

**Development Planning and Compliance**

**NOTICE OF DECISION**

Service Request No: 217960  
File Reference: 728366

**HEARING DATES:** 29 November 2010

**HEARING PANEL:** Ngaire Best, Ray Ahipene-Mercer & Helene Ritchie

**DATE OF REPORT:** 22 December 2010

<b><u>Site Address:</u></b>	3 Box Hill, Khandallah
<b><u>Legal Description:</u></b>	Lot 3 DP 77814
<b><u>Applicant:</u></b>	Julia Jane Jefferson, Grant Lee Jefferson, Richard Flannigan and Laura Flannigan (C/ - Gibson Sheat Lawyers)
<b><u>Proposal:</u></b>	Remove the District Plan listed heritage tree (213)
<b><u>Owner:</u></b>	Julia Jane Jefferson, Grant Lee Jefferson
<b><u>In Attendance:</u></b>	<u>Hearing Panel</u> Ngaire Best (Chair) Ray Ahipene-Mercer Helene Ritchie  <u>Wellington City Council</u> Erin Whooley (Planning Officer) Julian Emeny (Parks and Gardens) Myfanwy Eaves (Heritage Advisor) Bruce MacDonald (Independent Senior Aborist)  <u>Applicant</u> Richard Flannigan and Laura Flannigan (Owner/Occupier) Dave Robinson c/- Gibson Sheat Lawyers  <u>Submitter</u> Rosamund Averton Mary Munro John Gallagher Kevin Kilkelly

## **THE DECISION**

The Panel, acting under delegated authority from the Wellington City Council (the Council) and pursuant to section 104B of the Resource Management Act 1991 (the Act), **DECLINES** consent for the removal of a listed heritage tree at **3 Box Hill, Khandallah**, being Lot 3 DP 77814.

## **BACKGROUND**

### **Site Description**

1. The rectangular shaped 846m<sup>2</sup> subject site (3 Box Hill) is located on the south-east corner of Box Hill and Station Road, Khandallah. The site topography drops gradually south down towards the north.
2. The site is occupied by a large two storey residential home (circa 1903) with attached double garage. There is a 20.1m high Norfolk Island Pine Tree (the tree) in the centre of the garden which faces Station Road. The remainder of the site is landscaped with a variety of tree, shrub and flowering species.
3. 4 Station Road (Lot 2 DP 77814) immediately adjoins the eastern boundary of the subject site. This site is also owned by the applicant. This square shaped site (394m<sup>2</sup>) has an access leg from Station Road. This site was predominantly subdivided off 6 Station Road in 1994, with a small area also subdivided off 3 Box Hill to contribute to the access leg. This site does not contain any buildings or structures and is used as an additional garden by 3 Box Hill.
4. The wider area is characterised with residential properties with the exception of 7 Burma Road which is currently used a car mechanic and video shop, 1 Station Road which is used as a childcare centre and 11 Station Road which is used as a dairy. The subject site is approximately 75m from the railway line and Khandallah railway station.

### **Site History**

5. Robert Hannah (Wellington shoe manufacturer) purchased the site (and surrounding area) in 1894. With his wife, Hannah Hannah, they constructed a house (Victorian style) on the subject site (entitled "Tara's Hall") which was subsequently destroyed by fire. It is unclear how much of the garden (if any) survived.
6. Ellen Cameron purchased the site in 1903 and built a replacement house (Arts and Crafts/Tudorbethan style) was constructed (entitled "Lochiel") with a surrounding Victoria garden, on the same footprint as the previous house. This house remains on the site.

### **Background**

7. The tree was included for listing in the District Plan as part of Variation 12 (Heritage and Notable Trees).
8. The District Plan was publically notified in 1994. It contained a list of 48 individual and 4 groups of trees. The majority of these were carried over from the Transitional District Plan.
9. The District Plan Hearing Committee heard submissions on the heritage provisions of the District Plan in late 1995. Submissions were received which requested that additional trees were added to the Plan. Rather than assess the additional trees at the time, the Committee recommended that an assessment panel consider the requests and assess them against the STEM criteria. In February 1996 the Committee confirmed that the criteria be extended to Heritage and/or Notable Trees.

10. Funding for the assessments was made available in 1996/1997. 200 trees were evaluated. Only 136 trees which scored over 110 STEM criteria were included in Variation 12. The trees located on private property which had landowners who were opposed to the listing, were not listed.
11. The Report of the Hearings Committee (May 1999) discussed each tree to be listed. In relation to the tree at 3 Box Hill, the report states "*the Committee considered it to be striking tree, visually distinctive from other surrounding vegetation because of its stature and position.*" The subject trees height, age and form seem to be the basis for which the tree was listed. It is assumed that these reasons would have also provided the basis for its original consideration to be investigated for inclusion in the District Plan.

### **The Proposal**

12. The applicant wishes to remove the District Plan listed heritage tree (213) at 3 Box Hill, Khandallah.

## NOTIFICATION AND SUBMISSIONS

### Notification

13. The application was publicly notified on Tuesday 12 October 2010 in accordance with sections 95-95F of the Resource Management Act. A public notice appeared in the Dominion Post on this date and a sign was erected on the site. Owners and occupiers of land in the immediate area and the New Zealand Historic Places Trust, Wellington Tenth Trust, Te Runanga o Toa Rangatira Inc and Ngaio Progressive Association were served a copy of the application.
14. The written approval of the property owner of 6 Station Road Khandallah has been obtained and provided.
15. Submissions were received from the following parties:

#	Submitter	Address	Support /Oppose	Wish to be heard
1	Yolanda Slobbe	21 Blueberry Grove, Upper Hutt	Support	No
2	Margaret Ellis	53A Palmer Crescent, Upper Hutt	Support	No
3	Sneha Cherian	11 Station Road, Khandallah	Support	No
4	Alexandria Sorensen	4A Oak Grove, Mount Cook	Support	No
5	Nicolle Oldham	31 Harbour View Road, Lower Hutt	Support	No
6	Johnson Preschool Ltd	1 Station Road, Khandallah	Support	No
7	Scott Gibbons	8 Station Road, Khandallah	Support	No
8	Peter Embleton	47 Baroda Street, Khandallah	Support	No
9	Simon Palmer	125 Cashmere Avenue, Khandallah	Oppose	No
10	Bevan Domett	44 Dexter Ave, Auckland	Oppose	No
11	Richard Hill	5/102 Lyall Parade, Lyall Bay	Oppose	Not indicated
12	John Gallagher	29 Simla Crescent, Khandallah	Support	Yes
13	Kevin Patrick Kilkelly	85 Farnham Street, Mornington	Oppose	Yes
14	Mary Munro	1 Orari Street, Khandallah	Oppose	Yes
15	Rosamund Averton	12/17 Brougham Street, Mt Victoria	Oppose	Yes
16	Onslow Historical Society Inc	86 Khandallah Road, Khandallah	Oppose	Yes
17	NZ Historic Places Trust	PO Box 19173, Courtney Place	Neutral	Not indicated

16. A total of seventeen submissions were received by the close of submissions on 10 November 2010 at 4pm. Nine submissions supported the removal of the tree. Seven submissions opposed the removal of the tree. One submission was neutral.
17. The following issues were raised in the submissions (ordered generally by support, oppose then neutral):
  - Health and Safety – the tree is a danger to the owners and potential danger to children attending Johnson Preschool.

- Streetscape – the tree is an eyesore and conceals the historic house and garden.
- The large size of the tree dominates the garden, compromising site openness which is common in Khandallah.
- The tree has a great wider community benefit which should not be compromised by private desire. It is a community asset which should be left for the enjoyment of future generations.
- The tree is a defining feature of the landscape and is an important landmark.
- The tree is a wonderful specimen, in excellent health with environmental benefits.
- The tree is not a property or public hazard nor (generally) vulnerable to weather events.
- Future development options for the site if the tree is removed (apartments?).
- The gum tree removes more sunlight than the Norfolk pine to the dwelling
- The tree has historical values.

## **THE HEARING – 29 November 2010**

18. The hearing took place on 29 November 2010, started at 9.15am, at the Wellington City Council, Committee Room One.

### **Council Officers**

#### Erin Whooley – Planning Officer

19. Ms Whooley confirmed with the Panel that the Planning Officers report should be taken as read, she then introduced her advisors that were available for comment.
20. Ms Whooley circulated the Standard Tree Evaluation Method (STEM) report prepared by Mr MacDonald after the Planners report was completed. Ms Whooley clarified that the STEM result was higher since the re-assessment. Mr MacDonald the Arborist acting on behalf of the Council, noted that the STEM result was higher than other District Plan listed trees that hadn't been re-assessed. This is partly because of the heritage information that had been included and the significant amount of time and research that had gone into investigating the value of the tree. However Ms Whooley did note that prior to the re-assessment of the tree its original score of 162 (1997/1998) placed it in the middle to higher end of Wellington City Council District Plan listed tree's.
21. Ms Whooley also noted that a late submission had been received (Thursday 25 November), and pursuant to section 97 of the RMA, this had not been accepted. The Committee agreed with Ms Whooley that the late submission should not be accepted.
22. Ms Whooley concluded her evidence by reiterating her recommendation to the Hearing Panel that the proposal be declined. This was due to the proposal not being consistent with Part 2 of the RMA, in that it conflicts with the desired outcomes of the District Plan and Plan Change 43, the fact that the tree is in good health and some submitters have highlighted that the tree is a community asset.

### **The Applicant's Case**

23. Mr Dave Robinson (of Gibson Sheat Lawyers, agent for the owner) circulated a copy of his written evidence. This discussed the safety and dangers that the tree poses, including damage to structures on the site, risk of slippage due to tree roots and moss, as well as risk of health and safety to the users of the front lawn area. He detailed an incidence in which three of the lower branches of the tree broke off.
24. Mr Robinson provided articles sourced from the internet to indicate the biology of the species, in regards to the likely final height of the tree and root growth. Photographs of the site and surrounds were also tabled that were dated between 1907 – 1949 and it was argued that the tree in question was not visible within these images, nor that it was intentionally planted. He did not agree with the heritage assessment made by the Council's Heritage Advisor, Ms Eaves. He said that if the tree had been planted by a well known settler or if it was a native tree then its heritage listing would be more justified. The applicant then discussed the STEM report and questioned its findings.

25. A discussion and several photographs were provided of a number of other trees of the same species, size and stature in the immediate locality which did not have heritage listings. Mr Robinson concluded that it was not appropriate for the tree to remain and that the application should be granted.
26. Mr Robinson confirmed that no Arborist assessment had been presented and the assumptions made on the tree's age were based on the photographic evidence. He also noted that some methods of determining the tree's age (i.e. core sample of trunk) would require the applicant to obtain another resource consent from the Council.
27. The Panel questioned why no information determining the loss of sunlight had been provided. Mr Robinson referred to photographs 10-15 which were tabled with his evidence to demonstrate the impact of the loss of sunlight from the tree.
28. The Panel also enquired into the authorship of the internet articles that had been tabled in support of the applicant's evidence. Mr Robinson clarified that the references were at the bottom of the internet articles and that the information from Wikipedia also detailed who the sources were.
29. Mr Robinson confirmed that the owners of the site were not alerted to any issues relating to the tree when they initially purchased the property at No.3 Box Hill. It was his opinion that applying for a Land Information Memorandum (LIM) report when investigating a site was not always undertaken by future owners, and is a recent trend. The applicant questioned the listing of the tree in the first place and suggested that it was a remedial measure to avoid future development of the site, as feared by a neighbour. The owner confirmed that there were no plans to subdivide the site.
30. Mr Robinson discussed that there had been little communication with the Council regarding the management of the tree. He also discussed the owners intention to landscape the area which the tree occupies, should the application be approved.

## **Submitters**

### 1) Rosamund Averton

31. Ms Averton provided a written copy of her submission. Ms Averton noted that since her original submission she has undertaken further investigation of the tree to provide a context to her submission which requests that the application be declined. This was outlined in a written copy of her evidence which was circulated at the hearing.
32. Ms Averton provided background to the site at No.3 Boxhill and provided information about both the Hannah and the Cameron Families. Ms Averton tabled photographic evidence from the Alexander Turnbull Library and included botanical information about the tree.
33. Ms Averton concluded to say that the consent application should be declined in its entirety.



34. Ms Averton confirmed that there are no records of any Norfolk Pines falling over during the Napier Earthquake or during the storms that led to the Wahine disaster in 1968.
35. Ms Averton agreed that it was difficult to know which family planted the Norfolk Pine, but that you could assume that there were religious reasons behind its planting.

#### 2) Mary Munro

36. Ms Munro informed the Panel that she was a former President of the Ngaio Progressive Association and that there was no Khandallah Progressive Association. Ms Munro submission was on her own behalf and that she has travelled the route past the site frequently. Ms Munro stated that her career was as a Mediator and that she hoped to raise points that reflect her opposition to the proposal, but would add a way forward. Ms Munro also noted that she is the owner of a large Macrocarpa tree.
37. Ms Munro discussed safety, loss of light and the importance of the tree to the community and surrounding area. Ms Munro suggested that the tree could be more actively managed to prevent any potential hazards in the future. Ms Munro also commented that any landscaping should accommodate the tree. Ms Munro noted that the owners should have found out about the tree before purchasing the property, and that she would like to see a way around keeping the tree.

#### 3) John Gallagher

38. Mr Gallagher provided written evidence which should be read in conjunction with this report. Mr Gallagher submitted in support of the tree's removal from the site. He discussed that the tree appears to be a negative feature in the Khandallah surrounds. He also noted that Norfolk Pines in Khandallah are not an endangered species and that there are approximately 5 Norfolk Pines within a 1.5km radius of No.3 Boxhill. Mr Gallagher considered that the removal of the tree was a non-issue and that he did not understand why it was initially listed as it does not provide amenity to the occupants.

#### 4) Kevin Kilkelly

39. Mr Kilkelly submitted in opposition to the consent being granted. He explained his experience working as a postman in the area and his impression was that the tree was recognised by the community as being associated with the house formerly owned by the Hannah family. He considered that the tree should be kept because of its heritage values and its significance as a local landmark.

### **Wellington City Council – Right of Reply**

#### Erin Whooley – Council Planner

40. Ms Whooley addressed the concern of the applicant in her right of reply about the poor communication with Council in managing the tree. She commented that it is good customer service to call before entering a property.

#### Bruce MacDonald - Arborist

41. Mr MacDonald, an Independent Senior Arborist engaged by the Council, provided evidence about the science behind his profession and how that relates to his assessment (STEM) of the tree. Mr MacDonald's evidence covered the likely height of the tree, the importance of making comparisons with trees in the same locality, the likelihood of tree failure, and the impacts of the roots to structures.
42. He explained to the Panel the importance of making comparisons of tree species within the same locality. A lot of information is available on the internet but is not accurate for each situation. He clarified that the trees discussed in the applicants evidence which had failed were subject to different conditions, whereas Norfolk Pines in Wellington are used to a higher average wind speed.
43. Mr MacDonald informed the Panel that it is unlikely that the tree roots would undermine the house or walls on the site, if they are constructed to contemporary building standards, and that if there wasn't structural damage at this stage it would be unlikely. Mr MacDonald also stated that the final height of the tree is unlikely to double. Pruning of vegetation is carried out to benefit people, not the tree and in this case removal of branches or a Norfolk Pine can potentially destroy other branches. In regards to the health of the tree, Mr MacDonald suggested that the branches falling may be a result of mechanical damage to a lateral (i.e. by an activity such as tree climbing) which has caused decay. The risk of incidence of falling branches is considered to be minimal.
44. He stated that New Zealand is considered by Landscape Architects as being immature when it comes to urban tree appreciation. He considered that Norfolk Pines are planted to be landmark trees and assist in way-finding.
45. The Panel asked how old the tree was. Mr MacDonald stated that the diameter of the tree was 130cm and comparing this to other species in the region that the tree could be between 80-100 years old. He anticipated that the tree could live for another 20-30 years.

#### Myfanwy Eaves - Heritage

46. Ms Eaves, the Wellington City Council Heritage Advisor, provided comment about her understanding of the heritage of the tree and the site. She elaborated that the reading of old photos is subjective because of parallax error. She highlighted to the Panel that the tree did appear to be present in the photographs tabled at the hearing. Ms Eaves believed that due to the stature of the tree and the context of the heritage home that it belongs to the property, and we have a duty of care to preserve it.

#### **Applicant's Right of Reply**

47. Mr Robinson, on behalf of the sites owners, provided his final comments to the panel. He noted that he was providing his master copy of the photographs tabled in his evidence. He discussed that the tree is not clearly visible in the photograph tabled from 1949 where the tree would be approximately 40 years into maturation.
48. He also discussed that many pine cones had fallen to the ground on the property despite the evidence of the Arborist, Mr MacDonald, who said that this is rare. He asked who is responsible for damage from the tree as it is likely to

double in size. Mr Robinson reiterated the loss of amenity afforded to the subject site and that there are numerous other Norfolk Pine specimens that are not subject to a heritage listing.

49. The owner of the site Mr Flannigan commented that his family was unable to use the lawn in the dripline of the Norfolk Pine and that the risk of injury is great to the occupants of the site including their children. He closed with the statement that a child's life is worth a lot more than a pine tree.

### **Procedural Matters**

50. Hearing is closed.

## STATUTORY DOCUMENTS

### Resource Management Act 1991

51. The Panel have considered the following provisions of the Act in arriving at their decision on the application. The resource consent application was received by the Council after the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31) came into force on 1 October 2009. As such, the relevant provisions are those of the amended version of the Act.

### Part 2: Purpose and Principles

52. The consideration of all resource consent applications is subject to Part 2 of the Act, which sets out the purpose and principles of the Act. Under section 5, the purpose of the Act is to promote the sustainable management of natural and physical resources. "Sustainable management" means:

*"...managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while-*

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment."*

53. In achieving the purpose of the Act, all persons exercising functions and powers under it in relation to managing the use, development and protection of natural and physical resources are required to:
- Recognise and provide for the matters of national importance listed in section 6, which includes the protection of historic heritage; and
  - Have particular regard to the other matters listed in section 7; and
  - Take into account the principles of the Treaty of Waitangi in section 8.

### Part 3: Duties and Restrictions under this Act

54. Under section 9(1) of the Act:

*"No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is-*

- (a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or*
- (b) An existing use allowed by section 10 or section 10A."*

### Part 6: Resource Consents

55. As outlined below, the application is for a Discretionary (Unrestricted) Activity under the District Plan and Plan Change 43.

56. Section 104(1) of the Act sets out matters that a consent authority is to have regard to in considering an application for resource consent and any submissions received. Subject to Part 2 of the Act, these include:

*“Section 104(1)(a) any actual and potential effects on the environment of allowing the activity;*

*Section 104(1)(b) any relevant provisions of-*  
*(i) a national policy statement;*  
*(ii) a New Zealand coastal policy statement;*  
*(iii) a regional policy statement or proposed regional policy statement;*  
*(iv) a plan or proposed plan; and*

*Section 104(1)(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.”*

57. Section 104(2) of the Act provides that:

*“When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect”.*

58. Section 104B of the Act, in regard to the determination of applications for Discretionary or Non-Complying Activities, requires that:

*“After considering an application for a resource consent for a discretionary activity or non-complying activity, a consent authority-*  
*(a) may grant or refuse the application; and*  
*(b) if it grants the application, may impose conditions under section 108.”*

59. Section 108 of the Act outlines the nature of conditions that can be placed on land use consents.

## **RELEVANT PLANNING INSTRUMENTS**

60. The Panel consider that the Operative District Plan (including relevant Plan Changes) is the principal relevant planning instrument in deciding this application. The Panel also had regard for the relevant provisions of the Regional Policy Statement, the Proposed Regional Policy Statement, the Regional Coastal Plan and the New Zealand Coastal Policy Statement. It was considered that the provisions relating to the protection of historic heritage at a Regional level provide underlying support for the heritage provisions in the Operative District Plan and relevant Proposed Plan Changes..

### **Planning Maps**

61. The subject site is located in the Outer Residential Area of the District Plan (Map 21). Heritage Tree No. 213 (Norfolk Island Pine) is located on the site.

## Relevant Plan Change

### Plan Change 43 - Heritage Provisions

62. On 4 May 2006, proposed Plan Change No. 43 was notified. Plan Change 43 places a greater emphasis on the protection of historic heritage. The decision on Plan Change 43 was notified by Council on 18th October 2007. Plan Change 43 takes effect from the date of notification and assessment under the provisions of both the Operative Plan and Plan Change 43 has been undertaken as required. Plan Change 43 has relevance in determining the activity status, the notification decision and the substantive assessment of the proposal under section 104.
63. This decision is subject to two appeals and the plan change will not become operative until such time as the appeals are resolved. The appeals do not relate to the provisions relating to trees. Therefore, in terms of weighting, the provisions relating to trees have significant weight.

## ACTIVITY STATUS

64. The development requires consent for the following non-compliances with the District Plan and Plan Change 43:
- **Discretionary Activity (Unrestricted)** under **Rule 21.3.2** of the Operative District Plan as it is proposed to remove a listed tree (which is not a Permitted Activity).
  - **Discretionary Activity (Unrestricted)** under **Rule 21.C.2.1** of Plan Change 43 as it is proposed to remove a listed tree (which is not a Permitted Activity).

## SECTION 104(1)(a) ASSESSMENT: EFFECTS

65. The Panel have considered the anticipated effects of the proposal on the existing environment and, the extent of any adverse effects on neighbouring properties. In particular, the Panel have considered effects relating to:
- Historic heritage effects;
  - Ecological effects; and
  - Streetscape and amenity effects.
66. In addressing the actual and potential adverse effects the Panel considered all the evidence and undertook a site visit.

## Assessment of Effects

### *Historic Heritage Effects*

67. The Panel had consideration for the effects to heritage resulting from the removal of the listed Norfolk Pine from its position on the subject site at No.3 Box Hill Road. The tree is a listed specimen under the heritage provisions of the Wellington City Council District Plan. Conflicting evidence was presented on behalf of the owners of the site, and on behalf of the Planning Officer, in regard to the age and significance of the tree.

68. Mr Robinson, on behalf of the owner, claimed that there was nothing other than the size and form of the tree that made it meritorious of a listing. The tree was not a native species nor was it planted by a well known settler which could have made the listing more justified. Photographs were tabled by the applicant to indicate that the tree was not present in 1949, and therefore not planted by either the Hannah or the Cameron families.
69. The Council's Heritage Advisor, Ms Eaves, clarified for the Panel that the interpretation of archived photos could be purely subjective and that you cannot make assumptions about what is in the background or the foreground because of parallax error. She confirmed that the tree appears to be present in the photos tabled by the applicant but to continue a discussion about whether or not the tree was present better quality images would be required.
70. Mr Robinson provided a visibly clearer image on the 13 December 2010 as requested by the Panel at the close of the hearing. The image was originally tabled at the hearing under Appendix 6, Image No.27, sourced from the Alexander Turnbull Library. These were considered by the Panel to be inconclusive in terms of confirming that the tree was not present on the site in 1949. The submitters present at the hearing received notification that the image was available for viewing.
71. Evidence was also presented by submitters present that provided information about the historic significance of the tree for the past occupants of the site. Ms Averton submitted in opposition to the proposal and provided evidence about her research of various records including the Onslow Historian, National Library and the WCC Archives. Ms Averton noted that the tree with its Christian symbolism would have been significant for both the Hannah and the Cameron families.
72. The Panel considered that no hard evidence could be presented to determine the exact age and year of the tree being planted. However based on the expert evidence of Mr MacDonald, the Arborist for the Council, they could reasonably assume that the tree was likely to be between 80 – 100 years old.
73. The Panel then went on to consider what the heritage significance of the tree was. It was evident from the submissions received that there was a general understanding from the community that the tree had value as a notable tree. Whilst this does not necessarily translate to an understanding of the heritage significance of the tree, it is listed as a heritage tree on the district plan, which was not disputed at the time of listing.
74. Three submitters in opposition to the proposal made comment about the trees significance, including Mr Kilkelly who noted that the tree was seen as a landmark for the former residence of the Hannah family.

### Conclusion

75. The Panel concurred with Ms Eaves, and based on the evidence presented and their visit to the site they considered that the tree was of an age and recognised by the public as a landmark, and a valued feature of the landscape. Although the exact planting of the specimen can not be known, this is not considered to undermine the listing of the Norfolk Pine as a Heritage Tree. Further investigation into this tree's heritage would be required to confirm these

details. Mr MacDonald confirmed that in his view a heritage tree is an iconic tree with community value. It does not need to have stature, and it could be a commemorative planting with community interest. It could be a tree with biological purity, although they are normally listed for their stature or size.

76. Therefore it was determined that as a listed heritage tree, it has recognised and notable historic values and that its removal would result in the loss of its heritage value in totality.
77. The owner of the site, discussed mitigation in terms of landscaping the grounds to reflect the original plantings, and confirming that further development of townhouses would not occur. The owner also discussed a willingness to place a restrictive covenant on the site to prevent future owners from developing the site. Overall this was not considered to offset the loss of the tree and the effects of the proposal on historic heritage, which are considered to be more than minor by the Panel.

### ***Ecological Effects***

78. The Panel noted that a consideration of the ecology of the tree was necessary to determine the health of the specimen and hence the potential risk of retaining it on the subject site.
79. The Panel questioned the applicant as to whether there was any information to indicate that the tree was dangerous and people had been injured. The owner of the site, Mr Flannigan, confirmed that there was lots of information available on the internet, and that the species was sometimes referred to as the 'Widow-maker'.
80. Mr MacDonald, the Arborist on behalf of the Council, discussed in his evidence the high level of science behind the assessment and study of trees. He said that while there is a lot of information available on the internet you should only reference internet material relevant to your region. Mr MacDonald said that any comparison of plants should only be made in its locality, and that trees will grow and optimise to their current conditions.
81. The applicant could not provide any evidence of an injury occurring in the Wellington Region in relation to a Norfolk Pine tree. But a letter had been tabled with the applicant's evidence from the painters who had visited the site and witnessed the instance of branches falling. Photographs had also been tabled to show an instance of falling branches on the subject site.
82. The Panel carefully considered any likely risk for the occupants of the site and the surrounds of the proposal not being granted. This view was shared by the submitters also, including Ms Munro who commented that if the tree is deemed to be unsafe it should come down. However the Arborist report by Mr Macdonald confirmed that the tree is in excellent health and therefore there is no issue with safety.
83. Mr MacDonald discussed that trees typically fail when windloading is 4 times greater than the average wind speed experienced in that area. He gave examples of Norfolk Pine in Wellington which have survived large storms and high wind speeds. He said that Norfolk Pines generally only fail in their laterals if there has been damage or wounding which can be a result of tree climbing. He confirmed that any risk of stem failure would be minimal and that the incidence



of branches falling was a rare and isolated incidence. Similarly Norfolk Pines do not waste energy and pinecones very rarely fall to the ground. Julian Emeny confirmed that out of the many Norfolk Pine trees along Oriental Bay there have only been 7 calls about broken branches since 1999 and there have been no concerns with cones.

### Conclusion

84. The Panel concurred with the evidence provided the expert Arborist, Mr MacDonald and his finding in the STEM report that formed the basis of the Planning Officers decision. The Panel noted that no expert evidence had been provided to suggest that the tree was in ill health or a hazard.
85. The Panel also considered that the tree contributes to the ecology of the area and is an important natural resource that contributes to the local ecology.
86. Therefore it was determined that there was no evidence to indicate that there would be any positive impact in terms of ecological effects, and hence health and safety, from the removal of the tree. In applying the rules of evidence the Panel must accept the information provided by the expert Arborist at the hearing, as having more weight and influence than the internet articles produced in support of the applicant's case. Thus this internet evidence did not provide significant weight in support of the proposal.

### ***Streetscape and Amenity Effects***

87. The Panel considered the likely effects of the application to streetscape and amenity values both within the site and for the wider environment. Their assessment considered the value of the tree and its contribution to streetscape and the surrounding environment as well as its contribution to amenity.

### Streetscape and Wider Amenity

88. In considering streetscape and amenity effects the Panel considered whether the tree was recognised as having value and significance within the context of the site and surrounds. The Council Planner, Ms Whooley commented that the submissions received indicated the perception the community shared for the tree. This was seen as a prominent feature within the area.
89. The submitter, Ms Munro, commented that she has a passion for trees and that the destruction of this specimen would be significant. She stated that the urban landscape would be poorer without the tree.
90. The submitter in support, Mr Gallagher, said that when considering the total aspect of the site, the relatively close location of the tree to the house does not fit. He found it hard to understand why the tree was listed when they are there to provide amenity and there isn't any amenity afforded to the owners of the tree. Mr Gallagher went on to say that there are several Norfolk Pine species within close proximity to the site that are not listed. This view was also shared by the agent for the owners, Mr Robinson.
91. The Panel considered the evidence presented, and took note that while the Norfolk Pine was not a unique species of plant for the area, it was identified as being a significant specimen. They also agreed with the evidence presented by the Arborist, Mr MacDonald in that while there are plenty of Norfolk pines in

the Khandallah area, Norfolk pines of this scale are not as common, due to the Wellington environment being harsh for large trees. He also confirmed that it was biologically and physically impossible for this pine to reach a height of 60m as quoted by the Applicant and that in this location it is unlikely that the tree would even double in size. The Panel also concurred with Mr MacDonald's view that the tree was a landmark and in the upper echelon of Norfolk Pines in the Wellington suburbs.

92. Based on the content of the submissions, the evidence presented on behalf of the Council and the applicant, and the Panel's visit to the site, they considered the impacts to streetscape to be more than minor.

#### Amenity On-Site

93. The Panel also considered the impacts of the tree in relation to the amenity afforded for the occupants of the site. The applicant implied that the granting of this consent would provide positive effects in terms of better providing improved amenity both on and off the subject site. Mr Robinson, acting for the applicant, provided evidence that detailed the adverse effects to the occupants from the site which includes; loss of daylight and shading, health and safety impacts, and the potential to undermine built structures on site.
94. The applicant discussed that having the large tree in close proximity to the dwelling resulted in significant shading for the occupants. The Arborist, Mr MacDonald, provided evidence to say that shading from a Norfolk Pine tree was reduced somewhat by the separation and spread of the branch structures, compared to a tree with a greater density of foliage. The Panel considered the impact of shade for the property, and from their site visit they noted that the shading appears to be cumulated from other foliage also including a large gum tree to the north. This is consistent with the evidence of the submitter in opposition, Ms Munro, who said that she had looked at the property at different times of the day and considered that the majority of the shading came from the gum trees and other trees located to the north.
95. Overall the Panel could not determine the nature and scale of the shading from the tree to the property as no assessment of shading was provided by the applicant. However based on the submissions and their visit to the site it was evident that shading was not solely attributed to the tree in question.
96. Evidence was submitted by the applicant that highlighted that the reasonable and safe use of the entire lower lawn where the tree is situated is not possible. Mr Robinson also noted that the placement of the tree in close proximity to the house is not appropriate. Refusal to remove the listing implies that the tree is more important than the house and the people living in it.
97. The Panel noted from the information provided and their visit on-site that a second large area of open space is available to the south east of the dwelling which enables quality outdoor living. The health and safety impacts of the tree has also been carefully considered by the Panel who assessed that there was minimal risk, based on the expert evidence of Mr MacDonald.
98. The Panel also considered the potential for damage to the structures on the site from the tree and its root system. This was raised as a concern by the applicant and his agent, who provided internet articles about the likely root spread and its potential to undermine the house. The Panel concurred with the evidence of

the Arborist, Mr MacDonald, who confirmed that tree roots are lazy and when they spread they take the path of least resistance. The outer most reaches of the roots (feeder roots) don't do damage and that it's the anchoring roots (close to the trunk) that can do damage to structures. Mr MacDonald said that it is unlikely that the tree will undermine the house and wall on the site, if it hadn't occurred already.

99. Based on this the Panel determined that the risk of structures on the site being compromised by the tree roots was low. The Panel also noted that there was no expert evidence provided to indicate that any damage had occurred or would be likely to occur.

### Conclusion

100. Based on the comments above, the advice of the expert witnesses and the site visit undertaken, the Panel considered that the effects of the loss of the tree to streetscape and the wider environment to be more than minor. The Panel acknowledged the submission of the applicant that the removal of the tree may have some positive effects for the occupants of the subject site. However on balance the Panel considered that this did not offset the more than minor effects to the wider amenity and streetscape values, from the removal of the tree. Accordingly no expert evidence was provided by the applicant to determine otherwise.

### **Conclusion as to Effects**

101. The Panel has taken into consideration the evidence presented by the applicant and the concerns of the submitters, in regard to assessing the actual or potential adverse effects of the proposed removal of a heritage listed tree. Based on the assessments noted above, the Panel find that any actual or potential adverse effects of the proposal would be more that minor.

## **SECTION 104(1)(b) ASSESSMENT: RELEVANT PROVISIONS**

102. For the reasons outlined above in the assessment of the proposal under section 104(1)(a) of the Act, the Panel find that the proposal is contrary with the following relevant provisions under section 104(1)(b) of the Act:
- The assessment criteria of the Operative District Plan;
  - Objectives and Policies of the Operative District Plan; and
  - Objectives and Policies of Plan Change 43.
103. These provisions are included in Appendix 1 of this report.
104. The Panel concurred with the assessment of the Council Planner, Ms Whooley, in regards to the relevant provisions section 104(1)(b). The proposal is seen to be contrary to the relevant assessment criteria and the Objectives and Policies of the Operative District Plan and Plan Change 43.

## **SECTION 104(1)(c) ASSESSMENT: OTHER MATTERS**

105. The Panel considered that the property owners should have undertaken due diligence before purchasing the site to be aware of the heritage listing. Mr Robinson commented that in his experience obtaining a Land Information Memorandum (LIM) report was not a standard practice when purchasing a site. Ms Whooley confirmed for the Panel that information about the heritage tree listing was readily available from the Council and if the owner has contacted the WCC this information would have been provided.
106. The owner of the site, Mr Flannigan commented on the poor level of communication he had experienced with the Council in regard to his heritage listed tree. He was not aware that the tree was listed until he phoned Treescape for a quote to have it removed. He was told by the Parks and Gardens Team Manager, Julian Emeny, that to have it removed he would have to take the Council to Court. He noted that the Council had gained access to the property to trim the tree and remove branches without any warning. Mr Robinson noted that the powers of entry under section 171 of the Local Government Act (LGA) specified that the local authority must notify 24 hours in advance of entering the property.
107. The Panel considered this and informed the applicant at the hearing that if this occurs in the future the matter should be raised with the appropriate persons within Council (i.e the Issues Resolution Office or with the CEO). This matter is not considered pertinent to the consent.
108. The Panel asked whether the Council would be liable for any damage to the house on the site from the tree. The Officers will investigate the question of liability and respond in due course to the applicant. This matter was not considered pertinent by the Panel in making a Decision on the application.
109. There are no other matters that require consideration in the assessment of this application.

## **PART 2 CONSIDERATIONS**

110. In considering this application, the Panel have had regard to the matters identified in Part 2 of the Act. Part 2 (sections 5, 6 and 7) of the Act sets out the purposes and principles of the legislation.

### **Section 5: Purpose**

111. Section 5(1) states the purpose of the Act is *“to promote the sustainable management of natural and physical resources.”*

112. Section 5(2) goes on to state that sustainable management means

*“managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for health and safety while –*

- (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
- (c) avoiding, remedying or mitigating any adverse effects of activities on the environment”.*

113. The Panel concurred with the assessment of the Planning Officer, Ms Whooley in regards to Section 5(1). The removal of the tree may allow the applicant some social benefit but at the expense of the local community and future generations. The proposal does not act to protect the tree which is identified as being significant and there are no methods of avoiding, remedying or mitigating the adverse effects of its loss. Therefore the proposal is not seen to be consistent with Section 5(1).

### **Section 6: Matters of National Importance**

114. Section 6 sets out the matters of national importance which are to be recognised and provided for in relation to all decisions under the Act, including this resource consent application. The panel concurred with the assessment of the Planning Officer, Ms Whooley in that it was not consistent with Section 6(f) which requires protection of historic heritage. The removal of a listed heritage tree with recognised heritage values does not recognise and provide for the relevant matters of Section 6.

### **Section 7: Other Matters**

115. Section 7 includes matters that the consent authority shall have particular regard to in relation to all decisions under the Act, including this resource consent application. The Panel concurred with the Planning Officer, Ms Whooleys' assessment of Section 7 of the Act and the conclusions reached. The relevant provisions are;

- (aa) the ethic of stewardship:*
- (b) the efficient use and development of natural and physical resources:*
- (c) the maintenance and enhancement of amenity values:*
- (f) maintenance and enhancement of the quality of the environment:*
- (g) any finite characteristics of natural and physical resources:*

116. The granting of the proposal is not consistent with the ethics of stewardship as referred to in Section 7(aa), nor is it considered to have regard to the maintenance and enhancement of the amenity values for the site and surrounds, and the wider environment. The tree is a finite resource with irreplaceable heritage characteristics and the efficient use of this resource is not considered to translate to its removal in totality. Therefore the proposal is not seen to be in accordance with Section 7 of the Act.

### **Section 8: Treaty of Waitangi**

117. Section 8 states that all persons exercising functions and powers under the Act shall take into account the principles of the Treaty of Waitangi. The Panel found that this provision is not pertinent to the proposal.

## CONCLUSION

118. Consent is sought for the removal of the District Plan listed heritage tree (213) at 3 Box Hill, Khandallah (Map 21).
119. Part Two requires a broad overall judgment as to the sustainable management of natural and physical resources to be made. The Panel considered that the proposal would not enable people and communities to provide for their social, economic and cultural wellbeing whilst meeting the reasonable foreseeable needs of future generations. Preservation of the tree, because the tree is in good health, is considered to achieve the RMA desired outcome, with particular regard to section 6(f) where protection of historic heritage is of national importance.

## Heritage

120. The Panel agreed that the subject tree is of an age and has heritage characteristics and accordingly replacement planting can not replicate the significance of this tree. The District Plan listing of this tree provides the tree a level of protection higher than all other unlisted trees in Wellington City and does not anticipate removal of listed trees. The Panel confirmed that the removal of a listed heritage tree in good health, as sought, directly conflicts with the desired outcomes of the District Plan and Plan Change 43 objectives and policies. The objectives and policies seek to protect listed items and to allow changes to items only where they maintain or enhance heritage values.
121. The Panel acknowledged the evidence of the submitters which largely highlighted the value in retaining community assets for future generations. The presence of the tree is considered to provide a public good and serves as a community asset.

## Ecological

122. With a contemporary STEM score of 249, the tree is amongst the highest scoring trees included in the listed District Plan trees. The Arborist, Mr MacDonald, has assessed the value of the tree and stated "*the excellent form, structure and healthy condition of the tree further enhances the trees value*". It is his opinion that the tree is a high value specimen. In following the rules of evidence, the evidence provided by the Arborist was given more weight than the internet sourced articles presented by the applicant.

## Amenity

123. The tree is a contemporary iconic landmark due to its prominence and locality position which can be seen from almost any vantage point within Khandallah.
124. Therefore, for the reasons set out in this Decision the Hearing Panel acting under delegated authority from the Council and pursuant to Section 104B of the Resource Management Act 1991, decline consent for the removal of a District Plan listed heritage tree (213).



**Ngaire Best  
Chair**



# Appendix 1

## Assessment Criteria:

### Operative District Plan

21.3.2.1

*In respect of any listed tree:*

- *The necessity for carrying out the works;*
- *Whether the tree has a potentially fatal disease or has been damaged beyond recovery;*
- *The need for compliance with any statutory or legal obligation under other legislation;*
- *Whether the tree can be, or needs to be, relocated;*
- *Whether the proposal can be altered to achieve greater protection or preservation of the tree while still meeting the objectives of the applicant.*

## Objectives and Policies:

### Operative District Plan

**Objective 20.2.1** *To maintain and enhance the city's heritage to ensure continuity with the past in the development of the city.*

**Policy 20.2.1.1** *Identify and list items (buildings, objects, areas, trees and sites) of significant heritage value.*

**Policy 20.2.1.2** *Avoid the loss of heritage value associated with listed items.*

### Plan Change 43

**Objective 20.2.1** *To recognise and protect the City's historic heritage and protect it from inappropriate subdivision use and development.*

**Policy 20.2.1.10** *Identify, record and list the city's significant historic heritage.*

**Policy 20.2.1.10** *Protect listed trees from destruction and loss, and control the effects of trimming and changes to ground levels or other activities within the dripline of trees, to only allow these activities when they maintain or enhance the heritage values recognised in the listing of trees in section 20.1.3.*

