



# STATEMENT OF ENVIRONMENTAL EFFECTS

**116-123 Kerrs Road**

**Mount Vernon, NSW, 2178**

**Lot 103 DP 31924**

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Proposed land subdivision from 1 lot  
into 2 lots

**March 17, 2022**

V1.5a

**HDC**  
Haskew de Chalain  
**PLANNING**

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# 1 Introduction

This report has been prepared as a Statement of Environmental Effects in assessment of a Development Application proposing the subdivision of land upon **Lot 103, DP 31924** otherwise known as **116-123 Kerrs Road, Mount Vernon**.

The report is submitted in accordance with Clause 50(1)(a) of the *Environmental Planning and Assessment Regulation 2000* ("the EPAA Regulation 2000"). The purpose of this Statement of Environmental Effects is:

- To provide a description and general information about the site and the proposed development in accordance with Clause 1 of Schedule 1 of the EPAA Regulation 2000.

## ***Proposed land subdivision of 1 lot into 2 lots***

This report is submitted in accordance with Clause 50(1)(a) of the *Environmental Planning and Assessment Regulation 2000* ("the EPAA Regulation 2000"). The purpose of this Statement of Environmental Effects is:

- To provide a description and general information about the site and the proposed development in accordance with Clause 1 of Schedule 1 of the EPAA Regulation 2000.

In accordance with Clause 2 of Schedule 1 of the EPAA Regulation 2000, to provide the following information:

- The environmental impacts of the development;
- How the environmental impacts of the development have been identified; and,
- The steps to be taken to protect the environment or to lessen the expected harm to the environment.

To address the above statutory requirements, the report considers the following matters:

- Description of the site, surrounding development and the wider locality;
- Description of the proposed development;
- Assessment of the proposed development in accordance with all statutory controls and Council's Development Control Plan (DCP); and,
- A broader environmental assessment of the proposal, having regard to the matters for consideration contained within Section 4.15 of the *Environmental Planning and Assessment Act, 1979*.

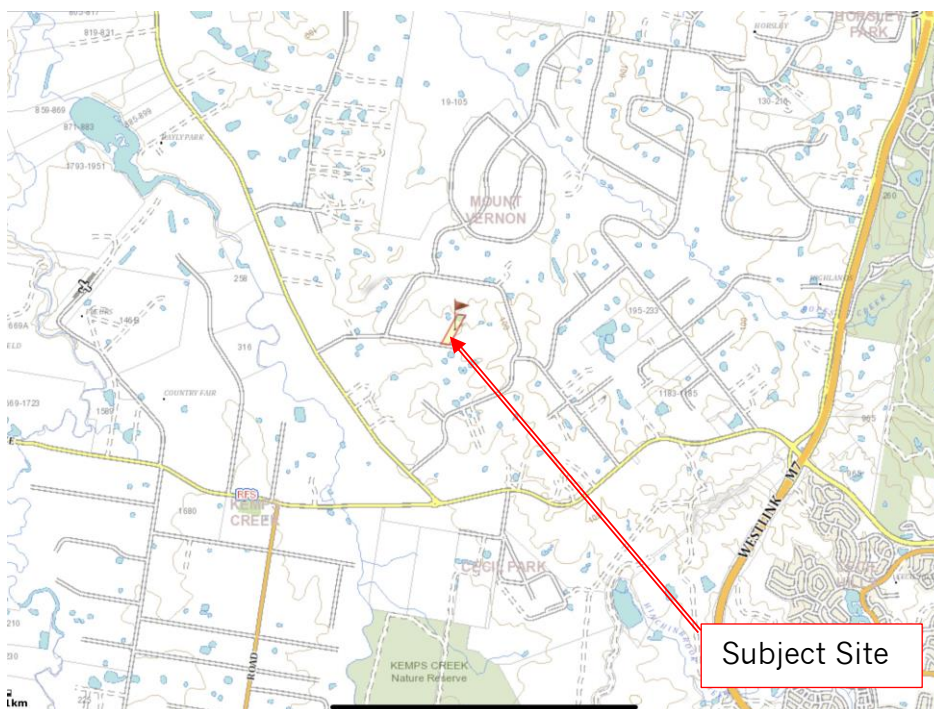
## 2 Site details

### 2.1 SITE LOCATION

The site is located within the suburb of Mount Vernon and is formally identified as **Lot 103, DP 31924** otherwise known as **No. 116-123 Kerrs Road, Mount Vernon**.



**Figure 1:** Subject site



**Figure 2:** Site location : Regional Locality

## 2.2 DESCRIPTION

The subject site is located in an established C4 Environmental Living zone in Mount Vernon. This site is located on Kerrs Road which connects the site to the surrounding suburbs and urban areas where services, shops and business zones developments are available to serve the occupants of the Mount Vernon locality.

The subject site is home to one existing dwelling and the vegetation is predominately low lying apart from a few various mature trees scattered around the site. Pedestrian and vehicular access to the site is gained from Kerrs Road.

The general dimensions of the current lot are as follows:

- The has front and rear boundaries that measure approximately 70m.
- The side boundaries each measure at approximately 297m in length.
- The area of the subject site is 20,023m<sup>2</sup>.

## 2.3 VEGETATION

The site is generally open land, semi-rural in nature with the land area relatively cleared of native vegetation with established gardens, lawns and fields with varied vegetation and plant species including some shrubs, low height plants and small trees. The subject site has ample opportunity for additional landscaping and or tree planting elements to the site should spatial separation between lots be desirable for future occupants.

## 2.4 EXISTING DEVELOPMENT

The site has built improvements, consisting of a two storey primary dwelling with a detached carport and various other ancillary structures around the site, consistent of the sites environmental living character. The ancillary structures are a swimming pool, detached metal shed, multiple smaller metal sheds and the conditions of these structures are varied.

The survey plan accompanying this application identifies the extent and location of the existing built improvements on the site including the residential dwelling. (See below)



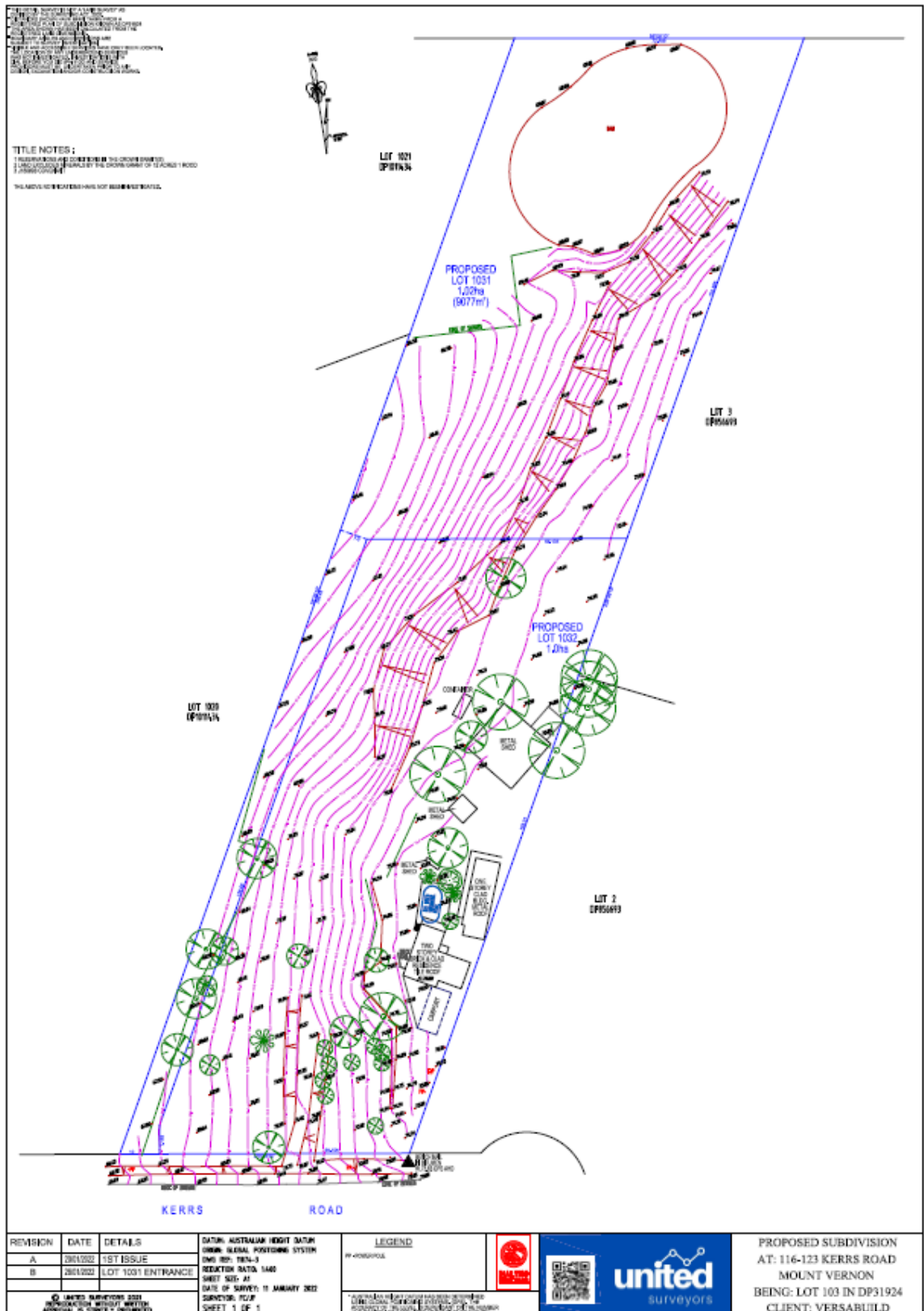


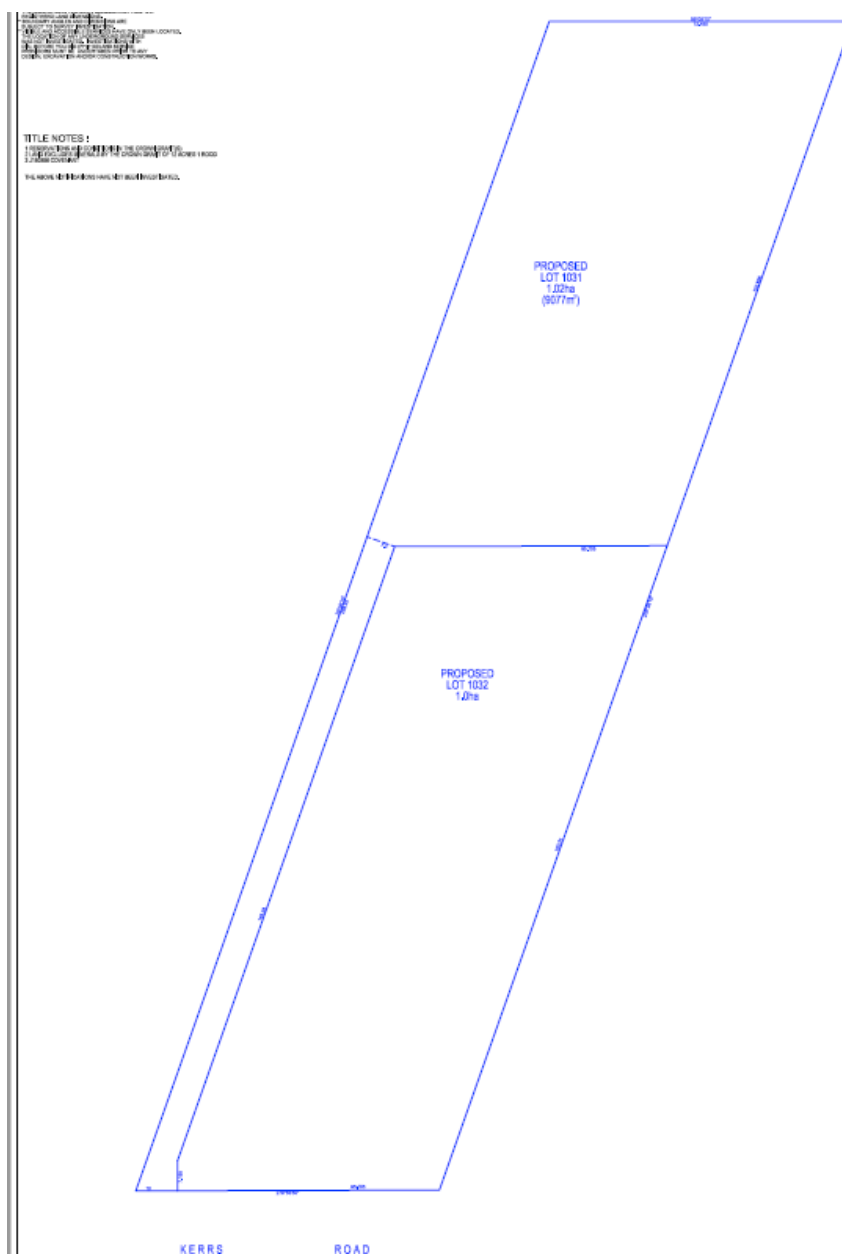
Figure 3: Site survey plan with plan of subdivision overlay



# 3 Proposed Subdivision

## 3.1 OVERVIEW

This development application is for a proposed land subdivision from 1 lot into 2 lots, located at 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.



**Figure 4:** Proposed plan of subdivision

## 3.2 SUBDIVISION LAYOUT

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 1161m<sup>2</sup> in area which results in the remaining area of the proposed lot being 9077m<sup>2</sup> in area, with the total site area combined to be 1.02 ha. The access handle area, remnant area and total site area are relevant matters in the consideration of compliance with clause 4.1 of the Penrith LEP 2010 regarding minimum lot sizes permissible for land subdivision. Minimum lot size is a development standard and is the subject of a request for variation (of the standard) detailed in Appendice 2 at the conclusion of this statement.

The front lot (proposed lot 1032) is 1.0 ha in area and has existing access to Kerrs Road with a front boundary of 65.105m noting the access handle serving the rear lot has a splay adjoining Kerrs Road to achieve a 10m wide street frontage to the access handle.

The subdivision layout is as per the subdivision plan detailed in Figure 4 on the previous page of this statement.

The proposed land subdivision, in the context of the Mount Vernon locality, is suitable to accommodate appropriate and desirable development in keeping with the low density and general amenity of the locality.

## 4 Assessment of Environmental Effects

In determining the environmental effects of a development proposal, the consent authority, in this case Penrith City Council, is required to consider those matters relevant as listed in section 4.15 of the Environmental Planning and Assessment Act, 1979. These matters are listed below with commentary where required.

### 4.1 ENVIRONMENTAL PLANNING INSTRUMENTS - SECTION 4.15(1)(A)(I)

The relevant environmental planning instruments have been identified and discussed below. This proposal is permissible subject to the provisions of the *Penrith Local Environment Plan 2010* and the provisions of all relevant environmental planning instruments are detailed below

#### 4.1.1 *State Environmental Planning Policy No. 55 - Remediation Of Land*

Clause 7 (1) (a) of SEPP 55 requires the Consent Authority to consider whether land is contaminated. The history of land use suggests that site contamination is not a constraint to the proposed land subdivision development. This proposal continues the current environmental living use of the land which applies to the parent lot. In this regard it is considered that the site poses no additional risk of contamination and therefore, no further consideration is required under Clause 7 (1) (b) and (c) of SEPP 55 and the land is considered to be suitable for the continuation of the environmental living land use.

#### 4.1.2 *State Environmental Planning Policy (Building Sustainability Index Basix) 2004*

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 does not apply to the development. The subdivision proposal is not subject to the Basix requirements as no physical building works will be undertaken and no new residential buildings are proposed that would trigger the operation and imposition of SEPP BASIX.

## 4.2 PENRITH LOCAL ENVIRONMENTAL PLAN 2010

The relevant clauses of the Penrith Local Environmental Plan 2010 are addressed below.

### 4.2.1 Zoning

The subject site is zoned C4 Environmental Living. The objectives of the zone and land use table are as follows:

Zone C4 – Environmental Living

#### **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*

#### **2 Permitted without consent**

*Home occupations*

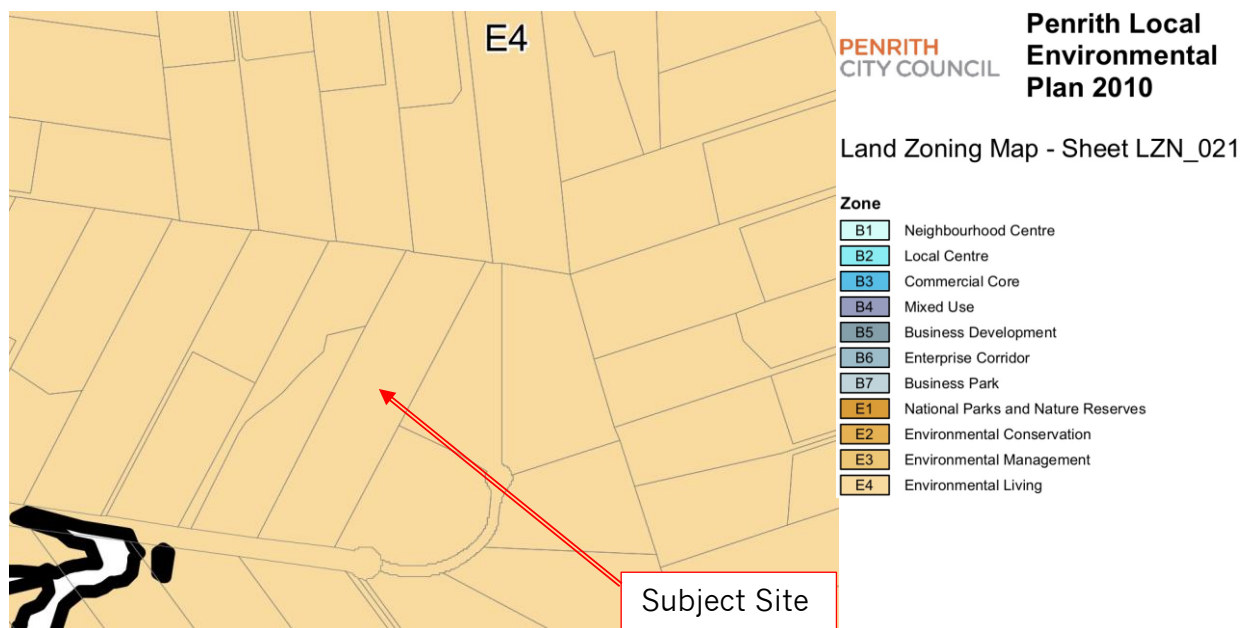
#### **3 Permitted with consent**

*Bed and breakfast accommodation; Building identification signs; Business identification signs; Centre-based child care facilities; Community facilities; Dual occupancies; Dwelling houses; Eco-tourist facilities; Environmental facilities; Environmental protection works; Flood mitigation works; Home-based child care; Home businesses; Home industries; Information and education facilities; Oyster aquaculture; Places of public worship; Pond-based aquaculture; Recreation areas; Respite day care centres; Roads; Schools; Secondary dwellings; Tank-based aquaculture*

#### **4 Prohibited**

*Industries; Service stations; Warehouse or distribution centres; Any other development not specified in item 2 or 3*

The proposal specifically relates to a two lot subdivision from the parent single allotment and is not considered a land use type. This proposal seeks the approval of the land subdivision as detailed in the accompanying plan of subdivision.



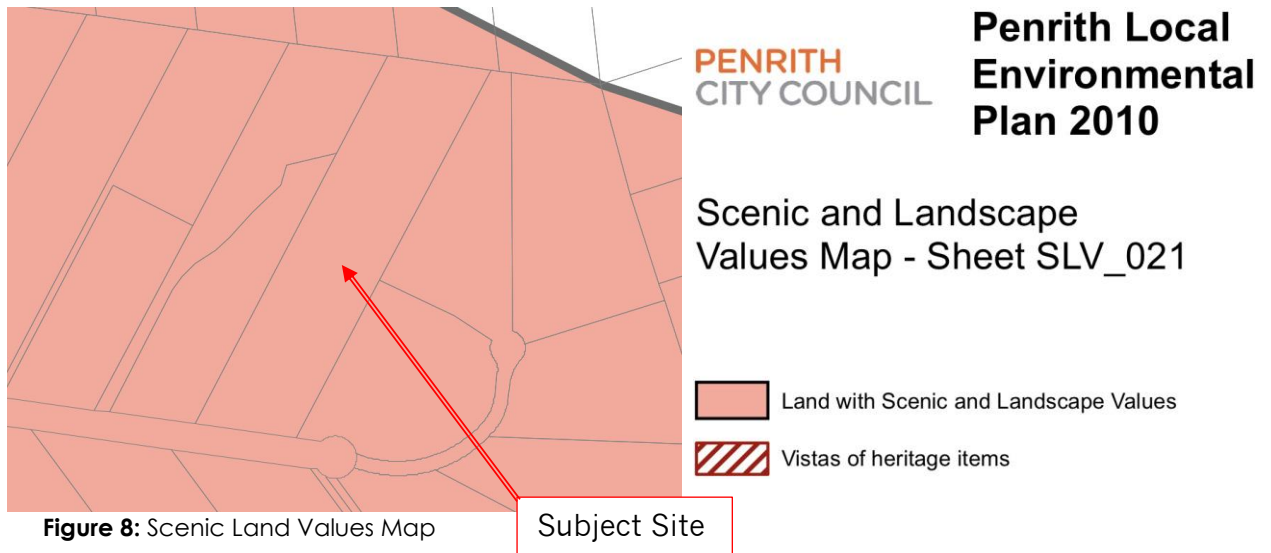
**Figure 7:** Land zoning map – C4 Environmental Living

#### 4.2.2 Consistency with Zone Objectives/Standards

The proposed land subdivision will be consistent with neighbouring allotments that have undergone prior, similar configuration subdivisions in the Mount Vernon locality and where the creation of new lots have still provided the opportunity for low-impact development that remains environmentally sustainable. The two lot subdivision is not in conflict with any of the zone objectives and remains 'compatible with the available infrastructure, services and facilities and with the environmental capabilities of the land'.

#### 4.2.3 Development Standards –Scenic and Landscape Values Map

The scenic land views map relates to the scenic value and the preservation of same for the subject site and surrounding sites. This SEE relates to the subdivision of land on the site and does not directly impact on the scenic value of the site or surrounding sites. The future lot development however may be envisaged to have some impact and the proposed 'battle axe' configuration is favoured for the retention of a generous lot width and to provide for satisfactory development opportunities on the respective allotments. The plan of subdivision retains all existing built improvements upon the 'front' proposed lot providing more than adequate site availability for a dwelling (with ancillary structures) upon the rear lot without adversely impacting upon the scenic and landscape values of the Mount Vernon locality.



#### 4.2.4 Development Standards – Minimum Lot Size

The minimum lot size requirements are a development standard, detailed in section 4.1 of the PLEP and therein is established by reference to the LEP minimum lot size maps. As indicated below, the site is identified as 'Y1' on the map and the key lists the minimum lot size as 10,000m<sup>2</sup> (1 hectare).



**Figure 9:** Minimum Lot Size Map & key

For ease of reference the complete clause 4.1 from the Penrith LEP 2010 is provided following:

##### **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.**



Having regard to the method of calculating lot size for battle-axe lots with an access handle pursuant to 4.1(4C), the proposed land subdivision is unable to satisfy clause 4.1(3) as the rear lot (proposed lot 1031) is 9077m<sup>2</sup> in area with the access handle area deducted.

In this regard this application is supported by an accompanying clause 4.6 request for variation of a development standard, namely clause 4.1(3).

Refer to the discussion and detail of the clause 4.6 request for variation in Appendice 2 at the conclusion of this statement.

## 5 S4.15 Planning Assessment

In determining the environmental effects of a development proposal the consent authority, is required to consider those matters relevant as listed in section 4.15 of the Environmental Planning and Assessment Act, 1979. These matters are listed below with commentary where required.

### 5.1 ENVIRONMENTAL PLANNING INSTRUMENTS - SECTION 4.15(1)(A)(I)

The relevant environmental planning instruments have been identified and discussed in section 4 of this statement. The proposal is permissible subject to the provisions of the Penrith Local Environmental Plan 2010, and it is considered that the provisions of all relevant environmental planning instruments have been satisfactorily addressed within Section 4 of this statement.

### 5.2 DRAFT ENVIRONMENTAL PLANNING INSTRUMENTS - SECTION 4.15(1)(A)(II)

At the time of preparing this application there were no draft planning instruments which would affect this site.

### 5.3 DEVELOPMENT CONTROL PLANS - SECTION 4.15(1)(A)(III)

The relevant controls of the Penrith Development Control Plan 2010 (PDCP 2010) have been taken into consideration in the assessment of this proposal and it is considered that the proposal is consistent with the relevant aims and objectives of the DCP and generally compliant with the specific controls applicable to the site and the type of development proposed. A summary of the relevant controls prescribed by the DCP and commentary is provided at **Appendix 1**.

### 5.4 ANY PLANNING AGREEMENT - SECTION 4.15(1)(A)(IIIA)

No planning agreement is proposed.

## 5.5 THE REGULATIONS (TO THE EXTENT THAT THEY PRESCRIBE MATTERS FOR THE PURPOSES OF THIS PARAGRAPH) - SECTION 4.15(1)(A)(IV)

Clause 92 of the Environmental Planning and Assessment Regulation 2000 requires that in the case of development involving demolition of a building the provisions of *Australian Standard AS 2601 – 2001: The Demolition of Structures* need to be taken into consideration. This proposal does not involve the demolition of any existing buildings after the approval of the proposed subdivision. In this regard a demolition plan of management is not required to accompany this application.

## 5.6 ENVIRONMENTAL AND SOCIAL IMPACTS - SECTION 4.15(1)(B)

Section 4.15(1)(b) requires the consent authority to consider:-

“(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.”

The proposed subdivision application is considered to be both orderly and economic in its outcomes having regard to the absence of any significant or appreciable adverse impacts upon the adjoining sites and surrounding development. The proposed subdivision is wholly consistent with the established land subdivision pattern found in the locality.

### 5.6.1 Impacts on The Natural Environment

The proposal is appropriate with regard to its impact on the natural environment being the subdivision of a property which will result in the front proposed lot (lot 1032) including the existing dwelling and associated outbuildings as the improvements upon the lot. The rear lot (lot 1031) will not have an existing dwelling, nor outbuildings, within its boundaries once the subdivision is realised and registered.

### 5.6.2 Impacts on The Built Environment

#### **Bulk and scale**

The proposed subdivision of land will not create any substantial adverse impact on the bulk and scale of built form on the property as no physical building works will be undertaken as part of the land subdivision phase. The allotment areas afforded for both the front and rear

lots will allow for ample physical separation to be enjoyed by both existing and future occupants of the newly formed allotments.

### **Overshadowing**

The subject site is located within an C4 Environmental Living zone, the proposed subdivision will not introduce any overshadowing issues on the surrounding properties and area.

### **Privacy and visual impacts**

The subject site is located within an C4 Environmental living zone and the proposed subdivision will not create any undue or adverse privacy and or visual issues for the surrounding properties and area.

### **Acoustic**

The subject site is located within an C4 Environmental living zone and the proposed subdivision will not create any undue acoustic issues on the surrounding properties and locality. There is minimal acoustic impact associated with an access handle serving a 'rear' allotment and this low level impact is not seen to be onerous in the context of the locality and the siting and spatial separation afforded to the neighbouring properties and importantly the front lot.

### **Traffic and parking**

The subject site is located within an C4 Environmental living zone and the proposed subdivision will not create any undue or appreciably adverse traffic and parking issues on the surrounding area.

### **Social and economic impacts**

The subject site is located within an C4 Environmental living zone and the proposed subdivision will not create any identifiable adverse social and economic impacts on the local community and surrounding area. The land subdivision will contribute to the local land stock which may be developed consistent with the environmental living zoning.

## 5.7 THE SUITABILITY OF THE SITE - SECTION 4.15(C)

Section 4.15(c) requires the consent authority to consider:

“(c) the suitability of the site for the development.”

The existing development site and the adjacent sites do not provide any constraints which would render the site unsuitable for a subdivision of this nature.

## 5.8 SUBMISSIONS - SECTION 4.15(D)

Section 4.15(d) requires the consent authority to consider:

“(d) any submissions made in accordance with this Act or the regulations”.

Any relevant submissions will require consideration by the consent authority in the determination of this proposal. The applicant will also seek the opportunity to respond to submissions if received after exhibition of this proposal.

## 5.9 PUBLIC INTEREST - SECTION 4.15(E)

Section 4.15(e) requires the consent authority to consider:

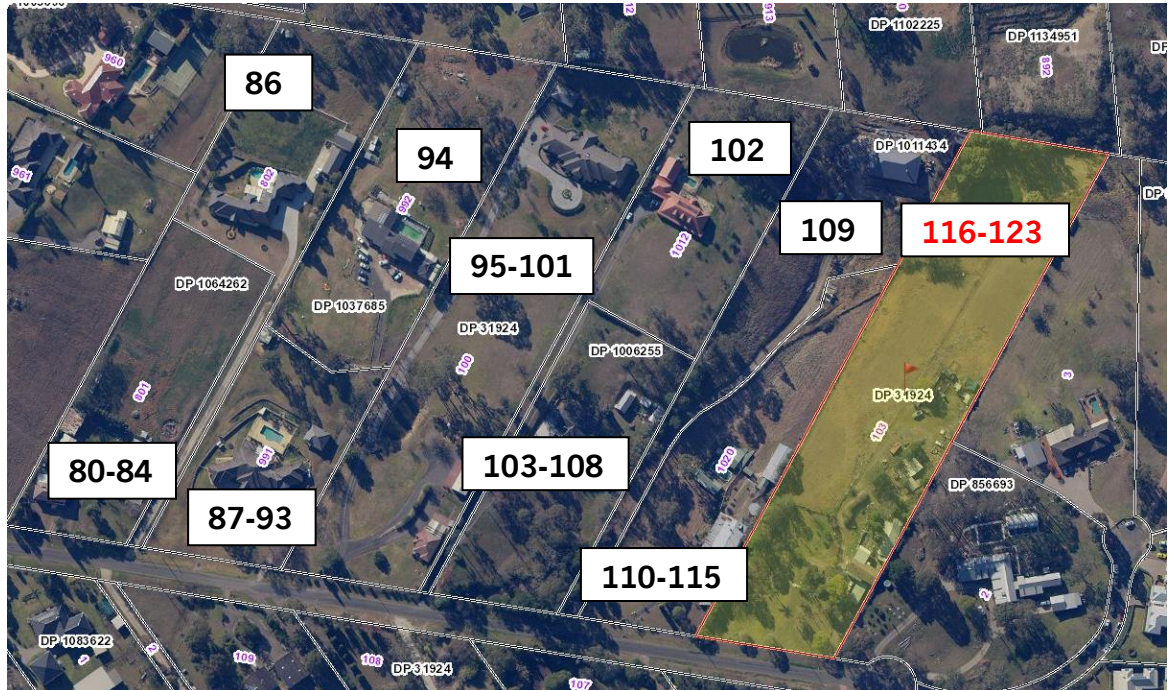
“(e) the public interest”.

The public interest is best achieved by the orderly and economic use of land for permissible purposes that do not impact unreasonably on development and/or enjoyment of surrounding land. In this case, it is considered that this proposal represents an efficient, orderly and economic use of land while also providing an enhanced outcome for the future site occupants with regards to amenity. The land subdivision is consistent with the Council's general objectives and qualifies as being in 'the public interest'. Notably the proposed land subdivision is wholly consistent with the existing established pattern of land subdivision in the immediate locality with particular focus on the properties to the west of the subject allotment, along Kerrs Road.

## 5.10 DEVELOPMENT CONTROL PLANS- SECTION 4.15(3A)

Section 4.15(3A) of the Act the Environmental Planning and Assessment Act, 1979 requires Councils to be flexible in applying any provisions that apply to a proposal and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development.

The proposed subdivision is generally consistent with the Penrith DCP as the proposal meets the applicable objectives of the relevant controls within the DCP relating to subdivision of land.



**Figure 10:** Subdivision pattern in immediate locality in Kerrs Road (west of the subject site)

The outcomes from a proposed battle-axe land subdivision allotment configuration can be numerous. The site particulars for this development are believed to be appropriate and highly suitable for the intended land subdivision.

Of the 5 (five) neighbouring allotments to the west of the subject property, 4 (four) have been subdivided, 3 (three) into conventional two lot battle-axe subdivisions and a further subdivision with an irregular battle axe configuration which partly follows site topography changes. The one site which has not been subdivided into two (2) would appear to have two dwellings upon the one allotment, or at least what appears to be two dwellings. No. 95-101 Kerrs Road appears to have an original dwelling building at the southern end of the site near the Kerrs Road boundary, and a larger more recent dwelling at the other end of the allotment to the north.

Whilst the DCP control identifies that a battle axe configuration should be discouraged it is plainly evident that the historical and actual land subdivision pattern immediate to the subject site has implemented this type of subdivision with satisfactory outcomes.

The siting of the existing dwelling and ancillary structures on the subject property lends itself to a battle axe plan of subdivision whereby potential associated impacts are minimised, noting the access handle is as far away from the existing dwelling as could be practical on a 70m wide allotment.

## 6 Conclusion

This proposal seeks to subdivide one lot of land into two lots upon **Lot 103, DP 31924** otherwise known as **116-123 Kerrs Road, Mount Vernon**.

The proposed land subdivision is generally consistent with all Council and State planning requirements with a minor shortfall in lot area, pursuant to the lot area method of measurement prescribed in clause 4.1(4C) of the Penrith LEP 2010. As this is a prescribed development standard of the PLEP 2010 the application for land subdivision is unable to be considered without consideration of a specific request for variation of the particular development standard (clause 4.1, minimum lot size).

A clause 4.6 request for variation of the development standard has been prepared and accompanies this statement. The variation request demonstrates that the proposed land subdivision is both suitable and appropriate to the locality and the subject parent allotment. Refer to Appendice 2 for the detail of the clause 4.6 request for variation of the minimum lot size development standard.

The proposed application for the subdivision is appropriate considering all State and Council planning controls and the proposed development is meritorious and should be granted consent.

Considering all the issues, the development is considered worthy of Council's consent.



## 7

**Table 4.5.1: Penrith Development Control Plan 2010**

		Comment	Compliance
C11 Subdivision			
11.1. General Subdivision Requirements	<p><b>B. Controls</b></p> <p><b>a) Engineering Works</b></p> <p>a) Where roads and other engineering works are required to support a proposed subdivision, details must be included in the development application. Applicants are advised to consult with Council's Development Services Unit in relation to any subdivision proposal.</p> <p><b>b) Site Planning</b></p> <p>a) Any proposed subdivision must demonstrate how the proposed subdivision design has taken into account the principles set out in Section C1 'Site Planning and Design Principles' of this DCP. This includes, but is not limited to:</p> <ul style="list-style-type: none"> <li>i) Site analysis and response to the site context;</li> <li>ii) Social impact of the proposed subdivision;</li> <li>iii) Economic assessment of the proposed subdivision;</li> <li>iv) Environmental assessment of the proposed subdivision;</li> <li>v) Urban design assessment of the proposed subdivision;</li> <li>vi) Compliance with the provisions of this DCP relating to specific land uses;</li> <li>vii) The allotment size, shape and orientation;</li> <li>viii) The alignment of roads with the natural topography;</li> <li>ix) Potential energy and water savings from subdivision design and allotment orientation; and</li> <li>x) The ability of proposed allotments to operate efficiently for the proposed use and potential future development.</li> </ul> <p>b) As part of any site analysis, the proposed subdivision must demonstrate its integration with</p>	<p>The access handle will involve the provision of a vehicular access crossing adjoining the Kerrs Road street front boundary.</p> <p>The proposed subdivision complies with the site planning controls relating to the site planning section of the DCP noting the access handle variation is considered acceptable</p>	<p>Yes</p> <p>Yes *</p>

		Comment	Compliance
	<p>the natural and physical features of the site including, but not limited to:</p> <ul style="list-style-type: none"> <li>i) Slope and orientation of land;</li> <li>ii) Opportunities for solar and daylight access to dwellings (if applicable);</li> <li>iii) Design of roads and access ways (individual site access);</li> <li>iv) Retention of special qualities or features such as trees or views;</li> <li>v) Availability of utilities;</li> <li>vi) Provision of adequate site drainage;</li> <li>vii) Possible need to retain the existing subdivision character;</li> <li>viii) Heritage and archaeological conservation;</li> <li>ix) Adequacy of each allotment considering relevant development standards for the proposed future use of the land;</li> <li>x) Relationship to adjacent subdivision patterns; and Potential land use conflicts with adjacent lands.</li> </ul> <p>c) Existing vegetation and natural drainage lines should be retained and enhanced, wherever possible.</p> <p>d) Existing dams should be retained, where possible.</p> <p>e) Long and narrow allotments should be avoided. Allotments should have a maximum of 4:1 depth to width ratio.</p> <p>f) 'Battle-axe' allotments are discouraged by Council. No more than two allotments shall be served by a shared access corridor. Where a corridor is shared, reciprocal rights of way and easements for drainage shall be granted over the access corridor for the benefit of both allotments.</p> <p>g) Applications for subdivision need to demonstrate that each of the proposed allotments can support the proposed development/buildings by providing a Potential Development Area Plan. This Plan (based on a survey diagram) shall show the potential development area of each allotment (after taking into account setbacks that may be required to meet built form or environmental controls in this DCP).</p> <p>h) Applications should be accompanied by landscape plans indicating proposed landscaping (including streets and how they are positioned so</p>	<p>The proposed access handle is not proposed to be a shared access.</p> <p>The locality has a clear subdivision pattern which has adopted battle axe (front lot / rear lot) configuration.</p>	

		Comment	Compliance
	<p>as not to compromise the effectiveness of street lighting) and parking arrangements.</p> <p>i) New allotments should be located so as to protect, enhance or conserve areas of high scenic or recreational value. Council may consider subdivisions/buildings in these higher value areas where ridgelines, vistas and other geographic features are not interrupted or where building materials that blend with the environment are to be used.</p> <p><b>c) Subdivision of Natural Resources Sensitive Land</b></p> <p>a) Where applicable, applicants are required to address the environmental impacts of any proposed subdivision of land where the proposed allotment(s) are within or adjacent to land shown on the Natural Resources Sensitivity Land Map of the LEP.</p> <p>b) Council will generally not support the subdivision of land within or adjacent to the land noted on the Natural Resources Sensitivity Land Map where the subdivision will result in fragmentation that will make control of environmental outcomes difficult to achieve.</p> <p>c) Council may require dedication of conservation easements, where necessary, over land adjacent to land shown on the Natural Resources Sensitivity Land Map to protect areas identified to be of significance.</p> <p><b>4) Vegetation Management</b></p> <p>a) Any subdivision proposal is required to address the objectives and controls set out in the Vegetation Management and Landscape Design sections with particular focus on the protection of existing vegetation.</p> <p>b) Not more than 10% of the vegetation on any site shall be cleared (or required to be cleared) as a result of any subdivision proposal.</p> <p>c) The design of any subdivision layout must ensure that the potential development pattern supported by the proposed subdivision design will be consistent with the existing landscape character of the area.</p> <p>d) A subdivision application on land identified as or adjacent to 'bushfire prone land' will need to address the controls set out in the Vegetation Management Section relating to bushfire protection and the provision of asset protection zones. Where possible, removal of significant vegetation is to be minimised.</p>	<p>The subject site is extensively cleared of all remnant vegetation such that there is no risk of adverse ecological outcomes with this subdivision.</p>	

		Comment	Compliance
	<p>e) Tree protection measures must be provided in accordance with Australian Standard AS 4970-2009 Protection of trees on development sites.</p> <p><b>5) Water Management</b></p> <p>a) Any subdivision proposal is required to address the objectives and controls set out in the Water Management Section. The subdivision design should consider the following and incorporate measures to address:</p> <ul style="list-style-type: none"> <li>i) The potential impacts of any future development on water catchments and surface water quality;</li> <li>ii) The potential impacts of any future development on watercourses, riparian corridors and wetlands or other environmentally sensitive areas. Lot design may need to facilitate the fronting onto riparian land to facilitate surveillance and prevent degradation of these areas;</li> <li>iii) The potential for flood risk and damage to life and property and the need to provide safe emergency access/egress from the site;</li> <li>iv) Issues arising from stormwater and drainage requirements; and</li> <li>v) The potential for the site design to incorporate features of water sensitive urban design.</li> </ul> <p>b) Council will not approve any subdivision of lots where it is evident that a flood free building envelope and safe internal access from/to the public road cannot be provided. The building envelope for any dwelling should be flood free in a 1:100 Average Recurrence Interval (ARI) flood. Evidence of this must be provided as part of any application.</p> <p>c) Council will not support the subdivision of any land located in a floodway or areas of high flood hazard.</p> <p>d) Subdivision of land below the flood planning level in rural zones creating additional allotments will generally not be supported. However, Council may consider a subdivision application where the applicant can demonstrate that:</p> <ul style="list-style-type: none"> <li>i) the flood hazard is low;</li> <li>ii) flood free access can be provided; and</li> <li>iii) a minimum of 1,000m2 within each allotment is flood free, allowing for a dwelling and all ancillary works;</li> </ul>	<p>The site and topography indicates that it is readily able to address required stormwater management control consistent with Council's policies.</p>	

		Comment	Compliance
	<p>e) Generally, land situated within existing residential, commercial and industrial zones may only be subdivided to enable its development for urban purposes where the level of the existing land to be developed is not lower than the 1:100 ARI flood. All lots created by such subdivision shall have the portion of the lot that can be built upon filled to a level at least 0.5m above the 1:100 ARI flood.</p> <p>f) Significant filling of flood planning land will not be supported. If minor filling is required on flood planning land, the provisions relating to flood liable lands will apply (refer to the Water Management section).</p> <p><b>6) Land Management</b></p> <p>a) Any subdivision proposal is required to address the objectives and controls set out in the Land Management section with particular focus on ensuring that the proposed subdivision is appropriate taking into consideration:</p> <ul style="list-style-type: none"> <li>i) Site instability due to geology, slope or landfill;</li> <li>ii) The need for excavation and fill to create developable allotments;</li> <li>iii) The potential for erosion and sedimentation; and</li> <li>iv) The potential for salinity.</li> </ul> <p>b) Any subdivision application must address whether the proposed site has any potential for contamination (in accordance with the Contaminated Land Management Act 1997), other than by normal grazing activities. If required by Council, the land will need to be remediated in accordance with legislative requirements before subdivision can be permitted.</p> <p><b>7) Culture and Heritage</b></p> <p>a) Subdivision of a heritage item or in the vicinity of a heritage item or where there is the likelihood of an Aboriginal archaeological heritage item must address the objectives and controls set out in the Culture and Heritage section. The proposed subdivision must minimise:</p> <ul style="list-style-type: none"> <li>i) The impact on Aboriginal or European archaeology on the site; and</li> <li>ii) The impact on Aboriginal objects and places.</li> </ul> <p><b>8) Access and Transport</b></p> <p>a) Any subdivision proposal is required to address the objectives and controls set out in the Transport, Access and Parking section with particular focus</p>	<p>Future works associated with the access handle may be addressed through minor land management activities and practices to be coordinated prior to registration of the land subdivision.</p> <p>There are no new proposed</p>	

		Comment	Compliance
	<p>on ensuring that the proposed subdivision is appropriate taking into consideration:</p> <ul style="list-style-type: none"> <li>i) The appropriate location of land uses to minimize transport requirements;</li> <li>ii) Likely traffic generation;</li> <li>iii) Safe access and egress to the site; and</li> <li>iv) Appropriate lot sizes to provide facilities for cars, pedestrians and bicycles.</li> </ul> <p>b) Council will not approve any subdivision of new lots in situations where each lot cannot be provided with a safe access point to an existing public road.</p> <p>c) Council may not approve subdivision of allotments where access is to a Crown Road only.</p> <p>d) Site frontage must be sufficient to permit vehicular and pedestrian access to the site.</p> <p>e) A minimum allotment frontage of 25m must be provided when the allotment has a vehicle access point to a collector or major road.</p> <p>f) Council and the Roads and Maritime Services (RMS) require that access points are grouped at existing or limited access points whenever feasible to minimise the traffic impact and risk on additional access points to road networks.</p> <p>g) Where an internal road system is proposed to a new subdivision, the application must demonstrate a distinctive and hierarchical network of roads with clear physical distinctions between each type of road, based on function, capacity, vehicle speeds and public transport.</p> <p>h) Any proposed road system must provide acceptable levels of access, safety and convenience for all road users, while ensuring acceptable levels of amenity and protection from the impact of traffic.</p> <p>i) Council may levy a road contribution or require road upgrading for all proposed lots whether the lots are accessed by sealed or unsealed roads. The amount of the contribution will depend on the current standard of the road and the increased levels of traffic to be generated.</p> <p><b>9) Noise and Vibration</b></p> <p>a) Any subdivision proposal is required to address the objectives and controls set out in the Noise and Vibration section with particular focus on designing lots so sensitive buildings (especially dwellings) will</p>	<p>public roads required to deliver the land subdivision.</p>	

		Comment	Compliance
	<p>have sufficient setbacks or noise mitigation measures to minimise noise and vibration impacts.</p> <p><b>10) Infrastructure and Services</b></p> <p>a) Council will not approve of any subdivision of new lots where requirements for effluent/waste water disposal cannot be adequately met on each individual lot.</p> <p>b) Council will not approve of any subdivision of new lots where the provision of services, such as electricity, telephone and other centralised services, would result in additional costs not paid for by the applicant.</p> <p>c) Satisfactory arrangements will be required to be made with Sydney Water in conjunction with the submission of the subdivision application. Documentary evidence will be required of the consultation which has been undertaken.</p> <p><b>C. Lifting the Bar</b></p> <p>The following represent some ways in which applicants can demonstrate additional commitment to the principles expressed in this Plan. Demonstration of this commitment may lead to Council considering variation of development controls. Applications that vary the</p> <p>development controls listed in this section will need to demonstrate that the proposed development complies with the objectives relevant to the development controls it seeks to vary.</p> <p>1) Consolidation of allotments: Where an applicant is proposing substantial works that require a development application on rural or industrial properties across a number of allotments with a single use, an applicant should review the potential to consolidate those allotments as part of the development application.</p> <p>2) Natural Resources Sensitive Land: Where a proposed subdivision is either within or immediately adjacent to land on the Natural Resources Sensitivity Land Map in the LEP an applicant should discuss with Council the potential to dedicate part of the subdivision as a buffer to that sensitive land.</p> <p>3) Water Sensitive Urban Design: Where a subdivision involves more than 10 allotments or an area greater than 5 hectares, the applicant should demonstrate to Council how the proposed subdivision layout will incorporate water sensitive urban design mechanisms both at the entire subdivision level and for each site.</p>	<p>The site has ample available land area to accommodate an on-site wastewater treatment system for any future dwelling proposed for the new rear lot.</p>	



		Comment	Compliance
11.2 Rural Subdivision	<b>B. Controls</b>  <b>1) Land Capability</b>  a) As part of any subdivision application for rural lands, an applicant must address the impact that the proposed subdivision will have on the agricultural capability and sustainability of the proposed allotments as well as the impact on agriculture in the surrounding area.  b) This must also address social, economic and environmental factors.	The site is not zoned rural land  The social, economic and environmental impacts of the proposed subdivision will be minor and the impacts are addressed in this report	N/A  Yes
	<b>2) Avoiding Land Use Conflicts</b>  a) The application will need to address how any potential land use conflicts (including, but not limited to, noise, dust, odour, traffic, light, etc.) will be minimised if any proposed subdivision is located within 1km of: <ul style="list-style-type: none"> <li>i) An existing approved or licensed intensive agricultural operation;</li> <li>ii) A waste or resource management facility;</li> <li>iii) A noxious, offensive or hazardous land use; or</li> <li>iv) A sensitive land use.</li> </ul> b) Site locations must ensure such existing land uses will still comply with the EPA Odour Control Guidelines and other relevant publications.  c) Use of building envelopes, buffer zones and planting will be considered in helping to mitigate these issues.	The current subdivision will not create a conflict of adjoining land zones	Yes
	<b>3) Subdivisions for Dwellings</b>  a) Applications for subdivision that will include a new dwelling should be accompanied by a proposal for siting of a dwelling.  b) In some circumstances, the building envelope (ground area and height) and/or design guidelines specifying the proposed building location/height must be registered on the Certificate of Title as part of the subdivision approval process.  c) The building envelope must comply with the relevant setbacks from roads, watercourses, other buildings and side boundaries in the Rural Land Uses Section of this Plan.	N/A	N/A

## 8 Appendix 2 – Clause 4.6 request for variation – Minimum Lot Size

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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)*:

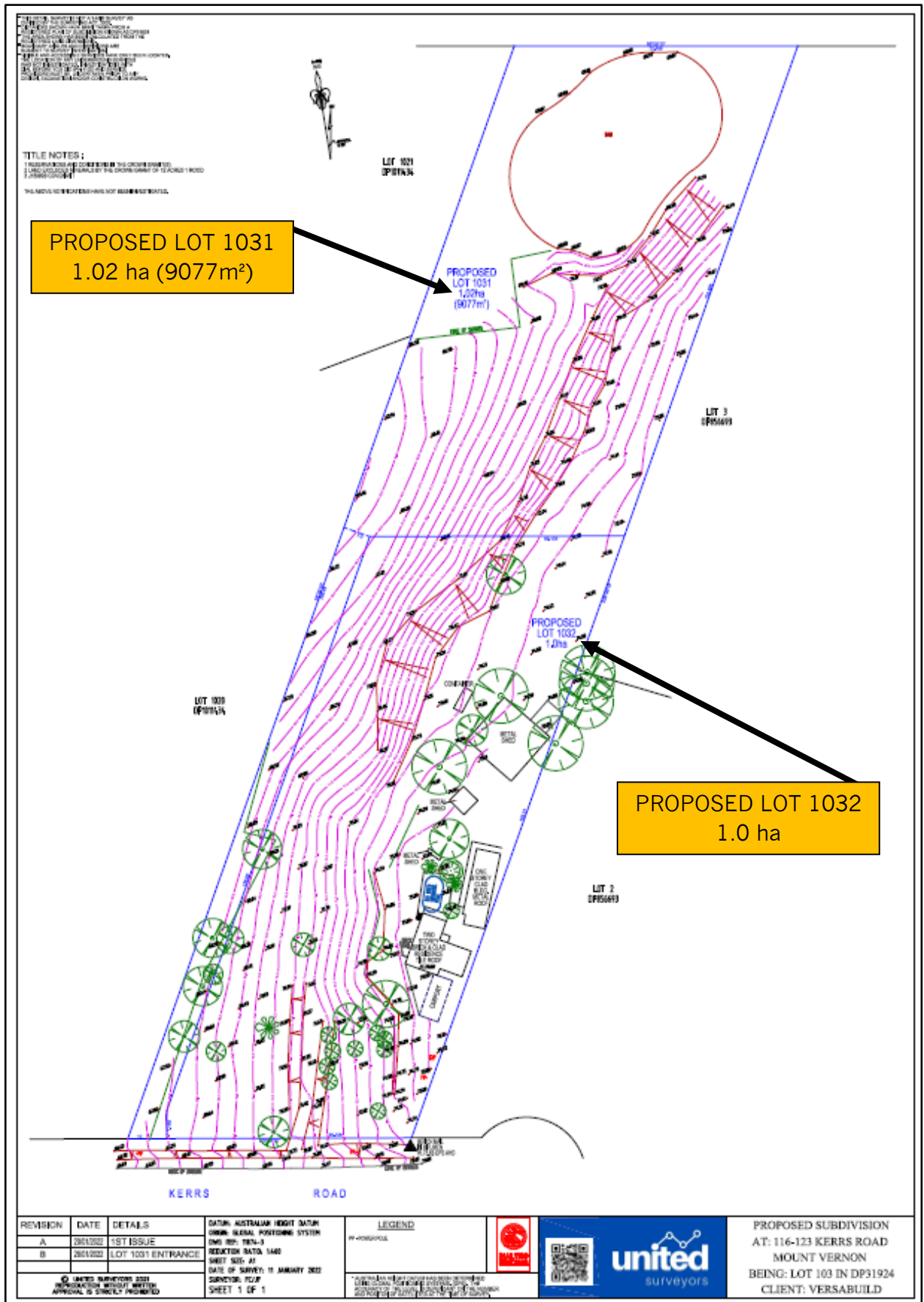
The Request for Variation is made in respect of a development application to reduce the minimum lot size on the subject site through a subdivision of one lot into two lots.

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 1161m<sup>2</sup> in area which results in the remaining area of the proposed lot being 9077m<sup>2</sup> 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 m<sup>2</sup>.

It has been determined that the extent of shortfall for the minimum lot size is 923m<sup>2</sup> (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 9,077m<sup>2</sup> 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 m<sup>2</sup> 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 m<sup>2</sup>** 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, 9.077m<sup>2</sup> by site area definition – **non-compliance**

The 9,077m<sup>2</sup> lot size area (pursuant to clause 4.1(4C)), represents a lot which has a 9.23% shortfall from the minimum required 10,000m<sup>2</sup>.

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.