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8th March 2023

The General Manager
Northern Beaches Council
Po Box 882
MONA VALE NSW 1660

Attention: Megan Surtees – Planner

Dear Ms Surtees,

Development Application DA2022/1675
Issues response/ addendum Statement of Environmental Effects/ Updated clause 4.6 variation requests – Height of buildings and FSR
Alterations and additions to a dwelling house including a swimming pool
57 Cutler Road, Clontarf

Reference is made to Council's issues letter of 10th February 2023 in which a number of issues were raised in relation to the detailing of the application. This submission represents a considered response to the issues raised and is to be read in conjunction with the following amended/supplementary documentation:

- Amended architectural plans A.00(B) – A.11(B) prepared by Gartner Trovato Architects, and
- Updated clause 4.6 variation requests – Height of buildings and FSR (Attachment 1).

The proposed amendments are shown clouded on the architectural plans and can be summarised as follows:

A-02 Lower Ground Floor Plan

- Driveway amended to reflect existing driveway.

A-03 Ground Floor Plan

- Pool Setback adjusted to 1.0m off rear boundary.

A-04 First Floor Plan

- Terrace off Master Suite 2 reduced to 1.0m deep balcony.
- Privacy screen on terrace reduced.
- Provision of an increased 8 metre setback to the rear boundary from the first floor Master Suite 2.
- Provision of an increased setback to the eastern boundary from the first floor Master Suite 2.

- Provision of an increased setback to the eastern boundary from the proposed first floor home offices.
- Provision of an increased setback to the eastern boundary from the first floor Master Suite 1and ensuite.
- A reduction in the size of the first floor Master Suite 1 through an increased setback to the street.
- A reduction in the size of the western terrace.
- The removal of the awning over the western terrace.

A-07 SECTIONS

- Accurately nominate the 8.5 metre building height standard above ground level (existing) in accordance with Merman.

A-08 SITE CALCULATIONS

- Landscape area amended to reflect driveway reinstatement.
- Landscaped Area increased from 181.64sqm to 185.81sqm.

A-09 FSR CALCS

- FSR recalculated to reflect the reduced first floor level floor space and to calculate gross floor area in accordance with *Connoisseur Investments Pty Ltd v Sutherland Shire Council [2020] NSWLEC 1181.*

- FSR reduced from 299.45sqm to 294.35sqm.

A-10 SHADOWS

- Shadow diagrams amended to reflect architectural changes.

A-11 VIEW ANALYSIS

- New drawing to assist in view loss analysis.

We respond to the issues raised as follows.

Clause 4.3 Height of Buildings

Response: As requested, the plans have been amended to accurately nominate the 8.5 metre building height standard above ground level (existing) in accordance with Merman. The first-floor terrace awning has been removed with the building height measured along the western edge of the first floor additions calculated at 9.27 metres representing a non-compliance of 770mm or 9%.

The gross floor area of the proposed first floor level additions has also been reduced by 16.36m² (noting that the area of internal stairs and lift have now been included reducing the overall reduction in GFA) with the amended plans providing for increased setbacks to the southern and eastern side boundaries. The south facing bedroom terrace has also been significantly reduced in size.

The ability to further reduce the height of the building was investigated with the 2.7 metre ceiling heights proposed at both ground and first floor level considered to be reasonable for an architecturally designed dwelling house in this location with overall building height otherwise determined by the ground floor levels established by the existing dwelling house as retained as a component of the application.

The clause 4.6 variation requests prepared in support of the building height and FSR non-compliances have been updated to reflect the reduction in the extent of building height breach and FSR proposed copies of which are at Attachment 1. We consider the clause 4.6 variation requests to be well-founded.

Clause 4.4 Floor Space Ratio

Response: The amended architectural plan bundle includes accurate GFA/FSR calculation plans repaired in accordance with *Connoisseur Investments Pty Ltd v Sutherland Shire Council [2020] NSWLEC 1181.* The overall GFA, as defined, has been reduced to 294.35sqm representing an FSR of 0.51:1.

The clause 4.6 variation request has been updated accordingly with a copy at Attachment 1. Whilst the GFA proposed exceeds the 0.4:1 FSR standard we consider the clause 4.6 variation request to be well-founded with weight given to the undersized nature of the lot and the associated provisions contained within Manly Development Control Plan.

Maintenance of Views

Response: Having inspected the site and its immediate surrounds to identify potential view corridors across the subject property we are of the opinion that an accurate assessment of potential view impacts is able to be undertaken without the need for height poles. In forming this opinion, we note that the majority of land to the north of the subject property is zoned RE1 Public Recreation with the dwelling house at 1 Alder Street, Clontarf located at a much higher elevation than the subject development site over which filtered views will be retained. We note that an objection has been submitted by the owners of 55 Cutler Road directly to the east of the subject site with turns raised in relation to view loss. The subject property relative to the adjacent RE1 Public Recreation zone land and 1 Alder Street and 55 Cutler Road are depicted in the aerial image at Figure 1 over page.

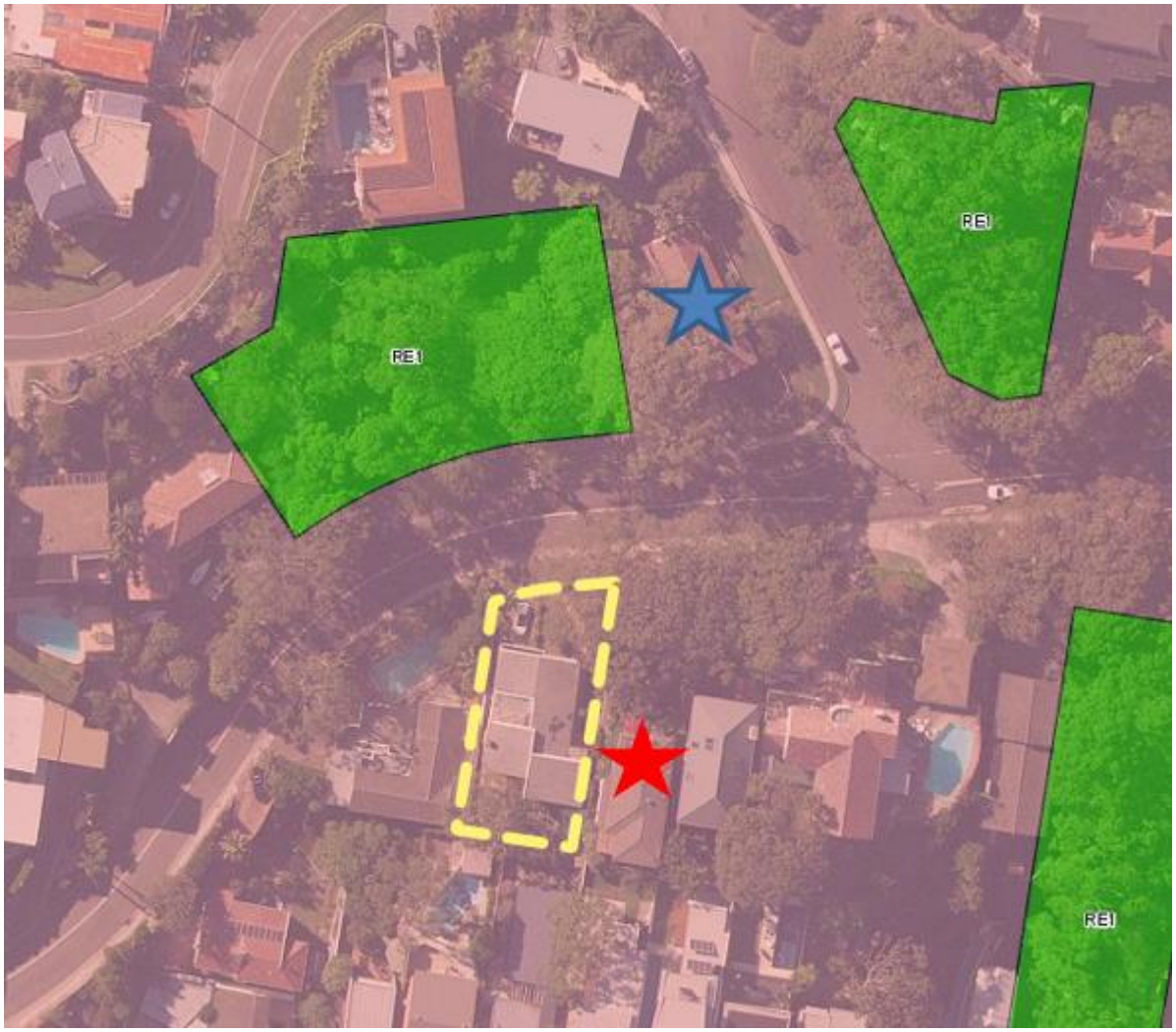


Figure 1 - Aerial photograph showing location of subject site (yellow dotted outline) relative to the adjacent RE1 Public Recreation zone land and 1 Alder Street (red star) and 55 Cutler Road (blue star)

An analysis of potential view impacts having regard to the view sharing principles established by the Land and Environment Court of NSW in the matter of *Tenacity Consulting v Warringah* [2004] NSWLEC 140 is as follows.

First Step - Assessment of views to be affected

An assessment of the view to be affected. The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.

1 Alder Street, Clontarf

Whilst no submission has been received from the owner of this property photos available on realestate.com.au provide some insight as to the view is generally available from this property. The photographs at Figures 2 and 3 show that views are available in a south westerly direction from the upper-level kitchen/living area and adjacent balcony in a south westerly direction across Middle Harbour towards the Balmoral Beach, Balmoral Slopes and the associated land/water interface. These views are filtered to a certain extent by intervening vegetation and built form elements.

Figure 2 - View available in a south westerly direction from 1 Alder Street, Clontarf

Figure 3 - View available in a south westerly direction from 1 Alder Street, Clontarf

55 Cutler Road, Clontarf

The views available from this adjoining property are sweeping views generally in a south/ south westerly direction across middle harbour towards Balmoral Beach, the Balmoral Slopes and the associated land/water interface around to Cobblers Bay. These views are depicted in photographs obtained from realestate.com.au at Figures 4, 5 and 6.

Figure 4 - View available in a south westerly direction from 55 Cutler Road, Clontarf

Figure 5 - View available in a south/ south westerly direction from 55 Cutler Road, Clontarf

Figure 6 - View available in a south westerly direction from 55 Cutler Road, Clontarf

Second Step - From what part of the property are the views obtained

The second step is to consider from what part of the property the views are obtained. For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.

1 Alder Street, Clontarf

Floor plans obtained from realestate.com.au confirm that the views at Figures 2 and 3 are available from the upper-level kitchen, living room and adjacent balcony from both a standing and seated position although seated position views are extremely vulnerable given the relatively shallow nature of the view and intervening landscape and built form elements. A copy of the floor plans is at Figure 7.

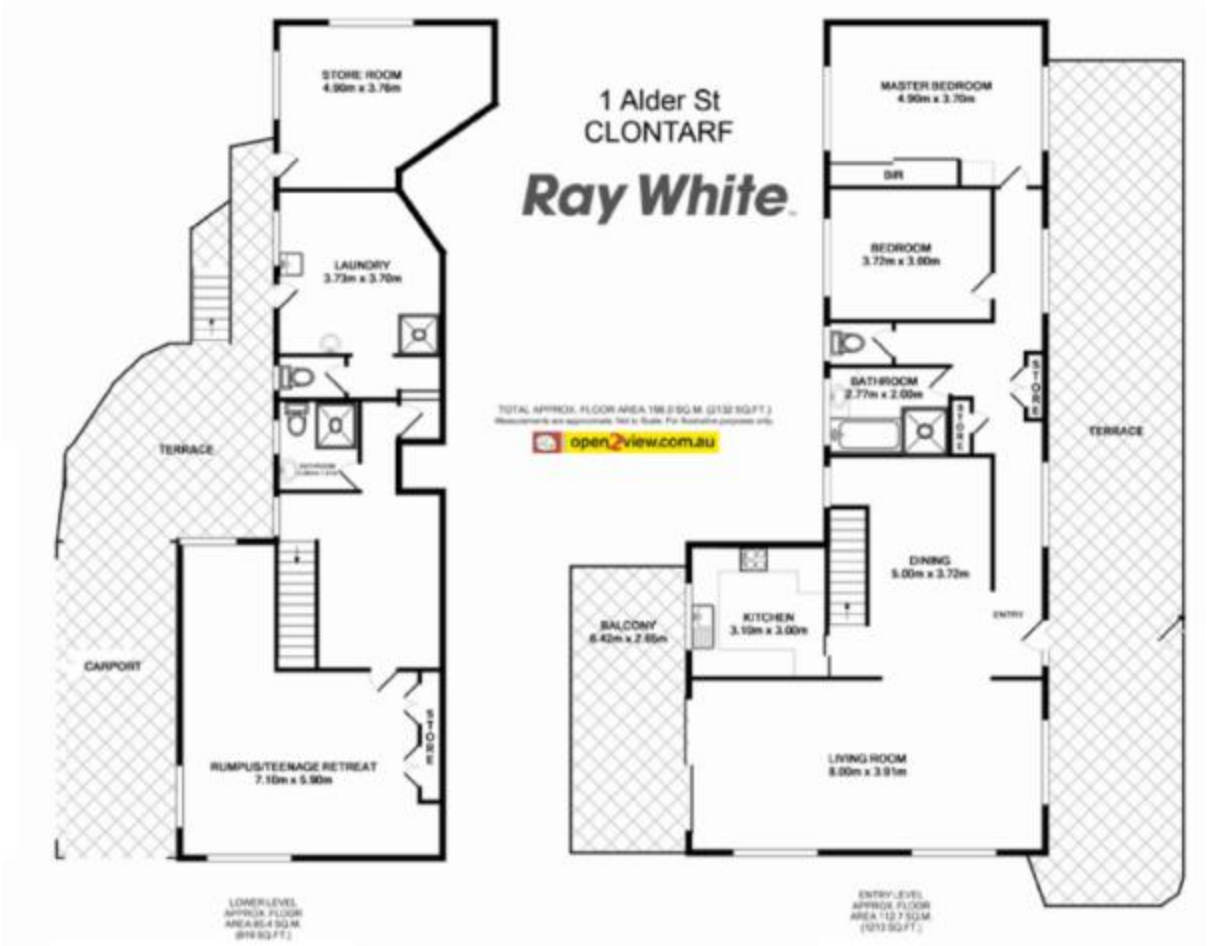


Figure 7 – Floor plans of 1 Alder Street, Clontarf obtained from realestate.com.au

55 Cutler Road, Clontarf

Floor plans obtained from realestate.com.au confirm that the views at Figures 4 and 5 are available from the upper-level (first floor) Living room and dining room and adjacent south western corner balcony. The view at Figure 6 is from the ground floor level master bedroom. We note that the submission from the owner of 55 Cutler Street appeared to ignore the views available from the upper-level principal living areas and adjacent balcony with primary focus on views available from the ground floor level study and Bedroom 1 which were incorrectly identified as principal living areas.

The views form the upper level living areas and balcony are from both a standing and seated position with the views from the ground floor level master bedroom also available from both a standing and seated position although the seated position views are extremely vulnerable given the relatively shallow nature of the view and intervening landscape and built form elements. A copy of the floor plans is at Figure 8.

Figure 8 – Floor plans of 55 Cutler Road, Clontarf obtained from realestate.com.au

<u>Third Step – Assessment of extent of the impact</u>

The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.

<u>1 Alder Street, Clontarf</u>

The subject property is visible in Figures 2 and 3 particularly the pitched roof form located in the north-western corner of the property over which the views are obtained.

The north-eastern corner of the proposed ground floor additions maintain the front and side boundary setback alignment and eave height of the existing pitched roof form with the proposed upper-level set well back from the front and western side boundary to maintain the existing view corridor as depicted in Figures 9 and 10. In this regard, we are satisfied that the existing views will be retained with view impact appropriately described as negligible.

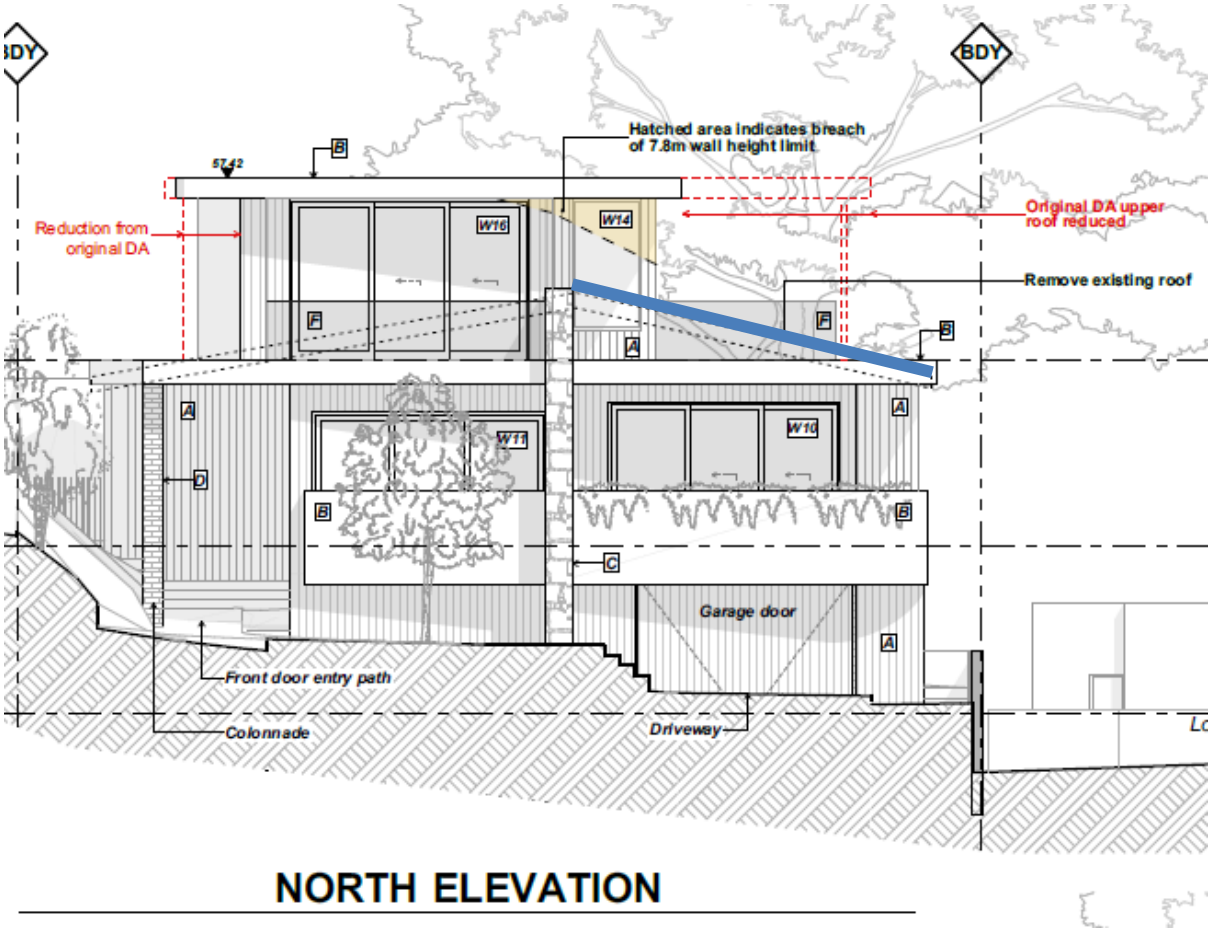


Figure 9 – Plan extract showing the height and alignment of the existing pitched roof form over which existing views are obtained (existing roof shown with blue line).

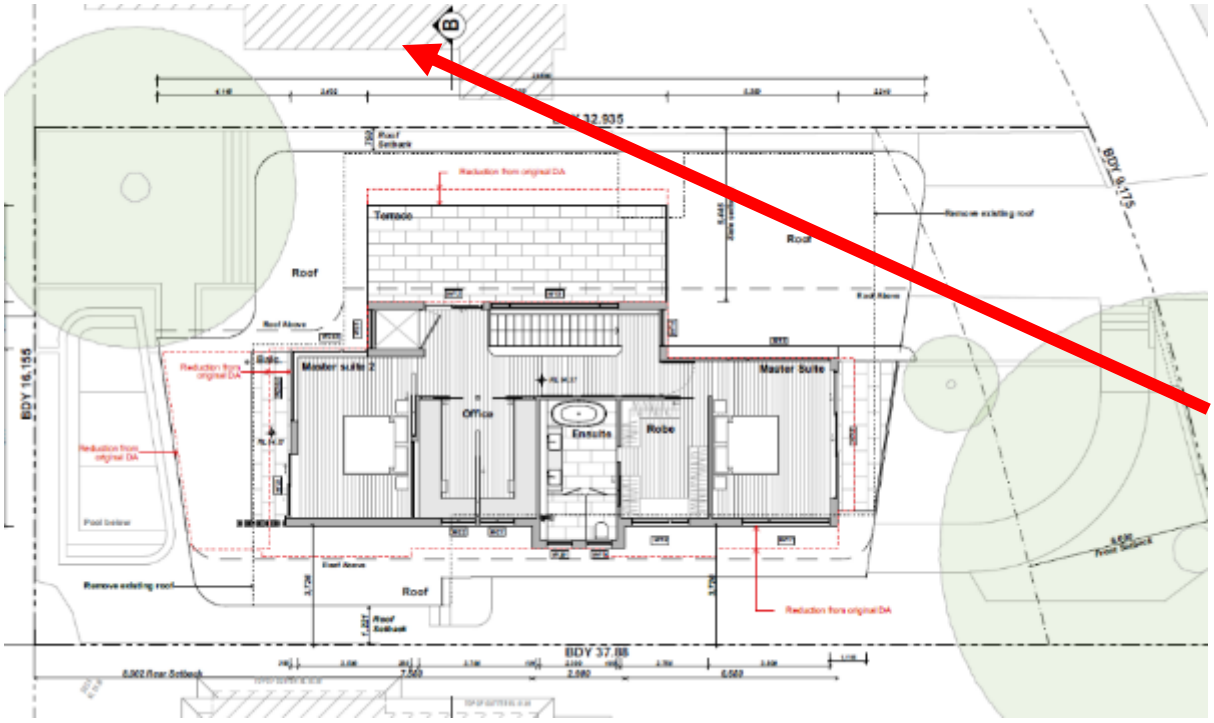


Figure 10 – Plan extract showing maintained view corridor across the north-western corner of the subject property.

55 Cutler Road, Clontarf

Given the relative levels of the properties the views currently obtained from the upper-level principal living areas and adjacent balcony will not be impacted by the proposal from either a seated or standing position. The view analysis plan at Figure 11 over page demonstrates that views currently obtained through the south facing windows of the ground floor master bedroom will also be preserved with views available in a westerly direction through the west facing windows in the same room will be impacted by the proposal to a varying degree on both a standing and seated position.

That said, the views available from the ground floor of the development are from a bedroom and obtained directly across the side boundary of the property with any concern in relation to view impacts from the street facing study at this level is not sustainable given the location of this room, the fact that views are available directly across the side boundary and the vulnerability of view impact from any compliant development on the subject site. As previously indicated, all views currently obtained from the first-floor principal living areas and adjacent balcony are preserved.

Given the totality of views retained the view impact is qualitatively described as minor.

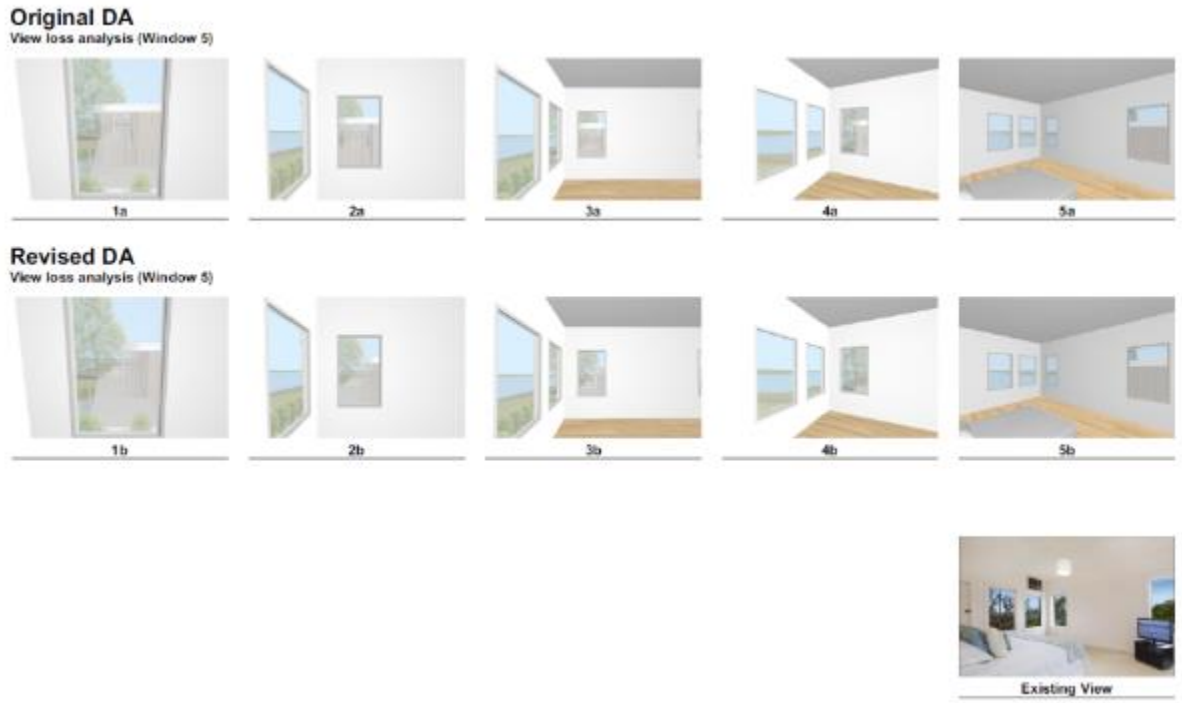


Figure 11 – Plan extract showing view loss analysis from the ground floor master bedroom 55 Cutler Road, Clontarf.

Fourth Step – Reasonableness of the proposal

The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them.

Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable.

In relation to the identified view impact from 55 Cutler Road we note the building height breaching elements do not give rise to the view affectation and whilst it could be argued that the FSR non-compliance contributes to such impact we do not consider this to be determinative given the contextually appropriate distribution of floor space on the site which maintains views from the principle living areas and adjacent private open space areas of all surrounding properties including, but not limited to, 1 Alder Street and 55 Cutler Road, Clontarf.

With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.

Comment: N/A

Having reviewed the detail of the application we have formed the considered opinion that a view sharing scenario is maintained between adjoining properties in accordance with the principles established in *Tenacity Consulting Pty Ltd v Warringah Council* [2004] NSWLEC140 and *Davies v Penrith City Council* [2013] NSWLEC 1141.

This analysis has been included in the updated clause 4.6 variation requests in support of the building height and FSR non-compliances proposed as contained at Attachment 1.

Wall Height

Response: As previously indicated, the awning over the west facing upper level terrace has been deleted and the setbacks to the eastern boundary increased at this level to provide greater spatial separation to both side boundaries. We note that the eastern elevation of the building is fully compliant with the applicable wall height control with a breach remaining along the western façade of the development as depicted on the plan extract below.

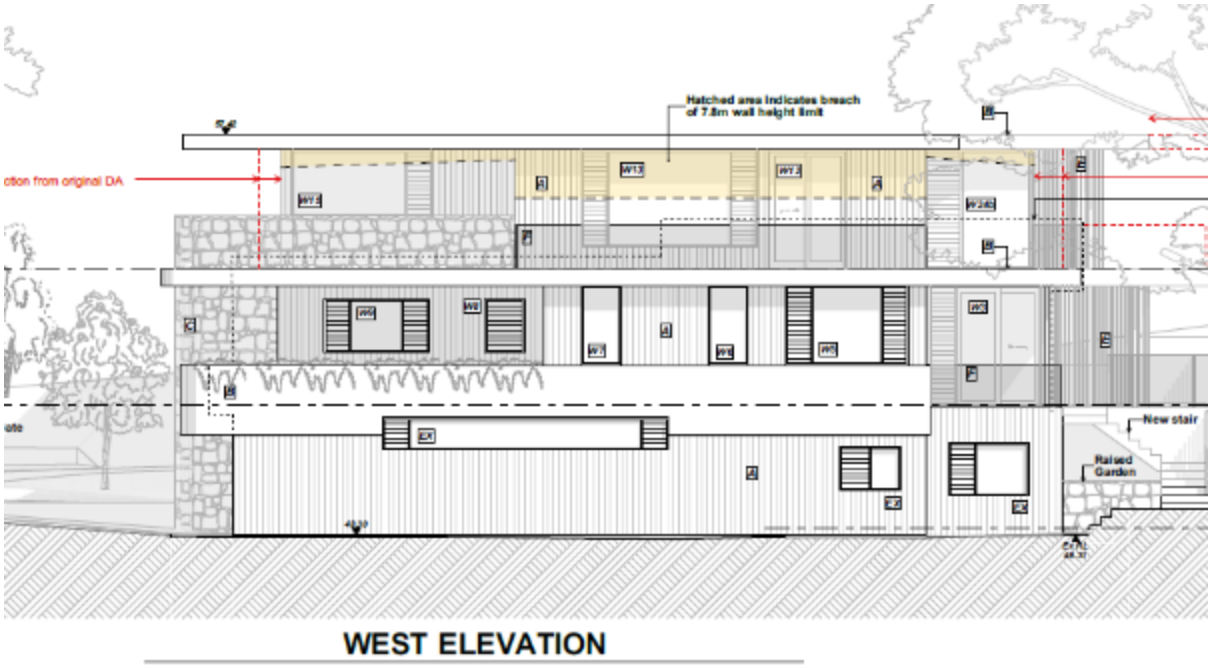


Figure 12 - Plan extract depicting the extent of wall height breach along the western façade of the first floor addition

The ability to further reduce the height of the building was investigated with the 2.7 metre ceiling heights proposed at both ground and first floor level considered to be reasonable for an architecturally designed dwelling house in this location with overall building height otherwise determined by the ground floor levels established by the existing dwelling house as retained as a component of the application.

Whilst the amended plans do not provide for a reduction in maximum wall height along the western façade of the building we note that this façade is setback between 5.445 and 6.93 metres from the western boundary which is well in excess of the 2.93 metre setback required pursuant to the 1/3rd wall height setback control.

The wall height variations can be directly attributed to the topography of the land with compliant wall heights maintained on the uphill side of the proposed development given the stepped building typology adopted. For the same reasons put forward in support of the 8.5 metre building height breaching elements as detailed within the accompanying clause 4.6 variation request strict compliance has been found to be both unreasonable and unnecessary given the developments ability to satisfy the underlying objectives. The proposal represents skilful contextually appropriate design with the wall height breaching elements not giving rise to any unacceptable residential amenity or streetscape impacts. We rely on the detailed analysis contained within the accompanying clause 4.6 variation request in this regard.

Rear Setbacks

Response: We confirm that the southern façade of the upper level bedroom has been setback 8 metres from the rear boundary of the property in strict compliance with the rear boundary setback control. Whilst the adjacent terrace has not been deleted it has been significantly reduced in size and geometry with a 7 metre setback maintained to the rear boundary of the allotment.

A variation to the 8 metre rear setback control to facilitate the provision of a narrow balcony in this location is considered acceptable, on merit, given the rear setbacks established by the immediately adjoining properties were habitable floor space and elevated balconies extend well into the 8 metre rear setback. This established built form outcome is depicted in Figure 13 over page. The minor variation to facilitate a cantilevered balcony off the south facing bedroom is considered acceptable in circumstances where all properties are orientated to the south to take advantage of available views and where the usage characteristics of the balcony, being accessed directly off a bedroom, will ensure no unreasonable privacy impacts on the properties located to the south of the site. Being cantilevered, the breaching element does not prevent the implementation of an appropriate landscape regime within the rear setback.

Under such circumstances, strict compliance with the 8 metre rear setback control has been found to be unreasonable and unnecessary.

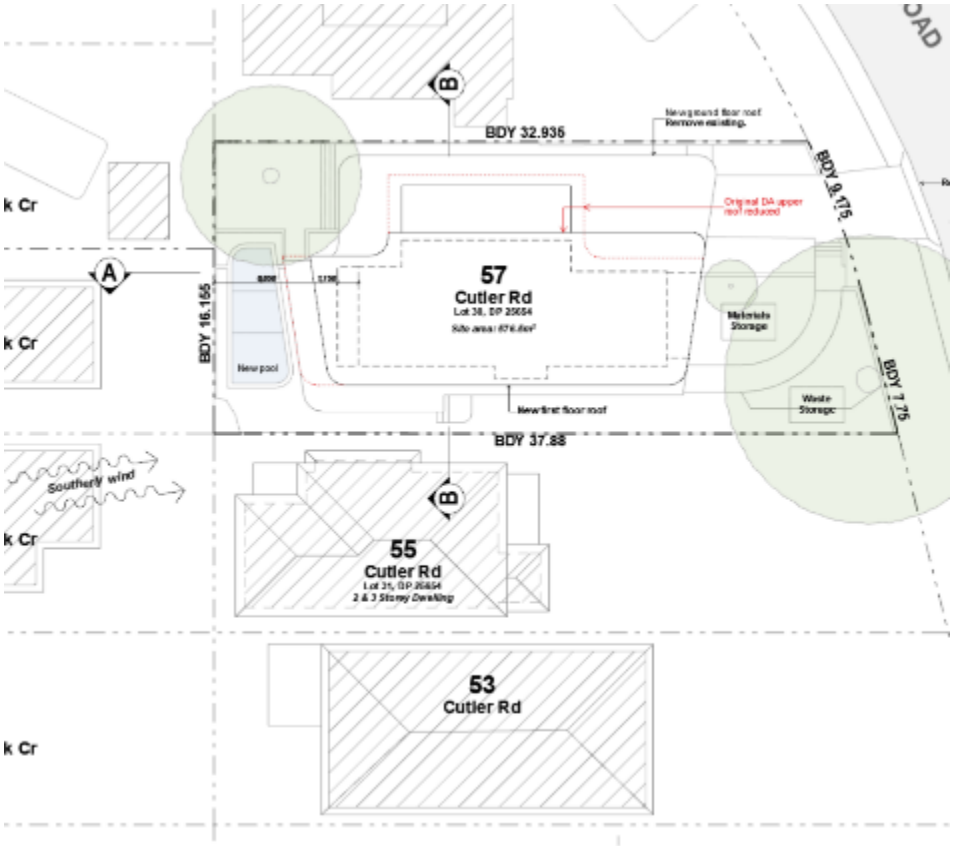


Figure 13 - Plan extract showing the prevailing pattern of rear setbacks within immediate vicinity of the site.

Landscaped Area

Response: The architectural plans have been amended to reduce the extent of hard stand areas within the total open space with such outcome providing for an increase in landscaped area, as defined.

Location and Setbacks (Swimming Pools, Spas and Water Features)

Response: The architectural plans have been amended to provide a 1 m setback from the rear boundary to the proposed swimming pool with such setback area appropriately landscaped.

We trust that this submission comprehensively addresses the issues raised by Council and will enable the favourable assessment and determination of the application. Please do not hesitate to contact me to discuss any aspect of this correspondence.

Yours sincerely
BOSTON BLYTH FLEMING PTY LIMITED

Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director

Attachment 1

Updatad Clause 4.6 variation request - Height of buildings (clause 4.3 MLEP 2012)

1.0 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe)* at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney [2019]* NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 Manly Local Environmental Plan 2013 ("MLEP")

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of Manly Local Environmental Plan 2013 (MLEP) the height of a building on the subject land is not to exceed 8.5 metres in height. The objectives of this control 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 environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

Building height is defined as follows:

> ***building height*** *(or* ***height of building****) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like*

Ground level existing is defined as follows:

> ***ground level (existing)*** means the existing level of a site at any point.

It has been determined that the western edge of the first-floor addition has a maximum building height of 9.27 metres representing a non-compliance of 770mm or 9%. The location and extent of building height breach is depicted in the plan extracts at Figure 1 and 2 below and over page.

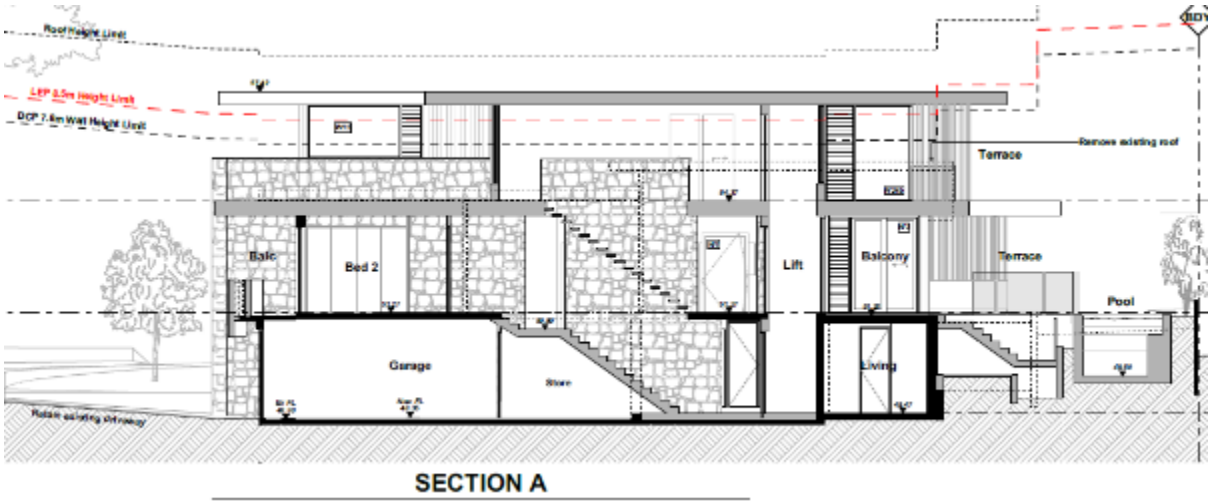


Figure 1 – Plan extract showing extent of building height breaching elements

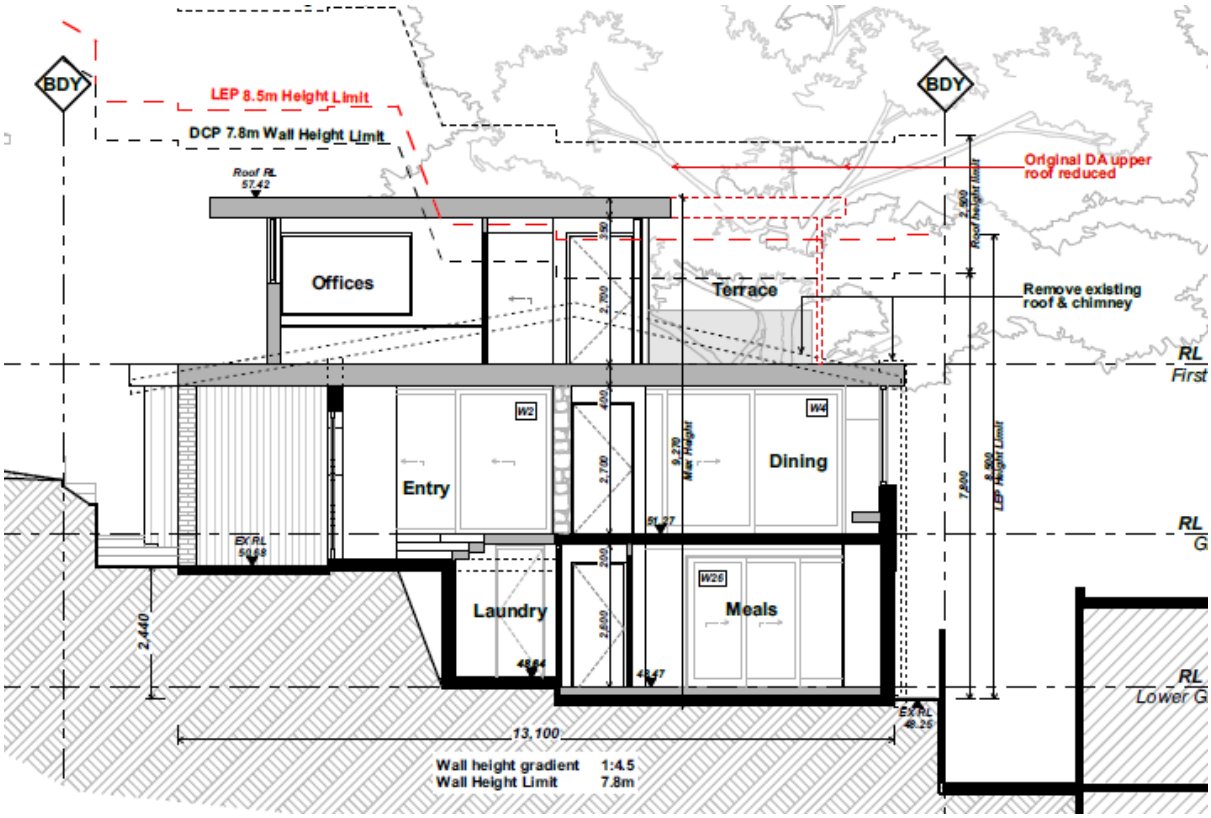


Figure 2 – Plan extract showing extent of building height breaching elements

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP provides:

(1) The objectives of this clause are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The decision of Chief Justice Preston in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal *in RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

> *"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."*

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of MLEP provides:

(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.

This clause applies to the clause 4.3 Height of Buildings Development Standard.

Clause 4.6(3) of MLEP provides:

(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.

The proposed development does not comply with the height of buildings provision at 4.3 of MLEP which specifies a maximum building height however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of MLEP provides:

(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.

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (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 and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 5th May 2020, attached to the Planning Circular PS 20-002 issued on 5th May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of MLEP provides:

(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.

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3 of MLEP from the operation of clause 4.6.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

18. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

19. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

20. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

21. A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48].

However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3 of MLEP a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

   (a) compliance is unreasonable or unnecessary; and

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

3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development for in the zone?

4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of MLEP?

4.0 Request for variation

4.1 Is clause 4.3 of MLEP a development standard?

The definition of "development standard" at clause 1.4 of the EP&A Act includes:

> *(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 4.3 MLEP prescribes a height provision that relates to certain development. Accordingly, clause 4.3 MLEP is a development standard.

4.2A Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in Wehbe v Pittwater Council [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the height of buildings standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is 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,*

Response: The building height and low pitched roof form proposed are consistent with the built form characteristics established by surrounding development and development generally within the site's visual catchment. I also note that other dwelling house development within proximity of the site, and also located on sloping sites, breach the 8.5 metre building height standard including the recently approved and under construction development at No. 61 Cutler Road to the west of the site DA2017/1300.

The building presents a predominantly 2 storey stepped building height to Cutler Road with the stepped building form acknowledging (consistent with) the topographic landscape of the land which falls away towards its western boundary.

Accordingly, the portion of the development that exceeds the height standard is consistent with prevailing building heights, with nearby development also exceeding the height standard, and consistent with the desired future streetscape character given the non-compliant building height elements are generally limited to the upper-level roof form, including a relatively minor area of habitable floor space immediately below, and the open terrace operable roof which do not in any significant manner contribute to bulk and scale or unacceptable streetscape consequences.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council (2005) NSW LEC 191* I have formed the considered opinion that most observers would not find the proposed development by virtue of its roof form and building height offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the site's visual catchment. In forming this opinion, I note that a significant portion of the street facing building façade sits well below the 8.5 metre height standard.

The development achieves this objective, notwithstanding the building height breaching elements, as it displays a building height and roof form 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,

Response: This objective is explanatory of the purpose of the height of building standard. The objective is not an end in itself. The objective is explanatory of the central purpose of the standard. By fixing different upper limits for the height of buildings on land in different areas by means of the building height map the clause does seek to control bulk and scale of buildings. The establishment of upper limit for height is not the end to be achieved by the clause rather it is a means to achieve the other objectives of the standard that are dealt with above and below (*Baron Corporation Pty Limited –v- the City of Sydney Council [2019]* NSWLEC 61 at [48]-[49]).

In any event, for the reasons outlined in relation to objective (a) above, I have formed the considered opinion that the bulk and scale of the building, having regard to the elements of the building exceeding the 8.5 metre height standard, is contextually appropriate with the floor space appropriately distributed across the site to achieve acceptable streetscape and residential amenity outcomes.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council (2005) NSW LEC 191,* I have formed the considered opinion that most observers would not find the proposed development by virtue of its bulk and scale offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the site's visual catchment.

Notwithstanding the building height breaching elements, the proposal achieves this objective.

(c) to minimise disruption to the following:

(i) views to nearby residential development from public spaces (including the harbour and foreshores),

Response: The predominantly 2 storey stepped building form minimises the disruption of views to nearby residential development from the adjoining public spaces with the significant distance between the harbour and its foreshores and the subject site ensuring no discernible disruption of views to nearby residential development as a consequence of the building height breach.

The proposal achieves this objective.

(ii) views from nearby residential development to public spaces (including the harbour and foreshores),

Response: An analysis of potential view impacts having regard to the view sharing principles established by the Land and Environment Court of NSW in the matter of *Tenacity Consulting v Warringah* [2004] NSWLEC 140 is as follows.

First Step - Assessment of views to be affected

An assessment of the view to be affected. The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.

1 Alder Street, Clontarf

Whilst no submission has been received from the owner of this property photos available on realestate.com.au provide some insight as to the view is generally available from this property. The photographs at Figures 3 and 4 show that views are available in a south westerly direction from the upper-level kitchen/living area and adjacent balcony in a south westerly direction across Middle Harbour towards the Balmoral Beach, Balmoral Slopes and the associated land/water interface. These views are filtered to a certain extent by intervening vegetation and built form elements.

Figure 3 - View available in a south westerly direction from 1 Alder Street, Clontarf

Figure 4 - View available in a south westerly direction from 1 Alder Street, Clontarf

55 Cutler Road, Clontarf

The views available from this adjoining property are sweeping views generally in a south/ south westerly direction across middle harbour towards Balmoral Beach, the Balmoral Slopes and the associated land/water interface around to Cobblers Bay. These views are depicted in photographs obtained from realestate.com.au at Figures 5, 6 and 7.

Figure 5 - View available in a south westerly direction from 55 Cutler Road, Clontarf

Figure 6 - View available in a south/ south westerly direction from 55 Cutler Road, Clontarf

Figure 7 - View available in a south westerly direction from 55 Cutler Road, Clontarf

Second Step - From what part of the property are the views obtained

The second step is to consider from what part of the property the views are obtained. For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.

1 Alder Street, Clontarf

Floor plans obtained from realestate.com.au confirm that the views at Figures 3 and 4 are available from the upper-level kitchen, living room and adjacent balcony from both a standing and seated position although seated position views are extremely vulnerable given the relatively shallow nature of the view and intervening landscape and built form elements. A copy of the floor plans is at Figure 8.

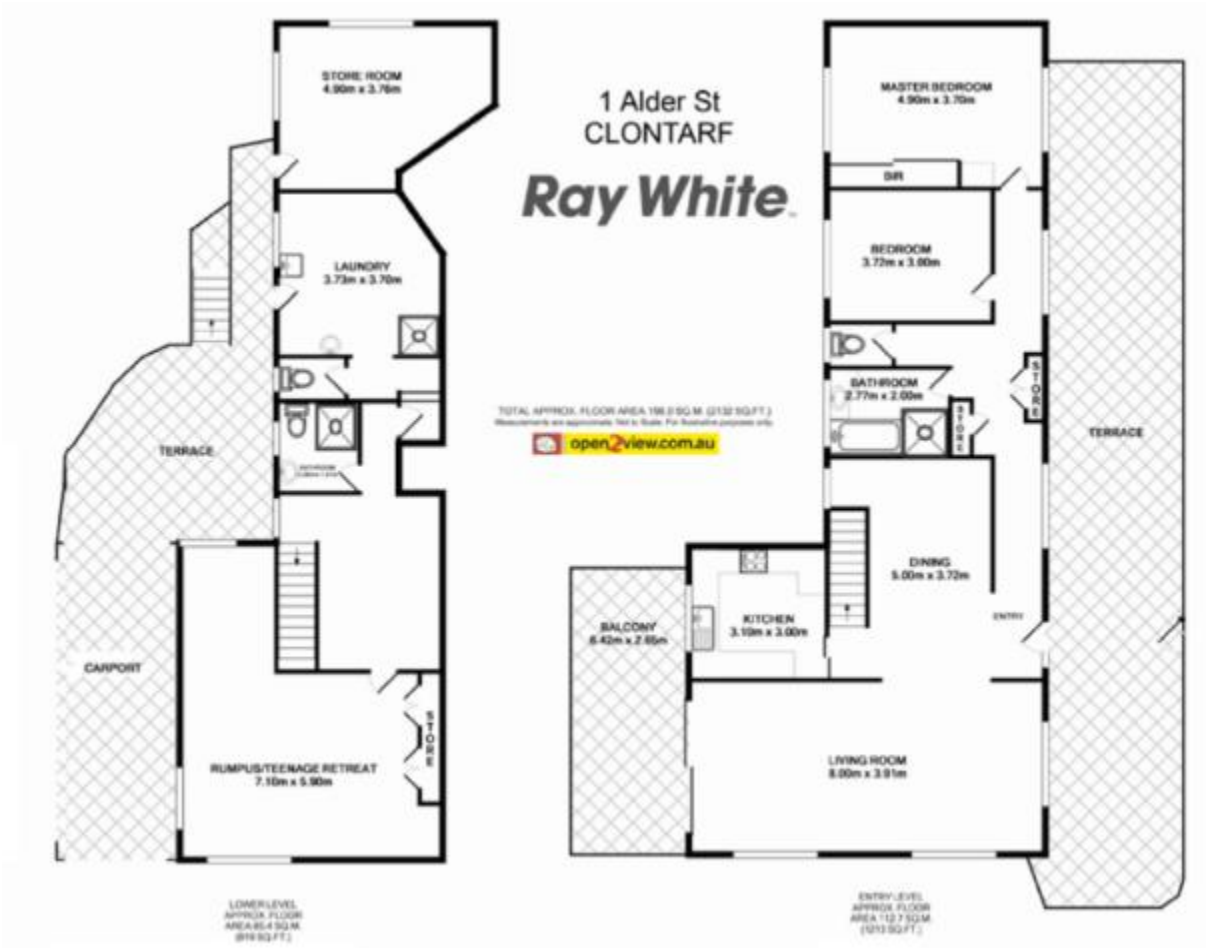


Figure 8 – Floor plans of 1 Alder Street, Clontarf obtained from realestate.com.au

55 Cutler Road, Clontarf

Floor plans obtained from realestate.com.au confirm that the views at Figures 5 and 6 are available from the upper-level (first floor) Living room and dining room and adjacent south western corner balcony. The view at Figure 7 is from the ground floor level master bedroom. We note that the submission from the owner of 55 Cutler Street appeared to ignore the views available from the upper-level principal living areas and adjacent balcony with primary focus on views available from the ground floor level study and Bedroom 1 which were incorrectly identified as principal living areas.

The views form the upper level living areas and balcony are from both a standing and seated position with the views from the ground floor level master bedroom also available from both a standing and seated position although the seated position views are extremely vulnerable given the relatively shallow nature of the view and intervening landscape and built form elements. A copy of the floor plans is at Figure 9.

Figure 9 – Floor plans of 55 Cutler Road, Clontarf obtained from realestate.com.au

Third Step – Assessment of extent of the impact

The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.

1 Alder Street, Clontarf

The subject property is visible in Figures 3 and 4 particularly the pitched roof form located in the north-western corner of the property over which the views are obtained.

The north-eastern corner of the proposed ground floor additions maintain the front and side boundary setback alignment and eave height of the existing pitched roof form with the proposed upper-level set well back from the front and western side boundary to maintain the existing view corridor as depicted in Figures 10 and 11. In this regard, we are satisfied that the existing views will be retained with view impact appropriately described as negligible.

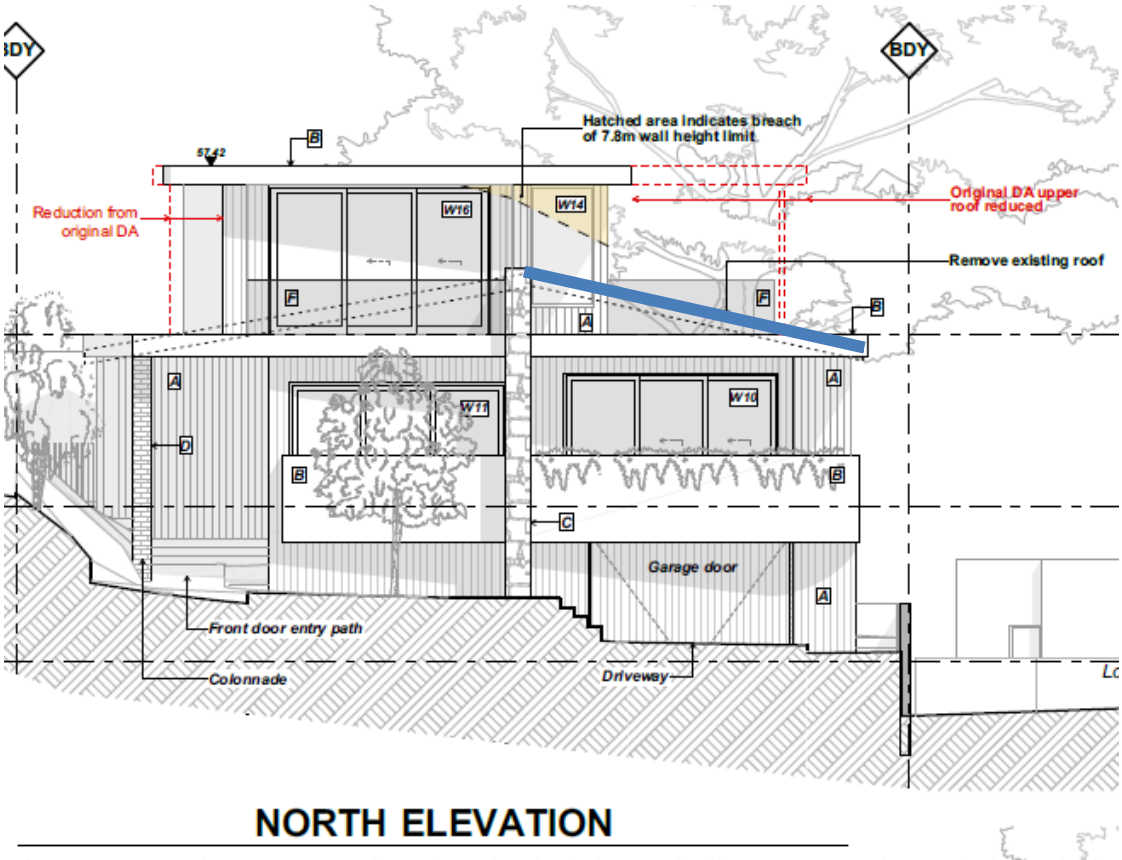


Figure 10 – Plan extract showing the height and alignment of the existing pitched roof form over which existing views are obtained (existing roof shown with blue line).

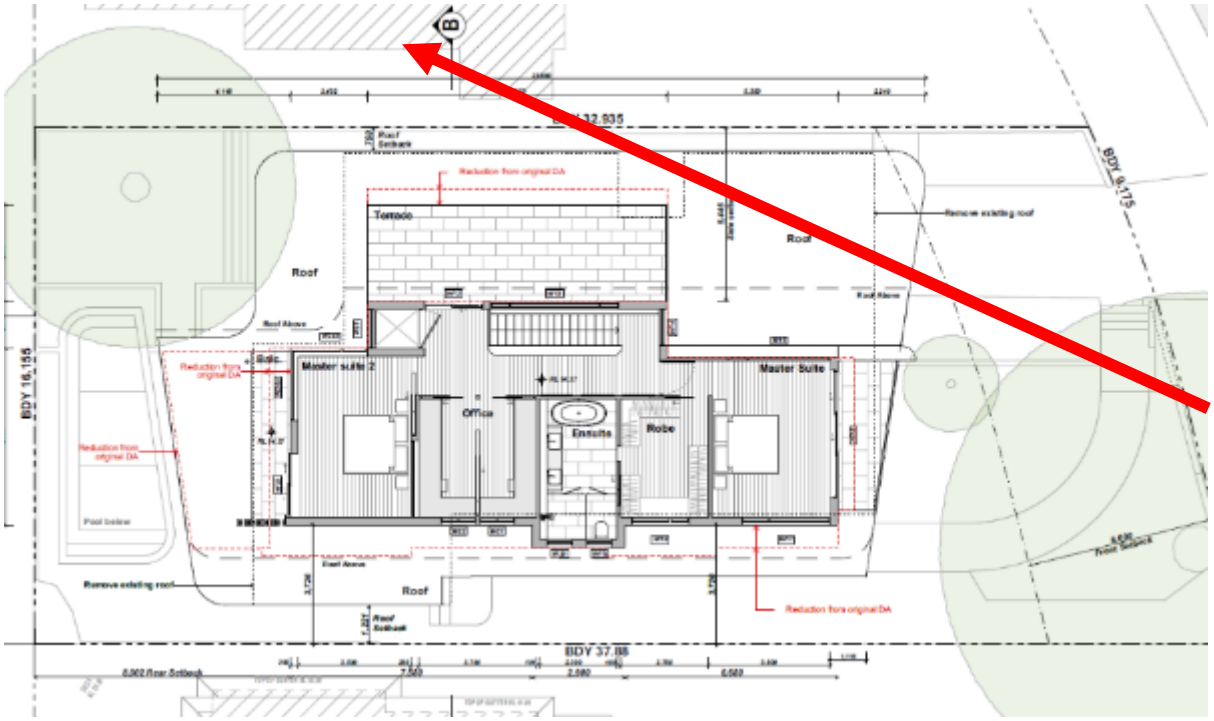


Figure 11 – Plan extract showing maintained view corridor across the north-western corner of the subject property.

55 Cutler Road, Clontarf

Given the relative levels of the properties the views currently obtained from the upper-level principal living areas and adjacent balcony will not be impacted by the proposal from either a seated or standing position. The view analysis plan at Figure 12 over page demonstrates that views currently obtained through the south facing windows of the ground floor master bedroom will also be preserved with views available in a westerly direction through the west facing windows in the same room will be impacted by the proposal to a varying degree on both a standing and seated position.

That said, the views available from the ground floor of the development are from a bedroom and obtained directly across the side boundary of the property with any concern in relation to view impacts from the street facing study at this level is not sustainable given the location of this room, the fact that views are available directly across the side boundary and the vulnerability of view impact from any compliant development on the subject site. As previously indicated, all views currently obtained from the first-floor principal living areas and adjacent balcony are preserved.

Given the totality of views retained the view impact is qualitatively described as minor.

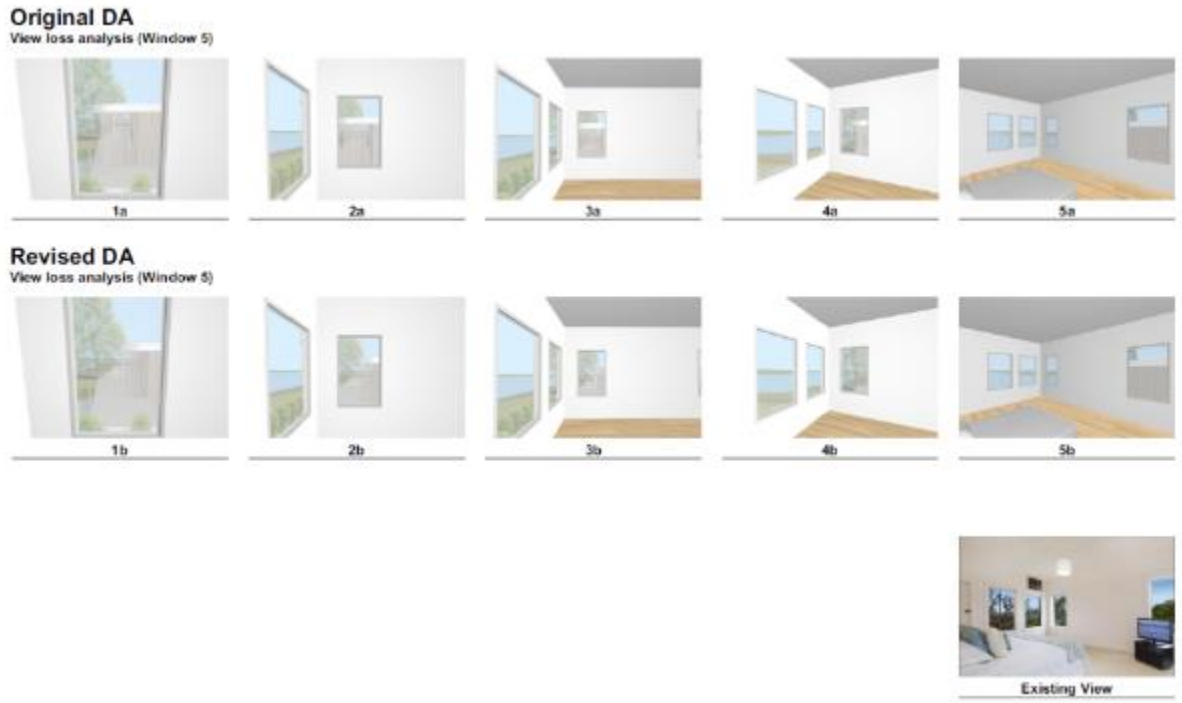


Figure 12 – Plan extract showing view loss analysis from the ground floor master bedroom 55 Cutler Road, Clontarf.

Fourth Step – Reasonableness of the proposal

The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them.

Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable.

In relation to the identified view impact from 55 Cutler Road we note the building height breaching elements do not give rise to the view affectation and whilst it could be argued that the FSR non-compliance contributes to such impact we do not consider this to be determinative given the contextually appropriate distribution of floor space on the site which maintains views from the principle living areas and adjacent private open space areas of all surrounding properties including, but not limited to, 1 Alder Street and 55 Cutler Road, Clontarf.

With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.

Comment: N/A

Having reviewed the detail of the application we have formed the considered opinion that a view sharing scenario is maintained between adjoining properties in accordance with the principles established in *Tenacity Consulting Pty Ltd v Warringah Council* [2004] NSWLEC140 and *Davies v Penrith City Council* [2013] NSWLEC 1141.

The proposal achieves the objective of minimising view impact as demonstrated by the view sharing outcome achieved.

(iii) views between public spaces (including the harbour and foreshores),

Response: The building form and height has been appropriately distributed across the site to minimise disruption of views between public spaces.

The proposal achieves this objective notwithstanding the building height breaching elements proposed.

(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,

Response: The accompanying shadow diagrams (Attachment 1) demonstrate that the building height breaching portion of the development will not give rise to any unacceptable shadowing impact to the north facing living room and open space areas of the adjoining residential properties with compliant levels of solar access maintained.

I am also of the opinion that the extent of overshadowing cast by the building height breaching element will not prevent the orderly and economic use and development of any adjacent and nearby properties with skilful design ensuring compliant levels of solar access are able to be achieved should any surrounding properties be redeveloped notwithstanding that the primary living and private open space areas are likely to be orientated to the south to take advantage of available views.

The proposal achieves this objective notwithstanding the building height breaching elements proposed.

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

Response: This objective is not applicable.

Having regard to the above, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard. Given the developments consistency with the objectives of the height of buildings standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

Consistency with zone objectives

The subject site is zoned R2 Low Density Residential pursuant to the provisions of MLEP. Dwelling houses are permissible in the zone with the consent of council. The stated objectives of the zone are as follows:

- *To provide for the housing needs of the community within a low density residential environment.*

Response: The development retains the existing dwelling house on the site which will provide for the housing needs of the community within a low density residential environment. The proposal is consistent with this objective notwithstanding the building height breaching elements proposed.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Response: N/A

The proposed works are permissible and consistent with the stated objectives of the zone.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the R2 Low Density Residential zone and the height of building standard objectives. Adopting the first option in *Wehbe* strict compliance with the height of buildings standard has been demonstrated to be is unreasonable and unnecessary.

4.2B Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26].

The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

24. *The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

    The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient environmental planning grounds

Sufficient environmental planning grounds exist to justify the height of buildings variation namely the design constraints imposed by the floor levels established by the existing dwelling house in the context of an application seeking legitimate alterations and additions to an existing dwelling and the topography of the land which has a cross fall of approximately 3 metres in a westerly direction which makes strict compliance difficult to achieve whilst realising the orderly and economic use and development of the land.

In this regard, I consider the proposal to be of a skilful design which responds appropriately and effectively to the above constraints by distributing floor space, building mass and building height across the site in a manner which provides for appropriate streetscape and residential amenity outcomes including a view sharing scenario.

While strict compliance could be achieved a reduction in the internal ceiling heights to 2.4 metres at each level such outcome would not represent good design and would significantly compromise the design quality and amenity of the development in circumstances where the building height breaching elements do not give rise to unacceptable environmental consequences.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).

- The development represents good design (1.3(g)).

- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

It is noted that in *Initial Action,* the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

There are sufficient environmental planning grounds to justify contravening the development standard.

4.3 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the R2 Low Density Residential zone

The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

> *"The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.*

If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).”

As demonstrated in this request, the proposed development it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.4 Secretary’s concurrence

By Planning Circular dated 5th May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

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

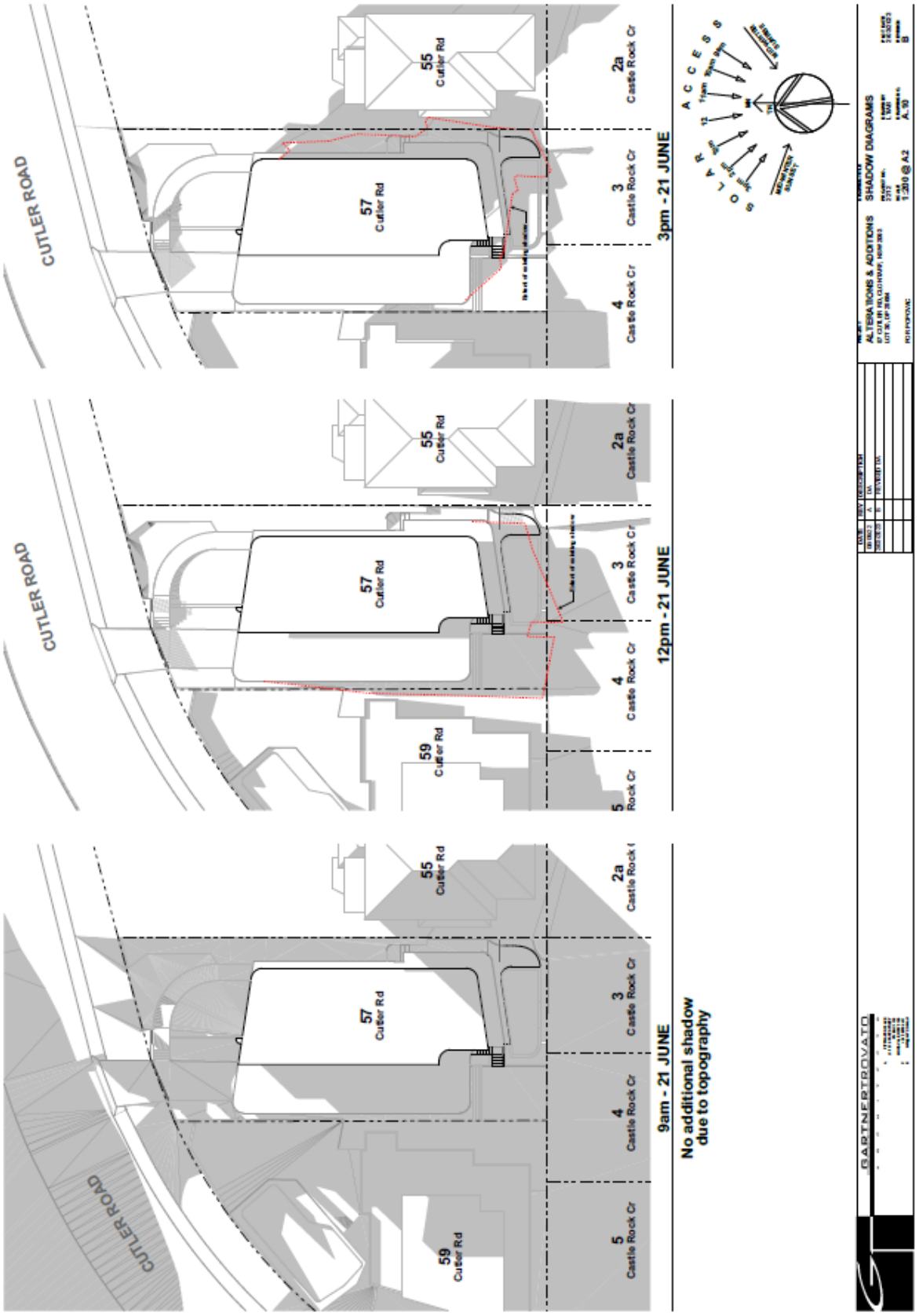
(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

Boston Blyth Fleming Pty Limited

Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director

Attachment 1 Shadow diagrams



Updated Clause 4.6 variation request – Floor Space Ratio (clause 4.4 MLEP 2012)

Floor Space Ratio

1.0 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe)* at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney [2019]* NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 Manly Local Environmental Plan 2013 ("MLEP")

2.1 Clause 4.4 – Floor space ratio

Pursuant to Clause 4.4 MLEP 2013 the maximum FSR for development on the site is 0.4:1 representing a gross floor area of 230.6 square metres. The stated objectives of this clause are:

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

(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,

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

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

(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.

It has been determined that the proposal, as amended, result in a total gross floor area on the site of 294.35 square metres. This represents a floor space ratio of 0.51:1 and therefore non-compliant with the FSR standard by 63.75 square metres or 27.6%.

I note that clause 4.1.3 of Manly Development Control Plan 2013 contains FSR exemption provisions applicable to land where the site area is less than the minimum Lot size required on the LEP Lot size map provided the relevant LEP objectives and the provisions of the DCP are satisfied.

The Lot size map identifies the subject site as being in sub zone “R” in which a minimum Lot area of 750m² is required. The site having an area of only 576.5m² is well below the minimum Lot area provision and accordingly the clause 4.1.3 Manly DCP FSR variation provisions apply.

Clause 4.1.3.1 states that the extent of any exception to the LEP FSR development standard pursuant to clause 4.6 of the LEP is to be no greater than the achievable gross floor area for the lot indicated in Figure 30 of the DCP. We confirm that pursuant to Figure 30 the calculation of FSR is to be based on a site area of 750m² with an achievable gross floor area of 300m².

In this regard, the 294.35m² of gross floor area proposed, representing an FSR of 0.39:1 (based on 750m²), is below the maximum prescribed gross floor area of 300m² and as such complies with the DCP variation provision. We note that such provision contains the following note:

> *Note: FSR is a development standard contained in the LEP and LEP objectives at clause 4.4(1) apply. In particular, Objectives in this plan support the purposes of the LEP in relation to maintaining appropriate visual relationships between new development and the existing character and landscape of an area as follows:*
>
> | | |
> |---|---|
> | *Objective 1)* | *To ensure the scale of development does not obscure important landscape features.* |
> | *Objective 2)* | *To minimise disruption to views to adjacent and nearby development.* |
> | *Objective 3)* | *To allow adequate sunlight to penetrate both the private open spaces within the development site and private open spaces and windows to the living spaces of adjacent residential development.* |

As the proposed GFA/ FSR complies with clause 4.1.3.1 MDCP numerical provision it is also “deemed to comply” with the associated objectives as outlined which, if complied with, demonstrate the maintenance of an *appropriate visual relationships between new development and the existing character and landscape of an area*.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP provides:

(1) The objectives of this clause are:

(c) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and

(d) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The decision of Chief Justice Preston in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal *in RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

> *"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development". If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."*

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of MLEP provides:

(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.

This clause applies to the clause 4.4 Floor Space Ratio Development Standard.

Clause 4.6(3) of MLEP provides:

(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.

The proposed development does not comply with the floor space ratio provision at 4.4 of MLEP which specifies a maximum FSR however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of MLEP provides:

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(ii) 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.

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (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 and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 5th May 2020, attached to the Planning Circular PS 20-002 issued on 5th May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of MLEP provides:

(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.

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.4 of MLEP from the operation of clause 4.6.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

18. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

19. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

20. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

21. A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51].
The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

22. These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.4 of MLEP a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

    (a) compliance is unreasonable or unnecessary; and

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

3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.4 and the objectives for development for in the zone?

4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.4 of MLEP?

4.0 Request for variation

4.1 Is clause 4.4 of MLEP a development standard?

The definition of "development standard" at clause 1.4 of the EP&A Act includes:

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,

Clause 4.4 MLEP prescribes a floor space height provision which seeks to limit the bulk, scale and density of the development. Accordingly, clause 4.4 MLEP is a development standard.

4.2A Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in Wehbe v Pittwater Council [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

<u>Consistency with objectives of the floor space ratio standard</u>

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

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

Response: This objective relates to streetscape character and in this regard the proposal presents a predominantly 2 storey stepped building height to Cutler Road with the stepped building form acknowledging (consistent with) the topographic landscape of the land which falls away towards its western boundary. Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191, I have formed the considered opinion that most observers would not find the bulk and scale of the proposed development, as viewed from Cutler Road, to be offensive, jarring or unsympathetic in a streetscape context.

This objective is satisfied, notwithstanding the non-compliant FSR proposed, as the bulk and scale of development is consistent with the existing and desired streetscape character.

(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,

Response: Having regard to clause 4.1.3.1 Manly DCP FSR provisions, which inform the 294.35m² of gross floor area proposed, representing an FSR of 0.39:1 (based on 750m²), is below the maximum prescribed gross floor area of 300m² and as such complies with the DCP variation provision applicable to undersized allotments. We note that Objective 1 of the DCP provision, which relates to establishing building density and bulk, as reflected by FSR, in relation to site area (undersized allotments) is similar to this LEP objective namely:

Objective 1) To ensure the scale of development does not obscure important landscape features.

As previously indicated the proposed FSR complies with the DCP numerical FSR control applicable to undersized allotments and is therefore deemed to comply with this objective.

That said, neither the LEP or DCP identify and important landscape or townscape features either on or within proximity of the subject site. My own observations did not identify and landscape or townscape features that I would consider important in terms of their visual significance.

I am satisfied that the proposal, notwithstanding the FSR non-compliance, achieves this objective as the building density and bulk, in relation to a site area, satisfies Objective 1 of the clause 4.1.3.1 DCP provision applicable to undersized allotments, with the development not obscuring any important landscape and townscape features.

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

Response: This objective is the same as the primary purpose/ objective outlined at clause 4.1.3 of the DCP as confirmed in the note such provision namely:

> *Note: FSR is a development standard contained in the LEP and LEP objectives at clause 4.4(1) apply. In particular, Objectives in this plan support the purposes of the LEP in relation to maintaining appropriate visual relationships between new development and the existing character and landscape of an area as follows:*
>
> *Objective 1) To ensure the scale of development does not obscure important landscape features.*
>
> *Objective 2) To minimise disruption to views to adjacent and nearby development.*
>
> *Objective 3) To allow adequate sunlight to penetrate both the private open spaces within the development site and private open spaces and windows to the living spaces of adjacent residential development.*

As the proposed GFA/ FSR complies with clause 4.1.3.1 MDCP numerical provision it is also "deemed to comply" with the associated objectives as outlined which, if complied with, demonstrate the maintenance of an *appropriate visual relationships between new development and the existing character and landscape of an area*.

That said, it has previously been determined that the proposal achieves objective (a) of the clause 4.4 MLEP FSR standard namely to *ensure the bulk and scale of development is consistent with the existing and desired streetscape character.* Accordingly, I am satisfied that the development, notwithstanding the FSR non-compliance, maintains an appropriate visual relationship between new development and the existing built form character of the area.

In relation to landscape character, the application does not require the removal of any significant trees or vegetation with a building footprint maintained which is compliant with the total open space and landscaped area MDCP controls. The building will sit within a landscaped setting. The application is accompanied by a schedule of materials and finishes which will enable the development to blend into the vegetated escarpment which forms and backdrop to the site. An appropriate visual relationship between new development and the existing landscape of the area is maintained.

I am satisfied that the development, notwithstanding its FSR non-compliance, achieves the objective as it maintains an appropriate visual relationship between new development and the existing character and landscape of the area.

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

Response: In responding to this objective. I have adopted views, privacy, solar access and visual amenity as environmental factors which contribute to the use and enjoyment of adjoining public and private land.

Views

An analysis of potential view impacts having regard to the view sharing principles established by the Land and Environment Court of NSW in the matter of *Tenacity Consulting v Warringah* [2004] NSWLEC 140 is as follows.

First Step - Assessment of views to be affected

An assessment of the view to be affected. The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.

1 Alder Street, Clontarf

Whilst no submission has been received from the owner of this property photos available on realestate.com.au provide some insight as to the view is generally available from this property. The photographs at Figures 3 and 4 show that views are available in a south westerly direction from the upper-level kitchen/living area and adjacent balcony in a south westerly direction across Middle Harbour towards the Balmoral Beach, Balmoral Slopes and the associated land/water interface. These views are filtered to a certain extent by intervening vegetation and built form elements.

Figure 3 - View available in a south westerly direction from 1 Alder Street, Clontarf

Figure 4 - View available in a south westerly direction from 1 Alder Street, Clontarf

55 Cutler Road, Clontarf

The views available from this adjoining property are sweeping views generally in a south/ south westerly direction across middle harbour towards Balmoral Beach, the Balmoral Slopes and the associated land/water interface around to Cobblers Bay. These views are depicted in photographs obtained from realestate.com.au at Figures 5, 6 and 7.

Figure 5 - View available in a south westerly direction from 55 Cutler Road, Clontarf

Figure 6 - View available in a south/ south westerly direction from 55 Cutler Road, Clontarf

Figure 7 - View available in a south westerly direction from 55 Cutler Road, Clontarf

Second Step - From what part of the property are the views obtained

The second step is to consider from what part of the property the views are obtained. For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.

1 Alder Street, Clontarf

Floor plans obtained from realestate.com.au confirm that the views at Figures 3 and 4 are available from the upper-level kitchen, living room and adjacent balcony from both a standing and seated position although seated position views are extremely vulnerable given the relatively shallow nature of the view and intervening landscape and built form elements. A copy of the floor plans is at Figure 8.

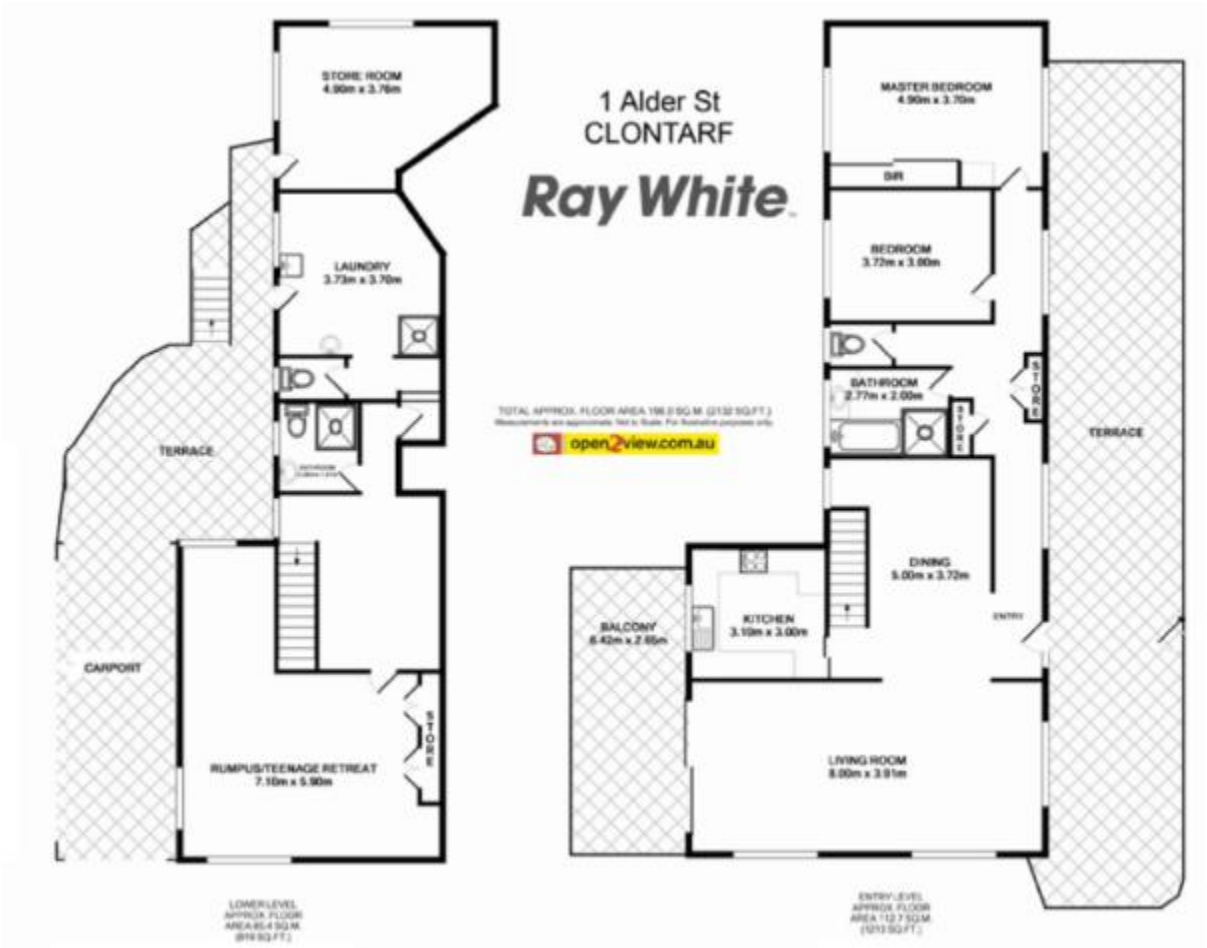


Figure 8 – Floor plans of 1 Alder Street, Clontarf obtained from realestate.com.au

55 Cutler Road, Clontarf

Floor plans obtained from realestate.com.au confirm that the views at Figures 5 and 6 are available from the upper-level (first floor) Living room and dining room and adjacent south western corner balcony. The view at Figure 7 is from the ground floor level master bedroom. We note that the submission from the owner of 55 Cutler Street appeared to ignore the views available from the upper-level principal living areas and adjacent balcony with primary focus on views available from the ground floor level study and Bedroom 1 which were incorrectly identified as principal living areas.

The views form the upper level living areas and balcony are from both a standing and seated position with the views from the ground floor level master bedroom also available from both a standing and seated position although the seated position views are extremely vulnerable given the relatively shallow nature of the view and intervening landscape and built form elements. A copy of the floor plans is at Figure 9.

Figure 9 – Floor plans of 55 Cutler Road, Clontarf obtained from realestate.com.au

Third Step – Assessment of extent of the impact

The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.

1 Alder Street, Clontarf

The subject property is visible in Figures 3 and 4 particularly the pitched roof form located in the north-western corner of the property over which the views are obtained.

The north-eastern corner of the proposed ground floor additions maintain the front and side boundary setback alignment and eave height of the existing pitched roof form with the proposed upper-level set well back from the front and western side boundary to maintain the existing view corridor as depicted in Figures 10 and 11. In this regard, we are satisfied that the existing views will be retained with view impact appropriately described as negligible.

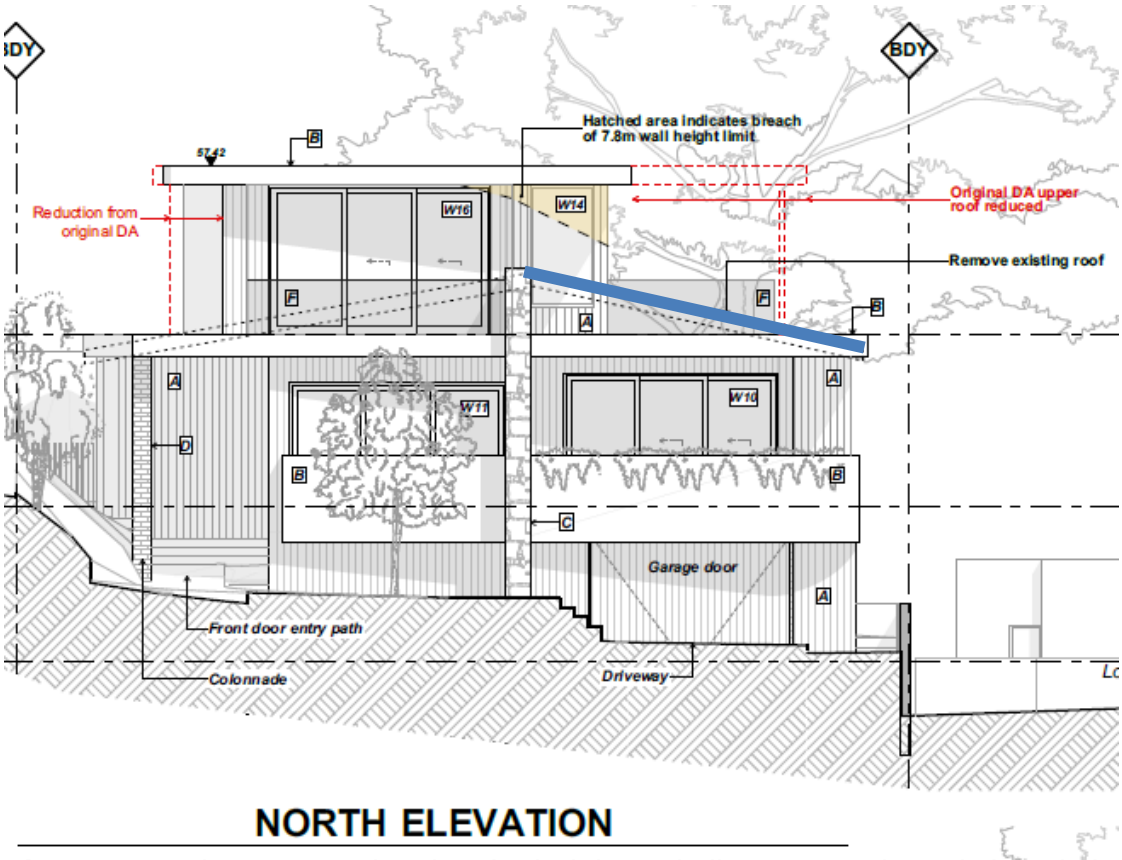


Figure 10 – Plan extract showing the height and alignment of the existing pitched roof form over which existing views are obtained (existing roof shown with blue line).

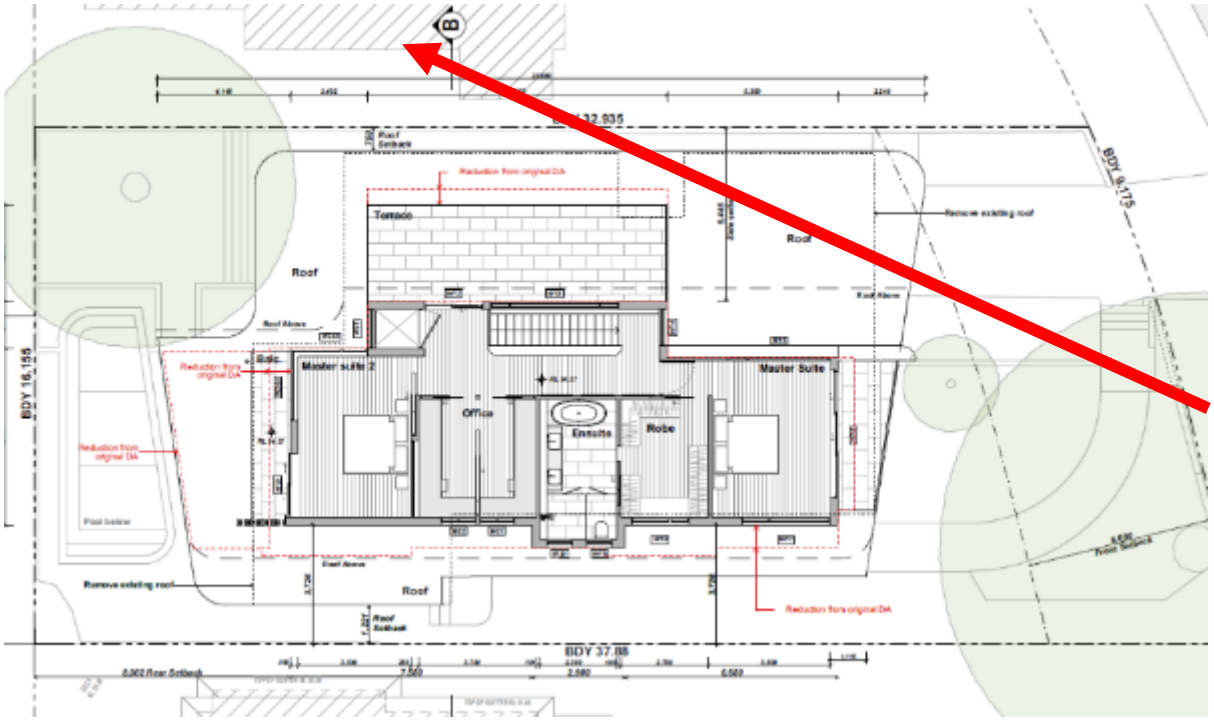


Figure 11 – Plan extract showing maintained view corridor across the north-western corner of the subject property.

55 Cutler Road, Clontarf

Given the relative levels of the properties the views currently obtained from the upper-level principal living areas and adjacent balcony will not be impacted by the proposal from either a seated or standing position. The view analysis plan at Figure 12 over page demonstrates that views currently obtained through the south facing windows of the ground floor master bedroom will also be preserved with views available in a westerly direction through the west facing windows in the same room will be impacted by the proposal to a varying degree on both a standing and seated position.

That said, the views available from the ground floor of the development are from a bedroom and obtained directly across the side boundary of the property with any concern in relation to view impacts from the street facing study at this level is not sustainable given the location of this room, the fact that views are available directly across the side boundary and the vulnerability of view impact from any compliant development on the subject site. As previously indicated, all views currently obtained from the first-floor principal living areas and adjacent balcony are preserved.

Given the totality of views retained the view impact is qualitatively described as minor.

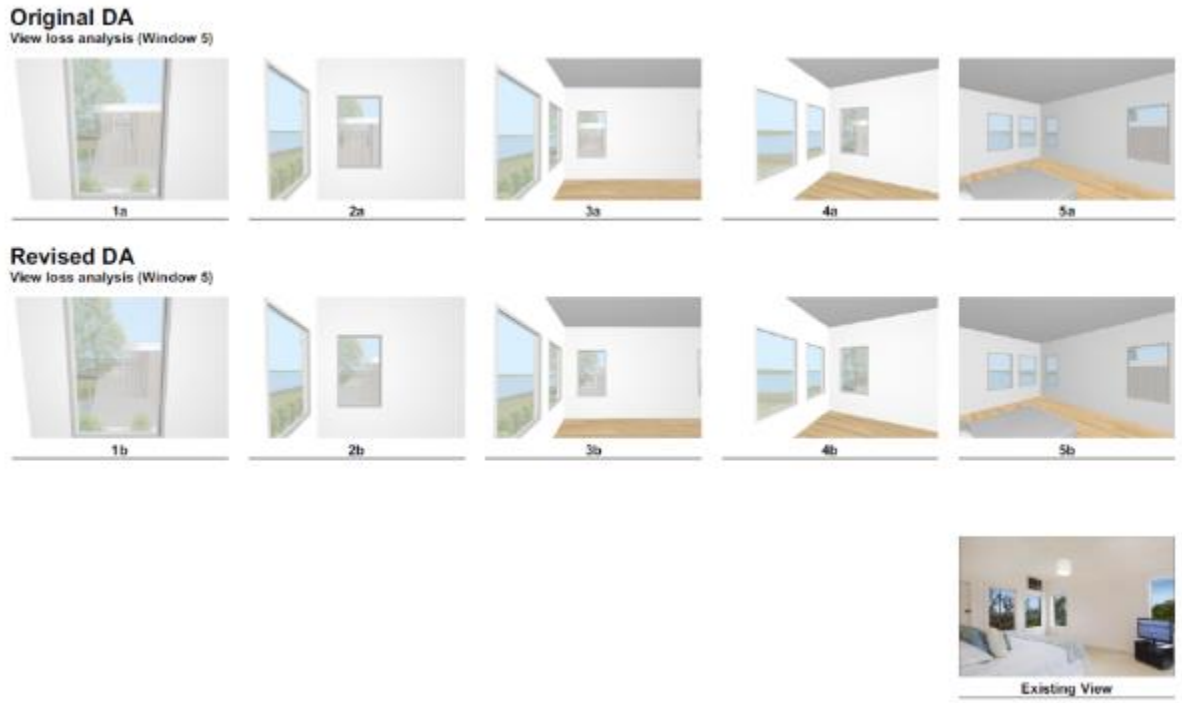


Figure 12 – Plan extract showing view loss analysis from the ground floor master bedroom 55 Cutler Road, Clontarf.

Fourth Step – Reasonableness of the proposal

The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them.

Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable.

In relation to the identified view impact from 55 Cutler Road we note the building height breaching elements do not give rise to the view affectation and whilst it could be argued that the FSR non-compliance contributes to such impact we do not consider this to be determinative given the contextually appropriate distribution of floor space on the site which maintains views from the principle living areas and adjacent private open space areas of all surrounding properties including, but not limited to, 1 Alder Street and 55 Cutler Road, Clontarf.

With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.

Comment: N/A

Having reviewed the detail of the application we have formed the considered opinion that a view sharing scenario is maintained between adjoining properties in accordance with the principles established in *Tenacity Consulting Pty Ltd v Warringah Council* [2004] NSWLEC140 and *Davies v Penrith City Council* [2013] NSWLEC 1141.

Notwithstanding the non-compliant FSR, the proposal achieves the objective of minimising view impact as demonstrated by the view sharing outcome achieved.

Privacy

Having regard to clause 4.1.3.1 Manly DCP FSR provisions, which inform the 294.35m² of gross floor area proposed, representing an FSR of 0.39:1 (based on 750m²), is below the maximum prescribed gross floor area of 300m² and as such complies with the DCP variation provision applicable to undersized allotments. We note that the privacy objectives at clause 3.4.2 are also referenced in relation to these provisions namely:

> *See also objectives for privacy at paragraph 3.4.2 of this plan.*
>
> *3.4.2 Privacy and Security*
>
> *Objective 1) To minimise loss of privacy to adjacent and nearby development by:*
>
> - *appropriate design for privacy (both acoustical and visual) including screening between closely spaced buildings;*
> - *mitigating direct viewing between windows and/or outdoor living areas of adjacent buildings.*

As previously indicated the proposed FSR complies with the DCP numerical FSR control applicable to undersized allotments and is therefore deemed to comply with the clause 3.4.2 privacy objectives to the extent that it can be demonstrated that the development *minimises loss of privacy to adjacent and nearby development.*

Notwithstanding, we note that all surrounding properties are orientated to the south to take advantage of views towards Middle Harbour. This spatial relationship prevents direct overlooking between the living areas of these properties with a degree of mutual overlooking of private open space areas anticipated where all properties are orientated to take advantage of views.

Given the spatial separation maintained between the balance of surrounding properties, and the primary orientation of living areas to the south towards available views, I am satisfied that the design, although non-compliant with the FSR standard, minimises adverse environmental impacts in terms of privacy and therefore achieves this objective.

Solar access

The accompanying shadow diagrams (Attachment 1) demonstrate that the building, although non-compliant with the FSR standard, will not give rise to any unacceptable shadowing impact to the existing north facing living room and open space areas of the adjoining residential properties with compliant levels of solar access maintained.

Visual amenity/ building bulk and scale

As indicated in response to objective (a), I have formed the considered opinion that the bulk and scale of the building is contextually appropriate with the floor space appropriately distributed across the site to achieve acceptable streetscape and residential amenity outcomes.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council (2005) NSW LEC 191,* I have formed the considered opinion that most observers would not find the proposed development by virtue of its visual bulk and scale offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the site's visual catchment.

I have formed the considered opinion that the building, notwithstanding the FSR non-compliance, achieves the objective through skilful design that minimises adverse environmental impacts on the use and enjoyment of adjoining land and the public domain.

> *(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.*

Response: This objective is not applicable.

Having regard to the above, the proposed building form which is non-compliant with the FSR standard will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the FSR standard. Given the developments consistency with the objectives of the FSR standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

<u>Consistency with zone objectives</u>

The subject site is zoned R2 Low Density Residential pursuant to the provisions of MLEP. Dwelling houses are permissible in the zone with the consent of council. The stated objectives of the zone are as follows:

- *To provide for the housing needs of the community within a low density residential environment.*

Response: The development seeks legitimate alterations and additions to an existing dwelling house on the site which will provide for the housing needs of the community within a low density residential environment. The proposal is consistent with this objective.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Response: N/A

The proposed works are permissible and consistent with the stated objectives of the zone.

The non-compliant development, as it relates to FSR, demonstrates consistency with objectives of the R2 Low Density Residential zone and the FSR standard objectives. Adopting the first option in *Wehbe* strict compliance with the FSR standard has been demonstrated to be is unreasonable and unnecessary.

4.2B Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

24. The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard".

The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient environmental planning grounds

I have formed the opinion that sufficient environmental planning grounds exist to justify the variation including the compatibility of the height, bulk and scale of the development, as reflected by floor space, with the built form characteristics established by adjoining development and development generally within the site's visual catchment.

Further, the variation provisions contained at clause 4.1.3.1 of Manly DCP reflect an acceptance that the FSR standard on undersized allotments does not provide for the orderly and economic use and development of the land and in my opinion represents an abandonment of the FSR standard on undersized allotments. The proposal satisfies such provisions.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).

- The development represents good design (1.3(g)).

- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

It is noted that in *Initial Action,* the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment).

Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

There are sufficient environmental planning grounds to justify contravening the development standard.

4.3 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.4 and the objectives of the R2 Low Density Residential zone

The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

"The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii)."

As demonstrated in this request, the proposed development it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.4 Secretary's concurrence

By Planning Circular dated 5th May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

(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.

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of an FSR variation in this instance.

Boston Blyth Fleming Pty Limited

Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director

Attachment 1 Shadow diagrams