

1. I have been engaged by Kapiti Coast District Council (KCDC) to urgently provide them with advice and assistance with regard to land along the coast line at Otaki Beach. The urgency is brought about by the fact that KCDC have let a tender for the construction of stormwater infrastructure valued at over \$3.5 million.
2. The intended site for disposal of stormwater is located in sand dunes that appear to be accretion to a legal road. The immediate issue for KCDC is the ownership status of the land for the disposal works, but KCDC are also interested in confirming the ownership status of land stretching from Otaki River to Waitohu Stream.
3. There are conflicting views on the ownership status of the land and this request seeks clarification so that an accretion claim be made if required, or the status of the land can be reviewed and amended if necessary.

Background

4. To date there have been various reports prepared with regard to the status of the land. My understanding of the background is as follows.
5. In July 2014, KCDC commissioned Simpson Grierson to provide advice as to the status of a small area of land adjacent to Marine Parade and immediately north of land occupied by the Otaki Surf Lifesaving Club. Simpson Grierson's opinion was that the land was likely to be accretion to a road and therefore KCDC was the controlling authority.
6. In July 2014 LINZ commissioned a status report in response to an OIA request. The status report covered an extended area of land which included the land adjacent to the surf club. The report was prepared by RMAC Services Ltd dated 30 July 2014 and concluded that the land was not accreted road but was Crown Land under the Land Act 1948.
7. In October 2014, RMAC services provided a second status report covering the length of coast between Otaki River and Waitohu Stream and again concluded that the strip of land between documentary boundaries and the line of mean high water springs (MHWS) was Crown Land under the Land Act 1948 but the report also suggested that accretion may be able to be claimed by KCDC in some areas.
8. Following each status report, an internal memorandum was prepared by LINZ recommending to the Deputy Commissioner of Crown Lands (DCCL) that the land be accepted as Crown Land. The DCCL approved the recommendations of both memoranda and the subject land is now considered to be under the jurisdiction of the Commissioner of Crown Lands.
9. I have read the status reports and undertaken a review of relevant literature including guidelines, legislation and case law in order to provide KCDC with further advice and to assess what will be required to proceed with a claim for the accretion.

10. The status reports have raised several questions for me and I now wish to seek advice in relation to the findings of those reports. I have attached copies of the reports and my observations and queries below are made with direct reference to the reports.

Comments and contentions with status report findings

11. The subject land is shown as areas A-I on the coloured plan attached to the second RMAC status report. The western boundary of this land is a water boundary, typically High Water Mark, and it appears that the right to accretion was not excluded when the land was alienated from the Crown.
12. I have not made a full investigation into whether the land is in fact true accretion, however the land generally comprises sand dunes which I have been told have formed naturally and that no artificial works have been carried out which would have created the dunes. Old survey plans in the area show a history of accretion along this portion of the coast over the last 100 years. On the balance of probability I consider that it is likely that the doctrine of accretion applies. The status reports do not appear to have made a full investigation as to whether the doctrine of accretion applies to the subject land or not.

Alienation from the Crown

13. The status reports both state that there is no evidence that the land between the established road and property boundaries and the line of MHWS have ever been alienated by the Crown. This proposition does not sit comfortably with me and appears to disregard the common law right of accretion and the moveable freehold which was conveyed upon the first issue of title.
14. My contention is that the land above high water was alienated from the Crown when the first conveyance took place and while the doctrine of accretion continues to apply, the land above MHWS continues to be alienated from the Crown.
15. In my opinion the only reason that the land could be considered as having never been alienated from the Crown would be if the doctrine of accretion has been excluded for some reason. The status reports do not provide any evidence that this has been the case.

Accretion and Ownership

16. The status reports appear to take the position that in the absence of an accretion claim, the boundaries remain fixed in position and ownership of the accretion does not convey to the title holder until an accretion claim has been made. Again, I am not convinced that this stance is correct. I contend that ownership to accretion conveys with the each movement of the boundary rather than with each claim for accretion, and that a claim is simply an update of the title record to reflect the extent of ownership at a particular moment in time.
17. Attorney-General and Hutt River Board v Leighton [1955] NZLR 750 (SC) & (CA) provides commentary on this issue, and while this case was dealing with accretion to a stream, I

consider the commentary is just as relevant to accretion along coastal boundaries. Judge Adams in his opinion said:

“...When the physical river-bed shifts by natural and imperceptible process, the boundary shifts accordingly, and the freeholds in the bed and in the riparian lands shrink, or expand, as the case may be . . .

. . . any true accretion would, in my opinion, have belonged to her, not as something over and above what was conveyed to her by the Crown grant, but as part and parcel of the land so conveyed . . . at common law, therefore, any accretion would have vested in the respondent by force of the grant as being land within the boundary fixed thereby.”

18. The foreword of the LINZ Guideline for accretion claims LINZG20711 describes the situation:

Accretion occurs where a property is bounded by water, has a moveable boundary, and further land is added to the property due to gradual and imperceptible changes in the position of the water boundary. When this occurs the property owner is entitled to have the title corrected to reflect the current position of the water boundary.

If land is gradually and imperceptibly added to, or eroded from a water boundary of a property, the registered proprietor may apply to the RGL to have their title corrected to show the true position of that boundary. The RGL may issue an amended title under s 80 of the LTA...

19. Further argument for the concept that the boundaries and extent of ownership move with each movement of the water is provided by the accretion claim process itself. An accretion claim is a correction to title under Section 80 of the Land Transfer Act 1952 (LTA) rather than the issue of a new title. F J Kearns¹ wrote:

It is generally accepted that when presenting an accretion claim the surveyor is redefining the land conveyed and the Registrar is correcting the description of the boundaries of an issued certificate of title...

The implication here is that an accretion claim is confirmation of an existing right of ownership.

20. In order to make the correction, the Registrar General of Land (RGL) must be satisfied that the doctrine of accretion applies and therefore that ownership does exist in fact. This brings about the requirement for the provision of evidence that the addition to land is true accretion and is stable. In addition to that evidence, a survey plan is required so that an updated parcel area and diagram may be incorporated into the amended title. The status reports seem to construe that a survey and accretion claim signal the beginning of ownership. In my view, a claim is

¹ *Water Boundaries*, F J Kearns, 1980, *The New Zealand Surveyor* XXIX (257)

simply the provision of evidence and information necessary to allow the RGL to issue an amended title to reflect ownership that already exists.

21. It is not compulsory for a land owner to make a claim for accretion, and in my opinion the absence of a claim does not divest them of their common law right of ownership to the land. The prospect that the Crown can step in and take ownership simply because the rightful owner has not made a claim seems to me to be quite wrong.

Accretion to Road

22. A significant portion of the subject land is adjacent to legal road which has a common ambulatory boundary with the sea. The doctrine of accretion is altered by statute when the adjoining land is road. Section 315(4) of the Local Government Act 1974 (LGA) states:

Every accretion to any road along the bank of a river or stream or along the mean high-water mark of the sea or along the margin of any lake caused by the action of the river or stream or of the sea or lake shall form part of the road.

23. The second status report states there is some uncertainty over whether accretion to roads needs to be claimed or whether the accretion automatically becomes road under the LGA. Despite this uncertainty the report has proceeded to conclude that the accretion is Crown Land.
24. The status reports also appear to suggest that the accretion needs to be surveyed and that an accretion claim may need to be made before the land can become road. There is no provision in the LGA for accretion claims, and I'm not sure what legislation such a claim would be assessed under. If a claim was to proceed pursuant to s80 LTA then a title would need to be issued for the road.
25. In "Elements of the Law on Moveable Water Boundaries", B E Hayes ² writes:

A practice established by the Department of Lands and Survey in 1926 – that an accretion to a road was Crown land, not road – was overturned in 1965. . .

Should there be an accretion to a road, the road having a natural boundary will widen to the extent of the accretion, the accretion taking the same status as the road to which it attaches.

26. In my view, the intent of s315 LGA seems clear that an accretion to a road becomes part of the road. In the absence of evidence showing that the additional land is not true accretion, I have difficulty understanding how the status report has arrived at the conclusion that the accretion is Crown Land.

² *Elements of Law on Moveable Water Boundaries*, B E Hayes, 2007, www.walkingaccess.org.nz

Marine and Coastal Area Act 2011

27. The status reports refer to the Coastal Marine Area as having a landward boundary of MHWS however the status reports appear to treat the movement of this boundary differently to that of the road and property boundaries. The status reports imply that the boundary of the Common Marine Area moves with the line of MHWS while the boundaries of the road and properties stay fixed in a documentary position. This seems to be an inconsistent interpretation of how the boundaries move, and I consider that it could only be justified if it was determined that the doctrine of accretion did not apply.
28. The Internal Memorandum prepared by LINZ dated 4 November 2014 suggests that the subject land remains Crown Land pursuant to Section 13(3) of the Marine and Coastal Area Act 2011 (MACAA). The intention of Section 13(3) MACAA is to vest land in the Crown when title to the land is not determined by enactment or the common law. In the case of the subject land, title to the land is determined by the LGA where it abuts road, and by common law accretion where it is held in fee-simple. I consider that Section 13(3) MACAA is intended to vest land when the doctrine of accretion does not apply. An example of this would be where property boundaries were right-lined or were not intended to be ambulatory. I note that the status reports do not directly specify Section 13(3) MACAA as the reason behind the land being considered Crown Land – the memorandum seems to have drawn that conclusion independently.

LINZS45000 Standard to determine authority to act and record Crown land

29. The Internal Memorandum prepared by LINZ dated 4 November 2014 states that the status report is compliant with LINZS45000 however I query whether the requirements of the standard have been met.
30. LINZS45000 requires that the land status must be assessed on the basis of all legislation. As noted earlier in this report, it is my view that the status report has disregarded the provisions of s351 LTA in relation to accreted road, and a related LINZ internal memorandum appears to have misinterpreted the application of s13(3) MACAA.
31. LINZS45000 also requires the land status investigation to include the legal description and area of the land, and cadastral information if applicable. The status reports do not appear to have provided a legal description or area of the subject land, and I am unaware of a cadastral survey of the accretion having taken place to provide this information. The status reports have neither proven nor disproven whether true accretion has taken place.

Difficulties caused by Crown Land status

32. The determination that the subject land is Crown Land creates difficulties and consequences which may be undesirable.

33. The status reports suggest that an accretion claim can be made despite the subject land having been given the status of Crown Land. The difficulty here is that there is now in effect a strip of Crown land separating the road and subject properties from the sea. Accretion cannot be claimed by a parcel which is not bounded by water and I consider that the strip of Crown land makes it doubtful that an accretion claim can be made.
34. If an accretion claim was attempted then the claim would be entirely over Crown land and not over any part of the bed of the sea. This seems unusual as an accretion claim would typically involve some part of the bed of a water body. I am concerned that this is another potential impediment to an accretion claim.
35. If an accretion claim can be made over Crown land then would the claim be subject to the reservation of a marginal strip? This prospect raises further questions about the appropriateness of the Crown Land status and the ability to make an accretion claim.
36. Section 176 of the Land Act 1948 contains a range of restrictions and offences including trespass on Crown land. This seems quite an unsuitable situation for the subject land which is used by the public on a daily basis.
37. Section 176(10) of the Land Act 1948 implies that the surf club building and any other buildings on the subject land may be forfeited to the Crown. Again this seems to be an undesirable outcome of the status reports.
38. A transfer of the Crown Land to KCDC could alleviate some of these issues however a survey of the land has not been carried out as part of the status report, and the absence of a parcel and legal description makes dealing with the land more difficult. A transfer of the land may also trigger the reservation of a marginal strip.

Conclusions

39. The status reports have concluded that the subject land is Crown land on the basis that the land has never been alienated from the Crown however legal commentary, common law, legislation, LINZ Guidelines and the accretion claim process suggest that this conclusion may be incorrect.
40. In my opinion, the subject land should not be considered Crown land unless it is proven that the doctrine of accretion does not apply and I suggest that the status reports are deficient in this aspect.
41. The status reports suggest that accretion claims can be made despite the land being considered Crown land. I am doubtful that an accretion claim can be made where Crown land separates the claimant's property from the sea.
42. The status report indicated that there is uncertainty over whether accretion to road needs to be claimed or whether the accretion automatically becomes road. I am not certain that there

is a process for claiming accretion to a road and literature suggests that the accretion may be automatic. I contend that Crown Land status should not have been granted without this uncertainty being resolved.

43. If the Crown land status is to be established over the subject land, then I suggest that the status investigation should include a report into how the doctrine of accretion has been excluded, an assessment against s351 LGA, and a cadastral survey defining the accreted area. I consider this is necessary in order to provide a legal description and area for the subject land thereby satisfying the requirements of LINZ545000, and to provide adjoining landowners and the public with confidence as to the extent of their rights.
44. On the basis of the information I have gathered to date, I consider that it is more likely than not that the doctrine of accretion does apply and therefore in the absence of evidence to the contrary, the control of the subject land should rest with the adjoining land owners in accordance with common law, and with KCDC for accreted road as provided by Section 351 LGA.

Requests

45. On behalf of KCDC I request that the status of the subject land is reviewed and that the Crown Land status is revoked if the findings of the RMAC status reports are found to be incorrect.
46. I have provided an alternative assessment of the subject land based on my understanding of the application of the law and statute with regard to accretion and this is attached to the end of this report. Can you please advise if this assessment is correct?
47. As noted at the start of this report, KCDC urgently needs clarification and certainty in relation to the areas of accreted road. It would therefore be appreciated if the status of the accreted road could be resolved as a priority.



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Licensed Cadastral Surveyor

Alternative Assessment of Areas A-I

With reference to the status report dated 9 October 2014 prepared by RMAC Services Ltd and attached diagram showing areas A-I, on the basis that the additional land is true accretion, I suggest the status of these areas should be as follows:

A-B

Ambulatory boundary and could be claimed by KCDC as common law owner, therefore is not Crown land and control rests with KCDC.

B-C

Uncertain – possibly KCDC.

The right to accretion extends to MHWS. DP 21871 indicates that the line of MHWS lay seaward of the accretion claimed at the time. DP 25180 also confirmed that the line of MHWS was beyond the boundary of Lots 5-8 DP 25180 when this subdivision took place. The right to accretion is not available to Lots 5-8 DP 25180 as these parcels are bounded with an irregular fixed boundary. The right to accretion may be available to KCDC as the line of MHWS was seaward of Lots 5-8 DP 25180 at the time of subdivision and hence ownership of the accretion may still remain with CFR WN18C/511. Further investigation is needed to confirm whether the accretion could be claimed.

C-D

Ambulatory boundary therefore accretion is road pursuant to s351 LGA. Control rests with KCDC.

D-E

Ambulatory boundary and could be claimed by Department of Conservation (DOC) as common law owner, therefore control rests with DOC.

E-F

Ambulatory boundary and could be claimed by KCDC as common law owner, therefore is not Crown land and control rests with KCDC.

F-G

Ambulatory boundary and could be claimed by KCDC as common law owner, therefore is not Crown land and control rests with KCDC.

G-H

Ambulatory boundary therefore accretion is road pursuant to s351 LGA. Control rests with KCDC.

H-I

Ambulatory boundary and could be claimed by the Crown as common law owner, therefore control rests with the Crown.

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