



**5A Hilltop Crescent, Fairlight**

**Demolition of existing dwelling house and  
construction of a new dwelling house  
and swimming pool**

**Statement of Environmental Effects  
For Northern Beaches Council**

**Prepared by Geoff Goodyer**

**March 2019  
Amended August 2019**

**Project No. 19-056**

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## **1. Executive summary**

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- 1.1. The proposal is to demolish the existing dwelling house and construct a new dwelling house and swimming pool at 5A Hilltop Crescent, Fairlight.
- 1.2. The dwelling house is sited and designed to fit comfortably into the streetscape and the context of the site, drawing particular reference to the adjacent residential flat buildings.
- 1.3. Careful consideration has been given to ensuring that reasonable amenity is maintained for neighbouring properties in terms of views, privacy and solar access.
- 1.4. The design of the proposal has been modified to take into consideration feedback at the formal pre-lodgement meeting held with Council's planners.
- 1.5. The new dwelling house and swimming pool will complement the character of the area and maintain the amenity of neighbouring dwellings and is considered to be suitable for approval.
- 1.6. Following feedback from Council officers as part of the processing of the development application amended plans were prepared (Drawing DA01 – DA20, Issue L, dated 14.08.2019, by Watershed Design). This Statement of Environmental Effects has been amended to address the amended plans.

## 2. Introduction

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- 2.1. This Statement of Environmental Effects has been prepared by Geoff Goodyer of Symons Goodyer Pty Limited, Manly Vale. My professional details are included in Appendix A of this Statement of Environmental Effects.
- 2.2. I am a town planner with over 30 years' experience in local government and private practice. I am a Registered Planner accredited by the Planning Institute of Australia.
- 2.3. I have been instructed by Monique and Andrew Tompson to assess the impacts of a proposal to demolish the existing dwelling house and construct a new dwelling house and swimming pool at 5A Hilltop Crescent, Fairlight, under section 4.15 of the *Environmental Planning and Assessment Act 1979*.
- 2.4. In the course of preparing this Statement of Environmental Effects I have:
- inspected the site and surrounding locality;
  - taken photographs of the site and surrounding locality;
  - reviewed the notes from the pre-lodgement meeting held with Council officers; and
  - reviewed relevant environmental planning instruments and Council policies, in particular *Manly Local Environmental Plan 2013* and *Manly Development Control Plan 2013*.

### 3. Description of proposal

3.1. The proposal is to demolish the existing dwelling house and construct a new dwelling house and swimming pool at 5A Hilltop Crescent, Fairlight.

3.2. The proposed dwelling house will contain:

#### Lower floor

- Two bedrooms, each with en-suite.
- Rumpus room.
- Two plant rooms.
- Deck.
- Swimming pool.

#### Ground floor

- Four bedrooms, two with en-suite.
- Music room.
- Bathroom.
- Laundry.
- Study nook.
- Tandem garage.

#### Upper floor

- Living / kitchen / dining room.
- One bedroom with ensuite.
- Toilet.
- Deck and terrace.

#### Roof

- Roof terrace.

3.3. The proposal is shown on the following plans:

No.	Rev.	Title	Drawn by
DA01	L	Site analysis	Watershed Design
DA02	L	Site and roof plan	Watershed Design
DA03	L	Roof terrace plan	Watershed Design
DA04	L	Ground floor plan	Watershed Design
DA05	L	Upper floor plan	Watershed Design
DA06	L	Lower floor plan	Watershed Design
DA07	L	Area calculations	Watershed Design
DA08	L	Section A-A	Watershed Design
DA09	L	Section B-B	Watershed Design
DA10	L	West elevation	Watershed Design
DA11	L	East elevation	Watershed Design
DA12	L	South elevation	Watershed Design

No.	Rev.	Title	Drawn by
DA13	L	North elevation	Watershed Design
DA14	L	Shadow analysis plan 9am	Watershed Design
DA15	L	Shadow analysis plan 12pm	Watershed Design
DA16	L	Shadow analysis plan 3pm	Watershed Design
DA17	L	Shadow analysis elevation #3 Hilltop Cres	Watershed Design
DA18	L	Shadow analysis elevation #5B Hilltop Cres	Watershed Design
DA19	L	Excavation and fill plan	Watershed Design
DA20	L	External materials & finishes schedule	Watershed Design
18/2052	D	Landscape plan	Paul Scrivener
18/2052	D	Planting plan	Paul Scrivener
DA01	B	Lower ground floor – drainage plan	NB Consulting Engineers
DA02	B	Ground floor – drainage plan	NB Consulting Engineers
DA03	B	Drainage plans	NB Consulting Engineers
DA04	A	Sediment and erosion control plan and details	NB Consulting Engineers
53016	B	Detail survey	Norton Survey Partners

3.4. The proposal is accompanied by the following reports:

Title	Date	Prepared by
Arboricultural Impact Assessment Report	21.3.2019	Urban Arbor
BASIX Certificate No. 1000702S_02	22.3.2019	Efficient Living
Geotechnical Investigation	18.3.2019	White Geotechnical Group
NATHers Certificate No. 0003690138	14.3.2019	Efficient Living
Statement of Environmental Effects	August 2019	Symons Goodyer
Waste Management Plan	March 2019	Watershed Design

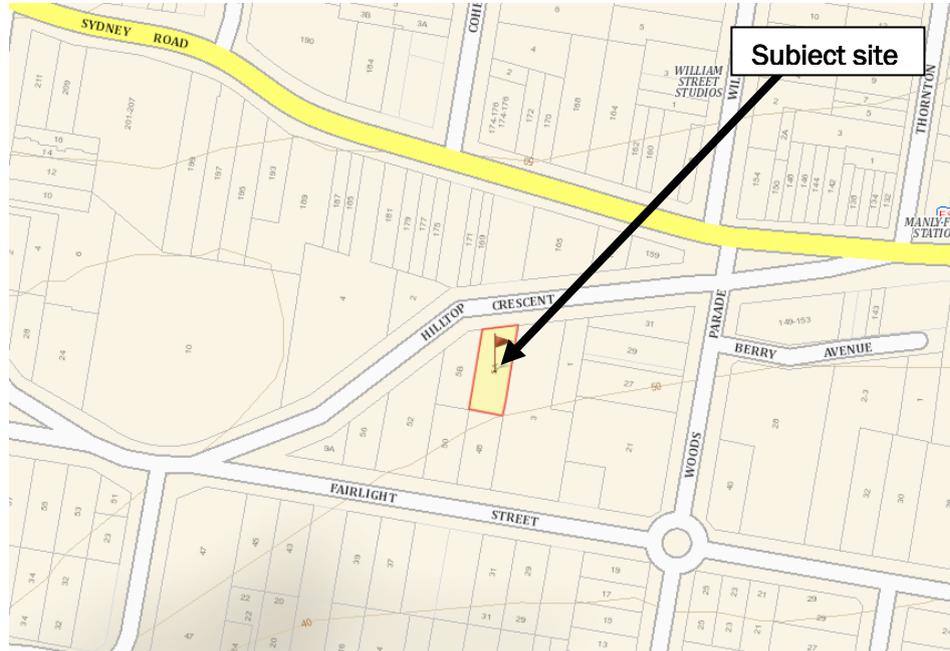
3.5. The project architect has advised that the amended plans submitted in August 2019 (Issue L) make the following changes to the proposal:

1. Increase eastern side setback of wall to 1280mm (increase of 350mm).
2. Increase western side setback of wall to 1080mm (increase of 150mm).
3. Lowering of Roof Terrace FFL and Upper Floor roof by 185mm and redistributing this reduction throughout the lower levels, reducing the overall building height.

4. Increase width of garden planters on Roof Terrace to increase setbacks from south and east boundaries.
5. Reduce width of access structure to Roof Terrace by 1700mm and amend angle of this roof to lower the overall height to be 725mm lower than original.
6. Reduce Deck area on Lower Floor to allow for increased landscaping.
7. This has had an overall reduction in the proposal floor area and an increase in landscaped and open space areas (Refer to DA07 for details).

#### 4. Locality analysis

4.1. The subject site is Lot 7, DP 5711, No. 5A Hilltop Crescent, Fairlight. It is located on the southern side of Hilltop Crescent between Woods Parade and Fairlight Street. The site's location is shown on the following maps:



Map 1 - Location (source: sixmaps)



Map 2 - Aerial photograph (source: sixmaps)

- 4.2. The site is trapezoidal in shape. It has a frontage of 15.86m to Hilltop Crescent to the north, an eastern side boundary of 40.97m, a western side boundary of 36.59m, and a southern rear boundary of 15.24m.
- 4.3. The site area is 590.9m<sup>2</sup> (by title).
- 4.4. The front portion of the site is level whilst the rear portion slopes down to the rear boundary. The total fall over the site is 4.0 metres, representing an average slope of 1 in 10.0 (10.0% or 5.7°).
- 4.5. The site is occupied by a part one-storey, part two-storey dwelling house of brick construction with a tiled roof in a landscaped setting.
- 4.6. The surrounding area has been developed for a mix of residential dwelling types including dwelling houses and residential flat buildings ranging from 2-storeys to 9-storeys in height. The site is within walking distance of shops and public transport at the Fairlight Shopping Village.
- 4.7. The following photographs show the site and surrounding area:



**Photo 1:**  
The subject site, viewed from Hilltop Crescent.



**Photo 2:**  
The front façade of the dwelling house on the subject site.



**Photo 3:**  
The rear façade of the dwelling house on the subject site.



**Photo 4:**  
3Hilltop Crescent to the east of the  
subject site.



**Photo 5:**  
Looking from the subject site to the  
duplex to the west of the site, 5B  
Hilltop Crescent.



**Photo 6:**  
Existing development on the  
opposite side of Hilltop Crescent.



**Photo 7:**  
Existing development to the west of  
the subject site.

## 5. Manly LEP 2013

### 5.1. Aims of MLEP 2013

- 5.1.1. The proposal is considered to be consistent with the aims stated in clause 1.2 of MLEP 2013. In particular, the proposal maintains the diverse range of housing opportunities and choices in the locality, provides a high quality landscaped area, and maintains the existing housing density on the site.

### 5.2. Zoning, permissibility, and zone objectives

- 5.2.1. The land is zoned R1 General Residential. Dwelling houses are permissible with consent in the zone.
- 5.2.2. The proposal is considered to be consistent with the relevant objectives of the zone in that it provides for the housing needs of the community and maintains the existing variety of housing types and densities.

### 5.3. Principal development standards

	Maximum permitted	Proposed	Complies
<b>Floor space ratio</b>	0.6:1 (354.5m <sup>2</sup> )	0.58:1 (340m <sup>2</sup> )	Yes
<b>Building height</b>	8.5 metres	9.1 metres	No

- 5.3.1. The proposal exceeds the building height control in clause 4.3(2) of MLEP 2013. The elements of the proposal that breach the control are the rooftop terrace balustrade (9.1m) and access structure (8.945m, being RL65.525 over EGL RL56.58) and a small part of the awning over the upper level deck (8.895m, RL62.575 over EGL RL53.68). However, the proposal sits comfortably into its context, with a maximum ridge level of RL65.525 sitting below the neighbouring buildings with ridge levels of RL65.85 (5B Hilltop Crescent) and RL66.25 (3 Hilltop Crescent).
- 5.3.2. Attached to this Statement of Environmental Effects as Appendix B is a request pursuant to clause 4.6 of MLEP 2013 to vary the provisions of clause 4.3(2) and permit the proposed building height. The request demonstrates that the proposal is consistent with the objectives of the R1 General Residential zone and the objectives of the building height control and that there are sufficient environmental planning grounds to justify the variation to the control.
- 5.3.3. The proposal complies with the floor space ratio control in clause 4.4(2) of MLEP 2013 and achieves the relevant objectives of the control:
- ✓ The bulk and scale of the building is consistent with the streetscape and, in particular, the neighbouring residential flat buildings.
  - ✓ The building does not obscure any important landscape or townscape features.

- ✓ The building has an appropriate visual relationship with the character and landscape of the area, complementing the mix of residential dwelling types ranging in scale from single-storey to 9-storeys in height.
- ✓ The building has been designed to maintain neighbouring residential amenity in terms of views, privacy and solar access and thereby minimise environmental impacts.

#### **5.4. Miscellaneous provisions**

- 5.4.1. The site is not within the coastal zone (clause 5.5).
- 5.4.2. The site does not contain a heritage item, is not in the vicinity of any heritage items and is not within a conservation area (clause 5.10).

#### **5.5. Additional provisions**

- 5.5.1. The site is within Class 5 land as shown on the Acid Sulphate Soils Map. Excavation is proposed for footings, lower ground floor levels and the swimming pool. The proposal will not lower the water table. The proposal is unlikely to result in acid sulfate pollution and no further assessment is required. The development complies with clause 6.1 of MLEP 2013.
- 5.5.2. Earthworks are proposed which are ancillary to the dwelling house and swimming pool (clause 6.2). Impacts arising from the minor earthworks may be addressed by conditions of consent and are assessed in the Preliminary Geotechnical Investigation by White Geotechnical Group.
- 5.5.3. The site is not a flood control lot (clause 6.3).
- 5.5.4. Stormwater will be disposed of in accordance with the details provided in the stormwater management plan by NB Consulting Engineers (clause 6.4). The land slopes to the rear of the site and a stormwater dispersion system is proposed.
- 5.5.5. The site is not identified as affected on the Terrestrial Biodiversity Map (clauses 6.5, 6.6 and 6.7).
- 5.5.6. The site is not identified as being at risk on the Landslide Risk Map (clause 6.8).
- 5.5.7. The site is within a Foreshore Scenic Protection Area. The proposal satisfies the matters for consideration in clause 6.9(3) of MLEP 2013:
  - (a) The proposal results in no overshadowing of the foreshore or loss of views from any public place to the foreshore.
  - (b) The proposal is architecturally designed and will improve the appearance of the urban backdrop to the harbour.

(c) The site is within the residential zone and the development is suitable for this location.

(d) The proposal will not result in any conflicts between land-based and water-based coastal activities.

5.5.8. The site is not within the foreshore area (clause 6.10).

5.5.9. The site is connected to all essential services (clause 6.12).

5.5.10. The site is not prone to bushfire.

## 6. Manly DCP 2013

### 6.1. Part 3 – General Principles of Development

Issue	Consistent with principle	Inconsistent with principle
Streetscape	✓	
Heritage	✓	
Sunlight access and overshadowing	✓	
Privacy and security	✓	
Maintenance of views	✓	

#### 6.1.1. Streetscape

The proposal has been designed to integrate into the surrounding streetscape. The setback to the street is varied, with the western portion of the building providing a generous setback of 14.0m – 16.5m enabling the provision of an extensive landscaped area to complement the streetscape and soften the appearance of the building.

#### 6.1.2. Landscaping

The proposal includes new landscaping around the building designed by Paul Scrivener Landscape Architects.

#### 6.1.3. Sunlight access and overshadowing

Shadow diagrams have been prepared that demonstrate that the proposal will retain sunlight to neighbouring properties in excess of that required by Council's controls.

Part 3.4.1.1 of the MDCP 2013 requires that new development must not eliminate more than one third of existing sunlight access the private open space of neighbouring properties from 9am to 3pm on 21 June. The site adjoins a number of properties, assessed as follows:

5B Hilltop Crescent: located to the west of the subject site, it contains two dwellings with the principal private open space of both properties appurtenant to the living areas oriented to the south towards views of Sydney Harbour. The upper level open space, comprising a roof terrace, is unaffected by the proposal. The lower level open space, comprising a large balcony, is self-shadowed and is unaffected by the proposal.

50 Fairlight Street: Located to the south-west of the subject site, it contains two dwellings. Living areas and appurtenant terraces are oriented to the south, towards views of Sydney Harbour, and are unaffected by the proposal. There is also a rear yard area that will receive some overshadowing at 9am but is unaffected at 12pm and 3pm on 21 June. As this is not the principal private open space the proposal technically complies with the requirements of the MDCP 2013; notwithstanding this, given the extent of sunlight retained and that it is a secondary space, the proposal provides for reasonable solar access.

48 Fairlight Street: Located to the south of the subject site, it contains two dwellings with the principal private open spaces comprising part of the rear yard. The shadow diagrams demonstrate that at 9am on June 21 there is a small increase in solar access to the western private open space at 9am, a small net reduction at 12noon, and no impact at 3pm. At all times more than two thirds of the existing solar access to both private open spaces is retained.

3 Hilltop Crescent: Located to the east and south-east of the site, it contains two buildings (one fronting Hilltop Crescent and the other fronting Fairlight Street) containing 15 apartments. The private open space of each dwelling comprises balconies and terraces oriented to the south towards views of Sydney Harbour. The building fronting Fairlight Street is unaffected by the proposal. The building fronting Fairlight Crescent is unaffected by the proposal at 9am and 12pm on 21 June. At 3pm on 21 June the roof terrace of 3 Hilltop Crescent is unaffected and lower level terraces are mostly self-shadowed. Any loss of solar access is minor and limited to 3pm on 21 June only.

Part 3.4.1.2 of the MDCP 2013 requires that the level of solar access presently enjoyed must be maintained to the glazed area of living rooms of adjacent properties for at least 2 hours on 21 June where those buildings have a north-south orientation. Internal plans of these dwellings are not available to the author of this Statement of Environmental Effects but it appears that the living areas are oriented to the south to benefit from views of Sydney Harbour. As such, the proposal will not have an impact on the glazed areas of living rooms as they are self-shadowed throughout the day on 21 June.

#### 6.1.4. Privacy and security

The proposal provides casual surveillance of the street with the kitchen and a terrace oriented to the street. The front door is located in a manner that does not encourage people to loiter undetected near the building entrance.

Windows have been designed to minimise overlooking opportunities. On the upper floor level a privacy screen is proposed to prevent overlooking from the east facing living room windows and another privacy screen is proposed to prevent overlooking from the front terrace. East-facing kitchen, pantry and w.c. windows will be provided with frosted glazing. Privacy screens and planter boxes are also proposed on both sides of the upper level rear terrace.

Planter boxes are proposed on the eastern and southern sides of the roof terrace to restrict sight lines to neighbouring properties and mitigate overlooking.

The 8.0m rear setback and proposed landscaping will mitigate overlooking of the properties to the south of the site.

#### 6.1.5. Maintenance of views

The site is surrounded by numerous residential premises. From a site inspection it does not appear that the proposal will result in the loss of any views of Sydney Harbour from any property. The increased rear setback, when compared to the existing situation, will provide some additional views from 5B Hilltop Crescent. It is anticipated that the development proposal will be notified to neighbouring landowners and it may be that individual landowners are able to identify affected views that are not apparent from a site inspection.

If any views are identified as a result of the public notification then a further assessment of the proposal may be undertaken using view sharing principles established by the Land and Environment Court and adopted in the Manly DCP 2013.

#### 6.1.6. Sustainability

A BASIX Certificate has been provided demonstrating that the proposal achieves the energy and water saving goals established by the State Government. Natural cross-ventilation is provided which will reduce reliance on air conditioning and the living areas have good access to daylight.

### 6.2. **Part 4 – Development Controls**

Control	Required / Permitted	Proposed	Complies?
Residential density – Area D3	1 dwelling per 250m <sup>2</sup>	1 dwelling per 590.9m <sup>2</sup>	YES
Wall height	- East 7.4m - West 7.1m	- East 4.0m – 8.0m - West 6.3m – 7.5mm	NO NO
Number of storeys	2	3	NO
Roof allowance	2.5m over wall height	1.4m	YES
Front Setback	6.0m or prevailing / established front setback	Dwelling 12.2m Garage 4.9m Consistent with streetscape	YES YES
Side setback	- East 2.47m - West 2.37m	- East 1.28m – 2.67m - West 1.08m – 2.7m	NO NO
Side setback of windows	3m	Most windows screened, frosted or have high sills within 3.0m of side boundaries. See discussion below.	YES On merit
Rear setback	8.0m	8.0m	YES
Open Space (OS3)			
- Total	55% site area (325.0m <sup>2</sup> )	59.6% site area (352m <sup>2</sup> )	YES
- Soft	19.25% site area (113.7m <sup>2</sup> )	36.2% site area (214m <sup>2</sup> )	YES
Number of endemic trees	3	7	YES
Private open space	18 m <sup>2</sup>	>18m <sup>2</sup>	YES
Car parking	2 spaces	2 spaces	YES
Swimming pool height above ground	1.0m maximum	620mm	YES

Control	Required / Permitted	Proposed	Complies?
Swimming pool setback	1.0m to concourse min. 1.5m to water minimum	1.0m (east), 1.35m (south) 2.05m (east), 1.55m (south)	YES YES
Cut and fill	1.0m maximum	2.0m	NO

#### 6.2.1. Wall height

Clause 4.1.2.1 of the MDCP 2013 limits the wall height of the building. The proposal generally complies with the wall height control. However, the site is unusual in that the majority is relatively level but the rear portion slopes down steeply. That part of the building on the level portion of the land complies with the wall height control but the rear portion of the building is non-compliant. Essentially, the non-compliance is a result of the unusual topography of the site.

The proposal incorporates a number of features to mitigate the impacts of bulk and scale of the building:

- A flat roof is proposed.
- The side elevations will have a variety of finished surface materials with the upper level finished in timber weatherboard to provide a natural, recessive appearance.
- The side facades are articulated with fenestration and screening structures.
- Planter boxes are provided around the upper level balconies to soften the appearance of the building.
- The upper level of the building is provided with a greater side setback.

Further, as discussed above, the proposal complies with the requirements with regards to maintaining solar access to neighbouring properties.

The building also needs to be appreciated in context, with the neighbouring apartment and duplex buildings having a commensurate wall height.

It is considered that these mitigating factors demonstrate that the proposed wall height is reasonable and that the building is consistent with the character of the area.

#### 6.2.2. Number of storeys

Clause 4.1.2.2 of the MDCO 2013 limits buildings on the site to 2 storeys. The proposed building is partly 2 storeys in height and partly 3 storeys in height. Clause 4.1.2.2(c)(i) permits variations to this limit where specific physical site constraints warrant an exception. In the context of this site, set between 3-storey apartment and duplex buildings, the proposed building is consistent with the character of the area.

#### 6.2.3. Street front setbacks

Clause 4.1.4.1 of MDCP 2013 requires that the street front setback must relate to the front building line of neighbouring properties and the prevailing building lines in the immediate vicinity. Where there is no consistent or established front building line a setback of 6m is required.

The front setback of buildings on the southern side of Hilltop Crescent is inconsistent, as shown in the following aerial photograph:



**Photo 8:** Aerial photo (source: sixmaps)

The proposal provides a variable front setback ranging from 4.9 metres to 15.3 metres. In the context of the variable front setbacks in Hilltop Crescent the proposal is consistent. The setback provides a generous area for the planting of trees and shrubs and satisfies the requirements of clause 4.1.4.1 of the MDCP.

#### 6.2.4. Side setbacks

Clause 4.1.4.2(a) provides that the side setback of buildings must not be less than one third of the height of the adjacent external wall of the building. As shown in the Compliance Table above, the proposal does not comply with this control.

Assessment of this variation to the controls has been assessed taking into consideration the context of the site and neighbouring development and achievement of the objectives of the setback controls in Part 4.1.4 of the MDCP 2013.

The site is flanked on both sides by 3-storey apartment and duplex buildings. In comparison, the proposal is of a diminutive scale, being generally 2-storeys in height.

The existing building on the site has very similar side setbacks to the proposed building. In both cases, the side setbacks provide for servicing

access to the rear yard and for maintenance of the side walls of the building.

The building steps in at the upper level to minimise its bulk and scale and to maintain the amenity of neighbouring dwellings. In this regard the side setbacks on the ground floor level are 1.08m – 1.28m, whilst at the first floor level the western side setbacks is 1.52m.

The building increases the side setback at the upper level towards the rear of the building, where the wall height increases due to the slope of the land. In this location the side setback is 2.7m west and 2.67m east.

The proposal satisfies the objectives of the setback controls:

Objective	Comment
Objective 1) To maintain and enhance the existing streetscape including the desired spatial proportions of the street, the street edge and the landscape character of the street.	The proposal maintains the streetscape through the generous front setbacks, the retention of the existing fence which screens the building, and the proposed landscaping.
Objective 2) To ensure and enhance local amenity by: <ul style="list-style-type: none"> <li>• providing privacy;</li> <li>• providing equitable access to light, sunshine and air movement; and</li> <li>• facilitating view sharing and maintaining adequate space between buildings to limit impacts on views and vistas from private and public spaces.</li> <li>• defining and adding character to the streetscape including the provision of adequate space between buildings to create a rhythm or pattern of spaces; and</li> <li>• facilitating safe and adequate traffic conditions including levels of visibility around corner lots at the street intersection.</li> </ul>	<ul style="list-style-type: none"> <li>• Privacy is maintained through the use of a variety of techniques (screens and frosted glazing).</li> <li>• Overshadowing impacts are reasonable and compliant with Council's controls.</li> <li>• Reasonable view sharing is maintained, as described above.</li> <li>• The site is flanked by 3-storey apartment and duplex buildings and the proposal maintains the existing pattern of spaces between buildings.</li> <li>• Safe vehicular access is maintained. The site is not located at a street intersection.</li> </ul>
Objective 3) To promote flexibility in the siting of buildings.	The siting of the building is appropriate in the circumstances of the case.
Objective 4) To enhance and maintain natural features by: <ul style="list-style-type: none"> <li>• accommodating planting, including deep soil zones, vegetation consolidated across sites, native vegetation and native trees;</li> <li>• ensuring the nature of development does not unduly detract from the context of the site and particularly in relation to the nature of any adjoining Open Space lands and National Parks; and</li> </ul>	<ul style="list-style-type: none"> <li>• The proposal provides generous for soft landscaping, in excess of the numerical requirements of the MDCP 2013.</li> <li>• The site does not adjoin any open Space lands or National Parks.</li> <li>• The site does not adjoin urban bushland subject to the provisions of SEPP 19.</li> </ul>

<ul style="list-style-type: none"> <li>ensuring the provisions of State Environmental Planning Policy No 19 - Urban Bushland are satisfied.</li> </ul>	
Objective 5) To assist in appropriate bush fire asset protection zones.	The site is not identified as being prone to bush fire.

6.2.5. Side setback of windows

Clause 4.1.4.2(c) of MDCP 2013 provides:

- c) *All new windows from habitable dwellings [sic] of dwellings that face the side boundary are to be setback at least 3m from side boundaries.*

The proposed dwelling house contains a number of windows facing side boundaries that are less than 3m from the boundary. The objective of the control is not specified in the MDCP 2013 but it is considered that it seeks to maintain privacy between dwellings. In this regard most windows facing side boundaries are provided privacy treatments to prevent overlooking, either through the location of side boundary fences, the use of frosted glazing, high sills or privacy screens. The exceptions are windows to bedrooms 3 and 4 on the ground floor. Potential privacy impacts are mitigated as the windows are narrow (600mm), relate to bedrooms which have low levels of daytime usage, and are windows which the occupier would be more concerned about people looking in rather than looking out so will have internal privacy measures (eg: blinds). These windows provide additional amenity to the bedrooms in terms of natural light and ventilation.

6.2.6. Open space and landscaping

Clause 4.1.5.1(a) of MDCP 2013 requires a minimum of 55% of the site area as open space of which 35% must constitute landscaped area. The proposal complies with these requirements, with 59.6% of the site area as open space and 36.2% as landscaped area. Details of the areas included in the calculation are shown on drawing DA07.

59.4m<sup>2</sup> of the total open space is provided above ground, representing less than 25% of the total open space is located above ground level and satisfying clause 4.1.5.1(a) and (c)(i).

In addition, there is open space of 57m<sup>2</sup> that is not included in the calculation because it is less than 3 metres in width (clause 4.1.5.1(b)(i)).

A roof terrace is proposed. The terrace is not large, measuring 5.4m x 4.0m. Planter boxes are proposed on the eastern and southern sides of the roof terrace to restrict view lines to neighbouring properties, mitigating potential overlooking, and to provide additional softening of the appearance of the building.

6.2.7. Cut and fill

The proposal satisfies the requirements of Part 4.4.5.1 of the MDCP 2013, limiting earthworks to that part of the site required to accommodate the

building and providing natural and undisturbed ground levels within 0.9m of side and rear boundaries. No excavation is proposed under the canopy of any trees and sediment, siltation and stormwater controls will be implemented.

Generally, excavation is less than 1m in depth, as required by clause 4.4.5.2 of the MDCP 2013. However, the swimming pool and part of the lower floor area require excavation of up to 2.0 metres. These areas have been designed, and will be constructed, in accordance with engineering advice as detailed in the report by White Geotechnical Group and will have no impact on sub-soil water flows, neighbouring land stability, or the bulk and scale of the development. It achieves the objectives of Part 4.4.5 of the MDCP 2013.

## **7. State Environmental Planning Policies**

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### **7.1. SEPP No. 55 - Remediation of land**

- 7.1.1. Clause 7 of SEPP 55 requires Council to consider whether land is contaminated prior to granting consent to the carrying out of any development on that land.
- 7.1.2. The site has been used for residential purposes for approximately 80 years prior to which it was probably vacant.
- 7.1.3. The historical uses of the site are not listed in Table 1 to the Planning Guidelines under SEPP 55 as being activities likely to cause contamination. It is considered unlikely that the site has experienced any contamination, and no further assessment is considered necessary.

### **7.2. SEPP (Infrastructure) 2007**

- 7.2.1. Clause 45 of SEPP Infrastructure requires the Consent Authority to notify the electricity supply authority of any development application (or an application for modification of consent) for any development proposal:
  - within or immediately adjacent to an easement for electricity purposes (whether or not the electricity infrastructure exists),
  - immediately adjacent to an electricity substation,
  - within 5m of an overhead power line
  - that includes installation of a swimming pool any part of which is within 30m of a structure supporting an overhead electricity transmission line and/or within 5m of an overhead electricity power line
- 7.2.2. Given the proximity of the proposal to electricity infrastructure the development application should be referred to the electricity supply authority in accordance with Council's usual practice.

### **7.3. SEPP (Building Sustainability Index) 2004**

- 7.3.1. Under clauses 8 and 9 of SEPP BASIX, other planning instruments and DCP's do not apply to BASIX commitments.
- 7.3.2. A BASIX Certificate accompanies the proposal.

### **7.4. SEPP (Vegetation in Non-Rural Areas) 2017**

- 7.4.1. Under clause 10 of SEPP (Vegetation in Non-Rural Areas) 2017, Council may issue a permit to clear vegetation in any non-rural area of the State. The proposal does involve the removal of 2 trees and 1 group of trees (a murraya hedge) as detailed in the Arboricultural Impact Assessment Report.

## **8. Environmental Planning and Assessment Regulation 2000**

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### **8.1. Demolition**

- 8.1.1. The proposal involves demolition of the existing dwelling house. Under Clause 92(1)(b) of the *Environmental Planning and Assessment Regulation 2000* Council must consider the provisions of Australian Standard AS 2601: The demolition of structures (“AS 2601”).
- 8.1.2. All demolition works will be carried out in accordance with AS 2601, including the preparation of an appropriate Work Plan. This matter may be addressed by a condition of consent.

**9. Other matters under Section 4.15 of the Environmental Planning & Assessment Act 1979**

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**9.1. The likely impacts of the development**

9.1.1. These have been addressed above.

**9.2. The suitability of the site**

9.2.1. The site is considered to be suitable for the proposed development. It does not contain any particular environmental features and does not have a history that would indicate any land contamination.

**9.3. Submissions**

9.3.1. None at this time. The applicant will be notified in accordance with the requirements of the MDCP 2013 and any submissions can then be considered by Council.

**9.4. The public interest**

9.4.1. The public interest is served by developing the land in an efficient and economic way that maintains the character of the area and the amenity of the neighbourhood. The Council's planning controls encourage such development in this locality.

## **10. Summary**

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- 10.1. The merits of this application have been identified in this assessment under Section 4.15 of the *Environmental Planning and Assessment Act 1979*, *Manly Local Environmental Plan 2013* and the *Manly Development Control Plan 2013*.
- 10.2. The proposed dwelling house will complement the streetscape and maintain the amenity of neighbouring dwellings.
- 10.3. The proposal achieves the objectives of Council's development controls and strategic aims and is considered to be suitable for approval on town planning grounds.

## **Appendix A - Details of the author**

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### **ACADEMIC QUALIFICATIONS**

Bachelor of Town Planning (Honours), University of New South Wales (1988).  
Master of Professional Accounting (Distinction), University of Southern Queensland (1999).

### **PROFESSIONAL EXPERIENCE**

#### **1997 to present                      SYMONS GOODYER PTY LTD**

Principal town planning consultant responsible for providing expert town planning advice to a diverse range of clients.

Expert witness in the Land and Environment Court.

Statutory and strategic projects within numerous Council areas, including Ashfield, Bankstown, Canterbury, Hornsby, Ku-ring-gai, Lane Cove, Leichhardt, Liverpool, Manly, Mosman, North Sydney, Pittwater, Randwick, Rockdale, Sutherland, Warringah, Waverley, and Woollahra.

#### **1988 to 1997      WARRINGAH COUNCIL**

Manager, Planning and Urban Design Branch (1994-7). Responsible for drafting of operative provisions of the Warringah Local Environmental Plan 2000.

Senior Strategic Planner (1993-1994)

Development Assessment Officer (1988-1993)

#### **1986 to 1988      MARRICKVILLE MUNICIPAL COUNCIL**

Town Planner

#### **1986                      EDWARDS MADIGAN TORZILLO BRIGGS INTERNATIONAL PTY LTD**

Town Planner

#### **1984                      RYDE MUNICIPAL COUNCIL**

Student Town Planner

### **PUBLICATIONS**

Goodyer, G (1988)

Retail and office activities in industrial areas in the Sydney region. University of New South Wales.

Goodyer, G (1989)

Hi-tech industry. Planning Law and Practice, UNSW, 1989.

Goodyer, G (1995)

Modern Planning Instruments. Health and Building Surveyors' Association (NSW) Conference, 1995.

## Appendix B – Clause 4.6 variation – building height

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Address: 5A Hilltop Crescent, Fairlight

Proposal: Demolition of an existing dwelling house and construction of a new dwelling house and swimming pool.

### 1. Manly Local Environmental Plan 2013 (“MLEP”)

#### 1.1 Clause 2.2 and the Land Use Table

Clause 2.2 and the Land Zoning provide that the subject site is zoned R1 – General Residential (the R1 zone) and the Land Use Table in Part 2 of MLEP specifies the following objectives for the R1 zone:

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

The proposed development is for the purpose of a dwelling house which is a permissible use in the R1 zone.

#### 1.2 Clause 4.3 – Building Height

Clause 4.3 of MLEP sets out the building height development standard as follows:

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

- (a) *to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*
- (b) *to control the bulk and scale of buildings,*
- (c) *to minimise disruption to the following:*
  - (i) *views to nearby residential development from public spaces (including the harbour and foreshores),*
  - (ii) *views from nearby residential development to public spaces (including the harbour and foreshores),*
  - (iii) *views between public spaces (including the harbour and foreshores),*
- (d) *to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*

(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

1.3 The maximum building height permitted on the land is 8.5 metres.

1.4 The Dictionary to MLEP operates via clause 1.4 of MLEP. The Dictionary defines “building height” and “ground level (existing)” as:

**building height (or height of building)** means:

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

**ground level (existing)** means the existing level of a site at any point.

1.5 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP provides:

(1) The objectives of this clause are as follows:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The latest authority in relation to the operation of clause 4.6 is the decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“*Initial Action*”). *Initial Action* involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

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

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

*achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."*

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

Clause 4.6(2) of MLEP provides:

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

Clause 4.3 (the building height 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 height development standard pursuant to clause 4.3 of MLEP which specifies a building height of 8.5 metres however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

Clause 4.6(4) of MLEP provides:

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

*standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

(b) *the concurrence of the Secretary has been obtained.*

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

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

Clause 4.6(5) of MLEP provides:

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

Council has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), and may assume the concurrence of the Secretary under cl 4.6(4)(b). Nevertheless, the Council should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.7(8) is only relevant

so as to note that it does not exclude clause 4.3 of MLEP from the operation of clause 4.6.

## 2. The Nature and Extent of the Variation

- 2.1 This request seeks a variation to the building height development standard contained in clause 4.3 of MLEP.
- 2.2 Clause 4.3(2) of MLEP specifies a maximum building height for development on the subject site of 8.5 metres.
- 2.3 The proposal exceeds the building height control in clause 4.3(2) of MLEP 2013. The elements of the proposal that breach the control are the rooftop terrace balustrade (9.1m) and access structure (8.945m, being RL65.525 over EGL RL56.58) and a small part of the awning over the upper level deck (8.895m, RL62.575 over EGL RL53.68). However, the proposal sits comfortably into its context, with a maximum ridge level of RL65.525 sitting below the neighbouring buildings with ridge levels of RL65.85 (5B Hilltop Crescent) and RL66.25 (3 Hilltop Crescent).

## 3. Relevant Caselaw

- 3.1 In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29] as follows:
  13. *The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.*
  14. *The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see Woolworths Ltd v Pallas Newco Pty Ltd (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000] HCA 5 at [28]; Winten Property Group Limited v North Sydney Council (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].*
  15. *The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the*

circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.

16. As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe v Pittwater Council* at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.
17. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: *Wehbe v Pittwater Council* at [42] and [43].
18. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: *Wehbe v Pittwater Council* at [45].
19. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: *Wehbe v Pittwater Council* at [46].
20. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: *Wehbe v Pittwater Council* at [47].
21. A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: *Wehbe v Pittwater Council* at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in *Wehbe v Pittwater Council* at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.
22. These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to

establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.
24. The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].
25. The consent authority, or the Court on appeal, must form the positive opinion of satisfaction that the applicant’s written request has adequately addressed both of the matters required to be demonstrated by cl 4.6(3)(a) and (b). As I observed in *Randwick City Council v Micaul Holdings Pty Ltd* at [39], the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant’s written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b). The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant’s written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction: see *Wehbe v Pittwater Council* at [38].
26. The second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the

*applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(ii).*

27. *The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).*
28. *The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.*
29. *On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41].*

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

1. Is clause 4.3 of MLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
  - (a) compliance is unreasonable or unnecessary; and
  - (b) there are sufficient environmental planning grounds to justify contravening the development standard ?

3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development for in the R1 zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of MLEP?

#### 4. Request for Variation

##### 4.1 Is clause 4.3 of MLEP a development standard?

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

*“(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work”*

- (b) Clause 4.3 of MLEP relates to the height of a building and, accordingly, clause 4.3 is a development standard.

##### 4.2 Is compliance with clause 4.3 unreasonable or unnecessary?

- (a) This request relies upon the 1<sup>st</sup> way identified by Preston CJ in *Wehbe*.
- (b) The first way in *Wehbe* is to establish that the objectives of the standard are achieved.
- (c) Each objective of the building height standard and reasoning why compliance is unreasonable or unnecessary is set out below:

- (a) *to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*

The proposed building is consistent with the prevailing building height, with a uppermost roof ridge of RL65.525 sitting below the level of both the eastern neighbour, 3 Hilltop Crescent (RL66.25), and the western neighbour, 5B Hilltop Crescent (RL65.85). Furthermore, the element of the proposal that represents its highest point is the balustrade around the roof terrace which is a small structure. The majority of the building has a lesser height.

The proposal reflects the topographic landscape, stepping down to the south with the slope of the land.

The desired streetscape is maintained through the generous front setback and provision of landscaping.

This objective is achieved.

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

The proposal has a bulk that is commensurate with the expected outcomes of the planning controls and a scale that is less than its neighbours.

The breaches of the building height relate to relatively minor elements of the building and the majority of the building is substantially below the building height control.

The proposal satisfies the floor space ratio control which is an indicator of an appropriate building bulk. Other aspects of the design further reduce the bulk of the building, including a variety of finished surface materials and colours, varying setbacks and the use of fenestration.

This objective is achieved.

(c) *to minimise disruption to the following:*

(i) *views to nearby residential development from public spaces (including the harbour and foreshores),*

The proposed building forms part of the urban backdrop when viewed from the harbour and foreshores. The building will have no perceptible impact on views to nearby residential development from public places. This objective is achieved.

(ii) *views from nearby residential development to public spaces (including the harbour and foreshores),*

Sit is located on a ridgeline and the author has not identified any views that are impacted. In the author's experience it is not unusual for views from private properties to be identified as part of the public notification of a development proposal and further assessment may be required at that time. This objective is achieved.

(iii) *views between public spaces (including the harbour and foreshores),*

The proposal does not result in any disruption to views between public spaces. This objective is achieved.

(d) *to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*

As discussed in the body of this Statement of Environmental Effects, the proposal retains solar access to neighbouring properties in excess of the requirements of the MDCP 2013.

The proposal does not result in any additional overshadowing of public places.

This objective is achieved.

- (e) *to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

The site is not in a recreation or environmental protection zone. This objective is achieved.

#### **4.3 Are there sufficient environmental planning grounds to justify contravening the development standard?**

There are sufficient environmental planning grounds to justify contravening the development standard. Whilst there is no requirement that the development comply with the objectives set out in clause 4.6(1) it is relevant to note that objective (b) provides:

*“to achieve better outcomes **for and from** development by allowing flexibility in particular circumstances.”* (emphasis added)

It should be noted at the outset that in *Initial Action* the Court held that it is incorrect to hold that the lack of adverse impact on adjoining properties is not a sufficient ground justifying the development contravening the development standard when one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse impacts.

The variation to the development standard does not reduce the amenity of other dwellings in the vicinity of the site or the public domain but results in significantly enhanced amenity for the proposed dwelling house in terms of the utility of their private open space.

Additionally, the variation to the development standard does not result in additional impacts on the streetscape as the existing streetscape presentation is maintained.

The form of the development, its appearance and its height is entirely consistent with the existing character of the area which generally reflects an eclectic mix of dwelling types including dwelling houses, duplexes, and apartment buildings ranging in height from 2 storeys to 8 storeys.

The absence of external impacts and the increased internal amenity of the dwelling house constitute sufficient environmental planning grounds to justify the proposed departures from the development standards.

**4.4 Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the R1 General Residential zone?**

(a) Section 4.2 of this written requests demonstrates that the proposed development meets each of the applicable objectives of clause 4.3. As the proposed development meets the applicable objectives it follows that the proposed development is also consistent with those objectives.

(b) Each of the objectives of the R1 zone and the reasons why the proposed development is consistent with each objective is set out below:

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

The dwelling house provides for the housing needs of members of the community.

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

The dwelling house compliments and contributes to the mix of dwelling types in the locality which includes dwelling houses, duplexes, and apartment buildings ranging in height from 2 storeys to 8 storeys.

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

This objective is not relevant to the proposal.

**4.5 Has council obtained the concurrence of the Director-General?**

Council can assume the concurrence of the Director-General with regards to this clause 4.6 variation pursuant to the Assumed Concurrence notice issued on 21 February 2018.

**4.6 Has Council considered the matters in clause 4.6(5) of MLEP?**

(a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed dwelling house for the particular site and this design is not readily transferrable to any other site in the immediate locality, wider region of the State and the scale or nature of the proposed development does not trigger requirements for a higher level of assessment.

(b) As the proposed development is in the public interest because it complies with the objectives of the development standard and the objectives of the zone there is no significant public benefit in maintaining the development standard.

(c) There are no other matters required to be taken into account by the secretary before granting concurrence.

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



Geoff Goodyer  
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