

27 November 2019

D L Williams and J M Phillips
139 Studholme Street
Somerfield
Christchurch 8024

Via email: johnmaxphillips@gmail.com
And Darlene.williams25@gmail.com

Dear D L Williams and J M Phillips

RESOURCE CONSENT APPLICATION:

**LUC-2-19-380
5 FERNTREE DRIVE, WAKARI
DUNEDIN**

The above application for land use consent is to remove a tree, being a European Silver Fir (*Abies alba*), that is listed in the Operative District Plan ('the ODP') as 'T444' and is also noted as a significant tree 'T444' in the Schedule of Trees in Appendix A1.3 of the Proposed District Plan ('the 2GP'). The tree is located at 5 Ferntree Drive, being Lot 4, DP 19517, comprising Council Reserve land.

The application was processed on a publicly notified basis in accordance with section 95 of the Resource Management Act 1991 ('the RMA' or 'the Act'). Three submissions in support and eleven submissions in opposition were lodged in respect to the application.

Hearings Commissioner Louise Taylor heard and considered the application at a hearing on 6 November 2019.

At the end of the public part of the hearing, the Commissioner, in accordance with section 48(1) of the Local Government Official Information and Meetings Act 1987, resolved to exclude the public.

Both prior to and following the conclusion of the hearing, a site visit was undertaken by the Commissioner.

The Commissioner has **declined** consent to the application on 22 November 2019. The full text of this decision commences below.

The Hearing and Appearances

The applicant was represented by:
John Phillips
Peter Waymouth (Consultant Arborist)

Council staff attending were:

Campbell Thomson (Senior Planner/Committee Advisor)

Madeline Seeley (Planner)

Mark Roberts (Consultant Arborist)

Luke McKinlay (Landscape Architect)

Steve Rowlands (Urban Forest Officer)

Wendy Collard (Governance Support Officer)

Louisa Sinclair (Team Leader, Asset Manager, 3 Waters)

Submitters in attendance included:

Jim Moffat (Protect Private Ownerships of Trees Society (POTS))

John and Pauline Beekhuis (The Dunedin Amenities Society)

Gerard Closs and Robyn Sperling

Malcolm and Jo Burns

Procedural Issues

No procedural issues were raised.

Principal Issues of Contention

The principal issues of contention are as follows:

- What value the tree holds in terms of STEM analysis.
- What risk is posed by partial or full failure of the tree, thus presenting a risk to people or property.
- Whether pruning would ensure any such risk would be low.
- What level of adverse effects would occur by removing the tree.
- Whether removing the tree would result in a positive effect.

Two arborists had prepared reports for and attended the hearing. While their assessments were the same or similar on some aspects of the condition of the tree, they disagreed about the health of the tree and level of safety risk of partial or full failure it presented.

I note that all parties agreed the tree is a prominent, longstanding feature of Ferntree Drive, and that it adds to the amenity of the street and surrounding suburbs. The tree is easily discernible from as far away as Roslyn Village. There were differences in opinion about the historic value of the tree, and whether the recent pruning has reduced the amenity and landscape value of the tree. None of the parties, including the arborists, considered the tree to be dead or in terminal decline.

Summary of Evidence

Processing Planner

Ms Seeley summarised her recommending report and explained that Council had initially received an application to remove the tree as emergency works, but that staff did not accept that emergency works were necessary. The application continued to be processed under the relevant district plan provisions.

Ms Seeley explained the Fir tree is listed in the Operative District Plan ('the ODP') as "T444" and is also noted as "T444" in the Schedule of Trees in Appendix A1.3 of the Proposed District Plan ('the 2GP'). Its removal comprises a discretionary activity under the ODP and non-complying activity under the 2GP. Some of the provisions in the 2GP which are relevant to this applicant are under appeal. Accordingly, relatively less weight can be given to those provisions. Ms Seeley and Mr Thomson confirmed that overall the application comprises a non-complying activity as this is the most conservative activity status. I accept this conclusion and have considered the application as a non-complying activity.

Ms Seeley explained that the applicants own the adjoining site at 3 Ferntree Drive. Ms Seeley provided a detailed summary of the consenting history of the 3 Ferntree Drive site in her report. This site is the subject of a subdivision named 'Ferntree Mews'. The applicant has been granted resource consent to subdivide 3 Ferntree Drive into 3 lots each being 550m² (approx.). These lots have been prepared (buildings removed, vehicle access created, land cleared and fences along internal boundaries erected). The Council has received a request for certification that the conditions of subdivision consent have been met under s224 of the Resource Management Act 1991 (a statutory requirement for issue of titles). Building consent to erect dwellings on Lots 1 and 3 of the subdivision has been granted and early building works are underway on Lot 1. There are no buildings on Lots 2 or 3. The tree was considered in the subdivision consent to create these lots. It was noted at that time that any development would need to progress with the presence of the tree in mind, including district plan rules in relation to set backs, etc.

In her report, Ms Seeley set out a careful analysis of the various expert opinions provided, in particular, she compared the findings of the two arborists. Her summary of the STEM analysis undertaken by the experts is:

In terms of the STEM evaluation, it is my opinion having viewed all of the evidence that overall the condition of the tree can be considered good, if not very good, and that the tree's condition is largely the same as in 2001, meaning that the tree warrants continued protection in the schedule in this regard. The development on the adjoining lot may adversely affect the tree, but any development can be assessed at the time in relation to the tree and construction methods can be implemented to ensure the lowest impact on the tree occurs¹.

I am grateful for this analysis as it served to bring the matters of contention into focus.

In terms of the values of the tree and its contribution to the streetscape and residential area of Wakari, Ms Seeley comes to the following conclusions:

Overall, it is considered that the tree maintains a significant contribution to the amenity of the area and as evidenced by the opposing submissions provides a sense of identity for residents in area that is connected to the history of the site. Any doubt cast by the applicant's arborist on the condition and amenity contribution of the tree is not supported by Council's experts, and is also not supported by submitters currently living in the area. The tree warrants ongoing protection for the reasons provided by Mr McKinlay and in submissions opposing the application. The proposed pruning of the tree to mitigate the health and safety effects is not considered to reduce the tree's value or contribution. The tree's removal would adversely affect the amenity values and character of the area and these adverse effects would not be mitigated by the proposed planting. Conversely, where the tree's health and safety effects can be mitigated by the proposed pruning, the amenity contribution of the tree can be maintained².

Mr Roberts, Mr McKinlay, Mr Rowlands

Messrs Roberts, McKinlay and Rowlands provided written reports to support Ms Seeley's recommending report. Mr Roberts provided a critique of Mr Waymouth's report, particularly in terms of the way he had applied the STEM and risk analyses. Messrs Roberts and McKinlay's combined STEM analysis give the tree a score of 174, which is the same score as the 2001 Council assessment concluded. This is well above the usual threshold applied to provide protection to trees via district plan provisions. Mr Roberts considered the risk of partial or full failure of the tree is low, subject to maintenance pruning.

¹ Recommending Report, paragraph 98.

² Recommending Report, paragraph 112.

Mr Rowlands explained he is the Council staff member responsible for the health and risk management of the tree. He has extensive experience in this area both in New Zealand and in the United Kingdom. He explained that Council has a maintenance plan in place for this and other large trees, and that regular pruning would occur as needed. He prefers to undertake regular, small scale pruning compared with less often, large changes to the tree to retain the health and shape of the tree whilst managing risk of failure.

Ms Sinclair

Ms Sinclair advised that while Council water and sewer mains run in close proximity to the tree, this is not unusual for Council infrastructure, and she was comfortable that the tree roots are not having any current impact on the pipes.

The Applicant's Case

Mr Phillips explained his partner had lived on the site for many years, and they are now planning to build a dwelling to live in on Lot 2. Construction work has recently commenced for a dwelling on Lot 2. He advised that the presence of the tree is not limiting his ability to proceed with the development plans. Mr Phillips stated he likes and values the tree, but upon receiving advice from Mr Waymouth, he holds concerns that it poses a risk of a loss leader or limb failure, which due to the size and position of the tree could cause significant damage to life and/or property.

While he was comforted to hear that the Council intends to prune the tree on a regular basis, his preference was for the tree to be removed, thus removing the risks from a failure of the tree.

Peter Waymouth, Arborist for the applicant, spoke to his report that accompanied the application. He concluded the tree has a high risk of potentially causing damage to people or property during a storm, could be a danger to traffic and pedestrians, the tree root growth makes the footpath uneven and hazardous, and is close to a water main. Overall, he gave the tree a STEM score of 144 and expressed a view that it no longer held sufficient value to be protected.

While in his report appended the application Mr Waymouth presented two options to manage the risk he identified with the tree, being either remove or prune it, at the hearing he explained he felt he did not have confidence that pruning the tree would suitably manage the risk of failure. Mr Waymouth suggested that further analysis of the tree would be appropriate, in particular looking at the root structure to ensure the overall health of the tree is not compromised.

Evidence of Submitters

I have considered all submissions filed in relation to this matter. The following submitters attended the hearing.

Jim Moffat (Protect Private Ownership of Trees Society "POTS"):

Mr Moffat is the advocate/secretary of POTS which advocates for landowners who own trees listed for protection in district plans. In this case, POTS submitted in support of the application which relates to a Council owned tree due to its effects on a residential property. POTS seeks the application be granted. Mr Moffat made comparison to other trees on Council land that had been subject of resource consent, and raised concerns about the cost implications for the applicant.

Gerard Closs and Robyn Sperling:

Mr Closs and Ms Sperling have lived at 17 Ferntree Avenue for 14 years. Mr Closs works in the Zoology Department at the University of Otago. They advised that the large trees in Ferntree Avenue are the main reason they bought property in the street. They value the presence of the tree and the wildlife including Kereru, Tui and Ruru it provides habitat for. They value the history of the area and the tree's place in that history. They advised that they regularly walk under the tree and are not concerned about any safety risk. They seek the application be declined.

John Beekhuis (The Dunedin Amenities Society):

Mr Beekhuis is the Vice President of the Dunedin Amenities Society and spoke to the Amenities Society's submission. He advised that the Society opposes the application on the grounds that the tree is healthy and is important from an amenity and historical perspective. The Society is concerned that removal this tree would set a precedent for the removal of other large trees in the City, including in the Town Belt.

Malcolm and Jo Burns:

Mr Burns advised he has worked in forestry most of his life. Mr Burns explained he and his wife live at 11 Ferntree Drive and highly value the tree. He noted there were many large trees close to residential dwellings in the area. He does not have safety concerns that result from the tree. He noted that the presence of the tree was considered at the time of the applicant's subdivision, and that any impact the tree might have on the ability of dwellings to be constructed should not be at the detriment to the tree.

Processing Planner's Review of Recommendation

Based on the evidence provided by both consultant arborists, Council's landscape architect and Council's Urban Forest Office, Ms Seeley assessed the application as generating adverse effects that are more than minor, and also as being contrary to relevant operative and proposed district plan objectives and policies. Accordingly, she recommended the application be declined.

Applicants Right of Reply

Mr Phillips confirmed he sought resource consent for the tree's removal. He advised he did not wish to offer any form of mitigation or off set of effects from the loss of the tree, due to the tree being on Council land.

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 I considered. Regard was given to the relevant provisions of the following chapters of the ODP: 4 Sustainability, 8 Residential Zones, and 15 Trees. I have had regard to all of those provisions. The following provisions are particularly relevant:

Objective 15.2.2: Protect Dunedin's most significant trees

Policy 15.3.2: Identify and protect trees that make a significant contribution toward amenity and environmental quality

Ms Seeley concludes that the proposal is contrary to these provisions. I agree with this conclusion as the tree makes a significant contribution toward amenity and environmental quality in Ferntree Drive and beyond. The removal of the tree will not protect it, and nothing is proposed by the applicant to offset the loss of the tree.

In terms of the proposed 2GP, I have given regard to chapter 7, the scheduled trees section, chapter 15, the residential zones section and chapter 2, the strategic direction section. Of particular relevance is:

Objective 7.2.1: The contribution made by significant trees to the visual landscape and history of neighbourhoods is maintained

Policy 7.2.1.1: Enable the removal of a schedule 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.

Based on the evidence of the experts, the tree is not covered by Policy 7.2.1.1.

Policy 7.2.1.2: *Avoid the removal of a scheduled tree (except as provided for in Policy 7.2.1.1) unless:*

- *there is a significant risk to personal/public safety or a risk to personal safety that is required to be managed under health and safety legislation;*
- *the tree poses a substantial risk to a scheduled heritage building or structure;*
- *there is a moderate to significant risk to buildings;*
- *the removal of the tree is necessary to avoid significant adverse effects on existing infrastructure and network utilities; or*
- *removal of the tree will result in significant positive effects in respect of the efficient use of land.*

Policy 7.2.1.2 is directive in that it uses the word “avoid”. This means that to be consistent with the policy, the tree is not able to be removed unless it fits at least one of the exclusions. Based on the evidence presented I do not consider any of the exclusions apply. I discuss these matters in more detail in my “reasons for this decision” section below.

Regard was also given to the Operative, Proposed and Partially Operative Regional Policy Statement for Otago. I agree with Ms Seeley that the Regional Policy Statements have little bearing on this matter.

I accept Ms Seeley’s analysis of the Statutory documents, including the identification and assessment of relevant District Plan provisions.

In terms of the nature of the application (in that it was originally filed as an emergency removal due to safety risk but was eventually processed under the relevant district plan rules), I have considered whether this was flawed to the extent the process was fatal. Whilst this path was not usual, Ms Seeley was comfortable that the application was complete due to the fulsome arborist’s report included, and I am satisfied that I had sufficient information upon which to consider the application in this case. This should not be considered best practice however.

Main Findings on Principal Issues of Contention

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

Decision

The final consideration of the application, which took into account all information presented at the hearing, along with submissions and material provided via the agenda, was held during the public-excluded portion of the hearing. I reached the following decision after considering the application under the statutory framework of the Resource Management Act 1991. In addition, a site visit was undertaken during the public-excluded portion of the hearing. I inspected the site and this added physical reality to my considerations.

*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 provisions of the Dunedin City District Plan and the Proposed Second Generation Dunedin City District Plan, the Dunedin City Council **declines** consent to a **non-complying activity** being the removal of the European Silver Fir (Abies alba) on the site at 5 Ferntree Drive, Wakari, Dunedin legally described as Lot 4 DP 19517 (a recreation reserve under the Reserves Act 1977).*

Reasons for this Decision

Mr Phillips explained at the hearing that while he values the tree, his concern was to ensure the tree did not pose a risk to current and future residents adjacent to the site. Upon careful review of the expert evidence, I am satisfied that with appropriate, regular maintenance, the tree will not present an inappropriate level of risk.

Both the ODP and 2GP include directive objectives and policies about protection of trees listed in the respective plans, and with respect to the 2GP, limited reasons are provided to justify the removal of such trees. I note that STEM and other risk assessments have occurred several times over the past twenty years, including a review via the 2GP process. The tree was most recently pruned via resource consent in 2018 to raise the crown on behalf of the Council. The conclusions of Mr Roberts, Mr McKinlay and Mr Rowlands is that the tree retains significant value, is in good health and, with appropriate, regular maintenance, carried out under supervision by a specialist arborist (as required by the relevant planning documents) does not present any safety risk that is greater than low. While Mr Waymouth would prefer further, more detailed assessment of the tree, including its root structure, I am persuaded by the Council officers that this is not necessary for the purposes of my consideration.

In terms of the fifth bullet point of Policy 7.2.1.2 (2GP), there was no evidence presented to me that the presence of the tree is impacting on the applicant's ability to develop their adjoining land. Given the reserve status of the site the tree is located on, I do not consider the tree's removal would increase the efficiency of the use of either the tree site or adjoining residential sites.

I therefore consider that the proposed activity is contrary to the relevant objectives and policies of the Operative and Proposed District Plans.

I consider the tree provides a significant contribution to the amenity of Ferntree Drive, especially as one approaches from the bottom of Ferntree Drive. This is supported by the majority of submissions as well as Council's experts. Those submitters who attended the hearing who are residents of the area clearly value this and other large trees in the immediate area, to the extent they cite these trees as a main reason they live in the area. I agree that large trees are a feature of Ferntree Drive and the area immediately surrounding, and they contribute to the character and amenity values of these streets.

The tree's removal would adversely affect the amenity values and character of the area and no mitigation of these effects has been proffered by the applicant. I conclude the tree's health and safety effects can be mitigated by maintenance pruning, and that this will ensure the amenity contribution of the tree can be maintained.

I conclude that while removing the tree may give rise to safety benefits to properties and users of the immediate adjacent site, the removal of the tree would be a significant loss to the Ferntree Drive streetscape. I conclude that adverse effects on the tree itself given its significant value and contribution to the streetscape, and the visual and amenity effects on residents and regular users of Ferntree Drive would be more than minor.

Accordingly, neither gateway test contained in Section 104D of the Resource Management Act 1991 is passed, and I am not able to consider the granting of consent to the proposal.

For completeness, I consider that the proposal is not a "true exception" as there are many large listed trees in Ferntree Drive, elsewhere in Wakari and beyond, which, unless carefully maintained, could pose a safety risk due to potential partial failure. These trees, to a greater or lesser extent, contribute significantly to the amenity of the City. Given this, I consider granting the application could establish an undesirable precedent for future applications.

I conclude that the granting of the consent would be inconsistent with the purpose of the Resource Management Act 1991 to promote the sustainable management of natural and physical resources.

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 black ink, appearing to read 'Louise Taylor', written in a cursive style.

Commissioner Louise Taylor