Land and Environment Court

New South Wales

Case Name:	Albert Square NSW Pty Ltd v Randwick City Council
Medium Neutral Citation:	[2021] NSWLEC 1401
Hearing Date(s):	28 April 2021
Date of Orders:	12 July 2021
Decision Date:	12 July 2021
Jurisdiction:	Class 1
Before:	Espinosa C
Decision:	The Court orders that: (1) The appeal is upheld. (2) Development Application DA/524/2020 seeking development consent for the strata subdivision of existing dual occupancy into two strata allotments at 89 Mons Avenue Maroubra legally described as Lot 2 DP 222605 is approved subject to conditions annexure A.
Catchwords:	DEVELOPMENT APPEAL – strata subdivision of existing dual occupancy – minimum lot size development standard – fragmentation – calculation of strata subdivision lot – owner's consent – orders
Legislation Cited:	Community Land Development Act 1989 Community Land Development Act 2021 Environmental Planning and Assessment Act 1979, s 4.16, 8.7 Interpretation Act 1987, s 68 Land and Environment Court Act 1979, s 34C Randwick Local Environmental Plan 2012, cl 2.6, 4.1, 4.1A, 4.6 Real Property Act 1900, State Environmental Planning Policy (Exempt and Complying Development Code) 2008, Part 6, Div 1 Strata Schemes Development Act 2015, s 4

	Strata Schemes (Freehold Development) Act 1973 Strata Schemes (Leasehold Development) Act 1973
Cases Cited:	DM & Longbow Pty Ltd v Willoughby City Council [2017] NSWLEC 1358 DM & Longbow Pty Ltd v Willoughby City Council (2017) 228 LGERA 342; [2017] NSWLEC 173 Eather v Randwick Council [2021] NSWLEC 1075 Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118 Junn v Willoughby City Council [2020] NSWLEC 1459 Kelly v Randwick City Council [2018] NSWLEC 1322 Kelly v Randwick City Council [2019] NSWLEC 43 Kingsford Property Developments v Randwick City Council [2019] NSWLEC 1486 MMP 888 Pty Ltd v Randwick City Council [2019] NSWLEC 1646 Parks and Playgrounds Movement Inc v Newcastle City Council (2010) 179 LGERA 346; [2010] NSWLEC 231
Texts Cited:	NSW Land Registry Services, Plan Preparation Guide Strata Plans Version 1.0, (September 2019) Randwick Comprehensive Development Control Plan 2013
Category:	Principal judgment
Parties:	Albert Square NSW Pty Ltd (Applicant) Randwick City Council (Respondent)
Representation:	Counsel: R Lancaster SC (Applicant) I Hemmings SC (Respondent) Solicitors: Pikes and Verekers Lawyers (Applicant) Randwick City Council (Respondent)
File Number(s):	2020/329432
Publication Restriction:	No

JUDGMENT

1 **COMMISSIONER:** This is a Class 1 Residential Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act)

being an Appeal against the deemed refusal of residential development application No. DA/524/2020 seeking development consent for the strata subdivision of existing dual occupancy into two strata allotments (the Proposed Development) at 89 Mons Avenue Maroubra legally described as Lot 2 DP 222605 (the Site).

2 This case is about the interpretation of cl 4.1A of the Randwick Local Environmental Plan 2012 (RLEP) which sets a development standard regarding the minimum subdivision lot size for strata plan schemes in Zone R2 with the express objective to avoid the fragmentation by subdivision that would create additional dwelling entitlements. The matter was listed for hearing pursuant to s 34C of the *Land and Environment Court Act 1979* and commenced on the Site where there has been constructed a new attached dual occupancy development pursuant to the existing 2018 consent (DA/305/2018). This dual occupancy does not benefit from the provisions of cl 4.1D of the RLEP having been granted consent after 6 July 2018, as confirmed by the Applicant's expert Mr Betros during oral evidence.

3 I will firstly deal with a preliminary jurisdictional prerequisite for this matter being evidence of owner's consent to the Proposed Development. The class 1 Application (Exhibit A) is signed by Mario Evangelo and I am satisfied that that Mario Evangelo, in the capacity of sole Director/Secretary and sole shareholder exercised the power of the owner of the Site when he signed the Development Application providing owner's consent having in evidence Exhibit G comprising Land Registry Services Title search for lot 2 DP 222605 showing registered owner on title being Albert Square NSW Pty Ltd, and an ASIC company search for Albert Square NSW Pty Ltd ACN 637 057 991 where the sole Director/Secretary and sole shareholder is Mario Evangelo.

4 The dispute in this matter arises from the fact that the general subdivision clause providing the development standard of minimum lot size, cl 4.1A does so by reference to the lot size map and to a figure of 400m2. It is agreed that the number attributed to the minimum lot size is 400m2. The Respondent argues that the lot size map and this figure can only be interpreted to refer to an area on the ground, or size of the land and says that "the number is clear

but the way in which it is to be calculated is where the dispute arises." (Transcript 28 April 2021, page 8 at 5). It is relevant that the parties agree that the relevant applicable clause is cl 4.1A(4) and that Respondent concedes in opening that the words "the size of each lot resulting from the subdivision" in cl 4.1A(4)(a) must be the strata lot. (Transcript 28 April 2021, page 7 at 44)

5 The Respondent contends that the correct interpretation of the cl 4.1A development standard and therefore the correct measure of a *lot* is the two dimensional area *on the ground only* (SOFAC, contention 2(d)) and relies on statutory interpretation principles and the decision of Commissioner Horton in *MMP 888 Pty Ltd v Randwick City Council* [2019] NSWLEC 1646. In opening the Respondent submitted that "The correct approach to the interpretation, we speak of this area control as being an area on the ground. Plainly when one looks at the lot size map, it is a reference to 400m2 being an area on the ground." (Transcript 28 April 2021, page 7 at 7-10).

6 Ultimately, the Respondent says that you can't subdivide this dual occupancy, either by a Torrens title subdivision or by a strata scheme subdivision and argues that "In order to subdivide it, it needs to be an attached dual occupancy on larger land." (Transcript 28 April 2021, page 9 at 40)

7 If the Respondent's interpretation of cl 4.1A is accepted, the resulting lot size from the Proposed Development is an area on the ground of 297.4m2. I do not accept the Respondent's interpretation and I explain why in my judgment below.

8 The Respondent argues also that the Proposed Development is not consistent with the objective of the cl 4.1A development standard and states that "The creation of independent dwellings that are then able to be available for sale as a consequence of the subdivision, result in fragmentation, a fragmentation that is not anticipated for lots of this size." (Transcript 28 April 2021, page 7 at 26). The Respondent relied on the dual occupancy dwellings reflecting the concept of a granny flat or similar.

9 The relevance of the objective of cl 4.1A is to the cl 4.6 written request which the Applicant relies on in the event that the minimum subdivision lot size

development standard is found to be contravened by the Proposed Development.

10 The Applicant submits that:

> "The objective in subclause (1) is that land to which the clause applies is not fragmented. It's not fragmentation at large, because the objective tells us what it means by fragmented. Not fragmented by subdivisions that would create additional dwelling entitlements. That's the kind of fragmentation that the objective is trying to avoid." (Transcript 28 April 2021, page 11 at 33)

11 In the Applicant's words:

> "you'll be able to have a different part of your family living in the other allotment or somebody else altogether, whether it's granny or whether it's friends or whether it's somebody with whom there's a formal lease relationship. The dwelling entitlements will not change." (Transcript 28 April 2021, page 11 at 41)
>
> and then:
>
> "functionally the same as any area that had a strata subdivision to the same effect. In other words, there's a party wall, but on each side of the party wall granny or family or friends or somebody else entirely, third parties, might be living next door. There will be no functional or amenity or character difference if this application is approved." (Transcript 28 April 2021, page 15 at 1-5)

12 It is agreed between the parties that the Proposed Development does not seek to create any additional dwelling entitlements and I find accordingly, that is, that the Proposed Development is consistent with the objective of the cl 4.1A development standard.

13 The Applicant argues that the Respondent's interpretation is artificial and incorrect and says in written submissions (Exhibit F) at par 6 "In a clause that is dealing specifically with minimum lot size for strata plans, the reference to the "*size of each lot*" must refer to the size of each strata lot, which in this case includes an area on ground level and an area above ground level, for a total lot size of 444m2." The Respondent argues that this is the result of the "addition of the floor area of each of the parts of the lot that are created by way of the subdivision." (Respondent, Transcript 28 April 2021, page 8 at 28)

14 The issue in this case revolves around statutory interpretation and the Respondent submits that "The very immediate tension that arises is for the purposes of the determination of area, one moves away from the LEP and one moves away from the Environmental Planning and Assessment Act to try and work out how you are measuring the lot." (Respondent, Transcript 28 April

2021, page 8 at 36). The Respondent argues that the approach of the Applicant to get definitions in the strata schemes development legislation to calculate the area is flawed because the Applicant's approach "works in this way; if you don't have 400m2 of land on the ground, in order to comply with the minimum, you just keep making your building bigger […] as long as they have enough floor space, then they get over a requirement which is meant to work as a minimum" (Respondent, Transcript 28 April 2021, page 9 at 11).

15 I don't accept this analysis by the Respondent for three reasons. Firstly, the size of a building is subject to controls set out in the RLEP and Randwick Comprehensive Development Control Plan 2013 (RDCP) as they apply to the R2 Low Density Residential Zone. It is a nonsense to allege that an applicant can simply build as many storeys as required on a small block of land in order to achieve a minimum lot size. Development, including within a strata scheme subdivision, is required to comply with various controls including those that relate to building envelope (height and setbacks) and with other development standards such as maximum floor space ratio applicable to that zone. These controls place limitations or restrictions on the size of a building.

16 Secondly, the Respondent's analysis may be flawed because of the reference to 'floor space' which discloses a misunderstanding of a strata lot entitlement. A strata lot entitlement often includes an outdoor entitlement or 'on the ground' areas such as a courtyard private open space, and a strata lot entitlement is not limited to or defined by a building's floor space. That is, the upper limit of the strata cubic space may not be defined or limited if it not within the confines of a building. In this case, the strata lot entitlement labelled as 'ground floor' includes the whole of the ground level not limited to the walls of the dual occupancy dwellings. This 'ground floor' area is the area occupied by the horizontal place by the base of the cubic space of the lot as set out in the proposed floor plan (refer to Figure 1 from Exhibit A below). I have also considered the Land Registry Services publication titled Plan Preparation Guide Strata Plans Version 1.0 September 2019 and in particular the section titled "Floor Plan" commencing at page 12 which confirms that boundaries of a strata lot are not always defined by a structure and that in such cases 'stratum statements' are required if "a lot is not limited in height and or depth by a

structure", that is, for "all lots outside a building which are not fully covered by a structure or do not have a structural base for their entire area." (page 15) In such cases, the LRS publication stipulates that "the maximum limitation for the height or depth of a lot defined by a stratum statement acceptable to NSW LRS is 50 metres" (page 15).

17 Thirdly, it is conceivable that some strata title subdivisions (not related to dual occupancies attached) will result in a strata lot not having any *on the ground* level presence other than an entitlement to common property at the entrance of a building where the strata lot entitlement may be in a number of parts, such as a below ground parking part strata lot entitlement together with the actual dwelling on, say, the first or second floor as the other part strata lot entitlement. Accordingly, limiting the measure of a lot within a strata scheme to on the ground level creates an artificial and inaccurate measure or definition of a strata lot. For these reasons, and others below, the measure of a strata lot cannot be defined by the limitation of a two dimensional area *on the ground*.

18 The Applicant in closing submissions, referred to the whole essence of what a strata scheme is and what a strata scheme subdivision involves for the purpose of interpreting cl 4.1A and referred the Court to s 4 of the *Strata Schemes Development Act 2015* (SSDA) and submits as follows:

> "when you're talking about the size of a strata lot, it must be the aggregate of the total horizontal are of those cubic spaces that are comprised in the lot. That might be on one level, and it might be in ground level, or it might be on, as in this case, three different levels, but its nevertheless all part of the one lot." (Transcript 28 April 2021, page 38 at 31)

19 The parties agree that the reference in cl 4.1A(4)(a) to *lot* is a reference to the strata lot. The Respondent however then reverts to the area on the ground and argues that the resulting lot of the Proposed Development measures 297.4m2, whereas the Applicant, correctly, in my view, calculated the resulting strata lot as defined in the plan showing the Calculations Table (Exhibit A) and replicated below in Figure 1, namely, by adding the value of each of the resulting part strata lots with the result being 444m2 for each new strata lot. The parties noted the typographical error in the Plan in Fig 1 and agreed that the first reference to Ground Floor for Lot 110 should read Garage Floor. Figure 2 below shows a section of the Proposed Development.

Figure 1 – Strata lot calculation table

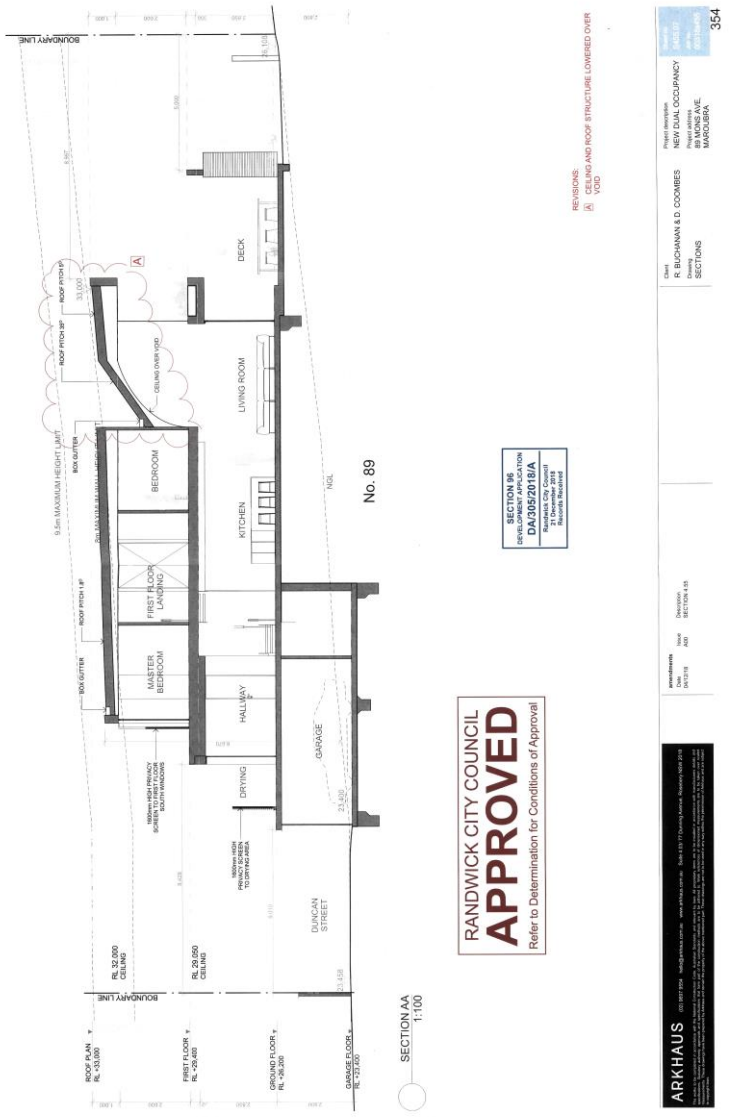

Figure 2 - Elevation section

20 The Applicant relies on the following argument in relation to cl 4.1A(4)(a):

> "It doesn't say only part of the strata lot that is on ground level. That's why we say council's interpretation tries to read words into the clause and tries to interpret them as saying something they don't." (Transcript 28 April 2021, page 12 at 15)
>
> ""when you measure each lot resulting from the subdivision you ask, "Well, how big is the strata lot?" That doesn't mean only that part of the strata lot that's on ground level. There would need to be additional words or different words in the clause for it to have that effect." (Transcript 28 April 2021, page 12 at 22-25)
>
> "Council's interpretation means that you have to read into cl 4.1A(4)(a) that you exclude from the strata lot anything above ground level, but also anything below ground level. All you have is just what's on the existing surface of the land. That's just not what the clause is saying we respectfully submit." (Transcript 28 April 2021, page 13 at 4-7).

21 It is agreed between the parties that the relevant control is found in cl 4.1A(4) of RLEP and both the Respondent and the Applicant rely on the ordinary words of cl 4.1A(4).

22 The Respondent's interpretation has been described above and the Applicant agrees that the introductory words of cl 4.1A which read "the subdivision is of a lot on which there is a dual occupancy attached" is a reference to the lot before subdivision." (Transcript 28 April 2021, page 12 at 5) "There is a lot and there is a dual occupancy attached on that lot. So we're on common ground on the first part of the clause." (Transcript 28 April 2021, page 12 at 9)

23 The Applicant interprets the ordinary meaning and submits that this points to each of the resulting strata lots in the Proposed Development having an area of 444m2 which is above the development standard subdivision minimum lot size and the Proposed Development is therefore a compliant development application. The Application submits that as a compliant application under cl 4.1A(4) the Proposed Development can be approved and there is no need for a cl 4.6 written request to justify any contravention of the minimum lot size development standard.

24 If the development standard is found to be contravened then, in the alternative, the Applicant relies on a cl 4.6 written request prepared by ABC Planning Pty Ltd filed 6 April 2021 (Exhibit D) and argues that "even if the Council's interpretation of the cl 4.1A is accepted, the subdivision application should be approved because the Applicant has a cl 4.6 variation request which is well founded. The strata subdivision will be entirely consistent with the objective in cl 4.1A(1), and with the objectives of the R2 zone and the strategic planning direction of the Council. It will involve no change to the built form or appearance of the property." (Applicant submissions at 7)

25 The Respondent contends that if the Court determines that the correct interpretation of the strata lot size is the 2 dimensional measure, that is the ground lot, then the cl 4.6 written request, upon consideration, should be rejected because:

(1) The Proposed Development is not consistent with the objectives of Zone R2 Low Density Residential in particular the objective relating to

housing diversity and affordability which the Respondent submits is the reason behind the minimum lot size.

(2) The Proposed Development is not in the public interest. (Statement of Facts and Contentions filed 10 December 2020 (SOFAC)) Exhibit 1

(3) Insufficient environmental planning grounds.

26 The parties relied on the evidence contained in the Joint Expert Report filed 20 April 2021 prepared by Anthony Betros, Town Planner for the Applicant and Eunice Huang, Town Planner for the Respondent (Exhibit E).

27 I will now review the statutory interpretation principles and how others have interpreted cl 4.1A in previous decisions before giving my reasons for my decision.

Statutory interpretation – Is the use of the word "Lot" limited to the measure of land size?

28 The whole subject matter of cl 4.1A of the RLEP is strata schemes and the subdivision referred to in cl 4.1A is pursuant to that scheme.

29 The Respondent agrees with the principles of statutory interpretation contained in the Applicant's written submissions (Transcript 28 April 2021, pg 46 at 35).

30 In the Applicant's written submissions at [12] the Applicant submits that the principles of construction of an environmental planning instrument are well known and have been stated in, for example, *DM & Longbow v Willoughby City Council* (2017) 228 LGERA 342; [2017] NSWLEC 173 at [19] (Preston CJ) and *Parks and Playgrounds Movement Inc v Newcastle City Council* (2010) 179 LGERA 346; [2010] NSWLEC 231 at [71]-[76] (Biscoe J). Firstly, in the decision of Bisco J in *Parks and Playgrounds Movement Inc v Newcastle City Council* [2010] NSWLEC 231, the statutory interpretation principles are set out as follows:

> "71 The true task of statutory interpretation is to determine what the statute means, not what the legislature meant: *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-169. Nevertheless, the task has often been described as determining the legislative intention, which is potentially misleading unless it is understood that it only means the objective intention as manifested by the words of the statute. It does not mean the subjective intention of parliamentarians or ministers, even if expressed in a Second Reading Speech: *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23 at [31] – [33]; *Wilson v State Rail Authority of New South Wales* [2010] NSWCA 198 at [12].

> 72 Principles of statutory interpretation relevant to the present case are summarised below. It is in the application of principles of statutory interpretation that there is an "intolerable wrestle": Spigelman CJ, *The Intolerable Wrestle: Developments in Statutory Interpretation*, keynote address to the Australasian Conference of Planning and Environmental Courts and Tribunals, 1 September 2010 (quoting T S Elliot).
>
> 73 In the interpretation of a statutory provision, a construction that would promote the purpose or object underlying the Act (whether or not expressly stated in the Act) is to be preferred to a construction that would not promote that purpose or object: s 33 *Interpretation Act* 1987.
>
> 74 The primary object of interpretation of a statutory provision is to construe it so that it is consistent with the language and purpose of all the provisions of the statute: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, 194 CLR 355 at [69]; *Wilson* at [13].
>
> 75 Fundamental to the task is giving close attention to the text and structure of the Act: *Wilson* at [12]. A Court must strive to give meaning to every word of a statutory provision: *Project Blue Sky* at [71]; *Wilson* at [13].
>
> 76 Words must be read in their context in the first instance, not merely at some later stage when ambiguity might be thought to arise. Context is used in its widest sense to include such things as the existing state of the law and the mischief or object to which the statute was directed: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408. This approach has been followed in a number of subsequent judgments (mostly joint judgments) of the High Court, sometimes using the language of "mischief", sometimes using the language of giving effect to any discernible statutory "purpose": *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 99, 113; *Project Blue Sky* at [69] and [78]; *Astley v Austrust Ltd* [1999] HCA 6, 197 CLR 1 at [49] and [71]; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2004] HCA 14, 218 CLR 273 at [11] – [12]. See also *Wilson* at [12] – [13]; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190 at [42]."

31 Secondly, Preston CJ confirmed that the principles of statutory construction apply equally to the interpretation of delegated legislation, such as environmental planning instruments and in his decision of *DM & Longbow v Willoughby City Council* (2017) 228 LGERA 342, [2017] NSWLEC 173 he states as follows at [19]:

> "[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]."

32 In the context of the above statutory interpretation principles, I will now consider the three conflicting decisions by commissioners of this court which both parties referred to in their submissions and then I will look at the statutory context of cl 4.1A and make my findings. I further note that I am not bound by these decisions and I will form my conclusions after having considered the reasons given in these decisions.

33 The three conflicting decisions by commissioner referred to by the parties are as follows:

(1) *MMP 888 Pty Ltd v Randwick City Council* [2019] NSWLEC 1646, (Horton C) (*MMP 888*);

(2) *Kingsford Property Developments v Randwick City Council* [2019] NSWLEC 1486, (Bish C) (*Kingsford*); and

(3) *Kelly v Randwick city Council* [2018] NSWLEC 1322, (Dickson C) (*Kelly*).

34 I will deal with the most recent decision first being *MMP 888* and note that the Respondent relies on this decision. The Applicant's interpretation of cl 4.1A(4) is consistent with the *Kelly* and *Kingsford* decisions.

35 It is relevant to observe that the *Kingsford* case was heard only a couple of weeks prior to *MMP 888* and the decision in *Kingsford* was published in October 2019 and the *MMP 888* decision published only a short time later in December 2019. All three decisions dealt with cl 4.1A of the RLEP.

MMP 888

36 In *MMP 888*, Horton C determined an application for development consent for the demolition of a single dwelling and erection of an attached two-storey dual occupancy development, and strata subdivision. The appeal was upheld and approval granted except for that part of the application for strata subdivision for which consent was not granted. The Applicant submits that the wrong conclusion was reached by Commissioner Horton at par [45] quoted below and says that in addition to the Horton C not referring to or trying to distinguish the other two commissioner's decisions making Horton C's decision less reliable, there is no reference in cl 4.1A(4) to either ground support or the land on the

site and Horton C has brought in criteria that is not found in or supported by the terms of cl 4.1A(4) to support a wrong conclusion (Transcript 28 April 2021 page 39 at par 7 – 20).

37 As I noted above regarding the timing of the *MMP 888* decision and of the *Kingsford* decision I do not regard that Horton C neglected or was required to distinguish or consider the decision of Bish C in *Kingsford*. However it would have been helpful in this case if Horton C had given some reason or explanation as to why the reasoning in the decision of Dickson C was not agreed with. As there was significant debate between the parties in these proceedings and the result is diametrically opposed, I propose to set out the reasoning of Horton C in *MMP 888* and consider and set out the reasoning of Dickson C in *Kelly* followed by the reasoning of Bish C in *Kingsford*. Firstly, the reasoning in *MMP 888* is extracted from the judgment from [41] – [57] below and I note relevantly that Horton C referred to the definition of subdivision set out in s 6 of the EPA Act and considered the definitions in s 4 of the SSDA. The extract from the judgment I include in full in the circumstances of this case, and it reads as follows:

> "[41] While the issues in dispute are different to those advanced in the matter of DM & Longbow v Willoughby City Council (2017) 228 LGERA 342; [2017] NSWLEC 173, Preston CJ's finding at [21], is relevant here as it was in that matter:
>
> > "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."
>
> [42] Applying his Honour's logic to the particular circumstances of this matter, it follows that the strata lots proposed by the Applicant will be the result of the strata subdivision, but not what are being subdivided. The subject of subdivision is land, which precedes a circumstance where a strata plan may be then registered, the result of which will be strata lots.
>
> [43] Clause 4.1A(4) provides for the circumstance where there is a lot on which there is a dual occupancy (attached). According to the dictionary in the RLEP, a dual occupancy (attached) is defined as "two dwellings on one lot of land that are attached to each other", as is the case here.

[44] Substituting the definition from the dictionary in place of the defined term, subcl (4) would read, in effect:

> "Despite subclause (3), the subdivision intended to result from the registration of a strata plan scheme of a lot on which two dwellings on that one lot are attached to each other, the size of each resulting lot is to be not less than 400m2, and one dwelling must be situated on each lot resulting from the subdivision."

[45] The purpose in using the preposition "on" when referring to the requirement for there to be one dwelling on each lot resulting from subdivision, is to recognise that the result or outcome of the subdivision of the land must be that the two attached dwellings continue to be founded in the same way in which they were founded before subdivision of the land – that is, having the same ground support on the site. That ground support, being the land on the site, must have a minimum area of 400m2 for each dwelling.

[46] Such an outcome is consistent with the objective of the clause expressed in cl 4.1A(1) as it avoids the fragmentation of dwelling entitlements by preserving the status quo in respect of land on which there is an attached dual occupancy, and limits the density of development in a zone prescribed Low Density Residential.

[47] Further support to this position is found when the provisions of cl 4.1A are read in context with cl 4.1C which permits dual occupancy (attached) development, absent of strata subdivision, if the area of the lot is at least 450m2.

[48] The Applicant submits that the Lot Size Map fixes a number that relates to various types of development, including strata subdivisions, and says nothing about being an area 'on the ground'. However, the provisions of cl 4.1A are qualified by operation of cl 4.1(4) of the RLEP which relates expressly to the subdivision of a lot on which there is a dual occupancy (attached).

[49] While the Lot Size Map is said, at subcl 4.1A(3), to operate when a strata subdivision is proposed in the R2 zone, cl 4.1A(4) does not refer to, or rely on the Lot Size Map, but expressly states a lot size area of 400m2.

[50] The Applicant argues that the strata lot must achieve a minimum of 400m2 in area, being the site and internal area aggregated together. The FSR and height of building controls act to place an upper limit on the total floor area.

[51] What underlies this proposition is that a strata lot must achieve 400m2 in area if it is to avoid offending the objective at cl 4.1A(1). Put another way, a strata lot with an area of anything less than 400m2 is not permissible, presumably as it would result in fragmentation by virtue of a subdivision that would create additional dwelling entitlements.

[52] However, if I adopt the Applicant's position that the purpose of the provision is to encourage strata lots of at least 400m2 in area, it follows that the removal of just 22m2 of floor area on Level 1 of the proposed development at No 40 Creer Street would result in the area of the strata lot being less than 400m2 and so be impermissible. Yet it would still fully comply with the FSR and height of buildings control and would have, in the words of the Applicant, no practical physical or visible distinction that would set this development apart from similar dwellings in the street.

> [53] Furthermore, while an area contained within a building envelope can be described as a cubic space by virtue of it having walls supporting floors, the site itself, or parts thereof, does not answer the description of a 'cubic space' as suggested by the Applicant at [21] and so the areas marked CY in Exhibit C cannot fall within the definition on which the Applicant seeks to rely when determining the area of the lot.
>
> [54] Finally, I cannot accept the Applicant's position that the aim of the provision would be to promote greater floor area, where the objectives of the zone include to protect the amenity of residents, and to encourage housing affordability. Arriving at such a conclusion is consistent with the objectives for the R2 zone, re-produced at [9]. That consistency adds further support to the contextual interpretation that accords with the principles of statutory interpretation.
>
> [55] I acknowledge the result is an interpretation that differs from that expressed in earlier decisions of Commissioners. As a general principle, while decisions on merit appeals do not engage the doctrine of precedent, comity would ordinarily suggest that a prior decision be followed on a question of interpretation unless it is respectfully considered that the earlier decision(s) is clearly wrong. For the reasons stated above, I cannot follow the reasoning applied in earlier decisions by other Commissioners.
>
> [56] The parties, and their planning experts, agree that any consideration as to whether the development is consistent with the desired future character of the area is contingent on my finding in relation to the method by which lot size is determined.
>
> [57] The Applicant submits that if I find in favour of the Respondent, the Court can grant consent for the demolition of the existing structures on the site, and for the construction of the dual occupancy dwellings, but decline to grant consent for the strata subdivision."

38 I do not agree, respectfully, with the reasoning of Horton C in *MMP 888* for reasons substantially as I have set out above in this judgment at [15] – [17].

Kelly's case

39 Dickson C was tasked with determining an appeal for development consent sought for strata scheme subdivision only, that is, in that case there was already an existing development consent for the construction of a dual occupancy development. Kelly's case also considered s 6 of the EPA Act and the definition of the word 'lot' in s 4 of the SSDA. The objective of the cl 4.1A development standard, namely, to avoid fragmentation that would create additional dwelling entitlements was also considered and I note that the parties agreed that the requirement of cl 4.1A(4)(b) was met by the construction of the dual occupancy previously approved (*Kelly* at [32]). It is noted also that in the *Kelly* case the experts agreed and the Council supported the cl 4.6 variation request (*Kelly* at [31]). Again, in the context of the matter I am tasked with to

determine, I reproduce the relevant extract of the decision in *Kelly* which sets out the reasoning of Dickson C from [37] – [42] as follows:

> "[37] … I accept the submission 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 408m² (Exhibit A) and the relevant lot size for the subject land is 400m², 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."

40 In accepting the reasoning of Mr Tomasetti, Dickson C accepted that the development standard in cl 4.1A "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." (*Kelly* at [22(2)])

41 I note that the parties in this matter agree that the development standard applies to the resulting lot being the strata lot (refer to [4] above) and I accept that cl 4.1A(4) is a development standard which regulates the minimum resulting lot size being a strata lot. The measurement of that resulting strata lot remains the contested issue between the parties and I give my reasons in this judgment as to why the measurement is as calculated in Figure 1 for the purpose of cl 4.1A(4) of the RLEP.

The Kingsford case

42 Bish C was tasked with determining an appeal for development consent sought for demolition, construction of dual occupancy and strata subdivision. Similar to

the *MMP 888* and the *Kelly* cases, s 6 of the EPA Act was considered together with s 9 of the SSDA which is titled "Subdivision of land by strata plan" (*Kingsford* at [14] – [15]), and at [16] notes that the parties do not agree on the area calculated for the proposed strata lots.

43 In the *Kingsford* case, the experts agreed that the definition of 'lot' was to be derived from the Strata Scheme Development Act, s 4, unlike in this matter where the Respondent expressly submits that this approach is flawed on the basis that "where you are looking for a 400m2 area on the ground, it words as a minimum. You need 400m2 and if you don't have it you can't strata subdivide your dual occupancy." (Transcript 28 April 2021, page 8 at 45)

44 Bish C notes that although the experts agreed on applying s 4 of the SSDA, Mr Harding for the Respondent in that matter "contends that based on the site area for each proposed strata lot, the areal dimension is defined in the two-dimensional plane, based on land area only" (*Kingsford* at [28]). In these proceedings, Mr Huang, expert town planner for the Respondent states at page 3 of the JER (Exhibit E) that 'it is incorrect to calculate the floor area of the strata lot above the two dimensional ground level.' For reasons I give throughout this judgment a strata lot is a three dimensional concept where the strata lot entitlement is generally measured in a two dimensional way but is not limited to the area on ground as this would potentially measure only part of a strata lot and will exclude other part strata lot entitlements which are located below or above ground, such as the Proposed Development as depicted in Fig 2.

45 Bish C upheld the appeal concluding that there was no contravention of the EPA Act or other relevant planning instruments. Her reasons, extracted in full from the Kingsford decision from [33] – [40] and [47] – [49] are as follows:

> "[33] Commissioner Dixon in DM & Longbow Pty Ltd v Willoughby City Council [2017] NSWLEC 1358 found that the clear and ordinary reading of the text of the EP&A Act provides the required context for the Courts consideration of a relevant planning instrument. I consider this approach in trying to understand what is intended to be included in the calculation of a strata lot area.
>
> [34] The Merriam-Webster dictionary defines area as:
>
> > Area: the surface included within a set of lines, specifically, the number of unit squares equal in measure to the surface

> [35] I accept that the calculation of a Torrens title lot, as existing on the site, is a two dimensional concept based on the total land area, which for this site equates to 669m². I also accept that the proposed land area of each strata lot is 335m². However, I do not accept that land area alone forms the basis for the calculation of the minimum lot size requirement for a strata lot. I explain the basis for my assessment below.
>
> [36] The applicant has adopted the calculation approach as described in s 6 of the SSD Act, whereby the floor areas for the ground and first floor levels are included. The respondent on the other hand has relied on the calculation of land area, as described in s 9 of the SSD Act, with 'land' defined in the Real Property Act 1900.
>
> [37] I agree with Mr Chapman, that the strata lot area is a three-dimensional concept, including all floor levels/areas of the dwelling on the strata lot. I consider that the calculation of a strata lot area should be consistent with s 6 of the SSD Act, which is based on floor area as opposed to land area.
>
> [38] Based on the evidence before me, I find that the proposed strata lot area is 422m² and 428m² for Strata Lots 1 and 2, respectively. The proposed development therefore, exceeds the minimum lot size of 400m², as specified in cl 4.1A(4)(a) of the RLEP. In making this determination, I rely on the definition of 'floor plan' provided in the SSD Act, which includes the areas of each floor.
>
> [39] I do not accept the approach of Mr Harding's that cl 4.1A(4)(a) of the RLEP requires that the site must have at least 800m² to be strata subdivided into two strata lots, with dual occupancy (attached) dwellings.
>
> [40] My approach to calculation of strata lot area is consistent with that held by Commissioner Dickson in Kelly v Randwick City Council [2018] NSWLEC 1322.
>
> [47] I find that the objective of cl 4.1A(1) of the RLEP has been satisfied. I agree with Mr Chapman that the two strata lots created by the proposed development will not result in 'fragmentation' of the land or 'additional dwelling entitlement'.
>
> [48] I disagree with Mr Harding that the objectives specified in cl 4.1A(1) of the RLEP are not complied with. The proposed development does not result in an additional dwelling entitlement, as only one lot remains registered on the Torrens title.
>
> [49] I find that the proposed two strata lot subdivision on the site does not breach the minimum lot size requirement of 400m², pursuant to cl 4.1A(4)(a) of the RLEP, and therefore no (cl 4.6) request for variation of this development standard is required for the Courts satisfaction to grant consent to the DA under appeal."

How to calculate the size of a lot for the purpose of cl 4.1A(4)(a) – the Statutory context

46 In accordance with the statutory interpretation principles set out above, I will consider the text of cl 4.1A(4) to which there are three parts being firstly the introductory words, secondly subclause (a) which stipulates the minimum size of the lot and thirdly subclause (b) which stipulates that a dwelling must be on each new lot.

47 The context within which cl 4.1A is found in relation to other provisions in the RLEP is in Part 4 Principal development standards and it follows cl 4.1 Minimum subdivision lot size which provides the relevant control for Torrens title subdivision as cl 4.1(4) expressly excludes subdivision of any land by registration of a strata plan of subdivision under the SSDA or by any kind of subdivision under the *Community Land Development Act 1989*. Following is cl 4.1AA Minimum subdivision lot size for community title schemes which refers to the *Community Land Development Act 1989* (now *Community Land Development Act 2021*) and expressly states that cl 4.1AA applies despite cl 4.1. Next is cl 4.1A, the relevant clause in these proceedings which provides in full 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."

48 Clause 4.1A refers to *Strata Schemes (Freehold Development) Act 1973* and to *Strata Schemes (Leasehold Development) Act 1973* both of which are no longer current, but I accept that references to predecessor legislation can (by s 68 of the *Interpretation Act 1987*) be taken to be references to the current legislation namely, the SSDA.

49 The context of other relevant statutory framework can be summarised as follows:

(1) SSDA, s 4 definitions of, inter alia, *strata lot*; and

(2) State Environmental Planning Policy (Exempt and Complying Development Code) 2008, Part 6, Div 1.

50 There are other relevant provisions in the RLEP, namely cl 2.6 which provides as follows:

> 2.6 Subdivision—consent requirements
>
> (1) Land to which this Plan applies may be subdivided, but only with development consent.
>
> Notes—
>
> **1** If a subdivision is specified as **exempt development** in an applicable environmental planning instrument, such as this Plan or *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, the Act enables it to be carried out without development consent.
>
> **2** Part 6 of *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* provides that the strata subdivision of a building in certain circumstances is **complying development**.
>
> (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.
>
> Note—
>
> The definition of ***secondary dwelling*** in the Dictionary requires the dwelling to be on the same lot of land as the principal dwelling.

51 The parties referred the Court to some of the definitions found in s 4 of the SSDA as follows:

> ***common property***, in relation to a strata scheme or a proposed strata scheme, means any part of a parcel that is not comprised in a lot (including any common infrastructure that is not part of a lot).
>
> ***floor plan*** means a plan that—
>
> (a) defines by lines (each a ***base line***) the base of the vertical boundaries of each cubic space forming the whole of a proposed lot, or the whole of a part of a proposed lot, to which the plan relates, and
>
> (b) shows—
>
> (i) the floor area of each proposed lot, and
>
> (ii) if a proposed lot has more than one part—the floor area of each part together with the aggregate of the floor areas of the parts, and

(c) if a proposed lot or part of a proposed lot is superimposed on another proposed lot or part—shows the separate base lines of the proposed lots or parts, by reference to floors or levels, in the order in which the superimposition occurs.

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.

parcel means—

(a) in relation to a strata scheme, the land comprising the lots and common property in the scheme, or

(b) in relation to a plan lodged for registration as a strata plan, the land comprised in the plan.

52 In relation to the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008, I acknowledge that this only applies to a development, such as a dual occupancy, for which a complying development certificate has been issued and that this dual occupancy was not approved under the Exempt and Complying provisions (Transcript 28 April 2021, page 10 at 10). The Code therefore does not readily assist in these proceedings.

53 Clause 4.1A(4) of the RLEP operates as an exception to subclause (3) and although I would agree with the Respondent that to some extent "there is an uncomfortable use of language through these provisions." (Transcript 28 April 2021, page 7 at 36) it is clear, and agreed, that the control in cl 4.1A relates to the lot resulting from the strata scheme subdivision and therefore applies to the size of the strata lot. To apply any other interpretation creates an artificial application of the words on a clause where the whole subject matter is strata scheme subdivision.

54 In relation to the objective of the cl 4.1A development standard, the parties agree that there is no additional dwelling entitlement created by the Proposed Development and for completeness I find that the Proposed Development is consistent with the objective of cl 4.1A.

Findings

55 For the reasons set out in this judgment, I accept the reasoning and methodology employed by Dickson C and Bish C and note that this is consistent with my decision in *Junn v Willoughby City Council* [2020] NSWLEC

1459 which dealt with slightly different issues, the measurement of the strata lot size is consistent.

56 I find that the lot size of each lot resulting from the strata subdivision of the Proposed Development will be 444m2.

57 The development standard in cl 4.1A(4) is not contravened and there is no requirement for the court to consider any request pursuant to cl 4.6 purporting to justify any contravention of the minimum strata subdivision lot size development standard.

58 I uphold the appeal based on my finding that the Proposed Development complies with the minimum lot size development standard in cl 4.1A(4) of RLEP.

Orders

59 The Court orders that:

(1) The appeal is upheld.

(2) Development Application DA/524/2020 seeking development consent for the strata subdivision of existing dual occupancy into two strata allotments at 89 Mons Avenue Maroubra legally described as Lot 2 DP 222605 is approved subject to conditions annexure A.

…….

E Espinosa

Commissioner of the Court

Annexure A (153491, pdf)

****