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Via Email

Dear Sir/Madam

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## Clause 4.6 Request to vary the Maximum Height Control Clause 4.3 of Manly LEP 2013 – Alterations and Additions to existing dwelling at 64 Fairlight Street, Fairlight

### Introduction

This 4.6 variation is to be read in conjunction with the Statement of Environmental Effects for the proposed alterations and additions to the existing dwelling at 64 Fairlight Street, Fairlight.

In particular, the proposal seeks to provide an attic roof level containing a master bedroom and ensuite. Due to the fall of the land from the front boundary to the rear of the site, the proposed additions will not have a significant height above street level. The proposed attic level design incorporates the following:

- Contemporary dormer structures at the rear of the side roof planes recessed from the walls of the floor below to be contained within the existing roof form.
- Attic additions have been designed to appear below the existing roof ridge when viewed from the street and surrounding properties.
- Sufficient floor to ceiling heights and skylights to maximise light into the attic level.

The proposed works have been designed to present as a contemporary attic level addition to an existing 2 storey dwelling. Nevertheless, as a result of the fall of the site and the existing building height the upper portions of the attic additions result in a maximum height of 9.135m and is above the maximum permitted for the site – 8.5m as set out on the Manly LEP 2013 mapping.

This 4.6 variation seeks to vary the height provision applicable to this site.

This submission forms a request to grant an exception to the development standard Height in clause 4.3 of the MLEP 2013 under clause 4.6 “Exceptions to development standards” of the LEP. This application breaks down the considerations, justifications and demonstrations required by clause 4.6 in the following sections.

### 4.6 Exceptions to development standards

(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.*

(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.*

(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.

(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.

(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.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

- (a) a development standard for complying development,
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
- (c) clause 5.4,

(ca) clause 6.15,

(cb) a development standard on land to which clause 6.19 applies.

### Court Principles and Guidance around Application of 4.6 Exceptions

A number of court cases have assisted to guide expectations and facilitate appropriate application for and justification of the variations sought. Significant cases are cited below and will be drawn upon to assist with this application:

- I. In 2007, in the case *Wehbe v Pittwater Council* (CJ Preston) five (5) ways of establishing that compliance was unreasonable or unnecessary was discussed.
  1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).*
  2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).*
  3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).*
  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 Method).*
  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 Method).*
- II. In 2015, in the case *Four2Five Pty Ltd v Ashfield Council* (C Pearson) and later 2016 *Moskovitch v Waverley Council* (Tuor) it was established that written requests made under clause were required to demonstrate that:
  - a. that compliance was unreasonable or unnecessary in the circumstances of the case to be consistent with the objectives of the development standard (cl4.6 (3)(a), and
  - b. "sufficient environmental planning grounds (4.6(3)(b)) exist to support the variation.

In 2018, in the case *Initial Action Pty Ltd v Woollahra Municipal Council* (CJ Preston) it was established that Commissioner Smithson had misinterpreted and misapplied cl 4.6 of the Woollahra LEP 2014. In this case, the commissioner herself considered whether compliance was unreasonable or unnecessary rather than determining whether the written request had adequately addressed the matter. In summary, the court found that:

*The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction.*

Further, the Commissioner had required that to be considered unreasonable or unnecessary, the non compliance with the standard needed to have a neutral or beneficial effect relative to a development that complied with the standard. CJ Preston said:

*'Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development.... Compliance*

*with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion.*

With reference to sufficient environmental planning grounds CJ Preston further held:

*Clause 4.6 does not directly or indirectly establish this test. The requirement ...is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.'*

### **Development Standard to be Varied – Maximum Height**

This clause 4.6 variation request relates to a departure from a numerical standard set out under clause 4.3 of the MLEP 2013 Height of 8.5 m that applies to the site.

This development standard relates to the maximum permitted height of the development, clause 4.3 of the MLEP 2013 falls within a scope of a “development standard” as defined under section 4 of the Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act).

Clause 4.3 of the MLEP 2013 contains objectives (bolded where applicable to this site) for buildings proposed in the local government area.

#### **4.3 Height of buildings**

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

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

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

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

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

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

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

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

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

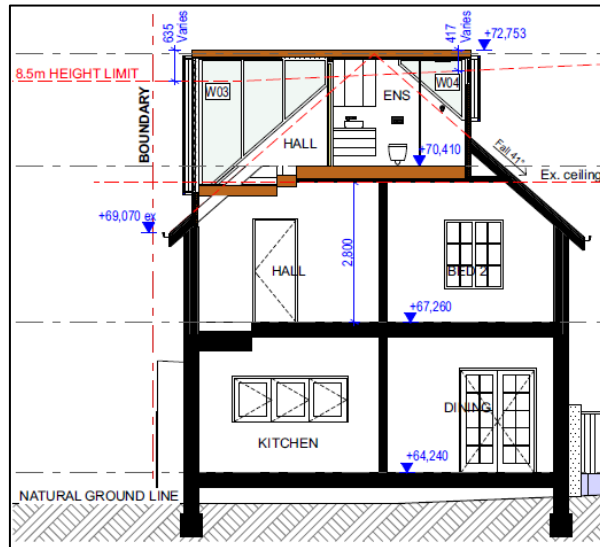
(2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

#### *Height Statistics*

Under clause 4.3 the site has a prescribed maximum height of **8.5 m**.

- The proposed maximum height is 9.135m (0.635m variation)
  - NB existing ridge height is 9.02 m
- This represents a 7.4% variation to the height standard.

- It should be noted that this over height component is located at the new attic additions to the dwelling.
- The over height component of the building only comprises the upper part of the attic level above the master bedroom central to the subject dwelling, noting the remaining attic level complies with the height control.



- The total floor area of the foyer is 22.05m<sup>2</sup>. The over height component does not contain any floor area.

Refer to Figure 1 below for Height Map noting I is 8.5m.



**Figure 1** Manly LEP 2013 Height Map

### Assessment of the Provisions of Clause 4.6 Exceptions to development standards

Clause 4.6 of the MLEP 2013 allows for flexibility to be applied to development standards where objectives can be obtained notwithstanding the variation. The mechanics of the clause, the objectives of

the height of buildings standard and a response are all outlined below; however, the main opportunities and justifications for the building height variation are presented here:

- The proposed additional bedroom within the attic level requires additional height to accommodate a BCA compliant ceiling. The additional height is not highly perceptible from the public domain or the street and would not impact upon the streetscape presentation of the dwelling.
- The proposal conforms to the bulk, scale and rhythm of buildings in the locality and has been designed to be read as a contemporary attic addition.
- The proposal generally sits comfortably within the existing roof form and is adequately recessed from the walls of the floor below.
- The proposal does not result in unacceptable solar impacts nor does it interrupt views.
- The site is flanked by a double driveway to the west and a driveway to the east. The additional space around the building creates space for the height to be accepted without impact.

The proposed contemporary attic addition allows for the interpretation of the original roof form and does not dominate the existing dwelling. The over height element does not contain any windows and will not introduce any opportunities for overlooking.

The site and the surrounding locality can support the increased height, as the primary controls for setbacks are generally maintained, and the proposal would not unreasonably overshadow or present a bulk and scale impact upon adjoining properties as surrounding dwellings are either located well above or well away from the proposed dwelling.

#### **Clause 4.6.3 (a)(b) - Unreasonable or Unnecessary / Environmental Planning Grounds**

Commentary provided below to address the requirements of this clause.

**Table 1** Request to vary development standard 4.3 Maximum Building Height

<b>Objective</b>	<b>Comment</b>
(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and	<p>The proposal will result in a two storey + attic form when viewed from the street level.</p> <p>The maximum height of the building is set at RL73.028.</p> <p>It is noted that the vast majority of the building is well under the maximum height limit. For example, the larger floor plate of the attic component of the proposed building is set below the existing ceiling.</p> <p>It is considered that a reduced height would not allow for adequate amenity/ceiling height at the upper level.</p> <p>The current proposal will produce a bulk and scale that will be consistent with other dwellings along within the locality noting there are examples of residential flat buildings within the R1 zone nearby. It is therefore considered unreasonable to meet the height standard under these circumstances.</p> <p>The proposal is consistent with the objectives of</p>

Objective	Comment
	<p>the R1 General Residential zone. In that:</p> <ul style="list-style-type: none"> <li>To provide for the housing needs of the community.</li> <li>To provide for a variety of housing types and densities.</li> </ul> <p>The proposed additions will result in a modest dwelling in size and will meet the key objective of the R1 zone as they have been designed in an attic form that sits within the existing roof form and recessed from the walls of the floor below and is consistent with the varied housing types and densities within the street. Further, the works would provide for the housing needs of the residents of the subject site through the provision of an additional bedroom and ensuite.</p>
(b) that there are sufficient environmental planning grounds to justify contravening the development standard.	<p>There are no significant adverse impacts created by this proposal and in particular a compliant development would provide a similar if not same presentation to the street and public domain.</p> <p>The proposed alterations and additions are not excessive and are generally contained within the existing roof form. The subject site is located below the street level and so the additional bulk at the attic would not have a significant visual impact upon the street or adjoining properties.</p> <p>On balance it is considered that the proposal meets the objectives of the zone and meeting the height requirement is unnecessary in this instance.</p>

#### 4.6.4 (i) (ii) - Achieving Consistency with the Objectives of the Standards

##### 4.6 Exceptions to development standards

(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 terms of Clause 4.6 (4)(a)(i) this submission is the written request that address the matters contained required to be considered in subclause (3).

**Table 2** Clause 4.6(4) ii assessment

Objectives for Consideration	Comment
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Objectives for Consideration	Comment
<p>The relevant R1 zone objectives include:</p> <ul style="list-style-type: none"> <li>To provide for the housing needs of the community.</li> <li>To provide for a variety of housing types and densities.</li> </ul>	<p>The proposed additions meet the key objective of the R1 zone as they have been designed in an attic form that sits within the existing roof form and recessed from the walls of the floor below and is consistent with the varied housing types and densities within the street. The majority of the proposed works sit within the 8.5m height control.</p> <p>Further, the works would provide for the housing needs of the residents of the subject site through the provision of an additional bedroom and ensuite.</p>
<p>The relevant objectives of the height standard include:</p> <p>(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,</p> <p>(b) to control the bulk and scale of buildings,</p> <p>(c) to minimise disruption to the following:</p> <ul style="list-style-type: none"> <li>(i) views to nearby residential development from public spaces (including the harbour and foreshores),</li> <li>(ii) views from nearby residential development to public spaces (including the harbour and foreshores),</li> <li>(iii) views between public spaces (including the harbour and foreshores),</li> </ul> <p>(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,</p>	<p>The scale of the dwelling is consistent with other development within the street and has been designed with a contemporary scale and form that complements the topographic landscape and will not be inconsistent with the prevailing building height in the street.</p> <p>The proposal will not have an unreasonable bulk and scale impact upon adjoining buildings.</p> <p>The proposal will not result in view loss, overlooking or overshadowing beyond that expected within the R1 General Residential zone. The visual impact of the proposal is minimised through the siting of the attic additions towards the rear of the side roof plane.</p>

## Clause 4.6(5) Considerations

### 4.6 Exceptions to development standards

(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.

The matters for consideration in clause 4.6(5) have been addressed in Table 2

**Table 2** Clause 4.5(5) assessment



Matters of Consideration	Comment
(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and	The contravention does not raise any matters of state or regional significance.
(b) the public benefit of maintaining the development standard, and	There is no public benefit in maintaining the standard. The proposal maintains amenity including privacy, overshadowing and views, which the additional height does not impact.
(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.	N/A

## Conclusion

The proposed application remains consistent with the objects of Part 1.3 and requirements of Part 4 of The Act. The proposed use is permissible with consent and uses the subject site to its full potential. The proposal will create a development that:

- For its vast majority of built form is compliant with the height standard.
- Does not significantly impact upon the existing streetscape
- Does not unduly impact the natural environment with no changes to the existing building footprint.
- Does not significantly impact views or privacy.
- Supports the needs of the residents of the subject site.
- Promotes the orderly and economic use and development of the land.
- Promotes good design and amenity of the built environment.

The proposal responds to the character and nature of the street and it is noted that the additions have been sensitively designed to minimise impacts upon adjoining properties noting the site is surrounded by battle-axe allotments. The proposed non-compliance with the height requirement would not result in any significant adverse impacts.

Yours Faithfully,



Nicole Lennon

Director

Planik Pty Ltd