

REVIEW OF DETERMINATION ASSESSMENT REPORT

Application Number:	REV2018/0018
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Responsible Officer:	Thomas Prosser
Land to be developed (Address):	Lot B DP 404022, 61 Cutler Road CLONTARF NSW 2093
Proposed Development:	Review of Determination of Application DA2017/1300 for demolition and construction of a new dwelling house
Zoning:	Manly LEP2013 - Land zoned R2 Low Density Residential
Development Permissible:	Yes
Existing Use Rights:	No
Consent Authority:	Northern Beaches Council
Delegation Level:	DDP
Land and Environment Court Action:	No
Owner:	Frank Jeremy Hopson Jessica Hee Jin Jun
Applicant:	Jessica Hee Jin Jun

Application lodged:	17/09/2018
Integrated Development:	No
Designated Development:	No
State Reporting Category:	Refer to Development Application
Notified:	21/09/2018 to 09/10/2018
Advertised:	Not Advertised
Submissions Received:	5
Recommendation:	Refusal

Estimated Cost of Works:	\$ 945,450.00
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ASSESSMENT INTRODUCTION

The application has been assessed in accordance with the requirements of the Environmental Planning and Assessment Act 1979 and the associated Regulations. In this regard:

- An assessment report and recommendation has been prepared (the subject of this report) taking into account all relevant provisions of the Environmental Planning and Assessment Act 1979, and the associated regulations;
- A site inspection was conducted and consideration has been given to the impacts of the development upon the subject site and adjoining, surrounding and nearby properties;
- Notification to adjoining and surrounding properties, advertisement (where required) and referral to relevant internal and external bodies in accordance with the Act, Regulations and relevant Development Control Plan;

- A review and consideration of all submissions made by the public and community interest groups in relation to the application;
- A review and consideration of all documentation provided with the application (up to the time of determination);
- A review and consideration of all referral comments provided by the relevant Council Officers, State Government Authorities/Agencies and Federal Government Authorities/Agencies on the proposal.

SUMMARY OF ASSESSMENT ISSUES

Environmental Planning and Assessment Act 1979 - Section 82A - Environmental Planning and Assessment Act 1979 - Section 8.2

Manly Local Environmental Plan 2013 - 4.6 Exceptions to development standards

Manly Development Control Plan - 3.4.2 Privacy and Security

Manly Development Control Plan - 3.4.3 Maintenance of Views

Manly Development Control Plan - 4.1.2 Height of Buildings (Incorporating Wall Height, Number of Storeys & Roof Height)

Manly Development Control Plan - 4.1.3 Floor Space Ratio (FSR)

Manly Development Control Plan - 4.1.4 Setbacks (front, side and rear) and Building Separation

Manly Development Control Plan - 4.1.5 Open Space and Landscaping

Manly Development Control Plan - 4.1.6 Parking, Vehicular Access and Loading (Including Bicycle Facilities)

Manly Development Control Plan - 4.1.9 Swimming Pools, Spas and Water Features

SITE DESCRIPTION

Property Description:	Lot B DP 404022 , 61 Cutler Road CLONTARF NSW 2093
Detailed Site Description:	<p>The subject site consists of one allotment located on the eastern side of Cutler Road, Clontarf.</p> <p>The site is irregular in shape with a frontage of 28m along Cutler Road and a depth of 24.88m along the southern boundary and 12.53 along the northern boundary. The site has a surveyed area of 461.6m².</p> <p>The site is located within the R2 Low Density Residential zone under the MLEP 2013 and accommodates a two storey weather board and brick house with tile roof.</p> <p>The site slopes down from the road in a south-eastern direction. The site terrain can be described as gentle to moderate as it descends from street level before flattening out across the rear of the site.</p> <p>Two drainage easements traverse the rear of the site.</p> <p>Detailed Description of Adjoining/Surrounding Development</p> <p>Adjoining and surrounding development is characterised by two and three storey dwelling houses in landscaped settings.</p>

Map:



SITE HISTORY

The land has been used for residential purposes for an extended period of time. A search of Council's records has revealed the following relevant history:

DA1995/93: Development Consent approved 14/07/1995 for additions and alteration to the existing dwelling including a second storey addition

The Development Application the subject of this review (DA2017/1300), was recommended for approval and provided to Council's Development Determination Panel on 13 June 2018. The Development Determination Panel resolved to refuse the application for the following reasons:

"1.Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.3 Height of Buildings of the Manly Local Environmental Plan 2013, having regard to the requirements and objectives of the control.

2.Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.4 Floor Space Ratio of the Manly Local Environmental Plan 2013, having regard to the requirements and objectives of the control.

3.Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 3.4.2 Privacy and Security of the Manly Development Control Plan, having regard to the requirements and objectives of the control.

4.Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 3.4.3 Maintenance of Views of the Manly Development Control Plan, having regard to the requirements and objectives of the control."

PROPOSED DEVELOPMENT IN DETAIL

The proposal is for demolition of the existing dwelling-house and construction of a new dwelling house including the following:

Ground Floor Level

- Cinema
- Sitting Room
- Guest Bedroom with ensuite bathroom
- separate bathroom
- Games Room and wet bar
- Deck and rain tank
- Pool equipment/ plant room
- Lift

First Floor Level

- Dining and Kitchen
- Pantry
- Laundry
- Store
- Toilet
- Entry
- Balcony to north and south
- Lift

Second Floor Level

- Bedroom 1 with walk in robe and ensuite
- Bedroom 2
- Bedroom 3
- Bathroom
- Deck
- Lift

External Components

- Landscaping
- Double garage
- Swimming pool

Amendments to the Proposed Development under S8.2 Request for Review

- Reconfiguration of ground floor including addition of window to wet bar
- Re-configuration of first floor
- Increase in garage width
- Provision of frosted glass to lower 50% of south facing balustrade
- Increase in setback to top floor from 4.85m to 7.6m in order to provide a view corridor at this level

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979 (EPAA)

The relevant matters for consideration under the Environmental Planning and Assessment Act, 1979,

are:

In accordance with Section 8.2 of the Act, an applicant may request Council to review a determination of a development application, other than for a complying development, integrated development, designated development or a determination made by Council in respect to an application by the Crown. The development application does not fall into any of these categories, therefore the applicant may request a review.

In accordance with Section 8.2 of the Act, the request for the review must be made and determined within 6 months after the date of determination of the development application. The application was determined on the 13/06/2018 and the notice of determination was issued on 28/06/2018. The review was lodged on and is to be considered by Development Determination Panel on 12/12/2018, which is within 6 months of the date of determination.

Section 8.3 (3) provides that the Council may review a determination if in the event that the applicant has made amendments to the development described in the original application, the consent authority is satisfied that the development, as amended, is substantially the same as the development described in the original application.

The amendments to the proposal are outlined in the 'Detailed Description of Works' section of this report.

A review of the original and amended plans has found that there are fundamental similarities between the original and the amended design (being subject of the S8.2 Review) and the nature of the intended land use remains the same. Accordingly it is concluded that the amended scheme is substantially the same as the original proposal. Accordingly, it is considered that the proposal satisfies the requirements of Section 8.3 of the Act

EXISTING USE RIGHTS

Existing Use Rights are not applicable to this application.

BUSHFIRE PRONE LAND

The site is classified as bush fire prone land. Section 4.14 of the Environmental Planning and Assessment Act 1979 requires Council to be satisfied that the development conforms to the specifications and requirements of the version (as prescribed by the regulations) of the document entitled Planning for Bush Fire Protection.

A Bush Fire Report was submitted with the previous application prepared by Advanced Bushfire Performance solutions, dated May 2017.

NOTIFICATION & SUBMISSIONS RECEIVED

The subject development application has been publicly exhibited in accordance with the Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation 2000 and the relevant Development Control Plan.

As a result of the public exhibition process council is in receipt of 5 submission/s from:

Name:	Address:
Ms Jie Chen	59 Cutler Road CLONTARF NSW 2093
Mr John Rowland Grice	57 Cutler Road CLONTARF NSW 2093
Bartier Perry Lawyers	10/77 Castlereagh Street SYDNEY NSW 2000

Name:	Address:
Mrs Louise Anne Mary Lane	6 Castle Rock Crescent CLONTARF NSW 2093
Mr Robert Alexander Clarke Mrs Susan Rhonda Clarke	66 Cutler Road CLONTARF NSW 2093

The following issues were raised in the submissions:

- Geotechnical
- Overshadowing
- Drainage
- Amenity
- Building Height
- View Loss
- Floor Space Ratio
- Development potential and impact on neighbour

The matters raised within the submissions are addressed as follows:

- **Geotechnical**

Comment:

The Geotechnical Report submitted with the development application has been reviewed by Councils Development Engineer. The detail within the report is considered acceptable.

A condition would be imposed in the event of an approval.

This issue does not warrant refusal of the application.

- **Overshadowing**

Comment:

The proposal is compliant with the requirements for Sunlight Access and Overshadowing under the Manly DCP.

This issue does not warrant refusal of the application.

- **Drainage**

Comment:

A report entitled 'Removal of requirement for OSD' prepared by FJA Consulting Engineers was prepared on behalf of the applicant and submitted with the DA documents. The DA is accompanied by a stormwater plan. Councils Development Engineer has reviewed the proposal including the specialist reporting stormwater design and has considered the proposal satisfactory in accordance with Councils specifications for stormwater drainage.

This issue does not warrant refusal of the application.

- **Amenity**

Comment:

As further explained under the sections for Privacy and Maintenance of views in this report, the impact provided by the bulk and siting of the development provides an unreasonable impact for

neighbouring properties. In summary, this is as a result of the building bulk provided within the rear setback (and above the building height, breaching the FSR requirement) and the extent of the first floor balcony facing the neighbour. The original reason for refusal should be maintained.

- **Building Height**

Comment:

As provided in the comments under Clause 4.3 of the MLEP in this report, the request to vary the development standard is not supported. In summary, this is a result of the cumulative impact on views that the building height contributes to. The original reason for refusal should be maintained.

- **View Loss**

Comment:

The proposed development would result in view loss from affected properties that ranges from minor to severe. Given the non-compliance with the development standards (Building height and FSR) and the rear setback control, this results in an unreasonable impact on views. The original reason for refusal should be maintained.

- **Floor space ratio**

Comment:

As provided in the comments under Clause 4.4 of the MLEP in this report, the request to vary the development standard is not supported. In summary, this is a result of the cumulative impact on views that the Floor space ratio contributes to. The original reason for refusal should be maintained.

- **Development Potential and impact on neighbour**

Comment:

Given the orientation of the proposed first floor balcony, the proposed extent to include a non-compliance with the control for total open space above ground is unreasonable. The original reason for refusal should be maintained.

MEDIATION

No requests for mediation have been made in relation to this application.

REFERRALS

Internal Referral Body	Comments
Landscape Officer	No additional landscape comments nor conditions are provided over and above the referral comments contained in Trim 2018/538142
NECC (Development Engineering)	The applicant proposed some changes on the building height and size in this review application. The actual building footprint/ impervious area of the development has no significant change. As such, Development Engineering raise no new issue in this review. Please use the comment and condition (Trim 2018/299603) of the original DA 2017/1300.

Internal Referral Body	Comments

External Referral Body	Comments
Ausgrid: (SEPP Infra.)	The proposal was referred to Ausgrid. No response has been received within the 21 day statutory period and therefore, it is assumed that no objections are raised and no conditions are recommended.

ENVIRONMENTAL PLANNING INSTRUMENTS (EPIs)*

All, Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and Council Policies have been considered in the merit assessment of this application.

In this regard, whilst all provisions of each Environmental Planning Instruments (SEPPs, REPs and LEPs), Development Controls Plans and Council Policies have been considered in the assessment, many provisions contained within the document are not relevant or are enacting, definitions and operational provisions which the proposal is considered to be acceptable against.

As such, an assessment is provided against the controls relevant to the merit consideration of the application hereunder.

State Environmental Planning Policies (SEPPs) and State Regional Environmental Plans (SREPs)

SEPP 55 - Remediation of Land

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

SEPP (Building Sustainability Index: BASIX) 2004

A BASIX certificate has been submitted with the application (see Certificate No. 956471S_02).

A condition should be included in the requiring compliance with the commitments indicated in the BASIX Certificate in the event of an approval.

SEPP (Infrastructure) 2007

Ausgrid

Clause 45 of the SEPP requires the Consent Authority to consider any development application (or an application for modification of consent) for any development carried out:

- within or immediately adjacent to an easement for electricity purposes (whether or not the electricity infrastructure exists).

- immediately adjacent to an electricity substation.
- within 5.0m of an overhead power line.
- includes installation of a swimming pool any part of which is: within 30m of a structure supporting an overhead electricity transmission line and/or within 5.0m of an overhead electricity power line.

Comment:

The revised proposal was referred to Ausgrid. No response has been received within the 21 day statutory period and therefore, it is assumed that no objections are raised and no conditions are recommended.

Manly Local Environmental Plan 2013

Is the development permissible?	Yes
After consideration of the merits of the proposal, is the development consistent with:	
aims of the LEP?	Yes
zone objectives of the LEP?	Yes

Principal Development Standards

Standard	Requirement	Proposed	% Variation	Complies
Height of Buildings	8.5m	10.5m	23.5%	No (see comments)
Floor Space Ratio Site area: 461.6m ²	FSR: 0.4:1 (184.64m ²)	FSR: 0.61:1 (283m ²)	53%	No (see comments)

Compliance Assessment

Clause	Compliance with Requirements
2.7 Demolition requires development consent	Yes
4.3 Height of buildings	No
4.4 Floor space ratio	No
4.6 Exceptions to development standards	No
6.1 Acid sulfate soils	Yes
6.2 Earthworks	Yes
6.4 Stormwater management	Yes
6.8 Landslide risk	Yes
6.9 Foreshore scenic protection area	No
6.12 Essential services	Yes

Detailed Assessment

4.6 Exceptions to development standards

Building Height

Description of non-compliance:

Requirement:	8.5m
Proposed:	10.5m
Is the planning control in question a development standard?	YES
If numerical enter a % variation to requirement	23.5%

Assessment of request to vary a Development Standard:

The following assessment of the variation to Clause 4.3 - Height of building development standard has taken into consideration the recent judgement contained within Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 and an assessment of the request to vary the development standard in accordance with the requirements of Clause 4.6 is provided below:

Clause 4.6 Exceptions to Development Standards:

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

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

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

Comment:

Clause 4.4 Floor space ratio development standard is not expressly excluded from the operation of this clause.

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

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

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

(a) the consent authority is satisfied that:

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

cl 4.6 (4)(a)(i) (Justification) Assessment:

cl 4.6 (4)(a)(i) requires the consent authority to be satisfied that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). There are two separate matters for consideration contained within cl 4.6 (3) and these are addressed as follows:

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

Comment:

The Applicant's written request (attached to this report as an Appendix) has not demonstrated that the objectives of the development standard are achieved, notwithstanding the non-compliance with the development standard.

In doing so, the Applicant's written request has not adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by cl 4.6(3)(a).

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

Comment:

In the matter of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ provides the following guidance (para 23) to inform the consent authority's finding that the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard:

'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.'

s 1.3 of the EPA Act reads as follows:

1.3 Objects of Act (cf previous s5)

The objects of this Act are as follows:

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

different levels of government in the State,

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

Applicant's Written Request

The Applicant's written request has not demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard. The Applicant's written request submits that the proposal is consistent with the height bulk and scale of surrounding developments and that this meets the desired character for development on sloping sites. The request further submits that the design including stepping down provides an appropriate outcome for views. In conclusion, the request submits that the topography and geometry of the site along with the absence of unacceptable environmental impact provide an acceptability for the variation.

Planners Comments

Although it is noted that the site does have some slope, it is not accepted that there are sufficient environmental planning grounds for a 23% variation, given the potential impact on views and outlook associated with this non-complying aspect of the building. Furthermore, the significant non-compliance with the Floor space ratio and the non-compliance with rear setback shows that the extent of building toward the rear of the site, where the slope and associated non-compliance exist, is an inappropriate development and is symptomatic of an overdevelopment of the site. As a result, topography is not a sufficient environmental planning ground in this instance.

Conclusions on Environmental Planning Grounds

In this regard, the applicant's written request has not demonstrated that the proposed development is not consistent with any of the objects under cl 1.3(c)(g) of the EPA Act above.

In this regard, the applicants written request has not adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard as required by cl 4.6 (3)(b).

Therefore, Council is not satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3).

cl 4.6 (4)(a)(ii) (Public Interest) Assessment:

cl 4.6 (4)(a)(ii) requires the consent authority to be satisfied that:

(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

Comment:

In considering whether or not the proposed development will be in the public interest consideration must be given to the underlying objectives of the Floor space ratio development standard and the objectives of the R2 Low Density Residential zone. An assessment against these objectives is provided below.

Objectives of Development Standard

The underlying objectives of cl 4.3 Height of Building Standard are:

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

Comment:

The proposal provides for a non-compliant building height toward the rear of the site but presents as a two storey dwelling at the front of the site. This does not have any unreasonable impact on the desired future streetscape character.

The development satisfies this objective.

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

Comment:

The non-compliant building height does not result in a reasonable control of bulk and scale given the associated amenity impact and the presentation of the building from neighbouring properties. The 23.5% variation to the height of building development standard along with a 53% variation to the Floor space ratio development standard does not demonstrate an adequate control of bulk and scale in this situation. This bulk and scale contributes directly to an unreasonable impact on views and outlooks for surrounding properties.

The development does not satisfy 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), to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*

Comment:

The cumulative impact of the view disruption provided by the proposed development results in an outcome in which an appropriate minimisation of impact is not provided. Although the most significant impacts on views are caused by elements of the building that comply with the building height, the overall impact on views which is contributed to by the building height non-compliance is unacceptable. A further analysis of view loss can be found under *Clause 3.4.3 Maintenance of Views* in this report.

The development does not satisfy this objective.

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

Comment:

The proposal is consistent with the numerical requirements for Sunlight access and Overshadowing under the Manly DCP. Given the difficulty provided by the unusual subdivision pattern and the slope of the land, this is a reasonable provision for existing and future development.

(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.

Conclusion:

The proposed development does not satisfy the underlying objectives of the Height of building development standard.

Zone objectives

The underlying objectives of the R2 Low Density Residential zone

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

Comment:

The proposal provides for a new dwelling house.

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

Comment:

Not applicable.

Conclusion:

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the R2 Low density Residential zone.

cl 4.6 (4)(b) (Concurrence of the Secretary) Assessment:

cl. 4.6(4)(b) requires the concurrence of the Secretary to be obtained in order for development consent to be granted.

Planning Circular PS 18-003 dated 21 February 2018, as issued by the NSW Department of Planning, advises that the concurrence of the Secretary may be assumed for exceptions to development standards under environmental planning instruments that adopt Clause 4.6 of the Standard Instrument. In this regard, given the consistency of the variation to the objectives of the zone, the concurrence of the Secretary for the variation to the Height of buildings Development Standard is assumed by the Development Determination Panel.

Floor Space Ratio

Description of Non-compliance:

Requirement:	0.4:1 (184.64m ²)
Proposed:	0.61:1 (283m ²)
Is the planning control in question a development standard?	YES
If numerical enter a % variation to requirement	53%

Assessment of request to vary a Development Standard:

The following assessment of the variation to Clause 4.4 - Floor space ratio development standard has taken into consideration the recent judgement contained within Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 and an assessment of the request to vary the development standard in accordance with the requirements of Clause 4.6 is provided below:

Clause 4.6 Exceptions to Development Standards:

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

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

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

Comment:

Clause 4.4 Floor space ratio development standard is not expressly excluded from the operation of this clause.

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

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

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

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

cl 4.6 (4)(a)(i) (Justification) Assessment:

cl 4.6 (4)(a)(i) requires the consent authority to be satisfied that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). There are two separate matters for consideration contained within cl 4.6 (3) and these are addressed as follows:

- (a) that compliance with the development standard is unreasonable or unnecessary in the*

circumstances of the case, and

Comment:

The Applicant's written request (attached to this report as an Appendix) has not demonstrated that the objectives of the development standard are achieved, notwithstanding the non-compliance with the development standard.

In doing so, the Applicant's written request has not adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by cl 4.6(3)(a).

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

Comment:

In the matter of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ provides the following guidance (para 23) to inform the consent authority's finding that the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard:

'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.'

s 1.3 of the EPA Act reads as follows:

1.3 Objects of Act (cf previous s 5)

The objects of this Act are as follows:

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

Applicant's Written Request

The Applicant's written request has not demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard. The Applicant's written request submits that

the undersized nature of the allotment (in accordance with Clause 4.1.3.1 of the Manly DCP) and compliance with the clause provide sufficient environmental planning grounds to justify the variation.

Planners Comments

In doing so, the applicant's written request has not demonstrated that the proposed development is an orderly and economic use and development of the land and that the building is of a good design and will protect the amenity of the surrounding built environment therefore satisfying cl 1.3(c)(g) of the EPA Act.

Conclusions on Environmental Planning Grounds

In this regard, the applicants written request has not adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard as required by cl 4.6 (3)(b).

Therefore, Council is not satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3).

cl 4.6 (4)(a)(ii) (Public Interest) Assessment:

cl 4.6 (4)(a)(ii) requires the consent authority to be satisfied that:

(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

Comment:

In considering whether or not the proposed development will be in the public interest consideration must be given to the underlying objectives of the Floor space ratio development standard and the objectives of the R2 Low Density Residential zone. An assessment against these objectives is provided below.

Objectives of development standard

The underlying objectives of cl 4.4 Floor Space Ratio Development Standard are:

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

Comment:

The proposal is for a dwelling that presents as a two storey building from the street. Along with the reasonable side setbacks at the front of the site, this provides a bulk and scale that is consistent with the existing and desired streetscape character.

The development satisfies this objective.

(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 provides for a 53% variation to the Floor space ratio development standard in which a portion of this floor space within a non-complying rear setback provides moderate to severe loss of a

harbour view for the neighbouring property. As a result, the bulk on the site is not adequately controlled to ensure that the development does not obscure important features.

The development does not satisfy this objective.

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

Comment:

The area is characterised by development which provides corridors for views toward the harbour for neighbouring properties. This development would result in a substantial disruption to the view corridor currently enjoyed by the neighbouring property at 59 Cutler Road (as further discussed under Clause 3.4.3 Maintenance of Views).

The development does not satisfy this objective.

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

Comment:

The proposed bulk and scale of the development relates to the excessive floor space and results in a development that does not minimise its impacts on privacy or views. In particular, the development would have an unreasonable impact on the views for 59 Cutler Road and an unreasonable impact on privacy for the neighbouring dwelling at 6 Castle Rock Crescent. This relates to the extent of the dwelling situated towards the rear of the site and the associated first floor balcony which will result in overlooking and the excessive floor space within the rear setback which will have a moderate to severe impact on the view corridor for No. 59 Cutler Road.

(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:

Not applicable.

Conclusion:

The proposed development does not satisfy the underlying objectives of the Floor space ratio development standard.

Zone objectives

The underlying objectives of the R2 Low Density Residential zone

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

Comment:

The proposal provides for a dwelling house.

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

residents

Comment:

Not applicable.

Conclusion:

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the R2 Low density Residential zone.

cl 4.6 (4)(b) (Concurrence of the Secretary) Assessment:

cl. 4.6(4)(b) requires the concurrence of the Secretary to be obtained in order for development consent to be granted.

Planning Circular PS 18-003 dated 21 February 2018, as issued by the NSW Department of Planning, advises that the concurrence of the Secretary may be assumed for exceptions to development standards under environmental planning instruments that adopt Clause 4.6 of the Standard Instrument. In this regard, given the consistency of the variation to the objectives of the zone, the concurrence of the Secretary for the variation to the Height of buildings Development Standard is assumed by the Development Determination Panel.

Manly Development Control Plan

Built Form Controls

Built Form Controls - Site Area: 461.6m ²	Requirement	Proposed	% Variation*	Complies
4.1.2.1 Wall Height	North: 8m (based on gradient 1:4+)	10.4m	30%	NO (see comments)
	South: 8m (based on gradient 1:4+)	10.6m	32.5%	NO (see comments)
4.1.2.2 Number of Storeys	2	3	50%	NO (see comments)
4.1.3 Floor space ratio	0.4:1 based on 950sqm lot size/ site area (380m ²)	0:3:1 (283m ²)	N/A	YES
4.1.4.1 Street Front Setbacks	6m	0m	100%	NO (see comments)
4.1.4.2 Side Setbacks and Secondary Street Frontages	North: 3.47m (based on wall height)	8.7m (to dwelling)	N/A	YES
	1.4m (to garage)	1.75m (garage)		YES
	South: 3.53m (based on wall height)	2m-3.21m	N/A	NO (see comments)
	Windows: 3m	3m	N/A	YES
4.1.4.4 Rear Setbacks	8m	3.73m	53%	NO (see

		(first floor)		comments)
4.1.5.1 Minimum Residential Total Open Space Requirements Residential Open Space Area: OS4	Open space 60% of site area	62% (290m ²)	N/A	YES
	Open space above ground 25% of total open space (72.5m ²)	27% (81m ²)		NO (see comments)
4.1.5.2 Landscaped Area	Landscaped area 40% of open space (116m ²)	64% (185m ²)	N/A	YES
4.1.6.1 Parking Design and the Location of Garages, Carports or Hardstand Areas	Maximum 50% of frontage up to maximum 6.2m	6.55m	N/A	NO (see comments)
4.1.9 Swimming Pools, Spas and Water Features	1m height above ground	1.2m	N/A	NO (see comments)
	1m curtilage/1.5m water side/rear setback	0.1m/0.4m/ front setback	N/A	NO/NO/NO (See comments)
Schedule 3 Parking and Access	Dwelling 2 spaces	2 spaces	N/A	YES

***Note:** The percentage variation is calculated on the *overall* numerical variation (ie: for LOS - Divide the proposed area by the numerical requirement then multiply the proposed area by 100 to equal X, then 100 minus X will equal the percentage variation. Example: $38/40 \times 100 = 95$ then $100 - 95 = 5\%$ variation)

Compliance Assessment

Clause	Compliance with Requirements	Consistency Aims/Objectives
3.1 Streetscapes and Townscapes	Yes	Yes
3.1.1 Streetscape (Residential areas)	Yes	Yes
3.4 Amenity (Views, Overshadowing, Overlooking /Privacy, Noise)	No	No
3.4.1 Sunlight Access and Overshadowing	Yes	Yes
3.4.2 Privacy and Security	No	
3.4.3 Maintenance of Views	No	No
3.5 Sustainability - (Greenhouse Energy Efficiency, Thermal Performance, and Water Sensitive Urban Design)	Yes	Yes
3.6 Accessibility	Yes	Yes
3.7 Stormwater Management	Yes	Yes
3.10 Safety and Security	Yes	Yes
4.1 Residential Development Controls	No	No
4.1.2 Height of Buildings (Incorporating Wall Height, Number of Storeys & Roof Height)	No	No
4.1.3 Floor Space Ratio (FSR)	Yes	No
4.1.4 Setbacks (front, side and rear) and Building Separation	No	No
4.1.5 Open Space and Landscaping	No	No
4.1.6 Parking, Vehicular Access and Loading (Including Bicycle	No	Yes

Clause	Compliance with Requirements	Consistency Aims/Objectives
Facilities)		
4.1.9 Swimming Pools, Spas and Water Features	No	No
5.4.1 Foreshore Scenic Protection Area	No	Yes

Detailed Assessment

3.4.2 Privacy and Security

Issue

The proposal involves a balcony on the southern elevation that would cause an unreasonable impact on privacy. This is as a result of overlooking due to the extent, orientation and design of the balcony.

It is noted that a recessed design has not been provided in a manner that is consistent with Clause 3.4.2.2b) below:

"Recessed design of balconies and terraces can also be used to limit overlooking and maintain privacy."

The proposal is also non-compliant with the control for open space above ground under the Manly DCP. The provision is for 25% (72.5m²) and the proposal exceeds this, being 27% (81m²).

Merit consideration:

The development is considered against the objectives of the clause as follows:

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

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

Comment:

The proposal involves a balcony at the first floor level and on the southern elevation that would result in an unacceptable privacy impact for the neighbouring property at 6 Castle Rock Crescent. The non-compliance with the control for open space above ground level and the design of the balcony results in an unacceptable outcome for privacy. In particular, the size of balcony with an orientation directly toward the neighbouring property will result in acoustical and visual privacy issues in terms of the relationship between living areas and private open space.

As such, the proposal does not meet this objective.

Objective 2) To increase privacy without compromising access to light and air. To balance outlook and views from habitable rooms and private open space.

Comment:

The proposed southern balcony is orientated toward the harbour water views. However, this orientation is also directly toward the living spaces of the neighbouring property to the south and along with the extent of the balcony, will result in a poor balance and loss of amenity.

Objective 3) To encourage awareness of neighbourhood security.

Comment:

The proposal provides appropriate openings so as to encourage awareness of neighbourhood security.

The proposal meets this objective.

Having regard to the above assessment, it is concluded that the proposed development is inconsistent with the relevant objectives of MLEP 2013 / MDCP and the objectives specified in section 1.3(a) of the Environmental Planning and Assessment Act, 1979. Accordingly, this assessment finds that the proposal is not supported, in this particular circumstance.

3.4.3 Maintenance of Views

Description of non-compliances relating directly to view loss

The proposal involves a 53% (98.36m²) variation to Floor Space ratio under the MLEP 2013.

The proposal involves a 23.5% (2m) variation to Height of building under the MLEP 2013.

The proposal involves a non-compliant rear setback of 3.73m². The rear setback control is 8m and thus the proposal involves a 53% variation.

Merit consideration:

With regard to the consideration for a variation, the development is considered against the underlying Objectives of the Control as follows:

Objective 1) To provide for view sharing for both existing and proposed development and existing and future Manly residents.

Comment:

The proposal provides a first floor level that extends from the front boundary toward the rear, a distance of 19.5m to cover 81% of the side boundary. This results in a rear setback non-compliance and also relates to the floor space ratio non-compliance. The outcome of this extension of building and floor space into the rear setback is that there is an unreasonable loss of view corridor for the neighbouring property at 59 Cutler Road. Views to the harbour from adjoining properties are generally in a southerly direction and so a more balanced provision of building in the southern rear setback of the subject site would provide a better outcome for view sharing. Instead, the extension of 81% of the building across the main boundary in which views are accessed in the area (along with the non-compliances with the planning controls) does not demonstrate adequate view sharing.

Objective 2) To minimise disruption to views from adjacent and nearby development and views to and from public spaces including views to the city, harbour, ocean, bushland, open space and recognised landmarks or buildings from both private property and public places (including roads and footpaths).

Views Planning Principle established by the NSW Land and Environment Court

An assessment of view loss has also been undertaken with reference to the Views Principle established by the NSW Land and Environment Court as follows:

The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (for example of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, for example a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.

Comment:

57 Cutler Road

The views that will be affected from this property are water views of Middle Harbour to the southwest filtered by the existing vegetation and residential dwellings. The proposed dwelling height would be close to the land-water interface from a standing eye level and as a result, the land-water interface would be lost from sitting position at parts of the living areas (see Photo 1).



Photo 1: Taken from the first floor balcony (adjoining living room) of 57 Cutler Road

59 Cutler Road

The views that will be affected will be extensive water views of middle harbour and land-water interface views across the harbour.

When comparing the proposed development against the existing development, the first floor element at
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the rear would be higher and would provide a greater disruption to the water and land-water interface views than the existing development.



Photo 2: Taken from No. 59 Cutler Road looking directly south over the subject site

66 Cutler Road

The neighbour at 66 Cutler Road obtains extensive water views over the top of the subject site. There

would be no loss of land-water interface view but as a result of the proposed height of the building there would be some loss of water view.

The second step is to consider from what part of the property the views are obtained. For example, the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.

Comment:

57 Cutler Road

The water views obtained from this property are from a front deck, a rear deck and a living room. At these locations there would be loss of water view from standing and seated position as well as loss of land water interface from sitting position. These views are all obtained across the side boundary.

59 Cutler Road

The views to be affected at this property are both water and land-water interface views from both a standing and sitting position. These views are obtained over a side boundary, from a living room and balcony.

66 Cutler Road

The water views to be affected from this property are obtained over the front boundary from the balcony and the living room in both a sitting and standing position.

The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20 percent if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.

Comment:

57 Cutler Road

This property enjoys a substantial view corridor to the south. The proposal will have a substantial impact on the water and land-water interface views to the south-west. However, the partial nature of the views (as a result of existing vegetation) along with the retention of land water interface views at standing position leads to rating of a minor-moderate impact.

59 Cutler Road

The views to be affected from this property are substantial water and land-water interface views looking directly south. The views impacted are from a living room and at standing position, leading to a rating of a moderate to severe impact.

66 Cutler Road

Although over a front boundary, as a result of the extensive water views retained from the living area of this property, the impact is minor-moderate.

The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.

Comment:

The non-compliances inherent in this application, including Floor space ratio, rear setback and building height contribute to a view loss that ranges from minor to severe. The multiple breaches of the planning controls, combined with the direct impact that those breaches translate into in relation to view loss, results in a view sharing outcome that is contrary to the principles established by the NSW Land and Environment Court.

Objective 3) To minimise loss of views, including accumulated view loss 'view creep' whilst recognising development may take place in accordance with the other provisions of this Plan.

Comment:

The non-compliance with the development standards of Building height and Floor Space ratio results in an impact on the views of surrounding properties that is unreasonable and unacceptable. As a result, the bulk that is proposed by this development would result in a view creep that is beyond reasonable.

Having regard to the above assessment, it is concluded that the proposed development is inconsistent with the relevant objectives of MLEP 2013 / MDCP and the objectives specified in section 1.3(a) of the Environmental Planning and Assessment Act, 1979. Accordingly, this assessment finds that the proposal is not supported, in this particular circumstance.

4.1.2 Height of Buildings (Incorporating Wall Height, Number of Storeys & Roof Height)

Description of non-compliance

The proposal involves non-compliant wall heights up to 10.4m on the northern elevation and 10.6m on the southern elevation. Given the slope of the site, the control for wall height on each elevation is 8.0m.

Merit consideration:

With regard to the consideration for a variation, the development is considered against the objectives of the Clause 4.3 of the Manly LEP (as stated by the Manly DCP as being particularly relevant to this paragraph):

(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 proposal involves non-compliant wall heights toward the rear of the site, but provides compliant wall heights and presents as a two storey dwelling at the front of the site. This does not have any unreasonable impact on the desired future streetscape character.

The development satisfies this objective.

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

Comment:

The non-compliant wall heights do not allow for a reasonable control of bulk and scale given the associated amenity impact and the presentation of the building from neighbouring properties. Along with the non-compliant wall height, the 23.5% variation to height of building along with a 53% variation to the Floor space ratio development standard is not represent an adequate control of bulk and scale in this situation. This bulk and scale contributes directly to an unreasonable impact on view loss and outlook for the area.

The development does not satisfy 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), to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*

Comment:

The cumulative impact of the view disruption caused by the proposed development, results in an outcome in which an appropriate minimisation of impact is not provided. Although the most significant impacts on views are caused by elements of the building that comply with the wall height, the overall impact on views, which is contributed to by the building wall height non-compliance is unacceptable. A further analysis of view loss can be found under Clause 3.4.3 Maintenance of Views in this report.

The development does not satisfy this objective.

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

Comment:

The proposal is consistent with the numerical requirements for Sunlight Access and Overshadowing under the Manly DCP. Given the difficulty provided by unusual subdivision pattern and the slope of the land, this is a reasonable provision for existing and future development.

The development satisfies this objective.

(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.

Having regard to the above assessment, it is concluded that the proposed development is consistent with the relevant objectives of MLEP 2013 / MDCP and the objectives specified in section 1.3(a) of the Environmental Planning and Assessment Act, 1979. Accordingly, this assessment finds that the proposal is not supported, in this particular circumstance.

4.1.3 Floor Space Ratio (FSR)

Complies with the control for 'Exceptions to FSR for undersized lots' but does not comply with objectives. See comments under Clause 4.6 MLEP 2013

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

Description of non-compliance

The proposal involves non-compliant front, side and rear setbacks.

The proposed southern setback is 2.0m to 3.21m which are non-compliant with the control of 3.53m.

The proposed front setback involves a Nil setback which is non-compliant with the numerical control of 6.0m.

The proposed rear setback provides for 3.73m which is non-compliant with the control of 8.0m.

Merit consideration:

With regard to the consideration for a variation, the development is considered against the underlying Objectives of the Control as follows:

Objective 1) To maintain and enhance the existing streetscape including the desired spatial proportions of the street, the street edge and the landscape character of the street.

Comment:

The proposal provides for a garage at the front boundary and a dwelling setback from the street with landscaping in between. The existing streetscape is characterised by a variety of front presentations in regards to dwelling houses and associated car parking. As a result of this varied form, the proposed front presentation of car parking at the street along with a two storey dwelling reasonably setback from the street (and with landscaping), provides an adequate outcome for the spatial proportions and character of the area.

The proposal does not satisfy this objective.

Objective 2) To ensure and enhance local amenity by:

- *providing privacy;*
- *providing equitable access to light, sunshine and air movement; and*
- *facilitating view sharing and maintaining adequate space between buildings to limit impacts on views and vistas from private and public spaces.*
- *defining and adding character to the streetscape including the provision of adequate space between*

- *buildings to create a rhythm or pattern of spaces; and*
- *facilitating safe and adequate traffic conditions including levels of visibility around corner lots at the street intersection.*

Comment:

The proposal provides for a non compliant rear setback which contributes to unreasonable amenity impact. In particular, this non-compliance with the rear setback control contributes to the moderate to severe obstruction from the neighbouring property at 59 Cutler Road. It is further noted that greater compliance with this control would directly relate to a greater view corridor being retained toward the harbour.

The proposal does not satisfy this objective.

Objective 3) To promote flexibility in the siting of buildings.

Comment:

Although the subject lot is unusual in shape, the extent of building proposed to include a non-compliant Floor Space ratio of 53% and significant rear setback non-compliance results in a siting that is inadequate. In particular, the extent of the building from the front of the site to the rear provides a lack of opportunity for adequate view corridors. Additionally, the siting and extent of the balcony at the first floor provide unreasonable impact on privacy.

The proposal does not satisfy this objective.

Objective 4) To enhance and maintain natural features by:

- *accommodating planting, including deep soil zones, vegetation consolidated across sites, native vegetation and native trees;*
- *ensuring the nature of development does not unduly detract from the context of the site and particularly in relation to the nature of any adjoining Open Space lands and National Parks; and*
- *ensuring the provisions of State Environmental Planning Policy No 19 - Urban Bushland are satisfied.*

Comment:

The compliant landscaped area and landscaping to the street ensures that natural features in the area would be reasonably provided for and maintained.

The proposal satisfies this objective.

Objective 5) To assist in appropriate bush fire asset protection zones.

Comment:

The Bushfire report prepared by Advanced Bushfire Performance solutions, dated May 2017 provides that the development is not within 'Flam zone' and provides for recommendations if the proposal was to be approved.

The proposal satisfies this objective.

Having regard to the above assessment, it is concluded that the proposed development is inconsistent with the relevant objectives of MLEP 2013 / MDCP and the objectives specified in section 1.3(a) of the Environmental Planning and Assessment Act, 1979. Accordingly, this assessment finds that the proposal is not supported, in this particular circumstance.

4.1.5 Open Space and Landscaping

Description of non-compliance

The proposal provides 81sqm of open space above ground which is 27% of the total open space. This is non-compliant with the control of 25% (maximum).

Merit consideration:

With regard to the consideration for a variation, the development is considered against the underlying Objectives of the Control as follows:

Objective 1) To retain and augment important landscape features and vegetation including remnant populations of native flora and fauna.

Comment:

The proposal provides for a compliant landscaped area under the Manly DCP. This would provide appropriate opportunity for landscape features and vegetation.

The proposal satisfies this objective.

Objective 2) To maximise soft landscaped areas and open space at ground level, encourage appropriate tree planting and the maintenance of existing vegetation and bushland.

Comment:

The proposal provides for a compliant landscaped area and compliant total open space under the Manly DCP. This includes a landscaped area at ground level to the north of the proposed dwelling which provides opportunity for tree planting and maintenance of existing vegetation..

The proposal satisfies this objective.

Objective 3) To maintain and enhance the amenity (including sunlight, privacy and views) of the site, the streetscape and the surrounding area.

Comment:

The non-compliance with the control for open space above ground contributes to an unsatisfactory privacy impact. In particular, the given the orientation of the space at the southern side setback of the second level, the extent of open space above ground leads to an unreasonable opportunity acoustical and overlooking privacy impact.

The proposal does not satisfy this objective.

Objective 4) To maximise water infiltration on-site with porous landscaped areas and surfaces and minimise stormwater runoff.

Comment:

The proposal provides compliant landscaped area and subject to conditions for stormwater this objective would be satisfied.

Objective 5) To minimise the spread of weeds and the degradation of private and public open space.

Comment:

The proposal provides no unreasonable opportunity for the spread of weeds.

Objective 6) To maximise wildlife habitat and the potential for wildlife corridors.

Comment:

The proposal provides compliant landscaped area under the Manly DCP which maximises potential for wildlife in this circumstance.

Having regard to the above assessment, it is concluded that the proposed development is inconsistent a relevant objective of MDCP and the objectives specified in section 1.3(a) of the Environmental Planning and Assessment Act, 1979. Accordingly, this assessment finds that the proposal is not supported, in this particular circumstance.

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

Description of non-compliance

The proposal provides for a garage width of 6.55m at the front of the site.

Merit consideration:

With regard to the consideration for a variation, the development is considered against the underlying Objectives of the Control as follows:

Objective 1) To provide accessible and adequate parking on site relative to the type of development and the locality for all users (residents, visitors or employees).

Comment:

The proposal would provide for two car parking spaces for a dwelling house and would provide adequate access.

Objective 2) To reduce the demand for on-street parking and identify where exceptions to onsite parking requirements may be considered in certain circumstances.

Comment:

The proposal provides for compliant off street parking under the Manly DCP.

Objective 3) To ensure that the location and design of driveways, parking spaces and other vehicular access areas are efficient, safe, convenient and are integrated into the design of the development to minimise their visual impact in the streetscape.

Comment:

As a result of the varied nature of the streetscape and varied character in the vicinity along with the landscaping to the front of the site, the proposed car parking would reasonably minimise visual impact.

Objective 4) To ensure that the layout of parking spaces limits the amount of site excavation in order to avoid site instability and the interruption to ground water flows.

Comment:

The proposed car parking does not provide for any extensive excavation.

Objective 5) To ensure the width and number of footpath crossings is minimised.

Comment:

The proposed crossing would provide for the compliant number of two car parking spaces.

Objective 6) To integrate access, parking and landscaping; to limit the amount of impervious surfaces and to provide screening of internal accesses from public view as far as practicable through appropriate landscape treatment.

Comment:

The proposal provides for landscaping to surround the garage and includes landscaping to the rear of the garage. This is an appropriate integration of landscaping.

Objective 7) To encourage the use of public transport by limiting onsite parking provision in Centres that are well serviced by public transport and by encouraging bicycle use to limit traffic congestion and promote clean air.

Comment:

Not applicable.

Having regard to the above assessment, it is concluded that the proposed development is consistent with the relevant objectives of MLEP 2013 / MDCP and the objectives specified in section 1.3(a) of the Environmental Planning and Assessment Act, 1979. Accordingly, this assessment finds that the proposal is supported, in this particular circumstance.

4.1.9 Swimming Pools, Spas and Water Features

Description of non-compliance

The proposal provides for non-compliant setbacks to the water edge and pool concourse.

The proposal is also inconsistent with the control requiring pools to be within the rear setback.

Merit consideration:

Objective 1) To be located and designed to maintain the privacy (visually and aurally) of neighbouring properties and to minimise the impact of filter noise on neighbouring properties;

Comment:

Although the swimming pool is reasonably separated from neighbouring living areas, the associated concourse (balcony) which extends toward the rear of the site would have an unreasonable privacy impact on the neighbour. As a result of being connected to the swimming pool, this area has a high potential for acoustical privacy impact on these areas.

The proposal does not satisfy this objective.

Objective 2) To be appropriately located so as not to adversely impact on the streetscape or the established character of the locality;

Comment:

Given the varied nature of the street along with the proposed screening and landscaping, the pool would not have an adverse impact on the street, despite being within the front setback.

The proposal satisfies this objective.

Objective 3) To integrate landscaping; and

Comment:

The proposed landscaping to the front of the lot would ensure the pool have no negative visual impact on the streetscape.

The proposal satisfies this objective.

Objective 4) To become an emergency water resource in bush fire prone areas.

Comment:

The proposed swimming pool would have the potential to be used as an emergency water resource.

The proposal satisfies this objective.

Having regard to the above assessment, it is concluded that the proposed development is inconsistent with the relevant objectives of MLEP 2013 / MDCP and the objectives specified in section 1.3(a) of the Environmental Planning and Assessment Act, 1979. Accordingly, this assessment finds that the proposal is not supported, in this particular circumstance.

THREATENED SPECIES, POPULATIONS OR ECOLOGICAL COMMUNITIES

The proposal will not significantly effect threatened species, populations or ecological communities, or their habitats.

CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN

The proposal is consistent with the principles of Crime Prevention Through Environmental Design.

CONCLUSION

The site has been inspected and the application assessed having regard to all documentation submitted by the applicant and the provisions of:

- Environmental Planning and Assessment Act 1979;
- Environmental Planning and Assessment Regulation 2000;
- All relevant and draft Environmental Planning Instruments;
- Manly Local Environment Plan;
- Manly Development Control Plan; and
- Codes and Policies of Council.

This assessment has taken into consideration the submitted plans, Statement of Environmental Effects, all other documentation supporting the application and public submissions, in this regard the application is not considered to be acceptable and is recommended for refusal.

In consideration of the proposal and the merit consideration of the development, the proposal is considered to be:

- Inconsistent with the objectives of the DCP
- Consistent with the zone objectives of the LEP
- Inconsistent with the aims of the LEP
- Consistent with the objectives of the relevant EPIs
- Inconsistent with the objects of the Environmental Planning and Assessment Act 1979

It is considered that the proposed development does not satisfy the appropriate controls and that all processes and assessments have been satisfactorily addressed.

RECOMMENDATION

THAT Council, as the consent authority REFUSE Development Consent to Development Application No REV2018/0018 for the Review of Determination of Application DA2017/1300 for demolition and construction of a new dwelling house on land at Lot B DP 404022,61 Cutler Road, CLONTARF, for the reasons outlined as follows:

1. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.3 Height of Buildings of the Manly Local Environmental Plan 2013.
2. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.4 Floor Space Ratio of the Manly Local Environmental Plan 2013.
3. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.6 Exceptions to Development Standards of the Manly Local Environmental Plan 2013.
4. Pursuant to Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 6.9 Foreshore Scenic Protection Area of the Manly Local Environmental Plan 2013.
5. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 3.4.2 Privacy and Security

of the Manly Development Control Plan .

6. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 3.4.3 Maintenance of Views of the Manly Development Control Plan .
7. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.1.2 Height of Buildings (Incorporating Wall Height, Number of Storeys & Roof Height) of the Manly Development Control Plan.
8. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.1.3 Floor Space Ratio (FSR) of the Manly Development Control Plan.
9. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.1.4 Setbacks (front, side and rear) and Building Separation of the Manly Development Control Plan.
10. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.1.5 Open Space and Landscaping of the Manly Development Control Plan.
11. Pursuant to Section 4.15(1)(a)(iii) of the Environmental Planning and Assessment Act 1979 the proposed development is inconsistent with the provisions of Clause 4.1.9 Swimming Pools, Spas and Water Features of the Manly Development Control Plan.