

TO: Hearings Committee

FROM: Jane O'Dea, Planner

DATE: 8 November 2023

SUBJECT: **RESOURCE CONSENT APPLICATION**
LUC-2023-282
2 MONTECILLO LANE

INTRODUCTION

- [1] This report has been prepared on the basis of information available on 8 November 2023. 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.
- [2] In preparing this report I have relied on the reports provided by Mr Samuel Ritchie of Valley Arborist (dated 27 June 2023) which was included in the application (refer to Appendix 1); Mr Luke McKinlay, Dunedin City Council Landscape Architect; and Mr Mark Roberts of Roberts Consulting, consultant arborist to the Dunedin City Council (refer to Appendix 3).

SUMMARY OF RECOMMENDATION

- [3] I consider that the proposal should be granted consent. I consider that the adverse effects of the proposal will be no more than minor; and it is not practical to avoid these effects due to the state of the tree's health and its diminished amenity value.

DESCRIPTION OF PROPOSAL

- [4] Resource consent is sought to remove a scheduled tree. The tree is a *Quercus robur* (Oak). The tree is scheduled in the Proposed Second Generation Dunedin City District Plan (the 2GP) Appendix A1.3 Schedule of Trees ('the schedule') as T402.
- [5] A copy of the application is contained in Appendix 1 of this report.

DESCRIPTION OF SITE AND LOCATION

- [6] The site at 2 Montecillo Lane is legally described as Lot 1 Deposited Plan 477748 & Lot 19 Deposited Plan 477748, held in Record of Title 66296.
- [7] 2 Montecillo Lane is the northern-most property in a development of 17 houses, laid out in two rows on the eastern and western sides of a private lane (Montecillo Lane). The dwellings can best be described as 'town houses,' with relatively small curtilage areas. To the east of the houses there is a large area of commonly owned land which is covered in bush. The Record of title is subject to a consent notice preventing future development of this commonly owned land.

- [8] 2 Montecillo Lane slopes down from west to east at a moderate gradient, and contains a split level dwelling with a garage on the lower level, and hard surfaced driveway extending from Montecillo Lane. The property has dual access from Montecillo Lane and Patrick St, via a leg in driveway.
- [9] The subject oak tree is located in the north-east corner of the property, in the location circled on Image 1 below. Mr Ritchie, the applicant's arborist, provides the following description of the tree:

The tree is approximately 15-18m high and situated approximately 3-4m from the northern boundary of 2 Montecillo Lane and the southern boundary of 29c and 33 Patrick St. The trunk diameter is approximately 1.1m measured at chest height, which is singular until it splits into 2 main stems at approximately 3.5m height... The canopy is unsymmetrical, and spreads approximately 7-8m N-S and approximately 10-11m W-SW...

In general, the tree has a messy, tortured appearance, with 3 or 4 major wind broken stubs... particularly on the NE and W sides, that all appeared to have occurred relatively recently, within the last 5 years. An approximately 150mm branch had recently been broken off by wind and was sitting where it had landed in the garden... There are many old pruning cuts both high in the crown and low in the trunk system, and they vary in quality and age; some look as though they have been made in accordance with arboricultural standards, while others do not and are left as stubs or are poorly made. The tree, by wind or by pruning, has had all of its lower branches, large and small, removed to a height of approximately 12m, and therefore growth is concentrated mostly in its uppermost portion, i.e. a 'lion's tail' form. Where there is other growth, it is in the form of numerous epicormic shoots that cover the trunk and main stems.



Image 1: Aerial photograph of 2 Montecillo Lane. Location of tree is circled in red.



Image 2: View of T402 from the west on Patrick Street.

- [10] In the immediate locality there are 3 additional scheduled trees – T401, a sequoia, which is located on Montecillo Lane; T403, another sequoia; and T407, a silver beech. T403 and T407 both appear to be located within the boundaries of 80 Eglinton Rd. All of these trees were once located within the same established group of trees and bush on the Montecillo site, prior to the subdivision and development of the site from 2013 onwards.

- [11] There are a number of individual scheduled trees scattered around the wider locality of Eglinton Rd, Glen Rd, Neidpath Rd and Haywood St. The Town Belt lies to the west of the site and extends to the south and north. This area contains large areas of open space and bush, no doubt with some substantial mature trees, however these are not specifically scheduled in the 2GP.

HISTORY OF THE SITE/BACKGROUND TO THE APPLICATION

- [12] The site was previously part of the grounds of the Montecillo Veterans Home and Hospital, which had been situated on the site since 1918. The occupation of the site pre-dates this

however, with the original building (which became the veterans home) having been built in around 1850 as a family home set in 10 acres of land.¹

[13] The Montecillo Lane development commenced in 2013 with the demolition of the former war veterans home and subdivision of the site (subdivision application reference SUB-2013-59). The house at 2 Montecillo Lane was erected some time between May 2014, when building consent was granted, and October 2016 when code compliance was issued for the build (building consent references ABA-2014-543 & ABA-2015-543/A).

[14] There have been a number of resource consent applications relating to the tree, all submitted by previous owners. These are as follows:

- LUC-2013-311 – non-notified application assessed in conjunction with subdivision consent SUB-2013-59, for the construction of the access (ie. the formed section of Montecillo Lane) and turning circle under the canopy of T402 (among other scheduled trees). The report makes the following comments regarding potential effects on T402:

The Arborist notes that the development proposal for the site has a driveway passing directly under the canopy of the oak, T402. She comments, 'T402 was clearly identified as a significant tree at the commencement of the development of the site, and should probably have been considered more carefully in the planning of the layout of the site.' I note that the proposed turning circle is one option for the manoeuvring of vehicles on-site, and that the development is not dependent on this circle being in place, nor is it dependent on the removal of the tree. Assuming that the oak tree will remain, it will be necessary for any work carried out within the dripline to be undertaken to acceptable arboricultural methods. Conditions should be placed on the consent to this effect.

Date of decision was 21 August 2013

- LUC-2013-294 – notified application to remove T402, T406, and an elm from tree group G037. Application was granted in respect of T406 and the elm.

The application to remove T402 was declined, and the committee gave the following reasons for this decision:

With respect to T402, the solitary Oak sited near the boundary of shared lot 19 and lot 1 of the development, the Committee considered the position of both the applicant and Council's Planner. After a site visit, they formed the view T402 is prominent and contributes to both the proposed development and wider area. The Committee concluded T402 was still in reasonable health after a history of root disturbance, and with careful management, the tree is likely to flourish.

In terms of the objectives and policies of the District Plan, the Committee noted that these were directed at tree protection. It therefore accepted that the proposed removal of protected trees in the application, particular T402, the solitary Oak would be inconsistent the relevant objectives and policies.

Date of decision was 2 October 2013.

¹ Montecillo Veterans' Home and Hospital Residents' Handbook – 3rd edition (from extract appended to DCC STEM Evaluation for T402)

- LUC-2016-366 – non-notified application for minor tree work comprising of pruning consisting of a crown thin of up to 10% and no more than 15% of the live crown of the tree; crown raising to a height of 4m; and crown cleaning.

The Council's arborist found the tree to be in average condition and noted that soil levels around the base and within the dripline have been altered and this was impacting on the health of the tree.

Date of decision was 7 September 2016.

- LUC-2019-93 – non-notified application for minor tree work, being crown reduction works only up to a maximum of 30% of the live foliage of the tree.

The Council's consultant arborist (Mr Roberts) noted at this time potential problems, including the high probability that there had been soil disturbance and root damage (during subdivision works); the recent exposure of the tree due to the removal of surrounding trees and vegetation; and extensive covering of the rooting area with hard surfacing. Nevertheless, at that point in time the tree appeared to be in good health and have vitality within the normal range for the species and age.

Date of decision was 15 March 2019.

- LUC-2020-336 – non-notified application for, amongst other matters, earthworks for the construction of retaining walls, within the dripline of T402. The application was partially retrospective in that the earthworks had already been undertaken.

The Council's consultant arborist (Mr Roberts) noted:

At the time of the August 25, 2020 visit the tree was not in leaf but looked to have declined since the January 2019 visit and there were signs of branch failure in the upper canopy. The type of branch failures and decline exhibited are consistent with trees that have suffered sudden exposure, root cutting and reduced soil volume; actions which appear to have happened as a result of the Montecillo Lane subdivision.

T402 looked as if it had declined since January 2019. This decline was most likely as a result of the Montecillo Lane subdivision; i.e. the removal of neighbouring trees, root cutting, changed soil levels and the creation of impermeable surfaces in close proximity to T402.

Any further damage and disturbance to T402 must factor in the pre-existing damage and disturbance [associated with the creation of the Montecillo Lane subdivision]. The seemingly minor encroachment under the dripline of T402 must be considered detrimental to the long-term health of the tree because it compounds upon recent harm events.

Summary of Effects on the long-term health of the tree

It is my opinion that the long-term health of the tree has been compromised as a result of the construction of the retaining wall at number 29c Patrick Street. The wall itself may have only had minor effect if the Montecillo Lane subdivision works had not occurred. The potential effects on tree health need to be considered as accumulative.

Neither construction events (the building of the retaining wall at number 29c Patrick Street and the construction of number 2 Montecillo Lane) have directly encroached the structural root zone, but it is possible that root damage may extend into structural roots over time and tree stability may be compromised.

Conditions such as mulching and irrigation were imposed to reduce the effects of construction on the long term health of the tree.

Date of decision was 7 September 2020.

- [15] The consenting history paints a picture of a series of actions which have compromised the health and appearance of T402. As described succinctly by the Council's Landscape Architect, Mr Luke McKinlay:

This tree has had an unfortunate history following the closure of Montecillo War Veterans home. As outlined in the Arborist's report, prepared for the applicant by Samuel Ritchie, the ground level around the western side of T402 was built up sometime after 2013. Subsequently, significant works (construction of a house, driveway, retaining wall) were then undertaken within the dripline of this tree. Significant pruning work has also been undertaken on several occasions since 2013, including the removal of large lower branches. These works appear to have had a cumulative effect on both the health and appearance of the tree.

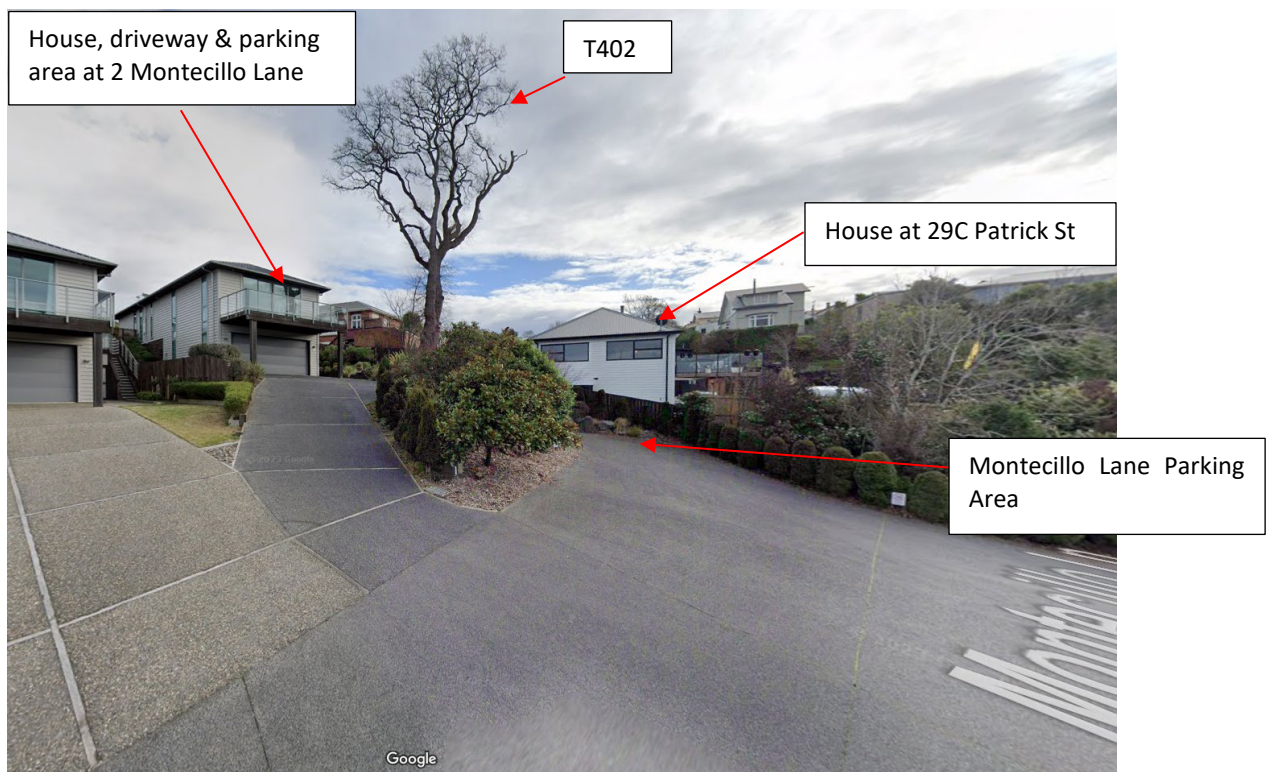


Image 3: T402 in context of Montecillo Lane and 29C Patrick St. Source: Google Streetview July 2023

2001 STEM ASSESSMENTS T402

- [16] Council has two Standard Tree Evaluation Form (STEM) assessments on file for T402, which were undertaken within weeks of each other in 2001.
- [17] T402 received a total STEM score of 171 points in the assessment dated 12 March 2001; and 138 points from the assessment dated 11 April 2001. The two assessment vary in their scores for function, age, stature and visibility.

- [18] I am unable to account for the two STEM assessments undertaken so close together, and with different scores.
- [19] The accepted score to warrant inclusion in the District Plan tree schedule is 145.
- [20] A copy of the STEM assessments is included as Appendix 4.

2GP AUDIT OF SCHEDULED TREES 2013/14

- [21] During the District Plan review process, most of the significant trees were examined in 2013-2014 by a Council Landscape Architect and a Council Arborist, to see if the trees were still worthy of continued inclusion in the 2GP's 'schedule' of significant trees (Appendix A1.3). However, a new STEM assessment was not undertaken in 2013, and the 'assessment' was more akin to a visual audit and inventory. A photograph of the subject tree is in Council's records from the 2GP audit, dated 26 February 2013 and attached as Appendix 5 of this report. I note that this visual assessment pre-dates the redevelopment of the Montecillo site.

ACTIVITY STATUS

- [22] 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.
- [23] 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

- [24] In this case the relevant zoning and rules of the Operative Plan are considered to have been superseded by the Proposed 2GP, wherein the provisions related to this application are beyond challenge. Therefore, no assessment of the proposal under the Operative Plan has been undertaken.

Proposed Second Generation Dunedin City District Plan "Proposed 2GP"

- [25] The Proposed 2GP was notified on 26 September 2015, and some Proposed 2GP rules had immediate legal effect from this date. Some rules became fully operative following the close of submissions, where no submissions were received. Additional rules came into legal effect upon the release of decisions. Those additional rules become fully operative if no appeals are lodged or once any appeals have been resolved. There are no appeals of relevance to this site or application.
- [26] The subject site is zoned General Residential 1 and is not subject to any overlay areas.
- [27] The proposal falls under the definition of the following city-wide activity:

Scheduled trees activities
- [28] As a result, only the City-wide Activities rules in the Proposed 2GP need consideration.

- [29] Rule 7.3.2.3 of the activity status table of the Scheduled Trees Section states that 'removal and any other work on a scheduled tree that will lead to the death or terminal decline of a scheduled tree' is a non-complying activity.
- [30] It is noted that Rule 7.3.2.1 of the activity status table states that the 'removal of a scheduled tree that is 'dead, in terminal decline or with extreme failure, or subject to a court order for removal' is a restricted discretionary activity. Based upon the assessment of Mr Mark Roberts, the Council's consultant arborist, the condition of the tree is not at a point where this rule would apply.
- [31] The application is therefore a **non-complying activity** in accordance with Rule 7.3.2.3.

NATIONAL ENVIRONMENTAL STANDARDS

- [32] There are no National Environmental Standards relevant to this application.

NOTIFICATION AND SUBMISSIONS

- [33] No written approvals were submitted with the application.
- [34] Rule 7.4 of the 2GP states that applications for the removal and any other works that will lead to the death or terminal decline of a scheduled tree will be publicly notified.
- [35] The application was publicly notified in the Otago Daily Times on 9 September 2023.
- [36] Copies of the application were sent to those parties the Council considered could be directly affected by the proposal.
- [37] Submissions closed on 6 October 2023.
- [38] 7 submissions were received by the close of the submission period. 2 submissions were in support of the application, and 5 submissions were opposed to the application.
- [39] 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?
C & G Ebbett 8 Montecillo Lane	Support	Neighbours who live in close proximity to the tree. Have observed the tree for over 6 years and have noticed branches fallen close to neighbours and into the driveway. Consider the tree to be dangerous to property and people.	Yes
CM Dorking 18 Montecillo Lane	Oppose	If the tree is healthy it is a significant feature of Montecillo Lane, is attractive and substantial and should remain unless there is a very good reason for removing it.	Unclear
C Taylor 15 Montecillo Lane	Oppose	It is a beautiful tree that is significant in our lane and Mornington.	Yes

		Having beautiful established trees in our neighbourhood is important for aesthetic pleasure to residents and enjoyed by the birds. It is a tall, majestic landmark of the Lane that gives pleasure to many. Believes the tree is NOT at risk of damaging houses close by as it is not in terminal decline, and all the lower branches have already been removed progressively over the past few years. As a society we should not be allowing removal of beautiful trees that enhance our area, to the whim of individual landowners.	
JL & HF Adams 13 Montecillo Lane	Oppose	The tree has been deemed not in terminal decline. As it is a healthy protected tree we do not know why the applicant wants it to be removed. The tree was there when the applicants bought the property. Previous owners carried out a severe cutback of the tree but it continues to be a special feature on the street. The tree and several other trees were part of the attraction of living in the street. The tree continues to enhance the environment of the street. Wish to defend the living tree's right to exist because it cannot defend itself.	Unclear
J Ward 15 Montecillo Lane	Oppose	The tree is scheduled in the 2GP The tree is not considered to be in terminal decline, it is mature and sound and does not deserve to be cut down. It has withstood numerous storms and gales over the years, and the redevelopment of the site. The tree is a significant feature on the skyline of the Montecillo development, it is distressing to imagine the space that would be opened up if the tree were removed. The residents of Montecillo Lane are fortunate to be surrounded by such vibrant vegetation and wildlife.	Unclear

		The development company wanted to preserve some of the Montecillo site's history by keeping some of the vegetation. It appears incongruous that the Council might approve the destruction of an item that is supposed to be protected by the same Council. It seems wrong to cut down a mature tree in these times of climate change and instability.	
Protect Private Ownership of Trees Society (POTS)	Support	T402 has passed its heritage status in the District Plan. Its growth form is unsuitable for its site. The tree is growing close to 3 houses in Montecillo Lane. Given the tree's suspicious rooting it could fall on someone during a gale. This could injury or even death to someone. Recent examples from North Island storms provide examples of potential damage should it blow over. Presently there is a large branch on the ground that was torn from the tree in a high wind and narrowly missed the neighbour's house. With more than 20 years experience assisting rate payers with obnoxious trees, POTS is firmly of the opinion that T402 is no longer fit for inclusion in the District Plan schedule. This includes the fact that the trunk is not in good order and shows many severe pruning wounds. There is a comparison with the site at 100 Cannington Rd where the DCC granted permission for the removal of T285 which was growing in a building site. POTs would be greatly interested to see what the Council's consulting arborist, Mr Mark Roberts has assessed the present STEM score as. T402 is past a useful amenity role in the built up community.	Yes

ENVIRONMENTAL EFFECTS OF ALLOWING THE ACTIVITY

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

a) Any positive or adverse effect; and

- b) *Any temporary or permanent effect; and*
- c) *Any past, present, or future effect; and*
- d) *Any cumulative effect which arises over time or in combination with other effects— regardless of the scale, intensity, duration or frequency of the effect, and also includes –*
- e) *Any potential effect of high probability; and*
- f) *Any potential effect of low probability which has a high potential impact.*

Permitted Baseline

- [41] An important consideration for the assessment of effects is the application of what is commonly referred to as the permitted baseline assessment. The purpose of the permitted baseline assessment is to identify the non-fanciful effects of permitted activities and those effects authorised by resource consent in order to quantify the degree of effect of the proposed activity. Effects within the permitted baseline can be disregarded in the effects assessment of the activity.
- [42] In terms of the 2GP, the removal of a scheduled tree that is dead, in terminal decline or with extreme failure, or subject to a court order for the removal is a restricted discretionary activity. In addition, the modification of a scheduled tree is also a restricted discretionary activity, subject to compliance with the 'best arboricultural practice' performance standard.
- [43] The 2GP therefore provides no permitted baseline for any form of work on a scheduled tree, or the removal of a scheduled tree, as even in the case of a court order or emergency situation, resource consent is still required as a restricted discretionary activity.
- [44] In terms of the activities that may take place within proximity of a scheduled tree, the 2GP excludes new buildings, structures, additions and alterations, public amenities, all earthworks, new roads or additions or alterations to roads, network utility activities and site development activities from the dripline of the tree, or distance from a tree that is half the height of the tree (whichever is greater). Activities employing trenchless methods (the installation of pipelines and cables below the ground with minimal excavation) are exempt from this 'exclusion zone' if a number of requirements are met, however as a permitted activity this is not considered to have any relevance to the current application.
- [45] Overall, I consider there are no relevant 'permitted effects' in terms of activities that may be undertaken within proximity of this scheduled tree that could feasibly be disregarded when considering the effects of the proposed removal.

Assessment of Effects

- [46] The assessment of non-complying activities contained in section 7.8.2 of the 2GP provides useful guidance for this application. Assessment matter 7.7.2.2 in relation to the assessment of restricted discretionary activities determines matters of discretion as the 'effects on amenity.' While matters of discretion are not limited in this case, amenity remains a principal consideration.

Amenity

- [47] The opposing submitters have made it clear that from their perspective, the tree continues to enhance the amenity of Montecillo Lane, and they do not wish to see its removal.

- [48] The Council's Landscape Architect, Mr Luke McKinlay, has reviewed the application and visited the site. He provided the following comments in relation to the potential effects of removing this tree in terms of the existing amenity values of the area.

This oak has a significantly reduced canopy from that shown in the existing STEM assessment and aerial images from 2013. Pruning has progressively reduced the canopy of T402 to the upper most parts of the tree only. As noted in Mr Ritchie's report, lower branches to a height of approximately 12m have been removed. Wind broken stubs also appear to indicate that parts of the canopy have been lost due to wind damage. In terms of the visual amenity of the tree, its top heavy, somewhat lop-sided form has significantly reduced the contribution this tree makes to the visual amenity of the surrounding area.

While visible from some Patrick Street locations due to its height (refer figure 2), it is not particularly prominent from Eglinton Road. Following removal of nearby vegetation over the years, T402 now stands apart from the tree-lined entrance of Monticello Lane, where its much-reduced form is visible from both the approach on Monticello Lane and from Patrick Street. It no longer has a harmonious relationship with this remaining area of trees on the site.

The severely reduced canopy means that this tree now only has a minor influence on the climate of the surrounding area. While viewed in August, when the tree was not in leaf, it appears that even when in leaf this tree would offer little shade or shelter.

Given the poor overall form of this tree, its severely reduced canopy, and its apparent decline in health, it is considered that its removal would have a relatively low impact on the amenity of the surrounding area.

- [49] The residents of Montecillo Lane who have opposed the application value the tree in its current form and consider that it contributes to the amenity of the lane. However, I am cognisant of the fact that in its current form and condition, Mr Roberts does not believe the tree would meet the criteria for District Plan protection. He states:

I am very confident that the tree has declined to point where it would no longer reach the threshold for inclusion on the schedule...and furthermore even if the tree was pruned and managed for the next five to ten years, there is no guarantee that the tree would or could develop to a point where it could reach the threshold for inclusion on the schedule.

- [50] It is clear that if the tree is retained, it would require significant pruning and management of regrowth in order to regenerate it to a point where it would be aesthetically pleasing and pose an acceptable level of risk. Mr Roberts considers that *'the pruning required would reduce the tree in both shape and size to a point below what would be required for inclusion on the schedule.'*

- [51] Not all scheduled trees will have equal amenity value, and the contribution of any particular tree may change over time as a result of various factors. In this case the history set out in previous sections of this report outlines the various actions that have occurred which have cumulatively, and unfortunately, led to a reduction in the tree's health and consequently in its amenity value.

- [52] Based on the above, while I acknowledge the submitter's concerns about loss of amenity if the tree is removed, I consider that any such effects will be localised, and no more than minor.

Historical Associations

- [53] The 2001 STEM assessments provide different ages for the tree. Conservatively, the tree has an age of between 40 and 80 years. This means that the tree dates from at least the period of the Montecillo Veterans Home, if not the earlier period of the site. The removal of the tree will mean the loss of this link to the history of the site.
- [54] It is regrettable that insufficient value appears to have been placed on maintaining this link to the past during the subdivision and redevelopment of the site, during which time the raising of the ground, earthworks and construction within the dripline, and introduction of hard-surfacing have compromised the health of the tree. This appears to have then been compounded by earthworks on the adjoining property at 29C Patrick St. Furthermore, arboricultural work on the tree does not appear to have followed best practice, and this has ultimately led to the situation now before us.
- [55] I consider that there is a strong link between amenity value and historical value. The tree is now a much diminished representation of the site's history, compromised by more recent redevelopment.
- [56] The tree's amenity value has been eroded, and if it is not removed it will either continue to decline further, or will require significant remedial work to the point where its remaining amenity value will be significantly undermined.
- [57] There are a number of other substantial mature trees scattered around the wider locality, some of which will date from the earlier periods of occupation of the former Montecillo site and maintain this historical association. Amongst these are the three other scheduled trees, T401, T403 and T407. In this context, the loss of this one tree which is now somewhat isolated, will not cause undue adverse effects in my opinion.
- [58] Based on the above, I do not consider the tree's historical associations to be a sufficient reason to recommend declining the application.

Health and Safety

- [59] My reading of the application is that the primary reason for seeking the removal of the tree is safety concerns. The application states that several large branches have fallen in recent years, putting the owners' and neighbours' properties at risk. I have seen evidence of this myself - when undertaking a site visit there was a large fallen branch lying beneath the tree.
- [60] While not completely aligned in their assessment of the degree of risk the tree currently poses, the professional advice of the two arborists, Mr Ritchie and Mr Roberts, are generally in agreement that imminent tree failure is unlikely to occur. Both arborists acknowledge the history of branches dropping, and that the tree does pose a risk to nearby targets such as houses.
- [61] Mr Roberts considers: *The tree has a low risk of causing severe harm in the next 24 months however there is a reasonable likelihood that branches may fall from the tree and minor property damage may occur.*
- [62] Mr Ritchie considers that: *Given the form and exposed nature of the tree and its inability to absorb wind energy in a distributed fashion, large and small wind breaks will continue to happen, creating a significant hazard for the safety of the occupiers of the 3 surrounding houses and the users of the driveways, parking area and the lane.*

- [63] Furthermore, both arborists have indicated the possibility or likelihood that the tree's decline will continue unless significant work and ongoing management is undertaken. I take from the two arborists reports, that the degree of risk will increase over time if nothing is done to halt the tree's decline.
- [64] Section 7.8.2 of the 2GP provides guidance on the assessment of resource consents to remove scheduled trees, and seeks to avoid the removal of scheduled trees unless there is a 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. I do not believe this level of risk has been substantiated from the information I have considered.
- [65] However the assessment guidance also provides scope for tree removal to be considered where there is a moderate to significant risk to buildings. I consider that the risk does meet this threshold.

Consideration of Alternatives

- [66] Continuing with the status quo does not seem to be a viable option because the tree currently poses an unacceptable level of risk, and will continue to decline and become more hazardous over time. The only viable alternative to removal, is the substantial and ongoing pruning outlined by Mr Roberts and/or the methods identified by Mr Ritchie. Once this work has been completed, the tree's amenity value will be eroded even further.
- [67] Mr Roberts considers does not consider it appropriate or realistic to impose the required work on a tree owner due to the time and expense. It would involve a timeframe of five to ten years and involve several pruning events.
- [68] From a cost/benefit point of view, it does not appear worthwhile to decline the application in the hopes that the owners would commit to the required course of action to revive the tree, particularly when the expert advice indicates that the tree does not currently meet the criteria for scheduling, and certainly wouldn't meet the criteria following the work. If an opportunity arose, whereby there was an opportunity to request the removal of the tree from the tree schedule, the owners would seemingly have a strong case.
- [69] It is my understanding from discussions with the City Development policy staff, that a plan change is scheduled ('Variation 3') which may provide an opportunity for people to lodge submissions requesting the removal of trees of the 2GP Schedule. Both this and any privately initiated plan change are public processes.

Positive Effects

- [70] There is no significant public benefit that will ensue if the tree is removed.
- [71] Removal of the tree will eliminate safety concerns which will no doubt provide peace of mind to the owners and close neighbours. It may also open up views and increase sunlight to surrounding houses, although with its much reduced canopy there may not be a significant benefit in this regard.

Cumulative Effects (Assessment Matter)

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

"... one of a gradual build up of consequences. The concept of combination with other effects is one of effect A combining with effects B and C to create an overall

composite effect D. All of these are effects which are going to happen as a result of the activity which is under consideration”.

- [73] Similarly, some effects may not presently seem an issue, but after having continued over time those effects may have significant impact on the environment. In both of these scenarios, the effects can be considered to be ‘cumulative’.
- [74] The proposed removal of the tree is unlikely to have significant cumulative adverse effects. The removal of the tree would cumulatively contribute to the loss of urban vegetation across the city. However, in the context of the immediate environment, the loss of the tree, albeit a substantial and relatively prominent one, is not considered to combine with the loss of other vegetation in the area to any noticeable extent that would represent a tipping point in terms of the amenity and character of the area and natural environment.

Effects Assessment Conclusion

- [75] After considering the advice of Mr Ritchie, Mr Roberts and Mr McKinlay on the health and amenity values of the tree, and the other effects noted above, I consider that overall, the effects of the proposal to remove T402 will be no more than minor.

OFFSETTING OR COMPENSATION MEASURES ASSESSMENT

- [76] 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.
- [77] 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))

- [78] In accordance with section 104(1)(b) of the Resource Management Act 1991, the objectives and policies of the Operative District Plan and the Proposed 2GP were taken into account when assessing the application.
- [79] The Proposed 2GP is now at an advanced stage. The zoning and rules of relevance to this application are operative, and the objectives and policies are not subject to appeal. Therefore, while regard has been had to the objectives and policies of the Operative District Plan, these are not discussed further in this report because no weight has been given to them, and full weight has been given to the objectives and policies of the Proposed 2GP.

Proposed 2GP

- [80] The following 2GP objective and policies are considered to be relevant to this application:

Scheduled Trees Objectives and Policies

Objective/Policy	Is the proposal Consistent with or Contrary to the Objectives and Policies?
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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, but not contrary to this objective. The loss of the tree will not maintain the visual landscape and history of the neighbourhood. However, it is considered that the tree would not currently meet the criteria for district plan protection. Given the decline of the tree, its contribution to the visual landscape, and its historical values, cannot now realistically be maintained in the long term.
Policy 7.2.1.1 Enable removal of a scheduled tree where they are certified as dead or in terminal decline by a suitably qualified arborist, or where subject to an order for removal in terms of Section 333 of the Property Law Act 2007	The application is considered to be inconsistent with, but not contrary to this policy. The tree is not currently considered to be 'dead or in terminal decline.' Nevertheless, the tree is in decline to the extent that without significant intervention it will slowly decline over the next 5-10 years to the point where the test of 'dead or in terminal decline' will likely be met.
Policy 7.2.1.2 Avoid the removal of a scheduled tree (except as provided for in Policy 7.2.1.1) unless: a. 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; b. the tree poses a substantial risk to a scheduled heritage building or scheduled heritage structure; c. there is a moderate to significant risk to buildings; d. the removal of the tree is necessary to avoid significant adverse effects on existing infrastructure and network utilities; d. removal of the tree will result in significant positive effects in	The application is considered to be inconsistent with, but not contrary to this policy. I do not consider it has been demonstrated that there is a <u>significant</u> risk to personal or public safety that is required to be managed under health and safety legislation. Nor is removal of the tree the only option to manage the risk that does exist. I accept that there is a moderate degree of risk to personal safety and buildings, as evidenced by fallen branches, including the large branch observed when I visited the site. That branch was of a size which would have had the potential to cause serious harm to a person, and damage to the house had it come into contact with either. However again, removal of the tree is not the only possible option for managing the risk. Heavy pruning and long term management is an option but will require a significant commitment from the owner.

respect of the efficient use of land; or X. removal of the tree is required to allow for significant public benefit that could not otherwise be achieved, and the public benefit outweighs the adverse effects of loss of the tree.	
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Overall Objectives and Policies Assessment

- [81] The above assessment demonstrates that, overall, there is a degree of conflict with the Proposed 2GP significant tree objectives and policies, particularly Policy 7.2.1.2. However, the proposal is not so repugnant with any provision so as to be considered 'contrary' to that provision.
- [82] The 2GP provides a pathway for trees determined to be in terminal decline by a suitably qualified arborist. While the application does not strictly meet the criteria for terminal decline, when considering the information from specialists, I consider that the need for removal of T402 is reasonable due to the declining health of the tree, and extensive work that would be needed to bring it back to health - so dramatic that the tree would no longer meet the criteria for protection.
- [83] The Objectives and Policies clearly define the circumstances where the effects from the removal of a scheduled tree are considered acceptable. While these circumstances do not apply at this time to the proposal, the situation is relatively close to what the provisions anticipate, such that I consider the proposal is not contrary to the 2GP provisions.

DECISION MAKING FRAMEWORK

Part 2 Matters

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

Section 104D

- [85] Section 104D of the Act specifies that a resource consent for a non-complying activity must not be granted unless the proposal can meet one of two limbs. The limbs of Section 104D require either that the adverse effects on the environment will be no more than minor, or that the application is for an activity which will not be contrary to the objectives and policies of either the relevant plan or the relevant proposed plan.
- [86] Overall, I consider that the actual and potential effects associated with the proposed development will be no more than minor and therefore the first 'gateway' test of Section 104D is met. Only one of the two tests outlined by Section 104D need be met in order for Council to be able to assess the application under Section 104 of the Act.

- [87] In order for a proposal to fail the second test of Section 104D, it needs to be contrary to the objectives and policies of both the Dunedin City District Plan and the 2GP. In order to be deemed contrary, an application needs to be repugnant to the intent of the District Plan and abhorrent to the values of the zone in which the activity was to be established. It is noted that in this instance, the proposal is assessed as being inconsistent with, but not contrary to, the relevant objectives and policies of the Scheduled Trees sections of both the operative and proposed plans. The proposed development is therefore considered to also satisfy the second 'gateway' test outlined by Section 104D.
- [88] In summary, the application passes both the threshold tests in Section 104D of the Act and therefore, in my opinion, it is appropriate for the Committee to undertake a full assessment of the application in accordance with Section 104 of the Act. In turn, consideration can therefore be given to the granting of the consent.

Section 104

- [89] 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 proposal will be minor.
- [90] 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.
- [91] 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, but not contrary to, the key objectives and policies of both the Dunedin City District Plan and the Proposed 2GP.
- [92] Section 104(1)(b)(v) requires the Council to have regard to any relevant regional policy statement. In this report it was concluded that given the very specific and localised nature of the proposal, there are no particularly relevant provisions within the Regional Policy Statement for Otago; and that overall the objectives and policies of the RPS have been delivered through the 2GP which has been thoroughly assessed in this report.

Other Matters

- [93] Section 104(1)(c) requires the Council to have regard to any other matters considered relevant and reasonably necessary to determine the application. For a non-complying activity, this includes the matter of precedent effects, and the integrity of the district plan provisions.

Case law indicates that for the Council to grant consent to a non-complying activity, the application needs to be a 'true exception', otherwise an undesirable precedent may be set and the integrity of the District Plan may be undermined. Given the state of decline of T402, and erosion of its amenity value, I consider the granting of consent to this application is unlikely to give rise to any undesirable precedent for other applications to remove trees because the granting of consent would only be relevant to another application where:

- The tree is in declining health;
- Significant efforts would be required for revitalisation to occur;

- Any new STEM assessment is unlikely to favour ongoing protection of the tree;
- Even if significant work was undertaken to improve the tree's health, there is no guarantee it would recover to a point where its public value would be restored;
- The tree poses a moderate risk to people and property.

[94] It is pertinent to note that the removal of any scheduled tree is required to go through this same robust framework of resource consent, and potentially a notified consent process and hearing depending on the circumstances of the tree. The circumstances of each such application can be expected to be different.

[95] I therefore consider that the proposed activity does not represent a challenge to the integrity of either the Operative District Plan or the Proposed 2GP.

CONCLUSION

[96] Having regard to the above assessment, I have concluded that consent should be granted to allow the removal of scheduled tree T402 at 2 Montecillo Lane.

[97] This conclusion has been made based on reports from Mr Ritchie and Mr Roberts that suggest the tree is in a state of decline, and has been subject to a number of interventions which have compromised its health over the past 10 years.

[98] The tree's decline will be terminal unless remedial action is undertaken. Whilst it is possible substantial remedial work could give the tree a chance of recovery, the work required is significant and would result in a much diminished tree which would no longer meet the criteria for District Plan protection. Moreover, Mr Roberts is of the opinion that it would not meet the inclusion criteria at the present time.

RECOMMENDATION

[99] That the application to remove significant tree T402 be granted.

REASONS FOR RECOMMENDATION

[100] I consider that the likely adverse effects of the proposed activity will be no more than minor.

[101] The proposal is not considered to be contrary to the key relevant objectives and policies of both the Dunedin City District Plan and the Proposed 2GP.

[102] I consider that the proposal represents a 'true exception' which will not undermine the integrity of the Proposed District Plan.

[103] Overall, I consider that the granting of the consent would be consistent with the purpose of the Resource Management Act 1991 to promote the sustainable management of natural and physical resources.

Report prepared by:



Jane O'Dea
Planner

8 November 2023

Report checked by:



John Sule
Senior Planner

8 November 2023

APPENDIX 1:

THE APPLICATION

APPENDIX 2:
SUBMISSIONS RECEIVED

APPENDIX 3:

COUNCIL OFFICER EVIDENCE

APPENDIX 4:

2001 STEM ASSESSMENTS

APPENDIX 5:
2GP VISUAL AUDIT T402

APPENDIX 6:

DRAFT CONDITIONS

1. *The proposed activity must be undertaken in general accordance with the information provided with the resource consent application received by the Council on 18 July 2023, except where modified by the following conditions.*
2. *The removal of the tree shall be undertaken by a suitably qualified person and in accordance with arboricultural best practice.*

Conditions to be met prior to site works commencing

3. *The consent holder must supply to the Council at rcmonitoring@dcc.govt.nz in writing at least five (5) working days prior to the works commencing the following information:*
 - (a) *The contractor who will be undertaking the works including the contact details of the contractor;*
 - (b) *The date the tree is to be removed.*

Conditions to be met at commencement of, or during, site works

4. *All waste generated by the removal works shall not cause a nuisance and shall be suitably disposed of within 7 days of the completion of the removal works.*
5. *The person exercising this consent shall take all reasonable measures to ensure the use of machinery for the removal of T402 shall be limited to the times set out below and shall comply with the following noise limits (dBA);*

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

6. *Sound levels shall be measured and assessed in accordance with the provisions of NZS 6803: 1999 Acoustics – Construction noise.*
7. *No work is to be undertaken on Sundays or Public Holidays, nor between 8.00pm to 7.30am Weekdays or Saturdays.*

Advice Notes:

General

1. In addition to the conditions of a 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. The ability to exercise this consent is not restricted to the party who applied and/or paid for the consent application.

3. It is the responsibility of any party exercising this consent to comply with any conditions imposed on the resource 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.
4. The lapse period specified above may be extended on application to the Council pursuant to section 125 of the Resource Management Act 1991.