

UPDATED CLAUSE 4.6 TO CLAUSE 4.4 OF MANLY LEP 2013

EXCEPTIONS TO DEVELOPMENT STANDARDS – **FSR VARIATION**

*Construction of new four-storey dwelling house with swimming pool, and off-street  
car parking*

at

60 CASTLE CIRCUIT SEAFORTH

PREPARED BY

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## **MANLY LEP 2013 - CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARDS**

This Clause 4.6 variation request has been prepared to accompany the development application that seeks construction of new four-storey dwelling house with swimming pool, and off-street car parking, at Lot 16 in DP 200638, commonly known as No. 60 Castle Circuit, Seaforth.

Clause 4.6 of the *Manly Local Environmental Plan 2013* (MLEP2013) allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards.

This Clause 4.6 variation request takes into account the relevant aspects of the Land and Environment Court judgement from *Initial Action Pty Ltd v Woollahra Council [2017] NSWLEC 1734*, as revised by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130*.

### **Clause 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 Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

### **Development Standard to be Varied**

The proposal seeks a variation to the development standard contained within Clause 4.4 of the MLEP2013 - maximum FSR of 0.4:1, as demonstrated on the LEP map in **Figure 1** below.

Pursuant to Clause 4.4 of MLEP2013, the site is subject to a maximum FSR of 0.4:1 (GFA 251.52m<sup>2</sup>), with the proposal for 0.43:1 (323.33m<sup>2</sup> GFA). However, in accordance with Section 4.1.3.1 of the Manly DCP 2013, exceptions to FSR may be considered for undersized lots. In this regard, the calculation of FSR for the subject site within the subzone "U" on the LEP Minimum Lot Size Map is based on a 750m<sup>2</sup> lot size, and consequently allows for a maximum GFA of 300m

In this regard, the proposed FSR of 0.43:1 (323.33sqm) is a minor 23.33m<sup>2</sup> variation from the DCP control.

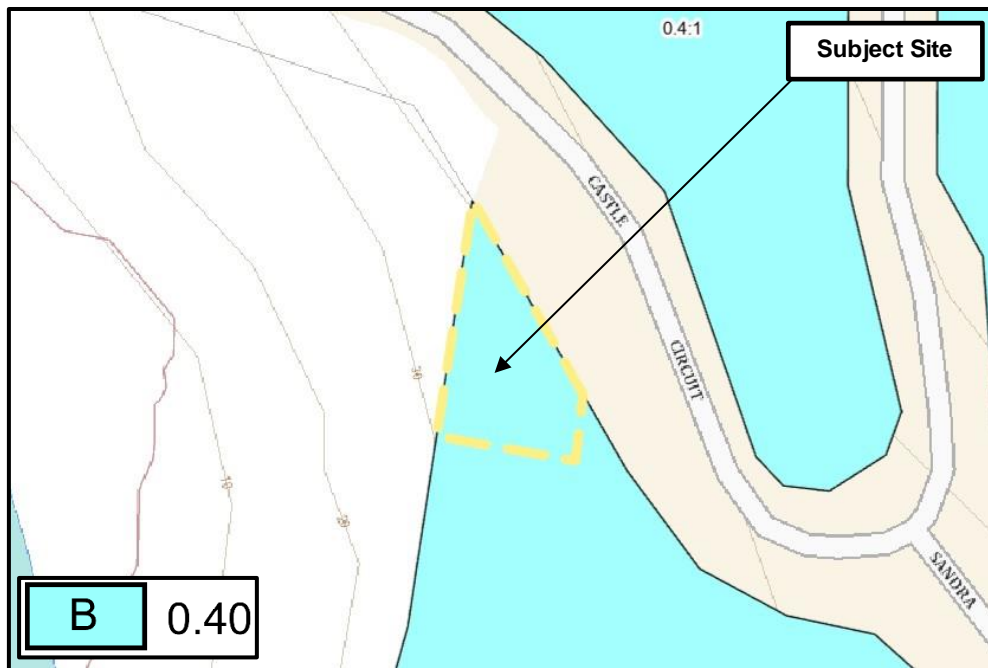


Figure 1: Floor Space Ratio Map

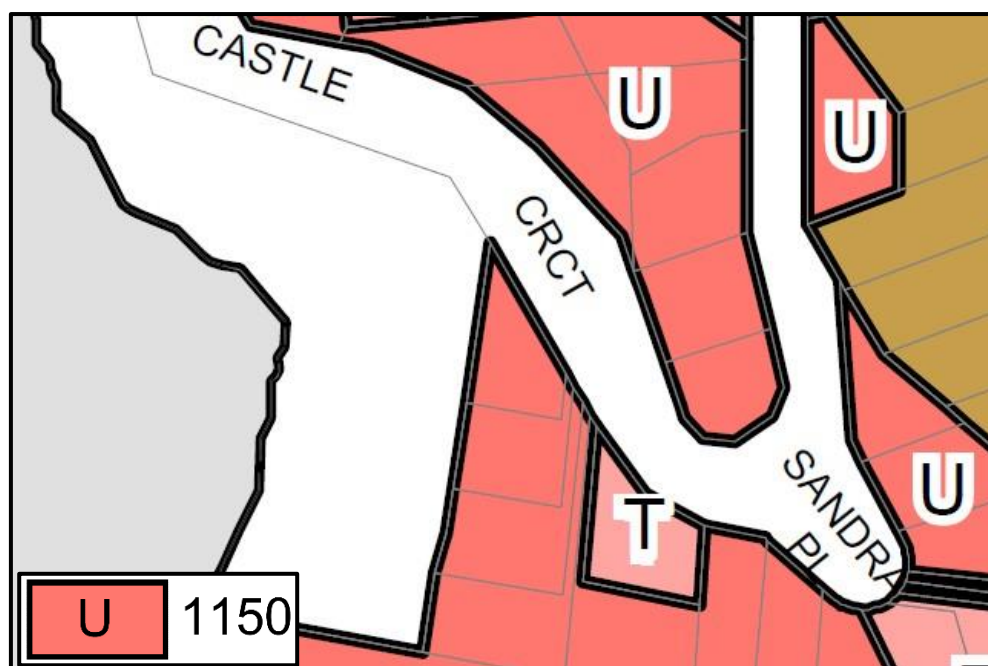


Figure 2: Minimum Lot Size Map

## Justification for Contravention of the Development Standard

This written request is considered to justify the contravention of the development standard and addresses the matters required to be demonstrated by Clause 4.6(3), of which there are two aspects. Both aspects are addressed below:

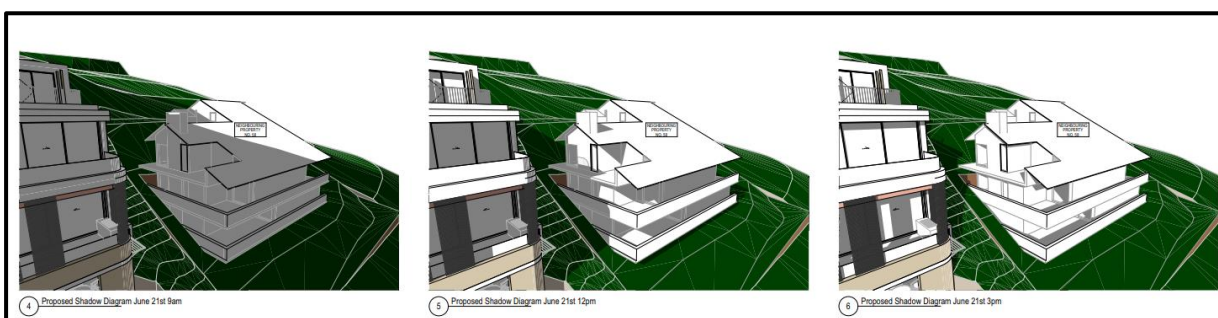
*(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case*

**Assessment:** It is considered that strict compliance with the development standard for FSR on the site is unreasonable and unnecessary in the circumstances for the following reasons:

- The proposal complies with the objectives of the development standard and the R2 Low-Density Residential zone, indicated in the assessment in **Table 1** below. Furthermore, compliance with the development standard is unreasonable and unnecessary as it is in the public interest, given it is consistent with the objectives for the development within the zone.
- Notwithstanding the numeric departure, the proposed dwelling house will have a height, bulk and scale compatible with the scale of the existing built form (that has been approved (0.4:1) and on neighbouring sites) and that of the broader surrounding local area. Furthermore, the FSR non-compliance will not have an adverse impact to surrounding properties, the streetscape or adjoining Environmental Conservation zoned land.

## Overshadowing

- The proposed FSR variation will also not generate any adverse shadow impacts as the shadows to 58 Castle Circuit are generated by the built form which is compliant with the height limit. In any event, the property to the south will maintain in excess of 3 hours solar access between noon and 3pm to the primary living and private open space areas of that property, as shown below:



**Figure 3: 3d solar access diagrams which show that the primary north and east-facing living room will continue to receive in excess of 3 hours between 9am and 3pm on June 21**

## Visual and Acoustic Privacy

- Visual and acoustic privacy impacts to adjoining neighbours from the additional FSR has also been carefully considered, with primary living areas oriented to the rear of the dwelling, which ensures that visual privacy is maintained to the southern adjoining neighbour.

## Visual Impact from Bulk and Scale

- The proposal has been designed to reduce bulk and scale, with the single-storey presentation to the street frontage is compatible and subservient with surrounding properties opposite on Castle Circuit, being not visually dominant in the streetscape. The FSR is unapparent from the streetscape and from neighbouring properties.



**Figure 4: View from across Castle Circuit to the proposed development noting the modest single-storey scale addressing the streetscape.**

- The proposed FSR variation is not considered to be responsible for any unreasonable bulk or scale impacts, noting that a significant proportion of the building is excavated into the hillside, whilst the stepped built form of the dwelling is compatible with the sloping nature of the topography of the site and surrounding properties. When viewed from the waterways, the dwelling will be viewed against the backdrop of dwellings higher up-slope and therefore, the FSR variation will not generate a built form that is prominent nor out of character with the established pattern of development in this foreshore location. The above-ground FSR is well below the FSR standard as a considerable extent of the FSR is

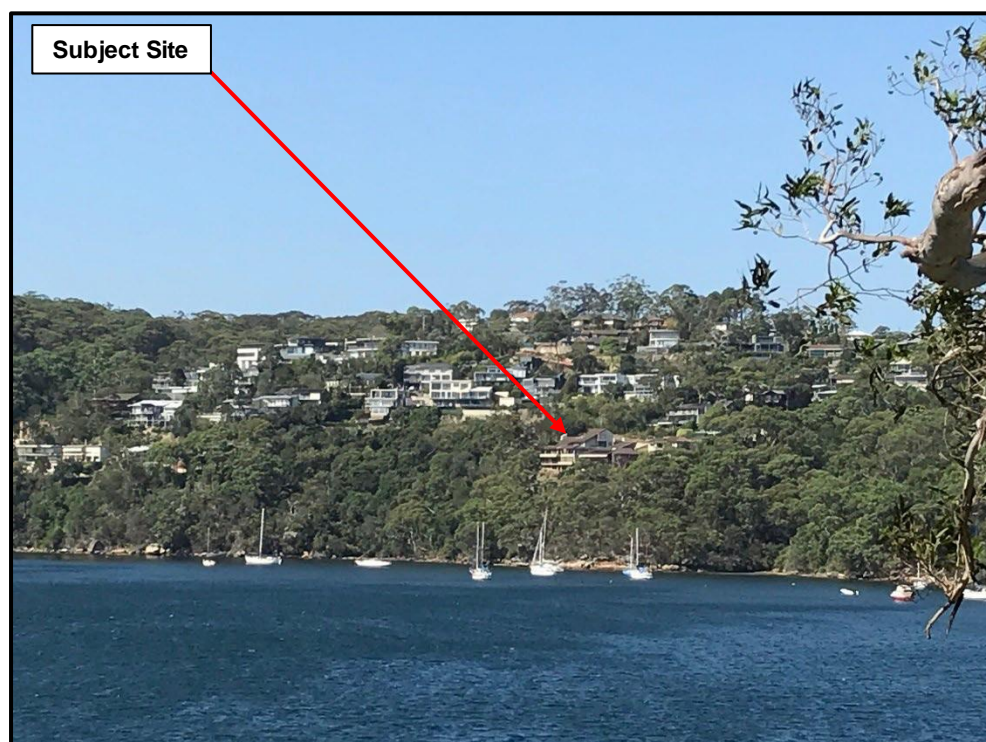
below existing ground level.

- Notwithstanding the exception to FSR for undersized lots, the proposed FSR is compatible with the site and context of the locality whilst the proposed built form is considered to be reasonable when compared with substantially larger homes, including those opposite the subject site which have a greater presence in the streetscape.



**Figure 5: Photo looking north and opposite subject site to dwellings along Castle Circuit, illustrating bulk and scale streetscape impacts associated with the nearby dwellings.**

- The substantial distance to the proposal from public view access confirms that the dwelling, including the additional FSR, will be viewed against the backdrop of dwellings higher up-slope, as shown above.



**Figure 6: Zoomed photo from Castlecrag noting the substantial distance to the proposal from**

**the public view access which confirms that the dwelling (including the additional FSR) will be viewed against the backdrop of dwellings higher up-slope, as shown above.**

## View Impacts

- The additional FSR will not be responsible for any adverse view impacts from the public domain nor from private residences. The dwellings higher upslope will continue to look out and over the built form whilst the sole adjoining residence to the south will also retain 180 degree views, notwithstanding the FSR variation.



**Figure 7: View from higher up slope showing the single storey of the built form and that the FSR variation would be indiscernible.**

## Amenity

- The FSR variation maintains a high level of internal amenity as demonstrated by compliance with the key amenity criteria including outperformance of the deep soil landscaped area (46.18%) and total open space (72.8%), plus above ground open space. The proposed 289.47m<sup>2</sup> of deep soil area allow for a sympathetic landscape planting which integrates with the adjacent C2 zone, whilst softening the visual bulk appearance of the development.

Despite the non-compliance, the proposal achieves the objectives of the development standard and the zoning, as demonstrated in the following table:

**Table 1: Assessment against the Objectives of the Development Standard and Land Use zone.**

<b>1 Consistency with the objectives of the FSR standard in the LEP</b>	
<b>Objectives</b>	<b>Assessment</b>
<i>4.4(a) to ensure that the bulk and scale of development is consistent with the existing and desired streetscape character</i>	<p>The bulk and scale of the proposed dwelling house sits comfortably in its context presenting a single storey to the street frontage.</p> <p>The single-storey presentation allows for retention of water views and is compatible with the sensitive nature of the locality. Notably, the proposed bulk and scale of the development is consistent with the existing and desired streetscape character.</p> <p>The proposal outperforms the deep soil landscaped area and total open space controls, ensuring that the dwelling house is integrated into the surrounding bushland and sympathetic with the character of the locality.</p> <p>The high-quality architectural design and proposed landscaping achieves a desirable outcome to the locality which is consistent with the objectives and controls.</p> <p>On this basis, the FSR variation does not generate any inconsistency with this objective.</p>
<i>4.4(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</i>	<p>The proposed architectural design is considered to address the site constraints. The proposed density, intensity and bulk of the dwelling will be compatible with the site and context. The proposed FSR does not preclude the development to be sympathetic with the existing bushland and harbour scenic protection area within the locality.</p> <p>The proposed density and bulk do not dominate the subject site and allow for integrated landscaping, whilst protecting water views from surrounding properties and public areas.</p> <p>The modest single-storey presentation to the streetscape combined with an acceptable building envelope and footprint ensures there will be no unreasonable adverse impacts in regard to landscape and townscape features.</p> <p>Retained bushland to the north and west will ensure that the built form will be sited in a landscaped setting, notwithstanding the FSR variation.</p> <p>The FSR variation is associated with a 4-bedroom dwelling house which is not considered to be excessive.</p> <p>On this basis, the FSR variation does not generate any inconsistency with this objective.</p>
<i>4.4(c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area</i>	<p>The additional FSR is associated with a development which presents a highly articulated built form and includes balconies and non-trafficable roof, plus landscape planters.</p> <p>Additionally, the proposal includes high-quality landscaping which ensures a positive visual relationship between the dwelling house and existing character and landscape of the foreshore area.</p> <p>As stated above, the retained bushland to the north and west</p>

	will ensure that the built form will be sited in a landscaped setting, notwithstanding the FSR variation.
4.4(d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain	<p>The proposed FSR variation will not be responsible for any unreasonable loss of privacy, loss of water views or depreciation of amenity beyond that of a compliant development. The proposed dwelling will retain a compliant level of solar access to the southern neighbour.</p> <p>As demonstrated above, the proposed additional FSR can be suitably accommodated on the subject site without generating any adverse or unreasonable impacts on the adjoining residences and public domain.</p> <p>On this basis, the FSR variation does not generate any inconsistency with this objective.</p>
Consistency with the objectives of the R2 Low Density Residential	
Objectives	Assessment
<ul style="list-style-type: none"> <li>To provide for the housing needs of the community within a low density residential environment.</li> <li>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</li> </ul>	<p>The proposed FSR variation does not raise any inconsistency with the R2 Low-Density Residential zone objectives. The FSR is associated with a high-quality contemporary dwelling house which provides for the needs of the community and presents a compatible height, bulk and scale with the dwellings in the vicinity of the site.</p> <p>The limited building footprint and envelope retain the low-density nature of the area whilst responding adequately to the sensitive adjacent C2 zone to the west, which is within a foreshore area and classified as bushfire prone zone.</p> <p>The topography of the site associated with the stepped built form mitigates any adverse or significant view, overshadowing, or privacy impacts to adjoining neighbours or the public domain.</p> <p>The proposal will maintain the low-density residential environment, thereby confirming that the variation does not raise any inconsistency with the objectives of the zone.</p>

Based on the above assessment, it is considered that strict compliance with the LEP FSR standard is unreasonable and unnecessary in this instance.

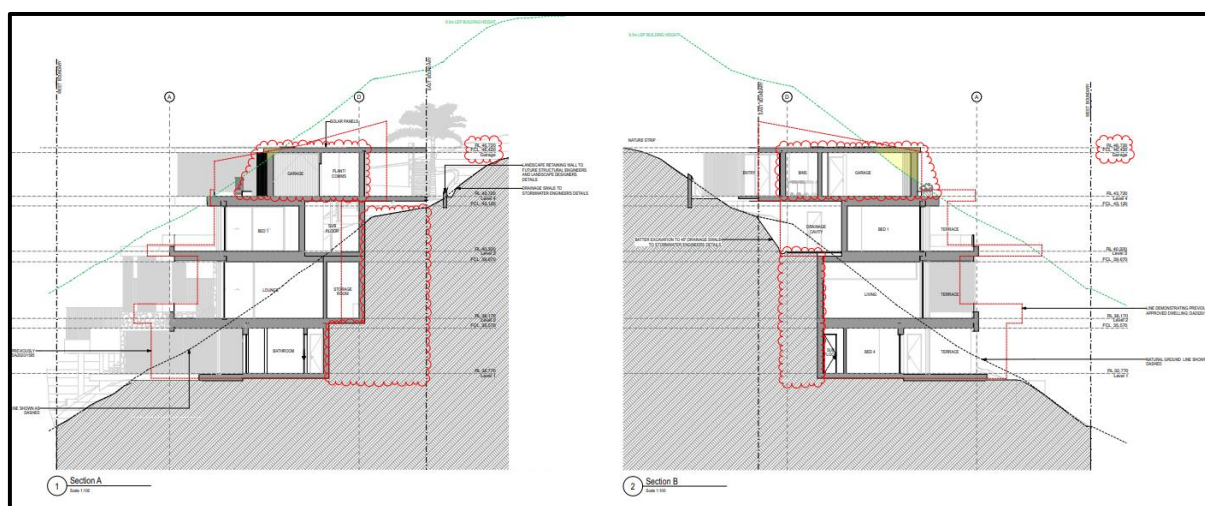
*(b) that there are sufficient environmental planning grounds to justify contravening the development standard*

**Assessment:** The assessment under the unreasonable and unnecessary section of this Clause 4.6 variation demonstrates that there are sufficient environmental grounds to permit the variation in this instance, which include the following:

- It is noted that the variation is only 23sqm beyond the 0.4:1 permitted and that such area is almost equivalent to the 3<sup>rd</sup> car space/circulation (24.38sqm) beyond the double garage area of 6m x 6m/36sqm exclusion from GFA..
- If the additional car space is considered to be allocated as the additional GFA, such GFA is a positive outcome for the site as it provides for an additional car space for the site which is detached from the street frontage. The high-quality presentation of the garage as shown

in the streetscape images demonstrates that the additional GFA would not be responsible for any adverse streetscape impacts. Furthermore, the additional GFA would not be responsible for any adverse view, shadow, privacy or shadow impacts.

- If the additional GFA is located elsewhere, it could be within Level 1 (the lowest level). GFA in this level is concealed from the public domain, from the sole adjoining neighbour to the south and from the harbour. The GFA is also below existing ground level as confirmed on the series of section diagrams, as shown below. On this basis, the above-ground level FSR would be compliant.



**Figure 8: Excerpt of sections A and B which show that the excess FSR could be attributed to the lowest level which is below existing ground level**

- It is reiterated that the additional FSR beyond the standard is not responsible for any greater shadow, privacy or view impacts beyond that of a dwelling with a compliant FSR.
- The additional FSR beyond the approved dwelling on the site is only 23sqm greater. Notwithstanding, the proposed overall bulk and scale is subservient to that approved as noted by the outline of the approved dwelling on the section diagrams above. In this regard, the approved dwelling extended beyond the footprint of the proposed dwelling. Given that the proposed dwelling is more articulated and includes above-ground landscaping, the proposed FSR variation is considered to be indiscernible when compared with the approved dwelling.

Based on the above points, it is considered that there are sufficient environmental planning grounds to permit the FSR in this instance.

### Other Matters for Consideration

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

**Assessment:** The above assessment demonstrates that the proposed FSR satisfies the objectives of the FSR standard and the R2 Low-Density Residential zone.

Furthermore, it is considered that the variation does not raise any matters of public interest as there are no public views or detrimental streetscape outcomes associated with the FSR variation.

Given that the proposal is consistent with the desired future character for the area nominated by the specific controls in the LEP and DCP, and that there are no adverse or unreasonable impacts to the broader community, it is considered that there are no public interest matters which would prevent a variation to the FSR control.

*(5) In deciding whether to grant concurrence, the Director-General must consider:  
(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning*

**Assessment:** The proposed height variation allows for the orderly and economic use of land as envisaged by the *Environmental Planning and Assessment Act, 1979*.

The proposed FSR allows for the achievement of a compatible building envelope without creating a development with overbearing height, bulk, or scale and without compromising the desired future character of the area.

The proposed FSR is therefore consistent with the State and Regional Policies, particularly urban consolidation principles, which seek to provide additional height and density near transport and established services.

*(b) the public benefit of maintaining the development standard*

**Assessment:** There is no public benefit in maintaining the FSR standard given the limited amenity impacts associated with the development, which provides a high level of internal amenity, and the positive streetscape outcome that would arise from the development of the subject site, while being sympathetic to the environmental constraints of the surrounding local area.

*(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.*

**Assessment:** There are not considered to be any additional matters to consider beyond those discussed above

## Conclusion

For reasons mentioned herein, this Clause 4.6 variation is forwarded in support of the development proposal at No. 60 Castle Circuit, Seaforth and is requested to be looked upon favourably by the consent authority.