



BUSINESS PAPER

LOCAL PLANNING PANEL MEETING

**Wednesday 26 May 2021
at 6:30pm**



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1 FURTHER REPORT - DA/43/2021 - DEMOLITION OF A DWELLING HOUSE, TORRENS TITLE SUBDIVISION OF ONE LOT INTO TWO AND CONSTRUCTION OF A DWELLING HOUSE ON EACH LOT - 1 TAYLOR PLACE, PENNANT HILLS

EXECUTIVE SUMMARY

DA No: DA/43/2021 (Lodged 15 January 2021)

Description: Demolition of a dwelling house, Torrens title subdivision of one lot into two and construction of a dwelling house on each lot

Property: Lot 1 Sec 10 DP 758836, No. 1 Taylor Place, Pennant Hills

Applicant: Champion Homes Sales Pty Ltd

Owner: Andrew Kevin Lewis

Estimated Value: \$1,065,000

Ward: B

- The application involves the demolition of a dwelling house, Torrens title subdivision of one lot into two and construction of a dwelling house on each lot.
- The amended proposal does not comply with the minimum lot size development standard contained within the *Hornsby Local Environmental Plan 2013*. The applicant has made a submission in accordance with Clause 4.6 'Exceptions to development standards' of the *Hornsby Local Environmental Plan 2013* to contravene the standard. The submission is not considered well founded and is not supported by Council.
- A total of 23 unique submissions as well as a petition with 42 signatures has been received in respect of the application.
- The application is required to be determined by the Hornsby Shire Council Local Planning Panel (HLPP) as 10 or more unique submissions were received by way of objection.
- It is recommended that the application be refused.

RECOMMENDATION

THAT Development Application No. DA/43/2021 for the demolition of a dwelling house, Torrens title subdivision of one lot into two and construction of a dwelling house on each lot at Lot 1 Sec 10 DP 758836, No. 1 Taylor Place, Pennant Hills be refused for the reasons detailed in Schedule 1 of LPP Report No. LPP3/21.

BACKGROUND

On 15 January 2021, the subject application was lodged.

On 9 February 2021, Council advised the applicant that the proposal cannot be supported due to the non-compliance with the minimum lot size development standard and issues with Dwelling 1. Council requested the applicant to withdraw the application.

On 9 February 2021, the applicant advised in writing that they would not be withdrawing the application and that they wish it to proceed to a local planning panel meeting.

On 10 February 2021, the applicant verbally contacted Council to discuss concerns over Dwelling 1. The applicant advised that they would lodge amended plans prior to the April Local Planning Panel meeting. On 26 February 2021, the applicant lodged amended plans with Council with revised architectural plans for Dwelling 1.

On 31 March 2021, the HLPP considered the proposal and Council assessment report LPP/3/21 which recommended refusal of the application. The Panel resolved to defer the determination of the application and required the preparation and submission of the following 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.*

On 15 May 2021, the applicant submitted a revised Clause 4.6 request and amended architectural plans with the following changes:

- Reduced building footprint of Dwelling 1 by 6.94m² and an overall reduction in floor area by 13.06m².
- Reduced building footprint of Dwelling 2 by 1.94m² and an overall reduction in floor area by 10.54m².
- Increased building separation between the garage of Dwelling 2 and the private outdoor space of Dwelling 1 by 850mm.
- Increase in size of the private open space of Dwelling 1 and a reduction in overshadowing impacts by Dwelling 1.
- Retention of 3 additional trees fronting Thorn street being Nos. 9 *Cotoneaster sp.* (weed species), 11 *Ulmus pavifolia* (Chinese elm) and 17 *Olea sp* (Olive tree).
- A reduction in the proposed building heights of 365mm for Dwelling 1 and 549mm for Dwelling 2.

SITE

The 990.3m² site is located on the corner of Thorn Street and Taylor Place, Pennant Hills and contains a single storey dwelling house. Vehicle access to the existing dwelling is from Taylor Place.

The site contains a number of locally indigenous and exotic tree species and has a fall in slope of 3.5m toward the western (Thorn Street) frontage.

The immediate surrounding area comprises low density, detached residential dwellings generally on larger allotments exceeding 700m².

The site is located within 100 metres of the Berowra Valley National Park and is bushfire prone land.

PROPOSAL

The application proposes the demolition of structures, the Torrens title subdivision of one lot into two and the construction of a two-storey dwelling house on each new lot.

Proposed Lot 101

- Lot 101 has an area of 500.3m², would be irregular in shape and would occupy the southern portion of the site. The lot would have a 22.5m frontage to Taylor Place and a 21m frontage to Thorn Street.
- The proposed two storey face brick dwelling house would comprise 5 bedrooms and would have vehicle access from Taylor Place.
- The ground floor of the dwelling house would comprise a double garage, front porch and entry room, living room, family room, kitchen/dining, powder room, bedroom, laundry and outdoor living area.
- The first floor would comprise a master bedroom with walk-in robe and ensuite, 3 additional bedrooms, bathroom and water closet, and a balcony.

Proposed Lot 102

- Lot 102 has an area of 490m², would be regular in shape and occupy the northern portion of the site. The lot would have a 19.2m frontage to Thorn Street.
- The ground floor of the dwelling house would comprise a double garage, front porch and entry room, living room, family/ kitchen/ dining, powder room, bedroom, laundry and outdoor living area.
- The first floor would comprise a master bedroom with walk-in robe and ensuite, 3 additional bedrooms and a bathroom

Stormwater from both allotments would drain to Thorn Street via on-site detention.

Various retaining walls are proposed within each new lot.

The amended plans indicate the removal of 10 trees to facilitate the subdivision and construction of the dwelling houses.

The proposal includes a landscape plan which details the planting of 4 trees along with 39 shrubs and various ground covers.

ASSESSMENT

The development application has been assessed having regard to the *Greater Sydney Region Plan – A Metropolis of Three Cities*, the *North District Plan* and the matters for consideration prescribed under Section 4.15 of the *Environmental Planning and Assessment Act 1979* (the Act). The following issues have been identified for further consideration.

1. STRATEGIC CONTEXT

1.1 Greater Sydney Region Plan - A Metropolis of Three Cities and North District Plan

The Greater Sydney Region Plan - A Metropolis of Three Cities has been prepared by the NSW State Government to guide land use planning decisions for the next 40 years (to 2056). The Plan sets a

strategy and actions for accommodating Sydney's future population growth and identifies dwelling targets to ensure supply meets demand. The Plan also identifies that the most suitable areas for new housing are in locations close to jobs, public transport, community facilities and services.

The NSW Government will use the subregional planning process to define objectives and set goals for job creation, housing supply and choice in each subregion. Hornsby Shire has been grouped with Hunters Hill, Ku-ring-gai, Lane Cove, Mosman, North Sydney, Ryde, Northern Beaches and Willoughby to form the North District. The Greater Sydney Commission has released the North District Plan which includes priorities and actions for Northern District for the next 20 years. The identified challenge for Hornsby Shire will be to provide an additional 4,350 dwellings by 2021 with further strategic supply targets to be identified to deliver 97,000 additional dwellings in the North District by 2036.

The proposed development would be generally consistent with the *Greater Sydney Region Plan - A Metropolis of Three Cities* and the *North District Plan* by contributing to achieving the dwelling targets for the region, however would result in an allotment not complying with the minimum allotment size under the HLEP.

2. STATUTORY CONTROLS

Section 4.15(1)(a) requires Council to consider “*any relevant environmental planning instruments, draft environmental planning instruments, development control plans, planning agreements and regulations*”.

2.1 Hornsby Local Environmental Plan 2013

The proposed development has been assessed having regard to the provisions of the *Hornsby Local Environmental Plan 2013 (HLEP)*.

2.1.1 Zoning of Land and Permissibility

The subject land is zoned R2 Low density residential under the *HLEP*. 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 is defined as ‘*subdivision*’ and ‘*dwelling house*’ and is permissible in the zone with Council’s consent.

2.1.2 Height of Buildings

Clause 4.3 of the *HLEP* provides that the height of a building on any land should not exceed the maximum height shown for the land on the Height of Buildings Map. The maximum permissible height for the subject site is 8.5m. The proposal is compliant with this provision as the dwelling houses are 7.9m and 7.7m in height respectively.

2.1.3 Minimum Subdivision Lot Size

Clause 4.1 of the *HLEP* provides that the minimum subdivided lot size is not to be less than the minimum size shown on the Lot Size Map in relation to that land. For the subject site, the minimum lot size is 500m².

The application seeks to contravene Clause 4.1 of the *HELP* as proposed Lot 102 would be 490m² and does not meet the 500m² requirement (2% variation).

The applicant has provided a written request to vary the development standard under the provisions of Clause 4.6 of *HLEP*, which is discussed in detail in Section 2.1.4 below.

2.1.4 Clause 4.6 - Exceptions to Development Standards

The application has been assessed against the requirements of Clause 4.6 of the *HLEP*. This clause provides flexibility in the application of the development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary, and it can be demonstrated that sufficient environmental planning grounds are present to justify contravening a development standard.

The application seeks to vary Clause 4.1 of the *HELP* as proposed Lot 102 would be 490m² and does not meet the 500m² requirement (2% variation).

The specific objectives of Clause 4.1 Minimum Lot Size are:

- (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.*

The applicant has made a submission in support of a contravention of the development standard in accordance with Clause 4.6 of the *HLEP*. Clause 4.6 provides that 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.*

Council must be satisfied that the written request provided by the applicant under Clause 4.6 addresses both the unreasonable and unnecessary test and demonstrates sufficient environmental planning grounds to justify contravening the development standard. These matters are discussed below.

2.1.4.1 Unreasonable or Unnecessary

The written request prepared by Champion Homes provides justification in part as follows:

Whether compliance with the development standard is unreasonable or unnecessary

- *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.*

- 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 level of residential amenity and compliance with the LEP and DCP requirements in circumstances where the density is appropriate.
- The lot sizes in the immediate vicinity of the subject site in Taylor Place and Thorn Street are as follows:

Taylor Place		Thorn Street	
No.	Lot Size	No.	Lot Size
1	990m ²	38	822m ²
2	777m ²	39	759m ²
3	876m ²	40	871m ²
4	790m ²	41	765m ²
5	879m ²	42	872m ²
6	937m ²	43	846m ²
7	879m ²	44	929m ²
8	923m ²	45	803m ²
9	942m ²	46	969m ²
10	936m ²	47	736m ²
11	849m ²	49	740m ²
12	1,071m ²	51	745m ²
14	486m ²	53	740m ²
		55	742m ²

- 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.
- 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 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.
- 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.
- 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).
- 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 (i.e. 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. 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.

- *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.*
- *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”.*
- *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. 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.*
- *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.*
- *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.*
- *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.

Council considers that the applicant's written request does not sufficiently address why compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. In regard to the statements listed above the following comments are made.

The justification notes that lot sizes vary in Taylor place from 486m² to 1,071m². Council notes that the 486m² lot is part of Jack Thompson Reserve with a total area of approximately 2800m². Therefore, as listed within the applicant's statement, residential lot sizes within the direct vicinity of the site range in size from 736m² to 1,071m². The proposed allotment size of 490m² would therefore be inconsistent with the character of the direct surrounding streets.

With regard to precedence within the area, the statement suggests that Council cannot see the 500m² minimum subdivision lot size as a *“kind of fixture or absolute development standard which cannot be varied”*. Clause 4.6 has been accepted by Council in numerous circumstances to contravene the minimum lot size where sufficient environmental planning grounds have been demonstrated. In the cases of DA/1100/2019 and DA/103/2017 listed above, both matters were considered by the HLPP and both demonstrated suitable justification. In the case of DA/1100/2019, the parent lot (1,128m²) could be subdivided to achieve two lots exceeding 500m², however a greater planning outcome was demonstrated with an undersized allotment to retain both existing dwellings. With regard to DA/103/2017, the existing parent lot contained a dwelling house and an active approval for multi-unit housing (DA/1510/2010). The applicant demonstrated that a subdivision would change a non-conforming land use (multi-dwelling housing) into a permissible land use (dwelling house). With regard to DA/350/2012, the subdivision was assessed under different environmental planning instruments, being *Hornsby Local Environmental Plan 1994* and *State Environmental Planning Policy No. 1 Development Standards* and cannot be directly compared.

In summary, the written request does not demonstrate compliance with the development standard in unreasonable or unnecessary in the specific circumstances of this development application.

2.1.4.2 Environmental Planning Grounds

In addition to demonstrating that compliance is unreasonable or unnecessary, Clause 4.6(3)(b) of the *HLEP* requires that there are sufficient environmental planning grounds to justify contravening the development standard. The written request prepared by Champion Homes provides justification in part as follows:

- *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.*
- *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.*
- *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.

- *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.*
- *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.*
- *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.*

Council considers that the environmental planning grounds stated within the written request are insufficient with respect to Clause 4.6(3)(b).

Council does not support the applicant's argument that if a Hornsby Development Control Plan 2013 (HDCP) compliant dwelling can be erected on a lot smaller than 500m², it is therefore appropriate to vary the minimum lot size. This notion is not unique to the subject site and could be applied to a lot substantially smaller than 500m². If this rational is adopted by Council, a precedent could be set that would effectively degrade the minimum lot size development standard.

The objection to the development standard does not provide sufficient environmental planning grounds, unique to the site to justify contravening the development standard and therefore, the proposal is considered inconsistent with the provisions of the exceptions to development standard.

2.1.4.3 Public Interest and Clause 4.6(4)

Clause 4.6(4) states that 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 Planning Secretary has been obtained.*

With regard to part (a)(i), the Council considers that the written request does not adequately address the required matters to be demonstrated within subclause (3).

With regard to part (a)(ii), the proposed development is not considered to be in the public interest. Whilst the submitted Clause 4.6 request suggests that the development is consistent with the objectives of this clause, it does not include a context that is unique to the subject site. Approval of the application would result in an undesirable precedent for undersized allotments without site specific

justification. There are countless other undersized sites within the Hornsby Shire that the applicant's justification could apply to. The proposed development would not be in the public interest because it is not consistent with the objectives of the minimum subdivision lot size development standard and the objectives for development within the zone.

With regard to (b) the concurrence of the Planning Secretary has been assumed.

2.1.5 Earthworks

Clause 6.2 of the *HLEP* states that consent is required for proposed earthworks on site. Before granting consent for earthworks, the consent authority is required to assess the impacts of the works on adjoining properties, drainage patterns and soil stability of the locality.

The application proposes cut and fill for the construction of the dwelling houses, along with the construction of retaining walls of up to 1.2m in height.

Council raises no objections to the proposed earthworks as they are unlikely to cause impact to adjoining property or existing drainage patterns.

2.2 Rural Fire Act 1997

The site is partly bushfire prone. Accordingly, the proposed development constitutes '*integrated development*' subject to approval of the NSW Rural Fire Service for the issue of General Terms of Approval under Division 4.8 of the *Environmental Planning and Assessment Act 1979* and a Bush Fire Safety Authority pursuant to Section 100B of the *Rural Fires Act 1997*.

A Bushfire Assessment prepared by Sydney Bushfire Consultants accompanied the application, which was subsequently referred to the NSW Rural Fire Service (RFS) for comment regarding bushfire protection.

The RFS raised no concerns with the proposed development and provided General Terms of Approval and a Bush Fire Safety Authority, subject to general terms of approval requiring the establishment of an Asset Protection Zone and construction standards in accordance with of *Australian Standard AS3959-2009 Construction of buildings in bush fire-prone areas*.

2.3 State Environmental Planning Policy No. 55 Remediation of Land

The application has been assessed against the requirements of *State Environmental Planning Policy No. 55 Remediation of Land (SEPP 55)* under which consent must not be granted to the carrying out of any development on land unless the consent authority has considered whether the land is contaminated or requires remediation for the proposed use.

Should the land be contaminated, Council must be satisfied that the land is suitable in a contaminated state for the proposed use. If the land requires remediation to be undertaken to make the land suitable for the proposed use, Council must be satisfied that the land will be remediated before the land is used for that purpose.

An examination of Council's records and aerial photography has determined that the site has been historically used for residential purposes. It is not likely that the site has experienced any significant contamination, and further assessment under *SEPP 55* is not required.

2.4 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

The application has been assessed against the requirements of *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004*. The proposal includes BASIX Certificates for the proposed development and is considered to be satisfactory.

2.5 State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017

State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 (Vegetation SEPP) aims to protect the biodiversity and amenity values of trees within non-rural areas of the state.

Part 3, Clause 9(2) of the *Vegetation SEPP* states that a Development Control Plan may make a declaration in any manner relating to species, size, location and presence of vegetation. Accordingly, Part 1B.6.1 of the Hornsby Development Control Plan 2013 (HDCP) prescribes works that can be undertaken with or without consent to trees and objectives for tree preservation.

The application has been assessed against the requirements of the *Vegetation SEPP* and it has been determined that the proposal would be contrary to the objectives of the *Vegetation SEPP*. This matter is addressed in Section 2.7.3 of this report.

2.6 Section 3.42 Environmental Planning and Assessment Act 1979 - Purpose and Status of Development Control Plans

Section 3.42 of the *Environmental Planning and Assessment Act 1979* states that a DCP provision will have no effect if it prevents or unreasonably restricts development that is otherwise permitted and complies with the development standards in relevant Local Environmental Plans and State Environmental Planning Policies.

The principal purpose of a development control plan is to provide guidance on the aims of any environmental planning instrument that applies to the development; facilitate development that is permissible under any such instrument; and achieve the objectives of land zones. The provisions contained in a DCP are not statutory requirements and are for guidance purposes only. Consent authorities have flexibility to consider innovative solutions when assessing development proposals, to assist achieve good planning outcomes.

2.7 Hornsby Development Control Plan 2013

The proposed development has been assessed having regard to the relevant desired outcomes and prescriptive requirements within the *Hornsby Development Control Plan 2013 (HDCP)*. The following table sets out the proposal's compliance with the prescriptive requirements of the Plan:

HDCP – Part 6 Subdivision and Part 3.1 Dwelling Houses			
Control	Proposal	Requirement	Complies
Part 6 - Subdivision			
Lot Area (excluding access)			
- Lot 101	500.3m ²	500m ²	Yes
- Lot 102	490m ²	500m ²	No
Lot Width			
- Lot 101	14m	12m	Yes

- Lot 102	19m	12m	Yes
Part 3.1 Residential (Lot 101 – Dwelling 1)			
Building Height	7.9m	8.5m	N/A
No. of Storeys	2	2 + attic	N/A
Site Coverage	33%	50%	Yes
Floor Area	270m ²	330m ²	Yes
Setbacks			
- Front (Thorn Street)	6.25m with <1/3 building width 5.08m	6m with <1/3 building width 4.5m	Yes
- Secondary (Taylor Pl)	3.4m	3m	Yes
- Side (northern)			
- Ground floor	967mm	900mm	Yes
- First floor	3.49m	1.5m	Yes
- Rear (eastern)			
- Ground floor	1.6m	3m	No
- First floor	8.1m	8m	Yes
Landscaped Area	47%	Min. 20%	Yes
Private Open Space	>24m ² (min width 3m)	24m ² (min width 3m)	Yes
Car Parking	2 spaces	2 spaces	Yes
Part 3.1 Residential (Lot 102 – Dwelling 2)			
Building Height	7.7m	8.5m	Yes
No. of Storeys	Existing	2 + attic	Yes
Site Coverage	33%	50%	Yes
Floor Area	262m ²	330m ²	Yes
Setbacks			
- Front	7m	6m	Yes
- Side (northern)			
- Ground floor	1.2m	900mm	Yes
- First floor	4.5m	1.5m	Yes
- Side (southern)			

- Ground floor	2m	900mm	Yes
- First floor	3m	1.5m (1st floor)	Yes
- Rear			
- Ground floor	6.3m	3m	Yes
- First floor	8m	8m	Yes
Landscaped Area	51%	Min. 20%	Yes
Private Open Space	>24m ² (min width 3m)	24m ² (min width 3m)	Yes
Car Parking	2 spaces	2 spaces	Yes

ITEM 1

As detailed in the above table, the proposed development does not comply with the minimum lot size for proposed Lot 102 and the rear setbacks for Dwelling 1 on proposed Lot 101. A brief discussion on compliance with relevant performance requirements and Part 1C General Controls is provided below.

2.7.1 Lot Design

The *HDCP* encourages appropriately shaped lots to ensure development will complement the streetscape, provide for landscaping, protect landscape features and provide sufficient building separation. As detailed in the above table, proposed Lot 102 would not meet the minimum 500m². A discussion regarding this non-compliance is provided in Part 2.1.4 of this report.

2.7.2 Setbacks

As detailed in the above table, Dwelling 1 would have a non-complaint ground floor rear setback of 1.6m whereas the *HDCP* recommends 3m. The non-compliance is largely attributed to by the shape of the proposed allotment and the dual street frontages.

Council considers the non-compliance minor given the rear boundary of the proposed Lot 1 adjoins the side boundary of the adjoining property at No. 3 Taylor Place which only requires a 900mm setback. Further, the proposed setback encroachment is in the form of a garage with no external windows which is unlikely to result in any detrimental privacy or amenity impact.

2.7.3 Tree Preservation

The amended application lists 10 trees to be removed and a further 3 trees to be retained being Nos. 9 *Cotoneaster sp.* (weed species), 11 *Ulmus pavifolia* (Chinese elm) and 17 *Olea sp* (Olive tree).

An arboricultural impact assessment (AIA) prepared by Arbor Pride was submitted in support of the application. The 10 trees and shrubs to be removed are listed as Nos. 4, 5, 7, 8, 13, 14, 15, 22, 23, 24 comprising the following species:

- *Syzygium sp.* (Roseapple Lilly Pilly)
- *Viburnum tinus* (Flowering shrub)
- *Gordonia axillaris* (Fried egg plant)
- *Camellia sp.* (Camellia)

- *Liquidamar styraciflua* (Liquidambar)
- *Robina pseudoacacia* (Weed species)
- *Olea sp* (Olive tree).
- *Melaleuca quinquenervia* (Broad leaf paperbark)
- *Pittosporum undulatum* (Sweet pittosporum)
- *Ceratopetalum gummiferum* (Christmas bush)

The proposal indicates trees numbered 4, 5, 7, 8, 22, 23 and 24 would be impacted by the building footprint, and trees 13, 14 and 15 would be impacted by the driveway. Council's Tree Management Team does not consider the species required for removal to be highly significant and therefore could be offset through replacement planting.

All other trees could be retained subject to the appointment of a project arborist to provide monitoring and guidance in accordance with *Australian Standard AS4970-2009*.

If consent were to be granted to the proposed development an additional 3 replacement trees would be recommended, in addition to the 4 trees and numerous shrubs proposed within the landscape plan.

2.7.4 Landscaping

As noted in the *HDCP* table above, both proposed allotments would provide for at least 20% of the site area to be landscaped. Notwithstanding, Part 3.1.3(c) states that at least 50% of the minimum landscaped area should be located behind the front building line. Given the site has an area of 500m², 50% of the minimum landscaped area is equal to 50m². Council have calculated that only 15m² of landscaped area would be provided behind the front building line which does not comply with the *HDCP* recommendation.

The non-compliance is largely attributed to by the large dual street frontages which restricts the developable portion of the site to the rear portion. Given the total landscape area far exceeds the minimum 50m² as it provides approximately 235m², the non-compliance is supported.

2.7.5 Privacy

Dwelling 1

Part 3.1.6 of the *HDCP* encourages living and entertaining areas to be located on the ground floor in order to maintain privacy to adjoining properties. Dwelling 1 would provide all living areas on the ground floor with the exception of a small 5m² balcony fronting Thorn Street. Given the small balcony faces the street and not another adjoining property, no privacy issues are anticipated.

With regard to windows, first floor windows are generally orientated toward the dual street frontages and not the existing neighbouring properties. Windows facing Dwelling 2 to the north would not directly face the private open space and are considered acceptable with regard to privacy impacts.

Dwelling 2

Three first floor windows are proposed on the northern elevation (adjoining the side yard of No. 47 Thorn Street), 2 of these windows would serve bedrooms with high sill heights of 1.5m and the other would serve a stairwell area. Generally, no adverse privacy impacts are anticipated, notwithstanding

the window serving the stairwell area could also be increased to a sill height of 1.5m in order to eliminate any possible overlooking.

Privacy concerns are raised with the eastern windows serving bedroom 3 and 4 as they may overlook the private open space of the adjoining property at No. 3 Taylor Place. If approval were to be granted, a condition would be recommended that the sill height of these windows be raised to at least 1.5m above the finished floor level.

2.7.6 Private Open Space

The *HDCP* requires dwelling houses to have access to at least 24m² of private open space that:

- Has a minimum dimension of 3m.
- Is located behind the front building line.
- Is directly accessible from living areas within the dwelling.

The amended plans provided by the applicant demonstrate that both dwellings would have at least 24m² of private open space located behind the front building line that are directly accessible from internal living areas. The application is compliant in this regard.

2.7.7 Sunlight and Ventilation

The *HDCP* provides that at least 50% of the private open space of a dwelling should allow for at least 3 hours of sunlight on Winter Solstice between 9am to 3pm.

The amended shadow diagrams submitted with the application indicate that the private open space of the subject and adjoining properties would receive at least 3 hours of unobstructed sunlight to at least half of their private open space between 9am and 3pm.

In this regard the proposal as amended considered acceptable.

2.7.8 Stormwater

The application proposes stormwater from the new dwelling houses to be drained via gravity to Council's street drainage system. No objections are raised in this regard.

If approval were recommended, conditions would require the installation of an on-site detention system limiting the flow of water during heavy rainfall events.

2.8 Section 7.11 Contributions Plans

Hornsby Shire Council Section 7.11 Contributions Plan 2020-2030 applies to the development as it would result in an additional lot. If approval were obtained a condition would be imposed requiring a monetary Section 7.11 contribution.

3. ENVIRONMENTAL IMPACTS

Section 4.15(1)(b) of the Act requires Council to consider *"the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality"*.

3.1 Natural Environment

A discussion regarding impact on trees, proposed landscaping and stormwater management is provided earlier in Part 2.7 (Hornsby Development Control Plan) of this report.

3.2 Built Environment

The application is considered to have a negative impact on the surrounding built environment as the proposal would result in an under-sized allotment.

3.3 Social Impacts

The residential development would result in a minor positive social impact by providing an additional dwelling house in the locality. Notwithstanding, Council considers that the proposal would have a detrimental social impact as approval would create an undesirable planning precedent for undersized subdivision.

3.4 Economic Impacts

The proposal is considered to have a minor short-term impact through the creation of jobs involved in the development of the site. Long term economic impacts are considered negligible.

4. SITE SUITABILITY

Section 4.15(1)(c) of the Act requires Council to consider *“the suitability of the site for the development”*.

The site is not considered suitable for the proposed development as it is under-sized and does not comply with Clause 4.1 (minimum subdivision lot size) of the *HLEP*.


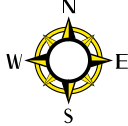
5. PUBLIC PARTICIPATION

Section 4.15(1)(d) of the Act requires Council to consider *“any submissions made in accordance with this Act”*.

The proposed development was placed on public exhibition and was notified to adjoining and nearby landowners between 18 January 2021 to 9 February 2021 as well as 15 April 2021 to 3 May 2021 in accordance with the Hornsby Community Participation Plan. During this period, Council received 23 individual submissions and a petition with 42 signatures. The map below illustrates the location of those nearby landowners who made a submission that are in close proximity to the development site.



NOTIFICATION PLAN

• PROPERTIES NOTIFIED	X SUBMISSIONS RECEIVED		PROPERTY SUBJECT OF DEVELOPMENT	
1 SUBMISSION RECEIVED OUT OF MAP RANGE				

23 submissions and a petition objected to the development, on the following grounds:

5.1.1 The proposal does not comply with the minimum lot size and would set an undesirable precedent:

Council considers that the application and amended Clause 4.6 request does not provide sufficient justification to contravene the minimum lot size development standard and would create an undesirable precedent. This matter is discussed in detail in section 2.1.4 of this report.

5.1.2 Lack of on-street car parking:

Both proposed dwelling houses would provide 2 off-street car parking spaces in accordance with the *HDGP* requirement. As a consequence, consideration of on-street parking is not directly required in the assessment of this application. Council also notes that sufficient on-street parking was available within the vicinity of the site when Council officers undertook an inspection of the property.

5.1.3 Unacceptable traffic and safety impact on local streets:

The proposal would result in one additional allotment and dwelling. It is anticipated that the proposed development would generate an additional 9 vehicle movements per day and 0.85 vehicle movements in the peak periods.

The proposed development would pose a negligible impact to traffic generation in the locality and is acceptable in this regard. Council consider that the driveway locations for each dwelling provide for acceptable site distances and would not result in a traffic safety issue.

5.1.4 Removal of established trees and impact on local fauna:

As discussed in Section 2.7.3 of this report, the proposed development would result in the removal of 10 trees numbered 4, 5, 7, 8, 13, 14, 15, 22, 23, and 24. Council considered that there is sufficient space on the site to provide compensatory plantings of locally occurring species to maintain the local amenity.

5.1.5 Dwelling houses too large:

As detailed in Section 2.7 of this report, the dwelling houses comply with the numerical standards contained within the *HDGP* with respect to bulk and scale.

5.1.6 Construction impacts:

Temporary construction noise would result if approval were obtained and the dwellings constructed. Notwithstanding, conditions of consent would limit hours of construction to ensure neighbourhood amenity is maintained throughout the temporary construction phase.

5.1.7 Privacy concerns to adjoining properties

Council considers that the proposal is generally acceptable with regard to privacy impacts, however if approval were obtained conditions would be recommended to increase the sill height of windows within Dwelling 2. This matter is further discussed in detail in Section 2.7.5 of this report.

5.1.8 Overshadowing impacts to adjoining properties

The submitted solar diagrams indicate that the dwelling houses would not overshadow adjoining properties and are compliant with controls contained within the *HDGP*.

5.1.9 Earthworks adjoining No. 38 Thorn Street and boundary fence

A submission raises concerns with the finished level of the landing for Dwelling 2 adjoining the northern boundary and impact it may have on a garden bed within No. 28 Thorn Street.

As per the submitted northern elevation plan, the finished floor level of the landing and step height are shown to be generally at grade or slightly lower (up to 400mm). Further no retaining walls are proposed as part of this development. Therefore, it is considered unlikely that the proposed ground levels would substantially impact upon No. 38 Thorn Street. If approval of the application were obtained, conditions would be recommended that the construction of any replacement boundary fencing is subject to negotiation between the relevant land owners in accordance with the *Dividing Fences Act 1991*.

5.1.10 Consideration of submission

Submissions received during the second notification period allege Council and the panel did not consider a submission received by the residents of No. 38 Thorn Street during the HLPP meeting on 31 March 2021. Council can confirm that the submission was received, its matters considered in the assessment report and a copy of the submission was provided to the panel. The notification map has been updated to include the identification of the property as one where a submission was received.

5.1.11 Overdevelopment and not in keeping with the character of the area

Submissions raise concerns that the proposal is an overdevelopment of the site and the two dwelling houses would not be in keeping with the local character of the area.

With respect to these concerns, Council raise similar concerns that the site is not suitable for the proposed subdivision and construction of two dwelling houses as it does not meet the minimum 500m² lot size development standard.

With regard to character, the site is surrounded by 1 and 2 storey dwelling houses on varying large sized allotments with established trees within the front and rear setbacks. Council does not raise concerns with the specific design of the dwelling houses as they would include face brick and pitched roofs which are not out of character with the surrounding dwellings. Further, sufficient and compliant front setbacks would allow for retention and planting of trees.

5.1.12 Financial gain

Submissions raise concerns that the development is for financial gain only.

In addressing this concern, Section 4.15 of the Act and the *HLEP* does not require the consent authority to take into consideration whether the development is for profit or not.

5.2 Public Agencies

5.2.1 Rural Fire Service

The application was forwarded to the NSW Rural Fire Service who raised no objections to the proposal subject to General Terms of Approval with regard to construction materials of the dwelling houses and the creation of an asset protection zone.

6. THE PUBLIC INTEREST

Section 4.15(1)(e) of the Act requires Council to consider “*the public interest*”.

The public interest is an overarching requirement, which includes the consideration of the matters discussed in this report. Implicit to the public interest is the achievement of future built outcomes adequately responding to and respecting the future desired outcomes expressed in environmental planning instruments and development control plans.

The application is not considered to have satisfactorily addressed Council's assessment criteria and would provide a development outcome that, on balance, would result in a negative impact for the community. Accordingly, it is considered that the approval of the proposed development would not be in the public interest.

CONCLUSION

The application proposes the demolition of structures, Torrens title subdivision of one lot into two and the construction of a two-storey dwelling house on each new lot.

The proposal does not comply with the minimum lot size development standard contained within the *Hornsby Local Environmental Plan 2013*. The written Clause 4.6 request to vary the development standard is unsatisfactory with respect to Clause 4.6(3) as it does not demonstrate that the standard is reasonable or unnecessary and that there are sufficient environmental grounds to vary the standard. Concerns are raised that approval of the proposal would result in an undesirable precedent.

Council received 23 individual submissions and a petition with 42 signatures during the public notification period. The matters raised have been addressed in the body of the report.

Having regard to the circumstances of the case, refusal of the application is recommended.

Note: At the time of the completion of this planning report, no persons have made a Political Donations Disclosure Statement pursuant to Section 10.4 of the Environmental Planning and Assessment Act 1979 in respect of the subject planning application.





RESPONSIBLE OFFICER

The officer responsible for the preparation of this report is Stephen Dobbs.

CASSANDRA WILLIAMS
Major Development Manager - Development
Assessments
Planning and Compliance Division

ROD PICKLES
Manager - Development Assessments
Planning and Compliance Division

Attachments:

1.  Locality Plan
2.  Development Plans
3.  Revised Clause 4.6
4.  Landscape Plan

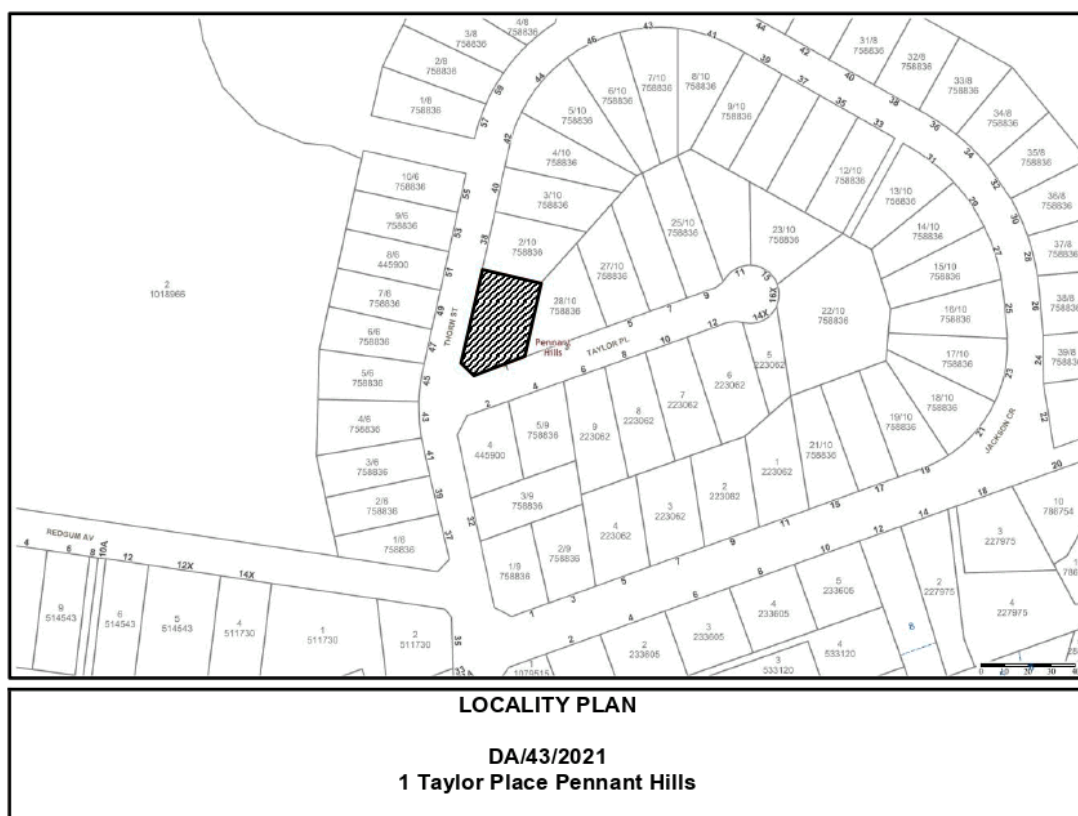
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SCHEDULE 1

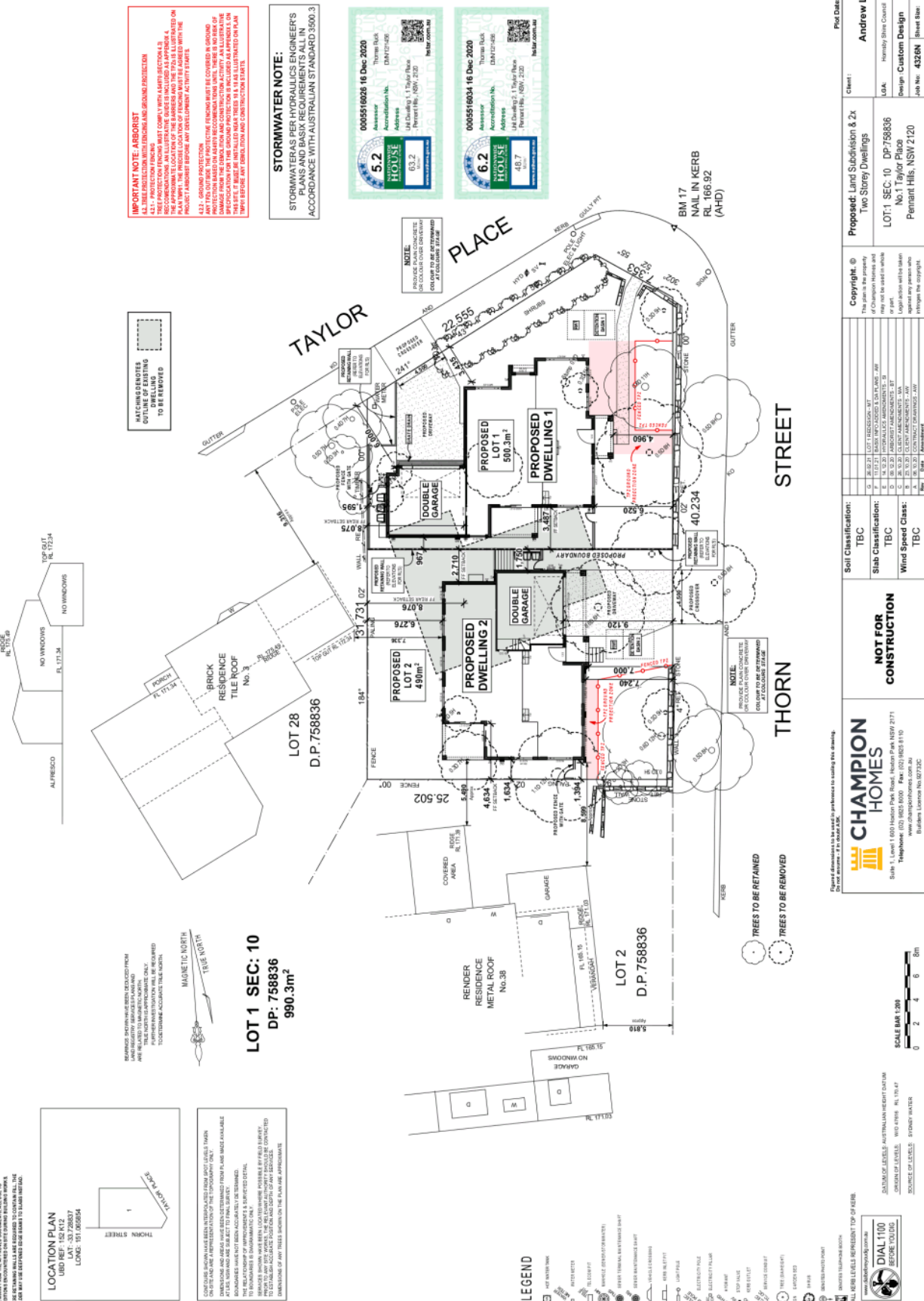
1. In accordance with Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979*, the proposal does not comply with Clause 4.1 (minimum subdivision lot size) of the *Hornsby Local Environmental Plan 2013*.
 - a) In accordance with Clause 4.6(4)(a)(i) of the *Hornsby Local Environmental Plan 2013*, the written Clause 4.6 request to contravene the development standard is unsatisfactory with respect to Clause 4.6(3) as it does not demonstrate that the standard is unreasonable or unnecessary and that there are sufficient environmental grounds to contravene the standard.

- b) In accordance with Clause 4.6(4)(a)(ii) of the *Hornsby Local Environmental Plan 2013*, the proposal is not considered to be in the public interest as approval of the proposal would result in an undesirable precedent.
- 2. In accordance with Section 4.15(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979*, the proposal does not comply with the following desired outcomes or the prescriptive measures of the Hornsby Development Control Plan 2013:
 - a) In accordance with Part 6.2.1 Residential Lands Subdivision of the Hornsby Development Control Plan 2013, the proposal does not provide for minimum 500m² allotments.
- 3. In accordance with Section 4.15(1)(c) of the *Environmental Planning and Assessment Act 1979*, the site is not suitable for the proposed development as it is undersized and does not comply with Clause 4.1 (minimum subdivision lot size) of the *Hornsby Local Environmental Plan 2013*.
- 4. In accordance with Section 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979*, the development would not be in the public interest as the proposal is contrary to the local planning controls and would create an undesirable precedent for the Clause 4.1 (minimum subdivision lot size) development standard of the *Hornsby Local Environmental Plan 2013*.

- END OF REASONS FOR REFUSAL -



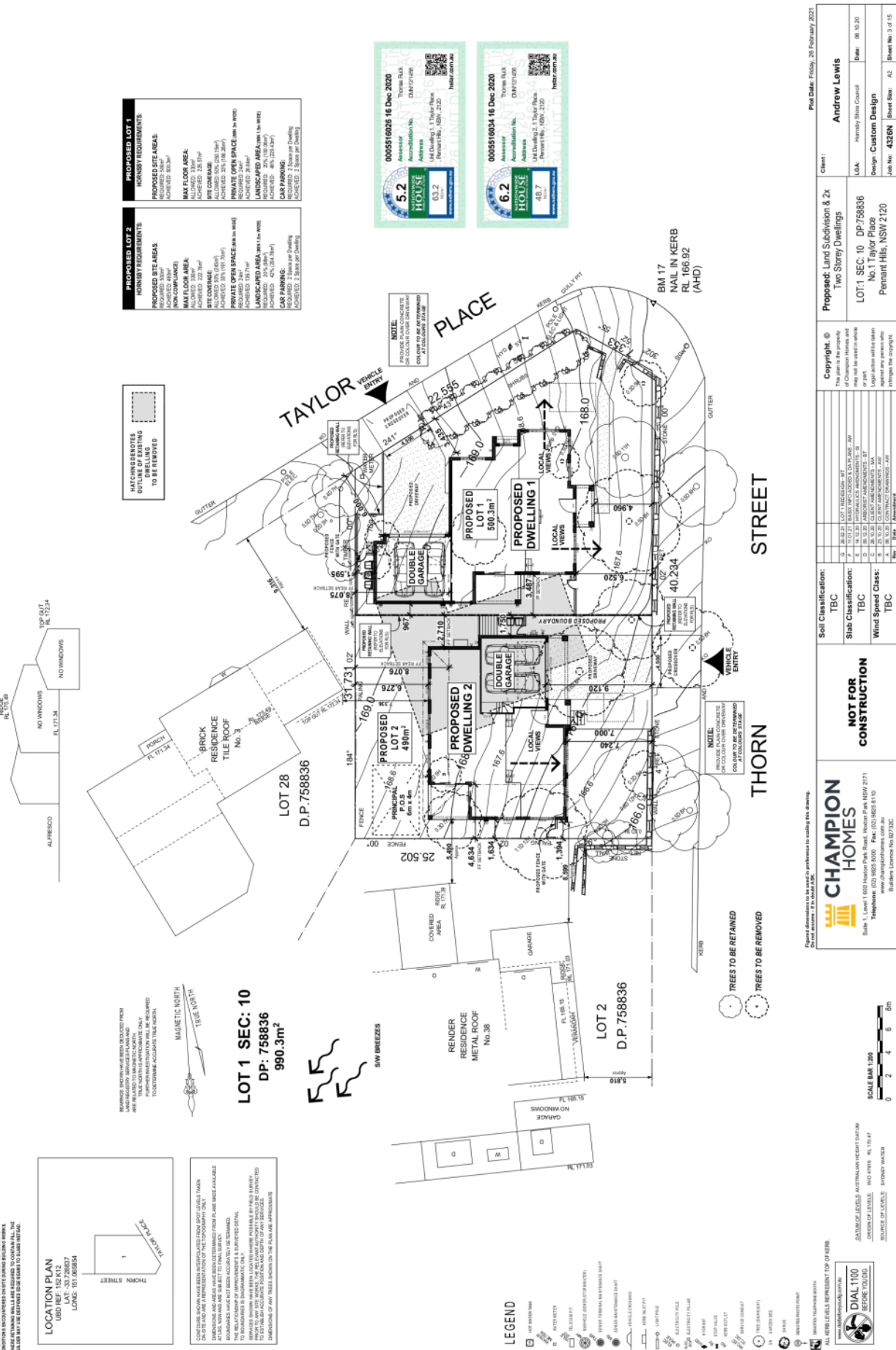
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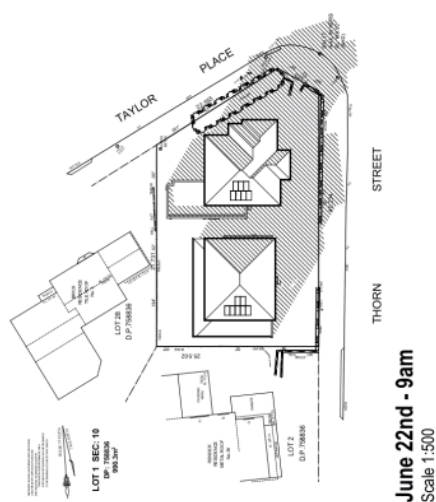
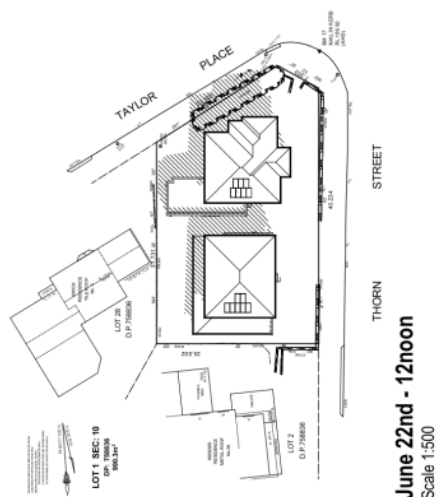
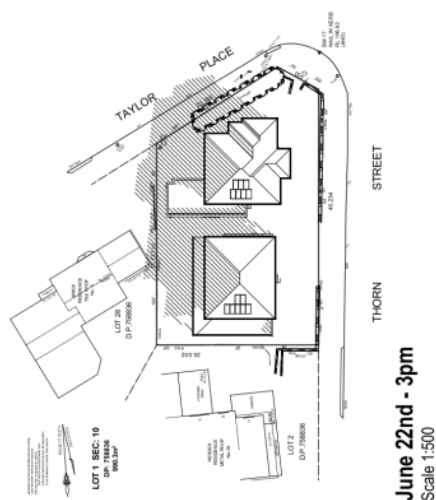
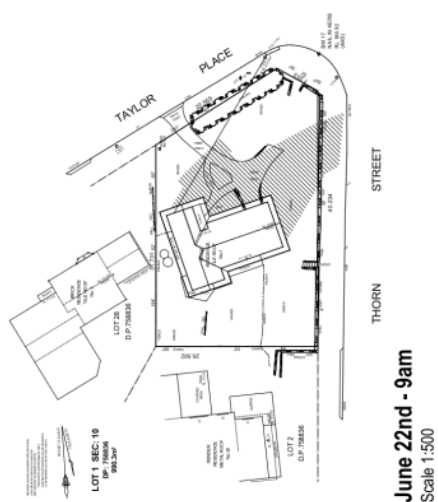
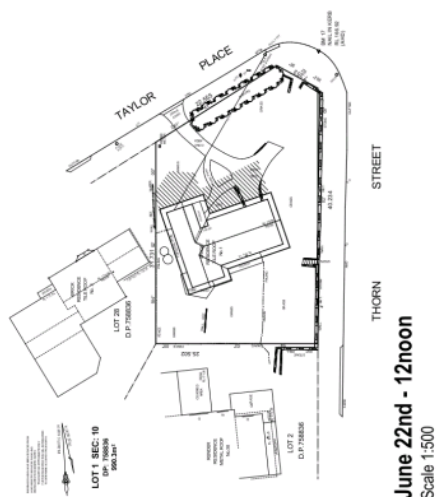
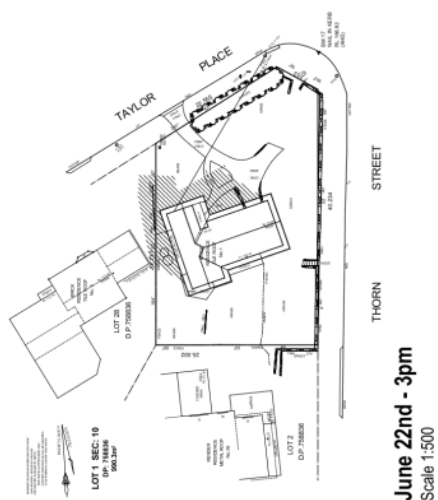
ATTACHMENT 2 - ITEM 1

Proposed Site Analysis Plan

Scale 1:200



Shadow Diagrams



0005516034 16 Dec 2020

Thomas Luck
DMV 12146

Accession No.
Accreditation No.
Address

Unit D Building 3, 1 Taylor Place
Parramatta, NSW, 2120

6.2
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HOUSE

48.7
Miles

https://www.fox.com.au

0005516026 16 Dec 2020

Assessor: Thomas Rick
ID# 1212426

Accreditation No. Address

121 Duvall St, 1 Taylor Place
Perth Hills, NSW, 2120

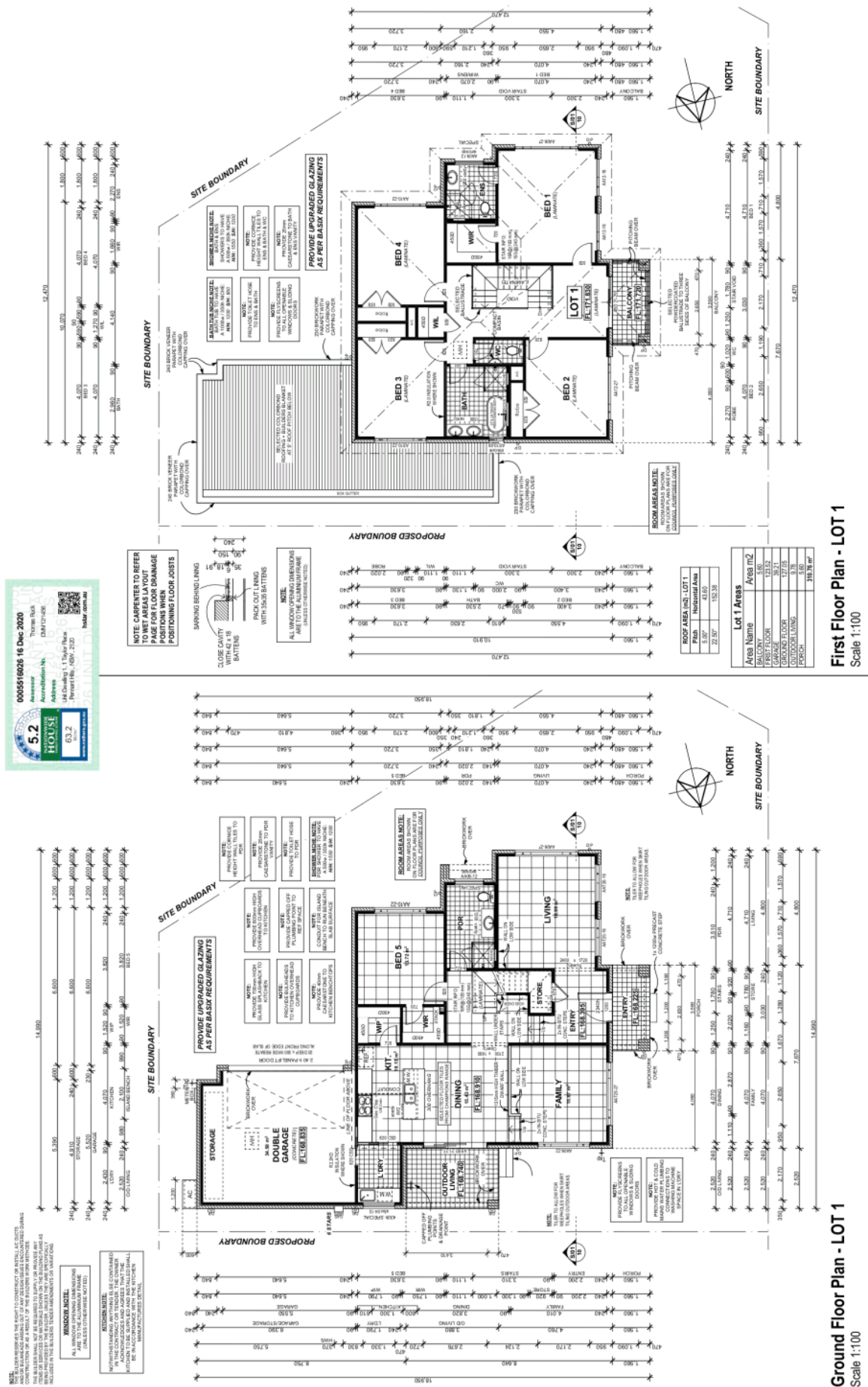
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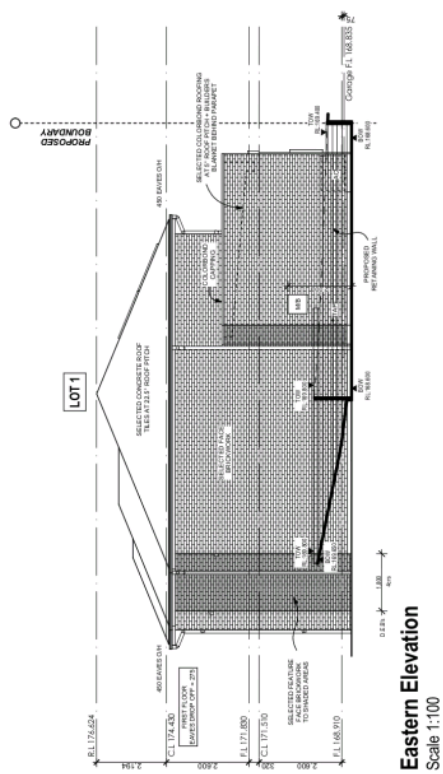
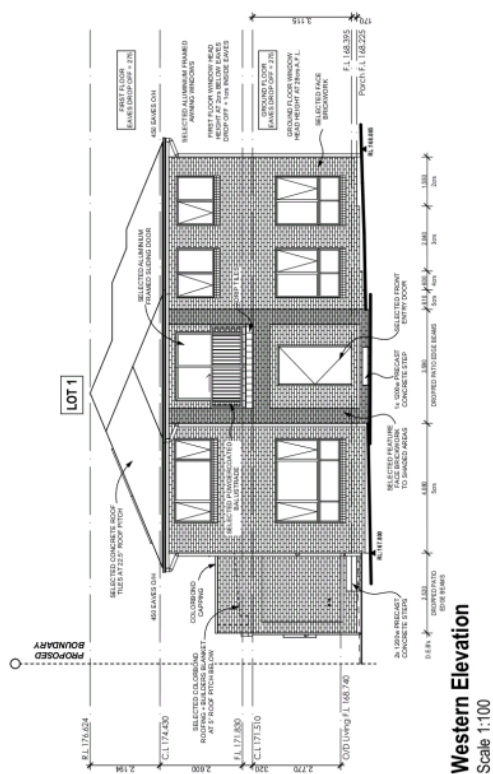
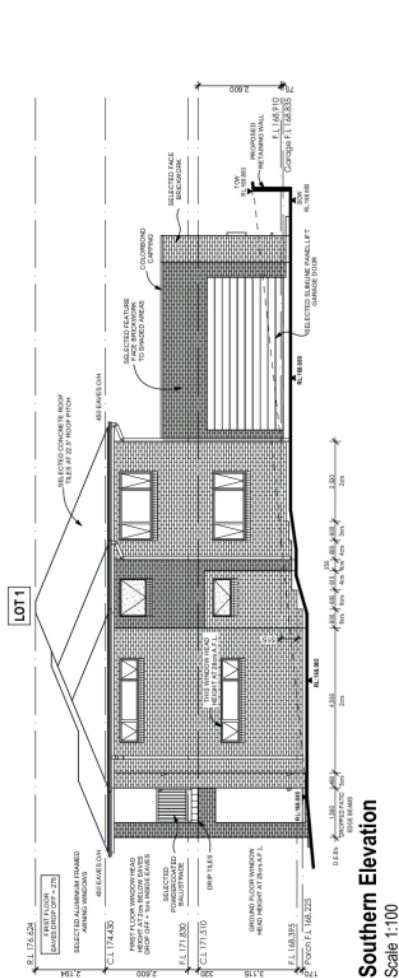
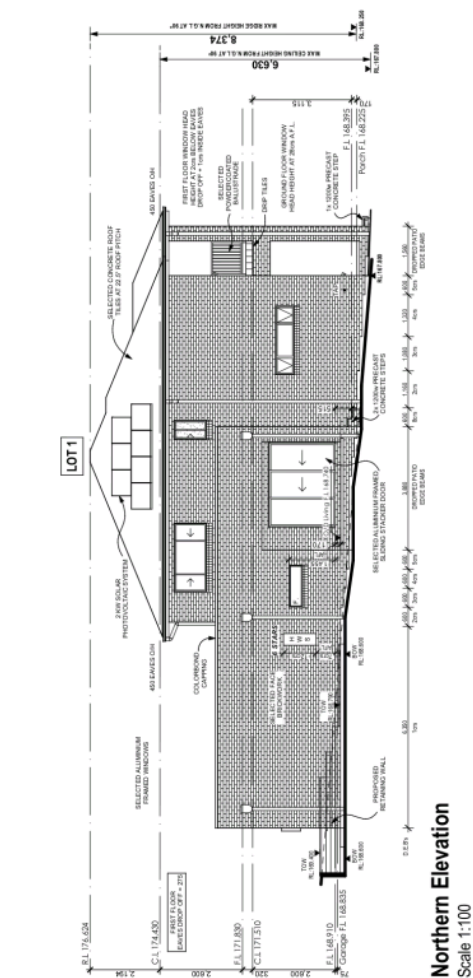
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ATTACHMENT 2 - ITEM 1



ATTACHMENT 2 - ITEM 1

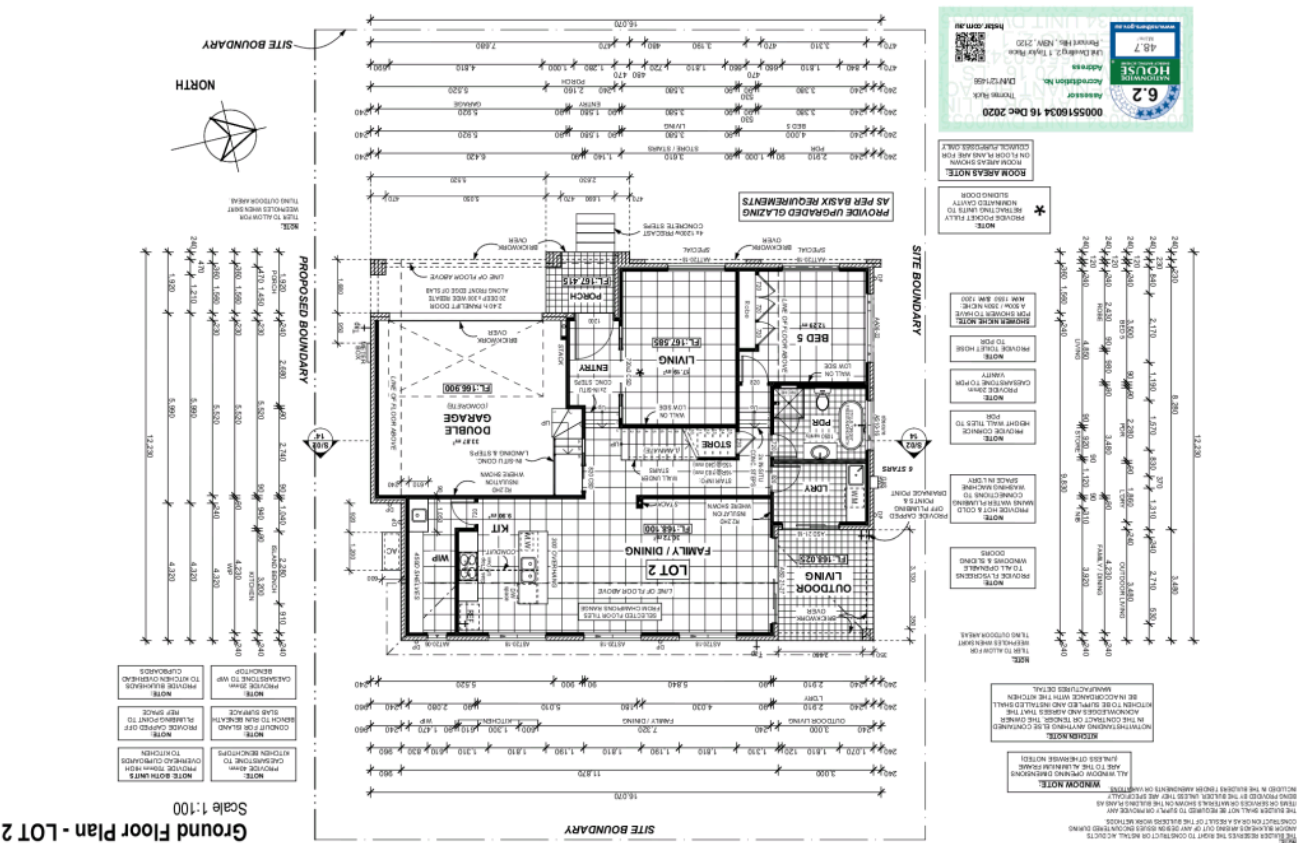
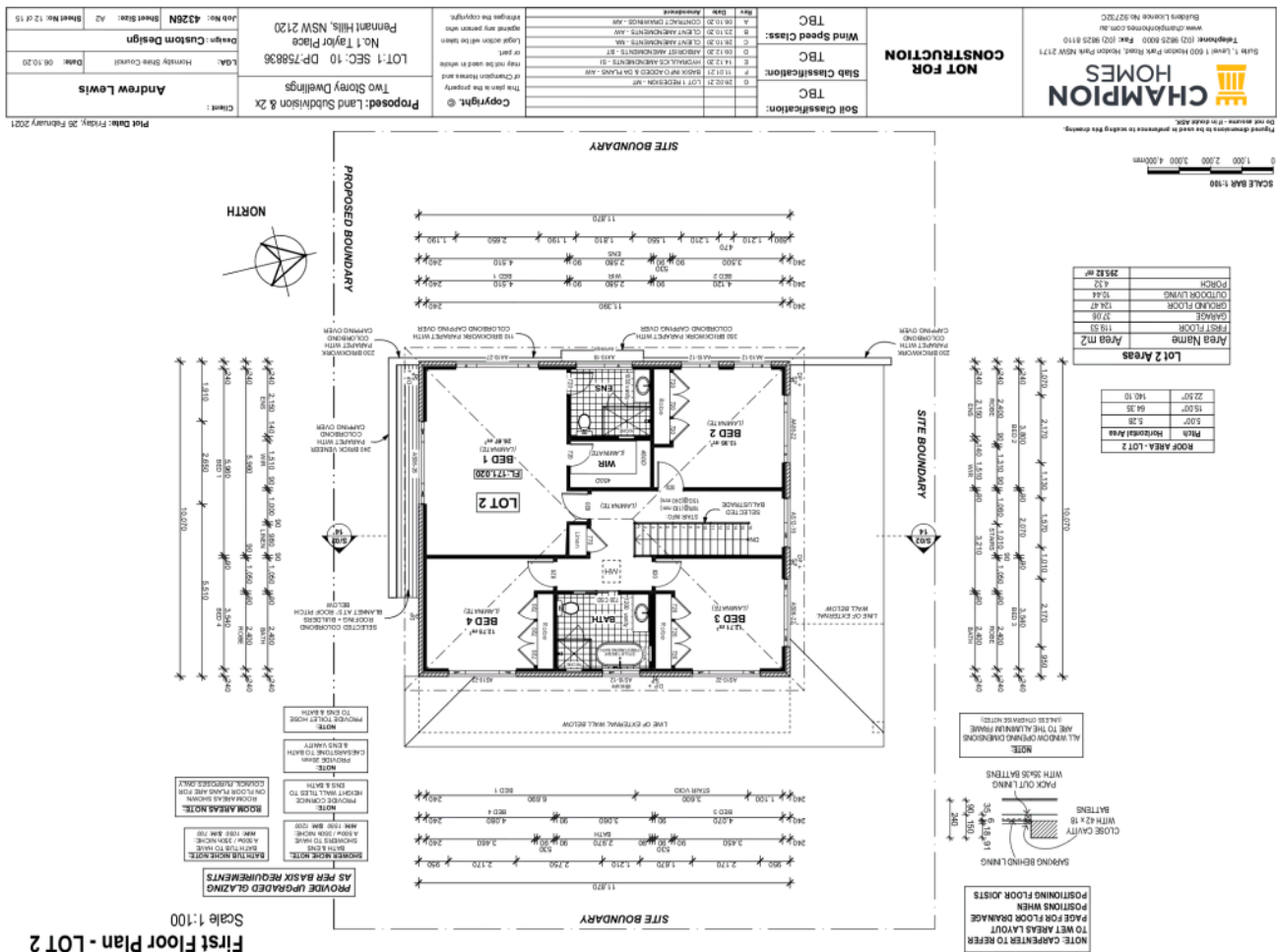
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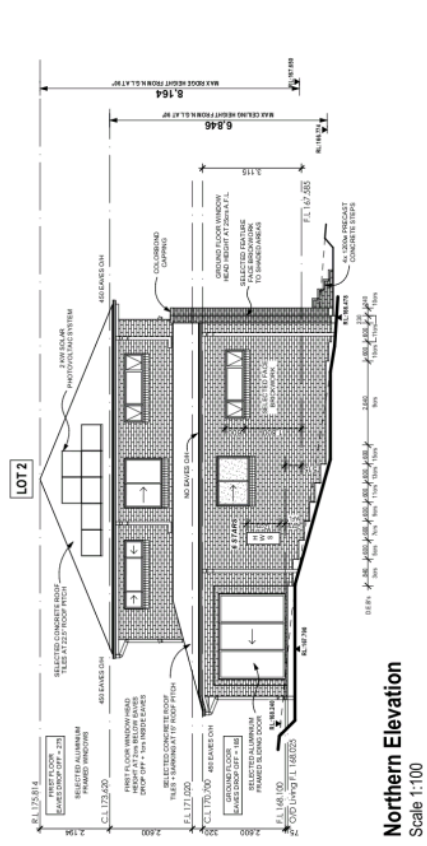
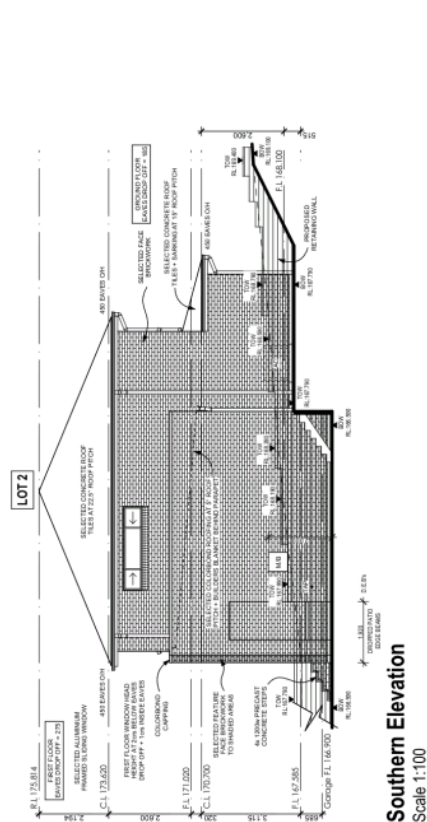
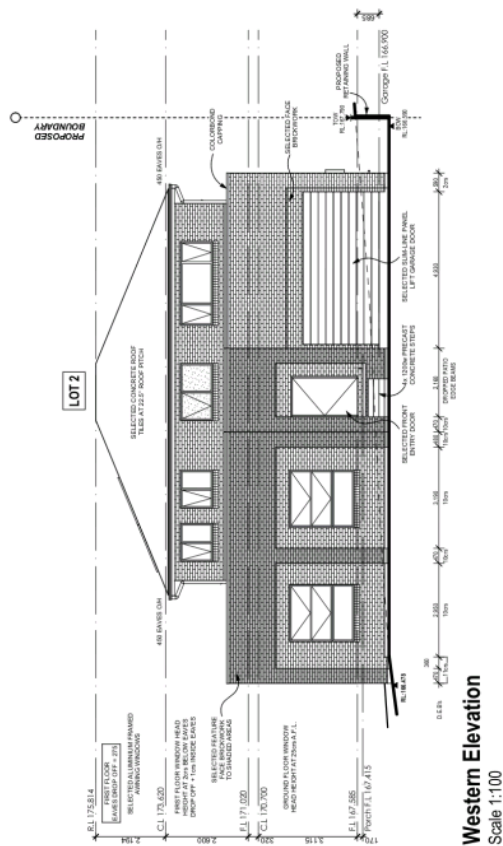
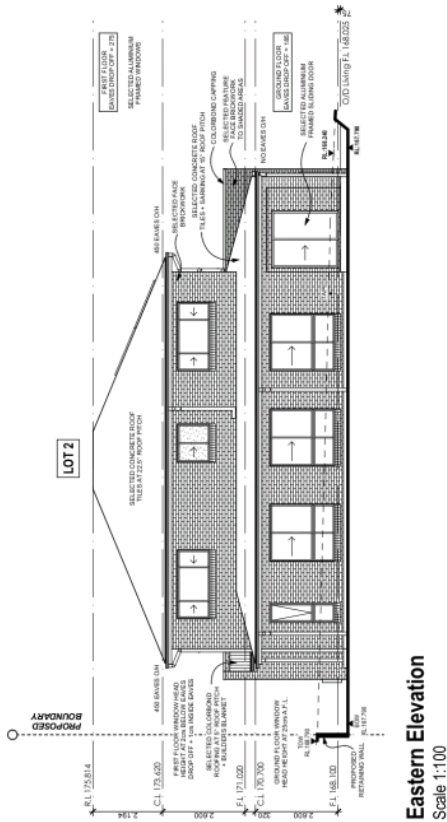
SCALE BAR 1:100

 CHAMPION HOMES Suite 1, Level 1, 600 Horizon Park Road, Horizon Park NSW 2171 Telephone: (02) 852 8000 Fax: (02) 852 8110 www.championhomes.com.au		<p style="text-align: center;">NOT FOR CONSTRUCTION</p>		<p>Soil Classification: TBC</p> <p>Slab Classification: TBC</p> <p>Wind Speed Class: TBC</p>		<p>Copyright © This plan is the property of Champion Homes and its agents and must not be reproduced or used in whole or part.</p> <p>Legal advice will be taken where necessary prior to construction.</p>		<p>Client:</p> <p>Proposed Land Subdivision & 2x Two Storey Dwellings</p> <p>LOT1: SEC-10 DP758836 No.1 Taylor Place Penrith Hills NSW 2120</p>		<p>Design Custom Design</p> <p>Job No. 4326N Street ASZ</p> <p>Block Size 15</p>		<p>Andrew Lewis</p> <p>Northern River Council</p> <p>Date: 08.10.20</p>		<p>Plot Date Friday, 26 February 2021</p>	
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ATTACHMENT 2 - ITEM 1



PROTECTION OF OPENABLE WINDOWS AS PER B.C.A CONDITION 3.9.2.5
A WINDOW OPENING MUST BE PROVIDED WITH PROTECTION IF THE FLOOR BELOW THE WINDOW IN A BEDROOM IS 2m OR MORE ABOVE THE SURFACE BENEATH. WHERE THE PROTECTION IS NOT PROVIDED, THE WINDOW MUST BE SECURED BY A KEYS LOCK. THE KEYS LOCK MUST BE FITTED SO AS TO RESTRICT THE WINDOW OPENING TO A MAX. 120mm.



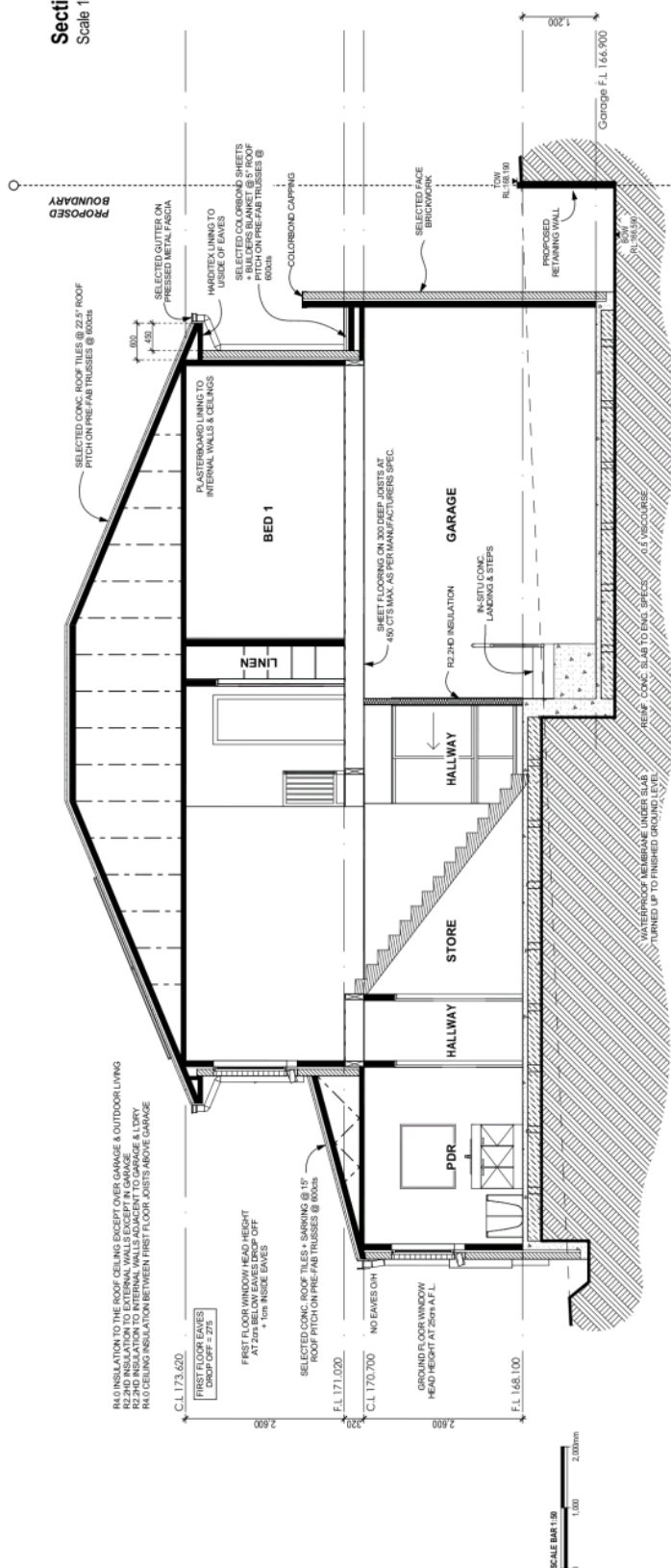
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Soil Classification: TBC Slab Classification: TBC Wind Speed Class: TBC	NOT FOR CONSTRUCTION	Copyright © This plan is the property of Champion Homes and is not to be used or altered without the written consent of Champion Homes. Legal action will be taken against any person who infringes this copyright.	Proposed: Land Subdivision & 2x Two Storey Dwellings LOT 1 SEC: 10 DP 758836 No.1 Taylor Place Penant Hills, NSW 2120	Client: Andrew Lewis LOA: Hornsby Shire Council Design: Custom Design Job No: 4320N Sheet No: 13 of 15	Plot Date: Friday, 26 February 2021

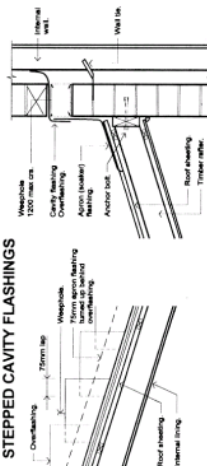
ATTACHMENT 2 - ITEM 1

Section 02

Scale 1:50



STEPPED CAVITY FLASHINGS



Figures dimensions to be used in preference to reading this drawing
Do not assume a 2 in order to 5 in

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Proposed: Land Subdivision & 2x Two Storey Dwellings
LOT 1 SEC 10 DP758836
No.1 Taylor Place
Pennant Hills, NSW 2120

Client:
Andrew Lewis
Lot 1
Design - Custom Design
Job No. 4320N
Sheet No. 14 of 15

Plot Date: Friday, 26 February 2021
Sheet No. 14 of 15

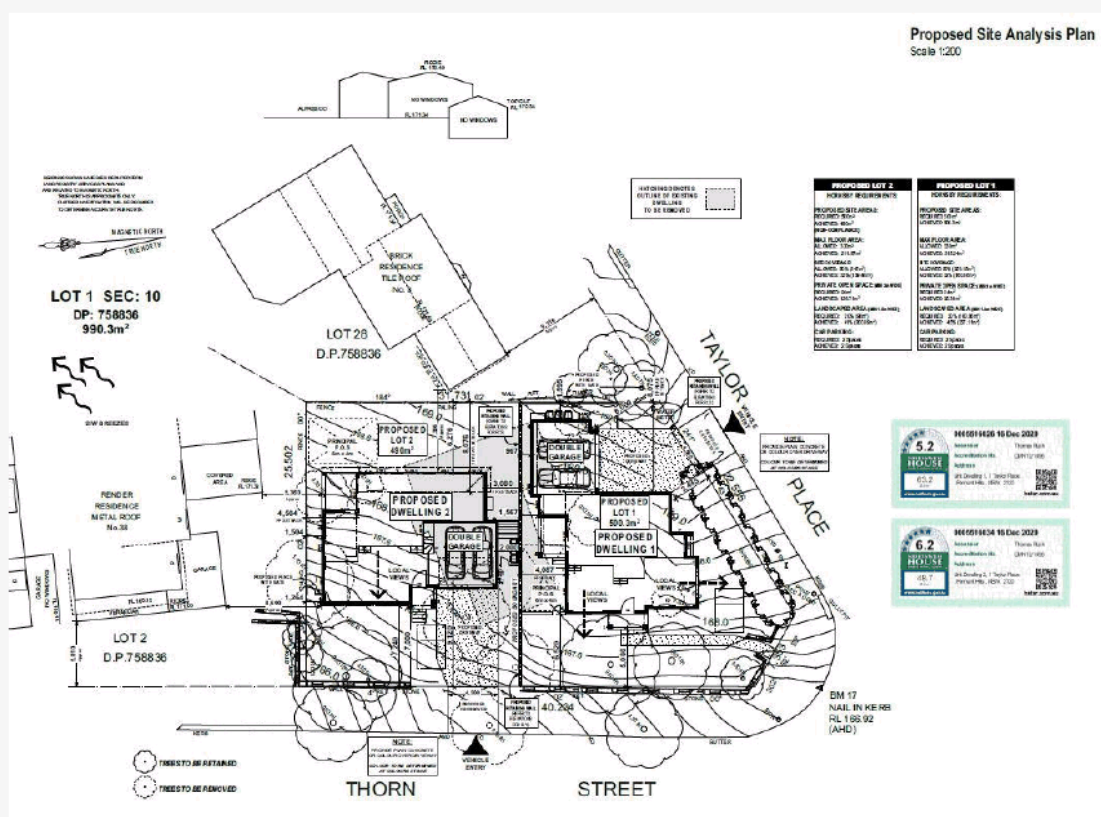
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ATTACHMENT 3 - ITEM 1

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)]

Champion Homes Sales Pty Ltd
ACN: 082 497 247
ABN: 33 082 497 247
Builder's License No. 92732C
HIA Member No. 804674

Suite 1/Level 1, 600 Hoxton Park Road
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champion@championhomes.com.au

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championhomes.com.au

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:

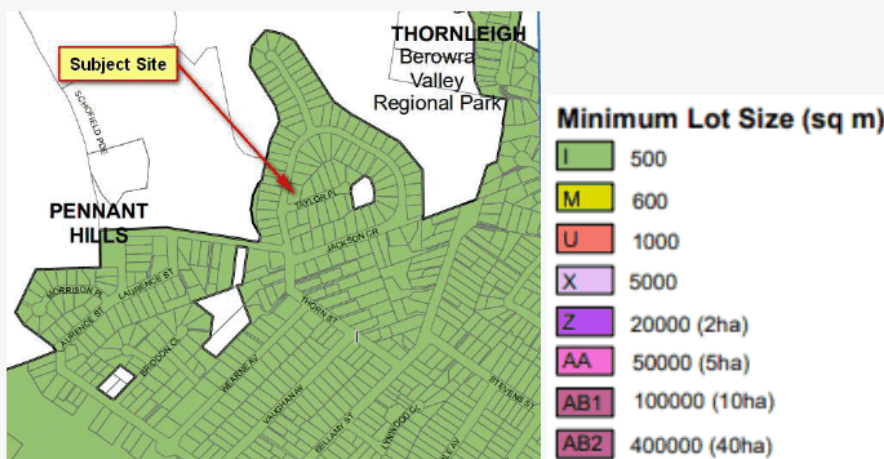
- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
- (b) the proportion or percentage of the area of a site which a building or work may occupy...
- (c) the character, location, siting, 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 500m². 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

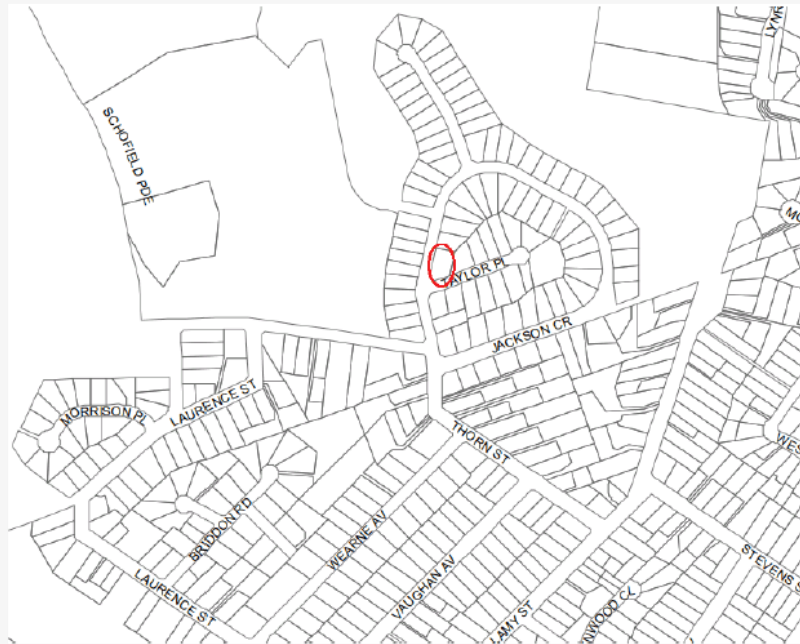
4.5 The locality is characterised by a variety of building forms and the subdivision pattern varies. The proposed two allotments will accommodate development which demonstrates a high

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:

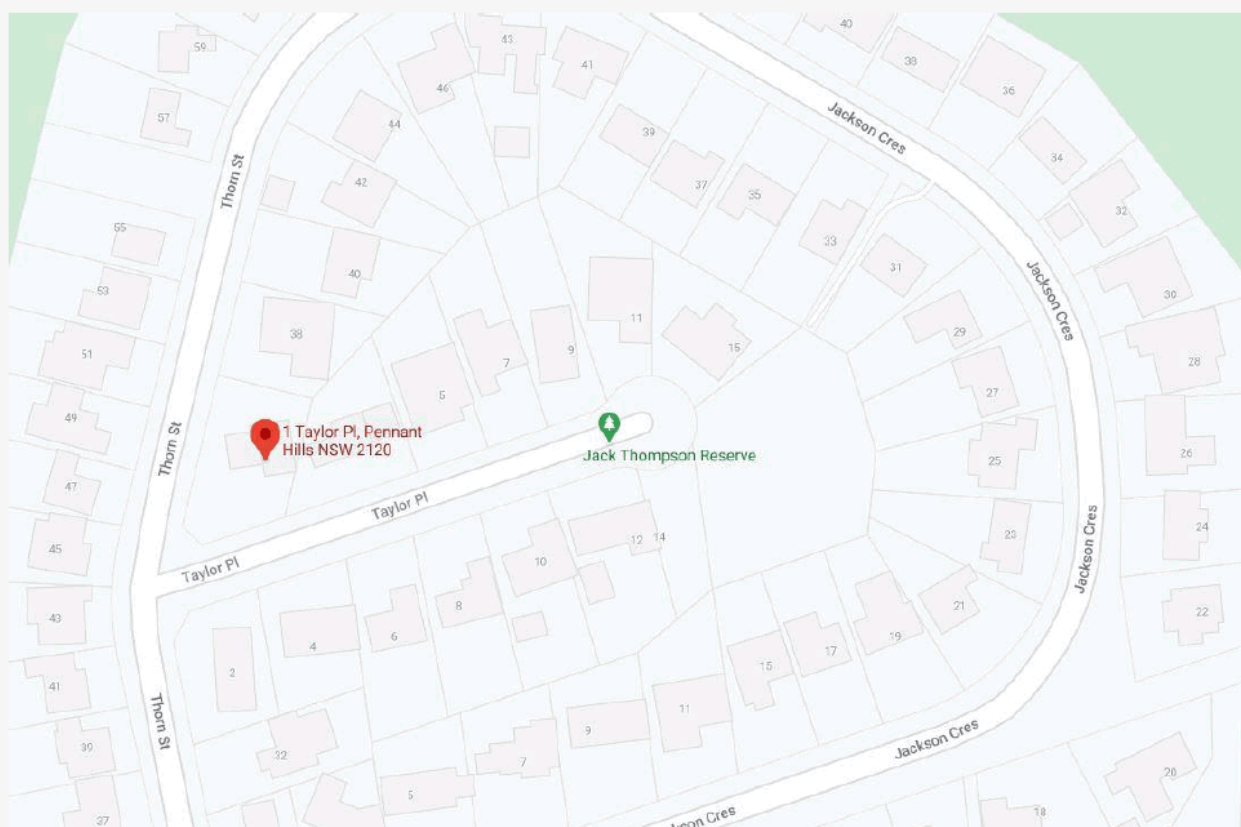
Taylor Place

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



Thorn Street

No.	Lot Size
38	822m ²
39	759m ²
40	871m ²
41	765m ²
42	872m ²
43	846m ²
44	929m ²
45	803m ²
46	969m ²
47	736m ²
49	740m ²
51	745m ²
53	740m ²
55	742m ²



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 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 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 Place) 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 determinations 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



