

STATEMENT OF ENVIRONMENTAL EFFECTS

Alterations and
Additions to the
Existing Dwelling

62 Birkley Road, Manly

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Statement of Environmental Effects

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62 Birkley Road, Manly

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TABLE OF CONTENTS

1	Introduction	4
2	Site Analysis.....	5
2.1	Site Description and Location	5
3	Description of Development.....	6
3.1	Details of the Proposed Development.....	6
4	Statutory Planning Framework	7
4.1	Manly Local Environmental Plan 2013.....	7
4.1.1	Zoning and Permissibility.....	7
4.1.2	Floor Space Ratio.....	7
4.1.3	Height of Buildings.....	8
4.1.4	Acid Sulfate Soils.....	8
4.2	Manly Development Control Plan 2013.....	9
4.2.1	Front Building Line.....	15
4.3	Matters for Consideration Pursuant to Section 4.15 of the Environmental Planning and Assessment Act 1979 as Amended	16
5	Conclusion	21

1 Introduction

This statement has been prepared as part of the supporting documentation for a Development Application in relation to alterations and additions to the existing dwelling.

The design of the proposed new dwelling is innovative and of high architectural merit. The proposed works provide a site-specific design. Particular attention has been given to ensuring that the proposed dwelling affords high levels of amenity for future occupants while maintaining reasonable levels of amenity to the adjoining properties.

A pre-lodgement meeting (PLM2020/0284) was held and the comments provided by Council have been considered with this development application.

In addition to the Statement of Environmental Effects, the following also accompanies the application:

- Survey;
- Architectural Plans by Alice Cutcliffe Architect

In preparation of this document, consideration has been given to the following:

- Environmental Planning and Assessment Act, 1979;
- Manly Local Environmental Plan 2013 and
- Manly Development Control Plan 2013

The proposal succeeds when assessed against the Heads of Consideration pursuant to section 4.15 of the Environmental Planning and Assessment Act, 1979 as amended. It is considered that the application, the subject of this document, is appropriate on merit and is worthy of the granting of development consent for the following reasons:

- The application has considered and satisfies the various relevant planning controls applicable to the proposed use and associated works.
- The site is assessed as suitable for the proposal, having regard to the relevant land use and planning requirements.

2 Site Analysis

2.1 Site Description and Location

The site is identified as being within lot 15 in DP 667425. The site has an area of 341.81m² and is rectangular in shape with a frontage to Birkley Road. An aerial location view is provided as figure 1 below.



Figure 1: Site Location Map (Source: Six Maps)

The subject site has a frontage of 9.07m and a depth of 48.77m. The existing development on the site consists of a 2 storey dwelling with a detached garage with first floor secondary dwelling located at the rear of the site. The garage and secondary dwelling is accessed via the Lawson Place laneway.

Development in the immediate vicinity generally consist single dwellings, semi-detached and residential flat buildings.

3 Description of Development

3.1 Details of the Proposed Development

The proposed works comprise of a first floor extension to create a bedroom and walk-in-robe. A small balcony is proposed of the bedroom.

4 Statutory Planning Framework

The following section of the report will assess the proposed development having regard to the statutory planning framework and matters for consideration pursuant to Section 4.15 of the Environmental Planning & Assessment Act, 1979 as amended. Those matters which are required to be addressed are outlined, and any steps to mitigate against any potential environmental impacts are discussed below.

4.1 Manly Local Environmental Plan 2013

4.1.1 Zoning and Permissibility

The subject site is Zoned R1 General Residential. The objectives of R1 General Residential zone are as follows:

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

Dwelling houses are permissible with consent in the R1 zone and the works relate to alterations and additions to an existing dwelling. As such, the works are permissible with consent.

4.1.2 Floor Space Ratio

Pursuant to clause 4.4 in the LEP, the site has a maximum floor space ratio (FSR) control calculated at 0.6:1. The objectives of the FSR control 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.*

The proposed FSR is calculated at 0.63:1 with a gross floor area of 217.7m². The proposed FSR is minorly non-compliance with the development standard and a clause 4.6 request has been prepared and is provided as annexure A.

4.1.3 Height of Buildings

Pursuant to clause 4.3 in the LEP the max building height is measured at 8.5m. The objectives of the control are as follows:

- a) *to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future Streetscape character in the locality,*
- b) *to control the bulk and scale of buildings,*
- c) *to minimise disruption to the following:*
 - i. *views to nearby residential development from public spaces (including the harbour and foreshores),*
 - ii. *views from nearby residential development to public spaces (including the harbour and foreshores),*
 - iii. *views between public spaces (including the harbour and foreshores),*

The first floor extension will continue the established height of the dwelling which is measured at 7.9m and compliant with the building height development standard.

4.1.4 Acid Sulfate Soils

Pursuant to clause 6.1 of the LEP the objective is to ensure that development does not disturb expose or drain acid sulfate soils and cause environmental damage. The subject site is mapped as being within class 5 acid sulfate soils. The proposed development does not require any excavation that would disturb or expose acid sulfate soils. It is considered that the proposed works will not adversely impact on the local environment.

4.2 Manly Development Control Plan 2013

The relevant provisions of the Manly Development Control Plan 2013 in relation the proposed works are detailed as follows:

Control	Requirement	Proposed	Compliance
Streetscapes and Townscapes 3.1	<p>To minimise any negative visual impact of walls, fences and carparking on the street frontage.</p> <p>To ensure development generally viewed from the street complements the identified streetscape.</p> <p>To encourage soft landscape alternatives when front fences and walls may not be appropriate.</p> <p>To ensure that all parking provision is designed and sited to respond to and respect the prevailing townscape.</p> <p>To assist in maintaining the character of the locality.</p> <p>To recognise the importance of pedestrian movements and townscape design in the strengthening and promotion of retail centres.</p>	<p>The proposed first floor extension is considered to be consistent with the existing streetscape character of the local area. The design ensures that the existing pitched roof form of the ground and first floor is maintained which is consistent with the existing built form of the dwelling and with similar development along Birkley Road.</p> <p>The dwelling will incorporate a highly articulated front façade to minimise any perceived bulk and scale concerns. The front setbacks have been considered and maintains ample open space within that front setback to mitigate the dwelling becoming a dominant feature in the streetscape.</p>	Yes

Control	Requirement	Proposed	Compliance
	To minimise negative visual impact, in particular at the arterial road entry points into the Council area and the former Manly Council area, so as to promote townscape qualities.		
Preservation of Trees 3.3.2 Footpath Tree Planting 3.3.3	<p>To protect and enhance the urban forest of the Northern Beaches.</p> <p>To protect and enhance the scenic value and character that trees and/or bushland vegetation provide.</p>	No trees are proposed to be removed or impacted with the proposed development.	Yes
Sunlight Access and Overshadowing 3.4.1	<p>New development (including alterations and additions) must not eliminate more than one third of the existing sunlight accessing the private open space of adjacent properties from 9am to 3pm at the winter solstice (21 June) ; or</p> <p>Where there is no winter sunlight available to open</p>	Shadow diagrams have been prepared and are provided within the architectural plans. The additional overshadowing is relatively minor and with adjoining properties still achieving compliant levels of solar access.	Yes

Control	Requirement	Proposed	Compliance
	space of adjacent properties from 9am to 3pm, the calculations for the purposes of sunlight will relate to the equinox in March and September from 9am to 3pm.		
Privacy and Security 3.4.2	<p>To minimise loss of privacy to adjacent and nearby development by:</p> <ul style="list-style-type: none"> • appropriate design for privacy (both acoustical and visual) including screening between closely spaced buildings; • mitigating direct viewing between windows and/or outdoor living areas of adjacent buildings. <p>To increase privacy without compromising access to light and air. To balance outlook and views from habitable rooms and private open space.</p>	<p>The proposed expressed dormer window includes a highlight window only which does not pose any overlooking risk.</p> <p>The balcony does not raise any overlooking concerns in this instance. It is located at the front of the site and does not directly overlook into any adjoining private open space or windows. It is also stepped in from the side boundaries to provide appropriate spatial separation. Privacy screening measures are included to the southern elevation to mitigate overlooking risks toward the adjoining front yard.</p>	Yes

Control	Requirement	Proposed	Compliance
	To encourage awareness of neighbourhood security.		
Stormwater Management 3.7	<p>To manage urban stormwater within its natural catchments and within the development site without degrading water quality of the catchments or cause erosion and sedimentation.</p> <p>To manage construction sites to prevent environmental impacts from stormwater and protect downstream properties from flooding and stormwater inundation.</p>	The new works will connect to the existing drainage system for the dwelling.	Yes
Number of Storeys 4.1.2.2	2 storeys	2 storeys	Yes
Wall Height 4.1.2.1	6.5m	A 7.5m wall height is proposed with the pop out along the northern elevation. The wall height breach is confined to this section and runs for a length of 4.6m. In this regard, the breach to the wall height is considered minor with the majority of the	Yes

Control	Requirement	Proposed	Compliance
		<p>existing wall height being maintained.</p> <p>The wall height breach does not contribute to any significant adverse impact with regard to privacy and overshadowing. The visual impact of the wall height is negligible considering the breach is confined to the small section of new work.</p>	
FSR 4.1.3	0.6:1	0.64:1	No – clause 4.6 has been prepared
Front Setback 4.1.4.1	Road Front setbacks must relate to the front building line of neighbouring properties and the prevailing building lines in the immediate vicinity.	Please refer to discussion below	No - worthy on merit
Side Setbacks 4.1.4.2	1/3 of wall height	<p>The development proposes a side setback to the new addition of 900mm to the northern boundary and 1.168m to the southern boundary.</p> <p>While not in strict compliance with the numerical control, it is considered reasonable in this instance. Appropriate design measure have been incorporated to address visual privacy concerns and limit any additional overshadowing.</p>	No – worthy on merit.

Control	Requirement	Proposed	Compliance
		<p>The proposed dormer to the north elevation is relatively minor in dimension and does not result in an unreasonable visual impact. The side elevations will continue to have a highly articulated presentation to mitigate visual impact concerns.</p> <p>Given the negligible amenity impacts associated with the new works it is considered that the side setbacks proposed are reasonable in this instance and meet the objectives of the control.</p>	
Open Space and Landscaping	55% Open Space 35% Soft Landscaping	The proposed works are confined within the existing building footprint and, as such, there is no change to the existing open space and landscape area calculations.	Yes – as per existing
First Floor and Roof Additions 4.1.7	First floor additions must complement the architectural style of the ground floor and where possible retain existing roof forms. Notwithstanding setback provisions, the addition may follow the existing ground floor wall setbacks providing adjoining properties are not adversely impacted by overshadowing, view loss or privacy issues.	<p>The first floor addition will continue the architectural style of the existing built form. The pitched roof element of the existing ground floor front façade and the existing first floor will be maintained. In this regard, the streetscape character will also be preserved. The works proposed raise no significant amenity impact concerns, as previously discussed.</p> <p>The first floor extension is only able to be achieved at the front of the site, in this</p>	Yes

Control	Requirement	Proposed	Compliance
	The dwelling and the form of alterations and additions must retain the existing scale and character of the street and should not degrade the amenity of surrounding residences or the aesthetic quality of the former Manly Council area. In this regard, it may be preferable that the addition be confined to the rear of the premises or be contained within the roof structure.	instance. Careful consideration of the existing character of the streetscape has been undertaken and has ensured that the front façade is highly articulated to create visual impact and alleviate potential bulk and scale concerns.	

4.2.1 Front Building Line

The proposed first floor addition has a proposed setback of 5.733m to the balcony and 8m to the external wall. With regard to clause 4.1.4.1, street front setbacks, the controls are as follows:

a) Street Front setbacks must relate to the front building line of neighbouring properties and the prevailing building lines in the immediate vicinity.

The existing ground floor setback is to be maintained with the proposed development. The first floor addition is consistent with the prevailing first floor setbacks in the immediate vicinity. For example, 68 Birkley Road has a first floor front setback of 7.346m. In this regard, it is considered that the proposed front setback is appropriate in this instance and consistent within the streetscape.

b) Where the street front building lines of neighbouring properties are variable and there is no prevailing building line in the immediate vicinity i.e. where building lines are neither consistent nor established, a minimum 6m front setback generally applies. This street setback may also need to be set further back for all or part of the front building façade to retain significant trees and to maintain and enhance the streetscape.

It is considered that the front building line for first floor are variable in this instance. The immediately adjoining properties are single storey developments with development in the vicinity including variable setbacks at the first floor level. While the proposed development is minorly non-compliant with the 6m setback to the balcony, the front façade will step in from the ground floor level and provides greater articulation and visual interest.

c) Where the streetscape character is predominantly single storey building at the street frontage, the street setback is to be increased for any proposed upper floor level.

The immediately adjoining development is characterised as single storey. The streetscape character is relatively even distribution of either single storey dwellings or 2 storey dwelling with recessed first floors from the ground floor level. The proposed development does increase the front setback for the first floor.

d) Projections into the front setback may be accepted for unenclosed balconies, roof eaves, sun-hoods, chimneys, meter boxes and the like, where no adverse impact on the streetscape or adjoining properties is demonstrated to Council's satisfaction.

A small balcony is proposed within the front setback and does not raise any adverse amenity impacts with regard to privacy or overshadowing.

With regard to the objectives of clause 4.1.4 we provide the following commentary:

- The streetscape character is maintained with the relatively modest additions being proposed.
- The works do not raise any amenity impact concerns with regard to privacy and overshadowing.
- The front setback proposed provides for adequate space between buildings and maintains the pattern of spaces along Birkley Road.

4.3 Matters for Consideration Pursuant to Section 4.15 of the Environmental Planning and Assessment Act 1979 as Amended

The following matters are to be taken into consideration when assessing an application pursuant to section 4.15 of the Environmental Planning and Assessment Act 1979 (as amended). Guidelines (in *italic*) to help identify the issues to be considered have been prepared by the Department of Planning and Environment. The relevant issues are:

(i) The provision of any planning instrument

The proposal is permissible and generally in conformity with the General, Development Type and Locality Specific Controls contained within Manly Development Control Plan.

The proposal succeeds when assessed against the Heads of Consideration pursuant to section 4.15 of the Environmental Planning and Assessment Act, 1979. It is considered that the application, the subject of this document, is appropriate on merit and is worthy of the granting of development consent.

(ii) Any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

N/A

(iii) Any development control plan

Manly DCP applies.

(iiia) Any Planning Agreement that has been entered into under section 7.4 or any draft planning agreement that a developer has offered to enter into under Section 7.4, and

N/A

(iv) The Regulations (to the extent that they prescribe matters for the purposes of this paragraph), and

N/A

(v) Any Coastal Zone Management Plan (within the meaning of the Coastal Protection Act 1979)

N/A

(b) The likely impacts of that development, including environmental impacts on both the natural and built environments and social and economic impacts in the locality,

Context and Setting

i. What is the relationship to the region and local context in terms of:

The scenic qualities and features of the landscape

The character and amenity of the locality and Streetscape

The scale, bulk, height, mass, form, character, density and design of development in the locality

The previous and existing land uses and activities in the locality

The proposed alterations and additions are entirely commensurate with that established by adjoining development and development generally within the sites visual catchment with no adverse residential amenity impacts in terms of views, privacy or overshadowing.

ii. What are the potential impacts on adjacent properties in terms of:

Relationship and compatibility of adjacent land uses?

sunlight access (overshadowing)

visual and acoustic privacy

views and vistas

edge conditions such as boundary treatments and fencing

These matters have been discussed in detail earlier in this report. The works have been designed such that potential impacts are minimal and within the scope of the built form controls.

Access, transport and traffic:

Would the development provide accessibility and transport management measures for vehicles, pedestrians, bicycles and the disabled within the development and locality, and what impacts would occur on:

Travel Demand

dependency on motor vehicles

traffic generation and the capacity of the local and arterial road network

public transport availability and use (including freight rail where relevant)

conflicts within and between transport modes

Traffic management schemes

Vehicular parking spaces

N/A

Public Domain

The proposed development will have no adverse impact on the public domain.

Utilities

Existing utility services will continue to service the dwelling house.

Flora and Fauna

N/A

Waste Collection

Normal domestic waste collection applies to the existing dwelling house.

Natural hazards

N/A

Economic Impact in the locality

The proposed development will not have any significant impact on economic factors within the area notwithstanding that it will generate additional employment opportunities through the construction period with respect to the proposed works.

Site Design and Internal Design

Is the development design sensitive to environmental considerations and site attributes including:

size, shape and design of allotments

The proportion of site covered by buildings

the position of buildings

the size (bulk, height, mass), form, appearance and design of buildings

the amount, location, design, use and management of private and communal open space

Landscaping

These matters have been discussed in detail earlier in this report. The potential impacts are minimal and within the scope of the general principles, desired future character and built form controls.

How would the development affect the health and safety of the occupants in terms of:

lighting, ventilation and insulation

building fire risk – prevention and suppression

building materials and finishes

a common wall structure and design

access and facilities for the disabled

likely compliance with the Building Code of Australia

The proposed development will comply with the provisions of the Building Code of Australia as required by Clause 98 of the Environmental Planning and Assessment Regulation 2000. There will be no detrimental effects on the occupants through the building design which will achieve the relevant standards pertaining to health and safety.

Construction

What would be the impacts of construction activities in terms of:

The environmental planning issues listed above

Site safety

The development will be carried out in accordance with the provisions of the Protection of the Environment Operations Act 1997. Normal site safety measures and procedures will ensure that no site safety or environmental impacts will arise during construction.

(c) The suitability of the site for the development

Does the proposal fit in the locality

Are the constraints posed by adjacent development prohibitive

Would development lead to unmanageable transport demands and are there adequate transport facilities in the area

Are utilities and services available to the site adequate for the development

Are the site attributes conducive to development

The site is located in an established residential area. The adjacent development does not impose any unusual or impossible development constraints. The proposed development will not cause excessive or unmanageable levels of transport demand.

The site being of moderate grade, adequate area, and having no special physical or engineering constraints is suitable for the proposed works.

(d) Any submissions received in accordance with this act or regulations

It is envisaged that Council will appropriately consider any submissions received during the notification period.

(e) The public interest

The architect has responded to the client brief to provide for a dwelling of design merit that provides a high level of amenity for the future occupants whilst appropriately addressing the sites setting and maintaining the amenity of the nearby residential properties. The development will provide a quality built form outcome on the site.

It is considered that the public interest is best served in providing certainty in the planning process through encouraging development of good design that satisfies the outcomes and controls contained within the adopted legislative framework. Accordingly, approval of the development would be in the public interest.

5 Conclusion

The proposed alterations and additions to the dwelling are commensurate with surrounding development and do not give rise to any unreasonable amenity impacts to neighbouring dwellings. The works are consistent with the objectives of the built form controls as they reasonably apply. The application relies on a favourable determination regarding the minor non-compliance with the FSR development and consider the clause 4.6 provided to be well-founded.

It is considered that the proposal is appropriate on merit and is worthy of the granting of development consent for the following reasons:

- The application has considered and satisfies the various relevant planning controls applicable to the site and the proposed development.
- The proposed alterations and additions are compatible with the existing Streetscape and development in the local area generally.
- The site is assessed as suitable for the proposal, having regard to the relevant land use and planning requirements.

It is considered that the public interest is best served in providing certainty in the planning process through encouraging development of exceptional design merit, that satisfies the outcomes and controls contained within the adopted legislative framework.

Having given due consideration to the matters pursuant to Section 4.15 of the Environmental Planning and Assessment Act, 1979 as amended, it is considered that there are no matters which would prevent Council from granting consent to this proposal in this instance.

ANNEXSURE 1

RE: CLAUSE 4.6 REQUEST TO VARY THE FLOOR SPACE RATIO 62 BIRKLEY ROAD, MANLY

1.0 Introduction

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

2.0 Manly Local Environmental Plan 2013 (“MLEP”)

2.1 Clause 4.4 – Floor Space Ratio

Pursuant to Clause 4.4 of Manly Local Environmental Plan 2013 (MLEP) the floor space ratio control applicable to the site is 0.6:1. The objectives of this control 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.*

It has been determined that the proposed gross floor area is calculated at 217.7m² representing an FSR of 0.63:1. This represents a non-compliance of 12.62m² or 6%.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP provides:

(1) *The objectives of this clause are:*

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

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

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

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

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

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

Clause 4.6(2) of MLEP provides:

- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

This clause applies to the clause 4.4 FSR Development Standard.

Clause 4.6(3) of MLEP provides:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

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

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

Clause 4.6(4) of MLEP provides:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Director-General has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the

applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that 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 Director-General must consider:*
- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

As these proceedings are the subject of an appeal to the Land & Environment Court, 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] (*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 4.6(8) is only relevant so as to note that it does not exclude clause 4.4 of MLEP from the operation of clause 4.6.

3.0 Relevant Case Law

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

17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant*

can demonstrate that compliance is unreasonable or unnecessary in more than one way.

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

1. Is clause 4.4 of MLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.4 and the objectives for development for in the zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.4 of MLEP?

4.0 Request for variation

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

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

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

Consistency with objectives of the Floor Space Ratio standard

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

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

Response: The alterations and additions have been designed to be consistent with the existing streetscape character. In this regard, the first floor extension has been stepped back from the ground floor to provide articulation and mitigate concerns regarding bulk and scale. The proposed balcony also provided for further articulation and visual interest. The pitched roof character of the existing dwelling will be continued with the alterations and additions.

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

This objective is achieved as the bulk and scale of development is entirely consistent with the existing and desired streetscape character.

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

Response: The proposal does not impact on any significant landscape or townscape features. The site benefits from the existing significant street tree which softens and screens the built form when viewed from the public domain.

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

Response: The development relates to relatively minor first floor addition which continues the existing character of the dwelling and, as such, generally maintains the visual relationship between adjoining development and development generally in the locality.

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

Response: The works would not result in any impact 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.*

Response: N/A

Consistency with zone objectives

The subject site is zoned R1 General Residential pursuant to MLEP 2013 with dwelling houses permissible in the zone with consent. The stated objectives of the zone are as follows:

- *To provide for the housing needs of the community.*

Response: The development relates to alterations and additions to an existing dwelling.

- *To provide for a variety of housing types and densities.*

Response: The proposal maintains the established single dwelling residential use on the site consistent with this objective.

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

Response: N/A

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

The non-compliant component of the development, as it relates to FSR, demonstrates consistency with objectives of the R1 General Residential zone and the FSR standard objectives. Adopting the first option in *Wehbe* strict compliance with the FSR standard has been demonstrated to be unreasonable and unnecessary.

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

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

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

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

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

Sufficient environmental planning grounds exist to justify the FSR variation. Specifically, the environmental planning grounds consist of the following:

- The proposal is consistent with the existing streetscape character by employing a continuation of the existing characteristics of the dwelling and provided a highly articulated front façade to mitigate any bulk and scale concerns.
- The development sits within the existing building footprint and does not result in any additional adverse amenity impacts to adjoining properties with regard to privacy and overshadowing. The narrowness of the block and the existing built form determined the location of the proposed first floor extension and would have the least amenity impact on adjoining development and their private outdoor open space.
- The development has no impact on the heritage items within the vicinity given the relative minor nature of the works proposed.
- The extent of the variation, at 6%, is considered relatively minor with the additional floor space not resulting in unreasonable amenity impacts and has been architecturally designed to be commensurate with the existing streetscape character. The character of the streetscape is mixed with predominately single and 2 storey dwellings with larger residential flat buildings located to the south of the site along Birkley. In this regard, it is considered that the addition at the front of the first floor would not be considered jarring within the streetscape.

- We note that a large significant street tree is located at the front of the site which provide further softening and screening of the dwelling.

I have formed the considered opinion that sufficient environmental planning grounds exist to justify the variation including the compatibility of the height, bulk and scale of the development, as reflected by floor space, with the built form characteristics established by adjoining development and development generally within the site's visual catchment, and the fact that the existing GFA/FSR is reduced as a consequence of the works proposed.

The developments compliance with the objectives of the FSR standard and the general paucity of adverse environmental impact also giving weight to the acceptability of the variation sought.

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

- The proposal promotes the orderly and economic use and development of land (1.3(c)).
- The development represents good design (1.3(g)).
- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

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

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

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

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

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

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

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

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

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

4.4 Secretary’s concurrence

By Planning Circular dated 21st February 2018, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

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

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

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

5.0 Conclusion

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

- (a) that the contextually responsive development is consistent with the zone objectives, and
- (b) that the contextually responsive development is consistent with the objectives of the FSR standard, and
- (c) that there are sufficient environmental planning grounds to justify contravening the development standard, and
- (d) that having regard to (a), (b) and (c) above that compliance with the FSR development standard is unreasonable or unnecessary in the circumstances of the case, and
- (e) that given the developments ability to comply with the zone and FSR standard objectives that approval would not be antipathetic to the public interest, and
- (f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and
- (g) Concurrence of the Secretary can be assumed in this case.

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

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

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

Boston Blyth Fleming Pty Limited

William Fleming
Planner

