

### Christmas office hours

Evans Bailey will close for Christmas at 4pm on Thursday 22 December 2005 and re-open at 8.30am Monday 9 January 2006

*Wishing you all a Merry Christmas and safe and happy holidays*

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### Building Compliance and The Building Act

You may recall an earlier article about the Building Act 2004 ("Act"). One of the areas in which its impact is being felt is by vendors selling properties on which building work has been undertaken. Purchasers often require evidence of compliance with the Act.

#### Building Code

One of the fundamental principles of the Act is that all building works must comply with the building code. Compliance with the building code is mandatory regardless of whether or not a building consent is required for the work. Even for minor building projects, householders need to check whether or not the building code is relevant and if it is, must ensure that the building work complies with the requirements of the code.

#### Evidence of Compliance

The most common way a building owner may provide evidence that work complies with the building code is by obtaining and being able to provide the purchaser with a Code Compliance Certificate ("CCC"). A CCC is issued where a building consent is applied for before building work is commenced. The CCC effectively provides that the consent authority is satisfied on reasonable grounds that the building work complies with the building consent. It is the building consent that is crucial in ensuring that the performance standards set out in the building code are met by the finished building product.

A building consent will lapse if work does not commence within 12 months of the date of issue. However, it appears that commencement of work within the first 12 months after the building consent is issued preserves the consent indefinitely.

#### Certificate of Acceptance

Sometimes a purchaser will ascertain that building work for which a building consent and CCC should have been issued, has not been completed in accordance with those requirements. The Act provides that in that situation a building consent authority can issue a certificate of acceptance.

A certificate of acceptance certifies, to the best of the building consent authority's knowledge and on reasonable grounds, that, as far as it could ascertain, the building work complies with the building code.

Obviously this certificate conveys a far lower degree of quality assurance than a building consent or CCC. It replaces what was previously referred to as a "safe and sanitary" letter which followed an inspection by the Council certifying to the effect that the building was deemed to be neither unsafe nor unsanitary.

#### Building Warrant of Fitness

Another matter which may require consideration when purchasing a commercial building is whether or not a building warrant of fitness is required and is up to date. If a building contains systems or services that require ongoing maintenance in order to function at the level demanded by the building code, a compliance schedule must be established in regard to those systems to ensure that maintenance is routinely carried out. The compliance schedule sets out the inspection, maintenance and reporting procedures required to ensure that those systems meet performance standards. The building warrant of fitness confirms that the inspection, maintenance and reporting procedures set out in the schedule

have been complied with for the foregoing 12 months. There are significant fines for a building owner who fails to obtain a compliance schedule or to display an up to date building warrant of fitness.

The Auckland District Law Society form of Agreement for Sale and Purchase of Real Estate (7th edition(2)) has been updated to incorporate the terms of the Act. If you require further information in regard to a specific building or a particular point mentioned in this article then please consult us. ●

## Recognising the Rights and Views of Children

On 1 July this year the Care of Children Act ("Act") replaced the Guardianship Act. The Act extends the principle that children's needs should be of primary importance in proceedings before the Family Court and increases children's rights of participation in those proceedings.

### Child's Welfare Paramount

When making a decision under the Act, the court must ensure that the welfare and best interests of the child are the first and paramount consideration. The Act provides guidelines as to what constitutes the welfare and best interests of a child. Those guidelines are consistent with the principles of the United Nations Convention on the Rights of the Child (UNCROC).

The Act emphasises agreement rather than litigation, with parents encouraged to share responsibilities and to reach agreement as to their child's care, development and upbringing. Emphasis is also placed on the child's right to know and be cared for by both parents.

One of the key aims of the Act is to involve children in decisions that affect them. The child must be given a reasonable opportunity to express his or her views, and those views must be taken into account. Ways in which the court will achieve this include using the lawyer appointed to represent the child, obtaining a specialist report from a child psychologist or by the Judge talking to the child.

### Parenting Orders

The Act also increases the ability of the Family Court to enforce parenting orders. The court will have the power to admonish the person breaching the order, vary an existing order, require the parties to attend counselling, or order the person in breach to enter into a financial bond to deter further breaches. The court can also issue a warrant that gives police the power to take possession of a child for the purpose of enforcing an order, but this is considered a last resort.

Parents deliberately breaching parenting orders could face up to three months in prison or a maximum fine of \$2500.

### Open Court

The previously closed environment of the Family Court will be opened up, although this will still be subject to certain restrictions. The reporting of proceedings, with identifying details removed, will also be allowed.

The key principle here is that justice must not only be done, but be seen to be done.

### New Terminology

The Act also removes all reference to the terms "custody" and "access". These are replaced with "day-to-day care" and "contact". Contact includes contact by writing, email, telephone as well as direct face-to-face contact. One of the aims of the new terminology is to remove the implications of control and power associated with the term "custody".

### Summary

In conclusion, the new Act aims to move the focus away from parental rights, to parental responsibilities, recognising the child's right to participate in decisions affecting him or her and to ensure that those views are taken into account. The child's welfare and best interests must be the paramount consideration. ●

## Noisy Neighbours – What are your Rights?

Most of us are used to living in an environment where there is a certain amount of noise. However, there are also times when noise can become excessive and can interfere with the peace, comfort and convenience of other people.

### How do you make a complaint about noise?

The Resource Management Act 1991 ("RMA") imposes obligations on occupiers of land to ensure noise does not exceed a reasonable level. The RMA deals with problems with excessive and unreasonable noise and provides various remedies. The environmental health sections of local district or city councils administer the noise control provisions of the RMA.

### What is excessive?

Your local authority will not take action unless it considers the noise to be excessive or unreasonable. Excessive noise is defined as any noise that is 'under human control and of such a nature as to unreasonably interfere with the peace, comfort, and convenience of any person (other than a person in or at the place from which the noise is being emitted), but specifically excludes noise from aircraft in flights, vehicles on the road and trains.

### What is the process?

Local authority enforcement officers can issue excessive noise directions or abatement notices to control noxious elements, adverse effects on the environment or unreasonable noise. When a complaint of "excessive noise" is made to the local authority an enforcement officer will then be sent to the address. If the officer considers the noise to be excessive, either an excessive noise direction or an abatement notice will be issued to the occupiers of the address.

# LEGAL *lease*

Excessive noise directions are short-term notices that last for 72 hours. These notices are usually issued in cases where the problem is easily resolved, for instance, turning down the volume dial of a stereo if it is too loud. Abatement notices last indefinitely until either the council is willing to remove them or until an appeal is lodged and is decided upon by the courts. Such problems are usually more serious and occur over a longer period, for instance, industrial noise.

If a noise direction or abatement notice is ignored the officer has the right to enter the property and seize and impound the source of the noise.

A policeman must accompany the officer if the building is a dwelling house. The officer can also issue an infringement notice imposing instant fines between \$500 and \$750, or the occupier may face a penalty of up to \$10,000 if successfully prosecuted.

## So...

If you suffer from noisy neighbours, and it cannot be satisfactorily resolved by talking to your neighbours (or if you do not feel comfortable doing so) contact your local council for assistance. ●

## Access onto Private Property – Your Rights and Obligations

The new Government has indicated it may not proceed with a proposal to provide public access over farms and instead may look at alternatives including negotiation with land owners to improve access.

The news has been welcomed by Federated Farmers who say they will be taking a keen interest in the framework for negotiating rights of access.

### Rights of access

So what are some of the issues surrounding your rights and liabilities with visitors on your land?

Network Utility Operators can request access to private land. They are usually involved in providing services such as gas distribution, telecommunications, electricity distribution, water supply and drainage or sewage systems.

Before entering onto land, a Network Utility Operator should provide information in writing to the owner. This information should include:

- the reason entry is required
- any rights the land owner may have to object to the entry
- a description of the work to be done on the land
- who will be undertaking the work
- confirmation that any damage caused will be remedied or paid for
- a complaints referral procedure

You do have the right to refuse entry to some operators but you must

allow others access in certain circumstances. If you are unsure as to which situation applies, seek advice from your lawyer.

### Health and safety

The Health, Safety and Employment Act 1992 ("Act") imposes obligations on land owners regarding access by third parties onto their land.

The focus of the Act is on identification of hazards in the work place. Residential premises are excluded from the definition of workplace so the Act's provisions do not apply to most urban residential properties nor does it apply to those parts of a farm which are used for domestic accommodation.

The purpose of the Act is to ensure that all practical steps are taken to ensure the health and safety for all persons on the property.

Land owners whose properties are a place of work are therefore obliged to take steps to ensure the following people are not harmed by hazards:

- people in the vicinity of the place of work
- employees, contractors and subcontractors
- people who are on the land with the owner's consent and who have paid to be there
- customers

There are circumstances where a duty of care is not owed to visitors. This includes people visiting for the purposes of leisure, recreation and also includes trespassers.

### Have a plan

As the issues of both access and health and safety are closely linked, it is worthwhile for land owners to have a policy in place to deal with them. In particular, it would be wise to ensure that practical steps are taken to manage any existing or potential hazards on the property. ●

## Problem Neighbours – What To Do?

Problems with neighbouring trees can be a common source of tension between neighbours. Have you ever purchased a property and later discovered that your neighbour's trees will eventually block your view or prevent your property from having the benefit of sunlight?

Obstructing trees can be a major cause of property disputes between neighbours. It is a good idea to talk to your neighbour first to see if you can come to some arrangement that is suitable to both parties, such as, agreeing to have the trees trimmed or reduced in height.

However, if that doesn't work you can apply to the District Court under

the Property Law Act 1952 ("Act"). Section 129C of the Act gives the Court the power to order removal or trimming of trees injuriously affecting neighbour's land. Specifically, section 129C(6) includes factors that the Court may take into consideration in determining whether a tree is obstructing the applicant's view or is otherwise causing injury or loss to the applicant. These factors include the:

- Interests of the public in the maintenance of an aesthetically pleasing environment;
- Desirability of protecting public reserves containing trees;
- Value of the tree as a public amenity;
- Historical, cultural or scientific significance (if any) of the tree; and
- Likely effect (if any) of the removal or trimming of the tree on ground stability, the water table or run-off.

## Other considerations

The Court will not make an order under this section unless it is satisfied that:

- The tree is causing or is likely to cause loss, injury or damage to the applicant's life, health or property (section 129C(8)(a)); or
- The tree is obstructing any view that an occupier of the applicant's land would otherwise be able to enjoy, or is otherwise causing injury or loss by diminishing the values of the property or reducing the enjoyment of it for residential purposes (section 129C(8)(b)).

The Court will balance these considerations between the hardship that would be caused to the applicant by the refusal to make the order and the hardship that would be caused to the defendant by the making of the order. ●

## News in Brief

### Increase to Paid Parental Leave

On 1 July 2005 the maximum rate for parental leave increased from \$346 a week to \$357 a week. The increase will apply to new applicants for parental leave and those currently receiving it. The duration of paid parental leave will also increase from 13 weeks to 14 weeks by the end of this year.

### Independent Contractor or Employee: Bryson vs Three Foot Six Ltd

Remember Mr Bryson from our May/June edition? He was the onset model technician working in the film industry who was found by the Court of Appeal to be doing so as an independent contractor and not as an employee.

Mr Bryson appealed that decision to the Supreme Court who have now allowed the appeal by reinstating the original decision of the Employment Court which found Mr Bryson to be an employee.

In reaching its decision, the Supreme Court has done so on the basis that the Employment Court did not make any errors of law and that it had based its decision on the particular circumstances of Mr Bryson's

employment. The decision is however not to be treated as affecting the status of any other employee in the film industry.

To that extent, the Supreme Court has not provided the clarity hoped for on the issue, as to whether an individual is an independent contractor or an employee. It appears therefore that the issue is one which will tend to be decided on the individual circumstances of each case rather than on general principles.

### Making a Will and Relationship Property

The Relationship Property Act 1976 ("Act") was amended in 2002 to include provisions that may apply when a relationship ends on the death of one of the parties. If they do, then the surviving partner can elect whether to claim against the estate of the deceased or receive under the deceased's Will.

If the first option is chosen then the Act provides that the surviving partner will receive half of the relationship property unless there is evidence to the contrary.

In choosing to make a claim under the Act, the surviving spouse's entitlement effectively overrides the wishes of the deceased person. The claim under the Act also takes priority over other claims against the estate, for example those made under the Family Protection Act 1955.

Any person making a Will therefore needs to be aware of the options which their surviving partner has under the Act and to plan accordingly. ●



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