

Information sheet for buyers and sellers

- Buying off the plans/subdivision
- Subject to issue of code compliance certificate
- Subject to issue of certificate of title

Overview

Buyers of properties 'off the plans/subdivision', 'subject to issue of certificate of title', or 'subject to issue of a code compliance certificate' (new builds/sections) need to be aware that there are risks associated with these types of transactions.

Subdivisions and developments can take many months and sometimes years to complete. Whilst every endeavour may be made by the seller to complete the resource and building consent processes, the building/subdivision work, the code compliance certificate process and to obtain the Record of Title by the dates specified in the sale and purchase agreement, there can be many factors that might delay this happening.

There are occasions where the seller may not be able to deliver the property and the documentation to the purchaser within the time frames specified. Unless this is clearly understood at the time the sale, and purchase agreement is entered into, these delays have the potential to place the purchaser in a position of financial and personal stress.

It is critical in each and every agreement that sellers and purchasers seek their own independent professional and legal advice to understand the risks involved in entering into these types of transactions and how the various clauses in the agreement operate. It is strongly recommended that this advice is obtained before signing the agreement for sale and purchase.

Performances clauses; obtaining consents/documentation

In almost every transaction of this type, the sale and purchase agreement should contain a number of performance clauses that deal exclusively with the responsibilities of the parties and which set out the dates by which certain actions must be completed.

While the performance clauses in the contract require the seller to take necessary actions and/or obtain required documentation within specified timeframes, there are many outside influences that may impact on the seller's ability to actually meet those timeframes. Examples of the various matters that can result in sellers being unable to meet timeframes and settlement dates are set out in the attached schedule.

Sunset clauses

Given that delays can and do occur, all sale and purchase agreements for new builds/sections should contain sunset provisions. A sunset provision may form part of a performance clause or it may be a stand-alone clause (sunset provision).

Sunset Provisions enable either the seller or buyer to cancel the sale and purchase agreement if an event or action has not occurred by a certain date.

For a purchaser, the events giving rise to the right for the purchaser to cancel under a Sunset Provision could be that the record of title has not issued or construction has not been completed by a specified date. For the seller, the event giving rise to the right to cancel could be that a certain number of properties have not sold in a given period and/or construction has not started by a certain date.

Both purchaser and seller, need to be aware of the potential implications of a Sunset Provision and what it means for them.

Purchasers need to be aware that while a Sunset Provision will allow them the opportunity to cancel the agreement. It also means that for the period that has been allowed in the agreement for the seller to complete the performance clauses (and this can often be a period of months), the purchaser will be locked into the agreement and they will have lost the opportunity to purchase another property during that time.

Whether it is the seller or the purchaser who exercises the Sunset Provision, the purchaser may find that prices have increased and they are no longer in a position to buy property for the funds they have available. Bank lending criteria and the purchaser's personal circumstances may also have changed in the intervening period, making it more difficult for the purchaser to purchase another property.

Again, sellers and purchasers must seek their own independent professional or legal advice to ensure that they understand what the various clauses in the agreement, including what Sunset Provisions, mean for them. It is strongly recommended that purchasers and sellers get this advice before signing the sale and purchase agreement.

Further guidance

Attached to this information sheet is further guidance including:

- Examples of potential delays in the issue of title and code compliance certificate process.
- An overview of the process for issue of code compliance certificates, certificate of title, and the subdivision process.

Conditional settlement

Examples of issues that can result in sellers not being able to meet timeframes

When settlement is conditional on the issue of title, settlement could be delayed for any of the following reasons:

- Further information requests delaying the processing and determination of the application for resource consent
- Public or limited notification of resource consent application
- Submissions in opposition to notified resource consent application
- Decline of resource consent application
- Objection to decision by developer to conditions of resource consent
- Appeals to the Environment Court by developer or submitters
- Season/weather affecting ability to carry out works required by resource consent conditions
- Availability of contractors or materials affecting ability to carry out works required by resource consent conditions
- Availability of surveyor to complete survey plan
- Non-approval of survey plan by council or LINZ
- Non-compliance with consent conditions
- Non-approval of completion certificate
- Non-payment of resource consent fees or development contributions
- Third-party documents and approvals (e.g. Vector or Watercare Services Limited)
- Council documents (e.g. consent notices and covenants)
- Developer documents (e.g. covenants)
- Mortgagee's consent
- Inconsistency between survey plan and other third party, Council and developer documents
- Congestion in LINZ
- Any other reason.

On the issue of a code compliance certificate

When settlement is conditional on the issue of a code compliance certificate, settlement could be delayed for any of the following reasons:

- Further information requests delaying the processing and determination of the application for building consent
- Decline of building consent application
- Application to MBIE for determination
- Season/weather affecting ability to carry out works required by building consent
- Availability of contractors or materials affecting ability to carry out works required by building consent
- Failure to request inspections
- Failure to meet required standards during inspections
- Failure to apply for code compliance certificate
- Failure to provide required certifications and documents with application for code compliance certificate
- Non-compliance with building consent
- Requirement to carry out remedial work
- Non-payment of council fees or development contributions
- Any other reason.

Overview of process for issue of code compliance certificate



Overview of process for issue of titles



The subdivision process

The council's authority and obligation to control subdivisions in their district/city comes from the Resource Management Act 1991; the Local Government Act 2002; and the Local Government Act 1974.

The following is a summary of the process for establishing a subdivision:

1 Feasibility/assessment/budget costing

The developer/owner

- Determines with a qualified surveyor the physical work required for subdivision, costs of completion and any other issues.
- Gets legal advice on any issues such as the inclusion of easements, land covenants, proposed sale of subdivided land, finance required and the ownership structure of the land.
- Confirms with the council the land can be subdivided.

2 Topographical survey/scheme plan of development prepared

- The developer applies for resource consent for the proposed subdivision from the Council.
- The surveyor prepares a scheme plan showing the new lots to be created.

3 Resource Consent Application and Issue of Consent

- The developer submits the scheme plan and the application for the subdivision consent to council.

4 Site construction

- Works required to satisfy conditions of consent are required to be completed before a separate title for each lot can be issued. These may be physical works such as:
 - Constructing roads/access ways
 - Installing drainage and utilities (sewage/water/electricity)

5 Preparation of new title documentation

- The surveyor prepares the survey plan, finalising the areas and dimensions of the proposed lots.
- When the survey plan is completed, the developer's lawyer prepares the documentation required for the issue of new titles. This might include drafting easement, consent notices, bonds, and obtaining the consent of any mortgagee.

6 Section 223/224(c) survey plan approval from Council

- The Council will issue a Section 223 Certificate. A Section 223 certificate is a confirmation by the council that the work specified on the survey plan is in accordance with what was approved by the council as part of the subdivision consent.
- Once the Section 223 Certificate has been signed, a formal application needs to be made by the developer to the council for the issue of a Section 224(c) Certificate. A Section 224(c) Certificate requires council engineering officers to undertake a site inspection, review the supporting documentation supplied with the application, confirm that the relevant development contributions have been paid, and undertake a check of each condition of resource consent to confirm that they have been complied with to the satisfaction of Council.
- When the Section 224(c) Certificate has been signed application can be made to Land Information New Zealand for the issue of separate titles.

7 Land Transfer Survey and lodge survey approval with Land Information New Zealand (LINZ)

- The surveyor can lodge a new survey plan with LINZ once the section 223/224(c) certificates have been issued and all the legal documentation has been finalised.
- A land transfer survey involves investigating old survey plans and information. Calculations are carried out to define the existing and new boundary positions and a new Title Plan is prepared.

8 Lawyer applies for new Titles

- The lawyer lodges the legal documentation with LINZ for the issue of the new Certificates of Title for each lot.