

15 September 2017

BY HAND

The Registrar
Environment Court
Level 2, Specialist Courts and Tribunals
41 Federal Street
AUCKLAND 1010

Dear Sir/Madam,

APPLICATION FOR DECLARATION – CATO BOLAM CONSULTANTS LIMITED V AUCKLAND COUNCIL

I act for Cato Bolam Consultants Limited.

I enclose for filing an application for declaration in relation to the correct interpretation of a rule in the Auckland Unitary Plan (Operative in Part).

The Auckland Council has been served as an interested party (naturally), but it may be appropriate to convene a brief tele-conference to consider the issue of whether directions ought to be made for the application to be served on other potentially affected persons.

I enclose a cheque for the required filing fee of \$56.22.

Yours sincerely,



K R M Littlejohn
Barrister

Kitt Littlejohn

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BEFORE THE ENVIRONMENT COURT AT AUCKLAND

ENV-2017-AKL-

UNDER

the Resource Management Act 1991

IN THE MATTER

an application for a declaration under section 311
of the Resource Management Act 1991 (Act)

BETWEEN

CATO BOLAM CONSULTANTS LIMITED

Applicant

AND

AUCKLAND COUNCIL

Respondent

**MEMORANDUM OF COUNSEL FOR CATO BOLAM
CONSULTANTS LIMITED**

15 September 2017

MAY IT PLEASE THE COURT

1. Filed herewith is an application for a declaration with respect to the interpretation of the boundary relocation subdivision rule in the Auckland Unitary Plan (Operative in Part).
2. The application is filed by Cato Bolam Consultants Limited, a well-established planning and environmental consultancy, which has worked on numerous subdivisions in the north and east of the Auckland Council area. Part of that work has involved boundary adjustment/relocation subdivisions in the Rodney Local Board area.
3. As explained in the affidavit of Myles Goodwin filed in support of the application, the applicant's consultants have recently been presented with an interpretation of the new boundary relocation subdivision rule referred to above, that is inconsistent with how the rule has been interpreted and applied historically, and which, in Mr Goodwin's opinion, is inconsistent with the plain ordinary meaning of the rule. In essence, the interpretation taken by Auckland Council staff results in any boundary relocation proposal where either of the resultant lots contains less than 90% of the area of land originally within the lots, being treated as non-complying.
4. Cato Bolam has endeavoured to clarify this interpretation with Council's legal advisers, but they maintain that the interpretation being taken by staff is correct.
5. This application for declaration has been filed to seek the Court's view on the correct interpretation of this rule.

DATED 15 September 2017



K R M Littlejohn
Counsel for Cato Bolam Consultants
Limited

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Respondent

APPLICATION FOR DECLARATION

15 September 2017

TO: The Registrar
Environment Court
AUCKLAND

1. Cato Bolam Consultants Limited applies for a declaration that:

A resource consent application to alter the boundaries of two or more contiguous allotments on a deposited plan:

- (a) *where the areas of the allotments following the alteration are no more than 10% larger or smaller than the respective areas of the original allotments; and*
- (b) *where one or more of the resulting allotments contains no less than 90% of the land area of the original allotment; and*
- (c) *where standards E39.6.3.2(1)-(5) are met,*

is classified as a controlled activity application under the Auckland Unitary Plan (Operative in Part).

2. The grounds for the application are:

- (a) Subdivision rule E39.4.1(A4) in the Auckland Unitary Plan (Operative in Part) (**AUP**) classifies boundary adjustments not exceeding 10% of the original site area and meeting standards E39.6.3.2(1)-(5) as controlled activities.
- (b) The rule is a revision of similar rules that existed in the legacy plans prior to the promulgation of the AUP which provided for boundary adjustments or relocations, but restricted the ability for the boundaries of the relevant allotments to be adjusted in such a way that the resultant allotments were increased (or decreased) in size by more than 10% of their original area.
- (c) The legacy rules were regularly relied on to adjust the boundaries of allotments in such a way that the outer boundaries of the combined sites remained the same, but the internal boundaries were modified substantially, effectively resulting in the shifting of a site within a site, while ensuring that no new sites were created and all other servicing and related development standards were met.
- (d) Auckland Council now consider that the new rule E39.4.1(A4) in the AUP cannot be relied on for such a boundary adjustment, claiming that the 10% criterion not only applies to the maximum permissible area change of the allotments but also to the extent of the area of the

original allotment that must be retained in the resultant allotment. That is, if less than 90% of the land within the original allotment is not contained within the resultant allotment, then the rule cannot be used, and the activity is therefore non-complying. This interpretation effectively makes non-complying any boundary relocation that seeks to shift a title within the area of the of the original allotments by more than 10%

- (e) The applicant has challenged this interpretation and claimed that the rule in question does not prescribe where the location of the resultant allotment must be and has sought this declaration to clarify the matter.
- (f) As appear in the affidavit of Myles Desborough Goodwin and memorandum of Counsel, both **attached**.

3. The following documents are attached:

- (a) An affidavit by Myles Desborough Goodwin dated 14 September 2017;
- (b) Memorandum of counsel for the applicant dated 15 September 2017;
- (c) A list of names and addresses of persons to be served with a copy of this application.

Signature: CATO BOLAM CONSULANTS LIMITED by its authorised agent:



K R M Littlejohn

Date: 15 September 2017

Address for service: Mr Kitt Littlejohn
Quay Chambers
Level 7, 2 Commerce Street
PO Box 106215
AUCKLAND CITY 1143

Telephone: (09) 374 1669

Facsimile: (09) 377 5071

Email: littlejohn@quaychambers.co.nz

Advice

If you have any questions about this notice, contact the Environment Court Unit of the Department for Courts in Auckland, Wellington or Christchurch.

NAMES AND ADDRESSES OF PERSONS TO BE SERVED

Auckland Council
Private Bag 92300
AUCKLAND 1142

Attention: James Hassall/Christian Brown

BEFORE THE ENVIRONMENT COURT AT AUCKLAND

ENV-2017-AKL-

UNDER

the Resource Management Act 1991

IN THE MATTER

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of the Resource Management Act 1991 (Act)

BETWEEN

CATO BOLAM CONSULTANTS LIMITED

Applicant

AND

AUCKLAND COUNCIL

Respondent

AFFIDAVIT OF MYLES DESBOROUGH GOODWIN

Dated 4 September 2017

I, **Myles Desborough Goodwin**, of Auckland, environmental planner, affirm:

1. My full name is Myles Desborough Goodwin. I am a Principal of the specialist planning and environment firm Cato Bolam Consultants Limited. I am an environmental planner. I hold the qualifications of B.Sc. and M.Sc. with 1st class honours in Environmental Science, specialising in native plant ecology. I have 18 years' experience as an environmental planner.
2. I am authorised by Cato Bolam Consultants Limited to give this affidavit in support of its application for a declaration as to the interpretation of the new boundary adjustments rule in the Auckland Unitary Plan (Operative in Part) (**AUP**).

Background to application for declaration

3. Earlier this year, Cato Bolam Consultants Limited sought legal advice from barrister Kitt Littlejohn in relation to the interpretation of a specific district plan subdivision rule for boundary adjustments after several of our consultants had confronted an interpretation of the rule by Council planning staff that was different to that taken historically. After obtaining that advice, we then instructed Mr Littlejohn to write to Auckland Council regarding the boundary adjustment rule under the AUP. Annexed and marked "**A**" is copy of Mr Littlejohn's letter dated 6 July 2017 to the Council.
4. The Council's lawyer responded by letter dated 7 August 2017. Annexed and marked "**B**" is a copy of that letter. The Council's response suggests that in combining terms for the provision for boundary adjustments / relocations the AUP's rule has been substantially altered and significantly limited in scope.
5. Under the previous (legacy) plans, the movement of a boundary between contiguous sites was described as a 'Boundary Relocation or Adjustment' in the Franklin District,¹ and as a 'Boundary Relocation' in

¹ Auckland Council District Plan – Operative Franklin Section 2013, Subdivision – Rural and Coastal Areas, 22B.15.



the Rodney District.² Under the AUP the process is described as 'Boundary adjustment'.³

6. The relevant rule in Table E39.4.1 is as follows:⁴

(A4) Boundary adjustments not exceeding 10 per cent of the **original site area** and meeting standard E39.6.3.2 (C)).

(emphasis added)

7. Standard E39.6.3.2. states:⁵

(1) All sites prior to the boundary adjustment must be contained within the same zone.

(2) All service connections and on-site infrastructure must be located within the boundary of the site they serve, or have legal rights provided by an appropriate legal mechanism.

(3) All sites must remain compliant with the applicable minimum site area and minimum average site area for the relevant zones.

(4) Boundary adjustments must not result in the creation of additional titles.

(5) If any boundary adjustment under this control creates the potential for additional subdivision or dwellings over and above what was possible for each site prior to the boundary adjustment a legal covenant or consent notice under s. 221 of the RMA is to be registered on the titles prohibiting;

(a) any further subdivision; and/or

(b) new dwellings.

8. I have researched the evidence provided by the Council to the IHP in relation to this rule. For this topic, the Council's evidence was provided by Mr Barry Mosely. In his evidence for Topic 57, Mr Mosely stated:⁶

² Auckland Council District Plan – Operative Rodney Section 2011, Definitions: Chapter 3 at 3.

³ Auckland Unitary Plan (Operative in Part), J1 Definitions at 19.

⁴ Auckland Unitary Plan (Operative in Part), E39. Subdivision – Rural, at 9.

⁵ Auckland Unitary Plan (Operative in Part), E39. Subdivision – Rural, at 16.

⁶ Auckland Unitary Plan Independent Hearings Panel, Topic 057 Rural Activities and Controls (Subdivision), evidence of Barry Kenneth Mosley, 18 May 2015 at [10.51].



I consider it appropriate to provide a simpler definition for boundary adjustments and boundary relocations so that **both these activities** become known as **boundary adjustments** for the purpose of the PAUP.

(emphasis added)

9. My understanding of Mr Mosely's advice was that activities referred as 'boundary relocations' and 'boundary adjustments' in various legacy plans should be included i.e. provided for, in the activity to be known in the AUP as 'boundary adjustments'. Council accepted Mr Mosely's advice.⁷
10. In his rebuttal evidence for the same Topic, Mr Mosely expanded on the rationale for the Unitary Plan's Boundary Adjustments regime:⁸

Analysis

11.4 The Council's amended provisions provide for boundary adjustments as a controlled activity defaulting to discretionary if the significant standards are not able to be satisfied. The notified PAUP provided for boundary adjustments on the basis of a discretionary activity defaulting to non-complying and prohibited activities in some circumstances.

11.5 The **key element** in boundary adjustments is to provide the opportunity for landowners to adjust boundaries in a reasonably expeditious and efficient when circumstances in their operations change or there is a wish for neighbours to undertake exchanges of land.

11.6 The **fundamental tenant** in this process (from the Council's perspective) is that this mechanism is **not used** in a way that results in **small sites being created** then utilised for rural lifestyle living which can produce reverse sensitivity effects, and thus have adverse effects on significant rural landscape and natural character values, or produce cumulative effects which adversely affect rural character and amenity.

⁷ Auckland Unitary Plan Independent Hearings Panel, Legal Submission on behalf of Auckland Council for Topic 64 Subdivision, 1 November 2015, at [8.14].

⁸ Auckland Unitary Plan Independent Hearings Panel, Topic 064 Subdivision, rebuttal evidence of Barry Kenneth Mosley, 22 October 2015 at [11].



11.7 Consider a situation of two adjacent rectangular parcels of land each with a house and approximately 30ha in area. In the absence of a 10% threshold a boundary adjustment occurs to create a new small parcel of say 1ha upon which a house is subsequently constructed. The two remaining houses are left on the majority of the land (now 39ha) which is then subdivided into two blocks of land. The net result is a situation of three houses where there were originally two. This process has the potential to be repeated over and over again in the absence of some level of control.

11.8 ***This is why there is a requirement that site size cannot change by more than 10%.*** The focus has remained on site size rather than building rights as generally a right to build a dwelling attaches to any site created.

Response

11.9 I consider that the 10% threshold should remain for boundary adjustments and that Council has the option to consider situations where multiple boundary adjustments are occurring and either impose conditions or decline such applications where it is evident that the process is resulting in unintended consequences.

(emphasis added)

11. Nothing in Mr Mosely's analysis contemplates the exclusion of boundary adjustments, where the resultant sites contain less than 90% of their original land area, from being able to rely on the rule. Such an interpretation would appear to be inconsistent with Mr Mosely's analysis.
12. At [8] to [11] of exhibit B Council argues that as the Rodney legacy definition of 'boundary relocation' includes 'the relocation of an existing SITE or SITES' and the AUP definition does not include those words, the AUP definition excludes 'boundary relocation.'
13. In the Rodney legacy Plan 'Boundary Relocation' was defined:⁹

⁹ Auckland Council District Plan Operative Rodney Section 2011, Definitions: Chapter 3 at 3.

means a SUBDIVISION of existing titles which maintains the same number of titles. (A boundary relocation may involve either a change in the position of existing boundaries, or the enlargement or diminution of the size of existing SITES, or the relocation of an existing SITE or SITES or any one or more of those circumstances)

14. In the AUP 'Boundary Relocation' and 'Boundary Adjustment' are combined as 'Boundary adjustment' defined as:¹⁰

Boundary adjustment

A subdivision of existing sites that:

- maintains the same number of sites following subdivision as existed prior to it;
- alters the boundaries between two or more contiguous sites, and
- may result in any one or more of the sites becoming larger or smaller.

15. The AUP definition cannot be said to exclude something because it is not mentioned, when the thing not mentioned is allowed by the words of the definition. The definitions are different but not inconsistent with each other.
16. At [12] of exhibit B Council identifies its approach in 'Policy E39.3(6)' which provides for 'minor boundary adjustments' and which enable a more efficient and effective use of land where there is compliance with Auckland-wide and zone rules, as a reason for its interpretation of the rule. However 'boundary relocation' and 'boundary adjustment' were combined, by Council, into 'boundary adjustment', and 'minor' refers to the change in site sizes of not more than 10% to prevent the process being used to create inappropriately small sites.
17. At [13] of exhibit B Council states 'the reason for the requirement in the Rule for a boundary adjustment not to exceed 10 per cent of the original site area is to provide some flexibility for rural landowners to adjust boundaries for operational reasons'. If the Council meant these words to mean that adjustments are not to exceed not only 10 per cent of the original site area, but also to not exceed 10 per cent of the original site,

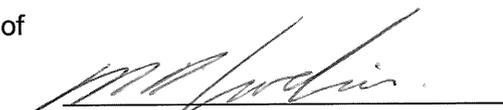
¹⁰ Auckland Unitary Plan (Operative in Part), J1 Definitions at 19.



the result would be a regime so restrictive as to be of almost no utility to rural land owners. In my experience such a regime would be by far the most restrictive in New Zealand. My reading of the Council's evidence to the IHP is that it did not intend to introduce such a dramatically restrictive regime.

18. I consider that the plain ordinary meaning of the words used in the rule do not exclude a boundary adjustment in which a resultant site contains less than 90% of its original land. The Council maintains that it meant the words to mean something other than what the words say, however Council's own evidence to the IHP was that 'boundary relocations' should be included under the title 'boundary adjustments' which is what happened and why the rules are worded the way they are.

AFFIRMED at Auckland this ^{16th} day of
September before me:


Myles Desborough Goodwin



**A barrister/solicitor
of the High Court of New Zealand**

**Michael Joseph Hawkins
Solicitor
Orewa**

6 July 2017

James Hassall
General Counsel
Auckland Council
Private Bag 92300
AUCKLAND 1142

Dear Mr Hassall

COUNCIL RULE INTERPRETATION – AUCKLAND UNITARY PLAN – E39.4.1(A4) – BOUNDARY ADJUSTMENTS

I act for Cato Bolam Consultants Limited.

Consultants employed by my client have recently been advised by Auckland Council consent processing Team Leaders and staff (Eric Oosthuizen, Dan Rodie, Nicola Broadbent) that they consider Rule E39.4.1(A4) of the Auckland Unitary Plan (OiP) does not apply to proposals whereby an approved lot is shifted to another location within the boundaries of the two lots shown on a scheme plan, even where the relocated lot is the same size as it was prior to relocation and the standards in rule E39.6.3.2 are all satisfied. Council personnel say that the rule can only be used where the lot is not being shifted by more than 10% from its existing location.

I am instructed that this interpretation is inconsistent with how the boundary adjustment rules have been applied historically, and my client requests confirmation of the legal basis upon which this recent interpretation/application of the rule relies.

The relevant rule in Table E39.4.1 is as follows:

(A4) Boundary adjustments not exceeding 10 per cent of the original site area and meeting standard E39.6.3.2 (C)).

Standard E39.6.3.2. states:

- (1) All sites prior to the boundary adjustment must be contained within the same zone.*
- (2) All service connections and on-site infrastructure must be located within the boundary of the site they serve, or have legal rights provided by an appropriate legal mechanism.*
- (3) All sites must remain compliant with the applicable minimum site area and minimum average site area for the relevant zones.*

This is the Exhibit marked "A" referred to in the affidavit of MYLES
DESBOROUGH GOODWIN affirmed at Auckland this 6th day of
September 2017 before me:

Signature:
A Barrister/Solicitor of the High Court of New Zealand

Michael Joseph Hawkins
Solicitor
Orewa

Michael Joseph Hawkins
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Auckland, New Zealand
Tel: +64 (0) 9 308 1222
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(4) *Boundary adjustments must not result in the creation of additional titles.*

(5) *If any boundary adjustment under this control creates the potential for additional subdivision or dwellings over and above what was possible for each site prior to the boundary adjustment a legal covenant or consent notice under s. 221 of the RMA is to be registered on the titles prohibiting;*

(a) *any further subdivision; and/or*

(b) *new dwellings.*

The definition for a "Boundary Adjustment" in the AUP is:

Boundary adjustment

A subdivision of existing sites that:

- maintains the same number of sites following subdivision as existed prior to it;*
- alters the boundaries between two or more contiguous sites, and*
- may result in any one or more of the sites becoming larger or smaller.*

Our client's consultants have consistently taken the view that the key attribute that a boundary change must comply with to be a controlled activity is the 10% area change, as this is the only physical attribute referred to. For example, in the case of a 50ha title and a 1ha title, if a Boundary Adjustment adjusts the boundaries to such an extent that the actual location of the 1ha title alters, so long as its size does not change by more than 10% (i.e. above 1.1ha or below 0.9ha), then such a change would be a controlled activity. There is nothing in the rule or in the definition to suggest otherwise.

However, Council personnel have advised my client's consultants that if a boundary adjustment alters the location of a title, then it is no longer a boundary adjustment, and becomes a subdivision, and is therefore non-complying. Their view is that the controlled activity status only applies when land is exchanged between two titles, but the area change is no more than 10% of the area as defined by the original title boundaries.

When asked for further explanation as to the interpretation being advanced, Mr Rodie advised as follows:

"Simon has passed on your message and asked that I clarify council's position relating to interpreting the boundary adjustment rule. As you know a boundary adjustment is defined within the Plan, and the Rule also provides guidance as to the extent of the adjustment anticipated i.e. 10% and the another Rule the activity status of a boundary adjustment does not comply with the 10%. You have asked why council has a firm view that proposals, of a similar nature and layout to the one you have illustrated on the scheme plan provided, would not be considered a boundary adjustment.

Firstly it was the view of all attendees at the rural subdivision workshop held yesterday, some 15 people including a solicitor, policy and consenting planners, that the movement of a lot/s and subsequent creation of boundaries in completely different locations, which may also result in a new, or new, building site/s, access arrangements, etc is not a boundary adjustment as defined in the Plan nor as intended taking into account the associated Plan provisions. It is considered, taking into account the guidance provided from Court decisions, that it is correct to interpret the correct meaning/application of the



Rule/s taking into account the associated definition, the relevant rules and also the relevant objectives and policies.

So we will continue to process the application, and any others like it, as a non-complying subdivision under Rule A(27). The decision to support, or not, any application will depend on the circumstances and effects relating to the proposal and also the consistency with the objectives and policies of the relevant zone."

I am not aware if Council's legal team has been asked to provide any advice on this approach to the interpretation of the rule. I would be grateful if you could let me know (and provide a copy of such advice) if that is the case.

In my opinion, the interpretation being advanced by Council staff is wrong. The plain ordinary meaning of the words used in the rule does not support the additional qualification being applied to it.

My client is sufficiently concerned about this matter to instruct me to write to you, and seek an explanation as to Council's legal position. It is also sufficiently motivated to instruct me to apply for a declaration as to the correct interpretation of the rule, if that explanation is not forthcoming or satisfactory.

I look forward to hearing from you as to Council's position on the interpretation of this rule.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kitt Littlejohn', with a long horizontal line extending to the right.

Kitt Littlejohn
Barrister

A small, stylized handwritten mark or signature in the bottom right corner of the page.

7 August 2017

By email

Kitt Littlejohn
Barrister
Quay Chambers
Level 7, 2 Commerce Street

This is the Exhibit marked "B" referred to in the affidavit of MYLES DESBOROUGH GOODWIN affirmed at Auckland this 14th day of September 2017 before me:

By email to: littlejohn@quaychambers.co.nz

Signature: 
A Barrister/Solicitor of the High Court of New Zealand

Dear Kitt

Michael Joseph Hawkins
Solicitor
Orewa

RE: Interpretation of Rule E39.4.1(A4) of the Auckland Unitary Plan Operative in part - boundary adjustments

- 1 I refer to your letter of 6 July 2017 to James Hassall concerning Auckland Council's (Council) interpretation of Rule E39.4.1(A4) of the Auckland Unitary Plan Operative in part (AUP) concerning boundary adjustments.
- 2 Rule E39.4.1(A4) provides that boundary adjustments not exceeding 10 per cent of the original site area and meeting Standard E39.6.3.2 are a controlled activity.
- 3 You have advised that your client Cato Bolam Consultants Limited has concerns about advice received from Council's Northern Resource Consenting Team that Rule E39.4.1(A4) (Rule) does not apply to proposals whereby an approved lot is shifted to another location within the boundaries of the two lots shown on a scheme plan.
- 4 Your letter states that Council personnel say that the Rule can only be used where the lot is not being shifted by more than 10 per cent from its existing location.
- 5 You have also advised that you are instructed that Council's interpretation is inconsistent with how the boundary adjustment rules have been applied historically.
- 6 I have liaised with Council's policy planners about this issue.
- 7 I have also reviewed the definition of 'boundary adjustment' in the AUP and the definition of 'boundary relocation' in the legacy Auckland Council District Plan - Operative Rodney Section 2011 (legacy plan).
- 8 The legacy plan definition of 'boundary relocation' states that a boundary relocation:
Means a SUBDIVISION of existing titles which maintains the same number of titles. (A boundary relocation may involve either a change in the position of existing boundaries, or the enlargement or diminution of the size of existing SITES, or the relocation of an existing SITE or SITES or any one or more of those circumstances).
- 9 The AUP definition provides that a 'boundary adjustment' is:
A subdivision of existing sites that:

- *maintains the same number of sites following subdivision as existed prior to it;*
- *alters the boundaries between two or more contiguous sites; and*
- *may result in any one or more of the sites becoming larger or smaller.*

- 10 These definitions demonstrate that the AUP now takes a different approach from the legacy plan.
- 11 Whereas the legacy plan definition of 'boundary relocation' allowed the relocation (or shifting) of an existing site, the AUP definition only allows for the altering of boundaries between two or more contiguous sites and does not provide for the relocation of a site(s) to other locations.
- 12 The policy approach taken by the AUP is recorded in Policy E39.3(6), which provides for "minor boundary adjustments" which enable a more efficient and effective use of land where there is compliance with Auckland-wide and zone rules.
- 13 I have been advised that the reason for the requirement in the Rule for a boundary adjustment not to exceed 10 per cent of the original site area is to provide some flexibility for rural landowners to adjust boundaries for operational reasons. At the same time, this threshold discourages boundary adjustments being used to create much smaller sites suitable for countryside living purposes.
- 14 For the above reasons, I consider that Council's interpretation of the Rule, being that it does not apply where an approved lot is proposed to be shifted to another location, is correct.

Yours faithfully



Christian Brown
Manager – Regulatory Litigation

Direct Dial: 09 890 7703
Email: christian.brown@aucklandcouncil.govt.nz

