



March 2022

## New case law offers solution for subdividing landowners to create public roads

In this article we look at a potential solution where subdividers need to vest land as road, where the land is subject to covenants.

It has become increasingly common for landowners carrying out subdivisions to seek to vest roads where the land is subject to existing covenants. In order to do so, s 224(b) of the RMA requires the subdivider to obtain the written consent of all the covenantees to the vesting of the roads for the “new” subdivision.

However, where there are very many covenantees whose consent would be required, commonly arising where mutual covenants affect all the lots under the earlier subdivision, a practice arose of Councils agreeing to accept the dedication of the road lot by way of transfer, subject to the covenants in question, to avoid the practical difficulties of the subdivider having to obtain those consents. LINZ formerly accepted that practice and registered the transfers in question, to enable the road lot to become legal road.

However, that practice is no longer available. In October 2020, the Registrar-General of Land (**RGL**) determined that the ‘transfer and dedication’ process could no longer be used to vest land as road in local authorities, when subdividing, and instead the process in section 224(b) of the RMA must be used.

Given that it can sometimes be impractical to obtain the consent of all covenantees, the only realistic option in most cases is to seek an order of the Court to modify or extinguish the covenant under section 317 of the Property Law Act 2007 (**PLA**).

The recent case of *Round v Palmerston North City Council* follows a number of other decisions where the Courts have been prepared to grant the application under section 317 to enable the road land to vest.

### The decision in *Round v Palmerston North City Council*:

In *Round*, the landowners, the Rounds, agreed to sell their land to L C Builders Limited (**LCB**) for development. LCB wished to vest part of the land in Palmerston North City Council as road and part as reserve on subdivision.

However, the land was subject to covenants from 1990 which required the landowners to contribute to maintaining a nearby private road, Schnell Drive, and to comply with certain building standards. The Council did not wish to take the land subject to the covenants, and the Rounds had been unable to obtain consent from the numerous covenantees.

The Rounds applied to the Court to have the covenants extinguished over that part of the land to be vested in the Council under section 317 of the PLA.

The Court noted that in 1990, when the covenants were drafted, the parties would have expected the transfer and dedication process to apply, but that given the RGL’s determination, a section 317 application was now necessary. Section 317 contains several factors which the Court must consider when deciding to modify or extinguish covenants.

In weighing these factors, the Court noted that the nature and use of the land had changed since 1990. When the covenants were registered there were only eight properties that had the benefit of the covenants. By the time of this case, the land had been further subdivided into 50 titles.

Further, the proposed subdivision had alternative access to the main road, so the properties in it had no need to use Schnell Drive, and therefore should not be expected to contribute to

its maintenance. Similarly, for the land to be vested as road and reserve, the covenants' building standards were irrelevant.

The Court accepted that the covenants were preventing the reasonable use of the land in a way that the covenants' drafters would not have expected, and that removing the covenants would not substantially disadvantage any covenantees. It concluded that removing the covenants was just and equitable.

The Court also decided that the orders to remove the covenants should not be released until the RMA section 224 certificate was presented to the Registrar. This was a practical precaution to reassure the Court that the interests would be removed simultaneously with subdivision occurring.

### **Lessons from Round v Palmerston North City Council:**

Round has confirmed that the process under sections 316 and 317 of the PLA may be appropriate when a party wishes to vest road that is subject to covenants but the covenantees refuse or are unable to consent to surrendering the interest.

It provides an example of how the section 317 factors apply to the Court's decision to modify or extinguish covenants, and indicates that the Court may be more willing to remove covenants given this is now the only realistic way for the land to be vested in local authorities free of those interests, where consent cannot practicably be obtained.

Lastly, the decision in Round indicates that careful drafting of orders, to ensure that covenants are removed only over the land to be vested and that removal is linked to subdivision may reassure the Court that it is appropriate to remove the interest.

***Disclaimer:** This article is only intended to provide general comments on the subject matter. Specialist advice should be sought about your specific circumstances.*

*Credit to Madeline Ash for assistance in preparing this article.*

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