



**Land & Housing
Corporation**

Application to vary the Floor Space Ratio under Clause 4.6 of the Bayside Local Environmental Plan 2021

Accompanying a development application for a

Seniors Housing Development



at

**6-12 Dalley Avenue and 212 Banksia Street,
Pagewood, NSW 2035
Lots 39-42 in DP35159 and Lot 37 in DP 35160**

September 2021

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EXECUTIVE SUMMARY

The NSW Land and Housing Corporation requests that the Bayside Council grant consent to the proposed development at 6-12 Dalley Avenue and 212 Banksia Street, Pagewood, despite the proposed development contravening the Floor Space Ratio development standard within the *Bayside Local Environmental Plan 2021* (BLEP 2021).

The request is reasonable and justified in that compliance with the standard is unnecessary on the grounds that:

- There are sufficient environmental planning grounds to justify the contravention of the development standard namely the provision of more social housing in an accessible location consistent with the NSW Government's Plan *Future Directions for Social Housing in NSW*, the *Greater Sydney Region Plan 2018*, the *Eastern City District Plan 2018*, the *Bayside Housing Strategy 2020-2036*, and consistency with the relative objectives of the development standard under BLEP 2021;
- The proposed development is in the public interest, as the objectives of the land use zone and the standards are both achieved notwithstanding the non-compliance;
- The contravention achieves a better outcome for, and from, the development without significant environmental impact by providing more social housing, better utilisation of well-located land, efficient use of existing serviced urban land; and
- The request satisfies the tests set by the Land and Environment Court for the justification and assessment of variations to development standards.

The extent of variation sought is 49.1% to the standard prescribed. In considering this request, it should be noted that in a recent decision of the NSW Land and Environment Court, it was held that a Clause 4.6 variation was not required to exceed height and floor space ratio standards in a Local Environmental Plan for seniors housing under the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004. Such a request is ousted through cl 5(3) of that SEPP. The decision can be found at *Eastern Suburbs Leagues Club Ltd v Waverley Council* [2019] NSWLEC 130. From case law, although not technically required, a Clause 4.6 request has been provided, should Council consider it warranted/necessary.

1 INTRODUCTION

1.1 Site Description

The site consists of five (5) Torrens title lots, legally described as Lots 39-42 in DP35159 & Lot 37 in DP 35160, known as No 6-12 Dalley Avenue and 212 Banksia Street, Pagewood, and located within the Bayside Council Local Government Area (LGA).

The development site has a total area of 2,820.2m², and is a corner lot located on the western side of the three-way intersection of Banksia Street, Page Street and Dalley Avenue. The site is irregular in shape, and by survey has a frontage to Dalley Avenue of approximately 63m, a splayed frontage to Page Street of approximately 10m, and frontage to Banksia Street of approximately 74m.

1.2 Proposed Development

The NSW Land and Housing Corporation (LAHC) proposes a two (2) and three (3) storey seniors housing development, providing for 33 self-contained dwellings; consisting of two (2) studio apartments, 19 x one-bedroom dwellings and 12 x two bedroom dwellings; with a floor space ratio (FSR) of 0.82:1. This exceeds the 0.55:1 FSR in Clause 4.4 *Floor space ratio* of the BLEP 2021 by 49.1%.

In considering this request, it should be noted that in a recent decision of the NSW Land and Environment Court, it was held that a Clause 4.6 variation was not required to exceed height and floor space ratio standards in a Local Environmental Plan for seniors housing under the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004. Such a request is ousted through cl 5(3) of that SEPP. The decision can be found at *Eastern Suburbs Leagues Club Ltd v Waverley Council [2019] NSWLEC 130*. From case law, although not technically required, a Clause 4.6 request has been provided, should Council consider it warranted/necessary.

Clause 4.6 of the BLEP 2021 provides Bayside Council with a degree of flexibility in applying the standards to the proposed development. This is subject to a written request by the applicant justifying any contraventions and demonstrating that compliance is unreasonable or unnecessary in the circumstance of the case. In addition, the Land and Environment Court, in *Wehbe v Pittwater Council (2007) NSW LEC 827*, *Winten Developments Pty Ltd v North Sydney Council (2001) NSW LEC 46* and *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* has articulated, principles and tests regarding the justification for, and assessment of, exceptions to development standards. The proposed development has been assessed against the established principles at **Section 4**.

This request therefore:

- Addresses the matters required to be considered by Council in exercising its discretion to the floor space ratio development standard under the BLEP 2021;
- Justifies the floor space ratio of the proposed development and demonstrates why compliance with the development standard is unnecessary and unreasonable in this case in terms of the objectives of the standard and the zone, as well as the tests for assessment established by the Land and Environment Court; and
- Demonstrates why Bayside Council should exercise its discretion by granting consent to the proposed development, despite a non-compliance with the BLEP 2021.

2 JUSTIFICATION FOR EXCEPTION TO THE STANDARDS

Clause 4.6 *Exceptions to development standards* of the BLEP 2021 provides Council with a degree of flexibility in applying the floor space ratio development standard to the subject development application (Clause 4.6(1)). This is provided that: the standards are not excluded from this discretion (Clause 4.6(2)); particular planning outcomes are achieved (Clause 4.6(3)); and that certain procedural requirements are met (Clauses 4.6(4)).

Each of these matters is addressed below.

2.1 Consistency with Objectives of the Clause

Clause 4.6 (1) states:

“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.”*

The non-compliance with the BLEP 2021 floor space ratio development standard is driven by the goal of achieving better outcomes for and from the development. The proposed development aims to achieve the objects of the EP&A Act, including:

- Object of the Act to promote the delivery and maintenance of affordable housing;
- Achieving the orderly and economic use and development of the land given its access to services and transport;
- Delivering more social (affordable) housing, consistent with the NSW Government’s *Future Directions for Social Housing in NSW* and the Bayside Housing Strategy 2020-2036;
- Achieving the objectives of the *Greater Sydney Region Plan 2018* and the *Eastern City District Plan 2018* regarding the provision of social (affordable) housing and high-density development in key transport nodes and corridors.

Despite the non-compliance with the standard, the proposed development will have a minimal impact on the amenity of the surrounding development with respect to overshadowing, views, visual impact and privacy.

2.2 Matters for consideration

In deciding whether or not to grant consent, Council is required to satisfy itself that the request for the variation demonstrates that:

- That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, (Clause 4.6(3)(a));
- There are sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b)); and
- The proposed development is in the public interest and consistent with the objectives of the standard and the zone in which the development is proposed to be carried out (Clause 4.6(4)(a)(ii)).

These clauses are addressed below.

Clause 4.6(3)(a) – Development standard is unreasonable or unnecessary

Compliance with the FSR standard is considered unreasonable and unnecessary given the following circumstances of this case:

- The proposed development achieves the objectives of the FSR standard and is consistent with the objectives of the zone notwithstanding non-compliance with the standard (see further discussion below).
- The FSR variation is necessary to facilitate provision of 33 affordable seniors housing units in accordance with LAHC's plans for the site. Strict compliance with the standard would prevent LAHC from achieving its affordable housing goals and reduce the number of affordable housing units available to the local community.
- There is a considerable public and social benefit arising from the provision of affordable housing. It is considered that the benefit of additional affordable housing allowed by the FSR variation far outweighs any minor perceived impacts associated with non-compliance with the FSR standard.
- The non-compliance would not result in any unreasonable environmental impacts (see further discussion below).

Clause 4.6(3)(b) – Environmental planning grounds

It is considered that there are sufficient environmental planning grounds to justify contravening the floor space ratio development standard under the BLEP 2021. The development is considered to be consistent with:

- The objectives of *Clause 4.4 Floor space ratio*;
- Relevant plans and strategies

These matters are addressed below.

Objectives of Clause 4.4 Floor space ratio

Table 1 Compliance with Clause 4.4 of the BLEP 2021

Objectives of Clause 4.4	Compliance	Comment
a) <i>to establish standards for the maximum development density and intensity of land use,</i>	N/A	Noted.
b) <i>to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality</i>	Yes	<p>The proposed development is compatible with the bulk and scale of the existing and desired future character of the locality. This is achieved by:</p> <ul style="list-style-type: none"> • adoption of building heights that are lower than the 10m maximum height limit prescribed for the area by Bayside Local Environmental Plan 2021, ensuring the development is consistent with the desired future character of the area. • adoption of building heights that are compatible in scale to existing surrounding developments. For example, the two storey portion of Building A has a building height of RL 27.556m. This is lower than the height of the adjoining two-storey residence at No. 4 Dalley Avenue, which has a height of RL 28.10m. The height of Building B, fronting Banksia Street is set marginally higher, but still lower than No. 4 Dalley Avenue, at RL 27.708m. These heights are common in the immediate area, particularly in instances of two storey developments, with pitched roof profiles.

		<p>Refer to Figures 33 & 35 in the Statement of Environmental Effects (SEE).</p> <ul style="list-style-type: none"> the three-storey component of Building A, located on the corner Dalley Avenue and Banksia Street, is compatible/consistent with other existing three-storey residential developments located on Page Street, including the residential flat building, located directly opposite, on the corner of Dalley Avenue and Page Street, at No. 11A Dalley Avenue. This is in addition to the higher density residential development located on the corner of Page Street and Holloway Avenue, located less than 200m southwest of the site. Refer to Section 3.3 of the SEE. division of the development into two separate buildings, Building A and B. Building B is designed, with minimal street frontage (with development/units to the rear), and two separate gable end roof profiles, at similar heights to surrounding developments, giving the appearance of a larger two-storey dual occupancy development, common/compatible to those in the area use of building form, design and siting that minimises the bulk and scale of the development, and includes; varied roof heights, changes in roof profiles, such as multiple gable ends - giving the appearance of separate dwellings; staggering and modulation of elevation alignments, including the setback lobby entry area, setback area above the basement driveway, and the use of recessed POS areas within the front elevations. the adoption of appropriate front and side setbacks, consistent with Council's controls, and surrounding residential development.
c) <i>to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,</i>	Yes	<p>The development has been designed to minimise any adverse environmental effects on adjoining properties and the public. This has been achieved though:</p> <ul style="list-style-type: none"> the adoption of building setbacks and heights that do not result in any unreasonable adverse overshadowing, onto adjoining properties. Due to the orientation of the subject site, the proposed development will result in some minor additional overshadowing of the adjoining property to the west at 210 Banksia Street, at the mid-winter solstice, between the hours of 9am and midday. The area overshadowed is primarily the driveway and front setback area. Notwithstanding this, the dwelling will continue to receive a minimum 3 hours of sunlight to living areas and POS areas between midday and 3.00pm. Refer to the Shadow diagrams provided, in Appendix C of the SEE. adoption of building setbacks and - considered dwelling layouts, including the careful placement and sizes of window/door openings, treatment of windows with obscured glazing and balconies with privacy screens, and

		<p>the positioning of private open space areas, to ensure no overlooking.</p> <ul style="list-style-type: none"> • adoption of recommended indicative treatments for major engineering services, as recommended in the acoustic assessment, to control noise impacts at external receivers • provision of landscaping plantings along common boundary lines, including Lemon Myrtle (x6), Cheese Tree (x1) and Japanese Elm (x1), that will reach mature heights of between 5m-20m, providing screening and a sense of separation between the subject, and neighbouring development. • retention of some of the existing mature trees along the front boundaries, specifically the two large prominent Morton Bay Figs on Banksia Street, which are visually prominent trees in the streetscape, and contribute significantly to the locations character. • development of high quality architecturally designed buildings, where building form, design and siting relates to the topography of the site, changes in roof profiles and staggering and modulation of elevation alignments have minimised the impact of the bulk and scale of the buildings on the streetscape and adjoining properties • provision of fencing that is appropriately located and designed (materials/height etc.).
<p>d) <i>to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing, and are not likely to undergo, a substantial transformation,</i></p>		<p>The development maintains an appropriate visual relationship to the existing character of the area through:</p> <ul style="list-style-type: none"> • the adoption of appropriate front and side setbacks, consistent with Council's controls, and surrounding residential development • adoption of building heights that are compatible in scale to surrounding developments, for example the neighbouring two-storey residence at No. 4 Dalley Avenue, and the three-storey Residential Flat Building, located directly opposite, on the corner of Dalley Avenue and Page Street, at No. 11A Dalley Avenue • adoption of building heights that are lower than the 10m maximum height limit prescribed for the area by Bayside Local Environmental Plan 2021, ensuring the development is consistent with the desired future character of the area • provision of fencing that is appropriately located and designed (materials/height etc.), and common in the surrounding area. • provision of landscaping plantings along boundary lines including Lemon Myrtle (x6), Cheese Tree (x1) and Japanese Elm (x1), that will reach mature heights of

		<p>between 5m-20m, providing screening and a sense of separation between the subject, and neighbouring development</p> <ul style="list-style-type: none"> • locating the three-storey section of the development, in the lowest part of the site, fronting Page Street. Page Street is of mixed character, being a main regional road subject to high vehicular traffic, where schools and other higher density residential developments and lower detached residential development front. It is not uncommon/unexpected to view such developments when driving along Page Street. • adopting common building elements/features and materials found in the area, including pitched gable roof profiles, staggering and modulation of elevation alignments and varied material choices, including brickwork, paint, cladding, and concrete. • retention of some of the existing mature trees along the front boundary of Banksia Street, including two prominent Morton Bay Figs. • adoption of a comprehensive landscaping scheme for the entire site, prepared in consideration of the streetscape and surrounding locality, incorporating both native and endemic species. The landscaping proposed will enhance the appearance of both the site and streetscape.
<p>e) <i>to ensure that buildings do not adversely affect the streetscape, skyline or landscape when viewed from adjoining roads and other public places such as parks, and community facilities,</i></p>	Yes	<p>The proposed development will not adversely affect the streetscape, skyline or landscape when viewed from adjoining public places. This is achieved through:</p> <ul style="list-style-type: none"> • the preservation of two large and prominent Morton Bay Figs fronting Banksia Street. These trees are the largest and most visually significant trees relating to the site, and greatly contribute to the adjoining streetscape and screening of the proposed built forms. • adoption of setbacks consistent with surrounding development. For example, Building A located closest to the western boundary, has a front setback to Dalley Avenue of 7.5m. This is the same as the neighbouring two-storey residence located at No. 4 Dalley Avenue, which also has a front setback of 7.5m. Building B has a staggered front setback to Banksia Street, starting at 3.471m and increasing. Similarly, Building B, on the southern side of the development mimics the building orientation and setback to Banksia Street of the adjoining residence, No. 210 Banksia Street, that is they are both aligned offset diagonally to the front boundary and similarly setback with their closest setbacks being 4.371m and 3.471m • adoption of building heights that are compatible in scale to surrounding developments. For example, Building A has a

		<p>two different heights, being RL 27.556m for the pitched section and RL 26.5m for the flat roofed section, whilst the height of Building B, fronting Banksia Street, is set marginally higher at 27.708m. These heights sit lower than the height of the adjoining two-storey residence at No. 4 Dalley Avenue, which has a height of RL 28.10m. These heights are common in the immediate area, particularly in instances of two storey developments, with pitched roof profiles.</p> <ul style="list-style-type: none"> • the three-storey component of Building A, located on the corner of Dalley Avenue and Banksia Street has a RL of 26.50m, and is consistent with the scale of the three-storey Residential Flat Building, located directly opposite, on the corner of Dalley Avenue and Page Street, at No. 11A Dalley Avenue. • adoption of building heights that are lower than the 10m maximum height limit prescribed for the area by Bayside Local Environmental Plan 2021, ensuring the development is consistent with the desired future character of the area • The development has been designed to respond to the topography of the site and the overall landform of the site will generally be retained.
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Relevant plans and strategies

The development provides for social housing and is therefore consistent with the NSW Government's Plan *Future Directions for Social Housing in NSW*, the *Greater Sydney Region Plan 2018*, and the *Eastern City District Plan 2018*.

Furthermore, the development will retain, upgrade and expand publically owned social housing in the Bayside LGA, a key deliverable of the *Bayside Housing Strategy 2020-2036*, endorsed by Council 10 March 2021, to Promote housing affordability. Modelling found in the Strategy showed that there will be a substantial increase in the demand for social and affordable housing in the LGA to address local housing need. The Strategy finds that between 2016 and 2036 an additional 5,405 households will require social and affordable housing. Lone person households, which the subject development will cater for with studio and one-bed units, will increase 2,493 over the same period. The Strategy stipulates that while Council can increase the supply of affordable housing in the Bayside LGA through identified actions, completely closing the gap would require substantial investment by the NSW Government and cannot be achieved by Bayside Council alone. This being the reason, that Strategy identifies as a key action to implement and deliver the plan that Bayside Council should... *Continue to engage with NSW Land and Housing Corporation regarding the retention, upgrade and potential expansion of publicly owned social housing in Bayside.*

Clause 4.6(4)(a)(ii) – the public interest

The proposed development will provide housing to meet the needs of the community, assisting LAHC in meeting its significant, long-standing and continually growing demand for social housing in the Bayside Council local government and surrounding areas. For example, at June 2020 there were over 46,000 households on the waiting list for social housing in NSW, whilst the waiting list in the Eastern Suburbs allocation zone (CS02), which incorporates the Bayside LGA is approximately 1,065, where the wait time for one and two bedroom units is between 5 to 10 years.

The development will assist LAHC to improve the amenity of accommodation for its tenants, by

providing new, more appropriate housing aligning with demand for seniors housing. The development will also improve the environmental sustainability of housing on the site, particularly through improved thermal performance, solar access, natural ventilation, energy and water efficiency.

Objectives of Clause 4.4 Floor space ratio

The objectives of the development standard are addressed in **Table 1** above. As noted in the table, the extent of variation is a 49.1% increase above the allowable floor space ratio of 0.55:1 (proposing 0.82:1). Notwithstanding the variation, it is considered that the building will still be compatible with the bulk and scale of the existing and desired future character of the locality, including accounting for the availability of infrastructure and generation of vehicular and pedestrian traffic.

The development provides for an appropriate transition from Page Street, a main road to surrounding developments to the west, and interfaces well with the existing character of the area, evident by the developments compliance with the 10m height control, and setback controls found in the DCP. Furthermore, any adverse environmental impacts on the use or enjoyment of adjoining properties and the public domain are minimised.

Objectives of the R2 Low Density Residential zone

The site identified within the *R2 Low Density Residential* zoning under the BLEP 2021. The objectives of the R2 zone are addressed below:

1) Objectives of zone

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure land uses are carried out in a context and setting that minimises impact on the character and amenity of the area.*
- *To enable residential development in accessible locations to maximise public transport patronage and encourage walking and cycling.*

The proposed development's non-compliant floor space ratio raises no inconsistencies with the objectives of the R2 zone. For example, the development provides for the housing needs of the community in a low-density residential environment, through the provision of various housing types, including studios, one and two bedroom units, all designed for seniors housing. The development is a direct response to the communities' immediate need for social and affordable housing, as identified in the *Bayside Housing Strategy 2020-2036*.

The development will not hinder the ability of surrounding lands to be developed for the purposes of providing facilities or services to residents. This is achieved by the developments compliant height, side and rear setbacks; adopting building designs that ensures that there will not be any overlooking or overshadowing issues. Noise attenuation measures have been incorporated into the design of the building to ensure noise emissions on nearby receivers from the operation of the base building services (i.e., electrical, hydraulic and mechanical plant) are compliant, with applicable guidelines.

The development is carried out in a context and setting that minimises any impact on the character and amenity of the area. This is achieved through the adoption of appropriate front and side setbacks, consistent with Council's controls, and surrounding residential development. The proposed height of the development is also compliant with Council's BLEP 2021 height control (10m), and is consistent with surrounding developments, being lower than neighbouring development at No 4 Dalley Avenue etc. The impact of the development is further minimised, owing to; considered dwelling layouts, including the careful placement and sizes of window/door openings, treatment of windows with obscured glazing

and balconies with privacy screens and the positioning of POS areas; provision of fencing that is appropriately located and designed (materials/height etc.); provision of landscaping plantings along boundary lines, and retention of existing mature trees along the front boundary of Banksia Street, including two (2) large and visually significant Morton Bay Figs; and concentrating the three-storey elements away from adjoining properties.

The development is located in an accessible location that will maximise public transport patronage. For example, the site is located within 400m of bus stops located on Page Street, accessed by an accessible path of travel along Dalley Avenue, Wentworth Avenue, and Page Street. The bus stops are located to the front of No. 31 Page Street (southbound travel) and 60 Page Street (northbound travel). These bus stops are serviced by one (1) regular scheduled State Transit bus service (Route 307), which includes frequent accessible services, during weekdays and on weekends. This service would take residents to a wide range of localities where services, facilities, shops and recreation facilities can be readily accessed including the Mascot town centre and train station (accessible), Matraville town centre, Botany town centre and Eastgardens Westfield Shopping Centre.

The development encourages walking by providing a combination of steps and ramps to, and throughout the site, allowing safe and efficient pedestrian movements. To ensure accessible paths of travel are provided to and from the development, LAHC is proposing to construct new suitable kerb ramps on either side of Dalley Avenue – so that a continuous path of travel can be provided to bus stops on Page Street. This is in addition to the regrading of footpaths along the frontage of the site (Refer to Architectural Plans in **Appendix C** of the SEE). The development encourages cycling through the provision of four (4) bicycle spaces in the basement, which is accessible and available to all residents.

2.3 Procedural Requirements

The procedural requirements of Clause 4.6 of BLEP 2021 are addressed below.

Clause 4.6(2)

Clause 4.6(2) states that *“this clause does not apply to a development standard that is expressly excluded from the operation of this clause”*.

Clause 4.4 Floor space ratio of the BLEP 2021 is not expressly excluded from the operation of Clause 4.6, and therefore, variation to the maximum floor space ratio can be considered under this clause.

Clause 4.6(3)

Clause 4.6 (3) requires a *“written request from the applicant that seeks to justify the contravention of the development standard”* that justifies *“compliance with the development standard is unreasonable or unnecessary in the circumstances of the case”*.

This Clause 4.6 variation provides a written request to contravene the BLEP 2021 floor space ratio development standard. In this instance, compliance with the maximum floor space ratio standard is considered unnecessary as the proposal allows the development to respond to design requirements for seniors housing developments and site constraints, whilst still achieving compliance with the relevant design standards and the desired development outcome envisaged by the planning controls.

Clause 4.6(4)(b)

Clause 4.6(4)(b) stipulates that *Council must not grant consent to any variation unless the concurrence of the Secretary has been obtained*.

Planning Circular no PS20-002 Variations to development standards (dated 5 May 2020) provides that the concurrence of the Secretary can be assumed where Councils have adopted Clause 4.6 of the Standard Instrument, subject to certain conditions.

In accordance with the Planning Circular, Sydney district and regional planning panels may assume the Secretary's concurrence where development standards will be contravened. The restriction on

delegates determining applications involving numerical or non-numerical standards does not apply to regionally significant development. This is because all regionally significant development, such as the subject application with a capital investment value of \$11.55M, is determined by a panel and is not delegated to council staff.

3 JUSTIFICATION FOR FLOOR SPACE RATIO VARIATION

The proposed floor space ratio of 0.82:1 represents a variation to the development standard prescribed in the BERP 2021 (0.55:1), constituting a 49.1% increase, which equates to an additional 768m² floor area. The increase in the floor space ratio allows LAHC to deliver an additional 13 x 1 bed units to the site (assuming 55m² unit areas) than would be able to be provided under the FSR control, each requiring greater accessibility areas for users with mobility issues such as those in wheelchairs, or walking assisted devices, typical with seniors housing development.

The development complies with Council's prescribed height limit of 10m, for the location. The setbacks of the dwellings comply with, and in many instances exceed, the Botany Bay Development Control Plan 2013 minimum setback requirements, as relevant to Multi Dwelling Housing. Owing to the nature of the variation, the design, scale and materiality of the proposed development, it is argued the development is consistent with the character of the locality, and for these reasons justifies the departure from Council's floor space ratio.

4 THE LAND AND ENVIRONMENT COURT PRINCIPLES/TESTS

Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118 is discussed below and addresses the correct approach to consider Clause 4.6 requests, see **Section 4.2**.

Two landmark cases articulate the Court's view on reasonable arguments for, and assessment of, requests for exceptions to development standards. These are discussed further below at **Section 4.2** and **Section 4.3**.

4.1 Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118

In his decision in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118*, Chief Justice Preston clarified the correct interpretation of Clause 4.6 requests with regard to Cl 4.6 (4)(a)(i) and (ii). A Cl 4.6 requests must:

- Adequately address the matters required by subclause (3) – that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Cl 4.6(3)(a)), and that there are sufficient environmental planning grounds to justify contravening the development standard (Cl 4.6(3)(b)); and
- Demonstrate that the proposed development will be in the public interest because it is consistent with the objectives of the development standard (in this case, Cl. 4.4 Floor space ratio) and land use zone objectives (in this case, R2 Low Residential zone) (Cl 4.6 (4)(a)(ii)).

These matters are addressed below.

With respect to the subject site, compliance with the 0.55:1 floor space ratio development standard is considered unnecessary in this case because the proposed development complies with the objectives of the subject development standard (*Clause 4.4 Floor space ratio*). The objectives of the development standards are addressed at **Section 2.2** above. Refer also to the five tests under *Wehbe v Pittwater Council* at **Section 4.2** below.

The development is considered to have sufficient environmental planning grounds given the development allows LAHC to address severe housing shortages and deliver greater housing choices to those in need, through the provision of units with greater accessibility areas/circulation spaces as needed by seniors with mobility issues.

The development will be in the public interest because it is consistent with the objectives of the R2 zone and achieves the objectives of the subject development standard. The proposed development has been designed to minimise any conflict with the adjoining properties such as overshadowing, privacy, sunlight, noise and view impacts. Refer to **Section 2.2** above.

The case also identifies that the outcome of the breach to a development standard does not necessarily need to be a *neutral* or *better* outcome, if the relevant environmental planning grounds to assess it against do not require such. With regard to overshadowing, visual impact and privacy the objective of the development standard is to *minimise* adverse environmental effects on the use or enjoyment of adjoining properties and the public domain (Cl 4.4(1)(e)). The proposed development has been designed to ensure that such impact to neighbours are minimised, and therefore complies with the objective.

4.2 Wehbe v Pittwater Council (2007) NSW LEC 827

In his decision in *Wehbe v Pittwater Council (2007) NSW LEC 827*, Chief Justice Preston expressed the view that there are five different ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary. The five tests are considered in the table below.

i. <i>The objectives of the standards are achieved notwithstanding non-compliance with the standard</i>	The proposed development complies with the objectives of <i>Clause 4.4 Floor space ratio</i> . The objectives of the standard are addressed at Section 2.2 above.
ii. <i>The underlying objectives or purposes of the standard are not relevant to the development and therefore compliance is unnecessary</i>	The underlying objectives of the standard are relevant to the development. However, as provided in this request, compliance with the standard is considered unnecessary in this case.
iii. <i>The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable</i>	The underlying object or purpose of the standards would not be defeated or thwarted if compliance was required.
iv. <i>The development standards have been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standards and hence compliance with the standard is unnecessary and unreasonable; and</i>	This exception to development standards request does not rely on this reason.
v. <i>The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.</i>	This exception to development standards request does not rely on this reason.

4.3 Winten Developments Pty Ltd v North Sydney Council (2001) NSWLEC 46

The exception to development standard request is assessed below against the accepted test for the assessment of development standard variation established by *Winten Developments Pty Ltd v North Sydney Council (2001) NSWLEC 46*.

a) Are the planning controls in question a development standard?	Yes, Clause 4.4 of the BLEP 2021 is a development standard.
b) What is the underlying object or purpose of the standards?	The objectives of the standard are addressed at Section 2.2 above.
c) Is compliance with the development standards unnecessary or unreasonable in the circumstances of the case?	Sections 2 and 3 demonstrate that compliance is unnecessary and unreasonable.

d) Is compliance with the development standards consistent with the aims of the Policy (to provide flexibility in the application of development standards); and, in particular, does compliance with the development standards tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act 1979?	As demonstrated in Section 2 , compliance with the standards would be inconsistent with the objectives of Clause 4.6 and would hinder the attainment of the objects of the Act as discussed in Sections 2, 3 and 4 of this request.
e) Is the objection well founded?	<p>The objection is well founded on the grounds that the non-compliance:</p> <ul style="list-style-type: none">– Enables the delivery of greater housing choices to those in need,– Allows for the delivery of an additional 13 x 1 bed units than would otherwise be achievable, therefore providing critical infrastructure,– Is required to address the long waiting list for social housing,– Has been demonstrated not to raise any issues of State or Regional planning significance,– Achieves the objects of the EP&A Act and will provide positive social impacts to the Bayside Local Government Area, and– Enables a development that reflects the changing character of the locality without significant environmental impacts on the use and enjoyment of adjoining land uses, such as overshadowing, privacy, sunlight, noise and view impacts.

5 CONCLUSION

The development proposes to vary the maximum BLEP 2021 floor space ratio standard of 0.55:1 by 49.1% resulting in a maximum floor space ratio of 0.82:1:1.

In considering this request, it should be noted that the Land and Environment Court of NSW in a recent decision in *Eastern Suburbs Leagues Club Ltd v Waverley Council [2019] NSWLEC 130* found that a Clause 4.6 variation is not required to exceed height and floor space ratio standards in a Local Environmental Plan for Seniors Housing under the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*. Although not technically required, the Clause 4.6 variation request has been provided, should Council consider it warranted/necessary.

The proposed development, with the non-compliant floor space ratio, will not result in a built form that will be out of character with surrounding residential development. Additionally, any potential impacts of the proposed development on surrounding dwellings are minimal, owing to considered design and the topography and orientation of the site.

The proposed floor space ratio is supported on environmental planning grounds and is in the public interest, as outlined in this report and as such in this instance compliance with the development standard is considered unnecessary and unreasonable..

It is therefore considered that the variation to the floor space ratio development standard at 6-12 Dalley Avenue and 212 Banksia Street, Pagewood, does not undermine the objectives of the development standard and the zone. The non-compliance results in a development that improves the amenity of future tenants without any discernible internal and external impacts. Council is therefore requested to exercise its flexibility under Clause 4.6 by granting development consent to the proposed development.