



general
purpose
committee

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section

environment

GENERAL PURPOSE COMMITTEE - ENVIRONMENT

Table of Contents

Meeting Date: 30 September 1997

Page 2

ITEM	SUBJECT	PAGE
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SECTION 1 - ENVIRONMENT.

37:	Cambridge v Hawkesbury City Council - Subdivision by adjustments or relocation of common boundaries.	
	SA076/96/EVD/ENI30LBX.V18	3

oooO END OF TABLE OF CONTENTS Oooo

ITEM: 37**Cambridge v Hawkesbury City Council - Subdivision by adjustments or relocation of common boundaries.****FILE NUMBER:**

SA076/96/EVD/ENI30LBX.V18

REPORT:

On 20 June 1996 a subdivision application was lodged for a boundary adjustment of two lots with areas of 1,120 m² and 4.2493 hectares. The lot containing the area of 1, 120 m² is 4.6 metres wide.

Following discussions with the applicant and an offer to withdraw the application, it was finally dealt with by delegated authority on 31 January 1997. The application was refused on a number of grounds, principally that Clause 13 (boundary adjustments) does not apply as the lots are stated on the plan to be held "conjointly" and, secondly, that the existing Lot 10 is not capable of a dwelling being erected on it and effluent disposal on the site and, as such, should not be considered as a separate allotment of land for the purposes of a boundary adjustment.

The application was not referred to Council as it was considered to be straight forward and prohibited.

The applicant then lodged a notice of appeal and subsequent investigations indicated that Lot 10 DP 247457 had, indeed, been originally created by the closure of a road with Clause 13 of Hawkesbury Local Environmental Plan 1989 specifically providing that a new allotment may not be created by a boundary adjustment where it utilises land created by the closure of part or all of a road. This strengthened Council's position in the appeal.

The matter was heard by Assessor Brown in the Land and Environment Court on 25 September 1997. Following argument, a matter of law was referred to the Chief Judge for a determination.

In summary, the Chief Judge found that whilst Lot 10 was originally created by closure of part or all of a road, it was not so for the purposes of Clause 13. She found that whilst Lot 10 presently comprises and, in prior subdivisions, also always comprised the total area of land which was part of a road closure in 1954, its legal creation occurred with the registration of DP 247457 in 1972.

"Lot 10 was created in the legal and title sense at that stage and it could not be said that it was created by the closure of part or all of the road. The road closure was an historical event only and the word 'create' where used in LEP 1989 means to bring into legal existence."

In relation to the argument that the lots were to be used conjointly, Her Honour found that if it had been the intention to restrict the lots in a planning sense, it should have been reflected in a Restriction as to User or a Section 88b Instrument registered on the title. Whilst the notices of intended restriction appear on the deposited plans, there was no reference at all on the actual certificates of title as to the intended restriction.

Given these findings by the Chief Judge, Assessor Brown found in the applicant's favour and approved the subdivision application.

Council's Solicitors, Abbott Tout, suggest that consideration be given to an amendment of Clause 13 in the following respects:

- “1. *Removing all reference to relocation of common boundaries and referring only to ‘minor’ adjustment of those boundaries, or possibly deleting the clause altogether given the provisions of clause 6 of SEPP4 which refers in sub-clause (b)(ii) to:*

‘making an adjustment to a boundary between allotments, being an adjustment that does not involve the creation of any additional allotment.’

As we recollect the word ‘relocate’ was inserted to overcome limitations Council perceived on its powers when the word ‘adjustment’ only was in the clause.

2. *In sub-clause (2) rewording the clause to refer to allotments ‘derived from or forming the whole or part of land resulting from the closure of part or all of a road irrespective of when that closure occurred.’”*

As advised by Council's Solicitors, Clause 13 of HLEP 1989 which provides for subdivision by adjustment or relocation of common boundaries has been altered on a number of occasions in an endeavour to provide a reasonably flexible arrangement whereby existing and often poorly considered subdivision can be varied by boundary adjustment to provide an improved resulting development.

Prior to this decision, it was considered that the problem of utilising all or parts of former closed roads had been overcome. However, the Court's relatively “narrow” interpretation of the clause now means that Council must amend Hawkesbury Local Environmental Plan 1989 to prevent further applicants taking advantage of the clause to vary boundaries of allotments which, as they currently exist, have little development potential.

It is not recommended that reference to the “relocation of common boundaries” be removed from the clause as this would unnecessarily limit subdivision to only minor adjustments. Often there is legitimate reason for varying boundaries by more than a “minor adjustment”.

However, Abbott Tout's second proposition is supported.

The opportunity also exists to not only require a minimum area standard for the existing parcel whose boundary is to be adjusted or relocated but to also specify a minimum road frontage and depth. This would further support the principles of the clause.

It is recommended that the matter be dealt with finally to enable a Draft Local Environmental Plan to be immediately placed upon public exhibition. Any delay will improve the legal standing of applicants who wish to rely upon the common law finding of the Court.

RECOMMENDATION:

That Council resolve to prepare a Draft Local Environmental Plan to amend Clause 13 of Hawkesbury Local Environmental Plan generally as follows:

(Amendments to clause shown in italics)

Subdivision by Adjustment or *Relocation of Boundaries*

13. (1) Nothing in this plan prohibits subdivision by adjustment or relocation of common boundaries provided that:
- (a) no additional allotments are created;
 - (b) no allotment becomes, as a consequence of the adjustment or relocation, capable of subdivision under this plan; and
 - (c) the number of undersized allotments resulting from the subdivision does not exceed the existing number of undersized allotments.
- (2) Sub-clause (1) does not apply to allotments smaller than *1,000 m² (one thousand square metres) and/or allotments which have a frontage to a public road of less than 20 (twenty) metres.*
- (3) *Sub-clause (1) does not apply to allotments derived from or forming the whole or part of land resulting from the closure of part or all of a road irrespective of when that closure occurred.*
- (4) An adjustment or relocation made under sub-clause (1) shall not prevent the subdivision of any allotment that was prior to the adjustment or relocation, and remains thereafter capable of subdivision under this plan.
- (5) Nothing in this plan prohibits subdivision by the opening of a public road.

ATTACHMENTS:

Copy of subdivision as considered by the Land and Environment Court

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