

C/o 6 Assisi Close
Cranebrook
NSW 2749

August 2021

Attn: The Assessing Officer

SITE: 6 Assisi Close, Cranebrook

PROPOSAL: Construction of a Dual Occupancy and Strata Subdivision.

RE: 4.6 Variation to Clause 4.1A Minimum lot sizes for dual occupancies, multi dwelling housing and residential flat buildings

The NSW planning system provides flexibility in planning controls by providing the ability for a council to vary development standards in certain circumstances. Development standards are a means to achieving an environmental planning objective and can be numerical or performance based. Some developments may achieve planning objectives despite not meeting the required development standards.

This letter supports a written request to vary the **Minimum lot sizes for dual occupancies, multi dwelling housing and residential flat buildings** development standard prescribed in the **Penrith Local Environmental Plan 2010** applying to the proposed **Construction of a Dual Occupancy and Strata Subdivision** at **6 Assisi Close, Cranebrook**. This submission should be read in conjunction with the Statement of Environmental Effects, architectural plans prepared by AA Dream Homes and other consultant's reports.

This variation request has been prepared based on the requirements of the report "Varying development standards: A Guide August 2011" prepared by the NSW Department of Planning & Infrastructure, Appendix 3.

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

The name of the environmental planning instrument that applies to the land is Penrith Local Environmental Plan 2010

2. What is the zoning of the land?

The zoning of the land is R2 – Low Density Residential

3. What are the objectives of the zone?

The objectives of this zone are:

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To promote the desired future character by ensuring that development reflects features or qualities of traditional detached dwelling houses that are surrounded by private gardens.*
- *To enhance the essential character and identity of established residential areas.*
- *To ensure a high level of residential amenity is achieved and maintained.*

4. What is the development standard being varied? e.g. FSR, height, lot size

The development standard being varied is *4.1A Minimum lot sizes for dual occupancies, multi dwelling housing and residential flat buildings*

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

The numerical control listed in Penrith Local Environmental Plan 2010 is *4.1A Minimum lot sizes for dual occupancies, multi dwelling housing and residential flat buildings.*

(2) Development consent may be granted to development on a lot in a zone shown in Column 2 of the Table to this clause for a purpose shown in Column 1 of the Table opposite that zone, if the area of the lot is equal to or greater than the area specified for that purpose and shown in Column 3 of the Table.



Column 1	Column 2	Column 3
Dual (attached)	occupancy Zone R2 Residential	Low Density 650 square metres

6. What are the objectives of the development standard?

The objectives of the development standard are:

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 numeric value of the development standard is:

Column 1	Column 2	Column 3
Dual (attached)	occupancy Zone R2 Residential	Low Density 650 square metres

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

The development is for a Dual occupancy (attached) in Zone R2 Low Density Residential and the lot has an area of 640.10sqm

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

The percentage variation (between the proposed development and the environmental planning instrument) is: 1.5% (9.9sqm)

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

Yes, compliance with the development standard is unreasonable in the circumstances.

In *Wehbe v Pittwater Council* [2007] NSWLEC827 (*Wehbe*), Preston CJ identified five (5) ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. While *Wehbe* related to objections pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the analysis can be of



assistance to variations made under clause 4.6 because subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see Four2Five at [61] and [62]).

The five (5) ways outlined in Wehbe include:

1. The objectives of the standard are achieved notwithstanding noncompliance with the standard (First Way)
2. The underlying objective of purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way)
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way)
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 (Fourth Way)
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Way).

Additionally, of note, in the judgment in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 the Chief Judge upheld the Commissioner's approval of large variations to height and FSR controls on appeal. He noted that under clause 4.6, the consent authority (in that case, the Court) did not have to be directly satisfied that compliance with the standard was unreasonable or unnecessary, rather that the applicant's written request adequately addresses the matters in clause 4.6(3)(a) that compliance with each development standard is unreasonable or unnecessary.

In this regard, this written request establishes and adequately addresses the matters in clause 4.6(3)(a) that compliance with each development standard is unreasonable or unnecessary because the underlying objective of purpose of the standard is not relevant to the development irrespective of the non-compliance with the height of buildings, and accordingly justifies the variation to the floor space ratio pursuant to the First way and Fourth way outlined in Wehbe, as follows.



That The objectives of the standard are achieved notwithstanding noncompliance with the standard (First Way)

The objectives of the control and responses relative to the development are:

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

Response: The development is for a dual occupancy, permitted in the R2 Low density residential zone. The development is less than that permitted by the Penrith Local Environmental Plan 2010 for height and there is no FSR specified for the land. The development generally meets the additional built form criteria outlined in Penrith Development Control Plan 2014 in relation to setbacks and landscaping.

In relation to the Forth Way, 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, it is noted that the development has previously been approved under DA17/1008 with the same variation. The Development Application proposed is identical to that approved in DA17/1008.

11. How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act (now Section 1.3)

The objects of this 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.*

The rationale is that development standards are not ends in themselves but means of achieving ends and the ends are environmental or planning objectives. The strict compliance with these controls do not hinder the attainment of the object specified in Section 5(a)(i) and (ii) of the Act. Strict compliance does not at all hinder the attainment of the objects specified in the Act.

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

Yes. The development standards noted in these variations are essentially performance based controls. The objectives of the control have otherwise been met. Refer above for responses for details.

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

As above noted within each of the variations.

14. Are there sufficient environmental planning grounds to justify contravening the numerical control? Give details.

Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Preston CJ provided in demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard, the grounds must be “environmental planning grounds” by their nature, relating to the subject matter, scope and purpose of the EPA Act.

The objects of the EPA Act are:

1.3 Objects of Act(cf previous s 5)

The objects of this 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.

The proposed contravention to the minimum lot size is justified in that it achieves the above Objectives, to promote the orderly and economic use and development of land and to promote good design and amenity of the built environment, by allowing the land to be developed in an orderly and economic way.

Given the above, it can be shown that the variation to the clause is warranted and supported by the objectives and other related controls.

We appreciate Councils open-minded approach to this matter and look forward to a favourable outcome.

Yours Faithfully,

Tania Hannaford (BURP, Dip.Proj.Management, Certificate IV NatHERS Assessment)
Plan for Tomorrow

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