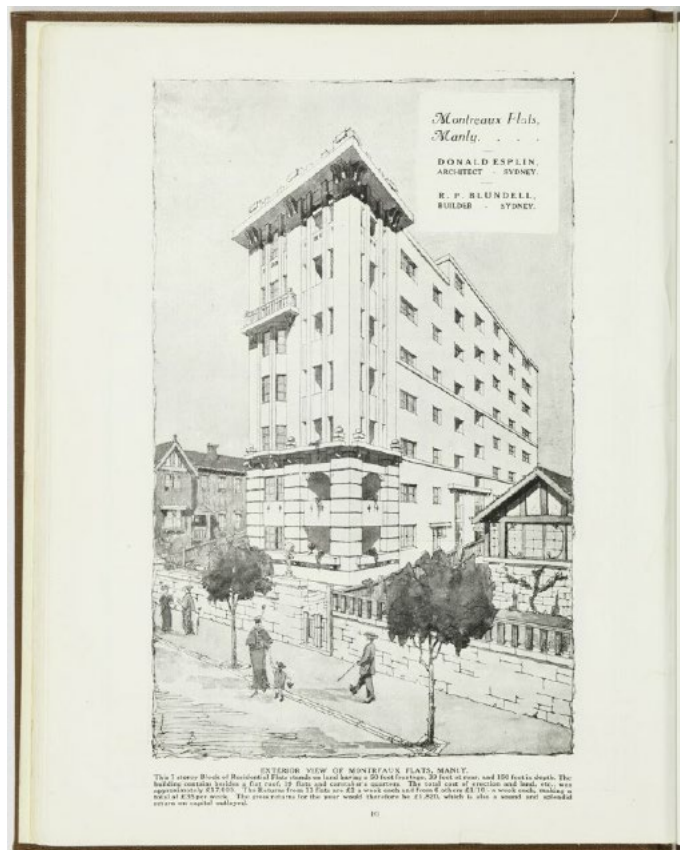


**Clause 4.6 Variation Request
Height of Buildings (Clause 4.3)
Manly Local Environmental Plan 2013**

**REPAIR WORKS TO MONTREAUX
7 Commonwealth Parade, Manly**



July 2024

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1.0 INTRODUCTION

This Clause 4.6 Variation Request has been prepared by MG Planning Pty Ltd on behalf of Hector Abrahams Architects (the Applicant). It is submitted to Northern Beaches Council (Council) in support of a development application (DA) for repairs to lintels and windows as well as repainting of the south-eastern elevation of the existing residential flat building, 'Montreaux', at 7 Commonwealth Parade, Manly (the site).

The existing building, also referred to as the 'Hilder Lea Flats', was built in 1916 and is listed as a local heritage item in the Manly Local Environmental Plan 2013 (Item I98). The building is described in the State Heritage Inventory statement of significance as follows:

The Hilder Lea block of flats is of significance for the local area for historical and esthetic reasons, and as a representative example of early "Chicagoesque" style architecture applied to residential flats. The building is one of the earliest high rise apartment buildings built in the Manly district and in the Sydney area. The building has local landmark qualities and makes a major contribution to the townscape of Manly.



Figure 1: South-eastern façade (Source: Statement of Environmental Effects)

The maximum building height for the site under *Manly Local Environmental Plan 2013* (Manly LEP 2013) is 11 metres. The existing building is 28.7 metres in height and therefore exceeds the stipulated maximum height by 17.7 metres. The proposed repair works include works above 11 metres and Council has requested that a clause 4.6 variation request be submitted to address the non-compliance with the height development standard.

Clause 4.6 of the Manly LEP 2013 enables the consent authority to grant consent for development even though the development contravenes the development standard. This Clause 4.6 Variation Request relates to the development standard for Height of Buildings under Clause 4.3 of the Manly

LEP 2013 and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Hector Abrahams Architects dated April 2024.

Clause 4.6(3) requires that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances (clause 4.6(3)(a)), and
- There are sufficient environmental planning grounds to justify the contravention of the development standard (clause 4.6(3)(b)).

This document demonstrates that compliance with the Height of Buildings development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the development standard.

2.0 DEVELOPMENT STANDARD TO BE VARIED

Cl.4.3 (2) of the Manly LEP 2013 provides that the maximum height for a building on any land is not to exceed the height shown for the land on the Height of Building Map. The maximum height applying to the site is on the Height of Building Map is 11 metres as shown in **Figure 2**.

The existing building on the site has a height of 28.7 metres. The existing building therefore exceeds the maximum building height standard by 17.7 metres or 161%.

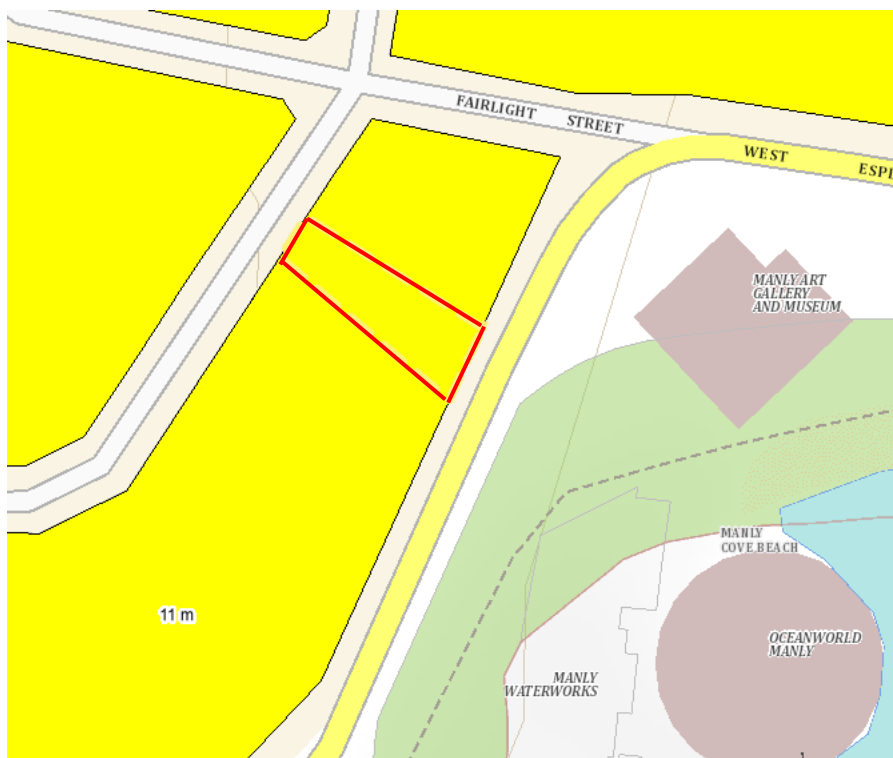


Figure 2: Extract from Manly LEP 2013 Height of Building Map

The proposed development involves repairs to the south-eastern exterior façade including replacement of lintels, window frames and sashes as well as repainting. These repair works to the existing building extend above the 11m height limit but no works are proposed which would exceed the current building height.

A plan of the proposed works are shown in **Figure 3**.



LEGEND

- ORIGINAL EXISTING WINDOW
Box Frame and Sill to be replaced in hardwood, original sashes with stepped horns to be repaired and rehung.
- NON-ORIGINAL (REPLACED) WINDOW
Frame, sill and sash to be replaced in hardwood to original detail including stepped horns.
- ORIGINAL HOODS
To be rebuilt to similar detail
- ORIGINAL MASONRY LINTELS
To be replaced with new concrete lintels and rendered to match existing finish
- EXISTING PAINTED RENDER
To be prepared and repainted in existing colour and paint type
- EXISTING PAINTED PVC DOWNPIPES
To be retained and repainted

Figure 3: Proposed repair works (Source: Hector Abrahams Architects)

3.0 JUSTIFICATION FOR CONTRAVENTION OF DEVELOPMENT STANDARD

Clause 4.6(3) of the Manly LEP 2013 provides that:

4.6 Exceptions to development standards

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:

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

(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

Guidance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827 (*Wehbe*)
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (*Four2Five*)
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*).

The relevant matters contained in clause 4.6 of the Manly LEP 2013, with respect to the Height of Buildings development standard, are each addressed below, including with regard to these decisions.

Role of the Consent Authority

The role of the consent authority in considering this request for a Clause 4.6 variation has been explained by the NSW Court of Appeal. This requires the consent authority being satisfied that the applicant's written request has adequately addressed the matters in clause 4.6(3)(a) and (b).

The consent authority is required to form this opinion first before it considers the merits of the DA and it can only consider the merits of the DA if it forms the required satisfaction in relation to the matter. In particular, the consent authority needs to be satisfied that there are sufficient environmental planning grounds to justify the contravention.

This document provides the basis for the consent authority to reach this level of satisfaction. The relevant matters contained in Clause 4.6 of the Manly LEP 2013 with respect to the Height of Buildings development standard, are each addressed below, including with regard to the above decisions.

3.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, his Honour in that case (and subsequently in *Initial Action*) confirmed that these five ways are not exhaustive; they are merely the most commonly invoked ways. Further, an applicant does not need to establish all of the ways.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language to clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the Manly LEP 2013 is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request.

The five alternative methods outlined in *Wehbe* include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).
- The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (Fourth Method).
- • The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Method).

This clause 4.6 request relies on the First Method under *Wehbe* by establishing that the objectives of the standard are achieved notwithstanding non-compliance with the standard.

3.1.1 *The underlying objectives or purposes of the development standard*

The objectives of the development standard are contained in clause 4.3 of the Manly LEP 2013 and state as follows:

(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 conservation zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.

3.1.2 The objectives of the standard are achieved notwithstanding non-compliance with the standard

(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.

The extent of variation is contained within the existing building envelope, and only comprises repair works to the southern façade above the maximum 11m height limit. These repair works are described in the Statement of Heritage Impact (Hector Abrahams Architects, April 2024) as:

... the replacement of all lintels in all masonry openings, the replacement of timber box frames in hardwood (to resist cockatoo damage), reinstatement of 26 original and replacement of 22 non-original sashes with new hardwood sashes to the original design. Finally, the elevation is to be painted in the existing paint type and colour scheme.

These repair works do not result in a development outcome that is any taller or different than that of the existing building. There is no impact on the topographic landscape, prevailing building height or desired future streetscape character in the locality.

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

As noted above, the proposed development will not result in any change to the bulk and scale of the existing building.

(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),

The repair works to the building above the stipulated height limit will not alter the overall existing building height and will not add additional structures or bulk above the height limit. Therefore, the proposed works above the height limit will not impact views to, from, or between public spaces. Rather, the proposed works will improve the appearance of the façade and therefore enhance views from surrounding areas to the building.

(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.

As no changes are proposed to the existing building height or bulk, there will be no impact on solar access to public or private spaces.

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

Not applicable.

In summary, compliance with the building height development standard is considered unreasonable and unnecessary since the proposed development achieves the objectives of the building height development standard in clause 4.3(1) of the Manly LEP 2013. The variation is a result of the height non-compliance of the existing building and has no material impact on the existing building height or bulk, will not impact the prevailing or future streetscape character, and does not impact on views or solar access.

3.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the Manly LEP 2013 requires the consent authority to be satisfied the applicant has demonstrated that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site.

There are sufficient environmental planning grounds to justify contravention of Height of Buildings development standard in this specific instance, as described below.

3.2.1 Ground 1: Existing height exceedance

As mentioned throughout this Clause 4.6 Variation Request, the scope of repair works located above the maximum height plane is limited to repairs to windows as well as repainting of the existing building. To this end, the contravention of the maximum building height standard does not contribute to additional built form that is in any way larger or different to that of the current building.

The strict enforcement of the maximum building height would mean that all areas above 11 metres could not be repaired or restored which would result in a negative outcome for this heritage listed building which has been identified as being of significance to the Manly town centre.

3.2.2 Ground 2: Conservation of heritage fabric

The Statement of Heritage Impact indicates that there is a need to repair and/or replace existing building fabric to address damage caused by cockatoos. The damage extends to that part of the south-eastern building façade above the 11 metre maximum height limit.

The proposed works above the height limit will ensure the building does not deteriorate further and important building fabric is protected and preserved as far as practicable.

3.2.3 Ground 3: Environmental impact

Given that the extent of contravention is localised within the existing building envelope and results in no new additional building structure above the 11 metre height limit, the works above the height limit will not cause any additional environmental impacts relating to overshadowing, privacy or view disruption beyond any of those that are existing.

4.0 CONCLUSION

The assessment above demonstrates that compliance with the height of buildings development standard contained in clause 4.3 of the Manly LEP 2013 is unreasonable and unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify the contravention. It is considered that the variation allows for the protection and conservation of an important heritage item. It also allows for the orderly and economic use of the land in an appropriate manner, whilst also allows for a better outcome in planning terms.

This Clause 4.6 Variation Request demonstrates that, notwithstanding the non-compliance with the height of buildings development standard, the proposed development:

- Achieves the objectives of Clause 4.3 of the Manly LEP 2013 because:
 - The variation is a result of the height non-compliance of the existing building and has no impact on the existing building height and adds no additional structures or bulk above the height limit.
 - The proposed works above the height limit comprise repair works only and will not change the existing height transitions between the site and adjacent buildings. The works are supported by a Statement of Heritage Impact appended to the SEE which confirms the works are necessary and justified.
 - Views from key public vantage points and surrounding buildings will not be changed by the proposed variation.
 - The proposed works are aimed at protecting the integrity and appearance of this heritage listed building and will have no impact on building height but instead will improve the amenity and attractiveness of the streetscape.
- The proposed variation is contained within the existing building envelope, with all repair works above the maximum height plane being located within the existing built form.
- The proposed development will not result in adverse environmental impacts including overshadowing, privacy and views.
- The strict enforcement of the maximum building height would mean that all areas above 11m could never be renovated or improved, which would result in a negative outcome for the building and its residents as well as local heritage values. The approval of this development application will ensure the restoration of building fabric and long term conservation of the building.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the Manly LEP 2013.