

A large, light grey graphic element with rounded corners and a purple cutout on the right side. The cutout is a dark purple, irregular shape that fits into the right side of the grey shape.

Appendix F

Clause 4.6 Variation

CLAUSE 4.6 VARIATION REQUEST

Hare Street and Lennox Street, Casino

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Clause 4.6 Variation Request
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REPORT

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1 INTRODUCTION

This Clause 4.6 variation request accompanies a development application (DA) relating to land at Hare Street, Casino (Lots 85 – 87/DP755627 and Lots 1-2/DP545750) (“the site”). The DA, submitted to Richmond Valley Council is to carry out site preparation works including earthworks and associated engineering infrastructure works and services and subdivide the existing site from 5 into 46 residential lots (staged).

The purpose of this Clause 4.6 request is to address a variation to Clause 4.1C of *Richmond Valley Local Environmental Plan 2012* (RVLEP 2012). This variation request is a result of the proposed development not complying with the minimum lot size development standard for a battle-axe lot.

1.1 What is the environmental planning instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is RVLEP 2012.

1.2 What is the zoning of the land?

The zoning of the land is R1 General Residential pursuant to RVLEP 2012.

1.3 What are the objectives of the zone?

The relevant objectives of the R1 General Residential zone 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 ensure that housing densities are generally concentrated in locations accessible to public transport, employment, services and facilities.
- To minimise conflict between land uses within the zone and land uses within adjoining zones.

1.4 What is the Development standard being varied?

The development standard being varied is the "minimum lot size".

Under what Clause is the development standard listed in the EPI?

The development standard is listed under Clause 4.1C of the RVLEP 2012, and the minimum lot size is 740m² excluding the access handle to the site.

What are the objectives of the development standard?

The objectives of the minimum lot size development standard are set out below:

- (a) to ensure that lot sizes have a practical and efficient layout to meet their intended use, and*
- (b) to prevent the fragmentation of rural lands.*

1.5 What is the numeric value of the development standard in the EPI?

The EPI seeks to have battle-axe lots with a minimum lot size requirement of 740m², excluding the access handle. The following lot sizes are proposed:

Lot 31 - 725m²

1.6 Matters to be considered under Clause 4.6 of the relevant EPI

1.6.1 How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

The NSW Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council [2007] NSW LEC 827*. Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary, was whether the proposal met the objectives of the standard regardless of the variation. Under *Four2Five*, whilst this can still be considered under this heading, consideration of the remaining four (4) ways in *Wehbe* was considered to be warranted.

The following discussion provides a response to each of these five (5) "tests".

Test 1. The objectives of the standard are achieved notwithstanding noncompliance with the standard;

Consistency with the objectives, and the absence of any environmental impacts, would demonstrate that strict compliance with the minimum lot size standard would be both unreasonable and unnecessary. The contentions below demonstrate how this proposal is consistent with the objectives in Clause 4.1:

- (a) *to ensure that lot sizes have a practical and efficient layout to meet their intended use, and*
- (b) *to prevent the fragmentation of rural lands.*

All proposed lots more than comply with the minimum lot size development standard, other than Lot 3, which is 725m² (821m² including the access handle) or 98% of the minimum lot size. The limited variation will not result in a subdivision pattern that is inconsistent with what already exists in the locality. The existing low density residential character of the locality will not be altered and the proposed lot configuration ensures the lots can be adequately serviced. The lot size proposed represent a practical and efficient configuration will also allow future dwellings to be appropriately sized and located to ensure a good degree of open space and privacy as well as solar access.

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

We do not rely on this reason. The underlying objectives or purpose of the standard is relevant to the development and is achieved as outlined in Test 1 above.

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

Strict compliance with the minimum lot size in this case would unreasonably undermine Objectives (a) and (b) above. The proposed subdivision represents a practical and efficient layout which fulfils the principles of good design through a layout achieving connectivity and serviceability while responding appropriately to site constraints and opportunities. The land is located within the existing urban area of Casino and has ready access to a range of essential infrastructure services.

Test 4: The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;

We do not rely on this reason.

Test 5: The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

We do not rely on this reason.

For the reasons as set out above, it is considered that compliance with the standard is unreasonable and unnecessary in the circumstances of the case. Compliance in this instance would not result in a better planning outcome.

1.6.2 Sufficient Environmental Planning Grounds to Justify Contravention

The SEE prepared for this DA provides a holistic environmental planning assessment of the proposed development and concludes that there are sufficient environmental planning grounds to support the development. The proposed subdivision layout achieves connectivity and serviceability while responding appropriately to site constraints and opportunities. Future dwellings can be appropriately sized and located to ensure a good degree of open space and privacy as well as solar access. The proposed development also has positive social and economic benefits.

1.6.3 Is the variation in the public interest?

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the proposed development will be in the public interest and 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.

The objectives of the standard have been addressed above and are satisfied. Moreover, if strict compliance were to be achieved it is considered that the objectives of the standard would be defeated or thwarted.

The proposal is also consistent with the objectives of the R1 zone. It will ensure that housing is concentrated in a location accessible to public transport, employment, services and facilities and allow for a variety of housing types and densities.

1.6.4 Conclusion

In every instance, the objectives of the zone, as well as the objectives for the standard have been satisfied. Therefore, the variation to the minimum lot size standard is in the public interest.

1.7 Matters of state or regional significance (cl 4.6(5)(a))

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

1.8 The public benefit of maintaining the standard (cl 4.6(5)(b))

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

There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation of the minimum lot size standard.

1.9 Is the variation well founded?

This Clause 4.6 variation request is considered to be well founded as it demonstrates, as required by Clause 4.6 of the RV LEP 2012, that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development to achieve the objectives of the standard;
- To comply with the standard would thwart and defeat the achievement of those objectives inasmuch as the underlying objectives are to allow for development that represents the desired future character of the locality, encourages high quality urban form, ensure heights provide appropriate transition in built form and land use intensity and that taller buildings are located appropriately
- There are sufficient environmental planning grounds to justify the contravention;
- The development meets the objectives of the development standard and the objectives of the R1 zone, notwithstanding the variation;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard;
- The proposed variation will not hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the *Environmental Planning & Assessment Act 1979*; and
- The contravention does not raise any matter of State or Regional Significance.