ATTACHMENT 1

REQUEST TO VARY A DEVELOPMENT STANDARD
(CLAUSE 4.6 Hornsby LEP 2013)

Property:	**1 Taylor Place, Pennant Hills**
Date:	**10th January 2021**
Planning Instrument:	**Hornsby Local Environmental Plan 2013 – Minimum Subdivision Lot Size [Cl. 4.1(3)]**

Introduction

Consideration has been given to the following matters within this assessment:

- Relevant planning principles and judgements issued by the Land and Environment Court. The Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 court judgement is the most relevant of recent case law. Commissioner Preston confirmed the following:

    1. *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].*
    2. *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].*

- Justice Preston in the decision of Wehbe v Pittwater Council [2007] NSWLEC 827 at 43 as to why it is unreasonable and unnecessary to apply a development standard to a particular case.
- The L&E Court judgment in Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90, Pearson C outlined that a Clause 4.6 Variation requires identification of grounds that are particular to the circumstances to the proposed development (i.e., simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 Variation).
- A more recent case where Commissioner Tuor of the Land and Environment Court applied the Court of Appeal's approach in *Moskovitch v Waverley Council* [2016] NSWLEC 1015 and in effect confirmed a greater flexibility.

In summary, the Variation Request satisfies the requirements of Clause 4.6 of Hornsby LEP 2013 as follows:

- It identifies the development standard to be varied.
- Discusses the extent of the variation sought.
- Establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.
- Demonstrates there are sufficient environmental planning grounds to justify the contravention.
- Demonstrates that the proposed variation is 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.

Clause 4.6

Clause 4.6 of Hornsby LEP 2013 (LEP) states:

(1) *The objectives of this clause are as follows:*
- *(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- *(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

(2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

(3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
- *(a) that compliance with the **development standard** is unreasonable or unnecessary in the circumstances of the case, and*
- *(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

(4) *Development consent must not be granted for development that contravenes a development standard unless:*
- *(a) the consent authority is satisfied that:*
  - *(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
  - *(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
- *(b) the concurrence of the Director-General has been obtained.*

(5) *In deciding whether to grant concurrence, the Director-General must consider:*
- *(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- *(b) the public benefit of maintaining the development standard, and*
- *(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.*

(6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—*
- *(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- *(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

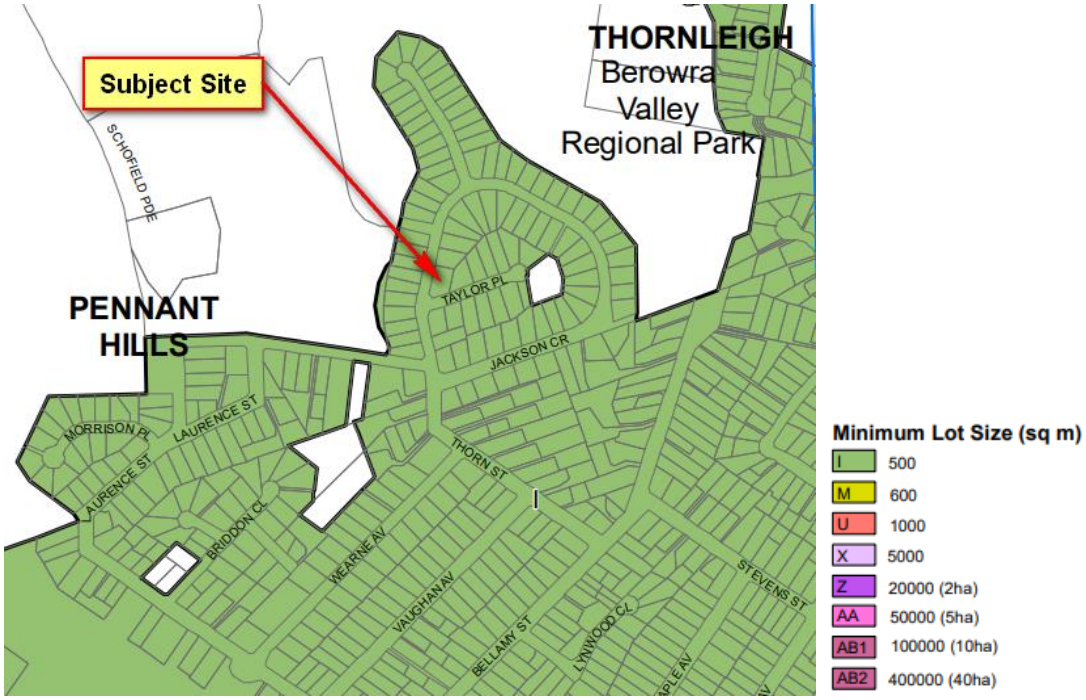
Note—*When this Plan was made it did not include of these zones.*

(7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*

(8) *This clause does not allow development consent to be granted for development that would contravene any of the following—*
- *(a) a development standard for complying development,*
- *(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
- *(c) clause 5.4.*

Development Standard & Extent of Variation

In this particular case, the development standard relates to the **Minimum Lot Size** of **500m²** as identified on the Lot Size Map referred to in Clause 4.1(3) of Hornsby LEP 2013.



The EP&A Act defines development standard as follows:

"development standards" means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

(a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,

(b) the proportion or percentage of the area of a site which a building or work may occupy…

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work…

It is clear from the above definition that the minimum lot size requirement of 500m² of Hornsby LEP 2013 is a '*development standard*'.

As such, a variation is sought to Clause 4.1(3), which states the following:

(3) The size of any lot resulting from a subdivision of land to which this clause applies is not to be less than the minimum size shown on the Lot Size Map in relation to that land.

The resulting allotments are **Lot 101 – 500.3m²** and **Lot 102** – **490m²**. This equates to a variation to the minimum lot size requirement for Proposed Lot 102, however, the proposed lot areas are similar in size to other existing allotments in the locality that currently comprise predominately dwelling house development on various sized and shaped allotments. The variation equates to Lot 102 – **2%**.

The Department of Planning's "Guidelines for the Use of State Environmental Planning Policy No.1" (refer to DOP Circular No. B1 - issued 17th March 1989) state that:

"As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some circumstances achieve the underlying purpose of the standard as much as one which complies. In many cases the variation will be numerically small and in other cases it may be numerically large, but nevertheless be consistent with the purpose of the standard...

In deciding whether to consent to a development application the Council should test whether the proposed development is consistent with the State, regional or local planning objectives for the locality; and in particular the underlying objective of the standard. If the development is not only consistent with the underlying purposes of the standard, but also with the broader planning objectives of the locality, strict compliance with the standard would be unnecessary and unreasonable."

It is a well-known fact that the strict application of numeric requirements in the planning process restricts the design process and often produces poor urban design outcomes. In this instance the variation will not cause the development to be unreasonable in terms of density, as no additional lots are proposed and the resulting development satisfies other parameters in the LEP/DCP that influence this consideration.

It is evident that the allotments can accommodate residential accommodation of a scale that is compatible with the character of the locality, and the subdivision pattern and subsequent built form will not be antipathetic with the established and likely future pattern and composite streetscape.

Subdivision Pattern

Compliance with Development Standard is Unreasonable and Unnecessary

The application must address whether strict compliance with the standard, in this particular case (circumstance), would be unreasonable or unnecessary and why – that being, a subdivision that creates allotments of a size comparable to the nominated minimum lot size. Furthermore, the resulting lot size of Proposed Lot 102 does not prevent development (i.e., dwelling house) from achieving a high level of residential amenity that meets or outperforms the requirements of the LEP and DCP.

The provision of two allotments with high quality housing is consistent with Metropolitan Strategies. Furthermore, Council and the Court have varied the minimum Lot Size requirement where justifiable in the Pennant Hills locality.

A decision in the Land and Environment Court **Wehbe v Pittwater Council** outlines a number of ways to establish that compliance with a development standard would be 'unreasonable' or 'unnecessary.' These include:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*
5. *The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

Specifically, the **first and fourth method** is relied upon in establishing that compliance with the standard is unreasonable or unnecessary.

In dealing with dwelling house development, and lot sizes in particular, the LEP stipulates the following objectives or purpose behind the standard:

(a) to provide for the subdivision of land at a density that is appropriate for the site constraints, development potential and infrastructure capacity of the land - **the locality is characterised by a variety of building forms and the subdivision pattern varies. The proposed allotments will accommodate development which demonstrates a high level of residential amenity and compliance with the LEP and DCP requirements, hence the density is appropriate and considered to be a good outcome for the site and locality in general.**

- to ensure that lots are of a sufficient size to accommodate development – **the proposed development and accompanying subdivision will not result in any adverse impacts to the amenity of neighbouring properties. Basically, the proposal will produce allotments which reflect the characteristics/pattern of subdivision of the area. The allotment layout aims to activate the streetscape of Thorn Street by providing a street fronting dwelling.**

In summary, the abovementioned objectives aim to ensure that subdivision is not antipathetic to existing and potential future development that is permitted in the zone and that sufficient land area is available to establish a reasonable level of residential amenity by the provision of private open space, landscaping, drying areas, driveways etc. associated with residential development permissible in the zone.

Expanded comment as to how the proposed development satisfies the above objectives is provided below:

- The shortfall in allotment area of the LEP will have no bearing on the level of residential amenity. The configuration of development on each allotment demonstrates that an acceptable level of residential amenity will be achieved at the proposed densities, being within the anticipated range for residential accommodation/development.

- The allotment layout aims to activate the streetscape of Thorn Street by providing a street fronting dwelling house, and maximise solar access opportunities through orientation of both internal and external living areas.

- The design of the proposed development takes into account other LEP and DCP requirements to ensure that the proposed development achieves a reasonable level of amenity and is within the environmental capacity of the zone.

- A Site Analysis was carried out which identified the constraints and opportunities of the site. The site does not contain any significant structural, cultural or environmental features that would prevent the development from proceeding with the proposed allotment areas.

- For all intents and purposes the variation will not be interpreted as a non-compliance, given that dwelling house development on similar sized allotments are currently evident in the locality.

Justice Preston in the decision of Wehbe v Pittwater Council [2007] NSWLEC 827 at 43 stated:

> *"…development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."*

In my opinion, strict compliance with Clause 4.1(3) of Hornsby LEP 2013 would be unreasonable and unnecessary when adopting the abovementioned test of Justice Preston. Earlier in this variation request, it was demonstrated that the purpose behind the clause is satisfied, notwithstanding the numerical non-compliance with respect to the lot size (i.e., the characteristics of development and subdivision patterns in the locality will not be compromised and all residential amenities will be available to each prospective dwelling), strict compliance with the standard would be unnecessary (i.e., its purpose is achieved anyway) and unreasonable (no purpose would be served].

Environmental Planning Grounds

The L&E Court judgment in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*, Pearson C outlined that a Clause 4.6 Variation requires identification of grounds that are particular to the circumstances to the proposed development (i.e., simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 Variation).

On 20 August 2015, the NSW Court of Appeal handed down its decision on appeal from the Land and Environment Court's decision: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248. The case upheld Commissioner Pearson's original decision in regard to Clause 4.6 but it interpreted the approach taken by the Commissioner differently to Pain J. In doing so, the decision largely confines Commissioner Pearson's decision to the particular facts of that case and the particular exercise of discretion by the Commissioner.

More recently, Commissioner Tuor of the Land and Environment Court applied the Court of Appeal's approach in *Moskovitch v Waverley Council* [2016] NSWLEC 1015 and in effect confirmed a greater flexibility.

Basically, Commissioners and consent authorities have a broad discretion as to the approach they take, in addition to the standard planning grounds, such as:

- Public benefit arising from additional housing, and
- An increase in the variety of housing stock[1].

1. **The state government strategies for the delivery of housing includes the push for increased densities and floor space ratio ranges.**

The more specific environmental planning grounds **[*Four2Five Pty Ltd v Ashfield Council*]** are:

1. The immediate locality comprises a variety of allotment sizes and some development types. Furthermore, other allotments in the locality are also less than the prescribed minimum, therefore, the consequences of a slightly smaller allotment has no environmental consequences.

2. The subject site is ideally located close to recreation facilities and services (i.e., Berowra Valley National Park, several local recreation facilities, schools, clubs, public transport, commercial centres, as well as neighbourhood shops, cafes and restaurants) and a shortfall in the allotment size should not prevent increased opportunity for residents to utilise those facilities.

3. A design incorporating effective design features and increased boundary offsets compensates for the very minor shortfall in the lot size, enabling the provision of all residential amenities expected for the lifestyle of its occupants, without any adverse environmental impacts to adjoining properties.

4. From an urban design viewpoint, the proposed subdivision and subsequent dwelling house development is consistent with the building character in the locality and will generally enhance the amenity of the site and locality by activating the streetscape of Thorn Street, thus satisfying the planning principles established in *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191.

Public Interest

The environmental planning benefits of approving the development in its proposed form, outweigh the need for the strict application of a numeric requirement.

As mentioned earlier, Torrens Title subdivision to better utilise a scarce resource (i.e., the parent allotment is almost double the minimum lot size requirement and land in the Sydney Metropolitan Area is a scarce resource).

The proposed subdivision pattern and proposed built form character is more reflective of the desired future pattern of development envisaged for the zone

It provides for all residential amenities expected for the lifestyle of its occupants without any adverse environmental impacts to adjoining properties. There will be sufficient accommodation and realistic leisure areas to ensure the dwellings are fit for their designed purpose.

It is economically unfeasible to annex the additional land area required to achieve strict numeric compliance. In the current economic climate, the provision of a variety of housing choice and more affordable housing, is more feasible and is generally consistent with Federal and State planning initiatives.

The proposed development will be in the public interest because it is consistent with the objectives of the R2 Low Density Residential zone (i.e., the objectives of the zone encourage low density residential development) which is being provided and the particular purpose behind the development standard has been achieved.

The objectives of the R2 zone 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.*

The proposed development satisfies the above objectives as follows:

- Low density development in the order of 495m^2 per allotment is being provided (i.e., the proposed subdivision will not affect the potential of the site in terms of density, in that, two dwellings can be achieved on the site).
- Consideration has been given to the existing amenity and character of the area and it is considered that the proposed development and subdivision is sympathetic and harmonious with adjoining development and will complement the existing character of the locality.
- The proposed development and subdivision will enhance the amenity of the residential area through the provision of new housing stock and landscaping.
- The proposed development will add to the range of housing in the zone through the provision of average sized dwellings.

Given the above, it is considered that the proposed development is within the environmental capacity of the R2 – Low Density Residential Zone and the variation will not undermine the standard, hence it is in the public interest and satisfies Clause 4.1(3).

Further, there are other allotments in the locality (i.e., less than 500m^2) and the proposed development will significantly improve the streetscape amenity of Thorn Street through activation and formalised landscaping.

No state or regional issues will arise should Council approve the variation.

CONCLUSION

Although the proposed allotment area of Lot 102 is less than the prescribed requirement, it has been demonstrated that the objectives behind the control have, notwithstanding been achieved. Site constraints and opportunities were also taken into account in the design of prospective dwellings, in particular, street presentation, orientation and separation between adjoining buildings. As such, allowance of a variation to the minimum allotment area requirement has no impacts that would frustrate the objectives of the Environmental Planning and Assessment Act 1979. Furthermore, compliance with the standard in this case is unreasonable and unnecessary, therefore, the variation request should be allowed, as it is well founded.

The variation will not be interpreted as an inconsistency, given that similar sized allotments are prevalent in the locality and that all residential amenities will be provided for each dwelling.

Accepting the variation will result in an orderly and economic use of the land by providing scope for attractive new dwellings, appropriate for the residential zone in which they are located.

David Bobinac
Town Planner