Land and Environment Court

New South Wales

Case Name:	Johnson v Coffs Harbour City Council
Medium Neutral Citation:	[2018] NSWLEC 1094
Hearing Date(s):	25 January 2018, written submissions received on 2 and 12 February 2018
Date of Orders:	28 February 2018
Decision Date:	28 February 2018
Jurisdiction:	Class 1
Before:	Gray C
Decision:	(1) The appeal is dismissed. (2) The development application (0795/17DA) for the subdivision of lots 200 and 201 DP 1183461 at 7 Dirty Creek Road, Dirty Creek, is refused. (3) Exhibits A and 3 are returned.
Catchwords:	DEVELOPMENT APPEAL - Sub-division of two lots by adjusting the boundary – existing irregular lot configuration – alteration sought to boundary to align with physical characteristics of land - whether the alteration constitutes a boundary adjustment
Legislation Cited:	Coffs Harbour Local Environmental Plan 2013 Environmental Planning and Assessment Act 1979 ss 79, 97 Land and Environment Court Act 1979 s 34
Cases Cited:	Barnes v Dungog Shire Council [2012] NSWLEC 1021 McCabe & Others v Blue Mountains City Council (2006) 145 LGERA 86; [2006] NSWLEC 176 Ousley Pty Ltd v Warringah Shire Council [1999] NSWLEC 143 Sutherland Shire Council v Benedict Industries Pty Ltd

	(No 8) [2017] NSWLEC 4
Category:	Principal judgment
Parties:	Coral Jean Johnson (Applicant) Coffs Harbour City Council (Respondent)
Representation:	Counsel: Mr R Fox, Solicitor (Applicant) Mr M Winram, Solicitor (Respondent) Solicitors: Fishburn Watson O'Brien (Applicant) Maddocks Lawyers (Respondent)
File Number(s):	2017/266514
Publication Restriction:	No

JUDGMENT

1 **COMMISSIONER:** About 45km north of Coffs Harbour, Ms Johnson owns two lots of land at 7 Dirty Creek Road, Dirty Creek, legally identified as Lots 200 and 201 in DP 1183461. Presently, Lot 201 is divided into 3 parcels of land separated by road and by Lot 200. She seeks development consent to change the boundaries of the two lots so that they reflect the physical separation of Lot 200 and the northern parts of Lot 201 by Solitary Islands Way from the southern part of Lots 201. Her development application was refused by Coffs Harbour City Council ("the Council") on 18 August 2017. Ms Johnson appeals against that decision pursuant to s 97 of the *Environmental Planning and Assessment Act 1979* ("EPA Act").

2 The appeal was listed before me for a conciliation conference pursuant to s 34 of the *Land and Environment Court Act 1979* ("LEC Act"), which commenced with a site view on 25 January 2018. The parties were unable to reach an agreement at the conciliation, but agreed to me disposing of the proceedings on the basis of what occurred at the conciliation pursuant to s 34(4)(b) of the LEC Act. Both parties also made further submissions following the site view.

3 The current configuration of lots 200 and 201 is depicted in Figure 1, and Figure 2 depicts the new boundaries that are sought in the development application.

4 The consequence of the applicable planning framework, which is set out below, is that the only way in which the proposal is permissible with development consent is if it subdivides land "by adjusting the boundary between adjoining lots" and satisfies the criteria for such an adjustment. The Council's position is that the proposal neither subdivides land "by adjusting the boundary" nor meets the criteria for that adjustment. The Council also opposes the application on the basis that a subdivision in the form sought would be against the public interest.

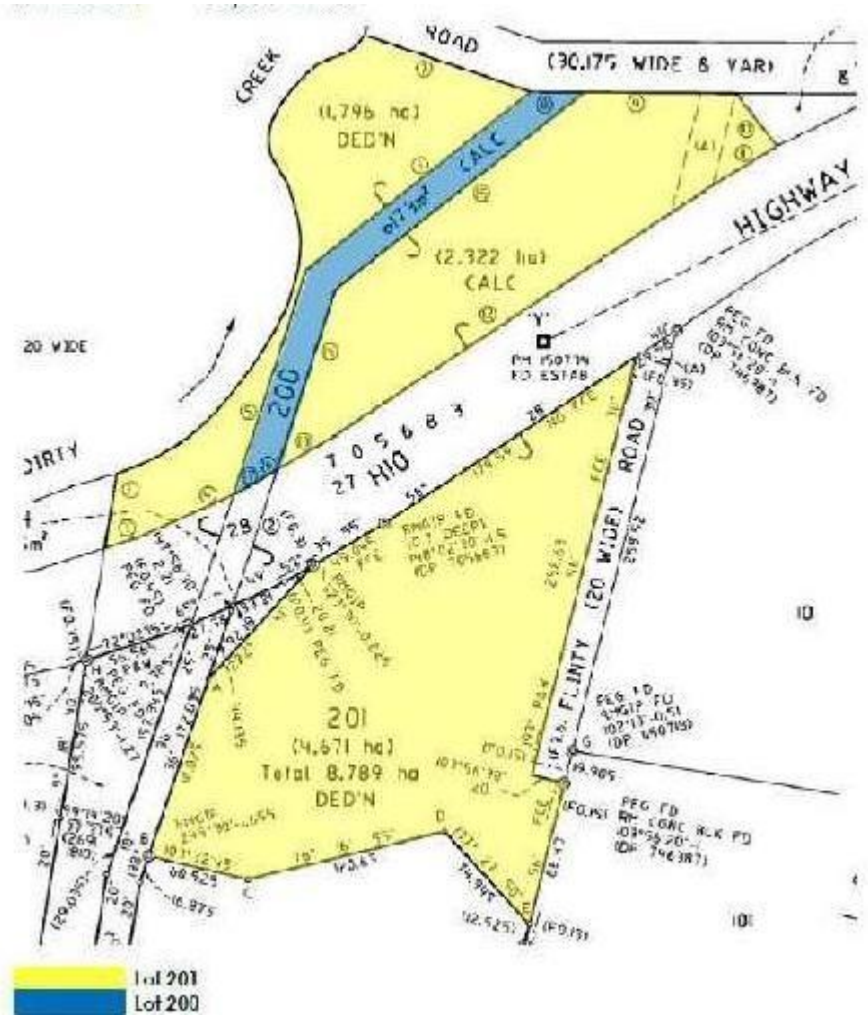

Figure 1: Current configuration of the lots

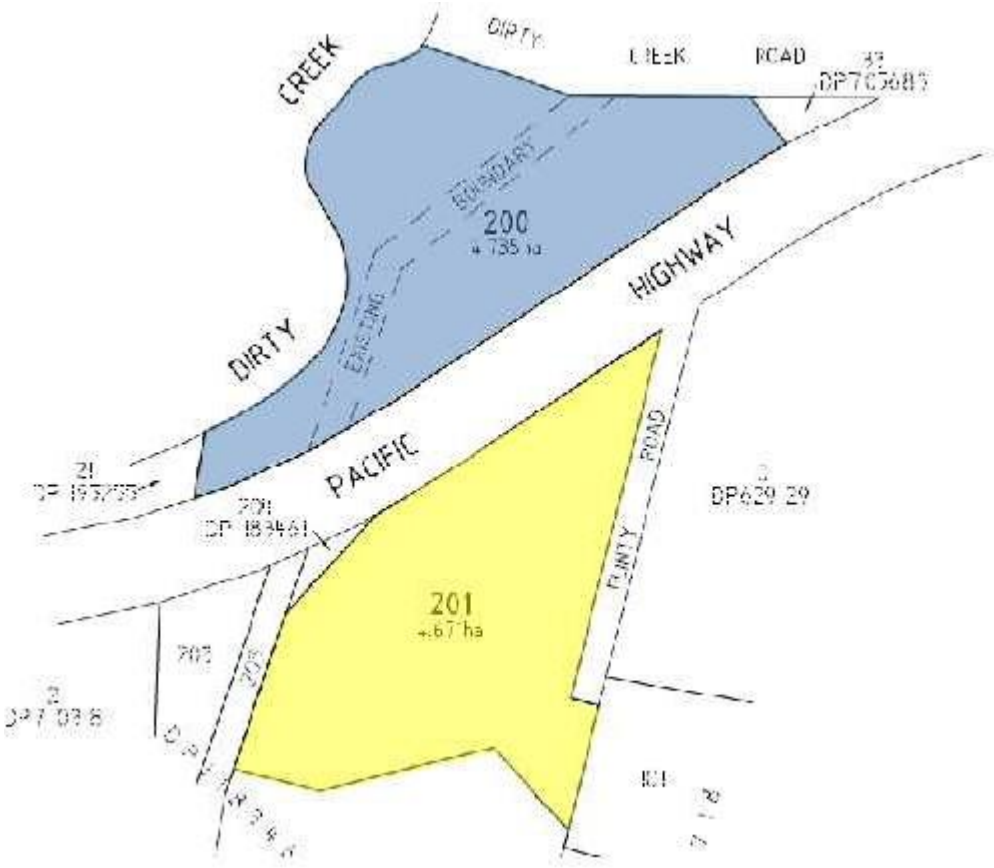

Figure 2: Proposed configuration of the lots

5 For the reasons below I have determined that, despite my view that the proposed subdivision creates a better planning outcome in the circumstances, the terms of the planning instrument that describe the permissible development as the subdivision of land “by adjusting the boundary between adjoining lots” are not sufficiently broad to encompass a subdivision of the type sought in the application. I find that the change to the boundaries that is sought, and the size of the increase to Lot 200, is so significant that it cannot be considered an “adjusting”. As a result, I am compelled by the EPA Act to refuse the application.

The site and the locality

6 The site the subject of the application comprises the two lots depicted in Figure 1. Lot 200 DP 586451 currently has an area of 6,173m2 and bisects part of Lot 201. Lot 201 DP 1031045 currently has an area of 8.789 ha and is held in three separate parcels, with 4.671 ha south of Solitary Islands Way (formerly the Pacific Highway) and two parcels north of Solitary Islands Way (formerly the Pacific Highway) and bisected by Lot 200, of 2.322 ha and 1.796 ha. Lot 200 is

uncharacteristic of the subdivision pattern of the area, and historically was created for the purpose of a future public road that didn't eventuate (and that is not likely to ever eventuate). The site view established that there are no physical characteristics of the land in Lot 200 that distinguish it from Lot 201, and there are no markings on the site that define the boundary between Lots 200 and 201.

7 There are two dwellings located within the site, one on the northern side of Solitary Islands Way and the other on the southern side of Solitary Islands Way. The dwelling on the northern side of Solitary Islands Way straddles both Lot 200 and 201 and is known as 7 Dirty Creek Road, Dirty Creek. The evidence given on site is that the erection of the dwelling to the north pre-dated the plan of subdivision that created the separate lot that eventually became Lot 200 and therefore was likely erected prior to there being any requirement to obtain planning approval or development consent. The dwelling is accessed from Dirty Creek Road using a gravel driveway. The southern portion of Lot 201 contains a dwelling occupied by Ms Johnson, which is accessed from Flinty Road using a separate driveway, and is also known as 12 Flinty Road, despite it being located at 7 Dirty Creek Road.

8 Both dwellings are equipped with rainwater tanks and are serviced by their own onsite wastewater management systems. Both dwellings are connected to electricity and are entirely independent of each other. Solitary Islands Way severs the site, and there is no access between the area of the site north of Solitary Islands Way and that to the south. The only connection between the two areas is a stormwater culvert that runs underneath Solitary Islands Way, which is inundated in periods of rain.

9 The site has an undulating terrain with gentle slopes within the lower portions and steeper slopes within the upper portions. The vegetation on the site consists predominately of Wet and Dry Sclerophyll forest, and there is a mapped area of remnant native vegetation in the south west corner of the southern portion of Lot 201. Additionally, there is a mapped area of Lowland Rainforest located along Dirty Creek Road in the north-western portion of Lot 201.

10 The site is surrounded by small rural holdings used for horticulture and blueberry production, which vary in size from 2.008 ha to 57.36 ha, with four of the five surrounding holdings of less than 20 ha. The new Pacific Motorway runs along the southern boundary of the site, and Dirty Creek runs along the western boundary.

11 The site is also the subject of a Property Vegetation Plan entered into voluntarily by Ms Johnson (under the now repealed *Native Vegetation Act 2003*), which requires the conservation of 6 ha of Blackbutt – Tallowwood dry grassy open forest and covers area across each of the lots.

Planning Controls

12 Section 79C(1)(a) of the EPA Act requires that the Court, in exercising the functions of the consent authority, consider the provisions of any applicable environmental planning instrument, development control plan, planning agreement, and regulations. Amongst other things, s 79C(1) also requires consideration of the likely impacts of the development, the suitability of the site for development, any submissions made, and the public interest.

13 Further, s 80(2) of the EPA Act makes it clear that consent cannot be granted to the subdivision of land if it contravenes a planning instrument, as follows:

> "(2) Despite subsection (1), the consent authority must refuse an application for development, being the subdivision of land, that would, if carried out, result in a contravention of this Act, an environmental planning instrument or the regulations, whether arising in relation to that or any other development."

14 Pursuant to the Coffs Harbour Local Environmental Plan 2013 ("CHLEP 2013") both lots are zoned RU2 Rural Landscape with a small area of land adjoining Dirty Creek in Lot 201 (895.72m2) zoned E2 Environmental Conservation. The entirety of Lot 200 is zoned RU2 Rural Landscape.

15 Clause 2.3(2) of the CHLEP 2013 requires the Court to "have regard to the objectives for development in a zone when determining a development application in respect of land within the zone". The zone objectives for the RU2 zone are:

> "• To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.
>
> • To maintain the rural landscape character of the land.

> • To provide for a range of compatible land uses, including extensive agriculture.
>
> • To minimise the fragmentation and alienation of resource lands."

16 The zone objectives for the E2 zone are:

> "• To protect, manage and restore areas of high ecological, scientific, cultural or aesthetic values.
>
> • To prevent development that could destroy, damage or otherwise have an adverse effect on those values."

17 The site is mapped as both Category 1 and Category 2 bushfire prone land in accordance with s 146 of the EPA Act, and is mapped in the Council's flood risk maps as within the indicative flooding area of Dirty Creek.

The provisions that relate to the subdivision of land

18 Clause 2.6 of the CHLEP 2013 provides that subdivision is permissible with development consent. However, cl 4.1 establishes a minimum lot size for the subdivision of land, and provides at (3) that:

> "(3) The size of any lot resulting from a subdivision of land to which this clause applies is not to be less than the minimum size shown on the Lot Size Map in relation to that land."

19 The minimum lot size applicable to the site is 40 ha.

20 Similarly, cl 4.1A provides for the subdivision of land in split zones, and requires that for a lot that contains both land in a rural zone and land in Zone E2, development consent can be granted to subdivide the lot if the land that is in the rural zone in the resulting lot is not less than the minimum lot size. This is set out as follows:

> "(2) This clause applies to each lot (an original lot) that contains:
>
> (a) land in a business, industrial, recreation, residential, rural or special purpose zone, and
>
> (b) land in Zone E2 Environmental Conservation.
>
> (3) Despite clause 4.1, development consent may be granted to subdivide an original lot to create other lots (the resulting lots) if:
>
> (a) in the case of a resulting lot that contains land in a rural zone—the land that is in the rural zone in the resulting lot is not less than the minimum size shown on the Lot Size Map in relation to that land, or
>
> (b) in the case of a resulting lot that contains land in a residential zone—the land in the residential zone in the resulting lot is not less than the minimum size shown on the Lot Size Map in relation to that land, or

(c) in the case of a resulting lot that contains land in a business, industrial, special purpose or recreation zone—the consent authority is satisfied that the area of the resulting lot, excluding any land in Zone E2 Environmental Conservation, is suitable for a use permitted in the relevant zone. (clauses 4.1 and 4.1A)"

21 For land in zones E2 and RU2 neither of these development standards can be varied by cl 4.6, which is the clause that permits exceptions to development standards in circumstances where to do would result in a better outcome. Specifically, cl 4.6(6) provides:

"(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard."

22 As a result, the present application relies upon cl 4.2D, which provides:

"(1) The objective of this clause is to facilitate boundary adjustments between lots if one or more lots do not meet the minimum lot size shown on the Lot Size Map in relation to that land and the objectives of the relevant zone can be achieved.

(2) This clause applies to land in the following zones:

(a) Zone RU2 Rural Landscape,

(b) Zone R5 Large Lot Residential,

(c) Zone E2 Environmental Conservation.

(3) Despite clause 4.1, development consent may be granted to subdivide land by adjusting the boundary between adjoining lots if one or more lots do not meet the minimum lot size shown on the Lot Size Map in relation to that land, and the consent authority is satisfied that:

(a) the subdivision will not create additional lots or the opportunity for additional dwellings, and

(b) the number of dwellings or opportunities for dwellings on each lot after the subdivision will be the same as before the subdivision, and

(c) the potential for land use conflict will not be increased as a result of the subdivision, and

(d) if the land is in Zone RU2 Rural Landscape, the agricultural viability of the land will not be adversely affected as a result of the subdivision.

(4) Before granting consent to development to which this clause applies the consent authority must be satisfied that the subdivision will not compromise

> the continued protection and long-term maintenance of any land in Zone E2 Environmental Conservation."

23 In order to enliven the power in cl 4.2D(3), it is necessary first to be satisfied that the application before the Court is one that subdivides land "by adjusting the boundary between adjoining lots". I then must be satisfied of the matters set out in (a) to (d). Only then can the merits of the application be considered.

Does the application seek to subdivide land "by adjusting the boundary between adjoining lots"?

24 Both parties agree that the decisions of the Court in *Ousley Pty Ltd v Warringah Shire Council* [1999] NSWLEC 143 and *McCabe & Others v Blue Mountains City Council* (2006) 145 LGERA 86; [2006] NSWLEC 176 set out the relevant principles on the question of whether an application constitutes an adjustment of the boundary between allotments.

Relevant principles

25 In *Ousley Pty Ltd v Warringah Shire Council*, Talbot J considered a subdivision under the now repealed provisions of State Environmental Planning Policy 4 – Development Without Consent and Miscellaneous Exempt and Complying Development (SEPP 4). Clause 6(b) of SEPP 4 permitted subdivision for the adjustment to a boundary between allotments, and provided that subdivision may be carried out without consent where it was "for the purpose of making an adjustment to a boundary between allotments, being an adjustment that does not involve the creation of any additional allotment".

26 In approaching the question as to whether the proposal constituted an adjustment to a boundary, Talbot J referred to the objectives and purposes of SEPP 4 and reached the conclusion at [16] that "the reference to "*an adjustment to a boundary*"… must be construed as being a re-arrangement of a boundary so that no significant changes are made to the configuration of any existing allotments." In particular, at [21], Talbot found that there is a "real element of degree", and that:

> "The extent of any changes must pay respect to the existing subdivision design and fit the prescription of an adjustment to a boundary between allotments **so that the resulting parcels of land bear some resemblance to the lots which existed before the subdivision**." [emphasis added]

27 In *McCabe & Others v Blue Mountains City Council*, Jagot J considered the ordinary meaning of the phrase "boundary adjustment" and found as follows:

> "I do not accept that the "ordinary and grammatical meaning" of the phrase "…for a boundary adjustment" embraces any and all alterations of a boundary that make land suitable for an applicant's requirements. I consider that the primary meaning conveyed by the clause, construed in its immediate and more general context, accords with the notion of **an alteration of a boundary by correction or regularisation, whether that correction or regularisation is to reflect actual conditions (such as physical features of the land or its zoning) or to achieve some other requirement or objective (for example, to render the use of land feasible or more practical)**. Hence, consistent with the observation of Cripps J in *Boast v Eurobodalla Shire Council*, unreported, NSWLEC, 20110/91, 22 November 1991 at pp 2 – 3, questions of fact and degree are involved." [emphasis added]

28 Jagot J also agreed with the principle espoused by Talbot J that the resulting parcels of land "should bear some resemblance to the lots which existed before the subdivision" (Talbot J, as cited by Jagot J in *McCabe & Others v Blue Mountains City Council* at [57]).

29 Jagot J also considered the purpose of allowing boundary adjustments as an exception to a prohibition on certain subdivisions, and stated:

> "I infer that the purpose of the provisions is to prohibit subdivision of such land other than in the limited circumstances identified so as not to enlarge, materially or significantly, the overall development potential of such land. Construing cl 34.4(c)(i) so as to permit subdivision by way of any and all alterations of a boundary (whether or not the resulting lots bear any resemblance to the existing lots) provided that no additional lots are created, does not accord well with that purpose."

30 These principles were applied by Commissioner Tuor in *Barnes v Dungog Shire Council* [2012] NSWLEC 1021, in which the Commissioner found on the facts of the case that (at [74]):

> "The subdivision is not for the purpose of a 'boundary adjustment' but the proposed development may accurately be described as the consolidation of Lot 182 DP 1156558 and Lot 4 DP 1033689 , and the subsequent subdivision of the consolidated lot into 2 lots. The purpose of the subdivision appears to be to create a small concessional type allotment so as to enable the erection of an additional dwelling on proposed Lot 40 in the future."

The parties' submissions

31 Ms Johnson submits that, consistent with the above principles, the Court can be satisfied that the proposal constitutes a boundary adjustment by reason of it being a correction of, and/or regularisation to reflect actual conditions being the physical separation of Lot 200 and the northern part of Lot 201 from the

southern part of Lot 201, including in respect of access, by reason of Solitary Islands Way. She submits that will render the use of the two allotments feasible and more practical as there is no formal or safe access suitable for any use of the land over or under the Pacific Highway between the northern and southern parts of Lot 201. Further, she submits that the proposal reflects that any agricultural use between the parts of Lot 201 north and south of the highway is already separated.

32 Ms Johnson also submits that the proposal is consistent with the objectives of the RU2 zone and will allow it to be used more purposefully, and that it formalises the way in which the land is presently used for rural living within two small holdings.

33 She also submits that in the context of the special physical constraints facing this site, the proposed lots bear some resemblance to the existing configuration, and that is sufficient to establish that it is a boundary adjustment. She says that one lot will continue to exist north of the highway and the other lot will continue to exist south of the highway both with the same uses and zoning.

34 Further, Ms Johnson points out that the Council has been satisfied with respect to similar applications, granting consent to proposals on the basis that they constitute a boundary adjustment in consents 0035/17DA and 0216/15DA.

35 The Council submits that the application does not constitute a boundary adjustment, and says that the proposal is an alteration for the purpose of making it attractive for a potential buyer. It relies on the comments of both Jagot J and Tuor C, who stated that a boundary adjustment does not include "any and all alterations of a boundary that make land suitable for an applicant's requirements". Accordingly, the Council says that in determining whether the development application is a 'boundary adjustment', the Court should not have regard to whether it will make the property more attractive to purchasers, or allow Ms Johnson to sell the sections separately.

36 The Council approaches the task of whether it fits the meaning of clause 4.2D of the CHLEP 2013 as one of characterisation. That is, the Council says that whether the proposal is for the purpose a boundary adjustment depends on

whether the proposal can truly be regarded as being for a boundary adjustment, and not another type of consolidation or subdivision. The Council says that this approach conforms to "legal tenets" for the characterisation of development expounded in *Sutherland Shire Council v Benedict Industries Pty Ltd* (No 8) [2017] NSWLEC 4. The Council therefore submits that the proposal constitutes a consolidation of Lots 200 and 201 and subsequent subdivision to create lots with respective land size of 4.735 ha and 4.67 ha, rather than a boundary adjustment for the purposes of cl 4.2D. The Council says that this is apparent because the boundary of Lot 200 is effectively disappearing, resulting in a deletion of Lot 200 and the subdivision of Lot 201 into two separate lots.

37 In response to the two previous consents issued by Council in relation to applications for boundary adjustment subdivisions, the Council says that one can be distinguished from the present proposal, as that application relied upon clause 4.2, and the other they concede was wrongly the subject of a grant of consent for a boundary adjustment.

The meaning of a subdivision "by adjusting the boundary between adjoining lots"

38 The Council's description of the task of determining whether the proposal is for boundary adjustment as one of characterisation is unhelpful. The principles espoused by Pepper J in *Sutherland Shire Council v Benedict Industries Pty Ltd* relate to the characterisation of land use. In order to characterise a use, the purpose for the use must be ascertained. However, "boundary adjustment" is not a use of land, and this proposal is not development that has an end purpose of specified land use. The distinction is made clear in the definitions contained in s 4 of the EPA Act, which defines *development* to mean:

> "(a) the use of land, and
> (b) the subdivision of land, and
> …"

39 The application is for development for the subdivision of land, and no land use is proposed in the application. Therefore, the question for determination is not about the characterisation of the proposed use, or the proposed purpose of the development. Rather, the task is one of statutory interpretation, and of determining whether the particular proposal falls within the description of it being a subdivision of land "by adjusting the boundary between adjoining lots."

It is only if the proposal meets that description that cl 4.2D can operate to permit the subdivision.

40 It is in the context of that task of interpretation that the question of the ordinary meaning arises, together with turning to the immediate and more general statutory context, as discussed by Jagot J in *McCabe & Others v Blue Mountains City Council*. The words used in cl 4.2D(3) differ slightly from those considered by Jagot J, as they refer to the ability to grant consent "to subdivide land by adjusting the boundary between adjoining lots" rather than "boundary adjustment". The context of cl 4.2D is that it sits within a part of the planning instrument that deals with principal development standards, and is grouped with a series of exceptions to the minimum lot size for subdivision of land set out in cl 4.1. For reasons that are unclear, the minimum lot size cannot be varied through cl 4.6 for land within the RU2 and E2 zone, notwithstanding that most of the neighbouring lots in the area of the site the subject of these proceedings are less than the minimum lot size.

41 In this context, I accept that the ordinary meaning of "adjusting" connotes something that is slight or marginal. Indeed, the Oxford Dictionary defines *adjust* as "alter or move (something) slightly in order to achieve the desired fit, appearance, or result." The question of whether a particular factual scenario fits within the meaning of "adjusting" depends on the degree of alteration that is sought in the context of the site as a whole.

42 Further, given that the statutory context of cl 4.2D is similar to that considered by Jagot J in *McCabe & Others v Blue Mountains City Council*, the principles discussed by Jagot J provide guidance that ought to be applied to the present context. In considering and applying the ordinary meaning of subdivision "by adjusting the boundary", I am of the view that this considers a notion of alteration of the boundary to reflect physical features or intended uses, but does not encompass any and all alterations. The meaning of the phrase "by adjusting the boundary" is thus constrained in the same way as that of "boundary adjustment" described by Jagot J in McCabe, in that it does not encompass any and all alterations of a boundary, and the resulting parcels of

land should bear some resemblance to the lots which existed prior to the boundary adjustment.

43 In applying the interpretation of “adjusting the boundary” to the proposal, I do not accept the Council’s submission that the desire or intention of the applicant is relevant. The task is merely about determining whether the proposal meets the wording of “adjusting the boundary”.

Is the proposal a subdivision “by adjusting the boundary between adjoining lots”?

44 The present application is consistent with the notion of an alteration of a boundary to reflect the physical features of the land, as the current configuration of the lots bears no resemblance to the physical features of the land. Similarly, it renders the use more feasible or practical by aligning the historical use, or planning units, with the proposed configuration. In favour of its planning merits, it results in a better pattern of subdivision across the site and a lot size consistent with the neighbouring lot sizes.

45 However, in considering the degree of the alteration required to achieve this alignment, it is in my view out of scope of a subdivision “by adjusting the boundary”, for three reasons. The first is that the change to the boundary is so significant that I do not accept it can be considered “adjusting”. The alteration requires moving the northern boundary of Lot 200 to the creek, and the southern boundary of Lot 200 to the road. The western and eastern boundaries are then increased in length to accommodate that alteration, so that the entire northern portion of the site becomes Lot 200. In the context of the site as a whole, that degree of alteration to the boundaries of Lot 200 is so substantial that it cannot be considered to fall within the ordinary meaning of “adjusting” the boundary.

46 The second reason that I am of the view that it is out of the scope of a subdivision “by adjusting the boundary” is that the two resulting lots do not bear sufficient resemblance to the lots currently in existence. In this respect, I accept the submission of the Council that the result is that the existing Lot 200 effectively disappears. The current configuration is of one lot with another narrow lot running through it, and the proposed configuration does not bear a resemblance to this. Accordingly, I accept that the description of the proposal is

more akin to a consolidation of the two lots and subsequent subdivision, consistent with the submissions of the Council.

47 The third reason that I form the view that it is not a subdivision "by adjusting the boundary" is that the size of lot 200 is increased through the proposal so significantly that it is more than simply a slight or marginal adjustment to boundaries. Lot 200 would go from comprising 6.6% of the total site area to 50% of the total site area.

48 That the Council has previously taken a more broad interpretation of what constitutes an "adjusting" of the boundary is, unfortunately, not relevant to my determination. The interpretation of whether a proposal is a subdivision "by adjusting the boundary between adjoining lots" does not give rise to the exercise of discretion. It is instead a question of how the law applies to the facts of the proposal. It is only if the proposal meets the criteria of being a subdivision "by adjusting the boundary between adjoining lots" that the question of discretion arises, as it is only then that the proposal becomes permissible with consent. Consistent with this, the Council now concedes that in one of the proposals for which consent was granted through the application of cl 4.2D, there was no power for the consent to be granted.

49 For these reasons, the exception to the minimum lot size that is permissible with consent in cl 4.2D does not apply to the present application. There being no other avenue known to the parties or put by Ms Johnson by which the subdivision could be permissible with development consent, there is no power to grant development consent and I must refuse the application.

Remaining considerations

50 The Council raised a number of other contentions as to why the application should be refused. Given that I have found that the proposal does not fall within the exception provided by cl 4.2D, I am required to refuse the application and I need not consider the remaining contentions. This is, in my view, an unfortunate outcome given that the current pattern of subdivision across the site is irregular and atypical. I note that some of the Council's submissions relied on correspondence with the Department of Planning regarding the separation of lots divided by new roads. However, none of that correspondence

considered that Ms Johnson already holds two lots in ownership, and I cannot discern how that correspondence could be considered relevant. A number of other aspects of the Council's remaining contentions were questionable, including their analysis of the whether the subdivision meets cl 4.2D(3)(b) and their requirement for a flood planning study where none appears necessary as the land is not "at or below the flood planning level" as required by cl 7.3 of the CHLEP 2013. Nevertheless, I need not consider the merit of those contentions given my finding that the proposed subdivision is not "adjusting the boundary between adjoining lots" as required for the power under cl 4.2D to be available.

51 Accordingly, the application for development consent for the subdivision must be refused.

52 The Court orders that:

(1) The appeal is dismissed.

(2) The development application (0795/17DA) for the subdivision of lots 200 and 201 DP 1183461 at 7 Dirty Creek Road, Dirty Creek, is refused.

(3) Exhibits A and 3 are returned.

…….

Commissioner Gray

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Amendments

28 February 2018 - Figure 1 - Added