

8.4 ME0051/2021 - Modification to DA0314/2008 for a Staged Three Lot Subdivision - 6-8 Clare Court, Mudgee - Lot 2 DP1169777 (formerly part of Lot 6 DP1058178)

REPORT BY THE TOWN PLANNER
 TO 15 SEPTEMBER 2021 ORDINARY MEETING
 GOV400088, P1348861

RECOMMENDATION

That Council:

- A. receive the report by the Town Planner on the ME0051/2021 - Modification to DA0314/2008 for a staged three lot subdivision - 6-8 Clare Court, Mudgee - Lot 2 DP1169777 (formerly part of Lot 6 DP1058178); and
- B. approve ME0051/2021 - Modification to DA0314/2008 for a staged three lot subdivision - 6-8 Clare Court, Mudgee - Lot 2 DP1169777 (formerly part of Lot 6 DP1058178) subject to the following conditions and statement of reasons:

APPROVED PLAN

1 Development is to be carried out generally in accordance with the plan prepared by Barnson depicting subdivision of Lot 6 DP1058178 Drawing Number 35957_L01 Revision A, dated 07/06/2021 and with the application received by Council on 20 February 2008 (as amended on 23 September 2009) 21 June 2021 except as varied by the conditions listed herein. Any minor modification to the approved plans will require the lodgement and consideration by Council of amended plans. Major modifications will require the lodgement of a new development application.

STAGES 1 & 2

ENGINEERING REQUIREMENTS

- 2 The applicant is to provide separate water and sewer reticulation services to each lot.
- 3 Where a mains extension is required, a “Subdivision Works Certificate” approval is required prior to carrying out any construction activities. The developer is to extend and meet the full cost of water and sewerage reticulations to service the new lots plus the cost of connecting to existing services. All water and sewerage work is required to be carried out in accordance with the requirements of Mid-Western Regional Council (as the Water Supply Authority under the Local Government Act, 1993) and in accordance with the National Specification – Water & Sewerage Codes of Australia.

(AMENDED BY ME0051/2021)

4 The developer is to provide a water service and meter for each lot in the subdivision. This can be achieved by making a payment to Council of \$1,040 per lot to cover the cost of installing both the service and a 20mm meter on the water main.

TOTAL PAYABLE – STAGE 1	1	x	\$1,040	=	\$1,040
TOTAL PAYABLE – STAGE 2	1	x	\$1,040	=	\$1,040

Note: Council does not permit other bodies to insert new junctions into 'live' water mains.

- 5 Interallotment drainage is to be provided to remove stormwater from any lots that cannot discharge to the street in accordance with AusSpec #1.
- 6 Three metre wide easements, including associated Section 88B instruments, are to be created in favour of Council over any existing or newly constructed inter-allotment drainage, water, or sewerage reticulation components located within the subject property, or extended through adjoining private properties as a result of this subdivision.
- 7 All earthworks, filling, building, driveways or other works, are to be designed and constructed (including stormwater drainage if necessary) so that at no time will any ponding of stormwater occur on adjoining land as a result of this development.
- 9 ~~Following completion of the subdivision works, one full set of work as executed plans, in pdf and dwg format, which is "Autocad compatible" is to be submitted on disk to Council. All work as executed plans shall bear the Consulting Engineer's or Consulting Surveyor's certification stating that all information shown on the plans is accurate.~~

Following the completion of subdivision works, one set of Works As Executed (WAE) Drawings in PDF format, AutoCAD compatible files in DWG format, MapInfo files (MGA GDA94 Zone 55/56) and completed Asset Data Template spreadsheets in MS Excel format, are to be submitted to Council. All Works As Executed plans shall bear the consulting engineer's or consulting surveyor's certification stating that all information shown in the plans is accurate.

(AMENDED BY ME0051/2021)

PRIOR TO THE ISSUE OF SUBDIVISION WORKS CERTIFICATE

- 10 ~~Engineering plans of any mains extensions are to be submitted to and approved by Council or an Accredited Certifier prior to the issue of a Construction Certificate~~

A detailed Engineering Design is to be submitted to and approved by Council prior to the issue of a Subdivision Works Certificate. The Engineering Design is to comply with Council's Development Control Plan, WSAA code. A Subdivision Works Certificate is required for, but not limited to the following Civil Works:

- Sewer Extensions works;

NOTE:

No work is permitted to commence prior to the issue of the Subdivision Works Certificate

(AMENDED BY ME0051/2021)

- 11 ~~A detailed engineering design supported by plans, and an "Autocad compatible" Plan, (in dwg format including pen map), material samples, test reports and specifications is to be prepared in accordance with AUS-SPEC #1 (as modified by Mid Western Regional Council) and the conditions of this development consent. The engineering design is to be submitted to and approved by Council prior to the issue of a Construction Certificate.~~

(DELETED BY ME0051/2021)

- 12 Contractor's public liability insurance cover for a minimum of \$10,000,000 is to be sighted and to be shown to Mid Western Regional Council as an interested party.

All work is to be at no cost to Council.

PRIOR TO THE ISSUE OF A SUBDIVISION CERTIFICATE

These conditions have been imposed to ensure that the proposed subdivision complies with the requirements of the Environmental Planning and Assessment Act, 1979, Council policy and the relevant standards.

13 Under the Environmental Planning & Assessment Act, 1979, a *Subdivision Certificate* is required before the linen plan of subdivision can be registered with the Land Titles Office.

14 A linen plan and two (2) copies are to be submitted to Council for approval and endorsement by the General Manager.

NOTE: Council's fee to issue a Subdivision Certificate is set out in Council's fees and charges and for this development is \$210 (Stage 1 and \$280 Stage 2) at the date of determination.

15 If the *Subdivision Certificate* is not issued, for any reason whatsoever, within twelve (12) months of the date of determination, then the charges and contributions contained in this consent may be increased to the current rate at the time of payment.

16 Prior to the issue of a *Subdivision Certificate*:

- (a) all contributions must be paid to Council and all works required by the consent be completed in accordance with the consent, or
- (b) an agreement be made between the developer and Council;
 - (i) as to the security to be given to Council that the works will be completed or the contribution paid, and
 - (ii) as to when the work will be completed or the contribution paid.

17 Electricity, and telecommunications are to be supplied to each lot. Prior to issue of the *Subdivision Certificate*, Council is to be supplied with:

- (a) A certificate from the appropriate power authority indicating that satisfactory arrangements have been made for provision of electricity supply to the development.
- (b) A certificate from the appropriate telecommunications authorities indicating that satisfactory arrangements have been made for provision of telephone services to the development.

18 The developer must provide Council and land purchasers with a site classification for the new vacant allotment lot within the subdivision. The classification is to be carried out at a suitable building site on each lot and is to be carried out by a NATA registered laboratory using method (a) of Clause 2.2.3 of AS2870 - 1996. Results to be submitted to Council prior to issue of the *Subdivision Certificate*.

19 Documentary evidence of compliance with Council's approval and relevant standards of construction is to be obtained and lodged with Council prior to the issue of the *Subdivision Certificate*.

STAGE 1

20 In accordance with the provisions of section 94 of the *Environmental Planning and Assessment Act 1979* and the Mid-Western Regional Council Section 94 Developer

Contributions Plan, a contribution shall be paid to Council in accordance with this condition for the purpose of: **SUBJECT TO CPI INCREASE**

Program	Levy per Lot \$	Total \$
Transport Management		
Traffic Management	\$962.70	\$962.70
Open Space		
Local Open Space	\$1,511.30	\$1,511.30
District Open Space	\$2,052	\$2,052.00
Community Facilities		
Library Buildings	\$197.80	\$197.80
Library Resources	\$237.40	\$237.40
Administration		
Plan Administration	\$461.60	\$461.60
TOTAL PAYABLE	\$5,422.80	\$5,422.80

21 The developer shall obtain a *Certificate of Compliance* under the Water Management Act. This will require:

(a) Payment of a contribution for water and sewerage headworks at the following rate:

Water Headworks	\$7,004
Sewerage Headworks	\$3,198
Total	\$10,202

(b) The adjustment of existing services or installation of new services and meters, as required, in compliance with Australian Standard 3500: National Plumbing and Drainage Code. All costs associated with this work shall be borne by the developer.

STAGE 2

22 In accordance with the provisions of section 94 of the *Environmental Planning and Assessment Act 1979* and the Mid-Western Regional Council Section 94 Developer Contributions Plan, a contribution shall be paid to Council in accordance with this condition for the purpose of: **SUBJECT TO CPI INCREASE**

Program	Levy per Lot \$	Total \$
Transport Management		
Traffic Management	\$962.70	\$962.70
Open Space		
Local Open Space	\$1,511.30	\$1,511.30
District Open Space	\$2,052	\$2,052.00
Community Facilities		
Library Buildings	\$197.80	\$197.80
Library Resources	\$237.40	\$237.40
Administration		
Plan Administration	\$461.60	\$461.60
TOTAL PAYABLE	\$5,422.80	\$5,422.80

23 The developer shall obtain a *Certificate of Compliance* under the Water Management Act. This will require:

(a) Payment of a contribution for water and sewerage headworks at the following rate:

Water Headworks	\$3,501
Sewerage Headworks	\$3,038
Total	\$6,539

(b) The adjustment of existing services or installation of new services and meters, as required, in compliance with Australian Standard 3500: National Plumbing and Drainage Code. All costs associated with this work shall be borne by the developer.

GENERAL

The following conditions have been applied to ensure that the use of the land and/or building is carried out in a manner that is consistent with the aims and objectives of the environmental planning instrument affecting the land

24 If any aboriginal artefacts are uncovered or identified during construction earthworks, such work is to cease immediately and the local aboriginal community and National Parks and Wildlife Service are to be notified.

(Note: A suitably qualified person would be required to be present during earthworks to identify whether any artefacts were uncovered)

ADVISORY NOTES

1. At such time as proposed Lot 1 is developed, a Stormwater Management Plan may be required to demonstrate how surface runoff from proposed Lot 1, which slopes down towards the western boundary and has lowest level at the mid-point of the block does not affect proposed Lot 2.

ADDED BY ME0051/2021

STATEMENT OF REASONS

1. The proposed modification is substantially the same development as that approved and will have minimal environmental impacts.
2. The proposed modification complies with all the relevant matters required to be taken into consideration in accordance with sections 4.15 and 4.55 of the *Environmental Planning and Assessment Act 1979*.
3. The proposed variation to the minimum lot size has been adequately justified in accordance with Clause 4.6 Mid Western Regional Local Environmental Plan 2012.

ADDED BY ME0051/2021

Executive summary

OWNER/S	Greg and Claire Toole
APPLICANT:	Mark Hitchenson, Navigate Planning
PROPERTY DESCRIPTION	Lot 2 DP1169777
PROPOSED DEVELOPMENT	Modify DA0314/2008 to realign the boundary between two approved lots.
ESTIMATED COST OF DEVELOPMENT:	Nil
REASON FOR REPORTING TO COUNCIL:	Variations greater than 10% to MWRLEP 2012 numerical standard are to be reported to Council to obtain the concurrence of the Secretary of the Department of Environment and Planning.
PUBLIC SUBMISSIONS:	Nil

Council is in receipt of Development Application ME0051/2021 that seeks approval to modify DA0314/2008 under Section 4.55(1A) of the Environmental Planning and Assessment Act 1979, relating to a three lot subdivision, located at 6-8 Clare Court, Mudgee (Lots 1 and 2 DP 1169777) and received by Council on 21 June 2021.

The application is a minor modification to the approved subdivision layout at 6-8 Clare Court resulting in a change of 31m² to the size of approved Lots 1 and 2. The modification is required to align the subdivision boundary with the existing fence line.

The original application, DA0314/2008, was assessed under the provisions of the *Mid Western Regional Interim Local Environmental Plan 2008* (MWRILEP 2008). Since this time, the zoning and minimum lot size affecting the land has changed. Under the current legislation (*Mid Western Regional Local Environmental Plan 2012* (MWRLEP, 2012)), the land is zoned R2 Low Density Residential and has a minimum lot size of 10 ha whereas at the time the application was originally approved the land was zoned Medium Density Residential and had a minimum lot size of 600m².

The proposed modification, whilst resulting only in a small change to the approved lot sizes, does not comply with the current minimum lot size affecting the land of 10 hectares. The modified lots will be 983m² and 719m² in size representing a variation of 90.17% and 92.81% respectively to the minimum lot size requirement.

The applicant has satisfactorily demonstrated that the minimum lot size of 10ha is unreasonable and unnecessary in this case and as such the proposed variation is supported. The reasoning for this is further discussed within the body of this report.

As the application involves a variation to a MWRLEP 2012 standard that is greater than 10%, the application is required to be determined at a Council meeting in order to gain concurrence by the Secretary of the Department of Environment and Planning for the variation.

The application was not required to be notified or advertised in accordance with the Mid-Western Regional Community Participation Plan 2019. No submissions were received during the assessment period.

The proposed development has been assessed in accordance with Council's current Development Control Plan 2013 (DCP 2013) and the MWRLEP 2012. The proposed development is considered generally consistent with Council's planning controls.

The application is recommended for Approval.

Disclosure of Interest

Nil

Detailed report

Background and proposal

Development consent DA0314/2008 was approved on 12 October 2009 to subdivide Lot 6 DP1058178 into three lots over two stages. An extract of the approved plans is in Figure 1. The application was assessed under the provisions of the *Mid Western Regional Interim Local Environmental Plan 2008* (MWRILEP 2008) and at this time was zoned Medium Density Residential with a minimum lot size of 600m². The land also fell within the area defined by the Development Control Plan - South Mudgee and Part C of the Residential Development Control Plan which required a minimum lot size of 700m².

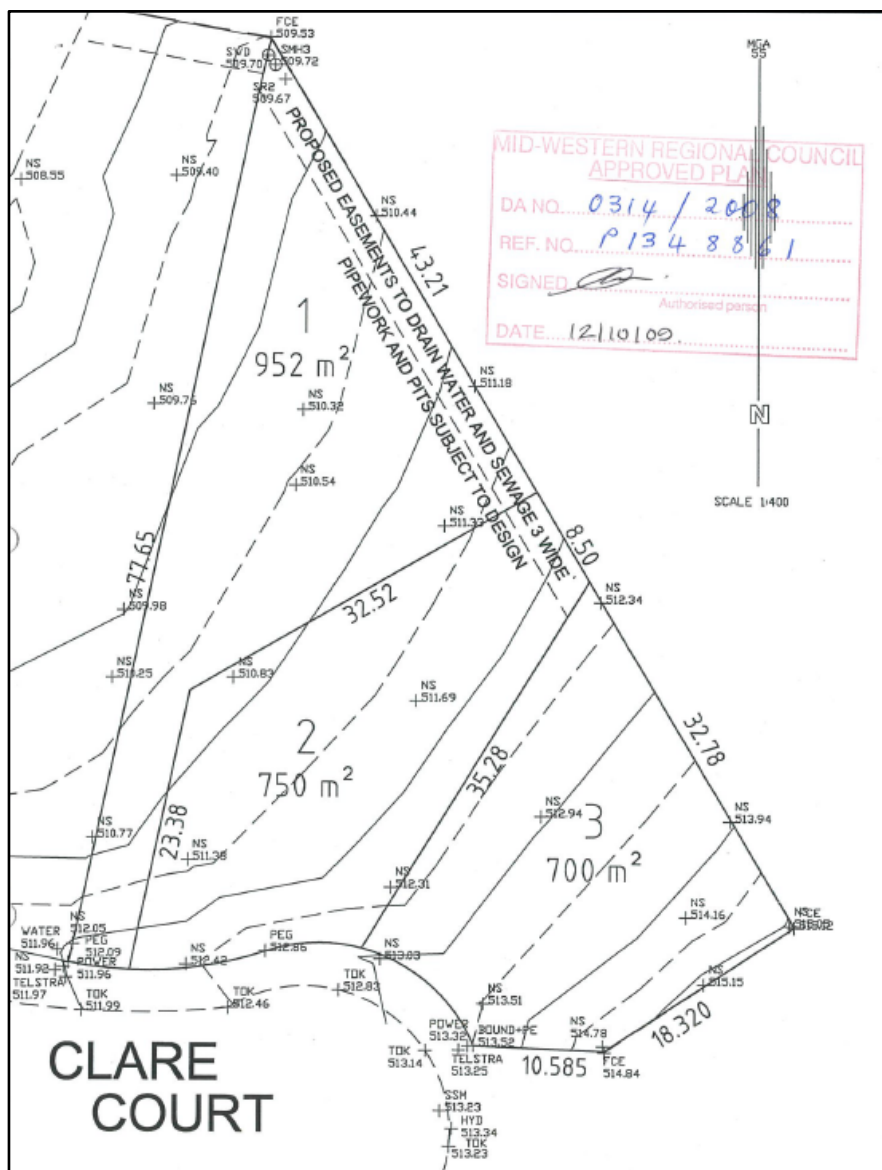


Figure 1 - Extract from approved plans DA314/2008

Stage 1 of the subdivision was completed with Subdivision Certificate SC0030/2011 issued on 25 February 2011 releasing Lot 3 of the subdivision (identified as Lot 1 DP1169777) and a residual lot

identified as Lot 2 DP1169777. The residual lot is to be subdivided into two lots under Stage 2 of DA0314/2008 and is the subject of this modification application.

Since the lots were registered, both have been developed with a single dwelling as shown on the aerial image in Figure 2. The residual lot has a dwelling located on the west side of the lot, with vacant land located on its south east side. It is proposed to modify the approved subdivision boundary to align with the existing fence line, so that one lot contains the existing dwelling and the other is vacant, a copy of the proposed subdivision layout is available in Attachment 1, with details as follows:

- Approved Lot 1 - will increase in size from 952m² to 983m² (an area of 31m² representing an increase of 3.25%) and will contain an existing dwelling.
- Approved Lot 2 – will decrease in size by from 750m² to 719m² (an area of 31m² representing a decrease of 4.1%). The lot will be vacant with suitable dimensions to accommodate a dwelling.

The proposal includes a variation to the minimum lot size of 10 hectares, representing a variation of 90.17% and 92.81% respectively to the standard requirement. This variation is further discussed in the assessment section of this report.



Figure 2 - Aerial Image of subject site

Assessment

The application has been assessed in accordance with Section 4.55 of the *Environmental Planning & Assessment Act 1979* as the original consent was granted by Council. The main issues are addressed below.

4.55(1A) Modifications involving minimal environmental impact**(1A) Modifications involving minimal environmental impact**

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

(a) it is satisfied that the proposed modification is of minimal environmental impact, and

Comment The proposed modification relates to a change to the layout of the subdivision to follow an existing fence line resulting in a change in the lot size of 31sqm. No additional environmental impacts have been identified as a result of the proposed modification.

(b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and

Comment Council is satisfied that the proposed modification is substantially the same development as the original consent granted for the subdivision of the land into three lots.

(c) it has notified the application in accordance with:
(i) the regulations, if the regulations so require, and
(ii) a development control plan,

Comment The Section 4.55 Application was not required to be notified to adjoining neighbours in accordance with Council's Community Participation Plan 2019 given the proposed subdivision will create less than 5 lots.

(d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.

Comment No submissions were received.

(3) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15 (1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

Comment All matters under Section 4.15(1) of relevance to the modification are addressed below.

(4) The modification of a development consent in accordance with this section is taken not to be the granting of development consent under this Part, but a reference in this or any other Act to a development consent includes a reference to a development consent as so modified.

Comment The applicant has submitted the Section 4.55(1A) application to Council in order to amend the layout of the subdivision only. No further development consent is sought by the modification application in accordance with this part.

4.15(1)(a) Evaluation – Matters for consideration

(i) Do any environmental planning instruments (SEPP, REP or LEP) apply to the land to which the Application relates?

State Environmental Planning Policies (SEPPs)

State Environmental Planning Policy no 55 – Remediation of Land

A site inspection and a search of Council's records did not reveal any potentially contaminating activities upon the site. Accordingly, no further consideration is necessary.

Mid-Western Regional Local Environmental Plan 2012 (MWRLEP 2012)

The following clauses of Mid-Western Regional Local Environmental Plan 2012 have been assessed as being relevant and matters for consideration in assessment of the Development Application.

Clause 1.2 Aims of Plan

The application is not contrary to the relevant aims and objectives of the plan.

Clause 1.4 Definitions

The proposal is defined in accordance with the MWRLEP 2012 as:

Subdivision of land pursuant to Section 6.2 of the *Environmental Planning and Assessment Act 1979*.

Clause 2.2 Zoning of Land to Which Plan Applies

The land is zoned R2 Low Density Residential and is therefore subject to the Plan. Figure 3 below shows the Land Use mapping of the subject site and surrounding area.

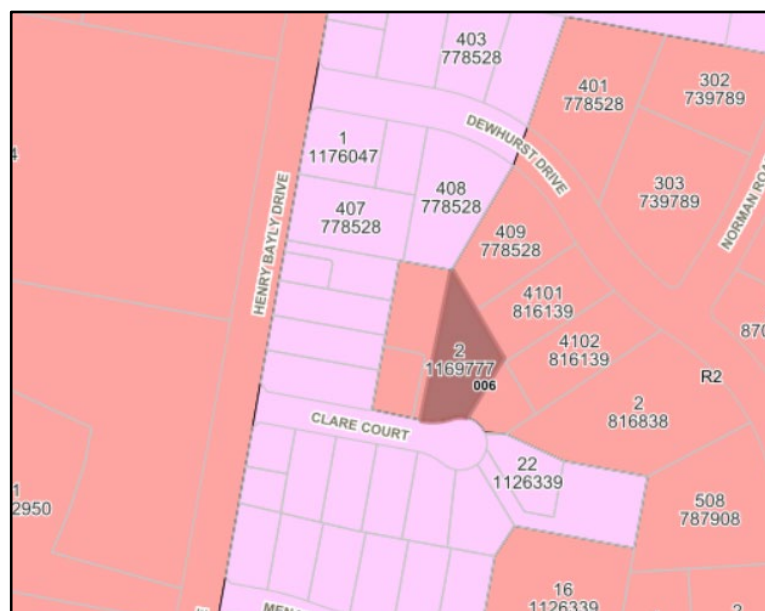


Figure 3: Land Zoning of subject land and surrounds
(light purple = R1 General Residential; red/orange = R2 Low Density Residential)

Clause 2.3 Zone objectives and Land Use table

The objectives of the zone and how the proposal satisfies the objectives is addressed below:

R2 Low Density Residential

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

Comment The proposal will contribute to the housing needs of the community.

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

Comment The proposal is not expected to hinder other possible permissible land uses within the immediate area.

Clause 2.6 Subdivision – consent requirements

Subdivision requires development consent under this Clause as discussed throughout the report.

Clause 4.1 Minimum subdivision lot size

The proposed lots have an area of 719m² and 983m². The minimum lot size pursuant to the mapping is 10ha as shown in Figure 4 below. Subsequently, the applicant has addressed clause 4.6 (discussed below) to justify the proposed variation.

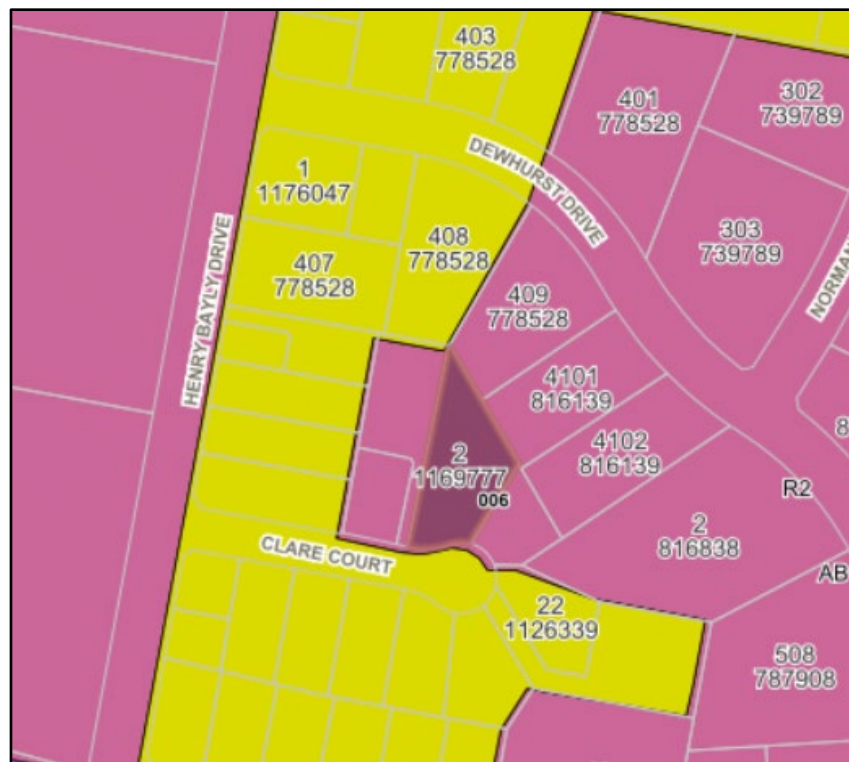


Figure 4: Minimum Lot Size mapping (Purple = 10 ha Yellow = 600sqm)

Clause 4.6 Exceptions to development standards

It is proposed to vary Clause 4.1 of the MWRLEP 2012 to reduce the minimum lot size from 10ha to 719m² and 983m², representing a variation of 92.81% and 90.17% to the development standard respectively. The development standard to be varied states the following:

(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.*

In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ clarified the correct approach to the consideration of clause 4.6 requests as follows:

- Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.
- The first opinion of satisfaction in clause 4.6(4)(a)(i) is whether the clause 4.6 request has adequately addressed the matters required to be demonstrated in clause 4.6(3). Those matters are:
 - 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 does not have to directly form the opinion of satisfaction regarding these matters, but only indirectly form the opinion of satisfaction that the written request has adequately addressed these matters.
- The second opinion of satisfaction in clause 4.6(4)(a)(ii) is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out.
- The consent authority must be directly satisfied that the clause 4.6 request adequately addresses the matter in clause 4.6(4)(a)(ii), which 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 in the zone.
- The final precondition in clause 4.6(4) that must be satisfied is that the concurrence of the Secretary of the Department of Planning and Environment has been obtained.

Given the above, an assessment has been made taking into consideration the above points and the requirements of Clause 4.6 as follows:

2. **Clause 4.6(4)(a)(i)**

The consent authority satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated in clause 4.6(3) being:

- *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.*

Comment:

The applicant has provided an appropriate justification that the minimum lot size standard is unreasonable and unnecessary in this case and that there are sufficient environmental planning grounds to justify contravening the development standard. The reasons (as summarised by the applicant in their report, a copy can be found in Attachment 2) are as follows:

- The proposed subdivision already has development consent and the proposed modification is a minor change to the approved subdivision plan.

- The site is relatively flat, environmentally unconstrained and able to accommodate a dwelling without negative impacts on adjoining properties.
- A dwelling on the subject lot can be easily serviced with electricity, water and sewer services and has adequate access.
- The proposed development will not affect the character of the area or create any land use conflicts.
- The development does not create a precedent for similar proposals.
- The development is consistent with the objectives of clause 4.1.
- The proposal achieves a better outcome for the Clare Court streetscape and character than the retention of a vacant area.
- The application of the R2 zone to the subject land is inappropriate and unreasonable.

A full copy of the justification is attached in Attachment 2.

2. **Clause 4.6(4)(a)(ii)**

The consent authority satisfied that the proposal will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out.

Comment:

It is proposed to vary Clause 4.1 Minimum Lot Size of the MWRLEP 2012. The applicant has provided an appropriate response to how the proposal meets the objectives of this Standard which incorporates the following (refer to Attachment 2 for a full assessment):

(a) *to ensure that subdivision of land occurs in a manner that promotes suitable land uses and development,*

- Comment**
- The subdivision will result in two lots that are similar in size to existing lots in Clare Court.
 - The lots will facilitate the construction of a dwelling which is similar in scale and character with the existing streetscape.

(b) *to minimise any likely impact of subdivision and other development on the amenity of neighbouring properties,*

- Comment**
- The proposed front lot (currently vacant) is likely to be developed with a single storey dwelling similar to that of other dwellings in Clare Court. The size of the lot is sufficient to allow for the construction of a dwelling that has minimal impacts on the amenity of neighbouring properties.
 - The rear lot is already developed with a dwelling and unlikely to create any additional amenity issues as a result of the boundary adjustment.

(c) *to ensure that lot sizes and dimensions are able to accommodate development, consistent with relevant development controls,*

- Comment**
- The rear lot will contain an existing dwelling.
 - The vacant lot will be 719m² in size with adequate dimensions to accommodate a dwelling compliant with the relevant development controls.
 - The applicant has also provided further discussion regarding the appropriateness of the lot to accommodate a dwelling in Attachment 2.

(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 Not applicable – the land is located within an urban area.

(e) *to ensure that subdivision does not have an inappropriate impact on the natural environment,*

Comment The subdivision is not expected to have a significant impact on the natural environment.

(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 Not applicable – the land is located in an urban area.

Given the above, the proposal is considered to be consistent with the objectives of Clause 4.1 and the zoning of the land R2 Low Density Residential (as set out previously in this report). The proposed variation to the minimum lot size is therefore considered to be in the public interest in this case.

3. **Clause 4.6(4)**

Council must be satisfied is that the concurrence of the Secretary of the Department of Planning and Environment has been obtained.

Comment

The Secretary's concurrence may be assumed in accordance with Planning Circular PS 20-002 issued on 5 May 2020 which states:

all consent authorities may assume the Secretary's concurrence under:

- *Clause 4.6 of a local environmental plan that adopts the Standard Instrument (Local Environmental Plan) Order 2006 or any other provision of an environmental planning instrument to the same effect, or*
- *State Environmental Planning Policy No 1 – Development Standards.*

However the assumed concurrence is subject to conditions:

- In relation to “**Numerical and non-numerical development standards**” the circular states that the Secretary's concurrence may not be assumed by a delegate of council if:
 - The development contravenes a numerical standard by greater than 10%; or
 - The variation is to a non-numerical standard.

The circular further states that “the purpose of the restriction on assumed concurrence for variations of numerical and non-numerical standards applying to delegates is to ensure that variations of this nature are considered by the council or its independent hearing and assessment panel and that they are subject to greater public scrutiny than decisions made by council staff under delegation”.

In this case as it is proposed to vary the minimum lot size by more than 10% and is being considered at a Council meeting. Accordingly, the secretary's concurrence can be assumed.

4. **Clause 6**

Relates to variations to the minimum lot size for 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 E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.

Comment: Not applicable - the land is zoned R2 Low Density Residential.

5. **Clause 8**

Requires that development consent cannot be granted in relation to a development standard for complying development, in connection to a commitment set out in a BASIX certificate or Clause 5.4

Comment: The variation does not related to any development standards excluded by Clause 8.

Clause 5.10 Heritage Conservation

No items of aboriginal significance or a heritage item are recorded on the site or in the vicinity. Notwithstanding this, Condition 24 on the consent will be retained to ensure that work is ceased should an item be discovered during construction.

Clause 5.21 Flood planning

The subject site is not identified as being within the flood planning area in accordance with Council's maps and the Floodplain Study and Management Plan. No further consideration is necessary.

Clause 6.1 Salinity

The proposal only involves minimal earthworks and is not expected to significantly affect the process of salinisation.

Clause 6.3 Earthworks

The proposal involves only minimal earthworks in order to service the proposed lots. The works are not expected to generate any significant impacts as listed in Clause 6.3(3).

Clause 6.4 Groundwater vulnerability

The site is not identified as groundwater vulnerable.

Clause 6.5 Terrestrial biodiversity

The proposal is not located in any area identified as 'Moderate or High Biodiversity Sensitivity'.

Clause 6.8 Airspace operations – Mudgee Airport

The proposal will not penetrate the relevant height limits for safe operation of the Mudgee Airport.

Clause 6.9 Essential Services

All essential services that are relevant to the proposal are available or will be available as a result of the proposed development as follows:

- a. The supply of water

Comment: Conditions on the existing consent relating to the provision of separate reticulated water services to each lot will be retained.

- b. The supply of electricity

Comment: Condition 17 on the existing consent relating to the provision of electricity to each lot will be retained.

- c. The disposal and management of sewage

Comment: Conditions on the existing consent relating to the provision of separate reticulated sewer services to each lot will be retained / updated.

d. Stormwater drainage or on-site conservation

Comment: New buildings constructed on proposed lots 1 and 2 can be drained to Clare Court. Council's Engineers have raised concerns that surface runoff from proposed Lot 1, which slopes down towards the western boundary and has its lowest level at the mid-point of the block, may need to be managed so as it does not impact on Lot 2. It is not known at this stage how the lot will be developed and what its finished surface levels will be, accordingly it is most appropriate that this is addressed at such time as the lot is developed. Accordingly, an advisory notation has been added to inform the developer of this issue and the possible requirement for a Stormwater Management Plan.

e. Suitable road access

Comment: All lots have road access to Clare Court. A section 138 application can be lodged with Council to physically construct an access, when required.

Clause 6.10 Visually sensitive land near Mudgee

The land is not located within the area identified within the visually sensitive land map.

4.15(1)(a) Requirements of Regulations and Policies

(ii) Draft environmental planning instruments (EPI)

No draft environmental planning instruments apply to the land to which the Development Application relates.

(iii) Any development control plans

Mid-Western Regional Development Control Plan 2013 (DCP 2013)

An assessment is made of the relevant chapters and sections of this DCP 2013. Those chapters or sections not discussed here were considered not specifically applicable to this application or are discussed elsewhere in this report.

Part 5.3 Stormwater Management

Council's Development Engineers have confirmed that new buildings constructed on proposed lots 1 and 2 can be drained to Clare Court. As mentioned previously, concerns have been raised in relation to surface runoff from proposed Lot 1, which may impact on Lot 2. It was concluded that this issue is best addressed when the lot is developed and as such an advisory note has been added to inform the developer of this issue and the possible requirement for a Stormwater Management Plan.

Part 5.4 Environmental Controls

All the relevant considerations have been discussed elsewhere in this report or dealt with through conditions of consent.

Part 7.1 Urban Subdivision

DEVELOPMENT CONTROL REQUIREMENT	COMPLIES?
Applies to	
Land zoned residential; village zones; rural residential lots up to 2 hectares	Land is zoned Residential
Lot size	
Minimum lot size as determined by MWRLEP 2012	Yes

DEVELOPMENT CONTROL REQUIREMENT	COMPLIES?
All lots have street frontage	All lots have frontage to Clare Court
Lots increase in size relative to slope as follows: – 0-10 degrees: 600m ² – 10-15 degrees: 700m ² – 15-20 degrees: 800m ² – >20: subdivision prohibited	Complies – the site is relatively flat with each dwelling exceeding 600m ²
All lots have 16m width at building line in residential and village zones	Yes. Lots are of ample size and dimension
Battle-axe handles in R1, R3 and RU5 Village have width of 4m	Not applicable
Battle-axe handles in R2 and R5 residential zones have width of 6m	Proposed lot 2 has a battle-axe handle which will be less than 6m at 5m. The variation is considered justified in this case as it is consistent with the battle-axe handle on the adjoining lot which is also in the R2 zone. Also, the original consent approved the battle-axe handle with a 5m width (no change)
Lot Design	
For infill subdivision lot orientation maximises solar access and takes account of existing pattern of development	Yes. Achieves adequate solar access.
For new release subdivision lot orientation maximises solar access by maximising north-south lots	Not applicable
For new release subdivision east-west orientated lots have increased width and midpoint	Not applicable
Lots generally rectangular in shape	The lots are not rectangular in shape, however this is considered appropriate in this case as Lot 1 already contains a dwelling and Lot 2 is of sufficient shape and size to accommodate a dwelling. It is also noted that the originally approved lots were also not rectangular in shape
Lots on southern side of road provide greater frontage width for better solar orientation of future dwelling	Not applicable – lots are on the northern side of the road
Corner lots have sufficient area to allow dual occupancy and independent utility connection points	Not applicable
Street Layout and Design	
Traffic Impact Statement submitted for 5+ lots	Not applicable
Traffic Impact Statement submitted for all subdivisions where new road required	Not applicable
Subdivision integrates with existing residential area	Yes
New roads must provide “through road” connections to surrounding roads and road heads where they exist in the locality	Not applicable
Where cul-de-sac treatment unavoidable, pedestrian linkages between streets provided	Not applicable
Multiple cul-de-sacs and “no through roads” discouraged	Not applicable
Maximum number of lots in cul-de-sac is 12 lots	Not applicable

DEVELOPMENT CONTROL REQUIREMENT	COMPLIES?
Subdivision >80 lots should not require backtracking	Not applicable
Road Standards for New Development	
Urban Road Standards required	Not applicable
1 x 1.2m footpath, barrier kerbing	Not applicable
Commercial and Industrial Subdivision roads: 22m road reserve, 13m carriageway, 2 x 4.5m nature strip, 1 x 1.2m footpath, barrier / rollover kerbing	Not applicable
Cycle ways and footpaths	
Cycle ways and pedestrian networks included in new subdivisions	Not applicable
If subdivision site identified in Council cycle way plan or pedestrian strategy, subdivision needs to respond to strategy	Not applicable
New subdivisions provide direct, convenient and safe access to major facilities	Yes, existing access to Mudgee retained
Cul-de-sacs may be required to include 10m wide shared overland flow/pathway	Not applicable
Developer to provide contribution to Council for installation of cycle ways and footpaths prior to release of subdivision certificate	Not applicable
Open Space	
Greenfield sites >20 lots ensure that lots are <400m from local park, playground or passive open space	Not applicable
Where on-site detention basins double as open space, must include raised level area which incorporates playground or fitness equipment etc and shading landscaping	Not applicable
Landscaping	
Landscape plan provided, detailing treatment of public domain	Not applicable
Land dedicated as public reserve top soiled, levelled, turfed prior to release of subdivision certificate and maintained by developer for period of two years	Not applicable
Street Trees	
Two (2) street trees provided per lot	Yes
Developer provides levy to Council to provide these trees after 80% of works carried out	Not applicable
Utility Services	
Servicing plan submitted showing provision of underground electricity, sewer, water, drainage and telecommunications to the development	Lots to be connected to reticulated water, sewer, electricity and telecommunications
Evidence of consultation with relevant authorities submitted with application	Not applicable (small subdivision)
Drainage	
As per Section 5.3 Stormwater and Drainage	Refer to Section 5.3 for details

Section 7.11 Contributions and Section 64 – Water/Sewer Developer Services Charges

The modification to subdivision layout does not impact on the Section 7.11 (previously Section 94) Contributions or Section 64 Contributions levied and included as a condition of approval.

4.15(1)(a) Provisions of any Planning Agreement or Draft Planning Agreement – (1)(a)(iia)

No Planning Agreements are applicable.

Regulations –4.15(1)(a)(iv)

Environmental Planning and Assessment Regulation 2000

No matters prescribed by the Regulations impact determination of the Development Application.

Likely impacts of the development – 4.15(1)(b)¹

¹ Including environmental impacts on both the natural and built environments, and social and economic impacts in the locality

(a) Context and Setting

No additional impact - the proposed modified subdivision layout is appropriate with regards to the surrounding context and setting.

(b) Access, Transport and Traffic

No additional impact - the modified layout will not impact on access to the subdivision from Clare Court and will not increase the volume of traffic from that considered under the original application.

(c) Public Domain

No impact - The proposed modification will not impact the public domain in terms of recreation opportunities, the amount, location, design, use and management of public spaces, or pedestrian linkages between public spaces.

(d) Utilities

All relevant utilities are available or can be made readily available to the proposed new lots.

(e) Heritage

Not applicable.

(f) Other Land Resources

No impact expected on the conserving and the use of valuable land, such as productive agricultural land, mineral or extractive resources, or water supply catchments.

(g) Water

No significant impact expected.

(h) Soils

No significant impact expected. The land is not known to be affected by subsidence, slip or mass movement, subject to contamination, and will not result in significant soil erosion or degradation.

(i) Air and Microclimate

The development is not expected to impact air quality or microclimatic conditions.

(j) Flora and fauna

Not applicable.

(k) Waste

Waste service available.

(l) Energy

Not applicable.

(m) Noise and Vibration

Not applicable.

(n) Natural Hazards

The development site is not identified as bushfire prone or flood prone and there are no known subsidence, slip or mass movement issues.

(o) Technological Hazards

There are no known risks to people, property or the biophysical environment, resulting from technological or industrial hazards, or building fire risk.

(p) Safety, Security and Crime Prevention

Increased passive surveillance as a result of the proposed development.

(q) Social Impact in the Locality

Generally positive.

(r) Economic Impact in the Locality

Generally positive.

(s) Site Design and Internal Design

Adequate as discussed throughout this report.

(t) Construction

To comply with the BCA where relevant.

(u) Cumulative Impacts

Nil. There are no known impacts that have the potential to act in unison, in terms of space or time, or owing to their repetitive nature, that would produce an effect greater or different than the sum of the separate parts.

Suitability of Site for Development – 4.15(1)(c)

(a) Does the proposal fit in the locality?

Yes. There are no hazardous land uses or activities nearby, there are no constraints posed by adjacent developments and there are adequate utilities and transport facilities in the area available for the development.

(b) Are the Site Attributes conducive to Development?

Yes. The site is not subjected to any natural hazards, and the project will not impact any critical habitat, threatened species, populations, ecological communities or endangered habitats on the site.

Submissions made in accordance with Act or Regulations – 4.15(1)(d)

(a) Public Submissions

The application was not required to be notified or advertised in accordance with the Mid-Western Regional Community Participation Plan 2019. No submissions were received during the assessment period.

(b) Submissions from Public Authorities

No submissions were sought or received from public authorities.

The Public Interest – 4.15(1)(e)

(a) Federal, State and Local Government interests and Community interests

No significant issues in the interests of the public are expected as a result of the proposed development.

Consultations

(a) Health and Building

No consultation necessary.

(b) Technical Services

Council's Development Engineer has not raised any concerns with the proposal subject to the update of existing conditions to reflect current requirements and terminology. A new advisory note has also been added relating to the requirement for a stormwater management plan when lot 1 is further developed in order to address overland flow.

(c) Heritage Advisor

No consultation necessary.

(d) Access committee

No consultation necessary.

Community Plan implications

Theme	Looking After Our Community
Goal	Vibrant towns and villages
Strategy	Make available diverse, sustainable, adaptable and affordable housing options through effective land use planning

Strategic implications

Council Strategies

Not applicable

Council Policies

Mid-Western Development Control Plan 2013
Community Participation Plan 2019
Mid-Western Regional Contributions Plan 2019

Legislation

Environmental Planning and Assessment Act 1979
Environmental Planning and Assessment Regulations 2000
Mid-Western Regional Local Environmental Plan 2012

Financial implications

Not applicable.

Associated Risks

Should Council refuse the application, the applicant may seek a further review of this decision or appeal through the Land & Environment Court.

SARAH HOPKINS
TOWN PLANNER

LINDSAY DUNSTAN
MANAGER, PLANNING

JULIE ROBERTSON

DIRECTOR DEVELOPMENT

26 August 2021

- Attachments:*
1. Proposed subdivision plan.
 2. Applicant Report - 4.6 Variation (ME0051/2021).

APPROVED FOR SUBMISSION:

BRAD CAM
GENERAL MANAGER



LEGEND

	EXISTING SURVEY CADASTRAL BOUNDARIES - BY TITLE
	EXISTING FENCE LINE
	EXTENDED FENCE LINE

NOTES:

- THE BOUNDARY INFORMATION SHOWN ON THIS PLAN BEEN PLOTTED AS REQUIRED UNDER DIVISION 1, SECTION 9(1) OF THE "SURVEYING AND SPATIAL INFORMATION REGULATION 2017". IT HAS NOT BEEN DETERMINED BY AN ACCURATE BOUNDARY SURVEY.
- A DETAIL LEVEL SURVEY IS NOT TO BE CONSIDERED AS A BASIS FOR THE SURVEYING AND SPATIAL INFORMATION SHOWN ON THIS PLAN. THE SURVEYING AND SPATIAL INFORMATION SHOWN ON THIS PLAN IS FOR INFORMATION ONLY AND IS NOT TO BE USED FOR ANY CONSTRUCTION OR DESIGN WORK WHICH RELIES ON CRITICAL SETBACKS FROM THE STREET OR BOUNDARIES IS PLANNED. IT WOULD BE PREFERABLE TO CARRY OUT FURTHER SURVEY WORK TO DETERMINE THE BOUNDARY DIMENSIONS.
- THE LOCATION AND DEPTHS OF UNDERGROUND SERVICES SHOWN ON THIS PLAN ARE FOR INFORMATION ONLY AND SHOULD BE CONSULTED BEFORE ANY EXCAVATION, DEPOSITION OR CONSTRUCTION COMMENCES.
- THERE MAY BE UNDERGROUND SERVICES THAT HAVE NOT BEEN SHOWN HEREON. ANY PERSON OR BARRISON TAKES NO RESPONSIBILITY FOR DAMAGES OR INJURIES THAT MAY OCCUR DUE TO THE RELIANCE ON THIS PLAN FOR THE LOCATION OF UNDERGROUND SERVICES.



DATE OF SURVEY: 19th JUNE 2021
SURVEY BY: BT

ISSUED TO CLIENT

Survey: BT Certification: BT
 Drawn: BT
 Check: RB Drawing Number: 35957_L01
 Original Sheet: See A.1
 Revision: A

Rev. Date Amendment
 A. 07/06/2021 05:00 TO CLARIFY

Client: GREG TOOLE CONSTRUCTION
 Project: PLAN SHOWING DUAL OCCUPANCY
 6 CLARE STREET
 LOT 2 IN DP1169777
 Drawing title: DUAL OCCUPANCY PLAN

THIS DRAWING IS TO BE READ IN CONJUNCTION WITH THE SPECIFICATIONS AND CONDITIONS OF CONTRACT AND THE SPECIFICATIONS AND CONDITIONS OF CONTRACT FOR THE PROJECT. THE DRAWING IS NOT TO BE USED FOR ANY OTHER PURPOSES WITHOUT THE WRITTEN PERMISSION OF BARRISON PTY LTD.

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EXCEPTION TO DEVELOPMENT STANDARD REPORT

6 Clare Court, Mudgee



Navigate Planning

21 June 2021

1 INTRODUCTION

This report supports an application to modify development consent DA0314/2008 for a three lot subdivision on land at Lot 2, DP 1169777, 6 Clare Court, Mudgee (the subject land).

The development consent permitted the subdivision in two stages. Stage 1 has been completed. It is now proposed to complete Stage 2.

The subject land is 1702m² in size and contains a dwelling towards the rear of the lot with a fenced yard. The front portion of the site is vacant, with a driveway along the western boundary. The modification application proposes to amend the boundary between proposed lots 1 and 2 to follow the line of the fence associated with the existing dwelling. The rear lot containing the dwelling would be 983m² in size and the front vacant lot would be 719m² in size.

The location of the subject land is shown in the map below.



2 RELEVANT DEVELOPMENT STANDARDS

The subject land is zoned R2 Low Density Residential under the Mid-Western Regional Local Environmental Plan 2012. The land has a minimum lot size of 10ha.

Subdivision of land must comply with clause 4.1 of the MWRLEP 2012, which is as follows:

4.1 Minimum subdivision lot size

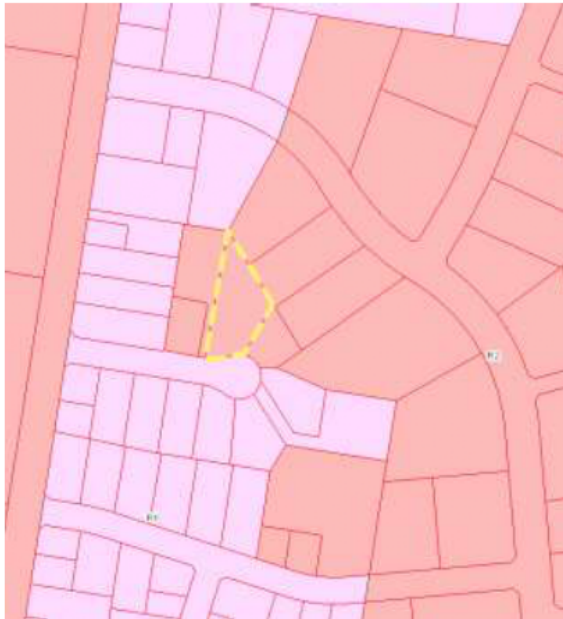
- (1) *The objectives of this clause are as follows—*
 - (a) *to ensure that subdivision of land occurs in a manner that promotes suitable land uses and development,*
 - (b) *to minimise any likely impact of subdivision and other development on the amenity of neighbouring properties,*
 - (c) *to ensure that lot sizes and dimensions are able to accommodate development, consistent with relevant development controls,*
 - (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,*
 - (e) *to ensure that subdivision does not have an inappropriate impact on the natural environment,*
 - (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.*
- (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.*
- (3A) *Despite subclause (3), if the consent authority is satisfied that each lot is, or will be serviced by a water reticulation system and sewerage system—*
 - (a) *land identified as “Area A” on the Lot Size Map may be subdivided to create lots of at least 2,000 square metres, or*
 - (b) *land identified as “Area B” on the Lot Size Map may be subdivided to create lots of at least 4,000 square metres.*
- (3B) *Despite subclause (3), if the consent authority is satisfied that each lot is, or will be serviced by a water reticulation system, land identified as “Area D” on the Lot Size Map may be subdivided to create lots of at least 2 hectares.*
- (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 1989.*

The subject land has a minimum lot size of 10ha. At 1702m² in size, the subject land is less than the minimum lot size. The approved subdivision of the land (DA0314/2008) results in two lots beneath the minimum lot size. The proposed modification also results in two lots beneath the minimum lot size, at 983m² and 719m² in size.

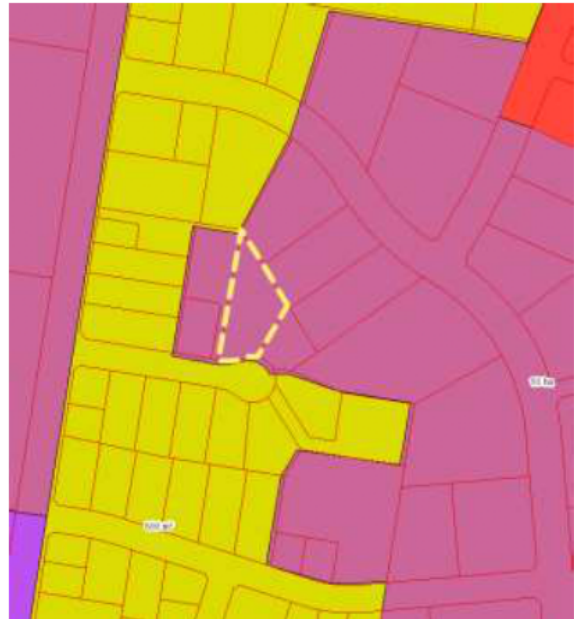
The subject land is not identified on the Lot Size Map in Areas A, B or D. The proposed subdivision is not a strata or community title subdivision.

Therefore, the development standard that the applicant seeks to vary is the minimum lot size of 10ha, as referred to in clause 4.1 (3) of the MWRLEP 2012.

Extracts of the LEP 2014 Land Zoning and Minimum Lot Size Maps are provided below.



LEP 2014 Land Zoning Map



LEP 2014 Minimum Lot Size Map

Development can be approved despite non-compliance with a development standard under clause 4.6 of LEP 2014. Clause 4.6 is as follows:

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 E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 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.*
- (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.*

As noted above, the approved subdivision and proposed modification contravenes the current minimum lot size standard referred to in clause 4.1 of MWRLEP 2012. Clause 4.1 is not expressly excluded from the operation of Clause 4.6.

This report should be considered a written request from the applicant for approval of an application to modify development consent (DA0314/2008) for Stage 2 of a three lot subdivision, being a two lot subdivision of Lot 2 DP 1169777 at 6 Clare Court, Mudgee, despite non-compliance with the minimum lot size development standard. Justification for the non-compliance is provided in Section 3 of this report.

Importantly, there is no upper limit to the extent of variation that can be argued and approved. The only limit relates to whether the Council has assumed concurrence to approve a variation. The Department of Planning's Planning Circular PS20-002 states that concurrence may not be assumed if the development contravenes a numerical standard by greater than 10%. The proposed variation is greater than 10%.

3 RELEVANT CASE LAW

There are a number of Land and Environment Court cases that provide guidance in the preparation of written requests to justify non-compliance with a development standard under clause 4.6 of Local Environmental Plans, including:

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

Brigham v Canterbury–Bankstown Council [2018] NSWLEC 1406.

Wehbe v Pittwater Council [2007] NSWLEC 827.

Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248.

Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90.

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

In *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Commissioner Preston summarised (from *Wehbe v Pittwater Council [2007] NSWLEC 827*) five common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary (under clause 4.6(3)(a)), as follows:

- *The first and 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.*
- *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 decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable.*
- *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary.*

The above ways to establish that a variation from a development standard is well founded are included in the Department of Planning's Guide to Varying Development Standards 2011.

The Commissioner also stated that an applicant does not need to establish all of the ways and that establishing only one way may be sufficient.

In relation to clause 4.6(3)(b), the Commissioner stated that the grounds relied on by the applicant in the written request must be "environmental planning grounds" by their nature, being grounds that relate to the subject matter, scope and purpose of the EPA Act. The environmental planning grounds must be "sufficient", in order "to justify contravening the development standard", so that the consent authority can be satisfied that the written request has adequately addressed this matter. The Commissioner clarified that "*the focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole*".

In relation to clause 4.6(4)(a)(ii), the Commissioner stated that the consent authority must be satisfied 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.

4 JUSTIFICATION FOR EXCEPTION TO DEVELOPMENT STANDARD

As stated above, clause 4.6 of LEP 2014 requires a written justification for non-compliance with a development standard to demonstrate that:

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

Council must also be satisfied that the development is in the public interest.

The following issues are relevant considerations in determining whether the proposed development can be approved, despite non-compliance with the minimum lot size development standard:

- the objectives of clause 4.1 of MWRLEP 2012,
- the relevant environmental planning grounds, and
- the appropriateness of the R2 zone applying to the subject land.

4.1 Clause 4.1 Objectives

This section of this report seeks to demonstrate that compliance with the relevant development standard is unreasonable or unnecessary in this case as the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The objectives of clause 4.1 are outlined below, along with comments relating to the proposed development.

- (a) *to ensure that subdivision of land occurs in a manner that promotes suitable land uses and development,*

Comment – The approved subdivision, as modified, will result in two lots that are similar in size to existing lots in Clare Court and will facilitate the construction of a dwelling that is consistent in scale and character with the existing streetscape.

The proposal will result in a lot fronting Clare Court plus a rear lot, similar to the adjoining land at 4 and 4A Clare Court.

The proposed lots will be 719m² and 983m² in size. Existing lots in Clare Court range from 698m² to 4,108m² in size, as shown in the following table, along with the zoning and minimum lot size standard for each lot.

Land	Area	Zone	MLS
3 Clare Court	914m ²	R1	600m ²
4 Clare Court	698m ²	R2	10ha
4A Clare Court	1,313m ²	R2	10ha
5 Clare Court	936m ²	R1	600m ²
7 Clare Court	944m ²	R1	600m ²
8 Clare Court	700m ²	R2	10ha
9 Clare Court	930m ²	R1	600m ²
10 Clare Court	997m ²	R1	600m ²
11 Clare Court	1,041m ²	R1	600m ²
13 Clare Court	4,108m ²	R2	10ha
15 Clare Court	2,007m ²	R1	600m ²

The majority of lots in Clare Court are zoned R1 General Residential and have a minimum lot size of 600m². This is the predominant minimum lot size for residential land zoned R1 in Mudgee. The proposed lots will be larger than this predominant minimum lot size for residential land in Mudgee.

Note: Section 4.4 below seeks to establish that the R2 zoning of the subject land was unreasonably and inappropriately applied and that compliance with the minimum lot size development standard in the circumstances of the case is also unreasonable and unnecessary.

(b) *to minimise any likely impact of subdivision and other development on the amenity of neighbouring properties,*

Comment – The proposed front lot which is currently vacant is proposed to be developed with a single storey dwelling similar to other dwellings in Clare Court (subject to a separate development application). The size of the proposed lot will facilitate a dwelling that will have minimal to no impacts on the amenity of neighbouring properties.

(c) *to ensure that lot sizes and dimensions are able to accommodate development, consistent with relevant development controls,*

Comment – The proposed lot which is currently vacant land will be able to accommodate a dwelling that can comply with relevant development controls.

(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 – This objective is not relevant to the proposed development as the subject land is not rural land.

(e) *to ensure that subdivision does not have an inappropriate impact on the natural environment,*

Comment – The proposed dwelling will have no negative impact on the natural environment as the land is relatively flat, clear of native vegetation, not proximate to any watercourse and is able to be serviced with all essential utilities.

(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 – This objective is not relevant to the proposed development as the subject land is not rural land.

Based on the above, it is considered that the proposed development will comply with the objectives of clause 4.1 of MWRLEP 2012 and therefore compliance with the minimum lot size development standard is unreasonable or unnecessary in this case. This satisfies clause 4.6(3)(a) of LEP 2014.

4.2 The Relevant Environmental Planning Grounds

This section of this report seeks to demonstrate that there are sufficient environmental planning grounds to justify contravening the relevant development standard.

4.2.1 *The capacity of the subject land to accommodate a dwelling*

The subject land is relatively flat, with a slight slope to the rear. A dwelling exists towards the rear of the lot with a driveway along the western side boundary. The front part of the site is vacant, contains no vegetation and has good frontage to Clare Court. The vacant part of the land has ample capacity to accommodate a dwelling in compliance with relevant development controls.

There is no physical or environmental impediment to the location of a dwelling on the front part of the subject land, despite it being smaller than the minimum lot size development standard, as:

- The site does not contain any native vegetation.
- The land is not identified as visually sensitive or groundwater vulnerable in the MWRLEP 2012 Maps.
- The land where a dwelling is proposed is not traversed by or in close proximity to a watercourse.
- The land is not steep in slope.
- The land is not identified as bushfire prone land.

There will also be no detrimental impacts on the amenity of the locality from the erection of a dwelling on the subject land, as:

- All services required for a dwelling can be provided without impacting on adjoining properties.
- A dwelling on the lot can be sited and oriented to avoid privacy impacts.
- A dwelling on the lot can be developed with no overshadowing impacts on adjoining properties.
- A dwelling can be erected in a manner that fits with the character of the area.

Photos of the subject land and surrounding properties are provided on the following pages.

Photo 1 – The subject land, 6 Clare Court



Photo 2 – Dwellings at 8 and 10 Clare Court



Photo 3 – Dwellings at 3, 5, and 7 Clare Court



Photo 4 – Dwellings at 4 and 4A Clare Court



Photo 5 – Dwellings at 9 and 11 Clare Court



4.2.2 Potential Precedent

In Clare Court the only other lots capable of further subdivision (with a similar variation required to Clause 4.1) are 4A and 13 Clare Court which are both rear lots. These lots do not have the same advantage as the vacant part of Lot 6 which has a good frontage to Clare Court. Both lots are also already developed with dwellings that would limit the capacity for subdivision. It is therefore considered that the proposal does not represent a precedent for further subdivision of R2 zoned land in Clare Court.

In the area of the R2 zone in which the subject land is included, centred on Dewhurst Drive, there are a number of lots that are capable of further subdivision (with a similar variation required to Clause 4.1). However, the character of the R2 land along Dewhurst Drive is very different to the character of Clare Court. The lots along Dewhurst Drive have been developed with large dwellings, many two-storeys in height, with large landscaped setbacks, on a wide street with mature street trees and occasional glimpses of the surrounding landscape. Clare Court contains more modest single storey dwellings with smaller setbacks on a narrower street with no street trees.

Photos demonstrating the character of Clare Court are provided above. Photos demonstrating the different character of the Dewhurst Drive areas are provided on the following page.

Photo 6 – Norman Road near the intersection of Dewhurst Drive – wide, tree-lined street



Photo 7 – Dewhurst Drive between Henry Bayley Drive and Norman Road – wide, tree-lined street



Photo 8 – Two-storey dwelling with large landscaped setback on Dewhurst Drive



Photo 9 – Two-storey dwelling with large landscaped setback on Dewhurst Drive



There is only one lot, on a cul-de-sac off Dewhurst Drive, at 3 Caerleon Court, which is in any way similar to 6 Clare Court. This lot is considered to be the only lot for which the proposal could be argued to be a precedent. However, that lot has been developed in a manner that would limit the capacity for subdivision.

Other land zoned R2 in Mudgee is either developed for 2000m² to 4000m² lots or is undeveloped land that will be the subject of planning proposals for any future proposed change to the minimum lot size.

Importantly, the subject land already has development consent for subdivision. No other similar land is likely to have approval for a subdivision less than the minimum lot size.

I contend that the approval of this development does not set a precedent for other possible applications as the circumstances of each case will differ from those in this case. In particular, this case is considered quite unique in terms of the lack of environmental or servicing constraint, and by having development consent for subdivision already in place. In any case, every application, including those requesting an exception to a development standard, must be assessed on their own individual merits.

4.2.3 *The Public Interest*

Completion of the approved subdivision and development of the subject land will complete the Clare Court streetscape which is currently disrupted by the presence of a vacant area that, to the average viewer, would appear to be an undeveloped residential lot. The vacant area detracts from the current streetscape and provides a locational opportunity for undesirable social behaviour. For example, the land has often been used as a dumping ground for rubbish items, such as broken bicycles. Leaving the area vacant has a greater potential to detrimentally impact the amenity of the street than the erection of a dwelling on the lot.

Based on the above, it is considered that there are sufficient environmental planning grounds to justify contravening the minimum lot size development standard. This satisfies clause 4.6(3)(b) of MWLEP 2012.

4.3 **The appropriateness of the R2 zone**

The R2 zone has generally been applied in Mudgee for large-lot urban residential development. The much larger minimum lot sizes applied to R2 land in Mudgee (from 2ha to 20ha), compared to the R1 zone (600m²), appears in most areas to represent a holding pattern on future development, requiring prospective developers to submit planning proposals to address relevant environmental and servicing issues and justify appropriate development outcomes.

This approach is reasonable for undeveloped land, particularly where there are environmental or servicing constraints that need to be addressed.

The application of the R2 zone to the subject land in Clare Court is considered inappropriate. Clare Court is a cul-de-sac, predominantly zoned R1 with a minimum lot size of 600m². There are no servicing or environmental constraints to the development of land in Clare Court. There is no physical or visual difference between the land zoned R1 and R2 in Clare Court.

The subject land has already received development consent for subdivision (DA0314/2008). At the time, the subject land was zoned Medium Density Residential and the lots proposed to be created all complied with the minimum lot size that applied, being:

- 600m² under the Mid Western Regional Interim Local Environmental Plan 2008, and
- 700m² under the Mudgee South DCP.

The Mudgee South DCP included a map that included a hatched area where a larger minimum lot size (2000m²) applied. The subject land was not included in the hatched area. The map on the following page shows the Mudgee South DCP Map, identifying the subject land.

Extract of Mudgee South DCP Map



★ Subject Land

The current R2 zoning is generally consistent with the hatched area, but the area has been expanded to include the subject land.

The subject land, and the adjoining lots at 4, 4A and 8 Clare Court should not have been included in the R2 zone with a 10 hectare minimum lot size applied, for all of the reasons outlined above, but particularly given the former medium density residential zoning, the existing subdivision approval and the fact that the land was not within the hatched area in the Mudgee South DCP. The land should have been zoned R1 General Residential, consistent with the other lots in Clare Court, with a minimum lot size of 600m².

5 CONCLUSION

The proposed two-lot subdivision on the subject land at 6 Clare Court, Mudgee is a development that can comply in all respects with Council's requirements, except for the fact that the proposed lots are less than the minimum lot size development standard.

This report seeks to justify the non-compliance with clause 4.1 of the Mid-Western Regional Local Environmental Plan 2012 under clause 4.6 of that Plan.

An exception to the minimum lot size development standard is considered justified for the following reasons:

1. The proposed subdivision already has development consent and the proposed modification is a minor change to the approved subdivision plan.
2. The site is relatively flat, environmentally unconstrained and able to accommodate a dwelling without negative impacts on adjoining properties.
3. A dwelling on the subject lot can easily be serviced with electricity, water and sewer services, and has adequate access.
4. The proposed development will not affect the character of the area or create any land use conflicts.
5. The development does not create a precedent for similar proposals.
6. The development is consistent with the objectives of clause 4.1.
7. The proposal achieves a better outcome for the Clare Court streetscape and character than the retention of a vacant area.
8. The application of the R2 zone to the subject land is inappropriate and unreasonable.

For these reasons, it is considered unreasonable and unnecessary to require compliance with the minimum lot size standard in this case. This report outlines the environmental planning grounds that justify approval of the modification despite the non-compliance. The public interest is served by the approval of an application to modify a development consent that in all other respects complies with relevant LEP objectives and provisions and has minimal to no environmental or amenity impacts.