

Ordinary Meeting

Meeting Date: Monday, 27 March, 2023
Location: Council Chambers, City Administrative Building, Bridge Road, Nowra
Time: 5.30pm

Membership (Quorum - 7)
All Councillors

Addendum Agenda

Reports

City Development

CL23.100 SF10948 – 13 Silver Sands Dr – Lot 6 DP 234796.....1

CL23.100 SF10948 – 13 Silver Sands Dr – Lot 6 DP 234796

DA. No: SF10948

HPERM Ref: D23/79503

Department: Development Services

Approver: James Ruprai, Director - City Development

Attachments:

1. Draft Notice of Determination [↓](#)
2. Section 4.15 Assessment Report [↓](#)
3. Subdivision Plan [↓](#)

Description of Development: One (1) into Two (2) Lot Torrens Title Subdivision of Existing Dual Occupancy

Owner: Majo Property Investments Pty Ltd, A J Schlaphoff, G P Schlaphoff

Applicant: Planning Development Commercial Lawyers Pty Ltd

Notification Dates: Notification not required in accordance with Section 3.3.1, Table 2 of the Community Consultation Policy. (Note: the proposal is for subdivision of an existing approved development. There is no material change to the development.)

No. of Submissions: NIL

Purpose / Reason for consideration by Council

In accordance with Planning System Circular No. PS20–002, the Secretary’s concurrence may not be assumed by a delegate of Council if the development contravenes a numerical standard by greater than 10% (a 36.08% variation to the development standard is proposed). Variations of this nature are instead required to be considered by the Council.

Recommendation

That Council:

1. Confirm that it supports the clause 4.6 variation of 29.9% for Lot 1 and 36.08% for Lot 2, with respect to the lot size of the proposed subdivision.
2. Approve the Development Application SF10954 for a one (1) into two (2) lot Torrens title subdivision of an existing and approved Dual Occupancy development at Lot 6 DP 234796 13 Silver Sands Drive, Berrara, as detailed in the draft conditions of consent (Attachment 1) to this report.

Options

1. That Council approve the recommendation as printed.

Implications: This would permit the subdivision of the subject site to go ahead. It is considered that support of the development would not jeopardise or lead to an abandonment of the minimum lot size requirement under cl. 4.1 of *Shoalhaven Local Environmental plan 2014* (SLEP).

CL23.100

This is due to the subdivision of dual occupancy development beneath the minimum lot size in the R2 Low Density Residential zone is permitted under cl. 4.1A(4).

Council has recently approved a similar DA at 68 Yeovil Drive Bombaderry (SF10873) and 111 Elizabeth Drive Vincentia (SF10923) at the Development & Environment Committee on 7 September 2021 [MIN21.623] and Ordinary Council Meeting on 9th of May 2022 [MIN22.327] respectively.

2. Refuse the Development Application (DA).

Implications: The development is unable to proceed as applied for. The applicant can, however, apply for a section 8.2A review of Council’s decision and/or could lodge an appeal with the NSW Land and Environment Court (LEC) against Council’s decision.

3. Adopt an alternative recommendation.

Implications: Council will need to specify an alternative recommendation and advise staff accordingly.



Figure 1 – Locality Plan

CL23.100



Figure 2 – Site Shown Highlighted in Yellow

Background

Proposed Development

The proposed development is to subdivide the approved attached dual occupancy dwelling that was approved on Lot 6 DP 234796 under DA17/1900 on 4th April 2018.

A subdivision plan prepared by Andrew George Johnson dated 29th January 2021 is included at Attachment 3.

A summary of the proposed lots is as follows:

- Proposed Lot 1 – is approximately 350.5m² with approximate average width of 7.75m and depth of 41.6 that fronts Silver Sands Drive.
- Proposed Lot 2 – is approximately 319.6m² with approximate average width of 7.955m and depth of 40.9m that fronts Edward Street.

The proposal is for subdivision only (of an existing and approved development) and therefore, the physical environment does not change from what was proposed in DA17/1900. No vegetation removal results from the proposal.

The proposed subdivision can be seen below in Figure 3:

CL23.100

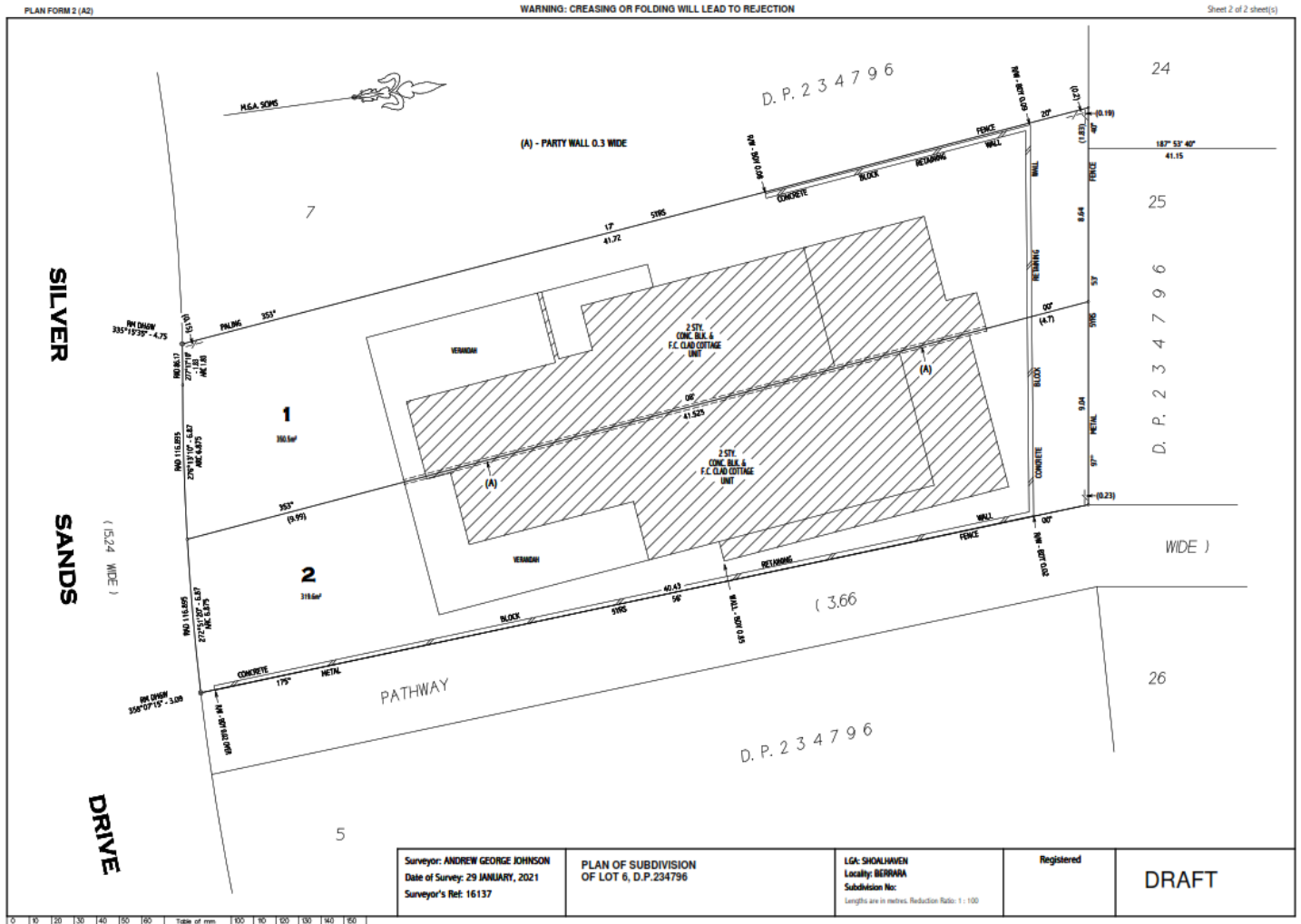


Figure 3: Subdivision Plan

Subject Land

The property is Lot 6 DP 234796 which is located at 13 Silver Sands Drive, Berrara (Subject Site). The subject site is approximately 1.6km south from the Cudmirrah village centre.

The site has an area of 670.1m², is irregular in shape and slopes slightly from the Northern boundary to the Southern boundary of 2.1m.

Site & Context

The site currently contains two (2) class one (1) dwelling houses and is bounded by low-density residential development to the north, south, east, and west. The dual occupancy subject to the subdivision application was constructed in 2019 with the Final Occupation Certificate issued in May 2020.

The locality is made of up of a combination of zonings. The subject site and most of the lots west, north, and east is zoned R2 Low Density Residential and the land to the south of subject site is RE1 Public Recreation. See Figure 4 below:

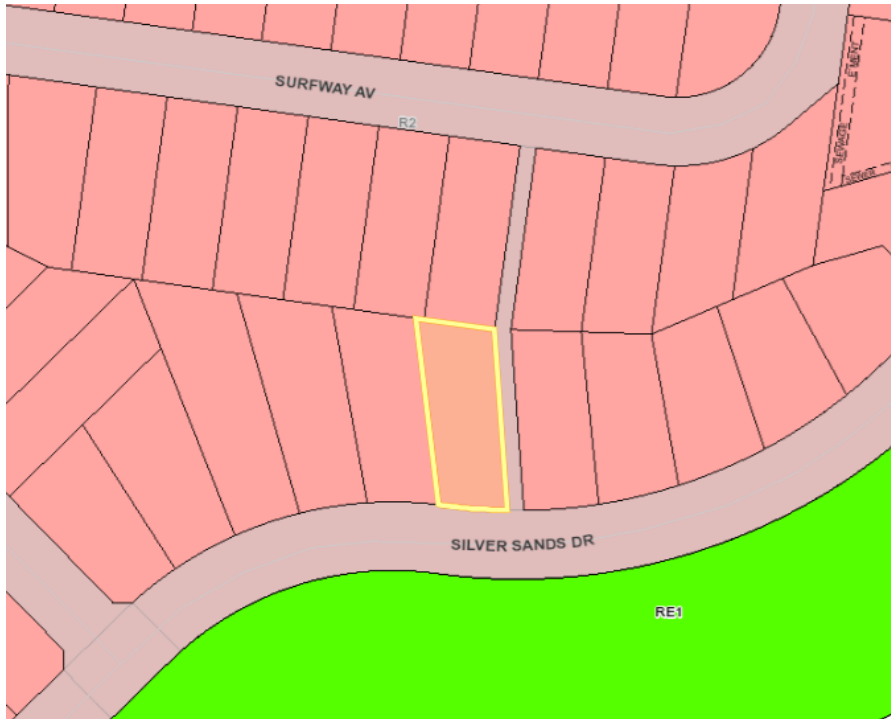


Figure 4: Zoning Map – SLEP 2014

Issue 1

Clause 4.1 – Minimum Subdivision Lot Size of SLEP 2014

The objectives of this clause are:

- (a) to ensure that subdivision is compatible with, and reinforces the predominant or historic subdivision pattern and character of, an area,
- (b) to minimise any likely impact of subdivision and 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.

The SLEP 2014 includes a minimum lot size map, which overlays different minimum lot size requirements for land throughout the Local Government Area (LGA).

A minimum lot size of 500m² (l) applies to the site.

Development Standard to be Varied

The application seeks a variation to clause 4.1 Minimum subdivision lot size in accordance with clause 4.6 of SLEP 2014.

Clause 4.1 (3) states:

- (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.

Extent of Variation

The table below outlines the proposed subdivision lot sizes and the extent of the variation under SLEP 2014 for each proposed lot.

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Table 1. Clause 4.6 variation under SLEP 2014

Parent Lot = 670.1m ²	Lot size	Minimum lot size under SLEP 2014	Extent of variation	Departure to development standard
Proposed Lot 1	350.5m ²	500m ²	- 149.5m ²	29.9%
Proposed Lot 2	319.6m ²	500m ²	- 180.4m ²	36.08%

Under clause 4.6(4) of the *Shoalhaven Local Environmental Plan (SLEP) 2014*, development consent is not permitted to be granted for development that contravenes a standard unless the consent authority is satisfied that:

- the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (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.

Written Request Provided by Applicant

The applicant has submitted a written request to justify the contravention of the development standard. Council is required to consider subclauses (3), (4) and (5) of Clause 4.6. Clause 4.6(3)-(5) are extracted from SLEP 2014 below:

(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 Secretary has been obtained.*

(5) In deciding whether to grant concurrence, the 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*

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- c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

Council must be satisfied that the abovementioned clauses have been addressed prior to granting development consent.

Clause 4.6(3)(a) – Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

To assess whether compliance with a development standard is unreasonable or unnecessary, the Land and Environment Court (LEC) has provided guidance in the required assessment.

This guidance has particular reference to the accepted "5 Part Test" for the assessment in *Wehbe v Pittwater Council* [2007] NSWLEC 827 noting also the principles outlined in *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46 and further clarified by *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

The "5-part Test" is outlined as follows:

1. The objectives of the development standard are achieved notwithstanding noncompliance with the standard.
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.
3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.
4. The development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable.
5. 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 applicant does not rely on part 4 or 5 of the '5 Part Test' as it is not considered applicable. The argument put forward is focussed on parts 1 – 3.

- *Part 1 The objectives of the development standard are achieved notwithstanding noncompliance with the standard.*

The following table outlines the respective objectives of the minimum lot size requirement and the applicant's comments regarding how the proposed development is achieving the objective.

Clause 4.1 – Minimum Subdivision Lot Size	
Objective	Applicant Comment
To ensure that subdivision is compatible with, and reinforces the predominant or historic subdivision pattern and character of, an area,	<i>The subdivision proposed will be compatible with the historic subdivision pattern of the area.</i>
To minimise any likely impact of subdivision and development on the amenity of neighbouring properties,	<i>The subdivision of the site into two lots in the manner proposed will unlikely result in any unacceptable amenity impacts for neighbouring properties.</i>
To ensure that lot sizes and dimensions are able to accommodate development consistent with relevant development controls.	<i>The lots proposed are of a regular shape and of such a size that developing the same could be carried out in full compliance with Council's DCP.</i>

- Part 2 - The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary

The underlying objectives and purpose of the minimum subdivision lot size are relevant to the proposed development.

The underlying objective and purpose of the standard (clause 4.1 – Minimum Lot Size) is relevant and the above assessment has revealed that compliance with the objectives has been achieved notwithstanding the non-compliance with the numerical standard.

It is worth noting that compliance in this case is unnecessary, as the respective subdivision for *dual occupancy* development beneath the minimum lot size in the R2 Low Density Residential zone is now permitted under cl. 4.1A (4).

- Part 3 - The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

There is no utility in maintaining the minimum lot size development standard under cl. 4.1 in this case, as the respective subdivision for the *dual occupancy* beneath the minimum lot size is permitted under cl. 4.1A (4).

It is specifically noted that Council has recently approved a similar DA at 68 Yeovil Drive Bombaderry (SF10873) and 111 Elizabeth Drive Vincentia (SF10923) at the Development & Environment Committee on 7 September 2021 [MIN21.623] and Ordinary Council Meeting on 9 May 2022 [MIN22.327] respectively.

Clause 4.6(3)(a) Evaluation of the written request relating to Clause 4.6(3)(a)- Compliance with the development standard is unreasonable or unnecessary.

The consent authority must form the positive opinion of satisfaction that the applicant's written request(s) have adequately addressed those matters required to be demonstrated by clause 4.6(3)(a). The applicant has applied the first test established in *Wehbe v Pittwater* that the development standard is unreasonable or unnecessary in the circumstances of the case

because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The following justifications are made by the applicant:

It is noted that in addition to the objectives of Clause 4.1, Clause 4.1A (4) of the SLEP2014 also provides a framework for council to grant consent for subdivision into separate lots for dual occupancy (attached) in the R2 zone if the parent lot is equal or greater than 500m².

Clause 4.1A (4) explicitly permits variations to the minimum lot size standard subject to both the proposed dual occupancy and subdivision being considered as a single DA. Clause 4.1A (4) was gazetted on 11 August 2020 as Amendment 35 of SLEP 2014 subsequent to the consent for the dual occupancy being issued on 4 April 2018 under DA17/1900.

As such, compliance with the Clause 4.1A (4) would render compliance with the minimum lot size standard unreasonable and unnecessary. The proposed development is consistent with Clause 4.1A (4), (demonstrated in the SoEE), and therefore compliance with Clause 4.1 is unreasonable and unnecessary as the dual occupancy development already exists.

Comment: The above justification is considered reasonable. It is recommended that the consent authority can form the positive opinion that the applicant's written request(s) has satisfied clause 4.6(3)(a).

Clause 4.6(3)(b) Evaluation - There are sufficient environmental planning grounds to justify contravening the development standard

The consent authority must form the positive opinion that the applicant's written request has adequately addressed those matters required to be demonstrated by clause 4.6(3)(b).

To demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, held that the grounds relied upon by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26].

The adjectival phrase "environmental planning" is not defined but would refer to grounds that relate to the subject matter, scope, and purpose of the *Environmental Planning and Assessment Act 1979* (EPA Act,) including the objects in s 1.3 of the EPA Act.

The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient" (*Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [24]). In [24] of the judgment, Preston CJ outlined the two methods for demonstrating that a Clause 4.6 is "sufficient" at paragraph [24] of case as follows:

First, *the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". 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: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15].*

Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].” The applicant’s clause 4.6 variation request must provide a written justification that there are sufficient environmental planning grounds to justify contravening the development standard.

Applicant’s Response:

The Environmental Planning grounds in favour of the variation are as follows:

- a. The dual occupancy has already been constructed and the proposed subdivision will not physically change the appearance of the surrounding environment.
- b. The proposed lot size variation will not generate any unacceptable adverse environmental impacts in respect of overshadowing, view loss or privacy impacts.
- c. The land is not steep.
- d. Each lot has direct frontage to a public road.
- e. The lots are located in a high amenity area with good access to the nearby beach and foreshore reserve.
- f. The site is not mapped as being affected by coastal hazards / erosion.
- g. The proposal, if approved, will not result in any inconsistencies with other environmental planning instruments.
- h. The site is within an established residential area comprising a range of lot sizes. The locality is one subject to urban renewal through redevelopment and use of vacant land as well as replacement of existing housing stock.
- i. The proposed subdivision will not impact on either the built or natural environment in any substantial way. In this regard;
 - i.It will not result in any substantial changes to the established streetscape qualities of the area;
 - ii.The act of subdividing will not directly impact on neighbouring properties. Future development will be subject to building application requirements where issues including overshadowing, noise, and privacy will be addressed. The new building site would have good separation distances to adjoining dwellings.
 - iii.The act of subdividing the site will not result in any substantial changes to traffic volumes in the locality;
 - iv.Subdividing the site will not necessitate removal of any existing important vegetation;

Comment: The above justification has outlined the environmental planning grounds for the departure. It is recommended that the consent authority can form the positive opinion that the applicant's written request(s) has satisfied clause 4.6(3)(b).

Clause 4.6(4)(a)(ii) Evaluation – Public Interest

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

Pursuant to the provisions of the SLEP 2014 the land is zone R2 Low Density Residential, the objectives of which are:

- *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 an environment primarily for detached housing and to ensure that other development is compatible with that environment*

The proposed subdivision will continue to provide for the housing needs of the community. This is exhibited in the proposed subdivision creating separately titled lot for an existing dwelling in a dual occupancy development.

The proposed development is consistent with the objectives of the R2 zone. Under these circumstances the proposed development is in the public interest.

Clause 4.6 (b) – Concurrence of the Secretary

The Council assumes the concurrence of the Secretary in this instance, when considering the application.

Clause 4.6(5)(a) - Matters of Significance for State or Regional Planning

The non-compliance with the minimum subdivision lot size requirement development standard will not raise any matter of significance for State or Regional planning.

Clause 4.6(5)(b) - Public Benefit of Maintaining the Planning Control Standard

In the judgement of *Ex Gratia P/L v Dungog Council* [2015] (NSWLEC 148), Commissioner Brown of the NSW LEC outlined that the question that needs to be answered in relation to the application of clause 4.6(5)(b) is "*whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development*".

Comment: The applicant has demonstrated that the non-compliant lot-size will provide a better planning outcome as opposed to strict compliance with the development standard or amending the application to reduce or remove the extent of the variation.

Furthermore, there is no public benefit for strict compliance with cl.4.1 as the subdivision of dual occupancies is permitted beneath the minimum lot size requirements under cl. 4.1A (4) of the SLEP 2014.

Clause 4.6(5)(c) - Other matters

No other matters need to be taken into consideration by the Secretary

Planning Assessment

The DA has been assessed under s4.15 of the *Environmental Planning and Assessment Act 1979*. Please refer to Attachment A.

Consultation and Community Engagement:

Pursuant to Section 3.3.1, Table 2 of Council's Community Consultation Policy, development which involves a two (2) lot Torrens subdivision of an approved dual occupancy development is not required to be notified within the surrounding locality. This is because the subject application does not involve any significant physical works, does not change the approved development noting also that notification was already carried out as part of the assessment of the dual occupancy development within Council's approved Development Application No. DA17/1900.

Note: minor works are required by Shoalhaven Water – the Notice explains that sewerage is to be made available to each lot which requires a separate junction(s).

Financial Implications:

There are potential cost implications for Council in the event of a refusal of the application. Such costs would be associated with defending an appeal in the Land and Environment Court of NSW.

Legal Implications

Pursuant to section 8.2 of the EPA Act, a decision of the Council may be subject of a review by the applicant in the event of an approval or refusal. If such a review is ultimately pursued the matter would be put to Council for consideration.

Alternatively, an applicant may also appeal to the Court against the determination pursuant to section 8.7 of the EPA Act.

Summary and Conclusion

This application has been satisfactorily assessed having regard for section 4.15 (Evaluation) under the *Environmental Planning and Assessment Act 1979*.

Having regard to the assessment and the matters described in 'Issues' above, the clause 4.6 variation of the minimum subdivision lot size is acceptable and warrants support on its merits. As such, it is recommended that Development Application No. SF10948 be approved in accordance with the draft notice of determination at Attachment 1 to this Report.



Address all correspondence to: The Chief Executive Officer,
PO Box 42, Nowra NSW 2541 Australia
shoalhaven.nsw.gov.au/contact | 1300 293 111

shoalhaven.nsw.gov.au     

**NOTICE TO APPLICANT OF DETERMINATION OF APPLICATION
DEVELOPMENT CONSENT**

Environmental Planning and Assessment Act, 1979
SF10948

TO:

Planning Development Commercial Lawyers Pty Ltd
PO BOX 214
Wollongong NSW 2500

being the applicant(s) for SF10948 relating to:

13 Silver Sands Dr, BERRARA - Lot 6 - DP 234796

APPROVED USE AND OR DEVELOPMENT:

Proposed 2 Lot Torrens Title Subdivision of Dual Occupancy

DETERMINATION DATE:

To be Determined

Pursuant to the Section 4.18 of the Act, notice is hereby given that the above application has been determined by granting consent, subject to the conditions listed below.

CONSENT TO OPERATE FROM:

To be Determined

CONSENT TO LAPSE ON:

To be Determined

This consent is valid for five years from the date hereon.

In accordance with Section 4.53 of the Act, development consent for the use of the land or the erection of a building does not lapse if building, engineering or construction work relating to the building or work or the use is physically commenced on the land to which the consent applies before the lapse date.

DETAILS OF CONDITIONS:

The conditions of consent and reasons for such conditions are set out as follows:

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PART A: GENERAL CONDITIONS

1. General

The consent relates to the subdivision of an existing *dual occupancy* as documented on the stamped plans/documentation, or as modified by the conditions of this consent. The development must be carried out in accordance with this consent. If there is inconsistency between the stamped plans/documentation and the conditions of consent, the conditions prevail to the extent of that inconsistency.

Stamped plans/documents	Ref/sheet no.	Prepared by	Dated
Subdivision Plan	16137	Andrew George Johnson	19 th January 2021

Note: Any alteration to the plans and/or documentation must be submitted for the approval of Council. Such alterations may require the lodgement of an application to amend the consent under section 4.55 of the Environmental Planning and Assessment Act, or a new development application.

2. Prescribed Conditions

The development must comply with the [Prescribed Conditions of Development Consent](#), Division 2 Subdivision 1, Environmental Planning and Assessment Regulation 2021, as applicable.

3. Shoalhaven Water - Certificate of Compliance

A Certificate of Compliance must be obtained to verify that all necessary requirements for matters relating to water supply and sewerage (where applicable) for the development have been made with Shoalhaven Water. A Certificate of Compliance must be obtained from Shoalhaven Water after satisfactory compliance with all conditions as listed on the Notice of Requirements and prior to the issue of an Occupation Certificate, Subdivision Certificate or Caravan Park Approval, as the case may be.

An application for a Certificate of Compliance is to be made once the Development Consent has been granted.

PART B: INTEGRATED DEVELOPMENT AND CONCURRENCE CONDITIONS

NIL

PART C: PRIOR TO THE COMMENCEMENT OF WORKS

4. Subdivision Works Certificate

A Subdivision Works Certificate must be obtained from either Council or an accredited certifier prior to commencement of any subdivision work.

5. Appointment of Principal Certifier

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Prior to the commencement of building or subdivision work, a Principal Certifier must be appointed.

6. **Notice of Commencement**

Notice must be given to Council at least two (2) days prior to the commencement of building or subdivision work by completing and returning the form '[Commencement Notice for Building or Subdivision Work and Appointment of Principal Certifying Authority](#)'

PART D: PRIOR TO THE ISSUE OF A CONSTRUCTION CERTIFICATE

NIL

PART E: PRIOR TO THE ISSUE OF A SUBDIVISION WORKS CERTIFICATE

7. **Compliance with Conditions**

A Subdivision Works Certificate must not be issued until the Certifier has received evidence that all relevant conditions have been met.

8. **Existing Services**

Prior to the issue of a Subdivision Works Certificate, the developer must check that the proposed works are not affected by or do not affect any Council electricity, telecommunications, gas, or other service. All services existing and proposed, above or below ground are to be shown accurately on the engineering plans including longitudinal sections with clearances to proposed infrastructure clearly labelled. Any required alterations to services will be at the developer's expense.

9. **Shoalhaven Water – Prior to the Issue of a Subdivision Works Certificate**

Prior to the issue of a Subdivision Works Certificate, all conditions listed on the Shoalhaven Water Notice of Requirements under the heading "Prior to the Issue of a Subdivision Works Certificate" must be complied with and accepted by Shoalhaven Water. Written notification must be issued by Shoalhaven Water and provided to the Certifier.

10. **National Construction Code**

Council considers it is appropriate to require the existing building to be upgraded to partial conformity with the National Construction Code (NCC) in force at the date of issue of the Subdivision Works Certificate. In this regard, the entire building is to be upgraded to meet the performance requirements of the NCC:

- a) Volume 2, Part 3.7 - Fire Safety
- b) Plumbing Code of Australia

Prior to the issue of a Subdivision Works Certificate, plans and specifications must be provided to the satisfaction of the Certifier, detailing how the existing building will be upgraded, as outlined above, to conformity with the NCC in force at the date of issue of the Subdivision Works Certificate.

The implementation of the upgrade works must not result in a NCC noncompliance.

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PART F: DURING WORKS

11. **Hours for Construction**

Construction may only be carried out between 7.00am and 5.00pm on Monday to Saturday and no construction is to be carried out at any time on a Sunday or a public holiday. Proposed changes to hours of construction must be approved by Council in writing.

12. **Excavation**

Excavation must be carried out in accordance with *Excavation Work: Code of Practice (ISBN 978-0-642-78544-2)* published by Safe Work Australia in October 2018.

13. **Aboriginal Objects Discovered During Excavation**

If an Aboriginal object (including evidence of habitation or remains) is discovered during the course of the work:

- a) All excavation or disturbance of the area must stop immediately
- b) The Office of Environment, Energy and Science must be advised of the discovery in accordance with section 89A of the [National Parks and Wildlife Act 1974](#).

14. **Archaeology Discovered During Excavation**

If any object having interest due to its age or association with the past is uncovered during the course of the work:

- a) All work must stop immediately in that area
- b) In accordance with the *Heritage Act 1997*, the Office of Environment, Energy and Science must be advised of the discovery.

PART G: PRIOR TO THE ISSUE OF AN OCCUPATION CERTIFICATE

NIL

PART H: PRIOR TO THE ISSUE OF A SUBDIVISION CERTIFICATE

15. **Compliance with DA17/1900**

Prior to the issue of a Subdivision Certificate all works for Development Consent DA17/1900 must be completed and all conditions of consent satisfied, including construction of buildings, provision of all civil engineering works external to the site such as roads, driveways and kerb and gutter, fencing, landscaping, and a final Occupation Certificate must be issued for each dwelling.

A copy of the Occupation Certificate and evidence of completion of works must be provided to Council prior to the issue of a Subdivision Certificate.

16. **Subdivision Certificate**

A Subdivision Certificate must be obtained from Council or an accredited certifier prior to lodgement of the Final Plan of Survey with NSW Land Registry Services.

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17. Schedule of Compliance

The Subdivision Certificate must not be issued until all relevant conditions of development consent have been met or other satisfactory arrangements have been made with Council (i.e. a security). A schedule of compliance in table format must be submitted with the application for a Subdivision /Strata Certificate. The schedule must provide evidence of how all relevant conditions of development consent have been fulfilled.

18. Verification of Works

Prior to issue of a Subdivision Certificate, all conditions for the development consent **DA17/1900**, are to be addressed to the satisfaction of Council or an accredited certifier.

19. Street Numbering of Dwellings

The numbering for the proposed Torrens Title Subdivision with reference to the lodged Proposed Subdivision Plan D22/273305 is:

Lot 1 – 13B Silver Sands Drive Berrara

Lot 2 – 13A Silver Sands Drive Berrara

20. Utility Services

Prior to the issue of a Subdivision Certificate, utility services must be provided in accordance with the following:

- a) The provision of electricity to service allotments and street lighting in the subdivision must be in accordance with the requirements of Endeavour Energy who are to confirm in writing that conditions of supply have been met.
- a) The submission of a Telecommunications Infrastructure Provisioning Confirmation from an approved telecommunications carrier to the Certifier or Council (as applicable) confirming that satisfactory arrangements have been made for the provision of telecommunication services to all individual lots.
- b) A Certificate of Compliance under Section 307 of Division 5 of Part 2 of Chapter 6 of the *Water Management Act 2000* must be obtained to verify that all necessary requirements for matters relating to water supply and sewerage (where applicable) for the development have been made with Shoalhaven Water. A Certificate of Compliance must be obtained from Shoalhaven Water after satisfactory compliance with all conditions as listed on the Notice of Requirements and prior to the issue of a Subdivision Certificate, as the case may be.
- c) If development is to be completed in approved stages or application is subsequently made for staging of the development, separate Compliance Certificates must be obtained for each stage of the development.

Note: Relevant details, including monetary contributions (where applicable) under the Water Management Act 2000, are given on the attached Notice issued by Shoalhaven Water. For further information and clarification regarding the above please contact Shoalhaven Water's Development Unit on (02) 4429 3547.

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PART I: ONGOING USE OF THE DEVELOPMENT

NIL

PART J: OTHER COUNCIL APPROVALS AND CONSENTS

NIL

PART K: REASONS FOR CONDITIONS

The application has been assessed as required by section 4.15 of the *Environmental Planning and Assessment Act 1979* and has been determined by the granting of conditional development consent.

Statutory requirements

The development proposal, subject to the recommended conditions, is consistent with:

- a) the objects of the Environmental Planning and Assessment Act, 1979.
- b) the aims, objectives and provisions of the applicable environmental planning instruments,
- c) the aims, objectives and provisions of Shoalhaven Development Control Plan 2014 (SDCP 2014).
- d) the aims, objectives and provisions of relevant Council policies.

Suitability of the Site

The application has been approved because the development proposal is considered to be suitable for the site.

The relevant public authorities and the water supply authority have been consulted and their requirements met, or arrangements made for the provision of services to the satisfaction of those authorities.

The increased demand for public amenities and services attributable to the development has been addressed by the requirement to pay contributions in accordance with section 7.11 of the *Environmental Planning and Assessment Act 1979* and Council's Contribution Plan 2019. Contributions under Section 307 of the Water Management Act 2000 have been applied as required.

Impacts of the Development

The application was considered to be suitable for approval. Conditions have been imposed to ensure that:

- a) the development will not result in unacceptable adverse impacts on the natural and built environments.
- b) the amenity and character of land adjoining and in the locality of the development is protected.
- c) any potential adverse environmental, social or economic impacts of the development are minimised.
- d) all traffic, car parking and access arrangements for the development will be satisfactory.
- e) the development does not conflict with the public interest.

PART L: RIGHTS OF REVIEW AND APPEAL

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Determination under Environmental Planning and Assessment Act, 1979

Division 8.2 of the EP&A Act, 1979 confers on an applicant who is dissatisfied with the determination a right to request the council to review its determination. The request and determination of the review must be undertaken within the prescribed period.

Division 8.3 of the EP&A Act, 1979 confers on an applicant who is dissatisfied with the determination of a consent authority a right of appeal to the Land and Environment Court which can be exercised within the prescribed period.

An appeal under Division 8.3 of the EP&A Act, 1979 by an objector may be made only within the prescribed period.

PART M: GENERAL ADVICE

In this consent the term developer means any person or corporation who carries out the development pursuant to that consent.

Disability Discrimination Act 1992

This application has been assessed in accordance with the *Environmental Planning & Assessment Act, 1979*. No guarantee is given that the proposal complies with the *Disability Discrimination Act 1992*.

The applicant/owner is responsible to ensure compliance with this and other anti-discrimination legislation.

The *Disability Discrimination Act 1992* covers disabilities not catered for in the minimum standards called up in the Building Code of Australia which references *AS1428.1 - Design for Access and Mobility*.

Disclaimer –Conveyancing Act 1919 – Division 4 – Restrictions on the Use of Land

The applicant should note that there could be covenants in favour of persons other than Council restricting what may be built or done upon the subject land. The applicant is advised to check the position before commencing any work.

Under Clause 1.9A of *Shoalhaven Local Environmental Plan 2014* agreements, covenants or instruments that restrict the carrying out of the proposed development do not apply to the extent necessary to enable the carrying out of that development, other than where the interests of a public authority is involved.

DBYD Enquiry - 'Dial Before You Dig'

In order to avoid risk to life and property it is advisable that an enquiry be made with "Dial Before You Dig" on 1100 or www.dialbeforeyoudig.com.au prior to any excavation works taking place to ascertain the location of underground services. You must also contact your Local Authority for locations of Water and Sewer Mains.

SIGNED on behalf of Shoalhaven City Council:

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Senior Development Planner
City Development

CL23.100 - Attachment 1

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	Section 4.15 Assessment Report <i>Environmental Planning & Assessment Act 1979</i>
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<u>Conflict of interest declaration</u>			
I have considered the potential for a conflict of interest under the Code of Conduct and to the best of my knowledge no pecuniary and/or significant non-pecuniary conflict of interest exists.			
<i>Note: If you determine that a non-pecuniary conflict of interest is less than significant and does not require further action, you must provide a written explanation of why you consider that the conflict does not require further action in the circumstances. This statement should then be countersigned by the Manager.</i>			
Variations Proposed	<input checked="" type="checkbox"/> Clause 4.6 exception >10% <input type="checkbox"/> DCP departure		
Councillor Representations	Councillor	Date	TRIM Reference
	-	-	-
Report Recommendation	Approval		

DA Number	SF10948
PAN	226254
Property Address	13 Silver Sands Dr, BERRARA - Lot 6 DP 234796
Proposal	Proposed 2 Lot Torrens Title Subdivision of Dual Occupancy
Applicant(s)	Planning Development Commercial Lawyers Pty Ltd
Owner(s)	Majo Property Investments Pty Ltd, A J Schlaphoff, G P Schlaphoff
Owner's consent provided?	Yes
Date Lodged	30-Jun-2022
Number of submissions	Zero (0) <i>Note: where submissions are received Council must give notice of the determination decision to all submitters.</i>

1. Detailed Proposal

The proposal development is to subdivide the approved detached dual occupancy dwelling that was approved on Lot 6 DP 234796 under DA17/1900 on 4TH April 2018.

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A subdivision plan prepared by Andrew George Johnson dated 29th January 2021 accompanies this proposal. A summary of the proposed subdivision is as follows:

- Proposed Lot 1 – is approximately 350.5m² with approximate average width of 7.75m and depth of 41.6 that fronts Silver Sands Drive.
- Proposed Lot 2 – is approximately 319.6m² with approximate average width of 7.955m and depth of 40.9m that fronts Silver Sands Drive

The proposal is for subdivision only and therefore, the built form does not change from what was proposed in DA17/1900. No vegetation removal results from the proposal.

Minor works are required for new sewer and water connections.

The proposed subdivision can be seen below in Figure 1:

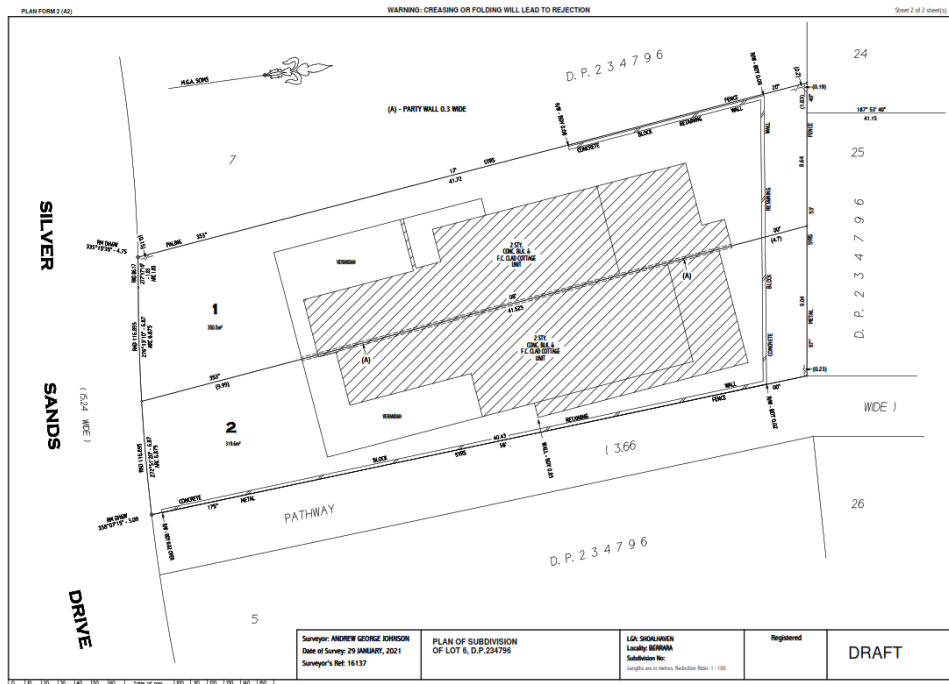


Figure 1: Proposed Development

2. Subject Site and Surrounds

Site Description

The property is Lot 6 DP 234796 which is located at 13 Silver Sands Drive, Berrara (Subject Site). The subject site is approximately 1.6km south from the Cudmirrah town centre.

The site has an area of 670.1m², is irregular in shape and slopes slightly from the Northern boundary to the Southern boundary of 2.1m.

The site currently contains two (2) class one (1) dwelling houses and is bounded by residential development to the north, south, east, and west.

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The locality is made up of a combination of zonings. The subject site and most of the lots west, north, and east is zoned R2 Low Density Residential and the land to the south of subject site is RE1 Public Recreation.

The subject site and the immediate locality can be seen in Figure 1 and 2 below:

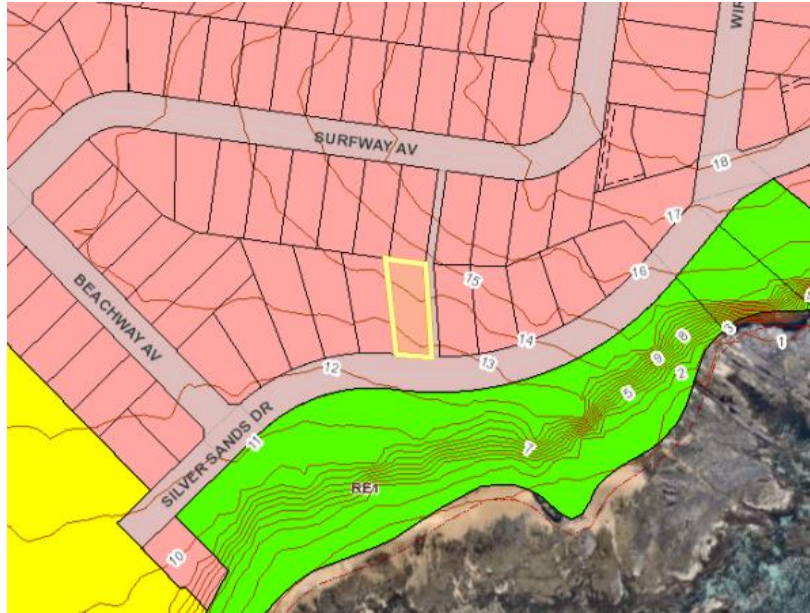


Figure 2: Aerial imagery of subject site

Deposited Plan and 88B Instrument

There are no identified restrictions on the use of the land that would limit or prohibit the proposed development.

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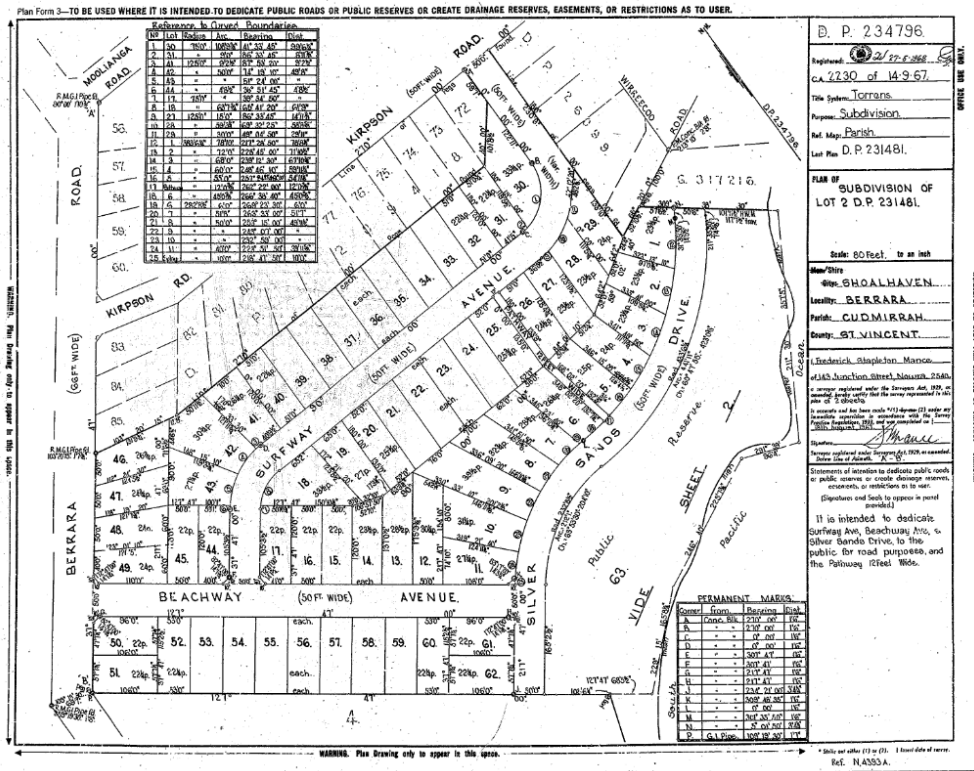


Figure 3: Deposited Plan

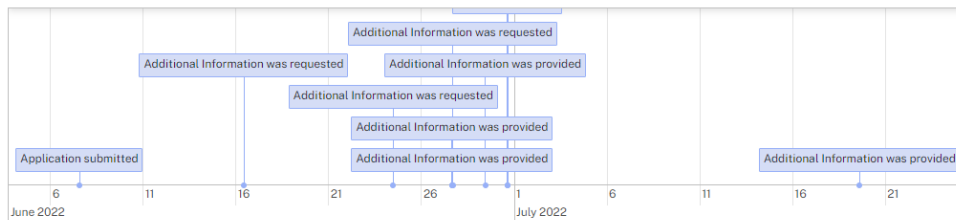
3. Background

Pre-Lodgement Information

N/A

Post-Lodgement Information

Timeline



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Site History and Previous Approvals

Darts - since 1st July 2005

Application	Appl. Date	Application Type	Proposal	Status	Completed
SF10948	30/06/2022	Subdivision Application	Proposed 2 Lot Torrens Title Subdivision of Dual Occupancy	Incomplete	
OC20/1414	05/05/2020	Final Occupation Certificate	Attached Dual Occupancy (2 New Units)	Approved	01/05/2020
RW19/1606	05/12/2019	S138 Approval	Attached Dual Occupancy (2 New Units)	Approved	05/12/2019
DS19/1178	01/05/2019	Section 96 Amendment	Attached Dual Occupancy (2 New Units) - Sec 4.55 Amendment - Window Changes, Water Tank Changes and FFI of Garages.	Approved	31/05/2019
CC18/2076	22/08/2018	Construction Certificate	Attached Dual Occupancy (2 New Units)	Approved	09/08/2018
CC17/1928	18/07/2017	S138 Approval	Dual Occupancy - construct 2 storey dual occupancy	Approved	04/04/2018
DR17/1770	18/07/2017	Sewer Connection	Dual Occupancy - construct 2 storey dual occupancy	Approved	04/04/2018
DA17/1900	18/07/2017	Development Application	Attached Dual Occupancy (2 New Units)	Approved	04/04/2018

4. Consultation and Referrals

Internal Referrals	
Referral	Comments
Building Surveyor	No objection subject to recommended conditions.
GIS Unit House Numbering	No objection subject to recommended conditions.
Shoalhaven Water	No objection subject to recommended conditions.

5. Other Approvals

NIL

6. Statutory Considerations

Environmental Planning and Assessment Act 1979

Section 4.14 Consultation and development consent – certain bush fire prone land

<i>Is the development site mapped as bush fire prone land?</i>	No
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Local Government Act 1993

<i>Do the proposed works require approval under Section 68 of the Local Government Act 1993?</i>	No
--	----

7. Statement of Compliance/Assessment

The following provides an assessment of the submitted application against the matters for consideration under Section 4.15 of the *Environmental Planning and Assessment Act 1979*.

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(a) Any planning instrument, draft instrument, DCP and regulations that apply to the land

i) Environmental Planning Instrument

This report assesses the proposed development/use against relevant State, Regional and Local Environmental Planning Instruments and policies in accordance with section 4.15 (1) of the *Environmental Planning and Assessment Act 1979*. The following planning instruments and controls apply to the proposed development:

Environmental Planning Instrument
<i>Shoalhaven Local Environmental Plan 2014</i>
<i>State Environmental Planning Policy (Resilience and Hazards) 2021</i>

State Environmental Planning Policy (SEPP) (Resilience and Hazards) 2021

Chapter 2 Coastal Management

The subject land is mapped as “coastal environment area” and “coastal use area” under the SEPP.

It is considered that the proposed development does not unduly impact upon the coastal environment. The proposed development is acceptable with regard to SEPP.

Chapter 4 Remediation of Land

Question	Yes		No	
1. Does the proposal result in a new land use being a residential, educational, recreational, hospital, childcare or other use that may result in exposure to contaminated land?	<input type="checkbox"/>	Proceed to Question 2	<input checked="" type="checkbox"/>	Assessment under SEPP 55 and DCP not required.

Shoalhaven Local Environmental Plan Local Environmental Plan 2014

Land Zoning

The land is zoned R2 Low Density Residential under the *Shoalhaven Local Environmental Plan 2014*.

Characterisation and Permissibility

The proposal is best characterised as subdivision under *Shoalhaven Local Environmental Plan 2014*. The proposal is permitted within the zone with the consent of Council.

Zone Objectives

Objective	Comment
To provide for the housing needs of the community within a low density residential environment.	The proposal is consistent with the objectives of the zone. The proposed subdivision retain existing residential development and will

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To enable other land uses that provide facilities or services to meet the day to day needs of residents.	remain compatible with the surrounding environment.
To provide an environment primarily for detached housing and to ensure that other development is compatible with that environment.	

Applicable Clauses

Clause	Comments	Complies/ Consistent
Part 2 Permitted or prohibited development		
2.6 Subdivision – Consent requirements	Consent sought as part of this application. Torrens titles subdivision proposed.	YES
Part 4 Principal development standards		
4.1 Minimum subdivision lot size	<p>(2) <i>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.</i></p> <p>(3) <i>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.</i></p> <p>The Minimum lot size for the property is 500m². The parent lot area is approximately 670.1m² and the subdivision creates the following non-compliant lot areas:</p> <ul style="list-style-type: none"> Proposed Lot 1 – 350.5m² Proposed Lot 2 – 319.6m² <p>Proposed Lot 1 is 149.5m² under the minimum lot size requirement. This is representative of a departure to development standard of 29.9%</p> <p>Proposed Lot 2 is 180.4m² under the minimum lot size requirement. This is representative of a departure to development standard of 36.08%</p> <p>As such, the development triggers the requirement for a clause 4.6 variation to be undertaken – refer Report below for detailed assessment.</p>	NO
4.6 Exceptions to Development Standard	<p>The applicant has submitted a Variation to a Development Standard request in accordance with clause 4.6 of the SLEP 2014.</p> <p>The principal development standard that is proposed to be varied is the minimum lot size for subdivision specified within clause 4.1 of the SLEP 2014.</p> <p>Specifically, the variation is described as follows:</p> <ul style="list-style-type: none"> Proposed Lot 1 – 350.5m² (non-complaint) 	YES

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	<ul style="list-style-type: none"> Proposed Lot 2 – 319.6m² (non-compliant) <p>A full assessment of the proposed variation against the applicable requirements of clause 4.6 of the SLEP 2014 and relevant case law such as <i>Wehbe v Pittwater Council [2007] NSW LEC 827</i>, is provided in Appendix A below</p>	
Part 5 Miscellaneous provisions		
Part 7 Additional local provisions		
7.1 Acid sulfate soils	<p>The site is mapped within a Class 5 Acid Sulfate Soils area.</p> <p>However, as no works are proposed to be undertaken it is considered that the development is compliant with this provision.</p>	YES
7.11 Essential services	<p>A supply of essential services was required to be provided as part of the construction of the approved dual occupancy development. No further assessment required.</p>	YES

ii) Draft Environmental Planning Instrument

The proposal is not inconsistent with any [Draft Environmental Planning Instruments](#).

iii) Any Development Control Plan

Shoalhaven Development Control Plan 2014

Generic DCP Chapter	Relevant
<u>G11: Subdivision of Land</u>	
<p>Dual Occupancy Subdivision:</p> <p>The proposal includes Torrens Title subdivision of the proposed dual occupancy pursuant to clause 4.1 of <i>Shoalhaven LEP 2014</i>.</p> <p>Council is satisfied that the subdivision and proposed lot size and layout is appropriate, and that the proposal is consistent with the development controls and performance criteria set out in Chapter G11 of <i>Shoalhaven DCP 2014</i>.</p> <p>Performance Criteria A79.2 Lot size and dimension requires for rectangular non-corner lots to have a 16m square width minimum and 30m minimum depth. The proposed lots will have between 6.87m to 9.04m widths and 41.72m depth. While the square width is non-compliant, the Performance Objective P79 is met, with the lot size appropriate for the area and dimensions for the siting and construction of a dwelling and associated outdoor space, vehicle access and parking. Noting that the site already accommodates dwellings, the proposed configurations are reasonable in the circumstance. The dwellings retain adequate amenity and will present as individual dwellings to each street frontage.</p> <p>The proposed Torrens Title subdivision is suitable with regard to the considerations of Chapter G11.</p>	

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iiia) Any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4

There are no planning agreements applying to this application.

iv) Environmental Planning and Assessment Regulation 2000

Complete table/delete as needed:

Clause	Comment
Additional matters that consent authority must consider	Notes: B) demolition of a building, the provisions of AS 2601 C) development on land that is subject to a subdivision order made under Schedule 7 to the Act E) development for the purposes of a manor house or multi dwelling housing (terraces)
Fire safety and other considerations	Note: change of building use for an existing building

Shoalhaven Contribution Plan 2019 & Section 64 Contributions

Is the development site an “ old subdivision property ” identified in Shoalhaven Contributions Plan 2019?	No
Is the proposed development considered to increase the demand for community facilities in accordance with the Shoalhaven Contributions Plan 2019 ?	No
Is the proposed development considered to increase the demand for on water and sewer services (i.e. s64 Contributions)	Yes – See Shoalhaven Water Development Application Notice

(b) The Likely impacts of that development, including environmental impacts on the natural and built environments, and social and economic impacts in the locality

Head of Consideration	Comment
Natural Environment	The proposed development will not have a significant adverse impact on the natural environment.
Built Environment	The proposed development will not have a significant adverse impact on the built environment.
Social Impacts	The proposed development will not have a negative social impact in the locality.
Economic Impacts	The proposed development will not have a negative economic impact in the locality.

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(c) Suitability of the site for the development

The site is suitable for the proposed development.

- The subdivision is consistent with the lot pattern seen generally within the area and for this type of development.
- The development is permissible with Council consent within the zone.
- The proposal supports the local zoning objectives.
- The proposal is consistent with the objectives and requirements of the *Shoalhaven Local Environmental Plan 2014*.
- The proposal is consistent with the objectives and requirements of the *Shoalhaven Development Control Plan 2014*.
- The intended use is compatible with surrounding/adjoining land uses

(d) Submissions made in accordance with the Act or the regulations

The DA did not require notification in accordance with Council’s Community Consultation Policy for Development Applications. Accordingly, no submissions were received by Council.

(e) The Public Interest

The public interest has been taken into consideration, including assessment of the application with consideration of relevant policies and process. The proposal is considered to be in the public interest.

Delegations

Are any clause 4.6 exceptions proposed?		Yes
Development Standard	Numerical Extent of Departure	Percentage (%) Extent of Departure
CI 4.1 Minimum Lot Size	Lot 1 – 149.5m ² Lot 2 – 180.4m ²	Lot 1 – 29.9% Lot 2 - 36.08%

Guidelines for use of Delegated Authority

The Guidelines for use of Delegated Authority have been reviewed and the assessing officer does not have the Delegated Authority to determine the Development Application.

In accordance with Planning System Circular No. PS20–002, the Secretary’s concurrence may not be assumed by a delegate of Council if the development contravenes a numerical standard by greater than 10% (a 36.08% variation to the development standard is proposed). Variations of this nature are instead required to be considered by the Council.

Accordingly, the application must be determined by the Ordinary Council.

Recommendation

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This application has been assessed having regard for Section 4.15 (Matters for consideration) under the *Environmental Planning and Assessment Act 1979*. As such, it is recommended that SF10948 be approved subject to appropriate conditions of consent.

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Appendix A

Clause 4.6 Exceptions to development standards

Clause 4.6 – Exceptions to Development Standards provides an opportunity for a development consent to be granted for a proposal even though it would contravene a development standard imposed by this or another environmental planning instrument.

The objectives for clause 4.6 of the SLEP 2014 state the following:

(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.**

The applicant seeks to vary the development standard by seeking flexibility with regard to the development standard due to the particular circumstances of the proposal.

(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.

In this instance the applicant is seeking to vary the minimum lot size requirement of 500m² provided as per clause 4.1 of the SLEP 2014.

(3) Consent must not be granted to a proposal 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.**

To assess whether compliance with a development standard is unreasonable or unnecessary, the Land and Environment Court (LEC) has provided guidance in the required assessment.

This guidance has particular reference to the accepted "5 Part Test" for the assessment in *Wehbe v Pittwater Council* [2007] NSWLEC 827 noting also the principles outlined in *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46 and further clarified by *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

The "5-part Test" is outlined as follows:

1. The objectives of the development standard are achieved notwithstanding noncompliance with the standard.
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.
3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

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4. 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.
5. 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 applicant does not rely on part 4 or 5 of the '5 Part Test' as it is not considered applicable. The argument put forward is focussed on parts 1 – 3.

- Part 1 The objectives of the development standard are achieved notwithstanding noncompliance with the standard.

The following table outlines the respective objectives of the minimum lot size requirement and the applicant's comments regarding how the proposed development is achieving the objective.

Clause 4.1 – Minimum Subdivision Lot Size	
Objective	Applicant Comment
To ensure that subdivision is compatible with, and reinforces the predominant or historic subdivision pattern and character of, an area,	<i>The subdivision proposed will be compatible with the historic subdivision pattern of the area.</i>
To minimise any likely impact of subdivision and development on the amenity of neighbouring properties,	<i>The subdivision of the site into two lots in the manner proposed will unlikely result in any unacceptable amenity impacts for neighbouring properties.</i>
To ensure that lot sizes and dimensions are able to accommodate development consistent with relevant development controls.	<i>The lots proposed are of a regular shape and of such a size that developing the same could be carried out in full compliance with Council's DCP.</i>

- Part 2 - The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary

The underlying objectives and purpose of the minimum subdivision lot size are relevant to the proposed development.

The underlying objective and purpose of the standard (clause 4.1 – Minimum Lot Size) is relevant and the above assessment has revealed that compliance with the objectives has been achieved notwithstanding the non-compliance with the numerical standard.

It is worth noting that compliance in this case is unnecessary, as the respective subdivision for *dual occupancy* development beneath the minimum lot size in the R2 Low Density Residential zone is now permitted under cl. 4.1A (4).

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- Part 3 - The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

There is no utility in maintaining the minimum lot size development standard under cl. 4.1 in this case, as the respective subdivision for the *dual occupancy* beneath the minimum lot size is permitted under cl. 4.1A (4).

It is specifically noted that Council has recently approved a similar DA at 68 Yeovil Drive Bombaderry (SF10873) and 111 Elizabeth Drive Vincentia (SF10923) at the Development & Environment Committee on 7 September 2021 [MIN21.623] and Ordinary Council Meeting on 9th of May 2022 [MIN22.327] respectively.

Clause 4.6(3)(a) Evaluation of the written request relating to Clause 4.6(3)(a)- Compliance with the development standard is unreasonable or unnecessary.

The consent authority must form the positive opinion of satisfaction that the applicant's written request(s) have adequately addressed those matters required to be demonstrated by clause 4.6(3)(a). The applicant has applied the first test established in *Wehbe v Pittwater* that the development standard is unreasonable or unnecessary in the circumstances of the case because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The following justifications are made by the applicant:

It is noted that in addition to the objectives of Clause 4.1, Clause 4.1A (4) of the SLEP2014 also provides a framework for council to grant consent for subdivision into separate lots for dual occupancy (attached) in the R2 zone if the parent lot is equal or greater than 500m².

Clause 4.1A (4) explicitly permits variations to the minimum lot size standard subject to both the proposed dual occupancy and subdivision being considered as a single DA. Clause 4.1A (4) was gazetted on 11 August 2020 as Amendment 35 of SLEP 2014 subsequent to the consent for the dual occupancy being issued on 4 April 2018 under DA17/1900.

As such, compliance with the Clause 4.1A (4) would render compliance with the minimum lot size standard unreasonable and unnecessary. The proposed development is consistent with Clause 4.1A (4), (demonstrated in the SoEE), and therefore compliance with Clause 4.1 is unreasonable and unnecessary as the dual occupancy development already exists.

Comment: The above justification is considered reasonable. It is recommended that the consent authority can form the positive opinion that the applicant's written request(s) has satisfied clause 4.6(3)(a).

Clause 4.6(3)(b) Evaluation - There are sufficient environmental planning grounds to justify contravening the development standard

The consent authority must form the positive opinion that the applicant's written request has adequately addressed those matters required to be demonstrated by clause 4.6(3)(b).

To demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, held that the grounds relied upon by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26].

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The adjectival phrase “environmental planning” is not defined but would refer to grounds that relate to the subject matter, scope, and purpose of the *Environmental Planning and Assessment Act 1979* (EPA Act,) including the objects in s 1.3 of the EPA Act.

The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient” (*Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [24]). In [24] of the judgment, Preston CJ outlined the two methods for demonstrating that a Clause 4.6 is “sufficient” at paragraph [24] of case as follows:

First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. 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: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15].

Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].” The applicant’s clause 4.6 variation request must provide a written justification that there are sufficient environmental planning grounds to justify contravening the development standard.

Applicant’s Response:

The Environmental Planning grounds in favour of the variation are as follows:

- a. *The dual occupancy has already been constructed and the proposed subdivision will not physically change the appearance of the surrounding environment.*
- b. *The proposed lot size variation will not generate any unacceptable adverse environmental impacts in respect of overshadowing, view loss or privacy impacts.*
- c. *The land is not steep.*
- d. *Each lot has direct frontage to a public road.*
- e. *The lots are located in a high amenity area with good access to the nearby beach and foreshore reserve.*
- f. *The site is not mapped as being affected by coastal hazards / erosion.*
- g. *The proposal, if approved, will not result in any inconsistencies with other environmental planning instruments.*
- h. *The site is within an established residential area comprising a range of lot sizes. The locality is one subject to urban renewal through redevelopment and use of vacant land as well as replacement of existing housing stock.*
- i. *The proposed subdivision will not impact on either the built or natural environment in any substantial away. In this regard;*
 - i. *It will not result in any substantial changes to the established streetscape qualities of the area;*
 - ii. *The act of subdividing will not directly impact on neighbouring properties. Future development will be subject to building application requirements where*

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issues including overshadowing, noise, and privacy will be addressed. The new building site would have good separation distances to adjoining dwellings.

- iii. The act of subdividing the site will not result in any substantial changes to traffic volumes in the locality;*
- iv. Subdividing the site will not necessitate removal of any existing important vegetation;*

Comment: The above justification has outlined the environmental planning grounds for the departure. It is recommended that the consent authority can form the positive opinion that the applicant's written request(s) has satisfied clause 4.6(3)(b).

(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 proposal is in the public interest because it is consistent with the objectives of the standard and for development within the zone in which the development is being carried out,**

In addressing (4)(a)(i), the above five (5) part test has been provided.

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

Pursuant to the provisions of the SLEP 2014 the land is zone R2 Low Density Residential, the objectives of which are:

- *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 an environment primarily for detached housing and to ensure that other development is compatible with that environment*

The proposed subdivision will continue to provide for the housing needs of the community. This is exhibited in the proposed subdivision creating separately titled lot for an existing dwelling in a dual occupancy development.

The proposed development is consistent with the objectives of the R2 zone. Under these circumstances the proposed development is in the public interest

(5) In deciding whether to grant concurrence, the Secretary must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

The non-compliance with the minimum subdivision lot size requirement development standard will not raise any matter of significance for State or Regional planning.

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(b) the public benefit of maintaining the development standard, and

In the judgement of *Ex Gratia P/L v Dungog Council* [2015] (NSWLEC 148), Commissioner Brown of the NSW LEC outlined that the question that needs to be answered in relation to the application of clause 4.6(5)(b) is “*whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development*”.

Comment: The applicant has demonstrated that the non-compliant lot-size will provide a better planning outcome as opposed to strict compliance with the development standard or amending the application to reduce or remove the extent of the variation.

Furthermore, there is no public benefit for strict compliance with cl.4.1 as the subdivision of dual occupancies is permitted beneath the minimum lot size requirements under cl. 4.1A (4) of the SLEP 2014.

(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

Given the extent of the variation proposed, a delegate of Council is not permitted to assess and determine the application. It must instead be determined by the Council at the Development and Environment Committee. Accordingly, a Report has been prepared to the April meeting.

(6) Consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, RU2 Rural Landscape, RU3 Forestry, RU4 Primary Production Small Lots, RU6 Transition, R5 Large Lot Residential, E2 Environ. Conservation, E3 Environ. Management or E4 Environ. 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.**

The site is not located within any of the listed zones.

(7) After determining a DA 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).

Noted.

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

- (a) a 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 which SEPP (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,**
 - (ba) clause 4.1E, to the extent that it applies to land in a rural or environment protection zone,**
 - (bb) clause 4.2B,**
- (c) clause 5.4,**
 - (ca) clause 6.1 or 6.2,**
 - (cb) clause 7.25,**

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(cc) clause 4.1H.

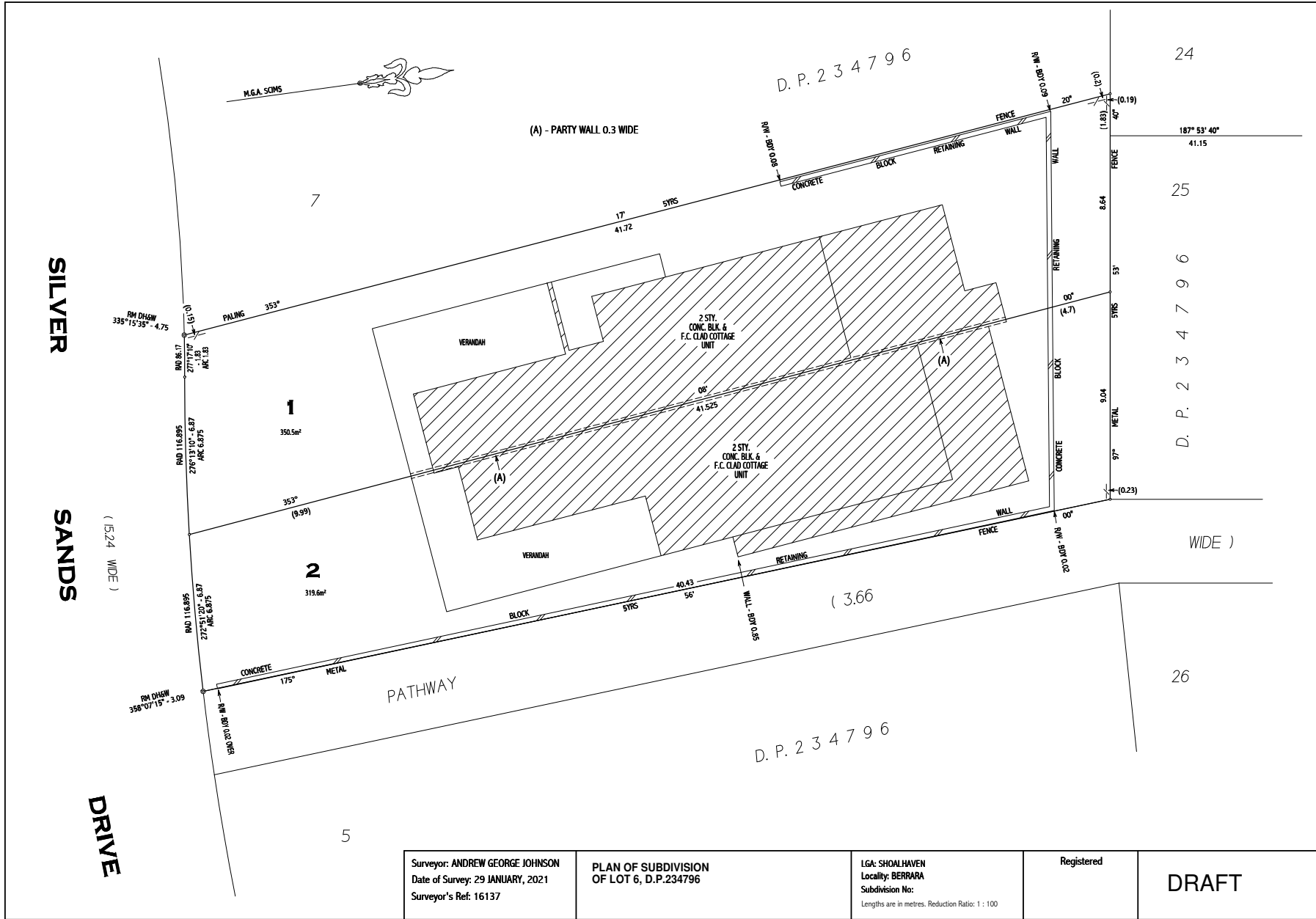
The proposal does not seek a variation with respect to any of the abovementioned clauses.

CL23.100 - Attachment 2

PLAN FORM 2 (A2)

WARNING: CREASING OR FOLDING WILL LEAD TO REJECTION

Sheet 2 of 2 sheet(s)



Surveyor: ANDREW GEORGE JOHNSON
Date of Survey: 29 JANUARY, 2021
Surveyor's Ref: 16137

PLAN OF SUBDIVISION
OF LOT 6, D.P.234796

LGA: SHOALHAVEN
Locality: BERRARA
Subdivision No:

Lengths are in metres. Reduction Ratio: 1 : 100

Registered

DRAFT

CL23.100 - Attachment 3