



CLAUSE 4.6 VARIATION TO FSR DEVELOPMENT STANDARD

30 Fairlight St Fairlight

Property	30 Fairlight Street, Fairlight																																																																																																																											
Development	The Development Application seeks approval for the construction of approval for residential flat building containing 5 units.																																																																																																																											
Subject Plans	<table><tr><th>Drawing No.</th><th>Drawing Name</th><th>Rev.</th></tr><tr><td>DA000</td><td>Cover Sheet</td><td>A</td></tr><tr><td>DA001</td><td>Development Summary</td><td>A</td></tr><tr><td>DA100</td><td>Site Photos</td><td>A</td></tr><tr><td>DA101</td><td>Site Analysis Plan 1/2</td><td>A</td></tr><tr><td>DA102</td><td>Site Analysis Plan 2/2</td><td>A</td></tr><tr><td>DA103</td><td>Existing Site Survey</td><td>A</td></tr><tr><td>DA104</td><td>Site Plan</td><td>A</td></tr><tr><td>DA105</td><td>Building Footprint Comparison</td><td>A</td></tr><tr><td>DA106</td><td>Demolition & Excavation Plan</td><td>A</td></tr><tr><td>DA200</td><td>Basement Plan</td><td>A</td></tr><tr><td>DA201</td><td>Ground Level Plan</td><td>A</td></tr><tr><td>DA202</td><td>Level 1 Plan</td><td>A</td></tr><tr><td>DA203</td><td>Level 2 Plan</td><td>A</td></tr><tr><td>DA204</td><td>Roof Plan</td><td>A</td></tr><tr><td>DA300</td><td>Elevations - Sheet 1</td><td>A</td></tr><tr><td>DA301</td><td>Elevations - Sheet 2</td><td>A</td></tr><tr><td>DA302</td><td>Materials & Finishes</td><td>A</td></tr><tr><td>DA303</td><td>Perspectives - Sheet 1</td><td>A</td></tr><tr><td>DA304</td><td>Perspectives - Sheet 2</td><td>A</td></tr><tr><td>DA305</td><td>Perspectives - Sheet 3</td><td>A</td></tr><tr><td>DA306</td><td>Perspectives - Sheet 4</td><td>A</td></tr><tr><td>DA400</td><td>Sections - Sheet 1</td><td>A</td></tr><tr><td>DA401</td><td>Sections - Sheet 2</td><td>A</td></tr><tr><td>DA500</td><td>Eye of the Sun</td><td>A</td></tr><tr><td>DA501</td><td>Shadows Study</td><td>A</td></tr><tr><td>DA502</td><td>Solar Access Calc.</td><td>A</td></tr><tr><td>DA503</td><td>Cross-Ventilation Calc</td><td>A</td></tr><tr><td>DA504</td><td>GFA Calc.</td><td>A</td></tr><tr><td>DA505</td><td>Deep Soil Calc.</td><td>A</td></tr><tr><td>DA506</td><td>Unit Mix Calc.</td><td>A</td></tr><tr><td>DA507</td><td>Adaptable Apartments</td><td>A</td></tr><tr><td>DA508</td><td>Adaptable Unit Layout</td><td>A</td></tr><tr><td>DA509</td><td>Livable Apartments</td><td>A</td></tr><tr><td>DA510</td><td>Livable Unit Layout</td><td>A</td></tr><tr><td>DA511</td><td>Height Plane Diagram</td><td>A</td></tr><tr><td>DA600</td><td>Site Isolation Scheme - Sheet 1</td><td>A</td></tr><tr><td>DA601</td><td>Site Isolation Scheme - Sheet 2</td><td>A</td></tr><tr><td>DA602</td><td>Site Isolation Scheme - Sheet 3</td><td>A</td></tr><tr><td>DA603</td><td>Site Isolation Scheme - Sheet 4</td><td>A</td></tr><tr><td>DA604</td><td>Site Isolation Scheme - Sheet 5</td><td>A</td></tr></table>	Drawing No.	Drawing Name	Rev.	DA000	Cover Sheet	A	DA001	Development Summary	A	DA100	Site Photos	A	DA101	Site Analysis Plan 1/2	A	DA102	Site Analysis Plan 2/2	A	DA103	Existing Site Survey	A	DA104	Site Plan	A	DA105	Building Footprint Comparison	A	DA106	Demolition & Excavation Plan	A	DA200	Basement Plan	A	DA201	Ground Level Plan	A	DA202	Level 1 Plan	A	DA203	Level 2 Plan	A	DA204	Roof Plan	A	DA300	Elevations - Sheet 1	A	DA301	Elevations - Sheet 2	A	DA302	Materials & Finishes	A	DA303	Perspectives - Sheet 1	A	DA304	Perspectives - Sheet 2	A	DA305	Perspectives - Sheet 3	A	DA306	Perspectives - Sheet 4	A	DA400	Sections - Sheet 1	A	DA401	Sections - Sheet 2	A	DA500	Eye of the Sun	A	DA501	Shadows Study	A	DA502	Solar Access Calc.	A	DA503	Cross-Ventilation Calc	A	DA504	GFA Calc.	A	DA505	Deep Soil Calc.	A	DA506	Unit Mix Calc.	A	DA507	Adaptable Apartments	A	DA508	Adaptable Unit Layout	A	DA509	Livable Apartments	A	DA510	Livable Unit Layout	A	DA511	Height Plane Diagram	A	DA600	Site Isolation Scheme - Sheet 1	A	DA601	Site Isolation Scheme - Sheet 2	A	DA602	Site Isolation Scheme - Sheet 3	A	DA603	Site Isolation Scheme - Sheet 4	A	DA604	Site Isolation Scheme - Sheet 5	A
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Development Standard	Clause 4.3 Height of buildings of Manly Local Environmental Plan 2013 (Manly LEP)																																																																																																																											

1. Summary

The proposed development involves the construction

Figure 1 shows the site configuration as outlined in red.



Source: Nearmap (as amended by GLN planning)

Figure 1 Aerial photograph of the site and surrounds

2 Authority to vary a development standard

The objectives of clause 4.6 seek to recognise that in particular circumstances, strict application of development standards may be unreasonable or unnecessary. The clause provides objectives and a means by which a variation to the standard can be achieved as outlined below.

4.6 Exceptions to development standards

- 1) *The objectives of this clause are as follows—*
 - a. *to provide an appropriate degree of flexibility in applying certain development standards to particular development;*
 - b. *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- 2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- 3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from*

the applicant that seeks to justify the contravention of the development standard by demonstrating—

- a. that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - b. that there are sufficient environmental planning grounds to justify contravening the development standard.*
- 4) Development consent must not be granted for development that contravenes a development standard unless—*
- a. the consent authority is satisfied that—*
 - i. the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - ii. the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - b. the concurrence of the Planning Secretary has been obtained.*
- 5) In deciding whether to grant concurrence, the Planning Secretary must consider—*
- a. whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - b. the public benefit of maintaining the development standard, and*
 - c. any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*
- 6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—*
- a. the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
 - b. the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note—

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

- 7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- 8) This clause does not allow development consent to be granted for development that would contravene any of the following—*
 - a. a development standard for complying development,*
 - b. a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - c. clause 5.4,*
 - ca. clause 6.15,*
 - cb. a development standard on land to which clause 6.19 applies.*

3 Development Standard to be Varied

A variation is requested to clause 4.4 which specifies the Floor Space Ratio (**FSR**) of buildings. This is a development standard as defined by s.1.4 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*.

Clause 4.4 (2) requires:

- (2) *The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.*

An extract of the Floor Space Ratio Map contained within the LEP is provided as **Figure 2**.

Clause 4.5 of the LEP outlines how to calculate the FSR of the building and subclause 4.5(2) relevantly provides the following definition:

- (2) *Definition of "floor space ratio" The floor space ratio of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.*



Source [FSR Map 3 Manly LEP](#) (as amended by GLN planning)

Figure 2 Extract of FSR Map from Manly LEP 2013 (subject site in red)

The LEP Dictionary provides the following definition:

gross floor area means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes—

- a) *the area of a mezzanine, and*
- b) *habitable rooms in a basement or an attic, and*
- c) *any shop, auditorium, cinema, and the like, in a basement or attic, but excludes—*
- d) *any area for common vertical circulation, such as lifts and stairs, and*
- e) *any basement—*
 - i. *storage, and*
 - ii. *vehicular access, loading areas, garbage and services, and*
- f) *plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and*
- g) *car parking to meet any requirements of the consent authority (including access to that car parking), and*
- h) *any space used for the loading or unloading of goods (including access to it), and*
- i) *terraces and balconies with outer walls less than 1.4 metres high, and*
- j) *voids above a floor at the level of a storey or storey above.*

That site survey (Usher and Co dated 12/10/2021 provided with the development application shows that the area of the site is 861.7m², which accords with the site area to be taken into account in calculating the FSR as required by subclause 4.5(3) of the LEP.

4 Extent of Variation

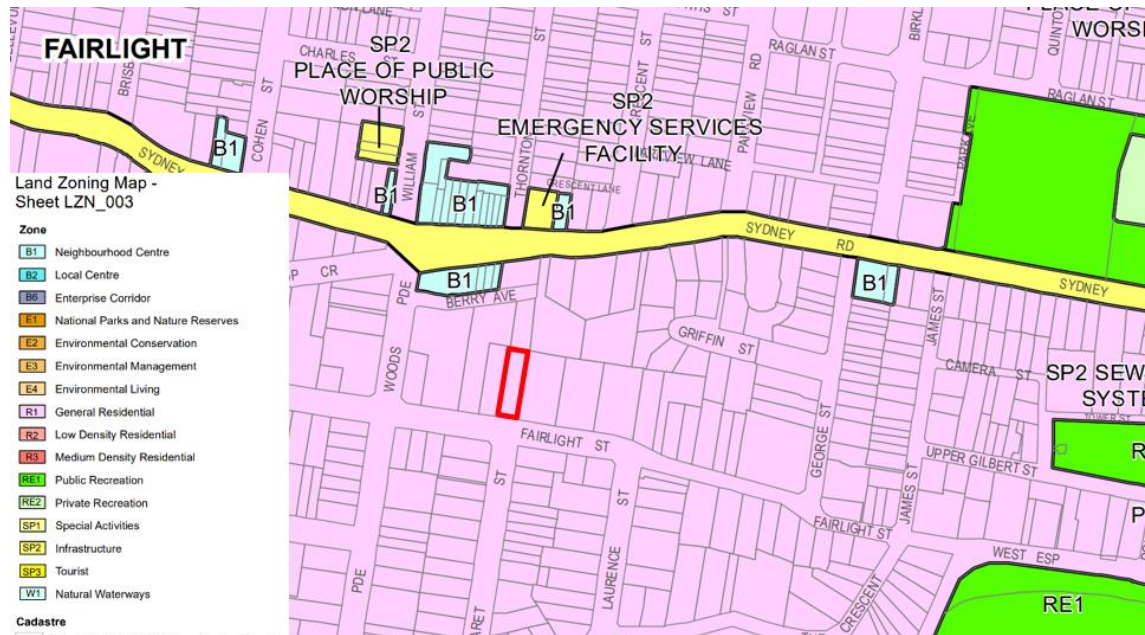
The architectural plans (DA504A dated 12 October 2021) delineate that part of each floor that accords with the definition of gross floor area (**GFA**). In summary, the GFA of each level of the proposed building is:

- Basement 19m²
- Ground 290m²
- Level 1 286m²
- Level 2 184m²
- **TOTAL 779m²**

The site area of 861.7m² and the applicable 0.75:1 FSR standard provides a compliant GFA of 646.275m². The GFA of the proposal is 779m², that is an FSR of 0.90:1 and GFA exceedance of 132.725m² (20.5%).

5. Zoning

The zoning of the site and surrounding area is illustrated on **Figure 3** below.



Source: [Land Zoning Map 3 MLEP](#)

Figure 3 Extract of Zoning Map from Manly LEP 2013 (subject site in red)

The objectives of the R1 zone are:

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

6. Objectives of Clause 4.4

The objectives of the FSR clause are:

- to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*
- to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,*
- to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*
- to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,*
- 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.*

Clause 4.6(3) requires the consent authority to consider a written request that demonstrates (amongst other things) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. When determining whether compliance with the standard is "unreasonable or unnecessary", it is usual to consider the Objectives of the clause relevant to the development standard. The Objectives of clause 4.3 are considered further below.



7. Assessment

The following sections discuss the grounds for the variation to clause 4.4 against the relevant provisions of clause 4.6.

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? (Clause 4.6(3)(a))

Clause 4.6(3)(a) requires the applicant to provide justification that strict compliance with the maximum FSR development standard is unreasonable or unnecessary in the circumstances of the case.

In *Wehbe v Pittwater Council* (2007) NSWLEC 827, Preston CJ established five potential ways for determining whether a development standard could be considered to be unreasonable or unnecessary. These include:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
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.
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.

We note that whilst *Wehbe* was a decision of the Court dealing with SEPP 1, it has been also found to be applicable in the consideration and assessment of Clause 4.6. Regard is also had to the Court's decision in *Four2Five Pty Limited v Ashfield Council* [2015] NSWLEC 90 and *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, which elaborated on how these five ways ought to be applied, requiring justification beyond compliance with the objectives of the development standard and the zone.

In addition to the above, Preston CJ further clarified the appropriate tests for a consideration of a request to vary a development standard in accordance with clause 4.6 in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118. This decision clarifies a number of matters including that:

- the five ways to be satisfied about whether to invoke clause 4.6 as outlined in *Wehbe* are not exhaustive (merely the most commonly invoked ways);
- it may be sufficient to establish only one way;
- the written request must be "sufficient" to justify contravening the development standard; and
- it is not necessary for a non-compliant development to have a neutral or beneficial effect relative to a compliant development.

It is our opinion that the proposal satisfies at least one of the five ways established in *Wehbe* that demonstrate that the development standard is unreasonable and unnecessary in this instance, for the reasons set out below.

1st Way – The objectives of the standard are achieved notwithstanding non-compliance with the standard

The proposal would satisfy the objectives of the standard to the extent relevant to the proposal, and compliance with the FSR standard in this circumstance is considered both unreasonable and unnecessary for the reasons outlined below.

Objective (a) - to ensure the bulk and scale of development is consistent with the existing and desired streetscape character.

The existing and surrounding development is a mix of small and large scale developments which do not directly reflect the underlying development standards contained in Manly LEP. To the rear of the site are residential flat buildings that present at 8 (maximum) storeys at street level and XX levels at the rear of the subject site. Opposite and nearby to the site are existing residential flat buildings of 3 to 4 levels.

The proposed development is a building of 3 habitable levels within the 11m height limit as is anticipated by Manly LEP and DCP. The architectural treatment of the proposal provides for balconies on the street frontage and the building is located above the existing garage level on a greater than the minimum 6m setback which reduces the apparent bulk of the building as compared to other adjoining and near by developments. The density of the development is consistent with the provisions of Manly DCP. The proposed development is considered consistent with the existing and desired scale of the area.

Objective (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.

The site is not in a location that enjoys access to specific important landscape and townscape features. There is an outlook enjoyed toward distant harbour glimpses and more general district views afforded by the location of the site on the upper levels associated with the ridgeline along which Sydney Road runs.

As discussed earlier and within the SEE, the density and height of the development is consistent with the anticipated built form under Manly LEP and DCP and consistent with the building alignments and scale of the nearby and adjoining properties.

Objective (c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area.

The existing streetscape of Fairlight Street is a mix of older and newer development styles. The existing dwelling house presents as a three car width garage and gate on a nil setback. The proposed architectural treatment of the elevated nature of the site will provide for a reduced dominant visual presentation of the carparking from that of the existing development.

Objective (d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain.

The development has been designed to respond to the objectives and development controls of State Environmental Planning Policy No. 65, Apartment Design Guide Manly LEP and DCP. The proposal will achieve an appropriate level of solar access, privacy and outlook. The proposal will not give rise to any impacts that are either not anticipated within a residential development and can be the subject of appropriate conditions of development consent.

Objective (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.

This objective is not relevant but will not be hindered as a consequence of the proposed FSR variation.

Summary of Satisfaction of Objectives of the Standard

Preston CJ at paragraph 43 in *Wehbe v Pittwater Council* stated:

The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)." (paragraph 43 of Wehbe v Pittwater Council).

There is an expectation for development to achieve an appropriate scale and density. This will be achieved by the proposed development. The development of the site is of a height and scale that is anticipated and will not have any unacceptable environmental or amenity impacts. Accordingly, the variation to maximum FSR standard will not compromise achievement of the objectives of the standard. Rather, this proposal offers an alternative means of achieving the objective.

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

Other than objective (a) to the extent discussed above, this consideration is not relevant in this case.

3rd Way - The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required.

This consideration is not relevant in this case, other than as commented on with regard to the "1st way."

4th Way - The development standard has been virtually abandoned or destroyed by the Council's own decisions

As noted above, Council has previously varied the standard on several occasions.

5th Way – The zoning of the site is unreasonable or inappropriate and consequently so is the development standard.

This consideration is not relevant in this case.



Are there sufficient environmental planning grounds to justify contravening the development standard? (Clause 4.6(3)(b))

The environmental planning grounds which support the contravention of the FSR of building standard relate to:

- A component of the additional floorspace (19m² for the foyer) is contained in a basement level that has no implications in regard to the size and scale of the building.
- XXXX
- In addition to the above, there is an absence of material negative impacts resulting from the proposed variation from the FSR standard.

Is the proposed development in the public interest? (Clause 4.6(4)(a)(ii))

The proposed development is in the public interest because it:

- Facilitates a development that is consistent with the objectives of the standard and the intent of the R1 zone under Manly LEP Consistency, with the objectives of the standard has been addressed previously under Wehbe method one ("1st way").
- Provides additional housing within the Sydney metropolitan region.
- The form of the proposed development is a permissible development achieving compliance with the built form controls of Manly LEP and DCP.
- The future occupants of the proposed development will have access to the existing facilities both built, infrastructure and environmental of the Fairlight locality.

In regard to the first point, the objectives of the *R1 General Residential* zoning of the site are:

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

The development is consistent with, or is not antipathetic to, the objectives of the zone for the reasons discussed above and below.

The proposed development will contribute to the delivery of about 5 new dwellings to provide alternative housing choice for the future residents. The proposal provides 3 bedroom residential apartment sizes and will form part of a housing mix within the R1 residential zone. Each dwelling provides a housing choice not readily available within the existing housing stock of Fairlight enabling a delivery of a small scale development containing 5 x 3 bedroom dwelling, each accessible via a lift, located in a landscaped setting with reduced maintenance responsibilities and improved affordability as compared to a single residential dwelling house within the locality.

The third objective is irrelevant, and the proposal is not antipathetic to this objective.

Consideration of concurrence by Director-General (Clause 4.6(4)(b) & (5))

Concurrence to the proposed variation is not required by the Secretary pursuant to clause 4.6(4)(b), as we understand that the relevant consent authority has the necessary delegation as set out in the Assumed Concurrence Notice issued by the Secretary of the Department of Planning and



Environment dated 21 February 2018 (attached to DPE Planning Circular PS 20-002 dated 5 May 2020).

Despite this, the proposed variation to the maximum FSR standard is not considered to be detrimental to any matters of significance for state or regional environmental planning.

In the circumstances of the application, there is no public benefit in maintaining the development standard. To the contrary and consistent with the objectives of clause 4.6, allowing the variation will facilitate a development that achieves better and appropriate outcomes and represents an appropriate degree of flexibility in applying a development standard.

In relation to clause 4.6(5)(c), we note that no other matters have been nominated by the Secretary for consideration.

8. Conclusion

A variation to the strict application of Council's maximum FSR standard is considered appropriate for development of Lot 50, DP 705739, No 30 Fairlight Street, Fairlight.

The proposed FSR results in an optimum outcome for the site that provides alternative residential development, with negligible impacts compared to those caused by a compliant FSR.

The proposal meets the intent of the floor space ratio standard and in accordance with clause 4.6 of Manly LEP, demonstrates that the development standard is unreasonable and unnecessary in this case and that the variation is justified.