

# Property Speaking



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ESTABLISHED 1907

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Welcome to the Summer edition of *Property Speaking*.

We hope you enjoy reading this e-newsletter and that you find the articles to be both interesting and useful.

To talk further about any of these articles, or indeed any property law matter, please don't hesitate to contact us – our details are on the top right of this page.



## Neighbourhood subdivisions

### What is going up over the fence?

As urban land becomes more expensive, landowners and developers are constantly looking for ways to get the most out of their patch of dirt.

Adding to the equation, a housing shortage across the country has led to increasing land development and subdivision to create additional dwellings.

More recently, there has been a move to more compact multiple unit developments in many neighbourhoods.

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## Assignment of commercial leases

### When your tenant sells their business

A common question that arises for landlords owning commercial premises (or tenants leasing those premises) is what happens to the lease when your tenant sells their business. The answer to this is usually found in the deed of lease itself.

When your tenant sells the assets of their business, the lease of their premises will usually be assigned to the purchaser on the settlement date.

We offer some guidelines to landlords who have a tenant wanting to assign their lease.

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## Property briefs

### Break fees: repaying your mortgage early

If you want to pay your mortgage back early, you can. Technically, however, you will break your loan contract if you have a fixed interest rate that hasn't expired.

### Refixing your mortgage interest rate

The OCR is noticeably dropping, it may now be a good time to consider refixing your mortgage interest rate – if your lender will allow.

### Refinancing mortgages – switching to a different lender

When you refinance your mortgage, you are essentially repaying your existing loan with your lender and taking out an entirely new one with a different lender. If you do this, there are legal costs and potentially break fees involved.

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# Neighbourhood subdivisions

## What is going up over the fence?

As urban land becomes more expensive, landowners and developers are constantly looking for ways to get the most out of their patch of dirt. Adding to the equation, a housing shortage across the country has led to increasing land development and subdivision to create additional dwellings. More recently, there has been a move to more compact multiple unit developments in many neighbourhoods.

## Types of developments

Multiple unit developments have become popular with Kāinga Ora and other government or charitable agencies as they can build multiple dwellings onto a section that in the past may have been limited to a single dwelling.

Whether these types of developments on your neighbour's property are being built for social housing or privately, you may have concerns about the effect they may have on your property.

## What about my view?

Strictly speaking, no one has a legal right to a view. If you have concerns about a potential development at the property next door, you should first check the title of that property. If it is subject to any restrictive covenants that prevent certain development or subdivision, the landowner with the right to enforce the covenant could potentially put a stop to the prohibited developments. Often this will be you as the neighbouring property owner, otherwise if the covenant is 'in gross' it is enforceable by anyone.

Falling short of that, there may be restrictions in a covenant meaning that any new dwelling should comply with specific design specifications or building height restrictions that protect certain views or 'view shafts.' This may ease concerns knowing the new buildings next door should not affect your property too much.

## No covenants, no choice?

Where there are no covenants in place that restrict the developer's use of the land, the developer is bound solely by the relevant district plan and the Resource Management Act (RMA). The district plan sets out the local authority's rules and restrictions for land use and development, and any application to develop a property is determined based on its compliance with the relevant district plan.

## Consent

Where a development next door looks as though it may affect you, the developer may ask you to sign a consent. This will be either in preparation for their submission to the relevant local authority or may be a requirement set by the local authority following their application.

In either case, you do not have to sign the consent if you are unhappy with the development as it is presented. There may be a particular aspect of the design or location of the new dwellings that you don't like; sometimes neighbours can negotiate amendments to the developer's plan in consideration for their consent. Other times, you may simply not want it to proceed.

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It is important to understand that not consenting to the developer's request does not automatically mean that the development won't go ahead.

## Notification

If you are a potentially affected neighbour and you have not approved the application, the developer can request that the local authority notify the potentially affected parties of their application. At this point, you would be invited to submit your objections to the local authority for it to finally determine whether the development can take place.

In other circumstances, the relevant local authority will require that the developer notify affected parties as part of their application process. You can view the relevant district plan on your local authority's website to determine if the development next door is compliant with the various rules relating to land and new housing.

In some circumstances, the proposed development will be wholly in compliance with the district plan and have no effect on your property. Where that is the case, you may not have any grounds for an objection or even be required to be notified of the development making it difficult to raise any objection.

## RMA review

At present, the RMA is under review which is likely to result in a significant overhaul to the legislation governing land use and subdivision. Time will tell as to the effect of these changes on the rights of neighbours regarding subdivision and developments over the fence.

If you are approached by a neighbour about their development and need help to find out more about what they can do or what you can do to stop it, please don't hesitate to contact us. +

# Assignment of commercial leases

## When your tenant sells their business

A common question that arises for landlords owning commercial premises (or tenants leasing those premises) is what happens to the lease when your tenant sells their business. The answer to this is usually found in the deed of lease itself.

## Assignment of the lease

When your tenant sells the assets of their business, the lease of their premises will usually be assigned to the purchaser on the settlement date. This is documented by you (as landlord), your tenant (as assignor) and the purchaser (as assignee) entering into a deed of assignment, which will assign the rights and obligations of the lease to the purchaser of their business. Your existing tenant will usually continue to be liable under the lease for the remainder of the current lease term. The assignee will also be liable to meet the lease obligations.

Under The Law Association (previously the ADLS) form of deed of lease, your tenant cannot assign the lease without your prior written consent, which you cannot unreasonably withhold. Your tenant must demonstrate to your (reasonable) satisfaction that the proposed assignee is respectable and has the financial resources to meet the obligations under the lease. Your tenant must also be up to date with rent and not be in breach of the lease. You can also require your tenant and the proposed assignee to sign a deed of assignment, and you may also be able to request a bank guarantee or a personal guarantee from the proposed assignee.

Your reasonable legal fees relating to the assignment of the lease will usually be paid by your tenant.

## Deemed assignment

If your tenant is a company, the shareholding in that company may change. Existing shareholders may be selling some (or all) of their company shares to a third party, or transferring some (or all) of their company shares to other existing shareholders.

Where shares in your tenant's company are being sold, you will not need a deed of assignment as the tenant will remain the same. However, if those shareholding

changes result in a change in control of the company, which is a deemed assignment under the lease, your tenant is required to obtain your written consent before transferring the shares.

You will have the opportunity to assess the financial resources and experience of the incoming shareholder and propose reasonable conditions to your consent as part of the process. You, the exiting shareholders and the new shareholders will need to negotiate in relation to the release or replacement of any existing guarantees as part of your consent.

## Agreement to lease

You may not have a deed of lease with your tenant, with the terms of your lease instead documented in an agreement to lease, which is a basic document setting out the broad material terms without going into detail about the day-to-day workings of the lease (which is contained in the deed of lease). A tenant's rights and obligations under an agreement to lease cannot be assigned, so if your tenant is selling their business and wishes to assign its lease which is documented in an agreement to lease, they will first need to enter into a deed of lease with you, which can be assigned to the purchaser of the business (with your consent).

While agreements to lease can be helpful for the parties to initially agree material terms, they still technically require both parties to enter into a deed of lease reflecting those terms. We recommend that you promptly enter into a deed of lease after signing any agreement to lease so that both parties are aware of their full rights and obligations under all the terms of the lease.

## We can help

Whether you are a landlord or a tenant negotiating through an assignment of the lease, we recommend early contact with us.

If you are a landlord, we can advise on what information you should request from any proposed assignee to allow you to make an informed decision on whether you consent to the assignment of the lease.

We can help both landlords and tenants in navigating what is and isn't reasonable from each party in the circumstances. +



# Property briefs



## Break fees: repaying your mortgage early

If you are in the position to repay your mortgage early to your lender, you can. If you have a fixed interest rate that has not expired, however, you will technically be breaching the loan by repaying early.

As a result, your lender will impose a 'break fee.' The break fee is designed to compensate your lender for the interest payments it will miss out on when you repay your loan early. Consult with your lender for an estimated break fee.

How the break fee is calculated will always depend on your lender, the fixed interest rate and the remaining balance on your mortgage.

You should also be mindful that many lenders offer a 'cash contribution' payment at the start of a loan. This is a one-off payment, for example \$3,000, as an acknowledgement of you choosing them as a lender – think of it as a 'loyalty payment' for keeping your mortgage with that lender for a certain period of time, generally three or four years.

If you repay early or refinance your mortgage (or in some cases at least half of your mortgage) this will likely trigger a 'claw back.' Your lender will expect you to repay some, or all, of the cash contribution. This will be outlined in your loan documentation.

## Refixing mortgages: changing the interest rate of your mortgage

New Zealand's Official Cash Rate (OCR) is noticeably dropping. As of 9 October 2024, the OCR stands at 4.75%. Most lenders are responding by lowering their mortgage interest rates.

In light of this, now may be a good time to consider refixing your mortgage interest rate with your lender – if your lender will allow you. Alternatively, you may opt for a floating or variable interest rate that goes up and down depending on the state of the financial markets, including the movement of the OCR.

The benefit of having a fixed interest rate is certainty; you will know how much your regular loan repayments will be. With a floating or variable interest rate, the amount of each repayment may vary as the OCR fluctuates. This may be preferable for some borrowers.

Alternatively, you may want to consider having your mortgage split between a fixed rate and a variable rate.

## Refinancing mortgages – switching to a different lender

When refinancing your mortgage, you are essentially repaying your existing loan with your lender and taking out an entirely new loan with a different lender. Many borrowers do this to secure themselves a better deal, usually at a lower interest rate.

If you do this, it is important to know there are legal costs and potentially break fees involved in refinancing (more on break fees in column one). If you are unsure about the process and whether or not to refinance your mortgage, talk with your lender.

Also note that if the bank paid you a cash contribution at the start of your loan (more on this in column one) and you refinance, then you may be expected to repay at least some of it. This will be outlined in your loan contract.

If you are considering making changes to your mortgage and are unsure how to go about it, please contact us. We are happy to help. +

