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File Ref: 204622-799

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Dear Carolyn

Proposed Waikato District Plan - Hearing 17: Te Kowhai Airpark Zone - Existing Use Rights

INTRODUCTION

1. The section 42A Planning Report for Hearing 17: Te Kowhai Airpark Zone (“s42A report”) recommends retaining the design and mapping of the Te Kowhai Obstacle Limitation Surface (OLS) as provided for in the Operative Waikato District Plan: Waikato section (2013) (“ODP”), rather than as notified in Variation 1 to the Proposed Waikato District Plan (Stage 1) – Te Kowhai Airport Obstacle Limitation Surface (“V1”). The OLS in the ODP is based on Visual Flight Rules (flying in good weather conditions).
2. The majority of the reasons for the s42A report recommendation are due to concerns by submitters regarding the impact the more extensive V1 OLS will have on their development rights, the need for a greater number of adjacent landowners to remove or trim trees that protrude through the V1 OSL, and the associated costs.
3. In support of the recommendation, the s42A author specifically raises the question of whether the increased height of trees/vegetation as they grow would meet the test under section 10(1)(a)(ii) of being the “same or similar in character, intensity and scale”.
4. You seek advice as to the application of existing use rights on trees/vegetation. The particular issue in this case is whether any further growth in the size of trees/vegetation above the lawfully established height constitutes a change in character, intensity and scale resulting in the additional growth not being protected by existing use rights.

EXECUTIVE SUMMARY

5. For existing use rights to apply, land must first contravene a rule in an operative or proposed plan. None of the trees on submitters’ properties contravene a rule in the ODP because the

relevant OLS rules do not control the height of trees or vegetation within the OLS. Any trees or vegetation that protrude into the ODP OLS is currently a permitted activity.

6. The OLS height rules in the relevant zones in the Proposed Waikato District Plan (Stage 1) notified on 18 July 2018 (“PDP”) do control the height of vegetation within the Airport OLS. At notification, at least 42 trees protruded into the PDP OLS. The PDP OLS provisions were subsequently amended from 29 June 2020 when V1 was notified to extend the OLS overlay by 500m from the runway. V1 impacts a greater number of landowners.
7. However, the PDP OLS rules, as varied by V1, do not yet have legal effect. As such, any submitters’ trees currently protruding into the varied OLS cannot at law be in breach of the OLS rules.
8. This means the relevant date for establishing existing use rights under section 10 of the Resource Management Act 1991 (“RMA”) will be the date decisions on the OLS rules are publicly notified (due September 2021). This is when the V1 OLS rules will have legal effect and must be complied with. Any trees that protrude into the OLS at the time decisions are notified, will be protected by existing use rights because they will be lawfully established at that date.
9. Of course, trees are dynamic and will continue to grow beyond September 2021. Any increased growth in the size of trees after September 2021 that protrude into the OLS may constitute a change in character, intensity and scale. This will depend on the particular facts of each case. If a change is established, the additional height will not be protected by existing use rights and the landowner(s) will be required to trim the trees back to the height that existed at September 2021 (being the lawfully established height).
10. The onus of establishing any increased growth in the size of trees is protected by existing use rights, falls on the landowners. There must be a proper evidential basis to show the effects of the increased height on the OLS are the same or similar in character, intensity or scale than the effects at the date of decisions.
11. This creates uncertainty for landowners wishing to rely on existing use rights for growth beyond the lawfully established date. Adding to the already uncertain nature of existing use rights, we note the duty of landowners to comply with section 17 RMA applies, regardless of whether their use is in accordance with existing use rights under section 10.
12. Landowners are required to ensure their use of the land complies with the rules of both the ODP and rules with legal effect under the PDP. This means, in the absence of any agreement with the airport operator, the landowners will be responsible for any trimming of the trees (that are not protected by existing use rights) to comply with the OLS height limit, or the cost of obtaining a resource consent to contravene the OLS height.

LEGAL FRAMEWORK

Section 10 Existing Use Rights

13. Section 10(1) RMA expressly allows land to be used in a manner that contravenes a rule in a district plan or proposed district plan if two conditions are met:

- (a) the use was lawfully established before the rule became operative or the proposed plan was notified; and
- (b) the effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified.

Do the trees contravene a rule in an operative or proposed plan?

14. For existing use rights to apply, land must first contravene a rule in an operative district plan or a proposed plan. None of the trees on submitters' properties contravene a rule in the ODP because the OLS rule in that plan (25.49.1) does not control the height of trees or vegetation within the OLS. The only restriction within the OLS in the ODP relates to building or structures. Therefore, under the ODP, vegetation and trees can intrude into the OLS as a permitted activity.
15. We now turn to consider whether submitter trees contravene a rule in a proposed plan. The PDP was notified on 18 July 2018. Unlike the ODP, the OLS height rules in the relevant PDP zones do control the height of vegetation within the Airport OLS. The s42A report states at paragraph 355(c) that a survey of only one direction of the approach and take off surface in April 2018 showed 42 trees intruded the PDP OLS (by between 0.4m and 24.2m), in breach of the then yet to be notified OLS rule.
16. However, V1 to the PDP was subsequently notified on 29 June 2020. A "proposed plan" is defined in s43AAC RMA to include a variation to a proposed plan. Clause 16B(2) of Schedule 1 RMA explains the effect of V1 on the PDP provisions relating to the OLS. It provides that from the date of notification of a variation, the proposed plan shall have effect as if it had been so varied. This means the PDP OLS provisions notified in 2018 are amended by the V1 OLS provisions from 29 June 2020.
17. V1 amends the PDP as it relates to the OLS in two ways:
 - (a) Replaces the maps showing the Te Kowhai Airport OLS overlay with new maps showing the overlay extending out to a distance of 2500m from the runway (being an additional 500m than shown in the PDP planning maps); and
 - (b) Amends text in Appendix 9 to correct errors and to be consistent with the new planning maps.
18. Accordingly, the PDP OLS provisions touched by V1 no longer exist (being the 2018 notified planning maps 25, 26 and 26.2, and some of the notified text in Appendix 9).
19. V1 did not amend the OLS height rule in the relevant PDP zones controlling the height of buildings, structures or vegetation within an OLS. The OLS height rule in the PDP does not prescribe a height limit. Instead, the rules refer to the Airport OLS "as shown on the planning maps". As mentioned, the planning maps as they relate to Te Kowhai have been amended by V1.
20. Despite notification of both the PDP and V1, the legal position is that, at the present time, no submitters' trees can be in breach of the PDP/V1 OLS rules, even if the trees physically

intrude into the varied OLS. This is because pursuant to s86B RMA, a rule in a proposed plan has legal effect only once decisions relating to the rule is made and publicly notified. Pending a rule having legal effect, s86G provides that it must be ignored.

21. Therefore, due to the combined operation of sections 86B and 86G, a rule without legal effect cannot be contravened. As such submitters need not (and at law cannot) rely on existing uses rights until decisions are released.
22. This means the relevant date for assessment of existing use rights is the date decisions on the OLS are publicly notified (due September 2021). From the date of notification, the OLS rules and associated planning maps have legal effect. Accordingly, any trees that protrude into the OLS at that time will contravene the rules. However, such contraventions will be protected by existing use rights at that date as the size/height of the trees will be lawfully established. This is because there are no rules in the ODP controlling trees or vegetation within the OLS.
23. In summary, the occupation of land by trees cannot currently contravene the OLS rules in the PDP, as varied by V1, because those rules do not yet have legal effect. The rules will only have legal effect once decisions on them are publicly notified. From that date, the size/height of trees are lawfully established. Any protrusion into the OLS at the date of decisions will be protected by existing use rights.
24. Given the dynamic nature of living vegetation, the critical issue that will arise in the future is whether any increased growth in the size of trees beyond what exists at the decision date (being the lawfully established date) will be protected by existing use rights?

Increased Tree Height – Same or Similar in Character Intensity or Scale

25. We have found one decision where an increase of the growth of trees in the context of section 10 RMA has been considered by the Court. This is a 2009 decision of the Environment Court in *Rotorua Regional Airport Limited v Fischer*¹. This decision concerned an application by the Airport Company for an enforcement order against Mr Fischer, directing him to trim trees on his property located 1km from the Rotorua Airport to comply with the OLS. Mr Fischer did not deny the trees intruded into the OLS but argued the trees enjoyed existing use rights under section 10 (or section 176 as the Airport was designated in the relevant plan).
26. Whilst the decision makes findings on existing use rights under sections 10 and 176, most of the analysis relates to the provision of existing use rights for designations under what is now section 176(1)(b)(iii). That section prevents a person from doing anything in relation to land subject to a designation that would prevent or hinder a public work or project including “changing the character, intensity or scale of the use of the land.”
27. The Court found:
 - (a) That at the time the designation was notified in 2005, the Fischer property largely complied with the existing OLS at around 20m-22m;

¹A113/2009, Judge JA Smith, 9 November 2009

- (b) Any further growth of trees above the height after the NOR for designation was issued (2005) did not have existing use rights;
- (c) The increased occupation represented a change in the intensity or scale of the use of the land, albeit gradual and incremental, in terms of what is now section 176(1)(b)(iii)².
28. The Court did not specify the extent of the increased growth as there was no reliable evidence before it. The Court noted that some of the trees would require trims of less than 1.3m. The Court was of the view “any” increase in height, regardless of magnitude, constituted a “change” in terms of section 176.
29. The decision makes it clear that the Court was not entirely comfortable with the concept of growth of trees representing a change in character, intensity and scale. The Court stated:
- [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?
30. The Court ultimately decided that it was not necessary to determine the issue finally and instead proceeded on the assumption that:
- [77]...**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.** (Emphasis added)
31. Whilst the Court proceeded on the basis that the natural growth in the size of a tree can be a change in character, intensity and scale under both section 10 and section 176, the decision does not analyse the subtle differences in text between the two sections. These are set out below:
- Section 10(1)(a)(ii)**
the *effects of the use* are the *same or similar* in character, intensity, and scale...
- section 176(1)(b)(iii)**
changing the character, intensity, or scale of *the use of the land*.
32. In terms of the differences in text, section 10 refers to the effects of the use, whereas section 176 refers to the use of the land (not the effects). Further, section 10 uses the words “same or similar” whereas section 176 uses the word “changing”. In our view the inclusion of the word “similar” in section 10 introduces a degree of tolerance. The ordinary dictionary definition of “similar” means:
- “having a resemblance in appearance, character or quantity, without being identical.”

² Ibid at [66], [74] and [75].

33. By contrast, the word “same” means that two (or more) things are identical. The character and scale of a tree will not be the same (identical) if after becoming lawfully established it increases its size. It may however still be similar.
34. For any increased growth in the size of a tree (beyond what will be lawfully established at the time of decisions) to be protected by existing use rights, the effects of the occupation of land by trees (being the use) must be the same or similar in character, intensity or scale to those which existed prior to the decision date.
35. In the context of the OLS for the Te Kowhai Airport, the effects of the occupation of land by trees relates to ensuring a safe flight path for flying aircraft. Other general effects relate to amenity and ecological values. Whether the effects on airport safety are the same or similar as a result of the natural growth in the size of a tree is a question of fact and degree and depends on the particular location of the tree within the OLS. For example, an increase in height of 1m on a tree in one location within the OLS may impact on flight safety, whereas a 10m height growth on a tree in another location within the OLS may not.
36. Therefore, while the Court in Fischer indicated that the growth can be a change in character, intensity and scale, this will depend on the particular facts in each case.
37. The Court in Fischer reserved the question about tree growth for proper argument in another case.³ We have not found another case addressing this particular issue.
38. The only other relevant decision we have found concerning trees in the context of existing use rights (as opposed to production forestry cases) is the Environment Court’s decision in *Auckland Council v Shepherd*⁴ which was delivered some 13 months after the Fischer decision.
39. The Shepherd decision also concerned an application for enforcement orders requiring the Shepherds to reduce the height of trees on their land to comply with the Airfield Height Restriction (AHR) in the Rodney District Council Plan. The issue of existing use rights was critical to the proceeding. The parties had agreed that the crucial time for considering existing use rights was the point at which the AHR rules were first notified (November 2000).
40. It was common ground that, as at November 2000, a group of Willow trees protruded into the then proposed AHRs airspace to some extent. The Shepherds argued the trees were 8m-9m high and therefore were protected by existing use rights to the extent of that height as at November 2000. The Council acknowledged that to the extent they protruded at that time, existing use rights would have arisen.
41. However, the evidence was that over the ten years since 2000 the Shepherds had consented to the Airfield trimming the trees a number of times to a height of 4m to comply with the AHR rule. As and when the trees grew to the point of non-compliance, they were trimmed again. In relation to this, the Court found:

[19]....Plainly, the intention, and the outcome, was to cease the *use* of the non-compliant height while still, to the degree possible, retaining the advantages of the trees for the property. The only sensible conclusion that can be drawn is that,

³ Ibid at [78].

⁴ [2010] NZEnvC 423 (J Thompson, 15 December 2010)

in terms of s10(2), that non-compliant *use* was discontinued for a continuous period for more than 12 months.

SUMMARY OF LEGAL POSITION ARISING FROM THE CASE LAW

42. In light of the above case law we summarise the legal position arising in respect of submitter trees as follows:
- (a) The relevant date for establishing existing use rights will be the date decisions on the OLS rules are publicly notified. For convenience we will define the date of decision as “September 2021”. Until that time, the OLS rules in the PDP, as varied by V1, do not have legal effect. Landowners cannot contravene rules that do not have legal effect.
 - (b) The size of trees on submitters’ properties will be lawfully established as at September 2021. This is because there are no rules in the ODP controlling trees or vegetation within the OLS. They are permitted activities.
 - (c) If the height of a tree at September 2021 does not contravene the OLS, the tree is a permitted activity.
 - (d) Any trees that protrude into the OLS at September 2021 will be protected by existing use rights as the trees will be lawfully established at that date.
 - (e) Any increased growth in the size of trees after September 2021 that protrudes (for the first time) or further protrudes into the OLS may constitute a change in character, intensity and scale. If this is established on the particular facts in each case, the additional height will not be protected by existing use rights. The landowners may be required to trim the trees back to the height that existed at September 2021 (being the lawfully established height).
 - (f) If landowners trim their trees post September 2021 to comply with the OLS height rule (whether by consent or otherwise), rather than any higher height that lawfully existed at September 2021, those existing use rights will be lost.
 - (g) The onus of establishing any increased growth in the size of trees post September 2021 is protected by existing use rights (on the basis the effects are the same or similar in character, intensity or scale) falls on the landowners and may not be straight forward. Many applications seeking to establish existing use rights fail because the applicants do not provide a proper evidential basis for the comparative analysis of the effects. In these situations the Court is hamstrung to assist, even though the Court often expresses sympathy for the unsuccessful applicant’s position.⁵
 - (h) The difficulty in establishing existing use rights can, to some extent, be reduced in the present case because the date for assessment of existing use rights has not yet crystallised. Had the relevant date been notification of the PDP in July 2018, we suspect many submitters would not be able to provide reliable evidence as to the height of their trees at that date. Most landowners do not undertake surveys of their trees, let alone undertake a survey at the relevant date. Whilst Council

⁵ Aokautere Land Company v Palmerston North City Council, A077/94, Planning Tribunal.

undertook a survey prior to notification of the PDP, it was limited to only the western approach and take off surface. However, we acknowledge having to survey the height of trees immediately prior to September 2021, in order to increase landowners' chances of proving existing use rights in the future, is a costly exercise and is unlikely to be taken up by landowners.

43. On balance, there is uncertainty for landowners wishing to rely on existing use rights for trees/vegetation that do not maintain a status quo existence, but continue to grow beyond the lawfully established date.
44. Furthermore, it is important to note that any reliance on existing use rights does not remove landowners' obligation to comply with section 17 RMA. This section imposes a general duty on every person to avoid, remedy, or mitigate any adverse effect on the environment, whether or not the activity is carried out in accordance with existing use rights under section 10, a rule, or a resource consent (a section 139A existing use certificate is deemed to be a resource consent). The duty under section 17 is not, of itself, enforceable. However, an enforcement order or abatement notice under Part 12 could be used to require landowners to trim any tree that is, or is likely to be dangerous, or if it is necessary to avoid, remedy or mitigate any actual or likely adverse effect on the environment (which includes the airpark).

RESPONSIBILITY AND COSTS OF COMPLYING WITH OLS HEIGHT

45. The section 42A report identifies⁶ the cost of compliance as a reason for recommending the ODP OLS. The author states the cost "would fall on landowners/property owners and not the aerodrome operator" and would "create an unfair financial burden on landowners." The section 42A report also identifies the cost to the property owner in applying for and obtaining an existing use certificate or resource consent to intrude into the OSL.⁷
46. These issues have also been raised by a number of submitters who seek clarification as to the responsibility for compliance, including costs.
47. It is the landowners' responsibility to ensure the use of their land complies with the rules in both the ODP and rules with legal effect under the PDP. We are not aware of any rule being imposed in a district plan requiring the airport operator to pay for the trimming of trees (not protected by existing use rights), without the consent of the airport company. In our view, a rule cannot be imposed without NZTE's consent. The Court has approved it in the form of an Advice Note with the airport company's consent. In *Shepherd v Rotorua District Council*⁸ the Court dealt with an appeal against the OLS provisions lodged by the Shepherds. The Court concluded the Council proposed provisions were the appropriate planning outcome and confirmed them subject to adding an Advice Note which read:

"Where the owners consent, trimming of trees required to comply with the AHR will be undertaken at the instruction of and paid for by the adjacent airfield."

48. As mentioned, the Advice Note reflected an offer by the airfield owners to meet those costs, to avoid the direct cost burden of trimming falling on the Shepherds. NZTE has not, as far as we are aware, made any offer to pay or contribute towards the cost of any trimming. NZTE may wish to comment on this at the hearing.

⁶ At paragraph 355(d).

⁷ At paragraph 355(h).

⁸ Decision A24/2009.

49. The cost of compliance and airport safety are both relevant factors for the Hearing Panel to consider. In deciding upon the most appropriate OLS rules, the Hearing Panel must have regard to the actual or potential effect on the environment of activities, including any adverse effect. Here there is a tension between the adverse effects on the landowners and the adverse effects of trees hindering a safe flight path for aircraft. The OLS rule to be decided upon must also be prepared in accordance with the provisions of Part 2 RMA which includes enabling people in communities to provide for their social, economic and cultural wellbeing and for their health and safety.
50. The Hearing Panel will need to weigh these competing considerations in determining whether the ODP OLS (as recommended by the section 42A report author), or the PDP OLS, as varied by V1 (as requested by NZTE), best satisfies a section 32AA evaluation.

CONCLUSION

51. We recommend this opinion be attached to your s42 Rebuttal evidence for Hearing 17 as it will assist both submitters and the Hearing Panel to understand the application of existing use rights in relation to trees/vegetation. Furthermore, it is evident from the submitter evidence that a number of submitters are of the incorrect belief that existing use rights crystallised on notification of the PDP. The date will crystallise upon notification of decision on the PDP OLS rules.

Yours faithfully
TOMPKINS WAKE



Bridget Parham
Partner