Confidential Item

CAMPBELLTOWN CITY COUNCIL

Confidential Supplementary Item

For Council meeting to be held on

Tuesday 18 February 2020 at 7.00 pm

Refer Item 11.18

Confidential Supplementary Item

11.18 Alleged Tree Damaging Activity

Nigel Litchfield Manager Planning Services Report

Purpose of Report

To consider correspondence received from Mr Nick Xenophon with regard to alleged tree damaging activity at 4 Richardson Avenue, Tranmere.

Strategic Plan Link

Strategy 2.1.3 Undertake assessment of development applications in accordance with the Development Act and Regulations to ensure robust decision making.

Background

The attached correspondence has been received by Council from Mr Nick Xenophon, acting on behalf of residents in Richardson Avenue who are currently in the process of appealing to the Environment Resources and Development Court the decision of the Council Assessment Panel to approve the construction of 5 dwellings at 4 Richardson Avenue, Tranmere.

The letter, addressed to Mayor Whittaker urges Council to undertake formal action with regard to alleged tree damaging activity which occurred on the property and which was initially investigated by Staff in 2017. The correspondence also requests that all matters relating to the construction of the 5 dwellings be deferred until such time as this action has been undertaken and resolved.

Discussion

The rapidly declining tree was first brought to Councils attention on 16 March 2017 in an email from a resident. Staff attended the site on Friday, 17 March and undertook an initial inspection including a door knock of nearby residents who had some view of the property.

On Monday 20 March Staff undertook a further site visit, met the owner and his arborist on site and did another door knock of properties in the immediate vicinity. At this site visit Staff noted a large subsurface hole in the base of the tree. The owner denied any knowledge of this hole. An inspection of the property owner's outbuildings did not locate any poisons, unusual chemicals or suspicious equipment.

In the process of the door knock Staff spoke to residents at the adjacent properties and the two properties directly opposite (they also left business cards at a number of other properties. None of the residents that Staff spoke to had seen or heard anything to indicate that deliberate tree damaging activity had occurred.

Please note this is a brief summary of Staff action for additional detail please find attached the Staff notes of the investigation.

It was determined, that given that there was no eye witness evidence and no physical evidence on the site (evidence of poisons or other equipment), taking samples and having them analysed would be a fruitless and expensive exercise. (The analysis occurs interstate, is prohibitively expensive and Staff would have to identify the chemicals to be tested for) and it would, if successful, only identify a poison and bring Staff no closer to a culprit.

Following discussions with Council's solicitors as to the likelihood of successfully prosecuting the property owner it was determined that proceeding further would be an inappropriate use of Council resources.

This matter has now been raised again in the context of an appeal to the Environment Resources and Development Court in the matter of an application to erect 5 dwellings on the subject land. Mr Xenophon (the solicitor acting on behalf of the appellants) is contending that Council should pursue this matter to ensure that the owner must plant a replacement tree which will significantly alter the utility of the subject land preventing the approved development from occurring. Mr Xenophon's correspondence has been forwarded to Council solicitors and the attached response has been received.

Council's Solicitors confirm that on the evidence able to be gathered by Staff the likelihood of Council successfully prosecuting the property owner either at the time the deterioration of the tree was brought to Council's attention or now is negligible.

Should action be taken now the most likely scenario is that Council would be unsuccessful and the Court would require Council to pay costs to the property owner.

The correspondence from Council's solicitors also provides a detailed refutation of the legal argument put forward by Mr Xenophon as to why action against the property owner with regard to the tree could and should be taken.

Whilst it is regrettable that formal action could not be undertaken with regard to this tree, please be assured that Staff always take these matters seriously and investigate them rigorously within the context of Staff resources and workloads. Staff have successfully pursued matters in the past and will continue to undertake action where appropriate.

Social Implications

There are no social implications in relation to this report.

Environmental Implications

There are no environmental implications in relation to this report.

Asset Management Implications

There are no asset management implications in relation to this report.

Governance / Risk Management

Council's solicitor advice in this matter is unequivocal and it is suggested that taking other action could constitute both a financial and reputational risk.

Community Engagement

There are no Community engagement implications in relation to this report.

Regional Implications

There are no regional implications in relation to this report.

Economic Development Implications

There are no economic development implications in relation to this report.

Financial Implications

The advice from Council's solicitors indicates that should Council opt to take formal action in this matter the most likely scenario is the Court awarding costs against Council.

Recommendation

That the report be received and that no further be taken with regard to the alleged tree damaging activity at 4 Richardson Avenue, Tranmere be undertaken.

Nick Xenophon & Co.
LAWYERS

Our Ref: NX: 19172: jg

12 February 2020

URGENT
Mayor Jill Whittaker
Campbelltown City Council
172 Montacute Road
ROSTREVOR SA 5073

By Hand Delivery & Email: mail@campbelltown.sa.gov.au

Dear Mayor

Re : Decision of Council not to bring enforcement proceedings pursuant to Section 85 of the Development Act in respect of the destruction of significant tree at 4 Richardson Ave Tranmere SA

I advise that I act for Sandra Kazubiernis of 10 Richardson Avenue Tranmere, David Kubler and Sasha Close of 21 Richardson Avenue Tranmere and Kumutha Indren of 23 Richardson Avenue Tranmere.

Whilst I am writing to you in relation to a matter that is before the Council's Assessment Panel on 170/0853/19/RF 4 Richardson Ave Tranmere, the matter that I am writing to you about is distinct from that process and I respectfully ask for your urgent consideration of the matters raised herein.

I now set out the following in accordance with my instructions:

1. A significant tree as defined by Section 4 of the Development Act (the Act) was located on the property at 4 Richardson Avenue Tranmere (the subject property). It was located in approximately the centre of the property near the boundary with 2 Richardson Avenue Tranmere (relevant in the context of the canopy of that tree affecting any Development Application in respect of 2 Richardson Avenue Tranmere).

2. On or about 24 February 2017 (the date may be highly relevant in the context of a limitation date for the issuing of enforcement proceedings), one of the residents of Richardson Avenue, namely Kumutha Indren (23 Richardson Avenue) noticed that a truck was parked on the street on Richardson Avenue across the driveway of 4 Richardson Avenue. She could not see what was happening down the block. The condition of the tree rapidly deteriorated in the following weeks and it was evident that the health of the tree had been drastically impacted.

3. As you are no doubt aware, Council subsequently investigated this matter. It confirmed that there were drill holes in the significant tree as well as newspapers stuffed in those drill holes with a strong chemical smell. Apparently Council did not arrange for the newspapers with a strong chemical smell to be examined other than to confirm it had a strong chemical smell.

4. It seems incontrovertible that there was a 'tree-damaging activity' as defined by the Development Act (the Act).

5. Some 12 months after the tree damaging activity the significant tree was removed.

6. An application was made by the owner of the subject property to receive development approval for 5 units on the property. It is our understanding that but for the tree damaging activity and/or removal of the significant tree that not more than 2 or 3 units would ordinarily be approved on the property given the significance of the tree, and its canopy. Furthermore, the removal of the significant tree appears to have impacted on an impending Development Application (initially lodged as 170/0538/1B/RF) for 2 Richardson Avenue Tranmere where I understand that there is an application for 7 units to be built on that site. I note this application was withdrawn prior to a scheduled CAP meeting in October 2019.

7. I understand that the Council decided not to pursue enforcement proceedings under Section 85 of the Act. In this regard I formally request you, as a matter of urgency to provide me with all documents, including notes, memoranda, investigation reports, and all relevant material in relation to the investigation of the damage to the significant tree and its subsequent removal, and the decision made not to bring enforcement proceedings under the Act. I make this request pursuant to the Freedom of Information Act and request that it be processed as a matter of urgency. If you consider this request pursuant to the Freedom of Information Act is in any way wanting, could you please advise me immediately as to whether you consider there is another format you wish me to bring this request.

8. I note that a plain reading of Section 85(5) of the Act and in particular 85(6)(a) makes reference to the Court being satisfied '*on the balance of probabilities*', for the enforcement action to be successful.

9. My clients are not satisfied that Council has decided, to this date, not to issue legal proceedings under the Act for an enforcement action in respect of the tree-damaging activity and its removal. We ask as a matter of urgency whether Council will reconsider its decision in order to issue proceedings prior to 24 February 2020, or if not, if it is prepared to indemnify any person that brings proceedings. May I respectfully have your response on this as a matter of urgency, and not later than 4.00pm

on Tuesday, 18 February 2020 in order that I may obtain urgent instructions from my clients.

10. I also draw to your attention concerns that indeed you and other members of Council have expressed, about the destruction of significant trees in the City of Campbelltown. I also note recent media reports about the destruction of significant trees. I mention this in the context that there appears to be a broader public interest as to the impact on the amenities of residents of the City of Campbelltown by the destruction of these trees.

11. I also draw to your attention Section 106A of the Act. In my view it ought to be read distinctly from Section 106 of the Act which makes reference to 'proceedings for an offence against this Act'. Section 106A is broader in that it makes reference to:

106A

'(1) If in any proceedings under this Act a court finds that a person has breached this Act by undertaking a tree-damaging activity, the court may, by order, direct a specified person to do 1 or more of the following:

(a) to establish a tree or trees of a kind specified by the court in a place or places specified by the court;

(b) to remove any buildings, works or vegetation that have been erected, undertaken or planted at or near the place where the regulated tree was situated since the breach occurred;

(c) to nurture, protect and maintain any tree or trees until they are fully established or for such period as may be specified by the court, or to make a payment or payments towards the maintenance of any tree or trees.

(2) A court acting under subsection (1) may make any ancillary order as the court thinks fit.

(3) A court must, before making an order under subsection (1) directed at a person who is not an owner or occupier of the relevant land, ensure that reasonable steps have been taken to give notice of the relevant proceedings to an owner or occupier of the land. Development Act 1993—17.6.2013 Part 13—Miscellaneous 6 Published under the Legislation Revision and Publication Act 2002

(4) If a person to whom an order under subsection (1) applies is not an owner or occupier of the relevant land at the time of the making of the order, the court may authorise the person (or a person authorised by him or her)'

(a) to enter the land with such materials and equipment as are reasonably necessary to comply with the order; and

(b) to enter and cross any land specified in the order with the materials and equipment referred to in paragraph (a) for the purpose of gaining access to the relevant land.

(5) Subject to subsection (6), an order under this section will cease to apply with respect to land if or when the land is sold to a genuine arms-length purchaser for value.

(6) Subsection (5) does not apply if the order is noted against the relevant instrument of title or, in the case of land not under the provisions of the Real Property Act 1886, against the land under a scheme prescribed by the regulations for the purposes of this subsection.

(7) A court that has made an order under this section may, on application, vary or revoke the order.

(8) A person who fails to comply with an order under subsection (1) or (2) is, in addition to any liability for contempt, guilty of an offence. Maximum penalty: $60 000.

(9) An owner or occupier of land, or any other person, who hinders or obstructs a person in carrying out the requirements of an order under subsection (1) or (2) or entering or crossing land under subsection (4) is guilty of an offence.

Maximum penalty: $15 000'

12. My instructions (and advice) are that Section 106A is much broader than Section 106. 'Proceedings under this Act' can refer to a Development Application before the Court, not just in respect of proceedings for an offence.

13. Our clients ask that Council considers as a matter of urgency issuing proceedings in this matter in respect of the significant tree that was damaged and removed, and to do so by 24 February 2020 (I emphasise that the other relevant date for a prosecution may be the date the significant tree was actually removed, but out of an abundance of caution, I am instructed to seek the issue of proceedings on or before 24 February 2020). The alternative, in the view of my clients, is inconsistent with the intent of the legislation. The consequence of not doing so can lead to greater densification of development, a loss of green space, and a general loss of amenities for residents in the City of Campbelltown.

I will copy members of Council and the Chief Executive of the City of Campbelltown of this letter to you. I hope you can appreciate the sense of grievance my clients feel that their Council has not, to-date, appropriately

protected their interests and that of the community generally. They still live in hope that Council will now do so.

My client's also request that they have an opportunity to meet with you to put these concerns to you in person, if you are amenable to such a meeting. I will of course attend with my clients on their behalf.

In the meantime, we request that Council defers any further consideration of the Application before the CAP on 25 February 2020 pursuant to a Category 2 Application, pending consideration of proceedings being issued under Section 85.

We await your urgent response and look forward to hearing from you by 4pm on Tuesday 18 February 2020.

Yours faithfully
NICK XENOPHON & CO.

Per:

NICK XENOPHON

Matthew O'Dwyer

From: Amanda Gmail <ajtheadquarters@gmail.com>
Sent: Thursday, 16 March 2017 4:05 PM
To: mail
Subject: For the Arborist
Attachments: IMG_2408.jpg; IMG_2409.jpg

Hi
I rang regarding a tree I believe is being poisoned but you were out so I thought I would send a picture of the tree I was concerned about.
It is located at 4 Richardson Ave Tranmere.
All other trees in the area are looking very good after the rain this year but this one looks as though it is dying. They took 4 other trees out last year but this was a large tree so at the time they just trimmed it.
I hope you can save it as this is what makes the neighbourhood.
Amanda

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Matthew O'Dwyer

From: Williams, Peter (DECD) <Peter.Williams6@sa.gov.au>
Sent: Friday, 17 March 2017 8:17 AM
To: mail
Cc: l.williams@internode.on.net
Subject: Dying red gum at 4 Richardson Avenue [SEC=UNOFFICIAL]

Hi,

I draw your urgent attention to a large red gum dying very quickly at the front of no 4 Richardson Avenue Tranmere. All red gums in the close proximity and the area general appear very healthy, going on the vigour of the foliage. Several very large trees (Spotted gums/Lemon-scented gums?) as well as Yates or similar were removed from this property very soon after the last sale; I presume they were granted permission because they were not indigenous species. The red gum I draw your attention to had all dead limbs removed at the same time as the other trees were removed.

The red gum in question is the one remaining indigenous tree on the property and until recently appeared very vigorous, but has had approximately 3 out of 4 main limbs die back very quickly; this is not consistent with normal ill-health of these tree in my experience with die-back and other diseases of Eucalyptus species.

Please investigate urgently for signs of poisoning poison bore holes in the truck or other signs of interference

Regards,

Peter Williams
(0466786833) (83322520)

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4 Richardson Avenue, Tranmere - alleged tree poisoning.

16/03/2017

Council receives an email from Amanda (surname unknown) advising Council that she has suspicions that the tree at 4 Richardson Avenue has been poisoned. She has recently noticed that the tree is looking like it is dying. She noted that 4 other trees had recently been removed by the owner. The email contains 2 photos of the tree which is suffering.

17/03/2017

Council receives an email from Peter Williams who lives at 6 Richardson Avenue, Tranmere. Peter's property is directly abutting 4 Richardson Avenue to the west. Peter is concerned about this tree as all of the other trees nearby seem to be in good health and condition and the rapid decline of this tree seems to indicate to him that the tree has been poisoned.

17/03/2017

Henry Haavisto and Matthew O'Dwyer undertake a site visit at 4 Richardson Avenue, Tranmere to investigate the 2 recent emails received by Council. Both officers note that the tree is in decline with brown leaves prominent throughout the canopy. Further investigating from Henry Haavisto reveals a recent drill hole which contains a smelly substance, thought to be a poison of some nature. The drill hole is located below ground level on the southern side of the trunk (towards the house).

17/03/2017

Darren Adams calls Tom Pierce (0402 936 780) the owner of 4 Richardson Avenue to enquire as to whether he has noticed the tree in decline. Tom suggests that he just recently noticed the brown leaves and subsequently called his arborist (We Can) to give him some advice as to the likely cause.

Darren Adams further suggests that a site visit and meeting to discuss the situation should occur and Monday 20th March 2017 is loosely discussed as a suitable date. Tom Pierce suggests that he will contact his arborist and call Council on Monday to confirm a time and date for the suggested meeting.

20/03/2017

Tom Pierce calls on Monday 20 March 2017 to organise a meeting with Council staff at 1.30pm with his arborist We Can.

20/03/2017

Darren Adams, Matthew O'Dwyer, Henry Haavisto, We Can (arborist) and Tom Pierce (owner) meet on site at 1.30pm.

It is evident immediately that the tree is suffering with 95% of the canopy being brown in colour.

Before discussing the matter with the owner and his arborist Darren Adams gave the relevant voluntary caution regarding answering questions and both the arborist and owner had no reservations in answering questions.

Tom Pierce was asked when he noticed the dieback within the tree to which he answered approximately 2 weeks ago when he returned from his honeymoon. (Tom Pierce was on his honeymoon during January and February).

Darren Adams asked We Can (arborist) what he thought was causing the dieback. He suggested he was unsure but ruled out insufficient access to water given the nature and quick decline of the tree. At no point did he indicate that his suspicion was that the tree had been poisoned.

Darren Adams asked Tom Pierce whether he had any ideas about what might be causing the dieback and Tom Answered by suggesting that he had no idea.

Henry Haavisto undertook a ground level visual inspection and noted significant dieback within the canopy with 95% of the leaves being brown in colour. He also noted a small portion of epicormic regrowth on one of the lower limbs which was green in nature but very dry and crispy. He suggests that this is likely evidence that the tree is trying to recover and failing. He suggests that the rapid decline is likely to indicate interference with the tree and his suspicion is poison.

Henry Haavisto continued to inspect the lower parts of the tree and removed some earth at the base of the tree and after some time he noticed a large subsurface hole at the base of the southern side of the tree. No significant odour was noted coming from the hole but Henry's suspicion was that this hole was the likely source where poison was applied to the tree.

Darren Adams asked Tom Pierce whether he was aware of the hole to which he answered no. Darren then asked whether any other contractors had been on site during the last month or so to which Tom suggested that a plumber had been out approximately 2 weeks ago to deal with a plumbing problem. Tom did not notice whether the plumber spent any time in or around the tree. No other tradesman or the like had recently been on site.

Darren Adams asked whether Tom was the owner and occupier of the residence to which Tom answered yes.

Darren Adams suggested that we would continue to compile some evidence and let Tom Pierce know of our findings.

Darren Adams, Matthew O'Dwyer, Henry Haavisto and We Can then left the site.

Darren Adams and Henry Haavisto commenced door knocking the adjoining neighbours to investigate the matter further. Three adjoining western residential flats were visited but only one neighbour (Josh McManus ph: 0423 527 554) was home in this group of flats. He lived at unit 2, 2 Richardson Avenue. Josh had suggested that he had not seen or heard anything suspicious on or near the land in the earlier weeks and could not provide any information to assist the investigation.

Two other properties being 21 and 23 Richardson Avenue were door knocked but neither of the tenants at either property had seen or heard anything suspicious occurring on or near the subject land.

21/03/2017

Darren Adams received a call from Tom Pierce advising that he had discussed the matter further with his neighbour (Josh Mcmanus) after the site visit had occurred and that Josh

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may be able to provide additional helpful information regarding a suspicious vehicle that Josh now remembers was loitering around the site and taking photos of trees on his property at 2 Richardson Avenue. He suggested that the vehicle was on old black convertible mercedes. He did not see the vehicle enter 4 Richardson Avenue at any time. Josh also now indicates that an elm tree in the rear yard of his property at 2/2 Richardson Avenue is in decline and he suspects it has been poisoned also.

21/03/2017

Darren Adams received a call from Peter Williams of 6 Richardson Avenue, Tranmere who lives directly abutting the subject land to the west. Peter Williams provided an initial email to Council alerting us to the declining tree. Peter Williams was calling as a result of a phone call message that Darren Adams left him on Monday 20/03/2017.

Peter Williams began discussing how concerned he was given the rapid decline in health of the tree. Peter suggested that he is well versed in trees and has a horticulture background and believes that very unusual and strong poison must have been used in order for the tree to dieback in such a short amount of time. Peter unfortunately could not provide any evidence that would assist Council with the investigation and he did not see or hear any suspicious activity on the site.

Peter did suggest that Council should vigorously pursue the matter and have samples taken and tested to work out the nature of the poison. Peter felt that the poison was very unusual and that it would be unlikely to be available at normal outlets and that Council may have an opportunity to try and trace the sale of such items to the property owner.

Matthew O'Dwyer

From: Kyra Gustavsson <kyragustavsson@gmail.com>
Sent: Wednesday, 22 March 2017 5:56 PM
To: mail
Cc: website
Subject: Fwd: 4 Richardson Avenue Tranmere - Dead large gum tree - concern tree will split or fall on 3 units at 2 Richardson Ave Tranmere
Attachments: 20170322_165552.jpg

Please see email below, unfortunately sent in error to your website address.

Regards

Kyra Gustavsson

---------- Forwarded message ----------
From: "Kyra Gustavsson" <kyragustavsson@gmail.com>
Date: 22/03/2017 5:51 PM
Subject: 4 Richardson Avenue Tranmere - Dead large gum tree - concern tree will split or fall on 3 units at 2 Richardson Ave Tranmere
To: "mail" <mail@campbelltown.sa.gov.au>
Cc:

> Good afternoon Council
>
> On behalf of the owners of Strata Corporation 4140, 2 Richardson Ave Tranmere, I express great concern about the above tree (see photo attached) should it split or fall on the building the Strata owns.
>
> I am writing to the owners this week and wonder if Council can assist in asking the owners to remove the dead tree to avoid property and possible personal damage/loss of life should the tree split or fall on 2 Richardson Ave Tranmere.
>
> Please advise of whether Council has jurisdiction to assist in this instance.
>
> Regards
>
> Kyra Gustavsson

Click here to report this email as spam.



Matthew O'Dwyer

From: Williams, Peter (DECD) <Peter.Williams6@sa.gov.au>
Sent: Thursday, 23 March 2017 10:00 AM
To: mail
Cc: l.williams@internode.on.net
Subject: Attention Darren Adams [DLM=For-Official-Use-Only]

For Official Use Only

Hi Darren,

Could you please investigate the potential for Council to gain an ISP search order (tree poisoning information) as part of the Council's investigation strategy into the Eucalyptus Camaldulensis destruction at 4 Richardson Avenue Tranmere. I'm meeting with other residents in the street tonight to discuss further.

Regards,

Peter Williams
(**CMSE®TUV NORD)**
6 Richardson Avenue Tranmere

Click here to report this email as spam.

Matthew O'Dwyer

From: Tom Pierce <t.pierce@outlook.com>
Sent: Thursday, 23 March 2017 6:56 PM
To: Darren Adams
Subject: 4 Richardson Ave - Tree

Dear Darren,

Following on from our on site meeting at my house at 4 Richardson Avenue Tranmere on Monday , to look at the tree that is dying. I thought I should contact you to let you know that my neighbor Josh McManus, (the one with the vip lawnmowing business) had come around to see me.

James walked over and knocked on my door on Monday night and said that you had visited his house on Monday afternoon and he had forgotten to mention that he had noticed a stranger a few weeks prior acting suspiciously around his house and on my property. Additionally he mentioned that he believed the tree in the back of his yard had also died recently. He said that the Tradesmen on the Building Site across the road had also noticed the person acting suspiciously and had discussed it with him.

I also forgot to mention to you that the Cyprus Pine tree in the front of my yard has also died recently from unknown causes. I'm concerned that with strangers accessing my property in my absence, noticed by my neighbor and tradesmen, that someone is destroying my property and potentially my neighbours' property. I gave James your number and asked him to repeat to you what he had told me. James also gave me his mobile which is 0423 527 554, if he does not contact you could you please call him on this number.

Thanks,

Tom Pierce

Sent from Outlook

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Darren Adams

From: Henry Haavisto <HHaavisto@campbelltown.sa.gov.au>
Sent: Friday, 24 March 2017 5:43 PM
To: Kyra Gustavsson
Cc: Darren Adams; Peter Collett
Subject: RE: 4 Richardson Avenue Tranmere - Dead large gum tree - concern tree will split or fall on 3 units at 2 Richardson Ave Tranmere

Hi Kyra

I confirm the subject Tree has been poisoned .

From experience, trees poisoned do not fail or fall over .Trees only fall over from root damage or root fungal decay.

The subject tree will hold on to leaves due to the trauma for some time and then start to drop A poisoned tree of this size can be stable for many years.

Council is currently conducting investigations, Council staff have been interviewing residents to gain further information about the poisoning.

Considerable amount of information is required before legal action can be taken

Any further questions please don't hesitate to contact us

Regards

Henry Haavisto
Tree Management Officer
T +61 8 83669285
F +61 8 83373818
M 0419824713
E HHaavisto@campbelltown.sa.gov.au
W www.campbelltown.sa.gov.au

From: Kyra Gustavsson [mailto:kyragustavsson@gmail.com]
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Cc:

Good afternoon Council

On behalf of the owners of Strata Corporation 4140, 2 Richardson Ave Tranmere, I express great concern about the above tree (see photo attached) should it split or fall on the building the Strata owns.

I am writing to the owners this week and wonder if Council can assist in asking the owners to remove the dead tree to avoid property and possible personal damage/loss of life should the tree split or fall on 2 Richardson Ave Tranmere.

Please advise of whether Council has jurisdiction to assist in this instance.

Regards

Kyra Gustavsson

Click here to report this email as spam.

Darren Adams

From: Nigel Litchfield <NLitchfield@campbelltown.sa.gov.au>
Sent: Tuesday, 16 May 2017 10:28 AM
To: Darren Adams
Subject: RE: 4 Richardson Avenue, Tranmere - tree poisoning

Probably worth putting something in the paper, but it would have to be general in nature, you'll need to respond to any interested parties to close the loops still.

From: Darren Adams
Sent: Tuesday, 16 May 2017 10:15 AM
To: Nigel Litchfield <NLitchfield@campbelltown.sa.gov.au>
Subject: 4 Richardson Avenue, Tranmere - tree poisoning

Hi Nigel,

Just wondering how you would suggest that I finalise the tree poisoning matter that we weren't able to prove.

It is worth putting something in the paper or similar which just advises people about the poisoning as a deterrent or should I just write to the owner and the interested parties (neighbours) advising that we weren't able to pursue due to lack of evidence?

Daz

Darren Adams
Team Leader Development Assessment and Compliance
T +61 8 83669202
F +61 8 83373818
E DAdams@campbelltown.sa.gov.au
W www.campbelltown.sa.gov.au

Nigel Litchfield
Manager Planning
T +61 8 83669259
F +61 8 83373818
E NLitchfield@campbelltown.sa.gov.au
W www.campbelltown.sa.gov.au

kelledy jones
LAWYERS

Level 6 / 19 Gilles Street
Adelaide South Australia 5000

GPO Box 2024
Adelaide South Australia 5001

T. 8113 7100
F. 8113 7199
W. kelledyjones.com.au

ABN 66 159 460 723

14 February 2020

Darren Adams
Team Leader Development Assessment and Compliance
Campbelltown City Council
PO Box 1
CAMPBELLTOWN SA 5074

BY EMAIL: dadams@campbelltown.sa.gov.au

Dear Darren

SUSPECTED TREE DAMAGING ACTIVITY AT 4 RICHARDSON AVENUE, TRANMERE - ADVICE

You have sought our advice concerning a letter sent to the Council from Nick Xenophon & Co Lawyers on the behalf of the owners of 10 Richardson Avenue, Tranmere, 21 Richardson Avenue Tranmere and 23 Richardson Avenue, Tranmere ("the Letter").

The Letter concerns alleged tree damaging activity to a significant tree formerly located at 4 Richardson Avenue, Tranmere ("the Land") which is alleged to have occurred on or about 24 February 2017.

The Letter demands that the Council:

- provide all documents, including notes, memoranda, investigation reports and all relevant material in relation to the investigation of the damage to the regulated tree and its subsequent removal and the Council's decision not to undertake enforcement action;
- reconsider its decision not to take enforcement action against the owner of the Land in respect of the tree-damaging activity; and
- defers consideration of DA 170/0853/19/RF "*pending consideration of proceedings being issued under Section 85* (of the *Development Act 1993* ("the Act"))".

Background

1. On 16 March 2017, the Council received a verbal complaint from an "Amanda" concerning the health of a large tree located within the front yard of the Land. Amanda also sent an email to the Council attaching photographs of the tree.

2. On 17 March 2017, the Council received a similar complaint from Peter Williams, the owner of 6 Richardson Avenue, Tranmere concerning the declining health of the tree.

3. That same day, you, Mr Matthew O'Dwyer, who is another authorised officer of the Council under the Act and Mr Henry Haavisto, the Council's qualified arborist, undertook an inspection of the Land. The health of the subject tree was in severe decline. A drill hole was observed in the southern side of the tree, below ground level. The drill hole appeared to have been recently created and contained a substance suspected to be a form of poison.

4. I understand that the tree was a form of eucalyptus and had a trunk circumference over 3 metres in diameter. The tree was, therefore, a significant tree as defined in regulation 6A of the *Development Regulations 2008* ("the Regulations").

5. Later on, 17 March 2017, you called Mr Tom Pierce, the owner of the Land. Tom stated that he had noticed the recent declining health of the subject tree and had sought advice from an arborist, named We Can, concerning the tree. You proposed a site meeting with Mr Pierce and his arborist for the following Monday, 20 March 2017.

6. The site meeting occurred at 1.30pm on 20 March 2017 and was attended by yourself, Mr O'Dwyer, Mr Haavisto, Mr Can and Mr Pierce.

7. Mr Pierce was cautioned at the commencement of the meeting. Mr Pierce was questioned and stated the following:

    7.1 he was the owner and occupier of the Land;

    7.2 he first noticed the declining health of the tree two weeks prior when he returned from his honeymoon. The honeymoon had occurred during January and February;

    7.3 he was not aware of the hole that had been drilled in the base of the tree;

    7.4 a plumber had attended the Land approximately two weeks prior to resolve a plumbing issue. Mr Pierce did not observe the plumber spending any time near the tree. No other tradespeople had attended the subject land in recent times.

8. During the site inspection, Mr Can confirmed that the quick decline of the tree's health could not have been caused by insufficient access to water. He indicated that he was not sure what could have caused the tree's decline but did not suggest or indicate poisoning.

9. Mr Haavisto confirmed his suspicion that the tree had been poisoned due to the state of the tree and the drill hole. On this date, the drill hole did not exhibit any odour.

10. Subsequent to the site meeting, you and Mr Haavisto commenced door knocking within the locality. They visited the units located to the immediate west of the Land at 2 Richardson Avenue. The only person to answer their door was a Mr Josh McManus, the owner of unit 2, 2 Richardson Avenue. Mr McManus informed you and Mr Haavisto that he was not seen or heard anything suspicious in the preceding weeks.

11. During the door-knocking exercise, the occupants of 21 and 23 Richardson Avenue responded and confirmed that they had not seen or heard anything suspicious occurring on or near the Land during the preceding weeks.

12. On 20 March 2017, verbal advice concerning the evidence gathered to date was obtained from KelledyJones Lawyers. The advice was that the Council had insufficient evidence to

commence legal proceedings concerning the alleged tree-damaging activity and that further evidence would need to be obtained before proceedings could be contemplated.

13. On 21 March 2017, you received a telephone call from Mr Pierce advising that he had spoken further with Mr McManus, the occupant of 2/2 Richardson Avenue and that Mr McManus now remembered a vehicle, a black Mercedes, loitering around the Land and a person taking photos of trees on 2 Richardson Avenue in the preceding weeks. Mr McManus apparently confirmed that a large tree on his property was showing signs of severe, declining health.

14. Later, on 21 March 2017, Mr Williams of 6 Richardson Avenue, Tranmere, rang you to express his concern regarding the subject tree and suggested that the Council take samples of the substance within the drill hole within the tree in an attempt to trace sale of the poison to an individual. Mr Williams confirmed to you that he had not observed any suspicious activity at the Land in the preceding weeks that may assist the Council in its investigation.

15. On 22 March 2017, the Council received an email from Kyra Gustavsson, sent on the behalf of the owners of Strata Corporation 4140, 2 Richardson Avenue, Tranmere, expressing concern as to the safety of the subject tree and asking for assistance in its removal.

16. On 23 March 2017, Mr Williams sent an email to the Council asking it if it could obtain an "ISP search order" as part of its investigation and confirmed that the decline of the tree was a matter of concern for a number of neighbours.

17. On 23 March 2017, Mr Pierce emailed you to confirm the matters discussed with you at paragraph 13 above and, additionally, that a Cyprus Pine tree in the front yard of the Land had also recently died. He confirmed that Mr McManus had spoken to tradesmen working at a site adjacent to the Land and they had also observed a stranger acting suspiciously around the Land some weeks ago. Mr Pierce provided you with Mr McManus's mobile number.

18. I understand that the Council determined not to proceed with further investigations at this point.

Further evidence in the Letter

19. The Letter claims that Ms Indren, the owner of 23 Richardson Avenue, Tranmere, noticed a truck parked across the driveway of the Land on or about 24 February 2017. Ms Indren did not see what was happening on the Land. She observed the health of the tree declining rapidly from that date.

20. The Letter suggests that this observation constitutes sufficient evidence to commence proceedings in respect of the tree-damaging activity under section 85 of the Act. It does not.

Tree-damaging activity and evidence required

21. Prior to explaining why the evidence gathered by the Council is insufficient, it is important to examine the law governing tree-damaging activity.

21.1 Section 44(1) of the Act states that the following constitutes an offence under the Act:

"*A person must not undertake development contrary to this Division*".

21.2 The "Division" referred to is Division 1 of Part 4 of the Act which requires that acts and activities of development only occur pursuant to a development approval issued by the Council.

21.3 Offences under section 44(1) of the Act can be actioned by way of a criminal prosecution, the issue of an enforcement notice under section 84 of the Act or the commencement of civil enforcement proceedings under section 85 of the Act. I will return to these options after examining the elements of the abovementioned offence.

21.4 The definition of "development" in section 4 of the Act includes, relevantly:

"*in relation to a regulated tree—any tree-damaging activity*".

21.5 Regulated trees are defined in regulation 6A of the Regulations. Significant trees are a sub-set of regulated trees which, in general terms, have larger trunk circumferences than a regulated tree.

21.6 The term "tree-damaging activity" is defined in section 4 of the Act to mean:

"*(a) the killing or destruction of a tree; or*

(b) the removal of a tree; or

(c) the severing of branches, limbs, stems or trunk of a tree; or

(d) the ringbarking, topping or lopping of a tree; or

(e) any other substantial damage to a tree."

21.7 In respect to subclause (b) of the abovementioned definition, clause 17 of Schedule 3 to the Regulations allows dead trees to be removed without this constituting development as defined under the Act. This means that dead trees can be removed without the need to first obtain development approval.

21.8 The term "to undertake development" is defined in section 4 of the Act to mean:

"*to commence or proceed with development or to cause, suffer or permit development to be commenced or to proceed*".

21.9 This definition "captures" persons who, themselves, commence or proceed with development as well as persons who cause, suffer or permit it to occur. The terms "cause" or "permit" are straightforward and capture circumstances where a land owner may arrange for, or allow a third party to breach the Act. To "suffer" a breach of the Act, an owner or occupier of land must have known about the breach, been in a position to prevent it and has taken no action to prevent it.[i]

21.10 In the present circumstances, to be able to take action concerning the alleged tree-damaging activity at the Land, the Council would need sufficient evidence to establish that:

21.10.1 the tree was a regulated tree; and

21.10.2 the tree was killed and/or suffered substantial damage; and

21.10.3 a person either killed or damaged the tree or caused, suffered or permitted this to occur.

22. A breach of section 44(1) of the Act can be pursued through a criminal prosecution, the issue of an enforcement notice pursuant to section 84 of the Act or by pursuing civil enforcement proceedings pursuant to section 85 of the Act.

23. In the circumstances of this case, a section 84 enforcement notice was not a viable option.[ii]

24. This left the Council with two options to consider, a criminal prosecution or civil enforcement proceedings.

25. A criminal prosecution under section 44(1) of the Act requires the informant (the Council) to prove all of the elements of the offence described at paragraph 21.10 above beyond reasonable doubt.

26. On my assumption that the subject tree:

26.1 was measured by Mr Haavisto; and

26.2 was assessed by Mr Haavisto to be a eucalypt,

the Council may be able to prove 21.10.1 above beyond reasonable doubt.

27. However, the Council has insufficient evidence to prove 21.10.2 above and 21.10.3 above beyond reasonable doubt as:

27.1 the substance observed in the drill hole on 17 March 2017 was not tested; and

27.2 no one observed who drilled the hole and applied the poison;

27.3 Mr Pierce claims he was away when the damage occurred; and

27.4 Mr McManus observed a third party acting suspiciously around the Land and there is no evidence to establish who that person is or if they have any relation to Mr Pierce.

28. The Letter raises the prospect of the Council having sufficient evidence to commence civil enforcement proceedings.

29. My advice is that the Council did not have sufficient evidence to commence civil enforcement proceedings at the time of its investigation in 2017 and that it does not presently have sufficient evidence to commence such proceedings.

30. I explain this advice in detail below.

30.1 The civil burden of proof is "on the balance of probabilities". To put this into plain terms, the Council must establish that it is more plausible than not that each of the elements described at paragraph 21.10 occurred as alleged by the Council than not.

30.2 My advice is that the Council is, on the basis of Mr Haavisto's evidence, in a position to establish the elements described at paragraphs 21.10.1 and 21.10.2 above on the balance of probabilities.

30.3 The Council is not, however, in a position to establish the element described at paragraph 21.10.3 above on the balance of probabilities.

30.4 To be able to establish that someone undertook the tree-damaging activity, the Council must have sufficient evidence to establish **who** drilled the hole in the base of the subject tree and inserted the poison or, alternatively, that Mr Pierce engaged someone to do so, allowed someone to do so or was aware someone was doing so and took no action to stop them.

30.5 As detailed at paragraph 27 above:

30.5.1 **no evidence** exists to establish who damaged the tree. The only evidence that exists is circumstantial evidence of a person driving a black Mercedes loitering in the vicinity of the Land at the time the subject tree is suspected to have been poisoned and of a truck parked across the driveway of the subject land. This evidence is wholly insufficient;

30.5.2 **no evidence** exists to link Mr Pierce (or indeed, any other identifiable person) with the tree-damaging activity. The tree was located in the front yard of the Land and could be accessed without his assistance. He claims to have been away prior to the tree being poisoned, that the only person he permitted to enter the Land for the purpose of undertaking works was a plumber who was not working near the tree as far as he is aware. It is wholly insufficient to simply claim that, as the owner of the Land, Mr Pierce must have been aware of the damage to the tree occurring. There must be some evidence linking him to the damage physically occurring for there to be any prospect of proving this element on the balance of probabilities.

Section 106A of the Act

31. Paragraphs 11 and 12 of the Letter suggest that section 106A of the Act may be utilised for "*a Development Application before the Court, not just in respect of proceedings for an offence*".

32. With the greatest of respect, it is not clear what is meant by this suggestion.

33. Section 106A of the Act provides the ERD Court with the ability, when it finds that a person has breached the Act by undertaking tree-damaging activity, to make certain Orders requiring, amongst other things, the establishment of a tree or trees of a king specified by the Court. The full text of section 106A is set out at paragraph 11 of the Letter.[iii]

34. It is my reading of section 106A that it can operate in the context of either a criminal prosecution or civil enforcement proceedings. It is not limited to criminal prosecutions only. To this extent I agree with the Letter.

35. However, before the ERD Court may make Orders under section 106A of the Act, it must make findings that a person has breached the Act by undertaking tree-damaging activity. Before such findings are made, either a criminal prosecution or civil enforcement proceedings must be initiated by the Council or another person.

36. As per paragraphs 21 – 30 above, my advice is that the Council has insufficient evidence to establish, on the balance of probabilities, that Mr Pierce, or any other person, undertook tree-damaging activity to the subject tree.

37. I confirm that the present development application, DA 170/0853/19/RF, is not before the ERD Court. This development application is before the Council for assessment by its delegates as required by section 56A of the Act. The only instance where a development application is considered by the ERD Court is during an appeal commenced against a decision made on a development application.

38. Again, it will take the commencement of a prosecution or civil enforcement proceedings and for the Council or another person to be successful in convincing the ERD Court on the relevant standard of proof that Mr Pierce or another person undertook tree-damaging activity to the subject tree, for section 106A to operate.

The Council's actions and estoppel

39. Though the Council could have pursued questioning with Mr McManus further after the last email received from Mr Pierce, it was not unreasonable of the Council to cease its investigation as it decided to do in 2017.

40. The fact that the Council ceased its investigation, and it is now close to three years after this occurred does have a significant impact on the Council's ability to commence enforcement action against Mr Pierce.

41. In the absence of very strong and compelling new evidence to implicate Mr Pierce, the Council is effectively estopped from taking action against him.

42. The term "estoppel" is a legal concept which prevents a statutory authority (i.e. the Council) from taking legal action against a person where the authority's actions or omissions have caused the person to reasonably assume that such action will not be taken.

43. The fact that the Council ceased its investigation close to three years ago, was subsequently was aware of the lawful removal of the subject tree and has been processing DA 170/0853/19/RF means that even if it had sufficient evidence, if it were to commence civil enforcement proceedings against Mr Pierce now, the ERD Court will most likely find that the Council is estopped from doing so and will decline to make Orders against Mr Pierce. In such circumstances, I consider it highly likely that the Court will also Order that the Council pay Mr Pierce's legal costs, which costs may well be awarded on the highest basis possible.[iv]

44. The only manner by which the Council could commence civil enforcement proceedings against Mr Pierce now without exposing itself to a significant risk of an adverse costs order would be if new and compelling evidence against him were discovered. The Letter does not constitute such evidence.

45. I confirm that the abovementioned-risk applies to civil enforcement proceedings which are commenced but later withdrawn or otherwise discontinued by the Council. It is not advisable to commence "place holder" litigation before the expiry of the three-year statutory limitation period. Civil enforcement proceedings should never be commenced without sufficient evidence.

46. To the extent that the three-year limitation period is of concern to the Council, I confirm that the Council is entitled to apply for an extension of time to commence civil enforcement proceedings against Mr Pierce pursuant to section 85(12) of the Act. Such extensions are often applied for by Councils and are often granted by the Attorney-General, particularly in circumstances where new and compelling evidence is obtained after the expiration of the limitation period.

47. As such, the expiration of the three-year statutory limitation period should not be of material concern to the Council in these circumstances.

The development application

48. I confirm that the Council cannot lawfully defer its consideration of DA 170/0853/19/RF or otherwise hold it in abeyance.

49. The subject tree was removed some years ago. The present development application proposes development on the Land in the absence of the tree. Without legal proceedings seeking the planting of new trees on the Land "on foot", the Council has no lawful basis to defer processing and determining DA 170/0853/19/RF.

Recommendations

In making these recommendations, I confirm that I understand the concern of the persons who instructed the Letter to be sent.

Unfortunately however, the abovementioned concerns do not provide the Council with sufficient evidence to commence enforcement proceedings against Mr Pierce, nor any other person, in regards to the alleged tree-damaging activity pursuant to section 85 of the Act.

My recommendations are as follows:

50. that the Council continue to process DA 170/0853/19/RF in accordance with the requirements of the Act; and

51. that the Council not commence legal proceedings against Mr Pierce concerning the alleged tree-damaging activity at this time;

52. that I be instructed to respond to the Letter, confirming:

    52.1 the extent of the Council's investigation;

52.2 the reasons why legal proceedings will not be commenced at this time;

52.3 the requirements for an application under the *Freedom of Information Act 1991* for access to the requested documents;

52.4 the evidence that the Council would require to commence civil enforcement proceedings for the tree-damaging activity;

52.5 that the Council will consider any further evidence provided to it;

52.6 that, should the required evidence be produced to the Council, the Council is entitled to apply for an extension of time to commence civil enforcement proceedings against Mr Pierce pursuant to section 85(18) of the Act;

52.7 that, should the residents not be satisfied with the Council's response, it is open to them to commence their own legal proceedings against Mr Pierce pursuant to section 85(1) of the Act and, to the extent that may be necessary, to obtain an extension of time to do so pursuant to section 85(18) of the Act.

Please confirm that I may respond to the letter as recommended at paragraph 52 above.

In the meantime, please call me with any questions.

Yours sincerely
KELLEDYJONES LAWYERS



VICTORIA SHUTE
Direct Line: 08 8113 7104
Mobile: 0423 004 339
Email: vshute@kelledyjones.com.au

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[i] *Wright v City of West Torrens* (1996) 91 LGERA 197.

[ii] This is because directions in an enforcement notice can only direct a person to refrain from or make good their breach of the Act. A tree that has been fatally poisoned cannot be restored to health, nor will requiring further poisoning to be refrained from assist in restoring the tree or preventing its death.

[iii] For convenience, I set out section 106A of the Act below.

106A—Make good orders

(1) If in any proceedings under this Act a court finds that a person has breached this Act by undertaking a tree-damaging activity, the court may, by order, direct a specified person to do 1 or more of the following:

(a) to establish a tree or trees of a kind specified by the court in a place or places specified by the court;

(b) to remove any buildings, works or vegetation that have been erected, undertaken or planted at or near the place where the regulated tree was situated since the breach occurred;

(c) to nurture, protect and maintain any tree or trees until they are fully established or for such period as may be specified by the court, or to make a payment or payments towards the maintenance of any tree or trees.

(2) A court acting under subsection (1) may make any ancillary order as the court thinks fit.

(3) A court must, before making an order under subsection (1) directed at a person who is not an owner or occupier of the relevant land, ensure that reasonable steps have been taken to give notice of the relevant proceedings to an owner or occupier of the land.

(4) If a person to whom an order under subsection (1) applies is not an owner or occupier of the relevant land at the time of the making of the order, the court may authorise the person (or a person authorised by him or her)—

(a) to enter the land with such materials and equipment as are reasonably necessary to comply with the order; and

(b) to enter and cross any land specified in the order with the materials and equipment referred to in paragraph (a) for the purpose of gaining access to the relevant land.

(5) Subject to subsection (6), an order under this section will cease to apply with respect to land if or when the land is sold to a genuine arms-length purchaser for value.

(6) Subsection (5) does not apply if the order is noted against the relevant instrument of title or, in the case of land not under the provisions of the Real Property Act 1886, against the land under a scheme prescribed by the regulations for the purposes of this subsection.

(7) A court that has made an order under this section may, on application, vary or revoke the order.

(8) A person who fails to comply with an order under subsection (1) or (2) is, in addition to any liability for contempt, guilty of an offence.

Maximum penalty: $60 000.

(9) An owner or occupier of land, or any other person, who hinders or obstructs a person in carrying out the requirements of an order under subsection (1) or (2) or entering or crossing land under subsection (4) is guilty of an offence.

Maximum penalty: $15 000.

[iv] Costs are generally awarded at different levels. Party-party costs mean that the successful party is entitled to claim costs arising from the legal proceedings and attendances at Court at the scale set by the Court. Such costs usually represent 50-60% of actual legal costs incurred on legal proceedings and do not cover legal advice. In circumstances where legal proceedings are brought by a statutory authority (i.e. the Council) and the authority is estopped or otherwise has insufficient evidence to prove their case, Courts can award costs on a full solicitor-client basis which means that the other party is entitled to reimbursement for all of their costs incurred. Such amounts can reach hundreds of thousands of dollars.