



Clause 4.6 – Exceptions to Development Standards

VARIATION TO THE MINIMUM SUBDIVISION LOT SIZE STANDARD UNDER CL. 4.1 HORNSBY LEP 2013

Lot 2 in DP 1128815 No 121A Pennant Hills Road NORMANHURST

Proposed Torrens Title Subdivision of One (1) Lot into Two (2).

Clause 4.6 Variation Request

Issue No	Amendment	Date
A	Initial draft Report	28th August 2024
B	issue to Client	30th August 2024
C	Final issue to Client	8th October 2024

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Waiver

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VARIATION TO THE MINIMUM SUBDIVISION LOT SIZE STANDARD UNDER CL. 4.1 HORNSBY LEP 2013

Peter Fryar of Key Urban Planning has prepared this clause 4.6 variation request (the “**request**”) to assist in gaining development consent for “*Torrens title subdivision of one (1) lot into two (2)*”. The property is known as Lot 2 in DP 1128815 No 121A Pennant Hills Road NORMANHURST (the “**site**”).

The request is made in support of a variation to the minimum subdivision lot standard prescribed under clause 4.1 of the Hornsby Local Environmental Plan 2013 (the “**LEP 2013**”).

The site comprises two single storey dwellings and a detached garage. The existing development constitutes a Dual Occupancy (detached). The existing dual occupancy formed part of an approved multi-unit housing that comprised 3 dwellings being the two dwellings on lot 2 and the existing dwelling house on lot 1 prior to subdivision.

Lot 2 is a battle-axe shaped allotment. Lot 2 has a total site area of 1,004m² (732m² excluding access handle). The surrounding locality is characterised by many ‘in-fill’ subdivisions of traditional allotments (see below).

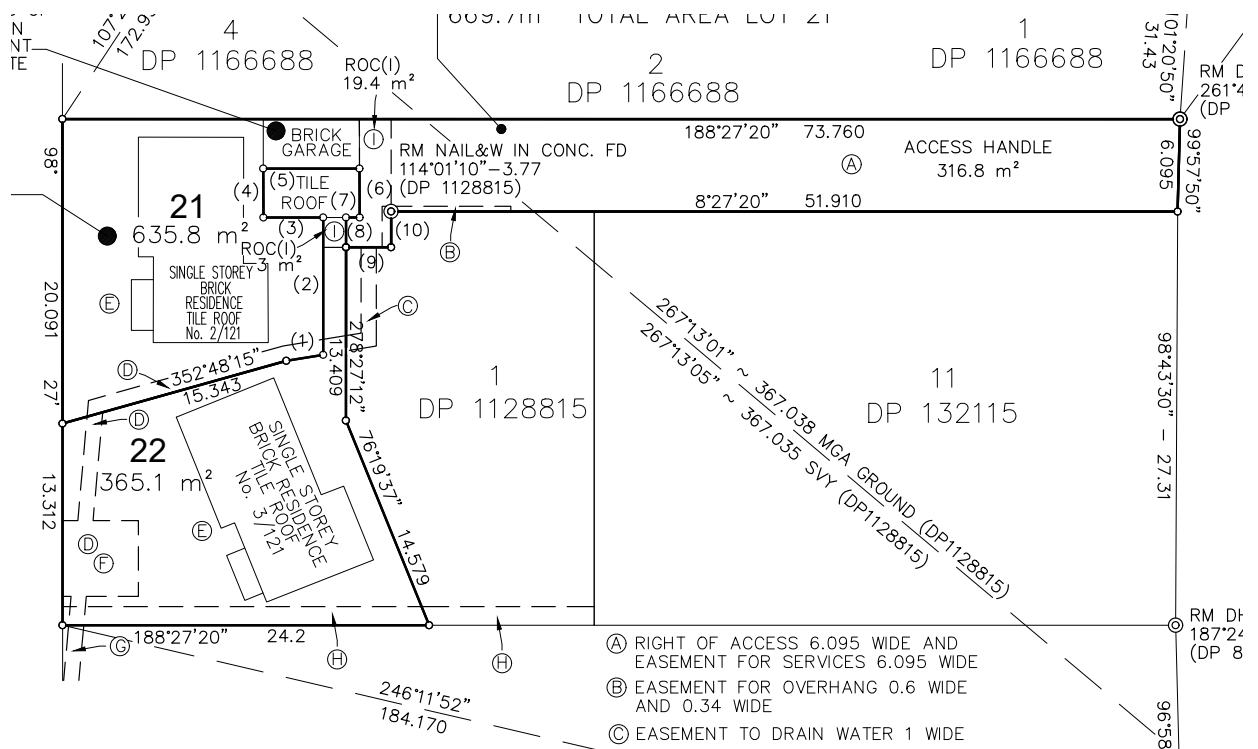
Photograph 1 – Aerial photograph (*courtesy Hornsby Shire Council*)



The proposed development incorporates:

- The subdivision of the subject site (lot 2) into two (2) Torrens title lots as shown on the accompanying plan that forms part of the DA.
- **The proposed lot areas are:**
 - Lot 21 – 635.8m² (299.6m² excl. ROW)
 - Lot 22 – 365.1m²
- Each proposed lot will contain an existing dwelling house. The subdivision configuration will align with the existing fenced arrangement including areas of private open space.
- The proposed subdivision will not result in any physical change to the development as it exists on the site and will facilitate the ability to have each dwelling house contained within a separate property title.
- Existing on-site drainage and service arrangements will be retained, and the terms of easements modified accordingly.
- The existing freestanding garage will provide carparking (undercover) for each of the proposed lots. One carspace will be allocated within the garage to each lot.
- The existing vehicular access arrangements to the proposed allotments will be unchanged.

Figure 1 – Proposed subdivision layout

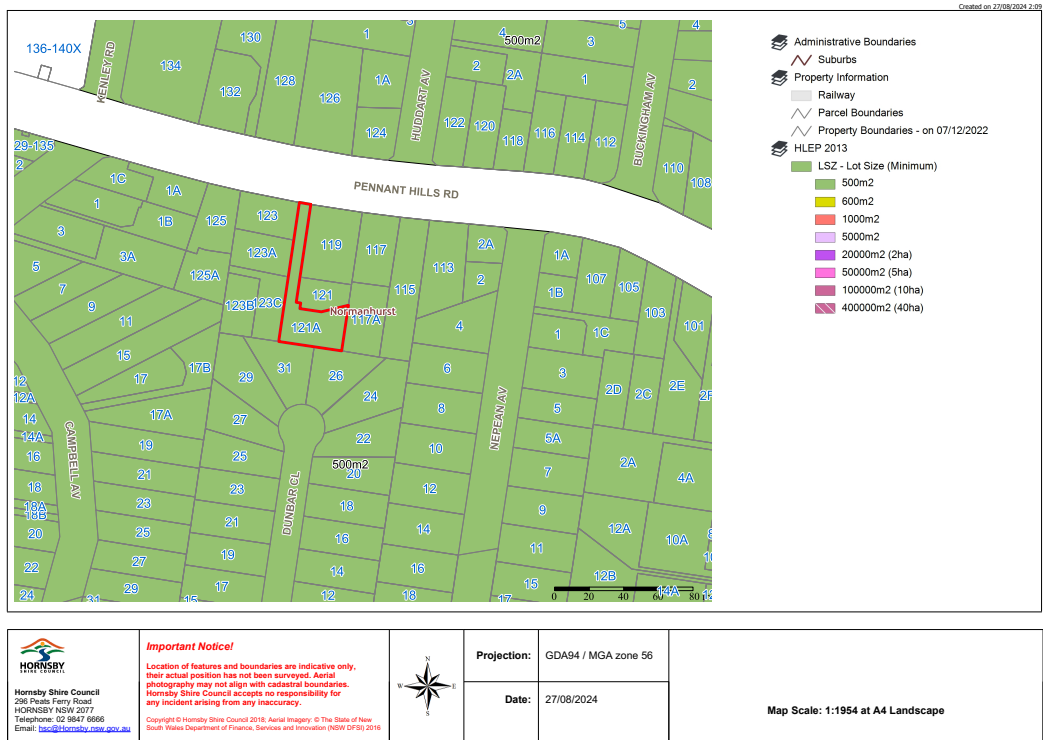


INTRODUCTION

Key Urban Planning is providing urban planning services to the owners of the site in support of the above-described development application submitted to Hornsby Shire Council.

The purpose of this request is to seek a variation to Clause 4.1 (Minimum subdivision lot size) of the LEP 2013

Figure 2- Extract of the LEP Minimum lot size map



Clause 4.1 of the LEP 2013 states:

4.1 Minimum subdivision lot size

(1) The objectives of this clause 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.

(2) 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.

(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.

(3A) If a lot is a battle-axe lot or other lot with an access handle, the area of the access handle must not be included in calculating the lot size, except in the following zones—

(a) Zone RU1 Primary Production,

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(b) Zone RU2 Rural Landscape,

(c) Zone RU4 Primary Production Small Lots,

(d) Zone C3 Environmental Management.

(4) This clause does not apply in relation to the subdivision of any land—

(a) by the registration of a strata plan or strata plan of subdivision under the [Strata Schemes Development Act 2015](#), or

(b) by any kind of subdivision under the [Community Land Development Act 2021](#).

The request seeks a variation to the minimum 500m² standard that applies to the land under the 'Lot size map' contained in the LEP 2013.

The proposed lot areas are:

- Lot 21 – 635.8m² (299.6m² excl. ROW)
- Lot 22 – 365.1m²

Clause 4.1(3A) specifies that if the lot is a battle-axe lot with an access handle, the area of the access handle is not included in calculating the lot size.

Proposed lot 21 is a variation of 40.08%.

Proposed lot 22 is a variation of 26.98%.

CLAUSE 4.6 FRAMEWORK

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 for and from a development.

Clause 4.6(3)(a) and (b) requires that a consent authority must not grant a variation to a development standard unless it is satisfied that 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).”

Additionally, there is Case Law precedence that must be considered prior to determining any variation request under clause 4.6. The Land and Environment Court Case law has set questions to be addressed in requests for variations facilitated by clause 4.6. The relevant precedence is in:

- *Wehbe v Pittwater Council (2007)*; and, more recently
- *Four2Five Pty Ltd v Ashfield Council (2015)*.

More recently, in two recent decisions (one in the Court of Appeal and one in the Land and Environment Court), Preston CJ further clarified the requirements for clause 4.6 requests and sought to unify the approaches in *Initial Action* and *Al Maha*.

This application to vary a development standard is framed to provide responses to each of the heads of consideration under Clause 4.6 and to address the precedence set by relevant Case Law. It is set out as follows:

- Verification that a statutory Development Standard is proposed to be varied;
- Description and quantification of the proposed variation
- Justification on merit of the validity of the variation requested (with particular attention to the current case law precedence in *Four2Five vs Pty Ltd v Ashfield Council & Wehbe v Pittwater Council (2007)*). Particularly, clause 4.6(3)(a) identifies that the request must demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances.
- Assessment against the remaining relevant statutory heads of consideration in the LEP 2013 and other relevant case law.
- As required by clause 4.6(3)(b) the request will demonstrate that there are sufficient environmental grounds to justify contravening the development standard.

1. Type of development standard & numeric value

The Development Standard to be varied by this application is Clause 4.1 (Minimum subdivision lot size) of the LEP 2013. The development standard is a 'numerical' development standard that uses a 'number' for measuring components of a site and/or development.

The Lot Size Map indicates that the minimum subdivision lot size is 500m². The purpose of this request is to seek a variation to Clause 4.1 (Minimum subdivision lot size) of the LEP 2013.

The site is zoned R2 Low Density Residential Zone under the LEP 2013. Clause 4.1 of the LEP 2013 specifies the means to calculate the minimum lot size for subdivision. This is further expanded under Part 6 of the Hornsby Development Control Plan 2013 under part 6.2.1 as follows:

6.2 Urban Subdivision

6.2.1 Residential Lands Subdivision

The following provides controls for subdivision in the R2 Low Density Residential Zone.

Desired Outcomes

- a. Subdivision design should maintain appropriately shaped lots to accommodate a dwelling and associated development that is compatible with a low-density residential environment.
- b. Subdivision design should provide setbacks to developable areas that will:
 - complement the streetscape,
 - provide for landscaping,
 - protect landscape features, and
 - provide separation between existing and future dwellings.

Prescriptive Measures

Lot Size

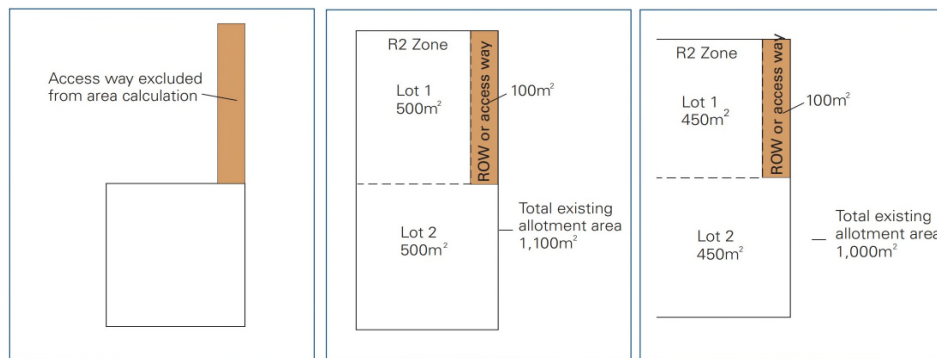
- a. The minimum lot size is depicted on the Minimum Lot Size map, as summarised in the following:

Table 6.2.1-a: Minimum Lot Size – R2 Zone

HLEP Area	Minimum Lot Size
I	500m ²
M	600m ²

- b. In calculating the area of a lot resulting from a subdivision of land, the area of any accessway, right of carriageway or the like is to be excluded.
- c. The size of the proposed lot may need to be greater than the area prescribed in the table above in order to achieve the minimum setbacks required from significant landscape features or to address site constraints.

Figure 6.2-a: Illustration of lot size controls in the R2 zone, within area I on the HLEP Lot Size Map. (I)



Battle-axe or other allotment with accessway

Complying subdivision

Noncomplying subdivision

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Section 1.4 of the 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,

(d) the cubic content or floor space of a building,

(e) the intensity or density of the use of any land, building or work,

(f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,

(g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,

(h) the volume, nature and type of traffic generated by the development,

(i) road patterns,

(j) drainage,

(k) the carrying out of earthworks,

(l) the effects of development on patterns of wind, sunlight, daylight or shadows,

(m) the provision of services, facilities and amenities demanded by development,

(n) the emission of pollution and means for its prevention or control or mitigation, and

(o) such other matters as may be prescribed.”

The minimum subdivision lot size identified on the 'Lot Size Map' is a development standard as defined under section 1.4 of the Environmental Planning and Assessment Act 1979 (the **“Act”**).

Accordingly, the proposed subdivision constitutes a variation of the minimum lots size development standard contained within the LEP 2013 and requires the proponent to formally seek a variation under the provisions of clause 4.6.

2. What is the difference between the existing and proposed numeric values? What is the percentage variation (between the proposed and the environmental planning instrument)?

The purpose of this request is to seek a variation to Clause 4.1 (Minimum subdivision lot size) of the Hornsby Local Environmental Plan 2013.

The proposed lot areas are:

- Lot 21 – 635.8m² (299.6m² excl. ROW)
- Lot 22 – 365.1m²

Clause 4.1(3A) specifies that if the lot is a battle-axe lot with an access handle, the area of the access handle is not included in calculating the lot size.

Proposed lot 21 is a variation of 40.08%.

Proposed lot 22 is a variation of 26.98%.

3. Visual representation of the proposed variation

The development involves the subdivision of what exists as an existing dual occupancy (detached) on the current lot. The subdivision will not involve any physical change to the existing built form. The proposed subdivision boundaries will align with the current configuration of the development that includes private open space, building footprints, access and carparking. Essentially, the proposed subdivision boundaries accord with the existing dividing fences that separate the two dwelling houses.

The historic approvals that have resulted in the current development form provide a justification in the circumstances of the case for the variation sought to the lot size standard.

In 1993, development consent was granted for the construction of three (3) dwellings on the parent lot known as Lot 12 in DP 132115. The development was defined as cluster housing by way of a policy adopted by council at the time of the existence of the Hornsby Planning Scheme Ordinance 1970. The cluster housing policy provided for a density of 1 dwlg/350m² of site area.

A development consent was subsequently granted by council in 1998 (DA/657/97) under the provisions of the now repealed Hornsby Local Environmental Plan 1994 for the subdivision of the site creating lots 1 and 2 in DP 1128815. The subject development application relates to lot 2.

DA/657/97 approved the subdivision of the site into two allotments and the erection of two detached 'multi-unit dwellings' on the subject site (lot 2). The site at the time of granting consent to the subdivision was zoned Residential A (Low Density) zone under LEP 1994. 'Multi-unit housing' was defined as follows and was permissible with consent.

"multi-unit housing means 2 or more dwellings, whether attached or not, but does not include a hotel or motel."

DA/657/97 was for the subdivision to create 2 allotments and the construction of the two dwellings that exist on the subject site.

Lot 1 is 406m² in area and land locked with access to Pennant Hills Road via a Right of Carriageway over the access handle of Lot 2. Lot 1 contains an existing dwelling that was constructed at the time of creating the lot. The existing dwelling complied with the HSLEP 1994 and the Dwelling House DCP in terms of floor space ratio, site cover, private open space and car parking provision. The proposed lot 1 under DA/657/97 did not comply with Clause 14 of the HSLEP 1994 in relation to the minimum lot size (500m²). The council approved the subdivision that created lot 1 by supporting a now repealed SEPP 1 objection.

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The subject site (Lot 2) is 732m² in area excluding access way. DA/657/97 also approved the erection of two detached single storey multi-unit dwellings without subdivision. The dwellings complied with the Low Density Multi Unit Housing DCP in relation to density, floor space ratio, site cover, private open space, side setbacks and car parking. The proposed dwellings did not comply with the minimum required setback between dwellings; however, council considered the variation to be justified.

The two dwellings on the subject site were permitted at a density less than the minimum subdivision lot size. This was permitted pursuant to the provisions clause 14 of the LEP 1994. Clause 14 specified a minimum lot size for subdivision in the Residential A zone of 500m² however permitted a reduced density for multi-unit housing as follows:

"14. Density

Multi-unit housing

(3) Regardless of subclause (2), the Council may consent to the development of land for the purpose of multi-unit housing, but only where the Council is satisfied that the development will result in a density not greater than:

(a) one dwelling per 350m² within the Residential A, AA, AM, or AT zone, exclusive of any accessway, rights of carriageway and public or private roads. or

(b) one dwelling per 400m² within the Residential AS zone, exclusive of any accessway, rights of carriageway and public or private roads.

(4) Land within the Residential A, AA, AM, AS or AT zone on which dwellings comprising multi-unit housing are situated may be subdivided for the purpose of creating separate land titles for dwellings only if the subdivision complies with subclause (2). The separate occupation of the proposed lots illustrated by a proposed strata plan relating to multi-unit housing situated on any such land is prohibited.

(4A) The Council is not to consent to the erection of multi-unit housing on a site area consisting of the whole or part of any of the 9 numbered development sites shown edged heavy black on Diagram 1 in Schedule BA unless the Council has considered whether it should require consolidation of all or some of the allotments comprising the numbered development site concerned.

(4B) Regardless of subclauses (2), (3) and (4), the Council may consent to the subdivision or other development of land shown edged heavy black in Diagram 2 in Schedule BA for the purposes of multi-unit housing, if the proposed development satisfies the provisions on that Diagram."

The development as it currently exists on the site conformed with the density provisions permitted under LEP 1994 and the proposed two lot subdivision does not seek to vary the density that applied at the time that the construction of the two existing dwellings was consented to,

JUSTIFICATION OF THE PROPOSED VARIATION

The proposed variation is assessed below against the relevant sub-clauses in Clause 4.6 of the LEP.

a) Are the objectives of the standard are achieved notwithstanding non-compliance with the standard.

In his decision in *Wehbe v Pittwater Council [2007] NSW LEC 827* (relating to the now repealed State Environmental Planning Policy No.1), Chief Justice Preston expressed the view that there are 5 different ways in which a Development Standard may be shown to be unreasonable or unnecessary (and so that an objection to the development standard may be well founded). In accordance with this precedent, the proposed variation is tested below against each of these.

The relevant objective underpinning the building height development standard is:

“(i) to ensure that buildings are compatible with the desired future character of the area in terms of building bulk and scale”

The variation to the site area standard does not compromise the scale and appearance of the development which is in keeping with the character of the area and the relevant density provisions that applied at time of the approval of the two dwellings. The built form will not change because of the proposed subdivision.

The objectives of the standard can be achieved, notwithstanding the non-compliance with the lot size standard.

“(ii) to provide a suitable balance between landscaping and built form”

The proposed subdivision will not have any change in built form, nor will there be any reduction in existing landscaped area on the site.

“(iii) to minimise the adverse effects of bulk and scale of buildings,

The proposed subdivision will not result in any change to the existing built form.

“(iv) to limit excavation of sites and retain natural ground levels for the purpose of landscaping and containing urban run-off”

Not applicable as there will be no resultant increase in impervious surfaces. No site excavation is proposed.

b) Are the underlying objectives or purpose of the standard not relevant to the development?

The underlining objective of the minimum lot size that applies to the subject site is to ensure that the resultant bulk and scale of the building is appropriate for the site in its context to the surrounding development. The proposal involves no change to the existing built form on the site that complied with the relevant planning controls at the time of granting development consent.

The density of development will not be increased. The strict application of the lot size standard does not have regard to the historic context of the approval granted for the existing development. The

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proposed subdivision will not undermine the purpose of the standard by resulting in a density greater than exists.

- c) **Would the underlying objective or purpose be defeated or thwarted (if compliance was required)?**

The underlying object or purpose of the standard would not be defeated or thwarted if compliance was required. However, strict compliance with the development standard would result in a missed opportunity to facilitate separate ownership of the dwelling houses providing affordable housing stock in the Normanhurst district.

- d) **Has the development standard been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard?**

It is considered that compliance with the standard in the circumstances is unreasonable and unnecessary when considering historic approvals by the council in the locality.

Lot I was approved with an area of 406m². Lot 1 did not comply with Clause 14 of the LEP 1994 in relation to the minimum lot size (500m²). The council approved the subdivision that created lot 1 by supporting a now repealed SEPP 1 objection. The two dwellings on the subject site complied fully with the density provisions applicable at the time in granting consent under the LEP 1994.

- e) **Is the zoning of the land unreasonable or inappropriate so that a development standard is also unreasonable and unnecessary?**

The proposed variation is consistent with the heads of consideration set by the decision of *Wehbe v Pittwater Council [2007]* and thus that for this case it would be unreasonable to strictly apply the numerical lot size standard for the development.

Until recently, the two dwellings on the subject site were prohibited under the HLEP 2013 as the development was defined as a 'Dual Occupancy (detached)'. The existing development benefitted from "existing use rights". The planning principles in *Fodor Investments v Hornsby Shire Council (2005)* 141 LGERA 14 would be applicable.

Recent amendments to State Environmental Planning Policy (Housing) 2021 under the introduction of Part 12 now permit dual occupancy development within the R2 zone in the Hornsby LGA. The council has not adopted any specific planning controls to regulate density or built form for dual occupancy development and the proposed subdivision of the existing dual occupancy development does not contravene any density provisions for dual occupancy development.

- f) **Are there sufficient environmental planning grounds to justify contravening the development standard?**

The merit - based justification above in this request provides strong evidence that the proposed lot size variation would have clear positive outcomes including the protection and enhancement of identified values specific to the site and provision of high-quality residential development in the locality.

The underlying objective of the standard is to minimise potential adverse environmental impacts of

development of the site on the surrounding area and control bulk and scale and density of development.

Whilst the term ‘environmental planning grounds’ is not defined under the EP & A Act or the Standard Instrument – Principal Local Environmental Plan, guidelines published by the NSW Department of Planning refer to the objects in s. 1.3 of the EP & A Act as a basis for matters to consider. More specifically, environmental planning grounds relevant in the circumstances are as follows:

1. Dealing with the unique circumstances of the site.

Comment: On 11.2.1998, council granted development consent (DA 675/1997) for the subdivision of one allotment into two and the erection of two multi-unit dwellings on the site. The lots did not comply with the provisions of the applicable planning instrument (HSLEP 1994) in relation to minimum allotment size, however, the “SEPP 1” application lodged by the applicant in this regard was supported. The proposal will simply facilitate the creation of separate title for the existing two dwellings on the site and considering the circumstances of the case, is a acceptable outcome.

2. Achieving consistency with the streetscape and existing built form

Comment: The proposed subdivision will not result in any change to the existing built form on the site. No changes will occur that would impact on the existing streetscape to Pennant Hills Road.

3. Responding to topography

Comment: The proposed subdivision will not result in any change to the existing built form on the site. No impacts will result to the existing topography.

4. Improving public benefit

Comment: The public interest is served by developing the land in an efficient and economic way that enhances the character of the area and amenity of the neighbourhood.

The public interest can extend to a wide variety of factors and would include that there is a critical shortage of housing and land within the Sydney metropolitan area.

The proposal is consistent with the 20-year vision for Housing in NSW contained in the NSW Government’s Housing 2041 that embodies the government’s goals and ambitions to deliver better housing outcomes by 2041— housing in the right locations and housing that suits diverse needs.

The proposed development is an infill development that meets the objective of the R2 zone so as to provide for the housing needs of the community in a low-density residential environment.

The proposal meets the aims of the Hornsby LEP 2013.

5. Achieving equal or better amenity outcomes (solar access, privacy, views/outlook)

Comment: Private Open Space areas to both the existing dwellings remain unchanged and provide for adequate solar access and are of a depth that attains sufficient solar access even in

mid-winter due to the natural topography and location of the accessway. Direct solar access to the proposed lots within the subject development and the rear yards of adjoining residences is attainable for a minimum 3 hours between 9 am and 3 pm at the winter solstice. The proposed subdivision will not change the existing development and the proposed site boundaries conform with the existing approved layout.

6. Being consistent with the prevailing subdivision pattern

Comment: The proposed subdivision is compatible with the surrounding residential land and subdivision pattern and will provide for the housing needs of the community. The density achieved by the subdivision will not be altered and will facilitate separate ownership of each allotment. The subdivision will maintain the low - density residential environment that exists in the locality while providing for housing demands within the Hornsby Local Government Area.

The proposed subdivision is not antipathetic to the existing subdivision pattern that has evolved over time within the locality.

7. Protecting or avoiding impacts to an area of environmental or biodiversity value.

Comment: The proposed subdivision will not result in any change to the existing built form on the site and there will be no resultant environmental impacts.

g) Is there any other relevant information relating to justifying a variation of the development standard?

The proposed minimum lot size variation will result in a development that is consistent with the objectives of the R2 zone, and the standard contained within the LEP 2013. The development proposal will maintain the density for development applicable at the time of granting consent to the existing two dwellings.

It is considered that the public benefit will not be undermined by varying the minimum lot size development standard. The proposed development is generally consistent with the adopted planning controls for the site.

CONCLUSION

The proposed development satisfies the test established by the Land and Environment Court of NSW in *Wehbe -v- Pittwater Council* [2007] NSW LEC 827 as being appropriate for consideration of "unreasonable or unnecessary" circumstances in the application of Clause 4.6 variation request because:

- the objectives of the standard are achieved notwithstanding non-compliance with the standard.
- the underlying objective or purpose of the standard is not relevant to the development therefore compliance is unnecessary in the context of the facts of this case.
- The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable - it would not result in the orderly and economic development of the land;

In the circumstances set out above there are sufficient environmental planning grounds to vary the numerical standard in this matter. Requiring strict compliance with the standard would hinder attainment of the relevant objects of the Environmental Planning and Assessment Act 1979.

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