

23 Wolseley Road, Point Piper

**REQUEST FOR VARIATION TO MINIMUM LOT SIZE DEVELOPMENT
STANDARD PURSUANT TO CLAUSE 4.6(3) OF WOLLAHRA LEP 2014**

**Clause 4.1A –Minimum lot sizes for dual occupancies, multi
dwelling housing and residential flat buildings**

Clause 4.1A prescribe a minimum lot size of 700m² for multi dwelling housing in the R3 Medium Density Residential zone. The subject site has an area of 665.9m², which is 34.1m² less than the minimum site area required, representing a 7.87% non-compliance with the minim lot size development standard.

The objective of Clause 4.1A is as follows:

The objective of this clause is to achieve planned residential density in certain zones consistent with the desired future character of the neighbourhood.

The zoning of the land is R3. The objectives of the R3 zone are:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.*

It has been demonstrated below that it is appropriate to accommodate a residential flat building on this site given the context of the development. It is noted that a part 2- and part 3-storey residential building currently exists on the site and that DA369/2017 approved a new part 5, part 6 storey residential flat building containing on the site. This residential flat building was

subsequently altered by DA484/2019 and is now proposed to be altered as part of the subject proposal.

Clause 4.6 – Exceptions to Development Standards

Clause 4.6 of the Woollahra Local Environmental Plan 2014 allows for exceptions of Development Standards. The objectives of this Clause 4.6 are:

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The clause goes on to state:

- (2) *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) *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) *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 Director-General has been
obtained.*

This document constitutes the written request referred to in Clause 4.6(3) in relation to the proposal's breach of the minimum lot size development standard.

The NSW Department of Planning and Infrastructure (DP&I) provides guidance on how to prepare Clause 4.6 variations; 'varying development standards: A Guide' (August 2011). This written request to vary the standards is based on the DP&I's Guide.

Clause 4.6(3) and 4.6(4)

The proposal is considered against the four matters required to be established under Clause 4.6.

1. Compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case:

In order to assess whether strict compliance with the development standard is unreasonable or unnecessary, a proposal is considered against the following five ways¹:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that 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; or
5. The zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to the land.

These five ways were re-emphasised by Commissioner Morris². Each 'test' offers a potential way of demonstrating that compliance is unnecessary or unreasonable in a particular circumstance³. All tests are separate and not all

¹ see *Wehbe v Pittwater Council* [2007] NSWLEC 827

² *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386

³ *Mecone Pty Limited v Waverley Council* [2015] NSWLEC 1312

tests may not be applicable in each case. Therefore, not all tests need to be met.

The most common way of establishing that compliance with a standard is unreasonable and unnecessary is to establish that the objectives of the standard are met, even though the standard is not complied with⁴. This objection relies on this method. Compliance with the objectives of the FSR standard is addressed under **Point 4 below**.

The following points are raised:

- Council acknowledged the site is suitable to accommodate a residential flat building on this site, given the context of the development, by approving a new part 5, part 6 storey residential flat building (DA386/2017 & DA484/2019);
- Point Piper desired future character statement under the Woollahra DCP 2015 states that "*the western side of the peninsula is predominantly zoned R3 zoning, and development for residential flat buildings and multi dwelling housing is encouraged*" and therefore, residential flat buildings are a type of residential development that is desired within the zone and within the Point Piper locality;
- The locality comprises residential flat buildings ranging from 4- to 13-storeys in height with the context being 3 residential flat buildings: 6-storeys (2A Wentworth Street), 7-storeys (25 Wolseley Road) and 7-storey (2B Wentworth Street);
- The breach of the standard in this instance achieves the objective of the zone;
- The site is 34.4m² below the minimum lot size, which is minor and will be indiscernible from the public domain;
- The previous consents demonstrate that the construction of a residential flat building on the subject site does not unreasonably impact on the amenity of neighbouring and nearby properties in terms of overshadowing, privacy and view loss.

2. There are sufficient environmental planning grounds to justify contravening the development standard:

Given the consistency of the proposal against the zone objectives and minimum lot size objectives (see **Point 4 below regarding both**), in my opinion there are sufficient environmental planning grounds to justify contravening the development standard⁵.

The site area falls short of the minimum required site area by:

⁴ see *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245

⁵ see *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [90]

- 34.1m²

In the circumstances of the case, there are sufficient planning grounds to justify contravening the development standard including:

- The subject site is located in the R3 Medium Density Zone, in which residential flat buildings are a permissible use. The subject site is located Point Piper locality. The Point Piper desired future character statement under the Woollahra DCP 2015 states that "*the western side of the peninsula is predominantly zoned R3 zoning, and development for residential flat buildings and multi dwelling housing is encouraged*". Accordingly, residential flat buildings are a type of residential development that is desired within the zone and within the Point Piper locality.
- The predominant surrounding building form comprises of residential flat buildings ranging from 4- to 13-storeys in height. Adjoining the site to the north are 2 residential flat buildings, which are 6-storeys (2A Wentworth Street) and 7-storeys (25 Wolseley Road) in height. Adjoining the site to the south is a 7-storey residential flat building at 2B Wentworth Street.
- It is noted that a part 2- and part 3-storey residential building currently exists on the site and that DA-369/2017 approved a new part 5, part 6 storey residential flat building containing on the site.
- The proposal will ensure that the existing character of the area is retained. The proposal has been designed having regard to the existing development on the site and surrounding development.
- The subject site is one of the only lots in the R3 zone on the ridge line of Point Piper that is under the minimum allotment size for residential flat buildings.
- It would be incongruous with the surrounding existing (and ongoing future) built form character of the area should compliance with the minimum lot size be achieved. The desired future character of the area, which seeks residential flat development and the objective of the minimum lot size development standard would therefore be thwarted.
- The site is only 34.4m² below the minimum lot size, which is minor and will be indiscernible from the public domain.
- The proposed development on the site results in a better planning outcome for this site as it enables additional residential accommodation to be provided on the site whilst complying with all LEP and DCP objectives. The proposal will result in additional car parking spaces

being provided in the basement level thereby improving the approved car parking arrangement on the site.

- Despite the site being under the minimum lot size, it has been demonstrated that the site can accommodate a residential flat building that is consistent with the buildings in the surrounding area and that does not unreasonably impact on the amenity of neighbouring and nearby properties in terms of overshadowing, privacy and view loss.

The proposal will provide a suitable design and be of suitable amenity in terms of the built environment and represents the orderly and economic use and development of land, which are identified as objects of the Act (Section 1.3 of the EP&A Act, 1979). The building envelope and design of the proposal responds appropriately to the unique opportunities and constraints of the site.

3. The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3):

The written request adequately addresses the matters referred to above by Clause 4.6(3).

4. 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:

Objectives of Standard

The proposal will be in the public interest as it meets the objectives of the minimum lot size development standard as follows:

Objective (a) seeks to achieve planned residential density in certain zones consistent with the desired future character of the neighbourhood.

Comment: The surrounding development comprises of residential flat buildings ranging from 4- to 13-storeys in height. Adjoining the site to the north are 2 residential flat buildings, which are 6-storeys (2A Wentworth Street) and 7-storeys (25 Wolseley Road) in height. Adjoining the site to the south is a 7-storey residential flat building at 2B Wentworth Street.

It is noted that a part 2- and part 3-storey residential building currently exists on the site and that several consents have been issued for a new part 5, part 6 storey residential flat building on the site.

The proposal will ensure that the existing character of the area is retained. The proposal has been designed having regard to the existing development on the site and surrounding development.

The proposed density, scale and bulk of the development is appropriate and acceptable, given the context of the locality and will not appear out of character when viewed in its context of other buildings in the vicinity.

The subject site is one of the only lots in the R3 zone on the ridge line of Point Piper that is under the minimum allotment size for residential flat buildings. The existing character of development in the R3 zone in the block bound by Wolseley Road and Wentworth Street are that of residential flat buildings.

The proposed development on the site results in a better planning outcome for this site as it enables additional residential accommodation to be provided on the site whilst complying with all LEP and DCP objectives.

It is considered that the proposal represents a building density and intensity which is compatible with the capacity of the site and the character of the neighbourhood.

As demonstrated above, the proposed development will be in the public interest because it is consistent with the objectives of the minimum lot size development standard and the objectives of the R3 zone.

In addition, the above demonstrates that compliance with the control is unreasonable and unnecessary in the circumstances of this case.

With respect to Clause 4.6(4)(b), concurrence of the Planning Secretary is taken to have been obtained as a result of written notice dated 21 February 2018 attached to the Planning Circular PS 18-003⁶.

Conclusion

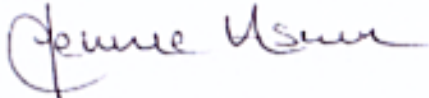
This document has considered that there are sufficient environmental planning grounds to justify the variation and that compliance with the standard would be unreasonable and unnecessary in the circumstances of this particular case. As demonstrated above, the proposed development will be in the public interest because it is consistent with the objectives of the minimum lot size standard and the objectives of the R3 zone.

Despite the breach with the standard, the proposal is consistent with the objects of Section 1.3 of the EP& A Act, 1979, which are to encourage development that promotes the social and economic welfare of the community and a better environment, to promote and coordinate orderly and economic use and development of land and to promote good design and amenity of the built environment.

⁶ *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at Para [28]

In the context of other requirements of Clause 4.6, it is considered that no matters of State or regional planning significance are raised by the proposed development. Moreover, it is considered that there would be no public benefit in maintaining the particular planning control in question, in the case of this specific development.

This submission is considered to adequately address the matters required by Clause 4.6 and demonstrates that compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case.

A handwritten signature in blue ink, appearing to read 'Jennie Askin', is positioned above the printed name.

Jennie Askin
Director
aSquare Planning Pty Ltd

24 May 2021