

The General Manager  
Northern Beaches Council 725  
Pittwater Road  
DEE WHY NSW 2099

12 December 2023

## REVISED REQUEST UNDER CLAUSE 4.6 WLEP 2011

(Reviewed by Mills Oakley, Planning & Environment Division)

**Property:** 107 Iris Street Beacon Hill  
**Proposal:** Torrens title subdivision – One lot into four.  
**DA No:** DA2023/0379  
**Lot No./Plan:** Lot 18 Deposited Plan 19022  
**Site Area:** 2,254.8m<sup>2</sup>  
**Zoning:** R2 – Low Density Residential - Warringah Local Environmental Plan 2011  
**Development Standard:** Minimum Lot Size – Clause 4.1(3) WLEP 2011.

### 1 Introduction and Minimum Lot Size Standard

This Revised Request has been prepared in accordance with Clause 4.6 of the Warringah Local Environmental Plan 2011 ('LEP') to accompany the Development Application. The Development Application seeks consent for the Torrens Title subdivision of the existing lot into four at 107 Iris Street, Beacon Hill ('Site').

Clause 4.6 requires that a consent authority be satisfied of three key matters before granting consent to a development that contravenes a development standard. These three matters are detailed below:

1. That the Applicant's written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; and
2. That the Applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard.
3. That 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.

This Clause 4.6 variation has been prepared in accordance with the requirements of Clause 4.6 of the WLEP 2012. It considers the various planning controls, existing characteristics of the Site, and demonstrates that compliance with the development standard 'is unreasonable or unnecessary in the circumstances of the case'.

Further, this Request has demonstrated that there are 'sufficient environmental planning grounds to justify contravening the development standard'.

## 2 Site and Proposed Variation

The Site is located on the southern side of Iris Street between Ellis Road to the east and Jones Street to the west. It has 34.695m frontage to Iris Street and an average depth of 65m. The Site falls from the rear to the front with a level difference of approximately 11.3m. The Site is rectangular in shape and has a total area of 2,254.8m<sup>2</sup>.

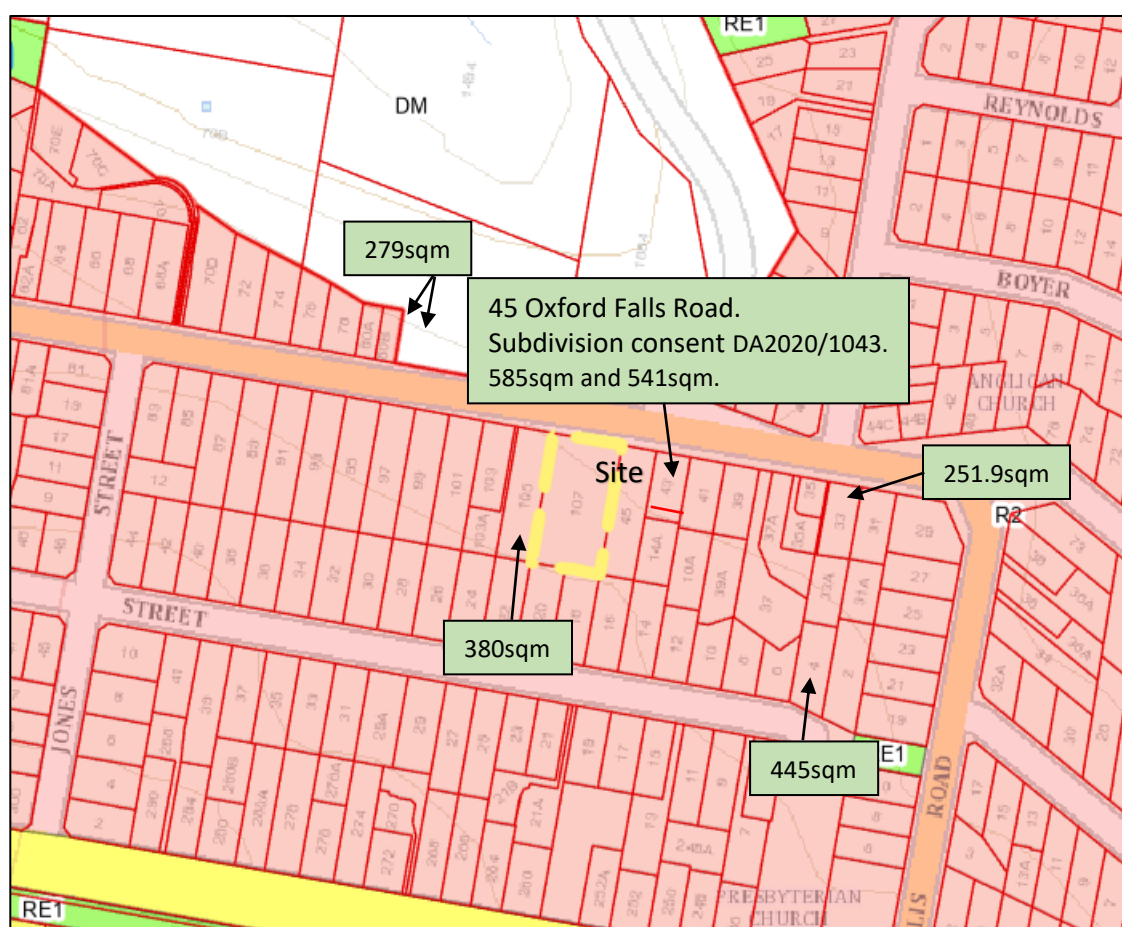
Lots in the vicinity of the Site vary considerably in area and shape and support both single and two-storey detached dwellings and dual occupancies. The dual occupancy subdivisions are as low as 252m<sup>2</sup>, for example, 35 Oxford Falls Road. The existing lot is large and inconsistent with the surrounding subdivision pattern. Refer to Figure 1 below.

The proposal seeks approval for the Torrens title subdivision of the site into 4 allotments (as recommended in the Pre-DA meeting with Council), in order to maintain regular lot shapes even if smaller lot sizes resulted.

The proposed subdivision lot sizes and numerical variations are as follows:

| Lot   | Proposed Area (excluding access handle) (Sqm) | Deviation from 600 Sqm |
|-------|-----------------------------------------------|------------------------|
| Lot 1 | 451.5                                         | 24.7%                  |
| Lot 2 | 475.8                                         | 21%                    |
| Lot 3 | 520.7                                         | 13.2%                  |
| Lot 4 | 493.6                                         | 17.7%                  |

**Table 1: Proposed lot areas.**



**Figure 1: Subject site (shaded in red) in its surrounding context, noting the range of lot shapes and sizes.**



Figure 2: Streetscape view of 107 Iris Street Beacon Hill.

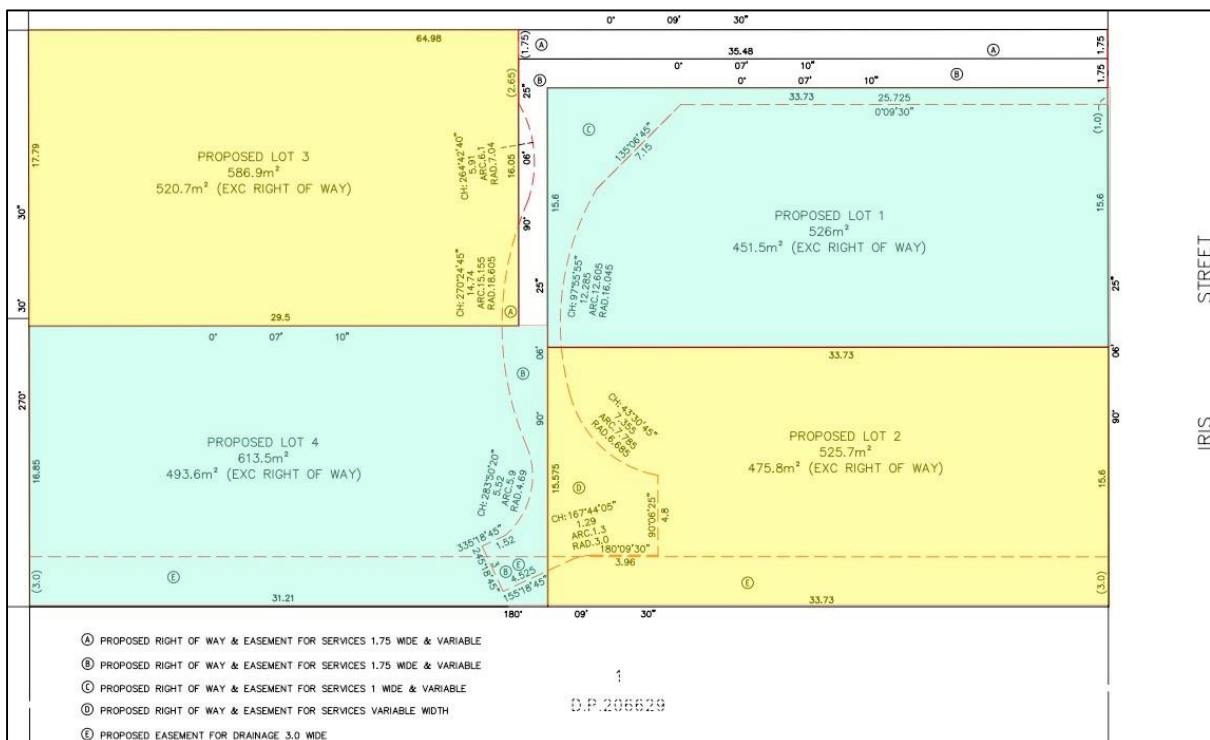


Figure 3: Extract from the submitted plan of subdivision prepared by Michael K Joyce, Surveyor.

### 3 Background to application

On 20 November 2022, the owner and her project team attended a Pre-DA meeting with relevant Council staff. The proposal was for a 6-lot subdivision that included 45 Oxford Falls Road. Council staff did not support incorporating 45 Oxford Falls Road into the subdivision because access arrangements would adversely impact on landscape area and lot size compliance. A 4 lot subdivision of 107 Iris Street was instead a preferred planning outcome.

The minutes of the meeting stated in part:-

**“... A four (4) lot subdivision of 107 Iris Street is considered to provide a favourable planning outcome for the site and would be consistent with the existing subdivision pattern along Oxford Falls Road and Iris Street. It is noted that a four (4) lot subdivision will result in four (4) undersized lots. Given this option will result 10% variation to the development standard Clause 4.1 Minimum subdivision lot size, any development application will be referred to the Northern Beaches Planning Panel (NBLPP) for determination.”**

The concluding comments show Council’s preferential support for a 4 lot subdivision of 107 Iris Street as a desirable planning outcome.

**“... As discussed throughout these Notes, Council could support a four (4) lot subdivision of 107 Iris Street. The driveway crossover off Iris Street proposed to access Lot C is not supported by Council’s Development Engineer given the close proximity to the existing roundabout located to the east on Oxford Falls Road. ...**

**Council recommends that a four (4) lot subdivision of 107 Iris Street would result in the most desirable planning outcome for the future of the site and would be in keeping with the surrounding character and subdivision pattern of Iris Street and Oxford Falls Road.**

**It is recommended that the any future works to both 45 Oxford Falls Road and 107 Iris Street are carried out independently.”**

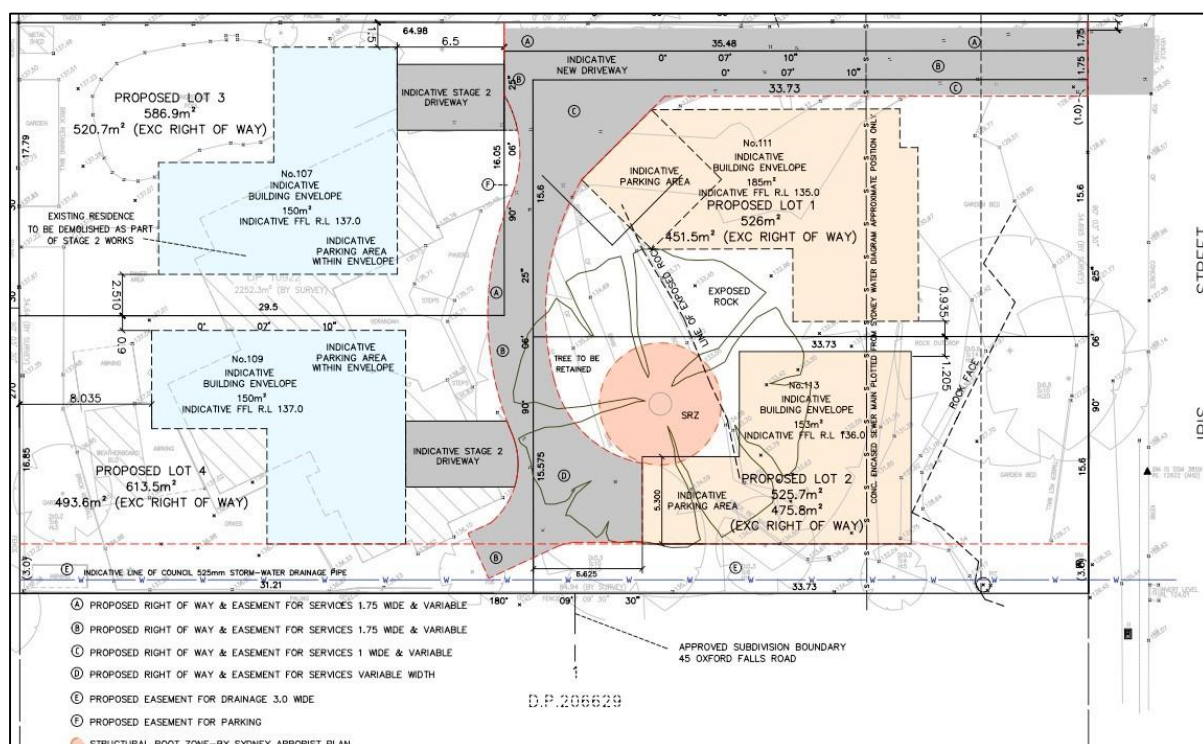


Figure 4: Proposed building footprints and indicative driveway layout.

## 4 Is the standard a development standard?

Clauses 4.1(3) of the *Warringah Local Environmental Plan 2011* (the LEP) provides minimum lot sizes for subdivision of land by reference to the minimum lot size maps. In this case the lot size map prescribes a lot size of 600m<sup>2</sup> for the site.

A development standard is defined in S1.4 of the *Environmental Planning and Assessment Act 1979* ("EPA Act") to mean:

***"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, ..."***

Clause 4.1 (3) is captured under subsection (a) of the EPA Act. Therefore, the control is a development standard and Clause 4.6 of the LEP applies.

## 5 Clause 4.6 - Warringah Local Environmental Plan 2011

The objectives and provisions of Clause 4.6 'Exceptions to development standards' of the LEP are relevantly as follows:-

- (1) The objectives of this Clause are as follows—*
  - (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
  - (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) Development consent may, subject to this Clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this Clause does not apply to a development standard that is expressly excluded from the operation of this Clause.*
- (3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*
  - (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
  - (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.*
- (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 Planning Secretary has been obtained.*
- (5) In deciding whether to grant concurrence, the Planning Secretary must consider—*
  - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
  - (b) the public benefit of maintaining the development standard, and*
  - (c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*
- (6) Development consent must not be granted under this Clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—*
  - (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*

*(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

The minimum lot size development standard in Clause 4.1(3) of the LEP is not excluded from the operation of Clause 4.6 for this Site by subclause 4.6(8).

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827;
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
3. *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2018] NSWLEC 191;
4. *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130;
5. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (**Initial Action**);
6. *Baron Corporation Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 1552 (**Baron Corporation**);
7. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (**Al Maha**);
8. *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511;
9. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386;
10. *Moskovich v Waverley Council* [2016] NSWLEC 1015; and
11. *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112

In *Initial Action* Chief Justice Preston considered the proper interpretation of Clause 4.6 and found that:-

- **Clause 4.6 does not require a proponent to show that the non-compliant development would have a neutral or beneficial test relative to a compliant development (at [87]);**
- **There is no requirement for a Clause 4.6 request to show that the proposed development would have a ‘better environmental planning outcome for the site’ relative to a development that complies with the standard (at [88]); and**
- **One way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts (at [95(c)]).** That is, the absence of environmental harm is sufficient to show that compliance with the development standard is unreasonable or unnecessary.

More recently, the Land and Environment Court emphasized that **Clause 4.6 is not subordinate to development standards such as height or FSR, and that the ability to vary a development standard is equally as valid as the development standards themselves.** In that regard, Acting Commissioner Clay held in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (later upheld on appeal by Chief Justice Preston) in upholding two Clause 4.6 variation requests allowing in excess of 40% over both the height and FSR controls applying to a site in the Double Bay town centre, that:

*“It should be noted cl 4.6 of WLEP is as much a part of WLEP as the Clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome”*

In this regard, the extent of the discretion afforded by subclause 4.6(2) is not numerically limited (*GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [85]), in contrast with the development standards referred to in, subclause 4.6(6).

## 6 That Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case (Clause 4.6(3)(a))

Of relevance to Clause 4.6(3)(a), in *Wehbe v Pittwater Council* (2007) NSW LEC 827 ('Wehbe'), Preston CJ sets out 'ways' of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:-

*"An objection under SEPP 1 may be well founded and be consistent with the aims set out in Clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."*

The judgment goes on to state that:-

*"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)."*

In *Wehbe*, Preston CJ expressed 5 different 'ways' in which it can be established that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. Those 'ways' are stated as follows:-

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

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to *Wehbe* and states:-

*"...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary."*

Whilst the Court has held that there are at least five different 'ways', and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (*Wehbe*), it is important to note that:-

- The requirement is to demonstrate that compliance is unreasonable **or** unnecessary. It does not need to be shown that compliance is both unreasonable and unnecessary;
- Wehbe identifies five ways of demonstrating that compliance is unreasonable or unnecessary, but the Courts have held that this list is not exhaustive (*Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [22]); and
- Equally, it is not necessary to identify more than one of the five Wehbe tests. “An applicant does not need to establish all of the ways. It may be sufficient to establish only one way” (Initial Action at [22]).

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case.

In summary, requiring strict compliance with the standard in this case is unreasonable or unnecessary because:-

- the development is consistent with the standard and zone objectives, even with the proposed variation (discussed further below);
- there are no additional significant adverse impacts arising from the proposed non-compliance;
- important planning goals are achieved by the approval of the variation in respect of housing supply.

On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

**Wehbe Way 1 – The objectives of the minimum lot size standard are achieved notwithstanding the non-compliance with the standard**

Objectives of the Standard

The objectives of the minimum lot size standard are articulated at Clauses 4.1(1) of the LEP and are set out below:-

1) *The objectives of this Clause are as follows—*

- a) to protect residential character by providing for the subdivision of land that results in lots that are consistent with the pattern, size and configuration of existing lots in the locality,*
- b) to promote a subdivision pattern that results in lots that are suitable for commercial and industrial development,*
- c) to protect the integrity of land holding patterns in rural localities against fragmentation,*
- d) to achieve low intensity of land use in localities of environmental significance,*
- e) to provide for appropriate bush fire protection measures on land that has an interface to bushland,*
- f) to protect and enhance existing remnant bushland,*
- g) to retain and protect existing significant natural landscape features,*
- h) to manage biodiversity,*
- i) to provide for appropriate stormwater management and sewer infrastructure.*

Compliance with the relevant objectives are addressed in turn below:-

- a) The resulting lot sizes are consistent with the pattern, size and configuration of existing lots in the locality. Given that there is little consistency in the locality regarding the pattern, size and configuration of existing lots, it can be better expressed that the resultant subdivision will not be inconsistent with the subdivision pattern, size and configuration of lots in the locality. Refer to Figure 1 above and Table 2 below. As shown in Table 2, there are a considerable number of allotments in the direct locality well below the minimum lot size of 600m<sup>2</sup>. The proposed subdivision provides for lot sizes (excluding the accessway) which are generally consistent with the minimum lot size standard. Additionally, it is noted that the proposed variation does not reduce the ability of the resulting allotments to support development otherwise than in accordance with the requirements of Council. The proposed lots are capable of supporting future residential development which is compatible with the existing character of the surrounding residential area.
- b) This objective is not relevant. The Site is not within a commercial or industrial area.
- c) This objective is not relevant. The Site is not within a rural locality. The surrounding area is characterized by residential allotments ranging in size and shape.
- d) This objective is not relevant. The Site is not located an area identified as being of environmental significance.
- e) This objective is not relevant. The Site is not identified as bushfire prone land.
- f) The proposal retains remnant bushland features such as two rocky outcrops. The reduced size of the allotments does not inhibit the ability to provide compliant landscaping. The proposal is capable of supporting future development which is sympathetic to the natural environment of Warringah and which protects natural landscape features.
- g) As above. The proposal retains two rock faces identified in the application documentation as well as the retention of the significant oak tree.
- h) This objective is not relevant as the land is not identified as having biodiversity significance. The land has been used as a suburban single dwelling and lacks biodiversity significance. Any concerns in respect of impact on biodiversity can be addressed when the allotments are developed.
- i) The proposal provides for new stormwater and sewer infrastructure to the satisfaction of Council and Sydney Water respectively.

**Having regard to the above, the relevant objectives of the development standard are considered to be achieved despite the requested variance to the lot minimum size.**

#### Clause 4.6 Request – Minimum Lot Size

| ADDRESS                             | LOT | DP      | SITE AREA m <sup>2</sup> |
|-------------------------------------|-----|---------|--------------------------|
| <b>Between 250-300m<sup>2</sup></b> |     |         |                          |
| 80A Iris Street Beacon Hill         | 32  | 1067494 | 279.30                   |
| 80B Iris Street Beacon Hill         | 32  | 1067494 | 279.30                   |
| 35 Oxford Falls Road Beacon Hill    | 1   | 850352  | 251.90                   |
| <b>Between 300-400m<sup>2</sup></b> |     |         |                          |
| 35A Oxford Falls Road Beacon Hill   | 2   | 850352  | 382.60                   |
| 44A Oxford Falls Road Beacon Hill   | 3   | 862488  | 317.20                   |
| 44B Oxford Falls Road Beacon Hill   | 2   | 862488  | 298.20                   |
| 44C Oxford Falls Road Beacon Hill   | 1   | 862488  | 339.80                   |
| 49 Iris Street Frenchs Forest       | 1   | 862415  | 380.60                   |
| 27 Iris Street Frenchs Forest       | 1   | 848217  | 383.00                   |
| 27A Iris Street Frenchs Forest      | 2   | 848217  | 434.00                   |
| <b>Between 400+ lots</b>            |     |         |                          |
| 25 Iris Street Frenchs Forest       | 1   | 836660  | 433.00                   |
| 51 Iris Street Frenchs Forest       | 1   | 1018589 | 670.90                   |
| 51A Iris Street Frenchs Forest      | 2   | 1018589 | 422.50                   |
| 31 Iris Street Frenchs Forest       | 100 | 857954  | 488.40                   |

**Table 2: An example list of some lots and lot groups under 600m<sup>2</sup> within in a 500m radius of the site.**

#### Objectives of the Zone

As noted above, the Site is located in the R2 – Low Density Residential zone. The objectives of the R2 zone are as follows:-

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provides 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.*

The zone objectives are broad in nature but nonetheless, the development will be consistent with the zone objectives for the following reasons:

- *The proposed subdivision will increase the housing supply in the Northern Beaches Local Government Area by providing for 3 additional lots for low density housing, being single family dwellings.*
- *The second objective is not applicable.*
- *Future dwellings cannot be approved unless provided with appropriate landscaping consistent with Council's controls or the controls under State Environmental Planning Policy (Exempt and Complying Development Codes) 2008. The reduced size of the allotments does not inhibit the ability to provide compliant landscaping. The proposal is capable of supporting future development which is sympathetic to the natural environment of Warringah.*

#### Clause 4.6 Request – Minimum Lot Size

Having regard to the above, the relevant objectives of the R2 Low Density zone are considered to be achieved despite the requested variance to the minimum lot size. Consistent with the decision in the *Initial Action* judgement and that of *Micaul v Randwick*, the satisfaction of the LEP objectives alone are deemed sufficient environmental grounds to justify the non-compliance with the lot size development standard.

On this basis, the written Clause 4.6 Variation is considered to be well founded as per the first Wehbe Way.

The requirements of Clause 4.6(3)(a) are satisfied.

## 7 Sufficient Environmental Planning Grounds (Clause 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 24), Preston CJ states:

*“The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15].”*

Preston CJ clarified what items a Clause 4.6 request does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome (paragraph 86-87):

*“Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*

*The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.”*

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site, and whether they are ‘sufficient’.

On the above basis, the following environmental planning grounds are submitted to justify contravening the minimum lot size:-

1. The development achieves the objectives of the zone.
2. The development achieves the objectives of the standard.
3. The lots exceed the minimum lot dimensions under Part C1 of the Warringah Development Control Plan (‘DCP’), being:-
  - a. Minimum width: 13 metres
  - b. Minimum depth: 27 metres; and
  - c. Minimum building area: 150m<sup>2</sup>

4. The resulting subdivision will support compliant building envelopes despite the variation in lot sizes, which will positively contribute to the locality as shown in Figure 4 above.
5. The subdivision and non-compliance of the lot sizes would not be discernible to a resident of the development, a neighbour or from the public domain. Additionally, noting the topography of the Site, the non-compliance is not perceptible from the street frontage.
6. The subdivision is compatible with the existing pattern of subdivision despite the variation in lot sizes. The proposal is not dissimilar in terms of lot sizes, orientation, or shape, nor is it inconsistent with the pattern of subdivision or dwelling forms in the surrounding streets. Therefore, it provides a compatible streetscape outcome that is compatible with the character of the street. The variation will not have any discernible impact on the streetscape or character of the locality.
7. The variation of the lot size control would be reduced if the access corridor was included in the calculation as set out in Figure 4 above.
8. Council previously agreed that a four-lot subdivision of the Site was considered to provide a favourable planning outcome for the site and would be consistent with the existing subdivision pattern along Oxford Falls Road and Iris Street.
9. There are no adverse amenity impacts as a result of the proposed variation. Any such matters can be addressed when the resulting lots are developed. The difference between a compliant subdivision and the proposed subdivision will have no discernible impact on density.
10. The development achieves the objectives of the Act, particularly as it relates to Objective 1.3(c), *“to promote the orderly and economic use and development of land”*. (Refer Council’s Pre-DA advice for its preference for a 4 lot subdivision in lieu of a 3 lot subdivision). A 4 lot subdivision is compatible with the surrounding pattern of subdivision whereas a 3 lot subdivision is not despite the variation in lot sizes as it would create an irregular pattern with a rear battle axe lot.
11. Strict compliance with the development standard would deny the opportunity of increased land and housing supply in the Northern Beaches LGA and broader region which is experiencing a significant housing supply shortage.

Having regard to the relevant environmental planning grounds and circumstances, strict compliance with the development standard is unreasonable and unnecessary, and the requirements of Clause 4.6(3)(b) are satisfied.

## 8 Clause 4.6(4)(a)

Preston CJ in Initial Action details how Clause 4.6(4)(a) needs to be addressed.

The first opinion of satisfaction, in Clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by Clause 4.6(3). These matters are twofold:-

1. first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a)) and,
2. secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b)).

This written request has addressed Clause 4.6(3)(a) and Clause 4.6(3)(b) above.

The second opinion of satisfaction, in Clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. In circumstances where the proposed subdivision achieves the objectives of the development standard and the zone, there are no adverse amenity impacts as a result and that additional housing is provided, it is clear that the proposal is in the public interest.

The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under Clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in Clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in Clause 4.6(4)(a)(ii).

## 9 Concurrence - Clause 4.6(4)(b)

The second precondition in Clause 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)).

Under Clause 55 of the Environmental Planning and Assessment Regulation 2021, the Secretary has given written notice, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

## 10 Clause 4.6(5)

With respect to Clause 4.6(5)(a), the contravention of the minimum lot size standard proposed by this application does not raise any matter of significance for State or regional environmental planning. The proposal responds to the call of strategic plans, which are seeking housing to meet the growing population of the State. Therefore, it is considered that the proposed development responds to the call of the regional strategic aims and objectives by providing additional housing and housing diversity in NSW.

With respect to Clause 4.6(5)(b), as detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the minimum lot size. As such there is no public benefit in maintaining strict compliance with the development standard.

Whilst the proposed subdivision exceeds the minimum lot size, the proposal 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.

## 11 Conclusion

The purpose of the development is to allow for a 4-lot subdivision, which is consistent with the pattern, and size of lots in the locality despite the variation.

Development standards are typically numerical in nature and fail to take into consideration the nature of the development, the design, any site constraints or qualitative aspects of the development or of the particular circumstances of the site which may give rise for justification for a variation. Clause 4.6 of the LEP allows such an analysis to be carried out.

In summary, compliance with the development standard is unreasonable or unnecessary in the circumstances where:-

- The applicant has complied with Council's advice in proposing a 4 lot subdivision in lieu of a 3 lot subdivision because a 4 lot subdivision is logical and is consistent with the subdivision pattern despite the shortfall in the lot areas. A 3 lot subdivision does not conform to the subdivision pattern.
- The development achieves the objectives of the zone.
- The development achieves the objectives of the standard and the lots exceed the minimum lot dimensions under Part C1 of the DCP.
- The subdivision supports compliant building envelopes despite the variation in lot sizes.
- The subdivision addresses the land and housing supply shortage across Sydney in general, and in the Northern Beaches LGA in particular. Strict compliance with the development standard would deny the opportunity of increased housing supply.

This written request has therefore demonstrated that compliance with the development standard is both unreasonable and unnecessary and that there are sufficient environmental planning grounds to allow Council to form the opinion of satisfaction that this written request has adequately addressed the matters required to be demonstrated by Cl.4.6(3)(a) and (b).

Therefore, I request that council support the variation on the basis that this Clause 4.6 variation demonstrates that compliance with the development standard is unreasonable and unnecessary and that there are sufficient environmental planning grounds to justify a variation to the development standard.



Eugene Sarich  
**Urbanesque Planning Pty Ltd**