

1. CLAUSE 4.6 VARIATION

1.1 Introduction

This is an application to vary a development standard under clause 4.6 – Exceptions to Development Standards of the *Penrith Local Environmental Plan 2010* (LEP). This variation request relates to the standard outlined via clause 4.1 of the LEP, being the minimum subdivision lot size. This clause 4.6 variation supports a development application seeking consent for development of an electricity generating works (battery storage) and two lot subdivision at 2235-2249 Castlereagh Road, Penrith (Lot 5 DP1017480). The site currently hosts the Penrith Endeavour Energy Substation – refer **Figure 1**.

Figure 1 – Subject site



The objectives of Clause 4.1 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,*

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(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.

The subject site is zoned IN1 – General Industrial (refer **Figure 2**) and is identified via the Lot Size Map as having of Minimum Lot Size of 1.25 hectares – refer **Figure 3**.

The subject site has a total area of 3.3 ha and proposes a two lot subdivision creating a lot (proposed Lot 51) of approximately 3 hectares and a lot (proposed Lot 52) of approximately 3,000 square metres. Proposed Lot 52 is below the applicable minimum lot size. As such a clause 4.6 variation is required.

Figure 2 – Subject site zoning

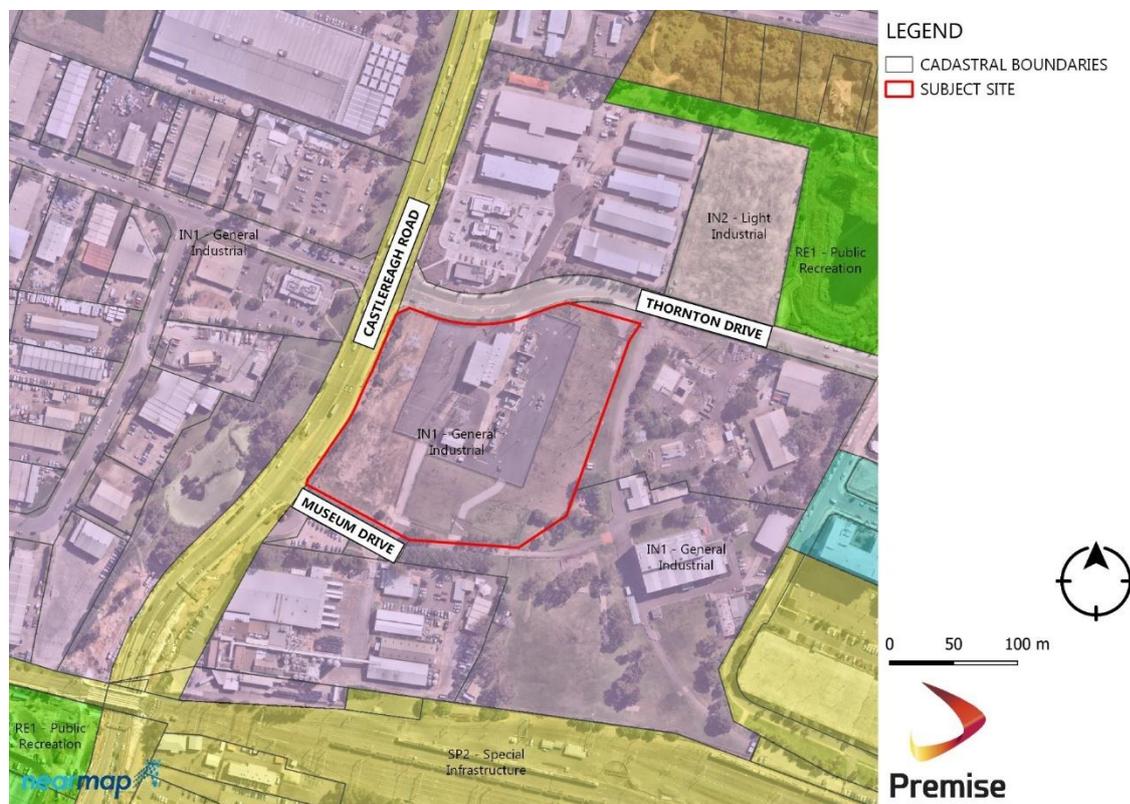


Figure 3 – Subject site mapped minimum lot size

1.2 Clause 4.6

The objectives of clause 4.6 are:

(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.

It further provides:

(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 Secretary has been obtained.

(5) In deciding whether to grant concurrence, the 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 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 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

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(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,

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

Clause 4.6 seeks to provide a mechanism for the legitimate variation of a development standard. It seeks to provide flexibility so as to achieve better outcomes for and from development.

Clause 4.6 variations, and SEPP1 objections before them, have been the subject of a large number of Land and Environment Court decisions and this has usefully established a clear pathway for demonstrating the methods by which the obligations of clause 4.6 are discharged.

SEPP1 was introduced in 1979 in conjunction with the *Environmental Planning and Assessment Act 1979*. SEPP1 was seen as a crucial tool in support of this new planning system, which sought to 'foster investment', 'facilitate growth' and provide 'flexibility' and 'wide discretion'. This is strongly reflected by the core aims and objectives of the SEPP1, which stated:

"This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects ... of the Act"

The most relevant of the cases relating to SEPP1 is *Wehbe vs Pittwater Council (2007) LEC 827* (Wehbe). Whilst Wehbe was concerned with a variation request pursuant to the provisions of *State Environmental Planning Policy No. 1 – Variations to a Development Standard* (SEPP1), it remains relevant in the determination of clause 4.6 variations.

In the decision of *Wehbe v Pittwater Council [2007] NSWLEC 827* (Wehbe), Preston CJ summarised the five (5) different ways in which an objection under SEPP 1 could be shown to be well founded and the manner by which the approval of the objection may be consistent with the aims of the policy. The five possible ways articulated in Wehbe are set out below:

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- *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- *The underlying object of the purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- *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;*
- *The compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

In applying the tests of Wehbe, only one of the above rationales is required to be established.

In 2006 the Standard Instrument Local Environmental Plan (SILEP) was introduced, and with it Clause 4.6. Clause 4.6 replaces the provisions of SEPP1 as relating to LEP's prepared in line with the SILEP.

Following the introduction of clause 4.6, the NSW LEC found at paragraph 62 in the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* (Four2Five) that:

"...the case law developed in relation to the application of SEPP 1 may be of assistance in applying Clause 4.6. While Wehbe concerned an objection under SEPP 1, in my view the analysis is equally applicable to a variation under Clause 4.6 where Clause 4.6 (3)(a) uses the same language as Clause 6 of SEPP 1."

A number of more recent LEC decisions in relation to clause 4.6 variations also have relevance.

In *Randwick City Council v Micaul Holdings Pty Ltd [2016]* (Micaul) the Chief Judge, Preston CJ, noted (our emphasis added):

*39. Hence, the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only **indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary.***

40. The Commissioner's reasons for judgment need to be scrutinised with this correct inquiry in mind. The Council needed to establish that the Commissioner did not provide adequate reasons for concluding that Micaul's cl 4.6 objections adequately addressed the matter of whether compliance with the relevant development standard is unreasonable or unnecessary in the circumstances of the case. I find that the Council has not established that the Commissioner's reasons were inadequate in law in this regard.

Also of relevance is the matter of *Moskovich v Waverley Council [2016]* (Moskovich), which related to a request to vary a maximum height limit. In favourably determining the matter, the

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Commissioner cited a number of relevant factors, including the lack of environmental impact of the proposal, the environmental benefits of the proposal, the two street frontages and its context.

Clause 4.6 also requires the concurrence of the Director-General to be obtained prior to the granting of consent for development that contravenes a development standard unless concurrence from the Director-General to vary the development standards have been delegated to the Council.

By virtue of Clause 64 of the *Environmental Planning and Assessment Regulations 2000* (EPA Regs) and Planning Circular 17-006, it is apparent that concurrence in matters relating to clause 4.6 variations may be assumed except in a limited number of circumstances. The proposal does not meet those limited circumstances and therefore concurrence may be assumed.

2. PURPOSE OF THIS REQUEST

Pursuant to Clause 4.6 of LEP, an exception is sought to clause 4.1 of the LEP relating to minimum lot size. The relevant considerations for the proposed non-compliance with the minimum lot size standard are assessed in the following sections.

Clause 4.6 of the LEP permits departures from development standards in certain circumstances. In the context of this variation request:

1. Strict compliance with clause 4.1 is unreasonable or unnecessary for the following reasons:
 - a. The objectives of the LEP are achieved notwithstanding the technical non-compliance.
 - b. The objectives of the LEP IN1 – General Industrial zone are achieved notwithstanding the technical non-compliance.
 - c. The objectives of clause 4.1 are achieved notwithstanding the technical non-compliance
2. There are sufficient environmental planning grounds to support the proposed variation.

Each of these reasons is addressed in detail on the following pages.

The key matters in relation to this request are outlined in the following table.

Table 2.1 – Key matters

Item	Response
Applicable planning instrument	<i>Penrith Local Environmental Plan 2010</i>
LEP objectives	Refer Section 3
Land zoning	IN1 – General Industrial
Zone objectives	Refer Section 4
Development standard seeking variation	Clause 4.1 of the LEP – applicable minimum lot size is 1.25 hectares
Is the standard a performance based control?	No, the lot size standard is a numerical control
Objectives of standard	Refer Section 5

Table 2.1 – Key matters

Item	Response
Numeric value of the standard	The LEP establishes the minimum lot size for subdivision of the subject land is 1.25 ha
Extent of variation	76%

3. LEP OBJECTIVES

3.1 Consideration of LEP objectives

The proposal satisfies the applicable LEP aims, where relevant, as articulated in the table below.

Table 3.1 – LEP Objectives

Objective	Assessment
(a) to provide the mechanism and planning framework for the management, orderly and economic development, and conservation of land in Penrith,	The proposed subdivision facilitates the delivery of an effective and efficient electrical network which supports the development of the area and broader region, to the benefit of the community. The application would utilise appropriate land for the purpose and would not lead to any degradation.
(b) to promote development that is consistent with the Council’s vision for Penrith, namely, one of a sustainable and prosperous region with harmony of urban and rural qualities and with a strong commitment to healthy and safe communities and environmental protection and enhancement,	The application facilitates the sustainable delivery of electrical infrastructure, supporting the vision of providing a sustainable and prosperous region
(c) to accommodate and support Penrith’s future population growth by providing a diversity of housing types, in areas well located with regard to services, facilities and transport, that meet the current and emerging needs of Penrith’s communities and safeguard residential amenity,	Not directly applicable as the project does not relate to delivery of housing.
(d) to foster viable employment, transport, education, agricultural production and future investment opportunities and recreational activities that are suitable for the needs and skills of residents, the workforce and visitors, allowing Penrith to fulfil its role as a regional city in the Sydney Metropolitan Region,	The delivery of an effective and efficient electrical network supports the provision of viable development within the region
(e) to reinforce Penrith’s urban growth limits by allowing rural living opportunities where they will promote the intrinsic rural values and functions of Penrith’s rural lands and the social well-being of its rural communities,	Not directly applicable as the project does not relate to rural living

Table 3.1 – LEP Objectives

Objective	Assessment
(f) to protect and enhance the environmental values and heritage of Penrith, including places of historical, aesthetic, architectural, natural, cultural, visual and Aboriginal significance,	The proposal would not result in any detrimental impacts to the environmental values and heritage of Penrith
(g) to minimise the risk to the community in areas subject to environmental hazards, particularly flooding and bushfire, by managing development in sensitive areas,	The site is not significantly affected by hazard. Minor flooding impacts are associated with the western portion of the site however there is sufficient capacity within the site to host the proposed battery storage unit outside of mapped flood affected land and without risk to the environment.
(h) to ensure that development incorporates the principles of sustainable development through the delivery of balanced social, economic and environmental outcomes, and that development is designed in a way that assists in reducing and adapting to the likely impacts of climate change.	The development addresses the principles of ESD at Section 4.1.1 of the SEE to which this clause 4.6 variation is attached. The development supports the delivery of an efficient and sustainable electricity network, thereby minimising the impact of climate change. An inefficient electrical network requires greater inputs, including from traditional forms of energy production such as fossil fuels, leading to a lower level of sustainability

On the basis of the above, it is contended that the proposal is consistent with the LEP aims.

4. ZONE OBJECTIVES

4.1 Consideration of zone objectives

The proposal satisfies the applicable zone objectives in relation to the IN1 – General Industrial zone, where relevant, as articulated in the table below.

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**Table 4.1 – IN1 zone Objectives**

Objective	Assessment
<ul style="list-style-type: none"> To provide a wide range of industrial and warehouse land uses. 	<p>The application facilitates the delivery of a permissible land use within the zone and is therefore acceptable in the context of the zone</p>
<ul style="list-style-type: none"> To encourage employment opportunities. 	<p>The application facilitates the delivery effective and efficient reticulated electrical infrastructure, which in turn supports the delivery of business and employment opportunities, and associated residential dwellings that support employment</p>
<ul style="list-style-type: none"> To minimise any adverse effect of industry on other land uses. 	<p>Detrimental impacts associated with the integral land use are not reasonably predicted, subject to the implementation of standard and reasonable mitigation measures as outlined throughout the SEE to which this Clause 4.6 variation is attached.</p>
<ul style="list-style-type: none"> To support and protect industrial land for industrial uses. 	<p>The proposal relates to a proposed use that is permissible in the zone, and, through provision of an effective and efficient reticulated electrical infrastructure, which in turn supports and protects the delivery of industrial land uses</p>
<ul style="list-style-type: none"> To promote development that makes efficient use of industrial land. 	<p>By co locating the proposal with the existing substation, the proposal ensures the efficient use of industrial land</p>
<ul style="list-style-type: none"> To permit facilities that serve the daily recreation and convenience needs of the people who work in the surrounding industrial area. 	<p>Not applicable.</p>

On the basis of the above, it is contended that the proposal is not inconsistent with the zone objectives.

5. CLAUSE 4.1 OBJECTIVES

5.1 Consideration of clause 4.1 objectives

The proposal satisfies the applicable objectives in relation to clause 4.1, where relevant, as articulated in the table below.

Table 5.1 – Clause 4.1 Objectives

Objective	Assessment
(a) to ensure that lot sizes are compatible with the environmental capabilities of the land being subdivided,	The proposed lot is suitable and sufficient to accommodate the proposed purpose, which is an integral part of the overarching application. The land use proposed and which would be facilitated by the proposed subdivision can be comfortably accommodated on the land and without detrimental impacts to the local environment.
(b) to minimise any likely impact of subdivision and development on the amenity of neighbouring properties,	The nature of the land use is consistent with the adjacent and nearby land uses and would not result in unreasonable impacts to the amenity of the surrounding locality
(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 heritage or valuable environmental features on the land requiring protection. The proposed lot size accommodates the proposed land use and does not lead to any unreasonable impacts to special views, trees or heritage items
(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 subdivision facilitates the provision of infrastructure for the benefit of the broader community and does not lead to any increased demand; it will in fact provide for the more efficient and effective delivery of reticulated electrical services.
(e) to ensure that lot sizes and dimensions are able to accommodate development consistent with relevant development controls.	Compliance with the Development Control Plan is achieved, as outlined via the SEE to which this Clause 4.6 variation request is attached.

6. JUSTIFICATION

6.1 Introduction

As outlined in **Section 1.2**, there are a number of specific tests that must be satisfied in determining a clause 4.6 variation. These are discussed in the following sections.

Compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case

It is unnecessary to comply with the development standard in respect of the subject site for the following reasons:

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- The nature of the land use is somewhat unique and provides a scenario that assists with the delivery of sustainable energy and an effective and efficient delivery of electrical infrastructure, to the benefit of the local area and broader region;
- The nature of the land use means that there is limited likelihood of the development creating an undesirable precedent that could be used as a justification for other developments of this nature within the LGA;
- The proposed subdivision facilitates the delivery of the project and is not objectionable in its own right.
- No further subdivision is proposed;
- The consistency with the adjacent land use (sub-station) means that there is a low likelihood of conflict occurring;
- The proposal is capable of meeting the requirements of Council's Development Control Plan as outlined in the SEE to which this clause 4.6 variation is attached;
- Strict compliance with the standard would result in an inflexible and unfair application of policy. It does not serve any purpose that is outweighed by the positive outcomes of the development.

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

This test is routinely satisfied by addressing one (but it need not address all) of the matters outlined by in the Webhe LEC decision, as outlined in **Section 1.2**. These potential reasons of justification are outlined and discussed below:

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*

This is extensively dealt with in **Section 5.1**. For the reasons outlined in that section, it is considered that the variation is sufficiently justified.

- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

Given the nature of the land use is to provide a suitable parcel of land for the delivery of an electricity battery storage system, enforcing the minimum lot size in this instance would serve limited purpose. The development may still proceed without the subdivision and Endeavour Energy, as an electricity supply authority and public authority, have the capacity to complete the subdivision without regard to local policy. With this in mind, it is therefore considered that the underlying objective or purpose of the standard, which is largely to ensure the proper and effective delivery of industrial land within the area, is not relevant to the project.

- *The underlying object of the purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

Not applicable.

- *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;*

Not applicable.

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- *The compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

Not applicable.

The applicant's written request has adequately addressed the matters required to be demonstrated by subclause 4.6(3)

The particular requirements at clause 4.6(3) are:

(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.

It is notable that in the recent LEC decision, *Randwick City Council v Micaul Holdings Pty Ltd [2016]*, the Chief Judge, Preston CJ, noted (our emphasis added):

*"the Commissioner **did not have to be satisfied directly** that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, **but only indirectly by being satisfied that the applicant's written request has adequately addressed** the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary".*

The matters raised at Clause 4.6(3) are adequately addressed above.

The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out

These matters are discussed in **Sections 2, 3 and 4**. Based on that discussion, it is considered that the proposal is in the public interest through demonstrating consistency with the applicable objectives.

In addition to the above, satisfaction of those matters that must be considered by the Secretary in determining whether concurrence should be granted is required.

- Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The setting of minimum lot sizes for development is very much managed at a local level. With respect to industrial land, many Councils recognise the need for flexibility in lot design with industrial areas, and therefore do not provide minimum lot sizes of industrial development. As discussed above, the objectives of the IN1 zone are not impeded by the application proceeding.

Given the very minor nature of the proposal, there are no matters of state or regional environmental planning significance contravened by the favourable determination of this variation request.

- The public benefit of maintaining the development standard

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Arguments around public benefit are limited to arguments of 'proper planning' through the making of consistent decisions that reinforce the overarching strategic framework. This can be succinctly summarised as avoided establishing undesirable precedent.

The public benefit of maintaining the development standard is of minor significance given the proposal is provided to facilitate the delivery of infrastructure that supports the efficient and effective delivery of electrical assets, for the benefit of the community and broader region. There is therefore limited capacity for setting a precedent in this matter that would support further applications of a similar nature, either here or in the wider LGA.

Applications should be considered, firstly, on their site specific merits and, secondly, on their role in proper planning. The development is meritorious in its own right as it supports the effective delivery of electrical assets. Due to the unique scenario, precedent is unlikely and therefore the proper planning of the area is not diminished.

7. CONCLUSION

The development proposes a variation to clause 4.1 of the LEP in that it seeks to enable the creation of a lot below the minimum lot size.

The requested variation is justified in the specific circumstances of the case and compliance with the standard is unnecessary to ensure that compliance with the LEP, IN1 zone and clause 4.1 objectives are achieved.

As demonstrated throughout this request, the variation request is well founded and there are sufficient environmental grounds to justify the non-compliance with the standard given the specific characteristics of the site.

The clause 4.6 variation provides sufficient justification for the variation as sought and therefore can be supported by Council. The concurrence of DPIE may be assumed by reference to Planning Circular 17-006.