

# **Restrictive Covenants – Is There A Case For Public Plans To Control Private Planning Instruments In New Zealand?**

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## **Introduction**

Restrictive covenants are commonly applied to residential subdivisions. These covenants, sometimes called building schemes, usually have the purpose of placing restrictions on the use of land with the aim of maintaining the quality of the subdivision and the value of the properties subject to the covenant. Typically the building scheme will contain restrictions against further subdivision or an increase housing density. In effect these private legal instruments operate in parallel with public planning instruments under the Resource Management Act 1991 (RMA) to control the use of land.

Because covenants run with the land, the restrictions in the building scheme covenant will bind future land owners in perpetuity. This may assist in the long-term recognition of residential amenity values, and thereby assist the implementation of residential amenity outcomes. But it may also be contrary to other public policy imperatives in some circumstances, such as where significant 'up-zoning' is planned or urban consolidation sought. Restrictive covenants may prevent such up-zoning now, and in the future. If the basis for public planning instruments under RMA is to promote the sustainable management of natural and physical resources including for future generations, why should that object potentially be frustrated by privately-imposed restrictive covenants when public planning instruments can override other private property rights?

Calls for land use planning legislation to regulate the use of restrictive covenants are not altogether new, but do not appear to have been widely considered in New Zealand.<sup>1</sup> We examine in what circumstances the use of restrictive covenants may be acceptable in public planning terms. In Australia, state legislation in New South Wales and Victoria contains mechanisms for public planning instruments to override restrictive covenants. We ask should these powers apply in New Zealand?

## **What are restrictive covenants?**

A restrictive covenant is a promise or agreement made that the covenantor will not do something in relation to specified land which he or she could otherwise do. The promise is enforceable in the civil courts. On registration on the title the restrictions in the covenant will bind future land owners in perpetuity. Typically in New Zealand the restrictions will be contained in a memorandum of transfer, or by a separate memorandum of encumbrance or covenant.

With large residential subdivisions it is common for there to be a building scheme. If this scheme is validly created and registered, any owner of land within the scheme may enforce against another owner the covenants made under the scheme.<sup>2</sup> Typically building schemes will contain restrictions on how a property may be developed, and include provisions such as specifying building materials, specifying the colour and shape and size of buildings, requiring building design to be submitted to a building committee for approval, as well as containing restrictions against further subdivision, or increases in height or increases in density. Certain covenants are void under specific statutory provisions.<sup>3</sup> These covenants create a private planning regime enforceable in the civil courts (District and High Court) by owners of property subject to the

## **Restrictive Covenants - is there a case for public plans to control private planning instruments in New Zealand?**

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scheme. Several cases brought in recent years have tested the enforceability of restrictive covenants in the civil courts.<sup>4</sup>

The RMA makes provision for various covenants in connection with resource consents and subdivisions.<sup>5</sup> Covenants are frequently imposed as conditions of land use and subdivision consent for conservation purposes, such as conditions requiring areas of native vegetation to be protected, and ongoing conditions for pest control and weed eradication. In *Morgan v Whangarei District Council* the High Court upheld these types of conservation conditions as being validly imposed and within the Council's powers.<sup>6</sup>

Restrictive covenants have also been recognised as a method of addressing reverse sensitivity effects where new sensitive activities are introduced to the environment where existing effects – intensive activities operate. In *Auckland Regional Council v Auckland City Council*<sup>7</sup> it was established as a principle that a Council could include provisions that provide for reverse sensitivity in a plan. No-complaints covenants have been successfully used by a number of industries (e.g. the wine industry, poultry farmers, port companies and airports) when faced with increasing residential activity in the immediate area. Sometimes these covenants have been recognised within public planning instruments.<sup>8</sup> Restrictive (no-complaints) covenants have been imposed as conditions of resource consent, but only if imposed with the consent of the applicant.<sup>9</sup> To our knowledge, plans under the RMA have not sought to control or limit the use of private planning instruments such as restrictive covenants.

### **Modification or extinguishment of restrictive covenants in New Zealand**

The District Court in New Zealand has a discretionary power under s317 of the Property Law Act 2007 to modify or to wholly or partially extinguish any easement or covenant upon being satisfied of any one of a number of grounds. Typically the Court will direct service on all owners within the area subject to the covenant. In addition, an application must be served on the territorial authority unless the Court directs otherwise.<sup>10</sup> The District Court may modify or extinguish a covenant under s317 of the Property Law Act 2007 having regard to a number of factors including:

- The nature and extent of the use of the land
- The character of the neighbourhood, and
- Any other circumstance the Court considers relevant.

Because a Court is able to consider “any other circumstance the Court considers relevant” it is possible that planning and resource management considerations need not be entirely ignored in determining whether the grounds had been made out to modify or extinguish a covenant, and the way in which the Court should exercise its discretion. However generally resource management considerations are likely to be of peripheral consideration to the exercise of the Court's power under s317 of the Property Law Act 2007. The focus is on the private rights of the parties affected by the covenant, rather than any public interest. In Australia, when applying similar legislation, it is said that “Judges are reluctant to vary or extinguish a covenant merely because variation or extinguishment would be acceptable in town planning terms”.<sup>11</sup>

## Restrictive Covenants - is there a case for public plans to control private planning instruments in New Zealand?

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### Australian state legislation – power to override covenants for public planning

In New South Wales and Victoria, state legislation provides power to override covenants for public planning purposes, in addition to any general power the Courts have to modify or extinguish covenants.<sup>12</sup> The purpose of these provisions is to give local councils the power to override restrictive covenants in circumstances where the covenants inhibit the goal of urban consolidation. The Environmental Planning and Assessment Act 1979 (NSW) s 28(2) provides that:

*For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent granted under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that instrument.*

The wide definition of 'regulatory instrument' includes a covenant or instrument (s28(1)). In *Coshott v Ludwig* (1997) Meagher JA said that:<sup>13</sup>

*The self-evident purpose of s 28 ... is to nullify and remove all obstacles to the planning principles decided by the Council or the Minister. In this context s28 of the Act is stating, in effect an environmental planning instrument may state what documents should be disregarded...*

For s28 to apply, it is unnecessary for the environmental planning instrument to describe the particular easement or restrictive covenant affected. It is sufficient for a class of instruments to be specified. Section 28 has the effect that the covenant is overridden only 'to the extent necessary' to permit the relevant development. Provisions overriding covenants are now frequently included in environmental planning instruments in NSW.

Whether a particular covenant is overridden will depend on the wording of the plan itself and the wording of the covenant. In *Lennard v Jessica Estates Pty Ltd*<sup>14</sup> the question was whether development consent granted by the Singleton Council (in NSW) under its local environment plan overrode a covenant that prohibited subdivision of the land or the building of two units on the land. The New South Wales Court of Appeal held that a private restrictive covenant between a developer and registered proprietor was rendered ineffective by a clause in the Singleton Local Environment Plan, enacted under section 28 of the Environmental Planning and Assessment Act 1979 (NSW). Mr and Mrs Lennard purchased a lot in the Hunter View Estate subdivision developed by Jessica Estates Pty Ltd. Each lot in the estate was subject to a restriction on the use of the land, of which the Lennards were fully aware, that the registered proprietor of a lot must not, *without the prior written consent of the developer*:

- 'construct more than one dwelling on the Lot...'
- 'construct any building...known as a semi-detached duplex on the Lot...'
- 'subdivide the Lot...'

## **Restrictive Covenants - is there a case for public plans to control private planning instruments in New Zealand?**

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The Singleton Council had on application by the Lennards approved a two unit duplex development that, if undertaken, would breach the covenant. The Singleton local environment plan was expressed to apply to "*any agreement, covenant or similar instrument [that] prohibits a land use ...*". The New South Wales Court of Appeal held that subdivision or building two units (or duplexes) were "uses" of land, and so the covenant purporting to prohibit them without approval of the developer was overridden by the Council's plan.

In Victoria, the Subdivision Act 1988 (Vic) and the Planning and Environment Act 1987 (Vic) provides power to override a covenant by issuing a planning permit or by approving an amendment to a planning scheme.<sup>15</sup> The Planning and Environment Act 1987 authorises the variation or removal of easements and covenants by provisions in planning schemes, or by permits issued in pursuance of provisions in planning schemes. Victorian provisions enabling planning provisions to override easements and restrictive covenants are said to be more complex and less effective than those in force in New South Wales.<sup>16</sup>

### **Planning implications of restrictive covenants**

The impact of covenants on housing redevelopment appears to have received relatively little attention in New Zealand although was the subject of a recent article "*My House, My Castle*" published in the Planning Quarterly. In the context of the Christchurch rebuild post-earthquake, the authors claimed that restrictive covenants in Selwyn District may be limiting redevelopment options for owners who were forced by the terms of covenants to build costly and larger homes than they require.<sup>17</sup>

Second generation regional policy statements in the Bay of Plenty, Canterbury, and the Waikato include growth management policies which seek to encourage good urban form, set specific development yields, and establish (or review) urban limits. In the Auckland context, these policies find recent expression in the Auckland Council's adoption of its first spatial plan, to be implemented in part through the Unitary Plan, due for notification in early 2013. The spatial plan has ambitious targets for intensification within existing developed areas. These regional policy statements (for the Bay of Plenty, Canterbury, and the Waikato) and the Auckland spatial plan appear to make no attempt to regulate the use of private instruments such as restrictive covenants, although in most cases these covenants will prevent further intensification in a way which may run counter to the aspirations of urban consolidation. In practical terms the cost of obtaining consent from all parties protected by the covenant may make it unlikely that land subject to restrictive covenants will ever be the subject of further intensification. Conceivably strategic planning objectives for intensification or consolidation may be thwarted or affected by these private restrictive covenants operating in perpetuity. Because restrictive covenants in New Zealand have generally only been imposed on residential subdivisions since the 1970s, the absence of restrictive covenants on older subdivisions (pre-1970s) will mean that intensification pressures may be concentrated in areas less suitable for urban change, such as areas with earlier period or character housing.

Aside from plan-led intensification of urban areas, there is also the question of whether private covenants should be able to be more readily rescinded by affected property owners where circumstances have changed since their original imposition. A case in point is Sunnynook on the

## **Restrictive Covenants - is there a case for public plans to control private planning instruments in New Zealand?**

North Shore of Auckland. Subdivided in the 1970s as a motorway-based suburb, some of the land in the area is subject to a no-further subdivision covenant. The Northern Busway was developed in the early 2000s to help relieve congestion, with a bus station provided at Sunnynook. Overtime as the role of public transport in meeting Auckland's transport needs increases, then proximity to public transit services should see a rise in demand for housing in the vicinity. This "natural" process of urban intensification is potentially thwarted by the covenants, a set of circumstances not likely to have been envisaged when the covenants were created. This suggests that easier provision could be made for groups of landowners (perhaps logical sub-groups or a large majority) to be able to revoke the covenant where they so desire.

In a similar vein, as house and land prices rise in cities, housing affordability reduces if additional development within the existing urban area is not possible. Covenants that restrict further subdivision and/or impose minimum house sizes or values therefore run counter to the tendency for urban areas to accommodate rising prices through more intensive use of land. As with the potential to off-load growth pressures onto other areas that may be less able to cope, covenants may also accentuate social divisions to the detriment of certain groups in society.

### **Is reform necessary?**

It could be argued it is already possible to have a rule in a district plan which controls the use of restrictive covenants on the basis that such a rule is within the powers of s31(1)(b) RMA – namely the "control of any actual or potential effects of the use, development, or protection of land...". Such a rule could state that the imposition of a covenant restricting urban intensification (as defined) within a specified growth management area is a permitted activity provided the covenant endures for not more than specified timeframe, for example, say, 30 years. Covenants which breach the duration requirement could default to a more restrictive activity classification requiring assessment and evaluation. Any such rule would ideally need support from regional policies and objectives. This rule would, arguably, be a control of the use of land in terms of s9 of the RMA. Its timing might be linked to the act of subdivision under s11 RMA.

The imposition of a duration control on a restrictive covenant by allowing such covenants for a specified limited duration (such as 25 or 30 years) may arguably align with the literature from property economics which examines the impact on house prices of covenant restrictions.<sup>18</sup> If we understand this literature correctly, the housing price impact of covenants depends on the nature of the covenant, and the nature of planning controls, with some results suggesting a positive price impact on housing in initial years of the covenant, but diminishing over time.

Given the potential however for challenge to the validity of a rule controlling covenants, and the desirability of providing for a sound legal foundation to rules, for urban intensification a better course is to amend the RMA to expressly provide for a power for local authorities to override restrictive covenants in circumstances where the covenants inhibit public policy goals of urban consolidation and urban intensification. If included within a plan then the individual merits of such control would be subject to public submission and require justification in cost/benefit (section 32 RMA) terms. Another option would be to make more flexible the process to revoke a private covenant (one not imposed by way of the RMA), for example by providing for a large majority of landowners to revoke the covenant.

## Restrictive Covenants - is there a case for public plans to control private planning instruments in New Zealand?

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### Conclusion

Restrictive covenants may support objectives for sustainable management, and have established a place in the regulation and control of reverse sensitivity effects, and as conservation covenants. However given the objectives of urban intensification in growth areas in New Zealand there is the potential for these urban consolidation objectives to be frustrated in the long term by privately imposed covenants. In our view, there is a case for public plans to control private planning instruments such as restrictive covenants, and which warrants further investigation in the New Zealand context.

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<sup>1</sup> For the position in the UK, see Donald Sabey and Ann Everton, "The Restrictive Covenant in the Control of Land Use", Dartmouth Publishing Company Limited, 1999; and Megarry and Wade, *The Law of Real Property*, Seventh Edition, Sweet & Maxwell, 2008, page 1378-1379

<sup>2</sup> For building schemes generally, see Hinde McMorland & Sim "Land Law in New Zealand" Vol 2, para 17.25 (loose leaf)

<sup>3</sup> For example, covenants that breach the provisions of the Human Rights Act 1993, or the Property Law Act 2007, s277A (concerning people on low incomes, with special housing needs, or with certain disabilities). Certain covenants reducing competition may also be void: Commerce Act 1986, s28(4) and 80-82A.

<sup>4</sup> *South Pacific Tyres NZ Limited v Powerland (NZ) Limited* [2009] NZRMA 58 (action for specific performance of reverse sensitivity or no-complaints covenant) *Big River Paradise Limited v Congreve* [2008] NZRMA336 (interpretation of restrictive covenant preventing further subdivision); *Omaha Beach Residents' Society (Inc) v Townsend Brooker Limited* (unsuccessful appeal against High Court decision declining declaration that restrictive covenant unenforceable).

<sup>5</sup> Resource Management Act 1991, s107 (covenants for the performance of any condition relating to the use of land included in a resource consent) s221 (every consent notice specifying a condition to be complied with on a continuing basis by subdividing owner and subsequent owners after the deposit of a survey plan to which the subdivision consent is subject) and s240 (covenants between the owner of land and the territorial authority required pursuant to a subdivision consent that any specified part or parts of land shall not, without the consent of the territorial authority, be transferred, leased or otherwise disposed of).

<sup>6</sup> *Morgan v Whangarei District Council* [2008] NZRMA 113

<sup>7</sup> *Auckland Regional Council v Auckland City Council* [1997] NZRMA 205, 206

<sup>8</sup> For example, the Auckland District Plan (central area) provides at s14.6.1 that building for accommodation in the Britomart precinct will be a permitted activity where the site is subject to a no-complaints covenant in favour of the Ports of Auckland.

<sup>9</sup> *Ports of Auckland v Auckland City Council* [1999] 1 NZLR 601

<sup>10</sup> Property Law Act 2007, s316(3).

<sup>11</sup> Butt, *Land Law*, 6<sup>th</sup> Ed, Lawbook Co, 2010, page 571.

<sup>12</sup> Bradbrook and Neave, *Easements and Restrictive Covenants in Australia*, Second Edition, 2000, page 555-558.

<sup>13</sup> *Ludwig v Coshott* (1994) 83 LGERA 22 at 31, 38 per Brennan J, affirmed in *Coshott v Ludwig* (1997) NSW Conv R. 55-810; 8 BPR 15,519 per Meagher JA

<sup>14</sup> *Lennard v Jessica Estates Pty Ltd* (2008) 71 NSWLR 306 (covenant restricting number of dwellings and prohibiting subdivision); and see "Planning law plays the wild card", Allens Arthur Robinson, at <http://www.aar.com.au/pubs/re/foreaug08.htm>

<sup>15</sup> Bradbrook et al, *Australian Real Property Law*, Lawbook Co, 5th Edition, 2011, para 18.285; and also see Overell and Easton, "Restrictive Covenant v Urban Consolidation" (1992) 66 LIJ 282; Tooher, "Restrictive Covenants and Public Planning Legislation —Should the Landowner Feel 'Touched and Concerned'" (1992) 9 EPLI 63; Tauber, "'Double Trouble' in Discharging Restrictive Covenants: Dual Occupancy and the Duality of Forums" (1993) 10 EPLJ 365.

<sup>16</sup> Bradbrook and Neave, *Easements and Restrictive Covenants in Australia*, Second Edition, 2000, page 556.

<sup>17</sup> David Hattam and John Raven "My House, My Castle" in *Planning Quarterly*, September 2011, 32.

<sup>18</sup> See William Hughes and Geoffrey Turnbull, "Restrictive Land Covenants", in *Journal of Real Estate Finance and Economics*, 12-21 (1996); and William H Rogers, "The Housing Price Impact of Covenant Restrictions and Other Subdivision Characteristics" in *Journal of Real Estate Finance and Economics* (2010) 40: 2003 - 220