8/6/2021

(CL 4.6 VARIATION TO THE MINIMIM SUBDIVISION LOT SIZE AT 6 BRIGHTON STREET FRESHWATER PREPARED FOR SATTLER AND ASSOCIATES (LAWYERS) ON BEHALF OF MR. GREG MAILMAN (OWNER)

PREPARED BY

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Introduction

This submission has been prepared in response to Northern Beaches Council refusal of DA2021/0089 related to a proposed subdivision at 6 Brighton Street Freshwater, on 26 May 3021, for a number of reasons including:

i. *Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.1 Minimum Subdivision Lot Size of the Warringah Local Environmental Plan 2011.*

ii. *ii. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.6 Exceptions to Development Standards of the Warringah Local Environmental Plan 2011.*

This submission seeks to justify a variation of the subdivision control standard applicable to the subject land, having regard to the requirements of the Environmental Planning and Assessment Act, 1979, Warringah Local Environmental Plan 2011, and relevant Land and Environment Court decisions.

In accordance with the requirements of Clause 4.6 of the Warringah Local Environmental Plan 2011, the report concludes that the applicable subdivision control standard in this instance is both unreasonable and unnecessary, there are sufficient environmental planning grounds to justify contravening the development standard, and approval of the subject application would be in the public interest.

Accordingly the subject application is recommended for approval.

Background;

19 March 2021 the Development Application was lodged with Council.

24 March 2021 to 7 April 2021the Development Application was publicly exhibited.

3 May 3021 the Council wrote to the applicant requesting a hydraulic report and model showing the 1% AEP stormwater flow over the Site, prepared by a chartered professional civil engineer.

14 May 2021, the Council granted the applicant an extension to provide the requested further information by 24 May 2021.

26 May 2021 as the applicant was unable to respond to the Council's request in the time allocated, Council determined the Development Application by way of refusal.

PROPOSED DEVELOPMENT

It is proposed to subdivide the subject land as shown on the attached plan.

Lot 1 has a frontage of 10.058 metres to Brighton Street, and lot 2 will have a similar frontage but comprises 7.887 metres to Brighton Street and a splay corner of 3.05 metres at the intersection of Brighton Street and the unmade Corella Street.

Both lots have similar side boundaries varying in length from 42.05 metres to 44.06 metres.

Lot 1 has an area of 442.2 square metres and Lot 2 an area of 441.7 square metres.

It is proposed that the existing dwelling be demolished prior to the issue of the subdivision certificate.

1.0 Warringah Local Environmental Plan 2011(WLEP)

1.1 Clause 2.2 and the Land Use Table

Clause 2.2 and the Land Zoning Map provide that the subject site is zoned R2 Low Density Residential.(the R2 zone) and the Land Use Table in Part 2 of MLEP 2013 specifies the following objectives for the R2 zone:

- *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.*

The proposed development is for the purpose of a subdivision which is a permissible use in the R2 zone.

1.2 Clause 4.1 - **Minimum subdivision lot size** provides as follows:

(1) The objectives of this clause are as follows—
(a) to protect residential character by providing for the subdivision of land that results in lots that are consistent with the pattern, size and configuration of existing lots in the locality,

(b) to promote a subdivision pattern that results in lots that are suitable for commercial and industrial development,

(c) to protect the integrity of land holding patterns in rural localities against fragmentation,

(d) to achieve low intensity of land use in localities of environmental significance,

(e) to provide for appropriate bush fire protection measures on land that has an interface to bushland,

(f) to protect and enhance existing remnant bushland,

(g) to retain and protect existing significant natural landscape features,

(h) to manage biodiversity,

(i) to provide for appropriate storm water management and sewer infrastructure.

(2) This clause applies to a subdivision of any land shown on the Lot Size Map that requires development consent and that is carried out after the commencement of this Plan.

(3) The size of any lot resulting from a subdivision of land to which this clause applies is not to be less than the minimum size shown on the Lot Size Map in relation to that land.

(3A) For the purposes of sub clause (3), in calculating the size of a lot the area of any access corridor (including any right of carriageway, access way or other area that provides for vehicle access) is to be excluded, whether the access corridor is to be created or is in existence at the time of the application for development consent for the subdivision.

(4) This clause does not apply in relation to the subdivision of any land—
(a) by the registration of a strata plan or strata plan of subdivision under the Strata Schemes Development Act 2015, or

(b) by any kind of subdivision under the Community Land Development Act 1989.

In accordance with this clause the minimum subdivision size is 450 square metres.

It is proposed to subdivide the subject into two allotments, with Lot 1 having an area of 442.2 square metres and Lot 2 having an area of 441.7 square metres.

1.3 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of WLEP provides:

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

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The latest authority in relation to the operation of clause 4.6 is the decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 ("*Initial Action*"). *Initial Action* involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1) (a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of WLEP provides:

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

Clause 4.1 (the minimum lot size standard development standard) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of WLEP.

Clause 4.6(3) of WLEP provides:

(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:

(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 proposed development does not comply with the minimum lot subdivision development standard pursuant to clause 4.1 of WLEP which specifies an minimum lot size of 450 square metres, however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

Clause 4.6(4) of WLEP provides:

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]).

The first precondition is found in clause 4.6(4) (a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4) (a) (i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3) (a) (i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4) (b). The second precondition of satisfaction requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

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.

Clause 4.6(5) of WLEP provides:

(5) In deciding whether to grant concurrence, the Secretary must consider:

(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.

As these proceedings are the subject of an appeal to the Land & Environment Court, 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] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development.

Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.1 of WLEP from the operation of clause 4.6.

2. The Nature and Extent of the Variation

2.1 This request seeks a variation to the minimum subdivision lot size standard contained in clause 4.1 of WLEP.

2.2 Clause 4.1(3) of WLEP specifies a minimum lot size of 450 square metres for the subject locality

2.3 The subject application proposes two allotments of 442.2 square metres and 441.7 square metres.

2.4 That is a variation of 1.7% and 1.8% respectively.

3. Relevant Case law

3.1 In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29] as follows:

13. 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.

14. 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: see Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000] HCA 5 at [28]; Winten Property Group Limited v North Sydney Council (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].

15. 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.

16. As to the first matter required by cl 4.6(3) (a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in Wehbe v Pittwater Council at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.

17. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

18. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

19. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

20. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and

hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*

22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

23. *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.*

24. *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].*

25 *The consent authority, or the Court on appeal, 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 cl 4.6(3) (a) and (b). As I observed in Randwick City Council v Micaul Holdings Pty Ltd at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3) (a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3) (a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see Wehbe v Pittwater Council at [38].

26. *The second opinion of satisfaction, in cl 4.6(4) (a) (ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4) (a) (ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(ii).*

27. *The matter in cl 4.6(4) (a) (ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).*

28. *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.*

29. *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].

3.2 The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.1 of WLEP a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

   (a) compliance is unreasonable or unnecessary; and

   (b) there are sufficient environmental planning grounds to justify contravening the development standard ?

3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.1 and the objectives for development in the R2 zone?

4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.4 of MLEP?

4. Request for Variation

4.1 Is clause 4.1 of WLEP a development standard?

The definition of "development standard" in clause 1.4 of the EP&A Act includes:

*(a) the **area** (my emphasis), 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,*

Clause 4.1 relates to a minimum lot size. Accordingly clause 4.1 is a development standard.

4.2 Is compliance with clause 4.1 unreasonable or unnecessary?

(a) This request relies upon the 1st, 2nd and 4th ways identified by Preston CJ in *Wehbe*.

(b) The first way in *Wehbe* is to establish that the objectives of the standard are achieved. The second way in *Wehbe* is to establish that an objective is not relevant to the development. The fourth way in *Wehbe* is to establish that the development standard has been abandoned by Council's own actions in approving development that does not comply with the standard.

(c) Each objective of the minimum lot size standard and reasoning why compliance is unreasonable or unnecessary is set out below:

(a) to protect residential character by providing for the subdivision of land that results in lots that are consistent with the pattern, size and configuration of existing lots in the locality,

It is considered that the proposed subdivision is consistent with the relevant objectives of this clause in that it:

- protects residential character by providing for the subdivision of land that results in lots that are not inconsistent with the pattern, size and configuration of existing lots in the locality,
- reflects the existing pattern of subdivision in this residential zone and regulates the density of lots to ensure that it is of a minimum size that would be sufficient to provide a useable area for building and landscaping**,**
- In addition, whilst not part of this application, any future development is capable of maintaining the character of the locality and streetscape and, in particular, the prevailing subdivision pattern.

(b) to promote a subdivision pattern that results in lots that are suitable for commercial and industrial development,

This objective is not applicable to the subject application, because it relates to a residential subdivision, not a commercial or industrial development.

(c) to protect the integrity of land holding patterns in rural localities against fragmentation,

This objective is not relevant to the subject application, because it relates to a residential subdivision, not a subdivision within a rural locality.

(d) to achieve low intensity of land use in localities of environmental significance,

This objective is not applicable to the subject application, because the site has not been identified as being environmentally significant.

(e) to provide for appropriate bush fire protection measures on land that has an interface to bushland,

The subject land does not have an interface with bushland, and has not been identified within a bush fire prone land.

(f) to protect and enhance existing remnant bushland.

The subject land is not affected by remnant bushland.

(g) to retain and protect existing significant natural landscape features.

The subject land does not have any existing natural landscape features***.***

(h) to manage biodiversity.

The subject land has not been identified as being within an area of biodiversity.

(i) to provide for appropriate storm water management and sewer infrastructure*.*

A detailed storm water assessment has been carried out, and is the subject of a separate report. Sewer infrastructure is accessible to the subject land.

4.3 *Are there sufficient environmental planning grounds to justify contravening the development standard?*

It is considered that there are sufficient environmental planning grounds to justify contravening the development standard as detailed below.

- The proposed subdivision satisfies the objectives of the R2 Residential zone as well as the objectives of the standard for minimum lot size.
- A variation to the minimum lot size in this instance would provide an opportunity for an increase in the variety and choice of housing which would otherwise not be available if the minimum lot size was not varied, given the availability of existing infrastructure in this locality.
- Each allotment is of a sufficient size to adequately accommodate a usable area for both building and landscaping without compromising the overall appearance of density within this locality.
- The proposed subdivision is not inconsistent with the subdivision pattern along the Brighton Street frontage and character of the locality.
- The proposed subdivision will not have adverse impact on the streetscape of Brighton Street, and any subsequent development of those two allotments will have no adverse impacts in terms of visual intrusion, and or loss of solar access.
- Approval of the proposed subdivision and the subsequent erection of two dwellings will facilitate the new dwellings having a 500mm freeboard above the predicted 1 in 100 year ARI water surface level for the floor of habitable rooms.
- The provision of a waterproof reinforced masonry fence along the eastern boundary of the subject property, will ensure that flood flows from Corella Street and other public areas uphill from the subject property, will not affect the subject property in any storm up to & beyond the 1% AEP Storm.
- The installation of a flood proof fence along the eastern boundary will also improve the flooding outcomes for existing properties to the west of the subject site.

In that regard, whilst there is no requirement that the development comply with the objectives set out in clause 4.6(1) it is relevant to note that objective (b) provides:

*"to achieve better outcomes **for and from*** (my emphasis) *development by allowing flexibility in particular circumstances."*

It should be noted at the outset that in *Initial Action,* the Court held that it is incorrect to hold that the lack of adverse impact on adjoining properties is not a sufficient ground justifying the development contravening the development standard when one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse impacts.

The variation to the development standard, and or any subsequent development should not reduce the amenity of other dwellings in the vicinity of the site or the public domain, but will inevitably lead to the demolition of an existing dwelling which is in need of a significant upgrade and its replacement with two newly designed dwellings.

It is considered that the absence of external impacts, constitute sufficient environmental planning grounds to justify a small departure from the development standard.

The proposed development also achieves the relevant objects in Section 1.3 of the EPA Act, in that the proposed subdivision specifically:

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- Promotes the orderly and economic use and development of land through the efficient use of infrastructure (roads, water, sewer, electricity, community services, and facilities), whilst meeting the housing needs of the community (1.3 (c)).
- A consequence of the proposed subdivision is that it increases the opportunity to provide a variety of housing and choice within the local government area (1.3(d).
- Does not adversely impact on the *conservation of threatened and other species of native animals and plants, ecological communities and their habitats* (1.3(e)).

- A consequence of the proposed subdivision will be provides an opportunity to replace the deteriorating existing dwelling, with two new dwelling of an improved design, as well as address issues related to flooding, and stormwater management (1.3(g)).

In that regard it is considered that the above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the provision of improved stormwater management.

These are not simply benefits of the development as a whole, but are benefits emanating from the breach of the minimum lot standard control.

It is noted that in *Initial Action,* the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

> *86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*
>
> *87. The second matter was in cl 4.6(3) (b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the*

development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

As outlined above, it is considered that in many respects, the proposed subdivision will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

4.4 **Is the proposed development in the public interest because it is consistent with the objectives of clause 4.1, and the objectives of the R2 Low Density Residential zone?**

(a) **Section 4.2** of this written requests demonstrates that the proposed development meets the relevant applicable objective of clause 4.1. As the proposed development meets the applicable objective it follows that the proposed development is also consistent with that objective.

(b) Each of the objectives of the R2 zone and the reasons why the proposed development is consistent with each objective is set out below:

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

It is considered that the proposed development is consistent with this objectives as the proposed subdivision, will provide an opportunity to increase the variety and choice of housing to meet the community needs 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.***

Not Applicable to the proposed development.

4.5 Has council obtained the concurrence of the Director-General?

The Court, by reason of Section 39(6) of the Court Act, can assume the concurrence of the Director-General with regards to this clause 4.6 variation pursuant to the Assumed Concurrence notice issued on 21 February 2018.

4.6 Has the Court considered the matters in clause 4.6(5) of WLEP?

(a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it relates to the subdivision of land. Furthermore, the proposed subdivision, is not readily transferable to any other site in the immediate locality, wider region of the State, and the scale or nature of any subsequent proposed development does not trigger requirements for a higher level of assessment, or necessarily set a precedent for developments of a similar nature.

(b) It is considered that the proposed subdivision is in the public interest because it complies with the objectives of the development standard and the objectives of the zone, and as such there appears to be no significant public benefit in maintaining the development standard in this instance.

Accordingly, it can be concluded that there are no other matters required to be taken into account by the secretary before granting concurrence.

In summary, it is considered that the proposal satisfies all of the requirements of clause 4.6 of WLEP 2011 and exception to the development standard is reasonable and appropriate in the circumstances of the case, and as such the application is acceptable for approval.