

# Written Request under Clause 4.6 Exceptions to Development Standards of Manly Local Environmental Plan 2013

**Lot 1 DP 1125216, No 107 Frenchs Forest Road,  
SEAFORTH**

Prepared For:



Prepared By:



January 2021

# Contents

|                                                                                                                                        |           |
|----------------------------------------------------------------------------------------------------------------------------------------|-----------|
| <b>1. INTRODUCTION .....</b>                                                                                                           | <b>3</b>  |
| FIGURE 1 – FLOOR SPACE MAP .....                                                                                                       | 3         |
| 1.1 THE SUBJECT LAND .....                                                                                                             | 4         |
| 1.2 PROPOSED DEVELOPMENT .....                                                                                                         | 4         |
| 1.3 ZONING .....                                                                                                                       | 4         |
| <b>2 PROVISIONS OF CLAUSE 4.6 – EXCEPTIONS TO DEVELOPMENT STANDARDS .....</b>                                                          | <b>4</b>  |
| 2.1 CLAUSE 4.6(4)(A)(i) – ADEQUATE ADDRESS OF MATTERS UNDER CLAUSE 4.6(3) .....                                                        | 4         |
| 2.2 CLAUSE 4.6(1) - OBJECTIVES.....                                                                                                    | 6         |
| 2.3 REQUIREMENTS OF EXCEPTION UNDER CLAUSE 4.6 .....                                                                                   | 7         |
| 2.4 REQUIREMENTS OF CONSENT AUTHORITY UNDER CLAUSE 4.6.....                                                                            | 7         |
| <b>3 GROUNDS OF OBJECTION TO THE DEVELOPMENT STANDARD.....</b>                                                                         | <b>8</b>  |
| 3.1 MATTERS FOR CONSIDERATION RELATING TO VARIATIONS IN GENERAL .....                                                                  | 8         |
| 3.2 REASONS FOR SUPPORT .....                                                                                                          | 9         |
| 3.3 MATTERS TO BE ADDRESSED IN ASSESSMENT OF A VARIATION – THE FIVE ‘WINTEN’ TESTS .....                                               | 10        |
| 3.4 IS THE PLANNING CONTROL IN QUESTION A DEVELOPMENT STANDARD? .....                                                                  | 10        |
| <b>4 OBJECTIVES OF DEVELOPMENT STANDARDS .....</b>                                                                                     | <b>11</b> |
| 4.1 CLAUSE 4.4 – FLOOR SPACE RATIO .....                                                                                               | 11        |
| <b>5 JUSTIFICATION FOR NON-COMPLIANCE WITH THE DEVELOPMENT STANDARDS .....</b>                                                         | <b>12</b> |
| 5.1 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (CLAUSE 4.6(3)(A))? ..... | 12        |
| 5.2 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD (CLAUSE 4.6(3)(B))? .....     | 13        |
| <b>6 CONCLUSION .....</b>                                                                                                              | <b>14</b> |

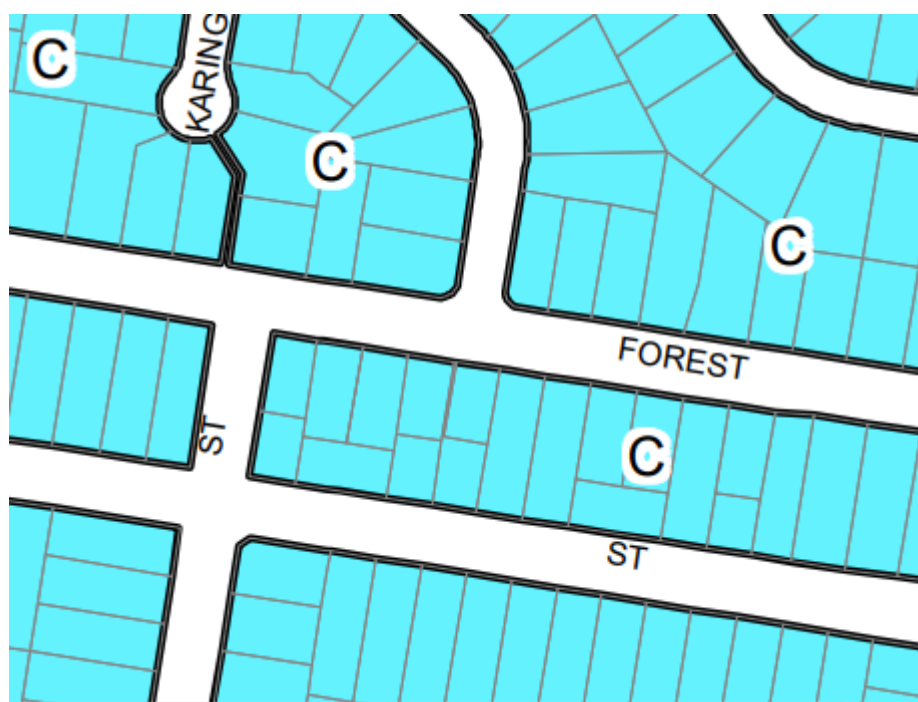
## 1. Introduction

This report is based on plans submitted to Council and comprises a written request from the Applicant under clause 4.6 of Manly Local Environmental Plan 2013 (“LEP 2013”) that seeks to justify the contravention by the new Proposed Development of the development standard for the floor space ratio (FSR) under clause 4.4 of LEP 2013.

This report has been prepared to support a variation to the development standard of Clause 4.4 of *Manly Local Environmental Plan 2013* (MLEP 2013). The submission should be read in conjunction with the Statement of Environmental Effects (SoEE) prepared by this firm.

The maximum FSR shown for the Floor Space Ratio Map referred to in clause 4.4(2) of LEP 2013 is 0.45:1 as shown on the extract of Map - Sheet FSR\_001 below in **Figure 1**.

FIGURE 1 – FLOOR SPACE MAP



The floor area of the dwelling is 193.33m<sup>2</sup> or 0.53.32:1. The proposed development proposes a floor space ratio greater than 0.45:1 provided by Clause 4.4 or a variation of 18.48%. However, in accordance with Subclause 4.1.3.1, addressed below, a 0.50:1 applies. The variation in this instance is 6.6%.

Whilst this is a DCP provision and not subject to a Clause 4.6 variation request, nonetheless the Council has recognised that under certain circumstances, such as this proposal where the lot size has been reduced due to road widening, a more flexible approach should be considered for such lots. As such a variation is sought under ‘Clause 4.6 – Exceptions to development standards’ under MLEP 2013.

As noted above, the subject property is an undersized allotment. Subclause 4.1.3.1 of Manly Development Control Plan 2013 provides under the heading of **Exceptions to FSR for undersized lots** provides:

The undersized nature of a lot is a matter that Council may consider in determining whether 'compliance with the standard is unreasonable or unnecessary in the circumstances of the case' and 'there is sufficient environment planning grounds to justify contravening the development standard' under LEP clause 4.6(3).

- a) The extent of any exception to the LEP FSR development standard pursuant to LEP clause 4.6 in this plan is to be no greater than the achievable FSR for the lot size indicated in Figure 30.

The lot falls under Area I of the LEP Lot Size Map, which is based on 500m<sup>2</sup> lot size/site area. On this basis, under the LEP with an FSR of 0.45:1, the allowable FSR is 163.16m<sup>2</sup>. The proposed dwelling has a floor area of 193.33m<sup>2</sup>, which is 30.17m<sup>2</sup> over the allowable FSR or an FSR of 53.32:1, which is more than the 50% control by 6.6%.

### 1.1 THE SUBJECT LAND

The land the subject of this objection is known as Lot 1 DP 1125216, No 107 Frenchs Forest Road, SEAFORTH.

### 1.2 PROPOSED DEVELOPMENT

The demolition of the existing dwelling on the Site and the erection of a new two-storey dwelling on the Site ("Proposed Development"). Further details of the development are provided in Section 3.1 of the Statement of Environmental Effects prepared by this firm and accompany this report.

### 1.3 ZONING

The site falls within the R2 Low Density Residential zone under Manly Local Environmental Plan 2013.

## 2 Provisions of Clause 4.6 – Exceptions to Development Standards

Clause 4.6 of the LEP 2013 operates as a precondition to the exercise of power to grant consent and unless a consent authority is satisfied that the precondition has been met, consent cannot be granted to a proposed development that contravenes development standards. Two positive opinions of satisfaction under clause 4.6(4)(a)(i) and (ii) must be made as stated in Section 2.1 below.

### 2.1 CLAUSE 4.6(4)(A)(I) – ADEQUATE ADDRESS OF MATTERS UNDER CLAUSE 4.6(3)

In response to cl. 4.6(3) two matters must be addressed:

- A. that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case; and
- B. that there are sufficient environmental planning grounds to justify contravening the development standard.

**(A) Compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.**

It is noted that the objectives of the floor space ratio under Clause 4.4(1) 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.

These objectives are addressed in the request for variation, as required by recent decisions of the Land & Environment Court in Section 4.

These objectives are achieved notwithstanding the breach of the standard, making it unnecessary to apply the floor space ratio. The above objectives are addressed:

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

**Comment:** The proposed development is a conventional pitch roof design that is proposed to be constructed of various materials. The front and rear facades of the dwelling are suitably articulated and the longer eastern side wall is indented to minimise bulk and scale impacts. On the basis of the design and materials used, the development will be in keeping with the bulk and scale of the surrounding area. The proposed dwelling will make a positive contribution to the streetscape of Frenchs Forest Road and is in keeping with the low density residential character of the area.

**(b) to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,**

**Comment:** The proposal marginally exceeds the mapped 0.45:1 dwelling density of the site however given the relatively small allotment size of 362.59m<sup>2</sup> there is justification to support the variation on the basis of the suitably articulated facades and use of lightweight materials. The proposal will not obscure any important landscape or townscape features.

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

**Comment:** The proposed 2 storey dwelling exhibits architectural merit and is in keeping with the existing and envisaged low density character of the area. As stated above, the character of the area will evolve over the years as older dwelling stock is replaced by new modern dwellings. As demonstrated in the Statement of Environmental Effects prepared by this firm, the development is generally compliant with the LEP and DCP. The property has been recognised as an undersized lot and the Council has provided flexibility in the DCP control to allow, subject to a written request under Clause 4.6, variations to this particular standard.

Obviously, the Council could not look at each lot that was undersized when preparing the minimum lot size map and moreover the floor space ratio map to provide different controls and hence 'blanket' floor space ratio controls to whole areas. However, the provision in the DCP looks at setting aside the 'blanket' control and provide a sliding scale for a range of lot sizes. This is a fair planning outcome for such lots.

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

**Comment:** The proposal will not have any adverse environmental impacts upon the use or enjoyment of adjoining properties or the public domain, as discussed in the Statement of Environmental Effects.

**(e) to provide for the viability of business zones and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.**

**Comment:** Non-applicable.

Having regard to all of the above, it is our opinion that compliance with the floor space ratio standard is unnecessary in the circumstances of the case as the development meets the objectives of that standard and the zone objectives, as described in this written variation request.

Compliance with the development standard is both unreasonable and unnecessary in this case given the fact that the property and the size of the lot already exist. The potential site development is in keeping with the existing character that has occurred in the immediate area having regard to the zoning of the land.

It is also relevant that, as a general principle, the highest and best economic use of land which has been identified as appropriate for residential development, will conversely act to preserve the character of the area, particularly having regard to the setting of the area and adjoining developments.

Having regard to the above we consider that the approach taken serves the objects of the Act of promoting the orderly and economic use of land, with a development that provides for housing close to services and facilities in the immediate area.

It is not considered that a variation to the development standard in these circumstances would act as a general planning change more appropriately dealt with under *Part 3* of the *Environmental Planning & Assessment Act 1979*.

## **2.2 CLAUSE 4.6(1) - OBJECTIVES**

The objectives of clause 4.6(1) 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.

Subclause 2 essentially provides for Council to grant development consent for a development that would contravene a development standard. Subclause 3 has the same requirement that a written request must be received objecting to the particular development standard.

The proposed variation to Clause 4.4 is considered to be consistent with the objectives of the exception clause. In this regard, given the specific circumstances of the site a better and more appropriate outcome for the proposed dwelling is achieved by allowing flexibility to the development standard, in this particular circumstance, also noting the comments above regarding Subclause 4.1.3.1 of the DCP.

### 2.3 REQUIREMENTS OF EXCEPTION UNDER CLAUSE 4.6

Clause 4.6(2) & (3) of MLEP 2013 states:

- (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.*

This report seeks to demonstrate that compliance with Clause 4.4 of MLEP 2013 is both unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard in this particular instance.

### 2.4 REQUIREMENTS OF CONSENT AUTHORITY UNDER CLAUSE 4.6

Clause 4.6(4) & (8) of MLEP 2013 states:

- (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 Planning Secretary has been obtained.*

It is considered that the public interest is better served as a consequence of the variation of the development standard of MLEP 2013 due to the area of non-compliance, being 0.53:32:1; whilst the FSR control is noted as being 0.45:1 or a variation of 18.48%, particularly having regard to the design outcome for this development and the road widening that occurred at the front of the property to reduce the size of the lot to less than the minimum lot size under Clause 4.1, being 500m<sup>2</sup>. As stated above in Section 1, Subclause 4.1.3.1 of the DCP, a 0.50:1 applies to undersized lots and this lot falls under such category. The variation therefore in this instance is 6.6%, which is less than 10%.

The subject property has an area of 362.59m<sup>2</sup>. In the accompanying SoEE it is demonstrated that the proposal is consistent with the objectives of the R2 Low Density Residential zone.

- (8) *This clause does not allow 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 which clause 6.19 applies.*

The proposed development will not contravene a development standard for complying development nor will it contravene any commitment set out in the BASIX Certificate that has been issued for the proposed dwelling on the site. Further the proposed building will not contravene any of the above clauses of MLEP 2013, particularly as these clauses relate to tourist accommodation and development in St Patrick's Estate.

### 3 Grounds of Objection to the Development Standard

#### 3.1 MATTERS FOR CONSIDERATION RELATING TO VARIATIONS IN GENERAL

The relevant matters for determination and consideration of the variation are:

- i) Determination of the underlying object or purpose of the development standard. It must be assumed that a development standard in a planning instrument has a purpose.
- ii) Whether compliance with the standard is consistent with the aims and objectives of the Policy and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5 (a)(i) and (ii) of the EP&A Act.
- iii) Whether the objection demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. To point to an absence of environmental harm occasioned by the application, which is the subject of the objection, is not sufficient. Nor should a Clause 4.6 variation be used as a means of effecting general planning changes which are contemplated in *Part 3* of the Act
- iv) Whether the objection is well founded.

In the matter of *Wehbe v Pittwater Council* (156 LGERA 446-465 at 457) Preston J sets out the various ways in which a departure from development standards may be justified, i.e.

- 1 by establishing that the objectives of the standard are satisfied;
- 2 by establishing that the objective of the standard is not relevant in the particular case;
- 3 by establishing that the objective of the standard would be defeated;
- 4 by establishing that the standard has been abandoned; and

- 5 by establishing that the zoning of the land is inappropriate.

We note the decision of the Land & Environment Court in the matter of Four2Five Pty Ltd V Ashfield Council (2013) NSWLEC 90, which indicates that merely showing that the development achieves the objectives of the development standard will be insufficient to justify that a development is unreasonable or unnecessary in the circumstances of the case for the purposes of an objection under Clause 4.6. This aspect will be addressed in this report.

### 3.2 REASONS FOR SUPPORT

The objects of the Act are:

a) To encourage:

- i. The proper management, development and conservation of natural and man-made resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.
- ii. The promotion and co-ordination of the orderly and economic use and development of land.

In our opinion, strict compliance with the development standard is *unreasonable or unnecessary* for the reasons espoused in this report, as required to be addressed by the above L&EC decision.

The surrounding area is characterised by predominantly residential development of various eras and built forms. The character of the area has evolved into different forms of residential development, particularly as various town planning policies have changed over the years. The proposed development is therefore consistent with the character of the area, being located in a transitional area, where older style dwellings are being replaced with new contemporary dwellings, which has occurred at No 109 Frenchs Forest Road.

In instances, such as this proposal on an undersized lot, a 0.45:1 FSR significantly reduces the dwelling size and persons are redeveloping houses on the basis of either achieving the required FSR under the LEP, obviously on larger lots, or in this case building a reasonable sized family home on a smaller lot. The sizes of houses in the area are generally large and a house of this size would not be out of character with the streetscape. This also needs to be put into context with the cost of land and redeveloping.

Given the fact that the general character of the area, was carefully considered during the preparation of the proposal, the coordination of the orderly and economic use and development of the land will most appropriately be achieved by supporting variations to the relevant development standards, noting the non-compliance with the standard.

It is also relevant that, as a general principle, the highest and best economic use of land which has been identified as appropriate for residential development, will conversely act to preserve the character of the area. Having regard to the above we consider that the approach taken serves the objects of the Act of promoting the orderly and economic use of land.

It is not considered that a variation to the development standard in these circumstances would act as a general planning change more appropriately dealt with under *Part 3* of the *Environmental Planning & Assessment Act 1979*.

It is considered that this case represents an individual circumstance in which Clause 4.6 was intended to be available to set aside compliance with unreasonable or unnecessary development standards that do not have a significant impact on adjoining developments.

### 3.3 MATTERS TO BE ADDRESSED IN ASSESSMENT OF A VARIATION – THE FIVE ‘WINTEN’ TESTS

The relevant matters for determination and consideration of the SEPP 1 objection are, noting the Winten Test was under the SEPP 1 provisions:

- ii) Is the planning control in question a development standard?
- iii) What is the underlying purpose of the development standard?
- iv) Is compliance with the development standard 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 5(a)(i) and (ii) of the EP&A Act?
- v) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? In responding to this question, it should be determined whether a development which complies with the development standard is unreasonable or unnecessary.
- vi) Is the objection well founded?

### 3.4 IS THE PLANNING CONTROL IN QUESTION A DEVELOPMENT STANDARD?

The EP&A Act defines development standards 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:*

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) the proportion or percentage of the area of a site which a building or work may occupy,*
- (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,*
- (e) the intensity or density of the use of any land, building or work,*

- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) the volume, nature and type of traffic generated by the development,*
- (i) road patterns,*
- (j) drainage,*
- (k) the carrying out of earthworks,*
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) the provision of services, facilities and amenities demanded by development,*
- (n) the emission of pollution and means for its prevention or control or mitigation, and*
- (o) such other matters as may be prescribed.*

We are of the opinion that the provisions of Clause 4.4 is a *development standard* as defined by the EP&A Act, being a standard fixed in respect of *the site area (a) and floor space of a building (d)*.

## **4 Objectives of Development Standards**

### **4.1 CLAUSE 4.4 – FLOOR SPACE RATIO**

Clause 4.4 is a development standard that may only be varied if the application is accompanied by a written request that adequately addresses the required matters.

The basis of this report is to demonstrate that the FSR requirement of 0.45:1 is unreasonable considering the specific circumstances of this case is not appropriate given the desired future character of the locality and the minimal adverse environmental impacts including amenity impacts on neighbouring residential properties resulting from the proposed development. The variation sort is 18.48%, if assessed on the 0.45:1 control under Clause 4.4 or 6.6% if consideration or weight is applied to subclause 4.1.3.1 of the DCP. The latter specifically applies to undersized lots and references that clause 4.6 is an appropriate ‘tool’ for considering development on such lots.

If development is to be encouraged in Manly in such streets, buildings that exceed the FSR requirement, but comply with other controls will allow more viable buildings to be designed and constructed. This is even more essential given that the area contains older housing stock that should be redeveloped as provided by the LEP. The built form desired by Council has not been realised to date. The development of the subject site will be compliant with the outcomes envisaged by the LEP and other planning documents highlighted in the SoEE prepared by this firm.

In addition, the proposed streetscape when viewed from various locations will provide variety and interest. What is achieved by permitting an increase in FSR is a streetscape that has various architectural elements.

There will also be a variety of building materials used on the proposed dwelling to complement the existing and future streetscape along Frenchs Forest Road.

On this basis, the opportunity is available to highlight that visual significance through the proposed building's siting and the general high quality building design, and as stated above, to comply with clause 4.4(2).

It has been demonstrated that the proposed building has been designed to take into consideration its surroundings and "fit in" with the streetscape. Therefore, restricting the FSR is unreasonable and unnecessary for the proposed development and Council has recognized that there does need to be a control that applies to undersized lots.

It is also considered that the subject development will present a high-quality urban form, having regard to existing development in the area. It is noted that the Council has approved the redevelopment of No 109 Frenchs Forest Road, which does not comply with the FSR control. The variation for this property was slightly different, as this property is larger (405m<sup>2</sup>) and has a wider frontage. Therefore, the variation was in this instance less than 10%.

## 5 Justification for Non-Compliance with the Development Standards

### 5.1 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (CLAUSE 4.6(3)(A))?

Compliance with the development standards under Clause 4.4 is both unreasonable and unnecessary in this case given that the characteristics of the site and the circumstances of the proposed building to allow for the proposed FSR.

In *Wehbe v Pittwater Council* (2007) NSW LEC 827, Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary.

The judgement goes on to state that:

*The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved.*

*However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).*

The potential site development is in keeping with the existing character and the form of development that has occurred in the immediate area having regard to the R2 zone applicable to the site and sites in the immediate area.

In addition, the proposed streetscape when viewed from various locations will provide variety and interest. What is achieved by permitting the proposed development is a streetscape that has various architectural elements, but generally consistent heights, setbacks and scale.

Having regard to all of the above, it is our opinion that compliance with the floor space ratio development standard is unnecessary in the circumstances of the case as the development meets the objectives of that standard and the zone objectives, as described at Part 3 of this written variation request. On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

In our opinion, the best planning practice should recognise these constraints and respond to the opportunity to value add to this infill development by going beyond basic numerical compliance checking, and consider broader structural and urban design frameworks. On this basis, the opportunity is available to consider variations through the proposed building's siting and the general high quality building design, and as stated above, to comply with clause 4.4

## **5.2 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD (CLAUSE 4.6(3)(B))?**

**(B) that there are sufficient environmental planning grounds to justify contravening the development standard.**

Having regard to the objectives of the *Environmental Planning and Assessment Act 1979* sufficient environmental planning grounds exist in this case to justify breaching the floor space ratio control for a dwelling house. In particular the objects under section 1.3(a), (b), (c), (g) and (h) are pursued by this development. The objective seeking orderly and economic development of land is clearly supported by approval of this development.

Part of the environmental planning grounds in this matter arise from the fact that this is an existing lot that cannot be increased in size to meet the standard due to part of the lot being acquired for road widening purposes. A larger lot (say 500m<sup>2</sup>), in our opinion, would have reasonably met the FSR control. But the subject lot is 137.4m<sup>2</sup> less than the minimum lot size.

Clause 4.6(3)(b) requires that the written request to vary a development standard demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard. In order to demonstrate that there are sufficient environmental planning grounds to justify varying the development standard and to satisfy objective (1)(b) of Clause 4.6 by demonstrating that the proposed variation allows for a better outcome for and from the development. The following discussion is provided:

- The discussion provided throughout this variation request demonstrates that the existing lot size will not result in any adverse environmental impacts, in terms of amenity impacts, nor will there be any adverse streetscape impacts given the nature of the departure. It is submitted that there are sufficient environmental planning grounds to support the variation.

The FSR requirements under LEP 2013 are, in the circumstances of this matter, unreasonable and unnecessary, as discussed in this submission, being an existing lot. The site is zoned for a dwelling house, with a lot size control of 500m<sup>2</sup>.

Exceedance of the FSR control is therefore not a prohibition, but more relating to development that may be developed in residential zones, with lot size controls restricting development on lots less than 500m<sup>2</sup>. The zoning of the land clearly envisages a dwelling house to be constructed on the property.

**(C) In addition, under cl 4.6(4)(a)(ii) of the LEP, the consent authority must also be satisfied that:**

- (1) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and with the objectives for the development within the zone in which the development is proposed to be carried out.

Having regard to the objectives of the *Environmental Planning and Assessment Act 1979* sufficient environmental planning grounds exist in this case to justify breaching the FSR standard, in particular the fact that this is an existing property that has a portion of the front part of the property acquired for road widening purposes. In particular the objects under section 1.3(a), (b), (c), (g) and (h) are pursued by this development.

The objectives of the standard and the zone are addressed above under heading **A**. In addition the public interest is well served by a dwelling constructed on the land to replace an older style dwelling that is probably nearing its 'used by date'.

It is considered that this represents an individual response which Clause 4.6 was intended to be available to set aside compliance with the generic controls as unreasonable or unnecessary in the circumstances of this particular case.

## **6 Conclusion**

Having regard to the objectives of the *Environmental Planning and Assessment Act 1979* sufficient environmental planning grounds exist in this case to justify breaching the floor space ratio control. In particular the objects under section 1.3(a), (b), (c), (g) and (h) are pursued by this development. The objective seeking orderly and economic development of land is clearly supported by approval of this development.

It has been demonstrated above that the development is one that satisfies the objectives of Clause 4.4, and that Council can use its discretion under Clause 4.6 to vary the floor space ratio requirement.

Given that the constraints of the land were carefully considered during the preparation of the proposal, the coordination of the orderly and economic use and development of the land will most appropriately be achieved by supporting variations to the relevant development standard.

It is not considered that a variation to the development standard in these circumstances would act as a general planning change more appropriately dealt with under *Part 3* of the *Environmental Planning & Assessment Act 1979*.

It is considered that this case represents an individual circumstance in which Clause 4.6 was intended to be available to set aside compliance with unreasonable or unnecessary development standards.

It is considered that the variation to the development standard contained in Clause 4.4 of MLEP 2013 should be supported, because it is consistent with Clause 4.6, the objects of the EPA & A Act, the relevant aims and objectives of MLEP 2013 and the R2 Low Density Residential zone and would appear to create a negligible impact on the natural environment and the landscape character of the area.