

**BEFORE THE HEARING PANEL APPOINTED ON BEHALF OF
DUNEDIN CITY COUNCIL**

Under	The Resource Management Act 1991 (the RMA)
In the Matter	of an application for Resource Consent for the removal of a significant tree, T014
Between	ADAM O'BYRNE AND ANNA O'BYRNE Applicant
And	DUNEDIN CITY COUNCIL Local Authority

SUBMISSIONS OF COUNSEL ON BEHALF OF THE APPLICANTS

DATED 13 JUNE 2025



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SUBMISSIONS OF COUNSEL ON BEHALF OF ADAM O'BYRNE AND ANNA O'BYRNE

May it please the Hearing Panel:

Introduction

1. These submissions are made on behalf of the Applicants, Adam and Anna O'Byrne who have applied for resource consent to remove a schedule tree from their property at 33 Preston Crescent.
2. To avoid repetition, these submissions adopt the description of the proposal, site and location contained at [8] to [17] of Council's s 42A Report.¹ We also adopt the background to the application at [18] to [25].

Issues

3. These submissions will address the following issues:
 - (a) The reasons for removing the Tree
 - (b) Whether the Applicant demonstrated that there are no reasonable alternative options?
 - (c) Section 104D Gateway test
 - (d) Section 104(1)(a) assessment of effects on the environment
 - (e) Is there a plan integrity issue?

The Reasons for Removal

4. This application for resource consent was made reluctantly, and follows a process of seeking to provide for the significant tree but also the ability for the Applicants to fairly and reasonably use their property. In an ideal world, the Applicants could protect their property against moderate or

¹ Recommending Report on Resource Consent Application LUC-2024-460 33 Preston Crescent, Dunedin, dated 20 May 2025, Finn Campbell (**S 42A Report**).

significant risks as well as maintaining the public good that comes from the existence of the significant tree.

5. The Tree poses a moderate to substantial risk to the Applicant's property. The only available solution is the drainage works which have been suggested. However, those works would risk the health and stability of the Tree. The only conclusion that remains is that the Tree must be removed to protect the property.
6. The background to the Application records a long history involving work on the property, and the Tree, including:
 - (a) Establishment of the dwelling in or around 1926;
 - (b) Establishment of the original garage – around 1943.
 - (c) Tree planted no later than 1947 which has successively eroded the available options of providing for the tree.
 - (d) Extension to existing garage – around 1979
 - (e) 1995 certificate of compliance for additions and alterations to the existing dwelling.
 - (f) 1998 – First STEM assessment resulting in a score of 168 (anything above 147 points is “significant”).
 - (g) 2001 – Second STEM assessment resulting in a reduced score of 156 (9 points above the significance criteria).
 - (h) 2013-2014 - a review of the significant trees for the purpose of the 2GP was carried out. No STEM analysis was undertaken and its inclusion in the 2GP was based on a visual assessment only.²
 - (i) 2017 - Toilet added to the “studio”.
 - (j) Drainage works resulting in a stormwater outfall as part of the hard-surfaced outdoor area – completed around 2017.
 - (k) The Applicant's purchase the site toward the end of 2021.

² Section 42A Report at [34].

- (l) Addition of a kitchen sink to the studio (now dwelling) in 2022 transforming the building into a fully self-contained residential unit.
 - (m) Four separate consents for tree maintenance in 2005, 2011, 2015, 2017 and 2023.
7. The Panel will note on its site visit that as a consequence of some of the works (prior to the Applicant's taking possession) have severely constrained the available root space available for the Tree. The Applicant was not responsible for those constraints but are nonetheless required to address the consequences that they now face.
8. Messrs Aurik, Roberts and Campbell accept that the Tree roots are damaging the building and the natural fall of the ground.³
9. A direct consequence of that fact is the damage caused by flooding during the heavy rainfall in October 2024. Mr Campbell accepts the insurance report which confirms the extent of the damage.⁴ Despite accepting that fact, Mr Campbell does not accept that the flooding is a direct result of the tree. That may appear to be the case in isolation because the flooding was the direct result of a rain event. However, that statement fails to consider that the Tree roots directly fall towards the dwelling and have caused the footpath to lift. The direct effect is to direct the overland flow path towards the dwelling as opposed to out onto the street.
10. To address the damage caused to the property, the Applicants sought expert plumbing advice which proposed two solutions:
- (a) A surface pump (the preferred option); or
 - (b) A sump and pump.
11. Both would have the effect of compromising the tree. For that reason, the only way to avoid further property damage would be to remove the tree entirely. The Applicant has demonstrated that it has made reasonable efforts to identify a solution that would avoid the need to

³ At [80].

⁴ At [84] and [86].

remove the tree. If a feasible solution were available then it would have presented itself by now.

Section 104D Assessment

Section 104D(1)(a) – Effects

12. The Applicants accept that the adverse effects of removing a scheduled tree are likely to be more than minor. We note that positive effects of the Application may only be considered with an assessment under s 104.

Section 104D(1)(b) – Objectives and Policies

13. The second s 104D gateway requires that the Application not be “*contrary to any of the objectives or policies of any relevant or proposed plan*”. In this case, the only relevant plan is the 2GP.⁵
14. Mr Campbell accepts that the Application *is not* contrary to the 2GP. The applicant accepts that assessment. For that reason the Application passes the s 104D gateway and can be considered against s 104.

Section 104 Assessment

Section 104(1)(a) – Effects

15. The Applicants accept that the removal of the tree will *prima facie* lead to a decrease in visual amenity in the area.⁶ The enjoyment of the visual amenity from the tree of the submitters is therefore acknowledged.
16. Mr Campbell’s assessment is that the tree is in good health and there are no immediate concerns about major limb failure.⁷ We note Mr Hagendorn’s assessment that:

Overall, the tree is in fair health with the only concern being the co-dominant stems, deadwood, and hangers throughout the canopy.⁸

⁵ This is consistent with the Report from Finn Campbell at [124].

⁶ S 42A Report at [67] – [71].

⁷ S 42A Report at [60] – [66].

⁸ Arborist Report by William Hagendorn at 53.

17. Any decrease in amenity value ought to be weighed against the positive effects of removing the tree for the Applicant. There is an inverse relationship between the Tree on this property and the neighbourhoods enjoyment of it. The Applicant's property suffers, while the neighbourhood continues to enjoy the visual amenity. The Applicants are entitled to seek an outcome which provides adequate protection of property from flooding and enabling the efficient use of land.
18. Mr Campbell has accepted that mitigation works are required to protect the ancillary residential unit from flooding in substantial/extreme rainfall.⁹
19. Mr Campbell engaged Mr Roberts to, amongst other things, consider options for drainage works to manage flooding risk.¹⁰ Mr Roberts was unable to provide any options that would not compromise the health and stability of the tree.¹¹
20. The Applicants accept that the October 2024 rainfall event did not constitute a regular rainfall event.¹² However, that is not a reason to deny preventative measures that will protect the property from such rainfall. These events are real, and protection from them should be provided for.
21. On this basis, removing the tree will enable the Applicants to adequately protect the ancillary residential unit from flooding. This will enable the Applicants to meet their obligation to provide the residential unit in a reasonable condition, as required by the Residential Tenancies Act 1986.

Section 104(1)(b) – Objectives and Policies

22. The relevant provisions to consider are Objective 7.2.1, Policy 7.2.1.2 and Rule 7.8.2.
23. Objective 7.2.1 provides that: "*The contribution made by significant trees to the visual landscape and history of neighbourhoods is maintained*".

⁹ S 42A Report at [103].

¹⁰ Report from Mark Roberts at 162 – 167.

¹¹ Note: Mr Roberts considered that "the possible positive effects of tree pruning on flood management are negated by the negative effects of tree pruning on flood management." Report from Mark Roberts at 4.4.1.

¹² S 42A Report at [104] – [105].

The objective applies city wide, and is not a general statement that every tree in the city ought to be maintained.

24. Objectives are given effect to through policies and Policy 7.2.1.2 says, which is to "*avoid the removal of a scheduled tree... unless:*".
25. Relevant exceptions to removal include where:
 - (a) (c) there is a moderate to significant risk to buildings; or
 - (b) (e) removal of the tree will result in significant positive effects in respect of the efficient use of land.
26. The requirement in (c) is for there to be "risk to buildings". It does not require the tree to be the direct cause of that risk. Mr Campbell accepts that there is a moderate to significant risk to buildings. Despite accepting that fact, Mr Campbell considers that the application is inconsistent with both the Objective and the Policy. That cannot be correct. Policy 7.2.1.2 is disjunctive and only one clause needs to be satisfied in order to be consistent with it. In this case, there is no dispute that there is a moderate to significant risk to buildings.
27. The ability to provide for the removal of scheduled trees in certain circumstances is exactly what Objective 7.2.1 provides for and is a logical and practical interpretation of the policy framework. Trees cannot be protected in perpetuity and there will inevitably be a circumstance in which their removal is considered. Objective 7.2.1 acknowledges that by seeking to 'maintain', rather than to 'protect'. Applying the Objective directly to an individual tree, as opposed to an area, does not provide for maintenance, it provides for protection. For these reasons, the Application is plainly consistent with the Objective.
28. Furthermore, it is also considered that 7.2.1.2(e) is relevant to the assessment in that removal of the tree will allow the Applicant's to effectively and efficiently utilise their property without the threat of further damage.

29. Mr Campbell raises an issue of precedent or plan integrity effects under the guise of s 104(1)(c). The rationale is due to the fact that this is a non-complying activity.
30. Precedent or plan integrity effects generally only arise for non-complying activities that are considered to be *contrary* to the provisions of the plan. Case law demonstrates that the weight to be given to any effect on that integrity is a matter of judgment for the consent authority or Environment Court.
31. Mr Campbell has concluded that this is not the case and in our view the Application is consistent with the key objective and policy relevant in Chapter 7. It is difficult to accept that a precedent or plan integrity issue might arise in a circumstance where a proposal is entirely consistent with, or at the very least not contrary to the provisions of a plan. The more concerning precedent in this case would be if the hearing panel concluded that there was an integrity issue because that would confirm to prospective applicants that proposals will not be accepted regardless of whether they are consistent with the plan. As we noted earlier, that would be applying a protectionist framework that does not exist here.
32. For these reasons, we invite the Panel to place little weight on paragraphs [139] to [142] of the s 42A Report.

Conclusion

33. For these reasons, it is submitted that consent should be granted.
34. Counsel and the O'Byrne's are available for any questions that the panel may have.

Dated 13 June 2025

A handwritten signature in black ink, appearing to read 'Simon Peirce', with a stylized, flowing script.

Simon Peirce / Josh Alexander

Counsel for Adam O'Byrne and Anna O'Byrne