

CLAUSE 4.6 TO CLAUSE 4.4 OF MANLY LEP 2013

EXCEPTIONS TO DEVELOPMENT STANDARDS – **FSR VARIATION**

*Construction of new four-storey dwelling house with swimming pool, and off-street
car parking*

at

60 CASTLE CIRCUIT SEAFORTH

PREPARED BY

ABC PLANNING PTY LTD

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MANLY LEP 2013 - CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARDS

This Clause 4.6 variation request has been prepared to accompany the development application that seeks construction of new four-storey dwelling house with swimming pool, and off-street car parking, at Lot 16 in DP 200638, commonly known as No. 60 Castle Circuit, Seaforth.

Clause 4.6 of the *Manly Local Environmental Plan 2013* (MLEP2013) allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards.

This Clause 4.6 variation request takes into account the relevant aspects of the Land and Environment Court judgement from *Initial Action Pty Ltd v Woollahra Council [2017] NSWLEC 1734*, as revised by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130*.

Clause 4.6 Exceptions to development standards

- (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.*
- (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.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Director-General has been obtained.*
- (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.*

Development Standard to be Varied

The proposal seeks a variation to the development standard contained within Clause 4.4 of the MLEP2013 - maximum FSR of 0.4:1, as demonstrated on the LEP map in **Figure 1** below. Pursuant to Clause 4.4 of MLEP2013, the site is subject to a maximum FSR of 0.4:1 (GFA 251.52m²), with the proposal for 0.44:1 (329.90m² GFA).

However, in accordance with Section 4.1.3.1 of the Manly DCP 2013, exceptions to FSR may be considered for undersized lots. In this regard, the calculation of FSR for the subject site within the subzone "U" on the LEP Minimum Lot Size Map is based on a 750m² lot size, and consequently allows for a maximum GFA of 300m² (**Figure 2**).

In this regard, the proposed FSR of 0.44:1 (329.90/750) and GFA of 329.90m², is a minor 29.99m² (9.9%) variation from the DCP control.

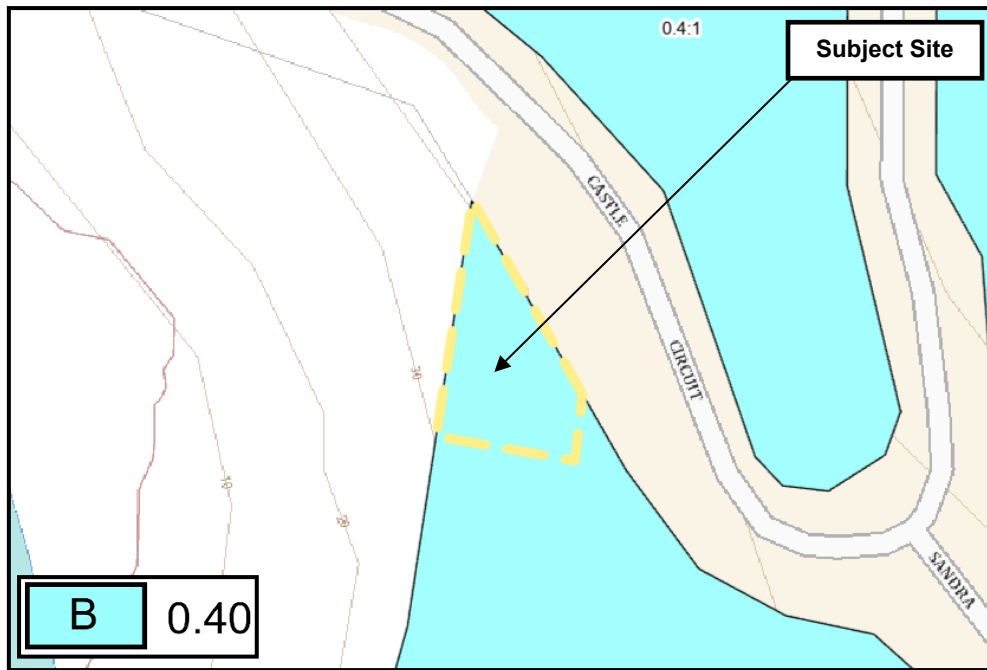


Figure 1: Floor Space Ratio Map

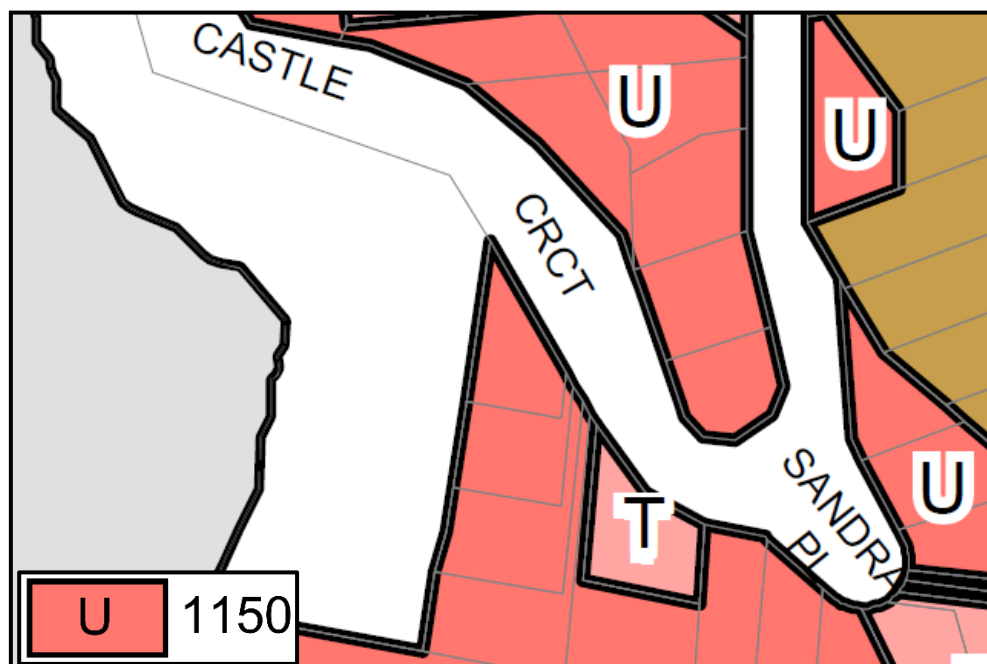


Figure 2: Minimum Lot Size Map

Justification for Contravention of the Development Standard

This written request is considered to justify the contravention of the development standard and addresses the matters required to be demonstrated by Clause 4.6(3), of which there are two aspects. Both aspects are addressed below:

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

Assessment: It is considered that strict compliance with the development standard for FSR on the site is unreasonable and unnecessary in the circumstances for the following reasons:

- The proposal complies with the objectives of the development standard and the R2 Low-Density Residential zone, indicated in the assessment in **Table 1** below. Furthermore, compliance with the development standard is unreasonable and unnecessary as it is in the public interest, given it is consistent with the objectives for the development within the zone.
- Notwithstanding the numeric departure, the proposed dwelling house will have a height, bulk and scale compatible with the scale of the existing built form (that has been approved and on neighbouring sites) and that of the broader surrounding local area. Furthermore, the FSR non-compliance will not have an adverse impact to surrounding properties, the streetscape or adjoining Environmental Conservation zoned land, in relation to significant additional overshadowing, visual impact from the bulk and scale, visual or acoustic privacy impacts, or view loss. Furthermore, the proposal provides for high-quality internal amenity to the existing dwelling house.

Overshadowing

- In accordance with the submitted Shadow Diagrams significant additional overshadowing impacts are not expected. The corner nature of the site combined with the solar orientation and generous side setback from the only immediate adjoining neighbour to the south, ensures that the proposed development will provide adequate solar access to public domain and surrounding properties. In this regard, the adjoining southerly neighbour has windows orientated with a western outlook to enjoy ocean views.
- Despite the FSR variation, the adjoining dwelling to the south will maintain access to sunlight. In this regard, the east-west orientation of the adjoining lot and west facing living areas with extensive glazing to the west to provide views over the ocean, plus the generous setback of the proposed dwelling to the southerly neighbour, the private open space and habitable rooms of the adjoining dwelling will receive a minimum of three (3) hours of direct sunlight between 9am and 3pm in mid-winter.

Visual and Acoustic Privacy

- Visual and acoustic privacy impacts to adjoining neighbours from the additional height has also been carefully considered, with primary living areas oriented to the front and rear of the dwelling, which ensures that visual privacy is maintained to the southern adjoining neighbour. In this regard, the Level 1 Plant Room is suitably screened to maintain acoustic amenity, and privacy screens are fitted to terraces along the southern elevation to mitigate overlooking the adjoining southerly neighbour.
- The generous separation distance between the proposed development and the neighbouring dwelling to the south, plus significant separation to the dwellings across

Castle Circuit, along with deep soil planting further mitigates potential visual and acoustic privacy impacts.

Visual Impact from Bulk and Scale

- The proposal has been designed to reduce bulk and scale, with the single-storey presentation to the street frontage is compatible and subservient with surrounding properties opposite on Castle Circuit, being not visually dominant in the streetscape (**Figures 2 & 3**).



Figure 3: View from across Castle Circuit to the proposed development noting the modest single-storey scale addressing the streetscape

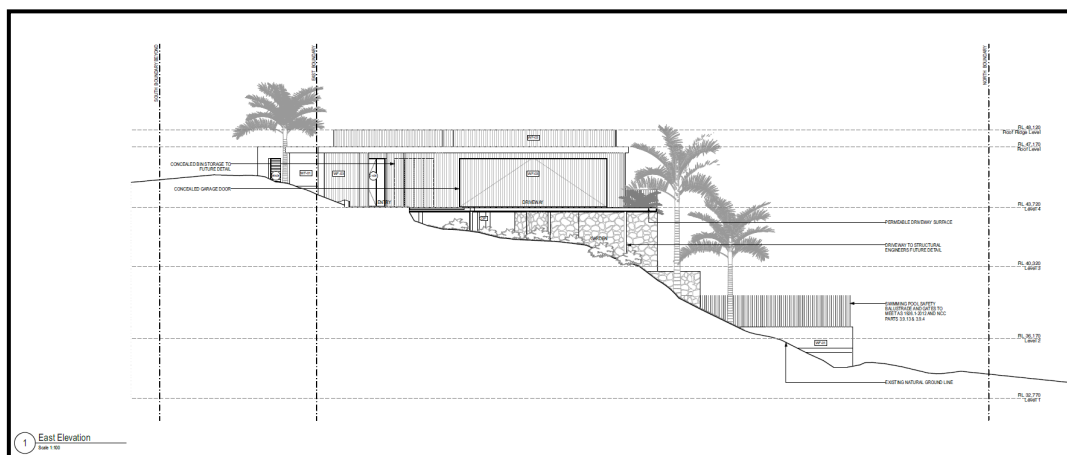


Figure 4: Excerpt East Elevation Plan, illustrating single storey presentation to the streetscape

- The proposed variety of architectural features are considered to be of a high standard which will enhance the character of the street, including indentation and recesses, deep set balconies, privacy screens, and steps in the floor levels, creating good articulation to the built form and building façade. In this regard, the proposed dwelling is sensitively designed with regard to the site conditions, with the excess FSR provided in a discrete and sympathetic manner (**Figure 4**).

- Notwithstanding the FSR variation, the proposed dwelling house has been designed to respect and enhance the water views whilst ensuring suitability of the development on the coastal foreshore, and will not have a detrimental impact on the visual amenity of the harbour or coastal foreshore. In this regard, the dwelling will be partially screened by the heritage landscape along the foreshore. The proposed development is considered to be suitable given its type, location and design and its relationship with and impact on the foreshore. The proposal provides for private open space and total landscaped area which outperform the control whilst combining with high-quality landscaping to ensure acceptable relationship between the development and the foreshore scenic protection area, and mitigation of visual bulk and scale impacts from the FSR variation.



Figure 5: Excerpt Southern Elevation Plan, illustrating articulation and modulation, with the built form stepping with the slope of the site

- The proposed FSR variation is not considered to be responsible for any unreasonable bulk or scale impacts, noting that a significant proportion of the building is excavated into the hillside, whilst the stepped built form of the dwelling is compatible with the sloping nature of the topography of the site and surrounding properties. When viewed from the waterways, the dwelling will be viewed against the backdrop of dwellings higher up-slope and therefore, the FSR variation will not generate a built form that is prominent nor out of character with the established pattern of development in this foreshore location.

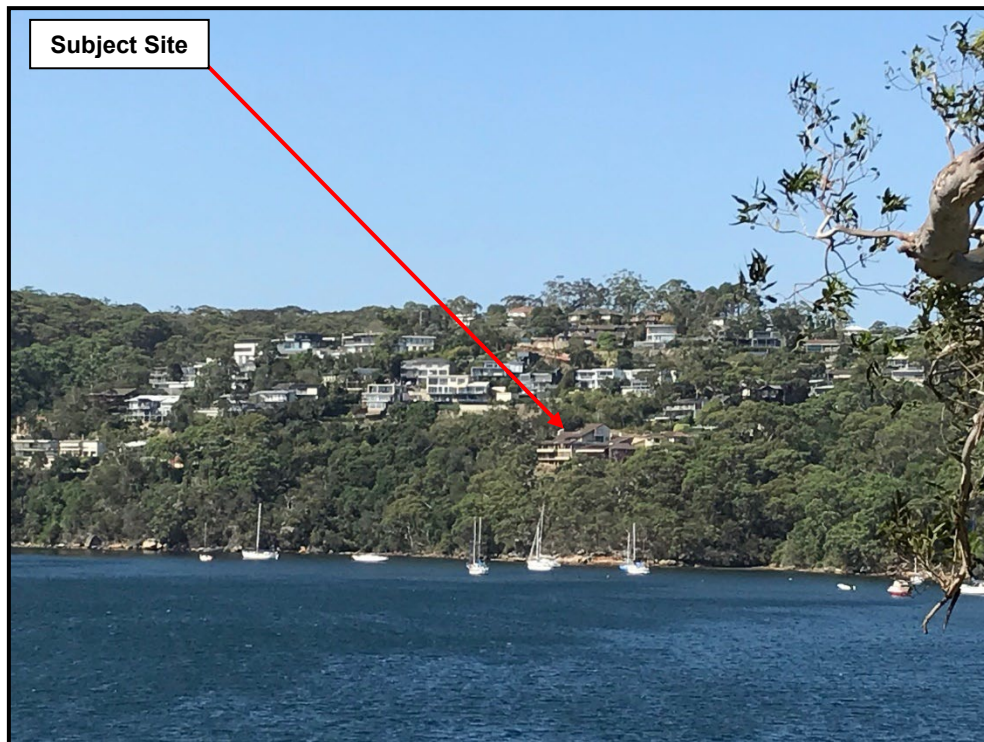


Figure 6: Zoomed photo from Castlecrag noting the substantial distance to the proposal from the public view access which confirms that the dwelling (including the additional FSR) will be viewed against the backdrop of dwellings higher up-slope, as shown above

- The proposed FSR non-compliance will be imperceptible from Castle Circuit and adjoining neighbours given the fact that the proposal exhibits a modest single-storey street presentation which is well below the maximum 8.5m permissible and sited on RL43.72 whilst the street kerb is RL46.20, being therefore compatible with the sensitive site and context of the locality. Therefore, the bulk, mass and scale of the proposal relate to the prevailing patterns of the streetscape character in the vicinity as shown on the elevation and 3D model images (**Figures 3 & 4**), and will not be responsible for any potential adverse visual impacts to surrounding properties and public domain.
- Notwithstanding the exception to FSR for undersized lots, the proposed FSR is compatible with the site and context of the locality whilst the proposed built form is considered to be reasonable when compared with substantially larger homes, including those opposite the subject site which have a greater presence in the streetscape (**Figure 5**).
- The substantial distance to the proposal from the public view access confirms that the dwelling, including the additional FSR, will be viewed against the backdrop of dwellings higher up-slope, as shown above (**Figure 6**).



Figure 7: Photo looking north and opposite subject site to dwellings along Caste Circuit, illustrating bulk and scale streetscape impacts associated with the nearby dwellings

View Impacts

- Despite the FSR variation, the proposed development is of a bulk and scale that contextually sits well within the public domain and is accommodated by the site conditions. In this regard, the proposed single-storey height presentation to the street, building separation, plus the orientation of lots and surrounding topography, in addition to the proposed flat roof form ensures that outlook is maintained for adjoining properties and the public domain.
- The proposed separation distances, including a generous southern side setback, ensures the FSR variation maintains outlook for the only adjoining neighbour to the south.
- The proposed excess FSR will not be perceptible from the watercourse. Given the heritage landscape area at the rear of the site (west), the residence will be screened by existing trees on the steep hillside, which combined with the expansive separation distance from publicly accessible areas from across Middle Harbour, will ensure that there will be limited visibility of the proposed dwelling house from waterways or foreshores (**Figure 6**).

Amenity

- The FSR variation maintains a high level of internal amenity as demonstrated by compliance with the key amenity criteria including outperformance of the deep soil landscaped area (46.18%) and total open space (72.8%), plus above ground open space. The proposed 289.47m² of deep soil area allow for a sympathetic landscape planting which integrates with the adjacent C2 zone, whilst softening the visual bulk appearance of the development.

Despite the non-compliance, the proposal achieves the objectives of the development standard and the zoning, as demonstrated in the following table:

Table 1: Assessment against the Objectives of the Development Standard and Land Use zone.

1 Consistency with the objectives of the FSR standard in the LEP	
Objectives	Assessment
<i>4.4(a) to ensure that the bulk and scale of development is consistent with the existing and desired streetscape character</i>	<p>The bulk and scale of the proposed dwelling house sits comfortably in its context presenting a single-storey to the street frontage, as illustrated in Figure 2.</p> <p>The single-storey presentation allows for retention of water views and is compatible with the sensitive nature of the locality. Notably, the proposed bulk and scale of the development is consistent with the existing and desired streetscape character.</p> <p>The proposal outperforms the deep soil landscaped area and total open space controls, ensuring that the dwelling house is integrated into the surrounding bushland and sympathetic with the character of the locality.</p> <p>The high-quality architectural design and proposed landscaping achieve a desirable outcome to the locality which is consistent with the objectives and controls.</p>
<i>4.4(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</i>	<p>The proposed architectural design is considered to address the site constraints. The proposed density, intensity and bulk of the dwelling will be compatible with the site and context. The proposed FSR does not preclude the development to be sympathetic with the existing bushland and harbour scenic protection area within the locality.</p> <p>The proposed density and bulk do not dominate the subject site and allow for an integrated landscaping, whilst protecting water views from surrounding properties and public areas.</p> <p>The modest single-storey presentation to the streetscape combined with an acceptable building envelope and footprint ensures there will be no unreasonable adverse impacts in regard to landscape and townscape features.</p>
<i>4.4(c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area</i>	<p>The additional FSR is associated with a development which presents a highly articulated built form and includes balconies and non-trafficable roof, plus landscape planters.</p> <p>Additionally, the proposal includes high-quality landscaping which ensures a positive visual relationship between the dwelling house and existing character and landscape of the foreshore area. Refer to Landscape Plan prepared by Myles Baldwin Design submitted with this application.</p>
<i>4.4(d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain</i>	<p>The proposed FSR variation will not be responsible for any unreasonable loss of privacy, loss of water views or depreciation of amenities beyond that of a compliant development. The proposed dwelling will retain a compliant level of solar access to the southern neighbour.</p> <p>As demonstrated above, the proposed additional FSR can be suitably accommodated on the subject site without generating any adverse or unreasonable impacts on the adjoining residences and public domain.</p>
Consistency with the objectives of the R2 Low Density Residential	
Objectives	Assessment
<ul style="list-style-type: none"> <i>To provide for the housing needs of the community</i> 	The proposed FSR variation does not raise any inconsistency with the R2 Low-Density Residential zone

<p><i>within a low density residential environment.</i></p> <ul style="list-style-type: none"> • <i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i> 	<p>objectives. The FSR is associated with a high-quality contemporary dwelling house which provides for the needs of the community and presents a compatible height, bulk and scale with the dwellings in the vicinity of the site.</p> <p>The limited building footprint and envelope retain the low-density nature of the area whilst responding adequately to the sensitive adjacent C2 zone to the west, which is within a foreshore area and classified as bushfire prone zone.</p> <p>The topography of the site associated with the stepped built form mitigates any adverse or significant view, overshadowing, or privacy impacts to adjoining neighbours or the public domain.</p> <p>The proposal will maintain the low-density residential environment, thereby confirming that the variation does not raise any inconsistency with the objectives of the zone.</p>
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Based on the above assessment, it is considered that strict compliance with the LEP FSR standard is unreasonable and unnecessary in this instance.

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

Assessment: The assessment under the unreasonable and unnecessary section of this Clause 4.6 variation demonstrates that there are sufficient environmental grounds to permit the variation in this instance, which include the following:

- In accordance with the submitted Shadow Diagrams significant additional overshadowing impacts are not expected. The corner nature of the site combined with the solar orientation and generous side setback from the only immediate adjoining neighbour to the south, ensures that the proposed development will provide adequate solar access to public domain and surrounding properties. In this regard, the adjoining southerly neighbour has windows orientated with a western outlook to enjoy ocean views.
- Visual and acoustic privacy impacts to adjoining neighbours from the additional height has also been carefully considered, with primary living areas oriented to the front and rear of the dwelling, which ensures that visual privacy is maintained to the southern adjoining neighbour. In this regard, the Level 1 Plant Room is suitably screened to maintain acoustic amenity, and privacy screens are fitted to terraces along the southern elevation to mitigate overlooking the adjoining southerly neighbour.
- The proposed dwelling house has been designed to respect and enhance the water views whilst ensuring suitability of the development on the coastal foreshore, and will not have a detrimental impact on the visual amenity of the harbour or coastal foreshore. In this regard, the dwelling will be partially screened by the heritage landscape along the foreshore. The proposed development is considered to be suitable given its type, location and design and its relationship with and impact on the foreshore. The proposal provides for private open space and total landscaped area which outperform the control whilst combining with high-quality landscaping to ensure acceptable relationship between the development and the foreshore scenic protection area, and mitigation of visual bulk and scale impacts from the FSR variation.

- The proposal has been designed to reduce bulk and scale, with the single-storey presentation to the street frontage is compatible and subservient with surrounding properties opposite on Castle Circuit, with the excess FSR being not visually dominant in the streetscape and public domain (**Figures 2 & 3**).
- The proposed variety of architectural features are considered to be of a high standard which will enhance the character of the street, including indentation and recesses, deep set balconies, privacy screens, and steps in the floor levels, creating good articulation to the built form and building façade. In this regard, the proposed dwelling is sensitively designed with regard to the site conditions, with the excess FSR provided in a discrete and sympathetic manner (**Figure 3**).
- The proposed FSR variation is not considered to be responsible for any unreasonable bulk or scale impacts, noting that a significant proportion of the building is excavated into the hillside, whilst the stepped built form of the dwelling is compatible with the sloping nature of the topography and surrounding properties.
- The proposed development is of a bulk and scale that contextually sits well within the public domain and is accommodated by the site conditions. In this regard, the proposed single-storey height presentation to the street, building separation, plus the orientation of lots and surrounding topography, in addition to the proposed flat roof form ensures that outlook is maintained for adjoining properties and the public domain.
- The proposed excess FSR will not be perceptible from the watercourse. Given the heritage landscape area at the rear (west) of the site, the residence will be screened by existing trees on the steep hillside, which combined with the expansive separation distance from publicly accessible areas from across Middle Harbour, will ensure that there will be limited visibility of the proposed dwelling house from waterways or foreshores (**Figure 6**).
- The FSR variation maintains a high level of internal amenity as demonstrated by compliance with the key amenity criteria including outperformance of the deep soil landscaping (46.18%) and total open space (72.8%), plus above ground open space. The proposed 289.47m² of deep soil area allow for a sympathetic landscape planting which integrates with the adjacent C2 zone, whilst softening the visual bulk appearance of the development.

Based on the above points, it is considered that there are sufficient environmental planning grounds to permit the FSR in this instance.

Other Matters for Consideration

4(a)(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

Assessment: The above assessment demonstrates that the proposed FSR satisfies the objectives of the FSR standard and the R2 Low-Density Residential zone.

Furthermore, it is considered that the variation does not raise any matters of public interest as there are no public views or detrimental streetscape outcomes associated with the FSR variation.

Given that the proposal is consistent with the desired future character for the area nominated by the specific controls in the LEP and DCP, and that there are no adverse or unreasonable

impacts to the broader community, it is considered that there are no public interest matters which would prevent a variation to the FSR control.

(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

Assessment: The proposed height variation allows for the orderly and economic use of land as envisaged by the *Environmental Planning and Assessment Act, 1979*.

The proposed FSR allows for the achievement of a compatible building envelope without creating a development with overbearing height, bulk, or scale and without compromising the desired future character of the area.

The proposed FSR is therefore consistent with the State and Regional Policies, particularly urban consolidation principles, which seek to provide additional height and density near transport and established services.

(b) the public benefit of maintaining the development standard

Assessment: There is no public benefit in maintaining the FSR standard given the limited amenity impacts associated with the development, which provides a high level of internal amenity, and the positive streetscape outcome that would arise from the development of the subject site, while being sympathetic to the environmental constraints of the surrounding local area.

(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

Assessment: There are not considered to be any additional matters to consider beyond those discussed above

Conclusion

For reasons mentioned herein, this Clause 4.6 variation is forwarded in support of the development proposal at No. 60 Castle Circuit, Seaforth and is requested to be looked upon favourably by the consent authority.