

**BEFORE THE COMMISSIONER
APPOINTED BY THE DUNEDIN CITY COUNCIL**

Under The Resource Management Act 1991
 (the **Act**)

In the Matter of an application for Land Use
 Consent 64 Passmore Crescent

Between **C A & K L MUIR**

 Applicants

SUBMISSIONS OF COUNSEL FOR THE APPLICANT

DATED 14 FEBRUARY 2023



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SUBMISSIONS OF COUNSEL ON BEHALF OF THE APPLICANTS

1. This application should not have required a hearing. Fundamental to that submission is understanding that the application is for a restricted discretionary activity. The scope of the restricted discretion is decisive.
2. In his original submission, Dr Treharne raised the following issues:
 - (a) Effects on residential amenity arising from shading of the parking area.
 - (b) Effects on the health of a tree.
 - (c) Creation of a physically inaccessible area on the applicant's property.
3. Dr Treharne sought the following relief:
 - (a) Submission of legible plans.
 - (b) Submit a boundary survey.
 - (c) A legal covenant limiting the rights of access to 64A Passmore Crescent.
4. Dr Treharne said he did not wish to be heard. Under the Act, a hearing was therefore not required.
5. Nevertheless, Council invited him to change his mind and to lodge evidence. Which he has done.
6. The evidence lodged has not addressed the residential amenity issue, but instead raises:
 - (a) Constrained access to the applicant's own property.
 - (b) Impacts on the health of the submitter's hedge and tree.
 - (c) The need for the proposed extension.

7. It is submitted that none of the matters raised by Dr Treharne, in his original submission, his relief sought, or in his evidence, are within the scope of the restricted discretion.

The scope of relevant considerations.

8. The proposal breaches rule 15.3.4.2 (performance standards that apply to all buildings). The setback rule is 15.6.13. Under 15.6.13.1(b):

Activities that contravene this performance standard are restricted discretionary activities

9. Rule 15.10 sets out the restricted discretion. Rule 15.10.4 (1) describes the matters for discretion and guidance for boundary setback breaches.
10. There are two separate sets of relevant matters under rule 15.10.4 (1):
- (a) private effects on neighbours' residential amenity; and
 - (b) public effects on neighbourhood residential character and amenity. Dr Treharne has not raised public effects on neighbourhood amenity so these submissions will not address those matters. Maria Callau's memorandum dated 23 January is accepted.
11. Rule 15.10.4 (1)(a) cross references back to Objective 15.2.3:

Objective 15.2.3	
Activities in residential zones maintain a good level of amenity on surrounding residential properties and public spaces.	
Policy 15.2.3.1	Require <u>buildings</u> and <u>structures</u> to be of a height and setback from boundaries that ensures there are no more than minor effects on the sunlight access of current and future residential <u>buildings</u> and their outdoor living spaces.

12. Dr Treharne does not claim that sunlight access for the current or any future residence will be affected. He is concerned only with his carparking area. To be relevant, the carparking area would have to qualify as an "outdoor living space". That term is defined as:

Outdoor Living Space

An area of open space that can be used for leisure, recreation, or food production to be provided for the use of the occupants of the residential unit/s to which the space is allocated. Outdoor living space excludes any area used for parking and/or driveway

13. The carparking area is specifically excluded from consideration.
14. It is also important to note that objective 15.2.3 and policy 15.2.3.1 do not address the protection of vegetation nor accessibility issues. Rule 15.6.13.2 only addresses setbacks from scheduled trees. There is no scheduled tree at issue here.
15. Rule 15.10.4 (1) (a) goes on to set out situations that would support a consent application for a setback breach:

Potential circumstances that may support a consent application include:

- i. Residential buildings on neighbouring sites receive adequate natural light and privacy.*
- ii. The reduced setback will mirror the setback of the adjacent residential building, both in minimum distance from the boundary, and the maximum extent to which the encroachment occurs along the boundary (including length and height).*
- iii. There are no windows from living or sleeping areas proposed along the wall of the new building or existing along the wall of any adjacent parallel residential building.*

16. All of those factors are present here.
 - (i) The residence on 64A Passmore will continue to receive the same natural light.
 - (ii) The nearest adjacent building is on 66 Passmore Crescent, which is on Dr Treharne's boundary on the opposite (western) side of the carparking area.
 - (iii) There are no windows from a living or sleeping area proposed.
17. There is therefore no evidence of a relevant adverse effect that goes to your discretion.

Tree Issues

18. It is submitted that the matter raised about the potential health of a tree on Dr Treharne's property is not a resource management issue. You need not decide whether the arborist is right that the foundations might interfere with the health of the tree. It is simply not a relevant consideration.
19. The legal position is that a landowner is entitled to the use of their land unencumbered by tree roots that might be growing across the boundary from a neighbouring property. The Mr and Mrs Muir oppose the inclusion of Condition 3 in principle, although it will be simple enough to comply with. Condition 3 essentially seeks to minimise the risk of damage to the tree. That intention is understandable, but irrelevant.
20. The tree issue raised by Dr Treharne, and addressed by condition 3, is a civil matter regulated by the common law "nuisance" concept. A "nuisance" is an unreasonable interference with a person's right to the use or enjoyment of their land. The common law of nuisance is quite clear in relation to root encroachment.
21. Recent decisions from the High Court have held that encroaching roots into a neighbour's property may constitute a nuisance if they affect the use and enjoyment of the property. Encroaching roots which cause a substantial and unreasonable interference with the use of the land may amount to an actionable nuisance claim.¹ The recent decision of the High Court in *Blakesfield v Foote*² is a case on point.
22. In *Blakesfield v Foote*, the plaintiff sought to create a 5-metre planting strip next to the shared boundary which would require digging into the soil, affecting the neighbour's encroaching roots. The Court held at [49] that the combined effect of the root encroachment and overhanging branches substantially and unreasonably interfered with the plaintiff's ability to create their intended planting strip and therefore

¹ *Semple v Wilson* [2018] NZHC 992 at [153].

² *Blakesfield v Foote* [2015] NZHC 1325.

impacted their use and enjoyment of the property. Similarly, the Muirs are seeking to use this area of their land close to the boundary for the extension. Preventing them from doing so would result in the roots being an actionable nuisance that the Muirs could require be removed.

23. Controlling soil disruption in condition 3 to protect encroaching tree roots is inconsistent with the common law position between the parties. Therefore Condition 3 should be removed as not serving any legitimate purpose under section 108AA(1)(b). The tree root issue is a private law matter between the parties that the Dunedin City Council has no reason to be involved in.

Dated 14 February 2023



Phil Page

Counsel for C A & K L Muir