

Michael Goldsmith

From: steve@bartlet.com.au
Sent: Friday, 6 September 2019 11:24 AM
To: Phil Costello; Stephen Dunshea
Cc: Elliott Weston; Lee Carmichael; Lawyer Alex Kelly; id (id@eidosconsult.com.au); Jeff & Barbara Park (jwbapark@gmail.com)
Subject: FW: Advice Regarding Operation of Chapter G4 of Shoalhaven Development Control Plan 2014 | Removal of Trees Under '45 Degree Rule'
Attachments: Letter to Shoalhaven City Council re 45 Degree Rule .pdf; A&D Tree Felling.pdf; Study Area Sept 2019.docx

Dear Stephen and Phil,

I have attached Alex Kelly's letter on the tree removal at the church site plus a map of the relevant trees. There will either be 5 or 6 trees removed. The 45 degree rule has to be investigated with regard to the 6th tree.

Additional information: :

1. The job will involve an excavator to remove the tree stump adjacent to the church and possibly the next tree
2. A crane will be used to safely remove the tree limbs to the west of the house.
3. There is Radar work being done on 12th and 13th of September of areas indicated in the attached diagram. This is not needed for condition 6 of the DA. But is good practice to get this work done as soon as possible.
4. The engineering work is under way on moving the church including turning circles for the truck with church building on board. This may require some tree limbs to be removed from remaining trees. Limb removal is to enable the truck enough room to turn and drive across the site.

We are mindful of condition 6 of DA18/210 which provides that:

No approval is granted or implied for any soil disturbance (beyond the movement of vehicles) in any area of the site where ground penetrating radar surveys have not been completed.

This matter is of course highly confidential.

The legal advice is clear that SCC approval is not required for removing these trees. However, we should discuss the matter to ensure that we are all on the same page and that nothing is done or said which could cause embarrassment to any one.

I will be informing the Jerrinja Land Council of these works on the morning of commencement and provide them with the above information at that time.

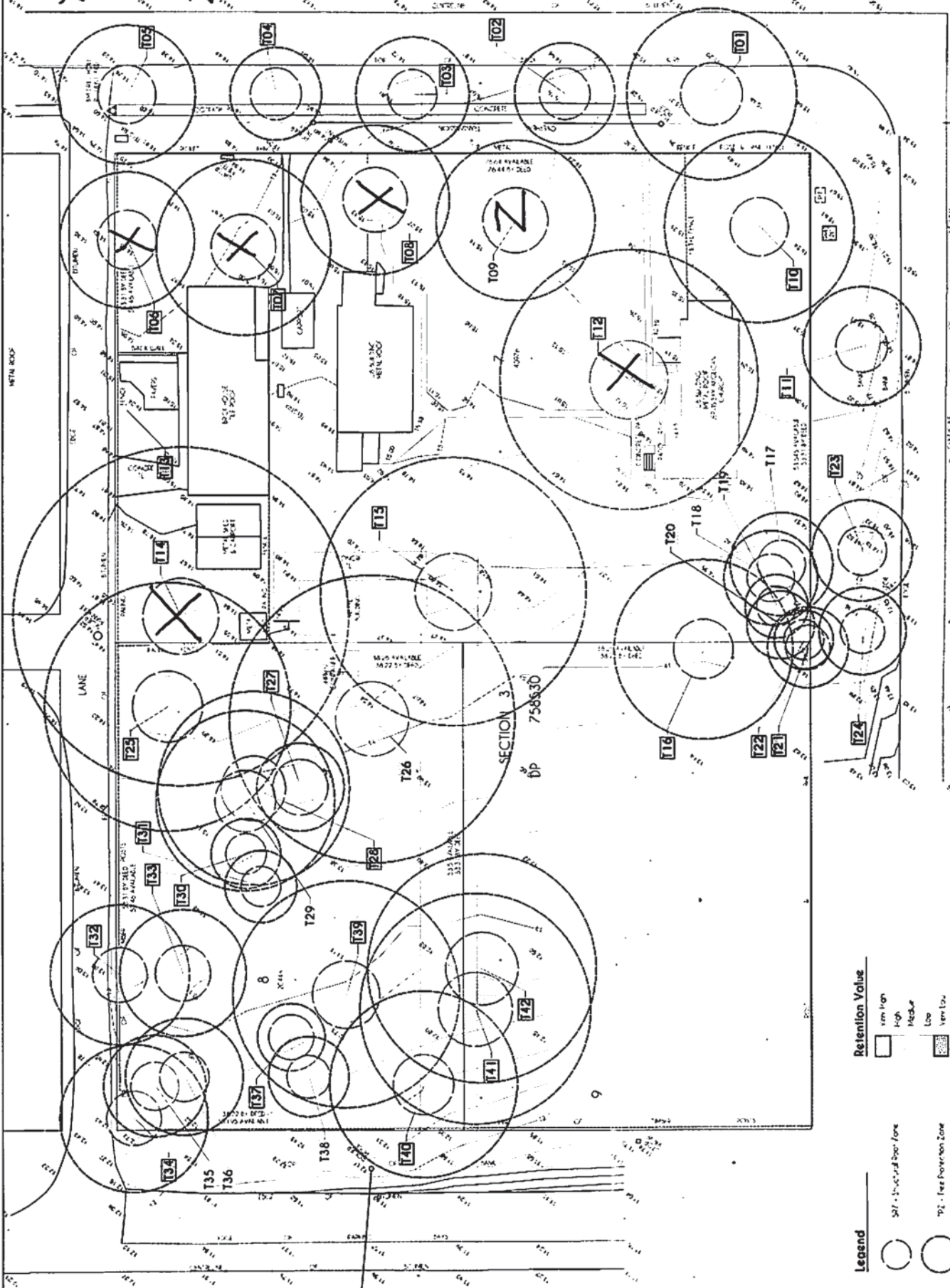
Please call me at any time to discuss.

Kind regards

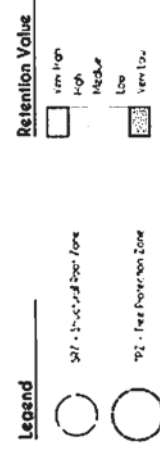
Steve Bartlett
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X Remove under 45 rule
 Z will need approval.

HALLKE STREET



CURRAMBENE STREET



Tree Location Plan

Hauke, Bowen & Currambene Streets

THE BOUNDARIES

Tree Management Strategies

3 Shady, Grand Court Residence
 6 SEP 2020
 www.treemanagementstrategies.com.au
 180 813 245 24

Project No: 2111702
 Design: 1700-0-A
 Drawn by: [Name]
 Checked by: [Name]

BOUVIER

SECTION 3
 DP 758830

5 September 2019

Your Ref: DA18/2102
Our Ref: ADK:19/0946

Chief Executive Officer
Shoalhaven City Council
PO Box 42
NOWRA NSW 2541

By email: council@shoalhaven.nsw.gov.au

Dear Chief Executive Officer,

**RE: ADVICE REGARDING OPERATION OF CHAPTER G4 OF SHOALHAVEN
DEVELOPMENT CONTROL PLAN 2014 | REMOVAL OF TREES UNDER '45
DEGREE RULE'**

1. I act for Steve Bartlett, in relation to land known as Lots 7 & 8, Section 3, DP758530 at Hawke, Bowen and Currumbene Streets, Huskisson (**the Site**). My client intends to remove trees from the Site that are located closer than their own height to a number of buildings. My client is of the opinion that this work may be carried out without development consent or permit from Shoalhaven City Council pursuant to the provisions of the *Shoalhaven Development Control Plan 2014* – Chapter G4 (Tree and Vegetation Management) (**the SDCP**).
2. Council has expressed some concern over this course of action, having regard to the significant community response to a recent development application which gave consent for the repositioning of a church from one part of the site to another as well as demolition of certain structures. Council has asked that my client prepare a detailed legal opinion on whether the tree removal works are permitted pursuant to the *Environmental Planning and Assessment Act 1979* (**EPA Act**), or indeed or they are exempt from the requirement to obtain approval pursuant to Council's '45-degree rule'.



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3. I have outlined below the law as it relates to removal of trees and vegetation in the Shoalhaven and, particularly, pursuant to Council's development control plan.

Removal of trees and vegetation in NSW

4. In 2018 the *Standard Instrument Local Environmental Plan* was amended with the effect that it repealed clause 5.9, which related to the removal of trees and vegetation. This had the effect of repealing clause 5.9 from the *Shoalhaven Local Environmental Plan 2014 (SLEP)* also.
5. In its place, the *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 (Vegetation SEPP)* was enacted.
6. The Vegetation SEPP provides an approval framework for the removal of trees and vegetation in NSW. It requires that an approval or a permit must be obtained from the relevant authority (Council) in order to remove trees or vegetation to which the SEPP applies.
7. The Vegetation SEPP applies to land zoned SP2 Infrastructure (clause 5(1)(b)). The Site is zoned SP2 Infrastructure.
8. Clause 9 of the Vegetation SEPP identifies the trees and vegetation affected by the SEPP:

9 Vegetation to which Part applies

- (1) *This Part applies to vegetation in any non-rural area of the State that is declared by a development control plan to be vegetation to which this Part applies.*
 - (2) *A development control plan may make the declaration in any manner, including by reference to any of the following—*
 - (a) *the species of vegetation,*
 - (b) *the size of vegetation,*
 - (c) *the location of vegetation (including by reference to any vegetation in an area shown on a map or in any specified zone),*
 - (d) *the presence of vegetation in an ecological community or in the habitat of a threatened species.*
9. Chapter G4 of the SDCP prescribes trees and vegetation for the purpose of the Vegetation SEPP.
 10. Clause 5.1 provides:

5 Controls

5.1 Declared Trees or Other Vegetation – Part 3 of the Vegetation SEPP

This clause declares **trees** and other **vegetation** for the purposes of Part 3 of the Vegetation SEPP. In accordance with Clause 7(1) of the Vegetation SEPP, a person must not cut down, fell, uproot, kill, poison, ringbark, burn or otherwise **destroy** the **vegetation**, or **lop** or otherwise remove a substantial part of the **vegetation** without a **permit** granted by **Council**. There are some exemptions to the requirement for a **permit** which are set out in Section 5.2.

The following **trees** or other **vegetation** are declared:

1. All **trees** and other **vegetation** located on an area mapped by this Chapter which includes:
 - a) Land which is mapped as a 'paper subdivision' in the Chapter G4 Supporting Maps; or
 - b) **Trees** or other **vegetation** that are:
 - i. less than 50 metres from the bank of a creek or water body deemed Category 1 (large creek/river) as defined by the **SLEP 2014**; or
 - ii. less than 30 metres from the bank of a creek or water body deemed Category 2 as defined by the **SLEP 2014**; or
 - iii. verified as supporting an **endangered ecological community (EEC)**; or
 - iv. mapped as supporting rainforest **vegetation** species; or
 - v. mapped on the **Scenic Protection Area Map of SLEP 2014**; or
 - vi. within 30 metres from a non-urban road boundary.

Note: The above areas are shown on the Supporting Maps for this Chapter.

2. All **trees** and other **vegetation** located on publicly owned or managed land; or
3. Where the **tree** in question is a *Toona australis* (Red Cedar); or
4. Where the **tree** contains a hollow; or
5. Where the **tree** or other **vegetation** is a **heritage item** or within a **heritage conservation area** under the **SLEP 2014**; or
6. All **trees** in an urban area.
7. All **trees** and **native vegetation** on land in zone E2, E3 or E4.

Note: An urban area for the purposes of this Chapter is any mapped area with a residential (excluding R5 Large Lot

11. Clause 5.2.3 then outlines exemptions to this prescription and provides as follows:

5.2.3 Exemptions

The following **trees** or other **vegetation** are exempt from section 5.1:

- a) **Clearing trees** and **vegetation** that is authorised under Section 600 of the *Local Land Services Act 2013* (LLS Act). This sub-clause does not apply to clearing merely because it is a part of or ancillary to the carrying out of **exempt development**.
- b) **Trees** and **vegetation** that **Council** or the **Native Vegetation Panel** is satisfied is dying or dead and is not required as the **habitat** of native animals.
- c) **Trees** and **vegetation** that **Council** is satisfied are a risk to human life or property.
- d) Where a **tree** is closer than its own height from an approved **building** (including a **dwelling, garage** or **outbuilding**). This means where any part of a **tree** is above a line 45 degrees from the vertical extension of the wall of any building measured from its base (as shown in Figure 1). Hollow bearing **trees** can only be removed without assessment under the 45 degree exemption if an animal handler is present.

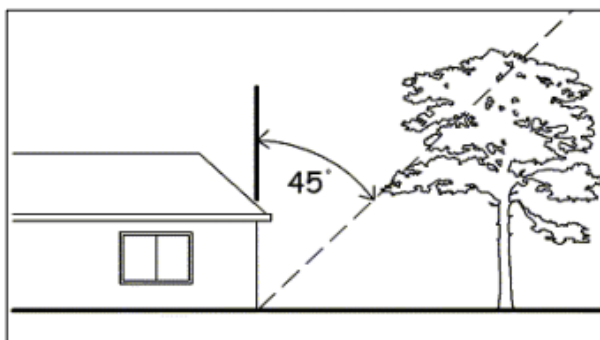


Figure 1: Example of the 45 degrees line from the vertical extension

- e) The non-native/invasive **tree** species listed in Table 1, regardless of size.

12. What it provides is that trees that are closer than their own height from an approved building will not be a tree prescribed for the purpose of clause 5.1 and will therefore not attract the operation of the Vegetation SEPP.
13. The wording contained in clause 5.2.3 was criticised by the Court of Appeal in *Elachi v Shoalhaven City Council* [2016] NSWCA 15, where the Court found that the 'unattractive wording' of subsequent 'exemptions' from the requirement to obtain consent, led to the clause itself being declared invalid by the Court.
14. However, since the decision in that case, the legislative framework has changed. Council has also amended the wording to reflect that the exemptions in clause 5.2.3 are directly related to the prescription of vegetation under clause 5.1, rather than a general exemption to the requirement to obtain consent. Critically, clause 5.2.3 identifies particular 'types' of trees as being exempt from the prescription in clause 5.1, rather than an 'activity' being exempt.

15. The consequence being that the so called '45-degree rule' subsists as an exemption from the requirement to obtain consent, because it is excluded from the prescription of vegetation for the purpose of the Vegetation SEPP.
16. It follows that trees that are closer than their own height to an approved building, will not require a permit or other approval pursuant to the Vegetation SEPP and their removal will not constitute a contravention of the EPA Act.
17. I note further that the *Local Land Services Act 2013* does not apply to land to which the Vegetation SEPP applies and therefore it does not apply to require any additional approval for the removal of 'native vegetation'.

'Approved building'

18. It is relevant to consider what the SDCP means by the words 'approved building', and whether the Church requires a formal approval in order to be eligible to benefit from the exemption offered by clause 5.2.3.
19. The Court is consistent in its approach to the application of DCPs, invariably holding that:
 - a. DCPs do not prescribe standards;
 - b. the provisions of a DCP are to be applied flexibly;
 - c. a development application will not be refused for failure to comply with one, or even several, controls within a DCP;
 - d. where the objectives of the control are met, notwithstanding the technical non-compliance, the development should not be refused on the basis of non-compliance with the control; and
 - e. although a DCP is a fundamental element in and focal point of the decision-making process, it is not determinative.
20. This position is reflected in various determinations of the Land and Environment Court. In *Tonne Legge v Council of the City of Sydney* [2016] NSWLEC 1424, the Court described, at [46] the non-determinative character of the provisions of a DCP and also how councils are not permitted to substitute a provision of the DCP with what it considers to be reasonable. (see also decisions in *DeAngelis v Pepping* [2014] NSWLEC 108, at [151]; *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189 at [170]; *Kninloch v*

Newcastle City Council [2016] NSWLEC at [78]-[79]; and *Bannerman v Lane Cove Council* [2016] NSWLEC 1116 at [60]).

21. The SDCP must be interpreted with a view to achieving a practical outcome. In *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189 (at [189]), the Court adopted Lord Reid's approach to construction of subordinate legislation (e.g. DCPs) in *Gill v Donald Humberstone & Co Ltd* [1963] 3 All ER 180 at 183 [emphasis added]:

...I find it necessary to make some general observations about the interpretation of regulations of this kind. They are addressed to practical people skilled in the particular trade or industry, ... They have often evolved by stages as in the present case, and as a result they often exhibit minor inconsistencies, overlapping and gaps. So they ought to be construed in light of practical considerations, rather than by a meticulous comparison of the language of their various provisions, such as might be appropriate in construing sections of an Act of Parliament. ...Of course, difficulties cannot always be foreseen, and it may happen that in a particular case the requirements of a regulation are unreasonable or impracticable; but, if the language is capable of more than one interpretation, we ought to discard the more natural meaning if it leads to an unreasonable result, and adopt that interpretation which leads to a reasonably practicable result.

22. In my view, it is not necessary for the Church to have received a physical development consent in order for it to be an 'approved building' for the purposes of clause 5.2.3. It need only be a building of lawful origin.
23. A similar test is applied in the context of whether a building will benefit from 'existing use rights'. It was held in the case of *RCM Constructions Pty Limited & Maycot Pty Limited v Ryde City Council* [2004] NSWLEC 266 (at [20]), that in order to satisfy the definition of 'existing use rights', the use of the subject site must (among other things) have a lawful origin.
24. It is appropriate in the circumstances to apply the same logic to the wording in the DCP so as not to exclude lawful structures that existed prior to the coming into force of planning laws in NSW. To take the alternative view would be to unfairly and unreasonably exclude historical buildings from the operation of the DCP. This would, in my view, lead to an unreasonably impractical result.
25. Accordingly, I consider that the Church benefits from the status of an 'approved building' for the purposes of clause 5.2.3 of Chapter G4 of the SDCP.

Impact of development consent DA18/2102

26. My attention is drawn to recent correspondence from Garon Irwin if Council, in which he suggests that a development application would be appropriate in circumstances where the removal of trees is the subject of such significant public scrutiny.
27. For the reasons outlined above, development consent is not required in order to remove trees that are closer than their own height to the Church. I have been asked to consider whether the development consent granted under DA reference DA18/2102 (**the Consent**), has the effect of altering this position at all.
28. Clause 5.2.2 of Chapter G4 of the SDCP provides that:

*None of the exemptions listed in this Section apply to any **trees** or **vegetation** that are required to be retained by the conditions of a **development consent** or a Section 88B restriction to user instrument. The Vegetation SEPP, and subsequently this Chapter, do not affect authorisations under other Acts that are required to be obtained in connection with the clearing of vegetation.*

29. I have reviewed the terms of the Consent and there is no condition in that document which requires the consent holder to retain trees or vegetation. I am instructed that further investigation is currently being undertaken with respect to previous development consents appurtenant to the Site, to ensure there are no conditions previously imposed that would preclude the operation of the exemption.
30. Equally, there is no section 88B instrument applying to the Site which has the effect of limiting the scope and application of the exemption in clause 5.2.3 of the SDCP.
31. Accordingly, I am of the view that the Consent has no bearing on the ability of my client to rely on the exemptions under the SDCP to remove trees from the Site. Unless Council has a different view, my client intends to proceed with the removal of trees that fall within the ambit of the exemption contained in clause 5.2.3, also known as the '45-degree rule'.
32. The clearing of vegetation is a term defined in the Vegetation SEPP as follows:

clear vegetation, includes—

- (a) cut down, fell, uproot, kill, poison, ringbark, burn or otherwise destroy the vegetation, or
- (b) lop or otherwise remove a substantial part of the vegetation.

33. Accordingly, in my opinion, the clearing of trees pursuant to the 45-degree rule, extends to the removal of the stumps and uprooting the subterranean vegetation that constitutes the structure of the eligible tree.
34. It is not relevant where the Church will eventually be located. Its present location attracts the operation of the exemption. Its future location may also attract the operation of the exemption.
35. It was open to Council to condition the Consent to avoid this potential impact, by requiring certain trees to be retained. However, Council did not impose such conditions.
36. I trust my advice here is of assistance. I would be happy to meet with Council to expand on any of the issues or legal contentions outlined above.
37. I look forward to reviewing Council's considered response. Please note that if I do not receive a response from Council within seven (7) days, outlining why my client does not have the benefit of the 45 degree rule, my client will proceed to clear the trees which benefit from that exemption.

Yours sincerely

A handwritten signature in blue ink that reads 'Alex Kelly'.

Alex Kelly
Director and Lawyer
Accredited Specialist – Planning & Environment Law

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Email: alex@pdclawyers.com.au

