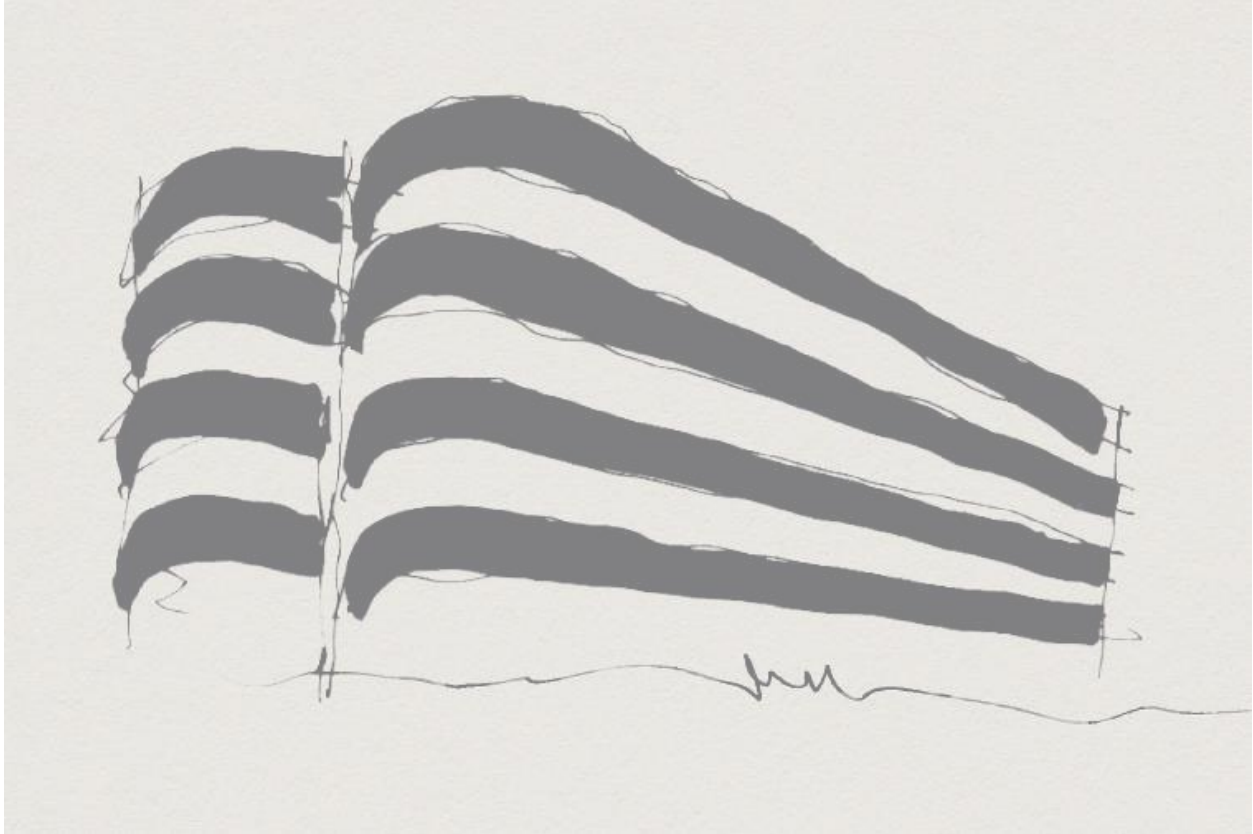


WILLOWTREE PLANNING



6 January 2025

Ref: WTJ24-187
Contact: Tim Gleeson



CLAUSE 4.6 VARIATION REQUEST FLOOR SPACE RATIO

PROPOSED RESIDENTIAL FLAT BUILDING

101 North Steyne, Manly
CP SP 4518

—
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on behalf of Manly Land 101 Pty Ltd c/o Time and Place

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DOCUMENT CONTROL TABLE			
Document Reference:	WTJ24-187		
Contact	Tim Gleeson		
Version and Date	Prepared by	Checked by	Approved by
Version No. 1 – 18/12/2024	Tim Gleeson Town Planner	Cameron Gray Senior Associate	Chris Wilson Managing Director
			

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PART A PRELIMINARY

1.1 INTRODUCTION

This Clause 4.6 variation request (Variation Request) has been prepared in support of a Development Application (DA) for the proposed residential flat building at 101 North Steyne, Manly (subject site).

The Subject Site is zoned R3 Medium Density Residential, pursuant to the *Manly Local Environmental Plan 2013* (MLEP2013) and is located within the Northern Beaches Local Government Area (LGA). The proposal is permissible with consent within the R3 zone is considered contextually appropriate. The proposal is generally consistent with the objectives and provisions of MLEP2013, with the exception of Clause 4.4 – Floor Space Ratio, for which this Variation Request is sought. A separate Variation Request has been prepared for the proposed variation to Clause 4.3 – Height of Buildings.

This Variation Request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards prescribed under MLEP2013. It considers various planning controls, strategic planning objectives and existing characteristics of the subject site and concludes that the proposed non-compliance is the best means of achieving the objects of encouraging orderly and economic use and development under the *Environmental Planning and Assessment Act 1979* (EP&A Act).

1.2 RATIONALE OF VARIATION FROM DEVELOPMENT STANDARDS

This Variation Request has been submitted to assess the proposed non-compliance with Clause 4.4 – Floor Space Ratio of MLEP2013 and has been prepared in accordance with the requirements of Clause 4.6 of MLEP2013 which includes the following objectives:

- (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.*

Under the provisions of Clause 4.4 of MLEP2013, the subject site is subject to a maximum floor space ratio development standard of **1.5:1**. The proposed floor space ratio of **1.93:1** would exceed the maximum floor space ratio development standard. The proposed variation will allow for the construction of a residential flat building that is of a bulk and scale that is consistent with development in the immediate vicinity. Strict compliance with the floor space ratio development standard would result in a poor streetscape outcome.

This Variation Request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards prescribed by MLEP2013.



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1.3 DEVELOPMENT STANDARD VARIATION

Under the provisions of Clause 4.4 of MLEP2013, the Subject Site is subject to a maximum floor space ratio of **1.5:1**. The proposal will result in a floor space ratio of **1.93**. **Table 1** below provides a summary of the variation.

TABLE 1: CLAUSE 4.4 OF MLEP2013 VARIATION SUMMARY			
MLEP2013	MLEP2013 Development Standard	Maximum Proposed	Proposed Development Non-Compliance
Clause 4.4 – Floor Space Ratio	1.5:1	1.93	The proposal seeks consent for a maximum development standard of 1.93:1 which is a 28.6% variation from the development standard.

Notwithstanding the above, curtailing the floor space ratio of the proposal to the current prescribed floor space ratio development standard would result in a built form that is inconsistent with the character of the streetscape. The proposed variation to the floor space ratio development standard does not result in adverse amenity or built form impacts on the surrounding area and is consistent with development in the area.

It should also be noted there are a number of precedents in the immediate vicinity of the subject site that have been approved with floor space ratio exceedances:

TABLE 2: FLOOR SPACE RATIO EXCEEDANCES IN THE IMMEDIATE VICINITY OF THE SUBJECT SITE	
Address	Floor Space Ratio
96-97 North Steyne, Manly	2.42:1
98-100 North Steyne, Manly	1.60:1
102-104 North Steyne, Manly	2.48:1

In its current form, the proposal therefore represents the most efficient use of the subject site which responds to the existing environmental constraints, compared to a development which is entirely compliant with the floor space ratio development standard.



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PART B THRESHOLDS THAT MUST BE MET

2.1 INTERPRETING CLAUSE 4.6

Clause 4.6 of MLEP2013 facilitates exceptions to strict compliance with development standards in certain circumstances. Clause 4.6(3) states (our emphasis added):

Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

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

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

Accordingly, a successful Clause 4.6 variation must satisfy the below:

First Limb – cl 4.6(3)

Clause 4.6(3) provides that the consent authority must be satisfied that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the following

- a. that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Cl 4.6(3)(a)); and
- b. that there are sufficient environmental planning grounds to justify contravening the development standard (Cl 4.6(3)(b)). To this end the environmental planning grounds advanced in the written request must justify the contravention, not simply promote the benefits of carrying out the development as a whole: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15].

In the decision of *Rebel MH v North Sydney Council* [2019] NSWCA 130 (**Rebel**) Payne JA held (our emphasis added):

*“Although it was unnecessary finally to decide the correct construction of cl 4.6(4) in Al Maha, I agree with the construction advanced in that case by Basten JA, with whom Leeming JA agreed, at [21]-[24]. **Properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).** Clause 4.6(3) requires the consent authority to have “considered” the written request and identifies the necessary evaluative elements to be satisfied. To comply with subcl (3), the request must demonstrate that compliance with the development standard is “unreasonable or unnecessary” and that “there are sufficient environmental planning grounds to justify” the contravention. It would give no work to subcl 4.6(4) simply to require the consent authority to be*



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satisfied that an argument addressing the matters required to be addressed under subcl (3) has been advanced."

Accordingly, a consent authority must be satisfied:

- a) that the Clause 4.6 variation application addresses the matters in Clause 4.6(3); and
- b) of those matters itself which means that there is greater scope for a consent authority to refuse a Clause 4.6 variation.

These matters are addressed in **Sections 4.3** and **4.4** of this Variation Request.

This written request has been prepared under Clause 4.6 to request a variation to the "floor space ratio" development standard at Clause 4.4 of MLEP2013.



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PART C STANDARDS BEING OBJECTED TO

3.1 OVERVIEW

The subject site is zoned R3 Medium Density Residential and is subject to the underling objectives of the varied standard as well as the R3 zone under MLEP2013.

3.2 CLAUSE 4.4 FLOOR SPACE RATIO CONTROL UNDER MLEP2013

Clause 4.4 of MLEP2013 identifies the following objectives:

- 1) *The objectives of this clause are as follows—*
 - a) *to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*
 - 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,*
 - c) *to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*
 - d) *to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the 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.*

Pursuant to Clause 4.6, the proposal seeks exception to the floor space ratio development standard of 1.5:1.

3.3 PROPOSED VARIATION TO DEVELOPMENT STANDARDS

The DA seeks approval for the proposed residential flat building at 101 North Steyne, Manly. The subject site is subject to a maximum floor space ratio of 1.5:1. The development proposes a maximum floor space ratio of **1.93:1**. The proposal would **exceed the floor space ratio development standard applicable to the subject site by a maximum of 0.43:1, which represents a 28.6% variation**. The area of non-compliance is considered to be a design outcome that achieves the desired outcomes of the R3 Medium Density Residential Zone in the MLEP2013. The proposal maintains and enhances the amenity derived from the built and natural environment by providing a design that is well considered and of a high standard and enhances Manly's urban environment.

Furthermore, the proposed development does not result in any significant loss of amenity or privacy for any of the neighbouring properties and provides a compatible built form that is consistent with development in the area and complements the surrounding area. Thus, the proposed residential flat building will achieve consistency with the streetscape.

Curtailing the floor space ratio of the proposal to the current prescribed development standard would result in a built form that is inconsistent with the character of the streetscape. The proposed variation to



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the floor space ratio development standard does not result in adverse amenity or built form impacts on the surrounding area and is consistent with development in the area.

In its current form, the proposal therefore represents the most orderly efficient use of the subject site which responds to the existing environmental constraints and the form and scale of the existing desired future development on the surrounding properties, compared to a development which is entirely compliant with the floor space ratio development standard. The subject site is zoned R3 Medium Density Residential under the provisions of MLEP2013, whereby residential flat buildings are permissible with consent.

This Variation Request has been prepared in accordance with the objectives of Clause 4.4 – Floor Space Ratio and the R3 Medium Density Residential zone objectives of MLEP2013.



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PART D PROPOSED VARIATION TO STANDARDS IN CLAUSE 4.4 OF MLEP2013

Pursuant to Clause 4.6 of MLEP2013 exception is sought from the height of buildings standard applicable to the subject site pursuant to Clause 4.4 of MLEP2013.

4.1 OBJECTIVES OF THE STANDARD

A key determinant of the appropriateness of a Clause 4.6 Variation to a development standard is the proposal's compliance with the underlying objectives and purpose of that development standard.

Clause 4.4 of MLEP2013 sets out specific objectives. Those objectives under MLEP2013 are responded to in **Table 3** below:

TABLE 3: CONSISTENCY WITH THE CLAUSE 4.4 OBJECTIVES	
Objective	Response
<i>(a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,</i>	The subject site is located within a block that is bound by North Steyne to the east, Pine Lane to the west, Pacific Street to the north and Pine Street to the south. There are 12 buildings within this location, typically between four (4) and five (5) storeys (aside from 115 North Steyne which is nine (9) storeys). It is acknowledged that the majority of buildings along this street exceed the 13m height limit and therefore the planning control is not reflective of the existing environment. The proposal is five (5) storeys which is generally consistent with the prevailing building height of surrounding development.
<i>(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,</i>	As previously discussed, the majority of buildings along North Steyne exceed the 13m height limit and therefore, there are limited existing views from sites located to the rear. Therefore, the proposal will not obscure important landscape or townscape features. Refer to the Visual Impact Assessment provided as Appendix 12 .
<i>(c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,</i>	It is considered that the proposal will maintain an appropriate visual relationship between new development and the existing character and landscape of the area. The existing building on the subject site is outdated, compared to the more recent developments located along North Steyne. The proposal presents an opportunity to revitalise the subject site through a modern development and an increase in landscaping and biodiversity.



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TABLE 3: CONSISTENCY WITH THE CLAUSE 4.4 OBJECTIVES

Objective	Response
<i>(d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,</i>	Significant efforts have been made to ensure no adverse environmental impacts arise from the proposal. Measures such as louvres along the side elevations ensures there is a directional outlook in addition to living spaces orientated towards the ocean. This ensures the use or enjoyment of adjoining land and the public domain is not compromised.
<i>(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.</i>	Not applicable. The subject site is zoned R3 Medium Density Residential.

4.2 OBJECTIVES OF THE ZONE

The subject site is zoned R3 Medium Density Residential pursuant to MLEP2013. Therefore, consideration has been given to the R3 zone objectives in **Table 4** below:

TABLE 4: CONSISTENCY WITH THE R3 ZONE OBJECTIVES

Objective	Response
To provide for the housing needs of the community within a medium density residential environment.	The proposal will provide for the housing needs of the community within a medium density residential environment.
To provide a variety of housing types within a medium density residential environment.	The proposal provides a mix of 4-bedroom and 3-bedroom apartments of varying sizes.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	Not Applicable. The proposal only provides for residential development.
To encourage the revitalisation of residential areas by rehabilitation and suitable redevelopment.	The existing building on the subject site is outdated, compared to the more recent developments located along North Steyne. The proposal presents an opportunity to revitalise the subject site through a modern development and an increase in landscaping and biodiversity.
To encourage the provision and retention of tourist accommodation that enhances the role of Manly as an international tourist destination.	Not Applicable. The proposal does not seek to provide tourist accommodation.



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4.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

Subclause 4.6(3)(a) (refer to **Section 2.1**) emphasises the need for the proponent to demonstrate how the relevant development standard is unreasonable or unnecessary in the circumstances.

The ways in which compliance with a development standard may be held to be “unreasonable or unnecessary” are well established. In *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*), Preston CJ provided a non-exhaustive list through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), in *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*) the Court held that the common ways of demonstrating that compliance with a development standard is unreasonable or unnecessary as outlined in *Wehbe* are equally applicable to clause 4.6.

The five methods outlined in *Wehbe* include:

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).*
- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).*
- *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).*
- *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 (Fourth Method).*
- *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 (Fifth Method).*

It is sufficient to demonstrate only one of these methods to satisfy clause 4.6(3)(a) of LCLEP 2009 (*Wehbe*, *Initial Action* at [22], *Rebel* at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

However, in this case, it is demonstrated below that:

- (a) the First Method has been satisfied, and the objectives of the height of buildings standard are achieved notwithstanding the non-compliance with the numerical standard (see also Section 4.1 above).

When considering whether a development standard is appropriate and/or necessary, one must take into account:



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- the nature of the proposed variation;
- the site context; and
- the design of the proposed development.

Following the decision in *Initial Action*, it was established that Clause 4.6 does not require an applicant to demonstrate that a development which contravenes a development standard have a better (or neutral) environment planning outcome than a development that complies with the development standard.

By providing a building at the scale proposed, a site layout is achieved that:

- Provides opportunity for architectural treatment at the upper levels that will set a desirable precedent for future development in the locality.
- Enhances Manly's urban environment by promoting the cultural, environmental, and aesthetic attributions of the locality. This is achieved through the improvement of the heritage item 'all stone kerbs' along the site frontage that is listed as a Local Heritage Item (Item No. 12) pursuant to the MLEP2013. The proposal seeks to decommission the vehicle crossings to North Steyne, which would allow for the full length of kerb to be reinstated.

The abovementioned justifications are considered valid, and in this instance the proposed Clause 4.6 Variation is considered to be acceptable. The proposal represents a more efficient use of the subject site. The objectives of the relevant clause and R3 zone would be upheld as a result of the proposal. In light of the above, the application of the height of building development standard is therefore unreasonable and unnecessary in response to the proposal.

4.4 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

In *Initial Action*, Preston CJ observed that in order for there to be “sufficient” environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

The environmental planning grounds to justify the departure of the development floor space ratio development standard are as follows:

- The proposal is entirely consistent with the underlying objectives and purposes of the standard, as demonstrated in **Section 4.1**.
- The proposal is entirely consistent with the underlying objective or purpose of the R3 Medium Density Residential zone, as demonstrated in **Section 4.3**.
- The recessed fifth floor level softens the visual impact of the development from street level and ensures the protection of adjoining amenity.
- The proposed development would improve the amenity of the streetscape and would provide additional on-street car parking through the consolidation of vehicle crossings. The vehicle crossings detract from the streetscape and limit on-street car parking in an area with high parking demand.



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- The proposal is not considered to impact surrounding road networks or intersections as demonstrated within the accompanying Traffic and Transport Impact Assessment provided as **Appendix 14**.
- The subsequent departure to the maximum floor space ratio development standard as a result of the maximum height of building development standard is consistent with the objective of both standards. Various design options have been explored to ensure the surrounding amenity is protected.

For the reasons outlined above, it is considered that the proposed variation to the floor space ratio under Clause 4.4 is appropriate and can be clearly justified having regard to the matters listed within clause 4.6(3)(b) under MLEP2013.

4.5 OBJECTIVES OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

All planning determinations made under the EP&A Act are required to be made with regard to the objects of the Act in accordance with section 1.3 of the EP&A Act. **Table 5** below assesses the proposed development against the objects of the EP&A Act.

TABLE 5: EP&A ACT OBJECTIVES	
Objective	Response
<i>(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,</i>	The proposal will positively contribute to the existing provision of residential accommodation on the subject site within the Northern Beaches LGA. Furthermore, the proposal can be progressed without any significant environmental impacts.
<i>(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,</i>	The proposal has been designed to include appropriate ecologically sustainable measures and has adequately considered environmental impacts on the surrounding locality.
<i>(c) to promote the orderly and economic use and development of land,</i>	The proposal represents the orderly and economic use and development of land in that the proposal relates to the demolition of the existing residential flat building on the subject site and the construction of a residential flat building. The proposal will make better use of the subject site and provide much needed residential accommodation in Manly.
<i>(d) to promote the delivery and maintenance of affordable housing,</i>	The proposal will not impact the delivery and maintenance of affordable housing.
<i>(e) to protect the environment, including the conservation of threatened and other species of</i>	The proposal has been sited to result in minimal impacts on the surrounding environment.



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TABLE 5: EP&A ACT OBJECTIVES	
Objective	Response
<i>native animals and plants, ecological communities and their habitats,</i>	
<i>(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),</i>	The existing subject site is not identified as a Heritage Item, within a heritage conservation area or as containing Aboriginal or cultural heritage significance. However, 'all stone kerbs' along the site frontage are listed as a Local Heritage Item (Item No. 12) pursuant to the MLEP2013. The proposal seeks to decommission the vehicle crossings in this location, which would allow for the full length of kerb to be reinstated. This is considered to be an improvement for the heritage item.
<i>(g) to promote good design and amenity of the built environment,</i>	The proposed development will promote good design and will not harm the amenity of the locality. The proposed residential flat building has been designed by smart design studio following close consultation with Northern Beaches Council.
<i>(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,</i>	The proposal can be constructed and maintained without health and safety risks to future tenants.
<i>(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,</i>	Given the EDC of the proposal does not exceed \$30 million, Northern Beaches Council will be the determining authority.
<i>(j) to provide increased opportunity for community participation in environmental planning and assessment.</i>	The Development Application would be subject to the relevant public notification requirements.



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4.6 MATTERS OF STATE AND REGIONAL SIGNIFICANCE

The proposed non-compliance with Clause 4.4 of MLEP2013 will not give rise to any matters of significance for State or regional environmental planning. They will also not conflict with any State Environmental Planning Policy or Ministerial Directives under section 9.1 of the EP&A Act.

Planning Circular PS 08-014, issued by the former NSW Department of Planning, requires that all development applications including a variation to a standard of more than 10% be considered by full Council rather than under delegation. It is noted that this variation does exceed 10% and would be required to be determined by the Local Planning Panel.

4.7 SUMMARY

For the reasons outlined above, it is considered that the variation to Clause 4.4 of MLEP2013 is well-founded in this instance and is appropriate in the circumstances. Furthermore, the Variation Request is considered to be well-founded for the following reasons as outlined in Clause 4.6 of MLEP2013, *Four2Five Pty Ltd v Ashfield Council* and *Wehbe v Pittwater Council*:

- The development is consistent with the objectives of the particular standard (refer to **Section 4.1**);
- The development is consistent with the objectives for development within the zone and long term strategic intentions to maintain and preserve employment land (refer to **Section 4.2**);
- Compliance with the development standard is unreasonable and unnecessary in the circumstances (refer to **Section 4.3**);
- There are sufficient environmental planning grounds to justify contravening the development standard (refer to **Section 4.4**); and
- The development does not give rise to any matter of significance for the State or regional environmental planning and is consistent with the visions and objectives of the relevant strategic plans (refer to **Section 4.6**).

Overall, it is considered that the proposed variation to the maximum floor space ratio is entirely appropriate and can be clearly justified having regard to the matters listed within Clause 4.6 of MLEP2013.



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PART E CONCLUSION

For the reasons outlined above, it is requested that Council support the Variation Request, which seeks approval for non-compliance with Clause 4.4 of MLEP2013 for the following reasons:

- The development is consistent with the objectives of the particular standard (refer to **Section 4.1**);
- The development is consistent with the objectives for development within the zone and long term strategic intentions to maintain and preserve employment land (refer to **Section 4.2**);
- Compliance with the development standard is unreasonable and unnecessary in the circumstances (refer to **Section 4.3** as part of the First Limb satisfied);
- There are sufficient environmental planning grounds to justify contravening the development standard (refer to **Section 4.4** as part of the First Limb satisfied);
- The Proposal is consistent with the objectives of the EP&A Act (refer to **Section 4.5**); and
- The development does not give rise to any matter of significance for the State or regional environmental planning and is consistent with the visions and objectives of the relevant strategic plans (refer to **Section 4.6**).

Given the justification provided above, the Variation Request is well founded and should be favourably considered by Northern Beaches Council.

