

15 January 2018

G A Parmenter
8 Michie Street
Dunedin 9011

Dear Sir

RESOURCE CONSENT APPLICATION – LUC 2017-372 – MICHIE STREET ROAD RESERVE, DUNEDIN

The above application seek consent to remove a Silver Beech tree (*Nothofagus menziesii*, also known as *Lophozonia menziesii* and Tawhai) that is listed as T790 in Schedule 25.3 of the Operative Dunedin City District Plan as a Significant Tree. The tree is located on legal road reserve, adjacent to 8 Michie Street, Dunedin.

The application was processed on a notified basis in accordance with Section 95 of the Resource Management Act 1991 ("the RMA"). Two submissions in support were lodged to the application, from R B Allan and A R Goodman of 6 Michie Street, and Protect Private Ownership of Trees Society (POTS).

Hearings Commissioner Keith Hovell heard and considered the application at a hearing on 7 December 2017.

Consent is **granted** to the application subject to conditions. The full text of this decision commences below with a consent certificate attached to this letter.

The Hearing and Appearances

The applicant, Graeme Parmenter, appeared at the hearing and represented himself.

Council staff attending were Campbell Thomson (Advisor to Committee), Amy Young (Processing Planner), Barry Knox (Landscape Architect), Mark Roberts (Consulting Arborist, and Wendy Collard (Governance Support Officer).

Jim Moffat, Advocate-Secretary, appeared on behalf of Protect Private Ownership of Trees Society.

Procedural Issues

On inquiry to Mr Moffat, I was advised that the Protect Private Ownership of Trees Society was an informal group. While section 96(2) of the RMA enables any person to make a submission on a publicly notified application, the definition of "person" on the RMA limits this to groups which have a legal entity. As such, the Protect Private Ownership of Trees Society does not have standing to make a submission. However, as the submission was signed by J Moffat, I have had regard to it and the matters raised in the name of that individual. There was no objection to this approach from the Applicant.

A submission was received from R B Allan and A R Goodman of 6 Michie Street. This submission referred to the effects of the protected tree on their property, particularly in relation to shading. These persons also signed an affected persons form. Section 104(3)(a) prohibits taking into account any effect on a person who has given a written approval. That section is open in its wording, and therefore refers to all effects. Mr Parmenter in his evidence referred to the effects of the tree on the adjoining property at 6 Michie Street and this mirrored the content of the submission. The written material received in the submission added weight to those comments, and in that regard consideration has been given to the content of the submission.

Principal Issues of Contention

The principal issues of contention are as follows:

- The extent to which regard should be given to the provision of vehicular access to the rear of 8 Michie Street to facilitate stabilising and repairing a land slip that occurred on that site.
- The adequacy of the STEM assessment undertaken on behalf of the Council prior to including the tree in the schedule of Significant Trees.
- Whether the values of the tree justified its protection and retention.

Summary of Evidence

Witnesses for the Council

Mark Roberts, Consultant Arborist, spoke to his report highlighting that he assessed the tree using the Tree Risk Assessment Qualification ("TRAQ") tree risk assessment tool. It was his view that having regard to a five-year timeline, the tree poses a low risk to the house at 8 Michie Street and a low risk to the occupants of the house and those accessing the house. He also stated:

- The tree was in good health, evenly foliated and exhibiting good vigour and vitality.
- The tree had small amounts of deadwood, which was typical for this species, and periodically the deadwood falls from the tree.
- The tree has previously been pruned.
- A one metre long open cavity extends up the trunk, but this is not recent and is of no structural concern.
- The root plate appears stable.
- The trunk has a slight lean but this is not the result of trunk or root plate movement, and there is nothing to suggest that the tree will fall.

In reply to questions from the Commissioner, Mr Roberts expressed the view that the STEM score was not relevant at this stage, but rather it was the values of the tree and degree of risk that was relevant. When asked why the STEM analysis and risk assessment undertaken by Peter Weymouth on behalf of the Applicant contained several modified criteria and scores, Mr Roberts said he was unsure as to why this was done. He also noted that different Councils use different scores for determining the threshold of what constitutes a "significant tree". Dunedin City uses a score of 147, while Queenstown-Lakes requires only a score of 120.

Barry Knox, Senior Landscape Architect with the Dunedin City Council described in his report that the normal practice of the Council was to undertake a further STEM assessment when a request was received to remove a significant tree. He would contribute to that by determining the "amenity" aspects of the STEM Assessment. In this case, he assigned a score of 69 to the amenity aspects, down from 75 when the original assessment was undertaken. If the arboricultural "condition" values remained the same, then the overall score would be 144, below the Council requirement of 147.

Notwithstanding that, it was the view of Mr Knox that the tree should be retained given its contribution to the Michie Street streetscape and wider community values.

In reply to questions from Commissioner Hovell, Mr Knox stated that overall, he rated the contribution of the tree towards the maintenance and enhancement of amenity as moderate. He also indicated that when the Proposed Plan was prepared an audit was undertaken of the trees included in the Operative District Plan, but that audit was limited to checking trees were still standing and in good health.

Amy Young, Planner with the Dunedin City Council, provided a description of the locality, and the circumstances which have led to this application being lodged, together with extracts of the key matters contained in the reports of Mr Roberts and Mr Knox. She noted that as the tree is located on legal road, a final decision on whether the tree is removed rests with the Council. She then referred to, and commented on, the various reasons given by the Applicant as to why the tree should be removed. She also noted that while the tree was listed in the Proposed District Plan, and no submissions sought its removal, none of the relevant provisions of the Proposed District Plan were operative at this time, and as a consequence, it was only the provisions in the Operative Plan to which regard should be had.

It was the view of Mrs Young that little weight should be given to the argument that the tree should be removed in order to gain access to the rear of the property to undertake remedial work on a recent slip. She considered that a decision on the removal of the tree should be based on the effects of the tree on the owners of 8 Michie Street versus the positive effects gained by the wider public by retaining the tree. She agreed that some of the adverse effects of the tree can be mitigated, but acknowledged that the effects of the loss of sunlight and the perceived risk of danger are real to the Applicant. Mrs Young concluded that the effects of removing the tree could be appropriately overcome by conditions of consent.

Mrs Young undertook an extensive assessment of the objectives and policies of the Operative District Plan, and in most instances concluded that the application was inconsistent with these. Notwithstanding that, she recommended that consent be granted subject to conditions, although she stated this was a "close call". At the request of Commissioner Hovell, Mrs Young provided a general list of potential consent conditions.

In reply to questions from Commissioner Hovell, Mrs Young also stated that overall, she rated the contribution of the tree towards the maintenance and enhancement of amenity as moderate. Discussion also took place with regard to the two procedural matters outlined above.

The Applicant's Case

Graeme Parmenter provided written evidence, both before and at the hearing, in which he described the house at 8 Michie Street as being built in about 1910, with nearly an acre of bush running down into the town belt. He stated that the sole reason why consent was being sought was to facilitate vehicle access to the rear of his property to enable the ground to be stabilised following a slip. He considered this the most practical and cost effective of several options available. It was also his view that the tree should be removed because:

1. The tree has damaged and will continue to damage the path, patio and house at 8 Michie Street, with a number of photographs, and a report from Smaill Building and Design, submitted to illustrate this.
2. The tree endangers those who use the high traffic areas of the path and patio.
3. The tree poses a danger to the house and its occupants.

4. The tree shades the house causing an on-going loss of solar energy and a loss of house value.
5. Leaf fall from the tree creates an annual cost to clear leaves of \$500.00.
6. The garden is adversely affected by low light and water levels caused by tree canopy and roots.
7. The STEM assessment of the tree is incorrect in several aspects, including his own assessment which provided a score of 114, and an assessment by Peter Weymouth, an experienced arborist who scored the tree 138.
8. Plantings on his own property over past 30 years has more than compensated for loss of amenity caused by removal of the tree. He explained that he has removed a number of sycamore trees from his land and the planted out some 60 – 70 native trees, providing a listing and map of these.

In summary, Mr Parmenter said that a long time ago a tree was planted too close to a house, and it is causing hardship to the current residents who want it removed. He also provided an assessment of the objectives and policies of the Operative District Plan, expressing the view that removal of the tree was consistent with most of these.

Mr Parmenter, in material circulated prior to the hearing, included a report and correspondence from Peter Weymouth, a qualified and experienced arborist, in which he assessed the risk to people and property from the tree as low. However, he did highlight a moderate risk arising from the bifurcating leaders at about four metres above the ground, stating that the seam referred to by Mr Roberts would suggest some fractional movement. In his view mitigation by pruning and cabling is required to obtain a low level risk. Mr Weymouth also undertook a modified STEM assessment as noted above, arriving at an overall score of 138.

In reply to questions from Commissioner Hovell, Mr Parmenter explained that while the tree was located on road reserve, the root system extended onto his property and work would be required there as well.

Evidence of Submitters

Jim Moffat spoke to the submission lodged under the name of the Protect Private Ownership of Trees Society. As noted above, the Commissioner considered this submission as coming from Mr Moffat himself, given that the Society did not have standing under the RMA.

Mr Moffat referred to the Section 42A report, noting the recommendation to grant consent to the application. He expressed concern at the costs incurred by the Applicant in obtaining various reports and needing to obtain resource consent, and agreed with points raised by Mr Parmenter

Sue Edwards accompanied Mr Moffat, referring to a tree in Harvey Street and the action that was taken to have repairs undertaken by the Council on a driveway adjoining that tree.

Processing Planner's Review of Recommendation

The Handling Officer reviewed her recommendation in light of the evidence presented at the hearing, maintaining her recommendation to grant consent. Mrs Young advised that following the presentation by the Applicant, her recommendation to grant consent was stronger now than when she wrote the report.

Mrs Young commented on the draft conditions and recommended an additional condition regarding the requirement of traffic management of Michie Street while felling of the tree and other work is carried out. She also noted that an advice note was required to highlight that any consent given would need to apply to two sites, being legal road and 8 Michie Street.

Applicants Right of Reply

Mr Parmenter stated he had nothing further to add.

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 matters to which regard should be had in making a decision on this application. Regard was also given to the following provisions of the Operative District Plan: 4 Sustainability, 8 Residential, 11 Natural Hazards, and 15 Trees. The objectives and policies in chapter 7 Trees of the Proposed District Plan were also considered.

Main Findings on Principal Issues of Contention

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

Decision

The final consideration of the application, which took into account the application, the submissions lodged, and all information presented at the hearing, was held during the public-excluded portion of the hearing. The Commissioner inspected the site following the hearing and reached the following decision after considering the application under the statutory framework of the Resource Management Act 1991:

Land Use LUC-2017-372

*That pursuant to sections 34A(1) and 104B and after having regard to sections 104 of the Resource Management Act 1991, and the District Plan, the Dunedin City Council grants consent to a **discretionary activity** being the removal of Silver Beech tree (*Nothofagus Menziesii*) that is listed as T790 in Schedule 25.3 of the Operative Dunedin City District Plan as a Significant Tree located on legal road reserve and encroaching into the property at 6 Michie Street, Dunedin legally described as Lot 6 Deeds Plan 251 (Computer Freehold Register OT278/175) subject to the conditions appended to this decision imposed under section 108 of the Act.*

Reasons for this Decision

The Applicant, Mr Parmenter, advised at the hearing that the sole reason why consent was being sought to remove the tree was to facilitate vehicle access to the rear of his property to enable the ground to be stabilised following a slip. It is accepted that the slip that has occurred on the property is an unfortunate and worrying event. However, having regard to the various provisions of the Resource Management Act 1991 and the Operative District Plan, this by itself is not a justification to remove the tree. The provision of access to the rear of the site is a positive effect arising from removal of the tree and it is recognised in that regard. However, had the provision of access been the sole resource management effect promoted for removal of the tree, then the outcome would have been to decline consent.

Mr Parmenter, and Mr Waymouth, an experienced arborist, argued at some length at what they saw as the inadequacies of the STEM analysis undertaken to justify the inclusion of the tree in the Operative District Plan as one worthy of protection. They both provided an alternative STEM analysis. Such an approach did not assist making a decision in this case. The tree is recognised as significant in the Operative District Plan, and regardless of the adequacy of the assessment undertaken at the time of its inclusion, that does not alter the fact that the tree is subject to protection and requires consent for its removal.

While there may be some benefit in undertaking a STEM analysis based on the current situation, none of those presented prior to, or at the hearing, including that of Mr Knox, were of assistance. They were either incomplete, or in the case of that prepared by Mr Waymouth, utilised a modified assessment table that was not consistent with that previously used. No explanation was given for the changes that had been made. Further, it was not clear as to what STEM score was appropriate for classifying a tree as "significant". As noted by Mr Roberts, while the Dunedin City Council uses a score of 147, the Queenstown-Lakes District Council adopts a threshold score of 120.

Mr Roberts also expressed the view that at this time the application should be assessed having regard to the values of the tree. That approach is considered appropriate, but in addition, regard also needs to be given to relevant statutory matters, of which the most significant is its effects.

Questions were put to both Mr Knox and Mrs Young asking how they would rate the contribution of this tree towards the maintenance and enhancement of amenity; would it be low, moderate, high or outstanding? In both cases they answered they consider the contribution "moderate". The wording of the question asked encapsulated the intent of a number of policies and objectives in both the Operative and Proposed District Plan.

In the Operative Plan:

- Sustainability Objective 4.2.4 protects significant natural and physical resources, while Policy 4.3.4 provides a level of protection commensurate with their level of significance.
- Trees Objective 15.2.1 affords protection to the "most significant trees" and Policy 15.2.2 focuses on those trees that make a significant contribution to amenity.

In the Proposed District Plan, a similar approach is adopted, with Objective 7.2.1 seeking to maintain the contribution made by significant trees.

Given the advice of Mr Knox and Mrs Young that the contribution of this tree is on "moderate", then this falls below the threshold for protection in terms of the Objectives and Policies of the District Plans. In that regard it is concluded that removal of the tree is not inconsistent with the various Objectives and Policies referred to by Mrs Young.

Policy 7.2.1.2(2) of the Proposed Plan acknowledges that removal of trees is appropriate where the tree is shading existing residential buildings to the point that access to sunlight is significantly compromised. The current application is consistent with that provision.

Mr Parmenter did present a compelling argument justifying the removal of the tree. Put simply, many years ago a large growing tree was planted too close to a house. As a consequence, in addition to the loss of sunlight and natural openness around parts of the house, the tree now overhangs the house with leaves and falling deadwood causing damage to the building. It is also accepted that tree roots are damaging paths and the dwelling, and this is creating a danger to persons walking over disrupted ground. While both Mr Waymouth and Mr Roberts considered the tree falling onto the house at the lower level of probability, if it were to occur, such as during a storm, then it would have a high potential impact. As such, it is a potential effect as defined by Section 3 of the Resource Management Act and one to which regard should be had.

Given the impact on the amenity of the property at 8 Michie Street, and the adverse effects arising from the location of the tree in close proximity to the dwelling at that property, then it is appropriate to provide for the removal of the tree. The effects described above have greater weight than the contribution that the tree makes to the amenity of the locality. The overall loss of amenity in this case is mitigated to some extent given that 8 Michie Street contains extensive mature bush, including a number of native trees, and that the Town Belt adjoins that site.

In reaching the view that approval should be granted to remove the tree it is acknowledged that the final decision on its removal rests with the Dunedin City Council, as the tree is located on legal road reserve. Should the Council give its approval, as the owner of land on which the tree is located, then it may impose any conditions that it considers appropriate to the circumstances. Those conditions would be in addition to those imposed by way of this consent.

Commencement of Consent

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

Right of Appeal

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 8140

Any appeal must be served on the following persons and organisations:

- The Dunedin City Council
- The Applicant
- 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.

Please direct any enquiries you may have regarding this decision to Amy Young, whose address for service is City Planning, Dunedin City Council, PO Box 5045, Dunedin 9058.

Yours faithfully



Commissioner Keith Hovell

Resource Consent Application – Land Use LUC-2017-372

That pursuant to sections 34A(1) and 104B and after having regard to section 104 of the Resource Management Act 1991, and the District Plan, the Dunedin City Council grants consent to a **discretionary activity** being the removal of Silver Beech tree (*Nothofagus Menziesii*) that is listed as T790 in Schedule 25.3 of the Operative Dunedin City District Plan as a Significant Tree located on legal road reserve and encroaching into the property at 8 Michie Street, Dunedin legally described as Lot 6 Deeds Plan 251 (Computer Freehold Register OT278/175) subject to the following conditions:

Conditions

1. Removal of Silver Beech tree (*Nothofagus Menziesii*) T790 shall be in accordance with arboricultural best practice and under the direction of a suitably qualified person.
2. At least 20 working days prior to the planned removal of tree T790, the consent holder or their agreed nominee, shall submit to the Dunedin City Council Roading Manager, for approval, a temporary traffic management plan prepared by a qualified 'Site Traffic Management Supervisor'.
3. All work undertaken in association with the removal of the tree shall be in conformity with an approved temporary traffic management plan.
4. The area within which works are undertaken shall be left in a tidy state within seven days after completion of the felling of tree T790. That shall include the removal of all tree material from the legal road within that time period.
5. Activities associated with the removal of the tree shall be limited to the hours of 7:30 am to 6:00 pm Monday to Saturday, except that where no work is undertaken prior to noon on any day, work may continue to 8:00 pm.
6. No work associated with the removal of tree T790 shall be undertaken on any Sunday or Public Holiday, nor between 8.00pm to 7.30am Weekdays or Saturdays.
7. In carrying out all works associated with the removal of tree T790, all reasonable measures shall be taken to ensure the use of machinery for the removal of tree T790 shall comply with the following noise limits (dBA) measured at the boundary of any residential site, excluding the site at 8 Michie Street:

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

Sound levels shall be measured and assessed in accordance with the provisions of NZS 6803: 1999 Acoustics – Construction noise.

Advice Notices

- 1 In addition to the conditions of resource consent, the Resource Management Act 1991 establishes through Sections 16 and 17 a duty for all persons to avoid unreasonable noise, and to avoid, remedy or mitigate any adverse effect created from an activity they undertake.
- 2 Resource consents are not personal property. This consent attaches to the land to which it relates, and consequently the ability to exercise this consent is not restricted to the party who applied and/or paid for the consent application. In this case, the tree is located on legal road, but part of the root system will extend onto private land. The Council and the owner of the adjoining property at 8 Michie Street will need to co-operate to enable removal of the tree.
- 3 Having regard to the provisions of Section 125(1)(a) of the Resource Management Act 1991, this consent shall lapse unless given effect to within five years, or approval is sought for a longer period under section 125(1A)(b).
- 4 It is the responsibility of any party exercising this consent to comply with any conditions imposed on the consent, prior to and during (as applicable) exercising the resource consent. Failure to comply with the conditions may result in prosecution, the penalties for which are outlined in Section 339 of the Resource Management Act 1991.

Issued at Dunedin this 15th day of January 2018



Keith Hovell
Hearings Commissioner