

Decision following the hearing of an application for resource consent

SUBJECT: Application for resource consent under section 88 of the Resource Management Act 1991 by Connell Place Ltd to remove a generally protected Pohutukawa tree at a hearing held on Friday, 12 November 2010 commencing at 9.29am

**CONSENT, PURSUANT TO SECTION 104, 104C and 108
OF THE RESOURCE MANAGEMENT ACT, IS REFUSED.
THE FULL DECISION IS SET OUT BELOW**

Hearing Panel:	The Application was heard by Hearings Commissioners consisting of:	
	Mr L Simmons	(Chairman)
	Mr H Bhana	
	Ms R Macky	

Council Officers:	Mr Q Budd	Team Leader Resource Consents
	Mr M Weingarh	Reporting Planner
	Mr P Hansen	Arborist
	Ms S Carnachan	Legal Advisor
	Mr C Bishop	Senior Ecologist
	Ms J McKee	Committee Secretary - Hearings
	Ms M Newman-Pound	Committee Secretary - Hearings

APPEARANCES:	
For the applicant:	Mr P Arnesen
	Mr A White
	Mr M McKearney

Submitter:	<p>The Tree Council represented by:</p> <ul style="list-style-type: none"> - Mr B Watts - Ms S Shayer - Mr C Boucher - Mr N Robinson - Ms S Peake - Mr O Taylor - Ms L Truttman - Ms I Tavia - Ms J Fuller - Ms J Dunn - Ms J Hughes - Ms F Milburn - Ms C Farmer - Ms P Cliffin - Ms R Martell - Ms D Mitten - Ms Lyndell Shannon
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TABLED EVIDENCE:	
Submitters:	Ms J Simpson Ms S Snowdon

APPLICATION DESCRIPTION

Application and Property Details

Application Number (s):	R/LUC/2001/2154
Site Address:	321 Rosebank Road, Avondale
Applicant's Name:	Connell Place Ltd
Lodgement Date:	9 July
Hearing Commencement:	Friday, 12 November 2010
Hearing Panel's Site Visit:	Thursday, 11 November 2010
Hearing Closed:	Friday, 19 November 2010

INTRODUCTION

This decision is made on behalf of the Auckland Council (AC) by Mr L Simmons, Mr H Bhana and Ms R Macky (Commissioners) appointed and acting under delegated authority pursuant to sections 34 & 34A of the Resource Management Act 1991 (RMA).

The application was subject to limited notification and notice of the application was served on one party, the Tree Council on 19th July 2010. The Tree Council lodged the only submission to be received, in opposition to the application.

REPRESENTATIONS AT HEARINGS

The details of the proceedings of the hearing, including the identification of those present, the procedural rulings and the evidence presented, are set out in this decision.

The Council officer's report was circulated to the applicant, the submitters and the members of the hearing panel prior to the hearing. The officer's report was taken as read.

This decision contains the findings of the commissioners deliberations on the resource consent application and has been prepared in accordance with section 113 of the Resource Management Act 1991.

SUMMARY OF PROPOSAL AND ACTIVITY STATUS

The applicant, Connell Place Limited, proposes to remove a Pohutukawa tree from the south eastern corner of 321 Rosebank Road. The subject tree which is located some 30-35m from the southern site boundary with Rosebank Road, it has a height of 14m and canopy spread of 25m and girth of 4.7m (at ground level).

The application was considered as a restricted discretionary activity under the Operative Auckland City District Plan 1999 – Isthmus Section.

RELEVANT STATUTORY PROVISIONS CONSIDERED

In accordance with section 104 of the Resource Management Act 1991, the commissioners have had regard to the relevant statutory provisions including the relevant sections of Part 2 of the RMA and section(s) 104, 104C and 108.

RELEVANT POLICY STATEMENTS AND PLAN PROVISIONS CONSIDERED

In accordance with section 104(1)(b)(i)-(iv) of the Resource Management Act 1991, the hearing commissioners have had regard to the relevant policy statements and plan provisions of the following documents:

- Section 5C and 8 of the Operative Auckland City District Plan 1999 – Isthmus Section
- Plan Modification 296.

The panel also considered the following other matters to be relevant and reasonably necessary to determine the application in accordance with section 104(1)(c).

- Previous application for resource consent to clear vegetation from the parent site (excluding the oak and the Pohutukawa) lodged by Connell Place Limited, December 2008.

SUMMARY OF EVIDENCE HEARD

On behalf of the Applicant

The evidence presented by the applicant was provided by Mr Paul Arnesen, the applicant's planner. It was provided in writing and read at the hearing. The key aspects of this evidence are contained within the findings on the principal issues in contention set out below.

Mr McKearney, the sole director of Connell Place Limited, which owns and has developed the parent Rosebank Road property, gave evidence about the tree and related costs and other matters.

On behalf of the Submitter

Mr Brandon Watts presented legal submissions on behalf of the Tree Council.

The evidence presented on behalf of the Tree Council was provided by the following persons:

Ms Sigrid Shayer, the Chair of the Tree Council.

Mr Chris Boucher, arborist.

Mr Nick Robinson, landscape architect.

Ms Sally Peake, landscape architect.

Mr Owen Taylor, planner.

The following local residents.

- Ms L Truttman
- Ms I Tavia
- Ms J Fuller
- Ms J Dunn
- Ms J Hughes
- Ms F Milburn
- Ms C Farmer
- Ms P Cliffin
- Ms R Martell
- Ms D Mitten
- Ms L Shannon

The majority of this evidence was provided in writing and read at the hearing. The key aspects of this evidence is also contained in the findings on the principal issues in contention set out below.

KEY ISSUES FOR CONSIDERATION

After analysis of the application and evidence (including the proposed mitigation measures), undertaking a site visit, reviewing the Council report and expert reviews, reviewing the submissions and concluding the hearing process, it is considered that the proposed activity raises a number of key issues for consideration and these are set out below as the principal issues that were in contention.

PRINCIPAL ISSUES THAT WERE IN CONTENTION

The principal issues that were in contention are:

1. Whether the proposed scheduling of the tree under Plan Modification 296 affected the basis and legal criteria for consideration of the application.
2. Whether Part 2 of the RMA could be applied to consideration of the application
3. Identification of the matters in respect to which the Council had restricted its discretion.
4. Whether the intrinsic value of the Pohutukawa tree justified the consideration of its retention.
5. Whether the objectives and policies of the District Plan, particularly those in respect of the zone involved, supported retention or removal of the tree.
6. Whether the applicant needed to remove the tree in order to obtain a practicable building site, access, parking area, or to install engineering services to the land.
7. Whether any alternative methods were available to the applicant which would encourage retention and enhancement of the tree.

8. Whether previous applications affecting tree removal on the site were of relevance to this application.
9. The extent to which the tree contributed to the amenity of the neighbourhood both visual and physical including contribution as habitat for birds and other animals.

THE MAIN FINDINGS ON PRINCIPAL ISSUES IN CONTENTION

Effect of Plan Modification 296

In his report Mr Weingarh expressed the opinion, that PM 296 would have a full legal effect pursuant to section 86B of the RMA as the rule related to the protection of historic heritage¹. However he considered that it could be given relatively little weight because it was at a relatively early stage in the process.

Furthermore Mr Weingarh advised that in terms of section 88A the application must continue to be processed considered and decided as an application for a restricted discretionary activity, that being the type of activity which applied at the time the application was lodged.

The consequence is that the change of status of the activity from a restricted discretionary activity to a discretionary activity resulting from the scheduling of the subject tree under PM 296 does not apply, nor can the extent of discretion be extended beyond the level applied when the application was lodged.

As a consequence we find that although PM 296 has relatively little relevance to the status of the application, it does have relevance in terms of our substantive consideration of the application.

Part II of the RMA

Ms Sally Carnachan, the Council solicitor, submitted that it was unclear whether the insertion of Section 87A(3)(a) had removed the authority arising from *Auckland City Council v John Woolley Trust* that enabled a consent authority to consider Part II matters when considering a grant of consent in respect of a restricted discretionary activity (but not when declining consent).

Mr Watts in his legal submissions on behalf of the Tree Council, submitted that the amendment had clearly removed the authority by specifically restricting consideration to the matters identified in the District Plan in regard to consideration of both a grant or a refusal of consent.

In support of this Mr Taylor attached a copy of the Local Government and Environment Committee commentary on the Resource Management (Simplifying and Streamlining) Bill which specifically referred to the intent to reverse the judgement of the High Court in *Woolley*.

Regardless of which of these legal submissions is likely to hold sway in future proceedings it is clear that Part II matters cannot be taken into account when a consent is declined; therefore the Commissioners have no need to make a ruling on this matter.

¹ Page 4 of the Section 42A report under heading "Status of the application".

Extent of Restricted Discretion

The City of Auckland District Plan Isthmus Section does not contain a specific clause that sets out the matters over which the Council reserves its discretion in respect of restricted discretionary activities. However all parties appeared to agree that the restrictions were sufficiently identified by the following clause 5C.7.3.3(C) of the District Plan under 5C. General Tree Protection and the bulleted list of 11 items which follow it:

In assessing an application the Council shall consider the guidelines for the carrying out of works in the vicinity of trees contained in Annexure 5 and the following matters: [and the matters are then listed].

We agree that these are the matters to which the Council has restricted its discretion and have assessed the application accordingly.

Intrinsic Value of the Pohutukawa - Health and General Condition

There was general consensus that the Pohutukawa was a significant and healthy specimen.

The evidence of Mr Chris Boucher, arborist on behalf of the Tree Council, was that was that the Pohutukawa a good example of the species in reasonable health and structural condition.²

Mr Paul Hanson, an Auckland City Council arborist, in his memo to the reporting planner, Mr Mark Weingarh, stated that he considered that the Pohutukawa was a significant asset, healthy and of good structure and form. He stated that the tree was 80 years old and at an age and size that no replacement planting could possibly conceive to replace in our lifetime.³

Mr Craig Webb, arborist, prepared an arboricultural assessment for the applicant and this was attached as Annexure C to the applicant's AEE. In his report Mr Webb said:

3.6.2 The foliage of the tree is assessed to be in fair health, and covers the entire canopy. There is no indication of any disease, dieback, decline or defoliation in the extremities of the Crown that would suggest ill-health.....

3.6.3 The branch structure of the tree is generally well formed and typical of the species. Many of the outer main stems lean significantly outwards and have a wide spreading lateral branch habit. Internal main stems have a more upright habit suppressed lower growth.

3.6.7 No major faults or defect in the branch framework that affect the structural stability of any part of the tree was noted during the inspection.⁴

Intrinsic Value of the Pohutukawa Contribution to Neighbourhood and District Amenity

Mr Nick Robinson, Landscape Architect, on behalf of the Tree Council in his evidence said that as far as he was aware it was the largest and best specimen of Pohutukawa in the Rosebank neighbourhood. He expressed the view that the Pohutukawa and the oak made a significant contribution to the best aspects of the landscape character of the

² Evidence of Chris Boucher paragraph 4.10

³ Memo of Paul Hanson dated 8 September 2010-paragraphs 7 and 8 on pages 213 and 214 of the hearing agenda.

⁴ Arboricultural Assessment by Craig Webb at page 61 of the hearing agenda.

whole Rosebank area and were important in the visual amenity of the immediate environment.⁵

Ms Sally Peake, Landscape Architect, on behalf of the Tree Council, referred to the Section 32 report which had been prepared to assess Plan Modification 296 which proposes the scheduling of the oak and the Pohutukawa within the Schedule of Notable Trees in Appendix 2 of the City of Auckland District Plan -Isthmus Section. She said that she agreed with the following quotation from that report:

The trees contribute to the social values of the locality in that they provide public esteem, have historical associations with the community and possess landmark qualities. The trees themselves are quality examples of the species and are reasonably well intact. Their visibility within the landscape also contributes to them being a rare example within the suburb.

Ms Peake also expressed her agreement with the section of the Section 32 report which referred to the contribution that the trees made to the visual and amenity values of the area. This section stated as follows:⁶

Visual/Amenity Values

Amenity is considered to be an appreciation of the pleasantness of an area or item. The trees themselves appear to be quality examples of their species and are reasonably well intact. Although they are set back from the road frontage they are reasonably prominent due to their size and the lack of large structures/foliage blocking views to them. The height and canopy spread of the trees also assist in heightening their visual prominence.

The trees are also located on the apex of a street corner, this means that they are thrust into view" as one travels along the road network in the immediate vicinity. As a result their visibility within the landscape is highlighted. This "pair" of trees within their context are therefore considered to be a rare example within the suburb. The locality has a low number of notable trees in this example of a twin stand of a large native and a large exotic within public view is rather unique and therefore provides high-quality visual and amenity values. Therefore the trees are considered to be worthy of protection.

The Chairman endeavoured to have the author of the Section 32 report attend the hearing so that the Panel could ask questions about the preparation of the report, the qualifications and experience of those who had prepared it and generally establish a baseline for the acceptance or otherwise of the views expressed in it. Unfortunately that was not possible due to personnel changes associated with the new local body structure. While we can only attach limited weight to the report itself we do accept that Ms Peake's reference and adoption of parts of the report allow us to place greater weight on those parts.

Mr Peter Kensington, Landscape Architect in his Assessment of Visual Amenity Effects on behalf of the Auckland City Council considered that while the tree was not highly visible beyond the immediate vicinity of the subject site it clearly contributed to the visual amenity of the Rosebank Road environment particularly when viewed in partnership with the oak.⁷

⁵ Evidence of Nick Robinson, dated 12 November 2010 at paragraphs 11.2 and 14.

⁶ Evidence of Sally Peake at paragraphs 16 and 18.

⁷ Report of Peter Kensington at paragraph 37 on page 171 of the hearing agenda.

We also heard from a number of residents and other witnesses for the Tree Council as to the significance of the pohutukawa, particularly in conjunction with the oak tree. By way of example:

- Sigrid Shayer, chair of the Tree Council provided cogent evidence about the tree's intrinsic values and its amenity value
- Daphne Mitten, a member of the Tree Council suggested that the pohutukawa tree and the oak are 'living testaments in the landscape memory of Avondale and must be fully protected and allowed to thrive in perpetuity'
- Lisa Truttman of the Avondale-Waterview Historical Society sought the retention of the pohutukawa (along with the oak) as a natural landmark memorial to Avondale's market gardeners
- Imi Tavia of Riversdale Road noted the significance of the tree in terms of its historical associations
- Lyndell Shannon compared the tree with the pohutukawa planted outside Wakefield's house on The Terrace, Wellington.

These are a representative sampling of the evidence given in support of the tree's retention.

We find on the basis of the evidence we have set out above (which generally confirmed the impression that we had gained from our site visit and our inspection of the subject tree and the surrounding neighbourhood) that the intrinsic value of the tree including the contribution it makes to the visual and amenity values of the neighbourhood and district is substantial and provides significant weight to the argument in favour of its retention.

Objectives and Policies of the District Plan

The objectives and policies relating to the Business 5 zone were set out in the evidence of Mr Arnesen. However we found little to assist us in the process of assessing the application because these objectives and policies were focused on appropriate location and method of control of industrial/business activities in order to manage the effects of those activities on the environment. In this regard we agree with Mr Arnesen that the policies referring to "controls" relate to the specific development controls applied in the zone and there is no mention of the retention of generally protected trees⁸.

Mr Weingarh in his section 42A report referred to Objective 5C.7.3.1 which is the primary objective under Part 5C relating to trees. This objective seeks to protect trees are significantly contribute to the district's amenity. In the light of the evidence discussed above the Pohutukawa clearly comes within the terms of this objective and its goal of protection of such trees.

Mr Taylor drew our attention to Clause 8 .3 of the District Plan which contained objectives and policies for the Business Zones⁹ and he quoted (inter alia) objectives 8.3.1 and 8.3.3 which state as follows:

8.3.1 Objective

To foster the service, employment and productive potential of business activity while ensuring sustainable management of natural and physical resources of the City.

⁸ Evidence of Paul Arnesen at paragraph 5.4.

⁹ Evidence of Owen Taylor at paragraph 8.9.

8.3.3 Objective

To ensure that community values are recognised and balanced against the maintenance of public and private interests

Mr Taylor suggested that these objectives introduce the much broader goals of achieving the sustainable management of natural and physical resources and the recognition of community values. We are of the view that both objectives are relevant and require us to take into consideration both the natural and physical resources represented by the tree and the community values that have been identified and which would be enhanced by its retention.

In respect of the proposed mitigation through planting of "Maori Princess" Pohutukawa cultivars we accept the evidence of Mr Boucher that:

... provision of a 2 metre wide landscape, strip along the road frontage boundary with inappropriately-planted Pohutukawa trees as proposed, does not adequately mitigate removal of the now prominent, mature specimen located some 40 m within the site. Apart from which, it will be a generation in human terms before any proposed landscaping can begin to replace the visual amenity value currently provided by the existing tree.¹⁰

We find that the immediately relevant objectives and policies of the plan support the retention of the Pohutukawa because of the contribution it makes to the amenity of the surrounding area and because it represents a significant natural and physical resource which would not be "sustainably managed" if it were removed, and in respect of which appropriate mitigation is not possible.

Necessity for Removal of Tree

The applicant's evidence focussed on the costs involved in retaining the tree, particularly the applicant's inability to obtain the maximum building area including an associated parking area, on proposed Lot 25 a site of 4696m². This Lot was part of an approved subdivision of an area of 10.54 ha.

The representatives of the Tree Council suggested that the evaluation of the practicability of obtaining a suitable building site needed to be carried out in the context of the subdivision of the 10 ha block. We agree with that approach.

In our view this particular criterion is provided to ensure that consideration is given to the need for the owner of an individual site to make reasonable use of his/her land. In the context of the whole subdivision controlled by the applicant the retention of the Pohutukawa has different implications than if this was applied of a single owner of Lot 25.

Alternative Methods Available to the Applicant

In our view an alternative approach to dealing with retention of this tree would have been for the whole of Lot 25 to be set aside as a public reserve, thereby meeting some part of the reserve contribution requirement for the subdivision. We accept that there is no sensible alternative location of the boundaries of Lot 25 which would allow a lesser area to be set aside as reserve.

Another alternative would have been to accept the limitations imposed by the trees' retention (that is, the Oak and the Pohutukawa) as an opportunity to create a

¹⁰ Page 11 of the evidence of Chris Boucher.

café/office/open space/parking environment to complement the industrial development which is occurring elsewhere in the subdivision.

The Commissioners regret that the approach taken by the developer has restricted his options and meant that the vision enunciated by Ms Shayer and set out in plan form by Nick Robinson can be argued away on financial grounds.

In the circumstances, the Commissioners reject Mr McKearney's evidence that removal of the pohutukawa "is necessary to enable an improved development yield". In our opinion, Mr McKearney had the option of planning the subdivision around the retention of these trees; yet chose not to.

Previous Applications Affecting Tree Removal on the Site

The representatives of the Tree Council referred us to previous applications for removal of generally protected trees on the subject site which had been made by the same applicant.

We were provided with a copy of an application in December 2008 by Connell Place Ltd lodged by Planning Focus Ltd seeking consent to the removal of native vegetation and exotic trees over 6 m in height and the removal of a number of individually protected trees. The AEE which accompanied the application and which was prepared by Planning Focus Ltd stated as follows:

.... The two most notable trees on the site being the English Oak and Pohutukawa are being retained and will be integrated into the future development of the site

..... The most significant specimen trees on the site are to be retained,.....¹¹

At the hearing Mr Arnesen said that the offer of retention was not intended to imply permanent retention, but we disagree and, whilst there is no 'Augier' type undertaking in relation to the trees, we absolutely reject Mr Arnesen's evidence in this regard. Our reading of Mr Arnesen's 2008 assessment equated the oak and pohutukawa with the coastal vegetation and clearly indicated that the permanent retention of the oak and Pohutukawa was being offered as mitigation for removal of the other trees and vegetation from the site.

Contribution of the Tree to the Amenity of the Neighbourhood and Wider Area

As noted above we accept the evidence of the landscape architects, and witnesses for the Tree Council, who gave evidence and prepared reports, that the Pohutukawa particularly in combination with the oak, makes a significant contribution to the amenity of the neighbourhood and the wider area.

Conclusion as to Findings of Fact

We have found that the objectives and policies of the plan support the retention of the Pohutukawa tree because of the contribution it makes to the amenity of the surrounding area and because it represents a natural and physical resource which would not be "sustainably managed" if it were removed without appropriate mitigation.

¹¹ Statutory Assessment prepared by Paul Arnesen of Planning Focus Ltd dated 22 December 2008 at Section 7.3.1 under "5C.7.3.1 Objective"

We find that the mitigation proposed is completely insufficient to balance the loss of amenity and the natural and physical resource which the tree represents.

We do not consider that a requirement to retain the tree imposes an undue hardship on the applicant given the size of the area being subdivided for development and given that its retention was previously offered as mitigation for the removal of other generally protected trees on the parent site.

DECISION

Having regard to the foregoing matters discussed in the deliberations by the hearing commissioners in exercising its jurisdiction pursuant to section 34A and having considered sections 104, 104C, 108, and Part 2 of the Resource Management Act 1991, the Auckland Council has made the following decision:

That consent for application R/TRC/2010/2836 be refused.

REASONS FOR THE DECISION

The reasons for this decision are as follows:

- (a) That there was general consensus from all the witnesses that presented evidence that the Pohutukawa was a significant and healthy specimen.
- (b) That the intrinsic value of the tree including the contribution it makes to the visual and amenity values of the neighbourhood and district is substantial and provides significant weight to the argument in favour of its retention.
- (c) That the immediately relevant objectives and policies of the plan support the retention of the Pohutukawa because of the contribution it makes to the amenity of the surrounding area and because it represents a natural and physical resource which would not be "sustainably managed" if it were removed. Appropriate mitigation does not appear possible.
- (d) That a requirement to retain the tree does not impose an undue hardship on the applicant given the size of the total area being subdivided for development and given that its permanent retention was previously offered as mitigation for the removal of other generally protected trees on the parent site.
- (e) That the mitigation proposed is insufficient to balance the loss of amenity and the natural and physical resource which the tree represents.
- (f) After carefully assessing the relevant matters in the District Plan over which discretion has been restricted to in clause 5C.7.3.3C the most relevant matters support the retention of the Pohutukawa tree, rather than its removal.

In particular:

- (i) The removal of the Pohutukawa tree is not supported by the immediately relevant objectives and policies of the District Plan being Objectives 5C.7.3.1, 8.3.1 and 8.3.3 and their supporting policies;

- (ii) In the context of the overall subdivision and development of the applicant's land the removal of the Pohutukawa is not necessary in order to obtain a practicable building site, access, parking area, or to install engineering services;
 - (iii) Alternative methods are available in order to achieve his objectives for the subdivision and development of this land, again in the context of the entire land holding that is currently being subdivided and developed, that would enable the retention and enhancement of the existing two large trees on this part of the site;
 - (iv) In the context of the previous applications made in respect of the land which involved the consideration of treescape conservation, there has been a clear stated intention to retain both the Oak and the Pohutukawa on this part of the site as part of the 2008 application and subsequent 2009 consent that provided for the removal of a large number of generally protected trees from the applicant's land;
 - (v) The Pohutukawa tree makes a significant contribution to the amenity of the neighbourhood, both visually and physically;
 - (vi) There was no evidence from any arborist that the tree is structurally unsound.
- (g) In terms of section 104(1)(a) of the Act, after having regard to all of the actual and potential effects on the environment of allowing the removal of the tree, the adverse environmental effects on the surrounding environment clearly outweigh any positive effects that may be provided for the applicant.
- (h) In terms of section 104(1)(b) of the Act, the proposal is not consistent with the objectives, policies and assessment criteria of the District Plan. In particular, the adverse visual effects and failure to provide for the area's amenity are considered contrary to the both the tree and Business 5 zone objectives and policies in the District Plan.
- (i) Because both the existing site, prior to the completion of the current proposed subdivision, and the proposed lot upon which the Pohutukawa stands, are greater than 4,000m², Section 76 of the Resource Management Act 1991, as amended in 2009, specifically retains the ability for the trees on this land to be protected by way of the general tree protection rules.

Chairperson



Date:

8 December 2010