

**Welcome to the Summer edition of *Rural eSpeaking*.
We hope you find the articles of interest.**

If you would like to talk further about any of the topics covered,
please be in touch.

We wish you a very Merry Christmas and a happy, and prosperous,
New Year.

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The next issue of Rural eSpeaking will be published in March next year.

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Use of Your Property

Do you have the right to keep doing what you have always done?

You most probably use your farm in a variety of ways, some of which would not always be expected with rural land, for example, a road-front retail shop for selling excess produce, your own airstrip for fertiliser application purposes, or a dirt bike park to indulge in your favourite hobby. But did you know that even if you are the second or even third generation to use your land in this way, you are not necessarily entitled to keep doing so . . .

Evolving nature of the law about how you can use your land

Just being the owner of land doesn't give you the right to use that land in every way your heart may desire. Modern property law is said to be based on the assumption that the landowner holds their land for the public good¹. With what is considered to be the 'public good' constantly changing and evolving, rules about how landowners may use their land are continually being introduced or changed.

But as rules change you do not necessarily have to stop doing things that do not comply with the new rules. You just have to be savvy about what you can, and can't, do.

You may well have the right to continue doing what you have always done

Even though District or Regional Plan rules may have changed since you first started a particular use of your land, it is possible that you may have 'existing use rights' to continue that use even if it contravenes the current rules.

The 'existing use rights' rules are contained in the Resource Management Act and are an exception to the general rule that landowners may not carry out any activities on their land that breach the relevant planning rules unless they have resource consent to do so. The specific existing use rights rules applying in any particular situation will depend on what the activity is, where the activity is undertaken, and whether the activity contravenes rules under the District Plan or the Regional Plan or both. To rely on the existing use rights rules for a particular activity, the landowner must be able to prove that the relevant conditions of the rules applying to that activity are met.

For example, you may have a road-front retail shop at your farm gate which you first started 15 years ago but is now contrary to current District Plan rules. You may have 'existing use rights' to continue to operate that shop, if you can prove the relevant conditions are met. These may be that:

- » The retail shop was 'lawfully established' before the relevant rule came in, ie: it did not breach previous planning rules. This may require a bit of investigation of what those previous rules were, going back to when the activity first started
- » The effects of the retail shop are 'the same or similar in character, intensity, and scale' to those which existed before the new rule came in. For example, you haven't enlarged it, its opening hours are the same, it doesn't generate more traffic, and
- » You haven't discontinued use of the retail shop for a continuous period of 12 months. For example, that you have routinely opened the shop during summer every year since you first opened the shop 15 years ago.

Being proactive

To have your chance to prove to the council that you have existing use rights, you don't have to sit around waiting for someone (such as a new neighbour) to complain about what you are doing. Instead, for certainty, and if you think you have sufficient evidence to satisfy the council that your use of the land complies with the relevant conditions of 'existing use rights', you can apply to the council for an 'existing use certificate'. And even if you do not meet the criteria for existing use rights, all hope is not lost as you may well be able to get resource consent for the activity.

¹ 1936 W Ivor Jennings, cited in *Hadfield v Rivers* (High Court, Christchurch CIV 2006-409-678, 25 May 2006 at para 51

Protecting Yourself From Your Trees

Don't just watch your garden grow

While we have many protected trees in New Zealand, we also have laws that protect people or things against trees. Under those laws, you could potentially be held liable for something that your trees do. Learn how you may be able to protect yourself from your trees.

Mischief makers we can't live without

We can't live without trees. They give us natural beauty, oxygen, shade, firewood, paper, furniture – the list goes on.

But trees can also get up to all sorts of mischief. Their roots can grow and damage underground pipes. They can drop leaves and fruit, and clog up drains or rivers. They can grow so big they block your neighbours' views. Their branches can interfere with power and telephone lines. They can prevent sunlight getting to roads causing them to ice up. Falling branches can cause significant damage.

The danger of just standing back and watching the garden grow

Because trees are mischief makers, over time laws have been developed so that trees and people can live peacefully together. Here are some examples:

- » *Your trees = your responsibility:* Generally speaking, if you own land, you are the owner of trees planted on that land, and are responsible for what those trees get up to as they grow, whether or not you planted the trees
- » *Your trees vs your neighbours:* If your trees are interfering with your neighbour's property, your neighbours may ask that you trim or remove those trees. If you can't reach agreement, your neighbours could even take you to court to seek a court order for trimming or removal of the trees
- » *Your trees vs your council:* Local councils may include restrictions in local planning laws on where trees may be planted, so that trees (shelterbelts in particular) do not interfere with neighbouring properties or with road safety. Local councils also have the right to require you to cut down or trim your trees if they are a potential problem to road safety
- » *Your trees vs network utility providers:* Likewise, power and telecommunication companies have the right to require you to cut down or trim your trees where they are interfering with, or encroaching on, power or phone lines, and
- » *Your trees could get you in trouble:* If you fail to cut down or trim trees despite being required to, or in emergency situations, councils and network utility providers have the right to cut or trim the trees themselves and charge you for it. If your trees cause damage to their infrastructure, the authorities can seek compensation from you.

Living alongside your trees

To help you to happily live alongside your trees, you can do the following:

- » Before planting trees (in particular shelterbelts), investigate whether there are any relevant laws that may restrict where those trees can be planted
- » Be aware of laws that restrict how big your existing trees can grow
- » If trees are a key feature of a property you want to buy, as part of your due diligence, investigate whether those trees may now or in the future need to be cut down or trimmed to comply with relevant laws
- » Keep branches (and maybe even roots) regularly trimmed so they do not get out of control, and
- » Act quickly if you receive a letter from a relevant authority asking you to cut or trim your trees.

By taking the steps above, you may not only protect yourself from liability, but also you may protect your trees from having to be cut down.

Over the Fence

Public Holidays: Christmas 2011 and New Year 2012

This year Christmas Day and New Year's Day fall on a Sunday. This means that for employees who do not normally work on weekends the holiday is transferred to the following Monday or Tuesday so that your employee still gets a paid day off.

For employees who normally work on that day the holiday remains on the traditional day and your employee is entitled to that day off on pay. If they do work they are entitled to be paid time and a half for the hours worked and to receive a whole day's alternate holiday.

An employee cannot be entitled to more than four public holidays over the Christmas/New Year period (Christmas Day, Boxing Day, New Year's Day and 2 January). To determine what would be a normal working day consideration must be given to the employment agreement, work patterns, any roster system in place and the reasonable expectation of both parties.

Sharemilking Agreements – Variable Order

Federated Farmers has now released an updated Variable Order Sharemilking Agreement. This follows the Sharemilking Agreements Order 2011.

The new Agreement updates a number of clauses from the former Variable Order Sharemilking Agreement including (amongst other things):

- » Increasing the minimum percentage of income derived from milk supplied to 22% from 21% for those with herds of not more than 300 cows and who agree not to share in the dividend related payment adjustment
- » Amendment to the Dispute Resolution (conciliation and arbitration clauses), and
- » Making provision for the fencing of farm home sections and safe places for children if they are to be at the cow shed while their parents milk.

Of critical importance is the completion of the farm specific details in the Agreement. It's important both parties work through the Agreement together and complete the required details.

Animal welfare

A corporate structure is no veil for liability. Every farmer, whether the owner or the person in charge of animals, has a statutory duty to ensure that the physical, health and behavioural needs of livestock are met in a manner that is in accordance with both:

- » Good practice, and
- » Scientific knowledge

While it's clear that the owner or person in charge of livestock has a duty of care, determining the owner or person in charge is not always apparent.

Equity partners and company directors cannot turn a blind eye to the conditions under which animals are cared for or treated on a corporately owned farm. It's a question of fact to be determined by a court as to who in a corporate structure is 'concerned with management'.

Failing to provide for the needs of animals is a strict liability offence. As such the prosecution doesn't have to show that the company directors or officers knew or should have known what was happening on any corporately owned farm. The onus is on the defendant to show on a balance of probabilities that they took all reasonable steps not to commit the offence.

Our advice is to take a high degree of care of any animals and livestock on your farm. If you're unsure if you could have liability, please be in touch with us.

Amendment to legislation

It's reassuring to know that sheep are no longer cattle following the recent amendments to the definition of cattle in the Biosecurity (National Bovine Tuberculosis Pest Management Strategy) Order 1998!