






INNER WEST

DEVELOPMENT ASSESSMENT REPORT

Application No.	DA/2023/0521
Address	2 Wellington Street, Rozelle
Proposal	Torrens Title Subdivision into two lots
Date of Lodgement	20 July 2023
Applicant	Mr Joseph Panetta
Owner	Mr Roberto Terrone
Number of Submissions	Initial: 0
Value of works	\$70,000.00
Reason for determination at Planning Panel	Section 4.6 variation exceeds 10%
Main Issues	Subdivision
Recommendation	Approved with Conditions
Attachment A	Recommended conditions of consent
Attachment B	Plans of proposed development
Attachment C	Section 4.6 Exception to Development Standards



LOCALITY MAP

Subject Site		Objectors		 N
Notified Area		Supporters		

1. Executive Summary

This report is an assessment of the application submitted to Council for Torrens Title Subdivision into two lots at 2 Wellington Street, Rozelle. The application was notified to surrounding properties and no submissions were received in response to the initial notification.

The main issues that have arisen from the application include:

- Proposed lot size

The non-compliance is acceptable given that no physical works are proposed to the existing dwellings on site and therefore the application is recommended for approval.

2. Proposal

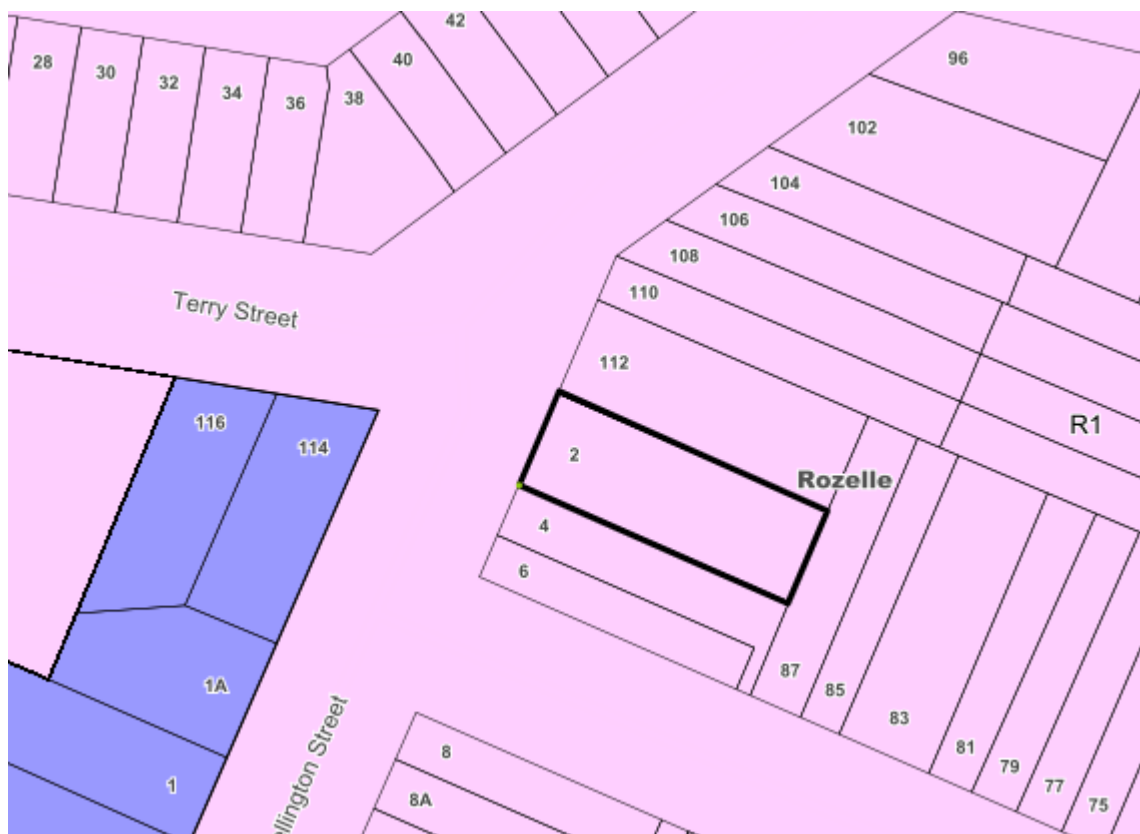
The proposal seeks to Torrens Title subdivide the existing dual occupancy development into two allotments, with each allotment measuring 153.3sqm in area. Each allotment proposed is to contain a dwelling, drainage, stormwater and a right of carriageway over the front portion of the basement and associated turning circle.

3. Site Description

The subject site is located on the eastern side of Wellington Street at the intersection of Terry Street. The site consists of a single allotment that is generally rectilinear in shape with a total area of 300.6sqm.

The site has a frontage to Wellington Street measuring 10.6m with side boundaries measuring 30.48m. The site supports a two-storey dual occupancy development with a shared car parking basement accessible via a centrally located driveway from Wellington Street.

The adjoining properties include a mix of single and two storey detached and attached dwellings. The subject site is located within The Valley Heritage Conservation Area.



Zoning map extract, subject site outlined in black

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
D/2008/107	Demolition of existing dwelling and construction of 2 new dwellings including basement car parking.	Approved, 17/07/2008
M/2009/195	Modification to development consent D/2008/107 for demolition of existing dwelling and construction of 2 new dwellings including basement car parking. Modification includes enlarging the ground & upper level balconies, increase size of upper level lofts, increase height of building by 200mm, relocate meter boards with design changes to facade, and minor internal replanning.	Approved, 09/10/2009

Surrounding properties

112 Terry Street, Rozelle

Application	Proposal	Decision & Date
D/2015/322	Alterations to the hard and soft landscaping in the front and rear yards, including changes to the parking space, swimming pool and deck with new cabana	Approved, 26/11/2015

DA/2021/0467	Alterations to dwelling to provide new first floor side facing window	Approved, 2/07/2021
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4(b) Application history

The following table outlines the relevant history of the subject application.

Date	Discussion / Letter / Additional Information
1/09/2023	Request for further information sent to the applicant requesting further details regarding the car parking facilities and stormwater drainage.
6/09/2023	Further parking and stormwater details provided by the applicant.

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*

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.

The application involves does not involve category 1 remediation under *SEPP (Resilience and Hazards) 2021*.

5(a)(ii) ***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 2.6 – Subdivision
- 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 5.21 – Flood planning
- Section 6.1 – Acid sulfate soils
- Section 6.2 – Earthworks
- Section 6.3 – Stormwater management

Section 2.3 Land Use Table and Zone Objectives

The site is zoned R1 under the *IWLEP 2022*. The *IWLEP 2022* defines the proposed development as:

semi-detached dwelling means a dwelling that is on its own lot of land and is attached to only one other dwelling.

The development is permitted with consent within the land use table. The development is consistent with the objectives of the R1 zone.

Section 4 Principal Development Standards

The following table provides an assessment of the application against the development standards:

Lot 1 and Lot 2:

Standard	Proposal	Non compliance	Complies
Minimum Subdivision Lot Size Minimum 200sqm	153.3sqm	23.35% or 46.7sqm	No
Floor Space Ratio Maximum permissible: 0.8:1 or 122.6sqm	0.7:1 or 108sqm	-	Yes
Landscape Area Minimum permissible: 15% or 23sqm	40% 61sqm	-	Yes
Site Coverage Maximum permissible: 60% or 92sqm	40% or 61.7sqm	-	Yes

As outlined in table above, the proposal results in a breach of the following development standards:

- Section 4.1 – Minimum Lot Size

The applicant seeks a variation to the minimum subdivision lot size development standard under Section 4.1 of the *IWLEP 2022* for each lot by 23.35% or 46.7sqm respectively. 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 lots are designed and scaled to wholly include the existing attached dwellings on the site. The proposed subdivision will have no material impact on the established physical form or the prevailing streetscape character.*
- *The sites are large enough to accommodate the existing dwellings having been approved in 2008 and demonstrate compliant setbacks, private open space, landscaping, site coverage and parking in the form of a basement.*
- *The proposed development provides housing diversity, choice and a form of housing which is consistent with the prevailing low-density scale of the area.*
- *The objectives in this case are aimed at providing lot sizes to accommodate a variety of dwelling types, avoidance of amenity impacts and a high standard of architectural and urban design.*
- *The proposed lot sizes are consistent with numerous lots along Terry Street and Wellington Street. The proposed lots will wholly contain established semi-detached dwellings that are contemporary in their design and layout*
- *The proposed subdivision will not result in any material physical changes to the existing development. Accordingly, the proposed subdivision will not result in any impacts to amenity beyond those previously considered by Council for the built form DA.*
- *The proposed subdivision will maintain the established and desired future character of the subdivision pattern in the area. Lots have been orientated east-west as per the prevailing subdivision pattern and lot shapes are regular. The size of the lots are commensurate with those numerous existing undersized lots 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 in the public interest because it is consistent with the objectives of the R1 – General Residential Zone in accordance with Section 4.6(4)(a)(ii) of the *IWLEP 2022* for the following reasons:

- *To provide for the housing needs of the community.*
The proposal is for subdivision only, each lot will consist of a two bedroom dwelling with carparking and an ample private open space area to the rear thus providing for the housing needs of the community.
- *To provide for a variety of housing types and densities.*
The lot sizes proposed are similar to that within the immediate vicinity of the subject site. The proposed subdivision will retain the existing dwelling uses ensuring a variety of housing types is provided within the area.
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
NA
- *To provide residential development that maintains the character of built and natural features in the surrounding area.*
The application seeks the subdivision of the existing lot with no physical works proposed to the existing dwellings. With this considered the proposal will retain the existing streetscape presentation to Wellington Street with no impacts to the character or natural features of the area. The subdivision proposed is consistent with the established lot pattern to the immediate south and north of the subject site.

It is considered the development is in the public interest because it is consistent with the objectives of the landscaped area development standard, in accordance with Section 4.6(4)(a)(ii) of the *IWLEP 2022* for the following reasons:

- *(a) to ensure lot sizes cater for a variety of development,*
The density of the proposal reflects its adjoining context and locality.
- *(b) to ensure lot sizes do not result in adverse amenity impacts,*
The proposal does not seek to undertake physical works, as such the lot sizes proposed will not result in any additional adverse amenity impacts to the streetscape or adjoining properties.
- *(c) to ensure lot sizes deliver high quality architectural, urban and landscape design,*
Whilst no physical works are proposed, the lot sizes proposed ensure that each dwelling is able to retain good internal and external amenity.
- *(d) to provide a pattern of subdivision that is consistent with the desired future character,*
The proposal is consistent with the pattern of subdivision immediately to the north and south of the subject site.
- *(e) to ensure lot sizes allow development to be sited to protect and enhance riparian and environmentally sensitive land.*
The subject site is not located on riparian or environmentally sensitive land, as such this objective is not applicable to the proposal.

The concurrence of the Planning Secretary may be assumed for matters dealt with by the Local Planning Panel.

The proposal thereby accords with the objective in 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 Minimum Lot Size Development Standard and it is recommended the Section 4.6 exception be granted.

Section 5.10 – Heritage conservation

The subject site is a neutral dwelling located within The Valley Heritage Conservation Area (C27 in Schedule 5 of the Inner West LEP 2022). The site currently holds two modern, semi-detached dwellings, constructed circa 2009. Prior to this, the site contained a single storey weatherboard cottage. The proposal intends to subdivide the land based on the layout of the two semis, with a right of way to access the basement garage. This would create two lots, roughly 5m in width. No work is proposed to the dwellings.

The subdivision pattern in the surrounding area features a number of narrow blocks, therefore the proposed subdivision pattern would be in keeping with this character and is acceptable.

5(b) Development Control Plans

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

LDCP2013	Compliance
Part A: Introductions	
Section 3 – Notification of Applications	Yes
Part B: Connections	Yes

LDCP2013	Compliance
Part C	
C1.0 General Provisions	Yes
C1.1 Site and Context Analysis	Yes
C1.2 Demolition	N/A
C1.3 Alterations and additions	N/A
C1.4 Heritage Conservation Areas and Heritage Items	Yes
C1.5 Corner Sites	N/A
C1.6 Subdivision	Yes – see discussion
C1.7 Site Facilities	Yes
C1.8 Contamination	N/A
C1.9 Safety by Design	N/A
C1.10 Equity of Access and Mobility	N/A
C1.11 Parking	Yes – see discussion
C1.12 Landscaping	Yes
C1.13 Open Space Design Within the Public Domain	N/A
C1.14 Tree Management	N/A
C1.15 Signs and Outdoor Advertising	N/A
C1.16 Structures in or over the Public Domain: Balconies, Verandahs and Awnings	N/A
C1.17 Minor Architectural Details	N/A
C1.18 Laneways	N/A
C1.19 Rock Faces, Rocky Outcrops, Cliff Faces, Steep Slopes and Rock Walls	N/A
C1.20 Foreshore Land	N/A
C1.21 Green Roofs and Green Living Walls	N/A
Part C: Place – Section 2 Urban Character	
C2.2.5.4 Iron Cove Distinctive Neighbourhood	Yes
Part C: Place – Section 3 – Residential Provisions	
C3.1 Residential General Provisions	Yes
C3.2 Site Layout and Building Design	Yes
C3.3 Elevation and Materials	Yes
C3.4 Dormer Windows	Yes
C3.5 Front Gardens and Dwelling Entries	Yes
C3.6 Fences	Yes
C3.7 Environmental Performance	Yes
C3.8 Private Open Space	Yes
C3.9 Solar Access	Yes
C3.10 Views	Yes
C3.11 Visual Privacy	Yes
C3.12 Acoustic Privacy	Yes
C3.13 Conversion of Existing Non-Residential Buildings	N/A
C3.14 Adaptable Housing	N/A
Part C: Place – Section 4 – Non-Residential Provisions	N/A
Part D: Energy	
Section 1 – Energy Management	N/A
Section 2 – Resource Recovery and Waste Management	
D2.1 General Requirements	Yes
D2.2 Demolition and Construction of All Development	N/A

LDCP2013	Compliance
D2.3 Residential Development	Yes
D2.4 Non-Residential Development	N/A
D2.5 Mixed Use Development	N/A
Part E: Water	
Section 1 – Sustainable Water and Risk Management	
E1.1 Approvals Process and Reports Required With Development Applications	Yes
E1.1.1 Water Management Statement	Yes
E1.1.2 Integrated Water Cycle Plan	N/A
E1.1.3 Stormwater Drainage Concept Plan	Yes
E1.1.4 Flood Risk Management Report	N/A
E1.1.5 Foreshore Risk Management Report	N/A
E1.2 Water Management	Yes
E1.2.1 Water Conservation	Yes
E1.2.2 Managing Stormwater within the Site	Yes
E1.2.3 On-Site Detention of Stormwater	Yes
E1.2.4 Stormwater Treatment	N/A
E1.2.5 Water Disposal	N/A
E1.2.6 Building in the vicinity of a Public Drainage System	N/A
E1.2.7 Wastewater Management	N/A
E1.3 Hazard Management	N/A
E1.3.1 Flood Risk Management	N/A
E1.3.2 Foreshore Risk Management	N/A
Part F: Food	N/A
Part G: Site Specific Controls	N/A

The following provides discussion of the relevant issues:

C1.6 Subdivision

The proposed subdivision of the existing dual occupancy is considered to meet the objectives and relevant controls under the clause. A Section 4.6 objection has been presented for merit assessment and is found to be supportable. As dual occupancy developments are no longer permitted under the *Inner West LEP 2022*, the Torrens Title subdivision will result in a permissible outcome (semi-detached dwellings) and formalise an existing built form situation which has no external impacts to the locality and reinforces the adjoining subdivision pattern.

C1.11 Parking

Each dwelling will retain access to the basement carparking, a right of carriageway is proposed to ensure equitable access is retained.

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. Nil submissions were received in response to the initial notification.

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. The proposal is not contrary to the public interest.

6 Referrals

6(a) Internal

The application was referred to the following internal sections/officers and issues raised in those referrals have been discussed in section 5 above.

- Development Engineering;
- Heritage; and
- Building Certification.

7. Section 7.11 Contributions/7.12 Levy

Section 7.11/7.12 levies are not 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 development would not result in significant impacts on the amenity of the adjoining premises/properties and the streetscape as there are no physical changes proposed and is therefore 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 Lot Size standard is unnecessary in the circumstance of the case and that there are sufficient environmental grounds to support the variation. 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/2023/0521 for Torrens Title Subdivision into two lots at 2 Wellington Street ROZELLE 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
-	Proposed Draft Subdivision Plan	Received by Council 20/07/2023	-

As amended by the conditions of consent.

GENERAL CONDITIONS

2. Stormwater Drainage System – Simple

Stormwater runoff from all roof and paved areas within the property must be collected in a system of gutters, down pipe, pits and pipelines discharged by gravity to the kerb and gutter of a public road;

Any existing component of the stormwater system that is to be retained, must be checked and certified by a Licensed Plumber or qualified practising Civil Engineer to be in good condition and operating satisfactorily.

If any component of the existing system is not in good condition and /or not operating satisfactorily and/or impacted by the works, the drainage system must be upgraded to discharge by gravity to the kerb and gutter of a public road.

3. Easements and Right of Way

All instruments used to create easements, rights and/or restrictions as to user including in them provisions that such may not be revoked or modified without the prior approval of Council.

PRIOR TO SUBDIVISION CERTIFICATE

4. Separate Drainage Systems

Prior to the issue of a Subdivision Certificate, the Principal Certifier must be provided with a plan detailing that separate drainage systems must be provided to drain each proposed lot.

5. Section 73 Certificate

Prior to the issue of a Subdivision Certificate, the Certifying Authority must be provided with the Section 73 Certificate. A Section 73 Compliance Certificate under the *Sydney Water Act 1994* must be obtained from Sydney Water Corporation.

6. Separate Stormwater

Prior to the issue of a Subdivision Certificate, the Certifying Authority must be provided with details, endorsed by a practising stormwater engineer demonstrating separate drainage systems to drain each proposed lot.

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*.

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.

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.

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.

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.

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

DRAFT ONLY - NOT FOR CONSTRUCTION
PROPOSED SUBDIVISION [TORRENS TITLE]
OF LOT 14 SEC. A IN DEPOSITED PLAN 119

BASEMENT FLOOR PLAN
 GROUND FLOOR PLAN
 FIRST FLOOR PLAN
 ATTIC PLAN

WELLINGTON STREET

WELLINGTON STREET

WELLINGTON STREET

WELLINGTON STREET

PROPOSED DRAFT SUBDIVISION PLAN
 FOR A 2 x LOT TORRENS TITLE SUBDIVISION
 OVER LOT 14, DP 119, SECTION A
 2 WELLINGTON STREET, ROZELLE, NSW

WELLINGTON STREET

WELLINGTON STREET

WELLINGTON STREET

WELLINGTON STREET

HATCHED AREA INDICATES EXISTING CONSTRUCTION
 HATCHED AREA INDICATES PROPOSED CONSTRUCTION

Document Set ID: 38694286
 Version: 1, Version Date: 08/09/2023

Attachment C- Section 4.6 Exception to Development Standards



**CLAUSE 4.6 REQUEST FOR VARIATION TO
CLAUSE 4.1 (MINIMUM SUBDIVISION LOT SIZE)
OF
INNER WEST LOCAL ENVIRONMENTAL PLAN
2022 (IWLEP)
2 Wellington Street,
ROZELLE**

March 2023

Andrew Martin Planning Pty Ltd - Town | Urban | Environmental

ABN 71 101 798 001

l. 02 9518 4120 m. 0405 449 150 e. amartin@amplanning.com.au p. PO Box 601 Pyrmont NSW 2009
www.amplanning.com.au



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Version: 1, Version Date: 15/09/2023

Clause 4.6 Variation to Minimum subdivision lot size
2 Wellington Street, Rozelle
Torrens title subdivision



1.0 Introduction

This is a request to vary a development standard pursuant to the provisions of Clause 4.6 of Inner West Local Environmental Plan 2022 (IWLEP 2022), the relevant clause being Clause 4.1 Minimum subdivision lot size.

This written variation request has been provided to support the proposed Torrens title subdivision of the property 2 Wellington Street, Rozelle (the site) into 2 separate allotments. The relevant subdivision plans relied upon are those prepared by Habitation.

The relevant minimum subdivision lot size standard under Clause 4.1 and shown on Lot Size Map 007 under IWLEP 2022 is 200m². The proposal seeks to create two new lots having equal areas of 153.3m². Accordingly, both of the proposed new lots are less than the minimum required 200m².

The minimum subdivision lot size control is a *development standard* for the purposes of the *EP&A Act 1979*.

This request to vary the minimum subdivision lot size development standard considers the judgment in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* ("Initial Action"), *Wehbe v Pittwater Council, Big Property Pty Ltd v Randwick City Council [2021]* and *SJD DB2 Pty Ltd v Woollahra Council [2020] NSWLEC 1112 (SJD DB2)*.

The request addresses those relevant provisions of Clause 4.6 under IWLEP 2022 and sets out the reasons for why strict application of the minimum subdivision lot size standard in this instance is unreasonable and unnecessary. Further, it demonstrates:

- That the development remains consistent with the objectives of the development standard under Clause 4.1;
- That the proposal is consistent with the objectives of the R1 General Residential zone; and
- That there are sufficient environmental planning grounds to justify the variation.

2.0 Development Standard to be Varied – Minimum Subdivision Lot Size

The relevant *development standard* to be varied is the minimum 200m² subdivision lot size control under Clause 4.1. Clause 4.1 of IWLEP relevantly provides:

4.1 Minimum subdivision lot size

(1) *The objectives of this clause 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.*

(2) *This clause applies to a subdivision of any land shown on the Lot Size Map that requires development consent and that is carried out after the commencement of this Plan.*

(3) *The size of any lot resulting from a subdivision of land to which this clause applies is not to be less than the minimum size shown on the Lot Size Map in relation to that land.*

(4) *This clause does not apply in relation to the subdivision of any land—*

- (a) *by the registration of a strata plan or strata plan of subdivision under the [Strata Schemes Development Act 2015](#), or*
- (b) *by any kind of subdivision under the [Community Land Development Act 2021](#).*

The relevant Minimum subdivision lot size map is identified below:



Clause 4.6 Variation to Minimum subdivision lot size
 2 Wellington Street, Rozelle
 Torrens title subdivision

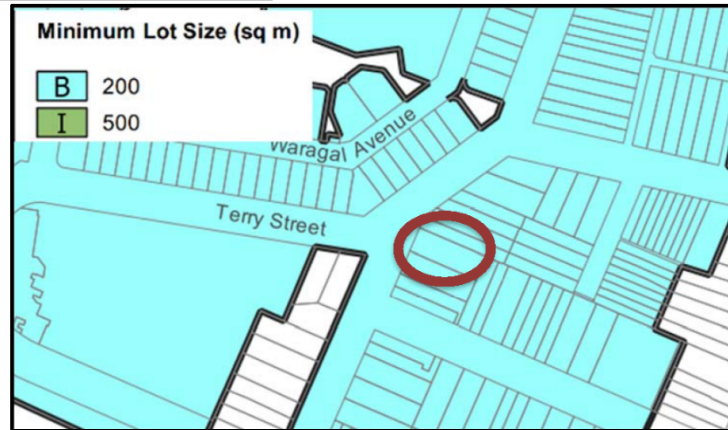


Figure 1: Minimum subdivision lot size under IWLEP (Source: LSR_007 IWLEP)

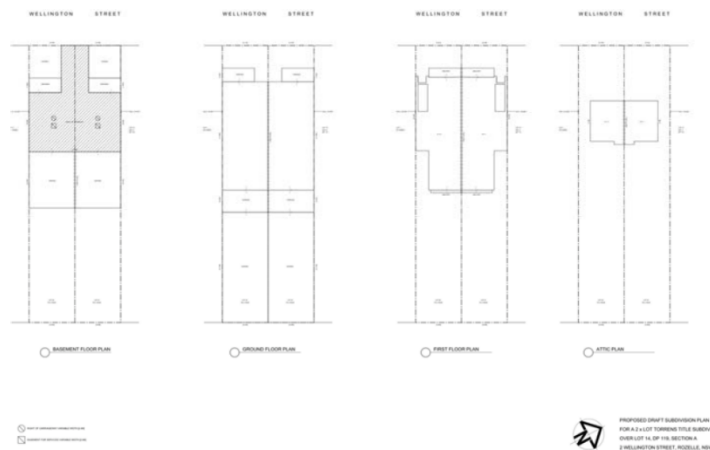
The subject site is mapped “B” – 200m².

3.0 Nature of Variation Sought

The requested variation is as follows:

The subject site has a minimum subdivision allotment size of 200m².

Each of the proposed new lots will comprise areas of 153.3m². Therefore, each lot is 46.7m² short of the required minimum subdivision lot size control. This is equivalent to a shortfall of 23.35%.



Clause 4.6 Variation to Minimum subdivision lot size
2 Wellington Street, Rozelle
Torrens title subdivision



4.0 Minimum Subdivision Lot Size – Development Standard

A development standard is defined in S1.4 of the *Environmental Planning and Assessment Act 1979* ("EPA Act") to mean:

"provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) the cubic content or floor space of a building,*
- (e) the intensity or density of the use of any land, building or work,*
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) the volume, nature and type of traffic generated by the development,*
- (i) road patterns,*
- (j) drainage,*
- (k) the carrying out of earthworks,*
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) the provision of services, facilities and amenities demanded by development,*
- (n) the emission of pollution and means for its prevention or control or mitigation,*
- and*
- (o) such other matters as may be prescribed."*

The **200m²** minimum subdivision lot size standard is a *development standard* as defined under the *EP&A Act 1979*.

5.0 Clause 4.6 of Inner West Local Environmental Plan 2022

The following provides a response to relevant Clause 4.6 provisions:

Clause 4.6(2) provides that:

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

The minimum subdivision lot size development standard is not expressly excluded from the operation of cl4.6 and accordingly, consent may be granted.

Clause 4.6(3) relates to the making of a written request to justify the contravention of a development standard and states:

(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:

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-
- 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 subdivision lot size development standard pursuant to cl4.1 of the IWLEP 2022. However, strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as detailed further in this written request.

Sufficient environmental planning grounds exist to justify contravening the development standard as detailed in Section 8.

Clause 4.6(4) provides that consent must not be granted for development that contravenes a development standard unless:

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

Sections below of this written request address the matters required under cl4.6(4)(a) of the IWLEP 2022 and cl4.6(4)(b).

Clause 4.6(5) provides that:

- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
 - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

Sections below of this written request addresses the matters required under cl4.6(5) of the IWLEP.

Clauses 4.6(6) and (8) are not relevant to the proposed development.

Cl 4.6(7) is an administrative clause requiring the consent authority to keep a record of its assessment under this clause after determining a development application.

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6.0 Relevant Decisions

Initial Action

In the Judgment of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* ('Initial Action'), Preston CJ indicated that cl4.6 does not directly or indirectly establish a test that a non-compliant development should have a neutral or beneficial effect relative to a compliant development. For example, a building that exceeds a development standard that has adverse amenity impacts should not be assessed on the basis of whether a complying development will have no adverse impacts. Rather, the non-compliance should be assessed with regard to whether the impacts are reasonable in the context of achieving consistency with the objectives of the zone and the objectives of the development standard. The relevant test is whether the environmental planning grounds relied upon and identified in the written request are "sufficient" to justify the non-compliance sought.

In addition, Preston CJ ruled that cl4.6 does not directly or indirectly establish a "test" that a development which contravenes a development standard results in a "*better environmental planning outcome*" relative to a development that complies with the development standard. There is no provision in IWLEP clause 4.6 that requires a development that contravenes a development standard to achieve better outcomes.

Furthermore, Preston CJ ruled that it is incorrect to hold that the lack of adverse amenity impacts on adjoining properties is not a sufficient ground justifying the development contravening the development standard, when one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts.

SJD DB2 Pty Ltd v Woollahra Council [2020] NSWLEC 1112 (SJD DB2).

This appeal sought consent for the construction of a six-storey Shop top housing development at 28-34 Cross Street Double Bay (**the DA**). The Court approved the proposed development, having a height of 21.21m where the control was 14.7m – representing a maximum variation of approximately **44%** (or 6.51m) – and a floor space ratio (**FSR**) of 3.54:1 where the control was 2.5:1 – representing a variation of approximately **41%**.

The Court drew from the decisions in *Initial Action* and *RebelMH* in the *SJD DB2* judgment, and noted that although there are a number of ways to demonstrate that compliance with a development standard is unreasonable or unnecessary, it may be sufficient to establish only one way (at [35].) In considering the clause 4.6 variation requests submitted by the Applicant, the Court considered that they could be treated together, as the breaches they related to were fundamentally related, as where there is greater building form with additional height, so too is there greater floor area (at [63].)

Acting Commissioner Clay makes it clear in his judgment, 'cl 4.6 is as much a part of [an LEP] as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome' (at [73]).

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Big Property Pty Ltd v Randwick (Big Property)

The appropriate determination of desired future character was dealt with in the recent case of *Big Property Pty Ltd v Randwick City Council* [2021] (herein 'Big Property'). This decision was also followed by *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] (herein 'HPG').

Big Property resulted in a decision of Commissioner O'Neill which was an appeal by Big Property against the refusal of a development application for alterations and additions to an approved residential flat building, including the provision of additional affordable rental housing units and the construction of an additional storey.

The proposal exceeded the height and FSR development standards and Council contended that the clause 4.6 request was not well founded because the proposal was incompatible with the local character of the area, primarily due to its bulk and scale. In *Big Property* the Applicant claimed that the height and FSR exceedances were a justified response to the provision of two additional affordable housing units.

In considering the clause 4.6 request and desired future character, Commissioner O'Neill held that the desired future character of an area is not determined solely by the development standards that control building envelopes for the area. Commissioner O'Neill held that development standards for building envelopes are frequently generic standards which do not account for existing and approved development, site amalgamations, SEPP allowances, heritage issues or the nuances of an individual site. The Commissioner expressly referenced SJD, and went on to hold that:

"The presumption that the development standards that control building envelopes determine the desired future character of an area is based upon a false notion that those building envelopes represent, or are derived from, a fixed three-dimensional masterplan of building envelopes for the area and the realization of that masterplan will achieve the desired urban character. Although development standards for building envelopes are mostly based on comprehensive studies and strategic plans, they are frequently generic, as demonstrated by the large areas of a single colour representing a single standard on Local Environmental Plan maps, and they reflect the zoning map. As generic standards, they do not necessarily account for existing and approved development, site amalgamations, the location of heritage items or the nuances of an individual site. Nor can they account for provisions under other EPIs that realisation of particular development with GFA bonuses or other mechanisms that intensify development. All these factors push the ultimate contest for evaluating and determining a building envelope for a specific use on a site to the development application stage. The application of the compulsory provisions of cl 4.6 further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality" [at44]

Commissioner O'Neill found that the exceedance of height/FSR standards due to the provision of affordable housing units was an environmental planning ground and thus the clause 4.6 request was a well-founded request. Commissioner O'Neill also expressly referenced the fact that some State Environmental Planning Instruments, such as that for Affordable Rental Housing, 'incentivise the provision by the private sector of in-fill affordable housing by providing additional GFA above the otherwise applicable development standards that determine the building envelope for a particular site'. This too must be factored into any consideration of what constitutes the 'desired future character' of an area.

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7.0 **Clause 4.6(3)(a): Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case**

In dealing with the “unreasonable and unnecessary” Preston CJ identifies and validates the 5 options available to an applicant in *Wehbe v Pittwater Council* which can be adopted in dealing with the *unreasonable and unnecessary* test under Cl. 4.6(3)(a).

Preston CJ at states as follows:

“As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in Wehbe v Pittwater Council at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.”

Based on the above the following identifies the first method identified in *Wehbe*:

“Ways of establishing that compliance is unreasonable or unnecessary

*42 An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The 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**: (our emphasis)*

Clause 4.6(3)(a) – UNREASONABLE AND UNNECESSARY

This clause 4.6 responds to the matters required to be demonstrated by sub-clause 4.6(3) namely:

- *that compliance with the development standard is unreasonable or unnecessary, in the circumstances of the case, and*
- *that there are sufficient environmental planning grounds to justify contravening the development standard.*

Having considered the above the Applicant relies upon the first method demonstrating that compliance is *unreasonable and unnecessary* because the objectives of the development standard are achieved notwithstanding a variation to the standard.

In dealing with the control it is necessary to identify the purpose of the minimum subdivision lot size control and then progress to dealing with the consistency or otherwise with the objectives. The following is relevant in addressing this consideration:

- The proposed lots are designed and scaled to wholly include the existing attached dwellings on the site. The proposed subdivision will have no material impact on the established physical form or the prevailing streetscape character.
- The sites are large enough to accommodate the existing dwellings having been approved in 2008 and demonstrate compliant setbacks, private open space, landscaping, site coverage and parking in the form of a basement.
- The subject site is located in a precinct where numerous allotments are less than the 200sqm requirement by Clause 4.1 of the IWLEP including:
 - 4 & 6 Wellington Street to the immediate south (existing semi-detached lots at 127sqm and 169sqm)
 - 8 & 8A Wellington Street further to the south (existing semi-detached lots at 145sqm and 160sqm)

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- 110 Terry Street to the north (188sqm)
- 106 Terry Street to the north (177sqm)
- 104 Terry Street to the north (165sqm)
- Various sites comprising semi-detached and attached dwellings along Wise Street and York Place to the north east (all circa 85-150sqm)
- The proposed development provides housing diversity, choice and a form of housing which is consistent with the prevailing low-density scale of the area.

Further insight into the purpose of the standard can be obtained by investigating the objectives of the standard. The objectives in this case are aimed at providing lot sizes to accommodate a variety of dwelling types, avoidance of amenity impacts and a high standard of architectural and urban design.

The following justification is provided.

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

The proposed lot sizes are consistent with numerous lots along Terry Street and Wellington Street. The proposed lots will wholly contain established semi-detached dwellings that are contemporary in their design and layout.

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

The proposed subdivision will not result in any material physical changes to the existing development. Accordingly, the proposed subdivision will not result in any impacts to amenity beyond those previously considered by Council for the built form DA.

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

As above, no material change to the existing built form, urban design or landscape design. The lot sizes proposed will wholly contain each semi-detached dwelling and will not compromise existing compliance with landscape, private open space, site coverage or parking requirements.

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

The proposed subdivision will maintain the established and desired future character of the subdivision pattern in the area. Lots have been orientated east-west as per the prevailing subdivision pattern and lot shapes are regular. The size of the lots are commensurate with those numerous existing undersized lots in the surrounding area.

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

Objective not relevant in this instance.

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8.0 4.6(3)(b) – SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

The variation relates to the minimum subdivision lot size and as such calls upon those matters considered to be environmental planning grounds relevant to the subject matter. Justification provided for the variation applies to this particular application and not environmental planning grounds that could apply to all lands zoned R1 General Residential.

The environmental planning grounds justification for the minimum subdivision lot size variation is provided as follows:

- Existing lots to the north and south of the site establish clear and reliable precedent in terms of subdivision lot sizes (directly comparable to those sought under this DA).
- The lot sizes proposed will wholly comprise each of the existing semi-detached dwellings and will accommodate compliant soft landscaping areas, compliant site cover and private open space.
- The shortfall in lot areas has had no adverse impact on the prevailing subdivision pattern of the area. In fact, the shape, dimensions and areas of the lots are consistent with numerous other existing properties along Terry Street and Wellington Street and therefore contribute to continued consistency.
- The proposal does not necessitate any physical changes to the existing built form or landscape features across the site. A right of carriageway easement over the turning circle and manoeuvring areas for vehicles in the basement and easements for support ensures the orderly function and use of the dwellings under a Torrens title subdivision. Accordingly, the subdivision will not result in any detrimental impacts in terms of the use of the properties.
- There are no adverse environmental impacts directly attributable to the reduced lot sizes proposed given that there is no material change to the built form and landscaping on site.

In dealing with the sufficient environmental planning grounds Preston CJ in Initial Action considers that it is available to the applicant to also deal with the Objectives of the Act under S1.3 in order to demonstrate that grounds exist to warrant a variation to the minimum subdivision lot size. Clause 1.3 of the *EP&A Act 1979* relevantly provides:

“1.3 Objects of Act (cf previous s 5)

The objects of this Act are as follows:

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

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

A development that complies with the land use zoning of the site (R1 General Residential) satisfies the objectives of under S1.3 EP&A Act 1979.

The proposed plan of subdivision and the minimum lot size variation satisfies the objectives in bold given that:

- The development continues to provide for residential land use (semi-detached dwellings) in line with Council's strategic planning intent and the IWLEP 2022.
- The development assists in achieving a co-ordinated and timely outcome for the site based on the neighbourhood provisions that are relevant to the subject site.
- The development offers better and proper management of the State's land resources by providing a more efficient use of private land, in the form of two saleable lots, that are well positioned to take advantage of its proximity to public transport, jobs, services and local and regional leisure, recreation, retail and cultural activities.
- The proposal will not cause adverse environmental impacts to neighbouring properties as outlined in the Statement of Environmental Effects.
- The subdivision enables increased home-ownership through the opportunity to on-sell the existing semi-detached dwellings separately under a Torrens title arrangement.

Based on the above the consent authority can be satisfied that there are sufficient environmental planning grounds to warrant the variation.

Clause 4.6(4)(a)(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.

Consistency with the Zone Objectives

An enquiry is now made in relation to the ability of the proposal and the identified variation, as one departing from the minimum subdivision lot size standard, to reasonably satisfy the stated objectives of the zone.

Zone R1 General Residential

1 Objectives of zone

- *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.*

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

The following provides a review of the zone objectives:

- ***To provide for the housing needs of the community.***

The proposed subdivision provides new lots comprising existing housing to meet the needs of the community. The proposed lots are compatible in their scale, dimensions and orientation with those of neighbouring residential properties in the street and is therefore considered acceptable.

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

The proposal provides two new lots in place of one containing two dwellings in a locality that is well served by transport and access to employment, recreation, cultural and retail services.

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

Not relevant.

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

The dwellings remain compatible with the character, style and pattern of dwellings in the area. The proposed new lots are consistent with the prevailing pattern of subdivision in the area and the fine-grain approach to development in the Iron Cove Distinctive Neighbourhood.

8.0 Other Matters For Consideration

Step 4 - Clause 4.6(4)(b) – The Concurrence of the Secretary has been obtained

On 21 February 2018, the Secretary of the Department of Planning and Environment issued a Notice ('the Notice') under cl. 64 of the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) providing that consent authorities may assume the Secretary's concurrence for exceptions to development standards for applications made under cl4.6 of the IWLEP.

The Court has power to grant development consent to the proposed development even though it contravenes the minimum subdivision lot size development standard, without obtaining or assuming the concurrence of the Secretary by reason of s39(6) of the *Land and Environment Court Act 1979* (the Court Act).

Clause 4.6(5) - Concurrence Considerations

In the event that concurrence cannot be assumed pursuant to the Notice, cl4.6(5) of the LEP provides that in deciding whether to grant concurrence, the Secretary must consider:

- whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- the public benefit of maintaining the development standard, and*
- any other matters required to be taken into consideration by the Secretary before granting concurrence.*

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The proposed contravention of the minimum subdivision lot size development standard has been considered in light of cl4.6(5) as follows:

- The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed development for this particular site. It is not directly transferrable to any other site in the immediate locality, wider region or the State and the scale of the proposed development does not trigger any requirement for a higher level of assessment;
- As indicated in Section 7 and Section 8, the proposed contravention of the development standard is considered to be in the public interest because it is consistent with the objectives of the zone and the objectives of the development standard.

The proposed development contravenes the minimum subdivision lot size development standard under cl4.1 of IWLEP 2022 and the control under cl4.1 of the IWLEP is a development standard and is not excluded from the application of cl4.6.

This written request to vary the development standard has been prepared in accordance with cl4.6(3) of the IWLEP and demonstrates that strict compliance with the development standard is unreasonable and unnecessary for the following reasons:

- Notwithstanding the contravention of the development standard, the proposed development is consistent with the relevant objectives of the development standard pursuant to cl 4.1 of the IWLEP 2022 and is consistent with the relevant objectives of the R1 General Residential zone and therefore, the proposed development is in the public interest;
- Notwithstanding the contravention of the development standard, the proposed development will not result in adverse environmental harm in that the amenity of neighbouring properties and the surrounding area will be reasonably maintained.

In addition, this written request outlines sufficient environmental planning grounds to justify the contravention of the minimum subdivision lot size development standard, including:

- The proposed lot sizes are directly comparable to several existing lots comprising semi-detached and attached dwellings along Wellington Street and Terry Street to the north and south of the site. Accordingly, the proposal carries on the desired future character of the area and prevailing pattern of subdivision in the distinctive neighbourhood.
- The lot sizes proposed will wholly comprise the existing semi-detached dwellings and continue to accommodate sufficient areas for compliant overall and soft landscaping areas, compliant site cover and private open space.

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- The shortfall in lot areas has had no adverse impact on the prevailing subdivision pattern of the area. In fact, the shape, dimensions and areas of the lots are consistent with numerous other existing properties along Wellington and Terry Streets and therefore contribute to continued consistency.
- There are no adverse environmental impacts directly attributable to the reduced lot sizes because there are otherwise no physical changes to the existing built form and landscaping.
- The proposed subdivision enables the lots / dwellings to be separately on sold under a Torrens title arrangement, providing additional opportunities for home ownership and the housing needs of the community.

A handwritten signature in black ink that reads 'A Martin'.

Andrew Martin MPlA
Planning Consultant