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Clause 4.6 Exceptions to Development Standards Written Request – Minimum lot sizes for dual occupancies

Construction of a Dual Occupancy (attached)

Proposed Lot 5 in Lot 6 DP 736961

10 Fern Creek Road, Warriewood NSW 2102

Prepared for: Skycorp Australia

CPS Project No: D458

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Contents

1. Introduction and Background

This variation statement has been prepared in accordance with Clause 4.6 of the Pittwater Local Environmental Plan 2014 ('PLEP 2014'). It is to accompany a development application ('DA') for the construction of a dual occupancy development and associate site works at proposed Lot 5, 10 Fern Creek Road, Warriewood. It is noted that no strata subdivision is proposed. 'Dual occupancies' are permitted with consent on the site pursuant to the PLEP 2014.

This variation statement relates to the minimum lot size of 800m² for dual occupancies developments pursuant to subclause 4.1B(2)(b) of the PLEP 2014. The variation is outlined below:

Required lot size (m²)	Area of subject site (m²)	Variation (m²)	Variation (%)
800	793.2	6.8	0.85

The subject site has an area of 793.2m² (Survey Plan) and a site frontage of 5.72m to the community title road.

The extent of variation is 6.8m², which equates to a 0.85% variation.

Notwithstanding the variation, development consent to the proposal is sought, pursuant to this statement that addresses the requirements of Clause 4.6 of the PLEP 2014.

It is noted that Clause 4.6 of the PLEP 2014 "*is as much a part of [the PLEP 2014] as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome*." (SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112 at [73]).

Furthermore, the context to the variation is as follows:

a) The irregular shape of the allotment are the reasoning behind the minor non-compliance of 0.85%.
b) The 6.8m² variation does not create any other non-compliances within the development and the proposal is largely compliant with the remainder of the PLEP 2014 and the Pittwater Development Control Plan 2021 (PDCP 2021).

This statement deals with each relevant aspect of clause 4.6 below.

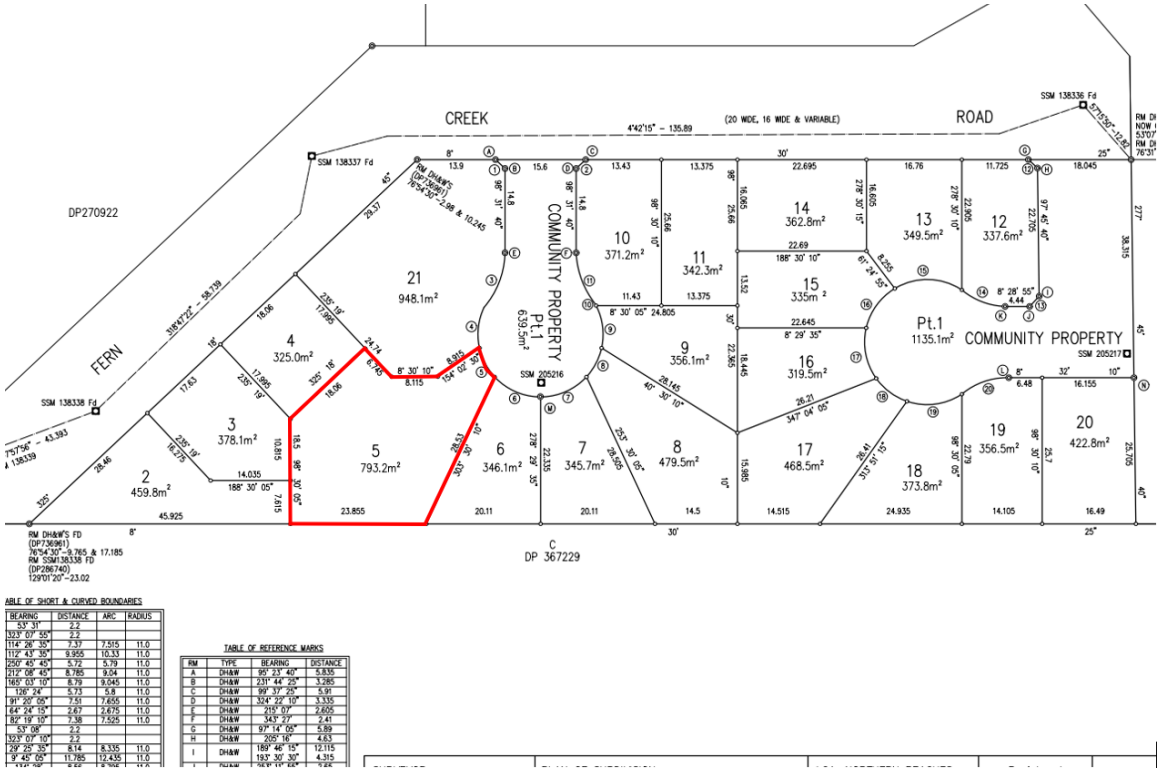

Figure 1 - Map of recent subdivision under N0540/15, subject site outlined in red
Source: N0540/15 subdivision plan

The subject site is located within an R3 Medium Density Residential zone under PLEP 2014 (***Figure 2***). Dual occupancies are a permissible form of development in this zone.

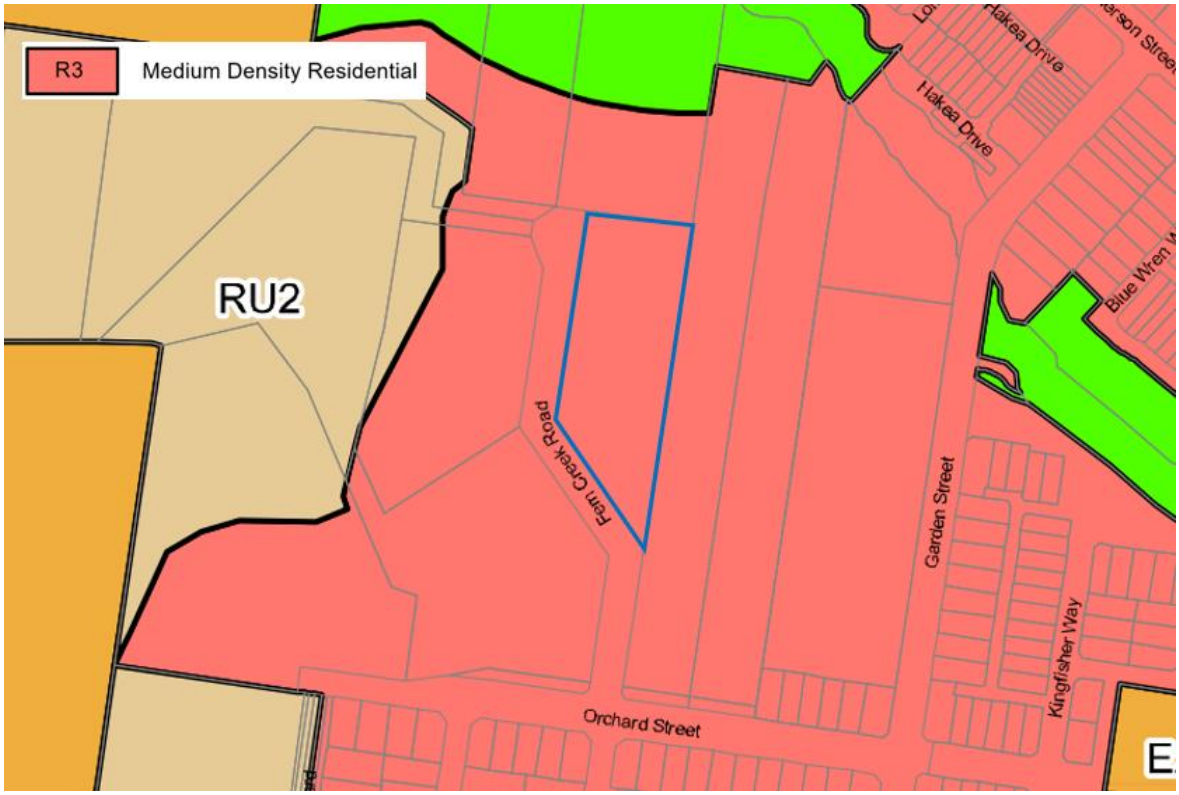

Figure 2 - An extract of the PLEP 2014 zone map extract; the location of the parent lot is identified by the blue border.
Source: legislation.nsw.gov.au

2. Development Standard to be varied

The minimum lot size control under Clause 4.1B(2)(b) of the PLEP 2014 is a development standard. Clause 4.1B(2) of the PLEP 2014 applies to the dual occupancy developments and is reproduced below:

> ***(2)*** *Development consent may only be granted to development on a lot for the purpose of a dual occupancy if—*
>
> ***(a)*** *the development is permitted on that lot with development consent, and*
>
> ***(b)*** *the area of the lot is equal to or greater than 800 square metres.*

The subject site has an area of 793.2m² (Survey Plan). The extent of variation is therefore 6.8m², which equates to a 0.85%.

3. Justification for Contravention of the Development Standard

Clause 4.6 of the PLEP 2014 enables the consent authority the ability to grant development consent for developments that contravenes a development standard provided the matters set out in Clause 4.6 are satisfied. This clause aims to provide an appropriate degree of flexibility in applying certain development standards to particular developments and to achieve better outcomes for and from developments by allowing flexibility in particular circumstances.

The objectives and provisions of Clause 4.6 are as follows:

(1) The objectives of this clause are as follows—

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless—

(a) the consent authority is satisfied that—

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning Secretary must consider—

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.

(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.

Note—

When this Plan was made it did not include all of these zones.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 *applies or for the land on which such a building is situated,*

(c) clause 5.4.

The development standard in Clause 4.1B (2)(b) is not "expressly excluded" from the operation of Clause 4.6.

4. Relevant Case Law

This statement has been prepared with regard to the latest decision of the NSW Land and Environment Court in relation to Clause 4.6 and the proper approach to justifying a variation of a development standard, including:

a) Wehbe v Pittwater Council [2007] 156 LGERA 446; [2007] NSWLEC 827;
b) Four2Five Pty Ltd v Ashfield Council [2007] 156 LGERA 446; [2015] NSWLEC 90;
c) Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118;
d) RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130; and
e) SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112.

There are also a number of other recent NSW Land and Environment Court cases that are relevant, including *Micaul Holdings Pty Ltd v Randwick City Council [2015]* NSWLEC 1386 and *Moskovich v Waverley Council [2016]* NSWLEC 1015, as well as *Zhang and anor v Council of the City of Ryde [2016]* NSWLEC 1179.

Importantly, in *Initial Action Pty Ltd v Woollahra Municipal Council [2018]* NSWLEC 118, Preston CJ held at paragraphs [87] and [90]:

> *87. …Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development…*
>
> *…*
>
> *90. In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause.*

These matters are discussed in the following sections.

5. Clause 4.6(3)(A) Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

In *Wehbe v Pittwater [2007]* NSWLEC 827 ('**Wehbe'**), Preston CJ identified five ways in which it could be established to demonstrate that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. This list is not exhaustive. It states, inter alia:

> *"An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."*

While *Wehbe* related to objections made to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the reasoning can be similarly applied to variations made under Clause 4.6 of the standard instrument.

The judgement goes on to state that:

> *"The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."*

Preston CJ in the judgement then expressed the view that there are at least 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;
- *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council [2007]* NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council [2018]* NSWLEC 118 at [22], *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019]* NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council [2020]* NSWLEC 1112 at [31].

It is generally understood that Clause 4.6(3) can be satisfied if it is established that a development satisfies one or more of the above points. In this instance point 1 is investigated and considered well founded for the proposed development.

The objectives of the minimum lot size development standard under Clause 4.1B of PLEP 2014 are provided below in Section 6, and followed by a response on how that objective is achieved notwithstanding noncompliance with the standard.

6. The objectives of the standard are achieved notwithstanding noncompliance with the standard.

This Clause 4.6 variation statement establishes that compliance with the minimum lot size standard is considered unreasonable or unnecessary in the circumstances of the proposed development because the objective of the standard is achieved notwithstanding the non-compliance with the numerical standard.

The objectives of Clause 4.1B minimum lot size for dual occupancies under the PLEP 2014 are as follows:

> *(a) to achieve planned residential density,*
>
> *(b) to maintain a high level of residential amenity, including adequate provision of private open space.*

- **Response to Objective (a):** The minimum lot size control for dual occupancies has been established at 800m². The proposed development provides a dual occupancy development that meets the objectives of the R3 Medium Density Residential Zone, and is in line with the type of development planned and envisaged for the site.

Further reasons to which this objective of Clause 4.1B of the PLEP 2014 is achieved despite the non-compliance with the numerical standard is noted:

- The planned residential density under this Clause is one (1) dwelling per 400m². The proposed development will achieve a density of 1 dwelling per 396.6m². This minor variation results in essentially the same as the planned residential density;
- The proposal is in line with the surrounding density and character of the area. The local streetscape is dominated by larger double storey dwellings and dual occupancies;
- The proposal is largely compliant with key planning controls as demonstrated by the accompanying Statement of Environmental Effects such as building height and parking. This demonstrates the subject site is of sufficient size to accommodate the dual occupancy development despite the minor departure from the minimum lot size control. Therefore, the lot size in respect of both width and total area is sufficient to accommodate the proposed dual occupancy;

- **Response to Objective (b):** The provision for adequate private open space has been complied with in the proposed development. As seen in *Part D16.10 Private and Communal Open Space Areas* of the PDCP 2021, developments on lots greater than 14m wide require a minimum private open space area of 24m² (with minimum dimensions of 4m). This control is achieved for each dwelling of the dual occupancy as Lot 5A has a 4m x 7m area, and Lot 5B has a 4m x 6m area. It is therefore deemed that the proposal maintains a high level of residential amenity.

Further reasons to which the objectives of Clause 4.1B of the PLEP 2014 are achieved despite the non-compliance with the numerical standard is noted:

- The proposal will create a dual occupancy development that will provide a high level of amenity and living standard for the future residents. The proposal is compliant with residential amenity controls such as solar access, and private open space as stated above;
- The development will improve the landscape setting as the site is currently a vacant lot. High quality landscaping is proposed as part of this development that will enhance the nearby natural environment.
- The minor variation does not result in excessive bulk or scale issues, nor will it over-develop the site;
- The proposal also adheres to the aesthetics of the surrounding neighbourhood by being constructed of similar materials as nearby residential dwellings;
- In relation to building height, the development will sit comfortably in the streetscape given that the overall building height is compliant with the PLEP 2014;
- The irregular shape of the allotment means that the proposed 0.85% variation will not be noticeable or significant to any future residents or negatively impact adjoining neighbours. The 6.8m² non-compliance is a minor issue that has no effect on the proposals ability to comply with minimum private open space controls.

On the basis of the above reasoning, the objectives of the development standard are satisfied, even with the minor variation to the numerical standard. Therefore, strict compliance with this requirement is considered to be unreasonable and unnecessary.

7. Clause 4.6(3)(B): Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

Clause 4.6(3)(b) of the PLEP 2014 requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard.

The following factors demonstrate that sufficient environmental planning grounds exist to justify contravening the lot size development standard. For that purpose, the critical matter that is required to be addressed is the departure from the development standard itself, not the whole development (as confirmed in *Initial Action Pty Ltd v Woollahra Municipal Council [2018]* NSWLEC 118 at 46, per Preston CJ).

1. The reason for the site area departure relates to the irregular shape of the allotment. Strict compliance could be achieved through a boundary adjustment, but this would not alter the development outcome on the site in any meaningful way other than enabling numerical compliance with the 800m² lot size control. The non-compliance to the 800m² standard arises because of the irregular shape of the site. Permitting a departure to the lot size, that is minor, is consistent with the objects of the Environmental Planning and Assessment Act 1979 as set out below:

    - To promote the orderly and economic use and development of land;
    - To promote the delivery of affordable housing through increased housing supply and a diversity in housing forms;

2. The departure from the lot size standard facilitates the delivery of 2 dwellings on the allotment that has a compliant north to rear orientation, and ample area to accommodate the dwellings when considering that the development achieves compliance with the PDCP 2021 private open space controls. The reduced lot size has no impact on the ability to provide 2 dwellings on site, other than in creating a numerical non-compliance with the standard.

3. Notwithstanding the departure from the numerical standard, the proposed development has been able to be designed to meet the requirements of a majority of the other relevant requirements of the PLEP 2014 and PDCP 2021, which clearly demonstrates that the site is suitable for a dual occupancy development. This demonstrates that adequate residential amenity will be maintained and achieved.

4. The orientation of the lot means that its reduced lot size does not preclude achieving a northerly orientation or sufficient solar access to the rear POS and living area of both the proposed dwellings.

5. The departure to the lot size control enables development of the proposed dual occupancy on a lot that is physically large enough, and has suitable width and depth, to accommodate a dual occupancy development, which is demonstrated through compliance with the remaining planning controls. This promotes the orderly and economic use of the land.

6. The variation to the lot size control enables the delivery of a dual occupancy to provide for a variety of housing types that is consistent with the objectives of the R3 zone.

The above analysis demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

8. Clause 4.6(4)(A)(II): Consistency with Objectives of the Standard and the Zone & the Public Interest

In the recent judgement within *Initial Action*, Preston CJ indicated that a consent authority only needs to be satisfied that an applicant has adequately addressed the matters within clause 4.6(3), and that, pursuant to 4.6(4)(a)(ii), the development is consistent with the objectives of the standard and consistent with the objectives of the zone. Although not strictly required, this variation has addressed the reasons that the development satisfies 4.6(4)(a)(ii).

The objectives of the R3 Medium Density Zone are as follows:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To provide for a limited range of other land uses of a low intensity and scale, compatible with surrounding land uses.*

The proposed development directly satisfies the first objective of the zone as the development will provide for 2 dwellings on a vacant lot to satisfy the housing needs of the community. Furthermore, the proposed development is consistent with the observed emerging character of the locality within the medium density environment, as well as the Warriewood Valley Release Area.

In response to the second objective, the proposed dual occupancy development will provide a variety of housing options within the medium density residential area. The resulting built form will be consistent with the medium density area and fit the bulk and scale of the streetscape while providing a different housing option for future residents.

While the third and fourth objectives are not directly relevant to the proposal, it is noted that the proposal is compatible with these objectives on the basis that it does not affect the ability of surrounding sites to provide other land uses.

For these reasons, it is argued that the consent authority would be satisfied the development is in the public interest.

9. Conclusion

For the reasons set out above, the applicant says that:

1. The matters canvassed in this request have adequately addressed the requirements of Clause 4.6(3); and
2. The Consent Authority should be satisfied that the proposed development is in the public interest, as it is consistent with both the objectives of the development standard, and the objectives of the R3 zone.

As such, it is submitted that the requirements of Clause 4.6 have been satisfied and that the proposed variation to the lot size development standard can be supported.