



Clause 4.6 – Exceptions to Development Standards

Request to Vary Clause 4.2A - Erection of dwelling houses on land in certain rural and environment protection zones.

Address: 3130 Oxley Highway, Gunnedah

Proposal: Proposed Gunnedah Koala Sanctuary

Date: June 2021

1.0 Introduction

This is a written request to seek an exception to a development standard pursuant to Clause 4.6 – Exceptions to Development Standards of the Waverley Local Environmental Plan (WLEP) 2012. The development standard for which the variation is sought is Clause 4.2A – Erection of dwelling houses on land in certain rural and environment protection zones to GLEP 2012.

2.0 Description of the planning instrument, development standard and proposed variation

2.1 What is the name of the environmental planning instrument that applies to the land?

The Gunnedah Local Environmental Plan (GLEP) 2012.

2.2 What is the zoning of the land?

The land is zoned RU1 Primary Production. It is noted that part of the site is also zoned E3 Environmental Management, however the proposed dwelling (subject of the proposed development standard variation) is located wholly within the RU1 zone.

2.3 What are the Objectives of the zone?

The objectives of the zone are:

- *To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.*
- *To encourage diversity in primary industry enterprises and systems appropriate for the area.*
- *To minimise the fragmentation and alienation of resource lands.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To provide for a range of ecologically sustainable agricultural and rural land uses and development on broad acre rural lands.*
- *To protect significant agricultural resources (soil, water and vegetation) in recognition of their value to Gunnedah's longer term economic sustainability.*
- *To conserve and enhance the quality of valuable environmental assets, including waterways, riparian land, wetlands and other surface and groundwater resources, remnant native vegetation and fauna movement corridors as part of all new development and land use.*

2.4 What is the development standard being varied?

The development standard being varied is the 'Erection of dwelling houses on land in certain rural and environment protection zones' development standard.

2.5 Is the development standard a performance based control?

The "Erection of dwelling houses on land in certain rural and environment protection zones" development standard includes numeric controls and performance based aspects. This Request to Vary the development standard relates specifically to Clause 4.2A(3)(a) which is a numeric control.

2.6 Under what Clause is the development standard listed in the environmental planning instrument?

The development standard is listed under Clause 4.2A of GLEP 2012.

2.7 What are the objectives of the development standard?

The objectives of the development standard are contained in Subclause 4.2A(1)(a)-(b), and are:

- "(a) to minimise unplanned rural residential development,*
- (b) to enable the replacement of lawfully erected dwelling houses in rural and environment protection zones."*

2.8 What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.2A(3)(a) establishes a minimum lot size of 200ha for the erection of a dwelling on land zoned RU1 Primary Production.

2.9 What is the proposed numeric value of the development standard in the development application?

The proposed development seeks consent for the erection of a dwelling on a lot that is 35.31ha in area.

The lot is predominantly zoned RU1 Primary Production, however the north west corner of the lot is zoned E3 Environmental Management. The location of the proposed dwelling is entirely within the RU1 Primary Production zone.

The area of the site that is zoned RU1 Primary Production is 33.95ha.

2.10 What is the percentage variation (between the proposal and the environmental planning instrument)?

The proposal will result in a variation of 83%.

3.0 Assessment of the Proposed Variation

3.1 Overview

Clause 4.6 Exceptions to Development Standards establishes the framework for varying development standards applying under a local environmental plan.

Objectives to Clause 4.6 at 4.6(1) 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.”*

Clause 4.6(3)(a) and 4.6(3)(b) require that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

- “(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.”*

Clause 4.6(4)(a)(i) and (ii) require that development consent must not be granted to a 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.”*

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained, and Clause 4.6(5) requires the Secretary in deciding whether to grant concurrence must consider:

- “(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning;*
- (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.”*

This application has been prepared in accordance with the NSW Department of Planning, Infrastructure and Environment (DPI&E) guideline *Varying Development Standards: A Guide*, August 2001, and has incorporated as relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* (‘Four2Five No 1’);
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* (‘Four2Five No 2’);
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 248* (‘Four2Five No 3’);
- *Micaul Holdings Pty Limited v Randwick City Council (2015) NSWLEC 1386;*
- *Randwick City Council v Micaul Holdings Pty Ltd (2016) NSW LEC7;*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;*
- *RebelMH Neutral Bay v North Sydney Council [2019] NSWCA 130;*
- *Baron Corporation v The Council of the City of Sydney [2019] NSWLEC 61; and*
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245.*

3.2 *Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?*

3.2.1 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?

A development that strictly complies with the development standard is unreasonable or unnecessary in this circumstance for the following reasons:

- The dominant purpose of the proposed development is for a Koala Sanctuary (being correctly or legally categorised as a veterinary hospital and an information and education facility). The proposed residential dwelling is ancillary to the dominant use.

Specifically, the proposed residential dwelling is to accommodate a caretaker or manager for the Koala Sanctuary. It is an entirely reasonable and rational approach to seek to accommodate a caretaker or manager at the site given the unique nature of the proposed use. The dwelling will ensure that a suitably qualified person (caretaker or manager) will be on site to oversee the operations and to organise and provide maintenance as and when needed (including in relation to such elements as the eucalypt forest, fencing and animal enclosures, waste management, weed management, building maintenance, etc).

An onsite manager or caretaker is also necessary to oversee the care and well being of the animals. Specifically, there will be a large amount of animals accommodated at the site including many koalas as well as wallabies, kangaroos and emus (within the wider sanctuary) and domestic animals within the petting zoo area. There is a duty of care involved with the animals and the proposed erection of a dwelling will enable a responsible person to be accommodated on-site to oversee this care during periods when the koala sanctuary is closed to the public (e.g. during evenings and night time) and when regular staff are not on-site.

- The proposal is consistent with the Ru1 Primary Production objectives and the objectives of the development standard (refer below).
- The proposal will result in the rehabilitation (in part) of the relatively disturbed resource land. The proposed residential dwelling (as a caretakers/managers dwelling) is one factor that will contribute to the success of the proposed permissible use.
- The site is well suited to accommodate the proposed Koala Sanctuary including the caretakers residential dwelling. The site is of an appropriate size and topography to accommodate the Koala Sanctuary and residential dwelling. Adjacent land uses and zones, which are predominantly agricultural and environmental management lands, will not be adversely impacted by the proposed Koala Sanctuary and the development of a caretakers/managers dwelling.
- The proposal will not result in the degrading of significant agricultural resources (soil, water and vegetation) and will not inhibit the future use of the land for different ecologically sustainable agricultural pursuits. Rather the proposal will enhance and improve the natural attributes of the site and will significantly contribute value to Gunnedah's longer term economic sustainability.
- The construction of various new structures at the site, including the caretakers/managers residential dwelling, for the purpose of the proposed Koala Sanctuary, will on balance result in the enhancement of the environmental assets of the site and will provide a significant contribution to the wider region in terms of valuable environmental assets.

3.2.2 Would the underlying objective or purpose be defeated or thwarted if compliance was required?

The underlying objective or purpose of the development standard would not be defeated or thwarted if compliance was required.

3.2.3 Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?

The development standard has not been abandoned.

3.2.4 Is the zoning of the land unreasonable or inappropriate?

The zoning of the land is reasonable and appropriate given the site's location.

3.3 ***Are there sufficient environmental planning grounds to justify contravening the development standard?***

It is considered that there are sufficient environmental planning grounds to justify contravening the development standard, being:

- The site is in relatively poor condition in terms of its potential use for primary industry production (such as large-scale agricultural pursuits), however it is relatively well suited for the unique purpose of a koala sanctuary which is a use that is permissible with consent in the RU1 Primary Production zone. Notwithstanding that the area of the land is less than 200ha, the erection of a residential dwelling is a rational and appropriate element of the proposed koala sanctuary that will greatly assist in contributing to the success of the proposed use. The dwelling will ensure the provision of an onsite caretaker or manager to oversee the day to day operations of the permitted land use.
- An onsite manager or caretaker is necessary to oversee and undertake maintenance and upgrading works including in relation to such elements as the eucalypt forest, fencing, animal enclosures, waste management, weed management, building maintenance, etc. The nature of the proposed use is such that some of the works are likely to be required to be undertaken urgently and at times when the koala sanctuary is closed to the public (e.g. during evenings and night time) when regular staff are not on-site.
- An onsite manager or caretaker is necessary to oversee the care and well being of the animals. Specifically, there will be a large amount of animals accommodated at the site including many koalas as well as wallabies, kangaroos and emus (within the wider sanctuary) and domestic animals within the petting zoo area. There is a duty of care involved with the animals and the proposed erection of a dwelling will enable a responsible person to be accommodated on-site to oversee this care during periods when the koala sanctuary is closed to the public (e.g. during evenings and night time) when regular staff are not on-site.
- The proposed arrangement to include a caretakers/managers dwelling at the site is consistent with the site's RU1 Primary Production zoning, that is, it is not uncommon for primary production land to accommodate a residential dwelling for a caretaker, farm or stock overseer or farm manager. In addition to the matters mentioned above (i.e. maintenance and animal care), the accommodation of a caretaker or manager on site will provide a higher level of security for the proposed koala sanctuary.
- The proposed dwelling will not prevent the site from being developed or used for primary industry or agricultural purposes in the future. Instead, the proposed dwelling will support the proposed core use of the site as a koala sanctuary which is a form of development that is permissible with consent within the RU1 zone;
- The proposed dwelling will not result in adverse bulk and scale impacts and is sympathetic in its architectural design to the rural character of the locality; and
- The proposed dwelling will have no adverse impacts on the amenity of any residential dwellings at adjacent properties in terms of views, overshadowing, visual massing, acoustic or privacy impacts.

3.4 ***Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?***

3.4.1 Objectives of the "Erection of dwelling houses on land in certain rural and environment protection zones" development standard.

The proposal remains consistent with the objectives of the development standard, despite the non-compliance as demonstrated in the assessment of the objectives below.

Objective	Comment
<i>To minimise unplanned rural residential development</i>	The proposal does not represent unplanned rural residential development. Rather, the purpose of the proposed dwelling at the site is to facilitate and assist with the successful operation of a permitted land use. The core land use, being a koala sanctuary, is an appropriate use for the site and the RU1 zone and the inclusion of a caretakers or managers dwelling on the site to support that land use is reasonable and rational element of the proposed development.
<i>To enable the replacement of lawfully erected dwelling houses in rural and environment protection zones.</i>	Not applicable.

Table 1: Development Standard Objectives Assessment Table

3.4.2 Objectives of the zone

The proposal remains consistent with the objectives of the RU1 Primary Production zone, despite the non-compliance with the “erection of dwelling houses on land in certain rural and environment protection zones” development standard as demonstrated in the assessment of the objectives below.

Objective	Comment
<i>To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.</i>	<p>A portion of the site was previously used as a quarry, but that use has ceased. Part of the site is also currently used for the purpose of recreation facilities, being the Balcary Park Motorcycle Track and Gunnedah Kart Track (with associated clubhouses and facilities).</p> <p>As such the land is not currently used for primary industry production and the land is considered in relatively poor condition in terms of its current prospects for meaningful agricultural primary production. Notwithstanding, the proposed uses are well suited to the rural setting of the site and the proposal will not inhibit the future use of the land for different ecologically sustainable agricultural pursuits.</p> <p>The proposed development of the site for the core purpose of a Koala Sanctuary (i.e. a veterinary hospital and an information and education facility) is development that is permitted with consent at the site and which accords with the objectives of the zone. The proposed use will contribute to the rehabilitation of the land in part and the proposed use will not inhibit its future use for the purpose of sustainable agricultural production. Overall, it is considered that the proposal will enhance the natural resource base of the site and enabling a caretaker to be accommodated on the site will assist with the facilitation of that outcome.</p>
<i>To encourage diversity in primary industry enterprises and systems appropriate for the area.</i>	The core proposed uses of the Koala Sanctuary are permissible with consent at the site and represent a diverse enterprise for the site and the locality. The proposed residential dwelling to accommodate a caretaker is consistent with this diverse use.
<i>To minimise the fragmentation and alienation of resource lands.</i>	The proposal does not seek subdivision and will not fragment the land or alienate resource lands. Rather the site has recently

Objective	Comment
	been consolidated into a single allotment and the proposal is likely to result in the rehabilitation of the relatively disturbed resource land. It is expected that the proposed residential dwelling (as a caretakers/managers dwelling) is one factor that will contribute to the success of the proposed permissible use.
<i>To minimise conflict between land uses within this zone and land uses within adjoining zones.</i>	<p>The site is well suited to accommodate the proposed Koala Sanctuary including the caretakers residential dwelling. The site is of an appropriate size and topography to accommodate the Koala Sanctuary and residential dwelling.</p> <p>Adjacent land uses and zones, which are predominantly agricultural and environmental management lands, will not be adversely impacted by the proposed Koala Sanctuary and residential dwelling. The multiple detailed technical reports supporting the application including traffic and parking, acoustic, biodiversity, bushfire, aboriginal cultural and koala habitat assessments demonstrate that the site is suitable for the proposed land uses.</p>
<i>To provide for a range of ecologically sustainable agricultural and rural land uses and development on broad acre rural lands.</i>	The subject land is considered in relatively poor condition in terms of its current prospects for meaningful agricultural primary production. Notwithstanding, the proposed uses are well suited to the rural setting of the site and the proposal will not inhibit the future use of the land for different ecologically sustainable agricultural pursuits.
<i>To protect significant agricultural resources (soil, water and vegetation) in recognition of their value to Gunnedah's longer term economic sustainability.</i>	The proposal will not result in the degrading of significant agricultural resources (soil, water and vegetation) and will not inhibit the future use of the land for different ecologically sustainable agricultural pursuits. Rather the proposal will enhance and improve the natural attributes of the site and will significantly contribute to the value to Gunnedah's longer term economic sustainability.
<i>To conserve and enhance the quality of valuable environmental assets, including waterways, riparian land, wetlands and other surface and groundwater resources, remnant native vegetation and fauna movement corridors as part of all new development and land use</i>	The site is in relatively poor condition in terms of its agricultural productivity prospects. The construction of various new structures at the site, including the caretakers/managers residential dwelling, for the purpose of the proposed Koala Sanctuary will on balance result in the enhancement of the environmental assets of the site and will provide a significant contribution to the wider region in terms of valuable environmental assets.

Table 2: RU1 Zone Objectives Assessment Table

3.5 Whether contravention of the development standard raises any matter of significance for the State or regional environmental planning?

In accordance with Planning Circular PS 18-003 issued on 21 February 2018, the Council and the Northern Regional Planning Panel may not assume the Secretary's concurrence as the contravention relates to a development standard relating to the minimum lot size required for erection of a dwelling on land in the RU1 Zone and the lot is less than 90% of the required minimum lot size.

Additionally, the proposed development for a Koala Sanctuary raised State and regional significance or interest in that the Sanctuary is aimed at providing a long term location for the medical care and

rehabilitation of a “vulnerable” species as listed under the *Environmental Protection and Biodiversity Conservation Act in 2012*.

3.6 **How would strict compliance hinder the attainment of the objects specified in Section 1.3 (a), (b) and (c) of the Act?**

The objects specified in Section 1.3 (a), (b), and (c) are as follows:

Objective	Comment
(a) <i>to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State’s natural and other resources,</i>	The proposal will promote the social and economic welfare of the site and wider Gunnedah locality. The proposed development will facilitate the care and rehabilitation of a nationally important and vulnerable fauna species. The proposal will also result in improvements to land and implementation of better land care management and conservation practices within the RU1 Primary Production zone and the E3 Environmental Management zone.
(b) <i>to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,</i>	The proposal demonstrates ecologically sustainable development. The proposal includes considerable new plantings of native flora and the construction of a specialised (and environmentally responsive) facility for the medical treatment and rehabilitation of a vulnerable native fauna species.
(c) <i>to promote the orderly and economic use of land,</i>	Notwithstanding that the proposed Koala Sanctuary does not represent primary industry production, the proposed core land use is nonetheless permitted with consent at the site and represents a good fit for the site in terms of the site’s topography, current physical condition and agricultural capacity. The proposed use will significantly intensify the economic use of the land and will increase the land’s economic contribution to the wider LGA.

Table 3: EP&A Act 1979 – Section 1.3 objectives compliance assessment

3.7 **Is there public benefit in maintaining the development standard?**

Generally, there is public benefit in maintaining standards. However, there is also public benefit in maintaining a degree of flexibility in specific circumstances.

In this case, no public benefit would accrue in the circumstances of requiring strict numerical compliance with the development standard.

3.8 **Is the objection well founded?**

Yes, the proposal is consistent with the objectives of the RU1 Primary Production zone and the “Erection of dwelling houses on land in certain rural and environment protection zones” development standard. It is considered that the objection is well founded in this instance and that granting an exception to the development can be supported in the circumstances of the case.

4.0 **Conclusion**

The proposed variation is based on the reasons contained within this formal request for an exception to the “Erection of dwelling houses on land in certain rural and environment protection zones” standard.

The proposal accords with the stated objectives for the RU1 Primary Production zone and the “Erection of dwelling houses on land in certain rural and environment protection zones” development standard (Clause 4.2A(3)(a)). The proposal is consistent with surrounding mix of land uses, being predominantly agricultural and environmental management type development. The proposal will enhance the environmental qualities and systems at the site and will provide a unique and valuable ecological facility through the development of a medical and rehabilitation centre for koalas. As such, it is considered that the proposal is consistent with the planning purposes for the area.

The non-compliance with the provisions of Clause 4.2A(3)(a) does not contribute to significant adverse amenity impacts by way of bulk and scale, overshadowing, acoustic and visual privacy impacts, or view loss. The proposal maintains an appropriate built form on the site and will not result in a structure that is out of proportion or scale with surrounding landscape or rural development. The external building materials of the proposed dwelling are consistent with that of the existing rural buildings and are sympathetic to the design of surrounding landscape.

A development strictly complying with the standard would not significantly improve the amenity of surrounding land uses. In the context of the locality, it would be unreasonable for strict compliance to be enforced.

The non-compliance is not considered to result in any precedents for future development within the locality or broader LGA, given the unique circumstances and surrounding pattern of development.

As demonstrated in this submission, it would be unreasonable for strict compliance with the “Erection of dwelling houses on land in certain rural and environment protection zones” control to be enforced. It is concluded that the variation to the development standard is well founded as compliance with the standard is both unnecessary and unreasonable in the circumstances of this case.