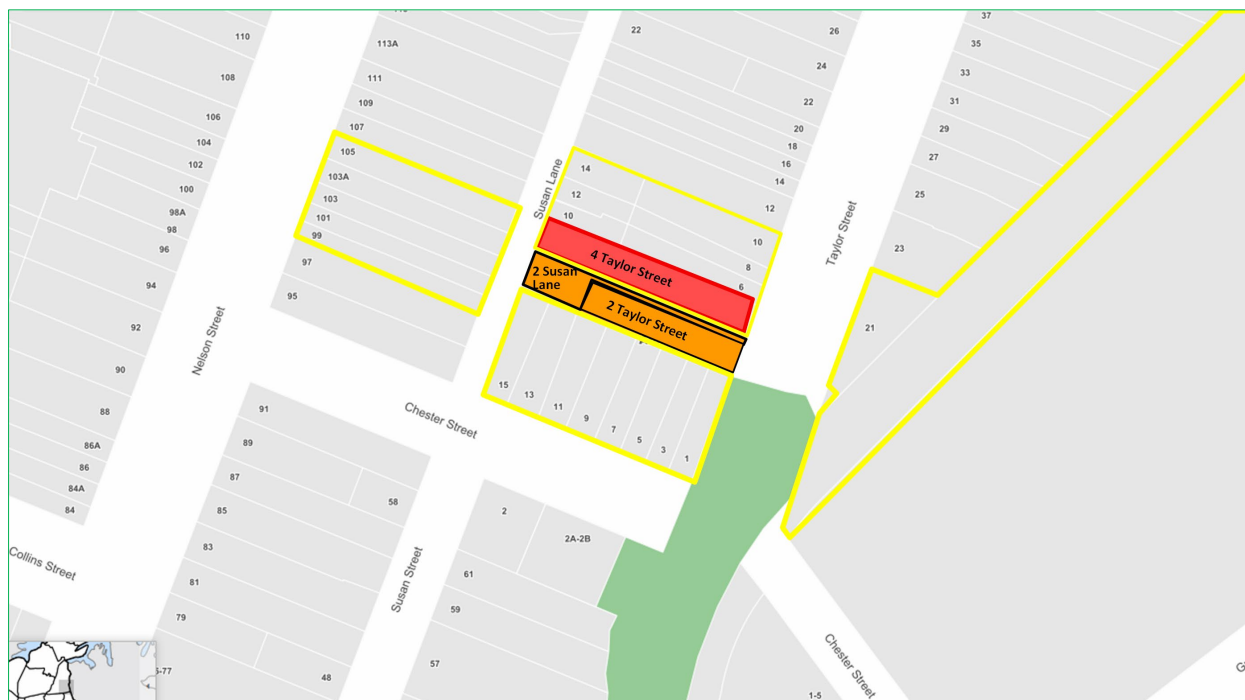




**DEVELOPMENT ASSESSMENT REPORT**

|   |   |
|---|---|
| <b>Application No.</b>                            | DA/2023/0702  |
| <b>Address</b>                                    | 2 Taylor Street and 2 Susan Lane ANNANDALE                                |
| <b>Proposal</b>                                   | Boundary adjustment between two existing lots                             |
| <b>Date of Lodgement</b>                          | 25 August 2023  |
| <b>Applicant</b>                                  | Ms Kerry A McGrath  |
| <b>Owner</b>                                      | Ms Kerry A McGrath<br>Mr Ricky S Hull<br>Mr Stephen J McGrath             |
| <b>Number of Submissions</b>                      | One (1)   |
| <b>Value of works</b>                             | \$10,000.00   |
| <b>Reason for determination at Planning Panel</b> | Section 4.6 variations to Minimum Subdivision Lot Size and FSR exceed 10% |
| <b>Main Issues</b>                                | None identified   |
| <b>Recommendation</b>                             | Approved with Conditions  |
| <b>Attachment A</b>                               | Recommended conditions of consent   |
| <b>Attachment B</b>                               | Plans of proposed development   |
| <b>Attachment C</b>                               | Section 4.6 Exception to Development Standards                            |



**LOCALITY MAP**

|               |  |            |  |     |
|---------------|--|------------|--|-----|
| Subject Site  |  | Objectors  |  | ↑ N |
| Notified Area |  | Supporters |  |     |

Note: Due to scale of map, not all objectors could be shown.

## 1. Executive Summary

This report is an assessment of the application submitted to Council for boundary adjustment between two existing lots at 2 Taylor Street Annandale and 2 Susan Lane Annandale.

The application was notified to surrounding properties and one (1) submission was received in response to the initial notification.

The main issues that have arisen from the application include:

- Non-compliance to relevant development standards, specifically Minimum Lot Size, Landscaped Area, Site Coverage and Floor Space Ratio for No. 2 Susan Lane after the boundary adjustment.
- There are no physical works proposed as part of this boundary adjustment.
- Council approval is required for NSW Land and Titles Registry for the boundary adjustments.

The non-compliances for No. 2 Susan Lane are acceptable given these non-compliances are largely existing and is the result of the boundary adjustment. There will be no additional or undue adverse amenity impacts on the adjoining properties or the subject site. Further, these non-compliances are largely existing. Therefore, the application is recommended for approval.

## 2. Proposal

The proposed development is a boundary realignment of the two lots known as 2 Taylor Street, Annandale and 2 Susan Lane, Annandale.

No. 2 Susan Lane is battle-axe in nature with access via Taylor Street and Susan Lane, with the handle of the battle-axe of No. 2 Susan Lane abutting No. 2 Taylor Street which is a rectangular shaped lot. This battle-axe handle of No. 2 Susan Lane has a width of one (1) metre and provides easements for services (see below) which will form part of No. 2 Taylor Street following the proposed boundary adjustment. The boundary adjustment will require realigning the vertical (east/west) boundary between the two lots to create two rectangular lots at both No. 2 Taylor Street and 2 Susan Lane. As a result of the proposed boundary adjustment and re-subdivision:

- One lot will result in a (further) smaller lot which falls below the Minimum Subdivision Lot Size of 200sqm prescribed by Section 4.1 Minimum Lot Size of *the Inner West Local Environmental Plan 2022* - this lot being No. 2 Susan Lane (western lot) will have a proposed lot size of 98.1sqm; and
- No. 2 Taylor Street (eastern lot) will have an increased lot size of 251.6sqm.

See Figure 1 and Figure 2 below.

Figure 1: Plan of Subdivision for Lots 282 (western lot) and 281 (eastern lot) in DP814

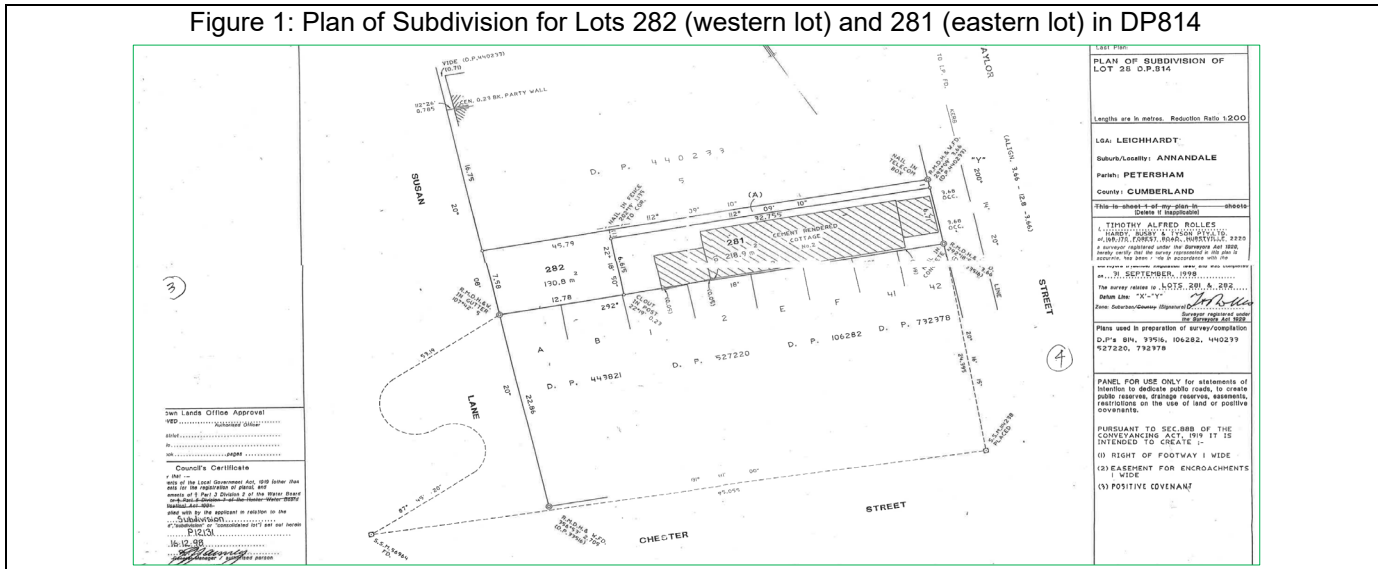
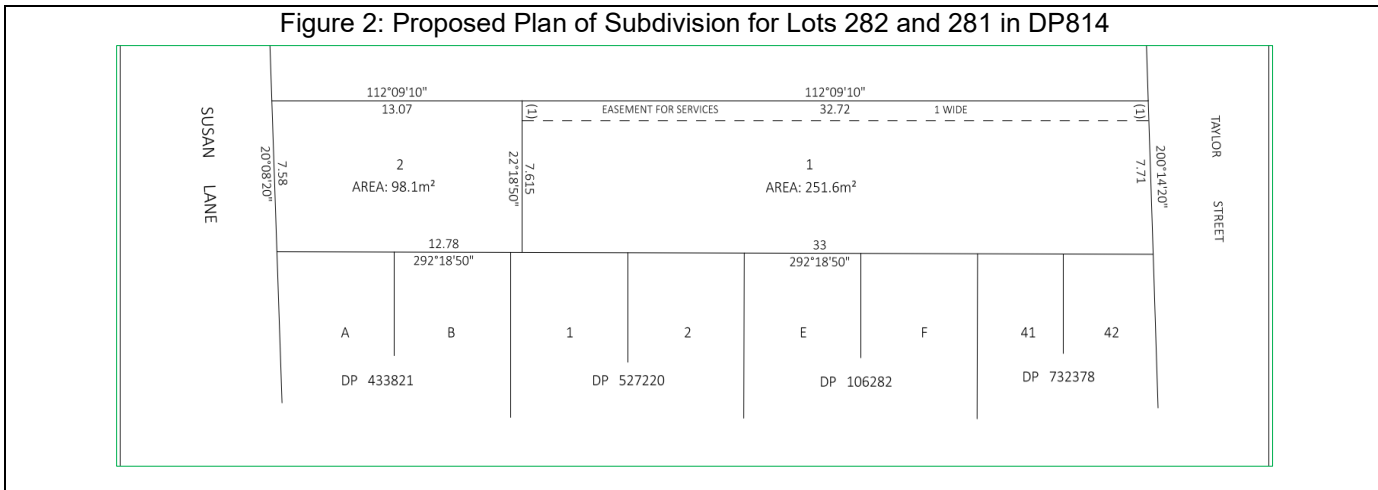


Figure 2: Proposed Plan of Subdivision for Lots 282 and 281 in DP814



A right of footway and easement for encroachments of one (1) m wide access is attached to the subdivision plan for these two sites. Specifically, the easement is attached to the battle-axe handle of No. 2 Susan Lane. This easement is used for services (sewerage and water lines for both sites). This easement currently favours No. 2 Taylor Street. Following the boundary adjustment, the easement will favour No. 2 Susan Lane.

### 3. Site Description

The subject sites are No. 2 Taylor Street, Annandale and No. 2 Susan Lane, Annandale, which are legally described, respectively, as Lot 281 in DP 814 and Lot 282 in DP 814. Taylor Street and Susan Lane run parallel to each other in a north/south direction – north towards Booth Street and south towards Chester Street. See Figure 3. The subject sites are within proximity of Douglas Grant Memorial Park.

Figure 3: general location of the subject sites in red boundary. Source: Near Maps, 17.01.2024



No. 2 Susan Lane is battle-axe in nature with access via Taylor Street and Susan Lane, with the handle of the battle-axe of No. 2 Susan Lane abutting No. 2 Taylor Street which is a rectangular shaped lot.

No. 2 Taylor Street has a site area of 218.9sqm. It has a street frontage of 6.71m and a depth of 32.755m to the northern boundary and 32.77m to the southern boundary.

No. 2 Susan Lane has a site area of 130.8sqm, with laneway frontage of 7.58m and a southern boundary depth of 12.78m. The battle-axe handle has a depth to its north and south boundaries of 45.78m and 32.755m, respectively, and a small boundary of 1m fronting Taylor Street. The battle-axe handle for this lot adjoins the northern boundary No. 2 Taylor Street.

No. 2 Taylor Street is an elevated lot containing a single storey dwelling with an attic level within the roof space and a garage located forward of the front building line.

No. 2 Susan Lane contains a three-storey dwelling with the street level being the third storey which contains the living areas. The two lower levels contain bedrooms. This section of the lot is excavated to allow the construction of the dwelling. No. 2 Susan Lane has a single-storey presentation from the laneway and is not visible from Taylor Street.

Developments on this section of Taylor Street consists of predominantly single storey and double storey (with a single-storey presentation) dwellings, some of which are attached terraces with parapet roofs. There are a number of dwellings with carports and garages located forward of the front building line.

Susan Lane is mixed in character and includes dwellings, garage and studios, parking structures and fencing to the rear of private open space areas on Taylor Street and nearby Nelson Street.

The subject sites are not heritage listed, nor located in the vicinity of a heritage item, however are located in a Heritage Conservation Area.

## 4. Background

### 4(a) Site history

The following application outlines the relevant development history of the subject site and any relevant applications on surrounding properties.

#### Subject Site

| Application   | Proposal  | Decision & Date      |
|---------------|---|----------------------|
| PDA/2023/0163 | Pre-Development Application advice sought for boundary adjustment to relocate the 1m wide land handle from Lot 282 to Lot 281 and information requirements relating to lodgement of a Development Application for the boundary adjustment | Issued on 25/07/2023 |

### 4(b) Application history

N/A

## 5. Assessment

The following is a summary of the assessment of the application in accordance with Section 4.15 of the *Environmental Planning and Assessment Act 1979 (EPA Act 1979)*.

### 5(a) Environmental Planning Instruments

The application has been assessed against the relevant Environmental Planning Instruments listed below:

- *State Environmental Planning Policy (Resilience and Hazards) 2021*
- *State Environmental Planning Policy (Biodiversity and Conservation) 2021*
- *Inner West Local Environmental Plan 2022*

The following provides further discussion of the relevant issues:

#### 5(a)(i) *State Environmental Planning Policy (Resilience and Hazards) 2021*

##### Chapter 4 Remediation of land

Section 4.16 (1) of the SEPP requires the consent authority not consent to the carrying out of any development on land unless:

*“(a) it has considered whether the land is contaminated, and*

- (b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and
- (c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.”

In considering the above, there is no evidence of contamination on the site. There is also no indication of uses listed in Table 1 of the contaminated land planning guidelines within Council's records. The land will be suitable for the proposed use as there is no indication of contamination.

### *5(a)(ii) State Environmental Planning Policy (Biodiversity and Conservation) 2021*

#### Chapter 2 Vegetation in Non-rural Areas

The SEPP concerns protection/removal of vegetation and gives effect to the local tree preservation provisions of Council's DCP.

The application does not propose any tree removal, and there are no prescribed trees that will be adversely affected by the proposal.

Overall, the proposal is considered acceptable with regard to the provisions of this part of the SEPP.

#### Chapter 6 Water Catchments

The site is not located in, or located within the vicinity of, a foreshores and waterways area and raises no issues that will be contrary to the provisions of this part of the SEPP.

### *5(a)(iii) Inner West Local Environmental Plan 2022 (IWLEP 2022)*

The application was assessed against the following relevant sections of the *Inner West Local Environmental Plan 2022*:

- Section 1.2 – Aims of Plan
- Section 2.3 – Land Use Table and Zone Objectives
- Section 4.1 – Minimum Subdivision Lot Size
- Section 4.3C – Landscaped Areas for Residential Accommodation in Zone R1
- Section 4.4 – Floor Space Ratio
- Section 4.5 – Calculation of Floor Space Ratio and Site Area
- Section 4.6 – Exceptions to Development Standards
- Section 5.10 – Heritage Conservation
- Section 6.1 – Acid Sulfate Soils
- Section 6.3 – Stormwater Management

The following provides discussion of the relevant issues:

### Section 1.2 – Aims of Plan

The development will not result in any adverse streetscape and adjoining amenity impacts, acceptable on-site amenity outcomes will remain respectful of the pattern of development in street, and hence, will meet the relevant Aims of Plan as follows:

- The proposal conserves and maintains the natural, built and cultural heritage of Inner West;
- The proposal encourages diversity in housing to meet the needs of, and enhance amenity for, Inner West residents;
- The proposal prevents adverse social, economic and environmental impacts on the local character of Inner West; and
- The proposal prevents adverse social, economic and environmental impacts, including cumulative impacts.

### Section 2.3 Land Use Table and Zone Objectives

The site is zoned LR1 under the *IWLEP 2022* and the proposed boundary adjustment associated with two dwelling houses is permitted with consent in the zone.

The development is consistent with the objectives of the LR1 zone.

The objectives of the R1 zone are as follows:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To improve opportunities to work from home.*
- *To provide housing that is compatible with the character, style, orientation and pattern of surrounding buildings, streetscapes, works and landscaped areas.*
- *To provide landscaped areas for the use and enjoyment of existing and future residents.*
- *To ensure that subdivision creates lots of regular shapes that are complementary to, and compatible with, the character, style, orientation and pattern of the surrounding area.*
- *To protect and enhance the amenity of existing and future residents and the neighbourhood.*

The development will continue to provide for a variety of housing types and for the housing needs of the community within a low-density residential environment. Further, the proposal, will not adversely impact on the character, style and pattern of surrounding buildings, will result

in acceptable on-site amenity outcomes, and will not result in any undue adverse amenity impacts on adjoining properties or the locality in general.

Given the above, the proposal, as conditioned, is considered to be consistent with the zone objectives.

Section 4.1 – Minimum Subdivision Lot Size, Section 4.3C – Landscaped Areas for Residential Accommodation in Zone R1 and Section 4.4 – Floor Space Ratio

The following tables demonstrate each subject site’s compliance against the relevant development standards under Section 4.1, Section 4.3C, and Section 4.4 of the *IWLEP 2022*.

| 2 Taylor Street  |        |         |
|--|--------|---------|
| Section 4.1 Minimum Subdivision Lot Size                   |        |         |
|  | Sqm    |         |
| Minimum =  | 200    |         |
| Proposed =   | 251.6  |         |
| Variation =  | N/A    |         |
| Section 4.3C Landscaped Area in R1 General Residential     |        |         |
|  | %      | Sqm     |
| Maximum =  | 20%    | 50.32   |
| Proposed =   | 20.81% | 52.364  |
| Variation =  | N/A    | N/A     |
| Section 4.3C(3)(b) Site Coverage in R1 General Residential |        |         |
|  | FSR    | Sqm     |
| Maximum =  | 60%    | 150.96  |
| Proposed =   | 65.81% | 165.57  |
| Variation =  | 9.68%  | 14.61   |
| Section 4.4 Floor Space Ratio                              |        |         |
|  | FSR    | Sqm     |
| Maximum =  | 0.8    | 201.28  |
| Proposed =   | 0.71   | 179.544 |
| Variation =  | N/A    | N/A     |

| 2 Susan Lane   |        |        |
|--|--------|--------|
| Section 4.1 Minimum Subdivision Lot Size                   |        |        |
|  | Sqm    |        |
| Minimum =  | 200    |        |
| Proposed =   | 98.1   |        |
| Variation =  | 103.9% |        |
| Section 4.3C Landscaped Area in R1 General Residential     |        |        |
|  | %      | Sqm    |
| Maximum =  | 15%    | 14.715 |
| Proposed =   | 16.34% | 16.025 |
| Variation =  | N/A    | N/A    |
| Section 4.3C(3)(b) Site Coverage in R1 General Residential |        |        |
|  | FSR    | Sqm    |
| Maximum =  | 60%    | 58.86  |
| Proposed =   | 40.10% | 39.339 |
| Variation =  | N/A    | N/A    |
| Section 4.4 Floor Space Ratio                              |        |        |
|  | FSR    | Sqm    |
| Maximum =  | 0.9    | 88.29  |
| Proposed =   | 1.03   | 100.72 |
| Variation =  | 14.08% | 12.43  |

Section 4.6 – Exceptions to Development Standards

*Section 4.1 – Minimum Subdivision Lot Size*

The applicant seeks a variation of 50.95% or 101.9sqm to the Minimum Subdivision Lot Size development standard prescribed Section 4.1 of the *IWLEP 2022* for No. 2 Susan Lane, under Section 4.6 of the LEP. Section 4.6 allows Council to vary development standards in certain circumstances and provides an appropriate degree of flexibility to achieve better design outcomes.



The objectives of the Minimum Subdivision Lot Size as prescribed in the LEP are as follows:

- (a) to ensure lot sizes cater for a variety of development,*
- (b) to ensure lot sizes do not result in adverse amenity impacts,*
- (c) to ensure lot sizes deliver high quality architectural, urban and landscape design,*
- (d) to provide a pattern of subdivision that is consistent with the desired future character,*
- (e) to ensure lot sizes allow development to be sited to protect and enhance riparian and environmentally sensitive land.*

The objectives of the R1 General residential zone have been identified previously in the assessment under Section 2.3 of the LEP.

In order to demonstrate whether strict numeric compliance is unreasonable and unnecessary in this instance, the proposed exception to the development standard has been assessed against the objectives and provisions of Section 4.6 of the *IWLEP 2022* below.

A written request has been submitted to Council in accordance with Section 4.6(4)(a)(i) of the *IWLEP 2022* justifying the proposed contravention of the development standard which is summarised as follows:

- The proposed boundary adjustment will not change the overall landscaped area or affect any existing vegetation on the site.*
- The proposed boundary adjustment will maintain all existing landscaping on the site.*
- The proposed boundary adjustment will maintain the existing development on the site and the existing neighbourhood character.*
- The proposal does not result in any changes to the existing built form or existing ecologically sustainable initiatives on the site.*
- The site density remains the same.*
- The proposed lots have satisfactory areas for landscaping and private open space.*
- The proposed boundary adjustment maintains to the existing use of the site as a dwelling house.*
- The proposal maintains the existing dwellings on each lot and the overall density of the combined site.*
- The proposed boundary adjustment will maintain the existing character of built and natural features in the surrounding area.*

The applicant's written rationale adequately demonstrates compliance with the development standard is unreasonable and unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

It is considered the development is not contrary to public interest because it is consistent with the relevant objectives of the R1 General Residential zone, and the objectives of Section 4.1

of the LEP, in accordance with Section 4.6(4)(a)(ii) of the *IWLEP 2022* for the following reasons:

- The proposed lots, post development, will be consistent with the lot shapes (rectangular), sizes (in terms of width, depth and area) characteristic of Taylor Street and Susan Lane in the vicinity, and hence, the resultant subdivision will be generally consistent with the existing subdivision pattern.
- The proposed boundary adjustment will not alter the existing site conditions at either subject site, retaining the existing dwellings which will continue to provide for the housing needs of the community and retaining the existing facilities and services for the needs of the existing and future residents.
- No physical works to the dwellings sought are proposed, and therefore, there is no change to the density or housing types in the locality;
- The proposal will not alter the streetscape or the character of the built and natural features of the surrounding area, and the desired future character of the locality will be maintained. The proposal will not have any adverse impact to the Heritage Conservation Area and Distinctive Neighbourhood;
- The proposed boundary alignment will not have any perceptible change to the lot sizes at the subject site, as the battle axe handle for No. 2 Susan Lane is only 1m wide, and will not result in adverse amenity impacts to the subject lots.
- The proposal will not result in any adverse amenity impacts for adjoining properties.
- The proposal will not impact on any existing vegetation.

The contravention of the development standard does not raise any matter of significance for State and Regional Environmental Planning. Council may assume the concurrence of the Director-General under the Planning Circular PS 20-002 issued in May 2020 in accordance with section 4.6(4)(b) of the *IWLEP 2022*.

The proposal thereby accords with the objective of section 4.6(1)(b) and requirements of section 4.6(3)(b) of the *IWLEP 2022*. For the reasons outlined above, there are sufficient planning grounds to justify the departure from the Section 4.1 of the LEP development standard and it is recommended the Section 4.6 exception be granted.

#### *Section 4.3C(3)(b) – Site Coverage*

The applicant seeks a variation of 9.68% or 14.61sqm to the maximum Site Coverage prescribed under Section 4.3C(3)(b) of the *IWLEP 2022* for No. 2 Taylor Street, under Section 4.6 of the *IWLEP 2022*. Section 4.6 allows Council to vary development standards in certain circumstances and provides an appropriate degree of flexibility to achieve better design outcomes.

The objectives of the Landscaped Area development standard as prescribed in the LEP are as follows:

- (a) to provide landscaped areas for substantial tree planting and for the use and enjoyment of residents,*
- (b) to maintain and encourage a landscaped corridor between adjoining properties,*
- (c) to ensure that development promotes the desired character of the neighbourhood,*
- (d) to encourage ecologically sustainable development,*
- (e) to control site density,*
- (f) to provide for landscaped areas and private open space.*

The objectives of the R1 General residential zone have been identified previously in the assessment under Section 2.3 of the LEP.

In order to demonstrate whether strict numeric compliance is unreasonable and unnecessary in this instance, the proposed exception to the development standard has been assessed against the objectives and provisions of Section 4.6 of the *IWLEP 2022* below.

A written request has been submitted to Council in accordance with Section 4.6(4)(a)(i) of the *IWLEP 2022* justifying the proposed contravention of the development standard which is summarised as follows:

- The proposed boundary will not affect the existing development on the site. The proposed lot sizes allow a variety of the development types.*
- Site coverage is consistent with surrounding development*
- The proposal does not result in any changes to the existing built form and therefore local amenity is maintained.*
- The proposed boundary adjustment will maintain the existing dwelling houses on each lot.*
- The proposed boundary adjustment is more consistent with the surrounding subdivision pattern.*
- The proposed boundary adjustment maintains the existing residential use of the site and density. The existing dwelling house will continue to contribute to the provision of the housing needs of the community.*
- The proposed boundary adjustment will maintain the existing character of built and natural features in the surrounding area.*
- The breach to the minimum lot size is the result of a land transfer from Lot 282 to Lot 281. There will be no perceptible change to the subdivision pattern.*
- The proposal maintains the siting and scale of the existing development*
- There will be no adverse impact on views, privacy or solar access of the adjoining properties arising from the proposed boundary adjustment. The height, form and design of the existing dwelling will not create any perceptible impact on the scenic quality or amenity of the streetscape and the locality.*
- The proposal maintains the existing built form that is consistent with surrounding development.*

- *There will be no adverse impact on views, privacy or solar access of the adjoining properties arising from the proposed boundary adjustment. The height, form and design of the existing dwelling will not create any perceptible impact on the scenic quality or amenity of the streetscape and the locality.*

The applicant's written rationale adequately demonstrates compliance with the development standard is unreasonable and unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

It is considered the development is not contrary to public interest because it is consistent with the objectives of the R1 General Residential zone, and the objectives of Section 4.3C Landscaped Area, in accordance with Section 4.6(4)(a)(ii) of the *IWLEP 2022* for the following reasons:

- Both lots, post subdivision, will remain compliant with the Landscaped Area development standards applicable to the site and will retain adequate Landscaped Areas capable of accommodating for substantial tree planting and for the use and enjoyment of residents.
- The proposal will not alter existing landscaped corridors between adjoining properties and will continue to provide and allow for landscaped areas and private open space on each site in accordance with Council controls;
- The proposal will not impact on any existing vegetation and will retain the existing site conditions.
- The proposal will not adversely impact on the desired character of the neighbourhood; and
- The proposal raises no issues that are contrary to ecologically sustainable development principles;
- There are no changes proposed to the form, size and scale of the dwellings on the subject lots;
- The proposed boundary alignment will not alter the existing site conditions at either subject site, retaining the existing dwellings which will continue to provide for the housing needs of the community and retaining the existing facilities and services for the needs of the existing and future residents.
- No physical works to the dwellings are proposed, and therefore, there is no change to the density or housing types in the locality;
- The proposal will not alter the streetscape or the character of the built and natural features of the surrounding area, and the desired future character of the locality will be maintained. The proposal will not have any adverse impact to the Heritage Conservation Area and Distinctive Neighbourhood;
- The site coverage is generally consistent with nearby development;
- The proposal will result in acceptable amenity outcomes on the site; and
- The proposal will not result in any adverse amenity impacts on adjoining properties.

The contravention of the development standard does not raise any matter of significance for State and Regional Environmental Planning. Council may assume the concurrence of the Director-General under the Planning Circular PS 20-002 issued in May 2020 in accordance with section 4.6(4)(b) of the *IWLEP 2022*.

The proposal thereby accords with the objective of section 4.6(1)(b) and requirements of section 4.6(3)(b) of the *IWLEP 2022*. For the reasons outlined above, there are sufficient planning grounds to justify the departure from the Section 4.3C(3)(b) Site Coverage development standard and it is recommended the Section 4.6 exception be granted.

#### *Section 4.4 – Floor Space Ratio*

The applicant seeks a variation of 14.08% or 12.43sqm to the maximum FSR prescribed under Section 4.4 of the *IWLEP 2022* for No. 2 Susan Lane, under Section 4.6 of the *IWLEP 2022*. Section 4.6 allows Council to vary development standards in certain circumstances and provides an appropriate degree of flexibility to achieve better design outcomes.

In order to demonstrate whether strict numeric compliance is unreasonable and unnecessary in this instance, the proposed exception to the development standard has been assessed against the objectives and provisions of Section 4.6 of the *IWLEP 2022* below.

A written request has been submitted to Council in accordance with Section 4.6(4)(a)(i) of the *IWLEP 2022* justifying the proposed contravention of the development standard which is summarised as follows:

- *The proposed boundary adjustment will not change the overall density on Lots 281 and Lot 282 which maintains 1 dwelling per lot.*
- *The proposed boundary adjustment will maintain the development density of the site and is reflective of the locality.*
- *The proposal does not result in any changes to the existing built form and therefore the local amenity is maintained.*
- *The proposal does not result in any changes to existing vegetation on the site.*
- *The proposed boundary adjustment maintains to the existing use of the site as a dwelling house.*
- *The proposed boundary adjustment will maintain the existing character of built and natural features in the surrounding area.*
- *The proposal maintains a siting and scale that is consistent with surrounding development.*
- *There will be no adverse impact on views, privacy or solar access of the adjoining properties arising from the proposed boundary adjustment. The height, form and design of the existing dwelling will not create any perceptible impact on the scenic quality or amenity of the streetscape and the locality.*

The applicant's written rationale adequately demonstrates compliance with the development standard is unreasonable and unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

The objectives of the Floor Space Ratio development standard as prescribed in the LEP are as follows:

- *to establish a maximum floor space ratio to enable appropriate development density,*
- *to ensure development density reflects its locality,*
- *to provide an appropriate transition between development of different densities,*
- *to minimise adverse impacts on local amenity,*
- *to increase the tree canopy and to protect the use and enjoyment of private properties and the public domain.*

The objectives of the R1 General residential zone have been identified previously in the assessment under Section 2.3 of the LEP.

It is considered the development is not contrary to public interest because it is largely consistent with the objectives of the R1 General Residential zone, and the objectives of Section 4.4 FSR, in accordance with Section 4.6(4)(a)(ii) of the *IWLEP 2022* for the following reasons:

- The proposed boundary adjustment will not alter the existing densities at either subject site as the resultant non-compliant FSR is purely as a result of a boundary adjustment and the built form will not be out of character with the area;
- No physical works are proposed, and therefore, there is no change to housing types in the locality;
- As no physical are proposed, the character of the built and natural features of the site, the desired future character of the locality is maintained and the proposal will not have any adverse impact to the Heritage Conservation Area and Distinctive Neighbourhood;
- The proposal will result in acceptable amenity outcomes on the site;
- The proposal will result in no adverse amenity impacts on adjoining properties; and
- The proposal will not adversely impact on existing trees or tree canopy within the private and public domain.

The contravention of the development standard does not raise any matter of significance for State and Regional Environmental Planning. Council may assume the concurrence of the Director-General under the Planning Circular PS 20-002 issued in May 2020 in accordance with section 4.6(4)(b) of the *IWLEP 2022*.

The proposal thereby accords with the objective of section 4.6(1)(b) and requirements of section 4.6(3)(b) of the *IWLEP 2022*. For the reasons outlined above, there are sufficient

planning grounds to justify the departure from the Section 4.4 Floor Space Ratio development standard and it is recommended the section 4.6 exception be granted.

Section 5.10 – Heritage Conservation

The site is located in a Heritage Conservation Area. The proposal seeks consent for a boundary adjustment only, and will not alter the size, form, scale or general design of the existing dwelling houses on the subject lots, nor the landscape features of the site, and hence, will not adversely impact on their appearance or setting. The proposal will not have any adverse impacts on the Heritage Conservation Area and raises no issues that will be contrary to the streetscape and heritage provisions of this part of the LEP or those contained in the Leichhardt Development Control Plan 2013.

Section 6.3 – Stormwater Management

The development maximises the use of permeable surfaces, and subject to standard conditions as recommended, the proposal is considered to be acceptable with respect to site drainage and stormwater control and would not result in any adverse runoff to adjoining properties or the environment.

5(b) Development Control Plans

5(b)(i) *Leichhardt Development Control Plan 2013 (LDCP 2013)*

The application has been assessed and the following provides a summary of the relevant provisions of the Leichhardt Development Control Plan 2013 (LDCP 2013).

| LDCP2013  | Compliance   |
|---|--|
| <b>Part A: Introductions</b>                        |  |
| Section 3 – Notification of Applications            | Yes  |
|   |  |
| <b>Part B: Connections</b>                          |  |
| B1.1 Connections – Objectives                       | Yes  |
| B2.1 Planning for Active Living                     | Yes  |
|   |  |
| <b>Part C</b>                                       |  |
| C1.0 General Provisions                             | Yes  |
| C1.1 Site and Context Analysis                      | Yes  |
| C1.4 Heritage Conservation Areas and Heritage Items | Yes – See <i>IWLEP 2022 Heritage Conservation</i> assessment above |
| C1.6 Subdivision                                    | Yes – see discussion   |
| C1.7 Site Facilities                                | Yes  |
| C1.8 Contamination                                  | Yes  |
| C1.11 Parking                                       | Yes / N/C  |
| C1.12 Landscaping                                   | Yes  |

|   |  |
|---|--|
| C1.14 Tree Management                                     | Yes – see <i>SEPP Biodiversity and Conservation</i> discussion above |
| C1.18 Laneways  | Yes - No change  |
| <b>Part C: Place – Section 2 Urban Character</b>          |  |
| C2.2.1.6 Nelson Street Distinctive Neighbourhood          | Yes  |
| <b>Part C: Place – Section 3 – Residential Provisions</b> |  |
| C3.1 Residential General Provisions                       | Yes  |
| C3.2 Site Layout and Building Design                      | Yes  |
| C3.5 Front Gardens and Dwelling Entries                   | Yes - No change  |
| C3.8 Private Open Space                                   | Yes  |
| C3.9 Solar Access   | Yes  |
| C3.11 Visual Privacy                                      | Yes  |
| C3.12 Acoustic Privacy                                    | Yes  |
| <b>Part D: Energy</b>                                     |  |
| Section 1 – Energy Management                             | Yes  |
| Section 2 – Resource Recovery and Waste Management        |  |
| D2.1 General Requirements                                 | Yes  |
| D2.2 Demolition and Construction of All Development       | Yes  |
| D2.3 Residential Development                              | Yes  |
| D2.4 Non-Residential Development                          | N/A  |
| D2.5 Mixed Use Development                                | N/A  |
| <b>Part E: Water</b>                                      |  |
| Section 1 – Sustainable Water and Risk Management         |  |
| E1.1.3 Stormwater Drainage Concept Plan                   | Yes  |
| E1.2 Water Management                                     | Yes  |
| E1.2.1 Water Conservation                                 | Yes  |
| E1.2.2 Managing Stormwater within the Site                | Yes  |
| E1.2.5 Water Disposal                                     | Yes  |
| <b>Part F: Food</b>                                       |  |
|   | N/A  |
| <b>Part G: Site Specific Controls</b>                     |  |
|   | N/A  |

C1.6 – Subdivision

This section of the LDCP 2013 outlines the objectives and controls for the subdivision of any parcel of land.

The proposed subdivision of the site results in two lots with site areas of 251.6sqm for No. 2 Taylor Street and 98.1sqm for No. 2 Susan Lane. As such, No. 2 Susan Lane will not comply with the minimum lot size requirements which states that the minimum lot size for dwellings is 200sqm. The following highlights lots under 200sqm on Susan Lane:



| Address | Lot Size (approx.) |
|---------|--------------------|
| No. 10  | 73sqm              |
| No. 12  | 75sqm              |
| No. 14  | 101sqm             |

Given the above, the proposed lot size at No. 2 Susan lane will not be out of character with other development in this laneway.

Further to the above, No. 2 Susan Lane is battle-axe in nature with access via Taylor Street and Susan Lane, with the handle of the battle-axe of No. 2 Susan Lane abutting No. 2 Taylor Street which is a rectangular shaped lot. This battle-axe handle of No. 2 Susan Lane has a width of one (1) metre and provides easements for services which will form part of No. 2 Taylor Street following the proposed boundary adjustment. The boundary adjustment will require realigning the vertical (east/west) boundary between the two lots to create two rectangular lots at both No. 2 Taylor Street and 2 Susan Lane and result in two more regular (in the context) rectangular shaped allotments in-lieu of the current irregular shaped allotment at No. 2 Taylor Street.

In addition to the above, the lots already contain a dwelling on each lot, and there will be no adverse amenity implications for either lot as a result of the proposed subdivision.

Finally, it is considered that the proposed subdivision when compared with other lots in the vicinity of the site, is not dissimilar and will not result in adverse impacts on the streetscape or surrounding properties.

Given all the above considerations, the proposal is acceptable with respect to the relevant provisions and objectives of this part of the DCP.

### 5(c) The Likely Impacts

The assessment of the Development Application demonstrates that, subject to the recommended conditions, the proposal will have minimal impact in the locality.

### 5(d) The suitability of the site for the development

Provided that any adverse effects on adjoining properties are minimised, this site is considered suitable to accommodate the proposed development, and this has been demonstrated in the assessment of the application.

### 5(e) Any submissions

The application was notified in accordance with the Community Engagement Framework for a period of 14 days to surrounding properties.

One (1) submission was received in response to the initial notification.

The following issues were raised in the submission:

- Stormwater management – barriers to prevent water egress from No. 2 Taylor Street and No. 2 Susan Lane to No. 4 Taylor Street should be in place;
- The land at No. 2 Taylor Street is higher than No. 4 Taylor Street;

- The land is sloping;
- Air conditioning units / noise related services must be away from boundary fencing as to not impact No. 4 Taylor Street access of south side of property and bedrooms;
- Gap soil level to fence level under Boundary Fencing from No. 4 Taylor Street land view to No. 2 Taylor. Shows Slope of land!

Comment: The proposal is for a boundary adjustment between No. 2 Taylor Street and No. 2 Susan Lane. As discussed throughout this report, there are no physical works proposed which will alter any of the existing conditions at either site. All existing site conditions for both No. 2 Taylor Street and No. 2 Susan Lane will be retained. The current easement for sewerage and water lines which services both subject sites and in favour of No. 2 Taylor Street will be retained and will be transferred in favour of No. 2 Susan Lane, and subject to standard conditions, as recommended, the proposal is considered to be acceptable with respect to site drainage and stormwater control and would not result in any adverse runoff to adjoining properties or the environment.

It was noted at site inspection, that there are current works underway at No. 4 Taylor Street including cutting of existing levels. Any changes to the site conditions at No. 4 Taylor Street are very unlikely to be the result of the proposed boundary adjustment at No. 2 Taylor Street and No. 2 Susan Lane.

#### 5(f) The Public Interest

The public interest is best served by the consistent application of the requirements of the relevant Environmental Planning Instruments, and by Council ensuring that any adverse effects on the surrounding area and the environment are appropriately managed.

## 6 Referrals

### 6(a) Internal

The application was referred to Development Engineering. No objections were raised, and conditions of consent are imposed.

### 6(b) External

The application was not required to be referred to any external bodies

## 7. Section 7.11 Contributions/7.12 Levy

Neither Section 7.11 contributions nor Section 7.12 levies are payable for the proposal.

## 8. Conclusion

The proposal generally complies with the aims, objectives and design parameters contained in *Inner West Local Environmental Plan 2022* and Leichhardt Development Control Plan 2013.

The development will not result in any significant impacts on the amenity of the adjoining premises/properties and the streetscape and is considered to be in the public interest.

The application is considered suitable for approval subject to the imposition of appropriate conditions.

## 9. Recommendation

- A. The applicant has made a written request pursuant to Section 4.6 of the *Inner West Local Environmental Plan 2022*. After considering the request, and assuming the concurrence of the Secretary has been given, the Panel is satisfied that compliance with the Minimum Subdivision Lot Size, Site Coverage and Floor Space Ratio development standards as prescribed under Sections 4.1, 4.3C(3)(b) and 4.4 of the *Inner West Local Environmental Plan 2022* is unnecessary in the circumstance of the case and that there are sufficient environmental grounds to support the variations. The proposed development will be in the public interest because the exceedance is not inconsistent with the objectives of the standard and of the zone in which the development is to be carried out.
- B. That the Inner West Local Planning Panel exercising the functions of the Council as the consent authority, pursuant to s4.16 of the *Environmental Planning and Assessment Act 1979*, grant consent to Development Application No. DA/2023/0702 for boundary adjustment between two existing lots at No. 2 Taylor Street ANNANDALE and No. 2 Susan Lane, ANNANDALE subject to the conditions listed in Attachment A below.

## Attachment A – Recommended conditions of consent

### CONDITIONS OF CONSENT

#### DOCUMENTS RELATED TO THE CONSENT

##### 1. Documents related to the consent

The development must be carried out in accordance with plans and documents listed below:

| Plan, Revision and Issue No. | Plan Name                        | Date Issued | Prepared by             |
|------------------------------|----------------------------------|-------------|-------------------------|
| 10/23 – 1/6                  | Subdivision Plan                 | 07.08.2023  | Kerry McGrath Architect |
| 10/23 – 2/6                  | Site Plan                        | 07.08.2023  | Kerry McGrath Architect |
| 10/23 – 6/6                  | Existing and Proposed Stormwater | 07.08.2023  | Kerry McGrath Architect |

As amended by the conditions of consent.

#### GENERAL CONDITIONS

##### 2. Works Outside the Property Boundary

This development consent does not authorise works outside the property boundaries on adjoining lands.

##### 3. Subdivision Plan Amendment

Prior to the issue of a Subdivision Certificate, the Principal Certifier must verify that:

- a. A common drainage easement in favour of the parcels of land to be drained must be created over the full length of all existing and proposed inter-allotment drainage systems within the site of the proposed development; and
- b. Proof of registration of the easement and a written statement signed by the Registered Surveyor that the as-built pipeline is totally within the proposed easement.

**ON-GOING****4. Bin Storage**

All bins are to be stored within the site.

**ADVISORY NOTES****Prescribed Conditions**

This consent is subject to the prescribed conditions of consent within Sections 69-86 of the *Environmental Planning and Assessment Regulations 2021*.

**Other Approvals may be needed**

Approvals under other acts and regulations may be required to carry out the development. It is the responsibility of property owners to ensure that they comply with all relevant legislation. Council takes no responsibility for informing applicants of any separate approvals required.

**Infrastructure**

The developer must liaise with the Sydney Water Corporation, Ausgrid, AGL and Telstra concerning the provision of water and sewerage, electricity, natural gas and telephones respectively to the property. Any adjustment or augmentation of any public utility services including Gas, Water, Sewer, Electricity, Street lighting and Telecommunications required as a result of the development must be undertaken before occupation of the site.

**Failure to comply with conditions**

Failure to comply with the relevant provisions of the *Environmental Planning and Assessment Act 1979* and/or the conditions of this consent may result in the serving of penalty notices or legal action.

**Other works**

Works or activities other than those approved by this Development Consent will require the submission of a new Development Application or an application to modify the consent under Section 4.55 of the *Environmental Planning and Assessment Act 1979*.

**Obtaining Relevant Certification**

This development consent does not remove the need to obtain any other statutory consent or approval necessary under any other Act, such as (if necessary):

- a. Application for any activity under that Act, including any erection of a hoarding;
- b. Application for a Construction Certificate under the *Environmental Planning and Assessment Act 1979*;
- c. Application for an Occupation Certificate under the *Environmental Planning and Assessment Act 1979*;
- d. Application for a Subdivision Certificate under the *Environmental Planning and Assessment Act 1979* if land (including stratum) subdivision of the development site is proposed;
- e. Application for Strata Title Subdivision if strata title subdivision of the development is proposed;
- f. Development Application for demolition if demolition is not approved by this consent;  
or
- g. Development Application for subdivision if consent for subdivision is not granted by this consent.

**National Construction Code (Building Code of Australia)**

A complete assessment of the application under the provisions of the National Construction Code (Building Code of Australia) has not been carried out. All building works approved by this consent must be carried out in accordance with the requirements of the National Construction Code.

**Dividing Fences Act**

The person acting on this consent must comply with the requirements of the *Dividing Fences Act 1991* in respect to the alterations and additions to the boundary fences.

**Permits from Council under Other Acts**

Where it is proposed to occupy or carry out works on public roads or Council controlled lands, the person acting on this consent must obtain all applicable Permits from Council in accordance with Section 68 (Approvals) of the *Local Government Act 1993* and/or Section 138 of the *Roads Act 1993*. Permits are required for the following activities:

- a. Work zone (designated parking for construction vehicles). Note that a minimum of 2 months should be allowed for the processing of a Work Zone application;
- b. A concrete pump across the roadway/footpath;
- c. Mobile crane or any standing plant;
- d. Skip bins;

- e. Scaffolding/Hoardings (fencing on public land);
- f. Public domain works including vehicle crossing, kerb & guttering, footpath, stormwater, etc.;
- g. Awning or street verandah over footpath;
- h. Partial or full road closure; and
- i. Installation or replacement of private stormwater drain, utility service or water supply.

Contact Council's Road Access team to ensure the correct Permit applications are made for the various activities. A lease fee is payable for all occupations.

**Dial before you dig**

Contact "Dial Prior to You Dig" prior to commencing any building activity on the site.

**Useful Contacts**

|                                   |  |
|-----------------------------------|--|
| BASIX Information                 | 1300 650 908 weekdays 2:00pm - 5:00pm  |
|                                   | <a href="http://www.basix.nsw.gov.au">www.basix.nsw.gov.au</a>                   |
| Department of Fair Trading        | 13 32 20   |
|                                   | <a href="http://www.fairtrading.nsw.gov.au">www.fairtrading.nsw.gov.au</a>       |
|                                   | Enquiries relating to Owner Builder Permits and Home Warranty Insurance.         |
| Dial Prior to You Dig             | 1100   |
|                                   | <a href="http://www.dialprior toyoudig.com.au">www.dialprior toyoudig.com.au</a> |
| Landcom                           | 9841 8660  |
|                                   | To purchase copies of Volume One of "Soils and Construction"                     |
| Long Service Payments Corporation | 131441   |
|                                   | <a href="http://www.lspc.nsw.gov.au">www.lspc.nsw.gov.au</a>                     |
| NSW Food Authority                | 1300 552 406   |
|                                   | <a href="http://www.foodnotify.nsw.gov.au">www.foodnotify.nsw.gov.au</a>         |

|   |  |
|---|--|
| NSW Government                                  | <a href="http://www.nsw.gov.au/fibro">www.nsw.gov.au/fibro</a><br><a href="http://www.diysafe.nsw.gov.au">www.diysafe.nsw.gov.au</a><br>Information on asbestos and safe work practices. |
| NSW Office of Environment and Heritage          | 131 555<br><a href="http://www.environment.nsw.gov.au">www.environment.nsw.gov.au</a>  |
| Sydney Water                                    | 13 20 92<br><a href="http://www.sydneywater.com.au">www.sydneywater.com.au</a>   |
| Waste Service - SITA Environmental Solutions    | 1300 651 116<br><a href="http://www.wasteservice.nsw.gov.au">www.wasteservice.nsw.gov.au</a>   |
| Water Efficiency Labelling and Standards (WELS) | <a href="http://www.waterrating.gov.au">www.waterrating.gov.au</a>   |
| WorkCover Authority of NSW                      | 13 10 50<br><a href="http://www.workcover.nsw.gov.au">www.workcover.nsw.gov.au</a><br>Enquiries relating to work safety and asbestos removal and disposal.                               |

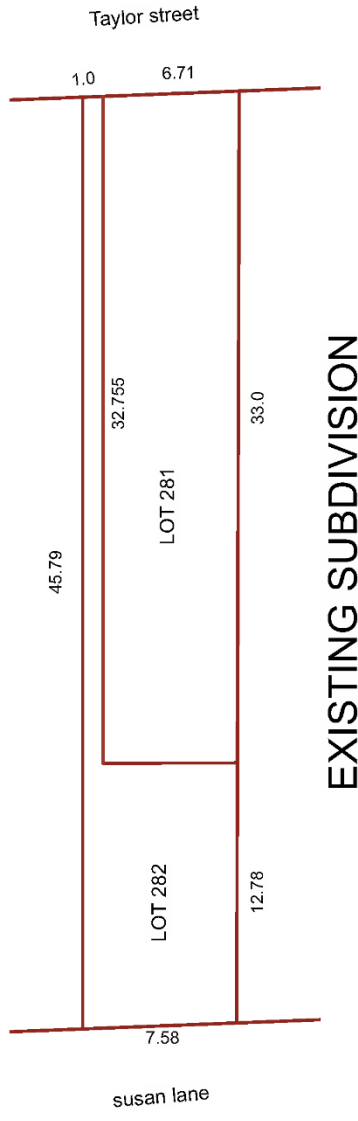
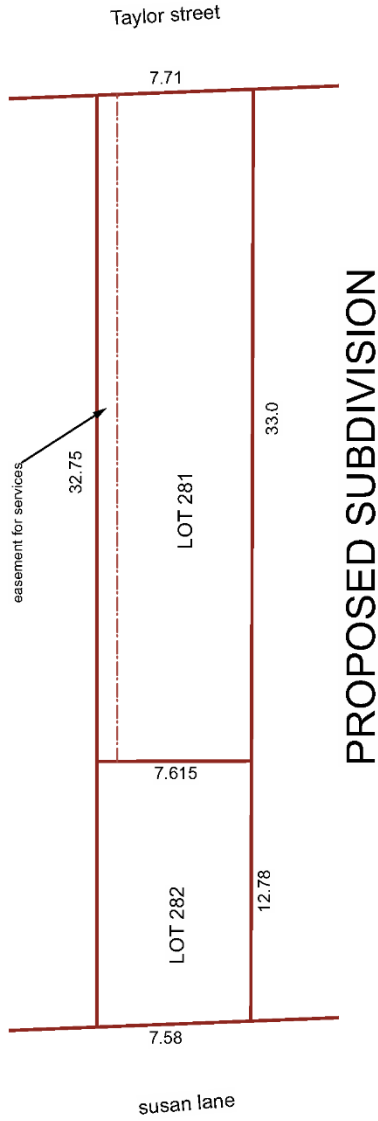
**Street Numbering**

If there are any changes to the number of occupancies including any additional occupancies created, a street numbering application must be lodged and approved by Council's GIS team before any street number is displayed. Link to [Street Numbering Application](#)

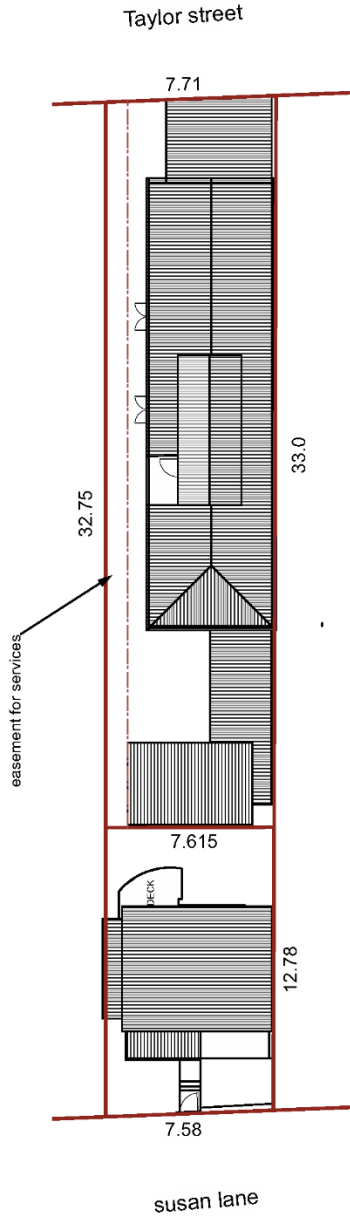
]



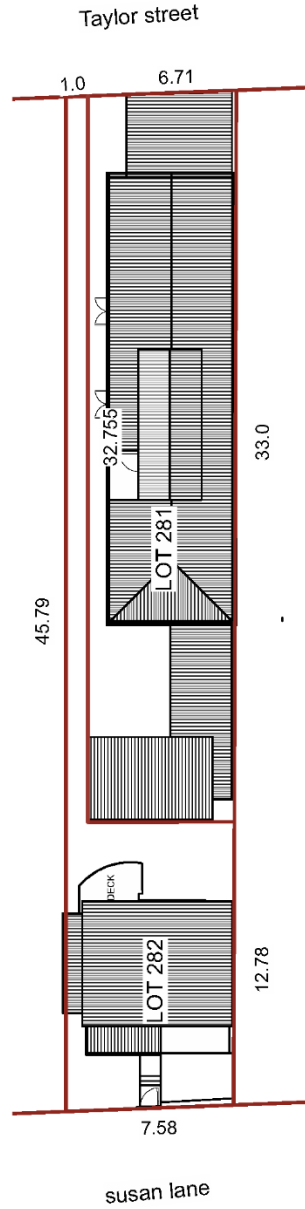
Attachment B – Plans of proposed development



|   |  |
|---|--|
| SCALE: 1:200@A3<br>DATE: 7/8/23                                   | PREPARED BY: KMCG  |
|   | DATE: 10/23  |
| SCALE: 1/6  | PROJECT NO:  |
| TITLE: SUB-DIVISION PLAN  | CLIENT:  |
| PROJECT: 2 SUSAN LANE AND 2 TAYLOR STREET ANNANDALE               | ARCHITECT: Kerry McGrath Architect<br>po box 300, elstons 2037<br>phone: 041049230<br>kerry.mc1@bigpond.net.au<br>reg.no:5897                    |
| STATE:  | ALL DIMENSIONS AND LEVELS ARE TO BE CHECKED ON SITE PRIOR TO THE COMMENCEMENT OF WORK.<br>DIMENSIONS FOR LOTS TO BE SAID TO BE OBTAINED FROM THE |
| DOCUMENT SET ID: 39800498<br>Version: 1, Version Date: 26/08/2024 | SCALE: 1:200@A3<br>DATE: 10/23   |



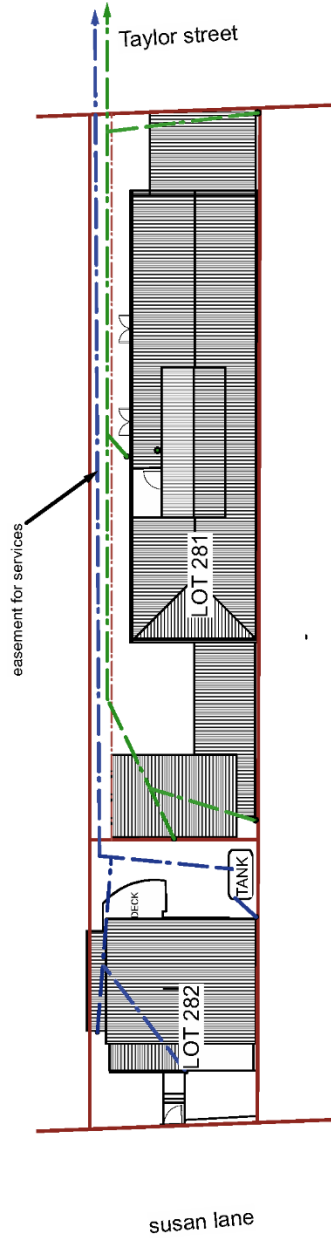
PROPOSED SITE PLAN



EXISTING SITE PLAN



|   |  |  |   |  |  |
|---|--|--|---|--|--|
| <p><b>Kerry McGrath Architect</b><br/>                 po box 300 glebe 2037<br/>                 ph.0419423230<br/>                 kerrymc1@bigpond.net.au<br/>                 reg.no.9637</p> | <p>PROJECT<br/>                 2 SUSAN LANE AND 2 TAYLOR STREET ANNANDALE</p> | <p>TITLE<br/>                 SITE PLAN</p>  | <p>DATE<br/>                 7/8/23</p>       | <p>SCALE<br/>                 1:200@A3</p> | <p>DRAWN<br/>                 KMCG</p> |
|   | <p>CLIENT</p>  | <p>STATUS<br/>                 APPROVED FOR THE USE OF THE PROPOSAL IN ACCORDANCE WITH THE DEPARTMENT OF WORKS AND INFRASTRUCTURE ACT 2015 AND THE DEPARTMENT OF WORKS AND INFRASTRUCTURE REGULATIONS 2015. THIS PLAN IS FOR INFORMATION ONLY AND IS NOT TO BE USED FOR ANY OTHER PURPOSE.</p> | <p>PROJECT NO.<br/>                 10/23</p> | <p>DWG NO.<br/>                 2/6</p>    | <p>REV</p>                             |



PROPOSED AND EXISTING STORMWATER

|  |  |  |   |  |  |
|--|--|--|---|--|--|
| <p><b>Kerry McGrath Architect</b><br/>                 po box 300 glebe 2037<br/>                 ph.0419423230<br/>                 kerry.mc1@bigpond.net.au<br/>                 reg.no.9637</p> | <p>PROJECT<br/>                 2 SUSAN LANE AND 2 TAYLOR STREET ANNANDALE</p> | <p>TITLE<br/>                 EXISTING AND PROPOSED<br/>                 STORMWATER</p>  | <p>DATE<br/>                 7/8/2023</p>     | <p>SCALE<br/>                 1:200@A3</p> | <p>DRAWN<br/>                 KMCG</p> |
|  | <p>CLIENT</p>  | <p>STATUS<br/>                 ALL WORKS ARE TO BE COMPLETED PRIOR TO THE COMMENCEMENT OF WORK.<br/>                 DIMENSIONS TO BE USED ARE SHOWN IN RED.</p> | <p>PROJECT NO.<br/>                 10/23</p> | <p>DWG NO.<br/>                 6/6</p>    | <p>REV</p>                             |

Attachment C- Section 4.6 Exception to Development Standards



DEVELOPMENT APPLICATION, 2 TAYLOR STREET AND 2 SUSAN LANE

ATTACHMENT A:

**Clause 4.6 variation request –Exception to Development Standards in relation to Clause 4.1(2) - Minimum subdivision lot size of the Inner West Local Environmental Plan 2022.**

**Minimum subdivision lot size**

**1.0 Introduction**

This clause 4.6 variation request has been prepared having regard to the NSW Land and Environment Court and NSW Court of Appeal judgments in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], [FouR1Five Pty Ltd v Ashfield Council \[2015\] NSWCA 248](#), *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

**2.0 Inner West Local Environmental Plan 2022 (IWLEP)**

**2.1 Clause 4.1 – Minimum subdivision lot size**

Pursuant to Clause 4.1(3) IWLEP 2022:

*(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.*

The Lot Size Map requires a minimum lot size of 200m<sup>2</sup> for the subject site.

**Details of the non-compliance**

Proposed Lot 1 has an area of 251.6m<sup>2</sup> and therefore complies with the minimum lot size.

Proposed Lot 2 has an area of 98.1m<sup>2</sup> and therefore does not comply with the minimum lot size.

The shortfall in the area of Lot 2 represents a 51% variation to the development standard.

The draft plan of subdivision is shown in Figure 1 below.

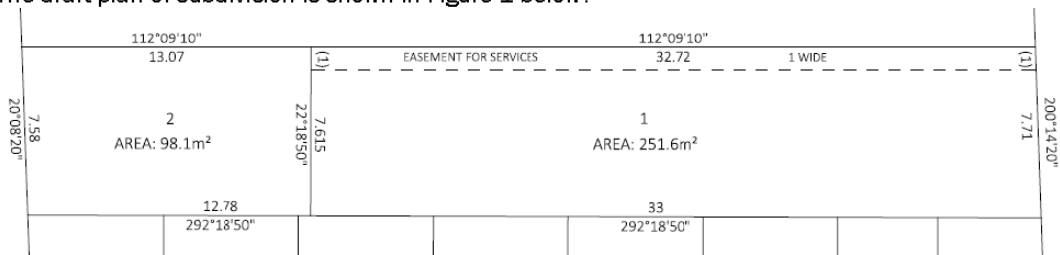


Figure 1. Extract of draft plan of subdivision



## 2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of IWLEP provides:

- (1) *The objectives of this clause are:*
  - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
  - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

*Initial Action* involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

*“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”*

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of IWLEP provides:

- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

This clause applies to the Clause 4.1 Minimum subdivision lot size Development Standard.

Clause 4.6(3) of IWLEP provides:

- (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.*

The proposed development does not comply with the minimum lot size provisions at Clause 4.1 of IWLEP however strict compliance is unreasonable and unnecessary in the circumstances of this case and there are sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of IWLEP provides:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
  - (a) *the consent authority is satisfied that:*
    - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
    - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
  - (b) *the concurrence of the Director-General has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest **because** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b).

The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

The Local Planning Panels Direction issued by the Minister for Planning and Public Spaces, dated 30 June 2020, provides that local planning panels have the delegation to approve development that



contravenes a development standard imposed by an environmental instrument by more than 10% or non-numerical development standards.

Clause 4.6(5), which relates to matters that must be considered by the Director-General in deciding whether to grant concurrence is not relevant, as the Council has the authority to determine this matter. Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant to note that it does not exclude Clause 4.1 of IWLEP 2022 from the operation of clause 4.6.

### 3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*



22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is Clause 4.1 of IWLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
  - (a) compliance is unreasonable or unnecessary; and
  - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the Clause 4.1 standard and the objectives for development for in the zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes Clause 4.1 of IWLEP?

#### 4.0 Request for variation

##### 4.1 Is Clause 4.1 of IWLEP a development standard?

Clause 4.1(2) of IWLEP, Minimum subdivision lot size, is a development standard to which clause 4.6 of IWLEP applies.

##### 4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary.

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary is set out in *Wehbe v Pittwater Council [2007] NSWLEC 827*.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.





Consistency with objectives of Minimum subdivision lot size

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

**(a) to ensure lot sizes cater for a variety of development**

Response:

The proposed boundary will not affect the existing development on the site. The proposed lot sizes allow a variety of the development types. The proposal is consistent with objective (a).

**(b) to ensure lot sizes do not result in adverse amenity impacts,**

Response:

The proposal does not result in any changes to the existing built form and therefore local amenity is maintained. The proposal is consistent with objective (b).

**(c) to ensure lot sizes deliver high quality architectural, urban and landscape design,**

Response:

The proposed boundary adjustment will maintain the existing dwelling houses on each lot. The proposal is consistent with objective (c).

**(d) to provide a pattern of subdivision that is consistent with the desired future character,**

Response: The proposed boundary adjustment is more consistent with the surrounding subdivision pattern. The proposal is consistent with objective (d).

**(e) to ensure lot sizes allow development to be sited to protect and enhance riparian and environmentally sensitive land**

Response: Not applicable.

Having regard to the above, the proposed boundary adjustment will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the minimum lot size. Given the proposal's consistency with the objectives of the standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

Consistency with zone objectives

The subject site is zoned R1 General Residential pursuant to the provisions of IWLEP. Dwelling houses are permissible in the zone with the consent of council. The stated objectives of the R1 zone are as follows:

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



Comment: The proposed boundary adjustment maintains the existing residential use of the site. The existing dwelling house will continue to contribute to the provision of the housing needs of the community.

- **To provide for a variety of housing types and densities.**

Comment: The proposal maintains the existing dwelling and density.

- **To enable other land uses that provide facilities or services to meet the day to day needs of residents.**

Comment: N/A.

- **To provide residential development that maintains the character of built and natural features in the surrounding area.**

Comment: The proposed boundary adjustment will maintain the existing character of built and natural features in the surrounding area.

The proposed works are permissible and consistent with the stated objectives of the zone.

The breach to the minimum lot size is the result of a land transfer from Lot 282 to Lot 281. There will be no perceptible change to the subdivision pattern. The proposal demonstrates consistency with objectives of the R1 General Residential zone and the Minimum subdivision lot size objectives. Adopting the first option in *Wehbe* strict compliance with the minimum lot size development standard has been demonstrated to be unreasonable and unnecessary.

#### 4.4 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see FouR1Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *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 FouR1Five 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 FouR1Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

Sufficient environmental planning grounds exist to justify the minimum lot size variation.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).
- The development promotes the delivery and maintenance of affordable housing, (1.3(d)).
- To promote good design and amenity of the built environment (1.3(h)).

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. *The second matter was in cl 4.6(3)(b). 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 proposal maintains the siting and scale of the existing development. The proposed boundary adjustment transfers a narrow strip of land from Lot 282 to Lot 281. The original purpose of this 1m wide strip of land was to provide pedestrian access from Taylor Street to 2 Susan Lane. However, this has never been practicable given the topographical constraints of the site created by the escarpment effectively severing the two lots. The occupants of 2 Susan Lane do not use the access handle, nor do they obtain any other form of amenity from this strip of land. It is therefore more logical for this land to be incorporated into Lot 281.

There will be no adverse impact on views, privacy or solar access of the adjoining properties arising from the proposed boundary adjustment. The height, form and design of the existing dwelling will not create any perceptible impact on the scenic quality or amenity of the streetscape and the locality.

For the reasons outlined above, there are sufficient environmental planning grounds to justify contravening the development standard.



**4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of Clause 4.1 and the objectives of the R1 General Residential zone**

The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

*“The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.*

*If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).”*

As demonstrated in this request, the proposed development is consistent with the objectives of the development standard and the objectives for the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

**4.5 Secretary’s concurrence**

By Planning Circular PS 20-002 (5 May 2020), the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.



## 5.0 Conclusion

Having regard to the clause 4.6 variation provisions we have formed the opinion:

- that the proposed boundary adjustment is consistent with the zone objectives,
- that the proposed boundary adjustment is consistent with the objectives of the minimum lot size standard,
- that there are sufficient environmental planning grounds to justify contravening the development standard,
- that having regard to (a), (b) and (c) above that compliance with the minimum lot size development standard is unreasonable and unnecessary in the circumstances of the case,
- that given the proposals ability to comply with the zone and minimum lot size standard objectives its approval would not be averse to the public interest,
- that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and
- Concurrence of the Secretary can be assumed in this case.

Pursuant to clause 4.6(4)(a), the consent authority can be satisfied that this written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (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.*

As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a minimum lot size variation in this instance.

A handwritten signature in black ink, appearing to read "Danielle Deegan".

Danielle Deegan  
Director  
D.M Planning Pty Ltd

21 August 2023



DEVELOPMENT APPLICATION, 2 TAYLOR STREET AND 2 SUSAN LANE

ATTACHMENT C:

**Clause 4.6 variation request – Exception to Development Standards in relation to Clause 4.4(2) - Floor Space Ratio of the Inner West Local Environmental Plan 2022.**

**Floor Space Ratio (FSR)**

**1.0 Introduction**

This clause 4.6 variation request has been prepared having regard to the NSW Land and Environment Court and NSW Court of Appeal judgments in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], [FourFive Pty Ltd v Ashfield Council \[2015\] NSWCA 248](#), *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

**2.0 Inner West Local Environmental Plan 2022 (IWLEP)**

**2.1 Clause 4.4 - Floor Space Ratio**

Pursuant to Clause 4.4(2B) IWLEP 2022:

*(2B) The maximum floor space ratio for development for the purposes of residential accommodation is as follows—*

*(a) on land shown edged black or pink on the Floor Space Ratio Map—*

| <i>Site area</i>                                | <i>Maximum floor space ratio</i> |
|---|----------------------------------|
| <i>&lt; 150m<sup>2</sup></i>                    | <i>0.9:1</i>                     |
| <i>≥ 150 &lt; 300m<sup>2</sup></i>              | <i>0.8:1</i>                     |
| <i>≥ 300m<sup>2</sup> &lt; 450m<sup>2</sup></i> | <i>0.7:1</i>                     |
| <i>≥ 450m<sup>2</sup></i>                       | <i>0.6:1</i>                     |

**Details of the non-compliance**

Proposed Lot 281 complies with the applicable FSR of 0.8:1.

In accordance with Clause 4.4(2B) a maximum FSR of 0.9:1 applies to Lot 282.

The existing development on Lot 282 has a gross floor area (GFA) of 95.6m<sup>2</sup> and a compliant FSR of 0.73:1. While there is no change to GFA, the boundary adjustment will result in a smaller lot size resulting in a non-compliant FSR of 0.98:1. This represents an exceedance of the development standard by 8.4%.

The FSR calculations are shown in Figure 1 below.



## 2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of IWLEP provides:

- (1) *The objectives of this clause are:*
  - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
  - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

*Initial Action* involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

*“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”*

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of IWLEP provides:

- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

This clause applies to the clause 4.4 Floor Space Ratio Development Standard.

Clause 4.6(3) of IWLEP provides:

- (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.*

The proposed development does not comply with the FSR provisions at clause 4.4 of IWLEP which specify a maximum FSR however strict compliance is unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of IWLEP provides:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
  - (a) *the consent authority is satisfied that:*
    - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
    - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
  - (b) *the concurrence of the Director-General has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest **because** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b).

The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

The Local Planning Panels Direction issued by the Minister for Planning and Public Spaces, dated 30 June 2020, provides that local planning panels have the delegation to approve development that





contravenes a development standard imposed by an environmental instrument by more than 10% or non-numerical development standards.

Clause 4.6(5), which relates to matters that must be considered by the Director-General in deciding whether to grant concurrence is not relevant, as the Council has the authority to determine this matter. Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant to note that it does not exclude clause 4.4 of IWLEP 2022 from the operation of clause 4.6.

### 3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*



22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.4 of IWLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
  - (a) compliance is unreasonable or unnecessary; and
  - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the clause 4.4 standard and the objectives for development for in the zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.4 of IWLEP?

#### 4.0 Request for variation

##### 4.1 Is clause 4.4 of IWLEP a development standard?

Clause 4.4(2) of IWLEP, floor space ratio, is a development standard to which clause 4.6 of IWLEP applies.

##### 4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary.

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary is set out in *Wehbe v Pittwater Council [2007] NSWLEC 827*.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.



#### Consistency with objectives of Floor Space Ratio

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

**(a) to establish a maximum floor space ratio to enable appropriate development density**

Response:

The proposed boundary adjustment will not change the overall density on Lots 281 and Lot 282 which maintains 1 dwelling per lot. The proposal is consistent with objective (a).

**(b) to ensure development density reflects its locality,**

Response:

The proposed boundary adjustment will maintain the development density of the site and is reflective of the locality. The proposal is consistent with objective (b).

**(c) to provide an appropriate transition between development of different densities,**

Response:

The proposed boundary adjustment will maintain the development density of the site. The proposal is consistent with objective (c).

**(d) to minimise adverse impacts on local amenity,**

Response: The proposal does not result in any changes to the existing built form and therefore the local amenity is maintained. The proposal is consistent with objective (d).

**(e) to increase the tree canopy and to protect the use and enjoyment of private properties and the public domain.**

Response: The proposal does not result in any changes to existing vegetation on the site. The proposal is consistent with objective (e).

Having regard to the above, the existing dwelling on Lot 282 achieves the objectives of the standard to an equal degree as would be the case with a development that complied with the FSR standard. Given the developments' consistency with the objectives of the standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

#### Consistency with zone objectives

The subject site is zoned R1 General Residential pursuant to the provisions of IWLEP. Dwelling houses are permissible in the zone with the consent of council. The stated objectives of the R1 zone are as follows:



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

Comment: The proposed boundary adjustment maintains to the existing use of the site as a dwelling house.

- **To provide for a variety of housing types and densities.**

Comment: The proposal maintains the existing dwelling and density.

- **To enable other land uses that provide facilities or services to meet the day to day needs of residents.**

Comment: N/A.

- **To provide residential development that maintains the character of built and natural features in the surrounding area.**

Comment: The proposed boundary adjustment will maintain the existing character of built and natural features in the surrounding area.

The proposed works are permissible and consistent with the stated objectives of the zone.

The minor breach to FSR is the result of a land transfer between Lot 282 and Lot 281. There is no change in the GFA on the site. The proposal demonstrates consistency with objectives of the R1 General Residential zone and the Floor Space Ratio objectives. Adopting the first option in *Wehbe* strict compliance with the FSR development standard has been demonstrated to be unreasonable and unnecessary.

#### **4.4 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?**

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see FouR1Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *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 FouR1Five 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 FouR1Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

Sufficient environmental planning grounds exist to justify the FSR variation.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).
- The development promotes the delivery and maintenance of affordable housing. (1.3(d)).
- To promote good design and amenity of the built environment (1.3(h)).

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. *The second matter was in cl 4.6(3)(b). 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 proposal maintains a siting and scale that is consistent with surrounding development. The proposed boundary adjustment transfers a narrow strip of land from Lot 282 to Lot 281. The original purpose of this 1m wide strip of land was to provide pedestrian access from Taylor Street to 2 Susan Lane. However, this has never been practicable given the topographical constraints of the site created by the escarpment effectively severing the two lots. The occupants of 2 Susan Lane do not use the access handle, nor do they obtain any other form of amenity from this strip of land. It is therefore more logical for this land to be incorporated into Lot 281.

There will be no adverse impact on views, privacy or solar access of the adjoining properties arising from the proposed boundary adjustment. The height, form and design of the existing dwelling will not create any perceptible impact on the scenic quality or amenity of the streetscape and the locality.

For the reasons outlined above, there are sufficient environmental planning grounds to justify contravening the development standard.



**4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.4 and the objectives of the R1 General Residential zone**

The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

*“The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.*

*If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).”*

As demonstrated in this request, the proposed development is consistent with the objectives of the development standard and the objectives for the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

**4.5 Secretary’s concurrence**

By Planning Circular PS 20-002 (5 May 2020), the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.



## 5.0 Conclusion

Having regard to the clause 4.6 variation provisions we have formed the opinion:

- that the proposed boundary adjustment is consistent with the zone objectives,
- that the proposed boundary adjustment is consistent with the objectives of the FSR standard,
- that there are sufficient environmental planning grounds to justify contravening the development standard,
- that having regard to (a), (b) and (c) above that compliance with the FSR development standard is unreasonable and unnecessary in the circumstances of the case,
- that given the proposals ability to comply with the zone and FSR standard objectives its approval would not be averse to the public interest,
- that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and
- Concurrence of the Secretary can be assumed in this case.

Pursuant to clause 4.6(4)(a), the consent authority can be satisfied that this written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (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.*

As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a FSR variation in this instance.

A handwritten signature in black ink, appearing to read "Danielle Deegan".

Danielle Deegan  
Director  
D.M Planning Pty Ltd

21 August 2023