PLANNING PROPOSAL

Amendment to the Maitland LEP 1993

Amendment to subdivision controls and dwelling entitlements

Version 1.0
25 May 2010

MAITLAND
CITY COUNCIL

CONTENTS

Version

Version 1.0 – 25 May 2010 for report to Council

INTRODUCTION

In accordance with Section 55 of the Environmental Planning and Assessment Act 1979, this planning proposal has been prepared to amend the provisions of the Maitland Local Environmental Plan 1993 (MLEP 1993) to clarify the relationship between subdivision controls and rural dwelling entitlements. This clarification is necessary as a result of a recent Land and Environment Court determination regarding of a question of law.

In the determination of the matter *Atkins v Maitland City Council* [2010] NSWLEC 36, it was held that there was a distinction between subdivisions generally, and particular forms of subdivision listed in subclause 8 (2) of the MLEP 1993. It was also held "*that apparent lack of logic is no basis upon which to found ... inference*", in relation to drafting omissions in the MLEP 1993. These issues relate to how Council has interpreted consolidation of land for the purpose of dwelling entitlements.

Clause 13 of the Maitland Local Environmental Plan 1993 (MLEP 1993) sets out the requirements for the erection of dwellings in rural zones ("dwelling entitlements"). In certain circumstances, Council may consent to the erection of a dwelling house on rural land if the land has been subdivided. The types of subdivision that do not "create" the entitlement for a dwelling are outlined in sub-clause 13 (4). This in turn references sub-clause 8 (2), which lists six different types or purposes of subdivision. It is the intention of sub-clause 13 (4) to exclude all allotments created by the six forms of subdivision in 8 (2), including the consolidation of land, from dwelling entitlements, unless the allotment is at least 40 hectares.

PART 1: OBJECTIVES or INTENDED OUTCOMES

The objectives of this planning proposal are:

1. To clarify the difference between the subdivision of land and a plan of consolidation, and
2. To prohibit new, but not replacement, dwellings on rural allotments created by a plan of consolidation

PART 2: EXPLANATION of PROVISIONS

To achieve the objectives of this planning proposal, it is intended to make the following amendments to MLEP 1993:

1. Alter Clause 8 (2) (e) to either,
    a. "a consolidation of lots that does not create additional lots or the opportunity for additional dwellings" [wording from SI LEP clause 2.6 (2) (c)], or
    b. omit, so that there is no inference that a plan of consolidation is a subdivision of land (ref. 4B (3) (e) (i) of Environmental Planning and Assessment Act, 1979)
2. Alter Clause 13 (4) as follows

a. Subject to proceeding with option 1(a),

"Subclause (3) (a) does not apply to an allotment created before or after the commencement of this subclause by a subdivision consented to by the Council for a purpose set out in clause 8 (2) (a), (b), (c), (d), (e) or (f), except an allotment with a minimum area of 40 hectares ~~created by a subdivision consolidating allotments~~."

Or

b. Subject to proceeding with option 1(b),

"Subclause (3) (a) does not apply to an allotment created before or after the commencement of this subclause by a subdivision consented to by the Council for a purpose set out in clause 8 (2) (a), (b), (c), (d) or (f), except an allotment with a minimum area of 40 hectares ~~created by a subdivision consolidating allotments~~."

Options for amendments to Clause 8 and 13 are given as it is uncertain how "consolidation" will be interpreted by Parliamentary Counsel, and how the implication of *Atkins v Maitland City Council* will affect this interpretation.

PART 3: JUSTIFICATION for PROPOSED LEP AMENDMENTS

In accordance with the Department of Planning's *'Guide to Preparing Planning Proposals'*, this section provides a response to the following issues:

- Section A: Need for the planning proposal
- Section B: Relationship to strategic planning framework
- Section C: Environmental, social and economic impact
- Section D: State and Commonwealth interests

Section A – NEED for the PLANNING PROPOSAL

1. Is the planning proposal a result of any strategic study or report?

This planning proposal is a result of the determination of *Atkins v Maitland City Council* [2010] NSWLEC 36 that created uncertainty about the interpretation and effect of clauses 8 and 13 of the MLEP 1993 for dwelling entitlements. A copy of the judgement is included as Attachment 1.

The intended outcome of this planning proposal to limit the proliferation of rural dwellings is consistent with the strategy of the Maitland Rural Strategy 2005 and objectives of the Lower Hunter Regional Strategy 2006 (action 9.7). Extracts from these strategies are included as Attachment 2.

2. *Is the planning proposal the best means of achieving the objectives or intended outcomes, or is there a better way?*

It is considered that an amendment to MLEP 1993 is the only method to achieve the objectives of this planning proposal, as it relates to the prohibition of dwellings on rural allotments.

It is necessary to make these amendments to MLEP 1993 as they will have forward implication through the proposed dwelling entitlement clause in the Maitland Local Environmental Plan 2011 (ref. 7.3) that will endow dwelling entitlements on allotments that had entitlements created by subdivisions in MLEP 1993.

3. *Is there a net community benefit?*

A net community benefit arises from this planning proposal as it will reinforce Council's adopted rural strategy and the Lower Hunter Regional Strategy, as well as removing ambiguity and inference from the operation of clauses 8 and 13 of MLEP 1993. Significant costs and resources have been expended in the defence of legal action arising from the interpretation of these clauses.

Section B – RELATIONSHIP to STRATEGIC PLANNING FRAMEWORK

4. *Is the planning proposal consistent with the objectives and actions contained within the applicable regional strategy?*

The applicable regional strategy is the Lower Hunter Regional Strategy (NSW Dept of Planning) – October 2006. This planning proposal is consistent with the Lower Hunter Regional Strategy, as it limits further dwelling entitlements in rural areas (pg. 37) and through this embraces the sustainable, affordable, prosperous and liveable future envisaged for the Lower Hunter.

5. *Is the planning proposal consistent with the local council's Community Strategic Plan, or other local strategic plan?*

Council is currently preparing a draft community strategic plan in line with the new Integrated Planning and Reporting legislation and guidelines.

The Maitland Rural Strategy 2005 outlines proposed changes to the Maitland local environmental plan, including the future of dwelling entitlements. It is the objective of the Rural Strategy to protect the underlying agricultural potential of Maitland's rural lands and to limit the further fragmentation of rural lands.

The objectives of this planning proposal are consistent with the objectives and intention of the Maitland Rural Strategy 2005.

6. *Is the planning proposal consistent with applicable state environmental planning policies?*

There are no existing or draft state environmental planning policies that apply to this planning proposal.

7. *Is the planning proposal consistent with applicable Ministerial Directions for Local Plan Making?*

There are no s.117 Ministerial Directions that apply to this planning proposal.

Section C – ENVIRONMENTAL, SOCIAL and ECONOMIC IMPACT

8. *Is there any likelihood that critical habitat or threatened species, populations or ecological communities, or their habitats, will be adversely affected as a result of the proposal?*

There will be no impact on any of these matters as a result of this planning proposal.

9. *Are there any other likely environmental effects as a result of the planning proposal and how are they proposed to be managed?*

There are no environmental effects likely as a result of this planning proposal.

10. *How has the planning proposal adequately addressed any social and economic effects?*

This planning proposal seeks to clarify Council's intentions regarding dwelling entitlements. The social and economic effects of dwelling entitlements for rural areas of Maitland were addressed during the preparation of the Maitland Rural Strategy 2005.

There are no additional social or economic effects as a result of this planning proposal.

Section D – STATE and COMMONWEALTH INTERESTS

11. *Is there adequate public infrastructure for the planning proposal?*

There is no additional demand generated for public infrastructure as a result of this planning proposal.

12. *What are the view of State and Commonwealth public authorities consulted in accordance with the gateway determination?*

No consultation with State or Commonwealth public authorities is proposed for this planning proposal, due to its consistency with adopted strategies and its objective to clarify the function of the MLEP 1993.

PART 4: COMMUNITY CONSULTATION

In accordance with Section 57(2) of the Environmental Planning and Assessment Act 1979, this planning proposal must be approved prior to community consultation is undertaken by the local authority. Council has deemed the planning proposal to be low impact and require a 14 day exhibition.

In accordance with Council's adopted *Community Engagement Strategy (March 2009)*, consultation on the proposed rezoning will be to inform and received limited feedback from interested stakeholders. To engage the local community the following will be undertaken:

- Notice in the local newspaper;
- Exhibition material and relevant consultation documents to be made available at all Council libraries and Council's Administration Building; and
- Consultation documents to be made available on Council's website.

At the close of the consultation process, Council officers will consider all submissions received and present a report to Council for their endorsement of the proposed rezoning before proceed to finalisation of the amendment.

The consultation process, as outline above does not prevent any additional consultation measures that may be determined appropriate as part of the 'Gateway' determination process.

Appendix ONE
Judgement
Atkins v Maitland City Council [2010] NSWLEC 36

Land and Environment Court of New South Wales

CITATION :	**Atkins v Maitland City Council [2010] NSWLEC 36**
PARTIES :	APPLICANT Lester Barry Atkins RESPONDENT Maitland City Council
FILE NUMBER(S) :	10910 of 2009
CORAM:	Craig J at 1
KEY ISSUES:	QUESTION OF LAW :- determination of separate question pursuant to Part 28 rule 2 of the Uniform Civil Procedure Rules 2005 - whether development permissible – interpretation of planning instrument - subdivision control – minimum allotment size – concessional allotment – context – development permissible
LEGISLATION CITED:	Conveyancing Act 1919 Environmental Planning and Assessment Act 1979 Interpretation Act 1987 Maitland Local Environmental Plan 1993 Uniform Civil Procedure Rules 2005
CASES CITED:	Bermingham v Corrective Services Commission of NSW (1988) 15 NSWLR 292 Calleja v Botany Bay City Council [2005] NSWCA 337; 142 LGERA 104 CIC Insurance Limited v Bankstown Football Club Limited [1977] HCA 2; 187 CLR 384 Cranbrook School v Woollahra Municipal Council [2006] NSWCA 155; 66 NSWLR 379 Harrison v Melhem [2008] NSWCA 67; 71 NSWLR 380 Hastings Co-operative Ltd v Port Macquarie Hastings Council [2009] NSWCA 400 Kingston v Keprose Pty Ltd (1987) 11 NSWLR 404 Matic v Mid-Western Regional Council [2008] NSW LEC 113

	Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc [2000] NSWCA 65; 48 NSWLR 548 Wentworth Securities Ltd v Jones [1980] AC 74
DATES OF HEARING:	4 March 2010
DATE OF JUDGMENT:	18 March 2010
LEGAL REPRESENTATIVES:	APPLICANT Mr J A Ayling SC (Barrister) with Ms H P Irish (Barrister) AGENT Richard Bennett of Hill Top Planners Pty Ltd RESPONDENT G W Williams (Solicitor) SOLICITORS Thompson Norrie Solicitors

THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

CRAIG J

18 March 2010

10910 of 2009

ATKINS v MAITLAND CITY COUNCIL

JUDGMENT

1 **HIS HONOUR:** The applicant is the owner of land at Oakhampton in the Hunter Valley of New South Wales, being Lot 100 in Deposited Plan 1083305 (**Lot 100**). The Deposited Plan reflected a subdivision to which development consent was granted by the respondent on 8 December 2005. The plan of subdivision was registered in the office of the Registrar General on 11 July 2005. That plan, as registered, bears the following notation in its right hand margin:

> "PLAN OF SUBDIVISION OF LOTS 1, 2, 3, AND 4 D.P. 217178 AND PART OF THE LAND IN CONV 950 BK 3692".

2 Lot 100 has an area of 9.73 hectares. While there is a farm shed presently standing on the Lot, there is no dwelling erected upon it.

3 The applicant sought development consent from the respondent to erect a single storey dwelling on Lot 100. That application was refused by the respondent on 12 November 2009. In consequence of that refusal, the applicant has appealed to this Court pursuant to s 97 of the *Environmental Planning and Assessment Act* 1979 (the EPA Act).

4 By its Statement of Facts and Contentions dated 14 January 2010, the respondent has contended that the erection of a dwelling house on Lot 100 is prohibited development. On the basis of that contention, the parties agreed that the question of permissibility should be determined by a judge of the Court, separately from the two merit issues which the respondent's Statement of Facts and Contentions also identifies.

5 It is unnecessary for present purposes to identify the process by which the separate question came to be listed before me for determination. Suffice to record that at the commencement of the hearing and with the consent of the parties I made an order pursuant to Part 28 rule 2 of the *Uniform Civil Procedure Rules* 2005 for the separate determination of an issue in the following terms:

> "Whether, upon the proper interpretation of *Maitland Local Environmental Plan* 1993, the erection of a dwelling house on land at Oakhampton, being Lot 100 in Deposited Plan 1083305 is prohibited development."

It is to that question that this judgment is directed.

Planning Controls

6 The planning controls relevant to be considered for present purposes are those found in *Maitland Local Environmental Plan* 1993 (**the LEP**). By operation of the LEP, Lot 100 is said to be zoned in Part 1(a) Prime Rural Land and in Part 1 (b) Secondary Rural Land (**the 1(b) Zone**). The

dwelling house for which development consent has been sought by the applicant is to be located wholly within the I (b) Zone.

7 Part 2 of the LEP contains those provisions of the instrument which generally relate to and control development upon the four rural zones which it identifies. The land use tables for each of those four zones are to be found in cl 10, within Part 2.

8 In the third paragraph of cl 10, immediately preceding the commencement of the four land use tables, the consent authority is enjoined from granting development consent "... if the proposed development does not satisfy the objectives of the zone in which it is intended to be carried out". Paragraph (1) of the land use table for the I (b) Zone is in the following terms:

> **"(1) Objectives of the zone**
>
> (a) To provide for agricultural uses and animal establishments.
>
> (b) To permit appropriate agriculture-related land uses and certain non-agriculture related land uses which will not adversely affect agricultural productivity.
>
> (c) To control development that could:
>
> (i) have an adverse impact on rural character,
>
> (ii) create unreasonable or uneconomic demands for the provision or extension of public amenities and services, or
>
> (iii) be subjected to physical limitations such as erosion hazard, bushfire risk and flooding.
>
> (d) To prevent the establishment of traffic generating development along classified roads."

9 Paragraph (2) of the same land use table describes the zone as one that "contains all rural land which is either not of prime agricultural value or has not been set aside for rural residential development."

10 It is paragraph (5) of the table which is of particular significance. It is that paragraph which identifies development within the 1(b) Zone which is prohibited. Relevantly, it includes as prohibited development the following:

> "Dwelling House (other than dwellings for which consent is permitted by Clause 13); ..."

11 Clause 13 of the LEP (also within Part 2) relevantly provides as follows:

> "**13 What are the requirements with respect to the erection of dwellings in rural zones?**
>
> (1) In this clause:
>
> ***Separate parcel*** means and allotment of land in existence on 3 September 1993 or the aggregation of two or more joining or adjacent allotments of land if they were in common ownership on 3 September 1993.
>
> ...
>
> (2) The Council may consent to the erection of a dwelling house on:
>
> ...
>
> (b) a separate parcel in Zone 1(b) where the separate parcel has a minimum area of 4000 m².
>
> (3) Notwithstanding subclause (2), Council may consent to the erection of a dwelling house on land in Zone 1(a), 1(b), 1(c) or 1(d) if:
>
> (a) the land comprises an allotment the subdivision of which was approved by Council after 7 December 1960, or

(4) Subclause (3)(a) does not apply to an allotment created before or after the commencement of this subclause by a subdivision consented to by the Council for a purpose set out in clause 8 (2) (a), (b), (c), (d) or (f), except an allotment with a minimum area of 40 hectares created by a subdivision consolidating allotments."

12 The incorporation within cl 13(4) of reference to cl 8 of the LEP necessitates the recitation of the latter clause. It provides as follows:

"8 **What subdivision controls apply?**

(1) Land to which this plan applies shall not be subdivided except with the consent of the Council.

(2) Nothing in this plan shall prevent the Council from granting consent to a subdivision for any of the following:

(a) widening or opening of a public road,

(b) making an adjustment to a boundary between allotments, being an adjustment that does not involve creating any additional allotment,

(c) rectifying an encroachment upon an allotment,

(d) creating a public reserve,

(e) consolidating allotments, or

(f) excising from an allotment land which is, or is untended to be, used for public purposes, including drainage purposes, bushfire brigade or other rescue service purposes or public conveniences.

Note. Clause 13 (4) prevents the erection of a dwelling house on an allotment of land in Zone 1 (a), (b) (c) or (d) created by a subdivision under subclause (2) (a), (b), (c), (d) or (f), except an allotment with a minimum area of 40

hectares created by a subdivision consolidating allotments."

13 There is one further provision of the LEP, that, for present purposes, needs to be noticed. It is cl 11. It identifies the minimum allotment sizes for rural land and requires that the minimum area which may be the subject of the grant of consent to subdivision of Zone 1(b) land is 40 hectares.

The parties' contentions

14 The respondent submits that the erection of a dwelling house on Lot 100 is prohibited. It refers to the prohibition upon development for a dwelling house as contained in the land use table to cl 10 of the LEP and says that the exception to that prohibition by reference to dwellings permitted by cl 13 is not engaged by the present development application.

15 Both parties accept that Lot 100 is not a *separate parcel* within the meaning of cl 13(1) and therefore the provisions of subclause (2)(b) of that clause do not apply.

16 The focus of the parties' submissions is upon subclauses (3) and (4) of cl 13 of the LEP. It will be remembered that subclause (3) potentially removes both the areal limitation and the temporal limitation as to the date on which the Lot or Lots needed to exist, both of which limitations are imposed by subclause (2). Both parties accept that the wording of subclause (3)(a) is infelicitous in its reference to "an allotment the subdivision of which was approved ...". Both agree that those words should be understood as if they read "an allotment created by subdivision which was approved ... ". Given that the provisions of subclause (4) expressly apply by way of exception to the provisions of subclause (3) and the former uses the verbal formula of referring to "an allotment created ...

by a subdivision", I agree with and approach the interpretation of the provisions of subclause (3) (a) on the basis jointly adopted by the parties.

17 The respondent concedes, consistently with the agreed statement of facts (Exhibit C), that Lot 100 was an allotment approved by the respondent after 7 December 1960, that approval having been given on 8 December 2004. If that is where the provision governing the power to erect a dwelling house on Lot 100 ended, it is conceded that such development would be permissible with consent. However, the respondent argues that the concessional provisions of subclause (3) do not apply by reason of the provisions of subclause (4). Indeed, it is the operation of the latter subclause upon which the respondent wholly founds its case for asserting that cl 13 is not engaged and thus the prohibition upon dwelling houses contained in the land use table prevails.

18 In essence, the submissions on behalf of the respondent as to why the concessional provisions of subclause (3) are overridden by subclause (4) are as follows:

(i) the plan of subdivision which came to be registered as Deposited Plan 1083305 by which Lots 100 and 101 were created, was a *subdivision consolidating allotments* within the meaning of subclause (4) and Lot 100 was below the minimum area of 40 hectares stipulated in that subclause;

(ii) when cl 13 was amended in October 2002 by the addition of subclause (4) and the insertion of the '**Note**' to cl 8(2), a reference to cl 8(2)(e) was mistakenly omitted from the subclause and in order to give the subclause work to do that provision should be read into that subclause. In so doing, the subclause would be interpreted as preventing the concessional provisions of subclause (3) applying to a

subdivision 'consolidating allotments' within the meaning of cl 8(2)(e). Deposited Plan 1083305 was such a subdivision.

19 The applicant submits that Lot 100 satisfies the only relevant criteria stipulated in cl 13(3)(a) of the LEP for permissibility of a dwelling house, namely that the land upon which it is proposed to be erected is within Zone 1(b) and that it comprises an allotment created by a subdivision approved by the respondent after 7 December 1960. In response to the respondent's contentions, the applicant submits that the purpose of the subdivision to which the Respondent consented and which gave rise to the registration of Deposited Plan 1083305 was not a purpose identified in cl 8 (2)(a), (b), (c), (d) or (f) and thus cl 13(4) is not engaged. Further, the applicant says that the subdivision in question was not a subdivision '*consolidating allotments*' within the meaning of subclause (4). The principles which would allow the 'mistakenly omitted' provisions of cl 8(2)(e) from cl 14 to be read into the latter clause are not satisfied in this case (*Bermingham v Corrective Services Commission of NSW* (1988) 15 NSWLR 292 at 302).

Inferring an intention to include an omitted provision

20 It is convenient first to address the respondent's submission that cl 13(4) should be read as including a reference to a subdivision consolidating allotments within the meaning of cl 8(2)(e). In making that submission, it sought to refer to an internal report addressing the draft local environmental plan which led to the insertion of subclause (4) into the LEP. It also relied upon an exchange of correspondence between it and Planning NSW (as the Department of Planning was then known) relating to the provision. That evidence was admitted for the purpose of allowing the respondent's legal representative to make the submissions that he did without conceding its relevance to the proper interpretation of the provisions of the LEP. The reports and correspondence upon which

reliance was sought to be placed indicated, so it was argued, that the amendment ultimately made in the form of cl 13 (4) did not reflect the purpose intended by the Respondent when it formulated and advertised its draft local environmental plan.

21 I reject the respondent's submissions in this regard. The local environmental plan is the instrument of the Minister, not that of the respondent. The respondent did not suggest that the amendment ultimately made to the LEP by the addition of subclause (4) to cl 13 was not the valid culmination of the statutory process ordained by Part 3 of the EPA Act for the making of a statutory instrument. Further, documents that reflect the aspirations of a council in formulating a local environmental plan and the exchange of correspondence with the Department of Planning in relation to the making of that plan would not ordinarily inform the process of interpretation.

22 The essence of the submission on behalf of the respondent in this regard is encaptured in its written submission as follows:

> "It is apparent from this correspondence that the omission from the amended clause 13 (4) of Maitland LEP 1993 of a reference to clause 8 (2) (e) (and from the note to cl 8 (2)) occurred contrary to the resolution of the Council and for a reason which is not explicit or able to be inferred from the correspondence."

How this 'omission' should be understood, as such, and then applied when interpreting the LEP was not explained in a principled way.

23 Ordinarily, the process of interpretation would require that the primacy of the text be recognised (*Matic v Mid-Western Regional Council* [2008] NSW LEC 113 at [10]).

24 The principles that should govern the interpretation of a planning instrument were not in contest. Emphasis was placed by the respondent

on the need to give the LEP and the particular provisions under consideration a purposive interpretation. These principles are well elucidated in authorities such as *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, *Cranbrook School v Woollahra Municipal Council* [2006] NSWCA 155; 66 NSWLR 379 and *Matic v Mid-Western Regional Council* (*supra*). Application of these principles do not detract from my rejection of the Respondent's submissions. As I have earlier indicated, focus must be upon the text of the instrument itself and, subject to what follows, not upon some extraneous material which is unnecessary to give meaning to the language of the LEP itself, even considering its context (*Harrison v Melhem* [2008] NSWCA 67; 72 NSWLR 380).

25 The submission made on behalf of the respondent to the effect that reference to cl 8(2)(e) should be read into subclause (4) of cl 13 could only be sustained if the principles concerning the circumstances in which words may be read into legislative provisions in order to give effect to the purpose of those provisions were satisfied. Those principles were addressed and summarised by McHugh JA (as his Honour then was) in *Bermingham v Corrective Services Commission of NSW (supra)*. Citing Lord Diplock in *Wentworth Securities Ltd v Jones* [1980] AC 74, McHugh JA summarised the principles thus (at 302):

> "First, the court must know the mischief with which the Act was dealing. Secondly, the court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved. Thirdly, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect."

In *Wentworth Securities* Lord Diplock had added the following observations in relation to the third requirement (at 106):

> "Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a

> written law which Parliament has passed. Such an attempt crosses the boundary between construction and legislation. It becomes a usurpation of a function which under the constitution of this country is vested in the legislature to the exclusion of the courts."

26 The respondent seeks to support the reading of cl 13(4) as including reference to paragraph (e) of cl 8(2) on the premise that so to do is the only means by which cl 13(4) can be given work to do. I do not agree. As the applicant submitted, one can readily conceive of circumstances in which a subdivision is effected for the purpose of making a boundary adjustment (cl 8(2)(b)) or a subdivision for the purpose of creating a public reserve (cl 8(2)(d)) which involve consolidation of allotments. In such a case an allotment so created will not attract the dispensatory provisions of cl 13(3)(a) for the erection of a dwelling house unless the allotment so created has a minimum area of 40 hectares.

27 Lest it be thought that there is no apparent logic in the requirement for a minimum area of 40 hectares in some cases but not in that apparent lack of logic is no basis upon which to found the inference that words should be read into subclause (4). As explained by Tobias JA in *Calleja v Botany Bay City Council* [2005] NSWCA 337; 142 LGERA 104 at [25], "to seek planning logic in planning instruments is generally a barren exercise". In similar vein, Basten JA in *Hastings Co-operative Ltd v Port Macquarie Hastings Council* [2009] NSWCA 400 observed (at [39]) that "the promotion of logic and consistency provides no basis for a court to rewrite a planning instrument."

A subdivision consolidating allotments?

28 As has already been noticed, it is fundamental to the submission made on behalf of the respondent that the subdivision created upon registration of Deposited Plan 1083305 was 'a subdivision consolidating allotments'. That is said because the land thereby subdivided is a parcel of land

comprised of 4 lots in a nominated deposited plan together with a further area in an Old System conveyance. The detail of the parcel comprising the subdivided land as noted on DP 1083305, is noted at [1]. The apparent purpose of that subdivision was to divide the identified parcel into 2 lots.

29 It is contended by the respondent that the purpose for which the subdivision was created was the purpose of consolidation of allotments. I do not agree. For the reasons identified in the preceding paragraph, the purpose of the subdivision, objectively judged, was the creation of 2 allotments from a parcel of land, the components of which were in common ownership. Reference to a *purpose* in cl 13(4) must be a reference to the ultimate object sought to be achieved by the subdivision and not to the intermediate consequence of an amalgamation of areas within a parcel of land which is the subject of intended division. This distinction, so it seems to me, is supported by the terms of cl 8(2) which identifies a number of specific objectives of subdivision which are an end in themselves, as distinct from reflecting steps along the path to reaching a single overriding purpose.

30 In support of its submissions that the subdivision approved by the respondent on 8 December 2004 and registered as Deposited Plan 1083305 was not a subdivision consolidating allotments, the applicant refers to the provisions of s 4B of the EPA *Act*. That section relevantly provides as follows:

> **"4B Subdivision of land**
>
> (1) For the purposes of this Act, ***subdivision of land*** means the division of land into 2 or more parts that, after the division, would be obviously adapted for separate occupation, use or disposition.

(2) Without limiting subsection (1), ***subdivision of land*** includes the procuring of the registration in the office of the Registrar-General of:

(a) a plan of subdivision within the meaning of s 195 of the *Conveyancing Act* 1919

...

(3) However, ***subdivision of land*** does not include:

...

(e) the procuring of the registration in the office of the Registrar-General of:

(i) a plan of consolidation, a plan of identification or a miscellaneous plan within the meaning of s 195 of the *Conveyancing Act 1919*

..."

31 The two definitions from s 195 of the *Conveyancing Act* 1919 referred to in s 4B of the *EPA Act* are relevantly as follows:

"***plan of consolidation*** means a plan that shows the consolidation of two or more existing lots into a single lot, where there is no simultaneous redivision of them into two or more lots ...

plan of subdivision means a plan that shows:

...

(b) the consolidation of two or more existing lots and their simultaneous redivision, along new boundaries, into two or more new lots, ...

... but does not include a plan of consolidation or a plan for identification."

32 These provisions identify a synergy between s 4B of the EPA *Act* and s 195 of the *Conveyancing Act* which requires, in the process of interpretation, that such synergy be recognised. This synergy, so it seems to me, has the effect, when applied to the provisions of the LEP (*cf.* s 11 of the *Interpretion Act* 1987) that a distinction must be drawn between a 'subdivision' that consolidates allotments only and a 'subdivision' that effects a subdivision into two or more lots, albeit that the process involved in the latter requires the grouping together of a number of lots so as to constitute a single parcel of land which is then simultaneously divided into 2 lots.

33 So to approach the interpretation of the instrument is consistent with the principle of interpretation that context be considered at the outset of the process of interpretation and not merely to address any perceived ambiguity (*CIC Insurance Limited v Bankstown Football Club Limited* [1997] HCA 2; 187 CLR 384 at 408; *Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc* [2000] NSWCA 65; 48 NSWLR 548 at 575 [107]). The particular context which informs my conclusion is the distinction which appears to be drawn in cl 8 between subdivisions generally and those particular forms of subdivision identified in subclause (2) of that clause.

34 In summary, I have concluded that cl 13(4) is not engaged by the present development application. The subdivision which resulted in the creation of Lot 100 does not fall within any of the specific purposes of subdivision identified by reference to cl 8(2) in subsection (4) nor is it an allotment created by "a subdivision consolidating allotments". It is a subdivision that created 2 allotments from a parcel of land which was the aggregation of 5 existing allotments.

35 As I have earlier noticed, it is accepted by the respondent that Lot 100 is a lot which was approved after 7 December 1960 and therefore cl 13(3) is

engaged so as to make permissible, with consent, the erection of a dwelling house on that Lot.

36 For these reasons the separate question should be answered as follows:

> Q *Whether upon the proper interpretion of Maitland Local Environmental Plan 1993 the erection of a dwelling house on land at Oakhampton, being Lot 100 in Deposited Plan 1083305, is prohibited development.*
>
> A. *No*

****

I CERTIFY THAT THIS AND THE 14 PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR THE JUDGEMENT OF THE HONOURABLE JUSTICE MALCOLM CRAIG

.....
Associate

Date 18/3/2010

Appendix TWO
Extracts from Maitland Rural Strategy and Lower Hunter Regional Strategy

(b) Significant Vegetation

The vast majority of Maitland's remnant bushland is located in rural areas. As such the Maitland Greening Plan, adopted by Council in 2002, is of considerable importance to the rural areas of the LGA.

There is significant detail in the Greening Plan regarding the conservation of vegetation in rural areas. For the most part, conservation measures are voluntary. However, there may be instances where a particular vegetation community in a particular location is so important that it requires regulatory controls to protect its conservation value. This may require the inclusion of these areas in an environmental protection zone. The objectives for such areas would include:

- *The protection of biodiversity and high conservation areas by preventing the extent of native vegetation loss.*
- *The conservation and enhancement of flora and fauna habitat and habitat corridors by minimising the extent of vegetation loss and encouraging regeneration of indigenous species.*

(c) Subdivision Standards

Clause 11 of Maitland Local Environmental Plan 1993 (LEP) provides the minimum allotment sizes for rural zoned land.

The current development standard for land zone 1(a) and 1(b) is 40ha. This minimum rural subdivision standard was determined in the 1970's by the former State Planning Authority. It was established by the State Government in an attempt to prevent ad hoc subdivision and fragmentation of rural lands.

At present there is no shortage of rural land holdings in Maitland that are less than 40 hectares. An assessment of lot sizes is provided in Part 1 Section 3.3(a) of the Strategy.

Land within the 1(b) Secondary Rural zone is highly fragmented due to a long history of intensive agricultural land use and the lack of subdivision controls in the past. Many of these small lots form part of larger holding. However, there are also many small lots in separate ownership. These lots tend to be unsuitable for economic

agricultural activities and encourage unsustainable agricultural practices and non-agricultural land uses. Some of these lots have dwellings or dwelling entitlements, many of which are in isolated and/or in inappropriate locations.

Increasing subdivision rights in rural areas may have negative effects by creating small area farms that tend to reduce the efficiency and intensity of agricultural production. Additional smaller lots may also increase the potential for conflict between land users and reduce the overall economic and environmental sustainability of existing farming practices.

Having regard to the above, it is intended to retain the 40 ha development standard to limit any further fragmentation of land in the proposed Agricultural Production and General Rural Zones. Council officers will also work with the Department of Primary Industries to identify if a more appropriate minimum rural lot size is required for the Maitland local government area.

The 40 ha standard will not prevent subdivision for boundary adjustments or public purposes. As a general principle, new agriculture uses and consolidation of allotments will be encouraged in the proposed Rural Production Zone.

In order to achieve the specific objectives of the proposed Rural Fringe Zone, new provisions for subdivision standards will be required. This zone will encourage land use and subdivisions for rural living opportunities that can achieve certain environmental outcomes. The size of allotments should only be determined after a full and proper environmental assessment of the urban capability has been carried out. If a merit-based assessment proves to be too difficult to implement, it may be necessary to introduce a minimum subdivision development standard. However, this may defeat the purpose of the proposed zone.

It may be appropriate to encourage the use of Community Title Subdivision in the proposed Rural Fringe Zone to achieve the objectives of vegetation management and better environmental outcomes. Matters relating to this proposed zone would need to be fully canvassed before any final determination on the appropriate subdivision development standards. This may be a matter best dealt with in a subsequent review of the MUSS.

Rural landscape and rural communities

BACKGROUND

Rural land has played a historically significant role in the settlement and development of the Lower Hunter Region. Although the Lower Hunter is now the sixth largest urban settlement in Australia, rural land still comprises approximately 80 per cent of all land within the Region.

These rural areas will continue to have significant value associated with their social and cultural heritage, scenic amenity, recreational value, rural production role, current and future tourism opportunities and rural living opportunities.

The Lower Hunter's rural lands contain rural industries such as agriculture, extractive industry and mining and natural areas that are of environmental significance and provide valuable regional open space. The rural lands enhance the landscape, contributing to scenic amenity, recreation and tourism opportunities and a sense of place.

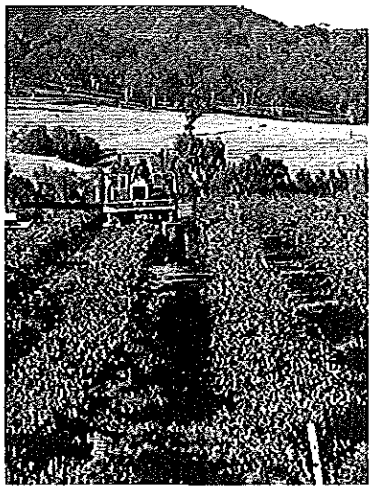
In terms of productivity, the rural lands of the vineyards district and the cultivated floodplain of the Hunter River provide the greatest return per hectare (apart from intensive industries such as poultry farming). The vineyards district experiences pressure for development that is often inconsistent with its rural/grape-growing character. Development in the vineyards district, therefore, needs to be carefully managed to avoid detracting from its character.

Rural residential development provides for those who desire to reside in a rural area without having to commit to the purchase of a working farm. This desire is catered for with a large supply of existing small rural holdings in the general rural zone (estimated to be approximately 7000) that is effectively being used for rural living without significant agricultural production. In addition, there is currently almost 7000 hectares of land zoned for rural residential purposes in the Lower Hunter. To further supplement that, another 700 hectares of land has been identified for rural residential development within endorsed local council strategies, which is yet to be rezoned.

Appropriate development of rural lands can contribute to the character, economy and social fabric of the Region and revitalise rural communities. However, these areas are also subject to many competing and potentially conflicting pressures that have the potential to damage some of their most valuable and irreplaceable attributes. Inappropriate rural residential development has the potential to conflict with agricultural activities, reduce agricultural viability and increase environmental damage.

OUTCOMES

The rural character of the Region is recognised and protected in local environmental plans. This includes protecting highly valued



agricultural lands (such as the vineyards district) from urban and rural-residential encroachment as well as maintaining the character of small rural villages.

Existing opportunities for rural residential development provided in local environmental plans, endorsed local council strategies and in the large supply of existing small rural holdings is maintained.

ACTIONS

- The scale of new development within and adjacent to existing villages and rural towns must respect and preserve their character, scale, cultural heritage and social values.
- Local environmental plans are to maintain rural zoning for regionally significant agricultural land including the vineyard district as defined by the existing 1(v) zone in Cessnock Local Environmental Plan and the irrigated floodplains.
- Local environmental plans are to recognise any additional regionally significant agricultural land identified by the State Government through an agreed upon methodology consistent with the objectives of the Regional Strategy.
- Provide a consistent approach to the zoning system in rural lands through the Standard Instrument (Local Environmental Plans) Order 2006 and ensure that access to resource lands (including mineral resources) are maintained and protected from incompatible and inappropriate uses.
- Recognise that mining is a transitional land use and that former mining land offers opportunities for both conservation and development outcomes when activities are completed.
- Any future rezoning proposal for rural-residential development, beyond areas already available or identified, should be:
  - > consistent with the Sustainability Criteria (Appendix 1)
  - > consistent with an endorsed local council strategy
  - > maintain the character and role of the existing village centre.
- Local environmental plans and other relevant planning provisions will be required to align with the strategic intentions contained in the Regional Strategy by:
  - > limiting further dwelling entitlements in rural areas
  - > maintaining or increasing minimum lot sizes for rural subdivisions that confer a new dwelling entitlement (where established by an appropriate methodology as agreed by the Department of Primary Industries).

Appendix THREE
Council Report and Resolution
13 July 2010

10.5 LAND AND ENVIRONMENT COURT APPEAL - MAITLAND CITY COUNCIL VS ATKINS IN RELATION TO A DEVELOPMENT APPLICATION FOR A DWELLING IN A RURAL ZONE AT OAKHAMPTON.

File No:	**DA 07-1285 & 85/1**
Attachments:	**1. Draft LEP Amendments**
Responsible Officer:	**Leanne Harris - Group Manager Service Planning and Regulation** **David Simm - Manager Development & Environment**
Author:	**Stephen Punch - Principal Planner**
Previous Items:	**10.2 - Land and Environment Court Appeal - Maitland City Council vs Atkins in relation to a Development Application for a dwelling in a rural zone at Oakhampton. - Ordinary Council - 8 June 2010**

EXECUTIVE SUMMARY

At its meeting on 22 June 2010, Council deferred its determination of this matter pending a briefing regarding the outcomes of the Land and Environment Court proceedings and an explanation of the proposed changes to the Maitland Local Environmental Plan (LEP) 1993. This briefing has been held and the matter is now re-presented before Council.

The purpose of this report is to advise the Council of the outcome of Land and Environment Court proceedings in relation to Council's refusal of Development Application No.07-1285 for a rural dwelling located on Lot 100, DP 1083305, Oakhampton Station Lane, Oakhampton.

The report also discusses the implications for the continued operation of the Maitland LEP 1993 and recommends an LEP amendment to give certainty to the circumstances where a dwelling entitlement can be granted.

OFFICER'S RECOMMENDATION

THAT

1. **In accordance with Section 55 of the Environmental Planning and Assessment Act 1979, a planning proposal be submitted to the Department of Planning to amend the Maitland Local Environmental Plan 1993 for the purpose of clarifying subdivision controls and dwelling entitlements for rural land.**

2. **If the planning proposal is given a gateway determination to proceed, consultation with the community in accordance with Section 57 of the Environmental Planning and Assessment Act 1979 and the directions of the gateway determination be undertaken.**

3. **A further report be presented to Council following the public consultation process.**

COUNCIL RESOLUTION

THAT

1. **In accordance with Section 55 of the Environmental Planning and Assessment Act 1979, a planning proposal be submitted to the Department of Planning to amend the Maitland Local Environmental Plan 1993 for the purpose of clarifying subdivision controls and dwelling entitlements for rural land.**

2. **If the planning proposal is given a gateway determination to proceed, consultation with the community in accordance with Section 57 of the Environmental Planning and Assessment Act 1979 and the directions of the gateway determination be undertaken.**

3. **A further report be presented to Council following the public consultation process.**

Moved Clr Wethered, Seconded Clr Geoghegan

CARRIED

The Mayor in accordance with Section 375A of the Local Government Act 1993 called for a division.

The division resulted in 13 for and 0 against, as follows:

For:	Clr Baker	Against:
	Clr Blackmore	
	Clr Casey	
	Clr Fairweather	
	Clr Garnham	
	Clr Geoghegan	
	Clr Humphery	
	Clr Meskauskas	
	Clr Mudd	
	Clr Penfold	
	Clr Procter	
	Clr Tierney	
	Clr Wethered	

10.5 LAND AND ENVIRONMENT COURT APPEAL - MAITLAND CITY COUNCIL VS ATKINS IN RELATION TO A DEVELOPMENT APPLICATION FOR A DWELLING IN A RURAL ZONE AT OAKHAMPTON.

File No:	**DA 07-1285 & 85/1**
Attachments:	**1. Draft LEP Amendments**
Responsible Officer:	**Leanne Harris - Group Manager Service Planning and Regulation** **David Simm - Manager Development & Environment**
Author:	**Stephen Punch - Principal Planner**
Previous Items:	**10.2 - Land and Environment Court Appeal - Maitland City Council vs Atkins in relation to a Development Application for a dwelling in a rural zone at Oakhampton. - Ordinary Council - 8 June 2010**

EXECUTIVE SUMMARY

At its meeting on 22 June 2010, Council deferred its determination of this matter pending a briefing regarding the outcomes of the Land and Environment Court proceedings and an explanation of the proposed changes to the Maitland Local Environmental Plan (LEP) 1993. This briefing has been held and the matter is now re-presented before Council.

The purpose of this report is to advise the Council of the outcome of Land and Environment Court proceedings in relation to Council's refusal of Development Application No.07-1285 for a rural dwelling located on Lot 100, DP 1083305, Oakhampton Station Lane, Oakhampton.

The report also discusses the implications for the continued operation of the Maitland LEP 1993 and recommends an LEP amendment to give certainty to the circumstances where a dwelling entitlement can be granted.

OFFICER'S RECOMMENDATION

THAT

1. **In accordance with Section 55 of the Environmental Planning and Assessment Act 1979, a planning proposal be submitted to the Department of Planning to amend the Maitland Local Environmental Plan 1993 for the purpose of clarifying subdivision controls and dwelling entitlements for rural land.**

2. **If the planning proposal is given a gateway determination to proceed, consultation with the community in accordance with Section 57 of the Environmental Planning and Assessment Act 1979 and the directions of the gateway determination be undertaken.**

3. **A further report be presented to Council following the public consultation process.**

LAND AND ENVIRONMENT COURT APPEAL - MAITLAND CITY COUNCIL VS ATKINS IN RELATION TO A DEVELOPMENT APPLICATION FOR A DWELLING IN A RURAL ZONE AT OAKHAMPTON. (Cont.)

BACKGROUND

In October 2002 the Minister for Planning amended the Maitland Local Environmental Plan 1993 in the following manner:

1. Added a note to the end of Clause 8 as shown in italics below.

What subdivision controls apply?

1) Land to which this plan applies shall not be subdivided except with the consent of the Council.

2) Nothing in this plan shall prevent the Council from granting consent to a subdivision for any of the following:

a) widening or opening of a public road;
b) making an adjustment to a boundary between allotments, being an adjustment that does not involve creating any additional allotment;
c) rectifying an encroachment upon an allotment;
d) creating a public reserve;
e) consolidating allotments; or
f) excising from an allotment land which is, or is intended to be, used for public purposes, including drainage purposes, bushfire brigade or other rescue service purposes or public conveniences.

Note: *Clause 13(4) prevents the erection of a dwelling house on an allotment of land in Zone 1(a), (b), (c) or (d) created by a subdivision under subclause 2(a), (b), (c), (d) or (f), except an allotment with a minimum area of 40 hectares created by a subdivision consolidating allotments.*

2. Included new Clause 13(4) as shown in italics after Clause 13(3).

3) Not withstanding subclause (2), Council may consent to the erection of a dwelling house on land in Zone 1(a), 1(b), 1(c) or 1(d) if:

a) the land comprises an allotment the subdivision of which was approved by Council after 14 April 1972, or

b) the dwelling house is to replace an existing habitable dwelling house.

4) Subclause 3 (a) does not apply to an allotment created before or after the commencement of this subclause by a subdivision consented to by the Council for a purpose set out in clause 8(2)(a), (b), (c), (d) or (f), except an allotment with a minimum area of 40 hectares created by a subdivision consolidating allotments.

Clause 13(4) together with the note to Clause 8 were intended to prohibit the erection of a dwelling on an allotment less than 40 hectares in area created by, amongst other things, consolidation of lots or by a boundary adjustment (where no additional lots result).

The aim of amending the LEP in this way was to close a loophole whereby some landowners were undertaking consolidation and boundary adjustments resulting in lots below 40ha in area and then making application for a dwelling entitlement for these lots under Clause 13(3)(a) claiming that the consolidation or boundary adjustment qualified as a subdivision approved after the 14 April 1972. The potential result was a significant increase in the number of dwellings on rural holdings that did not constitute a 'separate parcel' under the LEP and were never intended to contain dwellings.

Council have consistently applied Clause 13(4) of the LEP since its introduction in 2002 to ensure that dwelling entitlements have not been granted in relation to lots under 40 hectares in area resulting from lot consolidation and/or boundary adjustment applications.

In December 2004, Council approved Development Application No. 04-4176 which proposed the consolidation of six lots being Lots 1-4, DP 217178 and Lots 6 and 7, No.92 Oakhampton Station Road, Oakhampton and the creation of two new lots (Lots 100 and 101) each with an area of around 10 hectares. Proposed Lot 101 contained the existing dwelling on the holding. The application was deemed to be a subdivision consolidating lots and boundary adjustment. On the basis that the resulting lots contained an area of less than 40 hectares, an advice was provided with the development consent indicating that Lot 100 (the vacant lot) did not have an entitlement for a dwelling under Clause 13(4) of the LEP.

Notwithstanding the advice provided to the applicant on DA 04-4176 regarding the prohibition of a dwelling on Lot 100, Development Application No. 07-1285 was lodged with the Council in May, 2007 seeking Council's consent to the erection of a dwelling on this lot. The application was subsequently refused by the Council under delegated authority on 12 November, 2009 after lengthy discussions with the applicant on the issue of permissibility under the Maitland LEP 1993. The reason for the refusal of the application was as follows:

> *"Clause 13 of the Maitland Local Environmental Plan 1993 (LEP) makes no provision for the erection of a dwelling on the subject lot, thus the proposal is prohibited development pursuant to Clauses 10(5) and 13 of the LEP (Section 79C(1)(a)(i) of the EP&A Act, 1979)."*

In December 2009, Council received notice of an appeal by the landowner to the NSW Land and Environment Court in relation to Council's refusal of DA 07-1285. The applicant's appeal was based on an alternate interpretation of Clause 13 of the Maitland LEP 1993 which suggested that the application for the dwelling could be legitimately approved under Clause 13(3)(a) because the subject allotment (Lot 100) could only have been created as a 'subdivision' and therefore Clause 13(4) did not apply. A report on the receipt of the Appeal was provided to Council on the 23rd February 2010.

FINDINGS OF THE NSW LAND AND ENVIRONMENT COURT

The matter was brought before Justice Malcom Craig in the NSW Land and Environment Court on 4 March 2010. Justice Craigs formal decision was handed down on 18 March 2010. Following this, Court Orders were made in relation to the case on the 19th April and entered on the 5th May and also on the 16th April which were entered on the 11th May. Council received copies of the final sealed Orders on the 17th May.

Council argued that Clause 13(4) of the LEP would only permit a dwelling in the case of a 'subdivision consolidating allotments' where the allotment(s) achieved a minimum area of 40 hectares. Council further argued that Clause 13(4) can only be given meaning if Clause 8(2)(e) referring to "consolidating allotments" is inferred in its wording – that is, the exclusionary terms of the last line of Clause 13(4) have no proper work to do unless Clause 8(2)(e) is inferred. Council drew to the attention of

the Court that in drafting Clause 13(4) the Council had specifically included the reference to Clause 8(2)(e) but that this reference was deleted from the final version of the clause by the NSW Parliamentary Counsel.

In summary, the Court found as follows:

- Council cannot infer the inclusion of a reference to Clause 8(2)(e) within Clause 13(4). The LEP is an instrument of the Minister for Planning not the Council and the fact that a reference to Clause 8(2)(e) was not included in Clause 13(4) is not evidence in itself that the structure of Clause 13(4) is in error. It was also held "*that apparent lack of logic is no basis upon which to found ... inference*", in relation to drafting omissions in the Maitland LEP 1993. These issues relate to how Council has interpreted consolidation of land for the purpose of dwelling entitlements. Clause 13(4) does in fact have meaning as written as the last sentence excepting allotments with a minimum area of 40 hectares created by a subdivision consolidating allotments could conceivably apply to one of the alternative scenarios listed under Clause 8(2) even if it has no direct application to "consolidating allotments" (Clause 8(2)(e)).

- The categorisation of the proposal by the Council as a 'subdivision consolidating allotments' was not proper on the basis that the 2004 development application proposed a 2 lot subdivision from the original 6 lots. Consolidation would have only occurred if 1 lot had resulted from the amalgamation of all lots. The application is therefore properly categorised as a 'subdivision' which resulted in the creation of 2 lots. On this basis, Clause 13(4) does not apply. The subdivision resulting in the creation of Lots 100 and 101 constitutes a subdivision described under Clause 13(3)(a) of the Maitland LEP 1993 and the erection of a dwelling on Lot 100 is therefore permissible.

IMPLICATIONS FOR FUTURE PLANNING

From Council's perspective the Court's decision has significant implications for rural planning across the city via the operation of the Maitland LEP 1993. The structure of Clause 13(4) does not achieve the purposes which Council had envisaged when it initiated the LEP amendment in 2002 - preventing fragmentation and overdevelopment of rural land by limiting the establishment of dwellings in Rural 1(a) and Rural 1(b) zones to lots that have an area of over 40 hectares or to lots that qualify as a 'separate parcel' as defined under Clause 13(1) of the Maitland LEP 1993. Any proposal that constitutes a 'hybrid' type of application as occurred under the Atkins scenario - a partial consolidation and boundary adjustment resulting in more than 1 allotment - would be categorised as a subdivision for the purposes of the LEP and subsequently qualify for a dwelling under Clause 13(3)(a).

It is considered that both Clauses 8(2) and 13(4) of the Maitland LEP 1993 should be amended to give certainty to their interpretation and operation. It is necessary to make these amendments to MLEP 1993 now as they will have forward implications through the proposed dwelling entitlement clause in the Maitland Local Environmental Plan 2011 (ref. 7.3) that will endow dwelling entitlements on allotments that had entitlements created by subdivisions in MLEP 1993. A copy of the draft LEP amendments are included as **Attachment 1** to this report. It should be noted that two alternative scenarios for the wording of the amendments are being provided for review by the NSW Parliamentary Counsel as it is uncertain how

"consolidation" will be interpreted by Parliamentary Counsel, and how the implication of *Atkins v Maitland City Council* will affect this interpretation.

FINANCIAL IMPLICATIONS

Council's costs in running the appeal were approximately $26 300 funded from within the existing Service Planning and Regulation legal expenses (appeals) budget allocation.

POLICY IMPLICATIONS

This matter has no specific policy implications for Council.

STATUTORY IMPLICATIONS

There are no statutory implications under the Local Government Act 1993 with this matter. The recommended amendment of the Maitland LEP 1993 will resolve the problem of lack of clarity in the drafting of Clauses 8 and 13(4) of the existing Maitland LEP 1993.

CONCLUSION

The legal testing of Clauses 8 and 13(4) of the Maitland LEP 1993 via the Atkins appeal to the NSW Land and Environment Court has revealed to Council some major deficiencies in the structure of the clauses meaning that they fail to deliver what was originally intended when introduced to the LEP in 2002. It is recommended that a draft LEP be prepared amending the clauses in such a way as to provide certainty to the interpretation and application of the rural dwelling provisions of the instrument. This amendment should be undertaken prior to the introduction of LEP 2011 as the new citywide instrument will recognise those dwelling entitlements existing under the current 1993 LEP.