

## 4.6 Variation request

### Address

165 and 165A Seaforth Crescent SEAFORTH NSW

### Proposal

Boundary adjustment and demolition of a portion of the existing single car garage and construction of new double garage.

### Introduction

Clause 4.1 restricts the minimum size of a lot this clause applies to a subdivision of any land shown on the "*Lot Size Map*".

The relevant minimum lot size for the site is 1150m<sup>2</sup> and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

Due to the existing subdivision arrangement the proposed new lots will be 983.4m<sup>2</sup> (Lot 1 / 100) and 760.0m<sup>2</sup> (Lot 2 / 101). The proposal represents a variation of 22.3% (Lot 1 / 100) and 33.9% (Lot 2 / 101).

The proposal is considered acceptable and there are sufficient environmental planning grounds to justify contravening the development standard.

### Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

*(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 latest authority in relation to the operation of clause 4.6 is the decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 ("Initial Action"). 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(3) provides that:

*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.*

This submission has been prepared to support our contention that the development adequately responds to the provisions of 4.6(3)(a) & (b) above.

## **Justification of Proposed Variation**

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument & Manly LEP should be assessed in *Initial Action Pty Ltd vs Woollahra Municipal Council* [2018] NSWLEC 11 & *Samadi v Council of the City of Sydney* [2014] NSWLEC 1199.

Paragraph 27 of the judgement states:

*Clause 4.6 of LEP 2014 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).*

## **Precondition 1 - Consistency with zone objectives**

The proposed development of and use of the land within the R2 Low Density Residential Zone and E3 Environmental Management Zone is consistent with the zone objectives. Zone objectives are as follows:

### **R2 Low Density Residential Zone**

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

### **Comments**

The proposed boundary adjustment maintains the current level of housing with improved amenity that contributes to the housing needs of the community. The proposed dwellings contribute to the variety of housing types available in the area and to the variety of densities of dwelling in the area.

### **E3 Environmental Management Zone**

- *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*

- *To provide for a limited range of development that does not have an adverse effect on those values.*
- *To protect tree canopies and provide for low impact residential uses that does not dominate the natural scenic qualities of the foreshore.*
- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*
- *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*
- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

### Comment

The proposed boundary adjustment will not adversely impact upon the ecological significance or the aesthetic value of the site. The relocation of the access handle from the north-eastern boundary to the south-western boundary will not impact upon the future development of the site. The boundary adjustment will not result in an intensification of the dwelling density of the site.

No significant trees will be removed as part of this application. The boundary adjustment and the future development of the site will not impact upon the foreshore area or the natural features of the site.

No works are proposed within the foreshore area or the rear lot. The proposal will not result in development of an unreasonable bulk and scale.

### **Precondition 2 - Consistency with the objectives of the standard**

*(1) The objectives of this clause are as follows:*

*(a) to retain the existing pattern of subdivision in residential zones and regulate the density of lots in specific locations to ensure lots have a minimum size that would be sufficient to provide a useable area for building and landscaping,*

*(b) to maintain the character of the locality and streetscape and, in particular, complement the prevailing subdivision patterns,*

*(c) to require larger lots where existing vegetation, topography, public views and natural features of land, including the foreshore, limit its subdivision potential,*

*(d) to ensure that the location of smaller lots maximises the use of existing infrastructure, public transport and pedestrian access to local facilities and services.*

### Comments

Then pattern of subdivision in the vicinity is of battle-axe blocks arrangement of similar lot sizes. The boundary adjustment maintains sufficient useable area for building and landscaping.

The boundary adjustment will not adversely impact the existing character of the locality. The proposed boundary adjustment will result in only minor changes to the lot size. The future development of the rear lot will take into consideration the planning controls in relation to the natural environment and amenity.

**Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case**

It is unreasonable and unnecessary to require strict compliance with the development standard as the proposal provides for a boundary adjustment and the construction of a double garage. The desire to provide for two off street parking spaces is constrained by the existing boundary arrangement, siting of the existing building, and sloping topography of the site.

The boundary adjustment results in two lots with a similar configuration to the existing arrangement, this includes lot sizes and maintaining a battle axe arrangement. The proposed boundary adjustments will facilitate the capacity to construct a double garage for each of the lots. This will provide for better access arrangement whilst maintaining essential services to both lots.

Overall there will not be a significant change to the existing arrangement nor an intensification of dwelling density for the site.

**Precondition 4 - To consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court [or consent authority] finding that the matters required to be demonstrated have been adequately addressed**

The above are the environmental planning grounds which are the circumstance which are particular to the development which merit a variation to the development standard.

In the Wehbe judgment (Wehbe v Warringah Council [2007] NSWLEC 827), Preston CJ expressed the view that there are 5 different ways in which a SEPP 1 Objection may be well founded and that approval of the Objection may be consistent with the aims of the policy. These 5 questions may be usefully applied to the consideration of Clause 4.6 variations: -

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

Comment: Yes. Refer to comments under 'Justification of Proposed Variation' above which discusses the achievement of the objectives of the standard.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

Comment: It is considered that the purpose of the standard is relevant but the purpose is satisfied.

3. the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

Comment: Compliance does not defeat the underlying object of the standard development; however, compliance would prevent the approval of an otherwise supportable development.

Furthermore, it is noted that development standards are not intended to be applied in an absolute manner; which is evidenced by clause 4.6 (1)(a) and (b).

4. 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;

Comment: Not applicable.

5. 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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Comment: The development standard is applicable to and appropriate to the zone.

**Conclusion**

This development proposed a departure from the minimum lot size development standard, with the proposed new lots of 983.4m<sup>2</sup> (Lot 1 / 100) and 760.0m<sup>2</sup> (Lot 2 / 101).

This variation occurs as a result of an existing subdivision arrangement and the desire to provide two parking spaces on each of the lots that form part of this application.

This objection to the minimum lot size specified in Clause 4.1 of the Manly LEP 2014 adequately demonstrates that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

Strict compliance with the minimum lot size control would be unreasonable and unnecessary in the circumstances of this case.