

BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2020] NZEnvC 147

IN THE MATTER of the Resource Management Act 1991
AND of an application to change an enforcement
order under section 321 of the Act
BETWEEN GRANT'S MOTELS LIMITED
(ENV-2020-CHC-114)
Applicant
AND DUNEDIN CITY COUNCIL
Respondent

Court: Environment Judge J E Borthwick

Hearing: In Chambers at Christchurch

Date of Decision: 7 September 2020

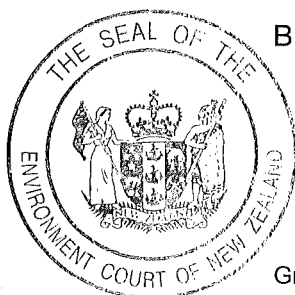
Date of Issue: 7 September 2020

**DECISION ON APPLICATION TO CHANGE ENFORCEMENT ORDERS
(BY CONSENT)**

A: Pursuant to sections 321 and 279(1)(b) of the Resource Management Act 1991, the Environment Court, changes the following orders, by consent:

- (a) CRI-2013-012-001679 as set out in Annexure 1 attached to and forming part of this order; and
- (b) ENV-2014-WLG-37 as set out in Annexure 2 attached to and forming part of this order.

B: Pursuant to section 321 of the Resource Management Act 1991 leave is reserved for any party to apply to change or cancel these Orders.



C: Pursuant to section 285 of the Resource Management Act 1991 there is no order as to costs.

REASONS

Introduction

[1] Grant's Motels Limited has applied under s 321 of the Resource Management Act 1991 to change two enforcement orders:

- (a) CRI-2013-012-001679 made on 8 October 2014; and
- (b) ENV-2014-WLG-37 made on 23 October 2014.

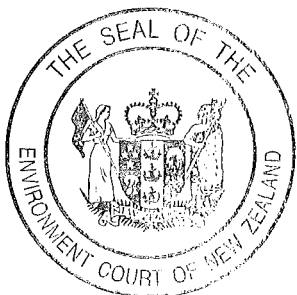
[2] Those orders required Grant's Motels Limited to cease planting any further Corsican and Douglas fir pine trees and to remove all trees of this kind from its property at 240 Munro Road, Berwick before 1 September 2020. Grant's Motels has applied to vary these orders as it will not be able to meet the timeframe for compliance.

[3] The Dunedin City Council does not oppose the application to change the enforcement order.

Background

[4] In 2011 and 2012, the applicant planted two species of exotic trees on a property without having obtained the necessary resource consents.¹ The applicant and one of its directors were prosecuted by the City Council in respect of the Douglas fir. As part of that prosecution the City Council applied for enforcement orders under s 339 ordering the removal of the Douglas fir. The City Council made a separate application under s 314 for enforcement orders in respect of the Corsican pines at the same time.

[5] The orders were identical and in summary ordered:

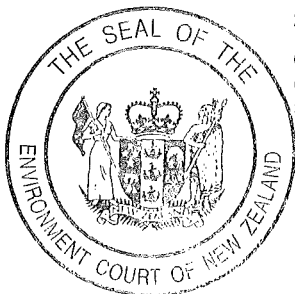


¹ Those exotic species were Douglas fir and Corsican pine trees. The property was located within the Rural Zone under the then Dunedin District Plan. Under the Second Generation Dunedin City District Plan, the property remains within the Rural Zone.

- (a) the applicant cease planting any further Douglas fir and Corsican pine trees (order 3.a);
- (b) the applicant to remove all existing Douglas fir and Corsican pine trees using the basal bark application method (order 3.b);
- (c) the applicant to provide a report to the Dunedin City Council by 1 September 2020 prepared by a suitably qualified forestry consultant that confirms:
 - (i) the Douglas fir and Corsican pine removal operation has been successfully undertaken;
 - (ii) a final survey has been undertaken to assess wilding Douglas fir and Corsican pine risk on the property; and
 - (iii) that there is no remaining wilding Douglas fir and Corsican pine risk on the property (order 3.c);
- (d) that the City Council have the power, under s 315(2) and s 315(3), to undertake removal of the trees if orders 3.b and 3.c were not complied with by 1 September 2020 and for the recovery of any costs of doing so as a debt, performance of which was secured by a bond for the benefit of Council (orders 4 and 5);
- (e) that any successors in title to the applicant were to be bound by the Orders (order 5).

[6] Grant's Motels, against whom the orders were made, no longer own the property. In January 2015 the property was sold to Michelle Bartlett and Allan Van Turnhout. Since that time Grant's Motels and the new owners have worked together to clear the trees and reasonable progress has been made but cannot be completed, as ordered, by 1 September 2020.²

[7] Grant's Motels explains the primary factor contributing to the delay was the nationwide Level 4 Lockdown in March 2020 in response to the COVID-19 pandemic. Because of this, N J Sim Forestry,³ who was contracted to remove the trees, was unable to operate and consequently could not complete the works by 1 September 2020.⁴



² Affidavit of Andrew Hocken dated 28 August 2020, at [5]. Order 5 of both orders provides that the enforcement orders apply to any successor of Grant's Motels Limited to the same extent as they apply to Grant's Motels Limited.

³ Memorandum and submissions of counsel dated 28 August 2020 at [10]. N J Sim Forestry were retained by the applicant to undertake the works in April and May 2020.

⁴ Memorandum and submissions of counsel dated 28 August 2020 at [11].

[8] Grant's Motels therefore seeks an extension of time to complete the works to 31 January 2021.⁵

[9] In support of the application to change the enforcement orders, Grant's Motels has provided a new bank bond to financially secure performance of the works and has arranged for that bond to remain in place until 31 March 2021.⁶

Amendments sought

[10] In addition to the extension of the timeframe for compliance, incidental amendments are required to update the references made to the now repealed, Statutory Land Charges Registration Act 1928. The relevant provisions are now in the Land Transfer Act 2017. Secondly, as the applicant has now provided a new bank bond, an amendment to order 7 is sought to remove the reference to the three month period for evidence of the bond to be provided.⁷

[11] The following are the identical changes sought to both CRI-2013-012-001679 and ENV-2014-WLG-37:⁸

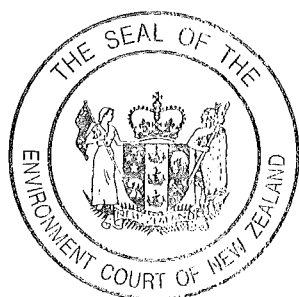
Amend order 3.c

Provide a report to the Dunedin City Council by ~~4 September 2020~~ 31 January 2021 prepared by a suitably qualified forestry consultant that confirms:

... [no further changes].

Amend order 4

Under sections 315(2) and 315(3) of the Act if Grant's Motels Limited fails to comply with order 3(b) or (c) above by 31 January 2021 ~~4 September 2020~~ then the Dunedin City Council or its agents may enter on the Property and undertake the Douglas Fir removal using the methods in 3(b) above so as to achieve the result anticipated in 3(c). The Dunedin City Council may recover the costs and expenses of doing so as a debt due from Grant's Motels Limited, and if necessary register any unpaid costs and expenses as a charge on the land under the ~~Statutory Land Charges Registration Act 1928~~. Land Transfer Act 2017.



⁵ Affidavit of Andrew Hocken dated 28 August 2020, at [8].

⁶ Affidavit of Andrew Hocken dated 28 August 2020, at [9].

⁷ Evidence of the bond was attached as annexure "AH-2" of the affidavit of Andrew Hocken provided in support of the application for variation of enforcement orders.

⁸ Application for variation dated 28 August 2020, at [5.1]-[5.2].

Amend order 6

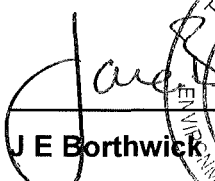
Grant's Motels Limited shall ~~within three months~~ provide evidence to the Council of a Bank Bond being in place for the benefit of the Council in the sum of not less than \$135,000, which shall be payable to the Council in the event that the order 3(c) herein is not complied with. The Council may use that bond to fund action taken by the Council in order 4. Insofar as work by the Council to satisfy order 4 leaves a surplus of bond remaining, that bond surplus shall be refunded to Grant's Motels Limited.

Discussion

[12] I am satisfied that prior to the disruption caused by the COVID-19 Level 4 lockdown the applicant had taken reasonable steps to complete the works. But for the COVID-19 Level 4 lockdown, I am satisfied that compliance could have been achieved. I will exercise my discretion to vary the orders as sought and extend the time to complete the works before the City Council can enter the property to undertake the works itself pursuant to order 4.

Outcome

[13] Having considered the memoranda filed, I agree that the changes sought to the enforcement orders set out in orders [A] and [B] should be made by consent.


J E Borthwick
Environment Judge



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ANNEXURE 1

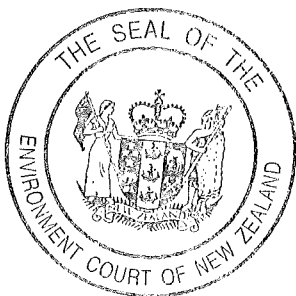
CRI-2013-012-001679

This Enforcement Order is made under sections 339(5)(a) and 314 of the Act with orders made against **Grant's Motels Limited** as follows:

1. The orders apply to those properties at 240 Munro Road, Berwick ("the Property") as shown in the following Computer Freehold Register' Identifier (Otago Land Registration District):
 - a. 3582
 - b. OT7D/402
 - c. OT7D/403
 - d. OT10A/955
2. This order applies to Douglas Fir (*Pseudotsuga menziesii*) only.
3. Grant's Motels Limited shall:
 - a. Cease any planting of Douglas Fir on the Property.
 - b. Remove all existing Douglas Fir from the Property using the 'basal bark application method' recommended in the Ahika Consulting Report (9 May 2014) at chapters 10 and 11 (attached).
 - c. Provide a report to the Dunedin City Council by 4 ~~September 2020~~ 31 January 2021 prepared by a suitably qualified forestry consultant that confirms:
 - i. The Douglas Fir removal operation has been successfully undertaken;
 - ii. A final survey has been under taken .to assess wilding Douglas Fir risk on the Property; and
 - iii. That there is no remaining wilding Douglas Fir risk on the Property.



4. Under sections 315(2) and 315(3) of the Act if Grant's Motels Limited fails to comply with order 3(b) or (c) above by 4 ~~September 2020~~ 31 January 2021 then the Dunedin City Council or its agents may enter on the Property and undertake the Douglas Fir removal using the methods in 3(b) above so as to achieve the result anticipated in 3(c). The Dunedin City Council may recover the costs and expenses of doing so as a debt due from Grant's Motels Limited, and if necessary register any unpaid costs and expenses as a charge on the land under the ~~Statutory Land Charges Registration Act 1928~~ Land Transfer Act 2017.
5. The orders shall apply to any successors of Grant's Motels Limited to the same extent as they apply to Grant's Motels Limited.
6. Grant's Motels Limited shall ~~within three months~~ provide evidence to the Council of a Bank Bond being in place for the benefit of the Council in the sum of not less than \$135,000, which shall be payable to the Council in the event that the order 3(c) herein is not complied with. The Council may use that bond to fund action taken by the Council in order 4. Insofar as work by the Council to satisfy order 4 leaves a surplus of bond remaining, that bond surplus shall be refunded to Grant's Motels Limited.
7. Order 6 shall be read in conjunction with the bond provision in the Corsican Pine Enforcement Order (ENV-2014-WLG-000037) to the effect that a total bank bond of \$135,000 will satisfy order 6 in both Enforcement Orders.

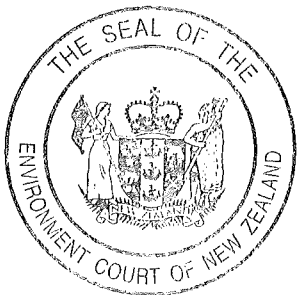


ANNEXURE 2

ENV-2014-WLG-000037

This Enforcement Order is made under sections 339(5)(a) and 314 of the Act with orders made against **Grant's Motels Limited** as follows:

1. The orders apply to those properties at 240 Munro Road, Berwick ("the Property") as shown in the following Computer Freehold Register' Identifier (Otago Land Registration District):
 - a. 3582
 - b. OT7D/402
 - c. OT7D/403
 - d. OT10A/955
2. This order applies to Corsican Pine (*Pinus Niagra*) only.
3. Grant's Motels Limited shall:
 - a. Cease any planting of Corsican Pine on the Property.
 - b. Remove all existing Corsican Pine from the Property using the 'basal bark application method' recommended in the Ahika Consulting Report (9 May 2014) at chapters 10 and 11 (attached).
 - c. Provide a report to the Dunedin City Council by 4 ~~September 2020~~ 31 January 2021 prepared by a suitably qualified forestry consultant that confirms:
 - i. The Corsican Pine removal operation has been successfully undertaken;
 - ii. A final survey has been undertaken to assess wilding Corsican Pine risk on the Property; and
 - iii. That there is no remaining wilding Corsican Pine risk on the Property.



4. Under sections 315(2) and 315(3) of the Act if Grant's Motels Limited fails to comply with order 3(b) or (c) above by 4 ~~September 2020~~ 31 January 2021 then the Dunedin City Council or its agents may enter on the Property and undertake the Corsican Pine removal using the methods in 3(b) above so as to achieve the result anticipated in 3(c). The Dunedin City Council may recover the costs and expenses of doing so as a debt due from Grant's Motels Limited, and if necessary register any unpaid costs and expenses as a charge on the land under the ~~Statutory Land Charges Registration Act 1928~~ Land Transfer Act 2017.
5. The orders shall apply to any successors of Grant's Motels Limited to the same extent as they apply to Grant's Motels Limited.
6. Grant's Motels Limited shall ~~within three months~~ provide evidence to the Council of a Bank Bond being in place for the benefit of the Council in the sum of not less than \$135,000, which shall be payable to the Council in the event that the order 3(c) herein is not complied with. The Council may use that bond to fund action taken by the Council in order 4. Insofar as work by the Council to satisfy order 4 leaves a surplus of bond remaining, that bond surplus shall be refunded to Grant's Motels Limited.
7. Order 6 shall be read in conjunction with the bond provision in the Corsican Pine Enforcement Order (CRN 13012500394) to the effect that a total bank bond of \$135,000 will satisfy order 6 in both Enforcement Orders.





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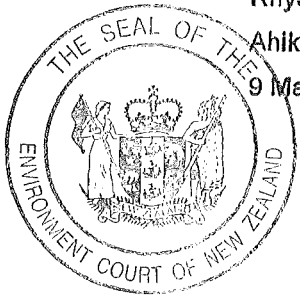
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Assessment of risk of wilding conifer spread and recommended strategy to remove planted Douglas fir and Corsican pine from land owned by Grants Motels Ltd, on the southern end of the Maungatua Range.

Rhys Millar.

Ahika Consulting Ltd

9 May 2014



10.0 Recommended Management Methods

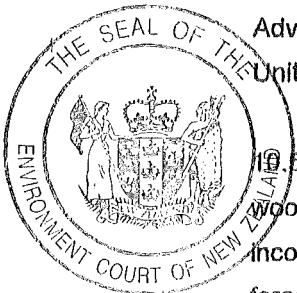
10.1 As discussed above, Proforest Services Ltd have been contracted by Grants Motels Ltd to remove the planted Douglas fir from across that part of the property that is within the Maungatua Landscape Conservation Area. However the quality of the removal operation has not been sufficiently high to provide confidence that there will not be regrowth of considerable numbers of planted Douglas fir. The ability of Douglas fir and other conifers to re-sprout from small green branches is well known, and as such a fundamental requirement of successful conifer tree removal requires the removal of all green needles and branches. An initial assessment of the site has also indicated that a number of planted trees have been missed during the removal process, undoubtedly due to the difficult terrain and in places, dense surrounding vegetation.

10.2 A more appropriate method for the removal of these young trees would have been to use a herbicide. Two suitable options exist in this regard; one being to foliar spray with the active ingredient metsulfuron, and the other to apply a triclopyr butoxyethyl ester / biodiesel herbicide to the bark of the actively growing trees. The later method is the preferred method because there is less risk of damage to surrounding vegetation and the environment, and because it is typically more cost effective due to its low application rates.

10.3 As part of providing recommendations to the court, I have taken advice from the most experienced wilding pine practitioners in New Zealand. Their advice is consistent in that a basal spray application is the most reliable and cost effective means of follow up work in this situation.

10.4 The following information has been taken directly from Peter Raal, Technical Advisor: Threats (Science and Technical's Christchurch Service Centre's Threats Unit) located in the Otago Conservancy Office.

10.5 "The basal bark application method provides the ideal solution for scattered woody weed control because it is quick and easy to use, highly effective and incorporates a practice that enhances to the growth of the desirable native and forage. Using this method, the herbicide is applied to a specific area on the tree,



which significantly reduces impacts on adjacent vegetation or the soil from drift or overspray.

10.6 The basal bark application method uses a knapsack to squirt a mixture of 120g/l triclopyr butoxyethyl ester (Grazon or equivalent generic) herbicide in oil onto the lower trunks of woody species including pines, willows, alders, elders, sycamores, hawthorns, cotoneasters, rowans, barberries, etc. The technique is highly effective on saplings and trees with a stem diameter of less than 20cm and which have not yet developed a thick bark. As the trees become bigger, the bark becomes rougher and thicker and the technique becomes less effective. It must be noted that treated trees may take up to 1 year (or more) to die so don't draw conclusions too soon if you use the method.

10.7 Basal bark herbicide treatment is most useful where the target tree or shrub density is moderate to low, where manual labour is available and where small dead standing trees and shrubs can be tolerated. Basal bark treatment is not recommended where there are thousands of stems per hectare to treat and boom spraying would be more appropriate.

10.8 Basal bark treatments are different than foliar treatments because the herbicide penetrates the bark, not leaves, to be effective. An oil carrier is used instead of water and oil soluble triclopyr butoxyethyl ester herbicide. Diesel oil or kerosene can be used as the oil carrier.

10.9 There is a new pre-mixed herbicide and oil product coming onto the market called X-Tree Basal (marketed by ETEC Crop Solutions), which uses biodiesel and a special penetrant as the oil carrier. "

10.10 Trees must be dry when using the basal bark method. This is because the oil-based herbicide mixture cannot penetrate through a water layer.

11.0 Recommended work programme for Grants Motels Ltd

It is considered possible that up to 15% of the planted trees will still be alive at the completion of the initial conifer removal programme. These remaining trees will be scattered across the extent of the property.



11.2 Given the relatively good vehicle access across the site, a ground control operation is recommended. The basal spray method of killing trees, using the X-Tree pre-mixed herbicide / oil penetrant is strongly recommended. It is considered the best solution in terms of reliability and completeness of kill of the wildings, and when applied correctly is the most viable both in terms of minimization of environmental effects and in terms of cost effectiveness.

11.3 It is essential that the contractor employed to implement the works has had experience with this method and has procured and used a reliable and safe applicator that meets requirements. On this basis Basal Bark applicators must be purpose built, have been used before with proven results and efficiency. They must have a refillable tank that can be swapped over in the field with a minimal chance of spillage.

11.4 To allow the trees to be identifiable there is now a need to allow them to grow. After three years (2017) it is expected that the Douglas fir will have grown sufficiently tall to be identifiable amongst the surrounding native vegetation, and therefore be able to be killed.

11.5 Because trees do not die instantly, and because there is a risk that trees will be missed in the first sweep, it is recommended that a second operation be planned for two years later (2019).

11.6 It is recommended that an independent monitoring and sampling regime be implemented, ensuring that the operation is being implemented in a quality manner and that trees are not being missed. During conifer removal operations, the independent monitor will be responsible for:

1. Ensuring the whole of the site has been covered by the contractors;
2. Ensuring the correct technique is being used in application;
3. Ensuring all trees are being affected by the herbicide.

Two months prior to each operation the independent monitor should survey the entire property, and identify the level of infestation of pines. This information could be achieved by way of a flyover in helicopter, or by a combination of four-wheel motorbikes and foot travel. This information should be collected as estimated baseline data, and can also be used by the landowner in establishing contract rates for subsequent completion of the basal spraying work.



11.8 A final sample of the entire property needs to occur in 2020. At this point in time it is hoped that pine numbers are negligible, and that the person monitoring during that final visit can kill any remaining trees.

12.0 Other recommendations

12.1 It is unclear whether the Corsican pines have been removed yet. If they have not, then these pine should be killed in the spring of 2014, using the basal spray method.

13.0 Costings

13.1 Given the unknown extent of the conifer regrowth it is difficult to generate a fully accurate estimate of costs. The population of conifers remaining has been estimated at 15% of those planted. This estimate has been based upon the site assessment of 11 April 2014, but can only be treated as a cursory but conservative estimate.

13.2 Industry costs have been used in the development of this budget, with all prices based upon current industry rates and, for the herbicide, actual costs.

13.3 Labour productivity and output has been determined through conversations with practitioners who are experienced in managing and running wilding tree removal operations.

13.4 The budget for completing the management works is outlined in the table over page. A total budget of \$149,966.00 has been calculated as being required to comprehensively remove the remaining conifers and ensure no risk of wilding spread.

