

WRITTEN REQUEST PURSUANT TO CLAUSE 4.6 OF WARRINGAH
LOCAL ENVIRONMENTAL PLAN 2011

35 EARL STREET, BEACON HILL

FOR PROPOSED TORRENS TITLE SUBDIVISION OF ONE LOT INTO TWO LOTS AND
CONSTRUCTION OF ALTERATIONS AND ADDITIONS TO AN EXISTING DWELLING

VARIATION OF A DEVELOPMENT STANDARD REGARDING THE MINIMUM SUBDIVISION LOT
SIZE AS DETAILED IN CLAUSE 4.1 OF THE WARRINGAH LOCAL ENVIRONMENTAL PLAN 2011

For: Proposed Torrens Title subdivision of one lot into two lots and construction of alterations and additions to an existing dwelling
At: 35 Earl Street, Beacon Hill
Owner: Kimbal & Charmaine Burke
Applicant: Kimbal & Charmaine Burke c/- Vaughan Milligan Development Consulting

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Warringah Local Environmental Plan 2011. In this regard it is requested Council support a variation with respect to compliance with the minimum subdivision lot size as described in Clause 4.1 of the Warringah Local Environmental Plan 2011 (WLEP 2011).

2.0 Background

Clause 4.1 restricts the minimum subdivision lot size in this locality to 600m² and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The resultant allotments which have been defined as Proposed Lots 1 and 2, will have the following indices:

Site Area (Lot 1):	573.8m ²
Site Area (Lot 2):	550.1m ²

The proposed Lot 1 and Lot 2 present minor variations of 26.2m² (4.3%) and 49.9m² (8.3%) respectively from the standard.

The controls of Clause 4.1 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

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3.0 Purpose of Clause 4.6

The Warringah Local Environmental Plan 2011 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the LEP should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 118* have been relied on in this request for a variation to the development standard.

4.0 Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The development will achieve a better outcome in this instance as the site will provide for the proposed Torrens Title subdivision of one lot into two lots and construction of alterations and additions to an existing dwelling, which is consistent with the stated Objectives of the R2 Low Density Residential Zone, which are noted as:

- 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.*
- To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

As sought by the zone objectives, the proposal will provide for the Torrens Title subdivision of one lot into two lots and construction of alterations and additions to an existing dwelling, with the proposal being sensitive to the location and the topography of the locality.

The two new lots will have separate pedestrian and vehicular access, with Lot 1 to retain existing access via a driveway from Earl Street and the new Lot 2 to be accessible via a new driveway from Earl Street.

Despite the non-compliance with the minimum lot size control, the proposed subdivision will provide lots that are capable of accommodating dwellings that will provide suitable amenity for occupants and neighbours, and therefore compliance with the maximum lot size standard is unnecessary and unreasonable in the circumstances of the case.

5.0 Onus on Applicant

Clause 4.6(3) provides that:

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.*

This submission has been prepared to support our contention that the development adequately responds to the provisions of 4.6(3)(a) & (b) above.

6.0 Justification of Proposed Variation

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 11* & *Samadi v Council of the City of Sydney [2011] NSWLEC 1199*.

Paragraph 27 of the Samadi judgement states:

Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

Precondition 1 - Consistency with zone objectives

The site is located in the R2 Low Density Residential Zone. The objectives of the R2 zone are noted as:

- *To provide for the housing needs of the community within a R2 Low Density Residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

It is considered that notwithstanding the minor noncompliance of the proposed lots with the lot size control, the proposed alterations and additions to the existing dwelling will be consistent with the individual Objectives of the R2 Low Density zone for the following reasons:

- *To provide for the housing needs of the community within a R2 Low Density Residential environment.*

The R2 Low Density Residential Zone contemplates low density residential uses on the land. The proposed subdivision is consistent with the existing subdivision pattern in the locality as noted in Table 1. The proposal is therefore considered to be in keeping with the residential character of the locality.

Table 1: Size of existing lots in the immediate locality

Address	Lot	DP	Land Area (m ²)
23 Earl Street, Beacon Hill	7	18253	463
25 Earl Street, Beacon Hill	8	18253	461
27 Earl Street, Beacon Hill	9	18253	464
27A Earl Street, Beacon Hill	10	18253	457
29 Earl Street, Beacon Hill	11	18253	460
31 Earl Street, Beacon Hill	12	18253	462
33 Earl Street, Beacon Hill	13	18253	410
39 Earl Street, Beacon Hill	33	25164	582
41 Earl Street, Beacon Hill	34	25164	575
43 Earl Street, Beacon Hill	35	25164	579
45 Earl Street, Beacon Hill	36	25164	577
47 Earl Street, Beacon Hill	37	25164	575
49 Earl Street, Beacon Hill	38	25164	580
53 Earl Street, Beacon Hill	40	25164	554
55 Earl Street, Beacon Hill	41	25164	579
22 Mary Street, Beacon Hill	15	18253	461
24 Mary Street, Beacon Hill	16	18253	465
26 Mary Street, Beacon Hill	17	18253	464
28 Mary Street, Beacon Hill	18	18253	467
30 Mary Street, Beacon Hill	19	18253	462
32 Mary Street, Beacon Hill	20	18253	464
34 Mary Street, Beacon Hill	21	18253	462
36 Mary Street, Beacon Hill	22	18253	416
40 Mary Street, Beacon Hill	49	27151	583
42 Mary Street, Beacon Hill	48	27151	579
44 Mary Street, Beacon Hill	47	27151	583
46 Mary Street, Beacon Hill	46	27151	582
48 Mary Street, Beacon Hill	45	27151	579
50 Mary Street, Beacon Hill	44	27151	575
52 Mary Street, Beacon Hill	43	27151	569
54 Mary Street, Beacon Hill	42	27151	538

As discussed above, the proposed subdivision results in allotments which are in keeping with the size of existing lots in the locality. The proposed lots are consistent with the existing pattern of subdivision to the east and west along Earl Street and Mary Street.

The proposed Lot 1 can readily accommodate the existing dwelling, and the proposed Lot 2 can accommodate a future dwelling which complies with Council's controls, as noted by the indicative building envelope in the submitted Subdivision Plan (Sheet No. 1).

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The development does not suggest any alternate land uses and this Objective is not directly relevant to the subject proposal.

- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

The proposal provides for the Torrens Title subdivision of one lot into two lots and construction of alterations and additions to an existing dwelling, in a manner which will retain the single dwelling character of the immediate area.

This objective is achieved in that the proposal will not require any significant further site disturbance or excavation, with minimal alteration to the natural ground levels and through the retention of generous areas of soft landscaping, will maintain the balance between landscaping and built form.

Precondition 2 - Consistency with the objectives of the standard

The objectives of Clause 4.1 are articulated at Clause 4.1(1):

- (1) *The objectives of this clause are as follows:*
 - (a) *to protect residential character and amenity by providing for subdivision where all resulting lots are consistent with the desired character of the locality, and the pattern, size and configuration of existing lots in the locality,*
 - (b) *to provide for subdivision where all resulting lots are capable of providing for the construction of a building that is safe from hazards,*
 - (c) *to provide for subdivision where all resulting lots are capable of providing for buildings that will not unacceptably impact on the natural environment or the amenity of neighbouring properties,*
 - (d) *to provide for subdivision that does not adversely affect the heritage significance of any heritage item or heritage conservation area,*
 - (e) *to provide for subdivision where all resulting lots can be provided with adequate and safe access and services,*
 - (f) *to maintain the existing function and character of rural areas and minimise fragmentation of rural land,*
 - (g) *to ensure that lot sizes and dimensions are able to accommodate development consistent with relevant development controls.*

Comments

Despite the variation to the minimum lot size control, it is considered that the sites are capable of accommodating future development which will contribute to the housing stock in Beacon Hill whilst maintaining consistency with the density of the locality.

The proposed development will not result in any unreasonable impacts on adjoining properties.

Accordingly, we are of the view that the proposal is consistent with the objectives of the development standard.

Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

It is unreasonable and unnecessary to require strict compliance with the development standard in this instance, as the proposal intends to provide for the Torrens Title subdivision of one lot into two lots, which maintains consistency with the subdivision pattern in the locality.

Clause 4.1 restricts the minimum subdivision lot size in this locality to 600m².

The resultant allotments which have been defined as Proposed Lots 1 and 2, will have the following indices:

Site Area (Lot 1):	573.8m ²
Site Area (Lot 2):	550.1m ²

The proposed non-compliance is consistent with the current lot size of existing surrounding development and for this reason, it is considered that compliance with the development standard is unreasonable and unnecessary in the circumstances of this case.

In the *Wehbe* judgment (*Wehbe v Pittwater Council* [2007] NSWLEC 827), Preston CJ expressed the view that there are 5 different ways in which a SEPP 1 Objection may be well founded and that approval of the Objection may be consistent with the aims of the policy.

These 5 questions may be usefully applied to the consideration of Clause 4.6 variations: -

1. *the objectives of the standard are achieved notwithstanding non-compliance with the standard;*

Comment: Yes. Refer to comments under 'Justification of Proposed Variation' above which discusses the achievement of the objectives of the standard.

2. *the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

Comment: It is considered that the underlying purpose of the standard is relevant but the purpose is satisfied by the proposed revised design.

3. *the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

Comment: In this instance, it is considered that the underlying object of the standard would be thwarted by a strict application of the development standard for minimum lot size.

The proposed design is intended to be compatible with the subdivision pattern in the locality.

The proposed minor non-compliance with the lot size control does not defeat the underlying object of the standard development; however, compliance would prevent the approval of an otherwise supportable development.

Furthermore, it is noted that development standards are not intended to be applied in an absolute manner; which is evidenced by clause 4.6 (1)(a) and (b).

4. *the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*

Comment: Not applicable.

5. *the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Comment: The development standard is applicable to and appropriate to the zone.

For the above reasons, it is considered that this written request demonstrates that it would be unreasonable and unnecessary to require strict compliance with the standard.

Precondition 4 - To consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court [or consent authority] finding that the matters required to be demonstrated have been adequately addressed

Council's controls in Clause 4.1 provide a minimum lot size of 600m².

The proposed Lot 1 and Lot 2 present minor variations of 26.2m² and 49.9m² respectively from the standard.

In the recent 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does not mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are "sufficient environmental planning grounds to justify contravening the development standard", it is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant's written document itself, and in the Commissioner's assessment of it). In February of 2017 the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligation is to be satisfied that "the applicant's written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard." He held that this means:

"the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary".

Accordingly, when assessed against the relevant Objects of the Environmental Planning & Assessment Act 1979, (NSW) outlined in s1.3, the following environmental planning grounds are considered to be sufficient to allow Council to be satisfied that a variation to the development standard can be supported:

- The proposed subdivision, which as discussed introduces an appropriate and compatible lot size within the locality, and which promotes the orderly & economic use of the land.
- The proposal is considered to promote good amenity to the local built environment as appropriate views, solar access and privacy will be maintained for the neighbouring properties.

Having regard to the above, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for minimum lot size.

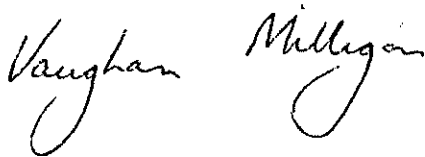
7.0 Conclusion

This written request to vary the minimum lot size specified in Clause 4.1 of the Warringah LEP 2011 adequately demonstrates that the objectives of the standard will be met.

The submission demonstrates that the lots can be readily developed in a manner which is consistent with the surrounding pattern and can achieve the Objectives of the R2 Low Density Zone.

The density of the proposed subdivision is appropriate for the site and locality.

Strict compliance with the minimum lot size control would be unreasonable and unnecessary in the circumstances of this case.

A handwritten signature in black ink, reading 'Vaughan Milligan'. The signature is written in a cursive, flowing style.

VAUGHAN MILLIGAN
Town Planner