

# **Clause 4.6 Written Request to Contravene Manly LEP 2013, Clause 4.4 Floor Space Ratio**

## **3 Hill Street Fairlight**

### **Clause 4.6 Written Request**

Submitted to Northern Beaches Council

On Behalf of Meaghan and Mark Gilbert

5 May 2025 ■ 25001

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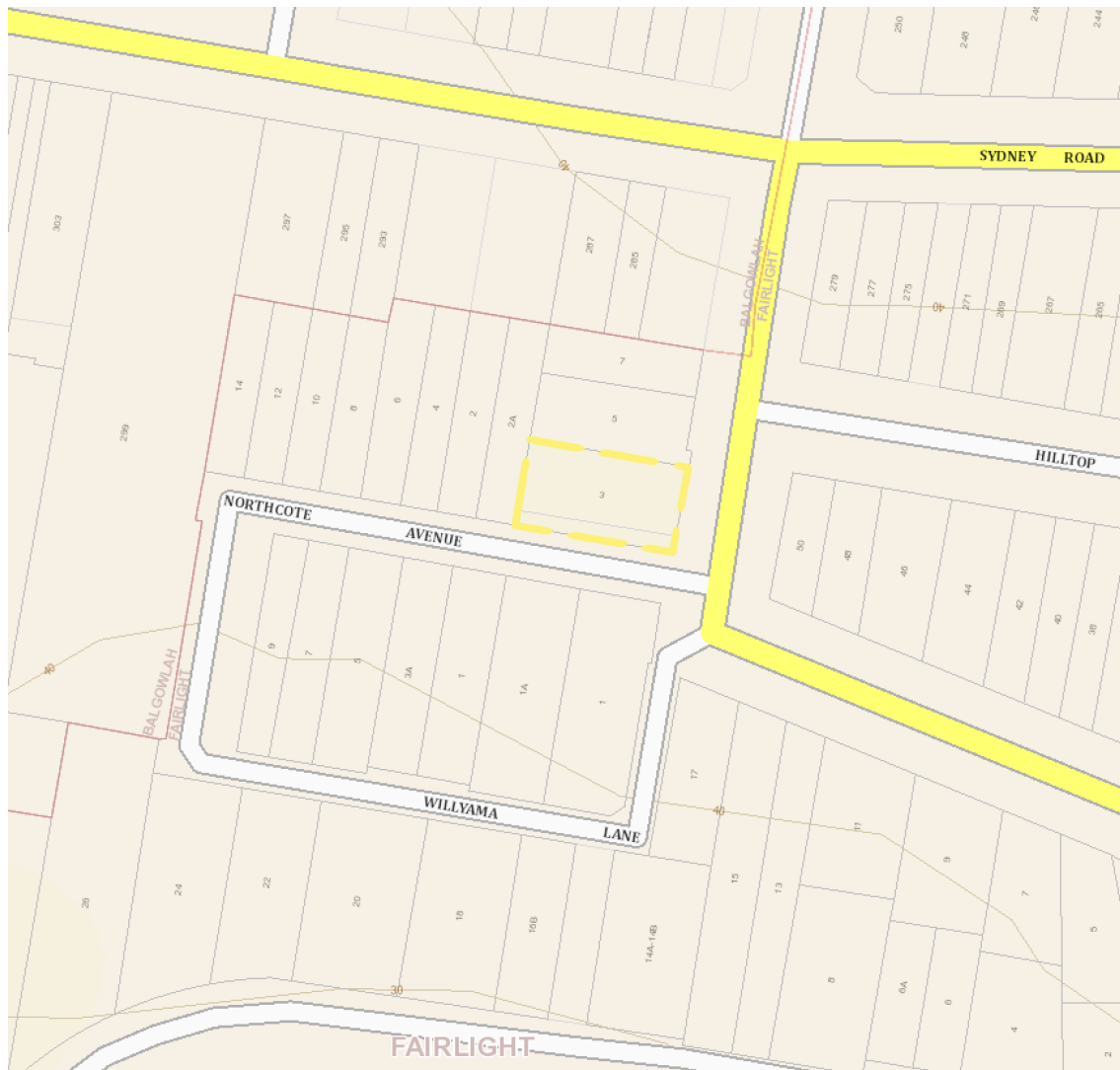
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## 1.0 PRELIMINARIES

### 1.1 Land to which this variation applies and overview of the proposal

This exception to development standards Written Request supports a development application (DA) relating to 3 Hill Street, Fairlight (the **site**) (**Figure 1**), which proposes demolition of the existing dwelling house and associated structures and construct a new pair of semi-detached dwellings with Torrens Title subdivision.

The Written Request has been prepared by KD Town Planning on behalf of the Meaghan and Mark Gilbert (the applicant). It should be read in conjunction with the Statement of Environmental Effects (SEE) that accompanies the DA.



**Figure 1 – Site Location Plan 3 Hill Street, Fairlight** (Source: <https://www.planningportal.nsw.gov.au/spatialviewer/#/find-a-property/address>)

## 1.2 Relevant environmental planning instrument

This exception to development standards Written Request relates to Manly Local Environmental Plan 2013 (**Manly LEP 2013**).

## 1.3 Relevant development standard

This exception to development standards Written Request relates to the floor space ratio (**FSR**) standard at cl. 4.4(2) of Manly LEP 2013 which states:

### 4.4 Floor Space Ratio

...

- (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.*

The FSR standard for the site is 0.6:1 as shown on **Figure 2**.



#### 1.4 Proposed contravention of the standard

The site is subject to an FSR standard of 0.6:1.

As calculated by Accurate Design and Drafting **Table 1** summarises the proposed site area, GFA/FSR and departure from the FSR standard.

**Table 1 – Summary of the proposed site area, proposed GFA and FSR, and non-compliance with the standard**

	Proposed Site Area	Proposed GFA (m <sup>2</sup> )	Proposed FSR	FSR Standard / Permitted GFA (m <sup>2</sup> )	Non-compliance with the FSR Standard
<b>House 1</b>	254.76	175.85	0.69:1	0.6:1 / 152.86	15% / 22.99m <sup>2</sup>
<b>House 2</b>	254.84	175.85	0.69:1	0.6:1 / 152.90	15% / 22.95m <sup>2</sup>

The proposed development results in a non-compliance of 15% for each dwelling on the newly created lots.

## 2.0 WRITTEN REQUEST AND TESTS

### 2.1 Additional requirements for DAs involving contravention of development standards

Section 35B of *Environmental Planning and Assessment Regulations 2021 (EP&A Regs)* states:

**35B Additional requirements for development applications involving contravention of development standards**

- (1) *This section applies to a development application that proposes, in accordance with a relevant EPI provision, development that contravenes a development standard imposed by any environmental planning instrument.*
- (2) *The development application must be accompanied by a document that sets out the grounds on which the applicant seeks to demonstrate that—*
  - (a) *compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
  - (b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*
- (3) *In this section—*

**relevant EPI provision** means—

  - (a) *clause 4.6 of a local environmental plan that adopts the provisions of the Standard Instrument, or*
  - (b) *an equivalent provision of another environmental planning instrument.*

In accordance with s. 35B of the EP&A Reg, the applicant bears the onus to demonstrate that the matters in cl. 4.6 of Manly LEP 2013 have been adequately addressed within a separate document.

In particular, the document seeking to justify contravention of a development standard must adequately address both:

- That compliance with the development standard is **unreasonable or unnecessary** in the circumstances of the case (s. 35B (2)(a) EP&A Reg), and
- That there are **sufficient environmental planning grounds** to justify contravening the development standard (s. 35B(2)(b) EP&A Reg).

As set out in Section 3.0 of this Written Request, the matters in cl. 4.6 of Manly LEP 2013 have been adequately addressed in order to enable the consent authority to form the requisite opinion of satisfaction. As a result of this, this document adequately fulfils the obligation under s. 35B of the EP&A Regs.

### 2.2 NSW Land and Environment Court tests

Section 3.0 of this Written Request assesses the proposed contravention of the FSR standard against the cl. 4.6 considerations using the accepted tests for the assessment of development standard variations established by the NSW Land and Environment Court in:

- *Initial Action v Woollahra Municipal Council* [2018] NSWLEC 118
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No 3')
- *Whebe v Pittwater Council* [2007] NSW LEC 82
- *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46.

## 3.0 JUSTIFICATION AND MATTERS FOR CONSIDERATION

### 3.1 Clause 4.6 Exceptions to development standards

Clause 4.6 of Manly LEP 2023 states:

#### 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 to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*

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

(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 C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 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 6.15,*
- (cb) a development standard on land to which clause 6.19 applies.*

An assessment of the proposed contravention of the FSR development standard at cl. 4.4(2) against the relevant matters in cl. 4.6 Exception to development standards of Manly LEP 2013 follows:

### 3.2 Clause 4.6(1) Objectives

Clause 4.6(1) of Manly LEP 2013 states:

*(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.*

Consistent with the objectives at cl. 4.6(1), and for the reasons set out in this Written Request, the FSR standard at cl. 4.4(2) of Manly LEP 2013 should be applied flexibly as the proposed development achieves a better outcome for and from the development in this particular circumstance.

### 3.3 Clause 4.6(2) Development excluded from this section

The FSR development standard at cl. 4.4(2) is not excluded from the operation of this section.

### 3.4 Clause 4.6(3) Compliance with the standard is unreasonable and unnecessary and grounds to justify contravening the standard

The following sections justify contravention of the FSR development standard using the following two tests:

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

#### 3.4.1 Clause 4.6(3)(a) Whether compliance with the development standard is unreasonable or unnecessary

The common ways in which an applicant might demonstrate that compliance with a development standard is **unreasonable or unnecessary** are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446. Although *Wehbe* concerned a SEPP 1 objection, the common ways to demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe* are equally applicable to cl. 4.6.

The five ways to demonstrate that compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way. In this instance, Test 1 is satisfied and further supported by Test 4.

The five ways to demonstrate that compliance with the standard is unreasonable or unnecessary and the relevance to this Written Request are noted below:

#### 1. **The objectives of the development standard are achieved notwithstanding non-compliance with the standard**

The objectives of the FSR standard (Manly LEP 2013 cl. 4.4(1)(a) development in Zone R1 General Residential) are satisfied as noted below:

*(a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*

The proposal (including the proposed subdivision) maintains the pre-existing building pattern along Hill Street, and presents a polite height, bulk and scale that sits comfortably within the existing and desired future character of the locality.

The proposed pair of semi-detached dwellings are compliant with the height standard, and wall height control, and comply with the side setback controls, and the predominant front and rear setbacks.

The proposal does not require the removal of any significant trees, or reduce existing open space or landscaped areas, with additional supplementary planting proposed to enhance the existing character of the area (consistent with the Manly DCP 2013 minimum controls)

A high standard of design is proposed, consistent with the emerging development pattern and desired future character of the locality. Accordingly, the proposed development is consistent with the existing and desired future character of the locality.

*(b) to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,*

The proposed development is compliant with the height standard, wall height control and complies with the side setback controls, and the predominant front and rear setbacks, as well as the landscape and open space controls. The proposed development therefore has a density and building bulk in relation to the site area that will present a polite height, bulk and scale that sits comfortably within the townscape.

*(c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*

The proposal does not require the removal of any significant trees, or reduce existing open space or landscaped areas, with additional supplementary planting proposed to enhance the existing character of the area (consistent with the Manly DCP 2013 minimum controls).

The proposed development does not propose an anomalous bulk and scale to the existing development on site, or adjoining development, and will presents as a seamless addition to the streetscape.

*(d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,*

The proposal does not overshadow any private property or principal private open space during midwinter. The proposal is therefore acceptable and reasonable, and compliant with Manly DCP 2013 Control 3.4.1.1 and 3.4.1.2.

There are no unreasonable privacy impacts arising from the development.

There are no public or private view impacts arising from the development, given the location and topography of the site. The proposal will therefore not impact views across the site.

There are no noise impacts arising from the development over and above existing conditions.

There is no impact to current access, parking and traffic conditions as a result of the proposal, with the existing vehicle crossings retained.

The proposed development therefore does not result in any adverse environmental amenity impacts to the adjoining land or public domain.

*(e) to provide for the viability of Zone E1 and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.*

N/A

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

Not applicable. The underlying objective or purpose of the FSR standard is relevant to the development and is achieved as outlined above.

**3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable***

Not applicable. The underlying object or purpose of the FSR standard would not be defeated or thwarted if compliance was required.

**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***

The FSR standard has not been abandoned or destroyed on the site or within the immediate area. Area.

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

Not applicable. The zoning of the land is reasonable and appropriate.

For consistency, and for the reasons set out below in addition to satisfying the objectives of the FSR standard at cl. 4.4(1) (as described above), the proposed development (with existing/proposed FSR contravention) also satisfies the objectives of Zone R1 General Residential:

- *To provide for the housing needs of the community*

The proposed development, which replaces an existing single dwelling with a pair of semi-detached dwellings (with Torrens Title subdivision), provides for the housing needs of the community, by delivering an additional dwelling on the site. Supporting the needs of the community, through the provision of additional housing supply.

- *To provide a variety of housing types and densities*

The proposal supports a variety of housing types, through the construction of two new dwellings on the site, that will meet modern living standards.

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

N/A

**3.4.2 Clause 4.6(3)(b) Whether there are sufficient environmental planning grounds to justify contravening the development standard**

"Sufficient environmental planning grounds" is a phrase of wide generality (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 [26]):

*Subclause (3)(b) requires a written report to demonstrate that sufficient environmental planning grounds support the contravention of a development standard. The EPA Act or the LEP do not define "sufficient" or "environmental planning grounds". As the Appellant submitted these phrases are of wide generality enabling a variety of circumstances or grounds to justify contravention of the particular development standard. The "sufficient ... grounds" must be "environmental planning grounds" by their nature. The word "environment" is defined in the EPA Act to mean "includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings".*

The environmental planning grounds relied on in the Written Request must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole.

Therefore, the environmental planning grounds advanced in the Written Request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole [24].

Four2Five [31]:

*Further support for the Commissioner's approach is derived from the use of the word "sufficient". Contrary to the Appellant's submission that this suggests a low bar, I draw the opposite inference, namely that the written report must address sufficient environmental planning grounds to inform the consent authorities finding of satisfaction in cl. 4.6(4)(a)(i).*

Using these tests, there are **sufficient environmental planning grounds** to contravene the FSR standard in this instance given that:

- The proposed pair of semi-detached dwellings present a polite height, bulk and scale that sits comfortably within the existing and desired future character of the locality.
- The additional GFA on the site does not propose an anomalous bulk and scale to the existing development on site, or adjoining development.
- The proposal maintains the pre-existing building pattern along Hill street, with a regular subdivision pattern proposed, and building form.
- The proposed development is compliant with the height standard, wall height control and complies with the side setback controls, and the predominant front and rear setbacks, landscape and open space controls.
- The proposal does not require the removal of any significant trees, or reduce existing open space or landscaped areas, with additional supplementary planting proposed to enhance the existing character of the area (consistent with the Manly DCP 2013 minimum controls).
- The proposed GFA and minor increase above the standard is contained within a complying building envelope and largely sits within the existing building's footprint. Whilst delivering an additional dwelling on the site.
- A high standard of design is proposed, consistent with the emerging development pattern and desired future character of the locality.
- The proposed development will activate an underutilised site, and bring it up to modern living standards, improving its presentation to the street and adding to the character of the neighbourhood.
- The proposal does not overshadow any private property or principal private open space during midwinter. The proposal is therefore acceptable and reasonable, and compliant with Manly DCP 2013 Control 3.4.1.1 and 3.4.1.2.
- There are no unreasonable privacy impacts arising from the development.
- There are no public or private view impacts arising from the development, given the location and topography of the site. The proposal will therefore not impact views across the site.
- There are no noise impacts arising from the development over and above existing conditions.
- There is no impact to current access, parking and traffic conditions as a result of the proposal, with the existing vehicle crossings retained.

### 3.5 Clause 4.6(4) Consent authority records

The consent authority must keep a record of its assessment under cl. 4.6(3).

### 3.6 Clause 4.6(8) Contravention of other matters

Pursuant to cl. 4.6(8) development consent cannot be granted under cl. 4.6 for development that would contravene any of the following:

*(a) a development standard for complying development*

N/A

*(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,*

The proposal is identified under the EP&A Regs as a BASIX building<sup>1</sup>.

As such, a BASIX Certificate has been prepared for each dwelling. An appropriate condition should be imposed on the consent requiring compliance with the BASIX commitments.

*(c) clause 5.4*

N/A

*(caa) clause 5.5*

N/A

*(ca) clause 6.15,*

N/A

*(cb) a development standard on land to which clause 6.19 applies.*

N/A

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<sup>1</sup> Pursuant to EP&A Reg 2021:

**BASIX building** means a building that contains at least 1 dwelling, but does not include the following—

*(a) hotel or motel accommodation,*

*(b) a boarding house, hostel or co-living housing that—*

*(i) accommodates more than 12 residents, or*

*(ii) has a gross floor area exceeding 300 square metres.*

## 4.0 CONCLUSION

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The proposed demolition of the existing dwelling house and associated structures and the construction of a pair of semi-detached dwellings with Torrens Title subdivision at 3 Hill Street, Fairlight will increase the GFA on site to 509.6m<sup>2</sup> total (or 254.76m<sup>2</sup> and 254.84m<sup>2</sup> for each dwelling) (which equates to an FSR of 0.69:1 (0.6:1 permitted) for each newly created site.

Consistent with the tests established by the Land and Environment Court, this Written Request demonstrates that:

- Compliance with the FSR development standard is unreasonable and unnecessary;
- There are sufficient environmental planning grounds to justify contravening the FSR development standard.