

Annexure D

CLAUSE 4.6 – EXCEPTIONS TO DEVELOPMENT STANDARDS

Address: 1 Scarborough Street, Orange, being Lot 129 DP 1237871

Proposal: Subdivision (2 Lots) and Construction of 2 New Dwellings

1. INTRODUCTION

This is a written request pursuant to Clause 4.6 – Exceptions to Development Standards of the Orange Local Environmental Plan 2011 (the LEP).

The development standard for which the variation is sought relates to Clause 4.1 – Minimum Subdivision Lot Size (MLS) under the LEP.

This request has been prepared in accordance with:

- The relevant considerations in Clause 4.6 of the LEP.
- The matters in Appendix 3 of the NSW Department of Planning and Infrastructure publication Varying Development Standards: A Guide August 2011 (the Guidelines).
- The five part test referred to in the Guidelines.

2. DESCRIPTION OF PLANNING INSTRUMENT, DEVELOPMENT STANDARD AND PROPOSED VARIATION

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

Orange Local Environmental Plan 2011 (the LEP)

2.2 What is the zoning of the land?

The subject land is zoned R1 General Residential.

2.3 What are the objectives of the zone?

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.
- To ensure development is ordered in such a way as to maximise public transport patronage and encourage walking and cycling in close proximity to settlement.
- To ensure that development along the Southern Link Road has an alternative access.

2.4 What is the development standard being varied?

The development standard being varied is Clause 4.1 Minimum Lot Size.

2.5 Is the development standard a performance based control?

No.

It should also be noted that Clause 4.1 of the LEP represents a development standard and not a prohibition in respect of development.

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

The development standard is listed under Clause 4.1 of the LEP.

2.7 What are the objectives of the development standard?

Pursuant to Clause 4.1(1) of the LEP, the objectives of the development standard are:

- a) To ensure that new subdivisions reflect existing lot sizes and patterns in the surrounding locality,
- b) To ensure that lot sizes have a practical and efficient layout to meet intended use,
- c) To ensure that lot sizes do not undermine the land's capability to support rural development,

- d) To prevent the fragmentation of rural lands,
- e) To provide for a range of lot sizes reflecting the ability of services available to the area,
- f) To encourage subdivision designs that promote a high level of pedestrian and cyclist connectivity and accommodate public transport vehicles.

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

Pursuant to Clause 4.1(3) of the LEP, the size of any lot resulting from a subdivision of land to which this clause applies is not to be less than the minimum size shown on the Lot Size Map in relation to that land.

The subject land is subject to a minimum lot size of 500m².

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

With reference to the submitted plan of proposed subdivision (Figure 3) the proposed subdivision involves the creation of proposed Lot 1291 with an area of 477.5m² and proposed Lot 1292 with an area of 428.3m². The proposed lots do not satisfy the MLS of 500m².

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

Proposed Lot 1291 with an area of 477.5m² seeks to vary the MLS by 4.5%.

Proposed Lot 1292 with an area of 428.3m² seeks to vary the MLS by 14.35%.

3. ASSESSMENT OF THE PROPOSED VARIATION

3.1 Overview

Clause 4.6 – Exceptions to development standards establishes the framework for varying development standards applying under an LEP and provides as follows:

4.6 Exceptions to development standards

- 1) The objectives of this clause 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.
- 2) Development 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) 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.
- 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.
- 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.
- 6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:
- a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
 - b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note. When this Plan was made it did not include Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots or Zone RU6 Transition.

- 7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).
- 8) This clause does not allow development consent to be granted for development that would contravene any of the following:
- a) a development standard for complying development,
 - b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004* applies or for the land on which such a building is situated,
 - c) clause 5.4,
 - ca) clause 6.1 or 6.2.

3.2 Response to Clause 4.6 Matters

Clause 4.6 – Exceptions to development standards establishes the framework for varying development standards applying under an LEP.

In consideration of subclause (1):

A clear aim of Clause 4.6 is for flexibility in the application of a planning control where it can be demonstrated that strict compliance is unreasonable and unnecessary. This proposal relies on such flexibility to have the development approved at the lot sizes proposed in the DA.

Flexibility in this matter would result in a better outcome for and from the development for the reasons outlined in support of subclause (3) below.

In consideration of subclause (2):

A variation of the MLS is a development standard that may be considered within the ambit and operation of this clause.

In consideration of subclause (3):

The matters contained in subclause (3) (a) and (b) are addressed in detail in Sections 3.3 and 3.4 below.

In consideration of subclause (4):

The information submitted in Sections 3.3 to 3.9 below provides reasonable justification to contravene the development standard. It is understood that Orange City Council has delegation on behalf of the Secretary of the Department of Planning & Environment to deal with the request.

In consideration of subclause (5):

The matters contained in subclause (5) (a) to (c) are addressed in Sections 3.3 to 3.9 below.

In consideration of subclause (6):

This subdivision involves land in the R1 General Residential Zone. As such, subclause (6) above is not relevant.

In consideration of subclause (7):

The requirements of subclause (7) above are a matter for Council as the consent authority.

In consideration of subclause (8):

The proposal does not involve any of the matters referred to in (a) to (ca) above. As such, subclause (8) above is not relevant.

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

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 the circumstances of this case for the reasons explained below:

- In effect, the proposed development represents a *dual occupancy*. It is only described differently in this DA because subdivision is proposed as Stage 1. The subject land satisfies the minimum lot size to permit a dual occupancy pursuant to Clause 4.1B of Orange LEP 2011.
- As indicated in the Statement of Environmental Effects, the proposal satisfies the relevant Planning Outcomes for such development pursuant to *Orange DCP 2004 – 07 Development in Residential Areas*.
- The excision of each dwelling onto a separate lot is a reasonable planning outcome and expectation.
- Subdivision of the development can actually occur via Clause 4.1(4) of Orange LEP 2011 either as strata subdivision or as community title subdivision because these forms of subdivision are not subject to a MLS.

However, the proposed subdivision layout, comprising regular lots each with direct street frontage and access is not conducive to strata or community subdivision.

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

Strict compliance with the 500m² MLS would not necessarily defeat or thwart the underlying objective or purpose of the development standard.

However, the proposal is considered to be consistent with the objectives of the development standard as explained below in Section 3.5.

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

The development standard cannot be said to be abandoned. However, the Leeds Parade Conceptual Subdivision Layout appears to depict several lots that are less than 500m².

Further the development standard becomes irrelevant if the subdivision was to be undertaken as strata or community title.

Is the zoning of the land unreasonable or inappropriate?

The zoning of the land is reasonable and appropriate for the site.

3.4 Are there sufficient environmental planning grounds to justify contravening the development standard

There are sufficient environmental planning grounds to justify a variation of the development standard. These are as follows:

- A variation of the development standard is justified in this case because it can be demonstrated that the proposal satisfies the objectives of the R1 General Residential Zone and the objectives of the MLS (refer Section 3.5 below).
- The proposed lots are demonstrated to accommodate each dwelling in a manner is entirely compliant with the relevant LEP and DCP provisions.
- As mentioned previously, Clause 4.1(4) of the LEP would actually permit the subdivision either as a community title or strata subdivision. However, it is considered that a subdivision of the land as proposed by this application is more appropriate given that each lot has direct road frontage and does not rely on common or shared elements that typify community or strata schemes.

- As indicated throughout the SoEE, the proposed development is entirely compatible with the expected residential land use pattern in this area. A variation of the MLS to allow each proposed dwelling to be excised on a conventional allotment (as opposed to a strata or community lot) does not diminish this aspect of the development.
- The Statement of Environmental Effects demonstrates that non-compliance with the MLS development standard does not generate unacceptable impacts in the locality.

3.5 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?

Objective of the Minimum Lot Size Standard

The proposal, including the proposed variation to the MLS would uphold the objectives of the development standard due to the following.

a) To ensure that new subdivisions reflect existing lot sizes and patterns in the surrounding locality,

The proposed lots may not necessarily reflect the majority of existing lot sizes in this precinct. However, once the development is completed, the two dwellings will become part of the development pattern. The creation of proposed Lots 1291 and 1292 to excise each of these dwellings would indeed reflect this element of the development pattern.

b) To ensure that lot sizes have a practical and efficient layout to meet intended use,

The proposed variation of the MLS remains consistent with this objective. Each lot is and the proposed dwelling therein has been demonstrated to satisfy the relevant LEP and DCP provisions. The proposed lots logically recognise each proposed dwelling and its associated private open space, access, and servicing requirements.

c) To ensure that lot sizes do not undermine the land's capability to support rural development,

This objective is not relevant as the subject land is not within a rural zone.

d) To prevent the fragmentation of rural lands,

This objective is not relevant as the subject land is not within a rural zone.

e) To provide for a range of lot sizes reflecting the ability of services available to the area,

The proposed subdivision is consistent with this objective as the servicing arrangements for each of the proposed lots are readily available.

f) To encourage subdivision designs that promote a high level of pedestrian and cyclist connectivity and accommodate public transport vehicles.

There are no aspects of the proposed MLS variation that would be adverse to this objective.

Objectives of the Zone

The proposal including the proposed variation of the MLS remains consistent with the objectives of the R1 General Residential Zone as explained below.

To provide for the housing needs of the community.

The proposed variation to the MLS is not adverse to this objective. The ability to create smaller housing lots in a logical manner would provide for the housing needs of the community because such lots have the potential to contribute to housing affordability.

To provide for a variety of housing types and densities.

The proposed variation to the MLS is not adverse to this objective. The proposed lots 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.

This objective is not relevant. The development involves residential land use only.

To ensure development is ordered in such a way as to maximise public transport patronage and encourage walking and cycling in close proximity to settlement.

There are no aspects of the proposed variation to the MLS that would be adverse to this objective.

To ensure that development along the Southern Link Road has an alternative access.

The objective pertains to the Southern Link Road and is not relevant to this proposal.

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

The contravention of the development standard does not raise an issue of State or regional planning significance as it relates to local and contextual conditions.

3.7 Is there public benefit in maintaining the development standard?

There is public benefit in maintaining development standards. However, consistent with the objectives of Clause 4.6(1), there is also public benefit in maintaining flexibility in specific circumstances.

Public benefit would not suffer as a result of the variation to the development standard. The public would benefit from an increase in the choice of residential accommodation.

The creation of proposed Lots 1291 and 1292 would not compromise the broader aims and principles of Orange LEP 2011; or the relevant Planning Outcomes of *Orange DCP 2004 – 07 Development in Residential Areas*.

3.8 How would strict compliance hinder the attainment of the relevant objects specified in Section 1.3 of the Act?

The objects of Section 1.3 of the Act, are as follows:

- a) 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,
- b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,
- c) to promote the orderly and economic use and development of land,
- d) to promote the delivery and maintenance of affordable housing,
- e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,
- f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),
- g) to promote good design and amenity of the built environment,
- h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,
- i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,
- j) to provide increased opportunity for community participation in environmental planning and assessment.

Strict compliance with the development standard may not necessarily hinder attainment of the relevant objects of the Act, because if the subdivision was to occur as a strata or community titles subdivision, the development could proceed without having to vary the development standard.

In any case, the development as proposed would not contravene any of the objects in Section 1.3 of the Act.

3.9 Is the objection well founded?

Based on the information provided in this statement, it is considered that the objection is well founded and that granting an exception to the development standard can be supported in the circumstances of the case.

4. CONCLUSION

The proposed variation is based on the reasons within this formal request to vary the MLS controls that apply to the subject land.

A development that strictly complies with the development standard would not necessarily result in a better planning outcome.

The variation to the MLS will not result in unacceptable impacts upon the existing and future amenity of adjoining properties or the broader precinct.

The proposed departure from the development standard is not likely to result in an unacceptable precedent. In this regard:

- The subject land (and certain other land in the Leeds Parade residential area) permits this style of development which is akin to dual occupancy; and the excision of dwellings on individual lots that do not satisfy the MLS is already allowed to occur.
- The fact that this proposal actually seeks to excise the dwellings via another form of subdivision would be largely indiscernible in terms of impact and public perception of the development.
- The only reason a conventional subdivision pattern is sought in this case is due largely to the corner site and the fact that each proposed dwelling has separate and independent access and servicing arrangements. In this case, strata or community title subdivision is considered less appropriate.

It is concluded that the variation to the MLS is well founded and that compliance with the standard is unnecessary and unreasonable in the circumstances of the case.