

EUROBODALLA LOCAL ENVIRONMENTAL PLAN 2012

CLAUSE 4.6 WRITTEN RESPONSE TO VARY CL4.2A(2)(A) OF THE EUROBODALLA LOCAL ENVIRONMENTAL PLAN 2012

June 2025

Lot 1 DP 826655

Youngs Road, Akolele, NSW, 2546

Concept Development Application for a Dwelling House

Submitted to the Eurobodalla Shire Council as the consent authority.

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CONTENTS

1. Executive Summary	3
2. Background.....	4
2.1 Site Context	4
3. Development standard to be varied	5
3.1 Development Standard to be varied.	5
4. Assessment of the provisions of clause 4.6 exceptions to development standards.....	8
4.1 Clause 4.6 Exceptions to Development Standards.....	8
4.2 Relevant Case Law	9
5. Clause 4.6(3)(a)(b) - Unreasonable or Unnecessary / sufficient Environmental Planning Grounds ...	9
5.1 Compliance with the development standard is unreasonable or unnecessary - cl 4.6(3)(a) ELEP.	9
5.2 Whether there are sufficient environmental planning grounds to justify contravening the development standard – cl4.6(3)(b) ELEP.	15
5.3 Has the Written Request adequately addressed Clause 4.6(3)?.....	15
6. Conclusion	15

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1. EXECUTIVE SUMMARY

Clause 4.6 of the Eurobodalla Local Environmental Plan 2012 ('**ELEP**') provides a mechanism to vary development standards under the local planning instrument. This Cl4.6 written request supports a development application for the concept approval for construction of a dwelling house at parcel of land identified as Lot 1 DP826655 (the '**Site**'), located on Youngs Road, Akolele. The site is zoned RU 1 Primary Production under the ELEP 2012 with a lot size of 2.04Ha.

The proposal seeks consent for a dwelling house under Cl4.2A(2)(a) of the ELEP 2012. Cl4.2A(2) 'Erection of dwelling houses or dual occupancies on land in Zone RU1 Primary Production' states that development consent must not be granted for the erection of a dwelling house unless the lot has an area of at least the minimum lot size shown on the Lot Size Map in relation to that land. The minimum lot size for the site is 100ha under the ELEP 2012. The existing lot size is 2.04Ha.

This Clause 4.6 written request is to be read in conjunction with:

- Statement of Environmental Effects (**SEE**) dated February 2025 by Candor Town Planning and Development Professionals and associated annexures one-seven.

This Clause 4.6 written request seeks a variation to the development standard and demonstrates that compliance with the standard is unreasonable and unnecessary in the circumstances of the site and there are sufficient environmental planning grounds to justify the contravention of the development standard as outlined in this request.

2. BACKGROUND

2.1 Site Context

The Site comprises a parcel of land legally described as Lot 1 DP826655, Youngs Road, Akolele. The location of the site is shown highlighted in yellow below in **figure one**. The site is 2.04ha in size and contains an upslope from the western boundary containing Youngs Road to the centre of the site, then downslope to the eastern boundary.



Figure 1: Subject Site source: Nearmap

The site is accessed from Youngs Road and contains an existing farm building. The adjoining land to the north, west and east are large lot allotments which all contain a dwelling house and associated ancillary rural structures. The lot to the south (Lot 2) contains a dwelling house, ancillary structures and a small-scale palm plantation. In the broader context, there is a mix of vacant unmanaged land and residentially developed rural lots that contain varying lot sizes.

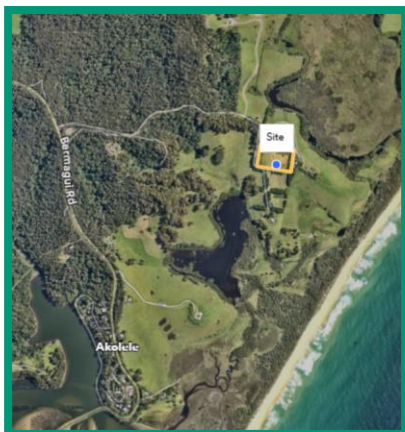


Figure 2: Locality- source: Nearmaps

The site is zoned RU1 Primary Production in accordance with the ELEP 2012.



Figure 3: Zoning source: ESC GIS

3. DEVELOPMENT STANDARD TO BE VARIED

This section of the written request identifies the development standard, which is proposed to be varied, including the extent of the variation. A detailed justification for the proposed variation is provided **Section 4** of this written request.

3.1 Development Standard to be varied.

This CI4.6 written request relates to a departure from a development standard set out under clause 4.2A Erection of dwelling houses or dual occupancies on land in Zone RU1 Primary Production of the ELEP 2012. Clause 4.2A of the ELEP 2012 falls within the scope of a development standard as defined under s1.4(1)(a) of the *Environmental Planning and Assessment Act 1979* (the 'EPA Act'). Clause 4.2A falls within Part 4 Principal Development Standards in the ELEP 2012 as accepted in *Elwaw v Kiama Municipal Council* [2022] NSWLEC 1395 and *Sharp v Kiama Municipal Council* [2024] NSWLEC 1360 and is not identified in cl 4.6(8) of the ELEP 2012, which lists exclusions from the flexibility allowed by cl 4.6.

CI4.2A of the ELEP 2012 contains the following objectives and development standards listed below (bolded where applicable to this site):

(1) The objectives of this clause are as follows—

- (a) to minimise unplanned rural residential development,**
- (b) to enable the replacement of lawfully erected dwelling houses and dual occupancies in Zone RU1 Primary Production,**
- (c) to ensure that rural residential development does not create unreasonable or uneconomic demands for the provision or extension of public infrastructure.**

(2) Development consent must not be granted for the erection of a dwelling house or dual occupancy on land in Zone RU1 Primary Production, and on which no dwelling house or dual occupancy is erected, unless the land—

(a) is a lot that has an area of at least the minimum lot size shown on the Lot Size Map in relation to that land, or

(b) is a lot created before this Plan commenced and on which the erection of a dwelling house or dual occupancy was permissible immediately before that commencement, or

(c) is a lot resulting from a subdivision for which development consent (or equivalent) was granted before this Plan commenced and on which the erection of a dwelling house or dual occupancy would have been permissible if the plan of subdivision had been registered before that commencement, or

(d) is an existing holding, or

(e) is a 1987 holding, or

(f) (Repealed)

(g) would have been a lot or a holding referred to in paragraphs (b)–(e) had it not been affected by—

(i) a minor realignment of its boundaries that did not create an additional lot, or

(ii) a subdivision creating or widening a public road or public reserve or for another public purpose.

Note—

A dwelling cannot be erected on a lot created under clause 9 of State Environmental Planning Policy (Rural Lands) 2008 or clause 4.2.

(3) (Repealed)

(4) Development consent may be granted for the erection of a dwelling house or dual occupancy on land to which this clause applies if there is a lawfully erected dwelling house or dual occupancy on the land and the dwelling house or dual occupancy to be erected is intended only to replace the existing dwelling house or dual occupancy.

(5) In this clause—

1987 holding means land that—

(a) was a holding on 11 December 1987, and

(b) is a holding at the time the application for development consent referred to in subclause (2) is lodged,

whether or not there has been a change in the ownership of the holding since 11 December 1987, and includes any other land adjoining that land acquired by the owner or owners since 11 December 1987.

Note—

The owner in whose ownership all the land is at the time the application is lodged need not be the same person as the owner in whose ownership all the land was on the stated date.

existing holding means land that—

(a) was a holding on 9 August 1963, and

(b) is a holding at the time the application for development consent referred to in subclause (2) is lodged,

whether or not there has been a change in the ownership of the holding since 9 August 1963, and includes any other land adjoining that land acquired by the owner or owners since 9 August 1963.

Note—

The owner in whose ownership all the land is at the time the application is lodged need not be the same person as the owner in whose ownership all the land was on the stated date.

holding means all adjoining land, even if separated by a road or railway, held by the same person or persons.

Under Clause 4.1(3) of the ELP 2012, the site has a prescribed minimum lot size of 100Ha as demonstrated in **figure four** below.



Figure 4: minimum lot size source: ESC GIS

The lot was created by a two-lot subdivision approval on 31/08/1990 under a historic Interim Development Order (IDO). A search on Trove suggests that the subdivision may have occurred under IDO #3. The subdivision was registered as Lot 1 DP826655 on 3/12/1992 as a Torrens title lot with a lot size of 2.04ha. **Figure five** below depicts the resultant subdivided lot which is undersized.

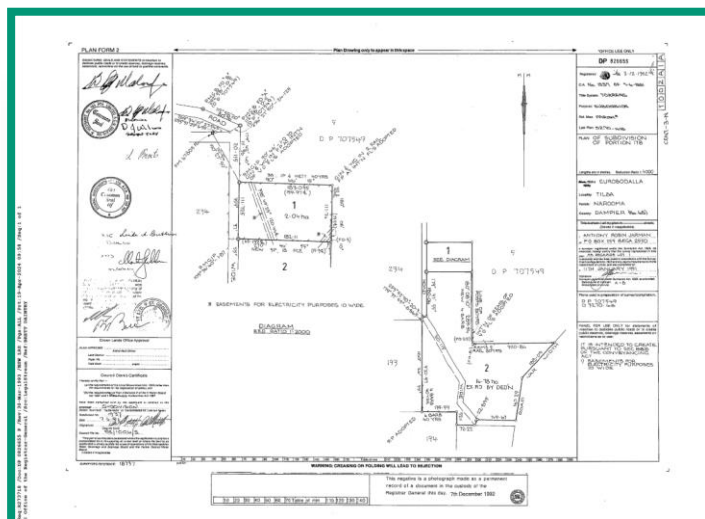


Figure 5 – Deposited Plan 826655

4. ASSESSMENT OF THE PROVISIONS OF CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

4.1 Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the ELP 2012 allows for flexibility to be applied to development standards where objectives can be obtained notwithstanding the variation. The objectives of Cl4.6 are 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.*

In determining whether to grant consent, cl4.6(3) requires the consent authority to consider a written request that seeks to justify contravention of the development standard by demonstrating:

(3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

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

Note—The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

The consent authority should also be satisfied that the proposed development is consistent with the objectives of the standard to be varied, therefore being within the public interest. This is demonstrated below in **section five**.

Cl 4.6(4)(6) and (8) listed below are not applicable or relevant to this written request and do not require addressing.

(4) The consent authority must keep a record of its assessment carried out under subclause (3).

(5) (Repealed)

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

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

(7) (Repealed)

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

(a) a development standard for complying development,

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

(c) clause 5.4,

(caa) clause 5.5.

4.2 Relevant Case Law

The NSW Planning Principles arising from NSW Land and Environment Court that have been considered in the preparation of this written request are as follows:

- *Winten v North Sydney Council*
- *Wehbe v Pittwater [2007] NSW LEC 827 (five-part test)*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*
- *Sharp v Kiama Municipal Council [2024] NSWLEC1360*
- *Strathfield Municipal Council v Poynting (2001) 116 LGERA 319*

5. CLAUSE 4.6(3)(A)(B) - UNREASONABLE OR UNNECESSARY / SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

5.1 Compliance with the development standard is unreasonable or unnecessary - cl 4.6(3)(a) ELEP.

A key element when considering a request to vary a development standard under Clause 4.6 of the ELEP 2012 is to consider the objectives of the development standard to be varied. **Table two** addresses the proposal against the relevant objectives of Cl4.2A of the ELEP 2012.

Table 2 –Cl4.2A of the ELEP 2012

Objectives	Assessment
To minimise unplanned rural residential development	The 2ha lot is existing and is situated on Youngs Road, surrounded by dwelling houses on all four boundaries. While the use of the word 'minimise' suggests that there are few situations where a dwelling house would be appropriate, the SEE and its supporting annexures provided to information this Clause 4.6 written request demonstrate that the site's size and location make it particularly suitable for a dwelling house. By placement of the concept building envelope in the location of the existing shed therefore not interfering with the existing vegetation on site or altering the existing landform and utilising the existing approved access driveway is considered planned residential development. Existing context: The lot is already surrounded by established dwelling houses, indicating compatibility with the area's character as demonstrated below in figure six.



Figure 6 – Adjoining dwellings

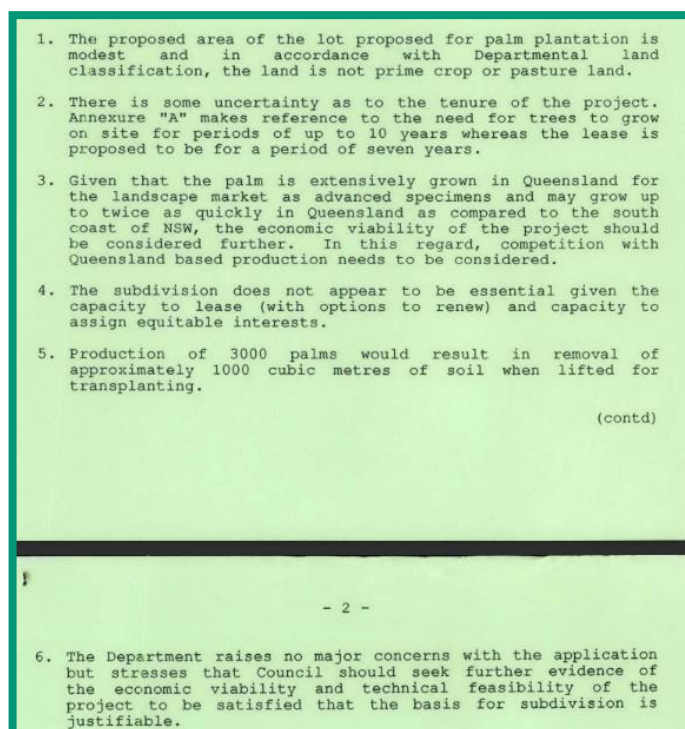
Site characteristics: The 2ha size of the lot is conducive to residential development. The site adjoins existing dwellings as shown in **figure six** and has vegetated buffers to neighbouring properties as demonstrated in **figure seven**.



Figure 7 – Mature vegetation buffer

It does not contain known Aboriginal artifacts as provided annexure two or heritage items, is not high value agricultural land, and is not flood prone. While bushfire prone, a consultant report, confirms the site can accommodate appropriate bushfire protection measures and support a dwelling house.

Limited agricultural potential: The site's attributes and specific soil composition suggest that its optimal use may not be for intensive agricultural purposes. The subject site contains Class 4 soils, which have limitations for cultivation, if large enough, is suitable for grazing. The key characteristics of Class 4 land as provided by the NSW Office of Environment & Heritage, with Class 1 being the best for agriculture and Class 5 containing severe limitations, the Class 4 soil can only be suitable for intermittent use for sowing of pastures and crops. The soil is not suitable for full time crops. Class 4 land is only suitable for intermittent cropping or pasture improvement. This is supported by the Department of Agriculture and Fisheries letter provided at the time of the approval for the subdivision as demonstrated below:



Historic Letter dated 22 February 1990-ESC Property File

Consistency with surroundings: A dwelling house would be in keeping with the existing pattern of development in the immediate vicinity as demonstrated above in **annexure six**.

Environment outcome: There is no detrimental environmental impact conducive to residential development. The site is not mapped on the High Values Biodiversity Values Map by the NSW Government, while the site is mapped as containing potential native vegetation, an ecological assessment found it is predominantly cleared with exotic groundcover. No threatened species were identified, and the dam is not considered suitable habitat. The proposal would not impact biodiversity under the Biodiversity Conservation Act 2016.

	Further, as noted within <i>Sharp</i>, the phrases ‘rural residential development’ and ‘unplanned rural residential development’ are not defined within the EEP 2012. The judgement found that a justified contravention of a development standard is a ‘planned outcome’, and goes on to state ‘<i>a dwelling would be unplanned if there were no Cl 4.6 written request or the Cl4.6 written request were deficient. The satisfaction of the terms of Cl4.6 is a jurisdictional prerequisite which adds weight to my conclusion that the grant of consent to the erection of a dwelling on an RU2 Rural Landscape lot less than 40Ha may be a planned outcome.</i>’ This Clause 4.6 adequately addresses the requirements outlined in Clause 4.6 and therefore is considered a planned outcome.
To enable the replacement of lawfully erected dwelling houses and dual occupancies in Zone RU1 Primary Production	This objective is not relevant to the proposal and compliance is not required.
To ensure that rural residential development does not create unreasonable or uneconomic demands for the provision or extension of public infrastructure.	The proposal will not place undue pressure on infrastructure: • <u>Road Infrastructure</u>: The site fronts an existing public road maintained by the consent authority. Council's website indicates that the road is scheduled for grading in the 2024/2025 financial year, demonstrating that the existing infrastructure is sufficient and regularly maintained • <u>Water and Sewerage</u>: The proposal is self-sufficient and does not require extension of reticulated services: • An on-site septic system, deemed suitable for the proposed use, will be installed as demonstrated in the On-site Sewage Management Capability Assessment prepared by Southeast Engineering & Environmental. • Rainwater will be captured and utilised by the dwelling house, removing any demand on water infrastructure. • <u>Electricity and Telecommunications</u>: Both services are available to the site. • <u>Self-Sustainability</u>: A dwelling house on the will be designed to be self-sustaining, minimising its impact on public infrastructure. This response demonstrates that the development aligns with the objective by showing how it avoids creating unreasonable or uneconomic demands on public infrastructure. It addresses key

	infrastructure elements (road, water, sewerage) and highlights the self-sustaining nature of the proposal.
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The variation does not result in any matters which are contradictory to objectives of Clause 4.2A of the ELEP 2012.

When considering the NSW Case Law ‘five-part test’, the objective of the development standard is achieved notwithstanding the minimum lot size not being met as provided in **table two**. Compliance with the minimum lot size is unreasonable, despite the non-compliance, the proposed concept for a dwelling house is consistent with the land use objectives that apply to the RU1 Primary Production zone in accordance with the ELEP 2012 as provided below in **table three**.

Table 3 – Assessment of compliance with the zone objectives

Consideration	Assessment
To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.	A dwelling house located on the site does not reduce the availability of sustainable, quality agricultural land as demonstrated in detail in section 5.3 of the attached SEE. The Site contains Class 4 soils, which have limitations for cultivation, if large enough, is suitable for grazing. The key characteristics of Class 4 land as provided by the NSW Office of Environment & Heritage, with Class 1 being the best for agriculture and Class 5 containing severe limitations, the Class 4 soil can only be suitable for intermittent use for sowing of pastures and crops. The soil is not suitable for full time crops. Class 4 land is only suitable for intermittent cropping or pasture improvement. The Site size of 2.04Ha is not suitable for sustainable primary industry production. The photographic history of the site as identified in s2.3 of the SEE identifies that since the Torrens title lot was created, the site has not been utilised for primary industry.
To encourage diversity in primary industry enterprises and systems appropriate for the area.	A 2.04ha lot is not sufficient to encourage or sustain significant primary industry, such as broad-acre farming, large-scale livestock operations, or extensive horticulture. Rural and agricultural zones often have much larger minimum lot sizes, ranging from 40ha to 100ha or more, to support viable primary production. Lots around 2ha are more commonly associated with rural residential development consistent with the C4 Environmental Living

	and R5 Large Lot Residential zone rather than productive agricultural use.
To minimise the fragmentation and alienation of resource lands.	The Torrens title lot is existing and has been created 2.04Ha. A dwelling house on the site will not cause fragmentation and alienation of resource lands.
To minimise conflict between land uses within this zone and land uses within adjoining zones.	The site adjoins existing dwellings as shown in figure six and contains a mature vegetation buffer on all four boundaries which will screen the building envelope as shown in figure seven above. As provided in <i>Damilabe Pty Ltd v Gunnedah Shire Council</i> [2018] NSWLEC1295 conflicting land uses where a dwelling house was sought on a lot adjoining a site that already had a dwelling, the issue of landuse conflict would be void. In the findings of that case, it was determined that ‘...a dwelling on the site is not inconsistent with the objectives of the zone...a dwelling on the site would not impede agricultural activity on either the site or neighbouring properties.’ The judgement goes on to state ‘the existence of other similar sized lots with dwelling houses located in close proximity to the site, supports the proposed development, and will not result in an undesirable precedent.
To minimise the visual impact of development on the rural landscape.	The proposed dwelling house will not have any negative visual impact on the rural landscape. The proposed concept building envelope is located within the area that contains an existing 4.5m high farm building. There will be no additional visual impact to the site. The site also contains mature vegetation on all four boundaries which provides for a suitable visual buffer between the proposal and adjoining dwelling houses.
To provide for recreational and tourist activities that support the agricultural, environmental and conservation value of the land.	This objective is not relevant to the proposal and compliance is not required.

There are examples of similar lot sizes within the locality in which a dwelling house are located on smaller parcel sizes that contain a minimum lot size of 100Ha and are zoned RU1 Primary Production under the ELEG 2012. These examples are located at the following:

- 126 Haxstead Road, Central Tilba which contains a dwelling and has a lot size of approx. 1.9774Ha.
- 132 Haxstead Road, Central Tilba which contains a dwelling and has a lot size of approx. 2.0307Ha. This was approved under DA0441/20 ‘use of existing unapproved dwelling house and proposed alterations and additions’ and approved on 09/03/2020. It is presumed that Council considered the lot was suitable for purposes of residential development at that time.
- 321 Bermagui Road, Akolele contains a dwelling house and has a lot size of 1757.58sqm
- 12 Serendip Lane, Akolele contains a dwelling house and has a lot size of 9144.73sqm.
- 359 Bermagui Road, Akolele contains a dwelling house and has a lot size of 2018.16sqm.

5.2 Whether there are sufficient environmental planning grounds to justify contravening the development standard – cl4.6(3)(b) ELEP.

Pursuant to ELEP cl4.6(3)(b), it is considered that the following environmental planning grounds are sufficient to justify the non-compliances with the development standard proposed:

- Compliance with the development standard is unreasonable as the site does not require additional land size to accommodate a dwelling house as demonstrated within this Clause 4.6 Written Request and supporting documentation.
- There is no public benefit in maintaining strict compliance with the development standard as a dwelling house is permitted in the zone, the proposed concept for a dwelling house meets the zone objectives, the development standard objectives and the objectives of the EP & A Act and the ELEP 2012.
- There is no loss of primary agricultural land, only a positive benefit to provide additional housing in the Eurobodalla.
- The proposal is supported by bushfire report, on-site sewage management capability assessment, environmental assessment and SEE that demonstrate the site is capable of sustaining a dwelling house building envelope without any environmental harm.

Based on the above, it has been demonstrated in this written request that there sufficient environmental planning grounds to justify the proposed minimum lot size non-compliance in this case.

5.3 Has the Written Request adequately addressed Clause 4.6(3)?

Clause 4.6(3) of the ELEP 2012 and Clause 35B(2)(a) & (b) of the Environmental Planning and Assessment Regulation 2021 state that the consent authority must not grant consent for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by Cl4.6(3).

Each matter is comprehensively addressed in this written request, including detailed consideration on why compliance is unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds to justify the proposed variation to the development standard.

6.CONCLUSION

For the reasons set out in this written request, strict compliance with the provisions contained within Cl4.2A(2)(A) of the ELEP 2012 is unreasonable and unnecessary in the circumstances of the case. There are sufficient environmental grounds to justify the departure from the development standard and it is in the public interest to do so.

It is reasonable and appropriate to vary Cl4.2A(2)(A) of the ELEP 2012 for the reasons detailed within this written request and summarised below:

- Compliance with the development standard is unreasonable as the site does not require additional land size to accommodate a dwelling house as demonstrated within this Clause 4.6 Written Request and supporting documentation.

- There is no public benefit in maintaining strict compliance with the development standard as a dwelling house is permitted in the zone, the proposed concept for a dwelling house meets the zone objectives, the development standard objectives and the objectives of the EP & A Act and the ELEP 2012.
- There is no loss of primary agricultural land, only a positive benefit to provide additional housing in the Eurobodalla.
- The proposal is supported by bushfire report, on-site sewage management capability assessment, environmental assessment and SEE that demonstrate the site can sustain a dwelling house building envelope without any environmental harm.

For the reasons outlined above, the Clause 4.6 written request is well founded. Compliance with the development standard is unnecessary and unreasonable in the circumstances, there are sufficient environmental planning grounds that warrant contravention of the standard. In the circumstances of this case, flexibility in the application of the development standard should be applied by the consent authority.