

## **RESOURCE CONSENTS HEARINGS PANEL**

**MINUTES:** of a meeting of the Resource Consents Hearings Panel which commenced at 9.00 a.m. in the Council Chamber, Centreway Road, Orewa on Monday, 16 November 2009.

**PRESENT:** Chair Harry Bhana

**IN ATTENDANCE:**

Reporting Planner	Anne Hessel
Team Leader	Denise Grandfield
Open Space Planner	Leo Jew
Ecologist	Rue Statham
Democracy Services Officer	Raewyn Morrison

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*Note: The applicant had requested the previous week that the hearing be conducted by an Independent Commissioner as permitted under the new rules of the Resource Management (Simplifying and Streamlining) Amendment Act 2009. Commissioner Bhana heard the application on his own. Crs Turner and Weld, originally stated as being part of the Panel on the agenda, were not present.*

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**837/11/09**                    **APOLOGIES**  
**AGENDA ITEM NO.**      1

There were no apologies.

**838/11/09**                    **A NOTIFIED RESOURCE CONSENT APPLICATION UNDER SECTION  
88 OF THE RESOURCE MANAGEMENT ACT 1991**

**AN APPLICATION FOR CONSENT TO REMOVE TWO TREES THAT  
ARE PROTECTED UNDER RULE 18.9.3 OF THE RODNEY DISTRICT  
PLAN - OPERATIVE IN PART. THERE ARE AS FOLLOWS:**

- 1. A JACARANDA TREE (JACARANDA MIMOSIFOLIA) OF MORE  
THAN 6 METRES IN HEIGHT**
- 2. A RIMU TREE (DACRYDIUM CUPRESSINUM) OF MORE THAN 6  
METRES IN HEIGHT**

Address: 24-26 Neville Street (5 & 3 Mill Lane), Warkworth

**APPLICANT: PROGRESSIVE ENTERPRISES LIMITED**

**FILE REF**                    **RMA 55383**  
**WARD**                        Northern  
**AGENDA ITEM NO.**      2

The applicant seeks resource consent to remove two trees, a Jacaranda and a Rimu tree, both over 6 metres in height. The cover letter accompanying the application was prepared by M. J. Foster of Zomac Planning Solutions (dated 30 June 2009), and stated that "*Irrespective of the final form of the land use/building development on the site of the application, consent to removal of the trees needs to be obtained.*" Further emails by Mr Foster urged the Council to treat the tree removal as a 'stand-alone' application. Progressive Enterprises recently lodged a resource consent application with Rodney District Council for a 'Countdown' supermarket on the site. The tree removal also forms part of the recently lodged consent for the supermarket which will be heard by the Environment Court under the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

The applicant's representatives, Allison Arthur-Young (Counsel), Mike Foster (Planning Consultant, Zomac Planning Solutions), Stephen Bishop (Arborist), and Brady Nixon (from 9.10 a.m. on behalf of Progressive Enterprises), present.

Submitter: Hueline Massey of The Tree Council, present.

Observing: Council Planner, Fiona McLeod.

9.03 a.m. The Chairperson opened the hearing and outlined the meeting procedure.

The Chairperson announced that he had undertaken a site visit on Friday, 13 November 2009.

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Allison Arthur-Young distributed and read her written submission.

Ms Arthur-Young outlined the background in relation to the site and the application. She said that the Council's approach to processing this very basic tree removal consent was symptomatic of its now entrenched opposition to Progressive's proposals for the site. In any other case, this very straightforward tree removal application would have been processed on a non-notified basis. She noted an instance for a nearby development that had involved a greater number of trees, the majority of which were native specimens, that application had been processed on a non-notified basis.

Ms Arthur-Young said that the Council had requested that the tree removal activity be considered as part of Progressive's supermarket proposal, which the Council had now agreed was appropriate for direct referral to the Environment Court. While that could occur, there were several reasons why the application should be progressed now:

- Progressive were entitled to have its tree removal application heard and determined on its own account. It did not have to be tied to any development proposal.
- It was more efficient as a hearing slot was allocated and Progressive had already begun preparing for the hearing accordingly.
- Any development of the site would require the removal of the trees if the Council's urban form objectives were to be met. The mitigation required to address the (minor) loss of the removal of the trees could be set now, so that Progressive (or any developer) could advance development of the site knowing what "base" mitigation was required.
- It was common for minor consents to be obtained separately from wider proposals. For example, earthworks consents were routinely granted to authorise levelling of sites, when the final form of development may be unconsented, or even unknown.

Ms Arthur-Young addressed the scope of the submissions, noting that only one submission in opposition had been received (The Tree Council) and that no person in Neville Street, or indeed Warkworth, had submitted on the application. She commented on the statutory framework, the relevant plan provisions, other matters and Part II matters. Ms Arthur-Young also commented on the planning officer's report which she considered did not contain any robust analysis of the factors which contributed to the amenity of the neighbourhood in terms of the site itself. She said that the planner's report did not assess the surrounding streetscape, the view shafts of the trees, or the other trees present in the surrounding area.

Ms Arthur-Young said that she had a statement of evidence from Mr Karl Cooper (who was not in attendance) and that she proposed to outline his key points. She said that Mr Cooper considered the Rimu to be not deserving of retention and that the applicant proposed mitigation planting of three trees on Council land on Neville Street with the condition proposed by Mr Foster in his evidence. In conclusion, Ms Arthur-Young said that granting the approval sought, subject to the conditions proposed by Progressive, would best promote the sustainable management of natural and physical resources and that consent should be granted on this basis.

Stephen Bishop distributed and read written evidence.

Mr Bishop presented evidence in regard to the quality and health of the two trees subject to the application; the Jacaranda and Rimu. Mr Bishop said that the overall effects of the tree removal would be no more than minor and that further, any effects would be more than adequately mitigated by the proposed planting of three specimen trees on Council land on Neville Street. He said that examples of suitable specimens included: Wych Elm, Silver Birch, Sweetgum, Titoki, Lemonwood and Lacebark. Any species planted should be a minimum of PB 95 size and be accompanied by appropriate care requirements, e.g. for a two year period to ensure establishment of the trees.

In his concluding remarks Mr Bishop said that the planner's report accorded largely with his assessment that the removal of the trees was unlikely to impact on erosion, instability or flooding, or affect habitats. Mr Bishop said that he had read the matters addressed in Mr Cooper's evidence in respect to the contribution of the trees to streetscape/amenity and that he supported the conclusions of Mr Cooper. The proposal required the removal of two generally protected trees. The identified actual and potential environmental effects of the proposal he considered to be no more than minor, and the proposed revegetation measures provided suitable mitigation.

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In response to a question regarding the life expectancy of the Rimu tree, Mr Bishop said that within 10 years he expected the tree would become a problem.

Ms Arthur-Young distributed a written statement of evidence from Karl Cooper, Urban Designer. She highlighted sections of that statement.

Ms Arthur-Young highlighted the impact and value of the trees on the streetscape noting that the vision proposed for this area of Neville Street termed "the Core Expansion Policy Area" was an unbroken, continuous built frontage at the back of pavement building line. This vision did not allow for the retention of trees within the site adjacent to the street frontage, but would relocate any landscaping amenity, particularly trees, to the street itself. She noted that the planner's report had stated that the trees contributed to the overall aesthetics of the area providing landmark significance. In Mr Cooper's opinion the trees were not of landmark significance. While the location of the trees was relevant, the trees themselves were the subject of the assessment not the location.

In concluding remarks, Ms Arthur-Young said that Mr Cooper believed that the Jacaranda and Rimu were inappropriate streetscape trees. Furthermore, these particular trees were both unremarkable and consequently instantly forgettable. In his opinion, from an urban form perspective, both were straggly dishevelled specimens (the Rimu because of its poor condition) that provided poor visual amenity. Ms Arthur-Young said that Mr Cooper in his evidence stated the Council, in his opinion, had failed to provide an experienced expert opinion (for example from a qualified urban designer) on the streetscape in which these trees were located, nor the effect that the removal of these trees would have on that streetscape amenity. This was particularly unfortunate given the planning report for recommending refusal of the application hinged upon this simple matter. Furthermore, it was obviously his opinion that the Council had up until now seriously misjudged the amenity value of these trees which he considered to be poor. It was thus his recommendation to the Council that the application to remove these trees be approved to allow for the realisation of the vision they themselves had for this area.

In response to questions from the Independent Commissioner Ms Arthur-Young said that Mr Cooper's point was that the Council's planner placed significant weight on urban amenity as opposed to urban design of streetscape. He considered that the Council should have obtained an assessment on urban design of the streetscape and an assessment from a landscape architect.

Mike Foster distributed and read written evidence.

In his evidence Mr Foster described the background to the application and the site. He undertook a comprehensive assessment of the relevant planning provisions and commented on the findings in the officer's report. Mr Foster discussed the mitigation proposed and commented on the submission filed in opposition to the application. He said notwithstanding that the applicant's proposed mixed-use retail development would necessitate the removal of the two trees the subject of this hearing, the applicant elected to seek this separate consent for four key reasons. One reason was that the removal of the trees was a separate activity from the supermarket proposal or any other proposal. It was something that did not depend on any particular form of development. Another reason was that it was quite clear that the urban tree provisions of the Amendment Act would become law thereby meaning that as from 1 January 2012 the applicant could remove the trees as of right. The trees were not scheduled trees, nor had it been suggested by any party that they were worth scheduling.

Mr Foster said that the relevant objectives and policies, as set out in the District Plan and Variation 125, were as set out in the officer's report at 9.6. and 9.9. However, unlike the officer, he did not consider the tree removal application was contrary to any or all of these objectives. He believed that insufficient consideration had been given to mitigation measures that would be offered by the applicant or required (even requested) by the Council.

Mr Foster noted that there was only one submission in opposition. He considered that belied the statement in the officer's planning report that these trees were important and valued by the community. He would have expected that many more submissions would have been received if that were the case. He also noted that the submission in opposition did not oppose the removal of the Rimu. In his view the concern of the submitter could be met by appropriate mitigation measures which could be enforced through a condition of the kind as earlier described.

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In conclusion Mr Foster said that overall he believed that the planning officer's recommendations were fundamentally flawed and short sighted. Consent could, and should, be granted subject to the mitigation conditions he recommended.

In response to questions from the Independent Commissioner, Mr Foster said that:

- With regard to mitigation measures, it was most unlikely the site would be developed in part. The applicant's site was sufficiently contiguous and any development would be done on a comprehensive basis. It was extremely unlikely that a supermarket would not be built on the site. The fine grained retail proposed on Neville Street automatically would take out the trees.
- The Variation 125 decision was under appeal by three 3 appellants. Progressive had appealed one of the criteria. There was also an appeal from Foodstuffs who were seeking the removal of fine grained retail that applied to their site. Perrendale Developments also opposed the Commissioners' decision and sought reinstatement of the non complying activity status for large stores etc.
- Discussions were ongoing with the Council, and between Progressive and Foodstuffs. It was quite likely an agreement would be reached with the Council. However, he believed the Perrendale opposition was trade competition based and Progressive might apply for a motion to strike.
- Mr Foster highlighted the criteria in Variation 125 which he believed to be of relevance. He referred the Commissioner to 9.8.1.2.5, (regarding scale and character of buildings), 9.8.1.3 (service provisions) and 9.12.5.2. which was one of the key criteria in respect to street frontage and pedestrian cover.

Commissioner Bhana said that he had been one of the commissioners who heard the Perrendale Development application a number of years ago. He declared that he did not consider this to be a conflict of interest with this application.

10.28 a.m. - 10.45 a.m. Morning tea adjournment.

In response to a further question, Mr Foster said that the Council could advise where the mitigation planting could be located.

Mr Bishop noted that underground utilities needed to be considered but he believed it was feasible to place street trees in that location.

Ms Arthur-Young introduced Mr Brady Nixon from Progressive Enterprises. She said that Mr Nixon was available to answer questions if required.

Submitter:

Hueline Massey from The Tree Council gave oral evidence and highlighted points from her original submission.

Ms Massey referred to the floriferous nature of the Jacaranda tree. She said that the beauty of the tree in flower made a significant contribution for about 6-8 weeks to the amenity of the area at that time. Ms Massey said that The Tree Council was an organisation that was concerned about loss of mature trees in the urban environment, whether this was suburban or in built up city zones.

Ms Massey noted that the Jacaranda was asymmetrical because it was growing against a building. She said that she believed the tree would not interfere with the supermarket building. She said that it had been suggested at a recent public meeting that the Neville Street service entry might not be necessary. She said that when applying for the removal of any tree the applicant should be saying why removal was required and she noted that this was a stand-alone application. Ms Massey said that the building's elevation on Neville Street was fairly low level, which was good to see, so a tree of 6 - 8m in height was relevant to frontage in terms of size and aspect; it was not out of place. She noted that the Oak trees opposite the Bank of New Zealand building on Neville Street were now scheduled trees. The Tree Council was not interested in trans-location and did not believe that was viable. The Tree Council also did not consider Lemonwood or Lacebark to be trees, they were shrubs. With regard to comments about the available rooting area for the Jacaranda, Ms Massey said that there

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was a large enough area for the tree to grow, especially when compared with the amount of room trees had been given in the recent planting within pavements in the Warkworth Town area.

Ms Massey noted that some of the mitigation species suggested did well in the South Island but not in the North Island. She reiterated that the tree removal should be for a very good pragmatic reason. She considered that consultants should have a wider view and a more personal view rather than just the view of the applicant and she wondered whether Mr Cooper had seen the Jacaranda tree in flower. With regard to comments by Mr Foster about rational development, Ms Massey wondered whether the tree could be incorporated into the design of the building. She said that Jacaranda trees were popular trees in parks and reserves and that there was no reason why they should not be more popular in urban areas as they offered shade and were pleasant to sit under, with an open form. Referring to comments about the trees being able to be removed in 2012, Ms Massey said that the purpose of the Act was so councils could put in alternative methods of tree protection. She said that if the attitude about removal as expressed became dominant the Minister (Parliament) may as well have given instant implementation to tree removal. She said that councils had 2 years to give some level of protection that plans otherwise gave. Ms Massey said that if the Jacaranda could be retained, it should be. She said that as a representative of The Tree Council she was speaking for a large group of people, including Rodney residents and she noted the apathy of the general public; they weren't all that proactive in submitting to resource consent applications. With regard to mitigation, Ms Massey said that subject to the type of trees, 3 replacement trees would be acceptable.

In response to questions Ms Massey said that:

- The willingness of Progressive Enterprises to not remove the tree until such time as consent was granted for the redevelopment of the site went some way to addressing her concerns.
- With regard to the Rimu tree and its assessment, when she inspected the tree she was not happy about its appearance but an arborist could do repairs and maintenance on the tree. The Rimu was on a more difficult position on the site and she believed it would always have a compromised life.
- If the Jacaranda was retained it would be more exposed than it was currently; exposure would result with removal of the little building. The motel removal wouldn't affect the tree quite so much as that was the warmer side. The proposed building was one and a half storeys and the height would not cast a great deal of shade. Certainly the tree would be cooler than it currently was but it should still give a good show when it flowered. The Jacaranda tree was a good tree and could withstand certain changes to its environment.

Council Officers:

Rue Statham

Mr Statham outlined his qualifications which included his qualifying as an arborist about 20 years ago. Mr Statham said that he was also a qualified ecologist. He said that in the medium to long term the outlook for the Rimu tree was pretty dire.

Leo Jew

Mr Jew outlined his qualifications. He said that he was a qualified urban designer and architect and he had also completed a post graduate degree in landscape architecture. With regard to urban form, Mr Jew said that what the Council was trying to achieve was a sense of continuity along the street frontage of Neville Street rather than continuous development. He noted that the proposed supermarket would require delivery access. In regard to the mitigation proposed, Mr Jew said that he had difficulty with assessing this without a proposal for the full development of the site. He considered the mitigation tree planting proposed on public land to be unusual; there were issues regarding the location of services, and the relationship of the planting to the development behind it. Mr Jew said that he considered the mitigation planting should be to an appropriate standard.

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Anne Hessel

Ms Hessel said that the Council's understanding was that the removal of the Jacaranda and Rimu was included in the application to be heard by the Environment Court and the application had been notified as such. With regard to comments about the Butterworth case, Ms Hessel said that she thought there was a difference between that situation and this; she believed the Jacaranda and Rimu trees benefited the amenity of the area.

Referring to paragraph 40 of the legal submissions and the criticism that in her report there was a lack of acknowledgement that within the explanations and reasons in the plan there was an expectation that trees may need to be removed, Ms Hessel said that she was not indicating the site should be a tree sanctuary and in fact on page 11 of the agenda her report acknowledged that zoning was very permissive in respect of development. Therefore in some circumstances trees may need to be removed to realise the potential and purpose of the zone. Ms Hessel said she felt her arguments were not unbalanced.

Referring to Mr Foster's evidence, Ms Hessel said that the removal of the apple tree and the liquid amber tree had been treated on a non notified basis because there was clearly little amenity loss in removing those trees due to their location (one was located behind the bowling club). With regard to the 2009 Amendment to the Resource Management Act, Ms Hessel said that The Tree Council made a good point; councils had 2 years in which to schedule trees and establish criteria in respect of scheduling trees. She said that she would be cautious about putting too much weight on comments that the trees could be removed as of right in 2012. Ms Hessel noted that the application for the tree removal was a stand-alone application whereas the mitigation proposed related to the supermarket proposal.

She said that she stood by her recommendation to refuse consent. She said that she had taken into account Mr Statham's comments in regard to the Rimu. She noted that the trees were located on the main thoroughfare into the Warkworth Township and she considered the mitigation measures offered to be an improvement on the original application. Nevertheless she believed the application was somewhat unusual and that the mitigation offered for the removal of the trees didn't address the full streetscape and the proposed building behind it. She thought that the applicant's comments that any commercial development on the site would necessitate removal of trees to be a sweeping statement and she was of the opinion that that was not necessarily the case.

In response to questions Ms Hessel said that it was difficult to look at the assessment criteria without a development proposal. With regard to the Rimu tree and whether she thought there was reason to justify its removal, Ms Hessel said that the information given in the application had been limited. She considered that a condition would have to be carefully worded regarding the trees not being removed until redevelopment of the site was approved.

Ms Arthur-Young presented the right of reply:

Ms Arthur-Young said that The Tree Council comment about the Jacaranda being able to be accommodated in the supermarket development was incorrect; based on the current design of the building the tree would be inside the building and it could not be accommodated. She said that the application to remove the trees was not tied to the supermarket development and that it didn't have to be. She said that she would have serious concerns about the retention of the Jacaranda tree as with the removal of the surrounding buildings it would be exposed to a different wind loading which it might not be able to adapt to. She also referred to the issue of the crown being asymmetrical.

With regard to comments by Council officers, Ms Arthur-Young said that she had heard that Mr Statham agreed with Mr Bishop's assessment in regard to the Rimu tree, nevertheless, in his written email to Ms Hessel Mr Statham had referred to the Rimu as significant.

Ms Arthur-Young commented on continuity and the active edge to the street space. With regard to comments from Council officers about there being no real assessment of the mitigation proposed, Ms Arthur-Young said that she thought it had been comprehensive and that this should have been more robustly considered by Council officers.

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She considered the Council planner's stance to be conflicting in respect of the apple tree and liquid amber tree; she noted their removal hadn't required a development plan whereas much emphasis had been placed on the lack of a development plan for the removal of the Jacaranda and Rimu trees.

Ms Arthur-Young said that the applicant had carefully thought about mitigation for the removal of two insignificant trees, one of which was in a state of decline and the other which was not in good shape, and considered it best to proceed with their removal as an entirely separate application. She said that the applicant was willing to offer a condition to not to remove the trees until consent was given for development of the site. Ms Arthur-Young confirmed that the tree removal was included in the application for the supermarket before the Environment Court; the inclusion of the trees in the application had been purely due to an abundance of caution by Progressive Enterprises.

On behalf of the applicant, Ms Arthur-Young expressed a lack of confidence in the process thus far as having been fair and reasonable.

In response to a question from the Commissioner, Ms Arthur-Young said that if consent was granted the wording of the condition for mitigation planting would need to reflect that the landscaping would be completed as the last stage of the supermarket development once all the paving had been finished.

11.56 a.m. The Chairperson closed the hearing.

The Chairperson subsequently resolved:

**Bhana**

#### **DECISION OF THE RODNEY DISTRICT COUNCIL**

**That pursuant to Sections 104 and 104C, of the Resource Management Act 1991, the notified resource consent application by Progressive Enterprises Limited to remove a Jacaranda tree (*Jacaranda mimosifolia*) and a Rimu tree (*Dacrydium cupressinum*) from a site at 24-26 Neville Street Warkworth, legally described as Lot 1 & 2 DP 36090 is refused consent for the following reasons:**

#### **REASONS FOR DECISION**

1. The proposed removal of the two trees would have adverse effects on the amenity of this part of Warkworth Town Centre that are more than minor.
2. The mitigation proposed by the applicant is uncertain as to its efficacy and ability to provide an appropriate compensatory contribution to balance the loss in amenity values.
3. The applicant did not provide adequate justification for removal of these protected trees principally because it wished to have the tree removal considered separately from its application for the re-development of the site.
4. This requirement for a separate consideration of the tree removal also meant that any mitigation by way of on-site replacement planting within an overall landscape concept for the re-development was not able to be assessed.
5. The grant of consent to the application in the absence of satisfactory mitigation would be contrary to the objectives and policies of the Partly Operative District Plan and to objectives and policies of Proposed Plan Change 110/Variation 125.
6. The applicant has accepted that the removal of the trees and the implementation of mitigation planting should be correlated with the re-development of the site. The applicant has included the application for tree removal within an application to redevelop the site to provide a supermarket and other retail shops which has been notified and is to be referred to the

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Environment Court. Having regard to these matters, I conclude that the assessment of the tree removal, and any appropriate mitigation within the more comprehensive and integrated context and process that the referred application would provide, is more consistent with the purpose and principles of the Resource Management Act 1991 than the stand alone process advanced by the applicant.

#### **THE RELEVANT STATUTORY PROVISIONS THAT WERE CONSIDERED:**

Overall this application was considered to be a restricted discretionary activity and was considered in terms of sections 104, 104C and Part 2 of the Act.

#### **OTHER RELEVANT PROVISIONS THAT WERE CONSIDERED:**

The provisions of the following documents were considered by the Commissioner in reaching this decision:

##### **National Policy Statement Provisions**

None applicable

##### **New Zealand Coastal Policy Statement Provisions**

Not relevant

##### **Auckland Regional Policy Statement Provisions**

Objective 2.5.1 (1)

##### **Proposed Regional Policy Statements Provisions**

Strategic Objective 2.6.1 (3), (5), (6), (11), & (13)  
Policies 2.6.5 (8) & (9)

##### **Auckland Regional Plan: Coastal Provision**

Not applicable

##### **Auckland Regional Plan: Air, Land and Water Provisions**

None applicable

##### **Plan Provisions**

##### **Plan Change Number 26, Residential Provisions**

Effectively superseded

##### **Plan Change Number 62, Financial Contributions**

Not applicable

##### **Proposed Plan Provisions**

##### **Partly Operative Proposed District Plan 2000**

Objective 9.3.1; 9.3.2; 9.3.3; 9.3.8

Policy 9.4.1

Objective 18.3.1 and Policies 18.4.1; 18.4.2; 18.4.3 & 18.4.4

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**Variation 125/Plan Change 110**

Objectives 9.8.1.1.2; 9.8.1.1.3

**Other Documents**

Vision Rodney - A non-statutory document produced by the Rodney District Council (Described as 'A Strategy for the District's Future')

**THOSE PRESENT AT THE HEARING****APPLICANT'S REPRESENTATIVE AND WITNESSES**

Ms Allison Arthur-Young (Counsel);  
Mr Mike Foster (Planning Consultant, Zomac Planning Solutions);  
Mr Stephen Bishop (Arborist – Amenity Tree Consultants Ltd); and,  
Mr Brady Nixon (Progressive Enterprises).

**SUBMITTER'S REPRESENTATIVE**

Ms Hueline Massey

**COUNCIL STAFF IN ATTENDANCE**

Anne Hessel, Reporting Planner;  
Denise Grandfield, Team Leader Resource Consents;  
Leo Jew, Landscape Architect and Open Space Planner;  
Rue Statham, Ecologist;  
Raewyn Morrison, Democracy Services Officer.

**PREAMBLE**

This was an application by Progressive Enterprises Ltd for consent to remove two protected trees, a Jacaranda and a Rimu, from a site at 24-26 Neville Street Warkworth. The site was included in the Retail Service Zone (Warkworth Town Centre) under the Partly Operative District Plan 2000. The trees were protected under the General Tree Protection provisions of Chapter 18 of that District Plan.

This application followed several other procedures relating to the intentions of the applicant to establish a supermarket on the subject site together with adjoining land. Under the Transitional District Plan (TDP) and the Partly Operative District Plan (PODP) the establishment of a supermarket with a floor area over 600m<sup>2</sup> would have been a permitted activity on the subject site. Plan Change 110 / Variation 125 (PC110/V125), was notified by the Council in May 2008 and initially would have made the development of a "large format store" on the subject site subject to a non-complying activity consent. The subsequent decision on submissions to the Plan Change/Variation resulted in "large format stores" becoming a restricted discretionary activity on the subject site. The Council's decision is subject to appeal but the most restrictive requirement under both the TDP/PODP and the Plan Change/Variation is that the development of a supermarket on the subject land would require a restricted discretionary activity consent.

The applicant lodged an application to develop a supermarket on the subject land together with 2 adjoining sites on 16 March, 2009. A further application for a similar development was lodged on 29 October, 2009 and was accompanied by a request to the Council for the application to be directly referred to the Environment Court under Sections 87D – 87I. In lodging the 2nd application the applicant requested that the March application be placed on hold.

An application was lodged on 2 July, 2009 to remove four trees from the subject site including the two trees the subject of this hearing together with an Apple tree and a Sweet Gum tree. The July application resulted in a decision that the removal of the Apple and Sweet Gum trees did not require notification and consent was granted for their removal. The application in respect of the Jacaranda and Rimu was notified.

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At the commencement of the hearing, Counsel for the applicant advised that the removal of the Rimu and the Jacaranda were not included within the scope of the October application now being publicly notified prior to being directly referred to the Environment Court. I was subsequently advised by Ms Hessel, the Council planner, that these two trees were included within the application that was being notified and referred. Counsel subsequently agreed that this was the case but that the inclusion of the trees in the referred application could be deleted in the event that consent was granted following this hearing.

The applicant requested that the tree removal be considered without reference to any specific proposal for re-development of the subject land. At the hearing the applicant offered to accept conditions that would require that removal of the trees only take place when the site was redeveloped and offered provision for mitigation planting within Council owned land at a non-specific location.

Following public notification one submission in opposition was received from The Tree Council and Ms Massey appeared at the hearing to give evidence in support of that submission.

Prior to the commencement of the hearing the applicant requested that the matter be heard by Independent Commissioner(s) and the Council resolved accordingly that I should hear the matter, sitting alone, in place of the previously appointed Hearing Panel comprising myself, Ms Suzanne Weld and Ms June Turner.

### **PROCEDURAL MATTERS**

As I have recorded above the tree removal the subject of this hearing has also been included within an application for redevelopment of the subject land including the erection of a supermarket and other retail shops. That application at the applicant's request has been directly referred to the Environment Court under the recently enacted Sections 87D – 87I of the RMA. As required by these provisions the application, including the proposed removal of the Rimu and Jacaranda, has been publicly notified. I understand that an applicant may make any number of resource consent applications for the same area of land and there does not appear to be any requirement in the new legislation to prevent an application being made simultaneously to the Council, and by direct reference, to the Environment Court. In the modest circumstances of this application and given the decision I have reached on the merits I have not considered it necessary to pursue the issue of whether a decision in such circumstances needs to be considered in any different manner.

### **SITE VISIT**

I visited and inspected the site and surrounding area on Friday, 13 November 2009.

### **THE PRINCIPAL ISSUES THAT WERE IN CONTENTION:**

The principal issues that were in contention were as follows:

1. Whether removal of either of the trees would result in an effect on the amenity values of the area such that mitigation of that affect was appropriate.
2. Whether the mitigation proposed by the applicant was appropriate having regard to the effect on amenity values that would result from removal of the trees.
3. Whether an assessment of the removal of these trees could be properly carried out without regard to a specific redevelopment of the subject land.
4. Whether the provisions of Plan Change 110/Variation 125 would result in any potential redevelopment of the site requiring the removal of these two trees.
5. Whether removal of the two trees would be contrary to, or inconsistent with, the objectives and policies of the Partly Operative Proposed District Plan 2000 and those of Plan Change 110/Variation 125.

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6. Whether the proposal was consistent with the purpose and principles of the Resource Management Act 1991 (RMA), as set out under Part 2 of that Act.

**SUMMARY OF THE EVIDENCE HEARD:****SUBMISSIONS AND EVIDENCE ON BEHALF OF THE APPLICANT****MS ALLISON ARTHUR-YOUNG - COUNSEL FOR THE APPLICANT**

Ms Arthur-Young outlined the background in relation to the site and the application. She described the sequence of procedures for Plan Change 110/Variation 125 and her client's concerns that the procedures reflected an effort by the Council to prevent the development of a supermarket on the subject site. She said that the Council's approach to processing this very basic tree removal consent was symptomatic of its now entrenched opposition to Progressive's proposals for the site. In any other case, this very straightforward tree removal application would have been processed on a non-notified basis. She noted an instance for a nearby development that had involved a greater number of trees, the majority of which were native specimens; that application had been processed on a non-notified basis.

Ms Arthur-Young said that the Council had requested that the tree removal activity be considered as part of Progressive's supermarket proposal, which the Council had now agreed was appropriate for direct referral to the Environment Court. While that could occur, there were several reasons why the application should be progressed now:

- Progressive was entitled to have its tree removal application heard and determined separately from any other proposal for the redevelopment of the site. It did not have to be tied to any development proposal.
- It was more efficient that the hearing proceed as a hearing slot was allocated and Progressive had accordingly already prepared for the hearing.
- Any development of the site would require the removal of the trees if the Council's urban form objectives were to be met. The mitigation required to address the (minor) loss of the removal of the trees could be set now, so that Progressive (or any developer) could advance development of the site knowing what "base" mitigation was required.
- It was common for minor consents to be obtained separately from wider proposals. For example, earthworks consents were routinely granted to authorise levelling of sites, when the final form of development may be unconsented, or even unknown.

Ms Arthur-Young addressed the scope of the submissions, noting that only one submission in opposition had been received (The Tree Council) and that no person in Neville Street, or indeed Warkworth, had submitted on the application. She commented on the statutory framework, the relevant plan provisions, other matters and Part II matters. Ms Arthur-Young also commented on the planning officer's report which she considered did not contain any robust analysis of the factors which contributed to the amenity of the neighbourhood in terms of the site itself. She said that the planner's report did not assess the surrounding streetscape, the view shafts of the trees, or the other trees present in the surrounding area.

Ms Arthur-Young said she would present a statement of evidence from Mr Karl Cooper (who was not in attendance) and that she proposed to outline his key points. She said that Mr Cooper considered the Rimu to be not deserving of retention.

Counsel referred to the Resource Management (Simplifying and Streamlining) Act 2009 and to the recent decision of the Environment Court in *Butterworth v Auckland City Council A90/2009 2 October 2009*. She pointed out that in that case, the Court had taken into account the intended revoking of tree protection rules.

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She advised that the applicant would accept conditions of consent to ensure the trees would not be removed until such time as the redevelopment of the site was commenced and that the applicant proposed mitigation planting of three trees on Council land on Neville Street. She said these conditions were set out in the evidence of Mr Foster.

In conclusion, Ms Arthur-Young said that granting the approval sought, subject to the conditions proposed by Progressive, would best promote the sustainable management of natural and physical resources and that consent should be granted on this basis.

#### **MR STEPHEN BISHOP ARBORIST - ON BEHALF OF THE APPLICANT**

Mr Bishop presented evidence in regard to the quality and health of the two trees subject to the application; the Jacaranda and Rimu. Mr Bishop said that the overall effects of the tree removal would be no more than minor and that further, any effects would be more than adequately mitigated by the proposed planting of three specimen trees on Council land on Neville Street. He said that examples of suitable specimens included: Wych Elm, Silver Birch, Sweetgum, Titoki, Lemonwood and Lacebark. Any species planted should be a minimum of PB 95 size and be accompanied by appropriate care requirements, e.g. for a two year period to ensure establishment of the trees.

In his concluding remarks Mr Bishop said that the planner's report accorded largely with his assessment that the removal of the trees was unlikely to impact on erosion, instability or flooding, or affect habitats. Mr Bishop said that he had read the matters addressed in Mr Cooper's evidence in respect to the contribution of the trees to streetscape/amenity and that he supported the conclusions of Mr Cooper. The proposal required the removal of two generally protected trees. The identified actual and potential environmental effects of the proposal he considered to be no more than minor, and the proposed revegetation measures provided suitable mitigation.

In response to a question regarding the life expectancy of the Rimu tree, Mr Bishop said that within 10 years he expected the tree would become a problem.

#### **MS ARTHUR-YOUNG DISTRIBUTED A WRITTEN STATEMENT OF EVIDENCE FROM KARL COOPER, URBAN DESIGNER**

Ms Arthur-Young highlighted matters addressed in this "statement", these included the following:

- PC110/V125, envisaged this area of Neville Street termed "the Core Expansion Policy Area" to have an unbroken, continuous built frontage at the back of pavement building line which did not allow for the retention of trees within the site adjacent to the street frontage. Any landscaping amenity, particularly trees, would be re-located onto the street itself;
- the trees were not of landmark significance;
- while the location of the trees was relevant, the trees themselves were the subject of the assessment not the location;
- the Jacaranda and Rimu were inappropriate streetscape trees, were both unremarkable, straggly dishevelled specimens (the Rimu because of its poor condition) that provided poor visual amenity;
- the amenity value of these trees was poor;
- it was thus his recommendation that the application to remove these trees be approved to allow for the realisation of the vision that PC110/V125, had for this area;
- he considered that the Council should have obtained an assessment on urban design of the streetscape and an assessment from a landscape architect.

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**MR MIKE FOSTER, CONSULTANT PLANNER ON BEHALF OF THE APPLICANT**

In his evidence Mr Foster described the background to the application and the site.

In his overview of the application Mr Foster said that notwithstanding that the applicant's proposed mixed-use retail development would necessitate the removal of the two trees the subject of this hearing, the applicant elected to seek this separate consent for four key reasons.

1. the removal of the trees was a separate activity from the supermarket proposal or any other proposal and did not depend on any particular form of development;
2. the assessment and report by the applicant's qualified arborist clearly established that the effects of the removal of the trees would be less than minor and that the landscape mitigation measures proposed would more than adequately mitigate any effects;
3. the proposed provisions of PC110/V125, which meant that any fine-grained retail development along Neville Street would require the removal of the 2 trees;
4. the 2009 amendments to the Resource Management Act which would remove the tree protection rules as from 1 January, 2012.

In commenting on the officer's report, Mr Foster expressed his opinion that any mitigation proposed as part of the supermarket application is to be considered at that time and against the relevant existing environment. He said that if the tree removal consent was granted then that (existing environment) would include the removal of the trees and the mitigation required as part of the tree removal consent.

He undertook a comprehensive assessment of the relevant planning provisions and commented on the findings in the officer's report. He emphasised that PC110/V125, required the built form of development be located on the frontage of Neville Street and that requirement could not be satisfied with the trees in place. He said that for that reason removal of the trees could be considered independently of the development of the site.

Mr Foster put forward suggested conditions covering the following matters:

1. the trees not to be removed until such time as consent is granted to the applicant for redevelopment of the site;
2. within 3 months of the removal of the trees the consent holder would provide and plant 3 specimen trees on Council land on Neville Street.

He said that the relevant objectives and policies, of the PODP and PC110/V125, were set out in the officer's report at sections 9.6 and 9.9. However, unlike the officer, he did not consider the tree removal application was contrary to any or all of these objectives. He believed that insufficient consideration had been given to mitigation measures that would be offered by the applicant or required (even requested) by the Council.

Mr Foster noted that there was only one submission in opposition. He considered that belied the statement in the officer's planning report that these trees were important and valued by the community. He would have expected that many more submissions would have been received if that were the case. He also noted that the submission in opposition did not oppose the removal of the Rimu. In his view the concern of the submitter could be met by appropriate mitigation measures which could be enforced through a condition of the kind as earlier described.

In conclusion Mr Foster said that overall he believed that the planning officer's recommendations were fundamentally flawed and short sighted. Consent could and should be granted, subject to the mitigation conditions he recommended.

In response to questions from the Independent Commissioner, Mr Foster said that:

- With regard to mitigation measures, it was most unlikely the site would be developed in part. The applicant's site was sufficiently contiguous and any development would be done on a comprehensive basis. It was extremely unlikely that a supermarket would not be built on the site. The fine grained retail proposed on Neville Street automatically would take out the trees.

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- The Council decision on PC110/V125, was under appeal by three 3 appellants. Progressive had appealed one of the criteria. There was also an appeal from Foodstuffs who were seeking the removal of fine grained retail that applied to their site. Perrendale Developments also opposed the Commissioners' decision and sought reinstatement of the non complying activity status for large stores etc.
- Discussions were ongoing with the Council, and between Progressive and Foodstuffs. It was quite likely an agreement would be reached with the Council. However, he believed the Perrendale opposition was trade competition based and Progressive might apply for a motion to strike.

Mr Foster highlighted the criteria in PC110/V125, which he believed to be of relevance. He referred the Commissioner to 9.8.1.2.5 (regarding scale and character of buildings), 9.8.1.3 (service provisions) and 9.12.5.2, which was one of the key criteria in respect to street frontage and pedestrian cover.

In response to a further question, Mr Foster said that the Council could advise where the mitigation planting could be located.

## **SUBMISSIONS AND EVIDENCE ON BEHALF OF THE SUBMITTERS**

### **MS HUELINE MASSEY FOR THE TREE COUNCIL, SUBMITTER IN OPPOSITION:**

Ms Massey referred to the beauty of the Jacaranda in flower which she said made a significant contribution to the amenity of the area for about 6-8 weeks and remained an attractive leafy shade tree when flowering was over.

Ms Massey noted that the Jacaranda was asymmetrical because it was growing against a building. She said that she believed the tree would not interfere with the proposed supermarket building (as shown on the plans lodged with the March 2009 application). She said that when applying for the removal of any tree the applicant should state why removal was required but this was a stand-alone application. Ms Massey said that the elevation of buildings on Neville Street (shown on the proposed supermarket development plans) was fairly low level, so a tree of 6 - 8m in height was not out of place in that frontage in terms of size and aspect. She noted that the Oak trees opposite the Bank of New Zealand building on Neville Street were now scheduled trees and so the application of the Plan Change 110/Variation 125 provisions regarding Neville Street frontage referred to by the applicant would have to work around those trees.

The witness said that The Tree Council was not interested in seeking re-location of either of the trees and did not believe that was viable.

In regard to the applicant's nominated tree species for its proposed mitigation, Ms Massey said that The Tree Council considered Lemonwood and Lacebark to be shrubs rather than trees. With regard to Mr Bishop's comments about the minimal root space for the Jacaranda, Ms Massey said that there was a large enough area for the tree to grow, especially when compared with the amount of room trees had been given in the recent planting within pavements in the Warkworth Town area.

Ms Massey noted that some of the mitigation species identified in the applicant's proposed condition did well in the South Island but not in the North Island. She reiterated that the tree removal should be for a very good pragmatic reason. She questioned whether Mr Cooper had seen the Jacaranda tree in flower. She considered some consideration should be given to whether the tree could be incorporated into the design of the building. She disagreed with Mr Cooper's description of the Jacaranda as a "domestic garden" tree and said that Jacaranda trees were popular trees in parks and reserves and that there was no reason why they should not be more popular in urban public areas as they offered filtered shade with an open form and were pleasant to sit under.

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Responding to Mr Foster's evidence that the trees were able to be removed in 2012, Ms Massey said that the purpose of the timeframe provided by the Amendment Act was so councils could put in place alternative methods of tree protection. She said that if tree removal was to be approved in the intervening period on the basis of the future deletion of the protection rules, the Minister (Parliament) may as well have given instant implementation to tree removal. She said that councils had 2 years to determine what alternative protection should be introduced to replace present general tree protection rules.

Ms Massey said that if the Jacaranda could be retained, it should be. With regard to mitigation, Ms Massey said that subject to the type of trees, 3 replacement trees would be acceptable.

In response to questions Ms Massey said that:

- The willingness of Progressive Enterprises to not remove the tree until such time as consent was granted for the redevelopment of the site went some way to addressing her concerns.
- With regard to the Rimu tree and its assessment, when she inspected the tree she was not happy about its appearance but an arborist could carry out repairs and maintenance on the tree. The Rimu was in a more difficult location on the site and she believed it would always have a compromised life.
- If the Jacaranda was retained the removal of the small shop building on the road frontage would result in the tree being more exposed than it currently was. The removal of the motel building would have a lesser affect on the tree. If the tree was retained without the shelter provided by the existing wall of the shop, the environment of the tree would be cooler than it was at present but it should still provide an attractive display when it flowered. She was of the view that the Jacaranda was a tree that could withstand some changes to its environment.

## **THE EVIDENCE OF COUNCIL OFFICERS**

### **MR RUE STATHAM – COUNCIL ECOLOGICAL ADVISOR**

Mr Statham outlined his qualifications and experience which included arboriculture and ecology. Mr Statham's assessment of the application as lodged was contained in an email attached to the s42A Report and was also referred to in the report itself and adopted and relied upon by Ms Hessell, the report writer. After hearing evidence and submissions by the applicant and the submitters he said that he agreed with Mr Bishop regarding the health of the Rimu tree and the uncertainty of it being able to be retained beyond a 10 year period.

### **MR LEO JEW - COUNCIL OPEN SPACE PLANNER**

Mr Jew said that he was a qualified urban designer and architect and he had also completed a post graduate degree in landscape architecture. Mr Jew's assessment of the application as lodged was contained in an email attached to the s42A Report and was also referred to in the report itself and adopted and relied upon by Ms Hessell, the report writer. He was of the view that both trees made a significant contribution to the amenity of the streetscape. After hearing evidence and submissions by the applicant and the submitters, Mr Jew said that with regard to urban form, PC110/V125 was intended to achieve a sense of continuity along the street frontage of Neville Street rather than continuous development. He noted that the redevelopment of the site for the proposed supermarket would require breaks in the frontage - for example to provide delivery access. In regard to the mitigation proposed, Mr Jew said that mitigation planting should be to an appropriate standard and he had difficulty in assessing this without a proposal for the full development of the site. He considered the proposed mitigation tree planting on public land was unusual as there could well be issues regarding the location of services in the berm, and there was a need to assess the relationship of the planting to the final form of development on the site.

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**REPORT OF MS ANNE HESSELL - REPORTING CONSULTANT PLANNER**

Ms Hessell's Section 42A report was circulated to all parties.

After the applicant and submitter had presented submissions and evidence she made the following comments:

- with regard to Ms Arthur-Young's submission referencing the Butterworth case, Ms Hessell said that she thought there was a difference between that situation and this one because she believed the Jacaranda and Rimu trees benefited the amenity of the area;
- she would be cautious about putting too much weight on the prospect that the trees could be removed as of right in 2012;
- the application for the tree removal was a stand-alone application whereas the mitigation proposed related to the supermarket proposal;
- the trees were located on the main thoroughfare into the Warkworth Township and the mitigation measures offered were an improvement on the original application but did not address the full streetscape and the proposed building;
- the applicant's comments that any commercial development on the site would necessitate removal of trees was a sweeping statement and she considered the inevitability of that outcome was not established;
- it was difficult to apply the relevant assessment criteria of the District Plan (applying to removal of protected trees) without a development proposal because a number of them made direct reference to development alternatives;
- the information given in the application to justify the removal of the Rimu tree had been limited;
- if a condition requiring that the trees not be removed until redevelopment of the site was approved it would have to be carefully worded – resource consent might be superseded by later applications.

**APPLICANT'S REPLY TO SUBMISSIONS****MS ARTHUR-YOUNG**

Ms Arthur-Young said that The Tree Council comment about the Jacaranda being able to be accommodated in the supermarket development was incorrect; based on the current design of the building the tree would be inside the building and it could not be accommodated. She said that the application to remove the trees was not tied to the supermarket development and that it was not required to be part of a development proposal.

Mr Bishop advised that with the removal of the surrounding buildings the Jacaranda, with its asymmetrical crown, would be exposed to a different wind loading which could affect its stability. He accepted that mitigation planting of trees in the road berm would be dependent on the location of (underground) utility services.

Ms Arthur-Young said that the applicant had carefully thought about mitigation for the removal of two insignificant trees, one of which was in a state of decline and the other which was not in good shape, and considered it best to proceed with their removal as an entirely separate application. She said that the applicant was willing to offer a condition to not to remove the trees until consent was given for development of the site. Ms Arthur-Young confirmed that the tree removal was included in the application for the supermarket before the Environment Court; the inclusion of the trees in the application had been purely due to an abundance of caution by her client.

In response to a question from the Commissioner, Ms Arthur-Young said that if consent was granted the wording of the condition for mitigation planting would need to reflect that the landscaping, including any planting of street trees, would be completed as the last stage of the supermarket development once all the paving had been finished.

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**THE MAIN FINDINGS ON THE PRINCIPAL ISSUES THAT WERE IN CONTENTION:****BASIS**

The main findings on the principal issues that were in contention are as follows. They have been reached after visiting the site and locality, considering the application, the evidence and submissions heard at the hearing, the report prepared by the reporting planner, and all the relevant statutory and planning provisions.

**EFFECT OF REMOVAL OF TREES ON THE AMENITY VALUES OF THE AREA AND NEED FOR MITIGATION**

I was faced with conflicting evidence regarding the amenity values of the two trees. While the Rimu tree was significant in terms of its height on the frontage of the site, its value was diminished by the clear signs of its deteriorating health. Both experts agreed that the Jacaranda was in excellent health however the applicant's arborist expressed doubt about the practicality of retention of the tree (in any redevelopment of the site) due to its asymmetrical crown. Ms Massey for the Tree Council said that the tree was particularly attractive during the 6 to 8 week period when it was in full flower. She considered that the flowering of this specimen was unusually striking. That evidence was not contradicted although the tabled evidence of Mr Cooper referred to it as a "domestic garden tree". Having considered that evidence in the light of my site visit and inspection of the trees, I find that the two trees do contribute to the amenity of the area to an extent that their removal would have effects that were more than minor and that accordingly appropriate mitigation is required.

**WHETHER THE MITIGATION PROPOSED WAS APPROPRIATE**

The applicant proposed mitigation by way of a condition requiring planting of three trees on Council owned land in the vicinity. In response to my question Mr Foster indicated that a likely means of meeting this condition would be the provision of three trees within the berm on the frontage of the site. No other alternative locations were indicated. Mr Jew pointed out that the ability to implement planting in the street berm would depend on whether sufficient space was available having regard to any utility services which are normally located in these areas. Mr Bishop acknowledged during the applicant's reply that the location of utility services might restrict or prevent planting in the berm. I find that the mitigation proposed was uncertain and incapable of proper evaluation in terms of its likely beneficial effects on the amenity values of the area and therefore incapable of evaluation in terms of its ability to mitigate the effects of the loss of the Jacaranda and Rimu.

**ASSESSMENT OF REMOVAL OF THE TREES WITHOUT INTEGRATION WITH A SPECIFIC REDEVELOPMENT**

The applicant insisted that it wished to have the tree removal application dealt with independently of any proposal to redevelop the site.

Mr Jew pointed out that it was unusual for mitigation for tree removal to be provided through an offer to plant trees on Council land. However given the applicant's insistence that the application for the removal of the trees was to be dealt with independently of the site redevelopment, it was not possible for me to consider any alternative location within the site. In response to the submitter's suggestion that the Jacaranda could be retained as part of the redevelopment, Counsel asserted that the redevelopment proposal could not accommodate that. However since the applicant did not wish to have the tree removal considered in the context of the application for redevelopment of the site I could not test that assertion.

I find that in the context of either retention of the Jacaranda or the provision of mitigation planting for one or both trees on site, the opportunities or possibilities can only be evaluated in the context of a specific redevelopment proposal. The Council's retained discretion under Rule 18.12.12 and Rule 18.12.10.1 include "(e) *Siting of buildings or works*" and the assessment criteria at 18.12.10.2 (g) refer to consideration of alternative location of the development or earthworks that threaten the tree. I find that it would be consistent with the holistic approach of the RMA to deal with the assessment of the tree removal (particularly in respect of the Jacaranda) as part of the consideration of a resource consent for re-development of the site because it would allow assessment of whether the removal

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was necessary in order to enable an appropriate redevelopment of the site and would enable assessment of the opportunities for mitigation within the redeveloped site, (or sufficiently close to it) in order to ensure that the mitigation had relevance to the amenity values affected by tree removal.

The applicant appeared to recognise that the removal of protected trees needed to be related to the redevelopment of the site and was prepared to accept a condition that the trees not be removed except as part of the redevelopment process. However as I have concluded above that the resultant quality of mitigation is uncertain at best.

### **PLAN CHANGE 110/VARIATION 125 PROVISIONS POTENTIALLY REQUIRING THE REMOVAL OF THE TREES**

Mr Foster (supported by the tabled evidence of Mr Cooper) was of the opinion that the form of development indicated by the assessment criteria of 9.12.5.2 (b) of the PODP and 5.3B.2 (b) of the TDP, (as both were amended by PC110/V125), would inevitably result in the removal of both of these trees.

This criteria states as follows:

#### ***Street frontage and pedestrian cover***

*(b) Whether the development incorporates unbroken frontages, with continuous verandahs for pedestrian shelter, on the main streets and whether the length of frontage associated with individual business activities reflects the fine grained nature of Warkworth town centre acknowledging that where frontage type 1 has been identified the frontages have a finer grain character than where frontage type 2 has been identified*

However under PC110/V125, the matters over which the Council retains its discretion (set out under 9.12.5.1 (b) and 5.3B.1(b)) include "Landscaping" and clause (f) of the assessment criteria requires:

#### ***Landscaping***

*(f) Whether landscaping is used in developments to soften and screen areas such as carparks and storage yards, and to contribute to the appearance of developments and the general amenity values of the Retail Service Zone.*

The assessment criteria under clause (e) require assessment of:

#### ***Protected buildings and trees***

*(e) Whether the development is designed to ensure the continuing existence of any protected buildings or trees.*

I find that the provisions of the Plan Change/Variation require that the removal of protected trees and the consideration of amenity values are to be relevant matters to be considered on any redevelopment of the site along with the consideration of provision of an active pedestrian frontage. The more comprehensive consideration taking account of the above criteria could include the integration of any required landscaping with mitigation planting, in the event that protected trees had to be removed.

### **OBJECTIVES AND POLICIES OF THE PODP AND PLAN CHANGE 110/VARIATION 125**

Both Ms Hessell and Mr Foster directed my attention to Chapter 18 of the PODP which is now operative.

Objective 18.3.1 (c) of this Chapter provides as follows:

*To avoid, remedy or mitigate the adverse effects of earthworks and vegetation removal on:  
(c) the visual amenity values of neighbourhoods and coastal areas.*

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Policy 18.4.2 of this Chapter provides:

*Native trees and bush, significant exotic trees, significant landforms, and watercourses and waterbodies, including wetlands, should be retained. Where this is not possible, mitigation measures should be undertaken.*

I find that the application as advanced by the applicant does not satisfactorily provide for avoiding, remedying or mitigating the adverse effects of vegetation removal on the visual amenity values of neighbourhoods and is accordingly inconsistent with Objective 18.3.1 (c) and to Policy 18.4.2.

Mr Foster directed my attention to certain provisions of PC110/V125, and during the hearing (at my request) I was provided with a copy of the decision version of that document to enable consideration of the issues raised.

In regard to the objectives and policies amended by the PC110/V125, I record the following:

*Objective 9.8.1.1.2*

*To protect and enhance the special values existing in the Warkworth town centre, in particular the unique character that results from the small and fine grained nature of the core retail area, the historic qualities of the town centre and the location of the town adjacent to the river.*

*Policy 9.8.1.2.5*

*Within the Warkworth Town Centre Policy Areas the scale and character of buildings, and the frontage and floor area of business premises shall be managed so as to:  
(b) recognise the different amenity values in different parts of the centre.*

I consider the tree removal application as presented is likely to be inconsistent with Objective 9.8.1.1.2 and Policy 9.8.1.2.5 (b) largely because the application did not properly evaluate the overall net effects on amenity values arising from tree removal, and replacement with mitigation planting, in the context of the building re-development proposed and the amenity benefits that might be encompassed within that.

## **CONSISTENCY WITH PART 2 OF RMA**

I find that the removal of these two trees without appropriate provision for mitigation and without the opportunity for properly assessing opportunities for retention and/or mitigation within the context of an overall plan of development for the subject site does not appropriately provide for the management of the natural and physical resources of this part of the Warkworth Town Centre. While the grant of consent to the application would have some (limited) economic benefit to the applicant it does not provide an adequate basis for assessment of the protection of the amenity values and environment of the wider community which, without adequate mitigation, would be diminished by the loss of these trees.

## **CONCLUSIONS AS TO FINDINGS**

I find that the applicant's insistence that the application be considered without reference to its proposals for re-development of the site to be unhelpful in enabling a comprehensive consideration of the most suitable method of mitigation as well as leaving some doubt as to whether retention of the Jacaranda was a viable option.

I am satisfied on the evidence that these two trees would lie somewhere in the middle of an overall scale of significance. However the applicant has properly acknowledged the need for mitigation and also acknowledged that the tree removal and the mitigation needed to be tied to a programme for re-development works on the site. Given these acknowledgements I can see no adequate reason to grant consent in the face of the uncertainty over need for removal of the Jacaranda and the adequacy of the proposed mitigation. The benefit of doing so appears to be limited to enabling the tree removal issue to be separated from the consideration of the overall re-development of the site and I find no benefits in terms of RMA considerations in that approach.

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I am mindful of the 2012 deadline for removal of general tree protection rules but also note that in *Butterworth v Auckland City Council* (referred to by the applicant) the Court was careful to state at paragraph 35 that :

*"We are conscious that we should not purport to give the change in legislation instant full effect. That would be contrary to the intention of Parliament that there be a lead time of something over two years."*

Having regard to all of the above findings I am satisfied that consent to this application (in its present form) should be refused.

**Carried**

The meeting closed at 11.56 a.m.

CONFIRMED AS A TRUE AND CORRECT RECORD THIS 17TH DAY OF DECEMBER 2009

MAYOR

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