

TITLE: ITEM 5.0 - Possible breaches related to partial removal of the Pōhutukawa tree located at Wharo Lane, Ahipara

From: Dean Myburgh, General Manager, District Services, Far North District Council (FNDC)

Whakarāpopototanga/Executive summary

Following the partial removal of a Pōhutukawa tree located at the abovementioned address during the week of 20 September 2021, the special significance to Ahipara whanau, hapū and iwi has been acknowledged. The Far North District Council had responded to the owner of the property indicating that the tree could be pruned, but advised him to check covenants applied to the property specifically in relation to the pōhutukawa. The Council cannot enforce private covenants, it is for the parties to the covenant to seek appropriate recourse where these are breached.

The Chief Executive of the Far North District Council requested that an investigation be undertaken to confirm whether any the partial removal of the tree constituted any breaches that could lead Council to follow up with appropriate enforcement action.

An investigation was completed by the Environmental Services staff at the Far North District Council and the investigation concluded that the partial removal (or ‘pruning’) of the Pōhutukawa tree on a residential property does not breach the District Plan rules. Nor is there any legal basis for enforcement action to be taken against the owner. Only the private land covenant provides any guidance on what is permitted in relation to the tree (and both the covenant and consent condition permits the owner to prune (or even remove) the tree).

What the partial removal of this tree has highlighted, is that Council needs a broader basis of protection of indigenous trees and species included in the Draft District Plan that is currently being consulted on. It also indicates that much clearer advice on what may or may not be permitted when ‘pruning’ an indigenous tree will be required (even in instances where such pruning is permitted by way of consent conditions and / or covenants).

Ngā mahi tūtohutia/Recommended actions

That the report ‘Possible breaches related to partial removal of the Pōhutukawa tree located at Wharo Road, Ahipara’ be received.

Tuhinga/Background to the investigation

A complaint was received that a Pōhutukawa tree had been cut down in a reserve at Wharo Road, Ahipara on Thursday 23 September 2021. Norm Marsh responded with a site inspection on the same day. He was able to establish that the tree that had partially trimmed was on a residential property at 1 Wharo Way.

A site visit was undertaken, together with an extensive review of all relevant documentation related to the site on which the tree is located. The documents that were reviewed and related findings are summarised in the table on the next page.

Summary of key findings from the Investigation

Permission sought / Documents reviewed / observations	Notes related to any protective clauses / provisions
Owner sought permission to prune the tree	On 22 September 2021 FNDC advised the that the tree is not listed on the Schedule of Notable Trees contained in the Operative (current) District Plan. That means the property owner can prune the tree only.
Resource Consent conditions / consent notices (2003)	The area was subject to a Subdivision Consent (RC 2030509) dated 21 July 2003, in which condition X Stated – “No work to be undertaken within the drip line of the existing Pōhutukawa tree...”. However, there are no consent notices on the Certificate of Title for 1 Wharo Road for the protection of the Pōhutukawa tree.
Environment Court Hearing decision (2005) related to the Lots adjacent to Lot 1 where the tree is located on private land.	The Environment Court decision in 2005 did not specifically protect the tree – there were decisions about the historic reserve adjacent to Lot1 (see Note 1 below).
Private land covenant	The tree is on private land and is protected by a covenant, but that covenant and consent conditions may permit the owner to prune (or even remove) the tree. However, this would require the owner to check covenants applied to the property specifically in relation to the pōhutukawa. The Council cannot enforce private covenants. It is for the parties to the covenant to seek appropriate recourse where these are breached (see Note 2 on the next page). (Land covenants are held by Toitū Te Whenua Land Information New Zealand and can be found on its website https://www.linz.govt.nz/).
Operative District Plan	The tree in question does not appear on the District Plan (DP) list of trees of note (see Note 3 on the next page).
Health of the tree / survival of remaining part of the tree.	Arborists have offered divergent opinions about the health of the remaining part of the tree and whether it will survive.
The Pōhutukawa tree meets the definition of indigenous flora .	The issue is that this tree has not been listed as a notable tree in the Operative District Plan; nor does this tree have any specific protection in any of the other documentation that has legal status and that enables FNDC to take enforcement action.
Clearance of indigenous vegetation in other zones outside of urban environment as defined in the Operative District Plan) is a permitted activity, provided that the clearance does not increase the total area of cleared land on the site above 500 square metres.	This clearance (‘pruning’ or part removal) fits within that definition within the DP.
The Council, along with Northland Regional Council, supported the development of the Ahipara Takiwā Management Plan created by the Ahipara Hapū and three Marae – Korou Kore, Roma and Wainui.	While the pōhutukawa was identified in the Ahipara Takiwā Management Plan as a “landmark pōhutukawa tree”, the Schedule of Notable Trees is the only legal mechanism available to the Council to protect individual trees.

Note 1: The tree could was protected by the consent notice issued by FNDC in 2003, but, upon review at the Environment Court Hearing (2005), this protection was not upheld and a replacement consent notice was issued. It should be noted that the Environment Court did not undertake a full hearing but instead worked with the various parties

involved in the appeal namely Melville Holdings Ltd (the applicant), the then-named Historic Places Trust and FNDC. Several submissions from Iwi asked for the tree to be protected and the Council's hearing report included full protection of the tree in perpetuity. The original decision also protected the tree as Lot 1 was a reserve. Following an appeal, Lot 1 was no longer included in the reserve and the tree was not protected other than by private covenant.

Note 2: It should be noted that **the FNDC did not give the property owner permission to remove the tree.** The advice provided to the owner was to check the private land covenant which could not be enforced by the council, but that may provide the parties to the private covenant the opportunity to seek appropriate recourse should there be any breaches.

Note 3: In November 2017, the Council asked Far North residents to nominate exceptional trees they thought deserving of special protection under its Schedule of Notable Trees. Notable trees may be included because of their age, size, character and visibility; because they commemorate important events in the district's history; or because they are critical to the survival of other species. Preference is given to trees growing on public land or on the property of the person nominating the tree. The call for nominations ran for one month and closed on 6 December 2017. **The tree at 1 Wharo Lane was not one of the trees nominated.** All trees that successfully meet criteria for inclusion on the Schedule of Notable Trees will be protected by new District Plan due to be proposed early next year.

Findings from the Site visit

The tree itself had two separate trunk features from the ground level up (split trunk). Without any survey data it appears that the NW trunk that lies on the side of 1 Wharo Way has been removed. The other trunk seems to be on road reserve and has been left.





Parts of the Operative District Plan that were reviewed as part of this investigation to conclude that the partial removal of this Pōhutukawa does not breach the district plan.

VEGETATION CLEARANCE

The removal of living flora or its alteration or damage which is likely to lead to its death by whatever means; but does not include clearance of plantation forestry activity, or vegetation removal associated with the clearance of plantation, the removal, alteration or damage of plants which are defined in other statutory instruments as pests, or the removal of living flora for the purposes of rongoā Māori (Māori medicinal purposes) or the trimming of trees, or the harvesting of crops or vegetation clearance for visibility and road safety, or normal gardening activities which result from the maintenance of lawn and gardens.

The Pōhutukawa tree meets the definition of indigenous flora

INDIGENOUS FLORA

Plants which belong naturally in the ecological locality. It includes manuka and kanuka, but does not include plants naturalised in New Zealand with human intervention or varieties and cultivars of indigenous plants (and the term indigenous vegetation has the same meaning).

1 Wharo Way is zoned residential and does not meet the definition of “Urban Environment” as it does not have reticulated water. Under the district plan rule:

12.2.6.1.4 INDIGENOUS VEGETATION CLEARANCE IN OTHER ZONES

The clearance of indigenous vegetation is a permitted activity if the site meets the definition of an “urban environment” site as specified in Rule 12.2.6.1.1(p) above. **On all other sites in other zones, the clearance of indigenous vegetation is a permitted activity, provided that the clearance does not increase the total area of cleared land on the site above 500 square metres.**

Note 1: Refer also to Rule 12.1.6.1.2, which applies to vegetation clearance in Outstanding Landscapes and Rule 12.1.6.1.1(d), which applies to Outstanding Landscape Features.

Note 2: This means that if a site not meeting the definition in Rule 12.2.6.1.1(p) already has 500m² of cleared land, any further clearance involving indigenous vegetation will require resource consent under this Rule.

Note 3: Refer also to Regulations 93 and 94 of the National Environmental Standards Plantation Forestry which prevail over this rule.

Under the definition of Cleared Land in the District Plan:

CLEARED LAND

Means the total area of land from which indigenous flora (vegetation) has been removed since 1 February 2005 (being the baseline date currently set in the District Plan for determining the amount of allowable clearance).

In the decisions of the 2003 subdivision consent RC2030509 there was discussion of clearing some “Flame Trees”. It is, therefore, concluded that any cleared land on the section, other than the Pōhutukawa tree, occurred before 2005 and therefore does not meet the definition of cleared land.

It has been concluded that rule 12.2.6.1.4 does not apply.