

25 September 2018

P S & H J Wilson
13 Wickliffe Street
Mosgiel
Dunedin 9024

Via email: telesis@xtra.co.nz

Dear Philip and Heather

RESOURCE CONSENT APPLICATION: LUC-2018-208
53 NICHOLS ROAD
MOMONA

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 Commissioner Colin Weatherall (Chairperson), Councillors Andrew Whiley, and Christine Geary, heard and considered the application at a hearing held on 15 August and 4 September 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.

Following the conclusion of the hearing, a site visit was undertaken by the Hearings Committee.

The Committee has **declined** consent to remove tree T854, but granted consent to the pruning of deadwood from T854. 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 Phillip and Heather Wilson.

Council staff attending were:

Campbell Thomson (initial hearing) and John Sule (reconvened hearing) (Committee Advisors), Amy Young (Processing Planner), Luke McKinlay (Urban Designer), Mark Roberts (Consultant Arborist at reconvened hearing) 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

No procedural issues were raised. As the Council's consultant arborist Mark Roberts was unavailable at the initial hearing the Committee adjourned the hearing on 15 August 2018 to allow Mr Roberts to be questioned on the STEM assessment and the risk posed the tree at the reconvened hearing on 4 September 2018.

Principal Issues of Contention

The principal issues of contention are as follows:

- The significance of the tree
- The adverse effects on the applicants particularly in relation to the health and safety risk posed by the tree

Summary of Evidence

Introduction from Processing Planner

Amy Young outlined the resource consent application to remove tree T854 and her report. Ms Young identified for the Committee the subdivision and land use consents that that will create a new 7000m² site and authorise a new dwelling proposed by the applicants. Ms Young advised that there were 6 submissions received that were all in support of removal of the tree. Ms Young noted that the expert arboricultural and landscape advice indicated that the tree was worthy of inclusion of the schedule and should be retained. In addition, she considered that removal of the tree was inconsistent with the objectives and policies of both District Plans. She recommended that consent should be declined. Ms Young responded to questions from the Committee regarding the reasons for listing the tree, the ability to consider the proposed District Plan, the need for a more up and to date Standard Tree Evaluation Method (STEM) assessment of the tree and the recent subdivision and land use consent issue for the site.

The Applicant's Case

Mr Wilson outlined the Wilson family connections with the area and advised the Committee that they were unaware that the land had a significant tree on it when they purchased the property. Mr Wilson identified the flood issues in the area and their experiences with flooding. He noted that the land at 53 Nichols Road where the dwelling is proposed is elevated and unlikely to flood. He did not want to move the house to a lower more shaded location.

Mr Wilson expressed his disappointment at the Planner's report. He noted the support in the local community for allowing the removal of the tree identifying that all the submissions were in support of removing the tree.

Mr Wilson tabled information outlining the reasons for the removing of the tree noted that health and safety was a particular concern. Shading other nuisance effects and the attraction of opossums were also identified as concerns. He outlined his experiences with large trees including an incident where a tree had fallen on him while he was on a tractor. This resulted in him being trapped for hours. He noted that he does not want to build a house by a large tree.

Mr Wilson noted that he saw the tree as a threat to biodiversity and not a positive amenity. He does not see it as a tree for a residential location. He acknowledged that removing a large tree was difficult to mitigate but he noted their intentions for more appropriate planting.

Heather Wilson noted that the Council should look to the future and not impede progress. She considered that the tree had had its turn and it is time for it to be removed and allow other trees to be planted.

The Wilsons responded to the questions from the Committee regarding the purchase of the property, their intentions for development of the site and the removal and maintenance of trees on the site since it was purchased.

Evidence of Submitters

Mr 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. He was critical of superfluous material contained in the Section 42A report and he was also critical of the STEM assessment noting its deficiencies. Mr Moffat strongly supported the applicants being able to remove the tree.

Expert Advisors

At the initial hearing the Councils landscape expert Luke McKinlay responded to a number of Committee questions regarding the amenity portion of the STEM assessment and the visual impact of tree removal. He noted that additional planting would be beneficial but it would not mitigate the loss of the tree given its age and size.

At the reconvened hearing, consultant arborist Mark Roberts advised the Committee that the tree was at the lowest possible risk of failure using accepted risk assessment methodology. Mr Roberts outlined his condition assessment in relation to STEM. Mr Roberts identified that the tree was a specimen example of a monkey puzzle and that it relatively rare. He noted its vigour and vitality was good and that the recently altered environment of the site in relation to the removal of the dwelling and garden had contributed to his reduced score for function.

Mr Roberts was questioned by the Committee on his assessment. In response to questioning he noted that there was no recent maintenance that he could see. He also responded to questions on bird life and historical significance and origins of the tree.

The Committee questioned the Committee advisor Mr Sule of the errors in the Plan in relation to the location of the tree on planning maps. Mr Sule acknowledged that there were errors that would need to be considered by the Committee. In response to a question regarding LIM information Mr Sule indicated that it was likely that has a LIM been sought that the applicants would have been made aware that a significant tree was located on the site.

Processing Planner's Review of Recommendation

Ms Young acknowledged the submissions from the applicant and their reasons for seeking consent to remove the tree. Ms Young noted that these submissions had been considered in the review of her recommendation. Ms Young noted that the tree merited inclusion on Schedule 25.3 and in her opinion the site was large enough to accommodate the tree without materially impacting of the residential use of the site. She maintained her recommendation to decline the consent.

Applicants Right of Reply

Mr Wilson spoke on behalf of the applicants and made a clear statement that he wanted the tree removed. He noted he was anxious about the tree falling given his experiences as a famer. Mr Wilson noted that no amount of pruning would guarantee that there was no limb failure or dangerous debris.

Mr Wilson observed that the STEM system was very subjective and that beauty was in the eye of the beholder. He considered the tree was in the wrong place in the foreground of the site and was shading the house site. He considered that the STEM score attributed to the tree was overstated and he pointed out areas with the assessment where he considered the score was too high. In his view the tree was not aesthetically pleasing.

He noted that they were local people with local connections. He observed that the local community had not expressed any support for the retention of the tree. All submissions were in support of removing the tree. Mr Wilson also outlined the nuisance effects of the tree and he observed there was no identified historical significance to the tree

Mr Wilson noted that flooding in the area meant that having the house location on high land was important. He wanted to build on the height point of the site to mitigate flooding risk. He noted that moving the tree was restricted by proximity to rural boundaries and was impractical.

He discussed the objectives and policies of the proposed District Plan (2GP) and he considered the tree was a significant risk, would cause shading and its amenity value was negligible. He outlined to the Committee the difficulty he had in obtaining arboricultural advice.

Mr Wilson concluded by requesting the Committee give consideration to the subjectivity of STEM and urged the Committee to make a common sense decision to allow the tree to be removed.

Mrs Wilson added that the site was private land and it was a rural area. She noted the high winds in the area and noted that the top third of the tree is the part that could fall on the proposed house in high winds. She also pointed to the support from the local community to removing the 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 Dunedin City District Plan: 4 Sustainability, 6 Rural Zones, and 15 Trees. The objectives and policies of the Proposed Plan(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. In addition, a site visit was undertaken during the public-excluded portion of the hearing, the Committee inspected the site and this added physical reality to the Committee's considerations.

*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 **declines** consent to a **discretionary activity** being the removal of significant tree T854 on the site at 53 Nichols Road, Momona legally described as Lot 1 DP 15299 (Computer Freehold Register OT6B/335).*

*That, pursuant to section 34(1) and 104B, and after having regard to Part 2 Matters and Sections 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 for a **discretionary activity** being the pruning of T854, located at at 53 Nichols Road, Momona legally described as Lot 1 DP 15299 (Computer Freehold Register OT6B/335).*

Reasons for this Decision

1. With respect to the proposal to remove significant tree T854, the Committee considered the positions of the applicant, submitters, the Council's planner and the expert advice that had been provided.
2. 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 (T854) would at least be inconsistent the relevant objectives and policies in the operative District Plan. In relation to the objective and policies of the proposed Plan (2GP), which are more balanced allowing consideration of risk and shading in assessing the merits of a removal proposal, it noted that the reasons within those policies for granting consent were not fulfilled in this case. Risk is assessed by an expert as being low and shading is not significantly compromising an existing building. It therefore agreed with the processing planner that the proposal was also inconsistent with the objectives and policies of the proposed District Plan.

3. The Committee noted the errors in the listing of the tree in the operative District Plan and observed that they have been corrected in the proposed plan (2GP) that was notified in September 2015. The Committee noted that this was confusing but it accepted that it was highly likely if a LIM had been sought prior to the purchase of the land that the protected status of the tree would have been made known to a prospective purchaser in the LIM.
4. The Committee acknowledged the submissions from Mr Wilson in relation to experiences and incidents with large trees. It acknowledged that he would be anxious about large trees and the Committee noted that the perception of risk was a relevant matter in relation to the considerations in Part 2 of the Act.
5. The Committee noted that the applicant's principal argument in seeking to remove the tree was and potential risk to health and safety from tree or limb failure. In respect of the health and safety issues raised by the applicant, the Committee observed that there will be a residual risk associated with any large tree on private or public land. Despite this, the Committee noted that in this case no compelling site specific evidence was provided that tree T854 was a risk. Mr Roberts who has qualification in the assessment of risk from trees identifies the risk from the tree to be at the lowest possible level. The Committee appreciates that this expert advice may be of little comfort to someone who has been trapped on a tractor as the result of a large fallen tree but this expert evidence must be considered by the Committee and it received no expert evidence to the contrary.
6. It also noted that the pruning of deadwood and maintenance pruning is prudent in reducing the potential safety issues and the tree had not been well maintained in the past. It supported maintenance work and on advice from the Committee advisor that pruning was able to be approved within the scope of this consent as it was removing part of the tree it considered it appropriate to approve maintenance pruning according to a standard specification to remove deadwood. It noted that a maintenance fund was available that would provide for up to one third of the maintenance costs to be returned with a maximum payment of \$250.
7. In respect of amenity values the Committee acknowledged that the tree has relatively limited visibility but it noted that it was a very good specimen of a Monkey Puzzle and with pruning to remove deadwood would be a prominent feature on Nichols Road. It also acknowledged the submissions received were all in support of removing the tree.
8. The Committee was of the view that on a large site that exceeds 7000m² it should be possible to accommodate a large tree. It also noted that operative Plan subdivision objectives and policies promoted subdivision and development that retained significant trees. The Committee accepted that materially altering the location of the new dwelling would require a variation to the existing land use consent if the applicants wanted to ensure the tree was clear of the dwelling. It noted that the consent variation process is frequently used to alter the location of a dwelling in response to a range of site considerations. The Committee also noted that it appeared possible to alter the location through a variation and still achieve a floor level that met building code requirements for avoiding flood damage.
9. The Committee acknowledged that there is some subjectivity in the STEM assessment particularly in relation to some of the matters in the amenity section in relation to role and climate but the expert evidence is that the tree warrants inclusion on the Schedule. It noted that the tree is a good specimen of an infrequent tree in good health. With pruning to remove deadwood it would be an attractive feature of Nichols Road.

10. The Committee considered the direction from the Environment Court in the Butterworth case noted in the Planners Report in relation to Part 2 considerations. The Committee considers there are clear differences with this application. In this case the large site means that the tree is not dominating the site. In addition the tree is a good specimen whereas the tree in the Butterworth case was not of good form and dominated the entire rear residential yard. The expert evidence indicates that the tree is a low risk and risk can be reduced by pruning to remove deadwood.
11. The Committee noted it 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 applications in the same way. In the absence of evidence, other than submissions regarding general health and safety concerns, it noted that a decision to grant consent had implications for the assessment of future applications. In this case the Committee acknowledges the anxiety of Mr Wilson in relation to large trees but it notes that no compelling tree specific health and safety evidence was provided to the Committee to indicate that the health and safety implications of the tree warranted its removal. It also noted that tree maintenance could be undertaken to reduce risk of falling debris.
12. The Committee was also clear that it did not want to be seen to be encouraging subdivision and development that resulted in subsequent applications to remove significant trees when the potential impacts from the tree could have been avoided through the subdivision and dwelling design process.
13. The Committee concluded that declining the consent to remove T854 would be consistent with the purpose of the Resource Management Act 1991 to promote the sustainable management of natural and physical resources. It also considered that it was appropriate to grant consent to pruning the tree in accordance with a standard specification and conditions for maintenance works.

In addition, you may wish to include the following as reasons:

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

A handwritten signature in black ink, appearing to read 'Colin Weatherall', written in a cursive style.

Colin Weatherall
Chair
Hearings Committee

Consent Type: Land Use Consent

Consent Number: LUC-2018-208

Purpose: Maintenance Work on a Significant Tree.

Location of Activity: 53 Nichols Road, Momona.

Legal Description: Lot 1 DP 15299 (Computer Freehold Register OT6B/335).

Lapse Date: 25 September 2023, unless the consent has been given effect to before this date.

Conditions

1. *Pruning work on Tree T854 shall be for the purpose of removing deadwood only and shall be undertaken by a suitably qualified and experienced arborist.*
2. *If necessary a suitable temporary barrier such as a temporary fence, barrier mesh, or 'danger tape' shall be erected on the site while work is taking place to keep pedestrians and other traffic away from falling limbs and debris.*
3. *All waste generated by the pruning works shall not cause a nuisance and shall be suitably disposed of within 7 days of the completion of the pruning works.*
4. *The person exercising this consent shall take all reasonable measures to ensure the use of machinery for the maintenance of T854 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.

Advice Notes

1. 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.

Issued at Dunedin on 25 September 2018

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Colin Weatherall
Chair
Hearings Committee