Torrens*talk*
Survey and Title Information for Land Professionals
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Toitū te whenua Land Information New Zealand

Clarifying Requirements for Lease Plans

Lease Plans or surveys have caused some confusion over the years, partly because of ambiguity as to how they relate to LT subdivisions. Terms like 'subdivision' and 'primary parcel' have different meanings in different areas of legislation, regulation and in **Land*online***. The proposed term of the lease has also been a confusing factor.

Term of the lease

Prior to 1 August 2003, under the Resource Management Act 1991 (RMA), leases of 20 years or more required resource consent whereas leases under 20 years did not. An amendment to the RMA came into force on 1 August 2003 changing the applicable term to more than 35 years.

The term of the lease only affects the requirements for resource consent, deposit of the survey plan and issue of title. It does not affect the requirements for survey definition, nor the manner in which the survey data is recorded in **Land*online***. For any lease (short or long term), an application can be made to the Senior Advisor to the Surveyor-General (SASG) for dispensation, under Rule 44, from the requirements of monumentation.

The factors taken into account will be as for any such application for dispensation.
There are not separate survey standards for leases over or under 20 years, nor for leases over or under 35 years.

Subdivision

For survey purposes, an LT Subdivision is a survey which defines one or more new parcels for issue of fee simple title and extinguishes one or more existing parcels with fee simple title. The RMA has a different definition, which covers the above surveys but also includes Units, Cross Leases and Leases over 35 years.

Therefore, while a survey plan of leases over 35 years will need to comply with the subdivisional requirements of the RMA including Territorial Authority certification, it is nevertheless classified in **Land*online*** as a Lease plan – not an LT Subdivision plan – and slightly different rules apply to it (see the topic on Rule 19 below).

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Check out the latest quarterly statistics for activity volumes and performance information on the Titles and Records section of the LINZ website www.linz.govt.nz

Did you know you can access back issues of Torrens*talk* on the Internet? Check out the Publications section of the LINZ website www.linz.govt.nz

Survey Information

This issue of* Torrenstalk *includes a comprehensive summary and clarification of the requirements for surveys for lease purposes. An underlying principle of surveying, inherent in the Surveyor-General's Rules for Cadastral Survey (and in previous regulations), is that while standards are paramount there is some flexibility in their application to take into account factors such as the value of the land, the proposed or potential use of the land, the extent of the proposed development, the nature of tenure intended, security of tenure and type of use or occupation expected. The dispensation provisions are sufficiently flexible to allow a reduced standard to apply where special circumstances warrant this.

It is repeatedly evident that where the standard of survey and documentation is inadequate for the intended purpose, this is a source of disputes, uncertainty and inefficiency for users of the survey system.

Steady progress is being made with the modernisation and extension of the geodetic control system. I would like to encourage surveyors' involvement in this process, both in identifying areas of priority for upgrade and in fostering the protection of existing marks. An active involvement by surveyors will enable the most effective use of limited resources to maintain and enhance the geodetic control infrastructure.

Tony Bevin
Surveyor-General

Plans Pursuant to 1972 Regulations No Longer Acceptable

Surveys completed pursuant to the Survey Regulations 1972 are no longer able to be accepted by LINZ. The savings provisions in the Surveyor-General's (SG's) Rules for Cadastral Survey 2002/2 (made under the Cadastral Survey Act 2002) only apply to the Survey Regulations 1998 and the SG's Rules 2002/1.

To cover the situation where the surveyor has an unexpired resource consent obtained prior to 1 May 1999 (when the 1972 Regulations were revoked), the surveyor may apply to the Senior Advisor to the Surveyor-General (SASG, previously Chief Surveyor) for a dispensation under Rule 44 (Class IV surveys) from rule 19 (all land affected by a subdivision to be accounted for).

The SASG will consider this application on its merits including balancing the impact on the survey system of not accounting for the whole parcel against any particular hardship that may result from obtaining a new resource consent. As with any dispensation, other conditions may be applied.

Where a dispensation is granted this will not be a dispensation to use the Survey Regulations 1972. The survey will be undertaken in accordance with the Surveyor-General's Rules for Cadastral Survey 2002/2 and certified accordingly.

2003/04 Geodetic Contract Work Programme

Contracts have been tendered for the 2003/04 geodetic contract work programme. This year's programme of upgrading NZGD49 control to NZGD2000 status focuses on the North Island, following a similar programme in the South Island in 2002/03.

The following geodetic contract work is being undertaken this financial year:

- Resurvey, maintenance and upgrade of approximately 600 NZGD49 control marks to NZGD2000 status, principally in the North Island
- Maintenance of 475 NZGD2000 geodetic control marks
- Upgrade of 5a control where problems are identified (to be let as small contracts as required)
- Tide gauge reference mark GPS resurvey for the North and South Islands and GPS processing
- Re-levelling of tide gauge reference marks in the North and South Islands
- Readjustment of existing NZGD49 geodetic data into the NZGD2000 network
- Implementation of the South Island component of the **PositioNZ** GPS active control network and the ongoing maintenance of existing North Island sites
- Crossover adjustment of marine gravity data for the vertical datum project
- Helicopter support to the survey extension of the Ross Sea Region Geodetic Datum 2000 (RSRGD2000) and Cape Roberts tide gauge maintenance in Antarctica (in partnership with the United States Geological Survey and Ohio State University).

Maintenance and Protection of the Geodetic Survey Infrastructure

It is estimated that about two percent of geodetic marks are either destroyed or damaged every year. With over 100,000 NZGD2000 marks in the geodetic database this amounts to damage to around 2000 marks, which is costly for users of the survey control network. Although LINZ is notified of the disturbance or destruction of many marks, and in some instances approves their removal, there are many cases where marks are destroyed or disturbed without LINZ's knowledge. Many of these marks are inadvertently damaged or destroyed by contractors or works agencies unaware that some survey marks are affected by their activities.

To help contractors and others identify survey marks that should be protected, LINZ provides a free survey mark protection advisory service. More information (including a copy of the brochure 'Survey Mark Protection') is available on the Survey System section of the LINZ website under Survey Mark Protection.

LINZ encourages surveyors to take an active interest in liaising with works agencies or contractors to promote the importance of protecting key survey marks and distribute copies of the brochure to them.

Printed copies of the brochure may be obtained from:

Senior Advisor to the Surveyor-General
at your local LINZ Processing Centre

or from:

National Office Operations Geodetic
Land Information New Zealand
Private Box 5501
Wellington

or email:

geodetic@linz.govt.nz

Urgent Work Notifications

LINZ should be notified of any survey marks requiring urgent work, such as repair of unsafe marks due to missing or broken covers and beacons.

Please contact:

0800 ONLINE (0800 665 463) and ask for the Senior Advisor to the Surveyor-General at your local LINZ Processing Centre

or use the form on the LINZ website:

www.linz.govt.nz/maintenanceform

or write to:

Senior Advisor to the Surveyor-General at your local LINZ Processing Centre.

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Primary, secondary and tertiary parcels

In **Land*online***, a parcel with 'primary topology' is part of the fundamental no-gaps, no-overlaps parcel layer across New Zealand. Rules applied to parcels (known as topology rules) prevent holes or slivers opening up between primary topology parcels or primary topology parcels overlapping.

In the Surveyor-General's (SG's) Rules for Cadastral Survey, and formerly the Survey Regulations 1998, the term 'Primary Parcel' has been used in a different sense, relating to the requirements for monumenting boundaries – not topology. Primary parcels have higher standards for monumentation, generally due to the intention to assign exclusive use rights to them.

Most parcels defined as Primary in the SG's Rules are also given a primary topology status in **Land*online*** (lots, sections, roads, rivers, lakes, etc). An exception is Lease parcels (regardless of the intended term of the lease). Under the SG's Rules, Lease parcels (except those on Cross Lease Plans) are to be monumented as for other primary parcels unless dispensation is obtained.

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They cannot have primary topology because they overlap the underlying fee simple (primary) parcel which is not extinguished.

Two other topology layers are secondary and tertiary. Secondary is used for parcels that are permitted to lie over the top of **one and only one** primary parcel. Easements and covenants are examples of secondary parcels. Tertiary parcels are permitted to lie over the top of **one or more** primary parcels. Leases are examples of tertiary parcels.

To date, the capture of lease parcels into **Land*online*** (and DCDB before it) has not been consistent. Some long term (over 20 year, or now over 35 year) lease parcels have been captured as primary parcels. Some have not been captured spatially at all and are not visible in the spatial window. From now on, lease parcels will be captured as 'tertiary' parcels.

To view live tertiary parcels in the **Land*online*** spatial window, go to the 'All Layers' tab. Under the 'Parcels' – 'Live' branches of the tree, select 'Live Tertiary Parcel'. To view approved tertiary parcels, go to the 'Parcels' – 'Approved' branches of the tree and select 'Aprv Tertiary Parcel'. Under the 'Current Layers' tab, this set can be saved as your default layers.

Rule 19 – Balance parcels

Rule 19 of the SG's Rules for Cadastral Survey 2002/2 applies to surveys that subdivide (in the survey sense) one or more parcels in the primary topology layer resulting in that or those parcel(s) being extinguished, existing title being cancelled and replaced by one or more new parcels in the primary topology layer with new fee simple titles being issued on deposit.

A lease survey does not result in a primary topology parcel being extinguished. Neither is the title for that underlying parcel cancelled. The new parcels should not be in the primary topology layer and the new titles are not fee simple titles. Therefore Rule 19 does not apply to Lease surveys. This is regardless of the term of the lease and regardless of the application of the RMA. The new lease parcels may cover all of the area of the underlying parcels, but are not required by the SG's Rules to do so.

A classic example would be a lease of more than 35 years to a small part of a large rural parcel for some facility such as power transmission or telecommunications. The area leased can be defined in isolation leaving the underlying parcel intact – notwithstanding that a resource consent and TA certification is required for the lease to be registered.

One condition of a resource consent for leases over 35 years might be a requirement by the Territorial Authority to deal with all of the underlying land. If this occurred, it would be a Territorial Authority requirement, not a specific survey requirement.

Rule 31 – Monumentation

In the past, there has been a view that leases over 20 years (now 35 years) needed to be monumented and that those under this term did not. The Survey Regulations 1998 made it a requirement that all lease boundaries are expected (by default) to be monumented. The SG's Rules treat all lease parcels (because they provide for exclusive use) as requiring the same monumentation as parcels for fee simple title.

The Survey Regulations 1998 did not provide for dispensations from the application of Regulation 31 but the SG's Rules 2002/2 do provide for such dispensations. Dispensation can also now be applied to Class I surveys. Therefore, regardless of the term of the lease, the requirements for monumentation can sometimes (on application) be relaxed for some or all boundary points and accompanied by such conditions as the Senior Advisor to the Surveyor-General considers appropriate.

When an application for dispensation is sought, the term of the lease is not directly relevant but may have an indirect bearing through considerations such as assessment of the proposed land use, the type of tenure, the value of rights and the cost of survey.

Note that where a lease boundary crosses an underlying parcel boundary, Rule 31 (except where dispensation is explicitly provided) requires monumentation of the intersection point.

Plan Requirements

The following note will be required in 7mm letters at the bottom centre of the plan form:

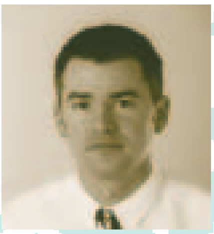
For Lease Purposes Only

The appellation for LT Lease parcels must be numbered Lots on a DP. This is in terms of the Surveyor-General's Rules for Cadastral Survey and the Cadastral Survey Guidelines.

The survey description should include reference to the new lots and the description, as shown on the underlying title, of the land affected by the lease areas, eg.

Lot 1 being a lease over Lot 1 DP…….

RGL Rulings



This section contains rulings and decisions of the Registrar-General of Land arising from appeals, legal opinions and practice issues agreed to by all Senior Advisers Regulatory (Titles). A principal aim has been standardisation of interpretation and practice nationwide. The information is applicable in all LINZ offices.

Robbie Muir
Registrar-General of Land

Land*online* eDealing Reviews – Notes for Compliance

Certification Regime

The **Land*online*** eDealing process is underpinned by the certification regime authorised under sections 164A to 164E of the Land Transfer Act 1952. The required certifications, which are given by the practitioners acting for the parties to the transaction, provide confirmation as to:

- authority and capacity
- verification of identity
- compliance with statutory requirements, and
- retention of supporting evidence.

The wording for the certifications is prescribed in regulation 12 of the Land Transfer Regulations 2002.

Document Retention and Compliance Review

To maintain the integrity of the eDealing system, practitioners who lodge transactions must retain supporting documentation to confirm the validity of their certifications. The Land Transfer Regulations 2002 prescribe a retention period of ten years.

The New Zealand Law Society has issued comprehensive eDealing guidelines, which include procedures for verifying the identity of clients and specially designed 'Authority and Instruction' (A&I) forms for document retention purposes. The guidelines are available from the NZLS website: ***www.lawyers.org.nz.***

The Registrar-General of Land (RGL) is authorised to monitor the eDealing system and review compliance with these requirements. Section 164C(3) of the Land Transfer Act 1952 authorises the RGL to require production of supporting documentation for this purpose. These reviews are undertaken within the first few months of sign-up and thereafter on an annual basis. A routine review is limited to a sample of three dealings. Law firms using the eDealing system must have systems in place to ensure that the required documentation is obtained and held on file for the required ten-year period. If a transaction is selected for review this will generally occur within a few weeks of registration. Interim storage and filing arrangements should therefore allow for ready access to supporting documentation if production is required.

What should I keep on file?

Firms already using the eDealing system have in some cases opted to store supporting documentation separately from the client file in a special folder, in dealing number order.

In the case of a Discharge/Transfer/Mortgage dealing, by way of example, the following would be required:

- A copy of the client(s) authority and instruction (A&I). The appropriate form specified in the NZLS guidelines should be used
- A copy of all the documents supporting the A&I, for example, photocopy of a passport, should be attached to the original A&I
- For registration of a discharge of mortgage
  - an executed discharge (with certificate of non revocation if applicable) or a written authority from the institution authorising registration of the discharge
- For registration of a mortgage – a letter of instruction from the lending institution which identifies the mortgage details and title/computer register; or an A&I from a private mortgagee
- Any other documents required to evidence the certifications should be attached to the A&I; examples of these documents are:
  - Caveator's consent if appropriate
  - Letter of consent from the prior chargeholder if appropriate
  - Any original consents or orders
  - Copy of Power of Attorney and certificate of non revocation if appropriate.

What happens if I don't comply?

If all the necessary supporting documentation is produced, the eDealing review process is very straightforward.

If, however, the documentation produced for review purposes is incomplete, the RGL may request further information. This may include a statutory declaration from the certifying practitioner to account for the gap in documentation. If further inquiry of this nature is required, the RGL may charge for the additional costs involved in accordance with Schedule 5 of the Land Transfer Regulations 2002 (see items 23, 24 and 25).

Any significant instance of non-compliance may result in the revocation of certification rights under section 164(B)(2) of the Land Transfer Act 1952. This may occur, for example, where an eDealing user fails to comply with a request for production of documents for audit purposes, or where RGL believes on reasonable grounds that a practitioner has given a certification that is fraudulent or materially incorrect.

A practitioner who falsely certifies a transaction or fails to comply with review requirements would also be in breach of the New Zealand Law Society rules (see in particular Rule 3.03) and therefore subject to professional disciplinary action.

Digital Certificate Sharing Prohibited

All **Land*online*** users must obtain a digital certificate (DC) in order to gain access to the system. For security reasons, a DC may only be used by the individual to whom it is issued. This is reinforced in the terms and conditions for system access which expressly prohibit DC or password sharing.

DC security is absolutely critical in the eDealing environment as a practitioner is responsible for any transaction that bears his or her digital signature. Such is the importance of these requirements that the New Zealand Law Society has passed the following rule:

Rule 3.04
A practitioner must not allow use of his or her Digital Certificate (DC) or the associated password by any other person.

Second Caveats – Section 148 Land Transfer Act

In recent months several attempts have been made to lodge second caveats in contravention of section 148 of the Land Transfer Act 1952. Practitioners are reminded that section 148 prohibits the lodgement of a second caveat where a prior caveat lodged by or on behalf of the same person in respect of the same interest has been removed under section 143 or lapsed.

LINZ monitors these matters and has procedures in place to check the historical view of the computer register for prior lapsed or removed caveats whenever a new caveat is lodged for registration.

It is also worth noting that any person who lodges a caveat without reasonable cause may be liable for damages under section 146 of the Land Transfer Act 1952.

Maori Land Titles

LINZ has responsibilities under section 126 Te Ture Whenua Maori Act 1993 to ensure that instruments affecting Maori land are not registered unless they have received the necessary confirmation from the Maori Land Court.

To assist in monitoring these requirements, a data-matching exercise has been undertaken to identify land that is or could be Maori freehold land. If a dealing is lodged against a title that has been flagged through this process, the **Land*online*** system provides registration staff with a prompt to verify the status of the land before completing registration. In the eDealing environment this also operates to notify the certifying practitioner that a certification relating to compliance with confirmation requirements may be required.

This flagging process is only intended to operate as an administrative reminder to registration staff to undertake status checks in appropriate cases, and as such it does not appear on title searches in **Land*online***. If, upon further investigation, it is determined that the land does not have Maori freehold status the existence of the flag will not prevent registration. It is therefore unnecessary for practitioners to delay settlement or seek the removal of a flag prior to registration, when dealing with a property that is clearly not Maori freehold land.

If, upon searching the register, there is any doubt as to land status, practitioners should make appropriate inquiries with the Maori Land Court.

New Legislative Amendments Impact on Registration Process

Two recent legislative amendments will have a significant effect on a range of land titles transactions. These are the **Local Government Act 2002** and the **Resource Management Amendment Act 2003**.

A Local Government Act 2002

This Act came into force on 1 July 2003. Whilst the Local Government Act 1974 (LGA 1974) remains in force, large segments of it have been repealed by the Local Government Act 2002 (LGA 2002). Although the LGA 2002 largely concerns itself with future local authority reorganisations and the role of local government in the wider community, it also makes a couple of changes that will be of interest to the conveyancer.

1 Evidence of Local Authority Reorganisation

Any local authority reorganisation under this Act or the LGA 1974 can be evidenced by a recital procedure set out in clause 65 Part 3 Schedule 3 to the LGA 2002. This procedure mirrors the one formerly prescribed in section 37ZZZR LGA 1974 (now repealed).

Thus a local authority that has been created out of a reorganisation scheme and which is dealing with land may use a simple recital in the transaction instrument to inform LINZ of the vesting of the property in that new local authority. The instrument must:

- be executed by the new local authority
- relate to property held by the former local authority, and
- contain a recital that the property has vested in the new local authority by virtue of an Order in Council giving effect to the reorganisation scheme.

LINZ is then obliged to accept that as sufficient evidence of the vesting of the property, but is not obliged to note the change on the register solely on the basis of that Order in Council. An application under section 99A Land Transfer Act 1952 will generally be required for the vesting to be formally registered.

2 Repeal of Section 230 Local Government Act 1974

This has been repealed by section 266 of the LGA 2002.

The former section 230 dealt with the sale or exchange of land owned by local authorities.

Various procedural requirements had to be met before land could be disposed of under this provision. Also it was limited in effect so that it did not authorise Councils to deal with:

- public reserves except in accordance with the Reserves Act 1977
- land taken or acquired under the Public Works Act 1981 except in accordance with that Act
- sale or exchange under ss345 and 572(3) of the 1974 or under any other Act
- sale or exchange of trust or endowment land if sale was prohibited by the trust or endowment.

Sections 138-141 of the LGA 2002 now deal with restrictions on disposals of parks and reserves as well as endowment land.

LINZ used to require certification to the effect that section 230 had been complied with because the former section 230(3) required the endorsement of a certificate on the transfer evidencing the sale or exchange. Section 230 has not been replaced with an equivalent provision in the LGA 2002, so there is no requirement to supply a certificate to evidence procedural compliance under the new regime. Relevant local authority transfers executed before 1 July 2003 should, however, have certification in terms of section 230 endorsed on them.

B Resource Management Amendment Act 2003

Most of this Act (RMAA 2003) came into force on 1 August 2003. Several amendments have an impact on land registration.

1 Statutory Time Limit Changes

Section 17 repeals the former section 37 and adds new sections 37-37B. Amongst other things section 37(1)(a) authorises a territorial authority to extend any time period in the Act whether or not it has expired. Potentially the three-year time period allowed by s224(h) for the deposit of a plan of subdivision after approval has been given can be extended before or after expiry. Because the plan cannot be altered once it has been deposited, the Council would have to notify LINZ of any extension by some other means, such as a letter from an authorised officer or under seal.

2 Term of Lease caught by Part 10 – extended from 20 Years to 35 Years

Section 218(1)(a)(iii) of the RMA 1991 Act is amended by section 69 of the RMAA 2003. This extends the term of a lease that will be caught by Part 10 from 20 years or more to more than 35 years.

Any lease presented before 1 August 2003 that has a term or potential term of 20 years or more is caught by Part 10. On and after that date only leases in excess of 35 years duration (or potential duration) will be so caught.

3 Evidence of Certification under Section 226(1)(e)

Section 72 RMAA 2003 amends section 226(1)(e) of the RMA I991. The amendment removes the need for certification to be on either the plan or a copy of the plan. A certification set out on a separate document will therefore suffice, provided there is a clear reference to the relevant plan.

4 Savings in respect of Cross Leases

An additional subsection 226A(1)(c) has been added. This removes the need for subdivisional approval in respect of renewed or substituted company leases of buildings or parts of buildings where the original lease was in existence as at 1 October 1991.

5 Esplanade Strips

Section 74 amends section 235(1) of the RMA 1991. This amendment links the provisions for esplanade strips created by agreement between land owners and territorial authorities to those that apply to esplanade strips created as a consequence of subdivisional requirements.

Reference to section 233 is added. This now means that esplanade strips created by agreement shift position as the river or lake moves. This addresses an omission that was made when the provisions were amended in 1997.

6 Road Access Requirements – Section 321 Local Government Act 1974

Section 321 LGA 1974, which dealt with road frontage requirements for subdivisions, has been repealed by section 98(1) of the RMAA 2003, effective 1 August 2003.

Alternative provisions relating to access requirements are now contained in section 106(1)(c) RMA 1991, as inserted by section 44 of the RMAA 2003. This provision reads:

"…a consent authority may refuse to grant subdivision consent or may grant a subdivision consent subject to conditions if it considers that – sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision."

Section 321 previously imposed mandatory requirements on territorial authorities and LINZ monitored compliance via the registration process. Section 106(1)(c) RMA 1991, by contrast, is permissive. The territorial authority will therefore be left to make a decision as to what it requires in each case and LINZ will no longer have a policing role in relation to road frontage requirements.

Section 112 deals with transitional matters including resource consents where application was made before 1 August 2003. Section 112(3) specifically deals with subdivision consents. It states that, where an application for a subdivision consent has been made, "the continuation and completion of all proceedings in relation to that subdivision, including the approval and deposit of a survey plan, must be in accordance with the principal Act as if this Act had not been enacted." As this relates to the provisions of the RMA 1991 rather than the LGA 1974 or the LGA 2002, however, the transitional implications for section 321 LGA 1974 are not entirely clear. LINZ is working with the relevant agencies to clarify these matters. In the meantime, LINZ will continue to police section 321 in the traditional manner for plans approved prior to 1 August 2003.

7 Rights of Way

Section 98(2) RMAA 2003 adds a new subsection (6) to section 348 LGA 1974.

This states that nothing in section 348 applies to private roads or rights of way created as part of a subdivision under the RMA 1991. This amendment is consistent with section 223(5) RMA 1991 which negates the requirement for separate consent under section 348 LGA 1974 when a subdivisional plan depicting a right of way is approved by a territorial authority.

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