

Application to Vary a Standard Under Clause 4.6

1. Introduction

This application is made in respect to a proposed Attached Dual Occupancy at 140 Alcorn Street, Suffolk Park (Lot 14 Section 5 DP 11632). This report is to be read in-conjunction with the accompanying Development Application and Statement of Environmental Effects.

Clause 4.1E of the *Byron Local Environmental Plan (LEP) 2014* states:

4.1E Minimum lot sizes for dual occupancies, multi dwelling housing and residential flat buildings

- (1) *The objective of this clause is to achieve planned residential density in certain zones.*
- (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 occupancy (attached)	Zone R2 Low Density Residential, Zone R3 Medium Density Residential	800 square metres
Dual occupancy (attached)	Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU5 Village, Zone R5 Large Lot Residential	4,000 square metres
Dual occupancy (detached)	Zone RU1 Primary Production, Zone RU2 Rural Landscape	4,000 square metres
Dual occupancy (detached)	Zone R2 Low Density Residential, Zone R3 Medium Density Residential	800 square metres
Multi dwelling housing	Zone R2 Low Density Residential	1,000 square metres
Multi dwelling housing	Zone R3 Medium Density Residential	800 square metres
Residential flat building	Zone R3 Medium Density Residential	800 square metres

The subject site is zoned R2 Low Density Residential and is about 699m² in area. That is, the site about 101m² short of the minimum lot size for a dual occupancy within the R2 zone as prescribed under Clause 4.1E(2) of the LEP. This equates to a 12.6% variation to the provision.

This application discusses the environmental planning grounds for contravening the numerical standard under this LEP provision and in turn, demonstrates that compliance is unnecessary in the circumstances of the case.

2. Consideration Under Clause 4.6

Clause 4.6 of the Byron LEP 2014 provides a mechanism to vary development standards under the local planning instrument.

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Requirement	Comment
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.	The proposal seeks flexibility in the application of Clause 4.1E(2), offered through Clause 4.6, to achieve a better outcome for and from the development. The site has been twice approved for and currently contains a dual occupancy development. This means that the site has previously been determined to be suitable for accommodating this form of density and in effect, has an 'existing use right' for this development type. Given the existing development onsite, the proposal does not result in increased densities at the subject site, in the locality or within the RU Low Density Residential zone. This is discussed in detail below.
(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.	Noted. Clause 4.1E and its subclauses are not excluded from the operation of Clause 4.6.
(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:	This application forms a written request to vary the numerical standard under Clause 4.1E(2). Specific reference to the particular subclause has been provided below.
(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and	Compliance with the numerical standard is considered unnecessary in the circumstances, given the site has twice been approved for and currently contains a dual occupancy development. This demonstrates that the site has previously been determined to be suitable for accommodating this form of density and in effect, has an 'existing use right' for this development type. This is further demonstrated when considering the relevant considerations established under <i>Wehbe v Pittwater Council</i> [2007] NSWLEC 827 (<i>Wehbe</i>) at [42] – [48]. We note these considerations also form the

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	<p>'five part test' referred to under the NSW Planning Department's 'Varying development standards: A Guide, 2011'.</p> <p>Despite not meeting the minimum lot size the proposed development maintains the dual occupancy density without variations to other LEP standards including height of buildings and floor space ratio, while also achieving the DCP standards. As such, it is considered unnecessary in the circumstances to enforce the minimum numerical standard given the proposed development achieves the development standards and objectives of the zone.</p>
<p>- the objectives of the development standard are achieved notwithstanding non-compliance with the standard</p>	<p>The objective of Clause 4.1 (E), is:</p> <p><i>To achieve planned residential density in certain zones</i></p> <p>A strict interpretation of the clause would mean dual occupancy development must only be located on lots larger than 800m² for the locality to achieve low density.</p> <p>While the proposal does not achieve the minimum lot size requirement under the current LEP; it does not result in increased densities at the subject site, in the locality or within the R2 Low Density Residential zone. This is due to the subject site already containing a lawful attached dual occupancy development which will be demolished, to enable development of a new attached dual occupancy development which will result in no density or net increase in dwellings on the site.</p> <p>We recognise Council is not pursuing a reduction to these minimum lot sizes under any Strategic Planning work program. Byron Shire Council has however, confirmed Suffolk Park is an area transitioning to larger / architecturally designed homes and duplexes through the Character Narrative for Suffolk Park under the Draft Residential Strategy. This is the development outcome being sought under this proposal. We also note that this 800m² minimum lot size control is inconsistent to the former locality planning for Suffolk Park which encouraged dual occupancy development upon lots of 600m² and indicated that this outcome was consistent with the area's low-density character and intended form.</p> <p><u>The proposal will result in a more contemporary development outcome that is consistent with the</u></p>

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Requirement	Comment
	built form character and trends in the area, without increasing dwelling yield.
- the underlying objective or purpose of the standard is not relevant to the development	<p>The subject site currently contains a dual occupancy development approved in 1968 under the Local Government Act 1919 (building permit number 65/68). Approval was then granted subject to conditions by Byron Shire Council for demolition of the existing dual occupancy and the development of a new dual occupancy on the site on 9 April 2009 (DA 10.2008.744.1). This consent was never acted upon and lapsed on 23 April 2014.</p> <p>The underlying objective or purpose of the standard is not relevant in this regard given the site already contains an existing dual occupancy development, has again been assessed and deemed suitable for dual occupancy development by Council in 2009 and that a single dual occupancy development is proposed which will result in no density or net increase in dwellings on the site.</p> <p>Furthermore, the proposal does not result in a density at the site that is inconsistent with the existing and future preferred built form character, nor will it strain infrastructure services in the area.</p> <p>The design, scale and form of the proposed development is considered to respond to the underlying site attributes and wider housing trends in the neighbourhood. The overall built form is restrained in size, consistent with neighbouring developments and providing generous setbacks that allow the dual occupancy to be nestled within its surrounding landscape, creating separation and reduced building dominance.</p> <p>These environmental planning considerations are discussed in more detail below.</p>
- the underlying objective or purpose would be defeated or thwarted if compliance was required	<p>Only permitting 1x dwelling at the site through its redevelopment would be a reduction in density, housing yield and housing diversity. This appears inconsistent to the intent of the clause and also State and local housing directions. In particular, Council's Residential Housing strategy promotes greater housing diversity to create a more self-sufficient Shire so that residents do not have to move outside the Shire to find the housing they want.</p> <p>These 'environmental planning grounds' are considered further below.</p>

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<ul style="list-style-type: none"> - the standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and/or 	<p>The subject site currently contains a dual occupancy development (approved in 1968) and approval was granted for demolition of the existing dual occupancy and the development of a new dual occupancy on the site on 9 April 2009 (DA 10.2008.744.1).</p> <p>Similarly, Byron Shire Council has approved dual occupancy development on other lots within Suffolk Park below the minimum lot size specified in Clause 4.1E, such as 114 Alcorn Street (DA 10.2020.88.1)</p> <p>The proposal seeks to establish an attached dual occupancy development that have been designed with close consideration to the site and contemporary housing and living trends. An increase in yield is not proposed as part of the application.</p>
<ul style="list-style-type: none"> - the zoning of land was unreasonable or inappropriate, such that the standards for that zoning are also unreasonable or unnecessary. 	<p>The R2 Low Density Residential zoning does reflect the site, existing character and future desired character for the area. The standard for the zoning, which this proposal seeks to vary, is unnecessary at this site however, considering the site already contains a dual occupancy development and that the proposed development outcome has significant environmental planning justification. This is discussed in more detail below.</p>
<p>(b) that there are sufficient environmental planning grounds to justify contravening the development standard.</p>	<p>There are sufficient environmental planning grounds to justify contravening the development standard when considering the following information.</p>
<ul style="list-style-type: none"> - identify the aspect or feature of the development that contravenes the relevant development standard, rather than discussing the development generally 	<p>The feature not being complied with is the size of the lot, rather than a built form standard.</p> <p>Despite not meeting the minimum lot size, the development achieves all of the prescribed built form standards under Council's LEP and the design controls stipulated under Council's DCP, with the exception of all services being provided on the landward side.</p> <p>It would seem unreasonable in this case that a redefinition of service provision be required for this site, particularly as this would be inconsistent with the existing and required servicing strategy for other residential land in the street.</p>
<ul style="list-style-type: none"> - justify why the contravention of the development standard is acceptable, rather than simply promoting the 	<p>For all of the matters discussed above, contravention of the standard is acceptable. This is summarised below:</p>

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benefits of carrying out the development as a whole	<ul style="list-style-type: none"> A dual occupancy is permissible in the zone and consistent with the objectives of the zone. The site has twice been approved for and currently contains a dual occupancy development. The proposal will result in a more contemporary development outcome that is consistent with the built form character and trends in the area, without increasing dwelling yield. The proposed development achieves the primary built form standards under the LEP (maximum FSR and height,) despite not meeting the minimum lot size standard. The proposed development achieves the primary DCP standards (setbacks, building height plane etc) ensuring a development product that does not dominate or crowd the street. The proposed development does not raise any servicing, stormwater or traffic issues within the area.
- explain on what basis there are sufficient environmental planning grounds to justify contravening the development standard. This explanation must be detailed enough so as to enable the consent authority to be satisfied that the written request has adequately addressed the matters outlined in cl 4.6(3).[5]	<p>The environmental planning grounds for contravening the standard have been discussed above. Similarly, the unnecessary requirement to uphold the standard, which would result in a reduced yield on the site, has also been discussed.</p> <p>At a wider strategic / macro-scale, the Draft Byron Residential Strategy relies heavily upon targeted dwelling yields being achieved in Suffolk Park through infill development and on lots greater than 800m². Yet recent evidence shows that new single homes continue to be pursued over multi-unit dwelling housing throughout Byron Shire above the 60 dwelling/40 multi-unit State target.</p> <p>Initiatives to reduce minimum lot sizes, revise existing controls or adopt new State initiatives that seek to facilitate increased housing stock through infill opportunities are not being proposed under the Strategy. The Strategy also relies upon housing provision in new release areas, such as West Byron, which to-date has not been supported.</p> <p>At a micro / site-specific scale, we consider that <u>continuing to allow a dual occupancy development</u></p>

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	<p>at the site is reasonable, demonstrating both strategic and statutory merit. It achieves:</p> <ul style="list-style-type: none"> - the intent of the Draft Byron Residential Strategy through infill and maintaining dwelling yields, - the objectives of the R2 zone and the underlying purpose of the standard are being achieved, given that the proposal provides housing diversity with a low-density character.
<p>(4) Development consent must not be granted for development that contravenes a development standard unless:</p> <p>(a) the consent authority is satisfied that:</p> <p>(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</p> <p>(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</p> <p>(b) the concurrence of the Secretary has been obtained.</p>	<p>The matters required to be addressed under subclause (3) have been demonstrated above.</p> <p>The proposed dual occupancy is considered to be in the public's interest considering it meets the objectives of the R2 zone and the underlying purpose of the standard. That is, the proposed development achieves housing diversity, which exhibits and maintains a low-density character.</p> <p>In accordance with Planning Circular PS 18-003, Council has the assumed concurrence of the Secretary. The matter will need to be determined by the Council however, not a delegate.</p>
<p>(5) In deciding whether to grant concurrence, the Secretary must consider:</p> <p>(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and</p> <p>(b) the public benefit of maintaining the development standard, and</p> <p>(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.</p>	<p>While Council may assume the concurrence of the Secretary, the tests are being achieved considering:</p> <p>The proposal is site-specific and unique, considering the subject site already contains a dual occupancy development.</p> <p>The proposal contributes towards maintaining Regional and local dwelling yield and housing diversity (multi-dwelling) targets.</p> <p>Allowing a dual occupancy development at the site despite contravention of the standard would not raise any matter of significance for State or regional environmental planning.</p> <p>There appears to be no public benefit for maintaining the standard in this case.</p> <ul style="list-style-type: none"> • A dual occupancy is permissible in the zone and consistent with the objectives of the zone.

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	<ul style="list-style-type: none"> The site has been approved for and currently contains a dual occupancy development. The proposal will result in a more contemporary development outcome that is consistent with the built form character and trends in the area and without increasing dwelling yield The proposed development achieves the primary built form standards under the LEP (FSR, height, etc.) despite not meeting the minimum lot size standard. The proposed development achieves the primary DCP standards (setbacks etc) ensuring a development product that does not dominate or crowd the street. The proposed development does not raise any servicing, stormwater or traffic issues within the area . <p>There are no other matters required to be taken into consideration by the Secretary; though consideration of the 'five-part test' has been undertaken given it appears under the NSW Planning Department's 'Varying development standards: A Guide, 2011'. This is provided under Part 3 of this Report.</p>
(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: Note. When this Plan was made it did not include all of these zones.	N/A
(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	N/A
(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.	N/A

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(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).	Council will keep a record of its assessment of the factors required to be addressed in the written request referred to above.
(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.	The variation does not relate to a complying development standard. The variation does not relate to a BASIX certificate. The variation does not relate to Clause 5.4 of the Byron LEP 2014.

With regard to the above, it has been demonstrated that there are environmental planning grounds to justify the contravention of the standard and compliance with the standard would seem unnecessary in this case.

3. Conclusion

It has been demonstrated that there are environmental planning grounds to justify the contravention of the standard and compliance with the standard would seem unnecessary in this case.

Support for the proposed variation is requested based on the matters addressed in this application.