



DEVELOPMENT ASSESSMENT PANEL REPORT

Application No.	DA/2024/0314
Address	204 Nelson Street ANNANDALE
Proposal	Torrens title subdivision of existing dual occupancy into two allotments.
Date of Lodgement	2 May 2024
Applicant	Mr James M Linz
Owner	Mr James M Linz Carla Pavez
Number of Submissions	Initial: 0
Cost of works	NA
Reason for determination at Planning Panel	Section 4.6 variation exceeds 10% - Subdivision
Main Issues	Heritage
Recommendation	Approved with Conditions
Attachment A	Recommended conditions of consent
Attachment B	Plans
Attachment C	Section 4.6 Exception to Development Standards
Attachment D	Heritage Impact Statement



LOCALITY MAP

Subject Site		Objectors		↑ N
Notified Area		Supporters		

1. Executive Summary

This report is an assessment of the application submitted to Council for the Torrens title subdivision of an existing dual occupancy into two allotments at 204 Nelson Street Annandale.

The application was notified to surrounding properties and no submissions were received in response to the notification.

2. Proposal

The application seeks to subdivide the land into two Torrens Title allotments with the following site areas:

- 204 Nelson Street - 196sqm
- 204 Trafalgar Lane - 95.7sqm

The site currently contains 2 dwellings, i.e, a dual occupancy, and the proposal seeks to formalise a subdivision to reflect the existing housing and fence boundaries on the site.

3. Site Description

The subject site is located on the western side of Nelson Street, between Piper Street and Booth Lane. The site consists of 1 allotment and is generally rectangular shaped with a total area of 290sqm and is legally described as Lot A in DP 25347.

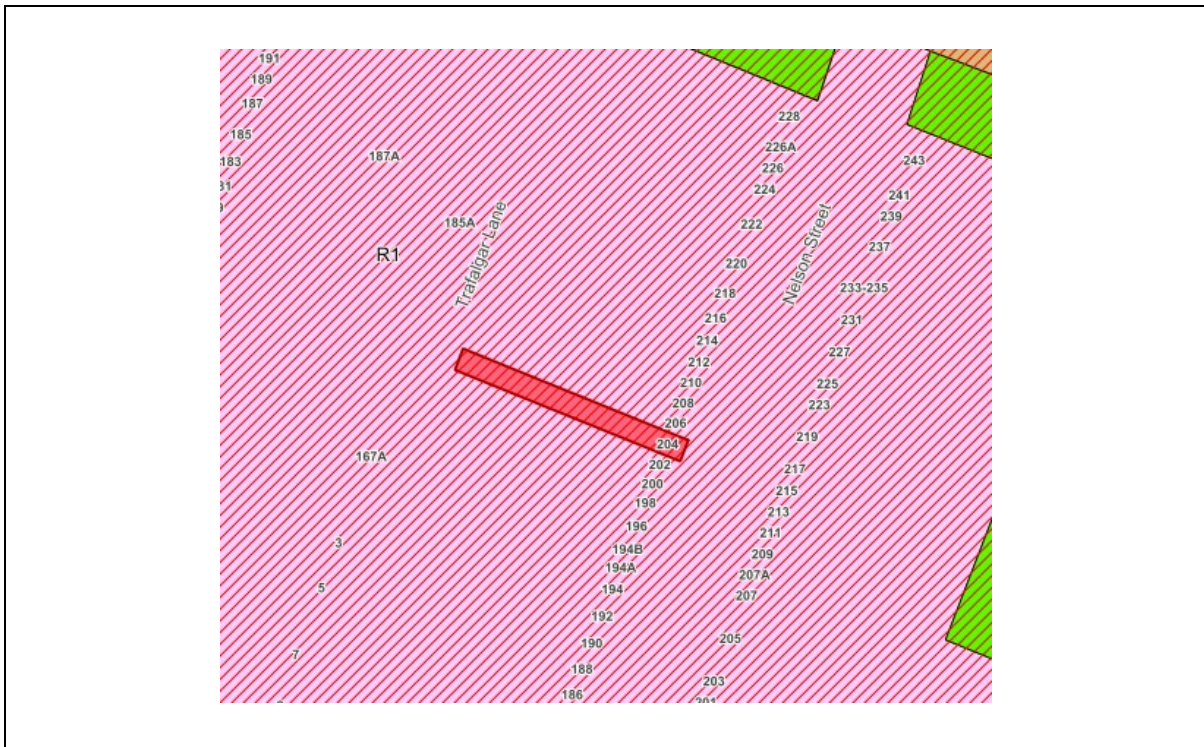
The site has a frontage to Nelson Street of 5.4 metres and a secondary frontage of approximate 5.6 metres to Trafalgar Lane. The site supports an existing dual occupancy approved in 1993 under DA/538/92 and constructed in 1999 under BA/97/772. The main dwelling is masonry single storey dwelling and the secondary dwelling is double storey part masonry and light weight structure with vehicular and pedestrian access off Trafalgar Lane. The adjoining properties on Nelson Street and Trafalgar Lane consist of a mix of dwellings, garages/studios and garages accessed from the lane with heights of one and two storeys.

The property is located within a conservation area.

There are no significant or prescribed trees located on the site.



204 Nelson Street Annandale indicated in green



204 Nelson Street Zoning Map R1 Residential

4. Background

Site history

The following application outlines the relevant development history of the subject site and any relevant applications on surrounding properties.

Subject Site

Application	Proposal	Decision & Date
BA90/311	Alterations and additions	24/05/1990
DA538/92	Two storey dual occupancy	31/03/1993
BA97/772	Class 1a 2 storey brick cottage	20/01/1998

Surrounding Development

Application	Proposal	Decision & Date
DA/249/1993	Dual Occupancy 181 Trafalgar Street	19/05/1994
BA/191/85b	2 storey dual occupancy at rear 171 Trafalgar Street	26/03/1991
BA/1991/84b	Two storey dual occupancy at rear 167 Trafalgar Street	26/03/1991
D/2000/164	Torrens title subdivision 163 Trafalgar Street	08/06/2001
D/2015/89	Convert existing strata to Torrens Title 153 Trafalgar Street	09/06/2015
D/2004/365	New dwelling and strata subdivision 150 Nelson Street	06/12/2004

5. Assessment

The following is a summary of the assessment of the application in accordance with Section 4.15 of the *Environmental Planning and Assessment Act 1979 (EPA Act 1979)*.

A. Environmental Planning Instruments

The application has been assessed and the following provides a summary of the relevant Environmental Planning Instruments.

State Environmental Planning Policies (SEPPs)

SEPP (Resilience and Hazards) 2021

Chapter 4 Remediation of land

Section 4.6(1) of the *Resilience and Hazards SEPP* requires the consent authority not consent to the carrying out of any development on land unless:

- (a) *it has considered whether the land is contaminated, and*
- (b) *if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and*
- (c) *if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.*

In considering the above, there is no evidence of contamination on the site. There is also no indication of uses listed in Table 1 of the contaminated land planning guidelines within Council’s records. The land will be suitable for the proposed use as there is no indication of contamination.

Inner West Local Environmental Plan 2022

The application was assessed against the following relevant sections of the *Inner West Local Environmental Plan 2022 (IWLEP 2022)*.

Part 1 – Preliminary

Section	Proposed	Compliance
Section 1.2 Aims of Plan	The proposal satisfies the section as follows: <ul style="list-style-type: none"> • The proposal encourages development that demonstrates efficient and sustainable use of energy and resources in accordance with ecologically sustainable development principles, • The proposal conserves and maintains the natural, built and cultural heritage of Inner West, • The proposal encourages diversity in housing to meet the needs of, and enhance amenity for, Inner West residents. 	Yes

Part 2 – Permitted or prohibited development

Section	Proposed	Compliance
Section 2.3 Zone objectives and Land Use Table	<ul style="list-style-type: none"> The application proposes subdivision and is permissible with consent in the R1 Residential zone. The proposal is consistent with the relevant objectives of the zone, the proposal for subdivision of existing structures would still meet the objective to provide for a variety of housing types while maintaining the built character of the surrounding area, as there are no building works thereby having no new impacts. 	Yes
Section 2.6 Subdivision – consent requirements	<ul style="list-style-type: none"> The application seeks development consent for the subdivision of the existing lot into two 2 Torrens title lots, which is permissible with consent. 	Yes

Part 4 – Principal development standards

Having regard to the proposed lot sizes, both lots fail to meet the prescribed development standard for minimum lot size, however each lot will be discussed on its own merits having regard to the non-compliances⁹⁺ presented with development standards below;

Lot 1 – 204 Trafalgar Lane

Section	Proposed	Compliance
Section 4.1 Minimum Subdivision lot size	Maximum	200sqm
	Proposed	95.7sqm
	Variation	104.3sqm or 52%
Section 4.3C (3)(a) Landscaped Area	Minimum	15%
	Proposed	17.4% or 16.7sqm
Section 4.3C (3)(b) Site Coverage	Maximum	60% or 57.42sqm
	Proposed	73.3% or 70.1sqm
	Variation	9.28sqm or 15%
Section 4.4 Floor space ratio	Maximum	0.9:1 or 86.13sqm
	Proposed	1..24:1 or 119.5sqm
	Variation	42.94sqm or 24%
Section 4.5 Calculation of floor space ratio and site area	The site area and floor space ratio for the proposal has been calculated in accordance with the section.	Yes
Section 4.6 Exceptions to development standards	The applicant has submitted a variation request in accordance with Section 4.6 to vary Section 4.1, 4.3C (3) a & b and 4.4.	See discussion below

Section 4.6 – Exceptions to Development Standards

Section 4.1 Minimum Subdivision lot size development standard

The applicant seeks a variation to the above mentioned development standard under section 4.6 of the *IWLEP 2022* by 104.3sqm or 52%. Section 4.6 allows Council to vary development standards in certain circumstances and provides an appropriate degree of flexibility to achieve better design outcomes.

A written request has been submitted to Council in accordance with Section 4.6(3) of the *IWLEP 2022* justifying the proposed contravention of the development standard. In order to demonstrate whether strict numeric compliance is unreasonable and unnecessary in this instance, the proposed exception to the development standard has been assessed against the objectives and provisions of Section 4.6 of the *IWLEP 2022* below.

Whether compliance with the development standard is unreasonable or unnecessary

In *Wehbe* at [42] – [51], Preston CJ summarises the common ways in which compliance with the development standard may be demonstrated as unreasonable or unnecessary. This is repeated in *Initial Action* at [16]. In the Applicant's written request, the first method described in *Initial Action* at [17] is used, which is that the objectives of the minimum subdivision lot size standard are achieved notwithstanding the numeric non-compliance.

The **first objective of Section 4.1** is to ensure lot sizes cater for a variety of development. The written request states *the paper Torren title subdivision will "separate" the 2 existing buildings into 2 distinct legal Titles on paper to ensure that both buildings can practically contribute to housing stock of the LGA (facilitate the potential for individual sale of each lot, and hence a more affordable price point for each lot rather than a much higher price for a combined site) and accommodate the affordable housing needs of the LGA.* In the wider Annandale HCA there are examples of smaller allotments that contribute to enabling a variety of development as outlined in this report. Council acknowledges that in this instance the two dwellings are existing and that the proposed subdivision meets intent of the first objective. It is noted that whilst this lot is albeit small, it has the ability to provide for a dwelling (which it has been doing) without any amenity impact.

The **second objective of Section 4.1** is to ensure lot sizes do not result in adverse amenity impacts. The written request states *the proposal will maintain the existing 2 residential buildings as-is, and therefore will not increase the residential population density of the subject site and the land use intensity beyond its existing level. As there are no changes to the existing physical built form, the proposal (for paper subdivision only, with no actual physical/building works) will not result in any changes to existing amenity conditions for the adjoining properties in terms of overshadowing, visual privacy and visual bulk.* Agreed, there are no adverse amenity impacts as the buildings are in situ and the application seeks to formalise this arrangement. Accordingly, the breach is consistent with the second objective.

The **third objective of Section 4.1** is to ensure lot sizes deliver high quality architectural, urban and landscape design. The written request states *there are no changes to the existing physical built form*. Agreed, the buildings are existing and have been contributing to the HCA and landscape setting. Accordingly, the breach is consistent with the third objective.

The **fourth objective of Section 4.1** is to provide a pattern of subdivision that is consistent with the desired future character. The written request states *the proposal, despite the “technical” numerical non-compliance, is largely consistent with the building bulk of nearby neighbours in the locality which are estimated to have a similar Minimum Subdivision Lot Size*. As demonstrated within this report, there are a number of Torrens title allotments in the Annandale HCA which support smaller allotment sizes where the result has no cumulative amenity impacts. The wider subdivision pattern in the HCA is not impacted by the development by virtue of the two dwellings being existing on the site and contributing the HCA. Accordingly, the breach is consistent with the fourth objective.

The **fifth objective of Section 4.1** is to ensure lot sizes allow development to be sited to protect and enhance riparian and environmentally sensitive land. The written request states *The proposal will retain the existing residential use of the site, and as no physical building works are proposed the built and natural features will remain unchanged (e.g. no changes to existing tree canopy cover)*. Agreed, there is no physical change to the sites other than formalising two separate allotments. Accordingly, the breach is consistent with the fifth objective.

As the proposal achieves the objectives of the minimum subdivision lot size standard, compliance is considered unreasonable and unnecessary in this instance.

Whether there are sufficient environmental planning grounds to justify contravening the development standard

Pursuant to Section 4.6(3)(b), the Applicant advances environmental planning grounds to justify contravening the minimum subdivision lot size development standard. Each will be dealt with in turn:

Environmental Planning Ground 1 - *is similar to other DAs that have been approved nearby in that the proposed subdivision will result in 2 new lots that are considered to be generally consistent with the widths, sizes and shapes and pattern of neighbouring lots in the locality along Nelson Street/Lane and Trafalgar Street/Lane e.g. front lot facing primary street and rear lot facing secondary rear lane, and which include several lots under 200m² in area – refer to Heading 5.4 for more details; further to the above point – it is practically impossible for any Torrens Title Subdivision of existing small lots within Annandale (and other suburbs in the Inner West) to achieve “technical” compliance with the MSLS development standard, given that the already-small parent lot is being subdivided*. Council does not concur that there are instances of similar sized Torren Title subdivisions in the immediate vicinity of the subject site to such an extent that would justify the comparison claimed above. However, it is the case that similar small Torrens Title subdivisions have been accommodated in the wider Annandale HCA, primarily related to pre-existing housing, with subdivision generally being supported where no new amenity impacts have arisen.

Environmental Planning Ground 2 - *will retain the existing 2 buildings/dwellings, and continue to provide for the housing needs of the community; and is generally compatible with the height, bulk and scale of the existing and desired future character of the locality i.e. does not result in any increases in gross floor area, building height, and/or changes to external building form;* This environmental planning ground is accepted because the nature of the development removes the prohibited Dual Occupancy use within the R1 residential zone and results in a conforming use when the Torrens subdivision is applied.

Environmental Planning Ground 3 - *does not reduce existing landscaping & open space, and does not increase the existing site coverage / building footprint; and will not have any impacts on the amenity of neighbouring properties in relation to overlooking, view loss, solar access loss etc.* This environmental planning ground is accepted because whilst proposing to formalise the development into two separate allotments, there are no additional physical works proposed, the amenity is maintained and desired future character is satisfied as the site remains contributory to the HCA.

Cumulatively, the grounds have been adequately justified, and are considered sufficient to justify contravening the development standard.

For the reasons outlined above, it is recommended that the section 4.6 exception be granted.

Section 4.3C (3)(b) Site Coverage development standard

The applicant seeks a variation to the above mentioned standard under section 4.6 of the *IWLEP 2022* by 12.78sqm or 13.3%. Section 4.6 allows Council to vary development standards in certain circumstances and provides an appropriate degree of flexibility to achieve better design outcomes.

A written request has been submitted to Council in accordance with Section 4.6(3) of the *IWLEP 2022* justifying the proposed contravention of the development standard. In order to demonstrate whether strict numeric compliance is unreasonable and unnecessary in this instance, the proposed exception to the development standard has been assessed against the objectives and provisions of Section 4.6 of the *IWLEP 2022* below.

Whether compliance with the development standard is unreasonable or unnecessary

In *Wehbe* at [42] – [51], Preston CJ summarises the common ways in which compliance with the development standard may be demonstrated as unreasonable or unnecessary. This is repeated in *Initial Action* at [16]. In the Applicant's written request, the first method described in *Initial Action* at [17] is used, which is that the objectives of the site coverage standard are achieved notwithstanding the numeric non-compliance.

The **first objective of Section 4.3C (3)(b)** *to provide landscaped areas for substantial tree planting and for the use and enjoyment of residents* The written request states *The proposal will retain the existing residential use of the site, and as no physical building works are*

proposed the built and natural features will remain unchanged (e.g. no changes to existing tree canopy cover). Agreed, there is no change to the existing landscape setting as a result of the proposal. Accordingly, the breach is consistent with the first objective.

The **second objective of Section 4.3C (3)(b)** is to maintain and encourage a landscaped corridor between adjoining properties. The written request states *As there are no changes to the existing physical built form, the proposal (for paper subdivision only, with no actual physical/building works) will not result in any changes to existing amenity conditions for the adjoining properties.* Agreed, there is no change to the existing landscape corridor and it is being maintained as part of the proposed development. Accordingly, the breach is consistent with the second objective.

The **third objective of Section 4.3C (3)(b)** is to ensure that development promotes the desired character of the neighbourhood. The written request states *The proposal, despite the "technical" numerical non-compliance, is largely consistent with the building bulk of nearby neighbours in the locality.* Agreed, there is no physical change to the two existing dwellings as a result of the proposed subdivision thereby maintaining the character of the area. Accordingly, the breach is consistent with the third objective.

The **fourth objective of Section 4.3C (3)(b)** is to encourage ecologically sustainable development. The written request states *The paper Torrens title subdivision will "separate" the 2 existing buildings into 2 distinct legal Titles on paper to ensure that both buildings can practically contribute to housing stock of the LGA (facilitate the potential for individual sale of each lot, and hence a more affordable price point for each lot rather than a much higher price for a combined site), and accommodate the affordable housing and inter-generational equity needs of the community.* Agreed, the continued use of both buildings thereby maintaining the existing housing stock which meets the intent of this objective and accordingly, the breach is consistent with the fourth objective.

The **fifth objective of Section 4.3C (3)(b)** is to control site density. The written request states *The proposal will maintain the existing 2 residential buildings as-is, and therefore will not increase the residential population density of the subject site and the land use intensity beyond its existing level,* Agreed, the density is not changing as a result of Torrens title subdivision. However this does not prevent the lodgement of a future development application for alterations and additions, however the existing planning controls would limit the ability of such additions and those additions would be subject to assessment having regard to impact to adjoining development, noting this lot already exceeds its potential and is unlikely to provide for any additional yield. Accordingly, the breach is consistent with the fifth objective.

The **sixth objective of Section 4.3C (3)(b)** is to provide for landscaped areas and private open space. The written request states *The proposal will retain the existing built and natural features, there is no change to the landscaped area or POS and after subdivision will provide adequate facilities to each new allotment.* It is agreed that the proposal provides the requisite landscape area for the subject site and this does not change with the formalisation of the subdivision in this instance. Accordingly, the breach is consistent with the sixth objective.

As the proposal achieves the objectives of the minimum subdivision lot size standard, compliance is considered unreasonable and unnecessary in this instance.

Whether there are sufficient environmental planning grounds to justify contravening the development standard

Pursuant to Section 4.6(3)(b), the Applicant advances environmental planning grounds to justify contravening the site coverage development standard. Each will be dealt with in turn:

Environmental Planning Ground 1 - *is similar to other DAs that have been approved nearby – refer to the Statement of Environmental Effects for more details – in that it is practically impossible for any Torrens Title Subdivision of existing small lots within Annandale (and other suburbs in the Inner West) to achieve “technical” compliance with the LA and/or SC development standard (demonstrated by the numerous non-compliance approved), due to the artificially inflated ratio/percentage between the reduced subdivided-lot size compared the existing building’s site coverage/footprint.* Council does not concur that there are instances of similar sized Torren Title subdivisions in the immediate vicinity of the subject site to such an extent that would justify the comparison claimed above. However, it is the case that similar small Torrens Title subdivisions have been accommodated in the wider Annandale HCA, primarily related to pre-existing housing where no new amenity impacts have arisen.

Environmental Planning Ground 2 - *will retain the existing 2 buildings/dwellings and continue to provide for the housing needs of the community* Agreed. This environmental planning ground is accepted because the result of the subdivision will still provide two dwellings / housing within the locality. From a built form and operation perspective there will be no impact as a result of the subdivision.

Environmental Planning Ground 3 - *will maintain the existing use of the site as residential, and the built and natural features will remain unchanged as no physical building works are proposed.* The proposal will have a minimal to negligible environmental impact as a result of subdividing the allotment. This environmental planning ground is accepted because the application to change the prohibited use from dual occupancy to two separate Torrens title lots will retain the amenity, natural features and exiting contributory desired future character of the HCA.

Cumulatively, the grounds have been adequately made out, and are considered sufficient to justify contravening the development standard.

For the reasons outlined above, it is recommended that the section 4.6 exception be granted.

Section 4.4 Floor Space Ratio development standard

The applicant seeks a variation to the above mentioned under section 4.6 of the *IWLEP 2022* by 42.94sqm or 24% Section 4.6 allows Council to vary development standards in certain circumstances and provides an appropriate degree of flexibility to achieve better design outcomes.

A written request has been submitted to Council in accordance with Section 4.6(3) of the *IWLEP 2022* justifying the proposed contravention of the development standard. In order to demonstrate whether strict numeric compliance is unreasonable and unnecessary in this instance, the proposed exception to the development standard has been assessed against the objectives and provisions of Section 4.6 of the *IWLEP 2022* below.

Whether compliance with the development standard is unreasonable or unnecessary

In *Wehbe* at [42] – [51], Preston CJ summarises the common ways in which compliance with the development standard may be demonstrated as unreasonable or unnecessary. This is repeated in *Initial Action* at [16]. In the Applicant's written request, the first method described in *Initial Action* at [17] is used, which is that the objectives of the floor space ratio standard are achieved notwithstanding the numeric non-compliance.

The **first objective of Section 4.4** is *to establish a maximum floor space ratio to enable appropriate development density*. The written request states the proposal is for paper subdivision only, with no actual physical/building works, and therefore will not result in an increase of the existing floor area, bulk/scale, and density, the resultant density is unchanged. Accordingly, the breach is consistent with the first objective.

The **second objective of Section 4.4** is *to ensure development density reflects its locality*. The written request states the proposal will maintain the existing 2 residential buildings as-is, and therefore will not increase the residential population density of the subject site and the land use intensity beyond its existing level the resultant density is unchanged, accordingly, the breach is consistent with the second objective

The **third objective of Section 4.4** is *to provide an appropriate transition between development of different densities*. The written request states, the proposal will not intensify the use of the existing development or result in a density that is beyond the existing level, and this is agreed, the resultant density is unchanged, the scale, form and siting of the building is unchanged. Accordingly, the breach is consistent with the third objective.

The **fourth objective of Section 4.4** is *to minimise adverse impacts on local amenity*. The written request states there are no changes to the existing physical built form, the proposal (for paper subdivision only, with no actual physical/building works) will not result in any changes to existing amenity conditions for the adjoining properties in terms of overshadowing, visual privacy and visual bulk. Accordingly, the breach is consistent with the fourth objective.

The **fifth objective of Section 4.4** is *to increase the tree canopy and to protect the use and enjoyment of private properties and the public domain*. The written request states no changes to existing tree canopy cover. As discussed above, the proposal will not intensify the use of the existing development or result in a density that is beyond the existing level. Agreed, there is no physical change to the canopy cover. Accordingly, the breach is consistent with the fifth objective.

As the proposal achieves the objectives of the floor space ratio standard, compliance is considered unreasonable and unnecessary in this instance.

Whether there are sufficient environmental planning grounds to justify contravening the development standard

Pursuant to Section 4.6(3)(b), the Applicant advances environmental planning grounds to justify contravening the floor space ratio development standard. Each will be dealt with in turn:

Environmental Planning Ground 1 - *is similar to other DAs that have been approved nearby in that it is practically impossible for any Torrens Title Subdivision of existing small lots within Annandale (and other suburbs in the Inner West) to achieve “technical” compliance with the FSR development standard, due to the artificially inflated ratio between the reduced subdivided-lot size compared the existing building’s floor area.* Council does not concur that there are instances of similar sized Torren Title subdivisions in the immediate vicinity of the subject site to such an extent that would justify the comparison claimed above. However, it is the case that similar small Torrens Title subdivisions have been accommodated in the wider Annandale HCA, primarily related to pre-existing housing where no new amenity impacts have arisen. Generally this has been limited to circumstances where the dwelling stock is already in situ and no new amenity outcomes eventuate and minimal additional development potential is created.

Environmental Planning Ground 2 - *will retain the existing two dwellings and continue to provide for the housing needs of the community.* This environmental planning ground is accepted because the resultant of the subdivision retains two dwellings with differing housing density to suit different people’s needs within the locale.

Environmental Planning Ground 3 - *does not reduce existing landscaping & open space and does not increase the existing building footprint; its existing siting, bulk and scale and density will not have any impacts on the amenity of neighbouring properties in relation to overlooking, view loss, solar access loss.* Agreed, this environmental planning ground is accepted because the resultant density is unchanged, the scale form and siting of the two buildings is unchanged and there are no environmental impacts as a result of the proposed subdivision

Cumulatively, the grounds have been adequately made out, and are considered sufficient to justify contravening the development standard.

For the reasons outlined above, it is recommended that the section 4.6 exception be granted.

Lot 2 – 204 Nelson Street

Section	Proposed		Compliance
Section 4.1 Minimum Subdivision lot size	Maximum	200sqm	No
	Proposed	196sqm	
	Variation	4sqm or 2%	

Section	Proposed		Compliance
Section 4.3C (3)(a) Landscaped Area	Minimum	15% or 29.4sqm	Yes
	Proposed	15% or 29.4sqm	
Section 4.3C (3)(b) Site Coverage	Maximum	60%	Yes
	Proposed	57% or 113sqm	
Section 4.4 Floor space ratio	Maximum	0.8:1	Yes
	Proposed	0.5:1 or 98sqm	
Section 4.5 Calculation of floor space ratio and site area	The site area and floor space ratio for the proposal has been calculated in accordance with the section.		Yes
Section 4.6 Exceptions to development standards	The applicant has submitted a variation request in accordance with Section 4.6 to vary Section 4.1, 4.3C (3) a & b and 4.4.		See discussion below

Section 4.6 – Exceptions to Development Standards

Section 4.1 Minimum Subdivision lot size development standard

The applicant seeks a variation to the above mentioned under section 4.6 of the *IWLEP 2022* by 4sqm or 2%. Section 4.6 allows Council to vary development standards in certain circumstances and provides an appropriate degree of flexibility to achieve better design outcomes.

A written request has been submitted to Council in accordance with Section 4.6(3) of the *IWLEP 2022* justifying the proposed contravention of the development standard. In order to demonstrate whether strict numeric compliance is unreasonable and unnecessary in this instance, the proposed exception to the development standard has been assessed against the objectives and provisions of Section 4.6 of the *IWLEP 2022* below.

Whether compliance with the development standard is unreasonable or unnecessary

In *Wehbe* at [42] – [51], Preston CJ summarises the common ways in which compliance with the development standard may be demonstrated as unreasonable or unnecessary. This is repeated in *Initial Action* at [16]. In the Applicant's written request, the first method described in *Initial Action* at [17] is used, which is that the objectives of the minimum subdivision lot size standard are achieved notwithstanding the numeric non-compliance.

The **first objective of Section 4.1** is to ensure lot sizes cater for a variety of development. The written request states *the paper Torren title subdivision will "separate" the 2 existing buildings into 2 distinct legal Titles on paper to ensure that both buildings can practically contribute to housing stock of the LGA (facilitate the potential for individual sale of each lot, and hence a more affordable price point for each lot rather than a much higher price for a combined site) and accommodate the affordable housing needs of the LGA.* Agreed, the

development is existing and results in removing prohibited development, dual occupancy, accordingly, the breach is consistent with the first objective.

The **second objective of Section 4.1** is to ensure lot sizes do not result in adverse amenity impacts. The written request states *The proposal will maintain the existing 2 residential buildings as-is, and therefore will not increase the residential population density of the subject site and the land use intensity beyond its existing level. As there are no changes to the existing physical built form, the proposal (for paper subdivision only, with no actual physical/building works) will not result in any changes to existing amenity conditions for the adjoining properties in terms of overshadowing, visual privacy and visual bulk.* Agreed, there is no amenity impact as the buildings are in situ the application is to formalise into two separate title lots. Accordingly, the breach is consistent with the second objective. The non-compliance of 4sqm would not be materially visible to surrounding development nor would the site function in an impaired way as a result.

The **third objective of Section 4.1** is to ensure lot sizes deliver high quality architectural, urban and landscape design. The written request states *there are no changes to the existing physical built form.* Agreed, the buildings are existing and have been contributing to the HCA and landscape setting. Accordingly, the breach is consistent with the third objective.

The **fourth objective of Section 4.1** is to provide a pattern of subdivision that is consistent with the desired future character. The written request states *The proposal, despite the "technical" numerical non-compliance, is largely consistent with the building bulk of nearby neighbours in the locality which are estimated to have a similar Minimum Subdivision Lot Size.* As assessed within this report, there are a number smaller Torrens title allotments in the locality to support the subdivision pattern. Accordingly, the breach is consistent with the fourth objective.

The **fifth objective of Section 4.1** is to ensure lot sizes allow development to be sited to protect and enhance riparian and environmentally sensitive land. The written request states *The proposal will retain the existing residential use of the site, and as no physical building works are proposed the built and natural features will remain unchanged (e.g. no changes to existing tree canopy cover).* Agreed, there is no physical change to the sites form as a result of the subdivision. Accordingly, the breach is consistent with the fifth objective.

As the proposal achieves the objectives of the minimum subdivision lot size standard, compliance is considered unreasonable and unnecessary in this instance.

Whether there are sufficient environmental planning grounds to justify contravening the development standard

Pursuant to Section 4.6(3)(b), the Applicant advances environmental planning grounds to justify contravening the minimum subdivision lot size development standard. Each will be dealt with in turn:

Environmental Planning Ground 1 - is similar to other DAs that have been approved nearby in that the proposed subdivision will result in 2 new lots that are considered to be generally consistent with the widths, sizes and shapes and pattern of neighbouring lots in the locality along Nelson Street/Lane and Trafalgar Street/Lane e.g. front lot facing primary street and rear lot facing secondary rear lane, and which include several lots under 200m² in area – refer to Heading 5.4 for more details; further to the above point – it is practically impossible for any Torrens Title Subdivision of existing small lots within Annandale (and other suburbs in the Inner West) to achieve “technical” compliance with the MSLS development standard, given that the already-small parent lot is being subdivided. This environmental planning ground is accepted because as discussed within this report there are examples of similar subdivisions and the fact that allotments within the locale subject to subdivision are in breach of the standards as is the nature of the smaller lots within the municipality.

Environmental Planning Ground 2 - will retain the existing 2 buildings/dwellings, and continue to provide for the housing needs of the community; and is generally compatible with the height, bulk and scale of the existing and desired future character of the locality i.e. does not result in any increases in gross floor area, building height, and/or changes to external building form; This environmental planning ground is accepted because the proposal does not alter the built form and supports a dwelling which is consistent with neighbouring development.

Environmental Planning Ground 3 - does not reduce existing landscaping & open space, and does not increase the existing site coverage / building footprint; and will not have any impacts on the amenity of neighbouring properties in relation to overlooking, view loss, solar access loss etc. This environmental planning ground is accepted because whilst proposing to formalise the development into two separate allotments, there are no additional physical works proposed, the amenity and desired future character remains contributory to the HCA.

Cumulatively, the grounds have been adequately made out, and are considered sufficient to justify contravening the development standard.

For the reasons outlined above, it is recommended that the section 4.6 exception be granted.

Part 5 – Miscellaneous provisions

Section	Compliance	Compliance
Section 5.10 Heritage conservation	<p>The subject property at 204 Nelson Street, Annandale, is a contributory dwelling located within the Annandale Heritage Conservation Area (C1 in Schedule 5 of the Inner West LEP 2022)</p> <p>The assessment of the application by Councils Heritage Specialist is concerned that the proposed subdivision would not be consistent with the prevailing character of allotments in the locality.</p> <p>See discussion below</p>	Yes – see discussion

Section 5.10 – Heritage Conservation

The key and relevant objectives of Section 5.10 of *IWLEP 2022* are to conserve the environmental heritage of the Inner West, including the heritage significance of conservation areas and their associated fabric, settings and views.

In particular Council's Heritage Specialist notes the following:

C2 of Part C1.6 of the DCP requires that new allotments be consistent with the prevailing subdivision pattern in the neighbourhood. The proposed subdivision is not consistent with the historical subdivision pattern of lots running in a generally east – west orientation from Nelson Street through to Trafalgar Lane.

The applicants HIS provided a list of sites that have similar developments, which Councils heritage specialist noted that none of these developments had carried out subdivision.

- 196 Nelson Street – 2 storey studio / garage with rear door lane access
- 194 Nelson Street – 2 storey studio / garage
- 192 Nelson Street - 2 storey studio / garage
- 190 Nelson Street - 2 storey studio / garage
- 182 Nelson Street – 2 storey secondary dwelling & garage

The advice goes on to add that if the proposal was to be considered, further historical evidence would need to be undertaken needing archival research and the like.

Assessment of the locale indicates Council has supported Torrens subdivision of allotments in the immediate locale as follows.

- 181 Trafalgar Street – Dual occupancy
- 171 Trafalgar Street – Dual Occupancy
- 167 Trafalgar Street – Dual Occupancy
- 163 Trafalgar Street - Torrens title subdivision
- 153 Trafalgar Street - Convert existing strata to Torrens Title
- 150 Nelson Street – New dwelling and Strata subdivision

It is considered that there is a prevailing subdivision pattern that has allowed for subdivision of the long east west allotments on both Nelson and Trafalgar Streets, As the proposal involves no building works and the dwellings are in situ, to alleviate the matter of Dual Occupancies being prohibited in the R1 Zone, it is considered that objective (1) (a) and (b) are achieved.

The following list contains a number of examples from the Annandale HCA of approved Torrens title lots similar in size to the smallest of the two proposed lots. These are scattered throughout the Annandale HCA.

- 279 Piper Street – 110.3sqm
- 101 View Street – 88.5sqm
- 103 View Street – 88.5sqm

- 35a Reserve Street – 80.4sqm
- 1 Mayes Street – 106.8sqm
- 6a Annandale Street – 56.9sqm
- 14 Susan Lane – 101.2sqm
- 12 Susan Lane – 75.3sqm (see below)
- 10 Susan Lane – 73.6sqm
- 2A Alfred St – 82.2sqm
- 2 Alfred St – 107sqm
- 9A Nelson St – 82.2sqm
- 3 Albion St – 82.2sqm
- 1 Susan St – 94.8sqm
- 1 Chester St – 110sqm
- 3 Chester St – 108sqm
- 150A Trafalgar lane – 63.2sqm
- 279 Piper Lane – 110sqm
- 5 Alfred St – 75.9sqm
- 7 Alfred St – 75.9sqm

It is considered a smaller lot is not an impediment in ensuring a good built form outcome that is consistent with the HCA. As noted this application would not result in a change to the built form outcome.



12 Susan Lane – example of small lot within the Annandale HCA

On balance, it is considered the proposal will satisfactorily conserve the heritage significance of the HCA, thereby satisfying Section 5.10 of *IWLEP 2022*.

Part 6 – Additional local provisions

Section	Proposed	Compliance
Section 6.1 Acid sulfate soils	<ul style="list-style-type: none"> The site is identified as containing Class 5 acid sulfate soils. The proposal is considered to adequately satisfy this section as the application does not propose any works that would result in any significant adverse impacts to the watertable. 	Yes
Section 6.3 Stormwater Management	<ul style="list-style-type: none"> The development maximises the use of permeable surfaces, includes on site retention as an alternative supply and subject to standard conditions would not result in any significant runoff to adjoining properties or the environment. 	Yes, subject to conditions
Section 6.8 Development in areas subject to aircraft noise	<ul style="list-style-type: none"> The site is located within the ANEF 20-25 and 15-20 contour. The proposal is for subdivision of the site with no building works. Conditions are not required to be imposed. 	N/A

B. Development Control Plans

Summary

The application has been assessed and the following provides a summary of the relevant provisions of Leichhardt Development Control Plan 2013 (LDCP 2013).

LDCP 2013	Compliance
Part A: Introductions	
Section 3 – Notification of Applications	Yes
Part B: Connections	N/A
Part C	
C1.0 General Provisions	Yes
C1.1 Site and Context Analysis	Yes
C1.2 Demolition	Yes
C1.3 Alterations and additions	Yes
C1.4 Heritage Conservation Areas and Heritage Items	Yes – see discussion
C1.6 Subdivision	Yes – see discussion
C1.7 Site Facilities	Yes
C1.11 Parking	Yes
C1.12 Landscaping	Yes
C1.14 Tree Management	Yes

C1.17 Minor Architectural Details	Yes
C1.18 Laneways	Yes
Part C: Place – Section 2 Urban Character	
C2.2.1.6 Nelson Street Distinctive Neighbourhood	Yes
Part C: Place – Section 3 – Residential Provisions	
C3.1 Residential General Provisions	Yes
C3.2 Site Layout and Building Design	Yes
C3.3 Elevation and Materials	Yes
C3.5 Front Gardens and Dwelling Entries	Yes
C3.6 Fences	Yes
C3.7 Environmental Performance	Yes
C3.8 Private Open Space	Yes
C3.9 Solar Access	Yes
C3.11 Visual Privacy	Yes
C3.12 Acoustic Privacy	Yes
Part C: Place – Section 4 – Non-Residential Provisions	N/A
Part D: Energy	
Section 1 – Energy Management	Yes
Section 2 – Resource Recovery and Waste Management	
D2.1 General Requirements	Yes
D2.3 Residential Development	Yes
Part E: Water	
Section 1 – Sustainable Water and Risk Management	
E1.1 Approvals Process and Reports Required with Development Applications	Yes
E1.1.3 Stormwater Drainage Concept Plan	Yes
E1.2.2 Managing Stormwater within the Site	Yes
Part F: Food	N/A
Part G: Site Specific Controls	N/A

C1.4 Heritage Conservation Areas and Heritage Items

Refer to Part 5 of this report.

C1.6 Subdivision

As discussed in Part 5 of this report, there are other examples of small lot subdivision within the locality to support the objectives under this clause. In particular the proposed subdivision meets the objectives prescribed by O1 as follows;

- The lots are of a sufficient dimension and area to accommodate residential development as witnessed by the existing built form
- The lot fronting Trafalgar Lane is consistent with a number of examples of small lot subdivision within the locality
- The site retains existing landscape area
- The site affords a high level of security and this remains unchanged as a result of the Torrens subdivision

C. The Likely Impacts

These matters have been considered as part of the assessment of the development application. It is considered that the proposed development will not have significant adverse environmental, social or economic impacts upon the locality.

D. The Suitability of the Site for the Development

The proposal is of a nature in keeping with the overall function of the site. The premises are in a residential surrounding and amongst similar uses to that proposed.

E. Submissions

The application was notified in accordance with Council's Community Engagement Strategy between 09 May 2024 to 23 May 2024.

No submissions were received

F. The Public Interest

The public interest is best served by the consistent application of the requirements of the relevant Environmental Planning Instruments, and by Council ensuring that any adverse effects on the surrounding area and the environment are appropriately managed.

This has been achieved in this instance.

6. Referrals

The following internal referrals were made, and their comments have been considered as part of the above assessment:

- Heritage Specialist;
- Development Engineer.

7. Conclusion

The proposal generally complies with the aims, objectives and design parameters contained in *Inner West Local Environmental Plan 2022* Leichhardt Development Control Plan 2013.

The development will not result in any unacceptable impacts on the amenity of the adjoining properties and the streetscape and is considered to be in the public interest.

The application is considered suitable for approval subject to the imposition of appropriate conditions.

8. Recommendation

- A. The Applicant's written request to contravene the development standards in 4.1, 4.3C and 4.4 of Inner West Local Environmental Plan 2022 has adequately addressed the following matters that are required to be demonstrated:
- (i) that compliance with the development standards is unreasonable or unnecessary in the circumstances of the case, and
 - (ii) that there are sufficient environmental planning grounds to justify contravening the development standards.
- B. That the Inner West Local Planning Panel exercising the functions of the Council as the consent authority, pursuant to s4.16 of the *Environmental Planning and Assessment Act 1979*, grant consent to/refuse Development Application No. DA/2024/0314 for Torrens title subdivision of an existing dual occupancy into two allotments. at 204 Nelson Street, Annandale subject to the conditions listed in Attachment A below/for the following reasons:

Attachment A – Recommended conditions of consent

CONDITIONS OF CONSENT

GENERAL CONDITIONS

Condition									
1.	<p style="text-align: center;">Boundary Alignment Levels</p> <p>Alignment levels for the site at all pedestrian and vehicular access locations must match the existing back of footpath levels at the boundary unless levels are otherwise approved by Council via a S138 approval.</p> <p>Reason: To allow for pedestrian and vehicular access.</p>								
2.	<p style="text-align: center;">Insurances</p> <p>Any person acting on this consent or any contractors carrying out works on public roads or Council controlled lands is required to take out Public Liability Insurance with a minimum cover of twenty (20) million dollars in relation to the occupation of, and approved works within those lands. The Policy is to note, and provide protection for Inner West Council, as an interested party and a copy of the Policy must be submitted to Council prior to commencement of the works. The Policy must be valid for the entire period that the works are being undertaken on public property.</p> <p>Reason: To ensure Council assets are protected.</p>								
3.	<p style="text-align: center;">Documents related to the consent</p> <p>The development must be carried out in accordance with plans and documents listed below:</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: center;">Plan, Revision and Issue No.</th> <th style="text-align: center;">Plan Name</th> <th style="text-align: center;">Date Issued/Received</th> <th style="text-align: center;">Prepared by</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">Sheet 1 of 1 Sheets</td> <td style="text-align: center;">Proposed Subdivision</td> <td style="text-align: center;">18/03/2024</td> <td style="text-align: center;">East West Surveyors P/L</td> </tr> </tbody> </table> <p>As amended by the conditions of consent.</p> <p>Reason: To ensure development is carried out in accordance with the approved documents.</p>	Plan, Revision and Issue No.	Plan Name	Date Issued/Received	Prepared by	Sheet 1 of 1 Sheets	Proposed Subdivision	18/03/2024	East West Surveyors P/L
Plan, Revision and Issue No.	Plan Name	Date Issued/Received	Prepared by						
Sheet 1 of 1 Sheets	Proposed Subdivision	18/03/2024	East West Surveyors P/L						

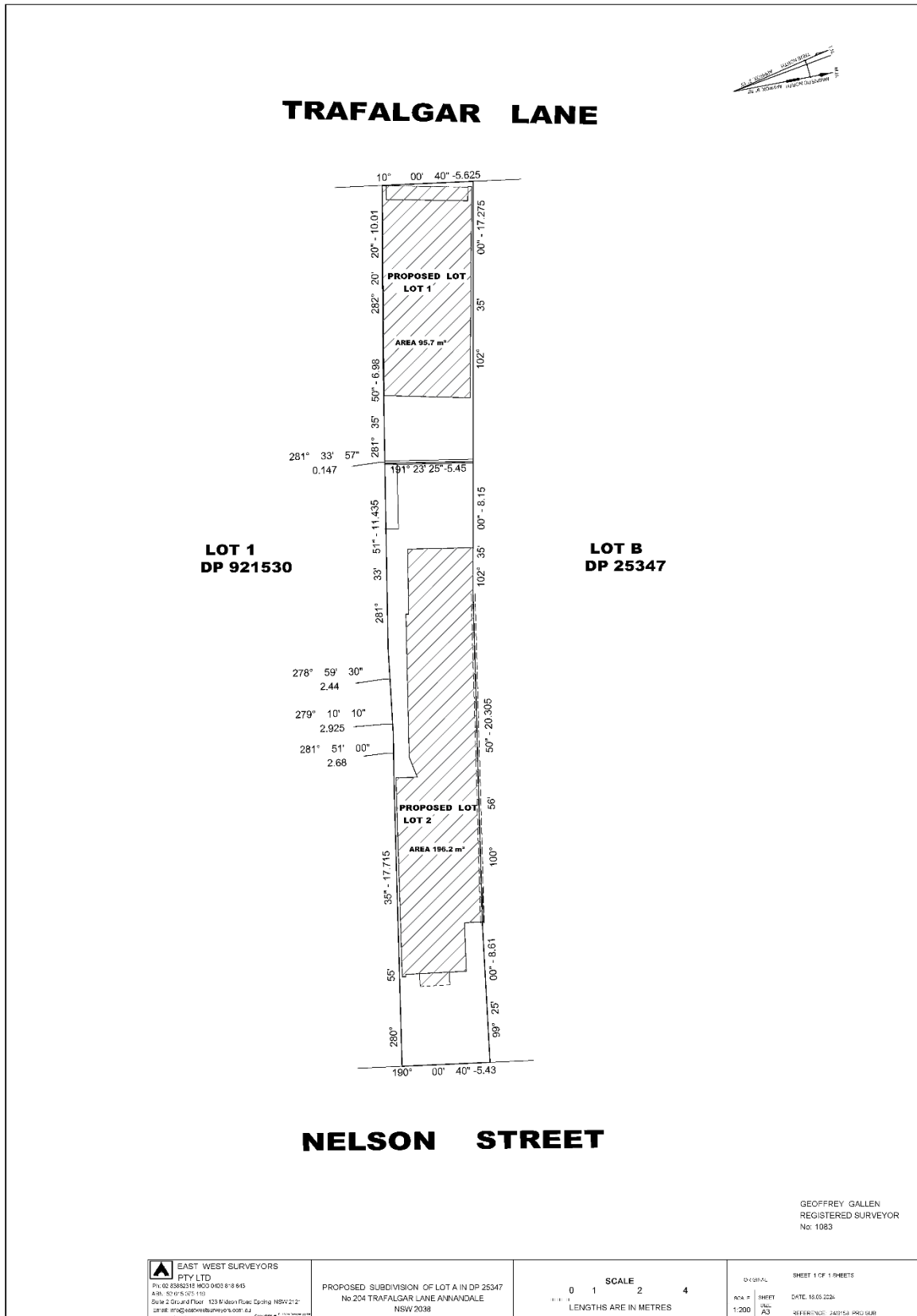
SUBDIVISION WORK

BEFORE ISSUE OF A SUBDIVISION CERTIFICATE

	Condition
4.	<p>Separate Drainage Systems</p> <p>Prior to the issue of a Subdivision Certificate, the Principal Certifier must be provided with a plan detailing that separate drainage systems must be provided to drain each proposed lot.</p> <p>Reason: To ensure that the adequate provision of stormwater drainage is provided.</p>
5.	<p>Subdivision Plan Amendment</p> <p>Prior to the issue of a Subdivision Certificate, the Principal Certifier must verify that:</p> <ul style="list-style-type: none"> a. A common drainage easement in favour of the parcels of land to be drained must be created over the full length of all existing and proposed inter-allotment drainage systems within the site of the proposed development; and b. Proof of registration of the easement and a written statement signed by the Registered Surveyor that the as-built pipeline is totally within the proposed easement. <p>Reason: To ensure easements are registered.</p>
6.	<p>Release of Subdivision Certificate</p> <p>Prior to the release of a Subdivision Certificate, the Certifying Authority must be provided with a copy of the Final Occupation Certificate.</p> <p>Reason: To ensure development is completed before the subdivision certificate is released.</p>

Attachment B – Plans





Attachment C – Section 4.6 Exception to Development Standards

19 April 2024

General Manager
Inner West Council

Dear Sir/Madam,

The applicant has engaged TRANPLAN Consulting to provide this Clause 4.6 Request/Submission in relation to a Development Application on land known as **204 Trafalgar Lane (204 Nelson Street), Annandale** for Torrens Title Subdivision of the existing property (1 lot) into 2 lots.

As detailed in this written request for a variation to the Minimum Subdivision Lot Size (MSLS) Clause 4.1 Development Standard under the LEP, the proposed development variation meets the requirements prescribed under Clause 4.6 of the Inner West Local Environmental Plan 2022 (IWLEP).

1 VARIATION TO CLAUSE 4.1 DEVELOPMENT STANDARD – INNER WEST LOCAL ENVIRONMENTAL PLAN 2022

This submission is made to support the variation to Clause 4.1 Minimum Subdivision Lot Size (MSLS) development standard of Inner West Local Environmental Plan 2022 (IWLEP). Clause 4.6 establishes the framework for varying development standards applying under a Local Environmental Plan. Clause 4.6 states the following:

4.6 Exceptions to development standards

- (1) *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.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *The consent authority must keep a record of its assessment carried out under subclause (3)*
- (5) *Repealed*

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- (6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:
- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.
- (7) Repealed
- (8) This clause does not allow development consent to be granted for development that would contravene any of the following:
- (a) a development standard for complying development,
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
 - (c) clause 5.4,
 - (caa) clause 5.5,
 - (ca) clause 6.27(4),
 - (cb), (cc) (Repealed)
 - (cd) clause 6.31.

2 ROLE OF THE CONSENT AUTHORITY

The role of the consent authority in considering a request for a clause 4.6 variation – specifically, subclause 4.6(3)(a) and 4.6(3)(b) – requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

- 4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- 4.6(3)(b) that there is sufficient environmental planning grounds to justify contravening the development standard.*

A key consideration is that the fundamental purpose/objective of Clause 4.6 is to provide flexibility in applying development standards in that in so doing better development outcomes ensue.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

- *Wehbe v Pittwater Council [2007] NSW LEC 827 (Wehbe);*
- *FouR1Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (FouR1Five);*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 (Initial Action);*
- *Ex Gratia P/L v Dungog Council (2015) NSWLEC 148;*
- *Moskovich v Waverley Council (2016) NSWLEC 1015;* and
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245 (Al Maha).*

2

In particular, the Council needs to be satisfied that there are proper planning grounds to grant consent and that the contravention of the standard is justified. This report provides the basis for the Council to reach this level of satisfaction.

The relevant matters contained in Clause 4.6 of the IWLEP 2012, with respect to the MSLS development standard, are each addressed below, including with regard to the above decisions.

3 CLAUSE 4.1 DEVELOPMENT STANDARD OF THE LEP

The Development Standard to which this variation relates to is Clause 4.1 Development Standard of the LEP, reads as follows:

4.1 Minimum subdivision lot size

- (1) *The objectives of this clause are as follows:*
- (a) *to ensure lot sizes cater for a variety of development,*
 - (b) *to ensure lot sizes do not result in adverse amenity impacts,*
 - (c) *to ensure lot sizes deliver high quality architectural, urban and landscape design,*
 - (d) *to provide a pattern of subdivision that is consistent with the desired future character,*
 - (e) *to ensure lot sizes allow development to be sited to protect and enhance riparian and environmentally sensitive land.*
- (2) *This clause applies to a subdivision of any land shown on the Lot Size Map that requires development consent and that is carried out after the commencement of this Plan.*
- (3) *The size of any lot resulting from a subdivision of land to which this clause applies is not to be less than the minimum size shown on the Lot Size Map in relation to that land.*
- (4) *This clause does not apply in relation to the subdivision of any land:*
- (a) *by the registration of a strata plan or strata plan of subdivision under the Strata Schemes Development Act 2015, or*
 - (b) *by any kind of subdivision under the Community Land Development Act 2021.*

Under Clause 4.1 of IWLEP 2022 the site has a minimum subdivision lot size (MSLS) control of 200m². The application is for Torrens Title Subdivision of the existing property (1 lot) into 2 lots.

The existing site's lot size/area is approximately 291.9m²; the Torrens Title Subdivision will create 2 new lots with the following lot sizes:

- Lot 1 (rear lot) will be approximately 95.7m², and
- Lot 2 (front lot) will be approximately 196m².

As is the case with other similar DAs that have been approved nearby (see Heading 5.4), it is practically impossible for any Torrens Title Subdivision of existing small lots within Annandale (and other suburbs in the Inner West) to achieve "technical" compliance with the MSLS development standard, given that the already-small parent lot is being subdivided – which requires Council's merit assessment and reasonable discretion on the basis of sound planning grounds and apply the flexibility afforded under Clause 4.6 of the IWLEP – specifically for circumstances such as this to permit the "technical" non-compliance.



Figure 1 – IWLEP 2012 MSLS Map Source: NSW Planning

4 EXTENT OF NON-COMPLIANCE

This Clause 4.6 Request relates to the proposed Torrens Title Subdivision of the existing property (1 lot) into 2 new lots i.e the 2 existing buildings on the site will formally function as separate dwellings within their own respective lots. The following are details of the proposed Torrens Title Subdivision.

Existing Site Area

- Total area of 291.9m² (by Survey Calculation)
 - **Note:** Total area of 290.9m² (by existing Title)

Proposed Lot size after Torrens Title Subdivision

- Lot 1 (rear lot) will be approximately 95.7m², and
- Lot 2 (front lot) will be approximately 196m².

As previously noted in Heading 3 above, the site has a minimum subdivision lot size (MSLS) control of 200m² pursuant to clause 4.1. Therefore the extent of non-compliance is as follows:

Extent of non-compliance with MSLS

- 104.3m² or 52.15% for Lot 1 (rear lot), and
- 4m² or 0.02% for Lot 2 (front lot).

As shown above both proposed lots will have variations, with Lot 1 (rear lot) having the most noticeable discrepancy (52.15%), and both require merit assessment under Clause 4.6 for the technical variations.

It is important to note that the 2 existing buildings result in existing high site coverage & low quantum of landscaped area, which is characteristic of the surrounding and adjacent properties. Furthermore the proposed subdivision layout is entirely dictated by the footprints and location of the 2 existing buildings within the site. In other words, the non-compliances and degree of variations are ultimately unavoidable.

4

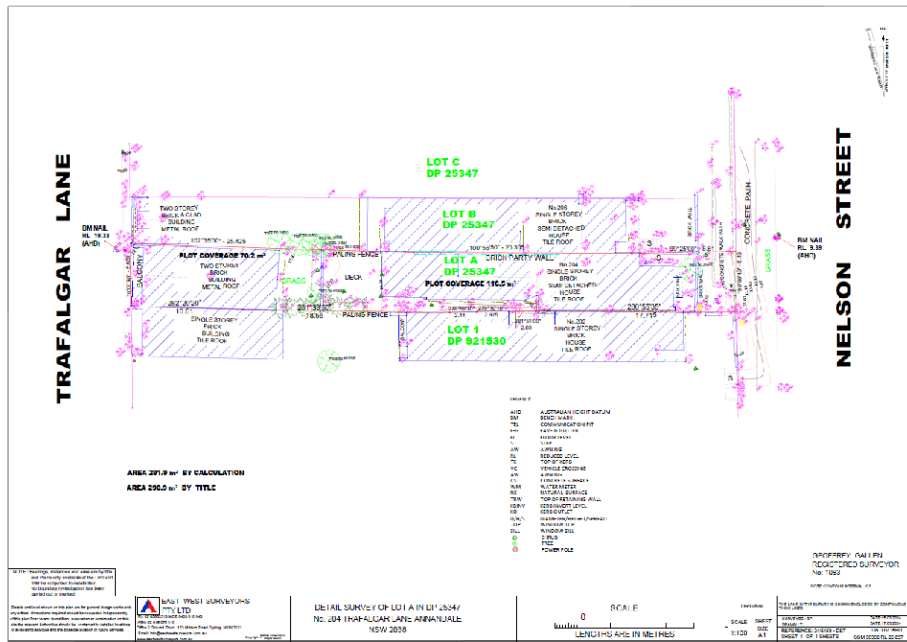


Figure 2 – Survey Plan Source: East West Surveyors

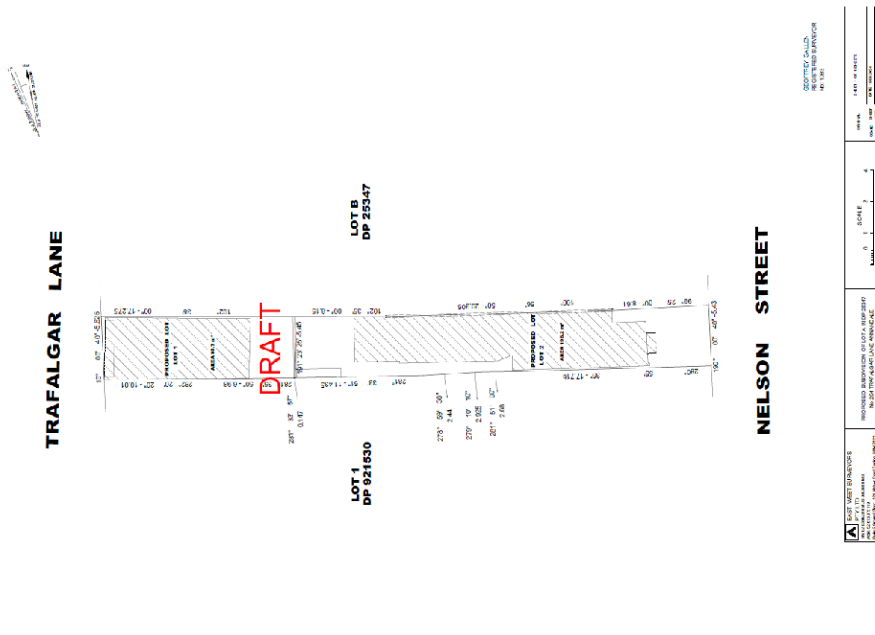


Figure 3 – Proposed/Draft Torrens Title Subdivision Plan Source: East West Surveyors

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It is worth noting that the functions of Clause 4.6 is similar to State Environmental Planning Policy No 1 – Development Standards (SEPP 1) in that the size/percentage of the variation is not, in itself, a material consideration as to whether the variation should be permitted¹. Some examples of rulings of the *NSW Land and Environment Court* (Court) are as follows:

- In *Baker Kavanagh Architects v Sydney City Council [2014] NSWLEC 1003* the Court granted development consent for a 3-storey shop top housing development in Woolloomooloo, with a FSR variation of 187%.
- In *Abrams v Council of the City of Sydney [2019] NSWLEC 1583* the Court granted development consent for a 4-storey mixed use development, with a FSR variation of 75% (2.63:1 versus LEP maximum of 1.5:1).
- In *Moskovich v Waverley Council [2016] NSWLEC 1015* the Court granted development consent for a residential flat building in Bondi, with a FSR variation of 65% (1.5:1 versus LEP maximum of 0.9:1).
- In *Edmondson Grange Pty Ltd v Liverpool City Council [2020] NSWLEC 1594* the Court granted development consent for 3x residential flat buildings, with a FSR variation of 59% (1.19:1 versus LEP maximum of 0.75:1).
- In *Landco (NSW) Pty Ltd v Camden Council [2018] NSWLEC 1252* the Court granted development consent for a land subdivision, with lot size variations ranging between 47-51% (220-240m² versus LEP minimum 450m²).

For comparison purposes, this subject DA represents a variation of 52.15% for Lot 1 (rear lot), and 0.02% for Lot 2 (front lot).

The proposed variation from the development standard is assessed against the accepted “5-Part Test” for the assessment of a development standard variation established by the Court in *Wehbe vs Pittwater Council (2007) LEC 827* and the principles outlined in *Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46*.

5 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

The NSW Land and Environment Court (LEC) in *FouR1Five Pty Ltd v Ashfield Council [2013] NSWLEC 90*, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council [2007] NSW LEC 827*.

In the decision of *Wehbe vs Pittwater Council (2007) LEC 827*, Chief Justice Preston expressed the view that there are five (5) different ways in which an objection may

¹The Court of Appeal considered the issue in *Legal and General Life v North Sydney Municipal Council (1990) 69 LGRA 201* (where North Sydney Council had approved a SEPP 1 objection allowing the FSR control of 3.5:1 to be increased to 15:1 (329% variation), and the 5-storey height control to be increased to 17-storeys (240% variation)).

The Court approved the following statement by Chief Judge (in *Legal and General Life v North Sydney Council (1989) 68 LGRA 192, 203*), and upheld the validity of the Council’s decision:

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

be well founded and that approval of the objection may be consistent with the aims of the policy. This attributes to determining whether compliance with the standard is unreasonable or unnecessary in the circumstances of the case as set out on the following Table:

First	<p>The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.</p> <p>The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective.</p>
Second	<p>A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.</p>
Third	<p>A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.</p>
Fourth	<p>A fourth way is to establish that 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.</p>
Fifth	<p>A fifth way is to establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary.</p>

The following discussion is provided in response to each point of the above Table:

5.1 THE OBJECTIVES OF THE STANDARD ARE ACHIEVED NOTWITHSTANDING NON-COMPLIANCE WITH THE STANDARD

The objectives supporting Clause 4.1 Development Standard are discussed below and demonstrates how the proposal is consistent with the objectives outlined in clause 4.1. Consistency with the objectives and the absence of any environmental impacts, would demonstrate that strict compliance with Clause 4.1 Development Standard would be both unreasonable and unnecessary in this instance.

- (1) *The objectives of this clause are as follows:*
 - (a) *to ensure lot sizes cater for a variety of development,*
 - (b) *to ensure lot sizes do not result in adverse amenity impacts,*
 - (c) *to ensure lot sizes deliver high quality architectural, urban and landscape design,*
 - (d) *to provide a pattern of subdivision that is consistent with the desired future character,*
 - (e) *to ensure lot sizes allow development to be sited to protect and enhance riparian and environmentally sensitive land.*

The primary objective/purpose of the control is to restrict the built form of development to ensure that its bulk and scale is compatible with the character of the locality, and to mitigate against undesirable amenity impacts. It is considered that the



proposal satisfies the respective objectives of Clause 4.1 Development Standard of the LEP as follows:

“(a) to ensure lot sizes cater for a variety of development”

- The paper Torren title subdivision will “separate” the 2 existing buildings into 2 distinct legal Titles on paper to ensure that both buildings can practically contribute to housing stock of the LGA (facilitate the potential for individual sale of each lot, and hence a more affordable price point for each lot rather than a much higher price for a combined site), and accommodate the affordable housing needs of the LGA.

“(b) to ensure lot sizes do not result in adverse amenity impacts”

- The proposal will maintain the existing 2 residential buildings as-is, and therefore will not increase the residential population density of the subject site and the land use intensity beyond its existing level.
- As there are no changes to the existing physical built form, the proposal (for paper subdivision only, with no actual physical/building works) will not result in any changes to existing amenity conditions for the adjoining properties in terms of overshadowing, visual privacy and visual bulk.

“(c) to ensure lot sizes deliver high quality architectural, urban and landscape design”

- As discussed above, there are no changes to the existing physical built form.

“(d) to provide a pattern of subdivision that is consistent with the desired future character”

- The proposal, despite the “technical” numerical non-compliance, is largely consistent with the building bulk of nearby neighbours in the locality which are estimated to have a similar Minimum Subdivision Lot Size (this is evident in the similar non-compliances approved by Council – see Heading 5.4.

“(e) to ensure lot sizes allow development to be sited to protect and enhance riparian and environmentally sensitive land”

- The proposal will retain the existing residential use of the site, and as no physical building works are proposed the built and natural features will remain unchanged (e.g. no changes to existing tree canopy cover).

Overall, the proposal provides for the orderly and economic development of the site, given the site’s orientation, location and context. It is considered that the site is well suited for the proposed development, and is essentially the same as other approved Torrens title subdivisions in the locality – see Heading 5.4.

5.2 THE UNDERLYING OBJECTIVE OR THE PURPOSE OF THE STANDARD IS NOT RELEVANT TO THE DEVELOPMENT AND THEREFORE COMPLIANCE IS UNNECESSARY

The underlying objective or purpose of the LEP control is relevant to the development and is achieved as outlined above.

5.3 THE UNDERLYING OBJECT OR PURPOSE WOULD BE DEFEATED OR THWARTED IF COMPLIANCE WAS REQUIRED AND THEREFORE COMPLIANCE IS UNREASONABLE

Not applicable as the underlying objective or purpose would not be defeated or thwarted if compliance was required.

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5.4 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; AND

It cannot be said that this development standard has been abandoned, however a review of Council’s register for most-recent variations (Quarter 3 2023) indicates that Council has historically approved the following MSLS variations which range from 23.52m² to 46.7m² (see Figure 4 below).

DA No.	Address	Clause	Degree of Non-Compliance	Approved Date
DA/2023/0254	54 Church Street, Birchgrove	4.1 (MSLS)	37%	10/10/2023
DA/2023/0521	2 Wellington Street, Rozelle	4.1 (MSLS)	46.7m ² or 23.35%	10/10/2023
DA/2022/0795	3 Emily Street, Leichardt	4.1 (MSLS)	23.52m ² or 11.76%	12/09/2023

Figure 4 – Example of other MSLS variations approved by Council Source: Council

Other similar Approved Subdivisions nearby

The following development history of nearby properties was researched from Council’s online DA records, and provide precedents of approval for similar developments (involving Torrens Title Subdivision):

5.4.1 209 NELSON STREET & 209 NELSON LANE, ANNANDALE

- SC/2021/0071 – **APPROVED** on 12/10/2021 by Council for Subdivision Certificate to formalise the approved Torrens Subdivision (2 Lots).
- D/2015/555 – **APPROVED** on 09/02/2016 by Council Local Planning Panel for proposed subdivision into 2 Torrens title lots. Minor alterations and additions to existing 2-storey dwelling at rear of site fronting Nelson Lane. This application relied on a variation to the minimum lot size and floor space ratio development standard.

Note: The approved Subdivision lot sizes are as follows (also shown in Figure 6), with **both** Lots 1 & 2 **not** complying with Clause 4.1 and required Council’s merit assessment and discretion to allow the non-compliance under Clause 4.6 of the IWLEP.

- Lot 1 (rear – 209 Nelson Lane) – 143.5m²
- Lot 2 (front – 209 Nelson Street) – 143.3m²



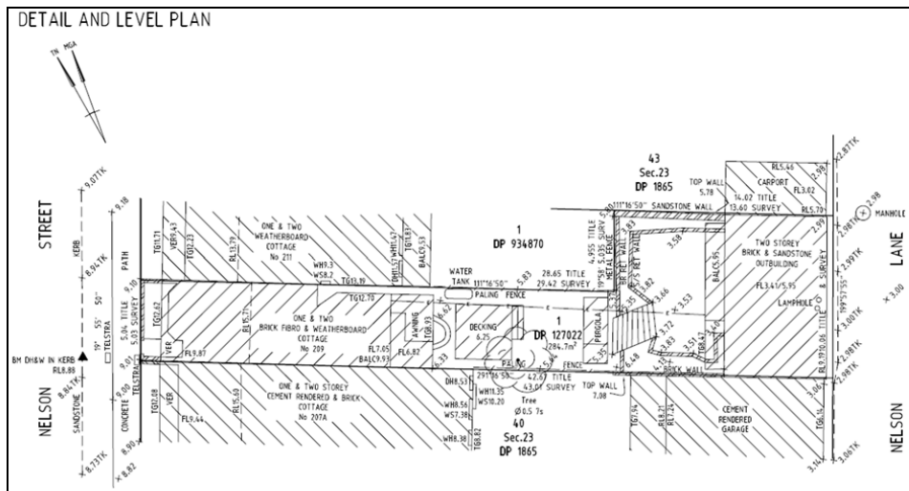


Figure 5 – Survey Plan of No. 209 (before Subdivision) SOURCE: COYAGD

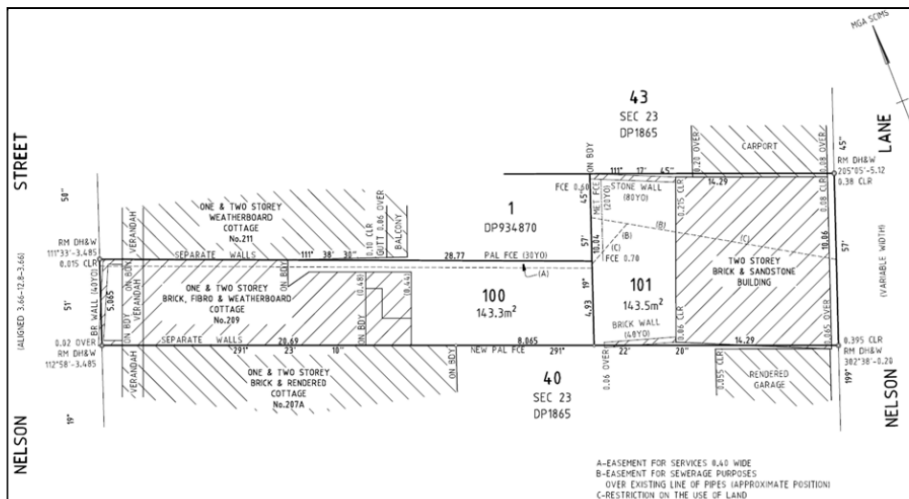


Figure 6 – Approved Subdivision Plan of No. 209 (D/2015/656) SOURCE: COYAGD

5.4.2 153 TRAFALGAR STREET ANNANDALE

- SC/2016/15 – **APPROVED** on 23/11/2016 by Council for Subdivision Certificate to formalise the approved Torrens Subdivision (2 Lots).
- D/2015/89 – **APPROVED** on 09/06/2015 by Council Local Planning Panel to convert existing strata title subdivision into Torrens title subdivision. This application relied on Clause 4.6 variations for non-compliance with minimum lot size & FSR.

Note: The approved Subdivision lot sizes are as follows (also shown in Figure 7), with Lot 2 (dash-blue) not complying with Clause 4.1 and required Council’s merit

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assessment and discretion to allow the non-compliance under Clause 4.6 of the IWLEP.

- Lot 1 - 217.2m²
- Lot 2 - 188.0m²

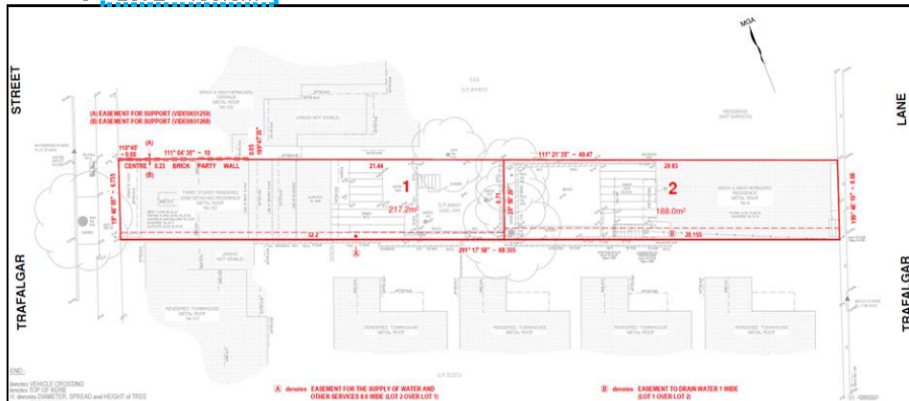


Figure 7 – Approved Subdivision Plan (D/2015/89)

- D/2002/673 – **APPROVED** on 10/10/2002 by Council for Strata subdivision of existing lot into 2 lots.

5.4.3 236, 238, AND 240 TRAFALGAR LANE, ANNANDALE (AKA 1A PIPER STREET)

M/2002/141 – **APPROVED** on 23/10/2002 by Council for Modification to development consent DA406/1997 and modification M/1999/228, which gave approval for consolidation, subdivision and the erection of three dwellings. Modifications include the deletion of Condition 6 relating to privacy screening.

Figure 8 below shows the aerial view of some nearby approved Torrens title Subdivisions.



Figure 8 – Aerial view with mark-up of some approved Torrens title Subdivisions* SO1 DE: NSM 0 000 19 04 17

- * Legend – the mark-ups in Figure 21 above are as follows:
- No. 209 Nelson Street & 209 Nelson Lane (dash-red)
 - No. 185 Trafalgar Street & No. 185A Trafalgar Lane + 187 & 187A Trafalgar Street (dash-purple)
 - No. 167 & No. 167A Trafalgar Street (dash-green)
 - No. 163 Trafalgar Street & No. 163 Trafalgar Lane (dash-blue)
 - No. 153 Trafalgar Street & No. 9 Trafalgar Lane (dash-orange)

5.5 THE ZONING OF THE 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.

Not applicable as the zoning of the site is appropriate. The proposed development is consistent with the objectives of the R1 General Residential zone, as demonstrated below.

Objectives of the R1 General Residential zone:

- a. "to provide for the housing needs of the community"
- The proposal will retain the existing 2 buildings/dwellings, and continue to provide for the housing needs of the community.
- b. "to provide for a variety of housing types and densities"
- The paper Torren title subdivision will "separate" the 2 existing buildings into 2 distinct legal Titles on paper to ensure that both buildings can practically contribute to housing stock of the LGA (facilitate the potential for individual

sale of each lot, and hence a more affordable price point for each lot rather than a much higher price for a combined site), and accommodate the affordable housing needs of the LGA.

c. "to enable other land uses that provide facilities or services to meet the day to day needs of residents"

- This objective is not applicable, as the use of the subject site for residential purpose remains unchanged.

d. "To provide residential development that maintains the character of built and natural features in the surrounding area."

- The proposal will maintain the existing use of the site as residential, and the built and natural features will remain unchanged as no physical building works are proposed.

6 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

There are sufficient planning grounds to justify contravening the Clause 4.1 development standard in the circumstances of this particular case, as the subject proposal:

- is similar to other DAs that have been approved nearby in that the proposed subdivision will result in 2 new lots that are considered to be generally consistent with the widths, sizes and shapes and pattern of neighbouring lots in the locality along Nelson Street/Lane and Trafalgar Street/Lane e.g. front lot facing primary street and rear lot facing secondary rear lane, and which include several lots under 200m² in area – refer to Heading 5.4 for more details;
- – further to the above point – it is practically impossible for any Torrens Title Subdivision of existing small lots within Annandale (and other suburbs in the Inner West) to achieve "technical" compliance with the MSLS development standard, given that the already-small parent lot is being subdivided;
- will retain the existing 2 buildings/dwellings, and continue to provide for the housing needs of the community;
- is generally compatible with the height, bulk and scale of the existing and desired future character of the locality i.e. does not result in any increases in gross floor area, building height, and/or changes to external building form;
- maintains the prevailing external building character and the number of storeys;
- will maintain the existing use of the site as residential, and the built and natural features will remain unchanged as no physical building works are proposed;
- does not reduce existing landscaping & open space, and does not increase the existing site coverage / building footprint;
- will not have any impacts on the amenity of neighbouring properties in relation to overlooking, view loss, solar access loss etc.;
- will not have any other adverse impacts such as noise, traffic, parking, waste, pollution;

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- can facilitate the potential for individual sale of each lot, and hence a more affordable price point for each lot rather than a much higher price for a combined site.

In the case of *Moskovich v Waverley Council (2016) NSWLEC 1015*, the LEC accepted that compliance with the standard (FSR in that case) was unreasonable and unnecessary because the design achieved the objectives of the standard and the respective zone, in a way that addressed the particular circumstances of the site.

If the land use intensity for the site remains consistent with the locality in a way which provides a similar (or better) planning outcome for the site, notwithstanding the variation which is within the ambit of Clause 4.6, this is considered to be a positive outcome.

The respective variations of 52.15% for Lot 1 (rear lot), and 0.02% for Lot 2 (front lot) are “on-paper” only, and will otherwise have no material change/impact. Notwithstanding the “on-paper” variation, the proposal represent a well-considered development that addresses the site constraints, streetscape and satisfy the relevant objectives of both the Clause 4.1 Development Standard and the R1 zone.

Variation to this particular development standard will allow a otherwise well-considered development to proceed. A key consideration is that the fundamental purpose of Clause 4.6 is to provide flexibility in applying development standards in that in so doing better development outcomes ensue.

The majority of the above environmental planning grounds that warrant support for the variation, are not “generic”, but rather, specific to the site and circumstances of the development. Overall, the proposal provides for the orderly and economic development of the site, given the site’s orientation, location and context. It is considered that the site is well suited for the proposed development.

7 IS THE VARIATION IN THE PUBLIC INTEREST?

Although no longer expressly required for consideration by Clause 4.6, it is considered that the proposed development will be in the public interest because it is consistent with the objectives of the Clause 4.1 development standard and the objectives of the R1 General Residential zone.

Pursuant to case law of *Ex Gratia P/L v Dungog Council (NSWLEC 148)*, the question that needs to be answered is “*whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development*”.

There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to Clause 4.1, whilst better planning outcomes are achieved.

The respective variations of 52.15% for Lot 1 (rear lot), and 0.02% for Lot 2 (front lot) are “on-paper” only, and will otherwise have no material change/impact. The departure from the MSLS control allows for the orderly and economic use of the site in a manner which otherwise achieves the outcomes and objectives of the relevant planning controls. On balance, it is considered that there is no benefit to the public or the community in maintaining the development standard.

8 Is the Variation Well Founded?

In summary, this Variation Request is well founded as required by Clause 4.6 in that:

- Compliance with the Clause 4.1 development standard would be unreasonable and unnecessary, in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the departure from the standard, which results in a same or better planning outcome than a strictly compliant development (it is practically impossible to achieve compliance in the circumstances of this particular case);
- The development meets the objectives of the development standard and the objectives of the land use zone, notwithstanding the variation;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard;

Based on the above, the variation is considered to be well founded. The consent authority may be satisfied that all requirements of Clause 4.6 have been accounted for, having regards to the merits of the proposed development.

If you have any questions regarding the above, please do not hesitate to contact TRANPLAN Consulting.

Yours sincerely



David Tran B. Planning (Honours)

22 April 2024

General Manager
Inner West Council

Dear Sir/Madam,

The applicant has engaged TRANPLAN Consulting to provide this Clause 4.6 Request/Submission in relation to a Development Application on land known as **204 Trafalgar Lane (204 Nelson Street), Annandale** for Torrens Title Subdivision of the existing property (1 lot) into 2 lots.

As detailed in this written request for a variation to Clause 4.3C(3)(b) Development Standard relating to Site Coverage (SC), the proposed development variation meets the requirements prescribed under Clause 4.6 of the Inner West Local Environmental Plan 2022 (IWLEP).

1 VARIATION TO CLAUSE 4.3C(3)(B) DEVELOPMENT STANDARD – INNER WEST LOCAL ENVIRONMENTAL PLAN 2022

This submission is made to support the variation to Clause 4.3C(3)(b) Development Standard relating to Site Coverage (SC) of IWLEP. Clause 4.6 establishes the framework for varying development standards applying under a Local Environmental Plan. Clause 4.6 states the following:

4.6 Exceptions to development standards

- (1) *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.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *The consent authority must keep a record of its assessment carried out under subclause (3)*
- (5) *Repealed*

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- (6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:
- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.
- (7) Repealed
- (8) This clause does not allow development consent to be granted for development that would contravene any of the following:
- (a) a development standard for complying development,
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
 - (c) clause 5.4,
 - (caa) clause 5.5,
 - (ca) clause 6.27(4),
 - (cb), (cc) (Repealed)
 - (cd) clause 6.31.

2 ROLE OF THE CONSENT AUTHORITY

The role of the consent authority in considering a request for a Clause 4.6 variation – specifically, subclause 4.6(3)(a) and 4.6(3)(b) – requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

- 4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
4.6(3)(b) that there is sufficient environmental planning grounds to justify contravening the development standard.

A key consideration is that the fundamental purpose/objective of Clause 4.6 is to provide flexibility in applying development standards in that in so doing better development outcomes ensue.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

- *Wehbe v Pittwater Council [2007] NSW LEC 827 (Wehbe)*;
- *FouR1Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (FouR1Five)*;
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 (Initial Action)*;
- *Ex Gratia P/L v Dungog Council [2015] NSWLEC 148 (Ex Gratia)*;
- *Moskovich v Waverley Council [2016] NSWLEC 1015 (Moskovich)*; and
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245 (Al Maha)*.

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In particular, the Council needs to be satisfied that there are proper planning grounds to grant consent and that the contravention of the standard is justified. This report provides the basis for the Council to reach this level of satisfaction.

The relevant matters contained in Clause 4.6 of the IWLEP 2012, with respect to the SC development standard, are each addressed below, including with regard to the above decisions.

3 CLAUSE 4.3C DEVELOPMENT STANDARD OF THE LEP

The Development Standard to which this variation relates to is Clause 4.3C Development Standard of the LEP, which reads in its entirety as follows:

4.3C Landscaped areas for residential accommodation in Zone R1

- (1) *The objectives of this clause are as follows:*
 - (a) *to provide landscaped areas for substantial tree planting and for the use and enjoyment of residents,*
 - (b) *to maintain and encourage a landscaped corridor between adjoining properties,*
 - (c) *to ensure that development promotes the desired character of the neighbourhood,*
 - (d) *to encourage ecologically sustainable development,*
 - (e) *to control site density,*
 - (f) *to provide for landscaped areas and private open space.*
- (2) *This clause applies to development for the purposes of residential accommodation on land in Zone R1 General Residential and identified as "Area 1" on the [Key Sites Map](#).*
- (3) *Development consent must not be granted to development to which this clause applies unless:*
 - (a) *the development will result in a landscaped area comprising at least:*
 - (i) *if the lot size is 235m² or less: 15% of the site area, or*
 - (ii) *otherwise: 20% of the site area, and*
 - (b) *the site coverage does not exceed 60% of the site area.*
- (4) *For subclause (3):*
 - (a) *the site area must be calculated in the way set out in clause 4.5, and*
 - (b) *the following areas must not be included as landscaped areas:*
 - (i) *a landscaped area with a length or width of less than 1m,*
 - (ii) *a landscaped area located more than 500mm above ground level (existing), and*
 - (c) *a deck, balcony or similar structure, whether enclosed or unenclosed, must not be included in calculating the site coverage if:*
 - (i) *the underside of the deck, balcony or structure is at least 2.4m above ground level (existing), and the area below the structure is able to be landscaped or used for recreational purposes, or*
 - (ii) *the finished floor level is 500mm or less above ground level (existing).*

The subject land is zoned R1, is mapped as being within "Area 1" on the Key Sites Map, and therefore under Clause 4.3C of IWLEP 2022 is subject to the standards of maximum 60% site coverage (SC), and minimum 15% landscaped area (LA).

Site Coverage (SC)

- Proposed Lot 1 (rear lot/Trafalgar Lane): SC of 70% and requires merit assessment for the **variation**; $66.7\text{m}^2 \div 95.7\text{m}^2$ (proposed size of Lot 1)
- Proposed Lot 2 (front lot/Nelson Street): SC of 58% and **complies**; $113.5\text{m}^2 \div 196\text{m}^2$ (proposed size of Lot 2)

Landscaped Area (LA)

- Proposed Lot 1 (rear lot/Trafalgar Lane): LA of 17.5% and complies: 16.7m² ÷ 95.7m² (proposed size of Lot 1)
- Proposed Lot 2 (front lot/Nelson Street): LA of 15% and complies: 29.4m² ÷ 196m² (proposed size of Lot 2)

Based on the above breakdown, the proposed development is generally compliant with Clause 4.3C, with the exception of the 73.3% SC for the proposed Lot 1 (rear lot/Trafalgar Lane), and requires merit assessment and support from Council for this minor/technical variation pursuant to Clause 4.6 of the IWLEP.

As was the case with other similar DAs that have been approved (see Heading 5.4), it is practically impossible for any Torrens Title Subdivision of existing small lots within Annandale (and other suburbs in the Inner West) to achieve “technical” compliance with the LA / SC development standard, due to the existing small-size of the parent lot – which requires Council’s merit assessment and reasonable discretion on the basis of sound planning grounds and apply the flexibility afforded under Clause 4.6 of the IWLEP – specifically for circumstances such as this to permit the “technical” non-compliance.

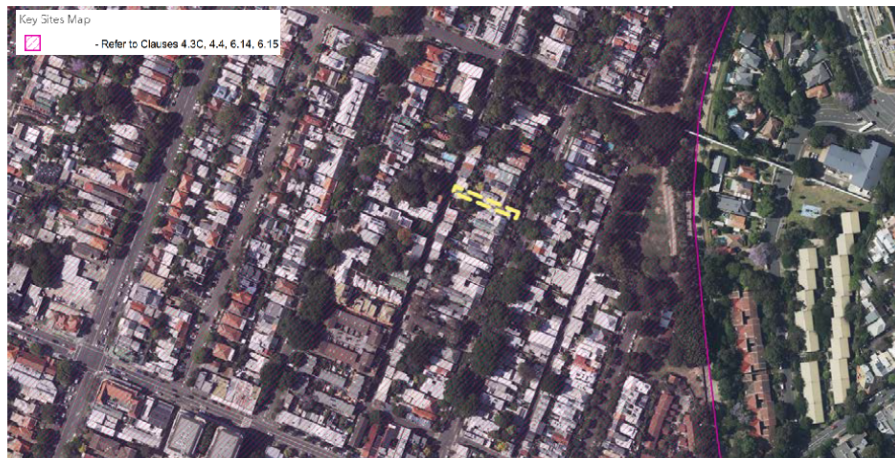


Figure 1 – IWLEP 2012 Key Sites Map Source: NSW Planning

4 EXTENT OF NON-COMPLIANCE

This Clause 4.6 Request relates to the proposed Torrens Title Subdivision of the existing property (1 lot) into 2 new lots i.e the 2 existing buildings on the site will formally function as separate dwellings within their own respective lots. The following are details of the proposed Torrens Title Subdivision.

Existing Site Area

- Total area of 291.9m² (by Survey Calculation)
 - **Note:** Total area of 290.9m² (by existing Title)

Proposed Lot size after Torrens Title Subdivision



- Lot 1 (rear lot) will be approximately 95.7m², and
- Lot 2 (front lot) will be approximately 196m².

As previously noted in Heading 3 above, the site is subject to the standards of maximum 60% site coverage (SC), and minimum 15% landscaped area (LA). The proposed development is generally compliant with the abovementioned standards of Clause 4.3C, with the exception of the 73.3% SC for the proposed Lot 1 (rear lot/Trafalgar Lane), with the extent of non-compliance being:

Extent of non-compliance with SC

- 12.78m² or 13.3% for Lot 1 (rear lot)

It is important to note that the 2 existing buildings result in existing high site coverage & low quantum of landscaped area, which is characteristic of the surrounding and adjacent properties. Furthermore the proposed subdivision layout is entirely dictated by the footprints and location of the 2 existing buildings within the site. In other words, the non-compliances and degree of variations are ultimately unavoidable.

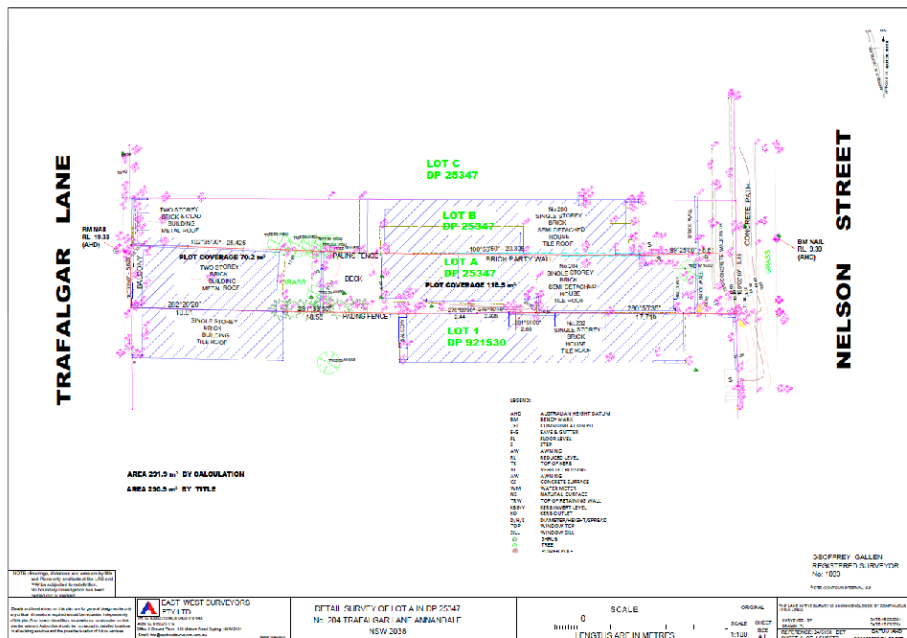


Figure 2 – Survey Plan Source: East West Surveyors

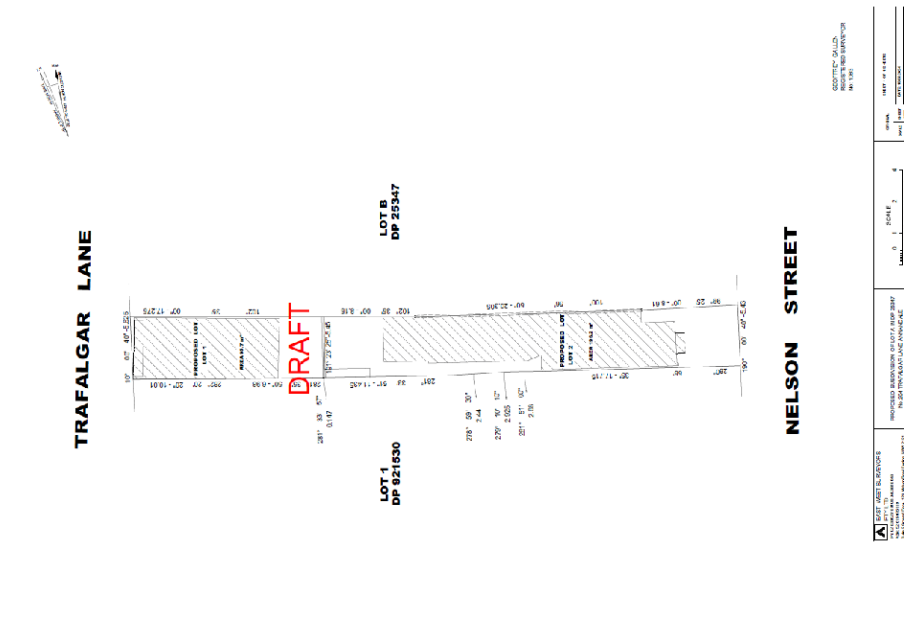


Figure 3 – Proposed/Draft Torrens Title Subdivision Plan Source: East West Surveyors

It is worth noting that the functions of Clause 4.6 is similar to State Environmental Planning Policy No 1 – Development Standards (SEPP 1) in that the size/percentage of the variation is not, in itself, a material consideration as to whether the variation should be permitted¹. Some examples of rulings of the *NSW Land and Environment Court* (Court) are as follows:

- In *Baker Kavanagh Architects v Sydney City Council [2014] NSWLEC 1003* the Court granted development consent for a 3-storey shop top housing development in Woolloomooloo, with a FSR variation of 187%.
- In *Abrams v Council of the City of Sydney [2019] NSWLEC 1583* the Court granted development consent for a 4-storey mixed use development, with a FSR variation of 75% (2.63:1 versus LEP maximum of 1.5:1).
- In *Moskovich v Waverley Council [2016] NSWLEC 1015* the Court granted development consent for a residential flat building in Bondi, with a FSR variation of 65% (1.5:1 versus LEP maximum of 0.9:1).

¹The Court of Appeal considered the issue in *Legal and General Life v North Sydney Municipal Council (1990) 69 LGRA 201* (where North Sydney Council had approved a SEPP 1 objection allowing the FSR control of 3.5:1 to be increased to 15:1 (329% variation), and the 5-storey height control to be increased to 17-storeys (240% variation).

The Court approved the following statement by Chief Judge (in *Legal and General Life v North Sydney Council (1989) 68 LGRA 192, 203*), and upheld the validity of the Council's decision:

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

- In *Edmondson Grange Pty Ltd v Liverpool City Council [2020] NSWLEC 1594* the Court granted development consent for 3x residential flat buildings, with a FSR variation of 59% (1.19:1 versus LEP maximum of 0.75:1).
- In *Landco (NSW) Pty Ltd v Camden Council [2018] NSWLEC 1252* the Court granted development consent for a land subdivision, with lot size variations ranging between 47-51% (220-240m² versus LEP minimum 450m²).

For comparison purposes, this subject DA represents a variation of only 13.3%, and only for Lot 1 (rear lot) in relation to SC.

The proposed variation from the development standard is assessed against the accepted “5-Part Test” for the assessment of a development standard variation established by the Court in *Wehbe vs Pittwater Council (2007) LEC 827* and the principles outlined in *Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46*.

5 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

The NSW Land and Environment Court (LEC) in *FouR1Five Pty Ltd v Ashfield Council [2013] NSWLEC 90*, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council [2007] NSW LEC 827*.

In the decision of *Wehbe vs Pittwater Council (2007) LEC 827*, Chief Justice Preston expressed the view that there are five (5) different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy. This attributes to determining whether compliance with the standard is unreasonable or unnecessary in the circumstances of the case as set out on the following Table:

First	The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective.
Second	A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.
Third	A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.
Fourth	A fourth way is to establish that 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.



Fifth	A fifth way is to establish that “the zoning of particular land” was “unreasonable or inappropriate” so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land” and that “compliance with the standard in that case would also be unreasonable or unnecessary.
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The following discussion is provided in response to each point of the above Table:

5.1 THE OBJECTIVES OF THE STANDARD ARE ACHIEVED NOTWITHSTANDING NON-COMPLIANCE WITH THE STANDARD

The objectives supporting Clause 4.3C Development Standard are discussed below and demonstrates how the proposal is consistent with those objectives. Consistency with the objectives and the absence of any environmental impacts, would demonstrate that strict compliance with Clause 4.3C Development Standard would be both unreasonable and unnecessary in this instance.

- (1) *The objectives of this clause are as follows:*
- (a) *to provide landscaped areas for substantial tree planting and for the use and enjoyment of residents,*
 - (b) *to maintain and encourage a landscaped corridor between adjoining properties,*
 - (c) *to ensure that development promotes the desired character of the neighbourhood,*
 - (d) *to encourage ecologically sustainable development,*
 - (e) *to control site density,*
 - (f) *to provide for landscaped areas and private open space.*

The primary objective/purpose of the control is to restrict the built form of development to ensure that its landscaped areas is compatible with the character of the locality, and for the use and enjoyment of residents. It is considered that the proposal satisfies the respective objectives of Clause 4.3C Development Standard of the LEP as follows:

“(a) to provide landscaped areas for substantial tree planting and for the use and enjoyment of residents”

- The proposal will retain the existing residential use of the site, and as no physical building works are proposed the built and natural features will remain unchanged (e.g. no changes to existing tree canopy cover).

“(b) to maintain and encourage a landscaped corridor between adjoining properties”

- As there are no changes to the existing physical built form, the proposal (for paper subdivision only, with no actual physical/building works) will not result in any changes to existing amenity conditions for the adjoining properties in terms of overshadowing, visual privacy and visual bulk.

“(c) to ensure that development promotes the desired character of the neighbourhood”

- The proposal, despite the “technical” numerical non-compliance, is largely consistent with the building bulk of nearby neighbours in the locality which are estimated to have a similar Landscaped Areas (LA) / Site Coverage (SC) (this is evident in the similar non-compliances approved by Council – see Heading 5.4.



"(d) to encourage ecologically sustainable development"

- The paper Torren title subdivision will “separate” the 2 existing buildings into 2 distinct legal Titles on paper to ensure that both buildings can practically contribute to housing stock of the LGA (facilitate the potential for individual sale of each lot, and hence a more affordable price point for each lot rather than a much higher price for a combined site), and accommodate the affordable housing and inter-generational equity needs of the community.

"(e) to control site density"

- The proposal will maintain the existing 2 residential buildings as-is, and therefore will not increase the residential population density of the subject site and the land use intensity beyond its existing level.

"(f) to provide for landscaped areas and private open space"

- The proposal will retain the existing built and natural features, and as discussed previously in Heading 3, the LA / POS / SC of both proposed lots are largely compliant with the exception of the minor 13.3% “technical” variation for only Lot 1.

Overall, the proposal provides for the orderly and economic development of the site, given the site’s orientation, location and context. It is considered that the site is well suited for the proposed development, and is essentially the same as other approved Torrens title subdivisions in the locality – see Heading 5.4.

5.2 THE UNDERLYING OBJECTIVE OR THE PURPOSE OF THE STANDARD IS NOT RELEVANT TO THE DEVELOPMENT AND THEREFORE COMPLIANCE IS UNNECESSARY

The underlying objective or purpose of the LEP control is relevant to the development and is achieved as outlined above.

5.3 THE UNDERLYING OBJECT OR PURPOSE WOULD BE DEFEATED OR THWARTED IF COMPLIANCE WAS REQUIRED AND THEREFORE COMPLIANCE IS UNREASONABLE

Not applicable as the underlying objective or purpose would not be defeated or thwarted if compliance was required.

5.4 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; AND

It cannot be said that this development standard has been abandoned, however a review of Council’s register for most-recent variations (Quarter 3 2023) indicates that Council has historically approved the following SC variations which range from 10.95% to 22% (see Figure 4 below).

DA No.	Address	Clause	Degree of Non-Compliance	Approved Date
DA/2023/0067	53 Grove Street,	4.3C(3)(b) SC	5.02m ² or 10.95%	06/07/2023



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	Birchgrove			
DA/2023/0074	2 Jacques Street, Balmain	4.3C(3)(b) SC	12.7%	01/09/2023
DA/2023/0193	9 Creek Street, Balmain	4.3C(3)(b) SC	14.6%	28/09/2023
DA/2023/0285	18 Edith Street, Leichhardt	4.3C(3)(b) SC	20.34m ² or 16.25%	28/07/2023
DA/2023/0459	6 Cecily Street, Lilyfield	4.3C(3)(b) SC	8.66m ² or 19.86%	13/07/2023
DA/2023/0257*	6 Punch Street, Balmain	4.3C(3)(b) SC	11.5m ² or 22%	12/09/2023

Figure 4 – Example of other SC variations approved by Council *Source: Council*

*Also non-compliant with FSR development standard (Clause 4.4); 28.1m² or 32%.

The rear/private yard area for Lot 1 (rear lot) of 25.5m² provides adequate private open space for the owner/occupants (it is much more than the recommended requirement of 16m²)

5.5 THE ZONING OF THE 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.

Not applicable as the zoning of the site is appropriate. The proposed development is consistent with the objectives of the R1 General Residential zone, as demonstrated below.

Objectives of the R1 General Residential zone:

a. "to provide for the housing needs of the community"

- The proposal will retain the existing 2 buildings/dwellings, and continue to provide for the housing needs of the community.

b. "to provide for a variety of housing types and densities"

- The paper Torren title subdivision will "separate" the 2 existing buildings into 2 distinct legal Titles on paper to ensure that both buildings can practically contribute to housing stock of the LGA (facilitate the potential for individual sale of each lot, and hence a more affordable price point for each lot rather than a much higher price for a combined site), and accommodate the affordable housing needs of the LGA.

c. "to enable other land uses that provide facilities or services to meet the day to day needs of residents"

- This objective is not applicable, as the use of the subject site for residential purpose remains unchanged.

d. "To provide residential development that maintains the character of built and natural features in the surrounding area."

- The proposal will maintain the existing use of the site as residential, and the built and natural features will remain unchanged as no physical building works are proposed.

6 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

There are sufficient planning grounds to justify contravening the Clause 4.3C(3)(b) development standard in the circumstances of this particular case, as the subject proposal:

- is similar to other DAs that have been approved nearby – refer to the Statement of Environmental Effects for more details – in that it is practically impossible for any Torrens Title Subdivision of existing small lots within Annandale (and other suburbs in the Inner West) to achieve "technical" compliance with the LA and/or SC development standard (demonstrated by the numerous non-compliances approved), due to the artificially inflated ratio/percentage between the reduced subdivided-lot size compared the existing building's site coverage/footprint;
- will retain the existing 2 buildings/dwellings, and continue to provide for the housing needs of the community;
- is generally compatible with the height, bulk and scale of the existing and desired future character of the locality i.e. does not result in any increases in internal floor area, building height, and/or changes to external building form;
- maintains the prevailing external building character and the number of storeys;
- will maintain the existing use of the site as residential, and the built and natural features will remain unchanged as no physical building works are proposed;
- does not reduce existing landscaping & open space, and does not increase the existing site coverage / building footprint;
- will not have any impacts on the amenity of neighbouring properties in relation to overlooking, view loss, solar access loss etc.;
- will not have any other adverse impacts such as noise, traffic, parking, waste, pollution;
- minor variation of 12.78m² or 13.3% for only Lot 1 (rear lot) is well within the range (10.95% to 22% variation) of most-recent approvals (Quarter 3 2023) by Council – see Figure 4;
- can facilitate the potential for individual sale of each lot, and hence a more affordable price point for each lot rather than a much higher price for a combined site.

In the case of *Moskovich v Waverley Council (2016) NSWLEC 1015*, the LEC accepted that compliance with the standard (FSR in that case) was unreasonable and unnecessary because the design achieved the objectives of the standard and the respective zone, in a way that addressed the particular circumstances of the site.

If the land use intensity for the site remains consistent with the locality in a way which provides a similar (or better) planning outcome for the site, notwithstanding the variation which is within the ambit of Clause 4.6, this is considered to be a positive outcome.

Notwithstanding the variation, the proposal represent a well-considered development that addresses the site constraints, streetscape and satisfy the relevant objectives of both the Clause 4.3C Development Standard and the R1 zone.

Variation to this particular development standard will allow a otherwise well-considered development to proceed. A key consideration is that the fundamental purpose of Clause 4.6 is to provide flexibility in applying development standards in that in so doing better development outcomes ensue.

The majority of the above environmental planning grounds that warrant support for the variation, are not "generic", but rather, specific to the site and circumstances of the development. Overall, the proposal provides for the orderly and economic development of the site, given the site's orientation, location and context. It is considered that the site is well suited for the proposed development.

7 IS THE VARIATION IN THE PUBLIC INTEREST?

Although no longer expressly required for consideration by Clause 4.6, it is considered that the proposed development will be in the public interest because it is consistent with the objectives of the Clause 4.3C development standard and the objectives of the R1 General Residential zone.

Pursuant to case law of *Ex Gratia P/L v Dungog Council (NSWLEC 148)*, the question that needs to be answered is "*whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development*".

There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to Clause 4.3C(3)(b) in relation to SC, whilst better planning outcomes are achieved.

The minor variation to the SC standard of 12.78m² or 13.3% for only Lot 1 (rear lot) allows for the orderly and economic use of the site in a manner which otherwise achieves the outcomes and objectives of the relevant planning controls. On balance, it is considered that there is no benefit to the public or the community in maintaining the development standard.

8 IS THE VARIATION WELL FOUNDED?

In summary, this Variation Request is well founded as required by Clause 4.6 in that:

- Compliance with the Clause 4.3C(3)(b) development standard would be unreasonable and unnecessary, in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the departure from the standard, which results in a same or better planning outcome than a strictly compliant development (it is practically impossible to achieve compliance in the circumstances of this particular case);
- The development meets the objectives of the development standard and the objectives of the land use zone, notwithstanding the variation;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard;

Based on the above, the variation is considered to be well founded. The consent authority may be satisfied that all requirements of Clause 4.6 have been accounted for, having regards to the merits of the proposed development.

If you have any questions regarding the above, please do not hesitate to contact TRANPLAN Consulting.

Yours sincerely



David Tran B. Planning (Honours)

19 April 2024

General Manager
Inner West Council

Dear Sir/Madam,

The applicant has engaged TRANPLAN Consulting to provide this Clause 4.6 Request/Submission in relation to a Development Application on land known as **204 Trafalgar Lane (204 Nelson Street), Annandale** for Torrens Title Subdivision of the existing property (1 lot) into 2 lots.

As detailed in this written request for a variation to the Floor Space Ratio (FSR) Clause 4.4 Development Standard under the LEP, the proposed development variation meets the requirements prescribed under Clause 4.6 of the Inner West Local Environmental Plan 2022 (IWLEP).

1 VARIATION TO CLAUSE 4.4 DEVELOPMENT STANDARD – INNER WEST LOCAL ENVIRONMENTAL PLAN 2022

This submission is made to support the variation to Clause 4.4 Floor Space Ratio (FSR) development standard of Inner West Local Environmental Plan 2022 (IWLEP). Clause 4.6 establishes the framework for varying development standards applying under a Local Environmental Plan. Clause 4.6 states the following:

4.6 Exceptions to development standards

- (1) *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.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *The consent authority must keep a record of its assessment carried out under subclause (3)*
- (5) *Repealed*

- (6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:
- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.
- (7) Repealed
- (8) This clause does not allow development consent to be granted for development that would contravene any of the following:
- (a) a development standard for complying development,
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
 - (c) clause 5.4,
 - (caa) clause 5.5,
 - (ca) clause 6.27(4),
 - (cb), (cc) (Repealed)
 - (cd) clause 6.31.

2 ROLE OF THE CONSENT AUTHORITY

The role of the consent authority in considering a request for a clause 4.6 variation – specifically, subclause 4.6(3)(a) and 4.6(3)(b) – requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

- 4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- 4.6(3)(b) that there is sufficient environmental planning grounds to justify contravening the development standard.*

A key consideration is that the fundamental purpose/objective of Clause 4.6 is to provide flexibility in applying development standards in that in so doing better development outcomes ensue.

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

- *Wehbe v Pittwater Council [2007] NSW LEC 827 (Wehbe);*
- *FouR1Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (FouR1Five);*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 (Initial Action);*
- *Ex Gratia P/L v Dungog Council (2015) NSWLEC 148;*
- *Moskovich v Waverley Council (2016) NSWLEC 1015; and*
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245 (Al Maha).*

In particular, the Council needs to be satisfied that there are proper planning grounds to grant consent and that the contravention of the standard is justified. This report provides the basis for the Council to reach this level of satisfaction.

The relevant matters contained in clause 4.6 of the IWLEP 2012, with respect to the maximum FSR standard, are each addressed below, including with regard to the above decisions.

3 CLAUSE 4.4 DEVELOPMENT STANDARD OF THE LEP

The Development Standard to which this variation relates to is Clause 4.4 Development Standard of the LEP, reads as follows:

4.4 Floor space ratio

- (1) *The objectives of this clause are as follows:*
 - (a) *to establish a maximum floor space ratio to enable appropriate development density,*
 - (b) *to ensure development density reflects its locality,*
 - (c) *to provide an appropriate transition between development of different densities,*
 - (d) *to minimise adverse impacts on local amenity,*
 - (e) *to increase the tree canopy and to protect the use and enjoyment of private properties and the public domain.*
- (2) *The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.*

Under Clause 4.4(2) of IWLEP 2022, the site has the base floor space ratio (FSR) control of 0.5:1.

However, the site is within FSR “Area 2” and Clause 4.4(2B) of IWLEP 2022 allows for the following exceptions to the FSR:

(a) on land shown edged black or pink on the Floor Space Ratio Map—

Site area	Maximum floor space ratio
< 150m ²	0.9:1
≥ 150 < 300m ²	0.8:1
≥ 300m ² < 450m ²	0.7:1
≥ 450m ²	0.6:1

The site has a site area of 291.9m² and is within “Area 2” on the FSR Map, and therefore is permitted a maximum FSR of 0.8:1 (see dash blue above) pursuant to clause 4.4(2B)(d).

Proposed Lot 1 (rear lot/Trafalgar Lane) will have FSR of 1.24:1 [approximate existing floor area of 119.5m² ÷ 95.7m² (proposed size of Lot 1)] representing a 24% variation, and requires merit assessment for the variation under Clause 4.6.

Note: Proposed Lot 2 (front lot/Nelson Street) has FSR of 0.59:1 and complies; 116.5m² ÷ 196m² (proposed size of Lot 2)

It should be noted that the existing FSR for the parent lot is approximately 0.8:1 (total existing GFA of 236m² ÷ existing/parent Lot size of 291.9m²).

As was the case with other similar DAs that have been approved (see Heading 5.4), it is practically impossible for any Torrens Title Subdivision of existing small lots within Annandale (and other suburbs in the Inner West) to achieve “technical” compliance with the FSR development standard, due to the artificially inflated ratio between the reduced subdivided-lot size compared the existing building’s floor area – which requires Council’s merit assessment and reasonable discretion on the basis of sound planning grounds and apply the flexibility afforded under Clause 4.6 of the IWLEP – specifically for circumstances such as this – to permit the “technical” non-compliance.

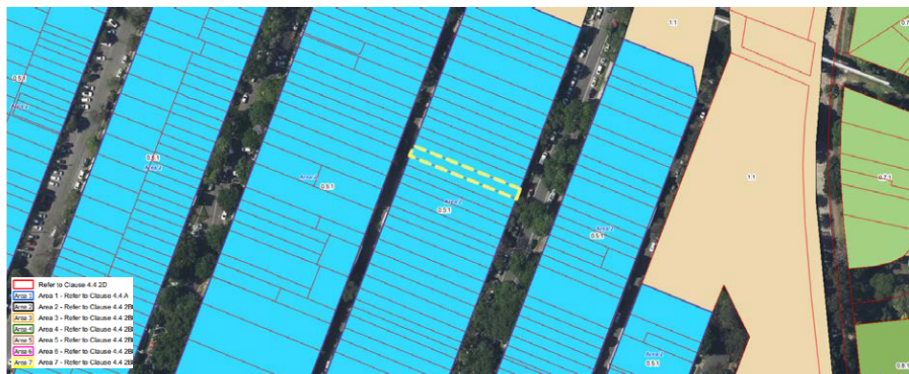


Figure 1 – IWLEP 2012 FSR Map Source: NSW Planning

4 EXTENT OF NON-COMPLIANCE

This Clause 4.6 Request relates to the proposed Torrens Title Subdivision of the existing property (1 lot) into 2 new lots i.e the 2 existing buildings on the site will formally function as separate dwellings within their own respective lots. The following are details of the proposed Torrens Title Subdivision.

Existing Site Area

- Total area of 291.9m² (by Survey Calculation)
 - **Note:** Total area of 290.9m² (by existing Title)

Proposed Lot size after Torrens Title Subdivision

- Proposed Lot 1 (rear lot/Trafalgar Lane): 95.7m²

Existing GFA/FSR (unchanged)

- Existing floor area of existing building within Proposed Lot 1 (rear lot/Trafalgar Lane): 119.5m²

As previously noted in Heading 3 above, the site is within “Area 2” on the FSR Map, and therefore is permitted a maximum FSR of 0.8:1 pursuant to clause 4.4(2B)(d), or a GFA of 76.56m².



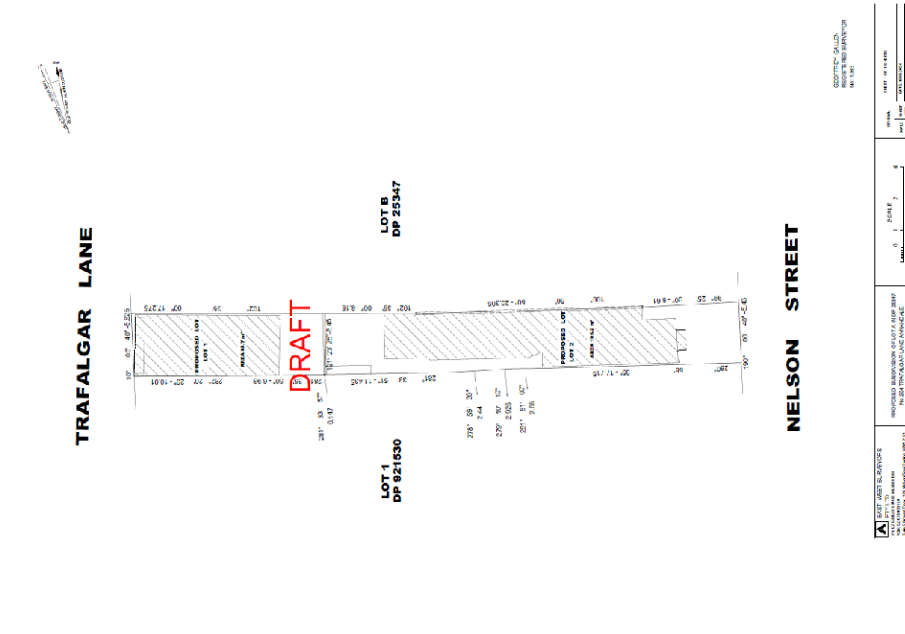


Figure 3 – Proposed/Draft Torrens Title Subdivision Plan Source: East West Surveyors

It is worth noting that the functions of Clause 4.6 is similar to State Environmental Planning Policy No 1 – Development Standards (SEPP 1) in that the size/percentage of the variation is not, in itself, a material consideration as to whether the variation should be permitted¹. Some examples of rulings of the *NSW Land and Environment Court* (Court) are as follows:

- In *Baker Kavanagh Architects v Sydney City Council [2014] NSWLEC 1003* the Court granted development consent for a 3-storey shop top housing development in Woolloomooloo, with a FSR variation of 187%.
- In *Abrams v Council of the City of Sydney [2019] NSWLEC 1583* the Court granted development consent for a 4-storey mixed use development, with a FSR variation of 75% (2.63:1 versus LEP maximum of 1.5:1).
- In *Moskovich v Waverley Council [2016] NSWLEC 1015* the Court granted development consent for a residential flat building in Bondi, with a FSR variation of 65% (1.5:1 versus LEP maximum of 0.9:1).

¹The Court of Appeal considered the issue in *Legal and General Life v North Sydney Municipal Council (1990) 69 LGRA 201* (where North Sydney Council had approved a SEPP 1 objection allowing the FSR control of 3.5:1 to be increased to 15:1 (329% variation), and the 5-storey height control to be increased to 17-storeys (240% variation).

The Court approved the following statement by Chief Judge (in *Legal and General Life v North Sydney Council (1989) 68 LGRA 192, 203*), and upheld the validity of the Council's decision:

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

- In *Edmondson Grange Pty Ltd v Liverpool City Council [2020] NSWLEC 1594* the Court granted development consent for 3x residential flat buildings, with a FSR variation of 59% (1.19:1 versus LEP maximum of 0.75:1).
- In *Landco (NSW) Pty Ltd v Camden Council [2018] NSWLEC 1252* the Court granted development consent for a land subdivision, with lot size variations ranging between 47-51% (220-240m² versus LEP minimum 450m²).
- In *SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112* the Court granted development consent to a 6-storey shop top housing development, with a FSR variation of 42% (3.54:1 versus LEP maximum of 2.5:1).

For comparison purposes, this subject DA only represents a variation of 24%.

The proposed variation from the development standard is assessed against the accepted “5-Part Test” for the assessment of a development standard variation established by the Court in *Wehbe vs Pittwater Council (2007) LEC 827* and and the principles outlined in *Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46*.

5 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

The NSW Land and Environment Court (LEC) in *FouR1Five Pty Ltd v Ashfield Council [2013] NSWLEC 90*, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council [2007] NSW LEC 827*.

In the decision of *Wehbe vs Pittwater Council (2007) LEC 827*, Chief Justice Preston expressed the view that there are five (5) different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy. This attributes to determining whether compliance with the standard is unreasonable or unnecessary in the circumstances of the case as set out on the following Table:

First	The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective.
Second	A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.
Third	A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.



Fourth	A fourth way is to establish that 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.
Fifth	A fifth way is to establish that “the zoning of particular land” was “unreasonable or inappropriate” so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land” and that “compliance with the standard in that case would also be unreasonable or unnecessary.

The following discussion is provided in response to each point of the above Table:

5.1 THE OBJECTIVES OF THE STANDARD ARE ACHIEVED NOTWITHSTANDING NON-COMPLIANCE WITH THE STANDARD

The objectives supporting Clause 4.4 Development Standard are discussed below and demonstrates how the proposal is consistent with the objectives outlined in clause 4.4(1). Consistency with the objectives and the absence of any environmental impacts, would demonstrate that strict compliance with Clause 4.4 Development Standard would be both unreasonable and unnecessary in this instance.

- (1) *The objectives of this clause are as follows:*
- (a) *to establish a maximum floor space ratio to enable appropriate development density,*
 - (b) *to ensure development density reflects its locality,*
 - (c) *to provide an appropriate transition between development of different densities,*
 - (d) *to minimise adverse impacts on local amenity,*
 - (e) *to increase the tree canopy and to protect the use and enjoyment of private properties and the public domain.*

The primary objective/purpose of the control is to restrict the built form of development to ensure that its bulk and scale is compatible with the character of the locality, and to mitigate against undesirable amenity impacts. It is considered that the proposal satisfies the respective objectives of Clause 4.4 Development Standard of the LEP as follows:

- “(a) to establish a maximum floor space ratio to enable appropriate development density,”*
- The proposal is for paper subdivision only, with no actual physical/building works, and therefore will not result in any increase of the existing floor area, bulk/scale, and density
- “(b) to ensure development density reflects its locality”*
- The proposal, despite the “technical” numerical non-compliance, is largely consistent with the building bulk of nearby neighbours in the locality which are estimated to have a similar floor space ratio (this is evident in the similar non-compliances approved by Council – see Heading 5.4.
 - The proposal will maintain the existing 2 residential buildings as-is, and therefore will not increase the residential population density of the subject site and the land use intensity beyond its existing level.



"(c) to provide an appropriate transition between development of different densities"

- As discussed above, the proposal will not intensify the use of the existing development or result in a density that is beyond the existing level.

"(d) to minimise adverse impacts on local amenity"

- As there are no changes to the existing physical built form, the proposal (for paper subdivision only, with no actual physical/building works) will not result in any changes to existing amenity conditions for the adjoining properties in terms of overshadowing, visual privacy and visual bulk.

"(e) to increase the tree canopy and to protect the use and enjoyment of private properties and the public domain."

- No changes to existing tree canopy cover. As discussed above, the proposal will not intensify the use of the existing development or result in a density that is beyond the existing level.

Overall, the proposal provides for the orderly and economic development of the site, given the site's orientation, location and context. It is considered that the site is well suited for the proposed development, and is essentially the same as other approved Torrens title subdivisions in the locality – see Heading 5.4.

5.2 THE UNDERLYING OBJECTIVE OR THE PURPOSE OF THE STANDARD IS NOT RELEVANT TO THE DEVELOPMENT AND THEREFORE COMPLIANCE IS UNNECESSARY

The underlying objective or purpose of the LEP control is relevant to the development and is achieved as outlined above.

5.3 THE UNDERLYING OBJECT OR PURPOSE WOULD BE DEFEATED OR THWARTED IF COMPLIANCE WAS REQUIRED AND THEREFORE COMPLIANCE IS UNREASONABLE

Not applicable as the underlying objective or purpose would not be defeated or thwarted if compliance was required.

5.4 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; AND

It cannot be said that this development standard has been abandoned, however a review of Council's register for most-recent variations (Quarter 3 2023) indicates that Council has historically approved the following FSR variations which range from 17% to 45.6% (see Figure 4 below).

DA No.	Address	Clause	Degree of Non-Compliance	Approved Date
DA/2022/0938*	35 Church Street, Birchgrove	4.4 (FSR)	45.6%	08/08/2023
DA/2023/0257**	6 Punch Street,	4.4 (FSR)	28.1m ² or 32%	12/09/2023



	Balmain			
DA/2023/0215	68 Bettle Street, Balmain	4.4 (FSR)	29.5%	18/07/2023
DA/2022/0725	85 Wardell Road, Dulwich Hill	4.4 (FSR)	65.m ² or 24.49%	08/08/2023
DA/2023/0043	10 Short Street, Leichhardt	4.4 (FSR)	21.5m ² or 17.35%	08/08/2023
DA/2023/0322***	47 Darling Street, Balmain East	4.4 (FSR)	24.88m ² or 17%	12/09/2023

Figure 4 – Example of other FSR variations approved by Council Source: Council

* Also non-compliant with Landscaped Area development standard (Clause 4.3C); 36.5%.

** Also non-compliant with Site Coverage development standard (Clause 4.3C); 22% or 11.5m².

*** Also non-compliant with Landscaped Area development standard (Clause 4.3C); 34% or 8.12m²

5.5 THE ZONING OF THE 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.

Not applicable as the zoning of the site is appropriate. The proposed development is consistent with the objectives of the R1 General Residential zone, as demonstrated below.

Objectives of the R1 General Residential zone:

a. "to provide for the housing needs of the community"

- The proposal will retain the existing 2 buildings/dwellings, and continue to provide for the housing needs of the community.

b. "to provide for a variety of housing types and densities"

- The paper Torren title subdivision will "separate" the 2 existing buildings into 2 distinct legal Titles on paper to ensure that both buildings can practically contribute to housing stock of the LGA (facilitate the potential for individual sale of each lot, and hence a more affordable price point for each lot rather than a much higher price for a combined site), and accommodate the affordable housing needs of the LGA.

c. "to enable other land uses that provide facilities or services to meet the day to day needs of residents"

- This objective is not applicable, as the use of the subject site for residential purpose remains unchanged.

d. "To provide residential development that maintains the character of built and natural features in the surrounding area."

- The proposal will maintain the existing use of the site as residential, and the built and natural features will remain unchanged as no physical building works are proposed.

6 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

There are sufficient planning grounds to justify contravening the Clause 4.4 development standard in the circumstances of this particular case, as the subject proposal:

- is similar to other DAs that have been approved nearby – refer to the Statement of Environmental Effects for more details – in that it is practically impossible for any Torrens Title Subdivision of existing small lots within Annandale (and other suburbs in the Inner West) to achieve “technical” compliance with the FSR development standard, due to the artificially inflated ratio between the reduced subdivided-lot size compared the existing building’s floor area;
- will retain the existing 2 buildings/dwellings, and continue to provide for the housing needs of the community;
- is generally compatible with the height, bulk and scale of the existing and desired future character of the locality i.e. does not result in any increases in internal floor area, building height, and/or changes to external building form;
- maintains the prevailing external building character and the number of storeys;
- will maintain the existing use of the site as residential, and the built and natural features will remain unchanged as no physical building works are proposed;
- does not reduce existing landscaping & open space, and does not increase the existing site coverage / building footprint;
- will not have any impacts on the amenity of neighbouring properties in relation to overlooking, view loss, solar access loss etc.;
- will not have any other adverse impacts such as noise, traffic, parking, waste, pollution;
- is well within the range (17% to 45.6% variation) of most-recent approvals (Quarter 3 2023) by Council – see Figure 4;
- can facilitate the potential for individual sale of each lot, and hence a more affordable price point for each lot rather than a much higher price for a combined site.

In the case of *Moskovich v Waverley Council (2016) NSWLEC 1015*, the LEC accepted that compliance with the standard (also FSR in that case) was unreasonable and unnecessary because the design achieved the objectives of the standard and the respective zone, in a way that addressed the particular circumstances of the site.

If the land use intensity for the site remains consistent with the locality in a way which provides a similar (or better) planning outcome for the site, notwithstanding the variation which is within the ambit of Clause 4.6, this is considered to be a positive outcome.

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Notwithstanding the variation, the proposal represent a well-considered development that addresses the site constraints, streetscape and satisfy the relevant objectives of both the Clause 4.4 Development Standard and the R1 zone.

Variation to this particular development standard will allow a otherwise well-considered development to proceed. A key consideration is that the fundamental purpose of Clause 4.6 is to provide flexibility in applying development standards in that in so doing better development outcomes ensue.

The majority of the above environmental planning grounds that warrant support for the variation, are not "generic", but rather, specific to the site and circumstances of the development. Overall, the proposal provides for the orderly and economic development of the site, given the site's orientation, location and context. It is considered that the site is well suited for the proposed development.

7 IS THE VARIATION IN THE PUBLIC INTEREST?

Although no longer expressly required for consideration by Clause 4.6, it is considered that the proposed development will be in the public interest because it is consistent with the objectives of the Clause 4.4 development standard and the objectives of the R1 General Residential zone.

Pursuant to case law of *Ex Gratia P/L v Dungog Council (NSWLEC 148)*, the question that needs to be answered is "*whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development*".

There is no public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to Clause 4.4, whilst better planning outcomes are achieved.

The departure of 24% from the FSR control allows for the orderly and economic use of the site in a manner which otherwise achieves the outcomes and objectives of the relevant planning controls. On balance, it is considered that there is no benefit to the public or the community in maintaining the development standard.

8 IS THE VARIATION WELL FOUNDED?

In summary, this Variation Request is well founded as required by Clause 4.6 in that:

- Compliance with the Clause 4.4 development standard would be unreasonable and unnecessary, in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the departure from the standard, which results in a same or better planning outcome than a strictly compliant development (it is practically impossible to achieve compliance in the circumstances of this particular case);
- The development meets the objectives of the development standard and the objectives of the land use zone, notwithstanding the variation;

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- The proposed development is in the public interest and there is no public benefit in maintaining the standard;

Based on the above, the variation is considered to be well founded. The consent authority may be satisfied that all requirements of Clause 4.6 have been accounted for, having regards to the merits of the proposed development.

If you have any questions regarding the above, please do not hesitate to contact TRANPLAN Consulting.

Yours sincerely



David Tran B. Planning (Honours)

Attachment D – Statement of Heritage Significance

Heritage Impact Statement

1 THE SITE

The subject development site has a legal description of Lot A/DP25347 is more commonly referred to as No. 204 Trafalgar Lane, Annandale¹. The site has dual frontage to Nelson Street (east) and Trafalgar Lane (west), and is located between Rose Lane to the north and Booth Lane to the south. The site has east-west orientation and a modest fall from the rear toward Nelson Street of approximately 0.4m, and is generally rectangular in shape with a frontage of 5.43m to Nelson Street, lengths of 54.33m (north) / 54.32m (south), rear boundary of 5.62m and a total area of 291.9m² (by Survey Calculation). The subject site is steeply sloping and has an approximate topographical difference of 7m fall from Trafalgar Lane to Nelson Street and near flat cross-site (north-south).

The site is located on the eastern side of Trafalgar Lane and currently comprise a semi-detached one-storey brick dwelling to the front (Nelson Street frontage) and semi-detached two-storey brick dwelling to the rear (Trafalgar Lane frontage). Refer to Figures 1 and 2 below for Aerial images of the site.

The site is located within Nelson Street Distinctive Neighbourhood precinct and also within a Heritage Conservation Area (“C1” – “Annandale”), but it is not a Heritage Item, nor located in vicinity of any Heritage Items. In proximity to the site are other neighbouring sites with similar developments facing the rear lane at Trafalgar Lane:

- 196 Nelson Street – 2 storey studio / garage with rear door lane access
- 194 Nelson Street – 2 storey studio / garage
- 192 Nelson Street - 2 storey studio / garage
- 190 Nelson Street - 2 storey studio / garage
- 182 Nelson Street – 2 storey secondary dwelling & garage

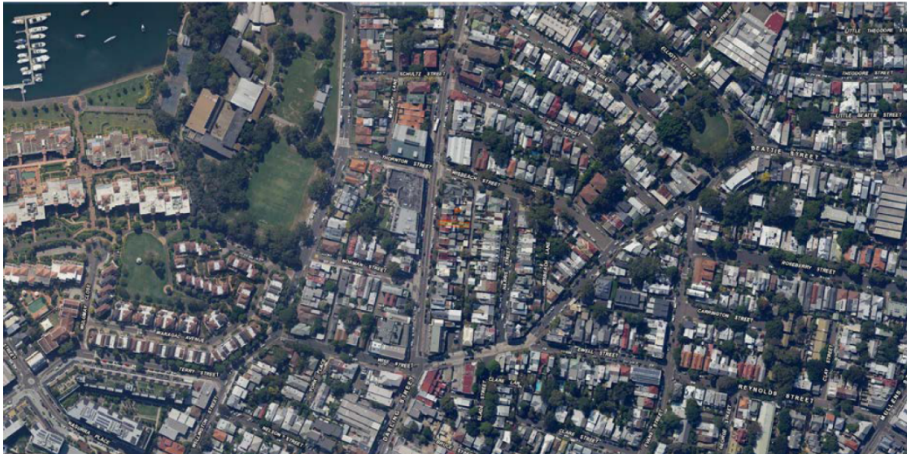


Figure 1 – Site & Locality (Site highlighted) Source: NSW Government

¹ Also known as 204 Nelson Street, Annandale – both street addresses come up (under only the 1 legal Title – Lot A/DP25347); refer to Figure 2.



Figure 2 – Site Aerial* Source: NSW Government

* Both street addresses come up (under only the 1 legal Title – Lot A/DP25347)

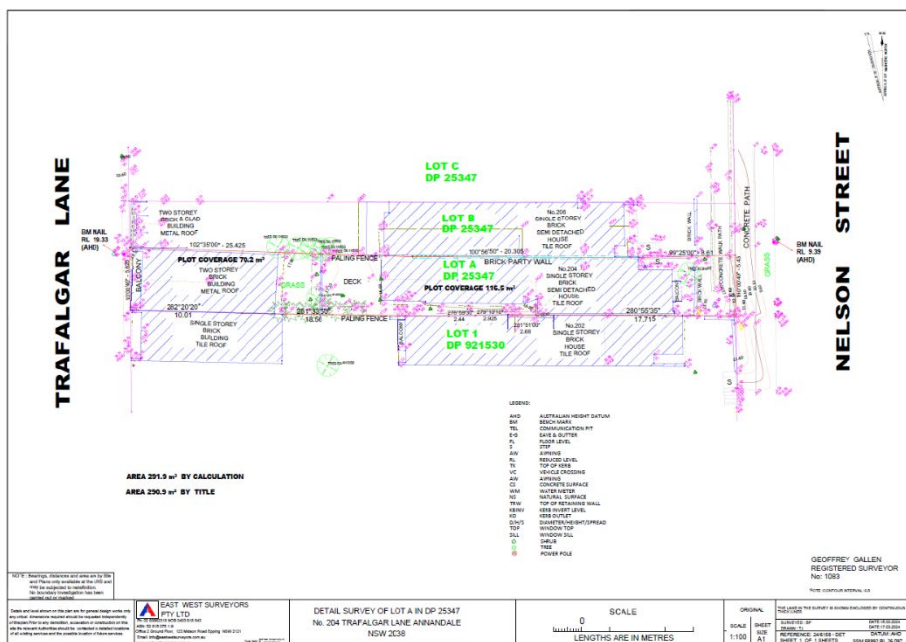


Figure 3 – Survey Plan Source: East West Surveyors

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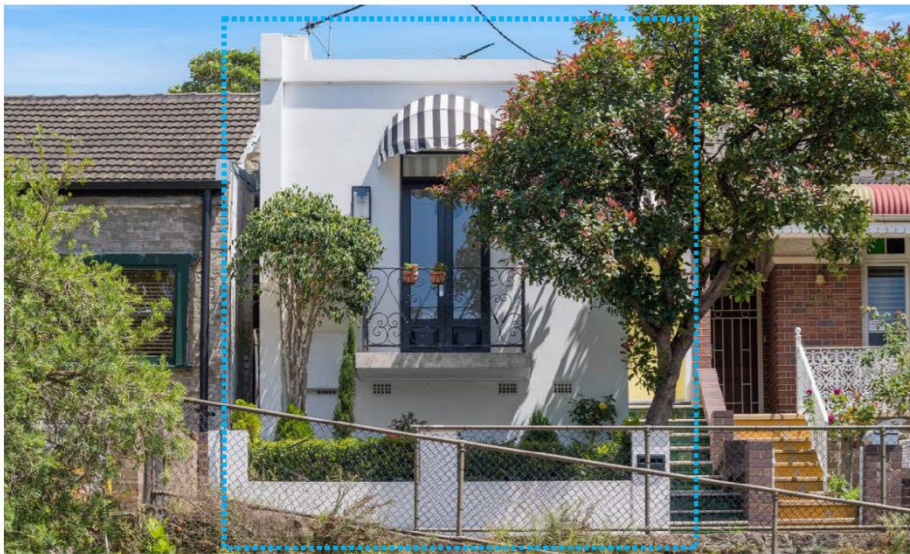


Figure 4 – The “front” building (No. 204 Nelson Street) viewed from Nelson Street Source: www.realestate.com.au



Figure 5 – No. 204 Nelson Street’s kitchen with the rear building (204 Trafalgar Lane) visible in background Source: www.realestate.com.au



Figure 6 – The façade/front of the “rear building” (No. 204 Trafalgar Lane, Annandale), viewed from rear yard Source: www.realestate.com.au



Figure 7 – No. 204 Trafalgar Lane, Annandale, as viewed from rear / Trafalgar Lane) Source: www.realestate.com.au

2 HERITAGE CONSERVATION

Clause 5.10 of IWLEP 2022 contains following provisions for development on land that is identified as a Heritage Item or located within a Heritage Conservation Area:

(5) Heritage assessment

The consent authority may, before granting consent to any development:

- (a) on land on which a heritage item is located, or*
- (b) on land that is within a heritage conservation area, or*
- (c) on land that is within the vicinity of land referred to in paragraph (a) or (b).*

require a heritage management document to be prepared that assesses the extent to which the carrying out of the proposed development would affect the heritage significance of the heritage item or heritage conservation area concerned.

The site is not a Heritage Item, but is located within a Heritage Conservation Area (HCA) – “C1” Annandale HCA. The site is not in the immediate vicinity of any Heritage Items. Refer to extract of the Heritage Map in Figure 23 below.

It is also not listed on the NSW State Heritage Register, the National Heritage List, the Commonwealth Heritage List, the National Trust Register (NSW), and the former Register of the National Estate².

The following Statement of Significance for the Annandale Heritage Conservation Area is in the *Leichhardt DCP 2013*:

One of a number of conservation areas that collectively illustrate the nature of Sydney's early suburbs and Leichhardt's suburban growth particularly between 1871 and 1891, with pockets of infill up to the end of the 1930s (i.e. prior to World War II).

This area is important as a well-planned nineteenth-century suburb, and for illustrating development particularly from 1880s–1890s, aimed initially at the middle class market. The surviving development from this period forms the major element of its identity along with an area of 1910s–1930s development at its northern end.

² The Register of the National Estate ceased as a statutory heritage list in 2007; however it continues to exist as an inventory of Australian heritage places.



Figure 8 – IWLEP 2022 Heritage Map source: NSW Legislation

The proposed development is for paper subdivision only, with no physical/building works and will retain the heritage/historical character of the HCA (by retaining the contributory original semi-detached dwelling).

As the physical form of the built environment and the character of the Heritage Conservation Area will remain unchanged, it is reasonably considered that there are no adverse impacts on the built heritage.

It is noted that Council's Heritage Advisor have been generally supportive of other similar subdivision proposals in the locality on heritage grounds.

On the basis of all the above, it is considered that a full Heritage Impact Statement is unnecessary and onerous for the applicant, and this brief Heritage Impact Statement is adequate.