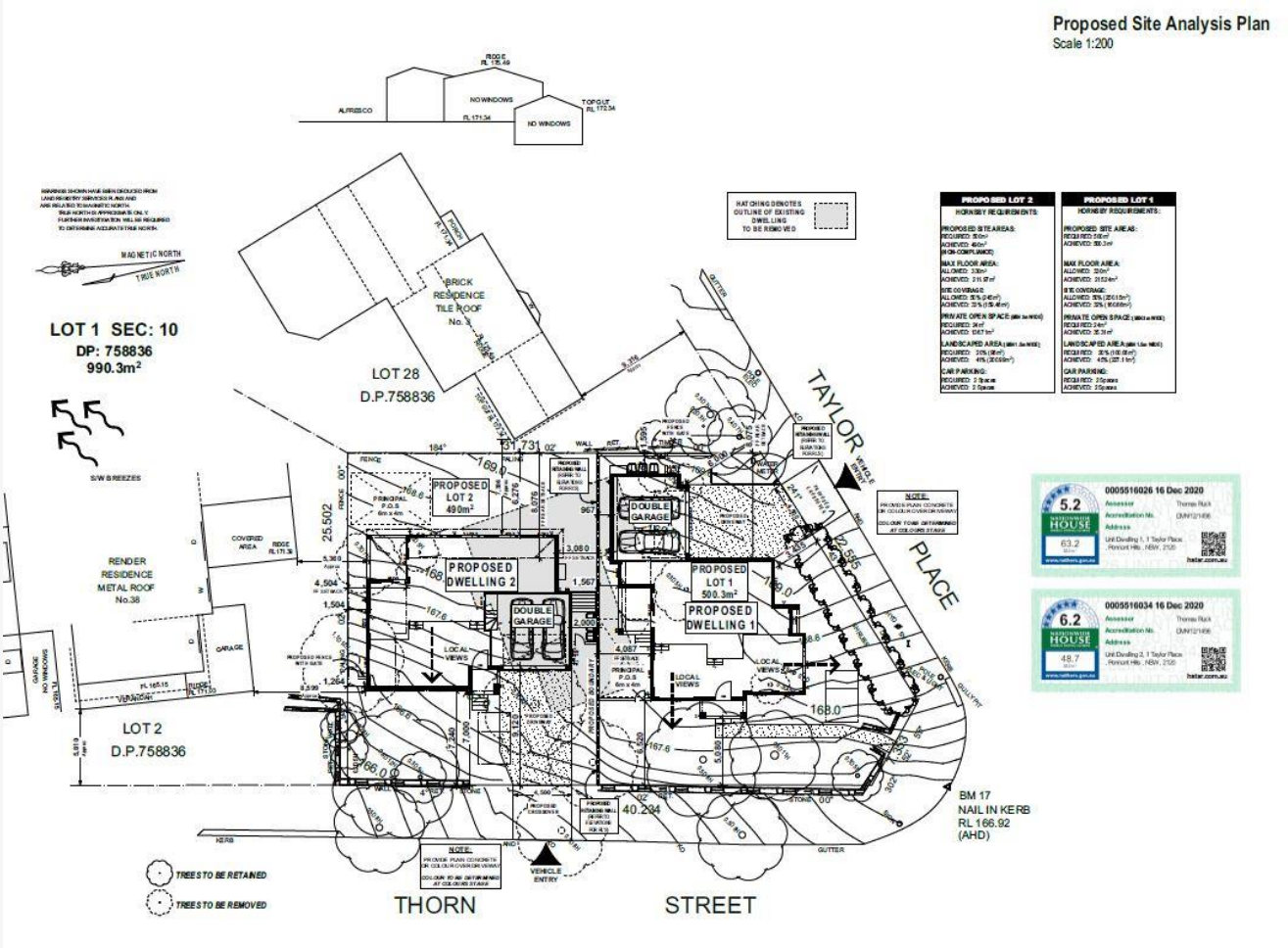
REVISED REQUEST TO VARY A DEVELOPMENT STANDARD

(Clause 4.6 Hornsby LEP 2013)



Property:	**1 Taylor Place, Pennant Hills**
Development Application:	DA/43/2021
Local Planning Panel:	LPP3/21
Planning Instrument:	Hornsby Local Environmental Plan 2013 – Minimum Subdivision Lot Size [Cl. 4.1(3)]

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1.0 INTRODUCTION

1.1 This is a revised Clause 4.6 Request in support of a variation to the minimum subdivision lot size development standard for a proposed residential development at 1 Taylor Place, Pennant Hills.

1.2 On 31 March 2021 the Hornsby Local Planning Panel (LPP) resolved to defer the determination of the application and require the preparation and submission to Council, within 14 days:

1) A revised Clause 4.6 request for variation that adequately addresses the relevant matters in clause 4.6 with respect to the standard being varied;

2) Amended plans that reduce the footprint of the proposed dwellings to address the overshadowing of POS of Dwelling 1 and minimise tree and associated habitat loss.

1.3 On 14 April 2021 the applicant, Champion Homes, submitted further amended architectural plans (Rev H, dated 12.4.2021) incorporating the following changes to the plans that were previously considered by the LPP:

(a) The proposed building footprints have been reduced as follows:

- Dwelling 1 reduced from 181.84m2 to 174.90m2 (-6.94m2)
- Dwelling 2 reduced from 176.09m2 to 174.15m2 (-1.94m2)

(b) The overall size of the buildings has been correspondingly reduced as follows:

- Dwelling 1 reduced from 310.76m2 to 297.70m2 (-13.06m2)
- Dwelling 2 reduced from 295.82m2 to 285.28m2 (-10.54m2)

(c) In terms of the building separation between Proposed Lot 1 and Proposed Lot 2 as viewed from Thorn Street, there is an overall improvement of 850mm in separation between the Lot 2 garage and the Lot 1 outdoor living area (from the originally proposed 1750mm + 967mm = 2717mm to the new proposal of 2000mm + 1567mm = 3567mm).

(d) In terms of the Private Open Space to Lot 1 (which was originally non-compliant) it is noted:

- With an increased setback of 600mm between the family wall and the boundary, there is now provision for a larger private open space.
- With several changes to Lot 2 including increased boundary setback, specifically to the upper floor, the overshadowing impacts have been reduced.
- The revised shadow diagrams reveal that more than 50% of the private open space achieves solar access at 12pm (approx. 15.40m2 or 64%) and at 3pm

(approx. 22.75m2 or 95%), resulting in the provision of 3 hours of direct solar access to Lot 1 private open space.

(e) Three additional existing trees are to be retained (located along Thorn Street within the subject property). [1]

(f) Finally, in terms of building height, it is noted:

- Ceiling heights have been reduced from 2600mm to 2550mm.
- Roof pitch has been reduced from 22.5 degrees to 21 degrees.
- Lot 1 has been reduced by 365mm in height.
- Lot 2 has been reduced by 549mm in height.

1.4 This revised request and submission is to be read in conjunction with the Statement of Environmental Effects by D-Plan Urban Planning Consultants dated 10 January 2021

2.0 CLAUSE 4.6 FRAMEWORK

2.1 Clause 4.6 (Exceptions to Development Standards) provides a mechanism for a Consent Authority to grant flexibility in Development Standards when it considers this would result in improved planning outcomes in respect of a proposed development.

2.2 Clause 4.6 of Hornsby LEP 2013 (LEP) relevantly 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.

[1] With any significant trees that are retained the applicant would agree to a development consent condition requiring that tree sensitive construction techniques including investigative excavation, construction at existing grade, excavation by hand and compaction control for any work within the TRZ of such trees.

(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.

2.3 This revised clause 4.6 variation has been prepared having regard to the guidance provided in recent judgments of the Land and Environment Court and NSW Court of Appeal, including but not limited to the matters of Wehbe v Pittwater Council [2007] NSWLEC 827 (Wehbe) at [42] – [48], Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248, Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61, RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130, Moskovich v Waverley Council [2016] NSWLEC 1015 and, most recently, Eather v Randwick City Council [2021] NSWLEC 1075.

2.4 Firstly, 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: Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15].

2.5 Secondly, 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: Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

2.6 These principles as distilled above will be considered below in terms of their application to the variation sought in this matter.

3.0 DEVELOPMENT STANDARD

3.1 Section 1.4 of the *Environmental Planning and Assessment Act* defines a "development standard" to mean:

"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…

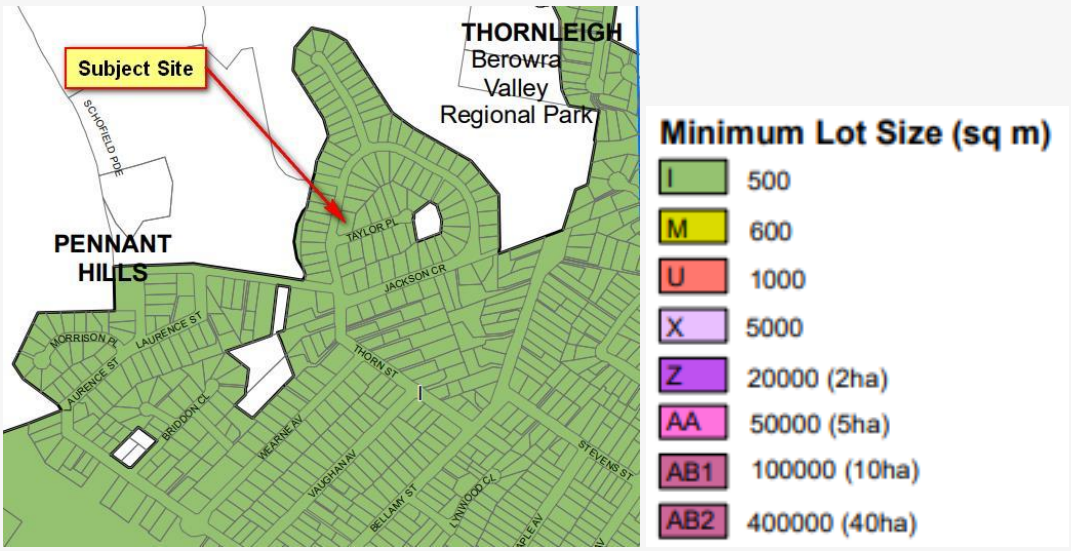
(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work…

Minimum subdivision lot size (Clause 4.1)

3.2 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 the Hornsby LEP 2013 which relevantly stipulates:

(1) 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.

(2) 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.



3.3 The **Lot Size Map** above identifies the site within an area requiring a minimum lot size of 500m^2. It is proposed to effect a Torrens Title subdivision and the resulting lot configurations are provided in the table below:

Lot	Frontage	Area
101	22.555m (excluding splay)	500.3m^2
102	19.21m	490m^2

3.4 The minimum lot size requirement of 500m² identified on the Lot size map of the Hornsby LEP 2013 is a development standard. As such, a variation is sought to Clause 4.1(3), which relevantly provides that 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.

3.5 The request seeks a variation to the minimum lot standard prescribed under the LEP in regard to proposed Lot 2 in the two lot subdivision involving a reduction of 10m² (or 2%) to 490m².

3.6 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."

4.0 REQUEST FOR VARIATION

4.1 As noted above clause 4.6(3)(a) and (b) relevantly requires that a consent authority must not grant a variation to a development standard unless it is satisfied:

(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;

Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

4.2 The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by Preston CJ in Wehbe v Pittwater Council and adopted in Initial Action. In this case, the question is whether the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

4.3 The objectives of clause 4.1 (minimum subdivision lot size) are as follows:

(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,
(b) to ensure that lots are of a sufficient size to accommodate development.

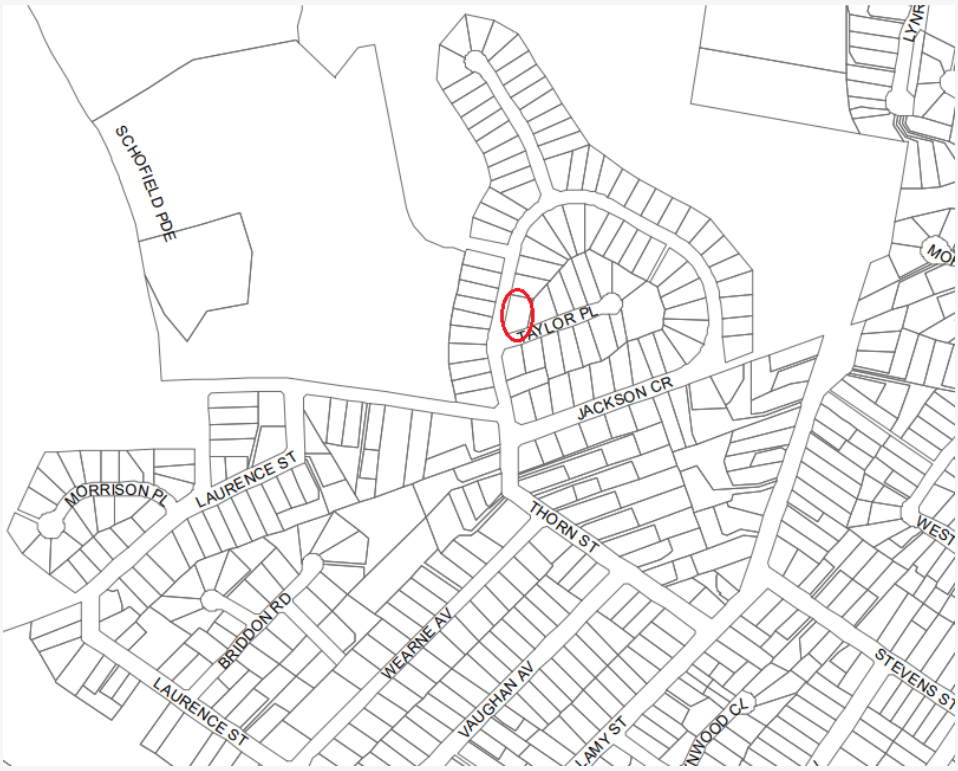
4.4 In relation to objective (a), the proposed development (as per the latest amended plans) complies with all other relevant controls including building height and FSR controls, and the various DCP controls, including overshadowing and setbacks. In this way it demonstrates the capacity of the proposed subdivision to "accommodate development that is suitable for its purpose, consistent with that which would be achieved on a compliant lot size configuration". [2]

4.5 The locality is characterised by a variety of building forms and the subdivision pattern varies. The proposed two allotments will accommodate development which demonstrates a high

[2] As per Walsh C in Eather v Randwick City Council [2021] NSWLEC 1075 at [25]

level of residential amenity and compliance with the LEP and DCP requirements in circumstances where the density is appropriate.

4.6 The immediate locality and subdivision pattern is depicted in the figure below:



Subdivision plan of the locality (with subject site marked)

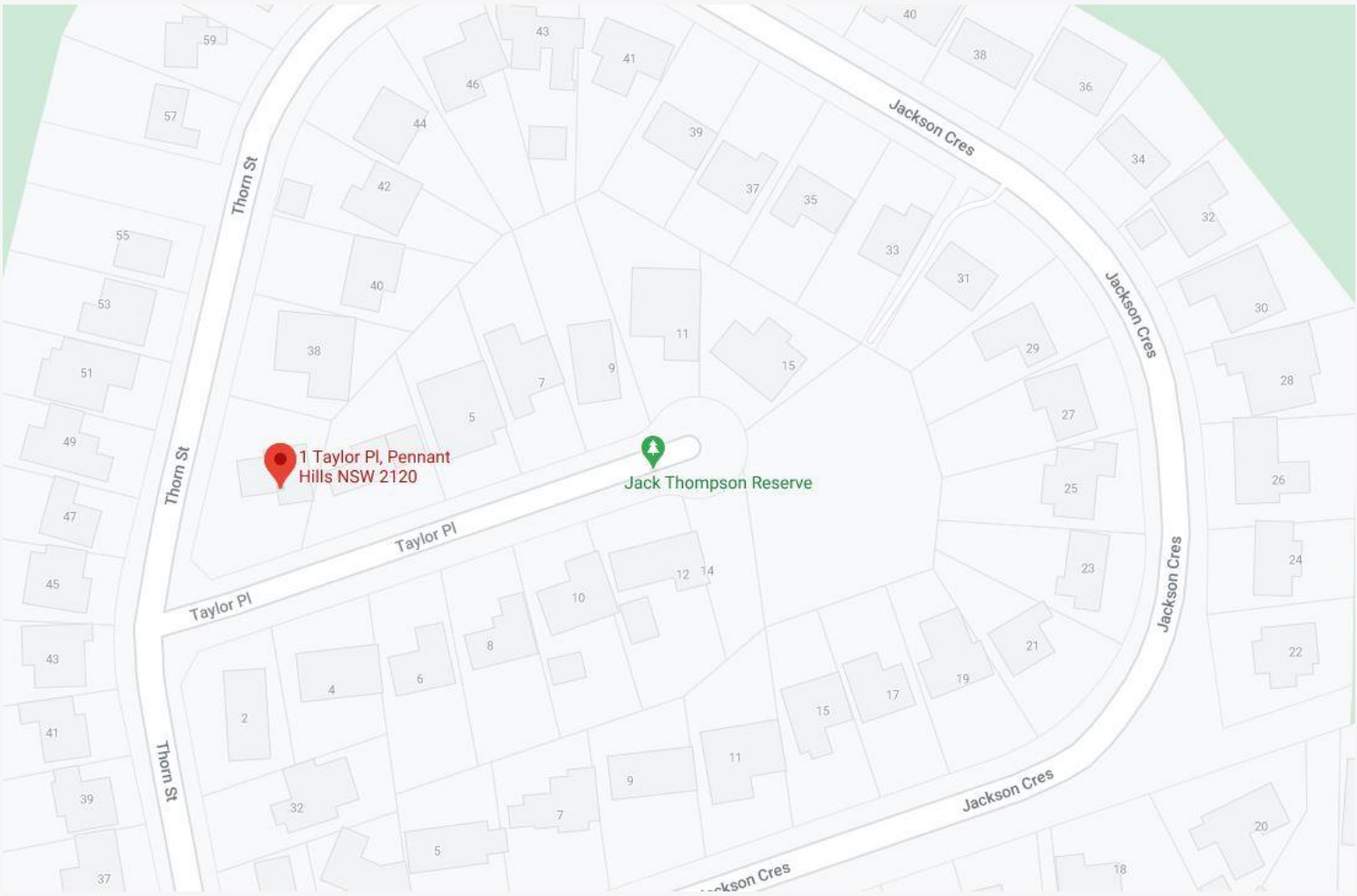
4.7 The lot sizes in the immediate vicinity of the subject site in Taylor Place and Thorn Street are as follows:

Taylor Place

No.	Lot Size
1	980m²
2	777m²
3	876m²
4	790m²
5	879m²
6	937m²
7	879m²
8	923m²
9	942m²
10	936m²
11	849m²
12	1,071m²
14	486m²

Thorn Street

No.	Lot Size
38	822m²
39	759m²
40	871m²
41	765m²
42	872m²
43	846m²
44	929m²
45	803m²
46	969m²
47	736m²
49	740m²
51	745m²
53	740m²
55	742m²



Google Street Map

Aerial map with lots delineated

4.8 Within Taylor Place, the range of lot sizes is between 486m² and 1,071m² with the result that on a strict numerical application of the minimum lot size standard the only lot which could possibly obtain subdivision approval is 12 Taylor Place. The next largest lot (apart from the subject site) is 949m² in area.

4.9 Along Thorn Street, there are again various types and sizes of allotments and in the immediate vicinity of the proposed development at 1 Taylor Place the range of lot sizes is between 736m² and 745m² opposite the subject site and 822m² and 871m² to the south of the subject site.

The subject site occupies the corner of Taylor Place and Thorn Street, Pennant Hills

4.10 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 in the area by providing two street fronting dwellings at each of the Taylor Place and Thorn Street elevations.

4.11 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.

4.12 In terms of precedents in the area, on 25 March 2020 the LPP actually considered a clause 4.6 variation request in relation to minimum subdivision lot size in respect of 23 Westwood Street Pennant Hills (DA/1100/2019).

4.13 That was a 1,128m² irregular shaped site with two existing detached dwellings. The proposed subdivision yielded lots of 687.1m² and 337.9m² in area (amounting a variation of 32.42% to the development standard). Although there were existing dwellings on the site and it was also taken into account that the proposed change was from a prohibited use (ie dual occupancy) to a permissible use, the proposal was approved, reflecting the flexibility which clause 4.6 permits where strict compliance with a development standard would otherwise be unreasonable or unnecessary or tends to hinder the attainment of the objectives of the zone.

4.14 It was also considered relevant that the proposed (non-complying) subdivision would in that case provide potential for more affordable housing options and would mean that the two lots (if so desired) could be sold separately thereby allowing potential home buyers the opportunity to buy land of a suitable size for residential purposes – which goes to the heart of the zone objectives.

4.15 Another example is 42 The Esplanade Thornleigh (DA/350/2012) where the proposal was for alterations to the existing dwelling and subdivision of one allotment into two. The site area was 963.9m² and the second lot comprised 493.9m² (or 92.8% of the minimum allotment size). It was determined that the proposed subdivision plan met the underlying objectives of the zone by providing an additional house site for the housing needs of the population of Hornsby and it also satisfy the DCP controls in terms of building envelope, setbacks and private open space. The Council DA assessment report concluded that the "minor non-compliance of 7.2% of the minimum area standard" would not hinder the orderly and economic use and development of the land and, at the same time, would not set an undesirable precedent for the area.

4.16 A more recent example is 110 Dartford Road, Thornleigh (DA/103/2017) involving Torrens title subdivision of an approved multi-unit housing development comprising two detached dwellings into two allotments, comprising lots of 432m² and 515m² in area (excluding rights of access). The subdivision was approved by the then Independent Hearing and Assessment Panel (IHAP4/18) notwithstanding the 13.6% variation to the minimum lot size requirement as it was accepted that the "numerical exceedance of the minimum subdivision lot size is minor And does not compromise the quality of the development outcome".

4.17 Conversely, an example of a development that just achieved numerical compliance with the minimum lot size and which is close to the subject site is a battle-axe development at 14 Thorn Street, Pennant Hills (DA/1589/2014). The original site was 1,174.7m² and the new proposed lots were 570m² and 500m² as depicted in the aerial pic below:

4.18 The newly created lot at 14 Thorn Street Pennant Hills met the minimum subdivision lot size area and complied with the prescriptive measures within the DCP.

4.19 The same result is achieved with the proposed development of 1 Taylor Place Pennant Hills except for the very minor non-compliance of 2% in the 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.

4.20 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, solar access, improved tree retention, driveways etc. associated with residential development permissible in the zone.

4.21 As Preston CJ noted in Wehbe:

"The rationale is that 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)."

4.22 In short, the 500m² minimum subdivision lot size cannot be seen as a kind of fixture or absolute development standard which cannot be varied and "cannot be seen as the end to be achieved by the clause" in view of the flexibility and "facultative function" inherent in Clause 4.6. [3]

[3] Walsh C in Eather v Randwick City Council [2021] NSWLEC 1075 at [33]

Sufficient Environmental Planning Grounds

4.23 Environmental planning grounds relate to the subject matter, scope and purpose of the *Environmental Planning and Assessment Act 1979* as distilled in the objects in Section 1.3 of the Act which relevantly for the purpose of this application include:

(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources;
(b) to promote the orderly and economic use and development of land;
(c) to promote the delivery and maintenance of affordable housing;
(d) to promote good design and amenity of the built environment;
(e) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.

4.24 The proposed lot sizes each suitably accommodate the detached dwelling houses and will not result in in any significant adverse environmental amenity impacts, such as overshadowing, visual or acoustic privacy, or loss of views. The revised plans have further reduced the height, bulk and scale of the dwellings and achieve full compliance with the DCP prescriptive controls for the site.

4.25 The resulting development will achieve a contextually appropriate building form on each of the two lots that will not be inconsistent with other developments within the immediate locality which comprises a variety of allotment sizes and development types.

4.26 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.

4.27 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.

4.28 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.

4.29 The proposed subdivision permits the land to achieve its full development potential which would not otherwise be achieved if the land were maintained as a single allotment. It is both site specific and accords with the zone objectives by allowing separate titles and increasing the availability of housing stock.

4.30 The proposed lots are of sufficient size to accommodate development of a low density scale and will not have an adverse impact on nearby existing residential properties. They represent 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.

4.31 The very minor departure from the minimum lot size requirement is such that the proposed subdivision will not deviate from the acceptable built form within the vicinity of the subject site. Nor will there be any practical difference in terms of amenity or streetscape.

4.32 As Gray C observed in Christodoulou v Blacktown City Council [2017] NSWLEC 1554 at [81] in a case involving a minimum size lot of 450m², the difference between a compliant subdivision and the present subdivision will have "no discernible impact on density".

4.33 There are therefore sufficient environmental planning grounds to justify the development standard

Clause 4.6(4) (a)(ii) – Is the proposed development in the public Interest

4.34 The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.35 Preston CJ in Initial Action at [27] described the relevant test for this as follows:

"The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest."

4.36 In Eather v Randwick City Council [2021] NSWLEC 1075 Walsh C considered the meaning of the word "consistent" and was content to rely on the summary prepared by Tuor C in Moskovich v Waverley Council [2016] NSWLEC 1015 at [53]:

"…(the term consistency) has been interpreted to mean "compatible" or "capable of existing together in harmony" (Dem Gillespies v Warringah Council (2002) 124 LGERA 147; Addenbrooke Pty Ltd v Woollahra Municipal Council [2008] NSWLEC 190) or "not being antipathetic" (Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21)."

4.37 As demonstrated in this request, the proposed development is clearly consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out in terms of accommodating the housing needs of the community within a low density residential environment.

4.38 Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Undesirable planning precedent?

4.39 The consent authority also contends that the departure from the minimum size development standard would set an undesirable precedent in the locality.

4.40 The applicant respectfully disagrees with this contention. As the Court observed in Christodoulou v Blacktown City Council [2017] NSWLEC 1554 at [83]:

"(A)s to maintaining the sanctity of the control, there is no basis upon which there should be blind adherence to a control. Clause 4.6 has a clear objective to allow a variation in the application of a control if it is warranted in the circumstances."

4.41 The question of what is an undesirable precedent and how it may impact on the q determination of an application which involves the contravention of a development control was considered by Lloyd J in Goldin & Anor v Minister for Transport Administering the Ports Corporatisation and Waterways Management Act 1995 [2002] NSWLEC 75 relied on Sugarman J in Emmott v Ku-ring-gai Municipal Council (1954) 3 LGRA 177, where he said at 182:

"It is sometimes contended that a proposed development, in itself unobjectionable, should not be allowed because it is likely to lead to others of a similar character and the totality would prove objectionable. That depends, inter alia, upon the existence of a sufficient probability that there will be further applications for a number of undistinguishable developments of the same class sufficient in their totality to bring about the objectionable condition of affairs … Applications must be considered on their own merits and it would appear to be unduly onerous to refuse an application, unobjectionable on its individual merits, on the mere chance of probability that there may be later applications sufficient, if approved, to produce in their totality some undesirable condition. In such a case as the present, if what originally appeared to be a mere possibility or chance turned out later to become a distinct possibility, there would be no reason why the council should not at that stage call a halt, if it should then appear proper to do so. Justice is not offended in these circumstances by the refusal of further applications calculated to lead to objectionable conditions after the granting of one or more earlier applications unobjectionable in themselves."

4.42 In the subject application, there is nothing substantively objectionable about the proposal *per se.* The proposal aligns with the relevant zone objectives, does not adversely affect the amenity of others and provides for satisfactory amenity for future occupants of the two modest residential dwellings to be erected thereon.

4.43 Accordingly, as the proposal is not objectionable of itself, the second test in Goldin, concerned with "the probability that there will be further applications of a like kind", does not come into play. And in any event, any future applications would still need to be assessed on their own merits.

4.44 In this case, as the analysis of the relevant site areas within Taylor Place and Thorn Street within the immediate vicinity of the subject site demonstrates, allowing a minor and almost indiscernible variation of 2% is highly unlikely to unleash a torrent of subdivision applications for sites which (leaving aside 12 Taylor Pace) are considerably smaller than the subject site.

Concurrence of the Secretary of the Department of Planning and Environment

4.45 By Planning Circular dated 5 May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

4.46 The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

4.47 Concurrence of the Secretary can therefore be assumed in this case

CONCLUSION

4.48 For the reasons outlined above it is respectfully submitted that this Clause 4.6 variation request is well-founded and should be adopted in the assessment and determination of the subject development application.

Dated 15 April 2021

Champion Homes Sales Pty Ltd