IN THE ENVIRONMENT COURT
AT AUCKLAND

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

UNDER	the Resource Management Act 1991 (**RMA**)
AND	
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**
	Respondent

APPLICATION FOR DECLARATION

Dated 29 May 2024

Hornabrook Macdonald Lawyers
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Auckland

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TO: the Registrar
Environment Court
Auckland

We, Cato Bolam Consultants Limited, Better Living Landscapes Limited, Warkworth Surveying Limited, Fluker Surveying Limited, Buckton Consulting Surveyors Limited, Terra Nova Planning Limited and Parallax Consultants Limited, apply for the following declarations:

*That under the Auckland Unitary Plan (**AUP**):*

a. *in-situ subdivision under rules A16 and A17C in Table E39.4.2 is a (restricted) discretionary activity provided it meets standard E39.6.4.4 and, in relation to Table E39.6.4.4.1, provided the Area of Feature Protected on the site is as required by the Table for the number of in-situ sites sought, and notwithstanding that the Area of Feature Protected may not be a single or continuous area on the site; and*

b. *in-situ subdivision under rule A18 in Table E39.4.2 is a (restricted) discretionary activity provided it meets standard E39.6.4.5 and, in relation to Table E39.6.4.5.1, provided the Established Area of Native Revegetation Planting Protected on the site is as required by the Table for the number of in-situ sites sought, and notwithstanding that the Established Area of Native Revegetation Planting Protected may not be a single or continuous planted area on the site; and*

c. *Transferable Rural Site Subdivision (**TRSS**) under rule A21C in Table E39.4.2 is a (restricted) discretionary activity provided it meets standard E39.6.4.6 and, in relation to Table E39.6.4.4.1, provided the Area of Feature Protected on the site is as required by the Table for the number of TRSS sites sought, and notwithstanding that the Area of Feature Protected may not be a single or continuous area on the site; and*

d. *TRSS under rule A22 in Table E39.4.2 is a (restricted) discretionary activity provided it meets standard E39.6.4.6 and, in relation to Table E39.6.4.5.1, provided the Established Area of Native Revegetation Planting Protected on the site is as required by the Table for the number of TRSS sites sought, and notwithstanding that the Established Area of Native Revegetation Planting Protected may not be a single or continuous planted area on the site*.

The grounds for this application are:

Background - the relevant rules

1. Where met, standard E39.6.4.4 of the AUP provides for the in-situ subdivision of a site in the rural zones where there is protection of a specified amount of indigenous vegetation, or wetland mapped on the

site as SEA, or meeting the factors in Policy B7.2.2(1), as a restricted discretionary activity (Table E39.4.2 (A16) and (A17C)), with the number of new in-situ sites being based on the total area of vegetation or wetland to be protected (as set out in Table E39.6.4.4.1).

2. Where met, standard E39.6.4.5 of the AUP provides for the in-situ subdivision of a site in the rural zones through establishing native revegetation planting as a restricted discretionary activity (Table E39.4.2 (A18)), with the number of new in-situ sites being based on the total area of revegetation planting to be established (as set out in Table E39.6.4.5.1).

3. Where met, standard E39.6.4.6 of the AUP provides for Transferable Rural Site Subdivision (**TRSS**), with one of the requirements of the standard being compliance with either standard E39.6.4.4 or E39.6.4.5, with the number of TRSS sites able to be created being based on the area of SEA or indigenous vegetation or wetland meeting the factors in Policy B7.2.2(1) being protected, or the area of native revegetation planting to be established (as set out in Table E39.6.4.4.1 and Table E39.6.4.5.1 respectively).

4. Neither Table E39.6.4.4.1 or Table E39.6.4.5.1, or the advice notes provided with the tables, specify that the minimum (or maximum) area of feature to be protected, or planted and protected, on a site must comprise a single, continuous area of indigenous vegetation or wetland, or revegetation. Rather, the tables specify a minimum area to be protected to comply with this sub-standard, and then minimum additional areas to be protected in order to increase either in-situ or TRSS lot yield.

The Auckland Council's interpretation of the rules

5. Since the period from the release of the Environment Court's final decision relating to the AUP rural subdivision appeals in February 2021 (*Cabra Rural Developments Limited & ors v Auckland Council* [2021] NZEnvC 010) the Auckland Council has generally treated subdivision proposals that protected areas of SEA, or other significant indigenous vegetation or wetland (and met the other sub-standards in the rules) under these rules as non-complying, where the feature to be protected on the site was not contained in a single, continuous area. This has frustrated the protection of smaller, dis-continuous pockets or fragments of significant indigenous vegetation or wetlands on rural properties, even though the total area to be protected complied with the relevant table (and rule).

6. A similar approach has been followed with respect to revegetation planting and protection proposals, whereby revegetation planting located on a site to buffer, enhance and link dis-continuous pockets or fragments of significant indigenous vegetation, meeting the minimum area requirement, but not in a single, continuous planted area, were also treated as non-complying.

7. In February 2024 Auckland Council published an Auckland Unitary Plan Practice and Guidance note – Rural Subdivision (**Guidance Note**), which appears further to codify its approach to the rules. 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 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.*

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

8. 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.

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

10. 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.

11. Moreover, 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.

12. The applicants are involved in numerous rural subdivision applications seeking to rely on these rules and are concerned that Auckland Council's interpretation of the standard (and the tables in particular) is in conflict with the Environment Court's decision in *Cabra Rural Developments Limited & ors v Auckland Council* [2021] NZEnvC 010, wrong, and inconsistent with the AUP's objective of protecting and enhancing indigenous vegetation and wetlands.

13. The applicants make this application for declarations having failed to persuade the Auckland Council that its interpretation of the AUP is wrong.

We attach the following documents:

(a) affidavits by Karen Ruth Pegrume, Patricia Joy Giles and Myles Desborough Goodwin in support of the application; and

(b) a list of names and addresses of persons to be served with a copy of this application (**Schedule A** to this application).

Kitt Littlejohn
Counsel for the Applicants
29 May 2024

Schedule A - Person(s) to be served a copy of this application

1. Auckland Council, Legal Team - Christian Brown
   (christian.brown@aucklandcouncil.govt.nz)