

3 July 2022

Amended Clause 4.6 Request to Contravene a Development Standard

Property Description: Lot 201 DP1022563, 16 Crooked River Road, Gerroa

Development: Dwelling House and Secondary Dwelling

Development Standard: Clause 4.2A(3)(a) Erection of dwelling houses in certain rural and environmental protection zones (Minimum Lot Size)

Introduction

This is an amended clause 4.6 request to support the development of the for the primary and secondary dwelling at 16 Crooked River Road, Gerroa. The clause 4.6 request is prepared to address an amendment to the development application following the Section 34 mediation conference held with the Land and Environment Court (the Court) on 6 June 2022.

The amendment to the development application is shown on the concept plans at **Attachment 1**. The amendments are summarised as follows:

- **Building Location**

The principal and secondary dwelling have been relocated further to the east with the principal dwelling located between contour 49 – 45 compared to the previous plans contour 49.5 – 47, and the secondary dwelling located between contour 49 and 48.5 compared to 49.5 – 50.

The length of the principal dwelling across the site (north-south) has been reduced by breaking the building length to no longer than approximately 17.5m, and redesign of the secondary dwelling to a 'square' building footprint reducing the length of the building to the northern boundary to 14m compared approximately 24m.

- **Setbacks**

The setback of the principal dwelling from the Crooked River Road boundary has increased from 42m – 45m to 51.9m, and the secondary dwelling has increased 20m-23m to 49m.

- **Roof form**

The roof form of the principal dwelling remains a pitched roof. The pitched roof form is broken into smaller elements to reflect the building elements with connecting roof forms.

- **Building height**

Due to the topography and position of the principal dwelling the building height to natural ground is 4.68m – 6.69m. The height compared to the level at the Crooked River Road boundary is 4.18m – 3.18m. The height of the previous plans is 6.48m and 3.98m – 4.98m at the Crooked River Road boundary.

The building height of the secondary dwelling is 7m to the natural ground level, and 5m – 6m from Crooked River Road. Due to the contours at the location of the secondary dwelling the height from the Crooked River Road boundary is consistent with the previous plans.

This clause 4.6 request is submitted to address the contravention the 40 Hectare minimum lot size development standard specified within Clause 4.2A(3)(a) of the Kiama Local Environmental Plan 2011.

The following history is relevant to the development application:

- Beachlands House was constructed in the 1890s on a lot having an area of 28.7ha.
- In 1929, the land was the subject of a boundary adjustment with the adjoining Ito which increased its size to 37.85ha.
- The minimum lot size under the provisions of Kiama LEP No.5 (which came into force on 21 August 1981) was 40ha. It is noted that the dwelling house was in existence at this time and so was deemed to have a development consent. It was also already on an undersized lot at this time.
- In 1986 subdivision was undertaken, by the then owners of the land Kiama Municipal Council, to create the land for the adjoining Gerringong Golf Course (lot 4) having an area of 32.7ha with the residue Lot 1 being a 2Ha parcel of land that contained Beachlands house and another two residue lots having a combined area of 2.8ha. The subdivision was permitted under the provisions of Kiama LEP No. 5 that allowed subdivision less than the minimum of 40ha for any purpose other than agriculture, forestry or a dwelling house.
- In 2001, a boundary adjustment was carried out between Lots 1 and 4 DP730771 to increase the size of the Gerringong Golf Club and subsequently reduce the size of the land in which Beachlands house was located. The subdivision created 2 parcels being:
 - Lot 201 being 1.95Ha containing Beachlands dwelling house, and
 - Lot 202 being a 33.5Ha parcel of the land for the Gerringong Golf Club.
- The Beachlands dwelling was destroyed by fire in 2002.

- Kiama LEP 1996 – Amended 42 Schedule 4 Development for certain additional purposes:
 - *Lot 201, DP1022563 Crooked River Road, Gerroa, as shown edged heavy black on the map marked “Kiama Local Environmental Plan 1996 (Amendment No 42)”—low impact and low scale tourist facility comprising buildings no higher than two storeys.*
- Development consent No. 10.2016.343.21 was issued on 8 June 2017 for a dwelling house. This consent is active until June 2024.

It is noted that in accordance with development application No. 10.2020.190.1 (primary and secondary dwelling and shed) the NSW Department of Planning, Industry and Environment (DPIE) issued concurrent to the development application on 1 December 2020. In granting concurrence to the application, the DPIE stated *the Department formed the view that the proposed variation in this case does not raise matters of State or regional significance and there is little public benefit in maintaining the 40Ha minimum lot size for the erection of a dwelling house.*

The erection of dwellings on land zoned E3 – Environmental Management is restricted by the provisions of Clause 4.2A of the Kiama Local Environmental Plan 2011, notably Clause 4.2A(3)(a) provides the following.

(3) Development consent must not be granted for the erection of a dwelling house on land in a zone to which this clause applies, and on which no dwelling house has been erected, unless the land is—

- (a) a lot that is at least the minimum lot size shown on the Lot Size Map in relation to that land, or*
- (b) a lot created before this Plan commenced and on which the erection of a dwelling house was permissible immediately before that commencement, or*
- (c) 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 would have been permissible if the plan of subdivision had been registered before that commencement, or*
- (d) an existing holding.*

(4) Subclause (3)(b), (c) and (d) ceases to apply if—

- (a) an application for development consent referred to in that subclause is not made in relation to that land within 5 years after the day this Plan commences, or*
- (b) an application for development consent referred to in that subclause is made in relation to that land within 5 years after the day this Plan commences, but the application is refused.*

(5) Despite subclause (3), development consent may be granted for the erection of a dwelling house on land to which this clause applies if—

- (a) there is a lawfully erected dwelling house on the land and the dwelling house to be erected is intended only to replace the existing dwelling house, or*
- (b) the land would have been a lot or a holding referred to in subclause (3) 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.*

The subject site is sized 1.195 Hectares and presents a contravention of approximately 97% to the 40Ha minimum lot size development standard.

The request to contravene the development standard for minimum lot size has been prepared in accordance with the principles applied in relevant case law including:

1. *Winten Property Group Limited v North Sydney Council* (2001) 130 LGERA 79,
2. *Wehbe v Pittwater Council* (2007) 156 LGERA 446,
3. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009,
4. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118,
5. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170, and
6. *RebelMH Neutral Bay Pty Limited v North Sydney Council* (2019) NSWCA 130

This Clause 4.6 variation request is set out in accordance with the relevant principles established by the Court including:

1. Is the development consistent with the objectives of the zone?
2. Is the proposed development consistent with the objectives of the development standard which is not met?
3. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? (cl 4.6(3)(a) and cl 4.6(4)(a)(i))
4. Are there sufficient environmental planning grounds to justify contravening the development standard and therefore the Applicant's written request to vary the development standard is well founded? (cl 4.6(3)(b) and 4.6(4)(a)(ii))
5. Is the proposed development in the public interest because it is consistent with the objectives of the standard and the zone? (cl 4.6(4)(a)(ii))

Matters required to be demonstrated under clause 4.6(3) of the LEP

Compliance with the development standard is unreasonable or unnecessary in this particular case

Pursuant to clause 4.6(3)(a) of the LEP, the contravention of the minimum lot size development standard contained within Clause 4.2A(3)(a) is acceptable in the circumstances of this case and compliance with the development standard is considered unnecessary because there is a valid development consent No. 10.2016.343.21 for a dwelling house.

The subject site has historically contained a dwelling house (Beachlands), however, the house was destroyed by fire in 2002. The dwelling house was constructed in the 1890s and was in existence whenb Kiama LEP No.5 introduced a minimum lot size of 40ha and so it was deemed to be lawfully constructed. The house was not on the land when the Kiama LEP 2011 was made. The allotment was created by the boundary adjustment in 2001 and Lot 201 (subject site) that contained Beachlands house. There is no potential for the subject site to comply with the development standard, noting the lot was created,

in 1986 and reduced in size in 2001. It is significant to note that the dwelling house was already on an undersized lot when Kiama LEP No. 5 introduced the 40ha minimum lot size.

Compliance is unreasonable as the development proposal meets the objectives of the standard notwithstanding the numerical contravention to the standard with the site area accommodating the proposed dwelling and secondary dwelling. The E3 zoning of the subject land permits dwellings and secondary dwelling, and dwellings are a common element within the surrounding landscape.

The objectives of clause 4.2A of the Kiama Local Environmental Plan 2011 are as follows:

- (a) to minimise unplanned rural residential development,*
- (b) to enable the replacement of lawfully erected dwelling houses in rural and environmental protection zones,*

The development proposal meets the applicable objectives of clause 4.2A of the LEP based on the following:

- **Objective (a):** The land has historically contained a dwelling house and is suitable for the proposed dwelling house. This is reiterated by the development consent – DA 10.2016.343.1 issued on 8 June 2017 for the dwelling house on the allotment. The dwelling house that existed on the lot was an undersized lot prior to the subdivision so it was already a rural residential use and therefore was not considered to be unplanned.
- **Objective (b):** The development application is consistent with development consent – DA 10.2016.343.1 issued for the dwelling house and replaces the Beachlands house on the allotment. It is noted this dwelling was erected prior to the introduction of the current planning controls, however at the time of creating Lot 201 the subject site contained a dwelling house.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827 the development meets the first test because compliance with a development standard is unreasonable or unnecessary as the objectives of the development standard are achieved notwithstanding the non-compliance.

There are sufficient environmental planning grounds to justify contravening the development standard

Pain J held in *Four2Five vs Ashfield Council* [2015] NSWLEC 90 that to satisfy clause 4.6(3)(b), a clause 4.6 request must do more than demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate that there are other environmental planning grounds that justify contravening the development standard, preferably being grounds that are specific to the site.

Pursuant to clause 4.6(3)(b) of the LEP, the environmental planning grounds contained in this application are sufficient to justify the non-compliance with the minimum lot size development standard because:

- Development consent No. 10.2016.343.21 approved on 8 June 2017 for a dwelling house. This consent is valid until June 2024.
- The proposed dwelling house is located further to the east and on a lower portion of the site, compared to the approved dwelling house, improving the visual setting of the dwelling as viewed from Crooked River Road – public domain.
- The revised design of the proposed dwelling house is in sympathy with the surrounding development.
- The allotment is sufficient area to accommodate the proposed dwelling house and secondary dwelling allowing adequate area for landscape works and retention of an outlook across the site from Crooked River Road.
- The allotment is sufficient area to ensure that the proposed principal dwelling and secondary dwelling have a setback of 51.955m (dwelling) and 49.098m (secondary dwelling) from Crooked River Road to mitigate the visual scale of development viewed from the public domain.
- The allotment area ensures that the principal and secondary dwelling have a 17.877m separation between the principal and secondary dwelling ensuring there is adequate separation of built form maintaining an outlook between the buildings across the site.
- There is no potential for this property to comply with the development standard and it is noted that the land has historically contained a dwelling house – Beachlands house.
- Despite the non-compliance with the minimum lot size development standard, the proposal is consistent with the following aims of the Kiama LEP 2011 found at clause 1.2(2):
 - 1.2(2)(b) – The proposed development will not impact or result in unreasonable impacts on the natural environment including native vegetation, ecological communities, natural habitat corridors, ground water or wetland biodiversity values,
 - 1.2(2)(c) - The proposed development will not result in unreasonable impacts on the area's water resources, groundwater, waterways, and water quality for their biodiversity, ecological, health and recreational values,
 - 1.2(2)(e) – The allotment is sufficient area to ensure that the proposed principal dwelling and secondary dwelling will be within a landscape setting and there is adequate setback from Crooked River Road to mitigate the visual scale of development viewed from the public domain, and setbacks and building separation of the built form allow for retention of the outlook past and between the buildings across the site.
 - 1.2(2)(i) – The subject site has consent for a dwelling house (Development consent No. 10.2016.343.21) confirming the site can accommodate a dwelling house, the dwelling house and secondary dwelling are permissible in the C3 – Environmental management zone

and the proposed lot can accommodate the proposed development with an acceptable visual scale of development viewed from the public domain being an orderly and economic development of land.

- 1.2(2)(j) – The subject site is not mapped as environmentally sensitive land.
- Despite the non-compliance with the minimum lot size standard, the proposal is consistent with the following objects of the Environmental Planning and Assessment Act 1979 as follows:
 - 1.3(c) – The proposal is an orderly and economic use of the site, and the development is consistent with the objectives of the development standard, with the clause 4.6 request facilitating a principal and secondary dwelling on the site noting there is a valid consent for a dwelling house (Development consent No. 10.2016.343.21).
 - 1.3(g) – The architectural plans submitted with the application demonstrate the built form is accommodated on the allotment. The dwelling and secondary dwelling are not a scale that would set it apart from other rural dwellings across the extended locality and the proposed development presents an acceptable visual scale of development from the public domain.

Clause 4.6 (4)(a)(i) – The consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3)

As demonstrated above, the proposed development has satisfied the matters required to be demonstrated in clause 4.6(3) of the LEP by providing a written request that demonstrates:

1. Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, by establishing that the objectives of the development standard are achieved notwithstanding the non-compliance.
2. The environmental planning grounds relied on are sufficient to justify the development standard.

In accordance with the findings of Chief Justice Preston in *Randwick Council v Micaul Holding Pty Ltd and Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the Consent Authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in Clause 4.6(3)(a) and (b), but indirectly form the opinion of satisfaction that the applicant’s written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)(a) and (b).

The relevant items in Clause 4.6(3) of the LEP have been adequately addressed above in order to enable the consent authority and the Court to form the requisite opinion of satisfaction.

Clause 4.6(4)(a)(ii) - The proposed development is in the public interest

In relation to clause 4.6(4)(a)(ii) of the LEP, the proposed dwelling house and secondary dwelling are in the public interest because the development is consistent with the objectives of the development standard and the objectives for development in the E3 – Environmental Management zone in accordance with the planning assessment in the following table.

Objective	Assessment
<i>To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.</i>	The allotment is a sufficient area to ensure that the proposed principle and secondary dwelling will not result in unreasonable impact on the aesthetic values of the locality noting the site has the benefit of a current development consent for a dwelling house, and the proposal is an acceptable form and scale to ensure the retention of the landscape setting and outlook past and between the building forms from the public domain.
<i>To provide for a limited range of development that does not have an adverse effect on those values.</i>	The proposed principal and secondary dwelling are a permissible land use and as addressed the form and scale of development is acceptable for the size of the land to ensure that built form is in the landscape setting and there is an outlook of the visual setting past and between the proposed buildings.
<i>To allow limited types of agriculture subject to effective environmental safeguards and sound land management practices.</i>	Not applicable.

In addition to the above reasons the proposal is also in the public interest because:

- The request for a degree of flexibility in the application of the development standard will facilitate the provision of a new dwelling on the land, being a permissible land use within the E3 – Environmental Management zone,
- The dwelling house and secondary dwelling can be accommodated on the land with no impacts to natural vegetation and retention of the outlook past the proposed built form,
- The residential use of the land will have an acceptable environmental impact noting development consent has been granted for a dwelling house under DA10.2016.343.1 which could have also allowed for secondary dwelling – a permissible use of the land.

Taking into consideration the above, the proposed development is in the public interest as it is consistent with the objectives of the development standard and the E3 – Environmental Management Zone under the Kiama Local Environmental Plan 2011.

The request for a numerical variation to the development standard is specific to the subject site, the development history and the application of Clause 4.2A of the LEP. The proposal does not undermine the intent and effectiveness of the development standard in Clause 4.2A or the objectives of the development standard and the zone being acceptable on environmental planning grounds.

For these reasons, the proposal and the numerical variation does not undermine the integrity of the minimum lot size development standard and its objectives, as well as the zoning objectives which have been adopted by Council as being in the public interest.

The concurrence of the Secretary

Clause 4.6(4)(b) of the LEP requires the concurrence of the Secretary (of the Department of Planning, Industry and Environment) before the consent authority can exercise the power to grant development consent for development that contravenes a development standard.

In deciding whether to grant concurrence, the Secretary is required to consider the following:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*
- a) The proposal is not likely to raise any matter of significance for State or regional environmental planning. As addressed DPIE issued concurrent to the development application on 1 December 2020. In granting concurrence to the application, the DPIE stated *the Department formed the view that the proposed variation in this case does not raise matters of State or regional significance and there is little public benefit in maintaining the 40Ha minimum lot size for the erection of a dwelling house.*
 - b) The public benefit of maintaining the development standard is not considered significant because development consent has been granted for a dwelling house under DA10.2016.343.1 and the proposed secondary dwelling is a permissible use of the land.
 - c) No other matters have been prescribed to be taken into consideration as the Court is not constrained from approving the development.

Conclusion

The development proposal seeks variation to the minimum lot size development standard contained within clause 4.2A of the Kiama Local Environmental Plan 2011. Notwithstanding, this clause 4.6 request demonstrates the proposed dwelling is an acceptable environmental outcome for development on the subject site.

The numerical contravention to the development standard does not attempt to affect the planning outcomes for the broader locality; rather the contravention allows for an orderly

and economic development of the subject site noting the proposed dwelling house is located further to the east and on a lower portion of the site, compared to the approved dwelling in accordance with development consent DA10.2016.343.1, improving the visual setting of the dwelling viewed from Crooked River Road – public domain.

It is unnecessary to require compliance with the 40ha minimum lot size development standard because there is a valid development consent No. 10.2016.343.21 for a dwelling house and the proposed allotment has historically contained a dwelling house - Beachlands house

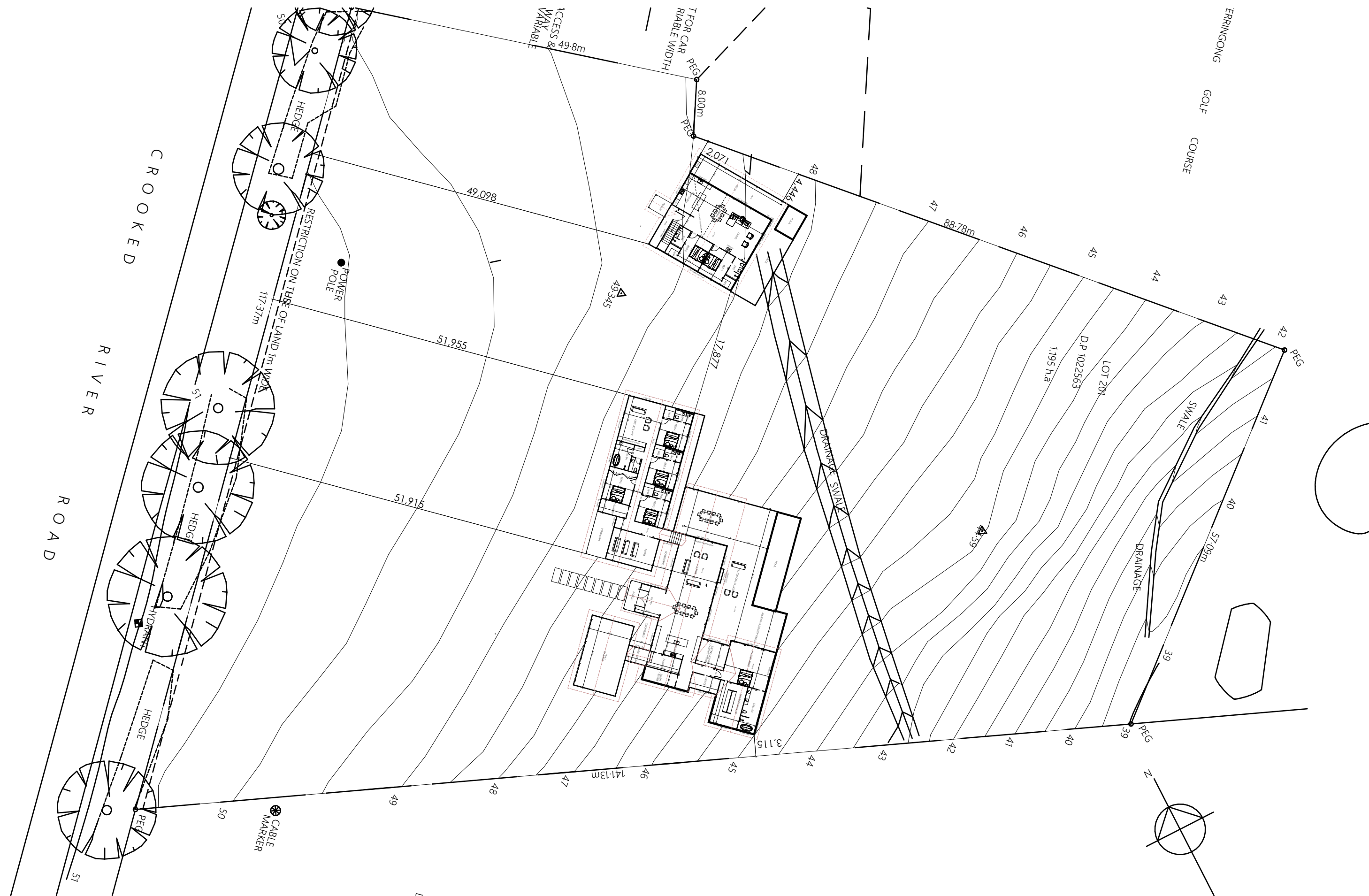
The original dwelling house on the land was constructed in the 1890s and was therefore in existence prior to the introduction of the planning instrument introducing a 40ha minimum so it had a deemed development consent and a dwelling entitlement already existed on the land. The subdivision was permitted to create the Gerringong Golf Course and not for a dwelling house, however this is not relevant because the dwelling house was already lawfully erected.

It is unreasonable to require compliance with the 40ha minimum lot size development standard under clause 4.2A(3)(a) noting the proposal maintains compliance with the objectives of the standard notwithstanding the numerical variation.

The application to vary the minimum lot size development standard is well founded and as addressed the proposed dwelling and secondary dwelling meets the objectives of the development standard. The proposal achieves an acceptable environmental planning outcome for this subject site and the variation to minimum lot size does not result in an outcome that is inconsistent with the objectives of the standard or the zone. In accordance with the environmental planning grounds addressed in this clause 4.6 request the proposed dwelling and secondary dwelling and contravention to minimum lot size can be supported.

Chapman Planning Pty Ltd
Member Planning Institute of Australia.

Attachment 1 – Concept Plans

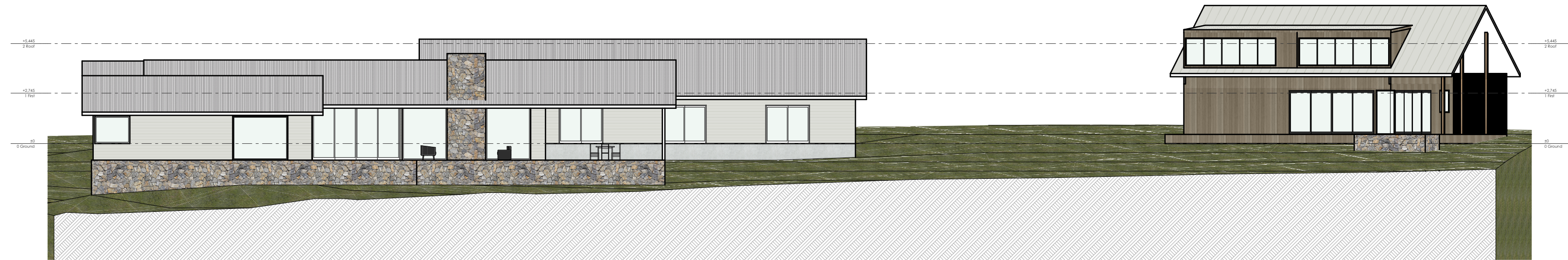
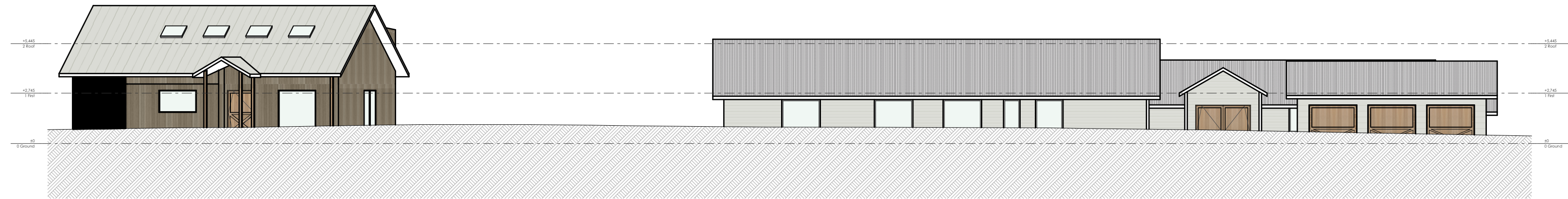


SITE PLAN
1:500

MAIN DWELLING TOTAL FOOTPRINT AREA = 543m²
(NOT INCLUDING DECK SPACES)

SECONDARY DWELLING TOTAL FOOTPRINT AREA = 147.7m²
(NOT INCLUDING DECK SPACES)

DRIVEWAY TO BE DESIGNED BY LANDSCAPE ARCHITECT



SOUTH EAST ELEVATION
1:200 @ A2