

**BEFORE THE ENVIRONMENT COURT  
I MUA I TE KOOTI TAIAO O AOTEAROA**

**Decision No. [2018] NZEnvC 215**

IN THE MATTER of the Resource Management Act 1991  
AND an application under s 292 of the Act  
BETWEEN 35 LIMITED  
(ENV-2018-AKL-000255)  
Applicant  
AUCKLAND COUNCIL  
Respondent

Court: Judge D A Kirkpatrick, sitting alone under s 279(1)(b) of the Act  
Appearances: W Maxwell-Steele on behalf of 35 Limited  
C Faesenkloet for Auckland Council  
Date of Decision: 8 November 2018  
Date of Issue: 8 November 2018

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**DECISION OF THE ENVIRONMENT COURT  
ON APPLICATION FOR CORRECTION OF ERROR IN PLAN**

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[1] This is an application under s 292 of the Resource Management Act 1991 to correct the zoning and overlays at 89 St Mary's Road, St Mary's Bay, Auckland,<sup>1</sup> **(the property)** under the Auckland Unitary Plan (operative in part) **(AUP)**.

[2] The property is privately owned with a single residential building on it and is situated at the northern end of St Mary's Road. Its northern boundary adjoins a strip of reserve land which runs along the southern edge of the Northern Motorway on State Highway 1.



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<sup>1</sup> The property has an area of 865m<sup>2</sup> and is legally described in title identifier NA 1597/59 as Part Lot 144 Part Allotment 14 Section 8 Suburbs of Auckland, Part Lot 145 Part Allotment 14 Section 8 Suburbs of Auckland and Defined on Deposited Plan 9389.

The underlying cadastral boundaries in this area are somewhat irregular. One may hypothesise that this could be because of the original survey being done when the northern boundary of the property was the coastline. Subsequently in the late 1950's, reclamation occurred to build the Auckland Northern Motorway as the approach road to the Auckland Harbour Bridge. It appears that a portion of this reclamation was added to the property. It then appears that the application of the open space zoning under the AUP in this location may have been mistakenly based on an assumption that the cadastral line indicating the old coastline was still the title boundary.

[3] Whatever may be the reason for it, the present position in the planning map of the AUP is that the northern part of the property is zoned Open Space – Informal Recreation, which is the same zoning as the adjacent reserve land.

[4] The Applicant says, and the Council agrees, that there are three errors in the AUP maps relating to the property:

- i) the whole property should not be zoned Open Space – Informal Recreation, and instead should be zoned Residential – Single House, to be consistent with the balance of the property and the zoning of neighbouring privately owned residential land;
- ii) if the zoning is corrected, then for the same reasons of consistency the whole of the property should also be subject to the Special Character Areas Overlay; and
- iii) the property is subject to the Natural Heritage: Notable Trees Overlay with reference to a scheduled *Populous deltooides* or Cottonwood tree (listed as item 82 in Schedule 10 - Notable Trees Schedule to the AUP), but as a matter of fact there is no such tree on the property.

[5] Both parties have confirmed to the Court that this matter can be resolved by consent. The Council accepts that the maps showing the zoning of the land and the applicable overlays are in error and that they should be corrected by the Court using the power in s 292 of the Act.

[6] Section 292 provides:



**292 Remediating defects in plans**

- (1) The Environment Court may, in any proceedings before it, direct a local authority to amend a regional plan or district plan to which the proceedings relate for the purpose of—
- (a) remedying any mistake, defect, or uncertainty; or
  - (b) giving full effect to the plan.
- (2) The local authority to whom a direction is made under subsection (1) shall comply with the direction without using the process in Schedule 1.

[7] This provision has been held to be a slip rule, available to remedy clear mistakes but not to be used to make a significant change.<sup>2</sup> Use of this power is not appropriate where third parties who may be affected are unable to participate.<sup>3</sup> The power is broadly discretionary with no presumption as to whether or how a mistake should be remedied but it does not extend to determining whether particular plan provisions are adequate or appropriate.<sup>4</sup>

[8] The usual manner in which to make a change to a plan is by way of the process set out in Schedule 1 to the RMA. This process requires public notification, submissions and further submissions, hearing of submissions and rights of appeal. Those matters are not required in the exercise of the power under s 292. The Court will accordingly always be concerned to ensure that the exercise of s 292 is within the limits of correcting mistakes and does not extend into making changes which ought to be dealt with by a change under Schedule 1.

[9] This point is particularly important in this case, as the Council has already notified Plan Change 13 which proposes a number of changes to the open space provisions of the Plan, including changing zonings of open space on privately owned land and on this property among others.

[10] The Applicant would prefer not to await the outcome of PC 13. It has development proposals for the land and these are constrained by the current zoning. As well, the overlay issues are not proposed to be addressed in PC 13. The correction of all three errors in one process would be efficient.



<sup>2</sup> *Catholic Archdiocese of Wellington v Friends of Mount Street Cemetery* [2000] NZRMA 385.  
<sup>3</sup> *Oxford Charter Ltd v Queenstown Lakes District Council* C 65/2000.  
<sup>4</sup> *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).

[11] The correction of the zoning and overlay issues does not affect any third party. Rezoning the property Residential – Single House and applying the Special Character Area Overlay will bring it into line with the balance of the property and with the neighbouring residential properties. Removing the notation indicating the presence of the Cottonwood tree will correct a factual error.

[12] From my review of the evidence in the affidavits of Mr Maxwell-Steele in support of the application, and of the Council's planning officer Han Long Ng in response, I accept that this is a clear case of a mistake in the mapping of zones and overlays in the AUP which was not picked up as part of the submission and hearing process in respect of the AUP. I have suggested a hypothetical basis on which this mistake may have occurred, but in the absence of any dispute between the parties and of any adverse effect on any third party, there is nothing that would be gained from attempting to determine why it happened. In particular, I see no reason why these errors need to be addressed through a notified process under Schedule 1 to the Act. Because the correction of a clear error in a plan is intrinsically a desirable thing to do and there is no apparent adverse effect on anyone, the use of the power under s 292 should, in my judgment, be preferred to a plan change.

[13] I conclude that there is no good reason why these errors should not be corrected under s 292.

[14] One potential jurisdictional issue identified by counsel for the Council is that the power in s 292 can only be exercised in relation to a provision in a "plan", which is defined in s 2 of the Act as an "operative plan". As PC 13 had been notified prior to this application being made, there is both an operative plan and a proposed plan in respect of the property. This would mean that the application could not be determined until the Council withdrew that part of PC 13 that applies to this property, leaving only the operative provisions in place.

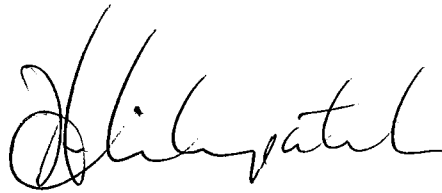
[15] Having raised this potential issue, counsel for the Council subsequently reported that on 1 November 2018 the Council gave public notice that it withdrew that part of PC 13 relating to the subject property because of this application. There is therefore no outstanding jurisdictional issue restricting the application of s 292 in this case to correct the mistakes in the plan relating to this property.



[16] For the foregoing reasons, I direct the Auckland Council to amend the Auckland Unitary Plan in respect of the property at 89 St Mary's Road, St Mary's Bay, Auckland, as follows:

- i) Remove the Open Space – Informal Recreation zone from the property;
- ii) Apply the Residential – Single House zone to the entire property;
- iii) Apply the Special Character Areas Overlay to the entire property;
- iv) Remove the notation of the scheduled *Populous deltoides* (Cottonwood) tree from the Natural Heritage: Notable Trees Overlay on the property; and
- v) Remove item 82 from Schedule 10 – Notable Trees Schedule.

[17] The application being essentially a joint one, there is no order as to costs.



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**Judge D A Kirkpatrick**  
**Environment Judge**

