RESEARCH NOTE

ROAD VESTING, PRIVATE COVENANTS AND THE PLANNING BILL 2025:

REMOVING ANTI-COMMONS FRICTION IN SUBDIVISION THROUGH PROPERTY RIGHTS, TRANSACTION COST AND COMPETITIVE LAND MARKET ANALYSIS

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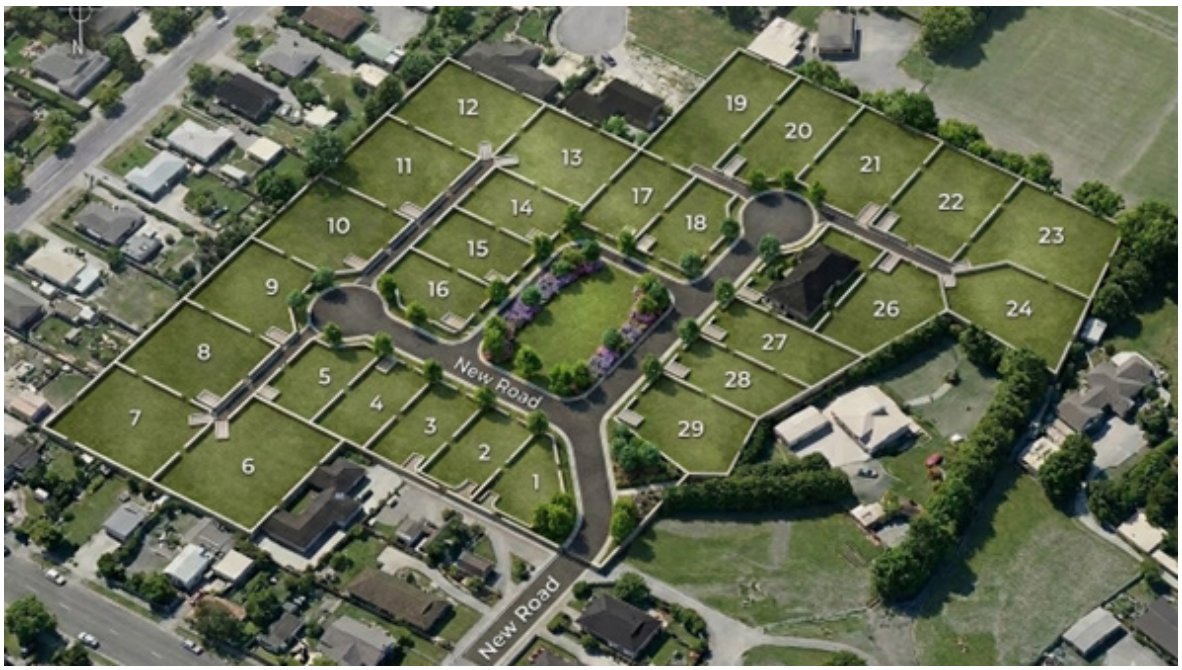

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Removing Anti-Commons Friction in Subdivision Through Property Rights, Transaction Cost and Competitive Land Market Analysis

1. The Presenting Matter

A provision in the Planning Bill 2025 will carry forward a longstanding procedural dysfunction in the subdivision process, unless amended by the select committee.

The issue concerns *Schedule 7*, *clause 28(2)* of the Planning Bill. This clause replicates existing Resource Management Act (RMA) provisions requiring the written consent of *all parties with a registered interest in land* before that land can vest as road (or reserve) upon deposit of a subdivision plan. "All parties" includes not only the registered owner and any mortgagee, but also every holder of a benefiting easement or covenant over the land, potentially hundreds of parties across multiple subdivided lots, plus their respective banks.

The New Zealand Law Society's Property Law Section, in its February 2026 submission on the Natural Environment and Planning Bills, has identified this as a discrete, fixable problem and proposed specific redrafting of clause 28(2) to resolve it.[1] The Registrar-General of Land has separately published on the practical difficulties this creates.[2] Simpson Grierson has analysed the leading case law confirming courts' willingness to remove these interests when applications are brought.[3]

Resource Management reform would ideally address the issue, but doing so requires addressing a concern some officials have with protecting property rights.

This note assesses the issue and the proposed solution through the lens of property rights analysis and competitive land market (CLM) theory.

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1 New Zealand Law Society, *Natural Environment Bill and Planning Bill: Submission of the New Zealand Law Society* (New Zealand, 2026), 10–12, https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/Natural-Environment-Bill-and-Planning-Bill-11-February-2026.pdf, paras 7.1-7.15.

2 Robbie Muir, "Registrar-General of Land: Creating Roads in Subdivisions – Dealing with Covenants and Easements," *The Property Lawyer* 22, no. 2 (2024): 12–13, https://www.linz.govt.nz/sites/default/files/2024-03/New%20Zealand%20Law%20Society%20bulletin%20article%20Creating%20roads%20in%20subdivisions%20-%20dealing%20with%20covenants%20and%20easements.pdf.

3 Will Barnes et al., "Simpson Grierson: New Case Law Offers Solution for Subdividing Landowners to Create Public Road," *Local Authority Property Association*, 2022, 1–2, https://lapa.co.nz/wp-content/uploads//2022/03/LAPA-Articles-New-Case-Law_Subdividing-Landowners.pdf.

2. Problem Definition

2.1 The Mechanical Problem

When land is subdivided and roads are created, the RMA (and now the Planning Bill) requires the land to *vest* as legal road upon deposit of the survey plan.[4] This is the only lawful mechanism for creating roads on subdivision. The Registrar-General confirmed in 2020 that transfer-and-dedication alternatives are not permitted where statute prescribes the vesting process.[5]

For vesting to occur, section 224(b) of the RMA, carried forward as Schedule 7, clause 28(2) of the Planning Bill, requires the written consent of every person with a registered interest in the land. This includes:

- The registered owner of the land being subdivided;
- Any mortgagee or encumbrancee registered against the title; and
- Every holder of a benefiting easement or covenant over the land.

The third category is where the problem lies.

2.2 How the Anti-Commons Arises

In practice, land being subdivided is very commonly subject to covenants and easements that benefit neighbouring land. This is an entirely normal feature of New Zealand's title system. Covenants may impose building standards, density controls, use restrictions, or maintenance contributions. Easements may secure rights of way or service corridors.

The difficulty arises because neighbouring land has often itself been subdivided, sometimes into dozens or hundreds of lots. Each lot inherits the benefit of the original covenant or easement. Each lot therefore holds a consent right over the vesting of any road strip on the burdened land. And if any of those lots carries a mortgage, the bank must consent as well.

The result is a cascade of consent requirements:

- In a moderate case, the subdivider must obtain written consents from dozens of individual lot owners and their respective banks.
- In a large case, consents may be required from hundreds of parties.

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[4] Resource Management Act 1991, s 238; Planning Bill 2025, Schedule 7, cl 28.

[5] Muir, "Registrar-General of Land: Creating Roads in Subdivisions – Dealing with Covenants and Easements", confirming that alternatives such as transfers dedicating road are not permitted where the RMA prescribes the vesting process.

- Fresh consents must be obtained from any new owner or new mortgagee who acquires a benefiting lot while the process is underway, meaning the goalposts shift continuously.[6]

Where it is not feasible to obtain all consents (and the Law Society confirms this is frequently the case) the subdivider's only recourse is an application to the High Court under section 317 of the Property Law Act 2007 for an order modifying or extinguishing the relevant interests.

2.3 The Cost and Delay

The court process works. Applications are, in the Law Society's word, "invariably" granted in the road-vesting context.[7] But the process imposes significant costs:

- Legal costs and court fees commonly in the range of $50,000 to $100,000;[8]
- Delays of months to years while proceedings are prepared, filed, and determined;
- Uncertainty for purchasers, lenders, and territorial authorities during the interim.

These costs are passed through to section and house prices. They fall on homebuyers. They do not typically protect any party from harm, because, as discussed below, the courts consistently find no material prejudice to the third-party interest holders.

2.4 The Anti-Commons Structure

This is a textbook *tragedy of the anti-commons*: numerous parties hold formal veto rights over a transaction that would harm none of them, yet the cost of assembling all consents is prohibitive. The result is not that the transaction is blocked permanently (the court process provides a workaround) but that it is burdened with deadweight costs that serve no protective function.

In the language of transaction cost economics, the consent requirement imposes costs vastly disproportionate to the interests it purports to protect. It is a structural friction, not a safeguard.

3. The Proposed Solution

The Law Society proposes redrafting Schedule 7, clause 28(2) of the Planning Bill to distinguish between road vesting and reserve vesting, and to narrow the consent requirements for each.

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[6] New Zealand Law Society, *Natural Environment Bill and Planning Bill: Submission of the New Zealand Law Society*, para 7.3.

[7] New Zealand Law Society, *Natural Environment Bill and Planning Bill: Submission of the New Zealand Law Society*, para 7.5.

[8] New Zealand Law Society, *Natural Environment Bill and Planning Bill: Submission of the New Zealand Law Society*, para 7.5.

3.1 Road Vesting

For land vesting as road, consent would be required only from:

- The registered owner of the land being subdivided; and
- Any mortgagee or encumbrancee registered against the title for that land.

Consent from third parties holding the benefit of easements or covenants would no longer be required.

3.2 Reserve Vesting

For land vesting as reserve, the territorial authority would have the option to take the land *subject to existing interests* (easements, covenants). If it does so, third-party consent is not required, because the interests remain in place and no one is prejudiced. If the territorial authority is *not* willing to take the land subject to existing interests, the subdivider retains the option of obtaining consents or seeking a court order through existing processes.

3.3 Specific Redrafting

The Law Society provides specific statutory language for clause 28(2), which would replace the current blanket consent requirement with targeted provisions for each category.[9] The proposed redraft also resolves a pre-existing contradiction between section 224(b)(i) and section 239(2) of the RMA, carried forward into the Bill, where the consent requirement in one provision is inconsistent with the reserve-vesting flexibility in the other.[10]

4. The Rationale for the Solution

The case for the reform rests on two distinct but complementary arguments.

4.1 Argument from Absence of Prejudice

The first argument is empirical and legal: third-party interest holders are not materially harmed by extinguishment of their interests over the road strip.

The Law Society states that third parties "are highly unlikely to be prejudiced from any interest that may have been extinguished over the portion of land that is to vest as road."[11]

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[9] New Zealand Law Society, *Natural Environment Bill and Planning Bill: Submission of the New Zealand Law Society*, para 7.14.

[10] New Zealand Law Society, *Natural Environment Bill and Planning Bill: Submission of the New Zealand Law Society*, para 7.8.

[11] New Zealand Law Society, *Natural Environment Bill and Planning Bill: Submission of the New Zealand Law Society*, para 7.9.

This claim is supported by the consistent pattern of judicial decisions. In *RCL Henley Downs Ltd v Hanson*, Matthews AJ found that the covenant in question could not remain on land vesting as road, that its effect would not be materially altered by extinguishment over the road strip, and that there was no basis on which the covenantees could be adversely affected, to the point that they did not even need to be served with the application.[12]

In *Round v Palmerston North City Council*, the Court similarly found that removing the covenants over the vesting land would not substantially disadvantage any covenantee, and that removal was just and equitable.[13]

The Registrar-General of Land has noted that if roads were dedicated subject to easements and covenants, those rights may in some cases conflict with the use of the road by the public. But it is already accepted and embedded in practice by the courts in such specific and scope-limited cases, that vesting free of interests is appropriate.[14]

The absence-of-prejudice argument is straightforward: if no one is harmed, requiring consent is a pure transaction cost, a toll without a protective function.

4.2 Argument from Change of Legal Character

The second argument is structural: when land vests as public road, it ceases to be private land and becomes a fundamentally different legal object. Private-law instruments (covenants and easements) are not the appropriate governance regime for public road.

The Law Society observes: "The services covered by any easements would then be services contained within the legal road, while covenants that would no longer apply over the land to vest as road would be replaced by the rules that the public must follow for legal roads."[15]

This is not a claim that the interests are worthless in general. It is a claim that they have no remaining subject matter over the specific strip that is becoming public road. A covenant restricting building height, dwelling numbers, or use is categorically inapplicable to a public road. An easement securing a service corridor does not lose its practical function (the service infrastructure persists within the road) but loses only its private enforcement mechanism, which is replaced by the public-law framework governing roads.

This argument has a different logical structure from the first. It does not depend on the empirical question of whether prejudice is likely in any given case. It rests on the proposition that private covenants and public road occupy different legal domains, and that requiring private consent for a public-domain transition is a category error.

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[12] Muir, "Registrar-General of Land: Creating Roads in Subdivisions – Dealing with Covenants and Easements", discussing *RCL Henley Downs Ltd v Hanson* [2018] NZHC 2714.

[13] Barnes et al., "Simpson Grierson: New Case Law Offers Solution for Subdividing Landowners to Create Public Road", discussing *Round v Palmerston North City Council*.

[14] Muir, "Registrar-General of Land: Creating Roads in Subdivisions – Dealing with Covenants and Easements."

[15] New Zealand Law Society, *Natural Environment Bill and Planning Bill: Submission of the New Zealand Law Society*, para 7.10.

5. Examination of the Rationale

Both arguments are strong in the road-vesting context. But they are not without limits, and intellectual honesty requires identifying where the reasoning is tightest and where it is more contestable.

5.1 Strengths

- **The empirical record is unambiguous:** Courts have never found material prejudice to third-party covenant or easement holders in the road-vesting context. This is not a case where the evidence is mixed or contested. It is a settled pattern across multiple decisions, observed by both the Law Society and the Registrar-General.[16] The reform would simply align the statutory framework with the de facto outcome, eliminating the costly intermediate step of litigation.

- **The change-of-character argument is structurally sound:** Public road is genuinely a different category of land from private lots. The governance frameworks are different; the permitted uses are different; the ownership regime is different. Requiring private consent for a transition to public status is functionally equivalent to requiring that every easement holder consent before a road can be gazetted, a requirement that would be recognised as absurd in other contexts.

- **The scope is precisely delimited:** Extinguishment applies only to the vesting strip, not to any other land over which the covenant or easement has force. Benefiting parties retain 100% of their interests over all land where those interests have functional application.

- **Core security interests are preserved:** The registered owner and any mortgagee or encumbrancee must still consent. The reform removes only third-party consent requirements where the third parties have no material stake.

5.2 Points of Tension

"Highly unlikely to be prejudiced" is a probabilistic claim, not a categorical one. The Law Society's language acknowledges a residual possibility of prejudice, even if it has not materialised in reported cases. Conceivable (if rare) scenarios include:[17]

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[16] New Zealand Law Society, *Natural Environment Bill and Planning Bill: Submission of the New Zealand Law Society*, para 7.5; Muir, "Registrar-General of Land: Creating Roads in Subdivisions – Dealing with Covenants and Easements"; Barnes et al., "Simpson Grierson: New Case Law Offers Solution for Subdividing Landowners to Create Public Road."

[17] The Registrar-General of Land has observed that easements may carry a higher theoretical risk of genuine prejudice than covenants, given that easements grant positive rights (such as installation and maintenance of infrastructure) that may be practically inconsistent with road land, whereas covenant restrictions (building height, density, use) are categorically inapplicable to public road. Experienced subdivision practitioners consulted through the Law Society's Property Law Section did not support a hard distinction for the purposes of road vesting, noting that material prejudice rarely arises in either category in practice.

- An easement that protects critical private infrastructure (e.g., a specific access arrangement or utility connection) whose enforceability is impaired when the corridor becomes public road;

- A covenant that was priced into land values as part of a subdivision bargain, where extinguishment over the road strip modestly affects the bundle of benefits a purchaser believed they had secured.

These scenarios have not materialised in any reported case. But we cannot be fully confident that this reflects the true picture. As discussed in Section 8.4, cases involving genuine prejudice may currently be resolved through negotiation under the existing consent requirement, precisely because that requirement gives the covenant holder leverage. If so, the absence of prejudice in the case law reflects the selection mechanism, not the absence of the problem. These scenarios represent the strongest version of the counter argument, and the uncertainty around them informs the choice of remedy discussed in Section 8.5.

"Replaced by the rules for legal roads" is not always an exact equivalence. Public road rules govern transport safety, public use, and general public-law constraints. Private covenants may govern landscaping, lighting, signage, or restrictions on adjacent uses. The two bundles are not identical. The argument works only if one accepts (as we do) that private controls over public road land are normatively inappropriate, not merely that they are redundant.

6. Considering Officials' Concern

Some officials have reportedly raised concern with this proposed change on the grounds of protecting property rights. The concern can be assessed at two levels.

6.1 The Formal Level

At the formal level, this concern is correct: a registered interest is a property right, and extinguishing it without the holder's consent is an interference with that right. In the abstract taxonomy of property law, this is a real impairment.

But formal classification is not the end of the analysis. Property rights frameworks, including those the government is building into the Planning Bill, distinguish between the *form* and the *function* of a right. The question is not whether an interest exists on the register, but whether the interest holder would suffer a loss of value, use, or reliance if the interest were extinguished over the specific strip in question.

When the answer is consistently and demonstrably no (as it is in the road-vesting context) then enforcing the consent requirement does not *protect* property rights. It uses the formal architecture of property rights to impose transaction costs on a process that harms no one.

6.2 The Precedent Concern

The more serious concern is not about this specific case but about the precedent it sets. The concern runs: *if we can extinguish third-party interests for road vesting because it is costly and delayed, what stops the same logic being applied to broader covenant override, for example, where covenants restrict density in areas the government wants to intensify?*

This is a legitimate concern, and it is the one that must be clearly answered. The answer has three components:

1. **Road vesting involves a change of legal domain, not a rebalancing of competing private interests:** The land is ceasing to be private land entirely. This is categorically different from overriding a covenant between two private parties because the state prefers a different land use outcome. The limiting principle is the *nature of road land*, not a general efficiency claim.

2. **The scope of extinguishment is precisely bounded:** Only interests over the vesting strip are affected. Interests over all remaining private land continue in full force. This is not a general weakening of private ordering; it is a targeted removal of interests that have no remaining subject matter.

3. **The reform preserves the consent requirements that matter:** The registered owner and any mortgagee or encumbrancee must still consent. The parties with a genuine financial and legal stake in the land are not bypassed.

These three features (change of legal domain, precise scope, and preserved core consents) constitute a structural limiting principle that does not generalise to broader covenant override. The precedent concern is answerable.

6.3 What the Concern Reveals

In absence of principled reasoning, the concern about property rights may actually reflect institutional caution, because the downside risk of getting it wrong (constitutional challenge, rule-of-law criticism) is concentrated and visible, while the upside of reform (reduced transaction costs, faster subdivision, lower house prices) is diffuse and delayed.

This is precisely the kind of institutional inertia that the Planning Bill is supposed to overcome. If the unqualified concern with property rights were taken to its logical conclusion, it would also preclude compulsory acquisition for public works, road stopping, and numerous other routine exercises of public power that extinguish private interests in the public interest. The concern proves too much.[18]

[18] The phrase "proves too much" means: the reasoning behind the concern, if taken seriously, would prove far more than an objector would intend, so much that the objector themselves would not accept the logical consequences of their own argument. In the road vesting context, the structure is this: The concern with the Law Society's amendment is essentially that extinguishing covenants and easements on road-vesting

7. Assessment Through the Competitive Land Market and Property Rights Framework

The competitive urban land market (CLM) framework and the "rules above, rights below" property rights analysis developed in the Initiative's work on resource management reform provide a clear lens for assessing this issue.[19] But before applying that framework, it is necessary to establish the analytical toolkit that both the CLM assessment and the choice of remedy (Section 8) depend on.

7.1 The Transaction Cost Framework

Coase's central insight is that with zero transaction costs, any initial assignment of well-defined rights leads to efficient outcomes through bargaining. But where transaction costs exist, the choice of legal entitlement becomes crucial for efficiency.[20]

Coase also established that in cases of conflicting uses, harm is reciprocal. Allowing development imposes costs on those affected by it. But withholding development also imposes a cost: the value that would have been created (housing supply, lower prices, productive use of land) is forgone. That forgone value is real and measurable, and it stands against whatever cost the development imposes on others. The question is not which party has the right, but which allocation produces the lower total social cost.

Demsetz reinforces this: private property rights should be extended or sharpened only where the gains from internalising externalities exceed the costs of specification and enforcement.[21] The guiding principle is to choose the form of rights protection that maximises net social

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land interferes with private property rights. But if that concern is taken at face value, it would also condemn what the courts are already doing every single time this issue comes before them, because the courts have never found that extinguishing these interests for road vesting materially alters their effect. Those concerned about property rights presumably do not object to the courts doing it. So, their own principle, applied consistently, would require them to object to something they already accept. The concern "proves too much" because it overshoots its target and undermines settled practice that nobody disputes. It is a way of saying: your stated principle is not really your principle, because you do not apply it elsewhere. The real concern must be something else. In this case, the risk is that the underlying issue could be institutional defensiveness or categorical resistance to statutory simplification. A lack of principled reasonings would constitute a red flag.

19 Benno Blaschke, *Submission on Going for Housing Growth (Pillar 1) Discussion Document: Freeing up Land for Urban Development*, Submission (The New Zealand Initiative, 2025), para 11.8, https://www.nzinitiative.org.nz/reports-and-media/submissions/submission-going-for-housing-growth-pillar-1-freeing-up-land-for-urban-development/; Benno A. Blaschke, *Competitive Urban Land Markets and the Planning Bill 2025: On Agile Land Release and the Definition of Sufficiency*, Research Note (The New Zealand Initiative, 2026), 1–56, https://www.nzinitiative.org.nz/reports-and-media/reports/competitive-urban-land-markets-and-the-planning-bill-2025/.

20 R. H. Coase, "The Problem of Social Cost: The Journal of Law and Economics: Vol 3," *The Journal of Law and Economics* (University of Chicago) 3 (1960): 1–44, https://doi.org/https://doi.org/10.1086/674872.

21 Harold Demsetz, "Toward a Theory of Property Rights," *The American Economic Review* 57, no. 2 (1967): 347–59, https://www.jstor.org/stable/1821637.

surplus once the real costs of bargaining, enforcement, and residual misallocation are taken into account.

Applied to property rights specifically, Calabresi and Melamed distinguish between two forms of legal protection. A *property rule* protects an entitlement by requiring the holder's consent before it can be taken. A *liability rule* protects the entitlement differently: it can be taken without consent, but the taker must compensate. The entitlement is protected by its price, not by a veto. Their central insight is that liability rules are the appropriate form of protection precisely when transaction costs make property-rule bargaining impractical.[22]

The exclusion-versus-governance distinction in the modern property rights literature reinforces this. Broad exclusionary rights ("rights against all comers") are efficient when the set of potential transactors is large and heterogeneous and monitoring fine-grained uses is costly. More tailored governance or property rules should be reserved for environments where the number and identity of affected parties is small enough that specific constraints are cheaper to apply.[23]

The road-vesting consent requirement inverts this logic: it applies an exclusionary property rule (each holder has a veto) in exactly the high-transaction-cost, many-party environment where the literature says that rule is least efficient. Where a property rule operates in a high-transaction-cost, many-party environment and produces deadweight loss without protecting any demonstrated interest, the question arises whether a different form of protection could be taken.

The question, then, is not whether to weaken property rights. It is whether the form of protection should change. A liability rule (compensation for demonstrated loss, assessed after the fact) preserves the economic substance of the entitlement while removing the transaction-cost barrier that the property rule creates. This is the standard prescription of the transaction cost literature for exactly this class of problem.

7.2 Registered Rights and the Form of their Protection

The third-party consent requirement protects specific, registered legal rights: covenants, easements, and encumbrances on title. These are vested rights. The question is not whether they deserve protection, but whether the current form of protection (a consent-based veto that each holder can exercise individually) is proportionate to the interest at stake, given the transaction cost environment in which it operates.

The current consent requirement is a property rule. It protects covenant and easement holders by requiring affirmative consent before their interest can be extinguished. When the benefiting land has been subdivided into dozens or hundreds of lots, this produces the anti-

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[22] Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *Harvard Law Review* 85, no. 6 (1972): 1089–128, https://doi.org/10.2307/1340059.

[23] For the exclusion/governance distinction, see Henry E. Smith, "Exclusion versus Governance: Two Strategies for Delineating Property Rights," *The Journal of Legal Studies* 31, no. S2 (2002): S453–87, https://doi.org/10.1086/344529.

commons structure described in Section 2: each lot holds a veto, transaction costs are prohibitive, and the subdivider's only recourse is costly litigation.

The transaction costs involved are not merely a private burden on the subdivider. They are relevant for housing supply. The CLM framework considers institutional mechanisms that suppress competitive supply as the primary driver of housing unaffordability. These mechanisms include both *public-law constraints* (zoning, consenting, infrastructure sequencing) and *private-law instruments* (that impose social cost without otherwise protecting any meaningful private interest) that function as *de facto* barriers to supply where the costs they impose are disproportionate to the interests they protect.

The specific example of the road-vesting consent requirement is a private-law mechanism that functions as a supply barrier. It does not restrict the *type* of development permitted; it restricts the *speed and cost* at which consented development can be completed. Every subdivision affected by this problem faces additional costs of $50,000 to $100,000 and delays measured in months or years. These costs are passed through to homebuyers.

In a competitive land market, the ability to bring supply to market quickly and with low transactions costs is a core condition for price discipline. Institutional frictions that slow supply, even where they do not block it outright, erode the competitive pressure that keeps prices aligned with marginal production costs.

The property rule is producing deadweight loss here. The question, applying the framework established in Section 7.1, is whether the form of protection should change: from a property rule (consent-based veto) that is demonstrably impractical in this many-party, high-transaction-cost environment, to a liability rule (compensation for demonstrated loss) that *preserves the economic substance of the entitlement while removing the transaction-cost barrier*.

7.3 Consistent with "Rules Above, Rights Below"

The "rules above, rights below" framework holds that:

- **From above:** clear national rules should remove unnecessary constraints on development.
- **From below:** secure property rights should empower private actors to deliver supply.

The proposed reform operates from above (a statutory rule change that removes a structural bottleneck) while strengthening the position from below by ensuring that subdividers with consented developments can complete them without being held hostage by fragmented consent requirements that impose costs disproportionate to the interests they protect.

It does not weaken property rights in any functional sense. It changes the form of protection from one that is impractical in this transaction cost environment to one that preserves the economic substance of the right while enabling competitive supply. This is pro-property-rights in the system sense: it reduces arbitrary burdens, improves certainty, and ensures that

property rights are respected as protections of genuine interests rather than deployed as instruments of obstruction.

7.4 Public interest justification for altering vested rights: bridging constitutional and competitive urban land market frameworks

The interests affected are specific, registered legal rights: covenants, easements, and encumbrances on title. These are vested rights, and legislation that alters vested rights engages our constitutional foundations (as presented in the Legislation Design and Advisory Committee's Fundamental Constitutional Principles and Values of New Zealand Law of their *Legislation Guidelines*),[24] which require that where vested rights have been altered, the question of compensation must be addressed. The question is whether the current form of enforcement of these rights, a requirement for individual consent before road vesting can proceed, is proportionate to the interest they protect.

The competitive urban land market (CLM) framework adds a second level to that analysis. The constitutional case for converting the form of protection applies at the micro level regardless of institutional context. CLM explains why the same logic applies at a system level, given that New Zealand's property rights operate within a public law planning system where councils, not landowners, control the "right to build".

The constitutional principle at the micro level

The constitutional case for converting a property rule (consent-based veto) to a liability rule (take, price, then compensate where needed) applies wherever transaction costs make consent-based bargaining impractical. This is standard constitutional logic, grounded in the transaction cost literature (established in Section 7.1). It does not depend on whether the system is one of private ordering (where landowners hold a presumed right to build) or public law (where councils confer them through zoning).

Subdivision fragments covenants and easements across dozens or hundreds of lots in any title system. This creates the anti-commons described in Section 2 regardless of how property rights are allocated. Whether under strong private property rights or under New Zealand's socialised planning system, the same mechanical problem arises: the original bilateral restriction has been fragmented to the point where assembling consents is prohibitive.

In both worlds, the constitutional response is the same: where reciprocal cost analysis favours proceeding (the cost of maintaining the blocking power exceeds the cost of overriding it), the principled response is to take, then compensate where needed. Put differently, there is a societal net-benefit (a case for the public interest) to overriding. The property rule transforms into a liability rule. *This transformation does not violate property rights, because it maintains the economic substance of the right. What changes is the*

[24] LDAC, "Legislation Guidelines (Chapter 4) Fundamental Constitutional Principles and Values of New Zealand Law," The Legislation Design and Advisory Committee, 2021, Section 4.4, https://www.ldac.org.nz/guidelines/.

mechanism of enforcement, from a veto to a price, not the entitlement itself. LDAC 4.4 contemplates exactly this: not the abolition of the right, but the conversion of its form of protection to one that is workable given the transaction cost reality.

What CLM adds: the same logic applies at a system level

Under a system of strong private property rights, the constitutional principle resolves the problem at micro (site-specific) level and nothing more. Covenants agreed between willing parties on their own land do not suppress aggregate supply, because strong property rights enable competitive entry on other land with disciplining effect: someone else can easily build elsewhere. The restriction does not make housing unaffordable or reduce urban productivity because the market can route around it. The anti-commons is a transaction cost problem for the specific subdivider on the specific site, but not a system-wide supply constraint.

The picture changes with context:

- Where there are strong private property rights (landowners hold a presumed right to build), development routes around the local constraint and provides an economically meaningful substitute elsewhere, leaving the wider city much less affected.

- But New Zealand does not operate in that kind of system. The right to build is not presumed but conferred: councils grant it through zoning, a public law approach to planning that developed precisely because private bargaining over land use externalities is impractical at urban scale.[25] This is unlikely to change, leaving councils to exercise that power (subject to constraints imposed by central government) across geographic jurisdictions broad enough to function as monopoly gatekeepers of land and floor space supply. This has a substantial city-wide effect.

In this institutional environment, consent-based vetoes (property rules) that might function efficiently under strong private property rights become instruments of supply suppression. The institutional conditions that would have made bargaining work to the net-benefit of wider prosperity (low transaction costs, competitive alternatives, symmetric information) are absent. It is here that CLM logic does its most important work in a planning system grounded in public law (councils confer the "right to build"), where two failures compound:

1. **Site level:** Consent-based vetoes (covenants and easements) operate in exactly the high-transaction-cost, many-party environment that the public law system was created to overcome.

2. **System level:** The public law planning system grants people effective property rights over other people's land, mediated through councils that respond to incumbent

[25] William Alan Fischel, *Zoning Rules! The Economics of Land Use Regulation* (Lincoln Institute of Land Policy, 2015), Chapter 5, https://www.lincolninst.edu/publications/books/zoning-rules. Fischel argues that zoning developed in the early twentieth century as transport technology, particularly the automobile, enabled incompatible land uses to locate in proximity at a scale that made private bargaining over externalities impractical: the transaction costs of private ordering exploded and became prohibitive with urban mobility and the high number of affected parties. In response, zoning emerged as the public law substitute.

preferences across monopoly jurisdictions. Development cannot reroute, because the same decision-maker controls the right to build across the entire local market.

The result is the worst of both worlds: the system forecloses competitive entry while private-law instruments compound blocking power under the very conditions that made private ordering impractical in the first place.

The CLM framework responds by applying the same constitutional logic to both levels: *prices not vetoes, liability rules not property rules*. At the system level, the justification is no longer confined to a single site where bargaining has broken down. It extends to the planning system itself, where public law has replaced private ordering and where competitive land markets cannot function while blocking power persists.

The public interest case

Where the compounding of public law restrictions and private blocking power imposes costs on the wider community that are disproportionate to the value the individual rights protect (property rule and subjective preferences), and the economic substance of those rights can be preserved through a less costly mechanism (liability rule through pricing and compensation), there is a public interest case for overriding the blocking power while protecting the holder through compensation.

The Initiative's work on *Competitive Urban Land Markets and the Planning Bill 2025* develops the operational mechanisms to be applied to the city-wide area in the planning system.[26] Broadly, the system should monitor land prices and require regulatory adjustment when price differences between adjacent zones (within the city or between urban and rural areas) indicate that regulatory restrictions are creating artificial scarcity of land and floor space, driving up prices. Where prices signal that the planning system is suppressing competitive supply, zoning expands. This approach rebalances the system in favour of wider prosperity over individual enjoyment of land for the net benefit of society, converting vetoes (property rules) into prices (liability rules).

Critically, the cost analysis is reciprocal. Allowing development to proceed imposes a cost on the right holder (the loss of their subjective preference). But maintaining the blocking power also imposes a cost: suppressed housing supply, forgone value creation, and deadweight loss passed to homebuyers. Both costs are real. The principled response is not to privilege one side but to choose the allocation that minimises total social cost, and to use the liability rule to ensure that where one party bears a cost so that the other may gain, that cost is accounted for.

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[26] Blaschke, *Competitive Urban Land Markets and the Planning Bill 2025*, Annexes A and B, which develop agile land release mechanisms and failsafe provisions based on diagnostics rooted in price signals that operationalise this principle in the planning context. The logic is the same: where the cost to society of maintaining restrictive zoning exceeds the cost of overriding it (the reciprocal cost principle), property rules are converted into prices. Where price differentials indicate regulatory scarcity, zoning expands. Compensation is not required because upzoning in aggregate confers greater density allowances and therefore higher land values on existing owners. The economic substance of their property right is preserved, and typically enhanced, by the very process that overrides their preference for restriction.

The holder may not get what they want in qualitative terms (their subjective preferences), but their economic interest (the economic substance of their property right) is preserved, and often enhanced, because value is created by the development the system enables. How that preservation works depends on the level at which the reform acts:

- **At the site level (road vesting):** The betterment offset means the compensation calculus is likely zero. The completed subdivision increases the value of neighbouring land by more than any interest lost over the road strip. The holder is made whole through the value the subdivision creates, not through a payout. The liability rule exists as a matter of constitutional principle, but in practice it produces nothing.

- **At the site level (zoning adjustment):** Where reform liberalises zoning in response to price signals, upzoning confers greater density allowances and therefore higher land values on existing owners. The economic substance of the property right is preserved, and typically enhanced, by the very process that overrides the owner's preference for restriction. No payout is required because no loss has occurred. Compensation is embedded in the reform itself.

- **At the system level (city-wide price adjustment):** Where system-wide reform increases city-wide housing supply and land prices adjust downward, no compensation is due. The reduction represents the elimination of rents caused by artificially scarcity of land and floor space: value that existed only because the planning system restricted competitive entry, not because of any genuine locational advantage, investment, or improvement by the landowner. These rents are extractive, not fundamental. They reflect a transfer from homebuyers to incumbent landowners under conditions analogous to a cartel, where supply is artificially restricted across a monopoly jurisdiction. The economic substance of the property right is the value of the land under competitive market conditions. Reform that moves prices toward that competitive baseline does not diminish the right; it removes the regulatory premium.

In all three cases, the qualitative preference (the specific covenant restriction, the particular zoning envelope, the quiet street) may not be preserved. But the economic substance of the property right is. That is what the conversion from vetoes to prices achieves: it protects the value of the entitlement while removing the blocking power that suppresses supply at the cost of society as a whole.

Mechanism design

Any compensation mechanism must be designed to preserve the low transaction costs that justify the reform in the first place. This means a materiality threshold (demonstrated actual loss, not hypothetical inconvenience), adverse costs for unsuccessful claims, and a short limitation period. These features prevent the remedy from recreating later blockages.

Given the empirical record of zero demonstrated prejudice in road vesting cases, such a mechanism would in practice rarely if ever be triggered. But its existence does three things:

1. ensures the reform is constitutionally sound and consistent with the property rights principles set out above;

2. protects against the residual possibility that genuine prejudice exists in cases currently resolved through negotiation under the existing consent requirement; and

3. incentivises private bargaining as a pre-vesting resolution where it is more optimal, because both parties know the liability rule sets the baseline if they fail to agree.

8. Residual Risk, Remedies, and the Question of a Safety Valve

8.1 The Tension

The case for the Law Society's clean rule (no third-party consent for road vesting) rests on the empirical finding that courts have never identified material prejudice to covenant or easement holders in this context. Section 5 sets out the strengths and some tensions of that finding.

But intellectual honesty requires confronting a tension. The Initiative's broader work on property rights and competitive land markets treats compensation as the mechanism that disciplines public power: when the state takes or restricts a private interest, the cost should be internalised. If the reform extinguishes private interests by operation of statute, the property rights framework asks: what recourse does the holder have if, contrary to the established pattern, they suffer genuine loss?

The transaction cost framework established in Section 7.1 provides the analytical basis for resolving this tension:

- As set out there, Coase's reciprocal cost principle means that the cost of maintaining the consent requirement (suppressed supply, forgone value, deadweight loss) must be weighed against the cost of overriding it (potential loss to the right holder).

- The Calabresi-Melamed distinction between property rules and liability rules identifies the appropriate form of protection: where transaction costs make consent-based bargaining impractical (and an anti-commons of hundreds of veto-holding parties is the textbook case), liability rules are the appropriate form of protection. The entitlement is preserved. Only the mechanism of enforcement changes, from a veto to a price.

The question, then, is not whether to weaken property rights. It is whether the form of protection should change, as Section 7.2 argues it should. The remainder of this section examines what existing remedies offer, why the gap may not matter, and what options are available for designing the reform.

8.2 What Existing Remedies Actually Offer

The honest answer is: less than one might assume.

- **Tort:** Statutory authority is a defence. If the Planning Act authorises extinguishment on vesting, the extinguishment is lawful. There is no cause of action in negligence, trespass, or nuisance for carrying out what the statute permits. Tort is not a viable pathway.

- **Judicial review:** Judicial review challenges the legality of process, not the substance of outcomes. If vesting was carried out lawfully under the statute, there is nothing to review. Judicial review also does not award compensation. It is the wrong instrument.

- **Statutory compensation under the planning framework:** The RMA's section 85 (and its Planning Bill equivalent) addresses plan provisions that render land incapable of reasonable use. That provision concerns restrictions on the interest holder's own land, not the extinguishment of an interest the holder has over someone else's land. The Public Works Act compensates for compulsory acquisition, but road vesting on subdivision is not a compulsory acquisition of the covenant holder's property. Their land is not being taken. An interest they hold over a different piece of land is being extinguished. The Public Works Act framework does not clearly reach this situation.

In short, if the reform proceeds as proposed and a covenant holder in a rare case suffers genuine loss, it is not clear that any existing legal remedy would provide compensation. This gap should be acknowledged rather than papered over.

8.3 Why the Gap May Not Matter

There are strong reasons to accept this gap as tolerable.

The loss has never materialised

Across every reported case, courts have found no material prejudice. This is not a mixed or contested evidence base. It is a uniform finding.

The change-of-legal-character argument explains why it should not materialise

When land becomes public road, private covenants lose their subject matter. A covenant restricting building height or dwelling density is categorically inapplicable to a road. An easement securing a service corridor retains its practical function (the service infrastructure persists within the road corridor), but the private enforcement mechanism is replaced by the public-law framework governing roads.

The argument is not merely that loss is unlikely; it is that the nature of road land makes loss structurally implausible for most categories of interest.

Betterment offsets any claimed loss

Where a subdivision increases the value of neighbouring properties (which it typically does, by providing road access, services, and a completed residential environment), the covenant holders whose interests are extinguished over the road strip are net beneficiaries of the very process they might claim harmed them.

Under the Public Works Act's mirror principle, betterment to the retained land is netted against compensation for what is taken. Applied here, any loss from covenant extinguishment over the road strip would in most cases be more than offset by the increase in value that the neighbouring land enjoys from the completed subdivision. The compensation calculus would therefore be zero or negative in practice, not because the principle is waived, but because the accounting produces that result.[27]

This is also an expression of how CLM protects property rights through price. The covenant holder may not get the qualitative outcome they originally contracted for (the particular density restriction, the quiet street), but the subdivision delivers them a quantitative gain: their land is worth more. They are not just compensated; they are often better off. The liability rule protects the economic substance of the entitlement even where the specific qualitative preference is not preserved.

8.4 Why Uncertainty Remains

The absence of prejudice in reported cases may reflect selection and favour caution: cases where genuine prejudice would arise may never reach court because they are screened out at the design stage or resolved through negotiation.

The reason cases may be resolved through negotiation is precisely that the consent requirement gives the covenant holder leverage. The subdivider cannot proceed without agreement, so they redesign the subdivision or make side-payments to avoid the problem.

Remove the consent requirement and that leverage disappears. The covenant holder who was previously negotiated with has nothing to negotiate from. The market mechanism that currently screens out genuine prejudice cases works because the legal rule forces engagement.

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[27] The Registrar-General has also observed that the subdivision consent process itself may provide substantive protection, as territorial authorities consider road and utility locations and impose conditions on the developer to ensure affected parties are not disadvantaged. However, practitioners consulted through the Law Society and through us directly were cautious about relying on this as a substitute safeguard, noting that generic consent conditions are not a reliable mechanism for identifying all potential issues and questioning whether this is an appropriate role for territorial authorities given the private property rights involved. The Initiative shares this caution. A reform grounded in competitive land market principles should not make its protective mechanism contingent on the reliability of the very institution whose discretionary power the broader reform programme seeks to constrain. This is a further reason why, if a residual protection mechanism is adopted, it should be a freestanding compensation pathway (Option C) rather than reliance on the council process.

This means we cannot be confident that the observed absence of prejudice reflects the true absence of prejudice. Some cases may currently be resolved quietly, and the clean rule would expose them without providing any remedy. This is an additional reason to favour a post-hoc compensation pathway over the clean rule, even if we expect claims to be rare.

8.5 Options

Three options present themselves. Each involves a different trade-off between the clean-rule benefits of the Law Society's proposal and the principled case for residual protection.

Option A: The Clean Rule (Law Society Proposal)

No third-party consent required for road vesting. No objection pathway. No bespoke compensation mechanism.

For: Maximum simplicity. Eliminates the anti-commons entirely. No notification burden (identifying all benefiting parties across potentially hundreds of lots is itself a significant cost that a notification model does not eliminate). No hold-up point. No institutional machinery for a problem that has never materialised.

Against: If the rare case of genuine loss arises, the holder has no clear remedy. The reform extinguishes a property interest by operation of statute without accountability in that edge case. Moreover, as discussed in Section 8.4, we cannot be fully confident that the case is as rare as the observed record suggests. The current consent requirement may be quietly resolving genuine prejudice through negotiation, and the clean rule would remove the leverage that produces those resolutions. This is both a principled gap and a gap whose empirical dimensions are uncertain.

Option B: Notification and Objection Window

Notify all interest holders. Provide a short statutory window (for example, 15 working days) in which substantive objections may be lodged. Vesting proceeds automatically if no objection is lodged. Frivolous objections attract cost penalties including cost of capital for delay.

For: Allows genuine prejudice to surface. Addresses the selection-bias concern. Preserves a hearing for the rare case. And critically, the risk of cost penalties means the objection pathway should only be used by parties who are confident they have a genuine case. The penalty regime acts as a filter: it deters frivolous or opportunistic objections while preserving access for those with real interests at stake. In effect, this reverses the burden and introduces a filter. Under the current rule, the subdivider bears the entire cost of proving that every interest holder is unaffected, by obtaining affirmative consent from each one. Under this option, vesting proceeds by default and the burden shifts to the objector to demonstrate genuine prejudice, at their own risk if they cannot.

Against: The notification requirement itself is a significant burden. The subdivider must still identify every benefiting party across all subdivided lots, which is a substantial part of the cost the reform is supposed to eliminate. The objection window creates a new hold-up point:

every subdivision must build the statutory period into its programme, and lenders and purchasers must wait. Determining "substantive" versus "frivolous" requires adjudication, reintroducing either a court process or a bespoke tribunal. The penalty regime depends on courts or adjudicators reliably imposing meaningful cost awards, which New Zealand courts are historically reluctant to do. A statutory cost regime specific to road-vesting objections would be disproportionate institutional machinery. Finally, creating an objection pathway signals that there may be something to object to, potentially activating opposition from parties who would not otherwise have considered objecting, though the penalty regime mitigates this to some extent by signalling that unsubstantiated objections carry real financial consequences.

Option C: Post-Hoc Compensation (No Objection Pathway)

Vesting proceeds automatically with no third-party consent and no objection window. The subdivision completes without delay. But any person who suffers demonstrable loss from the extinguishment of their interest over the vesting strip may claim compensation after the fact, by statutory right, from the territorial authority (or, alternatively, from the subdivider, with cost recovery through the subdivision process).

For: Preserves the clean rule's core benefit: no hold-up, no anti-commons, no conditional vesting. Does not reintroduce the notification burden. Satisfies the property rights principle that genuine impairment should be compensable. As discussed in Section 8.2, neither the Public Works Act nor the current planning framework clearly covers extinguishment of third-party interests on road vesting. Option C therefore requires a bespoke compensation provision in the Planning Act. That provision should be modelled on the Public Works Act's robust approach (taking proceeds, compensation assessed afterward, clear methodology) rather than the weak and largely ineffective compensation provisions in the RMA and the new Planning Bill. Structurally analogous to how compulsory acquisition works under the Public Works Act: the taking proceeds, compensation is assessed afterward. And, critically, if the empirical record is correct, compensation would in practice be zero because there is no demonstrable loss. The provision exists to satisfy the principle without generating claims. The pathway can also be reinforced with a statutory cost regime where unsuccessful claimants bear the respondent's costs, including cost of capital for any delay their claim occasions. This serves the same filtering function as Option B's penalty regime, deterring speculative claims, but without creating a pre-vesting hold-up point.

Against: Even with a penalty regime, the mere existence of a compensation pathway may create some litigation risk. Risk-averse territorial authorities may price the possibility of claims into their processing or use it as a reason to slow subdivision approvals. The provision may also require specification of the standard of loss, the liable party, and the assessment methodology, adding statutory complexity to what is otherwise a simple reform.

8.6 Assessment

We do not think this question admits of certainty.

- **Option B (notification and objection)** addresses the principled concern through a well-designed mechanism: it reverses the burden, filters frivolous objections through a penalty regime, and preserves a hearing for the rare genuine case. But the implementation risks remain significant. The notification burden does not disappear (the subdivider must still identify every benefiting party). Adjudicating "substantive" versus "frivolous" reintroduces either a court process or bespoke institutional machinery. And the penalty regime depends on courts reliably imposing meaningful cost awards, which is uncertain in the New Zealand context. Option B's design logic is sound; whether it would deliver in practice is less clear.

- **Option C (post-hoc compensation)** achieves the same principled objective as Option B (genuine impairment is compensable) without reintroducing friction in the vesting process. It is also the response that LDAC 4.4 contemplates: where legislation alters vested rights, the question of compensation must be addressed. Vesting proceeds cleanly. No notification burden. No hold-up point. The compensation pathway, modelled on the Public Works Act's robust framework rather than the weak provisions of the RMA and Planning Bill, provides a credible remedy if the rare case arises. The penalty regime deters speculative claims. And if the empirical record is correct, the pathway produces nothing, because there is no demonstrable loss. Its remaining weakness is the drafting complexity: the standard of loss, the liable party, the assessment methodology, and the cost regime all need to be specified in statute. Whether this adds disproportionate complexity to an otherwise simple reform depends on how it is drafted. However, given the betterment offset discussed in Section 8.3, the compensation calculus would in most cases be zero or negative. The provision exists to satisfy the constitutional principle, not to generate claims.

- **Option A (the clean rule)** remains the simplest and is what the Law Society, the Registrar-General, and the case law support. But its weakness is now more clearly defined. It is not only a principled gap (no remedy if loss arises) but an empirically uncertain one (based on the evidence we are aware of): the selection effect discussed in Section 8.4 means we cannot be confident that genuine prejudice cases are not currently being resolved through negotiation under the existing consent rule. Removing that rule removes the leverage that produces those resolutions, and Option A provides no substitute. Moreover, having grounded this reform in the constitutional principle that compensation must be addressed when vested rights are altered (LDAC 4.4), a design that provides no pathway for compensation is in tension with that principle. This does not make Option A impermissible, but it does mean the burden falls on those who favour the clean rule to demonstrate that the constitutional concern is empty, not merely unlikely.

We Tentatively Consider both Options A and C Defensible

Option C preserves the clean vesting process while satisfying the constitutional requirement that compensation be addressed when vested rights are altered, without reintroducing the anti-commons problem that Option B risks recreating. The betterment offset means the provision would in practice rarely if ever produce a payout. A statutory cost regime where unsuccessful claimants bear the respondent's costs, including cost of capital for any delay, deters speculative or unjustified claims without closing the pathway for genuine ones.

Option A is the simplest approach and is what the Law Society and the Registrar-General support. The only reason to add the machinery of Option C is the uncertainty about whether removing the consent requirement exposes a real gap and whether LDAC 4.4 has anything to bite on, which appears unlikely based on the initial evidence base. If a decision maker is comfortable with that initial evidence, sufficient to retire uncertainties, the clean rule is sufficient and potentially delivers the higher social net-benefit. Where those uncertainties remain, the burden falls on those who favour the clean rule to demonstrate that LDAC 4.4 has nothing to protect.

The choice between Options A and C ultimately turns on an empirical question we cannot resolve from the existing evidence: whether the current consent requirement is producing negotiated resolutions of genuine prejudice that would not otherwise occur.

- If it is, Option A has a real gap, because removing the consent requirement removes the leverage that produces those resolutions and leaves the affected party without recourse.

- If it is not, Option A's gap is principled but empirically empty, and the additional machinery of Option C is unnecessary. A confidence assessment of the selection effect, informed by practitioners who routinely deal with subdivision consent processes, would materially improve the basis for a final recommendation.

Any decision should also depend on the drafting: a well-designed compensation provision modelled on PWA principles strengthens the reform, while a poorly designed one could create new institutional friction.

The choice may ultimately depend on the broader institutional context. If the new planning system provides strong property rights, private ordering, and regulatory relief (including compensation) for overreach, then Option C is the consistent design: the system protects property rights through liability rules throughout, and road vesting should be no exception.

If, however, the new planning system remains a public law regime without compensation to landowners for regulatory overreach, as is currently the case and is likely to remain so under the Planning Bill 2025, then Option A is the more natural fit. It would be anomalous to introduce a compensation mechanism for extinguishment of third-party interests over a road strip when the system routinely extinguishes far greater property value through zoning decisions without any compensation at all.

9. Bottom Line and Evaluation

9.1 Assessment of the Reform

The Law Society's proposed amendment to Schedule 7, clause 28(2) of the Planning Bill is:

- **Well-targeted:** it addresses a specific, documented friction in the subdivision process;

- **Narrowly scoped:** it applies only to the road-vesting strip, preserves core consent requirements, and does not affect third-party interests over any other land.
- **Empirically supported:** courts have invariably granted orders to remove these interests, finding no material prejudice in every reported case;
- **Structurally sound:** the limiting principle (road land as a different legal category) is robust and does not generalise to broader private-ordering override;
- **Consistent with the government's reform objectives:** it removes an anti-commons friction that imposes deadweight costs on housing supply.

The question is not whether third-party consent for road vesting should be removed. It should. The question is whether the reform should be supplemented with a residual protection mechanism, and if so, of what kind. Section 8 examines this in detail. The following table summarises the three options against the criteria that matter.

9.2 Comparative Assessment of Options

The following table assesses the three options identified in Section 8.5 against the practical, principled, and institutional criteria that should inform the design choice.

Table 1: *Comparison of Options*

Criterion	Option A: Clean Rule	Option B: Notification and Objection	Option C: Post-Hoc Compensation
Eliminates anti-commons	Fully	Partially. Notification burden and objection window reintroduce friction	Fully. Vesting proceeds without condition
Notification burden	None	Significant. Must still identify all benefiting parties across subdivided lots	None
Hold-up risk	None	Present. Statutory window plus adjudication if objection lodged	None. Claims are post-hoc; vesting is unconditional
Protects genuine property interest	No. If the rare case of genuine loss arises, no clear remedy exists. In tension with LDAC 4.4	Yes. Objection pathway preserves hearing for genuine cases	Yes. Compensation available after the fact

Criterion	Option A: Clean Rule	Option B: Notification and Objection	Option C: Post-Hoc Compensation
	where legislation alters vested rights		
Selection effect addressed	No. Removing consent removes leverage that may currently produce negotiated resolutions	Yes. Objection pathway preserves opportunity for affected parties to come forward	Partially. Leverage is removed, but compensation provides a substitute remedy
Filter against abuse	Not applicable (no pathway)	Penalty regime deters frivolous objections; burden on objector to demonstrate prejudice	Penalty regime (costs against failed claimants) deters speculative claims
Court/adjudication dependence	None	High. Requires adjudication of "substantive" vs "frivolous"; depends on courts imposing meaningful cost awards	Moderate. Standard court process for compensation claims; costs awards are a normal feature
Administrative and drafting complexity	Minimal. Simple statutory amendment	Significant. Requires notification process, objection pathway, adjudication mechanism, bespoke penalty regime	Moderate. Requires compensation provision, standard of loss, liable party, cost regime, modelled on PWA. However, betterment offset means the provision would rarely produce a payout
Institutional risk aversion	Low. Clean rule gives councils no discretion	Moderate. Councils may treat objection pathway as reason to delay processing	Some risk. Councils may price possibility of claims into processing, though claims are post-hoc and do not condition vesting
Consistency with PWA principles	Does not engage compensation framework	Engages through objection pathway, but mechanism is bespoke rather than modelled on established framework	Directly modelled on PWA: taking proceeds, compensation assessed afterward

Criterion	Option A: Clean Rule	Option B: Notification and Objection	Option C: Post-Hoc Compensation
Consistency with CLM and property rights framework	In tension. Removes the anti-commons friction on supply, which is consistent with CLM. But applies no form of protection (neither property rule nor liability rule) to the extinguished interest. Having grounded this reform in the constitutional principle that compensation must be addressed when vested rights are altered (LDAC 4.4), a design that provides no compensation pathway is in tension with that principle. This tension may be resolved if the interest can be shown to have no economic content, but the selection effect (Section 8.4) leaves that uncertain.	Sound but costly. Consistent with CLM (removes supply friction) and with property rights principles (preserves a hearing). But the property-rule mechanism (objection pathway) is the form of protection the transaction cost literature identifies as least efficient in this high-transaction-cost, many-party environment	Fully aligned. The theoretically correct response to the transaction cost environment identified in Section 7.4. Converts a property rule (consent-based veto) to a liability rule (compensation for demonstrated loss). Preserves the economic substance of the entitlement while removing the transaction-cost barrier. Consistent with both CLM and the transaction cost literature on optimal rights protection
Supported by Law Society / Registrar-General	Yes. This is the proposal as made	Not proposed	Not proposed, but consistent with the core reform (removal of third-party consent for vesting)

9.3 Assessment of Officials' Concern

If the concern with property rights treats the formal existence of a registered interest as equivalent to a substantive protective function, then it would appear analytically unprincipled and unreasoned. In the road-vesting context, the interest seems to have no remaining functional content over the vesting strip. Requiring consent from parties who have no material stake is not protecting property rights. It is imposing transaction costs that flow directly to homebuyers and constrain housing supply.

The reform proposed in this note, by contrast, engages directly with the constitutional principle that compensation must be addressed when vested rights are altered (LDAC 4.4) and engages directly with the constitutional principle that compensation must be addressed when vested rights are altered (LDAC 4.4) and examines whether and how to do so. An unqualified concern does not.

The precedent concern is answerable. For private covenants, the reform's limiting principle is structural (change of legal domain), not pragmatic (efficiency beats rights). It does not open the door to general private covenant override.

The note does, however, argue that the same analytical logic (converting property rules to liability rules where transaction costs make consent-based bargaining impractical) applies more broadly to the planning system. That is a feature of the analysis, not a precedent risk. It is the principled response to the institutional environment in which New Zealand's property rights operate (Section 7.4), and it is consistent with our constitutional respect for property rights: the economic substance of those rights is preserved by the liability rule, even where the form of protection changes from a veto to a price.

9.4 Strategic Significance

This issue is not a headline reform. It is a practical friction point in implementation, the kind of institutional detail that determines whether planning reform translates into actual housing supply on the ground, or whether it is quietly neutralised by procedural bottlenecks.

The Planning Bill currently carries the problem forward. Unless the select committee acts on the Law Society's recommendation, subdividers will continue to face years of delay and tens of thousands of dollars in court costs to remove interests that the courts have always removed, a pure deadweight loss in the system.

Our work on infrastructure finance reform in the context of the Infrastructure Funding and Financing Amendment Act 2025 has further revealed that these types of issues end up being substantial barriers to identifying otherwise viable urban development projects that could deploy with an infrastructure levy.[28]

9.5 Recommendation

We support the Law Society's core position: third-party consent from covenant and easement holders should no longer be required for road vesting on subdivision.

On the question of whether this clean rule should be supplemented with a residual protection mechanism, our recommendation is as follows:

[28] Benno A. Blaschke, *Finance Freedom: The Institutional Reform Pathway Toward Elastic Infrastructure Supply*, Report (The New Zealand Initiative, forthcoming), Section 5.5 (Early Evidence: What Operational Experience Confirms) and Section 5.6 (The Role of Planning Reform).

1. **We consider both Options A and C defensible.**

    i. **Option C** (post-hoc compensation, no objection pathway) preserves the clean vesting process while satisfying the constitutional requirement under LDAC 4.4 that compensation be addressed when vested rights are altered. The compensation provision should be modelled on the Public Works Act's robust framework. Given the betterment offset, the provision would in practice rarely if ever produce a payout. A statutory cost regime where unsuccessful claimants bear the respondent's costs deters speculative claims.

    ii. **Option A** (the clean rule as proposed by the Law Society) is the simplest design and delivers the greater practical gain. Its downside risk is likely low given the initial practitioner evidence. The choice is a judgment call that may depend on the broader institutional context: if the planning system provides compensation for regulatory overreach, Option C is the consistent design; if it does not, Option A is the more natural fit.

2. **Initial engagement with the Registrar-General of Land and experienced subdivision practitioners** (through the Law Society's Property Law Section) indicates that genuine prejudice cases are not being negotiated under the current consent requirement. Where payments have occurred, they have been pragmatic settlements to avoid holdout, not compensation for real loss. This substantially narrows the empirical gap between Options A and C, though the sample is small and the finding could (and maybe should) be tested against wider practitioner experience.

3. **Confirming the empirical position more broadly**, through further engagement with development practitioners, would strengthen confidence in whichever option is adopted.

4. **Confirming at a policy level** that this proposal is analytically sound, consistent with the broader competitive land market objectives for the RMA and planning reforms, and should not be blocked by categorical objection.

5. **Clarifying whether the Planning Bill 2025 will include meaningful compensation for regulatory takings of property rights.** If the new system provides landowners with recourse when regulation reduces their property value, Option C is the consistent design for road vesting. If it does not, Option A is the more natural fit. This single design feature of the broader reform may be sufficient to determine the appropriate option.

6. **Clarifying to the select committee** that the amendment is a straightforward, narrowly scoped fix that strengthens rather than weakens the property rights framework, because property rights are instrumentally valuable for conferring the power to act. The solution empowers landowners to put land to more optimal use while third parties suffer no material loss (covenants continue to operate on every lot that is not the road, and the road strip could not practically be subject to the covenant anyway).

10. Conclusion: Toward a Decision Framework

The road-vesting consent problem is a microcosm of the broader challenge that competitive urban land market (CLM) theory addresses: how to remove institutional barriers to housing supply created by zoning without fundamentally violating property rights.

The transaction cost literature, discussed in Section 7.1, provides the analytical key. The choice is not between protecting property rights and overriding them. It is between two forms of protection: a property rule (consent-based veto) and a liability rule (compensation for demonstrated loss). The literature is clear that where transaction costs make consent-based bargaining impractical (and an anti-commons of hundreds of veto-holding parties is the textbook case) liability rules are the appropriate form of protection. The entitlement is preserved. Only the mechanism of enforcement changes, from a veto to a price.

This is the same balance that CLM strikes in the planning context. The Initiative's work on competitive urban land markets in the context of the resource management reform and the Planning Bill 2025 does not argue for the abolition of private interests in favour of public objectives. It argues that the appropriate protection for those interests, in the institutional environments where planning operates, is accountability through price signals and compensation rather than consent-based vetoes that produce deadweight loss. When the CLM framework favours wider prosperity over private enjoyment of land, it does so not by extinguishing the private interest but by converting the form of its protection to one that is compatible with competitive supply.[29]

The "rules from above, rights from below" framework captures this. Rules from above (in this case, a statutory rule that road vesting proceeds without third-party consent) remove structural bottlenecks that suppress competitive land supply. Rights from below (in this case, a post-hoc compensation pathway modelled on the Public Works Act, if one is adopted) ensure that where a private interest is genuinely impaired, the holder has recourse. The rules serve net social benefit; the rights ensure that benefit is not achieved by uncompensated confiscation of private entitlements.

Option C embodies this balance. It is a rule from above that clears the anti-commons, paired with a right from below that preserves accountability. It does not override the economic substance of private property rights. It converts the form of protection from one that is demonstrably impractical in this high transaction cost environment to one that is both principled and workable. That conversion is what our constitutional foundations contemplate: LDAC 4.4 requires that where legislation alters vested rights, the question of compensation must be addressed. Option C addresses it. The constitutional logic resolves this specific, narrow, and fixable institutional friction.

The guiding logic of competitive land markets is the same principle operating at a system level: applied to the broader planning context where public law has replaced private ordering

[29] Blaschke, *Competitive Urban Land Markets and the Planning Bill 2025*, 13–17, see also Annex A and Annex B.

and where the same pattern of converting vetoes to prices is required for land markets to function.

Option A is the leaner solution (clean rule; no compensation). Whether the reform requires the additional protection of Option C depends on the answers to two questions this note has examined:

1. **The first is empirical:** does the current consent requirement protect any genuine interest, or is the problem solely one of transaction costs, not of property rights impairment? Initial practitioner evidence suggests "no" and that the current regime is nothing but an imposed transaction cost. No practitioner (from a small sample) reported encountering genuine prejudice. Where payments have occurred, they have been pragmatic settlements to avoid holdout, not compensation for real loss.

2. **The second is constitutional:** does LDAC 4.4 require a compensation pathway even where the empirical evidence suggests there is nothing to compensate? That question cannot be answered in isolation. It depends on the broader institutional context.

If the planning system being built through the Planning Bill provides strong property rights and meaningful compensation for regulatory takings, then Option C (post-hoc compensation) could be the consistent design: the system protects property rights through liability rules throughout, and road vesting should be no exception.

If, however, the planning system remains a public law regime without meaningful compensation for regulatory overreach, as is currently the case and is likely to remain so under the Planning Bill, then Option A (the clean rule) is the more natural fit. It would be anomalous to introduce a compensation mechanism for extinguishment of third-party interests over a road strip when the system routinely extinguishes far greater property value through zoning decisions without any compensation at all.

The reciprocal cost principle established in Section 7.1 applies directly. The cost of maintaining the consent requirement (suppressed housing supply, forgone value creation, deadweight loss passed to homebuyers) is real and measurable. If no genuine cost falls on the other side of the ledger (no property interest is actually impaired), then the reciprocal cost analysis is not a trade-off at all. It is one-sided. Where there is no cost to account for, the clean rule is the right rule.

Both options are defensible. Neither is necessarily the wrong answer but depends on judgment and context. The CLM framework, consistent with the transaction cost literature, favours the allocation that minimises total social cost and uses liability rules to ensure that where one party bears a cost so that the other may gain, that cost is accounted for.

The liability rule of Option C is the constitutionally sound design, but not if the initial empirical evidence is true: there may not be a cost to account for. Therefore, initial evidence favours the clean rule of Option A, since it appears more likely than not that there is nothing for a liability rule to protect. But the burden of demonstrating that remains on those who

favour the clean rule, depending on how much evidence you demand to make a judgment call.

Finally, which option strikes the right balance also depends on the new system the reform will create. This single design feature of the broader reform, whether the Planning Bill 2025 provides meaningful compensation for regulatory takings, may be sufficient to determine the appropriate option for road vesting in the future planning system.

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