

IDAP REPORT

Property:	27 Boden Avenue STRATHFIELD DA2020/239 Lot: 62 DP: 15955
Proposal:	Alterations and additions to an unauthorised structure to comply with court order.
Applicant:	S Malass
Owner:	S Malass
Date of lodgement:	13 January 2021
Notification period:	25 January 2021 to 08 February 2021
Submissions received:	Seven (7)
Assessment officer:	P Santos
Estimated cost of works:	\$970,000.00
Zoning:	R2 - Low Density Residential - SLEP 2012
Heritage:	No
Flood affected:	Yes
Is a Clause 4.6 Variation Proposed:	Yes – Clause 4.4C (26.3% variation)
RECOMMENDATION OF OFFICER:	REFUSAL



Figure 1. Aerial imagery of the subject site (outlined) and its immediate locality.

EXECUTIVE SUMMARY

Proposal

Development consent is being sought for the alterations and additions to an unauthorised structure to comply with court order.

Site and Locality

The site is identified as 27 Boden Avenue, Strathfield and has a legal description of Lot 62 DP 15955. The site is a regular shaped parcel of land and is located on the western side of Boden Avenue.

The site has a width of 15.24m and an average depth of 50.29m and a total area of 765.1m².

The locality surrounding the subject site is predominantly characterised by low density residential development.

Strathfield Local Environmental Plan

The site is zoned R2 - Low Density Residential under the provisions of Strathfield LEP 2012 and the proposal is a permissible form of development with Council's consent. The proposal does not satisfy a principal development standard regarding the floor space ratio – Clause 4.4C.

Development Control Plan

The proposed development does not satisfy some provisions of the Strathfield Consolidated Development Control Plan 2005.

Notification

The application was notified in accordance with Council's Community Participation Plan from 25 January 2021 to 08 February 2021, where seven submission/s was/were received raising the following concerns;

- Stormwater;
- Visual privacy;
- Built-form;
- Earthworks; and
- Support for the demolition.

Issues

- Non-compliance with the floor space ratio development standard;
- Unreasonable excavation;
- Ground floor RL;
- Visual privacy;
- First floor side setback; and
- Built-form.

Conclusion

Having regards to the heads of consideration under Section 4.15 of the Environmental Planning & Assessment Act 1979, Development Application 2020/239 is recommended for refusal subject to attached reasons of refusal.

REPORT IN FULL

Proposal

Council has received an application for the alterations and additions to an unauthorised structure to comply with court order.

The Statement of Environmental Effects prepared by Planning Lab, dated 8 December 2020, has identified the proposal to be –

- The use of the land, including the use of the building and structures erected on the land;
- Additions and alterations to the existing structure to finish the building and make it capable of being occupied; and
- Remedial works such as the demolition of some unauthorised works.

The provided plans to council, prepared by AE Design Studio, have revealed that the proposal is made up of four levels. For clarification, in accordance with the definition of a basement in the SLEP 2012, their proposed basement cannot be categorised as a basement as the floor level above it is 1.92m above the EGL.

Basement is defined in the SLEP 2012 as follows:

basement means the space of a building where the floor level of that space is predominantly below ground level (existing) and where the floor level of the storey immediately above is less than 1 metre above ground level (existing).

For completeness, the proposed development is comprised of the following:

Basement level –

- Storage room.

Lower ground level –

- Demolition of the built unauthorised structures at the rear, side and front of the property, as identified in Figure 2;
- Three car parking spaces;
- Mechanical and pool equipment room;
- Cool room; and
- Laundry room.

Ground level –

- Demolition of the built unauthorised structures at the rear, side and front of the property, as identified in Figure 3;
- Study room;
- Common water closet;
- Open-plan living, dining and kitchen areas with adjoining pantry; and
- Alfresco.

First floor level:

- Five bedrooms; four with an ensuite each; and
- Lounge/family room.

External works:

- In-ground swimming pool;
- Water feature along the northern side of the house;
- Elevated landscaped areas, at the rear next to the alfresco and at the front of the dwelling; and
- Ancillary landscaping.

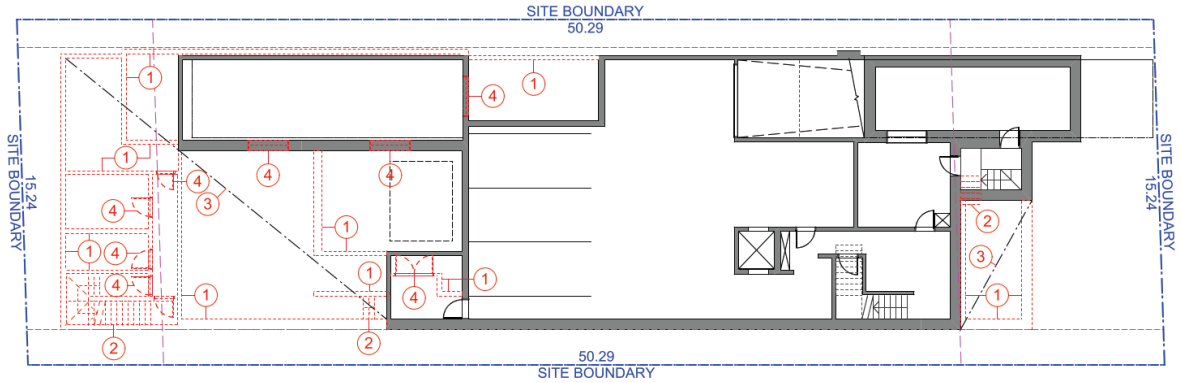


Figure 2. Extract of the proposed demolition plan – basement level (source: AE Design Studio).

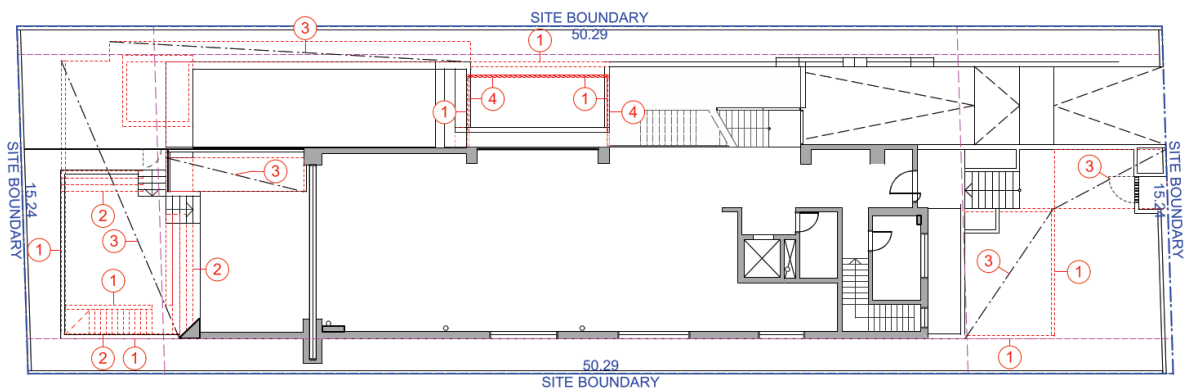


Figure 3. Extract of the proposed demolition plan – ground level (source: AE Design Studio).

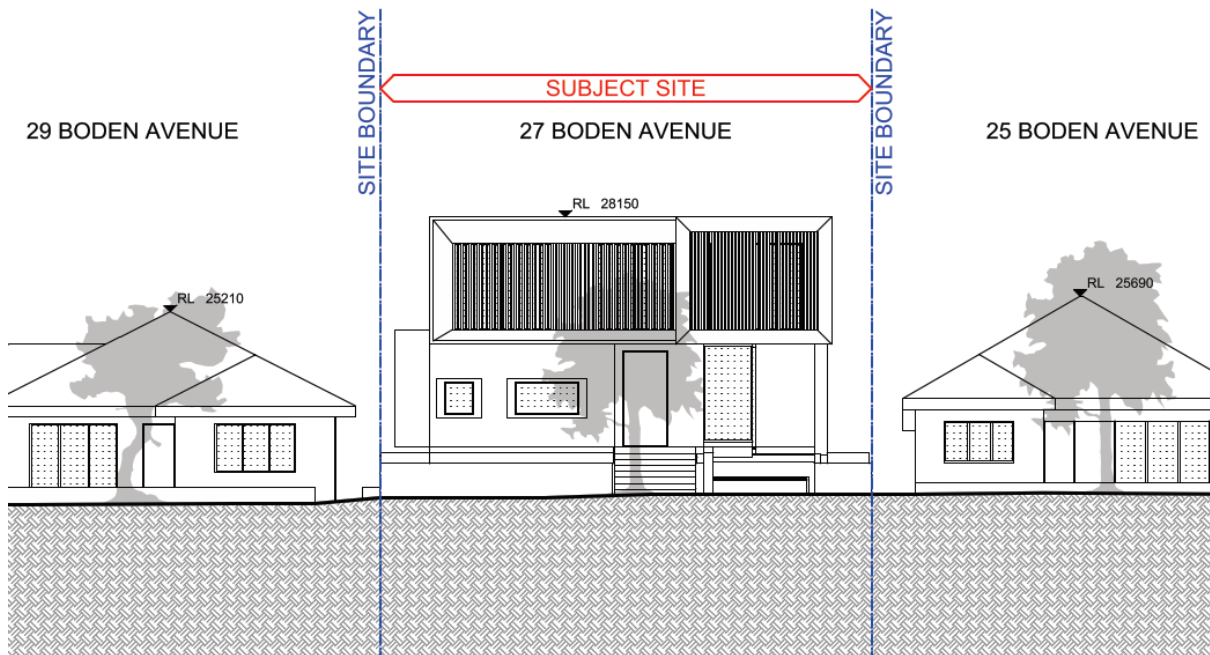


Figure 4. Extract of the streetscape elevation (source: AE Design Studio).

The Site and Locality

The subject site is legally described as Lot 62 DP 15955 and commonly known as 27 Boden Avenue, Strathfield. It is located off the western side of Boden Avenue, between Ada Avenue and Newton Road.

The site is rectangular in shape and has a width of 15.24m and an average depth of 50.29m and a total area of 765.1m².



Figure 5. Aerial imagery of the site (outlined) and the immediate locality (source: Nearmap, dated 26 January 2021).

The site is relatively flat with a minimal grade of 0.53% fall towards the rear.

The site is currently a construction site. The unfinished dwelling house on the site was a subject of a court order *Malass v Strathfield Municipal Council [2020] NSWLEC 168*. Figure 5A shows the as-built survey provided by council's Compliance Officer. More on this in the assessment section of this report.

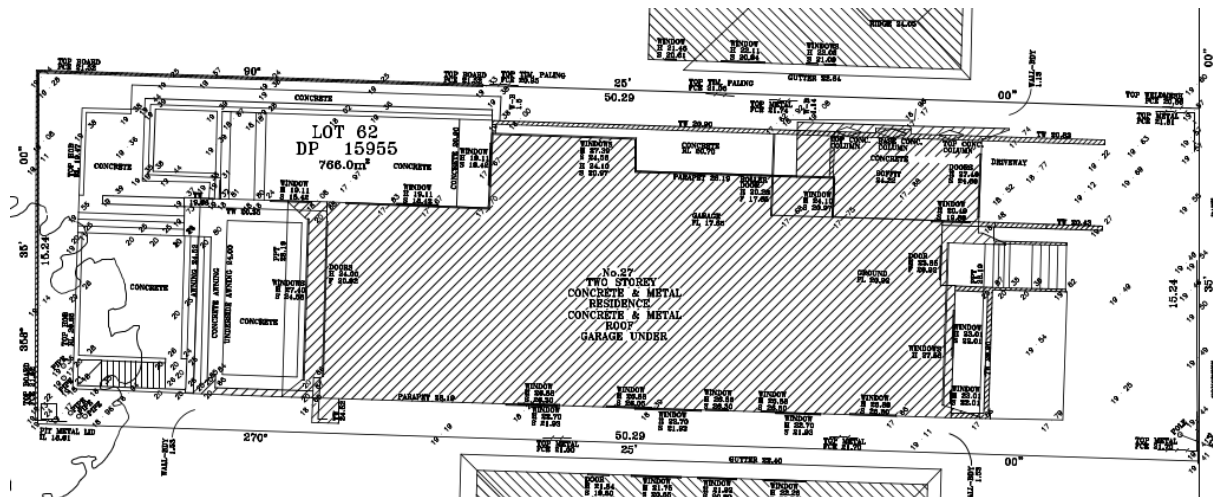


Figure 5A. Extract of the as-built survey (source: GK Wilson & Associates, dated 28/01/2021)



Figure 6. Image of the façade of the subject development during council's first site visit attempt on 01 February 2021.

The current streetscape is characterised by one to two-storey buildings with a mix of modern and traditional houses.



Figure 7. 25 Boden Ave, Strathfield (single-storey dwelling with brick façade) and 23 Boden Ave, Strathfield (dwelling to the right) (source: Nearmap)



Figure 8. 31 Boden Ave, Strathfield – surrounded by construction site temporary fencing (left-most) and 29 Boden Ave, Strathfield (centre), subject site – 27 Boden Ave, partly shown to the right (source: Nearmap).

The surrounding area is characterised by low density residential development. Australian Catholic University is located approximately 500m to the north east of the site and Strathfield South High School is situated about 600m to the south.

Background

Some of the information below are from the caselaw *Malass v Strathfield Municipal Council [2020] NSWLEC 168*.

- | | |
|-------------------|--|
| 22 November 2017 | A consent was granted by the Strathfield Internal Development Assessment Panel (IDAP) for the purpose of the demolition of the existing structures on the site and construction of a new two-storey dwelling with basement car parking, in-ground swimming pool and front fence (DA2017/091) at the subject site. |
| 14 September 2020 | <p>A stop work order to “cease all development work immediately” was issued by council for the following reasons:</p> <ol style="list-style-type: none">1. <i>“Council received concerns from neighbours alleging potential unauthorised work on the premises at 27 Boden Avenue, Strathfield.</i>2. <i>Onsite inspection conducted by Council’s Officer on 14/09/2020 revealed extensive amount of unauthorised development conducted on site. Amongst others, below are non-compliant works during inspection:</i><ul style="list-style-type: none">- <i>Non-compliant underground basement; extensive additional unauthorised basement floor has been constructed;</i>- <i>Non-compliant ground level layout; extensive unauthorised development work compared to approved plans;</i>- <i>Non-compliant first floor level layout; extensive unauthorised development work compared to approved plans;</i>3. <i>A search of Council records confirmed development constructed on the site differs significantly from what has been approved under DA2017/091.”</i> |
| 08 October 2020 | <p>Council issued a notice of intention to issue a Demolish Works Order, with the following terms:</p> <ol style="list-style-type: none">1. <i>“Demolition [sic, demolish] all authorised [sic, unauthorised] development on site.</i>2. <i>Conduct all necessary rectification work to ensure development work complies as per DA2017/091 approved plans.”</i> |

- 09 October 2020 The owner lodged an appeal to the NSW Land and Environment Court against the stop work order.
- 29 October 2020 The owner “*applied by notice of motion for the stop work order to be stayed until disposal of the proceedings*”.
- 27 November 2020 The notice of motion was heard by the Court, who is presided by Preston CJ, who ordered the following:
1. *“The operation of the order given by Respondent to the Applicant on 14 September 2020 under s 9.34 and schedule 5 of the Environmental Planning and Assessment Act 1979 is partially stayed, such that the following work may be carried out on or before 30 January 2021:*
 - a. *Installation of a front door.*
 - b. *Completion of the flashings on the skylights to achieve waterproofing.*
 - c. *Installation of glass in the window and sliding door frames (being the frames that are already in situ) and seal the glass and frames to achieve waterproofing.*
 - d. *Installation of a temporary hoarding to make the entrance to the car parking garage secure.*
 - e. *Work equipment may be removed from the site.*
 2. *The partial stay in order 1 is granted subject to the following conditions:*
 - a. *The Applicant is, on or before 14 December 2020, to make:*
 - i. *The development application; and*
 - ii. *Building information certificate application described in the letter from Mills Oakley to Planning Lab, dated 20 October 2020 (tab 16, folios 111-113, Exhibit ‘RM-1’ to the Affidavit of Rabi Malass 29 October 2020).*
 - b. *The Applicant is to actively pursue those applications.*
 - c. *Upon the Council refusing or being deemed to have refused both applications, the Applicant must take prompt steps to:*
 - i. *Appeal each of them to this Court; and*
 - ii. *File and serve a notice of motion for the consolidation of those appeal proceedings with these proceedings.*
 - d. *No other works may be carried out.*
 - e. *All work must be carried out in accordance with any conditions of development consent of DA2017/091 that directly prescribe the manner in which work must be carried out.”*

13 January 2021	The subject development application was lodged.
01 February 2021	An unannounced site visit was conducted by council's Planner. A person named Tony, who was present on the site and introduced himself as the project manager, prevented the site visit to happen and requested that the next visit to be scheduled. A memo, dated 01/02/2021, was prepared and attached to this report (Appendix A).
04 February 2021	A scheduled site visit was undertaken. Council's Planner was accompanied by Council's Compliance Officers Terrence Wong and Bradley Pope.

Referrals – Internal and External

Traffic

The application was referred to Council's Traffic Manager, who offered no objection to the proposal, subject to the conditions of consent, should the application be supported.

Stormwater

The application was referred to Council's Development Engineer, who offered no objection to the proposal, subject to the conditions of consent, should the application be supported. One of the conditions to be imposed is CC8042 Compliance with Flood Study which reads as follows:

"The development shall be designed to conform to the recommendations and conclusions of the submitted flood study prepared by Australian Consulting Engineers issue A project no. ACE170602 dated 08 December 2020.

This shall include, but not be limited to, any recommendations for the following:

- (a) Minimum floor levels
- (b) Site regrading
- (c) Overland,.....

...with the Construction Certificate application."

Note that the flood study specified that the habitable floor level must be set at RL 20.20m AHD (1% AEP flood level 19.70 + 0.5m freeboard) and the non-habitable floor level shall be at minimum 19.70m AHD. This is further discussed in the assessment section of this report.

Compliance with the minimum floor level nominated in the floor report would mean that the already built ground floor will have to be lowered by 800mm. However, the ground floor RL will still be over 1m above the existing ground level.

Building & Compliance

The application was referred to Council's Compliance Officer who provided the information that a Building Information Certificate application was lodged by the applicant.

A BIC application (2020/22) was lodged with council on 14 December 2020, as part of the order issued by the Court on 27 November 2020. At the time of writing this report, no determination has been issued yet regarding the BIC application.

Section 4.15 Assessment – EP&A Act 1979

The following is an assessment of the application with regard to Section 4.15 (1) of the Environmental Planning and Assessment Act 1979.

(1) *Matters for consideration – general*

In determining an application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

- (a) *the provision of:***
- (i) *any environmental planning instrument,***

Strathfield Local Environmental Plan

The development site is subject to the Strathfield Local Environmental Plan 2012

Part 2 – Permitted or Prohibited Development

Clause 2.1 – Land Use Zones

The subject site is zoned R2-Low Density Residential and the proposal is a permissible form of development with Council's consent.

Part 4 – Principal Development Standards

Applicable SLEP 2012 Clause	Development Standards	Development Proposal	Compliance/ Comment
4.3 Height of Buildings	9.5m	9.09m	Yes
4.4C Exceptions to FSR (Zone R2)	0.575:1 (439.9m ²)	0.73:1 (555.5m ²)	No (26.3% variation)

Table 1. Relevant principal development standards

Floor Space Ratio

The proposed development is comprised of four levels that when combined, do not satisfy the maximum gross floor area permitted on the site. Council's calculation revealed that the proposal exceeds the development standard (439.9m²) by 115.6m².

The submitted documents in the application has acknowledged that their proposal exceeds the maximum floor space ratio permitted. For example, the provided site calculation table on the submitted plans claims that the proposal exceeds the maximum FSR permitted under Clause 4.4C of the SLEP 2012 by 27.1m². See Table 2 below. However, this is not consistent with council's calculation of the variation.

Calculations		
Site Area 765.1m ²	GFA	FSR
Proposed	467	0.61:1
Permissible	439.9	0.575:1
Basement GFA	15.1	
First Floor GFA	208.5	
Ground Floor GFA	243.4	
Parking	Requirement	Proposed
	2	3
Landscaped Area	Requirement (m2)	Proposed (m2)
	329	329

Table 2. Site calculations on the submitted plans (source: AE Design Studio, number A001, received by council on 13 January 2021).

As discussed in the Proposal section of this report, what is being proposed as a basement is, by definition, not a basement and therefore would not be eligible for any exclusions in the calculation of gross floor area that would otherwise be applicable to areas within a basement, such as the vehicular access.

Figures 9 to 11 below show how the gross floor area for the lower ground level up to the first floor were calculated. The storage space in the basement has been excluded as per the definition of gross floor area in the SLEP 2012. The lower ground level (Figure 9) will have a gross floor area of 107.8m², with the generously allocated 40m² car parking spaces and lift void (2.6m²) already not included. The ground floor (Figure 10) has been calculated to have a GFA of 213.8m². The first floor (Figure 11) is proposed to have a GFA of 233.9m², with the lift void excluded. Overall, the proposed GFA, as per Table 1, is 555.5m² which presents a variation of 26.3%.

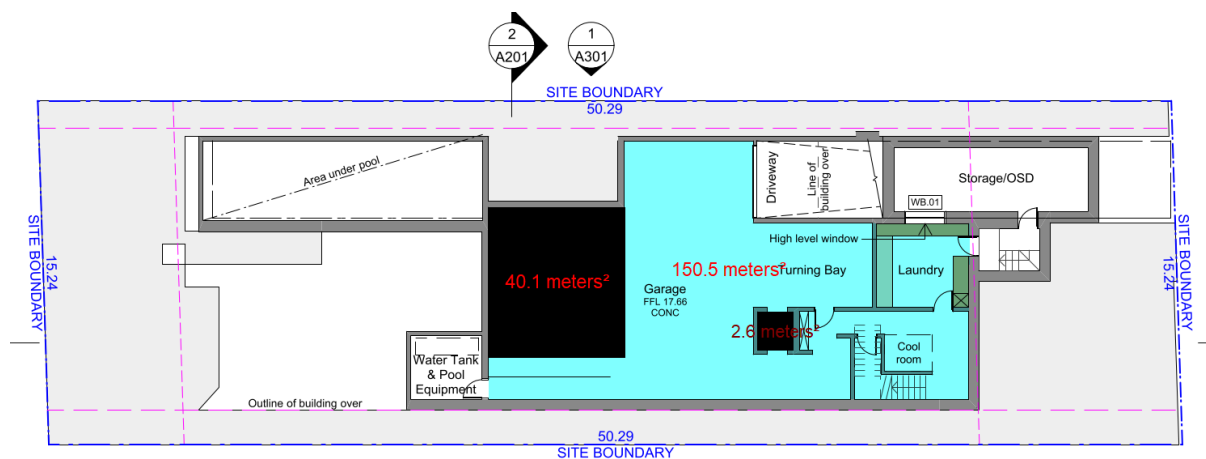


Figure 9. Marked-up proposed floor plan of the lower ground level.

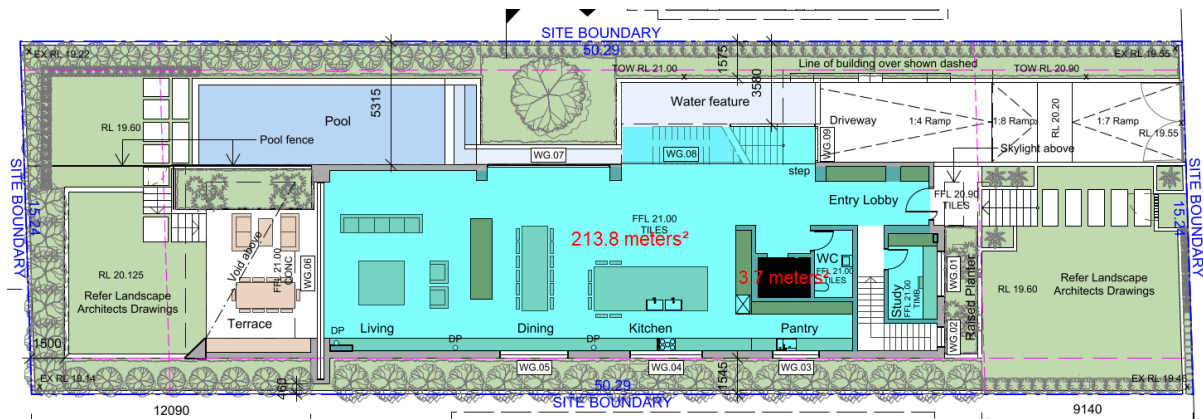


Figure 10. Marked-up proposed ground floor plan.

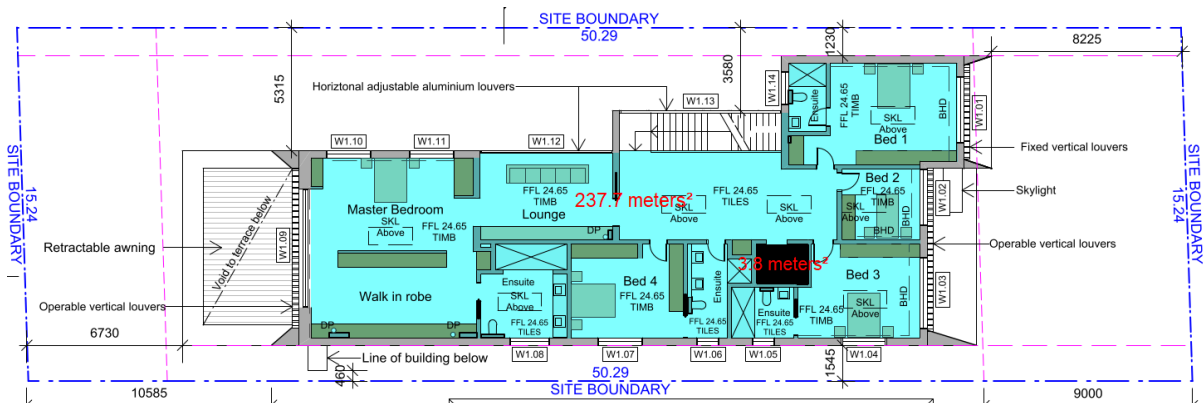


Figure 11. Marked-up proposed first floor plan.

A written request under Clause 4.6 of the SLEP 2012 has been submitted for council's consideration, which is detailed in the succeeding section below.

Clause 4.6 Variations

The applicant has provided a written request (Appendix B) to vary the principal development standard Clause 4.4C of the SLEP 2012. The variation proposed is not consistent with council's calculation of the FSR.

The following are excerpts from the written request:

"The proposed amendments to the approved dwelling result in a gross floor area of 467m² which equates to a FSR of 0.61:1 or 6.1% over the applicable FSR standard."

"The excess floor area equates to 27.1m², however the exceedance is mostly attributed to the laundry area of the dwelling which is located within the basement level."

"...the proposed non-compliance is considered minor in nature and will have a negligible impact in terms of the bulk and scale of the dwelling."

"Furthermore, the exceedance in the FSR will have no shadow and amenity impacts on surrounding residential development."

“Compliance with the Floor Space Ratio development standard (C 4.4 of SLEP 2012) is unreasonable or unnecessary in the circumstances of this case because, ..., the objectives of the development standard are achieved, notwithstanding non-compliance with the standard.”

“Further, the proposed built form, siting and scale of the dwelling will be commensurate with that of a number of identifiable developments within the context of the site.”

“..., the scale of the alterations and additions are compatible with the characteristic of the site, particularly given that the height of the dwelling does not exceeds the permissible standard as part of the proposed works.”

“The design of the building has carefully considered the need to continue to protect the privacy of occupants of neighbouring dwellings.”

“The main living areas are confined to the ground floor level and major windows at the first floor level are primarily oriented to the street and rear of the site.”

“The underlying objective or purpose of the FSR standard is relevant. As demonstrated above, the proposal retains consistency with the objectives of Clause 4.4 of SLEP, despite non-compliance.”

“The underlying objectives or purpose of the standard would not be defeated or thwarted if compliance was required, however, as outlined above consistency with objectives is achieved despite non-compliance.”

“Council has varied the FSR standard in circumstances where the objectives of the standard are achieved.”

Taking the above reasons provided in the submitted written request, council is not satisfied that the provided justifications has profoundly addressed the provisions raised in Clause 4.6(3) of the SLEP 2012.

- (a) *That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case,*

The objectives of the standard cannot be achieved by the proposal. The proposed four level dwelling house is not consistent with the surrounding developments. When taking into consideration how the gross floor area should be calculated, the built-form of the proposed development far exceeds not only that of the neighbouring properties, but can be said to most of the dwelling houses in the Strathfield LGA.

The bulk and scale of a development is generally defined by the building envelope, which is dictated by the height, setbacks and landscaping controls. In this instance, the proposal is not consistent with the bulk and scale of the dwellings in the area. The non-compliant matters such as landscaping and setback are discussed in detail in the succeeding part of this report.

Amenities of the adjoining properties are at risk because of the unreasonable height of the ground level which contributes to the excessive gross floor area. Overlooking onto the backyard and private open space of the neighbouring property – 25 Boden Avenue to the north is imminent. The visual privacy assessment against the DCP controls is discussed further in this report.

The proposal, when required to comply with the development standard will not defeat or thwart the underlying object or purpose of the standard, which is to control bulk and scale of the development. This is confirmed by the Clause 4.6 variation statement submitted to council prepared by Planning Lab.

(b) That there are sufficient environmental planning grounds to justify contravening the development standard.

The provided justifications in the submitted written request is not considered to be adequate planning grounds to justify the contravention. The maximum permissible gross floor area on the site, as indicated in Clause 4.4C of the SLEP 2012, is sufficient for comfortable living in a dwelling house.

While flooding is a concern on the property, the minimum habitable floor level (20.2m AHD) as per the Flood Impact Assessment report prepared by Australian Consulting Engineers Pty Ltd, dated December 2020, denotes that there is no justifiable reason for the proposed height of the ground level to be 1.9m above the ground.

(4)(a)(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out

The proposal is not in the public interest as it does not satisfy the relevant objectives of the standard as per (a) above.

In conclusion, the provisions stipulated in Clause 4.6 of the SLEP 2012 has not been satisfied and therefore, a development consent under the provisions of this clause is not supportable.

Part 5 – Miscellaneous Provisions

Heritage Conservation

The subject site is not listed as a heritage item or located within a heritage conservation area. The site does not adjoin nor is in close proximity to a heritage item and as such, the provisions of this clause are not applicable.

Part 6 – Additional Local Provisions

Acid Sulfate Soils

The subject site is identified as having Class 5 Acid Sulfate Soils but is not located within 500m of a Class 1, 2 3 or 4 soils. Therefore, development consent under the provisions of this section is not required and as such an Acid Sulfate Soils Management Plan is not required.

Earthworks

The proposal involves significant excavation works for the provision of a basement, driveway ramps and the lower ground level. The depth of excavation has not been kept to the minimum requirements to comply with Council's controls. The proposed excavation to the site is considered excessive and unnecessary. As such, development consent under the provisions of this section is not supportable.

Flood Planning

The subject site has been identified as being at or below the flood planning level. The application has been reviewed by Council's Engineer who has advised that subject to suitable conditions, the development is considered compatible with the flood hazard of the land, will not result in significant adverse effects on flood behaviour or environment and is not likely to result in unsustainable social and economic loss. The proposed development is considered to satisfy the objectives of this clause.

Essential Services

Clause 6.4 of the SLEP 2012 requires consideration to be given to the adequacy of essential services available to the subject site. The subject site is located within a well serviced area and features existing water and electricity connection and access to Council's stormwater drainage system. As such, the subject site is considered to be adequately serviced for the purposes of the proposed development

It is considered that the proposed development satisfies the aims, objectives and development standards, where relevant, of the Strathfield LEP 2012.

STATE ENVIRONMENTAL PLANNING POLICY (BUILDING SUSTAINABILITY INDEX: BASIX) 2004

A BASIX Certificate has been issued for the proposed development and the commitments required by the BASIX Certificate have been satisfied.

STATE ENVIRONMENTAL PLANNING POLICY NO. 55 – REMEDIATION OF LAND (SEPP 55)

SEPP 55 applies to the land and pursuant to Section 4.15 is a relevant consideration.

A review of council's records for the site gives no indication that the land associated with this development is contaminated. There were no historic uses that would trigger further site investigations.

The objectives outlined within SEPP55 are considered to be satisfied.

STATE ENVIRONMENTAL PLANNING POLICY (VEGETATION IN NON-RURAL AREAS) 2017

State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 replaces the repealed provisions of clause 5.9 of SLEP 2012 relating to the preservation of trees and vegetation.

The intent of this SEPP is consistent with the objectives of the repealed Standard where the primary aims/objectives are related to the protection of the biodiversity values of trees and other vegetation on the site.

The proposed development does not result in the removal or loss of any trees or vegetation subject to the provision of this SEPP.

The aims and objectives outlined within the SEPP are considered to be satisfied.

(ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority, and

There are no draft planning instruments that are applicable to this site.

(iii) any development control plan,

The proposed development is subject to the provisions of the Strathfield Consolidated Development Control Plan 2005. The following comments are made with respect to the proposal satisfying the objectives and controls contained within the DCP.

Applicable DCP Controls	DCP Controls	Development Proposal	Compliance/ Comment
Building Envelope			
Heights: Floor to ceiling heights: Parapet height: Overall height for flat roof dwelling: Proposed basement height above NGL: Number of Storeys/Levels (excluding the basement):	3.0m 0.8m 7.8m 1.0m 2	3.0m 0.8m 9.6m 1.9m 3	Yes Yes No (16% variation) No (90% variation) No
Setbacks: Front: Side (north): Side (south): Combined Side Setback: Rear:	9m 1.2m (min) 1.2m (min) 3m (20%) 6m	3.3m 1.2m 1.55m 2.78m 7.5m	No (basement) Yes Yes No Yes
Landscaping			
Landscaping/Deepsoil Provisions:	43% (328.99m ²)	35.7% (273.4m ²)	No
Fencing			
Height (overall/piers): Solid Component:	1.5m (maximum) 0.7m	- -	No information provided on fencing.

			This DA does not include any fencing component.
Solar Access			
POS or habitable windows	3hrs to habitable windows and to 50% of POS	3hrs to habitable windows and to 50% of POS	Yes
Vehicle Access and Parking			
Driveway width at Boundary:	3m	3.5m	No
Vehicular Crossing:	1	1	Yes
Driveway setback – side:	0.5m	1.5m	Yes
No. of Parking Spaces:	2	3	Yes
Ancillary Development			
RETAINING WALLS			
Maximum height:	1.2m	0.96m	Yes
SWIMMING POOL			
Side/Rear Setback	1.0m	1.6m	Yes

Table 3. Relevant development controls

Flat Roof Height

The proposed development does not satisfy the maximum height permitted for a flat-roof-designed dwelling house under the SCDGP 2005. The maximum height permitted is 7.8m and the proposed height is 9.06m. This presents a 16% non-compliance variation.

It can be considered that a major contributing factor to this non-compliance is the excessive height of the ground floor above the ground. This is not supportable. The exceedance in height contributes to the bulk and scale of the dwelling, which is not consistent with the character of the locality.

Basement Protrusion

As discussed in the FSR assessment in this report, the proposed basement, by definition, is not a basement. This does not satisfy the basement controls of the SCDGP 2005, and it contributes to the adverse amenity impacts onto the neighbouring properties (i.e. visual privacy).

Storeys

As previously clarified, the proposal involves the erection of a three-storey dwelling house with a basement that is for storage purposes. The SCDGP 2005 requires a maximum of two storeys for a dwelling house. With the ground floor having a level that is more than a metre above natural ground, the lower level is not a basement but can be better categorised as a lower-ground level. As such, this results to a three-storey dwelling that is not supportable.

A three-storey dwelling house with another level for basement will not be consistent with the low-density residential character of the immediate locality and therefore not supportable.

Front Setback

The proposed development includes a basement storage that is forward of the required building line. For completeness, the proposed front setback is 3.3m, which is 5.7m short of the required 9m front setback.

It is recognised that the non-compliant front setback is not visible from the street, therefore, not impacting the streetscape; however, the basement does not satisfy the development control of council that requires all basement to be within the footprint of the dwelling at ground level. As such, the non-compliant front setback is not supportable in this regard.

Side Setback

The proposed development includes a non-compliant combined side setback of 2.78m. The SCDCP 2005 requires a side setback that has a total of 20% of the site width. While the minimum side setback controls of 1.2m for each side is achieved, it is not compatible when taken in to the site's context.

The northern elevation of the first floor is setback 1.28m from the northern side boundary. The encroachment within the side setback requirement is not supportable as the design of this part of the dwelling is dominating when viewed from the neighbouring property and is a setback that is not consistent with the streetscape.



Figure 11A. Extract from video footage taken using a body camera during a site visit to the site (source: AXON Body 2 X81147032).

Landscaping and Open Space

The proposed development does not satisfy the objectives and controls of the SCDCP 2005, relating to landscaping. The required landscaping on the site is 43% (328.99m²). The proposed landscaping, when measured, is 35.7% (273.4m²).

Note that a landscaped area is defined in the SLEP 2012 as follows –

“landscaped area means a part of a site used for growing plants, grasses and trees, but does not include any building, structure or hard paved area.”

Further to the above, council's SCDP 2005 has a supplementing definition, which reads as follows –

“Building, structure and hard paved areas include dwelling and ancillary structures, vehicular driveways and manoeuvring areas, stairways, side setback areas between the boundary and house (paved or unpaved) that are 1.5 metres or less in width, unenclosed ground level pedestrian terraces or walkways, swimming pools, covered awnings, tennis courts (except natural grass courts), outbuildings, sheds, BBQs, gazebos, rainwater tanks and the like.”

Taking the above definitions into consideration, the landscaped area calculated for the site is 35.7% (273.4m²). Two identified landscaped areas on the plans were, during the site visit, structures that have a concrete base, which does not satisfy the definitions of landscaped area. These areas are the elevated landscaped areas at the rear and at the front of the property, outlined in cloud annotation in Figure 12 below.

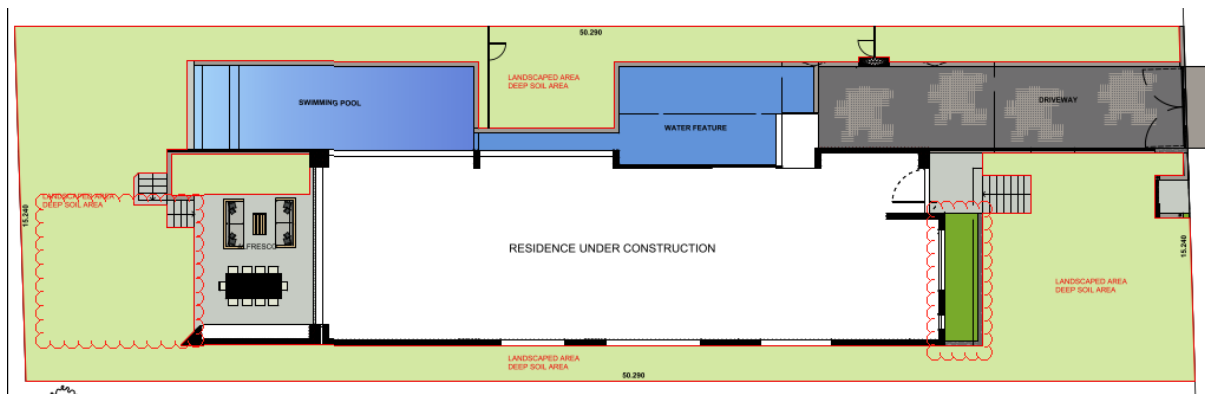


Figure 12. Extract of the landscape plan (source: Fluid Design, dated 3/11/2020)

The proposal has failed to demonstrate to council how the areas will be able to ensure compliance with the landscaped area definitions of the SLEP 2012 and SCDP 2005. As such, the proposed landscaping is not supportable.

Fencing

The proposed development does not have any information submitted to council regarding the side and rear fencing. As such, note that the side and rear fencing do not form part of the development application.

Solar Access

The solar diagrams in Figures 12A (DA2017/91) and 12B (DA2020/239) shows an improved solar access to the affected neighbour. In particular the shadow cast has improved between 12.00 PM to 3.00 PM, winter solstice. In this regard, solar access is supportable.

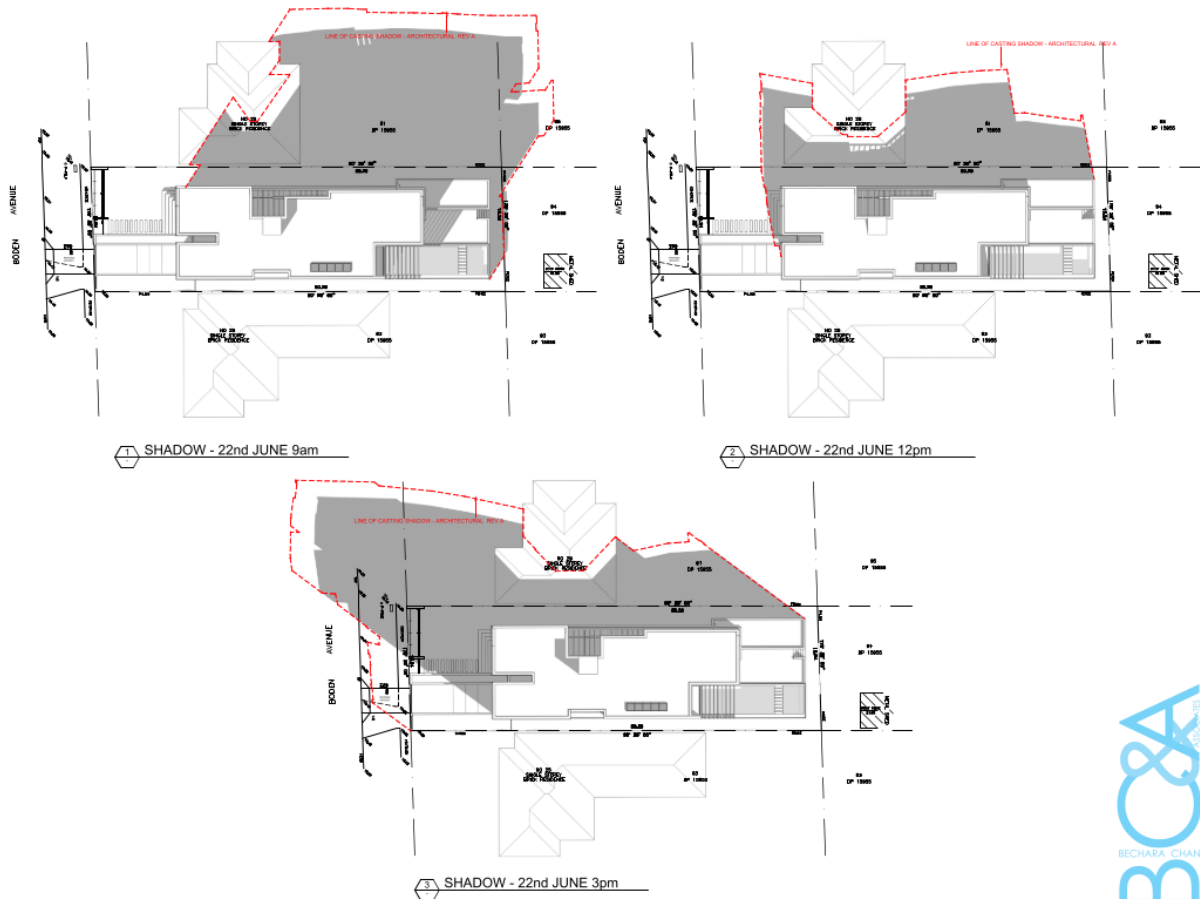
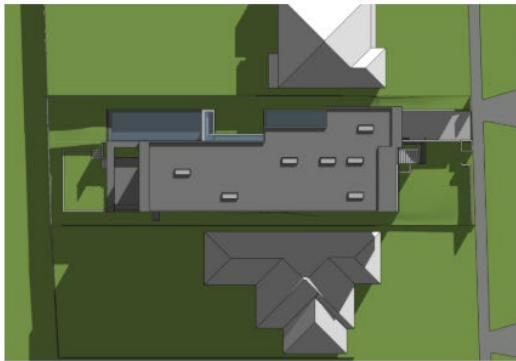
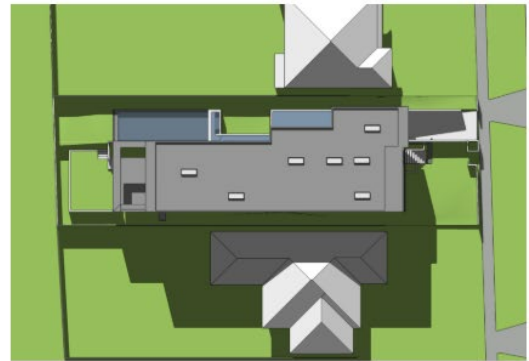


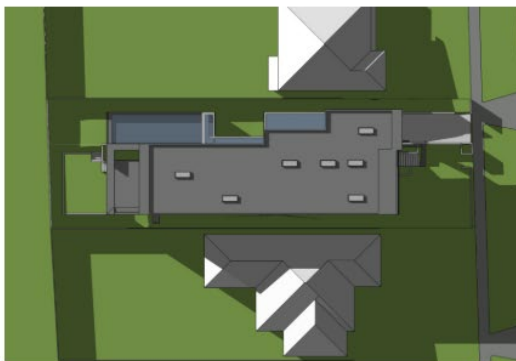
Figure 12A. Extract of the solar diagrams submitted in the original DA, DA2017/91 (source: Bechara Chan & Associates Pty Ltd, dated June 2017).



1 9am Shadows June 21



2 12pm Shadows June 21



3 3pm Shadows June 21

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13 January 2021

Figure 12B. Extract of the submitted solar diagrams in the current DA, DA2020/239 (source: AE Design Studio, dated 8/12/2020).

Privacy

The proposed development raises concerns regarding visual privacy on to the neighbouring properties. Due to the heavily raised proposed ground floor level, overlooking to neighbouring properties becomes an issue.

The stairs on the northern side of the dwelling house is next to a wall made up of floor to ceiling glass windows. See Figure 13.



Figure 13. Photo of the stairs, looking down from the first floor landing.

The stairs, which is the main means of going up and down of the living areas of the house promotes an unreasonable overlooking on to the back yard of 25 Boden Avenue, Strathfield. Figure 14 below shows a photo taken on the stairs' first floor landing. The neighbour's backyard is clearly visible from this standpoint rendering no privacy for the occupiers of the neighbouring property. Note that when the scaffolding is removed, it presents an even worse outlook that it not beneficial for the northern neighbours.



Figure 14. The back yard of 25 Boden Avenue, Strathfield, when viewed from the landing on the first floor of the subject dwelling's stairs.

Further on the first floor, Figures 15 to 17 shows a photo of the same neighbour's backyard when standing on northern-most part of the proposed timber lounge. Note that when the demolition of the existing structure north of the proposed timber lounge of the first floor is done, it will have a greater visual privacy impact on to the neighbour as it will provide a bigger extent.



Figure 15. Back yard and private open space of 25 Boden Ave, Strathfield.



Figure 16. Back yard and private open space of 25 Boden Ave, Strathfield



Figure 17. Back yard of 25 Boden Ave, Strathfield.

On the ground level, Figure 18 shows the existing structure north of the proposed dining area that will be demolished. However, it is important to note that the photo was taken at where the northern glass wall will be, near the dining table.



Figure 18. Image of the area (outlined) proposed to be demolished.

Figure 18 shows that even on the ground level, visual privacy onto the northern neighbour can occur.

The proposed alfresco to the rear of the dwelling has an unsupportable proposed floor level similar with the ground floor (RL 21.00). See Figure 19. Currently, the constructed alfresco has a level of RL 20.85, as per the as-built survey (Figure 20). From the information on-hand, it would mean that the existing alfresco will be raised further by 150mm.

The overlooking to the neighbour to the rear (west) of the site is not acceptable when viewed from the existing alfresco.

[illegible]

Figure 20. Extract of the as-built survey (source: GK Wilson & Associates, dated 28/01/2021).

In addition to the above, an elevated landscaped area is part of the proposal. Figure 22 shows the comparison of levels of the already-built concrete area and the proposed. This concrete area is proposed to be reinstated as landscaping on roughly the same level. This is not supportable.

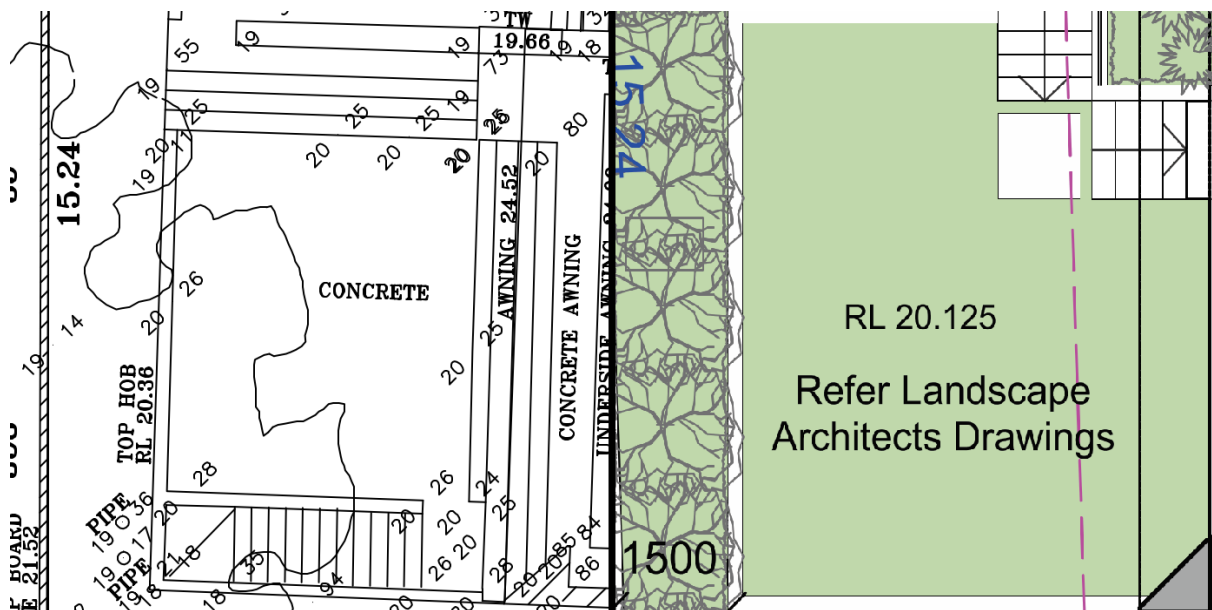


Figure 22. Extracts of the as-built elevated area (left) and the proposed (right) adjacent to the rear boundary.

The proposed elevated area is not supportable. There is no sufficient planning justification to permit raising the identified area to the proposed level. Further it promotes unwanted overlooking to the western neighbour. Because of the little room left along the rear boundary, there is no room for a tree to grow to provide screening between the two neighbours.



Figure 23. The eastern elevation of the existing dwelling of the western neighbour – 28 Melville Avenue.



Figure 24. Outlook from the proposed elevated landscaped area to the northern neighbour – 25 Boden Avenue.



Figure 25. Outlook from the existing elevated area adjacent to the alfresco in the backyard to the southern neighbour – 29 Boden Avenue.



Figure 26. View from the existing spa coping to the existing elevated area.

The proposal in its proposed form is envisaged to be an unfair development when the visual privacy concerns of the neighbouring properties are taken into consideration. The levels proposed promote overlooking onto the neighbours' private open spaces, which is not acceptable.

Vehicular access and Parking

The proposed development satisfies the relevant objectives and controls of the SCDP 2005 in that it provides the minimum number of required parking spaces and adequate vehicular access provisions. Should the development application be supported, a condition of consent will be imposed to require the driveway be tapered to no more than 3m at the property boundary.

Cut and fill

The proposed development involves an excessive fill that create the potential for overlooking of adjoining properties. See the discussion on visual privacy above.

The proposed development is not consistent with the objectives of the controls in the SCDP 2005. The existing ground levels were not maintained to minimise any potential site disturbance. As such, the proposal is not supportable.

Water and Soil Management

The proposed development satisfies the relevant objectives and controls of the SCDP 2005 and complies with Council's Stormwater Management Code.

ANCILLARY STRUCTURES

Retaining Walls

The proposed retaining wall to hold the raised planter at the front of the dwelling has a height of 1.3m that exceeds the maximum height permitted. Note that this section has been built with a concrete base leaving about 100mm of the wall exposed. See Figure 27 below. The proposal includes that this area will be converted into landscaping. Note that a retained area with a concrete base is not counted as a landscaped area.



Figure 27. Existing concrete-base structure at the front of the dwelling house proposed to be reinstated to landscaping.

Swimming Pools, Spas & Associated Enclosures

The proposed development satisfies the relevant objectives and controls with SCDCP 2005. The pool has been adequately setback from all adjoining boundaries, allowing for screen panting if required. The swimming pool fence/enclosure will comply with the swimming pools act and relevant standards.

PART H – Waste Management (SCDCP 2005)

In accordance with Part H of Strathfield CDCP 2005, a waste management plan was submitted with the application. The plan details measure for waste during demolition and construction, and the on-going waste generated by the development during its

use. It is considered that this plan adequately address Part H and considered satisfactory.

(iv) Any matters prescribed by the regulations, that apply to the land to which the development application relates,

The requirements of Australian Standard AS2601–1991: *The Demolition of Structures* is relevant to the determination of a development application for the demolition of a building.

The proposed development involves the demolition of a building. Should this application be approved, appropriate conditions of consent may be imposed to ensure compliance with the requirements of the above standard.

(c) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

The proposed development is not of a scale and character that is in keeping with other developments constructed and being constructed in the locality. The proposed four levels of development is an unwanted precedent that is not consistent with the low-scale built form of the low-density residential character of the neighbourhood.

Further to the above, the proposed development has greatly disturbed the natural environment with the excessive excavation.

(c) the suitability of the site for the development,

The scale of the proposal is considered to not be suitable for the site having regard to its size and shape, its topography and relationship to adjoining developments.

(d) any submissions made in accordance with this Act or the regulations,

In accordance with the provisions of Councils Community Participation Plan, the application was placed on neighbour notification for a period of fourteen (14) days where adjoining property owners were notified in writing of the proposal and invited to comment. Seven submissions were received raising the following concerns:

1. Stormwater

From occupiers of 30 Melville Avenue:

- *“...the storm water private drain located behind this property will be flooded by all the water coming from the excess concrete and put an undue amount of streets on the drainage system, as it has very little grass patch left to absorb the water in this development.”*

From the occupiers of 30 Boden Avenue:

- *“Rain water problems – overdevelopment minimises ground area to absorb water – causing drainage and backyard horticultural use problems to neighbours and surroundings.”*

2. Visual Privacy

From occupiers of 30 Melville Avenue:

- *“...the structure is so high, and we lost privacy and sunlight...”*

From the occupiers of 26 Melville Avenue:

- *“...we feel that the current unauthorised works intrude on our privacy.”*

From the occupiers of 30 Boden Avenue:

- *“Proximity to neighbours, loss of privacy – 25 Boden Avenue,...”*

From the occupiers of 25 Boden Avenue:

- *“I have no privacy: Those huge windows on the northern exposure (called “bay”) are so close I can almost touch them. And there were not on the 2017 DA!! There is supposed to be nothing there!! Not I learn they are to be demolished. I certainly hope so.”*

3. Built-form

From the occupiers of 30 Boden Avenue:

- *“...the structure (dwelling) as built, is overpowering and not consistent with other dwellings in size or form within this street or area.”*
- *“...the floor space ratio prescribed by Strathfield Municipal Council for the site is reasonable and necessary to maintain fairness to compliance which is based on heritage, environmental and integrity issues. Building codes are in place in this low density residential area and are fully supported. The integrity of the area must be stringently maintained as expected by all residents and developers.”*
- *“This Floor space ratio is reasonable and necessary for all development in this area. There are no environmental grounds to justify the proposed variation.”*

From the occupiers of 32 Boden Avenue:

- *“This area is a residential, low density area. Residents / developers should not build houses which do not observe the standards approved. The floor area of the development proposed should not exceed that which is allowed.”*

From the occupiers of 26 Boden Avenue:

- *“...I am writing on behalf of my family to object to all unauthorised works that have been built at this property.”*
- *“We object that this development contravenes development standards imposed by the Strathfield Local Environmental Plan 2012, or any other environmental planning instrument.”*
- *“..we implore that this residence be subject to strict compliance with the Floor Space Ratio development standard contained within clause 4.4C...”*
- *“The proposed non compliance is not considered by us the residents as minor in nature and it will have negligible impact in terms of bulk and scale of the dwelling. Rather the proposed zoning of the land is not at all reasonable and is not at all appropriate.”*

4. Earthworks

From the occupiers of 30 Boden Avenue:

- *“Concern is raised in a possible void being left after demolition of the area in the western end of the basement as built. Not detail is shown as to the use of this area and it should be backfilled with suitable engineered fill to stop any future illegal use by the developer / owner prior to any future construction certificate or DA being issued.”*

5. Support for the Demolition

Six of the seven submissions specifically expressed support for the demolition of the unauthorised structures on the site.

The matter related with the demolition of the unauthorised structures will be dealt by the building information certificate application that is currently with Strathfield Council. The other concerns raised on the submissions of the neighbouring properties have been discussed in detail in this report. The proposal is not supportable as it will have adverse amenity and environmental impacts on to the neighbouring properties and the locality.

(e) the public interest.

The proposed development does not satisfy the objectives stipulated by the Clause 1.2 Aims of Plan and Clause 4.4C principal development standard of the SLEP 2012. For this reason, coupled with the number of submissions received from the adjoining properties, the application is considered in conflict with the public interest.

Local Infrastructure Contributions

Section 7.13 of the EP&A Act 1979 relates to the collection of monetary contributions from applicants for use in developing key local infrastructure. In this instance, the contributions had already been discussed and dealt with in the original DA. Council's records show that contributions related with DA2017/91 had been paid to council.

Conclusion

The application has been assessed having regard to the Heads of Consideration under Section 4.15 (1) of the Environmental Planning and Assessment Act 1979, the provisions of the SLEP 2012 and SCDCP 2005.

Following detailed assessment it is considered that Development Application No. 2020/239 should be refused.

Signed:

Date: 26/02/2021

P Santos

Development Assessment Planner

☒ I confirm that I have determined the abovementioned development application with the delegations assigned to my position;

☒ I have reviewed the details of this development application and I also certify that Section 7.11/7.12 Contributions are not applicable to this development;

Report and recommendations have been peer reviewed and concurred with.

Signed:

Date:

Kandace Lindeberg

Executive Manager, Land Use Planning & Development

REFUSAL REASONS:

Under Section 4.16(1)(b) of the Environmental Planning and Assessment (EP&A Act, 1979, this consent is REFUSED for the following reason;

1. Refusal Reason – Environmental Planning Instrument

Pursuant to Section 4.15 (1)(a)(i) of the [Environmental Planning and Assessment Act 1979](#), the proposed development does not comply with the relevant environmental planning instruments in terms of the following:

- (a) Clause 1.2(2)(a) of the SLEP 2012 – where the new development does not reflect the existing character of the locality.
- (b) Clause 4.4C of the SLEP 2012 – where the proposal exceeds the maximum allowable gross floor area by 115.6m², presenting a 26.3% variation.
- (c) Clause 6.2(3)(h) of the SLEP 2012 – where the proposal failed to demonstrate that it had taken consideration of other appropriate measures to avoid, minimise or mitigate the impacts of unreasonably excessive excavation of the development.

2. Refusal Reason - Development Control Plan

Pursuant to Section 4.15 (1)(a)(iii) of the [Environmental Planning and Assessment Act 1979](#), the proposed development does not comply with the following sections of the Strathfield Consolidated Development Control Plan 2005 in terms of the following:

- (a) Section 2.2.2 Scale, Massing and Rhythm of Street of Part A – where the proposal is not consistent with the streetscape as it failed to give regard to the required combined side setback.
- (b) Section 4.2.2 Building Height of Part A – where the proposal exceeds the allowable maximum height to the top of a parapet roof by 1.8m.
- (c) Section 4.2.2 Building Height – where the proposal exceeds the maximum storeys permitted for a dwelling house (excluding the basement) by another storey.
- (d) Section 4.2.3.2 Side and Rear Setbacks of Part A – where the proposal has a total combined side setback of 2.78m, rather than the required 3m for the site, which leads to a dominating impact of the northern elevation wall of bedroom 1 to the northern neighbour – 25 Boden Avenue, Strathfield.
- (e) Section 5.2.1 Landscaped Area of Part A – where the proposed landscaping of 35.7% (273.4m²) failed to comply with the minimum required landscaping on the site of 43% (328.99m²).
- (f) Section 7.2 Visual Privacy of Part A – where the proposal, as discussed in

detail in the body of the report, failed to ensure that the visual privacy of the neighbouring properties have been taken into consideration and measures have been utilised to minimise visual intrusion onto their habitable areas and private open spaces.

- (g) Section 8.2.3 Basements of Part A – where the basement storage is outside the footprint of the dwelling at ground level.
- (h) Section 9.2 Altering Natural Ground Level of Part A – where the excessive fill to the area adjacent to the alfresco will create the potential for overlooking onto the western neighbour to the rear.

3. Refusal Reason – Impacts on the Environment

Pursuant to Section 4.15 (1)(b) of the [Environmental Planning and Assessment Act 1979](#), the proposed development is likely to have an adverse impact on the following aspects of the environment:

- (a) Natural environment – where the proposal has greatly disturbed the natural environment with the unreasonably excessive excavation, coupled with insufficient landscaping potentially causing issues with stormwater runoff.
- (b) Built environment – where the proposal of four levels of development has failed to comply with the setback controls applicable to the development, impacting on the streetscape, and the overly raised levels in particular starting from the ground floor, causing amenity impacts on to the neighbouring properties.

4. Refusal Reason – Suitability of Site

Pursuant to Section 4.15 (1)(c) of the [Environmental Planning and Assessment Act 1979](#), the site is not considered suitable for the proposed development for the following reasons:

- (a) The exceedance in the permissible floor space ratio on the site is an indication that the proposed development is not suitable for the site.

5. Refusal Reason – Public Interest

Pursuant to Section 4.15 (1)(e) of the [Environmental Planning and Assessment Act 1979](#), the proposed development is not considered to be in the public interest and is likely to set an undesirable precedent.

Appendix A



Memorandum

Date	01/02/2021
To	Relevant Officers
From	Patrick Santos
Subject	DA2020/239 – 27 Boden Ave, Strathfield

I did an unannounced site visit to the subject property on 01 February 2021. When I arrived, a person, male, came out of the property - Tony. I spoke with Tony, according to him he is the project manager working on the site, and I asked if he can give me access to the property for my site visit. He mentioned that he is unaware that there would be a visit today. I mentioned that I did not make any booking. I am of the opinion that under my delegation, a site visit can be carried out on to the property anytime.

Tony mentioned that he cannot just let me in and asked me if I am willing to book in a time on a different day. While speaking with Tony, three other people, all male, came out of the site.

PS took a photo of the site from the road after being stopped from entering. See Figure 1 below.

When I got into the council vehicle, Tony approached me and asked for some identification. I showed my council ID and Tony took a photo of it. When I asked for the reason why he took a photo of my ID, he replied that it is for his record.

Memorandum



Figure 1. Photo taken during a prevented attempt on a site visit on 01/02/2021.

Appendix B



Clause 4.6 Variation Request
Floor Space Ratio (Clause 4.4 C)
Strathfield LEP 2012

ALTERATIONS AND ADDITIONS TO AN APPROVED RESIDENTIAL DWELLING

27 Boden Avenue, Strathfield

Prepared by Planning Lab
Issued 7 December 2020

Introduction

This is a formal written request that has been prepared in accordance with Clause 4.6 (cl 4.6) of the Strathfield Local Environmental Plan 2012 (SLEP 2012) to support a development application (DA) submitted to Strathfield Council for additions and alterations to a two (2) storey dwelling house located at 27 Boden Street, Strathfield ('the site').

The purpose of this cl 4.6 variation request is to address a variation to Clause 4.4 C Floor Space Ratio (FSR) under the SLEP 2012. Specifically, this request seeks to vary the 0.575:1 standard that applies to the site.

The objectives of cl 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

This request has been prepared having regard to the following considerations:

- The Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011);
- The objectives of Clause 4.4 of the Strathfield LEP 2012, being the development standard to which a variation is sought;
- Relevant case law in the New South Wales Land and Environment Court and New South Wales Court of Appeal including *Wehbe v. Pittwater Council* [2007] NSWLEC 827.

This variation request provides an assessment of the development standard and the extent of variation proposed to the standard. The variation is then assessed in accordance with the principles set out in the *Wehbe*.

Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the Strathfield Local Environmental Plan 2012 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the Strathfield Local Environmental Plan 2012, or any other environmental planning instrument.

However, clause 4.6(3) states that 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant requests that the floor space ratio development standard be varied.

What is the Environmental Planning Instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is the Strathfield Local Environmental Plan 2012 (SLEP).

What is the zoning of the land?

The site is zoned R2 – Low Density Residential zone pursuant to the SLEP. Refer to **Figure 1**. Dwelling houses are permissible with consent in the zone.



Figure 1 – Land Zoning Map (Source: Sheet LZN_002 - SLEP 2012)

What is the development standard being varied?

Clause 4.4 C Exception to Floor Space Ratio (Zone R2) of the SLEP 2012 provides that the maximum Floor Space Ratio for a building on any land is not to exceed the FSR shown on the below table (**Figure 2**). The subject site has a site area of 765.1 m², therefore the applicable FSR for the site is 0.575:1.

4.4C Exceptions to floor space ratio (Zone R2)

Despite clause 4.4, the maximum floor space ratio for a building on a lot being land in Zone R2 Low Density Residential, with an area specified in Column 1 of the Table to this clause, is the floor space ratio specified opposite that lot in Column 2 of the Table.

Column 1 Lot area (m ²)	Column 2 Floor space ratio
< 500	0.65:1
500–599	0.625:1
600–699	0.60:1
700–799	0.575:1
800–899	0.55:1
900–999	0.525:1
≥ 1,000	0.50:1

Figure 2 – Exception to Floor Space Ratio | Zone R2 (Source: Clause 4.4 C of SLEP 2012)

Is the development standard excluded from the operation of Clause 4.6 of the EPI?

CI 4.6(2) states that development consent may be granted for development even though the development would contravene a development standard. However, this does not apply to a development standard that is expressly excluded under cl 4.6(8) of the SLEP 2012. Given the maximum FSR development standard is not identified under subclause 4.6(8), it is therefore not specifically excluded from the operation of cl 4.6 of SLEP 2012.

The site and its context

The subject site is legally described as Lot 62 in Deposited Plan 15955 and commonly known as 27 Boden Avenue, Strathfield which is within the Strathfield local government area. The site is located on the western side of Boden Avenue, between Ada Avenue and Newton Road. It is rectangular in shape with a 15.2 m eastern frontage to Boden Avenue, side boundaries of 50 m and a rear boundary of 15.2 m giving a total area of 765.1 m². The topography is relatively flat across the site (**Figure 3**). The site is not heritage listed or located within a heritage conservation area.



Figure 3 - Site location within the local context (Source: SIX Maps 2020)

Extent of Variation to the Development Standard

Under the provisions of Clause 4.4 C in SLEP 2012, the site is subject to a maximum base FSR of 0.75:1. Based on a site area of 765 m² and a FSR control of 0.575:1, a maximum Gross Floor Area of 439 m² may be obtained on the site. The proposed amendments to the approved dwelling result in

a gross floor area of 467 m² which equates to a FSR of 0.61:1 or 6.1 % over the applicable FSR standard.

The excess floor area equates to 27.1 m², however the exceedance is mostly attributed to the laundry area of the dwelling which is located within the basement level. The laundry has a floor area of 15.1 m² which represent the 55.7% of the excess floor area. Only 12 m² or 2.5 % of the total floor area of the development are therefore located within the above-ground floor levels of the dwelling.

In view of the above, the proposed non compliance is considered minor in nature and will have a negligible impact in terms of the bulk and scale of the dwelling. Furthermore, the exceedance in the FSR will have no shadow and amenity impacts on surrounding residential development.

Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was the satisfaction of the first test of the five-set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In *Wehbe v Pittwater Council* [2007] 156 LGERA 446 [42] – [51] (“*Wehbe*”) and repeated in *Initial Action* [17]-[21] the Chief Judge identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established.

Although *Wehbe* concerned a SEPP 1 objection, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii).

The 5 ways in *Wehbe* are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council’s actions in granting consents departing from the standard and hence the standard is unreasonable;
5. The zoning of the land is unreasonable or inappropriate. The five ways are not exhaustive, and it may be sufficient to establish only one.

For completeness, this request addresses the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827, followed by a concluding position which demonstrates that compliance with

the development standard is unreasonable and unnecessary in the circumstances of the case.

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

Compliance with the Floor Space Ratio development standard (C 4.4 of SLEP 2012) is unreasonable or unnecessary in the circumstances of this case because, as explained in **Table 1** (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard.

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34], the Chief Justice held, “*establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary*”.

Demonstrating that there will be no adverse amenity impacts is, therefore, one way of showing consistency with the objectives of a development standard.

Table 1: Achievement of Development Standard Objectives

Objective	Discussion
1(a) to ensure that dwellings are in keeping with the built form character of the local area,	Nonwithstanding the small exceedance in the dwelling's FSR, the proposal represents a building typology, form and scale which the planning controls anticipate for the land while all efforts have been made in the design so as to alleviate any amenity impacts to neighbouring development. Further, the proposed built form, siting and scale of the dwelling will be commensurate with that of a number of identifiable developments within the context of the site.
1(b) to provide consistency in the bulk and scale of new dwellings in residential areas,	As noted above and throughout the Statement of Environmental Effects, the scale of the alterations and additions are compatible with the characteristic of the site, particularly given that the height of the dwelling does not exceed the permissible standard as part of the proposed works.

	<p>The characteristics of the local area include high amenity dwelling houses with up to two storeys having a primarily east-west orientation, and the proposed built form, including technical non-compliance with FSR, is in keeping with these characteristics including bulk and scale of development, and will sit well within the locality.</p> <p>Most importantly, only 12 m² of the 27.1 m² of excess floor space are located above ground and therefore contribute minimally to the overall scale of the dwelling.</p> <p>In terms of its relationship with the immediate context, although the adjoining dwellings at No. 25 and No. 29 are single storey, the two storey scale of the proposed dwelling fits into the local streetscape as a large number of dwellings in the street are two storey or have a similar scale to the proposed dwelling.</p> <p>The proposed scale will, therefore, be perceived as similar to surrounding developments and as not being jarring or antipathetic within the local streetscape.</p>
<p>1(c) to minimise the impact of new development on the amenity of adjoining properties,</p>	<p><u>Privacy</u></p> <p>The design of the building has carefully considered the need to continue to protect the privacy of occupants of neighbouring dwellings.</p> <p>The main living areas are confined to the ground floor level and major windows at first floor level are primarily oriented to the street and rear of the site. There are no balconies/terraces at first floor level.</p> <p>Where appropriate, screening devices to minimise potential overlooking have been provided.</p> <p><u>Sun Access</u></p>

	<p>The shadow diagrams prepared by Ae Design Partnership indicate that the extent of overshadowing of the neighbouring property to the South meets the requirements of the relevant DCP clause.</p> <p><u>Impact on Views</u></p> <p>The proposed development will not result in any unreasonable impacts on views from neighbouring properties having regard to the proposed building height being well within the maximum limit, the building siting generally satisfies the setback controls for the site and the flat topography of the immediate locality.</p>
1(d) to minimise the impact of development on heritage conservation areas and heritage items,	n/a
<p>1(e) in relation to Strathfield Town Centre:</p> <p>(i) <i>to encourage consolidation and a sustainable integrated land use and transport development around key public transport infrastructure, and</i></p> <p>(ii) <i>to provide space for the strategic implementation of economic, social and cultural goals that create an active, lively and people-orientated development,</i></p>	n/a
1(f) in relation to Parramatta Road Corridor—to encourage a sustainable consolidation pattern that optimises floor space capacity in the corridor.	n/a

Compliance with the maximum FSR development standard is unreasonable or unnecessary in the circumstances of this case because the objective of the standard is achieved notwithstanding the non-compliance.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objective or purpose of the FSR standard is relevant. As demonstrated above, the proposal retains consistency with the objectives of Clause 4.4 of SLEP, despite non-compliance.

3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The underlying objectives or purpose of the standard would not be defeated or thwarted if compliance was required, however, as outlined above consistency with objectives is achieved despite non-compliance.

4. the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;

Council has varied the FSR standard in circumstances where the objectives of the standard are achieved.

5. the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

The proposed zoning of the land is reasonable and appropriate.

Strict compliance with the floor space standard is unreasonable and unnecessary in the circumstances of the case in that:

- The proposal is consistent with the objectives of the standard as detailed above.
- The proposed development complies with the Height of Building in SLEP 2012 and generally with the setback requirement objectives in the SDCP 2005. As such, the scale of the building is consistent with the desired character of the locality notwithstanding a small variation is proposed to the FSR standard.
- The proposed variation to the FSR standard does not give rise to an impact on the amenity of the locality.

As the proposal is consistent with the objectives of the FSR standard, compliance with the development standard is considered to be unreasonable and unnecessary in the circumstances of the case.

Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

The Land and Environment Court judgment in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that: *"in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and...there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development"*

The proposed massing of the building across the site is the result of a considered analysis of the site and surrounding context and the desire to deliver a positive design outcome with a high level of architectural merit. Strict compliance with the development standard would result in an inflexible application of the control that would not deliver any additional benefits.

As discussed above, the excess floor area is largely attributable to the laundry area of the dwelling in located within the basement level. Only 12 m² or 2.5 % of the total floor area of the development are therefore located within the above-ground floor levels of the dwelling.

In addition to the above, the following environmental planning grounds justify the component of the development which results in the FSR variation:

- The proposed building has a scale and proportions otherwise as anticipated by the planning controls, it is compliant in relation to height and front and rear setbacks, with justified minor non-compliances with the landscape area (42% rather than the required 43%) and side setbacks. The proposed variation does not result in any detrimental impact or a built form outcome which differs from that which is expected on the site. Therefore, the appropriate contextual fit of the proposed building provides an environmental planning ground to support the proposed variation.
- The proposed variation does not result in any adverse impacts of the kind that the FSR control is intended to manage or avoid.
- The excess floor space is largely attributable to the laundry area in the basement level. There is no requirement to have a laundry or any gross floor area in the basement and a compliant development would likely have its laundry above ground. By locating the laundry below ground, the proposed development reduces the mass on the surface.
- The house has a versatile design with larger than average living spaces and bedrooms which are suitable to accommodate a wider range of diverse families and households. This includes intergenerational households and people with mobility impairments. If the above ground area was reduced by 27.1m², the compliant house would be more suitable to a narrower range of household types than would otherwise be the case.

- Allowing this contravention, which has no material adverse impacts, enables the proposed development to better achieve important planning goals. In particular, it promotes the efficient and spatially appropriate use of land as set out as a plan aim in clause 1.2(2)(b) of the LEP. It also better provides for the housing needs of the community as per the first objective of the R2 zone under clause 2.3 of the LEP. The housing needs of the community are diverse and while some people's housing needs require more compact homes with smaller bedrooms and living spaces, other people's needs are better served by larger homes with larger bedrooms and living spaces (for example the elderly, families with multiple children and individuals with mobility impairments).

In this particular circumstance, there are sufficient environmental planning grounds to warrant the proposed variation to the FSR standard.

Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827 for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, with reference to the matters specific to the proposal and site, sufficient to justify contravening the development standard.

Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority 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.

Objective of the Development Standard

The consistency of the proposed development with the specific objectives of the Floor Space Ratio development standard is addressed above.

Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the R2 – Low Density . The objectives of the zone are:

- *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 that development of housing does not adversely impact the heritage significance of adjacent heritage items and conservation areas.*

The proposed development is for a “dwelling house” which is permissible in the R2 Low Density Residential zone with the consent of the Strathfield Council.

The proposed development is consistent with the relevant objectives of the zone in that it provides for a detached dwelling house of high quality design in a low density residential context and does not result in negative environmental impacts on the adjoining properties.

Clause 4.6(5) Secretary considerations

The Secretary (of Department of Planning, Industry and Environment) can be assumed to have been granted for the purpose of this variation request. This is because of Department of Planning Circular PS 20-002 ‘Variations to development standards’, dated 5 May 2020. This circular is a notice under 64(1) of the Environmental Planning and Assessment Regulation 2000.

A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given. The circular provides for assumed concurrence.

The variation sought in this circumstance represents a 6.1% variation of the development standard. As this is less than a 10% variation, the Secretary can be assumed to have given concurrence to the variation if the matter is determined by a delegate of the Council. The Secretary can also be assumed to have given concurrence to the variation if the matter is determined by a panel or the Court (by way of section 34 agreement or hearing).

In any event, the matters for consideration under clause 4.6(5) are addressed below.

The concurrence of the Secretary is provided for for the purposes of clause 4.6(4)(b). In deciding whether to grant concurrence, clause 4.6(5) requires that the Secretary 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 Secretary before granting concurrence.

This clause 4.6 request demonstrates that compliance with the floor space ratio prescribed for the site is unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest (because it is consistent with the development standard and zone objectives).

(a) Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The contravention of the standard does not raise any matters of significance for State or regional environmental planning. The development does not impact upon or have implications for any state policies in the locality or impacts which would be considered to be of State or regional significance.

(b) The public benefit of maintaining the development standard

The proposed development achieves the objectives of the floor space ratio development standard and the land use zone objectives despite the technical non-compliance.

This clause 4.6 request has demonstrated there are environmental planning benefits associated with the contravention of the standard. Accordingly, there is no material public benefit in maintaining the standard in relation to the site specifically as the built form outcomes and development proposed achieves an acceptable contextual relationship within the area. There is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.

(c) Other matters required to be taken into consideration

Concurrence can be assumed. Nevertheless, there are no known additional matters that need to be considered within the assessment of the clause 4.6 variation request prior to granting concurrence, should it be required.

Objectives of Clause 4.6

The specific objectives of Clause 4.6 are:

- (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 architectural package prepared by AE Design Partnership which accompanies the development application illustrates the relationship of the proposed development within the context of the site.

The proposal has been carefully designed to provide high quality and high amenity accommodation whilst minimising impacts on the character of the locality and the amenity of neighbouring properties. The proposal will not result in any unreasonable impacts on surrounding residents and is consistent with the intent of all applicable planning provisions.

Accordingly, it is considered that the consent authority can be satisfied that the proposal meets objective 1(a) of Clause 4.6 in that allowing flexibility in relation to the Floor Space Ratio development standard will achieve a better outcome in this instance in accordance with objective 1(b).

Conclusion

For the reasons set out in this written request, strict compliance with the Floor Space Ratio development standard contained within clause 4.4 C of the Strathfield Local Environmental Plan 2012 has been found to be unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation. In this regard, it is reasonable and appropriate to vary the FSR development standard to the extent proposed.