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22 October 2020

REQUEST UNDER CLAUSE 4.6 PLEP 2014

Property/s: 14 Gladstone Street Newport

Proposal: Strata title subdivision of approved detached dual occupancy

Lot No. Plan: Lot 11 in DP 10548

Zoning: R2 Low Density Residential under the Pittwater Local Environmental Plan 2014

Development Standard: Clause 4.2A(3) PLEP 2014 - Minimum subdivision lot size for strata plan schemes in certain rural, residential and environment protection zones.

1. BACKGROUND

This written request is made pursuant to Clause 4.6(3) of the Pittwater Local Environmental Plan 2014 (the LEP) to provide justification to vary a development standard concerning the minimum lot size for Strata title subdivision of an approved dual occupancy development at No. 14 Gladstone Street Newport. The dual occupancy was approved under DA No. 2019/1338 on 21 May 2020.

A Pre-DA meeting for the dual occupancy application was held with Council on 20 September 2018. Amongst other comments, Council advised that "Strata subdivision of the proposed dual occupancy could be considered subject to the proposal being issued development consent." As the proposal has now achieved development consent, this application seeks Strata subdivision. No additional dwelling house entitlements are created by the subdivision beyond the approved dual occupancy.

Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied as to the matters under Clause 4.6(4) of the LEP. It is the onus of the applicant to address the matters under Clause 4.6(3) of the LEP which are addressed through this written request.

Clause 4.2A of the Pittwater Local Environmental Plan provides:-

(1) The objective of this clause is to ensure that land to which this clause applies is not fragmented by subdivisions that would create additional dwelling entitlements.

(2) This clause applies to land in the following zones that is used, or is proposed to be used, for the purpose of a dual occupancy—

a) Zone RU2 Rural Landscape,

b) Zone R2 Low Density Residential,

c) Zone R5 Large Lot Residential,

d) Zone E4 Environmental Living.

(3) The size of any lot resulting from a subdivision of land to which this clause applies for a strata plan scheme (other than any lot comprising common property within the meaning of the Strata Schemes (Freehold Development) Act 1973 or Strata Schemes (Leasehold Development) Act 1986) is not to be less than the minimum size shown on the Lot Size Map in relation to that land.

Note. Part 6 of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 provides that strata subdivision of a building in certain circumstances is specified complying development.

(4) This clause does not apply to the strata subdivision of land used, or proposed to be used, for the purpose of a dual occupancy for which development consent was granted on or before 2 June 2003.

The proposed Strata title subdivision will result in lot sizes which are less than the minimum lot size shown on the Lot Size Map. The size shown on the Lot Size Map is 700m^2. This is identified as a development standard which requires a variation under Clause 4.6 of the Pittwater Local Environmental Plan to enable the granting of consent to the development application.

The proposed lot area for each site is 398.5m^2 represents a variation of 43% when expressed as a percentage.

Environmental Planning Grounds Relied Upon

The environmental planning grounds supporting variation are on the basis of:-

- 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,
- The land in not fragmented by the subdivision as it is a Strata subdivision and it does not create additional dwelling house entitlements.
- 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 request will now further expand on the identified environmental planning grounds.

2. IS THE STANDARD A DEVELOPMENT STANDARD?

Clauses 4.1B(2) under the Pittwater Local Environmental Plan 2014 (the LEP) provides:-

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 maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.

A development standard is defined in S1.4 of the Environmental Planning and Assessment Act 1979 (“EPA Act”) to mean:

"provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:-

(a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,

(b) the proportion or percentage of the area of a site which a building or work may occupy,

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

(d) the cubic content or floor space of a building,

(e) the intensity or density of the use of any land, building or work,

(f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,

(g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,

(h) the volume, nature and type of traffic generated by the development,

(i) road patterns,

(j) drainage,

(k) the carrying out of earthworks,

(l) the effects of development on patterns of wind, sunlight, daylight or shadows,

(m) the provision of services, facilities and amenities demanded by development,

(n) the emission of pollution and means for its prevention or control or mitigation, and

(o) such other matters as may be prescribed."

The lot area control falls under subsection (a); therefore the control is a development standard and may be subject to a request for variation under Clause 4.6 of the PLEP.

3. CLAUSE 4.6 OF THE PITTWATER LOCAL ENVIRONMENTAL PLAN 2014

Clause 4.6 of the Pittwater LEP is a variations clause that is similar in effect to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are also different to those in SEPP 1.

4.6 Exceptions to development standards

(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 Secretary has been obtained.

(5) In deciding whether to grant concurrence, the 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 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.

(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,

4. THE ONUS ON THE APPLICANT

Under Clause 4.6(3)(a), it is the onus of the applicant to demonstrate:-

(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.

According to the relevant case law, common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised in Wehbe v Pittwater Council (2007). The five tests under Wehbe are tabulated below. Only one of the tests needs to be satisfied. Consideration of a variation is not limited to these tests – they are simply the most common ways invoked in considering whether compliance is unreasonable or unnecessary.

TESTS UNDER WEHBE	COMMENTS
1. The objectives of the standard are achieved notwithstanding non-compliance with the standard.	The sole objective of the development standard is expressed at Clause 4.2A(1) of the PLEP:- The objective of this clause is to ensure that land to which this clause applies is not fragmented by subdivisions that would create additional dwelling entitlements. The objective of the standard is concerned with the avoidance of subdivisions which create additional dwelling entitlements. Clearly, the Strata subdivision of the approved development does not create additional dwelling entitlements beyond the approved dual occupancy and the objective is unequivocally met. As the objective of the standard is set out in such clear terms, it is considered that consistency with this aspect alone, constitutes sufficient environmental planning grounds planning grounds to allow a variation to the standard.
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;	The objective of the development standard is considered to be relevant to the development and the objective is met. Because the objective is achieved, compliance is unnecessary.
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;	The objective of the standard would not be defeated or thwarted if compliance was required however because the development meets the objects or purpose of the standard, strict compliance is unreasonable. In other words, the development is in harmony with the objective of the standard.
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;	The development standard has not been abandoned but the variation may be supported as the Strata subdivision does not create additional dwelling house entitlements.
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard	The zoning of the land is appropriate for the development standard. The land is within the R2 Low Density Residential Zone. The zone objectives are:-

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.	• 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. • To provide for a limited range of other land uses of a low intensity and scale, compatible with surrounding land uses. The first objective is relevant to the proposal. In this regard the proposal is not in conflict with the objective. The resulting development will provide for the housing needs of the community in a low density residential environment. The proposal demonstrates compatibility with the relevant zone objective.

Maintenance of and compatibility with the established neighbourhood character

The local character and subdivision pattern of the locality are varied. Please refer to the context analysis at Figure 1. The area is a mix of open space, Strata titled residential flat buildings, Strata titled multi dwelling housing, unsubdivided dual occupancies and subdivided dual occupancies.

The lot sizes are also varied dependent on the type of development supported, however of significant importance is the fact that subdivision does not impact on the established local character. The character is established by the planning controls, types of development, site density and building height. The Strata subdivision of the approved dual occupancies will not impact on the character of the area. They will be compatible with the area as they are compliant with Council's development controls which establish the character. After subdivision, there is no change to the character and there are no additional dwelling entitlements created by the subdivision. The act of subdivision is benign.

For the preceding reasons, it is considered there are sufficient environmental planning grounds to justify a variation to the development standard. Therefore, compliance with the development standard is unreasonable and unnecessary.

Figure 1: Context diagram noting the varied local character. The subject site is highlighted in yellow.

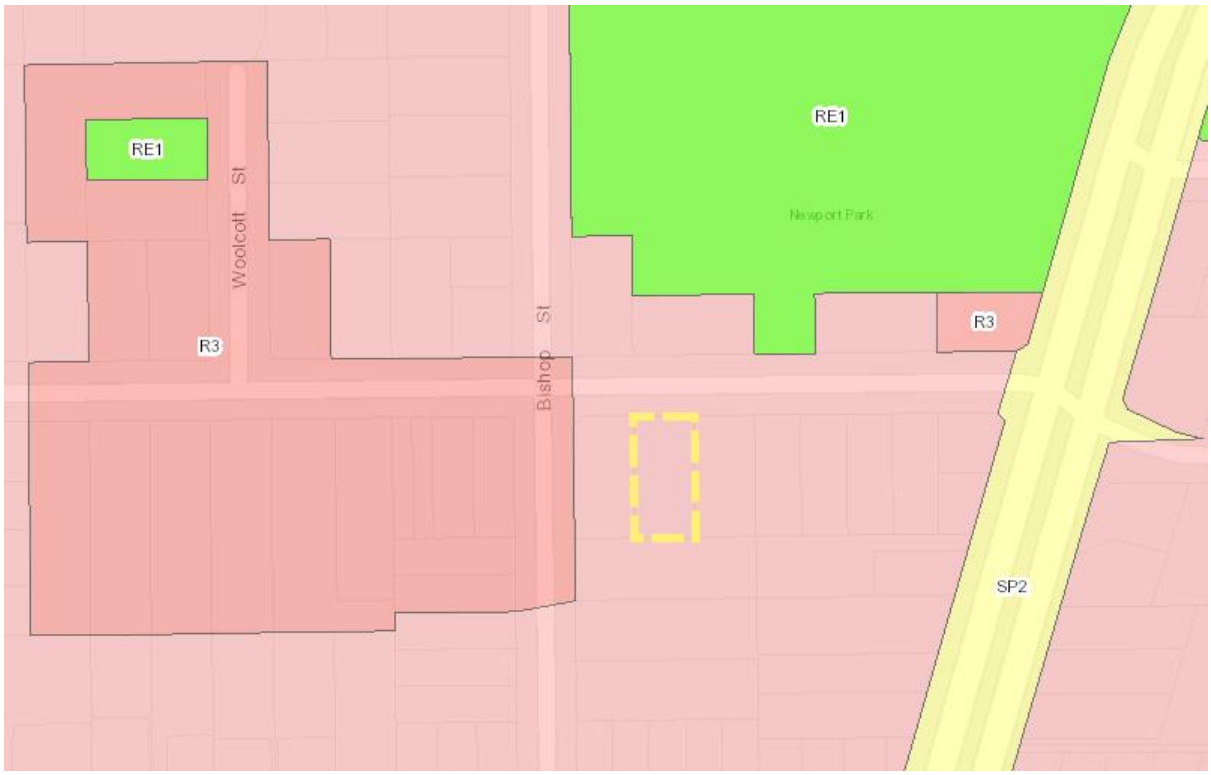

Figure 2: Extract from the Pittwater LEP zoning map noting the variation in the subject area.

In relation to the consideration of environmental planning grounds in justifying contravening a development standard, it is worth pointing out that in Four2Five Pty Ltd v Ashfield Council (2015) Commissioner Pearson made a judgement that a Clause 4.6 variation requires identification of environmental planning grounds that are particular to the circumstances to the proposed development. In other words, simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

In a follow up judgement on further appeal, the Chief Judge, upheld the Four2Five decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does not mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are "sufficient environmental planning grounds to justify contravening the development standard" is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The more recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether each and every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant's written document itself, and in the Commissioner's assessment of it). In February 2017, the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligation is to be satisfied that "the applicant's written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case …and that there are sufficient environmental planning grounds to justify contravening the development standard." He held that this means (*emphasis added*):

> "the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary".

Accordingly, in regard to the proposed variation to the lot area control, it is considered that this Clause 4.6 request has demonstrated sufficient environmental planning grounds for Council to be satisfied that the request is adequate and to allow appropriate flexibility.

There is also no requirement under Clause 4.6 or case law that a non-compliant development must demonstrate a better planning outcome. (*Initial Action Pty Ltd v Woollahra Municipal Council (2018)*.

Additionally, under (*Initial Action Pty Ltd v Woollahra Municipal Council (2018)* at [24], the Chief Judge stated that "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". It is considered that this request is consistent with this aspect of the judgment as it does not rely on promotion of the benefits of the development.

5. THE ONUS ON THE CONSENT AUTHORITY

Pursuant to Cl.4.6(4)(a), the Council must form the positive opinion of satisfaction that the applicant's written request has adequately addressed both of the matters required to be demonstrated by Clause 4.6(3)(a) and (b) and that 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.

The consent authority does not have to directly form the opinion of satisfaction but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in Clause 4.6(3)(a) and (b) have been adequately addressed in the written request in order to enable the consent authority to form the requisite opinion of satisfaction. (Initial Action Pty Ltd v Woollahra Municipal Council (2018)).

6. CONCLUSION

The intent of the development application is to allow for the Strata subdivision of an approved dual occupancy. Unequivocally, the subdivision does not result in the creation of additional dwelling entitlements beyond the approved dual occupancy which is the purpose of the development standard in question. Therefore, compliance is unnecessary and the withholding of consent is unreasonable.

Development standards tend to be strictly numerical in nature and fail to take into consideration the nature of the development, any site constraints or qualitative aspects of the development or of the particular circumstances of the case. Clause 4.6 of the standard instrument LEP allows such an analysis to be carried out.

It has been demonstrated in this request that strict compliance with the development standard is unnecessary and that there are sufficient environmental planning grounds to allow Council to indirectly form the opinion of satisfaction that this written request has adequately addressed the matters required to be demonstrated by Cl.4.6(3)(a) and (b).

Therefore, I request that council support the variation on the basis that this Clause 4.6 variation demonstrates that strict compliance with the development standard is unnecessary and that there are sufficient environmental planning grounds to justify a variation to the development standard.

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