



# CLAUSE 4.6 VARIATION TO MINIMUM LOT SIZE DEVELOPMENT STANDARD

16 Chapman Street, Werrington & Lot 2 Water Road,  
Werrington

GLN 11128

13 November 2020

<b>Property:</b>	The overall subdivision the subject of the Development Application (DA19/0704) is over land at Lot 1 DP 1226122 - 16 Chapman Street, Werrington, Lot 2 DP 1176624 - 2 Gipps Street, Werrington, Lot 12 DP 734612 - 12 Werrington Road, Werrington, Lot 1 DP 5277758 - 51 Rance Road, Werrington, Lot 1 DP 749982, 611-651 Great Western Highway, Werrington and Lot 101 DP 101140594 - 653-729 Great Western Highway, Werrington. The aspect of the site subject to the proposed variation applies to Lot 2 DP 1176624 - Water Street, Werrington
<b>Development:</b>	The Development Application is for staged subdivision of land to create 227 x residential lots, 17 light industrial lots, open space lots, 14 residue lots, 1 allotment for environmental conservation and road dedication. Works include site preparation, vegetation removal, bulk earthworks, civil works, construction of roads, including east-west collector road and a round-a-bout on Werrington Road, stormwater infrastructure and basins.
<b>Subject Plans:</b>	<p>Subdivision Plans prepared by Cardno for the subdivision component of the development including:</p> <ul style="list-style-type: none"> <li>- Subdivision Plan with Staging - Drawing no. 80219053-001-SK080 - Rev 10 Dated 04/11/2020</li> <li>- Subdivision Plan Stage 1A - Drawing no. 80219053-001-SK082 - Rev 10 Dated 04/11/2020</li> <li>- Subdivision Plan Stage 1B - Drawing no. 80219053-001-SK083 - Rev 9 Dated 04/11/2020</li> <li>- Subdivision Plan Stage 2A - Drawing no. 80219053-001-SK084 - Rev 9 Dated 04/11/2020</li> <li>- Subdivision Plan Stage 2B - Drawing no. 80219053-001-SK085 - Rev 9 Dated 04/11/2020</li> <li>- Subdivision Plan Stage 3 - Drawing no. 80219053-001-SK086 - Rev 9 Dated 04/11/2020</li> <li>- Subdivision Plan Stage 4A - Drawing no. 80219053-001-SK087 - Rev 9 Dated 04/11/2020</li> <li>- Subdivision Plan Stage 4B - Drawing no. 80219053-001-SK088 - Rev 7 Dated 18/08/2020</li> </ul> <p>Subdivision Plan prepared by Terry Edward Bartlett</p> <ul style="list-style-type: none"> <li>- Plan of Subdivision of Lot 1 in DP1226122 &amp; Lot 2 in DP1176624 Registered Draft 2020.11.13</li> </ul>
<b>Council Reference:</b>	DA19/00704
<b>Development Standard:</b>	Clause 4.1 Minimum Lot Size of the Penrith Local Environmental Plan 2010 (PLEP)

## 1. Introduction

This Clause 4.6 Request (Request) has been prepared to accompany a Development Application (DA) lodged on behalf of Lendlease Communities (Werrington) Pty Ltd (Lendlease) (the Applicant) seeking approval of a staged subdivision of land to create 227 x residential lots, 17 light industrial lots, open space lots, 14 residue lots, 1 allotment for environmental conservation and road dedication under DA 19/0704. The proposal also includes ancillary works including site preparation, vegetation removal, bulk earthworks, civil works and construction of roads.

The portion of the site subject of DA 19/0704, which is applicable to this Request is located on land currently owned by Wollemi College (Lot 2 DP1176624). As part of the proposal under DA 19/0704 the development includes the subdivision and boundary realignment of land owned by the Thorndale Foundation and Wollemi College to facilitate the alignment of the East/West Link Road from Werrington Road, through the development site to the west. To deliver this road and gain support from the Thorndale Foundation and Wollemi College, Lendlease has entered into an agreement whereby land currently owned by Thorndale and Wollemi will be subdivided for the purpose of the road and in turn Lendlease will gift other land adjacent to the Thorndale Foundation Land and Wollemi College Land for their continuing and future operations.

As a result of the subdivision, and the agreement between Lendlease, Thorndale Foundation and Wollemi College a 981.5m<sup>2</sup> residue lot (proposed Lot 4000) will be created and gifted to the Thorndale Foundation. This proposed residue lot is partially zoned IN2 Light Industrial, but the entire lot has a minimum lot size of 2,000m<sup>2</sup>. Proposed Lot 4000 has an area of 981.5m<sup>2</sup>.

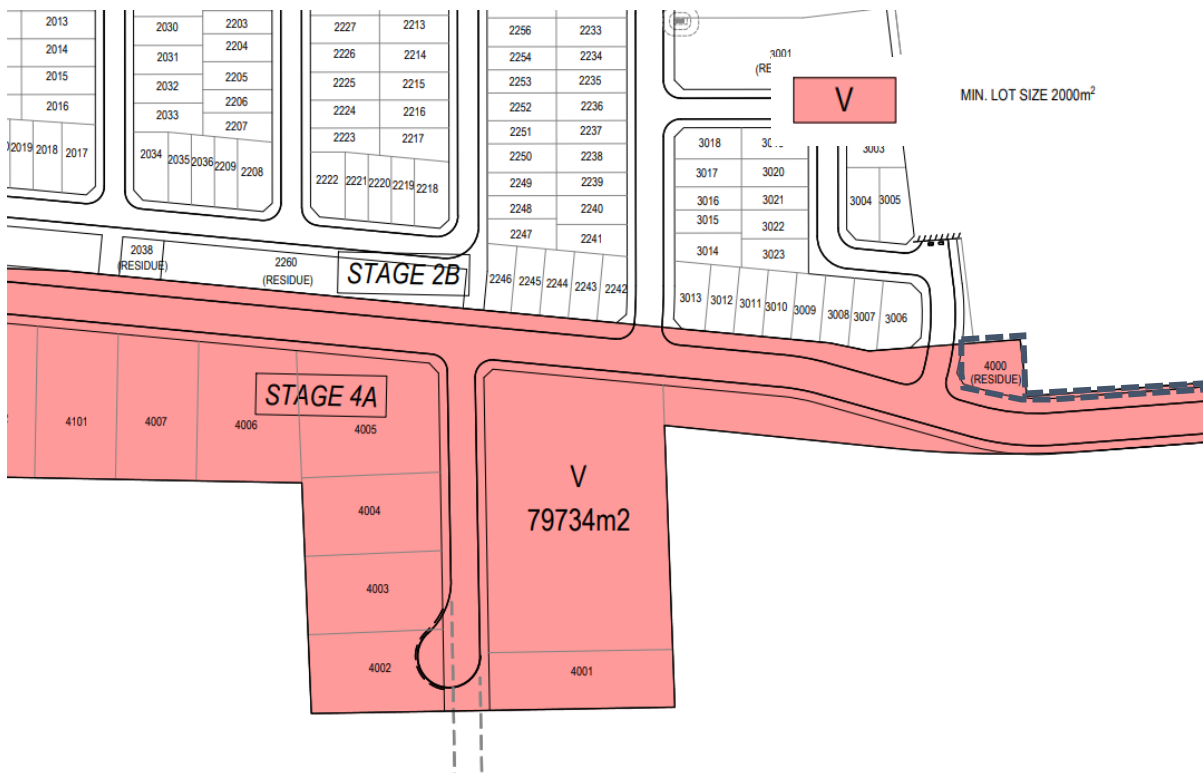


Figure 1 Lot Layout overlaid onto Lot Size Map (Lot 4000 in blue dash)

This Clause 4.6 Request supports the variation to the minimum lot size development standard that has arisen out of the alignment of the East/West Link Road and the agreement with Thorndale Foundation and Wollemi College to deliver the road through their land. Proposed Lot 4000 is a residual parcel of land, which will be gifted to Thorndale and expected to form part of their site for future development applications over their land.

This request for a variation to the minimum lot size standard outlines the justification for the contravention having regard to the circumstances of the case and demonstrates that it is in the public interest.

## **2. Authority to vary a development standard**

The objectives of clause 4.6 seek to recognise that in particular circumstances, strict application of development standards may be unreasonable or unnecessary. The clause provides objectives and a means by which a variation to the standard can be achieved as outlined below.

### *4.6 Exceptions to development standards*

*(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 Director-General has been obtained.*

*(5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*
- (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 Mall Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 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.*
- (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).*
- (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,*
  - (c) clause 5.4,*
  - (ca) clause 6.1, 6.2, 6.6, 6.7, 6.16, 7.7, 7.17, 7.21, 7.24 or Part 9.*

### 3. Development Standard to be Varied

A variation is requested to CI 4.1 which specifies the minimum lot size. This is a development standard as defined by S1.4 of the *Environmental Planning and Assessment Act 1979* (EPA Act)

Clause 4.2 (3) requires:

*(3) The lot 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.*

An extract of the Minimum Lot Size Map contained within the LEP is provided as Figure 2.

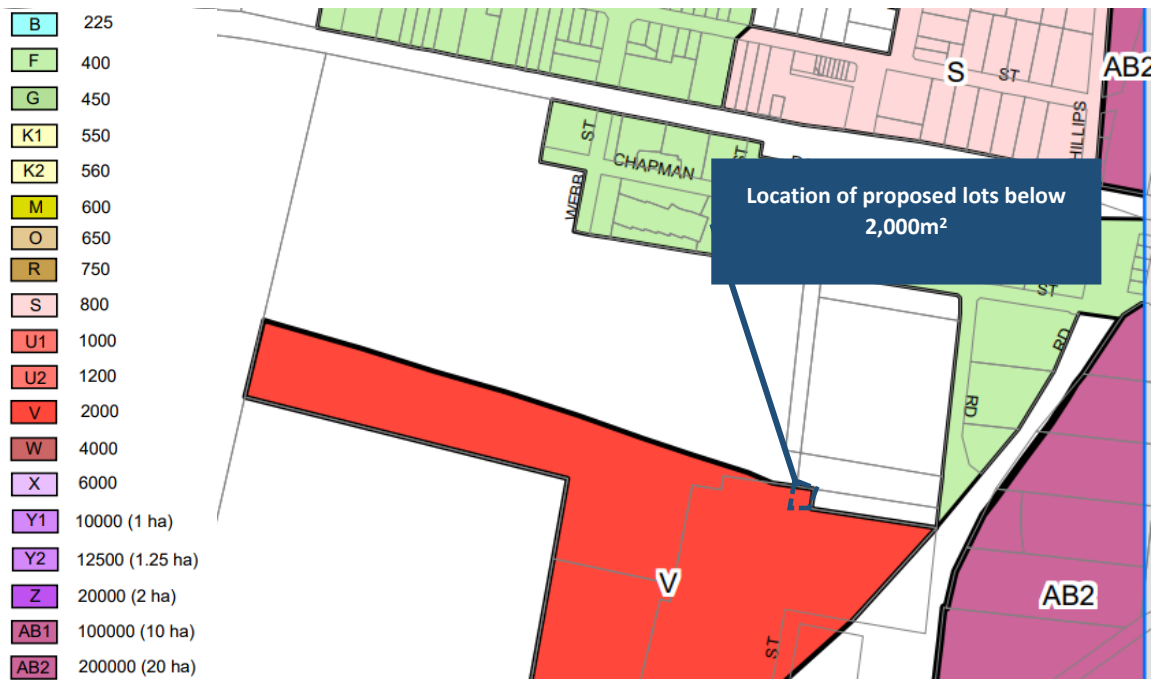
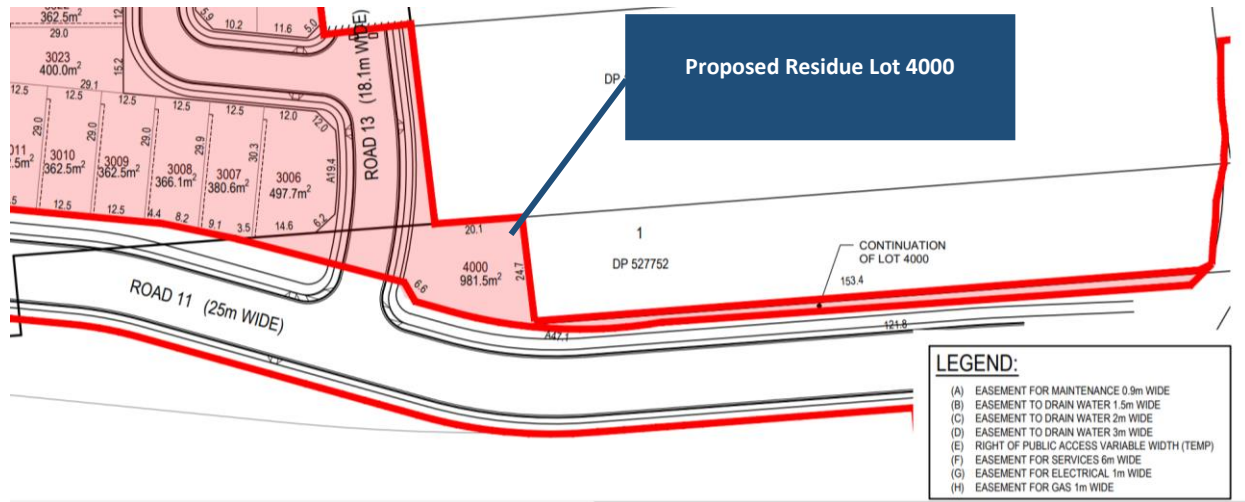


Figure 2 Minimum Lot Size Map

#### 4. Extent of variation

The variation requested to the minimum lot size development standard applies to proposed residue Lot 4000. Proposed Lot 4000 has an area of 981.5m<sup>2</sup>, seeking a variation to the development standard of 51%.



Source: Cardno

Figure 3 Proposed Plan of Subdivision

#### 6. Objectives of Clause 4.1 Minimum subdivision lot size

The objectives of the Minimum subdivision lot size clause are:

- (a) to ensure that lot sizes are compatible with the environmental capabilities of the land being subdivided,
- (b) to minimise any likely impact of subdivision and development on the amenity of neighbouring properties,
- (c) to ensure that lot sizes and dimensions allow developments to be sited to protect natural or cultural features including heritage items and retain special features such as trees and views,
- (d) to regulate the density of development and ensure that there is not an unreasonable increase in the demand for public services or public facilities,
- (e) to ensure that lot sizes and dimensions are able to accommodate development consistent with relevant development controls.



## 7. Assessment

The following sections discuss the grounds for the variation to clause 4.1 against the relevant provisions of clause 4.6.

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? (Clause 4.6(3)(a))

Clause 4.6(3)(a) requires the applicant to provide justification that strict compliance with the minimum lot size development standard is unreasonable or unnecessary in the circumstances of the case.

In *Wehbe v Pittwater Council (2007) NSWLEC 827*, Preston CJ established five potential ways for determining whether a development standard could be considered unreasonable or unnecessary. These include:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore 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 compliance with the standard is unnecessary and unreasonable.
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

We note that whilst *Wehbe* was a decision of the Court dealing with SEPP 1, it has been also found to be applicable in the consideration and assessment of Clause 4.6. Regard is also had to the Court's decision in *Four2Five Pty Limited v Ashfield Council [2015] NSWLEC 90* and *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7*, which elaborated on how these five ways ought to be applied, requiring justification beyond compliance with the objectives of the development standard and the zone.

In addition to the above, Preston CJ further clarified the appropriate tests for a consideration of a request to vary a development standard in accordance with clause 4.6 in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*. This decision clarifies a number of matters including that:

- the five ways to be satisfied about whether to invoke clause 4.6 as outlined in *Wehbe* are not exhaustive (merely the most commonly invoked ways);
- it may be sufficient to establish only one way;
- the written request must be "sufficient" to justify contravening the development standard; and
- it is not necessary for a non-compliant development to have a neutral or beneficial effect relative to a compliant development.

It is our opinion that the proposal satisfies the first and second of the five ways established in *Wehbe* that demonstrate the development standard is unreasonable and unnecessary in this instance, for the reasons set out below.



1<sup>st</sup> Way – The objectives of the standard are achieved notwithstanding non-compliance with the standard

The proposal satisfies the objectives of the standard to the extent relevant to the current proposal, and compliance with the minimum lot size objectives in this circumstance is considered both unreasonable and unnecessary for the reasons outlined below.

*Objective (a) - to ensure that lot sizes are compatible with the environmental capabilities of the land being subdivided.*

The site and surrounding areas have been identified for urban purposes, with land that contains sensitive environmental qualities appropriately zoned RE1 Public Open Space or E2 Environmental Conservation. The proposal does not impact on these sensitive environmental areas.

*Objective (b)- To minimise any likely impact of subdivision and development on the amenity of neighbouring properties.*

The 2,000m<sup>2</sup> minimum lot size is for the establishment of industrial development. Industrial development is located on the southern side of the East West Road, with the East West Road corridor providing clear separation from the impacts of the industrial uses from the residential uses on the northern side of the East West Road. The entire allotment is only partly zoned IN2 Light Industrial. There is no residential development existing or proposed adjoining Lot 4000. The land is being gifted to the Thorndale Foundation as a result of part of their land being required for the delivery of the East/West Link Road. The variation from the minimum lot size in this instance will not impact the amenity of any neighbouring properties.

*Objective (c) – to ensure that lot sizes and dimensions allow developments to be sited to protect natural or cultural features including heritage items and retain special features such as trees and views.*

There are no identified areas or items of natural or cultural heritage that would be impacted as a result of the development.

*Objective (d) – to regulate the density of development and ensure that there is not an unreasonable increase in the demand for public services or public facilities.*

The allotment is a Residue Lot and will not increase the density of development or increase the demand for public services or public facilities.

*Objective (e) to ensure that lot sizes and dimensions are able to accommodate development consistent with the relevant development controls.*

Proposed lot 4000 is a residue lot being gifted to the Thorndale Foundation. It is expected that the redevelopment of this site will be done in conjunction with any adjoining land also owned by Thorndale.

***Summary of Satisfaction of Objectives of the Standard***

Preston CJ at paragraph 43 in *Wehbe v Pittwater Council* stated:

*The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, 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). (paragraph 43 of Wehbe v Pittwater Council).*

Accordingly, considering the proposed Lot 4000 is a residue lot, created as a result of creating allotments that will ultimately deliver the East/West Link Road, the variation to the minimum lot size development standard will not compromise achievement of the objectives of the standard. Rather, this proposal meets the objective of the control when reviewed in the context of the land use proposed.

2<sup>nd</sup> Way - The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.

There is no future use proposed on Lot 4000 at this time. The allotment is a residue allotment.

The 2,000m<sup>2</sup> minimum lot size control relates to development for industrial purposes, however the site is partially zoned IN2 Light Industrial and part zoned R4 High Density Residential. There appears to be an error in the minimum lot size mapping.

The land is being gifted to the Thorndale Foundation. It is expected that the Foundation will use the land to support their ongoing use of the adjoining sites and ultimately utilise proposed Lot 4000 with any future development. As the development standard for 2,000m<sup>2</sup> applies to light industrial zoned land and no light industrial uses are proposed, the underlying purpose of the standard is not relevant to the development and therefore compliance is unnecessary.

3<sup>rd</sup> Way - The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required.

This consideration is not relevant in this case.

4<sup>th</sup> Way - The development standard has been virtually abandoned or destroyed by the Council's own decisions

This consideration is not relevant in this case.

5<sup>th</sup> Way – The zoning of the site is unreasonable or inappropriate and consequently so is the development standard.

This consideration is not relevant in this case.

Are there sufficient environmental planning grounds to justify contravening the development standard? (Clause 4.6(3)(b))

As outlined by Preston CJ in Initial Action Pty Ltd v Woollahra Municipal at paragraph 24:

*the focus of the 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.*

This request therefore does not relate to the location of the proposed road, which is detailed within the Statement of Environmental Effects, but must demonstrate that the variation to the lot size alone is justified.

Only a small portion of proposed Lot 4000 is zoned IN2 Light Industrial. The minimum lot size of 2,000m<sup>2</sup> generally applies to land zoned IN2 Light Industrial. The land use zone and the minimum lot size maps aligned the IN2 Light Industrial zone with the 2,000m<sup>2</sup> minimum lot size up until 3 October 2020, when the Land Use Zoning map changed and the minimum lot size map did not. It is believed that the discrepancy

between the minimum lot size map and the land use zoning map is an error. The minimum lot size of 2,000m<sup>2</sup> should only apply to a small portion of the site. Regardless of whether part of proposed Lot 4000 has a minimum lot size of 2,000m<sup>2</sup> or this minimum lot size only applies to part of the lot, the 2,000m<sup>2</sup> minimum lot size is for the delivery of industrial development.

The land has been gifted to Thorndale to ensure the East West Road can be delivered without having any detrimental impact on the Thorndale Foundation. To facilitate this, Lot 4000 has been gifted to Thorndale. There is no use proposed for the site in the short term as it is a residue allotment. Thorndale Foundation will utilise the site for their operations or future redevelopment. Requiring a minimum 2,000m<sup>2</sup> lot size would require relocation of the road that will impact the Thorndale Foundation and compromise the delivery of the road to service development of the entire precinct.

In addition to the above, there are no material negative impacts resulting from the proposed variation from the minimum lot size standard.

#### Is the proposed development in the public interest? (Clause 4.6(4)(a)(ii))

The proposed development is in the public interest because it:

- Facilitates a development that is consistent with the objectives of the standard and the intent of the IN2 Light Industrial zone under the PLEP. Consistency, with the objectives of the standard has been addressed previously under Wehbe method one ("1st way").
- Provides additional housing within the Sydney metropolitan region.

In regard to the first point, the objectives of the IN2 Light Industrial zoning of the site are:

- *To provide a wide range of light industrial, warehouse and related land uses.*
- *To encourage employment opportunities and to support the viability of centres.*
- *To minimise any adverse effect on industry on other land uses.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.*
- *To support and protect industrial land for industrial uses.*
- *To promote development that makes efficient use of industrial land.*
- *To limit the impact of industrial development on adjacent residential areas in terms of its built form, scale, acoustic and visual privacy and are quality.*

The development is consistent with, or is not antipathetic to, the objectives of the zone for the reasons discussed above and below.

To avoid the impact of industrial development on surrounding residential uses, industrial land has been identified in the controls south of the proposed East West Road. The proposed subdivision provides that this physical separation of land uses is maintained, by ensuring that no industrial development is located on the northern side of the road.

#### Consideration of concurrence by Director-General (Clause 4.6(4)(b) & (5))

Concurrence to the proposed variation is not required by the Secretary pursuant to clause 4.6(4)(b), as we understand that the relevant consent authority has the necessary delegation as set out in the Assumed Concurrence Notice issued by the Secretary of the Department of Planning and Environment dated 21 February 2018 (attached to DPE Planning Circular PS 20-002 dated 5 May 2020).

Despite this, the proposed variation to the minimum lot size standard is not considered to be detrimental

to any matters of significance for state or regional environmental planning.

In the circumstances of the application, there is no public benefit in maintaining the development standard. To the contrary and consistent with the objectives of CI 4.6, allowing the variation will facilitate a development that achieves better and appropriate outcomes and represents an appropriate degree of flexibility in applying a development standard.

In relation to clause 4.6(5)(c), we note that no other matters have been nominated by the Secretary for consideration.

### Conclusion

A variation to the strict application of Council's minimum lot size development standard is considered appropriate for development over the part of DA19/0704 at Lot 2 Water Street Werrington.

The proposed residue Lot 4000 is a result of the agreement between Lendlease and Thorndale Foundation to ensure the road alignment does not unreasonably impact the operations of Thorndale. Lot 4000 will be gifted to the Thorndale Foundation for consideration in any future development of their land.

The proposal meets the intent of the minimum lot size development standard and in accordance with clause 4.6 of the PLEP, demonstrates that the development standard is unreasonable and unnecessary in this case and that the variation is justified.