
Real Estate

Continuing Professional Development

Issues beyond the boundary

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Learning outcomes

At the end of this topic, you will be able to:

- explain what is meant by 'Issues beyond the boundary'
- explain your disclosure obligations as a licensee, to both the vendor and the prospective purchaser, including when to refer to specialists
- describe how to check for 'designations'
- explain the importance of licensees understanding Land Information Memorandum (LIM) reports and district, city or unitary plans
- explain the importance of local knowledge.

Issues beyond the boundary

A property may be affected by activities that take place beyond the property's physical boundaries.

It can sometimes be difficult for licensees to understand what information must be disclosed about these activities.

Some potential problems may not be visible. Licensees should make sure they have current copies (or access to property related documentation) before and during a property inspection – for example, the record of title, district plan, LIM report.

In this topic, we will look at some of the key issues that licensees must consider in relation to issues beyond the boundary.



Key Point

Case law to date suggests that knowledge about any issue beyond the boundary of a property must be disclosed if it would have an **impact on a party's decision to purchase or lease**.

Disclosure obligations relating to issues beyond the boundary

Most Land Information Memorandum (LIM) reports record where nearby resource consents have been granted.

However, previous case decisions have confirmed that it is not sufficient to simply provide or recommend that parties obtain a LIM report.

If there are issues that impact the marketing of a property, **the relevant parts of the LIM report must be drawn to the relevant party's attention** (after discussion with, and written approval from, the vendor or lessor).

Licensees must also recommend that parties seek independent legal and technical advice before entering into a transaction (refer to rule 9.7 below).

It is essential that any verbal disclosure is confirmed in writing, for example by email.

- 9.7** Before a prospective client, client, or customer signs an agency agreement, a sale and purchase agreement, or other contractual document, a licensee must—
- (a) recommend that the person seek legal advice; and
 - (b) ensure that the person is aware that he or she can, and may need to, seek technical or other advice and information; and
 - (c) allow that person a reasonable opportunity to obtain the advice referred to in paragraphs (a) and (b).

A LIM report will not always show any issue beyond the boundary that may affect a property. For example, where resource consent has been applied for but is not yet approved.

In situations where a licensee does not know of such developments, the CAC, disciplinary tribunal and courts will ask the question: *"Is this something a reasonably competent licensee working in the area should be expected to know?"*

Read the following scenario and answer the questions about the rules. (Refer to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012).

Scenario 1

A purchaser complained to the Real Estate Authority (REA) alleging that the licensed salespersons misled him as to the position of the boundaries on an irregularly-shaped, sloping vacant rural land and failed to disclose there was a paper road on the property.

Licensee A had provided the purchasers with a copy of a geotechnical report and site plan with a possible building site approximately mid-level. During a site visit, licensee A took the purchasers to the top of the site and indicated that they could build there and get the view that they wanted.

The complainant says that licensee A told them the fence was the boundary and they could build anywhere on the land.

Licensee A accepted that he was:

'...mistaken about a fence being a general representation of the position of the boundary...',

But, says that he told the purchasers that they would need to make further inquiries about building at that point.

The complainant says that licensee A did not draw their attention to the existence of a paper road along the fence line next to the property.

The licensed salesperson

"...did not think that the paper road would affect them so did not mention it...".

The paper road was clearly shown on the survey plans supplied to the complainant.

The complainant indicated that the building platform for the intended dwelling was significantly impacted. The boundary pegs were not in place at the time of inspection. The complainant would not have purchased the land if they had known about the paper road.

Licensee B carried out the day to day supervision of Licensee A.

On investigation, REA found that the Regional General Manager (Licensee B) delegated by the agency (Licensee C) to provide supervision to the salesperson was also a licensed salesperson and not qualified to supervise.

Complaint number: C17280

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

Designations

Designations are used to authorise essential public works and activities on a particular site, without the need for land use consent.

Designations are used by councils, government organisations or network utility operators. They can apply to both privately-owned land and land owned by the requiring authority.

Designations are shown on the district, city, or unitary plan map which is listed in an appendix to the plan.



Important points for licensees

When you list a property, it's important to check the district, city or unitary plan map – not only to correctly identify the zoning of the site, but also to see whether the site has any other restrictions, for example, a designation for road widening.

It is also important to check whether there are any designations in the surrounding area, such as for the development of roads, schools, power pylons, or telecommunications towers. Depending on the proximity to the actual site, these may be important considerations for prospective purchasers.

Any known and material designations must be fully disclosed, and parties are advised to seek independent legal and technical advice before entering into a transaction.

It is essential that any verbal disclosure is confirmed in writing, for example, by email.

Read the following scenario and answer the questions below.

Scenario 2

A vendor complained to the Real Estate Authority (REA) about the conduct of a licensed salesperson who was engaged to market her property.

The complainant alleged:

- (a) that the licensed salesperson incorrectly told the complainant that it was not possible to sub-divide her property as the land was less than 800m²
- (b) that soon after the agreement for sale and purchase was entered into, the City Council inspected the property following an application to sub-divide made by the buyer
- (c) that as a result, the complainant believes that she did not achieve the best price possible for the property.

Following the successful sale of the property, the property was divided into two fee simple lots of 328m² and 407.8m².

The licensed salesperson admitted that he had the discussion with the vendor as alleged.

The CAC met in January 2018 and considered the information gathered. It deemed that the licensee had engaged in unsatisfactory conduct, breaching the following Rules:

- 5.1 skill, care and competence
- 5.2 sound knowledge
- 6.4 not mislead or withhold information
- 9.1 act in the best interests

The committee was unable to conclude that the property would necessarily have sold for more had it been marketed as able to be sub-divided.

The decision was appealed, and the licensee submitted further explanations of his conduct.

The tribunal subsequently overturned the ruling and penalty orders, finding that the licensee did not mislead the complainant.

Complaint Number: C20545

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

Construction proposals

As noted previously, construction proposals not yet approved by the council may not appear on the LIM report.



Important points for licensees

Licensees are expected to keep up to date with local developments and follow property related media releases that affect the marketing area they work in.

In addition to talking to vendors or lessors, licensees may also need to talk with third parties, such as neighbours, or the local authority, to learn as much as possible about any proposals likely to affect the property, space, or business in question, for example, neighbourhood construction, motorway designations, road widening proposals and zoning changes.

Local people are likely to have knowledge of any proposals under approval from public notices, neighbourhood social media groups, meetings and bulletins.

Any known and material construction proposal must be fully disclosed. Parties are advised to seek independent legal and technical advice before entering into a transaction. (Refer rule 9.7 in the Code of Conduct).

It is essential that any verbal disclosure is confirmed in writing, for example, by email.

Read the following scenario and answer the questions about the rules. (Refer to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012).

Scenario 3

A complaint was made to the Real Estate Authority (REA) about a licensed salesperson not disclosing a consented activity for 'clean fill' on land that adjoined the property that the complainant had entered into an agreement to purchase.

The clean fill proposal was widely known about in the community and had received extensive community opposition. When granted, the consent had a significant adverse impact on property values in the area.

The consented activity (issued four to five years before the complaint) involved up to 93 truck and trailer loads a day, six days a week for ten years. The activity is within 20m of the boundary and very close to the house on the property.

The complainant alleged the licensed salesperson knew or should have known about the proposal. The complainant sought release from the agreement on the grounds of non-disclosure by the salesperson, who claimed that she did not know about the proposal, despite marketing the property for six months.

The vendors of the property declared on the agency agreement that they were not aware of any pending works on adjoining properties.

It was noted that the licensed salesperson marketing the property was working in an area outside where she normally operated, despite it being acknowledged as a specialist field (namely, a rural property).

Complaint number: C17934

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

Note the following comments from the committee:

[refer para 3.11]

In its investigation, the CAC discovered that the licensed salesperson was, in fact, involved in the initial sale to the current owners (prior to consent being issued but during the period of extensive community opposition).

A licensee from another agency who worked with the licensed salesperson in the conjunctive sale of the property to the current owners said, “*she made full disclosure to all parties about the proposed landfill including to [licensed salesperson]*”.

This was also supported by the previous owner who said they had fully disclosed this matter when they sold the property.’

[para 3.12] ‘The committee determined on the balance of probabilities that the licensed salesperson was aware of the potential for detrimental impacts...’ and

[refer para 3.13]

Although this does not prove they also knew of the subsequent consent being issued, it did establish that their knowledge was and should have been sufficient to warrant further investigation of the issue.

The committee made additional comments:

[para 3.14] ‘The evidence also shows that the issue was not insignificant, nor inconsequential and there were valid reasons for potential purchasers to be concerned about the impact of the proposed adjoining land activity. The committee forms this view because of the concerns expressed by the community in its vocal opposition to the proposal. This is also reinforced in the subsequent Environment Court decision requiring the consent holder to inspect and monitor adjoining properties to assess any adverse structural and other impacts.’

[para 3.15] ‘The committee has determined that the licensee’s obligation not to withhold information (Rule 6.4) extends to the knowledge she had of proposals for a landfill activity on the adjoining site in 2009. The committee is satisfied that in fairness this information should have been disclosed by the licensee or the matter further investigated.’

[para 3.16] ‘[Licensed salesperson] submits that a decision finding unsatisfactory conduct, in this case, would imply that licensees must undertake due diligence on behalf of potential purchasers. The committee does not accept this argument, nor does it wish to suggest the complainant is free of responsibility for the position he finds himself in. There will always be a risk of hidden or underlying defects or other matters that a licensee cannot reasonably be expected to anticipate. In this case and for the reasons outlined the committee determines that licensed salesperson had knowledge of a potential issue and should have investigated it further or disclosed it to potential purchasers.’

Interaction on site with a client-vendor or lessor

It is important to discuss disclosure and associated disclosure obligations early in the transaction process with the vendor or lessor.

Upfront disclosure of any issues protects the vendor, lessor or licensee from later complaints, claims and possible litigation.

Checklist: Sample questions to ask the vendor

Thank you to Ray White for the following list.

Note: Most of these factors are included in the standard *REINZ/ADLS Agreement for Sale and Purchase of Real Estate*.

Titles, boundaries and requisitions

1. Is the vendor aware of any matters concerning these that may cause a prospective purchaser concern? For example, fencing issues, boundary matters or disputes, title complications or requisitions etc?

Unit title and cross lease provisions

2. Have all relevant matters relating to the body corporate or cross lease documentation, for example, memorandum of lease, been disclosed as required under the vendor warranties in the agreement for sale and purchase? For example, relating to body corporate resolutions, rule changes, levies contributions, unsatisfied judgements, court orders or declarations, liabilities, proceedings, leases, licenses, easements, special privileges or plan changes.

3. Are all structures on the property shown on the deposited plan, and if not:

(a) Have the appropriate consents of other unit proprietors or lessees been obtained in writing?

(b) Has any necessary amended flats plan or development unit plan been prepared?

4. Has the vendor arranged to have the pre-contract disclosure statement prepared for the unit in form 18 required by section 145 of the Unit Titles Act 2010 which is necessary before a prospective buyer enters into an Agreement for Sale and Purchase?

Warranties and undertakings in the Agreement for Sale and Purchase

5. Has the vendor received any notice or demand, or are they aware of any outstanding requirements?

- from any local or government authority or other statutory body?
- relating to the Resource Management Act 1991?
- from any tenant of the property?
- from any party?

6. Has the vendor given any consent or waiver that directly or indirectly affects the property?

7. Where the vendor has done or caused or permitted to be done on the property any works:

- Were all permits, resource consents or building consents as required by law obtained?
- Were the works completed in compliance with these permits or consents and signed off accordingly?
- Were appropriate code compliance certificates obtained?
- Where the property requires a compliance schedule under the Building Act, have all requirements been complied with?
- Does the building require a warrant of fitness and if so is it current and is there any reason which will prevent a building warrant of fitness being supplied when next due?

8. Are all chattels included in the sale in good working order and the vendor's unencumbered property?

(Note that all the above warranties and undertakings are required to be repeated at possession and settlement dates).

Defects, hazards, risks or matters affecting the property

9. Is the vendor aware of any defects, including matters disclosed in a building report?

10. Is the vendor aware of any other significant potential risks in respect of the property arising from any likely hidden or underlying defects?

11. Is the vendor aware of any other matters or information (whether official or unofficial) which by law or fairness should be disclosed to a prospective purchaser?

Goods and service tax

12. Has the vendor fully advised their agent of any and all matters that may have a bearing on the application of GST to any part or all of the sale transaction?



Important points for licensees

It is important that vendors or lessors are advised to consider these disclosure issues carefully before completing any disclosure information. These issues should be covered in the agency's listing form.

It is also important that vendors or lessors understand that if any matters which should be disclosed arise subsequently, and prior to a sale being concluded, they need to notify their listing licensee immediately.

Approvals given and any signed variations

In some circumstances, neighbours may be required to give their approval for developments to occur near to their property.

In certain cases, this may have involved payment for their agreement. For example, payment made to or by a neighbour for an agreement to a construction proposal.



Important points for licensees

Any known and material approvals given, and any signed variations, (whether payment was made or not) must be fully disclosed, and parties are advised to seek independent legal and technical advice before proceeding to enter into a transaction (refer to rule 9.7 in the Code of Conduct).

It is essential that any verbal disclosure is confirmed in writing, for example, by email.

Read the following scenario and answer the questions about the rules. (Refer to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012).

Scenario 4

A licensed salesperson advertised a site as having 'all services at boundary'.

The licensed salesperson had relied on a statement by the vendor that some 12 years prior he had a conduit laid under the road to enable connection to telecommunication services.

It was later found that, although a conduit had been laid under the road, it did not contain a phone line.

The purchaser complained to the Real Estate Authority (REA) on the basis that the representation was misleading and extra expenditure was required to complete the installation.

Complaint number: C13761

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz.

CAC Decision [2017] NZREAA 46

Read the following scenario and answer the questions about the rules. (Refer to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012).

Scenario 5

A purchaser complained to the Real Estate Authority (REA) that he had entered into a contract to purchase a property based on a licensed salesperson's written confirmation that the property was within a specific school zone. On two occasions the purchaser asked the licensed salesperson if the property was in the school zone and was given affirmative answers on both occasions.

It transpired that the property was outside the zone and the salesperson's written representation was inaccurate.

The purchaser, through their solicitor, notified the vendor's solicitor of their wish to cancel the sale contract under section 7 of the Contractual Remedies Act 1979. The vendor agreed, and the contract was cancelled. The agency duly refunded the deposit.

In response to the complaint, the salesperson stated that:

"the property was not marketed with any reference to school zones", and that "the nature of the property is such that school zones would not likely have been a consideration for most purchasers".

When the complaint was heard by the CAC, the committee, in reaching its decision, took into account that while the licensed salesperson failed to check the school zoning, and thereby misled the purchaser, he did not deliberately do so.

Real Estate Disciplinary Tribunal Case: [2018] NZREADT 7

This complaint was heard by the CAC and the licensed salesperson was found to have engaged in unsatisfactory conduct. He was censured, but there was no repayment of costs and no fine ordered. The complainant appealed the CAC decision to the tribunal.

In its deliberation, the tribunal considered whether the CAC had erred in its ruling and should have considered whether relief should have been ordered in respect of the purchasers' claims.

The tribunal ordered the licensed salesperson to reimburse the purchaser for legal costs incurred in cancelling the sale contract.

Read the following scenario and answer the questions about the rules. (Refer to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012).

Scenario 6

Two licensed salespersons were involved in the marketing of a residential property. The agency they were engaged by had obtained a LIM from the council. The LIM for the property was addressed to the agency, not the vendor.

The marketing and advertising material stated: 'Potential exists to use your imagination to use the huge space downstairs to your advantage'.

A prospective purchaser viewed the property and was told by the licensees there was potential for two or three bedrooms in the basement area.

The licensees provided a copy of the LIM to the prospective purchaser but failed to highlight anything of significance within the report.

At no time did the licensees advise the prospective purchaser to seek independent legal and other advice.

Before entering into a sale and purchase agreement, the prospective purchaser was informed that he was in a 'multi-offer' situation. He was asked to sign a form provided by the licensees which referred to the *potential for a multi-offer*. **Note:** This form was inconsistent with the agency multi-offer form and was also inconsistent with the requirement for an offer to be in writing before a multi-offer situation exists.

The prospective purchaser was unaware of the inconsistencies and duly signed the multi-offer form and proceeded to make a written offer in the belief that this was a multi-offer situation.

After the initial offer was prepared, the prospective purchaser had further discussions with the licensees and was advised to increase his offer by \$15,000 before it was presented to the vendor. The offer was increased accordingly, presented to the vendor and accepted.

The sale and purchase agreement later became unconditional and was settled.

After moving into the property, the purchaser experienced flooding to the basement area and subsequently found that the property was located in a flood zone which was identified on the LIM.

The purchaser complained to the Real Estate Authority (REA) on the grounds that the licensees had not disclosed the flood zone entry noted on the LIM.

The licensees were adamant that the prospective purchaser had been verbally informed of the flood zone issues. However, the licensees provided no written record, for example, file notes or diary notes, of such a discussion to substantiate this.

Complaint number: C20306

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

Note the following comments from the Committee:

[para 3.7] 'The licensee has not provided any file notes or diary notes recording advice they gave to the complainant at any relevant time. They have not provided any documentary evidence of following up verbal advice they say they gave to the complainant, in writing...'

[para 3.26] 'By failing to advise the complainant of the risk of flooding disclosed in the LIM report (and to red flag it for him) prior to signing the ASP, the licensees have not dealt fairly with him, have failed to provide information which in fairness should be provided to a customer, and they have failed to exercise proper skill, care and competence.'



Key note

A key message from this case is that the CAC found that it is not enough for a licensee to pass on a LIM report if they have a copy.

A licensee is expected to have read and understood a LIM report, and highlight any material information that may be relevant to a prospective purchaser.

Stigmatised neighbouring properties

A property may have neighbouring properties that are used in ways that some purchasers may consider have an adverse effect on them.

For example, an addiction centre, a homeless shelter, a prison release shelter, known gang headquarters or a business which may be causing excessive pollution or noise.



Important point for licensees

Licensees should always verify the existence of such a property before any disclosure is made to potential purchasers.

The tribunal has made it clear that it is a disservice (and potentially a breach of fiduciary duty) to vendors to pass on rumours that have not been corroborated.

[para 7] 'To disclose a rumour would potentially have breached the agent's fiduciary duty to her vendor in this case'

Case: [2016] NZREADT 62

If a licensee is aware that a neighbouring property fits into this category, they should discuss this with the vendor who would need to be advised of licensee disclosure obligations to prospective purchasers.

If there is any doubt or uncertainty, the licensee should refer the matter to their supervising agent.

Any known and potential material information must be fully disclosed, and parties are advised to seek independent legal and technical advice before entering into a transaction. Verbal disclosure should be confirmed in writing, for example, by email.

Dealing with third parties and information learned from them

It is best practice for licensees to talk not just with vendors or lessors, but also with third parties, for example, neighbours to gain as much information as possible about any issues likely to affect the property in question.



Important point for licensees

Licensees should take steps to corroborate any relevant information learned from third parties through discussions with the vendor or lessor, contact with the relevant authority, collection of any relevant documentation, and by obtaining other legal and technical advice.

Where there is any doubt or uncertainty, the licensee should refer the matter to their supervising agent.

Any identified issues must be fully disclosed, and parties are advised to seek independent legal and technical advice before entering into a transaction. Verbal disclosure should be confirmed in writing, for example, by email.