



## **59 CUTLER STREET CLONTARF NSW 2093**

**STATEMENT OF ENVIRONMENTAL EFFECTS FOR  
ALTERATIONS AND ADDITIONS TO AN EXISTING DWELLING**



Report prepared for  
Action Plans  
December 2019

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## **1.0 Introduction**

- 1.1 This is a statement of environmental effects for alterations and additions to an existing dwelling at 59 Cutler Road Clontarf. The proposed development is for lower ground floor and ground floor alterations and a first floor addition to create a five bedroom dwelling on the site.

The report describes how the application addresses and satisfies the objectives and standards of the Manly Local Environmental Plan 2013, the Manly Development Control Plan 2013 and the heads of consideration listed in Section 4.15 of the Environmental Planning and Assessment Act 1979 (as amended).

- 1.2 This statement of environmental effects has been prepared with reference to the following:

- ◆ Site visit
- ◆ Survey Plan prepared by CMS Surveys
- ◆ Design Plans and BASIX Certificate prepared by Action Plans
- ◆ Bushfire Hazard Assessment Report prepared by Bushfire Consultancy Australia
- ◆ Stormwater Plans prepared by Shaning Australia Pty Ltd

- 1.3 The proposed alterations and additions are consistent with the objectives of all Council controls, considerate of neighbouring residents and will result in improved amenity for the residents of the site. It is an appropriate development worthy of Council consent.

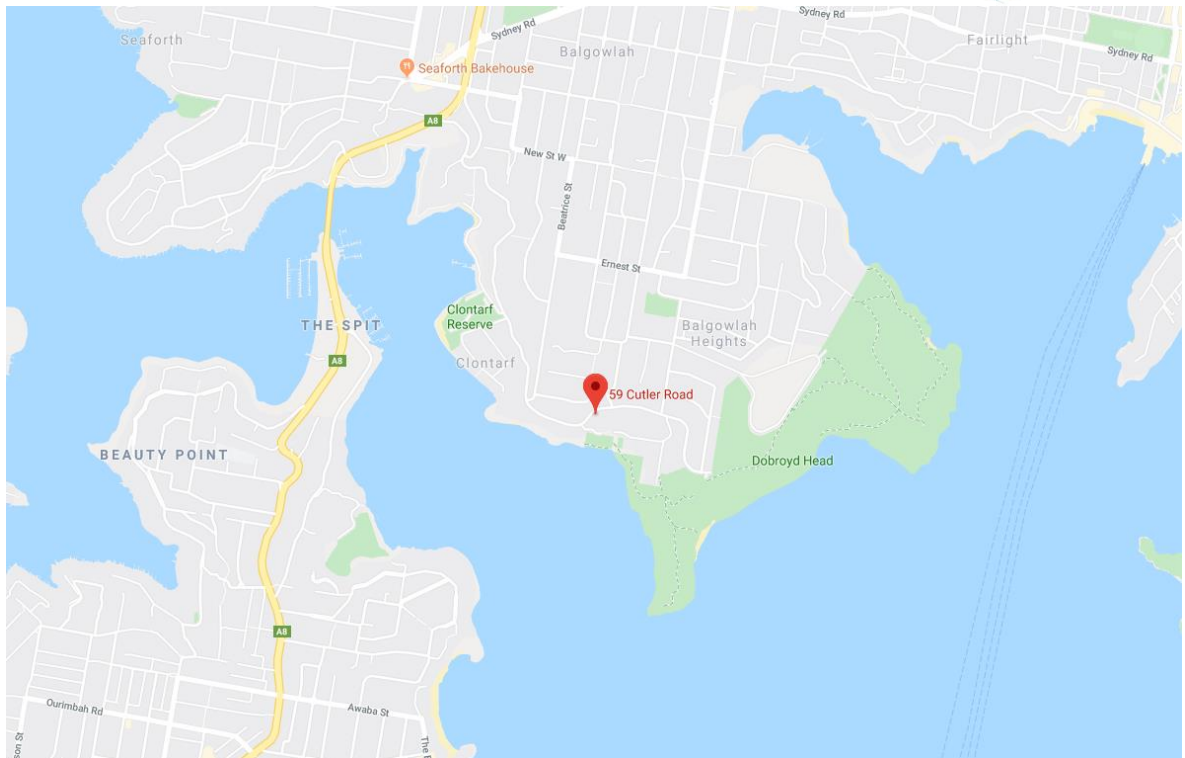
## 2.0 The site and its locality

- 2.1 The subject site is located on the southern side of Cutler Road in Clontarf, approximately 50 metres south west of its intersection with Alder Street. The site is legally described as Lot 29 DP 25654.
- 2.2 It is an irregular shaped lot, with a 43.865 metre curved frontage to Cutler Road and side boundaries of 28.38 metres (east) and 28.38 metres (south). The lot has an area of 601.1m<sup>2</sup> and slopes to the south.
- 2.3 The site is currently occupied by a two-storey clad residence with a tile and metal roof which is set back towards the rear of the lot. There is an existing swimming pool in the front setback area and vehicular access is obtained from Cutler Road.
- 2.4 The site is surrounded by detached residential dwellings in all directions. It is serviced by the Balgowlah shops to the north and is in close proximity to Middle Harbour, Castle Rock Beach, Dobroyd Head and Groto Point Lighthouse.

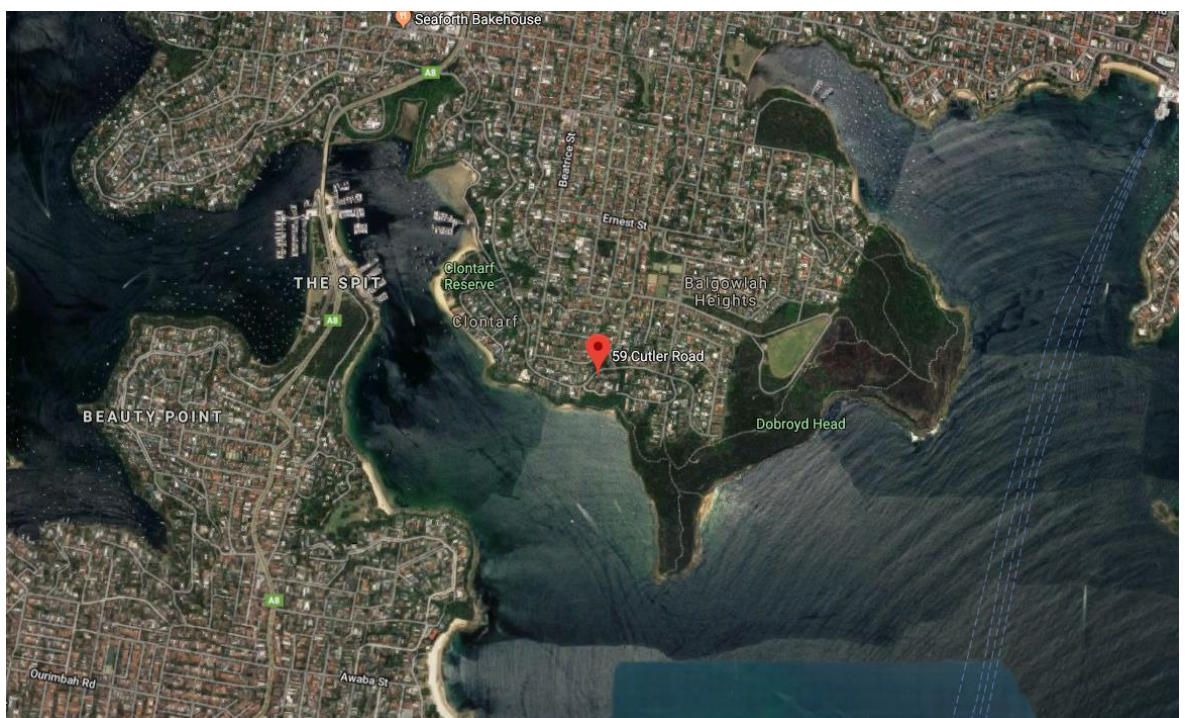


Figure 1. The site and it's immediate surrounds





**Figure 2. The site within the locality**



**Figure 3. Aerial image of the site within the locality**



### 3. Site Photos



Figure 4. The existing dwelling, looking east from Cutler Road



Figure 5. The existing dwelling, looking south from Cutler Road



**Figure 6. The existing dwelling, looking south east from Cutler Road**



**Figure 7. The existing garage, looking east**





**Figure 8.** The adjoining dwelling to the south



**Figure 9.** The existing swimming pool looking north





**Figure 9. The adjoining dwelling to the east**



**Figure 10. The existing driveway looking south west**

## 4. Proposed Development

- 4.1 The proposed development is for lower ground floor and ground floor alterations and a first-floor addition to create a five bedroom dwelling on the site.
- 4.2 The proposed dwelling remains consistent with the streetscape and the locality. The proposal is consistent with Council controls, ensures privacy and solar access are maintained for surrounding properties and the subject site.
- 4.3 The alterations and additions to the dwelling will be made up as follows:

### Lower Ground Floor

- Demolish the existing laundry, powder room, bedroom, single garage door, front wall and gate.
- Construct a new front porch, entry hall, study and lift
- Construct a new double carport
- Retain the existing store room, sub floor area and garage

### Ground Floor

- Demolish the front stair, porch, dining and living rooms,
- Convert the existing kitchen to a pantry and laundry,
- Refurbish the existing bathroom, powder room and hallway cupboard.
- Reconfigure the Bed 1 internal wall, new robes and windows to beds 1 and 2
- A new open plan kitchen, dining, living room, covered balcony, lift and staircase to access the first floor,
- A new master bedroom with WIR and ensuite

### New First floor

- A new first floor comprising of two bedrooms, bathroom, balcony, lift, staircase and void.



## 5. Statutory Framework

### 5.1 Rural Fires Act 1997

With regard to development in NSW, the *Rural Fires Act 1997* (RF Act) aims to protect the community from injury or death, and property from damage, arising from fires, and protect infrastructure and environmental, economic, cultural, agricultural and community assets from damage arising from fires. Clause 100B of the RF Act requires applicants to obtain a bush fire safety authority (BFSA) for subdivision of bush fire prone land that could lawfully be used for residential or rural residential purposes or development of bush fire prone land for a special fire protection purpose. If a proposal requires a BFSA it is considered integrated development under Clause 4.46 of the EPA Act.

Section 4.14 of the EPA Act requires that a council does not approve any development in a bush fire prone land area unless the development application complies with *Planning for Bush Fire Protection 2006* (PBP) requirements. All developments on land that is designated as bush fire prone have a legal obligation to consider bush fire and meet the requirements of *Planning for Bush Fire Protection 2006*.

**Comment:** The proposal is not for subdivision or a special fire protection purpose and therefore is not integrated development and does not require a BFSA from RFS. The site is however bush fire prone land, and therefore the proposal must comply with *Planning for Bush Fire Protection 2006*. A Bushfire Assessment Report is provided with this application, which concludes the property has a BAL – 12.5 for all elevations.

Appropriate construction standards will be adhered to for compliance with relevant Australian Standards and Appendix 3 of *Planning for Bushfire Protection* Bushfire Attack Level (BAL) – 12.5.

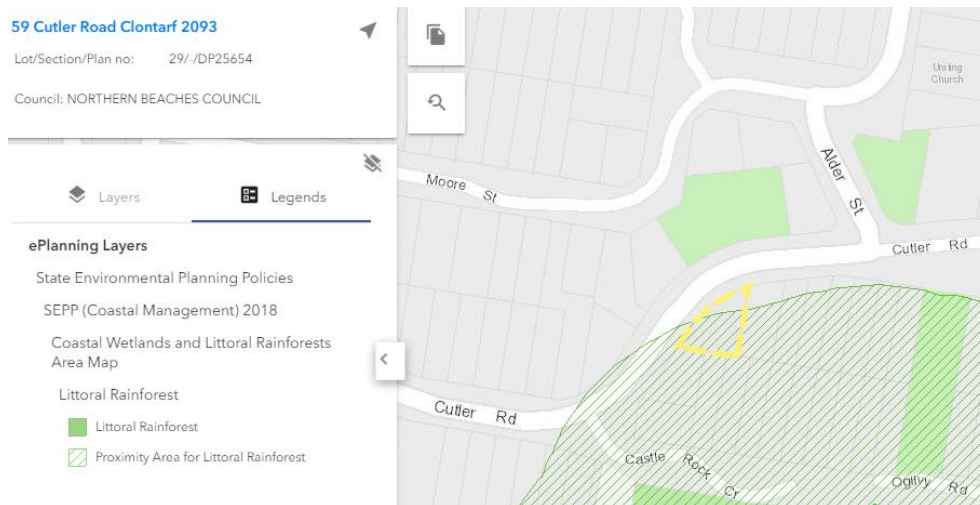
### 5.2 State Environmental Planning Policies

#### State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

Schedule 1 of the Environmental Planning and Assessment Regulation (2000) sets out the requirement for a BASIX certificate to accompany any BASIX affected building, being any building that contains one or more dwellings, but does not include a hotel or motel. SEPP BASIX applies to the proposal and a compliant BASIX certificate is provided with this application.

#### State Environmental Planning Policy (Coastal Management) 2018

A portion of the subject site is mapped as 'Proximity to Littoral Rainforest' by State Environmental Planning Policy (Coastal Management) 2018, accordingly the consent authority must consider clause 11 of the SEPP.



**Figure 11: Extract – SEPP (Coastal Management) 2018**

## **11 Development on land in proximity to coastal wetlands or littoral rainforest** **Note.**

*(1) Development consent must not be granted to development on land identified as “proximity area for coastal wetlands” or “proximity area for littoral rainforest” on the Coastal Wetlands and Littoral Rainforests Area Map unless the consent authority is satisfied that the proposed development will not significantly impact on:*

- (a) the biophysical, hydrological or ecological integrity of the adjacent coastal wetland or littoral rainforest, or*
- (b) the quantity and quality of surface and ground water flows to and from the adjacent coastal wetland or littoral rainforest.*

The proposed development is located predominantly within the footprint of the existing dwelling, on a highly disturbed portion of the site, as such there will be no impact on the biophysical or ecological integrity of the adjacent littoral rainforest.

Stormwater from the site will be managed in accordance with Councils controls and incorporates onsite detention and reuse of rainwater in the garden and toilets. The proposal will not impact on the quality or quantity of surface and ground water flows to and from the adjacent littoral rainforest.

## **State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017**

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



The aims of this Policy are to protect the biodiversity values of trees and other vegetation, and to preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation.

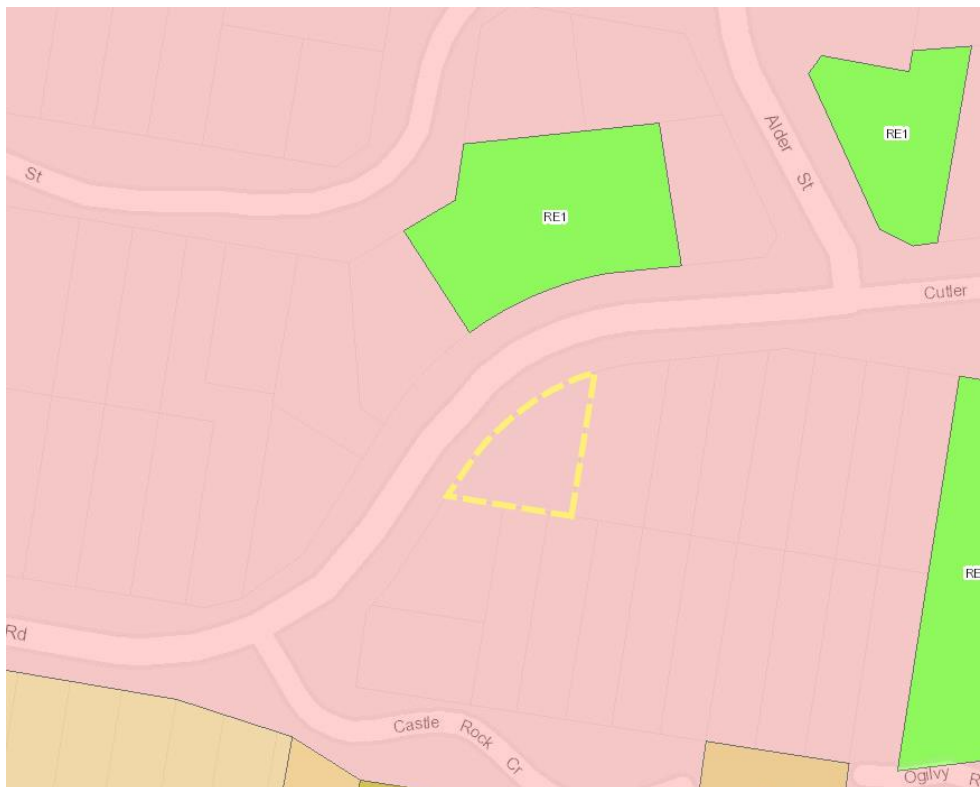
The development remains consistent with the provisions of the SEPP as it does not propose the removal of any trees and new landscaping is proposed to enhance the vegetation on the site.

### 5.3 Manly Local Environmental Plan 2013

The relevant clauses of the Manly Local Environmental Plan 2013 are addressed below.

#### Zoning

The site is zoned R2 -Low Density Residential, pursuant to the provisions of the Manly Local Environmental Plan 2013.



**Figure 12. Extract from Manly LEP 2013 zoning map**

The proposed development is for alterations and additions to the existing dwelling house and dwelling houses are permissible with development consent in the R2 zone.

#### Demolition

Consent is sought for demolition works as described above and detailed on the attached DA plans.

### **Minimum Lot Size**

The site is mapped with a minimum subdivision lot size of 750m<sup>2</sup>. The subject site comprises an area of 601.1m<sup>2</sup> and no subdivision is proposed.

### **Height**

Clause 4.3 of the LEP restricts the height of any development on the subject site to 8.5 metres. The existing building height is 6.9 metres and the proposed additions will result in a maximum building height of 9.284 metres.

A variation to the maximum building height is considered appropriate, in this case as the proposed variation is very minor at just 0.784 metres or 8.81%. The variation is largely the result of taking into account the existing excavated storage room and the topography of the site. The proposed development presents with a compliant height on the north and east elevations and the vast majority of the west elevation.

A clause 4.6 variation request is provided with this application.

### **Floor Space Ratio**

The site is mapped with a maximum FSR of 0.4:1, this equates to a maximum floor area of 240.44m<sup>2</sup> for the site area of 601.1m<sup>2</sup>. The development proposes a floor area of 261.5m<sup>2</sup> or 0.43:1, a variation of 21.06m<sup>2</sup>.

A variation is considered appropriate, in this case, as the proposed variation is very minor, just 8.39% greater than the control. The development remains consistent with the objectives of the control, despite the variation and does not present with bulk inappropriate to the area.

A clause 4.6 variation request is provided with this application.

### **Heritage**

The site is not a heritage item, located within a heritage conservation area or located in proximity to any heritage items.

### **Earthworks**

Minor earthworks are proposed to prepare the site for construction. All works will be undertaken in accordance with engineering specifications, Councils controls and any conditions of consent.

### **Acid Sulfate Soils**

The site is identified as Class 5 acid sulfate soils. The site is not located within 500 metres of adjacent class 1,2,3 or 4 land that is below 5 metres AHD and the proposed development is not likely to lower the watertable below 1 metre AHD.



## Flood Planning

The site is mapped as a low risk flood hazard precinct by the NBC Flood Hazard mapping.



Figure 13. Extract from NBC Flood Hazard Map

The proposed additions are considered compatible with the flood hazard, as no change of use or intensification of the existing approved use is proposed. The proposal will not increase the risk to life from flooding and is therefore appropriate for the site. We note that in the previous assessment of an application for this site in 2018 a flood report was not requested or required.

## Stormwater Management

Stormwater from the alterations and additions will be detained onsite for reuse and connected to the existing drainage infrastructure in Cutler Road. Full details of proposed stormwater management are provided in the attached stormwater management plans prepared by Shaning Australia Pty Ltd.

## Foreshore Scenic Protection Area

The subject site is mapped as foreshore scenic protection area, as such, development consent must not be granted unless the consent authority has considered the matters set out in clause 6.9 of LEP 2013:

- (a) *impacts that are of detriment to the visual amenity of harbour or coastal foreshore, including overshadowing of the foreshore and any loss of views from a public place to the foreshore,*

The proposed development is designed and sited to work with the site and presents a modern, aesthetically pleasing addition to Cutler Road. The development is consistent with surrounding dwellings when viewed from the public street and will be barely

visible from the foreshore. There will be no overshadowing of the foreshore or loss of views from a public place to the foreshore.

*(b) measures to protect and improve scenic qualities of the coastline,*

The site is barely visible from the coastal foreshore and as explained above, blends with the surrounding development when viewed from the coast. The proposed development incorporates coastal character, landscaping and layered textures to present a design in keeping with the coastal location, while maintaining the scenic quality of the coastal foreshore.

*(c) suitability of development given its type, location and design and its relationship with and impact on the foreshore,*

The proposed development is for alterations and additions to an existing residential dwelling. The site is zoned residential and the use remains permissible in the zone. The proposed works will not impact on the foreshore.

*(d) measures to reduce the potential for conflict between land-based and water-based coastal activities.*

The subject site is located approximately 130 metres from the water, within an existing residential lot. The proposed works will not create conflict between land-based and water-based coastal activities.

### **Essential Services**

All essential services are existing on the site.

## **5.4 Manly Development Control Plan 2013**

The relevant sections of the DCP are addressed below.

### **3. General Principles of Development**

#### **3.1 Streetscapes and Townscapes**

The subject site has frontage to and is visible from Cutler Road.

### **Garbage Areas**

The dwelling has existing bin storage areas that will be retained.

### **Complementary Design and Visual Improvement**

The proposed development remains consistent with the local character and streetscape in the locality.

The proposed works will be constructed of materials consistent with the residential use and coastal locality and are of an appropriate scale for the locality.

### **Roofs and Dormer Windows**

The new flat roof is proposed, which complements the modern design and roof styles in the locality. No dormer windows are proposed.

### **Garages, Carports and Hardstand Areas**

The subject site has an existing garage and the development proposes to replace the single garage door construct a new carport over the driveway.

### **3.3 Landscaping**

The proposed alterations and additions have been designed to appropriately complement the residential character of the site and the neighbouring properties. The proposed works are located predominantly within the footprint of the existing dwelling and over the existing hardstand area. No significant trees are proposed to be removed as part of this application.

### **3.4 Amenity (Views, Overshadowing, Overlooking/Privacy, Noise)**

#### **3.4.1.1 Overshadowing adjoining private open space**

The DCP requires that new development not eliminate more than 1/3 of existing sunlight accessing the private open space of adjoining properties 9am and 3pm on 21 June.

The following observations are made in relation to shadowing:

**9am** – The development will result in an increase in shadowing to the rear yard of No. 61 Cutler Road and a very small portion of the rear yard at No. 5 Castle Rock Crescent.

**12pm** – The development will result in an increase in shadowing to the rear yard of No. 5 Castle Rock Crescent and a very small portion of No. 61 Cutler Road and No. 4 Castle Rock Crescent.

**3pm** - The development will result in an increase in shadowing to the rear yard of No. 4 Castle Rock Crescent and a very small portion of the rear yards at No. 5 and No. 3 Castle Rock Crescent and No. 57 Cutler Road. A small portion of the dwelling at No. 57 Cutler Road will experience some increase in shadowing.

It is concluded that although the development will result in an increase in shadowing of surrounding properties, the increase is not persistent throughout the day and all properties retain complaint solar access. No property is unreasonably impacted and all retain significant access to sunlight.

#### **3.4.1.2 Maintaining Solar Access into Living Rooms of Adjacent Properties**



The subject site and adjoining lots have a north-south orientation, as such the DCP requires a minimum 4 hours solar access be maintained to the glazing in living rooms between 9am and 3pm on 21 June.

As described above, the increase in shadowing is largely to the rear yards of surrounding properties. No. 57 Cutler Road will experience a minor increase in shadowing to the dwelling at 3pm only and thus maintains a compliant 4 hours solar access to glazing.

#### **3.4.1.3 Overshadowing Solar Collector Systems**

The proposed development will not overshadow neighbouring solar collector systems.

#### **3.4.1.4 Overshadowing Clothes Drying Areas**

The proposed development will not overshadow neighbouring clothes drying areas.

#### **3.4.1.5 Excessive Glare or Reflectivity Nuisance**

All external material and finishes will be constructed of non-reflective materials in keeping with this clause.

#### **3.4.2 Privacy and Security**

Privacy will be retained for neighbours with ample setbacks and no direct overlooking into any key living areas. The side boundary fencing maintains privacy between dwellings on the lower ground and ground floors. The subject site sits lower than surrounding properties and experiences existing overlooking.

#### **3.4.2.3 Acoustical Privacy (Noise Nuisance)**

The development is appropriate and will not result in noise levels inappropriate to a residential area. No change to the existing pool pump is proposed.

#### **3.4.3 Maintenance of Views**

The subject site and surrounding properties enjoy water views to Middle Harbour and Castle Rock Beach. A view loss analysis, assessing the proposed development in accordance with the *Planning Principle established in Tenacity Consulting v Warringah Council (2004) NSWLEC 140* is provided as Appendix 1.

#### **3.5 Sustainability**

A compliant BASIX Certificate is provided with the attached plan set.

The proposed alterations and additions provide compliant solar access and ventilation.

#### **3.7 Stormwater Management**

Stormwater from the alterations and additions will be detained onsite for reuse and connected to the existing drainage infrastructure in Cutler Road. Full details of proposed stormwater management are provided in the attached stormwater management plans prepared by Shaning Australia Pty Ltd.

### **3.8 Waste Management**

Appropriate waste management will be undertaken during the demolition and construction process.

All demolished materials will be recycled where possible which is detailed in the accompanying Waste Management Plan.

The existing dwelling has appropriate waste storage areas, with waste to be collected by Councils regular service.

## **Part 4 Development Controls and Development Types**

### **4.1 Residential Development Controls**

No change is proposed to the existing residential density which comprises of a single dwelling house.

#### **4.1.2 Height of Buildings (incorporating wall height, number of storeys and roof height)**

Clause 4.3 of the LEP restricts the height of any development on the subject site to 8.5 metres. The existing building height is 6.9 metres and the proposed additions will result in a maximum building height of 9.284 metres. A minor variation to the maximum building height is proposed as detailed above and in the attached clause 4.6 variation request.

The DCP permits a maximum of 2 stories and basement on the subject site. The development proposes 3 levels, comprising of a compliant basement and 2 additional stories.

A flat roof is proposed with a 1.5 degree fall.

#### **4.1.3 Floor Space Ratio (FSR)**

The site is mapped with a maximum FSR of 0.4:1, this equates to a maximum floor area of 240.44m<sup>2</sup> for the site area of 601.1m<sup>2</sup>. The development proposes a floor area of 261.5m<sup>2</sup> or 0.43:1, a variation of 21.06m<sup>2</sup>. A minor variation to the FSR is proposed as detailed above and in the attached clause 4.6 variation request.

#### **4.1.4 Setback (front, side and rear) and Building Separation**

##### **4.1.4.1 Street Front setbacks**

A front setback consistent with the prevailing setback, or a minimum 6 metres, is required on the site.

The subject site has an existing front setback of 4.062 metres and no change is proposed.

#### **4.1.4.2 Side setbacks and secondary street frontages**

A side boundary setback equivalent of 1/3 of the wall height is required on the site which equates to 1.059 metres (east) and 1.786 metres (south).

The existing side setbacks are 0.868 metres (east) and 1.606 metres (south) and no change is proposed to existing setbacks.

#### **4.1.4.4 Rear Setback**

A minimum rear setback of 8 metres is required on the site. The irregular shape of the lot means it does not have a rear setback.

#### **4.1.5 Open Space and Landscaping**

##### **4.1.5.1 Minimum Residential Total Open Space Requirements**

The DCP requires a total of 60% of the site to be open space with a minimum 40% of that open space to be landscaped area. This equates to 360.66m<sup>2</sup> of open space for the site area of 601.10m<sup>2</sup> and 144.26m<sup>2</sup> landscaped area.

The existing area of open space is 370.5m<sup>2</sup> or 62% of the site area and the development proposes a compliant 364.64m<sup>2</sup> or 60% open space area.

The existing landscaped area on the site is 119.87 m<sup>2</sup> or 33.23% and no change is proposed. A very minor departure to the landscaped area of 24.39m<sup>2</sup> is considered appropriate, in this case, as no change is proposed to the existing landscaped area onsite and the site complies with the total open space control in the DCP.

#### **4.1.6 Parking, Vehicular Access and Loading (Including Bicycle Facilities)**

The development proposes to retain the existing garage to provide two onsite car parking spaces, compliant with the schedule 3 parking requirement for dwelling houses. In addition, a carport is proposed over the existing driveway to provide additional covered car parking on the site.

No change is proposed to the existing garages, driveway or driveway crossover.

#### **4.1.7 First Floor Additions and Roof Additions**

The style of the proposed first floor addition is consistent with the scale and character of the area. The proposed development will not degrade the amenity of surrounding residences or the aesthetic quality of the neighbourhood.

#### **4.4.2 Alterations and Additions**

The development is considered to apply to no more than half of the building and accordingly the proposal is for alterations and additions.



## 6. Section 4.15 Considerations

The following matters are to be taken into consideration when assessing an application pursuant to section 4.15 of the Environmental Planning and Assessment Act 1979 (as amended). Guidelines to help identify the issues to be considered have been prepared by the former Department of Urban Affairs and Planning. The relevant issues are:

### **The provision of any planning instrument, draft environmental planning instrument, development control plan or regulations**

This report clearly and comprehensively addresses the statutory regime applicable to the application and demonstrates that the proposed land use is complimentary and compatible with adjoining development. The proposal achieves the aims of the Manly LEP and DCP.

The development is permissible in the zone.

### **The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality**

#### 6.1. *Context and Setting*

*What is the relationship to the region and local context in terms of:*

- the scenic qualities and features of the landscape?*
- *the character and amenity of the locality and streetscape?*
- *the scale, bulk, height, mass, form, character, density and design of development in the locality?*
- *the previous and existing land uses and activities in the locality?*

These matters have been discussed in detail in the body of the statement.

*What are the potential impacts on adjacent properties in terms of:*

- *relationship and compatibility of adjacent land uses?*
- *sunlight access (overshadowing)?*
- *visual and acoustic privacy?*
- *views and vistas?*
- *edge conditions such as boundary treatments and fencing?*

The proposed alterations and additions have been designed to complement the site and its surrounds. The proposal is appropriate and will have negligible impact on adjacent properties.

## **6.2. Access, transport and traffic**

*Would the development provide accessibility and transport management measures for vehicles, pedestrians, bicycles and the disabled within the development and locality, and what impacts would occur on:*

- *travel demand?*
- *dependency on motor vehicles?*
- *traffic generation and the capacity of the local and arterial road network?*
- *public transport availability and use (including freight rail where relevant)?*
- *conflicts within and between transport modes?*
- *traffic management schemes?*
- *vehicular parking spaces?*

No conflict or issues will arise as a result of the proposed development.

## **6.3. Public domain**

There will be no impact.

## **6.4. Utilities**

There will be no impact on the site, which is already serviced.

## **6.5. Flora and fauna**

There will be no impact.

## **6.6. Waste**

There will be no impact.

## **6.7. Natural hazards**

The site is mapped as bushfire prone land and low risk flood hazard precinct. The proposed alterations and additions remain compatible with the risk as described within this report.

## **6.8. Economic impact in the locality**

There will be no impact, other than the possibility of a small amount of employment during construction.

## **6.9. Site design and internal design**

*Is the development design sensitive to environmental conditions and site attributes including:*

- *size, shape and design of allotments?*
- *the proportion of site covered by buildings?*
- *the position of buildings?*
- *the size (bulk, height, mass), form, appearance and design of buildings?*
- *the amount, location, design, use and management of private and communal open space?*
- *landscaping?*

The proposed development is highly appropriate to the site with regard to all of the above factors. The proposed development fits well within the context of the surrounds and is an appropriate scale.

*How would the development affect the health and safety of the occupants in terms of:*

- *lighting, ventilation and insulation?*
- *building fire risk – prevention and suppression/*
- *building materials and finishes?*
- *a common wall structure and design?*
- *access and facilities for the disabled?*
- *likely compliance with the Building Code of Australia?*

The proposed development will comply with the provisions of the Building Code of Australia and all relevant Council controls.

## **6.10. Construction**

*What would be the impacts of construction activities in terms of:*

- *the environmental planning issues listed above?*
- *site safety?*

Site safety measures and procedures compliant with relevant legislation will ensure that no site safety or environmental impacts will arise during construction.



## **The suitability of the site for the development**

*Does the proposal fit in the locality?*

- *are the constraints posed by adjacent developments prohibitive?*
- *would development lead to unmanageable transport demands and are there adequate transport facilities in the area?*
- *are utilities and services available to the site adequate for the development?*

The adjacent development does not impose any unusual development constraints.

*Are the site attributes conducive to development?*

The site is appropriate for the proposed alterations and additions.

## **Any submissions received in accordance with this Act or the regulations**

It is envisaged that the consent authority will consider any submissions made in relation to the proposed development.

## **The public interest**

It is considered that the proposal is in the public interest as it allows for appropriate use of the residential site.

Section 4.15(1) of the Environmental Planning and Assessment Act has been considered and the development is considered to fully comply with all relevant elements of this section of the Environmental Planning and Assessment Act 1979.

## **7. Conclusions**

- 7.1 The proposed development for alterations and additions at 59 Cutler Road Clontarf is appropriate considering all State and Council controls.
- 7.2 When assessed under the relevant heads of consideration of s4.15 of the Environmental Planning and Assessment Act, the proposed development is meritorious and should be granted consent.
- 7.3 Considering all the issues, the fully compliant development is considered worthy of Council's consent.

## Appendix 1 – View Loss Analysis

*Tenacity Consulting v Warringah Council (2004) NSWLEC 140. The Planning Principle established a four-step process for considering the impact of a development on views.*

### **Step 1. An assessment of the value of views to be affected by reference to their nature, extent and completeness.**

The views subject to this assessment are partial water views to Middle Harbour and headland views that include ‘Wyargine Point’ and ‘The Spit’ from No. 57 Cutler Road.

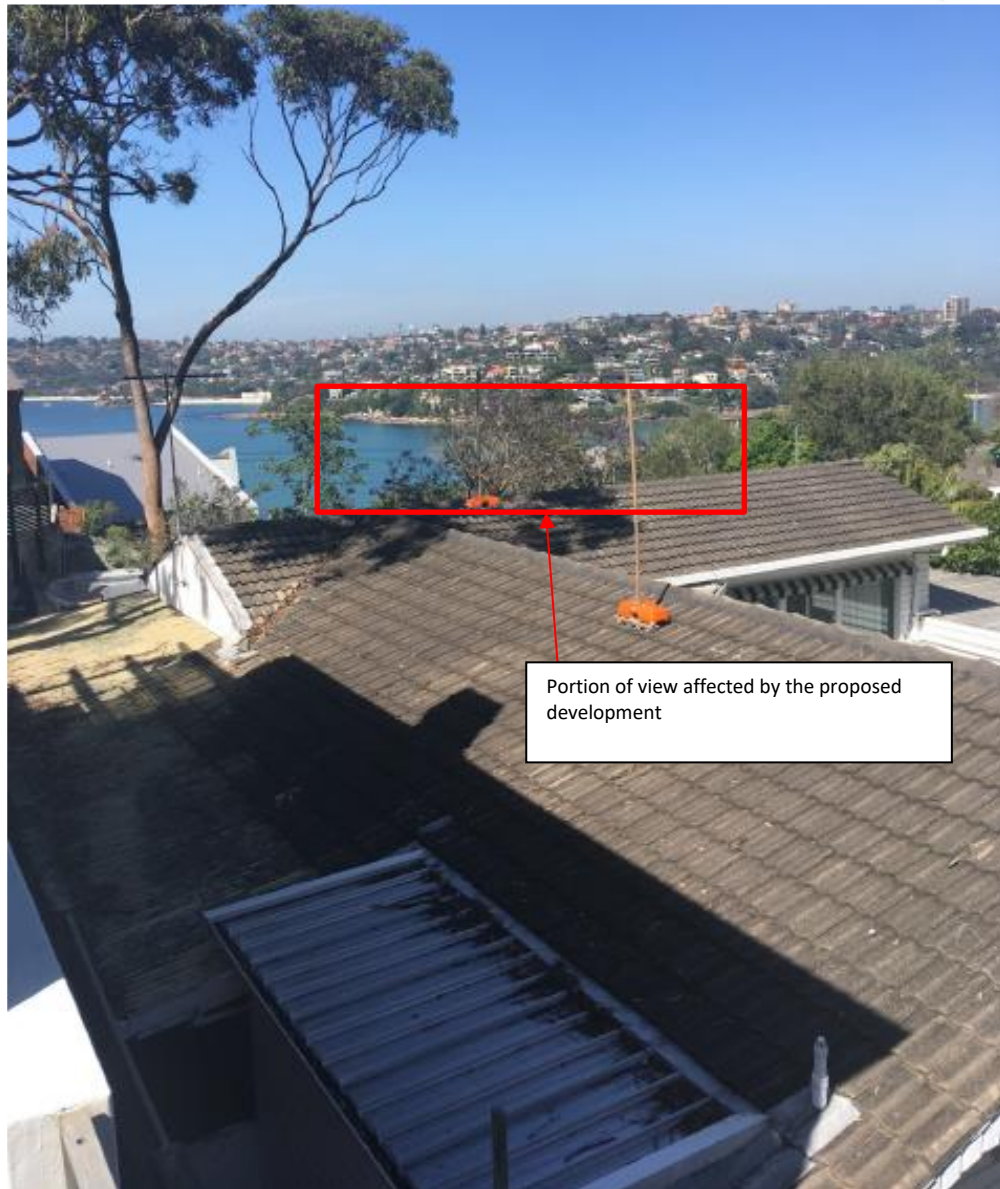


Figure 1: Aerial Image of the subject site and views subject to this assessment

### **Step 2. A consideration of how views are obtained and what part of the property the views are obtained from.**

The affected views are obtained from No. 57 Cutler Road from two decks on western side of the dwelling and from the living areas inside the dwelling. Views are obtained from the front and rear of the property and over the western side boundary from both a standing and sitting position.

Note: Access to adjoining properties was not possible for this assessment. The above information has been obtained from Council Assessment Report of DA 2018/260 and a submission made by the owner of 57 Cutler Road.



**Figure 2: View subject to this assessment. Photograph taken from the side deck at 57 Cutler Road (Source: Council Assessment Report of DA 2018/260)**

The images below provided by Action Plans further support this statement.



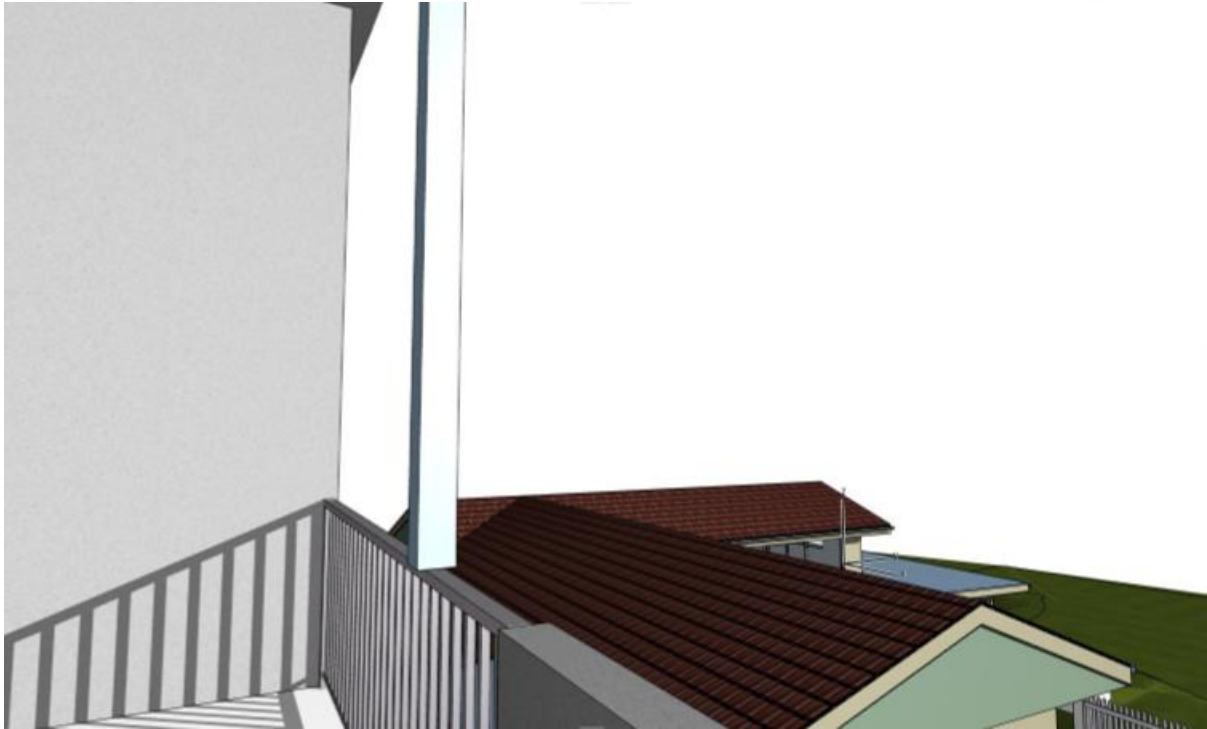


Figure 3: Existing

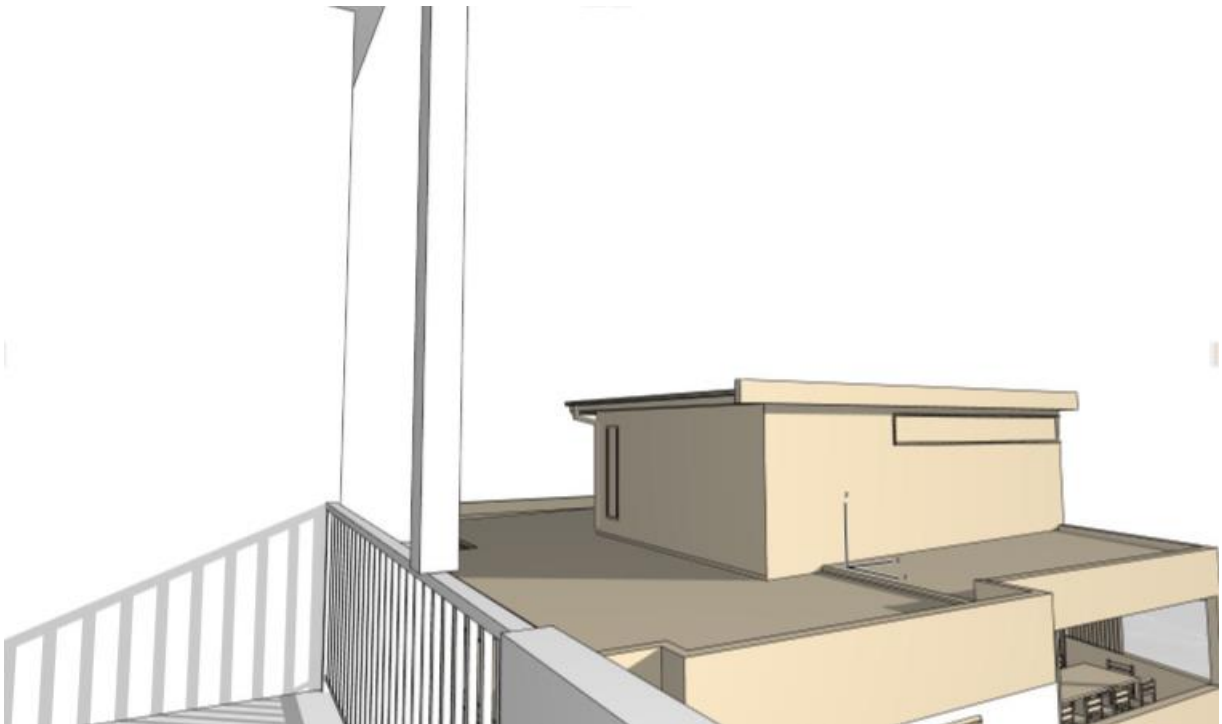


Figure 4: Proposed

***Step 3. A qualitative assessment of the extent of the impact in terms of severity particularly as to whether that impact is negligible, minor, moderate, severe or devastating.***

The extent of the impact in terms of severity is considered minor for No. 57 Cutler Road.

The proposed alterations and additions at 59 Cutler Road will result in minor view loss to partial water views to the south from No 57 Cutler Road. The impact is considered minor and acceptable as this view is over a side boundary and it affects a partial water view. We understand it is also not form a key living area. The proposed development has been designed to ensure No. 57 retains significant views to the south west and west.

***Step 4. An assessment of the reasonableness of the proposal causing the impact particularly in terms of compliance with applicable planning controls and whether a different or complying design must produce a better result. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable.***

The proposed development is considered reasonable, as although the impact on views to the south is minor from No. 57 Cutler Road, the property still retains significant headland and water views from multiple locations in the property.

The proposed development is non-complaint with Floor Space Ratio and Building Height Controls, however the proposed variations do not impact on the more substantial water view from No. 57 Cutler Road, which can be retained through a reasonable southern and western boundary setbacks.

## **Appendix Two - Clause 4.6 Exceptions to Development Standards – Height of Buildings**

Clause 4.6 of the Manly Local Environmental Plan 2013 (MLEP 2013) permits departures from development standards in certain circumstances. In this case, it is necessary to consider if compliance with the development standard is consistent with the aims of the policy and, in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in section 1.3 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) being:

- (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,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The aims and objectives of Manly LEP 2013 Clause 4.6 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.*

Under Clause 4.6(3) and (4) of the MLEP 2013, consent for a development that contravenes a development standard must not be granted unless the consent authority is satisfied that:

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

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

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

These matters, along with case law judgements from the NSW Land and Environment Court, are addressed below.

## **1. Environmental Planning Instrument Details (Manly LEP 2013)**

### **1.1 What is the name of the environmental planning instrument that applies to the land?**

Manly Local Environmental Plan 2013

### **1.2 What is the zoning of the land?**

R2 – Low Density Residential

### **1.3 What are the objectives of the zone?**

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

### **1.4 What is the development standard being varied?**

Cl 4.3 - Height of Buildings

### **1.5 Under what clause is the development standard listed in the environmental planning instrument?**

Cl 4.3 of the Manly Local Environmental Plan 2013

### **1.6 What are the objectives of the development standard?**

*(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.*

### **1.7 What is the numeric value of the development standard in the environmental planning instrument?**

The numeric value of the height of buildings development standard applicable to the subject site is a maximum of 8.5m.

### **1.8 What is proposed numeric value of the development standard in your development application?**

The development proposes a maximum building height of 9.284 metres.

### **1.9 What is the percentage variation (between your proposal and the environmental planning instrument)?**

The percentage variation sought is 8.81% or 0.784 metres.

## **2. NSW Land and Environment Court Case Law**

Several key Land and Environment Court (NSW LEC) judgements have refined the manner in which variations to development standards are required to be approached. The key findings and direction of each of these matters are outlined in the following discussion.

### **2.1 Wehbe v Pittwater [2007] NSW LEC 827**

The decision of Justice Preston in *Wehbe v Pittwater [2007] NSW LEC 827*, (expanded on the findings in *Winten v North Sydney Council*), identified 5 ways in which the applicant might establish that compliance with a development standard is unreasonable or unnecessary. It was

not suggested that the five ways were the only ways that a development standard could be shown to be unreasonable or unnecessary.

The five ways outlined in *Wehbe* include:

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

In the *Micaul* decision Preston CJ confirmed that the requirements mandated by SEPP 1 (as discussed in *Wehbe*) are only relevant in demonstrating that compliance with a development standard is unreasonable or unnecessary for the purpose of Clause 4.6(3)(a).

## 2.2 Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC

In the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

1. Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;
2. That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
3. That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs;
4. All three elements of clause 4.6 have to be met and it is best to have different reasons for each but it is not essential.

## 3 Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7

In *Randwick City Council v Micaul Holdings*, the Court allowed a departure from development standards, provided the processes required by clause 4.6 are followed, a consent authority has

a broad discretion as to whether to allow a departure from development standards under clause 4.6, even where the variation is not justified for site or development specific reasons.

Preston CJ noted that *the Commissioner did not have to be satisfied directly that compliance with each development standard was unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the appellant's written request had adequately addressed the matter in clause 4.6(3)(a) that compliance with each development standard was unreasonable or unnecessary.*

#### **4 Zhang v City of Ryde**

Commissioner Brown reiterated that clause 4.6 imposes three preconditions which must be satisfied before the application could be approved:

1. The consent authority must be satisfied that the proposed development will be consistent with the objectives of the zone;
2. The consent authority must be satisfied that the proposed development will be consistent with the objects of the standard which is not met; and
3. The consent authority must be satisfied that the written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances and there are sufficient environmental planning grounds to justify contravening the development standard.

It is only if all of these conditions are met that consent can be granted to the application, subject to an assessment of the merits of the application.

The Commissioner applied the now familiar approach to determining consistency with zone objectives by considering whether the development was antipathetic to the objectives.

In contrast to four<sup>2</sup>five, the reasons relied on to justify the departure from the standards in this case were not necessarily site specific.

#### **5. Action Pty Ltd v Woollahra Municipal Council [2018]**

In *Action Pty Ltd v Woollahra Municipal Council*, the court demonstrated the correct approach to the consideration of clause 4.6 requests, including that the clause does not require that a development that contravenes a development standard, must have a neutral or better environmental planning outcome than one that does not.

### 3. Consideration

The following section addresses the provisions of clause 4.6 of the MLEP 2013 together with principles established in the NSW Land and Environment Court Case Law outlined above.

**Clause 4.6(3)(A) - Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case (and is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case)?**

In order to demonstrate that compliance with the development standard is unreasonable or unnecessary, in the circumstances of the case, the Five (5) Part Test established in *Winten v North Sydney Council* and expanded by Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827 is considered:

The five ways outlined in *Wehbe* include:

#### 3.1 Five (5) Part Test - *Wehbe v Pittwater*

##### 1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).*

The objectives of the standard are:

*(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,*

Comment

The proposed variation is largely the result of taking into account the existing excavated storage room and the topography of the site. The proposed development presents with a compliant height on the north and east elevations and the vast majority of the west elevation. The proposed height and built form is considered to be consistent with other approved dwelling houses with the locality on sloping sites which breach the height limit.

The proposed breach is minor at 784mm and proposes a maximum height of 9.284 metres, in the control area of 8.5 metres. The resulting dwelling is considered to be compatible with the prevailing height of buildings and streetscape character within the locality, despite the non-compliance, with the variation largely attributed to the sloping topography of the site which contains a cross fall. It is considered this objective is met, despite the numerical variation.

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

Comment

The proposed built form for the most part is below the maximum height of 8.5m. The proposed height exceedance of an additional 784mm is considered to be negligible in relation to bulk and scale given the existing character of generally large multi-level dwelling houses. The proposed



development will not present with excessive bulk from the public domain due to the sloping topography of the site and surrounding area. It is considered this objective is met, despite the numerical variation.

*(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),*

Comment

The proposed variation in height of 784mm is considered not to result any unreasonable material view loss when assessed in relation to the view sharing principles set out in Tenacity Consulting v Warringah Council [2004].

The view loss assessment undertaken for this proposal is provided as Appendix 1 and concludes that the impact will be minor. It is therefore considered this objective is met, despite the numerical variation.

*(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,*

Comment

The proposed variation to height does not result in any unreasonable solar access impacts to adjoining dwelling. Given that compliant solar access is achieved, despite the height variation sought, it is considered the underlying objective of this clause has been satisfied.

*(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.*

Comment:

The proposed variation does not result in the requirement of removal or pruning of trees on the subject site or on adjoining properties. In this regard, the underlying intent of this objective has been satisfied despite the numerical departure.

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

This exception to development standards request does not rely on this reason.

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

This exception to development standards request does not rely on this reason

- 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 (Fourth Way).***

This exception to development standards request does not rely on this reason.

- 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 (Fifth Way).***

This exception to development standards request does not rely on this reason.

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the height of buildings control pursuant to the First Way outlined in Wehbe.

Thus it is considered that compliance with Clause 4.6(3)(a) is satisfied.

### **3.2 Clause 4.6(3)(B) – Are there sufficient environmental planning grounds to justify contravening the development standard?**

There are sufficient grounds to permit the variation of the development standard. In particular:

- The proposed variation is very minor at just 784mm or 8.81% and does not result in any unreasonable impacts.
- The proposed variation satisfies the objectives of the underlying intent of Clause 4.3, and therefore the merits of the proposal are considered to be worthy of approval. It has been demonstrated within Council and the Courts to apply a reasonable approach in supporting variations to development standards.
- Strict numerical compliance would not necessarily result in a materially better urban design outcome and would thwart the underlying objectives of the controls
- The proposed development will not present with excessive bulk from the public domain due to the sloping topography of the site and surrounding area. It is considered this objective is met, despite the numerical variation.
- By supporting this variation to building height in its current form, it is considered that an appropriate degree of flexibility be applied, which results in a reasonable built form, consistent with newer dwelling houses/alterations and additions within the locality.
- The extent of the variation is considered to be in the public interest as the proposal remains consistent with the objectives of the zone.
- The proposed variation adequately satisfies the underlying objectives of the controls and will not result in any unacceptable built, natural, social or economic impacts for consideration under the Act.

- A variation of 10% is generally accepted by the Land and Environment Court in relation to a negligible/minor non-compliance and impact. In this instance, the proposal seeks a variation of 8.81%.

**3.3 Clause 4.6(4)(A)(ii) – Will the proposed development be in the public interest because it is consistent with the objectives of the particular standard and objectives for development within the zone which the development is proposed to be carried out.**

The proposed development is consistent with the objectives of the standard (see Cl 4.6(3)(A)). An assessment of consistency with the objectives of the Zone is provided below:

**Zone – R2 Low Density Residential**

**Objectives of zone**

- *To provide for the housing needs of the community within a low density residential environment.*

Consistent. The proposal is for alterations and additions to an existing residential dwelling.

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

Not relevant. The proposal is for a residential dwelling.

Despite the proposal seeking an exception to the building height clause, the bulk and scale of the building will have minimal effects as it represents a minor exceedance and is consistent with surrounding development.

The proposed development is not contrary to the public interest, because it is consistent with the objectives of the standard (see Cl 4.6(3)(A)) and objectives for development within the zone.

**Clause 4.6(5)(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning,**

The non-compliance will not raise any matter of State or Regional Significance.

**Clause 4.6(5)(b) the public benefit of maintaining the development standard,**

The proposed development is not contrary to the public interest, accordingly there can be no quantifiable or perceived public benefit in maintaining the standard.

**Clause 4.6(5)(c) any other matters required to be taken into consideration by the Secretary before granting concurrence**

**How would strict compliance hinder the attainment of the objects specified in Section 1.3 of the Act.**

Strict compliance with the standard would hinder the attainment of the objects specified in section 1.3 of the Act

- (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,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

Strict compliance with the 8.5 metres height development standard would hinder the development for the purpose of *promoting the orderly and economic use and development of land, promoting good design and amenity of the built environment and promoting the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.*

## Conclusion

The proposed development is for alterations and additions to a dwelling house on land zoned R2 – Low Density Residential.

As stated above the proposed non-compliance is minor at just 784mm or 8.81% and does not result in any unreasonable impacts. The variation is largely the result of taking into account the existing excavated storage room and the topography of the site. The proposed development presents with a compliant height on the north and east elevations and the vast majority of the



west elevation. Overall the proposed development does not present with excessive bulk and is of a consistent scale to surrounding properties. There will not be unreasonable view loss for surrounding properties.

Strict numerical compliance is considered to be unnecessary and unreasonable given that the proposed variation sought is consistent with the underlying objectives of the control despite the numerical variation of which have been reasonably satisfied under the provisions of Clause 4.6.

The proposed variation satisfies the objectives of the zone, underlying intent of Clause 4.6 and Clause 4.3, and therefore the merits of the proposed variation are considered to be worthy of approval.

## **Appendix Three - Clause 4.6 *Exceptions to Development Standards – Floor Space Ratio***

Clause 4.6 of the Manly Local Environmental Plan 2013 (MLEP 2013) permits departures from development standards in certain circumstances. In this case, it is necessary to consider if compliance with the development standard is consistent with the aims of the policy and, in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in section 1.3 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) being:

- (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,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The aims and objectives of Manly LEP 2013 Clause 4.6 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.*

Under Clause 4.6(3) and (4) of the LCLEP 2009, consent for a development that contravenes a development standard must not be granted unless the consent authority is satisfied that:

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

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

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

These matters, along with case law judgements from the NSW Land and Environment Court, are addressed below.

## **1. Environmental Planning Instrument Details (Manly LEP 2013)**

### **1.1 What is the name of the environmental planning instrument that applies to the land?**

Manly Local Environmental Plan 2013

### **1.2 What is the zoning of the land?**

R2 – Low Density Residential

### **1.3 What are the objectives of the zone?**

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

### **1.4 What is the development standard being varied?**

Cl 4.4 – Floor Space Ratio

### **1.5 Under what clause is the development standard listed in the environmental planning instrument?**

Cl 4.4 of the Manly Local Environmental Plan 2013

### **1.6 What are the objectives of the development standard?**

(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 business zones 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.*

**What is the numeric value of the development standard in the environmental planning instrument?**

The numeric value of the FSR development standard applicable to the subject site is 0.4:1, this equates to a maximum floor area of 240.44m<sup>2</sup> for the site area of 601.1m<sup>2</sup>.

**1.7 What is proposed numeric value of the development standard in your development application?**

The numeric value of the development standard in this development application is a maximum floor area of 261.5m<sup>2</sup> or 0.43:1.

**What is the percentage variation (between your proposal and the environmental planning instrument)?**

The percentage variation sought is 8.39% or 21.06m<sup>2</sup>

## 2. NSW Land and Environment Court Case Law

Several key Land and Environment Court (NSW LEC) judgements have refined the manner in which variations to development standards are required to be approached. The key findings and direction of each of these matters are outlined in the following discussion.

### 4.1 *Wehbe v Pittwater* [2007] NSW LEC 827

The decision of Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827, (expanded on the findings in *Winten v North Sydney Council*), identified 5 ways in which the applicant might establish that compliance with a development standard is unreasonable or unnecessary. It was not suggested that the five ways were the only ways that a development standard could be shown to be unreasonable or unnecessary.

The five ways outlined in *Wehbe* include:

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

In the *Micaul* decision Preston CJ confirmed that the requirements mandated by SEPP 1 (as discussed in *Wehbe*) are only relevant in demonstrating that compliance with a development standard is unreasonable or unnecessary for the purpose of Clause 4.6(3)(a).

### 4.2 *Four2Five Pty Ltd v Ashfield Council* [2015] NSW LEC

In the matter of *Four2Five Pty Ltd v Ashfield Council* [2015] NSW LEC, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe v Pittwater* [2007] NSW LEC 827 and demonstrate the following:

1. Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;



2. That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
3. That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs;
4. All three elements of clause 4.6 have to be met and it is best to have different reasons for each but it is not essential.

## 5 **Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7**

In *Randwick City Council v Micaul Holdings*, the Court allowed a departure from development standards, provided the processes required by clause 4.6 are followed, a consent authority has a broad discretion as to whether to allow a departure from development standards under clause 4.6, even where the variation is not justified for site or development specific reasons.

Preston CJ noted that *the Commissioner did not have to be satisfied directly that compliance with each development standard was unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the appellant's written request had adequately addressed the matter in clause 4.6(3)(a) that compliance with each development standard was unreasonable or unnecessary.*

## 6 **Zhang v City of Ryde**

Commissioner Brown reiterated that clause 4.6 imposes three preconditions which must be satisfied before the application could be approved:

1. The consent authority must be satisfied that the proposed development will be consistent with the objectives of the zone;
2. The consent authority must be satisfied that the proposed development will be consistent with the objects of the standard which is not met; and
3. The consent authority must be satisfied that the written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances and there are sufficient environmental planning grounds to justify contravening the development standard.

It is only if all of these conditions are met that consent can be granted to the application, subject to an assessment of the merits of the application.

The Commissioner applied the now familiar approach to determining consistency with zone objectives by considering whether the development was antipathetic to the objectives.

In contrast to *four2five*, the reasons relied on to justify the departure from the standards in this case were not necessarily site specific.

## **5. Action Pty Ltd v Woollahra Municipal Council [2018]**

In *Action Pty Ltd v Woollahra Municipal Council*, the court demonstrated the correct approach to the consideration of clause 4.6 requests, including that the clause does not require that a development that contravenes a development standard, must have a neutral or better environmental planning outcome than one that does not.

### 3. Consideration

The following section addresses the provisions of clause 4.6 of the MLEP 2013 together with principles established in the NSW Land and Environment Court Case Law outlined above.

**Clause 4.6(3)(A) - Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case (and is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case)?**

In order to demonstrate that compliance with the development standard is unreasonable or unnecessary, in the circumstances of the case, the Five (5) Part Test established in *Winten v North Sydney Council* and expanded by Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827 is considered:

The five ways outlined in *Wehbe* include:

#### 3.1 Five (5) Part Test - *Wehbe v Pittwater*

##### 1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).*

The objectives of the standard are:

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

##### Comment

The proposed development adopts a modern built form with a bulk and scale consistent with other recent new dwellings and alterations and additions to dwellings in the locality.

The proposed variation is minor at just 8.39% and is considered reasonable given the site is an existing undersized lot and is an irregular triangular shaped allotment shape. It is considered this objective is met, despite the numerical variation.

*(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,*

##### Comment

The proposed built form, setbacks and massing are considered to be consistent with other approved dwelling houses with the locality on sloping sites. The proposal is appropriately massed and articulated to be compatible with the prevailing streetscape character within the locality and to minimise view loss for adjoining properties.

The proposed variation in gross floor area of 21.06m<sup>2</sup> is considered not to result any unreasonable material view loss when assessed in relation to the view sharing principles set out in *Tenacity Consulting v Warringah Council* [2004]. The view loss assessment

undertaken for this proposal is provided as Appendix 1 and concludes that the impact will be minor. It is therefore considered this objective is met, despite the numerical variation.

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

#### Comment

The proposed variation does not result in the requirement of removal or pruning of trees on the subject site or on adjoining properties. The proposed works are largely located on the portion of the lot that is already disturbed and it is considered the built form is consistent with new development in the locality. In this regard, the underlying intent of this objective has been satisfied despite the numerical departure.

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

#### Comment

The proposed variation to floor space ratio does not result in any unreasonable environmental impacts to the amenity of adjoining dwellings. Compliant levels of solar access are maintained despite the proposed variation and the dwellings maintain shared views, visual privacy and acoustic privacy. In this regard, the underlying intent of this objective has been satisfied despite the numerical departure.

- (e) *to provide for the viability of business zones 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.*

#### Comment

Not relevant as the subject site is no located in a business zone.

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

This exception to development standards request does not rely on this reason.

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

This exception to development standards request does not rely on this reason

- 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 (Fourth Way).***

This exception to development standards request does not rely on this reason.

- 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 (Fifth Way).***

This exception to development standards request does not rely on this reason.

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the floor space ratio control pursuant to the First Way outlined in Wehbe.

Thus it is considered that compliance with Clause 4.6(3)(a) is satisfied.

### **3.2 Clause 4.6(3)(B) – Are there sufficient environmental planning grounds to justify contravening the development standard?**

There are sufficient grounds to permit the variation of the development standard. In particular:

- The proposed variation is very minor at just 21.06 m<sup>2</sup> or 8.39% and does not result in any unreasonable impacts.
- The proposed variation satisfies the objectives of the underlying intent of Clause 4.4, and therefore the merits of the proposal are considered to be worthy of approval.
- Strict numerical compliance would not necessarily result in a materially better urban design outcome and would thwart the underlying objectives of the controls.
- The proposed development will not present with excessive bulk from the public domain due to the sloping topography of the site and surrounding area. The subject site has unique characteristics that support flexibility including the fact that it is an existing undersized parcel and has an unusual triangular shape.
- By supporting this variation to the floor space ratio, in its current form, it is considered that an appropriate degree of flexibility be applied, which results in a reasonable built form, consistent with newer dwelling houses/alterations and additions in the locality.
- The extent of the variation is considered to be in the public interest as the proposal remains consistent with the objectives of the zone.
- The proposed variation adequately satisfies the underlying objectives of the controls and will not result in any unacceptable built, natural, social or economic impacts for consideration under the Act.
- A variation of 10% is generally accepted by the Land and Environment Court in relation to a negligible/minor non-compliance and impact. In this instance, the proposal seeks a variation of 8.39%.

### **3.3 Clause 4.6(4)(A)(ii) – Will the proposed development be in the public interest because it is consistent with the objectives of the particular standard and objectives for development within the zone which the development is proposed to be carried out.**

The proposed development is consistent with the objectives of the standard (see Cl 4.6(3)(A)). An assessment of consistency with the objectives of the Zone is provided below:



## Zone – R2 Low Density Residential

### Objectives of zone

- *To provide for the housing needs of the community within a low density residential environment.*

Consistent. The proposal is for alterations and additions to an existing residential dwelling.

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

Not relevant. The proposal is for a residential dwelling.

Despite the proposal seeking an exception to the floor space ratio clause, the bulk and scale of the building will have minimal effects as it represents a minor exceedance and is consistent with surrounding development.

The proposed development is not contrary to the public interest, because it is consistent with the objectives of the standard (see Cl 4.6(3)(A)) and objectives for development within the zone.

### **Clause 4.6(5)(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning,**

The non-compliance will not raise any matter of State or Regional Significance.

### **Clause 4.6(5)(b) the public benefit of maintaining the development standard,**

The proposed development is not contrary to the public interest, accordingly there can be no quantifiable or perceived public benefit in maintaining the standard.

### **Clause 4.6(5)(c) any other matters required to be taken into consideration by the Secretary before granting concurrence**

### **How would strict compliance hinder the attainment of the objects specified in Section 1.3 of the Act.**

Strict compliance with the standard would hinder the attainment of the objects specified in section 1.3 of the Act

*(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,*

*(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*

- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

Strict compliance with the 0.4:1 FSR development standard would hinder the development for the purpose of *promoting the orderly and economic use and development of land, promoting good design and amenity of the built environment and promoting the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.*

## **Conclusion**

The proposed development is for alterations and additions to a dwelling house on land zoned R2 – Low Density Residential. The development proposes a minor, 21.06 m<sup>2</sup> or 8.39% variation to the Floor Space Ratio development standard in the Manly LEP 2013.

The variation is largely the result of taking into account the unique site characteristics including the fact that it is an existing undersized parcel and has an unusual triangular shape. Overall the proposed development does not present with excessive bulk and is of a consistent scale to surrounding properties. The proposal will not result in any unreasonable impacts.

Strict numerical compliance is considered to be unnecessary and unreasonable, given that the proposed variation sought is consistent with the underlying objectives of the control, despite the proposed variation, which has been reasonably satisfied under the provisions of Clause 4.6.

The proposed variation satisfies the objectives of the zone, underlying intent of Clause 4.6 and Clause 4.4, and therefore the merits of the proposed variation are considered to be worthy of approval.