



**34 Beatty Street, Balgowlah Heights**

**Substantial alterations and additions to the existing dwelling house and construction of a swimming pool**

**Statement of Environmental Effects  
For Northern Beaches Council**

**Prepared by Geoff Goodyer  
January 2019**

**Project No. 18-153**

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## **1. Executive summary**

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- 1.1. The proposal is to carry out substantial alterations and additions to the existing dwelling house and construct a swimming pool at 34 Beatty Street, Balgowlah Heights.
- 1.2. The existing dwelling house is to be retained to maintain the connection between the dwelling house and the adjacent Forty Baskets Reserve and beach. Behind the dwelling house a 2-storey addition is proposed set around a central courtyard, rising to 3-storeys closer to the streetfront and reflecting the topography of the land.
- 1.3. Because the proposal has been designed to retain the existing dwelling house as a 2-storey structure, the neighbours' views and solar access is largely retained. This can be contrasted with the current approval applying to the site (DA 0189/2011) which largely demolishes the existing dwelling house and proposes a 3-storey structure in its place.
- 1.4. A lift and tunnel is proposed connecting the existing elevated garage with the dwelling house.
- 1.5. The proposal has been assessed under the relevant planning controls, in particular *Manly Local Environmental Plan 2013* and *Manly Development Control Plan 2013*. The proposal satisfies the aims and objectives of all provisions within those planning controls. The proposal exceeds the floor space ratio control but is consistent in this regard with recent approvals for development adjoining the site.
- 1.6. The dwelling house will complement the character of the area and maintain the amenity of neighbouring dwellings and the proposal is considered to be suitable for approval on town planning grounds.

## 2. Introduction

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- 2.1. This Statement of Environmental Effects has been prepared by Geoff Goodyer of Symons Goodyer Pty Limited, Balgowlah. My professional details are included in Appendix A of this Statement of Environmental Effects.
- 2.2. I am a town planner with over 30 years' experience in local government and private practice. I am a Registered Planner accredited by the Planning Institute of Australia.
- 2.3. This Statement of Environmental Effects assesses the impacts of a proposal to carry out substantial alterations and additions to the existing dwelling house and construct a swimming pool at 34 Beatty Street, Balgowlah Heights, under section 4.15 of the *Environmental Planning and Assessment Act 1979*.
- 2.4. In the course of preparing this Statement of Environmental Effects I have:
- inspected the site and surrounding locality;
  - taken photographs of the site and surrounding locality; and
  - reviewed relevant environmental planning instruments and Council policies, in particular *Manly Local Environmental Plan 2013* and *Manly Development Control Plan 2013*.

### **3. Pre-lodgement liaison with Council**

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- 3.1. The applicant held a formal pre-lodgement meeting with Council's planners on 15 November 2018.
- 3.2. The feedback was generally supportive of the proposal but requested a redesign to increase the setback of the building to the northern side boundary. The proposal has been redesigned in accordance with the feedback from Council's planners.

#### 4. Description of proposal

- 4.1. The proposal is to carry out substantial alterations and additions to the existing dwelling house and construct a swimming pool at 34 Beatty Street, Balgowlah Heights.
- 4.2. The proposal has been designed to enable the retention of the existing 2-storey dwelling house and its visual connection with Forty Baskets Reserve and beach. The proposal involves creating a central courtyard framed by 2-storey buildings on the east, south and west.
- 4.3. The kitchen is proposed on the southern side of the courtyard, linking to living areas within the existing dwelling house to the east and new living areas to the west. Above the bedrooms on the western side is a rumpus room. The concept provides for the changing needs of a family as the children grow older by providing separate but related living areas.
- 4.4. Demolition works include the removal of internal walls within the dwelling house, and removal of the western wall and western wing.
- 4.5. The proposed swimming pool is located to the west of the dwelling house.
- 4.6. A lift and subterranean corridor is proposed to connect the garage with the dwelling house.
- 4.7. The dwelling house will provide accommodation in four bedrooms plus the existing studio room underneath the garage.
- 4.8. A boat storage deck is proposed between the dwelling house and the southern property boundary.
- 4.9. The area around the building will be landscaped.
- 4.10. The proposal is shown on the following plans:

No.	Revision	Title	Drawn by
DA-001	A	Survey	CHROFI Architects
DA-002	A	Site plan	CHROFI Architects
DA-003	A	Site analysis	CHROFI Architects
DA-004	A	Ground floor demolition plan	CHROFI Architects
DA-005	A	First floor demolition plan	CHROFI Architects
DA-006	A	Roof level demolition plan	CHROFI Architects
DA-007	A	Waste management plan	CHROFI Architects
DA-008	A	Cut and fill plan	CHROFI Architects
DA-010	A	BASIX	CHROFI Architects
DA-101	A	Ground floor plan	CHROFI Architects
DA-102	A	First floor plan	CHROFI Architects
DA-103	A	Second floor plan	CHROFI Architects
DA-104	A	Roof plan	CHROFI Architects
DA-105	A	Existing garage studio	CHROFI Architects
DA-110	A	Landscape plan	CHROFI Architects
DA-201	A	Elevations – sheet 1	CHROFI Architects

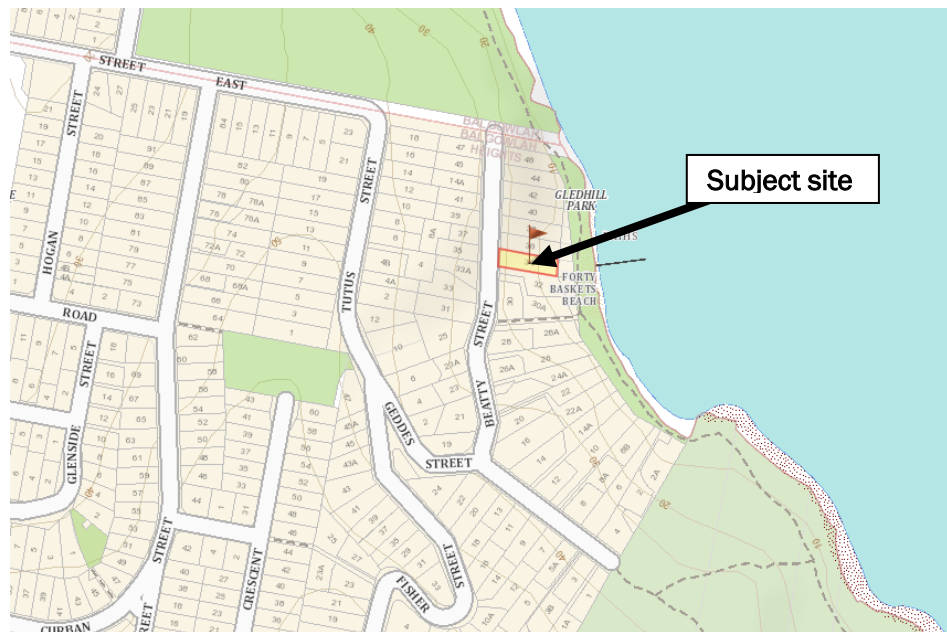
No.	Revision	Title	Drawn by
DA-202	A	Elevations – sheet 2	CHROFI Architects
DA-301	A	Sections	CHROFI Architects
DA-302	A	Sections	CHROFI Architects
DA-901	A	Shadow study	CHROFI Architects
DA-902	A	Shadow study	CHROFI Architects
DA-903	A	Shadow study	CHROFI Architects
DA-904	A	DCP controls	CHROFI Architects
BT1	A	Landscape site plan	Libby Birley
BT2	A	Landscape elevation and pool detail	Libby Birley
BT3	A	Planting plan	Libby Birley
D01	B	Ground floor / site drainage plan	NB Consulting Engineers
D02	A	First floor drainage plan	NB Consulting Engineers
D03	B	Second floor drainage plan	NB Consulting Engineers
D04	A	Roof drainage plan	NB Consulting Engineers
D05	B	Drainage details	NB Consulting Engineers
D06	A	Sediment and erosion control plan	NB Consulting Engineers
252476	B	Detail survey	Vekta

4.11. The proposal is accompanied by the following reports:

Title	Date	Prepared by
Arboricultural Assessment	15.1.2019	RainTree Consulting
BASIX Certificate No. A336749	11.1.2019	Ecomode Design
Bushfire Risk Assessment	18.1.2019	Bushfire Planning and Design
Flood Risk Management Report	23.1.2019	NB Consulting Engineers
Geotechnical Investigation	25.1.2019	White Geotechnical Group
Statement of Environmental Effects	January 2019	Symons Goodyer
Terrestrial Biodiversity Report	29.1.2019	GIS Environmental Consultants
Waste Management Plan	10.12.2018	CHROFI Architects

## 5. Locality analysis

- 5.1. The subject site is Lot 21A, DP 350345, known as No. 34 Beatty Street, Balgowlah Heights. It is located on the eastern side of Beatty Street to the north of its intersection with Geddes Street. The site's location is shown on the following maps:



Map 1 – Location (source: sixmaps)



Map 2 – Aerial photograph (source: sixmaps)

- 5.2. The site is generally rectangular in shape. It has a frontage of 15.4m to Beatty Street to the west, a frontage of 15.305m to Forty Baskets Reserve to the east, a northern side boundary of 52.205m and a southern side boundary of 51.36m.



- 5.3. The site area is 789m<sup>2</sup>.
- 5.4. The land slopes steeply from Beatty Street down to Forty Baskets Reserve, with the majority of the change in level occurring on the western portion of the site whilst the eastern portion, containing the existing dwelling house, is relatively flat. The total fall is approximately 15.8 metres.
- 5.5. The site is occupied by a 2-storey dwelling house of brick construction with a metal roof located towards the eastern boundary. At the Beatty Street frontage of the site is a double garage with a studio underneath. The area around the buildings is landscaped.
- 5.6. Adjoining the site to the north is a 3-storey dwelling house sited on the upper (western) portion of the site. Adjoining the site to the south is a 2-storey dwelling house located on the eastern portion of the site with a multi-car garage located on the street frontage.
- 5.7. Adjoining the site to the east is Forty Baskets Reserve, beach and swimming baths.
- 5.8. The surrounding area is characterised by large dwellings in landscaped settings. Sydney Harbour National Park is situated 200m to the south of the site and Welling Reserve is situated 120m to the north of the site, with both areas of public open space containing bushland.
- 5.9. The following photographs show the site and surrounding area:



**Photo 1:**  
The subject site, 34 Beatty Street,  
viewed from Beatty Street.



**Photo 2:**  
The subject site, 34 Beatty Street,  
viewed from Forty Baskets  
Reserve.



**Photo 3:**  
The subject site, looking up to the  
existing studio and garage.



**Photo 4:**  
The neighbouring dwelling house adjoining the site to the south, 32 Beatty Street, viewed from Beatty Street.



**Photo 5:**  
The neighbouring dwelling house adjoining the site to the south, 32 Beatty Street, viewed from Forty Baskets Reserve.



**Photo 6:**  
The neighbouring dwelling house adjoining the site to the north, 36 Beatty Street, viewed from Beatty Street.

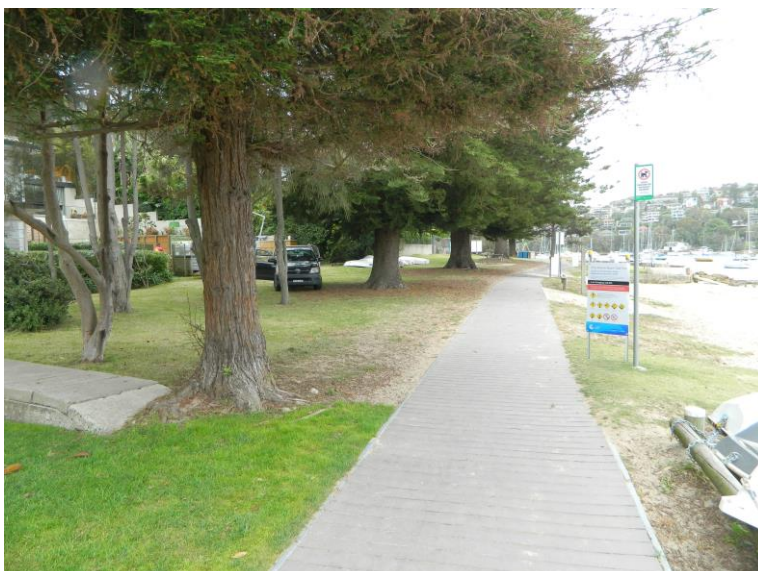




**Photo 7:**  
The neighbouring dwelling house adjoining the site to the north, 36 Beatty Street, viewed from Forty Baskets Reserve.



**Photo 8:**  
Existing development on the opposite side of Beatty Street.



**Photo 9:**  
Forty Baskets Reserve, adjacent to the subject site.

## 6. Does the proposal constitute “alterations and additions”?

- 6.1. In *Coorey v Municipality of Hunters Hill* [2013] NSWLEC 1187 the Land and Environment Court established a planning principle for characterising whether a proposal constitutes additions and/or alterations to an existing structure rather than a new structure.
- 6.2. The planning principle states that the first question to be considered is “what is the purpose” of determining how the proposal should be characterised. In this case the purpose is to clarify the weight to be given to the existing elements of the building and the constraints they pose to development of the site when assessing the performance of the proposal against the relevant planning controls.
- 6.3. The Court has listed the following matters for consideration (although the judgement notes that other matters may be relevant depending upon the circumstances of the case):

Qualitative issues	Comment
How is the appearance of the existing building to be changed when viewed from public places?	The appearance of the building from Beatty Street will remain essentially unchanged as it is hidden by the existing garage and high fence which are to be retained. When viewed from Forty Baskets Beach the building's appearance will continue to be that of a 2-storey dwelling house although it will be upgraded as part of the development.
To what extent, if any, will existing landscaping be removed and how will that affect the setting of the building when viewed from public places?	The presentation to Beatty Street is unchanged. The presentation to Forty Baskets Beach of a 2-storey dwelling house behind low shrubs is essentially unchanged. Vegetation in the central part of the site will be removed and new landscaping provided but this is not visible from public places.
To what extent, if any, will the proposal impact on a heritage item, the curtilage of a heritage item or a heritage conservation area?	There is no impact on any heritage items. The site does not contain a heritage item. The neighbouring heritage listed trees are unaffected by the proposal.
What additional structures, if any, in the curtilage of the existing building will be demolished or altered if the proposal is approved?	No ancillary structures are to be demolished.
What is the extent, if any, of any proposed change to the use of the building?	No change is proposed.
To what extent, if any, will the proposed development result in any change to the streetscape in which the building is located?	The streetscape is essentially unchanged.

Qualitative issues	Comment
To what extent, if any, are the existing access arrangements for the building proposed to be altered?	No change is proposed to vehicular access arrangements. A lift will provide pedestrian access from the garage to the dwelling house.
To what extent, if any, will the outlook from within the existing building be altered as a consequence the proposed development?	An outlook will be obtained from the new upper level of the building.
Is the proposed demolition so extensive to cause that which remains to lose the characteristics of the form of the existing structure?	No, the characteristics of the form of the existing building will be retained. In particular, the design retains the character of a 2-storey dwelling house with a low pitched roof facing the public reserve.

Quantitative issues	Comments
To what extent is the site coverage proposed to be changed?	There is an increase in impervious area from 61% to 77% of the site area.
To what extent are any existing non-compliances with numerical controls either increased or diminished by the proposal?	The proposal increases the floor space ratio of the development to 0.53:1 which is a non-compliance with the control. The building height complies with the control.
To what extent is the building envelope proposed to be changed?	The building envelope is changed as a result of the additions to the dwelling house in the central portion of the site.
To what extent are boundary setbacks proposed to be changed?	The boundary setbacks are essentially unchanged.
To what extent will the present numerical degree of landscaping on the site be changed?	The landscaped area is reduced but complies comfortably with the relevant controls.
To what extent will the existing floor space ratio be altered?	The floor space ratio is increased to 0.53:1.
To what extent will there be changes in the roof form?	The roof form is essentially unchanged.
To what extent will there be alterations to car parking/garaging on the site and/or within the building?	No changes are proposed to the garaging.
To what extent is the existing landform proposed to be changed by cut and/or fill to give effect to the proposed development?	The landform is essentially unchanged except for the creation of a lift shaft to provide access between the garage and the dwelling house.
What relationship does the proportion of the retained building bear to the proposed new development?	The retained portion is less than the proposed new development.

- 6.4. Based on the above analysis the proposal is considered to constitute alterations and additions to the existing structure. The Statement of Environmental Effects assesses the proposal accordingly.
- 6.5. However, it is noted that the alterations and additions are substantial and that it could be argued that the proposal is, technically, a new dwelling house. Assessing the proposal as a new dwelling house would not result in

any significant differences to the performance of the proposal under the relevant town planning controls.

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## **7. Manly LEP 2013**

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### **7.1. Aims of MLEP 2013**

- 7.1.1. The proposal is considered to be consistent with the aims stated in clause 1.2 of MLEP 2013. In particular, the proposal maintains the diverse range of housing opportunities and choices in the locality, provides high quality landscaped areas, maintains the existing housing density on the site, protects the natural environment and satisfies standards for energy conservation and water management.

### **7.2. Zoning, permissibility, and zone objectives**

- 7.2.1. The land is zoned E3 Environmental Management. Dwelling houses are permissible with consent in the zone.
- 7.2.2. The proposal is considered to be consistent with the relevant objectives of the zone in that it maintains the special ecological, scientific, cultural and aesthetic values of the area, provides landscaping to enhance the tree canopy, has no impact on the foreshore, and has a height and bulk that takes into consideration existing vegetation, topography and surrounding land uses.

### **7.3. Compliance Table**

	<b>Maximum permitted</b>	<b>Proposed</b>	<b>Complies</b>
<b>Building height</b>	8.5 metres	9.138 metres	No
<b>Floor space ratio</b>	0.4:1 (315.6m <sup>2</sup> )	0.53:1 (418.2m <sup>2</sup> )	No

### **7.4. Building height**

- 7.4.1. The building generally complies with the building height control in clause 4.3(2) of MLEP 2013. However, a small part of the south-eastern corner of the roof over the rumpus room exceeds the building height control as a result of localised changes in the ground levels. The maximum building height is 9.138 metres, measured from the south-western corner of the roof (RL 12.338) over a spot level of RL 3.20 shown on the survey.
- 7.4.2. A request to vary the building height control is attached as Appendix B to this Statement of Environmental Effects. For the reasons detailed in that request it is considered that the variation is justified in the circumstances of the case.
- 7.4.3. The proposal satisfies the objectives of the building height control:
- ✓ The building height is consistent with neighbouring and nearby development which is predominantly 3-storeys in height.
  - ✓ The scale is reasonable relatively to neighbouring development and the building facades are modulated to break up building bulk.



- ✓ Views to and from public and private spaces are maintained.
- ✓ Reasonable solar access is maintained to all neighbouring properties and complies with the requirements of the MDCP 2013.

## **7.5. Floor space ratio**

- 7.5.1. The proposal has been designed to have a bulk and scale that is consistent with the character of the area and existing and approved development on neighbouring and nearby sites.
- 7.5.2. The building has a floor space ratio of 0.53:1, which exceeds the maximum floor space ratio of 0.4:1 permitted under clause 4.4(2) of MLEP 2013.
- 7.5.3. A request to vary the floor space ratio control is attached as Appendix B to this Statement of Environmental Effects. For the reasons detailed in that request it is considered that the variation is justified in the circumstances of the case.
- 7.5.4. The proposal achieves the objectives of the floor space ratio control:
  - ✓ The bulk and scale of the building is consistent with neighbouring and nearby development which is predominantly 9-storeys in height.
  - ✓ The proposal does not obscure any landscape or townscape features.
  - ✓ The proposal maintains an appropriate relationship with the neighbouring 3-storey development.
  - ✓ The proposal does not result in any adverse environmental impacts on adjoining land or the public domain.

## **7.6. Miscellaneous provisions**

- 7.6.1. The site is not within the coastal zone (clause 5.5).
- 7.6.2. The site does not contain a heritage item and is not within a heritage conservation area (clause 5.10). Heritage listed trees in the adjacent reserve (Item I39) are unaffected by the proposal.

## **7.7. Additional provisions**

- 7.7.1. The site is not within an area identified on the Acid Sulphate Soils Map (clause 6.1).
- 7.7.2. Earthworks are proposed to provide for level building platforms, for the installation of the swimming pool, and for the construction of the lift and accessway (clause 6.2). The proposal satisfies the matter for consideration in clause 6.2(3) of MLEP 2013:

- (a) Drainage patterns will be managed in accordance with the hydraulic details prepared by NB Consulting Engineers.
- (b) The earthworks are to facilitate the future use of the land as a dwelling house.
- (c) Material extracted from the site is clean soil.
- (d) The proposed dwelling house will sit comfortably between neighbouring dwelling houses and maintain reasonable levels of amenity.
- (e) Material excavated from the site will generally be re-used on the site. Where this is not possible it will be disposed of to a licensed facility.
- (f) Given the historical use of the land for residential purposes it is unlikely that any relics will be disturbed.
- (g) Subject to the implementation of sedimentation and erosion control measures the proposal is unlikely to have any negative impacts on the nearby waterway.
- (h) Sedimentation and erosion control measures can be enforced through appropriate conditions of development consent to minimise impacts.

- 7.7.3. The site is not a flood control lot. The site is identified in the Draft Manly To Seaforth Flood Study as being subject to flooding. A Flood Risk Management Report has been prepared by NB Consulting Engineers and forms part of the development proposal, demonstrating compliance with the requirements of clause 6.3(3) of MLEP 2013. The report concludes:

*The proposed development is not envisaged to have an adverse effect on surrounding properties. The flood levels provided from council flood information have been adopted for this assessment. The proposed development generally meets the requirements of Northern Beaches Council (Manly) DCP provided the recommendations within this report are implemented.*

- 7.7.4. Stormwater will be disposed of in accordance with the plans and details prepared by NB Consulting Engineers (clause 6.4).

- 7.7.5. The site is identified as affected on the Terrestrial Biodiversity Map (clauses 6.5, 6.6 and 6.7). The impact of the proposal on local flora and fauna is assessed in the Terrestrial Biodiversity Impact Assessment report by GIS Environmental Consultants which relevantly concludes:

*The proposal will not have a significant impact to terrestrial biodiversity and meets the requirement of clause 6.5 of the MLEP 2013.*

*We recommend that ameliorative conditions and management recommendations in this report be followed to reduce disturbance during construction and to improve ecological outcomes.*

- 7.7.6. The site is not identified as being at risk on the Landslide Risk Map (clause 6.8).
- 7.7.7. The site is located within a Foreshore Scenic Protection Area (clause 6.9). The building is architecturally designed to maintain the visual amenity when viewed from the foreshore areas. Solar access to the foreshore areas is maintained. The proposal will not result in any conflicts between land-based and water-based activities. The proposal satisfies the requirements of clause 6.9 of MLEP 2013.
- 7.7.8. The site is not within the foreshore area (clause 6.10).
- 7.7.9. The site is connected to all essential services (clause 6.12).

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## 8. Manly DCP 2013

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### 8.1. Part 3 – General Principles of Development

Issue	Consistent with principle	Inconsistent with principle
Streetscape	✓	
Heritage	✓	
Landscaping	✓	
Sunlight access and overshadowing	✓	
Privacy and security	✓	
Maintenance of views	✓	
Sustainability	✓	

#### 8.1.1. Streetscape

The proposal retains the streetscape. The works are not visible from the street as they are generally located on the lower portion of the site and screened from the street by the existing garage and front fence, which are to be retained.

#### 8.1.2. Sunlight access and overshadowing

Shadow diagrams have been prepared that demonstrate that reasonable levels of solar access will be maintained to the neighbouring properties in accordance with the requirements of the MDCP 2013.

The only affected property is 32 Beatty Street. The principal private open space of that property is located on the eastern side of the site with expansive views over Forty Baskets Beach and North Harbour. The proposal has no impact on this private open space, complying with the requirements of clause 3.4.1.1 of the MRDCP to retain 2.3 of existing sunlight to this space at 9am, 12pm and 3pm in midwinter.

Living rooms in 32 Beatty Street are also oriented towards the expansive views to the east of the site and are retain all existing solar access. The proposal complies with the requirements of clause 3.4.1.2 of the MDCP 2013.

#### 8.1.3. Privacy and security

The proposal has been designed to maintain privacy between dwellings.

On the ground floor level the side boundary fences will prevent overlooking of neighbouring properties.

At first floor level a privacy screen is proposed on the southern side of the balcony to bedroom 2 to prevent overlooking of the neighbour's service courtyard. Window W-18 faces a blank wall on the neighbouring property and the balcony and fenestration to Bedroom 1 are oriented to the east and not towards neighbouring properties. The narrow balcony to bedrooms 3 and 4 has a blade wall on the northern edge to limit overlooking which is

also mitigated by the restricted width of the balcony and the low daytime usage of the bedrooms. Windows W-11 and W-12 are to the ensuite to bedroom 1 and will have frosted glazing.

On the second floor, privacy screens and non-trafficable roof gardens are proposed on both the northern and southern sides of the balcony to the rumpus room to prevent overlooking of neighbouring properties. Blade walls are proposed on the western side of the building extending out from the face of the western façade to provide visual and acoustic privacy to neighbouring properties. No windows are proposed facing the side boundaries at this level.

East-facing windows and balconies overlooking Forty Baskets Beach enhance safety in the adjoining public open space. Access from Beatty Street is securitised.

#### 8.1.4. Maintenance of views

The proposal is consistent with view sharing principles established by the Land and Environment Court and adopted in the Manly DCP 2013.

The proposal involves a much improved outcome for the neighbouring residents when compared to the development previously approved by Council (DA 189/2011). This is a result of a different design philosophy adopted by the project architect and embraced by the owners. Whereas the previous approval related to a development that constructed an additional level on the existing dwelling house the current proposal is to retain the existing 2-storey dwelling house to maintain the character of the area and to construct additions to the west, away from the frontage with Forty Baskets Beach Reserve.

In this way, the bulk of the building is moved away from the sight lines of the neighbouring properties to the harbour. Views over the existing dwelling house are generally maintained, as shown in the following comparison drawings prepared by the project architect:



--- APPROVED DA S96 DA 189/11



VIEW 1 - PROPOSED SCHEME



VIEW 2 - APPROVED DA S96 DA 189/11

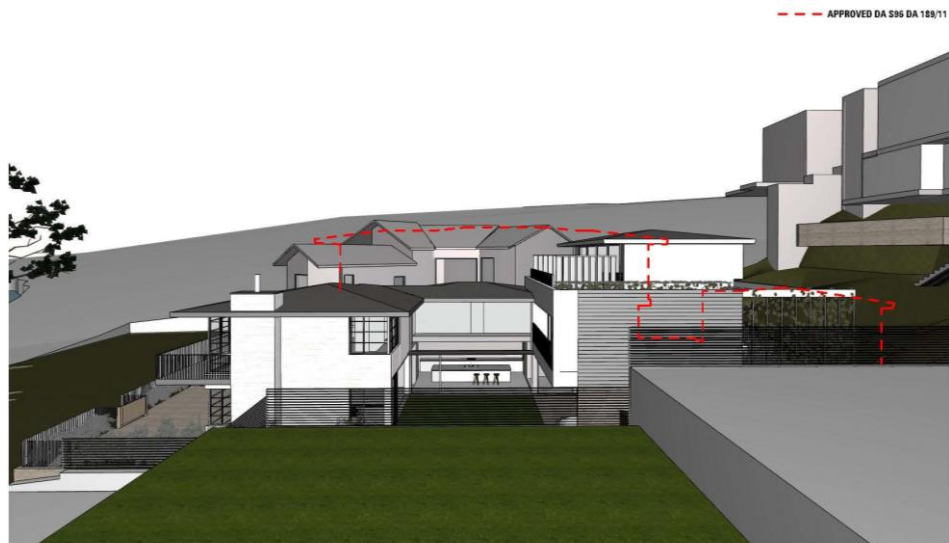
--- APPROVED DA S96 DA 189/11



VIEW 2 - PROPOSED SCHEME



VIEW 3 - APPROVED DA S95 DA 189/11



VIEW 3 - PROPOSED SCHEME

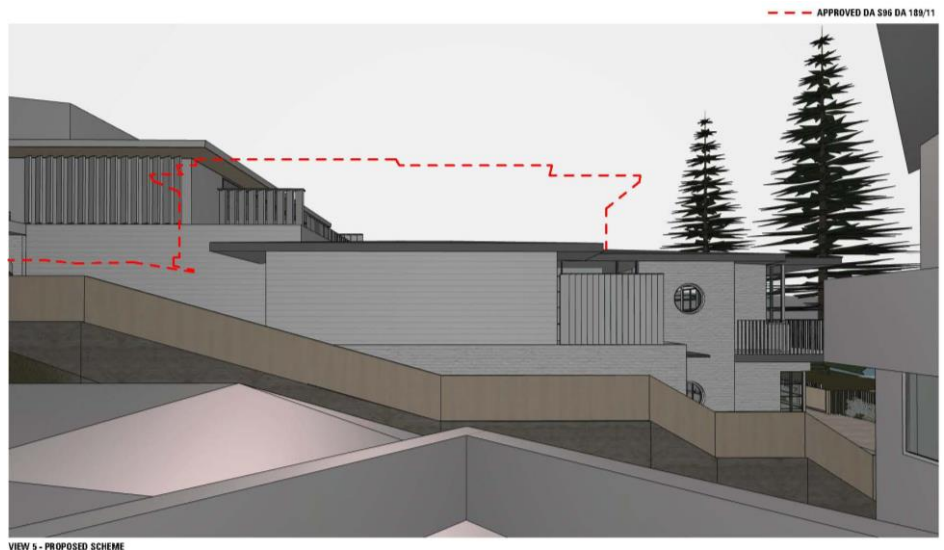


VIEW 4 - APPROVED DA S95 DA 189/11



VIEW 4 - PROPOSED SCHEME





Any impact on views is further mitigated by the fact that the views are obtained over a side boundary. As is noted in the Tenacity judgment, *“the expectation to retain side views... is often unrealistic”*.

The affected properties retain expansive harbour views over their rear boundaries.

To the extent that the proposal fails to comply with the numerical controls (ie: particularly floor space ratio), this non-compliance does not affect the views currently enjoyed by neighbouring properties because the bulk of the building has been relocated to the western portion of the site and out of sight lines.

The proposal has been skilfully designed by the project architects to retain views of the harbour from neighbouring properties, as demonstrated by the comparison drawings above, and it is considered that reasonable view sharing has been maintained.

#### 8.1.5. Sustainability

A BASIX Certificate has been provided demonstrating that the proposal achieves the energy and water saving goals established by the State Government. Natural cross-ventilation is provided which will reduce reliance on air conditioning and the living areas have good access to daylight.

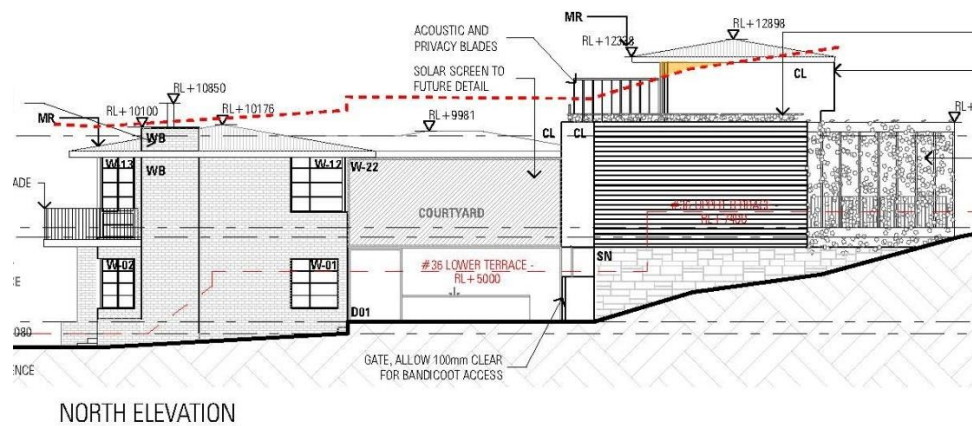
### 8.2. Part 4 – Development Controls

Control	Required / Permitted	Proposed	Complies?
Residential density – Area D9	1 dwelling per 1,150 m <sup>2</sup>	1 dwelling per 789m <sup>2</sup>	Existing
Wall height	- North 7.2m - South 7.5m	- East 7.5m - West 6.1m	NO YES
Number of storeys	2	Part 2 / Part 3	YES / NO
Roof allowance	2.5m over wall height	700mm	YES
Front Setback	6.0m or prevailing / established front setback	21.1m Consistent with streetscape	YES
Side setback	- North: 1.7m – 2.5m - South: 1.1m – 2.0m	- North: 1.0m – 2.5m - South: 1.525m – 3.22m	NO / YES YES
Side setback of windows to habitable rooms	- North: 3.0m - South: 3.0m	- North: 2.2m - South: 3.3m	NO YES
Rear setback	8.0m	4.5m – 5.3m	Existing
Open Space (OS4)			
- Total	60% site area (473.4m <sup>2</sup> )	60.2% site area (475.1m <sup>2</sup> )	YES
- Soft	24% site area (189.4m <sup>2</sup> )	28.5% site area (224.7m <sup>2</sup> )	YES
- Above ground	Maximum 25% of Total OS	8.8% of Total OS (41.7m <sup>2</sup> )	YES
Number of endemic trees	3	15	YES
Private open space	18 m <sup>2</sup>	> 18 m <sup>2</sup>	YES
Car parking	2 spaces	2 spaces	YES
Cut and fill	1.0m maximum	Max. 11.9m (lift shaft)	NO

#### 8.2.1. Wall height

The proposal generally complies comfortably with the wall height control.

There is a small area of localised breach on the northern façade of the building, shown in the following drawing:



The MDCP 2013 does not specify objectives for the wall height control but it can be assumed the underlying objectives relate to the retention of solar access, view sharing, and the perceived bulk and scale of development. In this regard the minor breach of the wall height control does not result in overshadowing because it is located on the northern façade (the southern façade fully complies with the wall height control). No view line are impeded by the small built element in breach of the control and, because the majority of the building is well below the wall height control, views are enhanced, particularly when compared with the previously approved development of the site. The area of breach is well set back from the boundary (2.5m) and the elevation is articulated to reduce the perceived bulk and scale.

The southern façade fully complies with the wall height control.

#### 8.2.2. Number of storeys

The proposal is to retain the 2-storey character of the dwelling house when viewed from Forty Baskets Beach. Whilst the majority of the dwelling house comprises 2 storeys the rumpus room creates a third storey in the central portion of the site.

The site is within an area characterised by 3-storey dwelling houses and the small portion comprising 3 storeys on site is in character with the area.

#### 8.2.3. Side boundary setbacks

The proposal generally complies with the side setback requirements of Part 4.1.4.2 of the MDCP 2013. However, a portion of the building is located on a 1.0m setback to the northern boundary. It is noted that this setback was discussed at the pre-lodgement meeting with Council officers and subsequent correspondence confirmed that a 1.0m setback was considered satisfactory.

The area where the 1.0m setback is proposed is adjacent to a raised terrace on the adjoining property. In this regard, the ground level and finished floor level on the subject site is RL3.9 whilst the level of the adjacent property is RL7.4. The wall height relative to the neighbour's site

for this portion of the northern façade is 2.86m (parapet RL10.26) and the 1.0m side setback complies with the 1/3 wall height control when using the levels on the neighbour's site. It can therefore be seen that the proposal achieves the underlying objectives of the control by providing separation between buildings and maintain a reasonable bulk and scale when viewed from the neighbouring property.

8.2.4. Rear boundary setback

The proposal is to retain the existing dwelling house which, whilst not complying with the rear setback control, ensures that no impacts arise. It is noted that Council previously approved an additional level on the existing dwelling house and that this is no longer proposed and thus there is a reduced impact compared to the previously approved development.

8.2.5. Open space

The proposal complies with the requirements of the MDCP 2013 with regards to open space, soft landscaping and private open space.

Details of the proposed landscaping are shown on the landscaping and planting plans prepared by Libby Birley Garden Design.

8.2.6. Earthworks (excavation and filling)

The proposal involves cut and fill to provide for level building platforms and for the proposed lift shaft.

Whilst the extent of the cut and fill is generally less than 1.0m in compliance with the MDCP 2013 controls, the lift shaft requires excavation up to 11.9 metres in depth. A geotechnical report has been prepared by White Geotechnical Group and forms part of the development proposal. It is anticipated that dilapidation reports will be required in accordance with Part 4.4.5.2 of the MDCP 2013.

All filling will be with clean and natural rock, gravels and soil and will generally be sourced from on-site excavation on site.

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## **9. State Environmental Planning Policies**

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### **9.1. SEPP No. 55 - Remediation of land**

- 9.1.1. Clause 7 of SEPP 55 requires Council to consider whether land is contaminated prior to granting consent to the carrying out of any development on that land.
- 9.1.2. The site has been used for residential purposes for approximately 70 years prior to which it was probably vacant.
- 9.1.3. The historical uses of the site are not listed in Table 1 to the Planning Guidelines under SEPP 55 as being activities likely to cause contamination. It is considered unlikely that the site has experienced any contamination, and no further assessment is considered necessary.

### **9.2. SEPP (Infrastructure) 2007**

- 9.2.1. Clause 45 of SEPP Infrastructure requires the Consent Authority to notify the electricity supply authority of any development application (or an application for modification of consent) for any development proposal:
  - within or immediately adjacent to an easement for electricity purposes (whether or not the electricity infrastructure exists),
  - immediately adjacent to an electricity substation,
  - within 5m of an overhead power line
  - that includes installation of a swimming pool any part of which is within 30m of a structure supporting an overhead electricity transmission line and/or within 5m of an overhead electricity power line
- 9.2.2. It is understood that the proposal will be referred to the electricity supply authority in accordance with Council's usual practice.

### **9.3. SEPP (Building Sustainability Index) 2004**

- 9.3.1. Under clauses 8 and 9 of SEPP BASIX, other planning instruments and DCP's do not apply to BASIX commitments.
- 9.3.2. A BASIX Certificate accompanies the proposal.

### **9.4. SEPP (Coastal Management) 2018**

- 9.4.1. The site is within both the coastal environment area and the coastal use area. However, the site is within the Foreshores and Waterways Area under SREP (SHC) so the provisions of SEPP CM relating to development in those areas don't apply (cl. 13(3) and 14(2) of SEPP CM).
- 9.4.2. The site is not located within the Coastal Zone.

## 9.5. SEPP (Vegetation in Non-Rural Areas) 2017

- 9.5.1. Under clause 10 of SEPP (Vegetation in Non-Rural Areas) 2017, Council may issue a permit to clear vegetation in any non-rural area of the State. The proposal involves the removal of four trees which are located within the building platform. These trees are assessed in the Arboricultural Impact Statement by RainTree Consulting.

## 9.6. SREP (Sydney Harbour Catchment) 2005 (Deemed SEPP)

### 9.1. Applicability

SREP (SHC) applies to the proposal because it is land identified in clause 3 of SREP (SHC). The site is located within the Foreshores and Waterways Area.

### 9.2. Matters for consideration

The following Table summarises the relevant matters for consideration under Part 3, Division 2 of SREP (SHC):

<b>Biodiversity, ecology and environment protection</b>	
(a) development should have a neutral or beneficial effect on the quality of water entering the waterways	No impact, subject to conditions controlling construction impacts.
(b) development should protect and enhance terrestrial and aquatic species, populations and ecological communities and, in particular, should avoid physical damage and shading of aquatic vegetation (such as seagrass, saltmarsh and algal and mangrove communities)	
(c) development should promote ecological connectivity between neighbouring areas of aquatic vegetation (such as seagrass, saltmarsh and algal and mangrove communities)	
(d) development should avoid indirect impacts on aquatic vegetation (such as changes to flow, current and wave action and changes to water quality) as a result of increased access	
(e) development should protect and reinstate natural intertidal foreshore areas, natural landforms and native vegetation	
(f) development should retain, rehabilitate and restore riparian land	
(g) development on land adjoining wetlands should maintain and enhance the ecological integrity of the wetlands and, where possible, should provide a vegetative buffer to protect the wetlands	
(h) the cumulative environmental impact of development	
(i) whether sediments in the waterway adjacent to the development are contaminated, and what means will minimise their disturbance	

Public access to, and use of, foreshores and waterways	
(a) development should maintain and improve public access to and along the foreshore, without adversely impacting on watercourses, wetlands, riparian lands or remnant vegetation	Public access to the foreshore is maintained.
(b) development should maintain and improve public access to and from the waterways for recreational purposes (such as swimming, fishing and boating), without adversely impacting on watercourses, wetlands, riparian lands or remnant vegetation	Public access to the waterway is maintained.
(c) if foreshore land made available for public access is not in public ownership, development should provide appropriate tenure and management mechanisms to safeguard public access to, and public use of, that land	Not relevant.
(d) the undesirability of boardwalks as a means of access across or along land below the mean high water mark if adequate alternative public access can otherwise be provided	Not relevant.
(e) the need to minimise disturbance of contaminated sediments	No impact, subject to conditions controlling construction impacts.
Maintenance of a working harbour	
(a) foreshore sites should be retained so as to preserve the character and functions of a working harbour, in relation to both current and future demand	Not relevant.
(b) consideration should be given to integrating facilities for maritime activities in any development	
(c) in the case of development on land that adjoins land used for industrial and commercial maritime purposes, development should be compatible with the use of the adjoining land for those purposes	
(d) in the case of development for industrial and commercial maritime purposes, development should provide and maintain public access to and along the foreshore where such access does not interfere with the use of the land for those purposes	
Interrelationship of waterway and foreshore uses	
(a) development should promote equitable use of the waterway, including use by passive recreation craft	Not relevant.
(b) development on foreshore land should minimise any adverse impact on the use of the waterway, including the use of the waterway for commercial and recreational uses	No adverse impacts.
(c) development on foreshore land should minimise excessive congestion of traffic in the waterways or along the foreshore	Not relevant.
(d) water-dependent land uses should have priority over other uses	Noted.

(e) development should avoid conflict between the various uses in the waterways and along the foreshores	The proposal does not result in any conflicts between users of the waterway and foreshore.
<b>Foreshore and waterways scenic quality</b>	
(a) the scale, form, design and siting of any building should be based on an analysis of: (i) the land on which it is to be erected, and (ii) the adjoining land, and (iii) the likely future character of the locality	The proposed alterations and additions are appropriate within the residential zone and are consistent with the likely future character of the area.
(b) development should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands, foreshores and tributaries	The proposal will improve the visual qualities of the harbour by upgrading the building.
(c) the cumulative impact of water-based development should not detract from the character of the waterways and adjoining foreshores	Not relevant.
<b>Maintenance, protection and enhancement of views</b>	
(a) development should maintain, protect and enhance views (including night views) to and from Sydney Harbour	The proposal will maintain views to and from the harbour by providing for reasonable view sharing.
(b) development should minimise any adverse impacts on views and vistas to and from public places, landmarks and heritage items	
(c) the cumulative impact of development on views should be minimised	
<b>Boat storage facilities</b>	
(a) development should increase the number of public boat storage facilities and encourage the use of such facilities	The proposal includes a boat storage platform over the existing drainage channel. It is an open area with minimal visual impacts. The boat storage is not below mean water mark and is not over the waterway.
(b) development should avoid the proliferation of boat sheds and other related buildings and structures below the mean high water mark	
(c) development should provide for the shared use of private boat storage facilities	
(d) development should avoid the proliferation of private boat storage facilities in and over the waterways by ensuring that all such facilities satisfy a demonstrated demand	
(e) boat storage facilities should be as visually unobtrusive as possible	
(f) in the case of permanent boat storage, the safety and utility of the development should not be adversely affected by the wave environment, and the development should avoid adverse impacts on safe navigation and single moorings	

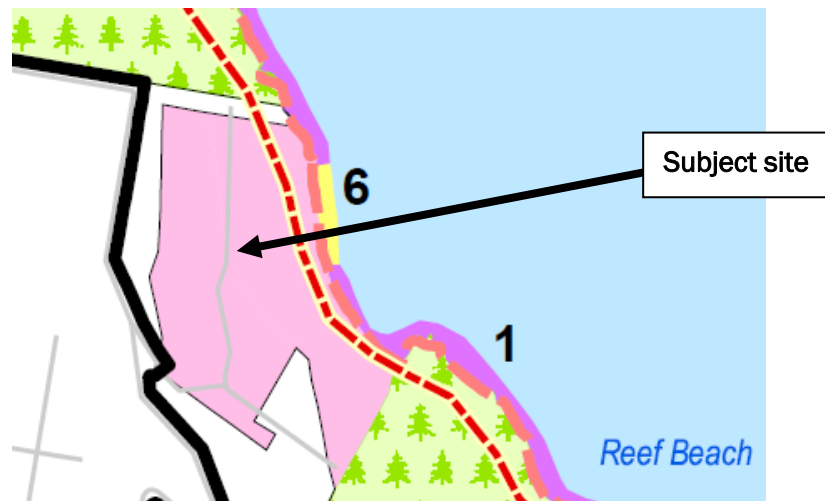


### 9.3. Referral to Advisory Committee

The proposal is not a type of development listed in Schedule 2 and referral to the Foreshores and Waterways Planning and Development Advisory Committee is not required under clause 29 of SREP (SHC).

### 9.7. **Sydney Harbour Foreshores and Waterways Area DCP 2005**

- 9.7.1. The Harbour DCP contains provisions in terms of Ecological Assessment, Landscape Assessment, Design Guidelines, and Other Matters for Consideration.
- 9.7.2. In terms of Ecological Assessment, the site of the proposed development is mapped within the “urban development with scattered trees” community. Existing pedestrian access through the adjacent public reserve is shown on the map (dotted red line).



Extract from DCP map.

- 9.7.3. Table 1 identifies the “urban development with scattered trees” area as having low conservation value.
- 9.7.4. The proposal is consistent with the Performance Criteria in Table 4 for the “urban development with scattered trees” area, where the additions are physically sited. The landscaped area is enhanced. Fencing to contain domestic pets is provided. Soil erosion and sedimentation will be controlled.
- 9.7.5. In terms of Landscape Assessment, the Harbour DCP identifies sixteen different landscape character types and provides assessment criteria for each type. The subject site is within Landscape Character Type 6. This area identifies the main harbor beaches. The proposal is consistent with the Performance Criteria for this area, with no impacts on the headlands, points and shorelines, maintenance of the visual continuity of Forty Baskets Beach, retention of a low density residential scale, and development that follows the topography of the land.
- 9.7.6. In summary, it is considered that the proposal is consistent with the provisions of the Harbour DCP.

## **10. Environmental Planning and Assessment Regulation 2000**

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### **10.1. Demolition**

- 10.1.1. The proposal involves demolition of part of the existing dwelling house. Under Clause 92(1)(b) of the *Environmental Planning and Assessment Regulation 2000* Council must consider the provisions of Australian Standard AS 2601: The demolition of structures ("AS 2601").
- 10.1.2. All demolition works will be carried out in accordance with AS 2601, including the preparation of an appropriate Work Plan. This matter may be addressed by a condition of consent.

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## **11. Other matters under Section 4.15 of the Environmental Planning & Assessment Act 1979**

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### **11.1. The likely impacts of the development**

- 11.1.1. These have been addressed above.

### **11.2. The suitability of the site**

- 11.2.1. The site is considered to be suitable for dwelling house development and is zoned for residential purposes. It does not contain any particular environmental features and does not have a history that would indicate any land contamination.

- 11.2.2. The site is identified as bush fire prone land. The proposal has been examined in the Bushfire Risk Assessment report by Bushfire planning and Design consultants which relevantly concludes:

*Based on the above report and with the implementation of the recommendation contained within this report the consent authority should determine that this development can comply with the requirements of AS 3959-2009 and 'Planning for Bushfire Protection' guidelines.*

- 11.2.3. The impacts of potential flooding and landslip have been investigated and addressed in the relevant engineering reports accompanying the proposal.

- 11.2.4. The site is located within an existing residential area and within walking distance of public transport and public open space, making it very suitable for residential development.

### **11.3. Submissions**

- 11.3.1. The proposal will require notification to neighbouring and nearby landowners in accordance with Part 2 of the MDCP 2013 and any submissions received will require consideration by Council.

### **11.4. The public interest**

- 11.4.1. The public interest is served by developing the land in an efficient and economic way that maintains the character of the area and the amenity of the neighbourhood. The Council's planning controls encourage such development in this locality.

## **12. Summary**

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- 12.1. The merits of this application have been identified in this assessment under Section 4.15 of the *Environmental Planning and Assessment Act 1979*, *Manly Local Environmental Plan 2013* and the *Manly Development Control Plan 2013*.
- 12.2. The proposed development will enhance the housing stock and diversity of housing choice in the locality. It makes efficient use of existing infrastructure. It will provide excellent amenity for the future residents of the development. The building is consistent with the character of the locality and will maintain the streetscape.
- 12.3. The proposal achieves the objectives of Council's development controls and strategic aims and is considered to be suitable for approval on town planning grounds.

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## Appendix A – Details of the author

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### ACADEMIC QUALIFICATIONS

Bachelor of Town Planning (Honours), University of New South Wales (1988).  
Master of Professional Accounting (Distinction), University of Southern Queensland (1999).

### PROFESSIONAL EXPERIENCE

#### **1997 to present                      SYMONS GOODYER PTY LTD**

Principal town planning consultant responsible for providing expert town planning advice to a diverse range of clients.

Expert witness in the Land and Environment Court.

Statutory and strategic projects within numerous Council areas, including Ashfield, Bankstown, Canterbury, Hornsby, Ku-ring-gai, Lane Cove, Leichhardt, Liverpool, Manly, Mosman, North Sydney, Pittwater, Randwick, Rockdale, Sutherland, Warringah, Waverley, and Woollahra.

#### **1988 to 1997      WARRINGAH COUNCIL**

Manager, Planning and Urban Design Branch (1994-7). Responsible for drafting of operative provisions of the Warringah Local Environmental Plan 2000.  
Senior Strategic Planner (1993-1994)  
Development Assessment Officer (1988-1993)

#### **1986 to 1988      MARRICKVILLE MUNICIPAL COUNCIL**

Town Planner

#### **1986                      EDWARDS MADIGAN TORZILLO BRIGGS INTERNATIONAL PTY LTD**

Town Planner

#### **1984                      RYDE MUNICIPAL COUNCIL**

Student Town Planner

### PUBLICATIONS

Goodyer, G (1988)  
Retail and office activities in industrial areas in the Sydney region. University of New South Wales.

Goodyer, G (1989)  
Hi-tech industry. Planning Law and Practice, UNSW, 1989.

Goodyer, G (1995)  
Modern Planning Instruments. Health and Building Surveyors' Association (NSW) Conference, 1995.

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## Appendix B – Clause 4.6 variation – building height and floor space ratio

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Address: 65 Bower Street, Manly

Proposal: Alterations and additions to existing dwelling house and construction of a swimming pool.

### 1. Manly Local Environmental Plan 2013 (“MLEP”)

#### 1.1 Clause 2.2 and the Land Use Table

Clause 2.2 and the Land Zoning provide that the subject site is zoned E3 – Environmental Management (the E3 zone) and the Land Use Table in Part 2 of MLEP specifies the following objectives for the E3 zone:

- \* *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*
- \* *To provide for a limited range of development that does not have an adverse effect on those values.*
- \* *To protect tree canopies and provide for low impact residential uses that does not dominate the natural scenic qualities of the foreshore.*
- \* *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*
- \* *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*
- \* *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

The proposed development is for the purpose of a dwelling house which is a permissible use in the E3 zone.

#### 1.2 Clause 4.3 – Building Height

Clause 4.3 of MLEP sets out the building height development standard as follows:

- (1) *The objectives of this clause 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.*
- (2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

### 1.3 Clause 4.4 – Floor Space Ratio

Clause 4.4 of MLEP sets out the FSR development standard as follows:

- (1) *The objectives of this clause are as follows:*
  - (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.*
- (2) *The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.*
- (2A) *Despite subclause (2), the floor space ratio for a building on land in Zone B2 Local Centre may exceed the maximum floor space ratio allowed under that subclause by up to 0.5:1 if the consent authority is satisfied that at least 50% of the gross floor area of the building will be used for the purpose of commercial premises.*

The Floor Space Ratio Map specifies a maximum floor space ratio of a building on the land is 0.4:1.

- 1.5 The Dictionary to MLEP operates via clause 1.4 of MLEP. The Dictionary defines “building height” and “ground level (existing)” as:

**building height** (or **height of building**) means:

- (a) *in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
- (b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to 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)** means the existing level of a site at any point.

- 1.6 Clause 4.5(2) of MLEP defines “floor space ratio” as:

*“The **floor space ratio** of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.”*

- 1.7 The Dictionary defines “gross floor area” as:

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

- (a) *the area of a mezzanine, and*
- (b) *habitable rooms in a basement or an attic, and*
- (c) *any shop, auditorium, cinema, and the like, in a basement or attic,*

*but excludes:*

- (d) *any area for common vertical circulation, such as lifts and stairs, and*
- (e) *any basement:*
  - (i) *storage, and*
  - (ii) *vehicular access, loading areas, garbage and services, and*
- (f) *plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and*
- (g) *car parking to meet any requirements of the consent authority (including access to that car parking), and*



- (h) any space used for the loading or unloading of goods (including access to it), and
- (i) terraces and balconies with outer walls less than 1.4 metres high, and
- (j) voids above a floor at the level of a storey or storey above.

#### 1.8 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP provides:

- (1) The objectives of this clause are as follows:
  - (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
  - (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The latest authority in relation to the operation of clause 4.6 is the decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“*Initial Action*”). *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.

Clause 4.4 (the FSR development standard) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of MLEP.

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 FSR development standard pursuant to clause 4.4 of MLEP which specifies an FSR of 0.45:1 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 Secretary 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 of satisfaction requires the consent authority to be satisfied 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 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, 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 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.*

Council has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), and may assume the concurrence of the Secretary under cl 4.6(4)(b). Nevertheless, the Council should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

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 4.7(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.

## **2. The Nature and Extent of the Variation**

- 2.1 This request seeks a variation to the building height and FSR development standards contained in clauses 4.3 and 4.4 of MLEP.
- 2.2 Clause 4.3(2) of MLEP specifies a maximum building height for development on the subject site of 8.5 metres.
- 2.3 The proposed building has a maximum building height of 9.138 metres. The non-compliance equates to 0.638 metres. The non-compliance occurs at the south-western corner of the roof over the proposed rumpus room. The development otherwise complies with the building height control.
- 2.4 Clause 4.4(2) of MLEP specifies a maximum FSR for the subject site of 0.4:1.
- 2.5 The subject site has an area of 789m<sup>2</sup>.
- 2.6 The FSR standard of 0.4:1 is equivalent to a gross floor area of 315.6m<sup>2</sup>. The proposal has a floor space ratio of 0.53:1 and a gross floor area of 418.2m<sup>2</sup>. The non-compliance is 0.13 which equates to 102.6m<sup>2</sup>.

## **3. Relevant Caselaw**

3.1 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] as follows:

13. *The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.*
14. *The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see Woolworths Ltd v Pallas Newco Pty Ltd (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000] HCA 5 at [28]; Winten Property Group Limited v North Sydney Council (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].*
15. *The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.*
16. *As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in Wehbe v Pittwater Council at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.*
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.*
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].

25. The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant's written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in *Randwick City Council v Micaul Holdings Pty Ltd* at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see *Wehbe v Pittwater Council* at [38].
26. The second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(i).
27. 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).
28. The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the *Planning Circular PS 18-003* issued on 21 February 2018, 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.*

29. *On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: Fast Buck\$ v Byron Shire Council (1999) 103 LGERA 94 at 100; Wehbe v Pittwater Council at [41].*

3.2 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 E3 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. Request for Variation

##### 4.1 Are clauses 4.3 and 4.4 of MLEP a development standards?

- (a) The definition of “development standard” in 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,*
  - (d) *the cubic content of floor space of a building.”*
- (b) Clause 4.3 of MLEP relates to the height of a building. Clause 4.4 of MLEP relates to floor space of a building. Accordingly clauses 4.3 and 4.4 are development standards.

**4.2 Is compliance with clauses 4.3 and 4.4 unreasonable or unnecessary ?.**

- (a) This request relies upon the 1<sup>st</sup> way identified by Preston CJ in *Wehbe*.
- (b) The first way in *Wehbe* is to establish that the objectives of the standard are achieved.
- (c) Each objective of the building height standard and reasoning why compliance is unreasonable or unnecessary is set out below:

- (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,*

The proposed building height is less than that of its neighbours. 36 Beatty Street has a building height of 12.54 metres (according to the Assessment Report for DA 315/2015) and 32 Beatty Street has a building height of approximately 11.0 metres (roof ridge RL 11.48 over ground level of approximately RL3.48). This can be contrasted with a proposed building height of 9.138 metres, which is 1.8 – 3.4 metres less than its neighbours.

Roof forms in the locality are varied and include flat roofs, pitched roofs and hipped roofs.

The proposal follows the topography of the land, stepping up the site from east to west.

There is no impact on the streetscape.

This objective is achieved.

- (b) *to control the bulk and scale of buildings,*

The proposal is almost entirely compliant with the building height control, with the variation being sought for only a small corner of the proposed rumpus room.

The building is architecturally designed and includes façade articulation and fenestration to break up the bulk and reduce the apparent scale of the building. Furthermore, the building is composed of a number of separate elements: the existing house, the connecting wing, the western wing, and the garage/studio. This further serves to reduce the bulk and scale of the building.

This objective is achieved.

- (c) *to minimise disruption to the following:*

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



The proposed building forms part of the urban backdrop to Forty Baskets Beach and Reserve. The proposal seeks to retain and improve the appearance of the existing dwelling house and not add to its bulk and scale by providing additional accommodation away from the foreshore and generally hidden by the existing building. This objective is achieved.

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

The issue of views from neighbouring sites is assessed in detail in the body of this Statement of Environmental Effects and concludes that reasonable view sharing is maintained. In particular, the proposal provides for a more considerate and equitable outcome than that which was previously approved by Council (DA 189/2011). This objective is achieved.

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

The proposal does not result in any disruption to views between public spaces. This objective is achieved.

- (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,*

As discussed in the body of this Statement of Environmental Effects, the proposal retains solar access to neighbouring properties in excess of the requirements of the MDCP 2013.

The proposal does not result in any additional overshadowing of Forty Baskets Beach Reserve.

This objective is achieved.

- (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.*

The development respects existing vegetation on site and the proposal involves the removal of only four prescribed trees (as assessed in the Arboricultural Impact Assessment by RainTree Consulting). The proposal includes additional landscaping of the site to soften its appearance. The building is generally 2 storeys in height with the small 3-storey element set back on the site and relating well to the rise in the site from east to west.

The proposal does not result in any conflicts with bushland or surrounding land uses.

This objective is achieved.

- (d) Each objective of the FSR standard and reasoning why compliance is unreasonable or unnecessary is set out below:

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

The proposal has no impact on the streetscape character of the area. The presentation to the street is essentially unchanged with the works being proposed on the lower part of the site, away from the street frontage. This objective is achieved.

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

The density of the development complies with the relevant controls in the MDCP 2013. As discussed above, the bulk is commensurate with that envisaged by the suite of controls applying to the land. The proposal will not obscure any important landscape and townscape features. This objective is achieved.

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

As discussed above, the proposal has a building height that is substantially less than that of its neighbours. Consistent with the decision of Roseth SC in *Project Ventures Developments v Pittwater Council* [2005] NSWLEC 191, it is my opinion that “most observers would not find the proposed building offensive, jarring or unsympathetic”.

The character of development in Beatty Street in the vicinity of the site is of large dwelling houses. Council recently approved the demolition of all existing structures and the construction of a new dwelling house at 38 Beatty Street with a greater floor space ratio than that which is proposed (0.54:1, DA 2017/1218).

The proposal includes new landscaping to ensure that an appropriate relationship is maintained with the landscape of the area.

This objective is achieved.

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

This objective contemplates that development may have adverse environmental impacts. The purpose of the objective is to minimise not prevent those impacts.

The building has been designed to minimise impacts on adjoining land and the public domain. Particular consideration has been given to addressing potential privacy impacts by orienting windows and decks

to the front and rear of the site and providing privacy screens where needed.

With regards to overshadowing, shadow diagrams demonstrate that solar access is retained to neighbouring properties in excess of the requirements of the MDCP 2013. There is no additional overshadowing of the adjacent Forty Baskets Beach Reserve.

With regards to impacts on views, the proposal locates the bulk of the building towards the western portion of the site to maintain views enjoyed by neighbouring dwelling houses.

Views from the adjacent public reserve to the site are maintained because the existing 2-storey dwelling house is retained and improved.

This objective is achieved.

- (e) *to provide for the viability of business zones and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.*

This objective is not relevant to the proposed development.

#### **4.3 Are there sufficient environmental planning grounds to justify contravening the development standard?**

There are sufficient environmental planning grounds to justify contravening the development standard. Whilst there is no requirement that the development comply with the objectives set out in clause 4.6(1) it is relevant to note that objective (b) provides:

*“to achieve better outcomes for and from development by allowing flexibility in particular circumstances.”* (emphasis added)

It should be noted at the outset that in *Initial Action* the Court held that it is incorrect to hold that the lack of adverse impact on adjoining properties is not a sufficient ground justifying the development contravening the development standard when one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse impacts.

The variation to the development standards does not reduce the amenity of other dwellings in the vicinity of the site or the public domain but results in significantly enhanced amenity for the proposed dwelling house in terms of the spaciousness of the living areas.

The variation to the development standards does not result in additional overshadowing.

Additionally, the variation to the development standards does not result in additional impacts on the streetscape as the existing streetscape presentation is maintained.

The form of the development, its appearance and its size is entirely consistent with the existing character of the area which generally reflects large dwelling houses set in landscaped settings sited so as to provide views of the adjacent waterway.

The absence of external impacts and the increased internal amenity of the dwelling house constitute sufficient environmental planning grounds to justify the proposed departures from the development standards.

**4.4 Is the proposed development in the public interest because it is consistent with the objectives of clauses 4.3 and 4.4 and the objectives of the E3 Environmental Management zone?**

(a) Section 4.2 of this written requests demonstrates that the proposed development meets each of the applicable objectives of clauses 4.3 and 4.4. As the proposed development meets the applicable objectives it follows that the proposed development is also consistent with those objectives.

(b) Each of the objectives of the E3 zone and the reasons why the proposed development is consistent with each objective is set out below:

- \* *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*

The proposal includes measures to address stormwater run-off and potential erosion and sedimentation. It is connected to reticulated sewerage to manage pollution impacts. Impacts on existing trees are assessed in the Arboricultural Impact Assessment by RainTree Consulting.

- \* *To provide for a limited range of development that does not have an adverse effect on those values.*

Dwelling houses are a permissible type of development in the E3 zone. The proposed development will be managed in accordance with the documentation submitted with the development application and conditions of consent in order to achieve this objective.

- \* *To protect tree canopies and provide for low impact residential uses that does not dominate the natural scenic qualities of the foreshore.*

Dwelling houses are a permissible type of development in the E3 zone. A dwelling house by its nature is a residential use which has low impact. The proposal will enhance the tree canopy in accordance with the landscape plan.

- \* *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*

Subject to appropriate conditions ensuring appropriate site management during construction the proposal will have no impact on nearby foreshore areas. Vegetation loss is minimal (4 prescribed trees) and offset by proposed planting. The Geotechnical Report by White

Geotechnical Group demonstrates that impacts on geological features can be managed appropriately.

- \* *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*

The site will have no impact on the nearby foreshore subject to appropriate construction management controls. Measures are proposed to control stormwater runoff.

- \* *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

As discussed above, the height and bulk of the building are considered to be appropriate for the site in the context of neighbouring development of a similar or greater bulk and scale.

#### **4.5 Has council obtained the concurrence of the Director-General?**

Council can assume the concurrence of the Director-General with regards to this clause 4.6 variation pursuant to the Assumed Concurrence notice issued on 21 February 2018.

#### **4.6 Has Council considered the matters in clause 4.6(5) of MLEP?**

- (a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed dwelling house for the particular site and this design is not readily transferrable to any other site in the immediate locality, wider region of the State and the scale or nature of the proposed development does not trigger requirements for a higher level of assessment.
- (b) As the proposed development is in the public interest because it complies with the objectives of the development standard and the objectives of the zone there is no significant public benefit in maintaining the development standard.
- (c) There are no other matters required to be taken into account by the secretary before granting concurrence.

In summary, the proposal satisfies all of the requirements of clause 4.6 of MLEP 2013 and exception to the development standards is reasonable and appropriate in the circumstances of the case.



Geoff Goodyer  
29 January 2019