**BEFORE THE ENVIRONMENT COURT**
**AT AUCKLAND**

**I MUA I TE KOOTI TAIAO**
**I TĀMAKI MAKAURAU ROHE** **ENV-2024-AKL-000**

| | |
|---|---|
| **UNDER** | the Resource Management Act 1991 (**RMA**) |
| **IN THE MATTER** | of an application under section 311 of the RMA for a declaration as to the activity status of subdivision in Chapter E39 Subdivision – Rural of the Auckland Unitary Plan (Operative in Part) (**AUPOP**) |
| **BETWEEN** | **CATO BOLAM CONSULTANTS LIMITED** |
| | **BETTER LIVING LANDSCAPES LIMITED** |
| | **WARKWORTH SURVEYING LIMITED** |
| | **FLUKER SURVEYING LIMITED** |
| | **BUCKTON CONSULTING SURVEYORS LIMITED** |
| | **TERRA NOVA PLANNING LIMITED** |
| | **PARALLAX CONSULTANTS LIMITED** |
| | Applicants |
| **AND** | **AUCKLAND COUNCIL** |
| | Consent Authority |

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**AFFIDAVIT OF KAREN RUTH PEGRUME IN SUPPORT OF APPLICATION FOR DECLARATION**

15 **MAY 2024**

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I, **KAREN RUTH PEGRUME**, ecologist/planner, of Auckland, swear:

**Introduction**

1. My full name is Karen Ruth Pegrume. I am a Director of Better Living Landscapes Limited (**BLLL**) an integrated planning, ecology and landscape assessment consultancy. BLLL has considerable experience in the preparation and lodgement of applications to subdivide rural and countryside living land utilising indigenous vegetation and wetland protection and restoration opportunities, land rehabilitation and enhancement revegetation.

2. I hold the qualifications of NDH (1987), (RNZIH), BLA (2002) (UNITEC) PgDip Planning (2007) (Massey) all from New Zealand and I am experienced in planning, horticulture, ecology and landscape architecture. I have worked for Local Government as an employee in Environmental Monitoring and Resource Consent Processing roles and have been an Environmental Planning consultant since 2007, representing a large range of clients.

3. My career in private practice extends well over 10 years. My work has included evaluation of rural sites for development with consent applications lodged for a variety of rural and Countryside Living developments and activities. Most of the work I do integrates all three disciplines of ecology, planning and landscape assessment. For example, applications I have prepared may have an AEE, ecological assessment and a landscape effects assessment that I have authored. These applications are routinely accepted by Council, who do not question my qualifications to be able to produce them.

4. Relevant examples of my experience include:

    - Numerous AEEs for Rural subdivisions in the Rodney area.
    - Wetland and Bush Assessments within the planning framework of the former Rodney Plan Appendix B and C (totalling around 400 such assessments).
    - Environmental Assessments for revegetation/restoration plantings under the Enhancement Planting and Rehabilitation Planting Rule Framework of the former Rodney Plan.
    - Restoration management of natural wetlands (not ponds) to a level of significance.
    - Overarching management of revegetation projects following approval of resources consent.

- Landscape Effects Assessments in accordance with the Quality Planning website framework for applications lodged within sensitive landscape environments.

- Regular engagement and consultation with landholders in the rural communities resulting in an understanding of their needs "on the land", while balancing the desired planning outcomes and ecological objectives, and engaging the landholders in the process.

- Working with numerous surveying companies with rural subdivision expertise in the Rodney District, resulting in a thorough understanding of the mechanisms involved in that process.

- Using the District Plan's rural subdivision provisions on a daily basis, resulting in a strong working knowledge of the provisions and their implementation both from a Council processing and consultant lodgement perspective.

5. I am authorised to give this affidavit on behalf of BLLL and in support of the application for declaration.

**Scope of declaration and issue**

6. Together with a number of other planning and surveying companies, BLLL has applied for a declaration in relation to the status of subdivision in Chapter E39 Subdivision – Rural of the AUPOP. Specifically, the declaration asks whether certain types of rural subdivision activities should be processed as a (restricted) discretionary activity or as a non-complying activity.

7. Further details about the types of subdivision activity addressed by the declaration application and the issues the applicants seek to have clarified by the Court are set out in the affidavit of Trish Giles. I agree with her summary and the background she has set out.

8. It is clear from memoranda filed by Council prior to the Court's final 2021 decision that the Council had a desire to add a further requirement to the incentive subdivision provisions, namely that the areas to be protected or planted be a single, continuous area, as had been the position under the legacy Rodney District Plan. However, this 'last minute' request was rejected by the Court.

9. Despite that, my experience since then has been that the Council rural subdivision processing officers have ignored this outcome and insisted on a continuity or contiguity requirement for the areas to be protected or planted. This has meant they have treated as non-complying (and regularly threatening notification and or refusal) applications that propose protection of the required area under the rules where the area is not a single, contiguous area. This position was made very clear in an email

to me from Mr Dan Rodie, Principal Specialist – Planning shortly after the Court's decision, which is attached and marked "**A**".

**March 2024 Guidance Note**

10. In February 2024 Auckland Council further solidified its interpretation approach to these rules and published an Auckland Unitary Plan Practice and Guidance note – Rural Subdivision (**Guidance Note**). The Guidance Note provides at 7.3 as follows:

> **7.3 Do the areas of wetland or indigenous vegetation need to be contiguous to meet the first and subsequent area thresholds?**
>
> Yes – although with respect to indigenous vegetation the second and subsequent area thresholds can be met by adding areas of SEA indigenous vegetation or wetland or indigenous vegetation or wetland meeting the SEA factors together.
>
> For an area of indigenous vegetation (whether identified as SEA or meeting the SEA factors) to qualify as a donor site TRSS opportunity there must be at least 2ha of contiguous qualifying indigenous vegetation. For that area of indigenous vegetation to provide for the creation of an in-situ allotment there must be a minimum of 4ha of contiguous indigenous vegetation.
>
> For any wetland (whether identified as SEA or meeting the SEA factors) to qualify for either a donor site TRSS opportunity or creation of an in-situ site a minimum contiguous area of 5,000m$^2$ of SEA wetland must be provided for each separate area of wetland being protected.
>
> This reflects the Court's intention, and that of the AUP (OP) provisions, of incentivising TRSS subdivision through the setting of a lower qualifying area threshold to achieve a TRSS opportunity. This would not be achieved if in-situ subdivision could occur through provision of an area of qualifying feature less than the first area threshold specified in the relevant table for that nature of subdivision.
>
> The following extract from the Courts decision *Cabra Rural Developments v Auckland Council* [2020] NZEnvC 153 [12] indicates it is intended that the first threshold area is to be met by the one contiguous area of the relevant feature:
>
> *[94] We recognise that with a 4-hectare minimum for SEA and a 0.5ha minimum for wetlands, the amount of in-situ subdivision may be slightly quicker in the initial stage, particularly for those persons outside the Countryside Living Zone with sufficient land to sustain a further subdivision. However, experience would suggest that the amount of existing SEA meeting the*

[12] [2020] NZEnvC 153 Cabra Rural Developments Limited v Auckland Council

> *required standard and the amount of existing wetlands meeting the required standard, is likely to be relatively minimal. Overall, we consider that protecting any SEAs may have the significant benefit of identifying those areas not yet mapped and protecting them in the first instance. This will encourage subdivision transfer into the Countryside Living Zone for smaller subdivisions.*
>
> [95] *Accordingly, under s 32AA, we conclude the risks of adverse consequences of these provisions are low and that the benefits, particularly in terms of indigenous vegetation and biodiversity, could be very significant. We conclude the most significant benefit would be for TRSS giving an easy pathway to protection while providing more generous transferable rights to the Countryside Living Zone. We note that Ms Hartley stated, and we agree, that there is sufficient capacity in the Countryside Living Zone for such transfer to occur, at least in the medium term.*

11. In referring to areas to be protected or planted, the Guidance Note uses the term "contiguous" to describe that area, by which it is assumed to mean that the area in question should be a single, continuous area.

12. However, neither of the relevant tables in the AUPOP use this term to qualify the areas be protected or planted.

13. The Guidance Note includes a reference to the Environment Court's interim decision in *Cabra Rural Developments Limited & ors v Auckland Council* [2020] NZEnvC 153, suggesting that it: "*indicates it is intended that the first threshold area is to be met by the one contiguous area of the relevant feature*". However, this is not what the extract from the decision says.

14. It is also inconsistent with the Environment Court's final decision in the proceedings (*Cabra Rural Developments Limited & ors v Auckland Council* [2021] NZEnvC 010), where, in rejecting the Auckland Council's last-minute attempt to introduce the word "contiguous" into the advice note to Table E39.6.4.4.1, the Court said:

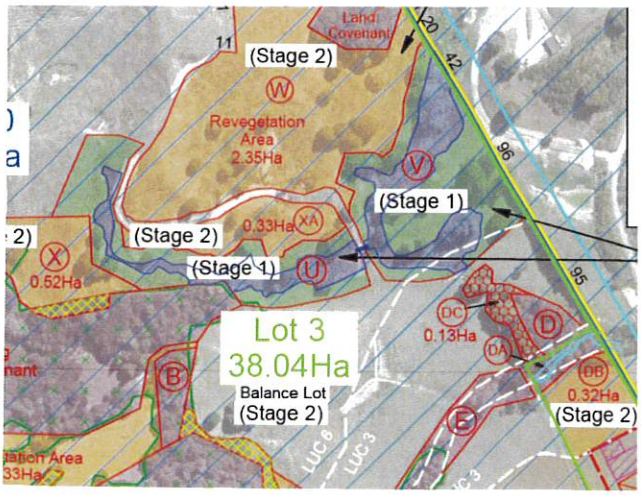
[27] The main difference is that the Council has added a requirement for the areas to be contiguous on a site in order to qualify as SEA for protection. This is not a matter which was discussed before the court. The issue of vegetation being contiguous was discussed only in relation to **re-vegetation** where this method is used for deriving subdivision rights.[4] This is new planting not existing SEA.

[28] We cannot see the grounds for a change of the kind now being sought by the Council and it would seem to reduce the protection afforded existing identified and qualifying SEA. We accept the Appellants arguments on this matter and conclude the note should read:

> Where indigenous vegetation is proposed to be protected using Table E39.6.4.4.1 the area of indigenous vegetation protected can consist of either indigenous vegetation identified in the Significant Ecological Areas Overlay or shown on Map [X] or meeting the Significant Ecological Area factors identified in Policy B7.2.2(1) or a combination of both. Where a wetland is proposed to be protected using Table E39.6.4.4.1 the area of wetland can consist of either wetland identified in the Significant Ecological Areas Overlay or meeting the Significant Ecological Area factors identified in Policy B7.2.2(1) or a combination of both. For example, where the indigenous vegetation comprises 1ha of indigenous vegetation identified in the Significant Ecological Areas Overlay and 1ha meeting the Significant Ecological Area factors identified in Policy B7.2.2(1) the 2ha area will be sufficient to generate one site for TRSS.

**Example 1 of Council approach to rules in question**

15. BLL has provided a wetland assessment for a wetland protection subdivision. The areas of wetland to be protected exceed the minimum area of 5000m$^2$ required for a single new title in Table E39.6.4.4.1, however the wetland is contained in two portions as shown in the image below as Area U and Area V that make up a wetland feature in excess of 5000m$^2$ . The wetland feature is broken by a 3 metre wide farm access track that is unavoidable. The track has a pipe system under it.



16. The wetland feature on the site in question is of good quality and meets the SEA Criteria Factors for significance.

17. The Council do not accept that this wetland meets the rules they have determined must be contiguous for at least 5000m$^2$.

18. The AUPOP does not, as I see it, require that the wetland be continuous in area. Therefore, the areas of wetland shown in blue, which sum to over 0.5ha, should form the basis of a subdivision in accordance with rule A16. If the AUPOP was applied as it is written, with there being no requirement for the wetland to form one continuous area, this part of the subdivision application would be granted as a restricted discretionary activity. The Council have not indicated any issue with wetland quality; just the fact it is comprised in separate areas.

19. The proposal is being treated as Non Complying for this separation and is not supported by Council for the separation issue of the track.

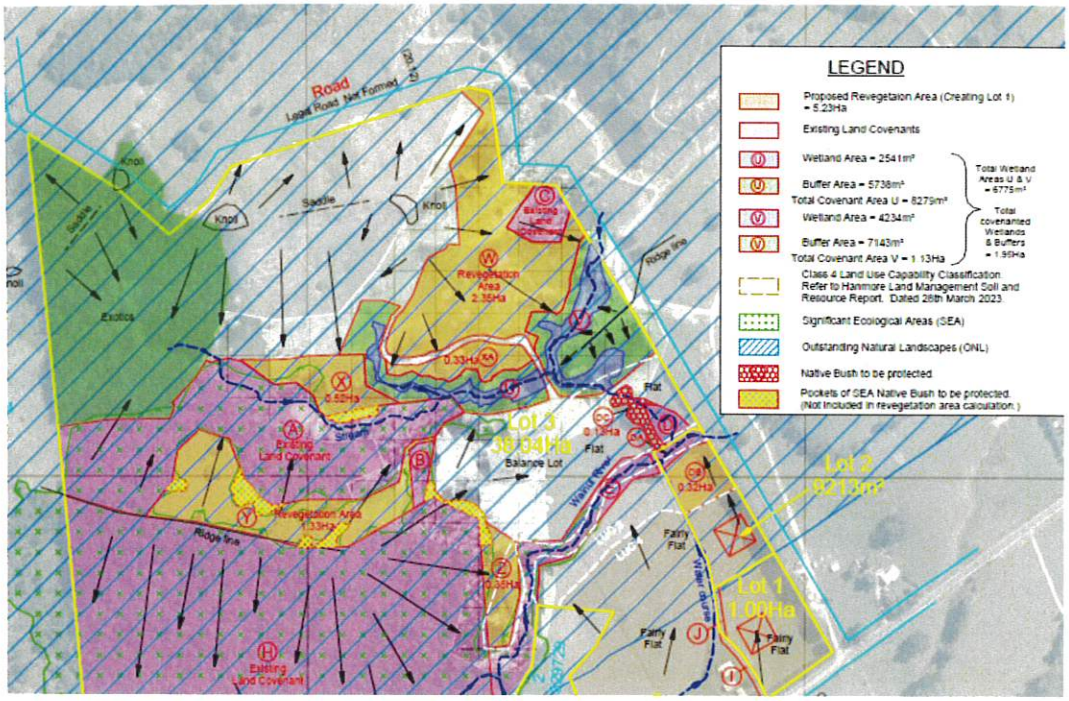
**Example 2 of Council approach to rules in question**

**Revegetation**

20. On this same site 5Ha of revegetation is proposed that is set out to strengthen the existing SEA features on the site. Each area of revegetation connects to SEA so in time the stepping stone features will be part of a contiguous large area or forest and wetland.

21. The council do not accept it meets the rule as although we meet the connections to SEA rule in Councils opinion the Planting must be a single 5Ha planted area so is being treated as a non complying standard.

22. The AUPOP does not, as I see it, require that the re-vegetation to be continuous in area. Therefore, the areas of revegetation shown in tan which sum to over 5ha, should form the basis of a subdivision in accordance with rule A16. If the AUPOP was applied as it is written, with there being no requirement for the revegetation to form one continuous area, this part of the subdivision application would be granted as a restricted discretionary activity.




**Example 3 of Council approach to rules in question**

23. BLL have been asked to apply for a variation to this approved subdivision wetland assessment for a wetland protection subdivision. The areas of wetland to be protected exceed the minimum area of 5000m$^2$ required for a single new title in Table E39.6.4.4.1, however the wetland is contained in two portions as shown in the image below as Area S that make up a wetland feature in excess of 5000m$^2$. The wetland feature is broken by a 3 metre wide farm access track that is unavoidable. The track has a pipe system under it. The two portions of the wetland are shown on the plan below. There are further areas of wetland that were identified during the consenting process also showing on the plan below that total 1Ha in size.

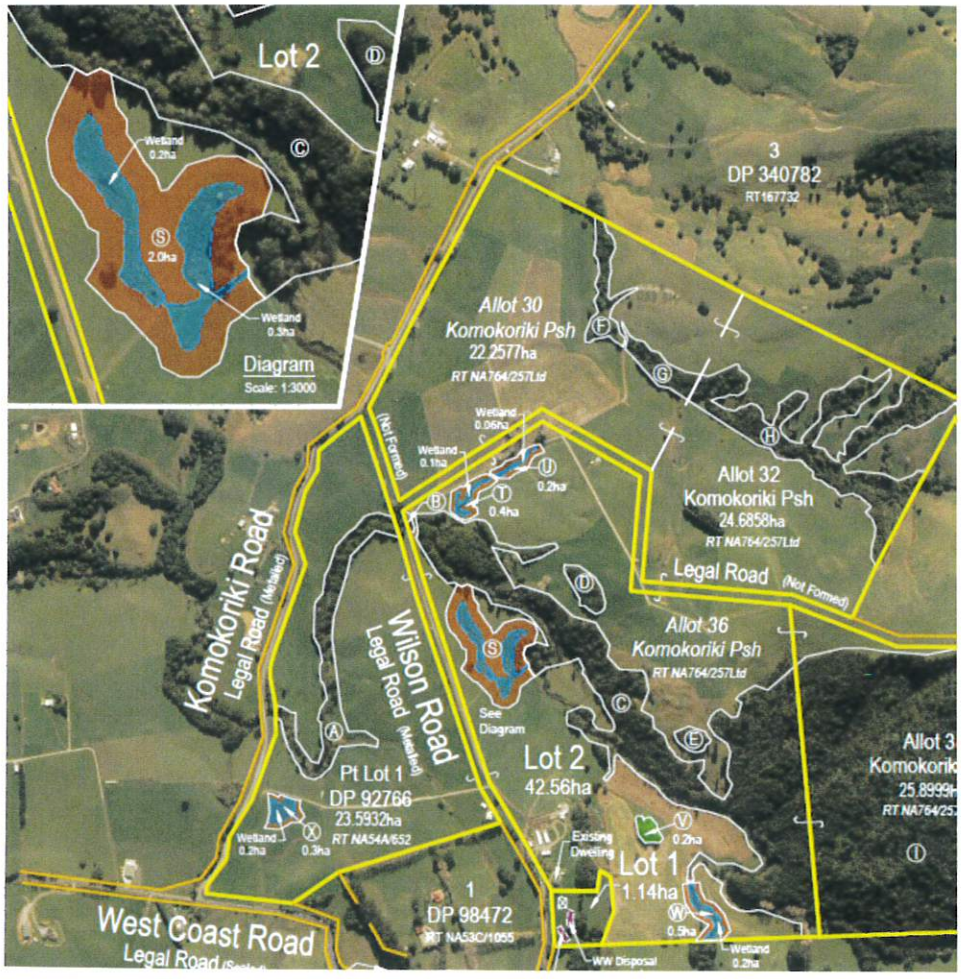
24. The Council approved this subdivision ONLY on the basis the track was removed between the wetland Areas S in order to a be a single area of wetland.

25. The variation I wish to lodge on behalf of the farm owners is to reinstate the track as in reality this requirement to ensure that the small paddock is able to be used for calf grazing and also provides hay for the farm operation.

26. The variation would also be to use the combined 1Ha of wetland areas to use off site instead of insitu and allows for 2 TRSS entitlements as a better outcome for the farm.

27. BLL have placed this proposal on hold in terms of lodging such a variation until the declaration is resolved.

28. The AUPOP does not, as I see it, require that the wetland be continuous in area. Therefore, the areas of wetland shown in blue, which sum to over 0.5ha, should form the basis of a subdivision in accordance with rule A16. If the AUPOP was applied as it is written, with there being no requirement for the wetland to form one continuous area, this part of the subdivision application would be granted as a restricted discretionary activity. The Council have not indicated any issue with wetland quality; just the fact it is comprised in separate areas and the only basis for the approved insitu subdivision was to remove the track.




**Conclusion**

29. In my opinion there is nothing in the AUPOP to support the Council's interpretation. To the contrary, Objective E39.2(14)(a) and Policy

E39.3(15)(b) are focussed on limiting the creation of in-situ sites to situations where indigenous vegetation is protected. The method to achieve that policy is set out in the subdivision incentive rules in question and Standard E39.6.4.4 and E39.6.4.5. I consider that the Council's approach to these provisions is directly contrary to the policy intent of the AUPOP and is resulting in multiple high quality wetland and indigenous vegetation remnants having no incentive for protection.

Affirmed

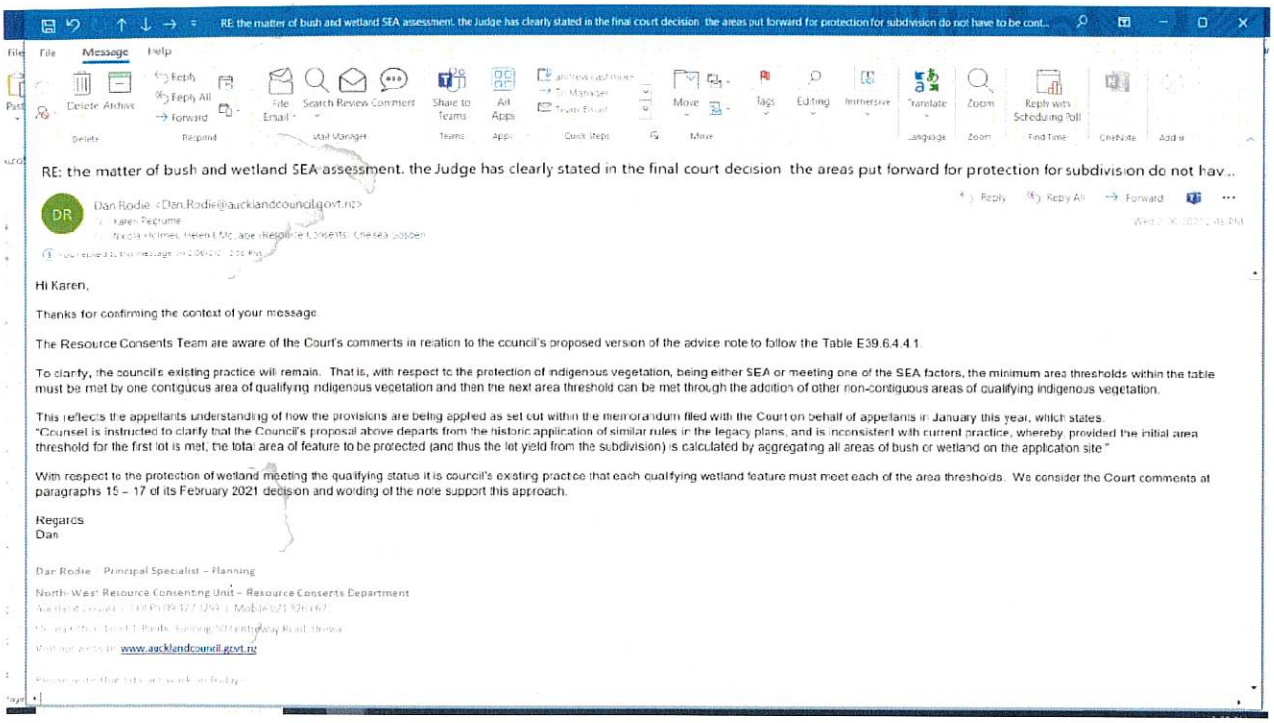
~~**SWORN**~~ at Warkworth this 15th day of May 2024 before me:

Rebecca Pavis
Lawyer
Warkworth

A Barrister/Solicitor of the High Court of New Zealand ~~or Justice of the Peace~~

**K R Pegrume**

"A"



RE: the matter of bush and wetland SEA assessment. the Judge has clearly stated in the final court decision the areas put forward for protection for subdivision do not hav...

Dan Rodie <Dan.Rodie@aucklandcouncil.govt.nz>

Hi Karen,

Thanks for confirming the context of your message.

The Resource Consents Team are aware of the Court's comments in relation to the council's proposed version of the advice note to follow the Table E39.6.4.4.1.

To clarify, the council's existing practice will remain. That is, with respect to the protection of indigenous vegetation, being either SEA or meeting one of the SEA factors, the minimum area thresholds within the table must be met by one contiguous area of qualifying indigenous vegetation and then the next area threshold can be met through the addition of other non-contiguous areas of qualifying indigenous vegetation.

This reflects the appellants understanding of how the provisions are being applied as set out within the memorandum filed with the Court on behalf of appellants in January this year, which states:
"Counsel is instructed to clarify that the Council's proposal above departs from the historic application of similar rules in the legacy plans, and is inconsistent with current practice, whereby, provided the initial area threshold for the first lot is met, the total area of feature to be protected (and thus the lot yield from the subdivision) is calculated by aggregating all areas of bush or wetland on the application site."

With respect to the protection of wetland meeting the qualifying status it is council's existing practice that each qualifying wetland feature must meet each of the area thresholds. We consider the Court comments at paragraphs 15 – 17 of its February 2021 decision and wording of the note support this approach.

Regards
Dan

Dan Rodie | Principal Specialist – Planning

North-West Resource Consenting Unit – Resource Consents Department

www.aucklandcouncil.govt.nz

This is the annexure marked "**A**" referred to within the Affidavit of Karen Ruth Pegrume affirmed ~~sworn~~ at Warkworth on May 2024 before me:

Rebecca Pavis
Lawyer
Warkworth

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~~Justice of the Peace~~/Barrister/Solicitor of the High Court