



## **Clause 4.6 Variation Request**

**Clause 7.14 - Minimum Site  
Width**


**14 Cosgrove Avenue, Keiraville**

Submitted to Wollongong City Council

On behalf of SureWin Parkview Pty Ltd

JANUARY 2020

## REPORT REVISION HISTORY

Revision	Date Issued	Revision Description	
01	12/12/2019	Draft Clause 4.6 Variation Report	
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02	06/01/2020	Final Clause 4.6 Variation Report	
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## 1. EXECUTIVE SUMMARY

The proposal involves the development of a multi-dwelling housing development and associated works on the land at 14 Cosgrove Avenue, Keiraville (the subject site).

The subject site is located within the residential areas of Keiraville and is zoned part E2 Environmental Conservation and part R2 Low Density Residential under the *Wollongong Local Environmental Plan 2009* (WLEP 2009). The proposed 'multi dwelling housing' development is contained wholly within the R2 zoned portion of the site and is a permissible land use with consent in the R2 zone.

This request has been prepared pursuant to Clause 4.6 of the WLEP 2009. The purpose of this Clause 4.6 variation request is to address a variation to Clause 7.14 - Minimum site width under the WLEP 2009, which specifies that the site area on which a multi dwelling housing development is to be carried out must have a dimension of at least 18 metres.

The *Wollongong Development Control Plan 2009* (WDCP 2009), Chapter B1, Sections 5.1.1 and 5.1.2, further provides objectives and relevant development controls for achieving clause 7.14 (1) of the WLEP 2009. Specifically, the DCP states that the site width is to be measured for the " ... full width of the site, perpendicular to the property side boundaries. This control may be varied for irregular shaped lots or where the development meets the requirements of setbacks, private open space, visual amenity, solar access, built form and landscaping". The WDCP 2009 objectives and development controls have been considered as part of this variation request. This approach is consistent with *Blasi v Wollongong City Council* [2018] NSWLEC 1074.

The subject site has a street frontage of 18.62 metres and at the proposed building line the width of site measures approximately 70 metres. The front portion of the site (up to a depth of approximately 45 metres), however, has a width of 16.88 metres when measured perpendicular to the property side boundaries. This is a variation of 1.12 metres in this portion of the site.

The minor variation occurs because of the irregular shape of the lot, with a narrower street frontage and very wide dimensions beyond the access handle. The reduced minimum site width, however, does not prevent a suitable development from being designed for the site with all minimum setbacks, private open space, visual amenity, solar access, built form and landscaping requirements being met.

The area on which the housing is proposed to be carried out (i.e. the area inside the proposed ring road) has dimensions of approximately 73m (width) and 261m (depth). The overall dimensions of the R2 zoned portion of the site (excluding the 16.88m wide access handle) are approximately 140m (width) and 339m (depth).

Such dimensions are clearly generous and can easily accommodate residential development without unreasonable amenity impacts on the proposed and surrounding residences. The site width allows the development to integrate within the streetscape. Although Clause 7.14 does not include any objectives, it is assumed that these matters (i.e. suitable amenity and streetscape integration) are appropriate objectives for the development standard.

The small portion of the subject site that is below the minimum 18 metre site width requirement is proposed to act as the main vehicular and pedestrian entry (i.e. an access handle). This portion of the site will not include any multi-dwelling housing and does not propose any habitable floor area. Furthermore, it does not include any residential development which could potentially result in unreasonable amenity or built form related impacts.

This request demonstrates that there are no environmental impacts as a consequence of this contravention of the minimum site width standard and that there are sufficient environmental planning grounds to justify the variation. The development as a whole satisfies the objectives of the R2 – Low Density Residential zone and is in the public interest. Strict adherence to the minimum site width standard for the entire portion of the site in this instance is therefore unreasonable and unnecessary.

## 2. INTRODUCTION

This request that has been prepared in accordance with clause 4.6 of the *Wollongong Local Environmental Plan 2009* (WLEP 2009). The request seeks an exception to the strict application of a development standard prescribed by Clause 7.14 of the WLEP 2009. The exception relates to a Development Application (DA) proposing multi dwelling housing at 14 Cosgrove Avenue, Keiraville (the subject site).

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards and achieve better outcomes for, and from, development.

As demonstrated, given there are no environmental amenity impacts it is appropriate in this circumstance to apply a degree of flexibility to this development standard, especially given it impacts only a small portion of the overall site that does not have any habitable space but rather acts as an accessway with landscaping.

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130):

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)];
3. 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 [clause 4.6(4)]

This request also addresses the requirement for the concurrence of the Secretary as required by clause 4.6(4)(b).

### 3. STANDARD TO BE VARIED

The standard that is proposed to be varied is the minimum site dimension development standard which is set out in clause 7.14(1) of the Wollongong Local Environmental Plan 2009 as follows:

#### **7.14 Minimum site width**

*Development consent must not be granted for development for the purposes of multi dwelling housing unless the site area on which the development is to be carried out has a dimension of at least 18 metres.*

The numerical value of the development standard applicable in this instance is 18m.

The Minimum site width development standard is not identified under sub-clause 4.6(8). The development standard to be varied is therefore not excluded from the operation of Clause 4.6 of the WLEP.

With specific reference to the site width requirement for multi-dwelling housing, the *Wollongong Development Control Plan 2009* (WDCP 2009), Chapter B1, Sections 5.1.1 and 5.1.2, provides objectives and relevant development controls for achieving clause 7.14 (1) of the WLEP 2009.

#### **5.1.1 Objectives**

*(a) To allow for development of sites which are of sufficient size to accommodate the required building envelope, car parking and landscaping requirements.*

*(b) To encourage amalgamation of allotments to provide for improved design outcomes.*

#### **5.1.2 Development Controls**

*1. The Wollongong LEP requires a minimum site width of 18 metres for multi-dwelling development. Site width is measured for the full width of the site, perpendicular to the property side boundaries.*

*2. A minimum site width of 18m is required for attached dwelling development. Site width is measured for the full width of the site, perpendicular to the property side boundaries. This control may be varied for irregular shaped lots or where the development meets the requirements of setbacks, private open space, visual amenity, solar access, built form and landscaping.*

*3. Sites should be amalgamated, where required, to achieve the minimum site width requirement.*

## 4. EXTENT OF VARIATION

The area on which the multi-dwelling housing will be carried out has a site width much greater than the 18 metre minimum requirement as demonstrated in the following table.

Table 1: Site dimensions

Portion of the site	Approx. Width	Approx. Depth
Total R2 zoned development site (excluding the 16.88m "access handle")	140 metres	339 metres
Developable area (i.e. portion of site located inside the proposed ring "road" where the dwellings are to be constructed)	73 metres	261 metres
Access handle (i.e. up to a depth of approximately 45 metres from the front property boundary)	16.88 metres	45 metres
Street frontage (i.e. eastern boundary)	18.62 metres	N/A
Proposed building line	Approximately 70 metres	N/A

At the proposed building line, the width of site measures approximately 70 metres and at the front property boundary the width of the site is 18.62 metres.

The front portion of the site (up to a depth of approximately 45 metres), however, has a width of 16.88 metres when measured perpendicular to the property side boundaries. This is a variation of 1.12 metres in this portion of the site. The variation is demonstrated in **Figure 1**.

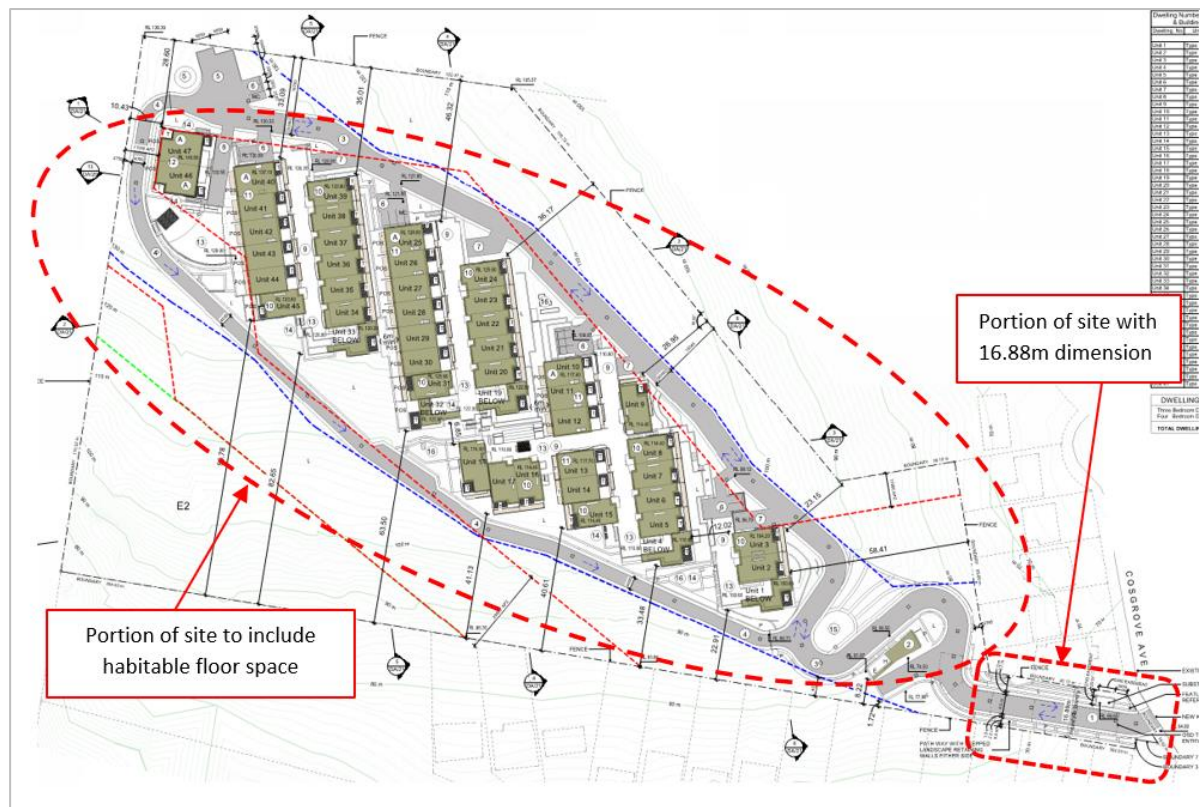


Figure 1: Extract of site plan demonstrating extent of variation (Source: Edminston Jones Architects)

The front portion of the site, being the area with the 16.88 metres site width, is proposed to act as an access handle accommodating a generous 2-way vehicular and pedestrian entry framed by formal landscaped features. This portion of the site does not propose any multi-dwelling housing or habitable floor area as represented in **Figure 2**.



Figure 2: Site entrance and access handle (Source: Edminston Jones Architects)

## 5. UNREASONABLE OR UNNECESSARY

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by clause 4.6(3)(a) of the WLEP.

The Court has held that there are at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary.

The five ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; and
5. The zoning of the land is unreasonable or inappropriate

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC) and *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118).

In this case, each of the five ways has been considered as follows.

### 5.1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The following table considers whether the element which contravenes the development standard (i.e. being the front portion of the site only) achieves the objectives of the development standard (Test 1 under *Wehbe*).

Table 2: Achievement of assumed objectives of Clause 7.14 Minimum site width development standard of WLEP 2009.

Objective	Discussion
There are no objectives for the minimum site width standard provided in clause 7.14 (1) of the WLEP 2009. The <i>Wollongong Development Control Plan 2009</i> (WDCP 2009), Chapter B1, Sections 5.1.1 and 5.1.2, however, provides objectives and relevant development controls for achieving clause 7.14 (1) of the WLEP 2009. This is consistent with <i>Blasi v Wollongong City Council</i> [2018] NSWLEC 1074).	
(a) To allow for development of sites which are of sufficient size to accommodate the required building envelope, car parking and landscaping requirements.	<p>The minor variation occurs because of the irregular shape of the lot and is limited to the site access handle only. The subject site has a street frontage of 18.62 metres and at the proposed building line the width of site measures approximately 70 metres.</p> <p>The area on which the housing is proposed to be carried out (i.e. the area inside the proposed ring road) has dimensions of approximately 73m (width) and 261m (depth).</p> <p>Such dimensions are clearly generous and can easily accommodate residential development without unreasonable amenity impacts on the proposed and surrounding residences. The reduced minimum site width does not prevent a</p>

Objective	Discussion
	suitable development from being designed for the site with all minimum setbacks, parking, deep soil and landscaping requirements being exceeded.
(b) To encourage amalgamation of allotments to provide for improved design outcomes.	The R2 portion of the site has an area of 36,753m <sup>2</sup> with a street frontage of 18.62 metres and a width of approximately 70 metres at the proposed building line. The generous overall site dimensions and land area do not warrant further amalgamation of the site.
<p>In addition to the above DCP objectives, typically the purpose of this standard is to ensure that the proposal and any existing or future surrounding development have adequate amenity.</p> <p>Such standards typically seek to ensure that the bulk and scale impacts of the development are not unreasonable in relation to the streetscape.</p> <p>In an R2 Low Density Residential zone the site width would be expected to accommodate an appropriately scaled building footprint, the vehicular access arrangements and landscaped side setbacks.</p>	<p>The assumed objectives would be satisfied as only a portion of the subject site does not satisfy the development standard in question and this portion of the site will not include any multi dwelling housing or habitable floor space.</p> <p>The extent of built form within the non-complying portion of the site is extremely minor and is limited to a 2-way driveway, stairs, retaining walls, substantial landscaping as well as ancillary items such as a substation, letterboxes and drainage. Such elements would not result in any unreasonable impacts to the streetscape or to the amenity of the proposed or surrounding dwellings. The actual street frontage width is 18.62 metres and complies.</p> <p>The portion of the subject site which is proposed to include the dwellings/habitable floor space (i.e. the area inside the proposed ring road), has generous dimensions of approximately 73 metres (width) and 261 metres (depth). The subject site provides sufficient area to avoid unreasonable impacts on the subject site, as well as to existing development on adjoining allotments.</p>

As demonstrated in Table 1 above, the assumed objectives of the minimum site width development standard are achieved notwithstanding the proposed variation.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC and *Initial Action Pty Limited v Woollahra Municipal Council* [2018], therefore, compliance with the minimum site width development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met.

For the sake of completeness, the other recognised ways have also been considered as follows.

## 5.2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;

On this occasion we do not believe that the underlying objective or purpose is not relevant to the development and therefore we do not rely on this reason.

**5.3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.**

We do not consider the underlying objective would be defeated or thwarted if compliance was required, even though we have demonstrated above that the assumed objectives of the standard are also achieved by the part of the site that does not comply with the development standard. In this regard we do not rely on this reason.

**5.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or**

We do not rely on this reason.

A review of Council's 'Variation to Development Standards' Register indicates, however, that on multiple occasions Council has supported variations to the minimum site width requirement on sites that are irregular in shape. In some of these instances, a variation has been granted where the reduced site width affects the front of the site only and where wider allotment dimensions are provided behind. This is because it is recognised that the wider dimensions are appropriate for multi-dwelling housing, as is the case here. The shortfall is minor and has not prevented a suitable design from occurring on the subject site.

**5.5. The zoning of the land is unreasonable or inappropriate.**

We do not consider that the zoning of the land is unreasonable or inappropriate and therefore we do not rely on this reason.

## 6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In this section it is demonstrated that there are sufficient environmental planning grounds to justify the minor non-compliance with the minimum site width development standard as required by clause 4.6(3)(b) of the LEP.

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

As discussed in **Section 4**, the portion of the site which contravenes the minimum site width development standard is the part of the site containing the main vehicular and pedestrian entry point to the site (refer to **Figures 2 and 3**). The actual street frontage width is 18.62 metres and complies.

The environmental planning grounds to justify the departure of the minimum site width standard are as follows:

### 6.1.1. Objects of 'the Act' are satisfied

That portion of the site which does not satisfy the development standard in question does satisfy the objects of the Environmental Planning & Assessment Act, 1979 (as amended) ('EP&A Act'), for the following reasons:

- It promotes the orderly and economic development of the R2 zoned portion of the subject site by providing pedestrian and vehicular access;
- It does not result in any unreasonable impacts to the environment, including the natural, built, economic and social environment. Instead, it is likely to result in positive impacts, such as increasing housing opportunities; and,
- 'Good design and amenity of the built environment' will be achieved on the portion of the site which does not comply with the standard. This is achieved with landscaping and low scale-built form (i.e. retaining walls, substation, letterbox wall, stairs and front fencing/walls) which provides an improved sense of address and presentation to the street compared to the current offering as shown in **Figure 3**.



Figure 3: Comparison of existing and proposed site entrance (Source: Urbaine Architecture and Edminston Jones Architects)

### 6.1.2. Minor exception

The proposal does not satisfy the standard by 1.12m when measured perpendicular to the property side boundaries at the front portion of the site (up to a depth of approximately 45 metres). This is a minor quantity and would not fundamentally undermine the intent of the standard or set an undesirable precedent. The street frontage width complies as does the width of area identified suitable for development.

### **6.1.3. No unreasonable impacts**

The variation sought does not result in any unreasonable impacts. The portion of the site on which the variation is sought does not contain any habitable floor space and is limited to retaining walls, a substation, letterbox wall, stairs, driveway, front fencing/walls and extensive landscaping. As a result, there will be no impacts in terms of bulk and scale, overlooking, overshadowing or the like, to any adjoining properties from that portion of the site on which the variation is sought

### **6.1.4. Orderly and economic development of land**

If compliance with the standard is enforced, development of the subject site for the purposes of multi dwelling housing, as is permitted in the subject R2 - Low Density Residential zone, cannot be delivered. As such, the exception will facilitate the orderly and economic use of the land.

### **6.1.5. Wollongong DCP 2009 is satisfied**

Chapter B1, Section 5.1 of Wollongong DCP 2009 includes a minimum site width requirement of 18 metres for multi-dwelling housing. The objectives of the DCP requirement are addressed in Section 5.1 of this report.

Clause 5.1.2 (2.) specifically states that the site width control *"may be varied for irregular shaped lots or where the development meets the requirements of setbacks, private open space, visual amenity, solar access, built form and landscaping"*. (emphasis added)

The minor variation to the site width requirement occurs because the site is irregular in shape. At the front of the site near the street frontage, the site has a narrow access handle. Beyond the handle the site has very generous dimensions of approximately 140m (width) and 339m (depth).

The small portion of the subject site that is below the minimum 18 metre site width requirement is limited to the access handle only, which is proposed to act as the main vehicular and pedestrian entry to the site. This portion of the site will not include any multi-dwelling housing and does not propose any habitable floor area. Furthermore, it does not include any residential development which could potentially result in unreasonable amenity or built form related impacts.

Furthermore, the development complies with the setbacks, private open space, visual amenity, solar access, built form and landscaping requirements of the DCP.

The front, side and rear setbacks all exceed the minimum DCP requirements. Each dwelling has also been provided with a private open space area with minimum dimensions of at least 4m x 5m which is immediately accessible from the internal living areas. At least 70% (i.e. 74%) of the primary private open space areas receive at least 3 hours of solar access to 50% of the private open space area as required by the DCP. Appropriate building separation and screening has also been provided to ensure that a high level of privacy is provided to future residents.

The proposed development requires 11,026sq.m of landscaped area and 5,513sq.m of deep soil. The proposed development provides 21,209sq.m of landscaped area and 15,370sq.m of deep soil (both excluding the E2 zone) and therefore well exceed the minimum DCP requirement.

In compliance with the DCP all north facing living room windows receive at least 3 hours of sunlight between 9am and 3pm in midwinter. The additional overshadowing caused by the proposed development will not prevent any neighbouring property from receiving a minimum of 3 hours of sunlight to their main living areas between 9am and 3pm in mid-winter. Adequate solar access will also be maintained to the large backyards of the neighbour's properties.

Given the site is irregular in shape and that the development meets the design and layout requirements of the DCP, a minor variation to the site width control is considered acceptable in this case.

## 7. PUBLIC INTEREST

In this section it is explained how the proposed development will be in the public interest because it is consistent with the assumed objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out as required by clause 4.6(4)(a)(ii) of the LEP.

In section 5 it was demonstrated that the assumed objectives of the development standard are achieved notwithstanding the variation of the development standard.

The table below considers whether the proposal is also consistent with the R2 - Low Density Residential zone objectives that apply to the site under WLEP 2009 pursuant to clause 4.6(4)(a)(ii) of the LEP.

*Table 3: Consistency with R2 Low Density Residential Zone Objectives.*

Objectives of Zone R2 - Low Density Residential	Discussion
To provide for the housing needs of the community within a low-density residential environment.	<p>The R2 zone allows for multi-dwelling housing, which is recognised as being a compatible form of residential development in low-density residential environments.</p> <p>Keiraville currently provides a range of dwelling types including boarding houses, villas and townhouses, with 2016 Census data indicating that 27.5% of the suburb comprised of medium density housing forms.</p> <p>The proposal seeks to develop a vacant parcel of R2 zoned land that is already cleared, to provide additional homes for the growing population in the Illawarra. The proposed development will also further contribute to the diversity of housing choices in the area.</p> <p>At 0.25:1, the proposal's floor space ratio (FSR) is only 50% of the maximum 0.50:1 FSR permitted for the site according to the WLEP 2009.</p> <p>In this case, the objective is satisfied.</p>
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	<p>The proposal does not preclude the use of other sites within the subject locality for uses which serve the daily convenience needs of residents.</p> <p>In this case, the objective is satisfied.</p>

As demonstrated in Table 2, the proposal is consistent with the objectives of the zone and in **Section 5** it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

## **8. STATE OR REGIONAL ENVIRONMENTAL PLANNING**

In this section we consider whether contravention of the development standard raises any matter of significance for State or regional environmental planning, the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by clause 4.6(5).

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

As demonstrated already, the proposal is consistent with the objectives of the zone and the assumed objectives of the development standard and in our opinion, there are no additional matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application.

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence.

## 9. CONCLUSION

This submission requests a variation, under clause 4.6 of the Wollongong Local Environmental Plan 2009, to the minimum site width development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development because the objectives of the development standard are achieved notwithstanding non-compliance with the standard; and
- There are sufficient environmental planning grounds to justify the contravention.

We submit that the consent authority can be satisfied to the above and that the development achieves the, in this case, assumed objectives of the development standard and is consistent with the objectives of Zone R2 - Low Density Residential, notwithstanding non-compliance with the minimum site width standard and is therefore in the public interest.

We note that the concurrence of the Secretary can be assumed in accordance with Planning Circular PS 18-003.

On this basis, therefore, it is appropriate to exercise the flexibility provided by clause 4.6 in the circumstances of this application.