1.0 INTRODUCTION

A Development Application has been prepared for submission to Northern Beaches Council for the subdivision of an existing dual occupancy (and addition of pergolas and decks) at 10 Rowan Street, Mona Vale. The proposal is detailed in the Statement of Environmental Effects.

The subject site is currently zoned R2 Low Density Residential. The Pittwater LEP 2014 (WLEP) prescribes the minimum lot size for this site as 550m^2.

The proposal seeks a minimum lot size (measured at ground) of

(subject to final survey):

- Lot 1 – 502.15m^2
- Lot 2 – 509.44m^2

The strata units will have the following resulting strata lot sizes (as measured under the Strata Schemes Development Act 2005) :

- Lot 1 – 565m^2 (total)
- Lot 2 – 572m^2 (total)

The computation of the lot sizes is made on the basis of the decision made by Espinosa C of the Land and Environment Court in the case *Albert Square NSW Pty Ltd v Randwick City Council* [2021] NSWLEC 1401 that was decided on 12 July 2021. In her decision the Commissioner considered the correct approach to calculating lot sizes under a strata scheme as follows:

Accordingly, limiting the measure of a lot within a strata scheme to on the ground level creates an artificial and inaccurate measure or definition of a strata lot. For these reasons, and others below, the measure of a strata lot cannot be defined by the limitation of a two-dimensional area on the ground.

For reasons I give throughout this judgment a strata lot is a three dimensional concept where the strata lot entitlement is generally measured in a two dimensional way but is not limited to the area on ground as this would potentially measure only part of a strata lot and will exclude other part strata lot entitlements which are located below or above ground, such as the Proposed Development as depicted in Fig 2

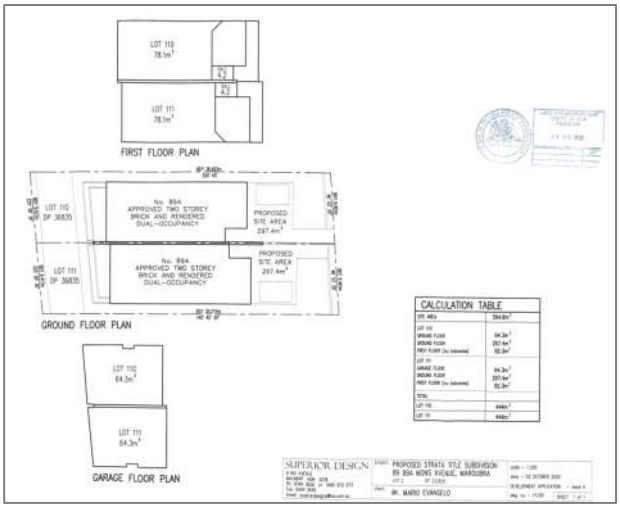

FIGURE 3: Plan referenced *Albert Square NSW Pty Ltd V Randwick City Council* NSWLEC 1401

Espinosa C, further strengthened the justification by identifying another similar case that she presided over that had the same outcome *Junn v Willoughby City Council* [2020] NSWLEC 1459 and dissected and analysed other decisions on the point including conflicting interpretations. Two other Commissioners have adopted the same interpretation. The rational analysis in Albert Square is an informed and most recent decision to be relied upon.

Overall, it is our opinion that the proposed strata subdivision as proposed is consistent with and satisfies the logical planning approach adopted by the Land and Environment Court for assessment in this case as the wording in 4.2A is in identical terms to the instruments referenced in those decisions i.e

> *(3) The size of any lot resulting from a subdivision of land to which this clause applies for a strata plan scheme (other than any lot comprising common property within the meaning of the Strata Schemes (Freehold Development) Act 1973 or Strata Schemes (Leasehold Development) Act 1986) is not to be less than the minimum size shown on the Lot Size Map in relation to that land.*

Council however appears not to support the applicants/surveyors calculations and our assessment within the SEE that the proposal complies with the standard based on the findings of the Land & Environment Court and requires a measurement on land area. On this basis each lot has an area of approximately 505.85m^2 which equates to a variation/shortfall of approximately 8% when measured on a traditional basis similar to a torrens. Accordingly Council has sought the submission of a clause 4.6 variation to clause 4.2A of the PLEP. Whilst we do not concur, for the reasons outlined above and in the statement of

environmental effects, the variation request is submitted without prejudice and for abundant caution to avoid any question of permissibility and validity of any approval.

This Variation Request has been prepared based on the Architectural Drawings and Draft Strata Subdivision Plans. It should be read in conjunction with the Statement of Environmental Effects accompanying the development application.

The proposed strata subdivision layout is as shown below:

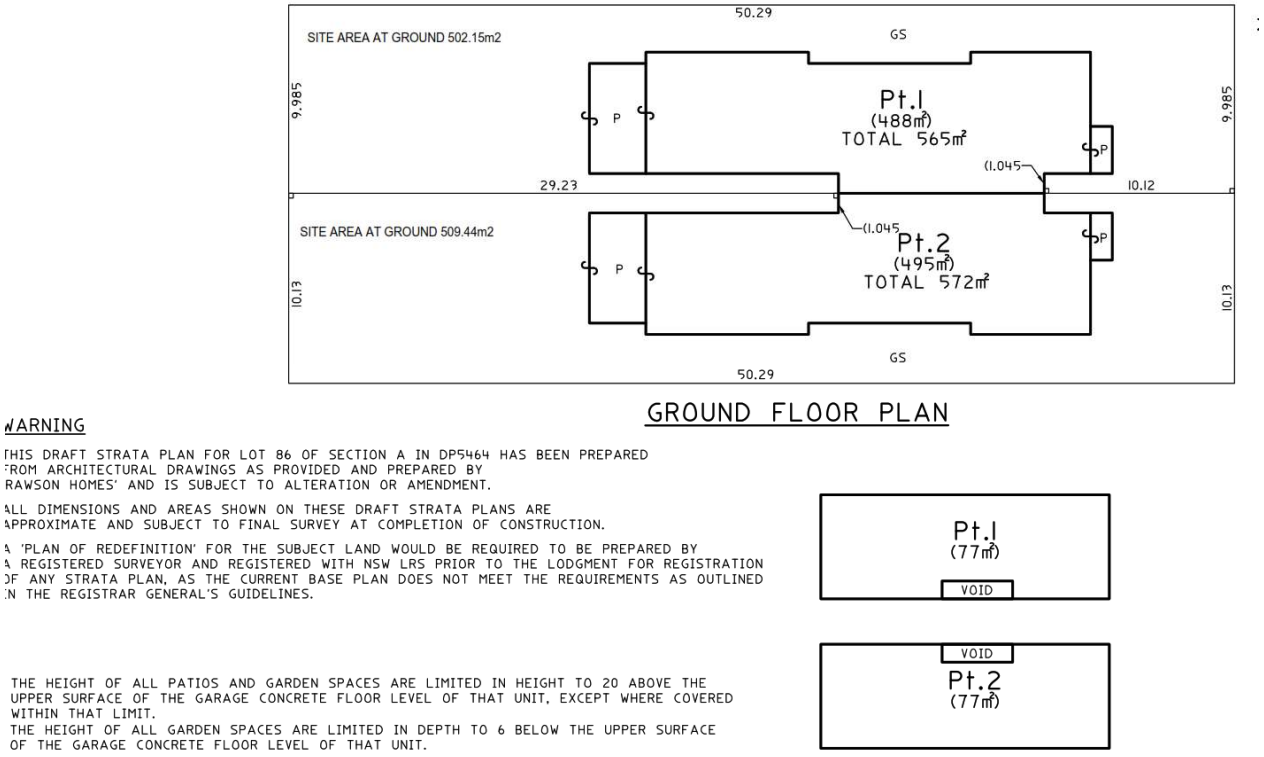

Figure 1 – Extract of Plan of Strata Subdivision

2.0 PITTWATER LEP 2014

Clause 4.2A of the Pittwater LEP 2014 provides:

4.2A Minimum subdivision lot size for strata plan schemes in certain rural, residential and conservation zones

(1) The objective of this clause is to ensure that land to which this clause applies is not fragmented by subdivisions that would create additional dwelling entitlements.

(2) This clause applies to land in the following zones that is used, or is proposed to be used, for the purpose of a dual occupancy—

(a) Zone RU2 Rural Landscape,
(b) Zone R2 Low Density Residential,
(c) Zone R5 Large Lot Residential,
(d) Zone C4 Environmental Living.
(3) The size of any lot resulting from a subdivision of land to which this clause applies for a strata plan scheme (other than any lot comprising common property within the meaning of the Strata Schemes (Freehold Development) Act 1973 or Strata Schemes (Leasehold Development) Act 1986) 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 to the strata subdivision of land used, or proposed to be used, for the purpose of a dual occupancy for which development consent was granted on or before 2 June 2003.

3.0 MECHANISM FOR A VARIATION

The Pittwater LEP 2014 contains provisions under Clause 4.6 which allow for the consent authority to consider certain variations to the principal development standards listed in the LEP. The variations may only be considered reasonable where they have been suitably justified by an applicant to be 'unreasonable or unnecessary' in the circumstances of the case, pertaining to site conditions, surrounding character of the built form, etc. The provisions of Clause 4.6 are reproduced 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), and
(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and
(b) the concurrence of the 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 include all of these zones.

(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.

Having regard to the above, in summary a development standard can be varied if a submission is made (in writing) by the applicant justifying a contravention to the development standard on the grounds that:

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

The consent authority must however be satisfied that:

- *the applicant's written request has adequately addressed the matters required to be demonstrated by sub-clause (3), and*
- *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.*

4.0 LEGAL PRINCIPLES

This request has been prepared having regard to various authorities on Clause 4.6, contained in the following guideline judgements including:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46*
- *Wehbe v Pittwater Council [2007] NSWLEC 827*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 ('Four2Five No. 1')*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 ('Four2Five No. 2')*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 ('Four2Five No. 3')*
- *Bates Smart Pty Ltd v Council of the of Sydney [2014] NSWLEC 1001*
- *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA*
- *Abrams v Council of the of Sydney [2019] NSWLEC 1583*

In short, cl 4.6 of LEP 2014 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development.

The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)).

The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)).

The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)).

The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

5.0 IS THE PLANNING CONTROL IN QUESTION A DEVELOPMENT STANDARD?

Clause 4.2A provides inter-alia that *(3) The size of any lot resulting from a subdivision of land to which this clause applies for a strata plan scheme (other than any lot comprising common property within the meaning of the Strata Schemes (Freehold Development) Act 1973 or Strata Schemes (Leasehold Development) Act 1986) is not to be less than the minimum size shown on the Lot Size Map in relation to that land.*

'Development Standards' has the following meaning ascribed to it under Section 4(1) of the *Environmental Planning and Assessment Act, 1979:*

"development standards" means provisions of an environmental planning instrument in relation to the carrying out of development, being provision 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, 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 land, building or work, the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles;
(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 provisions 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 Clauses relevant in this instance are:

*(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:*

On this basis, Clause 4.2A of the Pittwater LEP 2014, although referred to as a local standard is a development standard and not a "prohibition" in respect of development, and one amenable to an objection under Clause 4.6. This would be consistent with Council's intention.

6.0 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

Preston CJ in *Wehbe v Pittwater Council [2007]* NSWLEC 827 (21 December 2007), sets out 5 ways of establishing that compliance is unreasonable or unnecessary as follows:

"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……..

43 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).

A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary……

A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable……..

A fourth way is to establish that 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……..

A fifth way is to establish that "the zoning of particular land" was "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……

However, care needs to be taken not to expand this fifth way of establishing that compliance is unreasonable or unnecessary beyond its limits. It is focused on "particular land" and the circumstances of the case. Compliance with the development standard is unreasonable or unnecessary not because the standard is inappropriate to the zoning, but rather because the zoning of the particular land is found to be unreasonable or inappropriate. If the particular land should not have been included in the particular zone, the standard would not have applied, and the proposed development would not have had to comply with

that standard. To require compliance with the standard in these circumstances would be unreasonable or unnecessary.

50 However, so expressed, this way is limited. It does not permit of a general inquiry into the appropriateness of the development standard for the zoning. An objection would not be well-founded by an opinion that the development standard is inappropriate in respect of a particular zoning (the consent authority must assume the standard has a purpose)……

The requirement that the consent authority form the opinion that granting consent to the development application is consistent with the aims of SEPP 1 as set out in clause 3 (one of which is the promotion and coordination of the orderly and economic use and development of land) makes it relevant "to consider whether consent to the particular development application encourages what may be summarised as considered and planned development" or conversely may hinder a strategic approach to planning and development."

Set out below is an analysis of the standard, having regard to the principles enunciated in both the *Winten* and *Wehbe* judgements as applicable:

The variation to the PLEP 2014 development standard is numerically insignificant representing a variation of approximately 8%

7.0 IS IT CONSISTENT WITH THE OBJECTIVES OF THE STANDARD?

The Land and Environments Court's recent position in considering consistency with objectives, is the adoption of Pearlman J in *Schaffer Corporation v Hawkesbury Council (1992) 77 LGRA 21* where, Her Honor expresses the following opinion [at 27]:

"The guiding principle, then, is that a development will be generally consistent with the objectives, if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, not even that it is compatible."

The objectives of the <u>standard</u> are addressed below:

(a) The objective of this clause is to ensure that land to which this clause applies is not fragmented by subdivisions that would create additional dwelling entitlements.

The subdivision of the subject site does not create any additional dwelling entitlement particularly noting that the only form of alternate housing with greater density on each lot would be a dual occupancy, which would not be permissible as each lot is substantially less than the minimum 800m^2 required under clause 4.1B.

Whilst the locality does not display consistent allotment sizes there is a general mixture of lot shapes including battle axe allotments and irregular shaped corner lots adopting the street layout. Notwithstanding it can be concluded that the predominant shape is of rectangular shaped lots. The proposal adopts a rectangular shape generally consistent with the configuration of existing lots in the locality and responds to the existing built form.

The site is suitable for development safe from hazards as evidenced by the recent approval of the existing development on the land, the subject site is not subject to any natural hazard constraints such as bushfire, geotechnical, vegetation, flora and fauna or flooding etc.

The status quo will be maintained in respect of the relationship of the built form with the natural environment and amenity of neighbouring properties and the proposed subdivision adopts and follows the existing building rather than dictating any future built form.

The existing development is provided with all necessary services and utility infrastructure including safe access.

The subject site is capable of accommodating the residential development, as is evidenced by the original approval of the development and compliance with all other standards and controls including landscaped area, floor space ratio, carparking, private open space and setbacks and amenity such as privacy and solar access.

8.0 THERE ARE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

Clause 4.6(3)(b) of the WLEP 2014 2014 requires the departure from the development standard to be justified by demonstrating:

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

There are sufficient environmental planning grounds to justify a flexible approach to the application of the minimum lot size control as it applies to the site. In Four2Five, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site. The applicable circumstances that relate to the site are discussed below.

The proposal seeks flexibility in the application of the standard where the breach to the control arises from a building, which is consistent in bulk and scale with the existing and desired future character and the planning controls.

In regard to the subject proposal:

- The proposal would comply with the minimum lot size as deemed the appropriate measurement technique for strata lots accepted by the L&E Court;
- The status quo is maintained and there is no discernible material change to the built form or low density character of the development and would not be a perceptible change;
- The suitability of the site to accommodate the existing development has already been assessed and deemed satisfactory;
- There is no additional demand on existing services or infrastructure;
- The variation is minimal and would not be readily perceptible in the circumstances;
- The site and building thereon is still capable of comfortably complying with the required controls such as floor space ratios, landscaped areas, setbacks, private open space and solar access and amenity notwithstanding the minor variation;
- The objectives of the standard are achieved;
- Approval does not create any adverse environmental impacts nor set a precedent given the circumstances of the case.

9.0 PUBLIC INTEREST

9.1 Consistency with the objectives of the development standard

The proposed development is consistent with the objectives of the development standard, for the reasons discussed in Section 4.1 of this report.

9.2 Consistency with the objectives of the R2 – Low Density Residential zone

As accepted in planning law the principles of consistency with objectives are considered to include:

- Development will be generally consistent with the objectives, if it is not antipathetic to them.
- It is not necessary to show that the development promotes or is ancillary to those objectives, not even that it is compatible.
- The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary

- The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.
- A standard or objective has been virtually abandoned or destroyed by the Council's own actions in granting consents (or in this case by rezoning) departing from the standard and hence compliance with the standard and to be redundant objective is unnecessary and unreasonable.
- 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 (or therefore an inherent objective) would also be unreasonable or unnecessary.

The objectives for development in this R2 zone are:

1 Objectives of zone

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To provide for a limited range of other land uses of a low intensity and scale, compatible with surrounding land uses.*

The proposal with a reduced lot size is consistent with the first objective as it reflects the already approved and built dual occupancy development on the site, which is a form of low density housing permitted with consent in the R2 zone. The variation does not in any way change the existing context, setting or low density environment within which it is located.

The second and third objectives are not applicable.

The proposal is considered consistent with the objectives of the standard and for development in this zone as required by this subclause.

10.0 SECRETARY'S CONCURRENCE

Under Clause 4.6(5) of WLEP 2014, the Secretary's concurrence is required prior to any variation being granted. The following section provides a response to those matters set out in Clause 4.6(5) of the LEP, which must be considered by the Secretary.

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

The variation to the minimum lot size standard of PLEP 2014 will not raise any matter in which could be deemed to have State or Regional significance and enforcement of the standard would not result in any public benefit in this situation. As detailed within the SEE, the building and respective subdivision responds to the surrounding urban context and the requirements of the LEP and DCP planning provisions.

11.0 CONCLUSION

The assessment above demonstrates that compliance with the minimum lot size development standard contained in Clause 4.2A of PLEP 2014 is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded on environmental planning grounds.

In this instance it is considered appropriate to make an exception to the minimum lot size development standard under the provisions of Clause 4.6 for the reasons outlined in the preceding discussion.

Joe Vescio
18 September, 2023