



# Outlook

Planning &  
Development

## CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARD

Clause 4.1A Minimum subdivision lot size for strata plan schemes in  
Zone R2

54-56 Albert Street & 29 Isabela Street  
North Parramatta

Clause 4.6 (Minimum lot size for Strata)  
54-56 Albert Street & 29 Isabela Street North Parramatta

### **Clause 4.6 Exception to Development Standard**

**54-56 Albert Street & 29 Isabela Street North Parramatta**

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## 1 INTRODUCTION

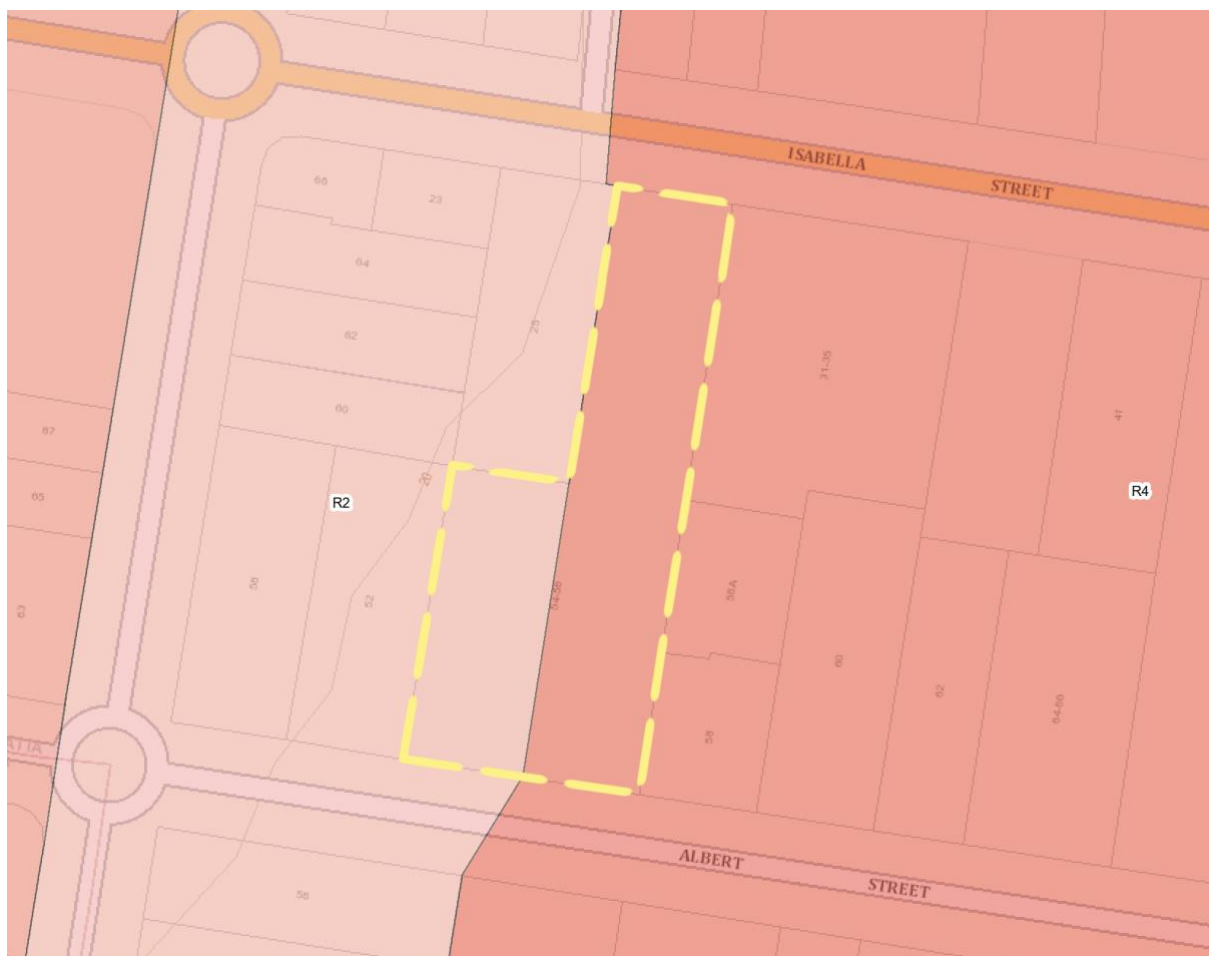
This submission seeks a variation to Clause 4.1A of the Parramatta Local Environmental Plan (LEP) 2023 which prescribes a minimum lot size area for strata subdivisions in R2 zone of 550sqm for the subject site. This Clause 4.6 variation request has been prepared in support of a development application (DA) in respect to the strata subdivision of an existing residential flat development on land known as Lot 102 DP 719145, 54-56 Albert Street & 29 Isabela Street North Parramatta NSW 2151.

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

The environmental planning instrument (EPI) that applies to the site is Parramatta Local Environmental Plan (LEP) 2023.

## 3 WHAT IS THE ZONING OF THE LAND AND WHAT ARE THE OBJECTIVES OF THE ZONE?

The site is a mixed zone site with the Eastern side of the site being R4 High Density Residential and the western being R2 Low Density Residential zone as shown below.



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- *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 maintain the low density residential character of the area.*
- *To ensure non-residential land uses are carried out in a way that minimises impacts on the amenity of a low density residential environment.*
- *To provide a range of community facilities that serve the needs of people who live in, work in and visit the area.*
- *To protect and enhance tree canopy, existing vegetation and other natural features.*

The objectives of the R4 zone are:

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To provide for high density residential development close to open space, major transport nodes, services and employment opportunities.*
- *To provide opportunities for people to carry out a reasonable range of activities from their homes if the activities will not adversely affect the amenity of the neighbourhood.*

As discussed in Section 7.1 of this report the proposed development is consistent with the objectives of the zone despite the variation.

#### **4 WHAT IS THE DEVELOPMENT STANDARD TO WHICH THIS CLAUSE 4.6 VARIATION APPLIES AND WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?**

The development standard to which this variation relates to is clause 4.1A (Minimum subdivision lot size for strata plan schemes in Zone R2), which reads as follows:

##### **4.1A Minimum subdivision lot size for strata plan schemes in Zone R2**

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

*(a) to ensure land is not fragmented by subdivisions that create additional dwelling entitlements,*

*(b) to provide for the subdivision of land at a density appropriate for the site constraints, development potential and infrastructure capacity of the land.*

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(2) This clause applies to land in Zone R2 Low Density Residential that is used, or is proposed to be used, for residential accommodation or tourist and visitor accommodation.

(3) A lot resulting from a subdivision of the land for a strata plan scheme, other than a lot comprising common property, within the meaning of the Strata Schemes Development Act 2015, must not be less than the minimum size shown on the Lot Size Map for the land.

Note—

State Environmental Planning Policy (Exempt and Complying Development Codes) 2008, Part 6 provides that strata subdivision of a building in certain circumstances is complying development.

(4) If a lot is a battle-axe lot or other lot with an access handle, the area of the access handle must not be included in calculating the lot size.

A minimum lot size of 550sqm relates to the site, as per Figure 2 below.

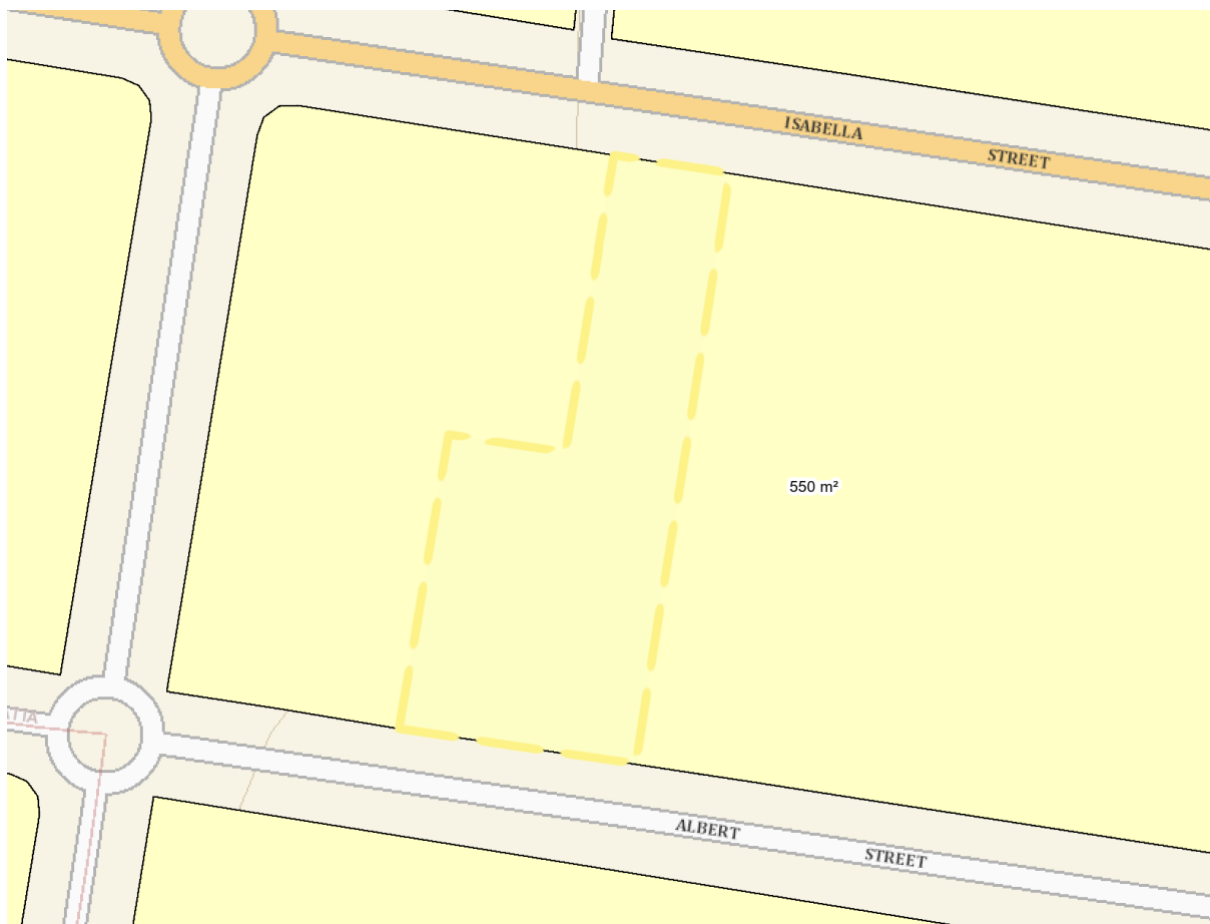


Figure 2: Minimum lot size map

## 5 WHAT IS THE EXTENT OF THE VARIATION?

The variation relates to the units located on R2 zoned land which measure between 87m<sup>2</sup> – 137m<sup>2</sup> with the clause requiring any lots created through a strata subdivision to meet the minimum lot size of 550sqm, being a difference of 463sqm or 84.2% of 550sqm.

The exceedance is a result of the development being approved prior to the newly adopted Parramatta Local Environmental Plan 2023 with the development relying on existing use rights for the portion of the buildings on the R2 zoned land.

## 6 Clause 4.6 Exceptions to development standards

Development standards are a means to achieving an environmental planning objective and can be numerical or performance based. Some developments may achieve planning objectives despite not meeting the required development standards. The planning system provides flexibility to allow these objectives to still be met by varying development standards in exceptional cases.

As detailed in this request, the proposed development is considered to meet the requirements prescribed under Clause 4.6 of the Parramatta LEP 2023, as the development standard is considered unreasonable, the development displays sufficient environmental planning grounds to warrant contravention of the development standard, and the development will be in the public interest because it is consistent with the objectives of the standard and the subject zone.

Clause 4.6 states the following:

### ***“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 to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*

*(a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and*

*(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.*

*Note—*

*The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).*

*(4) The consent authority must keep a record of its assessment carried out under subclause (3).*

*(5) (Repealed)*

*(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.*

*(7) (Repealed)*

*(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) for Parramatta City Centre—a development standard relating to the height or floor space ratio of a building by more than 5%,*

*(cb) for a building on land in the Epping Town Centre and identified as “Area D” on the Floor Space Ratio Map—clause 4.4 if the building will be used for one or more of the following—*

*(i) for land in Zone R4 High Density Residential—attached dwellings, boarding houses, dual occupancies, dwelling houses, hostels, multi dwelling housing, residential flat buildings, semi-detached dwellings, seniors housing or shop top housing,*

*(ii) for land in Zone E1 Local Centre—boarding houses, hostels, seniors housing, shop top housing or tourist and visitor accommodation.*

*(8A) Subclause (8)(cb) does not apply from the beginning of 31 July 2024.*

## 7 JUSTIFICATION FOR PROPOSED VARIATION

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument and LEP should be assessed contained in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 11 & *Samadi v Council of the City of Sydney* [2014] NSWLEC 1199.

Paragraph 27 of the judgement states:

*Clause 4.6 of (the LEP) imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).” [paragraph 27] [emphasis added by author]*

This written request satisfies the four preconditions in the following way:

- **Precondition 1: Consistency with zone objectives:** As described in Section 7.1.
- **Precondition 2: Consistency with the objectives of the standard:** As described in Section 7.2. Consistency with the objectives of the standard is demonstrated when establishing that compliance is unreasonable or unnecessary (specifically the first invocation of the “5 Part Test”).
- **Precondition 3: Compliance with the development standard is unreasonable or unnecessary:** As described in Section 7.3 utilising the accepted “5 Part Test”.
- **Precondition 4: Sufficient environmental planning grounds:** As described in Section 7.4.

As demonstrated throughout this report, the use of Clause 4.6 to enable an exception to this development standard is appropriate in this instance and the consent authority should be satisfied that all requirements of the clause have been suitably addressed via the content in this formal request.

### 7.1 IS THE PROPOSAL CONSISTENT WITH THE ZONE OBJECTIVES?

The objectives of the R2 zone are:

- *To provide for the housing needs of the community within a low density residential environment.*



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- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To maintain the low density residential character of the area.*
- *To ensure non-residential land uses are carried out in a way that minimises impacts on the amenity of a low density residential environment.*
- *To provide a range of community facilities that serve the needs of people who live in, work in and visit the area.*
- *To protect and enhance tree canopy, existing vegetation and other natural features.*

**Comment:** The proposed development is for the strata subdivision of an existing residential flat building and will not result in any additional dwellings and will not impact the density of development on site. The strata subdivision will maintain the existing character of the area and will not impact the tree canopy of vegetation within the area. It is therefore considered that, while the development is not considered low density due to the existing use rights of the development, that the proposed strata subdivision complies with the objectives of the zone.

## **7.2 IS THE PROPOSAL CONSISTENT WITH THE OBJECTIVES OF THE STANDARD?**

It is noted that the proposed development achieves the objectives of the development standard as provided:

**Objective (a)** to ensure land is not fragmented by subdivisions that create additional dwelling entitlements,

**Comment:** The proposed development is for the strata subdivision of an existing residential flat development and will not result in any fragmentation of land or any additional dwellings for the site. It is noted that the development was approved

**Objective (b)** to provide for the subdivision of land at a density appropriate for the site constraints, development potential and infrastructure capacity of the land.

**Comment:** The proposed development is to strata subdivide an existing residential flat building. The building was previously assessed by Council officers against the previous LEP and DCP and was considered to be acceptable based on the site constraints and infrastructure capacity of the land.

## **7.3 IS COMPLIANCE WITH THE STANDARD UNREASONABLE OR UNNECESSARY?**

The proposed variation from the development standard is assessed against the accepted “5 Part Test” for the assessment of a development standard variation established by the NSW Land and Environment Court (LEC) in *Wehbe v Pittwater Council* (2007) NSWLEC 827.

In the decision of *Wehbe v Pittwater Council* (2007) NSWLEC 827, Chief Justice Preston expressed the view that there are five (5) different ways in which an objection may be well founded, and that approval of the objection may be consistent with the aims of the policy. This attributes to determining whether compliance with the standard is unreasonable or unnecessary in the circumstances of the case as set out below:

1 *The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development provides an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable.*

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".*

Satisfactorily demonstrating that compliance with a development standard is unreasonable or unnecessary in any one of these ways is sufficient for meeting the requirement in Clause 4.6(3)(a) of LEP 2023.

The following discussion is provided in response to each of the above tests.

### **7.3.1 Are the objectives of the standard are achieved notwithstanding non-compliance with the standard (Wehbe Test No.1)**

As detailed within section 7.2 of this report it is considered that the objectives of the standard are achieved notwithstanding the non-compliance with the development standard.

### **7.3.2 The underlying objective or the purpose of the standard is not relevant to the development (Wehbe Test No.2)**

It is considered that the purpose of clause 4.1A is to prohibit the strata subdivision of dual occupancies approved under State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 which allows for dual occupancies to be building on blocks that are a minimum of 400sqm. The LEP has a minimum lot size exception for dual occupancies of 600sqm for R2 zones and it is considered that Council wants to allow small lot dual occupancies under a CDC but to provide affordable housing options but not allow these small dual occupancy dwellings to be sold off individually. As the development is for the strata subdivision of a residential flat development that was approved by Council it is considered that the underlying purpose of the standard is not relevant to the existing development on site.

### **7.3.3 The underlying object or purpose would be defeated or thwarted (Wehbe Test No.3)**

It is noted considered that the underlying objective or purpose would be defeated or thwarted, the sole reason for the non compliance is due to a historical approval for high density development on part of a low density zoning.

### **7.3.4 The development standard has been virtually abandoned or destroyed (Wehbe Test No.4)**

The development standard is a recent development standard with the LEP only being adopted within the last year. During that the development standard has yet to be varied.

### **7.3.5 The zoning of the land is unreasonable or inappropriate (Wehbe Test No.5)**

The zoning of the land in relation to the development is considered to be inappropriate with high density residential development being located on the split zoned site. The majority of the site is zoned R4 and it is considered that the most recent LEP should have rectified this existing use right conflict by rezoning the R2 portion of the site to R4 which would have allowed for a fully compliant development. It is therefore considered that the zoning of the R2 portion of the land is inappropriate to the existing development.

## **7.4 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS?**

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 24) states:

*The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].*

In this regard, the justification contained within Section 8.1.1 of this Clause 4.6 variation has focused on the ability of the elements of the development that are outside the height plane to demonstrate compliance with the objectives of the standard, and why, despite the height exceedance, the proposal is nonetheless able to achieve these standards.

Further, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ clarified what a Clause 4.6 variation request does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

*It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*

*I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

The assessment in the preceding sections and as shown throughout the supporting documentation demonstrates that the resultant environmental impacts of the proposal will be satisfactory, subsequently providing the justification for contravening the development standard. The proposal is consistent with the relevant objectives of the zone and the development standard, and it has been established that compliance with the standard is unreasonable or unnecessary.

There are sufficient environmental and planning grounds to justify contravening the development standard and are summarised from the preceding sections as follows:

- The proposed development meets the zone objectives (Section 7.1) and the development objectives (Section 7.2).
- The proposed development is compatible with existing and future built form within the surrounding locality.

The proposal will not result in any unreasonable amenity or environmental impacts as detailed in the supporting documentation and this request. Notwithstanding the variation, the proposed strata subdivision will not result in any negative impacts on the land or the character of the area.

As outlined above, it is considered that the proposal will provide for a better planning outcome than a strictly compliant development. In this case, we submit that there are sufficient environmental planning grounds to justify contravening the development standard.

## **8 OTHER MATTERS THAT MUST BE SATISFIED**

### **8.1 IS THE VARIATION IN THE PUBLIC INTEREST?**

As detailed above, Clause 4.6 (4)(a)(ii) of the LEP requires demonstration that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard (described and addressed above) and the objectives for the zone in which the development is proposed to be carried out. The demonstration of compliance with both

the objectives of the standard and the land zone in turn confirm that the proposal is in the public interest.

## **8.2 WHETHER CONTRAVENTION OF THE DEVELOPMENT STANDARD RAISES ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING**

The variation sought does not raise any matter of significance for State or regional environmental planning.

## **8.3 PUBLIC BENEFIT OF MAINTAINING THE STANDARD?**

It is considered that there is no benefit to the public or the community in maintaining the development standard. As established, there are no unreasonable or adverse impacts resulting from the development. As such, there would be no public benefit in maintaining strict numerical compliance the standard.

## **9 Conclusion**

As provided above, the development complies with the outcomes of the development standard and is considered to be in the public interest. Strict compliance with this control is deemed unnecessary and restricts the use of the site by the owner due to the width of the site. It is considered that the development results in a good planning outcome for the property and the community.

The consent authority should be satisfied that all requirements of the clause have been suitably addressed via the content in this formal request and the proposal is worthy of favourable consideration.