
Sent: 30/05/2021 1:00:55 PM
Subject: DA Application Number: DA2021/0511
Attachments: Submission DA 2021.0511.pdf;

We have indicated in a separate email to the Planning Officer that we wish to submit and objection to the proposed development.

There was no avenue, as far as we could ascertain, to attached a written submission.

As such, we attach our objection to the proposed development.

Kind regards,

Neil

.....
Neil Kennan
Nexus Environmental Planning Pty Ltd
PO Box 212
CONCORD NSW 2137

M: +61 418 419 279

E: kennan@ozemail.com.au

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Consultants in:

Town Planning
Environmental Assessment

Suite 29
103 Majors Bay Road
P.O. Box 212
CONCORD NSW 2137

Mobile: +61 418 419 279
Email: kennan@ozemail.com.au

Principal:
NEIL KENNAN
B.A., Dip. Urb. Reg. Plan., MPIA, Ord 4,
Diploma Cartography

Our Ref: B3401

29 May, 2021

The General Manager
Northern Beaches Council

Dear Sir,

Application Number: DA2021/0511
Subdivision of one (1) lot into two (2) lots
No.1 Bibbenluke Avenue
DUFFYS FOREST NSW 2084

We have been requested by Brent and Linda Lawson of No.383 Wyong Road, Duffys Forest to review the subject development application (**the Application**) and to prepare a submission to Northern Beaches Council (**Council**) objecting to the subject development.

In preparation of this submission, we have reviewed all documentation available on the Council website during the exhibition of the Application.

In preparing this submission, we have not had regard to the compliance or otherwise of the proposed development with the numerical requirements of the Council planning instruments other than those addressed in this submission. We assume that the Council Town Planning Staff will assess the proposed development against all other controls relating to the proposed development in its assessment of the Application.

Summary

In summary, our submission is that:

1. The proposed development is not one which is subject to the provisions of **Clause 4.2** of the Warringah Local Environmental Plan 2011 (**LEP 2011**).
2. The Application does not meet the minimum lot size for subdivision pursuant to **Clause 4.1** of LEP 2011.
3. The minimum lot size development standard contained in **Clause 4.1** of LEP 2011 cannot be varied pursuant to **Clause 4.6** of LEP 2011.

The proposed development

No.1 Bibbenluke Avenue is located within the RU4 Primary Production Small Lots zone of the LEP 2011.

The minimum lot size in the RU4 Primary Production Small Lots zone is 2 Hectares.

The Statement of Environmental Effects (**SEE**) submitted with the Application states that:

The proposal seeks approval for the two lot Torrens title subdivision of the subject site.

The development indices for the proposed subdivision are as follows:

Existing Lot Size: 1.84 ha

Proposed Lot 1: 1.16 ha

Proposed Lot 2: 6,772m²

The objectives of the RU4 Primary Production Small Lots zone are:

- *To enable sustainable primary industry and other compatible land uses.*
- *To encourage and promote diversity and employment opportunities in relation to primary industry enterprises, particularly those that require smaller lots or that are more intensive in nature.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To minimise the impact of development on long distance views of the area and on views to and from adjacent national parks and bushland.*
- *To maintain and enhance the natural landscape including landform and vegetation.*
- *To ensure low intensity of land use other than land uses that are primary industry enterprises.*
- *To maintain the rural and scenic character of the land.*

Clause 4.2 of LEP 2011 states:

4.2 Rural subdivision

- (1) *The objective of this clause is to provide flexibility in the application of standards for subdivision in rural zones to allow land owners a greater chance to achieve the objectives for development in the relevant zone.*
- (2) *This clause applies to the following rural zones—*
 - (a) *Zone RU1 Primary Production,*
 - (b) *Zone RU2 Rural Landscape,*
 - (baa) *Zone RU3 Forestry,*
 - (c) *Zone RU4 Primary Production Small Lots,*
 - (d) *Zone RU6 Transition.*
- Note - When this Plan was made it did not contain Zone RU1 Primary Production, Zone RU2 Rural Landscape or Zone RU6 Transition.*
- (3) *Land in a zone to which this clause applies may, with development consent, be subdivided for the purpose of primary production to create a lot of a size that is less than the minimum size shown on the Lot Size Map in relation to that land.*
- (4) *However, such a lot cannot be created if an existing dwelling would, as the result of the subdivision, be situated on the lot.*
- (5) *A dwelling cannot be erected on such a lot.*

The SEE submitted with the Application further states:

The proposal seeks to rely upon the flexibility offered by Clause 4.2 by providing the land owners with flexibility in relation to the Council's minimum allotment size requirements. The proposal will allow for the separation and sale of the existing animal boarding establishment to an animal welfare organisation and which it is submitted is consistent with the objectives of the RU4 – Primary Production Small Lots Zone.

Comment: **Sub-clause 4.2(3)** of LEP 2011 clearly informs the reader that the provisions of **Clause 4.2** relate to "the purpose of primary production".

Primary industry generally refers to an industry, such as mining, agriculture, or forestry, which is concerned with obtaining or providing natural raw materials for conversion into commodities and products for the consumer.

Primary production generally refers to the production of basic materials or crops, rather than of products made from them.

It is clearly the case that the use of the subject land as an animal boarding establishment is not a land use which would fit within the definition of either "primary industry" or "primary production" and, as such, we are of the opinion that **Clause 4.2** of LEP 2011 has no work to do in the assessment of the Application.

Notwithstanding, it might be argued that **Clause 4.6** of LEP 2011 could be utilised to vary the 2 hectare minimum lot size in the RU4 zone. In this regard, **sub-clause 4.6(1)** states:

- (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.*

Sub-clause 4.6(6) of LEP 2011, however, states:

- (6) *Development consent **must not be granted under this clause** [emphasis added] 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.*

Comment: **Sub-clauses 4.6(6)(a)** and **4.6(6)(b)** apply to the Application. The existing lot and the proposed 2 (two) lots are all below the minimum 2 hectare lot size. As such, **Clause 4.6** cannot be used to vary the minimum lot size development standard.

Even if **Clause 4.6** applied, in *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* and *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* Preston CJ outlined that Commissioners on appeal exercising the functions of the consent authority have power to grant consent to developments which contravene the building height standard (cl 4.6(2)), however, they cannot grant such a development consent unless they:

- Are satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)).
- Are satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)).
- Have considered a written request which demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and they are satisfied that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)).
- Have considered a written request which demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

We are of the opinion that the Application is clearly one where the Council could not be satisfied that the above tests for variation to the 2 hectare minimum lot size would be met.

As such, the proposed development must be refused by the Council.

Yours faithfully,

NEXUS ENVIRONMENTAL PLANNING PTY LTD

per:

A handwritten signature in black ink, appearing to read 'Neil Kennan', written in a cursive style.

Neil Kennan