Land and Environment Court

New South Wales

Case Name:	Heazlewood v Byron Shire Council
Medium Neutral Citation:	[2019] NSWLEC 1429
Hearing Date(s):	3 September 2019
Date of Orders:	11 September 2019
Decision Date:	11 September 2019
Jurisdiction:	Class 1
Before:	O'Neill C
Decision:	The Court orders: (1) The appeal is dismissed. (2) Development Application No. 10.2018.570.1 for the change of use of a dwelling and secondary dwelling to a detached dual occupancy and strata subdivision is refused. (3) The exhibits, except for exhibits 2, 5, A, B, C and D, are returned.
Catchwords:	DEVELOPMENT APPLICATION: change of use to detached dual occupancy and strata subdivision – existing secondary dwelling approved under State Environmental Planning Policy (Affordable Rental Housing) 2009 – contravention of numerical development standard for minimum lot size for dual occupancies – written request seeking to justify the contravention has not demonstrated that compliance with the development standard is unreasonable or unnecessary to justify the contravention.
Legislation Cited:	Byron Local Environmental Plan 2014 Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979 State Environmental Planning Policy (Affordable Rental Housing) 2009

	State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 Strata Schemes Development Act 2015
Cases Cited:	Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 Wehbe v Pittwater Council (2007) 156 LGERA 446 RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130
Texts Cited:	Byron Shire Development Control Plan 2014
Category:	Principal judgment
Parties:	Nathan Heazlewood (Applicant) Byron Shire Council (Respondent)
Representation:	Counsel: J Heazlewood (Applicant) K Huxley (Solicitor) (Respondent) Solicitors: McCabe Curwood (Respondent)
File Number(s):	2019/15238
Publication Restriction:	No

JUDGMENT

1 **COMMISSIONER**: This is an appeal pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application No.10.2018.570.1 for a change of use from a dwelling and detached secondary dwelling to a detached dual occupancy and strata subdivision of the site (the proposal) at 39 Julian Rocks Drive, Byron Bay (the site) by Byron Shire Council (the Council).

2 The appeal was subject to conciliation in accordance with the terms of s 34AA of the *Land and Environment Court Act 1979* (LEC Act). As agreement was not reached, the conciliation conference was terminated and a hearing held forthwith, pursuant to s 34AA(2)(b)(i) of the LEC Act.

Issues

3 The Council's contentions can be summarised as:

- The proposal is not consistent with the objectives and development standard for minimum lot size for dual occupancies in the Byron Local Environmental Plan 2014 (LEP 2014) at cl 4.1E;
- Approval of the application would set an undesirable precedent for the conversion of primary and secondary dwellings to detached dual occupancies and strata subdivision of the lot;
- The proposal would result in the loss of affordable housing in the Byron LGA, as the consent for the secondary dwelling was granted pursuant to State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH).

The site and its context

4 The site is on the north-eastern side of Julian Rocks Drive and contains a two storey principal dwelling consisting of 5 bedrooms and a double garage; a swimming pool and deck; and a detached single storey secondary dwelling consisting of one bedroom, a study and a car space. The secondary dwelling is at the rear of the site.

5 The site has an area of 700sqm, with a frontage to Julian Rocks Drive of 20m. The site backs onto a reserve.

6 The site is within a residential subdivision known as “Sunrise”.

Background and the proposal

7 The proposal is to change the use of the site from a principal dwelling and secondary dwelling to a detached dual occupancy and strata subdivision. There are no building works proposed in the application.

8 The strata subdivision would result in two strata lots of 337sqm and 239sqm, each containing a dwelling, and common areas.

9 The original development consent for the principal dwelling and secondary dwelling was granted on 5 December 2017. Development Consent 10.2017.687.2 as modified was determined on 29 June 2018 for the construction of a dwelling house, a secondary dwelling a swimming pool and ancillary structures including a pergola and deck (the consent). The conditions of consent included the following conditions (Ex 1, f 200):

> “…
>
> 37. No subdivision

> In accordance with clause 24 of the State Environmental Planning Policy (Affordable Rental Housing) 2009, subdivision of the subject land is not to occur.
>
> 39. Relationship to principal dwelling
>
> The secondary dwelling must remain on the same lot as the principal dwelling…"

Planning framework

10 Clause 22(2) of SEPP ARH requires that a consent authority must not consent to development to which Division 2 of SEPP ARH applies if there is on the land, or if the development would result in there being on the land, any dwelling other than the principal dwelling and the secondary dwelling.

11 Clause 24 of SEPP ARH is in the following terms:

> 24 No subdivision
>
> A consent authority must not consent to a development application that would result in any subdivision of a lot on which development for the purposes of a secondary dwelling has been carried out under this Division.

12 The site is zoned R2 Low Density Residential pursuant to LEP 2014. Dual occupancies are a nominate use permitted with consent. The objectives of the R2 zone, to which regard must be had, 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.

13 Clause 2.6 Subdivision – consent requirements, includes, at sub-cl (2):

> "Development consent must not be granted for the subdivision of land on which a secondary dwelling is situated if the subdivision would result in the principal dwelling and the secondary dwelling being situated on separate lots, unless the resulting lots are not less than the minimum size shown on the Lot Size Map in relation to that land."

14 The minimum lot size for the site is 600sqm (Lot Size Map - Sheet LSZ_003CC of LEP 2014). Clause 4.1 of LEP 2014 applies to a subdivision of any land shown on the Lot Size Map that requires consent and the resulting lot from a subdivision of land to which cl 4.1 applies must not be less than the minimum size. Clause 4.1 does not apply in relation to the subdivision of any land by the registration of a strata plan or strata plan of subdivision under the *Strata Schemes Development Act 2015*, at cl 4.1(4)(a).

15 Clause 4.6 Exceptions to development standards is in the compulsory terms of the Standard Instrument - Principal Local Environment Plan.

16 The dictionary of LEP 2014 includes the following definition:

> **dual occupancy (detached)** means 2 detached dwellings on one lot of land, but does not include a secondary dwelling.

17 The Byron Shire Development Control Plan 2014 (DCP 2014) includes at section D1.4, objectives and performance criteria for secondary dwellings and at section D1.5, objectives and performance criteria for dual occupancy development.

Expert evidence

18 The applicant relied on the expert planning evidence of Mr Jarrod Gillies and the Council relied on the expert planning evidence of Mr Jeff Mead.

Submissions

19 The applicant submitted that the applicant's request, made in an informal notice to produce in an email sent to the Council's solicitor on 21 August 2019 for copies of the files in relation to development approvals granted in respect of 2 Bower St, Brunswick Heads (DA 10.2017.79.1), 42 Corella Cres, Mullumbimby (DA 10.2017.691.1) and 33 Kallaroo Cir, Ocean Shores (DA 10.2017.639.1) (Ex E), is not pressed in the proceedings.

Clause 4.1E of LEP 2014 applies to the proposal

20 The applicant submitted that cl 4.1E of LEP 2014 does not apply to the proposal because the subdivision of land by the registration of a strata plan of subdivision is excluded from the operation of cl 4.1E pursuant to cl 4.1(4)(a) of LEP 2014. The Council submitted that this is not the case, as the terms of cl 4.1(4)(a) are confined to "this clause", being cl 4.1 and do not extend to cl 4.1E.

21 Clause 4.1 of LEP 2014 is a development standard for the minimum subdivision lot size of a property. Clause 4.1 does not apply to control lot sizes in a strata scheme, at cl 4.1(4). In other words, a strata lot does not have to meet the minimum lot size shown on the lot size map, but a Torrens title subdivision does have to result in lots of at least the minimum size shown on the minimum lot size map in order to comply with the minimum lot size development standard.

22 Clause 4.1E of LEP 2014 is a development standard for minimum lot sizes for particular forms of development. Clause 4.1E requires that a dual occupancy development (both attached and detached) in the R2 zone has a minimum lot size of 800sqm.

23 A dual occupancy that is strata subdivided will result in two dwellings on one lot of land. The strata subdivision allows each strata lot to be individually owned. Without the strata subdivision of the lot, the two dwellings would remain in a single ownership. Dual occupancy development can be strata titled either because the individual dwellings do not meet the minimum lot size in the applicable LEP for Torrens title subdivision, or they have basement car parking or other common areas that do not enable simple Torrens title subdivision. A dual occupancy may be Torrens title subdivided to create two dwellings or a semi-detached dwelling.

24 The proposed strata subdivision of the lot is irrelevant to the minimum lot sizes for dual occupancies at cl 4.1E of LEP 2014, because the minimum lot size refers to the minimum size required for the one lot of land on which the two dwellings are to be located. Whether or not the land is to be strata subdivided as part of the application (or at a later date) has no bearing on the minimum size of the lot required for dual occupancy development, because the minimum lot size for dual occupancy development does not apply to the resultant strata lots. For this reason, there is no equivalent provision to cl 4.1(4) in cl 4.1E of LEP 2014.

25 The planning purpose informing cl 4.1E is to ensure that dual occupancy development is located on lots that are larger than the minimum lot size for the locality to preserve the low density residential character of the locality and maintain good amenity by locating more intense residential development on lots that are larger than the minimum lot size in cl 4.1. The minimum lot size for a dwelling (and a secondary dwelling) in the Sunrise locality is 600sqm, whereas the minimum lot size for dual occupancy development is 800sqm.

Contravention of the minimum lot sizes for dual occupancies development standard in LEP 2014

26 The site has an area of 700sqm. The minimum lot size for dual occupancies is 800sqm, at cl 4.1E of LEP 2014. Clause 4.1E is a development standard that is not expressly excluded from the operation of cl 4.6 of LEP 2014. Development consent may, subject to cl 4.6, be granted for development even though the development would contravene a development standard in an environmental planning instrument (EPI), at cl 4.6(2) of LEP 2014.

27 Pursuant to the terms of cl 4.6(3) of LEP 2014, the applicant provided a written request prepared by Planit Consulting seeking to justify the contravention of the minimum lot size for dual occupancies development standard (Ex A).

28 Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority or the Court exercising the functions of a consent authority can exercise the power to grant development consent (*Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 [13] "*Initial Action*"). The consent authority must form two positive opinions of satisfaction under cl 4.6(4)(a). As these preconditions are expressed in terms of the opinion or satisfaction of a decision-maker, they are a "jurisdictional fact of a special kind", because the formation of the opinion of satisfaction enlivens the power of the consent authority to grant development consent (*Initial Action* [14]). The consent authority, or the Court on appeal, must be satisfied that the applicant's written request has adequately addressed the matters required to be addressed by cl 4.6(3) and that the proposal development will be in the public interest because it is consistent with the objectives of the contravened development standard and the zone, at cl 4.6(4), as follows:

> "..
>
> (4) Development 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 Secretary has been obtained..."

29 On appeal, the Court has the power under cl 4.6(2) to grant consent to development that contravenes a development standard without obtaining or assuming the concurrence of the Secretary of the Department of Planning and Environment, pursuant to s 39(2) LEC Act, but should still consider the matters in cl 4.6(5) of LEP 2014 (*Initial Action* [29]).

The applicant's written request to contravene the minimum lot sizes for dual occupancies development standard

30 The first opinion of satisfaction required by cl 4.6(4)(a)(i) is that the applicant's written request seeking to justify the contravention of a development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3) (see *Initial Action* [15]), as follows:

> "(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…"

31 The applicant bears the onus to demonstrate that the matters in cl 4.6(3) have been adequately addressed by the written request in order to enable the Court, exercising the functions of the consent authority, to form the requisite opinion of satisfaction (*Initial Action* [25]). The consent authority has to be satisfied that the applicant's written request has in fact demonstrated those matters required to be demonstrated by cl 4.6(3) and not simply that the applicant has addressed those matters (*RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [4]).

32 The applicant's written request justifies the contravention of the minimum lot sizes for dual occupancies development standard on the bases that compliance is unreasonable or unnecessary for the following reasons:

- There are 15 dual occupancy developments within the locality on lots less than 800sqm. One of those dual occupancy developments on a lot less than 800sqm was approved under the current LEP.
- The proposal will facilitate a better development outcome consistent with the historically intended density for dual occupancies in the locality.
- The site was historically intended to permit dual occupancies on allotments less than 800sqm.

- Applying the development standard would prevent completion of the historic land release with a development type that was historically intended and that has in fact been provided in the area and notably forms part of the built fabric and character of the locality.
- The SEPP (Codes) recognises the need to dual occupancies to be sited on allotments with at least 400sqm or greater, double the development standard. The Department of Environmental and Planning has recognised the need for quicker approval times for the same development type on allotments that are much smaller than required under LEP 2014.
- Adherence to the standard will achieve no practical purpose.
- The proposal does not involve physical works and the existing form of development on the site will remain, ensuring consistency with the R2 zone objectives.
- No negative local precedent would be set that would prevent the Council's continued enforcement of the standard in other areas of the LGA.

33 The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by the Chief Judge in *Wehbe v Pittwater Council* (2007) 156 LGERA 446 [42]-[51] ("*Wehbe*") and repeated in *Initial Action* [17]-[21]. Although *Wehbe* concerned a SEPP 1 objection, the common ways to demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe* are equally applicable to cl 4.6 (*Initial Action* [16]):

(1) the objectives of the development standard are achieved notwithstanding non-compliance with the standard;

(2) the underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;

(3) the underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;

(4) the development standard has been abandoned by the council;

(5) the zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).

34 The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*Initial Action* [22]). The applicant's written request claims that compliance with the development standard is unreasonable/unnecessary because (1) the

objectives of the standard are met notwithstanding non-compliance with the standard; (3) the underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable; and (5) the zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary.

(1) The objectives of the standard are achieved notwithstanding the non-compliance with the standard

35 The written request states that the objective of the development standard, to achieve planned residential density in certain zones, is achieved by the proposal because the standard was adopted under LEP 2014 and applies to a site that was historically intended to permit dual occupancies on allotments less than 800sqm. This is clearly demonstrated, according to the written request, by the existence of 15 dual occupancy developments on allotments less than 800sqm in the locality of the site, one of which was approved as recently as 2015 after the adoption of LEP 2014. As the site is one of only two remaining parcels in the Sunrise locality, applying the standard would prevent completion of this historic land release with a development type that was historically intended and that has been provided in the area and notably forms part of the built fabric and character of the locality. Adherence to the standard would achieve no practical purpose.

36 I am not satisfied that justifying the contravention of the minimum lot size for dual occupancies development standard on the basis that there are some historic examples of dual occupancies in the locality, both attached and detached, on lots that are smaller than the minimum lot size in the current planning regime, demonstrates that the proposal achieves the objective of the development standard. The 15 examples are within a total of 97 properties in the Sunrise locality. A number of the examples cited are on lots larger than the site. The majority of the 15 examples consist of building forms and arrangements that are more readily identifiable as dual occupancies because the two dwellings are similar in size to each other, they are legible as individual dwellings and they are smaller in scale when compared to the principal dwelling on surrounding properties. In contrast, the principal dwelling and secondary dwelling on the site read as a principal dwelling and secondary

dwelling on the same site, because the principal dwelling is a large two storey dwelling, the dwelling's footprint (including private open space) occupies the majority of the site, the principal dwelling is located in front of the secondary dwelling and dominates the site when viewed from the Julian Rocks Drive. The secondary dwelling is a small single storey building and it is positioned at the rear of the site, which results in the secondary dwelling having a very deferential relationship to the principal dwelling.

37 The planned residential density in the R2 zone under the current regime seeks to locate dual occupancy development on lots that are larger than the minimum lot size in order to achieve the objective of the R2 zone to provide for housing needs within a low density residential environment. A small proportion of historic approvals in the locality do not justify the undermining of the objective of the development standard.

(3) The underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable

38 The applicant's written request states that the underlying object of the standard would be thwarted if compliance was required because approval of the proposal would enable delivery of the planned density. This is an ambitious claim and I do not accept that the underlying objective or purpose of the development standard would be thwarted if compliance with the numerical development standard was required.

39 The applicant relies on the existence of the 15 dual occupancy developments on lots less than 800sqm in the Sunrise locality as the basis for an assertion that the historic planning intent was for dual occupancy development in the Sunrise subdivision. No other evidence was procured to demonstrate the historic planning intent for the original subdivision; but even if I take the applicant's assertion at its highest, historic standards/controls are not a matter for consideration in determining a development application under s 4.15 of the EPA Act. LEP 2014 and DCP 2014 are in place to realise the strategic planning vision for the Byron Shire LGA and, subject to individual merit considerations, a consent authority should not undermine the strategic vision for a LGA by giving any weight to a planning strategy that has been abandoned by a council.

40 I accept and prefer Mr Mead's evidence and the Council's submission that the existence of 15 dual occupancy developments in the locality on lots less than 800sqm, coupled with the 4 dual occupancy developments on lots larger than 800sqm, in amongst 97 lots, has not undermined the character of the R2 zone as low density residential environment and dual occupancies are not a predominant form of development in the Sunrise locality.

41 The planning purpose informing the minimum lot size for dual occupancy development is to ensure that the dual occupancy development is located on lots that are larger than the minimum lot size for the locality to preserve the low density residential character of the locality and maintain good amenity. This objective or purpose would not be thwarted if compliance with the development standard was required.

(5) The zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary

42 The written request states that the proposal does not require any physical changes to the approved development on the site.

43 The written request has misinterpreted this fifth way to demonstrate that a development standard is unreasonable or unnecessary. The fifth way of establishing that a development standard is unreasonable or unnecessary is limited because the inquiry is not whether the development standard is inappropriate to the zoning, but rather rests on a finding that the zoning of the particular land is unreasonable or inappropriate (*Wehbe* [49]). The applicant does not suggest that the zoning of the land is inappropriate. The applicant's argument in the written request is that the imposition of the dual occupancy development standard is unreasonable because the existing development will remain the same.

44 The existing development, however, will not necessarily remain the same as the approved development on the site because a dual occupancy development and strata subdivision would allow the dwellings to be in separate ownership. This is a crucial difference to the existing approved development and potentially has many repercussions for the physical form of the development on the site. The difference between the two forms of development is illustrated by

comparing the objectives and performance criteria for secondary dwellings and dual occupancies in DCP 2014 at D1.4 and D1.5.

45 The written request includes the following statement explaining why the zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary:

> "In addition, the Low Rise Medium Density Housing Code within the SEPP (Exempt and Complying Development) has recently been amended to recognise the need for dual occupancies to be sited on allotment [sic] with at least 400m2 or greater, double that of the BLEP2014 standard. To this affect [sic] it has been recognised by the Department that a reduced site area for the same development type is suitable in NSW."

46 The Low Rise Medium Density Housing Code (Code) allows well-designed dual occupancies, manor houses and terraces (up to two storeys) to be carried out under a complying development approval. The Code commenced on 6 July 2018 in a number of LGAs. Land in the Byron Shire LGA is a deferred area (see Part 3B.63 of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008), so the provisions in Part 3B do not apply to the proposal. The applicant's written request cites the Code not because it applies in the Byron Shire LGA, but to illustrate the reasonableness of the proposal on the ground that the Code only requires a minimum site area of 400sqm for dual occupancies. However, it is incorrect to claim that the Code only requires a minimum site area of 400sqm for dual occupancies. The lot requirements for dual occupancies, at 3B.8 of the Code, must not be less than *whichever is the greater* [italics added], 400sqm or the minimum lot area specified for dual occupancies in the EPI that applies to the land concerned. The minimum lot area of 800sqm for dual occupancies specified in LEP 2014 at cl 4.1E would be the minimum site area requirement for the purpose of the Code if the Code applied in the Byron Shire LGA. It is therefore incorrect to claim that the Department has recognised that site area of 400sqm is suitable for dual occupancy developments and this claim is not evidence that the zoning of the site was unreasonable or inappropriate.

Conclusion

47 As the proposal contravenes the minimum site area for dual occupancies development standard in LEP 2014 at cl 4.1E and the applicant's written

request has not adequately addressed the matters required to be demonstrated by subclause 4.6(3)(a) of LEP 2014, development consent must be refused.

Orders

48 The orders of the Court are:

(1) The appeal is dismissed.

(2) Development Application No. 10.2018.570.1 for the change of use of a dwelling and secondary dwelling to a detached dual occupancy and strata subdivision is refused.

(3) The exhibits, other than exhibits 2, 5, A, B, C and D, are returned.

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Susan O'Neill

Commissioner of the Court

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