

9 October 2024

Phillipa and Darren Bain
27 King Street
Mosgiel 9024

Via email: pip@a1electrical.co.nz

Dear Phillipa and Darren

RESOURCE CONSENT APPLICATION:

**LUC-2024-171
27 KING STREET, MOSGIEL**

The above application for the removal of a Scheduled Tree (T666) at 27 King Street, Mosgiel, was processed on a publicly notified basis in accordance with section 95 of the Resource Management Act 1991. A Hearing Committee, comprising Independent Chairperson Meg Justice and Councillors Sophie Barker and Steve Walker, heard and considered the application at a hearing on 12 September 2024.

At the end of the public part of the hearing, the Panel, in accordance with section 48(1) of the Local Government Official Information and Meetings Act 1987, resolved to exclude the public.

A site visit was undertaken by the Hearings Committee on Monday 16th September 2024.

The Committee has declined consent to the application on 9 October 2024. The full text of this decision commences below.

The Hearing and Appearances

The applicant, Phillipa Bain, was present at the hearing and spoke to the applicant's application. Peter Waymouth (Consultant Arborist) attended the hearing on behalf of the applicant and spoke to his evidence.

Council staff attending were:

Campbell Thomson (Senior Planner/Advisor to Committee), Finn Campbell (Processing Planner), Luke McKinlay (Landscape Architect), Mark Roberts (Consultant Arborist) and Wendy Collard (Governance Support Officer).

One submitter, Jim Moffatt (representing Protect Private Ownership of Trees Society (POTS)) attended and presented at the hearing.

Procedural Issues

No procedural issues were raised.

Principal Issues of Contention

The principal issues of contention are as follows:

- The form, vigour and vitality and visibility of the tree; and
- The risks to buildings and the safety of people associated with the tree.

Summary of Evidence

Introduction from Processing Planner

Mr Campbell outlined the application and presented a brief summary of his assessment of the proposal.

The Applicant's Case

Ms Bain spoke to the application and then responded to questions from the Committee. Ms Bain advised that they had purchased the property in 2016 and since that time had undertaken some works pruning the Pin Oak Tree and unblocking gutters due to leaf drop from the tree, all of which was costly. Ms Bain explained that their property is not of a size that could be subdivided so they could not benefit financially from the removal of the tree. Ms Bain considered that the tree was in the wrong location as it was too close to their dwelling. Ms Bain considered that the tree has undergone considerable growth since 2020, following works to thin and reduce the crown of the tree, and she expressed concerns about how much more it could grow. Ms Bain emphasized that the tree was causing her family considerable concern and stress, based on risk to their dwelling and its occupants in the event of the tree, or branches of the tree, failing and falling towards or onto their dwelling.

Mr Waymouth, arborist for the applicant, spoke to the main points of his evidence. He reiterated his qualifications and experience as an arborist and discussed the differences between the findings of his STEM assessment and the STEM assessment contained in the s42A report, which were the findings on tree form and vigour/vitality and visibility. Mr Waymouth commented that, in his view, the tree was not easily visible from a distance of 1km with the naked eye. Mr Waymouth also provided comments on the risk assessment he had undertaken for T666 and the examples he had presented of other Pin Oak trees on the Taieri Plains failing.

Submitter Presentation

Mr Moffatt expressed the view of POTS on the application. He commented that POTS supported the removal of T666 as he considered that people's enjoyment and use of their properties should be prioritised over the protection of a tree. He presented a STEM assessment of T666 and acknowledged that he was presenting this information as an advocate rather than an expert arborist. When questioned by the Committee, Mr Moffatt advised that the subject tree (T666) did not, in his view, have any distinguishing features that set it apart from other protected trees in the Partially Operative Second Generation Dunedin City District Plan ("Partially Operative 2GP") Appendix A1.3 Schedule of Trees that could support its removal. However, Mr Moffatt did note that Pin Oaks produced bountiful seeds which can attract rodents.

Ms Monaghan, who lives at 27A King Street and submitted in support of the application, did not attend the hearing.

Council Officer's Evidence

Mr Roberts presented a summary of his evidence and responded to the comments made by Ms Bain. He remained of the view that, based on the Tree Risk Assessment he had carried out, the tree was in good health, and was a near specimen example of a Pin Oak tree. In response to questioning, Mr Roberts advised what was meant by the terms "near specimen". Mr Roberts responded to questions about the methodologies used to undertake a Tree Risk Assessment and stated that the methodology takes into account the impact a failure may cause on buildings. Mr Roberts advised that, in his view, structural support using cabling of the tree was not required as he considered the tree presented a low risk of failure.

Mr Roberts confirmed that the Electricity Regulations 2003, and any subsequent changes to them, would not override the provisions in the Partially Operative 2GP.

Mr McKinlay explained his assessment on amenity effects and confirmed that in his view the loss of the tree will result in localised adverse effects that are moderate-high, due to the trees' stature and prominence. Mr McKinlay also described his methodology for undertaking the 'visibility' assessment for the STEM assessment, and how in his view, the tree was visible with the naked eye from a distance greater than 1km. At the hearing Mr McKinlay tabled a Google Earth image and photographs of Mosgiel taken from 1 Fairmile Drive with T666 identified with a red circle, to assist with identifying the tree from a distance.

Processing Planner's Review of Recommendation

Mr Campbell reviewed his recommendation in light of the evidence presented at the hearing, maintaining his recommendation that consent be declined. Mr Campbell discussed the perceived risks associated with the tree expressed by Ms Bain and acknowledged that the concerns were real. However, he stated that the demonstrated risks of tree T666 failing, based on the Tree Risk Assessments undertaken by Mr Roberts and in part Mr Waymouth, did not justify the removal of the tree.

He confirmed that Policy 7.2.1.2 was the relevant policy to apply when considering the subject application. He reiterated his view that the proposal does not meet any pathways in clauses (a) through (X) of the policy which allow for the removal of a scheduled tree, and therefore the proposal was contrary to this policy.

Applicants Right of Reply

In closing, Ms Bain emphasised the anxiety that the tree is causing her family, that the tree was overhanging their dwelling and was in the wrong location for its size. Mr Waymouth reiterated that he was satisfied with his STEM scores in relation to form, vigour/vitality and visibility, based on his expert assessment. He retained the view that cabling of the tree would be an appropriate option for managing risks associated with the tree's possible failure for a short period of time as an 'insurance' policy. Mr Waymouth retained his view that the tree should be removed and referred to the examples of Pin Oak Trees failing on the Taieri Plains to support his view.

Statutory and Other Provisions

In accordance with Section 104 of the Resource Management Act 1991, the Planner's Report detailed in full the relevant statutory provisions and other provisions that the Committee considered. Regard was given to the relevant provisions in Section 7 of the Partially Operative 2GP, which sets out the policy framework and rules for resource consent applications concerning Scheduled Trees.

Statutory provisions considered included Sections 104, 104B and 104D.

Main Findings on Principal Issues of Contention

The Hearings Committee has considered the evidence heard and the relevant statutory and plan provisions in relation to the application. The main findings on the principal issues have been incorporated within the reasons for the decision discussed below.

Decision

The final consideration of the application, which took into account all information presented at the hearing, was held during the public-excluded portion of the hearing. The Committee reached the following decision after considering the application under the statutory framework of the Resource Management Act 1991. In addition, a site visit was undertaken by the Committee on Monday 16th September during the public-excluded portion of the hearing. This added physical reality to the Committee's considerations.

*That pursuant to Section 34A(1) and 104B and after having regard to Sections 104 and 104D of the Resource Management Act 1991, and the provisions of the Partially Operative Second Generation Dunedin City District Plan, the Dunedin City Council **declines** consent to a **non-complying activity** being the removal of*

Scheduled Tree T666 located at 27 King Street, Mosgiel, legally described as Lot 2 Deposited Plan 495976 (Record of Title 728796).

Reasons for this Decision

1. The Committee agrees that the proposal is a non-complying activity under the relevant provisions of the Partially Operative 2GP. The provisions of this plan relating to scheduled trees are beyond legal challenge and the equivalent provisions of the Dunedin City District Plan 2006 are no longer relevant to the consideration of this application.
2. The Committee agrees that in this case there is no relevant permitted baseline that could be applied to the effects assessment that would provide for the disregarding of effects of the proposal.
3. Evidence was provided to the Committee from Council's Consultant Arborist Mr Roberts and Landscape Architect Mr McKinlay that the STEM analysis upon which the original scheduling of the tree had been based was still relevant and that a similar score (156 points) would still be achieved by the tree in its present state. The Committee considered the evidence of Mr Waymouth in relation to the STEM scores he attributed to the tree's form, vigour/vitality and visibility. The Committee accepted the evidence of Mr Roberts in relation to the form and vigour/vitality of the tree. The Committee accepted the evidence of Mr Roberts that the vigour /vitality score is based on the current state of the tree rather than a possible future state. The Committee considered both Mr McKinlay's evidence and Mr Waymouth's evidence on the visibility of the tree and confirmed at the site visit that the tree was clearly visible with the naked eye from 1 Fairmile Drive, which is a distance of over one kilometre from tree T666. Therefore, the Committee accepted the evidence of Mr McKinlay in relation to the visibility score attributed to the tree. Overall, the Committee considered that the tree would retain a STEM score that would warrant its continued inclusion in the Partially Operative 2GP Schedule of Trees.
4. The Committee had regard to the risks to personal/public safety and to buildings associated with the tree and noted that the two arborists were generally in agreement that the tree is in good health, and there is no indication of rot or decay. While Mr Waymouth did not rule out that rot and decay may be present, no evidence to validate this was presented. Mr Waymouth's view that the tree should be removed is partly based on his experience of other Pin Oak trees failing, and he provided examples of this occurring on the Taieri Plains. The Committee is persuaded by the evidence of Mr Roberts that these examples do not provide insight into the health of Tree T666 nor the need for the removal of this tree. The Committee accepts the evidence of Mr Roberts that the risk posed by the tree is low.
5. The Committee accepts the evidence provided by Council's Landscape Architect that the removal of the tree would result in a moderate to high adverse effect on amenity values, and Mr Campbell's assessment that this would be a more than minor adverse effect on existing amenity values of the locality, given its state, attractive form and prominent position near the street.
6. The Committee accepts that the removal of the tree would result in localised positive effects including allowing increased sunlight into the dwelling and yard of 27 King Street and alleviating the health and safety concerns held by the applicant and neighbour who resides at 27A King Street. Removing the tree would also alleviate property maintenance associated with the tree. The Committee did not consider that these positive effects constitute a significant public benefit, which is the criteria in Policy 7.2.1.2.d.
7. The Committee considers that the proposal is inconsistent with the relevant objectives and policies of the Partially Operative 2GP and is contrary to Policy 7.2.1.2. Policy 7.2.1.2 is considered to be the most relevant policy to guide decision making on applications to remove scheduled trees. This

policy is directive, and it requires the avoidance of the removal of scheduled trees unless one of the six specific exemptions set out in the policy apply. None of the six exemptions apply to the subject proposal, and therefore the Committee agrees with Mr Campbell that the proposal to remove the tree is contrary to this policy.

8. The Committee concludes that the proposal will likely result in adverse effects on amenity values at a local level that will be more than minor and, on this basis, the first 'gateway' test of the Section 104D of the RMA is not met. However, while the Committee considers the proposal to be contrary with Policy 7.2.1.2, the Committee considers the proposal satisfies the second 'gateway' test in that the proposal is either consistent or inconsistent (and not contrary) with all the relevant objectives and policies of the Partially Operative 2GP, when considered in the round. As such, the Committee are able to consider granting consent to the proposal.
9. The decision of this Committee to decline the application has been guided by the provisions of the Partially Operative 2GP, and in particular Policy 7.2.1.2, and expert advice. To grant consent in this situation, where the specific provisions in the Partially Operative 2GP to guide decision making on Scheduled Tree removal are not met, would lead to an undesirable precedent being set.

Right of Appeal

Pursuant to Section 120(1A) of the Resource Management Act 1991, no right of appeal to the Environment Court against the whole or any part of this decision exists for the following:

- (a) *A boundary activity, unless the boundary activity is a non-complying activity;*
(Refer Section 87AAB of the Act for definition of "boundary activity.")

For all other applications, in accordance with Section 120 of the Resource Management Act 1991, the applicant and/or any submitter may appeal to the Environment Court against the whole or any part of this decision within 15 working days of the notice of this decision being received.

The address of the Environment Court is:

The Registrar
Environment Court
PO Box 2069
Christchurch Mail Centre
Christchurch 8013

Any appeal must be served on the following persons and organisations:

- The Dunedin City Council.
- The applicant(s).
- Every person who made a submission on the application.

Failure to follow the procedures prescribed in Sections 120 and 121 of the Resource Management Act 1991 may invalidate any appeal.

A handwritten signature in black ink, appearing to be 'M Justice', with a large, stylized flourish at the end.

Meg Justice
Chair
Hearings Committee

