

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

PATEL v CONSERVATOR OF FLORA AND FAUNA (Administrative Review) [2020] ACAT 105

AT 41/2020

Catchwords:

ADMINISTRATIVE REVIEW – application for removal of a tree – whether the tree presents an unacceptable risk from falling branches – whether cracking damage to the house is caused by the tree – whether it is also demonstrated that all other reasonable remedial and mitigation measures have been determined to be ineffective – decision under review confirmed

Legislation cited:

ACT Civil and Administrative Tribunal Act 2008 ss 26, 69
Tree Protection Act 2005 ss 8, 10, 15, 21, 25, 107B

Subordinate

Legislation cited:

Tree Protection (Approval Criteria) Determination 2006 (No 2) DI2006-60

Cases cited:

Bozin v Conservator of Flora and Fauna [2010] ACAT 91
Maatouk v Conservator of Flora and Fauna [2015] ACAT 10

Tribunal:

Senior Member A Davey (Presiding)
Senior Member D Kerslake

Date of Orders:

9 December 2020

Date of Reasons for Decision:

9 December 2020

**AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL)**

AT 41/2020

BETWEEN:

RAHUL PATEL
Applicant

AND:

CONSERVATOR OF FLORA AND FAUNA
Respondent

TRIBUNAL: Senior Member A Davey (Presiding)
Senior Member D Kerslake

DATE: 9 December 2020

ORDER

The Tribunal orders that:

1. The decision under review dated 15 May 2020 is confirmed.

.....
Senior Member A Davey
For and on behalf of the Tribunal

REASONS FOR DECISION

Introduction

1. This is an application pursuant to section 107B of the *Tree Protection Act 2005* (the **Tree Protection Act**). The **applicant** Dr Rahul Patel has sought review of a decision made by the Conservator of Flora and Fauna (the **respondent**) refusing¹ to approve removal of a tree at Block 8 Section 51 Turner ACT (the **premises**). The **tree** is a *Carya illinoensis*, commonly known as a pecan tree.
2. The applicant, together with his wife Ann Patel (**the lessees**), purchased the premises in 2016. The tree is in the middle of the back yard, measuring some 18 metres in height with a canopy width of similar dimensions.
3. The lessees state that they became concerned over the course of a two-year period following purchase when several branches fell to the ground in their back yard and into an adjoining property. In 2018 they applied to the respondent for permission to remove the tree.² The tree was not listed on the ACT Tree Register but was nevertheless protected under section 8 of the Tree Protection Act because it both exceeded 12 metres in height and had a canopy more than 12 metres wide. Permission was refused. The lessees state that they became further concerned when they later noticed widening cracks at the side and rear of the house. They arranged for the house to be inspected by a structural engineer, who advised that the cracks were caused by the interaction between the tree's roots and the surrounding soil.
4. The lessees thereupon lodged a second request with the respondent, seeking permission to remove the tree.³ That application was refused on 17 March 2020⁴, prompting the lessees to seek an internal review of the decision.⁵ In accordance with section 107(1) of the Tree Protection Act, the application for reconsideration was referred to a Tree Advisory Panel (**TAP**) for advice. A member of the TAP inspected the tree and reported that the tree did not meet

¹ T documents pages 110-131

² Amended supplementary T documents pages 1-17

³ T documents pages 63-75

⁴ T documents pages 76-83

⁵ T documents pages 84-95, amended supplementary T documents pages 18-25

any of the criteria for removal.⁶ At a meeting on 12 May 2020 the TAP endorsed the report and recommended refusal of the application for reconsideration.⁷ On 15 May 2020 the respondent upheld the original decision.⁸ On 18 May 2020 a delegate of the respondent formally notified the applicant of the decision.⁹ On 12 June 2020 the applicant applied to the ACT Civil and Administrative Tribunal for an order to set aside the reconsidered decision and approve the tree's removal.¹⁰

Applicable legislation

5. Section 8 of the Tree Protection Act defines a protected tree to include a 'regulated tree'. Section 10(1) includes the threshold criteria for a regulated tree as a living tree that:
 - (a) is 12m or more high; or
 - (b) has a trunk with a circumference of 1.5m or more, 1m above natural ground level; or
 - (c) has two or more trunks and the total circumference of all the trunks, 1m above natural ground level, is 1.5m or more; or
 - (d) has a canopy 12m or more wide.
6. Section 15 of the Tree Protection Act renders it an offence to damage a protected tree without first obtaining approval from the conservator. The matters to which the conservator must have regard to in making such a decision are set out in section 25(3), namely:
 - (a) the approval criteria;
 - (b) the advice (if any) of the advisory panel;
 - (c) the advice (if any) of an entity to which the application was referred under section 24A; and
 - (d) anything else the conservator considers relevant.

⁶ T documents pages 96-103

⁷ T documents pages 104-105

⁸ T documents pages 106-198

⁹ T documents pages 110-131

¹⁰ T documents pages 1-62

7. Section 21 provides that the Minister may determine approval criteria to be applied by the conservator in considering an application to damage a regulated tree.
8. Section 107B of the Tree Protection Act further provides for review of a decision by the conservator by the tribunal following reconsideration of a decision originally made under section 25.
9. The Tree Protection (Approval Criteria) Determination 2006 (No 2)¹¹ (the **approval criteria**) made under section 21 of the Tree Protection Act sets out the criteria to be applied in determining whether to give approval for damage to a regulated tree in Schedule 1, paragraph 1, sub-paragraph (1):
 - (1) *The Conservator of Flora and Fauna (the conservator) may give an approval to damage a regulated tree under section 25 when:*
 - (a) *the tree is in decline and its life expectancy is short; or*
 - (b) *the tree represents an unacceptable risk to public or private safety; or*
 - (c) *the tree is shown to be causing or threatening to cause substantial damage to a substantial building, structure or service; or*
 - (d) *the location of the tree is inappropriate given its potential size and growth habit (excluding remnant eucalypts); or*
 - (e) *the tree is substantially affecting solar access to the lessees lease, or neighbouring lease, during winter between the hours of 9am to 3pm and pruning is not sufficient to remedy this (excluding remnant eucalypts); or*
 - (f) *the tree is causing an allergic reaction to an occupant of the lease, or neighbouring lease, and the claim can be supported by certification from a relevant medical specialist; or*
 - (g) *where the tree is part of a close planting of a number of trees, the removal of the tree will allow the other trees to develop; and*

all other reasonable remedial treatments and risk mitigation measures have been determined to be ineffective.
10. Section 69 of the *ACT Civil and Administrative Tribunal Act 2008* (the **ACAT Act**) provides that in reviewing administrative decisions the Tribunal ‘stands in the shoes’ of the original decision maker. That is to say, the Tribunal exercises

¹¹ Disallowable Instrument DI2006—60

the same powers and discretion as those available to the original decision maker and its determination is taken to be the decision of the original decision maker.

11. Section 26 of the ACAT Act provides that in considering each case the Tribunal may inform itself in any way it considers appropriate in the circumstances.

The application

12. The applicant contends that the correct and preferable decision is for the Tribunal to set aside the respondent's decision and find that the approval criteria for removing the tree are met, in that: (a) the tree (in the applicant's view) represents an unacceptable risk to private safety;¹² (b) the tree is shown to be causing substantial damage to a substantial structure;¹³ and (c) all other remedial treatments and risk mitigation measures have been determined to be ineffective.¹⁴ The applicant did not seek to argue that criteria (a) or (d)-(g)¹⁵ were applicable.

The hearing

13. The applicant represented himself, assisted by Mrs Ann Patel. He called as witnesses Mr Tarek El-Ansary (structural engineer), Mrs Ann Patel, Mr Adam Bak (neighbour), Mr Thomas Clark (resident), Mr Kieran Wallace (arborist), and Mr Matthew McGuinness (building inspector). Mr Nigel Oram, of counsel, represented the respondent, and called as witnesses Mr Linden Coot (structural engineer) and Dr Peter Coyne (chair of the Tree Advisory Panel).
14. On the morning of the hearing which commenced on 21 September 2020 the Tribunal conducted an onsite inspection of the premises, and an adjoining property which has branches overhanging it from the tree, in the presence of the applicant and Mrs Patel, witnesses for the applicant, the respondent's legal representatives, officers of the respondent, and the respondent's witnesses.

¹² Relating to criterion (b) in the approval criteria—Tree Protection (Approval Criteria) Determination 2006 (No 2)—i.e. Schedule 1, paragraph 1(1)b

¹³ Relating to criterion (c) in the approval criteria, i.e. Schedule 1, paragraph 1(1)c

¹⁴ Addressing the final clause in Schedule 1, paragraph 1(1), of the approval criteria, which must be met in all cases

¹⁵ Approval criteria, Schedule 1, paragraph 1(1)

15. The Tribunal's attention was drawn to cracks in the walls of the house at the premises. The Tribunal noted the position and character of the tree in the back yard and observed dead branches which were said to have fallen from the tree in the past. The Tribunal noted the general topography of the block and the location of the tree in relation to the house, and the extent of the canopy in relation to the property boundary and the pool and other features on the adjoining property. While on site the Tribunal was also shown features of the stormwater drainage, and of the street tree in front of the premises.

Issues to be determined

16. The issues for determination are:

- (a) whether any of the approval criteria are satisfied, in this case relating to:
 - (i) criterion (b), as to whether the tree presents an unacceptable risk (from falling branches), or
 - (ii) criterion (c) whether the cracking damage to the house is caused by the tree;
- (b) and if either of these criteria is satisfied, whether it is also demonstrated that all other reasonable remedial and mitigation measures have been determined to be ineffective.

Consideration of issues

Risk from falling branches

17. It was not disputed by either party that all trees pose some level of risk in that they all drop branches from time to time. The issue to be decided – as set out in the approval criteria – is whether this particular tree poses an **unacceptable** degree of risk. The Tribunal accepts that the applicant and Mrs Patel, together with their tenants and their neighbour, have a level of apprehension about the risks they consider to be associated with this tree. It was quite evident from the several witnesses for the applicant, and demonstrated at the field inspection, that falling branches had been observed on a number of occasions, and that while no injuries had actually resulted, residents and neighbours were apprehensive about the risk of injury or worse, and said they had reduced the extent of the usage they would otherwise make of the area beneath the tree.

18. Mr Tom Clark, a resident at the premises, gave evidence¹⁶ that he had observed branches fall from the tree, and as a consequence he was careful to use the back yard sparingly. He considers the tree to be dangerous. Mr Adam Bak, a neighbour whose yard is partly underneath the canopy of the tree, gave evidence¹⁷ that the tree dropped debris including branches into his yard and pool, and that he had reported the fall of larger branches to the applicant or Mrs Patel. Mrs Patel gave evidence¹⁸ about the history of dealing with the issues associated with the tree, about her research in obtaining background information about the species¹⁹, about her frustrations in getting practical help to deal with the risk, and the significant delays caused by the fact a powerline was involved. It was clear that she was quite apprehensive about the risk from falling branches for residents of the premises and its neighbour. Dr Peter Coyne, with qualifications in forestry and with experience in statistical analysis and risk management, and current chair of the Tree Advisory Panel, gave evidence²⁰ on behalf of the respondent in which he reviewed the literature submitted by the applicant²¹, stating that branch drop was extremely common in a very wide range of species. His opinion was that this particular species was regarded as generally strong, that this specimen was generally healthy and well structured, and in relation to the many other species observed in the Canberra urban environment, with normal maintenance this specimen did not present unusual or elevated risk.
19. The applicant called into question some aspects of the risk assessment undertaken by Dr Coyne, pointing out also that the minutes of the Tree Advisory Panel recorded little of substance on critical aspects of its consideration of the application, especially on the subject of risk assessment. The Tribunal agrees that more detailed minutes were desirable (although this would not have altered the findings set out below).

¹⁶ Exhibit A4

¹⁷ Exhibit A5

¹⁸ Exhibit A6

¹⁹ Exhibit A6, annexes 3-7

²⁰ Exhibit R3

²¹ Exhibit A6, annexes 3-7

20. The applicant argued that the precautionary principle²² should determine the outcome in assessing the risk from the tree. On the other hand, two tree experts who gave evidence in the hearing were very clear that in considering the risk posed by the tree, likelihood was as important a determinant as consequence. The applicant called as a witness Mr Kieran Wallace, an experienced arborist with extensive industry accreditation, and qualified in the QTRA²³ risk assessment framework. He had provided the applicant with quotes for removal of the tree, or for several levels of pruning.²⁴ He told the Tribunal that although he had not been asked by the lessees to provide a risk assessment, based on his QTRA training if he had completed one he doubted that he would have concluded there were risk grounds to recommend removal of the tree. He gave a convincing explanation as to the several factors in relation to this tree which resulted in quotes for pruning options consistent with the relevant standard²⁵, or for approved work beyond it, involving quite significant costs. Mr Wallace explained that once initial treatment was completed, the costs of regular follow-up maintenance would be significantly less. In his view, a minor prune under the Australian Standard AS4373 is all that he would recommend from a risk perspective.
21. This view concurred with the evidence presented by Dr Coyne on behalf of the respondent, who contended that adoption of the precautionary principle contended by the applicant would be inconsistent with the Tree Protection Act.
22. When the evidence of both experts is taken into account, in particular their agreement that the risk presented by the tree is not unacceptable, and in the absence of other persuasive evidence, the Tribunal is not satisfied that evidence has been demonstrated to conclude that the requirements of approval criterion (b)²⁶ have been met, sufficient to support removal of the tree.

²² For example, lack of full scientific certainty should not be used as a reason for postponing preventive action

²³ Quantified Tree Risk Assessment

²⁴ Annex 9 (quote for minor prune) & Annex 10 (quote for major prune) to Exhibit A6, witness statement of Ann Patel

²⁵ Australian Standard on Pruning of Amenity Trees AS4373-2007

²⁶ The tree represents an unacceptable risk to public or private safety.

Damage to buildings and whether the damage is attributable to the tree

23. It remains to consider the application of approval criterion (c).²⁷ It was not in dispute that the buildings at the premises constitute substantial structures.
24. Called as a witness by the applicant, Mr El-Ansary²⁸ gave extensive evidence that in his opinion the cracking in the walls of the house is both substantial and consistent with being caused by the tree. On questioning by the respondent, Mr El-Ansary conceded that most of his long and diverse professional experience was in heavy deeply founded construction, although he had experience of remedial work in residential construction. His conclusions about the evidence were based on his classification of the site soil conditions as being highly reactive, even though the soil test he had commissioned had not included an independent site classification. Mr Coot²⁹, called as a witness by the respondent and with a background in residential forensic and remediation work, was strongly of the view that the site had been mis-classified, that the cracking was fairly normal, and that in any case while the tree likely made some contribution to the cracking, there were other significant contributions, especially from poor drainage around the site. In his opinion the indicators showed that there was inadequate or marginal fall in the drainage system. He argued that the evidence on site provides much stronger support for contribution from abnormal drainage than from the tree. His conclusions were based on a plumber's camera survey of the pipework, but apart from a summary sketch, the results had not been included in his report. The structural engineers were in broad agreement about many of the technical aspects of site classification and application of the provisions of the standard³⁰, but were not in agreement about the actual site classification at the premises³¹, the extent to which some of the guidelines were applicable in the soil and climatic conditions found in Canberra, in interpreting the structural significance of the cracking observed in the building at the premises, or in attributing the observed cracking predominantly

²⁷ The tree is shown to be causing or threatening to cause substantial damage to a substantial building, structure or service.

²⁸ Exhibit A1

²⁹ Exhibit R1

³⁰ Australian Standard for Residential slabs and footings AS2870-2011, Section 2

³¹ Categorisation of the site under the standard was sensitive to soil classification, and therefore the conclusions that might be drawn about the significance of the cracking was also sensitive to site classification

to the tree. Mr Coot did not agree with Mr El-Ansary's opinion that the shape of the cracking enabled determination of direction to the source or was a reliable means of proving causation. While both witnesses were clearly well qualified, on these issues the evidence of Mr Coot was generally more persuasive than that of Mr El-Ansary, in justifying his opinions and in explaining the links between the principles on which they were based and the conclusions he would draw from the evidence. Mr Coot disputed that the extent of cracking even constituted substantial damage under the Australian Standard AS2870, and his opinion was that the most appropriate remedial measures would involve removal of the abnormal moisture conditions, in this case by repairing leaks, removing ponding and ensuring more adequate fall in the drainage system.

25. The applicant contended that the cracks in the house became substantially worse during the period 2018-2020 and that this is not accounted for in the Coot analysis. In support of that contention, the applicant called Mr Matthew McGuinness, a building inspector who had compiled the building report³² at the time the applicant and Mrs Patel had purchased the property in 2016. Mr McGuinness stated that he had not observed any cracks as great as 5mm or wider at that time, though he conceded he had not measured the width of the cracks he did observe. Even accepting that the cracks may have worsened over this period, the Tribunal would still need to be satisfied, in accordance with the approval criteria, that the tree was the major or at least a substantial contributor to this outcome as opposed to other possible significant causes.
26. In that regard the Tribunal notes the acknowledgement by Mr Coot, witness for the respondent, that the tree likely made *some* contribution to the existing damage. Other possible causes were canvassed in evidence to the Tribunal, however. Variation in moisture content because of changes in weather patterns (possibly in conjunction with, but also possibly independently of, interaction with tree roots) was one. Temporary or ongoing failure of drainage was another. The Tribunal also notes a report on subsurface sampling commissioned by Mr El-Ansary on the applicant's behalf. While Mr El-Ansary concluded, based on that report, that the soil character in the zone of the tree was "highly reactive

³² Witness statement of Matthew McGuinness, dated 16 July 2020, to which is attached a property inspection report dated 5 July 2016

clay”, the report added the rider that the results provided “are indicative of the sub-surface conditions only at the specific sampling and/or testing locations, and then only to the depths investigated and at the time the work was carried out”.³³ The report itself did not “include comment on the possible cause(s) of the existing wall cracking, nor the influence or otherwise of the soil conditions present”,³⁴ noting also that “groundwater conditions rarely remain constant and can change seasonally due to variations in rainfall, temperature, soil permeability and other factors”.³⁵ In the final analysis, the Tribunal is left with a number of possible causes of the damage to the house, none of which can be discounted based on the evidence presented. The Tribunal is unable, therefore, to conclude on the balance of probabilities, that the tree has been demonstrated to be the cause of substantial damage to the structure of the house.

Conclusions

27. Under the Tree Protection Act it is incumbent on the applicant to demonstrate that at least one of the approval criteria has been met, and if so also to demonstrate that all other reasonable remedial and mitigation measures have been determined to be ineffective.³⁶
28. In its assessment of the evidence relating to the two criteria on which the applicant sought to establish that the tree should be approved for removal, the Tribunal has concluded that it cannot be satisfied either criterion has been met.
29. While there is always a level of risk associated with the possibility of branches falling from any tree, this particular case requires persuasive evidence that the tree poses an unacceptable risk to private or public safety. For the reasons set out above, the Tribunal is not satisfied on the balance of probabilities that this test has been met.
30. In relation to damage to the house structure, the Tribunal is not satisfied on the balance of probabilities that the tree has been demonstrated to be the dominant

³³ Douglas Partners Report dated 3rd August 2020, Exhibit A1, Attachment A page 4

³⁴ Douglas Partners Report dated 3rd August 2020, Exhibit A1, Attachment A page 1

³⁵ Douglas Partners Report dated 3rd August 2020, Exhibit A1, Attachment A page 3

³⁶ *Božin v Conservator of Flora and Fauna* [2010] ACAT 91; *Maatouk v Conservator of Flora and Fauna* [2015] ACAT 10

causal factor involved, and that the contribution from any other potential causal factor is not significant.

31. The second part of the test under the approval criteria requires persuasive evidence to establish the ineffectiveness and unreasonableness of remedial measures other than removal. Because the first parts of the relevant criteria have not been met, the second part of the test under the criteria does not arise, but the Tribunal notes for completeness that it is not satisfied that alternative treatments have been demonstrated to be ineffective or unreasonable.
32. The Tribunal therefore confirms the decision of the respondent to refuse permission for removal of the tree.

.....
Senior Member A Davey
For and on behalf of the Tribunal

Date(s) of hearing	27 October 2020
Applicant:	In person
Counsel for the Respondent:	Mr N Oram
Solicitors for the Respondent:	ACT Government Solicitor