BEFORE THE ENVIRONMENT COURT
CHRISTCHURCH REGISTRY

ENV:2020-CHC-127

In the Matter	of the Resource Management Act 1991
And	a notice of motion under section 149T(2) to decide proposed Plan Change 7 to the Regional Plan: Water for Otago.
Between	**OTAGO REGIONAL COUNCIL**
	Applicant
And	**Clutha District Council, Waitaki District Council, Queenstown Lakes District Council, Dunedin City Council, and Central Otago District Council**
	Section 274 Parties

MEMORANDUM OF COUNSEL SEEKING LEAVE TO SUBSTITUTE A WITNESS – SETTING OUT RELEVANT PROVISIONS

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MEMORANDUM OF COUNSEL

1. Counsel refers to the direction from the Court dated 9 April 2021 requesting details as to the provisions relied upon to enable substitution of a witness for CODC.

RESOURCE MANAGEMENT ACT

2. There are no specific provisions in the RMA that address the matter of witness substitution. Therefore, the general power of the Court to regulate its own proceedings under section 269 RMA applies.

3. This power must be carried out in a manner that promotes timely and costs effective resolution of proceedings, without undue formality.[1]

4. Under section 276 RMA the Court may receive anything in evidence that it considers appropriate and call any person to give evidence that will assist it.[2]

5. Under section 276 (1A) the Court may (irrespective of the consent of the parties) direct how evidence is to be given to the Court.

6. The Court also has a higher degree of latitude than Courts of other jurisdiction by virtue of section 276(2) as it is not bound by the rules of law about evidence.

7. It is noted that in *Kidd v. Auckland CC* W078/95 (PT) the Council officer who had prepared the Council's officers report was no longer an employee of the Council and as such the Council called an alternative witness in the appeal proceedings. In that case the Tribunal required the witnesses contact details be made available so that the witness could be summoned if necessary.

8. It is submitted that the current context is slightly different because:

   (a) This is a first instance hearing;

[1] RMA section 269(1), (1A) and (2)
[2] RMA section 276(1)(a) and (c)

(b) Mr Greenwood/Mrs Muir are not providing expert opinion evidence, but rather factual evidence regarding the CODC's community supply infrastructure requirements.

9. It is understandable why the Tribunal in *Kidd* may have required the reporting officer to be available given that the report drafted by that person is likely to have been a significant factor in the decision being appealed and relevant to the Tribunal's decision on appeal. The evidence in support of the Council's case had changed through the appeal process so it is understandable why the Tribunal would have thought it necessary to have the original reporting officer available. Having said that the original Council officer was not called before the Court by any party.

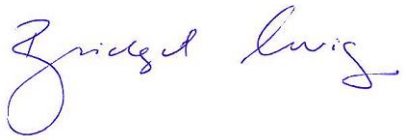
District Court Rules

10. Counsel considers that there are no rules of direct relevance in the District Court Rules. Rule 9.7(6) provides a process for the calling of a witness at late notice. But given that evidence has already been filed and what is proposed is a substitution of personnel to give the same evidence it does not address the specific circumstances in this instance.

Conclusion

11. It is submitted that section 269 and 272 of the Resource Management Act 1991 provide jurisdiction for the Court to enable the substitution of Mr Greenwood for Mrs Muir.

Date: 12 April 2021



B Irving

Counsel for the Territorial Authorities

ORIGINAL

Decision No. W 78 /95

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under s.120 of the Act
BETWEEN	R L KIDD
	(Appeal: RMA 435/94)
	Appellant
AND	AUCKLAND CITY COUNCIL
	Respondent
AND	G L DAVY
	Applicant

BEFORE THE PLANNING TRIBUNAL

His Honour Judge Treadwell presiding
Mr J R Fitzmaurice
Mr F Easdale

HEARING at AUCKLAND on the 26th and 27th days of April 1995

COUNSEL

Mr R M Mansfield for appellant
Ms D M Young for respondent
Mr S R Brownhill for applicant

DECISION

This is an appeal pursuant to the provisions of s.120 of the Resource Management Act 1991 against a decision of the respondent Council granting consent to a discretionary activity to enable the applicant to remove one 15 metre high pin oak tree from land at 757 Remuera Road, Meadowbank, Auckland. The appellant was granted legal aid to pursue this appeal but the legal issues which appeared at first sight to present a degree of complexity were misconceived leaving the Tribunal faced with a value judgment based on the provisions of the Resource Management Act 1991 (RMA) and the Transitional District Plan.

Background

The subject land is situated on the corner of Remuera Road and McFarland Street and contains an area of 1041 square metres. Situated upon the front part of this site is a substantial existing house which has been cross-leased. The tree is situated in the middle of the rear portion of the site which contains 295 square metres. The site is zoned Residential 6 in the operative plan which permits a density of one unit per 240 square metres and in the Proposed Plan has a zoning of Residential 7a which allows a density of one unit per 200 square metres.

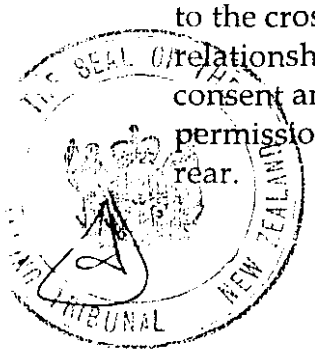
The appellant endeavoured to raise the question of the validity of Council consent to the cross-lease application, it being submitted that the Council should have addressed itself to the preservation of the tree before permitting a cross-lease. It was further submitted that to permit a cross-lease situation with a unit erected upon a land area of less than the minimum site area of 600 square metres was not permissible. With the greatest of respect to both counsel for the appellant and her consultant planner they had overlooked the definition of "*site*" in the plan which, in both the operative and proposed plan, clearly indicated that the minima was not intended to apply to a cross-lease situation.

Quite apart from this at the time the matter had reached the Tribunal a Certificate of Title had issued showing the land to be held in fee simple by the applicant G L Davy and the cross-lessees in common subject to a cross-lease of the larger allotment which contains the existing house. This left the remainder allotment to the rear upon which is situated the pin oak. That is not yet subject to cross-lease.

The title is indefeasible and this Tribunal has no jurisdiction to examine the circumstances surrounding the Council consent to the cross-lease of the front allotment even were it relevant and it is not.

The next door property on Remuera Road is owned by the applicant and her husband and a cross-lease subdivision similar to that proposed for the subject site has already taken place upon that property. Therefore that property is not available for boundary adjustments aimed at preserving the tree.

Throughout the whole subdivisional and cross-lease exercise relating to both parcels of land Mrs Davy has at all times, either personally or through her advisors, supplied the information sought by Council. At the time the Council consented to the cross-lease upon the subject site it brought to the attention of the applicant that consent would be needed to the removal of any trees which were afforded protection in terms of the Council's District Plan. At the time this was brought to the attention of the applicant it appears that Council, having consented to the cross-lease, had effectively locked the applicant into contractual relationships with the cross-lessees, that contract merely being subject to Council consent and not subject to the applicant being required to obtain planning permission for cross-lease purposes in respect of the remainder allotment at the rear.



There appeared to be a strong suggestion on the part of the appellant that Mrs Davy had engineered the whole exercise in conjunction with her husband in order to ensure that a site would be created with a tree in the middle of it which would render it virtually inevitable that consent would be granted to the removal of that tree. We can find no support for that allegation and record that Mrs Davy was at all times seeking to comply with the provisions of the operative and proposed plans. Commercial profit was an objective but that is not wrongful. The present proposals are far below maximum site utilisation using the word "*site*" in a sense in which it is used in the plan - namely the whole of the area comprised in the freehold title. If the resource represented by the existing substantial building on the front side were removed there would be a potential for five units upon this 1004 square metre site.

We therefore have no intention of examining the validity or otherwise of consents which have been granted even were it within our jurisdiction and it is not. Nor are we prepared to penalise the applicant for some unsubstantiated allegations that she has engineered the whole situation for her benefit.

Preliminary Issues

The question of the removal of the tree was considered by the Council Hearings Committee which heard evidence from witnesses including its own officers. A great deal of criticism was directed at the Council because it did not call the same witnesses before the Tribunal. Some of those called before us had a more lukewarm approach to the value of the pin oak than the witnesses called at first instance. The appellant took some exception to this and considered that the Council were endeavouring to bolster its case before the Tribunal by finding witnesses more supportive of the Council decision than those at first instance.

Counsel for the respondent Council explained to us the reason why the witnesses were different. In respect of planners the planner called at Council level had since left the employ of the Council and the planner now responsible was called in his stead. In respect of landscape witnesses the witness called before Council is no longer responsible for the assessment of tree value upon private land and the person who now has responsibility for that work was called. The Council furthermore obtained a further report from a landscape architect which evidence was not given to Council at first instance. It must be borne in mind that a Council, having considered the matters raised in an appeal, are perfectly at liberty to call further evidence to support its decision and to counter criticisms raised by an appellant.

A decision of the Tribunal in the case of Chan v Auckland City Council 1994, NZRMA 68 was brought to our attention where the Tribunal were critical of the actions of Council in a case which was dissimilar factually. In that case the Council called evidence in order to persuade the Tribunal that its initial decision was wrong.

Chan confirms that a Council once it has made a decision is functus officio and cannot change its decision without embarking upon a further hearing. That is well established law. There are many decisions which also hold that a Council as a full Council cannot ~~even~~ override the views of its hearing committee unless the matter is reheard by full Council. It is accepted law that a Council can only speak through its resolutions and cannot make decisions based on evidence which has not been through the public process.

However we do not read Chan as holding that a Council if it has material in its possession and acquired subsequent to the hearing of the original application should not make it available to the Tribunal or to any party to proceedings if it considers it relevant. This is particularly important if Council officers or planners are aware of subsequent material and if that subsequent material has caused them to change their views.

There may also be situations where ongoing investigation undertaken by Councils in the normal course of development or planning may result in reports being received by Council officers and/or committees subsequent to the hearing of a planning application. The hearing before the Tribunal is a hearing de novo and we would consider it perfectly proper for the Council as a body responsible to the Tribunal to bring those matters to our attention but it must be firmly borne in mind that such a course of action cannot be used to support a purported change of Council decision. It is passing on or making available relevant information to another decision maker.

If a Council however chooses to call different witnesses from those who appeared before Council then the original witnesses must be made available to the parties or to the Tribunal. The Council in the present case took the attitude that the appellant should issue a witness summons despite the fact that one of the witnesses was still in the employment of the Council. We consider in those circumstances that there are two situations to consider:

(a) If a witness at first instance is no longer in the employment of Council then the Council, if it has the information, should make the address of that witness known to any other party to the proceedings for the purpose of enabling that party to issue a witness summons.

(b) If the witness is still in the employment of the Council then the witness should be made available to the Tribunal without a witness summons at a time and place to be arranged in order that that witness may be called by the Tribunal or by any other party. We would consider a witness to be still in Council employment if employed by a Local Authority Trading Enterprise (LATE).

We record that in the present case the Council had made the names and addresses of the witnesses known to the appellant but required the issue of a witness

summons for financial reasons in respect of one such witness. We record that counsel for the appellant was given the opportunity by the Tribunal to call those witnesses if he so wished and we further record that the Tribunal made clear that the witness still in Council employment should be made available if required and that was acceptable. Counsel for the appellant did not avail himself of that opportunity.

The appellant then attempted to read into the evidence, the report of the planner at first instance. Although we have wide powers to permit evidence which would not be admissible in strict law, we are not prepared to accept such evidence as overriding evidence given to us on oath.

In any event the major dispute was not with the conclusions of the witnesses but rather with the relevant weight to be given to the value of this particular tree.

The Issue of Tree Protection

This is essentially what this case concerns. Various aspects of the RM Act were first brought to our attention, namely s.5 concerning sustainable management; s.6 in relation to outstanding natural features; and s.7 concerning amenity values and environmental quality.

We record that some of the neighbours most closely affected by this tree have consented to its removal whilst others have not. The appellant is one who has not consented but on the other hand the occupier of another flat on the same parcel of land has consented. Many of those close to the tree do not object to its removal and naturally this includes the applicant and her husband. The present cross-lessees of the house on the subject site, although originally agreeing, have now refused consent. There is clearly a division of opinion as to the value of the pin oak in the eyes of those most closely affected by its presence.

Of those actively opposed to its removal few would have full view of the tree. It is set back from the roadway on an elevated section. The complete tree can only be seen when standing immediately opposite the appeal site. There is ample room between the tree and the road to construct a fence or to plant other vegetation and any such action would serve to shield the tree further from view. To those passing along the roadway there is but a fleeting glimpse of it.

We accept that it is not a tree of such majesty as to cause passers-by to stand in admiration. It nevertheless possesses seasonable attributes by being bright green in spring, green during summer, and red in the autumn. In winter it is bereft of leaves. We are told that its potential growth is such that it would effectively take over the section in years to come and spread into neighbouring properties.

Many of those who have objected to its removal would only have glimpses of part of the tree. It can certainly not be said to be dominant or important in the context of the total environment that most objectors enjoy.

The person most closely affected by its removal would be the appellant who has a deck area facing north from which a view of this tree can be obtained and the tree would be dominant. The tree not only shields her flat from views of development and potential development in this high density zone fronting Remuera Road, but would prevent development creeping towards her as permitted by the plan.

We therefore do not view this solitary tree as an amenity of importance in terms of Part II of the RM Act. It is of local interest.

Tree removal is clearly a discretionary activity. The city has detailed ordinances relating to trees in both its operative and proposed scheme. There are essentially two categories, namely trees which are identified specifically and trees which are generically specified by height and bole measurement.

Those trees which are situated on private and public land which have been selected as worthy of protection have been so selected "*in the public interest*" in terms of the operative plan. They are categorised as having amenity value but may also be highly regarded because of appearance, historical value or botanical significance. The subject tree has not been selected under those rules.

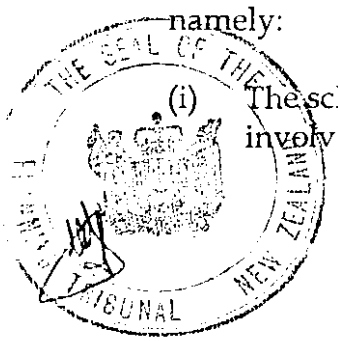
In the residential zones the general tree protection provision applies. Clause 12.03:1 states:

> "*The purpose of this particular control is to ensure that the general tree cover within the city is retained wherever possible. Hopefully, the provision should reduce the risk of serious or irreparable damage being done to the local environment through unnecessary tree removal, particularly on steep or difficult sites.*
>
> *The main objective of the ordinance is to ensure that those trees and areas of bush which make a positive contribution to the quality of the environment both visual and physical, are retained and conserved. This does not imply an absolute prohibition on the cutting or removal of the general tree cover but rather that work on mature trees is controlled and may in appropriate cases, be prohibited. To this end, the Council will endeavour to make available, its expertise in tree matters.*"

Then follow the rules which require prior written consent from Council before a person shall cut, damage, alter, injure, destroy or partially destroy any tree (including the roots) over six metres in height or with a girth (measured at breast height) greater than 600 millimetres.

Then Rule 12.10:3(d) lists criteria which are to be used for assessing applications namely:

(i) The scheme objectives and policies, particularly those in respect of the zone involved.



(ii) The applicant's need to obtain a practicable building site, access, a parking area, or install engineering services to the land.

(iii) Any alternative methods which may be available to the applicant in the achievement of his/her objectives.

(iv) All previous applications made in respect of the land which involve the consideration of treescape conservation.

(v) The extent to which the tree or trees contribute to the visual amenity of the neighbourhood.

(vi) Any other matters which may be relevant to the application.

Without going further into the plan it is clear that the city intend to achieve a pleasant treescape to compliment residential amenities. It is perhaps encapsulated in objective 3.1:2.3:-

> *"To allow maximum freedom and site development while affording reasonable protection for the amenities of neighbouring properties and the general environment."*

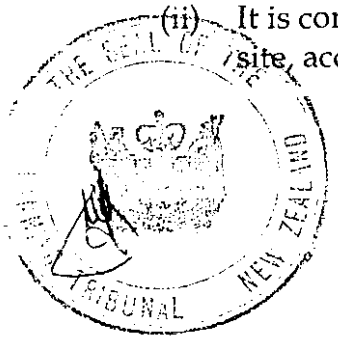
In respect of the subject site it is within a high density zone and the general thrust of the plan is to encourage objective 3.1:2.3 whilst nevertheless making full use of the valuable land resource within the high density areas.

In relation to the provisions of the plan we find from the evidence that it is a pleasant tree but not an outstanding example of its species. Retention would be desirable if possible. However, it is located in the centre of the site and there are other trees on site close to it such as a group of three silver birches which also qualify for protection and which the applicant intends to retain.

We will now comment on the relevant criteria in the order set forth in Rule 12.10:3(d).

(i) The objectives and policies of the scheme relating to high density development cannot be met if the tree remains in the centre of the rear allotment valued at some $130,000. The retention of other protected trees of amenity value will however compensate to a degree for the loss of the pin oak but the appellant will be faced with the view of a residence rather than a tree.

(ii) It is conceded by all that the applicant cannot obtain a practicable building site, access, or parking area if the tree remains.



(iii) There may have been some alternatives available to the applicant in the past but these are no longer available. Retention of the tree will result in a useless section for development purposes.

(iv) The only previous application made in respect of the land was the application to subdivide by way of cross-lease. The Council noted in its decision that the question of tree protection was relevant. The appellant took great issue with the alleged paucity of information lodged in connection with the application with particular regard to the lack of information given pursuant to s.88 of the RM Act and the Fourth Schedule. Information was provided in relation to the cross-lease and the Council decision shows awareness of the rules relating to trees. However, as we have previously recorded we have no intention of reviewing the cross-lease decision.

In respect of the tree removal application attention was directed at the environmental effects of removing the tree. Section 88(6) is directly in point when it states:

> "*Any assessment required under subsection (4)(b) ...*
> *(a) shall be in such detail as corresponds with the scale and significance of the actual or potential effects that the activity may have on the environment; and*
> *(b) shall be prepared in accordance with the Fourth Schedule.*"

It is for this reason that the Fourth Schedule is not mandatory but merely records information which "*should*" be provided.

We are satisfied that the Council was fully aware of the applicant's intentions and of matters of environmental importance. The property she acquired already had an approved cross-lease plan when she bought it. A further application was required because the building shown on the original cross-lease plan had been added to, necessitating a further plan. The planner in reporting on the cross-lease application recommended approval but cautioned that the tree was upon the site. At that stage no application had been made for removal of the tree. In relation to environmental effects it would be patently obvious to anyone that if a tree is removed it will no longer exist. Its absence will therefore leave an amenity gap. We frankly cannot see why a long environmental assessment is needed in that regard unless the tree is one of great community importance and visible over a wide area. The original letter seeking consent to removal was fairly general. However the follow-up letter of 14 June 1994 from the developer when combined with the original letter complies in our opinion with the statutory requirements.

(v) The tree makes a pleasant contribution to the visual amenity of the neighbourhood but we are satisfied that the conditions imposed by Council will mitigate any adverse effect caused by its removal. Indeed there is some

suggestion that this type of tree with its heavy autumn leaf fall has adverse as well as positive effects.

(vi) We can find no other matters which we consider relevant to this application which is to remove the oak tree.

Turning now to the proposed District Plan, this has similar objectives, policies and rules. Generally these provisions are:

- Any alternative methods which may be available which would encourage retention and enhancement of existing large trees.
- Whether the tree can be relocated.
- All previous applications.
- The extent to which the tree or trees contribute to the amenity of the neighbourhood, both visual and physical, including contributions as habitats for birds and other animals.
- Any function the tree may have in conservation of water and soil.

Moving to an assessment of those criteria the only ones which we consider different are questions of relocation and bird and animal habitat. Relocation of the tree has been considered. The short answer is that it cannot be relocated with any confidence in the success of that operation. Its contribution as a bird or animal habitat is not exceptional. We have some difficulty with considering animal habitats, the only one which springs to mind being the possum which is not regarded as highly desirable in a residential area.

Section 104

That section is subject to Part II but the evidence does not persuade us that this tree in isolation is likely to violate Part II principles if removed. We have discussed to a degree environmental effects and policies, objectives and rules of the plans. In essence this application involves a value judgment which the Council is more than capable of exercising. The case has assumed unwarranted proportions basically at the behest of one neighbour (with some neighbourhood support) who does not wish her view of a nice tree affected and is prepared to place her neighbour in the position of having to freeze a section to that end.

Were we to accede to the submissions of the appellant we would effectively be enunciating a resource management principle that if in a high density zone there is a tree of modest proportions and of a common exotic species located in the middle of a section then development should be prevented despite the fact that other trees qualifying for the same protection will remain upon site.

Conclusion

We consider the decision of the Council fully supportable. The matter should never have come before this Tribunal on appeal. We appreciate that the appellant is legally aided but record that the applicant for her part has lost a sale of the section and has been placed under great stress. The stress factor we tend to discount, however, because those who embark upon property development must take that risk at all times.

The decision of the Council was against the background of a particular low key development of modest proportion without any particular amenity impact upon the flat occupied by the appellant. The applicant no longer wishes to be tied to that development because the potential purchaser has lost interest.

The conditions the Council imposed in respect of the tree removal consent should have been directed at mitigation measures of a vegetative nature. They could not be directed at a particular type of housing development on site because the construction itself is not a discretionary activity but is permitted provided it complies with plan provisions.

The decision of the respondent Council is accordingly confirmed but in exercise of the powers we have, which are (inter alia) the same as the powers of the Council at first instance, we delete Condition II which requires the development to be in general accordance with the plans submitted. We appreciate that this may result in a development on the site which has greater effect upon the appellant than the development initially proposed. However this possibility is a consequence of the plan provisions.

In respect of Condition III we are conscious of the fact that one of the native trees in its suggested position may grow to a degree where the appellant's property may be shaded in winter. That condition is to be amended to read:

> "... *no less than two trees (one of which shall be native) of no less than three metres in height* ..."

The question of costs is reserved. We appreciate there is some difficulty because of the law relating to legal aid. We are prepared to certify the quantum we would otherwise have awarded.

DATED at WELLINGTON this 29th day of June 1995

W J M Treadwell
Planning Judge