

STATEMENT OF ENVIRONMENTAL EFFECTS

**FOR THE DEMOLITION OF THE EXISTING STRUCTURES AND THE
CONSTRUCTION OF A NEW TWO AND THREE STOREY DWELLING
WITH ATTACHED GARAGE, DRIVEWAY, SWIMMING POOL AND
ASSOCIATED LANDSCAPING**

AT

15 TUTUS STREET, BALGOWLAH HEIGHTS

FOR

COLIN & EMILY PANAGAKIS



**Prepared
March 2019**

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1.0 Introduction

This Statement of Environmental Effects accompanies details prepared on behalf of Colin and Emily Panagakis by Cadence and Co Design, Project No. PAN 0518, Sheet No. A01 – A20, dated 11 March 2019, to detail the proposed demolition of the existing structures and the construction of a new two and three storey dwelling with attached garage, driveway, swimming pool and associated landscaping at **15 Tutus Street, Balgowlah Heights**.

This Statement reviews the proposed development by assessing the relevant matters for consideration under Section 4.15 of the Environmental Planning and Assessment Act 1979, (as amended) including:

- *State Environmental Planning Policy No. 55 – Remediation of Land*
- *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004*
- *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017*
- *Manly Local Environmental Plan 2013*
- *Manly Development Control Plan 2013 Amendment 11*

Development Application No. 105/2016 for construction of a new dwelling was approved by Council on 12 December 2017 and whilst the consent has not been enacted, it remains valid.

The proposal seeks to provide a similar built form to the approved dwelling, however the design itself has been modified.

2.0 Property Description

The subject allotment is described as **15 Tutus Street, Balgowlah Heights**, being Lot 16 within Deposited Plan 9561 and is zoned R2 Low Density Residential under the Manly Local Environmental Plan 2013.

The dwelling is not listed as a heritage item within Schedule 5 of the Manly Local Environmental Plan 2013, nor is it noted as being within a conservation area.

The site is noted on Council's Bushfire Prone Land Map and a Bushfire Assessment Report has been prepared by Building Code & Bushfire Hazard Solutions Pty Limited, dated 14 February 2019, and accompanies this submission.

The site is identified on Council's DCP Mapping as being subject to Landslip Hazard (Area G4). Accordingly, a Geotechnical Investigation has been prepared by White Geotechnical Group, Reference No. J2038, dated 30 January 2019, and accompanies this submission. This matter will be discussed in further detail within this report.

The site is noted as being within the Class 5 Acid Sulfate Soils area. This matter will be discussed in further detail within this report.

The site is identified as being within the Foreshore Scenic Protection Area. This issue will be discussed in further detail within this report.

3.0 Site Description

The site is located on the western side of Tutus Street with a general fall to the front, eastern boundary.

The site has a width of 15.24m, and a depth of 67.06m. The total area of the site is 1022m² (by survey).

The site is currently developed with a brick dwelling with a tile roof. Vehicular access is currently available from Tutus Street to an existing garage at street level.

Stormwater from the roofed areas is directed to the street gutter in Tutus Street.

The details of the site are included on the survey plan prepared by J Elmir (Surveyor), Drawing No. JE5103, Rev 01, dated 20 January 2016 which accompanies the DA submission.

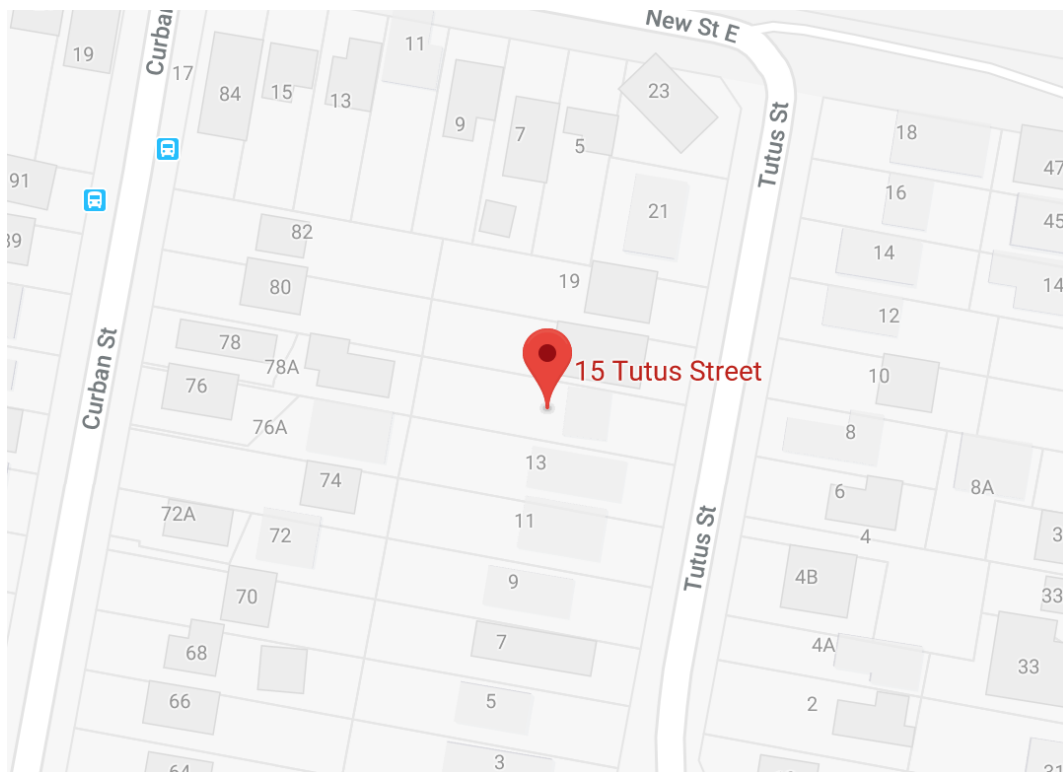


Fig 1: Location sketch
(Source: Google Maps)



Fig 2: View of subject site, looking west from Tutus Street



Fig 3: View of adjoining dwelling to the north at No 17 Tutus Street, looking west from Tutus Street



Fig 4: View of the nearby streetscape of Tutus Street to the north of the site, looking north-west



Fig 5: View of adjoining dwelling to the north at No 13 Tutus Street, looking west from Tutus Street



Fig 6: View of the nearby streetscape of Tutus Street to the south of the site, looking south-west

4.0 Surrounding Environment

The area surrounding the site is predominantly represented by a mix of development comprising one, two and three level dwellings. Existing building stock is gradually being replaced with newer housing, with a varied mix of development styles and building scale in the area.

The dwellings in the vicinity have been designed with living areas and associated open space that are oriented to take advantage of the harbour and district views available to the site.

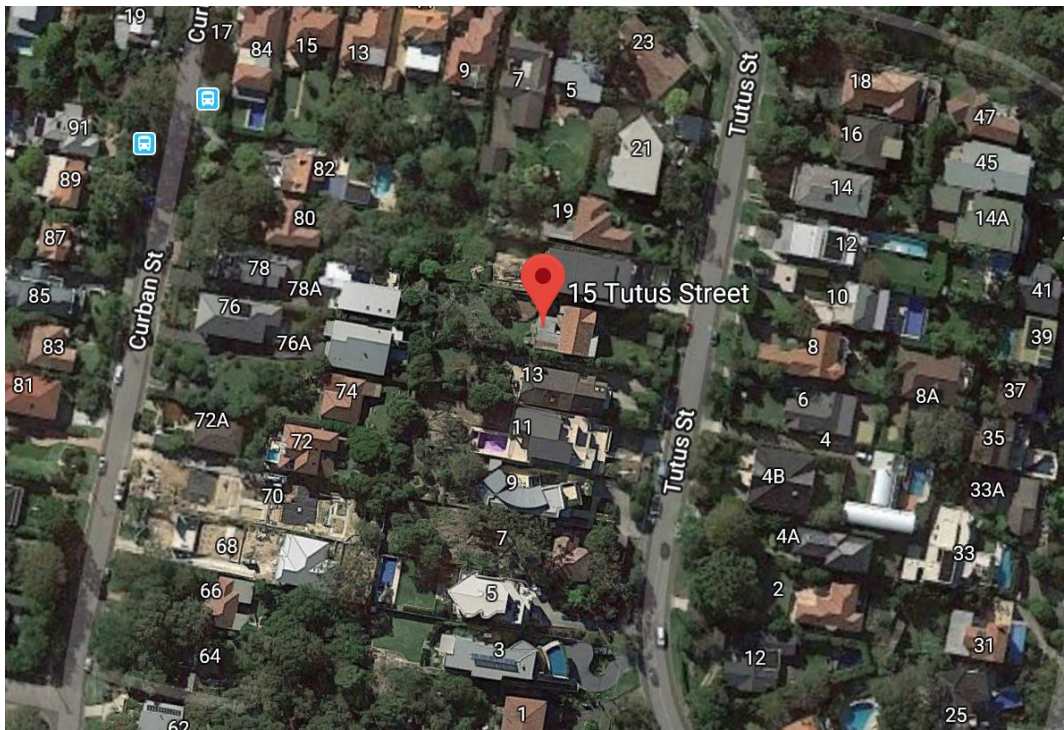


Fig 7: Aerial view of subject site
(Source: Google Maps)

5.0 Proposed Development

As detailed within the accompanying plans prepared by Cadence & Co Design, the proposal seeks consent for the proposed demolition of the existing structures and the construction of a new two and three storey dwelling with an attached garage, driveway, swimming pool and associated landscaping.

The new works comprise:

Lower Ground Floor Plan

- New lower ground floor level to provide for excavated garage, workshop, dwelling entry, bathroom, internal access stairs to upper level, lift shaft, 2 x storage areas and plant room

Ground Floor Plan

- New ground floor level to provide for entry, living/dining with fireplace, uncovered front balcony, powder room, lift shaft, internal access stairs, kitchen, pantry, laundry, study, family and dining room, partly covered rear terrace

First Floor Plan

- New first floor level to provide for master bedroom with walk-in robes, ensuite and balcony, three bedrooms including one with rear balcony, two bathrooms and sitting room with balcony

External Works

- New driveway
- New pedestrian access path from Tutus Street
- New inground swimming pool with paved and timber surround
- New perimeter planting

The proposed alterations and additions will present a predominantly two storey scale over the excavated garage area, with the external form of the dwelling to follow the sloping topography of the site.

The colours and finishes of the development have been selected to complement the existing dwelling.

The development indices for the site are:

Site Area	1022m ²
FSR permissible	0.4:1 or 408.8m ²
FSR proposed	0.42:1 or 428.25m ²
Required Open Space (Area OS4) – 60%/site	613.2m ²

Proposed Open Space	616.3m ² or 60%
Required Landscape – 40% of open space	245.28m ²
Proposed Landscape	337.8m ² or 55%

6.0 Zoning and Development Controls

6.1 State Environmental Planning Policy No. 55 – Remediation of Land

SEPP 55 – Remediation of Land and in particular Clause 7(1)(a) suggests that a consent authority must not grant consent to the carrying out of any development on land unless it has considered whether the land is contaminated.

Given the history of residential use of the land, the site is not considered to be subject to contamination and further investigation is not required at this stage.

6.2 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

The proposal meets water, thermal and energy standards required by BASIX. A BASIX certificate has been submitted with the development application.

6.3 State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017

The SEPP commenced on 25 August 2017 and replaced Clause 5.9 of Manly Local Environmental Plan 2013.

The aims of the SEPP are detailed in Clause 3 and note:

The aims of this Policy are:

- (a) to protect the biodiversity values of trees and other vegetation in non-rural areas of the State, and*
- (b) to preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation.*

The proposal will require the removal of a number of trees to accommodate the development, and accordingly an Arboricultural Impact Assessment Report has been prepared by Urban Arbor Pty Ltd, Reference No. 18/12/03/15TSBH, dated 3 December 2018.

Additional plantings are to be provided throughout the site to soften and screen the built form of the development. A Landscape Plan has been prepared by Sticks & Stones Residential Landscapes, Project No 0683, Drawing No F101, F102 & F103 dated 1 March 2019.

The proposal is therefore in keeping with the provisions of the SEPP.

6.4 Manly Local Environmental Plan 2013

The land is zoned R2 Low Density Residential under the provisions of the MLEP 2013.



Fig 6: Extract of Manly Local Environmental Plan 2013 Zoning Map

The development of and use of the land for residential purposes is consistent with the R2 Low Density Residential objectives, which are noted as:

- *To provide for the housing needs of the community within a R2 Low Density Residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

It is considered that the proposed new dwelling, will achieve the zone objectives and are consistent with the established character of the surrounding locality for the following reasons:

- The proposal will be consistent with and complement the existing detached style housing within the locality.
- The proposed development respects the scale and form of other dwellings in the vicinity and therefore complements the locality.
- The setbacks are compatible with the existing surrounding development.
- The proposal does not have any significant impact on long distance views for the neighbouring properties.
- The site is utilised as housing and will continue to maintain the residential use.

- The works will provide for construction of a new dwelling which will maintain the residential scale and character of the locality.
- The development will maintain an appropriate level of amenity to the adjoining properties.
- The proposal does not unreasonably obstruct any significant views from private property or the public domain.
- As detailed in this report, the proposal maintains appropriate solar access to the surrounding properties.

Clause 4.3 – Height of buildings

The dictionary supplement to the LEP notes building height to be:

***building height** (or **height of building**) means the vertical distance between ground level (existing) and 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.*

The building height limit for development in this portion of Balgowlah Heights is 8.5m. The proposed new works will provide for a maximum overall height of 9.3m, which presents a minor variation to the maximum height control. Accordingly, a submission has been prepared pursuant to Clause 4.6 and accompanies this statement.

Clause 4.4 – Floor space ratio

A maximum floor space ratio control of 0.4:1 for development in this locality is required. The proposed additions together with the inclusion of the carport will provide a gross floor area of 428.25m² or 0.42:1 which does not comply with this control. Accordingly, a submission has been prepared pursuant to Clause 4.6 and accompanies this statement.

Clause 6.2 – Earthworks

The proposal will require some excavation of the site to accommodate the proposed lower floor level and swimming pool.

All works will be carried out under the supervision and direction of a Structural Engineer and will be managed to ensure that the amenity and safety of the subject and neighbouring dwellings will be protected. The works will also be carried out in accordance with the recommendations of the consulting Geotechnical Engineer.

Clause 6.4 – Stormwater management

The proposal meets the objectives of the clause as stated below in that it:

- *is designed to maximise the use of water permeable surfaces on the land having regard to the soil characteristics affecting on-site infiltration of water, and*
- *includes, if practicable, on-site stormwater retention for use as an alternative supply to mains water, groundwater or river water, and*

- *avoids any significant adverse impacts of stormwater runoff on adjoining properties, native bushland and receiving waters, or if that impact cannot be reasonably avoided, minimises and mitigates the impact.*

OSD has been provided as detailed in the submitted plans prepared by Cadence & Co Design, dated 11 March 2019. The new roof areas will be directed to Tutus Street via an OSD tank below the proposed garage. The development will therefore comply with the provisions of this clause.

Clause 6.8 – Landslide risk

The site is identified on Council's DCP Mapping as being subject to Landslip Hazard (Area G4). Accordingly, a Geotechnical Investigation has been prepared by White Geotechnical Group, Reference No. J2038, dated 30 January 2019, which concludes the following:

The proposed development is suitable for the site. No geotechnical hazards will be created by the completion of the proposed development provided it is carried out in accordance with the requirements of this report and good engineering and building practice.

The proposal is therefore considered to satisfy the provisions of this clause.

Clause 6.9 – Foreshore scenic protection area

The subject site is identified as being within the Foreshore Scenic Protection Area. The objective of this clause is as follows:

- *The objective of this clause is to protect visual aesthetic amenity and views to and from Sydney Harbour, the Pacific Ocean and the foreshore in Manly.*

The proposal seeks to provide for the construction of a new two and three storey development which has been designed to largely follow the sloping topography of the site, and will largely comply with Council's statutory height limit. The proposal will maintain suitable views and amenity for neighbouring properties and the adjoining public domain.

The proposal will require the removal of a number of trees to accommodate the development, and accordingly an Arboricultural Impact Assessment Report has been prepared by Urban Arbor Pty Ltd, Reference No 18/12/03/15TSBH, dated 3 December 2018.

Additional plantings are to be provided throughout the site to soften and screen the built form of the development, as detailed in the Landscape Plan prepared by Sticks & Stones Residential Landscapes, Project No 0683, Drawings No's F101, F102 & F103 dated 1 March 2019.

The proposal is therefore in keeping with the provisions of this clause.

Clause 6.12 – Essential services

The services available for the existing dwelling on site will be made available for the proposed new dwelling.

There are no other clauses of the MLEP 2013 that are considered to be relevant to the proposed development.

It is considered that the proposal achieves the requirements of the MLEP.

6.3 Manly Development Control Plan 2013 – Amendment 11

Council's DCP Development Control Plan 2013 – Amendment 11 provides the primary control for development within the area.

The DA submission will address the Council's submission requirements outlined in Part 2 – Process.

The primary areas which are applicable to the proposed works are detailed within Part 3 – General Principles of Development & Part 4 – Development Controls and Development Types.

Clause 3.1.1 Streetscape (Residential Areas)

The intended outcomes are noted as:

- i) complement the predominant building form, distinct building character, building material and finishes and architectural style in the locality;*
- ii) ensure the bulk and design of development does not detract from the scenic amenity of the area (see also paragraph 3.4 Amenity) when viewed from surrounding public and private land;*
- iii) maintain building heights at a compatible scale with adjacent development particularly at the street frontage and building alignment, whilst also having regard to the LEP height standard and the controls of this plan concerning wall and roof height and the number of storeys;*
- iv) avoid elevated structures constructed on extended columns that dominate adjoining sites such as elevated open space terraces, pools, driveways and the like. See also paragraph 4.1.8 Development on Sloping Sites and paragraph 4.1.9 Swimming Pools, Spas and Water Features;*
- v) address and compliment the built form and style any heritage property in the vicinity to preserve the integrity of the item and its setting. See also paragraph 3.2 Heritage Considerations;*
- vi) visually improve existing streetscapes through innovative design solutions; and*
- vii) Incorporate building materials and finishes complementing those dominant in the locality. The use of plantation and/or recycled timbers in construction and finishes is encouraged. See also paragraph 3.5.7 Building Construction and Design*

The proposal provides for the construction of a new dwelling which is complementary to the existing locality, presenting a modest three storey scale to Tutus Street.

The proposed development is suitably set back from the street frontage, and the external form of the dwelling is stepped to follow the sloping topography of the site, thereby minimising the built form of the development.

As noted in the submitted elevations (Sheet No. A09), the proposed bulk and scale of the development is generally consistent with that of the neighbouring dwellings at No. 13 and No. 17 Tutus Street.

The colours and finishes of the development comprise earthy tones which will effectively integrate with the Tutus Street streetscape. The proposal is therefore considered to be in keeping with the character of the Tutus Street streetscape, and is worthy of Council's support.

Clause 3.3 Landscaping

The proposed new works will continue to retain a generous areas of soft landscaping on the site. The proposed total landscaped area of the site is 337.8m² or 55% of the site area, which is consistent with Council's requirement.

The new works will present an appropriate form and footprint, which is appropriately set back from the street, side and rear boundaries. The area surrounding the dwelling is to be provided with supplementary screen planting as detailed in the Landscape Plan prepared by Sticks & Stones Residential Landscapes, Project No 0683, Drawings No's F101, F102 & F103 dated 1 March 2019.

The potential to overlook the neighbouring properties and the street area will be suitably minimised through the proposed planting zones and limited pool coping area.

Clause 3.4 Amenity (Views, Overshadowing, Overlooking/Privacy, Noise)

The objectives of the clause are noted as:

- | | |
|---------------------|---|
| <i>Objective 1)</i> | <i>To protect the amenity of existing and future residents and minimise the impact of new development, including alterations and additions, on privacy, views, solar access and general amenity of adjoining and nearby properties.</i> |
| <i>Objective 2)</i> | <i>To maximise the provision of open space for recreational needs of the occupier and provide privacy and shade.</i> |

It is suggested that the works will achieve these objectives as:

- Maintaining an acceptable level of privacy to the adjoining allotments has been addressed by limiting the window openings to the side elevations and providing plantings throughout the site.
- The proposed additions will not see any unreasonable diminution of the solar access enjoyed by the neighbouring properties. The north-easterly aspect enjoyed by the properties in this immediate area ensures that appropriate access to sun from late morning to late in the afternoon is available to the sites.

Clause 3.5 Sustainability

A BASIX Certificate has been prepared to support the development and confirm that the dwelling will achieve the appropriate thermal performance criteria.

The proposal is accompanied by shadow diagrams which demonstrate the proposed overshadowing. The subject site will maintain suitable solar access throughout the day. The adjoining neighbour to the south at No. 13 Tutus will undergo some additional overshadowing to its northern elevation.

Notwithstanding, the habitable room windows within the adjoining property to the south are considered to maintain suitable solar access during the day. In addition, the rear yard of the southern neighbour will maintain adequate solar access. The proposal is therefore considered to be in keeping with the provisions of this clause.

Clause 3.7 Stormwater Management

OSD has been provided as detailed in the submitted plans prepared by Cadence & Co Design, dated 11 March 2019. The new roof areas will be directed to Tutus Street via an OSD tank below the proposed garage. The development will therefore comply with the provisions of this clause.

Part 4 – Residential Development Controls

Site Area 1022m² - Density Sub Zone D7 (750m² per lot)

Compliance Table

Control	Required	Proposed	Compliance
Clause 4.1.1 Residential Density & Subdivision	Density Area D7 – 1 dwelling per 750m ²	Site area is 1022m ²	Yes - existing site and dimensions are unchanged
Clause 4.1.2 Height of Buildings	Maximum height – 8.5m Wall height – 7.25mm Max two storeys	Maximum height – 9.3m Max proposed wall height 4.45m Max three storeys The variation to the wall height and number of storeys controls occurs as a result of the site's sloping topography. The proposal will maintain suitable	No – refer to Clause 4.6 Yes Yes – on merit

		<p>amenity and solar access for neighbouring properties, and will not be overbearing when viewed from the Tutus Street streetscape.</p> <p>Notwithstanding the variation to the wall height and number of storeys controls, the proposal is in keeping with desired outcomes of these provisions and is worthy of support on merit.</p> <p>Low pitch roof style <2.5m</p>	Yes
Clause 4.1.13 Floor Space Ratio (FSR)	0.4:1	0.42:1 or 428.25m ²	No – refer to Clause 4.6 submission
Clause 4.1.4 Setbacks (front, side and rear)	<p><u>Front</u></p> <p>a) Relate to neighbouring sites and the prevailing building lines or 6m</p> <p>c) Projections into the front setback may be accepted for unenclosed balconies, roof eaves, sun-hoods, chimneys, meter boxes and the like, where no adverse impact on the streetscape or adjoining properties</p>	The proposed dwelling provides a minimum setback of 9.645m from the front boundary.	Yes

<p>Side Boundary setback – 1/3 of wall height</p> <p>Rear setback</p>	<p>is demonstrated to Council's satisfaction.</p> <p><u>Side</u> 1/3 x 4.45m = 1.5m</p> <p><u>Rear</u> Min 8m</p>	<p>The proposal will stand a minimum of 1.6m from the northern and southern side boundaries and therefore complies with this control.</p> <p>Min proposed rear setback 29.985m</p>	<p>Yes</p> <p>Yes</p>
<p>Clause 4.1.5 Open space and Landscaping</p>	<p>Area OS 4 Open space: Min 60% site area</p> <p>Landscaping: 40% of open space</p>	<p>Proposed open space 616.3m² or 60%.</p> <p>Proposed soft landscaping 337.8m² or 55% of total open space.</p> <p>The Objectives of this control are as follows:</p> <p><i>Objective 1) To encourage appropriate tree planting and maintenance of existing vegetation.</i></p> <p><i>Objective 2) To retain and augment important landscape features and vegetation remnant populations of native flora and fauna.</i></p> <p>The proposal is in keeping with the Objectives of this control, as adequate</p>	<p>Yes</p> <p>Yes</p>

		landscaped areas are provided, and the natural landscape of the site is maintained.	
Clause 4.1.6 Parking	Min 2 spaces	Parking for two vehicles provided within proposed garage	Yes
Clause 4.1.6.4 Vehicular Access	<p>a) All vehicles should enter and leave the site in a forward direction.</p> <p>b) Vehicular access and parking for buildings with more than 1 dwelling is to be consolidated within one location, unless an alternative layout/design would better reflect the streetscape or the building form.</p> <p>c) Vision of vehicles entering and leaving the site must not be impaired by structures or landscaping.</p> <p>d) Particular attention should be given to separating pedestrian entries and vehicular crossings for safety.</p>	The proposal seeks to provide a new double garage under the dwelling. Forward entry and exit will be available within the proposed driveway.	Yes

<p>Clause 4.1.6.6 Tandem, Stacked and Mechanical Parking Areas</p>	<p>The design location and management of parking facilities involving tandem, stacked and mechanical parking (including car stackers, turntables, car lifts or other automated parking systems) must consider the equitable access and distribution of parking spaces to all occupants and visitors to the building. In this regard:</p> <p>a) all parking spaces in any tandem or stacked arrangement are to be allocated to the same dwelling/strata unit and must not be used as visitors parking; and</p> <p>b) where the proposed development involves a tandem, stacked and mechanical parking arrangement which necessitates more than one parking space being attributed to a single dwelling unit under paragraph i) above; Council must be satisfied that sufficient parking spaces are reasonably</p>		<p>N/A</p>
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	allocated to all other dwelling units within the development.		
Clause 4.1.7 First Floor and Roof Additions	<p>a) First floor additions must complement the architectural style of the ground floor and where possible retain existing roof forms.</p> <p>Notwithstanding setback provisions, the addition may follow the existing ground floor wall setbacks providing adjoining properties are not adversely impacted by overshadowing, view loss or privacy issues.</p> <p>b) The dwelling and the form of alterations and additions must retain the existing scale and character of the street and should not degrade the amenity of surrounding residences or the aesthetic quality of Manly. In this regard, it may be preferable that the addition be confined to the rear of the premises or be contained within the roof structure.</p>		N/A

<p>Clause 4.1.8 Development on sloping sites</p>	<p>a) Site Stability Report may be required in Geotechnical Areas G2, G3 and G4 i) The applicant should complete Council's Checklist for Preliminary Assessment of Site Conditions (Landslip) at Schedule 11 of this plan to determine whether a Site Stability Report is required. All development involving load bearing building works must complete the checklist for Preliminary Assessment of Site Conditions (Landslip) to ensure developments follows good engineering practice.</p> <p>b) Area G2 - Potential Hazards i) Potential Geotechnical hazards in this area include:</p> <ul style="list-style-type: none"> • Rock falls and slumping of soil and fill materials from unsupported cuts and natural cliffs onto public and private pathways and roadways. • Possible creep of talus materials on steeper soil covered slopes. 	<p>The site is identified in Landslip Hazard – Area G4. Accordingly, a Geotechnical Investigation has been prepared by White Geotechnical Group, Reference No. J2038, dated 30 January 2019, and accompanies this submission. Subject to compliance with the recommendations contained within this report, the proposal will satisfy the provisions of this clause.</p>	<p>Yes</p>
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	<ul style="list-style-type: none"> • Possible movement of detached blocks of sandstone. Limited to moderate damage of some or part of structures (for example dwelling or roadway), with part of site requiring some stabilisation works. Large scale stabilisation works unlikely to be required. 		
Clause 4.1.9 Swimming pools, spas and Water features	<p>Height above ground not more than 1m</p> <p>a) Swimming pools and spas must not be located within the front setback i.e. between the front boundary of the lot and the building line. Consideration of any exception to the required location must demonstrate that any swimming pools and/or spa and their curtilage and/or concourse:</p> <p>i) does not detract from the amenity or character of the neighbourhood; and</p> <p>ii) is a minimum distance from the front boundary equivalent to at least twice the height of the swimming</p>	<p>Proposed pool is sited below existing ground level</p> <p>Proposed pool is located in the rear yard</p>	<p>Yes</p> <p>N/A</p>

	<p>pools and/or spa and their curtilage and/or concourse at any point above existing ground level.</p> <p>b) Setback of outer edge of pool concourse from side and rear boundaries must be at least 1m with water line being at least 1.5m from the boundary</p>		
<p>Clause 4.1.10 Fencing</p>	<p>Freestanding walls and fences between the front street boundary and the building are to be no more than 1m high above ground level at any point.</p>	<p>No freestanding walls or fences proposed</p>	<p>N/A</p>

Part 5 – Special Character Area and Sites

The subject site is identified as being within the Foreshore Scenic Protection Area. The proposal seeks to provide for the construction of a new two and three storey development which has been designed to largely follow the sloping topography of the site, and will largely comply with Council's statutory height limit. The proposal readily complies with Council's setback controls, and the development will maintain suitable views and amenity for neighbouring properties and the adjoining public domain.

The proposal will require the removal of a number of trees to accommodate the development, and accordingly an Arboricultural Impact Assessment Report has been prepared by Urban Arbor Pty Ltd, Reference No 18/12/03/15TSBH, dated 3 December 2018. The proposal seeks to remove 1 x Category A tree and 5 x Category Z trees.

Additional plantings are to be provided throughout the site to soften and screen the built form of the development, as detailed in the Landscape Plan prepared by Sticks & Stones Residential Landscapes, Project No 0683, Drawings No's F101, F102 & F103 dated 1 March 2019.

Subject to compliance with the recommendations contained in the Arborist's report, the proposal considered to be in keeping with the provisions of this clause.

7.0 Matters for Consideration under Section 4.15 of The Environmental Planning and Assessment Act, 1979

7.1 The provisions of any environmental planning instrument

The proposal is subject to the provisions of the Manly Local Environmental Plan 2013 and the relevant supporting Council policies. It is considered that the provisions of this environmental planning instrument have been satisfactorily addressed within this report and that the proposal achieves compliance with its provisions.

There are no other environmental planning instruments applying to the site.

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

It is not considered that there are any draft environmental planning instruments applying to the site.

7.3 Any development control plan

The development has been designed to comply with the requirements of Manly's Development Control Plan 2013 – Amendment 11.

It is considered that the proposed design respects the aims and objectives of the DCP however we note that the Environmental Planning and Assessment Amendment Act 2012 No 93 (Amendment Act) which received assent on 21 November 2012 commenced on 1 March 2013.

Key amongst the amendments are requirements to interpret DCPs flexibly and to allow reasonable alternative solutions to achieve the objectives of DCP standards.

The new section 3.42 provides that the 'principal purpose' of DCPs is to 'provide guidance' on:-

- giving effect to the aims of any applicable environmental planning instrument
- facilitating permissible development
- achieving the objectives of the relevant land zones.

The key amendment is the insertion of section 4.15(3A) which:

- prevents the consent authority requiring more onerous standards than a DCP provides,
- requires the consent authority to be 'flexible' and allow 'reasonable alternative solutions' in applying DCP provisions with which a development application does not comply,

- limits the consent authority's consideration of the DCP to the development application (preventing consideration of previous or future applications of the DCP).

We request that Council applies considered flexibility where the application seeks variations to numerical development controls in the DCP as justified in this report. In particular we consider that the variation to the number of storeys controls is a reasonable alternative solution to compliance given the proposal will present a complementary form and scale to the surrounding dwellings and effectively reduces the visual bulk and scale through locating the garage and services/storage areas below ground level.

It is considered that the proposed design respects the desired character objectives of the DCP in that it reinforces the existing residential character of the area and is compatible with the existing uses in the vicinity.

The development respects the streetscape character objectives of the DCP and will provide a cohesive and sympathetic addition to the site which will make a positive contribution to the area.

It is considered that the proposed design respects the desired character objectives of the DCP in that it reinforces the existing character of the area and is compatible with the existing uses in the vicinity.

7.4 Any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4

No matters of relevance are raised in regard to the proposed development.

7.5 Any matter prescribed by the regulations that apply to the land to which the development relates.

No matters of relevance are raised in regard to the proposed development.

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

It is considered that the proposal, which seeks approval for proposed demolition of existing structures and construction of a new two and three storey dwelling with attached garage, driveway, swimming pool and associated landscaping, is reasonable.

It is considered that the proposal, which seeks consent for the proposed demolition of existing structures and construction of a new two and three storey dwelling with attached garage, driveway, swimming pool and associated landscaping, which will not unreasonably impact upon the amenity of adjoining properties or upon the character of the surrounding area. It is considered that the resultant development is compatible with and will complement the character of the area.

The proposal is considered to be well designed having regard to the relevant provisions of the Council's MLEP 2013 and Council's Codes and Policies, in particular the MDCP.

7.7 The suitability of the site for the development

The subject land is currently zoned R2 Low Density Residential under the Manly Local Environmental Plan 2013 and is considered suitable for the proposed development.

The subject site does not exhibit any significant constraint to the construction of the proposed development.

7.8 Submissions made in accordance with this Act or the regulations

This is a matter for Council in the consideration of this proposal.

7.9 The public interest

The proposal will not unreasonably impact upon the environment, the character of the locality or upon the amenity of adjoining properties and is therefore considered to be within the public interest.

8.0 Conclusion

The principal objective of this development is to support the proposed demolition of existing structures and construction of a new two and three storey dwelling with attached garage, driveway, swimming pool and associated landscaping, which satisfy the stated objectives of Council's Development Controls.

By maintaining our neighbour's amenity and by complementing the scale and form of other development in the immediate locality, the stated objectives have been satisfied.

As the proposed development will not have any significant impact on the environment, scenic quality of the area or the amenity of the adjoining allotments, the issue of Development Consent under the delegation of Council is requested.

VAUGHAN MILLIGAN

Town Planner

Grad. Dip Urban & Regional Planning (UNE)

APPENDIX 1
CLAUSE 4.6 – MAXIMUM BUILDING HEIGHT

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

15 TUTUS STREET, BALGOWLAH HEIGHTS

PROPOSED DEMOLITION OF EXISTING STRUCTURES AND CONSTRUCTION OF A NEW TWO AND THREE STOREY DWELLING WITH ATTACHED GARAGE, DRIVEWAY, SWIMMING POOL AND ASSOCIATED LANDSCAPING

For: Proposed demolition of existing structures and construction of a new two and three storey dwelling with attached garage, driveway, swimming pool and associated landscaping
At: 15 Tutus Street, Balgowlah Heights
Owner: Colin and Emily Panagakis
Applicant: Colin and Emily Panagakis
C/- Vaughan Milligan Development Consulting

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Manly Local Environmental Plan 2013. In this regard, it is requested Council support a variation with respect to compliance with the maximum building height as described in Clause 4.3 of the Manly Local Environmental Plan 2013 (MLEP 2013).

2.0 Background

Clause 4.3 restricts the height of a building and refers to the maximum building height noted within the *"Height of Buildings Map."*

The maximum building height for this locality is 8.5m and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The proposed new dwelling will provide a height of up to 9.3m which exceeds Council's maximum building height by 800mm or 9.41% and therefore does not comply with this control.

The controls of Clause 4.3 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

3.0 Purpose of Clause 4.6

The Manly Local Environmental Plan 2013 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the LEP should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 118* have been considered in this request for a variation to the development standard.

4.0 Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

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

The development will achieve a better outcome in this instance as the site will provide for the construction of a new dwelling, which is consistent with the stated Objectives of the R2 Low Density Residential Zone, which are noted as:

- *To provide for the housing needs of the community within a R2 Low Density Residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The proposal will provide for the construction of a new dwelling to provide for increased amenity for the site's occupants.

The new works maintain a bulk and scale which is in keeping with the extent of surrounding development, with a consistent palette of materials and finishes, in order to provide for high quality development that will enhance and complement the locality.

The maximum ridge level will stand at RL 56.56m. Notwithstanding the non-compliance with the maximum overall height, the new works will provide an attractive residential development that will add positively to the character and function of the local residential neighbourhood.

The proposed dwelling has been located to mitigate any adverse impacts of overshadowing and loss of view towards any neighbouring properties.

The development will not see any unreasonable impacts on view sharing.

5.0 Onus on Applicant

Clause 4.6(3) provides that:

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.*

This written request has been prepared to support our contention that the development adequately responds to the provisions of 4.6(3)(a) & (b) above.

6.0 Justification of Proposed Variation

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 11 Samadi v Council of the City of Sydney [2014] NSWLEC 1199*.

Paragraph 27 of the Samadi judgement states:

Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

Precondition 1 - Consistency with zone objectives

The site is located in the R2 Low Density Residential Zone. The objectives of the R2 zone are noted as:

- *To provide for the housing needs of the community within a R2 Low Density Residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Comments

It is considered that notwithstanding the extent of the non-compliance with the maximum building height control (800mm), the proposed new dwelling will be consistent with the individual Objectives of the R2 Low Density zone for the following reasons:

- ***To provide for the housing needs of the community within a low density residential environment.***

The R2 Low Density Residential Zone contemplates low density residential uses on the land. The housing needs of the community are appropriately provided for in this instance through the proposed residential dwelling which will provide form an appropriate level of family accommodation and in a form which respect the predominant height and scale of the surrounding dwellings.

The development will see a minor noncompliance with the building height control of up to 800mm and the contemporary building form with low pitch skillion roof and the darker external finishes considered to suitably reduce the visual bulk of the dwelling.

Further, the modulation of the front façade and building elevation, together with the increased side setbacks and recessive external finishes to the upper level will ensure the development minimises the visual impact when viewed from the surrounding public and private areas.

The proposal will be consistent with and complement the existing detached style single dwelling housing within the locality and as noted in the photo montage prepared by Cadence & Co Design, will not be a visually element in the area.

The compatible form and scale of the new dwelling will meet the housing needs of the community within a single dwelling house which is a permissible use in this low density residential zone.

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

The development does not suggest any alternate land uses and this Objective is not directly relevant to the subject single residential proposal.

Accordingly, it is considered that the site may be further developed with a variation to the prescribed maximum building height control, whilst maintaining consistency with the zone objectives.

Precondition 2 - Consistency with the objectives of the standard

The objectives of Clause 4.3 are articulated at Clause 4.3(1):

(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.*

Comments

Despite the minor variation to the maximum building height, the proposed alterations and additions are considered to be in keeping with the relevant Objectives of Clause 4.3 for the following reasons:

(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 Objective of Clause 4.3 (1)(a) seeks to ensure buildings, by virtue of their height and scale are consistent with the desired future streetscape character of the locality.

The surrounding area is predominantly characterised by two – three storey development, often located over basement garages and service rooms.

The proposal seeks to accommodate the new dwelling within a contemporary building form, with the slope of the site towards the street resulting in a portion of the roof being up to 9.3m in height.

The overall building height respects the surrounding character and the design seeks to minimise the visual height by providing for increasing setbacks to the upper floor level.

The proposed external colour and materials palette utilises darker finishes to the upper floor level and is intended to ensure that the building's visual height and scale is further minimised.

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

The proposed new dwelling will not result in any unreasonable impacts on adjoining properties in terms of views, privacy or overshadowing.

Further, the modulation of the front façade and building elevations where visible from the public domain minimises the visual impact of the development.

The proposal presents a compatible height and scale to the surrounding development and the articulation to the building facades and low pitch skillion roof form will suitably distribute the bulk of the new floor area.

(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),***

Due to the general slope of the site towards the east, the properties to the west of the site enjoys views towards the harbour. Views past the site are generally along the side setback areas.

The proposal will provide for increasing setbacks to the upper floor level which will allow for suitable views to be maintained through and over the site.

Views from the surrounding public spaces are not adversely affected.

(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 the proposal will see the replacement of an existing dwelling, the shadow analysis prepared by Cadence & Co Design includes plan and elevational views of the proposed shadow impacts.

The assessment confirms that the primary living room windows and the external private recreational spaces of the adjacent southern neighbour at No 13 Tutus Street will continue to receive appropriate solar access .

The increasing setbacks to the proposed upper floor and low pitch skillion roof form will assist in minimising the effects of overshadowing and will appropriately maintain the neighbour's amenity.

(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 site is not within a recreation or environmental protection zone and is well removed from the foreshore area. The site is not within a conservation area or in the vicinity of any heritage items.

The proposal is intended to reflect the predominant scale and form of the surrounding development in Tutus Street and will reflect the existing single dwelling uses in the vicinity.

Despite the variation to the building height control which occurs as a result of the sloping topography of the site, proposal is generally consistent with the height and scale of newer development in the locality.

Accordingly, we are of the view that the proposal is consistent with the objectives of the development standard.

Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

It is unreasonable and unnecessary to require strict compliance with the development standard as the proposal provides for the construction of a new dwelling, which is constrained by the nature of the existing development on site and the sloping topography of the site.

Council's controls in Clause 4.3 provide a maximum building height of 8.5m. As a result of the slope of the site towards the street, a portion of the roof will be up to 9.3m above ground level.

It is considered that the proposal achieves the Objectives of Clause 4.3 and that the development is justified in this instance for the following reasons:

- The development will maintain a compatible scale relationship with the existing residential development in the area. Development within Tutus Street has a wide range of architectural styles and given the variety in the scale of this development, the proposal will be consistent with surrounding development and will not adversely affect the streetscape.
- The proposed modest additions to the dwelling will maintain amenity and appropriate solar access for the subject site and neighbouring properties.
- The proposal will maintain a generous area of soft landscaping which readily complies with Council's landscaping requirements, and the site will maintain an appropriate balance between the landscaping and the built form. The area surrounding the dwelling is to be provided with supplementary screen planting as detailed in the Landscape Plan prepared by Sticks & Stones Residential Landscapes, Project No 0683, Drawings No's F101, F102 & F103 dated 1 March 2019.

In the *Wehbe* judgment (*Wehbe v Pittwater Council* [2007] NSWLEC 827), Preston CJ expressed the view that there are 5 different ways in which a SEPP 1 Objection may be well founded, and that approval of the Objection may be consistent with the aims of the policy.

These 5 questions may be usefully applied to the consideration of Clause 4.6 variations: -

1. *the objectives of the standard are achieved notwithstanding non-compliance with the standard;*

Comment: Yes. Refer to comments under 'Justification of Proposed Variation' above which discusses the achievement of the objectives of the standard.

2. *the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

Comment: It is considered that the purpose of the standard is relevant, but the purpose is satisfied.

3. *the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

Comment: Compliance does not defeat the underlying object of the standard development; however, compliance would prevent the approval of an otherwise supportable development.

Furthermore, it is noted that development standards are not intended to be applied in an absolute manner; which is evidenced by clause 4.6 (1)(a) and (b).

4. *the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*

Comment: Not applicable.

5. *the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Comment: The development standard is applicable to and appropriate to the zone.

For the above reasons, it would therefore be unreasonable and unnecessary to cause strict compliance with the standard.

Precondition 4 - To consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court [or consent authority] finding that the matters required to be demonstrated have been adequately addressed

Council's controls in Clause 4.3 provide a maximum building height of 8.5m for the subject development.

The proposed new dwelling the dwelling will provide a height of 9.3m or a 800mm/9.41% variation to the control.

The development is justified in this instance for the following reasons:

- The works will present a minor variation to the building height control which occurs as a result of the site's sloping topography. The new dwelling is considered to be compatible with the form and nature of the surrounding development.
- The proposal is consistent with the character of development in the locality.
- The development will maintain a compatible scale relationship with the existing residential development in the area. Development in the vicinity has a wide range of architectural styles and the given the variety in the scale of development, this proposal will reflect a positive contribution to its streetscape.
- The proposed new works do not present any unreasonable additional impacts in terms of view loss for neighbours, or bulk and scale.
- The proposed development is considered to promote good sustainable design and enhance the residential amenity of the buildings' occupants and the immediate area, which is consistent with the Objective 1.3 (g) of the EPA Act which is a suitable environmental planning ground which justifies the flexible application of the development standard.

Having regard to the above, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for maximum building height.

In the recent 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does **not** mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are "sufficient environmental planning grounds

to justify contravening the development standard”, it is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant’s written document itself, and in the Commissioner’s assessment of it). In February of this year the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner’s approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority’s obligation is to be satisfied that “the applicant’s written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard.” He held that this means:

“the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant’s written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary”.

Accordingly, when assessed against the relevant Objects of the Environmental Planning & Assessment Act 1979, (NSW) outlined in s1.3, the following environmental planning grounds are considered to be sufficient to allow Council to be satisfied that a variation to the development standard can be supported:

- The external form of the proposed dwelling is stepped to follow the sloping topography of the site and results in a dwelling which is compatible in scale to its surrounding neighbours, which promotes the orderly & economic use of the land.
- Similarly, the proposed development will provide for an appropriate level of family accommodation and improved amenity within a built form which is compatible with the streetscape of Tutus Street, which also promotes the orderly and economic use of the land.
- The proposal is considered to promote good design and amenity to the local built environment as appropriate views, solar access and privacy will be maintained for the neighbouring properties.

The above are the environmental planning grounds which are the circumstance which are particular to the development which merit a variation to the development standard.

7.0 Conclusion

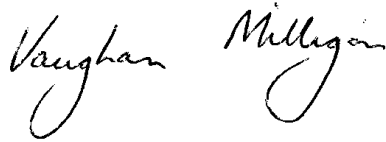
This development proposes a departure from the maximum building height control, with the proposed new dwelling to provide a maximum building height of 9.3m.

This variation occurs as a result of the siting of the sloping topography of the site.

This objection to the maximum building height control specified in Clause 4.3 of the Manly LEP 2013 adequately demonstrates that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

Strict compliance with the maximum building height would be unreasonable and unnecessary in the circumstances of this case.

A handwritten signature in black ink, reading "Vaughan Milligan". The signature is written in a cursive, flowing style.

VAUGHAN MILLIGAN
Town Planner

APPENDIX 2

CLAUSE 4.6 – FLOOR SPACE RATIO

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

15 TUTUS STREET, BALGOWLAH HEIGHTS

PROPOSED DEMOLITION OF EXISTING STRUCTURES AND CONSTRUCTION OF A NEW TWO AND THREE STOREY DWELLING WITH ATTACHED GARAGE, DRIVEWAY, SWIMMING POOL AND ASSOCIATED LANDSCAPING

For: Proposed demolition of existing structures and construction of a new two and three storey dwelling with attached garage, driveway, swimming pool and associated landscaping
At: 15 Tutus Street, Balgowlah Heights
Owner: Colin and Emily Panagakis
Applicant: Colin and Emily Panagakis
C/- Vaughan Milligan Development Consulting

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Manly Local Environmental Plan 2013. In this regard, it is requested Council support a variation with respect to compliance with the maximum floor space ratio development standard as described in Clause 4.4 of the Manly Local Environmental Plan 2013 (MLEP 2013).

2.0 Background

Clause 4.4 restricts the maximum floor space ratio for residential development in this locality to 0.4:1 or 408.8m² and is considered to be a development standard as defined by Section 4 of the *Environmental Planning and Assessment Act 1979* (NSW).

The proposed development will present a total gross floor area of 428.25m² or 0.42:1, which will result in a minor noncompliance of 19.45m² or 4.8% from the development standard.

3.0 Purpose of Clause 4.6

The Manly Local Environmental Plan 2013 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the Standard Instrument is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the Standard Instrument should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council* [2018] NSWLEC 118 have been relied on in this request for a variation to the development standard.

4.0 Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

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

The development will achieve a better outcome in this instance as the site will provide for the construction of a new dwelling, which is consistent with the stated Objectives of the R2 Low Density Residential Zone, which are noted as:

- *To provide for the housing needs of the community within a R2 Low Density Residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The proposal will provide for the construction of a new dwelling to provide for increased amenity for the site's occupants.

The new works maintain a bulk and scale which is in keeping with the extent of surrounding development, with a consistent palette of materials and finishes, in order to provide for high quality development that will enhance and complement the locality.

Notwithstanding the minor non-compliance with the maximum floor space ratio control, the new works will provide an attractive residential development that will add positively to the character and function of the local residential neighbourhood.

The proposed dwelling has been located to mitigate any adverse impacts of overshadowing and loss of view towards any neighbouring properties.

The development will not see any unreasonable impacts on view sharing for the surrounding properties.

5.0 Onus on Applicant

Clause 4.6(3) provides that:

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.*

This written request has been prepared to support our contention that the development adequately responds to the provisions of 4.6(3)(a) & (b) above.

6.0 Justification of Proposed Variation

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 11* & *Samadi v Council of the City of Sydney [2011] NSWLEC 1199*.

Paragraph 27 of the Samadi judgement states:

Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

Precondition 1 - Consistency with zone objectives

The site is located in the R2 Low Density Residential Zone. The objectives of the R2 zone are noted as:

- *To provide for the housing needs of the community within a R2 Low Density Residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Comments

It is considered that notwithstanding the extent of the non-compliance with the maximum floor space ratio control (19.45m² or 4.8%), the proposed new dwelling will be consistent with the individual Objectives of the R2 Low Density zone for the following reasons:

- ***To provide for the housing needs of the community within a low density residential environment.***

The R2 Low Density Residential Zone contemplates low density residential uses on the land. The housing needs of the community are appropriately provided for in this instance through the proposed residential dwelling which will provide form an appropriate level of family accommodation and in a form which respect the predominant height and scale of the surrounding dwellings.

The development will see a minor noncompliance with the floor space ratio of 19.45m² or 4.8%, with the contemporary building form with low pitch skillion roof form and the darker external finishes considered to suitably reduce the visual bulk of the dwelling.

Further, the modulation of the front façade and building elevation, together with the increased side setbacks and recessive external finishes to the upper level will ensure the development minimises the visual impact when viewed from the surrounding public and private areas.

The proposal will be consistent with and complement the existing detached style single dwelling housing within the locality and as noted in the photo montage prepared by Cadence & Co Design, will not be a visually element in the area.

The compatible form and scale of the new dwelling will meet the housing needs of the community within a single dwelling house which is a permissible use in this low density residential zone.

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

The development does not suggest any alternate land uses and this Objective is not directly relevant to the subject single residential proposal.

Accordingly, it is considered that the site may be further developed with a variation to the prescribed maximum building height control, whilst maintaining consistency with the zone objectives.

Precondition 2 - Consistency with the objectives of the standard

The objectives of Clause 4.4 are articulated at Clause 4.4(1):

(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.*

Despite the minor variation to the maximum building height, the proposed alterations and additions are considered to be in keeping with the relevant Objectives of Clause 4.4 for the following reasons:

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

The objective of Clause 4.4 (1)(a) seeks to ensure buildings, by virtue of their height and scale are consistent with the desired future streetscape character of the locality.

The surrounding area is predominantly characterised by two – three storey development, often located over basement garages and service rooms.

The development will maintain a compatible scale relationship with the existing residential development in the area. Development within Tutus Street has a wide range of architectural styles and given the variety in the scale of this development, the proposal will be consistent with surrounding development and will not adversely affect the streetscape.

The proposal seeks to accommodate the new dwelling within a contemporary building form, with the proposed design seeking to include a minor variation to the minor noncompliance with the floor space ratio of 19.45m² or 4.8%, with the contemporary building form with low pitch skillion roof form and the darker external finishes considered to suitably reduce the visual bulk of the dwelling.

The overall building height respects the surrounding character and the design seeks to minimise the sense of bulk and scale by providing for increasing setbacks to the upper floor level.

The proposed external colour and materials palette utilises darker finishes to the upper floor level and is intended to ensure that the building's visual height and scale is further minimised.

(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 proposed new dwelling presents a compatible scale and form to the surrounding newer development and will not obscure any important landscape and townscape features within the low density residential area.

The site is not within a recreation or environmental protection zone and is well removed from the foreshore area. The site is not within a conservation area or in the vicinity of any heritage items.

The proposal is intended to reflect the predominant scale and form of the surrounding development in Tutus Street and will reflect the existing single dwelling uses in the vicinity.

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

The site is considered to be sufficient to provide for the proposed works, with the dimensions of the lot to be unchanged.

The proposal will maintain a generous area of soft landscaping which readily complies with Council's landscaping requirements, and the site will maintain an appropriate balance between the landscaping and the built form.

On the basis that the existing landscaped area is unchanged, the site is considered to maintain an appropriate balance between the site's landscaping and the built form.

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

Due to the general slope of the site towards the east, the properties to the west of the site enjoys views towards the harbour. Views past the site are generally along the side setback areas.

The proposal will provide for increasing setbacks to the upper floor level which will allow for suitable views to be maintained through and over the site.

Views from the surrounding public spaces are not adversely affected.

Suitable erosion control and sedimentation designs, together with stormwater management will be provided to mitigate any environmental impacts to the adjoining lands and the nearby public domain.

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

The site is not located within a business zone and by providing for a new residential dwelling, is not contrary to the viability of any local business activity.

Despite the variation to the floor space ratio control, we are of the view that the proposal is consistent with the objectives of the development standard.

Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

It is unreasonable and unnecessary to require strict compliance with the development standard as the proposal provides for the construction of a new dwelling.

Council's controls in Clause 4.4 provide a maximum floor area of 0.5:1.

The proposed development will present a total gross floor area of 428.25m² or 0.42:1, which will result in a minor noncompliance of 19.45m² or 4.8%.

It is considered that the development is justified in this instance for the following reasons:

- The development will maintain a compatible scale relationship with the existing residential development in the area. Development within Tutus Street has a wide range of architectural styles and given the variety in the scale of this development, the proposal will be consistent with surrounding development and will not adversely affect the streetscape.
- The proposed new dwelling will maintain amenity and appropriate solar access for the subject site and neighbouring properties.

In the *Wehbe* judgment (*Wehbe v Pittwater Council* [2007] NSWLEC 827), Preston CJ expressed the view that there are 5 different ways in which a SEPP 1 Objection may be well founded and that approval of the Objection may be consistent with the aims of the policy.

These 5 questions may be usefully applied to the consideration of Clause 4.6 variations: -

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

Comment: Yes. Refer to comments under 'Justification of Proposed Variation' above which discusses the achievement of the objectives of the standard.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

Comment: It is considered that the purpose of the standard is relevant but the purpose is satisfied by the proposed revised design.

3. the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

Comment: Compliance does not defeat the underlying object of the standard development; however, compliance would prevent the approval of an otherwise supportable development. Furthermore, it is noted that development standards are not intended to be applied in an absolute manner; which is evidenced by clause 4.6 (1)(a) and (b).

4. the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;

Comment: Not applicable.

5. the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Comment: The development standard is applicable to and appropriate to the zone.

For the above reasons, it would therefore be unreasonable and unnecessary to require strict compliance with the standard.

Precondition 4 - To consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court [or consent authority] finding that the matters required to be demonstrated have been adequately addressed

Council's controls in Clause 4.4 provide a maximum floor space ratio of 0.4:1 for residential development in this locality.

The proposed development will present a total gross floor area of 428.25m² or 0.42:1, which will result in a minor noncompliance of 19.45m² or 4.8% from the development standard.

In the recent 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does **not** mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are "sufficient environmental planning grounds to justify contravening the development standard", it is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant's written document itself, and in the Commissioner's assessment of it). In February of 2017 the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligation is to be satisfied that "the applicant's written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard." He held that this means:

"the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary".

Accordingly, when assessed against the relevant Objects of the Environmental Planning & Assessment Act 1979, (NSW) outlined in s1.3, the following environmental planning grounds are considered to be sufficient to allow Council to be satisfied that a variation to the development standard can be supported:

- The proposed dwelling will maintain a bulk and scale which is consistent with that of existing surrounding development in the locality, which promotes the orderly & economic use of the land.
- Similarly, the proposed development will provide for an appropriate level of family accommodation and improved amenity within a built form which is compatible with the streetscape of Tutus Street which also promotes the orderly and economic use of the land.
- The proposal is considered to promote good design and amenity to the local built environment as appropriate views, solar access and privacy will be maintained for the neighbouring properties.

Having regard to the above, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for maximum floor space ratio.

7.0 Conclusion

The proposed development will present a total gross floor area of 428.25m² or 0.42:1, which will result in a minor noncompliance of 19.45m² or 4.8% from the development standard stipulated under Clause 4.4 of MLEP 2012.

This written request to vary the maximum floor space ratio specified in Clause 4.4 of the Manly LEP 2013 adequately demonstrates that the objectives of the standard will be met.

Strict compliance with the maximum floor space ratio control would be unreasonable and unnecessary in the circumstances of this case.

A handwritten signature in black ink, reading "Vaughan Milligan". The signature is written in a cursive, flowing style.

VAUGHAN MILLIGAN
Town Planner