

VARIATION TO DEVELOPMENT STANDARD (CLAUSE 4.6) REPORT

CLAUSE 4.1 – MINIMUM LOT SIZE

**438 BINGLEBURRA ROAD,
SUGARLOAF, NSW, 2420
(LOT: 1 DP: 1124046 & LOT: 1 DP: 652520)**

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EXECUTIVE SUMMARY

Perception Planning Pty Ltd have prepared this letter as a result of a variation to a development standard, at 438 Bingleburra Road, Sugarloaf, NSW, 2420 (LOT: 1 DP: 1124046 and LOT: 1 DP: 652520) ('the site'). This is in relation to approved DA 79/2022 and DA modification approved 18 April 2023. The Notice of Determination and stamped plans for each application are attached as **APPENDICES 1, 2, and 3**.

The proposed development results in a lot size of area less than the minimum subdivision lot size (MLS) applicable to the land specified under Clause 4.1 of the Dungog Local Environmental Plan 2014 (LEP).

The proposed subdivision results in a lot size for proposed Lot 101 of 56.2ha, which is 3.8ha below the minimum lot size of 60ha specified under Clause 4.1 of the Dungog Local Environmental Plan 2014 (The '**LEP**'). This raises a 3.8ha or 6.3% variation request.

This lot size has been determined as a result of an existing fence line on a ridgeline being used to separate the two proposed lots, as is normal practice when subdividing large lots of rural land.

Due to the large expense and additional environmental impacts of relocating the existing fence, it is considered that using the existing fence line as a physical and legal boundary is the most suitable method to determine new boundaries.

As the existing fence is located on a ridgeline on the property, it presents the most reasonable location for property boundaries by allowing the proposed two lots to maintain visual isolation and privacy whilst maintaining the scenic values of the location and avoiding conflicts relating to land use and visual impacts for future development.

While the proposed subdivision plan presents a variation to the minimum lot size requirement, it meets the objectives of the RU1 zone and offers adequate lot size to facilitate for a range of potential future land uses.

Clause 4.6 of the LEP provides for an appropriate degree of flexibility in applying certain development standards such minimum lot size to achieve better planning outcomes. This report demonstrates that the proposed development should not be refused on the basis of a variation to the minimum lot size resulting from the development. In summary, through this Clause 4.6 analysis it has been found that:

- Strict adherence to the numerical minimum lot size standard would be unreasonable and unnecessary as required under the Five Part Test (*Wehbe vs Pittwater Council*);
- The proposed lot size is appropriate when considering it in relation to the existing features of the site;
- The non-compliant lot size does not impact on potential future development or uses on the site. The proposed lot size is considered more than adequate to facilitate further development without any adverse effects on the land;

- Despite of the variation, the proposed subdivision will achieve the objectives of the development standard and the objectives of the relevant land use zone being RU1 – Primary Production; and
- There are no identified environmental or social impacts as a result of the proposed variation.

It is our view that the development is consistent with the character of the locality and enables the objectives of the LEP to be satisfied.

TERMS AND ABBREVIATIONS

| | |
|----------|--|
| EP&A Act | Environmental Planning & Assessment Act 1979 |
| EPI | Environmental Planning Instrument |
| DA | Development Application |
| LGA | Local Government Area |
| DLEP | Dungog Local Environmental Plan |
| SEPP | State Environmental Planning Policy |
| SEE | Statement of Environmental Effects |

FIGURES

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PROPOSED VARIATION TO DEVELOPMENT STANDARD

Clause 4.1 – Minimum Lot Size

The objectives of this clause are to ensure that subdivision reflects and reinforces the predominant subdivision pattern of the area whilst minimising any likely impacts on the amenity of neighbouring properties. The clause also aims to ensure that lot sizes and dimensions are able to accommodate development consistent with relevant development controls, to protect natural features and retain special features such as trees and views, and to protect and enhance waterways by restricting the creation of new riparian rights through subdivision so as to prevent increased direct access onto rivers.

The subject site has a minimum lot size of 60 ha, whereas the proposed subdivision results in a lot size for proposed Lot 101 of 56.2ha, which is 3.8ha below the minimum lot size of 60ha specified under Clause 4.1 of the Dungog Local Environmental Plan 2014 (The '**LEP**'). This raises a 3.8ha or 6.3% variation request.

Given the shortfall of the lot size proposed, please refer to assessment under Clause 4.6 of the DLEP below.

A draft survey plan of the proposed subdivision is attached as **APPENDIX 4** and can be viewed in **FIGURE 2** below.

This lot size has been determined as a result of an existing fence line on a ridgeline being used to separate the two proposed lots, as is normal practice when subdividing large lots of rural land.

As the existing fence is located on a ridgeline on the property, it presents the most reasonable location for property boundaries by allowing the proposed two lots to maintain visual isolation and privacy whilst maintaining the scenic values of the location and avoiding conflicts relating to land use and visual impacts for future development.

FIGURE 1 below shows the existing fence line on the ridgeline where the proposed line of subdivision has been determined.



Figure 1 - Aerial Image Showing Existing Fence line on Ridgeline (SixMaps 2023)

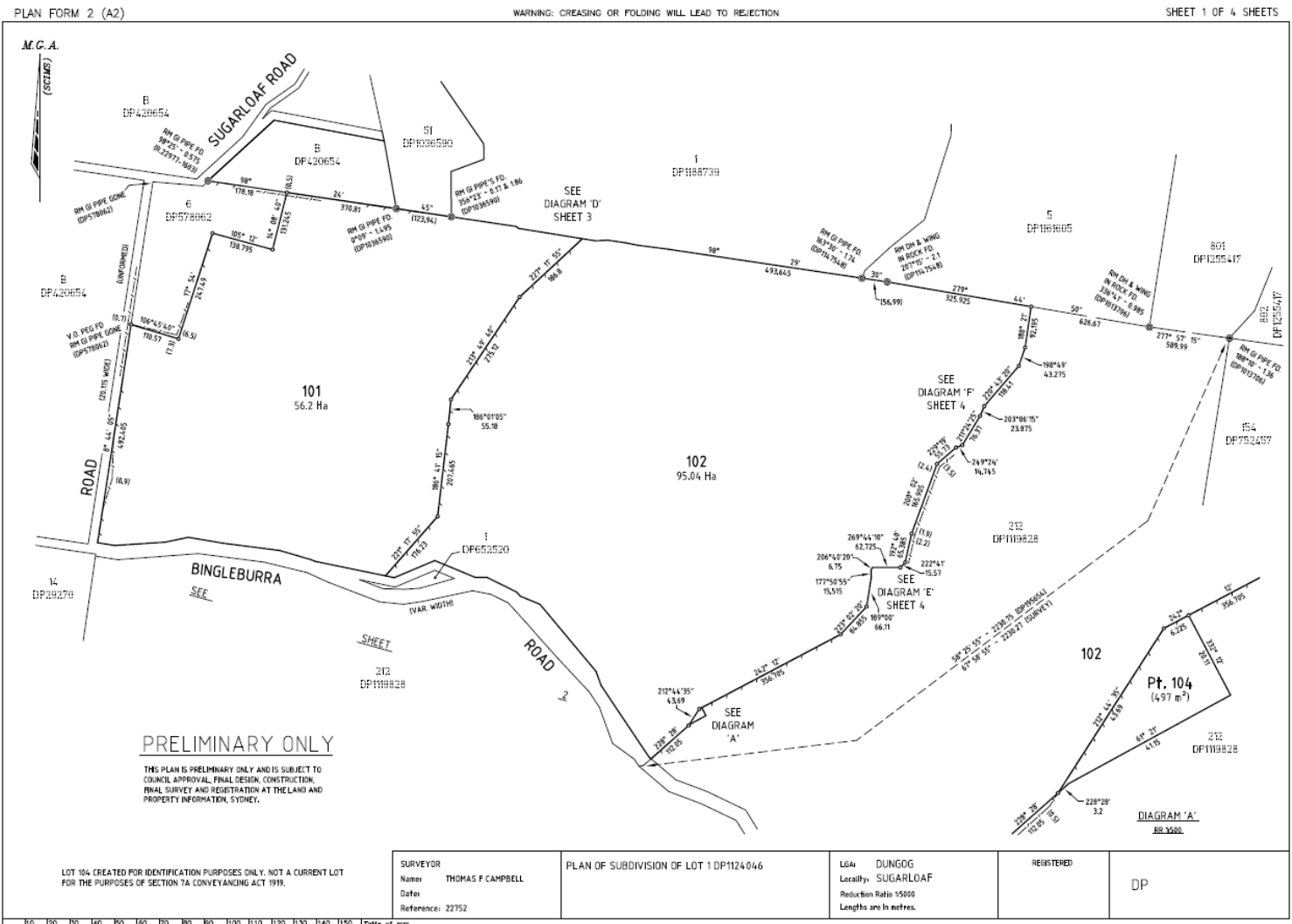


Figure 2 - Preliminary Survey Plan (Delfs Lascelles 2023)

Clause 4.6 – Exceptions to development standards

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—

- a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

The proposed subdivision will result in the area of proposed Lot 101 being reduced to 56.2ha which is 93.66% of the prescribed MLS of 60ha.

Clause 4.6 of the DLEP allows Council, where certain requirements are met, to exercise its discretion to grant development consent even though the proposed development contravenes a development standard. Therefore, it is considered the use of Clause 4.6 of the DLEP to enable consent for the proposed development is appropriate in this instance. This has been justified below.

Under clause 4.6, the following objectives apply:

- To provide an appropriate degree of flexibility in applying certain development standards to a particular development; and*
- To achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

As per Clause 4.6(3), development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; and*
- There are sufficient environmental planning grounds to justify contravening the development standard.*

The following approach to providing a detailed request to vary the development standard for minimum lot size has been informed by the following documents:

- Department of Planning & Infrastructure, 'Varying Development Standards: A Guide';
- Department of Planning & Environment, 'Circular PS 08-003, Variations to Development Standards'; and

- Independent Commission Against Corruption, 'Corruption Risks in NSW Development Approval Process: Position Paper'.

A relevant question is stated, and an appropriate response provided below.

a. What is the Environmental Planning Instrument (EPI) that applies to the land?

Dungog Local Environmental Plan 2014

b. What is the zoning of the land?

RU1 – Primary Production

c. What are the objectives of the zone?

The Land Use Table of the DLEP identifies the following objectives for the RU1 zone:

- To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.
- To encourage diversity in primary industry enterprises and systems appropriate for the area.
- To minimise the fragmentation and alienation of resource lands.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To provide for recreational and tourist activities that are compatible with the agricultural, environmental and conservation value of the land.
- To promote the rural amenity and scenic landscape values of the area and prevent the silhouetting of unsympathetic development on ridgelines.

d. What is the development standard being varied?

Minimum Subdivision Lot Size

e. What clause is the development standard listed in the EPI?

Clause 4.1 – Minimum Subdivision Lot Size

f. What are the objectives of the development standard?

Clause 4.1

- (a) to ensure that subdivision reflects and reinforces the predominant subdivision pattern of the area,

- (b) to minimise any likely impact of subdivision and development on the amenity of neighbouring properties,
- (c) to ensure that lot sizes and dimensions are able to accommodate development consistent with relevant development controls,
- (d) to ensure that lot sizes and dimensions allow dwellings to be sited to protect natural features and retain special features such as trees and views,
- (e) to protect and enhance waterways by restricting the creation of new riparian rights through subdivision so as to prevent increased direct access onto rivers.

g. What is the numeric value of the development standard in the EPI?

Minimum Subdivision Lot Size – 60 ha.

h. What is the proposed numeric value of the development standard in your DA?

Proposed lot size of proposed Lot 101 – 56.2 ha.

i. What is the percentage variation (between your proposal and the EPI)?

6.3%

j. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

In *Wehbe vs Pittwater Council (2007) LEC 827*, it was determined that the applicant was to satisfy the consent authority that "the objection was well founded" and compliance with the development standard was unreasonable or unnecessary in the circumstances of the case. In this instance, strict compliance with the standard is considered unreasonable in that the impact created by the proposed development will be minor and insignificant to neighbouring development. The proposed development does not contravene the objectives of the zone and is considered a good use of the site, as it enables a variety of land uses whilst preserving the areas scenic quality.

k. How would strict compliance hinder the attainment of the objects of the Environmental Planning and Assessment Act 1979?

It was also determined in *Wehbe v Pittwater Council* that the consent authority must be of the opinion that granting consent to the development application would be consistent with the policy's aim of providing flexibility in the application of planning controls where strict compliance with those controls would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 1.3(a), (b) and (c) of the *Environmental Planning & Assessment Act 1979*.

The objects of the Act and an appropriate response is provided as follows:

- a) *To promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*

The proposed development will promote the social and economic welfare of the local community through the provision of suitable liveable housing at an appropriate density located within close proximity to commercial zones and strategic centres, accommodating the facilities supporting residential living. The nearby township of Dungog incorporates good access to public transport to access commercial zones and strategic centres and also includes small coffee, convenience, and restaurant services.

Strict compliance with this development standard is not seen to facilitate the conservation of the State's natural and other resources. By impeding the proposed development, the efficient utilisation of the subject site will not occur.

- b) *To facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*

Strict compliance does not assist with the facilitation of ecologically sustainable development. The proposed development provides numerous economic and social benefits for the community. The lot size proposed does not compromise the natural environment in which the site is located and is appropriate in the context of the rural setting.

- c) *To promote the orderly and economic use and development of land,*

The proposed subdivision provides a more efficient use of the site whilst preserving the ecological and scenic quality of the area. This is a desirable outcome within the area and promotes the orderly and economic use and development of the land within a rural environment without negatively impacting on the natural and scenic views held by surrounding properties.

- d) *To promote the delivery and maintenance of affordable housing, the development is not proposed to be affordable housing; however, strict compliance does contribute to housing affordability.*

The proposal does not seek to provide affordable housing as defined under the State Environmental Planning Policy No 70 – Affordable Housing.

- e) *To protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*

Strict compliance with the minimum lot size will not impact site specific environmental outcomes.

- f) *To promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*

Strict compliance with the minimum lot size will not impact site specific cultural heritage outcomes. The site is not identified as containing any heritage items or places and is not located within a Heritage Conservation Zone. Strict compliance in this instance would not be conducive to efficient land use.

- g) *To promote good design and amenity of the built environment,*

Strict compliance will hinder the practical subdivision of rural land and has the potential to lead to land use and development conflicts in the future. The proposed development remains consistent with the desired context of the area and ensures lots of suitable size are created so as not to burden any future land uses or development.

- h) *To promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*

Strict compliance has no impact on proper construction.

- i) *To promote the sharing of the responsibility for environmental planning and assessment between the different levels of government to the State,*

Strict compliance has no impact on responsibility between levels of government.

- j) *To provide increased opportunity for community participation in environmental planning and assessment.*

Strict compliance has no impact on community participation. The development is anticipated to be publicly notified, with any submissions received to be appropriately addressed by the Consent Authority.

l. Is the development standard a performance-based control? Give details?

No. The development standard is numerical.

m. Are there sufficient environmental planning grounds to justify contravening the development standard? Give details?

The proposed subdivision creates two lots of sufficient size to facilitate a number of varied land uses permitted in the zone RU1. Considering the existing fence line to the East and neighbouring property boundaries to all other sides, the proposed lot 101 makes best use of the available land without burdening the scenic quality of the land and future development.

The Eastern boundary of proposed lot 101, which is the proposed subdivision line between the two proposed lots, has been determined due to the existing fence line along the ridgetop of the site. By placing the subdivision line on the ridgeline, practical land use for both lots is

maximised and any potential conflicts in regards to boundaries or visual impacts can be avoided. The development has been identified to be consistent with the relevant objectives, which provides sufficient environmental planning grounds under the DLEP (Clause 4.1) for a variation to the numerical development standard.

n. Is the Variation in the Public Interest?

The proposed variation results from the desire to provide additional rural property, compliant with the DCP controls and objectives of the RU1 zone, which discusses the need to provide for the housing needs of the whilst retaining the scenic quality of the rural setting.

The development will an additional rural lot, enabling further development for a variety of permissible land uses in the future. The proposed subdivision is consistent with the aims and objectives of the DCP and RU1 zone. The approval of this variation will facilitate the proposed subdivision which is considered to be in the interest of the local and greater community of Dungog.

o. Public Benefit of Maintaining the Standard

There appears to be little public benefit in maintaining the standard. The maintenance of the standard will likely result in a reduction of suitable rural lots capable of providing essential residential accommodation.

This variation sought to Clause 4.1 of the DLEP is considered acceptable in this particular instance as it will allow for a development that contributes to the provision of rural lots in the area whilst meeting the aims and objectives of the land zoning.

CONCLUSION

In summary, through this Clause 4.6 analysis it has been found that;

- Strict adherence to the numerical minimum lot size development standard would be unreasonable and unnecessary as required under the Five Part Test (*Wehbe vs Pittwater Council*);
- The proposed lot size of proposed lot 101 is appropriate when considering it in relation to the existing context of the site;
- The non-compliant lot size of proposed lot 101 does not impact on the planning merits of the development.
- The proposed subdivision integrates in with the existing rural setting and will ensure no additional adverse impacts are created by potential further development in the future;
- Despite the minor variation, the proposed development will achieve the objectives of the development standard and the objectives of the relevant land use zone being RU1 – Primary Production; and

- There are no identified environmental or social impacts as a result of the proposed variation.
- It is our view that the development is consistent with the rural character of the locality and enables the objectives of the DLEP to be satisfied.

Whilst the lot size for proposed lot 101 does not meet the minimum lot size from a quantitative perspective, when reviewing the proposal from a practical or qualitative perspective, the proposed lot size is consistent with the objectives of the zone and enables a variety of permissible land uses should the site be developed in the future.

Considering the minimal impact of the variation which provides a substantial increase in practicality, the variation is considered to have positive results for the site and surrounding area.

In response to the above matters and identified response, justification has been provided for the development standard variation.

Thank you for taking the time to review this information. If you have any questions, please contact me at jordan@perceptionplanning.com.au or on 0475 713 934.

Kind Regards,



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