ORIGINAL

BEFORE THE ENVIRONMENT COURT

Decision No. A 113 /2009

IN THE MATTER	of the Resource Management Act 1991 (**the Act**) and an application for enforcement orders under Section 316 of the Act
BETWEEN	ROTORUA REGIONAL AIRPORT LIMITED
	(ENV-2009-AKL-304)
	Applicant
AND	GEOFFREY WAYNE FISCHER
	Respondent

Hearing:	At Rotorua on 17th, 18th September 2009
Court:	Environment Judge J A Smith Environment Commissioner P A Catchpole Environment Commissioner C E Manning
Appearances:	Mr V Rive and Mr L U Hinchey for Rotorua Regional Airport Limited Mr G W Fischer for himself
Date of Decision:	9th November 2009

DECISION OF THE ENVIRONMENT COURT

A: Orders as sought refused.

B: Orders made to identify Poplar (5339) and Fir (3021) reduced heights necessary to meet 1997 OLS by:

[a] identifying current RL of top of both trees;

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[b] identifying RL for ground level and 1997 OLS level for both trees;

[c] identifying height of trees to remain and to be removed to comply with 1997 OLS.

C: The Airport Company or its authorized agents who have received a copy of this decision may enter the site to undertake survey, measurements, and mark the two trees with the 1997 OLS level. Such access is to occur at reasonable times on notice to the owner and tenant.

D: If agreement cannot be reached within 1 week of each tree being marked the court will convene a teleconference to discuss final or further orders or directions.

E: Leave and costs are reserved.

REASONS FOR DECISION

Introduction

[1] Rotorua Regional Airport Limited (**the Airport Company**) seeks enforcement orders against Mr G W Fischer, directing him to trim trees on his property at 628 Te Ngae Road, Rotorua. In submission to the court the company volunteered that such trimming would be undertaken and paid for by the Airport Company if Mr Fischer wished.

[2] Mr Fischer opposes the application strenuously not only on a substantive basis but also in relation to the exercise of the court's discretion to make any orders.

Background

[3] The background to the application is that the Airport Company operates Rotorua Airport on a site located between Te Ngae Road and Lake Rotorua, some seven to eight kilometres north of the centre of Rotorua. The airport commenced operation in 1963 when relocated for a more central position in Rotorua. Currently it offers scheduled public passenger services to Auckland, Wellington and Christchurch using Beechcraft 1900, Bombardier Q300, and ATR 72 aircraft, though at times in the past Boeing 737-300 aircraft have also used the airport. The company plans to attract

international services to the airport and to that end has extended its runway to accommodate Boeing 737-800 and Airbus 320 aircraft.

[4] The Civil Aviation Authority (CAA) requires airport operators to protect the flight paths of aircraft landing and taking off by the provision of Obstacle Limitation Surfaces (OLS). Rule Part 139.51 of the Civil Aviation rules provides:

> Airport operators shall ensure that the airport is provided with obstacle limitation surfaces commensurate with the characteristics of the aircraft it intends to serve, the lowest meteorological minima and the ambient light conditions during operation of aircraft.

[5] To provide for the proposed extension of airport operations for international flights, the Rotorua District Council publicly notified a Proposed Plan Change (PC32) and two Notices of Requirement (NOR) in December 2005. The second NOR contained a Section providing for the protection of the take-off and approach paths of the proposed runway extension by means of an OLS. Plan Change 32 and the NOR have now reached the point where they are incorporated into the district plan as from April 2008. The requirements for an OLS remains part of the second NOR, which now takes the form of a designation.

[6] Mr Fischer owns a property of some 2,112m^2 at 628 Te Ngae Road, Rotorua, approximately 1km south of the airport. Mr D S Park, an aviation consultant, attested that the flight path centreline passes approximately 50m to the west of Mr Fischer's property, and is approximately 1km from the end of the take-off runway, and the same distance from the landing threshold on the approach to the airport. Some air space above Mr Fischer's property forms part of the OLS.

[7] Prior to the recent extension the airport had a single sealed runway originally North/South identified as 18/36 at 1.622m long at the reduced level of 286.0m. The runway has been extended 150m to the north and 487m to the south. Of this extension, 130m to the north and 122m to the south is a shorter extension only for take-offs.

[8] In *Rotorua Regional Airport Strategy Designations and Plan Change Volume* at page 24, the Airport Company states:

> For the purpose of determining the scope and extent of the airspace controls on overall runway length of 2,259m including starter extensions has been adopted.[1]

Diagrams provided to the court show the OLS calculated from the end of the starter extension at RL 286. We attach diagram Aerodrome Obstruction Survey as Annexure **A**.

[9] The Fischer property is between 993.7m and 1,021.8m from the fan origin, and the 2% gradient should generate an OLS at the site of around RL 306 (20m above origin). Unfortunately, most of the data given to the court does not relate to Reduced Levels (RL) and thus we are unclear as to how the 2% gradient for Flight Path 2b relates to the site.

[10] Annexure **B** is part of a table showing some of the trees on the Fischer site in relation to the RL. For example, 3027 (Eucalyptus) shows the top of the tree as RL 310 with an intrusion of 8.3m into the OLS. Yet with an OLS at 306m (20m at 1km from 286 RL), the intrusion should only be around 4m. The discrepancy is difficult to follow and is obfuscated by the lack of clarity of surveys of the site.

[11] We also note that the approach OLS for landings to North (36) is Flight Path 6b into which only the Poplar and perhaps the Fir tree 3029 intrude. The most critical (lowest) OLS is take-off to South (18) which is OLS Flight Path 2b.

[12] Mr D S Park, an aviation consultant, gave affidavit evidence (at 24.3) that:

> This path **[2b]** has a turn or [*sic*] 185° to the west with radius 2,480m commencing 946m south of the inner edge location. In accordance with AC139-6 figure 4-6 the take-off OLS "steps down" 15ft (4.6m) from the point where the turn commences approximately 50m prior to the flight further crossing the trees on the property).

[13] This 4.6m step-down would explain the discrepancies in intrusion calculations but is not shown on diagram A. It also means the gradient is lower than 2% at the Fischer property which is not clear in the designation documents or the District Plan.

[1] Rotorua Regional Airport Strategy Designations and Plan Change Vol 1 page 24

History of dealings between the parties

[14] In 1997 the council inserted a provision into the District Plan controlling the height of trees and structures. That restraint impacted on Mr Fischer's property at about 20m – 22m from ground level or about 7m above the height required by the 2008 NOR and Plan Change 32 (PC32). At least one tree was within the 1997 height control (the Lombardy Poplar) and about 7m was removed by agreement in 1998 (i.e. the tree was around 30m above ground level). We note that the 1.6% gradient from the then runway end was around 1500m away at RK 284.57. This would yield a height of around 308.59 on the site, or around 20m above ground (see Annexure **A**)

[15] In 2000 the Airport Company sought to trim a Douglas Fir by around 7m. However, Mr Fischer refused permission. Proceedings were commenced in the Environment Court but after discussion with the Judge the parties reached an agreement. The resulting consent order is attached as **C**. That permitted the removal of some 3m from the Douglas Fir.

[16] Unfortunately, the Airport Company trimmed the 7m originally applied for. Mr Fischer complained to the court and the Airport Company acknowledged the facts and stated they had made an error. Mr Fischer sought compensation ($5,000 for himself, $5,000 to a charity) but the Airport Company refused. Mr Fischer took the matter no further.

[17] In 2004, the Airport Company asked Mr Hawkins, a consultant land valuer, to negotiate with Mr Fischer to see if the property could be purchased or exchanged. Mr Fischer responded positively to the approach but after valuations were obtained Mr Hawkins was instructed not to pursue the matter.

Notice of Requirement

[18] The NOR was notified in late 2005 after consultation from 2003 to December 2005. Mr Fischer's response to consultation was unflattering to the Airport Company. The Airport Company notified PC32 on 17th December 2005 and the NOR on 31st December 2005.

[19] The NOR specifically introduced new OLS provisions. In dealing with effects of the OLS, the *Assessment of Effects on the Environment* (AEE) is brief, devoting less than a page to the issue. Relevantly, it states:

> **9.15 Effects of OLS Designation**
>
> ...
>
> ... The great majority of these surfaces are already protected under Appendix E and the primary areas that may be affected are those under the take off and approach OLS determined by the flight paths at the south end of the runway between the runway end and Coulter Road. The Appendix E takeoff and approach OLS in this area is generally higher than that proposed in the NOR, but the maximum height restriction will be at least 8m above ground level. This still allows flexibility for existing land uses and buildings which are normally well within this height restriction.
>
> At Coulter Road and beyond, the height control is no lower than the existing Appendix E.
>
> At the north end, practically all the area under the OLS is already protected to a more stringent level under Appendix E and the proposed height controls in the NOR therefore provide some relief. The exception is a small area on the extremities of the takeoff and approach OLS extending over the Brunswick Park area.
>
> The mechanism whereby existing landowners can seek consents for buildings and/or structures within the areas covered by these airport protection surfaces is explained in Section 2.2.5.4 of this AEE. Briefly, it is envisaged that landowners seeking consents would first approach RRAL (as requiring authority) to ascertain whether or not its consent is required and then to seek the requisite building consent.
>
> Figures 9.3 and 9.4 show in simple graphical form how the airspace designation (as amended to cater for the runway extension) will actually affect developed properties at either end of the main runway. Further the OLS explanatory statement provides a straightforward explanation as to how the different airspace surfaces apply to individual properties both north and south of the main runway.
>
> Overall it is considered that the proposed OLS designation will have no more than a minor impact on the ability of landowners and occupiers to undertake activities on land beneath the airspace designation. At the same time, the designation will have a significant positive impact on the ability of the Airport to function safely and efficiently, consistent with its function as a key component of the regions transport infrastructure.[2]

[20] Given this does not address existing trees at all it is at least arguable that the NOR was only intended to affect new plantings or structures. Otherwise, the known effects on existing trees have been omitted for the purpose of AEE. We note that this

[2] Rotorua Regional Airport Development Strategy, Volume 2 Assessment of Environmental Effects

property was not the only property with known difficulties (***Rotorua District Council and Rotorua Airport Limited v W. Liddle and Stonebridge Park Limited***)[3].

[21] This concern is compounded by reference to the technical volume which lists only one tree on the Fischer property as being affected. From this one might reasonably deduce that the impact of the NOR on the property was less stringent than the existing protection provisions. There is no indication:

a) that 10 trees (at least) are affected, or of the extent of the effects;

b) that the trimming will lead to the death or demise of the majority of the trees.

Table 6.1 page 48 of AEE identifies one tree on the property being a Eucalyptus. The table is described as:

> The extent and nature of the obstacles that currently encroach the airspace to be designated are listed in Table 6.1 below which contains a description, in tabular form, of each encroachment together with a brief summary of the action RRAL proposes to take.

[22] The reference to 18598 is incomprehensible as to its position and requires reference to a plan held at the council offices. That plan shows one tree (the eucalyptus) as the only tree on Mr Fischer's property affected. The table is incomplete and the public would be unable to ascertain if the property was affected or to what extent from the AEE document.

[23] We note that one of the purposes of an AEE is to assist affected persons to ascertain the effect on them, so that they can decide on that basis whether or not to make a submission. Even the notice to trim issued in April 2009 gives no detail of the trees affected or the extent of the impact of the NOR.

[24] Mr Fischer heard no more until the Airport Company approached his tenant seeking permission to *trim* the trees in March 2009. Mr Fischer objected and refused consent. This application was filed on 7th July 2009 because international traffic was due to commence in December.

[25] Even after the hearing we remain uncertain as to the impact of the NOR on the property compared with the earlier plan provisions. We have interpolated from vague information provided that the new NOR is approximately 13m – 14m above ground level compared with the earlier plan provisions of around 20m – 21m. The lack of measurement above sealevel (ASML) means figures are not easily compared between surveys.

The Trees and the OLS

[26] Mr Fischer's property contains a number of trees which intrude into the OLS. There is no dispute that the trees were planted long before PC32 and the two NORs, and that most if not all occupied the OLS to some extent before PC32 was notified. These trees, and the extent to which they breach the protected flight paths, were set out in tabular form in the evidence of Mr M G Dyer, a surveyor called by the Airport Company. We include that below, noting that Flight Path 2b is the take-off flight path, and Flight Paths 4b and 6b are approach flight paths. Negative numbers in this table represent the distance of the trees below the flight path concerned.

Tree No.	Tree Type	Tree Height from Ground	Cut from ground level	Path 2b Amount to remove (metres)	Path 4b Amount to remove (metres)	Path 6b Amount to Remove (metres)
3019	Kauri Tree	16.1m	13.3m	2.8m	-1.9m	-7.0m
3021	Copper Beech	20.6m	13.2m	7.4m	2.7m	-2.4m
3023	Pittosporum	13.8m	13.1m	0.7m	-4.0m	-9.1m
3025	Oak	18.8m	13.4m	5.4m	0.8m	-4.3m
3027	Eucalyptus	22.0m	13.7m	8.3m	3.7m	-1.4m
3029	Fir	24.3m	13.9m	10.4m	5.7m	0.6m
3031	Walnut	15.8m	14.3m	1.3m	-3.3m	-8.3m
5327	Cypress	11.6m	10.5m	1.1m	-3.6m	-8.7m
5337	Fir	18.0m	14.2m	3.8m	-0.8m	-5.8m
5339	Poplar	29.2m	14.6m	14.6m	9.9m	4.9m

[27] The variations are due to differences in ground height. Given the approximate 6.8m difference between the 1997 OLS and the NOR, all but 4 of the trees comply with the old OLS. Of those that do not, trimming of 0.6m for the Copper Beech, 1.5m for the Oak, 3.6m for the Fir, and 7.8m for the Poplar, would meet the 1997 OLS. We

have already noted that some 4.6m of that intrusion appears to relate to a step-down for a turn rather than the 2% gradient. We note that only 5 trees would intrude into the 2b flight path at 2% gradient without the 4.6m step-down.

[28] It is accepted that if the trees are trimmed to the extent required to protect Flight Path 2b, at least three of them, and probably six, will not survive. If trimmed to meet the 1997 OLS none would be materially harmed. We accept that for practical purposes all trees trimmed to comply with the NOR (with the possible exception of the Pittosporum) would be better removed. We note that even the 2% gradient without step-down would reduce the affected trees to five and mean the trees would be likely to survive the pruning.

[29] If trimming to the height sought by the applicant were required by the Court the Kauri trees (there are two) which are beyond the ricker stage and beginning their adult growth phase, would be unable to achieve their potential. They cannot accomplish this at a 13m height limit. Other mature trees such as the Copper Beech, Oak, and Eucalyptus would become unsightly stumps. Mr Fischer says he would have to remove the trees (out of kindness) and we agree. Imposition of the NOR will mean the removal of these large specimen trees, some of which are good mature examples of their kind.

[30] Mr Fischer and the Airport Company have been unable to reach agreement on the terms on which the trees are to be trimmed or removed, although we do not understand the airport to dispute that Mr Fischer is entitled to some form of compensation. However, from the point of view of the Airport Company, the situation is now becoming urgent since Air New Zealand has announced its intention to commence flights between Rotorua and Sydney on 12th December 2009, using Airbus 320 aircraft.

[31] We record that at the beginning of the hearing counsel for the Airport Company indicated that following mediation, the Airport Company had offered to acquire Mr Fischer's property at market value, valued on normal Public Works Act principles or alternatively, if Mr Fischer so chose, to enter into a before and after valuation which would assess the value of the property without the designation, and

then the value of the property with the designation, and subsequently to compensate him for any loss of value. While that offer was also advanced during the hearing, Mr Rive indicated that he would need to take instructions on what the situation would be at the end of the hearing.

[32] Mr Fischer told us in closing that he no longer wishes to sell the property to the Airport Company but seeks compensation on a STEMS valuation system for the loss of these trees if they are to be removed. We note that during the course of the hearing the Airport Company indicated that it was unwilling to agree to independent arbitration on the value of the trees unless the use of Public Works Act methodology for the valuation was stipulated in advance.

The Legal Position

[33] The Airport Company, in this proceeding seeks enforcement orders from the Court to secure the trimming of the trees under Section 314(1)(a) and (b) of the Act, and in addition an order under Section 315(2) of the Act empowering it to comply with the order on Mr Fischer's behalf.

[34] The relevant sections of the Act provide:

> **314 Scope of enforcement order**
>
> (1) An enforcement order is an order made under section 319 by the [Environment Court] that may do any one or more of the following:
>
> (a) Require a person to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that, in the opinion of the [Environment Court], –
>
> (i) Contravenes or is likely to contravene this Act, any regulations, a rule in a plan, [a rule in a proposed plan,] a requirement for a designation or for a heritage order, or a resource consent, section 10 (certain existing uses protected), or section [20A] (certain existing lawful activities allowed); or
>
> (ii) Is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment:
>
> (b) Require a person to do something that, in the opinion of the [Environment Court], is necessary in order to –

(i) Ensure compliance by or on behalf of that person with this Act, any regulations, a rule in a plan, [a rule in a proposed plan], a requirement for a designation or for a heritage order, or a resource consent; or

(ii) Avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by or on behalf of that person:

315 Compliance with enforcement order

...

(2) If a person against whom an enforcement order is made fails to comply with the order, any person may, with the consent of the [Environment Court], –

(a) Comply with the order on behalf of the person who fails to comply with the order, and for this purpose, enter upon any land or enter any structure (with a constable if the structure is a dwelling house); and ...

319 Decision on application

(1) After considering an application for an enforcement order, the [Environment Court] may –

(a) Except as provided in subsection (2) make any appropriate order under section 314; or

(b) Refuse the application.

[35] We do not understand Mr Fischer to deny that the trees intrude into the OLS. Rather we understand him to contend:

a) that the trees on the property enjoy existing use rights under Section 10 of the Act, or Section 176 of the Act;

b) that simply allowing the trees to grow on his property is not "doing" anything in terms of Sections 314 and 176 of the Act;

c) that the trees are neither noxious, dangerous, offensive nor objectionable and do not constitute an adverse effect upon the environment;

d) that the removal is an adverse effect on the environment, particularly on the amenity for this area which acts as a refuge for native and exotic birds.

[36] Further, even if there are grounds for an enforcement order, Mr Fischer suggests we should not exercise our discretion to grant it on the grounds set out above, plus:

a) The acknowledged, and in his view, deliberate failure by the Airport Company to observe the terms of a consent order on a previous occasion;

b) The failure to identify the effects on his trees of the NOR and properly notify its effect in the AEE;

c) The delay in making the application. The Airport Company was aware of the issue in 2004 when it commenced negotiations but took no further steps until February 2009 when it approached his tenant;

d) The potential for the company to acquire the entire property or even (arguably) part under the Public Works Act; it has taken no steps to do so;

e) The company's refusal to respond to his STEMS valuations for the trees in negotiations.

[37] Finally, Mr Fischer contends that in making the OLS designation the Act was used *in breach of its stated purpose and for an improper purpose.* This latter contention is not properly able to be considered as part of this proceeding.

[38] We thus identify the following issues in this case:

a) Do the trees enjoy existing-use rights, or conversely, does the NOR require their removal now pursuant to Section 176?

b) Does the continued growth of the trees constitute *doing anything* on the part of the respondent in terms of Sections 314 and 176 of the Act?

c) Are the trees noxious, dangerous, offensive or objectionable?

d) Is the continued presence of the trees an adverse effect on the environment in terms of Section 314(1)(b)(ii) of the Act?

e) If there are grounds for an order, should the Court exercise its discretion to make an order?

Do the Trees Enjoy Existing-Use Rights?

[39] We note that the words *existing use* are used only in the explanatory heading to Section 10 of the Act.

[40] The term *existing use certificate* is defined in terms of Section 139A of the act and relates only to Section 10, Section 10A or 20A. In relation to designations however the issue is addressed as changing the character intent or scale of the use of the land under Section 176(1)(b)(iii) of the Act.

Section 9 Existing Uses

[41] In submitting that Mr Fischer's trees do not enjoy such rights, Mr Rive relies on the express wording of Section 9 of the Act, and in particular the first three subsections. We set them out in full:

> **9 Restrictions on use of land**
>
> (1) No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is –
>
> (a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
>
> (b) An existing use allowed by [Section 10 or Section 10A].
>
> **Note:** See s 4(3) of this Act as to this subsection not applying in specified circumstances.
>
> (2) No person may contravene [Section 176 or Section 178 or Section 193 or Section 194 (which relate to designations and heritage orders)] unless the prior written consent of the requiring authority concerned is obtained.
>
> (3) No person may use any land in a manner that contravenes a rule in a regional plan or a proposed regional plan unless that activity is –
>
> (a) Expressly allowed by a resource consent granted by the regional council responsible for the plan; or
>
> (b) Allowed by Section [20A] (certain existing lawful uses allowed).

[42] Mr Rive's submissions on the Sections were brief to the point of obscurity. As we interpret his argument, it is that Parliament specifically provided for existing uses allowed by Sections 10, 10A and 20A to contravene rules in district or regional plans, but made no such specific provision for them to contravene Sections 176 or 178 which relate to designations.

[43] Mr Rive noted that whereas in the case of district plan rules, the protection of lawfully established uses served an equitable purpose, since in general terms an interest in land is deemed not to be taken or injuriously affected by reason of a plan provision, there is no similar reason to protect existing uses from the effects of a designation, since Section 185 of the Act provides a potential right to compensation for owners of affected land.

[44] We accept that Parliament has made no specific provision for existing use rights under Section 9(2). But the significance of that depends on whether Section 176 and 178 apply to existing uses of the land. We add that the words *without the prior written consent of the requiring authority* can only apply to activities commenced after the designation is imposed under Section 176, or at least after notification of the requirement (see Section 178(1) and (3)).

[45] In the scheme of the Act, existing uses are provided for in the case of district plans under Section 10, in the cases of uses on the surface of water under Section 10A, and in the case of regional plans under Section 20A. The regime applicable to the relationship of activities in the case of designations is contained in Sections 176 and 178 of the Act. We note that the extent of protection for existing uses differs under Sections 10, 10A and 20A. There can be no assumption that the provision for existing uses in the case of designations, if there is any, will be the same as or resemble the provision under district plan rules.

[46] We cannot leave Section 9 without mentioning Section 9(8) of the Act. No argument was addressed to this provision. The OLS clearly relates to overflying aircraft but it is not suggested that Section 9(2) does not apply. We note that the scope of Section 9(8) has not been addressed in this or any other case. We therefore assume that Section 9(8) is in relation to aircraft rather than the airspace affected by

the overflying. Given the matter has not been addressed by any party we do not consider it further.

Change in Activity and Designations

[47] Before discussing Sections 176 and 178, we draw attention to two other sections in the Act relevant to designations. Section 168(1) provides that a designation may be either:

> (a) for a public work; or
>
> (b) in respect of any land, water, subsoil, or airspace where a restriction is necessary for the safe or efficient functioning or operation of a public work.

[48] In this case we are dealing with airspace where a restriction is necessary for the safe or efficient operation of overflying aircraft. We also draw attention to Section 175(d) which provides that when the decision of a requiring authority is beyond the point of appeal, the territorial authority shall include the designation in its district *plan as if it were a rule* in accordance with the requirement as issued or modified in accordance with the Act. The consequence of that is that it might be expected to have the same force, and be subject to the same limitations as a district plan rule. Accordingly, Section 9(2) lists a designation as a restriction on land use.

[49] Section 176(1) provides:

> **176 Effect of Designation**
>
> (1) If a designation is included in a district plan, then –
>
> (a) Section 9(1) does not apply to a public work or project or work undertaken by a requiring authority under the designation; and
>
> (b) no person may, without the prior written consent of that requiring authority, do anything in relation to the land that is subject to the designation that would prevent or hinder a public work or project or work to which the designation relates, including –
>
> (i) undertaking any use of the land described in Section 9(4); and
>
> (ii) subdividing the land; and
>
> (iii) changing the character, intensity, or scale of the use of the land.

[50] The effect of Section 176(1)(a) is that:

a) the designation is deemed to be expressly allowed;

b) a person cannot do anything that would hinder or prevent the works including certain examples.

It follows that the deeming of the designation as a plan rule under Section 175(1)(d) does not, in itself, make the designation subject to existing use rights. We turn now to consider the import of Section 176(1)(b).

[51] We have considered the tenses of the verbs in these Sections. The negative imperative *no person may do* and the hypothetical *would* both relate to actions undertaken after the inclusion of the designation in a district plan. They contemplate the future, but the words could relate to actions undertaken prior to the inclusion of the designation which continue after the designation is imposed. These tenses do not in themselves determine whether existing activities have any continuing rights. The reference to prior written consent does however indicate future activities as written permission could not be obtained prior to the designation.

[52] We note that subsections (i) – (iii) do not purport to be an exclusive list of what is forbidden without the prior written consent of the requiring authority. Moreover, the uses of land described in Section 9(4) include the very general (e) *any other use of land.* We conclude that subsection (iii) is the key to the interpretation of Section 176(1)(b). If subsection (i) or the section generally is taken to apply to existing uses of the land, it is difficult to see what purpose is served by subsection (iii) or what meaning can be given to it. The phrase *changing the character, intensity or scale of the land* can only be given meaning in the context of an existing use of the land. If that use of the land can itself be precluded by the operation of subsection (i) then subsection (iii) adds nothing to the extent of control over the uses of subject land the requiring authority can exercise. It would be an otiose provision.

[53] A consideration of the phraseology of Section 176(1)(b)(iii) lends further weight to the proposition an existing use does not contravene Section 176. The phrase *changing the character, intensity and scale of the use of the land* to describe something a person may not do, bears a strong resemblance to the phrase used to limit the extent of existing use rights when a rule in a plan is breached under Section 10. An existing use right exists if the use was lawfully established before a rule in a

district plan became operative or a proposed plan was notified, and the effects *are the same in character, intensity and scale to those which existed* before the relevant notification or coming into operation of a rule (Section 10).

[54] A consideration of Section 178 also suggests that Section 176 does not apply to existing uses. Section 178 subsections (1) and (3) provide:

> Section 178(1)
>
> Where, under Section 168 or Section 168A, or clause 4 of Schedule 1, a requiring authority has given notice of a requirement for a designation for a public work or project or work, then during the period described in subsection (3), regardless of the provisions of any plan or resource consent, no person may, without the prior written consent of the requiring authority, do anything (including the things referred to in subparagraphs (i) to (iii) of Section 176(1)(b)) that would prevent or hinder the public work or project or work.
>
> Section 178(3)
>
> For the purposes of Section (1), the period commences on the date on which notice of the requirement is given to the territorial authority under Section 168 or clause 4 of Schedule 1, or the date a territorial authority resolves to publicly notify its own requirement under Section 168A or to include its own requirement in a proposed plan under clause 4 of Schedule 1, and ends on the earliest of the following days:
>
> (a) The day on which the requirement is withdrawn by the requiring authority:
>
> (b) The day on which the requirement is cancelled by the [Environment Court];
>
> (c) The day on which the designation is included in the district plan.

[55] If Section 176(1)(b) applies to existing uses, the consequence in Section 178 is that a person is required to cease lawfully established existing uses if they would prevent or hinder a public work, from the time the notice of requirement is notified until it is completely processed, including a period in which the appropriateness of the requirement has not been publicly tested in any way. It is accepted that a notice of requirement may have such an effect on new uses. We doubt that parliament would have intended to impose such a restriction on existing uses.

A Designation over a Home

[56] Let us take a clearer example. We might consider the question, if the OLS set out in the NOR had gone through a house at say 3m or 4m height, is there a mandatory obligation for the owner to remove the house to avoid breaching the Act.

Clearly, no new works could be undertaken without permission but does the continued existence of the house breach the Act? The action here would be permitting a state of affairs to continue which pre-existed the NOR. Would mandatory compliance under Section 178 be necessary even before the NOR was confirmed.

[57] We conclude that under Section 176(1)(b)(iii) there must be a change to character, intensity or scale of use of the land before the landowner needs written permission for the existing house to be on the land.

[58] Similarly, Section 178 seeks to preserve the existing state of affairs until the NOR is confirmed *and* relied upon by the requiring authority. The Act contemplates that either the owner or requiring authority will take steps under Sections 185 or 186 of the Act, or under the Public Works Act to alter the status quo.

[59] The alternative would mean the homeowner would have to remove the house (or at least non-complying sections) prior to any discussions or steps as to compensation. Could parliament have intended that people are deprived of their houses without questions of acquisition or compensation being addressed? In this respect we note that frequently designations are in place for many years before the works for which they are required are commenced, and sometimes they lapse altogether. It does not seem conceivable to us that parliament would have required removal of physical structures in whole or in part in circumstances when there is no certainty when or if the work proposed in the NOR will eventuate.

[60] Although the imposition of a designation does not need to be accompanied by acquisition or compensation, the right of unchanged use and occupation has always continued until formal steps for acquisition are taken.

[61] We asked Mr Foster where he had formed the view that a designation took immediate compulsive effect. The relevant portion of the transcript states:

COURT	*... Do I take it that that is because there is a legal opinion to the effect that S176 requires owners to reduce their height of their trees as a result, is that where all this has come from?*
MR FOSTER	*Yes*

COURT	*... [W]ho supplied that opinion, is that Chapman Tripp or another firm?*
MR FOSTER	*No it has just been, as I say, a convention. The thing is that the way the OLS provisions are applied across airports in New Zealand has not been tested in law.*

[62] We have concluded that the view that there is an immediate compulsive nature to a designation is based upon a view adopted by airports. Given that Mr Foster indicates that he has advised many of these airports, we have concluded it is a view that Mr Foster holds, which has been communicated to those airports.

[63] What we struggle to understand is how such a view can be held in light of the wording of Section 176 and the intent of the Act itself. Furthermore, this court would have expected *extremely clear* statutory wording for legislation which allowed people's ownership of homes and properties (or other property rights) to be *removed* before any issues of compensation were addressed.

[64] Accordingly, we have always understood that the effect of a designation was that although it affected property rights, it did not affect the continuation of the status quo until such time as the position had been regularised, either by agreement or acquisition. The concept that a person is able to be made homeless, without being compensated before that happens, is of considerable concern to this court and does not follow from our understanding or interpretation of the designation provisions of the Act.

Designation Affecting Property Rights

[65] While we have used this more extreme example, it is clear that there are many cases where designations do occur over buildings, common examples being motorway extensions. We note that Map 44 in the Rotorua District Plan shows motorway extensions which would affect a number of homes within the Hannah Rd/Robinson Ave Area. Other examples of designations for road widening and/or service lanes exist within district plans.

[66] We realise that the situation is not quite so extreme in respect of airspace and trees; nevertheless, the Act does not deal differently with these matters, and accordingly, the principles must be the same. To that extent we conclude:

a) That at the time of the notification of the designation in December 2005, the Fischer property largely complied with the existing OLS (at around 20m - 22m);

b) Any further growth of trees above that height was a change in intensity, character and scale justifying the airport company requiring the trees to be trimmed;

c) It is not clear at this stage whether in fact any of the trees did extend into the 1997 NOR as at 2005;

d) It is clear that a number of the trees do now extend above the 1997 OLS, particularly the Eucalyptus, Fir, Copper Beech, and Poplar. Of these only the Fir and Poplar would involve any substantive trimming to achieve the 1997 OLS;

e) To the extent that the Poplar extended into the 1997 OLS in 1998, its reduction to comply meant that those existing use rights were lost, and accordingly, it now intrudes some 7m into the 1997 OLS;

[67] In respect of the other trees, it is unclear whether the growth of the Fir tree into the 1997 OLS has occurred entirely since 1997, but it is not unreasonable conjecture to conclude that this has occurred within the last 10 years. It can likewise be suggested that the Eucalyptus and Copper Beech trees have both extended their growth into the 1997 OLS during this period.

[68] Again no evidence is given as to the extent of intrusion into the new 2005 OLS which had already occurred as at December 2005. Clearly the Poplar, Oak, Eucalyptus, Fir, and Copper Beech would have already intruded. We suspect also, given growth rates, that the Kauri and Fir already intruded as at 2005, but it may be that the Walnut, Pittosporum and Cypress which require trims now of less than 1.3m, did not do so. However, we have no particular evidence on this point. The only tree identified in the council's Technical Assessment Vol 3, is the Eucalyptus, but it

appears to be conceded even by the Airport Company's witnesses that other trees would have intruded into the OLS as at December 2005.

[69] There is no question that the growth has occurred since that time, which has added to the height of the trees. There is no suggestion that Mr Fischer (who has not been resident at the property) has undertaken any action to increase or facilitate the growth of those trees.

[70] We conclude that Section 176(1)(b) does not preclude the continued presence of Mr Fischer's trees on 628 Te Ngae Road, to the extent that they existed as at December 2005 when the NOR was notified, and to the extent that they complied with Appendix E 1997 OLS, as at that date. It is of course for the applicant to demonstrate the extent to which the trees did not comply with Appendix E 1997 OLS, and that the trees held no existing use rights above that height as at that date.

Does allowing the trees to grow constitute doing anything under Sections 314 and 176 of the Act?

[71] Mr Fischer contends that he has not *done anything* in terms of Sections 176(1)(b) or 314(a) in contravention of a requirement for a designation. He argues that the words *do anything* imply some action rather than what he describes as *passive enjoyment of the land.*

[72] As we have previously set out *doing anything* includes any use of the land described in Section 9(4) of the Act which includes the catch-all provision *any other land use*. The term *use* is not defined in the Act. However, the Environment Court has considered the meaning of the word in ***Kaimanawa Wild Horse Preservation Society Incorporated v Attorney-General***[4]:

> ... the word "use" has to be given its ordinary meaning. The relevant meanings of the word are given in the New Shorter Oxford Dictionary (Oxford, Clarendon Press, 1993):
>
> ... application or conversion to some purpose ... make use of (a thing) especially for a particular end or purpose; utilize, turn to account ... work, till, occupy, (land, ground etc) ...

[4] [1994] NZRMA 356 per Sheppard PEJ

[73] We conclude that the occupation of the land by the trees is a use of the land in terms of Section 176(1)(b) and is therefore "doing something".

[74] There may be consequences of this for the extent of the existing use right Mr Fischer's trees may have. The increased occupation of the airspace above Mr Fischer's property does not have existing use rights. In terms of Section 176(1)(b)(iii) that increased occupation represents a change in the intensity or scale of the use of the land, albeit gradual and incremental.

[75] We also refer to Section 178(1) of the Act. The notice of requirement for the OLS was issued on 31 December 2005. Arguably any growth in the trees in terms of their increased occupation of the OLS after that date is in contravention of Section 176(1)(b)(iii) and Section 178(1) of the Act and may be the subject of an order. However, to determine the terms of any such order the Court would require evidence on the height of the trees as at the giving of notice for the requirement. As we have said, no such evidence was produced at this hearing, we suspect because it is not known.

[76] We are somewhat troubled with the concept of growth of trees representing a change in character, intensity and scale. Given the existing size of these trees (all over 15m in height), we are left with an argument that the growth of any tree represents a change in character, intensity and scale. Most district plans do not expressly allow trees or tree growth, but that is usually an accepted part of residential, rural or other activities. Could it then be that all trees which grow (which we suspect are all trees), are not expressly allowed by a provision of a district plan, and would require consent for their growth?

[77] In that regard, we recall that the *Assessment of Environmental Effects* filed for the Airport Company talked about planting of trees, but did not mention natural growth of trees. We do not consider it necessary to determine this issue finally, and proceed on the assumption that the natural accretion in the size of a tree can be a change in character, intensity and scale, both in terms of Section 10 of the Act, and in terms of Section 176.

[78] However, we do so for the purposes of this hearing only and reserve that question for proper argument in another case.

Are the trees noxious, dangerous, offensive or objectionable to the extent of being likely to have an adverse effect on the environment?

[79] Mr Rive noted the importance of human safety in the scheme of the Act, citing in support the decision of the Court in ***Glentanner Park (Mount Cook) Limited Anor v Mackenzie District Council***[5] where the Court found that although an accident may be of low probability, its potential effect is such as to militate against the grant of a Resource Consent for a heliport at Ferintosh Station. He also referred to the Court's decision in ***Aviation Activities v Mackenzie District Council***[6] where the Court averred that safety was by far the most important consideration in the case.

[80] We do not disagree with that approach. However, the evidence falls short of establishing that safety *per se* is an issue in this case. Mr Park told us that in terms of take-off, the maximum permitted weight of aircraft taking off would need to be reduced to ensure that the aircraft cleared the tallest tree with the requisite margin of safety. The necessary weight reduction is set out in the table below:

	Craft type	B737-300	B737-800	A320	Embraer 190
	Weight to be lost	2500kg	1700kg	3000kg	1300kg
or	Reduction in passenger numbers	21	15	26	11

[81] We note that Mr Park accepted that the 2% gradient already involved some weight reductions for take-off at Rotorua Airport.

[82] He told us that for landing aircraft the landing threshold would need to be displaced 497m to the north to enable these craft to make an instrument non-precision approach, leaving only 1347m of runway available. We understand that that is insufficient for the aircraft listed above to land safely. The Poplar is responsible for most of this displacement with the Fir 3029 also above the 6b flight line. Reduction

[5] W50/1994
[6] C72/2000

of these two trees to the 1997 OLS would reduce this displacement to around 100m (where the runway proper starts).

[83] However, even if no order at all were made, Mr Park's evidence was not that dangerous operations would occur, but rather that CAA rules would require Rotorua Airport and the aircraft using it to change their operational practices to ensure that aircraft would not be endangered when landing or taking off. Mr G White, the chief executive of the Airport Company, described what that would mean in practice (at para [63] of his evidence):

> ... If the trees are not removed by [three days prior to the opening of the runway extensions], the Rotorua Airport will not be available to host the B737-800 and A320 aircraft (meaning trans-Tasman flights with these aircraft will not be possible) and takeoff weight restrictions will apply to most other aircraft using the Airport for scheduled services.

[84] We conclude on the basis of this evidence that the question of danger to users of the airport and aircraft will not arise, although we accept that the planned operation of the airport, and some passengers, will be seriously inconvenienced.

[85] On this basis Mr Foster opined that a significant proportion of the Rotorua population may consider the present situation to be objectionable to such an extent that it is likely to have an adverse effect on the environment.

[86] We notice that no questions were addressed of general danger to the public from the trees themselves. From our site visit and the reports we have seen, the trees themselves appear healthy, are good specimens, and create positive beneficial amenity effects, both to Te Ngae Road and to residents living in the area. They also appear to be commonly utilised by both native and exotic birds and may hold some ecological values, although no evidence was advanced on this point.

[87] Accordingly, it is not the trees themselves that would be objectionable, but simply the fact that a portion of those trees intrudes into the OLS and therefore affects the operation of certain aircraft landing and take-offs that utilise the southern end of the runway. However Mr Foster's evidence was in such hypothetical terms and so

lacking in corroborative evidence on public opinion that it could not possibly provide a basis for a finding that this was an *objectionable* state of affairs that would meet the objective test set out in ***Zdrahal v Wellington City Council***[7].

Do the trees contribute to an adverse effect on the environment?

[88] Mr Fischer disputes the proposition that the trees have any adverse effect on the environment. He claims that such a proposition involves the substitution of *Rotorua Airport* for *the environment* and in any case does not agree that the trees cause an adverse effect on the environment. He further submits that no action on his part *caused* the existence of the trees. We have already discussed and rejected the latter argument.

[89] *Environment* is widely defined in Section 2 of the Act to include:

> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and
>
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:

[90] The environment includes Rotorua Airport, it being a physical resource, and any effect on the ability of the airport to operate to its full potential is thus an effect on the environment. Likewise any economic effects whether on the airport itself or on Rotorua more generally because it is less able to be accessed by direct trans-Tasman flights are also effects on the environment.

[91] We do not think there can be any dispute that Mr Fischer's trees will impede the planned future expanded operations of the airport and have consequential adverse effects on a portion of the environment, namely the operation of the airport. We have already indicated that the occupation of the land by the trees is a *use of land* in terms of the Act.

[1995] NZLR 700

[92] On the other hand, we also recognise that the trees themselves have beneficial effects, not only in respect of CO_2 processing and carbon sequestration, but in terms of amenity values both to passing traffic onto Te Ngae Road and to residents in the area. They also have beneficial effects in terms of fauna, particularly birds. We note for example that the Japanese Walnut referred to is one of the few trees identified as having particular values within the district plan generally on another site, and that there are few examples cited in the district plan at least of trees having particular value. We suspect a more expanded council inventory of trees deserving protection would include at least some of these on this site.

[93] The question therefore as to whether or not the trees are having an adverse effect on the environment as a whole, is to some extent guided by the provisions of the district plan as well as the Act. In this regard there is no doubt that the Plan itself places a particular value on the safe operation of the airport, in comparison to natural and other values which might be represented by both the amenity of the trees and its contribution to residential character generally.

[94] Overall, we have concluded that there is an adverse effect on the environment from the trees. The nature and scale of those effects can be judged, at least to some extent, against the background of the Rotorua District Plan.

Relevant Planning Provisions

[95] The transportation provisions of the district plan contain statements relating to the issues surrounding Rotorua Airport, policies and methods of implementation relating to the airport and a statement of anticipated environmental outcomes. Relevant policies from the Rotorua District Plan, Part Twelve Transportation[8]:

> **2.2.3.3** **Policy**
>
> *To protect the operational capability of the Airport for the planning period to 2033.*
>
> **2.2.3.4** **Policy**
>
> *To provide for the potential future development of the Airport resource by managing activities which have the potential to*

[8] Rotorua District Plan 12-10

> *adversely affect present and future safe and efficient operations.*

The anticipated environmental result of the various provisions includes:

> **2.2.5 ANTICIPATED ENVIRONMENTAL RESULT**
>
> ...
>
> Continued efficient operation of the Airport and its development as an important physical resource for the District.

[96] The evidence of the various witnesses called by the Airport Company that the intrusion of the trees into the OLS would impede the efficient operation of the airport, and in particular would prevent the operation of international and internal flights using Boeing 737 and Airbus 320 aircraft was not seriously challenged. Adverse effects on the wider Rotorua economy as a result of this were not quantified in the Airport Company's evidence, but we do not doubt they exist.

Types of Order

[97] Before we discuss the exercise of the Court's discretion under Section 319, we outline the orders we consider available to the Court:

a) We have concluded that Mr Fischer's trees contravene a requirement for a designation to the extent that they occupy the OLS designation in the airspace above his property to a greater extent than they did on 31 December 2005.

b) It would be possible for the Court to issue orders requiring Mr Fischer to cease occupying the additional airspace in contravention of that designation under Section 314(1)(a)(i) and require him to prune the trees in such a way as to achieve the heights they were as at 31 December 2005 under Section 314(1)(b)(1). For such orders to be practical, we would need some reliable evidence of the likely height of the various trees at that date. Inasmuch as trees have intruded beyond the 1997 OLS provided for in the Rotorua District Plan at that date, it would also be possible for the Court to order them to be trimmed to conform with that plan provision.

c) We have concluded that grounds for an order under Section 314(1)(a)(ii) do not exist.

d) We have concluded that the court can consider an order under Section 314(1)(b)(ii). The court might make orders requiring trimming to the 1997 OLS level, the 2005 level, or as sought by the Airport Company under that section.

[98] We consider whether we should make an order under Section 315(2) in the course of our discussion of the exercise of our discretion pursuant to Section 319.

[99] To the extent that intrusion into the OLS beyond that existing at 31 December 2005 can be established, it is unlikely that the Court would allow the breach to remain. We note the comments of Elias, J in ***Russell v Manukau City Council***[9]:

> In the case of a use which infringes the provisions of a district plan, however, it would not be appropriate for the Planning Tribunal to countenance continuation of a breach of the district plan ... Where grounds for an enforcement order are made out, as they are here, with the conclusion that the use is in breach of the district plan and not protected by existing use rights, I accept that it would only be in unusual circumstances that an order to effect immediate compliance would be refused. That is the effect of authorities such as *O'Sullivan v Mt Albert Borough Council* [1968] NZLR 1099 (at 1115 per McGregor J), and *Rangiora New World Ltd v Barry* (1992) 1 NZRMA 133. The integrity and evenhanded application of district plans is an important consideration. But while one may have doubts that the circumstances here would be seen by the Planning Tribunal to warrant any course other than an order for immediate compliance with the district plan, that is a matter for the Planning Tribunal. It is one that it does not appear to have considered, although it was squarely raised by the appellant. The answer is not so clear that I would be justified in deciding that the discretion under s 319 could not but be exercised to achieve the same result. The use has been unlawful, on the findings of the Planning Tribunal, for approximately ten years without enforcement action having been taken by the council. The effects of the non-compliance were regarded by the Planning Tribunal in part at least as minor. The extent to which the appellants' proposals to provide off-street parking will ameliorate the adverse affects of non-compliance will need to be considered. So too will it be necessary to consider whether a sunset condition, as proposed by the appellants, is sufficient in the circumstances of such longstanding use to maintain the integrity of the district plan. In all the circumstances, the question of what order is appropriate needs to be distinctly considered by the Planning Tribunal. I have concluded that the matter ought to be referred back to the Planning Tribunal for its further consideration of that point.

[9] [1996] NZRMA 35 (at p.47)

[100] In ***Rangiora New World v Barry***[10], the decision endorsed by Elias, J the Planning Tribunal considered whether, when grounds for an order were made out, it had any discretion to refuse an enforcement order. This case also concerned breach of a rule in a district plan. In that case Judge Skelton said:

> For these reasons it is my opinion that the Tribunal does have a residual discretion, but as the earlier cases, and particularly ***O'Sullivan v Mount Albert Borough Council*** hold where the grounds are made out, a strong case would need to exist before an enforcement order would be refused ...

[101] It is also clear that a least some trees breached the 1997 Plan provisions height limit, and lost any existing rights through previous trimming. This applies to the Lombardy Poplar at least, which exceeds the 20m – 21m height limit. There would need to be unusual circumstances for this to be allowed to persist.

Should the Court exercise its discretion to make Orders?

Orders under Section 314(1)(a)(i) and 314(1)(b)(i)

[102] We are satisfied that Mr Fischer has existing use rights to any existing lawful intrusion into the NOR as at notification. However, we are not satisfied that the Poplar and Fir (3029) (at the least) had any existing use rights above the 1997 OLS. We suspect the Eucalyptus (3027) and Copper Beech (3027) were also compliant with the 1997 OLS and their current growth above that level is a breach of the plan provisions.

[103] As to heights between the 1997 OLS and the 2005 NOR we have no reliable evidence. We suspect most if not all exceeded the 2b flight path as at 2005, but there is little evidence. Some must have exceeded this level (Poplar 5339; Eucalyptus 3027; Fir 3029; Copper Beech 3021; Oak 3025). The balance, we just do not know given Mr Dyer's confirmation that a number of trees exceeded the height, but only one was identified.

[104] Any growth beyond 2005 could also be subject to an order but no evidence was given on the point. In short however, a reduction in height of the Poplar and the Fir to the 1997 OLS would significantly impact the current situation reducing the

[10] (1992) 1 NZRMA 133

setback threshold at least some 300m. We acknowledge that both the 4b and 2b flight paths would remain compromised but to a lesser extent.

Orders under Section 314(1)(b)(ii)

[105] We note that the Court's discretion to grant orders under Section 314(1)(b)(ii) is restricted by Section 319(2). That Section provides that the Court must not issue an enforcement order against a person if:

> (a) that person is acting in accordance with –
> (i) a rule in a plan; or
> (ii) a resource consent; or
> (iii) a designation; and
>
> (b) the adverse effects in respect of which the order is sought were expressly recognised by the person who approved the plan, or granted the resource consent, or approved the designation, at the time of the approval or granting, as the case may be.

[106] The circumstances in which a person is exempt from the issue of an enforcement order are conjunctive, that the person is acting in accordance with a rule in a plan, resource consent or designation, and that the person approving the plan rule, resource consent or designation expressly recognized the adverse effects concerned. It is clear to us that the plan, resource consent or designation referred to in subsection (b) must be the same as that referred to in subsection (a). The trees were planted well before Mr Fischer's acquisition of 628 Te Ngae Road. There is no evidence that their planting was not in accordance with any rule in a district plan. Equally there is no evidence, and we consider it inherently unlikely, that any person approving a district plan perceived trees planted on the site would have any adverse effect on the operations of Rotorua Airport.

[107] We conclude that Section 319(2) of the Act does not preclude the issue of enforcement orders under Section 314(1)(a)(ii) or 314(1)(b)(ii) of the Act.

[108] Mr Rive appeared to suggest that the dicta of Elias, J cited above, in a case about infringement of district plan rules were of wider application in the exercise of discretion to grant or refuse enforcement orders. The case dealt with by Elias, J and the earlier decision of ***Rangiora New World v Barry*** endorsed by her both involved breach of district plan rules. Nevertheless we accept that in a case which involves

adverse effects on the environment, the Court should exercise caution before allowing such effects to continue. But there are other relevant questions for the Court to ask. These include:

a) Is the effect of the order sought appropriate, and proportionate to the adverse effects perceived to occur?

b) Are there other remedies available to deal with the adverse effect?

[109] We add that in this case there are also more general questions of discretion arising from the previous history of the dealings between the Airport Company and Mr Fischer which bear upon the exercise of discretion in this case.

[110] In addition, we identify from ***Russell*** and from Mr Fischer's submissions these further issues as relevant in this case:

a) delays;

b) conduct in relation to a previous enforcement order;

c) failure to identify effects of the NOR in the AEE which accompanied it;

d) whether the court has been fully and properly informed of the NOR and its impact on the site; and

e) failure to negotiate to acquire land or to consider alternative approaches to take valuations.

Proportionality

[111] Since the decision of the High Court in ***Russell***, the Privy Council has had cause to consider incidence of the cost of administering the Biosecurity Act 2003. In ***Waikato Regional Airport Limited v Attorney General***[11], the Privy Council noted:

> The principle of equity referred to in s 135(1) [of the Biosecurity Act] ... is better described as fairness or a proportionate sharing of benefits and burdens.

[11] [2004] 3NZLR1 para [54]

[112] In ***Neil Construction Limited and Ors v North Shore City Council***[12], Potter J discussed this decision and issues of proportionality in the context of funding sources and the proportionate sharing of costs. The argument before the High Court in that case was that the council had acted arbitrarily and given disproportionate weight to community outcomes and insufficient weight to costs. At paragraph [290] the court concluded that:

> The council has made an error of law in adopting a narrow concept of economic efficiency in the causative approach it has applied to the assessment of development contributions and excluded appropriate consideration of the distribution of benefits and equitable and proportionate allocation.

[113] It can therefore be seen that proportionality can be an issue not only in respect of equitable considerations to the extent that those may persist under the Act, but also in relation to fundamental consideration in terms of the Act itself.

[114] In ***Ngati Maru Iwi Authority Incorporated v Auckland City Council and Ors***[13], Baragwanath J noted at paragraph [27]:

> Importantly it is the Council, and on appeal the Environment Court, that has the responsibility on behalf of the community to decide what reconciliation of the competing values best gives effect to the purpose of the Act. For the jurisdiction of this Court and the Court of Appeal is limited to issues of law. They may not intervene unless there is some distinct error or result so much at odds with the policy of the measure as to be at least either based on an evident logical fallacy (re Erebus Royal Commission 1983 NZLR 662, 681 PC) or to infringe a test of proportionality McKenna v Bracknell Forest BC [2002] HRLR 303 at 334-35 (House of Lords).

[115] In ***Auckland Regional Council v Rodney District Council and Parihoa Farms Limited***[14], Harrison J discussed questions of proportionality in relation to non-notification of an application for consent. In the context of that decision by the High Court, he noted at paragraph [157]:

> ... An overall evaluation is required to decide whether or not relief is to be granted consistent with the discretionary nature of judicial remedies.

[116] At paragraph [159] he went onto note:

[12] CIV-2005-4044690, Potter J
[13] AP18-SW01 (HC) Baragwanath J 20 October 2002
[14] [2007] NZRMA 535

> In this context, Mr Mills also cites, and I respectfully adopt, the proportionality principle formulated by Asher J in ***Diagnostic Medlab v Auckland District Health Board*** HC AK CIV 2006-404-4724 20 March 2007 at paragraph [375]:
>
> > ... [The question] is whether the seriousness of the error identified in the successful judicial review application ... is proportionate to the consequences of relief being granted.

[117] Accordingly, we have concluded that the question of a proportionate response to any adverse effect identified is at the heart of this application. In exercising our discretion, we need to take into account the factual matters that we have discussed, including the likely loss of around up to six large specimen trees and the beneficial as well as adverse effects of the existence of the trees.

Alternative Remedies

[118] Mr Rive submitted that no other statutory mechanism other than enforcement orders is available to the Airport Company to maintain a safe flight path for aircraft using the airport. We are not entirely convinced about that. Section 186(1) of the Act provides:

> **186 Compulsory acquisition powers**
>
> (1) A network utility operator that is a requiring authority may apply to the Minister of Lands to have land required for a project or work acquired or taken under Part 2 of the Public Works Act 1981 as if the project or work were a Government work within the meaning of that Act and, if the Minister of Lands agrees, that land may be taken or acquired.

[119] This appears to us to leave the opportunity for the Airport Company to apply to the Minister of Lands to acquire:

a) Mr Fischer's land; or

b) that part of the land on which Mr Fischer's trees stand;

c) the airspace that is part of Mr Fischer's title above the OLS restriction.

[120] Mr Rive considered this proposition in his submissions. He noted the distinction in Section 168(2) between a requirement for a designation:

> (a) for a project or work; or

> (b) in respect of land, water, subsoil, or airspace where a restriction is reasonably necessary for the safe or efficient functioning or operation of such a project or work.

[121] He then referred us to the case of ***Allan Edward Jones v Southland District Council***[15]. In that case the Council was seeking to impose a restriction on what uses Mr Jones could undertake on land required as a buffer zone for a sewage treatment plant it intended to construct and operate. Mr Rive cited the following passage of the Court's decision[16]:

> Having regard to the definition of 'public work' in the Public Works Act, I would have thought that in the present context a buffer area is part of that work. However, this view appears to be inconsistent with section 168A(1) of the Resource Management Act which speaks of a public work or land necessary for the safe or efficient functioning of a public work. A buffer zone would appear to be in the latter category in much the same way as restrictions are sometimes placed around airports to prevent encroachment of residential development and thus promote the safe and efficient use of the airport.

[122] Acknowledging that ultimately the Court did not need to determine the issue, Mr Rive interpreted the passage as supporting a view that the traditional approach to public works and acquisition through designation is not applicable.

[123] We do not think the situation is as clear as that. In ***Jones***, the district council had argued that the buffer area or separation distance was for the protection of neighbours, not the sewage ponds, and for that reason it could not be acquired under the Public Works Act[17]. In this case the restriction is for the protection of the airport's operations, not for Mr Fischer's benefit. We accept that in many cases the Airport Company will come to an arrangement with owners of land under the flight path without the necessity of any acquisition. But we do not consider the company is precluded from acquiring any of the three interests described above.

[124] We also note that subsection (5) of Section 186 provides a mechanism for the party whose land is taken or partly taken to claim compensation, whereas there appears to be no provision in the enforcement section of the Act for compensation to be paid to a person subject to an enforcement order. Because of that the initiation by

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15 C49/1996
16 Ibid p. 11-12
17 Ibid p. 11

the requiring authority of procedures to acquire a partial or complete interest in Mr Fischer's land is arguably fairer than the use of enforcement procedures.

[125] Further, a more measured or proportionate response may be to require the two most seriously offending trees to be reduced to the 1997 OLS. If the Poplar (5339) and Fir (3021) were trimmed to around the RL 308 line, this would enable flights for landing and take-off with some weight constraints. This alternative was not addressed by the Airport Company.

[126] We keep in mind that the 4.6m step was not explicit in the AEE or Application. Mr Parks' evidence is also complex. Nevertheless, it appears that such an outcome would be close to the 2% gradient over the site i.e. achieving RL 308 compared with a 2% gradient from take-off producing a level of RL 306 at Mr Fischer's property. The 2m difference represents a displacement of around 100m from the end of the runway.

Delays

[127] It is clear from the evidence we have seen that the Airport Company was aware of the problem with Mr Fischer's trees in 2004. If it considers that these have been avoided by the change in the OLS height, this was not reflected in the evidence of the surveyor, Mr M G Dyer. He advised that he undertook a survey in July 2006 which identified the 10 trees being surveyed at that time as intruding into the proposed OLS, and that in July 2008 a further survey was taken with the results being provided to the Airport Company in September 2008.

[128] Mr Dyer confirmed, in cross-examination by Mr Fischer, that he had undertaken the initial survey for the AEE, but not all of the trees were included within the AEE and that he had not even been on Mr Fischer's property at the time. Mr Dyer advised the court that he only got a return reflection on the Eucalyptus, and accordingly, this was the only tree listed. It is clear to us that Mr Dyer was aware there were other trees on the site over the NOR OLS heights.

[129] In its evidence, the applicant makes no attempt to explain the delay in seeking to resolve the issue of Mr Fischer's trees, given that there is clear evidence before the

court that negotiations were commenced in 2004 and then abandoned by the Airport Company. There follows a gap of well over 4 years before the Airport Company took any action in respect of Mr Fischer's property.

[130] By 2006, Mr Dyer had undertaken initial surveys in identifying (and confirming the previous position) that a number of trees on this site intruded into the proposed new OLS.

[131] Accordingly, we must conclude that the difficulty that the Airport Company finds itself in now is in no small measure due to its own delay in seeking to resolve issues between Mr Fischer from 2004 until it delivered its notice to him in February 2009.

Conduct on Previous Enforcement Order

[132] Mr Fischer contends that the applicant's previous conduct is relevant to the exercise of our discretion. Mr Fischer's trees have long been a cause of contention between him and the airport. They were the subject of proceedings before the Environment Court, differently constituted, in 2000. These proceedings were settled by a consent order which allowed the Airport Company's contractor to trim approximately 3.43 metres from one Douglas Fir Tree on the property and to remove another. In the event the airport's contractor removed approximately 7.5 metres from the tree to be trimmed. In a minute of 11 August 2000 the Court made reference to:

> ... the Court's order of 6 June 2000 not having been implemented by the company in the manner contemplated by the order and despite its clearly expressed terms.

[133] We conclude as a fact that the Airport Company was, or should have been aware at the time it exercised its power under the previous order, that it was removing more than the 3.1m of Douglas Fir permitted under the order. It stretches the court's credulity to believe that the contractor and/or the representative for the company are unable to detect the difference between 3m and 7m.

[134] The company's lack of care in adhering to the terms of a previous Court order certainly tell against it receiving further orders from the Court. Whatever decision

we reach on an order under Section 314(1)(b)(ii), we would certainly not give the company authority under Section 315(2) until Mr Fischer has been given the opportunity to comply himself within a reasonable time-frame. After all, it is not Mr Fischer who has a history of breaching the terms of the Court's orders.

[135] We were also told by a witness that Mr Fischer sought payment of some $5,000 towards his costs and a donation to charity for a similar sum as compensation for the breach of the enforcement order. It is common ground that the Airport Company refused to make any offer.

[136] Although we remain concerned at the non-compliance by the Airport Company with the previous order, the court is satisfied that it could impose conditions upon any further order which would ensure no repetition. In fact, Mr Fischer made it clear to this court that he was not concerned about that issue being repeated, given that he considers that the trees will be killed by the trimming to the levels sought and accordingly that they should properly be removed if they are to be trimmed to that extent by the Airport Company. If trimming to the 1997 OLS level only is required, the situation is somewhat different.

[137] We think little can be put upon the issue of the settlement of the outstanding concerns of Mr Fischer in 2000 given that he did not pursue the matter any further with the court, notwithstanding that he was invited to do so.

Failure to Identify the Effects in the AEE for the NOR

[138] Failure to identify effects in the AEE goes not only to the substance of the issues, but also to the exercise of discretion. So far as the issue of discretion is concerned, there is no evidence before the court in which the Airport Company state it was surprised to find Mr Fischer's trees intruded. We have already concluded as a matter of fact that the Airport Company was, or should, have been aware as at 2005 that the trees intruded. Mr Dyer has confirmed the position that at least some of the trees intruded.

[139] Failure to identify those effects, which in the case of the Fischer property are very significant, is a concern. The AEE is required to identify the adverse effects of

the activity. Section 168A(3) of the Act requires the council to consider the adverse effects on the environment and consequently the designating authority is to provide an assessment of environmental effects.

[140] The AEE identified that there were minimal effects on landowners. It cannot be said that the evidence that was advanced in this case has asserted or established to the court's satisfaction that the effects of the removal of these 10 trees are minimal. We regard them as significant. The loss of these significant trees must be measured in some proportionate way against the adverse effects on the airport operation.

[141] Mr Fischer accepts the position as stated by Mr Rive that the question of the validity of the NOR itself cannot be addressed by the court at this hearing. He indicates that he is contemplating appropriate proceedings in that regard.

[142] On the other hand, when it comes to the court deciding whether to exercise its discretion to make an order, we have concluded that this is a matter that we can into account. Had the extent of the effect (the likely loss of these trees) been clearly indicated to Mr Fischer in the AEE, he would have been able to make proper decisions both in respect of appealing the designation and/or seeking other redress, or sought declarations or judicial review at an earlier stage in the light of adequate knowledge of the effects of the designation.

[143] The submissions and evidence of Mr Fischer (on this point) indicate to us that the Airport Company had other, albeit in its view more costly, remedies available to it. The interval between the negotiations aborted in 2004 and the attempts to have Mr Fischer's trees cut in 2009 might have been used to negotiate some mutually accepted value for the trees, or to have arbitration on the matter. As a result, we consider that the Airport Company took the right course of action in 2004 when it instructed Mr Hawkins to commence negotiations with Mr Fischer. Its abandonment of that process and its refusal to re-engage with Mr Fischer until February of this year has been the immediate cause of its problems.

Failure to Take Steps to Acquire the Land or Respond to the STEMS Evaluation

[144] The STEMS evaluation method adopted by Mr Fischer gives a total valuation for these trees in the order of approximately $150,000 made up as follows:

RRAL Tree Number	Species	STEM pts	Replacement Cost
3019	Agathis australis	174	$3,295.19
3021	Fagus sylvatica purpurea	192	$10,227.94
3023	Pittosporum eugenioides	108	$4,427.84
3025	Quercus robur	180	$19,831.75
3027	Eucalyptus cinerea	210	$50,563.95
3029	Pseudotsuga menziesii	186	$10,227.94
3031	Juglans ailantifolia	174	$29,555.61
5327	Cupressus spp	102	$6,866.61
5337	Pseudotsuga menziesii	156	$8,427.23
5339	Populus Nigra Italica	186	$4,465.65
Total			**$147,889.72**

[145] Annexed and marked **D** is a copy of his valuation. Although some of these trees, particularly the Douglas Fir, appear to be valued somewhat highly, the STEMS method of evaluation is at least a recognised method of valuing trees as opposed to land. It is the loss of the trees that Mr Fischer is concerned with, not the land itself.

[146] We recognise that the Airport Company could have pursued purchase options at an earlier time. It has still not responded in any meaningful way to Mr Fischer's STEMS valuation.

[147] Questions of compensation are not for this court. On the other hand, there are remedies available to the Airport Company enabling them to give notice to acquire. Certainly we conclude that they cannot rely on their failure to take steps to acquire to justify these orders.

[148] Nor can we conclude that Mr Fischer's responses to date have been completely intransigent. Given the Airport Company's previous actions it is to his credit that Mr Fischer attended mediation.

[149] Nevertheless, we consider these issues are largely peripheral to the exercise of our discretion. We also recognise the delays that would occur if such a procedure were adopted now.

Exercise of Discretion

[150] In terms of the exercise of the Court's discretion under Section 314(1)(b)(i) there are matters which influence us both for and against its use to grant an order. The adverse effect on the airport's operations would favour the making of an order, while the availability of an alternative to remedy those effects, the provision for settling compensation payable if that alternative route is taken, and the Airport Company's previous breach of the terms of a previously agreed order tell against it.

[151] We are aware that the procedures which would need to be invoked for the company to acquire an appropriate interest in Mr Fischer's land, with their attendant rights of appeal, may take longer than the time available before the trans-Tasman service is due to commence.

[152] In that respect the Airport Company is, as we have indicated, to a degree the author of its own misfortune. In 2004 the company was aware that its future plans would require the acquisition of a number of properties. It opened negotiations with a number of property owners during that year, including Mr Fischer, but then stopped negotiations at its own volition. We accept the evidence of Mr N F Oppatt, the current chairman of the Airport Company, and a member of its board in 2004, that the decision to terminate negotiations was taken in respect of a number of properties and Mr Fischer was not singled out for special treatment. However, negotiations of any sort were not resumed until February 2009, and in July 2009 the company applied for an enforcement order. The long intervals between negotiations, and the refusal of Mr Fischer's requests for financial compensation from the company after its breach of the 2000 order tell strongly against the company.

Outcome

[153] In the end, we are faced with the destruction of at least six (6) and probably nine (9) well-established specimen trees. They were planted well before the 1997

OLS and for the most part, are mature and well-formed. They provide not only amenity for the immediate homes, but are visible and provide benefits to the wider community, including people using Te Ngae Road. It is likely that if the trees are trimmed to the extent sought by the Airport Company, Mr Fischer would prefer them to be removed entirely because of the serious deleterious effect such trimming would have.

[154] On the other hand, we appreciate that the council and the Airport Company, including some of the local community, have put some considerable store on obtaining overseas tourists through extension of the runway and the expanded operation of the airport.

[155] We have concluded that the current situation has been created by the Airport Company, and in particular, its failure to resolve this issue at an earlier stage particularly after it identified the extent of non-compliance in 2006. It did not take steps to deal with the issue before contracts were in force for planes to commence flights in December. It appears to the court that it is being forced into a position where it has no choice. However, we have concluded that the situation is of the Airport Company's making, and is one which a sensible approach in 2004 would have resolved. Even now, a reasonable approach to compensation for the loss of the trees would enable the Airport Company to resolve this matter.

Conclusion

[156] We have concluded, with considerable reluctance given the importance of the airport to the Rotorua community, that orders for height reduction of the trees to the NOR levels should not be made at this time.

[157] Although not explicitly sought, we can see no reason why enforcement orders to the 1997 OLS height limit in the Plan cannot be issued in respect of the Lombardy Poplar 5339 and Fir 3029 at least. Given the lack of accurate information from the applicant, we make the following orders:

A: Orders as sought refused.

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B: **Orders made to identify Poplar (5339) and Fir (3021) reduced heights necessary to meet 1997 OLS by:**

[a] **identify current RL of top of both trees;**

[b] **identify RL for ground level and 1997 OLS level for both trees;**

[c] **identify height of trees to remain and to be removed to comply with 1997 OLS.**

C: **The Airport Company or its authorized agents who have received a copy of this decision may enter the site to undertake survey, measurements, and mark the two trees with the 1997 OLS level. Such access is to occur at reasonable times on notice to the owner and tenant.**

D: **If agreement cannot be reached within 1 week of each tree being marked the court will convene a teleconference to discuss final or further orders or directions.**

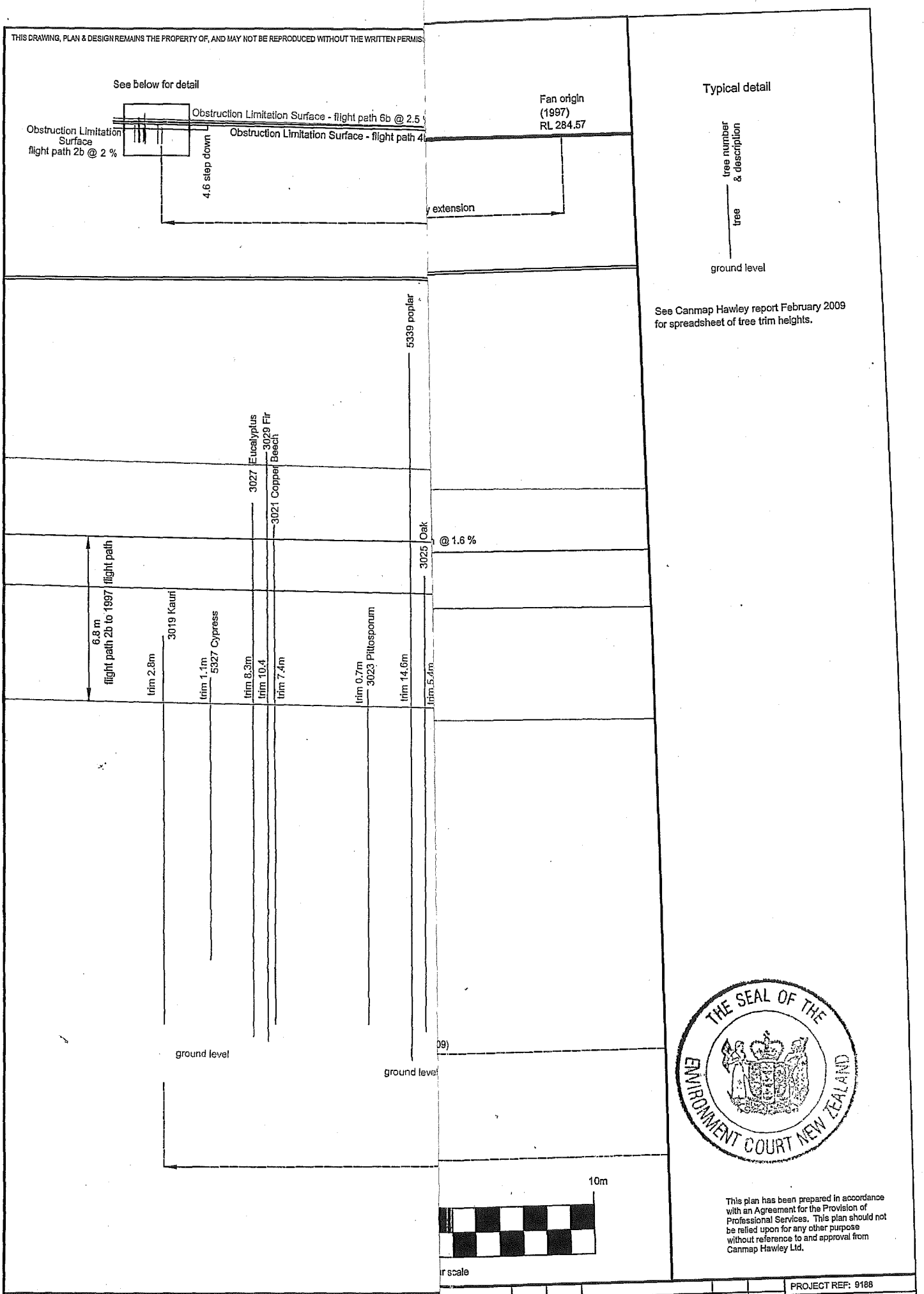
[158] Leave is reserved for further applications to remove growth into the NOR since 2005, if required.

[159] The Airport Company is encouraged to resolve the issue with Mr Fischer including questions of costs.

[160] Leave is reserved for any costs application within 20 working days, replies within a further 10 working days, and final reply another 5 working days after that.

DATED at AUCKLAND this 9th day of November 2009

J A Smith
Environment Judge



Typical detail

See Canmap Hawley report February 2009 for spreadsheet of tree trim heights.

This plan has been prepared in accordance with an Agreement for the Provision of Professional Services. This plan should not be relied upon for any other purpose without reference to and approval from Canmap Hawley Ltd.

CANMAP HAWLEY
MAKING SENSE OUT OF SPACE
ROTORUA PO Box 396 Ph 07 347 9482 Fax 07 347 6652
WHITIANGA PO Box 379 Ph 07 866 5777 Fax 07 866 5581

FILE REFERENCE:	
SDR REFERENCE:	
CAD REFERENCE:	
FIELD BOOK:	
LEVEL BOOK:	
SURVEYED:	

FIGURED DIMENSIONS

DRAWN	DATE	ISSUED TO	COPIES	DATE

PROJECT REF: 9188

DRAWING No: 9188-9

SHEET 1 OF 1 SHEETS

ORIGINAL SCALE (A1): 1:100

Obstruction Number	Centreline Distance from Origin	Offset from Centreline	Offset Direction	Top Reduced Level	Ground Reduced Level	Height Above Origin	Fan Intrusion (+ve above fan)	Point Gradient	Trim Height Above GL	Obstacle Description
2196	58.9	83.9	R	291.7	281.9	5.7	4.5	9.6%	5.2	oak
2198	42.8	59.4	R	291.7	282.4	5.7	4.8	13.2%	4.5	tree
2201	37.6	53.0	R	291.0	282.4	5.0	4.2	13.2%	4.4	cypress
2207	41.8	82.0	R	287.1	282.4	1.1	0.3	2.7%	4.4	chimney
2296	849.5	82.0	R	300.7	285.2	14.7	-2.2	1.7%	17.8	fir
2299	878.6	84.8	R	301.1	285.2	15.1	-2.4	1.7%	18.4	fir
2303	881.1	51.1	R	301.1	285.2	15.1	-2.5	1.7%	18.4	fir
2307	940.6	154.2	R	302.5	284.8	16.5	-2.3	1.8%	20.0	eucalyptus
2309	937.9	148.1	R	301.7	284.4	15.7	-3.1	1.7%	20.4	pine
2311	807.9	116.9	R	301.2	285.0	15.2	-1.0	1.9%	17.2	cypress
2313	740.3	122.3	R	299.3	284.9	13.3	-1.5	1.8%	15.9	willow
2315	738.5	129.0	R	303.3	284.9	17.3	2.5	2.3%	15.9	birch
2335	2313.6	240.5	R	323.7	309.5	37.7	-4.0	1.6%	18.2	macrocarpa
2340	299.1	114.8	L	291.2	283.6	5.2	-0.8	1.7%	8.4	chimney
2341	304.9	111.5	L	290.8	283.6	4.8	-1.3	1.6%	8.5	building
3003	968.8	192.4	L	303.8	291.1	17.8	3.0	1.8%	9.6	lamp
3006	1014.0	174.7	L	304.8	292.4	18.8	3.1	1.9%	9.3	lamp
3008	1059.2	158.1	L	306.2	293.5	20.2	3.6	1.9%	9.1	lamp
3010	1105.2	142.3	L	306.8	293.5	20.8	3.2	1.9%	10.0	lamp
3012	1157.8	125.7	L	308.2	295.5	22.2	3.6	1.9%	9.0	lamp
3017	1008.2	139.5	L	302.6	289.4	16.6	1.0	1.6%	12.2	bottle brush
3019	1018.3	121.1	L	304.5	288.5	18.5	2.8	1.8%	13.3	kauri
3021	1013.7	122.5	L	309.1	288.5	23.1	7.4	2.3%	13.2	tree
3023	1010.0	123.7	L	302.3	288.5	16.3	0.7	1.6%	13.1	pittosporum
3025	1008.1	109.0	L	307.0	288.2	21.0	5.4	2.1%	13.4	tree
3027	1015.3	97.4	L	310.0	288.0	24.0	8.3	2.4%	13.7	eucalyptus
3029	1015.0	84.7	L	312.1	287.8	26.1	10.4	2.6%	13.9	fir
3031	992.6	61.5	L	302.6	287.0	16.6	1.3	1.7%	14.3	tree
3036	968.4	66.5	L	303.5	286.9	17.5	2.8	1.8%	13.9	kauri
3038	955.0	70.4	L	306.0	286.6	20.0	5.5	2.1%	13.9	fir
3040	952.7	69.7	L	306.4	286.6	20.4	5.9	2.1%	13.9	tree
3042	950.0	86.1	L	300.8	286.8	14.8	0.4	1.6%	13.6	rimu

ANNEXURE "E"

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application for an enforcement order under s.316 of the Act

BETWEEN **ROTORUA REGIONAL AIRPORT LIMITED**

(ENF 76/99)

Applicant

AND **GEOFFREY WAYNE FISCHER and ANNETTE AUDREY FISCHER**

Respondents

BEFORE THE ENVIRONMENT COURT

His Honour Judge Bollard (presiding)
Environment Commissioner Hackett

HEARING at **ROTORUA** on 30 May 2000

APPEARANCES

Mr Pryce for applicant
Mr Lance for respondent

This is the exhibit marked with the letter "E" referred to in the annexed affidavit of Glenn White sworn at Rotorua this 7th day of July 2009 before me:

A Solicitor of the High Court of New Zealand

CONSENT ORDER

HAVING READ the consent memorandum signed by counsel for the applicant and by the respondents personally **THIS COURT HEREBY ORDERS BY CONSENT** that the application be disposed of on the following basis:

(i) The respondents agree to allow Mr Bob Cowan, or any other person nominated on behalf of the applicant, to enter onto the respondents' property at 628 Te Ngae Road, Rotorua ("the property") on such number of occasions as may be reasonably required to:

(a) Remove the Douglas Fir tree adjacent to Te Ngae Road, Rotorua; and

(b) Top or trim the Douglas Fir tree referred to as RO 19545 on the property so that its height is 308.77 metres above Moturiki Datum. The current height of the tree has been calculated as being 312.2 metres

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above Moturiki Datum, meaning on that calculation the topping or trimming required is approximately 3.43 metres.

(ii) The applicant shall meet the cost of the felling and topping or trimming of the two trees, and make good any damage to the property arising from such work.

(iii) The applicant acknowledges that disposal of the application on this basis is without prejudice to any existing rights the respondents have or may have had as a consequence of acquiring the property.

(iv) Disposal of the application on this basis is without prejudice to any action either party may take in the future in relation to the intrusion into any existing or future flight path or paths for Rotorua Airport of the remaining Douglas Fir tree and any other trees (whether current or future) on the property. For the sake of clarity, disposal of the application on this basis relates to both current operational conditions at Rotorua Airport, and any future operational conditions including those arising from any extension of the Rotorua Airport runway.

(v) No compensation shall be payable by the applicant to the respondents in relation to the removal and topping or trimming of the two Douglas Fir trees. This is without prejudice to any claims the respondents may have in the future concerning the felling or topping and trimming of any other trees on the property.

(vi) The applicant shall make a contribution to the respondents' reasonable legal costs in obtaining independent legal advice concerning disposal of the application on this basis up to a maximum of $1,000 plus GST.

(vii) Except for the payment to be made by the applicant to the respondents under paragraph (vi), there shall be no order as to costs.

DATED at **AUCKLAND** this 6th day of June, 2000.

R J Bollard
Environment Judge

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Annexure "B" - Evidence of G Fischer

Standard Tree Evaluation Method Scores: 628 Te Ngae Road, Rotorua

Land Value (RDC Rates 2009)	$116,000.00
Land area square metres	2111
Land value per sq metre	$54.95
Rate of return on capital p.a.	3%
Maintenance per stem p.a.	$25.00

Summary

RRAL Tree Number	Species	STEM pts	Replacement cost
3019	Agathis australis	174	$3,295.19
3021	Fagus sylvatica purpurea	192	$10,227.94
3023	Pittosporum eugenioides	108	$4,427.84
3025	Quercus robur	180	$19,831.75
3027	Eucalyptus cinerea	210	$50,563.95
3029	Pseudotsuga menziesii	186	$10,227.94
3031	Juglans ailantifolia	174	$29,555.61
5327	Cupressus spp	102	$6,866.61
5337	Pseudotsuga menziesii	156	$8,427.23
5339	Populus nigra Italica	186	$4,465.65
Total			$147,889.72

Annexure "B" - Evidence of G Fischer

Tree Number	**3019**
Botanical name	*Agathis australis*
Common name	Kauri
Height(m)	16.1
Average Width(m)	2.5
Area m2	4.9
Volume(m3)	79.0
Stem girth mm	1070
Stem diameter mm	341

Condition

Points	3	9	15	21	27	Score
Form	Poor	Moderate	Good	Very good	Specimen	21
Occurrence	Predominant	Common	Infrequent	Rare	Very Rare	15
Vigour &Vitality	Poor	Some	Good	Very good	Excellent	27
Function	Minor	Useful	Important	Significant	Major	27
Age(yr)	10yrs	20yrs	4Oyrs	8Oyrs	1OOyrs	15

Subtotal Points	105
Subtotal percentage score	0.70

Amenity

Points	3	9	15	21	27	Score
Stature m	3 to 8	9 to 14	15 to 20	21 to 26	27+	15
Visibiity km	0.5	1	2	4	8	3
Proximity	Forest	Parkland	Group10+	Group3+	Solitary	21
Role	Minor	Moderate	Important	Significant	Major	21
Climate	Minor	Moderate	Important	Significant	Major	9

Subtotal Points	69
Subtotal percentage score	0.46

Total Score Agathis australis **174**

Annexure "B" - Evidence of G Fischer

Tree Number	**3021**
Botanical name	*Fagus sylvatica purpurea*
Common name	Copper beech
Height(m)	20.6
Average Width(m)	8
Area m2	50.3
Volume(m3)	6212.8
Stem girth mm	2400
Stem diameter mm	764

Condition

Points	3	9	15	21	27	Score
Form	Poor	Moderate	Good	Very good	Specimen	21
Occurrence	Predominant	Common	Infrequent	Rare	Very Rare	15
Vigour &Vitality	Poor	Some	Good	Very good	Excellent	27
Function	Minor	Useful	Important	Significant	Major	27
Age(yr)	10yrs	20yrs	4Oyrs	8Oyrs	1OOyrs	15

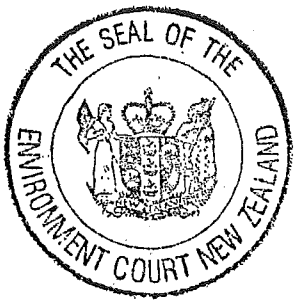
Subtotal Points	105
Subtotal percentage score	0.70

Amenity

Points	3	9	15	21	27	Score
Stature m	3 to 8	9 to 14	15 to 20	21 to 26	27+	21
Visibiity km	0.5	1	2	4	8	9
Proximity	Forest	Parkland	Group10+	Group3+	Solitary	21
Role	Minor	Moderate	Important	Significant	Major	21
Climate	Minor	Moderate	Important	Significant	Major	15

Subtotal Points	87
Subtotal percentage score	0.58

Total Score Fagus sylvatica **192**



Annexure "B" - Evidence of G Fischer

Tree Number	**3023**
Botanical name	*Pittosporum eugenioides*
Common name	Tarata
Height(m)	13.8
Average Width(m)	4
Area m2	12.6
Volume(m3)	1040.5
Stem girth mm	1180
Stem diameter mm	376

Condition

Points	3	9	15	21	27	Score
Form	Poor	Moderate	Good	Very good	Specimen	9
Occurrence	Predominant	Common	Infrequent	Rare	Very Rare	9
Vigour &Vitality	Poor	Some	Good	Very good	Excellent	9
Function	Minor	Useful	Important	Significant	Major	15
Age(yr)	10yrs	20yrs	4Oyrs	8Oyrs	1OOyrs	9
Subtotal Points						51
Subtotal percentage score						0.34

Amenity

Points	3	9	15	21	27	Score
Stature m	3 to 8	9 to 14	15 to 20	21 to 26	27+	9
Visibiity km	0.5	1	2	4	8	3
Proximity	Forest	Parkland	Group10+	Group3+	Solitary	15
Role	Minor	Moderate	Important	Significant	Major	21
Climate	Minor	Moderate	Important	Significant	Major	9
Subtotal Points						57
Subtotal percentage score						0.38

Total Score Pittosporum eugenioides **108**

Annexure "B" - Evidence of G Fischer

Tree Number	**3025**
Botanical name	*Quercus robur*
Common name	English oak
Height(m)	18.8
Average Width(m)	12
Area m2	113.1
Volume(m3)	12757.4
Stem girth mm	2160
Stem diameter mm	688

Condition

Points	3	9	15	21	27	Score
Form	Poor	Moderate	Good	Very good	Specimen	21
Occurrence	Predominant	Common	Infrequent	Rare	Very Rare	15
Vigour &Vitality	Poor	Some	Good	Very good	Excellent	21
Function	Minor	Useful	Important	Significant	Major	21
Age(yr)	10yrs	20yrs	4Oyrs	8Oyrs	1OOyrs	15
Subtotal Points						93
Subtotal percentage score						0.62

Amenity

Points	3	9	15	21	27	Score
Stature m	3 to 8	9 to 14	15 to 20	21 to 26	27+	15
Visibiity km	0.5	1	2	4	8	9
Proximity	Forest	Parkland	Group10+	Group3+	Solitary	21
Role	Minor	Moderate	Important	Significant	Major	21
Climate	Minor	Moderate	Important	Significant	Major	21
Subtotal Points						87
Subtotal percentage score						0.58

Total Score Quercus robur **180**

Annexure "B" - Evidence of G Fischer

Tree Number	**3027**
Botanical name	*Eucalyptus cinerea*
Common name	Silver dollar gum
Height(m)	22
Average Width(m)	20
Area m2	314.2
Volume(m3)	41469.0
Stem girth mm	4950
Stem diameter mm	1576

Condition

Points	3	9	15	21	27	Score
Form	Poor	Moderate	Good	Very good	Specimen	27
Occurrence	Predominant	Common	Infrequent	Rare	Very Rare	15
Vigour &Vitality	Poor	Some	Good	Very good	Excellent	27
Function	Minor	Useful	Important	Significant	Major	27
Age(yr)	10yrs	20yrs	4Oyrs	8Oyrs	1OOyrs	15

Subtotal Points	111
Subtotal percentage score	0.74

Amenity

Points	3	9	15	21	27	Score
Stature m	3 to 8	9 to 14	15 to 20	21 to 26	27+	21
Visibiity km	0.5	1	2	4	8	21
Proximity	Forest	Parkland	Group10+	Group3+	Solitary	21
Role	Minor	Moderate	Important	Significant	Major	15
Climate	Minor	Moderate	Important	Significant	Major	21

Subtotal Points	99
Subtotal percentage score	0.66

Total Score Eucalyptus cinerea **210**

Annexure "B" - Evidence of G Fischer

Tree Number	**3029**
Botanical name	*Pseudotsuga menziesii*
Common name	Douglas fir
Height(m)	24.3
Average Width(m)	8
Area m2	50.3
Volume(m3)	3664.4
Stem girth mm	2030
Stem diameter mm	646

Condition

Points	3	9	15	21	27	Score
Form	Poor	Moderate	Good	Very good	Specimen	15
Occurrence	Predominant	Common	Infrequent	Rare	Very Rare	9
Vigour &Vitality	Poor	Some	Good	Very good	Excellent	21
Function	Minor	Useful	Important	Significant	Major	21
Age(yr)	10yrs	20yrs	4Oyrs	8Oyrs	1OOyrs	15
Subtotal Points						81
Subtotal percentage score						0.54

Amenity

Points	3	9	15	21	27	Score
Stature m	3 to 8	9 to 14	15 to 20	21 to 26	27+	21
Visibiity km	0.5	1	2	4	8	21
Proximity	Forest	Parkland	Group10+	Group3+	Solitary	21
Role	Minor	Moderate	Important	Significant	Major	21
Climate	Minor	Moderate	Important	Significant	Major	21
Subtotal Points						105
Subtotal percentage score						0.7

Total Score Pseudotsuga menziesii **186**

Annexure "B" - Evidence of G Fischer

Tree Number	**3031**
Botanical name	*Juglans ailantifolia*
Common name	Japanese walnut
Height(m)	15.6
Average Width(m)	15
Area m2	176.7
Volume(m3)	16540.5
Stem girth mm	219
Stem diameter mm	70

Condition

Points	3	9	15	21	27	Score
Form	Poor	Moderate	Good	Very good	Specimen	21
Occurrence	Predominant	Common	Infrequent	Rare	Very Rare	9
Vigour &Vitality	Poor	Some	Good	Very good	Excellent	21
Function	Minor	Useful	Important	Significant	Major	21
Age(yr)	10yrs	20yrs	4Oyrs	8Oyrs	1OOyrs	15

Subtotal Points	87
Subtotal percentage score	0.58

Amenity

Points	3	9	15	21	27	Score
Stature m	3 to 8	9 to 14	15 to 20	21 to 26	27+	15
Visibiity km	0.5	1	2	4	8	9
Proximity	Forest	Parkland	Group10+	Group3+	Solitary	21
Role	Minor	Moderate	Important	Significant	Major	21
Climate	Minor	Moderate	Important	Significant	Major	21

Subtotal Points	87
Subtotal percentage score	0.58

Total Score Juglans ailantifolia **174**

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Annexure "B" - Evidence of G Fischer

RRAL Tree Number	**5327**
Botanical name	*Cupressus spp*
Common name	Cypress
Height(m)	11.6
Average Width(m)	6
Area m2	28.3
Volume(m3)	328.0
Stem girth mm	1550
Stem diameter mm	493

Condition

Points	3	9	15	21	27	Score
Form	Poor	Moderate	Good	Very good	Specimen	9
Occurrence	Predominant	Common	Infrequent	Rare	Very Rare	9
Vigour &Vitality	Poor	Some	Good	Very good	Excellent	15
Function	Minor	Useful	Important	Significant	Major	9
Age(yr)	10yrs	20yrs	4Oyrs	8Oyrs	1OOyrs	15

Subtotal Points	57
Subtotal percentage score	0.38

Amenity

Points	3	9	15	21	27	Score
Stature m	3 to 8	9 to 14	15 to 20	21 to 26	27+	9
Visibiity km	0.5	1	2	4	8	3
Proximity	Forest	Parkland	Group10+	Group3+	Solitary	15
Role	Minor	Moderate	Important	Significant	Major	9
Climate	Minor	Moderate	Important	Significant	Major	9

Subtotal Points	45
Subtotal percentage score	0.3

Total Score Cupressus spp **102**

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Annexure "B" - Evidence of G Fischer

RRAL Tree Number	**5337**
Botanical name	*Pseudotsuga menziesii*
Common name	Douglas fir
Height(m)	18
Average Width(m)	7
Area m2	38.5
Volume(m3)	2078.2
Stem girth mm	1510
Stem diameter mm	481

Condition

Points	3	9	15	21	27	Score
Form	Poor	Moderate	Good	Very good	Specimen	9
Occurrence	Predominant	Common	Infrequent	Rare	Very Rare	9
Vigour &Vitality	Poor	Some	Good	Very good	Excellent	21
Function	Minor	Useful	Important	Significant	Major	15
Age(yr)	10yrs	20yrs	4Oyrs	8Oyrs	1OOyrs	15
Subtotal Points						69
Subtotal percentage score						0.46

Amenity

Points	3	9	15	21	27	Score
Stature m	3 to 8	9 to 14	15 to 20	21 to 26	27+	15
Visibiity km	0.5	1	2	4	8	15
Proximity	Forest	Parkland	Group10+	Group3+	Solitary	21
Role	Minor	Moderate	Important	Significant	Major	21
Climate	Minor	Moderate	Important	Significant	Major	15
Subtotal Points						87
Subtotal percentage score						0.58

Total Score Pseudotsuga menziesii **156**

Annexure "B" - Evidence of G Fischer

Tree Number	**5339**
Botanical name	*Populus nigra* Italica
Common name	Lombardy poplar
Height(m)	29.2
Average Width(m)	4
Area m2	12.6
Volume(m3)	366.9
Stem girth mm	2470
Stem diameter mm	786

Condition

Points	3	9	15	21	27	Score
Form	Poor	Moderate	Good	Very good	Specimen	21
Occurrence	Predominant	Common	Infrequent	Rare	Very Rare	9
Vigour &Vitality	Poor	Some	Good	Very good	Excellent	21
Function	Minor	Useful	Important	Significant	Major	15
Age(yr)	10yrs	20yrs	4Oyrs	8Oyrs	1OOyrs	15

Subtotal Points	81
Subtotal percentage score	0.54

Amenity

Points	3	9	15	21	27	Score
Stature m	3 to 8	9 to 14	15 to 20	21 to 26	27+	27
Visibiity km	0.5	1	2	4	8	27
Proximity	Forest	Parkland	Group10+	Group3+	Solitary	27
Role	Minor	Moderate	Important	Significant	Major	15
Climate	Minor	Moderate	Important	Significant	Major	9

Subtotal Points	105
Subtotal percentage score	0.7

Total Score Populus nigra	**186**

Annexure "B" - Evidence of G Fischer

Tree Replacement values: 628 Te Ngae Road, Rotorua

RRAL Tree Number		**3019**	Agathis australis
	Costs	Compounded costs over 45	Replacement cost
Planting cost	$60.00	$226.90	
Land rent p.a.	$8.09		
Maintenance p.a.	$25.00		
Annual cost	$33.09	$3,068.29	
Replacement cost			**$3,295.19**

RRAL Tree Number		**3021**	Fagus sylvatica purpurea
	Costs	Compounded costs over 45	Replacement cost
Planting cost	$60.00	$226.90	
Land rent	$82.86		
Maintenance	$25.00		
Annual cost	$107.86	$10,001.05	
Replacement cost			**$10,227.94**

RRAL Tree Number		**3023**	Pittosporum eugenioides
	Costs	Compounded costs over 45	Replacement cost
Planting cost	$50.00	$189.08	
Land rent	$20.72		
Maintenance	$25.00		
Annual cost	$45.72	$4,238.76	
Replacement cost			**$4,427.84**

RRAL Tree Number		**3025**	Quercus robur
	Costs	Compounded costs over 45	Replacement cost
Planting cost	$60.00	$226.90	
Land rent	$186.44		
Maintenance	$25.00		
Annual cost	$211.44	$19,604.86	
Replacement cost			**$19,831.75**

Annexure "B" - Evidence of G Fischer

RRAL Tree Number		**3027**	Eucalyptus cinerea
	Costs	Compounded costs over 45	Replacement cost
Planting cost	$60.00	$226.90	
Land rent	$517.89		
Maintenance	$25.00		
Annual cost	$542.89	$50,337.06	
Replacement cost			**$50,563.95**

RRAL Tree Number		**3029**	Pseudotsuga menziesii
	Costs	Compounded costs over 45	Replacement cost
Planting cost	$60.00	$226.90	
Land rent	$82.86		
Maintenance	$25.00		
Annual cost	$107.86	$10,001.05	
Replacement cost			**$10,227.94**

RRAL Tree Number		**3031**	Juglans ailantifolia
	Costs	Compounded costs over 45	Replacement cost
Planting cost	$60.00	$226.90	
Land rent	$291.32		
Maintenance	$25.00		
Annual cost	$316.32	$29,328.72	
Replacement cost			**$29,555.61**

RRAL Tree Number		**5327**	Cupressus spp
	Costs	Compounded costs over 45	Replacement cost
Planting cost	$60.00	$226.90	
Land rent	$46.61		
Maintenance	$25.00		
Annual cost	$71.61	$6,639.71	
Replacement cost			**$6,866.61**

Annexure "B" - Evidence of G Fischer

RRAL Tree Number		**5337**	Pseudotsuga menziesii
	Costs	Compounded costs over 45	Replacement cost
Planting cost	$60.00	$226.90	
Land rent	$63.44		
Maintenance	$25.00		
Annual cost	$88.44	$8,200.33	
Replacement cost			**$8,427.23**

RRAL Tree Number		**5339**	Populus nigra Italica
	Costs	Compounded costs over 45	Replacement cost
Planting cost	$60.00	$226.90	
Land rent	$20.72		
Maintenance	$25.00		
Annual cost	$45.72	$4,238.76	
Replacement cost			**$4,465.65**