

**Submission
No 112**

**INQUIRY INTO PLANNING SYSTEM AND THE IMPACTS
OF CLIMATE CHANGE ON THE ENVIRONMENT AND
COMMUNITIES**

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Date Received: 3 November 2023

Submission to the NSW Parliamentary Inquiry into the Planning System and the Impacts of Climate Change on the Environment and Communities

Our experiences attempting to save large, healthy Fig Tree from destruction due to development.



Authors

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Thank you for the opportunity to make a submission this Parliamentary Committee on the NSW planning system and the impacts of climate change on the environment and communities.

We are well aware of the conflict that exists between the necessity of increased building development for both economic and housing reasons – and the negative impact that development can and does have on the environment, ecology and amenity of us all.

In this submission we present recent experience with opposing a development proposal that assumed the removal of a large and ancient Fig tree. The potential for the application of the Rural Fire Service *10/50 Vegetation Clearing Code of Practice for New South Wales (2015)* not only negated our argument for the tree's retention but, apparently, limited the Council's ability to comply with its own guidelines in determining the tree's fate.

The submission relates to the following underlined sections of the Committee's Terms of Reference¹:

That Portfolio Committee 7 inquire into and report on how the planning system can best ensure that people and the natural and built environment are protected from climate change impacts and changing landscapes, and in particular:

(a) developments proposed or approved:

(i) in flood and fire prone areas or areas that have become more exposed to natural disasters as a result of climate change,

(ii) in areas that are vulnerable to rising sea levels, coastal erosion or drought conditions as a result of climate change, and

(iii) in areas that are threatened ecological communities or habitat for threatened species

(b) the adequacy of planning powers and planning bodies, particularly for local councils, to review, amend or revoke development approvals, and consider the costs, that are identified as placing people or the environment at risk as a consequence of:

(i) the cumulative impacts of development,

(ii) climate change and natural disasters,

(iii) biodiversity loss, and

(iii) rapidly changing social, economic and environmental circumstances

(c) short, medium and long term planning reforms that may be necessary to ensure that communities are able to mitigate and adapt to conditions caused by changing environmental and climatic conditions, as well as the community's expectation and need for homes, schools, hospitals and infrastructure

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(d) alternative regulatory options to increase residential dwelling capacity where anticipated growth areas are no longer deemed suitable, or where existing capacity has been diminished due to the effects of climate change

Submission Summary

The owner of a dwelling adjacent to our property in Redhead, NSW, wishes to extend their existing home to create a large house, taking most of the available land and, in the process removing a 'tree of note' – an old, large, robustly healthy, fecund Port Jackson Fig (*Ficus rubiginosa* also known as a Rusty Fig) which is the epicentre of a large and varied wildlife in the vicinity, provides a significant microclimate within its vicinity and is something of an icon for the Redhead community because of its size and position.

We have attempted to prevent the removal of this tree and, in doing so, have found the process to be unsatisfactory - heavily weighted in favour of development at the expense of the environment and community. The main issues are:

- Inadequate protection for a tree that in other jurisdictions, such as the ACT would automatically be deemed worthy of protection, meaning any development that impinged upon it would be automatically rejected.
- An application process that lacks transparency and is inert to obvious untruths in a DA - for example falsely claimed "minimal impact" on the development's surroundings and failing to mention removal of the tree in any significant manner.
- The council's failure to follow its own guidelines (around tree canopy and protecting endangered wildlife) and specific internal advice (that the tree should be retained).
- The council ignoring its own height restrictions to wave through a development that is indisputably higher than permitted.
- The legally correct but illogical application of the 10/50 rule² to allow a fire retardant, temperature-reducing, healthy, suburban tree to be removed. We conclude that the 10/50 ruling is open to abuse despite attempts in 2015 to limit the possibility of developers using the ruling for reasons other than fire protection.
- We believe that the development application system is defective if we, who have no expertise in dealing with such matters, have to fight to defend a tree that should be protected automatically because of its beauty, size and environmental importance.
- We believe that criteria should be legally entrenched so that a tree above defined arboreal characteristics such as age, height, canopy cover, girth, health, expected life span and environmental significance, should be automatically protected - including trees within Bushfire Prone zones. If a developer wishes to remove a tree that meets these criteria, documented and expert evidence must be presented within the DA demonstrating that removal is essential and of benefit to the community.

Our experiences are detailed below.

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The NSW *Environmental Planning and Assessment Act 1979* as amended³ states in Part 1.3 that

The objects of this Act are as follows:

1. (a) *to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
2. (b) *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
3. (c) *to promote the orderly and economic use and development of land,*
4. (d) *to promote the delivery and maintenance of affordable housing,*
5. (e) *to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
6. (f) *to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
7. (g) *to promote good design and amenity of the built environment,*
8. (h) *to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
9. (i) *to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
10. (j) *to provide increased opportunity for community participation in environmental planning and assessment.*

We, Elisabeth Ann O'Daly and Brian James Moir fully support these objectives and see in them the means by which development, a very necessary component of our economy, can be achieved with proper regard for what we now know to be the dangers of climate change and habitat degradation.

However, recent experience in our attempting to save a large, healthy and venerable 100 year old Fig Tree from destruction, with all of the concomitant loss of wildlife habitat and environmental degradation from what was recognised by the local council's internal experts as an overdevelopment of a residential block, we have been left with the distinct impression that the published endeavours by Federal, State and Local Government purportedly aimed at preserving sustainability of our part of our planet the Laws, Regulations, Guidelines, the attractive and detailed brochures, talks and presentations, are little more than 'Greenwashing' in the face of NSW's 10/50 regulation.

Further we are of the view that the NSW 10/50 regulations can still be a convenient justification for the removal of precious habitat for properties in fire zones despite amendment introduced in 2015.

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Background

Mid-May 2023 we were advised by Lake Macquarie City Council that Development Application DA/765/2023⁴ for a property situated at 37 Steel St Redhead NSW 2290, had been lodged for demolition/renovation/extension building work on the property.

We own a dwelling, Brown St Redhead NSW 2290, across a lane to the rear boundary of the proposed development so were invited to make comment if we had objections.

The DA calls for demolishing the rear of the existing building on the block, a garage and a gazebo and building a two-story residence, swimming pool and ground-floor garage joined to the earlier building. The renovation will occupy most of the site with the eaves to 450mm off the rear boundary. To make this possible a large, old (perhaps 100 years), iconic, fecund and beautiful Port Jackson Fig Tree (*Ficis rubiginosa*) situated at a rear corner of the property will be chopped down.

We submitted an objection to Council on 07/06/2023 on the following grounds

1. Proposed removal of a **tree of note** at the south-western boundary of the property.
2. The proposed height of the building exceeding Council's guidelines.

The Statement of Environmental Effects submitted by the developer within the application did not mention the tree. This is an inexcusable deficiency, intended or not, and breaches Council's guidelines. It also stated that the development creates *no significant adverse impacts on any neighbouring properties*. This is blatantly incorrect. Our property will be significantly disadvantaged by both the loss of the fig tree – its microclimate, wildlife habitat, beauty, and a reduction of the view towards the beach that we have enjoyed for over 70 years.

The Development Application LMCC DA/765/2023

DA/765/2023 is accessible on <https://www.lakemac.com.au/Development/Planning-and-development-services/Application-Enquiry>. Relevant extracts are included in the Attached Files 1 & 2.

The DA proposed the renovation of an existing 85+yo timber house on a 716m² block of land within the coastal village of Redhead, NSW, population 3785 (2021 census). Progressively the older, often miner's cottages, in the village are being demolished/renovated to create much larger homes than the originals.

The block sits at the corner of Steel St and Brown St, one of the higher points in the original village and is bounded at the rear by Grimwood Lane. The existing house fronts Steel St. Its long axis runs east/west. It has a fall of 7m from its south-west to its north-east corners.

The western section of the original home, a garage fronting Grimwood Lane and a gazebo connected to the garage and, marginally, to the rear of the dwelling are to be demolished.

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These are to be replaced with a two-story extension sympathetic to the original building. A swimming pool and deck are to be built along the northern boundary.

The only reference to removal of the Port Jackson Fig is in the Pre-Lodgement Application Form as follows

Tree works	
Is tree removal and/or pruning work proposed?	Yes
Please provide a description of the proposed tree removal and/or pruning work	Removal of trees as shown on demolition plan to south western corner of site
Number of trees to be impacted by the proposed work	3
Land area to be impacted by the proposed work	
Units	
Approximate area of canopy REQUESTED to be removed	50
Units	Square metres

Note: There is no demolition plan included in the application. I believe the canopy requested to be removed is substantially greater than 50 m².

The extension exceeds council's height restriction by 0.75m several places.

The DA documentation includes a Bushfire Report. The property is in Bush Fire Prone Land with a BAL-19 (a moderate risk) assessment to the north, east and south and BAL-12.5 (a low risk) to the west. Overall, the property has been given a BA-19 rating. This means that the risk to the property is moderate with *a risk of ember attack and burning debris ignited by windborne embers and a likelihood of exposure to an increased level of radiant heat.*

Note that the Fig is in the south-western corner of the property, a lower risk boundary.

So, though not mentioned in the DA, the potential for applying the 10/50 Vegetation Clearing Entitlement Scheme 'awaits in the wings'!



The Tree, viewed over Grimwood Lane from the deck at the rear of our property at Brown St Redhead.

The Tree

The tree has always been known to us as a Port Jackson Fig (*Ficus rubiginosa*). It is also known as a Rusty Fig.

The tree is old. We have photographic evidence that it was a large tree in 1945. We estimate its age to be 100 years +, predating the construction of the house on No. 37 and most of Redhead's current dwellings. It is possible that it is a remnant of the native forest that covered Redhead before the town was developed.

It is probably the largest tree in Redhead, with a trunk diameter exceeding 2 metres (1 metre height) and a canopy diameter of approximately 20 metres giving an estimated canopy cover in excess of 200 m². Despite occasional pruning for the protection of power lines and nearby structures, the tree has maintained an impressive stature and is in robust health. Any disfigurement due to earlier pruning could easily be addressed by appropriate lopping.

Situated close to the high point along Steel Street, the tree significantly contributes to the landscape and townscape of Redhead. Its size and prominent position make it visible as Redhead is approached from Redhead Road, and it can be observed from most areas in the northern and eastern parts of the town.

The tree is key to the small ecosystem of trees that provides a habitat for wildlife, shade and enhanced microclimate to Grimwood Lane and surrounds.

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View to the north along Grimwood Lane. Fig tree on the right. Note the many trees along the lane. These and trees in the surrounding properties form a small ecosystem with the Fig as its epicentre, adjacent to a wildlife corridor along the Redhead beach foreshore.

Council's excellent *Urban Greening Strategy 2022-2032*⁵ clearly defines the importance of trees in the urban environment to help mitigate the increases in urban heat that are expected in the coming years. The document also reinforces the many other benefits that we know trees provide to all – human, flora and fauna. The Strategy also reports that Redhead has one of the lowest canopy covers in Lake Macquarie City - 29%. With a canopy approximately 20m diameter, this tree is a significant component Redhead's urban greenery.

The Port Jackson Fig (*Ficus rubiginosa*) is rare species in the area. We believe there are no other large fig trees remaining in Redhead. Further, listings of flora in the publications *Awabakal Nature Reserve Handbook*⁶ and *LMCC Wetlands Park*⁷ record no fig trees of this species or size in either reserve. Therefore, this tree is extremely rare within the local ecosystem.

Due to its age, size, obvious fecundity, massive and complex trunk with many grooves, nooks and hollows, its smooth bark and dense foliage with attractively coloured leaves, the tree has outstanding aesthetic quality and visual appeal. The fruit, small, round and yellow, can ripen and turn red at any time of the year, peaking in spring and summer and becoming a smorgasbord for wildlife.

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It serves as a vital habitat for fauna and many species of birds and insects. Its large size, dense foliage, presence of hollows, and copious fleshy fruit provide essential feeding, roosting, and nesting opportunities for many bird species, mammals, and insects. Its role extends beyond individual species, as it acts as an epicentre for wildlife within a radius of approximately 100 metres. It abounds with wildlife at all times, acts as wind break, a shade tree and has its own microclimate that is of benefit to its neighbours.

The significance of fleshy fruited trees, such as the Port Jackson Fig, is highlighted in the NSW Government Natural Resource Management Advisory Series No 5 *Fleshy Fruited Trees* ⁸, which emphasises their importance in supporting native birds and **threatened species like the Grey-headed Flying Fox**.

The tree and the surrounding small ecosystem are close to the green corridor that is developing along the Redhead beach foreshore and which will eventually link the Awabakal Reserve, Redhead Bluff bush and the Belmont wetlands. Together this green corridor will be a significant contribution to the network of green corridors throughout the Newcastle and Lake Macquarie regions. The fig tree will be an important food source supporting wildlife in the Redhead component of this overall network.

The Fig is a 'Fire Retardant Tree' ⁹.

DA Deficiencies

The following information is drawn from *LMCC Referral Response Trees*, dated 29/05/2023 (Attached File 1) and *Referral Response Development -Flora/Fauna*, dated 28/06/2023, (Attached File 2), a report by Temporal Tree Management, an independent arborist, dated 27/10/2023 (Attached File 6) and our own observations.

1. There is no demolition plan included in the drawings of the development though referenced in DA Pre-lodgement Application Form The trees to be removed are not shown anywhere within the application. There is no indication of their size or position in any drawings. The canopy cover is understated.
2. The new building will exceed council height limits in several places.
3. The DA Statement of Environmental Effects makes no mention of the Fig Tree. Given the size of the tree, its age and importance to the local ecosystem, this omission is inexcusable. Why was it not included?
4. The DA Statement of Environmental Effects states

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Clause 3.9 – Views

The proposed development will not impact view sharing from any neighbouring properties.

And further

6.0 CONCLUSION

..... The proposed project will have minimal impact on the existing neighbourhood and streetscape,

..... The proposal incorporates good design principles considering both the neighbouring properties and the residents’ requirements consequently creating no significant adverse impacts on any neighbouring properties.

These statements are patently false. Removal of such a large and iconic fig tree will have a comprehensive negative impact on the streetscape of Redhead overall. We will lose all of the beauty that the tree provides in outlook, shade, microclimate and wildlife, benefits that the tree has provided to the community for 100 years or more and ourselves for over 70 years.

The height of the building along Grimwood Lane and its proximity to that boundary means that we will lose about 75% of the span of view we now enjoy to the east, over coastal forest with glimpses of Redhead beach.

5. There was no Arboricultural Assessment or Arboricultural Impact Assessment included in the DA

Our Objection to the DA and Request for Inclusion of the Fig Tree in LMCC’s Significant Tree Register

We submitted our objections to the DA on 7th June 2023 (Attached File 4)

Our objections were targeted at the deficiencies in the DA, the Tree Assessment by Council and what we considered to be the unacceptable impact that the tree’s removal would have on the local and broader ecosystem. We presented argument supporting this position using Council’s *DCP – 2014 – Development within Residential Zones Chapter 2.13 Preservation of Trees and Vegetation*¹⁰ as a template. Of note is the high probability that the Grey Headed Flying Fox, an endangered species, is amongst the many flying foxes that visit the tree each night in season to feast on the prolific fleshy fruits produced.

On 9th June we submitted a request to Ms Morven Cameron, the Chief Executive Officer of LMCC requesting inclusion of the tree in LMCC’s Significant Tree Register in the hope that its inclusion would go some way towards protecting the tree. We understand that Ms Cameron is responsible for deciding on inclusion of trees in the Register. We also sent a copy to LMCC’s arborist and Tree Management Specialist.

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Justification for including the tree in the Significant Tree Register was presented using Council's criteria for inclusion as a template. In our view the tree met all the criteria for inclusion.

We also objected to the building being above Council's height limit, but our greatest concern is the loss of the tree.

Council made no formal response to our objections or request for inclusion of the tree in the Significant Tree Register.

Council's Response to the DA

Counsel's responses to the DA concerning the tree are contained in two reports (Attached Files 1 & 2)

1. Referral Response Trees dated 29/5/2023, Referral officer, Ben Dugan
2. Referral Response Development – Flora/Fauna, Referral office Development Planner Flora and Fauna

In his assessment, Ben Dugan states

One tree of note is the large Ficus rubignosa (Rusty Fig) located in the south western corner, that has been identified for removal.

The proposed development footprint does not leave scope for retention of the subject tree, however any amendments would be significant given the species very large (and potentially invasive) root system, and suitability as more of a park type where unlimited root space is available.

The tree has also been heavily lopped away from high voltage power lines giving an asymmetrical appearance, and a heavy leaning aspect over the subject property.

Considering the above, whilst it is always preferable to retain trees where possible, no objections are raised to removal in this instance.

Other trees and vegetation within the property are mostly small or exotic types not warranting restrictions on development.

Of note however is the scale of development not allowing for any deep soil planting space and potential for replacement of canopy type species - which is not supported.

Trees on adjoining private property should not be impacted by proposed development.

In telephone conversations with Ben he agreed

- that the tree has been *in situ* for a very long time, perhaps a 100 years or more, apparently without the roots presenting any problem to any of the surrounding houses. I assured him that the tree roots have never been a problem for our residence.

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- whilst it might usually be more suited to a park than a residential property the fact is that it was there before any of the surrounding houses were built and nobody has sought to remove it before this DA application.
- that the significance of the lopping was entirely dependent upon where you were viewing the tree from. It has been lopped on its southern side to clear street power lines but from every other aspect it looks fine. He believed there was no potential for the tree to fall over because of prior lopping.
- that removing this tree would probably set a precedent for the removal of the remaining trees along Grimwood Lane when, as is inevitable, the existing cottages are demolished and large houses built along Steel St. We will lose all of the trees along Grimwood Lane and be left with another collapsed ecosystem.
- retaining the tree was the preferred outcome. However because of the applicability of the 10/50 ruling he could see no way that the tree could be saved. I sensed a level of frustration on the difficulties the 10/50 ruling places upon Council Tree Assessment Officers.

The Flora and Fauna report is in line with our objection to the DA. It does not support removal of the tree. It states

The proposal is for a single dwelling within a residential lot. The proposal seems be an overdevelopment of the site, leaving no room for deep soil planting, limited landscaped area and no room to allow for replacement planting despite removing vegetation across the site.

The tree proposed for removal is an important food resource for threatened fauna species such as the Grey Headed Flying Fox (as well as an array of non-threatened fauna including birds and insects. The tree requires greater consideration and should be avoided/protected.

The current design does not align with the Council's DCP. The design does not avoid native vegetation onsite nor does it discuss the potential for this. Consideration should be given to changing the design of the proposal to allow tree retention to fulfil the principals of avoid and minimise as stipulated within Council's DCP.

Furthermore, the Statement of Environmental Effects (SEE) does not discuss this tree nor do plans indicate its location. The tree should be shown on all plans with direct reference within the SEE. The proposal should endeavour to avoid the removal of this tree due to its importance to biodiversity within the locality.

.....

Additional information is required. The following information is required in order to appropriately assess impacts to flora and fauna values:

- *The development be redesigned to avoid impacts to biodiversity on site as per the Council's DCP.*

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- *All plans should be amended to show the location of the Ficus rubiginosa (Rusty Fig), with a discussion provided within the Statement of Environmental Effects.*

This report, including the request for additional information, appears to have been ignored.

The DA's approval advice was posted on 03/08/2023. There were no amendments to plans or the Statement of Environmental Effects.

We were advised in Council's notification to us of the DA's approval that the only route for us to pursue our objections were through the Land and Environment Court.

Though removal of the Fig is essential for the development to proceed there is no specific approval for its removal. There must have been some negotiation with the Developer, however, for the DA was approved with the proviso that two *Banksia integrifolia* be planted on the verge in Steel St and three in Brown St.

We regard this as a ludicrous offset for the Fig. They will take years to grow to any size and, in Brown St, will be within 10m of the house. They will require ongoing pruning away from the power lines and the road. They will never provide equivalent habitat, sustenance and protection for the wildlife nor the environmental and aesthetic benefits of the Fig - a very large net loss to ourselves and the Redhead community.

Subsequent Action

On the 11/08/2023 we wrote to Counsellor Buckley of LMCC seeking her support for protection of the tree. The same day we received a copy of an email response copy written by Michael Corrigan, Manager Development Assessment and Certification (Attached File 5).

This email states in part

The development proposal was assessed in accordance with the Environmental Planning and Assessment Act 1979 ('EPA Act'). Internal referrals included Council's Senior Projects and Assets Officer, Tree Management Specialist, Development Planner Landscape and Development Planner Flora and Fauna and advice and recommendations have been considered.

The subject tree is within an identified bushfire affected area and was identified during the assessment process as satisfying NSW RFS 10/50 Vegetation Clearing rule, see following link. 10/50 vegetation clearing - NSW Rural Fire Service. Set out By NSW Rural Fire Service as a result of the 2013 bushfires for the purposes of people and property protection, this provides owners in a bushfire affected area permission to 'Clear trees on their property within 10 metres of a home, or structure such as decks, verandas, pergolas and garages that are attached to the building without seeking approval.'

A site inspection conducted 15 May demonstrated existing structures to the rear of the dwelling were within 10m of the tree, confirming the tree met the requirements for removal.

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The reasonable conclusion from this statement is that the DA was approved because the property owner is free to remove the tree at any time.

In other words, in Mr Corrigan's opinion, the legal requirements for processing a DA were adhered to by Council, implying there are no grounds for an appeal to the Land and Environment Court. The reports from relevant Council officers were considered but, apparently, where negative for the DA, were not of sufficient weight to impede approval. There was no explanation for why this was so. It is again reasonable to assume that in Council's view the 10/50 rule obviated the need for further investigation of the importance of the tree (eg: Arboricultural Assessment or Arboricultural Impact Assessment) or for amendments to the DA's drawings and Environmental Assessment as requested in the Council's Flora and Fauna Report.

If this is the case, we regard the decision as most unsatisfactory. Surely a DA should be assessed by Council on its merits. Whether or not a property owner decides to take advantage of the 10/50 ruling to achieve a particular building outcome is another matter entirely and subject to its own legal requirements.

In regards to our request for the Fig to be included in LMCC's Significant Tree Register Mr Corrigan states

With respect to a submission from Brian Noir (Moir) dated 5 June 2023, a request for the tree to be added to the Significant Tree Register was made and assessed by Council's Tree Management Specialist. The assessment found that the tree did not meet the criteria for the following reasons:

- 1. the owner of the property did not consent to the tree being placed on the register; and*
- 2. The species was not suitable in a restricted residential courtyard setting, due to the extensive root system which would likely undermine the immediate and surrounding neighbouring properties.*

As far as we can determine ¹¹, the owner should be consulted prior to any decision being made about including a tree on the owner's property in the Significant Tree Register. There should be another opportunity for the owner to comment should Council decide to make the inclusion. We see no requirement for the owner to agree on a tree's inclusion. It would make little sense if there was such a requirement.

Point 2 totally ignores the fact that the tree had been in place long before any house was built on the property and has not been an issue since.

Legal Advice on an Appeal to the Land and Environment Court

In mid-August we sought legal advice on the advisability of appealing Council's decision to the Land and Environment Court. We were told that an appeal would probably cost in excess of \$60,000 with little chance of success.

This route, whilst appearing to provide a means of appealing a decision, is clearly out of reach for the ordinary citizen.

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Professional, Independent Arborist Advice

In August we sought independent advice from a professional arborist, William Dunlop (M.UrbHort, Grad. Dip(Arb), BSc) of Temporal Tree Management Pty Ltd. (Attached File 6). Our objective was to determine if we were being unreasonable in our assessment of Council's approval of the DA and the way in which the decision was reached. He states

No Preliminary Arboricultural Assessment (PAA) or Arboricultural Impact Assessment (AIA) was prepared as part of the DA submission for this development.

..... using the Tree Retention Values Assessment Methodology (Morton 2011). Tree 1 (the Fig) was determined to be of High Retention Value within the surrounding landscape. The High Landscape Significance determined for this tree reflects its large size, visual prominence within the area and the significance of its species as a canopy tree of one of the indigenous vegetation formations within the Redhead area (Coastal Sands Littoral Scrub-Forest – PCT 3546). The long ULE determined for this tree reflects its good health and the broad lifespan of Ficus species. The retention of Tree 1 should therefore be prioritised within the surrounding landscape. Efforts should be made in development design within the subject site to accommodate the protection and retention of this tree.

Approval for removal of the assessed tree is not issued in the Conditions of Consent (issued 08/08/2023). The subject site is positioned within a Bushfire Prone Land zone (Planning NSW 2023). This tree may be removed with exemption from the Tree Preservation and Native Vegetation Management Guidelines of the Lake Macquarie Development Control Plan (DCP Environment) (2014) if it can be shown to satisfy the requirements of the Rural Fire Service 10/50 Vegetation Clearing Code of Practice for New South Wales (2015).

In subsequent communication he said

- The Fig is not a standout candidate for any significant tree register. It isn't an especially large specimen, and it has been severely pruned to facilitate the powerlines.
- The council can approve any tree for removal to facilitate a development. That being said, the retention of High retention value trees, which this is, should be prioritised. Typically, efforts to mitigate the impact would need to be shown.
- A Preliminary Arboriculture Assessment or Arboriculture Impact Assessment is typically done as part of a DA submission. It surprises me that Lake Mac council didn't require one. All LGAs in Sydney would require one in this case, as would Central Coast, Newcastle and Mid North Coast.
- He was surprised to not find any mention of the tree in the DA's Statement of Environmental Effects and more surprised that the requests for more information in Council's Flora and Fauna Report were not addressed in the conditions of consent.

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- To the question of the probable application of the 10/50 ruling voiding the necessity for Council requiring a response to the Flora and Fauna Report and the need for a PAA or AIA he was of the view that the 10/50 shouldn't exclude a tree from preliminary assessment as part of an Arboricultural Impact Assessment. It may reduce a tree's retention value if the consulting arborist determines that it's a factor of influence. But typically, the council's protection and actions associated should not be influenced by this exemption.

The 10/50 Regulations

The Review of the 10/50 Vegetation Clearing Entitlement Scheme published in August 2015¹² states in its Executive Summary

On 1 October 2014, the NSW Rural Fire Service announced the planned review of the scheme would be fast-tracked, due to concerns that some landholders were abusing the scheme, by clearing vegetation for purposes other than bush fire protection.

It appears to us that should the Fig be removed the purpose for doing so would not be related to bush fire protection. Rather, removal would be due to the desired overdevelopment of the site (as described in Council's Flora and Fauna Report).

It appears to us, that in this case, the objective of the October 2014 revision has not been achieved.

True there are strict legal conditions to be met before the tree can be removed under this ruling

- It must be within 10 m of an inhabited dwelling which includes garages, gazebos and the like which are connected to the dwelling. In this case the tree is within 10m of a garage, which is connected to a gazebo which is connected to the house as shown below



Photograph of the connection between the gazebo and the residential dwelling at 37 Steel St Redhead.

Further, the slope of the land from which the tree is to be removed must be less than 18° . Whilst the fall on this property from the south-west to the north-east boundary is less than 18° it is not clear what the slope is in the immediate vicinity of the tree where there is a much steeper decline than elsewhere.

Other requirements are that the buildings must be 'Approved' by Council and there must be a Certificate of Occupancy. Flora and Fauna must be protected when the tree is being removed.

The responsibility of complying with these requirement rests with the property owner and there are heavy fines for non-compliance. What is not clear to us is who monitors compliance.

Conclusion

We have no option but to assume that the processing and approval of DA/765/2023 has complied with Council's legal obligations.

We must also accept that the tree is not a suitable candidate for inclusion in LMCC's Significant Tree Register. However, it is recognised as a 'Tree of Note' which would be automatically protected in many jurisdictions.

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We believe that Council officers would have preferred to save the tree but, since this was not an option because of the 10/50 regulation, they have negotiated the alternate plantings. Possibly the requirement for further information or design work were waived as part of the negotiation. The planting of five *Banksia integrifolia* on the verge is not a satisfactory alternative for the Fig – larger canopy trees as suggested in the independent arborist report that are nearer to the Fig's habitat potential would be preferable – but we doubt that the property owner would have agreed to this.

As long as the 10/50 ruling is able to be abused, as we believe in this case it has, trees such as this Fig with all its beauty, its criticality for the environment as we experience longer periods of higher temperatures, will continue to be lost. Each loss setting a precedent for the next.

We believe that the DA approval system is flawed in that trees such as this Fig are not automatically protected against destruction due to development. We believe that criteria should be legally entrenched so that a tree above defined arboreal characteristics such as age, height, canopy cover, girth, health, expected life span and environmental significance, should be automatically protected - including trees within Bushfire Prone zones. If a developer wishes to remove a tree that meets these criteria, documented and expert evidence must be presented within the DA demonstrating that removal is essential.

Elisabeth Anne O'Daly

Brian James Moir

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