

Implied and Express Easements for Private Drainage

Background

This information sheet provides a summary of the City of Ballarat's (Council) position in relation to the differences between 'implied' and 'express' easements for drainage purposes and outlines whether Council can and should require easements for drainage purposes as part of subdivision developments that may or may not include common property where drainage requirements impact multiple lots.

The need to clarify a position on application of drainage easements has been raised by developers and other stakeholders in the development community who have expressed the view that Council should not be imposing requirements for express/registered easements in this context and that easements 'implied' under section 12(2) of the *Subdivision Act 1988* (Vic) (the *Act*) are sufficient.

This information sheet and Council position outlined within only considers private easements in favour of private lot owners, not easements in favour of Council or another public authority/service provider or containing Council or other public authority/service provider assets.

Summary

Upon considering comments from developers, stakeholders and legal representatives, Council agrees with the following statements that:

1. Express easements (shown on a plan of subdivision) and implied easements (pursuant to section 12(2) of the *Act*) both have a role to play in the administration of subdivisions in Victoria. The existence of implied easements does not preclude Council from requiring express easements in appropriate circumstances.
2. Express easements provide greater certainty for landowners but may not always be appropriate and should not be required generally or as a 'blanket' policy without a consideration of the particulars relating to the proposed subdivision.
3. It would be reasonable for Council to require an express easement for drainage to be shown on a plan of subdivision prior to certification (and possibly as a condition on a permit subject to the particular facts of a permit application) in circumstances where the drainage proposal for the lots proposed to be created is known at the time of subdivision.
4. Where the drainage proposal is not known at the time of subdivision, implied easements offer flexibility while ensuring that the relevant rights are protected. These rights will be subject to the

well-established case commentary on the correct approach to the two limbed 'test' provided for within section 12(2) that the implied easement or right is limited to that which:

- i. is necessary for the reasonable use and enjoyment of the lot or the common property;
and
- ii. is consistent with the reasonable use and enjoyment of the other lots and the common property.

Key Considerations

The rights created in an 'express' easement created pursuant to section 12(1) of the *Act* are determined based on the drafting of the instrument and are apparent from a title search so that prospective purchasers have notice of the easement. Express easements do not only relate to public works and rights of way. If an easement is required and to avoid one being implied where it is not wanted, then it is best to expressly create it on the plan.

The scope of the rights created in an 'implied' easement pursuant to section 12(2) of the *Act* cannot be found from a title search and are determined according to the two limbed 'test'. While section 34B enables an owner of a lot to apply to the Victorian Civil and Administrative Tribunal for an order to determine a dispute about easements, this is still an additional step that an owner needs to take and incur costs to assert its rights.

Based on section 12(2) of the *Act*, if the subdivision is not the subdivision of a building or the easement is not over land affected by an owners corporation, the plan of subdivision needs to specify that section 12(2) applies to it. Implied easements are designed to protect drainage services that are required for the reasonable use and enjoyment of lots or common property where they cannot be shown, or are impractical to show, or are not known at the time of subdivision.

Application

Where a Drainage Plan is approved by Council which show the details of the private drainage infrastructure servicing lots, it is required that all lots and common property have are shown to be connected to the Legal Point of Discharge (LPoD) via private expressed easements. Private express easements are to be nominated in favour of individual lots that are benefiting from the easement, or in favour of all lots created by the subdivision where the easement is between common property and the LPoD.

The following examples represent common applications of the requirements for expressed private easements, noting that Council will consider each proposed plan of subdivision and determine whether there is sufficient certainty about the scope of the easement at the time of certification of the plan to enable an express easement to be provided on the plan of subdivision or whether flexibility is required an implied easement is appropriate in the circumstances.

Private Express Easement Examples



