

## Living with our Neighbours

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### ABSTRACT

Living with our neighbours raises a number of issues, most often manifested by those involved as what I can do on my property and what you can't do on yours. The increasing awareness of planners and developers of these potential issues has led to a host of mechanisms being implemented to control issues which could result in neighbourhood problems. While these new mechanisms are useful to a certain degree, planners and developers need to be aware and understand other legal mechanisms which control property and neighbourly relations.

This paper discusses the various mechanisms embedded in property types and ownership, and how they can be used in an effective and cost effective way to control issues which can arise in neighbourhood disputes. The paper also evaluates the legal systems provision of governance over neighbourly problems and the limitations we need to be aware of for the future.

The conclusions of this paper provide practical ideas and solutions to deal with neighbourly disagreements which are becoming more common in an increasingly compacted urban lifestyle.

**KEYWORDS:** neighbourhood disputes, governance, property law, compact living.

### 1. INTRODUCTION

The expansion of our cities over the last hundred years has seen them transform from a heterogeneous mix of residential, commerce, industry and education to cities of highly regulated activities. Much of this transformation arose from both the growth of planning coupled with the planning ideas of the time which favoured segregation as the way of managing the problems that arose when dissimilar land uses are placed in close proximity; and the growth of first public transport, and subsequently private transport which made this segregation of uses possible.

Now, however, in response to climate change and sustainability issues, we are seeking to revive this trend. Mixed use and densified living are the new mantras, but these bring people closer together and also much more in contact with dissimilar land uses.

Both New Zealand and Australia are societies with a strong ethos of private home ownership coupled with both expectations and legal right to the enjoyment of that property. The new trends of densification and mixed use have the potential (already realised in a number of instances) for our neighbours' activities to impinge on our expectations of the liveability of our property and neighbourhood.

The issue therefore, is how this micro-scale of liveability should be governed. This paper takes up this issue. It first discusses the different ways that residential property is owned in New Zealand; it then identifies the nature of inter-property conflicts that have already been the subject of complaints to councils or the subject of legal processes. The third section of the paper describes various ways by which these inter-property conflicts are managed. The fourth part of the paper provides extended discussion on the ability of common law to address conflicts and its advantages of the two underlying themes in this area – "live and let live" and how "our expectations must vary according to the circumstances".

## **2. PROPERTY TYPE AND OWNERSHIP CONTROLS**

### **2.1 Property Type Constraints**

Planners and developers use property titles to best design and build new developments. Title types are also an affective way of quelling arguments before they arise and regulating the relationships between neighbours. Fee simple properties have very few limitations on them in terms of neighbours; they basically allow a person to do what they like on and above their own property within "ordinary use and enjoyment of [his] land and the structures upon it". (Bernstein of Leigh (Baron) v Skyviews and General Ltd, 1978)

Cross-lease and unit title properties however are constrained by their multiple ownership factors. For owners of cross-leases to do anything to "their" property they need to have the consent of the leaser (or other owner of the property). Cross-leases generally require the holder of the cross-lease to keep the interior of their houses in good repair also. The major issues that cross-leases raise are the need for a working, flexible and tolerable relationship with the other leaser as well as careful negotiation of insurance documents to ensure lack of compliance by the other leaseholder.

Unit titles were introduced to New Zealand in the early 1970s when it became apparent that that cross-leases were an unsatisfactory governance tool for large numbers of property owners. Unit titles provide a formalised mechanism for governing the relationship between property owners. The Unit Titles Act 1972 dictates that a body corporate be formed in any development which is built as unit titles. Unit titles are preferable to cross leases because they confer individual ownership of the units on the owners, and all owners own the "common property" of the development together. Unit titles do require a significant amount of administration, which can limit the effectiveness of the body. The benefits reaped by the owners under the body corporate will not always be equal.

### **2.2 Certificate of Title Constraints**

Easements and covenants are the main property type constraints in New Zealand and Australia. Easements are more onerous on landowners than licences and contracts in that they

bind successors in title. Easements are granted by the original landowner to the benefit of others, and place either a positive or negative requirement on the landowner – a positive easement is a right of way for example, while an example of a negative easement is the right of adjacent landowners to light and views.

Easements can be rather restrictive, especially as they bind successors in title, and while the intention at the time they were established may have been *good*, in future years the bundle of rights given to another may become restrictive. The most common types of easements in New Zealand and Australia are rights of way, easements of support, easements of light and air, and easements of water and drainage.

Covenants are a promise made on the title deed, and historically did not pass with the land. However the Property Law Act 1952 ensured that promises that are positive (requiring the landowner to do something) or that are to the benefit of another run with the land.

While covenants and easements are a somewhat arduous process for ensuring certain activities and circumstances are preserved they tend to be difficult to defeat without judicial action, and even then they are generally found to be binding. This makes them an effective means for developers and planners to use to ensure properties are used in the way they are intended to be.

As well as using covenants and easements as constraints on property use, it should also be remembered that occupiers and owners will impose their own restrictions, especially through rules which are imposed on joint owners and people with concurrent interests in land, and residential tenancies.

### **3. JUDICIAL GOVERNANCE**

A large basis of residential development and general day-to-day living in New Zealand is governed by the Resource Management Act 1990 (RMA). The RMA is a permissive statute, which is a direct contrast to the preceding Town and Country Planning Act which was a restrictive statute. The RMA allows residents to do whatever they please with their land as long as it does not contravene the Act; and the Act makes residents take responsibility for their actions on their own property and any effects on others.

As well as statutory control on residential activities there are common law restrictions which have been developed over the last 100 years. The majority of civil actions brought to the courts regarding neighbourly disputes are tort actions. A tort is a "civil wrong" other than a breach of contract or trust, and the most common tort action brought in neighbourhood disputes is "nuisance".

Nuisance in New Zealand is defined as "an activity or condition which unduly interferes with the use and enjoyment of land ... the conduct of a wrong-doer may not necessarily or usually be unlawful" (Hawkes Bay Protein Limited v Davidson, 2003). While judicial action may seem an extreme process to some, the history of case law indicates the value that New Zealanders place on their enjoyment of their own property. As Stephen Todd points out in his review of the common law, for nuisance law to effectively govern residential areas, and to allow further growth and development, a little "give and take" is required as well as understanding and employment of "live and let live" principles (Todd, 2005).

Examples of the types of judicial action that have been taken are of interest to planners and developers in that they should seek to comply with set precedents as well as bearing in mind the nature of such actions.

One of the more relevant nuisances to planners is the nuisance which trees can produce. Case law shows that both overhang and roots can raise nuisance actions. *Morgan v Khyatt* (1962) provided that for trees to be considered a nuisance they need to materially affect the claimants' enjoyment of their property. It was also upheld in *Morgan v Khyatt* (1962) that it is nuisance when a landowner allows an "offensive thing" to remain on their property and somehow damage someone else's property – in this case tree roots, from trees not planted by the current landowner, damaged foundations on a neighbour's property; and the current landowner was held liable for nuisance as they allowed the "offensive thing" to remain on the property, continuing the nuisance. Allowing the "offensive thing" to remain on the property has been affirmed as a reasonable basis for nuisance in a number of New Zealand and Australian cases (*Chen v Cornwall Park Trust Board*, 1997; *French v Auckland City Corporation*, 1974; *Goldman v Hargrave*, 1967).

Perhaps not so applicable to purely residential neighbourhoods, but of increasing interest in mixed-use type neighbourhoods; the nuisance of odour has been litigated in New Zealand. In *Hawkes Bay Protein v Davidson* (2003) a case was brought regarding odour contamination from an offal and blood processing plant. Judge Gendall made it clear that different "sensitivities" should be used when assessing nuisance claims in residential areas and in industrial areas. This is of particular interest to planners with the recent trend of mix-used urban planning and the implications which may flow on from that.

With the rise of "green infrastructure" and other energy saving, and cost effective infrastructure comes innovation and changes to infrastructure. What should be remembered in development of these buildings is that nuisance actions can be taken against infrastructure. *Bank of New Zealand v Greenwood* (1984) shows that reflective glass can create a nuisance; in this case reflective glass caused the sun to give a dazzling glare that was found to be a nuisance. The way a nuisance is determined is by inference of what a "reasonable person" would tolerate.

Nuisance claims have also emanated from situations where a tunnel under another property caused damage (*Clearlite Holdings Ltd v Auckland City Corporation and Another*, 1976), and damage to livestock from a harmful substance which was left on the defendant's property (*Paxhaven Holdings Ltd v attorney General*, 1974). Since these decisions in the 1970s there has been academic criticism of the judgements and it is unclear whether such cases would be decided on nuisance in the future (Todd, 2005).

The doctrine of *Rylands v Fletcher* (1868) is another aspect of nuisance law which planners, developers, and property owners need to be aware of. *Rylands v Fletcher* (1868) actions occur when a property owner accumulates on their property a non-hazardous object, which, due to some action or event, become hazardous and causes damage to neighbouring properties. The classic example of this situation is where someone has a stream, reservoir, lake, dam or similar on their property which due to some event floods other property.

The Australian judiciary have incorporated *Rylands v Fletcher* actions into their general area of nuisance law (*Burnie Port Authority v General Jones Pty Ltd*, 1994), but the New Zealand

Courts have not made decision on the area of such actions. The more recent cases brought under the doctrine where determined to have failed on their facts, and although having the opportunity to address the issue, the Court left the area open, without comment (Autex Industries Ltd v Auckland City Council, 2000; Hamilton v Papakura District Council, 2002; BP Oil New Zealand Ltd v Ports of Auckland Ltd, 2004).

There has been some recent discussion of privacy becoming a nuisance action (Burrows in Todd, 2005), and this of particular interest as urban forms become denser, and closer living becomes the norm. While there are currently not Australasian examples of this area of law, it should be remembered due to its potential.

#### **4. HIGH LEVEL GOVERNANCE**

The high level governance of residential living and urban development in both Australia and New Zealand has been widely studied and discussed. These mechanisms of governance are hugely important as they provide national synchronisation of development as well as standards and requirements. As is well known national statues regulate the country's development and often delegate governance responsibilities to local authorities. Through local and district plans these territorial authorities regulate aspects of residential living such as fence height, site coverage, building height, air quality, river and water management.

Looking at the complaint reports received by the local and regional councils throughout New Zealand there is definite themes in urban areas and rural areas as to what people complain about. The complaints and reasons for complaints in the urban areas are a likely indication of what importance residents place on their vicinity and amenities.

#### **5. PRACTICAL SOLUTIONS**

Having established the different mechanisms by which residential living can be governed, it must be considered which mechanisms are of most use to developers and planners in growing vibrant pleasant communities in which residents want to live.

Densification of urban areas is, at this stage, taking the form of multiple unit properties. In New Zealand the current legal management of these forms is undertaken in unit titles. While this is effective in creating a body corporate and a governing body, it can be cumbersome and has proven ineffective when there are a large proportion of rental properties in the complex. Cross-leases are very ineffective in large developments and are quite unmanageable in terms of structure. At this stage there is little other ownership structure that developers and planners can use, so unit titles should be employed in the most effective form, and with comprehensive legal advice.

Planners and developers also need to be very aware of the potential for nuisance actions under tort law should their designs cause nuisance to neighbours and other residents. Both the design and structure of the buildings need to be considered as well as the items which are planted and placed on the property.

#### **6. CONCLUSIONS**

The importance of individual property management through legal title as well as management of structures on the land is very important in building sustainable cities of the future. These aspects of property management need to be considered in light of the national guidelines that Parliament passes in statutes, and the local regulations implemented by territorial authorities. There are numerous scales of importance and it is the developer and planners job to balance these concerns in a way that addresses all levels of the puzzle.

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