

12.3 PERMISSIBILITY OF CEMETERIES IN ENVIRONMENTAL ZONES

LINK TO COMMUNITY STRATEGIC PLAN:

EN2 – Adopt environmental sustainability practices

EN4 - Maintain a balance between growth, development and environmental protection through sensible planning

CO5 – Maintain our rural lifestyle

PURPOSE OF REPORT

The *Al-Mabarar Benevolent Society Limited v Goulburn Mulwaree Council [2018] NSWLEC 1261* Land Environment Court decision made on 30 May 2018 prompted a review of the implications for large scale cemeteries on environmentally sensitive land. The purpose of this report is to provide Council with options regarding how to proceed with the permissibility of cemeteries in environmental zones.

BACKGROUND

On 29 September 2014 a development application was lodged (DA/0102/1415) by Al-Mabarar Benevolent Society Limited for a Cemetery and Service Hall at Lot 1 DP 548883, Lot 1 DP 548883, Lot 13 DP 700290, Lot 150 DP 750053, Lot 272 DP 750053, 247 Highland Way and 15213 Hume Highway, Marulan NSW 2579.

The proposal was met with community concerns, including but not limited to permissibility, the impact upon endangered ecological communities, bushfire hazards and traffic impacts.

On 30 May 2018 the development application was refused by the Land and Environment Court on a number of grounds, principle of which was permissibility.

Since the judgement it has been requested that Council investigate options in relation to the ongoing permissibility of cemeteries in environmental zones.

REPORT

The Land and Environment Court judgement had a number of implications for Council; the decision centred mainly on the permissibility of the use and not that a cemetery development could not take place on the site. The main themes of the case are summarised below;

- Throughout the public notification period Council received over 119 written submissions objecting to the development. The objections generally raised concern about the permissibility of the use, the size of the proposed service hall, the ecological impacts arising from the proposed clearing of the land, and the increase in traffic, noise and light spillage in an otherwise quiet rural locality.
- The Court did not accept that the evidence supports the characterisation of the development contended for by the Al-Mabarar Benevolent Society Limited. Council contended that the evidence failed to adequately describe the uses of the wake room and left open the possibility for the room to be used for viewing and the religious law rites of washing and enshrouding of the body. It also believes that the Service Hall is inappropriately characterised due to its size, intensity of use and its multifunction purposes including those of wake room, meeting rooms, reception area, rest rooms, administration and office area, amenities, Public Service Hall and other areas of use.

- According to one expert witness, the development outlined in the application before the Court has " ...all the hallmarks of a Mosque with an attached graveyard". Relevantly, on that basis it is submitted that the graveyard is the associated use not the Service Hall. Therefore, the development is not a cemetery.

The decision by the Land and Environment Court did not establish a precedent and an altered proposal could be permissible on the site. Furthermore, public sentiment has suggested that Council consider its approach to the overall permissibility of cemeteries within environmental zones altogether. In this regard Table 1 offers possible options around this community attitude.

Table 1

	Options	Discussion
1	Initiate a Planning Proposal to amend the <i>Goulburn Mulwaree Local Environmental Plan (LEP) 2009</i> to remove Cemeteries as a permissible use in the E3 Environmental Management zone.	<p>This would prohibit Cemeteries from land zoned E3 Environmental Management including the subject site. This would have the desired outcome of taking any ambiguity out of a similar proposal to the above.</p> <p>Prohibiting cemeteries as a use across the E3 Environmental Management zone could cause a potential issue for current cemeteries in Zone E3. Two existing cemeteries have been identified in the E3 zone; Bungonia (Lot 1 DP 89405 and Lot 2 DP 1130082) and Tallong (Lot 7312 DP 1145878). It is noted that these cemeteries may be able to continue to operate under existing use rights, however the ability for any further development or expansion could be compromised. This could be avoided by including the 2 existing cemetery sites to Schedule 1 (Additional Permitted Uses) of the LEP.</p> <p>If this option is pursued, it would be advisable to extend the approach to the E2 Environmental Conservation zone, as the E2 zone is generally considered to be land of higher environmental value compared to E3 zoned land.</p> <p>Should Council proceed with this option, a proponent would need to submit a Planning Proposal to amend the Goulburn Mulwaree LEP 2009 for any particular site where cemeteries are prohibited.</p>
2	Revise the definition for 'Cemeteries' to include reference to where land is of high (or substantial) ecological (and habitat) significance/value.	This approach involves changing a definition in the Standard Instrument. Preliminary advice from the Department of Planning and Environment has advised against this approach.
3	Revise the definition to read as ' <i>a place used for the internment of deceased persons or pets or their ashes, other than on land identified as having substantial ecological and habitat value including Lot 1 DP 548883, Lot 13 DP 700290, Lot 150 DP</i>	This approach involves changing a definition in the Standard Instrument. Preliminary advice from the Department of Planning and Environment has advised against this approach.

	750053 and Lot 1 DP 1208363.'	
4	Add a new definition of Cemetery or additional Controls under the Goulburn Mulwaree Development Control Plan (DCP) 2009.	<p>A similar example of this approach is the recently adopted '<i>large-scale sporting or recreational activities</i>' definition within the DCP. This would assist in providing further clarity around a type of development or to limit a size of a development. An amendment to the DCP is a faster process than an amendment to the LEP.</p> <p>Conversely, the DCP has limited statutory authority under the <i>Environment Planning and Assessment Act 1979</i>, particularly in regard to prohibiting a specific development type and should only act as an additional control mechanism. This does not give the same certainty as Option one (1).</p> <p>It is also noted that Council resolved at its meeting held 7 August 2018 to remove definitions from the DCP that had the effect of duplicating terms already defined within the LEP.</p>

CONCLUSION

The *Al-Mabarat Benevolent Society Limited v Goulburn Mulwaree Council* [2018] NSWLEC 1261 Land Environment Court decision made on 30 May 2018 has prompted a wider look at the implications of a large scale cemetery on environmentally sensitive land. This is not the type of development Council seeks to encourage in environmentally sensitive areas and as such Council's principal environmental planning instrument the *Goulburn Mulwaree Local Environmental Plan 2009* should be unequivocal in preventing this.

As identified in Table 1 above the options in progressing this matter and preventing future legal challenges have both positive and negative impacts. Advice from the Department of Planning and Environment has stated that a change to a standard instrument definition will not be well received and provisions in the DCP lack the certainty desired.

This report has taken into account Council's Cemetery Policy and Cemetery Plan of Management to assess any options impact on capacity or operational cemeteries in the Local Government Area.

It is recommended Council proceed with Option one (1) removing Cemeteries as a permissible use in Environmental Zones, and include the existing cemeteries at Bungonia and Tallong as additional permitted uses under Schedule 1 of the LEP.

If Option one (1) is supported, a proponent who wishes to pursue a cemetery development in an Environmental zone would be able to do so via a rezoning/planning proposal application to rezone land to SP2 Cemeteries if supported by Relevant Planning Authority (RPA).

RECOMMENDATION

That:

1. The report from the Graduate Strategic Planner on the definition of Cemeteries be received.
2. Council staff draft a planning proposal amend the Goulburn Mulwaree Local Environmental Plan 2009 to;
 - a. remove Cemeteries as being 'Permissible with Consent' in Zones E2 Environmental Conservation and E3 Environmental Management and;
 - b. include Cemeteries as an additional permitted use for the Bungonia (Lot 1 DP 89405 and Lot 2 DP 1130082) and Tallong (Lot 7312 DP 1145878) Cemeteries in Schedule 1.
3. The Planning Proposal once drafted - be submitted to the Minister of NSW Planning & Environment for a Gateway Determination in accordance with Section 3.34 of the Environmental Planning and Assessment Act 1979.
4. The Department of Planning and Environment be advised that Council wishes to be issued with an authorisation to use delegation for the Planning Proposal.
5. In the event NSW Planning & Environment issues a Gateway Determination to proceed with the Planning Proposal, consultation be undertaken with the community and government agencies in accordance with Schedule 1, Division 1, Clause 4 of the Environmental Planning and Assessment Act 1979 and any directions of the Gateway Determination.