

**4.7: VARIATION OF LEASE – ALBANY KINDERGARTEN ASSOCIATION INC. – PORTION OF LOT 34 ON DIAGRAM 39228 AT NO 9 RUTHERFORD STREET, LOWER KING**

**Land Description** : Lot 34 on Diagram 39228 at No 9 Rutherford Street (corner McKenzie Drive), Lower King

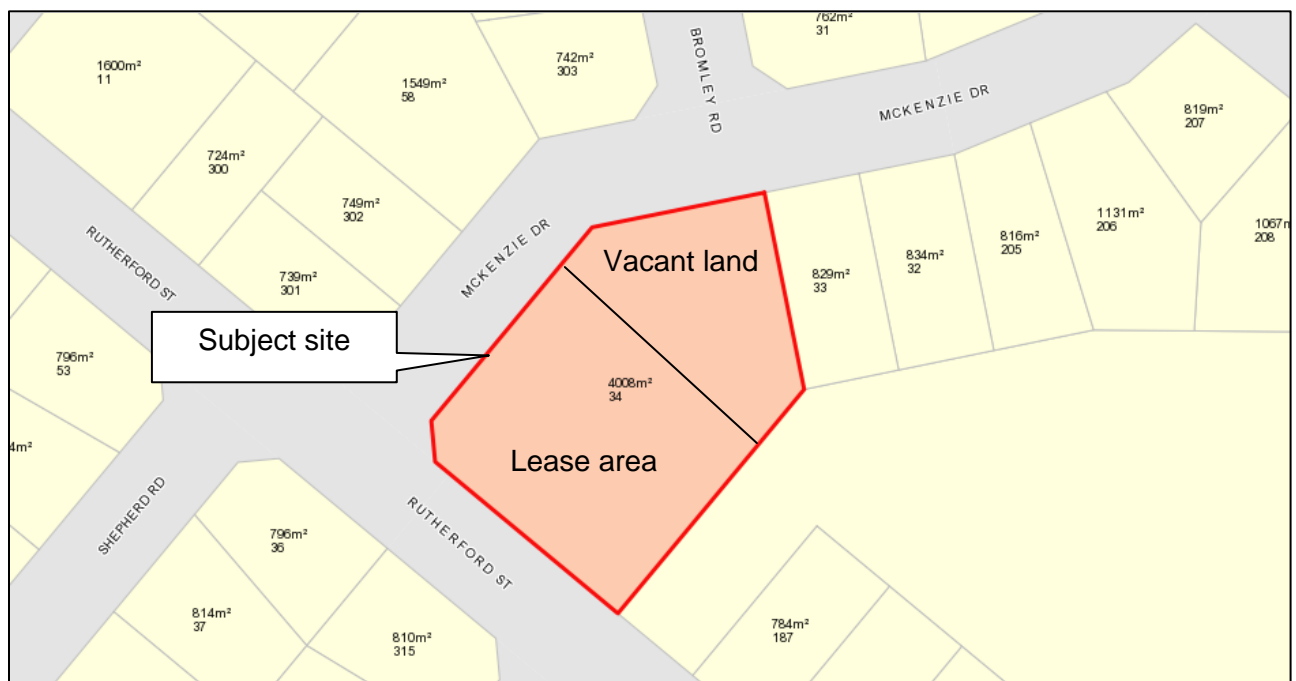
**Proponent** : City of Albany and Albany Kindergarten Association Inc.

**Owner** : City of Albany (freehold title)

**Attachments** : Aerial Photograph  
Survey Plan No. 2012-91-02C

**Responsible Officer(s)** : Executive Director Corporate Services (G Adams)

**Maps and Diagrams:**



**IN BRIEF**

- Council is requested to consider a variation of lease for the Albany Kindergarten Association Inc. (site of the Lower King Community Kindergarten) to allow for a realignment of the lease north eastern boundary in line with the existing fence line and completed survey plan.

**ITEM 4.7: RESPONSIBLE OFFICER RECOMMENDATION**  
**VOTING REQUIREMENT: SIMPLE MAJORITY**

That Council **APPROVE** the variation of lease for the Albany Kindergarten Association Inc. over portion of Lot 34 on Diagram 39228 at No. 9 Rutherford Street, Lower King, subject to:

1. Lease north eastern boundary being realigned to the existing fence line in accordance with completed survey plan No. 2012-91-02C.
2. Amended lease area totalling 2767m<sup>2</sup>.
3. All costs associated with the preparation, execution and completion of the Deed of Variation of Lease being payable by the City of Albany, to assist with the City's subdivision and sale of land for the remaining portion of Lot 34, to the rear of the leased property.
4. All costs associated with the ongoing operations of the lease property being payable by the Lessee.

**BACKGROUND**

1. In December 1997 the former Shire of Albany granted a new lease over an area of approximately 2744m<sup>2</sup> on Lot 34 to the Albany Kindergarten Association Inc. for the purpose of conducting Pre-School and Kindergarten activities.
2. The lease commenced on the 1 December 1997 and expires on 30 November 2017 with an option for a further term of 20 years expiring in 2037.
3. Lot 34 on Diagram 39228 at No. 9 Rutherford Street (corner McKenzie Drive) Lower King is land held in freehold title by the City of Albany. The land area totals 4008m<sup>2</sup> with the lease area being 2750m<sup>2</sup> and the remaining being vacant land.

**DISCUSSION**

4. In July 2012 the owner of Lot 33 McKenzie Drive asked whether they could purchase the vacant land adjoining their property. This vacant land forms part of Lot 34 Rutherford Street and is situated at the rear of the leased property.
5. At OCM 17/02/2012 Item 4.6, Council supported the proposed sale of the vacant land currently forming portion of Lot 34 Rutherford Street subject to the *Local Government Act 1995* and the *Council's Disposal of Land Policy*.
6. The proposed disposal of land requires the City to first subdivide Lot 34 Rutherford Street to create two separate titles.

7. As part of the subdivision process a survey was undertaken. During this process it was discovered that the Lower King Community Kindergarten fence line did not observe the lease boundary.
8. Council officers met on site with the kindergarten to discuss the lease boundary and fence line. The options to remedy the situation were either to adopt the lease boundary and modify the fencing during the subdivision process or amend the lease boundary to the fence line.
9. On inspection it was identified that the kindergarten had significant facilities just inside the fence line such as a specifically grown climbing tree, an outdoor tee pee, vegetable garden, sensory garden and another mature tree that supplied shade for the children.
10. To relocate the fence would require the removal of the two trees and garden which are considered to be of great importance to the kindergarten and such removal would adversely impact on the amenity and use of the outdoor area. In addition the relocation and removal costs would be greater than the variation to lease cost of approximately \$440 GST inclusive.
11. Given the importance of the facilities just inside the fence line to the kindergarten and the cost to remove and relocate the fence it was considered by all parties that the best option would be to vary by amending the lease boundary to the existing fence line.
12. A survey plan (No. 2012-91-02C) has been completed for the amended lease area to the existing north eastern fence line.
13. The City committed to pay all costs associated with a Deed of Variation of Lease including survey plan and legal costs as this will assist the City's subdivision process for Lot 34.
14. It is noted that Council Officers do not have delegated authority to approve variations to leases and that all such requests be submitted to Council for consideration.

#### **GOVERNMENT CONSULTATION**

15. No consultation with government agencies is required.

#### **PUBLIC CONSULTATION / ENGAGEMENT**

16. Prior to presenting this matter to Council, the City consulted with the kindergarten, who welcomes the opportunity to vary the lease to amend the area to comply with the lease.

## **STATUTORY IMPLICATIONS**

17. Section 3.58 of the *Local Government Act 1995* defines the requirements for the disposal of property, including leased land and buildings. The Act requires the following:
- a. A local government must give local public notice of the proposed lease inviting submissions from the public, for a period of two weeks;
  - b. Any submissions are to be considered by Council and their decision with regard to those submissions to be recorded in the minutes; and
  - c. A local government can then proceed with the lease.
18. Section 30 of the *Local Government (Functions & General) Regulations 1996* defines the dispositions to which the advertising requirements of Section 3.58 of the Act do not apply. Section 30 (2) (b) (i & ii) states that Section 3.58 of the Act is exempt if:
- (b) *The land is disposed of to a body, whether incorporated or not –*
- (i) *the object of which are charitable, benevolent, religious, cultural, educational, recreational, sporting or other like nature; and*
  - (ii) *the members of which are not entitled or permitted to receive any pecuniary profit from the body's transactions;*
19. The Albany Kindergarten Association Inc. is an incorporated, not for profit and educational association, therefore exempt from the advertising requirements of Section 3.58 of the *Local Government Act 1995*.

## **STRATEGIC IMPLICATIONS**

20. This item relates directly to the following elements of the City of Albany Strategic Plan (2011-2021)

### **Key Focus Area**

- *Organisational Performance.*
- *Community Focussed Organisation.*

### **Community Priority**

- *Policy and Procedures.*
- *Support for community groups.*

### **Proposed Strategies**

- *Develop clear processes and policies and ensure consistent, transparent application across the organisation.*
- *Support community groups by identifying funding opportunities.*

## **POLICY IMPLICATIONS**

21. Council adopted a revised Property Management – Leases and Licences Policy in September 2012.

22. The Policy aims to ensure that all requests for leases/licences, for whatever purpose, will be treated in a fair and equitable manner using open and accountable methodology and in line with statutory procedures.
23. The Policy section relevant to this category of Community lease – requires the following:
- Rent for Community groups leasing land for community purposes will be a peppercorn rent of \$10.00 plus GST per annum.
  - Lessee must be an incorporated body, not for profit and a copy of their Articles of Association/Constitution being provided.
  - Lease to be for a term not greater than 21 years.
  - Sub-lease agreements must be approved by the Landlord.
  - Lessee must have appropriate insurance pertaining to their particular activities, as a minimum.
  - Lessee will be responsible for all maintenance of the leased property at the Lessee's costs.
24. The recommendation is consistent with Council Policy – Property Management – Leases and Licences.

#### RISK IDENTIFICATION & MITIGATION

25. The risk identification and categorisation relies on the City's Risk Management Framework:

Risk	Likelihood	Consequence	Risk Rating	Mitigation
<i>Council does not approve a variation of lease – reputational loss to the City</i>	<i>Unlikely</i>	<i>Insignificant</i>	<i>Low</i>	<i>Further negotiate with Lessee to reach a mutually agreeable outcome for lease area. Further consider City subdivision requirements.</i>

#### FINANCIAL IMPLICATIONS

26. All legal costs associated with the preparation, execution and completion of the Deed of Variation of Lease being payable by the City, to assist with the City's subdivision and sale of vacant land at the rear of the leased property at Lot 34.
27. It is anticipated that the legal costs will be approximately \$400 GST inclusive.

#### LEGAL IMPLICATIONS

28. The agreement with the Albany Kindergarten Association Inc. is a formal Deed of Lease which grants an interest in the land with enforceable conditions. It is good practice, particularly when amending variables such as area by way of a Deed of Variation of Lease.
29. The proposed Deed of Variation of Lease will be prepared by the City's lawyers.

**ALTERNATE OPTIONS**

30. Council may:
- a. Refuse the request to vary the lease to realign the lease boundary to the existing fence line; or
  - b. Approve the request, allowing rectification of the lease boundary.
31. Should Council refuse the request the kindergarten would be required to remove existing facilities and relocate the fence, at significant cost to the community group, to remedy the lease boundary to comply with the lease.

**SUMMARY CONCLUSION**

32. The subject land is leased to the Albany Kindergarten Association Inc. for the purpose of a community kindergarten with lease expiring in 2017 with an option for a further term of 20 years.
33. All parties being the City and the kindergarten considered that a Deed of Variation of Lease to amend the lease area to remedy the lease boundary is the best option.
34. Rectifying the lease area will assist the City with the subdivision process and ensure that the kindergarten comply with the lease.
35. Council has previously endorsed the subdivision and sale of vacant land at Lot 34 to the rear of the leased property.

<b>Consulted References</b>	<ul style="list-style-type: none"><li>• Council Policy – Property Management – Leases and Licences</li><li>• <i>Local Government Act 1995</i></li><li>• <i>Local Government (Functions and General) Regulations 1996</i></li></ul>
<b>File Number (Name of Ward)</b>	PRO034, A5879 (Kalgan Ward)
<b>Previous Reference</b>	OCM 17/07/2012 Item 4.6

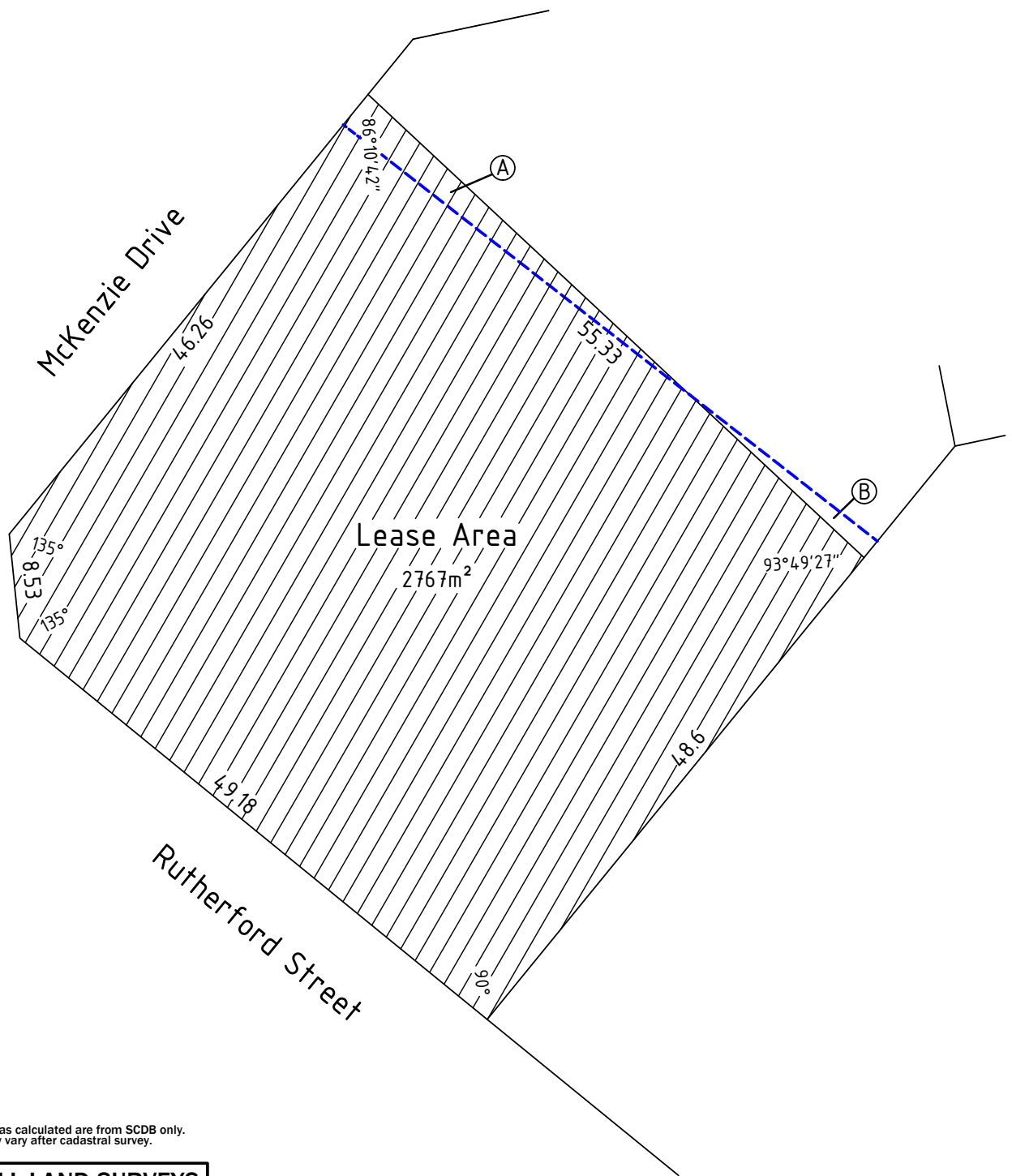
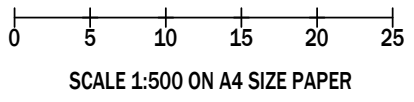


AGENDA ITEM 4.7 REFERS



Lot 34 on Diagram 39228 at No. 9 Rutherford Street, Lower King





Please note, areas calculated are from SCDB only.  
Areas may vary after cadastral survey.

**CALDWELL LAND SURVEYS**  
email: caldwellsurveys@bigpond.com

SCALE @ A4 1:500

Proposed Lease Lot on  
Lot 34 on Dia 39228 at  
9 Rutherford Street, Lower King

Horizontal Datum ALB94  
Level Datum AHD

Drawing No.  
**2012-91-02C**

- (A) 57m<sup>2</sup>
- (B) 17m<sup>2</sup>