

Phillipa and Darren Bain
27 King Street, Mosgiel
Dunedin 9024

Dear Phillipa and Darren

LUC-2025-420
27 KING STREET MOSGIEL

The Panel visited 27 King Street and viewed the tree on Monday 9 February ahead of the hearing. At the end of the public part of the hearing, the hearing was adjourned. A question regarding the National Policy Statement for Electricity Networks from the Panel was answered in writing by the processing planner Ms Karen Bain on 12 February 2026. The applicant provided their Right of Reply in writing on 20 February 2026. The Hearing was formally closed on 25 February 2026.

In reaching this decision we have considered:

- The application, the AEE and all supporting documents;
- The public submissions made on the application, including the submitter who presented at the hearing;
- The Council Officer's s42A report, together with the attached supporting reports;
- The pre-circulated material from the Applicant;
- The submissions from the Applicant's legal counsel, and the evidence presented at the hearing;
- The responses to our questions during the hearing process from all parties;
- The material provided by Council in response to Minute 2;
- The Applicant's Right of Reply;
- Our observations from the visit to the site and its surrounds;
- The relevant provisions of both the pertinent planning documents, particularly the Partially Operative 2GP; PDP; and
- The relevant provisions of the RMA, most notably ss104, 104B and 104D.

The Hearing and Appearances

The applicant was represented by:

- Ms Bain (Applicant);
- Mr Paine (Legal Counsel);
- Mr Waymouth (Arborist); and
- Mr Hagendorn (Arborist).

Council staff attending were:

- Mr Phil Marshall (Advisor to Committee);
- Ms Karen Bain (Processing Planner, s42A Author);
- Ms Lauren Riddle (Governance Support Officer);
- Mr Luke McKinlay (DCC Landscape Architect); and
- Mr Mark Roberts (DCC Consultant Arborist who appeared 'on-line').

There was one submitter present at the hearing:

- Mr Jim Moffat (Protect Private Ownership of Trees Society)

Procedural Matters

The following procedural matters were recorded at the commencing of the Hearing:

- Ms Bain agreed that a partially redacted version of the medical evidence could be formally received and circulated to all parties;
- The Chair declared that Mr Waymouth has previously undertaken arboricultural work for her family on a paid professional basis. This was not considered to give rise to an actual or potential conflict and no party raised any concerns.
- Commissioner Whiley declared that he had been a panel member for a previous hearing relating to the Pin Oak at 27 King Street.
- Commissioner Roberts confirmed that he is not related to Mr Mark Roberts, DCC consultant arborist.
- In consultation with the applicant, the Panel (accompanied by Phil Marshall) undertook a site visit on Monday 9 February.

Principal Issues of Contention

The principal issues of contention were as follows:

- The condition of the tree;
- The risks to buildings, infrastructure and people from the tree;
- The effects on amenity arising from the removal of the tree.

Summary of Evidence

Introduction from Processing Planner

Karen Bain spoke to a summary of her 42A report, giving an overview of the proposal before commenting on the notification of the application and the submissions received. She confirmed her recommendation that consent be refused.

The Applicant's Evidence

Mr Paine introduced the applicant's case. He referred to the substantial spiral crack recently identified in the trunk of the tree by Mr Waymouth. Mr Paine emphasised that Mr Waymouth had climbed the tree on several occasions, whereas Mr Roberts (DCC consultant arborist) had not. He submitted that the extent to which this crack has compromised the tree can only be ascertained by sonic tomography, and that obtaining such equipment is cost prohibitive given that no machine is available in the South Island.

Mr Paine further submitted that regular pruning of the tree is very expensive and the applicants are not prepared to undertake this unless Council is willing to meet the cost. He explained that the application to remove the tree is intended to alleviate the stress experienced by the applicants and by their neighbour to the northwest at 27A King Street. In relation to any future pruning regime, Mr Paine reminded the Panel that the spiral crack will remain, as such damage can never be repaired through the tree's natural healing processes.

Mr Paine also addressed the reasons for not proceeding with the Environment Court appeal which resulted from a decision made by Council's hearings committee in October 2024 (LUC-2024-171).

Ms Bain (applicant) circulated a written statement and spoke to the shading and health effects the tree has on her family. In her view, removal of the tree is the only viable option. At the Panel's request, she outlined the history of their ownership of the property. She explained that her family had previously lived in Highland Park but were attracted to the 27 King Street property, particularly as the vendor had indicated that the tree could be easily removed. The family has lived at the property for 9 years and has undertaken extensive renovations. While the tree did not pose an issue in the early years, Ms Bain stated that it has since grown substantially and now has a major impact on their daily lives. Consented trimming has been undertaken, and Mr Waymouth confirmed that the removal of a large branch and crown thinning in July 2020 cost approximately \$4,000. Ms Bain also advised that the whole family is prone to asthma and their doctor has recommended they move to another property due to the adverse health effects associated with the tree. She further expressed concern about the negative impact of the tree on property values.

Mr Hagendorn (arborist for the applicant and engaged for the current application) presented his evidence to the Panel. He stated he has climbed the tree and taken photographs of key structural features that are not readily visible from the ground. In his opinion the Pin Oak is a "big beautiful tree" with a large canopy. He observed bark inclusions, indicating that some limbs are weakly attached to the trunk.

Mr Hagendorn outlined two courses of action. The first was a major reduction of the tree, involving multiple pruning events over a 6-8 year period, in addition to the trimming already undertaken to prevent the trees growth from interfering with the lines. The alternative was complete removal of the tree, which in his view is the only option that would eliminate all associated risk.

He explained that progressive pruning is a viable option, particularly in urban environments. He estimated the Pin Oak to be approximately 80 years old and cautioned against relying on overseas observations to predict its future growth. In his experience, exotic trees in New Zealand often grow more quickly and develop a larger form than in the country of origin.

Mr Hagendorn agreed with Council's consultant arborist, Mr Roberts, that the tree does not present an imminent risk of failure. He also agreed that the failure of a branch would not necessarily be catastrophic. In his view, the risk to 27 and 27A King Street is low to moderate. In response to a Panel question, he confirmed that in his opinion, climbing a tree is important in order to properly understand the nature of the risk to those living in proximity to the tree.

Peter Waymouth (arborist for the applicant, involved in the 2024 application and with a long history of engagement with the tree) spoke to his written evidence. He presented to the Panel a compilation of 10 reports and letters concerning the tree, prepared at various times between 17 April 2024 and 6 September 2025. His key points in traversing his history of issue with the tree were:

1. The tree has grown to the extent that branches now overhang power lines in King Street;
2. A large spiral crack in the trunk (identified by Mr Waymouth in July 2025) had not been previously identified.
3. There is internal decay in the Pin Oak roots.

Panel questions to Mr Waymouth focussed on the nature of the spiral crack and the reasons it had not been identified in his earlier assessments. In relation to the risk the crack posed to the structural integrity of the tree, he stated that the spiral crack - caused by twisting of the trunk under wind load due to the large canopy – presented a significant risk of collapse. He confirmed that his assessment is informed by numerous climbs of the tree over several years. However, in response to Panel questions, Mr Waymouth acknowledged that the only way to determine the degree of risk associated with the spiral crack would be to undertake a survey of the tree using sonic tomography technology.

Submitter

Mr Moffat, in speaking to his circulated notes, emphasised to the Panel the importance of taking people into account when considering this application to remove the Pin Oak. He highlighted the considerable costs the applicants had incurred in obtaining arboricultural advice, both for the current application and the earlier application to Council seeking removal of the tree. Speaking on behalf of the Protect Private Ownership of Trees Society, Mr Moffat made a plea to the Panel that the tree should be removed.

Council Staff

Mr Mark Roberts was of the view that failure of the tree was not imminent. While he acknowledged the existence of the 5m long spiral crack in the trunk, he did not consider it to be critical to the safety of the tree. Although he has not climbed the tree, Mr Roberts stated that climbing is not necessary to assess the structural integrity or general health of the tree. He explained that cracks do not, in themselves, indicate structural weakness, and that many healthy trees exhibit cracking that remains throughout their lifespan.

Mr Roberts considered that pruning would reduce the 'lever-arm' on the tree and, if undertaken progressively, would provide a viable long-term management option. He noted that he has supported pruning in excess of ten percent on other trees, and that several prunings over time would be required in this case. He also observed that the Pin Oak had withstood two major windstorms in 2025. In terms of prognosis, Mr Roberts stated that while the tree will eventually decline and die, it is not currently in a state of active failure. He did not consider the tree to pose an imminent risk to people or property over a 10-year timeframe.

Mr Roberts further advised that Mr Waymouth's use of an invasive drilling technique at the base of the tree (to determine if root collar rot was present) is outdated, as it carries a risk of introducing disease into the root system. He also did not support Mr Waymouth's reliance on information from the United States when predicting the tree's future growth under New Zealand conditions.

Mr Luke McKinlay, in his presentation to the Panel, stated that the tree retains public amenity values. He noted that the Council last assessed the tree in the early 2000s, and while he acknowledged the presence of a spiral crack in the trunk, he did not consider this to detract from the community's enjoyment of the tree. In discussion with the Panel, Mr McKinlay outlined the STEM analysis used by Council to rate the tree. He also addressed the location of the tree to the west of the applicant's dwelling at 27 King Street in relation to shading effects. Mr McKinlay commented that the tree does not serve a recreational function in the wider community sense but does provide strong visual amenity due to its size. While a replacement tree could be planted, he advised that it would take approximately 50 years to reach a comparable size.

Processing Planner's Review of Recommendation

Ms Bain was asked by the Chair about Plan Change 1 and the ongoing RMA reform process. She advised that that Plan Change 1 was not relevant to the current application and that nothing arising from RMA reform to date altered the status of the Pin Oak or its scheduling in the 2GP. While the applicant had raised the issues relating to property values, insurance, and sunlight (and had provided a copy of an academic paper on sunlight to the panel prior to the hearing), Ms Bain confirmed that property value considerations are not relevant to the RMA consent application process. She also confirmed in response to Panel questioning, that in her view the expert evidence presented to the hearing established that the tree did not constitute a safety issue.

The Panel asked Ms Bain to provide advice on the relevance of the National Policy Statement - Electricity Networks (NES-EN) which came into force in mid-January 2026. Ms Bain provided this advice in response to Panel Minute 2. We discuss this matter further below.

The Chair disallowed a question from Mr Paine to Ms Bain regarding Footnote 4 on page 20 of the agenda. The Panel notes that Footnote 4 (and the associated paragraph 86¹ of the s42A Report) clearly functions as an advisory note, reinforcing that the Panel is not bound by any comments made within the s42A Report. The Panel was satisfied that it had all the evidence necessary to make its decision, subject only to Ms Bain's response to Minute 2 and the applicant's Right of Reply.

Applicant's Right of Reply

The applicant's Right of Reply, filed on 20 February 2026 by Counsel Mr Paine, responded to Ms Bain's review of the NPS-EN and NPS-I, queried the absence of any evidence regarding the position of the power company (Aurora), and reiterated the question concerning Footnote 4 on page 20 of the Agenda. Mr Paine further submitted that "there is nothing special about the tree", that "the onus is on the Council to show why the tree should not be removed" and suggested that a better specimen of tree or different species could be planted to replace the Pin Oak.

STATUTORY AND OTHER PROVISIONS

In accordance with Section 104 of the Resource Management Act 1991, the Planner's Report detailed in full the relevant statutory provisions and other provisions the Panel considered. Regard was given

¹ Incorrectly referenced as paragraph 83 within Footnote 5, page 20.

to the relevant provisions in Section 7 of the Partially Operative 2GP, which sets out the policy framework and rules for resource consent applications concerning Scheduled Trees.

Statutory provisions considered included sections 104, 104B, and 104D of the Resource Management Act 1991.

We note for the record that whilst not in contention the activity status of the application is non-complying. We may not consider the merits of a non-complying activity under s104 or contemplate granting consent under s104B RMA unless at least one of the two gateway tests in s104D are met. These are that the adverse effects of the activity on the environment will be no more than minor (s104D(1)(a)), or that the proposal is not contrary to the objectives and policies of the Plan or Proposed Plan (s104D(1)(b)).

MAIN FINDINGS ON PRINCIPAL ISSUES OF CONTENTION

By the close of the hearing, the following matters remained in contention or required a specific finding:

- Are the adverse effects of the proposal more than minor?
- Is the proposal contrary to the objectives and policies of the Plan or Proposed Plan?
- Does the proposal pass the Section 104D gateway test?
- If the proposal passes the Section 104D gateway test, can consent be granted?

Adverse Effects

The s42A Report sets out the relevant assessment matters under Rule 7.8.2 of the 2GP when considering applications for the removal of a scheduled tree. For completeness, we note there was no dispute from the applicant regarding the applicable assessment matters or the planning framework.

On the issue of adverse landscape and visual effects, the evidence of Mr McKinlay was that the loss of the tree would have moderate-high adverse effects on existing amenity values, particularly in terms of the local streetscape. No other expert evidence on landscape or visual effects was presented to the Panel, noting the applicant's position that the tree is "nothing special"². In the absence of any contrary landscape evidence, we accept Mr McKinlay's evidence and find that the effects on amenity values arising from the removal of the tree would be more than minor.

We accept and adopt Ms Bain's assessment of the proposal's effects relating to natural hazards, noting that no evidence to the contrary was presented.

We acknowledge that there will be some positive amenity affects for the applicant arising from the removal of the tree. However, for the purposes of Section 104D, at least, positive effects are not a relevant consideration.

In respect of Ms Bain's concern about the perceived loss of value of their property, we record that changes in property value or saleability of property is a flow on effect from other impacts (such as reduction in amenity values) and not direct effects for us to consider in this matter.

We address the proposal against the key assessment matters as part of our evaluation of the relevant objectives and policies below. Having regard to our findings, we accept Ms Bain's overall conclusion

² Applicant's Right of Reply Para 8.

that the adverse effects associated with the removal of Tree T666 will be more than minor, for the reasons provided.³

Objectives and Policies

Rule 7.8.2 of the 2GP lists the relevant objectives and policies (priority considerations) when assessing the application as:

- Objectives 7.2.1 and 2.4.1
- Policy 2.4.1.2
- Policy 7.2.1.1

Objective 2.4.1 and Policy 2.4.1.2 sit in the Strategic Directions section of the 2GP. The s42 Officer found the proposal was inconsistent with, but not contrary to this objective and policy. We agree.

Moving to Section 7 of the 2GP, Objective 7.2.1 states:

“The contribution made by significant trees to the visual landscape and history of neighbourhoods is maintained.”

It is clear to the Panel, having regard to the evidence of Ms Bain and Mr McKinlay, that the contribution the tree makes to the visual landscape and history of the neighborhood would not be maintained if the tree was removed. During our site visit, we observed that the tree is a prominent feature when viewed from the surrounding environment. We agree with Ms Bain that the removal of this tree would be contrary to this policy.

Policy 7.2.1.2 is directive, and is in our view, the key policy consideration in this instance. It provides that the removal of a scheduled tree (except as provided for in Policy 7.2.1.1) is to be avoided unless one of the listed scenarios (i – vi) apply. We address each of these scenarios below:

- Is 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?*

The degree of risk posed by the tree was an area where the arborists’ evidence diverged. Mr Weymouth considered the tree to present a significant risk to people and property. In contrast the applicant’s other arborist, Mr Hagendorn, assessed the risk to be moderate and manageable. Mr Roberts was considerably less concerned and was unequivocal in his view that there was no significant danger, assessing the risk as low.

The crux of Mr Weymouth’s position was the spiral crack in the trunk represented a major safety concern. Both Mr Hagendorn and Mr Roberts acknowledged the presence of the crack but did not consider it indicative of imminent failure. Both Mr Weymouth and Mr Hagendorn confirmed the only way to definitively determine the risk posed by the crack would be through the use of sonic tomography.

In light of this, we are not persuaded that the evidence before us is sufficient to support a conclusion that a significant risk exists, particularly given the degree of interpretation required to assess the risk posed by the crack. We were further influenced by the consistent assessments of Mr Hagendorn and Mr Roberts.

³ S42A Report, para 85.

The Panel acknowledges the medical evidence provided by the applicant regarding family members' allergies and asthma. We have had regard to this evidence; however, we did not have the benefit of Dr Monaghan's attendance at the Hearing and were therefore unable to clarify the specific factors underpinning his medical statement. For example, it is unclear whether Dr Monaghan has specialist training in the diagnosis, treatment and management of allergies, or the extent of his familiarity with allergens associated with the Pin Oak tree species. In addition, no evidence was presented on whether airborne allergens from other trees in the vicinity may also contribute to the family's experience of allergies and asthma. For these reasons, we have not placed substantial weight on the medical evidence.

ii. *Does the tree pose a substantial risk to a scheduled heritage building or scheduled heritage structure?*

Ms Bain confirmed there are no scheduled heritage buildings or structures in the vicinity of the tree, the nearest being 145 metres away. Therefore, a risk of this nature does not exist in this instance. We accept her evidence on this matter.

iii. *Is there is a moderate to significant risk to buildings?*

The more recent written reports presented by Mr Waymouth regarding risk in this instance were equivocal. In his letter dated 6 August 2025 he concluded that *'the resulting harm to people and/or property damage may be significant'* (our emphasis). Similarly, in a subsequent letter dated 6 September 2025 he stated that *'a reasonable, balanced and proportionate approach is to consider removal of the Pin Oak (T666) for health & safety reasons, in order to eliminate undue risk to people & property'* (our emphasis). Under questioning, Mr Hagendorn assessed the risk as low to moderate, and Mr Roberts expressed even less concern, noting it was not an imminent risk to people or property over a 10 year timeframe. He considered the likelihood of the tree causing significant damage to property (including 27A King Street) was low. We prefer the evidence of Mr Hagendorn and Mr Roberts and find that while the tree might pose a risk to buildings and property (as is the case for any tree), it does not present a level of risk that might be defined as moderate to significant. During our site visit, consistent with Mr Roberts' evidence, we observed no large diameter branches growing directly above the dwellings at 27 or 27A King Street and noted that the house at 27 King Street is located some distance from the base of the tree.

iv. *Is the removal of the tree necessary to avoid significant adverse effects on existing infrastructure and network utilities?*

Notably, no submission was lodged by the lines company (Aurora). We do not accept Mr Paine's assertions that "it would be remiss not to raise this issue with an organisation that it directly impacts upon in circumstances where they would have certain responsibilities". The application was publicly notified, and it was open to the lines company to make a submission on the application. Further, the Panel understands that the lines company has its own processes and powers available to it in relation to trees in proximity to electricity distribution infrastructure.

There was again a divergence of views among the arborists as to the level of risk posed by the tree to the adjacent electricity distribution infrastructure. Consistent with the discussion on risk above, Mr Waymouth considered that a large branch leaning over the electricity cable in King Street was likely to impact the wires with considerable force⁴. He considered that the removal of the tree was "the

⁴ Waymouth Evidence (09.02.26), Page 2.

only viable option” to reduce the risk of damage to the electrical network. Mr Hagendorn expressed a similar view⁵. Mr Roberts, however, was firm that no such risk existed.

Having considered the evidence on this matter, it is clear to us that removal of the tree is not necessary to address the issue, as the matter can be addressed through trimming. We accept and adopt Ms Bain’s assessment and find that the tree does not pose an immediate risk to the power lines or network utilities, nor is its removal necessary to avoid significant adverse effects on existing infrastructure and network utilities.

v. *Will removal of the tree result in significant positive effects in respect of the efficient use of land?*

Ms Bain provided an assessment⁶ of the theoretical increase in development yield on the site if the tree was removed, which she calculated as an additional one or two habitable rooms under the current zoning. She concluded that this did not compromise a ‘significant positive effect’. We agree. While the ability to accommodate one to two additional habitable rooms may be reasonably considered as a positive effect, we do not consider it to be significant in the context of this proposal. We received no planning evidence to the contrary.

vi. *Is removal of the tree 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?*

The Panel acknowledges there would be some benefit to the applicant and the neighboring submitter from removing the tree, however no evidence was provided that any public benefit arising from removing the tree would be significant, nor that any public benefit outweighed the loss of the tree.

Having had regard to the above analysis of Policy 7.2.1.2 we consider the removal of the tree would clearly be contrary to this policy, and in particular as noted by Ms Bain, the ‘avoid’ direction of the Policy.

For completeness we note Policy 7.2.1.1 enables the removal of a scheduled tree in two circumstances:

- (a) where the tree is certified as being dead or in terminal decline by a suitably qualified arborist or
- (b) where subject to an order for removal in terms of section 333 of the Property Law Act 2007.

Having regard to the policy, none of the arborists provided expert opinion that the tree was dead or in terminal decline. We were also not presented with any evidence that an order under the Property Law Act 2007 is engaged. Accordingly, we find the policy does not apply to the application before us.

We have carefully considered the evidence and find, overall, that the proposed removal of tree T666 is contrary to 2GP policy provisions, particularly Policy 7.2.1.2.

Regional Policy Statements

We accept and adopt Ms Bain’s assessment and find that the localised nature and scale of the proposal is such that there are no especially relevant provisions in the Regional Policy Statement for Otago, particularly as the 2GP reflects the objectives and policies of the RPS in any case.

⁵ Arborist Report Prepared by William Hagendorn, November 2025, Page 5.

⁶ 42A Report Paras 61-63.

National Policy Statements

As identified above, several existing National Policy Statements were amended, and new ones introduced following the completion of the s42A report. In response to a request from the Panel, Ms Bain helpfully summarised the relevance of the National Policy Statement – Electricity Networks (NPS-EN) with particular reference to Policies 11 and 12. She also clarified that the National Policy Statement – Infrastructure (NPS-I) was not relevant to our consideration of the application. We note for completeness that we do not agree with Ms Bain that the 2GP has given effect to the NPS-EN. Our reading of the NPS-EN is that it replaced and widened the scope of the National Policy Statement - Electricity Transmission. However, this technicality is not determinative for our assessment of the relevant policies and has not altered our findings below.

In terms of Policy 11(1)(a) we are required, as decision makers, to avoid direct effects on the Electricity Network and under 11(1)(c) to ensure that the effective operation, maintenance, upgrading and development of the Electricity Network is not compromised. Given our effects and policy findings above, we are satisfied that the tree does not compromise the Electricity Network.

Mr Paine, in his Reply, asserted that there was insufficient evidence on matters relevant to national direction. We do not respond to each of these points, other than to record that we received no planning analysis or evidence from the applicant to underpin these assertions.

Other matters

We accept and adopt Ms Bain's assessment relating to matters of precedent and plan integrity. We agree that the evidence in support of the application does not demonstrate that removal of tree T666 is necessary; the evidence of Mr Hagendorn and Mr Roberts indicates that retention of the tree is a viable option; and Mr McKinlay's assessment confirms that the tree continues to be worthy of inclusion in the schedule. We find there is nothing exceptional about this application that would set it apart from any similar applications that might follow, and on this basis, we find that the removal of tree T666 is likely to set an undesirable precedent and put the integrity of the plan at risk.

Gateway Test

As set out in the s42A Report, 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 proposed plan.

As discussed above in the assessment of effects, overall, we have found that the actual and potential effects associated with the proposal will be more than minor; and therefore the first limb of Section 104D is not met. In order for a proposal to fail the second test of Section 104D, it needs to be contrary to the objectives and policies of the plan. In order to be deemed contrary, an application needs to be repugnant to the intent of the District Plan. In this instance, we have found the proposal to be contrary to the 2GP policy framework. The proposal therefore fails to meet the second limb of Section 104D.

In summary, we find that the proposal fails to meet either limb of Section 104D.

Part 2 Matters

We accept and adopt Ms Bain's assessment and find there is no invalidity, incomplete coverage or uncertainty within the 2GP. As a result, there is no need for an assessment in terms of Part 2 of the Resource Management Act 1991.

DECISION

The final consideration of the application, which took into account all information presented at the hearing, was held during the public-excluded portion of the hearing. The Panel reached the following decision after considering the application under the statutory framework of the Resource Management Act 1991.

That, pursuant to sections 104, 104B and 104D of the Resource Management Act 1991, and the provisions of the Partially Operative Dunedin City District Plan the Dunedin City Council refuses consent to a non-complying activity being the removal of Scheduled Tree T666 located at 27 King Street, Mosgiel, legally described as Lot 2 Deposited Plan 495976 (Record of Title 728796).

Reasons for this Decision

Our reasons are detailed in the body of this Decision, but in summary they include:

1. We find that the proposal is a non-complying activity under the relevant provisions of the Partially Operative 2GP. The provisions of this plan relating to scheduled trees are beyond legal challenge and the equivalent provisions of the Dunedin City District Plan 2006 are no longer relevant to the consideration of this application.
2. We find that in this case there is no relevant permitted baseline that could be applied to the effects assessment that would provide for the disregarding of effects of the proposal.
3. Regarding the condition of the tree, there was no dispute amongst the arborists as to the overall health of the tree.
4. We accept the evidence provided by Council's Landscape Architect and conclude that the proposal will likely result in adverse effects on amenity values at a local level that will be more than minor and, on this basis, the first 'gateway' test of the Section 104D of the RMA is not met.
5. We conclude that on balance the proposed removal of tree T666 is contrary to 2GP provisions, particularly Policy 7.2.1.2. Policy 7.2.1.2 is considered to be the most relevant policy to guide decision making on applications to remove scheduled trees. This policy is directive, and it requires the avoidance of the removal of scheduled trees unless one of the six specific exemptions set out in the policy apply. None of the six exemptions apply to the subject proposal, and therefore we find that the proposal to remove the tree is contrary to this policy. On this basis, the Panel finds that the second 'gateway' test of the Section 104D of the RMA is not met.

6. For the reasons set out above and detailed in this Decision, we conclude that the proposal fails to meet either limb of Section 104D. Accordingly, as neither gateway is satisfied, the Council has no jurisdiction to grant consent to the proposal under s104 of the RMA. There is insufficient evidence to demonstrate that the proposal meets the statutory threshold for consideration of the merits of a non-complying activity under s104 or contemplate granting the consent under s104B RMA.
7. Even if we had reached a different conclusion on the gateway test under s104D – thereby enabling the consideration of the application under s104B - we consider that granting consent in circumstances where the specific provisions in the Partially Operative 2GP to guide decision making on Scheduled Tree removal are not met, would lead to an undesirable precedent being set and undermine the integrity of the plan. We regard this as a relevant ‘other matter’ under Section 104(1)(c) of the RMA.
8. The Panel notes that Mr Paine in his Reply for the applicant posited that “the onus is on the Council to show why the tree should not be removed”. The Panel does not accept this assertion. It is well established under the RMA that the applicant bears the burden of demonstrating that their proposal meets the relevant statutory tests, including the assessment matters, objectives, and policies of the District Plan. This applies equally to applications seeking the removal of scheduled trees. The Council is not required to prove that a scheduled tree should remain; rather, it is for the applicant to provide sufficient evidence to justify its removal, particularly where the planning framework is directive, as is the case with Policy 7.2.1.2.

Right of Appeal

In accordance with section 120 of the Resource Management Act 1991, the applicant or any submitter may appeal to the Environment Court against the whole or any part of this decision within 15 working days of the notice of this decision being received.

The address of the Environment Court is:

The Registrar
Environment Court
PO Box 2069
Christchurch Mail Centre
Christchurch 8013

Any appeal must be served on the following persons and organisations:

- The Dunedin City Council.
- The applicant(s).
- Every person who made a submission on the application.

Failure to follow the procedures prescribed in sections 120 and 121 of the Resource Management Act 1991 may invalidate any appeal.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Ros Day-Cleavin', written in a cursive style.

Ros Day-Cleavin
Independent Commissioner
Chair of the Hearings Panel