

2/4/85

## SECTION 58 LAND ACT 1948

File: HO CL5/1/3

CASE 10008

Prepared in Head Office

PROPOSAL

1 To note the interpretation and application of Section 58 of the Land Act 1948.

THE ACT

2 Section 58 states:

"58. Land reserved from sale - (1) There shall be reserved from sale or other disposition of Crown land under this Act a strip of land not less than 20 metres in width -

(a) Along the mean high-water mark of the sea and of its bays, inlets, and creeks;

(b) Along the margin of every lake with an area in excess of 8 hectares:

(c) Unless the Minister considers it unnecessary to do so, along the banks of all rivers and streams which have an average width of not less than 3 metres.

Provided that the Minister may approve the reduction of the width of the strip of land to not less than 3 metres if in his opinion the reduced width will be sufficient for reasonable access to the sea, lake, river, or stream.

(2) The Board may in its discretion determine that the provisions of the last preceding subsection shall not apply to any specified land comprised in a closed road or street which is disposed of under this Act.

(3) Where any unsurveyed farm land or pastoral land is disposed of on any tenure under this Act the Board may at any time before the approval by the Chief Surveyor of the plan of the survey of the land, and without liability to pay compensation; exclude from the disposition -

(a) Any land which may be required for a road:

(b) Any part of the land which is situated along the mean high-water mark of the sea or along the margin of any lake or along the bank of any river or stream, and which is required to be reserved under subsection (1) of this section:

(c) Any part of the land which is required for a reserve for any public purpose within the meaning of section 167 of this Act.

(4) The renewal under this Act of any lease or licence granted under any former Land Act shall, if the Board considers it to be equitable and in the public interest and so determines, be deemed to be a disposition of land for the purposes of subsection (1) of this section.

(5) Nothing in this section shall limit the provisions of section 60 of this Act in relation to any land reserved from sale or other disposition under this section."

## HISTORY

3 The earliest known provision of general application for public access along waters on the alienation of Crown land, was in 1851, when the Chief Surveyor for the Canterbury Association, Thomas Cass dictated that one chain from high water mark, one chain from the surveyed edge of all lakes and lagoons, one chain on each bank of the the larger rivers and their principal tributaries, should be reserved as roads.

4 A paper by Mr J T Thomson, Chief Surveyor, Province of Otago dated 1861 containing instructions to surveyors, included a requirement to reserve 100 links frontage to navigable waters.

5 In 1876 on the resumption by General Government of responsibility for surveying Crown Lands (abolition of the provinces) the Surveyor General issued "Instructions for Settlement Surveyors on Demesne Lands of the Crown" and these required "Reserve 100 links frontage to all navigable rivers".

6 In 1886 survey regulations under the Land Act 1885 were gazetted (Page 634 et seq) and these required at least 100 links frontage to all navigable rivers and coasts making the traverse lines if possible the boundary of such reservation.

7 The Land Act 1892 (S.15) made provision for land on the seashore or margin of lakes or riverbanks to be excluded from sale. Similar provisions have been re-enacted since then - s.122 Land Act 1908, s.129 Land Act 1924, s.58 Land Act 1948.

## LEGAL STATUS

8 Although sometimes incorrectly referred to as reserves, the areas are in fact, ordinary Crown land withheld from sale, or other disposition. They are not public reserves within the meaning of the Reserves Act 1977.

A section 58 strip is fixed on the land boundary but not on the riparian boundary. Thus as the riparian boundary moves so will the strip of land alter.

## LAYING OFF SECTION 58 STRIPS

9 Where not already laid off, Section 58 "strips" can be obtained on a number of occasions including:

- (a) Disposal of Crown land by way of sale, lease or licence, including a special lease under Section 67 Land Act 1948.
- (b) Amalgamation; renewal, subdivision, transfer, exchange, reclassification and conversion of a lease or licence.
- (c) Disposal of closed roads or streets under Land Act 1948 unless the Board determines otherwise under Section 58(2).

10 Section 58 strips are shown on survey plans. Where practical the diagram on a lease of unsurveyed land shows the Section 58 "strips" and their width and states that they are "reserved under the Land Act 1948". With pastoral leases a great majority are unsurveyed or where the scale of the diagram may limit ability to show areas reserved and position of streams, a clause making reference to Section 58 strips being in place around such and such a lake and along the banks of all rivers and streams which have on average width of not less than 3 metres (and stating the width of the strip laid off) is inserted in the lease.

11 Section 58 strips may be dispensed with along rivers or streams where considered unnecessary, or reduced in width to not less than 3 metres (approx), if the reduced width will be sufficient for reasonable access. The consent of the Minister of Lands is required for such action.

12 Further, while the Act states these strips may not be less than 20 m in width (without consent of Minister of Lands), this does not restrict the laying off of such areas to just 20 m and in fact, substantially greater areas can and have been laid off.

13 When granting a temporary tenancy over Crown land adjoining a river, lake etc the provisions of Section 58 apply although no physical laying off is done until such time as permanent disposal/alienation is made.

14 Easements for access, water supplies etc are provided for under Section 58(5).

#### ADVERSE OCCUPATION

15 Adjoining owners commonly occupy Section 58 strips and in the absence of legislation to the contrary, the owners could in course of time acquire title to the lands by adverse occupation. S.172 Land Act 1948, however, provides that no title to land that is deemed to be reserved from sale or other disposition in accordance with Section 58 shall be acquired by adverse possession. Legal opinion is that Section 58 does not of itself create a reservation and that there must be some administration act to bring land clearly within the section.

#### GENERAL

16 While the Act does not actually confer any rights on the public, or individuals to use Section 58 strips, it is intended that they are

provided for use by the public, for access to and along the water, for fishing, duck shooting, picnics, swimming, etc and trespass action would not be taken against any person making reasonable use of the strips for this purpose. An adjoining owner has no right to exclude people from the strip, but there is normally no objection to him omitting to fence the common boundary so that he may graze to the waters edge. Where public demand warrants however, an adjoining owner may be required to install a gate or stile in any fence crossing the strip so that there is ease of public access along the river.

17 Buildings and other structures are normally not permitted on S.58 strips, although exceptions have been made in the case of boat shed sites (living accommodation prohibited) and pump sheds.

#### APPLICATION OF SECTION 58 ON LEASES IN PERPETUITY

18 In the Department's submission to the Clayton Committee, it was pointed out that, while supporting the concept of an incentive being given to lessees to encourage freeholding, concessionary rights might not be applicable in all situations. Attention was particularly drawn to the fact that LIP lessees around Lake Ellesmere have land included in their leases which is periodically covered with water to a 'navigable' depth. In situations such as this the Department sought the opportunity to negotiate variations to the concessionary freeholding right, thus enabling other Government policies and objectives to be achieved.

19 In normal circumstances if the Crown was to alienate today, land currently held on LIP, a requirement of disposal would be the retention in Crown ownership of land subject to tidal influence through use of the provisions of Section 58. However the original disposition of this land was effected at the time the LIPs were issued and at that time no 'reserve strip' provision was made in the specific legislation applying to the Lease in Perpetuity scheme.

20 While it may not be possible to impose the laying off of Section 58 strips, the Department is prepared to negotiate with individual lessees on the prospect of retaining access strips.

#### SECTION 58 STRIPS ADJOINING STATE FOREST

21 Under Case No 9755 on 28 February 1983 the Board endorsed the signing of an agreement to provide for the management and control of Section 58 strips adjoining State forest. Briefly this agreement, between the Minister of Lands and Land Settlement Board jointly and the Minister of Forests on behalf of NZ Forest Service provides that:

- (a) No Section 58 strips required for Crown land declared State forest park, recreation area, open State indigenous forest, dedicated areas open for public recreational use, and forest sanctuaries or dedicated scientific reservations where uncontrolled public access could endanger the scientific values present.

- (b) Section 58 strips will be provided where Crown land is to be set apart as State forest - indigenous forest or State exotic forests - where access is controlled a proviso is that the Department agrees to the Forest Service managing Section 58 strips in State forests, not to control access, but to ensure that the management of the strips is compatible with the management of the adjoining forest eg for weed control purposes, fire and animal control purposes.

To facilitate the agreement set out in paragraph (b), it is proposed that Forest Service be appointed to manage and control Section 58 strips adjoining State forest under Section 64 of the Forests Act 1949.

#### DEPARTMENTAL POSITION ON "ALIENATION" AND "DISPOSITION"

22 The department has over the years interpreted the words "sale or other disposition of Crown land under this Act" as

not applying to subsequent actions following the initial issuing of title. Freeholding is not considered to be a disposition as it is exercising a right under conditions of the lease;

applying, if the Board determines, to renewals of Crown leases.

23 This interpretation is supported by

(i) A legal opinion (Crown law office) sought when the issue of S58 "strips" in Crown land set apart State forest was an issue - this states in part "... I think the expression "Other disposition" must be construed eiusdem generis [of the same kind or nature] with "sale".

(ii) A legal opinion (also sought on the S58 strips in UCL/SF issue) from the Department's then Office Solicitor who stated that the phrase "other disposition" had generally been very strictly interpreted - so strictly that it had been necessary to seek an amendment to the Act to enable Section 60 easements to issue over S.58 "strips".

24 The Leases in Perpetuity were issued under their own specific enacting legislation and this did not contain provision for the laying off of strips similar to those set apart under the Surveyors Instructions, Land Act 1885, Land Act 1892.

25 The Department is aware that its position on alienation and disposition does not meet with the full support of J B O'Keefe (joint editor of a legal text O'Keefe and Farrands) who contends that "it is not inconceivable that S.58....may override the provisions of S.122..."

1. concludes:

"It is submitted that, despite the Amendments S.58 still remains unclear, particularly in the light of the definition in S.2 of the Land Act 1948 and the peculiar nature of the lessee's "rights" under S.122".

26 As mentioned "alienation" is defined in Section 2 of the Land Act 1948 as follows:

"Alienation includes a limited disposal by lease or licence, as well as an absolute disposal by sale or otherwise; and 'to alienate' has a corresponding meaning".

### CONCLUSION

27 It must be remembered that Section 58 strips are fixed. Through erosion, accretion and flooding, rivers and streams change their course and in these instances the land through which these new water courses flow, would not immediately be subject to Section 58. Record maps may show the existence of a Section 58 strip, but in reality it could not be used for access. The Crown is not able to guarantee that Section 58 strips form a practical access. Although at the time of setting apart the Section 58 strip an effort is made to ensure that it does in fact provide practical access.

28 There is no provision for Section 58 strips to be set apart on freeholding of a lease. Freeholding is not considered a disposition as it is exercising a right under the conditions of the lease. However the Crown could be deprived of the opportunity to obtain a Section 58 strip on freeholding of a lease where it is in the public interest to provide access.

### RECOMMENDATION

29 That the Board note the information on the Department's interpretation and application of Section 58 of the Land Act 1948.

### DECISION

30 The Land Settlement Board on 2 April 1985 resolved *to note the information and thank the staff involved for their effort in preparation of the paper.*