

BEFORE THE ENVIRONMENT COURT

Decision No. [2013] NZEnvC 203

**IN THE MATTER** of an appeal pursuant to Clause 14 of First  
Schedule of the Resource Management Act  
1991 (**the Act**)

**BETWEEN** ALAN GRIFFITHS  
(ENV-2012-AKL-000217)  
Appellant

**AND** AUCKLAND COUNCIL  
Respondent

*Topic:* PPC 149 (Rodney Section) – Schedule of Notable Trees  
*Hearing:* In Auckland, 5 & 6 August 2013  
*Court:* Environment Judge J A Smith  
Environment Commissioner J Hodges  
Environment Commissioner K Prime  
*Counsel:* D J Sadlier and D A Obushenkova for Auckland Council (**the Council**)  
M J McLean for Alan Griffiths (**Mr Griffiths**)

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DECISION OF THE ENVIRONMENT COURT

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- A. The decision of the Council is confirmed and the appeal dismissed.
- B. Tentatively, the Court considers that this is not an appropriate case for the award of costs, and note that costs are generally not awarded on references. However, notwithstanding, if any party does seek costs, they must file the



same within 15 working days; reply with 10 working days; final reply, if any, 5 working days thereafter.

## REASONS FOR DECISION

### Introduction

[1] Arkles Bay is an endearing, enclosed coastal settlement facing south on the Whangaparoa Peninsula. Set between two steep wooded headlands, the area is contained by the sandy beach and the escarpment demarcating the bay.

[2] The escarpment is still generally well-wooded except for the central area, and both entries through Arkle Drive and Cochrane Avenue create a sense of arrival driving through well-established trees including karaka, manuka, pohutukawa and other well-established species.

[3] When in the bay itself the headlands and the bushed escarpment mark out the perimeters of Arkles Bay and give a sense of scale and containment. This is broken to some extent by the central area, where the subject site is situated.

### The Griffiths Property

[4] The Griffiths property is situated on the rising escarpment around 10m – 15m above the flatter lands of the bay. In the central area the escarpment is not quite as steep and this has enabled construction on it and the Griffiths section is one of the few undeveloped sections remaining.

[5] Of particular note however is the fact that two trees on the property (large pohutukawa) form a group in common with the kahikatea and large puriri on adjacent properties to constitute a central landmark to the bay. This gives a sense of connection between the more extensively bushed escarpment both to the left and right of the central area.



[6] The site has a larger section (some 1,300m<sup>2</sup>), probably in recognition of the trees on the site. As Mr McLean explains it, since the subdivision in the 1970s, the trees have continued to grow to the extent that they now constitute a limitation on the developability of the section.

### The Issue

[7] At heart in this case is whether both pohutukawas on the property should be listed as notable trees, or only the northern one. There is no dispute that the northern tree is listed, as is the kahikatea and the puriri. The question for this Court is whether it is most appropriate under Section 32 of the Act that the Council provides for the southern pohutukawa by way of a listing as a notable tree.

### The Council's Decision

[8] The Council's decision is of little assistance in the circumstances of this case. Unfortunately, the Council proceeded on the assumption that the tree could be trimmed as a permitted activity which would provide sufficient scope for the development of a house and the existence of the two trees.

[9] As it transpired, such permitted activity rules do not apply to this site because it is not part of the urban environment. The *urban environment* is defined in the District Plan (the Plan) in the same way as it is under Section 76 of the Act namely no greater than 4,000m<sup>2</sup> within an urban area, with a house built upon it and connected to reticulated water supply system and a reticulated sewerage system.

[10] Given that there is neither a house nor connection to reticulated services, the parties were agreed that the Act amendment, and consequently the definition of *urban environment* in the Plan, did not apply. This has two consequences:

- [a] The permitted activities in relation to pruning and the like are not covered explicitly. It appears that a more general rule allowing hand secateurs to be used could apply, but given the size of most of the limbs on this tree, that would be of little consequence; and



- [b] More importantly, this means that the general repeal of the tree protection rules within the Plan does not apply on this site. In particular, these pohutukawa are over 6m and within 200m of the mean high water springs (MHWS). Accordingly, a restricted discretionary consent is required for any works on the tree, and particularly, any major alterations or removal.

### The Value of the Tree

[11] Overall, there did not appear to be a dispute that the tree is of value. Ms Woodhouse described it in a report dated 21 June 2000 for consent to pruning as a *magnificent* example. She now considers that to be hyperbole, but similar views were expressed by the Council's witnesses, Mr Boucher, arborist and Ms Absolum, landscape architect called for the Council.

[12] Moreover, the ecological value of the tree and its connection to the group did not appear to be in dispute. Dr Julian gave evidence indicating that this group of trees being fructitious trees in the centre of the bay created an important connection between the escarpment to the east and west, and for the feeding and roosting of birds.

[13] We accept that puriri, kahikatea and pohutukawa all provide native birds with roosting and feeding areas - witnesses made mention of tui and wood pigeon. We also inspected the area carefully and we are satisfied that Dr Julian is correct that these four trees act together with associated undergrowth to create an important central ecological area for native birds and insects.

[14] The southern pohutukawa creates a physical connection between the canopies of the northern pohutukawa and the puriri, and subsequently the kahikatea. Although the branches of pohutukawa do not touch the puriri, they are sufficiently close that birds need only flutter from one tree to the next, and in this way are able to connect between the kahikatea and puriri on the lower-lying land and the pohutukawa on the raised area.

[15] We also acknowledge that the kahikatea is in the order of 20m – 25m high and is likely to grow considerably taller in the coming decades. The existing puriri is a very large and impressive specimen. Although it commences growth at around the 5m – 6m contour, it seems to be nearly the same height as the southern pohutukawa which commences growth at the 15m contour. Thus we estimate that the height of the puriri is



in the order of 20m – 25m. From a distance, the three trees seem to be reasonably similarly matched in terms of height. More importantly, they form a cohesive group visually, from almost all views within the harbour, and particularly from those on the waterfront looking directly at them.

### Status of Activities

[16] It is clear that whether or not the southern pohutukawa is listed, a resource consent would still be required for works or removal. Thus it could be said that it is currently adequately protected.

[17] The relevant restricted discretionary activities rules are annexed hereto and marked A. Of particular importance is the fact that issues relating to the amenity and landscape values, and ecological values of the area are covered. What is additional in terms of the criteria are the words of *Assessment Criteria 18.12.14.2(c)*:

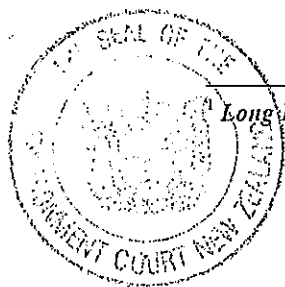
- (c) ... or result in a wider community loss because of the siting of the tree, its context, its landscape prominence, scientific significance, rarity or historic significance.

[18] It is clear that either the inclusion or non-inclusion within the schedule of trees could be said to meet the purposes of the Act in broad terms. Similarly, we agree that non-inclusion would still meet all the various tests under the Act as described at some length in *Long Bay*.<sup>1</sup> Given that the objectives and policies are entirely settled, we are therefore in a much more truncated position of having to examine whether inclusion or exclusion is most appropriate in terms of Section 32 of the Act.

### Reasons for Exclusion

[19] The following were advanced as reasons for exclusion:

- [a] The same or similar matters would be addressed as part of the restricted discretionary criteria in respect of the general protection rules;
- [b] It avoids the potential for Council staff to assume that the removal of protected trees should be vetoed; and



- [c] It gives greater flexibility to achieve a fair and reasonable outcome in respect of the design of a home on the section. Without it, no reasonable and fair provision can be made for a home on the site.

[20] The argument advanced to support this exclusionary regime made the assumption that if the tree was not in the Notable Trees list, it might be available for removal and thus could result in a much better outcome for a house placed on the site. With respect, such reasoning is clearly fallacious. There can be no more expectation that a consent would be granted under a restricted discretionary activity, either listed as a notable tree or as a generally protected tree. There is nothing in the provisions of the Plan to indicate a substantially different criteria or outcome could be expected. To suggest that this is based upon Council's past conduct is, in our view, inappropriate. In the event that parties are not satisfied with the Council decision, they can of course appeal. There is no evidence of significant problems with the Tree Protection Rule in this area, or with the Notable Tree Rule, and no particular cases were cited to the Court showing a long history of incorrect application by Council officers of the various criteria.

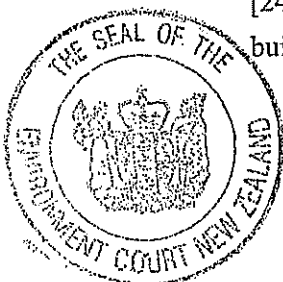
**Can a fair and reasonable use be made of the site?**

[21] The more pointed argument and the focus of Section 85 aspect to this application was that if the tree was listed, no fair and reasonable use can be made of the site.

[22] Again with respect, we consider that the reasoning for this is fallacious and based upon an assumption that a consent will be granted under the general Tree Protection Rule, but refused under the notable tree listing. The criteria in both cases are nearly the same, and the status of both activities are identical. On this basis the current protection rules already constrain development on this site as a permitted activity.

[23] We have investigated the site carefully and we are satisfied that a good quality dwelling of at least 200m in size could be constructed on this site, avoiding the drip lines of both trees. We consider the constraints on this site are less than on many of the nearby sites, including a number elsewhere on the escarpment where the buildings are built in or right next to the escarpment bush.

[24] To the extent that Mr Marlo suggests that no fair or reasonable building could be built on this site, we do not agree. In fact, careful architectural design could result in a



very attractive building interacting with both the pohutukawa and utilising the slope advantages. Consideration of a root-friendly building may even broaden the footprint of such a building to areas within the drip line. Short of the removal of the pohutukawa tree, there is always the prospect that a resource consent could be obtained to remove the most southerly branch which protrudes from the balance of the southern pohutukawa significantly expanding the building possibilities on the site. As we have already noted, whether this occurred due to the scheduling of the southern pohutukawa as a notable tree, or protected under the general rules, a resource consent would be necessary.

[25] Overall, we have concluded that Section 85 of the Act cannot apply with either of the outcomes envisaged.

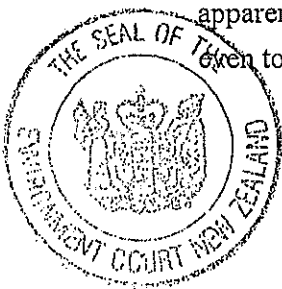
**Which is the most appropriate?**

[26] Sometimes where there are two options, the Court examines this test of the most appropriate or which is the better outcome. In terms of cost, there is the potential for there to be a higher cost involved in an application to remove a notable tree than there is in respect of the general protection rule. However, no evidence was produced to us in this regard and we were asked to make an assumption that Council officers would treat the restricted discretionary applications in completely different ways.

[27] We must say that having seen the tree, we consider that even if the tree were not listed as a notable tree, the issues in relation to its part in an important central group in this bay and its landscape and amenity impact, would be of particular concern to the Council in considering any modification or removal.

[28] In the end, we have identified two benefits from the listing as a notable tree which, in our view, makes it most appropriate or better for this tree to be listed.

[29] Firstly, its listing as a notable tree gives notice to the world, and in particular, any developer or owner, that the tree has special considerations applying to it. Given the removal of the general protection rules by the government, there is always the potential for an owner to consider that they now have the ability to remove any trees on their site as of right. The subtleties of the Act's application on this site were not immediately apparent to the Court, and we suspect may not be immediately apparent to an owner or even to an advisor.



[30] Given the very significant penalties that could apply in the event of the removal of such a tree without a resource consent, it appears to us that it would be of significant benefit that the tree was listed, thus giving the maximum possible notice to an owner or a contractor that the tree requires a resource consent for removal.

[31] We conclude that this would assist the Council in undertaking its duties under the Act by ensuring that appropriate notice is given to owners and avoiding the potential confusion that can arise through the difficulty in applying the wording of Section 76 of the Act within the urban area.

[32] We acknowledge that there are few properties likely to be in the same position as this one, particularly in Arkles Bay, and given the general publicity provided to the removal of the tree rules, there is always the potential for Council staff and/or an owner or contractor to misunderstand the application of the statute on this site.

[33] Secondly, we conclude that the tree's relationship to the others in the group makes it notable as part of a central element to the bay. The group as a whole would be diminished if the southern pohutukawa were not included.

#### **The outcome under Part 2 of the Act**

[34] Of course the objective of any provision in the Plan, including the listing of this tree, is to achieve the sustainable management purpose of the Act.

[35] As we have identified, we do not consider that the impacts upon the use of the land are significant, given the fact that any removal of this tree is already subject to a restricted discretionary activity. Moreover, as a matter of fact, we consider that a suitable modern quality home can be constructed on this site without affecting either of the trees.

[36] Finally, we consider that the enabling of the general community by way of providing for this important group of trees as both an ecological amenity and landscape feature, is appropriate in the circumstances.

[37] Given the values of the group of trees which are recognised, we consider that the listing better achieves that purpose by ensuring that maximum notice is given to the site





owner or developer, members of the public and Council officers of the need to obtain a resource consent for its modification or removal.

[38] In this regard we have reached the same conclusion as the Council's decision, but by different reasoning.

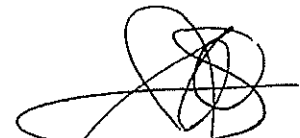
### **Conclusion**

[39] The decision of the Council is confirmed and the appeal dismissed.

[40] We are tentatively of the view that this is not an appropriate case for the award of costs, and note that costs are generally not awarded on references. However, notwithstanding, if any party does seek costs, they must file the same within 15 working days; reply with 10 working days; final reply, if any, 5 working days thereafter.

**DATED** at AUCKLAND this 26<sup>th</sup> day of August 2013

*For the Court:*

  
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J A Smith  
Environment Judge





## Rule 18.12

### RESTRICTED DISCRETIONARY ACTIVITIES: MATTERS FOR DISCRETION

In accordance with sections 76(3B) and 105(3A) of the Act, the Council will restrict its discretion to the matters listed against each specific activity, when considering Restricted Discretionary Activity resource consent applications.





Rule  
8.12.10  
**The Cutting, Damaging or  
Removal of Any Native  
Tree Greater than 3Metres  
in Height within 200  
Metres of MHWS**

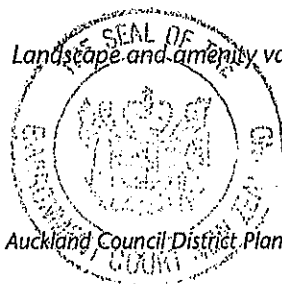
Rule 18.12.10.1  
Matters for Discretion

18.12.10.2  
Assessment Criteria

*Safety*

*Alternative mechanisms*

*Landscape and amenity values*



**The Cutting, Damaging or Removal of Any Native Tree Greater than 3Metres in Height within 200 Metres of Mean High Water Springs (MHWS)**

**Matters for Discretion**

The Council will restrict its discretion to the following matters:

- (a) Pruning or removal of the tree.
- (b) Condition and safety of the tree.
- (c) Location of the tree to be removed.
- (d) The ecological values of the tree to be removed and the values of the vegetation or ecosystem of which it is a part.
- (e) Siting of building or works.

**Assessment Criteria**

When considering an application the Council will have regard to the following criteria:

- (a) Whether the condition of the tree is such that it will endanger life or property on the site.
- (b) Whether alternative remedial mechanisms are available, so that removal or cutting of the tree does not need to occur.
- (c) Whether the removal of the tree will adversely impact on the amenity and landscape values of the neighbourhood.



*Erosion/instability*

(d) Whether the removal of the tree will initiate or exacerbate erosion or instability, especially within 200 metres of mean high water springs (MHWS).

*Flooding*

(e) Whether the removal of tree will initiate or exacerbate flooding.

*Wildlife habitat*

(f) Whether the removal of the tree will result in the loss of significant wildlife habitat.

*Alternative siting*

(g) Whether the development or earthworks which threaten the tree could be undertaken elsewhere on the site, so that effects on the tree are avoided or minimised.

*Alternative planting*

(h) Whether appropriate alternative plantings or remedial measures are proposed.

*Health*

(i) Whether circumstances exist, concerning the health of the tree, including diseased or damaged conditions, that warrant the tree's removal.

*Significant Natural Areas*

(j) Whether the works proposed in an area identified as a Significant Natural Area defined on the Planning Maps are undertaken in such a manner and at such times as to have no adverse effect, or minimum adverse effect, on the ecology and wildlife of the area and in particular where relevant:

- (i) nesting, feeding and breeding of species;
- (ii) ecological processes;
- (iii) connections between ecosystems;
- (iv) the diversity of species;
- (v) the habitat of threatened or protected species both terrestrial and aquatic;
- (vi) cumulative effects

Rule

18.12.11

**The Cutting, Damaging or Removal of Any Native Tree Greater than 3 Metres in Height and Less than or Equal to 6 Metres in Height unless within specified areas**

**The Cutting, Damaging or Removal of Any Native Tree Greater than 3 Metres in Height and Less than or Equal to 6 Metres in Height (unless within 200 metres of MHWS) within the Landscape Protection Zone and the following areas zoned Residential Medium Intensity: Muriwai, Baddeleys Beach, Buckletons Bay and Campbells Beach or from areas defined as Significant Natural Areas (SNA) on the planning maps**

Rule

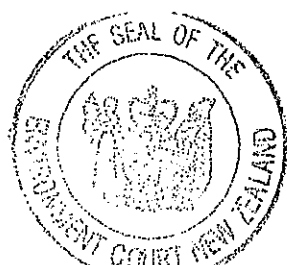
18.12.11.1

**Matters for Discretion**

**Matters for Discretion**

The Council will restrict its discretion to the following matters:

- (a) Pruning or removal of the tree.
- (b) Condition and safety of the tree.
- (c) Location of the tree to be removed.





18.12.11.2  
Assessment Criteria

*High landscape values*

*Significant wildlife values*

(d) The ecological values of the tree to be removed and the values of the vegetation or ecosystem of which it is a part.

(e) Siting of building or works.

**Assessment Criteria**

When considering an application the Council will have regard to the following criteria:

(a) Whether the removal of the tree will adversely affect the high landscape values of the Landscape Protection Zone and the following areas zoned Residential Medium Intensity: Muriwai, Baddeleys Beach, Buckletons Bay and Campbells Beach.

(b) Whether the wildlife values of the area are significant, and whether the removal of the tree will adversely affect these values, especially during the breeding and nesting season.

(c) Also see the Assessment Criteria in Rule 18.12.10.2.

Rule  
18.12.12  
The Cutting, Damaging or  
Removal of Any Native or  
Exotic Tree Greater than 6  
Metres in Height

**The Cutting, Damaging or Removal of Any Native or Exotic Tree  
Greater than 6 Metres in Height**

See the Matters for Discretion and Assessment Criteria in Rule 18.12.10.1.

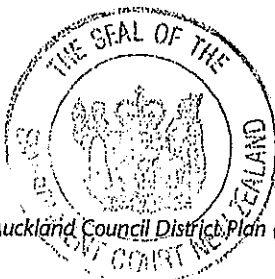
Rule 18.12.13  
The Cutting, Damaging or  
Removal of Any Native  
Vegetation Greater than  
25m<sup>2</sup> in Area

**The Cutting, Damaging or Removal of Any Native Vegetation  
Greater than 25m<sup>2</sup> in Area**

See the Matters for Discretion and Assessment Criteria in Rules 18.12.1, 18.12.6 and 18.12.10.

Rule 18.12.14  
The Cutting, Damaging or  
Removal of Any Notable  
Trees

**The Cutting, Damaging or Removal of Any Notable Trees Listed in  
Appendix 18A or Historic Trees Listed in Appendix 17C**





Rule 18.12.14.1  
**Matters for Discretion**

**Matters for Discretion**

The Council will restrict its discretion to the following matters:

- (a) Removal of the tree.
- (b) Condition and safety of the tree.
- (c) Location of the tree to be removed.
- (d) Siting of building works.

18.12.14.2  
**Assessment Criteria**

**Assessment Criteria**

When considering an application the Council will have regard to the following criteria:

*Safety*

- (a) Whether the condition of the tree is such that it will endanger life or property on the site.

*Alternative mechanisms*

- (b) Whether alternative remedial mechanisms are available, so that the removal or pruning of the tree does not need to occur.

*Significance of the tree(s)*

- (c) Whether the removal of the tree will result in the loss of amenity and landscape values for the neighbourhood, or result in a wider community loss because of the siting of the tree, its context, its landscape prominence, scientific significance, rarity or historic significance.

*Alternative siting*

- (d) Whether the works which threaten the tree could be undertaken elsewhere on the site, so that effects on the tree are avoided or minimised.

*Alternative planting*

- (e) Whether appropriate alternative planting or remedial measures are proposed to replace the tree.

