

21 January 2018

K D and B G Hill
27 Cranston Street
Dunedin 9013

Via email: ken.hill@farra.co.nz

Dear Ken and Geraldine

RESOURCE CONSENT APPLICATION: LUC-2018-387
27 CRANSTON 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 Councillors David Benson-Pope (Chairperson), Aaron Hawkins and Jim O'Malley, heard and considered the application at a hearing on 3 December 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 the application on 21 January 2018. The full text of this decision commences below.

The Hearing and Appearances

The applicant was represented by:
Ken and Geraldine Hill.

Council staff attending were:

Campbell Thomson (Committee Advisor), Kirstyn Lindsay (Consultant Planner), Luke McKinlay (Urban Designer), Mark Roberts (Consultant Arborist) and Wendy Collard (Governance Support Officer).

Submitters in attendance included:

Jim Moffat (on behalf of Protect the Private Ownership of Trees (POTS))
Brian Porter and Wendy Knight

Procedural Issues

Prior to the hearing commencing Councillor Benson-Pope advised the parties to the hearing that he has three scheduled trees located on his property. He stated that he would assess and determine the application on its own merits. He asked the applicants if they were happy for him to continue on the panel. Following a question on the location of the trees on Councillor Benson-Pope's property, Mr and Mrs Hill advised that they were happy for him to continue.

Principal Issues of Contention

The principal issues of contention are as follows:

- The degree of nuisance and site amenity impact arising from the tree
- The health and safety risk posed by the tree
- Whether the impacts of maintaining the tree and health and safety risks outweighed the wider amenity impacts arising from removal of the tree

Summary of Evidence

Introduction from Processing Planner

The Consultant Planner (Kirstyn Lindsay) spoke to a summary of her Section 42A report, giving an overview of the proposal before commenting on the notification of the application and the submissions received. Ms Lindsay advised that overall the proposal had been assessed as a discretionary activity as it was lodged prior to the rules in the proposed 2GP coming into effect. Ms Lindsay identified that she had recommended that consent be declined. Ms Lindsay responded to initial questions from the Committee on notification.

The Applicant's Case

Mr and Mrs Hill tabled and spoke to the application. They provided background to their purchase of the property. Mr Hill noted that it was his view that the tree should not have been included on the Schedule in 2001. He noted that the previous owner had trimmed the tree about 35 years ago to gutter level.

Mr Hill discussed the STEM assessment noting that they had employed Mr Waymouth to do an assessment of the tree. He also noted that the three STEM assessments undertaken to date had a large variation and that he felt the tree should not have been put onto the list in the first place in 2001. He noted the STEM assessment did not consider the health and safety of the tree or the maintenance burden associated with the tree.

He discussed the amenity value assigned to the tree by the Council's Landscape Architect and he feels it is too high. Mr Hill asserted that in winter you cannot see the tree and during the other six months the tree just blends in. He also stated that because it is not on the sky line he considers it would not be missed. He noted that neighbours have not submitted in support of the tree.

In terms of the condition assessment of the tree, Mr Hill considers the score assigned to "form and function" is too high. He noted that STEM is subjective and that the tree does not stand out. Mr Hill disagreed with the evaluations undertaken by the Consultant Arborist and the Council's Urban Designer. He pointed out the differences between the Council and their arborists' assessment.

Mr Hill outlined for the Committee the burden of owning and maintaining the tree and stated that he considered the location of the tree has affected the value of the property. In terms of the nuisance issues and maintenance costs he noted that the Lime tree sheds branches, twigs and leaves that he has to pick up daily and that weekly gutter cleaning is required. He noted that petals and seed pods clog up the gutters and due to the nature of the debris he is not able to put mesh over the gutters. He noted that the tree resulted in a significant amount of bird droppings and that this was a health issue.

Mr Hill commented on the Auckland City Council environment court case (Butterworth). He considers that their tree is more of a nuisance than the tree identified in that case.

Mr Hill also noted that tree's roots were damaging the driveway. He also feels that damage to the retaining wall on 25 Cranston Street was the result of the tree. He was concerned that they would not be able to fix their driveway because the tree is significant and a resource consent would be required for work within the canopy spread.

Mr Hill noted the effects of a changing climate resulting in more storm events. He feels that they should be able to prepare for this change in weather patterns as well. He talked about health and safety considerations with the tree commenting on the death that a protected tree had caused when it fell over in Rotorua despite six monthly maintenance activity by Council arborists.

He outlined how consistent maintenance was needed to clean the gutters on a sloping section and the gutters are only able to be cleaned by a ladder. He commented that he had fallen twice from it. Mr Hill indicated he had purchased mobile scaffolding which needs to be assembled and broken down each time. He cleans the gutters up to 10 times a year and it is very costly to get a contractor in. He also identified the purchases that he has made to maintain the section noting that concerns regarding maintenance and tree risk would also apply to number 25 Cranston St.

Mr Hill stated that the best way to mitigate all concerns would be to remove the tree and landscape the section. He noted that there was no alternative way of mitigating the effects he had identified and removal of the tree would also allow the best use of the site through landscaping.

The Committee questioned Mr Hill on advice obtained prior to purchase of the property and maintenance that had been undertaken on the site relating to the tree. The visibility of the tree and risk were also examined by the panel.

If consent was to be granted, Mr Hill offered mitigation planting and he was open to that being either off-site or on-site planting.

Evidence of Submitters

Mr Porter spoke in support of the application to remove the tree. He advised the Committee that he lived at number 25 Cranston Street and he pointed out the location of the tree in relation to their property. Mr Porter noted that the tree extends over their living area and kitchen and the light restriction created by the tree means they need to have lights on, even in summer. He has concerns that if the tree failed then it would take out a third of the house. In relation to concerns about the tree falling, Mr Porter noted he has grandchildren who play under the tree. He noted that when the tree is full of birds you can hardly hear yourself and the bird droppings are a health concern.

Mr Porter asserted that the roots have come through the ground and have broken the retaining wall on his site. He also noted that drainage goes along the side of the house closest to the tree and the drains are impacted requiring yearly maintenance such as plumbers and cameras. He also identified that he replaced the roof six years ago and maintenance of the gutters is now a little overwhelming and he is getting older. Wendy Porter noted she was tired of dealing with bird droppings on the clothes line as the washing line sits under the tree.

Mr Moffat spoke to POTS submission in support of allowing the tree to be removed and commented on the age of the tree which had been estimated at 80 years. He commented on the planner's report and the STEM assessment focusing on comments from the Consultant Arborist regarding amenity value. He considers the Council's STEM score is too high.

Mr Moffat felt that Mr Roberts had a conflict of interest in acting as Council's expert as he is serving as a Council contractor and a commercial arborist. In response, Mr Roberts advised that his role was to provide independent expert advice and was contracted by the Council for this purpose. He noted that Council could employ who they would like to undertake this role. He was contracted to look at the tree and assess it and that he doesn't have a conflict.

Mr Moffat continued his submission and commented on pests that could be attracted to the tree. He commented on the city's pest management and the cost to the city. He felt that this would be a good reason to remove the tree due to it providing food for pests such as rats.

He requested that the Committee grant consent.

Evidence of Experts

Mr McKinlay spoke and summarised to his memorandum. He commented that he had undertaken a STEM evaluation and the only change to the original score was that a cluster of trees had matured and the tree was now part of a small cluster of trees rather than a solitary specimen. In general, he considered the tree was in good form and a contrast to the built form of area. Mr McKinlay considered the amenity value of the tree still warranted its inclusion on the Schedule.

Mr McKinlay responded to questions from the panel on visibility and amenity value.

Mr Roberts, the Council's consultant arborist, spoke and summarised his report. He commented on the construction of the driveway and the tree roots being drawn to it. He advised that the risk of any tree killing someone was low and explained why his risk assessment for this tree differed from the applicant's consultant. Mr Roberts considered that the tree was sound and at a low risk of failure in a storm event.

The Committee questioned Mr Roberts of the elements of his risk assessment and the assumptions and judgments that had been applied to his assessment. In response to a question he indicated that if the tree was to fail that the tree was more likely to fall forward in a storm event.

Processing Planner's Review of Recommendation

Ms Lindsay was given an opportunity by the panel to review her application in the light of the evidence and submissions presented at the hearing. Ms Lindsay commented on the balancing of wider amenity value and amenity values of owners and occupiers impacted by the tree and referred to Butterworth vs Auckland City Council case. In terms of risk she noted that the risk from the tree could be mitigated to low by cabling. She referred to the on-going maintenance of the property due to the tree identified by Mr Hill and Mr Porter. She also noted the positive effects arising from the removal of the tree in regards to the outdoor amenity area of 25 Cranston Street. She also noted that Mr and Mrs Hill could have submitted on the 2GP and contested the continued listing of the tree on the schedule but had not.

Ms Lindsay acknowledged the difficulty of balancing wider amenity effect and direct impact on people. She agreed that there is a wider amenity effect for the surrounding area if the tree was to be removed but accepted the submissions at the hearing identifying that there is significant on-going maintenance that arises from the proximity of the tree to dwellings at 27 and 25 Cranston Street.

Ms Lindsay noted that the matter was finely balanced but that on balance she wished to change her original recommendation and recommend that the consent be granted as she considered the impacts to the owners and occupiers of 25 and 27 Cranston Street outweighed the wider amenity impact from the trees removal.

Ms Lindsay responded to questions from the Committee.

Applicants Right of Reply

Mr Hill commented on the amenity value and asserted that from Bayfield Park you would not see the tree. He disagreed with the amenity valuation from Mr McKinlay.

He reiterated his concerns about health and safety noting that people have been killed by trees. He considers that gusts from storm events will weaken the tree and it will fall where the weight directs it to fall. The risk, in his view, is a lot greater than the Council's consulting arborists suggests.

He did not recall being notified in regards to the 2GP. He noted that he went through the submission process in 2001 and does not recall being notified to the rollover to 2GP.

Mrs Hill commented on the real world issues impacting on her husband's health and wellbeing arising from the tree. She noted that they do not have the resources to get contractors to do the work. They consider the tree should not dictate their health and wellbeing and that of their neighbours. They care for their neighbours and do not want to have to give medical assistance due to a weather event injury related to the tree. They are not prepared to put their health and wellbeing at risk. The Hill's asked the Committee to use a common-sense approach to this matter and grant consent.

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 and the principal issues in contention. The main findings on the principal issues have been incorporated within the reasons for the decision discussed below.

Decision

The final consideration of the application, which took into account all information presented at the hearing, was held during the public-excluded portion of the hearing on Tuesday 11 December 2018. 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 immediately following the public portion of the hearing on 3 December 2018, 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 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 T358 on the site at 27 Cranston Street, Dunedin, legally described as Part Section 3-4 Block II Andersons Bay Survey District (Computer Freehold Register OT280/62).*

Reasons for this Decision

1. With respect to the proposal to remove significant tree T358, the Committee considered the positions of the applicant, the submitters, the Council's planning consultant, 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 (T358) would, at least, be inconsistent with the relevant objectives and policies in the operative District Plan. In relation to the objective and policies of the proposed Plan (2GP), the Committee noted these provisions are more balanced, allowing consideration of risk and shading in assessing the merits of a tree removal proposal. However, the Committee concluded that the reasons within the policies for granting consent were not fulfilled in this case. All expert advice presented indicates that the risk of tree failure is low, and the Committee were not convinced that shading effects are significantly compromising an existing building. It therefore agreed with the processing planner that the proposal was contrary to the objectives and policies of the proposed District Plan.

3. The Committee noted the history of the listing and protection of the tree in the operative District Plan and continuation in the tree schedule of the proposed District Plan. They observed that the applicants had been involved in the submission process on Variation 11 to the operative District Plan, when the tree was first included in the schedule of Significant Trees, having previously been protected by way of a general rule in the former Dunedin City District Scheme.
4. The Committee noted that the applicant's principal arguments in seeking to remove the tree included the potential risk to safety from tree or limb failure in extreme weather events. The Committee noted that the evidence received from both the consultant Arborists, for the Council and for the Applicant, indicated that the risk of catastrophic failure of the tree was low. Applying the Tree Risk Assessment Qualification method, Mr Roberts concluded that the risk was low. Applying the same method Mr Waymouth concluded that the risk was moderate, but identified pruning and cabling as one mitigation option to reduce the risk to low. Mr Roberts had reviewed Mr Waymouth's analysis and determined that the 'moderate' classification was an error, and correctly applied the assessment method resulted in an assessment of low risk. Mr Waymouth did not attend the hearing and no evidence from Mr Waymouth in dispute of Mr Roberts finding was submitted to the Committee.
5. The Committee were particularly mindful of the concerns expressed by both the applicants, and the neighbours at 25 Cranston Street about the consequences of any failure of the tree. It also acknowledged all the submissions received were in support of removing the tree. However, it observed that much of the evidence presented at the hearing about failure of trees and consequential effects was general in nature, and not specific to the species, health, form and location of the tree subject of the application. In light of the expert evidence available and visual inspection by the Committee of the tree and properties, the Committee were not convinced that the risk was so substantial as to warrant removal of the tree. The Committee considered that mitigation work suggested by Mr Waymouth was a more appropriate option to address the risk.
6. The Committee considered the arguments presented by the applicants and submitters in relation to health, safety and maintenance issues arising from the tree, as a result of material shed from the tree canopy, and root damage. The Committee considered that some adverse effects on amenity and property maintenance attributed to the subject tree were overstated.
7. Given the design and window placement of the dwelling at 27 Cranston Street and location of the tree, there was little evidence of shading effects on the building on the subject site. The main effect on the amenity of 27 Cranston Street appeared to be constraints of the development of on-site parking and manoeuvring space. However, the Committee were satisfied that options were available to overcome the limitations posed by the tree, through use of design, materials and construction that avoided or minimised damage to the tree and its root system. While the Committee accepted that the tree had some shading effects on the dwelling and land at 25 Cranston Street, it was apparent to the Committee that a number of other factors contributed to the limitations on solar access. This included the design and orientation of the building to the sun, and setting within the topography, bulk and location of the dwelling at 27 Cranston Street, and other vegetation in the vicinity, including the hedging along the boundary.
8. 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 regard to role and climate. Despite this, the Committee was satisfied with the expert evidence from Mr Roberts and Mr McKinlay that the tree warrants continued inclusion on the Tree Schedule. It noted that the tree is a good specimen of an infrequent tree in good health.

9. The Committee were satisfied that the tree had good visibility, and could be readily seen from a number of public areas in the Andersons Bay area. Observations during the Committee's site visit were consistent with the advice of the Council's urban designer, Mr McKinlay. The Committee considered that the extent and proximity of other vegetation in the surrounding area did not detract from the amenity value of the tree as a mature and healthy specimen of a Lime Tree.
10. 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, no compelling evidence was provided to the Committee to indicate that the health and safety implications of the tree warranted its removal.
11. The Committee concluded that declining the consent to remove T358 would be consistent with the purpose of the Resource Management Act 1991 to promote the sustainable management of natural and physical resources.

Right of Objection

Pursuant to Sections 357A(1)(f) and 357A(2) of the Resource Management Act 1991, the consent holder may object to this decision or any condition if:

- (i) The application was notified, and
- (ii) Either no submissions were received or any submissions received were withdrawn.

And

- (a) The application was for a controlled activity, or
- (b) The application was for a restricted discretionary, discretionary or non-complying activity that was not declined by the Hearings Committee, or
- (c) The application was declined by an officer under delegated authority.

Any objection must be made within 15 working days of the decision being received, by applying in writing to the Dunedin City Council at the following address:

Senior Planner - Enquiries
Dunedin City Council
PO Box 5045
Moray Place
Dunedin 9058

In accordance with Section 357AB of the Resource Management Act 1991, the consent holder may, when making the objection, request that the objection be considered by a hearings commissioner. The Council will then delegate its functions, powers and duties in relation to consider and decide the objection to an independent hearings commissioner. Please note that the applicant may be required to pay for the full costs of the independent hearings commissioner.

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.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'David Benson-Pope', with a long horizontal flourish extending to the right.

David Benson-Pope
Chair
Hearings Committee