

STATEMENT OF ENVIRONMENTAL EFFECTS

Alterations and
Additions to a
Residential Apartment

25/37-38 East
Esplanade, Manly

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Statement of Environmental Effects

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25, 37-38 East Esplanade, Manly

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1 Introduction

This Statement of Environmental Effects (SEE) has been prepared in support of a development application proposing alterations and additions to a residential unit within the existing shop top housing development at 37-38 East Esplanade, Manly. The subject site is the top floor apartment which is over 2 levels.

Hobbs Jamieson, the project architects, have responded to the client brief to redesign the existing top floor apartment. The apartment includes a roof level enclosed entertainment space which opens out to the roof terrace. The proposed design seeks to provide an upper level addition utilising the enclosed entertaining space as formalised habitable space and reconfigurations to the existing apartment layout. The scheme has been developed through detailed site and contextual analysis to identify the constraints and opportunities associated with the development of this unit having regard to the height, scale, proximity, use and orientation of surrounding development.

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

- Architectural Plans by Hobbs Jamieson
- Survey
- BCA report prepared by Beyond Certification

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

- Environmental Planning and Assessment Act 1979 (**EP&A Act**),
- Manly Local Environmental Plan 2013 (**MLEP 2013**),
- Manly Development Control Plan 2013 (**MDCP 2013**),
- State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

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

- The accompanying plans depict a high quality and contextually appropriate built form outcome that responds to adjacent and nearby development and the surrounding environment.
- The apparent height and bulk of the proposed development is compatible with that of surrounding development, and consistent with the desired future character of the locality.
- Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* (2005) NSW LEC 191, we have formed the considered opinion that most observers would not find the apparent size of the proposed development offensive, jarring or unsympathetic in the streetscape context.

- Whilst the proposal requires the consent authority to give favourable consideration to a variation to the building height development standard, strict compliance has been found to be unreasonable and unnecessary in this instance as the development is otherwise consistent with the objectives of the development standard and sufficient environmental planning grounds exist to support the variation (as outlined in the attached Clause 4.6 Variation Request).

2 Site Analysis

2.1 Site Description and location

2.1.1 The Site

The subject property is legally described as Lot 25 in Deposited Plan 3035 and is known as unit 25, 37-38 East Esplanade, Manly. The site is generally rectangular in shape with an area of 994.9m².

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



Figure 1: Aerial photograph of the site

Source: Six Maps

The existing development comprises a 7-8 storey brick and rendered building and is known as 'Capricorn'. Development along East Esplanade predominately consist of mixed use and residential flat buildings.

The building is orientated to the west with views to Manly Wharf and the surrounding Harbour. Manly Corso is located in close proximity to the north of the site.

2.1.1 The Locality

The site is located within the E1 Local Centre Zone, as shown on the Zoning Map of MLEP 2013.



Figure 2: Zoning Map

The surrounding area comprises development of varying use, scale, density, age and architectural style. A visual representation of the subject site and surrounding development, including development in the wider E1 zone is shown in Figures below.



Figure 3: Existing Streetscape



Figure 4: Existing enclosed entertainment space at the top level

3 Description of Proposed Development

3.1 Details of the proposed development

The proposed development is depicted in the architectural plans set prepared by Hobbs Jamieson Architects. The works relate to unit 25 which occupies the two top floors of the building. The application provides for the following works:

- Partial demolition including walls and staircase
- Internal reconfigurations to level 7 to create 3 bedrooms, bathroom, media room, study nook and family room. BED1 will include a WIR and ensuite.
- Level 8 proposes creating a new open plan living/dining/kitchen space with a WC and powder room. This will open out to deck area which will include a new BBQ.
- Pergola to cover part of the top level terrace.
- New internal stair and private lift provides access to each floor of the apartment.
- Planter box with seating to top level terrace

The alterations and additions seek to create an apartment of exceptional amenity by making use of underutilised developable area while maintaining the existing character of the building and its bulk and scale.

4 Statutory Planning Framework

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

4.1 Manly Local Environmental Plan 2013

4.1.1 Zoning

MLEP 2013 applies to the subject site and this development proposal. The subject site is located within the E1 Local Centre zone and the proposed commercial building is permissible with consent.

The proposal is consistent with the stated objectives of the E1 Local Centre zone, as follows:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*

Comment: Works relate to an existing residential unit

- *To encourage investment in local commercial development that generates employment opportunities and economic growth.*

Comment: Works relate to alterations and additions to an existing residential unit.

- *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.*

- Comment: The proposed works to the existing unit will contribute positively to residential development in the area by providing high quality apartments that maximise the area superior locational attributes.

- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*

Comment: Ground floor commercial units will not be impacted.

- *To minimise conflict between land uses in the zone and adjoining zones and ensure amenity for the people who live in the local centre in relation to noise, odour, delivery of materials and use of machinery.*

Comment: The existing residential use is maintained and will not result in any adverse conflicts with other land uses.

- *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*

Comment: Works relates to the top floor apartment. No change to existing street frontage.

- *To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment.*

Comment: The overall scale of the building is largely preserved with the proposed works.

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

4.1.2 Height of buildings

Pursuant to the Height of Buildings Map of MLEP 2013, the site has a maximum building height limit of 15m.

The objectives of this control are as follows:

- (a) *to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*
- (b) *to control the bulk and scale of buildings,*
- (c) *to minimise disruption to the following—*
 - i. *views to nearby residential development from public spaces (including the harbour and foreshores),*
 - ii. *views from nearby residential development to public spaces (including the harbour and foreshores),*
 - iii. *views between public spaces (including the harbour and foreshores),*
- (d) *to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*
- (e) *to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses*

Building height is defined as follows:

building height (or height of building) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like

The proposed development relates to an existing top floor unit of a 7 & 8 storey which is already considerably over the 15m. The maximum building height prescribed by clause 4.3 of MLEP 2013 is a development standard, as defined by the EP&A Act. Clause 4.6 of MLEP 2013 provides a mechanism by which a development standard can be varied.

The objectives of clause 4.6 of MLEP 2013 are:

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

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

4.1.3 Floor space ratio

Clause 4.4(2) of MLEP 2013 prescribes a maximum floor space ratio of 3.0:1 with respect to the subject site. The objectives of this clause are:

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

The existing development has a gross floor area of 1782.74m² and a floor space ratio of 1.776:1. The proposed development will add an additional 21m² of GFA which brings the proposed GFA to be 1803.74m² or 1.797:1 in compliance with the development standard.

4.1.4 Heritage conservation

The site is not located within a heritage conservation area nor is it identified as a heritage item. It is within proximity to identified heritage items and heritage conservation areas. The works relates to an existing top floor apartment and will have no impact on the heritage value of items within proximity to the building.

Overall, Council can be satisfied that the proposed development is consistent with the requirements and objectives of clause 5.10 of MLEP 2013.

4.1.5 Acid sulfate soils

The site is located within Class 4 as shown on the Acid Sulfate Soils Map of MLEP 2013. No works are proposed that would risk exposing acid sulfate soils.

4.1.6 Stormwater management

The consent authority can be satisfied that the proposal is consistent with the provisions of clause 6.4 of MLEP 2013. The proposed additions can connect to the existing drainage system for the building.

4.1.7 Foreshore scenic protection area

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

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

Comment: The proposed development will not overshadow the foreshore. The works related to the top floor apartment and will not impact views from public places.

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

Comment: The works will not significantly alter the built form of the building that it would detrimentally impact on the scenic quality of the area. Existing large Norfolk Pine trees along the foreshore provide additional screening of the development.

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

Comment: Given the location of the apartment being significantly above the foreshore area there are no unreasonable impact anticipated with the works.

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

Comment: The development will have no conflict with coastal activities.

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

4.1.8 Active street frontages

The East Esplanade street frontages are identified on the Active Street Frontages Map of MLEP 2013. There will be no change the existing street frontage of the building.

4.1.9 Design excellence

In accordance with the provisions of clause 6.13 of MLEP 2013, development consent must not be granted for the erection of a new building or external alterations to an existing building on land within the E1 Local Centre zone unless the consent authority considers that the development exhibits design excellence.

Clause 6.13(4) of MLEP 2013 prescribes a series of matters to be considered when determining whether the development exhibits design excellence. These matters are considered, as follows:

- (a) *contains buildings that consist of a form, bulk, massing and modulation that are likely to overshadow public open spaces, and*

Comment: The proposed development does not result in any unreasonable or excessive overshadowing of nearby public places.

- (b) *is likely to protect and enhance the streetscape and quality of the public realm, and*

Comment: The existing streetscape will not be impacted with the proposed works.

- (c) *clearly defines the edge of public places, streets, lanes and plazas through separation, setbacks, amenity, and boundary treatments, and*

Comment: Maintained as per existing

- (d) *minimises street clutter and provides ease of movement and circulation of pedestrian, cycle, vehicular and service access, and*

Comment: Existing pedestrian and vehicle access maintained.

- (e) *encourages casual surveillance and social activity in public places, streets, laneways and plazas, and*

Comment: As per existing circumstance. The works will not change the existing level of casual surveillance achieved from ground floor commercial and above level residential.

- (f) *is sympathetic to its setting, including neighbouring sites and existing or proposed buildings, and*

Comment: The proposed development has been sensitively designed to respond to the surrounding context, in particular adjoining residential apartments.

- (g) *protects and enhances the natural topography and vegetation including trees, escarpments or other significant natural features, and*

Comment: The site does not contain any significant natural features.

- (h) *promotes vistas from public places to prominent natural and built landmarks, and*

Comment: Existing vistas from public places will not be impacted.

- (i) *uses high standards of architectural design, materials and detailing appropriate to the building type and location, and*

Comment: The proposed alterations and additions is a superior design response that will significantly enhance the amenity of the apartment while largely maintaining the buildings existing character.

- (j) *responds to environmental factors such as wind, reflectivity and permeability of surfaces, and*

Comment: The proposed building is thermally efficient and sustainable, providing a high level of amenity for future occupants of the spaces proposed.

- (k) *coordinates shared utility infrastructure to minimise disruption at street level in public spaces.*

Comment: As per existing.

As such, we are confident that Council will find that the development exhibits design excellence, consistent with the provisions of clause 6.13 of MLEP 2013.

4.1.10 Gross floor area in Zone B2

Clause 6.16(3) of MLEP 2013 prescribes that development consent must not be granted to the erection of a building on land identified on the *Key Sites Map* unless the consent authority is satisfied that at least 25% of the gross floor area of the building will be used as commercial premises.

This application does not propose any works to the existing level of commercial units within the building.

4.2 Manly Development Control Plan 2013

4.2.1 Townscape (Local and Neighbourhood Centres)

The proposed development is consistent with the requirements and objectives of clause 3.1.3 of MDCP 2013, as follows:

- The proposed alterations and additions have been designed to sensitively respond to the context of the site and the opportunities the existing built form provides the top floor unit
- The height of the development as it presents to East Esplanade will be maintained as per existing. The opportunity for additional floor space at the top level utilises an existing space and is recessed further to the rear than the lower level. It will not be discernible from the street.
- The overall bulk and scale of the building will be largely per existing with a negligible increase in gross floor area proposed.
- There will be no impact on the townscape character with existing ground floor commercial units being maintained.

4.2.2 Heritage Consideration

The site is located in proximity to identified heritage items and heritage conservation area which has been addressed earlier in this statement. No heritage impacts are anticipated with the proposed works.

4.2.3 Landscaping

No change to the existing landscaping on site. A planter box seated area is proposed to the terrace.

4.2.4 Sunlight Access and Overshadowing

The proposed development is supported by Solar Access Diagrams that demonstrate minor additional overshadowing resulting from the proposed development. The development will see some minor overshadowing to windows of 29 East Esplanade top floor apartments at 3pm. The proposal is consistent with this control.

4.2.5 Privacy and Security

The proposed development will not change the existing privacy outcome and its relationship with adjoining development. The works do not give rise to any additional privacy risks.

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

4.2.6 Maintenance of Views

It appears unlikely that the proposed development will result in any unreasonable impacts upon existing view corridors from adjoining apartment buildings. The top level of the subject site sits higher than the adjoining buildings and will not impact on views. As such, the minor extension at this level will not impact any views. It is noted that the works will not significantly change the existing built form that would give rise to any significant view impacts.

The proposal is consistent with the objectives and requirements of clause 3.4.3 of MDCP 2013.

4.2.7 Sustainability

The application is supported by a BASIX Certificate which confirms that the proposed development meets the relevant water, thermal comfort and energy requirements.

4.2.8 Stormwater Management

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

Stormwater is to be collected and directed to Council's stormwater drainage system via the existing drainage circumstance on site.

4.2.9 Waste Management

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

The application is supported by a Waste Management Plan which can be found within the architectural set.

4.2.10 Built Form Controls Compliance Table

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

Control	Requirement	Proposed	Compliance
Part 4.2 – Development in Business Centres			
4.2.1 FSR	To provide firm guidelines as to the potential development of a centre and an individual site.	The proposed development complies with the maximum FSR prescribed for the site.	Yes
4.2.2 Height of Buildings	Height of Building is a development standard contained under LEP clause 4.3 and applies to land shown on the LEP Height of Building Map.	The overall height of the building is unchanged however it is already above the 15m development standard. A clause 4.6 is provided.	No – clause 4.6 provided
4.2.3 Setbacks Controls in LEP Zones B1 and B2	All buildings must be constructed to the public road and side boundaries of the allotment.	No change to existing setbacks.	Yes
4.2.5.1 Design for Townscape	Maintain the predominant pattern of narrow fronted buildings within the town centre with new buildings incorporating modulation of the street wall such as recesses or modulation in the building facade to visually reduce the length and perceived bulk of the street wall.	The works to the top floor apartment will have a negligible impact on the town centre characteristics.	Yes

Control	Requirement	Proposed	Compliance
	Maintain existing setbacks. New development to enhance townscape characteristics, disregarding existing unsympathetic buildings.		
4.2.5.2 Height of Buildings: Consideration of Townscape	Consideration of the appropriate heights within the maximum Building Height development standard and exceptions to the standard in the LEP.	The height of both façades is consistent with that of the existing building, with the upper floor remaining recessed to minimise the visual impact of the development.	Acceptable on merit
4.2.5.3 Security Shutters	Shop window security roller shutters are not permitted on the external face of the building. Such screens may only be used behind the window display.	No change to existing ground floor commercial units. No shutters proposed.	Yes
4.2.5.4 Car Parking and Access	In exceptional circumstances and having regard to the merits of the application, Council may be prepared to allow a reduction in the any parking rate/ requirements in Manly Town Centre (including residential and commercial) where the applicant	No change to existing car parking access.	Yes

Control	Requirement	Proposed	Compliance
	has demonstrated that: i) in the case of all uses other than dwellings, the dimensions or topography of the site would physically prevent the provision of some or all of the required spaces; ii) the required access interferes with the continuity of retail frontage or interrupts the frontage of the property in other ways such that there would be a conflict with any other provisions of this DCP in particular the townscape objectives; or iii) the movement of vehicles to and from the site would cause unacceptable conflict with pedestrian movements, special servicing arrangements for pedestrianised areas or contribute to congestion at key intersections.		
4.4.4.1 Awnings	Continuous footpath awnings must be provided on all street	No change to existing ground floor units or street frontage.	Yes

Control	Requirement	Proposed	Compliance
	frontages generally consistent with the streetscape. The width, fascia height and method of support of all awnings in any street block must be consistent with entrances to public lands and through-site links allowed to be accentuated and generally in accordance with given dimensions.		

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

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

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

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

SEPP 65 does not apply in this instance as it is not considered to be a substantial redevelopment or refurbishment of the existing building. It relates to alterations and additions to a single unit within the building.

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

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

(i) any environmental planning instrument

The proposed alterations and additions to the residential apartment is permissible and consistent with the provisions of MLEP 2013 and MDCP 2013 as they are reasonably applied to the proposed works.

(ii) Any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

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

(iii) Any development control plan

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

(iiia) Any Planning Agreement that has been entered into under section 7.4 or any draft planning agreement that a developer has offered to enter into under Section 7.4, and

N/A

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

N/A

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

N/A

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

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

Context and Setting

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

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

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

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

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

These matters have been discussed in detail earlier in this report. The potential impacts are considered to be acceptable with regard to the relevant provisions of MDCP 2013.

Access, transport and traffic:

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

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

These issues have been discussed in detail in the report.

Public Domain

The proposed development will have no adverse impact on the public domain.

Utilities

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

Flora and Fauna

N/A

Waste Collection

No change to existing waste collection for the building

Natural hazards

N/A

Economic Impact in the locality

The proposed development will generate temporary employment during construction. On-going employment will be provided through the commercial floor spaces proposed, in addition to services associated with the management of the building and proposed tenancies/land uses.

Site Design and Internal Design

- i) *Is the development design sensitive to environmental considerations and site attributes including:*
 - *size, shape and design of allotments*
 - *The proportion of site covered by buildings*

- *the position of buildings*
- *the size (bulk, height, mass), form, appearance and design of buildings*
- *the amount, location, design, use and management of private and communal open space*
- *Landscaping*

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

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

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

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

Construction

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

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

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

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

- *Does the proposal fit in the locality*
- *Are the constraints posed by adjacent development prohibitive*
- *Would development lead to unmanageable transport demands and are there adequate transport facilities in the area*

- *Are utilities and services available to the site adequate for the development*
- *Are the site attributes conducive to development*

The adjacent development does not impose any unusual or impossible development constraints.

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

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

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

(e) The public interest

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

5 Conclusion

The proposal is permissible and in conformity with the objectives of MLEP 2013 as they reasonably relate to this form of development on this particular site. The proposed development appropriately responds to the guidelines contained within the MDCP 2013 and the massing and built form established by nearby developments.

Hobbs Jamieson, the project architects, have responded to the client brief to design a contextually responsive apartment that takes advantage of the superior locational attributes. In this regard, the scheme has been developed through detailed site and contextual analysis to identify the constraints and opportunities associated with the development of this site.

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

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

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

Boston Blyth Fleming Pty Limited



Greg Boston

Director

ANNEXURE 1

CLAUSE 4.6 VARIATION REQUEST – HEIGHT OF BUILDINGS

1 Clause 4.6 variation request – Height of Buildings

1.1 Introduction

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

1.2 Manly Local Environmental Plan 2013 (MLEP 2013)

1.2.1 Clause 4.3 – Height of Buildings

Pursuant to the Height of Buildings Map of MLEP 2013, the site has a maximum building height limit of 15m.

The objectives of this control are as follows:

- (a) *to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*
- (b) *to control the bulk and scale of buildings,*
- (c) *to minimise disruption to the following:*
 - (i) *views to nearby residential development from public spaces (including the harbour and foreshores),*
 - (ii) *views from nearby residential development to public spaces (including the harbour and foreshores),*
 - (iii) *views between public spaces (including the harbour and foreshores),*
- (d) *to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*
- (e) *to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

Building height is defined as follows:

building height (or height of building) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like

Ground level existing is defined as follows:

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

The overall maximum height of the building to the top of the lift shaft and stairwell is to be unchanged, however the works relate to the top floor apartment which is already over the 15m control. The building height has been taken from the excavated garage basement level and from the existing natural ground level. The resultant heights are:

- When measured from the garage basement level – **28.79m or 91.93% variation**
- When measured from natural ground level – **26.34m or 75.6% variation**

1.2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP 2013 provides:

The objectives of this clause are:

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

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

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner. At [90] of *Initial Action* the Court held that:

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

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

Clause 4.6(2) of MLEP 2013 provides:

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

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

Clause 4.6(3) of MLEP 2013 provides:

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

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

The proposed development does not comply with the building height development standard at clause 4.3 of MLEP 2013 which specifies a building height of 15m. However, strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

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

Clause 4.6(4) of MLEP 2013 provides:

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

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

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

The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest **because** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]).

The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

The Local Planning Panels Direction issued by the Minister for Planning and Public Spaces, dated 30 June 2020, provides that local planning panels have the delegation to approve development that contravenes a development standard imposed by an environmental instrument by more than 10%.

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

1.3 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

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

1. Is clause 4.3 of MLEP 2013 a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 of MLEP 2013 and the objectives for development for in the zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of MLEP 2013?

1.4 Request for variation

1.4.1 Is clause 4.3 of MLEP 2013 a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes a provision of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are

fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

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

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

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

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

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

Consistency with objectives of the building height development standard

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

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

Comment: The variation represents a technical non-compliance as it will maintain the prevailing building height of the existing development. The works do not impact on the existing streetscape character.

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

Comment: The proposed development will maintain its existing height. Further, the proposed development is maintained well below the maximum permitted floor space ratio, which is the primary development standard to control the bulk and scale of development.

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

The non-compliant elements of the proposed development do not detract from consistency with this objective.

- (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: There are no apparent view corridors obtained over the subject site, and as such, it appears unlikely that the proposed development will result in any unreasonable impacts upon views.

The works do not substantially alter the existing built form that impact views across the site. The upper levels of the subject site sit higher than adjoining apartment building which, as such, the non-compliant elements would not impact on views.

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

Comment: The non-compliant elements of the proposed development do not result in any adverse impacts upon the amount of sunlight received by adjoining properties.

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

Comment: Not applicable – the site is located within the E1 Local Centre zone and not within a recreation or environmental protection zone.

Consistency with zone objectives

The subject property is zoned E1 Local Centre zone pursuant to MLEP 2013. The development's consistency with the stated objectives of the E1 zone is as follows:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*

Comment: Works relate to an existing residential unit

- *To encourage investment in local commercial development that generates employment opportunities and economic growth.*

Comment: Works relate to alterations and additions to an existing residential unit.

- *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.*
- Comment: The proposed works to the existing unit will contribute positively to residential development in the area by providing high quality apartments that maximise the area superior locational attributes.
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*

Comment: Ground floor commercial units will not be impacted.

- *To minimise conflict between land uses in the zone and adjoining zones and ensure amenity for the people who live in the local centre in relation to noise, odour, delivery of materials and use of machinery.*

Comment: The existing residential use is maintained and will not result in any adverse conflicts with other land uses.

- *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*

Comment: Works relates to the top floor apartment. No change to existing street frontage.

- *To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment.*

Comment: The overall scale of the building is largely preserved with the proposed works.

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

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

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

As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient environmental planning grounds

- The existing development is significantly non-compliant with the 15m development standard with the proposed works associated with the top floor apartment. The entire top floor apartment sit above the 15m control.
- The proposed works to level 8 to convert the enclosed entertainment space to kitchen/living/dining area maintains the existing roof height of that level with a minor addition of floor space and an open pergola. This level will remain recessed from the edged of the front façade ensuring it remains indiscernible from the street.
- The bulk and scale of the development is largely maintained with only a small addition of 21m of GFA to the top level. The works do not contribute to any unreasonable bulk and scale concerns. It is noted that the building is significantly under the 3:1 FSR control which is the main driver of bulk and scale.
- The works seek to utilise existing spaces to facilitate the new works and do not substantially change the existing built form. In that regard, the amenity outcomes with adjoining apartments does not substantially change either in relation to view sharing, privacy and overshadowing.
- The proposed works will still sit lower than the existing maximum height of the building measured to the top of the lift shaft and stairwell.

To insist upon strict compliance with the building height standard would prevent any works occurring to the existing building above the height standard and in circumstances where existing FSR is below the maximum prescribed standard would prevent the orderly and economic use and development of the land.

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

1.4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the E1 Local Centre Zone

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

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

The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

As demonstrated in this request, the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

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

1.4.5 Secretary's concurrence

The Local Planning Panels Direction issued by the Minister for Planning and Public Spaces, dated 30 June 2020, provides that local planning panels have the delegation to approve development that contravenes a development standard imposed by an environmental instrument by more than 10%.

Concurrence of the Secretary can therefore be assumed in this case.

1.5 Conclusion

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

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

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

Boston Blyth Fleming Pty Limited



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