



Addendum – Clause 4.6 variation – Minimum Subdivision Lot Sizes for Dual Occupancy

**Dual Occupancy and Two
(2) Lot Subdivision**

21 Dunnachie Street, Mudgee

Lot 90 in DP 1281961

1.0 INTRODUCTION

This Statement of Environmental Effects (SEE) has been prepared by Maas Group and forms part of a development application to Mid-Western Regional Council for the construction of a single-storey detached dual occupancy and two (2) lot subdivision on Lot 90 Logan at 21 Dunnachie Street, Mudgee.

The objective of this proposal is to:

- Dwelling A: 3 bedroom single storey dwelling with living, kitchen, dining, bathroom, laundry, main bedroom with WIW and ensuite, front patio, single car garage, and car space within the front setback;
- Dwelling B: 4 bedroom single storey dwelling with living, kitchen, dining, bathroom, laundry, main bedroom with WIW and ensuite, front patio, single car garage, and car space within the front setback;
- Landscaping works, including turf, low water garden beds, mesh and colourbond fencing, rainwater tank and concrete paths within the front, side and rear boundaries; and
- Two lot Torrens Title subdivision to allow each dwelling to be located on a separate lot.

The proposal is in accordance with the relevant zone objectives in the *Mid-Western Regional Local Environmental Plan 2012* (LEP) and satisfies the relevant objectives of the *Mid-Western Development Control Plan (DCP) 2013*. Importantly, the proposal complies with the key development principles, being setbacks, private open space and landscaping, solar access, streetscape character and privacy.

For a dual occupancy to be lawfully subdivided over the subject land, Clause 4.1A and 4.1B of LEP must be satisfied. Clause 4.1A(3)(b) requires the lot to be at least 800 square metres for the purpose of a detached dual occupancy. The subject parent lot has an area of 800m² which complies with the requirement. Clause 4.1B(3) requires that consent may be granted to a single DA for development that fulfils both of the following:

(a) *the subdivision of land into 2 or more lots,*

(b) *the erection of a dual occupancy (attached), dual occupancy (detached) or multi dwelling housing on each lot resulting from the subdivision, if the size of each lot is equal to or greater than—*

(ii) *400 square metres for a dual occupancy (detached).*

The two new lots from the proposed subdivision will respectively have a site area of 431m² and 369m². The size (369m²) of the new lot on which Dwelling B will be located does not comply with the Clause. Given the noncompliance with this development standard, a Clause 4.6 request has been prepared, seeking Council's consideration to vary the minimum lot size of the lots resulting from the subdivision applicable to the subject land.

This document forms an addendum to the SEE which contains the Clause 4.6 variation request.

2.0 PLANNING CONTROLS

Pursuant to section 4.15(1)(a) of the EP&A Act, this section will assess the compliance with the planning controls applicable to the site pursuant to the relevant heads for consideration. The relevant controls include:

- *Mid-Western Regional Local Environmental Plan (LEP) 2012;*
- *State Environmental Planning Policy (SEPP) – BASIX 2004;* and
- *Mid-Western Regional Development Control Plan (DCP) 2013.*

2.1 Mid-Western Regional Local Environmental Plan (LEP) 2012

The site is located within the Mid-Western Regional Local Government Area (LGA) and the *Mid-Western Regional Local Environmental Plan 2012 (LEP)* is the applicable Environmental Planning Instrument.

In accordance with the LEP Land Zoning Map, the subject site falls within the R1 – General Residential zone. Detached dual occupancies are permissible with development consent in the R1 zone.

2.1.1 Objectives

The relevant objectives for Zone R1 as per below:

- *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.*

The proposal is consistent with the relevant objectives of the R1 General Residential zone, due to the following:

- The proposal will provide two new dwellings to the housing market in Mudgee.
- The proposed dual occupancy will be an addition to the residential area largely featured by single dwelling houses which providing a more compact residential environment within the Logan estate.
- The development will be part of the local community which will generate demand for providing facilities and services in order to sustain economically.

Clause 4.1B Exceptions to minimum lot sizes for certain residential development

As identified previously, the proposal does not comply with Clause 4.1B (3)(b)(ii), as follows:

(3) Development consent may be granted to a single development application for development to which this clause applies that is both of the following—

- (b) the erection of a dual occupancy (attached), dual occupancy (detached) or multi dwelling housing on each lot resulting from the subdivision, if the size of each lot is equal to or greater than—*
 - (ii) 400 square metres for a dual occupancy (detached).*

As per the Clause, the minimum site area for each new lot resulting from subdivision is 400m². The proposed development does not comply with this Clause and its development standard and does not entertain a subdivision entitlement based on Clause 4.1B.

Clause 4.6 Exceptions to development standards

As a result of strict non-compliance with Clause 4.1B (3)(b)(ii) of the MWRLEP, the proponent seeks a variation of this development standard under Clause 4.6 of the MWRLEP2012.

Clause 4.6 is reproduced from the MWRLEP as follows, and is addressed in relation to each relevant sub-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 Planning Secretary has been obtained.*

In accordance with subclause (3) of Clause 4.6 of the MWRLEP we provide the following written request justifying the contravention of the development standard as there are sufficient environmental planning grounds in support of the proposal and that the strict application of the development standard is therefore unreasonable in this circumstance noting:

- (a) The lot size of the parent lot is 800m² which is compliant and eligible for land subdivision for a detached dual occupancy in accordance with Clause 4.1A(3)(b).
- (b) The subject parent lot is an irregular lot comprising irregular and narrow widths in the front and rear of the site;
- (c) The falling topography from the front to the rear, with easements located at both front and rear of the site constrain the siting of future detached (dual occupancy) dwelling house building envelopes to that as presented in this proposal.
- (d) The proposal is situated in a new residential locality featuring single storey dwellings and attached and detached dual occupancies within the future streetscape consistent with the residential zone objectives.
- (e) The proposal provides for a variety of housing types and densities when considered amongst the surrounding approved newly constructed residential estate.
- (f) The design for the proposed development fulfills all other development standards and controls listed as required in Council's LEP and DCP.

It is clear that the flexible application of development standards is permitted by Clause 4.6 subject to meeting several tests. With regards to the proposal in this SEE and Clause 4.1B, it is considered that:

- (a) It is not a development standard that is expressly excluded from the operation of Clause 4.6 (2);
- (b) That compliance with the development standard is unreasonable and unnecessary in the circumstances of the case (3(a));
- (c) That there are sufficient environmental planning grounds to justify contravening the development standard (3(b));
- (d) The proposed development will be in the public interest because it is consistent with the objectives of the particular development standard and the objectives for development within the zone in which the development is proposed to be carried out (4(a)(ii));
- (e) That contravention of the development standard does not raise any matter of significance for State or regional environmental planning (5(a)); and
- (f) It is not in the public interest to maintain the development standard (5(b)).

Furthermore, it is our interpretation that:

- The proposal does not conflict with the zone objectives;

- The objectives of the development standard and
- The proposal is generally consistent with the controls and intent of the controls, contained in the Mid-Western Regional Development Control Plan 2013.

Based on the above statement, we request for a variation of the development standard (Clause 4.1B (3)(b)(ii)) on the basis that it meets the objectives of Clause 4.6. Following consideration and application of relevant planning instruments, the proposed dual occupancy development would provide a better use of the subject residential lot given the site constraints.

In light of the above and the steps outlined below for varying development standards, we seek that Mid-Western Regional Council consider and allow an appropriate degree of flexibility of the development standard due to unique nature and circumstances of this proposal.

Furthermore, the State Government guide of *'Varying development standards: A Guide' (August 2011)* requires the following matters to be addressed:

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

Mid-Western Regional Local Environmental Plan 2012 (MWRLEP 2012).

2. What is the zoning of the land?

The subject site is located within the R1 General Residential zone in accordance with MWRLEP 2012.

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.*

4. What is the development standard being varied?

Clause 4.1B (3)(b)(ii), being the minimum lot size of lots resulting from subdivision where a dual occupancy is erected is 400 square metres, under MWRLEP 2012.

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

The development standard listed in MWRLEP 2012 is Clause 4.1B (3)(ii).

6. What are the objectives of the development standard?

There are no objectives prescribed to Clause 4.1B. Objectives of the relevant clauses are:

4.1 Minimum subdivision lot size

(1) *The objectives of this clause are as follows—*

- (a) to ensure that subdivision of land occurs in a manner that promotes suitable land uses and development,*
- (b) to minimise any likely impact of subdivision and other development on the amenity of neighbouring properties,*
- (c) to ensure that lot sizes and dimensions are able to accommodate development, consistent with relevant development controls*

4.1A Minimum lot sizes for dual occupancies, manor houses, multi dwelling housing and residential flat buildings

(1) *The objective of this clause is to achieve planned residential density in certain zones.*

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

The minimum lot size for lots resulting from subdivision for a detached dual occupancy is 400 square metres.

8. What is proposed numeric value of the development standard in your development application?

The lot to locate Dwelling A (north) has a site area of 431m² (compliant). The lot to locate Dwelling B (south) has a site area of 369m².

9. What is the percentage variation (between your proposal and the environmental planning instrument)?

The percentage of variation is 7.75%.

10. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

Strict compliance with the development standard is unreasonable and unnecessary in this case due to the following reasons:

- The required minimum lot size for the parent lot by Clause 4.1A in MWRLEP 2012 is 800m² which prescribes a residential density to the locality of one dwelling per 400m². The objective for Clause 4.1A is to achieve planned residential density in certain zones. The proposed development provides with two new dwellings on the subject site which is 800m². This equals to one dwelling per 400m² and therefore achieves the density requirement.
- Notwithstanding the departure from minimum lot size after subdivision, the development application complies with all other development standards and controls within MWRLEP 2012 and MWRDCP 2013. The proposed new lot for Dwelling B is able to accommodate future dwelling with the adequate provision of both interior living areas and exterior private open space and minimising any likely impact on the amenity of neighbouring properties including proposed Dwelling A.
- The subject parent lot is an irregular lot comprising narrow widths in the front and rear of the site and a falling topography from the front to the rear. The proposal consists of smart design to take into account the site constraints while ensuring compliance with all other applicable development standards and controls.
- The proposed design will provide two new dwelling houses as a way of efficiently using the subject allotment, without compromising the amenity of the subject and adjoining sites. Alternative designs with strict compliance would provide for a consistent dwelling density though comparably incur reduced land use efficiency for the subject site and possibly result in other non-compliances with the MWRC DCP.
- The subject development is located within an urban release area for Mudgee LGA and will feature low to medium density residential subdivisions comprising single and two storey attached and detached dwellings.

Strict compliance with the development standard is unreasonable and unnecessary in ensuring the development compatible with the neighbouring environment.

11. How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act.

The objects set down in Section 5(a)(i) and (ii) are as follows (Current version – Section 1.3 Objects of Act):

“to encourage:

(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

(ii) the promotion and co-ordination of the orderly and economic use and development of land”

Strict compliance with the standard would hinder the attainment of the objects of section 5(a)(i) and (ii) of the Act, which are to encourage development that promotes the social and economic welfare of the community and a better environment, and to promote and coordinate orderly and economic use and development of land.

Strict compliance with the development standard would result in negative impacts to the amenity of adjoining sites, or the public as it is likely alternative development would be required to be designed and sited upon the land in closer proximity to itself and adjoining residential allotments and their dwellings. notwithstanding this and given circumstances of this case, the proposal satisfies the zone objectives and is compatible with the intended future and existing scale of development in the locality. The development as proposed is consistent with the provisions of orderly and economic development. Strict compliance with the standard is not required in order to achieve compliance with the objects.

12. Is the development standard a performance based control? Give details.

No. The development standard of minimum allotment size is a numerical control.

13. Would strict compliance with the standard, in your particular case, would be unreasonable or unnecessary? Why?

In this particular case, strict compliance with the standard would be unreasonable or unnecessary for the following reasons:

- The required minimum lot size for the parent lot by Clause 4.1A in MWRLEP 2012 is 800m² which prescribes a residential density to the locality of one dwelling per 400m². The objective for Clause 4.1A is to achieve planned residential density in certain zones. The proposed development provides with two new dwellings on the subject site which is 800m². This equals to one dwelling per 400m² and therefore achieves the density requirement.
- Notwithstanding the departure from minimum lot size after subdivision, the development application complies with all other development standards and controls within MWRLEP 2012 and MWRDCP 2013. The proposed new lot for Dwelling B is able to accommodate future dwelling with the adequate provision of both interior living areas and exterior private open space and minimising any likely impact on the amenity of neighbouring properties including proposed Dwelling A.
- The subject parent lot is an irregular lot comprising narrow widths in the front and rear of the site and a falling topography from the front to the rear. The proposal consists of smart design to take into account the site constraints while ensuring compliance with all other applicable development standards and controls.
- The proposed design will provide two new dwelling houses as a way of efficiently using the subject allotment, without compromising the amenity of the subject and adjoining sites. Alternative designs with strict compliance would provide for a consistent dwelling density though comparably incur reduced land use efficiency for the subject site and possibly result in other non-compliances with the MWRC DCP.
- The subject development is located within an urban release area for Mudgee LGA and will feature low to medium density residential subdivisions comprising single and two storey attached and detached dwellings.

Strict compliance with the development standard is unreasonable and unnecessary in ensuring the development compatible with the neighbouring environment.

14. Are there sufficient environmental planning grounds to justify contravening the development standard? Give details.

The following environmental planning grounds further justify contravening the development standard:

- The proposal satisfies the relevant objectives of R1 General Residential zone by providing for the housing needs of the community and a variety of housing types and densities .
- Non-compliance with the standard does not contribute unreasonable environmental impacts noting the proposed Dwelling B and its subject allotment is considered to minimise any likely impact on the amenity of neighbouring properties including proposed Dwelling A.
- The proposal is generally consistent with the controls and intent of the controls, contained in the Mid-Western Regional Development Control Plan 2013.
- The development will promote economic welfare of the community by creating local work positions during the construction period through the proper development of the subject land.
- The proposed two single dwellings on the subject land will contribute to the locality by continuing to provide affordable housing stock through the addition of two additional properties to Mudgee housing market.

General assessment of the variation:

The planning principle set out in *Wehbe v Pittwater Council (2007)* provides an accepted method for justifying that compliance with the development standard is unreasonable or unnecessary. This method is to demonstrate that the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard. Chief Justice Preston expressed the view that there are five different ways in which an objection may be well founded, and that approval of the objection may be consistent with the aims of the policy. The analysis below has considered the five-part test:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;

The subject development standard *Clause 4.1B Exceptions to minimum lot sizes for certain residential development* with which the proposed development does not comply is not prescribed with any objective in MWRLEP 2012. The most relevant objectives lie in:

4.1 Minimum subdivision lot size

(1) The objectives of this clause are as follows—

- (a) to ensure that subdivision of land occurs in a manner that promotes suitable land uses and development,*
- (b) to minimise any likely impact of subdivision and other development on the amenity of neighbouring properties,*
- (c) to ensure that lot sizes and dimensions are able to accommodate development, consistent with relevant development controls.*

and:

4.1A Minimum lot sizes for dual occupancies, manor houses, multi dwelling housing and residential flat buildings

(1) The objective of this clause is to achieve planned residential density in certain zones.

The proposal fully complies with the numerical development standard set out in *Clause 4.1 minimum subdivision lot size* which is 800 square metres minimum lot size in that the allotment for the proposed development is 800 square metres in size. The development achieves the objectives for the following reasons:

- The development proposes the erection of two dwelling houses which is consistent with the residential land use purposes for the R1 General Residential zone.
- The development and subdivision will unlikely have an adverse impact on the amenity of adjacent and neighbouring properties or limit the development potential of these properties.
- The design of the proposed two dwellings and lot subdivision demonstrates that, notwithstanding the non-compliance with the minimum subdivision lot size standard this addendum is associated with, all other relevant development standards and controls required under Council's LEP and DCP have been fully complied with.

The minimum lot size for a parent lot for a detached dual occupancy on the subject site is 800m² as provided in the LEP, which translates to Council's further requirement for residential density in the prescribed area being one lot per 400m². Amid the non-compliance, the proposed development fully meets the density requirement in that it provides two new dwelling houses on the subject site which has an area of 800m² being equivalent to one lot per 400m². The development will fully achieve the objective of planned residential density in the R1 General Residential zone without overly densifying the locality.

Furthermore, the proposed development ensures all other development standards and controls are complied with notwithstanding non-compliance with 4.1B(3)(ii). Both of the two proposed new dwellings will be provided with adequate internal habitable rooms and living areas, external private open space, sufficient solar access and residential amenity. The non-compliance with the standard will not hinder the ability of the development to achieve other applicable development objectives set out in Council's development plans. Overall, the development will achieve the prescribed objectives by fulfilling the density requirement and providing all necessary amenity notwithstanding the non-compliance with the subject development standard.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The relevant objective of the minimum lot size standard aims 'to achieve planned residential density in certain zones' by providing further subdivided allotments of 400m². The objective and purpose of the standard is not relevant to the development as the development fully achieves the objective by fulfilling the dual occupancy density requirement in the R1 zone achieving the planned residential density despite Dwelling B's non-compliance with the minimum lot size of 400m².

3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The above request has demonstrated that the proposal would achieve the required residential density requirement in the locality while providing adequate amenity to the two new dwellings.

Notwithstanding the sought departure to the subdivision lot size nominated by Clause 4.1B(3)(ii), the purpose of the objectives are not compromised by the proposed non-compliance.

4. 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 development standard is enforced by Council and has not been abandoned. However, a variation as justified by the abovementioned environmental considerations the sites unique lot configuration, merits consideration of whether strict compliance is considered to be unnecessary or unreasonable noting the development is consistent with all relevant objectives.

5. The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

The zoning and minimum lot size of the land is considered to be true and accurate with regard to Clause 4.1A(3)(b), notwithstanding in this particular circumstance compliance with the development standard of Clause 4.1B(3)(ii) is considered unreasonable and inappropriate due to the environmental character of the land parcel as detailed above.