

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TAMAKI MAKAU**

Decision [2024] NZEnvC 081

IN THE MATTER OF

an application under s 292 of the
Resource Management Act 1991

BETWEEN

AUCKLAND COUNCIL

(ENV-2024-AKL-000051)

Applicant

Court: Environment Judge J A Smith sitting alone under s 279(1)(b) of
the Act

Hearing: On the papers
Last case event: 27 March 2024

Appearances: C L L Faesenkloet for Auckland Council

Date of Decision: 17 April 2024

Date of Issue: 17 April 2024

DECISION OF THE ENVIRONMENT COURT

A: Auckland Council is directed, under s 292 of the Resource Management Act
1991, to:

- (1) Amend the sub-precinct B boundary on I513.10.1 Kaipara Flats Airfield:
Precinct plan 1 – subdivision concept plan in accordance with Annexure A;
and
- (2) Amend the Kaipara Flats Airfield Precinct by adding the following underlined
words:



Auckland Council

I513.4. Activity table

The following tables specify the activity status of land use activities in the Kaipara Flats Airfield Precinct pursuant to section 9(3) and subdivision pursuant to section 11 of the Resource Management Act 1991. The zone applies but there are no rules in the zone. Auckland-wide and overlay provisions apply in this precinct unless otherwise specified below. The following provisions do not apply:

- (1) Chapter D24 Aircraft Noise Overlay Activity Table D24.4.1; and
- (2) Chapter D24 Aircraft Noise Overlay Standard D24.6.1.

B: There is no order as to costs.

REASONS

Introduction

[1] Auckland Council applies under s 292 of the Resource Management Act 1991 (**the Act**) for a direction by this Court to amend the I513 Kaipara Flats Airfield Precinct provisions and precinct plan in I513 Kaipara Flats Airfield Precinct in the Auckland Unitary Plan (**AUP**) to remedy the mistakes or defects.

[2] The mistakes or defects relate to the location of the boundary of sub-precinct B in I513.10.1 Kaipara Flats Airfield: Precinct plan 1 - subdivision concept plan, and the lack of a rules in the Kaipara Flats Airfield Precinct that specifies that the Aircraft Noise Overlay provisions in D24 do not apply in the Kaipara Flats Airfield Precinct.

[3] The mistake in the sub-precinct boundaries was identified when a building consent application was lodged with the Council to construct a new dwelling on Lot 8 DP 557617 (2 Turaki Lane) (**the site**).

[4] The application was supported by an affidavit of Mr Benjamin John Bazley Willis, affirmed 20 March 2024.

Kaipara Flats Airfield Precinct

[5] The Kaipara Flats Airfield Precinct applies to approximately 16.3ha of land about seven kilometres to the west of Warkworth.

[6] Dwellings are prohibited in the Airfield Sub-precinct (sub-precinct A). The Residential Sub-precinct (sub-precinct B) is intended to enable eight residential sites and associated aircraft hangars. Subdivision for the creation of more than eight

residential sites and associated aircraft hangers is a prohibited activity. The precinct provides for limited residential development, to enable aircraft enthusiasts to live in close proximity to the Kaipara Flats Airfield, and provide permanent access from individual properties adjoining the runway.

[7] Virtually all of the land within the Kaipara Flats Precinct is located within the Aircraft Noise Overlay set out in Chapter D24 Aircraft Noise Overlay.

[8] All of the residential sites in sub-precinct B are located partially within the 65dB Ldn noise boundary and partially within the 55dB Ldn noise boundary.

Historic context of the Kaipara Flats Airfield provisions

Legacy Rodney District Plan

[9] The legacy Rodney District Plan (**RDP**) 2011 applied to the Kaipara Flats Airfield prior to the AUP. The RDP included a Special 15 – Kaipara Flats Airfield zone. Rather than the two sub-precincts, the entire area was a special zone in the RDP where the subdivision of eight residential lots was required to be in general accordance with the concept plan at Appendix 12V of the RDP providing a location for eight residential lots as an Aeropark.

Proposed Auckland Unitary Plan – notified September 2013

[10] The Kaipara Flats Airfield Precinct was not included in the Proposed Auckland Unitary Plan (**PAUP**) as notified in September 2013. The PAUP, as notified, provided for all activities sensitive to aircraft noise, which includes residential dwellings, as a prohibited activity where located within the Ldn65dBA noise contour for the North Shore Airfield, Kaipara Flats Airfield and Whenuapai Airbase.

[11] Dentara Holdings Limited (with Jim Schmidt as one of two directors of Dentara Holdings Limited and the sole director of the Kaipara Aerodrome Limited) lodged a submission on the PAUP seeking the following relief:

- (a) allow for the development of housing and hangars for the eight-lot aeropark at Kaipara Flats as a Restricted Discretionary Activity;

- (b) insert additional restricted discretionary assessment criteria from the Operative Auckland Council District Plan (Rodney section) which relates to the Kaipara Flats Airfield Special zone;
- (c) delete Rule 2 Notification;
- (d) amend Activity Table 4 to allow for the subdivision of the Kaipara Flats Airfield in accordance with a concept plan as a restricted discretionary activity; and
- (e) include in Part 5 Appendices the Appendix 12V Kaipara Flats Airfield Subdivision Concept Plan and Appendix 12W Housing and Hangar Site Specific Guidelines from the Operative Auckland Council District Plan (Rodney Section).

Subdivision consent obtained by Dentara Holdings Limited

[12] In 2014, Dentara Holdings Limited obtained a subdivision consent to create eight residential lots. The consent was granted under the RDP and PAUP, with two of the residential sites (Lots 1 and 8) going beyond the extent of the concept plan in Appendix 12V of the RDP.

IHP recommendations and the Council's decision for Kaipara Flats Airfield

[13] The Independent Hearings Panel (**IHP**) recommendations provided for the Kaipara Flats Airfield precinct to be included in the AUP, with the boundaries of sub-precinct B based on the concept plan in Appendix 12V in the legacy district plan, and providing for residential dwellings outside of sub-precinct B as a prohibited activity.

[14] The Council's decision in 2016 approved that IHP recommendation. The I513 Kaipara Flats Airfield precinct provides for up to eight residential dwellings as a restricted discretionary activity within sub-precinct B. Residential dwellings outside of sub-precinct B (i.e., within sub-precinct A) are a prohibited activity.

The mistakes

[15] There are two mistakes, or defects. Mistakes have been identified in relation to the location of the boundary of sub-precinct B in I513.10.1 Kaipara Flats Airfield: Precinct plan 1 – subdivision concept plan, and the I513 Kaipara Flats Airfield Precinct and its relationship with the D24 Aircraft Noise Overlay in the AUP. The mistake, or defect, in the AUP relates to the lack of a rule in Kaipara Flats Airfield Precinct that specified that the Aircraft Noise Overlay provisions in D24 of the AUP provisions do not apply to new dwellings in the Kaipara Flats Airfield Precinct.

Mistake in I513 Kaipara Flats Airfield Precinct as it relates to the precinct boundaries

[16] The 2014 subdivision created two lots (2 and 16 Turaki Lane) that are partially within sub-precinct A and partially within sub-precinct B, because sub-precinct B was based on the RDP Appendix 12V concept plan boundaries. Development is not possible on those two lots that are partially within sub-precinct A and sub-precinct B, unless the mistake in the boundary of sub-precinct B is corrected so that these two lots fall entirely within sub-precinct B.

[17] The issue came to light when a building consent application to construct a new dwelling on Lot 8 DP 557617 (2 Turaki Lane) was considered by the Council. A Building Act section 37 certificate was attached to the building consent for the site because of a 10m side yard infringement, leading the applicant to discover the mistake in the plan. The planning consultant for the applicant contacted the Council by email dated 6 July 2023.

[18] The subdivision of the eight residential lots was consented by the Council in 2014 under the RDP and the notified PAUP. The IHP recommendations and the Council decision approving the same, resulted in the inclusion of the precinct in the AUP and the creation of sub-precinct B to provide for subdivision of eight residential lots, based on the concept plan in the legacy district plan instead of the eight-lot subdivision that had been granted in 2014.

[19] Mr Willis suggests the IHP was unlikely to be aware of the subdivision consent when it made its recommendations to the Council in 2016, and notes that the IHP

recommendations do not contain any detail or rationale for the boundary of sub-precinct B. The Council did not identify this issue when making its decisions on the IHP recommendations for the Kaipara Flats Airfield precinct either. However, the evidence provided by Council Planner, Mark Vinall, states that through mediation with Dentara Holdings Limited, it was agreed to include the new precinct for Kaipara Flats Airfield and include zone activity rules to provide for housing and hangars at Kaipara Flats Airfield as a restricted discretionary activity with associated assessment criteria, concept plan, housing and hangar guidelines.

[20] Auckland Council considers that the location of the boundary for sub-precinct B is a mistake, and that the boundary of sub-precinct B should match the surveyed boundary lines in Land Information New Zealand for the subdivision that was granted by the Council in 2014. The boundary of sub-precinct B should be amended to ensure that Lots 1 and 8 (2 and 16 Turaki Lane respectively) are wholly within the sub-precinct B boundary.

Mistake in I513 Kaipara Flats Airfield Precinct as it relates to activities sensitive to noise

[21] All of the residential sites within the Kaipara Flats Airfield Precinct are located partially within the 65dB Ldn noise boundary and within the 55dB Ldn noise boundary Aircraft Noise Overlay set out in D24 Aircraft Noise.

[22] The D24 Aircraft Noise Overlay provisions provides that new activities sensitive to aircraft noise within the 65dB Ldn noise boundary are a prohibited activity. Dwellings are included within the definition of ‘activities sensitive to aircraft noise’ in Chapter J of the AUP.

[23] Mr Willis explains in his affidavit that where a site is subject to both the I513 Kaipara Flat Precinct and D24 Aircraft Noise Overlay, Chapter C of the AUP provides guidance on how the rules are to be applied. Rule C 1.6 of the AUP provides that the activity status of an activity in an overlay takes precedence over the activity status of that activity in a precinct, unless otherwise specified by a rule in the precinct applying to the particular activity. Mr Willis considers that it is not otherwise specified in a rule in the Kaipara Flats Airfield Precinct that precinct rules take precedence over

the rules in the Aircraft Noise Overlay.

[24] The result is that a new dwelling at 2 Turaki Lane is a prohibited activity.

[25] Mr Willis consider that this is a mistake, as the Kaipara Flats Airfield Precinct is a bespoke precinct that provides for a limited number of dwellings (which are activities sensitive to aircraft noise) within sub-precinct B, including on sites within the 65dB Ldn noise boundary, as a Restricted discretionary activity. Mr Willis considers that if the mistakes are not corrected, property owners in sub-precinct B will not be able to build within the 65dB Ldn noise boundary, which would defeat the purpose and objective of the Kaipara Flats Airfield Precinct.

[26] Auckland Council considers that the Kaipara Flats Airfield Precinct should contain a specific rule excluding the D24 Aircraft Noise Overlay provisions from applying and this is the mistake in the Kaipara Flats Airfield Precinct. If this mistake is not corrected, new dwellings proposed in sub-precinct B of the Kaipara Flats Airfield Precinct that are within the 65dB Ldn noise boundary will be prohibited activities, and the Council will be unable to grant consents pursuant to s 87A(6)(b) of the Act.

Position of affected parties

[27] The landowner at the site at 2 Turaki Land is Kaipara Aerodrome Limited. Kaipara Aerodrome Limited also own all the land within sub-precinct A as well as 8 – 12 Turaki Land within sub-precinct B. Kaipara Aerodrome Limited is the applicant for the building consent. The landowner agrees that the Kaipara Flats Airfield Precinct should be amended to correct the mistakes.

[28] The site at 16 Turaki Land is also located partially within sub-precinct A because of the sub-precinct B boundary mistake. The landowner of the site at 16 Turaki Land also agrees that the Kaipara Flats Airfield Precinct should be amended to correct the mistakes.

[29] Mr Willis included correspondence from the landowners in his affidavit.

[30] In the Councils view there are no other affected parties that need to be heard in

relation to the proposal to correct the mistakes. While there are other landowners within the Kaipara Flats Airfield Precinct, these parties will benefit from the correction of the mistakes as it will enable development to occur within the Kaipara Flats Precinct as was previously intended.

Council's power to correct a mistake in an operative plan

[31] Having identified the mistakes in the Kaipara Flats Airfield Precinct, the Council then considered the options available to correct the mistakes.

[32] The options include using clause 20A of Schedule 1 of the Act or applying to the Environment Court under s 292 of the Act. Clause 20A of Schedule 1 provides:

A local authority may amend, without using the process in this schedule, an operative policy statement or plan to correct any minor errors.

[33] The Council does not consider that these mistakes/errors could be considered as 'minor' and, as a result, clause 20A of Schedule 1 of the Act could not be used by the Council to correct the sub-precinct B boundary on I513.10.1 Kaipara Flats Airfield: Precinct plan 1 – subdivision concept plan, or the omission of a rule from the Kaipara Flats Airfield Precinct.

Legal framework

[34] Section 292 of the Act 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) remediating 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.

[35] Section 292 is a “slip rule”, that should only be exercised in cases of mistake, defect or uncertainty, or to give full effect to a plan. Use of this section is not appropriate where there is opposition to the order and/or where third parties who

may be affected are unable to participate.¹ The purpose of this section is to allow the Court to make an order directing the amendment of a plan where there is an inadvertent error which can be readily corrected. This section does not empower the Court to make any substantive changes to a plan.² The power is broadly discretionary, but it does not extend to determining whether particular plan provisions are adequate or appropriate.³

[36] The Council referred to various cases where the Environment Court has made s 292 directions in the past for similar instances. One of the cases referred to is *Re Auckland Council*⁴ in which Auckland Council made an application under s 292 of the Act, seeking a direction to correct a mistake in the Dairy Flat precinct. The mistake related to the lack of a rule in the Dairy Flat precinct that specified that the Aircraft Noise Overlay provisions in D24 of the AUP provisions do not apply to new dwellings and subdivision in the Dairy Flat Precinct. The Court granted the s 292 application and directed the Council to amend the AUP. The Council submits the same amendments proposed in its s 292 application for the Dairy Flat precinct is sought here. There is no proposal to change the activity status of dwellings in sub-precinct A.

Evaluation

[37] Mr Willis has identified how the mistake in the boundary came about. The boundary of sub-precinct B does not reflect the subdivision consent granted in 2014, but instead reflects the boundaries of a concept plan in Appendix 12V of the RDP.

[38] The AUP IHP Report notes that residential activity was previously approved for people with an active interest in aviation and wanting to live on an airfield.

[39] As Mr Willis has stated, if the mistakes are not corrected, residential development cannot occur on any of the sites in the precinct as dwellings are a prohibited activity within 65dB Ldn noise boundary and the sites at 2 Turaki Land

¹ *Oxford Charter Ltd v Queenstown Lakes DC*, C065/00.

² *35 Limited v Auckland Council* [2018] NZEnvC 215, at 7; *Catholic Archdiocese of Wellington v Friends of Mount St Cemetery* [2000] NZRMA 385.

³ *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).

⁴ *Re Auckland Council* [2021] NZEnvC 137.

and 16 Turaki Lane as dwellings are a prohibited activity as a result of the sub-precinct boundary mistake.

[40] The precinct provides for residential development of up to eight sites in sub-precinct B and prohibits development outside of sub-precinct B. Correcting the mistake will mean that residential development of up to eight sites within the precinct can occur.

[41] The Court accepts Mr Willis evidence that sub-precinct B and the RDP intended to allow limited residential development in the vicinity of the airfield and prohibit such development outside that area. The error appears to have occurred in failing to utilise the 2014 subdivision boundaries but instead using an older concept plan Appendix 12V of the former Rodney District plan. This had the impact of putting 2 and 16 Turaki Lane outside the sub-precinct.

[42] I accept that this was an error by the Council in carrying over the sub-precinct into the AUP. I conclude it was oversight and not an intentional exclusion of those properties. The subdivision has now been in place for nearly 10 years and the relevant AUP provisions for over seven years.

[43] I conclude that correcting this inadvertent oversight would not be so significant that it would be inappropriate to make a direction under s 292 of the Act. There is no change in activity status, the changes are consistent with the intention of sub-precinct B, and provide clarity for plan users. They also fulfil the purpose of the subdivision granted in 2014.

[44] I am satisfied that affected landowners have been consulted. The wider community are already aware of the 2014 subdivision, and this has not given rise to concerns over the last decade. In the Council's view, there are no other affected parties that need to be heard in relation to the proposal to correct the errors. I therefore conclude that the application need not be notified to anyone else and that no further action under s 293 of the Act is required.

Outcome

[45] For the reasons above, I conclude that there are mistakes or defects relating to:

- (a) the location of the boundary of sub-precinct B in I513.10.1 Kaipara Flats Airfield: Precinct plan 1 - subdivision concept plan; and
- (b) the lack of a rules in the Kaipara Flats Airfield Precinct that specifies that the Aircraft Noise Overlay provisions in D24 do not apply in the Kaipara Flats Airfield Precinct

which should be remedied and that it is appropriate to use the powers under s 292 of the Act to do so. I am satisfied the errors were inadvertent and the consequences unintended.

[46] Therefore, Auckland Council is directed, under s 292 of the Act, to:

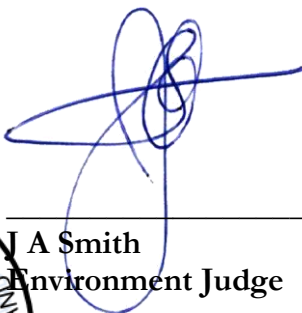
- (a) Amend the sub-precinct B boundary on I513.10.1 Kaipara Flats Airfield: Precinct plan 1 – subdivision concept plan in accordance with Annexure A; and
- (b) Amend the Kaipara Flats Airfield Precinct by adding the following underlined words:

I513.4 Activity table

The following tables specify the activity status of land use activities in the Kaipara Flats Airfield Precinct pursuant to section 9(3) and subdivision pursuant to section 11 of the Resource Management Act 1991. The zone applies but there are no rules in the zone. Auckland-wide and overlay provisions apply in this precinct unless otherwise specified below. The following provisions do not apply:

- (3) Chapter D24 Aircraft Noise Overlay Activity Table D24.4.1; and
- (4) Chapter D24 Aircraft Noise Overlay Standard D24.6.1.

[47] There is no order as to costs.

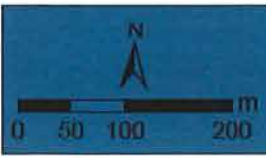
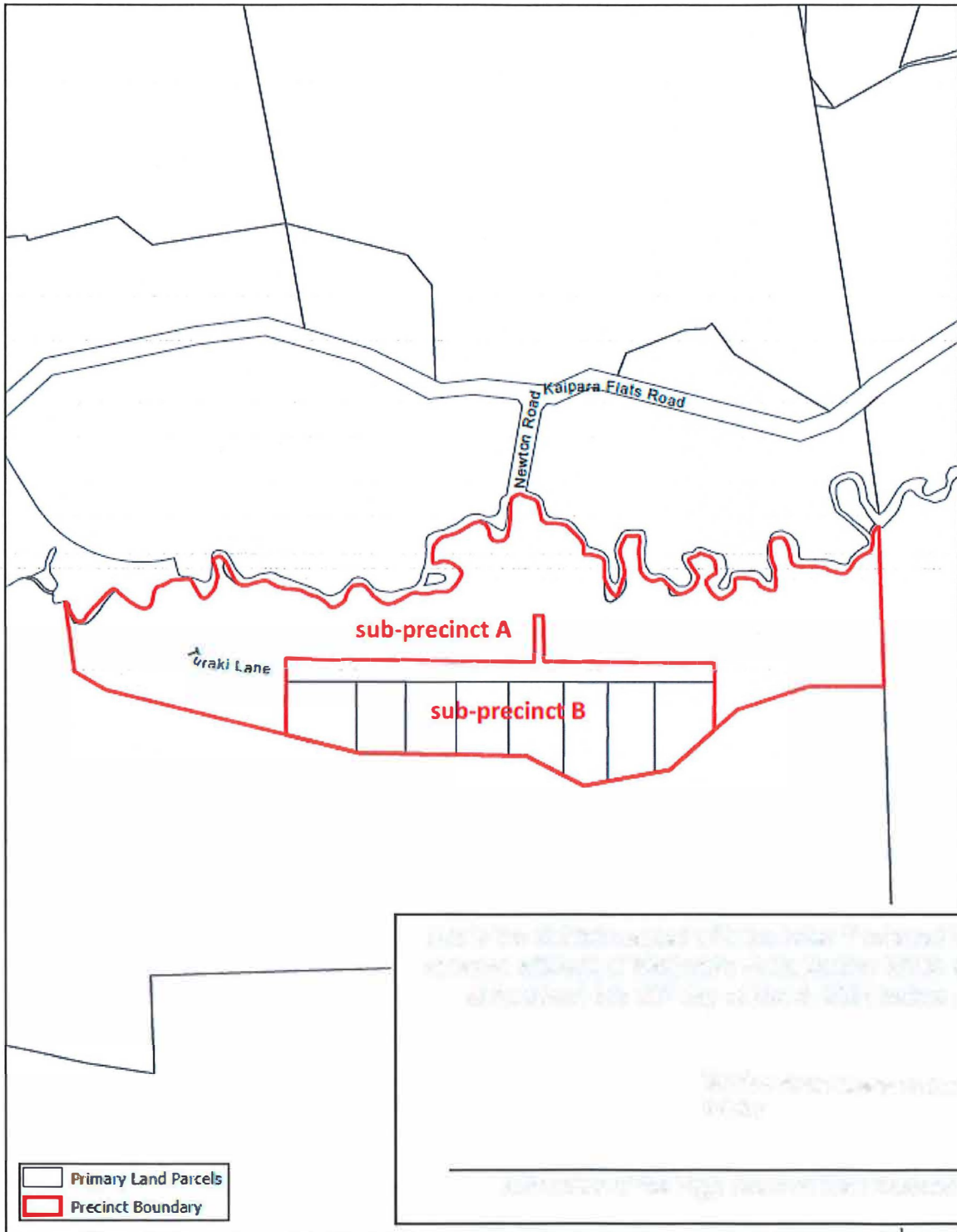


J A Smith
Environment Judge



Annexure A

Precinct boundary



Precinct plan

