

General Manager  
Northern Beaches Council  
1 Park Street  
MONA VALE NSW 2103

4 April 2019

## REQUEST UNDER CLAUSE 4.6 PLEP 2014

**Property/s:** 14 Gladstone Street Newport

**Proposal:** Attached Dual Occupancy and Torrens Title Subdivision

**DA No.:** DA-2019/40

**Lot No. Plan:** Lot 11 in DP 10548

**Site Area:** 797m<sup>2</sup>

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

**Development Standard:** Clause 4.1B(2) PLEP 2014 - Minimum lot sizes for dual occupancies.

### 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 the establishment of a dual occupancy development at No. 14 Gladstone Street Newport as proposed under the accompanying development application.

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.

The applicable lot area required for the establishment of a dual occupancy development is 800m<sup>2</sup>. The subject lot area is 797m<sup>2</sup>. The variation is 3m<sup>2</sup> or expressed as a percentage, 0.375%. The variation is considered to be minor or modest.

### 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 Clause 4.6 of the WLEP is applicable.

### 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,
  - (ca) clause 4.4, to the extent that it applies to the land in Zone B4 Mixed Use that has a maximum floor space ratio of 3:1.
  - (cb) clause 4.4A.

## 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.

In this case, the variation is considered to be minor or modest and our request relies in the principle established by the Court under *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 (“Fast Buck\$”) which is explained in *Banjanin v Mosman Council* [2016] NSWLEC 1332 at paragraphs 46-47.

44. Mr Staunton submits that *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 [9] is relevant to my consideration of the very minor numerical non-compliance with the standard. He further submits that this important case, which was influential in the Chief Judge’s reasoning in *Wehbe v Pittwater Council* (2007) 156 LGERA 446 [42], is often overlooked as it can be difficult to locate given the dollar sign in lieu of a ‘s’. The relevant portion of [9], in relation to a minor numerical departure from the standard, is as follows:

Before the assessor the appellant attempted to establish that compliance with the development standard was unreasonable or unnecessary because the standard itself was unreasonable or unnecessary. There were other ways in which an objector under SEPP 1 might present his case. He might accept that the standard was both reasonable and necessary, but seek to establish that enforcing compliance in his case would be unreasonable or unnecessary. This would be a sensible approach where the departure from the standard was modest...

47. I accept the applicant’s justification of the minor numerical non-compliance with the FSR development standard and I am satisfied that compliance with the FSR development standard is unnecessary in the circumstances. I accept that the proposal is consistent with the relevant objectives of the FSR development standard to ensure that buildings

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are compatible with the desired future character of the area in terms of building bulk and scale; to provide a suitable balance between landscaping and built form; and to minimise the adverse effects of bulk and scale of buildings, for the reasons articulated by Ms McCabe in her written request for the contravention of the FSR development standard.

Pursuant to Fast Buck\$, while we consider the development standard is both reasonable and necessary however it would be unreasonable of Council to enforce strict compliance given that the variation is so minor.

TESTS UNDER WEHBE	COMMENTS
<p>1. The objectives of the standard are achieved notwithstanding non-compliance with the standard.</p>	<p>The objectives of the development standard are expressed at Clause 4.1B(1):-</p> <p>“The objectives of this clause are as follows:</p> <p style="padding-left: 40px;">(a) to achieve planned residential density,</p> <p style="padding-left: 40px;">(b) to maintain a high level of residential amenity, including adequate provision of private open space.</p> <p>The objectives of the standard are concerned with achieving planned residential densities and maintaining a high level of residential amenity including adequate private open space.</p> <p>With these objectives in mind, I make the following observations: -</p> <ul style="list-style-type: none"> <li>• The planned residential density under the control is 1 dwelling per 400m<sup>2</sup>. The development will achieve a density of 1 dwelling per 398.5m<sup>2</sup>. The minor variation results in essentially the same result as the planned residential density.</li> <li>• The variation is such that it does not detract from the environmental capacity of the land to support the intended development.</li> <li>• The development results in a high level of residential amenity for the future residents of the development as the development has compliant private open space and landscaped area.</li> <li>• The minor variation does not result in an over development of the site as the floor space ratio and building heights will be compliant.</li> </ul> <p>For the above reasons, the objectives of the control are satisfied and there are sufficient environmental planning grounds to allow a variation to the standard.</p>
<p>2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;</p>	<p>The objective of the development standard is considered to be relevant to the development however due to the minor variance, strict compliance is unreasonable and unnecessary.</p>
<p>3. The underlying object or purpose would be defeated or thwarted if compliance was required and</p>	<p>The objective of the standard would not be defeated or thwarted if compliance was required. The minor variance does not defeat the objects or purpose of the standard and therefore strict compliance is unreasonable.</p>

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therefore compliance is unreasonable;	
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.
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.	The zoning of the land is appropriate for the development standard.

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.

Additionally, there is 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)).

## 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)).

In assisting the consent authority in forming its opinion of satisfaction as to the public interest test under Cl.4.6(4)(a)(ii), I refer to the objectives for development within the zone in which the development is proposed to be carried out.

The land is within the R2 Low Density Residential Zone. The zone objectives are:-

- 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 continues to provide for the housing needs of the community in a low density residential environment.

The proposal thereby demonstrates compatibility with the relevant zone objectives.

## 6. CONCLUSION

The purpose of the development is to allow for the construction of an attached dual occupancy with subsequent Torrens title subdivision. There is a minor variation in the minimum lot area required for the establishment of a dual occupancy.

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 both unreasonable and 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 unreasonable and unnecessary and that there are sufficient environmental planning grounds to justify a variation to the development standard.



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