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## CLAUSE 4.6 VARIATION REQUEST - MINIMUM LOT WIDTH DEVELOPMENT STANDARD

PROPOSED 3 LOT SUBDIVISION

PHOENIX RESERVE - PACIFIC RD, ERSKINE PARK

JANUARY 2022

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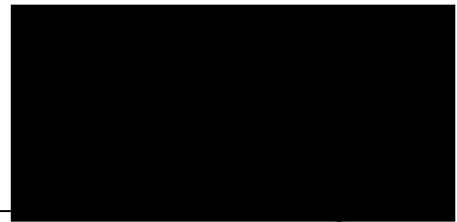
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**cityscape planning + projects, 2022**

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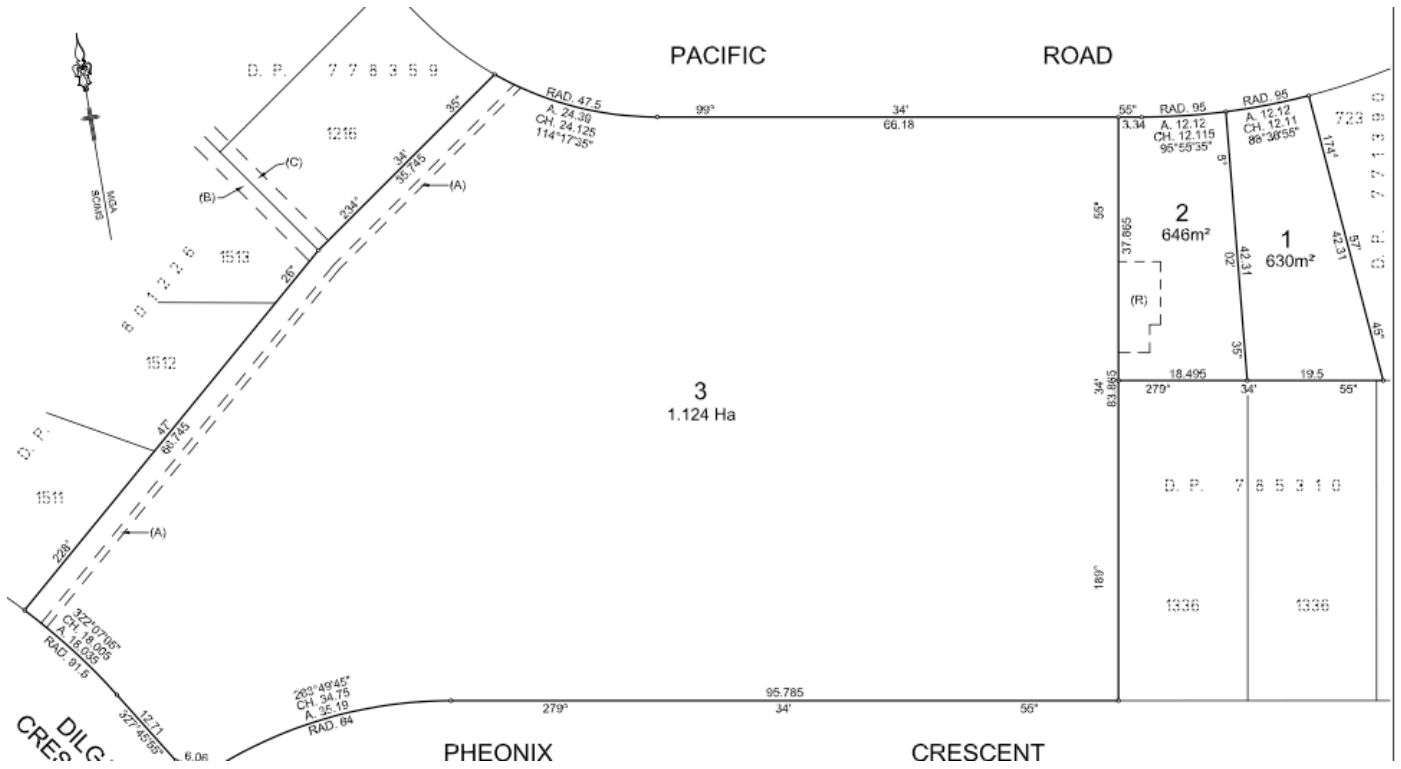
## 1.0 INTRODUCTION

This report seeks a variation to a development standard prescribed by the Penrith Local Environmental Plan (PLEP) 2010. The report relates to an application to subdivide the subject site to create three (3) new lots at Phoenix Reserve, Erskine Park. A representation of that subdivision plan is provided at Figure 1.

The variation is sought pursuant to Clause 4.6 under the PLEP in relation to the minimum lot size for subdivision applicable to the subject development site.

This request has been prepared in accordance with the Department of Planning & Environment (DP&E) Guideline *Varying Development Standards: A Guide, August 2011* and has also incorporated the relevant principles identified in relevant NSW Land and Environment Court judgements.

FIGURE 1: PROPOSED SUBDIVISION PLAN



## 2.0 WHAT IS THE NAME OF THE ENVIRONMENTAL PLANNING INSTRUMENT THAT APPLIES TO THE LAND?

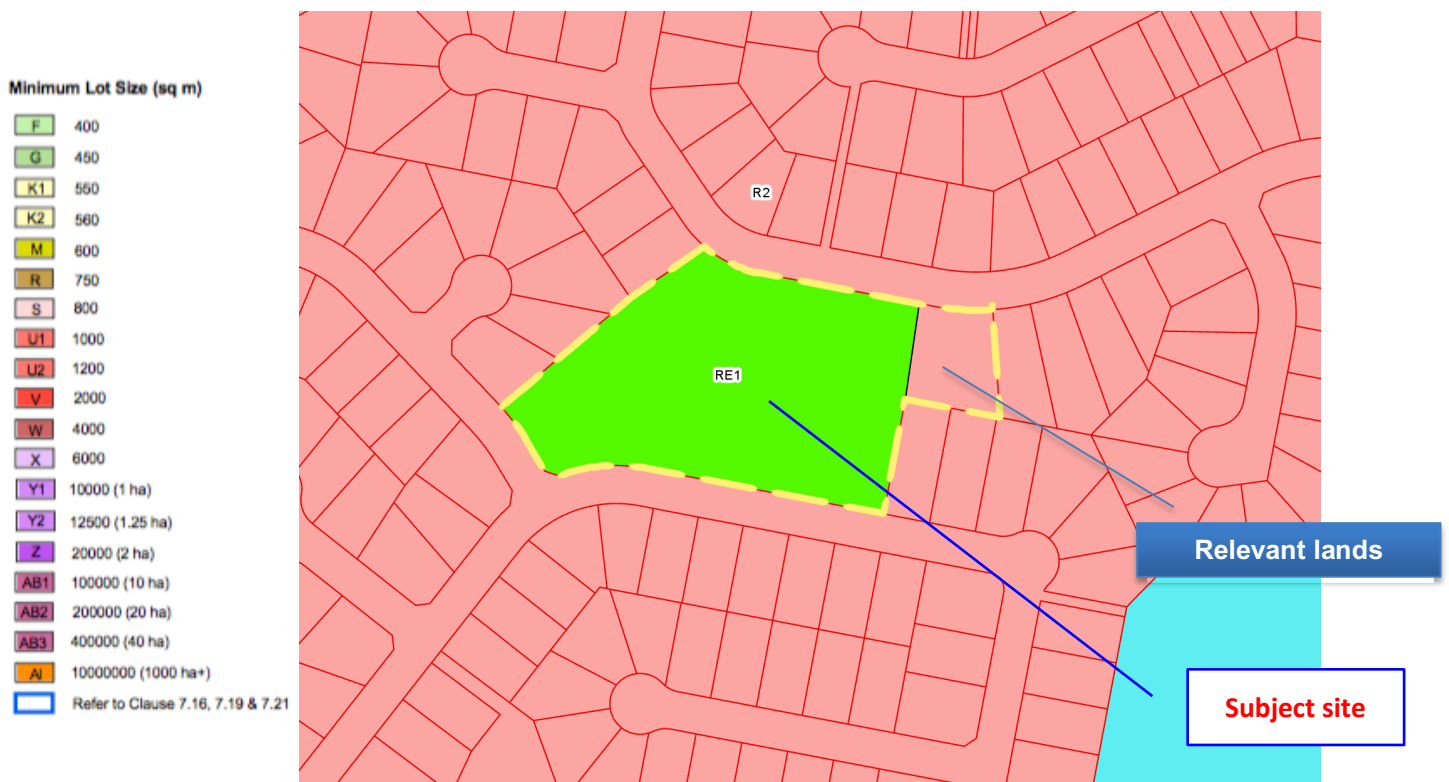
The Environmental Planning Instrument (EPI) to which this variation relates is the Penrith Local Environmental Plan 2010 (PLEP).

## 3.0 WHAT IS THE ZONING OF THE LAND?

In accordance with clause 2.2 of the PLEP the subject site is zoned as follows:

- Part R2 Residential Low Density
- Part RE1 Public Recreation

**FIGURE 2: PLEP ZONING MAP** (Source NSW Planning Portal)



## 4.0 WHAT ARE THE OBJECTIVES OF THE ZONE?

The land use table under the PLEP provides the following objectives for those zones:

### 1 Objectives of zone

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To promote the desired future character by ensuring that development reflects features or qualities of traditional detached dwelling houses that are surrounded by private gardens.
- To enhance the essential character and identity of established residential areas.
- To ensure a high level of residential amenity is achieved and maintained.

### **COMMENT:**

The development represents a small and logical infill type development that will provide new dwelling opportunities at a scale and density that is entirely consistent with that of existing and adjacent development.

The site enjoys access to *Sydney Waters* reticulated water supply and sewer network as well as full suite of power and telecommunication services in addition to the local road network and the development is of a type and scale that would not exceed the carrying capacities of that infrastructure.

The development therefore causes no inconsistencies with the relevant zone objectives.

### **Zone RE1 Public Recreation**

#### **1 Objectives of zone**

- **To enable land to be used for public open space or recreational purposes.**
- **To provide a range of recreational settings and activities and compatible land uses.**
- **To protect and enhance the natural environment for recreational purposes.**
- **To ensure that development is secondary and complementary to the use of land as public open space, and enhances public use, and access to, the open space.**
- **To provide land for the development of services and facilities by public authorities for the benefit of the community.**

#### **COMMENT:**

The development proposes no changes or impacts to that section of land zoned RE1 and therefore will enable the public open space to continue to provide a high amenity neighbourhood park for the use and enjoyment of the local community.

The development therefore causes no inconsistencies with the relevant zone objectives.



## 5.0 WHAT IS THE DEVELOPMENT STANDARD BEING VARIED?

The development standard being varied is the Minimum subdivision lot size - minimum width of lot.

## 6.0 UNDER WHAT CLAUSE IS THE DEVELOPMENT STANDARD LISTED IN THE ENVIRONMENTAL PLANNING INSTRUMENT?

The development standard being varied is prescribed under clause 4.1(4A)(a) of PLEP.

## 7.0 WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

The objectives of the relevant development standard are set out below:

### ***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.*

## **8.0 WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE ENVIRONMENTAL PLANNING INSTRUMENT?**

Clause 4.1(4A)(a) of PLEP provides a minimum lot width standard of 15m.

## **9.0 WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE DEVELOPMENT APPLICATION?**

The development provides three proposed lots. One of the lots (Lot 1) proposes a lot width of 12.12m at the street frontage which is less than the 15m minimum required by the development standard.

## **10.0 WHAT IS THE PERCENTAGE VARIATION?**

Proposed lot 1 proposes a lot width that represents a 19.2% variation from the 15m development standard.

## 11.0 MATTERS TO BE CONSIDERED UNDER CLAUSE 4.6

The following table provides a summary of the key matters for consideration under Clause 4.6 of the PLEP and a response as to where each is addressed in this written request:

**TABLE 1: MATTERS FOR CONSIDERATION UNDER CLAUSE 4.6**

Requirements/Sub-clause 4.6	Response/Comment
(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.	It is important to note that the objectives of the clause are to provide flexibility in applying development standards in that in so doing better development outcomes ensue.
(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.	The minimum subdivision lot size standard is not 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:	This written request justifies the variation by demonstrating (a) is achieved in Section 12, and (b) is achieved in Section 16.

- (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

This written request addresses all requirements of sub-clause (3).

As set out in Section 4, 12 and 17 of this written request, the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for the zone.

Concurrence is assumed. Due to the extent of the variation, the application is required to be determined by the relevant consent authority.

There is no prejudice to planning matters of State or Regional significance resulting from varying the development standard as proposed by this application.

- (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.

Pursuant to Ex Gratia P/L v Dungog Council (NSWLEC 148), the question that needs to be answered is “whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development”.

There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the minimum subdivision lot size standard and hence there are only minor public disadvantages.

The public advantage of the development is that it retains important bushland and improved stormwater outcomes as part of small and logical infill development consistent with planned outcomes for the site.

We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will have an overall public benefit.

- (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

Not relevant to the proposed development or the subject site.

Management or Zone E4 Environmental Living if:

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4.

This is a matter for the consent authority.

This does not apply to the subject site or its proposed development.

## 12.0 HOW IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THIS PARTICULAR CASE?

The proposed variation from the development standard is assessed below against the accepted "5 Part Test" for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe v Pittwater Council [2007] NSWLEC 827* and the principles outlined in *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46*. Whilst the principle applied to SEPP 1, it is believed that it is still useful to address these considerations and this too has been confirmed by more recent judgements inclusive of *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*.

The five-part test described in *Wehbe* are therefore appropriately considered in this context, as follows:

### **1. The objectives of the standard are achieved notwithstanding non-compliance with the standard**

The relevant LEP clause objectives together with an assessment of the development against them is provided below:

#### **(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,**

The residential zoned land does not provide any significant environmental constraints or resources and the development

proposes two residential lots that exceed the minimum 550m<sup>2</sup> lot size required by the PLEP by 14.5% and 17.4%.

An easement has also been provided on proposed lot 2 to facilitate the conservation of vegetation that forms part of the adjacent Phoenix Reserve.

***(b) to minimise any likely impact of subdivision and development on the amenity of neighbouring properties,***

The non-complying lot width could typically be expected to cause a potential adverse impact to existing adjoining development. However, proposed Lot 1 is located adjacent to No.16 Pacific Road and the dwelling on that site provides a lengthy building form located on the shared boundary. This development outcome results in private open spaces and internal living areas being orientated to the east and south and therefore causes no significant interface issues at the shared boundary.

Compliance with the DCP rear setback requirements will ensure that any future built form on proposed lot 1 will not cause any adverse impact on the amenity of the existing dwellings to the rear of Proposed lot 1.

Accordingly, the non-complying lot width is not expected to cause any adverse amenity impacts to adjacent development.

***(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,***



The development allows for the continued use and improved amenity and utility of the Phoenix Reserve.

An easement has also been provided on proposed lot 2 to facilitate the conservation of vegetation that forms part of the Phoenix Reserve.

The small section of the lot that provides a width less than 15m will not result in any adverse impacts to any adjacent development, land use or cultural feature.

***(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 development proposes two residential lots with an area of 630m<sup>2</sup> and 640m<sup>2</sup> that exceeds the minimum 550m<sup>2</sup> lot size standard by 14.5% and 17.4% respectively.

Accordingly, the non-compliant lot width does not increase the lot yield or density to be derived from residential zoned section of land.

The site is well serviced by a full range of urban services and infrastructure including *Sydney Water* reticulated water and sewer supplies. The additional proposed lots are not expected to place demands on that infrastructure that exceeds its current carrying capacity.

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

The non-complying lot width only applies to the front or northern section of Proposed Lot 1 (See Figure 3). The balance of that lot actually provides a lot width that well exceeds the minimum lot width.

As such both lots can be readily expected to provide a future residential building that could readily achieve all the minimum building setback and other relevant building requirements as required by the DCP.

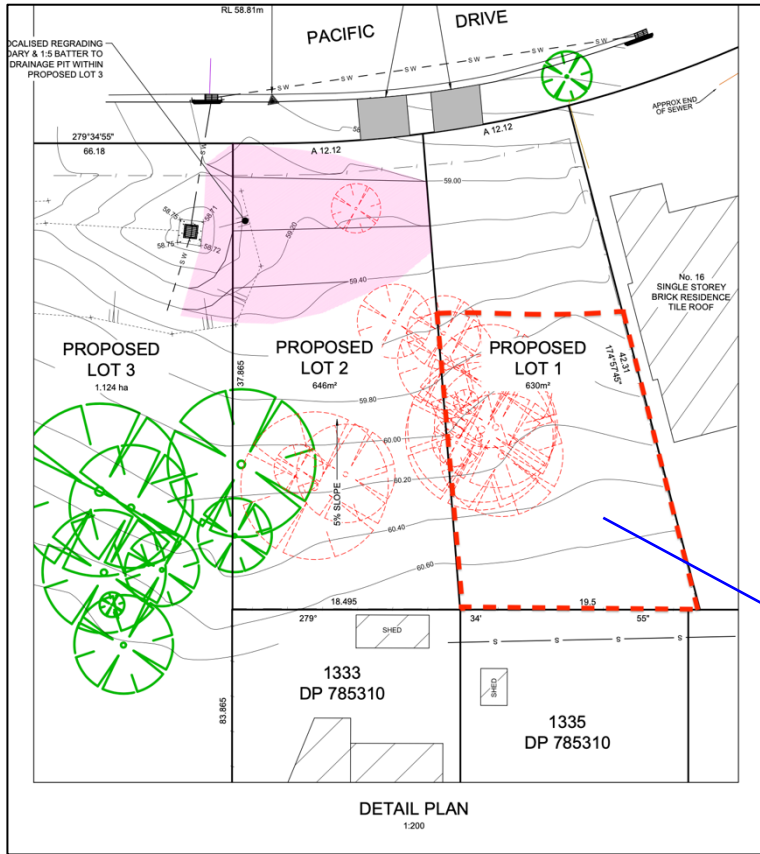
The development is therefore considered to be entirely consistent with all the PLEP clause objectives.

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

An analysis of the prevailing subdivision pattern demonstrates that the curvi-linear road pattern, that provides the underlying urban form of the Erskine Park neighbourhood, results in numerous lots with irregular shapes that commonly taper to the rear or front of the respective site. As such there are many examples of existing lots with a width less than 15m in close proximity to the subject site. This is demonstrated at Figure 4.

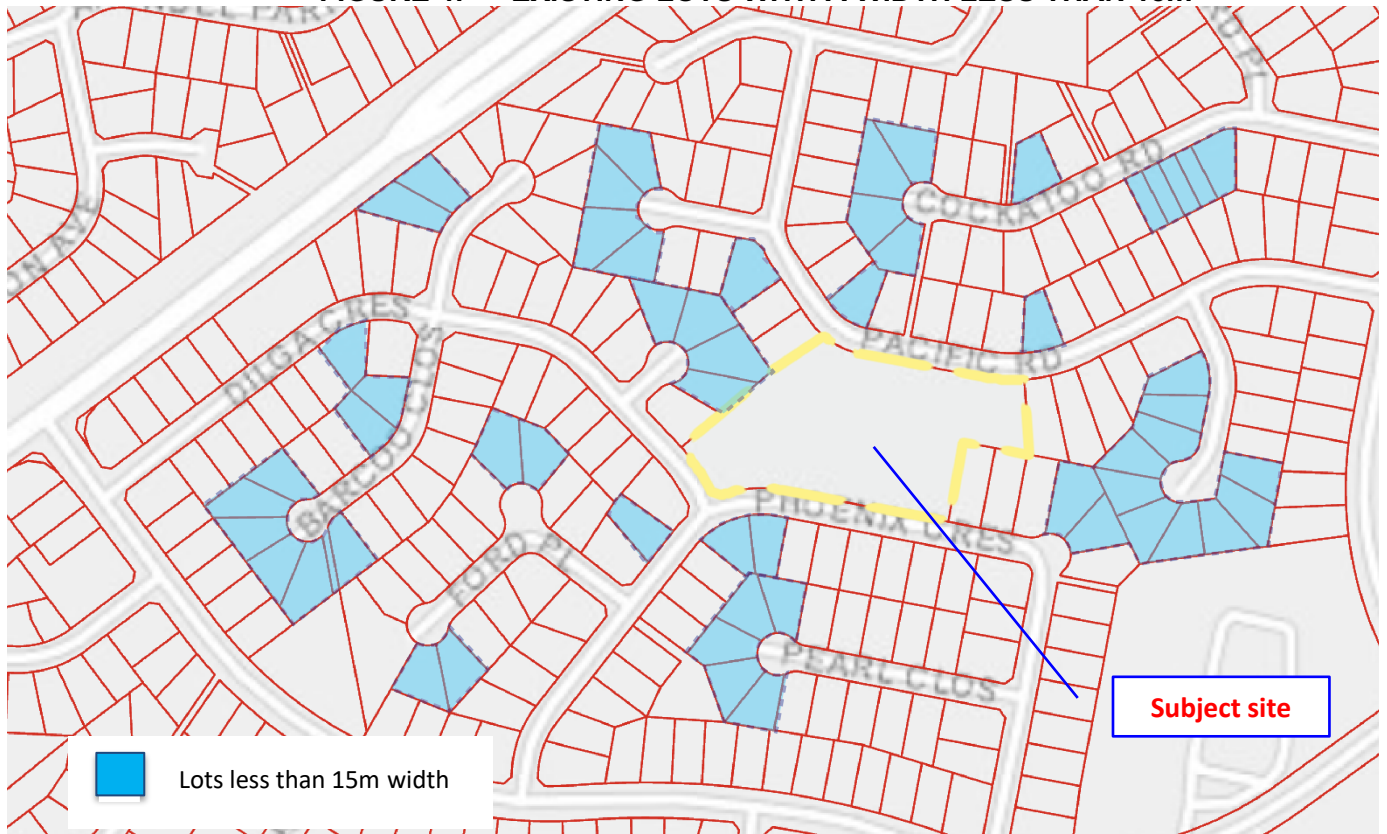
There is a strong case to be made that given the prevailing curvi-linear road layout and subdivision pattern, the 15m lot width should not be applied as that road pattern does not allow for regular shaped lot and lot widths.

FIGURE 3: SECTION OF COMPLYING LOT WIDTH



Section of lots that complies with lot width standard

FIGURE 4: EXISTING LOTS WITH A WIDTH LESS THAN 15m



Subject site

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

We do not rely on this reason.

**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;**

We do not rely on this reason.

**5. The compliance with 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.**

We do not rely on this reason.

## **13.0 HOW WOULD STRICT COMPLIANCE HINDER THE ATTAINMENT OF THE OBJECTS SPECIFIED IN THE ACT.**

Section 1.3 of the *Environmental Planning and Assessment Act 1979* provides:

*The objects of this Act are as follows:*

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*

- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The subject site and the development proposal form part of broader program of planning works undertaken by Penrith City in Erskine Park and St Clair known as the Open Space Reinvestment Project (OSRP).

This is innovative and award-winning project commenced in Oct 2015 and identified open space sites in Erskine Park that were underutilised or in need of an upgrade to meet resident's expectations. The OSRP provides the delivery mechanism to transform those identified lands from underutilised public open space into residential zoned lands, with the funds raised from their development and sale utilised to provide open space improvements.

Six sites, including the lands subject to this DA, have been already been rezoned for residential land use and development, with the proceeds from the future sale of that land being proposed to going directly into improving targeted open space and public domain areas within Erskine Park. The selected improvements were identified during the community consultation phase of the OSRP and are

outlined in Penrith Councils *Erskine Park Open Space Masterplan Report*.

Council has already forward funded \$2.65 million of open space and public domain improvements from the anticipated sale of these sites with examples of those forwarded funded improvement located in Phoenix Reserve provided at Figure 5. However once complete, the project will inject approx. \$5.6 million back into Erskine Park and contribute to Penrith City Council's vision for creating a more attractive and safer place to live as well as adapting to the future needs of residents.

The broader OSRP had always contemplated rezoning and a further two lot subdivision of the lands that are the subject of this development application. This two-lot subdivision (proposed lots 1 and 2) concept was included as exhibition material accompanying both the OSRP and rezoning processes.

Accordingly, the further advancement of that outcome as part of this DA is considered to "...*promote the orderly and economic use and development of land*" as identified by the Object of the EP& Act.

The broader outcomes of the OSRP inclusive of the subdivision and open space upgrades also are entirely consistent with the following objects of the EP& Act:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (c) to promote the orderly and economic use and development of land,*
- (g) to promote good design and amenity of the built environment,*

FIGURES 5: OPEN SPACE IMPROVEMENTS IN PHOENIX RESERVE



## **14.0 IS THE DEVELOPMENT STANDARD A PERFORMANCE BASED CONTROL?**

No. The development standard is clearly a numerical standard.

## **15.0 WOULD STRICT COMPLIANCE WITH THE STANDARD BE UNREASONABLE OR UNNECESSARY?**

As demonstrated in previous sections of this report, there are currently numerous lots in close proximity to the site that already provide a minimum lot width that fails to comply with the 15m lot width standard.

The non-compliance of those lots and the proposed development typically relates to just a small section of the lots street frontage and occurs primarily because of the existing curvi-linear road pattern and the irregular shaped lots that such a road layout causes.

The minimum lot width standard did not apply at the time when the original road layout and parent subdivisions were approved and implemented in the 1980's. Indeed, the relevant standard was only introduced into PLEP 2010 on 25/02/2015.

Accordingly, just as it is impossible to retrospectively apply the lot width standard on those existing lots, it would be unreasonable or unnecessary to strictly apply the development standard to infill type lots located within that 1980's curvi-linear road pattern.

It is also important to note that the development provides 1276m<sup>2</sup> of residential zoned lands and proposes two lots within that land area. As such the non-compliance with the minimum lot width does not result in



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an increased lot yield that would otherwise be expected from such a site area.

Further, proposed Lot 1 is fully lot width compliant in the rear and central sections and as such can be expected to be able to accommodate a dwelling house in a manner that complied with all other DCP requirements. As such a dwelling house on that lot would not be expected to cause adverse amenity impacts upon adjacent development.

Given all the circumstances of the case as described above, it is considered that strict compliance with the development standard would be both unreasonable and unnecessary.

## **16.0 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?**

The proposed development has been prepared within the context of a broader planning framework for Phoenix Reserve that includes:

- the rezoning of surplus and unused section of Phoenix Reserve
- transformative renewal and improvements to the amenities, utility and landscape character of the Phoenix Reserve open space area
- Subdivision and development of two residential parcels of land within Phoenix Reserve.

The transformative improvements to the Phoenix Reserve open space area represents a significant environmental planning benefit that is directly related to the proposed subdivision.

The alternate planning response, resulting from an LEP compliant development, would be to reduce the lot yield and therefore reduce the funds available for further reinvestment in Open Spaces across the neighbourhood, or to increase the land take of residential zoned land within Phoenix Reserve. Both of these alternate planning outcomes are considered to represent sub-optimal planning outcomes to those currently proposed.

The above is considered to represent legitimate environmental planning grounds that justifies the proposed non-compliance. They are not "generic" grounds, but rather, specific to the site and circumstances of the modified development.

In that context, there is considered to be sufficient environmental and planning grounds to justify a contravention of the development standard.

## **17.0 PUBLIC INTEREST**

The development proposal is in the public interest for the following reasons:

- Small and logical infill development consistent with planned outcomes for the site and broader neighbourhood
- Delivers substantial improvements to local open spaces and community gathering locations
- New dwelling opportunities
- Site responsive design
- Retention of existing trees within adjacent Public Reserve
- Further development contributions payable for improvement to local infrastructure and facilities

## 18.0 CONCLUSION

Given the circumstances of the case, as outlined in the preceding sections of this report, strict compliance with the standard would be unreasonable or unnecessary.

Further, this report has also demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard.