
TO: Hearing Commissioner

FROM: Nicola Petrie, Planner

DATE: 10 March 2021

SUBJECT: **RESOURCE CONSENT APPLICATION**
LUC-2020-341
516 Highgate, Dunedin

Applicant: K and S McArley

INTRODUCTION

- [1] This report has been prepared on the basis of information available on 29 January 2021. The purpose of the report is to provide a framework for the Commissioner's consideration of the application and the Commissioner is not bound by any comments made within the report. The Commissioner is required to make a thorough assessment of the application using the statutory framework of the Resource Management Act 1991 (the Act) before reaching a decision.

SUMMARY OF RECOMMENDATION

- [2] For the reasons set out in paragraphs [121] to [124] below, I have concluded that the proposal should be granted consent. I consider that the proposal will have no more than minor adverse effects, and it is not practical to avoid these effects due to state of decline of the trees. The effects can be mitigated to some extent and I consider the proposal is consistent with the relevant objectives and policies of both the Dunedin City District Plan and the Proposed Second-Generation District Plan. .

DESCRIPTION OF PROPOSAL

- [3] Resource consent is sought to remove two protected two trees. The trees are an *Ulmus glabra* 'Horizontalis' – Spreading Elm (T608) and the other is a *Fagus Sylvatica* – English Beech (T609), which are listed in Appendix A1.3 Schedule of Trees in the Proposed Second Generation Dunedin City District Plan (the 2GP). The physical location of the trees is the property at 516 Highgate. The English Beech Tree (T609) has the larger canopy of the two trees and is located on the Northern Corner of the property. The Elm tree (T608) is due south of the Beech Tree and closer to the residence.
- [4] The further information provided as part of the application makes the following case for the tree's removal:
- Remedial work and maintenance consents from 2011, 2016 and 2019 has been attempted to improve the health of the trees with no avail.
 - The landscaping design and implementation was undertaken in 2012-2013 with the trees and roots system in mind, however, it is possible damage was sustained during this time.

- Mounting financial burden for the applicant in regards to repair and maintenance of the boundary walls will be required as the tree root systems continue to disturb the space.
 - Concern raised for neighbouring properties in regards to sustained loss of branches and potential risk to property of public safety.
- [5] The arborist's report undertaken for the Council by Mark Roberts of Roberts Consulting includes an assessment of the condition of tree in terms of the Standard Tree Evaluation Method (STEM). Mr Roberts comment in the report for T608, the Spreading Elm, are summarised as follows:
- This tree uncommon and most likely been planted at the time of the house being built in the 1930s.
 - The tree has lost its symmetry and the distribution of foliage is uneven.
 - The tree is in decline and has been so for a number of years.
 - An increasing eco-system has established in the deadwood and decay within the tree structure.
- [6] Mr Roberts comments in the report for T609, the English Beech, are summarised as follows:
- This tree is common in occurrence and most likely planted at the time of the house being built in the 1930s.
 - The tree has good symmetry and silhouette however the foliage distribution is now uneven.
 - The tree is in decline and has been so for a number of years.
 - Due to its stature at location it is providing human services beyond that of the property owners.
 - Appears to be leaning towards the road
 - Also housing an increasing amount of flora and fauna eco-system but less than the Elm.
- [7] A copy of the application, including the arborist's report, is contained in Appendix 1 of this report.

DESCRIPTION OF SITE AND LOCATION

- [8] 516 Highgate is a 1340m² site located near the top of a rise at the northern end of Highgate. It is within proximity to the busy intersection of Lynn Street and Highgate. McMillan Park is diagonally opposite the site to the West. The surrounding sites are largely residential with one or two storied stand-alone dwellings. Multi-unit developments are less frequent. A range of architectural styles are represented. Front boundary treatments are commonly tall timber or masonry fences with hedges. Mercy Hospital is nearby on Newington Avenue. Balmacewen Intermediate and Columba College are West and South West respectively. There are no street trees on this section of Highgate, however, several mature trees are housed in front

yards. McMillan Park has several large mature trees. There are several scheduled trees in the wider area including T611 and T612, two red Beech Trees, at the corner of Highgate and Drivers Road. Also noteworthy is a Lancewood, Totara and Southern Rata all located on Burwood Avenue (T249, G026 and T250 respectively) and a Red Beech on Newington Avenue (T849).

[9] The English Beech tree occupies a prominent location near the northern corner of this site. Approximately a third of the canopy appears to overhang the footpath and roadway. The Spreading Elm is located more internally, somewhat lower growing, and is less prominent from surrounding publicly accessible locations.

[10] The site is legally described as Lot 1 DP 20160 held in Register of Title OT11B/63.

HISTORY OF THE SITE/BACKGROUND TO THE APPLICATION

[11] The McArley's purchased the property in 2010. Renovations including some landscaping was done in 2012 through to 2013.

[12] Tree applications for maintenance have been applied for in 2011, 2016 and 2017 since the McArley's took ownership of the property. Two early consents were applied for in 2007 and 2008 by the previous owner.

[13] The McArley's have taken Mark Roberts advice and believe they have fed the tree adequate nutrients, however, this has not been successful in improving the health of the trees.

2001 STEM ASSESSMENT T608

[14] T608 received a total STEM score of 150 points when assessed via the STEM method (see below) on 15 March 2001. The amenity evaluation section scored 87 and the condition evaluation section scored 63 points.

[15] In the condition evaluation, the highest score was attributed to both Age and Form (21 points), while occurrence, vigour & vitality and function all scoring 15 points each.

[16] In the amenity evaluation, the highest score was attributed to proximity at 27 points. Next highest is role on 15 points. Climate and stature are both awarded 9 and visibility 3 points. A copy of this STEM assessment is attached in Appendix 6 of this report.

2001 STEM ASSESSMENT T609

[17] T609 received a total STEM score of 168 points when assessed via the STEM method on 15 March 2001. The condition evaluation section scored 81 whilst amenity evaluation scored 87 points.

[18] In the condition evaluation, the highest score was attributed to both age and function at 21 points. This was followed by form and vigour & vitality both on 15 and occurrence on 9 points.

[19] In the amenity evaluation, the highest score was attributed to proximity on 27 points followed by the remaining sections of stature, visibility, role and climate all scoring 15 points. A copy of this STEM assessment is attached in Appendix 6 of this report.

2GP AUDIT OF SCHEDULED TREES 2013/2014

- [20] During the District Plan review process, most of the significant trees were examined in 2013-2014 by a Council Landscape Architect and a Council Arborist, to see if the trees were still worthy of continued inclusion into the 2GP's 'schedule' of significant trees (Appendix A1.3). The assessment of the trees determined that they did warrant specific protection under both the operative and proposed district plans. However, a new STEM assessment was not undertaken in 2013, and the 'assessment' was more akin to a visual audit and inventory. A photograph of the subject tree is in Council's records from the 2GP 'audit', dated 02 February 2013 and attached as Appendix 7 of this report.

HISTORY OF WORKS

- [21] LUC-2007-763 was applied for on 03 December 2007 to undertake crown raising and thinning on T609.
- [22] LUC-2011-568 was applied for on 21 November 2011 to undertake removal of "dead" wood, thinning and shaping, to improve the appearance of the Elm and ensure easy clearance past the tree for vehicles and people whilst accessing the driveway. Thinning of the Beech by 15% was sought with a light crown lift over the boundary, footpath, road and powerline clearance.
- [23] LUC-2016-643 was applied for on 20 December 2016 to undertake works on the T608 and LUC-2016-644 was applied for T609. Works on T608 consisted of crown thinning, whilst works on T609 consisted of crowning cleaning and powerline clearance.
- [24] As part of the 2016 consents, an arborists report was obtained by the Council assessing T608 as of average health and vitality. For the species, the crown was very thin due to pruning which had contributed to a deadwood at the ends of the branches and epicormic growth on the main stems.
- [25] The assessment for LUC-2016-643 recommended care be taken during works on T608 to limit further damage to tree, avoid over pruning and for the epicormic growth to remain.
- [26] The 2016 arborists report assessed T609 as of fair health and vitality. It was observed that there had been an overall decline in the tree and that previous works had resulted in complete loss of the inner canopy.
- [27] Regarding T609, the assessment for LUC-2016-644 recommended minimal pruning for power line and street lighting clearance only. In addition, it was recommended that crown cleaning should consist of deadwood remove only and further monitoring be undertaken of the tree's condition at six monthly intervals for a period of two years.
- [28] This historical information assists in giving a snapshot of the health of the trees over the last 10 to 15 years showing a trajectory of ailing health was already occurring.

ACTIVITY STATUS

Background to STEM Analysis

[29] The restriction on removal or pruning of trees is limited to a specific list of trees included as schedule A1.3 in the 2GP. Most but not all of the trees are listed in Schedule 25.3 of the 2006 Operative District Plan. All trees now listed in the 2GP have been assessed using the Standard Tree Evaluation Method (STEM) when first included for protection in the District Plan, in most cases when included within Schedule 25.3 of the Operative Plan. T608 and T609 are listed, for protection, in both Plan Schedules. The STEM method has three distinct components, being the condition (health) of the tree, the amenity (community benefit) that it provides and its notability. With regard to the assessment of 'condition' and 'amenity', each tree is assessed and allocated points for the following factors:

- (i) Form
- (ii) Occurrence
- (iii) Vigour and vitality
- (iv) Function (usefulness)
- (v) Age
- (vi) Stature
- (vii) Visibility
- (viii) Proximity of other trees
- (ix) Role in the setting
- (x) Climatic influence.

[30] Items (i) – (v) are in relation to the condition of the tree. Items (vi) – (x) are in relation to the amenity the tree provides. With regards to its notability, points are allocated for a range of recognition factors such as 'feature', 'association', 'commemoration', 'remnant', 'rarity'.

[31] The points received for each factor are totalled. Any tree that is allocated a sum total of **147** points or more has been considered by the Council to be 'significant' and generally worthy of inclusion in the District Plan Schedule of Trees.

District Plan Status

[32] Dunedin currently has two district plans: The Operative Dunedin City District Plan, and the Proposed Second Generation Dunedin City District Plan (the 2GP). Until the Proposed 2GP is made fully operative, both district plans need to be considered in determining the activity status and deciding what aspects of the activity require resource consent.

[33] The activity status of the application is fixed by the provisions in place when the application was first lodged, pursuant to Section 88A of the Resource Management Act 1991. However, it is the provisions of both district plans in force at the time of the decision that must be had regard to when assessing the application.

[34] The Proposed 2GP was notified on 26 September 2015 and given legal effect on 7 November 2018. Some rules became fully operative following the close of submissions, where no submissions were received. Additional rules came into legal

effect upon the release of decisions. Those additional rules become fully operative if no appeals are lodged or once any appeals have been resolved.

OPERATIVE DISTRICT PLAN

- [35] The subject site is zoned **Residential 1** in the Operative District Plan (ODP). Highgate is classified as a **District Road**.
- [36] Rule 15.5.1(i). of the Trees Section of the ODP, states that the 'removal or modification of any tree or pruning, trimming or any other modification or activity within the canopy spread of any tree listed in Schedule 25.3 is a **Discretionary activity** (unrestricted).
- [37] Exemptions to this rule listed in Rule 15.5.1(i)(a) to (c) are not applicable to the application but are discussed below under the section titled 'permitted baseline'.
- [38] As such, the removal of this tree is a **Discretionary Activity** pursuant to Rule 15.5.1(i). of the ODP and consequently resource consent is required.

Proposed Second Generation Dunedin City District Plan (Proposed 2GP)

- [39] The subject site is zoned as **General Residential 1**. Highgate is classified as an **Urban High-Density Corridor**. There are no other planning layers that apply to this site.
- [40] Rule 7.3.2.3 of the activity status table of the Scheduled Trees Section states that 'removal and other work on a scheduled tree that will lead to the death or terminal decline of a schedule tree' is a Non-Complying Activity. This rule is designed to protect trees from being removed where they are in a healthy condition or any decline has reached the terminal stage. The advice from Mr Roberts is that both the trees at 516 Highgate are in decline, but at this point in time there remains some scope for remedial work to halt or reverse this decline.
- [41] It is noted that Rule 7.3.2.1 of the activity status table states that the 'removal of a scheduled tree that is "dead, in terminal decline or with extreme failure, or subject to a court order for removal" is a **Restricted Discretionary Activity**., Based upon the assessment of Mr Roberts, as well as assessments made previously, the state of the trees is almost at a point where this rule would apply. The assessment by Mr Roberts indicates that the trees entered a state of decline in 2009 and without intervention this decline will be terminal. There are remedial works that could be undertaken, but they are substantial and costly, with a low likelihood success.
- [42] Rule 7.3.2.3 has been appealed under ENV 2018-CHC-270 by the Otago University and as such is not fully operative. It is noted that the relevant appeal seeks for activities that breach this standard be assessed as discretionary activities rather than Non-Complying.

Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 ("the NES")

- [43] The Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 came into effect on 1 January 2012. The National Environmental Standard applies to any piece of land on which an activity or industry described in the current edition of the Hazardous Activities and Industries List (HAIL) is being undertaken, has been undertaken or is more likely than not to have been undertaken. Activities on HAIL

sites may need to comply with permitted activity conditions specified in the National Environmental Standard and/or might require resource consent.

- [44] It is considered more likely than not, that no activities have been undertaken on the site that appear on the HAIL. In any case, no change in potential risks to human health from soil contamination are anticipated, as no change to the existing residential land use is proposed. As such, the National Environmental Standard is not applicable to the proposal.

Overall Status

- [45] Where an activity requires a resource consent under more than one rule, and the effects of the activity are inextricably linked, the general principle from case law is that the different components should be bundled, and the most restricted activity classification applied to the whole proposal.
- [46] In this case, under the Operative District Plan the removal of the trees is a **Discretionary Activity** (Unrestricted) in accordance with Rule 15.5.1 (i). In the Proposed 2GP, based on Mr Roberts's assessment, the proposal is considered to be a **Non-Complying Activity** in accordance with Rule 7.3.2.3. When two different activity status apply, the more restrictive of the two rules will apply. Consequently, resource consent is required as a **Non-Complying activity**

NOTIFICATION AND SUBMISSIONS

- [47] No written approvals were submitted with the application.
- [48] The application was publicly notified in the Otago Daily Times on Saturday 5 December 2020.
- [49] Copies of the application were available on the Dunedin City Council website. Submission closed on the 22 January 2021.
- [50] **Three** submissions were received by the close of the submission period and all of the submissions were in support.
- [51] The submissions are summarised in the table below, and a full copy of the submissions is attached in Appendix 2.

Name of Submitter	Support/ Oppose	Summary of Submission	Wish to be heard?
Jane Wilson	Support	Based on Mark Roberts report indicating decline of the health of the trees and increase in debris on her property.	No
Louise Majorie Croot	Support	Failing health of the trees and damage to property.	No
James Melville Chisholm Moffat	Support	In agreement with Mark Roberts Report and trees no longer a good fit for the built-up urban space. Public safety concerns and no longer adding to wider city landscape.	Yes

ENVIRONMENTAL EFFECTS OF ALLOWING THE ACTIVITY

[52] Section 104(1)(a) of the Act requires that the Council have regard to any actual and potential effects on the environment of allowing the activity. 'Effect' is defined in Section 3 of the Act as including-

- a) *Any positive or adverse effect; and*
- b) *Any temporary or permanent effect; and*
- c) *Any past, present, or future effect; and*
- d) *Any cumulative effect which arises over time or in combination with other effects-*

regardless of the scale, intensity, duration or frequency of the effect, and also includes -

- e) *Any potential effect of high probability; and*
- f) *Any potential effect of low probability which has a high potential impact.*

Permitted Baseline

[53] An important consideration for the assessment of effects is the application of what is commonly referred to as the permitted baseline assessment. The purpose of the permitted baseline assessment is to identify the non-fanciful effects of permitted activities, and those effects authorised by resource consent, in order to quantify the degree of effect of the proposed activity. Effects within the permitted baseline can be disregarded in the effects of assessment of the activity.

[54] The removal, modification, pruning, trimming or activity within the canopy spread of any tree listed in Schedule 25.3 is a **Discretionary Activity** in the ODP. There are three exceptions to this activity status, which are as follows:

- Where the work amounts only to minor trimming and maintenance and is undertaken by hand-operated pruning shears or secateurs in accordance with accepted arboricultural practice;
- The work is required as emergency work to safeguard life or property and is carried out by the Council or a statutory authority.
- The tree or trees are subject to an order for removal or modification in terms of Section 129(C)5(a), (b), and (c) of the Property Law Act 1952.

[55] None of these listed exemptions to a discretionary activity status apply to the current situation. In the absence of a court order or any evidence of an emergency/ imminent risk of danger, there is no permitted baseline under the ODP for the removal of a scheduled tree.

[56] The effects pertaining to the 'minor trimming and maintenance undertaken by hand operated pruning shears or secateurs in accordance with accepted arboricultural practice' could be considered permitted in terms of the ODP, as per the above exemption. The effect of modification is considered to have limited relevance to the present application, which is to remove the trees entirely.

[57] In terms of the 2GP, the removal of a scheduled tree that is dead, in terminal decline or with extreme failure, or subject to a court order for the removal is a restricted discretionary activity. In addition, the modification of a schedule tree is also a

restricted discretionary activity subject to compliance with the 'best arboricultural practice' performance standard.

- [58] The 2GP therefore provides no permitted baseline for any form of work on a scheduled tree or the removal of a scheduled tree as even in the case of a court order or emergency situation, resource consent is still required as a restricted discretionary activity.
- [59] For completeness, it is noted that the advice of the Council Consultant Arborist – Mark Roberts,, and comments on prior applications for remedial work from Mark and other Tree Experts, provides evidence of ongoing deterioration of the trees, despite efforts to maintain the trees.
- [60] In terms of the activities that may take place within proximity of a scheduled tree, the 2GP excludes buildings, structures, additions and alterations, public amenities, all earthworks, new roads or additions or alterations to roads, network utility activities and site development activities from the dripline of the tree or distance from a tree that is half the height of the tree (whichever is greater). Activities employing trenchless methods (the installation of pipelines and cables below the ground with minimal excavation) are exempt from this 'exclusion zone' where a number of requirements are met. Therefore, while the 2GP expands the 'exclusion zone' within which works can occur in proximity to a scheduled tree, it also provides a permitted baseline for the installation of pipes where the required circumstances are met.
- [61] Overall, it is not considered that there are any relevant 'permitted effects' in terms of activities that may be undertaken within proximity on these scheduled trees that could feasibly be disregarded when considering the effects of the proposed removal. This is because the removal of the trees means the destruction of the trees as it is not anticipated the relocation of either tree will be feasible.
- [62] However, as noted above, any impermeable surfaces, structures, dwellings, etc, within a distance amounting to half the height of the subject trees may not occur without resource consent.
- [63] The removal of most non-protected trees in residential zones is permitted by both District Plans, with the exception of indigenous vegetation, where in some circumstances resource consent is required. Any non-protected tree removal is subject to the approval of the landowner.

Assessment of Effects

- [64] The assessment of effects is guided by the assessment matters in Sections 7.7.2 (Scheduled Trees) of the 2GP District Plan. Accordingly, assessment is made of the effects on amenity resulting from removal of the trees and the assessment of the long-term health of the trees in relation to the scope for remedial works (as an alternative to removal) considering the report from the arborist.
- [65] The applicant's assessment of effects states that he would not be applying to remove 'beautiful trees' and that their true glory has been. Their deterioration means that they are no longer contributing as they once did.
- [66] Council Contracted Arborist Mark Roberts reached the following conclusions / recommendations:

- *Both trees are in a state of decline, they entered decline in 2009 and left to their own devices then the decline of both trees will be terminal.*
- *It might be possible to halt or reverse the decline of these trees;*
- *Remedial works would be substantial (reconfiguring the landscaping to create and improve drainage, improving soil structure and the addition of soil amendments). Further, it is possible that the trees may not fully recover and/or if they did it is possible that the residual form of these trees may not be acceptable in terms of aesthetics or risk;*
- *As of November 2020, based on its poor form, reduced vigour and limited vitality the Spreading Elm (T608) would fail to meet the benchmark score to be included on the DCC 2GP schedule of trees (Appendix A1.3). Further to this, based on the rate of decline it is unlikely to meet these criteria again in the future.*
- *The English Beech (T609) has an acceptable form but reduced vigour and limited vitality. Based on its current condition, and rate of decline, it is also unlikely to meet the threshold to be included in the DCC 2GP schedule of trees (Appendix A1.3). Further to this T609 is unlikely to recover enough to meet the criterion and be included at a future date.*

Operative District Plan

- [67] The assessment of effects is guided by Section 15.6 (Trees) of the Operative District Plan. Accordingly, assessment is made of the following effects of the proposal:
- Effect of modification (Assessment Matter 15.6.1);
 - Reasons and alternatives (Assessment Matter 15.6.2);
 - Amenity Values (Assessment Matter 15.6.3);

Proposed 2GP

- [68] Whilst this proposal is assessed as a non-complying activity, the assessment matter of effects, as guided by Chapter 7 Scheduled Trees, provides useful guidance for this application. Assessment matter 7.7.2.2 in relation to the assessment of restricted discretionary activities determines matters of discretion as the effects on amenity. While matters of discretion are not limited in this case, amenity remains a principal consideration.
- [69] In addition, the assessment criteria refer to Objective 2.4.1 and Policy 2.4.1.2 of the Strategic Directions section, which provide the following 'matters of discretion':
- The elements of the environment that contribute to residents' and visitors; aesthetic appreciation for and enjoyment of the city are protected and enhanced. These include trees that make a significant contribution to the visual landscape and history of the neighbourhoods (Objective 2.4.1(b)).
 - Policy 2.4.1.2 refers to the creation of the schedule on the basis of 'trees that make a significant contribution to the visual and historical landscape and amenity of neighbourhoods and other places' and the STEM criteria used to evaluate their inclusion.

Effect of Modification, Condition and Amenity Values (STEM assessment) (Assessment Matters 15.6.1 and 15.6.3 of ODP and Policy 2.4.1.2 of 2GP)

Condition of the tree

- [70] As noted above and within Policy 2.4.1.2 of the 2GP, the STEM evaluation provides the basis for the inclusion and protection of certain trees within the District Plan. The first section of the evaluation relates to the condition of the tree. The 2001 STEM assessment of the tree provided a score for the condition of each of the trees. Points are awarded based on 3 being the minimum number of points awarded for each category and 27 is the maximum number of points awarded for each category.
- [71] The trees were re-evaluated in December 2020. For the re-evaluated STEM assessment, Mark concluded the condition of the trees had deteriorated to **57** points for both T608 and T609.
- [72] The highest portion of the score attributed to T608 was for age at 21 points and then occurrence at 15 points. The lowest scored section was for Vigour and Vitality at 3 points. STEM assessment and aerial photograph of the site are attached in Appendix 3.
- [73] The highest portion of the score attributed to T609 was for age at 21 points then form at 15 points. The lowest scored section was for Vigour and Vitality at 3 points. STEM assessment and aerial photograph of the site are attached in Appendix 3.
- [74] In comparison, the 2001 assessment for the trees had a score for condition of **87** points for T608 and **81** for T609. Mr Roberts's assessment reduces these scores by 30 and 24 points respectively. The amenity component of the trees was scored in 2001 at **63** points for T608 and **87** for T609 giving total scores at that time of **150** points for T608 and **168** for T609. The reduced condition scores would change the totals to 120 and 144 points.

Amenity of the tree (Assessment matter 7.7.2.a)

- [75] Council's Landscape Architect, Mr. Luke McKinlay, reviewed the amenity values the trees contribute. He considered T608 amenity value had dropped to **51** from **63** whilst T609 amenity contribution was revised to **75** from **87** points. This would reduce the total STEM scores further to **108** points for T608 and **132** for T609. These totals are well below the benchmark that has been applied by the Council to inclusion of trees in the District Plan Tree Schedule.
- [76] The highest portion of the amenity value score attributed to T608 was for Proximity at **27** points and then Stature and Role where both awarded **9** points. The lowest scored section was for Climate and Visibility on **3** points each. Further detail within Landscape Architect comments attached in Appendix 4.
- [77] The highest portion of the score attributed to T609 was for Proximity at **27** points, then Visibility and Stature at **15** points. Lowest marks awarded to Role and Climate on **9** points each. Further detail within Landscape Architect comments attached in Appendix 4.
- [78] Mr Roberts report was made available to Mr. McKinlay. Mr McKinlay undertook a site visit to determine the potential effect of removing these trees in terms of the existing amenity values of the area. Mr. McKinlay acknowledged that the trees are

showing signs of decline. But did advise their removal will negatively impact on the existing amenity.

“The Beech tree, in particular, is a prominent natural feature and focal point near the intersection of Lynne Street and Highgate. Both trees retain amenity value as natural features of the streetscape and their removal will therefore have some adverse effects on the streetscape amenity.”

- [79] Mr. McKinlay concludes that with the trees’ health in decline, so too will their contribution to the amenity value. This will be further exacerbated as the form and canopy continue to thin leading to reduced ability to counterpoint the built development or provide beneficial climate amelioration.
- [80] Mr. McKinlay notes removing these trees will not leave an undesirable view. And whilst they are not screening, their presence does offer a softening of the dwelling at 516 Highgate and the neighbouring dwellings.
- [81] He also acknowledges that whilst there are no street trees in this area, there are mature trees that contribute to the overall amenity at McMillan Park and within the front yards of adjoining properties. Therefore, the removal of T608 and T609 will not devoid the area of large trees or greenery.
- [82] Mr McKinlay assessed the effects of the proposed mitigation offered by the applicant of additional tree planting at McMillian Park. He acknowledges that the introduction of new trees at this park may assist in off-setting some of the lost amenity but cautions that care should be taken to ensure the “open spatial characteristics” remain at the popular recreation space.
- [83] Mr. McKinlay concludes that the proposed removal of T608 and T609 will have low adverse effects on the broader amenity values of the surrounding Highgate streetscape. Their poor health and likely trajectory of said health will likely only continue to reduce their contribution to overall amenity.

Proposed remedial works

- [84] Mark Roberts Report recommends that there is a possible course of remediation for the trees but that substantial efforts may not result in flourishing healthy trees:

“The required works would be substantial (reconfiguring the landscaping to create and improve drainage, improving soil structure and the addition of soil amendments)...it is possible that the trees may not fully recover and/or if they did it is possible the residual form of the trees may not be acceptable in terms of aesthetics or risk.”

- [85] The conclusion of this recommending report is that the enormity of the remedial works and low predication of success rate would outstrip the community benefit gained from said works. Given the revised STEM analysis for both trees it is apparent that the decline has already reached a point where these trees no longer retain a value that would warrant protection in the District Plan.

Reasons and alternatives, risk to personal/public safety, effects on buildings (Assessment Matters 15.6.2 and 7.8.2(1)(c))

Health and safety risk

- [86] Concerns have been raised by the applicants, submitters and neighbours regarding the health and safety risk to people and property at 516 Highgate and the adjoining properties and the public that use the road asset alongside 516 Highgate. Submitter Mr. Moffat, who representing the Protect Private Ownership of Trees Society (POTS) states that the trees are “no longer suitable for a small urban section” and that T609 English Beech tree is overhanging the road reserve and poses “a threat to public safety.”

Positive Effects

- [87] The proposed removal of the significant trees would potentially result in some positive outcomes for the health and safety of the residents at 516 Highgate and the public passing this property on the public footpath where T609 overhangs the Council Road Reserve.

Cumulative Effects (Assessment Matter)

- [88] The concept of cumulative effects, as defined in *Dye v Auckland Regional Council & Rodney District Council* [2001] NZRMA 513, is:

“... one of a gradual build up of consequences. The concept of combination with other effects is one of effect A combining with effects B and C to create an overall composite effect D. All of these are effects which are going to happen as a result of the activity which is under consideration”.

- [89] Similarly, some effects may not presently seem an issue, but after having continued over time those effects may have significant impact on the environment. In both of these scenarios, the effects can be considered to be ‘cumulative’.
- [90] The proposed removal of the trees is unlikely to have significant cumulative adverse effects. The removal of these two trees would cumulatively contribute to the loss of urban vegetation across the city. However, in the context of the immediate environment, the loss of two trees, albeit in a very prominent location, is not considered to combine with the loss of other vegetation in the area to any noticeable extent that would represent a tipping point in terms of the amenity and character of the residential area and natural environment. The retention of vegetation in this residential community is probably higher given that residences and their gardens in this area are well established.

Effects Assessment Conclusion

- [91] After considering the evidence of Mr Roberts and McKinlay on the health and amenity values of the trees, and the other effects noted above, I consider that overall, the effects of the proposal to remove T608 and T609 will be no more than minor.

OFFSETTING OR COMPENSATION MEASURES ASSESSMENT

- [92] Section 104(1)(ab) of the Resource Management Act 1991 requires that the Council have regard to any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity.

[93] In this case, replacement at McMillan Park has been suggested by the applicant. No additional offsetting or compensation measures have been proposed in terms of works on the site of the application. The Commissioner must have regard to the positive effects of these measures if they are found to be practical and suitable by the Parks and Recreation Department (PARS) of Dunedin City Council.

[94] Parks and Recreation Planner Mr. Angus Robertson has reviewed the proposal and had the following comments:

“While this is a unique proposal and not something PARS would typically support, PARS may, in this instance, be willing to take on ownership of two trees to help mitigate the loss of these specimens, should it be determined that removal is appropriate. This could either be at McMillan Park or another reserve nearby, depending on further assessment as to the suitability of location and species proposed – a weeping elm may be suitable for McMillan Park.

Due to existing budget shortages and contracts, PARS would presently be unable to maintain these trees without adequate contribution to their initial upkeep for at least the first year. Along with this contribution, planting would need to be undertaken by a professional to ensure correct methods are employed.”

OBJECTIVES AND POLICIES ASSESSMENT

Assessment of Objectives and Policies of the District Plan (Section 104(1)(b)(vi))

[95] In accordance with Section 104(1)(b) of the Resource Management Act 1991, the objectives and policies of the Dunedin City District Plan and the proposed 2GP were taken into account in assessing the application.

Dunedin City District Plan 2006

[96] The following objectives and policies of the Dunedin City District Plan were considered to be relevant to this application:

[97]

Trees Objectives and Policies

	Objective/Policy	Is the proposal Consistent with or Contrary to the Objectives and Policies?
Objective 15.2.1	Maintain and enhance the amenity and environmental quality of the City by encouraging the conservation and planting of trees	The removal of scheduled trees is inconsistent with objective 15.2.1, but given the advanced state of decline of T608 and T609, the proposal is not repugnant to this objective,
Policy 15.3.1	Ensure that landowners and developer are aware of the environmental benefits of trees and encourage them to conserve trees and undertake plantings where possible.	When considering the offset of planting some replacement trees at McMillan Park, the proposal consistent with this objective.

		The proposal is consistent with this policy as the owners have undertaken steps to cater for the trees health and applied for maintenance consents in previous years.
Objective 15.2.2	Protect Dunedin's most significant trees.	
Policy 15.3.2	Identify and protect trees that make a significant contribution towards amenity and environmental quality.	The proposal is inconsistent with Objective 15.2.1 and this policy, as two scheduled trees are being removed, but given the state of decline of the trees the proposal is not contrary to them. Whilst the subject trees have made a significant contribution in the past when in good health, their ability to significantly contribute to amenity and environmental quality is dwindling. Their removal will see this contribution cease completely, but to some extent this loss will be offset by the replacement planting offered by the applicant.

Proposed 2GP

[52] The objectives and policies of the 2GP must be considered alongside the objectives and policies of the operative district plan. The following 2GP objectives and policies were considered to be relevant to this application:

Trees Objectives and Policies

	Objective/Policy	Is the proposal Consistent with or Contrary to the Objectives and Policies?
Objective 7.2.1	The contribution made by significant trees to the visual landscape and history of neighbourhoods is maintained.	The proposal is inconsistent with this objective as the loss of the trees visually and historically will have an impact. However, given the decline of the trees this contribution cannot realistically be maintained in the long term.
Policy 7.2.1.1	Enable removal of a scheduled tree where they are certified as dead or in a terminal decline by a suitably qualified arborist or where	

	subject to an order for removal in terms of Section 333 of the Property Law Act 2007.	The proposal is consistent with Policy 7.2.1.1 as there is a report from council contracted arborist determining the decline of the trees will be terminal without intervention. Further, the benefit of any intervention that is still possible appears very limited.
Policy 7.2.1.3	Only allow modification of a schedule tree where: 1. there is a significant risk to personal/public safety or property; or 2. the tree is shading existing residential buildings to the point that access to sunlight is significantly compromised; or 3. the removal of the tree is necessary to avoid significant adverse effects on public infrastructure; and these adverse effects cannot be reasonably mitigated through pruning and the effects outweigh the loss of amenity from the removal of the tree.	The proposal is inconsistent with this policy. While one of the reasons he applicant seeks to remove the trees is to avoid adverse effects and risks to adjoining properties, there is limited evidence at this time as to how significant this risk currently is. However, given the declining health of the trees it can be expected that the risks to safety will increase over time.
Policy 7.2.1.4	Require earthworks, network utilities activities, new roads and additions and alterations to roads, buildings, structures, and site development that involves the laying of an impermeable surface, to be set back from a scheduled tree an adequate distance to avoid: damage to the scheduled tree; and potential future adverse effects caused by the tree on amenity values, structural integrity of buildings or infrastructure, or safety that may lead to future demand to remove the tree.	The proposal is consistent to this policy as the applicant seeks to remove the tree therefore potential risk to public safety and infrastructure is negated by its removal.

Overall Objectives and Policies Assessment

- [98] The above assessment of the specific relevant objectives and policies of the Operative and Proposed District Plans demonstrates that, overall, there is a degree of conflict with the Operative District Plan (ODP) and the Proposed 2GP. However, the proposal is not so repugnant with any provision so as to be considered contrary to that provision. The ODP promotes protection of significant trees but neglects to provide a framework on how to address the decline of these trees. The 2GP is more prescriptive and provides a pathway for trees determined to be in decline from a suitably qualified arborist. The proposal is more consistent with the 2GP provisions, as these recognise circumstances where protection is not warranted unlike the ODP. This is largely expected as the removal of declining trees is provided for within the objectives and policies of the plan.
- [99] When considering the information provided for by the Council Contracted Arborist – Mark Roberts, I consider that the need for removal of T608 and T609 is almost inevitable due to the declining health of each of the trees. Having regard for the relevant objectives and policies individually, and considering these in an overall way, the above assessment indicates that the application is consistent with some of those provisions and inconsistent with others, as the proposal is to remove two scheduled trees which will be in terminal decline without significant intervention. Even if this intervention is successful, the trees are no longer in a state that would warrant protection in the Plan.
- [100] The activity status of the proposal in the Proposed Plan is a **Non-Complying Activity**, but only because the decline of the trees is not yet terminal. Remedial work to halt this decline is still possible. The 2GP rules are not fully operative in this instance because there was an appeal on the activity status of the removal of significant trees (as well as the key policy providing the framework for this rule). This Appeal opposes the non-complying status. Given that the rules are not fully operative, the objectives and policies relevant to the tree removal in the Proposed Plan are given reduced weight in regard to the assessment of the activity against the Operative District Plan.
- [101] The Proposed Plan Objectives and Policies are more prescriptive and clearly define the circumstances where the effects from the removal of a scheduled tree are considered acceptable. While these circumstances do not apply at this time to the proposal, the situation is so close to what provisions anticipate that I consider the proposal is not contrary to the 2GP provisions. With respect to the Operative District Plan (ODP), the objectives and policies are less prescriptive, but their meaning is helpfully provided in the 'explanation' of each objective and policy. Under the policy framework of the Operative District Plan, where trees make a significant contribution towards amenity and environmental quality, they are considered to be significant and their protection is warranted. Further to this the ODP policy framework promotes the idea of prioritising the mitigation of trees' perceived adverse nuisance effects over the removal of significant trees. This notion is related to the higher 'status' within a community and the recognition of the environmental benefits of such trees over others.
- [102] The policy framework of the Proposed District Plans supports the removal of the declining trees when supported by a suitably qualified arborist report. The policy framework of the ODP falls short of providing a pathway to remove a significant tree once their overall health is declining and the trajectory of that decline is at a point that they are unlikely to recover. Given the absence of this pathway we should consider that the overall guidance of the trees section in the ODP is framed to

celebrate those trees currently making a significant contribution to their environment, and that will continue to do so for future years. Based on this conclusion, the proposal to remove trees that are very close to terminal decline should not be refused based on the policy framework of the ODP.

DECISION MAKING FRAMEWORK

Part 2 Matters

- [103] It is considered that there is no invalidity, incomplete coverage or uncertainty within either the operative Dunedin City District Plan or the Proposed 2GP. As a result, there is no need for an assessment in terms of Part 2 of the Resource Management Act 1991.

Section 104D

- [104] Section 104D of the Act specifies that a resource consent for a non-complying activity must not be granted unless the proposal can meet one of two limbs. The limbs of Section 104D require either that the adverse effects on the environment will be no more than minor, or that the application is for an activity which will not be contrary to the objectives and policies of either the relevant plan or the relevant proposed plan.
- [105] Overall, I consider that the actual and potential effects associated with the proposed development will be no more than minor and therefore the first 'gateway' test of Section 104D is met. Only one of the two tests outlined by Section 104D need be met in order for Council to be able to assess the application under Section 104 of the Act.
- [106] In order for a proposal to fail the second test of Section 104D, it needs to be contrary to the objectives and policies of both the Dunedin City District Plan and the proposed 2GP. In order to be deemed contrary, an application needs to be repugnant to the intent of the District Plan and abhorrent to the values of the zone in which the activity was to be established. It is noted that in this instance, the proposal is assessed as being inconsistent with some and consistent with other relevant objectives and policies of the Operative District Plan and Proposed 2GP. The proposed activity is therefore considered to pass the second 'gateway' test outlined by Section 104D.
- [107] In summary, the application passes both the threshold tests in Section 104D of the Act and therefore, in my opinion, it is appropriate for the Commissioner to undertake a full assessment of the application in accordance with Section 104 of the Act. In turn, consideration can therefore be given to the granting of the consent.

Section 104

- [108] Section 104(1)(a) states that the Council must have regard to any actual and potential effects on the environment of allowing the activity. This report assessed the environmental effects of the proposal and concluded that the likely adverse effects of the proposed removal will be no more than minor to the overall amenity values of the area.
- [109] Balancing the scale of remedial works, potential success rate of remedial action and community gain, it is concluded, that effort of works outstrips the potential gain in terms of maintaining amenity values. The trees have lost much of the value that once warranted their inclusion in the District Plan, and given the low probability

intervention will succeed, it is likely that the trees will soon be in terminal decline, if not already at that stage.

- [110] Section 104(1)(ab) requires the Council to have regard to any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects. The applicant has offered to fund replacement trees at McMillan Park. Consideration shall be required as to whether the replacement planting at McMillan Park is satisfactory and would planting assist in mitigating some of the loss.

Mark Roberts report supported this replacement planting as did the assessment from Councils' Landscape Architect, Mr McKinlay. Parks and Recreation has indicated that a 'weeping elm' could be suitable for McMillan Park and with financial assistance could be agreeable to taking ownership of the new tree.

- [111] Section 104 (1)(b)(ii) of the Act requires consideration of any relevant National Policy Statement. There are none applicable to the circumstances of the application.
- [112] Section 104(1)(b)(v) of the Act requires that the Council to consider any relevant regional policy statements. The Regional Policy Statement for Otago was made operative in October 1998. It has been superseded in part by the Partially Operative Regional Policy Statement (PORPS) for Otago which was made partially operative on 14 January 2019. The operative RPS remains in partial effect until the proposed RPS is fully operative. Given its regional focus, the regional policy statement does not have a significant influence or relevance to this application. Also given the proposed 2GP was prepared and decisions were made on submissions having regard to the proposed RPS, it is considered that the 2GP objectives and policies have adequately addressed this higher document.
- [113] Section 104(1)(b)(vi) requires the Council to have regard to any relevant objectives and policies of a plan or proposed plan. The conclusion of this report is that the proposal is consistent with some and inconsistent with other relevant objectives and policies relating to both the Dunedin City District Plan and the Proposed 2GP, but not contrary to these provisions when the present condition of the trees is taken in to account, and prospects for remedial work to save the trees.

Other Matters

- [114] Section 104(1)(c) requires the Council to have regard to any other matters considered relevant and reasonably necessary to determine the application. For a non-complying activity, this includes the matter of precedent effects, and the integrity of the District plan provisions.
- [115] Case law indicates that for the Council to grant consent to a non-complying activity, the application needs to be a 'true exception', otherwise an undesirable precedent may be set and the integrity of the District Plan may be undermined. Given the advanced state of decline of trees T608 and T609 I consider the granting of consent to this application is unlikely to give rise to any undesirable precedent for other applications to remove trees. The granting of consent would only be relevant to another application where a tree is in a serious state of decline with any new STEM assessment unlikely to favour ongoing protection of the tree.
- [116] It is pertinent to note that the removal of any scheduled tree is required to go through this same robust framework of resource consent, and potentially a notified consent process and hearing depending on the circumstances of the tree. The

circumstances of each such application can be expected to be different, and I note that this proposal is very much on the margins of qualifying for consideration as a restricted discretionary activity due to the state of decline of the subject trees. I consider that the proposed activity does not represent a challenge to the integrity of either the Operative District Plan or the Proposed 2GP.

CONCLUSION

- [117] Having regard to the above assessment, I have concluded that the application should be granted to allow the removal of the two scheduled trees at 516 Highgate. This conclusion has been made based on Mark Roberts report that suggests the trees are in a state of decline and have been for some time. This decline will be terminal unless remedial action is undertaken. Whilst it is possible substantial remedial work could give the trees a chance of recovery, the monetary cost is high, and the likelihood of recovery for the trees is low.

RECOMMENDATION

- [118] That the application to remove trees T608 and T609 be granted.
- [119] That the offer of replacement planting at McMillan Park, or similar park nearby, be accepted to help mitigate some of the loss to the area.
- [120] That the conditions set out in Appendix 8 be adhered to.

REASONS FOR RECOMMENDATION

- [121] The proposed development has been assessed and likely to give rise to adverse effects that are no more than minor, and it is not anticipated that these effects can be avoided or remedied with any certainty due to the advanced decline in the health of the trees. Possible remedial works have a low probability of success and would not achieve an outcome that restores the public value of the trees. Replacement planting proposed at McMillan Park (or another reserve) may help mitigate to some extent the loss of the trees. Provided that the recommended conditions of consent are implemented, I consider that the likely adverse effects of the proposed activity can be adequately mitigated.
- [122] I consider the proposal is consistent with the key relevant objectives and policies of both the Dunedin City District Plan and the Proposed 2GP.
- [123] I consider the proposal is consistent with the objectives and policies of the Regional Policy Statement for Otago.
- [124] Overall, I consider that the granting of the consent would be consistent with the purpose of the Resource Management Act 1991 to promote the sustainable management of natural and physical resources.

Report prepared by:



Nicola Petrie
Planner

10 March 2021

Report checked by:



Campbell Thomson
Senior Planner

10 March 2021