REPORT TO THE
MINISTER FOR ENVIRONMENT

APPEAL IN OBJECTION TO THE GRANT OF CLEARING PERMIT CPS 5242/1

CLEARING OF 20 TREES ON LOT 5 ON DEPOSITED PLAN 20591,
177 SHEOAK DRIVE, HAY, SHIRE OF DENMARK

APPLICANT: RP & KM DOMINIAK AND MS ROWE

Appeal number C013 of 2013

July 2013
**Appeal summary**

This report addresses an appeal lodged by Mr Robert Heady (appellant) in objection to the grant of clearing permit CPS 5484/1 (clearing permit). The clearing permit was granted by the former Department of Environment and Conservation (DEC) to RP and KM Dominiak and MS Rowe (applicant) authorising the clearing of 20 trees on Lot 5 on Deposited Plan 20591, 177 Sheoak Drive, Hay in the Shire of Denmark.

The appellant objected to the grant of the clearing permit on the basis that the trees provide habitat for black cockatoos, magpies, parrots and other fauna and are included in the Shire of Denmark’s “Tree Preservation Area”. The appellant also raised concern that alleged unauthorised grazing had taken place on the property which damaged two sheoak trees which were then allegedly removed by the applicant without authorisation.

In its clearing assessment, the DEC found that the proposed clearing was not likely to be at variance with the clearing principles described in Schedule 5 of the Environmental Protection Act 1986.

Having regard to the issues raised in this appeal, the advice provided by the DEC, and information obtained in discussions with the applicant and the appellant, the Appeals Convenor considered that the DEC was justified in granting the clearing permit.

However, noting that the clearing permit currently authorises the clearing of up to 20 trees scattered throughout a 2.5 hectare area of native vegetation, it is recommended that the clearing permit is amended to provide greater certainty to specify the trees to be cleared.

**Recommendation**

The Appeals Convenor recommends that the Minister allow the appeal to the extent that the clearing permit is amended to include a condition that specifies that the trees to be cleared are the trees identified in the report by Roderick’s Tree Lopping and Landscaping Services (Muggeridge, 2012) as being dead, diseased or dangerous.

The Appeals Convenor further recommended that the final wording of the condition is a matter for the Department under section 110 of the EP Act.
INTRODUCTION

This report relates to an appeal by Mr R Heady (appellant) in objection to the decision of the former Department of Environment and Conservation (DEC) to grant clearing permit CPS 5484/1 (clearing permit) to RP and KM Dominiak and MS Rowe (applicant) authorising the clearing of 20 trees on Lot 5 on Deposited Plan 20591, 177 Sheoak Drive, Hay, in the Shire of Denmark.

This document is the Appeals Convenor’s formal report to the Minister for Environment under section 109(3) of the Environmental Protection Act 1986 (EP Act).

BACKGROUND

In February 2013 the applicant submitted an application to the DEC to clear 20 trees within a 2.5 hectare (ha) area of bushland for the purpose of hazard reduction or fire control. The application included a report from Roderick’s Tree Lopping and Landscaping Services (Muggeridge 2012) stating that the subject trees were dead or of ill health and likely to fall over or drop their limbs.

Lot 5 is zoned ‘special rural’ in the Shire of Denmark Town Planning Scheme No. 3 (TPS3). The location and extent of the application area are depicted in Figures 1 and 2.

The application was advertised in The West Australian on 25 February 2013 and on the DEC’s website with a seven day public submission period. The DEC received one submission expressing concern that the trees under application have been damaged as a result of cattle grazing, and that further damage to other trees may occur as a result of this practice.

Figure 1: Location map

(Source: whereis.com)
Figure 2: Area to which the clearing permit applies
(Source: CPS Plan 5484/1)
The DEC’s assessment found that the proposed clearing is not likely to be at variance with the clearing principles described in Schedule 5 to the EP Act.

The DEC granted the clearing permit on 18 April 2013. The decision was advertised in *The West Australian* on 22 April 2013 and on the DEC’s website.

By section 101A(4) of the EP Act, any person who disagrees with the grant of a clearing permit may lodge an appeal in writing, setting out the grounds of that appeal. It is under this section that this appeal was lodged.

**APPEAL PROCESS**

Pursuant to section 106 of the EP Act, a report was obtained from the DEC on the matters raised in the appeal. As part of the investigation of the appeal, the Office of the Appeals Convenor invited the applicant to respond to the issues raised in the appeal, undertook a site visit, and met with the applicant and appellant.

The environmental appeals process is a merits based process. The investigation of appeals in objection to the grant of a clearing permit normally considers the environmental merits of the assessment by the decision maker based on principles as set in Schedule 5 to the EP Act as well as other factors. Questions of additional information not considered by the decision maker, technical errors and attainment of relevant policy objectives are normally central to appeals.

**OUTCOMES SOUGHT BY APPELLANT**

The appellant requested that the clearing permit be revoked.

**GROUNDS OF APPEAL**

The two grounds of appeal can be summarised as:

1. The environmental values of the trees, and their inclusion in a ‘Tree Preservation Area’ by the Shire, means that they should not be removed; and

2. The applicant allegedly allowed grazing to take place on the property, and allegedly cleared without authorisation.

**GROUND 1: ENVIRONMENTAL VALUES ASSOCIATED WITH THE TREES**

The appellant submitted that the trees the subject of the clearing permit are within an area designated by the Shire as a ‘Tree Preservation Area’ (TPA) and hold aesthetic and ecological value. In this regard the appellant noted that these trees provide habitat for black cockatoos, magpies, parrots and other fauna. The appellant also alleged that the report by Roderick’s Tree Lopping and Landscaping Services (Muggeridge 2012) is biased towards the interests of the applicant.

The appellant submitted that the trees could be pruned where necessary to avoid damaging property and livestock, and supported with rails and netting to prevent further damage.

**Department advice**

The DEC advised that it assessed the clearing application against the ten clearing principles contained in Schedule 5 to the EP Act using information that was provided with the application, and obtained through consultation. The DEC noted that it sent an email on 25 February 2013 to the Shire advising that it may have a direct interest in the proposed clearing and invited the Shire to make a submission.
The DEC advised that the native vegetation subject to the clearing permit consists of 20 individual trees in poor health with no understorey, and is not considered to be significant as a remnant or to hold high environmental value. The DEC also advised that it accepts that these trees present a potential hazard to buildings and human life, and was of the view that their removal will result in minimal environmental impact.

The DEC also noted the Shire advice that the subject property is within a TPA. In this regard, the DEC noted that an information sheet that accompanied the email included the provisions of the TPA which allows for the removal of trees that are dead, diseased or dangerous. The DEC recommended that this ground of appeal be dismissed.

**Applicant response**

The applicant advised that the property is part of a subdivision of farmland, and that there is a large amount of damage caused by the use of synthetic fertilisers and animal grazing as well as dieback. The applicant advised that they applied to clear the trees they considered to be the most likely to have a serious impact on buildings, stock and human lives.

The applicant agreed with the appellant that the 20 trees the subject of the clearing permit are indigenous and habitat to cockatoos, parrots, magpies, and crows, and advised that the property has been registered with Land for Wildlife for the last six years as well as operating as an organic farm during that time. The applicant also advised that they have established corridors from the front to the back of the property to allow the birds to migrate safely, and that during the past six years hundreds of local indigenous trees and native understorey have been planted.

The applicant also submitted that in respect to the appellant’s recommendation that the trees could be pruned and the bottoms netted, pruning large branches will weaken the trees.

The applicant advised that they engaged a tree lopper as well as a bulldozer to commence the work once the clearing permit was received. Further, the applicant advised that the bulldozer was parked on the property as the operator was undertaking other work in the area.

The applicant advised that the reason for the clearing application was that over time, several dangerous incidents have occurred where fallen branches and trees have caused significant damage to fences, buildings and driveways. The applicant advised that the most recent incident was a jarrah tree that partly fell during a storm, which clipped an outbuilding and damaged a fence. The applicant further advised that this latest incident prompted it to engage a certified arborist to identify any dead, leaning and dangerous trees.

The applicant submitted that they followed the necessary procedures since the first complaint from the appellant regarding the two trees removed (as noted under Ground 2), and advised that they have received several visits by the Shire and the DEC in regard to complaints about trees and buildings.

**Consideration**

Roderick’s Tree Lopping and Landscaping Services (Muggeridge, 2012) inspection examined all areas adjacent to the main house, all out buildings, two driveways and the areas that livestock are run in. The report found that these areas contain different varieties of trees that are in various states of decay, termite damage, rot, dead, splitting and exposed roots due to trees leaning over at various degrees. The report identified 17 trees that require attention as they are in a position to potentially damage property or livestock if left unattended.
The DEC advised that the trees identified in Muggeridge 2012 are in poor health and are not considered significant as a remnant or to have high environmental values, and it is considered that this advice is supported by the fact that the proposed clearing was not considered to be at variance to any of the ten clearing principles under Schedule 5 of the EP Act. The DEC also noted the Shire’s advice that trees within a TPA may be removed if they are dead, diseased or dangerous.

By clause 5.25 of the Shire of Denmark’s TPS3, the Shire may establish a TPA for the purpose of tree preservation or protection of amenity. The TPS3 also states that no indigenous trees or substantial vegetation shall be felled or removed within a TPA except where, among other things, trees are dead, diseased or dangerous. Given the above, it is considered that the decision of the DEC to grant the clearing permit was consistent with the terms of TPS3.

Notwithstanding the above, it is noted that during the site visit, a number of forest red-tailed black cockatoos were foraging within the application area. The permit holder has also confirmed the application area is habitat for a number of bird species, but that only small portion of trees were proposed to be removed.

Given this, and noting that the clearing permit currently authorises the clearing of up to 20 trees scattered throughout a 2.5ha area of native vegetation, it is considered that greater certainty could be achieved if the permit is amended to specify that the trees to be removed are those specifically identified in Muggeridge 2012 as being dead, diseased or dangerous.

**GROUND 2: UNAUTHORISED CLEARING**

By this ground of appeal, the appellant alleged that the applicant allowed livestock to graze around the trees causing damage to their bark and their subsequent demise, and that the applicant subsequently removed the trees without a clearing permit and caused root damage to other trees.

**Department advice**

The DEC advised that it conducted an inspection of Lot 5 and issued a letter of education on 6 July 2012 to the applicant following a complaint regarding the removal of two sheoak trees on the property. The DEC advised the applicant during the investigation that a clearing permit would be required if further clearing of native vegetation was intended. The DEC advised that it inspected the application area on 26 March 2013 and confirmed that the trees proposed for clearing were in declining health and represented a hazard.

With respect to the alleged unauthorised clearing by grazing, the DEC advised that it is investigating this complaint under a separate investigation. The DEC recommended that this ground of appeal be dismissed.

**Applicant response**

The applicant advised that the two sheoak trees were located near the property’s main electrical meter box near the boundary, and that one of the trees had died and the other had a large section damaged during a storm and was in advanced stages of dying.

Further, the applicant advised that the two trees were in the direct line of an underground cable that was being installed to supply a Shire-approved outbuilding, and that the contractors engaged to install the cable had recommended that the trees be removed as a safety precaution to prevent them falling onto the boundary fence or livestock, and digging up the electrical cable if they fell.

The applicant also submitted that the appellant had written to both the Shire and the DEC regarding this matter. In this regard, the applicant advised that an officer from the DEC inspected the trees and took a statement.
The applicant advised that a DEC officer informed her that a clearing permit would be required to fell any trees on the property regardless of whether they are dead, and submitted that it had previously been unaware of this requirement. In addition, the applicant advised that the DEC officer subsequently advised in a letter that after careful consideration the DEC had chosen not to enforce action in this instance, and had issued a letter of education and a copy of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*.

In addition, the applicant advised that officers from the Shire have inspected the outbuilding and the trees. The applicant submitted that, after the trees had been inspected by both the DEC and the Shire and had been lying on the ground for four months, it had cut up the trees up for firewood.

**Consideration**

It is considered that the subject matter of this appeal ground is being considered by the DEC in separate proceedings, and that this is the appropriate forum for the concerns raised under this ground of appeal. It is therefore recommended that this ground of appeal be dismissed.

**CONCLUSION AND RECOMMENDATION**

Having regard to the issues raised in this appeal, the advice provided by the DEC, and information obtained in discussions with the applicant and the appellant, it is considered that the DEC was justified in granting the clearing permit in this case.

It is recommended however, that the Minister allows the appeal to the extent that the clearing permit is amended to include a condition that specifies that the trees to be cleared are those identified in the report by Roderick’s Tree Lopping and Landscaping Services (Muggeridge, 2012), as those trees being dead, diseased or dangerous.

It is further recommended that the final wording of the condition is a matter for the Department of Environment Regulation under section 110 of the EP Act.

Kelly Faulkner
APPEALS CONVENOR

Prepared by:
Golnar Nabizadeh, Appeals Assessor
Jean-Pierre Clement, Deputy Appeals Convenor

**REFERENCES**


Denmark Chamber of Commerce website: http://denmarkchamber.com.au

Muggeridge, P (2012) Roderick’s Tree Lopping and Landscaping Services, report provided for Maureen Rowe at 177 Sheoak Drive, Hay, 30 December 2012

Shire of Denmark *Town Planning Scheme No. 3*