



Land and Environment Court  
New South Wales

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Case Name: Kelly v Randwick City Council

Medium Neutral Citation: [2018] NSWLEC 1322

Hearing Date(s): 15 June 2018

Date of Orders: 3 July 2018

Decision Date: 3 July 2018

Jurisdiction: Class 1

Before: Dickson C

Decision: The orders of the Court are:  
(1) The appeal is upheld;  
(2) Consent is granted to Development Application No. 96/2018 for Strata subdivision of Lot 3118, DP 752015 (in accordance with the proposed form of strata plan lodged with the development application) following completion of construction of dual occupancy (attached) under DA/531/2017, subject to conditions in Annexure A;  
(3) The exhibits are returned with the exception of Exhibits 1, 4, and A.

Catchwords: DEVELOPMENT APPEAL: Two- lot strata subdivision of approved dual occupancy – interpretation of clause detailing minimum subdivision allotment size – whether a cl. 4.6 variation request is required.

Legislation Cited: Environmental Planning and Assessment Act 1979  
Land and Environment Court Act 1979

Cases Cited: DM & Longbow Pty Ltd v Willoughby Council [2017] NSWLEC 1358

Category: Principal judgment

Parties: Craig Kelly (Applicant)  
Randwick City Council (Respondent)

Representation: Counsel:  
P Tomasetti, SC (Applicant)

Solicitors:  
A Seton, Marsdens Law Group (Respondent)

File Number(s): 2018/106112

Publication Restriction: No

## **JUDGMENT**

- 1 This development appeal is brought by Craig Kelly (the Applicant) under section 8.7 (1) of the Environmental Planning and Assessment Act 1979 (the Act) following Randwick City Council's refusal of a development application DA/96/2018. The application seeks development consent for a two lot strata subdivision of Lot 3118 in DP 752015, following construction of an approved dual occupancy (attached), at 84 Austral Street Malabar (the Site).
- 2 The hearing was preceded by conferencing of town planning experts in accordance the directions of the Court. The result of the expert's conference was resolution of the planning issues previously pressed by the Council. It is accepted by the Council that the two lot strata subdivision is acceptable and should be approved subject to the agreed conditions of consent.
- 3 However there is a legal argument between the parties as the interpretation of cl. 4.1A Minimum subdivision lot size for strata schemes in Zone R2: Contention 1, of the Respondent's Statement of Facts and Contentions (Exhibit 1).
- 4 The resolution of this question requires an examination of the language in cl 4.1 of the Randwick Local Environmental Plan 2012 (LEP 2012), and its application to the facts of this case.

### **Background:**

- 5 On 11 October 2017, the Respondent granted consent to DA/531/2017 (Dual Occupancy consent) for the demolition of all structures on the site and

construction of a two storey attached dual occupancy including a rear pool and associated landscaping works on the subject site.

- 6 The current development application DA/96/2018 seeks strata subdivision of Lot 3118 in DP 752015. The subdivision is proposed to follow completion of the dual occupancy (attached) which was approved in the Dual Occupancy consent.
- 7 Whilst the respective arguments of the parties are outlined in detail in the following, in short:
  - (1) Council argues that the strata subdivision application relies on a variation to the development standard in cl. 4.1A of LEP 2012. This is because the proposed subdivision will result in two “lots” of 271 square metres (being half of the land of the subject site) which is less than the development standard of 400sqm. As such the clause 4.6 variation request submitted by the applicant is required to be upheld by the Court for the application to be consented to;
  - (2) In the alternative, the applicant argues that the reference to ‘lot’ in cl. 4.1A of LEP 2012 is a reference to a lot in a strata plan. As the draft strata plan details strata lots of greater than 400 square metres, the development is compliant with the control and no variation request is required.

#### **The Subject site:**

- 8 The site is a rectangular parcel of land with frontage to Austral Street, and a rear boundary dimension, each of 13.715 metres, side dimensions of 39.65 metres. The site has an area of 543.5 square metres.
- 9 The planning experts agree that “... *the casual observer would not be able to differentiate between a non –subdivided dual occupancy and a subdivided dual occupancy, noting that there are numerous dual occupancies in the vicinity of the site and the broader locality*” (Exhibit 3).

#### **Planning Controls:**

- 10 The Act at s. 6.2 states:

6.2 Meaning of “subdivision” of land

(cf previous s 4B)

(1) For the purposes of this Act, **subdivision** of land means the division of land into 2 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 Development Act 2015*.

Note.

The definition of **plan of subdivision** in section 195 of the *Conveyancing Act 1919* extends to plans of subdivision for lease purposes (within the meaning of section 23H of that Act) and to various kinds of plan under the *Community Land Development Act 1989*.

(3) However, **subdivision** of land does not include:

- (a) a lease (of any duration) of a building or part of a building, or
- (b) the opening of a public road, or the dedication of land as a public road, by the Crown, a statutory body representing the Crown or a council, or
- (c) the acquisition of land, by agreement or compulsory process, under a provision of an Act (including a Commonwealth Act) that authorises the acquisition of land by compulsory process, or
- (d) a division of land effected by means of a transaction referred to in section 23G of the *Conveyancing Act 1919*, or
- (e) the procuring of the registration in the office of the Registrar-General of:
  - (i) a plan of consolidation, a plan of identification or a miscellaneous plan within the meaning of section 195 of the *Conveyancing Act 1919*, or
  - (ii) a strata plan of consolidation or a building alteration plan within the meaning of the *Strata Schemes Development Act 2015*.

11 Relevant to s. 6.2 (2)(b) of the Act, in the Strata Schemes Development Act 2015 the definition of "lot" is:

**"lot"** , in relation to a strata scheme, means one or more cubic spaces shown as a lot on a floor plan relating to the scheme, but does not include any common infrastructure, unless the common infrastructure is described on the plan, in the way prescribed by the regulations, as a part of the lot

12 The effect of this definition is that a reference to subdivision of land incorporates a division of land by strata subdivision. This interpretation is

consistent with the findings of the Court in *DM & Longbow Pty Ltd v Willoughby Council* [2017] NSWLEC 1358.

- 13 The site is zoned R2 Low Density Residential and LEP 2012 at cl. 2.3(2) requires the consent authority to have regard to the objectives of the zone. The objectives of the zone relevant to the proceedings are:

- To provide for the housing needs of the community within a low density residential environment.

...

- To recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition, that contribute to the desired future character of the area.

- To protect the amenity of residents.

- To encourage housing affordability.

...

- 14 Clause 2.6 of LEP 2012 provides that: *‘Land to which this Plan applies may be subdivided, but only with development consent.’*

- 15 Clause 4.1A Minimum subdivision lot size for strata plan schemes in Zone R2 is within Part 4 of LEP 2012 under the heading Principle development standards, it provides as follows:

#### **4.1A Minimum subdivision lot size for strata plan schemes in Zone R2**

(1) The objective of this clause is to ensure that land to which this clause applies is not fragmented by subdivisions that would create additional dwelling entitlements.

(2) This clause applies to land in Zone R2 Low Density Residential.

(3) The size of any lot resulting from a subdivision of land to which this clause applies for a strata plan scheme (other than any lot comprising common property within the meaning of the *Strata Schemes (Freehold Development) Act 1973* or *Strata Schemes (Leasehold Development) Act 1986*) is not to be less than the minimum size shown on the Lot Size Map in relation to that land.

Note.

Part 6 of *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* provides that strata subdivision of a building in certain circumstances is specified complying development.

(4) Despite subclause (3), if the subdivision is of a lot on which there is a dual occupancy (attached):

(a) the size of each lot resulting from the subdivision is not to be less than 400 square metres, and

(b) 1 dwelling must be situated on each lot resulting from the subdivision.

16 In addition to cl. 4.1A, the operation of cl. 4.1C is relevant to the proceedings. It states:

4.1C Minimum lot size for dual occupancies (attached)

(1) The objective of this clause is to provide for housing diversity and affordability in residential zones.

(2) Development consent may be granted for development on a lot in Zone R2 Low Density Residential for the purpose of a dual occupancy (attached), if the area of the lot is at least 450 square metres.

17 The application was notified in accordance with the relevant planning controls and no submissions were received.

18 Since the filing of the appeal, and the preparation of the Respondent's Statement of Facts and Contentions (Exhibit 1), Randwick Council has prepared and amendment to LEP 2012 directed at the minimum subdivision lot size for attached dual occupancy in the R2 Low Density Residential zone. This change is explained in the joint report of the planners as follows :

9. The change in facts relates to a significant resolution of Council since the filing of this appeal (and preparation of the SOFC). An Extraordinary Council Meeting was held on 17 April 2018. Council resolved to amend the Randwick LEP development standards relating to the minimum subdivision lot size for attached dual occupancy in the R2 Low Density Residential zone to allow for the subdivision of dual occupancy developments, existing or approved prior to 6 July 2018.

...

15. The proposal would comply with the draft LEP controls for lot sizes and frontage (180sqm strata area at ground level and each lot having a minimum frontage of 6m)

...

(Exhibit 3)

19 Further the joint report of the planners argues that the draft LEP should be given weight in the assessment of the cl. 4.6 variation request for the following reasons:

- The Planning Proposal is Council initiated rather than privately initiated so is effectively a current expression of policy by Council and is relatively certain;
- The Department has been requested to "fast track" completion of the LEP process which elevates imminence;
- While the application is required to be placed on public exhibition, it is unlikely that any new evidence will come forward to change the position of Council (given the content of the report to Council in Appendix 3) and therefore the outcome is relatively certain;

- Enquiries of the planners indicate that the Planning Proposal will not be affected by the more recent resolution of Council in relation to the SEPP (Medium Density Housing Code);
- Irrespective of the Planning Proposal, it is open to the Court to consider the Clause 4.6 Statement. That is, the application does not rely on the Planning Proposal for permissibility;
- The Planning Proposal contemplates a limited number of situations in which the pattern (or character) of subdivision in a locality will be affected by the LEP change. The subject application is consistent with this expectation ie. a limited impact on area character because the LEP change will affect a very small number of properties in the locality. Therefore, upholding the current controls need not be determinative to achieve consistency with the objectives of the control and zone.

(Exhibit 3)

### **The Applicant's interpretation of cl. 4.1A and cl. 4.1C**

20 The Applicant emphasises that the objective of cl. 4.1A is to ensure that subdivision does not: fragment land that would create additional dwelling entitlements. The applicant argues that the reference to additional entitlements are *'additional dwelling entitlements (beyond) the maximum number of dwellings the applicant could otherwise obtain development consent for and use, in accordance with Clauses 4.1A(3) and (4) (Applicant's written submissions)*.

21 Mr Tomasetti submits that the strata subdivision of the dual occupancy approved on the land is consistent with the objective of cl. 4.1A. His reasoning is that:

- (1) the operation of Clauses 2.3, 4.1A(3)(4) and 4.1C of LEP 2012 is such that *"subject to obtaining development consent, there is created an entitlement to construct and use two dwellings on the site"*.
- (2) The Dual Occupancy consent provides the approval for two dwellings.
- (3) The proposed subdivision does not create a dwelling entitlement beyond the LEP or the Dual Occupancy consent, therefore it is consistent with the objective of the clause.

(Applicant's written submissions)

22 Mr Tomasetti submits that in order to determine the correct construction of sub-cl. 4.1A(3) the following should be taken into account:

- (1) The heading of the clause (Minimum subdivision lot size for strata plan schemes in Zone R2), and the subject matter of sub-cl. (3) (strata subdivision), means that read in context the expression *"size of any lot*

*resulting from a subdivision of land*” is a reference to a lot in a strata plan and not any other kind of lot;

- (2) Sub-clause 4.1A (3) regulates only the size of a lot ‘resulting from a subdivision of land’, in other words the ‘product’ or ‘outcome’ of the subdivision. It does not contain any control on the size of the lot prior to the subdivision.
- (3) The minimum size of any strata lot permitted under sub-cl. 4.1A(3) is the minimum size shown on the LEP Lot Size Map. For the subject site that is 400 square metres. This standard is a control on the minimum size of the entire strata lot.
- (4) Clause 4.1 C is the clause in LEP 2012 that controls the size of lot that can be developed for the purposes of a dual occupancy attached.
- (5) It is clear, from the words “(other than any lot comprising common property within the meaning of the (*other than any lot comprising common property within the meaning of the Strata Schemes (Freehold Development) Act 1973 or Strata Schemes (Leasehold Development) Act 1986*))” within the clause, that sub-cl. (3) does not attempt to regulate the size of common property in a strata plan in any way.

(Applicant’s written submissions)

23 Finally Mr Tomasetti submits that:

The proper construction of clause 4.1 A (3), applying a plain English meaning, is that the clause prohibits strata subdivision of any relevant land by any strata plan which results in strata lots that are less than 400 square metres in area.

(Applicant’s written submissions)

24 In relation to the cl. 4.1A(4) Mr Tomasetti submits that at the time at which subdivision will occur (on registration) one dwelling will be situated on each of the strata lots of the proposed subdivision.

### **The Council’s interpretation of cl. 4.1A and cl. 4.1C**

25 The Council argues that the subdivision lot size standard in cl. 4.1A requires strata lots to be located on land that is 400 square metres. Given the resulting land/lots will be 271 square metres (half of the existing lot), Council argues the application is required to be accompanied by a cl. 4.6 variation request to vary the allotment size standard.

26 In the Council’s planning assessment report for the Dual Occupancy Consent they outline their reasoning as follows:

#### **“Minimum Lot Size**



The proposed strata subdivision where each dwelling will be located on a 271sqm lot of land is well below the minimum 400sqm required for each lot under Clause 4.1A *Minimum Subdivision lot size for strata plan schemes in Zone R2*.

The applicant asserts that the proposed strata lots comprising the areas at the ground, first and attic level will be 408sqm and therefore complies with the standard.

...

In relation to the interpretation of the standards for subdivision, reference is made to the word "lot" in the RLEP which is "an indefinable piece or parcel of land" and "that ordinary principles of statutory construction" lead to the conclusion that the defined meaning of "subdivision of land" in the EP&A Act (in clause 4B [now s6.2] ) is to be equally applied to strata and Torrens titled development. This interpretation clearly promotes the objectives underlying the minimum lot size standards which are to ensure R2 low density zoned land is not fragmented by subdivisions that would create additional dwelling entitlements where subdivision of land does not respect the predominant subdivision and development pattern in the locality. This is further supported by the FSR provision limiting dual occupancies to a maximum FSR of 0.5:1 which is less than that applying to dwelling houses on individual lots which allows for greater density under the RLEP."

(Exhibit 2)

27 Ms Hudson submits that the Court should adopt an interpretation of sub-cl.(4) of cl. 4.1A that reads the word "lot" in (4), (a) and (b) [as highlighted below] as a reference to an allotment of land.

(4) Despite subclause (3), if the subdivision is of a **lot** on which there is a dual occupancy (attached):

(a) the size of each **lot** resulting from the subdivision is not to be less than 400 square metres, and

(b) 1 dwelling must be situated on each **lot** resulting from the subdivision.

28 In Ms Hudson's submission the Council's interpretation of the clause excludes a lot created from a strata subdivision from being relied on to meet the development standard of 400 square metres in cl. 4(a).

29 Further Ms Hudson submits that when read with the intent of the clause, to ensure land is not fragmented, the reference to 'lot' in cl. 4(b) is not a reference to a strata lot.

30 Ms Hudson submits that the variation sought by the applicant should be achieved through the operation of cl. 4.6 and notes that the joint expert report of the planners states as follows:

27. The experts agree that with the change in facts in this matter, the Clause 4.6 variation demonstrates that the standards in the Clause are unreasonable and unnecessary in the circumstances of the case.

28. The experts agree with the Clause 4.6, that the two lot sizes provide for a high level of amenity for each dwelling whilst maintaining amenity to surrounding properties, as well as having an acceptable streetscape presentation. Council's Assessment report which approved the dual occupancy under DA531/2017, notes that the proposal is compliant with all relevant building envelope and amenity considerations, including:

- Height (LEP)
- FSR (LEP)
- Wall height (DCP)
- Landscaped area (DCP)
- Front setback (DCP)
- Side setbacks (DCP)
- Rear setback (DCP)
- Site coverage (DCP)
- Private open space (DCP)
- Solar access to and adjoining the subject site (DCP)
- Privacy (DCP)
- Views (DCP)
- Car parking (DCP)
- Fencing (DCP)
- Streetscape considerations (DCP)

29. In light of the Planning Proposal which relates to dual occupancy existing or approved prior to 6 July, 2018, the Clause 4.6 also demonstrates that the objectives of the standard are satisfied, whilst the objectives of the zone are not thwarted by the variation. That is because the subdivision proposal represents one of the limited scenarios that will be covered by the LEP change. The combination of such assessment demonstrates that the variation would not contravene the public interest.

- 31 The Council adopts the evidence of the experts and supports the cl. 4.6 variation request being upheld.
- 32 The parties agree that the requirement of cl. 4.1A 4(b) is met by the construction of the dual occupancy approved by DA/531/2017 (Exhibit 1).

## Consideration

33 Recently the Court considered the operation of cl. 4.1 in the Willoughby Local Environmental Plan 2012 in *DM & Longbow Pty Ltd v Willoughby Council*. The clause in that instrument was worded as follows:

### 4.1 Minimum subdivision lot size

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

(a) to retain the pattern of the 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

34 In *DM & Longbow Pty Ltd v Willoughby Council* the Court held that the reference to 'subdivision of land' in sub. cl. (2) of cl. 4.1 (above) includes a reference to strata subdivision. In forming that determination Dixon, C (as she was then) accepted the Council's reliance on the definition of "Subdivision of land" within s4B (2) (b) of the Act (now s6.2) to assist in the interpretation of the text.

35 Relevantly s6.2(2)(b) of the Act states that "subdivision" is a reference to strata subdivision.

36 The result of the determination in *DM & Longbow Pty Ltd v Willoughby Council* is that the minimum lot size development standard in sub. cl (3) in the Willoughby Local Environmental Plan 2012 applies to the size of strata lots as

well as the subdivision of land. In other words the judgment found that the strata lot must meet the minimum size shown in the Lot Size Map for the subject site.

- 37 In considering the above decisions of the Court and applying their approach to the current proceedings I accept the submissions of Mr Tomasetti and his reasoning at paragraph [21-23]. I am satisfied that the intent of the clause, when read as a whole, is to prohibit strata subdivision of any relevant land by any strata plan which results in strata lots that are less than the minimum size shown on the Lot Size Map in relation to that land.
- 38 As the strata lots will comprise an area of 408m<sup>2</sup> (Exhibit A) and the relevant lot size for the subject land is 400m<sup>2</sup>, the application does not rely on the Court upholding the submitted cl. 4.6 variation request for consent to be granted.
- 39 For Council's interpretation to be sustained it is necessary for the reference to "lot" in cl. 4.1(4), (a) and (b) to be a reference to "land" or "site area". I am satisfied when read as a whole that this is not the intent of the clause.
- 40 Further the drafting of cl. 4.1A is such that the term 'land' is utilised in both sub-cl. (1) and (2) and specifically not in the remainder of the clause. I am satisfied that this distinction in the drafting of the clause has a purpose.
- 41 There being no issues raised by the parties I concur with the conclusions of the experts that the application warrants approval.
- 42 I have considered the proposed conditions of consent, agreed between the parties, I am satisfied that it is lawful and appropriate to grant the proposal development consent.

### **Orders**

- 43 The orders of the Court are:
- (1) The appeal is upheld;
  - (2) Consent is granted to Development Application No. 96/2018 for Strata subdivision of Lot 3118, DP 752015 (in accordance with the proposed form of strata plan lodged with the development application) following completion of construction of dual occupancy (attached) under DA/531/2017, subject to conditions in Annexure A;
  - (3) The exhibits are returned with the exception of Exhibits 1, 4, and A.

.....

D M Dickson

**Commissioner of the Court**

**Annexure A (39.8 KB, pdf)**

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