

Are restrictive covenants or easements hampering your development?

Restrictive covenants are commonly applied in modern subdivisions to control what can be built in the development. But what happens when those covenants, or any easements registered to the title of your property, prevent you from developing your property as you wish?

A restrictive covenant prohibits or restricts certain activities on a property (for example, restricting the use of certain building materials and colours).

An easement provides a right for one property owner to carry out some form of activity on another lot (for example, to convey electricity over another property).

Many historical easements and covenants will no longer be appropriate for modern zoning and development standards. Further, registered easements and covenants can prevent the completion of modern developments.

So, how can you get rid of those instruments from the title to your property so you can develop your land?

Applications under the Property Law Act 2007

Section 317 of Property Law Act 2007 (**Act**) provides that the Court may make orders modifying or extinguishing an easement or land covenant.

Such applications can only be made by the owner of land burdened by easements or covenants.

The Court may make orders modifying or extinguishing the easements or covenants (either wholly or in part) if it is satisfied that at least one of the following grounds has been made out:

- (a) since the particular instrument was created, either:
 - (i) the nature or extent of the use being made of the benefited or burdened land has changed;
 - (ii) the character of the neighbourhood has changed; or
 - (iii) there have been changes in "other circumstances" that the Court considers relevant; or
- (b) the continuation of the Easement or Covenant in its current form, would impede the reasonable use of the burdened land in a different way or extent, from that which the original parties would have reasonably foreseen at the time of its creation; or
- (c) all entitled persons have agreed to the modification or extinguishment, or they have abandoned or waived their rights to do so; or
- (d) the proposed modification or extinguishment will not substantially injure any person entitled; or
- (e) in the case of a covenant, the covenant is contrary to public policy or to any enactment or rule of law; or
- (f) in the case of a covenant, it is just and equitable to modify or extinguish the covenant, wholly or partly.

Where one or more of the elements set out above have been established, the Court will then consider whether it is appropriate to exercise its discretion to make the orders sought.

The Court of Appeal recently confirmed in *Hurlimann v Lilley* [2023] NZCA 173 that applications made under section 317 of the Act require the Court to apply the following two stage assessment:

1. have one or more of the grounds in section 317 been made out?
2. if so, is it appropriate for the Court to exercise its discretion to grant the orders sought?

Are restricted covenants or easements hampering your development? (Continued)

It is also possible for easements or covenants to be removed with the agreement of all affected parties. We have experience negotiating that process, and in making the necessary applications, if required.

Your next steps

Please contact us to discuss if you have any concerns or questions about:

1. whether there are any easements or covenants registered to the title of your property;
2. the impact of any easements or covenants registered to your property, and whether these instruments may prohibit you from developing your property; and
3. how to remove or modify the easements or covenants registered to the title of your property.

We can also assist you if you have any concerns that a property owner is acting in breach of a restrictive covenant or easement right. We can discuss with you how to enforce that restrictive covenant and/or easement right.

Want to know more?

If you have any questions or would like to please contact [Simon Munro](#) or [Anna Davidson](#) to discuss.