

We hope you enjoy reading this Spring edition of *Property Speaking*, and that you find the articles both interesting and useful.

To talk further about any of the topics we've covered, or indeed on any property matter, please don't hesitate to contact us – our details are on the right.



Subdivisions

Steps to take for a successful project

Subdivisions are more common than you think. A subdivision can range from the carving up of hundreds of acres of rural land for housing, developing land in a prime commercial area, selling half your quarter-acre section or simply wanting to extend your boundary a few metres. Whatever the scale of your subdivision, there is a common thread of stages to be ticked off – we explain inside.

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The secret lives of tenants

The 'KFC test' and tenant privacy

Following publicity in 2018 that some property managers were using the 'KFC test' to vet prospective tenants, landlords' protection of their tenants' privacy has come under scrutiny by the Privacy Commissioner. Any unlawful intrusion into your tenants' private lives can be a costly mistake. If you are a landlord, it is timely to ask yourself, "How can I best protect my property without risking a privacy breach?"

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Building report conditions

If you have read an agreement for sale and purchase, you are likely to have seen the term 'building report condition'. But do you know what a building report condition actually allows you to do, and what it doesn't?

AML one year on

By now property purchasers will be aware of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, generally known as 'AML'. Since 1 July 2018, this legislation has imposed obligations on most of the professionals you deal with when you're buying property. We reiterate what information you must supply to us, as well as explaining why this is so important.

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Getting your land ready to subdivide

The first thing is to line up your professionals – discuss the project with us, arrange finance with your bank, consult your accountant and speak with a surveyor. If you are undertaking a large commercial development, you may want to line up buyers early on. A real estate agent can help with this so that you avoid cashflow issues half way through.

Next, you need to check that your local council's district plan will allow you to subdivide your property. Your surveyor prepares a scheme plan to submit to the council for resource consent. A resource consent for subdivision may be issued by

your council in as short a timeframe as 10 working days from its receipt, but the process can also take years to resolve if the application is particularly complex.

If your resource consent is issued, it will generally have a list of conditions and requirements to be completed before the council will sign off the subdivision. You can include a condition in your agreement that allows the seller and buyer to approve the resource consent before work begins. The council's signoff is known as 's223 and 224 approval'. The council's conditions and requirements can include:

- » Your surveyor preparing a Land Transfer Plan (LT Plan). This plan shows the size of each section and the location of any easements to be registered
- » Completing earthworks and having the building platforms designed by suitably qualified people
- » Registering certain easements
- » Completing driveways to the council's specifications, and – in some cases
- » Amalgamating certain titles where two separate pieces of land are required to be held in one property title.

Once s223 and 224 approval is received, your LT Plan can be lodged with Land Information

New Zealand (LINZ); this can take up to 15 working days. LINZ will issue your titles and transfer to your buyer, if you have one already lined up.

Drafting your sales agreement

The Agreement for Sale and Purchase dictates the whole subdivision process. You must include specific conditions to cover the various steps involved, provide the dates or timeframes for the completion of each step, and identify which party is to cover the subdivision costs. Generally the costs are met by the landowner. In some cases, however, the buyer/s are expected to cover these.

Sometimes we receive agreements that have been prepared and signed by the parties that don't include the necessary subdivision clauses. When this happens the sellers, the buyers and their lawyers must either revisit the agreement or draft a new document. If we are involved early, it could save you a headache later on.

Easements and covenants

As well as all the above, you should also consider the need to register any easements or covenants.

An easement is a right on, over or through someone else's land such as a shared driveway or the right to lay power and phone lines, be it on, over or through land.

Your council may require you to include easements as part of the resource consent. If the correct easements aren't in place you could find that the section you have sold has an electricity connection, but the purchaser has no right to use it.

Covenants are a type of promise between landowners. By using covenants you can restrict what the buyer does on their land.

Common covenants include restricting the size, colour and value of houses being built in the subdivision. For a rural subdivision, you can restrict the types of animals being kept on the land such as no pigs.

Be well-prepared

Subdivisions can be successful commercial projects if you are well-prepared and work hard. However, they can cause nightmares when things don't go according to plan or you miss a step. We deal with subdivisions every day and can guide you through the steps – come in and talk to us. ■

The secret lives of tenants

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The 'KFC test'

In a submission made to a Parliamentary Select Committee in July 2018, an Auckland property manager admitted to requesting prospective tenants' bank statements and referring to the amount of their fast food spend as an indicator of whether the tenants could afford the rent. Dubbed by the media as the 'KFC test', the property manager's actions were criticised by the Assistant Privacy Commissioner as potentially "unfair or unreasonably intrusive".

Privacy Act 1993

To address practices such as the 'KFC test', in May 2019 the Privacy Commissioner released these [guidelines](#) that were intended to help landlords in meeting their obligations under

the Privacy Act 1993. Following concerns that some aspects are unduly restrictive or confusing, these guidelines are currently under review.

Despite the review, however, the basic legal principles in the Privacy Act 1993 concerning how you can collect and use private information remain. In a rental property context, these principles cover not only information for assessing a tenant's application to rent your property, but also information once your tenant is renting your property, such as photographs during property inspections.

The principles do not stop you from collecting the information necessary to protect your investment. They do, however, place some restrictions on how much and what type of information you should collect, and how you use that information.

In general, when collecting or using information about your tenants, there are some questions you should ask yourself:

- » Has the information been collected for a lawful purpose, for example, assessing a tenant's application or undertaking a property inspection?
- » Is the information the minimum amount of information I need for that lawful purpose?

- » Was the information provided to me by my tenant directly or otherwise by a third party with my tenant's consent?
- » Have I ensured that my tenant's information cannot be accessed by, or disclosed to, third parties without my tenant's consent?
- » Did I take reasonable steps to check the accuracy of any information I received about my tenant?
- » Have I only used my tenant's information for the purpose for which it was collected?

If the answer to any of the above questions is 'no', you risk breaching the principles of the Privacy Act 1993. Any breach of those principles can be the subject of an investigation by the Privacy Commissioner and, in the case of serious breaches, can lead to you being ordered to pay compensation to your tenant.

Residential tenancies legislation

Aside from the rules about the use of information about your tenants, your tenants are also entitled to protection of their privacy in your property. This includes their exclusive right to possess and to access your property – subject to a few exceptions.

You can still keep a watching eye on your property as long as you follow the notice requirements in the Residential Tenancies Act 1986.

Broadly, you can enter your property without first giving notice to your tenant in an emergency or if your tenant agrees at the time. In other situations, you must give appropriate notice to your tenant. The length of notice required depends on the reason you need to enter your property. For example, you must give a minimum of 24 hours' notice to enter your property to carry out necessary repairs and maintenance, and you must give a minimum of 48 hours' notice to enter your property to carry out an inspection.

Again, your tenant can seek compensation in the Tenancy Tribunal if you enter onto your property without appropriate notice.

Once the Privacy Commissioner's guidelines for landlords are re-released, clearer information will be available on how you can protect both your property and your tenants' privacy.

Until then, we can help with any specific questions you might have on how to lawfully vet prospective tenants or avoid infringing on your existing tenants' privacy. There is also general information about tenants' privacy rights at the Privacy Commission [here](#) and at Tenancy Services [here](#). ●

Property briefs

Building report conditions

If you have read an agreement for sale and purchase, you are likely to have seen the term 'building report condition'. But do you know what a building report condition actually allows you to do, and what it doesn't?

A building report condition gives you, as the buyer, the opportunity (10 working days is the standard, but this can be lengthened or reduced) to have a suitably qualified building inspector go through your soon-to-be-settled property and report on various elements of the building including the integrity of the construction materials used and its weathertightness.

The standard building report clause requires the seller to allow the inspector reasonable access for the inspection. There are some caveats to the inspection; it must be non-invasive so the inspector cannot drill into walls, for example. Also the inspector may not move furniture or any other items.

It's best to obtain a builder's report after your agreement is signed and make it a condition. If you organise a report before you sign the agreement, the seller could sign with someone else before you submit your offer. The seller can also stop your building inspector from entering the property.

The standard building report clause allows a buyer to cancel the agreement if the building or any improvements are unsatisfactory to the buyer as long as the considerations are based on an objective assessment and on a builder's report that is prepared in good faith. The buyer is also required to provide the building report to the seller, if requested, and the seller can then argue your reasoning for cancelling the agreement. You cannot, however, use the building report condition as an excuse to back out of the agreement if you simply change your mind about the purchase!

The standard clause is balanced in favour of both the seller and the buyer. We can, however, draft more robust clauses if required.

Whether you are buying or selling, do talk to us before you sign the agreement; we may be able to amend or replace the clause to suit your situation better. Remember, if there is something seriously wrong with the property and you don't have a building report clause in your agreement, then you won't be able to rely on the condition to cancel the agreement. ●

AML one year on

By now property purchasers will be aware of the Anti-Money Laundering

and Countering Financing of Terrorism Act 2009, generally known as 'AML'. Since 1 July 2018, this legislation has imposed obligations on most of the professionals you deal with when you're buying property. AML affects your bank, accountant, lawyers and conveyancers. Since 1 January 2019, real estate agents must comply with this legislation.

What is AML about? AML is the government's response to international pressure to help combat money laundering and the financing of terrorist organisations. All your professional agents must now have evidence of your identity.

Evidence: If you are buying a property in your individual capacity, we must have a copy of your passport or driver licence, as well as a copy of a bank statement, rates notice or utility bill that proves you live where you say you do. Depending on the circumstances, we may ask about the source of your funds for purchase (see below).

If you are purchasing on behalf of a company, we need the above documents (ID and address verification) for each director and each shareholder, and your company address.

If you are buying for a trust, we need the above information for the settlors,

the appointers, each trustee and any named beneficiary, and your trust address.

For both trusts and companies, we must know the funding source for the purchase and where the funds are currently held.

Source of funds for the purchase: If you are using funds from a previous property you have sold to fund this purchase, we may have to ask to see your sale agreement. If you are using an investment or savings from working, we may ask for a bank statement, your employment agreement or to see a set of financial statements. If you have received a monetary gift or an inheritance, we may ask to see the deed of gift or the deceased's will.

Why should we comply? Under AML, if you don't provide us with the above information, or we believe that your transaction is suspicious for other reasons, we must file a report with the Commissioner of Police. If we don't do this, we could be fined up to \$5,000,000 and/or be sent to jail.

Complying with AML has added a huge layer of compliance to any property purchase. Irritating as it can be, particularly if you have been a client of ours for years, we must obey the law. If you would like to talk more with us on AML, don't hesitate to ask us. ●