

RESOURCE MANAGEMENT ACT 1991

ASHBURTON DISTRICT COUNCIL

RESOURCE CONSENT APPLICATION

BY

TRACY FLEET

Application references: LUC21/0050

Property location: 30 Queens Drive, Allenton, Ashburton

Resource consent is sought to: Removal of a protected tree – Tilia Tomentosa / x Europa

Appearances: Applicant

Ms Tracey Fleet

Submitters

Dr Caroline McIntosh
Mr Alistair Perkins
Mr Robert Engelbrecht

Council

Ms Mary Clay
Mr Brad Cadwallader

Decision by Commissioner Dean Chrystal

1.0 Introduction

1.1 Pursuant to instructions from the Ashburton District Council I was appointed to review and determine the above application for resource consent (land use).

The Proposal

1.2 The proposal is to removal of a listed tree – Tilia Tomentosa / x Europa or Silver Lime. The application for removal is sought due to the existence of structural defects within the tree that could cause harm to persons and property.

Site and Surrounding Area

1.3 The site containing the tree itself is currently vacant with no permanent building although it does contain a caravan. There is no fence between the application site and the adjoining site at 28 Queens Drive, and these properties have in the past been in the same ownership. There is some other landscaping on the site, but the primary feature is the protected Silver Lime.

1.4 The protected tree is a prominent feature within the surrounding area and can be seen from State Highway 1 to the south. The tree itself contains three codominant stems and is around 15m or more high. It is situated towards the rear of the property and contains a bracing system.

1.5 The adjoining sites contain residential dwellings which are within 5m - 16m of the tree.

Written Approvals

1.6 The applicant provided the written approval from the following persons:

- The owner of 26 Queens Drive
- The owner of 28 Queens Drive
- The Owner/Occupier of 30 Queens Drive
- The owner of 34 Queens Drive

Notification and Process

1.7 The land use application was limited notified on the 3rd of July 2021. Fourteen submissions were received on the application, all of which were in support.

1.8 One of those submissions was received late which I had previously decided to provide a waiver of time pursuant to s37A of the Resource Management Act (RMA).

1.9 The submitters raised the following issues:

- The tree was a danger to the house, glasshouse and workshop at 32 Queens Drive
- That with the three main trunks each leaning and supported by rope, it was just an accident waiting to happen
- The tree poses significant risk to property and should be removed
- The tree should be removed on health and safety grounds
- Concerns around the mental health and wellbeing of the applicant and surrounding neighbours
- The structural integrity of the tree was poor
- The private landowner should not be subject to the liability for the failure of the tree and the Council should not be allowed to protect a tree that is structurally unsound

1.10 I confirm that I have read the application, submissions, the s42A report and the Applicants evidence as part of my decision. I have also undertaken a specific site visit after the hearing.

Application Status

District Plan

1.11 The proposal has been assessed as not complying with Rule 12.7.5 f) in the District Plan, being:

the destruction or removal of any tree listed in Appendix 12-4 as Protected Trees (other than a dead, hazardous or dangerous tree).

1.12 Therefore, the status of the activity in this situation is determined to be **non-complying activity**. I have commented on this further below.

S42A report

- 1.13 Ms Clays s42A (of the Act) report addressed the details of the proposal and the non-compliance, the statutory considerations and undertook an assessment of the effects on the environment of the proposal to remove the tree and a consideration against the objectives and policies of the District Plan.
- 1.14 Ms Clay considered, and I agree, that there was no permitted baseline to be considered in the assessment of this proposal. She went on to note that the key effect in her view was the actual effect on the tree in question.
- 1.15 Ms Clay noted that recent pruning and ringbarking had had an effect on the crown system of the tree, and on its appearance and health. However, she said the report provided by Mr Cadwallader indicated that the pruning undertaken was not terminal, and that with management, the tree could be expected to live for many years provided the cabling system was reassessed and corrective steps taken as well as additional pruning for balance. She said the tree remained an impressively sized specimen of lime, which was visible from some distance and was the largest tree in its immediate vicinity.
- 1.16 Ms Clay said that the District Plan, in categorising the removal of protected trees as non-complying, did not anticipate their removal except with good reason. She said it was clear that its removal would have an adverse effect on the tree itself and would result in the loss of a significant landscape feature for the community. She went on to say that despite its recent pruning, she considered that the beneficial and special characteristics of the tree that made it worthy of protection in the first place still remained, and its removal would have wide reaching community effects that were more than minor. She acknowledged that there would be a need for ongoing monitoring.
- 1.17 In her conclusion on effects Ms Clay said in her view the removal of the tree would have significant adverse effects, on the tree and surrounding environment and that having regard to the assessment made by Mr Cadwallader, that the tree was still worthy of retention. She considered that it could be retained in such a way that would ensure that the physical health and safety of residents in the area would not be unduly affected. Therefore, having regard to the goals anticipated by the District Plan, and the current and future outlook for the health and safety of the tree, Ms Clay's view was that that the removal of the tree would have more than minor adverse effects.
- 1.18 Ms Clay referred to Objective 12.2 and Policies 12.2A, 12.2B, 12.2C and 12.2D and said that given the tree remained worthy of recognition, despite the damage recently caused to it, the proposal to remove it was contrary to the objectives and policies of the District Plan which sought to protect trees from being removed due to their high level of significance.
- 1.19 In addressing the first part of the s104D (of the RMA) gateway test, Ms Clay said that it was her understanding that when considering whether the adverse effects will be minor, there was no statutory authority to consider the positive effects that might accrue from the proposal. Rather it is the adverse effects, as proposed to be remedied and/or mitigated, and taken as a whole, that are to be no more than minor. Based on her assessment she said the proposal resulted in "more than minor" adverse on the protected tree and surrounding environment.
- 1.20 In assessing the second part of the gateway test, Ms Clay said her understanding was that the term contrary meant that a proposal must be "not repugnant" to the relevant plan objectives and policies rather than simply not being in accordance or inconsistent with them. This she considered to be a high threshold, and in order to be considered 'contrary' as in 'repugnant' the application must demonstrate a significant level of inconsistency with the policy framework. Based on that threshold, she considered the application to be contrary to the relevant objectives and policies.

- 1.21 Ms Clay considered that the application would not meet the threshold tests for a non-complying activity and therefore was not eligible for approval pursuant to section 104D of the RMA and therefore should be declined.
- 1.22 Mr Cadwallader's report had been produced in May 2021 to consider the damage to the tree. In that report he stated that the damage was not sufficiently high enough to cause the short-term death of the tree as satisfactory conductivity remained to ensure the roots received starch and other assimilates from the canopy, and that the canopy was conversely provided the moisture it required from the root system
- 1.23 Mr Cadwallader agreed with previous assessments that there were two options, one being removal and the other crown reduction and retention. He was of the view that the tree was not immediately dangerous and that efforts could be made to restore the canopy by corrective pruning. He said that while this might affect the visual appeal of the tree in the short term, lime trees were resistant and quite able to respond to heavy pruning. He said to that end a complete crown reduction will be required to balance the canopy along with a cable support system reassessment and corrective steps if necessary. He indicated that a six-monthly inspection of the tree should follow up any work.
- 1.24 Mr Cadwallader said it would be difficult to anticipate the long-term impact of the damage to the tree, but with corrective steps taken, the tree could live for many years if it continued to be managed appropriately. He noted that it was also possible that future inspections deem the tree to have become unsafe, necessitating its removal, but was of the view that this would be unlikely to occur within the next 5-10 years.

Applicant

- 1.25 **Ms Fleet** said the application was deeply personal to her because the decision made under this application will have a profound impact on her life. In this context she said she had resigned from one of the most rewarding jobs she has ever had, in order to focus on this presentation and leave no stone unturned.
- 1.26 Ms Fleet said her primary motivation for making this application was to be the safety rail at the top of the cliff, rather than the ambulance at the bottom. She went on to say that if the Silver Lime had a single structurally sound trunk, we wouldn't be here today. Instead, she said we have a tree with 3 stems growing at various angles, with 'included bark' between them, we also have three qualified arborists reports who all agree that these codominant stems and the 'included bark' are major structural defects.
- 1.27 Ms Fleet said the Tree Hazard Evaluation form completed by Walter Fielding-Cotterell back in January 2014 had scored the tree an 11 out of 12 as a hazard rating with immediate action needed and further inspection. She noted Mr Fielding-Cotterell quote that: *'It is true that there is no way that any remedial work can guarantee absolutely the safety of a tree. If it did fail, having regard to three inspectors that found the tree to be structurally defective, a claim is likely to be made on the basis of negligence together with a claim made for damages.'*
- 1.28 Ms Fleet felt that the wire cable bracing now installed, if it had sufficient strength to act as partial abatement for wind throw in relation to the leaning stems, then it was feasible that if one stem was to fail the strength in the wire cable bracing could cause all three stems to fail. In her opinion, trying to abate the highly hazardous tree, has in fact created a much bigger hazard and potentially more catastrophic consequences than before which kept her awake at night.

- 1.29 On the basis of the above Ms Fleet challenged the status of non-complying given the hazard presented by the tree.
- 1.30 Ms Fleet agreed with Ms Clay's assessment that the potential effect on the environment from removing the tree were not a minor effect albeit a major immediate positive effect on the safety of neighbours and the public. She went on to say that as part of the process of preparing the assessment of effects to accompany the application she had given consideration to:
1. Crown reduction v removal
 2. Uncommon Species in New Zealand
 3. Benefit outweighs the major effect
- 1.31 Ms Fleet noted that Mr Jemmett, an arborist stated: *"Unfortunately work had already been undertaken leaving the tree significantly damaged and unbalanced. This work has affected the aesthetics of the tree and also possibly causing a health and safety issue due to the unbalanced weighting of the tree"* and that he recommended two options:
- a) A full crown reduction to take all the wind loading out of the tree and regular monitoring; or
 - b) Full removal
- 1.32 Ms Fleet noted that Mr Cadwallader agreed with Mr Jemmett and that 10 months later none of the recommended options had been actioned by the Council despite the tree in its current state being assessed as being a health and safety issue.
- 1.33 In terms of the issue of precedent and plan integrity Ms Fleet argued that in this circumstance the situation regarding the Silver Lime tree was unique in that the tree had structural defects identified by three qualified arborists, the tree was supported by cobra ties for 2 and 4 ton weight and cabled together by wire cables and is deemed to be too much of a risk for insurance cover due to hazards identified that it was too close to residential dwellings within its falling zone.
- 1.34 Ms Fleet said that she agreed trees were important to the environment if their positive aspects outweighed any negatives and that any replacement should equal or surpass the benefit to the environment.
- 1.35 Ms Fleet sought that I apply a health and safety lens in the decision-making process and grant the application to remove the Silver Lime tree at 30 Queens Drive.
- 1.36 I questioned Ms Fleet about the costs associated with the remediation of the tree and she indicated that those were being covered by the Council. I also asked about the ability to develop 30 Queens Drive, to which she indicated that around 45% of the section was undevelopable due to the tree.
- 1.37 I also asked Ms Fleet about the issue of insurance to which she responded that her broker had advised that they could not get any form of liability insurance and she indicated she could not get insurance for a house and therefore could not get a mortgage.

Submitters

- 1.38 **Dr Caroline McIntosh** indicated she was the daughter of the late Joy and late Eric Drewitt who were the previous owners and-occupiers of the land at 28/30 Queens Drive. She said she had then shouldered responsibility for the land, and consequently the tree, as executor of her parents' estate. She said she gave her unreserved support for Miss Fleet's resource consent application to remove the tree.

- 1.39 Dr McIntosh said the tree presents a real and serious danger to health and safety of residents living within the 23-metre radius fall zone, any visitors to 30 Queens Drive and neighbouring sites, and members of the public. She continued that the tree has been deemed unsafe by four qualified arborists and must be removed on grounds of health and safety.
- 1.40 Dr McIntosh considered the risk to human life and wellbeing must be prioritised over the protected status of the tree. She noted that over the last four years there had been several fatalities from trees failing in high winds which weren't industry related. She also said as well as fatalities, there have been numerous serious injuries from falling trees including the case of a tree falling on four children and a teacher at an early childhood centre. She noted that in a case in Rotorua the Council knew that the tree was unsafe and failed to take action resulting in a person losing her life.
- 1.41 Dr McIntosh felt that there was a need to be proactive now, to prevent a tragedy and that while no one knows exactly when this tree is going to fail, when it does it will be too late to avoid injury, potentially a fatal injury.
- 1.42 Dr McIntosh attested to the detrimental environmental impact of the tree on the previous owners, neighbours and concerned citizens throughout the last 16 years with the following examples:
- Her parents had been extremely worried about the instability of the tree. They lived in fear that the tree could fall on their house and the neighbouring houses. They were so terrified of the tree falling that they would not go in any of the rooms at the tree end of the house when there were strong winds, this included the kitchen and living room. They had advised the Council of their concerns on numerous occasions.
 - An immediate neighbour was so anxious about the tree falling that he would ring her parents every time there was a strong wind to express his concern that the tree was at risk of falling and the heavy trunks landing on the houses within range. This neighbour had also contacted the Council with his concerns.
 - Other neighbours frequently expressed their concerns to her parents about the tree falling. They had also expressed their concerns directly to the Council.
 - Canterbury District Health Board staff who visited her parents, were concerned about the impact of the unsafe tree on her parents' health and safety. Those staff had advised the Council of their concerns.
- 1.43 Dr McIntosh went onto say that the tree has had, and continues to have, a significantly negative impact on the mental and emotional wellbeing of individuals within its fall zone as well as a negative impact on the mental and emotional wellbeing of owners when not on site. She said the fact that there were 15 submissions supporting this resource consent application and none opposing it spoke to the concerns of the community. Furthermore, the owner-occupiers of three immediate neighbouring properties support this application and have formally given their consent as affected parties.
- 1.44 Dr McIntosh noted that during the period 2005-2016 her parents had sought legal advice and explored all viable channels that were recommended by experts including writing to the Council, seeking legal advice and commissioning arborist reports. The consensus was that the tree was unsafe but there was no feasible way forward. She said her father had spent three years doing preparatory work for a resource consent application and indicated that process had cost around \$27,000. The burden of providing proof had been mentally, emotionally and financially draining on him and eventually after three years of letters, reports and meetings,

her father was advised by his lawyer that the Council had indicated that a resource consent application would not be successful.

- 1.45 Dr McIntosh concluded by stating that the danger of the tree falling and injuring or killing someone in the process was deeply concerning for her father right up until the time of his passing. She considered the negligence and blatant disregard shown by the Council took a huge emotional toll on him and put him in a dangerous and unhealthy situation- physically and emotionally.
- 1.46 **Mr Alistair Perkins** said he saw first-hand the anguish his friend Mr Drewitt suffered as a result of his inability to have this tree removed. He said trees close to buildings and dwellings naturally pose problems and risks, including the risk of a tree coming down in stormy weather with great potential to cause damage to property, life and limb. He considered large trees are beautiful, majestic and graceful life forms and need to grow unrestricted in parks and domains, not on someone's back doorstep.
- 1.47 Mr Perkins said the fear that this tree might come down causing untold damage, kept his friend awake on many a night and even now the thought of this distressed him. He wondered if the welfare of people had even been a consideration in decisions relating to this tree. He considered the exercise of common sense to remove the tree from 30 Queens Drive should be taken.
- 1.48 In response to my question, Mr Perkins said the Mr Drewitt talked often about the tree and that it had a negative effect on him and was a burden to him.
- 1.49 **Mr Robert Engelbrecht** said he use to go around to the property and help Mr Drewitt clean up the leaves from the tree in the autumn. He considered the tree had reached the end of its life and should be taken down and said that it no longer represented the lime tree that it was.
- 1.50 A written submission was also received from **Mr Les Hunter** who questioned why the Council had taken out various trees on public land without any public notification and considered there was an inconsistency in the application of rules and regulations.

Council Response

- 1.51 I questioned Mr Cadwallader about whether this was a hazardous tree to which he responded that the hazard can be mitigated through appropriate arboriculture care which included canopy reduction and the cable bracing re-evaluation. He stated that the tree had been identified by all arborists that had looked at it as having codominant stems, so by virtue of that the tree doesn't have an ideal structural form that alone without mitigation would be considered hazardous. He noted that other reports suggesting the tree was hazardous were written six or seven years ago prior to the steel bracing system being installed. He considered that with appropriate management the tree would not pose a danger but acknowledged that 'included bark' can be a point of weakness.
- 1.52 I also asked Mr Cadwallader about the lifespan of the tree which he said was difficult to project but was likely to be as least 5-10 years. He did not consider the damage to the tree was fatal, but that the long-term consequences would manifest themselves at a later date. He also indicated that the ongoing maintenance costs would be around \$1500-\$2000 every 5 years and annual inspections of around \$200 would be necessary.
- 1.53 In relation to questions around the criteria for listing Mr Cadwallader said the tree was still representative of a listed tree even in its current state. He accepted that some categories such as size would have changed and that it remained to be seen whether it was still at the level originally assessed. In terms of the hazard rating he considered the failure potential of the tree

was low and it would take an event which lifted roofs for the tree to fail. He accepted however that it was impossible to remove all risks.

Right of Reply

- 1.54 Ms Fleet provided a written right of reply in which she clarified the insurance situation. In particular she said that post the sale of 28 Queens Drive she had enquired with AA Insurance about liability insurance for the section at 30 Queens Drive and been informed that they did not offer any policies that would suit the cover required for 30 Queens Drive. She had then approached brokers Crombie Lockwood and provided the Arborists reports and photos of the tree to the broker so that they could approach their underwriters to see what if any liability cover, they could offer. The response in summary was that they were unable to offer cover due to the size of the tree, the proximity to neighbouring properties and the risk involved demonstrated by the supports installed in the tree.
- 1.55 Ms Fleet then referred to the provision of a dwelling on 30 Queens Drive and said that regardless of any concessions that Council made in relation to a resource consent in order to fit a dwelling on the front of the section, building a dwelling was not possible due to not being able to secure insurance because of the risk of the tree.
- 1.56 Ms Fleet went on to clarify the issue around 'included bark' because she said this was the defect that was most likely to cause failure. She went on to describe 'included bark' and provide examples from the tree. She considered 'included bark' amplified the risk and hazard rating in this particular tree, especially when you factored in the size of the 3 stems which was the point in where a stem/branch was most likely to fail.
- 1.57 Ms Fleet referred to the heritage tree assessment criteria which had been discussed with Mr Cadwallader during the hearing and said that what hadn't been addressed was the two major structural defects that could not be rectified. She also noted that in terms of the criterion on importance of position in landscape, while the Silver Lime was the most dominant tree in Queens Drive she disagreed strongly to Queens Drive being described as 'an area where other large trees are scarce'. She provided photographs showing Queens Drive was not devoid of large trees. She went onto say that there was an argument that the Silver Lime was in fact too large for its surrounding environment and had a negative impact on the environment when factoring in the hazard it presents and the negative impact on the health of the residents.
- 1.58 Ms Fleet also provided photographs which she said showed the degree of decay which was occurring in the tree.
- 1.59 Ms Fleet concluded the right of reply by saying that despite statements that the tree will not fail, this could not be guaranteed. She said the risk that they could be wrong was the equivalent to playing Russian roulette with the lives of the Queens Drive residents. She also said she was committed to turning her focus to how she could have a more positive impact on the environment when redesigning/rebuilding on the section.
- 1.60 I sought further clarification, via a minute, on the insurance issue as follows:
- i. I want to understand from Ms Fleet whether the ability or not to obtain insurance extends to a house built on 30 Queens Drive. In other words, would she be able to obtain insurance for a house on the property if one were proposed.
 - ii. Does the District Council have any form of liability insurance cover in a case where a private but listed tree falls on a neighbouring property
- 1.61 The Council response was received via Mr Ian Hyde and stated:

Council staff have sought clarity from our insurance advisors who have advised it is unlikely that Council holds any liability for damage caused by protected trees on private property.

Among the reasons for this is that the tree is on private property and not Council owned land and is the responsibility of the ratepayer. While Council offer some maintenance, any damage caused by the tree would be the responsibility of the ratepayer.

1.62 Ms Fleet sought further advice from her broker, asking:

1. If the tree was to have the crown reduced but had to retain the bracing to mitigate wind throw, would that make a difference in terms of being able to offer cover?
 - Their verbal response was that whilst the tree still requires bracing then that indicates to them the risk involved and therefore they were still unable to offer cover.
2. Would they be able to offer a Home Insurance policy in order to be able to secure a mortgage?
 - Their verbal response was that although the house may possibly be outside the falling zone of the tree, there is no change to the proximity of the neighbours and this is where the greater risk would remain.
 - They may consider a Home Insurance policy once the house is built, with any damage caused by the tree excluded. However, they cannot assess whether they would or not until the build was complete.

1.63 Ms Fleet said that this was a summary of their verbal response, and was awaiting an official response in writing which was subsequently received via email and stated:

The matter of building a home on the property was advised to insurers when I made the liability submission.

Vero's response in verbatim: "We have assessed the risk and based on the information received we are unable to provide a solution in this instance."

If you are granted consent to build you can make an application for contract works (construction cover) with an associated liability policy. A new submission would need to be made here. I cannot give positive assurance that insurer would consider offering cover considering they have already declined to cover liability.

Hearing Closure

1.64 Upon receipt of this latter information, I closed the hearing on the 29th of October 2021.

2.0 Assessment

Background

2.1 I note at this point that the protected tree in question has supposedly been illegally damaged late last year including being heavily pruned and partially ringbarked. While I acknowledge that this may well have an ongoing impact on the tree, the proceeding associated with this action are not a part of my considerations and I have not given this weight in my determination of the application.

Activity Status

2.2 As referred to above the activity was assessed as being a non-complying activity on the basis that its removal was not because it was a dead, hazardous or dangerous tree. If any of these had

applied, then the status would have been a controlled activity for which consent would have had to be granted.

- 2.3 Ms Fleet herself did contest this issue and considered the tree was hazardous and dangerous. She relied on previous arborist reports prepared 6 or 7 years ago to support this. As such I was unable to question the authors about their views and the potential of mitigating the danger.
- 2.4 I specifically asked Mr Cadwallader the question around the hazardous nature of the tree at the hearing as referred to above, and he responded by saying that the tree had been identified as have co-dominant stems, so by virtue of that it didn't have an ideal structural form and that alone without mitigation it would be considered hazardous. However, he went onto say that the hazard that the tree presented could be mitigated by appropriate arboriculture care which would include the canopy being reduced and the cable bracing system being re-evaluated. On that basis he considered the tree did not present a hazard or danger.
- 2.5 Mr Cadwallader's evidence and answers as an expert arborist on this matter were uncontested by another expert at the hearing. I therefore accept that for the purposes of determining the status of the activity the hazardous or dangerous threshold is not met.

Statutory Tests

- 2.6 The application is to first be considered under Section 104D of the RMA and then if those tests are passed sections 104, having regard to Part 2, and 104B are to be considered. Conditions may also be imposed pursuant to s.108.
- 2.7 Section 104D requires that as a non-complying activity consent cannot be granted if the proposal fails to pass both of the 'gateway tests' which are whether adverse effects are 'more than minor' and whether the proposal is 'contrary to' the District Plan's objectives and policies.
- 2.8 If one of the 'gateway tests' is passed then relevant to this case, the s104 matters include:
- any actual and potential effects on the environment of allowing the activity; and
 - any relevant provisions of the district plan; and
 - any other matter we consider relevant and reasonably necessary to determine the application.
- 2.9 I note that as a non-complying activity there are no restrictions, and I am able to consider all aspects of the proposal. Under S104B of the RMA I may grant or refuse an application for a non-complying activity, and if granting the application, may impose appropriate conditions in accordance with section 108.
- 2.10 In assessing any proposal, I am also able to have regard to the nature and scale of activities that might be permitted as of right on the site in terms of Section 104(2) of the Act (the permitted baseline). In this regard I accept Ms Clay's view that the permitted baseline is of limited relevance.
- 2.11 In terms of the *Davidson decision*¹ the Court of Appeal found that the High Court erred when it determined the Environment Court was "not able or required to consider Part 2 of the Resource Management Act 1991" when undertaking its decision-making role in accordance with section 104 of the RMA. The decision means that when considering resource consent applications, decision-makers "must have regard to the provision of Part 2 when it is appropriate to do so": [47]. I address this later in my decision.

¹ R J Davidson Family Trust v Marlborough District Council [2018] NZCA 316

- 2.12 For the record I noted that there are no s6 (RMA) matters of national importance (the listing is not a heritage trees) nor any s8 (RMA) Treaty of Waitangi matters associated with the proposal that I need to consider.
- 2.13 Section 104(3) states that a consent authority must not have regard to any effect on a person who has given written approval to the application. Four written approvals were provided as identified above, including one from the Applicant themselves. This creates the somewhat bizarre situation in this case that I cannot have regard to the effects of the removal of the tree on these properties even if they were positive. For the reasons set out later in this decision this becomes irrelevant.

Objectives and Policies

- 2.14 The relevant objective and policies identified by Ms Clay were Objective 12.2 and Policies 12.2A, 12.2B, 12.2C and 12.2D. I have set them out in full below due to their importance in this situation:

Objective 12.2: Protected Trees

The protection of trees and groups of trees which contribute significantly to the District's amenity and/or heritage.

Policy 12.2A

To identify and record trees of significance, recognising them as heritage items or an important character element in maintaining and enhancing the environment and amenity of the District.

Policy 12.2B

In determining items to record, the District Council will have regard to the following factors:

- heritage / historic value;
- scientific or botanic value, including rarity or representativeness;
- importance of position in the landscape, including landmark significance;
- cultural, ethnical, social, spiritual or recreational significance, including any commemorative value;
- age;
- size;
- form and condition;
- contribution to local amenity as an individual tree or as part of a stand of trees;
- suitability in relation to the setting or site conditions;
- functional value.

Policy 12.2C

To use methods and rules in the District Plan to protect identified trees from loss or destruction.

Policy 12.2D

To encourage the practice of planting trees, including indigenous trees, on publicly owned and managed land and protect these trees from unnecessary interference and destruction.

- 2.15 Ms Clay’s position was that the proposal to remove the tree was contrary to the objectives and policies of the District Plan which seek to protect trees from being removed due to their high level of significance. I have therefore considered these provisions carefully and I note that the term contrary in this context has been defined by the High Court as being opposed to in nature, different to, or opposite and repugnant and antagonistic.²
- 2.16 Starting first with the policies I find that none of them in themselves actually require protection of a tree once listed. The first three policies are all concerned with identifying and determining whether a tree is to be listed and the mechanism for doing so, while the last policy is simply not relevant to this situation. Even the Explanation and Reasons which follow the policies are tailored towards the criteria by which a tree may be listed rather than its ongoing protection. I note in particular that there is no equivalent for heritage trees of Policy 12.11 which relates to ensuring the protection of heritage items and none of the policies refer to avoiding or preventing the loss of heritage trees.
- 2.17 In this context the proposal to remove the tree cannot in my view be said to be contrary to the above policies. While I acknowledge that the Anticipated Environmental Results which follow the policies include “*the retention, within their natural life spans, of trees or groups of trees, which have significant value to the District’s residents and visitors*” the test I am required to consider is against the policies themselves and not the Anticipated Environmental Results.
- 2.18 Turning then to the objective, it seeks the protection of trees and groups of trees which contribute significantly to the District’s amenity and/or heritage. Again, an element of this objective is about the identification of a heritage tree, however I consider it does as an objective afford such trees protection once listed if they contribute significantly to the District’s amenity and/or heritage. The Silver Lime has been listed and therefore at the time of listing it was considered to contribute significantly to the District’s amenity and/or heritage otherwise it wouldn’t have been listed.
- 2.19 I note here that the system used for listing trees was that adopted by Christchurch City Council at the time and the identification work as I understand it was undertaken by Mr Fielding-Cotterill. As acknowledged by Mr Cadwallader at the hearing a re-assessment of the tree may change some of the scoring, however whether such changes would mean the tree would now no longer met the relevant threshold was unclear and indeed cannot really be satisfactorily determined through this process nor could it change the fact that the tree is protected in the District Plan.
- 2.20 Effectively therefore the objective becomes in my view the only provision against which the proposal can be assessed and in a circumstance such as this where the tree will be lost there are no shades of grey – the proposal is either contrary or it’s not. In my opinion given the wording, which includes protection, the removal of the tree in the present circumstances can only be seen as contrary to the objective.
- 2.21 Finally, I acknowledge that that my findings here may well have identified a significant, and until now unforeseen, gap in the District Plan provisions and for that reason, I could have considered it appropriate to have regard to the provision of Part 2 of the RMA. However, for reasons set out below that became unnecessary.

Effects on the Environment

- 2.22 Having regard to the application, the s42A report and the evidence before me, I accept that the key potential effect on the environment relates to the loss of the lime tree.

² High Court in New Zealand Rail Limited and others v Marlborough District Council (AP 169/93 Wellington Registry)

- 2.23 I acknowledge that the removal of the tree may well bring a range of 'benefits' or positive effects to the Applicant including the ability to better utilise or even simply utilise the site for residential purposes and the removal of stress and wellbeing associated with the tree for the Applicant and immediate neighbours.
- 2.24 I acknowledge, however that when considering whether the effects will be more than minor in terms of s104D, there is no authority for me to consider the positive effects that might accrue from the proposal.
- 2.25 Having considered the evidence and on the basis its dangers can be mitigated as referred to by Mr Cadwallader, there is little doubt that the removal of the tree will have an effect on the environment that is more than minor. I can simply see no way of reaching an alternative conclusion.
- 2.26 Notwithstanding my conclusion above, I consider it is worthwhile for the reasons expanded on in the conclusion below to traverse the positive effects of the tree's removal.
- 2.27 It seems to me that there is a potential issue around the ability to utilise 30 Queens Drive for its zoned and intended purpose of residential development. The response from the insurance broker casts real doubt about the ability to obtain insurance for a house built on the site and of course without the ability to insure, the likelihood of a house being built is virtually non-existent.
- 2.28 While this is a resource consent and not a change to the District Plan, Section 85 of the RMA is of some note in this circumstance because it confers on the Environment Court a discretion, where it concludes that the provisions of a plan or proposed plan renders any land incapable of reasonable use and places an unfair and unreasonable burden on any person having an interest in the land, to direct the relevant local authority to modify, delete or replace the provision – in this case the listing of the tree.
- 2.29 I observe that section 85 cannot be directly relevant to me given that, to state the obvious, I am not the Environment Court and that this is a resource consent process. I raised this as an issue because it seems me that there is a risk here of depriving Ms Fleet of the ability to make any reasonable and indeed anticipated use of her land.
- 2.30 The other key issue associated with stress and wellbeing is more complex. It was clear to me from the evidence given by the Applicant and submitters that the lime tree has over the years caused a great deal of stress and has clearly affected peoples wellbeing. The evidence of Dr McIntosh in particular about her father was compelling. The ability to quantify the stress and wellbeing is difficult and obviously different people will react in different ways. Nevertheless, in my view people should not be left feeling stressed and their wellbeing affected by a listed tree regardless of its ability to be retained. Having visited the site, I can certainly understand those concerns.

Section 104D Test

- 2.31 I have concluded that the proposal does not meet either of the two s104D tests and therefore consent cannot be granted.

Conclusion

- 2.32 Having reached the above conclusions, I can go no further. This is one of those unusual situations where there are no shades of grey in an assessment – the tree is either removed or it's not.

- 2.33 As will be clear however I have some sympathy for the Applicants position in these circumstances. Put simply, a resource consent in this instance is the wrong mechanism for ultimately having the tree removed. The consenting framework, being a non-complying activity, counts against such an action because it is simply impossible in a black and white situation such as this to get through the s104D 'gateway test' even with the gaps in the policy framework I have identified. In these circumstances s104D becomes a very blunt tool and associated with the provisions effectively makes removal of a tree where the hazardous or dangerous threshold is not met (which was Mr Cadwalladers assessment as the only expert in this field providing evidence at the hearing) a prohibited activity.
- 2.34 I make the point that had I been able to go on and consider the s104 requirements and taken into account all effects including those which might be seen as positive to the Applicant including the issues around insurance, health and wellbeing and use of the site, my decision would very likely have been different.
- 2.35 The correct mechanism in the circumstances in my opinion is a change to the District Plan where the significance of the tree against set criteria can be reassessed (something which cannot really be undertaken as part of a resource consent), the issues around the ability to utilise the site at 30 Queens Drive can be teased out and the matters contained in Part 2 of the RMA, which include peoples social well-being and health and safety, can be considered. In my view there is in this instance some onus on the Council to investigate this whole situation as I do not consider based on the information and evidence before me that it is simply a matter of whether the tree contributes significantly to the District's amenity and/or heritage, there are other matters at play here including the ability to utilise the site and peoples ongoing safety and wellbeing.

3.0 Determination.

- 3.1 For the forgoing reasons set out above and in accordance with the provisions of s104D of the RMA, I have determined that resource consents LUC21/0050 to remove a protected tree at 30 Queens Drive be **declined**.



Commissioner D Chrystal

5th November 2021