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Clause 4.6 Exception to Development Standard for minimum lot size

Proposed Development

14 Lot Torrens Title Residential Subdivision

Property:

27 Lang Drive, Bolwarra Heights
1/DP1156433

Applicant:

SNL Building

Date:

September 2023

Document Control Sheet

Issue No.	Amendment	Date	Prepared By	Checked By
A	Draft	August 2023	RD	CM
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Limitations Statement

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Unless otherwise specified in this report, information and advice received from external parties during the course of this project was not independently verified. However, any such information was, in our opinion, deemed to be current and relevant prior to its use. Whilst all reasonable skill, diligence and care have been taken to provide accurate information and appropriate recommendations, it is not warranted or guaranteed and no responsibility or liability for any information, opinion or commentary contained herein or for any consequences of its use will be accepted by ADW Johnson or by any person involved in the preparation of this assessment and report.

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1.0 Introduction

SNL Building is seeking development consent from Maitland City Council for the subdivision of land at 27 Lang Drive, Bolwarra Heights. The subdivision represents a new large lot residential subdivision adjacent an existing large lot residential area. This Clause 4.6 report seeks to vary the minimum lot size for four (4) proposed lots.

The proposal was amended in response to feedback from Council, specifically that the Vegetated Riparian Zone (VRZ) should be accommodated on as few lots as possible to reduce the potential for adverse impacts on the riparian corridor from future land owners. To achieve this outcome, three (3) lots are proposed to be below the minimum lot size. The fourth lot proposed to be below the minimum lot size relates to proposed Lot 11 which, in order for the lot boundary to follow the existing right-of-carriageway boundary will be slightly undersized.

Clause 4.1 of the Maitland Local Environmental Plan (MLEP) 2011 requires that the size for any lot resulting from a subdivision of land is not to be less than the minimum size shown on the Lot Size Map in relation to that land.

As the current proposal does not satisfy this requirement it is necessary to lodge this request for an exception to the development standard. This report should be read in conjunction with the prepared Statement of Environmental Effects and subdivision plan.

A summary of the details of the site is at **Table 1**.

Table 1: Site details	
Site	27 Lang Drive, Bolwarra Heights
Site description	- 8.89ha - dual access (Hilldale Drive and Lang Drive) - access to Hunter Water reticulated services - mapped 2 nd order watercourse through site
Zone	R5 Large Lot Residential
Applicable EPIs	Maitland LEP 2011
Applicable DCP	Maitland DCP 2011
Minimum Lot Size	5,000sqm
Building Height	N/a
Floor Space Ratio	N/a
Heritage	N/a
Flood prone land	Yes
Bushfire prone land	Yes (Category 3 Grasslands and associated buffer)

2.0 Methodology

The mechanism that permits Council to consider a variation to a development standard is Clause 4.6 of the MLEP 2011.

A development standard is a provision of an environmental planning instrument or the Regulations. Development standards relate 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,
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,

The provisions of Clause 4.6 of the MLEP are replicated below.

4.6 Exceptions to Development Standards

- (1) *The objectives of this clause are as follows:*
 - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
 - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (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),*
 - (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.*

(b) the concurrence of the Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning 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 Planning Secretary before granting concurrence.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note—

When this Plan was made it did not contain land in Zone RU3 Forestry, Zone RU4 Primary Production Small Lots or Zone RU6 Transition.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(caa) clause 5.5,

(ca) clauses 6.1 or 6.2.

The Land & Environment Court has over the years developed a basis for the consideration of objections to development standards, initially in the context of SEPP 1 and then more recently with the introduction of clause 4.6 in standard template LEPs. This document has been prepared in consideration of key cases on Clause 4.6, including:

- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90;*

- Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7;
- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;
- RebelMH Neutral Bay Pty Ltd v North Sydney Council [2019] NNSWCA 130;
- SJD DB2 Pty Ltd v Woollahra Municipal Council (2020) NSWLEC 1112.

This report is structured to present the relevant planning background and context in the first instance and then addresses the relevant Clause 4.6 considerations.

3.0 Variation Sought

The standard to which exception is sought under Clause 4.6 of the MLEP 2011 is established by Clause 4.1 of the MLEP which prescribes minimum lot sizes for subdivision.

Clause 4.1 of the MLEP 2011 is reproduced below:

4.1 Minimum subdivision lot size

- (1) The objectives of this clause are as follows—
 - a) to ensure that lot sizes are able to accommodate development that is suitable for its purpose and consistent with relevant development controls,
 - b) to prevent the fragmentation of rural 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.

Table 2 sets out the details of the four (4) lots for which a reduction in the mapped minimum lot size is sought.

Table 2: Details of lots below minimum lot size			
Proposed Lot	Minimum lot size (m ²)	Size (m ²)	Variation (%) to development standard
Lot 1	5,000 sqm	4,506 sqm	9.88%
Lot 2	5,000 sqm	4,503 sqm	9.94%
Lot 11	5,000 sqm	4,759 sqm	4.8%
Lot 14	5,000 sqm	4,631 sqm	7.3%

The location of these within the context of the proposed subdivision layout is at **Figure 1**.

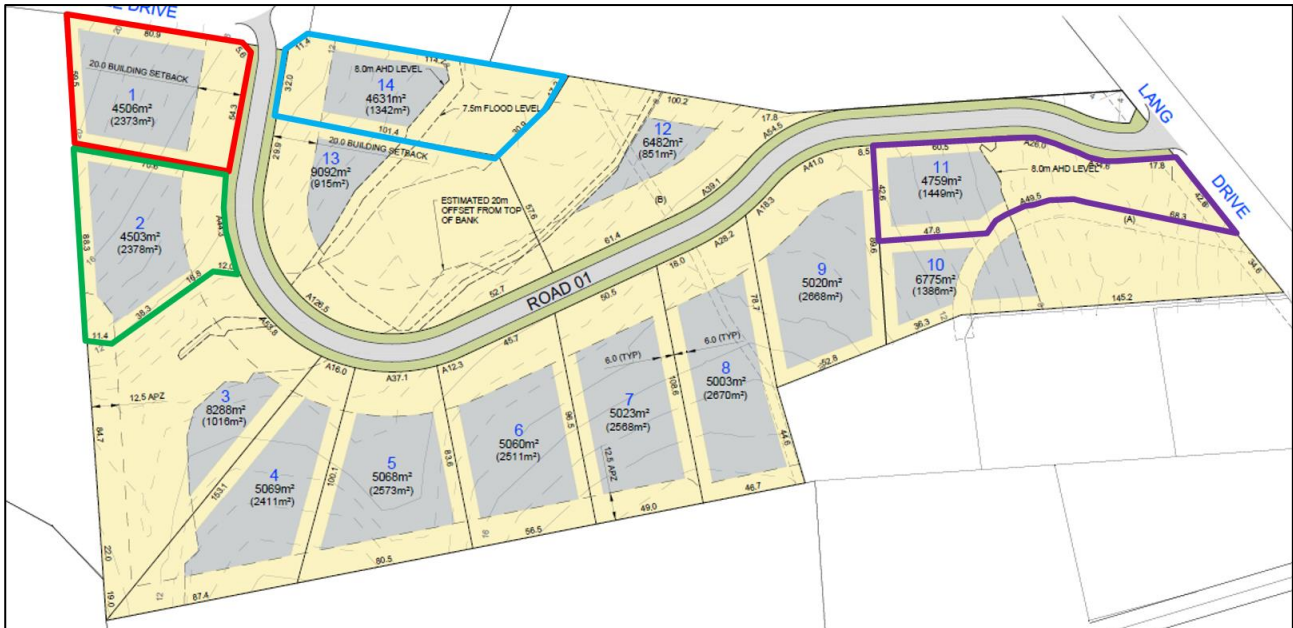


Figure 1: Location of lots proposed to be under minimum lot size (colour coded to Table 2)

4.0 Relevant Planning Context

Below outlines the relevant planning controls applicable to the proposal.

4.1 Maitland LEP 2011

Clause 2.2 – Zoning of land to which the Plan applies

The subject site is zoned R5 Large Lot Residential. An extract from the LEP showing the zoning of the site in the context of surrounding zones is provided at **Figure 2**.

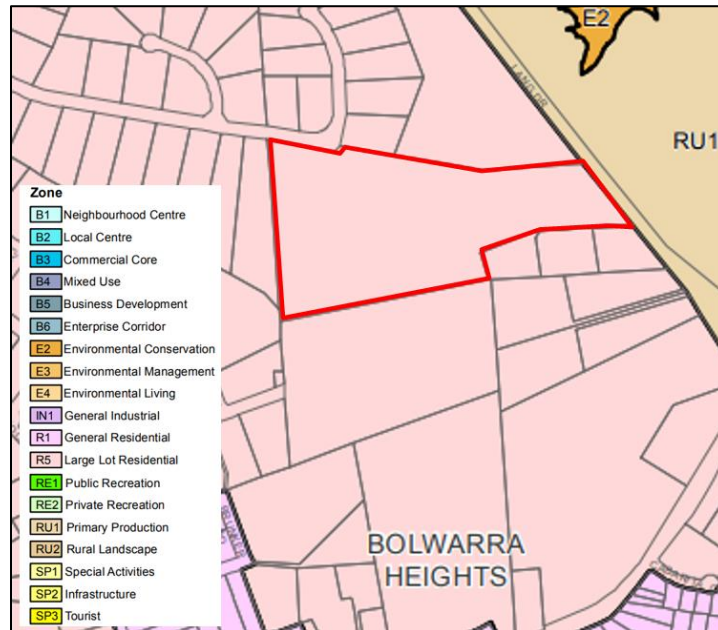


Figure 2: Zoning Extract from MLEP 2011

Clause 4.1 – Minimum Subdivision Size

The site is mapped as having a minimum lot size of 5,000sqm. An extract from the LEP showing the mapped minimum lot size is provided at **Figure 3**.

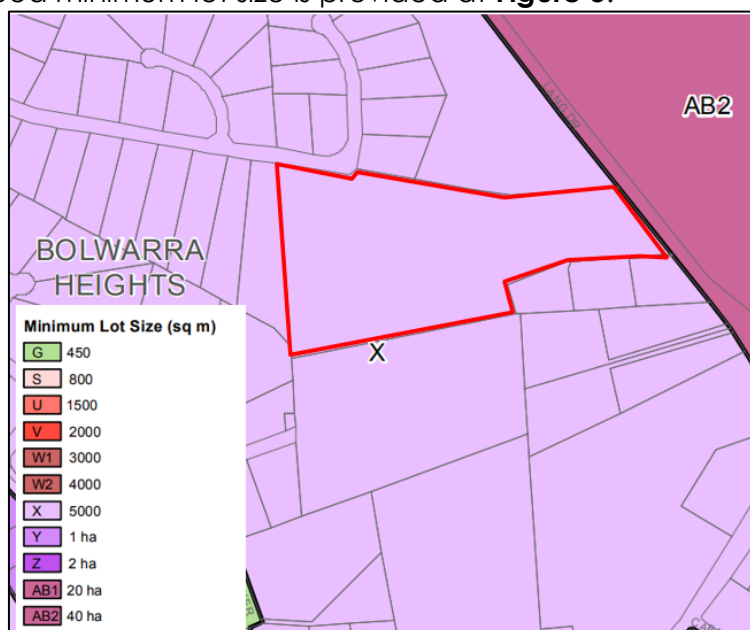


Figure 3: Minimum Lot Size Extract from MLEP 2011

Clause 7.4 – Riparian Land and Watercourses

The site is mapped as having a watercourse on-site. An extract from the MLEP 2011 showing the location of the mapped watercourse is at **Figure 4**.

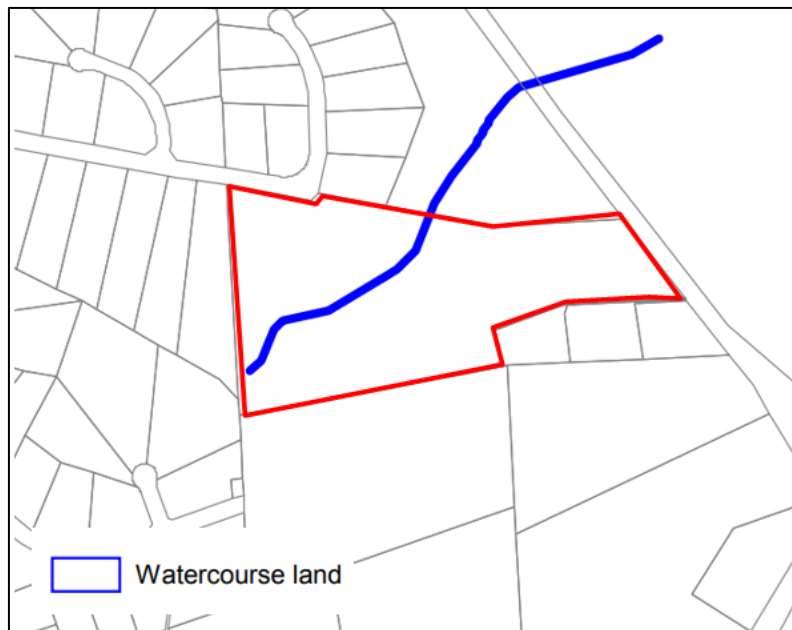


Figure 4: Watercourse Map Extract from MLEP 2011

4.2 Maitland DCP

The site is subject to the Maitland DCP (MDCP) 2011. Because the site is mapped as containing a water course in the MLEP, Chapter B.7 – Environmentally Sensitive Land of the DCP applies with regard to recreating the VRZ.

The proposed subdivision layout has incorporated revegetation of the mapped riparian corridor. The positive environmental outcome of revegetating the riparian corridor is a key reason for the variation to the minimum lot size control being sought.

5.0 Matters for Consideration Under Clause 4.6

The relevant matters to be dealt with under Clause 4.6 for the purpose of the variation are addressed below. This response has taken into consideration the information and observations outlined above. The response seeks to justify the contravention of the development standard by demonstrating:

- a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case,
- b) that there are sufficient environmental planning grounds to justify contravening the development standard,
- c) 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,
- d) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
- e) the public benefit of maintaining the development standard is minimal.

5.1 ZONE AND DEVELOPMENT STANDARD OBJECTIVES

Zone

The Objectives of the R5 Large Lot Residential zone are:

- To provide residential housing in a rural setting while preserving, and minimising impacts on, environmentally sensitive locations and scenic quality.
- To ensure that large residential lots do not hinder the proper and orderly development of urban areas in the future.
- To ensure that development in the area does not unreasonably increase the demand for public services or public facilities.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.

Comment

The proposed variations to the minimum lot size development standard will remain consistent with the zone objectives in the following ways:

1. The proposed reduced lot sizes are to facilitate larger lot sizes for proposed lots which will accommodate the Vegetated Riparian Zone (VRZ) and for the southern lot boundary of proposed Lot 11 to follow the alignment of the existing right-of-carriageway. Compliant lot sizes can be achieved for all lots but this would result in the VRZ being located across a greater number of lots. The proposed subdivision layout will achieve a superior positive environmental outcome through revegetation of the riparian corridor and the proposed undersized lots (being less than 10% variation), will not result in development which will be inconsistent with the rural setting of the area.
2. Consenting to the proposed exceptions to the minimum lot size will not result in an unreasonable increase on the demand for public services and public facilities.
3. The proposed exceptions will not result in any land use conflicts.

Minimum Subdivision Size

The Objectives of Clause 4.1 Minimum Subdivision Size are:

- (a) to ensure that lot sizes are able to accommodate development that is suitable for its purpose and consistent with relevant development controls,
- (b) to prevent the fragmentation of rural land.

Comment

The proposed variations to the minimum lot size development standard will remain consistent with the objectives of Clause 4.1 in the following ways:

1. The subdivision will be connected to Hunter Water Corporation reticulated water and sewer and so lots will not require any area on-site for effluent disposal. As such, each lot has a substantial development footprint to accommodate development typical of a large lot residential subdivision.
2. The variations sought are minor, being less than 10%, and so will not impact existing or future residents in terms of the desired character and amenity of a large lot rural-residential development.

5.2 MATTERS FOR CONSIDERATION

This section addresses the specific requirements of clause 4.6 of MLEP 2011 and justifies the contravention of the development standard by demonstrating:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard;
- (c) 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;
- (d) whether contravention of the development standard raises any matter of significance for State or regional environmental planning; and
- (e) the public benefit of maintaining the development standard.

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? (Clause 4.6(3))

Compliance with the development standard in this instance is unreasonable and unnecessary because compliance with the standard could be achieved but for accommodating the Vegetated Riparian Zone on as few lots as possible.

It is considered that revegetation of the riparian zone is a superior environmental outcome for the broader area compared to strict compliance with the minimum lot size control. In addition, the variations to the control constitute variations of less than 10% (between 4.8% to 9.94% variation), and will remain consistent with the zone and development standard objectives despite the proposed variations and outlined in **Section 5.1**.

With regard to proposed Lot 11, aligning the southern boundary with the existing right-of-carriageway results in a lot size of 4,759sqm, constituting a variation of 4.8% to the development standard. It is considered unreasonable to require this lot comply with the

minimum lot size as an adequate buildable area is provided (1,449sqm) for the lot and the proposed reduced minimum lot size will not have any adverse impact on surrounding lots or the rural-residential character of the area as a result of the variation.

Are there sufficient environmental planning grounds to justify contravening the development standard?

Yes. As stated above, the requested variation for proposed Lots 1, 2 and 14 are a result of a desire to contain the Vegetated Riparian Zone (VRZ) within as few lots as possible. If the VRZ were to be located on a greater number of lots then the proposal would not be requesting a variation to the minimum lot size.

Regarding proposed Lot 11, this proposed variation is a result of following the existing right-of-carriageway. The variation represents a small variation of 4.8% and will not present any adverse environmental outcomes as a result of the variation.

In addition, despite the requested variations each lot will have a substantial buildable area (**Table 3**) to accommodate construction of a dwelling and ancillary structures. To note is the buildable areas will not be required to also accommodate any on-site effluent disposal areas as lots will be connected to Hunter Water Corporation's reticulated water and sewer system.

Table 3: Buildable areas (sqm)	
Proposed Lot	Buildable area
1	2,373 sqm
2	2,378 sqm
11	1,449 sqm
14	1,342 sqm

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.

The objectives of the minimum lot size control are to ensure that lot sizes are able to accommodate development that is suitable for its purpose and consistent with relevant development controls, and to prevent the fragmentation of rural land.

The proposed variations remain consistent with the control's objectives and are in the public interest as they will contribute to the provision of large lot residential housing which is a lifestyle offering which will be limited into the future in Maitland according to the Maitland Local Housing Strategy.

The proposed variations will not inhibit the expected development potential of the lots in terms of being adequately able to accommodate a dwelling house and ancillary development, while also providing adequate setbacks and bushfire Asset Protection Zones from the future Vegetated Riparian Zone. As stated, future lots will be connected to Hunter Water Corporation's reticulated water and sewer system and as such an effluent

disposal area within each lot will not be required.

Whether contravention of the development standard raises any matter of significance for State or regional environmental planning.

Contravention of the development standard does not raise any matter for State or regional planning. The proposal will achieve efficient delivery of housing in the area.

The public benefit of maintaining the development standard.

Per the adopted Maitland Local Housing Strategy, it is unlikely that significant additional areas of large lot residential areas will be made available and as such the development of existing areas zoned for this lifestyle offering is crucial to ensure land for this housing type remains available. In this regard, it is considered there is no benefit to not permitting the proposed contraventions to the development standard.

6.0 Objects of the EPA Act

The proposed variation to minimum lot size will promote the objects of the Act, in particular the following:

Object (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"

The proposed variation to minimum lot size control will promote the conservation of the environment through the revegetation of the riparian corridor which is considered a positive outcome for the site and the broader area and so consistent with this object of the Act.

Object (b)

"To facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment"

The proposed re-creation of the riparian corridor is wholly consistent with this object of the Act as revegetation of the riparian corridor will facilitate an ecologically sustainable development.

Object (c)

"To provide the orderly and economic use and development of land"

The proposal can facilitate the same number of lots despite the proposed variations to minimum lot size which is a result of a desire to site the Vegetation Riparian Corridor on as few lots as possible. Therefore, it is considered the proposed number of lots is appropriate for the site and constitutes orderly and economic use of the land.

Object (d)

"To promote the delivery and maintenance of affordable housing"

The proposal does not seek to prohibit affordable housing types. Secondary dwellings are permissible with consent in the zone pursuant to SEPP (Housing) which provides a planning pathway for affordable housing types at the site.

Object (e)

"To protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats"

The proposal will require the future removal of one (1) native tree which and also proposes to re-create the vegetated riparian corridor which will provide a positive environmental outcome for the site and so consistent with this object of the Act.

Object (f)

"To promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)"

The proposal is supported by an Aboriginal Due Diligence report which demonstrates the proposal will not have any adverse impact on cultural heritage as a result of the proposed contravention to the development standards and so consistent with this object of the Act.

Object (g)

"to promote good design and amenity of the built environment"

The proposal being for residential subdivision only does not propose construction of dwellings; however, the developable areas of each site will be able facilitate construction which will be of good design and amenity of the built environment.

Object (h)

"to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants"

The proposal being for residential subdivision only does not propose construction of dwellings; however, the developable areas of each site will be able facilitate construction which will be of good design and amenity of the built environment.

Object (i)

"to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State"

This object does not relate directly to the proposal.

Object (j)

"to provide increased opportunity for community participation in environmental planning and assessment"

We acknowledge the proposal which outlines the proposed variation to minimum lot size will be publicly exhibited and so is consistent with this object of the Act.

7.0 Conclusion

The proposed development has responded to the objectives of the standard by ensuring that large lot residential housing is made available in Maitland which, despite not meeting the prescriptive minimum lot size, will result in a superior environmental outcome through the revegetation of the mapped watercourse.

Given this alternative approach it is considered unnecessary in this instance to strictly comply with the minimum lot size development standard.