



14 ERNEST STREET BALGOWLAH HEIGHTS

**STATEMENT OF ENVIRONMENTAL EFFECTS FOR
ALTERATIONS AND ADDITIONS TO AN EXISTING DWELLING
& CONSTRUCTION OF A SWIMMING POOL**



Report prepared for
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1.0 Introduction

- 1.1 This is a statement of environmental effects for additions to a dwelling at 14 Ernest Street, Balgowlah Heights. The proposed development includes alterations to the ground floor, a new first floor, pool and associated landscaping works.

The report describes how the application addresses and satisfies the objectives and standards of the Manly Local Environmental Plan 2013, the Manly Development Control Plan 2013 and the heads of consideration listed in Section 4.15 of the Environmental Planning and Assessment Act 1979 (as amended).

- 1.2 This statement of environmental effects has been prepared with reference to the following:

- ◆ Site visit
- ◆ Survey Plan by CMS Surveyors
- ◆ Design Plans prepared by Action Plans
- ◆ BASIX Certificate prepared by Action Plans
- ◆ Waste Management Plan
- ◆ Hydraulic Plan by NB Consulting Engineers

- 1.3 The proposed additions are consistent with the objectives of all Council controls, considerate of neighbouring residents and will result in improved amenity for the residents of the site, by providing much needed additional and enhanced floor areas and outdoor spaces. It is an appropriate development worthy of Council consent.

2.0 The site and its locality

- 2.1 The subject site is located on the northern side of Ernest Street in Balgowlah Heights, approximately 100 metres west of the intersection with Condamine Street. It is legally described as Lot 15A DP 31138 and is known as 14 Ernest Street, Balgowlah Heights.
- 2.2 It is rectangular in shape with a 15.24 metre primary street frontage to Ernest Street and rear boundary, and side boundaries of 57.435 metres.
- 2.3 The site has an area of 875.32m² and falls from front to rear. The lot is currently occupied by a single storey brick and clad dwelling with a metal roof and a carport and storage space along the western side of the dwelling.
- 2.4 The site is surrounded by detached residential dwellings. It is in close proximity to Bareena Park and Forty Baskets Beach. Public transport and shops are available along Ernest Street and Beatrice Street.



Figure 1. The site and its immediate surrounds



Figure 2. The site within the locality

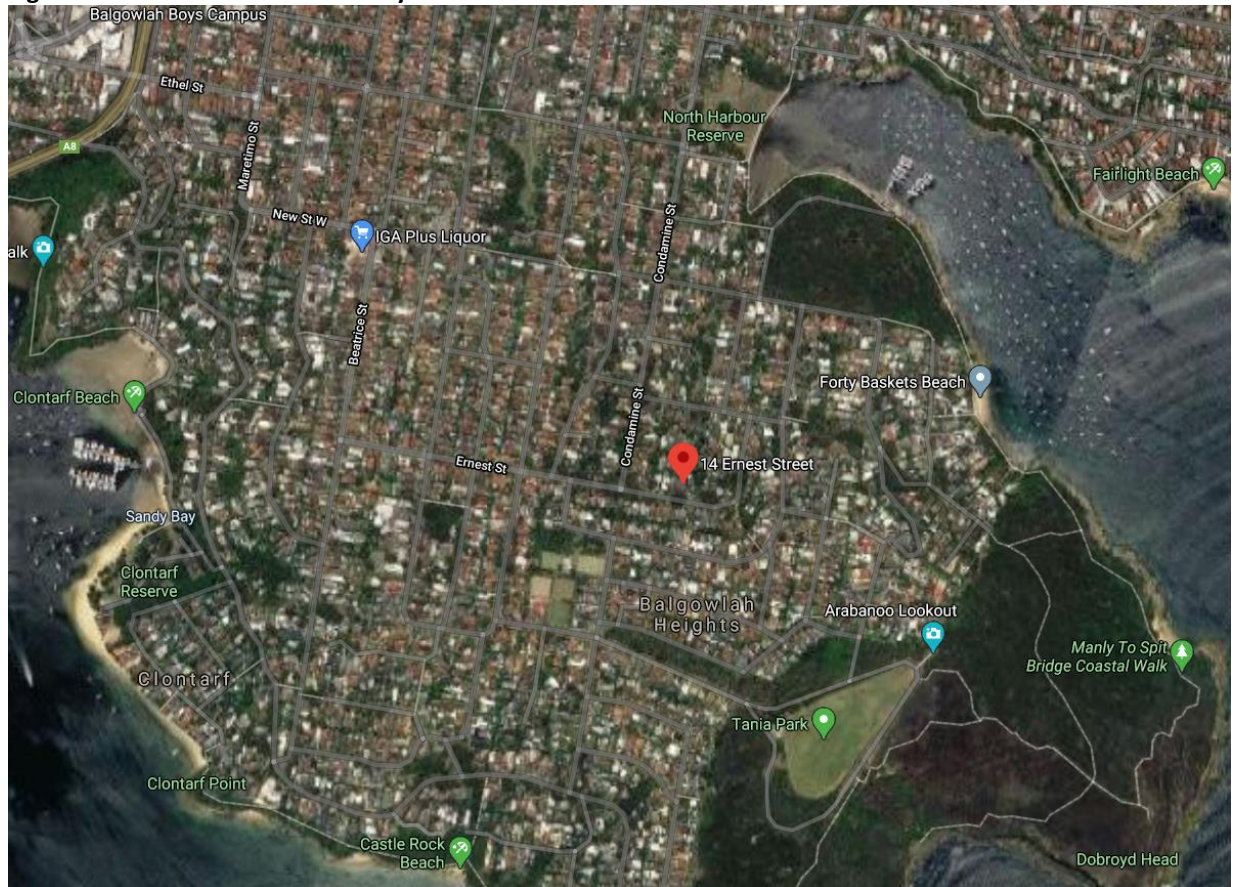


Figure 3. Aerial image of the site within the locality

3. Site Photos



Figure 4: The existing dwelling and its neighbours viewed from Ernest Street



Figure 5. The existing dwelling viewed from the rear yard



Figure 6. The dwelling viewed from the rear yard



Figure 7. The proposed location of the pool



Figure 8. Western setback area of dwelling



Figure 9. Large street tree in front of site

4. Proposed Development

- 4.1 The proposed development is for additions to the existing dwelling, to modify the existing dwelling, add a first floor, pool and associated landscape works.
- 4.2 The proposed development remains consistent with the streetscape and the locality. The proposal is consistent with Council controls, ensures privacy, views and solar access are maintained for surrounding properties and the subject site.
- 4.3 The alterations and additions will be made up as follows:

Ground Floor

- Internal alterations to open up the rear of dwelling to create an open plan living area with kitchen opening onto the deck.
- Installation of stairs to new first floor and a bathroom.
- Bedroom 2 converted into a study.
- Bedroom 1 and lounge room converted into a family room.
- Construction of covered rear deck with stairs to lawn
- New windows as detailed on plans
- New Garage at the front of the dwelling

First Floor

New first floor including:

- Master bedroom with walk in robe, ensuite, retreat and balcony
- Bathroom
- Bedroom 2 with built in robe
- Bedroom 3 with built in robe
- Sitting area
- Linen cupboards

Pool and Rear Yard

- In-ground pool with spa with a volume of 55mL (pool) and 5mL (spa) and dimensions of 11.3m x 4m and maximum depth of 1.8m.
- Raising of lawn by 600mm
- Paved pool surrounds with compliant fencing as detailed on plans
- Retaining wall and planter box

Front Yard

- New timber and masonry front fence 1.6m high.
- New path to entry of the dwelling
- New driveway
- New lawn area

5. Statutory Framework

5.1 State Environmental Planning Policies

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

Schedule 1 of the Environmental Planning and Assessment Regulation (2000) sets out the requirement for a BASIX certificate to accompany any BASIX affected building, being any building that contains one or more dwellings, but does not include a hotel or motel. SEPP BASIX applies to the proposal and a compliant BASIX certificate is provided with this application.

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

State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 replaces the repealed provisions of clause 5.9 of the standard instrument LEP relating to the preservation of trees and vegetation.

The aims of this Policy are to protect the biodiversity values of trees and other vegetation, and to preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation.

The development remains consistent with the provisions of the SEPP as it does not propose the removal of any trees.

SEPP 55 – Remediation of Land

Clause 7 (1) (a) of SEPP 55 requires the Consent Authority to consider whether land is contaminated. Council records indicate that the subject site has been used for residential purposes for a significant period of time with no prior land uses. In this regard it is considered that the site poses no risk of contamination and therefore, no further consideration is required under Clause 7 (1) (b) and (c) of SEPP 55 and the land is considered to be suitable for the residential land use.

5.2 Manly Local Environmental Plan 2013

The relevant clauses of the Manly Local Environmental Plan 2013 are addressed below.

Zoning

The site is zoned R2 – Low Density Residential, pursuant to the provisions of the Manly Local Environmental Plan 2013.



Figure 11. Extract from Manly LEP 2013 zoning map

The proposed development is for additions to the existing dwelling house including garage and pool which are permitted with consent in Zone R2.

Demolition

Consent is sought for demolition works as detailed on the attached DA plans.

Minimum Lot Size

The site is mapped with a minimum subdivision lot size of 500m². The subject site comprises an area of 875.3m² and no subdivision is proposed.

Height

Clause 4.3 of the LEP restricts the height of any development on the subject site to 8.5 metres.

The proposed additions result in a maximum height of 8.794 metres at the roof ridge. This is minimally non-compliant and for a very small component of the development. This has been justified in the accompanying Clause 4.6 variation at Appendix 1.

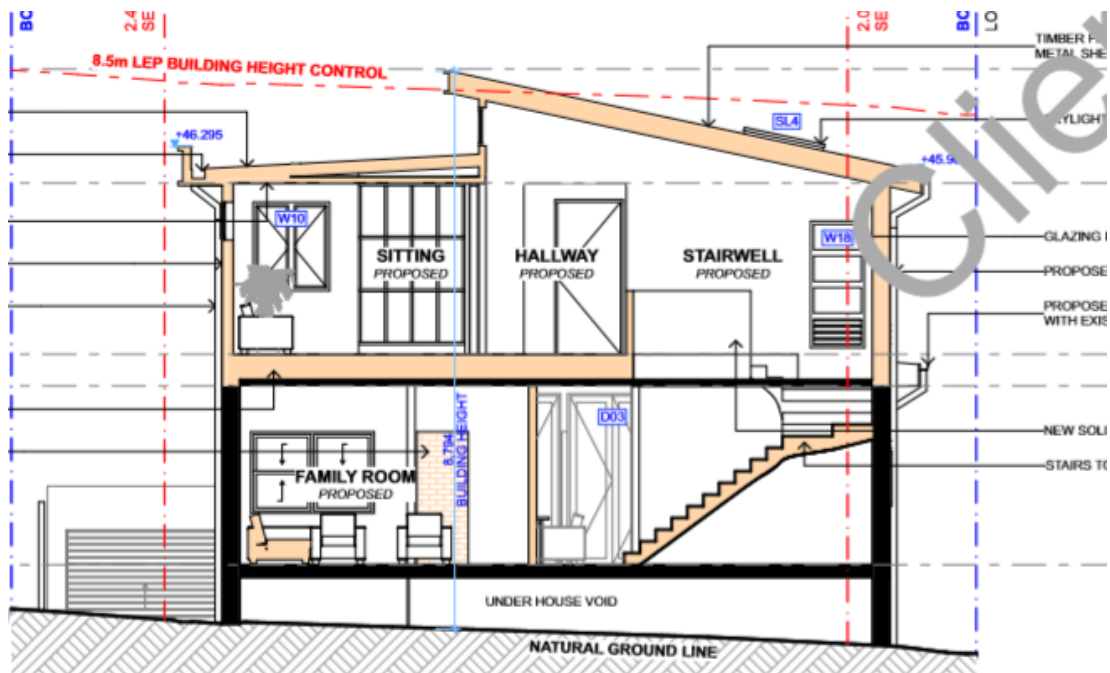
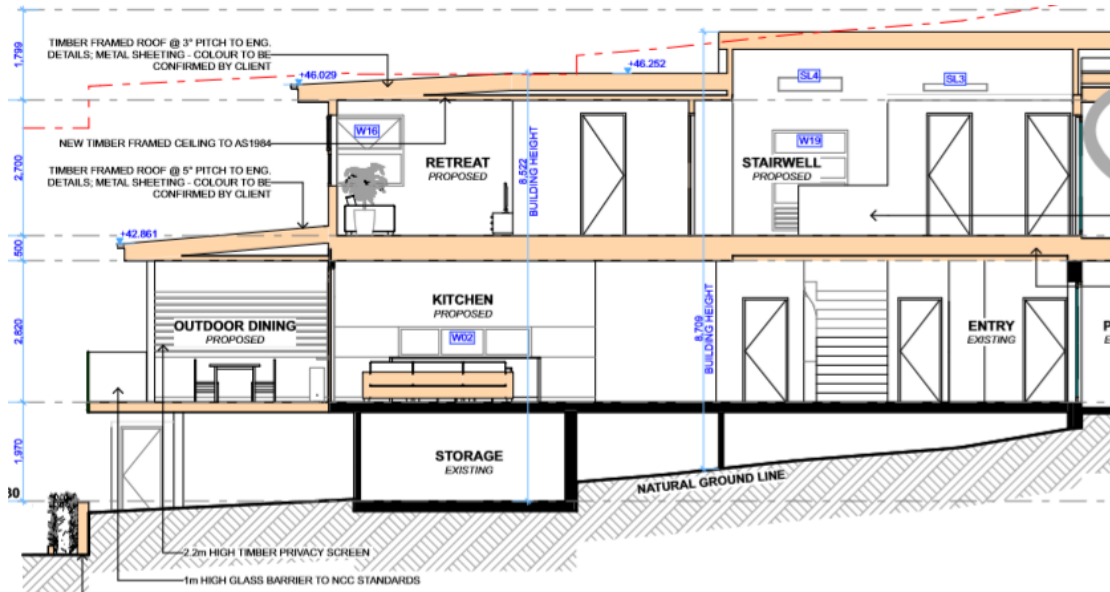


Figure 11. Cross sections from DA plans showing minor variation at ridge

Floor Space Ratio

The site is mapped with a maximum FSR of 0.45:1. This equates to a maximum floor area of 393.88m² for the site area of 875.3m².

The existing FSR on the site is 142.42m² or 0.162:1. The proposed FSR is compliant at 275.58m² or 0.314:1.

Heritage

The site is not a heritage item, located within a heritage conservation area or located in proximity to heritage item.

Acid Sulfate Soils

The site is not mapped in an acid sulfate soil area.

Earthworks

Minor earthworks and excavation are proposed to allow for the construction of the proposed swimming pool and levelling the middle portion of lawn in the rear yard. All works will be undertaken in accordance with engineering specifications, Councils controls and any consent conditions.

Stormwater Management

Stormwater from the additions will drain connect to Council's existing stormwater network. See the accompanying hydraulic plan prepared by NC Consulting Engineers.

Essential Services

All essential services are existing on the site.

5.2 Manly Development Control Plan 2013

The relevant sections of the DCP are addressed below.

3. General Principles of Development

3.1 Streetscapes and Townscapes

The proposed additions have been designed to be consistent with the design of the dwelling. The proposal maintains and improves the character of the area through design, architectural features and complimentary materials and colour choices.

3.1.1 Streetscape (Residential Areas)

The subject site has frontage to and is visible from Ernest Street.

Complementary Design and Visual Improvement

The proposed development remains consistent with the character and streetscape in the locality. The proposed works will be constructed of materials consistent with the existing dwelling and are of an appropriate scale for the locality.

Front Fences and Gates

The development proposes a new timber and masonry front fence with a height of 1.5m on the western boundary to 1.6m to the eastern boundary due to the slope of the land. The proposed fence material and style is compatible with the character of the dwelling and local area.

The vehicle and pedestrian gate will open onto the subject site.

Roofs and Dormer Windows

The roof pitch is variable to create a visual interest and is compatible with the character of the local area. The new roof proposes up to a 12° pitch, with varying elements due to the modern saw-tooth design. It is a timber framed metal sheet roof.

No dormer windows are proposed.

Garages, Carports and Hardstand Areas

The proposed garage is designed to integrate with the dwelling and does not dominate the street frontage. The materials and roof line allow it to integrate with the dwelling.

3.2 Heritage Considerations

The subject site is not a heritage item, located in a heritage conservation area and is not located in proximity to a heritage item.

3.3 Landscaping

The site contains existing landscaping in the front setback. The proposal includes removing a portion of the existing driveway/pathway and providing a dedicated entry pathway and new lawn area.

The rear yard will include new landscaping, a retaining wall and garden bed between the dwelling/deck and pool and rear yard. The middle portion of lawn will also be levelled.

One (1) trees in the rear yard are proposed to be removed as part of the proposal. Two (2) trees at along the rear boundary will be removed under TA2020/0312.

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

3.4.1 Sunlight Access and Overshadowing

3.4.1.1 Overshadowing adjoining private open space

The DCP requires that new development not eliminate more than 1/3 of existing sunlight accessing the private open space of adjoining properties between 9am and 3pm on 21 June.

Due to the fortunate north- south orientation of the site the proposed additions will result in a very minor increase to shadowing of the front yard and eastern side of No 16 Ernest Street at 9am only and over the front yard and western side of No 12 Ernest Street at 3pm only. The shadow diagram provided with this application demonstrates compliance with this clause, with primary open space for both neighbours in the rear yards.

3.4.1.2 Maintaining Solar Access into Living Rooms of Adjacent Properties

The subject site and adjoining lots have a north- south orientation, as such the DCP requires a minimum 3 hours solar access be maintained to the glazing in living rooms of adjacent properties between 9am and 3pm on 21 June.

As described above the proposed additions a very minor increase to shadowing of No 16 Ernest Street at 9am only and over No 12 Ernest Street at 3pm only. There will be no increase in shadowing of glazed areas at the rear where living areas are located on adjoining properties. The shadow diagram provided with this application demonstrates compliance with this clause.

3.4.1.3 Overshadowing Solar Collector Systems

The proposed development will not overshadow neighbouring solar collector systems.

3.4.1.4 Overshadowing Clothes Drying Areas

The proposed development will not overshadow neighbouring clothes drying areas.

3.4.1.5 Excessive Glare or Reflectivity Nuisance

All external material and finishes will be constructed of non-reflective materials in keeping with this clause.

3.4.2 Privacy and Security

Privacy will be retained for neighbours with no direct overlooking to neighbouring properties.

The upper level rear balcony includes a privacy screen to ensure no overlooking and is not located from a living space. Windows on the upper levels are well located to ensure no direct views into neighbours and frosted or raised sills where required.

3.4.2.3 Acoustical Privacy (Noise Nuisance)

The development is appropriate and will not result in noise levels inappropriate to a residential area.

The pool filter will be appropriately located and acoustically housed to ensure no adverse impacts on neighbours.

The site is not located in proximity to a noise generating activity.

3.4.3 Maintenance of Views

It is considered the proposed development will have no impact on views from the subject site or adjoining properties.

3.5 Sustainability

A compliant BASIX Certificate is provided with the attached plan set.
The proposed additions provide compliant solar access and ventilation.

3.7 Stormwater Management

Stormwater from the additions will connect to Councils existing stormwater network.
See the accompanying plan prepared by NB Consulting Engineers.

3.8 Waste Management

Appropriate waste management will be undertaken during the demolition and construction process. All demolished materials will be recycled where possible which is detailed in the accompanying Waste Management Plan.

As described above a new bin storage area is proposed adjacent the existing carport.
The site is serviced by Councils existing garbage collection service.

3.10 Safety and Security

The dwelling maintains clear property boundaries and visual surveillance of the street, which is of benefit to the safety and security of residents.

Part 4 Development Controls and Development Types

4.1 Residential Development Controls

No change is proposed to the existing residential density, which comprises of a single dwelling house.

4.1.2 Height of Buildings (incorporating wall height, number of storeys and roof height)

Clause 4.3 of the LEP restricts the height of any development on the subject site to 8.5 metres. The proposed additions result in a maximum height of 8.974 metres which minimally varies the development standard. Clause 4.6 of the Manly Local Environmental Plan 2013 (MLEP 2013) permits departures from development standards in certain circumstances and it is considered that this application fits this criteria as is detailed in Appendix 1 of this report.

The DCP permits a maximum of 2 stories plus basement on the subject site. The development proposes 2 levels. The new roof proposes a compliant pitch.

A clause 4.6 variation is provided as Appendix 1.

The DCP permits a maximum wall height of 7.2 metres. This is easily achieved for the vast majority of the dwelling with one minor variation of the eastern elevation where the site drops away and a maximum of 7.57 metres is proposed. The small variation proposed at the rear end of this elevation is entirely reasonable and on negligible impact with compliant solar access and very generous setback proposed.

4.1.3 Floor Space Ratio (FSR)

The site is mapped with a maximum FSR of 0.45:1. This equates to a maximum floor area of 393.88m² for the site area of 875.3m².

The existing FSR on the site is 142.42m² or 0.162:1. The proposed FSR is compliant at 275.58m² or 0.314:1.

4.1.4 Setback (front, side and rear) and Building Separation

4.1.4.1 Street Front setbacks

A front setback consistent with the prevailing setback, or a minimum 6 metres, is required on the site.

The subject site has an existing front setback of 10.625 metres on the ground floor with no change proposed. The proposed garage is setback 6.962m. This is considered appropriate as there is significant landscape, garden and pathways in the front yard and the staggered setback of the garage and dwelling ensure the garage does not visually dominate the streetscape.

Additionally, we note that there are varying setbacks with the Ernest Street streetscape as is demonstrated on the aerial image of the streetscape below. No. 14 has a greater setback than many of those immediately surrounding and the location the new garage is appropriate and compatible, particularly given that it is a low level structure.

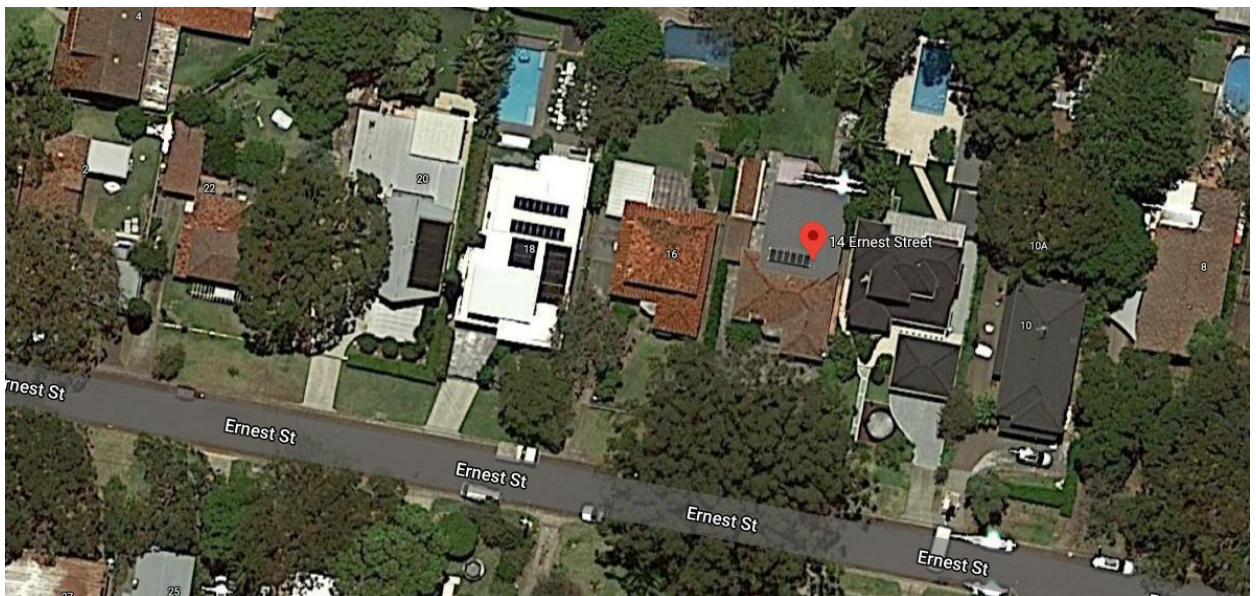


Figure 12. Ernest Street Aerial image

4.1.4.2 Side setbacks and secondary street frontages

A side boundary setback equivalent of $\frac{1}{3}$ of the wall height is required on the site. The ground floor will retain the existing side setbacks of 3.324 metres and greater to the west and 1.348 metres to the east.

The new first floor proposes setbacks of 1.345 metres to east and 3.319 metres to the west. The first-floor setbacks result in variations on the eastern boundary. The proposed variation is reasonable in this instance as it is very minimal and has negligible impact on solar access and the appropriate bulk and scale. Additionally, the setbacks are to a large extent established due to the siting of the existing dwelling. The objectives of the clause are achieved with:

- A positive presentation to the streetscape
- Privacy, solar access, view sharing all retained for neighbours

- Streetscape character maintained and improved
- No detriment to natural features

The pool will have a side setbacks of 1.196 metres to the east, which is ample to allow for separation between dwellings when the topography is also taken into consideration.

4.1.4.4 Rear Setback

A rear setback is 28.756 metres is proposed, which is easily compliant.

The pool sits with a rear setback of greater than 8 metres, which is appropriate for the in-ground structure.

4.1.5 Open Space and Landscaping

4.1.5.1 Minimum Residential Total Open Space Requirements

The DCP requires a total of 55% of the site to be open space with a minimum 35% of that open space to be landscaped area. This equates to 192.56m² of open space for the site area of 875.3² and 168.49m² landscaped area.

The existing area of open space is 441.55m² or 50.4%. The development proposes an increase in open space area to 470.79m² or 53.7% of the site area, which is a positive result for the development site.

Landscaped area and Open space above ground are compliant as is detailed on the DA plans. See DA15.

4.1.6 Parking, Vehicular Access and Loading (Including Bicycle Facilities)

The existing dwelling has an existing single off-street parking space. The proposal includes increasing parking space from 1 to 2 with the new garage.

4.1.7 First Floor Additions

The proposed upper floor addition is complementary to the site and streetscape and is appropriate with its impact on neighbouring properties.

4.1.19 Swimming Pools, Spas and Water Features

The proposed swimming pool is appropriate in regards to character and amenity of the neighbourhood.

It has setbacks to the side boundary to the waters edge of 1.196m, with narrow coping ensuring that there is ample landscaped area to provide a green buffer to the neighbours in this location.

The pool sits with the fall of the land and is fully inground at the top of the site and sits out by only 1.23 metres at the northern end. As this is part way down the site and ample landscaping sites in between, there are no adverse unreasonable privacy implications and the siting is considered appropriate as proposed.

The pool and pool pump are suitably setback from rear and side boundaries and will meet all safety requirements.

6. Section 4.15 Considerations

The following matters are to be taken into consideration when assessing an application pursuant to section 4.15 of the Environmental Planning and Assessment Act 1979 (as amended). Guidelines to help identify the issues to be considered have been prepared by the former Department of Urban Affairs and Planning. The relevant issues are:

The provision of any planning instrument, draft environmental planning instrument, development control plan or regulations

This report clearly and comprehensively addresses the statutory regime applicable to the application and demonstrates that the proposed land use is complimentary and compatible with adjoining development. The proposal achieves the aims of the Manly LEP and DCP.

The development is permissible in the zone.

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

6.1. Context and Setting

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 detail in the body of the statement.

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?*

The proposed additions have been designed to complement the site and its surrounds. The proposal is appropriate and will have negligible impact on adjacent properties.

6.2. 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?*

No conflict or issues will arise as a result of the proposed development and includes an increase to onsite parking.

6.3. Public domain

The proposed development will have a positive impact on the public domain as the proposal is consistent with character of the streetscape of the area.

6.4. Utilities

There will be no impact on the site, which is already serviced.

6.5. Flora and fauna

The proposal includes the removal of trees, which will result in minimal environmental impact.

6.6. Waste

There will be no impact.

6.7. Natural hazards

The site is not constrained by natural hazards.

6.8. Economic impact in the locality

There will be no impact, other than the possibility of a small amount of employment during construction.

6.9. Site design and internal design

Is the development design sensitive to environmental conditions 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?*

The proposed development is highly appropriate to the site with regard to all of the above factors. The proposed development fits well within the context of the surrounds and is an appropriate scale.

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 and all relevant Council controls. Additionally finishes, building materials and all facilities will be compliant with all relevant Council controls.

6.10. Construction

What would be the impacts of construction activities in terms of:

- *the environmental planning issues listed above?*
- *site safety?*

Site safety measures and procedures compliant with relevant legislation will ensure that no site safety or environmental impacts will arise during construction.

The suitability of the site for the development

Does the proposal fit in the locality?

- *are the constraints posed by adjacent developments 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?*

The adjacent development does not impose any unusual development constraints.

Are the site attributes conducive to development?

The site is appropriate for the proposed additions.

Any submissions received in accordance with this Act or the regulations

It is envisaged that the consent authority will consider any submissions made in relation to the proposed development.

The public interest

It is considered that the proposal is in the public interest as it allows for appropriate use of the residential site.

Section 4.15(1) of the Environmental Planning and Assessment Act has been considered and the development is considered to fully comply with all relevant elements of this section of the Environmental Planning and Assessment Act 1979.

7. Conclusions

- 7.1 The proposed development for additions and a pool at 14 Ernest Street, Balgowlah Heights, are appropriate considering all State and Council controls.

The additions have been designed to complement the Ernest Street streetscape. Privacy, solar access and neighbouring amenity have all been key to the design of the proposal.

- 7.3 When assessed under the relevant heads of consideration of s4.15 of the Environmental Planning and Assessment Act, the proposed development is meritorious and should be granted consent.

- 7.3 Considering all the issues, the development is considered worthy of Council's consent.

Appendix One - Clause 4.6 Exceptions to Development Standards – Height of Buildings

Clause 4.6 of the Manly Local Environmental Plan 2013 (MLEP 2013) permits departures from development standards in certain circumstances. In this case, it is necessary to consider if compliance with the development standard is consistent with the aims of the policy and, in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in section 1.3 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) being:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The aims and objectives of Manly LEP 2013 Clause 4.6 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.*

Under Clause 4.6(3) and (4) of the MLEP 2013, consent for a development that contravenes a development standard must not be granted unless the consent authority is satisfied that:

(3)(a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(3)(b) there are sufficient environmental planning grounds to justify contravening the development standard.

(4)(a)(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,

These matters, along with case law judgements from the NSW Land and Environment Court, are addressed below.

1. Environmental Planning Instrument Details (Manly LEP 2013)

1.1 What is the name of the environmental planning instrument that applies to the land?

Manly Local Environmental Plan 2013

1.2 What is the zoning of the land?

R2 – Low Density Residential

1.3 What are the objectives of the zone?

- *To provide for the housing needs of the community within a low-density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

1.4 What is the development standard being varied?

Cl 4.3 - Height of Buildings

1.5 Under what clause is the development standard listed in the environmental planning instrument?

Cl 4.3 of the Manly Local Environmental Plan 2013

1.6 What are the objectives of the development standard?

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

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

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

(c) to minimise disruption to the following—

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

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

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

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

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

1.7 What is the numeric value of the development standard in the environmental planning instrument?

The numeric value of the height of buildings development standard applicable to the subject site is a maximum of 8.5m.

1.8 What is proposed numeric value of the development standard in your development application?

The development proposes a maximum height of 8.794 metres.

1.9 What is the percentage variation (between your proposal and the environmental planning instrument)?

The percentage variation between the proposal and the environmental planning instrument is 3.45% or 0.294 metres.

2. NSW Land and Environment Court Case Law

Several key Land and Environment Court (NSW LEC) judgements have refined the manner in which variations to development standards are required to be approached. The key findings and direction of each of these matters are outlined in the following discussion.

2.1 Wehbe v Pittwater [2007] NSW LEC 827

The decision of Justice Preston in *Wehbe v Pittwater [2007] NSW LEC 827*, (expanded on the findings in *Winten v North Sydney Council*), identified 5 ways in which the applicant might establish that compliance with a development standard is unreasonable or unnecessary. It was not suggested that the five ways were the only ways that a development standard could be shown to be unreasonable or unnecessary.

The five ways outlined in *Wehbe* include:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).

2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).*

3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).*

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

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

In the Micaul decision Preston CJ confirmed that the requirements mandated by SEPP 1 (as discussed in Wehbe) are only relevant in demonstrating that compliance with a development standard is unreasonable or unnecessary for the purpose of Clause 4.6(3)(a).

2.2 Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC

In the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

1. Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;
2. That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
3. That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs;
4. All three elements of clause 4.6 have to be met and it is best to have different reasons for each but it is not essential.

3 Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7

In *Randwick City Council v Micaul Holdings*, the Court allowed a departure from development standards, provided the processes required by clause 4.6 are followed, a consent authority has a broad discretion as to whether to allow a departure from development standards under clause 4.6, even where the variation is not justified for site or development specific reasons.

Preston CJ noted that *the Commissioner did not have to be satisfied directly that compliance with each development standard was unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the appellant's written request had adequately addressed the matter in clause 4.6(3)(a) that compliance with each development standard was unreasonable or unnecessary.*

4 Zhang v City of Ryde

Commissioner Brown reiterated that clause 4.6 imposes three preconditions, which must be satisfied before the application could be approved:

1. The consent authority must be satisfied that the proposed development will be consistent with the objectives of the zone.
2. The consent authority must be satisfied that the proposed development will be consistent with the objects of the standard, which is not met; and
3. The consent authority must be satisfied that the written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances and there are sufficient environmental planning grounds to justify contravening the development standard.

It is only if all of these conditions are met that consent can be granted to the application, subject to an assessment of the merits of the application.

The Commissioner applied the now familiar approach to determining consistency with zone objectives by considering whether the development was antipathetic to the objectives.

In contrast to *four2five*, the reasons relied on to justify the departure from the standards in this case were not necessarily site specific.

5. Action Pty Ltd v Woollahra Municipal Council [2018]

In *Action Pty Ltd v Woollahra Municipal Council*, the court demonstrated the correct approach to the consideration of clause 4.6 requests, including that the clause does not require that a development that contravenes a development standard, must have a neutral or better environmental planning outcome than one that does not.

3. Consideration

The following section addresses the provisions of clause 4.6 of the MLEP 2013 together with principles established in the NSW Land and Environment Court Case Law outlined above.

Clause 4.6(3)(A) - Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case (and is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case)?

In order to demonstrate that compliance with the development standard is unreasonable or unnecessary, in the circumstances of the case, the Five (5) Part Test established in *Winten v North Sydney Council* and expanded by Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827 is considered:

The five ways outlined in *Wehbe* include:

3.1 Five (5) Part Test - *Wehbe v Pittwater*

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).*

The objectives of the standard are:

- (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 development is consistent with the bulk and scale of the neighbourhood. The variation is minor and is largely the result of the topography of the site and desire to ensure the dwelling is consistent with the desired future streetscape character in the locality.

The proposed height and built form is considered to be consistent with other approved dwelling houses with the locality on sloping sites, which breach the height limit.

The proposed variation is just 3.45% or 0.294metres. The resulting dwelling is considered to be compatible with the prevailing height of buildings and streetscape character within the locality, despite the non-compliance, with the variation largely attributed to the sloping topography of the site. It is considered this objective is met, despite the numerical variation.

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

Comment

The proposed built form for the most part is consistent with the existing character of the locality. The proposed height exceedance of an additional 294mm is considered to be negligible in relation to bulk and scale given the existing character of the locality.

The proposed development will not present with excessive bulk from the public domain due to the sloping topography of the site and surrounding area. It is considered this objective is met, despite the numerical variation.

(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 proposed variation in height is considered not to result any unreasonable material view loss. No harbour or foreshore views will be impacted or views between public spaces.

It is therefore considered this objective is met, despite the numerical variation.

(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 proposed variation to height does not result in any unreasonable solar access impacts to adjoining dwellings. Given that compliant solar access is achieved, despite the height variation sought, it is considered the underlying objective of this clause has been satisfied.

(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:

The proposed variation does not result in the requirement of removal or pruning of trees on the subject site or on adjoining properties. In this regard, the underlying intent of this objective has been satisfied despite the numerical departure.

2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).*

This exception to development standards request does not rely on this reason.

3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).*

This exception to development standards request does not rely on this reason

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

This exception to development standards request does not rely on this reason.

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

This exception to development standards request does not rely on this reason.

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the height of buildings control pursuant to the First Way outlined in Wehbe.

Thus it is considered that compliance with Clause 4.6(3)(a) is satisfied.

3.2 Clause 4.6(3)(B) – Are there sufficient environmental planning grounds to justify contravening the development standard?

There are sufficient grounds to permit the variation of the development standard. In particular:

- The proposed variation between the proposal and the existing building height is just 3.45% or 0.294 metres.
- The proposed variation satisfies the objectives of the underlying intent of Clause 4.3, and therefore the merits of the proposal are considered to be worthy of approval. It has been demonstrated within Council and the Courts to apply a reasonable approach in supporting variations to development standards.
- Strict numerical compliance would not necessarily result in a materially better urban design outcome and would thwart the underlying objectives of the controls
- The proposed development will not present with excessive bulk from the public domain due to the sloping topography of the site. It is considered this objective is met, despite the numerical variation.
- By supporting this variation to building height in its current form, it is considered that an appropriate degree of flexibility be applied, which results in a reasonable built form, consistent with the character of the locality.
- The extent of the variation is considered to be in the public interest as the proposal remains consistent with the objectives of the zone.
- The proposed variation adequately satisfies the underlying objectives of the controls and will not result in any unacceptable built, natural, social or economic impacts for consideration under the Act.

3.3 Clause 4.6(4)(A)(ii) – Will the proposed development be in the public interest because it is consistent with the objectives of the particular standard and objectives for development

within the zone which the development is proposed to be carried out.

The proposed development is consistent with the objectives of the standard (see Cl 4.6(3)(A)). An assessment of consistency with the objectives of the Zone is provided below:

Zone – R2 Low Density Residential

Objectives of zone

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

Consistent. The proposal is for alterations and additions to an existing dwelling and is consistent with existing character of the locality.

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

Not relevant. The proposal is for alterations and additions to a residential dwelling.

Despite the proposal seeking an exception to the building height clause, the bulk and scale of the building will have minimal effects as it represents a minor exceedance and is consistent with surrounding development.

The proposed development is not contrary to the public interest, because it is consistent with the objectives of the standard (see Cl 4.6(3)(A)) and objectives for development within the zone.

Clause 4.6(5)(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning,

The non-compliance will not raise any matter of State or Regional Significance.

Clause 4.6(5)(b) the public benefit of maintaining the development standard,

The proposed development is not contrary to the public interest, accordingly there can be no quantifiable or perceived public benefit in maintaining the standard.

Clause 4.6(5)(c) any other matters required to be taken into consideration by the Secretary before granting concurrence

How would strict compliance hinder the attainment of the objects specified in Section 1.3 of the Act.

Strict compliance with the standard would hinder the attainment of the objects specified in section 1.3 of the Act

(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,

(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,

(c) to promote the orderly and economic use and development of land,

(d) to promote the delivery and maintenance of affordable housing,

(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,

(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),

(g) to promote good design and amenity of the built environment,

(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,

(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,

(j) to provide increased opportunity for community participation in environmental planning and assessment.

Strict compliance with the 8.5 metres height development standard would hinder the development for the purpose of *promoting the orderly and economic use and development of land, promoting good design and amenity of the built environment and promoting the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.*

Conclusion

The proposed development is for alterations and additions to an existing dwelling on land zoned R2 – Low Density Residential.

As stated above the non-compliance between the proposal and the environmental planning instrument is 3.45% or 0.294 metres.

The variation does not result in any unreasonable impacts on adjoining sites. The proposed development is not excessive bulk in comparison to surrounding properties. There will not be unreasonable view loss for surrounding properties.

Strict numerical compliance is considered to be unnecessary and unreasonable given that the proposed variation sought is consistent with the underlying objectives of the control despite the numerical variation, of which have been reasonably satisfied under the provisions of Clause 4.6.

The proposed variation satisfies the objectives of the zone, underlying intent of Clause 4.6 and

Clause 4.3, and therefore the merits of the proposed variation are considered to be worthy of approval.