

20 November 2018

J L Snow & J A Nielsen
27 Falkland Street
Dunedin 9010

Via email: jacquinielsen@yahoo.com

Dear John and Jacqui

RESOURCE CONSENT APPLICATION: LUC-2018-367
27 FALKLAND STREET
DUNEDIN

The above application for resource consent to remove a scheduled tree was processed on a publicly notified basis in accordance with Section 95 of the Resource Management Act 1991. The Consent Hearings Committee comprised of Independent Commissioners Colin Weatherall (Chairperson) and Ros Day-Cleavin and Councillor Jim O'Malley, heard and considered the application at a hearing held on 12 November 2018.

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

The Committee has **granted** consent to remove tree T442. The full text of this decision commences below with a consent certificate attached to this letter.

The Hearing and Appearances

The applicant was represented by Dr John Snow.

Council staff attending were:

John Sule (Committee Advisor), Lucy Collins (Processing Planner), Luke McKinlay (Urban Designer), Mark Roberts (Consultant Arborist) and Wendy Collard (Governance Support Officer).

Submitters in attendance included:

Jim and Beth Moffat from the Protect Private Ownership of Trees Society (POTS)

Procedural Issues & late Submission

No procedural issues were raised.

Principal Issues of Contention

The principal issues of contention are as follows:

- The significance of the tree and whether the adverse effects of the tree on the applicant outweigh the amenity values of the tree.
- The consideration of alternatives to removing the tree.
- Mitigation options for addressing the impacts of the trees removal.

Summary of Evidence

Introduction from Processing Planner

Lucy Collins outlined the resource consent application to remove tree T442 and the findings in her report. Ms Collins commented on the effects of the removal of the tree and advised that while she considered the effects on amenity to be more than minor she accepted the removal of the tree was the only practical means of resolving ongoing property damage to the retaining wall. On that basis the effects were considered acceptable. She indicated that her recommendation was to grant consent to the removal of the tree as its location meant that it was causing property damage now and it was likely to continue to cause problems as it grew.

Ms Collins also identified that the proposed Plan (2GP) provisions were now in effect. She outlined the rule changes for the Committee and the new non-complying activity status. She noted that as the application was lodged before the 2GP rules came into effect the application would retain its discretionary activity status under the operative District Plan. Ms Collins responded to questions from the panel on the activity status. The Committee Advisor noted that the threshold test would not need to be applied as the discretionary status of the application was retained.

In response to further questions from the panel, Ms Collins indicated that she considered the letter from Mark Seymour at 29 Falkland Street included with the application supporting the proposal as an affected party approval. She also noted that as there was uncertainty, Mr Seymour had been given an opportunity to lodge a submission on the application but chose not to.

In response to a question about the species of any tree planted as mitigation, Ms Collins noted the tree has cultural value relating to the time that it was planted and the area. If it was considered appropriate she noted that replacement trees could be planted that supported the same cultural and amenity value as to when the street was established.

The Applicant's Case

John Snow outlined the main reasons for the applicants seeking to remove the tree. He noted that they had given the matter serious consideration and the ongoing property damage that was likely to occur as the tree grew was key to their decision to seek to remove the tree. Dr Snow also indicated that the danger from slipping on tree detritus was a concern as were the health effects from pollen. He noted that he has slipped on two occasions as a result of tree detritus.

Dr Snow indicated in response to questions that they have not explored the option of relocating the tree or other options in any detail as these options did not appear practical. He indicated the limited community response to the tree that he had personally experienced was in relation to the negative impacts of the tree.

He responded to a question regarding the removal process noting that his intention was to remove as much of the tree as possible including the roots.

Evidence of Submitters

Jim Moffat identified the aims of POTS the group he represents and he spoke in support of the applicants being able to remove the significant tree on the site.

Mr Moffat supported the Planner's recommendation to grant consent to the removal the tree but he did not support the recommendation of the planner in relation to tree planting as mitigation. Mr Moffat considered the recommended mitigation proposal to be ultra vires and he signalled an intention to challenge any decision to include tree planting mitigation. He sought that the applicant be allowed to remove the tree "full stop".

Expert Advisors

Mark Roberts the Council's Consultant Arborist spoke to his report and he noted that the health of the tree is not being questioned in this case. He advised the Committee that he agreed in principle that the tree should be removed as it is the most practical response to the property damage issues but he noted that that the tree was also able to be moved and mitigation alternatives were available, but they would be expensive.

Mr Roberts responded to a question from the Committee Chair noting that from what he had observed the tree had been maintained in the past in accordance with good arboricultural practice.

In response to a question from the panel on risk Mr Roberts noted that he has assessed the tree using the two accepted international methods. Under both of these systems the risks come out as low as possible. He noted that this was because the tree is in good health and it is not a tree prone to limb failure and as the road is not a high use road or footpath. While the tree could fail in an extreme storm event, during that event it would be unlikely for anyone to be outside near the tree.

Mr Roberts raised the question of precedent and he had concerns about that aspect. This was discussed by the Committee. He noted that the tree was a good tree and qualified for protection consideration based on the STEM score but only a C+ in his view.

Luke McKinlay, the Council's Urban Designer spoke to his memorandum which discussed the amenity values of the tree. He noted that its amenity value is its stature and as it is a natural element contrast to the built environment. He accepted the issues of property damage were valid and on that basis the tree may need to be removed that he had recommended mitigation plantings.

He responded to a question from the panel on mitigation noting one tree would be suitable as mitigation. He noted that whether it was one medium tree or two small trees that it would not make much difference at the end of the day. He noted in response to a further question that he supported some flexibility for the applicant in the choice of tree. The Committee explored tree type and location with further questions to the both the arboricultural and landscape experts.

Processing Planner's Review of Recommendation

Ms Collins advised the panel that she had not heard anything at the hearing that would cause her to alter her recommendation. She noted that the conditions proposed on the planting of a tree, including the requirements for the size of the grow bag and reference to a commercial plant nursery, that were challenged by Mr Moffat were designed to give any tree selected a good chance of survival and ensure mitigation of amenity values would be more rapid.

She responded to further questions from the Committee accepting that additional conditions in relation to safe removal of the tree were appropriate given the size of the tree and its location close to the road.

Applicants Right of Reply

Dr Snow acknowledged the wonderful trees in Dunedin and he noted that the city benefitted from those trees. He read a short statement from his partner, Jacqui Nielsen, identifying the consideration they had given prior to the request to remove the tree and outlining her concerns regarding property damage and health and safety. Dr Snow confirmed that he had no issue with a condition to replant a tree.

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 the Committee considered. Regard was given to the relevant provisions of the following chapters of the operative Dunedin City District Plan: 4 Sustainability, 8 Residential Zones, and 15 Trees. The relevant objectives and policies of the Proposed Plan (2GP) and the 2GP rules under Section 7 of the 2GP were considered and the statutory provisions considered included Part 2 of the Act. Regard was also given to the Regional Policy Statement for Otago.

Main Findings on Principal Issues of Contention

The Hearings Committee has considered the evidence heard, the relevant statutory and plan provisions, the principle issues in contention. The main findings on the principal issues have been incorporated within the reasons 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.

*That pursuant to Section 34A(1) and 104B and after having regard to to Part 2 matters and Section 104 of the Resource Management Act 1991, and the provisions of the Dunedin City District Plan and the Proposed Second Generation Dunedin City District Plan, the Dunedin City Council **grants** consent to a **discretionary activity** being the removal of significant tree T422 on the site at 27 Falkland Street, Dunedin legally described as Pt Lot 20 DP 3652 (Computer Freehold Register OT279/95).*

Reasons for this Decision

1. With respect to the proposal to remove significant tree T422 the Committee took into account the submissions and evidence from the applicant, the written and oral submissions received, the evaluative evidence from Council's planner and the expert technical advice that had been provided.
2. The Committee acknowledged that the submissions received were all in support of allowing the removal of the tree.
3. The Committee considered the significance of the tree and the revised STEM assessment of the tree by Mr McKinlay. On balance they agreed the tree was a good example of a Himalayan Cedar that met the threshold for inclusion on the schedule but it accepted advice from Mr Roberts that while it was a good example of the tree it was a "C+" rather than a top specimen example.
4. The Committee agreed that due to the location of the tree near a retaining wall entrance path and Council road reserve property damage was occurring. Continued growth of the tree was likely to increase impacts on the retaining wall, entrance path and the road.
5. The Committee noted the advice from Mr Roberts that there was a low risk of harm from the tree in relation to failure of the tree or limbs but it was cognisant of a number of submitters identifying that there is a slipping hazard from the tree's detritus. It noted Mr Snow's advice to the Committee that he had slipped on the tree's detritus. It accepted the advice from Mr Roberts that the risk of tree or limb failure causing harm was 'as low as practicable' but it acknowledged that there was a potential slip hazard from detritus in certain conditions.
6. The Committee considered the amenity impacts arising from the loss of the tree and it agreed with the landscape architect and planner that there would be an adverse amenity impact from the loss of the tree.
7. In terms of the objectives and policies of the operative District Plan, the Committee noted that these were primarily directed at tree protection. It therefore considered that the proposed removal of a protected tree (T422) would at the least be inconsistent with the relevant objectives and policies in the operative District Plan. The objective and policies of the proposed Plan (2GP) were noted as being more directive indicating that removal should be avoided unless there were specified circumstances that applied. In this case a "*moderate to significant risk to buildings*" was a relevant consideration. The Committee noted that the definition of buildings in the 2GP may not extend to retaining walls but in this case, there is a garage associated with the retaining wall that would qualify as "buildings". It therefore noted that the reasons within those policies for

granting consent were relevant in this case in relation to the impact of a tree on buildings.

8. The Committee also considered the direction from the Environment Court in the Butterworth case in relation to Part 2 considerations. The Committee considers that there are some similarities with this application but it noted shading impacts from the tree are not raised as a significant concern by the applicant. It accepted that location and size of the tree means that the tree is already quite dominant on the site and it will continue to grow. The other difference from tree considered in the Butterworth case is that the tree is a good specimen whereas the tree in the Butterworth case was not of good form.
9. The Committee noted Mr Robert's concerns about precedent. It considered that each tree application is likely to have a different set of circumstances that apply to it. Despite this it acknowledges that the Council is charged with consistent administration on the District Plan rules when it determines the outcome of consent applications of this type. Granting consent to this application would mean that it would have to treat other similar applications in the same way. It therefore acknowledged that a decision to grant consent has some implications for the assessment of future applications if the situations are similar. In this case, the Committee acknowledges the tree is a good specimen but not a great specimen. It is poorly located and it is resulting in property damage. Mr Roberts acknowledged that while alternatives exist to removal they are likely to be costly. It agreed with Mr Roberts that with a more valuable healthy tree that closer scrutiny of alternatives is likely to be necessary.
10. The Committee concluded that the loss of amenity from removal of the tree was outweighed by the negative effects of the tree on the owners of 27 Falkland Street. The adverse effects of removal are therefore considered acceptable by the Committee and the Committee considers the removal of the tree will materially improve on-site amenity for the owners of 27 Falkland Street, avoid significant future building maintenance costs and avoid an ongoing slip hazard on the footpath. The Committee considered granting the consent to remove T422 would be consistent with the purpose of the Resource Management Act 1991 to promote the sustainable management of natural and physical resources.
11. The Committee considered the objections of Mr Moffat to replacement tree planting as mitigation. Mr Moffat suggested that requiring a replacement tree would be outside the scope of the application and "ultra vires". The Committee disagrees with this proposition. It noted that under Section 108(2)(c) of the RMA it can impose tree planting as a mitigation and such a condition would also relate to an effect arising from the activity necessary under Section 108AA. It also noted that the Environment Court imposed a replacement tree planting condition in its determination on the Butterworth case discussed in the Section 42A report. In this case, the applicants have also accepted planting a tree as a mitigation noting that they would diligently select a tree and a location for the tree that would prevent similar issues arising to those considered by the Committee in this application. The Committee has imposed conditions for a replacement tree as a long term mitigation measure but it has built some flexibility into the condition in relation to the species of tree and its location with the front yard. It accepted the reasons for a tree size recommendation from the planner that will allow mitigation to be effective earlier but as it is not known when the tree will be removed it allowed more scope on the timing of planting to ensure the tree was planted at an appropriate time.

12. The Committee noted the intention of the applicant is to remove as much of the tree as practicable and its close location to the footpath. These works are likely to require safe setbacks from the activity. As a result, it has imposed conditions in relation to removal to ensure the tree is safely removed from the site.

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;*
- (b) *A subdivision, unless the subdivision is a non-complying activity;*
- (c) *A residential activity, unless the residential activity is a non-complying activity.*

(Refer Section 87AAB of the Act for definition of "boundary activity", and refer to Section 95A(6) for definition of "residential 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.

Commencement of Consent

As stated in Section 116 of the Resource Management Act 1991, this consent will only commence once the time for lodging appeals against the grant of the consent expires and no appeals have been lodged, or the Environment Court determines the appeals or all appellants withdraw their appeals, unless a determination of the Environment Court states otherwise.

Yours faithfully



Colin Weatherall
Chair
Hearings Committee

Consent Type: Land Use Consent

Consent Number: LUC-2018-367

Purpose: Removal of a Significant Tree.

Location of Activity: 27 Falkland Street, Dunedin.

Legal Description: Pt Lot 20 DP 3652 (Computer Freehold Register OT279/95).

Lapse Date: 20 November 2023, unless the consent has been given effect to before this date.

Conditions

1. *The proposal shall be undertaken in general accordance with the relevant details and information submitted with resource consent application LUC-2018-367 received by the Council on 4 July 2018, except where modified by the following conditions.*
2. *The removal of tree T422 shall be in accordance with arboricultural best practice and undertaken by a suitably qualified person.*
3. *The consent holder shall advise the Council in writing of the date that T422 is to be removed. The written advice shall be provided to the Council at least five (5) working days prior to the removal of the tree.*
4. *Prior to undertaking the tree removal work a traffic management plan prepared by a suitably qualified person is to be submitted to and approved by the resource consents manager. The Traffic Management Plan must include details of signage and proposed traffic control method to ensure safe and efficient operation of the transport network during the removal operation.*
5. *All waste generated by the removal works shall not cause a nuisance and shall be suitably disposed of within 7 days of the completion of the pruning works.*
6. *The person exercising this consent shall take all reasonable measures to ensure the use of machinery for the removal of T422 shall be limited to the times set out below and shall comply with the following noise limits (dBA);*

Time Period	Weekdays		Saturdays	
	(dBA)		(dBA)	
	Leq	L _{max}	Leq	L _{max}
0730-1800	75	90	75	90
1800-2000	70	85	45	75

Sound levels shall be measured and assessed in accordance with the provisions of NZS 6803: 1999 Acoustics – Construction noise. No work is undertaken on Sundays or Public Holidays nor between 8.00pm to 7.30am Weekdays or Saturdays.

7. *The consent holder must plant a tree in an appropriate location within the front yard of 27 Falkland Street to mitigate the amenity effects of removing significant tree T442. (See Advice Note 6)*

8. *The tree must be planted within the first planting season following the removal of the Cedar (T442).*
9. *The tree must be supplied from a commercial nursery and must be growing in a bag (at least 50-litres) at the time of planting.*
10. *The tree must be adequately maintained and in the event that the tree dies, it must be replaced as soon as practicable.*

Advice Notes

1. Please note this approval is a resource consent approval. Please check with the Council's Building Control Office, Development Services, to determine the building consent requirements for the work.
2. In addition to the conditions of a resource consent, the Resource Management Act 1991 establishes through Sections 16 and 17 a duty for all persons to avoid unreasonable noise, and to avoid, remedy or mitigate any adverse effect created from an activity they undertake.
3. Resource consents are not personal property. This consent attaches to the land to which it relates, and consequently the ability to exercise this consent is not restricted to the party who applied and/or paid for the consent application.
4. It is the consent holder's responsibility to comply with any conditions imposed on their resource consent prior to and during (as applicable) exercising the resource consent. Failure to comply with the conditions may result in prosecution, the penalties for which are outlined in Section 339 of the Resource Management Act 1991.
5. This consent will lapse after a period of five years from the date of granting of this consent. This period may be extended on application to the Council pursuant to Section 125 of the Resource Management Act 1991.
6. It is recommended that the tree species be selected to reflect the period of botanical selection that would have been used when the neighbourhood was established, being the 1920s and 1930s. For example, Japanese Maple (*Acer palmatum*), Rowan (*Sorbus aucuparia*), Strawberry Tree (*Arbutus unedo*) or similar.

Issued at Dunedin on 20 November 2018



Colin Weatherall
Chair
Hearings Committee