



**OBJECTION PURSUANT TO CLAUSE  
4.6 OF MANLY LOCAL  
ENVIRONMENTAL PLAN 2013**

**VARIATION OF A DEVELOPMENT  
STANDARD REGARDING THE HEIGHT  
OF BUILDINGS AS DETAILED IN  
CLAUSE 4.3 OF MANLY LOCAL  
ENVIRONMENTAL PLAN 2013**

**ALTERATIONS AND ADDITIONS TO  
AN EXISTING DWELLING HOUSE**

**59 FRANCIS STREET,  
MANLY NSW 2095**

✉ [mathew@fourtowns.com.au](mailto:mathew@fourtowns.com.au)

☎ 0425232018

[www.fourtowns.com.au](http://www.fourtowns.com.au)

PO Box 361, Balgowlah NSW 2093

**This report has been prepared to support a Development Application under the *Environmental Planning and Assessment Act 1979*.**

**Report prepared by:**

Mathew Quattroville

Director – Four Towns Pty Ltd

**Report prepared for:**

Eoin Architects

**10 October 2021**

**© Four Towns Pty Ltd**

NOTE: This document is the property of Four Towns Pty Ltd (trading as Four Towns Planning). This document is Copyright, no part may be reproduced in whole or in part, without the written permission of Four Towns Pty Ltd.

## **Introduction**

This objection is made pursuant to the provisions of Clause 4.6 of Manly Local Environmental Plan 2013. In this regard, it is requested Council support a variation with respect to compliance with the maximum building height of a building as described in Clause 4.3 of the Manly Local Environmental Plan 2013 (MLEP 2013).

The following assessment of the variation to Clause 4.3 – Building Height development standard, has taken into consideration the recent judgement contained within Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61, and RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130.

|   |           |
|---|-----------|
| <b>Requirement</b>  | 8.5m      |
| <b>Proposed</b>   | 8.78m     |
| <b>Is the planning control in question a development standard?</b>                                      | Yes       |
| <b>Is the non-compliance with to the clause requirement a numerical/or performance based variation?</b> | Numerical |
| <b>If numerical enter a % variation to requirement</b>  | 3.3%      |

The proposal must satisfy the objectives of Clause 4.3 – Height of Buildings, the underlying objectives of the particular zone, and the objectives of Clause 4.6 - Exceptions to Development Standards under the MLEP 2013. The variation to the Height of Building control occurs within the existing building footprint with an extension to the first-floor level. The proposal is consistent with surrounding developments and the proposed minor increase is compatible with the locality and complies with the maximum FSR control.

A variation to the strict application of the Height of Building standard is considered appropriate for the subject site and is supportable for the following reasons:

- The objectives of the MLEP2013 Height of Building control are achieved notwithstanding the technical non-compliance.
- The objectives of the MLEP2013 R1 General Residential zone are achieved notwithstanding the technical non-compliance.
- The compliance with the development standard is both unreasonable and unnecessary.
- There are sufficient environmental planning grounds to support the proposed variation.
- The site has a steep topography and slopes to the rear by approximately 5m. The resulting constraints from the topography of the site contribute to the minor variation proposed.
- The proposed development is consistent with the building height and building bulk of properties immediately surrounding the site also noting the approval granted for 61 Francis Street, Manly.
- The breach to the building is minimal and only relates to one corner of the proposed development.
- The breach in building height will not be visible from the street and will have no adverse impacts on neighbouring properties and will not result in a building of an unacceptable bulk and scale.
- The proposal complies with the objectives and numerical standard of Clause 4.4 Floor Space Ratio
- The proposed alterations and additions do not result in any adverse privacy or overshadowing impacts to neighbouring properties or any public place.

#### **Clause 4.6 Variation Requirements**

The grounds of objection are based upon the various tests of the recent judgements in the *NSW Land and Environment Court Case Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and review the following:

##### **Compliance being unreasonable or unnecessary**

1. Compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: *Wehbe v Pittwater Council* at [42] and [43].
2. The underlying objective or purpose of Clause 4.3(2) is not relevant to the development with the consequence that compliance is unnecessary. *Wehbe v Pittwater Council* at [45]
3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable. *Wehbe v Pittwater Council* at [46]
4. The development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the stand is unnecessary and unreasonable: *Wehbe v Pittwater Council* at [47].
5. The relevance of the zoning provisions of the land to which the development is proposed.

##### **Sufficient environmental planning grounds**

1. First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard"
2. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31]

##### **Is the proposed development in the public interest?**

The Consent Authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of:

- a. the particular development standard;
- b. the zone in which the development is proposed to be carried out.

##### **Secretary's Concurrence**

Under clause 4.6(5), in deciding whether to grant concurrence, the Secretary must consider the following matters:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

**General Provisions Relating to Clause 4.6 which will be applicable to Clause 4.3(2) Height of Building**

**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 has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—*

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

*(4) Development consent must not be granted for development that contravenes a development standard unless—*

*(a) the consent authority is satisfied that—*

- (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
- (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

*(b) the concurrence of the Planning Secretary has been obtained.*

*(5) In deciding whether to grant concurrence, the Planning Secretary must consider—*

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*

*(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.*

**Note—** When this Plan was made, it did not include land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition or Zone R5 Large Lot Residential.

*(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*

*(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,*
- (ca) clause 6.15,*
- (cb) a development standard on land to which clause 6.19 applies.*

**Comment:** As detailed previously in this request, Clause 4.6 of MLEP2013 is applicable to enable a variation to the Height of Building to permit Northern Beaches Council power to grant development consent to the subject development.

This proposal involves a departure from the Height of Building control of MLEP2013, a formal variation to this standard is required under *Clause 4.6 – Exceptions to Development Standards*. This provision allows consent to be granted for a development even though it would contravene a development standard imposed by this or any other planning instrument.

The provisions of Clause 4.6, which the consent authority must have regard to in determining whether a development that contravenes a development standard should be supported, includes the following:

- *That compliance with the development standard is unreasonable and unnecessary in the circumstances of the case; Cl 4.6 (3)(a)*
- *That there is sufficient environmental planning grounds to justify contravening the development standard; Cl 4.6 (3) (b)*
- *The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out: Cl 4.6 (4)(a)(ii)*
- *The public benefit of maintaining the development standard, and Cl 4.6 (5)(b)*
- *Any other matters required to be taken into consideration by the Planning Secretary before granting concurrence Cl 4.6 (5)(c)*

#### **4.3 Height of buildings**

*(1) The objectives of this clause are as follows—*

- (a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*
- (b) to control the bulk and scale of buildings,*
- (c) to minimise disruption to the following—*
  - (i) views to nearby residential development from public spaces (including the harbour and foreshores),*
  - (ii) views from nearby residential development to public spaces (including the harbour and foreshores),*
  - (iii) views between public spaces (including the harbour and foreshores),*
- (d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*
- (e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

*(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

**Comment:** It is acknowledged that the proposed development does not comply with clause 4.3 (2) and accordingly there is a requirement to submit a Clause 4.6 Variation. This Clause 4.6 seeks an exemption to the development standard as prescribed under the MLEP2013 and demonstrates that compliance with the provisions of clause 4.3 (2) is both unreasonable and unnecessary and the proposed development meets the required steps that are set out in the relevant NSW Land and Environment Court decisions to justify that the standard can be varied to achieve the subject proposal.

The development standard in Clause 4.3 (2) of the MLEP2013, is amendable to variation. The purpose of this Clause 4.6 is to vary the Height of Building as a building height referable to the building to give Council the power to grant development consent to the non-compliant purposes. This proposition is reinforced by the following:

Clause 4.3 (2) states:

*(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

The Height of Building Map sets a maximum Height of Building control of 8.5m. For the purpose of calculating Height of Building, the MLEP2013 provides the following definition:

Building height is defined as follows:

***building height (or height of building) means—***

*(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*

*(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

*including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

***ground level (existing) means the existing level of a site at any point.***

The leading case authority which considers the definition of “ground level (existing)” is *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 which was followed in the recent decision of *Stamford Property Services Pty Ltd v City of Sydney & Anor* [2015] NSWLEC 1189.

In this regard, it has been determined that the proposed development has a maximum building above unmodified ground level of 8.78m which exceeds the building height standard by 0.28m or represents a 3.3% variation to Council’s development standard.

The Height of Building in clause 4.3(2) of the MLEP2013 is a development standard in accordance with the definition set out below:

Development standards’ is defined in section 1.4 of the EP&A Act 1979 as:

***development standards*** means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which **requirements are specified or standards are fixed** in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

*(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Despite the variation to the Height of Building control which occurs as a result of the topography of the land, the proposed alterations and additions are considered to be in keeping with the desired future character of the locality. The proposed first floor additions are sited within the existing building footprint, therefore the alterations and additions will not result in any unreasonable visual impact on the Francis Street streetscape.

The proposed development will not result in any unreasonable impacts on adjoining properties in terms of views, privacy or overshadowing. Therefore, this written submission is considered to be compliant with the Statutory Provisions prescribed both under MLEP2013 and the provisions of Clause 4.6 which permit a variation to a development standard.

### **Objection to Development Standard – Height of Building (Clause 4.3(2))**

#### **Compliance being unreasonable or unnecessary**

1. Compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the stand: *Wehbe v Pittwater Council* at [42] and [43].

**Comment:** Clause 4.6(3)(a) of the MLEP2013 states that the proposed variation to the development standard must demonstrate that compliance with the development standard is *‘unreasonable or unnecessary in the circumstances of the case’*.

In determining a merits based assessment for the Height of Building of the development due consideration has been given to the above objectives and the planning principles set by the Land and Environment Court of NSW, Planning Principle – *Veloshin v Randwick Council* [2007] NSWLEC 428.

It is acknowledged that the purpose of Clause 4.6 is to provide an appropriate degree of flexibility in applying certain development standards. In this regard the Height of Building of the site should be assessed on a greater numerical figure, noting the sites constraints and the unique nature of the locality in a varying degree of development types. Given the proposed application is minor and consistent with similar approvals granted in the area, Council’s assessment should be focused on this numerical allowance as opposed to the variation to the specific standard. By providing flexibility in this regard, the subject proposal is capable of achieving a better development and design outcome which adequately caters for residential needs within the Northern Beaches LGA in particular the Manly precinct. As noted under the review of Clause 4.3 within the Statement of Environmental Effects, the proposal is consistent with the objectives of Clause 4.3, as outlined below:

- The objectives of the MLEP2013 Height of Building control are achieved notwithstanding the technical non-compliance.
- The objectives of the MLEP2013 R1 General Residential zone are achieved notwithstanding the technical non-compliance.
- The proposal is consistent with the existing and desired streetscape character. As previously noted, the immediate area has a variety of property types ranging in scale from one storey to three storeys.
- The proposal is retained behind the front building line existing, therefore no impact to important landscape or townscape features.



- The proposal has been strategically designed by the project architects who have worked with relevant consultants and the clients to achieve a design which meets the needs of the project while maintaining the streetscape, and the privacy and solar values for adjoining neighbours.
- The site has a steep topography and slopes to the rear by approximately 5m. The resulting constraints from the topography of the site contribute to the minor variation proposed.
- The proposed development is consistent with the building height and building bulk of properties immediately surrounding the site also noting the approval granted for 61 Francis Street, Manly.
- The breach to the building is minimal and only relates to one corner of the proposed development.
- The breach in building height will not be visible from the street and will have no adverse impacts on neighbouring properties and will not result in a building of an unacceptable bulk and scale.
- The proposal complies with the objectives and numerical standard of Clause 4.4 Floor Space Ratio
- The proposed alterations and additions do not result in any adverse privacy or overshadowing impacts to neighbouring properties or any public place.

As outlined above, the proposed development is consistent with the underlying objectives of the Height of Building standard, notwithstanding the proposed variation. Given the building footprint does not change where the variation is proposed, through this application the permissible Height of Building control does not align with the permissible height on the site, nor several built form controls of the MDCP2013. This essentially limits any redevelopment potential of the site without varying Councils FSR standard.

2. The underlying objective or purpose of Clause 4.3 is not relevant to the development with the consequence that compliance is unnecessary. *Wehbe v Pittwater Council at [45]*

**Comment:** The underlying objective and purpose of Clause 4.3 is not relevant as the proposal and variation to the building height meets the purpose and objectives of Clause 4.3:

*(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*

A streetscape analysis was undertaken which identified a varying bulk and scale along Francis Street from one to three storey's in height. The proposal is consistent with various other approvals and provides for a two storey dwelling appearance fronting Francis Street, in line with the topography of the area.

*(b) to control the bulk and scale of buildings,*

The dwelling has a stepped building form that responds to the topography of the area. The majority of the dwelling will sit well below the 8.5m development standard. In this regard, it is considered that the building height breaching elements do not unreasonable contribute to visual bulk to the extent that the building would be considered incompatible with nearby development.

*(c) to minimise disruption to the following—*

*(i) views to nearby residential development from public spaces (including the harbour and foreshores),*

*(ii) views from nearby residential development to public spaces (including the harbour and foreshores),*

*(iii) views between public spaces (including the harbour and foreshores),*

A site inspection was undertaken which identified available public and private view lines over and across the site. It is my opinion that I am satisfied that the building height breaching elements will not give rise to any unacceptable view loss with a view sharing outcome maintained in accordance with the planning principle established in the matter of *Tenacity vs Warringah Council* (2004) NSWLEC 140. Notwithstanding the building height breaching elements of the proposed first floor, the proposal is consistent with this objective.

*(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*

The application is supported by shadow diagrams prepared by Eoin Architects which demonstrates that the building height breaching elements will not contribute to a non-compliant shadow impact on neighbouring properties. The increased side setbacks assist in minimising any potential adverse overshadowing.

*(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

Not applicable – the site is not in an environmental protection zone.

3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable. *Wehbe v Pittwater Council* at [46]

**Comment:** It would indeed be unreasonable for Council to refuse the development that is proposed by way of relatively minor works to the existing building as the development does not have any adverse impacts on the immediate amenity of the area. The development has been designed with the necessary sensitivity to complement existing buildings and the natural landform of the area. There is no adverse visual impact associated with the form and structures proposed within the existing building footprint and new areas linking the dwelling to the rear yard.

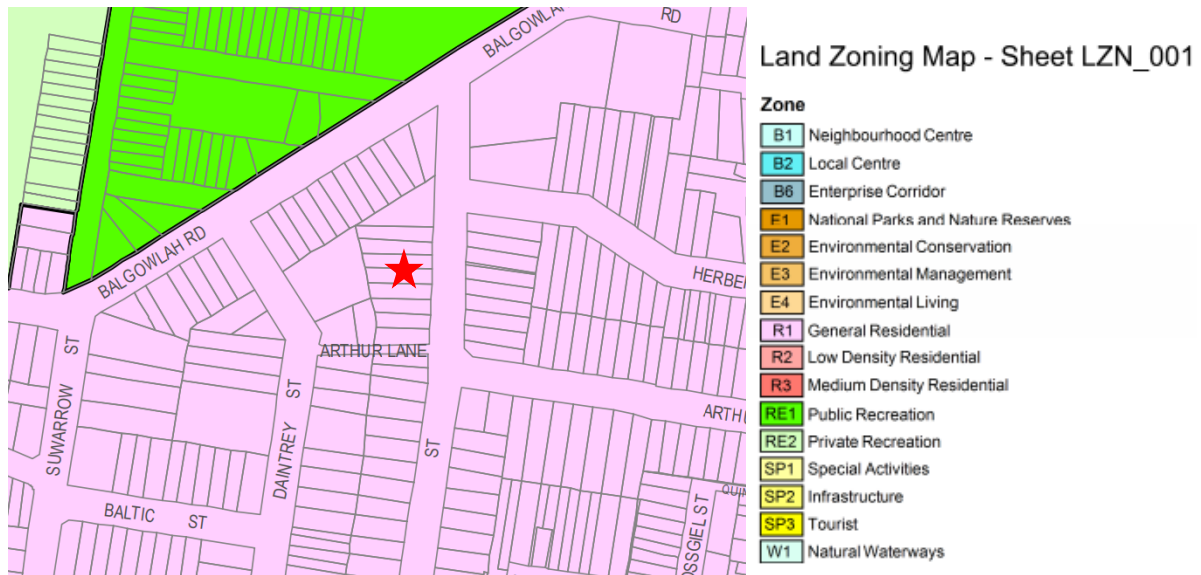
4. The development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the stand is unnecessary and unreasonable: *Wehbe v Pittwater Council* at [47].

**Comment:** Whilst the proposal seeks a variation to Councils numerical Height of Building standard, it is consistent with the relevant objectives (as outlined previously in this report).

A review of other developments within the immediate area and approvals granted for this site show that the development standard for Height of Buildings has been virtually abandoned or destroyed by Council's own decisions in granting development consents, hence compliance with this development standard is unnecessary and unreasonable.

5. The relevance of the zoning provisions of the land to which the development is proposed.

## Zoning Map



## Zone R1 General Residential

### 1 Objectives of zone

- To provide for the housing needs of the community.
- To provide for a variety of housing types and densities.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.

### 2 Permitted without consent

Home-based child care; Home occupations

### 3 Permitted with consent

Attached dwellings; Bed and breakfast accommodation; Boarding houses; Boat launching ramps; Boat sheds; Centre-based child care facilities; Community facilities; Dual occupancies; Dwelling houses; Emergency services facilities; Environmental protection works; Flood mitigation works; Group homes; Health consulting rooms; Home businesses; Home industries; Hostels; Information and education facilities; Jetties; Multi dwelling housing; Neighbourhood shops; Oyster aquaculture; Places of public worship; Pond-based aquaculture; Recreation areas; Recreation facilities (indoor); Residential flat buildings; Respite day care centres; Roads; Secondary dwellings; Semi-detached dwellings; Seniors housing; Shop top housing; Signage; Tank-based aquaculture; Water recreation structures; Water recycling facilities; Water supply systems

### 4 Prohibited

Advertising structures; Water treatment facilities; Any other development not specified in item 2 or 3

**Comment:** The relevance of the zone objectives are assessed below:

Clause 4.6(4)(a)(ii) states that a request for exemption from a development standard must establish that the proposed variation is consistent with both the objectives of the zone and standard.

### Objectives of the R1 General Residential zone:

- To provide for the housing needs of the community.
- To provide for a variety of housing types and densities.

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

The site is zoned R1 General Residential. A dwelling house is a permissible land use, therefore any alterations and additions are permissible with Council's consent. The proposed alterations and additions are consistent with the objectives of the zone, as supported below:

- The proposal retains the dwelling house which in turn provides for the housing needs of the community with the R1 General Residential zone.
- The proposal retains the dwelling house which provides a variety of housing types in the immediate precinct.
- The proposal encourages the enhancement of the existing site with new facilities to bring it in line with the needs of the residential area – i.e. a three-bedroom house.

### **Sufficient environmental planning grounds**

1. First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard"

**Comment:** Sufficient environmental planning grounds exist to justify the height of buildings variation namely the steep topography of the land which makes strict compliance difficult to achieve whilst appropriately distributing height and floor space, in the form of legitimate alterations and additions to the existing dwelling, on this particular site. Further justification to support the proposed variation is provided below:

- The proposed development is for a minor increase to the existing building height and is within the parameters and building footprint of the existing structures, which have set the ground rules for the bulk, scale and mass of the proposal.
- The LEC planning principles on Height of Building relating to the height, bulk and scale, including compatibility between subject buildings and its surrounding context to ensure the proposal is compatible with its context. The planning principle seeks qualification of the following:

#### *Planning principle: assessment of height and bulk*

*• The appropriateness of a proposal's height and bulk is most usefully assessed against planning controls related to these attributes, such as maximum height, floor space ratio, site coverage and setbacks. The questions to be asked are:*

*Are the impacts consistent with impacts that may be reasonably expected under the controls? (For complying proposals this question relates to whether the massing has been distributed so as to reduce impacts, rather than to increase them. For non-complying proposals the question cannot be answered unless the difference between the impacts of a complying and a non-complying development is quantified.)*

*How does the proposal's height and bulk relate to the height and bulk desired under the relevant controls?*

*• Where the planning controls are aimed at preserving the existing character of an area, additional questions to be asked are:*

*Does the area have a predominant existing character and are the planning controls likely to maintain it?*

*Does the proposal fit into the existing character of the area?*

*• Where the planning controls are aimed at creating a new character, the existing character is of less relevance. The controls then indicate the nature of the new character desired. The question to be asked is:*

*Is the proposal consistent with the bulk and character intended by the planning controls?*

*Where there is an absence of planning controls related to bulk and character, the assessment of a proposal should be based on whether the planning intent for the area appears to be the preservation of the existing character or the creation of a new one. In cases where even this question cannot be answered, reliance on subjective opinion cannot be avoided. The question then is:*

*Does the proposal look appropriate in its context?*

*Note: the above questions are not exhaustive; other questions may also be asked.*

In addressing the above planning principals, the benefits of the first-floor addition, represents a new functional design which enhances the internal amenity of the dwelling. Not only does this provide improved amenity for the occupants of the building, it complies with the objectives of the zone.

From a planning perspective, there is sufficient grounds to justify the variation to the Height of Building development standard for the following reasons:

- The objectives of the MLEP2013 Height of Building control are achieved notwithstanding the technical non-compliance.
- The objectives of the MLEP2013 R1 General Residential zone are achieved notwithstanding the technical non-compliance.
- The proposal is consistent with the existing and desired streetscape character. As previously noted, the immediate area has a variety of property types ranging in scale from one storey to three storeys.
- The proposal is retained behind the front building line existing, therefore no impact to important landscape or townscape features.
- The proposal has been strategically designed by the project architects who have worked with relevant consultants and the clients to achieve a design which meets the needs of the project while maintaining the streetscape, and the privacy and solar values for adjoining neighbours.
- The site has a steep topography and slopes to the rear by approximately 5m. The resulting constraints from the topography of the site contribute to the minor variation proposed.
- The proposed development is consistent with the building height and building bulk of properties immediately surrounding the site also noting the approval granted for 61 Francis Street, Manly.
- The breach to the building is minimal and only relates to one corner of the proposed development.
- The breach in building height will not be visible from the street and will have no adverse impacts on neighbouring properties and will not result in a building of an unacceptable bulk and scale.
- The proposal complies with the objectives and numerical standard of Clause 4.4 Floor Space Ratio
- The proposed alterations and additions do not result in any adverse privacy or overshadowing impacts to neighbouring properties or any public place.

The non-compliance does not result in any unacceptable environmental consequences in terms of streetscape, or residential amenity. In this regard, I consider the proposal to be of a skilful design which responds appropriately to the topography and environmental constraints on the site. Such an outcome is achieved whilst realising the reasonable development potential of the land.

2. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the

consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31]

**Comment:** This report demonstrates that there is sufficient environmental planning grounds to justify contravening the development standard for Clause 4.3(2). The proposal has assessed the relevant impacts (if any) and has assessed the bulk, scale and mass of the existing building and the proposed new parts which will breach the development standard. This report finds that a merit assessment is applicable and determines that there is sufficient grounds to justify the breach to the Height of Buildings. The proposal has been skilfully designed and strategically located to not have an adverse impact to neighbouring properties. Therefore, the development as proposed is sufficiently justified to contravene the development standard.

### **Is the proposed development in the public interest?**

The Consent Authority must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of:

- a. the particular development standard;
- b. the zone in which the development is proposed to be carried out.

**Comment:** As demonstrated in this request, the proposed development it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. The proposal is in the public's interest as there is very little public benefit in maintaining the development standard of Height of Building applicable to this site. Additionally, the building improvements add significant social and healthy benefits through a new functional design. Council should encourage such building upgrades via support of positive intention to upgrade old residential buildings within the Northern Beaches LGA.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

### **Secretary's Concurrence**

Under clause 4.6(5), in deciding whether to grant concurrence, the Secretary must consider the following matters:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

**Comment:** The contravention of the development standard will not result in any consequences for State or regional environmental planning.

There would be no public benefit in maintaining the development standard in this instance for the following reasons:

- The variation to the Height of Building development standard does not give rise to any adverse environmental impacts. As such, the maintenance of the development standard in



this specific instance would not provide any public benefit and would hinder the orderly and economic development of the site.

- Maintaining the development standard, in the context of this site, would be inconsistent with the objectives of the zone, and the Act, as it would be inconsistent with the surrounding developments.

By Planning Circular dated 5<sup>th</sup> May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determinations are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case. There are no other relevant matters required to be taken into account by the Secretary.

### ***Summary and Conclusion***

It is therefore submitted that Clause 4.6 is applicable to the subject development in respect to the variation to clause 4.3(2) Height of Building and this statement verifies that compliance with the provisions of clause 4.3(2) would be both unreasonable and unnecessary in the circumstances of this case. The development is consistent with the objectives of Clause 4.6 as per below:

*1(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*

*1(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

A variation to the strict application of Council's Height of Buildings development standard is considered appropriate for the site at 59 Francis Street, Manly.

It is acknowledged that the purpose of Clause 4.6 is to provide an appropriate degree of flexibility in applying certain development standards. In this regard the Height of Building of the site should be assessed on a greater numerical figure, noting the sites constraints and the unique nature of the locality in a varying degree of development types. Given the proposed application is minor and consistent with similar approvals granted in the area, Council's assessment should be focused on this numerical allowance as opposed to the variation to the specific standard. By providing flexibility in this regard, the subject proposal is capable of achieving a better development and design outcome which adequately caters for residential needs within the Northern Beaches LGA in particular the Manly precinct. As noted under the review of Clause 4.3 within the Statement of Environmental Effects, the proposal is consistent with the objectives of Clause 4.3. From a planning perspective, there is sufficient grounds to justify the variation to the Height of Building development standard for the following reasons:

- The objectives of the MLEP2013 Height of Building control are achieved notwithstanding the technical non-compliance.
- The objectives of the MLEP2013 R1 General Residential zone are achieved notwithstanding the technical non-compliance.
- The proposal is consistent with the existing and desired streetscape character. As previously noted, the immediate area has a variety of property types ranging in scale from one storey to three storeys.
- The proposal is retained behind the front building line existing, therefore no impact to important landscape or townscape features.
- The proposal has been strategically designed by the project architects who have worked with relevant consultants and the clients to achieve a design which meets the needs of the project while maintaining the streetscape, and the privacy and solar values for adjoining neighbours.
- The site has a steep topography and slopes to the rear by approximately 5m. The resulting constraints from the topography of the site contribute to the minor variation proposed.
- The proposed development is consistent with the building height and building bulk of properties immediately surrounding the site also noting the approval granted for 61 Francis Street, Manly.
- The breach to the building is minimal and only relates to one corner of the proposed development.
- The breach in building height will not be visible from the street and will have no adverse impacts on neighbouring properties and will not result in a building of an unacceptable bulk and scale.
- The proposal complies with the objectives and numerical standard of Clause 4.4 Floor Space Ratio
- The proposed alterations and additions do not result in any adverse privacy or overshadowing impacts to neighbouring properties or any public place.

As outlined above, the proposed development is consistent with the underlying objectives of the Height of Building standard, notwithstanding the proposed variation. Given the building footprint does not change where the variation is proposed, through this application the permissible Height of Building control does not align with the permissible height on the site, nor several built form controls of the MDCP2013. This essentially limits any redevelopment potential of the site without varying Council's FSR standard.

In addition to the above justification, the proposal is considered to meet the intent of Council's controls relating to Height of Building, the R1 General Residential zoning objectives and the desired future character of this precinct. It is therefore submitted that the non-compliance with the Height of Building Clause 4.3(2) is acceptable, and flexibility should be exercised by Council as a better outcome is achieved for the site and the immediate locality. The variation under Clause 4.6 is to vary the Height of Building control to give Northern Beaches Council the power to grant development consent to the proposed development.