

Weaponising Covenants in Gross

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The housing crisis. It's near impossible to watch the news, listen to the radio or read any news site without catching something about the housing shortage. In May, Auckland economist Satish Ranchhod said that New Zealand needs to build approximately 26,000 new homes per year over the next five years to combat this shortfall and the expected population growth.

As a measure to combat this, the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 was given royal assent in December of last year. This automatically affects Tier 1 cities (Auckland, Hamilton, Tauranga, Wellington and Christchurch), allows for Tier 2 environments to adopt these standards if there is 'acute need' for more housing or Tier 3 environments to apply to the Ministry for Environment to adopt the standards.

The Amendment Act allows for three storey and multi unit dwellings to be built in most residential areas in Auckland, Hamilton, Tauranga, Wellington and Christchurch without the need for a land use resource consent. If Dunedin and Queenstown have an 'acute need' for more housing, the density requirements in their respective district plans may be altered. From August 2022, all district plans must be updated to reflect these standards.

So what's the catch here? Some academics are concerned that these requirements may be curtailed by residents who seek to maintain the aesthetic and quiet nature of medium density neighbourhoods, especially those located in wealthier areas with large homes and private gardens. One way of circumventing the changes to district plans is for property owners to register covenants in gross over a property or properties in perpetuity.

Land covenants are commonplace in subdivisions and often have the effect of controlling land use to promote certain qualities within a neighbourhood increasing the value and desirability of the area. These covenants regularly prevent further development and set height restrictions and boundary setbacks over and above what the operative district plan may provide for (and take precedence over). The Land Transfer Act 2017 amended the Property Law Act 2007 to permit the registration of land covenants in gross. This meant that covenants can now be registered on a title between the owner of a property for the benefit of a person or entity rather than the owner of another property.

There are currently no restrictions in place to stop a group of neighbours creating a residents' association for the purpose of registering a covenant in gross with maximum density and height restrictions on each of their titles with no expiry date. This would bind

successive property owners to prevent high density development in the area. Removal under the current rules would be extraordinarily difficult, requiring the consent of every property owner subject to that covenant or a High Court application to extinguish it.

The vast majority of existing land covenants are registered over titles that issued within the last 30 years which are often located in more affluent areas. These covenants coupled with the potential for property owners to come together to register covenants in gross could have the effect of upmarket areas being able to roadblock planning regulations in favour of private ordering pushing the higher density development into lower socio-economic areas.

While the likelihood of covenants in gross being weaponised to counteract district plan changes may be small, it will be interesting to see whether the government enacts legislation to prioritise district planning or to allow for easier routes to modify or extinguish covenants in future. For comparison, in some states in Australia, district planning rules trump private covenants and in England, the ability to extinguish or modify covenants is much easier.

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