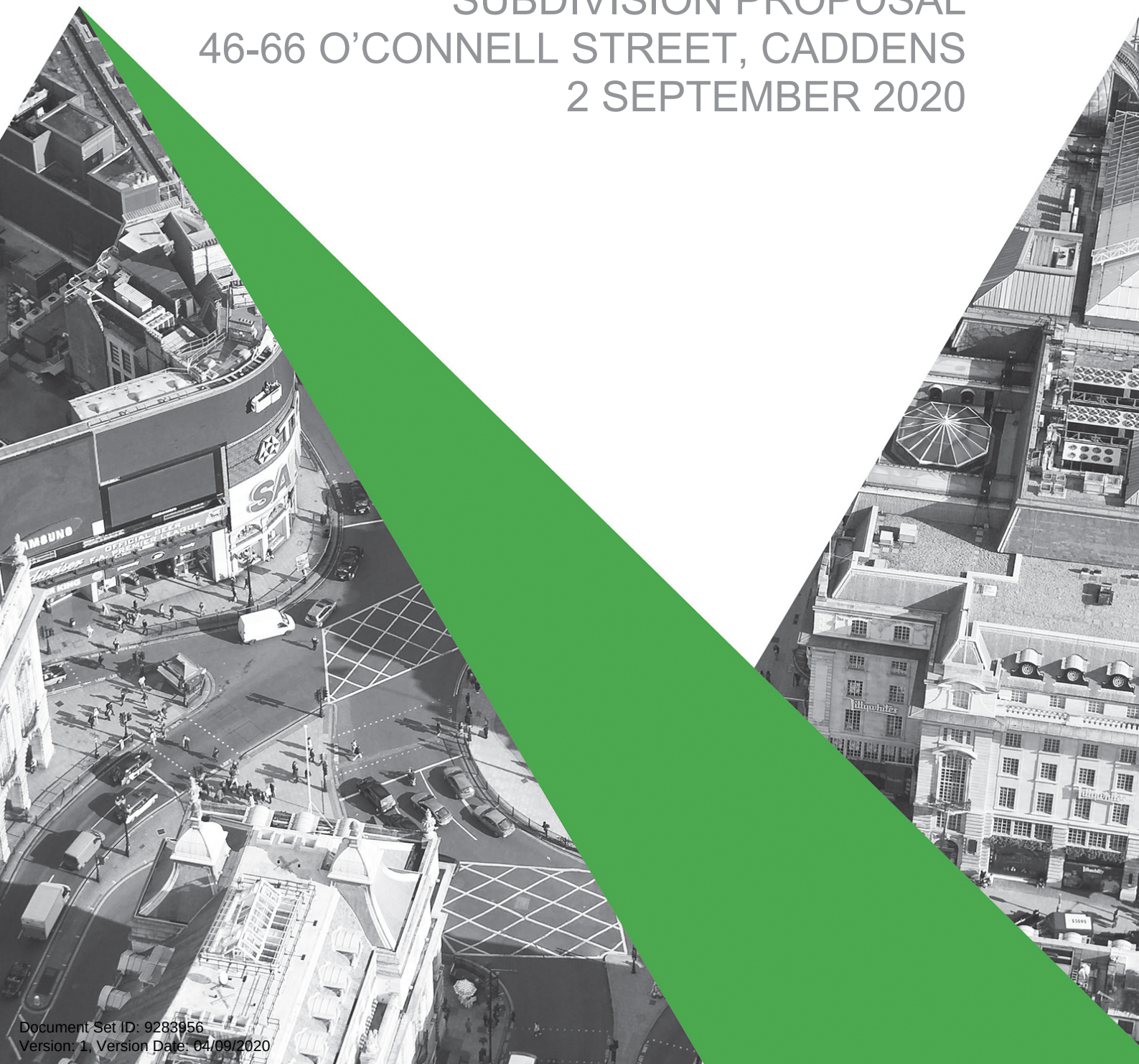
Clause 4.6 Variation

SUBDIVISION PROPOSAL
46-66 O'CONNELL STREET, CADDENS
2 SEPTEMBER 2020



CLAUSE 4.6 VARIATION: MINIMUM LOT SIZE

BACKGROUND, CONTROLS, AND THE DEPARTURE

Clause 4.1 of the Penrith LEP 2010 sets a minimum lot size of 400m^2. This is reflected on the mapping extract below.

Clause 4.1 of the Penrith LEP 2010 also nominates a minimum frontage of 12m in the R3 zone.

It is noted that this Clause 4.6 seeks a departure to both provisions- noting they are both covered in Clause 4.1 and informed by the same objectives of the control.

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 1989.

(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.

It is noted that as per 4.1(4) the minimum lot size does not apply to the development of land under a Community Title arrangement. However this scheme is a torrens title arrangement.

The departures to the controls are as follows:

Lot Frontage:

- The lot frontage to the 12.5m product is 100% compliant
- The lot frontage to the 11m product has a 12% departure
- The lot frontage to the 10m product has a 25% departure to the control.

Lot Size:

- The lot sizes vary with compliance achieved to corner lots, but a departure to the remaining lots that varies noting:
    - The 12.5m product presents a 15% departure to the lot size- being 337.5m^2
    - The 10m product presents a 32.5% departure to the lot size- being 270m^2

When considering the density of 160 lots on the 9ha it is 17.7 dwellings per ha- or 1 dwelling per 562.5m^2 of lot area on that land. This includes roads and the park area.

For a larger scale subdivision the density per Ha and site area per dwelling is considered a better guide as to the outcome of the proposal.

Comparison to Prior Concept Plan DA

The proposal does not comply with the 400m^2 lot size and 12m frontage control in the LEP, owing really to the fact the site is zoned R3 but is subject to the general residential controls- rather than the Caddens DCP.

Further the typical R3 outcome in Penrith LGA are townhouses with common driveways and the like- rather than small lot subdivision.

The site context- noting the significant size- and interface with the Caddens land means that a merit based approach to the development outcome needs to be explored.

This is very much in the same way as the prior DA on the land- that was to be established via a community title arrangement- was considered as the exact same planning controls applied, i.e. a merit basis and outcome focus.

Density

By way of a comparison of outcomes, as it relates to density, this is explained below.

In terms of density when considering the developable area- excluding Lot 401 and 501 (B2)- the ***proposal achieves a density of 17.7 dwellings per Ha***. This compares to the prior Concept Plan approval that achieved ***39 dwellings per Ha (excluding B2)***. So on a density basis it can be clearly seen that the density of the scheme is substantially less- and enables a more suitable outcome for the site.

Further it is noted that the desired minimum density for Caddens is 15 dwellings per Ha- which this scheme achieves but does not substantially exceed- again pointing to the suitability of the outcome on the site.

Hence the departure to the lot size control has nothing to do with the outcome on the site- only that this proposal is a torrens scheme vs a community title scheme. The merit considerations are the same in terms of the outcome- it is only that this scheme is triggering the typical lot size under PLEP 2010 which necessitates a Clause 4.6 variation.

RELEVANT CASE LAW

There are a number of recent Land and Environment Court cases including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council,* as well as *Zhang v Council of the City of Ryde*.

In addition a recent judgement in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact Is a way of demonstrating consistency with the objectives of a development standard. Therefore this must be considered when evaluating the merit of the lot width departure.

Further a decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245* has adopted further consideration of this matter which requires that a consent authority must be satisfied that:

- The written request addresses the relevant matters at Clause 4.6 (3) and demonstrates compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and

- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

The approach in Al Maha was reinforced by *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 where is was found that:

… in order for a consent authority to be satisfied that an applicant's written request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i)).

Finally the decision in *Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61* confirmed that the consent authority must be directly satisfied that the matters are adequately addressed in the written Clause 4.6 variation request.

On that basis it is necessary that the following be satisfied.

- The consent authority must be satisfied the written request demonstrates the matters in Clause 4.6(3).

- The consent authority be satisfied the proposed development will be in the public interest because it is "*consistent with*" the objectives of the development standard and zone is not a requirement to "*achieve*" those objectives.

  It is a requirement that the development be compatible with the objectives, rather than having to 'achieve' the objectives.

- Establishing that 'compliance with the standard is unreasonable or unnecessary in the circumstances of the case' does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe "test" 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in Wehbe v Pittwater.

- The proposal is required to be in 'the public interest'.

CLAUSE 4.6 OF THE LEP

Clause 4.6 of the Penrith Local Environmental Plan 2010 provides that development consent may be granted for development even though the development would contravene a development standard. It is submitted that cl.4.1 of LEP 2010 is consistent with the definition of "development standard" contained in s.1.4(1) of the *Environmental Planning and Assessment Act 1979* (**the Act**), being:

> *….. 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—*
>
> *……*
>
> *(c) the character, location, siting, bulk, scale, **shape, size**, height, density, design or external appearance of a building or work,*

Clause 4.6(3) to (5) of LEP 2010 follows:

(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.

Clause 4.6 does not fetter the consent authority's discretion as to the numerical extent of the departure from the development standard.

Consequently, by this request, the applicant seeks to justify the contravention of the Standard by demonstrating (as clause 4.6(3) requires):

3 "(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."

Further, the Consent authority must be satisfied (as clause 4.6(4) requires) that:

4 "(i) (this 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 Secretary has been obtained."

Notably, as the subject land is not in any of the zones referenced in clause 4.6(6), that sub-clause has no application.

RELEVANT MATTERS TO BE DEMONSTRATED IN CLAUSE 4.6

As Clause 4.6 provides, to enable development consent to be granted, the applicant must satisfy the consent authority that:

> *this request has adequately addressed the matters required to be demonstrated by subclause (3),*[1] *namely that:*
>
> a. *compliance with the development standard is unreasonable or unnecessary in the circumstances of the case,*[2] *and*
> b. *there are sufficient environmental planning grounds to justify contravening the development standard*[3]*;*
>
> *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*
>
> *the concurrence of the Secretary has been obtained.*[4]

The request deals with each relevant aspect of clause 4.6 below.

[1] Clause 4.6(4)(a)(i)
[2] Clause 4.6(3)(a)
[3] Clause 4.6(3)(b)
[4] Clause 4.6(4)(b)

COMPLIANCE UNREASONABLE OR UNNECESSARY

Clause 4.6(3)- Objectives of the Standard
In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved.

The underlying objectives of the control are satisfied, known as the first way in the decision of Wehbe v Pittwater Council (2007) 156 LGERA 446;

The objectives of the 'lot size' development standard are stated as:

> (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.*

Strict compliance with the development is unnecessary in this particular case having regard to the design merit of the proposal and noting that the proposal satisfies the underlying objectives of the control of the lot size standard owing to the outcome achieved.

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case for the following reasons:

Each objectives is considered below.

- ***Objective (a):***
- The proposed development ensures the lot sizes are compatible with the environmental capabilities of the land being subdivided when considering the careful design and configuration of the scheme and the retention and restoration of the CPW on the land that sits on the park lot of Residue Lot 335. The proposal will regenerate and retain the CPW and the fact that this is achieved demonstrates a site responsive design with regard to lot size and means the 7883.4m^2 is not developed for residential purposes and offsets the fact that the remaining lots are smaller as a means of offsetting the retention and preservation of the CPW and the park.

- Notably the proposal also deals with stormwater conveyed from the site on the subject site through the OSD basins which again necessitates the design approach of smaller lot sizes- but off site OSD (relative to individual lots) again ensuring the lot sizes are compatible with the environmental capabilities of the land being subdivided.

- ***Objective (b):***

- The subdivision, and in particular the lot size, will have no discernible additional likely impact on the amenity of the adjoining properties owing to the road layouts which achieve perimeter roads and as such there is nothing that can be said to arise in terms of any greater likely impacts of a compliant vs non-compliant scheme.

- If anything when measured with regard to density it is clear the density, and therefore impacts by way of traffic generation and the like, are substantially less than the prior approval given the 17.7 dwellings per Ha achieved vs the 39 dwellings per Ha approved. Therefore the impact is less, despite the non-compliance, as compared to the prior scheme.

- ***Objective (c):***
- The development scheme, and the reduced lot size, specifically satisfies c) in when considering the careful design and configuration of the scheme and the retention and restoration of the CPW on the land that sits on the park lot of Residue Lot 335. The proposal will regenerate and retain the CPW and the fact that this is achieved demonstrates a site responsive design with regard to lot size and means the 7883.4m^2 is not developed for residential purposes and offsets the fact that the remaining lots are smaller as a means of offsetting the retention and preservation of the CPW and the park.

- ***Objective (d):***
- Objective (d) is satisfied by the proposed development as this draws in the regulation of density on the land and then consideration of increase in demand for services and facilities. As it relates to services and facilities Section 7.11 contributions will ensure the development contributes to services and facilities.

- The variation to the lot size enables the delivery of a suitable density of 17.7 dwellings per Ha, generally consistent with the desired minimum density of 15 dwellings per Ha more broadly in Caddens. This is also substantially less than the density of 39 dwellings per Ha previously found to be acceptable by Council and the Sydney West Planning Panel. Hence the impact of this development is substantially less than the prior DA approval and a much more suitable development intensity on the land.

- ***Objective (e):***
  Objective (e) is satisfied by the proposal as the development, despite the lot size and width departure, is capable of ensuring suitable built form outcomes- clearly reflected on the PBD building envelope plans. They show that compliance is achieved with regard to:
    - Setbacks;
    - POS;
    - Parking;
    - Height;

  A greater and compliant lot size would not change this fact hence the departure to the standard still enables suitable development on the lots as shown on the PBD plans and strict compliance with the lot size control brings no discernible planning benefit.

On the basis of the above points the development is clearly in the public interest because it is consistent with the underlying objectives of the lot size and width control; and the numerical departure from the lot size and width control facilitates a positive design outcome on the site.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances.

Clause 4.6(3)- Environmental Planning Grounds

The following factors demonstrate that sufficient environmental planning grounds exist to justify contravening the lot size development standard. [5] For that purpose, the critical matter that is required to be addressed is the departure from the development standard itself, not the whole development.[6]

- The proposed development ensures the lot sizes are compatible with the environmental capabilities of the land being subdivided when considering the careful design and configuration of the scheme and the retention and restoration of the CPW on the land that sits on the park lot of Residue Lot 335. The proposal will regenerate and retain the CPW and the fact that this is achieved demonstrates a site responsive design with regard to lot size and means the 7883.4m^2 is not developed for residential purposes and offsets the fact that the remaining lots are smaller as a means of offsetting the retention and preservation of the CPW and the park. Therefore the non-compliance facilitates this outcome which is a positive environmental planning outcome.

- The subdivision, and in particular the lot size, will have no discernible additional likely impact on the amenity of the adjoining properties owing to the road layouts which achieve perimeter roads and as such there is nothing that can be said to arise in terms of any greater likely impacts of a compliant vs non-compliant scheme by way of lot size and width departures proposed by this scheme.

- When measured with regard to density it is clear the density, and therefore impacts by way of traffic generation and the like, are substantially less than the prior approval given the 17.7 dwellings per Ha achieved vs the 39 dwellings per Ha approved. Therefore the impact is less, despite the non-compliance, as compared to the prior scheme. Therefore the environmental planning outcome is preferred as there will be lesser impact arising, despite the non-compliance.

- The regulation of density on the land and consideration of increase in demand for services and facilities is of importance in considering the outcome achieved- particularly as compared to that desired and approved as part of the prior scheme. The variation to the lot size enables the delivery of a suitable density of 17.7 dwellings per Ha, generally consistent with the desired minimum density of 15 dwellings per Ha more broadly in Caddens. This is also substantially less than the density of 39 dwellings per Ha previously found to be acceptable by

[5] As clause 4(3)(b) requires
[6] As confirmed in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at 46, per Preston CJ

Council and the Sydney West Planning Panel. Hence the impact of this development is substantially less than the prior DA approval and a much more suitable development intensity on the land.

- Further to the above the departure to lot size and width standard furthers the objects of the Environmental Planning and Assessment Act 1979 as set out below:
    - To promote the orderly and economic use and development of land;
    - To promote the delivery of affordable housing through increased housing supply and a diversity in housing forms;
    - To promote good design and amenity of the built environment through enabling suitable lot sizes and configurations to enable dwelling outcomes as shown on the building envelope plans
    - 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- by virtue of retention of the CPW.
    - To protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats - by virtue of retention of the CPW achieved through creating the parkland lot and relevant VMP works to restore the CPW.

The above analysis demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

CONSISTENCY WITH OBJECTIVES OF THE STANDARD AND THE ZONE & THE PUBLIC INTEREST

As clause 4.6(4)(a)(i) requires, the Consent Authority must also be satisfied that proposed development will be in the public interest because it is consistent with:

1. the objectives of the particular standard and
2. the objectives for development within the zone in which the development is proposed to be carried out.

The Applicant has already addressed the objectives of the development standard in the context of Cl 4.1 in demonstrating that compliance is unnecessary or unreasonable.

The objectives of the R3 Zone are as follows:

"Objectives of zone
• To provide for the housing needs of the community within a medium density residential environment.
• To provide a variety of housing types within a medium density residential environment.
• To enable other land uses that provide facilities or services to meet the day to day needs of residents.
• To provide for a concentration of housing with access to services and facilities.
• To enhance the essential character and identity of established residential areas.
• To ensure that a high level of residential amenity is achieved and maintained.
• To ensure that development reflects the desired future character and dwelling densities of the area.

- The development directly satisfies the first objective of the zone as the development proposal provides for housing needs of the community in a medium density residential environment.
- The development contributions to dwelling diversity by virtue of small lot housing rather than typical townhouse forms;
- The site is well located to services and facilities noting the immediately adjacent B2 land;
- The locality is not an established residential area hence that is not relevant however the proposal is consistent with the desired future character envisaged by the Caddens controls.
- The proposal enables a high level of residential amenity to be achieved noting the building envelope plans that show the typical housing outcomes.

- The regulation of density on the land and consideration of increase in demand for services and facilities is of importance in considering the outcome achieved- particularly as compared to that desired and approved as part of the prior scheme. The variation to the lot size enables the delivery of a suitable density of 17.7 dwellings per Ha, generally consistent with the desired minimum density of 15 dwellings per Ha more broadly in Caddens. This is also substantially less than the density of 39 dwellings per Ha previously found to be acceptable by Council and the Sydney West Planning Panel. Hence the impact of this development is substantially less than the prior DA approval and a much more suitable development intensity on the land.

For those reasons the applicant says the consent authority would be satisfied the development is in the public interest.

CONCURRENCE OF THE SECRETARY

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 18–003 'Variations to development standards', dated 21 February 2018. This circular is a notice under 64(1) of *the Environmental Planning and Assessment Regulation 2000*. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

CONCLUSION

For the reasons set out above, the applicant says that:

1. the matters canvassed in this request have adequately addressed the requirements of clause 4.6(3) and
2. The Consent Authority should be satisfied that the proposed development is in the public interest, as it is consistent with both the objectives of the development standard, and the objectives of the R3 zone.