

CLAUSE 4.6 VARIATION TO THE DEVELOPMENT STANDARD

Introduction

This Clause 4.6 variation request aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for, and from, development. The request has been prepared to address the variation to the development standard for minimum allotment size under Clause 4.1 of the Bankstown LEP 2015.

Clause 4.1 specifies a minimum allotment size of 450m². Lot 2 provides a site area of 437m² which is a variation to the standard of 13m² or 2.8% and Lot 3 provides 437.1m² which is a variation of 12.9m² or 2.8%. A unique site-specific analysis has been undertaken throughout the project to determine appropriate responses to site constraints which result in both allotments having the ability to deliver dwellings consistent with the plan with permissible dimensions and responses to underlying objectives.

This site-specific analysis has delivered the proposed development which outlines an indicative dwelling footprint upon the proposed allotments, whilst also indicating the access handle provides adequate passing areas and allows vehicles to enter and exit in a forward direction.

Summary of Variation Request

This variation request demonstrates that compliance with the minimum allotment size development standard of the Bankstown LEP 2015 is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the standard. Notwithstanding the variation to the minimum allotment size development standard, the proposed development:

- Achieves the objectives of Clause 4.1 of the Bankstown LEP 2015 by:
 - (a) to establish minimum lot sizes for residential development,
 - (b) to ensure that new residential development is compatible with the existing character of the surrounding residential area.
- Is in the public interest as it is consistent with the objectives of both the development standard and the R2 low density residential zone and will ensure the long-term conservation and revitalisation of the site.
- Is consistent with the Greater Sydney Regional Plan, the District Plan and the Blacktown Council strategic planning policies and does not raise any matter of significance for State or regional planning.

In light of the above, the consent authority can be satisfied that there is sufficient justification for the variation to the minimum allotment size development standard, as proposed in accordance with the flexibility allowed under Clause 4.6 of the Hornsby LEP 2013.

Development Standard to be Varied

Is the Planning Control in Question a Development Standard?

The minimum subdivision lot size control in Clause 4.1 of the Bankstown LEP 2015 is a development standard.

Relevant Development Standard

This written variation request made under Clause 4.6 seeks to justify a proposed contravention of the minimum lot size development standard set out in the Bankstown LEP 2015.

Justification for Contravention of the Development Standard

Clause 4.6(3) of the Bankstown LEP 2015 provides that:

4.6 Exceptions to development standards

(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.

Furthermore, clause 4.6(4)(a) of the Hornsby LEP 2013 provides that:

(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. Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:
 - *Wehbe v Pittwater Council* [2007] NSW LEC 827.
 - *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.
 - *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*).
 - *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (*Al Maha*).

Role of the consent authority

The role of the consent authority in considering this written request for a Clause 4.6 variation has been recently explained by the NSW Court of Appeal in *Initial Action* and in *Al Maha* to require that the consent authority needs to be satisfied in relation to two matters:

- That the applicant's request has adequately addressed the matters in in Clause 4.6(4)(a)(i).
- That the proposed development will be in the public interest because of its consistence with the objectives of the development standard and the zone objectives.

The consent authority is required to form these two opinions first before it considers the merits of the DA, and it can only consider the merits of the DA if it forms the required satisfaction in relation to the matters. In particular, the consent authority needs to be satisfied that there are proper planning grounds to grant consent and that the contravention of the standard is justified.

This report provides the basis for the consent authority to reach the required level of satisfaction. The relevant matters contained in clause 4.6 of the Bankstown LEP 2015, with respect to the minimum allotment size development standard, are each addressed below, including with regard to the above decisions.

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe, Preston CJ* of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class, i.e. there may be other ways.

While *Wehbe* related to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of recently repealed SEPP 1 (*see Four2Five at [61] and [62]; Initial Action at [16]*).

As the language used in subclause 4.6(3)(a) of the Hornsby LEP 2013 is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request.

The five-part test outlined in *Wehbe* are:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable
- 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 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.

This Clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances because the objectives of the maximum allotment size development standard are achieved notwithstanding the non-compliance with the standard.

The underlying objectives or purposes of the development standard

The relevant objectives of the development standard contained in Clause 4.1 of the Bankstown LEP 2015 are:

Relevant Objective

To establish minimum lot sizes for residential development,

Response

The instrument is the appropriate legislative tool to maintain a consistent benchmark for the allotment sizes within the locality. In this regard, the minor nature of the variations sought do not depower the control, alternatively, the proposal when reviewed in a wholistic methodology, provides an average site area of 456m².

Additionally, the building envelopes provided as part of the application, clearly demonstrate that all allotments proposed, including those subject to the minor variation, may be developed in accordance with the existing controls.

It is noted that allotment 1 is earmarked for a dual occupancy development, hence the 500m² allotment size. It is understood that a 450m² allotment for this site would result in a numerically compliant proposal, however, the following is offered to allow for a balanced consideration of this intended site yield.

The housing needs of the community will be more appropriately accommodated by the proposal allowing for a dual occupancy upon allotment 1. This is also in direct consistency with both the promotion of the orderly and economic use and development of land, and to promote the delivery and maintenance of affordable housing, both fundamental objects of the Act.

The varied allotment provision includes opportunities for dwellings servicing:

- Varied and mixed Demographics
- Addressing of Rental Affordability
- Homeownership Affordability
- Adequacy of Housing Production
- Housing Stock Characteristics
- Neighbourhood Variations
- Housing Stock for Older Adults

These considerations, combined with the overall objectives of the proposal, contribute to community needs and make a significant contribution to gentrification of the locale whilst adding to housing stock.

At a strategic level, planning rules that constrain development in cities have also led to a shortage of housing compared to what is actually required in the urban areas. Evidence suggests that many people would prefer a townhouse, semi-detached dwelling, or apartment in a middle- or outer-suburb, rather than a house on the city fringe. For example, semi-detached dwellings, townhouses, units, and apartments made up 44 per cent of Sydney's dwelling stock in 2016. It would be contrary to addressing this situation were the proposal be viewed unfavourably. *Grattan Institute 2021*

Relevant Objective

To ensure that new residential development is compatible with the existing character of the surrounding residential area.

Response

The proposal does not result in a density outside that envisaged by the strategic and statutory documents. Any future development will be an appropriate style and scale, as that which is demonstrated by the indicative footprints provided as part of the assessment tools, accompanying the proposal. The relevant objectives of the standard are achieved and exceeded notwithstanding non-compliance with the standard.

Clause 4.6(4)(a)(i): The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)

This written request adequately and comprehensively addresses the matters required to be demonstrated by subclause (3).

Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

In *Initial Action at [27]*, it was held that it is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public

interest. The proposal is in the public interest because it is consistent with the objectives of the development standard and the objectives of the zone.

Consistency

Caselaw

Consistency has been defined throughout caselaw including the following Land and Environment Court cases:

- *Addenbrooke v Woollahra Municipal Council* [2008] NSWLEC 190
- *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21
- *Raissis v Randwick City Council* [2019] NSWLEC 1040
- *Abrams v Council of Blacktown* [2018] NSWLEC 1648
- *Kingsland Developments v Parramatta Council* [2018] NSWLEC 1241
- *Dem Gillespies v Warringah Council* (2002) 124 LGRA 147

In these cases, consistency is considered to be different to that of 'achievement'. The term 'consistent' has been considered in a judgements of the Court in relation to zone objectives and has been interpreted to mean "compatible" or "capable of existing together in harmony" (*Dem Gillespies v Warringah Council* (2002) 124 LGRA 147; *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190) or "not being antipathetic" (*Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21). Whichever interpretation is adopted the test of "consistency", is less onerous than that of "achievement".

Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the minimum allotment size development standard, for the reasons discussed in this report.

Consistency with objectives of the zone

The proposed development is consistent with the relevant objectives of the R2 Low Density Residential Zone, as follows:

Relevant Objective

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

Response

The provision of an opportunity for four dwellings where currently there is only a single dwelling, clearly addresses the housing needs of the community. It is well documented that housing stress and availability of dwellings in areas suitable for development are sought after and needed with the well-established residential zones.

Relevant Objective

To allow for the development of low-density housing that has regard to local amenity.

Response

The amenity of the locality will remain characterised by detached style housing in landscaped settings interspersed by a range of complementary and compatible uses. Any future development has the ability to maintain the visual pattern and predominant scale of existing detached style housing in the locality. The streets will be characterised by landscaped front gardens and consistent front building setbacks.

The relationship of the allot to the surrounding bushland will be reinforced by protecting and enhancing the spread of indigenous tree canopy and preserving the natural landscape and remnant bushland and natural watercourses. The use of materials that blend with the colours and textures of the natural landscape will be encouraged at development stage.

Relevant Objective

To require landscape as a key characteristic in the low-density residential environment.

Response

The proposals indicative footprints indicate that the subdivision pattern allows for substantial landscape provisions to be made in any future development. The proposal is consistent in this regard.

Other Matters for Consideration

Under clause 4.6(5), in deciding whether to grant concurrence, the Director-General must consider the following matters:

(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.

These matters are addressed in detail below.

Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation of the minimum allotment size development standard does not raise any matter of significance for State or regional planning. As relevant to State and regional planning, the proposal is consistent with the Greater Sydney Regional Plan – A Metropolis of three Cities in that it:

- Contributes to the longevity of the site overall as a residential land use and increases housing opportunity.

The public benefit of maintaining the development standard

As outlined above, there are sufficient environmental planning grounds to warrant contravention of the development standard and it is therefore considered to be in the public interest for the variation to be supported in this case.

There is evidence in the existing built form generally in the area and the street specifically, as demonstrated in figure 3 that there are sites already contravening the minimum allotment size-built form development standard, therefore any development that delivers the additional dwelling to housing stock, and in turn public benefits, can be also understood to contravene the standard.

As the proposal provides additional housing opportunity at a time when housing diversity and demand is at an all-time high the proposed variation is in the public interest and necessary.

Any other matters required to be taken into consideration by the Director General before granting concurrence.

There are no other matters required to be taken into consideration.

Conclusion

The preceding assessment demonstrates that compliance with the minimum allotment size development standard contained in Clause 4.1 of the Bankstown LEP 2015 is unreasonable and unnecessary in the circumstances of the case and that the variation is well founded. It is considered that the variation allows for the orderly and economic use of the land and the ability to provide a development that is in accordance with the relevant plans, in an appropriate manner, while also allowing for a positive outcome in planning terms.

As outlined in this written variation request, there is an absence of any significant or unreasonable impacts and the proposal will deliver benefit in accordance with the Hornsby Council's strategic planning framework. The proposed development therefore fulfills Council's vision for the precinct as a residential locale. Thus, the consent authority can be satisfied that there is sufficient justification for the variation to the minimum allotment size development standard as proposed in accordance with the flexibility allowed under Clause 4.6 of the Bankstown LEP 2015.