REGISTRAR-GENERAL OF LAND

Creating roads in subdivisions – dealing with covenants and easements

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Background – history

In October last year Toitū Te Whenua Land Information New Zealand published my practice note on the question of whether there is legal authority to dedicate or create roads by transfer when land is subdivided. I confirmed that that the authorised process for creating a new road under the Resource Management Act 1991 (RMA) is to have the land vested as road upon deposit of the plan under section 238 of the Act, with the prior consent of any person with a registered interest in the land under section 224(b) of the Act (see Issue 161 of *Landwrap*, 7 October 2020).

I have had the opportunity to engage with the NZLS Property Law Section on these matters and discuss some of the practical challenges for subdividers in dealing with existing interests like land covenants. As noted at the conclusion of this article, this is an area that warrants further consideration in the context of the broader RMA reform proposals.

Given the level of interest and debate about how road vesting should be dealt with under the current provisions, I thought it useful to provide some further commentary on these issues.

Man O'War Station Ltd v Auckland City Council

It has been suggested that the Privy Council's decision in *Man O'War Station Limited v Auckland City Council (No 2)*[1] confirmed that the common law principle of implied dedication applies in NZ, and it is consistent with that decision for a transfer instrument to be able to be registered to perfect an implied dedication.

However, that case did not involve a subdivision under the RMA or the equivalent legislation at the relevant time. In fact, the Court of Appeal in its judgment on the *Man O'War* case[2] referred to an article by EC Adams, *The Doctrine of Implied Dedication of Land as a Public Highway*[3]:

> *"Mr Adams … said (p317) that if a statute prescribes a certain mode of dedication (such as for a subdivision – see s 238 Resource Management Act 1991 and, in force at the relevant time in this case, s 35(3) Counties Amendment Act 1961…there can be no dedication by any other mode."*
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> *We can find nothing in the scheme or in any particular provision of the Land Transfer Act or in any other statute to which we have been referred which expressly or impliedly abrogates the common law rule in the circumstances of this case. It may rarely be necessary nowadays for a local authority to rely upon the doctrine of implied dedication but in our view it continues to apply in New Zealand, even in relation to Torrens system land.*

Within this passage the Court also referred to part of the judgement of Edwards J in *Parkes & Wright v The District Land Registrar at Wellington*:

> *There can be no dedication of a highway to the public as part of a scheme for the subdivision of land otherwise than in accordance with the statutory provisions which regulate this question. To hold otherwise would be in effect to repeal those provisions* 4.

These references in the Court of Appeal's judgement were not referred to the Privy Council.

So, while the common law principle of implied dedication of road is still applicable in New Zealand, it cannot be used where a statute prescribes a certain mode for dedication. For example, where road is to be created as part of a subdivision the RMA prescribes the mode of dedication, which is to have the land vested as road upon deposit of the survey plan under section 238 with the consent of any person with a registered interest in the land under section 224(b). Similarly, a transfer instrument explicitly dedicating land as road cannot be used where a statute such as the RMA prescribes a different mode of creating roads.

Unlike the vesting process under the RMA provisions, dedicating road by a transfer instrument also does not resolve the question of what should happen to any existing interests once the land becomes road. If roads were

dedicated subject to easements and covenants, those rights may in some cases conflict with the use of the road by the public, so there is good reason to require vesting free of interests as provided for under the RMA regime.

Property Law Act 2007 powers to modify or extinguish an easement or covenant

An alternative to obtaining consents from persons with an interest in a covenant or easement is to apply under s 317 of the Property Law Act 2007 (PLA) for the covenant or easement to be varied so that it will be extinguished as to the road to vest, prior to the subdivision survey plan depositing. Both the High Court and the District Court (s 362(1)(b) PLA) have jurisdiction to make an order under s 317.

The case of *RCL Henley Downs Limited v Hanson*[5] which Heidi Bendikson cites in her article *Creating roads in subdivisions* (see *The Property Lawyer*, Volume 21 Issue 3) demonstrates the courts' approach under s 317. In that case, Matthews AJ determined the covenant in question could not remain on land which was to vest as road, that the effect of the covenant would not be altered in any material respect if was extinguished from land to vest, and was satisfied there was no need for any of the respondents (parties to the covenant) to be served with the application, as he was unable to discern any basis that the parties could be adversely affected. (For another example of a recent decision involving these provisions see *Woodcocks Property Limited v Auckland Council* [2021] NZHC 1600 Jagose J).

It is also worth noting that s 317(1) was amended by the Land Transfer Act 2017, with the addition of two further grounds for modifying or extinguishing a covenant:

> *(e) ... the covenant is contrary to public policy or to any enactment or rule of law; or*
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> *(f) ... for any other reason it is just and equitable to modify or extinguish the covenant, wholly or partly.*

The system that generates and dispatches the searches to the bank is the same system that automatically sends the post registration searches to the law firm upon completion of registration ... the bank receives its searches at the same time you do

Resource management system reform

The reform of the resource management system led by the Ministry for the Environment (MfE) includes the proposed Natural and Built Environment Act (NBA), which is the primary replacement of the RMA. The proposed NBA specifies a range of outcomes that decision-makers will be required to promote for both natural and built environments. This provides an opportunity to consider whether provisions governing subdivisions (including creating roads) are fit for purpose.

You can find out more about the reform process on MfE's website at *environment.govt.nz/what-government-is-doing/key-initiatives/resource-management-system-reform*.

Conclusion

I confirm my conclusion that the process for creating roads in subdivisions is as authorised under the RMA, and that alternatives such as transfers dedicating road are not permitted. LINZ will continue to consider case by case exceptions, as published in *Landwrap*, November 2020, Issue 162. ■

1. [2002] UKPC 267
2. *Man O'War Station Ltd v Auckland City Council* [2000] NZCA 268; [2000] 2 NZLR 267; (2000) 4 NZ ConvC 193,193 (11 April 2000)
3. [1950] NZLJ 315, 316
4. (1914) 33 NZLR 1449, 1457)
5. [2018] NZHC 2714 (19 October 2018)