
TO: Hearings Committee

FROM: Amy Young, Planner

DATE: 20 July 2018

SUBJECT: **RESOURCE CONSENT APPLICATION
LUC-2018-208
53 NICHOLS ROAD, MOMONA
P AND H WILSON**

INTRODUCTION

- [1] This report has been prepared on the basis of information available on 20 July 2018. The purpose of the report is to provide a framework for the Committee's consideration of the application and the Committee is not bound by any comments made within the report. The Committee 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 126-140 below, I consider that the proposal is inconsistent with the key relevant objectives and policies of both the Dunedin City District Plan and the Proposed 2GP and that the adverse effects of removing the tree are not acceptable in this environment and cannot be mitigated. As a result, I have concluded that the proposal should be declined.

DESCRIPTION OF PROPOSAL

- [3] Resource consent is sought to remove the protected Monkey Puzzle Tree (*Araucaria araucana*) which is listed in Schedule 25.3 as T854 in the Operative Dunedin City District Plan. The description of the tree location in the Operative Plan is incorrect. The schedule identifies the correct address but the incorrect legal description Lot 2 Deposited Plan 15229. The reference number and marker on the Planning Map show the tree being located on 55 Nichols Road. The physical location of the tree is within Lot 1 DP 15229, 53 Nichols Road and the trunk is located approximately 8m from the Nichols Road front boundary.
- [4] A copy of the application, including plans of the proposed including reasons for the proposed tree removal, is contained in Appendix 1 of this report.

DESCRIPTION OF SITE AND LOCATION

- [5] 53 Nichols Road is a 41.45 hectare site that is going through the subdivision process, located close to the Dunedin International Airport and the rural settlement of Momona. The site is located on the Taieri Plains which is predominantly in pasture and is currently used for dairy farming. The site is flat and low lying and is identified as being within an overland flow path hazard: Flood Hazard Area 1B. The site is also identified with seismic hazards: intensified shaking and liquefaction.

- [6] Access to the site is via the sealed portion of Nichols Road. The dwelling that had been there since the 1950s and the majority of the associated accessory buildings have been demolished. The large shed/workshop to the south of the tree with large Castrol signs painted on the roof and large M & N Bailing Supplies Ltd sign facing Nichols Road remains on site. These signs appear to be hoardings and there is no record of consent in Council's Records.

HISTORY OF THE SITE/BACKGROUND TO THE APPLICATION

- [7] Subdivision SUB-2017-120 and Land Use Consent LUC-2017-644 was authorised on the 15 of January 2018. The application was to subdivide the two properties of 49 and 53 Nichols Road into three lots, with Lots 1 and 2 being amalgamated so that the subdivision will create a total of two sites and will be, in effect, a boundary adjustment. Proposed Lot 1 will be a parcel of pastoral land on the western side of Nichols Road, and will have an area of approximately 19.9ha. Proposed Lot 2 will be all the land of 53 Nichols Road on the eastern side of the road. The two lots will be amalgamated to form a new title of approximately 40.7ha.
- [8] Proposed Lot 3 (The proposed lot that will contain the scheduled tree) will be a small parcel of land approximately 0.7ha on the western side of Nichols Road. Section 223 and 224c certification for the subdivision has been issued but titles have not been released from LINZ at the time of writing this report. The proposed title reference for proposed Lot 3 will be Lot 3 Deposited Plan 520868 Computer Freehold Register 835159. The LT plan identifies the new site area as 0.7209 hectares.
- [9] Land use consent (LUC-2017-644) authorised the existing dwelling or the proposed dwelling on the new undersized Lot 3 in accordance with the plans provided with the application. The consent provided for a reduced side yard of 18m. The new dwelling will comply with the minimum front yard requirement of 20m for any building in the Rural Zone.
- [10] The report referred to the significant tree as physical limitations of land and water are taken into account at the time of subdivision in accordance with Objective 18.2.2: The design of a subdivision shall take into account the physical limitations of an area, including areas of instability, watercourses, vegetation and other topographical features.
- [11] The tree and the impact of its location on the proposed subdivision and land use consent were assessed by the recommending planner at the time. Her assessment was as follows:
- [12] *"A listed monkey puzzle tree is situated within the front garden of 53 Nichols Road. The District Plan does not allow any activity to occur under the canopy spread of a listed tree without resource consent, and it is recommended to maintain a distance from a tree at least half its height although there is no District Plan rule to this effect. In this case, the tree is a tall, narrow species, having a present height of approximately 20m, and 'half its height' will approximately 10m of Lot 3 although the canopy spread is not nearly as wide.*
- [13] *While the District Plan allows construction up to the edge of a tree's canopy spread, it is advised that a large tree in close proximity to a dwelling can create adverse shading effects. There are also risks to persons and property from falling branches (or occasionally falling trees), as well as a general nuisance factor associated with the tree's seasonal cycle of leaf and seed distribution. It is advised that the tree cannot be felled or pruned without resource consent, and there should be no expectation that the tree can be removed. The replacement dwelling for Lot 3 is likely to be within the height-distance of the tree, but will be further from the tree than the existing house. As such, the*

construction of the new dwelling does not increase any risks associated with living with the tree and is acceptable to the Council.

- [14] *While the relevant Proposed Plan rules are not in effect or operative, it is worth considering the situation under the Proposed Plan rules as notified on 26 September 2015. Rule 7.3.2 lists any work on a scheduled tree which will lead to its death or terminal decline as being a non-complying activity. Rule 7.5.2 requires structures to be clear of the dripline or maintain a setback distance at least half the height of the tree, whichever is the greater. Accordingly, while a house can currently be built on Lot 3 up to the dripline of the tree, the development of Lot 3 will need to be set back a much greater distance in order to be a permitted activity once the Proposed Plan rules (as notified) are in effect or operative. This could have implications the building of the replacement house, but this cannot be addressed as part of this consent as Council cannot give consent for activities which do not currently breach a Plan rule. Nor should it be assumed that any such breach will be approved.*
- [15] *Any work including earthworks undertaken within the dripline of the tree will require resource consent, and it is possible that consent will be declined if the proposal does not satisfy the guidelines for working within the dripline of a significant tree. During the removal of the existing house and the construction of the replacement house, the following conditions are recommended:*
- [16] *A Tree Protection Zone (TPZ) in the form of a physical barrier must be established prior to any works being carried out, to prevent construction and compaction damage to the tree. The extent of the TPZ must be established by Councils arborist. The TPZ must exclude all vehicles, plant, machinery, construction materials, fuels, liquids, etc. from entering the zone. This must remain in place until all works have been completed on site.*
- [17] *If an accessway and/or infrastructure are to be installed within the protected root zone of the tree, structural suspended pavement cells (Silva Cell) or similar should be employed to avoid excavation."*
- [18] *The decision was granted on the basis that the tree remain on the site and that the effects of the subdivision and residential activity on an undersized Rural lot on the tree could be mitigated by the following land use conditions:*
- [19] *LUC-2017-644*
*That pursuant to section 34A(1) and 104B and after having regard to sections 104 and 104D of the Resource Management Act 1991, and the District Plan, the Dunedin City Council **grants** consent to a **non-complying** activity being the existing and proposed house with a side yard encroachment, and the existing shed, on the undersized Lot 3 SUB-2017-120 at 53 Nichols Road, Momona, subject to the conditions imposed under section 108 of the Act, as follows:*
1. *The proposal shall be given effect to generally in accordance with the plan prepared by Paterson Pitts Partners Ltd entitled, 'Proposed Land Use Consent and Subdivision of OT13A/1096 (2 DP2680, Pt 8 DP720 & Pt DP844) and OT6B/335 (Lot 1 DP 15229),' and the plan prepared by Trident Homes entitled, 'Proposed New Dwelling for Heather & Philip Wilson, Address 53 Nichols Road, Momona,' and the accompanying information submitted as part of LUC-2017-644 received at Council on 30 November 2017, except where modified by the following.*

2. *Only one residential unit shall be established on Lot 3 at any one time.*
3. *The new residential unit must comply with Rule 6.5.3(iii) of the District Plan regarding the requirement to acoustically insulate any new building within the Airport Outer Control Boundary area.*
4. *Unless the listed monkey puzzle tree has been removed prior to works commencing, or has resource consent which removes its listed status from the District Plan or Proposed Plan, a Tree Protection Zone (TPZ) in the form of a physical barrier must be established around the tree prior to any works being carried out to remove the existing house or construct the replacement house, to prevent construction and compaction damage to the tree. The extent of the TPZ must be established by Councils arborist. The TPZ must exclude all vehicles, plant, machinery, construction materials, fuels, liquids, etc. from entering the zone. This must remain in place until all works have been completed on site.*
5. *If an access way and/or any infrastructure is to be installed within the protected root zone of the tree, structural suspended pavement cells (Silva Cell) or similar should be employed to avoid excavation.*

[20] The decision certificate also included the following advice note that refers to the tree:

It is advised that under the rules of the Proposed Plan as notified on 26 September 2015, the placement of any structure within half the height of the listed monkey puzzle tree (T854) will be a non-complying activity. This could impact on the proposed redevelopment of Lot 3, and might mean further resource consent is required.

ACTIVITY STATUS

[21] Dunedin currently has two district plans: the operative Dunedin City District Plan, and the Proposed Second Generation Dunedin City District Plan (the "Proposed 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.

[22] 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.

Dunedin City District Plan (Operative Plan)

[23] The site is zoned Rural in the Dunedin City District Plan. The restriction on removal or pruning of trees is limited to a specific list of trees included as schedule 25.3 in the Dunedin City District Plan. All trees listed in the operative district plan have been assessed using the STEM (Standard Tree Evaluation Method) evaluation. The assessment of this tree determined it did warrant specific protection. 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 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.

- [24] 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 regard to its notability, points are allocated for recognition factors such as 'feature', 'association', 'commemoration', 'remnant', 'rarity' etc.
- [25] The points received for each factor are totalled. Any tree that is allocated a sum total of 147 points or more is considered to be 'significant' and generally worthy of inclusion in the District Plan's schedule of trees.
- [26] The tree has a total score of 156 points in the STEM assessment. This assessment was undertaken in 2001.
- [27] The highest portion of the score is attributed to the "Proximity" of the tree scoring the highest possible score of 27 points, the next highest score is at 21. The STEM assessment and aerial photograph of the site are attached in Appendix 4.
- [28] The following rule in the District Plan applies to any scheduled significant tree:
- 15.5.1(i) 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.*
- [29] As such, the removal of this tree is a **Discretionary Activity** pursuant to Rule 15.5.1(i) of the District Plan. Consequently, resource consent is required.

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

- [30] The Proposed 2GP was notified on 26 September 2015. The 2GP zoning maps indicate that it is proposed that the subject site be zoned as Rural: Taieri Plains. The proposed maps also indicate that the property is within an area of High Class Soils. The site is within the Airport Noise Outer Control Area, Hazard 2: Flood Hazard Area 1B, Dunedin Airport Flight Fan Designation (Horizontal). The tree is still showing as protected in the Proposed 2GP.

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

- [31] 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.

[32] The planner processing the previous subdivision/ land use consent (SUB-2017-120) made the following considerations in relation to the NES:

[33] *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.*

[34] *The applicant had a search of Council records, HAIL-2015-107, undertaken at the time of submitting the application for SUB-2015-107. The applicant's agent has discussed the findings of the search in a letter submitted with this subdivision application. The applicant's agent notes that the aerial photographs provided are relatively sparse, but show the property in a cultivated state in 1990 and in pasture by 2000. No HAIL activities were evident in the photographs.*

[35] *Regarding the shed on-site, the property owner advises that the shed has always been linked to the house. Originally, the shed was used to house trucks loaded with vegetables ready for market, tractors and implements associated with market gardening. No fertiliser or sprays were stored in the shed. When the market garden closed 20 years ago, the shed was used for implement storage, and as a part time workshop repairing and maintaining farm vehicles. The property owner is unaware of any contamination occurring.*

[36] *The applicant's agent notes that HAIL item F4 (Motor Vehicle Workshops) might apply to this shed, although the scale, intensity and duration of the activity is 'well below' the level envisaged for motor vehicle workshops in the HAIL context. The applicant's agent comments:*

'Motor Vehicle Workshop is a term normally applied to workshops used commercially for car repairs. Farm vehicles are substantially different in terms of their needs, with a greater electrical workload and have a substantial mechanical workload relating to ancillary equipment; compared to cars that are relatively demanding in terms of fluid changes (and consequent risk of leaks). Most repairs to agricultural equipment is done on the farm where the equipment resides, therefore it would be an undesirable precedent to term buildings where this type of equipment has been repaired to be HAIL sites.'

[37] *The applicant's agent advises that whilst none of the information sources used provide absolute evidence that no contamination exists on any part of the site, when all the results from the various information sources are taken in their totality, the likelihood of contamination at a level that would raise concern seems extremely remote.*

[38] *I note that the proposed subdivision is essentially a boundary adjustment between two farming properties. The majority of the land is productive land, and this does not change with the proposed subdivision; therefore the NES does not apply to most of the land. Although there is a new residential unit involved, it is to be established on an existing residential building site. As such, the subdivision and development of Lot 3 is not expected to increase the risk to human health from contaminated soils, and the NES is not considered applicable in this case.*

[39] As such there is no definitive advice confirming that the site is not a HAIL site and that any soil disturbance associated with the removal of a scheduled tree may trigger the requirement for an additional consent under the NES.

NOTIFICATION AND SUBMISSIONS

[40] Written affected party approvals were received from parties in the following table:

Person	Owner	Occupier	Address	Obtained
Jason Matthew Paul Fraser and Candice Elissa Ruth Ross-Fraser	✓	✓	55 Nichols Road, Outram	19/02/2018

[41] In accordance with Section 104 of the Act, where written approval has been obtained from affected parties the consent authority cannot have regard to the effects of the activity on that person.

[42] The application was publicly notified in the Otago Daily Times on 26 May 2018.

[43] Copies of the application were sent to those parties the Council considered could be directly affected by the proposal. Submissions closed on 25 June 2018.

[44] Six submissions were received by the close of the submission period and all of these submissions were in support.

[45] 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?
Glynis Hunter	Support	No reasons given for wanting the tree removed	No
Mark James Turton	Support	No reasons given for wanting the tree removed	No
Jessica Ashleigh Cox and Christopher Noel Brent Scur	Support	In favour of removal – there won't be any issues regarding noise or changing of our view	No
Lyndon Allan Newall	Support	No reasons given for wanting the tree removed	No
Christopher Arthur and Belinda Marie Taylor	Support	We are happy for them to do as they wish	No
Jim Moffat on behalf of Protect Private Ownership of Trees Society (POTS)	Support	- Is well past being a heritage tree. The tree is old and dying. The current condition puts it outside its schedule 25.3 status - The removal will not adversely affect the	Yes

		surrounding environment ▪ Health and safety considerations if left in place ▪ The trees form barely resembles a thriving Monkey Puzzle Tree. ▪ If the tree fell it could be a danger to traffic. It grows close to the existing driveway which the applicants wish to upgrade.	
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ENVIRONMENTAL EFFECTS OF ALLOWING THE ACTIVITY

[46] 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.*

Assessment of Effects

Dunedin City District Plan (Operative Plan)

[47] The assessment of effects is guided by Section 15.6 Trees of the District Plan. Accordingly, assessment is made of the following effects of the proposal:

- Effect of modification;
- Reasons and alternatives;
- Amenity values.

Effect of Modification(Removal) (Assessment Matter 15.6.1)

[48] The applicant's assessment of effects states that the removal of the tree will enhance the environment as the new house will be more pleasant to look at than the current one. It is unclear how this relates to the removal of the tree. The applicants did not provide an arborist report in support of their application. Council's Consultant Arborist has inspected the tree and has commented on the application for the tree removal. Comments from the Councils Arborist are as follows:

[49] *Arboricultural condition assessment and observations*
The tree was visually inspected from ground level on the morning of May 11, 2018.

[50] *The inspection took place from outside the property and the weather was clear and calm at the time of the visit.*

[51] *The tree sits approximately 7 meters inside the eastern boundary of number 53 Nichols Road, and approximately 16 meters from number 55 Nichols Road [images one and two] In general, at the time of the assessment, the tree looked to be in good health and have vitality within the normal range for the species and age.*

- [52] *I estimated the tree to be approximately 25 meters tall, with approximately 16 meters of 'clear' trunk [image three].*
- [53] *The species naturally lose lower branches, and the clear trunk appeared to be as a result of natural process more so than as a result of pruning activities*
- [54] *The trees had good trunk taper and root flare, and the root plate appeared to be stable.*
- [55] *The tree exhibits a natural form for its age, and the tree as is a near specimen example of the species*
- [56] *Overall, the tree appeared to free from obvious defects that suggest imminent failure.*
- [57] *Araucaria araucana are not native to the area and for the tree to be the size that it is would suggest that it is one of the original introduced plantings. The tree is possibly associated with Momona School (established in 1899) or connected to one of the farms in the Henley Co-operative Dairy Company which was operating in the area from about 1915.*
- [58] *At the time of the assessment, the buildings and structures on number 53 Nichols Road were being removed and an excavator was on site removing what appeared to be foundations. There was a temporary fence erected around the tree, sitting roughly under the dripline [image three]. There was no sign of excavation or demolition activities taking place within the Tree Protection Zone [the Tree Protection Zone (TPZ) for individual trees is calculated based on trunk diameter (DBH), measured at 1.4 metres up from ground level. The radius of the TPZ is calculated by multiplying the tree's DBH by 12 and is measured as a radius from the centre of the trunk at ground level].*
- [59] Assessment Matters in the operative plan for the tree 15.6.1 Effect of Modification
The health and quality of the tree; At the time of the assessment the health and quality of the tree were exceptional. The effect of any proposed pruning, trimming or other modification to the tree. The proposed effect of removing the tree would be terminal (the tree would no longer exist)
- [60] Conclusion and summary
I saw nothing to suggest that the tree's age or exposure was detrimentally affecting the health, structural integrity or stability of the tree
- [61] *The health and safety concerns raised by the applicant can be addressed by pruning and relocation of the proposed dwelling before construction begins.*
- [62] *In my opinion the six reasons for removing the tree given by the applicant are not sufficient to have the tree felled and removed from the Dunedin City District Plan*
- [63] *In my opinion the Assessment of Environmental Effects, presented as Assessment of Effects on Environmental by the applicant do not adequately address the effect that removal of the tree will have on; land, water, flora and fauna, people, infrastructure, traffic and parking.*

- [64] *In my opinion there is insufficient mitigation or potential remedy options given by the applicant to enable consideration for removing this tree.*
- [65] *In my opinion I do not believe that the Dunedin City Council should grant Philip and Heather Wilson [the applicant] consent to remove significant tree T854. Comments in relation to the condition of this tree only considered known targets and visible or detectable tree conditions at the time of the inspection."*
- [66] The subject site has accommodated the tree for 80+ years according to the stem assessment undertaken in 2001 and potentially a lot longer in accordance with the arborist's comments above. The tree has remained on this site for all of this time without any request to remove it. The previous house was established on the site in close proximity to the tree. The applicants undertook a subdivision and land use consent to establish an undersized rural lot and designed a new dwelling in close proximity to the tree being fully aware of the trees protection at that time.
- [67] There will be positive effects gained by the applicants by removing the tree in removal of maintenance costs associated with the tree. However the applicant has not listed this as a reason for removing the tree. Based on the expert advice provided above and having no other expert advice proving contrary to the advice given, I consider that the removal of the tree will have adverse effects as the tree is able to remain with normal remedial tree work and there are alternative locations for the new dwelling and vehicle access for this now vacant site.

Reasons and Alternatives (Assessment Matter 15.6.2)

- [68] The land use consent authorised the existing dwelling on the new undersized Lot 3 or the proposed dwelling in accordance with the plans provided with the application. The consent provided for a reduced side yard of 18m. The proposed building will comply with the minimum front yard of 20m at 24m from the front boundary. If the building was set back 40m from the side boundary as per the requirements of the Rural Zone Rules the new dwelling would be sited a significant distance from the tree and the effects raised as concerns by the applicant would be reduced or even removed. Especially in relation to fear of the tree falling on the new dwelling.
- [69] There is an alternative option that hasn't been considered in the application which would involve locating the dwelling away from the tree. The site has been cleared of the majority of buildings and vegetation. The site is very flat and low lying. The new dwelling location will be on a contour of approximately 3.5m. There are other areas on the subject site with a similar elevation that could allow the establishment of a dwelling not in close proximity to the scheduled tree.
- [70] Council's Consultant Arborist makes the following assessment on the reasons for the tree removal provided by the applicant. [The applicants reasons are italicised and the arborists response in in plain text]:
- [71] *Reasons for carrying out such proposed work as provided by the applicant;*
Health and Safety.
The tree is very old and contains many dead branches, which along with cones and seeds, regularly drop from the tree. These are falling 15-20 meters and are a danger to anyone under that tree...
- [72] The tree looked to be in good health and have vitality within the normal range for the species and age. I saw nothing to suggest that the tree's age was detrimentally affecting the health, structural integrity or stability of the tree

- [73] Dead branches and cones can be removed/pruned from the from the tree. If the dead branches and cones were removed from the tree the danger associated with them falling would also be removed.
- [74] *Health and Safety. loss of shelter]... has left the monkey puzzle tree more exposed and hence at risk from strong winds. ... it has the potential to fall on passing traffic or fall back onto the new house.*
- [75] The tree is effectively a free-standing tree, it stands approximately 70 meters from the sheltering trees to the west and 20 meters from the sheltering trees to the north. The shelter provided by the trees 70 meters away to the west would have been minimal, and because the tree extends above the height of the shelter to the north there is effectively no shelter provided by those trees.
- [76] Because the tree is effectively a free-standing tree it has been exposed to wind and has adapted to the conditions that it grows in. I saw nothing to suggest that the tree's exposure was detrimentally affecting the health, structural integrity or stability of the tree
- [77] Nichols Road is a rural low-volume road, the chances of the tree falling and simultaneously impacting passing traffic are low
- [78] Property No: 5121776 [53 Nichols Road Momona] is a section approximately 70 x 50 meters if the new house was constructed outside the fall distance of the tree (i.e. further away from the tree that the tree is tall) then the chances of the tree falling and impacting the new house would be extremely low.
- [79] *Health and Safety. c) ... we do not want the risk of this tree falling on our new house or on us, or on our...*
- [80] *Property No: 5121776 [53 Nichols Road Momona] is a section approximately 70x50 meters if the new house was constructed outside the fall distance of the tree (i.e. further away from the tree that the tree is tall) then the chances of the tree falling and impacting the new house would be extremely low.*
- [81] I saw nothing to suggest that the tree's age or exposure to the wind was detrimentally affecting the health, structural integrity or stability of the tree
- [82] Dead branches and cones can be removed/pruned from the tree. If the dead branches and cones were removed from the tree the danger associated with them falling would also be removed
- [83] Fit for purpose. The tree has lost all of its lower branches and foliage and is no longer *representative of a 'true to form; Monkey Puzzle tree.*
- [84] The tree exhibits typical form for its age and is a near specimen example of the species. The image provided by the applicant on page 12 of the application is of a juvenile tree. As the tree matures lower branches are naturally lost and trunk takes on a typically clear appearance.
- [85] *Safeguarding our investment. ... The size of the section and positioning of other existing buildings does not allow us to move the house, far enough, away from this tree to make it safe if the tree falls .i) At the time of the site inspection, there were no existing buildings on the site.*
- [86] Property No: 5121776 [53 Nichols Road Momona] is a section approximately 70X50 meters if the new house was constructed outside the fall distance of the tree then the chances of the tree falling and impacting the new house would be extremely low
- [87] I saw nothing to suggest that the tree's age or exposure to the wind was detrimentally affecting the health, structural integrity or stability of the tree

- [88] *Removing the tree will make for a safer environment for both road users (many people walk this road) and for our family. Currently the tree is dangerous... This tree has a very high nuisance factor and removing it will improve the environment.*
- [89] Nichols Road is a rural low-volume road, the chances of the tree falling and simultaneously impacting passing traffic vehicle or foot are low
- [90] I saw nothing to suggest that the tree's age or exposure to the wind was detrimentally affecting the health, structural integrity or stability of the tree. If the dead branches and cones were removed from the tree the danger associated with them falling would also be removed.
- [91] I am unable to comment on the 'nuisance factor' - and the comment that removing the tree will 'improve the environment' seems to be a personal opinion.
- [92] *The Monkey Puzzle is very old and seems to be slowly dying... Removing an old unsightly tree and planting a new species will enhance the general environment*
- [93] The tree looked to be in good health and have vitality within the normal range for the species and age. I saw nothing to suggest that the tree's age was detrimentally affecting the health, structural integrity or stability of the tree.
- [94] I am unable to comment on how 'Removing an old unsightly tree and planting a new species will enhance the general environment' as there is no information on the size, type and number of new species that are to be planted.
- [95] *The trunk is very close to the existing driveway... this area is where we would like to place our new driveway... continual falling debris from the tree will prevent us from placing the new driveway in this position...*
- [96] The existing driveway is not under the dripline of the tree (images two and four), therefore the area currently occupied by the existing driveway could be used for a new driveway.
- [97] If the dead branches and cones were removed from the tree the danger associated with them falling would also be removed.
- [98] I agree with the Consultant Arborists assessment of the reasons provided by the applicant. As the applicant has not provided any alternatives for the location of the building I cannot comment on this either. Based on the assessment above the effects of the removal of the tree are not justified by the reasons provided by the applicant.

Amenity Values (Assessment Matter 15.6.3 and Rural Zone Amenity Values 6.7.3(i) and 6.7.21)

- [99] The applicant determines that due to the alignment of Nichols Road that people do not get to appreciate the tree as they drive past. The line of sight is to look at the trunk and some dead branches. There is no green foliage below 12-15 metres. The applicants intend to have their site professionally landscaped after the new dwelling has been established. This will improve the environment for neighbours and the general public. This landscaping will include planting native trees and tussocks to "*beautify our new house*".
- [100] All submissions on this application were in support of the tree removal however only two submissions provided reasons and none wish to attend the

hearing. This makes it difficult to determine the reasons for wanting the removal. The reasons that were given that relate to the amenity values of the area are: *'In favour of removal – there won't be any issues regarding noise or changing of our view' and 'The removal will not adversely affect the surrounding environment. The trees form barely resembles a thriving Monkey Puzzle Tree.'* All but one of the submitters lives in close proximity to the tree and are the most likely to be considered affected by its removal.

[101] Councils Consultant Arborist made the following comments on the effects of removing the tree in relation to amenity effect. This is not commonly undertaken by the arborist but he is able to identify the general age of the tree and make assumptions as to how it came to be established on this site. He makes the following comment:

[102] *"Araucaria araucana are not native to the area and for the tree to be the size that it is would suggest that it is one of the original introduced plantings. It is possible there is an historic importance or community connection with this tree. The removal of the tree could result in a loss of a connection with the local community and/or history associated with the area. The tree exhibits typical form for its age and is a near specimen example of the species."*

[103] Councils Landscape Architect has reviewed the proposal as follows:

[104] *"This memorandum is in response to a request for comment on the application to remove a scheduled tree, T854 (Monkey Puzzle), protected in Schedule 25.3 of the Dunedin City District Plan. The tree was also recently carried over to the Second Generation Plan (2GP) significant tree schedule."*

[105] *The original STEM assessment was made in 2001 and the tree scored 156, which is above the required 147 "pass" total.*

[106] Background
When an assessment of a resource consent application for the removal of a significant tree is required, an updated STEM assessment is usually completed by the in-house landscape architect and (more recently), by a consultant arborist.

[107] *In the case of this application, Mark Roberts was engaged to provide the arboricultural condition assessment. He has provided a very thorough set of comments, but did not conduct an evaluation of the tree using the STEM framework. However, he does note that he is confident that the tree would score very highly under the Condition and Amenity Evaluation sections of the STEM.*

[108] *I did not manage to co-ordinate a joint site visit with Mr Robert's; however, I did visit the site on 08 May 2017 with council arborist, Aiden Battrick, and undertook the "Amenity Evaluation" part of the STEM. We met Mr Wilson on site, who expressed that his predominant concern related to the risk posed by the tree falling and causing damage to people or property. Mr Wilson addresses his health and safety concerns in more detail in his application. Mr Robert's report addresses the health and condition of the tree.*

[109] General Comment
There are two broad assessment categories to a STEM report– arboricultural ("Condition") and "Amenity". My role in the assessment of applications to remove a scheduled tree or group of trees is to comment on the amenity related matters.

- [110] *Overall, it is my opinion that T854 retains particular amenity values which contribute positively to the Nichols Road streetscape. I consider that the tree continues to merit inclusion on the protected tree schedule from an amenity perspective and the existing STEM assessment remains valid. As noted above, the "Condition Evaluation" part of the assessment has not been updated, but, Mr Roberts considers that the tree would score very highly if assessed within this framework.*
- [111] *Amenity Values*
The stature of T854 (estimated at approximately 20m) and it's largely symmetrical, domed crown means that this tree forms a prominent local feature. As noted in Mr Robert's report, the tree is a rare specimen. T854 is effectively a solitary tree, standing apart from shelter vegetation to the west and north. This separation from surrounding tall vegetation enhances the prominence of this tree so that it forms a focal feature, especially when one approaches it from the north east on Nichols road, where the road aligns in the direction of the tree (Refer fig 2).
- [112] *Mr Roberts notes the following regarding the age of the tree and possible historical associations:*
- ...for the tree to be the size that it is would suggest that it is one of the original introduced plantings. The tree is possibly associated with Momona School (established in 1899) or connected to one of the farms in the Henley Co-operative Dairy Company which was operating in the area from about 1915.*
- [113] *It is noted that if the above historic associations were applied to the STEM assessment, this would increase the total score as part of the notable evaluation.*
- [114] *In addition to the visual amenity values of T854, it is noted that trees of this scale provide a role in local climate regulation by influencing air temperature and solar radiation, enhance water quality through filtration of nutrients, sequester greenhouse gases, such as atmospheric carbon; and enhance biodiversity by providing habitat for birds and invertebrates.*
- [115] *Concluding Comments*
Overall, given the STEM assessment pass mark, which has been confirmed from an amenity perspective, and the positive assessment of the condition of the tree in the arborist report by Mr Roberts, it is considered that T854 warrants continued inclusion in Schedule 25.3. It is recommended that the applicant should not be granted consent to remove this significant tree on the basis of the amenity values of this tree."
- [116] *Based on the assessments above I believe that the tree is not 'well past being a heritage tree.' as promoted in the submission by POTS. Council's Consultant Arborist has not come to the conclusion that the tree is old and dying and both the Arborist and Landscape Architect have reached the view that the tree is worthy of retention and that the STEM evaluation score would not decrease to a level that it would put it outside "schedule 25.3 status'*
- [117] *I agree with the Council's Landscape Architect that the tree is worthy of its status as tree protected on the schedule. In my opinion any adverse effects of the tree are only on the subject site and the road reserve and are considered to be minor. The proposed location of the new dwelling will have the most impact on the whether this tree will be retained.*
- [118] *All submissions are in support of removing the tree and lack of opposing submissions indicate limited community support for the retention of the tree.*

If removed, its disappearance will have effects on the appearance of the surrounding environment, generally to a small viewing audience using Nichols Road. Due to the limited viewing audience it is difficult to determine if the adverse effects of removing the tree will outweigh the positive effects desired by the applicant and neighbours. As noted the tree can be pruned and the risk to safety mitigated by moving the location of the dwelling and vehicle entrance.

Proposed 2GP (Proposed Plan)

- [119] At time of writing, there are no applicable assessment rules, because the only 2GP rules that have legal effect currently are ones relating to rural subdivision and the clearance of indigenous vegetation. The Monkey Puzzle Tree is not a native tree to New Zealand.

Effects Assessment Conclusion

- [120] There were no submissions in support for the retention of the tree. The reports from Council's Arborist suggest that the tree is in good health and does not pose a significant safety risk. The removal of the tree would cause some adverse effects on the amenity of the surrounding environment I agree with Council's Consultant Arborist and Landscape Architects views that the tree should remain protected on the schedule.

OFFSETTING OR COMPENSATION MEASURES ASSESSMENT

- [121] 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.
- [122] In this case, no offsetting or compensation measures have been proposed or agreed to by the applicant.

OBJECTIVES AND POLICIES ASSESSMENT

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

- [123] 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 (Operative Plan)

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

Trees Objectives and Policies

	<u>Objective/Policy</u>	Is the proposal Consistent with or Contrary to the Objective?
Objective 15.2.1	Maintain and enhance the amenity and environmental quality of the City by encouraging the conservation and planting of trees.	The proposal is contrary to these objectives and policies. The tree is very large and the site is large enough to accommodate a new dwelling and the tree comfortably.

Policy 15.3.1	Ensure that landowners and developers are aware of the environmental benefits of trees and encourage them to conserve trees and undertake new plantings whenever possible.	The removal of the tree does little to contribute to the objectives and policies. Council's experts considered the tree should remain on the Schedule of Protected Trees.
Objective 15.2.1	Protect Dunedin's most significant trees.	
Policy 15.2.2	Identify and protect trees that make a significant contribution towards amenity and environmental quality.	

Rural Objectives and Policies

	<u>Objective/Policy</u>	<u>Is the proposal Consistent with or Contrary to the Objective?</u>
Objective 6.2.2	Maintain and enhance the amenity values associated with the character of the rural area.	The removal of a large tree to accommodate a large dwelling on a newly created undersized rural zoned site is considered to be inconsistent with the Rural Zone Objectives and Policies that seek to promote 'the predominance of natural features over human made features', 'the high ratio of open space relative to the built environment' and 'low population densities relative to urban areas'. Rural Zoned sites are able to accommodate large trees with fewer difficulties in comparison to those located on small Residential Zoned sites.
Policy 6.3.3	Avoid, remedy or mitigate the adverse effects of buildings, structures and vegetation on the amenity of adjoining properties.	

Proposed 2GP (Proposed Plan)

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

	<u>Objective/Policy</u>	<u>Is the proposal Consistent with or Contrary to the Objective?</u>
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 these objectives and policies. The tree is not certified as being dead, or in terminal decline, the tree is not subject to a court order under Section 333 of the Property Law
Policy	Enable the removal of a	

7.2.1.1	scheduled tree where they are certified as being dead or in 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.	Act 2007. Council's Consultant Arborist comments indicate that there is very low risk to personal/public safety or property but not considered "significant" .
Policy 7.2.1.2	Avoid the removal of a scheduled tree (except as provided for in Policy 7.2.1.1) unless: 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 4. these adverse effects cannot be reasonably mitigated through pruning and the effects outweigh the loss of amenity from the removal of the tree.	
Policy 7.2.1.3	Only allow the modification of a scheduled tree where: 1. the work is undertaken in accordance with best arboricultural practice, by a suitably qualified arborist and will maintain or improve the health of the tree; 2. any adverse effects from the modification of the tree on amenity values are avoided or, if avoidance is not possible, no more than minor; and	The proposal is contrary with this policy as the proposal is for removal of the tree.

	3. the modification is necessary to improve the health of the tree or to mitigate adverse effects of the tree on safety, sunlight access, or damage to property or infrastructure.	
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 contrary to this policy as the applicant seeks to remove the tree.

Overall Objectives and Policies Assessment

- [126] The above assessment of the specific relevant objectives and policies of the Operative and Proposed Dunedin City District Plans demonstrates that overall, the activity is generally inconsistent with the policy directives both Plans. This is to be expected as the removal of a healthy scheduled tree is unlikely to align with the objective and policies of the plan. When considering the information provided by the Council's Arborist and Council's Landscape Architect it is considered that the tree removal would not be acceptable.
- [127] The activity status of the proposal in the Proposed Plan will be non-complying. Although given that the rules are not yet operative the Objectives and Policies relevant to the tree removal are given less weight in regards to the assessment of the activity against the Plan. The Proposed Plan Objectives and Policies are more refined and acknowledge the requirement at times to remove Scheduled Trees for a number of reasons.
- [128] Having regard to the relevant objectives and policies individually, and considering these in an overall way, the above assessment indicates that the application is inconsistent with those provisions.

Assessment of Regional Policy Statements (Section 104(1)(b)(v))

- [129] Section 104(1)(b)(v) of the Act requires that the Council take into account any relevant regional policy statements. The Regional Policy Statement for Otago was made operative in October 1998. The decisions for the Proposed RPS were released in October 2016. The operative RPS remains in force until the review is completed. Local authorities must have regard to both the operative RPS and the proposed RPS when preparing and changing regional or district plans. Given its regional focus, the regional policy statement does not have a great bearing and has little relevance to the current application.

DECISION MAKING FRAMEWORK

Regional Policy Statements and Part 2 Matters

- [130] The King Salmon approach used in *RJ Davidson Family Trust v Marlborough District Council* [2016] EnvC 81 follows the Court's reasoning that in most cases it is not necessary to refer back to Part 2 when determining an application for resource consent. The rationale for this approach is because planning instruments are prepared as a cascade with district plans at the bottom of the cascade. Therefore, unless the district plan(s), under which the resource consent is being considered, are deemed to be incomplete, invalid or uncertain, these are assumed to give effect to the higher order planning documents including regional policy statements, national policy statements and Part 2 of the Act, and no further consideration of those planning instruments is required.

- [131] *However, in Davidson, the Court stated at paragraph [262]:*

In summary we hold that the correct way of applying section 104(1)(b) RMA in the context of section 104 as a whole is to ask:

- (1) Does the proposed activity, after: assessing the relevant potential effects of the proposal in the light of the objectives, policies and rules of the relevant district plans;*
- (2) having regard to any other relevant statutory instruments but placing different weight on their objectives and policies depending on whether:*
 - (a) the relevant instrument is dated earlier than the district (or regional) plan in which case there is a presumption that the district (or regional) plan particularises or has been made consistent with the superior instruments' objectives and policies;*
 - (b) the other, usually superior, instrument is later, in which case more weight should be given to it and it may override the district plan even if it does not need to be given effect to; and/or*
 - (c) there is any illegality, uncertainty or incompleteness in the district (or regional) plan, noting that assessing such a problem may in itself require reference to Part 2 of the Act, can be remedied by the intermediate document rather than by recourse to Part 2;*
- (3) applying the remainder of Part 2 of the RMA if there is still some other relevant deficiency in any of the relevant instruments; and*

(4) weighing these conclusions with any other relevant considerations

- achieve the purpose of the Act as particularised in the objectives and policies of the district/regional plan?"

[132] Given the advent of the proposed regional policy statement since the current plan was made operative and the 2GP was notified, assuming absolute compliance with the higher order planning documents should be undertaken with caution. Decisions on the proposed regional policy statement for Otago have been released (although under appeal), as such, there is a degree of uncertainty that the district plans continue to give effect to this higher order planning instrument. As such, the proposal has also been assessed against the Operative and Proposed Regional Policy Statement.

[133] Another implication of King Salmon and Davidson is that a greater importance is imposed on objectives and policies. As the operative district plan pre-dates King Salmon and Davidson, the wording of the objectives and policies now carry a level of significance that were perhaps not anticipated when the plan was first drafted. To that end, a cautious approach has been applied and an assessment of the proposal against Part 2 has been undertaken.

[134] When considering an application for resource consent, an assessment of the proposal is to be made subject to the matters outlined in Part 2 of the Act. This includes the ability of the proposal to meet the purpose of the Act, which is to promote the sustainable management of natural and physical resources. Furthermore, the matters of national importance in Section 6 must be recognised and provided for, and particular regard must be had to the matters listed in Section 7. Of particular relevance are sections:

- 5(2) "peoples and communities to provide for their social, economic, and cultural wellbeing and for their health and safety"
- 5(2)(c) "avoiding, remedying or mitigating any adverse effects of activities on the environment",
- 6(b) "protection of outstanding natural features",
- (7)(c) "the maintenance and enhancement of amenity values", and
- 7(b) "the efficient use and development of natural and physical resources", and
- 7(g) "any finite characteristics of natural and physical resources"

[135] Section 5(2) seeks to enable 'peoples and communities to provide for their social, economic, and cultural wellbeing and for their health and safety', and while this should ideally occur while avoiding, remedying, or mitigating any adverse effects of activities on the environment, it may be that genuine health and safety issues take precedence. The applicants have concerns about their own, and others', safety.

[136] Section 6(b) and 7(c) refer to the protection of outstanding natural features and the maintenance and enhancement of amenity values. The tree could be considered an outstanding natural feature but outstanding features are usually attributed to large topographical features and not individual specimen trees even if it is a tree worthy of protection. The loss of the tree will have some adverse effects on the amenity of the surrounding environment.

- [137] When considering the proposal overall, and in considering the positive effects that would result for the subject and neighbouring sites, the proposed development would be inconsistent with the purpose of the Act outlined in Section 5 of that legislation.
- [138] Having regard to Section 6 of the Act, there are no matters of national importance which can be considered to be affected by the development of this site.
- [139] With regard to Section 7(c), the removal of the tree will decrease the amenity of the surrounding environment which is consistent with council staff assessments. I believe the adverse effects of removing the tree outweigh the positive effects in this case.
- [140] The proposal has been assessed against both the operative and proposed Regional Policy Statement for Otago and found to be consistent with the direction set out in these documents. Overall, I consider the proposal is consistent with those matters outlined in Part 2 of the Act.

Section 104

- [141] 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 development overall will be unacceptable.
- [142] 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. No offsetting or compensation measures have been proposed or agreed to by the applicant.
- [143] Section 104(1)(b)(vi) requires the Council to have regard to any relevant objectives and policies of a plan or proposed plan. This report concluded that the application would be inconsistent with the key objectives and policies relating to both the Dunedin City District Plan and the Proposed 2GP.
- [144] Section 104(1)(b)(v) requires the Council to have regard to any relevant regional policy statement. The regional policy statement does not have a great bearing on the current application. I do not consider it relevant for my assessment of the proposal.

Other Matters

- [145] Section 104(1)(c) requires the Council to have regard to any other matters considered relevant and reasonably necessary to determine the application.
- [146] Case law, *Butterworth, C v Auckland City Council* (A090/2009) demonstrated that Council was wrong to base too much emphasis on the retention of the tree in light of the other effects caused by the tree. In paragraph 14 of the decision Judge Newhook acknowledged that the provisions of the plan strongly support the retention of trees and contained nothing of the flavour of matters raised by Part 2 of the Act, for instance, the health and safety of people and social and economic wellbeing.
- [147] The appellant won the appeal to allow removal of the tree due to the dominance of the tree on a residential site. In this situation the effects of the tree are based on the establishment of a new dwelling on the site. There are currently no building consent applications with council to establish this dwelling. The applicant has undertaken to provide building plans of the new dwelling. The site is large enough to accommodate this dwelling some

distance from the existing tree which would reduce or remove the perceived effects. There are no other matters of relevance to this proposal.

CONCLUSION

[148] While I appreciate that the applicants do not find the tree aesthetically pleasing this is not the only consideration that the Council must have regard to when making a recommendation on an application to remove a significant tree. The site is large enough to accommodate both the tree and a new dwelling. Having regard to the above assessment, I recommend that the application be declined.

RECOMMENDATION

[149] LUC-2018-208

*Pursuant to section 34(1) and 104B, and after having regard to Part II Matters, and section 104 of the Resource Management Act 1991, the Dunedin City Council **declines** consent to the discretionary activity being the removal of the Monkey Puzzle Tree (*Araucaria araucana*) that is listed as T854 in Schedule 25.3 of the Operative Dunedin City District Plan as a Significant Tree located at 53 Nichols Road, Dunedin on the site legally described as Lot 1 Deposited Plan 15229 (Computer Freehold Register OT6B/335) and on new LT plan as Lot 3 Deposited Plan 520868 Computer Freehold Register 835159*

REASONS FOR RECOMMENDATION

- a) The proposal is considered to be inconsistent with the key relevant objectives and policies of both the Dunedin City District Plan and the Proposed 2GP.
- b) The proposal has the potential to cause adverse effects on amenity of that cannot be avoided, remedied or mitigated.
- c) Granting of the proposal will not be consistent with the purpose of the Resource Management Act 1991 to promote the sustainable management of natural and physical resources.
- d) Alternatives exist on the large site to accommodate the tree and a future dwelling.
- e) The tree is healthy and expert advice indicates it warrants its inclusion on the schedule.

Report prepared by:


Amy Young
Planner
20/07/2018
Date

Report checked by:


John Sule
Senior Planner
23/07/2018
Date