

Clause 4.6 Written Request to contravene Manly LEP 2013, clause 4.4 - FSR

48 and 50 Eurobin Avenue, Manly

Clause 4.6 Written Request submitted to Northern Beaches Council

Prepared on behalf of Stella Maris College

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1.0 Preliminaries

1.1 Land to which this variation applies and overview of the proposal

This exception to development standards Written Request supports a Development Application (DA) relating to Stella Maris College (the **College**), an independent secondary school for girls that is owned and governed by the Good Samaritan Education (**GSE**).

The College is located across two separate sites, the Main Campus at 52 Eurobin Avenue, Manly and the smaller Benedict Campus located at 270 Pittwater Road, Manly. The DA the subject of this Written Request relates to 48 and 50 Eurobin Avenue, Manly (the **New School Site**) which adjoins the Main Campus to the west.

The DA proposes to change the use of the New School Site from residential to an *educational establishment/school* (to be used in connection with Stella Maris, College) and installation of a prefabricated single storey temporary demountable building. After a period of 24 months the temporary demountable building will be removed and the New School Site will be made good (open space turf).

This Written Request has been prepared by Robinson Urban Planning Pty Ltd (**RUP**). It should be read in conjunction with the Statement of Environmental Effects (**SEE**) that accompanies the DA.

1.2 Relevant environmental planning instrument

This exception to development standards Written Request relates to Manly Local Environmental Plan 2013 (**Manly LEP 2013**).

1.3 Relevant development standard

This exception to development standards Written Request relates to the floor space ratio (**FSR**) development standard at clause 4.4 of Manly LEP 2013 which states that the maximum FSR for the New School Site is 0.6:1 (which represents a *gross floor area (GFA)* of 558.78m² on the New School Site which has an area of 931.3m²).

1.4 Proposed contravention of to the standard

As calculated by JDH Architects, the proposed single storey prefabricated temporary demountable building, which will be in place for a period of 24 months, has a GFA of 644.93m² which equates to an FSR of 0.71:1 on the New School Site.

The proposal on the New School Site contravenes the 0.6:1 FSR standard by 86.15m² which represents a temporary contravention of 0.11:1 or 15.4%.

The GFA/FSR as permitted by the FSR standard and proposed on the New School Site is summarised in **Table 1**.

Table 1 – GFA/FSR permitted by Manly LEP 2013 and proposed[^]

Site Area: 931.3m ²	Proposal on the New School Site	Manly LEP 2013 clause 4.4	Contravention
GFA (m ²)	644.93	558.78	86.15
FSR	0.71	0.6:1	0.11:1
%			15.4%

[^] Based on Drawing DA_111 Rev D by JDH Architects

1.5 Project need

The proposed prefabricated single storey temporary building will house students during critical works on the Main Campus, being the demolition of the two storey Block G and construction of the new Creative Arts Building.

The proposed temporary demountable building which proposes eight (8) general learning areas (GLAs) will replace the existing 11 GLAs in Block G.

The proposed prefabricated temporary building on the New School Site will be in place for a period 24 months. Following that, the temporary demountable building will be removed from the New School Site and the land will be made good (open space turf).

The New School Site was acquired by the College to provide temporary accommodation for students during the construction period as the Main Campus has no capacity to accommodate GLAs during this time.

It is noted that should the New School Site be granted approval for an *educational establishment/school* change of use, temporary demountable buildings could be installed under the relevant provisions of *State Environmental Planning Policy (Transport and Infrastructure 2021 (Transport and Infrastructure SEPP))* as either exempt development, development permitted without consent, or alternatively a complying development (one and two storey forms for a period of 48 months). Using these planning pathways, there is no FSR development standard.

In this instance, the temporary demountable could not comply with all of the relevant setback standards (as a minimum of eight (8) GLAs were required by the College in a single storey form to avoid the costly requirement to install a lift).

As such the exempt, development permitted without consent and complying development provisions were not available and a DA is required for the temporary demountable building.

2.0 Justification for the exception and matters for consideration

2.1 Clause 4.6

Clause 4.6 of Manly LEP 2013 states:

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....*

2.2 Land and Environment Court tests

This section of the Written Request assesses the proposed contravention of the FSR standard against the cl. 4.6 considerations using the accepted tests for the assessment of development standard variations established by the NSW Land and Environment Court in:

- *Initial Action v Woollahra Municipal Council* [2018] NSWLEC 118
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 ('Four2Five No 3')
- *Wehbe v Pittwater Council* [2007] NSW LEC 82
- *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46.

2.3 Clause 4.6(3)

The applicant bears the onus to demonstrate that the matters in cl. 4.6(3) have been adequately addressed by the Written Request in order to enable the consent authority to form the requisite opinion of satisfaction. The applicant's Written Request seeking to justify the contravention of the development standard must adequately address both:

- That compliance with the development standard is **unreasonable or unnecessary** in the circumstances of the case (cl 4.6(3)(a)); and
- That there are **sufficient environmental planning grounds** to justify contravening the development standard (cl 4.6(3)(b)).

The following sections justify contravention of the FSR development standard using these tests.

2.3.1 Clause 4.6(3)(a) (Whether compliance with the development standard is unreasonable or unnecessary)

The common ways in which an applicant might demonstrate that compliance with a development standard is **unreasonable or unnecessary** are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446. Although *Wehbe* concerned a SEPP 1 objection, the common ways to demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe* are equally applicable to cl 4.6. The five ways to demonstrate that compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way.

The five ways to demonstrate that compliance with the standard is unreasonable or unnecessary and the relevance to this Written Request are noted below:

1. *The objectives of the development standard are achieved notwithstanding non-compliance with the standard*

The objectives of the FSR standard (Manly LEP 2013 cl. 4.4(1)) are satisfied as noted below:

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

The proposed demolition of the existing single storey dwelling, two storey duplex and associated structures on the New School Site and proposed single storey prefabricated temporary demountable building are consistent with the existing and desired streetscape character for the following reasons:

- The temporary building is a single storey structure with a maximum height of approximately 5m, which is consistent with the one and two storey residential built form in the surrounding area
- Neutral materials and finishes are proposed so the temporary building will sit comfortably within the streetscape
- Suitable supplementary planting is proposed to the front and side boundaries (north and west) with existing vegetation maintained along the rear boundary (south) to preserve the character of the site and surrounding area
- New fencing is proposed to Eurobin Avenue to match the existing fencing on the Main Campus, presenting as a seamless extension to the existing College grounds
- The proposal complies with the front and side setback controls for residential development, as such the location and position of the temporary building is consistent with the residential built form in the surrounding area

- The temporary building will only be in place for a period of 24 months, following that the site will be made good (open space turf).

(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

Like existing dwellings within the street, the proposed temporary building is single storey. It therefore respects the bulk and scale of adjoining development. The proposal is well below the permitted 8.5m building height standard that applies to the site (5m proposed), as such the proposal will not adversely affect any public or private views or obscure any important landscape or townscape features.

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

A good standard of design is proposed, consistent with existing residential development in the area. New fencing is proposed to Eurobin Avenue to match existing fencing on the Main Campus, presenting as a seamless extension to the existing College grounds. The proposal therefore retains the existing and desired future character of the area.

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

An assessment of the environmental effects of the proposal for neighbouring properties and public spaces follows:

Overshadowing

Shadow diagrams for midwinter have been prepared by JDH Architects.

A summary of the proposal's solar impacts is outlined below:

- The proposal will create a small amount of temporary additional overshadowing to the rear private open space of properties to the south of the New School Site (at 4, 6 and 8 Iluka Avenue) from 9.00 am to 12.00 midday
- From 12.00 midday onwards, the proposal will not create any additional overshadowing to any neighbouring property
- At no time is the public domain impacted by the proposal by way of solar access impacts.

The proposal complies with the relevant solar access provisions of Manly DCP 2013 as follows:

- Due to the location and orientation of the site, the proposal does not reduce solar access to more than one third of the existing sunlight access of the adjacent properties, consistent with Section 3.4.1.1 of Manly DCP 2013
- The proposal complies with Section 3.4.1.2 of Manly DCP 2013 which requires solar access to windows of living rooms to adjacent buildings to be maintained for at least 2 hours between 9.00 am and 3.00 pm. The proposal will not impact any north facing windows.

The proposal also complies with Section 3.40(5) and Schedule 6 Overshadowing Standard of the Transport and Infrastructure SEPP which states that to be complying development, a new building or an alteration or addition to an existing building must not overshadow any adjoining residential accommodation so that solar access to any habitable room or principal private open space on the adjoining property is reduced to

less than 3 hours between 9:00 am and 3:00 pm at the winter solstice, or is reduced in any manner if solar access to any habitable room on the adjoining property is already less than 3 hours. This complying development standard provides a useful guide for the proposal.

Visual Privacy

The proposed change of use to *educational establishment/school* and associated works does not give rise to any privacy issues as:

- The proposed new temporary building is single storey, with limited openings proposed to the west and south elevations
- Existing boundary fencing is to be retained to the west and to south of the New School Site along with additional supplementary planting, which will protect the privacy of the adjacent occupants of the residential dwellings
- School uses (existing) adjoin the New School Site to the east, being the Main Campus and three storey Scholastica Building
- No change is proposed to the student and staff population of the College and the use of the New School Site and Main Campus will operate during standard school hours with students supervised by school staff at all times.

Acoustic privacy

A Noise Assessment has been carried out by JHA Acoustics which concludes that the noise impacts of the proposal will be reasonable.

Views

The proposed temporary building is single storey with a flat roof. As such, it will not adversely affect any public or private views.

Heritage

The proposed change of use and new temporary demountable building will not detrimentally impact the nearby heritage items being the Convent Building and two figs located on the Main Campus, given the distance and intervening buildings.

(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.

N/A

As the proposal satisfies the FSR development standard objectives, compliance with the standard in this instance is unnecessary and unreasonable.

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

Not applicable. The underlying objective or purpose of the FSR standard is relevant to the development and is achieved as outlined above.

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

Not applicable. The underlying object or purpose of the FSR standard would not be defeated or thwarted if compliance was required.

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

Not applicable. The FSR standard has not been abandoned by the granting of consents by Council.

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.

Not applicable. The zoning of the land is reasonable and appropriate.

2.3.2 Clause 4.6(3)(b) (Whether there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b))

"Sufficient environmental planning grounds" is a phrase of wide generality (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 [26]):

Subclause (3)(b) requires a written report to demonstrate that sufficient environmental planning grounds support the contravention of a development standard. The EPA Act or the LEP do not define "sufficient" or "environmental planning grounds". As the Appellant submitted these phrases are of wide generality enabling a variety of circumstances or grounds to justify contravention of the particular development standard. The "sufficient ... grounds" must be "environmental planning grounds" by their nature. The word "environment" is defined in the EPA Act to mean "includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings".

The environmental planning grounds relied on in the Written Request under cl. 4.6 must be sufficient to justify contravening the development standard. 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 [24].

Four2Five [31]:

Further support for the Commissioner's approach is derived from the use of the word "sufficient". Contrary to the Appellant's submission that this suggests a low bar, I draw the opposite inference, namely that the written report must address sufficient environmental planning grounds to inform the consent authorities finding of satisfaction in cl 4.6(4)(a)(i).

Using these tests, there are **sufficient environmental planning grounds** to vary the FSR development standard in this instance given that:

- The proposed prefabricated single storey temporary building will house students during critical works on the Main Campus, being the demolition of the two storey Block G, and construction of the new Creative Arts Building
- The temporary demountable building which proposes eight (8) GLAs will temporarily replace the existing 10 + GLAs on the Main Campus located in the Block G to be demolished
- The proposed prefabricated temporary building on the New School Site will be in place for a period of 24 months (from date of issue of Occupation Certificate), minimising disruption to the College's current operations whilst these vital works are undertaken

- Following that the temporary demountable building will be removed from the New School Site and made good (open space turf). As such the contravention from the FSR standard is temporary
- The DA does not seek to increase the density of the combined Main Campus and New School Site, as there is no increase in student or staff population or change to the operating hours of the College
- There is no impact to current access, parking and traffic conditions as a result of the proposal
- The proposal maintains the pre-existing residential building pattern along Eurobin Avenue and presents a polite height, bulk and scale that sits comfortably within the existing and desired future character of the locality
- The proposed alterations and additions are compliant with the height standard, and the predominant front and side setbacks
- There are no unreasonable overshadowing impacts arising from the contravention
- There are no unreasonable privacy impacts arising from the contravention
- There are no public or private view impacts arising from the contravention
- There are no unreasonable noise impacts arising from the contravention
- The proposal is for a temporary building which will be removed from the site, as such any impacts arising from the proposal is transitory.

2.4 Clause 4.6(4)(a)

Clause 4.6(4)(a) establishes preconditions that must be satisfied before a consent authority (or the court exercising the functions of a consent authority) can exercise the power to grant development consent.

The first opinion of satisfaction in cl 4.6(4)(a)(i) is that the Written Request has addressed subclause (3). As demonstrated above at Section 2.3, the Written Request has addressed both parts of cl. 4.6(3). Demonstrating:

- That compliance with the FSR standard is unreasonable and unnecessary; and
- That there are sufficient environmental planning grounds to justify contravening the development standard.

The second opinion of satisfaction in cl 4.6(4)(a)(ii) is that the proposed development will be in the public interest because it is consistent with the objectives of the development standard that is contravened and the zone objectives. The consent authority must be satisfied that the development is in the public interest because it is consistent with these objectives, not simply that the development is in the public interest.

The consistency of the development with the objectives of the FSR development standard is addressed above at Section 2.3.1.

The consistency of the development with the objectives of Zone R1 – General Residential is noted below, demonstrating that the development is in the public interest

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

The proposed change of use of the New School Site to an *educational establishment/school* to be used in association with Stella Maris College will provide educational services to meet the day to day need of residents.

The proposed prefabricated temporary building will house students during works on the Main Campus, being the construction of the new Creative Arts Building. The temporary demountable building will replace existing GLAs on the Main Campus during this period (being approximately 24 months), minimising disruption to the College's current operations whilst these vital works are undertaken. Following that the temporary demountable building will be removed from the New School site and made good (open space turf).

The proposed development will be in the public interest because it is consistent with both the objectives of the FSR standard and the objectives for development within the zone.

2.5 Clause 4.6(4)(b) (Concurrence of the Secretary of the Department of Planning, Industry and Environment)

The Secretary has granted concurrence to Northern Beaches Council.

3.0 Conclusion

The proposed change of use to the New School Site to an *educational establishment/school* (to be used in connection with Stella Maris College) and installation of a new temporary demountable building, with an FSR of 0.71:1 (644.93m²) represents a temporary contravention of 86.15m² (15.4%) from the FSR standard of 0.6:1.

Consistent with the tests established by the Land and Environment Court, this cl. 4.6 Written Request to contravene the FSR standard demonstrates that:

- Compliance with the development standard is unreasonable and unnecessary;
- There are sufficient environmental planning grounds to justify contravening the development standard; and
- The proposed development will be in public interest because it is consistent with the objectives of the FSR development standard and the zone objectives.