



DREW@ASTUTEPLANNING.COM.AU
Ph.: 0472 648 087
ABN: 876 501 61139

4.6 VARIATION REQUEST MINIMUM LOT SIZE (4.1B(2))



40 GLADSTONE STREET, MUDGEE
Dual Occupancy (Detached) & Boundary Adjustment

12 November, 2024

Clause 4.6 Variation – Minimum Lot Size

Introduction

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The proposal is for the erection of one additional dwelling house together with additions to an existing dwelling house to create a *dual occupancy (detached)* at 40 Gladstone Street, Mudgee. Subsequently, the proposal also involves the creation of two lots to facilitate separate ownership of the two dwellings. The resultant subdivision creates a lot size of 567.84m² and 351.93m² respectively. Refer to figure 1 below:

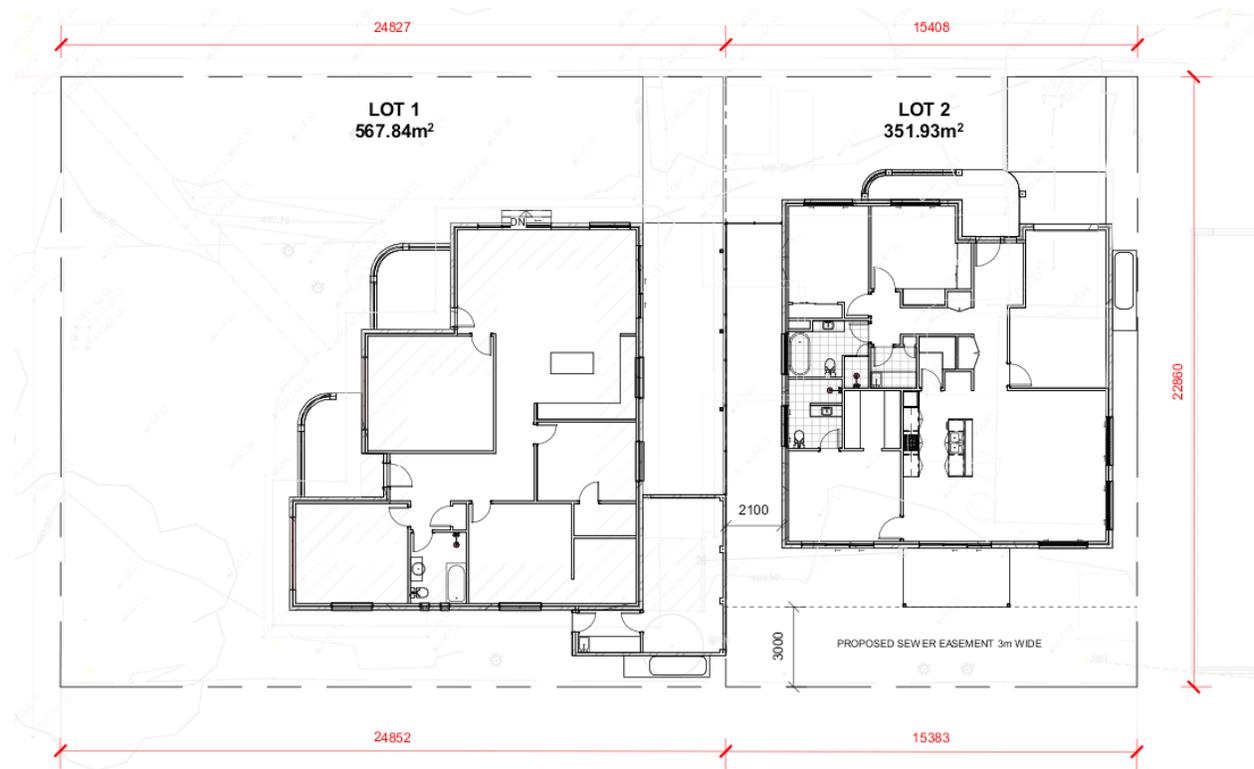


FIGURE 1: SUBDIVISION PLAN (BL DESIGNS)

The subject site is identified as having a minimum lot size control of 400m², where a dual occupancy (detached) is erected upon the site and each lot will contain one dwelling each, under clause 4.1B(2) of Mid-Western Regional Local Environmental Plan 2012 (MWRLEP 2012).

The subdivision proposed presents a variation of 48.07m² to this requirement due primarily to the footprint of the existing dwelling and designing around this footprint to accommodate an additional dwelling, representing a 12% variation. This variation involves proposed lot 2 with proposed lot 1 readily complying with an area of 567.84m².

Clause 4.6 of the Mid-Western Regional LEP 2012, Exceptions to development standards provides opportunity for Council to vary the controls where the concurrence of the Secretary has been obtained and the written request adequately addresses the following two items:

- **Compliance is unreasonable or unnecessary:** The request must demonstrate that strict compliance with a development standard is unreasonable or unnecessary in the circumstances of the case;
- **Environmental planning grounds:** The request must show that there are sufficient environmental planning grounds to justify contravening the development standard;

This document is a formal request for a variation to the minimum lot size development standard (4.1B(2)) under MWRLEP 2012. It has been prepared in accordance with the principles outlined in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action).

Strict Compliance Unreasonable and Unnecessary

Under Clause 4.1B(2) of MWRLEP 2012 the development standard states:

“(2) Despite any other provision of this Plan, development consent may be granted to the subdivision of land to which this clause applies if—

(a) multi dwelling housing or a dual occupancy is lawfully erected on the land, and

(b) the area of each resulting lot will not be less than—

(i) 300 square metres for a dual occupancy (attached) or multi dwelling housing, or

(ii) 400 square metres for a dual occupancy (detached), and

(c) only one dwelling will be located on each lot resulting from the subdivision.”.

The Initial Action case is referable to the judgement of Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 (Wehbe) which sets out five ways of demonstrating that compliance with a development standard is unreasonable or unnecessary. Cases such as *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Randwick Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 have confirmed that adopting the ‘Wehbe’ principles when assessing a clause 4.6 submission in respect of clause 4.1B(2) is an appropriate approach. It is necessary that the proposal meets one or more of the Wehbe principles (although the Wehbe principles are not the only basis upon which ‘unnecessary or unreasonable may be demonstrated).

Five ways from the Wehbe judgement of demonstrating that compliance with a development standard is unreasonable or unnecessary are:

1. “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)”
2. “the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary”
3. “the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable”
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”
5. “the zoning of particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in that case would also be unreasonable or unnecessary”

For the purpose of this variation request, only the first of the Wehbe principles is relevant.

Despite the breach of the minimum lot size control, the proposal achieves the objectives for the minimum lot size control that is set out in the parent Clause 4.1 of MWRLEP 2012 relating to subdivisions in general as outlined below.

4.1(1)(a):

“to ensure that subdivision of land occurs in a manner that promotes suitable land uses and development,”

Comment: Despite the smaller size of lot 2 it has been demonstrated within the concurrent SEE for the proposal that the dwelling proposed upon lot 2 is highly suitable for the location and surrounding medium density residential area. The dwelling has been sensitively designed to ensure a high level of amenity for occupants of the site with no significant impacts to adjoining properties or the streetscape despite the smaller land area.

It should be noted that the site overall is >800m² and a subdivision could occur that is fully compliant with the development standard. However, the footprint of the existing dwelling on proposed lot 1 with the extensive front setback to Gladstone Street has resulted in a larger than normal area along the southern extent of the site that is not able to be developed in a logical manner without significant detracting from the Gladstone Street streetscape. Subsequently, the better outcome on balance of

providing a smaller lot and smaller dwelling upon lot 2 is being proposed to ensure no unnecessary works within the Gladstone Street frontage are undertaken.

Accordingly, the proposal results in a subdivision that promotes a suitable land use and development in accordance with this objective.

4.1(1)(b):

“to minimise any likely impact of subdivision and other development on the amenity of neighbouring properties,”

Comment: The smaller lot 2 and associated dwelling sit comfortably on the site with no significant impact upon neighbouring properties. The side and rear setbacks associated with dwelling 2 are fully compliant and, together with the single storey form still able to be accommodated on the lot, results in an appropriate level of amenity for both the subject site and the surrounding properties..

4.1(1)(c):

“to ensure that lot sizes and dimensions are able to accommodate development, consistent with relevant development controls,”

Comment: As discussed above the site is still able to accommodate a standard 3 bedroom dwelling with compliant POS, parking, site coverage and side/rear setbacks. The front setback variation has been demonstrated to be appropriate for the context of the streetscape, where a variety of reduced street setbacks are a feature of the heritage aspects of Lewis Street and the HCA as a whole.

4.1(1)(d):

“to ensure that rural lands are not fragmented in a manner that threatens either their future use, or the use of neighbouring land, for agricultural production,”

Comment: N/A. The site is not rural in nature.

4.1(1)(e):

“to ensure that subdivision does not have an inappropriate impact on the natural environment,”

Comment: The resultant smaller lot size does not lead to any inappropriate impact upon the natural environment, particularly given the urban infill location of the site. Stormwater will continue to be discharged appropriately from the site in a manner that does not impact downstream waterways both individually and from a cumulative consideration.

4.1(1)(f):

“to maximise the economic potential of, and provide for more intensive, small lot agricultural uses in, areas that are able to access commercial quantities of irrigation water.”

Comment: N/A. The site is not rural in nature.

Despite the minor minimum lot size breach the proposal also satisfies the R3 Medium Density Residential zone objectives, which applies to the site, as noted below:

1. *To provide for the housing needs of the community within a medium density residential environment.*

Comment: The proposed additional dwelling will allow the site to continue benefiting from a residential use in the medium density residential environment.

2. *To provide a variety of housing types within a medium density residential environment.*

Comment: The proposal is for an additional dwelling, which will not impede a variety of other housing types being developed in the area.

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

Comment: The proposal is for a new additional dwelling, which will not impede other land uses from being considered in the area.

4. *To encourage higher-density residential development that is sympathetic to and compatible with the existing character of the Mudgee Heritage Conservation Area.*

Comment: The proposal creates one additional dwelling where it is most appropriate to do so within the downtown area of Mudgee with close access to services. The design will complement the existing character of the Mudgee HCA and create infill housing that is in keeping with the rhythm of Lewis Street.

Environmental Planning Grounds

Under Clause 4.6(3)(b) of MWRLEP 2012 “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:(b) that there are sufficient environmental planning grounds to justify contravening the development standard”.

It is considered that there are sufficient environmental planning grounds to justify breaching the minimum lot size standard in this instance because:

- **The development overall is appropriate for the locality.**

The concurrent SEE has demonstrated that there are no significant impacts associated with the development with the two dwellings still able to be accommodated on the site. Dwelling 2 is still able to incorporate a single storey form and generally achieve all of the MWRDCP 2013 controls or objectives that relate to minimum lot size controls.

- **The alternative to the variation proposed would result in a lesser planning outcome.**

The site overall has an area of 919.77m², which if developed as a vacant site could readily comply with the minimum lot size of 400m² where a new detached dual occupancy is erected. However, given the desire to retain the existing dwelling to preserve a contributory building to the rhythm of the HCA streetscape, it has been necessary to present a design that retains the built form in the streetscape whilst also allowing for the erection of a new dwelling.

The existing dwelling incorporates an extended setback of 8.56m to Gladstone Street (refer to figure below) that needs to be retained in order to preserve the heritage values the site contributes to the HCA. Consequently, parking is best suited to the rear of the existing dwelling, which has then set the location for the new dissecting boundary between proposed lot 1 and lot 2.

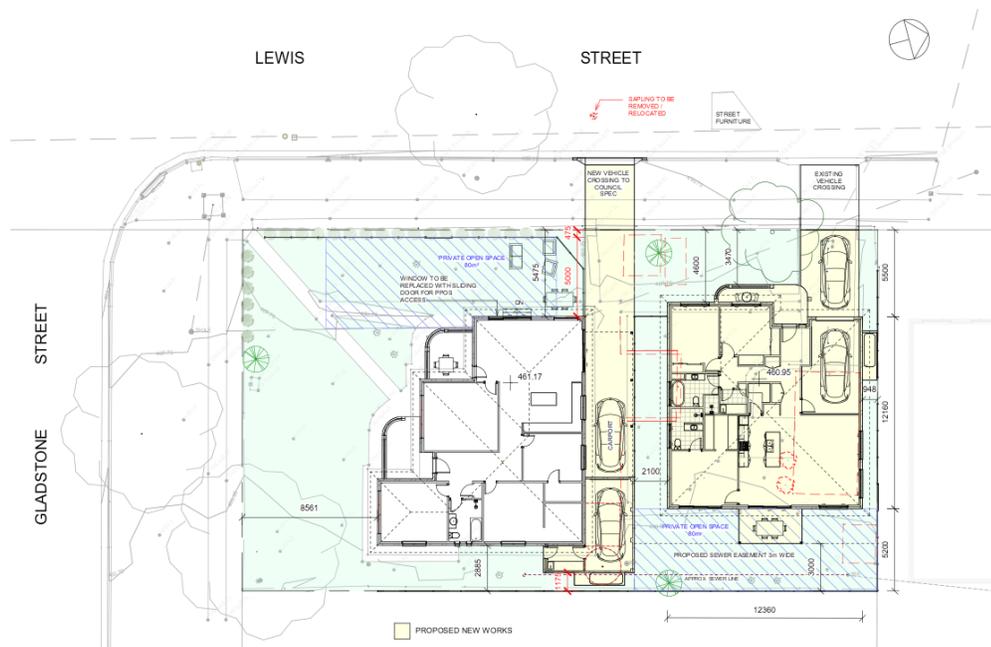


FIGURE 2: SITE PLAN (BL DESIGNS)

The removal of the existing dwelling or the provision of parking within the Gladstone Street setback area to achieve 'technical' compliance would result in a lesser planning outcome, on balance.

Furthermore, the demolition of the existing dwelling and retention of the two existing lots in their current form could result in 'gun-barrel' style development which is not desirable for the HCA and is not a logical or orderly use of a corner site.

- **The variation is minor.**

The variation is considered minor, being only 12% in reference to the 400m² minimum lot size. It should be noted that the site overall is 919.77m² and proposed lot 1 still benefits from an excessively compliant lot size of 567.84m². This outcome generally allows the retained openness and curtilage of dwelling 1 to be shared across the site as a whole.

- **The non-compliant elements of the proposal satisfy the relevant matters outlined in section 1.3 of the Environmental Planning and Assessment Act 1979.**

This is outlined below:

- *“(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,”* **Comment:** The proposed development has been designed with regard to ecologically sustainable design measures, with the variation not preventing compliance with other legislative requirements and allowing for improved amenity for occupants into the future.
- *“(c) to promote the orderly and economic use and development of land,”* **Comment:** The design of the dwellings has been carefully considered and the issue of non compliance will not be perceptible as a non compliance as viewed from the street and surrounding development given the existence of other higher density developments in the immediate area combined with the heritage nature of the area. The non compliant area promotes the orderly use of land in that it will have no unreasonable environmental impacts on adjoining properties in terms of visual bulk and scale, privacy, overshadowing or on street parking etc.
- *“(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,”* **Comment:** The proposed development has no adverse implications with regard to protecting native vegetation or habitats.
- *“(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),”* **Comment:** The benefits of the layout with regards to the Mudgee HCA have been extensively discussed and proven

within this statement and also the statement of environmental effects prepared by Astute Planning. The proposed lot size is considered the most appropriate outcome with regards to the built heritage fabric of the surrounding area.

- *“(g) to promote good design and amenity of the built environment”* **Comment:**
Despite the minimum lot size breach the proposed second dwelling is of high architectural merit. It has been sensitively designed and incorporates high-quality finishes. The proposed design is considerate in ensuring compatibility with adjacent and surrounding buildings and is presented appropriately when viewed from the street. The appropriate design ensures no unreasonable adverse environmental impacts will result from the proposed works, including in terms of privacy, acoustic amenity, visual intrusion and overshadowing. Given that it will not result in any adverse impacts and will result in a building form that is visually appropriate for its location it will satisfy this object of the Act.

• **The height control breach has no implications for compliance with other key MWRLEP 2012 requirements:**

The proposal is consistent with all other key MWRLEP 2012 requirements. A low footprint is maintained on site. Overall, the design has been refined and considered in striving to achieve compatibility with both the existing streetscape and the future desired built form of the area. It is also noted that the proposal overall is consistent with the objectives of the R3 zone.

Conclusion

This submission demonstrates that strict compliance with Clause 4.1B of MWRLEP 2012 is unreasonable or unnecessary in the circumstances of the case because the proposal achieves both the objectives of the minimum lot size clause (4.1), which relate primarily to ensuring residential development is able to be appropriately accommodated and the objectives of the R3 zone. This submission also demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard. Additionally, the proposal is considered to be in the public interest in that it achieves the objectives of the R3 zone and continues to allow the general area to be infilled appropriately with no impact upon the streetscape or surrounding properties.

It is important to note that given the particular circumstances of the site in relation to existing building footprints, the corner location and existing lot size together with an emphasis on quality heritage outcomes that no precedence is considered to be set that would allow other proposals in the immediate area to also readily contravene the development standard. Other sites would need to also demonstrate identical circumstances exist in which to justify the proposal, which is not expected to occur. A review of other corner properties within the general area has not revealed any other sites that could also be developed in a similar manner. Subsequently, the intent of the development standard is not eroded or diminished as a result of the proposal.

A summary of the key arguments in support of the clause 4.6 variation is as follows:

- The proposed design is complementary to the surrounding streetscape in the Mudgee HCA and achieves:
 - the relevant objectives of clause 1.3 of the Environmental Planning and Assessment Act 1979;
 - the objectives for minimum lot sizes in clause 4.1 of the LEP; and
 - the objectives of the R3 zone.
- The variation is to ensure that an appropriate density of development is achieved within the Mudgee HCA and R3 zone;
- The alternative to the variation proposed would result in a lesser planning outcome;
- The proposed variation does not create adverse visual, privacy or other amenity impacts; and
- The lot size variation has no implications for compliance with other key MWRLEP 2012 requirements.

It is notable that this submission demonstrates that both the objectives of the minimum lot size clause and the zone objectives are achieved. Achieving these objectives is a higher level of satisfaction than that of a compliant proposal, on balance.

Accordingly, in light of the above written request it is submitted that the Council will be satisfied that in this instance the development standard can be varied because this written request has addressed all of the necessary matters contained in clause 4.6(3) of the MWRLEP 2012. Relevantly, compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; and sufficient environmental planning grounds exist to justify a contravention of the development standard; and the proposed development will be in the public interest as it is consistent with the development standards and the zone.