CLAUSE 4.6 REQUEST FOR VARIATION OF DEVELOPMENT STANDARD (minimum lot size)

116-123 Kerrs Road

Mount Vernon, NSW, 2178

Lot 103 DP 31924

Proposed land subdivision from 1 lot into 2 lots

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TABLE OF CONTENTS

1 Clause 4.6 request for variation – Minimum Lot Size

This request has been prepared as the Applicant's Written Request for Variation to a Development Standard and is made in accordance with the provisions of clause 4.6 of the *Penrith Local Environmental Plan 2010* (**PLEP 2010**):

The Request for Variation is made in respect of a development application to reduce the minimum lot size on the subject site through a subdivision of one lot into two lots.

This proposal relates to **Lot 103, DP 31924** otherwise known as **116-123 Kerrs Road, Mount Vernon.**

The proposed plan of subdivision will configure the lots into a battle-axe style lot configuration with an access handle serving the proposed lot at the rear (proposed lot 1031) and providing the lot's access to Kerrs Road. The proposed front lot (proposed lot 1032) has existing vehicular access and existing dwelling and associated built improvements and is 1.0 ha in area which achieves the minimum lot standard.

The proposed land subdivision creates a 7m wide access handle along the western side of the subject site which serves as access for the proposed rear lot (proposed lot 1031). The access handle is 1161m² in area which results in the remaining area of the proposed lot being 9077m² in area, with the total site area combined to be 1.02 ha.

The plan of subdivision below (overlayed with site survey plan) identifies the proposed subdivision plan forming the 1 into 2 lot subdivision.

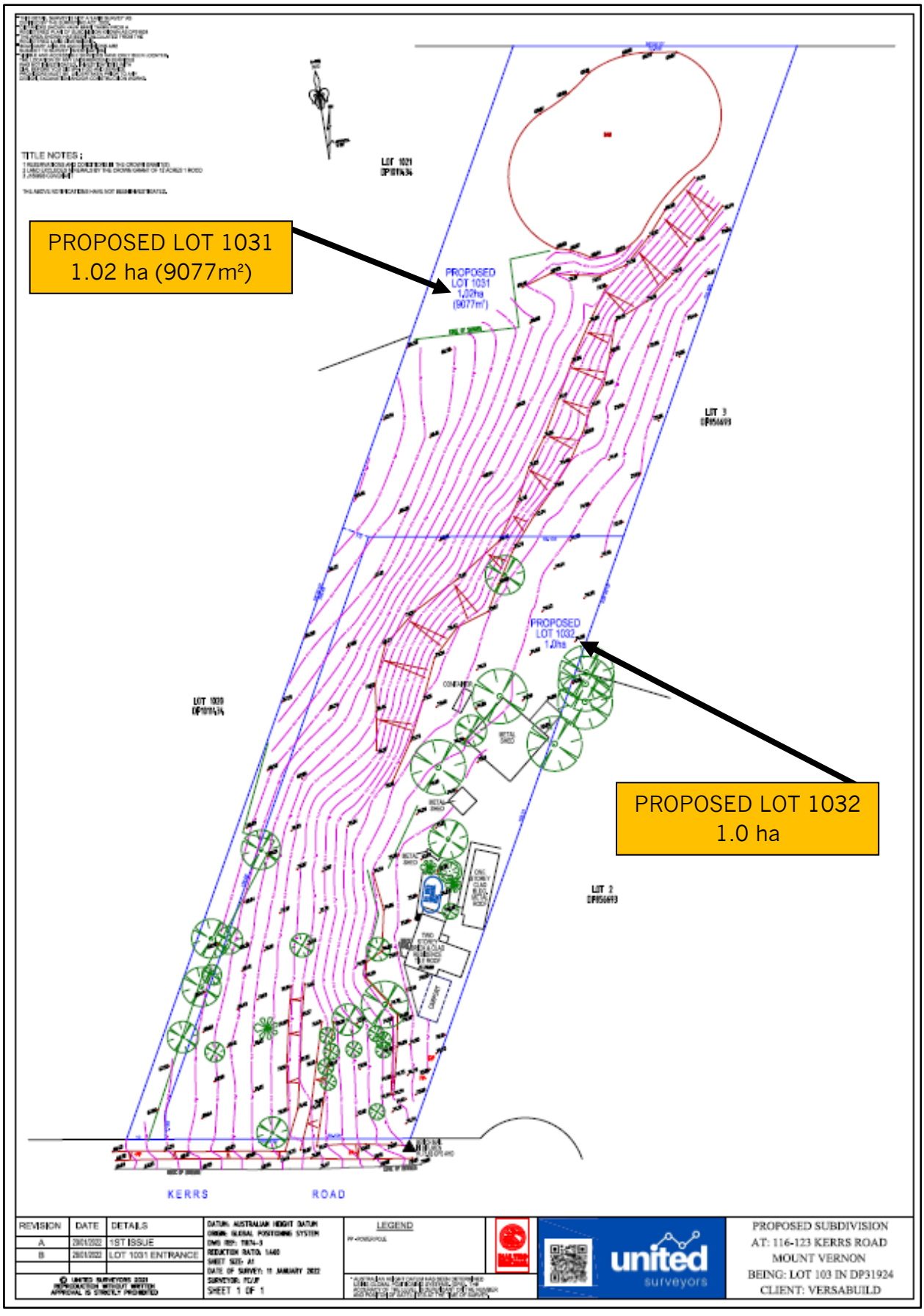

Figure 1: Proposed land subdivision (1 into 2 lots).

Purpose of Request

This Clause 4.6 variation has been submitted to assess the proposed non-compliance with the Minimum Lot Size standard provided under Clause 4.1 of the PLEP2010. A Minimum Lot Size for the applicable site is 10,000 m².

It has been determined that the extent of shortfall for the minimum lot size is 923m² (9.23%). The land subdivision proposes two lots that are 1.0ha and 1.02 ha in actual area however the method of lot size area excludes the inclusion of the access handle area and in tis regard the rear lot of 1.02ha becomes 9,077m² which represents a variation (reduction in area) of 9.23%. Please refer to the plans above that depict the lot size as well as the existing built improvements already erected on the site:

The Request for Variation has been generally set out in accordance with the structure recommended by the Department of Planning in its publication entitled *Varying Development Standards – A Guide*.

In brief terms, this variation request says that:

- The reason for minor reduction in lot size is so the subdivision yield will retain comparable actual areas (not pursuant to clause 4.1(4C)) and afford the rear lot an opportunity for development consistent with the permissible land uses for the C4 land zoning, likely a single dwelling for the newly created rear lot, consistent with the subdivision pattern in the immediate locality.

- The extent of proposed non-compliance is not so significant as to have any demonstrable impacts on the desired future character of the area.

- The proposed subdivision is consistent with the desired future character of the area in relation to the future building opportunities as expressed and available in the Penrith DCP.

The proposed minor shortfall of 9.23%, in relation to the Minimum Lot Size is in the public interest because it is consistent and compatible with:

- the objectives of the Minimum Lot Size development standard;

- permitting the non-compliance with the Minimum Lot Size standard will allow for the orderly and economic creation of two allotments, each with a dwelling entitlement and this outcome will afford a development outcome consistent with the C4 zone and the context of development in the immediate locality in Kerrs Road particularly.

- the land subdivision will contribute positively to the locality without adversely impacting upon the amenity of the area and the local C4 zone land uses in keeping with the local context of the Mount Vernon area.

Requiring strict compliance with the Minimum Lot size development standard is unreasonable in the circumstances of the case. This is because:

- the objectives of both the zone and standard are achieved notwithstanding the minor non-compliance with the standard represented by the proposed rear lot; and

- There are sufficient environmental planning grounds to justify contravening the development standard.

Clause 4.6 Request for Variation

Clause 4.6 of PLEP 2010 allows for variation to development standards. Components of Clause 4.6 relevant to the preparation of a Request for Variation are:

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 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.

(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.

Note— *When this Plan was made it did not include Zone RU3 Forestry or Zone RU6 Transition.*

(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,

(caa) clause 5.5,

(ca) clause 6.1, 6.2, 6.6, 6.7, 6.16, 7.7, 7.17, 7.21, 7.24, 8.4(5) or Part 9.

Clause 4.1 is not identified as being excluded from the operation of clause 4.6. Therefore a request to vary the development standard may be made by the applicant.

Having regard to clause 4.6(6) it is noted that the proposed land subdivision satisfactorily achieves the additional minimum lot size criteria wherein there is only 1 lot which fails to achieve the minimum lot size of 1.0 ha, and the lot which is deficient in area still achieves a minimum of 90% of the lot size minimum. In this regard, proposed lot 1032 is fully compliant (1.0ha) and proposed lot 1031, despite being less than 1.0ha (pursuant to the method of measurement prescribed by 4.1(4C)), still achieves a minimum of 90% of the required minimum lot area size.

What is the name of the environmental Planning instrument that applies to the land?

Penrith Local Environmental Plan 2010.

What is the zoning of the Land?

The subject site is zoned C4 Environmental Living.

What Are the objectives of the zone?

The objectives of the C4 Environmental Living zone are:

1 Objectives of zone

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*

- *To ensure that residential development does not have an adverse effect on those values.*
- *To minimise conflict between land uses within the zone and land uses within adjoining zones.*
- *To ensure land uses are compatible with the available infrastructure, services and facilities and with the environmental capabilities of the land.*
- *To preserve and improve natural resources through appropriate land management practices.*

The proposed subdivision is entirely consistent with the relevant C4 zone objectives detailed above. That is, with respect to this proposal it will allow the creation of two lots, with the opportunity for compatible development upon the proposed rear lot without adverse impacts upon the land or locality. The land subdivision will not introduce conflict between land uses in the locality.

What Is The Development Standard Being Varied?

The subject Request for Variation relates to the minimum lot size standard pursuant to clause 4.1 of the PLEP2010. Therefore, the proposed development seeks exception to the 10,000 m² minimum lot size standard, having particular regard to the method of measurement imposed upon battle-axe subdivision configurations which excludes the access handle area from the 'site area'.

What are the objectives of the Development Standard?

The minimum lot size standard is detailed in clause 4.1 as follows;

4.1 Minimum subdivision lot size

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

(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.

(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.

(4) This clause does not apply in relation to the subdivision of any land—

(a) by the registration of a strata plan or strata plan of subdivision under the Strata Schemes Development Act 2015, or

(b) by any kind of subdivision under the Community Land Development Act 2021.

(4A) Despite subclause (3), development consent must not be granted for the subdivision of land in Zone R2 Low Density Residential unless each lot to be created by the subdivision would have—

(a) if it is a standard lot—a minimum width of 15 metres, or

(b) if it is a battle-axe lot—a minimum width of 15 metres and a minimum area of 650 square metres.

(4B) Despite subclause (3), development consent must not be granted for the subdivision of land in Zone R3 Medium Density Residential unless each lot to be created by the subdivision would have—

(a) if it is a standard lot—a minimum width of 12 metres, or

(b) if it is a battle-axe lot—a minimum width of 15 metres and a minimum area of 450 square metres.

(4C) For the purposes of this clause, if a lot is a battle-axe lot or other lot with an access handle, the area of the access handle is not to be included in calculating the lot size.

The development proposal is consistent with the development standard objectives and the extent of the lot size shortfall at 9.23% is noted and does not detract from the general amenity, capacity appearance and the land use opportunity for the newly formed rear lot. The required minimum lot size (of 1.0 ha) is achieved by the proposed new front lot and is considered to satisfactorily address the objectives. Likewise the proposed rear lot is not considered restricted or with adverse outcomes on the basis the 9.23% reduction in area is not critical to the site. This comment is offered with the notation of the land subdivision pattern prevalent in the locality which has seen similar forms of subdivision in the locality. The proposed land subdivision, notwithstanding the numerical non-compliance with the lot size (via method of measurement prescribed in 4.1(4C)) is acceptable, and suitable to the site.

Clause 4.6 allows consideration of these particular variations having regard to the objectives of clause 4.6 which are detailed 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

What Is the Numeric Value of the Development Standard in the Environmental Planning Instrument?

Clause 4.1 prescribes a Minimum Lot Size of **10,000 m²** by reference to the minimum lot size map.

What Is The Numeric Value Of The Development Standard In The Development Application?

The lot sizes for the proposed application two lot plan of subdivision are detailed as follows:

Proposed front lot 1032 – 1.0 ha in area – **complies**

Proposed rear lot 1031 – 1.02 ha in physical area, 9.077m² by site area definition – **non-compliance**

The 9,077m² lot size area (pursuant to clause 4.1(4C)), represents a a lot which has a 9.23% shortfall from the minimum required 10,000m².

Whilst the NSW Department of Planning and Environment includes a requirement to identify the percentage variation in its *Guide to Varying Development Standards* there are a number of case law examples that demonstrate that there is no constraint on the degree to which a consent authority may depart from a numerical standard.

The following examples relate to Floor Space Ratio and Height of Buildings development standards and assist in demonstrating that the degree of exceedance alone is not determinative in assessment of a Request for Variation to a development standard.

Clause 4.6 of the LEP is in similar terms to SEPP 1. Relevantly, like SEPP 1, there are no provisions that make necessary for a consent authority to decide whether the variation is minor. This makes the Court of Appeal's decision in *Legal and General Life* equally applicable to clause 4.6. This means that there is no constraint on the degree to which a consent authority may depart from a numerical standard.

Some examples that illustrate the wide range of commonplace numerical variations to development standards under clause 4.6 (as it appears in the Standard Instrument) are as follows:

(a) In *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003 the Land and Environment Court granted a development consent for a three storey shop top housing development in Woolloomooloo. In this decision, the Court, approved a **floor space ratio variation of 187 per cent**.

(b) In *Amarino Pty Ltd v Liverpool City Council* [2017] NSWLEC 1035 the Land and Environment Court granted development consent to a mixed use development on the basis of a clause 4.6 request that sought a **38 per cent height exceedance over a 15-metre building height standard**.

(c) In *Auswin TWT Development Pty Ltd v Council of the City of Sydney* [2015] NSWLEC 1273 the Land and Environment Court granted development consent for a mixed use development on the basis of a clause 4.6 request that sought a **28 per cent height exceedance over a 22-metre building height standard.**

(d) In *Season Group Pty Ltd v Council of the City of Sydney* [2016] NSWLEC 1354 the Land and Environment Court granted development consent for a mixed use development on the basis of a clause 4.6 request that sought a **21 per cent height exceedance over a 18-metre building height standard.**

In short, clause 4.6 is a performance-based control so it is possible (and not uncommon) for large variations to be approved in the right circumstances.

How is strict compliance with the development unreasonable or unnecessary in this particular case?

The matter of Wehbe v Pittwater Council [2007] NSWLEC 827 (21 December 2007) sets out five ways in which strict compliance with a development standard can be demonstrated to be unreasonable or unnecessary in the circumstances of the case.

The 5 ways are:

1. *if the proposed development proffers an alternative means of achieving the [development standard] objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served);*

2. *the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary*

3. *the underlying objective or purpose 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 compliance with the standard is unnecessary and unreasonable*

5. *"the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary.*

Compliance with a development standard might be shown as unreasonable or unnecessary in circumstances where the development achieves the objectives of the development standard, notwithstanding non-compliance with the development standard. Demonstrating that the development achieves the objectives of the development standard involves identification of what are the objectives of the development standard and establishing that those objectives are in fact achieved.

Strict compliance with the Minimum Lot Size development standard is considered to be unreasonable and unnecessary in the circumstances of the case for the following reasons:

The proposal achieves the objectives of the Zone.

As detailed above, this proposal achieves the objectives of the zone. That is, with respect to this proposal it includes a minor reduction to the lot size however this proposal remains compatible with the existing and future development in the locality, having particular regard to land subdivision patterns and the locality having examples of existing lots with comparable battle-axe lot configurations and lot sizes. The proposed subdivision is entirely consistent with the relevant C4 zone objectives. The development does provide for future low impact residential development opportunities for the proposed rear lot. The lot configuration, as demonstrated by neighbouring subdivision layouts and lot development, is likely to achieve residential development outcomes that do not have adverse effect upon any possible ecological, scientific, or aesthetic values in the area.

The proposal achieves the objectives of clause 4.1

As detailed above, this proposal achieves the objectives of the development standard. That is, the proposal has been designed to be compatible and in keeping with the established pattern of land subdivision in the locality. The future development opportunity for the new rear lot is able to be afforded without the introduction of significant adverse impacts upon neighbouring sites and development. The general lot size achieved and the overall lot dimensions provide for appropriate site development and enhancement with built improvements typical of the locality with substantial spatial separation achievable and deliverable through compliance with the Council DCP provisions.

The proposal has been designed to deliver a high quality land subdivision development with the availability of high amenity areas.

Sufficient environmental planning grounds to justify contravening the development standard

The term "environmental planning grounds" is not defined in PLEP2010 nor any other environmental planning instrument. It is also not defined in the Department of Planning's Guide to Varying Development Standards

Nevertheless, given that demonstration of sufficient environmental planning grounds is a separate test under clause 4.6(3) to the test of "unreasonable or unnecessary in the circumstances of the case"; and that case law relevant to SEPP 1 such as Wehbe v Pittwater Council [2007] NSWLEC 827 (21 December 2007) and Winten Property v North Sydney (2001) 130 LGERA 79 deal with demonstration of "unreasonable and unnecessary in the circumstances of the case", it must therefore be concluded that "environmental planning grounds" are a different test which cannot necessarily rely on the same methodology as laid down in SEPP 1 relevant Court decisions.

The matter of Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (30 January 2015) provides some helpful guidance on the subject of "environmental planning grounds", however it is in fact limited to defining some factors which are not environmental planning grounds. Paragraph 60 of Commissioner Pearson's decision states:

> *The environmental planning grounds identified in the written request are the public benefits arising from the additional housing and employment opportunities that would be delivered by the development, noting (at p 5) the close proximity to Ashfield railway station, major regional road networks and the Ashfield town centre; access to areas of employment, educational facilities, entertainment and open space; provision of increased employment opportunities through the ground floor retail/business space; and an increase in the available housing stock. I accept that the proposed development would provide those public benefits, however any development for a mixed use development on this site would provide those benefits, as would any similar development on any of the sites on Liverpool Road in the vicinity of the subject site that are also in the B4 zone.* ***These grounds are not particular to the circumstances of this proposed development on this site****. To accept a departure from the development standard in that context would not promote the proper and orderly*

development of land as contemplated by the controls applicable to the B4 zoned land, which is an objective of the Act (s 5(a)(ii)) and which it can be assumed is within the scope of the "environmental planning grounds" referred to in cl 4.6(4)(a)(i) of the LEP. (emphasis added)

30. On Appeal in Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 (3 June 2015), the Court considered whether the Commissioner had erred in law in confining environmental planning grounds to those particular to a site or proposed development. The Court held at [29] and [30] that this was a matter which the Commissioner was entitled to consider in her exercising of discretion:

> *Turning to the first ground of appeal, it refers to a finding of the Commissioner at [60] in relation to the environmental planning grounds identified in the written request, as required by cl 4.6(3)(b). The Commissioner concluded that the grounds referred to were not particular to the circumstances of the proposed development on the particular site. Firstly, it is debatable that this ground of appeal couched as the misconstruction of subclause (4)(a)(i) does identify a question of law. The Commissioner's finding, that the grounds relied on in the written report were not particular to the circumstances of the proposed development on this particular site, is one of fact. That informed her finding of whether the grounds put forward were sufficient environmental planning grounds.*
>
> *To the extent the issue raised can be described as a question of mixed fact and law, the Commissioner is exercising a discretion under subclause (4)(a)(i) in relation to the written report where the terms in subclause (3)(b) of sufficient environmental planning grounds are not defined and have wide import,*

From this we interpret that particular circumstances of the site or development is an appropriate (although not exclusive) filter through which to view the sufficiency of environmental planning grounds.

In the absence of a legislative or other definition we adopt a definition for "environmental planning grounds" as 'any matter arising from consideration of either Section 4.15 of the EP&A Act 1979 or its Objectives which in the circumstances of the particular development on the particular site, warrants variation from the development standard'.

Based on that methodology, the environmental planning grounds which support variation to the Minimum Lot Size standard in this instance are:

Environmental Planning Ground 1 – Negligible amenity or visual impacts

Numerically, the minimum lot size variation of 9.23% for the rear lot is not considered excessive or unreasonable in the context of the site or surrounding locality. It is argued that the variation in lot size does not cause adverse impact and satisfies the objectives of the standard.

Environmental Planning Ground 2 – Locality Character

The proposed development represents a land subdivision configuration that is compatible and consistent with the land subdivision pattern of the locality. The particular subdivision, in the context of this site means that the variation to the minimum lot size will entail future building works which are

readily capable of achieving full compliance with Council's DCP provisions relating to the desired and future character of the area. The end result of the two lot subdivision, provides for a single dwelling entitlement to the newly created rear lot and the future development of the rear lot is unlikely to have any impact upon the streetscape of Kerrs Road but will represent positive enhancement for compatible development to the rear of the site.

Public Interest

The proposed development will be in the public interest because it is consistent with the objectives of clause 4.1 and the objectives of the zone. As the Court recently reminded in *Initial Action* (2018) at [26] – [27], this is what is required, rather than broad statements about general 'public interest' considerations at large.

The arguments outlined earlier in relation to consistency with clause 4.3, C4 zone objectives of the PLEP 2010 are relied upon as detailed above.

Secretary's Concurrence

It is understood that the Secretary's concurrence under clause 4.6(4) of PLEP 2010 has been delegated to Council. Nevertheless, Council may wish to consider the concurrence requirements, being:

> (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
>
> (b) the public benefit of maintaining the development standard, and
>
> (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

In this matter, for the reasons outlined above – and particularly having regard to the minimal adverse amenity impacts stemming from the minor variation non-compliance with the minimum lot size standard – there is nothing about this proposed variation that raises any matter of significance for State or regional environmental planning, nor is there any broad public benefit in maintaining the development standard on this site. There are no other relevant matters required to be taken into consideration before granting concurrence.

Conclusion

For the reasons outlined above, the objection to Clause 4.1 of PLEP 2010 is considered well-founded on the basis that the development in fact demonstrates achievement of the objectives of the development standard and the objectives of the C4 zone. In this regard, strict compliance with the development standard is considered unreasonable or unnecessary, particularly noting the following:

- the proposed subdivision appropriately respects the local character and pattern of subdivision in the immediate Mount Vernon locality,
- there are no unreasonable impacts associated with the proposed subdivision,
- the proposed subdivision is consistent with the existing and future character of the area,
- the proposed subdivision will create a superior outcome for the social and economic outcomes when compared to the underutilised parent lot with the existing single dwelling that is currently on site

As demonstrated within this submission, the subdivision configuration is considered appropriate to the locality.

Council can be satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development and that there are sufficient environmental planning grounds to justify contravening the development standards.

It is therefore requested that the Council not withhold development consent for the proposed development due to a noncompliance with the minimum lot size development standard.