

## DEVELOPMENT APPLICATION ASSESSMENT REPORT

<b>Application Number:</b>	DA2020/0817
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<b>Responsible Officer:</b>	Rebecca Englund
<b>Land to be developed (Address):</b>	Lot 11 DP 10548, 14 Gladstone Street NEWPORT NSW 2106
<b>Proposed Development:</b>	Subdivision of an approved dual occupancy development
<b>Zoning:</b>	R2 Low Density Residential
<b>Development Permissible:</b>	Yes
<b>Existing Use Rights:</b>	No
<b>Consent Authority:</b>	Northern Beaches Council
<b>Delegation Level:</b>	NBLPP
<b>Land and Environment Court Action:</b>	No
<b>Owner:</b>	P & V Fiedler Pty Ltd
<b>Applicant:</b>	Urbanesque Planning Pty Ltd

<b>Application Lodged:</b>	22/07/2020
<b>Integrated Development:</b>	No
<b>Designated Development:</b>	No
<b>State Reporting Category:</b>	Subdivision only
<b>Notified:</b>	04/08/2020 to 18/08/2020
<b>Advertised:</b>	Not Advertised
<b>Submissions Received:</b>	0
<b>Clause 4.6 Variation:</b>	4.2A Minimum subdivision lot size for strata plan schemes in certain rural, residential and environment protection zones: 43.1%
<b>Recommendation:</b>	Refusal

<b>Estimated Cost of Works:</b>	\$ 0.00
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### EXECUTIVE SUMMARY

Northern Beaches Council is in receipt of development application DA2020/0817 from P&V Fiedler Pty Ltd for the strata subdivision of an approved detached dual occupancy at 14 Gladstone Street, Newport.

The subject site is zoned R2 Low Density Residential under the provisions of *Pittwater Local Environmental Plan 2014* (PLEP 2014), and the proposed development is permissible with consent.

The proposal is reliant upon variations to the minimum subdivision lot size for dual occupancies prescribed by clause 4.2A of PLEP 2014, with a 301.5m<sup>2</sup> or 43.1% shortfall in relation to both proposed

lots. The applicant's written request to vary this development standard has not satisfactorily addressed the matters required, and the extent of variation attributes to inconsistency with the objectives of the R2 zoning. As such, the consent authority cannot be satisfied of the matters of clause 4.6(4) of PLEP 2014.

In accordance with the direction issued by the Minister for Planning and Public Spaces on 30 June 2020, development applications involving a variation to a numerical development standard greater than 10% are to be deferred to the relevant local planning panel for determination. As such, the subject application is referred to the Northern Beaches Local Planning Panel for determination, with a recommendation of refusal.

## PROPOSED DEVELOPMENT IN DETAIL

The application seeks consent for the strata subdivision of a detached dual occupancy approved pursuant to DA2019/1338. The proposed strata subdivision will result in two 398.5m<sup>2</sup> lots, each containing one dwelling.

## ASSESSMENT INTRODUCTION

The application has been assessed in accordance with the requirements of the Environmental Planning and Assessment Act 1979 and the associated Regulations. In this regard:

- An assessment report and recommendation has been prepared (the subject of this report) taking into account all relevant provisions of the Environmental Planning and Assessment Act 1979, and the associated regulations;
- A site inspection was conducted and consideration has been given to the impacts of the development upon the subject site and adjoining, surrounding and nearby properties;
- Notification to adjoining and surrounding properties, advertisement (where required) and referral to relevant internal and external bodies in accordance with the Act, Regulations and relevant Development Control Plan;
- A review and consideration of all submissions made by the public and community interest groups in relation to the application;
- A review and consideration of all documentation provided with the application (up to the time of determination);
- A review and consideration of all referral comments provided by the relevant Council Officers, State Government Authorities/Agencies and Federal Government Authorities/Agencies on the proposal.

## SUMMARY OF ASSESSMENT ISSUES

Pittwater Local Environmental Plan 2014 - Zone R2 Low Density Residential  
Pittwater Local Environmental Plan 2014 - 4.2A Minimum subdivision lot size for strata plan schemes in certain rural, residential and environment protection zones

## SITE DESCRIPTION

<b>Property Description:</b>	Lot 11 DP 10548 , 14 Gladstone Street NEWPORT NSW 2106
<b>Detailed Site Description:</b>	The site is a rectangular shaped corner site, with a 20.115m wide frontage to Gladstone Street, a 39.625m wide frontage to Bishop Street, and a total area of 797.1m <sup>2</sup> . The site

currently contains a single storey dwelling and a swimming pool, with vehicular access to Bishop Street. The site benefits from a development consent for the demolition of the existing dwelling and the construction of a detached dual occupancy development, which has not been commenced.

The site is zoned R2 Low Density Residential and is surrounded by development of varying zoning, density, age and character, including a public reserve to the north and north-east, a residential flat building on R2 zoned land to the east, a subdivided (torrens title) dual occupancy on R2 zoned land to the west, residential dwellings on R2 zoned land to the south and residential dwellings on R3 zoned land to the south-west.

Map:



## SITE HISTORY

On 21 May 2020, Development Application DA2019/1338 for the demolition of the existing dwelling and the construction of a detached dual occupancy was approved by Council. Of relevance, it is noted that the application involved a variation to clause 4.1B (Minimum lot sizes for dual occupancies) of PLEP 2014, noting that the lot size is 797.1m<sup>2</sup> and the minimum lot size for dual occupancies as prescribed by clause 4.1B of PLEP 2014 is 800m<sup>2</sup>.

On 22 July 2020, the subject application was lodged with Council.

On 8 October 2020, Council provided the applicant an opportunity to amend the clause 4.6 submission, to further substantiate the variation request.

On 26 October 2020, an amended clause 4.6 submission was received.

## CONTEXTUAL HISTORY

The site is located opposite two sites, 18 Gladstone Street and 12A Bishop Street, that are undersized

R2 Low Density Residential zoned lots. With lot sizes of 472m<sup>2</sup> and 329m<sup>2</sup> respectively, the undersized lots result from development consent for the torrens title subdivision of an attached dual occupancy issued under the provisions of State Environmental Planning Policy No. 25 - Residential Allotment Sizes and Dual Occupancy Subdivision, which has since been repealed.

## ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

The relevant matters for consideration under the Environmental Planning and Assessment Act, 1979, are:

Section 4.15 Matters for Consideration'	Comments
Section 4.15 (1) (a)(i) – Provisions of any environmental planning instrument	See discussion on “Environmental Planning Instruments” in this report.
Section 4.15 (1) (a)(ii) – Provisions of any draft environmental planning instrument	Draft State Environmental Planning Policy (Remediation of Land) seeks to replace the existing SEPP No. 55 (Remediation of Land). Public consultation on the draft policy was completed on 13 April 2018. The subject site has been used for residential purposes for an extended period of time. The proposed development retains the residential use of the site, and is not considered a contamination risk.
Section 4.15 (1) (a)(iii) – Provisions of any development control plan	Pittwater 21 Development Control Plan applies to this proposal.
Section 4.15 (1) (a)(iia) – Provisions of any planning agreement	None applicable.
Section 4.15 (1) (a)(iv) – Provisions of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation 2000)	<u>Division 8A</u> of the EP&A Regulation 2000 requires the consent authority to consider "Prescribed conditions" of development consent. These matters have been addressed via a condition of consent.
Section 4.15 (1) (b) – the likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality	<p>(i) <b>Environmental Impact</b> The environmental impacts of the proposed development on the natural and built environment are addressed under the Pittwater 21 Development Control Plan section in this report.</p> <p>(ii) <b>Social Impact</b> The proposed development will not have a detrimental social impact in the locality considering the character of the proposal.</p> <p>(iii) <b>Economic Impact</b> The proposed development will not have a detrimental economic impact on the locality considering the nature of the existing and proposed land use.</p>
Section 4.15 (1) (c) – the suitability of the site for the development	The site is considered unsuitable for the proposed development.
Section 4.15 (1) (d) – any submissions made in accordance with the EPA Act or EPA Regs	No submissions were received.
Section 4.15 (1) (e) – the public interest	This assessment has found the proposal to be contrary to the relevant requirements of clause 4.2A of PLEP 2014 and will result in a development which will create an undesirable

Section 4.15 Matters for Consideration'	Comments
	precedent and be contrary to the expectations of the community. In this regard, the development is not considered to be in the public interest.

## EXISTING USE RIGHTS

Existing Use Rights are not applicable to this application.

## NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application has been publicly exhibited from 04/08/2020 to 18/08/2020 in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000 and the relevant Development Control Plan.

As a result of the public exhibition of the application Council received no submissions.

## REFERRALS

Internal Referral Body	Comments
Strategic and Place Planning	<p><b>Refusal</b></p> <p><i>The former Pittwater Council had a longstanding view that subdivision of dual occupancies was not permitted and the Pittwater LEP 1993 did not permit it. I presume the historical reasons are reflected in the current objective set out in 4.2A(1) of the Pittwater LEP 2015, namely to ensure that land to which this clause applies is not fragmented by subdivisions that would create additional dwelling entitlements.</i></p> <p><i>With the introduction of the Standard Instrument LEP, Council undertook to translate the Pittwater LEP 1993 as a 'like for like'. To ensure the subdivisions of dual occupancies would continue not to be permitted, Council first drafted provisions in clause 2.6 Subdivision—consent requirements. The then DP&amp;I raised issue with a proposed clause to directly prohibit the subdivision of dual occupancies and subdivision. As an alternative to the use of clause 2.6, DP&amp;I advised that Council could consider setting a minimum lot size through its Lot Size Map which Council then did.</i></p> <p><i>If the variation is small enough, clause 4.6 Exceptions to development standards can be applied, however the minimum lot size requirement is basically the Pittwater LEP 2014's way of prohibiting the subdivision of dual occupancies so should be applied as intended.</i></p>

## ENVIRONMENTAL PLANNING INSTRUMENTS (EPis)\*

All, Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and



Council Policies have been considered in the merit assessment of this application.

In this regard, whilst all provisions of each Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and Council Policies have been considered in the assessment, many provisions contained within the document are not relevant or are enacting, definitions and operational provisions which the proposal is considered to be acceptable against.

As such, an assessment is provided against the controls relevant to the merit consideration of the application hereunder.

### State Environmental Planning Policies (SEPPs) and State Regional Environmental Plans (SREPs)

Nil

### Pittwater Local Environmental Plan 2014

Is the development permissible?	Yes
After consideration of the merits of the proposal, is the development consistent with:	
aims of the LEP?	Yes
zone objectives of the LEP?	No

### Principal Development Standards

Standard	Requirement	Proposed	% Variation	Complies
Minimum subdivision lot size for strata plan schemes in certain rural, residential and environment protection zones	700m <sup>2</sup>	Lot 1: 398.5m <sup>2</sup> Lot 2: 398.5m <sup>2</sup>	Lot 1: 43.1% Lot 2: 43.1%	No

### Compliance Assessment

Clause	Compliance with Requirements
1.9A Suspension of covenants, agreements and instruments	Yes
2.6 Subdivision - consent requirements	Yes
4.2A Minimum subdivision lot size for strata plan schemes in certain rural, residential and environment protection zones	No
4.6 Exceptions to development standards	No
7.10 Essential services	Yes

### Detailed Assessment

### Zone R2 Low Density Residential

The proposed development has been considered with respect to the objectives of the R2 Low Density Residential zone, as follows:

- *To provide for the housing needs of the community within a low density residential environment.*

Comment: Without strata subdivision, each of the dwellings forming the detached dual occupancy are owned by the one entity. This would ordinarily result in at least one of the dwellings being a rental property. As a result of the proposed subdivision, each dwelling may be owned by separate entities, which may result in both dwellings being occupied by owners. Alternatively, both properties may be rented, irrespective of the title arrangements. Whilst the proposed strata subdivision may result in a different outcome with regard to the development's contribution to the rental market, the strata subdivision of the detached dual occupancy will still provide for the housing needs of the community.

However, the question then arises as to whether the resultant development provides an outcome that is in keeping with the low density residential environment anticipated under the provisions of PLEP 2014. The minimum lot size for R2 zoned land in the former Pittwater LGA is 550m<sup>2</sup>, which increases to 700m<sup>2</sup> for all R2 zoned land north of Mona Vale Road, inclusive of the entire Newport Locality. The proposed development represents a significant shortfall of not only the minimum lot size applicable for the site, but also the minimum lot size for all R2 zoned land subject to the provisions of PLEP 2014.

The proposed lot sizes are uncharacteristic of the R2 zone, and are more akin to the lots sizes anticipated within the R3 Medium Density zone. As such, the proposed development is not considered to be consistent with a low density residential environment.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Comment: N/A - the proposal is associated with a residential use.

- *To provide for a limited range of other land uses of a low intensity and scale, compatible with surrounding land uses.*

Comment: N/A - the proposal is associated with a residential use.

As such, the proposal is not considered to be consistent with the objectives of the R2 Low Density Residential Zone.

#### **4.2A Minimum subdivision lot size for strata plan schemes in certain rural, residential and environment protection zones**

#### **and 4.6 Exceptions to development standards**

The application seeks consent for the strata subdivision of an approved but yet to be constructed dual occupancy, resulting in two strata lots, each with an area of 398.5m<sup>2</sup>. Pursuant to clause 4.2A(3) of PLEP 2014, the size of any lot resulting from a subdivision of land for a strata plan scheme is not to be less than the minimum size shown on the Lot Size Map in relation to that land. The subject site is located within Area Q on the Lot Size Map, with a minimum lot size of 700m<sup>2</sup>.

The minimum lot size for strata subdivision is a development standard, as defined by the EP&A Act, and as such, the provisions of clause 4.6 of PLEP 2014 can be applied. Pursuant to clause 4.6(2) of PLEP 2014, consent may be granted for development even though the proposal contravenes a development standard prescribed by an environmental planning instrument. Whilst this clause does not apply to those standards expressly excluded from this clause, the minimum lot size for strata

subdivision is not expressly excluded and thus, the clause can be applied in this instance.

What is the extent of the breach?

The application seeks consent for two strata lots, each with an area of 398.5m<sup>2</sup>, being variation of 301.5m<sup>2</sup> or 43.1% with respect to each lot.

Has the applicant's submission addressed the relevant criteria of clause 4.6 of PLEP 2014?

Pursuant to clause 4.6(4) of PLEP 2014, consent can only be granted if the consent authority is satisfied that the applicant's written request to vary the development standard has addressed the criteria of clause 4.6(3) of PLEP 2014. The application was supported by a submission (attached) addressing the provisions of clause 4.6 of PLEP 2014, which has been considered with regard to the criteria of clause 4.6(3) of PLEP 2014, as follows:

- a. *That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case,*

Comment: In accordance with the decision of the NSW LEC in the matter of *Wehbe v Pittwater Council* [2007] NSWLEC 827, one way in which strict compliance with a development standard may be found to be unreasonable or unnecessary is if it can be demonstrated that the objectives of the standard are achieved, despite non-compliance with the development standard. With regard to this clause, there is only one objective:

*"to ensure that land to which this clause applies is not fragmented by subdivisions that would create additional dwelling entitlements"*

The applicant provided a statement confirming that the proposed strata subdivision of the approved dual occupancy will not result in the fragmentation of land, nor the creation of additional dwelling entitlements. This position is supported, noting that strata subdivision does not result in fragmentation of land and the resultant development would remain a detached dual occupancy, with no additional dwellings permissible on the land.

- b. *That there are sufficient environmental planning grounds to justify contravening the development standard.*

Comment: The environmental planning grounds put forward by the applicant are as follows:

1. *The variation achieves the objective of the standard which is to ensure that land to which the clause applies is not fragmented by subdivision that would create additional dwelling entitlements.*
2. *The land is not fragmented by the subdivision as it is a Strata subdivision and it does not create additional dwelling house entitlements.*
3. *Maintenance of and compatibility with the established neighbourhood character. The local context is varied such that the Strata subdivision of the development is inconsequential in terms of the character of the area.*

The first two points put forward by the applicant relate to consistency with the objective of the standard. If simply meeting the objective of the standard and satisfaction of subclause (a) was considered to be 'sufficient grounds' to justify the variation, subclause (b) itself would have no work to do. As such, the applicant must provide separate reasoning to justify the variation to the



minimum lot size standard.

In accordance with the findings of *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, "environmental planning grounds" should relate to the subject matter, scope and purpose of the EP&A Act, including the objects in s1.3 of the EP&A Act. Furthermore, in accordance with the findings of *Pritchard v Northern Beaches Council* [2020] NSWLEC 1310, they must be "sufficient" and be some way tethered to the breach proposed.

The proposed strata subdivision is essentially a paper exercise to facilitate the separate sale of each of the dwellings approved on the site. This outcome is not endorsed by the provisions of PLEP 2014, which was a like-for-like translation of PLEP 1993 that expressly prohibited the strata subdivision of dual occupancies.

The strata subdivision of an approved dual occupancy is not something that impacts upon the visual appearance of the development, nor does it impact/alter the character of an area. As such, the applicant's third point, which suggests that the breach should be supported because the non-compliant proposal will be "inconsequential in terms of the character of the area", is not considered to be a sufficient environmental planning ground that would justify contravention of the standard. If this position was to be supported in this instance, it could be equally applied in relation to every dual occupancy, such that the standard would become irrelevant and obsolete.

Overall, the applicant's request has not satisfactorily addressed the matter required by clause 4.6(3) of PLEP 2014.

#### Is the proposal in the public's interest?

Under the provisions of clause 4.6(4)(a) of PLEP 2014, consent must not be granted to a proposal that contravenes a development standard unless the proposed development (as a whole) 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 to be carried out.

As discussed in further detail separately above, the proposal is not considered to be consistent with the relevant objectives of the R2 Low Density Zone, in that the extent of the departure from the minimum lot size will result in a development that is at odds with the low density residential environment anticipated within the R2 zone.

The proposal is considered to be consistent with the objective of the minimum lot size for strata subdivision, as follows:

- *to ensure that land to which this clause applies is not fragmented by subdivisions that would create additional dwelling entitlements*

Comment: The strata subdivision of a development does not result in the fragmentation of land, as the resultant site remains one lot of land, irrespective of how many strata lots are created. Further, the proposal will remain classified as a detached dual occupancy (2 dwellings on one lot of land), which is the maximum density permitted on the subject site. As such, the strata subdivision does not create additional dwelling entitlements, and the proposal is consistent with the objective of the standard.

However, there appears to be no circumstance in which the strata subdivision of a dual occupancy would ever result in an outcome that would be seen to be inconsistent with the objective of this clause, and the clause would serve no purpose in relation to strata subdivision. As such, it is important to

consider the intent of this clause; namely that the minimum lot size requirement prescribed by clause 4.2A of PLEP 2014 acts to deter, if not prohibit, the subdivision of dual occupancies.

Noting that the proposal is at odds with the true purpose of the clause, that has been endorsed by the community in two concurrent LEPs, it is difficult to suggest that the proposal is in the public's interest.

Furthermore, there is nothing put forward within the applicant's clause 4.6 submission that would differentiate this site from any other R2 zoned site under the provisions of PLEP 2014. Should the application be approved, the proposal would create an undesirable precedent that could be similarly adopted in relation to any dual occupancy development on R2 zoned land. The creation of a precedent that essentially makes a specific standard obsolete is not considered to be in the public's interest.

#### Has concurrence been obtained?

Pursuant to clause 4.6(4) of PLEP 2014, development consent must not be granted to a development that contravenes a development standard unless the concurrence of the Secretary has been obtained. In accordance with Planning Circular PS 18-003 (dated 21 February 2018) issued by the NSW Department of Planning and Environment, the Secretary's concurrence may be assumed by the Northern Beaches Local Planning Panel, if the application was to be approved.

#### Conclusion

The applicant's submission has not satisfactorily addressed the provisions of clause 4.6(3) of PLEP 2014, and the proposal is not in the public's interest, as the proposal is at odds with the objectives of the low density residential environment. Accordingly, the application is recommended for refusal in this regard.

### **Pittwater 21 Development Control Plan**

#### Compliance Assessment

Clause	Compliance with Requirements	Consistency Aims/Objectives
A1.7 Considerations before consent is granted	Yes	Yes
A4.10 Newport Locality	Yes	Yes
C4.2 Subdivision - Access Driveways and Off-Street Parking Facilities	Yes	Yes
C4.5 Subdivision - Utility Services	Yes	Yes

### **CONCLUSION**

The site has been inspected and the application assessed having regard to all documentation submitted by the applicant and the provisions of:

- Environmental Planning and Assessment Act 1979;
- Environmental Planning and Assessment Regulation 2000;
- All relevant and draft Environmental Planning Instruments;
- Pittwater Local Environment Plan;
- Pittwater Development Control Plan; and
- Codes and Policies of Council.

This assessment has taken into consideration the submitted plans, Statement of Environmental Effects, all other documentation supporting the application and public submissions, in this regard the application

is not considered to be acceptable and is recommended for refusal.

In consideration of the proposal and the merit consideration of the development, the proposal is considered to be:

- Consistent with the objectives of the DCP
- Inconsistent with the zone objectives of the LEP
- Inconsistent with the aims of the LEP
- Consistent with the objectives of the relevant EPIs
- Inconsistent with the objects of the Environmental Planning and Assessment Act 1979

The proposal seeks a considerable variation to the minimum subdivision lot size for dual occupancies prescribed by clause 4.2A of PLEP 2014 with respect to both of the proposed strata lots. The extent of variation is at odds with the low density residential character of the area, and will result in a development that will create an undesirable precedent that is not in the public's interest. Furthermore, the clause 4.6 submission provided to support the proposed variation has not satisfactorily demonstrated that there are sufficient environmental planning grounds to justify the proposed contravention.

It is noted that Northern Beaches Local Environmental Plan is currently under development, which will involve the review of the clause relating to the minimum subdivision lot size for dual occupancies, in addition to the zoning of land. The applicant may choose to make representations relating to the zoning of the site and/or the restrictions relating to strata subdivision of dual occupancies as part of any community consultation undertaken during this process.

It is considered that the proposed development does not satisfy the appropriate controls and that all processes and assessments have been satisfactorily addressed.

## RECOMMENDATION

THAT the Northern Beaches Local Planning Panel, on behalf of Northern Beaches Council , as the consent authority REFUSE Development Consent to Development Application No DA2020/0817 for the Subdivision of an approved dual occupancy development on land at Lot 11 DP 10548,14 Gladstone Street, NEWPORT, for the reasons outlined as follows:

1. In accordance with the provisions of clause 4.6(4) of Pittwater Local Environmental Plan 2014 (PLEP 2014), consent cannot be granted to the proposal as;
  - a. The applicant's written request seeking to justify contravention of clause 4.2A (Minimum subdivision lot size for strata plan schemes in certain rural, residential and environmental protection zones) of PLEP 2014 has not satisfactorily addressed or demonstrated that there are sufficient environmental planning grounds to justify the contravention.
  - b. The proposed development is not in the public's interest, as the extent of the proposed variations to clause 4.1A (Minimum subdivision lot size for strata plan schemes in certain rural, residential and environmental protection zones) of PLEP 2014 will result in lot sizes that are inconsistent with the low density residential environment, and in turn, the objectives of the R2 Low Density Zone.