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Land covenants

Now commonplace in residential developments

With all the property development over the last 20 years or so, land covenants have become commonplace in new build residential developments.

If you are buying a property in a newly or recently built residential subdivision, the odds are that the title will come with various covenants registered against it. These covenants are likely to place restrictions on the ways in which the owners can use and enjoy their properties.

What are land covenants?

Land covenants are usually put in place to ensure that the aesthetics and maintenance of the subdivision are built and kept up to a certain standard. In other instances, a landowner may subdivide part of their property and wish to restrict what can be done on the subdivided land to protect their use and enjoyment of their remaining land, for example, by restricting the location and size of any buildings to protect their view.

Whilst life in a subdivision is not for everyone, urban development in New Zealand is now usually done through a subdivision with land covenants.

Land covenants broadly fall into two categories:

1. **Positive covenants** that impose an obligation on a property owner to do something, or
2. **Restrictive covenants** that prevent an owner from doing something.

Positive covenants usually include an obligation to make a financial contribution or assist with maintenance of something in common with neighbouring landowners, such as the repair and maintenance of a fence or driveway.

Restrictive covenants are the most common covenants in residential subdivisions. The restrictions could include:

+ The construction materials that can, or cannot, be used for building on the land (including a possible prohibition on the use of second-hand materials)
+ The height/design of your house, garage or even a fence
+ Restrictions on whether you can leave caravans, boats and trailers parked in the driveway
+ Ensuring clotheslines, heat pump infrastructure, solar panels or satellite dishes are not visible from the street

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- Limitation on the number of dwellings and/or outbuildings you can have on the property
- Whether certain types of animals are not allowed on your property, and/or
- A reverse sensitivity covenant, that prevents the owners of the land burdened by the covenant from complaining about noise, smell or substances produced by an activity (such as an airport, farm, etc) being conducted on the property having the benefit of the covenant.

What to look out for

This depends on your intended use of the property. If you are considering buying a section to build a home from scratch, you must ensure your builder and/or architect have a copy of the land covenants, and that the build complies with all restrictions.

If you are making any alterations to an existing property, or even installing a solar panel/heat pump, you should first read all land covenants and establish whether it is allowed and, if so, whether there are any restrictions.

When buying a property that is subject to land covenants, you should ensure that the current owner has adhered to the rules and restrictions of the covenant, obtained the necessary developer's consents and not committed any breach to date by, for example, building a granny flat on the property where that is prohibited.

Once the subdivision is completed, developers will often wind up their development company. If the landowners have not obtained any necessary developer consent before the company is wound up, this can hinder or prevent a sale later. Prospective purchasers are likely to be advised by their lawyers to seek a copy of any developer's consent and this can prove to be difficult where the development company no longer exists.

How long does a covenant last?

Many land covenants 'run with the land' which means they bind every new owner and run indefinitely.

A well-designed land covenant could have various provisions that expire – such as any requirement for obtaining consent from the developer to avoid the issue of a developer company being wound up. If this is the case, the expiry date will be stipulated in the land covenant.

Breaching a covenant?

The rules contained within the land covenant can be enforced by you and your neighbours (if they hold the benefit of the land covenant) against anyone who has breached the restrictions.

To enforce a breach, written notice should be given to the owner that specifies what the owner must do or pay to fix the breach. If the owner receiving this notice does not agree that there has been a breach, they should give notice in return stating this.

If there has been a breach, most land covenants provide for damages, often in the range of $100–$250 per day and per property owner who has been affected by the breach. These damages will normally accrue until the breach is remedied. Sometimes the covenant provides for payment of a lump sum when there is a breach.

Often it is an immediate neighbour who raises any potential breach of the land covenants as they are the most likely to be impacted.

We encourage compliance with land covenants to avoid any liability to pay damages or a breakdown in relationships between neighbours.

Can a land covenant be removed or varied?

Land covenants can be removed from the title or varied. The easiest and most common mechanism for a removal or variation is when all parties affected by the land covenants agree to the removal or variation, and sign the necessary documentation. Getting all affected parties to agree to a removal or variation can be a lengthy, expensive and difficult process. In some subdivisions, the sheer number of affected parties will make this option an unattractive proposition and the possibility of complete agreement unlikely.

If you cannot get all parties to agree, there are possible remedies available by an application to the courts. The courts are, however, often reluctant to vary or remove land covenants, even those which may seem to no longer be relevant.

Conclusion

With modern urban housing density in subdivisions, the prevalence of land covenants is likely to continue to increase. Land covenants usually impact land indefinitely. This makes it more important than ever to understand the land covenants registered against a property before you buy it.

If you are unsure whether any covenants apply, or their effect, please be in touch with us. You should not presume that the other owners, including previous owners, have complied with their obligations to date.

Advance directives

Right to choose your healthcare

Healthcare choices can influence the quality of our lives. An advance directive can provide direction on the care you consent to, and do not consent to, when you are incapable of expressing your wishes.

An advance directive can be used when you do not wish to consent to a particular form of healthcare or where you wish to receive a certain form of treatment in situations where you are unable to provide instruction such as a blood transfusion or resuscitation. Your healthcare provider will consider your advance directive when you are unconscious, incapacitated or otherwise unable to provide informed consent.

Making an advance directive

There are a variety of ways to make a directive. There are online templates (see the footnote for one example[1]), you may wish to do your own using these as a guide (remember to sign and date!) or you may want to discuss this with us.

Is it valid?

Your advance directive must be expressed in clear terms. Although your advance directive may be made orally or in writing, a written directive will provide greater certainty and clarity.

Advance directives must be made at a time when you have mental capacity and are not unduly influenced by another person. You may have to show that you have received sufficient information from your healthcare provider to understand the implications of your decision, particularly in high-risk situations such as a critical accident. The information you will need to provide to meet these requirements will depend on the circumstances of your care.

You should send your advance directive to your doctor and other health professionals who look after you. Your family should also have a copy.

Not being able to use your advance directive

Your healthcare provider may respect your advance directive if they are aware of it. There are instances, however, where healthcare providers may not use your advance directive even if they are aware of it. An example is when a health professional is obliged to provide compulsory treatment for mental disorders under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

There are also certain forms of treatment that you cannot consent to. For example, your healthcare provider cannot be compelled to assist in your death or to provide treatment that is not clinically available.

If your advance directive is uncertain, based on incorrect information or if it is unclear whether it applies to a given situation, your healthcare provider may decide to provide treatment if they believe it is in your best interests. In this instance, your healthcare provider must attempt to obtain your consent. This also applies if there is insufficient time to determine whether you have an advance directive, such as if there is an emergency or an accident. You will be given the appropriate medical care that is required at the time.

Enduring power of attorney

You may have appointed an attorney to make healthcare decisions on your behalf through an enduring power of attorney for personal care and welfare; your attorney must act in your best interests. As your advance directive is a representation of your interests, your attorney is likely to uphold the directive.

However, your attorney has a discretion on whether to uphold your directive. Ultimately, whether your advance directive will be respected will depend on its certainty and on the circumstances of your care. If your attorney decides that treatment or a refusal for treatment will better protect your welfare and best interests, they may instruct your healthcare provider to act contrary to your advance directive. It is, therefore, critical to discuss this with your attorney to ensure they understand your healthcare preferences.

How can we help?

With more healthcare options available, it is important that you have the best opportunity to decide what healthcare you would like to receive. Although there is no requirement for a lawyer to be involved in the process, we can help to ensure that your advance directive is clear, certain and applicable in most circumstances.

If you have not received treatment or have received treatment that you did not consent to, you can lodge a complaint with the Health and Disability Commissioner. If you need further guidance, please do not hesitate to contact us – we are here to help. +

1 www.myacp.org.nz/your-plan

School boards of trustees

Significant obligations and responsibilities

Every three years, state and state-integrated schools hold elections for parent and staff representatives to join the governing bodies for their schools – the board of trustees (BoT).

School trustees are, however, sometimes confused or unsure about their role, and their obligations and responsibilities. The BoT is not like the PTA committee that co-ordinates parent helpers, organises school events, fundraises, etc.

A BoT role is like that of a company director. Although a school is not a commercial business, it should have robust governance processes in place that align with those of a well-run commercial business.

Health and safety aspects

The BoT is responsible for the governance and management of the school. It has discretion to manage the school within the parameters of the laws of New Zealand.

Alongside this governance approach, the Education & Training Act 2020 (E&TA) sets out the BoT's obligations under the health and safety workplace laws. The Ministry of Education advises that:

School boards and early learning organisations are considered a **PCBU** *(Person Conducting a Business or Undertaking) and must, so far as is reasonably practicable, provide and maintain a work environment that is without health and safety risks.*

(Ministry of Education website)

A BoT is the legal entity that is the PCBU. If there is a health and safety failure at a school, the BoT could potentially face prosecution by WorkSafe under the Health and Safety at Work Act 2015 (HSWA).

The best possible policies, and rigid adherence to them, may still not prevent accidents or injuries from occurring. The potential always exists that actions may be taken that do not comply with the policies and issues that arise. In this situation, it would be fair to say that responsibility would fall on those responsible for those non-compliant actions if the obligations of the BOT are shown to have been fulfilled.

Even if the BoT delegates responsibility for these policies, it has over-arching responsibility for the school staff who are operating under those policies. The BoT must take an active role to ensure that any people under its control are safe, and that suitable guidelines are in place to identify and mitigate the risks being faced. Ultimately, it remains an obligation of the school and BoT to be responsible for their students' safety.

EOTC risks

Out of school activities or education outside the classroom (EOTC) should be managed and controlled by reference to the BoT-approved health and safety policies.

To be effective, the policies must have measurable risk assessment components. For example: what are the risks and how serious is each risk? What is the likelihood of students and accompanying adults being hurt? How can these risks be managed by the activity leader? Does the school's policy have a tool for assessing risk and the seriousness of the risk?

When things go wrong on an EOTC trip and a participant is badly hurt, there will be investigations by the police and WorkSafe and, if someone dies, the coroner. It is equally possible that, as the result of those investigations, charges could be laid if breaches have occurred.

Prosecutions

Two recent cases[1] have shown that even with a successful WorkSafe prosecution, the fines awarded have either been reduced to $0, or set at a notional figure and payment has not been sought.

Regarding personal liability of BoT members, both the E&TA and HSWA contain exclusions of personal liability for board members provided that any act or omission was carried in good faith with the performance, or intended performance, of the BoT.

Trustees must fully understand their role

The BoT role is not one to be considered lightly, although training and guidance is available so trustees fully understand their responsibilities. BoTs are full of amazing and dedicated people who are doing their best for their community. A crucial part of that role is ensuring the everyday safety of the students and employees at their school.

Trustees must be aware that with the role comes responsibility and accountability. BoTs must manage their duties accordingly and fulfil all legal requirements. +

1 *WorkSafe v Tauraroa Area School Board of Trustees* [2022] NZDC 21558 and *WorkSafe v Forest View High School Board of Trustees* [2019] NZDC 21558

Time changed to raise personal grievance for sexual harassment

Extended from 90 days to 12 months

The Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Act came into force on 13 June 2023. It has extended the timeframe in which a personal grievance (PG) can be raised when sexual harassment has occurred at work.

The timeframe now allows a PG to be raised within 12 months of the harassment occurring or coming to an employee's attention, rather than the former period of 90 days. The purpose of this amendment is to allow sexual harassment victims more time to come to terms with what has happened before deciding whether or not to raise a PG.

Employment law fundamentals

Employment law in New Zealand is underpinned by the Employment Relations Act 2000; it promotes productive employment relationships and encourages employers and employees to act in good faith in all aspects of the employment environment. This is achieved by specific processes to help parties resolve employment disputes in a quick and flexible way, such as allowing an employee to raise a PG. A PG is a complaint that allows an employer and employee to address, amongst other things, a sexual harassment claim.

What is a personal grievance?

You may raise a PG against your current or former employer if you believe you have been treated unfairly or unreasonably. This includes situations where you think you have been:

+ Unjustifiably dismissed
+ Unjustifiably disadvantaged
+ Discriminated against in your employment
+ Sexually harassed in your employment
+ Treated adversely in your employment on the grounds of family violence, or
+ Racially harassed.

When deciding if an act or dismissal was justified, your employer, the mediator or the Employment Relations Authority must consider what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

You can choose to raise a PG with your employer directly or via the Employment Relations Authority. To raise a PG, you have 90 days, or 12 months for instances of sexual harassment, from the date the action or dismissal occurred or from when you became aware of it. You can, however, raise a PG *after* the 90-day period has expired in other circumstances if your employer agrees.

Defining sexual harassment

Sexual harassment is unwelcome or offensive sexual behaviour that is either repeated or serious enough to have a harmful effect. It can be direct or indirect. Sexual harassment does not have to be physical; it can also be through written, verbal or visual materials/actions. You may only raise a PG for sexual harassment if it has occurred during the term of your employment. Sexual harassment is defined in sections 108 and 117 of the Employment Relations Act 2000.

Know your rights

It is important for both employees and employers to know their rights and obligations surrounding personal grievances. Employers should ensure their employment agreements are updated to reflect the above amendments. +

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Postscript

Firearms Registry now up and running

The new Firearms Registry opened on 24 June 2023.

It is now mandatory for firearms licence holders to provide information about their firearms items. The development of the Firearms Registry follows major changes to New Zealand's firearms laws made after the March 2019 terrorist attacks at two Christchurch mosques.

Firearms owners must register:

+ Non-prohibited firearms, including Specially Dangerous Airguns (PCPs)
+ Prohibited firearms and magazines
+ Pistols
+ Restricted weapons
+ Major parts, and
+ Pistol carbine conversion kits.

You must also register firearms that do not work.

Antique firearms or airguns are not required to be registered. Registration is also not required for ammunition in your possession, nor do you need to record sales or purchase of ammunition to or from other firearms licence holders.

You can register online here: **https://www.firearmssafetyauthority.govt.nz/firearms-registry** or by phone at 0800 844 431 (04 499 2870) 8.30am-5pm, Monday to Friday.

Looking after your mental health

These days everyone is being advised to take care of their mental health, as well as making sure their physical (and emotional) needs are met. In busy working days, it's easy (and tempting) to think things will sort themselves out if you are under pressure.

To help you manage your mental health and day-to-day activities, Spark Business Lab and The Institute of Organisational Psychology has designed an e-learning series to help you run your business more effectively and to help make your life easier.

The videos have practical advice, you can download useful tips and templates you can use every day. Go here to get started: **www.business.govt.nz/wellbeing-support/brave-in-business-e-learning/ +**

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