

Resource Management (Forms, Fees, and Procedure) Regulations 2003 (as at 03 March 2015)

Form 34

Notice of appeal to Environment Court (general)

To the Registrar
Environment Court
Wellington

I, Tracy Ann Fleet, appeal a decision (*or* part of a decision) on the following matter:
Dispute of an invoice from the Ashburton District Council for Post hearing charges in relation to a resource consent hearing.

I received notice of the decision on 09 June 2022 1.56pm

The decision was made by Mr Mountfort – Hearing Commissioner

I am not* a trade competitor for the purposes of [section 308D](#) of the Resource Management Act 1991.

The decision (*or* part of the decision) that I am appealing is:
To disallow an objection to additional charges in relation to Resource Consent hearing LUC21/0050.

The reasons for the appeal are as follows:

Below is a summary to be read in conjunction with the attached document called LUC21-0050 additional charges - Appendix 1

1. My objection to the invoice for post hearing charges was dismissed and ignored by Ashburton District Council (ADC) staff. The application form refers to application processing fees not ADC costs for defending the application. Applicants have to sign the form without being given a confirmation of costs or their application will not be processed.
2. Not being given adequate information about the objection process or the opportunity to provide information or feedback to the commissioner to explain my objection by the ADC or the Commissioner. Resulting in a report that contained irrelevant, offensive, unprofessional and prejudicial comments.
3. Being given the wrong advice by the Ashburton District Council in relation to a resource consent being the only process available in this situation. The costs would not have been incurred if the ADC and the contracted planner had advised that a commissioner would not have the authority to approve the application.

4. If a local authority chooses not to use council resources to manage council processes i.e. hearings, then these shouldn't be at the cost of the applicant if they get no input or choice in this decision. It would seem that they choose to use commissioners so that they can pass on the full cost to the applicant, in order to balance council budgets.
5. Multiple requests to the Ashburton District Council for an estimate/quote for costs, so that I as the applicant could do my due diligence to ensure that the process was affordable. No effort was made to give a full answer to this question or to provide reasonably accurate quotes.
6. Under s36 and s360A of the RMA, if the local authority was ordered to fix charges for administrative charges and other amounts relating to resource consent hearings, quotes and overall charges are required to be provided. It is unreasonable for the local authority to contract out of the same requirements if requested by the applicant.

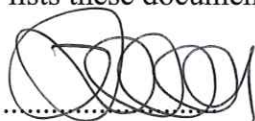
I seek the following relief:

1. Determine that the Ashburton District Council and the Commissioner appointed to hear my original objection did not do so in a fair and reasonable way.
2. Determine that the Invoice from Planz consultants for \$7,615.65 is a local authority cost because they had already appointed a commissioner before any request was received by the applicant under s100A of the RMA.
3. Determine that the Invoice from AVANZAR consulting for \$6,882.75 is not classified as a cost of processing the resource consent application and therefore a local authority cost.
4. Determine that the Invoice from Cadwallader Tree Consultancy for \$1,043.63 is not classified as a cost of processing the resource consent application and therefore a local authority cost.
5. Determine that the Ashburton District Council cannot retrospectively charge for costs identified as a cost of processing the resource consent application.

I attach the following documents* to this notice:

- (a) a copy of the relevant decision (*or* part of the decision):
- (b) a list of names and addresses of persons to be served with a copy of this notice:
- (c) any other documents necessary for an adequate understanding of the appeal.

*These documents constitute part of this form and, as such, must be attached to both copies of the notice lodged with the Environment Court. The appellant does not need to attach copies of these documents to copies of the notice served on other persons if the copy served lists these documents and states that copies may be obtained on request from the appellant.



Signature of appellant

(or person authorised to sign
on behalf of appellant)

.....
Date: 30.06.22

Address for service of appellant: 24 Waihoanga Road, Hautere RD2 Otaki
Telephone: 021 818 480
Fax/email: 30treehouse@gmail.com
Contact person: NA

Persons served with a copy of this notice:

Ian Hyde, Ashburton District Council, 5 Baring Square West, Ashburton – Via email
to ian.hyde@adc.govt.nz

TREEHOUSE30

APPEAL – LUC21/0050 – ADDITIONAL CHARGES

APPENDIX 1

25 June 2022

INTRODUCTION

The primary reason for this appeal is because as a ratepayer and in this situation the applicant for a resource consent, we should be able to, before entering into a process be able to obtain a reasonable estimate of costs allowing for a reasonable +/- 10%. This is no less than what any other service provider would have to do under the consumer guarantees act.

BACKGROUND

I own a non native tree on a private property in Allenton, Ashburton, which is listed on the Ashburton District plan as a protected tree. The tree has two major structural defects that are a health & safety threat to persons and property, the former being the major threat.

The tree has had 10 tones worth of supporting ropes and steel cables installed in an attempt to mitigate these risks. These cables do not guarantee safety and in fact put the landowner in an untenable situation where the risk is calculated by insurance underwriters to be too great to offer cover in the even of the tree failing.

REASON 1 – OBJECTION TO POST HEARING INVOICE

1st attempt to object

When I originally received invoice #44996 dated 29/11/21 for LUC Planning Misc Charge (Post hearing charges), I initially thought it was for \$790.63 by the way the email was received. It was more than the +/- 10% expected but felt reasonable and within expectations.

I then realised that the invoice was for \$9,882.66' and immediately went into shock. Below is my response to the Council.

From: Tracy Fleet <30treehouse@gmail.com>
Sent: Tuesday, 30 November 2021 01:19
To: Hirani Sikandar <Hirani.Sikandar@adc.govt.nz>
Cc: Ian Hyde <Ian.Hyde@adc.govt.nz>
Subject: Re: LUC21/0050 - Post hearing charges Lime Tree application - 30 Queens Drive

Hi Hirani,

In addition to the invoice that appears to relate to another hearing, I also wish to advise that I object to paying for the Ashburton District Councils bills for their Arborist and for Mary Clay's report and time.

These costs are not within the ballpark of the costs stipulated in your fees for a fully notified resource consent application.

It is unfeasible to stipulate an approximate cost and then charge 130% more than the estimate.

The response received (attached in full) basically advised that I had signed the Declaration on the Application form agreeing to pay these costs.

On the Resource Consent application form the applicant is required to sign a declaration before the application will be accepted as follows:

I/we understand that the Council may charge me/us for all costs actually and reasonably incurred in processing this application. Subject to my/our rights under section 357B and 358 of the RMA to object to any costs, I/we agree to pay all the fees and charges levied by the Ashburton District Council for processing this application, including a further account if the cost of processing the application exceeds the deposit paid. Without limiting the Council's legal rights, if any steps, including the use of debt collectors, are necessary to recover unpaid processing costs, I/we agree to pay all costs of recovering those processing costs. If this application is made on behalf of a trust (private or family), a society (incorporated or unincorporated), or a company, in signing this application I/we are binding the trust, society or company to pay all the above costs and guaranteeing to pay all the above costs in my/our personal capacity.

This declaration refers to all the fees and charges levied by the Ashburton District Council for processing this application, including a further account if the cost of processing the application exceeds the deposit paid. It does not

This implies an administrative process in which to determine the outcome of an application, it does not imply the costs incurred by the Ashburton District Council to defend the application or for their experts to have input and attend the public hearing.

2nd attempt to object

I was subsequently contacted by a new employee of the Ashburton District Council on the 16th February, Ian Hyde responded on the 25th February and his response to the points I raised about the invoice was as follows.

Council staff responses have been clear in previous communications so I do not intend to address your points individually except to acknowledge your understanding that the Council holds no liability for the tree.

Which basically meant he refused to discuss it any further.

I then attempted to contact and discuss this directly with the Ashburton District Council CEO considering My Hyde was unwilling to discuss it.

The CEO also refused to meet with me to discuss this further, however I did receive another response from Mr Ian Hyde on the 5th April advising that the ADC would treat my correspondence as a formal objection and had referred it to a Commissioner who would be in touch with next steps. This was the only information I was given. My expectation was that I would be contacted by the Commissioner to hear my side of the story or to advise what the next steps were.

From: Ian Hyde <Ian.Hyde@adc.govt.nz>
Sent: Tuesday, 5 April 2022 10:16 AM
To: Tracy Fleet <nixchick@hotmail.co.nz>
Subject: FW: Objection to invoice - LUC21/0050 30 Queens Drive

Good morning Tracy,

We are in receipt of your correspondence around the costs associated with your resource consent application.

This is being treated as a formal objection under the RMA and has been referred to an independent Commissioner for their decision on the matter.

The Commissioner's name is David Mountfort of Mountfort Planning and I can confirm that he is completely independent of Council.

Commissioner Mountfort will be in touch with the next steps (this may be through the Council) in this process. Please note that there is no cost to you for an objection.

I would also note that Hamish Riach, our Chief Executive has been made aware of the commencement of this process.

Kind regards

Ian Hyde

A resource consent applicant cannot get an application processed unless they agree to the declaration on the application form, without knowing what these costs are likely to be. How is this fair and reasonable.

REASON 2 - OBJECTION COMMISSIONER REPORT

I never received any contact from David Mountford the Commissioner the Council referred my objection to.

I eventually received an email from the Ashburton District Council on the 9th June 22 at 1.56pm attaching his report on my objection under section 357A of the RMA.

Reading the report it is obvious that he didn't have sufficient information in order to understand the aspects of the Resource consent application or the reasons for my objection to the additional charges.

I was not given the opportunity to prepare any information for him to consider, nor was I able to see the information provided to him by the Ashburton District Council. He did not contact me to clarify any details, nor did he spell my name correctly, which I find hugely disrespectful.

He has also felt the need to make comments in relation to the pending court case which was irrelevant to this objection and made personal comment about what I personally may or may not have done, whilst also acknowledging it was immaterial to the purpose of his report. This is highly unprofessional and prejudicial.

In relation to his assessment of Mary Clay's report under point #24, I find his comments about her report being careful and comprehensive baffling. Considering she felt the need to include in her report a comment about the tree being well known to most of the youth in Ashburton because the wand wood in the Harry Potter fantasy series were made out of Silver Lime tree, which is either highly unprofessional if an attempt to inject some humour into her report or if she was in fact being serious, raises more concerning questions about her professionalism as a planner if she thinks a fantasy story is relevant in a real life

situation. Not to mention other references to trees in the Sherwood forest that have supports, which are completely irrelevant to a tree on a residential section in Ashburton.

I was left feeling that the whole process was a farce and by no means professional or respectful to me in any way.

REASON 3 – RESCOURSE CONSENT APP LUC21/0050 – APPENDIX 3A

I had been advised on multiple occasions that the correct process for the protected tree to be removed on the grounds of concern over the safety risks, was to apply for a resource consent for a non complying activity as detailed in the Ashburton District plan.

Without going into more specific details which will be dealt with under the pending court case. There was no indication post December 2020 from Council staff that there were any other processes available to address my concerns over the safety concerns with the silver lime tree.

As a result of this advice, I was given advice about the Resource Consent process and indicated I would be filing a retrospective application for pruning, which became a new application for complete removal due to this being the only 100% effective method for removing the risk of tree failure.

At no point did the ADC or the consultant planner advise that a removal of the tree would never meet the gateway tests under section 104D because it only allows for consideration of the negative effects of the removal of the tree on the tree and none of the positive effects. The other test was whether it was contrary to the district plan objectives and as a consequence any removal after being listed would always be contrary to these objectives.

At which point they should have strongly recommended that this was the wrong process for achieving my objectives as the applicant and that the correct and really only process would be to request a plan change.

If the Council had done their due diligence in this regard then I as the applicant would have only incurred the non-notified (non-complying status) fee of \$1,334.00 to determine how the application should proceed.

This is documented in more depth by the Resource consent hearing commissioners report under point 2.33 and 2.35.

- 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.

He also comments that there is an onus on the council to consider this situation with a wider community focused lens because this situation may have identified an unforeseen gap in the District plan Point 2.21. If an applicant appears to fall through the cracks of any local legislation, it could be argued that the Council should factor this in the applicants favour, considering they should be acting as an advocate for their ratepayers in the first instance.

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.

I understand the council feeling they want to punish me as the land and tree owner for what they consider unauthorised works carried out in December 2020. Which they have the opportunity to do as part of the process of the pending court action.

This should not cloud their judgement or let this impact on them having a wider lens when considering the impact this tree is having on the wider community which is negative to their social wellbeing and health and safety. It's obvious that they have not considered the commissioners recommendations.

Mr Hyde had asked me if I wanted to withdraw my application once they notified that they intended to proceed with legal action, at the time I enquired why he would make such an offer considering my intent was to remove the health & safety risk of the tree.

and he had advised that this was the only process.

From: Ian Hyde <Ian.Hyde@adc.govt.nz>
Sent: Wednesday, 23 June 2021 11:53 AM
To: Tracy Fleet <nixchick@hotmail.co.nz>
Subject: RE: Resource Consent - 30 Queens Drive

Hi Tracy

The question was simply an opportunity for you to have the opportunity to consider your options in light of the information within the correspondence and the decision as to how you wish to proceed is of course yours. You may wish to discuss this with your advisors.

Kind regards

Ian

From: Tracy Fleet <nixchick@hotmail.co.nz>
Sent: Wednesday, 23 June 2021 10:53
To: Ian Hyde <Ian.Hyde@adc.govt.nz>

Cc: Sikandar Hirani <Sikandar.Hirani@adc.govt.nz>
Subject: Re: Resource Consent - 30 Queens Drive

Hi Ian,

Thank you for your letter, it's good to know what is happening and I look forward to hearing more details.

In terms of the Resource consent application, are you able to provide a reason why in light of the Council proceeding with the prosecution that I may wish to choose to withdraw my resource consent application?

Thanks

Tracy

Letter attached – Appendix 3B

REASON 4 - INDEPENDENT COMMISSIONER COSTS

Under the RMA section 100A, the applicant and submitters are given the opportunity to request an independent commissioner to manage the resource consent application process.

When I confirmed that I would proceed with the resource consent process and indicated my intention to request an independent commissioner, I was advised that one had already been appointed by the ADC. Please see email trail below.

From: Ian Hyde <Ian.Hyde@adc.govt.nz>
Sent: Friday, 25 June 2021 4:05 PM
To: Tracy Fleet <nixchick@hotmail.co.nz>
Cc: Sikandar Hirani <Sikandar.Hirani@adc.govt.nz>
Subject: RE: Resource Consent - 30 Queens Drive

Thank you Tracy

[We had already engaged a Commissioner for the application](#) so there is no further action required by you on that front, however I acknowledge your request in any event.

In regards to your request for an estimate, we try to make our notified application fees (which I believe you have already paid) reflect the average cost of a notified consent process. However as I have said previously the final total is somewhat dependent upon the complexity of the application and the level of response received to notification. [We would need to ask the reporting officer and commissioner for an estimate and my experience is that they will be reluctant to do so until after the close of submissions when they can more accurately predict how much time they will need to complete their respective parts of the process.](#)

Sikandar, can you please note Tracy's request, place her email on the file and prepare the application for notification at the earliest opportunity.

Kind regards

Ian

From: Tracy Fleet <nixchick@hotmail.co.nz>
Sent: Friday, 25 June 2021 15:40

To: Ian Hyde <Ian.Hyde@adc.govt.nz>
Cc: Sikandar Hirani <Sikandar.Hirani@adc.govt.nz>
Subject: Re: Resource Consent - 30 Queens Drive

Hi Ian,

Thanks for the reply and this has certainly clarified matters for me.

Yes I can confirm I intend to proceed with the Resource Consent application and in light of your response, I want to formally request that the application is heard by an independent commissioner.

Can you please advise [what if any paperwork I need to complete to confirm this](#) and for the ADC to [provide a formal estimate of costs for this process](#).

Kind regards

Tracy Fleet

This confirms that the Council had already made the decision without consultation with me as the applicant to engage a commissioner. Which I understand is their standard practice because they don't have the resource at the local authority to provide this service, not because the applicant has requested it.

100A Hearing by commissioner if requested by applicant or submitter

- (1) This section applies in relation to an application for a resource consent if—
 - (a) the application is notified; and
 - (b) in accordance with section 100, a hearing of the application is to be held.
- (2) The applicant, or a person who makes a submission on the application, may request in writing that a local authority delegate its functions, powers, and duties required to hear and decide the application in accordance with subsection (4).
- (3) The request must be made no later than 5 working days after the closing date for submissions on the application.
- (4) If the local authority receives a request under subsection (2), it must delegate, under section 34A(1), its functions, powers, and duties required to hear and decide the application to 1 or more hearings commissioners who are not members of the local authority.

Section 100A: inserted, on 1 October 2009, by section 78 of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

I object to having to pay for the Commissioners charges considering the decision to use one had already been made by the ADC.

The RMA doesn't specify that the applicant needs to pay these fees if the Council make the decision as the local authority to engage a commissioner and the applicant and submitters have no choice in this decision.

REASON 5 - MULTIPLE REQUESTS FOR A QUOTE

From: Tracy Fleet <nixchick@hotmail.co.nz>
Sent: Thursday, 11 February 2021 20:18
To: William McCormick <William.McCormick@adc.govt.nz>
Cc: Ian Hyde <Ian.Hyde@adc.govt.nz>

I wish to provide a further response and seek clarification on the following matters.

1. I can confirm I will not be in the Ashburton District anytime in the next few weeks and therefore am unavailable to attend an interview in person.
2. I have received the Resource Consent application form thank you, however I have been having some difficulty determining the correct fees and charges associated with this application based on the different options in relation to the notification process and therefore need the following clarification.
 - a. Can you please confirm as per the Application form that the correct type of resource consent required is Land Use.
 - b. Please advise which specific minimum charges relate to this type of application.
 - c. Provide an estimated cost of the relevant Resource consent application process including minimum charge, cost associated by relevant notification process and any subsequent related charges.

From: Tracy Fleet <nixchick@hotmail.co.nz>
Sent: Sunday, 21 February 2021 21:07
To: William McCormick <William.McCormick@adc.govt.nz>
Cc: Ian Hyde <Ian.Hyde@adc.govt.nz>

In relation to the information from the planning team, once again the information provided is extremely frustrating from a ratepayers perspective because once again it does not provide accurate information in respect to my question in relation to the costs associated with this specific application.

As per the [fees and charges](#) the application fee for a non-notified (non-complying status) land use application is \$1,332.00. I would note that if notification of the application is required then the limited notified application fee is \$4,538.00 or full notification application fee would be \$6,627.00. These are deposits and depending on how the notification process goes further fees may be required for processing so it is hard to give an estimate beyond that.

How as an ordinary ratepayer am I to determine if the application I am making is a non-notified, limited notified or full notification application. From all the literature that I have read, this is determined by the relevant council, so here I am for the 3rd time asking for the specific cost relating to this particular application of which yourself and My Hyde will be very familiar with.

There must be some relevant information within the council that will determine what the initial application fee will be, what the usual process is and how long and how from a ballpark figure this will cost.

From: Ian Hyde <Ian.Hyde@adc.govt.nz>
Sent: Monday, 22 February 2021 9:32 AM
To: 'Tracy Fleet' <nixchick@hotmail.co.nz>
Cc: William McCormick <William.McCormick@adc.govt.nz>

Mr Hyde responded and provided the following information in relation to my request for an estimate of costs.

As has been said before it is difficult to estimate costs, however to help you, I have given an indicative scenario on the costs by a Commissioner. There are a number of variables in this, so you should not rely on it to be specific to your situation. In this example a decision maker might spend 5 hours reviewing information associated with an application and another 2 hours on a site visit. A half day hearing would be 4 hours and the decision maker could spend around 12 hours on a decision. At a rate of \$250 per hour, this would be a cost of \$5750 plus disbursements.

In relation to additional costs, we have tried to make the lodgement fee for a notified application approximate the average total cost of a notified consent, however there are a number of variables which come into play, for example if the Council needed to commission a report about the condition of the tree or if there were a number of submissions from parties who wished to be heard and which made the hearing longer than expected. Alternatively, there have been other applications where the applicant received a refund at the end of the process as not all of their deposit had been accounted for during it.

I am sorry that we can't give you a fixed cost for the application process, however hopefully, from the explanation above you will see that there are a number of complexities which are involved in the application process.

Please let me know if there is anything that remains unclear in relation to the process of applying for a resource consent.

From: Tracy Fleet <nixchick@hotmail.co.nz>
Sent: Friday, 25 June 2021 15:40
To: Ian Hyde <Ian.Hyde@adc.govt.nz>
Cc: Sikandar Hirani <Sikandar.Hirani@adc.govt.nz>

Can you please advise what if any paperwork I need to complete to confirm this and for the ADC to provide a formal estimate of costs for this process.

From: Ian Hyde <Ian.Hyde@adc.govt.nz>
Sent: Friday, 25 June 2021 4:05 PM
To: Tracy Fleet <nixchick@hotmail.co.nz>
Cc: Sikandar Hirani <Sikandar.Hirani@adc.govt.nz>

In regards to your request for an estimate, we try to make our notified application fees (which I believe you have already paid) reflect the average cost of a notified consent process. However as I have said previously the final total is somewhat dependent upon the complexity of the application and the level of response received to notification. We would need to ask the reporting officer and commissioner for an estimate and my experience is that they will be reluctant to do so until after the close of submissions when they can more accurately predict how much time they will need to complete their respective parts of the process.

I note that neither the District plan or the RMA have a definition of who a reporting officer is for the purpose of a resource consent application. I also tried to google a definition of who the reporting officer might be and found a reference by David McMahon from RMG (**Appendix 5A**) that the reporting officer is handling administrative arrangements, including commissioner liaison which would indicate the Council staff managing the resource consent process, i.e. Hirani Sikandar.

So given the Council's experience/expertise in this matter, why would they be reluctant to provide a quote for the administrative costs of managing a resource consent process?

There was no indication that this would include the Councils costs to defend the application. i.e. external planner and arborists costs. Which as the applicant I would be required to incur myself.

Why are the Council allowed to have free rein on spending a ratepayers, resource consent applicants money without having to provide a reasonable estimate of the cost of that service?

REASON 6 - RMA SECTION RELATING TO FIXED CHARGES

Under the RMA **section 36 Administrative charges**, a local authority may from time to time fix charges of all or any of the following kinds: (aa) charges payable by an applicant who makes a request under section 100A (Hearing by commissioner if requested by applicant or submitter).

RMA 36(1) a local authority may from time to time fix charges of all or any of the following kinds (aa) charges payable by an applicant who makes a request under section 100A (commissioner) in relation to an application for a resource consent for the cost of the application being heard and decided in accordance with the request **(i) charges payable by the applicant for the amount that the local authority estimates it will cost for the application to be heard and decided if the request had not been made.**

RMA section **360F Regulations** relating to **administrative charges and other amounts**. The Governor-General may make regulations for the purpose of specifying the charges that a local authority is required to fix under section 36(1).

RMA 360F(2)(b) if they require local authorities_(i) to fix charges for hearing commissioners determining resource consent applications, where a hearing is held: **(ii) before a hearing commences, to set the overall charge payable by the applicant for a resource consent hearing.**

I am aware that these relate to situation where local authorities are instructed to fix certain fees and that in this situation the local authority have not been instructed to do so. But if they were they would have to provide an estimate and/or the overall charge payable.

Estimates and quotes for overall charges are a fair and reasonable expectation if the RMA recognises these if they mandate fixed fees.

It is reasonable for local authorities to circumvent these reasonable requirements by publishing deposits and expecting ratepayers to pay all expenses at the local authorities discretion. No other service provider would be given this opportunity.

A copy of the ADC fees for resource consents attached – **Appendix 6A**

SUMMARY

It is hard to be objective when you feel that you are powerless in a process because the system is geared towards protecting the local authority, those who control the process have a vested interest and an agenda to protect their own interests.

Is it fair that as part of the process the local authority can make decisions that impact you financially without having to justify those decisions before making them?

We as ratepayers pay rates and taxes that are used to fund the local authorities, so why is the legislation written in order to give local authorities the ability to pass on any costs without determining that they are fair and reasonable before they are incurred.

If you are not independently wealthy then the system makes it very hard for an ordinary ratepayer to make informed decisions about incurring expenses when they are not able to determine what that cost is likely to be.

If Council processes are not affordable it discriminates against those who are entitled to be treated equally and fairly.

The Council is not held to the same standards that ordinary ratepayers are held to.

**TAX INVOICE**

Tracy Ann Fleet
30 Queens Drive
Allenton
Ashburton 7700

Tax Invoice Number : 44996
GST Number : 51-641-051
Invoice Date : 29 Nov 2021
ePayment Reference : 00022172
Your Order Reference : LUC21/0050

Application Reference: LUC21/0050 - Resource Consents - Land Use Consents

Applicant: Tracy Ann Fleet

Location Address: 30 Queens Drive ASHBURTON

Charge Description	Qty	Unit Charge	Total Charge
LUC Planning Misc Charge (Post hearing charges)			\$7,906.11

Subtotal	\$7,906.11
GST	\$1,185.92

Total Amount Due **\$9,092.03**

Please pay by the 20th of month following the invoice date

Payment Methods

Online through the [Ashburton District Council](http://www.ashburtondc.govt.nz) website using ePayment reference 00022172

By direct credit to bank account **03-1592-0521970-00** referencing LUC21/0050

By post and in person to/at our Baring Square Offices

ASHBURTON DISTRICT COUNCIL

5 Baring Square West
Ashburton

PO Box 94
Ashburton 7740

P (03) 307 7700
E info@adc.govt.nz

www.ashburtondc.govt.nz

BREAKDOWN

PAYMENTS RECEIVED			
	Amount	Invoice	Date
1 Application payment	\$ 1,332.00	INV-43154	25-May-21
2 LUC Misc- Fully notified payment	\$ 5,118.00	INV-43452	28-Jun-21

TOTAL PAYMENTS RECEIVED BY ADC \$ 6,450.00 ANZ

ASSOCIATED CHARGES			
	Amount	Invoice	Date
1 Avanzar - Consultant Planner	\$ 6,882.75	INV-21107	09-Nov-21
2 Cadwallader Tree Consultancy	\$ 790.63	INV-00946	30-Sep-21
3 Cadwallader Tree Consultancy	\$ 1,043.63	INV-00951	11-Oct-21
4 Dean (Commissioner)	\$ 7,615.65	INV-19404	10-Nov-21

TOTAL CHARGES \$ 15,542.03 16,332.66
BALANCE TO BE PAID TO ADC (\$14,751.40-\$6,450) 9,882.66

Kiwibank
Paid \$4538.00 16/05/21
Paid \$1912.00 06/07/21
\$6450.00



TAX INVOICE

Attention: Ian Hyde
Ashburton District Council
PO Box 94
Ashburton 7740
New Zealand

Date
10 November 2021

Invoice Number
INV19404

Reference

Planz Consultants Limited
PO Box 1845
Christchurch, 8140

GST: 57-961-759

P: 03 377 9829
E: admin@planzconsultants.co.nz
W: planzconsultants.co.nz

Commissioner - 30 Queens Drive, List Tree
Job No: J16355

Tasks	Time	Rate	Amount
Review Reports and Evidence	4.50	210.00	945.00
Hearing Attendance	6.50	210.00	1,365.00
Draft Decision	17.00	210.00	3,570.00
Issue Minute	2.25	210.00	472.50
Discussions re revised hearing date and draft Minute 2.			
Project Management	2.00	60.00	120.00
Type up evidence from applicant and submitters.			

Costs	Quantity	Rate	Amount
Mileage/km	120.00	0.70	84.00
A4 copying, black	56.00	0.30	16.80
A4 copying, colour	34.00	1.00	34.00
Admin Fee	1.00	15.00	15.00

PAID BY ADC

Subtotal	6,622.30
GST	993.35
Total	7,615.65
Amount Due	7,615.65

Due Date: 20 December 2021

Bank Account Details for Direct Credit Payments:
Westpac Bank 03-1705-0038951-00
Planz Consultants Limited

Please quote your invoice number as reference

Thank you for your business, it's appreciated

Cadwallader Tree Consultancy

33 Cropp Place
Richmond,
Nelson 7020

brad.cadwallader@cropp-place.nz
Ph: 03 544 0346
Cell: 027 2261666

Ashburton District Council
PO Box 94
Ashburton 7740



Order Number EN03186
Attention Sikandar Hirani
Invoice Number INV00951
Invoice Date 11/10/2021
GST Number 15.183.632

Tax Invoice

Description	Quantity	Unit Price	Price
Resource Consent Hearing - Fleet - LUC21/0050			
Aug. 2021 - Various discussions regarding aspects of the matter with Mary Clay & Ian Hyde, review application, submissions and various arborist reports.	1.75	110.00	192.50
30 Sept 2021 - Further review 5 arborist reports prior to hearing.	3	110.00	330.00
4 October 2021 - attendance via Zoom	3.5	110.00	385.00
Total Before GST			907.50
GST			136.13
TOTAL PAID			<u>\$1,043.63</u>

Prompt payment is much appreciated.

We prefer payment by direct credit. Our bank details are:
030751-0335514-00 Please include invoice number with payment.

PAID BY ADC

Please detach and return with your payment to

Cadwallader Tree Consultancy

33 Cropp Place
Richmond,
Nelson 7020

brad.cadwallader@cropp-place.nz
Ph: 03 544 0346

11/10/2021

Ashburton District Council, INV00951

TOTAL DUE \$0.00

Amount Being Paid _____

INVOICE

DATE: November 9, 2021
 INVOICE #: 21107
 FOR: Queens Drive Tree Ashburton
 Attn: Ian Hyde

www.avanzar.co.nz
info@avanzar.co.nz
 027 742 2122
 267 Kerrytown Road
 RDS
 Timaru 7975

Description	Rate	Amount (\$)
Processing of LUC21/0050 for 35 Queens Drive, Allenton, Ashburton 7700		
Receive application, review, site visit and prepare S95 assessment. 15.5 hours	\$ 140.00	2,170.00
Receive and review submissions. Prepare S42A report and liaise with arborist. 19.25 hours	\$ 140.00	\$ 2,695.00
Prepare for hearing and attend hearing. 8 hours	\$ 140.00	1,120.00
PAID BY ADC		

GST Number : 92 852 302

SUBTOTAL	\$ 5,985.00
GST RATE	15.00%
GST	897.75
OTHER	-
TOTAL	\$ 6,882.75

If you have any questions concerning this invoice, contact Mary Clay, Principal Planner, ph 021 0298 6162 or email mary@avanzar.co.nz

SBS Bank Account for direct credits 03-1355-0055363-01
 Payment is due 7 days after the date of this invoice
 THANK YOU FOR YOUR BUSINESS!

This becomes a Tax Invoice when paid.
 Please retain a copy for your records.

Work	Employee Name	Date	Description	Duration (SUM)
14460 Ashburton DC Tree notified	Mary Clay	27/05/2021	Received Application. Check	1.25
14460 Ashburton DC Tree notified	Mary Clay	28/05/2021	Review, read all documents	0.25
14460 Ashburton DC Tree notified	Mary Clay	31/05/2021	Review, confirm complete	1
14460 Ashburton DC Tree notified	Mary Clay	2/06/2021	Background, prep for site visit (Liaise with ADC)	2.5
14460 Ashburton DC Tree notified	Mary Clay	3/06/2021	Site Visit	3.5
14460 Ashburton DC Tree notified	Mary Clay	4/06/2021	Research Prep S95	0.5
14460 Ashburton DC Tree notified	Mary Clay	8/06/2021	Research Prep S95	3
14460 Ashburton DC Tree notified	Mary Clay	9/06/2021	Research Prep S95	3
14460 Ashburton DC Tree notified	Mary Clay	10/06/2021	Research Prep S95	3.5
14460 Ashburton DC Tree notified	Mary Clay	11/06/2021	QA, changes to S95 report	1
14460 Ashburton DC Tree notified	Mary Clay	18/08/2021	Tree S42a report	1
14460 Ashburton DC Tree notified	Mary Clay	19/08/2021	Review submissions	1
14460 Ashburton DC Tree notified	Mary Clay	23/08/2021	Summarise submissions	3
14460 Ashburton DC Tree notified	Mary Clay	24/08/2021	Summarise submissions	3
14460 Ashburton DC Tree notified	Mary Clay	25/08/2021	S42A report	3
14460 Ashburton DC Tree notified	Mary Clay	26/08/2021	S42A report	2
14460 Ashburton DC Tree notified	Mary Clay	30/08/2021	S42A report QA, changes	1.25
14460 Ashburton DC Tree notified	Mary Clay	22/09/2021	Admin	1
14460 Ashburton DC Tree notified	Mary Clay	3/10/2021	Prep for hearing	1
14460 Ashburton DC Tree notified	Mary Clay	4/10/2021	Hearing attendance and prep	7
				42.75

PAID BY ADC

Received 9/6/22 1.56pm.
via
email.
Appendix 2

Resource Management Act 1991

Ashburton District Plan

Resource Consent Application LUC21/0050

Objection Under section 357A of the RMA to additional costs for processing the application

Introduction

1. There is a very large Lime tree (Tilia Tomentosa - Silver Lime or Tilia Europa - Common Lime) on the property at 28 Queens Drive, Ashburton. This tree is protected from removal or unauthorised pruning under the Ashburton District plan.
2. Prior to these proceedings No's 28 and 30 Queens Drive were held together in one ownership, with a house on 30 and the tree on 28 which was otherwise vacant. The two properties have been sold separately. Ms Tracey Fleet is the current owner of No 28 and therefore of the tree.
3. There was a long history, said to be 16 years, by the previous owners and more recently by Ms Fleet trying to get some help from the Council in dealing with what they considered to be a very dangerous tree.
4. The tree has three codominant trunks, and this is considered by some arborists who have assessed the tree on behalf of the owners in the past to be a significant weakness that could lead to trunks or limbs splitting away and falling. Because of the size of the tree this could pose a significant danger to owners and occupiers of the property and neighbouring properties.
5. Other arborists retained by the Council disagree about the condition of the tree and therefore its safety and risk.
6. At some stage in the past the tree has been braced with wire cables, and if it is to remain the Council's arborists agree that this system must be retained and maintained.
7. On acquiring the property Ms Fleet continued with attempts to have the tree removed. Little progress appears to have been with these discussions and Ms Fleet made a unilateral decision to have the tree felled, or at least heavily pruned. Her exact intention has not been made clear to me but that is immaterial.
8. Operations on the tree commenced and were halted by the Council, and an abatement notice has been issued. By that stage some major cuts had been made and the tree partially ring barked. Photographs I have seen however show that it is still a very large tree.
9. The position has now been reached that the Council's arborists consider that with some further pruning to balance the tree, and repair of the cable bracing system, the tree could be saved. Regrowth would occur and the tree may have many years of life remaining. However Ms Fleet, and a number of her neighbours and other people strongly disagree. The Council's arborist, Mr Cadwallader also noted that if decay set in from the major cuts which were made, the remaining life of the tree could be as short as 10-15 years.
10. Ms Fleet has made enquiries and learnt that it may be very difficult or impossible to get liability insurance for this tree, and because of that it would not be possible to get a mortgage to enable her to build a dwelling on the section.

The Resource Consent Application

11. Ms Fleet then made a resource consent application to remove the tree. It has not been made clear to me whether the Council suggested this or whether it was her own decision.
12. The status of the application under the district plan was that it was a non-complying activity.
13. The application was publicly notified and a number of submissions received, mostly in support of the application. A hearing was held before Mr Dean Chrystal, a Hearings Commissioner. Consent was declined, due to the preliminary test for non-complying activities under Section 104D of the Resource Management Act (the RMA). There are two parts to this test and the application failed both of them. Firstly it would be contrary to the key objective in the district plan for the protection of a heritage tree. Secondly the effects on landscape and amenity would clearly be more than minor, noting that s104D only allows the adverse effects of the application to be considered and not any positive effects, such as the relief from stress and mental health issues for the landowner and surrounding residents that were being caused because of concerns about the safety of the tree.
14. Having made that finding, the outcome was inevitable. Section 104D provides that unless an application does not pass at least one of these tests it must be declined.

The objection

15. Following the decision, Ms Fleet received an invoice from the Council for additional costs for processing the application. Having already paid a fee deposit of \$ 6,450.00 she has now been required to pay an additional sum \$9,092.03. She has lodged an objection against those fees under section 357B of the Resource Management Act 1991.
16. I am now charged with resolving the applicant's objection against the fees she has been charged for this application.
17. In her objection Ms Fleet has not specifically examined or criticised the detailed makeup of the fees. Instead the objection is in more general terms. In particular she says she enquired before making the application how much the fees were likely to be, and in response Mr Ian Hyde, the Planning Manager at the Council provided a hypothetical example based on the number of hours it might take to process a typical notified application. It is worth quoting the exact wording of Mr Hyde's advice, from emails which have been provided to me. He wrote

As has been said before it is difficult to estimate costs, however to help you, I have given an indicative scenario on the costs by a Commissioner. There are a number of variables in this, so you should not rely on it to be specific to your situation. In this example a decision maker might spend 5 hours reviewing information associated with an application and another 2 hours on a site visit. A half day hearing would be 4 hours and the decision maker could spend around 12 hours on a decision. At a rate of \$250 per hour, this would be a cost of \$5750 plus disbursements.

In relation to additional costs, we have tried to make the lodgement fee for a notified application approximate the average total cost of a notified consent, however there are a number of variables which come into play, for example if the Council needed to commission a report about the condition of the tree or if there were a number of submissions from parties who wished to be heard and which made the hearing longer than expected. Alternatively, there have been other applications where the

applicant received a refund at the end of the process as not all of their deposit had been accounted for during it.

18. It is clear from this that Mr Hyde was careful to note that costs could well be different from this scenario due to the circumstances of the case. In the event it was necessary to involve an arborist, there were submissions, and the hearing took more than a half day, as Mr Hyde indicated could happen.
19. Ms Fleet said that she assumed that the actual costs might vary by plus or minus 10% from the hypothetical example. That was her assumption and not that of Mr Hyde.
20. With the benefit of hindsight it may have been wiser to provide a range of actual costs of past applications, rather than the hypothetical scenario. However I make no criticism of Mr Hyde for this. He was asked a difficult question and gave the best answer he could.
21. I have examined the breakdown of the fees charged. They are based largely on the hours of the three professionals the Council employed, the Commissioner Mr Chrystal, the planning consultant Ms Mary Clay, and the consultant arborist Mr Cadwallader.
22. Mr Cadwallader's fees came to \$907 (+ GST), for 8.25 hours at \$110 per hour. His work consisted of discussions regarding aspects of the matter with Mary Clay & Ian Hyde, reviewing the application, submissions and various arborist reports prior to hearing, and attendance at the hearing by Zoom.
23. I consider this to be a fair and reasonable number of hours, especially since his attendance at the hearing lasted 3.5 hours. Nor do I question his hourly rate which seems very reasonable.
24. Ms Clay produced two reports for the Council, firstly a report on whether the application should be notified, and secondly on the substantive merits of the application for Mr Chrystal's consideration. I have studied these reports Both reports were careful and comprehensive. They deal with all the matters I would expect to see and, in my opinion, come to the correct conclusions in the circumstances of the case, especially on section 104D of the RMA. By setting out the background and history, and the competing issues, the reports would have assisted Mr Chrystal to come up to speed quickly and efficiently and shortened the time he would have otherwise had to spend familiarising himself with the details of the case.
25. Ms Clay's costs came to \$6,882.75, (incl. GST) consisting of 15.5 hours to receive and review the application, carry out a site visit and prepare the notification report, 19.25 hours to receive and review the submissions, liaise with the arborist and prepare the hearings report, and 8 hours to prepare for and attend the hearing. Her charge out rate is \$140 per hour, which is typical for the industry.
26. Ms Clay is a very experienced planning consultant and obviously understands her role in matters such as this very well. The bulk of her time was spent on producing the two reports. Her reports are clear and comprehensive and I expect would have been of considerable assistance to Mr Chrystal. They are precisely the type of reports I would have expected to receive had I been the Hearings Commissioner hearing the application. In these circumstances the only question I can ask myself is whether the number of hours is excessive. I have concluded that they are not for an application involving as many issues as this one, complicated by the past history and the enforcement action.

27. Mr Chrystal's costs came to \$7, 615.65 (including GST), consisting of reviewing the application, reports and evidence, attending the hearing, drafting the decision, preparing and issuing a Minute to the parties, and some miscellaneous office costs. His charge out rate is \$210 per hour, which is typical or even slightly low for the industry.
28. Having read the decision, and based on my own extensive experience as a Hearings Commissioner I do not consider Mr Chrystal's time and costs are excessive for a rather unusual application such as this.
29. . Once the application had been made then it had to be processed and the costs incurred in the process are reasonable. I do not see any work that was unnecessary, done poorly or took too much time. I do not see any basis for reducing the additional fees charged for what was done.
30. I also understand that the Council incurred additional administration costs. These included lodging and notifying the application and providing support for the hearing and decision. None of this time was on charged, nor was the time that the District Planning Manager spent in responding to the requests of the applicant. To that extent the Council has off-set some of the costs of this application.
31. That is enough to reach a decision on this objection.
32. Having come to these conclusions on the costs, I conclude that the additional costs charged by the Council are fair and reasonable for an application of this nature, scale and complexity. The result is that the objection by Ms Fleet must be disallowed.

Decision

That the Objection by Ms Fleet to the additional charges for the resource consent application Number LUC21/0050 is disallowed.

D. L. Mountfort

Hearings Commissioner

8 June 2022

8 June 2022

TA Fleet
30 Queens Drive
Allenton
Ashburton.

Dear Madam

RESOURCE CONSENT APPLICATION – ADVICE OF DECISION ON OBJECTION

Applicant:	Tracy Ann Fleet
Reference:	LUC21/0050
Site location:	30 Queens Drive Allenton
Legal description:	Lot 42 DP 23494
Description of application:	Land use consent at 30 Queens Drive Allenton to address noncomplying activity to remove protected Silver Lime Tree, Zoned Residential C
Zoning:	Residential C
Status of activity:	Land Use Non Complying

Your objection to the Council's invoices for additional charges and costs associated with the above application falls under Section 357B of the Resource Management Act 1991. As previously advised, an Independent Commissioner (David Mountfort) was appointed to consider the matter.

Commissioner Mountfort has now made his decision which is to disallow the objection. A copy of the decision accompanies this correspondence.

You have a right to appeal this decision to the Environment Court under section 358 of the Resource Management Act. Any appeal must be undertaken within 15 working days of the receipt of the decision, unless otherwise allowed by the Court. If an appeal is lodged you must also serve a copy on the District Council.

The information on appeals in this letter is provided as a guide only and does not constitute legal advice. Information on the appeal process can be found on the Environment Court website www.justice.govt.nz/courts/environment-court.

Yours faithfully,

Cara Badger
Support Officer
Strategy and Compliance Group

ASHBURTON DISTRICT COUNCIL

5 Baring Square West
Ashburton

PO Box 94
Ashburton 7740

P (03) 307 7700
E info@adc.govt.nz

www.ashburtondc.govt.nz

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 on to 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.

Ian Harding signed as approval as an affected party, but then made a subsequent submission

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:

which should have made his affected party form invalid so as a submitter the positive effects on him should be considered.

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



16 June 2021

T A Fleet
30 Queens Drive
Allenton
Ashburton

Dear Madam,

Resource Consent Application – Notification Decision

Our Reference:	LUC21/0050
Applicant Reference:	Land use consent at 30 Queens Drive Allenton to address non-complying activity to remove protected Silver Lime Tree, Zoned Residential C
Proposed Activity(s):	
Address:	30 Queens Drive ASHBURTON

You are advised that your application for the above was referred to an Independent Planning Commissioner to make a notification decision on the application. The decision of the Commissioner made on 14 June is to proceed to full public notification pursuant to sections 95A-95D of the Resource Management Act 1991.

As you have been previously advised, the Council's investigation into the December 2020 unauthorised works to the tree remains open. During this time, Council staff have continued to investigate this matter and are of the opinion that a formal case against you is warranted. You are advised that it is the Council's intention to seek a formal prosecution for the unauthorised activities undertaken through the Courts.

While the enforcement action and the application for resource consent referred to above are separate matters, we would like to give you the opportunity to consider whether you wish to proceed with the resource consent, the next step of which would be for it to be publically notified.

We wish to be clear that the Council's intention to proceed to Court in relation to the enforcement investigation will be unaffected by any decision you might make in relation to your resource consent application.

Continued over

→ Emailed 23/06/21 to query why the Council would make this offer if the processes are different and this is the only process available to have the tree removed.

Please confirm whether you wish to proceed with your resource consent on or before 5pm on 1 July 2021. If we have not heard from you by this date, we will proceed to public notification of the application in accordance with the requirements of the Resource Management Act.

Yours faithfully,

A handwritten signature in dark ink, appearing to be 'Ian Hyde', written over a faint horizontal line.

Ian Hyde
District Planning Manager
Planning Team

How to run a successful RMA hearing process

by Debra | Environment, Interviews



Introduction

David McMahon is an accredited Independent Hearing Commissioner and resource management consultant at RMG with particular expertise in statutory planning and process. He has been a Commissioner since 2001, and has worked on a large number of RMA plan changes, resource consent and designation hearings in Wellington, the lower North Island and across the South Island.

In this article (the final one of a three part series), David identifies areas for improvement in how councils work with commissioners, and some of the challenges commissioners face when running RMA hearings.

In part one David discusses the increasing trend for councils to use independent commissioners, and in part two he discusses the RMA decision making process.

What can council officers do to help independent hearing commissioners, to ensure a smooth RMA hearing and decision making process?

The most important things are **early engagement** and **separation of functions**.

The sooner the Commissioner or panel is engaged, the sooner they can establish the pre-hearing process and timetable to be followed; for example pre-hearing meetings, expert conferencing/caucusing and further information requests.

Providing sufficient time for those actions to occur, whilst potentially delaying the commencement of the hearing, can usefully serve to narrow the issues in contention and therefore shorten the actual hearing duration or even in some (albeit limited) cases can completely resolve issues without the need for a hearing. The written directions to parties that a Commissioner can provide once appointed can readily assist in providing the scope and space for such conferencing/resolutions.

Although it is difficult for smaller councils without the luxury of large planning teams, it's also essential that wherever possible a council maintains a separation between their administrative and reporting functions when dealing with hearing commissioners and panels.

Quite often the reporting officer is handling administrative arrangements, including commissioner liaison, and this is not appropriate. A reporting officer is no different from a submitter or an applicant. It is not okay for the hearing panel to be liaising directly and individually with any individual party to the proceedings, whether submitter, applicant or reporting officer because there's the risk of influence, or a perception of influence.

What are some of the challenges independent hearing commissioners face?

- **Timeframes**

The statutory time frames in the RMA for limited notified and fully notified consents mean that if a large proportion of the time is used up in processing, it constrains the time available for deliberations and decision-making. In this respect, pre-circulation of evidence (including the section 42A report) has been the biggest game changer due to the impact on timeframes. This is particularly so for resource consent hearings, whereas plan hearings have fewer time constraints.

Accommodating pre-circulation requirements into the time frames set down for limited and fully notified resource consent hearings is now mandatory but it does put pressure on all parties. Expert witnesses, whilst conscious of meeting the expectations of commissioners and working in the spirit of the code of practice, understandably have an eye on the ticking clock which means that they will still need to produce a brief of evidence following conferencing and have it circulated as per the due dates. Commissioners need to be cognisant of these tensions and pressures when setting their own timeframes. The quid pro quo for experts is that if they are successful in narrowing the issues during conferencing this will reduce the scope and length of their evidence.

There is more opportunity for resolution of issues through a prehearing process for plan reviews and plan changes because the time frames are more liberal. So, whilst prehearing discussions enable a narrowing of the issues to be considered at the hearing, this can only effectively be done for plan changes and plans, unless in the case of resource consents the applicant agrees to put the application process on hold to accommodate pre-hearing conferencing. Otherwise, there isn't much time for talking and everyone becomes locked into pre-circulation of evidence.

Early engagement is critical for this to be successful. For example, I have been engaged to assist with the decision making on a plan change at Tasman District Council. I have known this for 18 months, which means I can make sure I have the time available to do it, and I can be across all

aspects of the process as soon as the official delegation has been made by the Council. This usually occurs prior to notification.

Once submissions close, I issue directions through a minute. This goes out to all parties involved in the hearing. It provides certainty about the process and gives a likely timeframe. In the minute, I outline the key issues raised in submissions and indicate I want parties to get together to resolve as much as possible before the hearing.

- **Role separation**

Working with councillors who are less experienced as RMA hearing panel members can be challenging if they are finding it difficult to separate their roles as a hearing commissioner and as a councillor. In addition, some panel members are less willing to be advised on processes governing deliberations and outcomes. Fortunately, this is a rare occurrence. Overall, and as discussed in Article 1 of this series, I firmly believe mixed panels are a good idea.

- **Out of scope submissions**

Sometimes submitters raise matters that are not relevant to the proceedings. I don't enjoy having to explain to the submitter that the issue is 'out of scope' or outside the RMA jurisdiction. I do allow some latitude for submitters to address such issues but it's usually on the basis that they are best advised to use their speaking time more effectively on matters that I can control as opposed to matters that are outside my jurisdiction.

- **Categorisation of submissions**

As discussed in Article 2, I like to take an issues approach to deliberations, which can be assisted or impeded by the way submission points are categorised, and reported on in the section 42A report. In this respect, having reporting officers group a whole range of submission points in a 'general' category in the section 42A report is not helpful.

- **Voluminous material**

One of the noticeable trends under the RMA is the massive amount of written material produced by its statutory instruments and associated processes. This is very prevalent in RMA hearings, particularly with the amount of pre-circulated material that is produced and needs to be read prior to the hearing commencement. While this essentially shortens the hearing process, it places a huge demand on panel members to read the material beforehand and to assimilate the content.

Concluding comment

This is the final in this series of articles on decision making under the RMA. I've enjoyed contributing to it and hope it has been of interest to all participants in RMA hearings. Hopefully it has stimulated some discussion even if you don't agree with all that has been canvased.

Finally, I would like to thank Debra Bradley for initiating this series and getting me motivated to contribute under her editorial tutelage. Her grasp of these matters is impressive and I would commend her services to councils throughout the country.

8.0 Planning and resource consents

Planning and resource consent fees are charged under the Resource Management Act 1991. Fees indicated by a ^(B) below are a **minimum** fee. Council may recover all additional costs on a time and cost basis. Additional charges will be determined on the basis of actual and reasonable costs. Time in excess of that covered by minimum fees will be charged in 30 minute increments to the nearest half hour.

Costs incurred by Council, such as travel, materials are charged at the cost to Council plus 10% cost of administration.

Costs associated with the review of compliance with the provisions of the Resource Management Act 1991, the Ashburton District Plan and the monitoring of resource consent conditions will be recovered on a time/cost basis. For the monitoring of consent conditions, any costs to be recovered will be less any monitoring fees paid at the time of application.

If the cost of receiving and processing a resource consent application is less than the prescribed fee, Council may refund the difference to the applicant ^(C).

For Land Use Consents a \$70 monitoring fee will be charged. This fee is refundable where consent is not granted or the application is withdrawn ^(D).

Council may create and install a new rapid plate and number on a site where it has been identified that the existing plate has been moved from its surveyed location by more than 20m. All costs associated with resurveying, creating and installing new plates will be passed on to the landowner.

		1 July 2020 - 30 June 2021	1 July 2021 - 30 June 2022
8.1	Charge-out Rates - per hour		
	First 30 minutes of pre-application advice is free of charge		
	District Planning Manager / Senior Planner	\$187.00	\$192.00
	Planner / Environmental Monitoring Staff	\$145.00	\$148.00
	Graduate Planner	\$131.00	\$134.00
	Planning Administration Officer	\$104.00	\$107.00
	Internal technical advice / Support	\$157.00	\$160.00
	Consultants	Cost (no admin fee)	Cost (no admin fee)
	Legal advice	Cost + 10% admin fee	Cost + 10% admin fee
	Scanning fee (where a digital copy of an application is not provided at lodgement)	\$84.00	\$86.00
	Misc Charges ^(B)		
	Affixing seal	\$157.00	\$160.00
	Miscellaneous documents	\$157.00	\$160.00
8.2	Application for change to District Plan ^{(B)(C)}	\$26,061.00	\$26,634.00
8.3	Land Use Consent Applications – Minimum charges ^(B)		
	Non-notified ^(D)	\$1,092.00	\$1,116.00
	Non-notified (non-complying status) ^(D)	\$1,332.00	\$1,361.00
	Limited notified ^{(C)(D)}	\$4,329.00	\$4,424.00
	Full notified ^{(C)(D)}	\$6,314.00	\$6,453.00
	Limited notified (non-complying status) ^{(C)(D)}	\$4,538.00	\$4,638.00
	Full notified (non-complying status) ^{(C)(D)}	\$6,627.00	\$6,773.00
	Non-notified application for non-compliance with internal setback and / or recession plane rules only	\$679.00	\$694.00

	1 July 2020 - 30 June 2021	1 July 2021 - 30 June 2022
Permitted boundary activity (section 87BA RMA)	\$256.00	\$262.00
Marginal or temporary non-compliance (section 87BB RMA)	\$835.00	\$854.00
8.4 Subdivision Consent Applications – Minimum charges ^(B)		
Change to Flats Plan or Unit Title	\$1,018.00	\$1,041.00
Non-notified	\$1,018.00	\$1,041.00
Non-notified (non-complying status)	\$1,227.00	\$1,254.00
Limited notified ^(C)	\$4,361.00	\$4,457.00
Full notified ^(C)	\$6,241.00	\$6,378.00
Full / limited notified (non-complying status) ^(C)	\$6,450.00	\$6,592.00
Per lot fee (for the fourth lot and each additional lot, including reserves for utilities / recreation)	\$57.00	\$58.00
Section 223 Certificate	\$261.00	\$267.00
Section 224 Certificate	\$261.00	\$267.00
Section 226 Certificate	\$418.00	\$427.00
District Land Registrar consultation	\$110.00	\$112.00
Right of way consent – Section 348 of LGA 2002	\$365.00	\$373.00
8.5 Hearing Panel Charges (additional to fee for full / limited notification)		
Commissioner	At cost + 10%	At cost + 10%
Panel comprising 2 Councillors (per hour)	\$188.00	\$192.00
Panel comprising 3 Councillors (per hour)	\$271.00	\$277.00
Pre-hearing meeting (per hour)	At cost	At cost
8.6 Other Applications – Minimum charge ^(B)		
For any application lodged under the following sections		
1. Extension of time (S125 RMA) (non-notified application)	\$626.00	\$640.00
2. Extension of time (S125 RMA) – notified application	\$5,859.00	\$5,978.00
3. Change or cancellation of condition (section 127 RMA) - non-notified application	\$835.00	\$854.00
4. Change or cancellation of condition (section 127 RMA) - notified application	\$6,058.00	\$6,191.00
5. S139 Certificate of Compliance	\$1,567.00	\$1,601.00
6. S139A Certificate of Existing Use	\$1,044.00	\$1,067.00
7. S10 (2) Extension of existing use rights	\$1,044.00	\$1,067.00
8. S168/168A Notice of Requirement for designation	\$5,222.00	\$5,337.00
9. S181 Application for alteration to a designation	\$1,253.00	\$1,281.00
11. S182 Removal of a designation	\$261.00	\$267.00
12. S184 Extension of time for designations	\$522.00	\$534.00
13. S176 Application for outline plan	\$522.00	\$534.00
14. S176A Application for outline plan waiver	\$157.00	\$160.00
15. Preparation / change or cancellation of consent notices	\$157.00	\$160.00
16. Removal / refund of bonds and caveats	\$300.00	\$267.00
17. Review of delegated decision to reject application	\$835.00	\$854.00
18. Cancellation of amalgamation	\$940.00	\$961.00

	1 July 2020 - 30 June 2021	1 July 2021 - 30 June 2022
19. Overseas investment certificate application	\$209.00	\$214.00
20. Removal of building line restriction	\$522.00	\$534.00
8.7 Rapid Number Plate		
Allocation of new Rapid Number (includes plate)	\$63.00	\$64.00
Resurveying site access where allocated number is no longer correct	At cost	At cost
Replacement Rapid Number plate	\$26.00	\$27.00

9.0 Bylaw fees and fines

Bylaw fees and fines are charged under the Local Government Act 2002. When the cost of bylaw monitoring and/or enforcement related processes exceeds the stated fee, (minimum charge), Council may recover all additional costs on a time and cost basis ^(E).

	1 July 2020 - 30 June 2021	1 July 2021 - 30 June 2022
9.1 Fees under the Ashburton District Bylaws		
Licence to keep bees (urban areas)	\$50.00	\$51.00
Licence to keep poultry or stock (urban areas)	\$100.00	\$102.00
Removal of advertising signs ^(E)	\$167.00	\$170.00
Regulatory functions and enforcement ^(E)	\$83.00	\$85.00
9.2 Litter Fines – Maximum permitted under the <u>Litter Act 1979</u> ◊	\$427.00	\$400.00
Clean-up relating to litter and illegal dumping infringements ^(E)	\$56.00	\$57.00
9.3 Noise Equipment Seizure - Return of seized equipment ^(E)	\$120.00	\$123.00

10.0 Water sampling – private supplies

Water sampling fees are charged under the Health Act 1956. The fee stated below is a **minimum** fee. When the cost of water testing exceeds the stated fee (minimum charge) the Council may recover all additional costs on a time charge basis ^(F).

	1 July 2020 - 30 June 2021	1 July 2021 - 30 June 2022
10.1 Bacteriological Water Testing - Minimum charge ^(F)	\$31.00	\$31.00