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**APPENDIX A:****Clause 4.6 Request for Variation to Clause 4.1A Minimum lot sizes and special provisions for dual occupancies of Canterbury Bankstown Local Environmental Plan 2023.****1. INTRODUCTION**

This Variation Statement has been prepared in accordance with Clause 4.6 of *Canterbury Bankstown Local Environmental Plan 2023* (CBLEP 2023) to vary Clause 4.1A(2)(b) of the Canterbury Bankstown Local Environmental Plan 2023 to accompany the DA in respect of a proposal for *a new two storey attached dual occupancy* at 88 Juno Parade, Greenacre. This *Clause 4.6 Request for variation to a development standard* statement is a revised statement which further responds to the Clause 4.6 statement prepared for, submitted and refused application DA-257/2025.

**2. OBJECTIVES OF CLAUSE 4.6**

The objectives of Clause 4.6 are to provide ***an appropriate level of flexibility*** in applying certain development standards to particular development, and to achieve better outcomes for and from development, by allowing flexibility in particular circumstances. The in

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various recent decisions in the New South Wales Land and Environment Court (LEC) and New South Wales Court of Appeal (Appeals Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130) and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)]; and
3. That the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard and the objectives for development within the zone in which the development is proposed to be carried out [clause 4.6(4)].

This request considers that compliance with the Minimum lot sizes and special provisions (including minimum frontage) for attached dual occupancies development standard is unreasonable and

unnecessary in the circumstances of the proposed development because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. Furthermore, there are sufficient environmental planning grounds to justify the variation. The recent refusal of the base application DA-257/2025 did raise a single amenity related reason for refusal in the associated determination.

Furthermore, the development satisfies the objectives of the minimum frontage requirements in spite of the non-compliance by not resulting in a single amenity related issue associated by a lack of 5 cm to the minimum frontage requirement, as well as the manifestly complies with the objectives of the *R2 Low Density Residential* and is therefore submitted to be acceptable.

### **3. MINIMUM LOT SIZES AND SPECIAL PROVISIONS FOR DUAL OCCUPANCIES STANDARD**

Clause 4.1A(2)(b) of CBLEP 2023 prescribes a minimum lot frontage for *attached dual occupancies* in *R2 Low Density Residential* Area 1 for the site of 15 metres including a minimum lot area of 500 m<sup>2</sup>.

### **4. EXTENT OF VARIATION**

Pursuant to Clause 4.1A of the CBLEP 2023, the Minimum lot sizes and special provisions for dual occupancies. The site lies in "Area 1" of the clause application map and has a zoning of R2 Low Density Residential zone.

The relevant portion of the clause 4.1A applicable to the development is (2) reproduced below:

*(2) Development consent must not be granted to development for the purposes of dual occupancies on a lot in Zone R2 on land identified as "Area 1" on the [Clause Application Map](#) unless—*

*(a) the lot is at least—*

*(i) for dual occupancies (attached)—500m<sup>2</sup>, and*

*(ii) for dual occupancies (detached)—700m<sup>2</sup>, and*

*(b) the width of the lot at the front building line is at least—*

*(i) for dual occupancies (attached)—15m, and*

*(ii) for dual occupancies (detached)—20m, and*

*(c) each dwelling will have a frontage to a road.*

The site at 537.50 m<sup>2</sup> meets the minimum area requirement of 500 m<sup>2</sup>. The development standard in non compliance relates to the minimum frontage requirement of 15 metres. The subject site has a frontage of 14.955 m representing a 5 cm or less than 1% variation to the development standard. This level of variation should be within the remit of Council staff to consider and approve the variation without requiring to report the matter to the Local Planning Panel however it is requested that if Council is having difficulty reconciling support for the proposed variation that the matter

should be reported to the Local Planning Panel on the basis to enable the client to make further representations to the panel and obtain a further consideration of the variation. .

## 5. EXCEPTION TO DEVELOPMENT STANDARD

Clause 4.6 of the LEP provides that consent may be granted to development which contravenes a development standard as outlined in Clause 4.6(2), (3)(a) & (b). Consideration of these provision follows:

### **4.6 Exceptions to development standards**

(1) ...

(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.*

It is necessary to consider the particular wording of Clause 4,6 and the approach taken by the NSW Land & Environment Court when considering variations to a development standard. Relevant Court Judgements have been considered within this request as follows:

### ***Wehbe v Pittwater [2007] NSW LEC 827***

The Court has held (*in Wehbe*) that there are at least five different ways, and possibly more, through which an applicant may establish that compliance with a development standard is unreasonable or unnecessary.

The five ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; (First Test)
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary; (Second Test)
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; (Third Test)

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 the standard is unreasonable and unnecessary; (Fourth Test) and
5. The zoning of the land is unreasonable or inappropriate. (Fifth Test)

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a). Consideration against these tests is addressed as follows:

### 5.1 The objectives of the development standard are achieved notwithstanding non-compliance with the standard

The objectives of the standard are addressed in the following table:

<i><b>Standard Objectives</b></i>	<i><b>Discussion</b></i>
<b>4.1A Minimum lot sizes and special provisions for dual occupancies</b> (1) The objectives of this clause are as follows—	
(a) to ensure lots are large enough to accommodate proposed dwellings, setbacks to adjoining land, private open space and landscaped areas, driveways and vehicle manoeuvring areas,	The lot the development complies with the lot size requirement and only fails by 5 cm on the specified minimum frontage requirement of the clause. The design achieves all other requirements for setbacks, private open space and landscaped areas, driveways and vehicle manoeuvring areas with no diminishing of the quality of the design or proposal in terms of anticipated outcomes for a dual occupancy development. The lot is a historically old allotment predating the modern Dual occupancy requirement and requiring the acquisition of an additional 5 cms via boundary adjustment would make no reasonable logic given the near compliance of the site allotment as existing.
(b) to ensure lots are large enough to protect special attributes, including natural or cultural features, heritage items, heritage conservation areas, trees and natural topographical features,	The site is not noted as containing and significant natural, cultural or heritage features and the proposal in itself does not make significant adverse topographical alteration of the natural ground due to its achievement of all other design parameters beyond the minimal site frontage non-compliance.
(c) to minimise the likely adverse impact of development on the amenity of the area.	The 5 cm non compliance is not significant in terms of provisioning any tangible improvements to anticipated reasonably expected impacts from the development i.e 5 cm would not significantly alter or improve the anticipated solar access outcomes on site vs a minimum compliant site frontage of 15 metres. All reasonable setbacks and privacy parameters for assessment are achieved irrespective of the non-compliance.

### 5.2 Objectives of the Zone

Clause 4.6(4)(a)(ii) also requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The objectives of *Zone R2 Low Density Residential* under *Canterbury-Bankstown Local Environmental Plan 2023*, and a response as to how the proposal meets the objective is provided as follows:

- ***To provide for the housing needs of the community within a low density residential environment.***

The development will maintain the existing and desired future character of the R2 zone by virtue of dual occupancies being a form of permissible development in the zone.

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

The proposal directly supports this objective by maintaining and improving opportunities for housing choice for existing and perspective residents. The site is highly accessible to public transport and adequate provision is made to provide for on site parking, bicycle parking and storage.

- ***To allow for certain non-residential uses that are compatible with residential uses and do not adversely affect the living environment or amenity of the area.***

The proposal is substantially in accordance with this objective by being permissible in the zone, near compliance in development parameters with no material adverse impact arising from the development.

- ***To ensure suitable landscaping in the low density residential environment.***

The proposal meets all landscaping requirements.

- ***To minimise and manage traffic and parking impacts.***

The proposal does not result in any adverse or unanticipated traffic impacts as a result of the development.

- ***To minimise conflict between land uses within this zone and land uses within adjoining zones.***

There is no conflict from the development and adjoining zones. All surrounding sites/zones are R2 Low Density Residential zoned land.

- ***To promote a high standard of urban design and local amenity.***

It is submitted the proposal is of a high standard of urban design and does not result in any adverse impacts to local amenity as a result of the development.

The proposal is in accordance with the only applicable objective of the zoning.

### **5.3 The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary.**

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

**5.4 The objective would be defeated or thwarted if compliance was required with the consequent that compliance is unreasonable.**

The objective would not be defeated or thwarted if compliance was required. This reason is not relied upon.

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

This reason is not relied upon. It is however noted there is no benefit gained in refusing a less than 1% variation to the control for a pre existing allotment in the zone created predating the modern controls for dual occupancy development.

**5.6 The zoning of the land is unreasonable or inappropriate.**

This reason is not relied upon. Zoning of the site is reasonable and development is a form of development anticipated in the zone.

**6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS**

In *Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 118*, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*, Plain 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.

The environmental planning grounds to justify the departure of the minimum frontage requirement applied to the current proposal are submitted as follows:

1. The applicant is in receipt of a refusal for DA-257/2025 Council dated 24 April 2025 which advises one of the basis for refusal is that the Clause 4.6 request to vary the 15 metre required frontage due to the 5 centimetre shortfall is "not well founded" but then fails to identify a single amenity standard by which the proposed design causes as a result of the non-compliance.
2. Examination of Council's Variation Register 2024 note that Council routinely supports variations to Clause 4.3(2B) Wall Height which by virtue of allowing and supporting increased wall heights has a greater potential from an objective and physical standpoint to result in tangible impacts to adjoining properties via increased potential for overshadowing and bulk and scale matters. None the less, this development standard is routinely requested to be varied and supported by Council in this regard. The basis of which is frequently noted as being the result of slope of land or flooding – conditions of a site which are largely outside of the control of an owner to do anything about. In the same vein, the proposed site is lot 44 of DP12573 registered on 27 November 1923. The site is not a recently created or registered lot but has been in legal existence for over 90 years. The majority of lots within the same deposited plan

to the east of the site exhibit site conditions to the subject site with site frontages of less than 15 metres. Whilst it is acknowledged the lots were not originally created with a dual occupancy development as an intended form of development on the site, in developing modern controls under Canterbury Bankstown LEP 2023, refusal of an application not supported by any associated amenity impacts (as demonstrated by Council's refusal of DA-257/2025) demonstrates Council principle concern with the proposal lies not in the merit of the proposal, but an unwillingness to permit creating a perceived precedent effect to a newly established control. It is submitted that Council unwillingness to support a minor variation without being supported by any amenity reasons demonstrates Council's refusal of DA-257/2025 is not well founded as Council cannot provide any supporting planning-based reason to refuse the application. This demonstrates that in spite of the non-compliance, there is no other planning related basis to otherwise support the application. It is therefore submitted that this demonstrates compliance in the circumstances is unreasonable and unnecessary when all other planning related matters associated with the application have been met and from a planning standpoint the proposal is manifestly supportable.

3. Council's refusal of DA257/2025 did not identify a single objective under *Clause 1.2 Aims of the Plan*, zone objective of the *R2 Low Density Residential* or objective of *Clause 4.1A Minimum Lot sizes and special provisions for dual occupancies of Canterbury-Bankstown Local Environmental Plan 2023* by which the proposal did not satisfy. It can therefore be concluded that the proposal does satisfy the relevant objectives of the statutory LEP controls applicable to the development.
4. Council's incapacitation to support a less than 1% variation impair the provisioning new housing in the area and is further contrary State Governments intent to provide more housing in NSW and Sydney as evidenced by the recent amendments to *State Environmental Planning Policy (Housing) 2021* which incorporate provisions to permit Dual occupancies in R2 Low Density Residential zones **across the state** (Chapter 6, Part 2, Clauses 166-168) with a minimum non-discretionary development standard (a standard by which Council cannot refuse the application) lot width requirement of 12 metres. Failure to support a requested variation to Clause 4.1A of Canterbury-Bankstown Local Environmental Plan 2023 would not prevent the development proceeding as a development application made to Council under the SEPP (Housing) 2021 provisions. Further prevaricating by Council on the current Clause 4.1A basis will not prevent the application being resubmitted in a form which will be unable to be refused on lot frontage grounds and consume more resources of Council preserving a control which has been superseded by State Based controls. The new SEPP (Housing) 2021 controls override Canterbury Bankstown Local LEP based Planning Controls and Council would therefore be unreasonably and unnecessarily upholding what is in effect now a redundant lot frontage requirement.
5. The contravention of the standard does not result in any material adverse environmental impacts to adjoining properties and the proposal has been designed to make maximum use potential built envelope on the site without any noteworthy amenity impacts arising from the contravention. This a position now supported by Councils refusal of DA-257/2025 with a determination which did not yield a single planning based reason for refusal being only based on a non compliance with a stated frontage requirement which, as detailed in the previous paragraph, has been superseded by State Based Planning legislation which will override local LEP based controls. The SEPP (Housing) 2021 Controls are also a control under the state

legislation which cannot be used for a basis of refusal. In effect the 15 metre requirement has been abandoned by virtue of being overridden by a newer and more lenient 12 metre frontage requirement. The Canterbury-Bankstown Local Environmental Plan 2023 requirement is therefore now unnecessary. It is also further submitted that to apply utilising the new Low and Mid Rise Housing provisions of SEPP (Housing) 2021 is unnecessary when the variation is less than 1% or a 5 centimetre non compliance when dual occupancies are a form of permissible development in the zone and **can** be considered under the LEP provisions.

6. The proposal in itself does not impede the development of surrounding sites in accordance with the future identified character of the locality and new state-based legislation.
7. The proposed development is compatible with adjoining residential development, is articulated and features a mix of materials, colours and landscaping which make it visually sympathetic to neighbouring buildings. Importantly, the variation to the minimum frontage of the development standard does not result in any new building height increase or unreasonable impacts to residential amenity, solar access, views or privacy. Accordingly, the objective achieves objective 1.3 (g) of the EP&A Act, *"to promote good design and amenity in the built environment"*.
8. The proposal, continues to promote good design and amenity of the built environment, resulting in improved urban design and amenity considerations for both the local community and future occupants of the building.
9. The contravention does not detract from the achievement of the objectives of the R2 Low Density Residential, Minimum frontage development standard
10. Continued refusal of the variation would result in a site with an underutilised envelope, potential development and not result in an improved development outcome on the site.

In the circumstances it is considered reasonable and appropriate to adopt a flexible approach the height standard for the proposed development. The extent of variation being of a minor impact, and there being no utility or improvement to site conditions being achieved via refusal of the development, is sufficient basis to support the variation.

## CONCLUSION

This submission requests a variation, under clause 4.6 of the *Canterbury Bankstown Local Environmental Plan 2023 Local Environmental Plan 2013*, to the Minimum site frontage requirement development standard and demonstrates that:

- i. Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- ii. The development achieves the objectives of the development standard and is consistent with the objectives of the standard and zone;
- iii. There are sufficient environmental planning grounds to justify the contravention;

The consent authority can be satisfied to the above and that the development achieves the objectives of the development standard and is consistent with the objectives of R2 Low Density



Residential notwithstanding non-compliance with the standard. Sufficient Environmental Planning Grounds have also been identified in support of this variation request.

On this basis, therefore, it is appropriate to exercise the flexibility provided by clause 4.6 in the circumstances of this application.