Institute of Cadastral Surveying (Inc)
Post Box 775, Timaru, 7940
Ph. (03) 686 9400
Email: sec@ics.org.nz
Web: www.ics.org.nz

24 June 2017

Surveyor-General
Land Information New Zealand
Via Email

Dear Mark

Cadastral Survey Amendment Rules 2017 (Cadastral survey rules for greater Christchurch)

Further to our letter of 12 April 2017 and LINZ's response (Deputy Surveyor-General Anselm Haanen) of 29 May 2017 (the letter), our concerns regarding LINZ's policy to allow SO plans to define boundaries deformed by earthquake in Christchurch (or elsewhere) are not appeased.

We note your suggestion that we direct our communications based on the relevance to the distinct respective roles of the Minister, LINZ CEO and the Surveyor General. We agree that the roles are distinct and that has been one of our thrusts with regard to the RCS. However, when all or parts of any matter being considered or discussed has a direct impact on all three, we will direct our correspondence accordingly.

We acknowledge that our concerns can only be resolved by the Office of the Surveyor General but in this case the impact will, in our view, negatively impact on the Minister and the LINZ CEO, hence their inclusion.

Please be aware that representatives of the Institute wish to be proactive in resolving this matter and can be available for meaningful consultation.

ICS concerns:

The letter suggests:
"*"What you really appear to be arguing is that property owners should be required to obtain updated titles whenever they are having their boundaries resurveyed."*

Whilst that end result is desirable, our concerns are specifically to what we see as a flawed process and interpretation that has resulted in a LINZ policy with the potential to undermine the public confidence in the Cadastre and the secured value of the land.

Despite taking several years, the consensus now is that the boundaries have moved with the land. Section 8(3) Canterbury Property Boundaries and Related Matters Act 2016 (the Act) states (underlining added):

"***8 Boundaries redefined as moving with movement of land caused by Canterbury earthquakes***

(1) The boundaries within greater Christchurch on and from the commencement of this Act are redefined as set out in this section.

(2) The boundaries are deemed to have moved or to move with the movement of land caused by the Canterbury earthquakes (whether the movement was horizontal or vertical, or both), unless the movement was a landslip.

(3) To avoid doubt, nothing in this section affects—

(a) the validity of an estate or interest in land, and the land (as moved) continues to be the same land, and affected by the same interests, as before the movement:

(b) the boundaries within greater Christchurch before the commencement of this Act.

(4) This section applies—

(a) despite any other enactment, but subject to section 9; and

(b) despite any rule of law.

The letter states that pursuant to Section (8)(3) of the Act, the validity of the titles to land are unaffected by the Canterbury earthquake movement. The letter states further that the affected titles are not incorrect, and that there is nothing in law requiring any or all titles to be corrected to reflect the acknowledged movement.
Neither the land owners nor the Crown could reasonably sustain compulsory corrections. This subclause also favourably addresses the 'risk averse' priority of the Crown.

Hence we are now in a situation where the law acknowledges that the physical position of the boundaries in greater Christchurch have moved (well outside the 'little more or less'), and in the same breath, the law is stating that even if the new position of the boundaries is determined by an approved survey, there is no legal requirement for the status of the title to be corrected.

The principle that the Crown does not guarantee the dimensions, which pre-dates the earthquakes, relates directly to the principle of 'a little, more or less". Now that the land movement has been acknowledged to exceed even the most liberal interpretation of a little more or less, the passing of the Act, Clause (8)(3) of the Act effectively changes the status of all affected titles to "*Limited as to parcels".*

The letter also addresses the possibility that an LT survey may never deposit, which is quite true, and goes on to state that an approved but not deposited plan (presumably an SO or an LT) would improve the confidence in the cadastre as it would "***record"*** the location and dimensions of the boundaries in their new positions.

This is where the whole policy unravels.

Assume a parcel of land in the greater Christchurch area has been re-defined, which of course is probably the most challenging definition faced by LCS's, and consequently the most expensive. The resultant SO is approved as to survey and is recorded in landonline.

The ***only*** reference to that SO in the cadastral record will be the presence of the SO 'plan reference' on the landonline spatial view.

This means that the private landowner, the real-estate agent, the Registered Valuer, the Lawyer, the property developer, the TA Rating Department, the Regional Council, the Finance Institutions, and

any other professional, individual or body/group involved in the status or transfer or value or location or size of the land, apart from the LCS, will have absolutely no clue that the SO exists.

Furthermore, even if any of those parties are made aware of the SO, the law says:

"*the validity of an estate or interest in land, and the land (as moved) continues to be the same land, and affected by the same interests, as before the movement".*

In other words, the Act prohibits the SO from having any benefit to the landowner whatsoever.

The only body that would perceive any increase in confidence in the cadastre is the custodian of the cadastre. All other parties have to make all decisions and judgements based on the estate or interest in land, and the land as it was before the earthquake. *For example, if the land is transferred then as the SO is not part of the legal description, any area or dimension on that SO is irrelevant.*

If an approved SO exists as evidence that there is an 'difference' in the estate or interest in the land, but that 'evidence' has to be ignored, then the legislation and/or policy allowing this situation to arise is fundamentally flawed.

The only outcome providing protection to all parties is that if a parcel of land is re-defined in the greater Christchurch Area (or any other area for that matter), and if the boundaries are defined in new positions, then the title must be updated.

Not to do so jeopardises the public confidence in the cadastre and potentially jeopardises a fundamental component of our financial institutions.

The letter acknowledges that conflicting 'approved' dimensions for any parcel of land is undesirable, and we would reiterate that the situation is actually socially and legally unacceptable, as the law, as it currently stands, states that the incorrect dimensions are the only ones the 'public' should rely upon.

Comments

1) The letter states
"boundaries are defined by the marks in the ground and that the dimensions are not guaranteed."

This of course is an acknowledgement of the scope of Rule 6 in the RCS 2010. The ICS has consistently promoted that the definition of the land in greater Christchurch is adequately covered by Rule 6. The ICS applauds the acknowledgement.

2) The letter argues that there is a 'cost' case for the presentation of land re-definition in an SO plan (presumably the reduced SO processing fees). The ICS do not agree. As set out above, an SO has nil positive impact for the owner and zero influence on the title status. Despite the SO redefinition the landowner is, under the Act, still legally obliged to base all decisions on dimensions and area on values that have, by the re-definition work, been proven to be incorrect. We suggest implementing a reduced processing fee for "definition of earthquake affected boundaries" which is to be presented in an LT plan. This would give the 'definition' a real value to the land owner and the Cadastre.

3) The ICS notes that Sections 80 and 81 of the Land Transfer Act 1952 states (underline added):

80 Errors in register may be corrected

(1) The Registrar may, upon such evidence as appears to him sufficient, subject to any regulations under this Act, correct errors and supply omissions in certificates of title or in the register, or in any entry therein, and may call in any outstanding instrument of title for that purpose.

81 Surrender of instrument obtained through fraud, etc

(1) Where it appears to the satisfaction of the Registrar that any certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error, or that any grant, certificate, instrument, entry, or endorsement has been fraudulently or wrongfully obtained, or is fraudulently or wrongfully retained, he may require the person to whom that grant, certificate, or instrument has been so issued, or by whom it is retained, to deliver up the same for the purpose of being cancelled or corrected, as the case may require.

Section 21 in the Land Transfer Act 2016 (not yet passed) has a similar provision.

It appears to the ICS that if a misdescription of land or of boundaries is proven, then there is a legal obligation upon the Registrar, if called upon to do so, to correct that title. Thus the Registrar can order that any redefinition survey for earthquake moved land must be presented as an LT plan. The Law has placed the power to correct titles in the hands of the Registrar, not the S-G, which is acknowledged in the letter.

4) Surveyors and LINZ have never had control over whether a Land Transfer plan is deposited. However, where someone has invested significantly in the re-definition of their land, taking the next step to plan deposit (which is not subject to any TA or RMA 1991 provisions) is highly likely. Any LCS would strongly advise a client to do so in order to avoid the potential for future Legal, Neighbour, Bank or Transfer problems. The potential for future problems far outweighs any perceived cost savings of an SO plan.

5) To allow lodgement of SO plans in these circumstances, is to provide incentive for poor survey practice. No competent LCS is going to advise a client to accept an SO plan outcome when that plan data has correct but unenforceable boundary information. The ICS recognises that there may be 'exceptions' when an SO is appropriate, however, for the majority of re-definition surveys of affected boundaries, LT plans should be required.

Conclusion

Despite the years since the Christchurch earthquakes and despite new legislation and new survey rules, there remains confusion about how to best record earthquake moved land in the cadastre.

Our members are passionate and experienced, and, quite reasonably require clarity and direction. The LCS needs to be able to professionally advise his/her client. The ICS cannot support and advise its members if there are existing flaws in the legislation and direction from LINZ. We are not prepared to support the option of presenting the redefinition of earthquake moved land on survey office plans.

The ICS continues to have significant concerns with the LINZ policy allowing SO plans to be integrated into the cadastre as a record of earthquake affected boundaries. It appears to us that any such SO plan has no legal status.

Our letter of 12 April 2017 expressed our concerns for what we see as a flawed process with a high risk of adverse outcome. The letter from LINZ has not allayed our concerns.

Your office has previously stated: *"It is clear there remains confusion among surveyors and lawyers about the relationship between the cadastral survey and land tenure systems, particularly on the role of survey office plans and land transfer plans and how and when they are used to update titles."*

Clearly LINZ believes that surveyors and lawyers have not grasped some vital aspect of the role and use of survey office plans and Land Transfer plans in status of freehold titles.

Therefore we have three specific requests:

1) Please identify the value and significance to the public and the landowner of an SO plan re-defining the boundaries of earthquake moved land.

2) Please confirm and/or clarify the legal status of an SO plan redefining earthquake moved land in light of the provisions of Section (8)(3) of the Act.

3) Please confirm whether or not an approved as to survey SO plan is sufficient evidence to present to the Registrar with a request to 'correct the title'.

Yours faithfully

Simon Jenkin
President ICS