



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

**VARIATION OF A DEVELOPMENT
STANDARD REGARDING THE
MAXIMUM FLOOR SPACE RATIO AS
DETAILED IN CLAUSE 4.4 OF MANLY
LOCAL ENVIRONMENTAL PLAN 2013**

**Alterations and Additions to Existing
Dwelling House including a
Swimming Pool and Associated
Works**

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

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Disclaimer

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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.

The nature and extent of the contravention is as follows:

Requirement	0.75:1 161.33sqm
Proposed	0.849:1 182.66sqm
Is the planning control in question a development standard?	Yes
Is the non-compliance with to the clause requirement a numerical/or performance based variation?	Numerical
If numerical enter a % variation to requirement	13.22%

It is important to note that if the provisions under Manly Development Control Plan Clause 4.1.3.1 are applied, the proposal complies with the FSR allowance for undersized lots with a FSR of 0.73:1.

Manly Local Environmental Plan 2013 (“MLEP”)

2.1 Clause 2.2 and the Land Use Table

Clause 2.2 and the Land Zoning Map provide that the subject site is zoned R3 – Medium Density Residential (the R3 zone) and the Land Use Table in Part 2 of MLEP 2013 specifies the following objectives for the R3 zone:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To encourage the revitalisation of residential areas by rehabilitation and suitable redevelopment.*
- *To encourage the provision and retention of tourist accommodation that enhances the role of Manly as an international tourist destination.*

The proposed development is for the purpose of alterations and additions to an existing dwelling house. A dwelling house is a permissible land use in the zone.

2.2 Clause 4.4 Floor Space Ratio

Clause 4.4 Floor Space Ratio is set out below:

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

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

- (b) to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,*
- (c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*
- (d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,*
- (e) to provide for the viability of business zones and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.*

(2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the [Floor Space Ratio Map](#).

(2A) Despite subclause (2), the floor space ratio for a building on land in Zone B2 Local Centre may exceed the maximum floor space ratio allowed under that subclause by up to 0.5:1 if the consent authority is satisfied that at least 50% of the gross floor area of the building will be used for the purpose of commercial premises.

The maximum floor space ratio for the site is 0.75:1.

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

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

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

2.3 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP provides:

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

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

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

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

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

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

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

Clause 4.6(2) of MLEP provides:

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

Clause 4.4 is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of MLEP.

Clause 4.6(3) of MLEP provides:

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

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

The proposed development does not comply with the floor space ratio standard pursuant to clause 4.4 of the Manly Local Environmental Plan 2013 which specifies a floor space ratio of 0.75:1, 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 provides:

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

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

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion

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

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

Clause 4.6(5) of MLEP provides:

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

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 the MLEP2013 from the operation of clause 4.6.

3. Relevant Caselaw

The grounds of objection are based upon the various tests of the recent judgements in the *NSW Land and Environment Court Case Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827, Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61, and RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130.*

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

1. Is clause 4.4 of MLEP2013 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 4.4 and the objectives for development for in the R3 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 4.4 of MLEP2013?

4. Request for Variation

4.1 Is clause 4.4 of MLEP2013 a development standard?

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

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

“(d) the cubic content or floor space of a building”

- (b) Clause 4.4 relates to the floor space ratio or floor space of a building. Accordingly, clause 4.4 is a development standard.

4.2 Is compliance with clause 4.4 unreasonable or unnecessary?

- (a) This request relies upon the 1st, 2nd and 4th ways identified by Preston CJ in *Wehbe*.

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

- (c) Each objective of the standard and reasoning why compliance is unreasonable or unnecessary is set out below. Firstly, an analysis of the objectives is provided:

In determining a merits based assessment for the floor space ratio of the development due consideration has been given to the above objectives and the planning principles set by the Land and Environment Court of NSW, Planning Principle – floor space ratio (*Salanitro-Chafei V Ashfield Council* (2005) NSWLEC 366) and *Project Venture Developments v Pittwater Council* (2005) NSW LEC 91).

It is acknowledged that the purpose of Clause 4.6 is to provide an appropriate degree of flexibility in applying certain development standards. In this regard the FSR of the site should be assessed on a greater numerical figure, noting the sites constraints and the unique nature of the locality in a varying degree of development types. Given the proposed application is minor and consistent with similar approvals granted in the area, Council’s assessment should be focused on this numerical allowance as opposed to the variation to the specific standard. By providing flexibility in this regard, the subject proposal is capable of achieving a better development and design outcome which adequately caters for enhanced housing options for the residential needs within the Northern Beaches LGA in particular the Manly precinct.

The proposal is consistent with the objectives of Clause 4.4, as outlined below:

The site has a maximum FSR provision of 0.75:1. It has been determined that the proposal, results in a total gross floor area on the site of 182.66sqm. This represents a floor space ratio of 0.849:1 and therefore non-compliant with the FSR standard by 21.34sqm or 13.22%.

I note that clause 4.1.3 of Manly Development Control Plan 2013 contains FSR exemption provisions applicable to land where the site area is less than the minimum Lot size required on the LEP Lot size map provided the relevant LEP objectives and the provisions of the DCP are satisfied.

The Lot size map identifies the subject site as being in sub zone "C" in which a minimum Lot area of 250sqm is required. The site having an area of only 215.1sqm is well below the minimum Lot area provision and accordingly the clause 4.1.3 Manly DCP FSR variation provisions apply.

Clause 4.1.3.1 states that the extent of any exception to the LEP FSR development standard pursuant to clause 4.6 of the LEP is to be no greater than the achievable gross floor area for the lot indicated in Figure 30 of the DCP. We confirm that pursuant to Figure 30 the calculation of FSR is to be based on a site area of 250m² with an achievable gross floor area of 187.5sqm.

In this regard, the 182.66sqm of gross floor area proposed, representing an FSR of 0.73:1 (based on 250m²), is below the maximum prescribed gross floor area of 187.5sqm and as such complies with the DCP variation provision. We note that such provision contains the following note:

Note: FSR is a development standard contained in the LEP and LEP objectives at clause 4.4(1) apply. In particular, Objectives in this plan support the purposes of the LEP in relation to maintaining appropriate visual relationships between new development and the existing character and landscape of an area as follows:

Objective 1) To ensure the scale of development does not obscure important landscape features.

Objective 2) To minimise disruption to views to adjacent and nearby development.

Objective 3) To allow adequate sunlight to penetrate both the private open spaces within the development site and private open spaces and windows to the living spaces of adjacent residential development.

As the proposed GFA/FSR complies with clause 4.1.3.1 MDCP numerical provision it is also "deemed to comply" with the associated objectives as outlined which, if complied with, demonstrate the maintenance of an appropriate visual relationships between new development and the existing character and landscape of an area.

A review of the objectives of Clause 4.4 (and also Manly DCP 4.1.3.1) has been undertaken below:

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

The objective of Clause 4.4 (1)(a) seeks to ensure buildings are compatible with the height and scale of surrounding and nearby development. The surrounding area varies in size, bulk and scale, ranging from one to five storeys in height and varying setbacks. In particular, the approvals granted for 32 Pacific Street, 24 Collingwood Street and also 36 Malvern Avenue, guide the bulk and scale allowances for dwelling houses in the R3 Medium Density zone.

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 bulk and scale of the proposed development, as viewed from Pacific Street, to be offensive, jarring or unsympathetic in a streetscape context. This objective is satisfied, notwithstanding the non-compliant FSR proposed, as the bulk and scale of development is consistent with the existing and desired streetscape character.

This objective is achieved as the bulk and scale of development is entirely 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,

Having regard to clause 4.1.3.1 Manly DCP FSR provisions, which inform the 182.66sqm of gross floor area proposed, representing an FSR of 0.73:1 (based on 250sqm), is below the maximum prescribed gross floor area of 187.5sqm and as such complies with the DCP variation provision applicable to undersized allotments. We note that Objective 1 of the DCP provision, which relates to establishing building density and bulk, as reflected by FSR, in relation to site area (undersized allotments) is similar to this LEP objective namely:

Objective 1) To ensure the scale of development does not obscure important landscape features.

As previously indicated the proposed FSR complies with the DCP numerical FSR control applicable to undersized allotments and is therefore deemed to comply with this objective.

That said, neither the LEP or DCP identify any important landscape or townscape features either on or within proximity of the subject site. My own observations did not identify any landscape or townscape features that I would consider important in terms of their visual significance.

I am satisfied that the proposal, notwithstanding the FSR non-compliance, achieves this objective as the building density and bulk, in relation to a site area, satisfies Objective 1 of the clause 4.1.3.1 DCP provision applicable to undersized allotments, with the development not obscuring any important landscape and townscape features.

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

The proposal enhances the existing visual relationship acknowledging the alterations and additions will enhance the existing dwelling on the site. The proposal has been designed to the desired character of the area while creating its own “image” and “identity for the area”. The proposal is consistent with the height, bulk and scale of existing dwellings along Pacific Street, noting the three-five storey nature of the streetscape, while ensuring a buffer through landscaping, and a building façade which has modulation and articulation.

It is noted that this objective is the same as the primary purpose/objective outlined at clause 4.1.3 of the DCP as confirmed in the note such provision namely:

Note: FSR is a development standard contained in the LEP and LEP objectives at clause 4.4(1) apply. In particular, Objectives in this plan support the purposes of the LEP in relation to maintaining appropriate visual relationships between new development and the existing character and landscape of an area as follows:

Objective 1) To ensure the scale of development does not obscure important landscape features.

Objective 2) To minimise disruption to views to adjacent and nearby development.

Objective 3) To allow adequate sunlight to penetrate both the private open spaces within the development site and private open spaces and windows to the living spaces of adjacent residential development.

As the proposed GFA/ FSR complies with clause 4.1.3.1 MDCP numerical provision it is also “deemed to comply” with the associated objectives as outlined which, if complied with, demonstrate the maintenance of an appropriate visual relationships between new development and the existing character and landscape of an area. That said, it has previously been determined that the proposal achieves objective (a) of the clause 4.4 MLEP FSR standard namely to ensure the bulk and scale of development is consistent with the existing and desired streetscape character. Accordingly, I am satisfied that the development, notwithstanding the FSR non-compliance, maintains an appropriate visual relationship between new development and the existing built form character of the area.

In relation to landscape character, the application does not require the removal of any significant trees or vegetation with a building footprint maintained which increases the total open space and landscaped area MDCP controls from that existing. The building will sit within a landscaped setting. An appropriate visual relationship between new development and the existing landscape of the area is maintained.

I am satisfied that the development, notwithstanding its FSR non-compliance, achieves the objective as it maintains 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,

In responding to this objective, I have adopted views, privacy, solar access and visual amenity as environmental factors which contribute to the use and enjoyment of adjoining public and private land.

The proposed alterations and additions will not result in any impacts on the use or enjoyment of neighbouring properties or the public areas adjoining the site. It is my professional opinion that the proposal provides a functional building footprint which ensures the amenity and privacy of adjoining properties is maintained, with the intent of approval DA433/2005 maintained.

Privacy

Having regard to clause 4.1.3.1 Manly DCP FSR provisions, which inform the 182.66sqm of gross floor area proposed, representing an FSR of 0.73:1 (based on 250m²), is below the maximum prescribed gross floor area of 187.5sqm and as such complies with the DCP variation provision applicable to undersized allotments. We note that the privacy objectives at clause 3.4.2 are also referenced in relation to these provisions namely:

See also objectives for privacy at paragraph 3.4.2 of this plan.

3.4.2 Privacy and Security

Objective 1) To minimise loss of privacy to adjacent and nearby development by:

- *appropriate design for privacy (both acoustical and visual) including screening between closely spaced buildings;*
- *mitigating direct viewing between windows and/or outdoor living areas of adjacent buildings.*

As previously indicated, the proposed FSR complies with the DCP numerical FSR control applicable to undersized allotments and is therefore deemed to comply with the clause 3.4.2 privacy objectives to

the extent that it can be demonstrated that the development minimises loss of privacy to adjacent and nearby development.

Notwithstanding, we note that all surrounding properties are orientated north-south with varying lot sizes and widths. On this basis, it is noted the intent of DA433/2005 is maintained with the second floor study maintained to the south front portion of the site to avoid overlooking to the rear of neighbouring properties.

Given the spatial separation maintained between the balance of surrounding properties, and the primary orientation of living areas on the ground floor to the north, I am satisfied that the design, although non-compliant with the FSR standard, minimises adverse environmental impacts in terms of privacy and therefore achieves this objective.

Solar access

The accompanying shadow diagrams DA16 to DA18 demonstrate that the building, although non-compliant with the FSR standard, will not give rise to any unacceptable shadowing impact to the existing north facing living room and open space areas of the adjoining residential properties with compliant levels of solar access maintained. It is noted that the shadow diagrams also show the outline of approval DA433/2005, this assists to show that the proposed will have minimal impact to that approved.

Visual amenity/ building bulk and scale

As indicated in response to objective (a), I have formed the considered opinion that the bulk and scale of the building is contextually appropriate with the floor space appropriately distributed across the site to achieve acceptable streetscape and residential amenity outcomes.

It is my considered opinion that the building, notwithstanding the FSR non-compliance, achieves the objective through skilful design that minimises adverse environmental impacts on the use and 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.

Not applicable.

Having regard to the above, the proposed building form which is non-compliant with the FSR standard will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the FSR standard. This is consistent with the approval granted for 36 Malvern Ave, Manly (DA2018/0046) which had an approved FSR of 0.86:1 (12.9% variation). Given the developments consistency with the objectives of the FSR standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

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

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

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

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

There is an absence of environmental harm arising from the contravention and positive planning benefits arising from the proposed development as outlined in detail above. From a planning perspective, there is sufficient grounds to justify the variation to the FSR development standard for the following reasons:

- The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation report and summarised as follows:
 - The proposal is consistent with the bulk and scale of the existing and desired streetscape character of the area.
 - The proposal provides articulation and modulation of the facades which assist in maintaining an appropriate visual relationship between the proposal and existing developments in the area.
 - The proposal enhances open space and landscaping to the site.
 - The proposal has been strategically designed by the project designers who have worked with relevant consultants and the clients to achieve a design which meets the needs of the project while maintaining the streetscape, the privacy and amenity of adjoining properties.
 - The design proposed represents an increase in GFA which is minor and complies with the building height for the site.
 - The variation has been reviewed against relevant LEC court principles in regards to FSR, and the proposal is considered suitable in the context of the site and the merit analysis required given the existing scale, adjoining developments and the proposed development.
 - The desired future character of the locality is not jeopardised by the proposal and is consistent with Council's objectives for this precinct in regards to the R3 zone.
 - The area of non-compliance does not give rise to any adverse environmental impacts to the amenity of the neighbouring properties. The area of non-compliance does not contribute to any adverse overshadowing impacts to adjoining developments.

Further, the variation provisions contained at clause 4.1.3.1 of Manly DCP reflect an acceptance that the FSR standard on undersized allotments does not provide for the orderly and economic use and development of the land and in my opinion represents an abandonment of the FSR standard on undersized allotments. The proposal satisfies such provisions.

- Having regard to *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, and further to the proposal's consistency with the above strategic and statutory environmental planning provisions, the proposal is consistent with the following objectives under Section 1.3 of the Environmental Planning and Assessment Act 1979 (the Act):
 - (c) to promote the orderly and economic use and development of land; and*
 - (g) to promote good design and amenity of the built environment,*

1. In response to (c), the proposal will facilitate the orderly and economic use and development of the land, in a highly appropriate location, in a manner that is desired by the planning controls because it will facilitate the revitalisation of the dwelling that is functional

and integrates the dwelling with the open space areas. In considering the contrary (refusal of the DA), retention of the building in its current form would not promote the orderly and economic use and development of land in the manner that council's strategic and statutory planning provisions seek. Retention of the building in its current form makes no advancement towards achieving the goal of creating functional development opportunities of run-down sites.

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

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

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

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

4.4 Is the proposed development in the public interest because it is consistent with the objectives of clause 4.4 and the objectives of the R3 Medium Density Residential zone?

Section 4.2 of this written request demonstrates that the proposed development achieves each of the underlying objectives of clause 4.4. As the proposed development achieves the objectives it follows that the proposed development is also consistent with those objectives.

(b) The objectives of the R3 zone and the reasons why the proposed development is consistent with the objectives are set out below:

The proposed alterations and additions are permissible with Council's consent. The proposal is consistent with the objectives of the zone, as supported below:

- the proposal enhances the existing dwelling house and retains the use which provides a land use variety noting dwelling houses, terraces and residential flat buildings in the immediate area.
- The proposal revitalises the site which is consistent with recent works to modernise adjoining properties.
- The proposal has building elements updated from approval DA433/2005 to create an urban form that relates favourably to the scale and treatment to the neighbouring land uses and the natural environment.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

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

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

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

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

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

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

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

5 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant’s 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 an FSR variation in this instance.