



## Clause 4.6 Development Standard Variation

### Introduction

Clause 4.6 of the *Mid-Western Regional Local Environmental Plan 2012* (LEP) allows for development consent to be granted to developments that would contravene a development standard imposed by an Environmental Planning Instrument. A written request from the applicant is required to accompany a DA that is seeking a variation to a development standard pursuant to Clause 4.6. Specifically, the following is required:

- (3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—
- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and
  - (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

**Note—**

The *Environmental Planning and Assessment Regulation 2021* requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

- (4) The consent authority must keep a record of its assessment carried out under subclause (3).

This letter forms the required written request. The proposed development standard to be varied is the minimum lot size requirement under Clause 4.1B of the LEP.

### Development Standard to be Varied

The Development Standard to be varied is Clause 4.1B of the Mid-Western Regional LEP which states:

- (1) *This clause applies to the following land—*
  - (a) *land within Zone R1 General Residential,*
  - (b) *land within Zone R3 Medium Density Residential,*
  - (c) *land in Rylstone or Kandos that is within Zone RU5 Village.*
- (2) *Despite any other provision of this Plan, development consent may be granted to the subdivision of land to which this clause applies if—*
  - (a) *multi dwelling housing or a dual occupancy is lawfully erected on the land, and*
  - (b) *the area of each resulting lot will not be less than—*
    - (i) *300 square metres for a dual occupancy (attached) or multi dwelling housing, or*
    - (ii) *400 square metres for a dual occupancy (detached), and*

- (c) only one dwelling will be located on each lot resulting from the subdivision.
- (3) Development consent may be granted to a single development application for development to which this clause applies that is both of the following—
- (a) the subdivision of land into 2 or more lots,
  - (b) the erection of a dual occupancy (attached), dual occupancy (detached) or multi dwelling housing on each lot resulting from the subdivision, if the size of each lot is equal to or greater than—
    - (i) 300 square metres for a dual occupancy (attached) or multi dwelling housing, or
    - (ii) 400 square metres for a dual occupancy (detached).

Development consent is sought for the construction of an attached dual occupancy development and associated Torrens Title Subdivision under Clause 4.1B of the LEP. Pursuant to Clause 4.1B(3) of the LEP, an attached dual occupancy development may be subdivided down to 300m<sup>2</sup>. Each proposed dwelling shall be situated on its own Lot, as follows:

- Two bedroom dwelling – 256.93m<sup>2</sup> proposed Lot area; and
- Three bedroom dwelling – 344.57m<sup>2</sup> proposed Lot area.

The variation to Clause 4.1B of the LEP is numerically minor when considering the proposed development and development trends in Mudgee. The exceedance equates to 14.35% reduction to the 300m<sup>2</sup> minimum lot size requirement under Clause 4.1B of the LEP.

## Justification

The NSW Planning & Infrastructures' *Varying Development Standards: A Guide* provides guidance on the preparation of a written submission required for a Clause 4.6 Development Standard Variation. Specifically, it notes that the matters in Clause 4.6 should be addressed along with the "Five Part Test" established by the NSW Land and Environment Court.

The Five Part Test was established in *Wehbe v Pittwater Council (2007) NSWLEC 827*. Preston CJ established five potential ways for determining whether a development standard could be considered to be unreasonable or unnecessary. These include:

1. The objectives of the Standard are achieved notwithstanding noncompliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the councils own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary or unreasonable;
5. The compliance with the development standard is unreasonable or inappropriate due to the existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

It is noted that the *Wehbe v Pittwater Council* decision was dealing with SEPP1, however it has also been found to be applicable when considering a Clause 4.6 variation. Reference is also made to the court decisions *Four2Five Pty Ltd v Ashfield Council (2915) NSWLEP 90* and *Randwick City*

*Council v Micaul Holdings Pty Ltd (2016) NSWLEC 7*, which elaborated on how the five ways should be applied beyond compliance with the objectives of the development standard and the zone.

In our opinion, the proposal satisfies the first of the five ways established in the Five Part Test, that demonstrate that the development standard is unreasonable and unnecessary in this instance, for the reasons set out below.

## Five Part Test

### 1. The objectives of the Standard are achieved notwithstanding noncompliance with the standard

The proposed development would satisfy the objectives of the standard and is considered both unreasonable and unnecessary..

The minimum lot size provision primarily has a descriptive administrative purpose as opposed to an environmental outcome. Despite this, the proposed variation does not comprise the environmental outcome intended to be achieved for the standard, as discussed below.

The proposed development variation would not change the established minimum lot size limit within the locality of the proposed development for other future development as it is only requesting a variation for the proposed development associated with this development application and, as such, would not set a 'precedent' for future development as each development application is assessed by merit.

Therefore, despite not achieving the development standard, the proposed development does not hinder or decrease the capacity of the objective of the standard to be achieved and the minimum lot size requirement would still be established in the locality.

The site in its entirety is surrounded by existing public roads and residential development, and consequently the proposed development fits the context of the locality.

The variation only represents a 14.35% or 43.07m<sup>2</sup> reduction to the minimum lot size provision. The minor variation arises as a consequence of the intended development of the site, being a mix of residential opportunities, and in this case a 3 bedroom medium sized development and 2 bedroom smaller sized dwelling. The proposed variation would not be perceivable.

The nature of the proposed variation would have no adverse effect on the shadows cast to adjoining properties. The shadows would not affect any residential lands or public open space. As such, the development minimises any visual impact and protects the amenity of adjoining development and sensitive lands within proximity.

The proposed development provides for a new development that is situated within an existing residential area, contributing to the vitality of the Mudgee economy. The site is within convenient walking distance to the CBD and bus routes, thereby being a suitable site for the intended development.

### ***Summary of Achieving Objectives of the Standard***

Preston CJ in *Wehbe v Pittwater* stated the following:

*"The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the*

*objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)''*

There is an expectation that the 300m<sup>2</sup> minimum lot size provision under Clause 4.1B would serve to provide a single residential dwelling. However, there are efficient ways to achieve a range of residential opportunities, including larger Lots and smaller more dense Lots. The proposed development achieves a smaller Lot that still supports a two bedroom residential dwelling, providing diversity in the housing market.

Accordingly, the variation to the standard would not compromise achievement of the objectives of the standard. Rather, this proposal offers an alternative means of achieving the objective.

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

This matter is not applicable in this instance as the underlying objectives and purpose is applicable to the development.

- 3. The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.**

This matter is not applicable in this instance.

- 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 or unreasonable.**

This matter is not applicable in this instance.

- 5. The compliance with the development standard is unreasonable or inappropriate due to the existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.**

This matter is not applicable in this instance.

## **Clause 4.6 Matters**

### **Clause 4.6(3)(a) Compliance with the development standard is unreasonable or unnecessary in the circumstance of the case**

This Clause requires the applicant to provide justification that strict compliance with the minimum lot size provision under Clause 4.1B of the LEP is unreasonable or unnecessary in the circumstances of this development.

The Five Part Test, as discussed above, establishes the justification in accordance with relevant caselaw, which determines where a development standard could be considered unreasonable or unnecessary.

The proposed minimum lot size variation does not result in adverse amenity impacts and the development remains consistent with that of surrounding subdivision patterns. The proposed Lot sizes, and the overall Lot dimensions, allow for appropriate site development typical of the emerging locality with general compliance with Council's DCP controls.

The design of the proposed subdivision and extent of the variation is consistent with the immediate locality. The proposed lot configuration will achieve residential development outcomes

that do not have adverse effect upon any possible ecological, scientific, or aesthetic values in the locality. In particular, the siting of the dwelling on the reduced sized Lot has been carefully positioned to ensure that there are no immediate impacts on nearby residences.

**Clause 4.6(3)(b) Sufficient environmental planning grounds to justify contravening the development standard**

The environmental planning grounds which support the contravention of the minimum lot size standard relate to:

- The proposed subdivision will deliver two Lots that are capable of achieving general consistency with Council's DCP controls for residential development;
- The subdivision layout is sympathetic to the existing character in the locality whilst innovatively catering to the needs of residents. The proposed subdivision will not result in adverse streetscape impacts in the locality.
- The minimum lot size variation of 14.35% for the site is not considered excessive or unreasonable in this instance when viewed in the context of the site or locality.
- The proposal provides for the economic and orderly development of the site by allowing a Torrens Title subdivision to cater for the housing needs of the community.

The proposed variations relate to a relatively minor encroachment to the development standard and do not relate to an attempt to create a exceedingly dense residential outcome. Consequently, the proposal would be consistent with the following objectives of the EP&A Act (Section 1.3):

- (c) to promote the orderly and economic use and development of land,*
- (g) to promote good design and amenity of the built environment,*

In addition, there are no known negative impacts as a result of the proposed development.

**Clause 4.6(4)(a)(ii) The Proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives of for development within the zone in which the development is proposed to be carried out**

The proposed development is in the public interest due to the following:

- Facilitates a development that is consistent with the zone objectives and intent of the R1 General Residential zone, being a development that provides for the housing needs of the community and providing for a variety of housing types and densities.
- Provides for an additional housing that is situated in a convenient location due to the existing Mudgee CBD and dominated residential area;
- The development is consistent with other developments within the locality.

Regarding the first point above, the objectives of the R1 General Residential zone are:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The development is consistent with the objectives of the R1 zone. The development shall provide for a new residential development, which will provide for a range of housing types and densities in the area. The development is consistent with other residential developments in the vicinity.

### **Clause 4.6(4)(a)(b) & (5) Consideration and concurrence by Director General**

Concurrence to the proposed variation is not required by the Secretary pursuant to Clause 4.6(4)(b), as it is understood that the relevant consent authority has the necessary delegation to process.

Despite this, the proposed variation to the minimum lot size standard is not considered to be detrimental to any matters of significance for state or regional planning.

In terms of this development, there is no public benefit in maintaining the development standard. Consistent with the Clause 4.6 objectives, allowing the variation will facilitate a development that achieves better and appropriate outcomes and represents an appropriate degree in applying a development standard.

### **Conclusion**

The development proposes a variation from the minimum lot size standards under Clause 4.1B of the LEP. As outlined above, the proposed development, despite not meeting the minimum lot size, would not result in any land use conflict and not significantly impact the public domain, does not significantly impact the establishment minimum lot size in the locality and still reflects the nature of the surrounding development being residential developments. In this regard, the development would be consistent with the objectives of the R1 zone and Clause 4.1B of the LEP. It can therefore be concluded that:

- Compliance with the development standard is unreasonable and unnecessary in this instance as the development would achieve the intent of the relative objectives and intent of the planning provisions; and
- There are sufficient environmental planning grounds to justify the contravention of the development standard; and
- The development would be in the public interest by virtue of being consistent with the objectives of the R1 zone and does not hinder the objectives of the standard.