Clause 4.6 Report

127-127A Boundary Road, North Epping

Minimum Lot Size Variation Request

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1. INTRODUCTION

This Clause 4.6 variation report has been prepared by Group Development Services Pty Ltd in support of a Development Application for the proposed subdivision of Lot O and Lot N in Deposited Plan 28986, commonly known as 127 and 127A Boundary Road, North Epping (the site).

This report has been prepared to request a variation to Clause 4.1 Minimum Subdivision Lot Sizes of the Hornsby Local Environmental Plan 2013 as it applies to the Drawing Number P00430-SK001 Revision D dated 28/09/2022, submitted under separate cover.

Additionally, case laws have been considered in this report and has incorporated relevant principles identified in the following judgements:

1. Wehbe v Pittwater Council [2007] NSWLEC 827

2. Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118

Clause 4.6 “Exceptions to development standards” of The Hornsby Local Environmental Plan 2013 (HLEP 2013), provides an appropriate degree of flexibility to be applied to certain development applications that do not strictly comply with a development standard. In this case, the applicant seeks to vary the Minimum subdivision lot size and it is found that strict compliance is unreasonable and unnecessary in this instance and sufficient environmental planning grounds to justify this contravene are provided to support this variation.

2. DEVELOPMENT STANDARD TO BE VARIED AND OBJECTIVES

2.1 Clause 4.1 – Minimum subdivision lot size

This Clause 4.6 Variation submission requests to grant an exception to the development standard Clause 4.1 Minimum subdivision lot size within HLEP 2013, which prescribes a minimum subdivision lot size of 500m^2 across the site, identified on the Lot Size Map. The clause is within the scope of a "development standard" as defined under Clause 1.4 of the Environmental Planning and Assessment Act 1979 (EP&A Act) which states:

> **development standards** mean provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:
> (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point.

Clause 4.1 of HLEP 2013 is a development standard in relation to minimum subdivision lot size. The Clause and objectives are stated:

> ***4.1 Minimum subdivision lot size***
>
> *(1) The objectives of this clause are as follows—*
> *(a) to provide for the subdivision of land at a density that is appropriate for the site constraints, development potential and infrastructure capacity of the land,*
> *(b) to ensure that lots are of a sufficient size to accommodate development.*
>
> *(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.*

It is demonstrated through this Clause 4.6 submission report that the objectives of the development standard of minimum subdivision lot size are achieved despite the minor variation proposed.

In particular, the subdivision will result in a density reflecting the existing subdivision pattern and infrastructure capacity of the locality. The lots are of sufficient size to accommodate dwelling house development, compliant with the Hornsby DCP controls.

Approval of the proposal will achieve the development standard objectives.

The relevant 'Minimum subdivision lot size' map has been provided below.

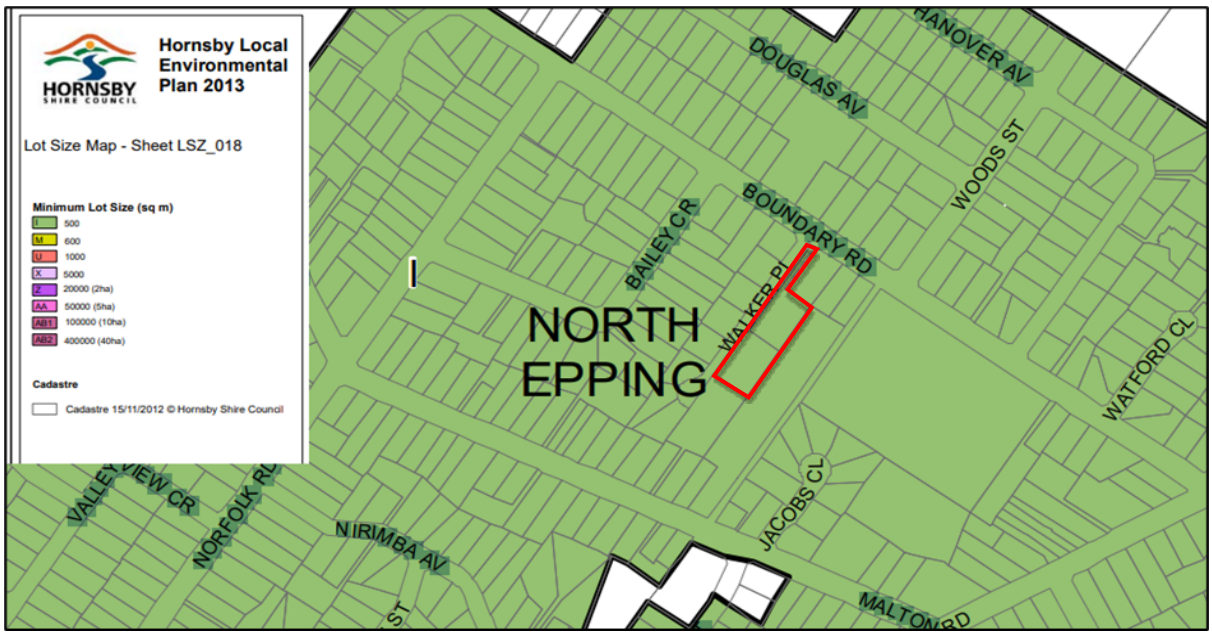


Figure 1. Minimum Subdivision Map. Sheet LSZ_018 of the HLEP 2013

2.2 Land Use Table – Zone R2 Low Density Residential

The Objectives of Zone R2 Low Density Residential are stated:

- *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 residential land subdivision will provide dwelling entitlement lots meeting the housing needs of the community maintaining a low density residential environment. The appropriate future land use of the lots will be low density dwelling house and this can be achieved.

Approval of the development will meet the objectives of the R2 Low Density Residential zone.

2.3 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of HLEP 2013 states:

(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 decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 at [1], [4] & [51]* where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Clause 4.6(3) of HLEP 2013 states:

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 size provisions at clause 4.1 of HLEP 2013 which specifies a minimum lot size of 500m^2; however, it is our opinion that strict compliance is 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 provided in this report.

Clause 4.6(4) of HELP 2013 states:

(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.

In Initial Action the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is in clause 4.6(4)(a). That precondition requires the formation of two opinions of satisfaction by the consent authority.

The first 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 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]).

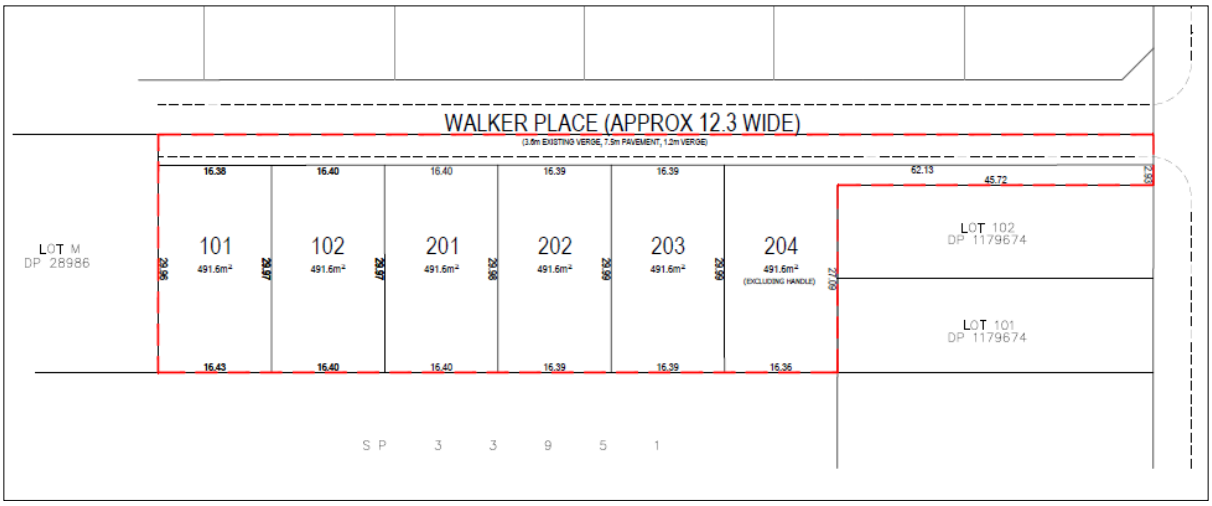
The second precondition is in clause 4.6(4)(b) which requires that the consent authority is satisfied that the concurrence of the Secretary (Department of Planning and Environment) has been obtained *(Initial Action at [28]).*

The Secretary for Planning, under clause 64 of the Environmental Planning and Assessment Regulation 2000 (NSW), has given written notice to consent authority, dated 5 May 2022, that the Secretary's concurrence is to be assumed for exceptions to development standards requested under clause 4.6 and this Concurrence does in fact apply to this Clause 4.6 variation request. Clause 4.6(5) has been satisfied in this respect.

Clause 4.6(6) relates to subdivision in other land use zones and is not relevant to this site. Clause 4.6(7) is administrative and Clauses 4.6(8) and 4.6(8A) do not apply to this development.

3. PROPOSED VARIATION

It is intended to reduce the total lot area of the proposed lots to be created under DA/431/2022 by 8.4m^2. The resulting lots will have an area of 491.6m^2 as shown in the below plan of subdivision. The variation is minor in nature and only proposes a reduced lot area of 1.68%.



Despite the proposed variation, the development maintains consistency with the objectives of the minimum lot size requirements mentioned above given the proposed subdivision can provide additional land that is supported by infrastructure, including the existing and proposed road, and suitable serviceability as outlined in the DA this request is submitted with, and the proposed density is considered appropriate for the development given the lack of site constraints. Each lot can accommodate the minimum lot width requirement, 200m^2 building envelopes, minimum principal POS area and garage and parking areas in accordance with section 6.2 of the Hornsby Development Control Plan 2013 (HDCP 2013), as shown in the submitted Plan of Subdivision and Plan of Constraints.

4. REASON AND JUSTIFICATION FOR NON-COMPLIANCE WITH DEVELOPMENT STANDARDS

Clause 4.6(3)(b) requires *that there are sufficient environmental planning grounds to justify contravening the development standard*.

Ground 1 – The reduction in minimum lot size provides for safe and efficient access to the site

The subdivision application under DA/431/2022 initially proposed a 6 lot subdivision that is compliant with the minimum lot size requirements. However, discussions with Council after submission of the DA identified the road widening was not compliant with the requirements for a local street. It is noted at the time of the Pre-Lodgement meeting, Council did not advise of any concerns with the road width, hence the DA was submitted as per the Pre-Lodgment meeting advice. The road width has since been discussed in detail with Council and it has been agreed that the total road reserve width is to be increased to allow for a road pavement of 7.5m and a verge of 1.2m. Council has suggested that the increased road width would provide a safer and more adequate road corridor for both the proposed subdivision, and the existing residential lots along Walker Place, and would allow for more adequate street parking and tree planting. The proposed road widening would be within the public interest, as required under Clause 4.6(4)(a)(ii), as this land is proposed to be dedicated to Council.

Approval of this revised road pavement and revised plan of subdivision is in the public benefit as it will complete Boundary Rd resulting in an orderly development outcome.

Ground 2 – The reduction in the minimum lot size provides for the orderly and economic use and development of undersized allotments

As a result of the increased road width, the proposed lot depths have been impacted by 0.7m, slightly reducing the total lot area. The proposed variation is minor in nature and will not impact on the residential integrity of the development or existing neighbouring sites. The lots proposed to be created under DA/431/2022 will all maintain compliance with the HDCP 2013. Each lot is able to accommodate the minimum lot width requirement, 200m2 building envelopes, minimum principal POS area and garage and parking areas as required under section 6.2 of the DCP, as shown in the submitted Plan of Constraints.

The proposed Development Application has also been amended to incorporate tree planting fronting each lot within the verge in compliance with Council's native and Indigenous plant communities. Furthermore, each lot is capable of additional tree planting to the rear if required by Council.

Approval of a subdivision of 6 residential lots, will support residential development within North Epping and is in line with the Hornsby Local Strategic Plan to encourage population growth. The subdivision better utilises the sites development potential with only minor deviance from the LEP and no increased environmental impact, and therefore, strict compliance with the minimum lot size requirement is unnecessary in this circumstance. Furthermore, the proposal remains in line with the objectives of the

R2 Zoning, to provide for the housing needs of the community within a low-density residential environment, and the minimum lot size development standard outlined in section 2.

Ground 3 – Objects of EP&A Act

Approval of the minimum lot size variation does promote the objects of the EP& A Act, particularly:

- Approval would promote the orderly and economic use and development of land 1.3(c).
- Approval would promote good design and amenity of the built environment 1.3(g).

5. NSW LAND AND ENVIRONMENT COURT PRINCIPLES – RELEVANT CASE LAW

Due to recent stricter approaches to Clause 4.6 Variation Requests, following the decision of Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (Initial Action), development proposed to be carried out in breach of a development standard set out in an Environmental Planning Instrument must satisfy the requirements of the consent authority. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

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.

In the case of this application, the minimum lot size development standard set out under the HLEP 2013 is proposed to be varied in accordance with the matters of consideration identified in Initial Action, outlined below.

1. The applicant has satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances.

2. Sufficient environmental planning grounds to justify contravening the development standard has been provided.

3. The proposed development will be in the public interest because it is consistent with the objectives of the development standard and the zone.

4. Concurrence of the Secretary has been obtained.

5.1. Compliance with the development standard is unreasonable or unnecessary

Clause 4.6(3)(a) requires demonstration that compliance with the development standard is unreasonable or unnecessary. The *Wehbe v. Pittwater Council [2007] NSWLEC 827* (Wehbe) judgment sets out certain methods that an applicant can address to establish compliance being unreasonable or unnecessary:

- Objectives of the development standard are achieved notwithstanding noncompliance with the development standard

- The underlying objective or purpose is not relevant to the development, such that compliance is unnecessary

- The underlying purpose is defeated or thwarted if compliance is required, such that compliance becomes unreasonable

- That the development standard has been 'virtually abandoned or destroyed,' rendering it unnecessary and unreasonable

- The zoning area of the proposed development was 'unreasonable or inappropriate' such that the development standard which is appropriate to that zoning is no longer reasonable or necessary

The underlying purpose of this application is the subdivision of land, and this purpose will be defeated if strict compliance to the minimum lot size is required. Thus, compliance has been deemed unreasonable given the objectives of the development standard is still achieved.

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

> *(a) to provide for the subdivision of land at a density that is appropriate for the site constraints, development potential and infrastructure capacity of the land,*

Response: The subdivision will result in a density reflecting the existing subdivision pattern and infrastructure capacity of the locality.

(b) to ensure that lots are of a sufficient size to accommodate development.

Response: The proposed lots are of sufficient size to accommodate dwelling houses compliant with the Hornsby DCP controls.

5.2. Sufficient environmental planning grounds

Clause 4.6(3)(b) requires that a DA demonstrates the variation is justified on 'sufficient environmental planning grounds', relating to the subject matter. The focus is required to be the element of the development that contravenes the development standard, not on the development as a whole.

Section 4 of this Variation Request demonstrates the variation is justified with sufficient environmental planning grounds, specifically relating to the requirement of road widening for Walker Place, resulting in affected lot sizes.

5.3. Proposed development in the public interest

The Consent Authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard and the zone in which the development is proposed to be carried out.

The proposal is within the public interest as this development will enable the remaining construction of Walker Place, completed to current road safety standards and resultant dedication of Walker Place to Council.

In its current state, Walker Place does not provide adequate area for safe ingress and egress as well as suitable street parking locations. Additionally, vehicles are using the site in an illegal manner for movement and parking. The proposed subdivision will facilitate the remaining half width construction of Walker Place and will enable vehicle movement in a suitable and legal manner, another benefit in the public interest.

The proposal is demonstrated to be consistent with the objectives of the standard and objectives of the zone. Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

5.4. Concurrence of the Secretary has been obtained

The Secretary for Planning, under clause 64 of the Environmental Planning and Assessment Regulation 2000 (NSW), has given written notice to consent authority that the Secretary's concurrence is to be assumed for exceptions to development standards requested under clause 4.6 and this Concurrence does in fact apply to this Clause 4.6 variation request.

6. ASSESSMENT OF THE PROVISIONS OF CLAUSE 4.6 "EXCEPTIONS TO DEVELOPMENT STANDARDS"

The provisions of Clause 4.6 "Exceptions to development standards" under HLEP 2013 provides the consent authority with the flexibility to vary a development standard where the circumstances of the development demonstrate that an exception to the development standard will maintain the objectives of the standard and the variation to the development standard results in a better development outcome than if strict compliance was upheld.

4.6 Exceptions to development standards	**Comment:**
(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 use of clause 4.6 in this circumstance is to allow flexibility to vary the minimum lot size development standard. Strict application with the standard is considered unreasonable and unnecessary in this circumstance given the minor nature of the non-compliance and will achieve a better outcome for the site's accessibility.
(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.	(3): This submission forms the written request that addresses those matters required to be considered in subclause (3). (3)(a): As outlined in the Wehbe judgement, there are methods to establish strict compliance with a development standard is unreasonable or unnecessary. It is found in this instance that the objectives of the development standard are achieved notwithstanding noncompliance with the development standard. This has been addressed under section 2 and section 5.1 of this Variation Request. On this basis, strict compliance is unreasonable with the underlying objectives still being achieved and resultant adequate access to the proposed subdivision.
(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	(3)(b): The element of the development that contravenes the development standard is the local road width requirement and resultant outcome of land subdivision requiring a minor variation to the min lot sizes numerical standard. Section 4 and section 5.2 of this Variation Request provides sufficient Environmental Planning Grounds to justify the variation to the minimum lot size. (4)(a)(ii): As addressed in section 4 and section 5.3, the proposed subdivision is consistent with the objectives of both the minimum lot size development standard and

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.	consistent with the zone objectives, thus within the public interest. Furthermore, the proposed widening of Walker Place will result in a safer road corridor, again within the public interest due to the dedication of an adequate road to Council.
(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 variation will not raise any concerns in relation to state and regional planning. It is considered that all matters required to be taken into account by the Secretary before granting concurrence have been adequately addressed as part of this clause 4.6 variation request to vary clause 4.1 of the HLEP 2013.
(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if— (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.	Clause 4.6 (6) does not apply as the site is not zoned under any of the listed zones.
(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).	Council records to be updated accordingly upon acceptance of the variation.
(8) This clause does not allow development consent to be granted for development that would contravene any of the following— (a) a development standard for complying development, (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,	Clause 4.6 (8) does not apply as the application does not contravene any of the listed developments.

7. CONCLUSION

The non-compliance to the minimum lot size area is considered acceptable based on the extensive and accepted planning rationale outlined in this report.

The proposal is considered worthy of support by Council because:

- The proposed minor non-compliance to the minimum lot size will not result in any significant adverse impacts on the subject site, neighbouring land uses or the environment.
- Despite the variation, the proposal maintains consistency with both the objectives for the zone and the development standard and the impediment does not create a better or worse planning outcome for the site.
- The proposed lots will continue to accommodate future dwelling design, landscaping and native planting requirements of the HDCP 2013.

Specifically, it is our view that the variation does not:

- Hinder the attainment of the objects specified in 1.3(a) and (c) [previously s5(a)(i) and (ii)] of the Environmental Planning and Assessment Act 1979;
- Raise any matter of significance for State or Regional planning;
- Create any unreasonable precedent; or
- Impact unreasonably on adjoining properties.

As identified in this report, the development is still capable of satisfying the relevant objectives notwithstanding the minor lot size area variation. It is our opinion that there is no statutory or environmental planning reason to not grant a variation to the minimum lot size in this instance.