



Clause 4.6 Variation – Floor Space Ratio (FSR)

Alterations and Additions to an Existing Dwelling

39 Adelaide Street, Clontarf
Lot A DP368257

**Prepared by Willowtree Planning Pty Ltd on behalf
Of Linked Project Management**

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PART A PRELIMINARY

1.1 INTRODUCTION

This Clause 4.6 Variation Request has been prepared in support of a Development Application (DA) for the alterations and additions to the existing dwelling at 39 Adelaide Street, Clontarf (Lot A DP368257).

The proposed non-compliances are with the following development standards under the Manly Local Environmental Plan 2013 (MLEP 2013):

- Clause 4.4 Floor Space Ratio

This variation request has therefore been prepared in accordance with the requirements of Clause 4.6 of MLEP 2013, which includes the following objectives:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

1.2 PROPOSED NON-COMPLIANCES

Under the provisions of Clause 4.4 in MLEP 2013, the site is subject to a maximum FSR of 0.4:1. The proposed development would result in a maximum FSR of 0.64:1. The proposed development therefore exceeds the Clause 4.4 FSR control of 0.4:1 by 60% as shown in **Table 1** below.

Table 1. Variation Summary			
MLEP 2013	MLEP 2013 Development Standard	Existing Development Non Compliance	Proposed Development Non Compliance
Clause 4.4 - Floor Space Ratio	maximum FSR of 0.4:1	The proposal acknowledges an existing technical non-compliant FSR, as the site is currently 0.41:1 (variation of 2.5%)	The proposal seeks development consent for a maximum FSR of 0.64:1 which is 60% departure from the Council's development standards and a 56% increase in the existing FSR.

The site area is 452.8m² and therefore the total permissible GFA based on an FSR of 0.4:1 is a maximum GFA of 181m². The existing GFA is 187m² which equates to an existing FSR of 0.41:1 which constitutes a technical non-compliance. The proposed GFA is 288.7m² and has a GFA of 0.64:1 which equates to a 60% departure from the development standard and a 56% increase in the existing technically non-compliant FSR.

It is important to note that the maximum building height remains compliant and the proposed development will not result in a significant loss of private open space or landscaped area to accommodate the additional GFA. This is further illustrated in the ensuing sections.

1.3 STRATEGIC PLANNING JUSTIFICATION

This Clause 4.6 variation request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards under MLEP 2013. It considers various planning controls, strategic planning objectives and existing characteristics of the site, and concludes that

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the proposed FSR non-compliance is the best means of achieving the objects of encouraging orderly and economic use and development of land under the *Environmental Planning and Assessment 1979*.

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PART B THRESHOLDS THAT MUST BE MET

2.1 CLAUSE 4.6 OF MLEP 2013

In accordance with Clause 4.6 of the MLEP 2013 Council is required to consider the following Subclauses:

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

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

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

- (a) the consent authority is satisfied that:*
 - i. the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - ii. the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
- (b) the concurrence of the Secretary has been obtained.*

(5) In deciding whether to grant concurrence, the Secretary must consider:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

These matters are responded to in **Part D** of this Clause 4.6 variation.

2.2 CASE LAW

Relevant case law on the application of the standard Local Environmental Plan Clause 4.6 provisions have established the following principles:

- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, which emphasised that the proponent must address the following:
 - Compliance with the development standard is unreasonable and unnecessary in the circumstances;
 - There are sufficient environmental planning grounds to justify contravening the development standard;
 - The development is in the public interest;
 - The development is consistent with the objectives of the particular standard; and
 - The development is consistent with the objectives for development within the zone;
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, which held that the degree of satisfaction required under Subclause 4.6(4) is a matter of discretion for the consent authority;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827, which emphasized the need to demonstrate that the objectives of the relevant development standard are nevertheless achieved, despite the numerical standard being exceeded. Justification is then to be provided on environmental planning grounds. Wehbe sets out five ways in which numerical compliance with a development standard might be considered unreasonable or unnecessary as follows:
 - The objectives of the standard are achieved notwithstanding the non-compliance with the standard;

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- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
- The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable; or
- The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

These matters are responded to in **Part D** of this Clause 4.6 Variation.

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PART C STANDARD BEING OBJECTED TO

3.1 CLAUSE 4.4 FLOOR SPACE RATIO

The development standard being requested to be varied is **Clause 4.4 Floor Space Ratio** of MLEP 2013.

Table 2 outlines the proposed Clause 4.6 variation to MLEP 2013.

Table 2. Variation Summary			
MLEP 2013	MLEP 2013 Development Standard	Existing Development Non Compliance	Proposed Development Non Compliance
<i>Clause 4.4 - Floor Space Ratio</i>	maximum FSR of 0.4:1	The proposal acknowledges an existing technical non-compliant FSR, as the site is currently 0.41:1 (variation of 2.5%)	The proposal seeks development consent for a maximum FSR of 0.64:1 which is 60% departure from the Council's development standards and a 56% increase in the existing FSR.

The site area is 452.8m² and therefore the total permissible GFA based on an FSR of 0.4:1 is a maximum GFA of 181.9m². The existing GFA is 187m² which equates to an existing FSR of 0.41:1 which is technical non-compliance. The proposed GFA is 288.7m² and has a GFA of 0.64:1 which equates to a 60% departure from the development standard and a 56% increase in the existing FSR.

The proposed development which exceed the FSR development standard, does not:

- The maximum building height remains compliant; and
- The proposed development will not result in a significant loss of private open space or landscaped area to accommodate the additional GFA.

Figure 1 demonstrates the extent of the variation from 0.4:1 maximum FSR.

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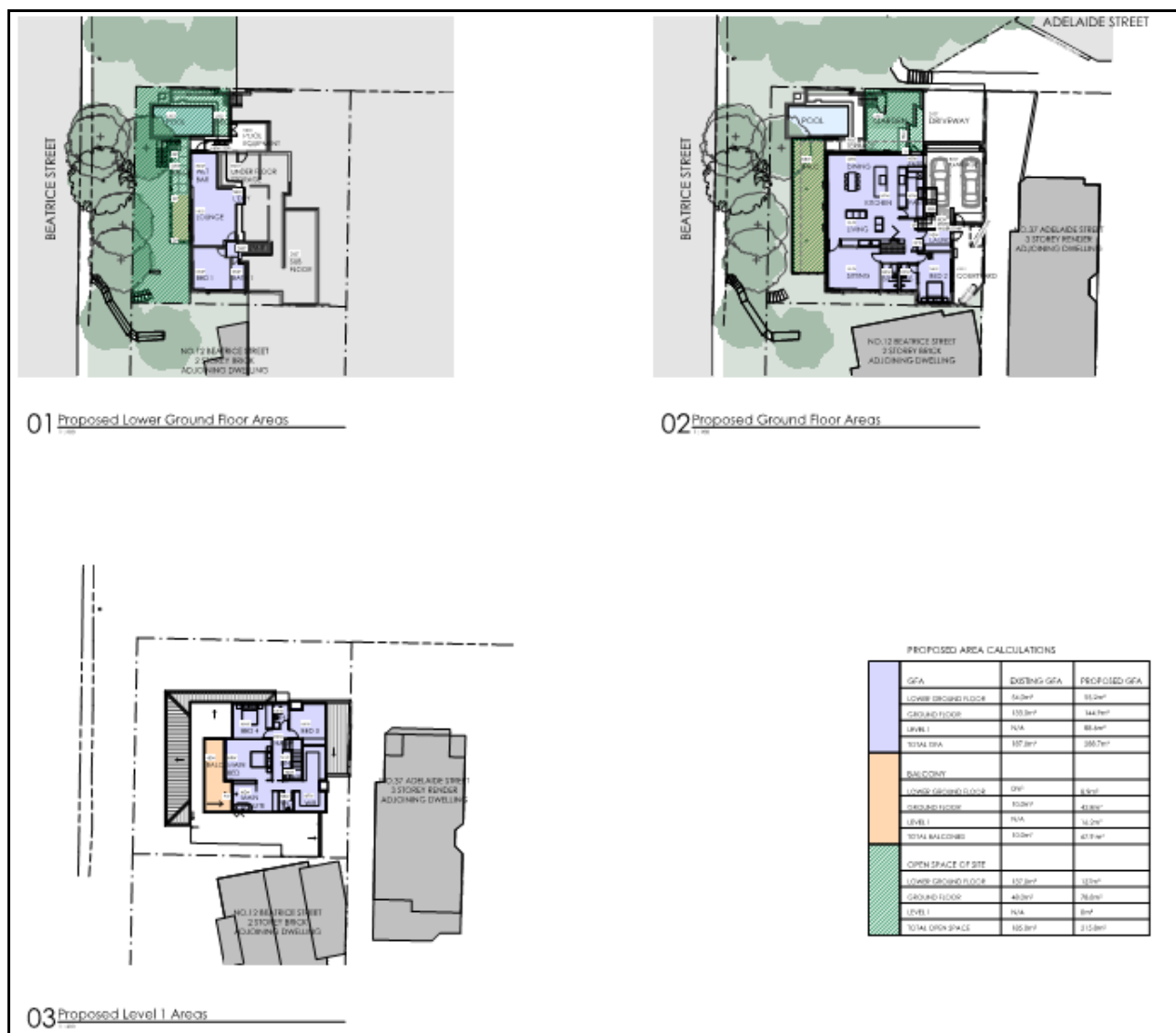


Figure 1: Proposed Area Calculations (Red Blue Architecture & Design, 2019)

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PART D PROPOSED VARIATION TO CLAUSE 4.4 FLOOR SPACE RATIO

4.1 OBJECTIVES OF CLAUSE 4.4 FLOOR SPACE RATIO STANDARD UNDER MLEP 2013

A key determination of the appropriateness of a Clause 4.6 variation to a development standard is the proposed development's compliance with the underlying objectives and purpose of that development standard. Indeed, *Wehbe v Pittwater Council* recognized this as one of the ways in which a variation to development standards might be justified (refer to **Section 2.2**). In *Four2Five Pty Ltd v Ashfield Council*, it was found that the proponent must demonstrate compliance with these objectives (refer to **Section 2.2**).

Therefore, while the site is subject to a specified numerical control for FSR, the objectives and underlying purpose behind the development standard are basic issues for consideration in the development assessment process.

4.1.1 Floor Space Ratio

The objectives of Clause 4.4 under MLEP 2013 are responded to as follows:

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

The proposed development seeks to undertake alterations and additions that would significantly renovate and rejuvenate the existing dwelling on site. The proposed development is considered compatible and consistent with the bulk and scale of the surrounding properties located along both Adelaide Street and Beatrice Street.

The site is characterised by a steep slope from the east of the site to the west of the site and the built form has carefully responded to the unique topography. The height complies with the MLEP 2013 and the built form reads as a two (2) storey dwelling from Adelaide Street which is consistent with the streetscape of Adelaide Street. Further to this, the proposed alterations and additions would read as three (3) storey stepped backed dwelling when viewed from Beatrice Street which is consistent with properties along Beatrice Street which are all constrained by a similar topography of the land.

The location of the additional floorspace creates an outcome that is consistent with both the existing and desired streetscape character of the locality having regard to the topography and building forms on adjoining properties.

The minimum lot size for the site is 1,150m² pursuant to Area U shown in the MLEP 2013. The site consists of an area of only 452.8m². Given the unique topography of the site and the small lot size (when considering minimum lot size pursuant to the MLEP 2013) the proposal has been thoughtfully designed to accord to the streetscape pattern of both Adelaide Street and Beatrice Street and would provide a renovation and rejuvenation of the existing property that is consistent with both streetscapes. Accordingly, the *Manly Development Control Plan 2013* (MDCP 2013) makes provisions for undersized lots and exceptions to the MLEP 2013 FSR controls. Section 4.1.3 of the MDCP 2013 states:

The undersized nature of a lot is a matter that Council may consider in determining whether 'compliance with the standard is unreasonable or unnecessary in the circumstances of the case' and 'there is sufficient environment planning grounds to justify contravening the development standard' under LEP clause 4.6(3).

The clause goes on to state:

- a) The extent of any exception to the LEP FSR development standard pursuant to LEP clause 4.6 in this plan is to be no greater than the achievable FSR for the lot size indicated in Figure 30 - Extent of FSR Variation for Undersized Lots.*

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Figure 30 - Extent of FSR Variation for Undersized Lots

Subzones on the LEP Lot Size (LSZ) Map	Maximum variation to FSR for undersized lots
Area 'C' on the LEP LSZ map	Calculation of FSR based on 250 sqm lot size/ site area
Area 'D' on the LEP LSZ map	Calculation of FSR based on 300 sqm lot size/ site area
Area 'I' on the LEP LSZ map	Calculation of FSR based on 500 sqm lot size/ site area
Area 'M' on the LEP LSZ map	Calculation of FSR based on 600 sqm lot size/ site area
Areas 'R', 'T' & 'U' on the LEP LSZ map	Calculation of FSR based on 750 sqm lot size/ site area

Figure 2: Figure 30 of MDCP 2013 (MDCP, 2019)

Therefore, based on the calculations identified within the Figure 30 of the MDCP 2013 extent of the GFA on an undersized lot in Area U is 300m² (0.4 x 750m²). The proposed GFA is 288.7m² which is below 300m².

The proposal is generally compliant with planning controls, except for the FSR and garage setback, and ensures the bulk and scale are consistent with the built form of the surrounding dwellings.

The proposal has been designed to generally comply with the height, building envelope and landscaping requirements with an exceedance in the FSR due to the existing undersized lot and unique topography. The proposal results in a building bulk and scale that is consistent with the desired outcome and objectives for the low density residential area. Given the proposals careful consideration of the streetscape character, it is considered that the proposal is compliant with the relevant objective.

(b) to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,

A view analysis has been prepared by Myriad Consulting and a montage image showing the views from 37 Adelaide Street prepared by Red Blue Architecture & Design. Both the montage image and the view analysis has clearly demonstrated view loss and gain as a consequence of the proposal.

Planning Principle *Tenacity Consulting v Warringah* [2004] NSWLEC 140 sets out a four (4) step assessment when considering view sharing and the impact on neighbours, these are set out below:

1. The first step is the assessment of views to be affected.
2. The second step is to consider from what part of the property the views are obtained.
3. The third step is to assess the extent of the impact.
4. The fourth step is to assess the reasonableness of the proposal that is causing the impact.

The montage image prepared by Red Blue Architecture & Design clearly articulates the way in which the proposed development achieves view sharing and reinforces views from adjoining properties to important elements of the horizon, landscape and townscape features. Whilst there are minimal changes to the view, the montage shows that the view gained is a water view and the view lost is land view. The *Tenacity Consulting v Warringah* decision states that the water views are valued more highly than land views and therefore, it is considered that this would be acceptable when considering step 1. The view would be obtained from the existing living room which is identified as an important room when considering outlook. The extent of the view to the west would be increased as the mass and bulk has been shifted to the north of the site as part of the first floor extension. Additionally, as previously mentioned this results in an increase in a water view which is held in high regard. The proposed would raise the roof height by approximately 700mm on the northern side of the house reducing a small portion of the existing land view to the west. Therefore, it could be considered that the proposal would have positive impact by increasing a water view and only marginally reducing the land view. The fourth step is the reasonableness of the development impacting these views. It is considered that the development is reasonable, given that it is primarily compliant with planning controls except garage setbacks and the FSR, which this report seeks to justify.

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

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The layout and orientation of proposed alterations and additions have been configured to ensure an appropriate visual relationship between the new development and the existing character of the area.

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

The proposal has been carefully designed to minimise any impacts on adjoining land in terms of solar access, privacy, and view sharing. There will be no unreasonable impacts on the amenity of adjoining land or 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.

The proposed development is for alterations and additions to an existing dwelling and therefore this objective does not apply.

4.2 OBJECTIVES OF THE ZONE

The site is currently zoned R2 Low Density Residential under MLEP 2013. The proposed development is permissible with consent in the zone. The proposed development is consistent with the following R2 zone objectives:

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

The height and proportion of the building is commensurate of the character envisaged for the area and will achieve a high level of amenity for the occupiers.

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

The proposed development is for alterations and additions to an existing dwelling, therefore it is considered that the development would not increase, nor detract from local facilities or services.

Therefore, it is considered that the proposed development would adhere to the objectives of the R2 zone. However, flexibility is sought in order to achieve a design outcome that achieves the planning controls prescribed for the site whilst providing a high level of residential amenity for both the occupiers and adjoining properties.

4.3 ESTABLISHING IF THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY

Subclause 4.6(3)(a) and the judgement in *Four2Five Pty Ltd v Ashfield Council* (refer to **Section 2.2**) emphasise the need for the proponent to demonstrate how the relevant development standard is unreasonable or unnecessary in the circumstances.

As shown in **Section 4.1**, the proposed development is considered consistent with the objectives of **Clause 4.4**.

Compliance with the Clause 4.4 requirement is considered unnecessary given that the objectives of the site are achieved notwithstanding the non-compliance, and the underlying objective of the development standard would be defeated in the event a compliant scheme was proposed.

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4.4 SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

As demonstrated in **Section 4.1**, the proposed development would result in a built form outcome which meets the future desired outcome of the site as prescribed by the MLEP 2013. The proposed development is permissible with consent at the site, maintains a suitable use of the site for residential purposes and is consistent with the objectives of the R2 zone.

The proposed development is justified on the following environmental planning grounds:

- The upgrade to an existing dwelling will have a positive impact on the streetscape character of the area.
- The provision of high quality and well designed floor space without creating additional view impacts or amenity impost on adjoining properties.
- The location of floor space in locations which respond to the topography of the site and surrounding locality. The relocation of floor space from 'compliant' areas on the site to sit within the slope of the land creates opportunity to retain and enhance views which would otherwise be subject to impacts.

Moreover, the Clause 4.6 variation to the development standard for FSR, is considered well founded on planning grounds notwithstanding the proposed non-compliance:

- The proposed development is consistent with the underlying objectives or purpose of the standards as demonstrated in **Section 4.1**;
- The proposed development is consistent with the underlying objectives or purpose of the R2 Low Density Residential zone as demonstrated in **Section 4.2**;
- The proposed development is consistent with the desired character of the site as part of the surrounding area; and
- The proposed development would not result in significant environmental or amenity impacts.

4.5 PUBLIC INTEREST

As outlined in **Section 2.2**, *Four2Five Pty Ltd v Ashfield Council* emphasised that it is for the proponent to demonstrate that the proposed non-compliance with the development standard is in the public interest. Subclause 4.6(4)(a)(ii) requires the proposed development 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.

Section 4.1 and **4.2** have already demonstrated how the proposed development is consistent with the objectives of both Clause 4.4 and the R2 zone under the MLEP 2013.

In *Lane Cove Council v Orca Partners Management Pty Ltd* (No 2) [2015] NSWLEC 52, Sheahan J referred to the question of public interest with respect to planning matters as a consideration of whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development.

The public advantages of the proposed development are as follows:

- The proposed built form will make a positive contribution to the surrounding locality; and
- Provide a development outcome that is compatible with the existing residential area and consistent with the land use zone objectives.

There are no significant public disadvantages which would result from the proposed development. The proposed development is therefore considered to be justified on public interest grounds.

4.6 MATTERS OF STATE AND REGIONAL SIGNIFICANCE

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The proposed non-compliances with Clause 4.4 would not arise any matters of significance for State or Regional Environmental Planning. It would also not conflict with any State Environmental Planning Policy or Ministerial Directives under Section 117 of the Environmental Planning and Assessment Act 1979 (EP&A Act).

Planning circular PS 08-014, issued by the NSW Department of Planning, requires that all development applications including a variation to a standard of more than 10% be considered by Council rather than under delegation. The proposed development would result in exceedances of the relevant planning controls as follows:

- Variation of FSR control of 60% departure from the Council's development standards and a 56% increase in the existing FSR.

The non-compliance is more than 10% prescribed in this planning circular.

4.7 PUBLIC BENEFIT IN MAINTAINING THE STANDARD

Strict compliance with Clause 4.4 would result in:

- Minimising opportunities to develop the site for future occupiers; and
- Preventing the renovation and rejuvenation of the site;

As such, there is no genuine public benefit in maintaining the strict FSR control for the site.

4.8 SUMMARY

For the reasons outlined above, it is considered that the objection to Clause 4.4 of the MLEP 2013 are well-founded in this instance and the granting of a Clause 4.6 variation to this development standard is appropriate in the circumstances. Furthermore, the objection is considered to be well-founded for the following reasons as outlined in Clause 4.6 of the MLEP 2013, *Four2Five Pty Ltd v Ashfield Council* and *Wehbe v Pittwater Council*.

- Compliance with the development standard is unreasonable and unnecessary in the circumstances;
- There are sufficient environmental planning grounds to justify contravening the development standard;
- The development is in the public interest;
- The development is consistent with the objectives for development within the zone;
- The objectives of the standard are achieved notwithstanding the non-compliance with the standard;
- The development does not negatively impact on any matters of State and regional significance; and
- The public benefit in maintaining strict compliance with the development standard would be negligible.

Further to this, it is submitted that:

- Strict compliance with the standards would not result in a better planning outcome for the land as it may prevent the development of a well consider proposal;
- No unreasonable impacts are associated with the proposed development.

Overall it is considered that the proposed Clause 4.6 variation to the FSR control are appropriate and can be justified having regard to the matters listed above.

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PART E CONCLUSION

It is requested that Northern Beaches Council and the Northern Beaches Local Planning Panel exercise their discretion (as identified in *Randwick City Council v Micaul Holdings Pty Ltd* – refer to **Section 2.2**) and find that this Clause 4.6 variation adequately addresses the matters required to be demonstrated by Subclause 4.6(3) of the MLEP 2013 (refer to **Section 2.1**).

This is particularly the case given the proposed development's otherwise compliance with MLEP 2013 and the suitability of the site for the proposed development.