Property Speaking

Allen, Needham & Co Ltd
Barristers, Solicitors and Notary Public

ALLEN, NEEDHAM & CO LTD
52 Canada Street , PO Box 12, Morrinsville 3300
T 07 889 5062 | F 07 889 5369
law@anco.co.nz | www.allen-needham.co.nz

ISSUE **39** | Autumn **2022**

Welcome to the Autumn edition of *Property Speaking*; the first of three issues for 2022.

To talk further about any of these topics, or indeed any property matter, please don't hesitate to contact us – our details are on the top right of this page.

NZ LAW
Stronger Together.

Resource consents

What are they and when do you need one?

The Resource Management Act 1991 places restrictions on how your land can be used; this is done by the issuing of consents. Their purpose is to limit any adverse effects that your intended use of your property may cause to neighbours' properties or the environment.

If you are a property owner, or you lease premises to operate your business, we explain below the various types of consent that you may come across from time to time.

PAGE 2 ▶

Not sure of your boundary?

Remedies if there is an encroachment

All property owners, whether commercial or residential, must ensure that any structure on their property is located within its legal boundaries. These boundaries cannot be moved without the property's title also being changed. Sometimes, however, the legal boundaries do not match up with structures (such as a fence or a building) on that property. What happens when the title does not match what is literally 'on the ground'?

PAGE 3 ▶

Property briefs

Updates to ADLS Agreement – important for buyers and sellers

The process for claiming compensation for a breach of contract by one party or property defects has changed.

Building in the Covid landscape

Fixed-price contracts are a thing of the past with builders unable to guarantee prices and delivery times; new clauses in building contracts.

Harsh CCCFA provisions relaxed

Legislative changes in late 2021 have resulted in many borrowers struggling to gain lending approval for a property purchase.

PAGE 4 ▶

RETURN TO FRONT PAGE

Resource consents

What are they and when do you need one?

The Resource Management Act 1991 places restrictions on how your land can be used; this is done by the issuing of consents. Their purpose is to limit any adverse effects that your intended use of your property may cause to neighbours' properties or the environment. If you are a property owner, or you lease premises to operate your business, we explain below the various types of consent that you may come across from time to time.

Types of consent

Discharge consents: The Act restricts the discharge of contaminants into the air, water or land. It is important that the way you use your property doesn't adversely affect it for future generations or damage your neighbour's property. If your business manufactures goods or you are farming, rules restricting the use of pesticides, limiting dust and controls around dairy effluent will be familiar to you.

Consent to take water: If your farm has a spring or river flowing through it, you may use that to water your crops or herd. What you may not know is that your council may restrict how much water you can draw from that source over a particular period. Although there is plenty of water in the sea, clean fresh water is a limited resource and it needs to be controlled appropriately.

Subdivision consents: If you want to change the size of your section (a boundary adjustment) or to split your property into additional property titles, you will usually need subdivision consent. This type of consent is likely to come with some conditions.

Your local council may also ask that part of your property, normally around waterways, is transferred to the council as an esplanade reserve or esplanade strip. This is known as 'vesting'. The council can also require that future development (for example, if you're building a new subdivision) meets certain council-dictated design specifications.

Change of use consents: If your property is used for a particular purpose and you want to change that use, you may need to apply to the council. A common example of this is converting a commercial building or garage into a residential dwelling.

Do I need resource consent?

If your proposed activity is not listed in the district plan as either permitted or prohibited, then you will need a consent.

The district plan for each region is publicly accessible through the local council's website; it varies for each region depending on the needs and focus of that community. For example, somewhere dry like the Wairarapa is likely to have stricter water restrictions in place than Fiordland.

The zoning of your property will impact on your consent. Councils zone certain areas based on the expected characteristics of that area. Different zones, residential, commercial, industrial and rural (the names of zones also differ from region to region) have different rules that apply based on their proximity to other zones, amenities and natural hazards. It is useful to know that when subdividing your urban residential property, you will be permitted to have smaller section sizes than if you were subdividing your rural property into lifestyle blocks.

If you are looking at doing something different with your property it always pays to check the region's district plan first. If you're not sure whether you need consent, get in touch with the local or regional council; council staff are experts and are generally friendly and happy to help.

What if I carry on my activity without consent?

If you ignore your responsibilities under the Act, penalties can range from $1,500 to $300,000 or you could be sentenced to up to two years in prison. If you are operating through another entity (a company, for example) you could be fined up to $600,000.

It is important that the council balances your rights as a property owner with the rights of your neighbours, future landowners and the environment. The council, however, doesn't always get this balance right. If you believe that your consent application has been unfairly rejected, please don't hesitate to talk with us.

Building consents

In addition to requiring resource consent, if you are building a new structure or doing structural alterations on your property, you may also require building consent. Your building work is governed by the Building Act 2004 and must be built to the standards contained in that legislation. Once the consented building work is completed, it is vital that the council approves that work so a code compliance certificate (CCC) can be issued. When you want to sell your property, any prospective purchaser will want to see the CCC. +

Not sure of your boundary?

Remedies if there is an encroachment

All property owners, whether commercial or residential, must ensure that any structure on their property is located within its legal boundaries. These boundaries cannot be moved without the property's title also being changed. Sometimes, however, the legal boundaries do not match up with structures (such as a fence or a building) on that property. What happens when the title does not match what is literally 'on the ground'?

Confirm the legal boundary first

The first step when a query about a boundary arises is to determine where your boundary legally lies. Online aerial maps (like those available on some council websites) give you a starting point. However, the definitive description of your boundary is on the legal title for your property. There is usually at least one diagram on your title which will have the set measurements of all of your boundaries' locations.

On the ground, there should be markers along your boundary. You can use these boundary markers together with the title to figure out where the relevant boundary lies. Sometimes, however, the boundary markers are well hidden or missing entirely, particularly on older properties. If boundary markers cannot be found, you should engage a surveyor to establish where your boundary is and to replace missing markers.

The other situation where you may need help in establishing your boundary is where your title is marked that it is 'limited as to parcels'. This means that when the title was issued, there may have been insufficient survey information available about your boundaries' locations. To be sure about your boundaries and to remove this classification, you must arrange a professional survey and work through a process with Land Information New Zealand to get the boundaries confirmed.

Encroachment

Once your boundary is confirmed, you may find a structure sits over the boundary; this is called an 'encroachment.' The current owner of the property and the structure is legally responsible for any encroachment regardless of when the structure was erected.

How you address an encroachment issue differs depending on whether you are a prospective buyer or you already own the property.

Before purchasing a property

The best time to check any boundary issue is before you buy the property.

It is essential that you use your own judgement and get professional survey advice where necessary, rather than relying on advice from the vendor. There have been legal cases[1] where the vendor has assured the buyer that everything was fine, only for it to be discovered that buildings included in the purchase were over a boundary. This can have significant consequences for you as the buyer; under many agreements for the purchase of property, it is the buyer's responsibility to check and raise any issues with the boundaries. The vendor is usually not required to show you where the boundaries are nor to check the boundary markers are in place unless a bare section is being sold.

1 For example, *Armstrong v Mitchell* [2018] NZHC 2353.

If you discover an encroachment, talk with us and we can raise this with the vendor. There is usually a limited time for raising title issues – either under the standard 'requisition' procedure or any due diligence condition. If raised within the proper time and the vendor cannot fix the issue, you may be able to cancel the agreement and not buy the property.

Issues when you own a property

If you already own a property and discover that a structure or fence is over your boundary, different processes apply. If you discover an encroachment, you may want to talk with your neighbour first and see if you can figure out a solution together. If this does not work, there are some legal remedies to assist:

- For fences, the Fencing Act 1974 requires that any fence is usually built with the fence or its posts as close to the boundary line as possible – unless agreed or a court has ordered otherwise. If your neighbour has unlawfully erected a fence over your boundary, you can ask the Disputes Tribunal or District Court to order the removal of the fence.
- For a building or other structure, you can ask the District Court or High Court under the Property Law Act 2007 for help around the 'wrongly placed structure'. Depending on the circumstances and what is 'just and equitable', the court can allow your neighbour rights to use the land and structure, give you the right to use the structure, require removal of the structure and/or require payment of compensation.

Navigating boundary and encroachment issues can be tricky, particularly when you have a friendly relationship with your neighbours. If you think you might have a boundary issue, please do talk to us about your options. +

RETURN TO FRONT PAGE

Property briefs

Updates to the ADLS Agreement – important for buyers and sellers

On 8 February 2022 the Auckland District Law Society (ADLS) released an updated version of the Agreement for Sale and Purchase of Real Estate. This is the most-used agreement when buying or selling property. The new version incorporates several changes that are important for people buying and selling property, along with some superficial amendments to accommodate the nuts and bolts for lawyers handling the transaction.

The process for claiming compensation for a breach of the contract by one party or for a defect in the property has been clarified in clauses 10 and 11 of the agreement. One fundamental difference is that the new agreement limits parties to only one claim for compensation under clause 10. A party might use this clause to claim compensation for services in the property that don't work or for loss suffered by that party as a result of a misrepresentation by the other party or their real estate agent. Despite parties being limited to one claim, the claim can include more than one element set out in clause 10.2 so vendors and purchasers can still be fully compensated where multiple breaches occur.

Another change to note is where parties are transferring residential property for a purchase price exceeding $7.5 million or commercial property for a purchase price of more than $1 million. In each of these

two situations, for tax purposes, parties will need to agree on the value of land and buildings that make up the purchase price as well as the value of any other assets, fixtures, fittings or chattels sold with the property. These should be included as an addendum to the agreement.

Getting legal advice regarding the full terms and conditions of the agreement is always essential, particularly in light of these changes to the ADLS agreement. If you're buying and/or selling property, talking with us early on should be your first step.

Building in the Covid landscape

The steady rise of house prices in recent years has prompted many people to consider building a house as a much more viable and affordable option than it has been in the past. Covid and its pervasive disruption of everyday life, however, has brought up a range of new issues that prospective home builders should be aware of before considering a build.

Fixed-price contracts have become a thing of the past with builders now being unable to guarantee the price of materials due to their scarcity and long delivery times. Buyers should look out for clauses in building contracts that allow the builder to increase the price where materials, labour or services become more expensive than at the time the contract was signed.

Similarly, due to the difficulty builders have getting materials and labour, completion dates are often much further out than people have come to expect. Like the price escalation-type clauses referred to above, builders will often now include an ability to extend the contract completion date due to delays in obtaining materials or labour to complete the build in the time prescribed in the contract.

With these issues in mind, it is important that you get advice regarding your building contract before you sign it. Make sure you have a good handle on your budget and there is room for a potential increase in the contract price.

Harsh CCCFA provisions relaxed

The amendments to the Credit Contracts and Consumer Finance Act 2003 (CCCFA) that were introduced on 1 December 2021 have resulted in many borrowers struggling to gain lending approval for a property purchase.

The amendments include regulations requiring lenders to look more closely at the affordability of loans for lending applicants and the suitability of particular loan structures based on the financial position of their customers. This has prompted banks to delve into applicants' spending habits and has resulted in an increase in rejected applications.

Other restrictions imposed on lenders include regulating the way banks and other lenders can advertise their products. Lenders are required to adhere to minimum standards that require lending advertisements to be clear to customers and not confusing. This places a higher threshold on lenders than the requirements not to mislead or deceive customers as required under the Fair Trading Act 1986.

Finally, greater restrictions have been placed on low equity lending meaning that banks are more limited in approving applications from borrowers with less than a 20% deposit.

The effect of these legislative changes has been detrimental to the ability of first home buyers to obtain lending to enter the property market; mortgage and business advisors have openly opposed or criticised these changes since their introduction.

This opposition, combined with the perhaps unintended difficulties that the changes have created for first home buyers, has prompted the government to review the changes on the basis that lenders' enquiries under the legislation were too intrusive for customers.

The proposed amendments will no longer require lenders to take a deep dive into the spending habits of potential borrowers in order to assess future spending for applicants. A more comprehensive list of the changes to ease the December amendments can be read **here**.

Despite the challenges caused by the December amendments to the CCCFA, it appears that they are only temporary and that following the finalisation and enactment of the proposed easing measures, potential borrowers will be able to proceed without the invasive or unreasonable inquest that many have recently experienced. +

The next edition of *Property Speaking* will be published in **Winter**.