

Extra Ordinary Meeting

Meeting Date: Thursday, 22 April, 2021
Location: Council Chambers, City Administrative Building, Bridge Road, Nowra
Time: 3.30pm

Membership (Quorum - 7)
All Councillors

Please note: The proceedings of this meeting (including presentations, deputations and debate) will be webcast and may be recorded and broadcast under the provisions of the Code of Meeting Practice. Your attendance at this meeting is taken as consent to the possibility that your image and/or voice may be recorded and broadcast to the public.

Agenda

1. **Apologies / Leave of Absence**
2. **Declarations of Interest**
3. **Reports**

City Development

CL21.56 Land & Environment Class 1 Appeal - Lot 87 Abernathys Road
Budgong 1

CL21.56 Land & Environment Class 1 Appeal - Lot 87 Abernathys Road Budgong

HPERM Ref: D21/154693

Department: Certification & Compliance

Approver: Phil Costello, Director - City Development

Reason for Report

This report is being submitted in response to a requisition by 3 Councillors to hold an Extra Ordinary meeting of Council in regard to the subject matter.

Recommendation

That Council receive this report and move into confidential session under Section 10A(2)(g) of the Local Government Act 1993 to receive a legal briefing in regard to legal aspects associated with this Class 1 appeal – the reason being the matter contains advice concerning litigation, or advice as comprises a discussion of this matter, that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege.

Background

This report relates to a matter before the Land and Environment Court regarding the alleged construction and occupation of an unauthorised dwelling at Lot 87 Abernathys Road, Budgong.

The issue was first raised with Council in 2012 by way of complaint to Council's Environmental Health Officer. The complaint indicated people were staying at the property and there were concerns about access and bush fire.

The property owner at that time confirmed the building was on site when she purchased the property.

Initial investigations identified the dwelling was unauthorised. This complaint was not fully investigated until 14 May 2019 when the complaint was re-allocated to a new Compliance Officer. The following items/contentions were identified from the investigation:

1. The dwelling does not enjoy existing use rights.
2. The minimum lot size to achieve a dwelling entitlement under SLEP is 40 ha. The current ownership/holding is 32 hectares.
3. Council has no record of any prior development consent or a Building Approval and such approval was/is required.
4. The dwelling is significantly impacted by biodiversity and bushfire matters (Flame Zone).
5. There is insufficient evidence to ascertain whether or not the dwelling meets the requirements of the National Construction Code.
6. There is insufficient evidence to ascertain the dwelling meets the plumbing requirements.

Council issued an emergency stop use order and a notice of intention to serve an order to demolish the building on 15 May 2019. These were issued on new owners of the property.

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The owners contacted Council's Compliance Officer and indicated they live in Sydney and the building was not being permanently occupied. It was concluded the cease use order was being complied with.

The owners wished to discuss the way forward for regularising the building rather than having to demolish it. A meeting with the owners and Council's compliance staff was held on 31 May 2019 which identified the ownership was at that time 3 allotments as follows:

Lot 86 – 16.19ha
 Lot 87 - 16.19ha
 Lot 88 – 84.98ha
 Total 117.36ha

There was a possibility of combining Lots 86 and 87 (32.38ha) and create a boundary adjustment from Lot 88 of 7.62ha to create 40ha (32.38 + 7.62 = 40ha). With a dwelling entitlement, Council could consider a Building Information Certificate with upgrades to the dwelling and the building could be regularised.

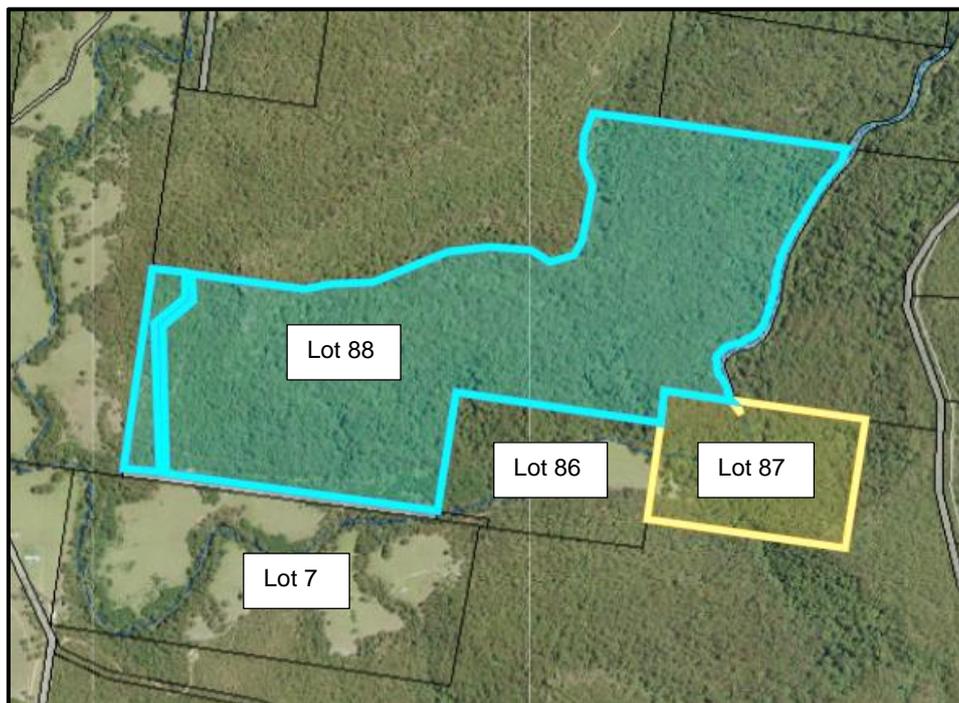


Figure 1 – The allotment arrangement

On 27 June 2019 Council received representations from the owners' solicitor indicating they did not require development consent and the building was legal on the basis of existing use rights. The submission indicated there was a BA approved in 1977 and that their building **was** the approved building (BA77/414).

Further investigations were carried out by Compliance Officers where it was established at the time of BA77/414, Lots 7 and 87 were owned by Mr Friedrichs. This had a total combined area of 56.66ha and this would have permitted a dwelling entitlement. The dwelling was constructed on Lot 7.

Council's Compliance Officers had already taken photographs of the unauthorised dwelling and it did not support the claim made by the Solicitor acting for the owners as the plans did not match.

On 13 August 2019 Council's Compliance Officers inspected the site with the approved plans as a reference. This inspection confirmed the approved dwelling was located on Lot 7

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(BA77/414). This dwelling was unfortunately destroyed by the Currowan Fires in January 2020.

On 13 August 2019, Council Compliance Officers were advised that Lot 88 had been sold independently. This was subsequently confirmed by the former owners and they essentially lost the opportunity to regularise the unauthorised dwelling.

There is no approval for the building on Lot 87 and the dwelling is considered unauthorised. This was confirmed with the owners' solicitor there were legal arguments submitted. Council sought legal advice from Marsden's in the first instance and they confirmed the owners need to prove existing use rights for the building to remain. The legal advice also identified the original emergency order was invalid as it failed to identify the order was issued in "an emergency".

In the absence of additional information from the owners or their representative, Council's Compliance Officers sent the owners of the premises a notice of intention to serve a demolition order on 18 November 2020 (NISO).

On 17 December 2020 Council Officers issued a fresh Emergency Cease Use Order based on previous legal advice from Marsden's. This order was given in an emergency due to the concern for bushfires and to protect Council's interests.

On 19 January 2021 Council received notification of the Land and Environment Court Class 1 appeal against the emergency cease use order. The demolition Order has been held pending the outcome of the Class 1 appeal.

A section 34(1) mediation conference was held on 29 March 2021. The Class 1 appeal is set for 27, 28 and 29 July 2021.

Summary

Council staff, following a detailed search of records, have been unable to verify that the structure in question has been legitimately constructed and occupied. The ongoing occupation presents significant safety and liability issues. Staff have recommended that further details be provided in confidential session having regard to the legal process in motion.

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LOCAL GOVERNMENT AMENDMENT (GOVERNANCE & PLANNING) ACT 2016

Chapter 3, Section 8A Guiding principles for councils

(1) Exercise of functions generally

The following general principles apply to the exercise of functions by councils:

- (a) Councils should provide strong and effective representation, leadership, planning and decision-making.
- (b) Councils should carry out functions in a way that provides the best possible value for residents and ratepayers.
- (c) Councils should plan strategically, using the integrated planning and reporting framework, for the provision of effective and efficient services and regulation to meet the diverse needs of the local community.
- (d) Councils should apply the integrated planning and reporting framework in carrying out their functions so as to achieve desired outcomes and continuous improvements.
- (e) Councils should work co-operatively with other councils and the State government to achieve desired outcomes for the local community.
- (f) Councils should manage lands and other assets so that current and future local community needs can be met in an affordable way.
- (g) Councils should work with others to secure appropriate services for local community needs.
- (h) Councils should act fairly, ethically and without bias in the interests of the local community.
- (i) Councils should be responsible employers and provide a consultative and supportive working environment for staff.

(2) Decision-making

The following principles apply to decision-making by councils (subject to any other applicable law):

- (a) Councils should recognise diverse local community needs and interests.
- (b) Councils should consider social justice principles.
- (c) Councils should consider the long term and cumulative effects of actions on future generations.
- (d) Councils should consider the principles of ecologically sustainable development.
- (e) Council decision-making should be transparent and decision-makers are to be accountable for decisions and omissions.

(3) Community participation

Councils should actively engage with their local communities, through the use of the integrated planning and reporting framework and other measures.

Chapter 3, Section 8B Principles of sound financial management

The following principles of sound financial management apply to councils:

- (a) Council spending should be responsible and sustainable, aligning general revenue and expenses.
- (b) Councils should invest in responsible and sustainable infrastructure for the benefit of the local community.
- (c) Councils should have effective financial and asset management, including sound policies and processes for the following:
 - (i) performance management and reporting,
 - (ii) asset maintenance and enhancement,
 - (iii) funding decisions,
 - (iv) risk management practices.
- (d) Councils should have regard to achieving intergenerational equity, including ensuring the following:
 - (i) policy decisions are made after considering their financial effects on future generations,
 - (ii) the current generation funds the cost of its services

Chapter 3, 8C Integrated planning and reporting principles that apply to councils

The following principles for strategic planning apply to the development of the integrated planning and reporting framework by councils:

- (a) Councils should identify and prioritise key local community needs and aspirations and consider regional priorities.
- (b) Councils should identify strategic goals to meet those needs and aspirations.
- (c) Councils should develop activities, and prioritise actions, to work towards the strategic goals.
- (d) Councils should ensure that the strategic goals and activities to work towards them may be achieved within council resources.
- (e) Councils should regularly review and evaluate progress towards achieving strategic goals.
- (f) Councils should maintain an integrated approach to planning, delivering, monitoring and reporting on strategic goals.
- (g) Councils should collaborate with others to maximise achievement of strategic goals.
- (h) Councils should manage risks to the local community or area or to the council effectively and proactively.
- (i) Councils should make appropriate evidence-based adaptations to meet changing needs and circumstances.