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EXTRACT OF THE BURWOOD DEVELOPMENT CONTROL PLAN SECTION 6.1 PRESERVATION OF TREES OR VEGETATION

PO Box 240, BURWOOD NSW 1805
2 Conder Street, BURWOOD NSW 2134
Phone: 9911-9911 Fax: 9911-9900
Email: council@burwood.nsw.gov.au
Website: www.burwood.nsw.gov.au

Burwood Development Control Plan
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This document is an extract of Section 6.1 of the Burwood Development Control Plan. It is provided here for reference purposes, but should not be relied upon in isolation. Council recommends that the Burwood Development Control Plan be considered in its entirety.

6.1 Preservation of Trees or Vegetation

Introduction

State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 (the SEPP) has the aim of preserving the amenity of non-rural areas of the State, including its biodiversity values, through the preservation of trees and other vegetation.

Authority for tree preservation is derived ultimately from Section 3.14 (1) (e) of the Environmental Planning and Assessment Act (the Act) 1979 which enables an Environmental Planning Instrument to make provision for or with respect to, among other things, the protection or preservation of trees or vegetation.

Purpose

Section 7 of the SEPP provides that a person must not clear vegetation (cut down, fell, uproot, kill, poison, ringbark, burn or otherwise destroy, lop or otherwise remove a substantial portion of any tree or other vegetation), other than vegetation described in Section 6.1.1 below, without the authority conferred by:

- a) A development consent, or
- b) A permit granted by Council.

As enabled by Clause 9 of the SEPP, the purpose of this section of the DCP is to prescribe the species or kinds of trees or other vegetation that are subject to the powers of Clause 7, and to clarify the circumstances where the powers do not apply subject to Clause 8 of the SEPP and Section 6.1.1 below.

This section also:

- Explains and facilitates the procedures for applying to a permit,
- Indicates the information that must accompany an application for a permit, or an application for a Development Application relating to a tree or vegetation, and
- Informs people of the consequences of breaching the tree preservation provisions of this DCP.

Objectives

The objectives of this section of the DCP for tree and vegetation preservation in Burwood LGA are to:

- Secure and maintain the amenity of the urban forest.
- Preserve and protect existing trees from injury or destruction.
- Promote trees for 'carbon sequestration', solar access and shade.
- Provide no net loss, over time, of tree cover in the Burwood LGA.
- Promote and encourage the planting of replacement trees that are appropriate for the available site conditions.
- Require landscaping and new tree planting (where appropriate) as part of new developments and garden renovations.

Scope

This DCP section applies to all species and kinds of trees in the Burwood LGA on privately owned land, publicly owned land or within any road reserve.

In addition, this section provides that:

- A person must not wilfully or deliberately fail to plant, protect or care for a tree, which is required to be planted, protected or cared for as a condition of a permit or development consent, or fail to carry out any other activities required as a condition of a permit or a consent.
- Despite any other clause in this DCP section, no tree in a park, reserve or street regardless of its species or size, may be pruned, removed or damaged in any way without Council's written consent.

6.1.1 Exemptions

Exempt Species of Trees

The following species of trees located on private property are exempt species prescribed in this DCP:

- Bamboo (all species).
- Privet (*Ligustrum* species).
- Rubber (*Ficus elastica*).
- Loquat (*Eriobotrya japonica*).
- Rhus (*Toxicodendron succedaneum*).
- Umbrella (*Schefflera* species).
- Willow (*Salix* species).
- Populus (all species).
- Robinia (all species).
- Cocos Palm (*Syagrus romanzoffianum*).
- Mulberry (*Morus* species).
- Banana (*Musa* species).
- Citrus (all species).
- Fruit trees or a tree that is grown for the purposes of fruit, or is harbouring fruit fly, except Australian native trees i.e. *Syzygium* species, *Elaeocarpus* species, etc.
- Any tree that has been declared a priority weed under the Biosecurity Act 2015.

These species of trees may be pruned or removed without the need for a permit or development consent from Council, except where the site is identified as containing a heritage item or the site is within a Heritage Conservation Area. For such sites please refer to Section 6.1.4 below.

All other species of trees in the Burwood LGA on privately owned land, publicly owned land or within any road reserve are subject to Part 2 and 3 of the SEPP.

Allowable Tree Activities (no application required)

Where a tree of any species does not exceed the following dimensions (as illustrated in Figure 50), the tree may be pruned or removed without the need for a permit or development consent from Council. The dimensions are:

- A height less than four metres and

- A crown spread less than two metres and
- A trunk diameter less than 150mm, measured at a distance of 1.4 metres above ground
- In the case of multi-trunked trees, the diameters of each trunk, measured at a distance of 1.4 metres above ground, are added together to be less than 150mm in total.

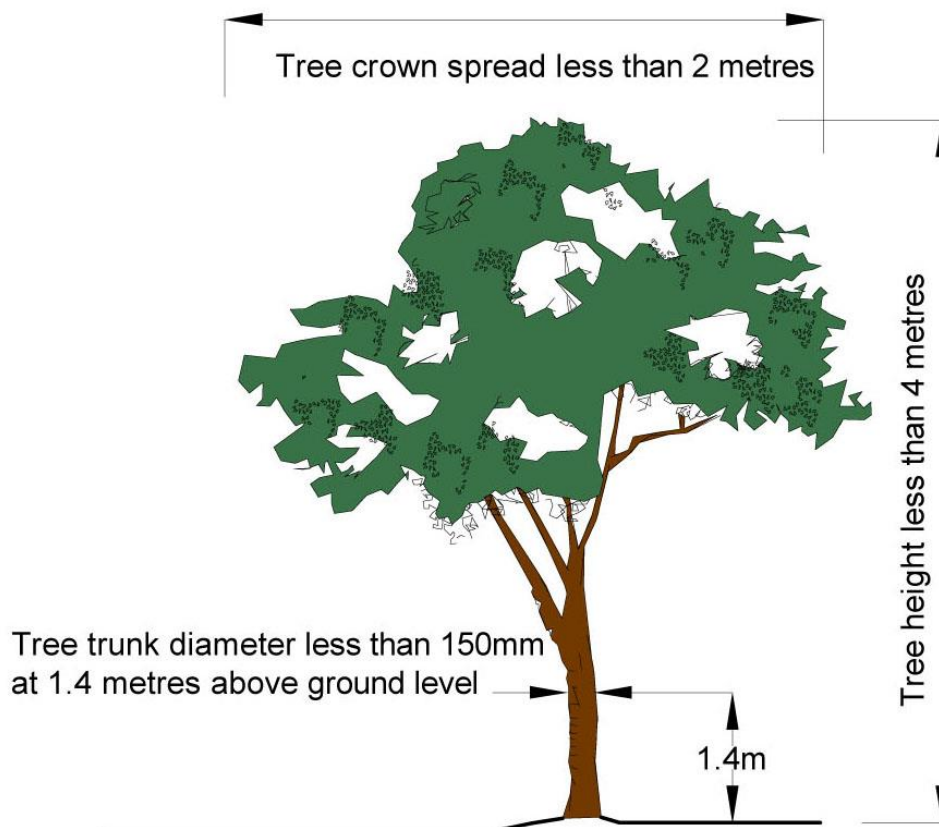


Figure 50: Tree Dimensions for Allowable Tree Activities

In addition, Council does not require an application nor is any written permit or consent required to be issued by Council for the following works or activities in relation to trees or other vegetation, on the condition that pruning is carried out by an arborist with a minimum Australian Qualifications Framework (AQF) Level 3 in Arboriculture:

- Pruning of dead branches and/or torn storm-damaged branches
- Routine pruning of shrubs and trees to a predetermined height, width or shape, that are of the same age, height and species, and grown as a hedge
- Removal of any species of mistletoe or parasitic plant from a tree
- Minor pruning of crowns (i.e. by not more than 10% of the crown or branches with a diameter of not more than 100mm) to reduce interference with roofs, gutters and walls of buildings only
- Up to 5% pruning of root systems to reduce interference with footings of buildings.

Tree Activities by Public Authorities

An application or a written permit or consent is not required to be issued by Council for tree works or activities by Council, the NSW State Emergency Service or other public authority in response to an emergency. Legislation also provides certain exemptions for public authorities under the Biodiversity Conservation Act 2016, the Forestry Act 1916, the Electricity Supply Act 1995, the Roads Act 1993, the Surveying and Spatial Information Act 2002, and the Biosecurity Act 2015.

The permissibility of tree works or activities may be a matter that is determined by or under any of these Acts.

6.1.2 Tree Permit Application Required

An application is required where proposed tree activities involve trees that are not exempt species listed in 6.1.1 or are not allowable pursuant to the tree dimensions described in 6.1.1.2 and in Figure 40 above.

Council will consider the tree activity application in one of two ways:

- Activities requiring Council's approval – Tree Permit application required.
- Activities requiring Council's approval – Development Application required (see Section 6.1.3 and Section 6.1.4).

An application for a Tree Permit must be made where the tree works or tree activities are not ancillary to or associated with any new construction or development on the land. In these cases the tree works or activities are a "stand alone" matter and do not involve any other development activity on the site.

Making a Tree Permit Application – Property Owner

Applications must be made by the owner or owners of the property where the tree stands, or alternatively bear the owner's consent on the application.

Applications must be submitted to Council using the Tree Permit application form which is available from Council's Customer Service Counter or is available on Council's website.

The application is to be accompanied by the nominated fee as determined by Council and set out in the Schedule of Fees and Charges and included in the Tree Permit application form.

The application is to describe in sufficient detail the following information:

- The name/s and contact details of the tree owner or applicant, to permit access to the trees for inspection purposes
- The location of the tree
- The species (if known)
- The condition of the tree
- The size of the tree
- The reason for the proposed works to be carried out to the tree.

Council may require the applicant to obtain a report from a qualified Consulting Arborist, Practising Structural Engineer, Licensed Plumber or other consultant or expert to assist Council in assessing and determining the permit application.

Applications may be brought to the Burwood Council Customer Service Centre, or sent via post (including a cheque or money order for the required fee).

Permit Application – Neighbouring Property

The owner of a property affected by overhang from a tree or trees on an adjoining property may apply for a permit to prune that part of the tree or trees overhanging the boundary of his or her property.

Advisory Note:

For the purpose of this section, the owner of a property where the tree stands is referred to as the "Tree Owner".

An application for the removal or pruning of branches from a tree on an adjoining property must include written evidence, including the Tree Owner's signature, of the Tree Owner's consent to the proposed pruning or removal of branches as part of the application.

If it is not possible to provide the Tree Owner's consent, Council will consider an application for pruning (only) where it is satisfied that the applicant has written to the Tree Owner requesting the Tree Owner's written consent to the application (Notification) and the following conditions have been met:

- The applicant has not received a reply from the Tree Owner to the Notification within a reasonable time of providing the Notification to the Tree Owner or
- The applicant satisfies Council that the Tree Owner has refused to provide his or her written consent to the proposed pruning of branches.

In the majority of circumstances a reasonable time will be not less than 28 days, however Council also retains discretion to consider what is a "reasonable time" on a case by case basis.

Any consent granted by Council under this section does not authorise the applicant (or someone engaged by the applicant) to enter any neighbouring property in order to carry out the approved works.

Council cannot order a neighbouring resident to remove a tree located on their property. Provisions for seeking a court order for a neighbour's tree to be removed are set out below. However, in certain circumstances Council may consider applications made by a neighbour on an adjoining property, to where the tree stands, for the pruning of branches back to the boundary.

For such applications to be considered, Council requires that the applicant obtain the written consent of the owner of the property where the tree stands (Tree Owner) to the pruning of the tree (a space for the Tree Owner's signature has been provided on the Tree Permit Application Form).

Alternatively, pursuant to section 7 of *Trees (Disputes Between Neighbours) Act 2006* (the Trees Act) a person may apply to have their matter heard by the Land and Environment Court where they seek to remove or prune a neighbour's tree and cannot resolve the issue.

The Trees Act does not apply to trees on land owned or managed by a Council.

The purpose of the Trees Act is to enable the Court to make orders to remedy, restrain or prevent damage to property or to prevent injury to any person when a tree that is situated on adjoining land might cause that damage or injury. The Trees Act also permits the Court to order compensation for or rectification of damage caused by a tree.

An application must be made to the Land & Environment Court in writing and the required application fees paid. An application form must be completed as well as one or more of the Tree Dispute Claim Details forms.

The relevant forms can be downloaded from www.lawlink.nsw.gov.au/lec

- Application Form – Tree Dispute Application Form
- Tree Dispute Claim Details – Damage to Property or Injury to Person
- Tree Dispute Claim Details – High Hedges

Application forms can be lodged at Burwood Local Court or the Land and Environment Court at Level 4, 225 Macquarie Street (Windeyer Chambers), Sydney.

There are a number of matters the Court will consider under Section 12 of The Tree Act, before making a decision on an application. Please refer to Section 12 of the Tree Act for further details of such matters.

The Land and Environment Court has published Dispute Principles, Interpretation Guidance and Jurisdictional Findings made under the Trees Act. These include:

- **The tree was there first** – (Dispute Principle)
- **Urban trees and ordinary maintenance issues** - The dropping of leaves, flowers, fruit, seeds or small elements of deadwood by urban trees ordinarily will not provide the basis for ordering removal of or intervention with a tree – (Dispute Principle)
- **“in the near future”** – constitutes within 12 months [s10(2)(a) – Interpretation Guidance]
- **Damage caused by animals, birds or insects** is not caused by the tree which attracts them or provides habitat for them – [s 10(2) – Jurisdictional finding]

6.1.3 Development Application Required

Any proposed tree works which are ancillary to or associated with any new construction or development on the land will be considered through the Development Application process under Part 4 of the Environmental Planning and Assessment Act 1979.

In these cases, the proposed tree works must be specified in a landscape plan and submitted to Council with the Development Application for the construction/development works on the site. The landscape plan must be prepared in accordance with Council's Landscaping Code and must include the details specified in section 6.5 of the Code. The Landscaping Code is available on Council's website at the following location:

http://www.burwood.nsw.gov.au/verve/resources/Landscaping_Code.pdf

Council will assess the proposed tree works as part of the Development Application process and where so determined, issue consent including any conditions, as part of the development consent. Where justified by the circumstances, Council may decline consent for the proposed tree works.

Tree works or activities in accordance with a valid and current development consent issued by Council where the tree works are ancillary to proposed building works or other development do not require any other kind of approval or permit from Council.

6.1.4 Trees and Heritage

Clause 10(3) of the SEPP, prevents Council from issuing a permit that allows any pruning or removal of any tree or other vegetation that:

- a) Is or forms part of a heritage item or that is within a heritage conservation area (see Schedule 5 of the BLEP 2012), or
- b) Is or forms part of an Aboriginal object or that is within an Aboriginal place of heritage significance.

Clause 10(3) provides exceptions that allow Council to issue a permit where it is satisfied that the proposed activity:

- c) Is of a minor nature or is for the maintenance of the heritage item, Aboriginal object, Aboriginal place of heritage significance or heritage conservation area, and
- d) Would not affect the heritage significance of the heritage item, Aboriginal object, Aboriginal place of heritage significance or heritage conservation area.

The BLEP 2012 Schedule 5 does not include any heritage items or heritage conservation areas that comprise a tree or other vegetation alone, or any matters of Aboriginal heritage.

Most tree works or activities involving a Schedule 5 heritage item or within a heritage conservation area are expected to form part of a Development Application for other development or construction activities. In these cases the tree works will be dealt with as part of the broader Development Application. The provisions of Clause 5.10 Heritage Conservation of the BLEP 2012 may be applicable in the determination of the Development Application.

In cases where a proposed tree removal is located on a property identified as containing a Schedule 5 heritage item or is within a Heritage Conservation Area and not associated with any other development or construction activity, a Development Application is required. Where the proposed tree works or activities are minor, Council will determine the application for a Tree Permit in accordance with Section 6.1.2 and Section 6.1.5 of this DCP.

If after consideration of the Tree Permit application Council determines that the proposed tree works or activities are not minor etc, that is falling outside the terms of (c) and (d) above, Council will advise the applicant that a Development Application must be lodged in place of the Tree Permit application.

In these cases the normal Development Application processes will apply. As well as meeting the information requirements for Development Applications, a landscape plan must be prepared and submitted in accordance with Council's Landscaping Code and must include the details specified in section 6.5 of the Code.

6.1.5 Assessment Process for a Tree Permit Application

Criteria for a Tree Permit Application

Applications for a Tree Permit will be considered by Council in accordance with the following criteria:

- Whether the tree is causing or is likely to cause structural damage to a building in the near future or damage to Council infrastructure. Council may require that such an application be accompanied by a report from a practicing structural engineer.
- A Doctor's certificate (from a registered medical specialist practitioner) is produced to the effect that the tree in question is injurious to the health of the resident or residents.
- The trunk of the tree is located within three metres of a building or five metres in the case of the following species:
 - i) Camphor Laurel (*Cinnamomum camphora*).
 - ii) Liquidambar (*Liquidambar styraciflua*).
 - iii) Broad-leaf Paper Bark (*Melaleuca quinquenervia*).
 - iv) River She-Oak (*Casuarina cunninghamiana*).
 - v) Chinese Tallow Tree (*Triadica sebifera* syn. *Sapium sebiferum*).
- Whether the tree is a Camphor Laurel (*Cinnamomum camphora*) under 15m in height.
- The tree has caused extensive damage to fences, kerb and guttering, sewer or stormwater drains, where there are no permanent repair alternatives. Council may require that applications relating to sewer or stormwater pipe damage be accompanied by a licensed plumber's report.
- Pruning is necessary as the tree crown:
 - i) overhangs and is likely to damage a roof of a building or a swimming pool.
 - ii) interferes with overhead electricity service wires.

- iii) impedes safe access for pedestrians.

It should be noted that applications based on loss of view or loss of sunlight will not generally form a basis for Council to issue a permit for the pruning or removal of a tree. Additionally, the dropping of leaves, flowers, fruit, seeds or small elements of deadwood by urban trees ordinarily will not provide the basis for Council to issue a permit to prune or remove a tree.

Clause 8 of the SEPP allows consideration of whether:

- Trees are dying or dead and are not required as the habitat of native fauna, or
- Trees are a risk to human life or property.

Advisory Note:

Council must be satisfied that these circumstances apply. It will be necessary to make an application under Sections 8, 9 or 10 for this determination to be made by Council. These circumstances cannot be assumed and are not an excuse for taking action outside the application process.

Council Determination of Tree Permit Applications

On receipt of the application for a Tree Permit, or as part of a Development Application, a Council Officer will inspect the tree to assess the application.

If the Council officer requires further information to assess the application, for example, in the form of a report from a consulting arborist (refer 6.1.9 for requirements of arborist reports), structural engineer, and/or licensed plumber, then the applicant will be advised and will be required to commission the required report or reports at the applicant's expense.

For Tree Permit applications that Council considers involve significant tree works or activities, or for any other application for which Council considers community consultation is appropriate, Council may conduct community consultation in accordance with Council's "Community Consultation Protocol". Development applications that involve tree works will be subject only to the notification requirements of Part 7.2 of this DCP.

All applications will be determined by either approving the application without conditions approving the application subject to conditions or refusing the application.

Conditions of Approval

It is a condition of all approvals granted by Council for a Tree Permit or for tree works as part of development consent that all tree works are carried out in compliance with the Australian Standard – Pruning of Amenity Trees (AS4373–2007) and the WorkCover Code of Practice for the Amenity Tree Industry (1998).

A Tree Permit or development consent granted by Council must be made available for inspection on request by any Council staff member during the carrying out of any work permitted under such permit or consent.

A Tree Permit granted by Council remains valid for one year from the date of issue. Where replanting is a condition of consent, replacement plants are to be protected and cared for until maturity so they remain in good condition and attain their natural size and form.

A development consent that includes an approval for tree works is valid for up to five years.

Where a Tree Permit is granted, Council will impose conditions, including that the work is carried out by an arborist with a minimum Australian Qualifications Framework (AQF) Level 3 in Arboriculture.

6.1.6 Right of Appeal

Internal Appeal Process

If an application for a Tree Permit is refused, the applicant may seek a review by an internal panel. The panel will consist of two members of the Burwood Council Executive and an independent expert. The internal panel will only consider applications where the refusal has been based on the assessment of subjective criteria or there has been a request to consider extenuating factors that are not accommodated within the set criteria.

External Appeal Process

Clause 12 of the SEPP provides that an applicant may appeal to the Land and Environment Court against the refusal by Council to grant a Tree Permit. An appeal is to be made within 3 months of the refusal.

Where tree works are determined by way of a Development Application, the same legal right of appeal applies, as applies for Development Applications.

6.1.7 Reported Breaches

On receiving a report of a breach of the SEPP and of this Part of the DCP, a Council officer may attend the site and order that any contravening works cease immediately. The Council Officer may gather any necessary information including:

- The name, address and contact details of the person or organisation carrying out the work.
- The name, address and contact details of the person or organisation that authorised the work.
- Descriptions, diagrams and photographs of the illegal works, plant, equipment, machinery and persons.
- The person carrying out the contravening work and/or the Tree Owner (or the person who authorised the work) may be asked to show cause in writing as to why they should not be prosecuted in relation to the breach.
- The Deputy General Manager - Land, Infrastructure and Environment will determine whether the matter will proceed to prosecution.

6.1.8 Penalties for Breaches

Breaches of the provisions of the SEPP are subject to penalties in Section 9.56 of the Environmental Planning and Assessment Act 1979.

This Section also provides that where a person is guilty of an offence involving the destruction of or damage to a tree or vegetation, the court dealing with the offence may, in addition to or in substitution for any pecuniary penalty imposed or liable to be imposed, direct that person:

- (a) To plant new trees and vegetation and maintain those trees and vegetation to a mature growth, and
- (b) To provide security for the performance of any obligation imposed under paragraph (a).

6.1.9 Arborists' Reports that are Submitted to Council

To assist assessment and determination of applications, Council requires that an Arborist's report in relation to an application is to be prepared by a consulting Arborist who holds a minimum qualification of a Diploma (AQF Level 5) in Arboriculture.

Arborist's reports submitted to Council in relation to an application must contain the following information:

- the name, address and telephone number of the qualified consulting arborist who prepared the report (and the company, where applicable)
- the qualifications of the Arborist
- who commissioned the report and why the report was commissioned
- what the report examines
- the address of the site containing the tree or trees
- the date the Arborist conducted the inspection
- the methods or techniques used by the Arborist to inspect the tree or trees
- an abstract or synopsis of the findings from the Arborist's inspection
- a map or diagram of the site showing the location of the tree or trees, with the tree or trees numbered to correspond with the text in the Arborist's report
- the botanical and common name, height, crown spread, trunk diameter at 1.4m above ground level, and form of each tree inspected
- a discussion of the data collected – this may include, for example, detailed information regarding wounds, cavities, cracks, splits, forking, root-zone, pests and diseases
- supporting evidence where appropriate, such as photographs
- testing results should be submitted with clear and legible copies
- references used must be those referred to in the report
- data included in the report should be relevant to the application
- a discussion of all the options available – why they are recommended or why they are not recommended, e.g., can the built structure be relocated or repaired and the tree retained
- a recommendation as to the preferred option and the reasons for this recommendation
- the information in the report should be presented as objectively as possible without attempting to support specific outcomes.

The above list is not exhaustive. The Arborist may choose to include further information or Council may require further information to properly assess and determine the application.

Advisory Note:

A list of qualified Arborists can be obtained from the Institute of Australian Consulting Arboriculturalists (IACA) website at www.iaca.org.au. Arboriculture Australia is also able to supply the details of a suitably qualified Arborist. For more information call 1300 664 374 or visit www.arboriculture.org.au.

6.1.10 Definitions

Arborist - A person with minimum training to AQF Level 3 in Arboriculture that enables the person to competently perform tree work.

Australian Qualifications Framework (AQF) - The national framework for all educational and training purposes in Australia.

Building - For the purpose of section 6.1.5 a building is a permanent Council approved, or principal certifying authority approved, single storey roofed and enclosed structure with a floor space greater than thirty (30) square metres, constructed at natural ground level.

Carbon sequestration - The process of trees removing carbon from the atmosphere and storing it in their wood as they grow.

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.

Dead tree - A tree with no living vascular tissue.

Destroy - Any immediate or ongoing process or activity leading to the death of a tree.

Height - The distance measured vertically between the horizontal plane at the lowest point at the base of a tree which is immediately above ground and the horizontal plane immediately above the uppermost point of a tree.

Injure - To inflict damage to a tree by an immediate or ongoing process or activity and includes:

- Lopping and topping.
- Poisoning, including applying herbicides and other plant toxic chemicals to a tree or spilling (including washing off or directing water contaminated by) oil, petroleum, paint, cement, mortar and the like onto the root zone cutting, tearing, snapping and breaking off branches and roots that is not carried out in accordance with accepted arboricultural practices, does not qualify as "pruning" or is done for invalid reasons such as vandalism.
- Ringbarking, scarring the bark when operating machinery, fixing objects (e.g. signs) by nails, staples or wire, using tree climbing spikes in healthy trees marked for retention (except for access to an injured tree worker) or fastening materials that circle and significantly restrict the normal vascular function of the trunk or branches or inflicting a blaze on a tree as a marker point.
- Damaging a tree's root zone by compaction or excavation, stripping of topsoils, asphyxiation by burial (including unauthorised filling or stockpiling of materials) or the alteration of ground level or water table which causes damage to the tree or any part of the tree.
- "Underscrubbing", unless carried out by hand tools, such as brushcutters and the like.

Lopping - Indiscriminate cutting of branches or stems between branch unions, with the final cut leaving a stub.

Pruning - The cutting of any stem dead or alive, back to the intersection of another live stem to a swollen area at the intersection called a branch collar, with a final cut at the outer edge of the collar leaving no stub. This also means any act or acts severing any part of a tree so as to cause a reduction of the air space occupied by the branches and foliage of a tree.

Remove - To dismantle a tree or to separate the tree from the ground where it is growing or dislodging it with earth moving equipment in order to kill the tree so that the tree, including its branches, foliage, trunk, stump and root system will not regrow. This includes the poisoning of the stump and/or roots and/or taking away, or grinding or burning out its remains to prevent regrowth.

Top - Cutting away part, or all, of a tree's crown leaving a trunk and stubbed main branches to reduce its height and spread. This is an antiquated practice which damages a tree, reducing strength and vigour and predisposing it to premature decline.

Tree - A woody perennial plant equal to or exceeding four (4) metres in height with a trunk diameter equal to or exceeding 150mm measured at a distance of 1.4m above ground.

Tree Owner - The owner of a property where the majority of a tree's trunk meets the ground.

Vegetation – means a tree or other vegetation whether or not it is native vegetation.

6.1.11 Related Information

- Street Tree Management Strategy
- Compliance and Enforcement Corporate Practice
- Trees (Disputes Between Neighbours) Act 2006