Land and Environment Court

New South Wales

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| Case Name: | DM & Longbow Pty Ltd v Willoughby City Council |
| Medium Neutral Citation: | [2017] NSWLEC 173 |
| Hearing Date(s): | 11 December 2017 |
| Date of Orders: | 11 December 2017 |
| Decision Date: | 11 December 2017 |
| Jurisdiction: | Class 1 |
| Before: | Preston CJ |
| Decision: | The Court orders:<br>(1) The appeal is dismissed.<br>(2) The applicant is to pay the respondent's costs of the appeal. |
| Catchwords: | APPEAL – appeal against a Commissioner's decision on a question of law – proposed strata subdivision of a proposed dual occupancy – development standard fixing minimum subdivision lot size – proposed subdivision will result in lots less than minimum size – development standard does not apply to "subdivision of individual lots in a strata plan" – whether proposed subdivision is such a subdivision – proposed subdivision of Torrens title lot into individual lots by registration of a plan as a strata plan – not subdivision of individual lots in a strata plan – development standard applicable to proposed subdivision |
| Legislation Cited: | Environmental Planning and Assessment Act 1979 ss 4B, 79C, 97<br>Land and Environment Court Act 1979 s 56A(1)<br>Real Property Act 1900<br>Strata Schemes Development Act 2015 s 4(1)<br>Strata Schemes (Freehold Development) Act 1973 s 5(5) |

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| | Willoughby Local Environmental Plan 2012 cll 2.3, 2.6, 4.1, 4.1A, 4.1B, 4.1C, 4.6 |
| Cases Cited: | 4Nature Inc v Centennial Springvale Pty Ltd (2017) 224 LGERA 301; [2017] NSWCA 191<br>Calleja v Botany Bay City Council (2005) 142 LGERA 104; [2005] NSWCA 337<br>Collector of Customs v Agfa-Gevaert (1996) 186 CLR 389; [1996] HCA 36<br>Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297; [1981] HCA 26<br>Cranbrook School v Woollahra Municipal Council (2006) 66 NSWLR 379; [2006] NSWCA 155<br>Flower v Land Cover Council [2017] NSWLEC 1135<br>FTD Pty Ltd v Muswellbrook Shire Council [2011] NSWLEC 1061<br>Tovir Investments Pty Ltd v Waverley Council [2014] NSWCA 379 |
| Category: | Principal judgment |
| Parties: | DM & Longbow Pty Ltd (Applicant)<br>Willoughby City Council (Respondent) |
| Representation: | Counsel:<br>F Berglund (Applicant)<br>S Nash (Respondent)<br><br>Solicitors:<br>Dixon Holmes du Pont Lawyers (Applicant)<br>Wilshire Webb Staunton Beattie (Respondent) |
| File Number(s): | 2017/232317 |
| Publication Restriction: | Nil |
| Decision under appeal: | |
| Court or Tribunal: | Land and Environment Court of NSW |
| Jurisdiction: | Civil |
| Citation: | [2017] NSWLEC 1358 |
| Date of Decision: | 7 July 2017 |

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| Before: | Dixon C |
| File Number(s): | 2017/41951 |

## JUDGMENT

### Strata subdivision is sought

1 The applicant, DM & Longbow Pty Ltd, applied for development consent for, first, alterations to an existing, two storey detached dwelling at 15A Hart Street, Lane Cove North ('the land') and conversion to a dual occupancy comprising two dwellings, and second, the strata subdivision of that dual occupancy to two individual lots (one for each residential unit) and one common lot. Willoughby City Council (the Council) refused consent to both developments.

2 The applicant appealed to the Court under s 97 of the *Environmental Planning and Assessment Act 1979* ('EPA Act'). At a conciliation conference between the parties, the Council agreed with the applicant that the proposed dual occupancy development was acceptable and should be approved subject to agreed conditions of consent. However, the Council still opposed the strata subdivision of the dual occupancy. The reason was that the two individual lots (for the two residential units) and the common lot would each have a size less than the minimum subdivision lot size for land in the applicable zone (650m2) required by cl 4.1(3) of Willoughby Local Environmental Plan 2012 ('WLEP'). The applicant contended that cl 4.1 of WLEP did not apply to any strata subdivision. The Council contended that cl 4.1 did apply to the applicant's proposed strata subdivision. This was the sole issue on the hearing of the appeal in the Court below.

### Strata subdivision is refused

3 The appeal was heard by Commissioner Dixon on 29 June 2017 and judgment was delivered on 7 July 2017: *DM & Longbow Pty Ltd v Willoughby City Council* [2017] NSWLEC 1358. The Commissioner decided that cl 4.1 of WLEP did apply to the applicant's proposed strata subdivision. The Commissioner decided that cl 4.1(4), which caused cl 4.1 to not apply to certain types of subdivision, did not apply to the applicant's proposed strata subdivision. Clause 4.6(6) prohibits the grant of consent to a subdivision that will result in two or

more lots of less than the minimum subdivision lot size. The Commissioner therefore refused development consent to the applicant's proposed strata subdivision of the dual occupancy.

**Appeal on a question of law**

4 The applicant appealed against that decision under s 56A(1) of the *Land and Environment Court Act 1979* ('the Court Act'). An appeal under s 56A(1) is limited to questions of law. The summons commencing the appeal raised three grounds of appeal:

> "1. The Commissioner erred in law in finding that clause 4.1(4) of Willoughby Local Environmental Plan 2012 does not apply to the subdivision of lots within a newly created strata plan but only to the subdivision of lots within an existing strata plan.
>
> 2. The Commissioner erred in finding that clause 4.1 of Willoughby Local Environmental Plan 2012 applies to the development application with the effect that the strata subdivision element of the development application is constrained by the minimum lot sizes shown on the Lot Size Map.
>
> 3. The Commissioner erred in finding that the proposed strata subdivision is not permissible."

5 These grounds are different ways of expressing the same point: the Commissioner erred in construing and applying cl 4.1(4) of WLEP.

**The clause controlling subdivision**

6 The land is within Zone E4 Environmental Living under WLEP. Development for the purpose of dual occupancies is a nominate development permitted with consent by the Land Use Table for the zone (see cl 2.3 and Land Use Table). The land can also be subdivided, but only with development consent (cl 2.6 of WLEP).

7 The "subdivision of land" is not defined in WLEP but is defined in s 4B of the EPA Act:

> "(1) For the purposes of this Act, subdivision of land means the division of land into two or more parts that, after the division, would be obviously adapted for separate occupation, use or disposition. The division may (but need not) be effected:
>
> (a) by conveyance, transfer or partition, or
>
> (b) by any agreement, dealing, plan or instrument rendering different parts of the land available for separate occupation, use or disposition.
>
> (2) Without limiting subsection (1), subdivision of land includes the procuring of the registration in the office of the Registrar-General of:

> (a) a plan of subdivision within the meaning of section 195 of the *Conveyancing Act 1919*, or
>
> (b) a strata plan or a strata plan of subdivision within the meaning of the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*."

8 The strata scheme legislation referred to in subsection (2) has been replaced by the *Strata Schemes Development Act 2015*. Under either legislation however, a strata plan or a strata plan of subdivision refers to a plan that has been registered as such. In s 5(5) of the former *Strata Schemes (Freehold Development) Act 1973*, a reference in the Act "to a strata plan, a strata plan of subdivision, a strata plan of consolidation or a building alteration plan is a reference to a plan registered as such…" In s 4(1) of the current *Strata Schemes Development Act 2015*:

> "***strata plan*** means a plan that is registered as a strata plan, and includes any information, certificate or other document required by this Act or the regulations to be included with the plan before it may be registered.
>
> …
>
> ***strata plan of subdivision*** means a plan that is registered as a strata plan of subdivision, and includes any information, certificate or other document required by this Act or the regulations to be included with the plan before it may be registered."

9 Clause 4.1 of WLEP controls the minimum lot size resulting from a subdivision of land:

> "(1) The objectives of this clause are as follows:
>
> (a) to retain the pattern of subdivision in low density residential and environmental living zones,
>
> (b) to ensure lots have sufficient area for the effective siting of development in order to achieve a good relationship with adjoining dwellings and to provide adequate space for landscaped open space, drainage, parking, residential amenity and other services,
>
> (c) to require larger lots along the foreshore or where the topography or other natural features of a site limit its subdivision potential,
>
> (d) to ensure that subdivision does not cause fragmentation of sites that limits potential future uses or redevelopment in accordance with the zone objectives.
>
> (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.

> (3A) 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.
>
> (4) This clause does not apply in relation to the subdivision of individual lots in a strata plan or community title scheme."

10 The Lot Size Map referred to in cl 4.1(3) sets a minimum lot size of 650m2 for the land.

11 The development standard of the minimum subdivision lot size fixed by cl 4.1(3) is not amenable to be varied under cl 4.6 of WLEP. Clause 4.6(6) of WLEP provides:

> "(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."

12 The applicant's proposed strata subdivision is of land in Zone E4 Environmental Living and will result in two or more lots (the two individual lots and the common lot) of less than the minimum area specified for such lots by the development standard in cl 4.1(3).

13 Development consent could not, therefore, be granted for the strata subdivision if cl 4.1 applies to the applicant's proposed strata subdivision. The application of cl 4.1 depends on whether the applicant's proposed strata subdivision is of a type that is exempted from cl 4.1 by cl 4.1(4), that is to say, whether it involves "the subdivision of individual lots in a strata plan or community title scheme."

**The Commissioner's reasoning**

14 After summarising the approach to interpretation of legislation, whether primary or delegated, the Commissioner explained her reasons for deciding that cl 4.1 of WLEP did apply to the applicant's proposed strata subdivision:

> "35. Regrettably, I must agree with the Council's interpretation of the clause as it does not import words into the subclause but reflects the clear and ordinary meaning of the text. I accept that s11 of the *Interpretation Act* requires me in this case to rely on the definition of 'Subdivision of land' in the EPA Act in the absence of a definition in the instrument. Applying that definition to the use of

the word 'subdivision' in cl4.1 I must find that the clause includes a proposed strata subdivision and the exemption in subclause (4) only applies to subdivision of individual lots in an existing strata plan.

36. The Applicant's interpretation of subclause (4) requires a redraft of the subclause to import the additional words '…any lots resulting from a subdivision under a proposed strata plan' in order to overcome the minimum subdivision lot size control prior to the creation of the strata plan which creates the strata lots. The Court cannot delete, add to or rephrase the words in subclause (4) but must apply the clause based on its natural reading in context. If that is done I agree with the Council that the proper construction of the instrument is that subclause (4) does not switch off subclause (2) in the circumstances of this application.

37. Accordingly, I have decided to approve of the dual occupancy development, but under s80 (4) of the EPA Act decline to approve the strata subdivision component of the application. In coming to this decision I appreciate that adopting a subdivision minimum lot size referrable to land for each lot for this strata subdivision - at 650m2 – would require the lot in the strata plan to have the same area of an allotment of land intended to accommodate both the building and its curtilage. The Applicant submits that such a planning outcome cannot have been the intent of the legislature however; a different outcome in my opinion is not available on the current draft of the clause. This is not a case where two meanings are open in statutory interpretation and it is proper to adopt a meaning that avoids consequences that appear irrational and unjust and produces a fairer and more convenient operation so long as it conforms to the legislating intent: *Cooper Brookes (Wollongong) v Federal Commissioner of Taxation* (1981) 147 CLR 297 at [320]. To me the words are intractable and lead to the result indicated. They are not ambiguous and the provision must be given its ordinary and grammatical meaning in the present circumstances. In the ultimate I must accept that the policy rationale for [the] clause is not a matter for interpretation or comment by the Court in this case."

**The applicant's argument that all strata subdivision is exempted**

15 The applicant argued that cl 4.1(4) includes all strata subdivision, not only the subdivision of individual lots in an existing strata plan but also the creation of individual lots under a new strata plan. The applicant submitted that:

(a) "The most obvious reading" of the phrase in cl 4.1(4), "the subdivision of individual lots in a strata plan", is one which includes all strata subdivision.

(b) Alternatively, the phrase in cl 4.1(4) is ambiguous. The applicant submitted that different people have interpreted cl 4.1(4) in other local environmental plans in different ways.

(c) In decisions of commissioners of the Court, in *Flower v Lane Cove Council* [2017] NSWLEC 1135, the minimum subdivision lot size development standard was held to apply to the proposed strata subdivision while in *FTD Pty Ltd v Muswellbrook Shire Council* [2011] NSWLEC 1061, by consent of the parties, the

minimum subdivision lot size development standard was not applied to the new strata development proposed.

(d) In 2015, the NSW Department of Planning and Environment reviewed the Standard Instrument Local Environmental Plan and proposed certain changes. One proposal was to amend cl 4.1(4) "to clarify" that the clause does not apply to strata subdivision by omitting the current cl 4.1(4) and replacing it with:

"(4) This clause does not apply in relation to the following:

(a) the subdivision of land under the *Community Land Development Act 1989*,

(b) the subdivision of land into lots as a strata plan under the *Strata Schemes (Freehold Development) Act 1973*,

(c) the subdivision of lots in a strata plan under that Act."

The Department gave as a reason for the change: "This clause is generally being used as intended but some councils and stakeholders have identified that the clause could be written more clearly to remove potential ambiguity." The Department's proposal has not been pursued.

(e) In these circumstances, where different people have come to different views on the interpretation of the clause, it cannot be said that the clause is clear and unambiguous.

(f) The meaning of the phrase should be determined having regard to its context and purpose, citing *Cranbrook School v Woollahra Municipal Council* (2006) 66 NSWLR 379; [2006] NSWCA 155 at [36]-[46], [63].

(g) There is an obvious planning purpose to waiving the standard lot size restriction for strata development. The nature of strata development, including access to common property and facilities, means that the same area of individual lot space is not required in order to achieve a similar level of amenity.

(h) The Lot Size Map does not specifically show strata plan lots. It is a cadastral plan showing Torrens title lots. Clause 4.1(2) specifies that the clause "applies to a subdivision of any land shown on the Lot Size Map". In the context of Torrens title subdivision, the purpose of a minimum lot size may be logical, but the more complex and layered nature of strata subdivision makes it significantly less so. Effectively, multiple lots in a strata development may occupy the same space if viewed from the two dimensional perspective of the Lot Size Map. Thus, it is completely reasonable that all strata subdivision be exempt from the minimum lot size requirement.

(i) Clause 4.1(4) is intended to be a facultative provision which recognises that greater flexibility is appropriate in the context of strata subdivision. A broad interpretation which facilitates that flexibility should be preferred.

(j) Because the phrase in cl 4.1(4) is ambiguous and has more than one potential meaning, it is appropriate to take into account the consequences of a particular interpretation, citing *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; [1981] HCA 26 at 320-321. In choosing between "two strong competing interpretations", the Court would prefer the interpretation "which provides the fairer and more convenient operation so long as it conforms to the legislative intention": at 321.

(k) A narrow interpretation of the phrase in cl 4.1(4) would have three "peculiar consequences": first, a lot size of at least 650m2 would be "very much out of the ordinary for strata development" and practically impossible; second, the subdivision of individual lots of an existing strata plan into smaller lots is not a common occurrence; and third, if such subdivision did occur, there would be no control governing how small the new, smaller lots within the strata development could be.

(l) These consequences, together with no obvious planning benefit, strongly suggest that the narrow interpretation was not the intended one. On the other hand, the inclusive interpretation has the clear planning purpose of enabling appropriate strata subdivision to be carried out without the first instance obstacle of a lot size limitation intended for a quite different kind of development.

**The Council's argument that only subdivision of lots in an existing strata plan is exempted**

16 The Council argued that cl 4.1(4) applies only to the subdivision of individual lots in an existing strata plan and not the subdivision of a lot to create a new strata plan with individual lots in that strata plan. The Council submitted that:

(a) The development application is not for the subdivision of individual lots in a strata plan.

(b) Rather, the development application seeks consent to create a new strata plan (i.e. subdivision of one existing lot to create a new strata plan).

(c) On a plain and natural reading of cl 4.1(4), the lot sought to be subdivided must be "in" a strata plan (that is, in a current and identifiable strata plan).

(d) The effect of the applicant's argument is to redraft cl 4.1(4) as follows where indicated with underlining and strike through text:

"(4) This clause does not apply in relation to *any lots resulting from a* ~~the~~ subdivision ~~of individual lots in a~~ *under a proposed* strata plan or community title scheme."

(e) The Court would not delete, add to or rephrase the words in this way, but rather would apply the clause based on a natural reading of it. Where the draftsperson intended to use the expression "lots resulting from", that has been done in express terms (see e.g. cl 4.1(3), cl 4.1A(3), cl 4.1B(1) and cl 4.1C(1)(b) and (c)).

(f) For example, cl 4.1A, which fixes a minimum subdivision lot size for strata plan schemes in Zone B3, includes subclause (3):

"The size of any lot resulting from a subdivision of land to which this clause applies under the *Strata Schemes (Freehold Development) Act 1973* (other than any lot comprising common property within the meaning of that Act) is not to be less than the minimum size shown on the Lot Size Map in relation to that land."

(g) The language of cl 4.1(3) speaks in futurity; referring to the lots that will result from the proposed subdivision. This is in contrast to the language of cl 4.1(4) which speaks of lots that have already been created in a strata plan (which is a strata plan that has been registered under the relevant strata schemes legislation).

(h) Inquiries into the policy rationale for cl 4.1(4) are not relevant because, as the Court of Appeal observed in *Calleja v Botany Bay City Council* (2005) 142 LGERA 104; [2005] NSWCA 337 at [25], "any attempt to always find planning logic in planning instruments is generally a barren exercise".

(i) In any event, the Council's construction of cl 4.1(4) does not lead to absurd results nor defy logic because the areas within the Willoughby local government area which encourage multi-dwelling housing and residential flat development (i.e. the R3 and R4 zones), and which are therefore more likely to seek strata subdivision, are not subject to the minimum lot size control in cl 4.1 (the Lot Size Map does not show any minimum size for land in those zones).

(j) WLEP has made particular provision for subdivision of dual occupancies. Clause 4.1C fixes a minimum lot size (350m2) for each lot resulting from the subdivision of a lot on which there is a dual occupancy. The subdivision can include strata subdivision. This reflects a planning policy decision to allow for subdivision, including strata subdivision, of dual occupancies. The clause is expressly stated not to affect the right to subdivide a dual occupancy under cl 4.1, but can be seen to be facultative in allowing subdivision of dual occupancies that would not comply with the development standard in cl 4.1.

17 In response to the applicant's submissions, the Council submitted:

(a) The phrase in cl 4.1(4) is not ambiguous. The plain and natural reading of cl 4.1(4) is that it must only apply where the strata subdivision application involves subdivision of "individual lots" which are "in a strata plan".

(b) In *Cranbrook School v Woollahra Municipal Council* at [36], the Court noted that "a construction should be preferred that is consistent with the language and purpose of all the provisions of such instruments". The applicant's contended interpretation of cl 4.1(4) would extend the application of the clause to when the lots "resulting from" the proposed strata subdivision do not meet the minimum lot size of 650m2. That interpretation is not consistent with the language and purpose of *all* of the provisions in WLEP because the expression "resulting from" is not deployed in cl 4.1(4) despite that form of words being used in other clauses within the instrument.

(c) There is not more than one potential meaning of cl 4.1(4). The applicant's interpretation is contrary to the plain and natural reading of cl 4.1(4).

(d) The interpretation for which the Council contended and the Court found to be correct does not have the "peculiar" consequences contended for by the applicants. First, strata subdivision of a dual occupancy is not "impossible" on the land. Provided it meets the minimum lot size of 650m2, it can be achieved (or, alternatively, relying on cl 4.1C of WLEP which controls the minimum subdivision lot size for dual occupancies). The minimum subdivision lot size in cl 4.1 does not apply in areas within the Willoughby local government area where multi-unit housing and residential flat buildings are encouraged (i.e. the R3 and R4 zones). The obvious planning purpose of cl 4.1 is therefore to ensure strata subdivided lots in areas where lower density living is encouraged must meet a larger minimum areas requirement. Accordingly, there is no concept of "ordinary strata development" as suggested by the applicants. Strata subdivision exists on a scale, from smaller lots to larger lots. Second, the regularity of strata subdivision applications and the desirability of large strata lot subdivision from a planning perspective are not matters which can inform the proper interpretation of cl 4.1(4). Third, the applicant's concern about the size of the subdivided lots would be addressed at the planning merit consideration stage under s 79C of the EPA Act. This concern does not and cannot inform the proper interpretation of cl 4.1(4).

**The Commissioner's construction is correct**

18 The Commissioner's construction of cl 4.1 of WLEP is correct and no error on a question of law is revealed in her reasons for reaching that conclusion.

19 At the outset, it should be noted that there are not differing principles of statutory construction applicable to primary and delegated legislation. There is not "some general principle requiring laxity or flexibility in construing delegated legislated, or statutory instruments generally": *4Nature Inc v Centennial Springvale Pty Ltd* (2017) 224 LGERA 301; [2017] NSWCA 191 at [45]. The general principles relating to the interpretation of statutes are equally applicable to the interpretation of delegated legislation: *Collector of Customs v Agfa-Gevaert* (1996) 186 CLR 389; [1996] HCA 36 at 398. The basic principles of statutory construction "require that the language be read in context and having regard to the objective which it was designed to promote", however "the primary focus must remain upon the text": *4Nature Inc v Centennial Springvale Pty Ltd* at [51] and see *Cranbrook School v Woollahra Municipal Council* at [36].

20 Focusing on the text of cl 4.1(4), the phrase "the subdivision of individual lots in the strata plan" is clear and unambiguous. The object of the action of subdivision is the "individual lots in a strata plan". The subdivision is "of" those lots. Those lots are what is being subdivided. Those "individual lots" must be "in a strata plan". A "strata plan" is "a plan that is registered as a strata plan" (see s 4(1) of the *Strata Schemes Development Act* 2015). It is a strata plan that is already in existence. If there is no strata plan yet in existence, there can be no individual lots "in a strata plan" that can be subdivided.

21 The applicant's proposed subdivision is for the subdivision of the existing land (being land under the *Real Property Act 1900* that is held in fee simple) into individual lots and common property by the registration of a plan as a strata plan under s 9 of the *Strata Schemes Development Act 2015*. The object of such subdivision is the land under the *Real Property Act*. The land does not answer the description of being "individual lots in a strata plan". Any individual lots in a strata plan will only result from the registration of a plan as a strata plan that creates the lots. Hence, the "individual lots" will be the result of the subdivision but not what are being subdivided.

22 Consideration of the language of the phrase in the context of cl 4.1(4) particularly and cl 4.1 generally, as well as other provisions of WLEP, and the

objective which cl 4.1 is designed to promote, do not lead to a different conclusion. The general context is a scheme for permitting subdivision of land, but prescribing development standards controlling how that subdivision must be carried out (including specifying a minimum subdivision lot size). The minimum subdivision lot size applies in certain zones, but not others. In certain zones where it is applicable, this minimum subdivision lot size development standard can be varied under cl 4.6, but in other zones it cannot and acts as a bar to the grant of consent to subdivision that results in lots of less than minimum lot size. The draftsperson has precisely specified the types of subdivisions to which the development standard of the minimum subdivision lot size applies. Separate provision is made for certain types of subdivisions in certain zones to be subject to different development standards (e.g. cl 4.1A (strata subdivision in Zone B3 Commercial Core), cl 4.1B (subdivision of shop top housing) and cl 4.1C (subdivision of a dual occupancy) of WLEP). Together, the provisions of WLEP reveal a carefully conceived scheme regulating different types of subdivision of different land in different zones.

23 This is not a case "where the drafter has been less than fastidiously precise in his or her choice of language", so that it might be appropriate "to give rather less weight to precise textual considerations": see *Tovir Investments Pty Ltd v Waverley Council* [2014] NSWCA 379 at [54]-[55] and *4Nature Inc v Centennial Springvale Pty Ltd* at [107]. The draftsperson has been precise in the choice of language in cl 4.1(4) of WLEP.

24 I also do not consider that the potential consequences, alleged by the applicant, that might flow if the phrase in cl 4.1(4) were to be construed in the manner I have held is appropriate, justify construing the phrase differently. First, it is not clear that those consequences would occur, for the reasons advanced by the Council. Second, the occurrence of those consequences does not lead to the conclusion that the draftsperson could not have intended the clause to have such an operation. Planning policy decisions have been made regarding where and how subdivision of land is to occur in Willoughby local government area. The consequences may be the intended result of those planning policy decisions. Third, it is not for the Court to substitute its preference for what might be the "fairer or more convenient" operation of the

clause and then choose an interpretation of the clause that better enables that operation.

**Conclusion and orders**

25 For these reasons, the applicant has not established that the Commissioner erred on a question of law in the ways alleged in the grounds of appeal. The appeal should be dismissed.

26 The usual order for costs in an appeal under s 56A(1) of the Court Act is that costs follow the event. There are no circumstances or conduct of the parties that would justify making a different order.

27 The Court orders:

(1) The appeal is dismissed.

(2) The applicant is to pay the respondent's costs of the appeal.

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