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CLAUSE 4.6 REQUEST FOR VARIATION TO CLAUSE 4.4 (2B)(b)(ii) FLOOR SPACE RATIO

OF

*Canterbury-Bankstown Local Environmental Plan 2023
(CBLEP 2023).*

12 Bykool Avenue, Kingsgrove NSW 2208

1. INTRODUCTION:

This submission seeks to vary a development standard pursuant to Clause 4.6 of the *Canterbury-Bankstown Local Environmental Plan 2023 (CBLEP 2023)*. The relevant provision is Clause 4.4 (2B)(b)(ii) – Maximum Floor Space Ratio for dwelling houses.

This written request supports the proposed demolition and construction of a two storey dwelling house at 12 Bykool Avenue Kingsgrove. The proposal is based on the plans prepared by Natek Pty Ltd, dated 12 November 2025.

Under Clause 4.4 (2B)(b)(ii) and as identified on the *Clause Application Map “Area 2”* the maximum Floor Space Ratio allowed for dwelling houses is 0.55:1. The subject site has an area of 524.3 m². The proposed dwelling has a total 317.2 m² which is equivalent to FSR 0.60:1.

The maximum FSR control under Clause 4.4(2B) of the CBLEP 2023 is a development standard for the purposes of the *EP&A Act 1979*.

This request is made with regard to key planning principles established in:

- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*,
- *Wehbe v Pittwater Council [2007] NSWLEC 827*,
- *Big Property Pty Ltd v Randwick City Council [2021]*, and
- *SJD DB2 Pty Ltd v Woollahra Council [2020] NSWLEC 1112*.
- *Legal and General Life v North Sydney Municipal Council (1990) 69 LGRA 201*,
- *FouR1Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (FouR1Five)*,
- *Winten Property Group Ltd v North Sydney Council [2001] NSWLEC 46*

This variation request addresses the relevant provisions of Clause 4.6 of CBLEP 2023 and outlines the reasons why strict adherence to the maximum floor space ratio standard is unreasonable and unnecessary in this case. It demonstrates that:

- The development is consistent with the objectives of the development standard under Clause 4.4 (2B).
- The proposal is consistent with the objectives of the Zone R3 Medium Density Residential zone.
- There are sufficient environmental planning grounds to justify the variation

2. DEVELOPMENT STANDARD TO BE VARIED – MAXIMUM FLOOR SPACE RATIO

The relevant development standard to be varied is the maximum FSR 0.55:1 control under Clause 4.4. Clause 4.4 (2B) (2) of CLEP 215 relevantly provides:

4.4 Floor space ratio

(1) *The objectives of this clause are as follows—*

(a) *to establish the bulk and maximum density of development consistent with the character, amenity and capacity of the area in which the development will be located,*

- (b) to ensure the bulk of non-residential development in or adjoining a residential zone is compatible with the prevailing suburban character and amenity of the residential zone,
- (c) to encourage lot consolidations in commercial centres to facilitate higher quality built form and urban design outcomes,
- (d) to establish the maximum floor space available for development, taking into account the availability of infrastructure and the generation of vehicular and pedestrian traffic,
- (e) to provide a suitable balance between landscaping and built form in residential areas.

(2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.

(2B) Despite subclause (2), the following maximum floor space ratios apply—

(b) for a building used for the purposes of dwelling houses or semi-detached dwellings on land identified as “Area 2” on the Clause Application Map—

- (i) for a site area less than 200m²—0.65:1, and
- (ii) for a site area greater than 200m² but less than 600m²—0.55:1, and
- (iii) for a site area of 600m² or more—0.5:1,

The relevant maximum floor space ration identified below is identified below

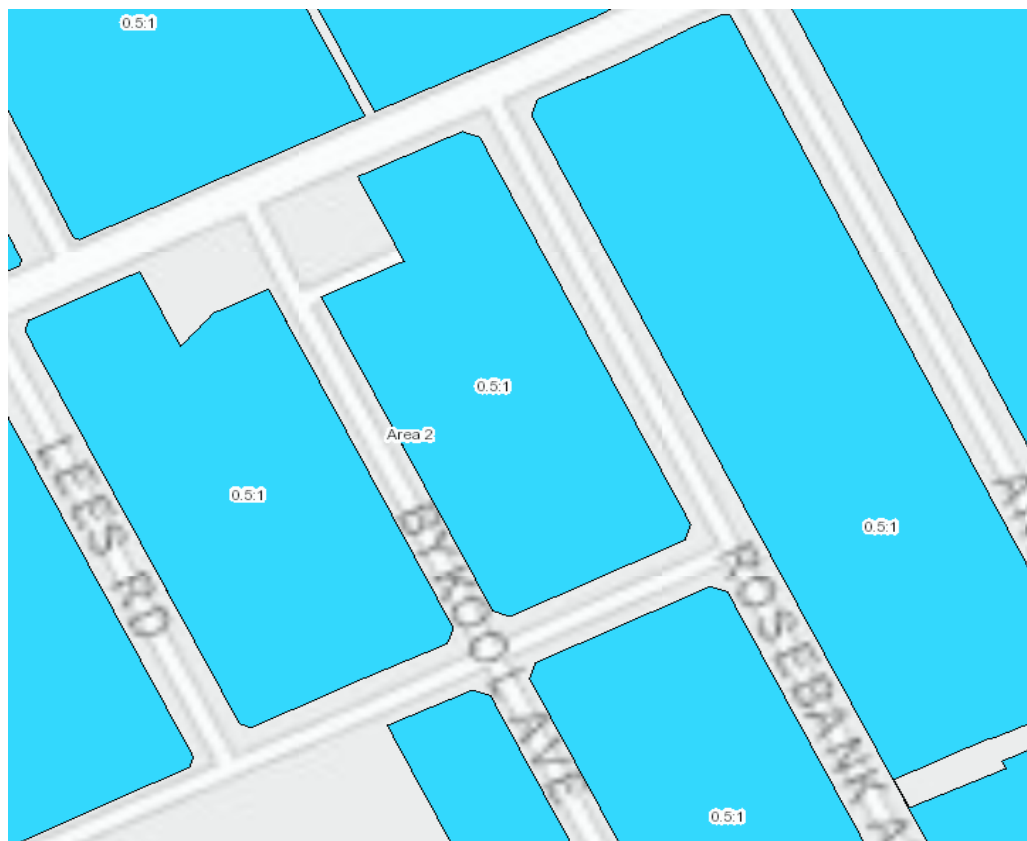


Figure 1: Area 2 Clause Application Map (CBLEP 2023), source: NSW Planning Portal

3. NATURE OF VARIATION SOUGHT

This clause 4.6 Request relates to the proposed two storey dwelling house.

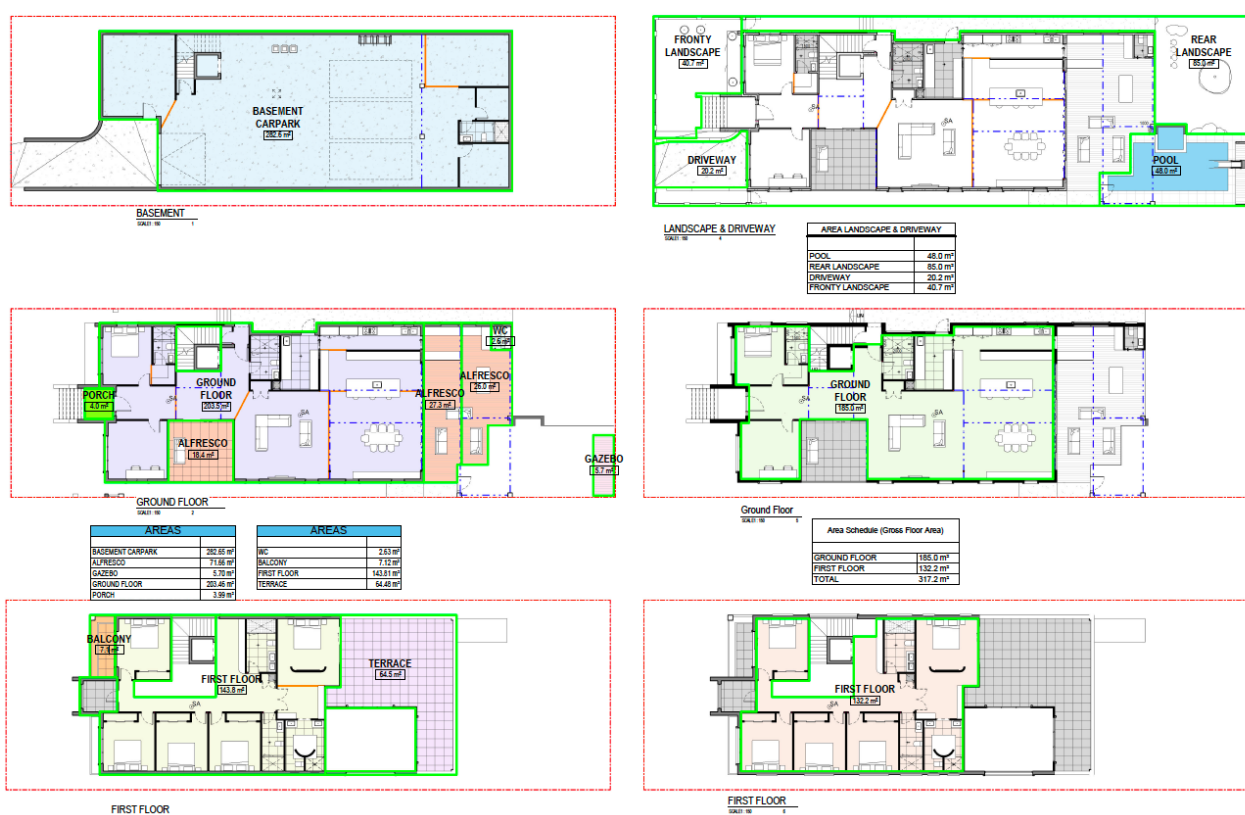
The subject site is located within a zone where the maximum FSR allowed for dwelling house is 0.55:1 under the Canterbury Bankstown Local Environmental Plan 2023 (CBLEP 2023).

Existing total site area: 524.3 m²

Maximum allowed Gross Floor Area (GFA) is 288.38 m² under CBLEP 2023 for the site.

The proposed Gross Floor Area (GFA) is 317.2 m², which is equivalent to FSR 0.60:1

Extent of non-compliance: **28.81 m² or 9.9%.**



It is important to highlight that Clause 4.6 functions similarly to State Environmental Planning Policy No 1 – Development Standards (SEPP 1) in that the magnitude or **percentage of the variation alone is not considered a material factor** in determining whether the variation should be permitted¹. In the matter of *Legal and General Life v North Sydney Municipal Council (1990) 69 LGRA 201*, the court upheld the decision of North Sydney Council to allow 329% variation for FSR control and 240% for Height control. To provide a basis for comparison, this particular Development Application (DA) involves a variation of **9.9%**.

¹ The Court of Appeal considered the issue in *Legal and General Life v North Sydney Municipal Council (1990) 69 LGRA 201* (where North Sydney Council had approved a SEPP 1 objection allowing the FSR control of 3.5:1 to be increased to 15:1 (329% variation), and the 5-storey height control to be increased to 17-storeys (240% variation). The Court approved the following statement by Chief Judge (in *Legal and General Life v North Sydney Council (1989) 68 LGRA 192, 203*), and upheld the validity of the Council's decision:

The discretion vested in councils under SEPP No 1 is wide and, subject to limitations found in the instrument itself and its relation to the EP&A Act 1979, is unconfined. [emphasis added]

4. CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

The following provides a response to relevant Clause 4.6 provisions of *Canterbury Bankstown Local Environmental Plan 2023*

Clause 4.6 (2) provides that

(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.

The maximum FSR for dwelling house development standard is not expressly excluded from the operation of cl4.6 and accordingly, consent may be granted.

Clause 4.6 (3) provides that

(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.*

(Note—The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b)).

The proposed development does not comply with maximum Floor Space Ratio development standard pursuant to cl.4.4(2B)(b)(ii) of the *CBLEP 2023*. However, strict compliance is considered to be unreasonable and unnecessary in the circumstances of this case as detailed further in this written request.

5. COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THIS CASE. [CL. 4.6(3)(A)]

Compliance with the development standard is considered unreasonable and unnecessary in the circumstances of the case. In the decision of *Four2Five*, the Commissioner identified to satisfy Clause 4.6(3)(a) merit considerations were required to be amounted to no more than establishing an absence of environmental harm.

Also, in *Four2Five*, it was considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827 (*Wehbe*). Under *Wehbe*, the most common way of demonstrating that compliance is unreasonable or unnecessary, was whether the objectives of the standard were still met despite the contravention of that standard.

Therefore, to determine “unreasonable and unnecessary” the 5-Part-Test outlined in *Wehbe* is considered to be relevant in demonstrating unreasonable and unnecessary in the circumstances of the case. Although these tests are primarily relative to the function of SEPP1, the tests are not exhaustive or prescriptive. The tests assist in adequately addressing the non-conformity allowing the consent authority with the ability to grant consent.

Test 1: The objectives of the development standard are achieved notwithstanding the non-compliance.

The objectives of the Clause 4.4 are as follows:

- (a) to establish the bulk and maximum density of development consistent with the character, amenity and capacity of the area in which the development will be located,,***

The proposed dwelling house contributes to the intended residential density for the R3 Medium Density Residential zone. While the site does not meet the numerical FSR standard, the development provides an appropriate residential yield within the capacity of local infrastructure and services.

This objective is achieved despite the variation. The proposed development presents as a well-articulated two storey dwelling that is consistent in scale, form and presentation with surrounding residential development within Bykool Avenue and the broader Kingsgrove locality. The building complies with the maximum height control, required setbacks, site coverage and deep soil requirements, which collectively regulate perceived bulk and scale more directly than FSR alone.

The additional floor area is predominantly accommodated within the internal layout and basement level, resulting in no adverse increase in visual bulk when viewed from the street or adjoining properties. The streetscape character remains intact, and the development does not appear excessive or dominant. Amenity impacts relating to privacy, overshadowing and visual impact are adequately mitigated through compliance with DCP controls. Accordingly, the proposed density is consistent with the established character and amenity of the area.

- (b) to ensure the bulk of non-residential development in or adjoining a residential zone is compatible with the prevailing suburban character and amenity of the residential zone.***

This objective is not directly applicable to the proposal, as the development is a single dwelling house and does not involve non-residential uses. Notwithstanding this, the proposal reinforces residential character and does not introduce any use or built form that would undermine suburban amenity. As such, the intent of this objective is inherently satisfied.

(c) to encourage lot consolidations in commercial centres to facilitate higher quality built form and urban design outcomes,

This objective is not relevant to the subject development. The site is located within a residential street and does not form part of a commercial centre or involve lot consolidation. The proposed FSR variation does not undermine the intent of this objective, nor does it create any precedent that would discourage appropriate consolidation in commercial areas. The objective is therefore satisfied in principle.

(d) to establish the maximum floor space available for development, taking into account the availability of infrastructure and the generation of vehicular and pedestrian traffic.

This objective is achieved notwithstanding the minor exceedance in FSR. The proposal is for a single dwelling house, which will not generate traffic beyond what is reasonably expected for a residential use of this nature. On-site parking is fully provided within the basement in accordance with DCP requirements, ensuring no reliance on street parking.

The site is well serviced by existing infrastructure, including water, sewer, stormwater, electricity and public transport. The modest increase in floor area does not result in any additional demand that would exceed infrastructure capacity. Pedestrian and vehicular movements remain consistent with the intended residential function of the site. Accordingly, the maximum floor space objective is satisfied in a practical and planning sense.

(e) to provide a suitable balance between landscaping and built form in residential areas.

This objective is clearly achieved. The proposal complies with site coverage and deep soil requirements, with approximately 23.98% of the site provided as deep soil area. Extensive landscaping is incorporated within the front, side and rear setbacks, contributing positively to visual amenity, softening built form and enhancing the streetscape.

The additional floor space does not reduce landscaped areas nor compromise private open space. The balance between built form and landscape is appropriate for a residential allotment of this size and zoning, and supports both environmental and amenity outcomes consistent with the intent of the control.

Test 2: The objective of the development standard is not relevant to the development (and therefore, it is unnecessary to comply with the standard).

While the development standard has a legitimate planning purpose in general terms, its strict application is not necessary in this instance, as the objective is already achieved as outline above. As such, compliance is unnecessary, and a variation is appropriate in the circumstances.

Test 3: Compliance with the standard would thwart or defeat the objective of the standard (and therefore it is unreasonable to require compliance)

Requiring strict compliance with the FSR standard would compromise the ability to deliver a functional and well-designed dwelling that responds appropriately to the site's dimensions, zoning and context. Reducing the proposed floor area to achieve compliance would likely result in a less efficient internal layout or a design outcome that undermines residential amenity and architectural quality.

The proposal already achieves the objectives of the standard by maintaining an appropriate built form, respecting neighbourhood character, and ensuring adequate landscaping and open space. Enforcing compliance would not improve bulk, density or amenity outcomes and would instead frustrate the

underlying objective of achieving high-quality residential development. Accordingly, compliance in this case would be unreasonable.

Test 4: The standard has been abandoned by the Council through other approvals that exceed the standard.

Within the surrounding locality, Council has approved a number of dwelling house developments that exceed the prescribed FSR control, particularly where proposals demonstrate compliance with height, setback, site coverage and amenity standards. This indicates a consistent and established planning approach that allows flexibility in the application of the FSR standard where the objectives are otherwise satisfied.

The approval of similar variations demonstrates that the standard is applied with discretion rather than rigidly enforced, especially for minor exceedances that result in acceptable planning outcomes. The proposed variation is modest in scale and consistent with this established approval pattern.

Test 5: The zoning is unreasonable or inappropriate and therefore the development standard applying to that zoning is unreasonable or inappropriately applied to the site.

Not applicable as the zoning of the site is appropriate.

6. THERE ARE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE STANDARD. [cl. 4.6(3)(b)]

There are sufficient environmental planning grounds to justify the proposed variation, as required under Clause 4.6(3)(b) of CBLEP 2023. This position is supported by the principles set out in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, which make clear that a variation must be supported by site-specific environmental planning grounds, not just general desirability or financial benefit. Further, in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009, the Court emphasised that the applicant must demonstrate a sufficiently strong planning rationale to depart from the standard.

In this case, the variation is well-supported by the following site-specific planning grounds:

- ***Site functionality and suitability:*** Although the proposed development exceeds the maximum permissible Floor Space Ratio by a modest margin, the subject site is demonstrably capable of accommodating the additional floor space while fully complying with all other critical development controls, including building height, setbacks, site coverage, deep soil provision, landscaping and on-site parking. The proposal confirms that the FSR standard, while numeric in nature, is not determinative of acceptable planning outcomes in isolation. This approach is consistent with the findings in *Wehbe v Pittwater Council* [2007] NSWLEC 827, where the Land and Environment Court recognised that compliance with a numerical standard is not, of itself, conclusive of whether a development achieves the objectives of the relevant planning controls.
- ***No adverse environmental or amenity impacts:*** The development maintains privacy, solar access, and visual separation from neighbouring properties. The variation does not give rise to any material environmental effects, satisfying the planning principles of *Winten Property Group Ltd v North Sydney Council* [2001] NSWLEC 46.

- **Consistency with neighbourhood character:** The proposed dwelling is consistent with the emerging built form within Bykool Avenue and the surrounding Kingsgrove locality, which includes a number of contemporary two storey dwellings with basement accommodation. The development presents as a conventional two storey residence when viewed from the public domain and integrates appropriately with the established residential character..
- **High level of residential amenity achieved:** The proposal satisfies DCP controls relating to solar access, overshadowing, visual privacy, acoustic privacy and private open space. Shadow diagrams confirm no unreasonable loss of sunlight to neighbouring properties, and window placement and setbacks ensure privacy is maintained. The variation does not result in any amenity impacts beyond what is acceptable in a medium density residential zone.

Taken together, these points demonstrate that the proposal is well founded on environmental planning grounds, specific to the site and supported by both policy and case law. Accordingly, the variation satisfies the legal and planning tests of Clause 4.6(3)(b) and is reasonable and appropriate in the circumstances.

7. OTHER MATTERS FOR CONSIDERATION

Consistency with the Zone Objectives:

Zone R3 Medium Density Residential

Objectives of zone

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *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.*
- *To allow for development that provides a suitable visual transition between high density residential areas and low density residential areas.*
- *To ensure suitable landscaping in the medium density residential environment.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To allow for increased residential density in accessible locations to maximise public transport patronage and encourage walking and cycling.*
- *To promote a high standard of urban design and local amenity.*

The following provides a review of the zone objectives:

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

The proposed development delivers a contemporary two storey dwelling that contributes to the ongoing provision of housing within an established medium density residential area. The minor increase in floor space does not alter the residential nature of the development nor intensify use beyond what is appropriate for the zone. The proposal remains consistent with the intended residential function and supports housing supply without adverse impacts.

- ***To provide a variety of housing types within a medium density residential environment***

The proposal introduces a modern dwelling typology that reflects evolving housing needs and expectations within the R3 zone. The FSR variation allows for a functional internal layout and contemporary design outcome without changing the building's overall form or scale. This supports diversity in housing design while remaining compatible with surrounding development..

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

The development is residential in nature and does not inhibit the ability of the zone to accommodate complementary land uses. The proposal does not restrict access, infrastructure capacity or amenity that would otherwise support day-to-day services. Accordingly, the FSR variation does not undermine this objective.

- ***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.***

While the proposal does not include non-residential uses, it does not preclude or conflict with such uses within the broader zone. The scale, bulk and presentation of the development maintain residential amenity and compatibility, ensuring that the intent of this objective is upheld.

- ***To allow for development that provides a suitable visual transition between high density residential areas and low density residential areas.***

The development achieves an appropriate visual transition through its compliant two storey height, articulated façade and generous setbacks. The modest FSR exceedance does not result in excessive bulk or massing and does not visually distinguish the dwelling from other contemporary residences in the locality. The proposal reinforces a transitional built form consistent with the zone's intent.

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

The proposal provides substantial landscaping and deep soil areas in accordance with DCP requirements. The additional floor space does not reduce landscaped areas or compromise the balance between built form and open space. Landscaping is integrated into the front, side and rear setbacks, enhancing visual amenity and contributing positively to the streetscape.

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

The development remains wholly residential and is compatible with surrounding residential properties. The FSR variation does not introduce additional intensity or impacts that would create land use conflict. Privacy, overshadowing, noise and visual impacts are appropriately managed, ensuring harmonious integration with adjoining sites

- ***To allow for increased residential density in accessible locations to maximise public transport patronage and encourage walking and cycling***

The subject site is located within close proximity to public transport, schools, shops and open space. The minor increase in floor space aligns with the strategic intent of accommodating residential development in accessible locations. The proposal supports sustainable transport patterns without generating additional traffic or parking demand beyond acceptable levels.

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

The proposal demonstrates a high standard of architectural design, with careful consideration given to scale, articulation, materials and internal amenity. The FSR variation facilitates a well-resolved design outcome without compromising neighbourhood character or residential amenity. The development complies with height, setback and design controls, resulting in a positive contribution to the local built environment

Despite the proposed variation to the Floor Space Ratio standard, the development satisfies the objectives of the R3 Medium Density Residential zone. The variation enables a high-quality, site-responsive residential outcome that aligns with strategic planning objectives, protects amenity and reinforces the intended character of the zone.

8. IS THE VARIATION WELL FOUNDED?

In summary, this Clause 4.6 variation request is well founded and satisfies the requirements of Clause 4.6 of the Canterbury-Bankstown Local Environmental Plan 2023 for the following reasons:

- **Strict compliance with the Floor Space Ratio standard would be unreasonable and unnecessary**

Compliance with Clause 4.4 (Floor Space Ratio) would be unreasonable in the circumstances of this application, as the proposed development achieves the objectives of the standard notwithstanding the minor numerical exceedance. The additional floor space does not result in excessive bulk, scale or density and does not give rise to adverse amenity or environmental impacts. As demonstrated, the numeric standard is not determinative of planning performance in this instance.

- **Sufficient environmental planning grounds justify the variation**

There are sufficient environmental planning grounds to support the departure from the FSR standard. The variation facilitates a high-quality design outcome that responds appropriately to the site's size, configuration and context. Achieving strict compliance would require a reduction in internal amenity or an inferior design outcome, without delivering any corresponding planning or environmental benefit.

- **Consistency with the objectives of the development standard and the R3 zone**

The proposal is consistent with the objectives of Clause 4.4 of the LEP, as it maintains appropriate bulk, scale and density, and ensures a suitable balance between built form and landscaping. The development also aligns with the objectives of the R3 Medium Density Residential zone by providing a compatible residential form that respects neighbourhood character, maintains amenity and supports housing in a well-serviced location.

- **The proposal is in the public interest**

The development is in the public interest as it delivers a well-designed dwelling in an accessible location without adverse impacts on surrounding properties or public infrastructure. There is no identifiable public benefit in rigidly enforcing the numerical FSR standard in this case, particularly where the proposal achieves a planning outcome equal to or better than a compliant development and aligns with State and local planning objectives.

Accordingly, the proposed FSR variation is reasonable, appropriate and justified on its planning merits. The consent authority may be satisfied that the requirements of Clause 4.6(3) and (4) of the Canterbury-Bankstown Local Environmental Plan 2023 have been met, and that the proposed development warrants approval.

Your sincerely



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