Appendix A

Clause 4.6 Justification

No 27 Violet Street Balgowlah

Introduction - Content of the clause 4.6 request

Clause 4.4 of the LEP relates to Floor Space Ratio. The maximum permissible floor space ratio for the subject site is 0.5:1.

The proposed development has a total FSR of 0.57:1 being non-compliant with the maximum allowable floor space ratio for the subject site by 32.35sqm or 13.9%.

Given the above non-compliance with clause 4.4 of the LEP, consideration of the matter is given pursuant to the provisions of clause 4.6 of the LEP for completeness.

The objectives of clause 4.6 of the LEP 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.

Clause 4.6 of the LEP notably is designed to provide **flexibility when applying development standards particularly when the variation of the standard enables a better development outcome**.

The variation to the floor space ratio control by approximately 32.35sqm arises do to the relatively small site area. The proposed increase in floor space is modest and is reasonably contained within the footprint of the lower level of the existing dwelling. The proposed upper level is to accommodate 3 bedrooms, a bathroom and a study. Such provides needed space for an expanding family.

A degree of flexibility to the application of the FSR development standard is warranted in this instance.

No adverse planning consequences (overshadowing, privacy, visual impact, urban design/streetscape, heritage, neighbourhood character) arise as a result of the variation. Rather, in this particular case the variation facilitates the provision of quality internal spaces and proportionate built form with a strong streetscape appeal.

The proposed development will sit comfortably in its context in terms of scale, massing and form given the prevalence of 2 storey buildings in the street. The proposed variation to the floor space ratio standard will not be discernible to the casual observer from a streetscape perspective given that the proposed upper level addition is well setback from the street and is well articulated.

For reasons expressed in this submission the 'flexibility' provided by clause 4.6 of the LEP facilitates a design outcome that does not adversely impact on any adjoining property despite the proposed variation to the floor space ratio standard.

Application of Clause 4.6

(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.

Comment:

Clause 4.6(2) of the LEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this does not apply to a development standard that is expressly excluded from the operation of this clause.

Clause 4.4 of the LEP is not expressly excluded from the operation of clause 4.6 and thus Council would have the authority to grant consent to a breach of the specified development standard under clause 4.4 subject to being satisfied of other matters under clause 4.6.

Contravention of a Development Standard

Clause 4.6(4)(a)(i) of the LEP provides that Council, as consent authority, must not grant development consent for a development that contravenes a development standard unless it is satisfied that a written request prepared by or for the applicant (as required under clause 4.6(3)) has adequately addressed the matters required to be demonstrated by clause 4.6(3).

The matters required to be demonstrated by clause 4.6(3) are considered below.

(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.

Clause 4.63)(a) - Unreasonable and Unnecessary

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

This, with clause 4.6(4)(a)(i) requires Council to consider the written request and to form an opinion that it satisfactorily demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances, rather than Council undertaking its own enquiry and forming a direct opinion of satisfaction on whether compliance with the development standard is unreasonable or unnecessary in the circumstances.

The term "unreasonable or unnecessary" is not defined in the relevant environmental planning instruments or in the Act. Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [42] – [49] identifies 5 ways by which strict compliance with a development standard may be unreasonable or unnecessary. This written request adopts the first way identified by Preston CJ.

42……. 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 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 *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, the Chief Judge of the Land and Environment Court stated that the commonly cited tests he set out in Wehbe remain relevant to a consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances under clause 4.6.

Justice Preston’s analysis requires the following questions to be answered.
1. What are the objectives of the development standard?
2. Does the development proffer an alternative means of achieving the objectives of the development? (unnecessary)
3. Would no purpose be served if strict compliance was required? (unreasonable)

Provided below is a commentary in relation to the above three considerations.

1 Objectives of development standard

The objectives of clause 4.4 - FSR control are:

(a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,
(b) to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,
(c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,
(d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,

(e) to provide for the viability of business zones and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.

The proposed development does not undermine the objective to provide effective control of bulk over future development as the bulk of the building has been minimised through the recessing of the upper level and retention of floor space within the footprint of the existing dwelling.

The subject site is zoned for a higher density of residential development and the proposal will sit comfortably with existing buildings within the visual catchment.

There will be no disruption of views, loss of privacy or significant loss of solar access given the site context and orientation and design resolution.

There will be no erosion of bushland or scenic quality as a result of the FSR.

The additional floor space above the maximum permitted under clause 4.4 does not add any undesirable bulk to the building when viewed from the public domain.

Compliance unnecessary

The development proffers alternative means of achieving the objectives for the floor space ratio standard by providing an acceptable residential character without comprising the amenity of the surrounding area in terms of visual impacts and overshadowing.

The existing generous street setback and frontage width enables the retention of building proportions and the containment of impacts.

As the development proffers alternative means of achieving the objectives of clause 4.4 based on the site context, strict compliance is unnecessary.

Compliance unreasonable

There would be no purpose served if strict compliance was required by the consent authority given that the proposed dwelling is consistent with the scale of nearby buildings.

As will be detailed in subsequent parts of this request the variation does not manifest in any adverse planning consequences in terms of streetscape, neighbourhood character or amenity (shadowing and privacy). There are no adverse 'flow on' adverse environmental impacts arising from the variation in this instance.

A compliant development (in relation to floor space) would have a similar performance in regards to overshadowing and bulk/scale. The building already has a standard roof profile.

Despite the floor space ratio variation, a near compliant building height and consistent setbacks is achieved facilitating the orderly and economic development of the land.

No particular benefit would be derived from the strict application of the floor space ratio standard in this instance, particularly in terms of streetscape considerations; strict compliance is therefore unreasonable.

The proposed dwelling design represents a cost effective, orderly and economic outcome for the site.

Clause 4.6(3)(b) - Sufficient Environmental planning grounds

Clause 4.6(3)(b) requires the applicant's written request to demonstrate that that there are sufficient environmental planning grounds to justify contravening the development standard.

This, with clause 4.6(4)(a)(i) requires Council to consider the written request and to form an opinion that it satisfactorily demonstrates that that there are sufficient environmental planning grounds to justify contravening the development standard, rather than Council undertaking its own enquiry and forming a direct opinion of satisfaction on whether there are sufficient environmental planning grounds to justify contravening the development standard.

The term "environmental planning grounds" is broad and encompasses wide environmental planning grounds beyond the mere absence of environmental harm or impacts : Tuor C in *Glenayr Avenue Pty Ltd v Waverley Council* [2013] NSWLEC 125 at [50].

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1008, Pearson C held at [60] that environmental planning grounds as identified in cl 4.6 must be particular to the circumstances of the proposed development on a site. This finding was not disturbed on appeal (Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 & Meaher JA; Leeming JA in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248.

In this particular case the variation to the floor space ratio control does not impact on the ability to accord with all other performance standards and controls.

Strict compliance with the floor space ratio control in this instance would not achieve any additional architectural integrity or urban design merit of the development.

Compliance with the building height control demonstrates that a suitable modulation of built form has been achieved.

The proposed built form will not be intrusive and will sit well within its setting surrounding the site.

In addition, there are no adverse amenity impacts arising, which affect existing residential properties or adversely affect the environment. An attractive dwelling is proposed which can only benefit the neighbourhood.

Having regard to the above there are well founded environmental planning grounds to vary the development standard in this instance.

Clause 4.6(4) Public Interest

Clause 4.6(4)(a)(ii) of the LEP provides that Council, as consent authority, must not grant development consent for a development that contravenes a development standard unless it is satisfied 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.

Unlike clause 4.6(4)(a)(i), this requires Council, as consent authority to form a direct opinion of satisfaction the proposed development will be in the public interest (rather than considering whether the applicant's written request demonstrates that the proposed development will be in the public interest).

A consideration of the public interest aspects of the development is provided in the following, to assist Council form the requisite opinion of satisfaction.

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.

With regards to the objectives for FSR, it is noted that the scale and form of the building is consistent with surrounding built form.

The objectives of the R1 General Residential zone are:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The proposed development is consistent with the objectives as follows:

The proposed development provides an appropriate infill development and contemporary construction.

Provides for the housing need of the community by permitting residentially zoned land to be used for residential purposes of an appropriate low density and scale.

Is not inconsistent with, or incapable of, existing in harmony with other developments in the immediate locality.

The building height, scale and massing of the development is considered to be compatible with the evolving and desired built character of the area.

The floor space ratio variation is of no consequence in respect of the zone objective. Approval of the proposed development will have no impact on any other nearby development opportunities.

The floor space generated on-site does not result in any significant view loss, loss of privacy or overshadowing in the context of the site. There are no adverse heritage impacts associated with the proposed development. The height and scale of the development is typical within the residential context.

Standard floor to ceiling heights is proposed inclusive of a standard roof profile.

Having regard to the above the proposal is consistent with the objectives of the floor space ratio control and the objectives of the zone.

Concurrence of the Planning Secretary

(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.

It is expected that the Council will obtain the concurrence of the Planning Secretary as required (possibly through delegation).

The variation to the floor space ratio standard does not raise any matter of significance for State or regional environmental planning.

There is no public benefit that would be achieved by maintaining strict adherence with the development standard or compromised by approving the building.

It is contextually appropriate not to strictly apply the development standard in this instance and it is not an abandonment of the standard.

Conclusion

The proposed dwelling maintains a consistent built form with nearby buildings.

Amenity considerations has been reasonably resolved through design.

Strict compliance with the development standard is therefore unnecessary and unreasonable given the circumstances of the site and design initiatives.

There are sufficient environmental grounds to justify the breach in this instance.

The FSR as construed is in the public interest.

It is recommended that Council invoke its powers pursuant to clause 4.6 and approve the application.

It is noted that Acting Commissioner P Clay (SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112) in a recent consideration in relation to the consideration of clause 4.6, deemed that there is no numerical limitation to the extent of the variation sought. Such will be determined on merit. In consideration of the merits of the application, the proposal is reasonable.

Should you require any further information please contact the undersigned.

Yours Faithfully

Nigel White
Bachelor of Applied Science (Environmental Planning)