



**Four Towns  
Planning**

*Planning and property consultant*

***Without Prejudice***

**WRITTEN REQUEST PURSUANT TO  
CLAUSE 4.6 OF MANLY LOCAL  
ENVIRONMENTAL PLAN 2013**

**VARIATION OF A DEVELOPMENT  
STANDARD REGARDING THE ADG  
BUILDING SEPARATION FOR CO-  
LIVING HOUSING AS DETAILED IN  
STATE ENVIRONMENTAL PLANNING  
POLICY (HOUSING) 2021 – CLAUSE  
69 2(b)**

**Demolition Works and Construction  
of a Mixed-Use Development**

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**This report has been prepared to support a Development Application under the *Environmental Planning and Assessment Act 1979*.**

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**Report prepared for:**

Erin Isle Investments Pty Ltd

**9 May 2023**

***Disclaimer***

*This report has been prepared with due care and thoroughness by Four Towns Pty Ltd. The statements and opinions are given in good faith and in confidence that they are accurate and not misleading. In preparing this document, Four Towns Pty Ltd has relied upon information and documents provided by the Client or prepared by other Consultants. Four Towns Pty Ltd does not accept responsibility for any errors or omissions in any of the material provided by other parties.*

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## 1. Introduction and Background

It is our professional opinion that building separation is not a development standard and as such, this report is provided on a without prejudice basis. This is because clause 69(2) only requires the consent authority to *consider whether* the building will comply with the minimum separation distances specified in the ADG. It does not require the building to comply with those separation distances. Accordingly, clause 69(2) does not fall within the definition of “development standard” contained in the EP&A Act as it is not a provision by or under which requirements are specified or standards are fixed in respect of an aspect of the development. Rather, clause 69(2) specifies matters that the consent authority must consider before granting consent.

This written request is made pursuant to the provisions of Clause 4.6 of *Manly Local Environmental Plan 2013* (MLEP2013). In this regard, it is requested Council support a variation to the building separation development standard for co-living housing prescribed by clause 69(2)(b) of *State Environmental Planning Policy (Housing) 2021* (SEPP Housing) which provides:

### **69 Standards for co-living housing**

(2) Development consent must not be granted for development for the purposes of co-living housing unless the consent authority considers whether—

(b) if the co-living housing has at least 3 storeys—the building will comply with the minimum building separation distances specified in the *Apartment Design Guide*, and

The nature and extent of the contravention is as follows:

<b>Requirement</b>	3m – 6m
<b>Proposed</b>	0m – 4m
<b>Is the planning control in question a development standard?</b>	Yes
<b>Is the non-compliance with to the clause requirement a numerical/or performance based variation?</b>	Numerical
<b>If numerical enter a % variation to requirement</b>	100% or 41.6% (if averaged across all levels)

## Background

Development Application No. 2022/0596 (“DA”) was lodged with Northern Beaches Council on 6 May 2022. The DA seeks consent for the demolition of the existing building on the land and the erection of a co-living housing development containing 10 rooms, a business premises addressing the street and basement carparking (“Development”) at 29-37 Dobroyd Road, Balgowlah Heights (“Land”).

## 2. Manly Local Environmental Plan 2013 (MLEP2013) and State Environmental Planning Policy (Housing) 2021 (Housing SEPP)

### **Manly Local Environmental Plan 2013 (“MLEP”)**

#### **2.1 Clause 2.2 and the Land Use Table**

Clause 2.2 and the Land Zoning Map provide that the subject site is zoned E1 – Local Centre (the E1 zone) and the Land Use Table in Part 2 of MLEP 2013 specifies the following objectives for the E1 zone:

- To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.
- To encourage investment in local commercial development that generates employment opportunities and economic growth.
- To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
- To minimise conflict between land uses in the zone and adjoining zones and ensure amenity for the people who live in the local centre in relation to noise, odour, delivery of materials and use of machinery.
- To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.
- To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment.

The proposed development is for the purpose of a mixed use development including co-living housing and a business premises which is a permissible use in the E1 zone.

## 2.2 Housing SEPP – Clause 69 Standards for co-living housing

Clause 69 Standards for co-living housing is set out below:

### **69 Standards for co-living housing**

(2) Development consent must not be granted for development for the purposes of co-living housing unless the consent authority considers whether—

- (b) if the co-living housing has at least 3 storeys—the building will comply with the minimum building separation distances specified in the Apartment Design Guide, and

Development standards' is defined in section 1.4 of the EP&A Act 1979 as:

*development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which **requirements are specified or standards are fixed** in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:*

- (a) *the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the **distance of any land, building or work from any specified point,***

## 2.3 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 69 (the building separation 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 building separation development standard pursuant to clause 69 of the Housing SEPP, however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

Clause 4.6(4) of MLEP provides:

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

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

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest **because** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition of satisfaction requires the consent authority to be satisfied that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of MLEP provides:

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

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 69 of the Housing SEPP from the operation of clause 4.6.

### **3. Relevant Caselaw**

The grounds of objection are based upon the various tests of the recent judgements in the *NSW Land and Environment Court Case Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827, 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.*

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

1. Is clause 69 of the Housing 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 69 and the objectives for development for in the E1 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 69 of the Housing SEPP?

### **4. Request for Variation**

#### **4.1 Is Clause 69 of the Housing SEPP a development standard?**

- (a) The definition of “development standard” in clause 1.4 of the EP&A Act includes:

*“(a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,.”*

- (b) Clause 69 relates to building separation which is the distance of the building from any specified point. Accordingly, clause 69 is a development standard.

#### **4.2 Is compliance with clause 69 unreasonable or unnecessary?**

- (a) This request relies upon the 1<sup>st</sup> and 2<sup>nd</sup> ways identified by Preston CJ in *Wehbe*.

(b) The first way in *Wehbe* is to establish that the objectives of the standard are achieved. The second way in *Wehbe* is to establish that an objective is not relevant to the development. The fourth way in *Wehbe* is to establish that the development standard has been abandoned by Council's own actions in approving development that does not comply with the standard.

(c) Each objective of the standard and reasoning why compliance is unreasonable or unnecessary is set out below.

It is noted Clause 69 of the Housing SEPP does not have any objectives, so this analysis has been undertaken on intent of Clause 69(2)(b) with specific reference to the Apartment Design Guide. It is noted that the Apartment Design Guide has different parts with the relevant part not identified by Clause 69(2)(b) but rather the words building separation. As a result, the "aims" for Part 2F Building Separation and the objectives for Part 3F Visual Privacy have been reviewed. The following assessment is undertaken:

#### Control 2F Building Separation

##### *Aims*

- *ensure that new development is scaled to support the desired future character with appropriate massing and spaces between buildings*

The proposal implements a contemporary approach and land use which will positively contribute to the quality of the existing streetscape. The project architect has considered the existing shop-top housing development and has strategically designed this proposal to remain consistent with the streetscape and locality of Balgowlah Heights, in particular the Dobroyd Road precinct. The development is of a scale which supports the desired character of the locality and provides massing and spaces applicable to a local zone. Further communal open spaces and landscaping have been provided to limit impacts to adjoining properties and the maintain privacy both visual and acoustic. This objective is achieved.

- *assist in providing residential amenity including visual and acoustic privacy, natural ventilation, sunlight and daylight access and outlook*

The proposal provides amenity with no adverse impacts to visual or acoustic privacy with access to natural ventilation, sunlight and outlooks. The proposal has also been designed with deep soil areas and communal areas as required under the Housing SEPP. It is our professional opinion that the proposal achieves the required amenity outcomes.

- *provide suitable areas for communal open spaces, deep soil zones and landscaping*

The development has been revised to increase communal open spaces, deep soil zones and landscaping. The proposal, as revised, more than adequately meets these requirements, with expert involvement from the architect, urban designer and landscape architect. The proposal as designed provides suitable areas which do not adversely impact adjoining properties, in particular the development to the west at 31 Dobroyd Road. This objective is achieved.

#### Control 3F Visual Privacy

##### *Objective 3F-1*

*Adequate building separation distances are shared equitably between neighbouring sites, to achieve reasonable levels of external and internal visual privacy*

The proposal includes a blank party wall with a common open space area with adequate separation. The site is constrained by the existing non-complying building separation of the development to the



west (31 Dobroyd Road). The communal open space area includes a privacy screen along the boundary with additional landscape planting to assist in providing a buffer between the two properties. The proposal in our professional opinion provides adequate separation, privacy and amenity to the adjoining development. This objective is achieved.

*Objective 3F-2*

*Site and building design elements increase privacy without compromising access to light and air and balance outlook and views from habitable rooms and private open space*

The proposal has been designed to optimise sunlight and minimise any impact through the provision of privacy screens and planting. Further, the project architect has strategically placed windows and blank party walls to ensure a balanced outlook is achieved. This objective is achieved.

It is important for Council to acknowledge that the requirement to review 2F Building Separation and 3F Visual Privacy under Clause 69 2(b) of the Housing SEPP is to only “consider” whether the proposal complies with the requirements under 2F Building Separation and 3F Visual Privacy. In this regard, it is our professional opinion that the development meets the aims of the control and has considered the relevant requirements under the ADG. The proposal has been strategically designed considering the adjoining approved development which constrains the site and the parameters of a neighbourhood centre. It is submitted that the proposal meets the requirements of building separation and is of a high-quality architectural design and therefore, consent should be granted as submitted.

Therefore, on the basis above, it would indeed be unreasonable and unnecessary for Northern Beaches Council to enforce strict compliance with Clause 69(2)(b) of the Housing SEPP.

#### **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.”*

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.

There is an absence of environmental harm arising from the contravention and positive planning benefits arising from the proposed development as outlined in detail above. These include:

- The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation report and summarised as follows:
  - The proposal has been designed with adequate building separation which achieves reasonable levels of external and internal visual privacy.

- The development is of a scale which supports the desired character of the locality and provides massing and spaces applicable to a neighbourhood zone. The proposal provides amenity with no adverse impacts to visual or acoustic privacy with access to natural ventilation, sunlight and outlooks. The proposal has also been designed with deep soil areas and communal areas as required under the Housing SEPP.
- The wedged shape of the site, slope and isolated neighbourhood centre zoning give rise to the building separation controls being less applicable to this site. The primary issue of building separation is between the site and neighbouring development to the west. The proposed development is of good design which is adequately separated, with measures to ameliorate impacts to amenity, such as privacy screens, planter beds and landscaped screening. Appropriate amenity including visual and acoustic privacy, natural ventilation, sunlight and daylight access and outlook are retained.
- The proposal has been designed with compliant sunlight access to both the proposed development and adjoining properties. Refer to the Shadow Diagrams prepared by Woodhouse & Danks Architects which show compliance. The non-compliance to the building separation controls do not hinder the development's ability to achieve these criteria. Sufficient solar access is also provided to the communal and public open spaces in the development, which will enjoy high levels of amenity through new landscape planting.
- Having regard to *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, and further to the proposal's consistency with the above strategic and statutory environmental planning provisions, the proposal is consistent with the following objectives under Section 1.3 of the Environmental Planning and Assessment Act 1979 (the Act):
  - (c) to promote the orderly and economic use and development of land; and*
  - (d) to promote the delivery and maintenance of affordable housing*
  - (g) to promote good design and amenity of the built environment,*

1. In response to (c), the proposal will facilitate the orderly and economic use and development of the land, in a highly appropriate location, in a manner that is desired by the planning controls because it will facilitate urban renewal for affordable rental housing and employment generating floor space. In considering the contrary (refusal of the DA), retention of the building in its current form would not promote the orderly and economic use and development of land in the manner that council's strategic and statutory planning provisions seek. Retention of the building in its current form makes no advancement towards achieving the goal of creating functional development opportunities of run-down sites. Further, the development of the land will provide a better outcome than that currently existing with better privacy and amenity which is promoted through good design initiatives and the amenity of the built environment.

2. In response to (d), the proposal will advance the delivery of increased affordable rental housing provision in a highly accessible location where tenants would have the option of utilising other transport modes and avoid the costs associated with purchasing, running, and maintaining their own private motor vehicle. Furthermore, such housing allows for the provision of affordable rents in highly desired locations providing diversity and accessibility.

3. In response to (g) the proposal has been designed to promote good design and amenity of the built environment, noting compliance with the maximum building height and FSR controls of MLEP2013.

The above environmental planning grounds are not general propositions, they are unique circumstances to the proposed development. These are not simply benefits of the development as a whole, but are benefits emanating from the breach of the building separation.

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed building separation non-compliance in this instance.

#### **4.4 Is the proposed development in the public interest because it is consistent with the objectives of clause 69 and the objectives of the B1 Neighbourhood Centre zone?**

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

(b) The objective of the E1 zone and the reasons why the proposed development is consistent with the objective is set out below:

The proposed mixed-use development is permissible through the permissible land uses and Housing SEPP, therefore the proposed development is permissible with Council's consent. The proposal is consistent with the objective of the zone, as supported below:

- The proposal provides a new form of housing which will utilise the existing commercial premises with the area in the form of affordable housing.
- The proposal provides commercial premises to the front of the site that will serve the needs of people who live or work in the surrounding neighbourhood.
- The proposal includes a new functional commercial tenancy which has an activated frontage to Dobroyd Road.
- The proposal encourages the revitalisation and rehabilitation of the existing site which is run down and in need of new facilities to bring it in line with the needs of the business zone.
- The proposal enables a form of residential development which contributes to the vibrant and active local centre and aligns with the strategic direction including the intent of the Northern Beaches Affordable Housing Needs Analysis.
- The proposal has been revised and building elements updated to create an urban form that relates favourably to the scale and treatment (both architecturally and landscape) to the neighbouring land uses and the natural environment.
- The proposal provides adequate separation and ensures privacy is maintained for the site and adjoining properties. Privacy elements such as screening and landscaping have been implemented to further enhance and protect the amenity.

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

The Secretary can be assumed to have concurred to the variation under Department of Planning Circular PS 18-003 'Variations to development standards', dated 21 February 2018. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

The Secretary can be assumed to have given concurrence as the matter will be determined by the Northern Beaches Local Planning Panel in accordance with the Planning Circular.

The matters for consideration under clause 4.6(5) are considered below.

**4.6 Has the Court considered the matters in clause 4.6(5) of MLEP2013?**

(a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the particular site and this design and lot 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. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

(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.

**Summary**

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