



Section 4.55 Application for Modification of Consent:

DA2020/0061 – Alterations and additions to a dwelling
house

59 Cutler Road, Clontarf



Statement of Modification

21 March 2025

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1.0 Introduction

This Statement of Modification by Blue-Sky Urban accompanies an application for modification of consent under section 4.55(2) of the Environmental Planning and Assessment Act 1979 (EPA Act).

This statement describes an application for modification of consent No. DA2020/0061, for alterations and additions to a dwelling house at 59 Cutler Road, Clontarf. This statement has been prepared on behalf of the owner of the property, Jie Chen.

This statement describes the current development consent and the proposed modifications, with reference to the relevant provisions of s.4.55 and s.4.15 of the EPA Act.

2.0 Background

2.1 The Site

The site is Lot 29, DP 25654, known as 59 Cutler Road, Clontarf. The site has an area of 601.1m² and is irregular in shape.



Figure 1 – Site (highlighted in yellow) and surrounding development (Source: SixMAPS)

Existing development on the site includes a two storey weatherboard clad dwelling with garage parking for two vehicles, and a swimming pool in the front setback area.

The site is zoned R2 Low Density Residential under Manly Local Environmental Plan 2013 (MLEP 2013) and dwelling houses are permissible with consent in the R2 Low Density Residential zone.

The site is located on the southern side of Cutler Road, between Castle Rock Crescent and Alder Street, Clontarf. Surrounding development predominantly comprises dwelling houses.



Subject Site from Cutler Road

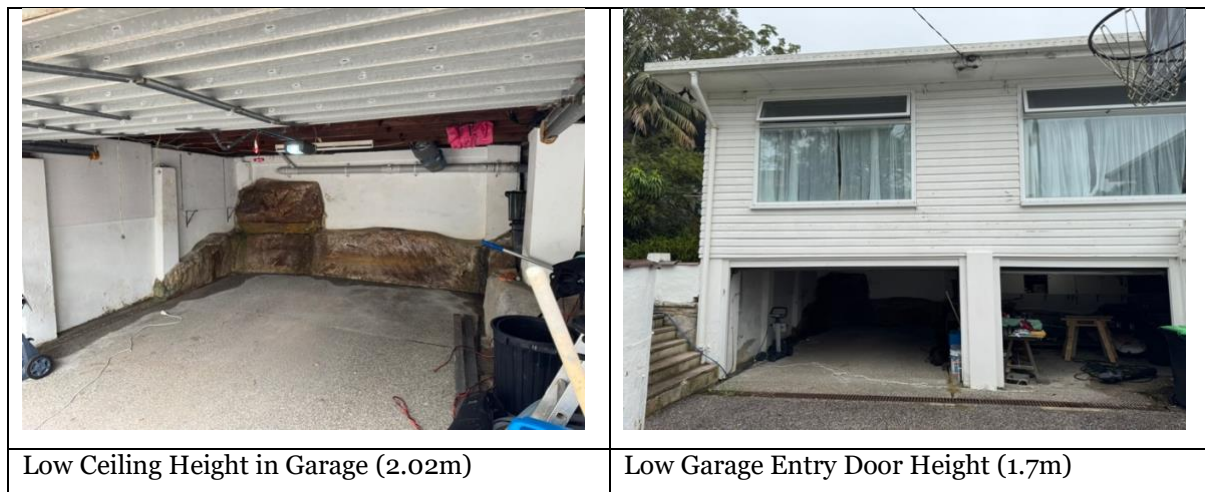


Figure 2 – Photographs of the existing dwelling and garage

2.2 DA2020/0061

Development application DA2020/0061, for alterations and additions to a dwelling house was granted deferred commencement consent by Northern Beaches Council, under delegated authority on 20 August 2020.

The approved development under DA2020/0061 includes the following:

Lower Ground Floor-

- Partial demolition of the lower ground floor, including the sunroom, laundry, powder room, stairs and internal walls.
- Porch on existing slab.
- Entry hall.
- Internal lift.
- Stairs.
- Carport.

Ground Floor-

- Partial demolition of the ground floor including the western porch, internal and external bedroom walls.

- Master bedroom with ensuite.
- Living, dining and kitchen.
- Pantry and laundry.
- Bathroom.
- Covered balcony.
- Two (2) bedrooms.
- Lift and stair access.

First Floor-

- Two (2) bedrooms.
- Bathroom.
- Balcony.
- Lift and stair access.

Relevant dates including the following:

- 20 August 2020: DA2020/0061 for alterations and additions to a dwelling house was granted Deferred Commencement Consent under delegated authority by Northern Beaches Council.
- 20 August 2022: Lapsing date in the Notice of Determination (two (2) years from the date of the consent) in relation to satisfaction of the Deferred Commencement conditions. The lapsing period has been extended until 20 August 2025 by way of s.4.53(6)(b) of the EPA Act. The lapsing date of DA2020/0061 is discussed in more detail below.

The Deferred Commencement consent conditions are as follows:

1. Council's Pipeline survey
A survey of Council's pipelines prepared by a registered surveyor to indicate the accurate location and dimensions of the pipelines and associated infrastructure on the site. The survey plan shall be overdrawn

on the site plan. Details demonstrating compliance are to be submitted to Council prior to the activation of the consent.

Reason: Protection of Council's Infrastructure

2. Certification building works over Council's pipelines
An appropriately qualified and practicing Structural Engineer shall certify the proposed alteration and additional work in compliance with Council's D100 Drainage Easement - construction over Drainage Easement. Details demonstrating compliance are to be submitted to Council prior to the activation of the consent.

Reason: Protection of council's infrastructure.

Evidence required to satisfy the deferred commencement condition/s must be submitted to Council within two (2) years of the date of this consent, or the consent will lapse in accordance with Section 95 of the Environmental Planning and Assessment Regulation 2000. This evidence is to be submitted along with a completed 'Deferred Commencement Document Review Form' (available on Council's website) and the application fee, as per Council's Schedule of Fees and Charges. (Emphasis added)

Upon satisfaction of the deferred commencement condition/s, the following conditions apply:

The Deferred Commencement consent conditions are not proposed to be modified under this s.4.55 application, and will be satisfied in due course in accordance with the requirements set out in the subject conditions.

2.3 Lapsing of Consent

The lapsing period in relation to satisfaction of the Deferred Commencement conditions for development consent to DA2020/0061 was reduced by Northern Beaches Council to two (2) years from the date of the consent, being 20 August 2022.

However, under s.4.53(6)(b) of the Environmental Planning and Assessment Act 1979 (EPA Act), a development consent that is subject to a deferred commencement condition under section 4.16(3) lapses if the applicant fails to satisfy the consent

authority as to the matter specified in the condition within 5 years after the grant of consent if the consent is granted during the prescribed period. The prescribed period means the period commencing on 25 March 2020 and ending on 25 March 2022. The subject development consent was granted during the prescribed period, on 20 August 2020.

Of relevance to the reduced lapsing date of 20 August 2022 in the Notice of Determination, section 4.53(6A) of the EPA Act states:

(6A) A consent authority may reduce a period specified in subsection (6)(a) or (b) in granting development consent.

However, section 4.53(6B) states (in an apparent contradiction):

(6B) Subsection (6A) does not authorise a reduction to be made that would cause a development consent granted during the prescribed period to lapse within 5 years after the date on which it was granted.

This apparent contradiction was addressed in the case of *Norman v Central Coast Council* [2022] NSWLEC 120, where Pepper J found that a consent authority is not authorised, by operation of s.4.53(6B), to reduce the five year period specified in s.4.53(6)(b) for a deferred commencement consent to lapse.

With regard to the decision in *Norman*, the lapsing period of development consent DA2020/0061 is five years from the date of determination on 20 August 2020, being 20 August 2025, and the purported reduction in the lapsing period to less than five years (IE, to 20 August 2022) is invalid and in contravention of s.4.53(6B) of the EPA Act.

Consequently, DA2020/0061 has not lapsed and the Deferred Commencement conditions can be satisfied up until 20 August 2025. When the Deferred Commencement conditions have been satisfied and the consent is operational, the consent will then lapse two (2) years from the operation date of the consent (unless

the development is physically commenced within that two year period) as set out in this extract from the Notice of Determination:

**DETERMINATION - APPROVED -
DEFERRED COMMENCEMENT
CONSENT**

Made on (Date)	20/08/2020
Consent to operate from (Date):	Once Council is satisfied as to those matters specified in the deferred commencement conditions, Council will nominate by way of written notice to the Applicant, the date from which the consent operates
Consent to lapse on (Date):	2 years from the operation date of Consent

3.0 Proposed modifications to the approved development

It is proposed to make a number of minor modifications and refinements to the approved development, in order to improve internal amenity, accessibility and usability, energy efficiency, and architectural design. There is no proposed increase to the existing building envelope, despite an increase in GFA at the Lower Ground Level. The approved internal void is retained without modification.

The following design modifications are proposed to the approved development:

Lower Ground Floor-

- Convert the existing Sunroom (currently approved as a Porch) into an Office and covered entry way, retaining the existing southern elevation Sunroom wall and windows.
- Internal addition of a bathroom in the approved Storage room.
- Minor widening of the approved Entry Hall and commensurate reduction in the carport area.
- The proposed Office and widening of the Entry Hall result in an increase in GFA of 35.23m², from 256.5m² to 291.73m².

Ground Floor-

- Minor internal reconfiguration of the kitchen, bedroom, bathroom and laundry, in part order to accommodate an increase in the floor to ceiling height of the existing garage below, from the approved internal height of 2020mm with a garage door height of 1700mm, to an internal height of 2470mm with a garage door height of 2100mm, and to reduce internal level differences and steps.
- Minor increase in floor level in relation to the internal reconfiguration described above, of 168mm, from RL 47.072 to RL 47.240.
- Addition of a small deck in the south-eastern corner of the site over the existing porch, adjoining the Butler's Kitchen and Laundry, at RL 47.240.
- Ensuite window deleted and in-filled.
- Hall door DO3 relocated from south elevation to east elevation.

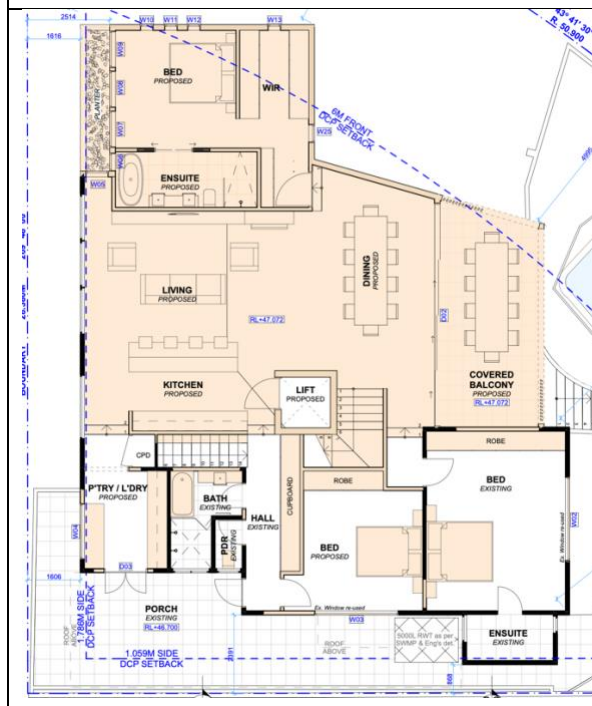
First Floor-

- Minor window reconfiguration.
- Increased balustrade height to achieve NCC compliance.
- Minor increase to floor level of 181mm, from RL 50.295 to RL 50.476

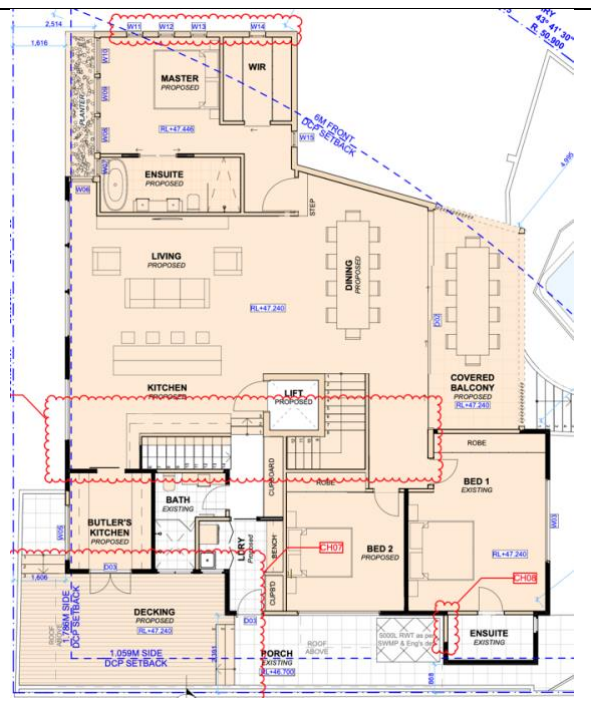
Roof Level-

- Minor roof reconfiguration to accommodate the Ground Floor modifications as detailed above, resulting in a slight ridge height increase of 209mm, from RL 53.205 to RL 53.414. The ridge height increase of 209mm increases the maximum building height from the approved height of 9.1m to 9.309m.
- Minor extension of eave towards the front of the site

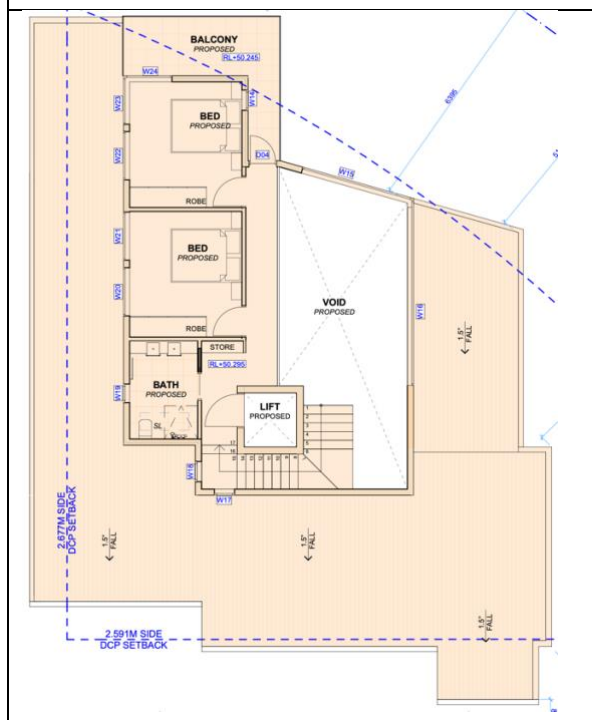
Approved Ground Floor



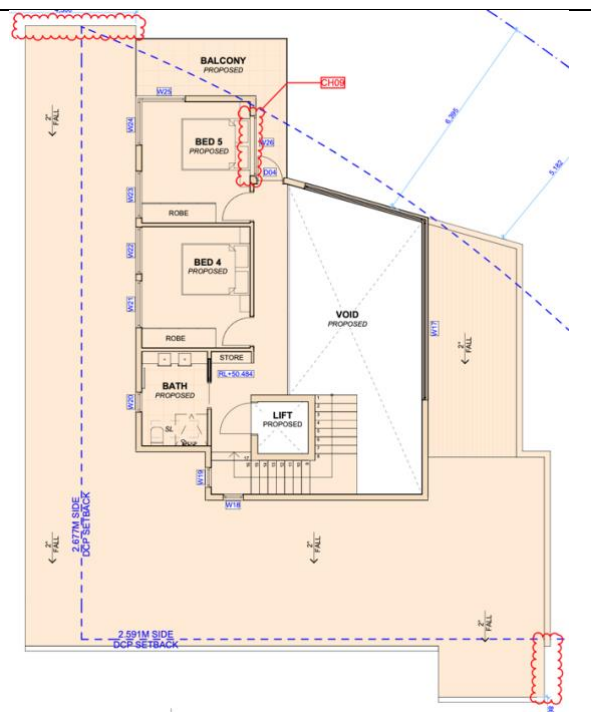
Modified Ground Floor



Approved First Floor



Modified First Floor



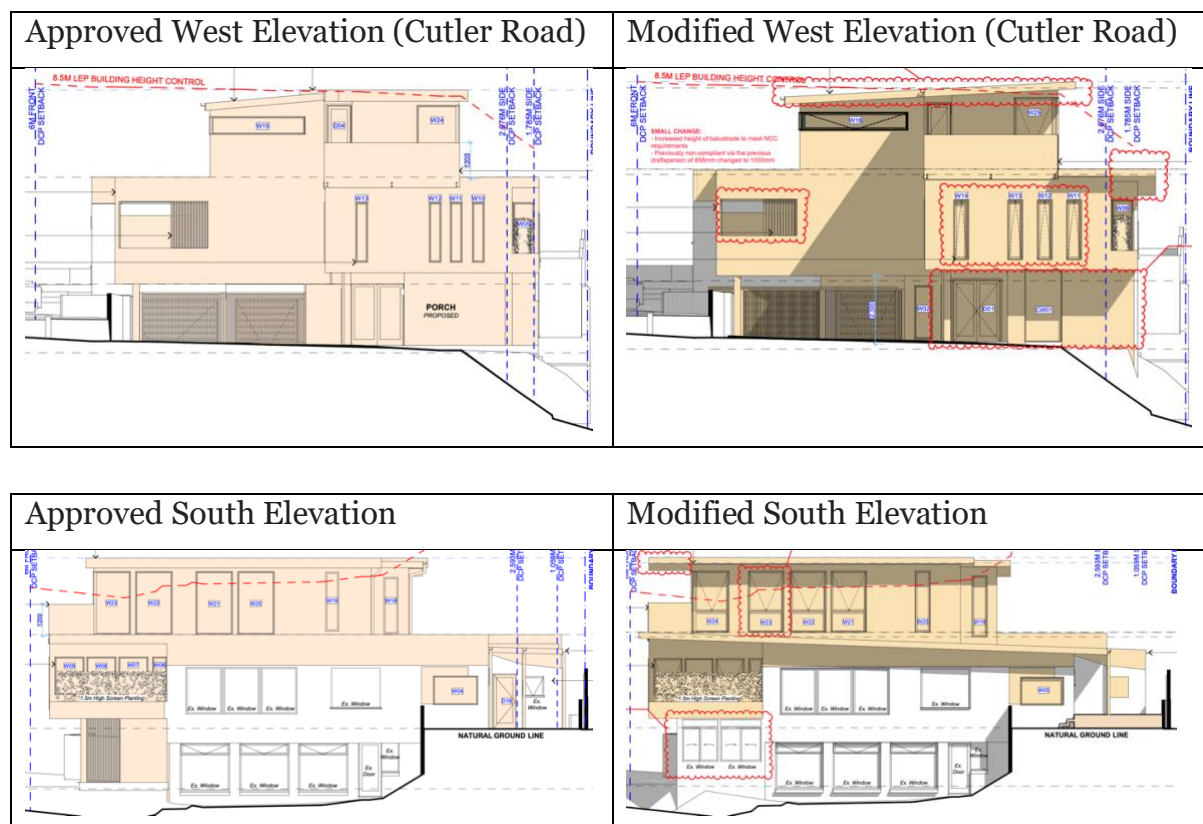


Figure 3 – Comparison of approved and proposed development

4.0 Proposed modifications to conditions of consent

Condition 3 – Approved Plans and Supporting Documentation

Condition 3 will require modification to reference the current architectural plan set.

5.0 Planning Assessment

5.1 Section 4.55(2)

Section 4.55 of the Environmental Planning and Assessment Act 1979 (EP&A Act) includes the following provisions in relation to modifications under section 4.55(2):

(2) Other modifications

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if—

- (a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and
- (b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and
- (c) it has notified the application in accordance with—
 - (i) the regulations, if the regulations so require, or
 - (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and
- (d) it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.

Subsections (1) and (1A) do not apply to such a modification.

- (3) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

5.2 Substantially the same development

Under section 4.55(2)(a) of the EP&A Act, Council as the consent authority must be satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted.

In relation to the question of substantially the same development, the recent decision in *Canterbury-Bankstown Council v Realize Architecture Pty Ltd* [2024] NSWLEC 31 (Realize Architecture), which was an appeal against the decision of Commissioner Espinosa in the matter of *Realize Architecture Pty Ltd v Canterbury-Bankstown* [2023] NSWLEC 1437, confirms prior caselaw in relation to substantially the same development and sets out the test to be applied by decision-makers in deciding whether or not they are satisfied of the precondition in s.4.55(2)(a) of the EPA Act 1979.

In the decision of *Realize Architecture Pty Ltd v Canterbury-Bankstown* [2023] NSWLEC 1437, Espinosa C held that the modified development, with an additional two storeys in height, thirty-eight (38) additional apartments and an increase of 2,368m² of gross floor area was substantially the same development.

The judgement by Chief Justice Preston in *Realize Architecture* provides guidance on the tasks required to be undertaken, which involve an analysis of the differences, including qualitative and quantitative differences, and subsequent categorising of the facts in the statutory description of the precondition in s.4.55(2)(a). The task of categorising the facts in the statutory description is an evaluative one and is an essential task in deciding whether or not the precondition in s.4.55(2)(a) is satisfied.

In relation to the proposed development, in quantitative terms the modified development remains alterations and additions to a dwelling house. There is no increase in the number of storeys, site coverage or the building envelope, and no reduction in landscaped area. The proposal retains two (2) off-street parking spaces. The minor numerical increase in building height of 209mm at the southern edge of the skillion roof would be very difficult, and likely impossible to discern, and has no impact on the development remaining substantially the same development. Similarly, the additional GFA of 35.23m² is located within the existing building envelope and is quantitatively a minor increase with regard to the approved GFA of 256.5m². With regard to the above, the proposed development is substantially the same development quantitatively.

Qualitatively, the proposal retains the essential characteristics of the approved development in terms of remaining a three storey dwelling house with off street parking for two cars, containing five (5) bedrooms. The proposal retains the essential architectural and design characteristics of the approved development. The modified development has in no way been radically transformed and there is no significant modification to any critical element of the original development. The slightly modified roof configuration provides an improved streetscape presentation, without radical transformation. Qualitatively, the development is substantially the same development.

When evaluating both the quantitative and qualitative differences, the proposed development as modified is clearly substantially the same development, satisfying the precondition in s.4.55(2)(a).

Further, while not relevant to the statutory test under s.4.55(2)(a), the modified proposal does not have an adverse amenity impact on any adjoining dwelling, with regard to visual and aural privacy, visual impact, streetscape, solar access, views or in any other respect.

5.3 Notification of application

It is anticipated that Council will notify the modification application and consider any submissions made within the prescribed period (if any), concerning the proposed modification.

5.4 Section 4.15 Evaluation

The consent authority is required to consider the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application.

Manly Local Environmental Plan 2013

Permissibility:

The proposal remains permissible with consent in the R2 Low Density Residential zone, under MLEP 2013.

Height:

Under clause 4.3 of MLEP 2013 the maximum permissible height of buildings on the subject site is 8.5m. As identified in Council's assessment report dated 20/08/2020, the approved building height is 9.1m. The development application included a clause 4.6 exception request to the building height development standard, which was supported by Council.

As the subject application is a modification of consent and not an application for the grant of consent, a clause 4.6 request is not required and is not a jurisdictional prerequisite. Nonetheless, the proposed modified roof form and minor height increase of 209mm to a maximum height of 9.309m remains consistent with the objectives of the height standard, with no adverse impact on any adjoining or surrounding dwelling in terms of overshadowing, privacy, views, visual impact or desired future streetscape character. The proposed height is also consistent with the objectives of the R2 Low Density Residential zone.

The shadow diagrams submitted with the development application demonstrate that the 208mm height increase in the modified development does not have an adverse impact on solar access to any adjoining dwelling, particularly 61 Cutler Road. Adjoining dwellings will receive in excess of the minimum required solar access under MDCP, between 9am and 3pm, midwinter.

The proposal is satisfactory with regard to building height.

Floor Space Ratio (FSR):

Under clause 4.4 of MLEP 2013 the site is subject to a maximum FSR of 0.4:1, as specified in the Floor Space Ratio Map. However, under part 4.1.3.1 Exceptions to FSR for Undersized Lots in Manly Development Control Plan 2013 (MDCP), the subject site benefits from the undersized lot exceptions due to the site area being under 750m².

The provisions in 4.1.3.1 are as follows:

Note: On existing sites in Residential LEP Zones (including E3 & E4) with a site area less than the minimum lot size required on the LEP Lot Size (LSZ) Map, Council may consider exceptions to the maximum FSR under LEP clause 4.6 when both the relevant LEP objectives and the provisions of this DCP are satisfied. See LEP clause 4.6(4)(a).

The undersized nature of a lot is a matter that Council may consider in determining whether ‘compliance with the standard is unreasonable or unnecessary in the circumstances of the case’ and ‘there is sufficient environment planning grounds to justify contravening the development standard’ under LEP clause 4.6(3).

As set out in Figure 30 – Extent of FSR Variation for Undersized Lot, undersized lots in Area R (among other areas) on the LEP Lot Size Map are subject to a maximum variation based on “Calculation of FSR based on 750 sqm lot size/site area”.

The subject site is located in Area R on the LEP Lot Size Map, as depicted in the extract from the LEP Lot Size Map below:

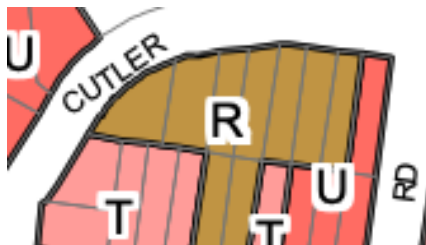


Figure 4 – Extract from MLEP Lot Size Map

With regard to both the MLEP 2013 and MDCP provisions, the maximum FSR anticipated by the planning controls for development on the site is 0.4:1 of 750m², which equates to 300m² of GFA. The proposed GFA of 291.73m² is below the anticipated maximum GFA, and equates to an FSR of 0.389:1 (based on a 750m² lot size), which is below the 0.4:1 maximum FSR.

As the subject application is a modification of consent and not an application for the grant of consent, a clause 4.6 request for the proposed FSR is not required and is not a jurisdictional prerequisite to modification of the consent. Regardless, the proposed

development is consistent with the objectives of FSR control, particularly in relation to not disrupting views or obscuring important landscape features, and allowing adequate sunlight to adjoining private open space and living room windows of adjoining dwellings. Of particular relevance is that the additional GFA is located in the Lower Ground Level of the development, within the existing building envelope, and therefore does not result in any additional height, bulk or scale at the upper levels of the dwelling.

The development is entirely consistent with the objectives of the FSR control and the proposed FSR is below the allowable FSR for development on the site under MLEP 2013 and MDCP.

Privacy:

The proposed modifications do not result in any additional privacy impacts on adjoining dwellings, and particularly 61 Cutler Road. It is apparent from a comparison of the approved and modified development that the southern elevation does not result in any adverse privacy impact on the adjoining dwellings to the south. The existing Lower Ground Floor Sunroom southern wall and windows are to be retained without modification for use as an Office, and as the windows are existing they do not introduce any additional privacy impacts beyond the existing. Further, existing landscaping comprising trees and understorey planting on 61 Cutler Road provides an appropriate degree of visual screening between the existing Sunroom and the adjoining dwelling. In relation to privacy, the existing Sunroom windows are satisfactory and do not have an adverse impact on the privacy of the adjoining dwelling at 61 Cutler Road.

The proposed deck located in the south east corner of the site adjoins a retaining and boundary wall on the eastern boundary with a height of 2.7m. The proposed deck is raised by approximately 540mm above the existing tiled porch, however there is no associated privacy impact due to the existing 2.7m high wall to the eastern boundary

(being 2.16m above the deck level) and the high boundary fence to the southern boundary, also approximately 2.7m in height.

The proposed modifications are satisfactory with regard to privacy to adjoining dwellings.

Bush Fire Prone Land (s.4.14 EPA Act)

The approved development is subject to the recommendations and construction standards specified in the Bushfire Risk Assessment for the subject site, prepared by Bushfire Consultancy Australia, dated 5/5/2020, under existing Condition 3 of the development consent. The required construction standards are in accordance with the requirements of Planning for Bushfire Protection 2006 and AS 3959-2009 Construction of buildings in bushfire prone areas and remain applicable in relation to the modified development.

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

A revised BASIX Certificate has been produced, in relation to the modified development. The proposal is satisfactory with regard to the provisions of SEPP BASIX.

5.5 Reasons for the grant of consent

The reasons for the grant of development consent to DA2020/0061 do not appear in the Notice of Determination and are assumed to be contained in the Conclusion of Council's Assessment Report, which states the following:

CONCLUSION

The site has been inspected and the application assessed having regard to all documentation submitted by the applicant and the provisions of:

- *Environmental Planning and Assessment Act 1979;*
- *Environmental Planning and Assessment Regulation 2000;*
- *All relevant and draft Environmental Planning Instruments;*
- *Manly Local Environment Plan;*
- *Manly Development Control Plan; and*
- *Codes and Policies of Council.*

This assessment has taken into consideration the submitted plans, Statement of Environmental Effects, all other documentation supporting the application and public submissions, and does not result in any unreasonable impacts on surrounding, adjoining, adjacent and nearby properties subject to the conditions contained within the recommendation.

In consideration of the proposal and the merit consideration of the development, the proposal is considered to be:

- *Consistent with the objectives of the DCP*
- *Consistent with the zone objectives of the LEP*
- *Consistent with the aims of the LEP*
- *Consistent with the objectives of the relevant EPIs*
- *Consistent with the objects of the Environmental Planning and Assessment Act 1979*

Council is satisfied that:

1) The Applicant's written request under Clause 4.6 of the Manly Local Environmental Plan 2013 seeking to justify a contravention of Clause 4.3 Height of Buildings and Clause 4.4 Floor Space Ratio has adequately addressed and demonstrated that:

- a) Compliance with the standard is unreasonable or unnecessary in the circumstances of the case; and*
- b) There are sufficient environmental planning grounds to justify the contravention.*

2) The proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

It is considered that the proposed development satisfies the appropriate controls and that all processes and assessments have been satisfactorily addressed.

The proposed modification remains consistent with Council's reasons for the grant of consent, particularly in relation to the relevant aims and objectives of MLEP 2013 and MDCP and the satisfactory nature of the development in terms of having no unreasonable impacts on any adjoining property.

The proposed modified development is satisfactory with regard to the reasons for the grant of consent.

6.0 Conclusion

The proposed modification of consent as described in this statement has significant merit and remains substantially the same development as the development for which consent was originally granted.

The proposed modifications are minor in nature and do not result in any adverse impact on adjoining dwellings in relation to amenity, privacy, overshadowing, views, visual impact or in any other respect.

The proposal is satisfactory when assessed against all relevant considerations under s.4.55 of the EPA Act and applicable case law, and it is considered that this application will result in an improved and refined development and is worthy of approval by Northern Beaches Council.

George Youhanna

Principal

Blue-Sky Urban

BTP, Grad Cert Urb Des, Grad Dip Law, MPIA

