

ENVIRONMENT, RESOURCES AND DEVELOPMENT COURT OF SOUTH AUSTRALIA

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BACK v CITY OF UNLEY

Judgment of Commissioner Mosel

24 August 2005

LOCAL GOVERNMENT - TOWN PLANNING

Development application to remove a significant tree - Residential B400 Zone - consent refused by the Council - tree in the front yard of a dwelling within a recently constructed group housing development - located near two dwellings in the group - canopy over driveway - area used for childrens' play - expert evidence agreed that the tree is a healthy specimen with a long life expected - planning issues centre on the risk to private safety - Eucalyptus camaldulensis prone to sudden limb failure - conservative approach to risk assessment warranted - evidence about the pre-disposing factors to sudden limb failure accepted - the application of Principle 181 considered - risk acknowledged but not considered to be unacceptable - appeal dismissed - decision of the Council confirmed.

Development Act 1993; Development Regulations 1993, referred to.

Appellant: CHRIS BACK Counsel: MR G MANOS - Solicitor: MANOS & ASSOCIATES
Respondent: CITY OF UNLEY Counsel: MR J MCELHINNEY - Solicitor: GRIFFIN HILDITCH
Hearing Date/s: 21/07/2005
File No/s: ERD-05-189

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[2005] SAERDC 78

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THE COURT DELIVERED THE FOLLOWING JUDGMENT:

1 This appeal arises from a decision by the City of Unley ('the Council') to refuse Provisional Development Plan Consent to an application to remove a significant tree. The tree concerned is situated on the land at Unit 3, 7 Charra Street, Hyde Park ('the subject land'). The development application was submitted by Mr Back, an owner of the subject land, in December 2004. The decision was conveyed to Mr Back on 17 March 2005. In the Council's view, the removal of the tree would be contrary to Objective 56 and Principles of Development Control 179 and 181 of the Development Plan for its area.

2 In these proceedings the relevant Development Plan is dated 23 September 2004.

3 Mr Manos appeared for Mr Back and Mr McElhinney for the Council. Mr Back appeared as a witness as did Mr Nicolle (botanist and natural resource manager) and Mr Knight (arborist and horticulturalist).

4 Mr Back's land has upon it a large dwelling. It is one of three group dwellings served by a central driveway. Mr Back's dwelling is at the rear of the other two. The tree in question is within his land and not within the common property. Its location is shown on the plan attached to this decision (from Exhibit R1).

5 Exhibit R1 contains a report prepared by an officer of the Council. Among other things, the report provided background information about the group dwelling development. Consent was granted in March 2001 subject to a number of conditions. The conditions of consent made reference to three significant trees – one of which is the subject tree – to the following effect:

- That the 3 significant River Red Gum trees on the site nominated as being retained on the approved plan are to be protected during construction by a 1.5 metre fence placed a minimum of 3 metre radius around the base of the tree.
- That no service trenches or excavation occur within a 6 metre radius of any of the 3 significant River Red Gum trees on the site.
- That any excavation, filling and sealing of adjacent paving surfaces should minimise any disruption to the root system of the 3 significant River Red Gum trees on the site, with no severing of roots with a diameter greater than 50mm.
- That pier and beam footing systems be used for the western sections of dwellings 1 and 2 and the south western sections of dwelling 3 so

as to minimise any disruption to the root systems of the three (3) significant River Red Gum trees located on the site, with no severing of roots with a diameter greater than 50mm.

6 One of the trees has been removed. The report in Exhibit R1 indicates that the requisite consent for removal was obtained in May 2005 after an inspection ‘revealed that termite damage had caused the structural integrity of the tree to be compromised resulting in the tree’s decline’.

7 The subject land is in the Residential B400 Zone. Mr Manos drew my attention to that part of the Desired Character under the ‘streetscape’ heading. It is expressed thus:

Private gardens and street trees are a more dominant element of the streetscape in the Fullarton/Highgate areas. The attractive Victorian and other dwellings in the Hyde Park and Wayville area contribute significantly to the character of these areas. Infill development should respond to the landscape and built form elements to enhance the established and attractive nature of the localities and streetscapes in which they are proposed.

8 Mr Manos submitted that the desired character, expressed in this way, does not include Hyde Park within the list of suburbs or areas within which the retention of vegetated streetscapes is given most emphasis.

9 The provisions of the Development Plan of most relevance are found in Council Wide Objective 56 and Principles 179 and 181. The relevant aspects of these provisions are expressed thus:

Objective 56: The preservation of significant trees in The City of Unley which provide important aesthetic and environmental benefit.

Trees are a highly valued part of the Metropolitan Adelaide and Unley environment and are important for a number of reasons including high aesthetic value, preservation of bio-diversity, provision of habitat for fauna, and preservation of original and remnant vegetation. While indiscriminate and inappropriate significant tree removal should be generally prevented, the preservation of significant trees should occur in balance with achieving appropriate development.

...

179 Where a significant tree or significant tree grouping:

- (a) makes an important contribution to the character or amenity of the local area; or
- (b) forms a notable visual element to the landscape of the local area; or
- (c) contributes to habitat value of an area individually, or provides links to other vegetation which forms a wildlife corridor;

development should preserve these attributes.

...

181 Significant trees should be preserved and tree-damaging activity should not be undertaken unless:

- (a) in the case of tree removal;
 - (i) the tree is diseased and its life expectancy is short; or
 - (ii) the tree represents an unacceptable risk to public or private safety; or
 - (iii) the tree is shown to be causing or threatening to cause substantial damage to a substantial building or structure of value and all other reasonable remedial treatments and measures have been determined to be ineffective; or
 - (iv) it is demonstrated that reasonable alternative development options and design solutions in accord with Council-wide, Zone and Area provisions have been considered to minimise inappropriate tree-damaging activity occurring.

...

¹⁰ The following aspects about the subject tree (*Eucalyptus camaldulensis* or River Red Gum) were either agreed by the parties or were not seriously contested:

- It is a ‘significant tree’ (Regulation 6A Development Regulations 1993). It is about 24 metres to 25 metres tall and has a crown diameter of between 12 metres to 18 metres.
- It is a tree in its mature phase and is thought to be between 40 to 100 years old. Although large and mature it will continue to increase in size.
- The location of the tree in relation to buildings and boundaries is as follows:
 - The trunk is about 5.5 metres from Mr Back’s dwelling, some 8 to 9 metres from the dwelling immediately to the west and 1 metre from the southern boundary of the subject land.
 - The overhang of the tree is about 3 metres in respect of Mr Back’s dwelling and the property to the south. Most of the crown is above the driveway of Mr Back’s dwelling and the rear yard of the dwelling to the west.
 - There is evidence of major pruning having been undertaken 20 to 40 years ago. This work has caused scarring and decay. However, the tree is in good health and displays signs of

vigorous growth. Some dead wood is evident in the crown. Recent minor borer activity is of no significance. Its life expectancy is likely to be 50 years or more.

- Despite recent housing construction in its near vicinity there is no evidence of that work having had a detrimental impact on its health.
- There is no evidence of previous live branch failure. There is however, evidence of small dead branches and twigs having fallen. A considerable amount of leaf litter has fallen in the gutters and valleys of the aforementioned dwellings.
- The tree makes an important contribution to the amenity of the area within which it is situated and is a notable visual element in the landscape (Principle 179(a) and (b)).

11 Also, it was not in dispute that Principle 181(a)(i)(iii) and (iv) do not apply in these proceedings. I agree. Thus, the central question to be answered in this matter is this: does the tree represent an unacceptable risk to public and private safety? (Principle 118(ii)).

12 I think it necessary to make an observation about the way in which Principle 181 is constructed. It is expressed in a slightly different way from the equivalent provision in the Development Plan for several other Councils notwithstanding its introduction into the Development Plan on a metropolitan wide basis by way of a Ministerial Plan Amendment Report a number of years ago. In the Development Plan relevant in these proceedings, the phrase ‘and all other reasonable remedial treatments and measures have been determined to be ineffective’ appears as a qualifier only to the provisions in subparagraph (iii) of Principle 181(a). In other development plans, that qualification appears to apply to all three subparagraphs (see, for example, the following provisions in the Development Plans: Principle 312 Charles Sturt, Principle 181 Mitcham, Principle 108 Tea Tree Gully, Principle 211 Norwood, Payneham and St Peters and Principle 292 West Torrens).

13 If Principle 181 should be so constructed, the question posed earlier is also qualified. I am of the view that it is the intention of Principle 181 to, *inter alia*, place an obligation on an applicant to remove a significant tree to demonstrate that, by applying remedial treatment (or have actually applied that treatment), such treatment is likely to be or is in fact ineffective in overcoming the particular problem.

14 The case for the appellant was supported by evidence from Mr Back and Mr Nicolle. Mr Back has lived in the dwelling with his wife and two teenage children since November 2003. He said that the paved area in front of the dwelling under the canopy of the tree is used for the parking of cars and, because

of the limited space in the rear yard, it is the primary play area for his children. Some time ago a branch, described by Mr Back as ‘sizable’, fell on to the paved area and barely missed one of his children. It is Mr Back’s intention to allow a third vehicle to be parked within the area of the subject land now under the canopy. Were the tree removed, it is the intention of Mr Back to replace it with one which achieves the necessary privacy.

15 On the view of the subject land and environs I observed several small (dead) branches that had fallen. They did not appear to me to be particularly large. According to Mr Back those branches typified the problem and were similar to that which fell near his child.

16 Mr Nicolle is well qualified. He has degrees in Natural Resource Management and Botany, is completing a PhD in Biological Science and is a recognised authority on eucalypt species. In oral evidence he rated the risk from whole tree failure as low. On the question of risk to personal safety from branch failure, he opined that the subject tree falls in the range of moderate to high. He reached this conclusion having regard to the position of the tree in respect of the dwellings and driveways, the modified environment within which the tree now exists and the following opinions formed as an expert:

- Mature individuals of *Eucalyptus camaldulensis* are ‘notorious branch droppers’ both in storm events and under warm, calm and non-storm conditions.
- This characteristic together with its present age, evidence of decay, future growth expectations and expected longevity will increase the likelihood of branch failure.
- Selective crown pruning and other hazard minimizing techniques are not effective in reducing risk.
- Branch failure occurs without warning and without there being prior evidence of defect.

17 In oral evidence Mr Nicolle conceded the following:

- The tree had formed longitudinal flutes which has strengthened the tree in response to the decay.
- Sudden limb failure (SLF) is more likely to occur where a history of SLF exists.
- The tree is healthy and depending on the response to the modified site conditions it may live for up to another 100 years.
- Not all trees of this species are the subject of SLF.

18 Mr Nicolle further conceded, in answer to questions from me about the relative risks associated with SLF, that there is an element of subjectivity when assigning a risk category.

19 Mr Knight is an arborist and horticulturalist. He is from a different academic stream than Mr Nicolle and would appear to have considerable practical experience in assessing the health and risk status of trees and making recommendations about and undertaking risk mitigating works. He did not dispute the evidence of Mr Nicolle to the effect that the subject species are prone to SLF. However, he noted that SLF is a common problem in many species of Eucalypts and other native trees. He said that he had examined, in some detail, many hundreds of incidents of SLF. From that work he has concluded that SLF is always initiated by a defect. He conceded that a defect that leads to SLF is not always detectable before the incident. However, he said that it is possible to recognise the symptoms that lead to SLF. On p8 of his statement he listed the 'predisposing factors of SLF'. He said (in Exhibit R2) of this concept:

The failure mechanisms of SLF relate to the above predisposing factors culminating in wind damage caused by excessive limb movement, particularly where the movement acts against the trees normal growth stresses. i.e. When a branch normally accustomed to resisting gravity is blown strongly upwards or sideways.

20 He listed the predisposing factors as follows:

- A low angle of limb attachment.
- An absence of, or reduced limb taper over the length of the limb.
- High limb exposure: Branches that are on their own without many surrounding limbs or limbs that extend beyond the main crown are the highest risk.
- Over-extension: Very long limbs are a greater risk than shorter limbs.
- A concentration of foliage density and weight towards the end of the limb provides additional leverage.
- Limbs that have previously been inappropriately pruned, by the removal of secondary limbs from the lower two thirds of the main limb.

21 He opined that, at present, the risk of SLF is low. He reached this conclusion after determining that the tree displayed vulnerability in one of the listed factors. To the extent that it did, he said that remedial treatment would remedy the problem. In this respect he said that the chance of there being a defect induced by excessive movement is virtually zero if appropriate pruning is carried out. He opined that an inspection/pruning regime every five years would cost about \$1500 for each attendance. His final conclusion in his statement is expressed thus:

This specimen is a mature, healthy example of the species with a safe useful life expectancy of at least 50 years. It has good form, with no history of previous limb failures and no defects of any relevance to a debate over its safety.

Crown maintenance pruning to the Australian Standard, AS 4373 (refer to page 9 of the standard) will effectively address any small concerns with regard to safety of persons and property in the surrounding area.

This species is one of the most adaptable and tolerant trees found in the Adelaide region. Many thousands of examples of River Red Gums occur in the area and across Adelaide in close proximity to buildings, with few serious long term health impacts.

In my opinion there are no valid arguments for this trees removal. It [sic] and should be retained until such time as its health declines or regular pruning management is unable to provide an acceptable level of safety while preserving the trees amenity and character values.

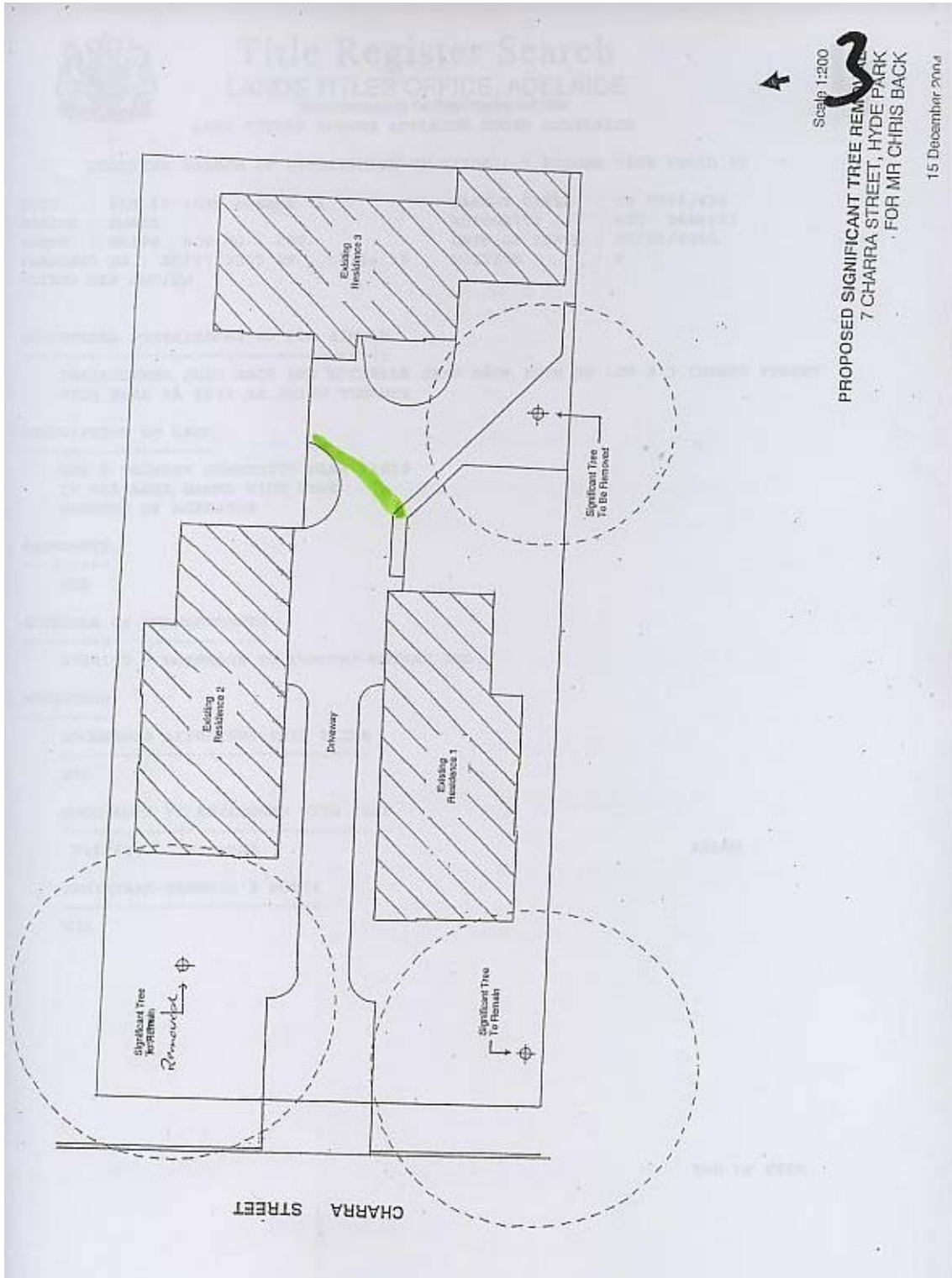
22 I have examined the evidence very carefully and considered facts and circumstances encountered by Mr Back. Any risk that exists are risks to private safety. The tree is not within an area in which the public in general visit or congregate. It is evident also that the risk to personal safety is in large part caused by the position of the tree in relation to the dwelling and the use of part of the driveway and carpark for children's play activities. A conservative approach to risk management would not be unreasonable in the circumstances notwithstanding the fact that the Back family occupied the dwelling in the knowledge of its obvious limitations in serving their recreation and other needs and the fact that the area under the canopy could be quarantined from its use as a play space.

23 However, on the evidence I am of the view that the provisions of Principle 181(a)(ii) have not been satisfied to an adequate extent. I do not think the intention of Principle 181 is to enable the removal of a significant tree that is healthy, has no structural defects and has no history of limb drop and in circumstances where there has been no attempt to maintain the tree in the manner intended to reduce or eliminate the risk factors. When saying this I have not discounted Mr Nicolle's evidence about the notoriety of the tree and the effectiveness of maintenance pruning and, generally, the implications to personal safety given the circumstances of its location and those of Mr Back and his family. I cannot say that, in the circumstances, there is no risk at all. However, the evidence when weighed carefully does not indicate to me that the risk is at the level considered 'unacceptable'. In so concluding I have relied on Mr Knight's evidence which, it appears, is based on many years of practical experience in assessing the health of Eucalypts and associated risk factors and his extensive background in researching the problem of SLF. I have had particular regard to his evidence about the way in which defects occur, how those defects lead to SLF, his views about managing rather than eliminating risk and his views expressed on p71 of the transcript to which I have already made mention:

... if the tree has been pruned appropriately, the risk factors have been addressed and therefore the chance of there being a defect induced by excessive movement is virtually 0.

24 Were there evidence of previous failure of limbs of a size to be concerned about, structural defects or other predisposing factors identified by Mr Knight or evidence of a serious decline in the health of the tree because of the changed environment, then the picture might be different. Should any of these symptoms arise it is always open to Mr Back to make a further application for the removal of the tree.

25 The appeal is dismissed. The decision of the Council is confirmed.



Scale 1:200
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PROPOSED SIGNIFICANT TREE REMOVAL
7 CHARRA STREET, HYDE PARK
FOR MR CHRIS BACK

15 December 2014