

7 July 2010

The MFLR Project Leader
Ministry of Justice
PO Box 1764
DX AP24518
Whangarei
New Zealand

Attn: Mr Lindsay Wilson

Dear Sir

**INVESTIGATION INTO MAORI LAND
KOPUA KAWAU BLOCK**

Thank you for your correspondence of 14th June 2010 asking Paterson Pitts to investigate the location of Kopua Kawau Block.

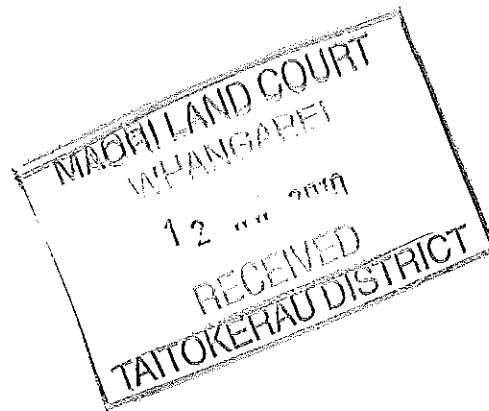
As you have noted, there appears to be a conflict between the spatial location of this block and other land parcels in the area. This report aims to describe the cause of this conflict, the current status of Kopua Kawau Block, and the solutions which might be available to remedy this situation.

Survey History of Block

Kopua Kawau Block was first defined by survey on ML 9717 (1915), which shows the block being located on the south-western side of the first bend in the Waikare Stream south of its intersection with Waikare Road.

The spatial extents of the block as shown on ML 9717 are consistent with the boundary lines shown on earlier survey plans, namely ML 721 (circa 1907) and OLC 135 (1887).

It is worth noting that OLC 135 (OLC = Old Land Claim) is the oldest survey of relevance to this investigation. This survey shows an adjoining parcel of land, approximately the shape of Kopua Kawau Block as it is shown on ML 9717, located between the OLC 135 area, the Waikare Stream, and an adjoining parcel described on OLC 135 as Native Reserve Turuki. OLC shows the label 'Kopua Kawau' near the adjoining block of interest, and it is our conclusion that this adjoining block on OLC 135 is indeed the Kopua Kawau Block parcel which we have been asked to investigate.



DUNEDIN

8 - 10 Broadway
P.O. Box 1083 Dunedin 9054
Tel: 64 3 477 3245
Fax: 64 3 474 0484
dunedin@pppgroup.co.nz

MOSGIEL

4 Glasgow Street
P.O. Box 3, Mosgiel 9053
Tel: 64 3 489 7110
Fax: 64 3 489 7411
mosgiel@pppgroup.co.nz

Directors

Nigel Pitts

FNZIS, RPS, REA

Leon Hallett

BSurv, MNZIS

Kurt Bowen

BSurv, RPS, MNZIS

Associates

Peter Williams

BSurv, RPS, MNZIS

Mark Wylie

NZCLS, ANZIS

Consultant

Tony Hosken

DipSurv, MNZIS

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While the boundaries of the subject block differ in shape to some degree between OLC 135 in 1887 and ML 9717 in 1915, this is not surprising given the definition quality of the OLC survey and the moveable status of the river boundary. The important feature is that the blocks shown on these two plans are generally of similar location, shape and size.

Having established that the Kopua Kawau Block has been properly recognised by the surveys up until ML 9717 in 1915, we now look at the more recent surveys in the vicinity of this block.

A number of partition and subdivision surveys occurred between 1945 and 1954, including ML 13287 (1945), ML 13289 (1945), ML 13767 (1954) and DP 42853 (1954).

All of these plans have dealt with land in the Te Turuki Block (shown Native Reserve Turuki on OLC 135), and none have directly involved Kopua Kawau Block. The boundary between these plans and the Kopua Kawau Block appears generally consistent with the location of this boundary as defined by ML 9717, accepting that there have possibly been minor adjustments made as a result of alternative survey methods and/or practices which were in use at the time.

Our conclusion, in terms of the 1945-1954 plans, is that these surveys are consistent with the earlier surveys and do not encroach onto the Kopua Kawau Block. The subject block is therefore still an independent parcel of land at this time.

One matter of interest is that none of the 1945-1954 plans label Kopua Kawau Block as being an adjoining land parcel. While this may not have been entirely necessary at the time these plans were drawn, I find it surprising that the surveyors responsible for drawing these plans did not choose to recognise, by label and abutting boundaries, the existence of the adjoining Kopua Kawau Block. Certainly, survey convention and accepted practice would have required the adjoining lands to be correctly indicated and labeled. This omission, on all four plans through this period, is suggestive that the surveyors who prepared these plans may not have been aware of, or might not have had access to, ML 9717. Each of these surveys indicates (erroneously) that the land in question is part of the OLC 135 parcel. I will discuss this issue in further detail later on, suffice to say that we believe ML 9717 was not taken into consideration by the surveyors of this era, and that OLC 135, covering a very large area and not having particularly well defined boundaries, was assumed to include all of the adjoining land.

However, despite the surveys which occurred between 1945 and 1954 overlooking the earlier ML 9717 which defined Kopua Kawau Block, we believe that these plans have not encroached into the land contained in the ML 9717 survey. As such, Kopua Kawau Block would still have existed independently at this time.

The next survey to deal with the land of interest and the most recent survey in this area is DP 102868 (1983). Unfortunately, this survey appears to have dealt with the land which we suspect is Kopua Kawau Block, without recognising the true identity of this land.

DP 102868 is a land transfer subdivision of Part OLC 135 and Part Te Turuki Block. When we overlay the earlier ML 9717 plan image, we can see that the Kopua Kawau Block coincides with Lots 1-4 and 9 on DP 102868. The land in Lots 1-4 DP 102868 is now owned in a number of

guaranteed fee simple titles issued under the Land Transfer Act, while the land in Lot 9 DP 102868 has been vested to the local authority as a Local Purpose Reserve (Esplanade).

We believe that the surveyor who prepared DP 102868 has been unaware of the existence of the earlier ML 9717 which depicts Kopua Kawau Block. Had the surveyor been aware of this earlier survey, it is likely that the subject land, and its independent ownership, would have been respected by DP 102868.

It appears that the surveyor has decided that the total area of land which he was dealing with as part of DP 102868 was contained in the underlying parcels known as OLC 135 and Te Turuki Block. Specifically, the land which we are now investigating was thought to be part of the Old Land Claim area.

On this basis, DP 102868 then proceeds to subdivide the land (presumably with the consent of the owners of Part OLC 135 and Te Turuki Block), the result being that new fee simple titles have been issued under the Land Transfer Act for Lots 1-8 on DP 102868 and that Lot 9 on the same plan has been transferred to the local authority as a Local Purpose Reserve.

This is an unfortunate situation as it appears that the underlying Maori Land known as Kopua Kawau Block has been overlooked by the more recent land transfer survey and now a number of fee simple titles exist over the same land.

It is also a rather unfortunate situation for the surveyor of DP 102868, who it appears, may not have been aware of the existence of Kopua Kawau Block or of the related ML 9717. There may be ramifications for the surveyor in resolving the ownership issues, and in his defense, I believe that the following matters have contributed to the present situation-

1. The database of plan references and locations, held by Land Information New Zealand (LINZ), is not accurate. This database is used by surveyors to identify which survey plans in a particular area might be relevant when undertaking a new survey. In this case, the plan reference for ML 9717 was inserted into the database at a ground distance of approximately 1km from the true location of Kopua Kawau Block (even now, the plan reference can be seen in the landonline database at its erroneous location). Having looked at the location of the plan reference relative to the subject land, as well as the cadastral format of the surrounding land, I believe that it would have been unlikely that the surveyor would have identified ML 9717 as being worthy of review as part of the DP 102868 survey. We also note that the plan checking process employed by Land Information New Zealand (used to approve DP 102868) must have also failed to identify the relevance of ML 9717.
2. The nearby underlying plans, occurring between 1945 and 1954, were certainly taken under consideration by the surveyor of DP 102868. Unfortunately, these plans did not acknowledge the existence of the adjoining Kopua Kawau Block. Had they shown the subject land as being an adjoining parcel, the later surveyor would likely have been able to respect the correct parcel definition.

3. The only plan, which the surveyor of DP 102868 had available, and which indicated the existence of Kopua Kawau Block, was the original survey OLC 135. This plan covers a large area and is not distinctly clear as to the existence, or location of, the subject land.
4. Certificate of Title NA46A/755 (issued in 1979) was the title for the land in Old Land Claim 135 immediately prior to the subdivision shown on DP 102868 (1983). The diagram attached to this title depicts, reasonably clearly, the land subject to this investigation as being contained within the OLC area. The surveyor when looking at this title would have been under the impression that the only land he needed to be concerned with was OLC 135 and Te Turuki Block. Even if the surveyor had researched the title prior to NA46A/755, being certificate of title NA1368/89 (issued in 1957), he would have seen, on this earlier title, the "Not to Scale" diagram next to the main diagram. This enlarged diagram shows Turuki A and B Blocks and DP 42853, and clearly indicates that the balance of the land is part Old Land Claim 135.
5. In looking at the occupation details shown on the various survey plans over the history of Kopua Kawau Block, and a recent aerial photograph of the area obtained from Google Earth, we have not been able to distinguish any distinct form of land use within the subject land. It appears the land use of this block has been similar to the land use of the adjoining properties. This being the case, there probably was little evidence on the ground to suggest to the surveyor the existence of a separate land parcel.

I suggest that the combination of the five matters above has led the surveyor of DP 102868 to conclude that he was only dealing with OLC 135 and Te Turuki Block as underlying properties. The existence of Kopua Kawau Block was not realised by the surveyor, and unfortunately was not respected by DP 102868.

We have attached in Appendix A, a plan of the existing cadastral format in the vicinity of Kopua Kawau Block. This plan also shows the approximate location of Kopua Kawau Block overlaid on top of the cadastral record.

Appendix B shows the approximate location of Kopua Kawau Block overlaid on top of the Google Earth aerial photograph image. The image has been aligned to best fit with the cadastral record.

Appendix C contains a number of plans showing the progression of surveys over time. Each plan shows the approximate location of Kopua Kawau Block overlaid on top of the applicable survey.

Appendix D contains copies of various certificates of title which are of relevance to this report and the land contained in Kopua Kawau Block.

Finally, as a note on the process we have used to identify the location of Kopua Kawau Block, this has been achieved through a series of image overlays and tracings. We have worked from the earliest surveys forward, matching each subsequent survey plan as closely as possible with the boundary information contained in the previous survey. While this process is sufficiently accurate to identify the approximate location, shape and area of the subject block, it is certainly not what we would consider to be survey accurate. I estimate that the extents of Kopua Kawau Block, which

we have shown on the appended plans, are probably accurate to around +/- 5m. A full field survey will be necessary to define the boundaries of Kopua Kawau Block to a better accuracy.

Status of Kopua Kawau Block

At present Kopua Kawau Block does not exist. The subject land has been subject to a more recent survey under the Land Transfer Act and the land which was once contained in Kopua Kawau Block now resides partly in a number of fee simple titles and partly as Local Purpose Reserve.

However, this is not to say that Kopua Kawau Block should not exist. Because the existence of the subject block was not recognised by the recent survey (perhaps by mistake), it could be concluded that Kopua Kawau Block has been removed from the present cadastral record in error, and that it should be re-instated in some form.

The question of reinstatement is a difficult one. As Crown guaranteed fee simple titles have issued for much of the land which was previously Kopua Kawau Block, we need to consider the premise of Indefeasibility of Title, which is discussed in the next section, and we also need to consider the range of options for remedying the earlier error, including financial compensation and the provision of an alternative block of land.

In our investigations, we have researched all of the relevant survey plans, the current fee simple titles, Google Earth records, and the surveyors report for DP 102868. All of these documents are consistent with our reporting above. Further information which we have not obtained, but which might offer some additional insight into the problem, might include the surveyor's application to the local authority for permission to undertake the subdivision in DP 102868, and discussions with the surveyor himself if he can be located.

Indefeasibility of Title

The conflict between the Maori Land Court records and the Land Registry titles is the subject of Section 123 (5) of Te Ture Whenua Maori Act 1993 and a number of High Court decisions.

Te Ture Whenua Maori Act 1993 Section 123 (5) provides that until registration an order of the Maori Land Court in respect of land subject to the Land Transfer Act 1952 affects only the equitable title to the land.

The issue of the conflict between the equitable interests (unregistered interests) shown in the Maori Land Court records and the legal interests as shown on the certificate of title under the Land Transfer Act 1952 were discussed in the case of *Registrar General of Land v Marshall [1995] 2 NZLR 189*. This case held that the purchaser whose land was transferred to him without obtaining the necessary confirmation from the Maori Land Court obtains the benefit of indefeasibility of title. This was confirmed in the later case of *Warin & Others v Registrar General of Land (unreported), High Court, Whangarei, CIV 2006-488-000245, 31 October 2008* that in the absence of fraud, registered interests must "trump" unregistered interests.

Notwithstanding that a transferee whose transfer is registered with LINZ obtains an indefeasible title, in the absence of fraud, the status of the land does not change but remains Maori Freehold Land. Non-Maori Owners should not assume that a change of status of the land will be granted. Thus all the provisions of the Te Ture Whenua Maori Act 1993 continue to apply to the land, including the requirement of the land to the preferred class of alienee should they wish to sell the land in future.

The fact that parts of Lots 1, 2, 3, 4 and 9 DP 102868 are still deemed to be Maori Freehold Land creates a considerable problem for the owners who will be seeking compensation from the Crown because the subdivision that created these properties was undertaken by Her Majesty the Queen for the purposes of the Housing Act 1955 by Transfer B420343.2 (See CFR NA46A/755). In fact Lots 3 and 4 5 DP 102868 are now in the name of Housing New Zealand Limited, the legal successor to title for land taken under the Housing Act 1955.

Solutions

A number of solutions are offered below, although we acknowledge that there may well be other avenues available to the Ministry of Justice to remedy the existence of Kopua Kawau Block. We have ordered these with what we would consider might be the preferred option at the top.

Solution 1 – Lot 9 DP 102868

The easiest solution may lie with Lot 9 DP 102868. This land has been vested as Local Purpose Reserve (Esplanade) subject to the Reserves Act 1977 with the Bay of Island County Council pursuant to Section 306 (4) of the Local Government Act 1974 as part of the DP 102868 deposit process.

Conveniently, the land contained in Lot 9 DP 102868 is roughly the same shape as the original Kopua Kawau Block. It also occupies much of the same spatial region, and has a land area which is not inconsistent with the Kopua Kawau Block.

Our suggestion is that the Ministry of Justice could pursue, with the local authority, the acquisition of Lot 9 DP 102868 as a replacement block for the original Kopua Kawau Block or more usefully a redefinition of the Kopua Kawau Block.

This option has the obvious advantage that it may not involve any dealings with the private owners of Lots 1-4 DP 102868, nor require any adjustment to the boundaries of these Lots 1-4. It would effectively clear these properties of any of the provisions of the Te Ture Whenua Maori Act 1993 noted above.

Provided that the Maori owners of Kopua Kawau Block were happy to accept the area of Lot 9 DP 102868 as the new extents of Kopua Kawau Block, then the Ministry might only need to deal with the local authority to achieve a suitable transfer of the land and removal of the reserve status under the Reserves Act 1977.

Disadvantages of this option include the possible requirement to purchase the land from the local authority (who would fund this?), possible legislative difficulties with the transfer of Lot 9 from effectively public ownership into private ownership, and the consideration of access to the land.

Solution 2 – Financial Compensation

Financial compensation for the loss of the Kopua Kawau Block might be sought by the Ministry of Justice. Considering that the land was lost through an error implemented through DP 102868, compensation might be entirely reasonable. This would also include the removal of Maori Land Status from all the Lots affected.

If this option is preferable, the ministry will need to consider which parties might be responsible in contributing to this compensation. If compensation was agreed, the land ownership would remain as is depicted on DP 102868.

Solution 3 – Ownership Adjustment

This solution involves undertaking a full field survey to accurately identify the location and extents of the original Kopua Kawau Block, and then adjusting the current cadastral record to re-instate this block in its original form.

This option will be problematic because it deals with a number of private owners who enjoy guaranteed titles issued under the Land Transfer Act. It is quite possible that this option might only be achieved with the consent of all of the applicable land owners (and this might not be likely).

The cost of undertaking a full survey will not be insignificant, and could easily be upwards of \$15,000. This cost might also have an influencing factor on what option you decide to proceed with.

This option might also include compensation payments to each of the affected fee simple owners (basically a purchase cost for the land which will be removed from their properties).

There is also the question of how suitable access might be achieved into Kopua Kawau Block. This can be looked at in further detail if this option is pursued by the Ministry.

Conclusion

At present Kopua Kawau Block does not exist. The subject land has been subject to a more recent survey under the Land Transfer Act and the land which was once contained in Kopua Kawau Block now resides partly in a number of fee simple titles and partly as Local Purpose Reserve.

We conclude that the subdivision process which resulted in the subject land being transferred to fee simple titles was undertaken without the knowledge of the existence of Kopua Kawau Block. This subdivision process should not have occurred without inclusion of Kopua Kawau Block, and was undertaken in error. The causes of, and contributors to, this error have been described above.

Solutions to this issue are available, and have been discussed above, and we are fortunate that one of the options, being the possible acquisition of Lot 9 DP 102868 (which is under the control of the local authority), offers perhaps a relatively simple solution.

However, whichever solution is preferred, there will be a number of individuals and organisations who will need to be approached to assist in the resolution of this issue. Some of these parties will need to provide consent to the preferred solution, while others may be asked to contribute on a financial level.

As a starting point, the Ministry of Justice will need to consult with the Maori Land Court as to preferred option to resolve this issue. It is envisaged that the Maori owners of Kopua Kawau Block will also need to be consulted at an early stage.

We trust that the report herein and the attached overlays of ML 9717 provided are sufficient for this process to commence.

Please feel free to contact me for any further information, or to discuss the matters outlined above.

Yours Faithfully

PATERSON PITTS PARTNERS LIMITED



Kurt Bowen

Registered Professional Surveyor