

## **Attachment C: Clause 4.6 Variation – Minimum Lot Size**

*The Development Standard to be varied and extent of the variation*

The development standard to be varied is Clause 4.1(3) of the *Wingecarribee Local Environmental Plan 2010* ('WLEP 2010') which states:

*(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.*

The Lot Size Map provides for a number of different minimum lot sizes across the site, corresponding to the varying zoning across the site. The proposed lot sizes and consideration of the relevant minimum lot sizes is outlined in **Table 1**. The zoning Map and the Lot Size Map for the site are illustrated in **Figures 1** and **2**.

**Table 1: Minimum Lot Sizes – Proposed Stage 1**

<b>MIN LOT SIZE</b>	<b>PROPOSED LOT SIZE</b>	<b>COMPLY</b>
R2 – 450m <sup>2</sup>	5 lots proposed – min 450m <sup>2</sup> Lot 1182 (public reserve) – 38,124m <sup>2</sup>	Yes Yes
R2 – 600m <sup>2</sup>	168 lots proposed - min 600m <sup>2</sup> 1 residue lot proposed – 883,697m <sup>2</sup>	Yes
R5 – 2000m <sup>2</sup>	None proposed	N/A
RE1 - 40Ha	Lot 1181 – 21,303m <sup>2</sup>	<b>No</b>
B1 – N/A	1 residue lot proposed – 1,809m <sup>2</sup>	N/A

As outlined in Table 1, all of the proposed residential lots and residue lots in Stage 1 comply with the minimum lot size, as well as the proposed public reserve surrounding Whites Creek (proposed Lot 1182).

Proposed Lot 1181, which comprises the Windbreak Buffer Planting Public Reserve along Yarrowa Road and consists of three (3) separate portions with a total overall lot area of 2.115 hectares (**Figure 3**), does not comply with the minimum lot size of 40 hectares. This proposed lot has an overall area of 21,152.7 square metres, being 37.885 hectares under the minimum lot size. Interestingly, the other portion of RE1 zoned land on the site is not subject to a minimum lot size (white area in Figure 2).

This proposed lot comprises a landscape buffer zone on the site's western boundary fronting Yarrowa Road to provide a windbreak and visual buffer, consistent with the concept plan in the DCP. This proposed public reserve will be embellished as part of the stage 1 application.

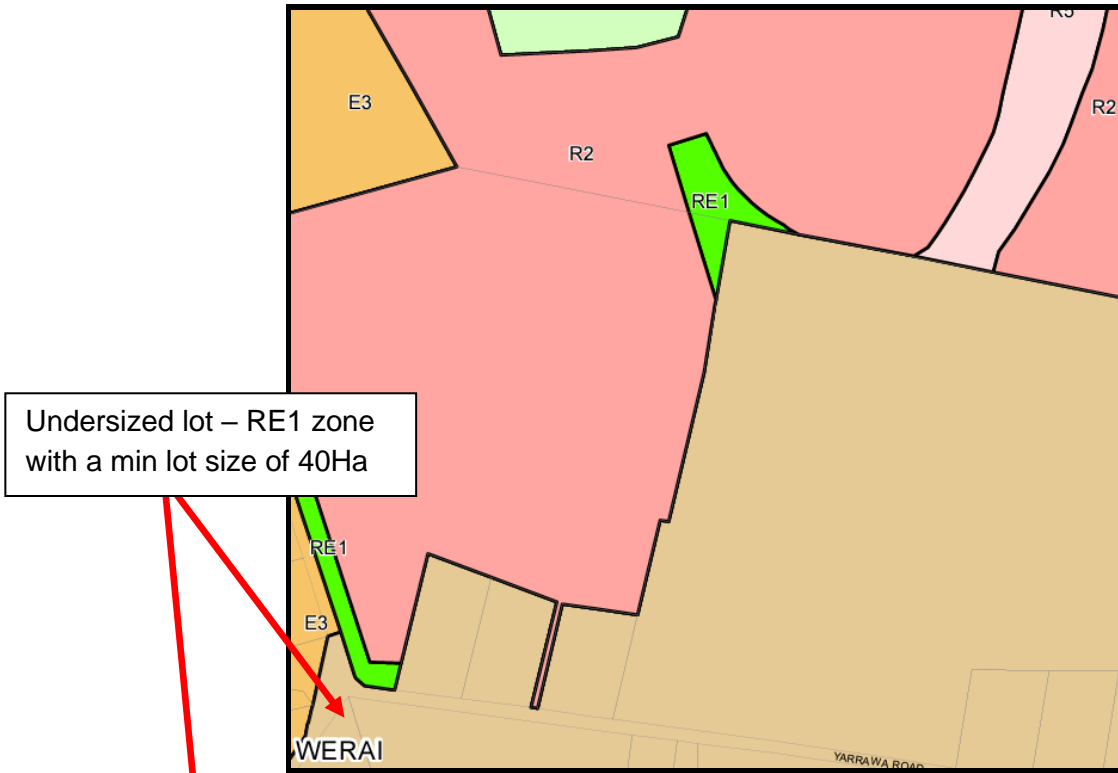


Figure 1: Zoning for the Site (Source: [www.legislaiton.nsw.gov.au](http://www.legislaiton.nsw.gov.au))

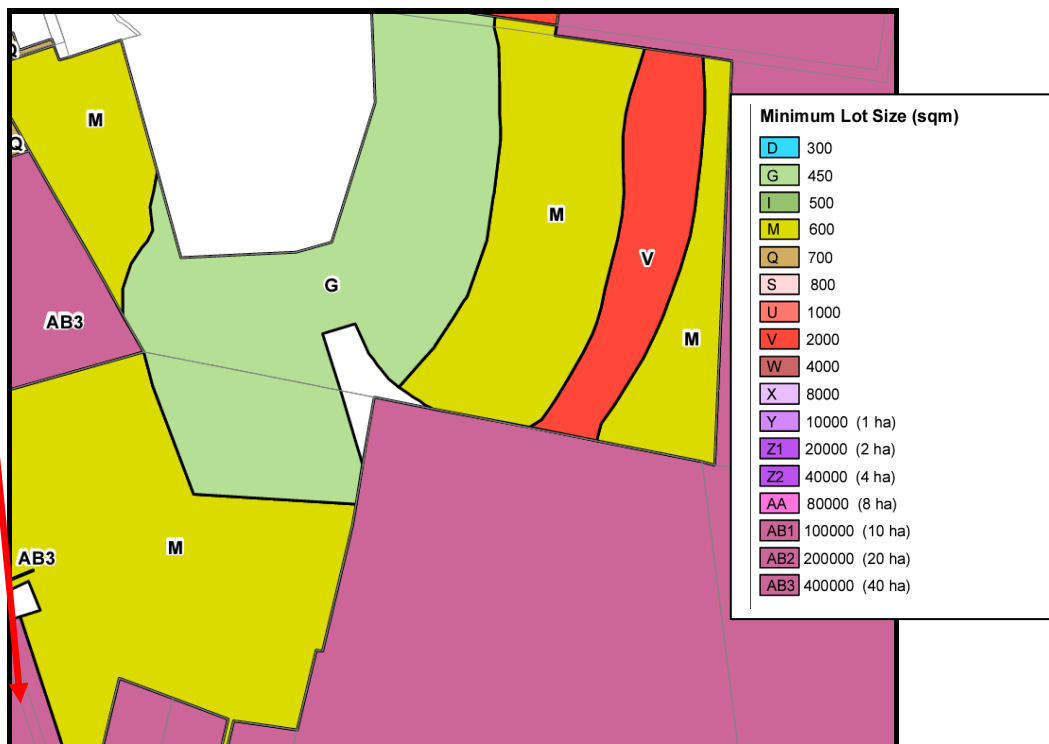
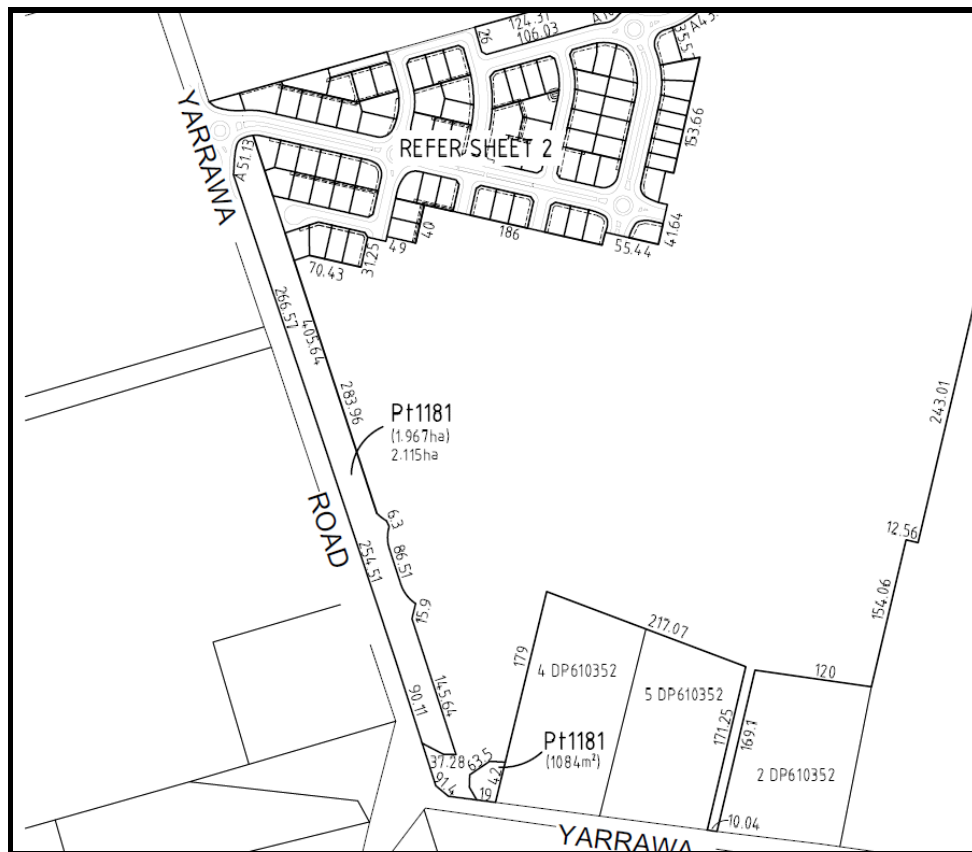


Figure 2: Minimum Lot Size Map (Source: WLEP 2010 – Map 7H)



**Figure 3: Proposed Plan of Subdivision (Source: JMD, Revision F, 27/04/2022)**

### *Variations to Development Standards*

Variations to development standards can be considered by the Council pursuant to Clause 4.6 of the WLEP 2010. The provisions of Clause 4.6 relevant to this proposal include the following:

- (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.*
- (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*
- (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.*

- (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 Planning Secretary has been obtained.*
- (5) *In deciding whether to grant concurrence, the Planning 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 Planning Secretary before granting concurrence.*

The exceptions to this clause outlined in Clause 4.6(6) do not apply to this proposal while Clause 4.6(8) also includes exceptions to this clause which are not relevant to this proposal. Clause 4.6(7) is a matter for the consent authority following determination of the application.

To support the non-compliance, the applicant has provided a request for a variation to Clause 4.1(3) of WLEP 2010 in accordance with Clause 4.6 of WLEP 2010. The Clause 4.6 request for variation is assessed below.

#### *Preconditions to be satisfied*

Preston CJ, in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* ('Initial Action'), outlined the permissive power in Clause 4.6(2) to grant development consent for a development that contravenes the development standard is subject to conditions. These conditions are set out in Clause 4.6(4) which 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 two preconditions include:

1. Tests to be satisfied pursuant to Cl 4.6(a) – this includes matters under Cl 4.6(3)(a) and (b) and whether the proposal is in the public interest (Cl 4.6(a)(ii)); and
2. Tests to be satisfied pursuant to Cl 4.6(b) – concurrence of the Planning Secretary.

These matters are considered below for the proposed development having regard to the applicant's Clause 4.6 request.

#### *First Precondition*

The first precondition requires the satisfaction of two (2) tests pursuant to Cl 4.6(4)(a) which includes:

- Clause 4.6(4)(a)(i) – whether the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), which requires the applicant to seek to justify the contravention by demonstrating:
  - that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Cl 4.6(3)(a)), and
  - that there are sufficient environmental planning grounds to justify contravening the development standard (Cl 4.6(3)(b)); and
- Clause 4.6(4)(a)(ii) – whether 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.

These tests for the first precondition are considered below.

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

There has been significant case law on this aspect of Clause 4.6 requests. Preston CJ, in Initial Action, reconfirmed the five common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary as outlined in *Wehbe v Pittwater Council (2007) NSWLEC 827* ('Wehbe'). 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.

The rationale is that development standards are not ends in themselves but means of achieving ends, as outlined in *Wehbe*, with the 'ends' being environmental or planning objectives, with compliance with a development standard the usual means by which that is achieved. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).

The applicant considers that the proposed development satisfies the first *Wehbe* test, in that the objectives of the standard are achieved notwithstanding noncompliance with the standards.

The objectives of the minimum lot size development standard pursuant to Clause 4.1(1) of the WLEP 2010 include the following:

- (a) to identify minimum lot sizes,*
- (b) to ensure that the subdivision of land to create new lots is compatible with the character of the surrounding land and does not compromise existing development or amenity.*

The applicant’s justification in relation to the first *Wehbe* test is considered below.

*It is considered that compliance with the 40ha development standard is unreasonable or unnecessary here principally because the proposed Lot 1181 will enable the achieving of the intended outcomes for this portion of the Precinct as envisaged by the RE1 zoning and the aforementioned Indicative Master Plan contained in the MVDCP, i.e. a landscaped visual and acoustic buffer of the development to Yarrowa Road and*

*to provide a windbreak to the estate. Non-compliance with the development standard does not prevent the achievement of the intended planning outcome.*

*Accordingly:*

- *the objectives of the standard are achieved notwithstanding non-compliance with the 40ha lot size standard.*
- *The underlying objective or purpose would be defeated or thwarted if strict compliance with the 40ha lot size development standard was required. Strict compliance would thwart development of the Precinct as envisaged by its land use zoning and the adopted Indicative Master Plan. Compliance is therefore considered unreasonable.*

Independent Planner comment:

The justification in this case is that the variation satisfies first Webhe test, that the objectives of the development standard are achieved notwithstanding noncompliance with the development standard. The minimum lot size objectives are considered below.

The third Webhe test is also outlined in the applicant's justification, which claims that the variation is acceptable by establishing that the underlying purpose is defeated or thwarted if compliance is required, such that compliance becomes unreasonable, is not supported. Ordinarily, the minimum lot size development standard is an important standard that sets out the requirements for subdivision to ensure future development can satisfy the planning controls.

*Objective (a) - to identify minimum lot sizes*

The proposal is not inconsistent with this objective, however, it does have limited relevance in this case.

*Objective (b) - to ensure that the subdivision of land to create new lots is compatible with the character of the surrounding land and does not compromise existing development or amenity.*

It is agreed that the proposed minimum lot size in this case is satisfactory as it allows for the new lot to be compatible with the size and layout of other parks proposed within the larger site and fulfills the planning purpose for this portion of land as outlined in the concept plan in the DCP. In these ways, it is considered that the proposed height exceedence is not contrary to this objective.

*There are sufficient environmental planning grounds to justify contravening the standard - Clause 4.6(3)(b)*

The grounds relied on by the applicant in the written request under this part of CI 4.6 must be "environmental planning grounds" by their nature, as outlined in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 ('*Four2Five*') and confirmed in *Initial Action*. While *environmental planning* is not defined in the EP&A Act, Preston CJ considered in *Initial Action* it would refer to grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in s 1.3 of the EPA Act.

The environmental planning grounds relied upon must be 'sufficient' in two respects, the first being that they must be sufficient to *justify* contravening the development standard with the focus being on the aspect or element of the development that contravenes the development standard and not on the development as a whole, and why that contravention is justified on environmental planning grounds. The second aspect relates to whether the written request

has *demonstrated* 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.

The applicant's justification is outlined below.

*Applicant's Justification:*

*It is considered that the following environmental planning grounds would sufficiently justify a contravention of the development standard:*

- (i) The variation would enable development in accordance with the adopted Indicative Master Plan for the Precinct.*
- (ii) The variation of the development standard would not result in any unintended environmental impacts by the development on its locality.*

Independent Planner comment:

In relation to the first aspect of sufficiency, the applicant justifies the lack of compliance with the minimum lot size as it allows for the provision of open space and the lack of any significant adverse amenity impacts on the adjoining properties. Having regard to the second test of sufficiency, it is considered that this variation request has demonstrated there are sufficient environmental planning grounds for the variation given it allows for the provision of the public reserve in accordance with the concept plan and does not result in any impacts to adjoining properties or the environment.

These reasons are considered to focus just on the aspect of the proposal which contravenes the development standard, being proposed Lot 1181 only, which is consistent with *Initial Action* and *Four2Five*.

The objects of the EP&A Act pursuant to Section 1.3 include several matters, however, for the purposes of this request, Objects (a), (c), and (g) are considered to be relevant and include:

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

*Object (c) to promote the orderly and economic use and development of land,*

*Object (g) to promote good design and amenity of the built environment,*

The proposed minimum lot size inconsistency allows for the promotion of the social welfare of the community and a better environment by providing for a public open space area and represents orderly and economic use of land by public open space in an area of the site where its buffer planting function will have the greatest impact aligning with the entry to the subdivision (Object (c)). The promotion of good design and amenity of the built environment is also achieved as the proposed public open space area will provide a landscaped setting for future dwelling houses to be located and provides a pleasant outlook for future development in the vicinity of the park (Object (g)).

In this respect, the applicant's justification is supported and it is considered that the environmental planning grounds have been adequately demonstrated in this request. Accordingly, it is considered that Clause 4.6(3)(b) has been satisfied.

*The proposal is in the public interest as it is consistent with the objectives of the standard and the zone objectives – Clause 4.6(4)(a)(ii)*

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.

*Applicant's Justification:*

*Clause 4.6.4(a)(ii) requires consideration of the public interest in terms of the consistency of the proposed development with the objectives of the minimum lot size standard and the objectives of development in the zone in which the development is to be carried out.*

*As outlined above it is considered that the proposed development satisfies the underlying objective of the minimum lot size standard in the circumstances here.*

*As also outlined above:*

- The subject site is predominantly zoned R2 Low Density Residential, with a portion of R5 Large Lot Residential, a small area of B1 Neighbourhood Centre, and RE1 Public Recreation.*
- Proposed Lot 1181 – the subject of this variation request – is majority zoned RE1 Public Recreation, with a small portion zoned B1 Neighbourhood Centre.*

*The objectives of the RE1 Public Recreation zone are:*

- To enable land to be used for public open space or recreational purposes.*
- To provide a range of recreational settings and activities and compatible land uses.*
- To protect and enhance the natural environment for recreational purposes.*
- To enable ancillary development that will encourage the enjoyment of land zoned for open space.*

*Relevantly, proposed Lot 1181 will be used as public open space. The landscape & acoustic buffer it will provide will be compatible with the adjoining proposed urban development as well as restricting vehicular access from the development to Yarrowa Road. It would not result in any unacceptable environmental impacts on the locality.*

*The objectives of the B1 Neighbourhood Centre zone are:*

- To provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood.*
- To generally conserve and enhance the unique sense of place of business centre precincts in villages and towns by ensuring that new development integrates with the distinct village scale, character, cultural heritage and landscape setting of those places.*
- To ensure that new development has regard to the character and amenity of adjacent and nearby residential areas.*



*The development, by virtue of its consistency with the adopted Indicative Master Plan for the site, would be consistent with the planned character of / intended amenity for the Chelsea Gardens and Coomungie Lands residential area and its landscape setting whilst allowing for small scale retail, business and community uses serving the future local community. It is consistent with the intended hierarchy of business centres as envisaged by WLEP 2010.*

*It is therefore considered that the development would satisfy the public interest tests at clause 4.6.4(a)(ii).*

Independent Planner comment:

This matter requires demonstration that the proposal is in the public interest as it is consistent with the objectives of both the development standard and the zone objectives.

Consistency with the objectives of the minimum lot size development standard has already been adequately demonstrated above and so only the zone objectives need to be considered.

The proposal is considered to be generally consistent with the objectives of the RE1 zone, despite the minimum lot size breach, given;

- The proposal provides for land to be used for public open space consistent with the concept plan in the DCP;
- The proposal encourages use of land for recreation and is compatible with surrounding use of land for future residential development;
- The proposal provides protection and enhancement of the natural environment for recreational purposes through the use of land as public open space and the opportunity for screen planting to assist biodiversity in the area through additional tree cover;
- Further embellishments of the propose public open space can occur to ensure the enjoyment of the land for open space is maximised.

The proposal is also considered to satisfy the zone objectives of the B1 zone in that the proposed public open space provides a community use that serve the needs of people who live or work in the surrounding neighbourhood and ensures that new development is consistent with the character and amenity of adjacent and nearby residential areas due to the provision of open space and landscaping.

The applicant's justification is supported, and it is considered that the proposal is in the public interest as it is consistent with the objectives of the standard and the zone, provide public open space and is consistent with a master plan provided in the Moss Vale DCP.

It is considered that the written request has adequately demonstrated both of the matters required for the first precondition. Strict compliance with the development standard would result in a failure to achieve an appropriate provision of public open space on the site and consistency with the master plan for the site.

Second Precondition - Clauses 4.6(4)(b) and (5) – Concurrence of the Secretary

The second precondition that must be satisfied before the consent authority can grant consent for development that contravenes a development standard is that the concurrence of the

Secretary has been obtained pursuant to Clause 4.6(4)(b) of KLEP 2012.

Pursuant to Clause 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has granted assumed concurrence to various proposals as outlined in Planning Circular PS 20-002 issued on 5 May 2020 subject to conditions. The conditions relevant in this case are that the proposal is for *regionally significant development*, will be determined by a Panel and does not seek to vary lot size standards for dwellings in rural areas. Accordingly, the Panel can assume the Secretary's concurrence for this application. Accordingly, this second precondition has been satisfied by the proposal.

In *Initial Action*, Preston CJ, considered that 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.

The matters for which the Secretary is to take into consideration in deciding whether to grant of concurrence include:

- (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 Planning Secretary before granting concurrence.*

These matters are considered below in the context of the applicant's written request.

#### *Applicant's Justification*

##### *Would non-compliance with the development standard raise any matter of significance for State or regional environmental planning?*

*It is not considered that minimum lot size non-compliance here would raise any matters of State or regional planning significance. The non-compliance enables the development of the site as envisaged.*

*Significantly, strict compliance with the development standard would clearly not allow development of the site as planned. This would raise matters of regional significance by restricting its intended development as a planned urban release area and delivering residential dwelling targets as planned by the Wingecarribee Local Housing Strategy (July 2021) for Chelsea Gardens and Coomungie Lands.*

##### *Is there a public benefit of maintaining the development standard?*

*It is considered, based on the above, that there would be no public benefit to maintaining the 40ha lot size standard. Maintaining the standard would prevent development of the site as envisaged by the adopted land use zones, the Indicative Master Plan of the MVDCP. It would unreasonably and unnecessarily restrict its development as a planned urban release area and delivering on adopted residential dwelling targets.*

##### *Any other matters required to be taken into consideration before granting concurrence?*

*There are no additional matters required to be taken into consideration before granting concurrence.*

Independent Planner comment:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*

It is agreed that there is no matter of state or regional significance which arises out of the proposed minimum lot inconsistency. The proposed lot provides for public open space in accordance with the master plan in the DCP, with the size of proposed Lt 1181 not detracting from this purpose. The provision of public open space within the proposed lot assists with the housing provision on the site which is consistent with the housing strategy and the site-specific DCP and assists in meeting the housing requirements for the state and region. Accordingly, *contravention of the development standard raises any matter of significance for State or regional environmental planning* supporting the variation assists in matters of state and regional planning significance and is therefore consistent with this consideration.

- (b) *the public benefit of maintaining the development standard*

In relation to whether there is a public benefit of maintaining the development standard, there is generally a public benefit arising from such compliance however, it is considered that a variation is warranted in this instance as outlined in this consideration of the Clause 4.6 request. The variation allows for public open space to be provided in accordance with than adopted master plan under a site-specific DCP. The provision of the public open space provides a public benefit as well as consistency with the planning controls. The variation of the development standards assists in providing these public benefits.

- (c) *any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*

No other relevant matters.

It is considered that the written request has adequately demonstrated the matters required for the second precondition.

Accordingly, since the proposed Clause 4.6 request has adequately demonstrated compliance with both preconditions, the Clause 4.6 is recommended to be supported for the exceedence of the minimum lot size for the proposed development.