

A NEW ANGLE ON TPOS - THE 45 DEGREE RULE

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SYNOPSIS

Shoalhaven City Council has revised its Tree Preservation Order. It now exempts “*Tree works on private land 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*”. This rule is confusing and it does not work.

Using this rule, thousands of healthy trees that are structurally sound, can be topped, lopped or removed by their owner without Council consent.

The 45 degree angle rule has nothing to do with tree or risk management.

It is Council avoidance of its environmental responsibility, in particular avoidance of any potential for liability.

This paper considers how the 45 degree rule came about in the Shoalhaven and raises the question “how can it be prevented from being adopted by other Councils?”

BACKGROUND INFORMATION

Shoalhaven City Local Government Area is located in New South Wales, approximately three hours drive south of Sydney. Its capital is Nowra. Shoalhaven City has a population of ~88,000 and a growth rate of more than 4% per annum. Tourism is one of the City’s main industries.

Shoalhaven City Council (SCC) had a Tree Preservation Order (TPO) for 30 years.

Such Orders are now made generally in accordance with the NSW *Environmental Planning and Assessment Act 1979 No 203* and clause 8 of the *Environmental Planning and Assessment Model Provisions 1980*. The Model Provisions state the TPO is for the “purpose of securing amenity or of preserving existing amenity.” Shoalhaven City Council TPO prohibited the ring-barking, cutting down, lopping & topping, removing, injuring, poisoning or wilful destruction of any tree ...without the written consent of Council. This applied to specified zones including residential. Consent was not required for removal or pruning of trees under the TPO for: bushfire hazard reduction work; wire clearance; emergency work.

In January 2004, Shoalhaven City Council significantly revised its Tree Preservation Order. The effect of the revised TPO is to significantly reduce situations in which the consent of Council is required before a tree may be pruned or removed in both rural and urban areas. In this talk, I will only discuss the application of the 45 degree rule, which the revised TPO introduces. This rule exempts “*Tree works on private land 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.*” (TPO p.3, 2004)^{1 2}

¹ The new TPO increases the size of trees protected to: more than 5 metres tall; or >5m wide across the foliage crown; or having a trunk circumference of more than 500mm measured 1 metre above ground level.

² ‘Tree work’ is not defined in the TPO.

Using this rule, thousands of healthy trees that are structurally sound, can be topped lopped or removed without any involvement by Council.

Although the previous TPO required a person to pay a fee and obtain a consent before pruning or removing a tree to which the TPO applied, through its application Council could also provide basic advice on tree management. The Council Officer would assess trees for residents and the decision whether or not to grant consent for pruning or removal was given or rejected on the basis of the assessment and any other relevant matters under the *Environmental Planning and Assessment Act 1979*, such as consideration of impacts on threatened species. If consent was refused, the applicant could appeal the decision in the Land and Environment Court. If a landowner (or other person) removed a tree without obtaining consent, Council could seek to prosecute the relevant person in the Land and Environment Court.

The requirement that consent be obtained, ensured that healthy trees, in good condition, that were not causing significant problems, were protected for the benefit of the community, residents and visitors. It also ensured residents understood the reason for not topping trees; that they were familiar with the *Australian Standard Pruning of Amenity Trees, AS4373 - 1996*; and the importance of replacement trees and appropriate tree species. Council could, as a condition of granting consent for removal of a tree, require replacement planting/s.

Council in determining whether a tree could be removed could take into consideration whether the tree was dying, dead, or dangerous to persons or property. Ninety-eight percent of requests to Council for pruning or removal by residents were approved.

So, why did Shoalhaven City Council rescind its TPO and make another one that included the 45 degree rule?

THE 45 DEGREE ANGLE RULE

Shoalhaven City Council Draft Tree Management Policy, August 2003, was prepared by Council staff with a consulting arboriculturist. This policy states that its purpose “*is to preserve and maintain, in safe and healthy condition, those trees which are currently or which will become visually, historically, horticulturally or environmentally valuable to the community of Shoalhaven City... also ensuring that any risks associated with them are managed or controlled in accordance with industry best practice.*” (p. 2, Draft Policy, 2003)

It also states that there would be a “*Risk management approach to Council’s tree resources inline with Statewide’s Best Practice Manual for Trees and Tree Root Management.*” (p. 1, Draft Policy, 2003)

Amendments were proposed to this Draft Policy by some Shoalhaven Councillors. The most controversial was the 45 degree angle rule.

Let us apply this rule up slope.

A 15m high tree could be more than 30m away from a building yet be exempt from any protection because it could potentially fall on the building!

Up slope, one could lose every tree for a very long distance.

Let us now apply this rule down slope.

It is confusing. Where is the right angle triangle? Where will I place the 45 degree angle line? It could be interpreted that a 15m high tree, 20m down slope of a building, is exempt from any protection.

Council staff who developed the Draft Policy advised against a number of changes proposed by Councillors, in particular the adoption of the 45 degree angle rule.

Their reasons included the following:

- it appears to be based on the premise that all trees are dangerous and that if approval is required it will not be given;
- there are various interpretations of removal zones particularly on sloping sites;
- it would be difficult to regulate, particularly once the tree has been cut down;
- it will effectively remove all existing controls on tree removal in urban areas where individual lot sizes are less than ~1000 square metres;
- it will be left to the landowner to contact the Department of Environment & Conservation if the proposed 'tree works' are likely to significantly affect threatened species, or their habitats, or threatened ecological communities or populations.

In addition to these concerns, Council received 87 public submissions on the *Draft Tree Management Policy* (including submissions from experts in arboriculture and the Department of Environment & Conservation). All submissions by arboriculturists and Government Departments raised concerns about the 45 degree rule. Eighty-one out of eighty-seven submissions received by Council were against the adoption of this rule.

WHERE DID THE 45 DEGREE RULE COME FROM AND WHY WAS IT SO STUBBORNLY RETAINED?

The 45 degree rule was devised by a Councillor and supported by a group of Councillors.

One Councillor announced (on radio), that landowners would be able to do as they wished with their own trees on their own property. These Councillors also subsequently proposed extending the 45 degree rule to land zoned 1c rural (Rural Lifestyle), and to public land.

It is more likely, that the Councillors who promoted the 45 degree rule were influenced by the following:

- Possible concern about the outcome of a Court Case - *Timbs v Shoalhaven City Council* appeal. Although Council had not been held to be negligent in the District Court, the NSW Court of Appeal upheld the appeal. The Court of Appeal held that Council was negligent in the way in which it refused a request by Mr Timbs to cut down 3 trees, one of which subsequently killed Mr Timbs. Significantly, the Court of Appeal believed Mrs. Timbs, that a Council officer attended the property and refused consent to remove the trees & had not carried out any assessment of risk or any other relevant issue in reaching his decision.³
- The desire to pass any liability for trees on private property to the landholder.
- Strong development interests that perceive trees as a nuisance; e.g. obscuring water views, or reducing development potential of land.
- Recent storms and fires in the Shoalhaven, resulting in sensational headlines in the press and whipping-up hysteria and fear of trees amongst the general public.
- The community at large over-emphasising perceived negatives of trees: "There's thousands of them"; "leaves get in my gutters ... I have to sweep every day"; "they block my views"; "they could fall on my house".
- Lack of understanding of the very significant roles, which trees play; e.g. absorbing carbon dioxide; maintaining biodiversity through conservation of remnant vegetation.

³ The Court of Appeal judgement came down after the 45 degree rule was proposed.

This is despite the fact that Councillors under the NSW *Local Government Act 1993*, are required to take into consideration ecologically sustainable development in decision-making.

- A perception that it is the role of Local Government to give primary weight to private interests (e.g. clear visual exposure of their products) rather than public amenity and other matters relating to the public interest.

COMMUNITY INFORMATION SESSIONS

Three information sessions were held by Council, to inform the public about the *Draft Tree Management Policy* including additional exemptions such as the 45 degree rule. Councillors who supported the 45 degree rule chaired these meetings.

As a qualified arboriculturist, I prepared and distributed information regarding the implications of adopting the 45 degree rule. I also contacted a number of Government Departments and Ministers to ensure that they were aware of the contents of the *Draft Tree Management Policy*.

FINAL OUTCOME

Regardless of the advice and comments of Council staff, Department of Environment & Conservation, arboriculturists, conservationists and the majority of public submissions, Shoalhaven City Council rescinded the existing TPO and made a new TPO that included the 45 degree rule.

IMPLICATIONS

In adopting the 45 degree rule, Shoalhaven City Council has not adopted industry best management practices. With Council withdrawing from its role in relation to trees on private property, there is neither regulation nor education for landowners in relation to:

- the topping of trees;
- *Australian Standard Pruning of Amenity Trees* (AS-4373, 1996);
- impact of tree removal on adjoining trees (neighbours, public land, street trees);
- replacement trees.

The 45 degree rule has led to increased public fear of trees. There are now demands for the removal of trees on neighbours' property and on public land.

For example, seven roadside *Corymbia maculata* (Spotted Gums), remnant native trees, were recently removed. These trees had been professionally assessed for Council and were found to be in good health and have good structure.

The applicant's reasons for requesting removal included – potential to obscure their caravan showroom and potential for damage to caravans.

Contrary to the arborist's report, to Council staff recommendations, to objections submitted by the public, Council gave approval for removal of all the Spotted Gum trees. The applicant will replace them with palm trees and turf.

Tall remnant Eucalypts on public land, including street trees, are being replaced by smaller 'safe' trees at the expense of biodiversity and habitat.

Thousands of low risk trees can now be topped or removed. This is not justifiable. Topping trees substantially increases the risk of failure.

Tree loss results in higher energy use for cooling, more water run-off in the gutters, water and air quality deterioration, increased greenhouse emissions etc.

At Hyams Beach Village, I surveyed 117 lots, generally in excess of 650 m².

Seventy of the 117 lots support a total of 342 trees.

Using the 45 degree rule, I estimated that 76% of these trees (261) can now be removed. Previously, these trees were protected.

The minimum urban lot is now 500 m² and the building area is increasingly maximized.

Council estimates that the 45 degree rule will effectively remove all existing controls on tree removal in urban areas where individual lot sizes are less than ~1000 m². I don't think that this level of protection is consistent with the original intent of clause 8 of the *Environmental Planning and Assessment Model Provisions 1980*.

Does the TPO remain effective in urban situations?

What is stopping other Councils from adopting similar strategies to the Shoalhaven to avoid responsibility for our urban forests?

THE FUTURE

Tree Preservation Orders go back to the NSW *Local Government Act 1919*.

TPOs need to be reviewed Statewide as part of broader planning reforms.

If TPOs were to be abandoned, provisions relating to the protection of trees could be incorporated into the Local Environment Plan.

The intent of clause 8 of the NSW *Environmental Planning and Assessment Model Provisions 1980*, as indicated previously, is for the 'purpose of securing amenity or of preserving existing amenity'. Shoalhaven City Council Tree Preservation Order does not provide adequate or appropriate protection to trees on either private or public land.

- There needs to be debate to decide how best to protect our urban forests; through organizations such as Treenet, National Arborists Association of Australia (NAAA), Institute of Australian Consulting Arboriculturists (IACA), International Society of Arborists Australian Chapter (ISAAC), Local Government Tree Resources Association (LGTRA).
- There need to be ongoing public information campaigns to generate an understanding and appreciation of urban forests and remnant vegetation.
- Information needs to target Councillors and Council staff, the media, schools, builders, residents.
- It needs to systematically quantify as well as promote the benefits of urban forests.

I consider that, in the light of what has happened in the Shoalhaven, the future of our urban forests should not be left to the whim of individual Councils.

REFERENCES

Shoalhaven City Council Tree Preservation Order, 2004;

Shoalhaven City Council Tree Management Policy, 2004 (Parts 1, 2 & 3), www.shoalhaven.nsw.gov.au ;

Shoalhaven City Council Draft Tree Management Policy, 2003