Corona Projects

DEVELOPMENT APPLICATION

Cl4.6 VARIATION REQUEST – Minimum lot sizes and special provisions for dual occupancies

Demolition of the existing structures, construction of two new dual occupancies and subsequent Torrens title subdivision of two (2) lots into four (4) lots.

113-115 Faraday Road Padstow

December 2023

CONTENTS

PROJECT DETAILS

Client:	Mr Sebastian Giompaolo
Subject land:	113-115 Faraday Road Padstow
Lot Description:	Lot 4 and 5 of Deposited Plan 19247
Proposed development:	Demolition of the existing structures, construction of two new dual occupancies and subsequent Torrens title subdivision of two (2) lots into four (4) lots.
Clause being varied:	Clause 4.1A Minimum lot sizes and special provisions for dual occupancies
Extent of variation:	2.47%
The report is prepared by	Lauren McNamara Bachelor of Planning (WSU)
The report is reviewed by	Madeline Maric Bachelor of Planning (MQU) PIA Planning Institute Australia

I certify that the contents of the Clause 4.6 Variation request to the best of my knowledge, has been prepared as follows:

- In accordance with Section 4.12 of the Environmental Planning and Assessment Act 1979 and Clause 24 of the Environmental Planning and Assessment Regulation 2021;
- The statement contains all available information that is relevant to the environmental impact assessment of the proposed development;
- To the best of my knowledge the information contained in this report is neither false nor misleading.

1.0 BACKGROUND

This Clause 4.6 variation is a written request to vary a development standard to support a development application for the demolition of the existing structures, construction of two new dual occupancies and subsequent Torrens title subdivision of two (2) lots into four (4) lots at 113-115 Faraday Road Padstow**.** The proposal is in direct response to the growing housing needs of the Padstow locality. The design is commensurate in scale, bulk, site coverage, and materiality to many of the buildings located in the immediate locality.

The proposed works include: -

- Demolition of the existing dwelling and associated structures on site including 2 fibro garages;
- Construction of two (2) new attached dual occupancies with associated vehicle crossings;
- Removal of 13 trees;
- Torrens title subdivision of two (2) lots into four (4) lots.

Clause 4.1A of Canterbury-Bankstown Local Environmental Plan (LEP) 2023 relates to the minimum lot sizes and special provisions for dual occupancies requirements and states that;

Development consent must not be granted to development for the purposes of dual occupancies on a lot in Zone R2 in Area 1 unless—

(a) the lot is at least—

(i) for dual occupancies (attached)—500m^2, and

(ii) for dual occupancies (detached)—700m^2, and

(b) the width of the lot at the front building line is at least—

(i) for dual occupancies (attached)—15m, and

(ii) for dual occupancies (detached)—20m, and

The subject site is located in Area 1 and thus, for the development of an attached dual occupancy, requires a minimum lot size of 500m^2, and a minimum frontage of 15m.

The architectural plans submitted with the Development Application at 113-115 Faraday Road Padstow indicate that the subject sites have frontage widths of 14.63m. This results in a 2.47% variation to the development standard and non-compliance of 0.37m.

The proposal is of a reasonable scale and provides a high quality and durable development which will assist to meet the high demand for additional housing in the Padstow locality. The development is commensurate in scale and character with other properties in the streetscape, measuring only two stories and complies with the maximum FSR prescribed for the site. The variation results in the substantial increase in amenity for the subject site without producing any adverse impacts on the privacy, views, and overall amenity of surrounding properties.

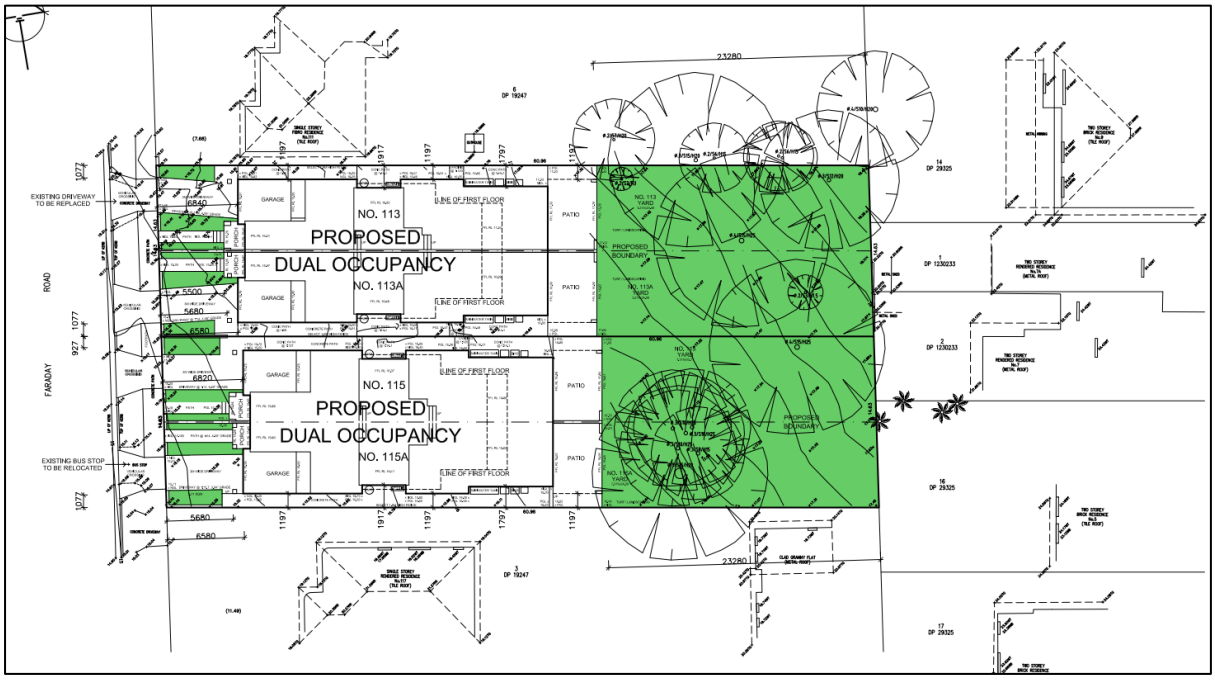

Figure 1 *– Proposed Site Plan (Niche Home Designs, 2023)*

2.0 IS THE STANDARD A DEVELOPMENT STANDARD?

Clause 4.1A of the Canterbury-Bankstown Local Environmental Plan (LEP) 2023 states that:

Development consent must not be granted to development for the purposes of dual occupancies on a lot in Zone R2 in Area 1 unless—

(a) the lot is at least—

(i) for dual occupancies (attached)—500m^2, and

(ii) for dual occupancies (detached)—700m^2, and

(b) the width of the lot at the front building line is at least—

(i) for dual occupancies (attached)—15m, and

(ii) for dual occupancies (detached)—20m, and

A development standard is defined in Section 1.4 of the Environmental Planning and Assessment Act 1979 ("EPA Act") to mean:

"provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
b) the proportion or percentage of the area of a site which a building or work may occupy,
c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,
d) the cubic content or floor space of a building,
e) the intensity or density of the use of any land, building or work,
f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,
g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,
h) the volume, nature and type of traffic generated by the development,
i) road patterns,

j) drainage,
k) the carrying out of earthworks,
l) the effects of development on patterns of wind, sunlight, daylight or shadows,
m) the provision of services, facilities and amenities demanded by development,
n) the emission of pollution and means for its prevention or control or mitigation, and
o) such other matters as may be prescribed."

The minimum lot sizes and special provisions for dual occupancies control falls under subsection (a); therefore, the control is a development standard and Clause 4.6 of the Canterbury-Bankstown Local Environmental Plan 2023 is applicable.

3.0 CLAUSE 4.6 OF THE CANTERBURY-BANKSTOWN LOCAL ENVIRONMENTAL PLAN 2023

The Standard Instrument LEP contains its own variations clause (Clause 4.6) to allow the variation of development standards. Clause 4.6 of the Standard Instrument is similar in tenor to the former State Environmental Planning Policy No. 1; however, the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) and case law suggests a similar approach to SEPP 1 may be taken in part.

There is abundant judicial guidance on how variations under Clause 4.6 variations should be assessed. Some of these cases are taken into consideration in this request for variation.

While it is not necessary to refer to case law, we do so as it has become customary in sustaining requests under Clause 4.6.

4.0 THE ONUS ON THE APPLICANT

Under Clause 4.6(3)(a), it is the onus of the applicant to demonstrate: -

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.

The judgement by Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* clarified the correct approach to Clause 4.6 variation requests, including that:

Paragraph 13 -15 of the judgement states: -

> *The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard*

The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see Woolworths Ltd v Pallas Newco Pty Ltd (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard.

The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.

Accordingly, the matters required to be demonstrated by cl 4.6(3) are set out below using the relevant principles established by the Court.

Clause 4.6 (3) (a) - Compliance with the development standard is unreasonable or unnecessary in this particular case

Pursuant to clause 4.6(3)(a) of the LEP, and the applicable principle within *Wehbe v Pittwater Council (2007) 156 LGERA 446*, the variation to the minimum lot sizes and special provisions for dual occupancies development standard is acceptable in the circumstances of this case and compliance with the development standard is considered unreasonable and unnecessary because the proposed development is consistent with the objectives of the minimum lot sizes and special provisions for dual occupancies standard, notwithstanding non-compliance with the standard.

<u>Consistency with the objectives of the standard:</u>
The objectives of Clause 4.1A are articulated at Clause 4.1A(1): -

1) The objectives of this clause are as follows—

(a) to ensure lots are large enough to accommodate proposed dwellings, setbacks to adjoining land, private open space and landscaped areas, driveways and vehicle manoeuvring areas,

(b) to ensure lots are large enough to protect special attributes, including natural or cultural features, heritage items, heritage conservation areas, trees and natural topographical features,

(c) to minimise the likely adverse impact of development on the amenity of the area.

Objective (a) is concerned with ensuring that lots are large enough to accommodate proposed dual occupancies whilst ensuring appropriate development standards are adhered to. The proposed lots are 891.4m^2 each in size and are significantly greater than the minimum lot size required for this development. The proposed dwellings all provide for compliant setbacks, private open space, landscaped area, driveways and vehicle manoeuvring areas, which afford appropriate amenity to the site. Therefore, it can be deemed that the lots are large enough to accommodate the proposed dwellings.

Objective (b) is concerned with protecting special attributes, including natural or cultural features, heritage items, heritage conservation areas, trees and natural topographical features. The proposed site is not considered to comprise of any special attributes, natural or cultural features. The subject site is not located within close proximity to any heritage items or heritage conservation areas. The proposed development retains significant trees at the rear where possible to ensure that trees and natural topographical features are conserved. The proposed development is considered to be consistent with this objective.

Objective (c) is concerned with the minimising adverse impact of the proposed development on the amenity of the area. The numerical non-compliance in this case is minor, only resulting in a 2.67% variation. Due to the minor nature of the variance, it is considered that a compliant lot width would not have a tangible impact on the amenity afforded to the area, in comparison to the proposed development. The variation results in the substantial increase in amenity for the subject site without producing any adverse impacts on the privacy, views, and overall amenity of surrounding properties and is considered to be consistent with this objective.

For the above reasons, I am of the view that the variation requested and the resultant development is consistent with the objectives of the development standard and an appropriate degree of flexibility is warranted.

Consequently, I conclude that strict compliance with the development standard is unreasonable or unnecessary in this particular case.

Clause 4.6 (3) (b) - That there are sufficient environmental planning grounds to justify contravening the development standard

Satisfaction as to sufficient environmental planning grounds is a matter for the Council to determine and can be site specific as set out in the judgement of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118.*

Paragraph 23 -24 of the judgement states: -

> *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
>
> *The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

The term 'environmental planning grounds' is not defined and may be interpreted with wide scope as has been the practice of the Land and Environment Court. The environmental planning grounds supporting variation are on the basis of:

- Compliant Lot Size. The subject sites are large in length, providing a site length of approximately 60 metres, however fall minimally below the required 15m frontage in width. The individual lot sizes for each lot are far in excess of the required 500m^2 as required by Clause 4.1A. This is a particularly relevant environmental planning ground in justifying the contravention of the standard as it clearly demonstrates the subject sites are large enough in size to be capable of accommodating for the size and nature of the development.

- Appropriate bulk and scale. The proposal fully complies with the maximum height and wall height prescribed for the site, additionally the proposal also complies with the required setbacks, private open space, landscaping, and parking. This demonstrates that notwithstanding the variation, the site is capable of providing generally compliant dwellings with high levels of residential amenity. As such the new dwellings will not dominate the streetscape any more than the surrounding development and will be visually consistent with the wider locality.

- Residential Amenity. The proposal provides four (4) dwelling in the form of two (2) dual occupancy developments which have the potential to provide high levels of residential amenity. The variation to the lot width control as discussed above, does not decrease the residential amenity afforded to residents, nor does it negatively impact the design or configuration of the dwellings.

- Compatibility with the character and amenity of the area. The proposed dual occupancies will not alter the established character of the area, nor will they introduce an undesirable precedent to the locality. This is as the area is already supports several other two (2) storey dual occupancy developments of a similar scale. Due to the minor nature of the variation to the lot width, this results in a negligible difference between the proposal and surrounding dual occupancy development.

As set out in *'Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118',* the aforementioned environmental planning grounds do not rely on the benefits of the development as a whole, but rather they directly relate to the proposed minimum lot sizes and special provisions for dual occupancies aspect that contravenes the development standard.

For the reasons detailed in this request, I am of the opinion that there are sufficient environmental planning grounds for Council to be satisfied that the request is adequate and to allow appropriate flexibility.

5.0 DEVELOPMENT IN THE PUBLIC INTEREST

Under Clause 4.6(4)(a) & (b), 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 Planning Secretary has been obtained.

Pursuant to Cl.4.6(4)(a), the Council must form the positive opinion of satisfaction that the applicant's written request has adequately addressed both of the matters required to be demonstrated by Clause 4.6(3)(a) and (b) and that 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 as set out in 'Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118'.

As demonstrated in section 4 above, the proposed development has satisfied the matters required to be demonstrated in Clause 4.6(3) by providing a written request that demonstrates:

1. Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, by establishing that the objectives of the development standard are achieved notwithstanding the non-compliance.
2. The environmental planning grounds relied on are sufficient to justify the development standard.

In accordance with the findings of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118,* the Consent Authority under Clause 4.6(4)(a)(i) must only be satisfied that the request addresses Clause 4.6(3). Under Clause 4.6(4)(a)(i) the Consent Authority is not to determine in their opinion whether the request satisfies the requirements of Clause 4.6(3)(a) and (b), just that the request has been made and that these items have demonstrated. The relevant items in Clause 4.6(3) have been demonstrated above.

Clause 4.6 (4)(a)(ii) – The Public Interest

In relation to clause 4.6(4)(a)(ii) of the LEP, the proposed development is in the public interest because it is consistent with the objectives of the applicable minimum lot sizes and special provisions for dual occupancies standard under clause 4.1A as provided above in section 4, and the objectives for development in the R2 Low Density Residential zone as set out below.

The land is located in the R2 Low Density Residential zone. The objectives of the R2 Low Density Residential zone 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.*
- *To allow for certain non-residential uses that are compatible with residential uses and do not adversely affect the living environment or amenity of the area.*
- *To ensure suitable landscaping in the low-density residential environment.*
- *To minimise and manage traffic and parking impacts.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To promote a high standard of urban design and local amenity.*

The development is compatible with the zone objectives as:

- The proposed development will provide four new dwellings to cater for the housing needs of the community within a low-density environment.
- The proposed development will not impact on surrounding land uses that provides facilities and services to meet the day to day needs of residents.
- The proposal does not include any non-residential uses.
- The proposed development provides compliant and suitable landscaping across both lots. Landscaping and retention of select existing trees on site are used as a key characteristic in the design of the development and provide generous landscaped areas in the front and rear yards.
- The proposed dwellings will provide two (2) car spaces within each lot which will reduce the impact on street parking for the locality.
- The proposal is not considered to create any conflict between land uses and/or land zones.

- The proposed dwellings provide a high standard of urban design. The appropriate size and visual features of this contemporary development also create the potential for a cohesive outlook along the street. The proposal generally retains surrounding amenity.

The variation to the minimum lot sizes and special provisions for dual occupancies does not render the development incompatible with the zone objectives, in accordance with the approach of the former Chief Judge, Justice Pearlman in Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21, in Paragraph [27]:

> 'The guiding principle, then, is that a development will be generally consistent with the objectives, if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, nor even that it is compatible.'

Taking into consideration the above, the proposed development is in the public interest as it is consistent with the objectives of the development standard and the R2 Low Density Residential zone. For these reasons, the proposal and the aforementioned variation does not undermine the integrity of the Minimum lot sizes and special provisions for dual occupancies development standard and its objectives, as well as the zoning objectives which have been adopted by Council as being in the public interest.

Clause 4.6 (4)(b) - The Concurrence of the Planning Secretary

Clause 4.6(4)(b) of the LEP requires the concurrence of the Secretary (of the Department of Planning, Industry and Environment) before the consent authority can exercise the power to grant development consent for development that contravenes a development standard.

The judgement by Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* clarifies the requirements pursuant to clause 4.6 (4)(b), stating that:
Paragraph 28 - 29 of the judgement states: -

> *The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority,*

that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: Fast Buck$ v Byron Shire Council (1999) 103 LGERA 94 at 100; Wehbe v Pittwater Council at [41].

Accordingly, the matters in clause 4.6(5) of the LEP should still be considered when exercising the power to grant development consent for development that contravenes a development standard (Fast Buck$ v Byron Shire Council (1999) 103 LGERA 94 at 100 and Wehbe at [41]).

Clause 4.6 (5) states that:

(5) In deciding whether to grant concurrence, the Secretary is required to consider the following:

a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
b) the public benefit of maintaining the development standard, and
c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

The proposal is not likely to raise any matter of significance for State or regional environmental planning. As addressed above, the non-compliance with the minimum lot sizes and special provisions for dual occupancies standard is considered to be in the public interest, and accordingly the public benefit, because the proposed development is consistent with the objectives of the minimum lot sizes and special provisions for dual occupancies standard and the objectives of the R2 Low Density Residential zone.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted under clause 4.6(5) of the LEP. The exceedance of the standard will not result in adverse amenity impacts and is in the public interest.

6.0 CONCLUSION

The purpose of the application is to apply for the demolition of the existing structures, construction of two new dual occupancies and subsequent Torrens title subdivision of two (2) lots into four (4) lots at 113-115 Faraday Road Padstow. The nature of the proposal necessitates a variation to the minimum lot sizes and special provisions for dual occupancies development standard; however, the proposal will be commensurate in bulk and siting to surrounding development within the locality.

As development standards tend to be strictly numerical in nature, they fail to take into consideration the nature of the development, any site constraints, or qualitative aspects of the development or of the particular circumstances of the case. Clause 4.6 of the standard instrument LEP allows such an analysis to be carried out.

It has been demonstrated in this request that strict compliance with the minimum lot sizes and special provisions for dual occupancies development standard is both unreasonable and unnecessary and that there are sufficient environmental planning grounds to allow Council to form the opinion of satisfaction that this written request has adequately addressed the matters required to be demonstrated by Cl.4.6(3)(a) and (b).

Therefore, I request that council support the variation on the basis that this Clause 4.6 variation demonstrates that strict compliance with the development standard is both unreasonable and unnecessary and that there are sufficient environmental planning grounds to justify a variation to the development standard.

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