

No complaints covenants

"No complaints covenants" are a voluntary mechanism used to restrain new activities from complaining about the adverse effects of an existing activity. More specifically, no complaints covenants prevent the covenantor from complaining about the adverse effects of a nearby activity. Such instruments will often include a prohibition on the owner or occupier: suing for nuisance; taking any type of enforcement action under the RMA; making opposing submissions against an application by the effects-producing landowner to obtain new resource consents or renew existing ones; and funding or being otherwise involved in any of the above (Davidson, A. (2003) "Reverse Sensitivity – Are No Complaints Instruments a Solution?", *New Zealand Journal of Environmental Law*, 7, pp203-241).

A resource consent applicant will often propose such a covenant to respond to the concerns of existing operators. A covenant may be either agreed as a condition of the consent under s108 RMA, or by private agreement, and can be registered on the title of the receiving site under s109 RMA (*Winstone Aggregates*).

It is important that no complaints covenants are carefully drafted and should provide:

- (a) an accurate description of the specific land as well as the rights provided (that is the dominant and servient lands);
- (b) an accurate description of the existing activity, e.g. the extent of current/future operations, hours of operation, noise levels legally allowed;
- (c) an acknowledgement by the registered proprietor/s of the servient land that the described activity may have adverse effects on the servient land and that that activity is entitled to be carried out;
- (d) a description of the activities that the proprietor/s of the servient land must, or must not, undertake. eg. covenant may include a prohibition on further residential or other noise sensitive development on the servient land; and
- (e) a "no complaints" clause that extends to owners, lessees, tenants, visitors or other occupiers. It must also prevent the owners etc from utilising the full extent of processes available to them to impose restrictions on the existing activity.

(Nolan, D. and Gunnell, K. (2007) "Reverse Sensitivity and 'No Complaints' Covenants", *Resource Management Bulletin*, 7(5), pp50-57)

No complaints covenants have been successfully used in a variety of situations where incompatible activities are proposed. For example, the Auckland District Plan Central Area Section 14.6.6.1 provides that building for accommodation in the Britomart Precinct will be a permitted activity where the site is subject to a no complaints covenant in favour of the Ports of Auckland. In *Sugrue v Selwyn District Council* (EnvC C43/2004, 7 April 2004), proposed restaurant operators covenanted not to complain about odour from an existing neighbouring piggery. However, concerns have been

expressed regarding the efficacy of such covenants when not accompanied by measures to mitigate cross boundary effects (*Calapashi Holdings Ltd*, at [29]).

No complaints covenants are frequently included by Councils as conditions of resource consents where this is agreed to by the relevant parties. The resource consent will either require the parties to enter into a no complaints covenant, or may contain the full text of the covenant to be entered into.

The enforceability of no complaints covenants was recently tested in the Courts. In *South Pacific Tyres NZ Limited v Powerland(NZ) Limited* (CIV 2008-485-427, unreported, 16 May 2008) the High Court considered an application for summary judgement in relation to a covenant requiring the defendant to register a "transfer creating a restrictive covenant" against property that the defendant owned. The Court considered whether what was broadly termed a "reverse sensitivity covenant" or "no complaints covenant" contravened the RMA and whether it was illegal under the Illegal Contracts Act 1970 (ICA). The Court held that

"...reverse sensitivity covenants like the Covenant in this case do not contravene the principles or provisions of the RMA. In my view, the rights to public participation in the RMA can be waived by an individual giving free and informed consent – as, clearly, the defendant here did.

On an individual level, a person can benefit directly from being able to waive such rights in order to obtain consent to develop their land as they so desire. [paras 61 and 62]

Further the Court held that such a covenant did not allow the plaintiff to contravene the RMA or remove the possibility of RMA duties being enforced. Rather it only precluded the defendant and its successors in titles from complaining.

A number of earlier cases also reviewed covenants and did not hold them to be invalid or illegal. In example: *Christchurch International Airport Limited v Christchurch City Council* [1997] 1 NZLR 573 (HC) it was argued that such covenants might be unenforceable on public policy and/or Bill of Rights grounds. In that case, the Court considered whether a condition that a consent would only endure so long as the consent holder did not complain was a breach of the right to freedom of expression. The Court held that if the condition was consented to by the applicant then that person had voluntarily given up their rights under the Bill of Rights Act 1990. Even if the condition was not consented to but was reasonable on resource management grounds and otherwise lawful, it would prevail over individual rights as affirmed in the Bill of Rights.

However, it is essential that no complaints covenants, if imposed as a condition of consent under section 108, must meet the following test set out in *Newbury District Council v Secretary of State for the Environment* [1981 AC 578, that is, it must:

- (f) be for a resource management purpose;
- (g) fairly and reasonably relate to the development authorised by the consent; and

(h) must not be unreasonable.

Also, a covenant may not be imposed without the consent of the applicant (*Ports of Auckland v Auckland City Council* [1999] 1 NZLR 601).

As no complaints covenants are usually registered against the title of the servient property, they will run with the land, and remedies for breach of covenant include, injunctions, specific performance, damages and enforcement proceedings under the RMA.

For an example of a no complaints covenant, refer to the [Winegrower's Legal Guide](#).

For further discussion of reverse sensitivity, refer to [Bell Gully](#) and the [New Zealand Journal of Environmental Law](#).

Regional and Local Planning Mechanisms

At the local level, territorial authorities can utilise strategic zoning, land use and subdivision provisions in planning documents to restrict inappropriate residential development in rural zones. This can be achieved by providing for minimum lot size, separation distances and buffer zones (see *Winstone Aggregates*) in district plans. Alternatively, special zoning can be used to protect a particular industry, for example, Hasting District Plan's Te Mata Special Character Zone, which recognises the importance of established viticultural activities and makes specific provision for the separation of viticulture and rural residential development.

For examples of alternative approaches in other jurisdictions and regions, refer to [Western Australian](#) and [Waipara](#) examples.