

STATEMENT OF ENVIRONMENTAL EFFECTS

Proposed Residential
Flat Building

33-35 Fairlight Street,
Fairlight

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33-35 Fairlight Street, Fairlight

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1 Introduction

This Statement of Environmental Effects (SEE) has been prepared on behalf of Allen Group Developments Pty Ltd in support of a development application proposing the demolition of the existing structures and the construction of a residential flat building comprising 6 residential apartments and carparking for 14 vehicles. The application also includes the implementation of an integrated site landscape regime and all associated infrastructure.

Platform Architects, the project architect, have responded to the client brief to design a contextually responsive building of exceptional quality with high levels of amenity for future occupants. In this regard, the scheme has been developed through detailed site and contextual analysis to identify the constraints and opportunities associated with the development of this site having regard to the topography, height, scale, proximity, use and orientation of surrounding development. The final design is also responsive to the minutes arising from formal pre-DA discussions with Council (PLM2021/0002). The proposal relies on the creation of a drainage easement through a downstream property with negotiations continuing to secure an easement prior to the commencement of works on site.

In addition to this SEE, the application is also accompanied by the following:

- Architectural Plans
- Survey
- Landscape Plans
- Traffic and Parking Assessment Report
- Construction Traffic Management Plan
- BCA Compliance Report
- Acoustic Report
- Stormwater Management Plans
- Arboricultural Impact Assessment Report
- Geotechnical Report
- Visual Impact Assessment
- Heritage Impact Assessment Report
- Construction & Demolition Waste Management Plan
- On-Going Waste Management Plan
- QS Report
- SEPP 65 Design Verification Statement
- ADG Compliance Table

- BASIX and NatHERS Certificates

In preparation of this document, consideration has been given to the following:

- Environmental Planning and Assessment Act 1979 (**EP&A Act**),
- Manly Local Environmental Plan 2013 (**MLEP 2013**),
- Manly Development Control Plan 2013 (**MDCP 2013**),
- State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (**SEPP BASIX**),
- State Environmental Planning Policy (Biodiversity and Conservation) 2021,
- State Environmental Planning Policy (Resilience and Hazards) 2021,
- State Environmental Planning Policy No.65 – Design Quality of Residential Apartment Development (**SEPP 65**), and
- The Apartment Design Guide (**ADG**).

The proposal succeeds when assessed against the Heads of Consideration pursuant to section 4.15(1) of the EP&A Act. It is considered that the application, the subject of this document, is appropriate on merit and is worthy of the granting of development consent for the following reasons:

- The accompanying plans depict a high quality and contextually appropriate built form outcome that responds to adjacent and nearby development and the surrounding environment. The proposed development is a suitable design solution in light of the zoning of the site and the slope of the land.
- The apparent height and bulk of the proposed development is compatible with that of surrounding development, and consistent with the desired future character of the locality.
- Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* (2005) NSW LEC 191, we have formed the considered opinion that most observers would not find the apparent size of the proposed development offensive, jarring or unsympathetic in the streetscape context.
- Whilst the proposal requires the consent authority to give favourable consideration to a variation to the building height and floor space ratio development standards, strict compliance has been found to be unreasonable and unnecessary in this instance as the development is otherwise consistent with the objectives of the development standards and sufficient environmental planning grounds exist to support the variation (as outlined in the attached Clause 4.6 Variation Request).

- The minor areas of non-compliance with the dwelling density and wall height controls prescribed by MDCP 2013 have been acknowledged and appropriately justified having regard to the associated objectives. Such variations succeed pursuant to section 4.15(3A)(b) of the EP&A Act which requires Council to be flexible in applying such provisions and allow reasonable alternative solutions that achieve the objects of DCP standards for dealing with that aspect of the development.
- The proposal will provide a notable increase to the supply of premium housing on a site ideally suited to increased residential densities.
- The proposed development has been amended in response to the feedback from Council provided at the pre-lodgement meeting on 4 February 2021 and in the subsequent minutes provided.
- The site is assessed as suitable for the proposal having regard to the relevant considerations pursuant to the SEPP 65 - Design Quality of Residential Apartment Development (SEPP 65) and the Apartment Design Guide (ADG).

2 Site Analysis

2.1 Site Description and location

2.1.1 The Site

The site is comprised of the following land holdings:

- Lot 9 in Section B in DP 3742 (33 Fairlight Street, Fairlight)
- Lot 8 in Section B in DP 3742 (35 Fairlight Street, Fairlight)

The consolidated site is highlighted in the aerial image in Figure 1 below.

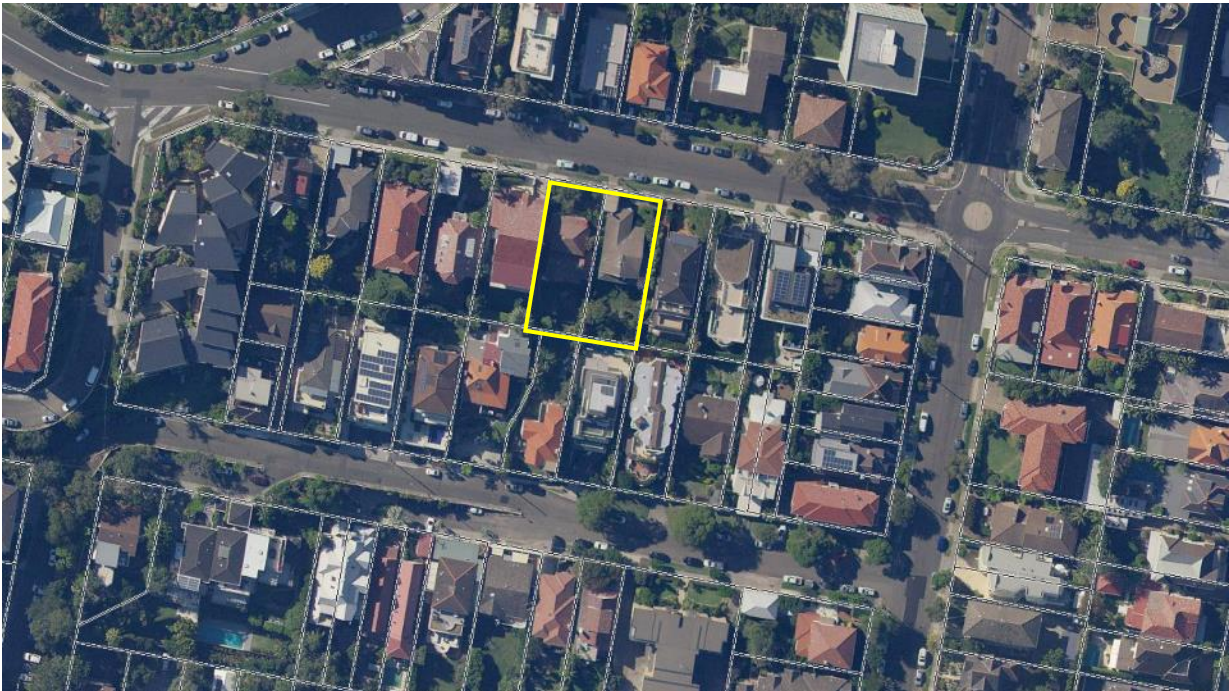


Figure 1: Aerial photograph of consolidated development site
Source: Six Maps

The consolidated allotment is rectangular shaped, with a 30.48m wide frontage to Fairlight Street to the north, a depth of 40.235m and a total area of 1226m². The site slopes from the upper front boundary down towards the rear, with a fall of approximately 10.3m and a slope of approximately 26%.

Each lot currently contains a 2 storey residential building comprising 3 units. A single garage is located in the north-western corner of 33 Fairlight Street. Existing canopy trees on the site are predominantly exempt species and are in poor health.

Fairlight Street is a two-lane local road, with on-street time-restricted parking on both sides of the road.

The physical and topographical characteristics of the site are depicted on the site survey extract at Figure 2.

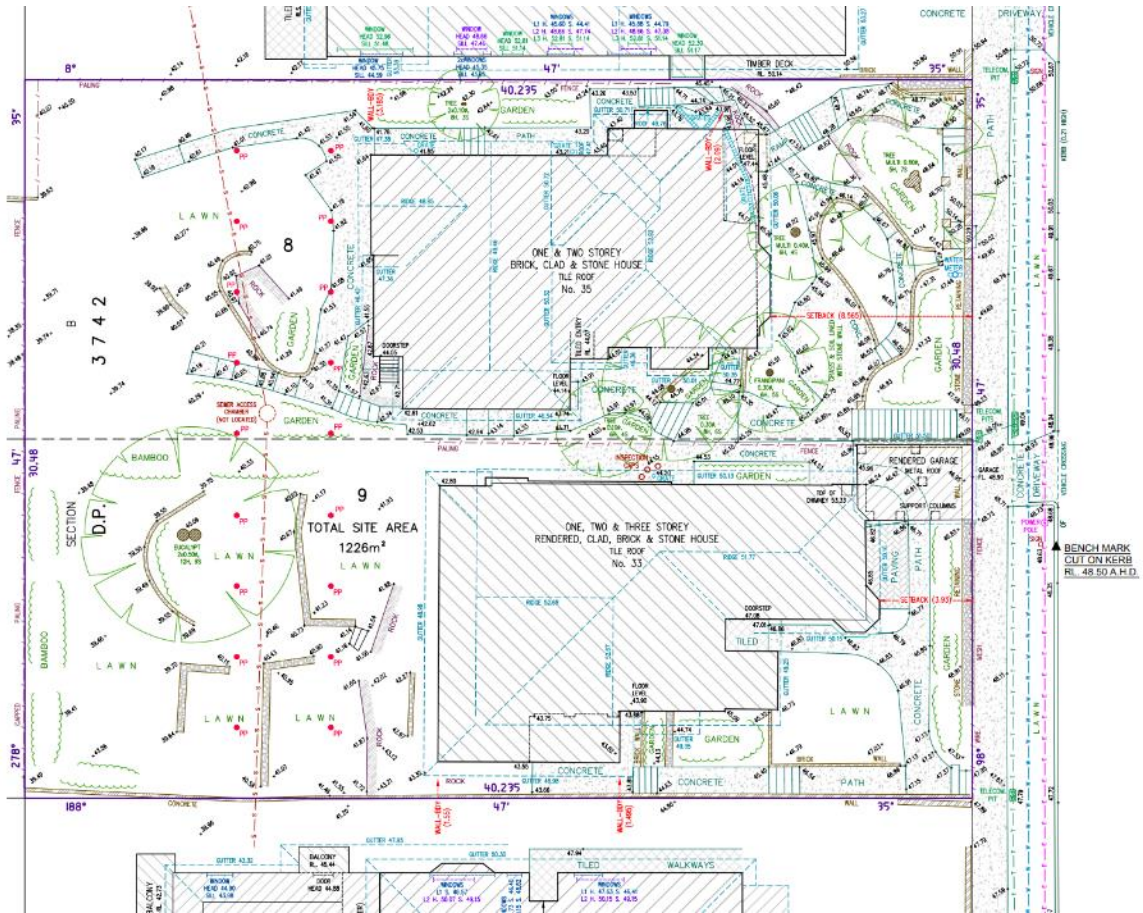


Figure 2: Site survey extract



Figure 3: Subject property as viewed from Fairlight Street (east)



Figure 4: Subject property as viewed from Fairlight Street (west)

2.1.2 The Locality

The site is located within the R1 General Residential Zone under MLEP 2013 (Figure 5).

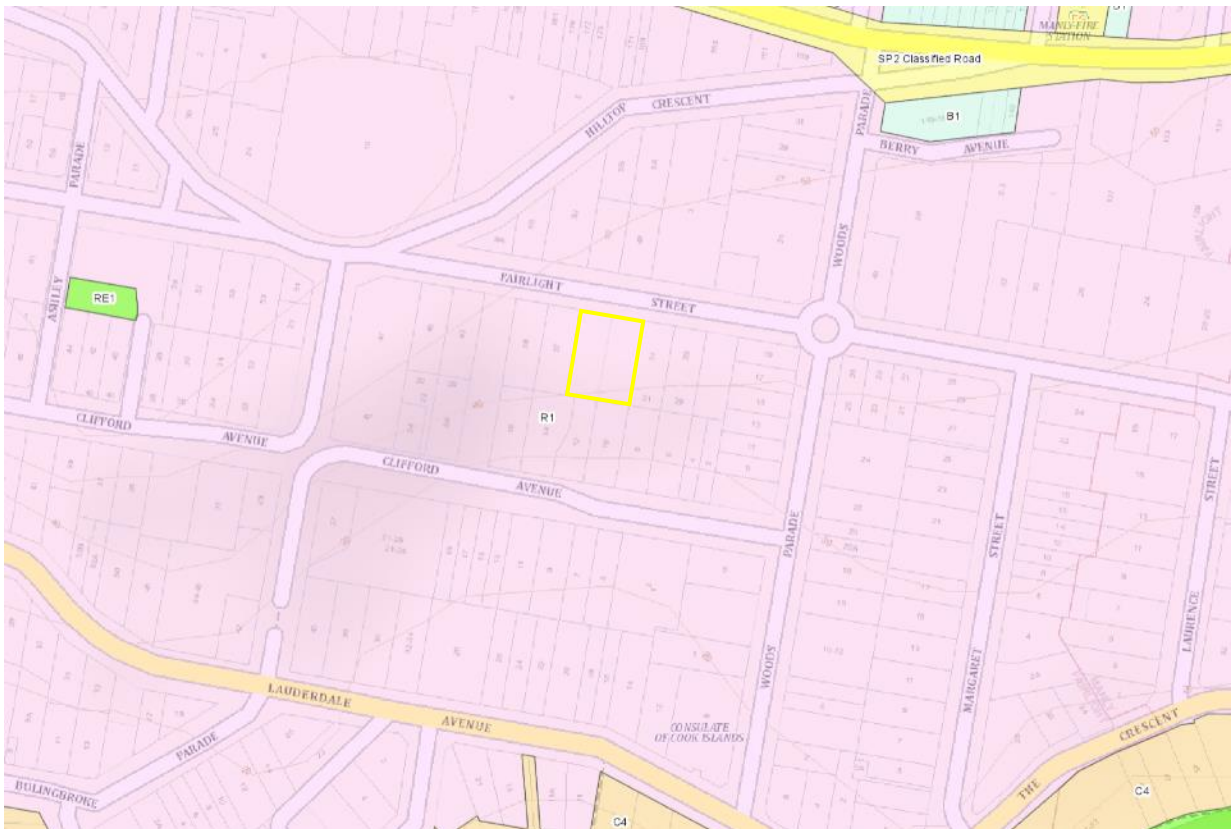


Figure 5: Extract of Zoning Map

The surrounding area comprises residential development of varying scale, density, age and architectural style.

A visual representation of the surrounding development, including development in the wider R1 zone is shown in Figures 6 to 11, below.



Figure 6: Development to the east of the subject property on Fairlight Street



Figure 7: Development to the west of the subject property on Fairlight Street



Figure 8: Development to the north-east of the subject property



Figure 9: Development to the north-west of the subject property



Figure 10: View of Fairlight Street as seen from the east



Figure 11: Development downslope of the subject site (northern side of Clifford Ave)

2.1.3 Site Analysis

Detailed site analysis has been undertaken by Platform Architects to form the basis of the proposal now before Council. A Site Analysis Plan is included in the architectural drawings set accompanying this application, an extract of which is provided in Figure 11, below.

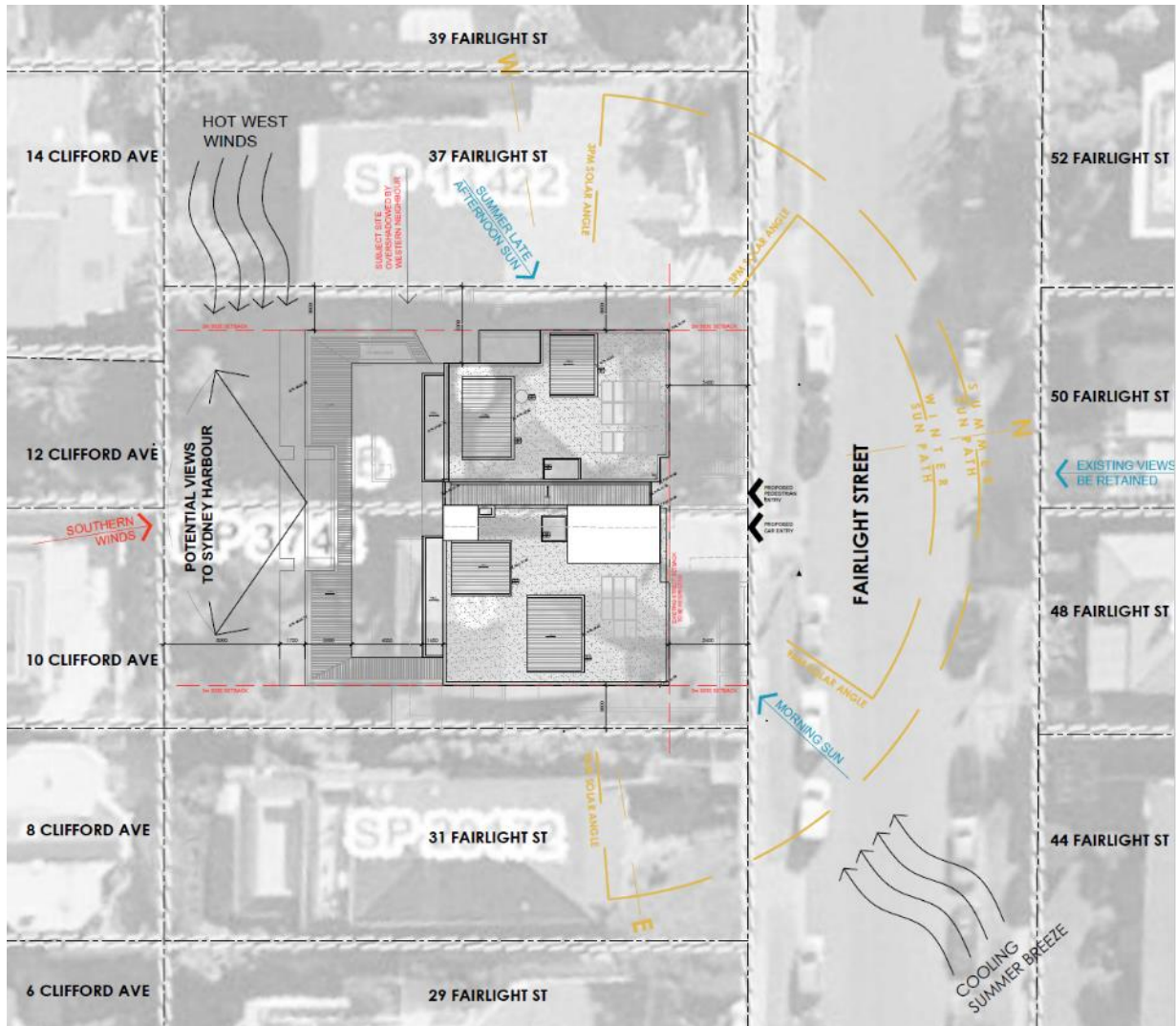


Figure 12: Site Analysis Plan by Platform Architects

The relationship of the proposed development to the adjacent sites provides for appropriate and anticipated built form separation. The development does not result in any unacceptable impacts upon the amenity of surrounding developments and is complementary and compatible in the streetscape context.

3 Description of Proposed Development

3.1 Details of the proposed development

The proposed development is depicted in the architectural plans set prepared by Platform Architects. This application provides for the following built form and land use outcomes:

- Demolition of the existing site structures,
- Tree removal,
- Construction of a 3 storey residential flat building, comprising:
 - 4 x 3 bedroom apartments and 2 x 4 bedroom apartments,
 - carparking for 14 vehicles, comprising 12 residential and 2 visitor spaces, accessed via a car lift to Fairlight Street,
- Internal lift and stair access,
- Landscaping, and
- Stormwater infrastructure,

The proposed development presents as a single storey structure to Fairlight Street and is designed to follow the slope of the land, with a maximum of 3 storeys in any one place. The horizontal massing of the development as viewed from downslope is appropriately relieved by a series of double storey vertical recesses, articulated roof forms, and sensitively located landscaping.

Each unit is designed to take advantage of harbour views to the south, with access to sunlight maximised through skilful design encompassing clerestory windows and strategically placed courtyards.

The proposal features a refined and contextually responsive materials palette, as shown in the External Finishes Schedule by Platform Architects.

Consideration of the Design Principles of SEPP 65 and the assessment of the proposal's performance against the relevant criteria of the ADG is provided with the accompanying SEPP 65 Report and ADG Compliance Table by Platform Architects.

The application is supported by a detailed Visual Impact Assessment prepared by Urbaine Architecture, that confirms that the proposal has been designed and sited to minimise impacts upon views currently enjoyed by upslope properties.

The residential flat building will sit in a landscaped setting, comprised of at-grade and upper level plantings, as shown on the Landscape Plans prepared by Paul Scrivener Landscape. Impact upon existing canopy trees is addressed in the Arboricultural Impact Assessment prepared by Naturally Trees.

The acceptability of the access, car parking and servicing arrangements are detailed within the accompanying Traffic and Parking Assessment Report prepared by Transport and Traffic Planning Associates with the proposal's acceptability in relation to accessibility addressed in the accompanying Access Assessment.

The proposal's readiness to comply with the relevant provisions of the BCA is detailed in the BCA Compliance Report prepared by Group DLA.

Stormwater is to be collected from the site, directed to the required on-site detention and filtration systems and piped to Clifford Avenue via a new inter-allotment drainage easement burdening 12 Clifford Avenue. The proposed stormwater management solution developed for the site is detailed in the Stormwater Plans prepared by M+G Consulting Engineers Pty Ltd.

The application is supported by an Acoustic Report by Pulse White Noise Acoustics Pty Ltd that provides a series of detailed recommendations to ensure that the acoustic amenity of future occupants is maximised and that any impacts to adjoining properties associated with mechanical plant is minimised.

The suitability of the proposal with regard to the local heritage significance of the stone kerbing within the adjacent road reserve is considered and positively confirmed in the Heritage Impact Statement prepared by Architectural Projects Pty Ltd.

The application is supported by a BASIX Certificate and a NatHERS Certificate prepared by ESD Synergy Pty Ltd, confirming that the building performs well with regard to sustainability and meets and/or exceeds relevant industry standards.

Finally, the application is supported by a Construction and Demolition Waste Management Plan by Lighthouse Project Group detailing how waste is to be managed during construction and an On-Going Waste Management Plans prepared by Foresight Environmental detailing how waste is to be managed throughout the life of the development.

4 Statutory Planning Framework

The following section of the report will assess the proposed development having regard to the statutory planning framework and matters for consideration pursuant to Section 4.15 of the EP&A Act, as amended. Those matters which are required to be addressed are outlined, and any steps to mitigate against any potential adverse environmental impacts are discussed below.

4.1 Manly Local Environmental Plan 2013

An assessment of the relevant provisions of MLEP 2013 is undertaken, below.

4.1.1 Zoning

MLEP 2013 applies to the subject site and this development proposal. The subject site is located within the R1 General Residential zone and the proposed residential flat building is permissible with consent.

The proposal is consistent with the stated objectives of the R1 General Residential zone, as follows:

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

Comment: The proposed development comprises 6 residential apartments that will positively contribute to housing supply in the Fairlight area and provide additional housing for the Northern Beaches community.

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

Comment: The proposed development will complement the existing supply of housing within the R1 zone, providing a premium housing product that takes advantage of available views towards the harbour. The proposed development provides a mix of generously proportioned 3 and 4 bedroom apartments.

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

Comment: This objective is not applicable as the application proposes residential/housing development.

Accordingly, there is no statutory zoning or zone objective impediment to the granting of approval to the proposed development.

4.1.2 Height of buildings

Pursuant to the Height of Buildings Map of MLEP 2013, the site has a maximum building height limit of 8.5m.

The objectives of this control 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

Building height is defined as follows:

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

Whilst the bulk of the development is maintained below the 8.5m maximum building height, minor elements of the proposal, including rear awnings and the clerestory windows protrude above the height plane by between 435mm (5.1%) and 791mm (9.3%) as depicted in the building height breach diagram at Figure 13 below.

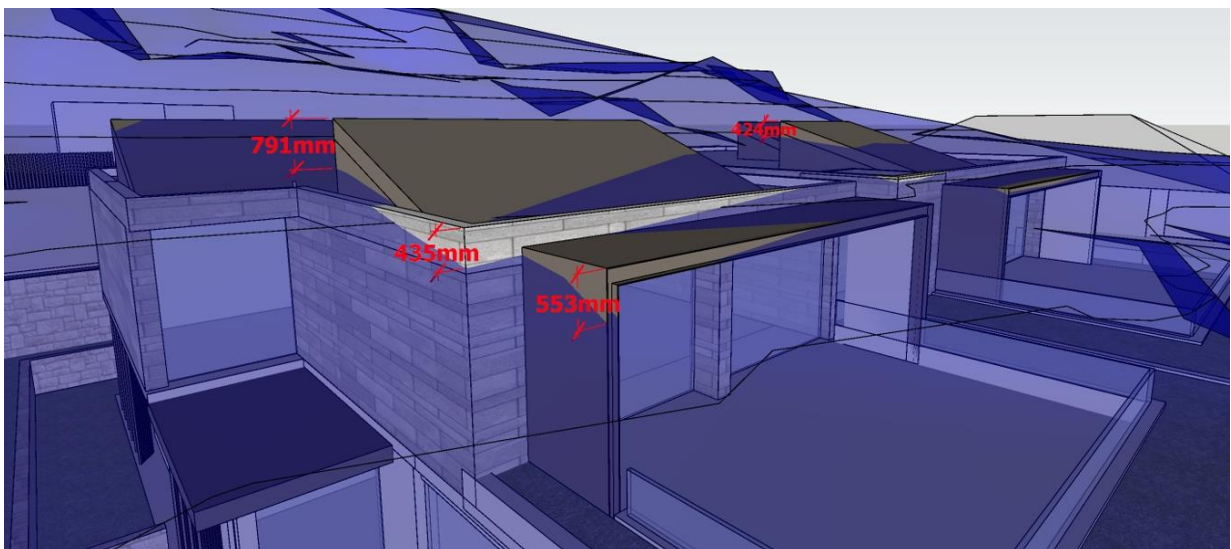


Figure 13: Building height breach diagram

Clause 4.6 of MLEP 2013 provides a mechanism by which a development standard can be varied. The objectives of this clause are:

- (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.*

Having regard to these provisions, strict compliance has been found to be unreasonable and unnecessary having regard to the particular circumstances of the case including the ability to satisfy the objectives of the zone and the objectives of the development standard. Sufficient environmental planning grounds exist to support the variation proposed, as outlined in the accompanying clause 4.6 variation request at **ANNEXURE 1**.

4.1.3 Floor space ratio

Clause 4.4 of MLEP 2013 prescribes a maximum floor space ratio of 0.6:1 with respect to the subject site. The objectives of this clause are:

- (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.*

The proposed development has a gross floor area of 1049.4m² and a floor space ratio of 0.85:1 resulting in non-compliance with the FSR development standard prescribed by clause 4.4 of MLEP 2013.

Strict compliance with the 0.60:1 FSR development standard has been found to be unreasonable and unnecessary having regard to the particular circumstances of the case including the ability to satisfy the objectives of the zone and the objectives of the development standard. Sufficient environmental planning grounds exist to support the variation proposed, as outlined in the accompanying clause 4.6 variation request at **ANNEXURE 2**.

4.1.4 Heritage conservation

Existing stone kerbing located within the adjoining public road reserve is identified as an item of local heritage significance under the provisions of clause 5.10 of MLEP 2013. The proposed development is accompanied by a Heritage Impact Statement prepared by Architectural Projects Pty Ltd confirming that the proposed development will not have an adverse impact upon the heritage significance of this item.

4.1.5 Earthworks

The consent authority can be satisfied that the excavation proposed to accommodate the basement will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land, consistent with the provisions of clause 6.2 of MLEP 2013.

4.1.6 Stormwater management

The consent authority can be satisfied that the proposed development—

- (a) has been 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
- (b) includes on-site stormwater retention for use as an alternative supply to mains water, and
- (c) avoids any significant adverse impacts of stormwater runoff on adjoining properties, native bushland and receiving waters.

As such, the consent authority can be satisfied that the proposal is consistent with the provisions of clause 6.4 of MLEP 2013.

4.1.7 Foreshore scenic protection area

Clause 6.9 of MLEP 2013 identifies matters that must be considered before consent is granted to the proposed development. These matters are considered, as follows:

- (a) *impacts that are of detriment to the visual amenity of harbour or coastal foreshore, including overshadowing of the foreshore and any loss of views from a public place to the foreshore,*

Comment: The proposed development will not overshadow the foreshore. Further, as evident in the Visual Impact Assessment prepared to support this application, the proposed development will not result in any unreasonable impacts upon harbour views currently enjoyed by upslope properties.

- (b) *measures to protect and improve scenic qualities of the coastline,*

Comment: The proposed development is a high-quality architectural design response that will positively contribute to the scenic quality of the area.

- (c) *suitability of development given its type, location and design and its relationship with and impact on the foreshore,*

Comment: The proposed has been designed to sensitively respond to the natural topography of the land, with definitive steps in the built form that follow the slope of the site. The proposed development has also had appropriate regard for the amenity of adjoining properties, ensuring that resultant impacts upon sunlight, visual privacy and views are minimal and not unreasonable.

When viewed from the waterway, the proposed development will be seen to be complementary and compatible with surrounding residential development.

- (d) *measures to reduce the potential for conflict between land-based and water-based coastal activities.*

Comment: The proposed development will not result in any conflict between land-based and water-based coastal activities.

The consent authority can be satisfied that the proposal is consistent with the objective and requirements of clause 6.9 of MLEP 2013.

4.1.8 Essential Services

Pursuant to clause 6.12 development consent must not be granted to development unless the consent authority is satisfied that any of the following services that are essential for the development are available or that adequate arrangements have been made to make them available when required:

- (a) *the supply of water,*
- (b) *the supply of electricity,*
- (c) *the disposal and management of sewage,*
- (d) *stormwater drainage or on-site conservation,*
- (e) *suitable vehicular access.*

The consent authority can be satisfied that these services will be available prior to occupation, and conditions of consent can be imposed in this regard.

4.2 Manly Development Control Plan 2013

4.2.1 Townscape (Local and Neighbourhood Centres)

The proposed development is consistent with the requirements and objectives of clause 3.1.1 of MDCP 2013, as follows:

- The proposed residential flat building has been designed to sensitively respond to the context of the site, to ensure that the bulk of the development does not detract from the scenic amenity of the area as seen from the street, nearby properties and the waterway.
- The development has a single storey presentation to Fairlight Street, ensuring that the apparent size of the development is reasonably reduced.
- The front setback of the development is responsive to the setbacks of adjoining and nearby development, to positively contribute to the established streetscape setting.
- The proposed garage entrance has been minimised and appropriately integrated into the design of the Fairlight Street façade to ensure that the street frontage is not dominated by garages and parking areas.
- The proposed fence is complementary to the existing streetscape and will not detract from the character of Fairlight Street.
- The garbage store is unobtrusive and has been integrated into the design of the front fence.

4.2.2 Heritage Consideration

Existing stone kerbing located within the adjoining public road reserve is identified as an item of local heritage significance under the provisions of clause 5.10 of MLEP 2013. The proposed development is accompanied by a Heritage Impact Statement prepared by Architectural Projects Pty Ltd confirming that the proposed development will not have an adverse impact upon the heritage significance of this item.

4.2.3 Landscaping

The application is supported by detailed Landscape Plans prepared by Paul Scrivener that demonstrate a highly considered landscape solution for the site. The landscaping complements the proposed architectural form and positively contributes to the amenity of the proposed development and the surrounding environment.

The proposed landscaping is consistent with the requirements and objectives of clause 3.3.1 of MDCP 2013.

4.2.4 Sunlight Access and Overshadowing

Clause 3.4.1.1 of MDCP 2013 prescribes that new development must not eliminate more than one-third of the existing sunlight accessing the private open space of adjacent properties between 9am and 3pm in midwinter. Further, clause 3.4.1.2 prescribes that the level of solar access presently enjoyed must be maintained to windows or glazed doors of living rooms for at least 4 hours between 9am and 3pm in midwinter.

The proposed development generally maintains existing levels of solar access to areas of private open space and windows to living rooms of adjoining dwellings during mid-winter, as shown on the Shadow Diagrams prepared by Platform Architects to support this application.

Both adjoining properties have the benefit of a northerly orientation, with north facing windows to remain unaffected by the proposed development.

4.2.5 Privacy and Security

The proposed dwellings are primarily oriented towards the harbour views available to the south, with minimal openings along the side elevations. Where windows are located along side elevations, the openings are narrow or are appropriately screened by louvres or landscaping. Upper-level balconies are set further back from the side boundaries and comprise integrated planters to prevent downward overlooking of neighbouring dwellings.

The proposed development is consistent with the objectives and requirements of clause 3.4.2 of MDCP 2013.

4.2.6 Maintenance of Views

Views of the harbour are available in a southerly direction from the subject site and adjoining and nearby properties. For properties upslope to the north of the subject site, these views are obtained over the roof of the existing buildings on site and the roofs of neighbouring buildings to the east and west.

In order to minimise the impacts upon these views, the height of the proposed development presenting to Fairlight Street has been limited to single storey and the bulk of the new development has been generally maintained within the volume of the existing buildings on site. The proposed development is wholly maintained below the 8.5m height plane, and new elements that extend above the existing built form are off set by reductions to the built form proposed elsewhere.

A detail Visual Impact Assessment has been prepared by Urbaine Architectural to support this application, which demonstrates that the impacts to views currently enjoyed by properties upslope to the north of the site are minor and reasonable. Further, in some instances, the extent of harbour views will be increased as a result of the proposed development.

In this respect, Council can be satisfied that the disruption of views from nearby properties has been reasonably minimised and that view sharing between properties is achieved, consistent with the objectives and requirements of clause 3.4.3 of MDCP 2013.

4.2.7 Sustainability

The design provides for sustainable development, utilising passive solar design principles, thermal massing and achieves cross ventilation to a complying number of dwellings within the development.

The application is supported by BASIX and NatHERS Certificates to confirm that the proposed development meets or exceeds necessary requirements and industry standards.

4.2.8 Accessibility

Clause 3.6.1 of MDCP 2013 requires all new development to meet the relevant requirements of the Disability (Access to Premises – Buildings) Standards 2010 and the BCA with respect to the design of equitable access. Further, at least 2 apartments (25% rounded up) within the development, including associated parking and access thereto, is to comply with the provisions of with AS4299 – Adaptable Housing.

The application is supported by an Access Report that confirms compliance with the provisions of this clause.

4.2.9 Stormwater Management

Clause 3.7 of MDCP 2013 requires the management of stormwater to comply with the provisions of Council's *Water Management for Development Policy*.

Stormwater is to be collected from the site, directed to the required on-site detention and filtration systems and piped to Clifford Avenue via a new inter-allotment drainage easement burdening 12 Clifford Avenue. The proposed stormwater management solution developed for the site is detailed in the Stormwater Plans prepared by M+G Consulting Engineers Pty Ltd.

4.2.10 Waste Management

Clause 3.8 of MDCP 2013 requires all development to comply with the appropriate sections of Council's Waste Management Guidelines, with all development applications to be accompanied by a Waste Management Plan.

The application is supported by a Demolition and Construction Waste Management Plan prepared by Lighthouse Project Group detailing how waste is to be managed during construction and an On-Going Waste Management Plan prepared by Foresight Environmental detailing how waste is to be managed throughout the life of the development.

4.2.11 Mechanical Plant Equipment

The proposed lift overrun does not project above the dominant roof plane and is integrated into the design of the development. Plant equipment will be sited and maintained to prevent adverse acoustic impacts for future occupants of the development and adjoining properties.

The application is supported by an Acoustic Report by Pulse White Noise Acoustics Pty Ltd that provides a series of detailed recommendations to ensure that the acoustic amenity of future occupants is maximised and that any impacts to adjoining properties associated with mechanical plant is minimised.

The proposed development is consistent with the requirements and objectives of clause 3.9 of MDCP 2013.

4.2.12 Safety and Security

The proposed residential flat building has been designed to appropriately respond the CPTED design principles, providing an environment that is safe and secure for all future residents and visitors, consistent with the provisions of clause 3.10 of MDCP 2013.

4.2.13 Earthworks (Excavation and Filling)

The level of excavation proposed on the site is appropriate for the type of development proposed and in consideration of the slope of the land. The application is supported by a Geotechnical Investigation by JK Geotechnics Pty Ltd which has assessed and considered the subsurface conditions of the site and provides comments and recommendations in relation to excavation and hydrogeology, retention, footings, slabs on grade, engineered fill and aggressivity, to ensure that the development is undertaken safely, with minimal impact to the surrounding environment.

4.2.14 Residential Built Form Controls Compliance Table

A table demonstrating compliance with the relevant provisions of the DCP is detailed as follows:

Control	Requirement	Proposed	Compliance
Part 4 – Residential Development Controls			
4.1.1.1 Residential Density & Size	4.9 dwellings (D3 – 1 dwelling per 250m ²)	6 Dwellings The proposed exceedance does not detract from consistency with the objectives of this clause, with a variety of dwelling types and dwelling sizes proposed with high levels of internal amenity.	Acceptable on merit
4.1.2.1 Wall Height	1:3.6 slope so maximum 8 metre wall height	3 – 8.5 metres. Minor breach 500mm breach in south eastern corner of 3 rd level floor plate. Minor breach with no adverse streetscape or residential amenity impacts. The majority of the building sits well below the maximum prescribed wall height control.	Acceptable on merit

Control	Requirement	Proposed	Compliance
4.1.2.2 Number of storeys	2 storeys	2-3 storeys The proposed development has a single storey presentation to Fairlight Street and is stepped to respond to the slope of the land. The majority of the development is limited to 2 storeys in height, with a minor overlap occurring through the centre of the proposed building. The development is wholly maintained below the 8.5m height limit prescribed by MLEP 2013 and the bulk and scale of the proposal is consistent with surrounding development.	Acceptable on merit
4.1.2.3 Roof Height	Pitched Roof: 2.5m (max.) Parapet: 0.6m (max.)	Clerestory windows: <2.5m Parapet: <0.6m	Yes Yes
4.1.4.1 Street Front Setbacks	Front Façade setback: 6.0m	Front façade setback: 6.0m Structures forward of the front façade are limited to pedestrian and vehicular access, fencing and garbage stores.	Yes
4.1.4.2 Side Setbacks	Setbacks to the side boundary must not be less than 1/3 of the wall height. Window setback: 3.0m (min.)	A minimum setback of 3 metres is maintained to both side boundaries in strict accordance with the setback control. All windows are setback at a minimum distance of 3.0m from the site setbacks.	Yes
4.1.4.4 Rear Setbacks	Rear setback: 8.0m (min.)	Rear setback: 8.0m	Yes

Control	Requirement	Proposed	Compliance
4.1.5.1 Minimum Total Open Space	Total Open Space = 55% of site area (min.)	Total Open Space = 826m ² or 67% of the site area	Yes
	Landscaped Area = 35% of total open space (min.)	Landscaped Area = 432m ² or 52% of total open space	Yes
	Above ground = 40% of open space (max.)	Above Ground = 264m ² or 32% of total open space	Yes
	4 trees to be planted on site	6 trees proposed.	Yes
4.1.6.1 Parking Design and Location of Garages	The design and location of all garages, carports or hardstand areas must minimise their visual impact on the streetscape and neighbouring properties and maintain the desired character of the locality.	The garage has been appropriately integrated into the front façade of the development, to minimise the visual impact of the proposed garage door as seen from Fairlight Street.	Yes
	Max. garage width = 6.2m	The width of the garage door is limited to 5.1m.	Yes
	Residential Spaces: 9	Residential Spaces = 12 spaces	Yes
	Visitor Spaces: 2	Visitor Spaces = 2 spaces	Yes
4.1.6.4 Vehicular Access	All vehicles should enter and leave the site in a forward direction.	All vehicles will be able to enter and existing the site in a forward direction.	Yes
	Vehicular access and parking for buildings with more than 1 dwelling is to be	Vehicle access for the 6 dwellings is consolidated into one access driveway.	Yes

Control	Requirement	Proposed	Compliance
	consolidated within one location.		
4.1.6.6 Tandem, Stacked and Mechanical Parking Areas	The design location and management of parking facilities involving tandem, stacked and mechanical parking must consider the equitable access and distribution of parking spaces to all occupants and visitors to the building	The acceptability of the access, car parking and servicing arrangements are detailed within the accompanying Traffic and Parking Assessment Report prepared by Transport and Traffic Planning Associates with the proposal's acceptability in relation to accessibility addressed in the accompanying Access Assessment	Yes
4.1.8 Development on Sloping Sites	<p>The design of development must respond to the slope of the site, to minimise loss of views and amenity from public and private spaces.</p> <p>The application is to be supported by a Site Stability Report.</p>	<p>The proposed built form has been designed to step and follow the slope of the land. The development is largely maintained within the volume of existing development on the site and will not result in any adverse impacts upon the amenity of adjoining properties with respect to view loss.</p> <p>The application is supported by a Geotechnical Investigation by JK Geotechnics Pty Ltd, consistent with the provisions of this clause.</p>	<p>Yes</p> <p>Yes</p>
4.1.10 Fencing	In relation to open/transparent fences, height may be increased up to 1.5m where at least 30 percent of the fence is open/ transparent for at least that part of the fence higher than 1m.	The height of the front fence is stepped and does not exceed 1.5m in height.	Yes

4.3 State Environmental Planning Policy (Resilience and Hazards) 2021

4.3.1 Remediation of Land

Chapter 4 of SEPP (Resilience and Hazards) applies to all land and aims to provide for a state-wide planning approach to the remediation of contaminated land.

Clause 4.6(1)(a) of this policy requires the consent authority to consider whether land is contaminated. The site has been used for residential purposes for an extended period of time with no known prior land uses. In this regard, the potential for contamination is considered to be extremely unlikely.

The site is not identified as a contaminated site on the NSW EPA's list of notified sites, nor is it in the vicinity of any listed sites. The consent authority can be satisfied that the subject site is suitable for the proposed development.

As such, the proposed development is consistent with the provisions of Chapter 4 of this policy.

4.4 State Environmental Planning Policy (Biodiversity and Conservation) 2021

4.4.1 Sydney Harbour Catchment

The subject property is located within the Sydney Harbour Catchment and therefore, the provisions of Chapter 10 of this policy apply to this development. An assessment of the proposal against the relevant aims of the chapter has been undertaken, and the consent authority can be satisfied in this regard. Whilst referral to the Foreshores and Waterways Planning and Development Advisory Committee is at the discretion of Council, it is our opinion that referral is not warranted in the circumstances of this application.

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

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies to the residential component of the development and aims to encourage sustainable residential development.

A BASIX Assessment accompanies the development application and demonstrates that the proposal achieves compliance with the BASIX water, energy and thermal efficiency targets.

4.6 State Environmental Planning Policy No. 65 Design Quality of Residential Apartment Development

State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development (SEPP 65) aims to improve the design quality of residential flat developments to provide sustainable housing in social and environmental terms that is a long-term asset to the community and presents a better built form within the streetscape.

It also aims to better provide for a range of residents, provide safety, amenity and satisfy ecologically sustainable development principles. In order to satisfy these aims, the plan sets design principles in relation to context, scale, built form, density, resources, energy and water efficiency, landscaping, amenity, safety and security, social dimensions and aesthetics to improve the design quality of residential flat building in the State.

SEPP 65 applies to new residential flat buildings that are at least 3 or more storeys in height and that contain at least 4 dwellings.

As the proposed development is for the erection of a 3 storey residential flat building development containing 6 dwellings, the provisions of SEPP 65 are applicable to the proposed development.

Clause 28(2)(b) SEPP 65 requires the proposal to be assessed against the 9 design quality principles contained in Schedule 1. The proposal's compliance with the design quality principles is detailed in the SEPP 65 Report prepared by Platform Architects provided to support this application.

Clause 28(2)(c) of SEPP 65 requires the consent authority to take into consideration the Apartment Design Guide. In this regard, an Apartment Design Guide compliance table prepared by Platform Architects accompanies this application.

4.7 Matters for Consideration pursuant to section 4.15(1) of the Environmental Planning and Assessment Act 1979 as amended

The following matters are to be taken into consideration when assessing an application pursuant to section 4.15(1) of the EP&A Act (as amended):

(i) any environmental planning instrument

The proposed residential flat building is permissible and consistent with the intent of the MLEP 2013 and MDCP 2013 as they are reasonably applied to the proposed works given the constraints imposed by the site's location, environmental and topographical characteristics.

(ii) 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 Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

There are no draft environmental planning instruments relevant to the proposed development.

(iii) Any development control plan

MDCP 2013 is applicable to this application and has been considered in detail in this report.

(iiiia) *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, and*

N/A

(iv) *The Regulations (to the extent that they prescribe matters for the purposes of this paragraph), and*

N/A

(v) *Any Coastal Zone Management Plan (within the meaning of the Coastal Protection Act 1979)*

N/A

(b) *The likely impacts of that development, including environmental impacts on both the natural and built environments and social and economic impacts in the locality,*

[The assessment considers the Guidelines (in italics) prepared by the Department of Planning and Environment in this regard].

Context and Setting

i. *What is the relationship to the region and local context in terms of:*

- *The scenic qualities and features of the landscape*
- *The character and amenity of the locality and streetscape*
- *The scale, bulk, height, mass, form, character, density and design of development in the locality*
- *The previous and existing land uses and activities in the locality*

These matters have been discussed in the body of this report.

ii. *What are the potential impacts on adjacent properties in terms of:*

- *Relationship and compatibility of adjacent land uses?*
- *sunlight access (overshadowing)*
- *visual and acoustic privacy*
- *views and vistas*
- *edge conditions such as boundary treatments and fencing*

These matters have been discussed in detail earlier in this report. The potential impacts are considered to be acceptable with regard to SEPP 65 and the ADG.

Access, transport and traffic:

Would the development provide accessibility and transport management measures for vehicles, pedestrians, bicycles and the disabled within the development and locality, and what impacts would occur on:

- *Travel Demand*
- *dependency on motor vehicles*
- *traffic generation and the capacity of the local and arterial road network*
- *public transport availability and use (including freight rail where relevant)*
- *conflicts within and between transport modes*
- *Traffic management schemes*
- *Vehicular parking spaces*

These issues have been discussed in detail in the report. The development provides adequate carparking facilities in conformity with the policy controls.

Public Domain

The proposed development will have no adverse impact on the public domain. Rather, the proposal will result in a significant enhancement of the public domain, by virtue of the high-quality architectural design solution proposed.

Utilities

This matter has been discussed in detail in the body of this report.

Flora and Fauna

The proposal will result in a significant improvement to the quality and quantity of landscaping across the site, providing increased habitat value for fauna.

Waste Collection

Waste will be managed appropriately on the site with regard to Council's DCP controls. An On-Going Waste Management prepared by Foresight Environmental accompanies this application.

Natural hazards

N/A

Economic Impact in the locality

The proposed development will generate temporary employment during construction. On-going employment will be provided through the employment of building and strata managers for the building and on-going maintenance requirements.

Site Design and Internal Design

i) *Is the development design sensitive to environmental considerations and site attributes including:*

- *size, shape and design of allotments*
- *The proportion of site covered by buildings*
- *the position of buildings*
- *the size (bulk, height, mass), form, appearance and design of buildings*
- *the amount, location, design, use and management of private and communal open space*
- *Landscaping*

These matters have been discussed in detail earlier in this report. The potential impacts are considered to be minimal and within the scope of the general principles, desired future character and built form controls.

ii) *How would the development affect the health and safety of the occupants in terms of:*

- *lighting, ventilation and insulation*
- *building fire risk – prevention and suppression*
- *building materials and finishes*
- *a common wall structure and design*
- *access and facilities for the disabled*
- *likely compliance with the Building Code of Australia*

The proposed development will comply with the provisions of the Building Code of Australia. The proposal complies with the relevant standards pertaining to health and safety and will not have any detrimental effect on the occupants.

Construction

i) *What would be the impacts of construction activities in terms of:*

- *The environmental planning issues listed above*
- *Site safety*

Normal site safety measures and procedures will ensure that no safety or environmental impacts will arise during construction.

(c) *The suitability of the site for the development*

- *Does the proposal fit in the locality*
- *Are the constraints posed by adjacent development prohibitive*
- *Would development lead to unmanageable transport demands and are there adequate transport facilities in the area*
- *Are utilities and services available to the site adequate for the development*
- *Are the site attributes conducive to development*

The adjacent development does not impose any unusual or impossible development constraints. The development will not cause excessive or unmanageable levels of transport demand.

The development responds to the topography and constraints of the site, is of adequate area, and is a suitable design solution for the context of the site.

(d) *Any submissions received in accordance with this act or regulations*

It is envisaged that Council will appropriately consider any submissions received during the notification period.

(e) *The public interest*

The proposed works are permissible and consistent with the intent of the LEP and DCP controls as they are reasonably applied to the proposed development. The development would not be contrary to the public interest.

5 Conclusion

The proposal is permissible and in conformity with the objectives of MLEP 2013 as they reasonably relate to this form of development on this particular site. The proposed development appropriately responds to the guidelines contained within the MDCP 2013 and the massing and built form established by nearby contemporary residential developments. The proposal satisfies the design quality principles contained within SEPP 65 and the design guidance within the Apartment Design Guide.

Platform Architects, the project architect, have responded to the client brief to design a contextually responsive building of exceptional quality with high levels of amenity for future occupants. In this regard, the scheme has been developed through detailed site and contextual analysis to identify the constraints and opportunities associated with the development of this site having regard to the topography, height, scale, proximity, use and orientation of surrounding development.

It is considered that the application, the subject of this document, is appropriate on merit and is worthy of the granting of development consent for the following reasons:

- The accompanying plans depict a high quality and contextually appropriate built form outcome that responds to adjacent and nearby development and the surrounding environment. The proposed development is a suitable design solution in light of the zoning of the site and the slope of the land.
- The apparent height and bulk of the proposed development is compatible with that of surrounding development, and consistent with the desired future character of the locality.
- Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* (2005) NSW LEC 191, we have formed the considered opinion that most observers would not find the apparent size of the proposed development offensive, jarring or unsympathetic in the streetscape context.
- Whilst the proposal requires the consent authority to give favourable consideration to variations to the height of buildings and floor space ratio development standards, strict compliance has been found to be unreasonable and unnecessary in this instance as the development is otherwise consistent with the objectives of the development standards and sufficient environmental planning grounds exist to support the variation (as outlined in the attached Clause 4.6 Variation Requests).
- The minor areas of non-compliance with the dwelling density and wall height controls prescribed by MDCP 2013 have been acknowledged and appropriately justified having regard to the associated objectives. Such variations succeed pursuant to section 4.15(3A)(b) of the EP&A Act which requires Council to be flexible in applying such provisions and allow reasonable alternative solutions that achieve the objects of DCP standards for dealing with that aspect of the development.

- The proposal will provide a notable increase to the supply of premium housing on a site ideally suited to increased residential densities.
- The proposed development has been amended in response to the feedback from Council provided at the pre-lodgement meeting on 4 February 2021 and in the subsequent minutes provided.
- The site is assessed as suitable for the proposal having regard to the relevant considerations pursuant to the SEPP 65 - Design Quality of Residential Apartment Development (SEPP 65) and the Apartment Design Guide (ADG).

Having given due consideration to the matters pursuant to Section 4.15(1) of the EP&A Act as amended, it is considered that there are no matters which would prevent Council from granting consent to this proposal in this instance.

Boston Blyth Fleming Pty Limited



Greg Boston

Director

ANNEXURE 1

CLAUSE 4.6 VARIATION REQUEST – HEIGHT OF BUILDINGS

1 Clause 4.6 variation request – Height of Buildings

1.1 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

1.2 Manly Local Environmental Plan 2013 (MLEP 2013)

1.2.1 Clause 4.3 – Height of Buildings

Pursuant to Clause 4.3 of MLEP 2013, the height of buildings on the subject land is not to exceed 8.5m. The objectives of this control 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.*

Building height is defined as follows:

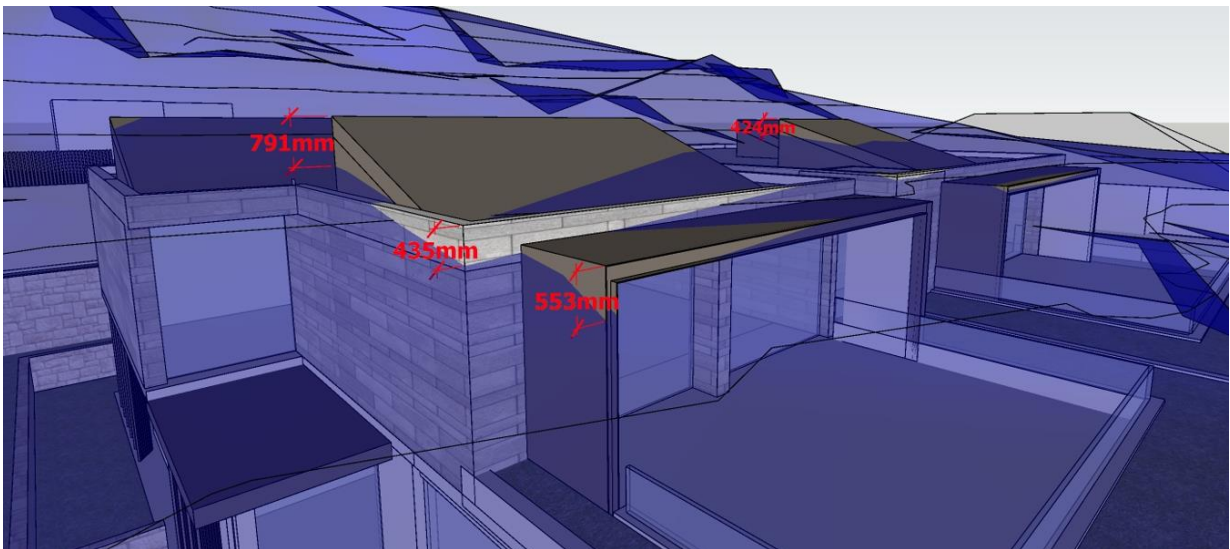
building height (or ***height of building***) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns,

but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like

Ground level existing is defined as follows:

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

Whilst the bulk of the development is maintained below the 8.5m maximum building height, minor elements of the proposal, including rear awnings and the clerestory windows protrude above the height plane by between 435mm (5.1%) and 791mm (9.3%) as depicted in the building height breach diagram at Figure 13 below.



1.2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP 2013 provides:

The objectives of this clause are:

- (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 decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“*Initial Action*”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by clause 4.6(3).

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 2013 provides:

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.

This clause applies to the building height development standard in clause 4.3 of MLEP 2013.

Clause 4.6(3) of MLEP 2013 provides:

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 at clause 4.3 of MLEP 2013 which specifies a building height of 8.5m. 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 2013 provides:

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 Planning 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 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 clause 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 5th May 2020, attached to the Planning Circular PS 18-003 issued on 5th May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under clause 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5), which relates to matters that must be considered by the Director-General in deciding whether to grant concurrence is not relevant, as the Council has the authority to determine this matter. Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3 of MLEP 2013 from the operation of clause 4.6.

1.3 Relevant Case Law

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]. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007)* 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

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].

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].

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].

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].

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.

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.

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 2013 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 of MLEP 2013 and the objectives for development for in the 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 2013?

1.4 Request for variation

1.4.1 Is clause 4.3 of MLEP 2013 a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes a provision of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

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

Clause 4.3 of MLEP 2013 prescribes a height limit for development on the site. Accordingly, clause 4.3 of MLEP 2013 is a development standard.

1.4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first approach is relevant in this instance, being that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the building height development standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is 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,*

Comment: The building height of the proposed development is consistent with that of surrounding development and development within the visual catchment of the site. The roof form has been designed to minimise impacts upon harbour views obtained by properties upslope whilst maximising solar access into the units proposed. In this respect, the roof form of the proposed development is considered to achieve a balance between the pitched roof forms of the adjoining buildings and the flat roof forms of more contemporary buildings in the wider catchment.

The proposed development has a single storey presentation to Fairlight Street and is maintained below the ridgelines of both adjoining buildings, as shown in Figure 3.

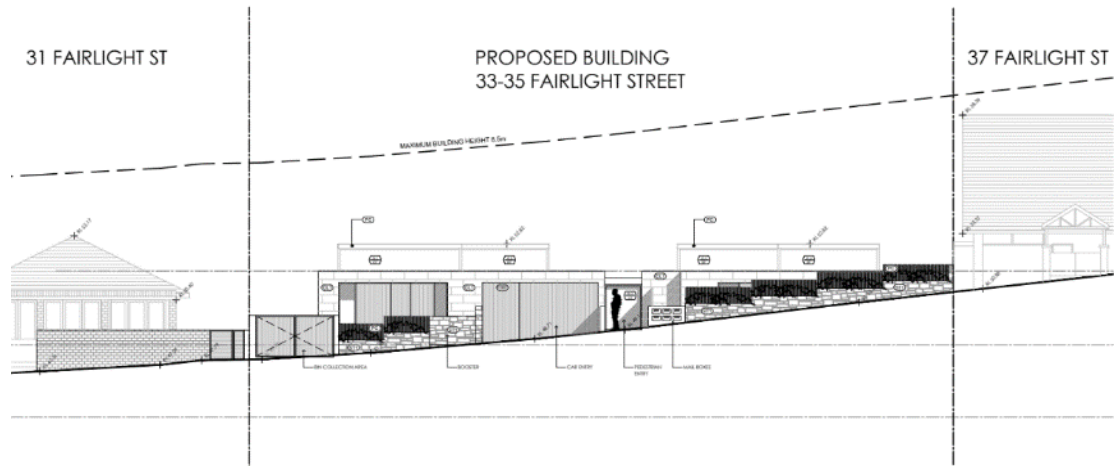


Figure 3: Street Elevation

The portions of the development that protrude beyond the 8.5m height plane are towards the rear of the upper floor of the building. As the building has been stepped to follow the natural fall of the land, the extent of the upper floor is limited and maintained within the front portion of the site. As shown on the Site Analysis Plan, an extract of which is provided in Figure 4, the non-compliant elements are located in line with the upper roof forms of the existing buildings to either side, which are 350mm (31 Fairlight Street) and 5.57m (37 Fairlight Street) higher than the maximum RL proposed. In fact, the maximum RL of the clerestory windows is 450mm lower than the gutter line of the adjoining dwelling to the west at 37 Fairlight Street.

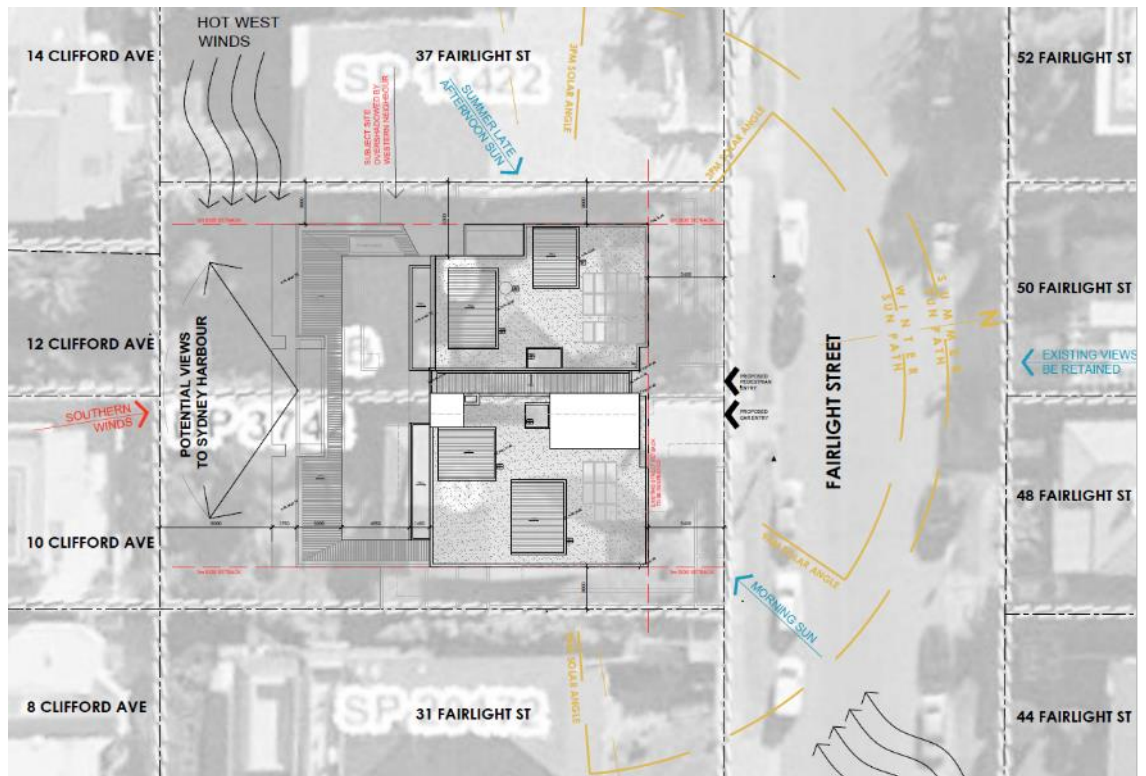


Figure 4: Site Analysis with indicative alignment of roof forms

Accordingly, the portion of the development that exceeds the height standard is consistent with prevailing building heights, including the two immediately adjoining buildings that also appear to exceed the 8.5m height plane. Further, the development is consistent with the desired streetscape character, with a single storey presentation to Fairlight Street.

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

Comment: The proposed development is well articulated with a single storey presentation to Fairlight Street. Non-compliance with the 8.5m height plane is limited to minor portions of the development, including the clerestory windows and awnings, that do not contribute to excessive bulk and scale.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council (2005) NSW LEC 191* I have formed the considered opinion that most observers would not find the proposed development by virtue of its bulk and scale offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the visual catchment of the site.

- (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),*

Comment: The application is supported by a detailed Visual Impact Assessment prepared by Urbaine Architectural, which demonstrates that the impacts to views currently enjoyed by properties upslope to the north of the site are minor and reasonable. Further, in some instances, the extent of harbour views will be increased as a result of the proposed development.

Whilst minor portions of the proposed development protrude beyond the height plane, the vast majority of the development is maintained well below the height plane, achieving a contextually appropriate outcome for the subject site.

(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,*

Comment: The non-compliant elements of the proposed development do not result in any adverse impacts upon the amount of sunlight received by adjoining properties. Rather, the elements in question provide enhanced solar access and weather protection to the south facing units proposed.

(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.*

Comment: Not applicable – the site is located within the R1 General Residential zone.

Consistency with zone objectives

The subject property is zoned R1 General Residential pursuant to MLEP 2013. The developments consistency with the stated objectives of the R1 zone is as follows:

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

Comment: The proposed development comprises 6 residential apartments that will positively contribute to the housing supply in the Fairlight area and provide additional housing for the Northern Beaches community.

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

Comment: The proposed development will complement the existing supply of housing within the R1 zone, providing a premium housing product that take advantage of the harbour views available from the site. The proposed development provides a mix of generously proportioned 3 and 4 bedroom apartments.

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

Comment: This objective is not applicable as the application proposes residential/housing development.

The non-compliant development, as it relates to building height, demonstrates consistency with objectives of the zone and the building height development standard objectives. Adopting the first option in *Wehbe*, strict compliance with the height of buildings standard has been demonstrated to be unreasonable and unnecessary in the circumstances of this application.

1.4.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In *Initial Action* the Court found at [23]-[25] that:

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.

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].

Sufficient environmental planning grounds

Ground 1 - Contextually responsive building design

Despite non-compliance with the 8.5m building height development standard, the proposed development is consistent and compatible with the height of both immediately adjoining buildings at 31 and 39 Fairlight Street, and other development within the visual catchment of the site, including:

- The three storey dwelling at 56 Fairlight Street,
- The six storey residential flat building at 52 Fairlight Street,

- The three storey building at 50 Fairlight Street,
- The three storey building at 48 Fairlight Street,
- The two-four storey residential flat building at 46 Fairlight Street,
- The three storey building at 42 Fairlight Street,
- The nine storey residential flat building at 21 Woods Parade,
- The two-three storey dwelling at 19 Wood Parade,
- The three-storey dual occupancy at 27 Fairlight Street,
- The four storey dual occupancy at 29 Fairlight Street,
- The two-three storey residential flat building at 31 Fairlight Street,
- The two-three storey residential flat building at 37 Fairlight Street, and
- The four storey dwelling at 39 Fairlight Street

It is noted that the list above includes every development on the northern side of Fairlight Street, where the slope of the land is far less than that of the southern side of the street.

Council's acceptance of the proposed height variation will ensure the orderly and economic development of the site, in so far as it will ensure conformity with the scale and character established by other existing development within the visual catchment of the site, consistent with Objective 1.3(c) of the EP&A Act.

The proposed development is also compatible with the height of immediately adjacent development along Fairlight Street and has been sensitively designed to respond to both the location of the site and also the form and massing of adjoining development. The building is of exceptional design quality with the variation facilitating a height that provides for contextual built form compatibility, consistent with Objective 1.3(g) of the Act.

Ground 2 – Topography

The site experiences a fall of approximately 10.3m, from the upper northern boundary (Fairlight Street) down towards the southern rear boundary, with a slope of approximately 26%. The proposed development has been appropriately stepped in response to the fall of the land, with the non-compliances limited to architectural details that provide for enhanced amenity for future occupants of the development.

The slope of the site, and the scale of surrounding buildings along the same contours, is considered to warrant the minor variations proposed.

Allowing for the height breach in response to the topography of the site is considered to ensure the orderly and economic development of the site, consistent with Objective 1.3(c) of the EP&A Act.

Ground 3 – Minor nature of breach & lack of impact

The extent of the breach associated with the clerestory windows and upper-level awnings is limited to between 435mm (5.1%) and 791mm (9.3%) for minor areas of these elements which is appropriately described both quantitatively and qualitatively as minor.

The non-compliant elements of the proposed development do not result in any unreasonable impacts upon the amenity of adjoining sites or the wider public domain.

Rather, the elements in question provide for the enhancement of amenity for future residents of the development, by providing appropriate solar access and weather protection to the south facing upper level units

Consistent with the findings of Commissioner Walsh in *Eather v Randwick City Council* [2021] NSWLEC 1075 and Commissioner Grey in *Petrovic v Randwick City Council* [202] NSW LEC 1242, the particularly small departure from the actual numerical standard and absence of impacts consequential of the departure constitute environmental planning grounds, as it promotes the good design and amenity of the development in accordance with the objects of the EP&A Act.

Overall, there are sufficient environmental planning grounds to justify contravening the development standard.

1.4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.4 and the objectives of the R1 General Residential zone

The consent authority needs to be satisfied that the proposed development will be in the public interest. A development is said to be in the public interest if it is consistent with the objectives of the particular standard to be varied and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

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).

As demonstrated in this request, the proposed development 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.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest.

1.4.5 Secretary's concurrence

In Planning Circular PS20-002 dated 5th May 2020, it was advised that consent authorities can assume the Secretary's concurrence to vary development standards pursuant to clause 4.6 except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determinations are subject to, compared with decisions made under delegation by Council staff. Concurrence of the Secretary can therefore be assumed in this case.

1.5 Conclusion

Pursuant to clause 4.6(4)(a) of MLEP 2013, the consent authority can be satisfied that this written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (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.*

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a floor space ratio variation in this instance.

Boston Blyth Fleming Pty Limited



Greg Boston

B Urb & Reg Plan (UNE) MPIA

Director

ANNEXURE 2

CLAUSE 4.6 VARIATION REQUEST – FLOOR SPACE RATIO

2 Clause 4.6 variation request - Floor space ratio

2.1 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.2 Manly Local Environmental Plan 2013 (MLEP 2013)

2.2.1 Clause 4.4 – Floor Space Ratio

Pursuant to Clause 4.4 of MLEP 2013, the floor space ratio of development on the subject land is not to exceed 0.6:1. The objectives of this control 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.*

In accordance with the provisions of clause 4.5(2) of MLEP 2013, floor space ratio is defined as follows:

*The **floor space ratio** of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.*

The proposed development has a gross floor area 1049.4m². Based on the area of site, the proposal has a floor space ratio of 0.85:1. This represents a variation of 313.8m² or 42.6%.

2.2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP 2013 provides:

The objectives of this clause are:

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

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“*Initial Action*”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by clause 4.6(3).

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 2013 provides:

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.

This clause applies to the floor space ratio development standard in clause 4.4 of MLEP 2013.

Clause 4.6(3) of MLEP 2013 provides:

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:

- (c) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (d) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

The proposed development does not comply with the floor space ratio development standard at clause 4.4 of MLEP 2013 which specifies a maximum floor space ratio of 0.60:1. However, strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of MLEP 2013 provides:

Development consent must not be granted for development that contravenes a development standard unless:

- (c) *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*
- (d) *the concurrence of the Planning 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 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 clause 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 5th May 2020, attached to the Planning Circular PS 18-003 issued on 5th May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under clause 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5), which relates to matters that must be considered by the Director-General in deciding whether to grant concurrence is not relevant, as the Council has the authority to determine this matter. Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.4 of MLEP 2013 from the operation of clause 4.6.

2.3 Relevant Case Law

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]. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

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].

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].

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].

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].

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.

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.

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

6. Is clause 4.4 of MLEP 2013 a development standard?
7. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (c) compliance is unreasonable or unnecessary; and
 - (d) there are sufficient environmental planning grounds to justify contravening the development standard
8. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.4 of MLEP 2013 and the objectives for development for in the zone?
9. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
10. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.4 of MLEP 2013?

2.4 Request for variation

2.4.1 Is clause 4.4 of MLEP 2013 a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes a provision of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (d) *the cubic content or floor space of a building,*

Clause 4.4 of MLEP 2013 prescribes a bulk and scale provision that seeks to control the floor space ratio of certain development. Accordingly, clause 4.4 of MLEP 2013 is a development standard.

2.4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first approach is relevant in this instance, being that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the floor space ratio development standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

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

Comment: Development within the immediate visual catchment of the site and the wider R1 General Residential zone is comprised of residential development of varying bulk and scale, as shown in Figures 1-4.

The proposed development has a single storey presentation to Fairlight Street and is generally maintained within the bulk/volume of existing development on the site. The proposed development has a front setback that aligns with neighbouring dwellings, with generous setbacks to both side boundaries, that allow for the enhancement of landscaping across the site. The proposed development is maintained below the maximum building height and exceeds the minimum total open space and landscaped area requirements of MDCP 2013, despite the less onerous provisions of the ADG.

As evident in the photomontages provided to support the application (Figures 4-5), the proposed development is entirely consistent with the existing character of Fairlight Street and non-compliance with the floor space ratio development standard does not detract from consistency with the desired streetscape character, noting that all relevant streetscape character and built form controls of MDCP 2013 are nonetheless achieved.



Figure 1: North-western side of Fairlight Street



Figure 2: North-eastern side of Fairlight Street



Figure 3: Fairlight Street, to the east of the subject site



Figure 4: Photomontage of proposal as seen from the north-west



Figure 5: Photomontage of the proposal as seen from the north-east

- (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,*

Comment: The height of the proposal presenting to Fairlight Street has been limited to single storey and the bulk of the new development has been generally maintained within the volume of the existing buildings on site and below street level. The proposed development is wholly maintained below the 8.5m height plane, and new elements that extend above the existing built form are off set by reductions to the built form proposed elsewhere.

A detail Visual Impact Assessment has been prepared by Urbaine Architectural to support this application, which demonstrates that the impacts to views currently enjoyed by properties upslope to the north of the site are minor and reasonable. Further, in some instances, the extent of harbour views will be increased as a result of the proposed development.

The proposed development that exceeds the FSR development standard does not attribute to any unreasonable impacts upon views and 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,*

Comment: Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments*, most observers would not find the proposed development, in particular the non-compliant building floor space ratio, offensive, jarring or unsympathetic in a streetscape context or as viewed from the waterway, as demonstrated in the montages provided to support the application (Figures 4 and 5).

The proposed development is compatible with the existing streetscape of Fairlight Street, and the character of the wider R1 General Residential Zone.

Furthermore, despite non-compliance with the maximum FSR prescribed, the proposed development achieves consistency with the total open space and landscaped area controls of MDCP 2013, enabling the provision of a high-quality landscaped solution for the site.

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

Comment: The proposed development does not result in any unreasonable impacts upon neighbouring properties with regards to overshadowing, visual or acoustic privacy. The proposed built form is highly articulated, by virtue of recessed elements, varied setbacks, differing materials and landscaping, and will not be overly dominant as seen from the street, the waterway or adjoining properties. The non-compliant FSR does not detract from consistency with this objective.

- (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.*

Comment: Not Applicable.

Consistency with zone objectives

The subject property is zoned R1 General Residential pursuant to MLEP 2013. The developments consistency with the stated objectives of the R1 zone is as follows:

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

Comment: The proposed development comprises 6 residential apartments that will positively contribute to the housing supply in the Fairlight area and provide additional housing for the Northern Beaches community.

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

Comment: The proposed development will complement the existing supply of housing within the R1 zone, providing a premium housing product that take advantage of the harbour views available from the site. The proposed development provides a mix of generously proportioned 3 and 4 bedroom apartments.

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

Comment: This objective is not applicable as the application proposes residential/housing development.

The non-compliant development, as it relates to floor space ratio, demonstrates consistency with objectives of the zone and the floor space ratio development standard objectives. Adopting the first option in *Wehbe*, strict compliance with the floor space ratio development standard has been demonstrated to be unreasonable and unnecessary in the circumstances of this application.

2.4.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In *Initial Action* the Court found at [23]-[25] that:

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.

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].

Sufficient environmental planning grounds

The proposed residential flat building is situated across two lots on the low side of Fairlight Street. The proposal has a single storey presentation to Fairlight Crescent and sits well below the height of neighbouring development and the 8.5m height limit that is applicable on the site. The building has been designed to step down the slope of the land, with the majority of the built form below street level and screened from view from the street.

By proposing the development across two lots, the proposal gains the benefit of the floor space through the middle of the site, within the setback area that would otherwise be required if the lots were to be developed independently.

Consistent with the findings of Commissioner Tuor in the matter of *Moskovich v Waverly Council (2016) NSWLEC 1015*, a large amount of the gross floor area of the proposed development through the centre of the proposed building does not add to the perceived bulk of the development or result in impacts greater than that associated with a complying development.

The apparent size of the proposed development will be compatible with the existing streetscape of Fairlight Street, which features a number of buildings of significantly greater bulk and scale. The building is of exceptional design quality with the variation facilitating a floor space that provides for contextual built form compatibility, consistent with Objectives 1.3(c) and (g) of the Act.

Overall, there are sufficient environmental planning grounds to justify contravening the development standard.

2.4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.4 and the objectives of the R1 General Residential zone

The consent authority needs to be satisfied that the proposed development will be in the public interest. A development is said to be in the public interest if it is consistent with the objectives of the particular standard to be varied and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

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).

As demonstrated in this request, the proposed development 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.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest.

2.4.5 Secretary's concurrence

In Planning Circular PS20-002 dated 5th May 2020, it was advised that consent authorities can assume the Secretary's concurrence to vary development standards pursuant to clause 4.6 except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determinations are subject to, compared with decisions made under delegation by Council staff. Concurrence of the Secretary can therefore be assumed in this case.

2.5 Conclusion

Pursuant to clause 4.6(4)(a) of MLEP 2013, the consent authority can be satisfied that this written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (c) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (d) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a floor space ratio variation in this instance.

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