

Port Stephens Council Tree Management – Draft changes to Development Control Plan (DCP)

Draft submission from TRRA and EcoNetwork Port Stephens (Summary and Desirable changes suggested as key points for other submissions)

Submissions due by 27 July 2020 to council council@portstephens.nsw.gov.au

File number **PSC2019-05565**

Summary of concerns

The statement in the report to the 23 June 2020 Council meeting: '*There are no policy changes proposed ...*' is misleading. Council's proposed introduction of a 'self-certification' regime, without input from a qualified arborist, as the means of implementing a 2017 State Government Vegetation policy¹, does in practice mean a significant (and undesirable) change to the Tree Management provisions.

Preservation of tree cover is vital not just for the character of Port Stephens, which is our main attraction for residents and visitors alike, but also for shade, cooling, wildlife habitat and carbon storage.

No-one disagrees with the need for an efficient mechanism for removal of trees which pose a genuine risk to health and safety. Unfortunately, experience is that many landowners and occupiers wish to remove healthy trees for economic or amenity reasons, and seek to use health and safety as an excuse even where it is not at issue. Council's Tree Management Policy² needs to strike a balance between these two risks (as does the legislation which it must follow).

Council resolved on 10 March 2020 (resolution 055) to introduce a temporary (12 month) 'moratorium on the need to obtain pre-approval for the removal of trees...'.¹

Instead of a *temporary* moratorium, the proposed amendments confirm a *permanent* removal of any requirement for prior approval for removal of trees for health and safety reasons (or where a tree is dead or dying and is not required as the habitat of native animals).

In our view, the draft amendments:

- make tree removal easier, increasing the risk of removal for inappropriate reasons
- do not adequately support the objective of the 2017 State Government Policy - to preserve and protect trees
- weaken Council's ability to perform its legislated role under the 2017 Policy.

¹ State Environmental Planning Policy (Vegetation in non-Rural Areas) 2017 (Vegetation SEPP)

² i.e. The Tree Management provisions in Section B1 of the *Port Stephens Development Control Plan 2014*

Desirable changes to the DCP

We submit that some important changes are required to ensure that the Tree Management Policy strikes an appropriate balance:

1. The DCP Section B1 and all relevant Forms and Community Education materials should emphasise up-front that the objective of the Tree Management Policy is the same as that of the Vegetation SEPP, i.e. protection and preservation of trees etc.
2. The messaging needs to make it clear that the exemptions are intended to apply only where necessary. It should also encourage persons concerned about safety of a tree to consider the least drastic (and cheaper) solution such as trimming, and/or retaining some branches to encourage hollows, rather than complete removal of a tree.
3. The period of notice required for most removals should be increased to 15 working days.
4. In the case of 'immediate failure' removals (which require only post event notice to Council), a qualified arborist opinion should be required, not just encouraged.
5. A person submitting an *Exempt Tree Removal Self Certification Form* should also be required to clearly mark or label any substantial tree proposed for removal, to notify all immediate neighbours of the submission, and if requested by a neighbour to supply them with a copy of the completed form and any attachments.
6. The Form should include a declaration that the notifier has read and understood the explanatory material and satisfies the relevant requirements.
7. A draft Fact Sheet states that Council reserves the right to reject the assessment of risk [in an *Exempt Tree Removal Self Certification Form*] and require a permit application to be submitted. It should also be confirmed that Council may require further information, and Council must have the ability to impose a 'hold' on removal (stop-the-clock) pending receipt and assessment of any additional required information (including a site visit if appropriate).
8. Council's internal guidelines should require that if an assessment concludes that a person submitting an *Exempt Tree Removal Self Certification Form* has not met the criteria for removal, or if additional information is required, then positive contact must be made with the person within the notice period (i.e. not just an email sent or message left, which may not be received in time to prevent removal).
9. There need to be significant penalties for breaches of the Tree Management Policy, including for:
 - Removal of a tree without at least the required period of notice to Council, by means of a properly completed *Port Stephens Council Exempt Tree Removal Self Certification Form* (or in the case of risk of 'immediate failure' without notice within the required period after removal).
 - Provision of false and misleading information.
10. Information about the penalties needs to be prominently included in the *Port Stephens Council Exempt Tree Removal Self Certification Form* and in any educational materials.
11. Council should commit to adequate professional staffing levels to assess Forms received, under the overall supervision of a fully qualified arborist.
12. There should be regular monitoring and periodic public reporting of the operation of the Tree Management Policy, including statistics on the number of notices and outcomes.

Supplementary explanation

– to support submissions but not necessarily all to be included

Below we explain in more detail our understanding of the revised policy, as implemented in amendments to the *Port Stephens Development Control Plan 2014* and associated administrative processes.

The objective of the Tree Management Policy

The objective of the Council Tree Management, set out in Section B1 of the Development Control Plan is:

To give effect to *State Environmental Planning Policy (Vegetation in non-Rural Areas) 2017 (SEPP) (B1.A)*

We note that clause 3 of the Vegetation SEPP states that:

The aims of this Policy [the SEPP] are:

- (a) to protect the biodiversity values of trees and other vegetation in non-rural areas of the State, and
- (b) to preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation.

The objective is clearly to regulate, not facilitate, tree removal, and implicitly favours retention wherever possible. This needs to be expressly recognised by Council.

Where does the Tree Management Policy apply?

The Tree Management section of the DCP applies only to privately or publicly owned land in ‘non-rural’ areas.

We comment further below on the definitions, but submit that it is essential that any Community Education materials make it very clear that it is only the owner of the land on which a tree stands who can avail themselves of the exemptions, or make application under the Policy (Joint owners must have consent of all)

Urgent removal without prior approval or notice

A tree ‘that requires urgent removal on account of immediate failure’ can be removed without prior permission when Council is provided with a **tree removal notification** post-event.

This provision is already in the Policy and remains unchanged. However, our understanding is that it is intended to apply mainly in the aftermath of rare large scale mass events such as extreme storms. Community Education material should emphasise that this ‘post-event notice’ route is not appropriate for most ‘risk to life or property’ scenarios – where the prior notice route should be taken.

Removal without approval but requiring prior notice

As a result of the Vegetation SEPP, prior permission³ is not required for removal of a tree *'where there is a risk to human life or property'* or which is *'dying or dead and is not required as the habitat of native animals'*.⁴

The DCP is proposed to be amended to include these two circumstances.

While prior *approval* is not required in these circumstances, Council must still be satisfied that the criteria have been met. In order to allow Council to assess this, the amended DCP requires landowners⁵ to lodge a tree removal *notification* 10 days prior to removal (we are submitting that it should be 15 working days).

Tree removal notification is now defined as being by means of a 'new' *Port Stephens Council Exempt Tree Removal Self Certification Form*. This form is still being drafted.⁶ We understand that the Form will draw on the relevant international standard⁷, but are concerned that the complexities of the assessment methodology – designed as a tool for qualified professionals – are difficult to convey to landowners. In particular, it is essential that the Form does not give the impression that the relationship of the height of a tree to the distance from any 'at-risk' structure or area is a simple indicator of risk, but rather only one factor in risk assessment.

From Item 13 in the Explanation table and discussion with Council staff, we understand that the new Form will:

- (a) replace the current tree removal notification required for the *urgent removal of trees or vegetation on account of immediate failure*, and
- be the means by which a person 'self-certifies' that EITHER
- (b) a tree is *a risk to human life or property* OR
 - (c) a tree is *dying or dead and is not required as the habitat of native animals*, AND THAT
 - (d) tree removal or vegetation is exempt from approval for the other circumstances listed in the DCP.

The DCP notes that *'The onus of proof is on the landowner and photos should be taken before and after removal. Landowners are encouraged to seek the advice of a qualified arborist in determining the direct threat of any tree.'*

'Direct threat' is not defined and it is not clear how this concept relates to either of the two risk thresholds — *'immediate failure'* and *'risk to human life or property'*. This should be clarified.

We understand that photos will be required to be submitted with the tree removal notification, along with a clear sketch or plan. This is an important safeguard, which should be included in the substantive provisions of the DCP not just in a Note, as well as on the Form and in Fact Sheets.

³ variously and confusingly described in the Development Control Plan (DCP) and Council reports as a permit, authority or approval

⁴ These criteria were introduced by the State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 (Vegetation SEPP)

⁵ See point below about lack of clarity about who can apply/notify

⁶ The website currently houses a 2019 Tree removal (permit) application form (which we assume will still be required, with appropriate modification, to reflect the amended DCP)

⁷ ISA Basic Tree Risk Assessment Form – International Society of Arboriculture, 2017

How will Council process Exempt Tree Removal Self Certification Forms it receives?

Under the Vegetation SEPP 'An authority is not required under this Policy for the removal of vegetation that **the council is satisfied** is a risk to human life or property' (our emphasis). This implies that an officer of Council must assess a Tree removal notification before the Council can be so satisfied.

The purpose of a period of notice is to give Council staff the opportunity to assess the merits of a proposed removal, including by examination of any photographs submitted with the **tree removal notification** or by a site visit if that seems justified. The notice period also allows for Council staff to assess whether any of the other considerations in Chapter B1 of the DCP apply (e.g. protected species or sites).

The effectiveness of the self-certification regime in ensuring that trees are only removed where they meet the criteria will depend critically on the availability of appropriately trained staff to adequately assess all **tree removal notifications** within the notice period. We submit that this period should be 15 working days, and that Council should commit to adequate staffing levels and oversight of the scheme by a fully qualified arborist.

Other matters

We support the provision of more and clearer Community Education information about the Policy, so that the rules are clear both to owners and occupiers with genuine fears, and to those who may seek short cuts to removing trees for economic or amenity reasons.

To whom do the provisions apply?

Community Education material should make it clear who needs to apply or self-certify under the revised DCP and processes.

The DCP does not clearly explain who is able to remove trees with or without approval or notice in the varying circumstances.

The existing 2019 Tree removal (permit) application form includes a requirement for the owner of the land in question to give consent for removal.

The new *Port Stephens Council Exempt Tree Removal Self Certification Form* needs to similarly ensure that the requirement for landowner consent is made clear.

Map and decision tree

It is proposed to remove from the DCP both the map showing where in the LGA the tree management policy applies (Figure BB), and the decision tree to assist people to work through which requirements apply to any proposed tree removal (Figure BA).

Item 10 in the Explanation table explains that a decision tree will be included in other Community Education materials. While we agree that it need not be in the DCP itself, it is an essential aid and should be included in or attached to the *Port Stephens Council Exempt Tree Removal Self Certification Form* — otherwise it is unlikely to be used by a majority of those considering tree removal to ensure they meet the criteria for removal. We understand that an interactive version of the Form will be available online, and this may offer the opportunity for persons completing the form to follow an automated decision tree – being presented only with options relevant to their circumstances.

Item 11 in the Explanation table asserts that the Map is out of date, and that it is not required since 'Associated amendments have been made to Schedule E to accurately identify the land [in question]'. If the definition of 'non-rural areas' is comprehensively defined by the list of zones in Schedule E, then at the very least this should be accompanied by a link to the Planning Portal lookup site at <https://www.planningportal.nsw.gov.au/spatialviewer/#/find-a-property/address>), so that interested parties can easily see the areas that are covered and find the relevant status of their property. This also applies to the identification of land subject to the RFS 10/50 provisions (via the online RFS tool at <https://www.rfs.nsw.gov.au/plan-and-prepare/1050-vegetation-clearing/tool>).

While these other options should be promoted, we suggest that a summary map similar to the current Figure BB should also be included in Community Education material – as much for the information of the wider community interested in where the Policy applies as for landowners seeking to remove a tree.

It appears that to ensure consistency with the Vegetation SEPP, the list of zones in Schedule E (comprising the non-rural areas to which the Policy applies) has been revised to include R5 and E2,3 & 4 zones. Community Education material about the revised policy should make it clear that significant new areas of the LGA are now covered by *this* Policy rather than the alternative regime for rural areas under the Local Land Services Amendment Act 2016.

Consistency of references to OEH

In the 'Note' on page B2, corrections have been made to 2 references to the OEH to reflect new administrative arrangements, but 2 other references remain unchanged. References to OEH should be consistent.