

Attachment C

**Clause 4.6 Variation Request
– Minimum Site Area**

CLAUSE 4.6 SUBMISSION
(site area)

for
Proposed secondary dwelling

at
898 Elizabeth Street, Zetland

for
Marlene Kanga

prepared by
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1. INTRODUCTION

In March 2023 a development application was made to subdivide the site at 898 Elizabeth Street, Zetland, and carry out alterations and additions to the existing dwelling and construct a new dwelling over the garage at the rear. Council registered the application as D/2023/243 and by letter dated 6 June 2023 advised that the proposed subdivision is not supported and requested amendments to the design to comply with the planning controls. Council has advised that if a secondary dwelling at the rear is to be pursued, a submission is required under clause 4.6 of *Sydney Local Environmental Plan 2012* (the LEP) seeking a variation to the non-discretionary development standard for minimum site area contained within Chapter 3 Part 1 of *State Environmental Planning Policy (Housing) 2021*, with which the proposal would not comply. This submission addresses that request.

2. STATE ENVIRONMENTAL PLANNING POLICY (HOUSING) 2021

2.1 Site Area

Part 1 of Chapter 3 of *State Environmental Planning Policy (Housing) 2021* (the Housing SEPP) provides incentives including expanded zoning permissibility and non-discretionary development standards to facilitate the delivery of diverse housing types in well-served localities. The Housing SEPP overrides any inconsistent provision of another environmental planning instrument such as a Local Environmental Plan.

Part 1 allows development for the purposes of a secondary dwelling on land within a Residential zone in which development for the purposes of a dwelling house is permissible. Under *Sydney Local Environmental Plan 2012* (the LEP) the site is zoned R1 General Residential, within which dwelling houses (and secondary dwellings) are permitted with consent.

The proposal complies with the provisions of section 52 relating to number of dwellings and floor area.

Section 53 specifies *non-discretionary development standards* for secondary dwellings. A non-discretionary development standard is a standard that, if complied with, prevents Council as consent authority from taking the standard into further consideration in determining a development application and from requiring a more onerous standard for the matter specified. The proposal complies with the non-discretionary development standard for parking spaces. The proposal does not comply, however, with the non-discretionary minimum of 450m² site area for a detached secondary dwelling, because the area of the site is only 160.9m².

Section 4.15(3) of the *Environmental Planning and Assessment Act 1979* provides that if a development proposal does not comply with an applicable non-discretionary development standard, the discretion of the consent authority is not limited and a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied.

2.2 Exception to Non-discretionary Development Standard (site area)

Clause 4.6 of the LEP allows consent to be granted for development that would contravene a development standard if:

- the applicant has made a written request seeking to justify the contravention and
- the consent authority is satisfied that the written request has adequately addressed the matters required to be addressed by subclause (3); that is
 - (3)(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 and*
- the consent authority is satisfied that
 - (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 for development within the zone in which the development is proposed to be carried out, and*
- the concurrence of the Secretary has been obtained

The section 53(2)(a) minimum site area provision of the Housing SEPP is a development standard as defined under the *Environmental Planning and Assessment Act 1979* and is not subject to any of the specified exclusions from the operation of clause 4.6 of the LEP. In accordance with the guidelines provided by decisions of the Land and Environment Court, the submission in this Statement addresses the requirements of clause 4.6 in turn.

4.6(3)(a) *Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?*

In the decision of *Wehbe v Pittwater Council* [2007] NSWLEC 827, Chief Justice Preston outlined the rationale for development standards and the ways by which a standard might be considered unnecessary and/or unreasonable. At paragraph 43 of his decision Preston CJ noted:

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).

The judgment in *Wehbe* identified five ways of establishing under *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1) that compliance is unreasonable or unnecessary. Subsequent cases including *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118 have confirmed that these ways are equally applicable under the clause 4.6 regime.

The first and most commonly invoked way to establish that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case is to demonstrate that the objectives of the development standard are achieved notwithstanding non-compliance with the standard (*Wehbe* at 42 and 43).

The Housing SEPP does not specify any objectives of the minimum site area standard. The LEP has no analogous site area standards or related objectives. Section 4.1.6 of *Sydney Development Control Plan 2012* (the DCP), however, contains objectives and provisions for secondary and laneway dwellings that might reasonably be adopted as the implied objectives of section 53 of the Housing SEPP for the purposes of the application. Those objectives are –

- (a) *ensure secondary dwellings activate lanes and address the public domain*
- (b) *maintain a reasonable level of amenity to the principal dwelling, the site, surrounding properties, and any adjoining lane*
- (c) *ensure the scale and type of development is compatible with the width of the lane, the significance and the scale of heritage items and heritage conservation areas*

Objective (a) *Activate the lane and address the public domain*

Given the reasonableness of retaining a garage to the rear lane, the design of the proposal maximises its address to McPherson Lane and the potential to activate it by incorporating two pedestrian access points and a dormer window facing the lane.

Objective (b) *Maintain reasonable amenity to the principal dwelling, the site, surrounding properties, and the lane*

The built form of the proposed secondary dwelling as amended is not materially different from that of a loft studio without kitchen facilities and complies with the relevant DCP controls. With particular reference to site area, section 4.1.6.1(2) requires the principal dwelling on a lot smaller than 150 square metres (m²) to have minimum private open space of 16m²/3m, clearly indicating that a site area significantly below the standard is no bar in itself to approval. The site is 160.9m² in area and the proposal meets this control for the secondary dwelling as well as for the principal dwelling. The design of the proposal has been amended in accordance with Council's requirements to comply with the provisions of section 4.1.6.1 and will not result in unreasonable overshadowing or loss of privacy to surrounding properties.

Objective (c) *Scale and type of development compatible with width of lane and significance and scale of heritage conservation area*

The built form of the proposal as amended complies with the relevant DCP controls contained in sections 4.1.6.1(1) (*one storey with attic, height not exceeding 5.4m*); 4.1.6.1(4) (*clearly subservient to the principal dwelling*); and 4.1.6.2(2) (*compatible in scale and configuration with surrounding development in the Zetland Estate Heritage Conservation Area, no adverse impact on the heritage significance of that Area*).

The arguments set out above show that in the circumstances strict compliance with the development standard is unreasonable and unnecessary because the implied objectives of the development standard will be achieved by the proposed development despite numerical non-compliance.

4.6(3)(b) Are there sufficient environmental planning grounds to justify contravening the development standard?

The following environmental planning grounds are relevant:

- If the kitchenette were deleted and the proposal were instead for a studio over the garage; that is, not subject to the site area standard for a secondary dwelling, it would make no material difference to the perceived bulk, scale, character or visual impact of the proposal nor to its amenity impacts on surrounding properties.
- In the context of this part of McPherson Lane (which on the western side is bounded by back yard fences, single-storey, single storey plus attic and two-storey buildings; and on the eastern side is bounded by three-storey plus attic and four-storey buildings) the proposal will provide a built form outcome compatible in terms of bulk, scale, character and visual impact.
- The proposed secondary dwelling will have no adverse heritage or streetscape impacts.
- The proposal complies with the applicable planning controls for floor space ratio, building height and car parking and in particular with Council's detailed planning controls for secondary and laneway dwellings.
- The proposal maintains good solar access to the subject site and will not unreasonably increase winter shading to adjoining properties.
- The proposal will not obstruct any views.

4.6(4)(a)(ii) Will the proposed development be in the public interest because it is consistent with the objectives of the development standard?

Any proposed development that achieves the objectives of a development standard must also be consistent with the objectives of the standard, as the threshold for consistency is lower than that for achievement. The discussion above in response to clause 4.6(3)(a) has demonstrated that the proposed development will achieve the implied objectives of the standard; therefore it will also be consistent with those objectives.

4.6(4)(a)(ii) Will the proposed development be in the public interest because it is consistent with the objectives of the zone?

In relation to the objectives of the R1 General Residential zone:

- *to provide for the housing needs of the community*
The proposed additional small dwelling will contribute towards meeting the demand for housing in the locality.
- *to provide for a variety of housing types and densities*
The proposed secondary dwelling will contribute towards the provision of 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*
This objective is not relevant, as the proposal is not for non-residential use.
- *to maintain the existing land use pattern of predominantly residential uses*
The proposal will maintain the existing residential use of the site.

4.6(4)(b) Concurrence of the Secretary

The concurrence of the Secretary can be assumed by Council. The implications of a single secondary dwelling development not complying with the non-discretionary site area development standard of the Housing SEPP are local in scope and raise no matters of significance for State or regional environmental planning.

The circumstances of the case should be balanced against the usual presumption of public benefit in maintaining a development standard. The non-compliance is justified as set out above. The variation sought will enhance the utility and amenity of the development, furthering the objectives of the *Environmental Planning and Assessment Act 1979*, without adverse impacts on neighbouring amenity or the public domain.

3. CONCLUSION

This submission shows that, in the circumstances of the case, compliance with the development standard is unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify contravening the development standard and that the proposed development will be in the public interest because it is consistent with the implied objectives of the development standard and with those of the R1 General Residential zone.

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30 June 2023