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

Address: 34 Beatty Street, Balgowlah Heights

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 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^2.

2.6 The FSR standard of 0.4:1 is equivalent to a gross floor area of 315.6m^2. The proposal has a floor space ratio of 0.53:1 and a gross floor area of 418.2m^2. The non-compliance is 0.13 which equates to 102.6m^2.

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.*
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> *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].*
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> *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.*
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> *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.*
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> *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].*
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> *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)(ii).*

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 1st 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-stroey 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 ba 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

Geoff Goodyer
17 May 2019