

## 12.0 APPENDIX D – Clause 4.6 request to vary battle-axe lot size standard

### 1.0 Introduction

This is a written request to seek an exception to a development standard pursuant to clause 4.6 in respect of the minimum 450sqm battle-axe lot size development standard for a proposed residential development at 31-32 Park Avenue Kingswood. Relevantly, clause 4.1(4B) of Penrith Local Environmental Plan 2010 provides that:

#### **4.1 Minimum subdivision lot size**

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

- (a) *to ensure that lot sizes are compatible with the environmental capabilities of the land being subdivided,*
  - (b) *to minimise any likely impact of subdivision and development on the amenity of neighbouring properties,*
  - (c) *to ensure that lot sizes and dimensions allow developments to be sited to protect natural or cultural features including heritage items and retain special features such as trees and views,*
  - (d) *to regulate the density of development and ensure that there is not an unreasonable increase in the demand for public services or public facilities,*
  - (e) *to ensure that lot sizes and dimensions are able to accommodate development consistent with relevant development controls.*
- (2) *This clause applies to a subdivision of any land shown on the [Lot Size Map](#) that requires development consent and that is carried out after the commencement of this Plan.*
- (3) *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.*

...

(4B) *Despite subclause (3), development consent must not be granted for the subdivision of land in Zone R3 Medium Density Residential unless each lot to be created by the subdivision would have—*

- (a) *if it is a standard lot—a minimum width of 12 metres, or*
- (b) *if it is a battle-axe lot—a minimum width of 15 metres and a minimum area of 450 square metres.*

(4C) *For the purposes of this clause, if a lot is a battle-axe lot or other lot with an access handle, the area of the access handle is not to be included in calculating the lot size.*

Clause 4.1(4B) requires subdivision in the R3 zone to provide a minimum width of 12m for standard lots and a minimum width of 15m and minimum area of 450sqm for battle-axe lots. In this instance, whilst the proposed lots comply with the minimum width requirements for standard and battle-axe lots, variations of 43sqm (9.48%) and 35sqm (7.78%) are proposed to the minimum battle-axe lot area requirements for Lot 2 and Lot 3, respectively.

Accordingly, this Clause 4.6 request to vary the maximum height of building development standard has been prepared having regard to *Four2Five Pty Ltd v Ashfield Council [2015]* and *Wehbe v Pittwater Council 120071*. In this regard, it is noted that Wehbe sets out five ways of demonstrating that compliance is unreasonable or unnecessary, one of which is that the objectives of the standard are achieved. Noting the requirements of Clause 4.6 as opposed to SEPP No. 1, it is also necessary to demonstrate that there are sufficient environmental planning grounds to justify contravening the standard and that 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 in the zone.

It is contended that compliance with the minimum 450sqm battle-axe lot size standard is unreasonable and unnecessary in the circumstances of the case given there are sufficient environmental planning grounds and the objectives of the standard are achieved nonetheless as follows:

- The proposed variations relate to the paper plan subdivision lot boundaries only and would not be visually discernible given the proposed building siting and design, bulk and scale, landscaping, private open space, access, car parking and fencing would remain unchanged.
- Notwithstanding the above, the proposed subdivision facilitates the provision of new residential accommodation of a significantly lesser scale and intensity of development that could otherwise be achieved on an unsubdivided site noting Council's approval of a 28 room boarding house at 45 Park Avenue under D16/0374.
- The proposed lot layout results in a better planning outcome than an otherwise strictly compliant lot layout given the proposal minimises bulk and scale and overshadowing impacts to adjoining properties to the rear by providing for additional building area within Lot 1 facing the street, whereas a reduction in the size of Lot 1 and increase to the size of battle-axe Lots 2 and 3 would result in additional building area and bulk and scale at the rear of the site and additional visual bulk and overshadowing impacts to adjoining properties.
- The proposed battle-axe lot area variations are numerically minor variations of 43sqm (9.48%) and 35sqm (7.78%) for Lot 2 and Lot 3, respectively.
- Proposed Lot 1 is 97.5sqm larger than the minimum lot size requirement of 400sqm for a standard lot, which offsets the sum of the shortfall of 88sqm on battle-axe Lots 2 and 3, and as such, the proposed subdivision complies on an overall average lot size basis.
- The proposal is not an overdevelopment of the site given an overall yield of 3 lots in the form of two battle-axe lots of at least 450sqm excluding the access handle and one standard lot of 400sqm could otherwise be accommodated on the site.
- The proposed lot sizes ranging from 407sqm (excluding the access handle) and 497sqm are compatible with the environmental capabilities of the R3 medium density zoned land being subdivided.
- The proposed subdivision layout and building design and layout does minimise any likely adverse amenity impacts on adjoining properties in relation to bulk and scale, overshadowing, visual privacy and acoustic amenity.
- The proposed lot sizes and dimensions allow for the proposed building design and layout and detailed landscaping with additional canopy tree coverage to be suitably accommodated within the site in accordance with relevant development controls and do not result in any adverse heritage, tree or view impacts.

- The proposed lot sizes are wholly consistent with the planned residential density of the R3 zoned land given the yield is equivalent to an otherwise strictly compliant lot layout comprising 3 lots, but results in a better planning outcome in terms of reduced bulk and scale and overshadowing impacts to adjoining properties at the rear, and will ensure that there is not any unreasonable increase in demand for public services or public facilities.
- The variations do not result in additional floor area or an overdevelopment of the site.
- The proposal complies with relevant development controls including setbacks, building height, landscaping, private open space, solar access, visual privacy, car parking, access, stormwater and waste management.
- The proposal is in harmony with the bulk and scale of surrounding buildings and the streetscape and minimises the impacts of new development on adjoining or nearby properties from loss of privacy or acoustic amenity, overshadowing or visual intrusion.
- The proposal results in an improvement to the existing streetscape and park frontage and ensures a high visual quality of the development when viewed from adjoining properties, the adjoining public reserve to the west and the street frontage
- The proposal is consistent with the existing pattern of development and desired future character of this section of the street and the local area as shown in the aerial photo below.
- The proposal is a permitted form of development in the R3 zone and consistent with the relevant zone objectives to provide for the housing needs of the community and a variety of housing types within the medium density residential environment with excellent access to services and facilities and maintains a high level of residential amenity consistent with the existing and desired future character of the local area.
- The proposal is consistent with, and of a lesser scale and intensity of, residential development that could otherwise be reasonably accommodated noting Council has approved a total of 10 x 3-5 bedroom dwellings on the adjoining property to the east at 29-30 Park Avenue under DA15/0171 and 4 x 2-3 bedroom dwellings at 32 Joseph Street under DA18/0428.



## **2.0 Penrith Local Environmental Plan 2010**

### **2.1 Clause 4.6(1) – Flexibility and Better Outcomes**

Subclause 4.6(1) states the objectives of the clause as follows:

*“(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 proposal is considered to be compatible with these objectives and a response to the objectives is contained within this submission.

### **2.2 Subclause 4.6(2) – Consent may be granted**

Subclause 4.6(2) provides that:

*(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.*

The minimum battle-axe lot size development standard is not expressly excluded from the operation of clause 4.6 and accordingly, consent may be granted.

### **2.3 Subclause 4.6(3) – Written Request**

Subclause 4.6(3) relates to the making of a written request to justify an exception to a development standard and states:

*“(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.”*

The proposed development does not comply with the minimum battle-axe lot size development standard. However, strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as justified in this written variation request.

## 2.4 Subclause 4.6(4) – Written Request

Subclause 4.6(4) provides that 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.”*

The remainder of this written request for exception to the development standard addresses the matters required under subclause 4.6(4) the LEP, as follows.

Furthermore, subclause 4.6(5) provides that in deciding whether to grant concurrence, the Director General 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 Director-General before granting concurrence.”*

It is contended that the proposed development is a form of development that is most appropriate for this R3 medium density residential site as it will have minimal, if any, detrimental impacts on the surrounding amenity or the long term development potential of the neighbouring lands. As part of any consideration of this matter the Director-General can accept that the variation of the battle-axe lot size standard is a local matter, given the minor extent and overall compliance with the requirements of SEPP Affordable Rental Housing 2009, Penrith Local Environmental Plan 2010 and Penrith DCP 2014.

## 2.5 The Nature of the Variation

Clause 4.1(4B) requires subdivision in the R3 zone to provide a minimum area of 450sqm for battle-axe lots. In this instance, proposed Lot 2 is 407sqm and proposed Lot 3 is 415sqm, equating to variations of 43sqm (9.48%) and 35sqm (7.78%) are proposed to the minimum battle-axe lot area requirements for Lot 2 and Lot 3, respectively.

It is argued in this request that this variation is unlikely to result in any significant environmental impacts but does assist in achieving a higher quality building design and a yield that is entirely consistent with the density projections for this site and the desired future character of the locality.

To require strict compliance would result in a building form with additional bulk and scale to the rear and increased visual bulk and overshadowing impacts to adjoining properties compared to the proposed scheme. In this way the underlying objectives of the development standard are achieved by the proposal to an equivalent or better degree than a development that complied with the standard and strict compliance would be unreasonable or unnecessary in these circumstances.

Further, the proposal provides public benefits arising through employment during the construction phase and ongoing employment opportunities upon completion. The proposal represents an appropriate increase and replenishment of the available housing stock that is wholly in keeping with the desired future character of the locality, noting the need to provide housing choice and affordability for a growing population in close proximity to local train and bus services, major regional road networks, access to areas of employment, educational facilities, entertainment and open space.

## 2.6 The Objectives of the Development Standard

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

- (a) to ensure that lot sizes are compatible with the environmental capabilities of the land being subdivided,*
- (b) to minimise any likely impact of subdivision and development on the amenity of neighbouring properties,*
- (c) to ensure that lot sizes and dimensions allow developments to be sited to protect natural or cultural features including heritage items and retain special features such as trees and views,*
- (d) to regulate the density of development and ensure that there is not an unreasonable increase in the demand for public services or public facilities,*
- (e) to ensure that lot sizes and dimensions are able to accommodate development consistent with relevant development controls.*

The proposed development is considered to achieve the above objectives as follows:

- The proposed variations relate to the paper plan subdivision lot boundaries only and would not be visually discernible given the proposed building siting and design, bulk and scale, landscaping, private open space, access, car parking and fencing would remain unchanged.
- Notwithstanding the above, the proposed subdivision facilitates the provision of new residential accommodation of a significantly lesser scale and intensity of development that could otherwise be achieved on an unsubdivided site noting Council's approval of a 28 room boarding house at 45 Park Avenue under D16/0374.
- The proposed lot layout results in a better planning outcome than an otherwise strictly compliant lot layout given the proposal minimises bulk and scale and overshadowing impacts to adjoining properties to the rear by providing for additional building area within Lot 1 facing the street, whereas a reduction in the size of Lot 1 and increase to the size of battle-axe Lots 2 and 3 would result in additional building area and bulk and scale at the rear of the site and additional visual bulk and overshadowing impacts to adjoining properties.

- The proposed battle-axe lot area variations are numerically minor variations of 43sqm (9.48%) and 35sqm (7.78%) for Lot 2 and Lot 3, respectively.
- Proposed Lot 1 is 97.5sqm larger than the minimum lot size requirement of 400sqm for a standard lot, which offsets the sum of the shortfall of 88sqm on battle-axe Lots 2 and 3, and as such, the proposed subdivision complies on an overall average lot size basis.
- The proposal is not an overdevelopment of the site given an overall yield of 3 lots in the form of two battle-axe lots of at least 450sqm excluding the access handle and one standard lot of 400sqm could otherwise be accommodated on the site.
- The proposed lot sizes ranging from 407sqm (excluding the access handle) and 497sqm are compatible with the environmental capabilities of the R3 medium density zoned land being subdivided.
- The proposed subdivision layout and building design and layout does minimise any likely adverse amenity impacts on adjoining properties in relation to bulk and scale, overshadowing, visual privacy and acoustic amenity.
- The proposed lot sizes and dimensions allow for the proposed building design and layout and detailed landscaping with additional canopy tree coverage to be suitably accommodated within the site in accordance with relevant development controls and do not result in any adverse heritage, tree or view impacts.
- The proposed lot sizes are wholly consistent with the planned residential density of the R3 zoned land given the yield is equivalent to an otherwise strictly compliant lot layout comprising 3 lots, but results in a better planning outcome in terms of reduced bulk and scale and overshadowing impacts to adjoining properties at the rear, and will ensure that there is not any unreasonable increase in demand for public services or public facilities.
- The variations do not result in additional floor area or an overdevelopment of the site.
- The proposal complies with relevant development controls including setbacks, building height, landscaping, private open space, solar access, visual privacy, car parking, access, stormwater and waste management.
- The proposal is in harmony with the bulk and scale of surrounding buildings and the streetscape and minimises the impacts of new development on adjoining or nearby properties from loss of privacy or acoustic amenity, overshadowing or visual intrusion.
- The proposal results in an improvement to the existing streetscape and park frontage and ensures a high visual quality of the development when viewed from adjoining properties, the adjoining public reserve to the west and the street frontage
- The proposal is consistent with the existing pattern of development and desired future character of this section of the street and the local area as shown in the aerial photo below.
- The proposal is a permitted form of development in the R3 zone and consistent with the relevant zone objectives to provide for the housing needs of the community and a variety of housing types within the medium density residential environment with excellent access to services and facilities and maintains a high level of residential amenity consistent with the existing and desired future character of the local area.
- The proposal is consistent with, and of a lesser scale and intensity of, residential development that could otherwise be reasonably accommodated noting Council has approved a total of 10 x 3-5 bedroom dwellings on the adjoining property to the east at 29-

30 Park Avenue under DA15/0171 and 4 x 2-3 bedroom dwellings at 32 Joseph Street under DA18/0428.



## 2.7 The Objectives of the Zone

The land use table states the objectives of the Zone as follows:

- *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 provide for a concentration of housing with access to services and facilities.*
- *To enhance the essential character and identity of established residential areas.*
- *To ensure that a high level of residential amenity is achieved and maintained.*
- *To ensure that development reflects the desired future character and dwelling densities of the area.*

As the proposal is for residential development of the land, the first, second, fourth, fifth, sixth and seventh objectives are relevant. The proposed development provides for housing choice and variety consistent with the medium density residential environment with excellent access to services and facilities and maintains a high level of residential amenity consistent with the existing and desired future character of the local area.

The proposal provides for the housing needs of the community within a medium density residential environment and represents a significant improvement to the existing streetscape and local context.



The proposal will cater for the expected traffic generation through off-street parking and will be adequately serviced in accordance with authority requirements. The proposed development is located in an area well serviced by public transport, roads, services, amenities, employment and entertainment areas, educational facilities and open space.

It is considered that the proposal is consistent with the objectives of the zone, complies with the requirements of SEPP Affordable Rental Housing and is generally compliant with the requirements of Penrith LEP and DCP. In this regard, it is noted that the proposal represents a carefully considered design outcome having regard to the existing streetscape and the desired future character of the streetscape. Overall, the proposal provides a residential form of development that minimises any potential adverse amenity or streetscape impacts and maximises internal residential amenity, which is entirely in keeping with the objectives of the zone and the desired future character of the locality.

## **2.8 The Grounds of the Objection**

The proposed variation to the development standard has been considered in light of the abovementioned objectives and potential environmental impacts and hence, strict compliance with the Battle-axe Lot Site Control in this particular instance is considered to be unreasonable and unnecessary for the following reasons:

- The proposed variations relate to the paper plan subdivision lot boundaries only and would not be visually discernible given the proposed building siting and design, bulk and scale, landscaping, private open space, access, car parking and fencing would remain unchanged.
- Notwithstanding the above, the proposed subdivision facilitates the provision of new residential accommodation of a significantly lesser scale and intensity of development that could otherwise be achieved on an unsubdivided site noting Council's approval of a 28 room boarding house at 45 Park Avenue under D16/0374.
- The proposed lot layout results in a better planning outcome than an otherwise strictly compliant lot layout given the proposal minimises bulk and scale and overshadowing impacts to adjoining properties to the rear by providing for additional building area within Lot 1 facing the street, whereas a reduction in the size of Lot 1 and increase to the size of battle-axe Lots 2 and 3 would result in additional building area and bulk and scale at the rear of the site and additional visual bulk and overshadowing impacts to adjoining properties.
- The proposed battle-axe lot area variations are numerically minor variations of 43sqm (9.48%) and 35sqm (7.78%) for Lot 2 and Lot 3, respectively.
- Proposed Lot 1 is 97.5sqm larger than the minimum lot size requirement of 400sqm for a standard lot, which offsets the sum of the shortfall of 88sqm on battle-axe Lots 2 and 3, and as such, the proposed subdivision complies on an overall average lot size basis.
- The proposal is not an overdevelopment of the site given an overall yield of 3 lots in the form of two battle-axe lots of at least 450sqm excluding the access handle and one standard lot of 400sqm could otherwise be accommodated on the site.
- The proposed lot sizes ranging from 407sqm (excluding the access handle) and 497sqm are compatible with the environmental capabilities of the R3 medium density zoned land being subdivided.

- The proposed subdivision layout and building design and layout does minimise any likely adverse amenity impacts on adjoining properties in relation to bulk and scale, overshadowing, visual privacy and acoustic amenity.
- The proposed lot sizes and dimensions allow for the proposed building design and layout and detailed landscaping with additional canopy tree coverage to be suitably accommodated within the site in accordance with relevant development controls and do not result in any adverse heritage, tree or view impacts.
- The proposed lot sizes are wholly consistent with the planned residential density of the R3 zoned land given the yield is equivalent to an otherwise strictly compliant lot layout comprising 3 lots, but results in a better planning outcome in terms of reduced bulk and scale and overshadowing impacts to adjoining properties at the rear, and will ensure that there is not any unreasonable increase in demand for public services or public facilities.
- The variations do not result in additional floor area or an overdevelopment of the site.
- The proposal complies with relevant development controls including setbacks, building height, landscaping, private open space, solar access, visual privacy, car parking, access, stormwater and waste management.
- The proposal is in harmony with the bulk and scale of surrounding buildings and the streetscape and minimises the impacts of new development on adjoining or nearby properties from loss of privacy or acoustic amenity, overshadowing or visual intrusion.
- The proposal results in an improvement to the existing streetscape and park frontage and ensures a high visual quality of the development when viewed from adjoining properties, the adjoining public reserve to the west and the street frontage
- The proposal is consistent with the existing pattern of development and desired future character of this section of the street and the local area as shown in the aerial photo below.
- The proposal is a permitted form of development in the R3 zone and consistent with the relevant zone objectives to provide for the housing needs of the community and a variety of housing types within the medium density residential environment with excellent access to services and facilities and maintains a high level of residential amenity consistent with the existing and desired future character of the local area.
- The proposal is consistent with, and of a lesser scale and intensity of, residential development that could otherwise be reasonably accommodated noting Council has approved a total of 10 x 3-5 bedroom dwellings on the adjoining property to the east at 29-30 Park Avenue under DA15/0171 and 4 x 2-3 bedroom dwellings at 32 Joseph Street under DA18/0428.

The proposal promotes the objects of the Act in terms of the orderly and economic use and development of land in an ecologically sustainable manner and promotes the social and economic welfare of the community and a better urban environment. It is considered that compliance with the development standard is unreasonable in this instance in light of these similar applicable circumstances.

## 2.9 Director-General's Considerations

As indicated above, subclause 4.6(5) of the LEP also requires the Director-General, in deciding whether to grant concurrence, to consider the following:

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

The breach of height of building limit is not a matter of state or regional significance.

*“(b) the public benefit of maintaining the development standard,”*

There is a public benefit in allowing the development to proceed. The proposed development would be consistent with anticipated development for the site, comparable in character with the scale of new built form for this locality, provides a high quality design outcome and would result in an appropriate housing yield for this site and adds to housing choice.

*“(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.”*

Approval will result in a better planning outcome and would be in the public interest.

### **3.0 Conclusion and Recommendations**

The proposed residential development has been assessed against the relevant statutory provisions of clause 4.6 and this written request has provided justification that compliance with the site width development standard is unreasonable or unnecessary in the circumstances of this particular case.

Further, the proposal provides public benefits arising through employment during the construction phase and at completion and is entirely in keeping with the desired future character of the locality. The proposal represents an appropriate increase in the available housing stock that is wholly consistent with the desired medium density outcome of the locality, noting the close proximity to local train and bus services, major regional road networks, access to areas of employment, services, amenities, educational facilities, entertainment and open space. Accordingly, the justification within this written request is considered to be well founded.