For land, the basis is that the owner can proceed with uses unless a plan or the legislation puts limits on this use. A different approach is taken for the allocation of water, coastal space, and other public resources. In these situations, uses are not lawful unless they are sanctioned by the legislation, a plan, or a resource consent.*

A plan may classify an activity as permitted, controlled, restricted discretionary, discretionary, non-complying or prohibited (RMA, s 77A(2)). Permitted activities do not require a resource consent. Resource consent cannot be sought in respect of a prohibited activity. Other classes of activities – controlled, restricted discretionary, discretionary and non-complying – require a resource consent.

Section 87B serves as a 'catch-all' clause in the event certain activities are omitted from a plan or where there is no plan in respect of those activities. A default discretionary activity status applies to these unspecified activities.

It is important to recognise that the default discretionary activity status does not apply to activities that are subject to a permissive regime under Part 3. In other words, absent of any intervention by a planning authority, the RMA does not impose an inherent restriction on land use. This contrasts with, for example, the discharge of contaminants into water, which is not allowed unless it is sanctioned by a rule or a resource consent (s 15(1)(a)). In the absence of a rule that specifies the status of this discharge, it defaults to be a discretionary activity under s 87B(1).

At first blush, s 9 appears to invite councils to identify in their plans which activities they wish to control, restrict or prohibit. Unspecified activities would be permitted. In practice, most district plans tend to adopt a very different approach by classifying 'innominate activities' as either a discretionary or a non-complying activity. For example, the *Proposed Auckland Unitary Plan* as notified included a default non-complying activity rule for activities not otherwise provided for ((Auckland Council, notified 30 September 2013) at Chapter G, [2.2]). This rule was subsequently amended to make innominate activities discretionary to reflect the 'statutory position' set out in s 87B(1)(b) of the RMA (Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council Hearing topic 004: General rules* (22 July 2016) at [5.2]).

Arguments for and against a discretionary versus non-complying default rule ignore the underlying question of whether it is in fact appropriate to restrict land use generally. The starting point in s 9 is that the use of land is permitted, not discretionary or non-complying. This is an important distinction, but one which has rarely been brought to the fore. A possible explanation could be that, to a landowner, regulations not only affect his property rights but also the rights of his neighbour. On balance, the prospect of having to apply for a resource consent if or when the landowner decides to undertake development may be seen as an acceptable trade-off for safeguarding the peaceful enjoyment of his property in the meantime.

Despite the public's acceptance of the current approach to managing land use, agencies discharging their duties under the RMA should approach the matter of reversing a statutory presumption with care. If Parliament had wanted land use to be managed in this manner, it could have simply adopted the same restrictive presumption for all activities under Part 3; this clearly was not the case.

FRAMING THE PROPOSED CHANGE

The disconnect between the intent of s 9 and how it is being implemented is unsatisfactory. It is understandably difficult for a local authority to justify, through a cost and benefit-type analysis, such wholesale intervention of private property rights. To practically address this difficulty, Parliament can and should amend s 9 to 'nationalise' development rights in relation to land use.

Reversing the presumption in s 9 should not be seen as promoting 'anti-development' or 'pro-environment' sentiments. It merely seeks to remedy the disconnect between the aspiration of a government that was influenced by the neo-liberal ideologies of its day and rejection of that approach by councils over the past three decades of the RMA's existence. Part 3 of the RMA does not promote any substantive values. Rather, it sets up the machinery of how resources ought to be managed. Values are advanced through policies within the hierarchy of planning instruments, which ultimately seek to promote the sustainable management purpose of the RMA.

Legislators ought to be cautious not to see Part 3 as an opportunity to introduce explicit or implied values statements, as it has been doing with the recent amendment (and proposed reversal of that amendment) to s 11 of the RMA, which governs the subdivision of land. In contrast to the presumption for land use under s 9, subdivisions are not permitted unless expressly allowed by a rule in a district plan or a resource consent. The Resource Legislation Amendment Act 2017 (RLAA) introduced by the previous government amended s 11 of the RMA so that subdivision is now permitted unless expressly restricted by a rule in a district plan. The objective behind this change was to "increase and streamline the supply of land for housing" and "reduce the number of consents required for simple types of subdivision" (Ministry for the Environment *Resource Legislation Amendments 2017 – Fact Sheet 2* (September 2017) at 4).

The current government is proposing to reinstate the restrictive presumption for subdivisions through further changes to the RMA for the following reasons (Cabinet paper "Proposed Resource Management Amendment Bill: Stage 1 of a resource management system review" (9 October 2018)):

> ***Reversing the change to the subdivision presumption:***
>
> *43. Prior to the RLAA 2017, all subdivision proposals required a resource consent unless specifically permitted by the provisions in a district plan … All plans currently reflect this presumption. However, the RLAA 2017 made all subdivisions permitted unless restricted by a rule …*
>
> *44. Concerns have been raised that this new presumption sends a signal that subdivision is appropriate in all places at all times and should be allowed, irrespective of location … I do not consider this is appropriate.*
>
> *45. I propose reinstating the original subdivision presumption that subdivisions are restricted activities, to ensure that all subdivision activities require resource consent unless expressly permitted by a provision in a district plan or other instrument. Reverting to the former presumption will also mean that council do not have to revise their plans to reflect the 2017 amendment, …*

The proposal to reinstate the restrictive presumption for subdivisions is in response to a perception that the position set out in Part 3 'signals' Parliament's intent as to how land use and resources ought to be managed. The foregoing analysis demonstrates that the presumption in s 9 has had little practical influence on how councils have elected to control land use in their districts. By extension, amending s 11 on its own is unlikely to lead to a different outcome.

The flip-flopping of this legislative presumption suggests a lack of practical understanding of the RMA framework and the respective functions of policy and administrative law. So long as the substantive policy and rule-making functions assigned to councils remain unfettered by anything other than procedural obligations, the status quo will remain. Government's intentions, whether it is to adopt a more enabling attitude towards development, or to place greater emphasis on protecting certain environmental values, need to be addressed through clear national policies. Instead, successive governments have focused on 'fixing' the machinery of the RMA framework in the hope it would lead to the desired policy outcome.

CONCLUSION

Part 3 of the RMA signals that land use ought to be managed differently from other resources. In practice, this distinction has largely been ignored by councils who have almost universally adopted a restrictive regime in relation to land use. Rewriting s 9 to shift the burden of justifying the broad-brush taking of property rights from councils to Parliament is overdue. As councils have always regulated land use in practice through their plans, the actual impact of this change will be largely academic, albeit constitutionally significant.