



DEVELOPMENT ASSESSMENT PANEL REPORT

Application No.	DA/2024/0352
Address	18 Ballast Point Road BIRCHGROVE
Proposal	Proposed subdivision to create a new lot behind the subject site fronting Yeend Street Birchgrove
Date of Lodgement	7 May 2024
Applicant	Ms Xin Tian
Owner	Ms Xin Tian and Inner West Council
Number of Submissions	Initial: 0
Cost of works	\$0.00
Reason for determination at Planning Panel	Section 4.6 variation exceeds 10% Council is the owner of the land
Main Issues	Creation of undersized lot
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
Attachment D	Council meeting minutes



LOCALITY MAP

Subject Site		Objectors		↑ N
Notified Area		Supporters		

1. Executive Summary

This report is an assessment of the application submitted to Council for a proposed subdivision of the Yeend Street road reserve to create a new lot at the rear of the subject site at 18 Ballast Point Road Birchgrove. The application was notified to surrounding properties and no submissions were received in response to the initial notification.

The main issue that has arisen from the application is:

- Minimum subdivision lot size development standard breach

The proposal satisfies the objectives of Inner West Local Environmental Plan 2022 and will not result in significant adverse impacts for the locality. Accordingly the application is recommended for approval, subject to conditions.

2. Proposal

This application seeks consent for the subdivision of part of the Yeend Street road reserve to create a new lot in connection with a proposed partial road closure and sale at the rear of 18 Ballast Point Road Birchgrove.

On 25 October 2022, Inner West Council resolved (C1022(1) Item 7):

“That Council provides its ‘in principle’ support to consider the partial road closure of Yeend Street, Birchgrove and subsequent sale to the adjoining owner.”

On 13 February 2024, Inner West Council resolved (C0224(1) Item 41):

1. *That Council approve closing the part of Yeend Street, Birchgrove noted in this report (subject to survey) by notice published in the NSW Government Gazette, in accordance with Section 38D of the Roads Act 1993.*
2. *That Council authorise the placing of a Notice of partial road closure in the Government Gazette.*
3. *That Council note the land formerly part of Yeend St will be classified as operational land for the purposes of the Local Government Act 1993.*
4. *That Council authorise the sale of the land to the adjoining landholder, as detailed in the Confidential Attachment 1. 5. That Council delegate Authority to the General Manager to sign all associated documents for the survey, road closure and sale of this land.*

This DA is connected with an application Council will make to the Department of Lands for this part of the road reserve to be formally closed as road (i.e. so the subject part ceases to

be public road and becomes a lot in a registered deposited plan and owned by Council) under Part 4 of the Roads Act, 1993.

The proposed lot will have an area of 58.5sqm and will be sold to the owners of 18 Ballast Road. This subdivision will not affect the location of the existing footpath, road carriageway, on street parking or associated services along this section of Yeend Street. Photograph 1 below depicts the subject lot and the eastern section of Yeend Street and the Image 1 illustrates the survey associated with the subdivision.



Photograph 1 - Depiction the subject lot (highlighted) and the eastern section of Yeend Street.

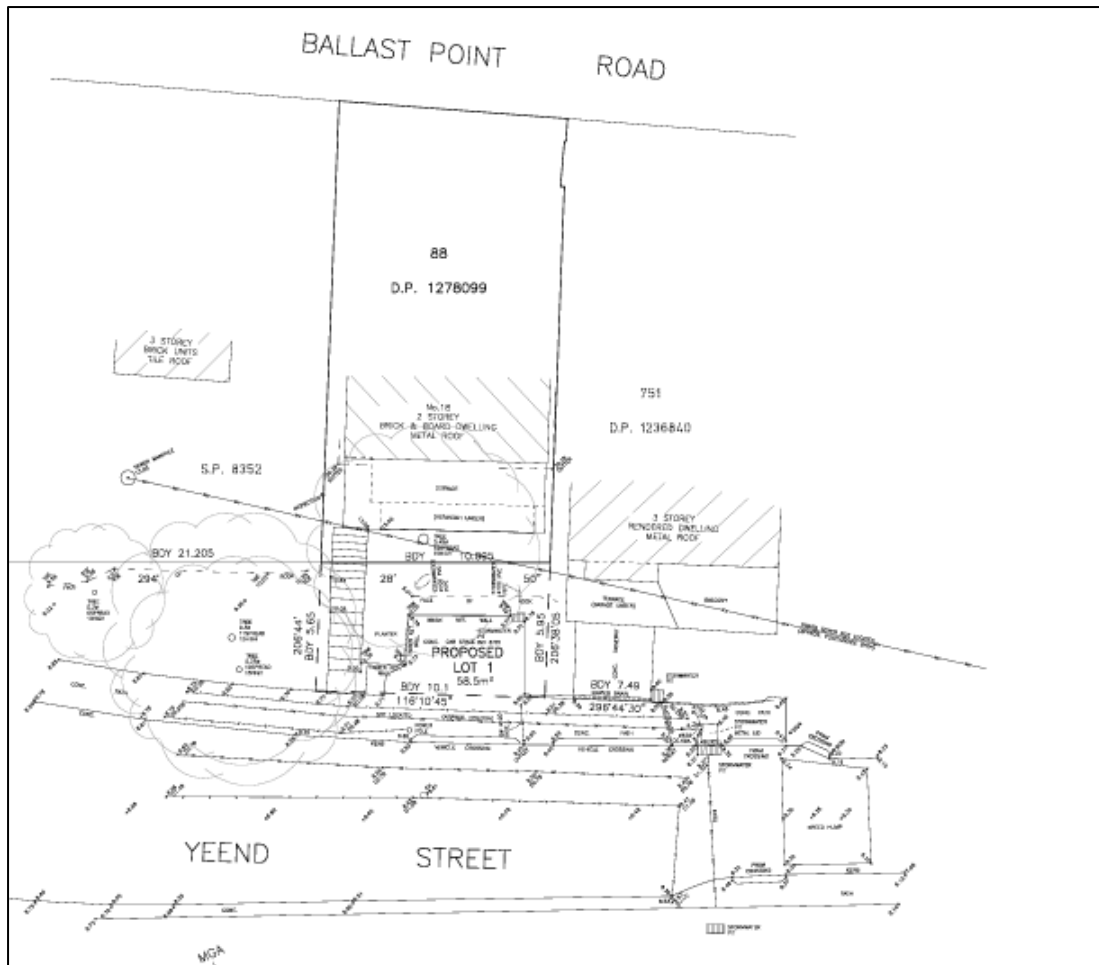


Image 1: Survey associated with the proposed subdivision

3. Site Description

The site has an approx. area of 58.5m² and has a frontage of 10.1m to Yeend Street. The site is located on the north side of Yeend Street.

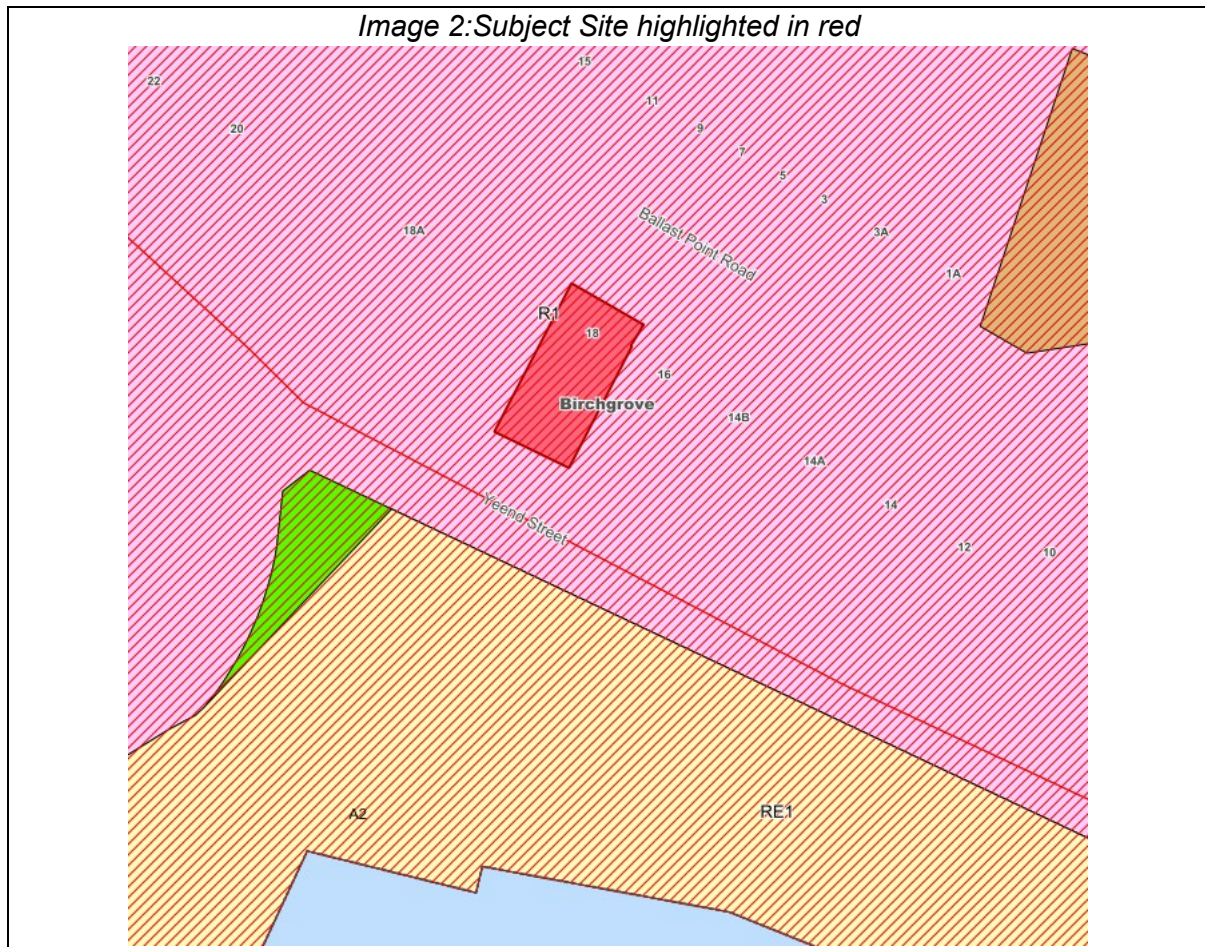
The site comprises part of the existing road reserve that consists of a rocky outcrop and steep embankment with retaining wall with stairs providing access from the existing dwelling upon No 18 Ballast Point Road to Yeend Street. Yeend Street is described as a no through road with disabled car parking facilities located to the south east of the site. To the east, this section of Yeend Street comprises a steep embankment. Refer to Photograph 1 above for further details.

The adjoining site, i.e 18 Ballast Point Road, is located on the south-eastern side of Ballast Point Road, between Ronald Street and the cross junction of Yeend and Lemm Streets to the west. The site legally known as Lot 88 in DP 1278099 is generally rectangular shaped with a total area of approximately 201sqm.

The site has a frontage to Ballast Point Road of approximately 10.1 metres and a secondary frontage of approximately 10.1 metres to Yeend Street.

The site supports an existing double storey dwelling with attic level. The adjoining properties support 2 and 3 storey dwellings and there is one 4 storey residential flat building to the immediate western side boundary of the subject site.

The property is located within a Heritage conservation area.



4. Background

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/2006/67	Alterations and additions to an existing dwelling including new attic addition.	Approved 10 May 2006

Surrounding properties**16 Ballast Point Road, Birchgrove**

Application	Proposal	Decision & Date
D/2016/281	Subdivision of part of the Yeend Street road reserve to create a new lot in connection with a proposed partial road closure and sale.	Approved Local Planning Panel 13/09/2016

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)*.

A. Environmental Planning Instruments

The application has been assessed and the following provides a summary of the relevant Environmental Planning Instruments.

State Environmental Planning Policies (SEPPs)*SEPP (Resilience and Hazards) 2021*

Chapter 4 Remediation of land

Section 4.6(1) of the *Resilience and Hazards 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.

Inner West Local Environmental Plan 2022

The application was assessed against the following relevant sections of the *Inner West Local Environmental Plan 2022 (IWLEP 2022)*.

Part 1 – Preliminary

Section	Proposed	Compliance
Section 1.2 Aims of Plan	<p>The proposal satisfies the section as follows:</p> <ul style="list-style-type: none"> The proposal conserves and maintains the natural, built and cultural heritage of Inner West, The proposal prevents adverse social, economic and environmental impacts on the local character of Inner West, The proposal prevents adverse social, economic and environmental impacts, including cumulative impacts 	Yes

Part 2 – Permitted or prohibited development

Section	Proposed	Compliance
Section 2.3 Zone objectives and Land Use Table	<ul style="list-style-type: none"> The application proposes subdivision which is permissible with consent in the R1 zone. The proposal is consistent with the relevant objectives of the zone, maintains the character and natural features in the area while facilitating the service needs of the resident. 	Yes
Section 2.6 Subdivision – consent requirements	<ul style="list-style-type: none"> The application seeks development consent for the subdivision of an existing road reserve to be closed and allow for consolidation of the existing and proposed lot to Torrens title lots, which is permissible with consent. 	Yes

Part 4 – Principal development standards

Former Leichhardt development standards

Section	Proposed	Compliance
Section 4.1 Minimum Subdivision lot size	Maximum	200sqm
	Proposed	58.5sqm
	Variation	141.5sqm or 70.75%
Section 4.6 Exceptions to development standards	The applicant has submitted a variation request in accordance with Section 4.6 to vary Section 4.1.	See discussion below

Section 4.6 – Exceptions to Development Standards

4.1 Minimum subdivision lot size development standard

The applicant seeks a variation to the above mentioned under section 4.6 of the *IWLEP 2022* by 141.5sqm or 70.75%. Section 4.6 allows Council to vary development standards in certain circumstances and provides an appropriate degree of flexibility to achieve better design outcomes.

A written request has been submitted to Council in accordance with Section 4.6(3) of the *IWLEP 2022* justifying the proposed contravention of the development standard. 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.

Whether compliance with the development standard is unreasonable or unnecessary

In *Wehbe* at [42] – [51], Preston CJ summarises the common ways in which compliance with the development standard may be demonstrated as unreasonable or unnecessary. This is repeated in *Initial Action* at [16]. In the Applicant's written request, the first method described in *Initial Action* at [17] is used, which is that the objectives of the Minimum Subdivision Lot size standard are achieved notwithstanding the numeric non-compliance.

The **first objective of Section 4.1** is "*to ensure lot sizes cater for a variety of development*" The written request states the proposal will allow the lot owner of the adjacent property to consolidate the new lot with the bigger lot at 18 Ballast Road after the lot owner purchases the new lot from Council. Whilst it is acknowledged that as a stand alone lot of 58.5sqm would not facilitate a lot size to cater to a variety of development, the consolidation of this lot with the adjoining property at 18 Ballast Point Road would ensure consistency with this objective. Accordingly, the breach is consistent with the first objective.

The **second objective of Section 4.1** is "*to ensure lot sizes do not result in adverse amenity impacts.*" The written request states the proposal does not seek to undertake any physical works, as such the proposed lot size will not result in any additional adverse amenity impacts to the streetscape or adjoining properties. The use of the subject site will remain the same, the subdivision simply allows private ownership by the owner of the adjacent property for use as the backyard or parking space. Accordingly, the breach is consistent with the second objective.

The **third objective of Section 4.1** is "*to ensure lot sizes deliver high quality architectural, urban and landscape design*" The written request states, the lot size proposed will ensure the adjacent property at 18 Ballast Point Road once consolidated will retain good internal and external amenity. The subdivision will not present changes to the built form as viewed from the streetscape. Accordingly, the breach is consistent with the third objective.

The **fourth objective of Section 4.1** is "*to provide a pattern of subdivision that is consistent with the desired future character*". The written request states the proposal is consistent with

the pattern of subdivision in the surrounding area namely the precedent set by the neighbouring property at 16 Ballast Point Road in 2016 (D/2016/281) which similarly acquired the adjacent portion of the road and consolidated it into their site similarly to this application. Accordingly, the breach is consistent with the fourth objective.

The **fifth objective of Section 4.1** is *“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.

As the proposal achieves the objectives of the Minimum subdivision lot size standard, compliance is considered unreasonable and unnecessary in this instance.

Whether there are sufficient environmental planning grounds to justify contravening the development standard

Pursuant to Section 4.6(3)(b), the Applicant advances 3 environmental planning grounds to justify contravening the Minimum Subdivision Lot development standard. Each will be dealt with in turn:

Environmental Planning Ground 1 - *The proposed subdivision lot relates to existing council land and does not seek to increase residential density by proposing a dwelling to be built on the new lot or a consolidated lot.* The newly created lot will be required to be consolidated and accommodates and formalises existing arrangements on the site. It is agreed that no works or additional GFA is sought and physically there are no discernible changes proposed to the site from a streetscape perspective.

Environmental Planning Ground 2 - *The proposed subdivision compliments the subdivision pattern of the neighbouring property at 16 Ballast Point Road in terms of lot size and alignment of boundary on the Yeend Street frontage.* This environmental planning ground is accepted because while the proposed lot size is smaller than the minimum required, the proposal to consolidate the new lot with 18 Ballast Point Road ensures the continuation of the existing development pattern and results in a lot consistent with the adjoining property at 16 Ballast Point Road.

Environmental Planning Ground 3 - *The contravention to the minimum lot size standard does not result in an overdevelopment of the new lot as no actual works are proposed* This environmental planning ground is accepted because the proposal only looks to legitimise the current use of the land being access stair and vehicle parking associated with 18 Ballast Point Road and in essence reiterates Ground 1.

Cumulatively, the grounds are considered sufficient to justify contravening the development standard.

Whether the proposed development meets the objectives of the development standard, and of the zone

The objectives of the R1 General Residential zone under the *IWLEP 2022* are:

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

Council accepts the Applicant’s submissions in the written request that the relevant objectives of the R1 General Residential zone are met.

As stated above, the applicant has submitted a written request demonstrating that compliance with the development standard would be unnecessary and unreasonable in this case and has provided sufficient environmental planning grounds to justify a variation to the development standard as follows:

- The underlying object of this development standard is to control residential development to ensure that created lots are of a suitable size and dimension to accommodate residential development that is compatible with surrounding residential development. The subdivision achieves this intent as the proposed lot will be consolidated with the adjoining residential lot that is occupied by an existing dwelling creating a residential lot that is of a similar size to surrounding residential lots and retaining the existing subdivision pattern of this residential precinct; and
- This standard is considered to be unreasonable and unnecessary in this case as there is no intention for the subdivided lot to be used as a stand alone lot for further residential development but will need to be consolidated with the adjoining residential lot. Hence the subdivision will not adversely affect the amenity of this locality with the existing rocky outcrop being retained and the subdivision will not impact the existing road reserve in terms of traffic and pedestrian movements or on street car parking facilities. The proposed subdivision is considered to be a positive long term outcome for this residential area.

As indicated above, Council is also satisfied that the development meets the objectives of the minimum subdivision lot size development standard. As the proposal is consistent with both the objectives of the zone and the standard, it is considered in the public interest.

For the reasons outlined above, it is recommended the section 4.6 exception be granted.

Part 5 – Miscellaneous provisions

Section	Compliance	Compliance
Section 5.10 Heritage conservation	The road reserve located to the rear of No. 18 Ballast Point Road, fronting Yeend Street, is located within the Birchgrove and Ballast Point Heritage Conservation Area (C29), listed under Schedule 5 of the Inner West LEP 2022	Yes

Section	Compliance	Compliance
	<p>The proposal achieves the objectives of this section as follows:</p> <ul style="list-style-type: none"> • The subdivision of the land, with the eventual aim of sale to the owner of the residence above, does not have a heritage impact. • The Statement of Environmental Effects for this subdivision proposal notes that the subdivision incorporates the natural landscape features within the proposed boundary line and that no works are proposed as part of this application. The SoEE concludes that there is no heritage impact as no works are proposed. This conclusion is concurred with. <p>Given the above the proposal preserves the environmental heritage of the Inner West</p>	

Part 6 – Additional local provisions

Section	Proposed	Compliance
Section 6.1 Acid sulfate soils	<ul style="list-style-type: none"> • The site is identified as containing Class 5 acid sulfate soils. The proposal is considered to adequately satisfy this section as the application does not propose any works that would result in any significant adverse impacts to the watertable. 	Yes

B. Development Control Plans

Summary

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

LDCP 2013	Compliance
Part A: Introductions	
Section 3 – Notification of Applications	Yes
Part B: Connections	N/A
Part C	
C1.0 General Provisions	Yes
C1.1 Site and Context Analysis	Yes
C1.4 Heritage Conservation Areas and Heritage Items	Yes – see discussion

C1.6 Subdivision	Yes – see discussion
C1.7 Site Facilities	Yes
C1.8 Contamination	Yes
C1.19 Rock Faces, Rocky Outcrops, Cliff Faces, Steep Slopes and Rock Walls	Yes
Part C: Place – Section 2 Urban Character	
C2.2.2.6 Birchgrove Distinctive Neighbourhood	Yes
Part C: Place – Section 3 – Residential Provisions	
C3.1 Residential General Provisions	Yes
Part C: Place – Section 4 – Non-Residential Provisions	
	N/A

The following provides discussion of the relevant issues:

C1.4 Heritage Conservation Areas and Heritage Items

As there are no works proposed and the existing rockface is to be retained, the subdivision of the unused roadway to be consolidated into the adjoining lot at 18 Ballast Point Road to legitimise the existing use of pedestrian access and vehicular parking will have no adverse heritage impacts.

C1.6 Subdivision

The proposed lot does not satisfy the 200sqm minimum lot size. This has been discussed in detail in the previous section of this report and given that the proposed lot is to be consolidated with the adjoining residential lot the proposed subdivision is considered acceptable. The proposed subdivision is considered to be consistent with the prevailing subdivision and will not physically change the existing road or associated services. Furthermore the proposed subdivision is not likely to impact onto the existing rocky outcrop or embankment along this section of Yeend Street.

C. The Likely Impacts

These matters have been considered as part of the assessment of the development application. It is considered that the proposed development will not have significant adverse environmental, social or economic impacts upon the locality.

D. The Suitability of the Site for the Development

The proposal is of a nature in keeping with the overall function of the site. The premises are in a residential surrounding and amongst similar uses to that proposed.

E. Submissions

The application was required to be notified in accordance with Council's Community Engagement Strategy between 14 May 2024 to 28 May 2024.

No submissions were received

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.

This has been achieved in this instance.

6. Referrals

The following internal referrals were made, and conclude the following;

- Heritage Specialist: no objection to the proposed development
- Property: no objection to the proposed development, a contract of sale is being prepared to facilitate the subdivision and registration

7. Recommendation

- A. The applicant has made a written request pursuant to Section 4.1 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 Subdivision 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/2024/0352 for the proposed subdivision to create a new lot behind the subject site fronting Yeend Street Birchgrove at 18 Ballast Point Road, Birchgrove subject to the conditions listed in Attachment A below

Attachment A – Recommended conditions of consent

CONDITIONS OF CONSENT

GENERAL CONDITIONS

Condition								
1.	Documents related to the consent							
	The development must be carried out in accordance with plans and documents listed below:							
	<table border="1"> <thead> <tr> <th>Plan, Revision and Issue No.</th> <th>Plan Name</th> <th>Date Issued/Received</th> <th>Prepared by</th> </tr> </thead> <tbody> <tr> <td>1431-S1</td> <td>Proposed Subdivision</td> <td>20/10/2021</td> <td>M. Y. XU & Co Surveyors & Development Consultants</td> </tr> </tbody> </table>	Plan, Revision and Issue No.	Plan Name	Date Issued/Received	Prepared by	1431-S1	Proposed Subdivision	20/10/2021
Plan, Revision and Issue No.	Plan Name	Date Issued/Received	Prepared by					
1431-S1	Proposed Subdivision	20/10/2021	M. Y. XU & Co Surveyors & Development Consultants					
As amended by the conditions of consent.								
Reason: To ensure development is carried out in accordance with the approved documents.								

SUBDIVISION WORK

BEFORE ISSUE OF A SUBDIVISION CERTIFICATE

Condition	
2.	Prior to the issue of Subdivision Certificate
	<p>Prior to the issue of a Subdivision Certificate, the applicant shall submit an original plan of subdivision plus six (6) copies for Council's endorsement. The following details shall also be submitted:</p> <ul style="list-style-type: none"> a) Evidence that all conditions of Development Consent have been satisfied. b) Evidence of payment of all relevant fees c) The 88B instrument plus six (6) copies d) A copy of the Section 73 Compliance Certificate issued by Sydney Water. <p>Reason: To ensure development is completed before the subdivision certificate is released.</p>

<p>3.</p>	<p>Consolidation of Lots The proposed lot shall be consolidated with Lot 88 in DP 1278099 (i.e. No 18 Ballast Point Road) within two months of purchase of this lot by the owners of this lot. Reason: To ensure the proper disposition of land</p>
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Attachment B – Plans of proposed development

Attachment "B"

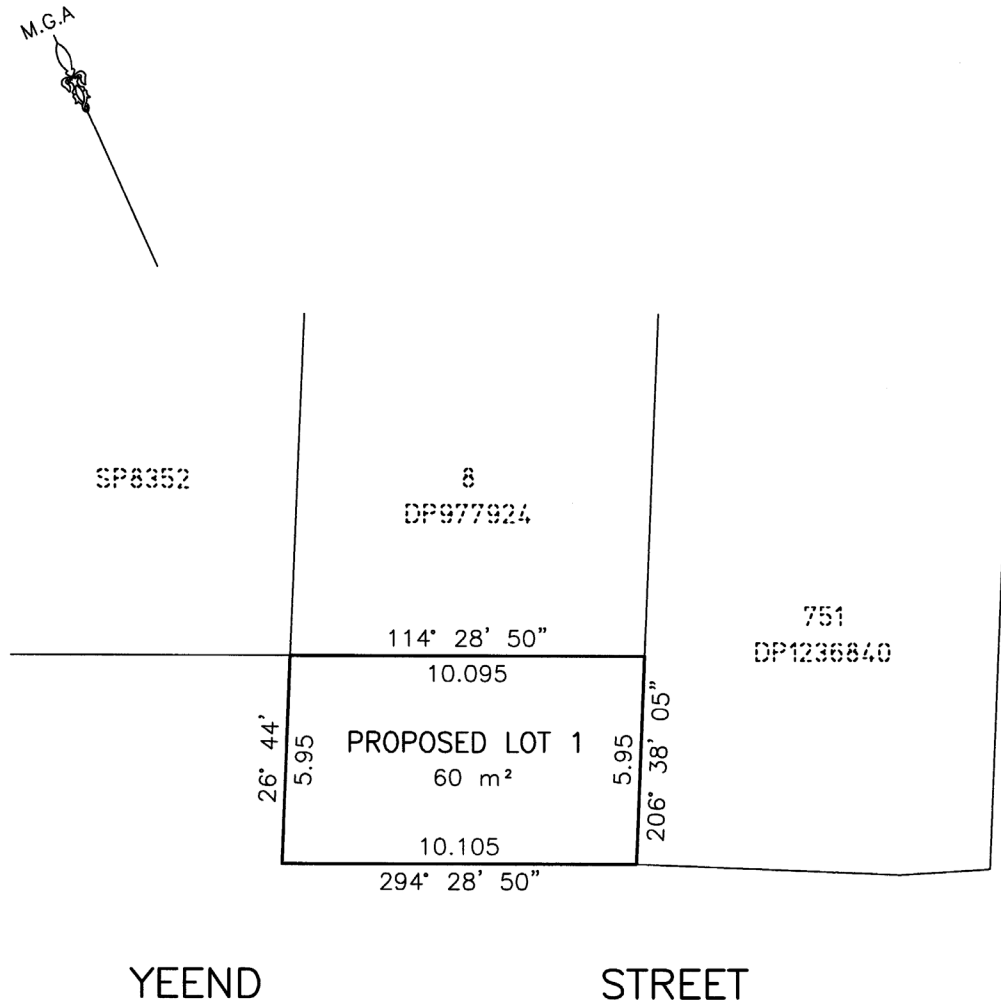
M. Y. XU & Co.

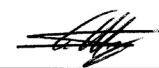
SURVEYORS & DEVELOPMENT CONSULTANTS
A. B. N. 82 357 803 551

162 Murray Farm Road
Beecroft NSW 2119
Tel: (02) 8812 3029
Email: land@landmarksurveyors.com.au

SKETCH OF PROPOSED SUBDIVISION OF
PART OF YEEND STREET, BIRCHGROVE

REF.: 14831-S1
DATE: 20/10/2021





 MARTIN XU
 REGISTERED SURVEYOR

NOTE:
AREA AND DIMENSIONS ARE SUBJECT TO FINAL SURVEY.

Document Set ID: 39378292
Version: 1, Version Date: 06/05/2024

Attachment C – Section 4.6 Exception to Development Standards

Clause 4.6 Variation to Minimum Subdivision Lot Size
Part of Yeend Street Road Reserve adjacent to 18 Ballast Point Road, Birchgrove
Torrens Title Subdivision (updated 8 July 2024)

**CLAUSE 4.6 REQUEST FOR VARIATION TO
CLAUSE 4.1 (MINIMUM SUBDIVISION LOT SIZE)
OF
INNER WEST LOCAL ENVIRONMENTAL PLAN
2022 (IWLEP2022)**

**Part of Yeend Street Road Reserve adjacent to 18
Ballast Point Road,
Birchgrove**

8 JULY 2024

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Clause 4.6 Variation to Minimum Subdivision Lot Size
Part of Yeend Street Road Reserve adjacent to 18 Ballast Point Road, Birchgrove
Torrens Title Subdivision (updated 8 July 2024)

1.0 Introduction

This written request seeks to vary a development standard pursuant to the provisions of Clause 4.6 of Inner West Council Environmental Plan 2022 (**IWLEP2022**), the relevant clause being Clause 4.1 Minimum Subdivision Lot Size.

Property Description: Part of Yeend Street Road Reserve adjacent to 18 Ballast Point Road, Birchgrove

Development: Torrens title subdivision of council land

Development: Standard: Minimum subdivision lot size

This written request has been prepared for the lot owner of 18 Ballast Point Road, Birchgrove (the **Adjacent Property**), to support the development application (DA/2024/0352) for the proposed subdivision of part of Yeend Street Road Reserve (the **Subject Site**) which adjoins the rear of the Adjacent Property. The relevant plans relied upon for the proposed subdivision of the Subject Site is the detailed survey plan prepared by M.Y. XU & Co referred to in Figure 3.

The relevant minimum subdivision lot size control standard under Clause 4.1 and shown on lot size map 007 under IWLEP2022 is 200m². The proposal seeks to create a new lot having an area of approximately 58.5m². Accordingly, the proposed new lot is less than the minimum required 200m².

The minimum subdivision lot size is a development standard for the purposes of the *Environmental Planning and Assessment Act 1979* NSW (the **EPA Act**).

This written request to vary the minimum subdivision lot size development standard has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and the various principles applied in the following NSW case law:

- a) *Winter Property Group Limited v North Sydney Council* [2001] NSWLEC 46;
- b) *Wehbe v Pittwater Council* [2007] NSWLEC 827;
- c) *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
- d) *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90;
- e) *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248;
- f) *Micaul Holdings Pty Ltd v Randwick City Council* [2015] NSWLEC 1386;
- g) *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7;
- h) *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
- i) *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245;
- j) *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130
- k) *Big Property Pty Ltd v Randwick City Council* [2021]; and
- l) *SJD DB2 Pty Ltd v Woollahra Council* [2020] NSWLEC 1112

This written request addresses those relevant provisions of Clause 4.6 of IWLEP2022 and sets out the reasons for why strict application of the minimum subdivision lot size standard in this case is *unreasonable* and *unnecessary*. Further, it demonstrates:

Clause 4.6 Variation to Minimum Subdivision Lot Size
 Part of Yeend Street Road Reserve adjacent to 18 Ballast Point Road, Birchgrove
 Torrens Title Subdivision (updated 8 July 2024)

- That the proposed subdivision remains consistent with the objectives of the development standard under Clause 4.1 of the IWLEP2022; and
- That the proposed subdivision is consistent with the objectives of the R1 General Residential Zone; and
- That there are sufficient environmental planning grounds to justify the variation; and
- That the variation is consistent with the precedent set by 16 Ballast Point Road in 2016 and the resultant site is consistent with the established residential character.

2.0 Site Background

The Subject Site is commonly known as Part of Yeend Street Road Reserve adjacent to the rear of 18 Ballast Point Road, Birchgrove, and will not have a legal description (Folio Identifier) until the plan of subdivision is registered with LRS NSW.

The subject site is located within a predominantly suburban neighbourhood, being situated on the northern side of Yeend Street approximately 80m west from the entrance to Ballast Point Park. The Subject Site is generally rectangular in shape and follows the subdivision precedent of the neighbouring property at 16 Ballast Point Road in 2016 (D/2016/281). The total site area is approximately 58.5m², having a frontage of 10.1m and depth of 5.65m and 5.95m on each respective side.

The Subject Site is predominantly covered by a concrete slab, staircase to the Adjacent Property, rocky outcrop and plantings.

Yeend Street is characterized as a suburban streetscape with pathways on either side of the street. The housing stock on Yeend Street is predominantly low density residential and containing similar contemporary building styles.

The Subject Site is located within the R1 General residential Zone under the provisions of the IWLEP2022. The subject site does not contain a heritage listed item, however, is located within the Birchgrove and Ballast Point Heritage Conservation Area (HCA) (#C08)

The subject site is close to public park space, services and public transportation.



Figure 1: Map showing the Adjacent Property and arrow point the Subject Site (proposed development) (Source: LPI SIX Maps)

Clause 4.6 Variation to Minimum Subdivision Lot Size
 Part of Yeend Street Road Reserve adjacent to 18 Ballast Point Road, Birchgrove
 Torrens Title Subdivision (updated 8 July 2024)

3.0 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 of IWLEP2022, which 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:

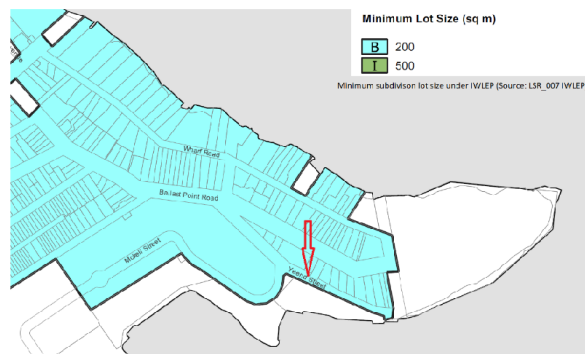


Figure 2: Minimum subdivision lot size under IWLEP (Source: LSR_007 IWLEP2022)

Clause 4.6 Variation to Minimum Subdivision Lot Size
 Part of Yeend Street Road Reserve adjacent to 18 Ballast Point Road, Birchgrove
 Torrens Title Subdivision (updated 8 July 2024)

4.0 Nature of Variation Sought

The Subject Site has a minimum allotment size of 200m². The proposed subdivision seeks to create a new lot with an area of approximately 58.5m² which is 141.5m² smaller than the minimum lot size for subdivision which is a percentage variation of minus (-) 70.75%.

Proposed Lot

Lot size = 58.5m ²	%	m ²
Minimum =	100%	200
Proposed =	29.25%	58.5
Variation =	-70.75%	-141.5

The proposed plan of subdivision is shown below:

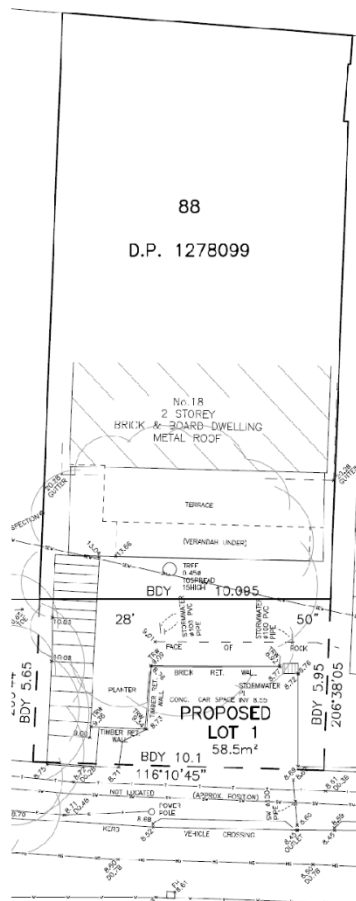


Figure 3: Proposed plan of subdivision by M.Y. XU & Co dated 3 May 2023

Clause 4.6 Variation to Minimum Subdivision Lot Size
Part of Yeend Street Road Reserve adjacent to 18 Ballast Point Road, Birchgrove
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5.0 Minimum Subdivision Lot Size – Development Standard

A development standard is defined in section 1.4 of the 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 control standard as defined in the EPA Act.

6.0 Clause 4.6 Exception to development standard in the Inner West Local Environmental Plan 2022

The objective of Clause 4.6 is to provide an appropriate degree of flexibility in applying certain development standards to particular development and to achieve better outcomes for and from development by allowing flexibility in particular circumstances.¹

The following are responses to the *relevant* Clause 4.6 provisions of the IWLEP2022²:

Clause 4.6(2) states 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

¹ See Clause 4.6 (1) of the Inner West Local Environmental Plan 2022
<https://legislation.nsw.gov.au/view/html/inforce/current/epi-2022-0457#sec.4.6>

² Ibid - Revised Clause 4.6 test commencing 1 November 2023

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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 is not expressly excluded from the operation of Clause 4.6 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 to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

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

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

The proposed development does not comply with the minimum subdivision lot size development standard pursuant to clause 4.1 of the IWLEP2022. However, strict compliance is considered to be *unreasonable* or *unnecessary* in the circumstances of this case as detailed in this written request.

There are sufficient environmental planning grounds in this written request to justify the contravention of the development as detailed in paragraph 8 of this written request.

Clause 4.6(4) is now an administrative clause requiring the consent authority to keep a record of its assessment carried out under subclause (3).

Clauses 4.6 (5) to 4.6 (8) (inclusive) are not relevant to this written request for the proposed development.

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

In *Wehbe v Pittwater Council* (2007) NSW LEC 827 (**Wehbe**) Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:

"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."³

³ *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]

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The judgement in *Wehbe* goes on to state that:

“The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”⁴

The proposed variation from the development standard is assessed against the required tests in Clause 4.6. In addition, in addressing the requirements of subclause 4.6(3), Preston CJ has identified 5 common methods which an applicant may use to establish that compliance with a development standard is *unreasonable* or *unnecessary* in the circumstances of the case (with emphasis placed on numbers 1 and 2 for the purposes of this Clause 4.6 variation [in underline]):

1. The first method is to show that the objectives of the development standard are achieved notwithstanding non-compliance with the development standard⁵; (applicable)
2. The second method is by establishing that the underlying objective or purpose is not relevant to the development, such that compliance is unnecessary⁶; (applicable)
3. The third method is by establishing that the underlying purpose is defeated or thwarted if compliance is required, such that compliance becomes unreasonable⁷; (not applicable)
4. The fourth method is by illustrating that the Council itself has granted development consent that departs from the standard, and arguing from this that the development standard has been ‘virtually abandoned or destroyed,’ rendering it unnecessary and unreasonable⁸; (not applicable)
5. The fifth method is establishing that the zoning area of the proposed development was ‘unreasonable or inappropriate’ so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be

⁴ Ibid [43]

⁵ Ibid [42]

⁶ Ibid [45]

⁷ Ibid [46]

⁸ Ibid [47]

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unreasonable and unnecessary. That is, the particular parcel of land should not have included in the particular zone.⁹ (**not applicable**)

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ refer to the decision in *Wehbe* and states:

“...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.”¹⁰

Having considered the above, the applicant relies on the *first method* demonstrating that compliance is unnecessary or unnecessary because the objectives of the development standard are achieved notwithstanding a variation to the standard.

In dealing with the development 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 purpose of the development standard is at Clause 4.1 of the IWLEP2022 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 proposed development meets the objectives of Clause 4.1 based on the following assessment:

Objective (a) – The proposal will allow the lot owner of the Adjacent Property to consolidate the new lot with the bigger lot at 18 Ballast Road after the lot owner purchase the new lot from council.

Objective (b) – The proposal does not seek to undertake any physical works, as such the proposed lot size will not result in any additional adverse amenity impacts to the streetscape or adjoining properties. The use of the Subject Site will remain the same, the subdivision simply allows private ownership by the owner of the Adjacent Property for use as the backyard or parking lot.

Objective (c) – The lot size proposed will ensure the Adjacent Property will retain good internal and external amenity. The subdivision will not present changes to the built form as viewed from the streetscape.

⁹ Ibid [48]

¹⁰ *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 [16]

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Objective (d) – The proposal is consistent with the pattern of subdivision in the surrounding area namely the precedent set by the neighbouring property at 16 Ballast Point Road in 2016 (D/2016/281).

Objectives (e) – The Subject Site is not located on riparian or environmentally sensitive land, as such this objective is not applicable to the proposal.

It is unnecessary to require compliance with the minimum lot size development standard due to the following reasons:

1. This is not a development to subdivide an existing lot into two smaller lots and to have a separate dwelling on each new lot.
2. The contravention to the minimum lot size subdivision lot size standard is a result of subdividing council land and then selling it to the owner of the Adjacent Property as per Inner West council resolution passed on 12 February 2024. This is a unique case.
3. From a physical inspection, it is not obvious that this council land is part of the road reserve rather than being the backyard or the parking lot of the Adjacent Property. As such, the proposed subdivision will not have an adverse impact on the Birchgrove and Ballast Point Heritage Conservation Area with respect to the established subdivision pattern.
4. It is unreasonable to require compliance with the development standard as Council has authorised the sale of the subdivided lot to the owner of the Adjacent Property after a lengthy period of consultation and public notice.
5. There is precedent to justify the non-compliance as part of the road adjacent to the 18 Ballast Point Road, but behind 16 Ballast Point Road, was closed and sold to the lot owner of 16 Ballast Point Road to form a consolidated lot with the existing lot for 16 Ballast Point Road (notice of determination dated 13 September 2016 DA No D/2016/281)
6. The resultant boundary of the subdivided lot will be in alignment with the neighbouring property at 16 Ballast Point Road on its Yeend Street frontage.
7. The amenity impacts of the adjoining properties arising from the development are negligible.
8. The proposed development is consistent with the prevailing low-density scale of the area. Accordingly, the proposed demonstrates alignment with the R1 General Zone objectives notwithstanding the minimum lot size non-compliance.

The applicant also relies on the *second method* demonstrating that compliance is not relevant to the development because:

- a. This is not a proposal to subdivide land to create multiple dwellings.
- b. There are no actual works on the Subject Site planned.

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- c. The proposed development is a part road closure to create a new lot for the specific purpose of selling it to the adjacent lot owner in accordance with Inner West Council resolution on 13 February 2024 (C0224(1) Item 41).

In view of the above, it is submitted that compliance with the standard is both unreasonable and unnecessary as the variation and development meets the objectives of the standard and is consistent with the subdivision precedent set by 16 Ballast Point Road.

8.0 Clause 4.6(3)(b): there are sufficient environmental planning grounds to justify the contravention of the development standard

In *Four2Five v Ashfield Council*¹¹, Pain J held that to satisfy Clause 4.3(3)(b), a clause 4.6 request must do more than demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate that there are other environmental planning grounds that justify contravening the development standard, preferably being grounds that are specific to the site.

In *Initial Action Pty Ltd v Woollahra Municipal Council*¹², Preston CJ held that in order for there to be ‘sufficient’ environmental planning grounds to justify a written request under 4.6, the aspect of the development that contravenes the development standard should be the focus (as opposed to the development as a whole) of any analysis.

Pursuant to Clause 4.6(3)(b) of the IWLEP2022, there are sufficient environmental planning grounds to justify the contravention to the minimum subdivision lot size development standard because:

1. The proposed subdivision lot relates to existing council land and does not seek to increase residential density by proposing a dwelling to be built on the new lot or a consolidated lot.
2. The proposed subdivision compliments the subdivision pattern of the neighbouring property at 16 Ballast Point Road in terms of lot size and alignment of boundary on the Yeend Street frontage.
3. The contravention to the minimum lot size standard does not result in an overdevelopment of the new lot as no actual works are proposed.
4. The proposed subdivision does not necessitate any physical changes to the landscape.
5. There are no adverse environmental impacts directly attributable to the proposed subdivision given that there is not material change to the landscaping on the Subject Site.
6. The proposed contravention does not result in any significant environmental or amenity impacts when compared with a complying lot size. In *WZSydney Pty Ltd v Ku-ring-gai Municipal Council*, Dickson C confirmed that the

¹¹ *Four2Five v Ashfield Council* [2015] NSWLEC 90

¹² *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118

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avoidance of impacts is an environmental planning ground as it promotes 'good design and amenity of the built environment' being an objective of the EPA Act.¹³

The contravention to the minimum subdivision lot size is consistent with the following relevant aims of the IWLEP2022 found at clause 1.2(2):

- a. 2(a) - The contravention will result in a subdivision of Council land that is a more efficient use of the energy and resources, given the new lot will be privately owned and maintained.
- b. 2(e) - The proceeds from the sale of the new lot can be used to facilitate economic growth and employment opportunities within Inner West.
- c. 2(g) - The contravention will result in a subdivision of Council land that the resultant boundary of the subdivided lot will be in alignment with the neighbouring property at 16 Ballast Point Road on its Yeend Street frontage.
- d. 2(h) & (i) - The contravention does not result in any adverse social, economic or environmental impacts, given there is no actual works proposed.

The contravention in lot size is also consistent with the following objects of the EPA Act found at Clause 1.3:

- a. 1.3 (c) - The contravention will promote the orderly and economic use and development of council land by allowing the new lot to be managed and maintained by private ownership. The proposal will not cause adverse environmental impacts to neighbouring properties.
- b. 1.3 (f) - The contravention will result in a subdivision of council land that is compatible with the subdivision precedent set by 16 Ballast Point Road as already noted in this written request above.
- c. 1.3 (g) - The contravention to the lot size control does not result in unreasonable amenity impacts to adjoining properties as no actual works are proposed.

9.0 Environmental Planning and Assessment Regulation 2021 - Clause 35B Additional requirements for development applications involving contravention of development standards (formerly Clause 4.6 (4)(a)(i) of the IWLEP2022)

As demonstrated in this written request above, the proposed development has satisfied the matters required to be demonstrated in Clause 4.6(3) of the IWLEP2022 by providing a written request that demonstrates:

1. Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, by establishing that the objectives of the development standard are achieved notwithstanding the non-compliance.

¹³ *WZSydney Pty Ltd v Ku-ring-gai Municipal Council* [2023] NSWLEC 1065 [78]

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2. The environmental planning grounds relied on are sufficient to justify the development standard.

In accordance with the findings of Preston CJ in *Initial Action v Woollahra Municipal Council*¹⁴, the consent authority under clause 4.6 (4)(a)(i) must only be satisfied that the request addresses clause 4.6 (3). Under Clause 4.6 (4)(a)(i) the consent authority is not to determine in their opinion whether the request satisfies the requirements of Clause 4.6 (3)(a), just that the request has been made and that these items have demonstrated.¹⁵

The relevant items in Clause 4.6 (3) have been demonstrated in this written request above.

10.0 The proposed development is in the public interest

Notwithstanding the removal of clause 4.6 (4)(a)(ii) from IWLEP2022 since November 2023, it is noted that consent authorities are obliged to consider the public interest requirement.

It has been held by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* in respect of the former ‘public interest requirement’ in Clause 4.6 (4)(a)(ii), that:

“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.”¹⁶

The proposed development is in the public interest because it is consistent with the objectives of the applicable minimum subdivision lot size standard and the objectives for development in the R1 General Residential Zone in accordance with the planning assessment provided as follows:

Objective	Review
To provide for the housing needs of the community	Not relevant - No additional new dwelling is proposed.
To provide for a variety of housing types and densities	Not relevant - No additional new dwelling is proposed.

¹⁴ Ibid above 12

¹⁵ Ibid [86]

¹⁶ Ibid [27]

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<p>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</p>	<p>The proposed subdivision does not propose the change of use of land, but it will allow the lot owner of the Adjacent Property to have legal ownership of her backyard.</p>
<p>To provide residential development that maintains the character of built and natural features in the surrounding area</p>	<p>The proposed subdivision of council land is consistent with the subdivision of the neighbouring property at 16 Ballast Point Road as noted in this written request above. The resultant boundary of the subdivided lot will be in alignment with 16 Ballast Point Road on its Yeend Street frontage.</p> <p>The proposed subdivision maintains the visual characteristic of the streetscape because no actual work is proposed.</p>


11.0 Conclusion

The proposed subdivision of council land does not strictly comply with the minimum subdivision lot size control as prescribed by Clause 4.1 of the IWLEP2022. Having assessed the likely effects arising from this non-compliance, we are satisfied that the objectives of Clause 4.6 of the IWLEP2022 are satisfied as the breach to the development control does not create any environmental impacts.

Consequently, strict compliance with this development standard is unreasonable and unnecessary in this particular case and that the use of Clause 4.6 of the IWLEP2022 to vary this development control is applicable in the context of this case.

Based on the above, it is to conclude that strict compliance with the minimum subdivision lot size is not necessary, and a better outcome is achieved for this determination by allowing flexibility in the application and to progress Inner West Council resolution passed on 13 February 2024 (C0224(1) Item 41).

Please do not hesitate to contact the undersigned if you have any questions.



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Attachment D – Council Meeting Minutes



Council Meeting

13 February 2024

Langford, Lockie, Scott, Shetty, Smith, Stamolis, Stephens and Tsardoulis
Against Motion: Nil

C0224(1) Item 41 Sale of part of Yeend Street, Birchgrove

Motion: (Scott/Atkins)

1. That Council approve closing the part of Yeend Street, Birchgrove noted in this report (subject to survey) by notice published in the NSW Government Gazette, in accordance with Section 38D of the *Roads Act 1993*.
2. That Council authorise the placing of a Notice of partial road closure in the Government Gazette.
3. That Council note the land formerly part of Yeend St will be classified as operational land for the purposes of the *Local Government Act 1993*.
4. That Council authorise the sale of the land to the adjoining landholder, as detailed in the *Confidential Attachment 1*.
5. That Council delegate Authority to the General Manager to sign all associated documents for the survey, road closure and sale of this land.

Motion Carried

For Motion: Crs Atkins, Byrne, Da Cruz, D'Arienzo, Drury, Griffiths, Howard, Langford, Lockie, Scott, Shetty, Smith, Stamolis, Stephens and Tsardoulis

Against Motion: Nil

C0224(1) Item 1 Quarter two - Progress report on the Delivery Program 2022-26 and Operational Plan 2023/24 and Quarterly Budget Review Statement

Motion: (Drury/Langford)

1. That Council endorse the quarter two Progress Report on the Delivery Program 2022-26 and Operational Plan 2023/24.
2. That Council adopt the quarter two Budget Review 2023/24.

Motion Carried

For Motion: Crs Atkins, Byrne, Da Cruz, D'Arienzo, Drury, Griffiths, Howard, Langford, Lockie, Scott, Shetty, Smith, Stamolis, Stephens and Tsardoulis

Against Motion: Nil

Amendment (Langford/Da Cruz)

1. That in tandem with the preparation of Council's Biodiversity Strategy, Council officers prepare a report about threatened and unique species of flora and fauna in local parks and wild places across the Inner West.