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Confidential

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Our ref: SHO16021

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The General Manager
Shoalhaven City Council
PO Box 42
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Attention: Tim Fletcher

Email

Dear Sir,

Implementation of Council Resolution - Draft Collingwood Beach Dune Vegetation Management Plan

Introduction

- 1 I refer to the emails from Kelie Lowe and Tim Fletcher to me requesting advice in relation to the implementation of the Draft Collingwood Beach Dune Vegetation Management Plan (**Draft Plan**).
- 2 I am instructed that at its meeting on 24 May 2016, Council resolved to do the following:
 - 2.1 publicly exhibit the Draft Plan (as prepared by NGH Consultants) with some modifications and as part of the exhibition, provide a 50m trial site where proposed pruning works are undertaken with minor modification;
 - 2.2 publicly exhibit the 11 point Draft Vegetation Plan (**Residents' Plan**) prepared by the residents' group, known as the Collingwood Beach Preservation Group (**Residents**).
- 3 In a number of emails to Council, the Residents claim that Council would be acting beyond power were the resolution to be carried out.

Advice requested

- 4 Council has requested advice on the following issues:
 - 4.1 Does the proposed exhibition of the Draft Plan contravene the *Local Government Act 1993 (LG Act)*?

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- 4.2 Is the pruning of vegetation for the Trial Site a Part 5 activity under the *Environmental Planning and Assessment Act 1979 (EPA Act)* and/or does it conflict with any other legislation?

Summary of advice

- 5 The proposed exhibition of the Draft Plan does not contravene the LG Act.
- 6 If functions are conferred on Council in relation to the land under either the LG Act (or CL Act) then in my view, Council has the power to exhibit a Draft Plan which proposes the means by which the land ought to be managed.
- 7 The pruning of vegetation for the Trial Site appears to be a Part 5 activity under the EPA Act and subject to Council complying with the requirements of Part 5 there does not appear to be a conflict with other legislation.

Discussion

Background

- 8 I understand from the available information that the land to which the Draft Plan would apply is Crown land which Council is responsible for managing. The land is zoned RE1 Public Recreation.
- 9 NGH Consultants have prepared a review of environmental factors dated June 2016 (**REF**) in relation to the demonstration site. The REF is said to have been prepared in accordance with the requirements of s111 of the EPA Act to allow Council to consider the environmental impacts of the demonstration site.
- 10 We have not been asked to review the REF and this advice is based on the assumption that the REF adequately identifies the environmental impacts of the activity identified in the REF.
- 11 The REF states that the proposed activity in Zone 4 includes the following stages:
- 11.1 Under-prune mature trees (those over 4m) up to a maximum height of 3m.
 - 11.2 Fell tall shrubs and young trees less than 3m tall where they occur underneath the canopy of under-pruned trees. Young trees that occur outside of the mature under-pruned tree canopy would be retained.
 - 11.3 Remove young seedlings of all tall shrub species and tree species where they occur underneath the canopy of under-pruned trees. Tree seedlings that occur outside of the mature under-pruned tree canopy would be retained.
 - 11.4 Coarsely break up or mulch felled/trimmed material and spread thinly over the ground in the immediate vicinity (no greater than 5cm deep for mulch).
- 12 The specific objective of Zone 4 is to maximise low level views by lifting the canopy of mature trees to a height of 3 metres and removing tall shrubs and young tree growth.
- 13 The objective of establishing the Trial site is to provide the public with an on ground visual example of what the Draft Plan aims to achieve and to allow members of the public to observe and make informed comments regarding the exhibition of the Draft Plan.
- 14 On 24 May 2015, Council endorsed the Draft Plan with a number of modifications that were not addressed in the REF including:
- 14.1 In Zone 5 prune trees and tall shrubs to a height 1 m – 1.5m;



- 14.2 Establish a 50 metre demonstration site at the end of Susan Street Vincentia prior to the exhibition period to facilitate the understanding and visualisation of the proposed management zone for the area.
- 15 NGH Consultants in a letter to Council have raised its concerns about the modification of the Council referred to at 14.1 of this advice as the increased pruning will increase tree mortality and could possibly further reduce root penetration reducing dune stability.

Exhibition of Draft Plan

- 16 In my opinion, it is lawful for Council to resolve to exhibit the Draft Plan.
- 17 As I understand the situation, Council manages the land to which the Draft Plan applies, which is Crown Land.
- 18 Chapter 5 of the LG Act sets out a council's functions. Relevantly, this includes any function conferred under the LG Act, by any other Act and a power to do all such things as are supplemental or incidental to, or consequential on, the exercise of its functions.
- 19 Section 48 of the LG Act gives a council responsibility over certain public reserves.
- 20 A council may also have functions in respect of Crown Land under the *Crown Lands Act 1989 (CL Act)*.
- 21 If functions are conferred on Council in relation to the land under either the LG Act or CL Act then in my view, Council has the power to exhibit a Draft Plan which proposes the means by which the land ought to be managed.
- 22 Section 38 of the LG Act prescribes a requirement for public notice of draft plans of managements and the public notice must include the draft plan together with any other matter which it considers appropriate or necessary to better enable the draft plan and its implications to be understood.
- 23 This may include the REF prepared by NGH Consultants and its letter dated 2 June 2016 where the potential impacts of the additional pruning that was recommended by the Council in the modification of the draft plan.
- 24 I should point out that if the Draft Plan proposes something that is beyond the power of Council, then there may be an argument that the exhibition of the Draft Plan amounts to a breach of the LG Act, because 'breach' is defined to include a threatened or apprehended failure to comply with the Act: (LG Act, s672).

Application of Infrastructure SEPP

- 25 The *State Environmental Planning Policy (Infrastructure) 2007 (Infrastructure SEPP)* provides at clause 65 that development for a range of purposes may be carried out by or on behalf of a council without consent on a public reserve under the control of or vested in the council.
- 26 The purposes include landscaping (cl 65(3) (h)). The word 'landscaping' is not defined so the ordinary meaning of the word is to be applied.
- 27 'Public reserve' is defined under the Infrastructure SEPP to have the same meaning as it has in the LG Act but excludes a Crown reserve that is dedicated or reserved for a public cemetery.
- 28 'Public reserve' is defined under the LG Act, relevantly, as follows:
- (f) any land vested in the council, and declared to be a public reserve, under section 76 of the Crown Lands Act 1989, or



(g) a Crown reserve that is dedicated or reserved:

...

(ii) for a purpose that is declared to be a purpose that falls within the scope of this definition by means of an order published in the Gazette by the Minister administering the Crown Lands Act 1989,

being a Crown reserve in respect of which a council has been appointed as manager of a reserve trust for the reserve or for which no reserve trust has been established...

- 29 Assuming that the land falls within the definition of 'public reserve' under the LG Act and Infrastructure SEPP, it is arguable that the works for the Trial Site can be carried out as development without consent under clause 65(3) (h) of the Infrastructure SEPP.
- 30 On this basis, then an assessment under Part 5 of the EPA Act is required.
- 31 For completeness, I do not think that it can be said that the works for the Trial Site are 'routine maintenance' within the meaning of the exempt development provisions in clause 66(1) (b) of the Infrastructure SEPP. In my view, given the circumstances in which the works will be carried out, they cannot be characterised as 'routine'.

Part 5 Assessment

- 32 In my view, the pruning activity required for the Trial Site is an 'activity' within the meaning of Part 5 of the EPA Act.
- 33 'Activity' is defined under s110 of the Act to include the 'carrying out of a work'.
- 34 In *Warringah Shire Council v May* (1978) 38 LGRA 424, clearing of land for the purposes of an airstrip was held to be a 'work' on the basis that the clearing created a 'substantial change in the physical nature of the land'.
- 35 I note that in *City of Sydney Council v Royal Botanic Gardens and Domain Trust* [2004] NSWLEC 285 Lloyd J held that the removal of eleven trees in the Domain was not the 'carrying out of a work' for the purposes of s110 of the EPA Act.
- 36 However, Lloyd J emphasised that each case turned on its own facts and in that case, the context was that eleven trees out of 'thousands' present on the land were to be removed. In my view, the conclusion in this case can be distinguished from the present circumstances.
- 37 In my view, the pruning required for the Trial Site involves the 'carrying out of a work' because having regard to the circumstances, there will be a 'substantial change in the physical nature of the land'.
- 38 Assuming this to be correct then the Council must examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity: s111 EPA Act
- 39 This would involve a consideration of the impacts arising from the additional pruning recommended by the Council to the extent that it applies to the Trial site.

Does the pruning of vegetation for the Trial Site conflict with any other legislation

- 40 The pruning of the vegetation at the Trial site involves consideration of other legislation.



Native Vegetation Act

- 41 The NV Act prohibits the clearing of native vegetation subject to a range of exceptions.
- 42 While the 'clearing of native vegetation' does not include pruning it extends to cutting down, felling, thinning, or removing of native vegetation.
- 43 The NV Act does not apply to clearing of native that is, or is part of, an activity carried out by a determining authority within the meaning of Part 5 of the EPA Act if the determining authority has complied with that Part.
- 44 Assuming Council complies with its requirements under Part 5, the clearing of native vegetation will be excluded from the operation of the NV Act.

Shoalhaven LEP

- 45 Clause 5.9 of the Shoalhaven LEP prohibits the lopping removal injuring or destroying of any tree to which the Shoalhaven DCP applies.
- 46 As discussed above, the Infrastructure SEPP allows development without consent in certain circumstances. The word 'consent' for the purposes of the SEPP includes any other type of consent, licence, permission, approval or authorisation that is required by or under an environmental planning instrument such as a permit required under cl 5.9.
- 47 Where there is an inconsistency between the Infrastructure SEPP and the Shoalhaven LEP, the SEPP prevails: cl8 (1) Infrastructure SEPP.
- 48 This means that the cl 5.9 (that requires consent for the removal of trees) does not apply to the extent of the inconsistency with the Infrastructure SEPP (that allows development without consent).

Local Government Act

- 49 Section 35 of the LG Act requires that community land is to be used and managed in accordance with a plan of management applying to the land.
- 50 Council manages the land in accordance with the Generic Community Land Plan of Management (**Generic Plan**) and this would include the creation of the Trial site.
- 51 It is arguable that the operation of the Trial site is consistent with the objectives set out in the Generic Plan and that the pruning involved in the Trial site is part of the process of involving the community, the importance of which is foreshadowed in the Generic Plan.
- 52 I trust that the above advice is of assistance.
- 53 Please contact me if you have any questions or wish to discuss the matter.



Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Carlo Zoppo', with a long horizontal flourish extending to the right.

Carlo Zoppo

Partner

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