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Clause 4.6 variation request – Minimum subdivision lot size
Torrens Title subdivision of 1 Lot into 2 Lots
38 Undercliff Road, Freshwater

1.0 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe)* at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney [2019]* NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 Manly Local Environmental Plan 2013 (MLEP)

2.1 Clause 4.1 - Minimum subdivision lot size

Pursuant to clause 4.1(2) WLEP 2013, the size of any lot resulting from the subdivision on land shall not be less than 450m². The objectives of this clause are as follows:

(a) to protect residential character by providing for the subdivision of land that results in lots that are consistent with the pattern, size and configuration of existing lots in the locality,

(b) to promote a subdivision pattern that results in lots that are suitable for commercial and industrial development,

(c) to protect the integrity of land holding patterns in rural localities against fragmentation,

(d) to achieve low intensity of land use in localities of environmental significance,

(e) to provide for appropriate bush fire protection measures on land that has an interface to bushland,

(f) to protect and enhance existing remnant bushland,

(g) to retain and protect existing significant natural landscape features,

(h) to manage biodiversity,

(i) to provide for appropriate stormwater management and sewer infrastructure.

The proposed allotments have the following lot sizes:

Lot	Proposed Lot area m²
100	291.6m² A variation of 158.4m² or 35.2%
101	285m² A variation of 165 m² or 36.6%

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of WLEP provides:

(1) The objectives of this clause are:

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

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

The decision of Chief Justice Preston in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal *in RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.
At [90] of *Initial Action* the Court held that:

"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. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of WLEP provides:

(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.

This clause applies to the clause 4.1 Minimum subdivision lot size development standard.

Clause 4.6(3) of WLEP provides:

(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.

The proposed development does not comply with the minimum subdivision lot size provision at clause 4.1 of WLEP which specifies a minimum subdivision lot size however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. The first and 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: Wehbe v Pittwater Council at [42] and [43].

18. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

19. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

20. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

21. A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

22. These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.1 of WLEP a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

    (a) compliance is unreasonable or unnecessary; and

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

4.0 Request for variation

4.1 Is clause 4.1 of WLEP a development standard?

The definition of "development standard" at clause 1.4 of the EP&A Act includes:

> *(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 4.1 WLEP prescribes a minimum subdivision lot size standard that relates to certain development. This standard seeks to control the size of residential allotments. Accordingly, clause 4.1 WLEP is a development standard.

4.2A Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in Wehbe v Pittwater Council [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the minimum subdivision lot size standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

(a) to protect residential character by providing for the subdivision of land that results in lots that are consistent with the pattern, size and configuration of existing lots in the locality,

Response: I note that there are a variety of allotment sizes and geometry within immediate proximity of the site and certainly within the R2 Low Density Residential Zone within the Freshwater locality. The following map extract demonstrates that the proposed allotment size and configuration will complement/ will not be antipathetic to the existing subdivision pattern both within this street block and the Freshwater locality generally including No's 50 and 52 to the east of the site.

Figure 1 - Map extract showing varied subdivision pattern along Undercliff Road and within the Freshwater locality generally.

Development consent DA2024/1430 demonstrates that each of the proposed allotments is capable of being accommodated by a dwelling house which has been found to be consistent with the applicable environmental considerations and built form controls including density.

I am satisfied that notwithstanding the Lot size variations that the resultant Lots are consistent with the pattern, size and configuration of existing lots in the locality and accordingly this objective is achieved.

(b) to promote a subdivision pattern that results in lots that are suitable for commercial and industrial development,

Response: N/A. Such land uses are prohibited in the R2 Low Density Residential Zone.

(c) to protect the integrity of land holding patterns in rural localities against fragmentation,

Response: N/A. The property is not within a rural locality.

(d) to achieve low intensity of land use in localities of environmental significance,

Response: The subject property is not within a Conservation Zone and is instead zoned R2 Low Density Residential reflecting the absence of identified environmental significance/ sensitivities. The subdivision lot size variation does not prevent consistency with this objective.

(e) to provide for appropriate bush fire protection measures on land that has an interface to bushland,

Response: N/A. The site is not bushfire prone land nor located adjacent to bushland.

(f) to protect and enhance existing remnant bushland,

Response: The existing vegetation on the site is not appropriately described as remnant bushland and accordingly this objective is achieved notwithstanding the minimum subdivision lot size variation proposed.

(g) to retain and protect existing significant natural landscape features,

Response: The variation to the minimum subdivision lot size does not prevent attainment of this objective notwithstanding that some impact is unavoidable to realise the orderly and economic use and development of the land.

(h) to manage biodiversity,

Response: The variation to the minimum subdivision lot size does not prevent attainment of this objective given that the site is not mapped/ identified as having biodiversity constraints.

(i) to provide for appropriate stormwater management and sewer infrastructure.

Response: The variation to the minimum subdivision lot size does not prevent attainment of this objective given that both proposed lots can gravity drain to Moore Lane with sewer available to the existing allotment.

This objective is achieved notwithstanding the non-compliant subdivision lot size proposed.

Having regard to the above, the non-compliant lots sizes will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the minimum subdivision lot size standard. Given the developments consistency with the objectives of the minimum subdivision lot size standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

4.2B Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

24. The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient environmental planning grounds

Ground 1 – Development efficiencies associated with double street frontage

The sites double street frontage enables both allotments to have primary pedestrian and vehicular access from alternate frontages providing enhanced layout efficiencies compared to a battle-axe style subdivision.

Development consent DA2024/1430 demonstrates that each of the proposed allotments is capable of being accommodated by a dwelling house which has been found to be consistent with the applicable environmental considerations and built form controls including density.

A detached style dwelling house land use and built form outcome will be maintained to each street frontage being a site-specific environmental planning ground.

Ground 2 – Subdivision is compliant with the recently adopted Low and Mid Rise Housing (LMR) reform dual occupancy subdivision non-discretionary development standards

Stage 2 of the Low and Mid Rise Housing (LMR) reforms commenced on 28th February 2025. Clause 169 of SEPP (Housing) 2021 prescribes the development standards applicable to the subdivision of dual occupancies on R2 zoned land within the mapped LMR housing area. In the absence of any subdivision standards and/ or controls applying to dual occupancy development within the Warringah LEP area it is considered reasonable to adopt these subdivision standards notwithstanding that the site is not within the LMR mapped area. An assessment of the proposed subdivision against the clause 169(3) non-discretionary subdivision standards is as follows:

Standard	Proposed	Compliance
(a) each resulting lot must contain no more than 1 dwelling,	Each resulting lot contains 1 dwelling	Yes
(b) each resulting lot must be at least 6m wide at the front building line,	Each resulting lot is greater than 6 metres in width	Yes
(c) each resulting lot must have lawful access and frontage to a public road,	Each resulting lot has frontage to a public road	Yes
(d) each resulting lot must have an area of at least 225m2,	Each resulting lot has an area of at least 225m2	Yes
(e) each resulting lot must not be a battle-axe lot.	No battle-axe lots are created	Yes

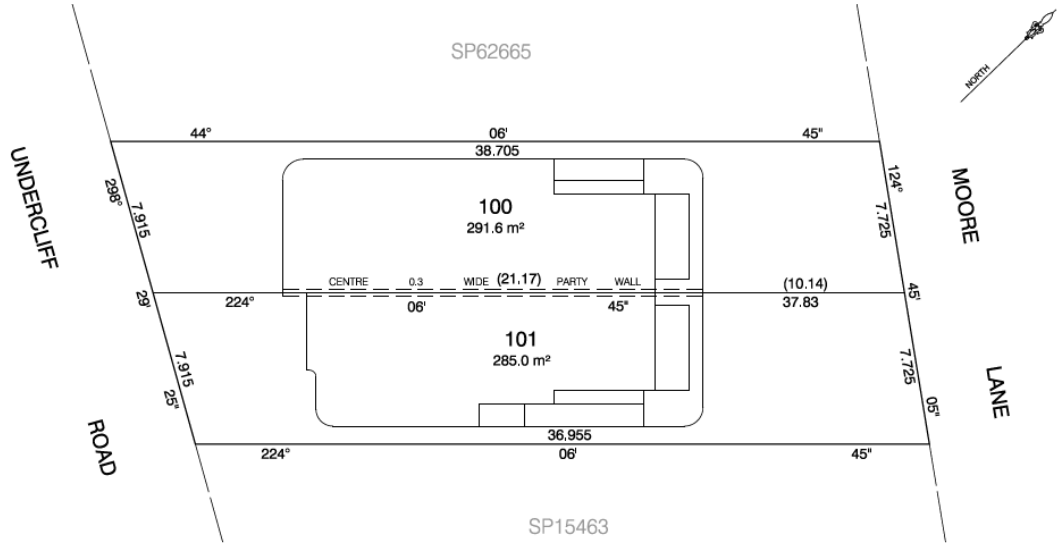

Figure 2 - Proposed plan of subdivision

Accordingly, approval of the WLEP minimum lot size standard variation and the subdivision pattern proposed will facilitate the subdivision outcome anticipate by the LMR reforms for dual occupancy development.

Again, in the absence of any subdivision standards and/ or controls applying to dual occupancy development within the Warringah LEP area it is considered reasonable to adopt these subdivision standards notwithstanding that the site is not within the LMR mapped area. The proposals compliance with such standards and the consistency of the proposed lots and associated geometry with that established within the Freshwater locality is an environmental planning ground in support of the minimum subdivision lot size variation proposed.

Ground 3 - Consistency with varied subdivision pattern and built form characteristics established along Birkley Road

The subdivision pattern and built form characteristics established along Undercliff Road and within the Freshwater Locality generally will ensure that the proposed subdivision, which reflects the approved built form circumstance on the site, is not perceived as inappropriate or jarring in a streetscape context and will not give rise to any adverse environmental consequences. Given such context no unacceptable precedence is created.

It is noted that in *Initial Action,* the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

> *87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

There are sufficient environmental planning grounds to justify contravening the development standard.

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

> *(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.*

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a minimum subdivision lot size variation in this instance.

Boston Blyth Fleming Pty Limited

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