SYMPOSIUM INSIGHTS ON USE OF TDRS

Bal Matheson

Bal is a specialist in resource management and environmental law, and is a partner in Russell McVeagh's Environment, Planning, and Natural Resources Group. He provides strategic advice for, and leads, many large scale infrastructure and commercial projects from the conceptual stage through to obtaining consents. This includes applications in the energy sector (hydro-electricity generation), industrial air discharge projects (sulphur, PM10, solvents), manufacturing, infrastructure (gas and electricity transmission, bulk water supply, wastewater, trade waste), mining (quarrying, clean fills and mining), contaminated land (assessment and remediation), dairy (manufacturing sites and dairy farms), residential (retirement villages, aged care facilities, townhouse developments), education facilities, large scale subdivisions, and town centre developments (retail, commercial).

Bal has a particular interest in water related topics. He is co-author of the 'Water' chapter of the 4th Ed. and online editions of New Zealand's leading environmental textbook Environmental and Resource Management Law (Ed. Nolan, D.A.), and has been involved in many projects involving water takes and discharges. Most recently this has included acting for TrustPower Limited on its successful application to vary the National Water Conservation Order (Rakaia River) 1988, enabling the development of a comprehensive irrigation and generation scheme on the Canterbury Plains, while ensuring that the outstanding characteristics identified by the Order remained protected.

Bal also has considerable experience in related fields of the Public Works Act 1981 (acting for both those acquiring land and landowners who are subject to Public Works Act procedures), Local Government Act processes (rating, development contributions), law reform, and, under the Resource Management Act 1991, district and regional plan formulation.

I was fortunate enough to spend this last summer with my young family of four children around Lake Rotoiti and I am delighted to be able to contribute my time and expertise to preserving such a taonga, the significance of which I can understand having spent just a short time here.

It has been a very interesting day. I come from a legal perspective and the 'goods' and 'bads' that go with it. My practice is generally developer focused so I do understand the frustrations of land being zoned where no one will buy it, obviously a key point.

Before I get into the detail I want to say something about the Resource Management Act which is one of the umbrella Acts that governs our thinking here. The first point made admirably by Mr Oppatt is that the RMA does indisputably remove private property rights. The RMA does affect what we all do with our land. In many ways it represents a social contract that says, 'We will restrict what you can do on your land for the benefit of other people'. This leads to the second point which is very relevant in Auckland at the moment. People are saying, 'We really

like intensification, we think Auckland has to intensify, but we'd really like you to do it in some other suburb'.

It is very easy to quantify the costs for each of us: 'This is going to cost me this much time'; 'This is going to cost me this much money to go through this process'. It is very rare to sit back and think about quantifying the benefits that one gets. That would be my challenge to those that do complain about the controls, whether it be under the RMA or any other regulation. You do have some costs imposed on you, but you also get a lot of benefits. Think about the benefits.

A TDR is a way of helping somebody change the way that they use their land. It is a way of reflecting controls that have been imposed on those people and, that in itself, is not unusual. The RMA controls the way people use their land all the time, as it and previous planning legislation, always has. There have been controls on how to use the land and even a specific provision that says the Council are generally not liable to pay out if they change the rules and say the land cannot be used in the way it has been previously.

The Western Bay of Plenty is a very good example of a TDR in terms of how they are able to be used. One of the issues is the difficulty in a temporal separation between the creation of a TDR and its ultimate use. That is an issue for those who create TDRs. Another example is the Heritage TDR which is operating in Auckland City and has been successful for a number of years. The rules say if there is a 4 story heritage building on site one could build 8 stories on that site, then you can effectively sell 4 stories to somebody else. That other person can then build a 12 story building in a zone where they could only build an 8 story building. And the heritage building is protected on its site because that site is now capped at 4 stories.

A TDR is a very similar example in that it is a development right essentially taken from one person and given to someone else – if you do not demolish your building and build an 8 story building we will compensate you by giving you rights that you can sell to somebody else to use. In the case of TDRs here in Rotorua – you give up some productive potential of your land and we will compensate you by giving you an equivalent reduced right to sell to somebody else. One of the subtleties about the TDR for nutrients is that in the example I gave it is about a building height on one site being transferred from one site to another site. Here it is about a reduction in nutrient discharges from one site, leading to an ability to subdivide on another site - which is a lot harder to conceptualise and to capture in a rule framework.

The second point I want to make is about people that say, 'It's all very hard', 'We didn't want to do it last time because it was too hard.' That should set off flashing lights and the response should be: 'Well actually that's probably a damn good reason to do it sooner rather than later.' If it is hard now it is only going to get harder in 10 years' time.

In that regard, with respect, the Environment Court's decision on the One Plan in relation to water quality and specifically nutrients I think really grasped the nettle, which at the same time obviously upset a lot of people. The Court did make some good comments about nutrient management. One of which was that it is only going to get harder, there is no perfect solution and we do not have all the answers. But if we do not start now we are never going to get to the end. You have to start some time and somewhere. That is not to say jump in without a proper assessment and plans, absolutely not. But it also means that you must not end up suffering from paralysis by analysis.

The RMA requires one to look at the sustainable management of natural and physical resources. It requires regional policy statements to be given effect to by district plans and that is the challenge for the Rotorua District Council. The benefit of TDRs is that they will reduce nutrients into the water, but TDRs themselves have a different type of effect and this effect will occur somewhere else in the district. However, to create something you have to give something and in this case it is giving the right to subdivide somewhere where you might not otherwise have been able to.

There is probably a reason for not being able to subdivide in that place, so you should not pretend that a TDR subdivision right does not have an adverse effect, it is different; in a different place, and different effect, but it is an effect. The piper has to be paid. The RMA does give you an ability to spread the costs of a change of land use across the community. TDRs are a way of doing it. There are lots of different ways for the cost to be spread across communities; differential rates, rates, development contributions; and TDRs are just another emerging example of doing this.

Coming from a legal background I always say to my staff we should be very proud of being pedantic and be careful about the words used, whether spoken or written. Because if you want to say what you mean one has to be careful about those words used. They will be interpreted and applied. So with rules. Clarity is to the fore and Mr Dagg's forthrightness was much appreciated. My look at the rules currently proposed is that they are far too complicated and need significant simplification.

From a legal point of view (particularly enforceability) there is a difference between land use change and land use management. Land use change is legally easier to police. Looking across a paddock at somewhere that is meant to be growing trees but seeing cows means something is clearly not right! It is much harder to sit there, unless you sit for days at a time (in which case you will probably get arrested for stalking), and see whether someone has adopted best farm practice.

Likewise the example of bush lot covenants - 'You shall not chop down trees' – is reasonably easy to police. Imposing best farm management is much much harder to police. From an enforceability point of view that would be a key issue. I agree that land use management should be recognised. The challenge will be how to make it enforceable in the long term.

When the LakesWater Quality Society asked me to give them my thoughts on TDRs, they were horrified 45 minutes later when I was still asking how this system would work. The first thing I said was, 'Why would anyone buy it? Where is the market for this? You have to create something that somebody wants!'

The point has been well made today. There are a lot of rural subdivided lots and reasons why they have not sold. One is a global financial crisis and the other is that nobody wants to live there. I know because I spent most of my summer, when I was not playing lifeguard, looking around to buy a house. There are no houses for sale in places where people want to live. I can assure you of that. There are houses three gullies back, with a lovely rural, rustic aspect where you spend most of the weekend digging out weeds. Try and find a lakeside property of around 1,000 square metres. A TDR will be worth far more than $20,000 if you target your recipient areas where people want to live.

I absolutely endorse the suggestion that recipient areas be clearly defined for a number of reasons. Talk to the people selling the houses, ring the wastewater treatment plant or the traffic people, and say:

- Where do people want to live?
- Where are the infrastructure constraints?
- How many houses could we put on this line?
- What do we need to do?
- How much traffic can this area accommodate?

Then create an area for a TDR subdivision. They will be attractive lots and the infrastructure will either be there (or can be installed) because the analysis has been done. Some landowner will no doubt make an absolute fortune, but that is inevitable.

There is no reason why you could not identify a number of separate areas as TDR recipient areas where you would have difficulty getting a subdivision consent now. Make sure they are not in visually inappropriate places, culturally sensitive or otherwise inappropriate locations. Target the recipient areas to somewhere where you want houses to be.

These locations also need to be clear to the community because it is a cost for them. People do not necessarily want more lakeside houses but the reality is the more valuable you make the TDRs, the faster they will get taken up, the more effective and legitimate will the TDR programme be.

The observant ones among you would have noticed that when the question was raised whether I agree with imposing a prohibited activity status on subdivision *unless* you had a TDR, I was very much a lawyer right? I did not put my hand up or down - I put it halfway up (or halfway down, depending on your perspective on life). And that means sort of maybe. Legally, you can make anything a prohibited activity in your Proposed Plan. I always see the challenge as being to see whether ‘it’ survives it into the Operative Plan or not. The prohibited activities in New

Zealand include nuclear power stations in the Waitakere City Council district, as it once was, because they were paranoid that someone might put a nuclear power station there. There are few prohibited activities because legally those are things that should never ever, ever happen. That is a very high threshold.

I am slightly concerned that you would struggle to get a prohibited activity rule through the Environment Court, i.e., in effect saying to people 'You have to have a TDR in order to subdivide in a rural zone.' That is not to take away from my earlier comments, namely that you do not necessarily have a *right* to subdivide in the first place. You do not have a *right* to make more money out of your land. If everyone was given that right we would be in all sorts of trouble.

Morally you could probably justify a prohibited activity for subdivision unless you had a TDR, legally you could probably mount a reasonable argument to do it, but I think practically there is a much better way. Rather than focus on the stick, focus on the carrot. Look where people want to go and create an incentive for the use of TDRs, rather than a barrier forcing people to use TDRs.

My suggestion is that a rule is drafted to create a TDR and one applies for a resource consent to do that. If the criteria are not met then there is no consent. A consent would require either land use change or land use management change to occur and constitutes a record of the TDR. It would be subject to conditions such as adopting certain practices which come with an enforceability risk and say, 'You must subdivide, you must covenant this land, you must retire this land, you must do a certain number of other things.' Importantly if one adopts that approach the TDR would take effect immediately and last forever and not lapse. A lapse date could be legally extended well beyond 5 years, which is a matter for the Council, and no legal barrier.

The benefit comes from the temporal separation that I talked about earlier. Bush lot subdivisions for protection do not get a section 224(c) certificates until the covenant is ready to be lodged on that bush lot. There is a temporal connection between the protection and the benefit. For TDRs here in Rotorua, farmers wanting a TDR might take the view, for example, to retire marginal land and, because of benefits and incentives from other regional rules coming down the track, they would apply for TDRs and keep them in their pocket to maybe use later. The farmer might think there will be costs retiring that land from production but on the other hand if it has to be retired anyway, maybe there is benefit from another incentive payment then why not look for that opportunity. Who wouldn't?

My suggestion would be get a consent to have a TDR. If you do keep it and later want to use a TDR you can check the consents register which is publicly available and see who has a TDR. That way you will not run the risk of randomly running into people in the street, looking into their eyes and asking "Do you have a TDR?" (which would probably also get one arrested). That person can negotiate and decide whether or not they want to sell their TDR.

The benefit of a consent is that it is a simple, very clear record. There is no need for another register. The conditions of the TDR donor are clearly set out in the consent and it is an enforceable document. It runs with the land, the consent may require the land to have property restrictions (e.g. encumbrances or covenants registered against the title), and it could be implemented immediately. Legally it is an interesting beast, like a reverse land use consent in a sense because it is a restriction saying you will not to use land in a certain way, as opposed to being given permission to use land in a certain other way.

Another benefit of a register is that when a TDR is used up, for example, having bought a development lot, or sold a TDR to a developer who uses it for a TDR subdivision, the consent is simply cancelled. There is a record of that too. There are no Pine Barren certificates lying around which look like Monopoly money, and probably was in the end. A consent simply gets surrendered. Nice, easy and clear.

In conclusion I do not have a problem with people receiving an incentive payment, after having obtained a TDR, from some other scheme. They would have to meet the limits of that scheme. The simple fact is farmers will take a hit from the proposed rules restricting nutrient discharges. The issue is how to spread that cost out among the community. It is not as if those farmers are getting a windfall, in which case it would be inappropriate. If they are not getting a windfall then it is hard to see how morally it could be wrong. Why should someone not be able to access a regional or government incentive scheme just because they have also taken advantage of a TDR type approach?

There will be a cost to the community of improving water quality, which is unavoidable. There are a number of options in the RMA to allocate that cost across the district. In my view, the cost to landowners of reducing those nutrient loads below best practice is a cost that should be shared. It should not be borne by one or two individuals who happen to be doing the best they can on their land and doing what they want to do. Farmers will be farmers and may want to keep farming. I come from a farm and I can understand that too.

Just to emphasise the point again, the stronger you make the demand the higher the value and the faster TDRs will be taken up. But the community needs to accept that to make the demand higher, the effects will be higher. To make the demand such that people will pay $50,000, $60,000 for a TDR, which is perfectly possible, those TDRs must be on sites which are visually attractive and have benefits for people to live there. There is no point zoning land if nobody wants to live there.

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Ian McLean

Ian is a life member and committee member of LWQS, and helped develop this Symposium. He was formerly chair of the society and led the transition to LWQS from the Lakeweed Control Society, as well as the first symposia in 2001. Ian was an MP for Tarawera for 12 years. He has considerable governance experience as former chair of the Earthquake Commission and the Parliamentary Public Expenditure Committee. For over two decades he has worked in earthquake insurance and related emergency management.

On behalf of LakesWater Quality Society I would like to thank Bal for the huge contribution he is making towards the Rotorua lakes district by his participation in this work.

I will start with a brief apology to people who may have been concerned at incomplete proposals. The intention of today's Symposium was not to present a complete picture, a chart of how TDRs should work. For those of you who could not see how it fits together, my apologies. It was never the intention. The intention was to draw you in to help the picture be drawn, rather than to present a complete object.

I grew up in Whakatane, in the Bay of Plenty. A few times every year or two I used to go along the coast to a small fishing village called Tauranga with a beach not half as good as Ohope. But I used to come to Rotorua every 2 or 3 months if I could. What a great place it was. Exciting thermal, great lakes to swim in, bush to walk in. Looking at the two now there is a huge difference. I am not suggesting Rotorua should emulate Tauranga, but I would suggest that the status quo is not an option. The status quo is not an option for the lakes and it is not an option for the district. Doing nothing is not an option.

The question was raised several times asking what the market for TDRs would be. I was thrilled by Dave Umbers' presentation as to the possibility of a spectacular themed development, and to see his picture of what could be built and then sold, not just in New Zealand, but overseas as well. TDRs will not create the market, but TDRs may unlock the possibility of the market being created. It is not possible at the present time for people with the imagination that Dave and other people like John Sax have shown to go out and create the market.

As someone who has lived in the Rotorua district for 30 or 40 years it is easy to get despondent, but one of the things that is most encouraging is the resurgence of Maori economic activity and vitality. It affects not just the land itself but much wider than land alone. I believe that is one of the greatest hopes for the future of our district. If it can be harnessed it will be great.

The question was raised as to whether TDRs should apply to land use or land management. The argument for saying the TDRs should only apply to land management is essentially administrative convenience: it makes it easier in the office. But it is not necessary to restrict that because as Anna Grayling pointed out, with the use of *Overseer* now embedded in what the Regional Council is doing. Hence there is already established a measurement scheme on which TDRs and Regional Council incentives can be based.

On one hand there is land use change, pine trees instead of dairy cows. On the other hand there are possibilities of developing new ways to stop nitrogen seeping into the lakes. Which should we encourage? Which one should we seek public money for? Which one should the authorities encourage? One that is going to be worse for the district or the one that is going to be better? The argument is incontrovertible that TDRs should apply to land management change beyond best practice as well as to land use change.

The word flexibility was used. It is clear that in this scheme - which has to been set up for a long time - lots of changes may occur in the world outside and in the district as well. If there is an attempt to pin down every moving part it will be almost impossible in the future for adaptations to be made. For example, determining the number of TDRs required is a real challenge. A bigger challenge is to have enough flexibility to satisfy the needs of the market so as to get the best value and at the same time give enough certainty so that the players in the market can plan their own activities with certainty.

Somebody suggested that TDRs are not a silver bullet that will fix the lakes or employment in the district. But TDRs are one source of funding. It was suggested as an alternative that a fund should be set up from which money should go to pay farmers to make the change and then over time the fund can be repaid. The question is – 'Where's that fund going to come from?'

I am not sure whether the new Chief Executive of the Rotorua District Council has found $20 million sitting in the bottom drawer. I know that Bill English will not be giving an extra $20 million here when he has every district in the country facing problems like ours. Even the Bay of Plenty Regional Council would find it difficult to take $20 million extra and put it in here. It is simply not realistic to say 'Let's get the money from somewhere else', and not know where that somewhere else is.

As far as the lakes are concerned we have to look at realistic sources and ways ahead, Farmers face reality even more so. The situation has now been reached where farmers will carry the residual cost of change. The targets are set in the RPS and have to be met. There is a certain amount of money coming from government, some from the Regional and District Councils and the rest of the cost will fall on farmers. That is the way it is and I do not believe it is fair that we should ignore ways to assist farmers. I do not believe it is in the interests of the district if there are alternative imaginative ways in which funding can be found.

TDRs are one of those ways and I hope as the District Plan goes through its processes that a way will be found to make it workable. I hope that you will all contribute to the further work with the District Council. Today has given me significant confidence that some of the very hard issues can be tackled so that Rotorua is again that exciting, attractive, fascinating wonderful place with a beautiful lake that I remember from my youth.