

**IN THE MATTER**

of the Resource Management Act 1991

**AND**

**IN THE MATTER**

of Proposed Plan Change 129 to the  
Whangarei District Plan – Notable and  
Public Trees

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**STATEMENT OF EVIDENCE OF MARK CHRISP**

**3 DECEMBER 2018**

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## INTRODUCTION

1. My full name is Mark Bulpitt Chrisp. I am a Director and a Principal Environmental Planner in the Hamilton Office of Mitchell Daysh Ltd, a company which commenced operations on 1 October 2016 following a merger of Mitchell Partnerships Ltd and Environmental Management Services Ltd (of which I was a founding Director when the company was established in 1994 and remained so until the merger in 2016). I am currently serving as the Chairman of the Board of Mitchell Daysh Ltd.
2. In addition to my professional practice, I am an Honorary Lecturer in the Department of Geography, Tourism and Environmental Planning at the University of Waikato. I am also the Chairman of the Environmental Planning Advisory Board at the University of Waikato, which assists the Environmental Planning Programme in the Faculty of Arts and Social Sciences in understanding the educational, professional and research needs of planners.
3. I have a Master of Social Sciences degree in Resources and Environmental Planning from the University of Waikato (conferred in 1990) and have more than 28 years' experience as a Resource Management Planning Consultant.
4. I am a member of the New Zealand Planning Institute, the New Zealand Geothermal Association, and the Resource Management Law Association.
5. I am a Certified Commissioner under the Ministry for the Environment's 'Making Good Decisions' course.
6. I have appeared as an Expert Planning Witness in numerous Council and Environment Court hearings, as well as several Boards of Inquiry (most recently as the Expert Planning Witness for the Hawke's Bay Regional Investment Company Ltd's proposed Ruataniwha Water Storage Scheme).

7. I have an extensive and diverse range of experience dealing with resource management projects throughout New Zealand (and have also undertaken projects in Australia and Papua New Guinea). Examples include:

- Contact Energy Ltd – Consenting the Te Mihi Geothermal Power Station and the Tauhara II Geothermal Development Project
- Crest Energy Kaipara Ltd – Marine Turbine Project
- Ministry of Foreign Affairs and Trade – NZ Aid Programme – Geothermal Resource Policy for Papua New Guinea
- State Forests of New South Wales, Australia - Environmental Impact Statement for the sustainable management (including logging) of a eucalyptus forest in the Queanbeyan and Badja Management Areas approximately 100km east of Canberra
- St Kilda Residential Development
- World Rowing Championships 2010
- Fonterra Hautapu Re-consenting (a project involving the protection of a stand of exotic trees which are bat roosting habitat)
- Countdown Cambridge (a project which included the protection of 10 mature Oak trees as part of the development)
- State Highway 1 Cambridge Bypass (now referred to as the Cambridge Section of the Waikato Expressway)
- Hingakaka Battle Site Iwi Management Plan
- Hawkes Bay Regional Investment Company Ltd – Ruataniwha Water Storage Scheme
- Private Plan Change 11 – Bardowie Industrial Precinct

### **Purpose and Scope of Evidence**

8. I have been engaged by Heather Rye (Heather) to present planning evidence in relation to her submission on Plan Change 129 to the Whangarei District Plan (PC129) in relation to Notable and Public Trees.

### **Code of Conduct**

9. I confirm that I have read the 'Code of Conduct' for expert witnesses contained in the Environment Court Practice Note 2014. My evidence has been prepared in compliance with that Code in the same way as I would do so when giving evidence in the Environment Court. In particular, unless I state otherwise, this evidence is within my sphere of expertise and I have not omitted to consider material facts known to me that might alter or detract from the opinions I express.
10. In the interests of full disclosure, I record the fact that Heather is my mother-in-law, however that makes no difference to the professional opinions I hold and/or express in relation to this matter. I remain independent as I have nothing to personally gain from the outcome of PC129.

### **PARTICIPATION IN PC129**

11. To date, Heather has participated in PC129 by way of:
  - Providing feedback to Council in relation to the draft of PC129 in a letter dated 30 November 2017; and
  - The lodgment of a submission on PC129 dated 8 June 2018.
12. As set out in her feedback and submission, Heather has significant concerns in relation to the existing *Liquidambar styraciflua* located on her property at 76 Mains Avenue, Whangarei recorded in PC129 as Notable Tree 433. Attachment A of my evidence presents several photos of the tree showing its size and proximity to Heather's house and public infrastructure.

## RELIEF SOUGHT

13. The relief sought in Heather's submission specified a first and second preference in terms of outcomes. The first preference was to delete Notable Tree 433 from NPT.1.9 Schedule of Notable Trees so that the provisions of PC129 do not apply to the tree at 76 Mains Avenue. This remains as Heather's preferred relief for the reasons set out in the submission and discussed as follows.
14. As a general proposition it is understood and accepted that privately owned trees can and do create public benefits in terms of amenity values. However, the retention of trees to provide such benefits needs to occur in appropriate locations and not be achieved at the cost to private individuals. On that basis an assessment as to whether any particular tree should be protected needs to confirm the appropriateness of the tree in its current location taking into account matters such as the size of the tree relative to the environment in which it is located and any associated risks to people, property or infrastructure. Furthermore, if a decision is made to protect a tree due to its public benefit/amenity value that situation should not create costs, risks and/or liabilities on the part of the landowner on who's land the Notable Tree is located.

## STEM ASSESSMENT AND TREE EVALUATION SCORE SHEET

15. The STEM assessment focuses on the tree itself and involves little, if any, consideration of the context and environment in which the tree is located – being matters which are highly relevant to the appropriateness (or otherwise) of regulation seeking to protect the tree.
16. The Tree Evaluation Score Sheet completed for the tree at 76 Mains Avenue, Whangarei records the tree as being "*visually prominent large native tree in a suburban area*"<sup>1</sup> [emphasis added]. The tree is in fact a *Liquidambar styraciflua* otherwise known as "American Sweetgum" and is not native to New Zealand. This error in the assessment

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<sup>1</sup> Miller, S. *Tree Evaluation Score Sheet - Tree # 433, 2.4 Role in Location*

therefore raises questions about the assessed score of the tree (an issue that was raised in Heather's submission, but which has not been addressed in the s.42A report).

17. The STEM assessment and Arborist report on the tree in question acknowledges that the issues relating to this particular tree are difficult to factor in. Given its very large size, it is my view that Notable Tree 433 is inappropriate in its current location whereby it is within a residential zone, in close proximity to a house, powerlines and a public roadway including footpath, with the associated risk of damage to people, property and public infrastructure.
18. The STEM assessment and Arborist report acknowledge that "regular pruning" is required to maintain clearance between the canopy and the adjacent power lines. It is submitted that is inappropriate for PC129 to place the financial cost and legal liability of doing or not doing so on private individuals.
19. The Arborist report acknowledges the risk of branch failure and fracture and notes that previous such failures are evident. Also, Heather has had received advice that neighbours have concerns about branches falling and is aware that there has been at least one complaint to Council about the same.
20. As acknowledged in the Arborist report, *"[t]he tree's canopy is a significant component of the both the site and the adjacent path and carriageway"*. Heather is concerned that restrictions in relation to pruning and trimming of the tree as set out in PC129 will increase the risk that the tree may injure passing pedestrians or motorists or damage public infrastructure.
21. There is a CityLink Bus Stop (Otangarei Route) positioned under the tree on Mains Avenue and passengers regularly wait there to catch the bus. Heather is aware that passengers have on occasion been warned by a neighbour not to wait for the bus under the tree because of risk of branches falling from the tree. This suggests that safety concerns about the tree are not unique to the submitter.

22. The STEM assessment methodology focuses on the positive attributes of trees. At paragraph 17 of this evidence, Mr Simon Miller states that “from an arboricultural perspective” he does not support the inclusion of ‘negative’ effects of trees in the tree evaluation methodology. In my opinion, it is perfectly acceptable and appropriate for Mr Miller to take such a position as an Arboriculturalist. However, the task facing the Council is to make a resource management decision which requires a wider range of considerations to be taken into account beyond just arboricultural considerations.

23. Section 3 of the RMA sets out the meaning of the word ‘effect’. It states (with relevant aspects underlined):

*In this Act, unless the context otherwise requires, the term effect includes—*

- (a) any positive or adverse effect; and
- (b) any temporary or permanent effect; and
- (c) any past, present, or future effect; and
- (d) *any cumulative effect which arises over time or in combination with other effects—*

*regardless of the scale, intensity, duration, or frequency of the effect, and also includes—*

- (e) *any potential effect of high probability; and*
- (f) any potential effect of low probability which has a high potential impact.

24. A large branch falling on Heather’s house, the bus stop, power lines or the road would have potentially significant adverse effects which could be permanent (in relation to injury or death). Mr Miller (at paragraph 20 onwards in his evidence) discusses the risk of significant harm or death. While the risk may be low, the potential impact is high. With an increase in the number of severe weather events, the level of risk will only increase.

25. In summary, Heather has significant concerns about the risk to people, property and public infrastructure which she would be potentially liable

for, including in such a situation when she was unable to obtain a resource consent to undertake works which would reduce or eliminate such risk. It is totally inappropriate for the Council to seek a public benefit (in this case amenity values) in a situation that creates a significant private liability and cost in circumstances where the owner of the tree may not be able to address or avoid those risks (either due to financial barrier or the inability to secure a resource consent).

## **COUNCIL'S FUNCTIONS AND PART 2 OF THE RMA**

26. PC129 has been prepared in order to assist the Whangarei District Council undertake its functions which are specified in section 31 of the RMA. Those functions, including *“the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district”*<sup>2</sup> are expressly for the purpose of “giving effect to” the RMA.<sup>3</sup>
27. The purpose of the RMA is *“to promote the sustainable management of natural and physical resources.”*<sup>4</sup>
28. The “health and safety” of people and communities forms part of the definition of sustainable management in section 5(2) of the RMA. On that basis, it is my opinion that the health and safety of Heather (and others including those using the adjacent bus stop, footpaths and roads) needs to be a key consideration whether determining the appropriateness of the provisions within PC129 as they relate to Notable Tree 433.
29. Council’s functions under section 31 of the RMA include achieving the *“integrated management of effects”* whereby the full ambit of the meaning of ‘effect’ is relevant. Importantly, this needs to occur as part of the preparation of, or changes to, the Whangarei District Plan (not

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<sup>2</sup> s.31(1)(a) of the RMA.

<sup>3</sup> S.31(1) of the RMA.

<sup>4</sup> S.5(1) of the RMA.



just in resource consent processes as suggested by Mr Miller (as paragraph 52 of his evidence).

### **ALTERNATIVE RELIEF SOUGHT**

30. If Council does not accept Heather's preferred relief (discussed above), her second preference was for Council to amend the provisions of PC129 to address the issues of concern set out in her submission, including (but not limited to) the following (presented in italics) along with my comments in relation to each of the outcomes sought:

*Relief Sought:*

*Applying a more appropriate and robust set of criteria to assess not only the "notability" of the tree but also the appropriateness of its retention or otherwise taking into account matters such as risk to public and private safety, damage to property and/or public infrastructure, personal liability, and costs associated with compliance.*

31. The s.42A report recommends that this relief sought be rejected. The reasons for that recommendation rely on a view that the STEM criteria and assessment process "*represent the most efficient and effective tree evaluation option*". I have no objection to Council utilizing the STEM assessment process to evaluate trees within the Whangarei District. However, having completed an assessment of each tree (using a methodology such as STEM), a wider consideration of relevant factors needs to be undertaken to be able to justify that the proposed regulation (in this case protection) is the most appropriate method. From what I have seen (and as discussed above), that wider consideration has simply not occurred. Matters such as risk to public and private safety, damage to property and/or public infrastructure, personal liability, and costs associated with compliance have not been taken into account (or have not been taken sufficient account of).
32. On a positive note, the changes to Policy NPT.1.4.1, particularly the addition of clause (f) is supported. The policy regime in the District

Plan needs to recognise and provide for the ability to remove a Notable Tree in appropriate circumstances.<sup>5</sup>

Relief Sought:

*Include a Permitted Activity rule to make it explicit as to what can be done in relation to a notable tree without the need for a resource consent (rather than it being as a matter of 'inference' by not being a Discretionary Activity). Failure to comply with the Permitted Activity standards would result in Discretionary Activity status.*

- 33. This point of submission has been accepted in part, insofar as the proposed Discretionary Activity Rule (NPT.1.5) has become a Permitted Activity Rule. This is a step in the right direction, but will still mean that a resource consent is required to prune the tree at 76 Mains Avenue due to the size of most branches exceeding 100mm.
- 34. The following is a photograph of one of the 10 mature Oak trees at Countdown in Cambridge (referred to in my introduction).



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<sup>5</sup> The same applies in relation to Public Trees addressed in Policy NPT.1.4.2.

35. The single branch that has been removed (presumably for the safety of people using the carpark underneath it) had a diameter of about 400mm. In a similar situation in the Whangarei District (if the tree was a Notable Tree), a resource consent would be required as a Discretionary Activity and the cost of the application process would probably exceed the cost of the branch being removed.
36. The way that Rule NPT.1.5 is drafted, it is not clear as to whether all of the conditions a – e must be satisfied for the pruning and maintenance of a Notable Tree to be a Permitted Activity (being a combination of circumstances that will probably never exist). My recommendation is that the rule be split up into a number of individual Permitted Activity rules.

Relief Sought:

*Amend the rules to provide a greater ability for owners of notable trees to undertake maintenance and trimming (including crown lowering) without the need for a resource consent but possibly being subject to arboricultural advice being first obtained. At the very least provide for private owners of notable trees to be able to have the same rights to undertake works on such trees as is afforded the Council and Network Utility Operators in relation to Public Trees.*

37. The s.42A report recommends that this relief sought be rejected.
38. When drafting RMA policy and planning documents, it is not appropriate to 'pick winners' whereby, for example, Whangarei District Council or a network utility operator is able to safeguard their property or people's lives, but private individuals are not able to do the same.

Relief Sought:

*Amend PC129 to enable compliance with The Electricity (Hazards from Trees) Regulations 2003. Compliance with the law should not be contingent upon securing a resource consent which as a Discretionary Activity may be declined.*

39. The s.42A report recommends that this relief sought be rejected but does not discuss the issues raised in Heather's submission relating to this matter.

40. The Electricity (Hazards from Trees) Regulations 2003 ('Tree Regulations') are for the purpose of protecting the security of the supply of electricity, and the safety of the public. The regulations prescribe distances from electrical conductors within which trees must not encroach and set rules about who is required to cut or trim trees that might encroach. The regulations further assign liability when the rules are breached. The regulations assign liability to the landowner where damage arises from a failure to keep the tree trimmed back from power lines.
41. As can be seen in the photos attached to my evidence, the *Liquidambar* at 76 Mains Avenue is in close proximity to power lines.
42. Northpower (the lines company) is explicit on its website that the landowner/tree owner is responsible for maintaining trees at a safe distance from lines. The provisions as currently set out in PC129 prevent the landowner from doing this effectively unless a resource consent is obtained which could impose significant costs with no guarantee of consent being granted, resulting in a breach of the regulations. In other words, the Council is potentially placing landowners with Notable Trees on their property in a no-win situation, being unable to comply with the law.
43. The regulations provide for the ability to register a "No-Interest Tree Notice" with Northpower (the local lines company) when a landowner no longer wants to maintain a tree. However, Northpower's "No Interest Tree Notice" requires a declaration that the landowner is not aware of any "protection order" relating to the tree. Accordingly, this option is not available to Heather in the current circumstances.
44. The tree is inconsistent with the species of tree recommended to be planted in proximity to power lines. Other lines companies in New Zealand specifically identify *Liquidambar* trees as trees that should not be planted close to any power lines. Northpower recommends suitable trees for planting under or near powerlines have a mature height of between 2.5 and 4 metres or that can be maintained at a suitable height through regular pruning. Accordingly, it is clear that Notable Tree 433 is not located in an appropriate environment and

should be removed from the NPT.1.9 Schedule of Notable Trees in PC129.

Relief Sought:

*If Notable Tree 433 is retained, correct the legal description is located to read Lot 1 DP 184341.*

45. This is the one aspect of Heather's submission that has been accepted in full in the s.42A report.

Relief Sought:

*The Council shall indemnify any landowner with a Notable Tree on their property in relation to any loss or liability that may occur as a result of the continued existence of the tree.*

46. The s.42A report recommends that this relief sought be rejected. The s.42A report states:

*"In my opinion, the request for Council to accept liability and indemnify landowners is outside of the scope of the WDP and the scope of the plan change. Such relief would be unprecedented within the District Plan or any other District Plan that I am aware of within New Zealand. Such an approach would need to be considered and agreed to by the Council and implemented and administered outside of the District Plan."<sup>6</sup>*

47. I disagree with the above. The costs associated with any regulation are a key aspect of any evaluation that Council must undertake in accordance with s.32 of the RMA. In this case, the provisions of PC129 impose potentially significant costs and liability on private land owners without that cost being recognised and addressed.

Relief Sought:

*Any resource consent application in relation to works associated with a Notable Tree (including trimming or felling) shall be processed by the Council at no charge to the applicant. Furthermore the costs*

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<sup>6</sup> S.42A report, para 47.

*incurred by the applicant in the preparation of any such application shall be reimbursed by Council to the applicant.*

48. The s.42A report recommends that this relief sought be rejected. It suggests that this matter needs to be considered and agreed to by the Council and implemented through the Annual Plan and Long-Term Plan which set budgets outside of the District Plan. In terms of 'integrated management', there is no reason in my opinion why Council cannot make such a commitment in the context of PC129 if it is going to properly take into account and address the costs associated with the provisions in PC129.

### **CONCLUSION**

49. For the reasons discussed in my evidence, the preferred relief sought in Heather's submission stands. Notable Tree 433 should be deleted from NPT.1.9 Schedule of Notable Trees so that the provisions of PC129 do not apply to the tree at 76 Mains Avenue.
50. While the *Liquidambar* in question has botanical and amenity values, its very large size is totally inappropriate in the current context being located on a small 485m<sup>2</sup> lot within a Residential Zone. It represents a danger to both public and private property and to lives. The inability for Heather to have any guarantee that she can responsibly address those issues and avoid liability is not possible under PC129.
51. If Council is not minded to grant the preferred relief sought in Heather's submission, it is my opinion that her alternative relief should be accepted.

Dated this 3<sup>rd</sup> day of December 2018



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Mark Chrisp



**ATTACHMENT A – PHOTOS OF LIQUIDAMBAR AT 76 MAINS AVENUE**



Photograph 1 Liquidambar located at 76 Mains Avenue – View from the garden



Photograph 2 Liquidambar located at 76 Mains Avenue – View from Mains Avenue





Photograph 3 Liquidambar located at 76 Mains Avenue – View from Mains Avenue



Photograph 4 Liquidambar located at 76 Mains Avenue – Aerial Photograph

Photograph 4 shows that the tree extends over the house, 50% of Cairnfield Road, and 75% of Mains Avenue.