

STATEMENT OF ENVIRONMENTAL EFFECTS

FOR PROPOSED ADDITIONS AND ALTERATIONS TO AN EXISTING DWELLING

AT

13 BARRABOOKA STREET, CLONTARF

FOR

IAN & LISA DUNN



**Prepared
February 2022**

Table of Contents

1.0	Introduction	3
2.0	Property Description	3
3.0	Site Description	4
4.0	Surrounding Environment	7
5.0	Proposed Development	8
6.0	Zoning and Development Controls	9
6.1	State Environmental Planning Policy (Coastal Management) 2019	11
6.2	Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005	11
6.3	State Environmental Planning Policy No. 55 – Remediation of Land	17
6.4	State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004	17
6.5	Manly Local Environmental Plan 2013	18
6.6	Manly Development Control Plan 2013	22
7.0	Matters for Consideration under Section 4.15 of The Environmental Planning and Assessment Act, 1979	33
7.1	The provisions of any environmental planning instrument	33
7.2	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 Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and	33
7.3	Any development control plan	33
7.4	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	34
7.5	The regulations (to the extent that they prescribe matters for the purposes of this paragraph),	34
7.6	The likely impacts of that development, including environmental impacts on both the natural and built environments, and the social and economic impacts in the locality.	34
7.7	The suitability of the site for the development	34
7.8	Any submissions made in accordance with this Act or the regulations	34
7.9	The public interest	34
8.0	Conclusion	35
Appendix 1: Clause 4.6 Submission – Building Height		
Appendix 2: Clause 4.6 Submission – Floor Space Ratio		

1.0 Introduction

This Statement of Environmental Effects accompanies architectural details prepared R Squared Studios Pty Ltd, Drawings No's. AR.DA.00 – AR.DA.13, EXC.-01, DEMO01 – DEM04, Issue G, dated August 2021, to detail proposed alterations and additions to the existing dwelling at

13 Barrabooka Street, Clontarf.

This Statement reviews the proposed development by assessing the relevant matters for consideration under Section 4.15 of the Environmental Planning and Assessment Act 1979, (as amended) including:

- *State Environmental Planning Policy (Coastal Management) 2018*
- *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005*
- *State Environmental Planning Policy No 55 – Remediation of Land*
- *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004*
- *Manly Local Environmental Plan 2013*
- *Manly Development Control Plan 2013*

2.0 Property Description

The subject allotment is described as **13 Barrabooka Street, Clontarf**, being Lot 11, Section K within Deposited Plan 2610 and is zoned C3 Environmental Management under the Manly Local Environmental Plan 2013.

The site is identified as being within the Coastal Environment Area and Coastal Use Area under the provisions of SEPP (Coastal Management) 2018. In addition, the site is identified as being within the Foreshores and Waterways Area under the provisions of Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005. These matters will be discussed further within this submission.

The dwelling is not listed as a heritage item within Schedule 5 of the Manly Local Environmental Plan 2013, nor is it noted as being within a conservation area.

The land is identified on Council's Foreshore Scenic Protection and Terrestrial Biodiversity Maps. This will be discussed further within this submission.

The site is identified as being Bushfire Prone Land and accordingly a Bushfire Risk Assessment Report has been prepared by Planning for Bushfire Protection, Reference No. 611-R, dated 26 January 2022.

There are no other known hazards affecting the site.

3.0 Site Description

The site is located on the western, lower side of Barrabooka Street, with a general fall to the west of approximately 14.3m over the site's length.

The site is rectangular in shape with a width of 10.365m and northern and southern side boundaries measuring 45.375m and 45.385m respectively. The total site area is 470.4m².

The site is currently developed with a two and three storey rendered residence with a tiled roof. An in-ground swimming pool is centrally located within the rear yard.

Stormwater from the roofed areas is partly directed to the street gutter in Barrabooka Street, with the rear portion of the roof area being dispersed within the rear yard.

Vehicular access is currently available from Barrabooka Street via an existing driveway, with car parking available in an existing double garage, with access directly from the street.

The details of the site are included on the Survey Plan prepared by S.J. Dixon Surveyors Pty Ltd, Reference No. 52746, dated 21 January 2021, which accompanies the DA submission.

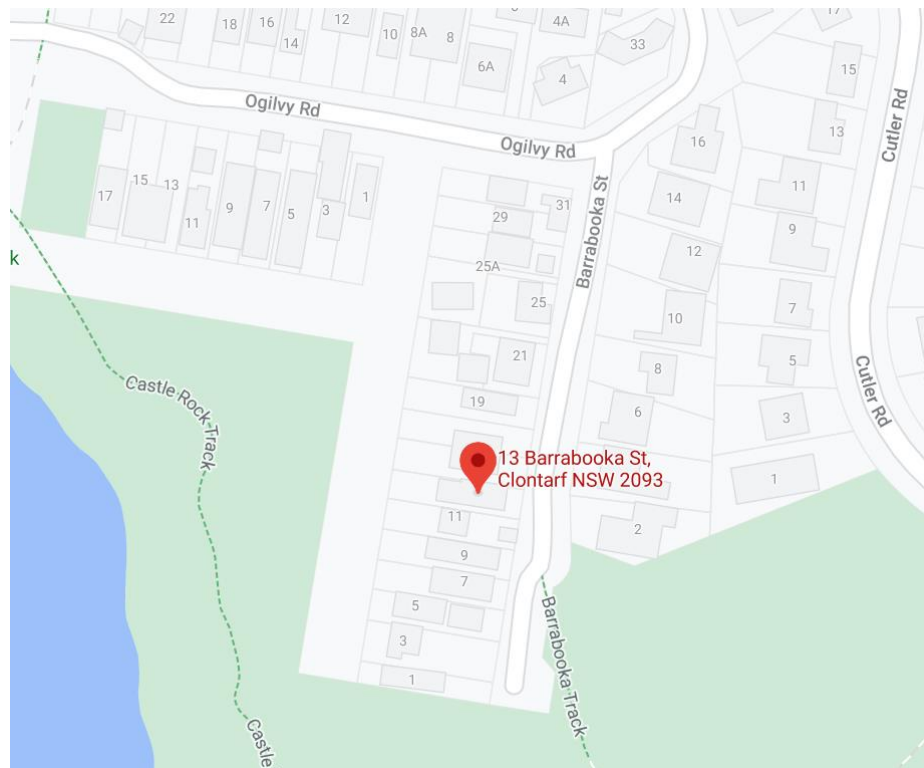




Fig 2: View of subject site and access driveway to existing garage, looking west from Barrabooka Street



Fig 3: View of subject site and access driveway to existing garage, looking south-west from Barrabooka Street



Fig 4: View of the adjoining development to the south of the site, looking south-west from Barrabooka Street



Fig 5: View of the adjoining development to the north of the site, looking west from Barrabooka Street

4.0 Surrounding Environment

The area surrounding the site is predominantly represented by a mix of development comprising dwellings of varying sizes.

The dwellings in the vicinity have been designed with living areas and associated open space that are oriented to take advantage of the district views available to the site.

The site and surrounding properties enjoy views to the south-west towards The Spit and Mosman.

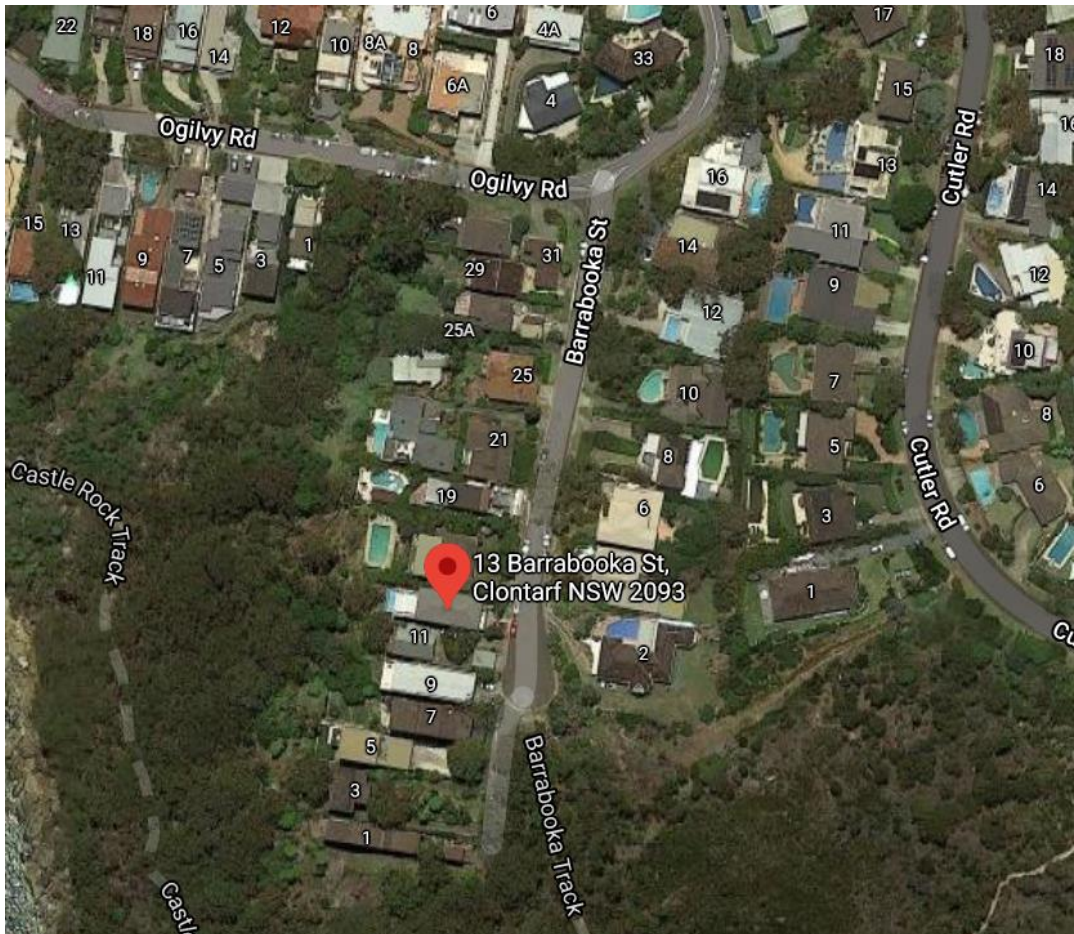


Fig 6: Aerial view of subject site
(Source: Google Maps)

5.0 Proposed Development

As detailed within the accompanying plans prepared by R Squared Studios Pty Ltd, the proposal seeks consent for proposed alterations and additions to the existing dwelling.

The new works to provide for additions and alterations to the existing dwelling comprising the following works:

External

External Works	Demolish existing pool, new pool in re-orientated position and lowered in RL. New pool terrace and stairs to rear yard. New passenger lift.
Lower Ground Floor	Alterations and additions to existing lower ground floor to provide for extension of existing rumpus room, Guest Room, bathroom, laundry, cellar and plant room. Access to new passenger lift.
Ground Floor	Alterations and additions to existing ground floor to provide for minor alterations to internal walls, new ensuite to bedroom 2, new access hallway to new passenger lift and new privacy screens to existing balcony. New window to entrance.
First Floor	Alterations and additions to existing first floor level to provide for new sitting room, bedroom with ensuite, cloak room, powder room, open plan living, dining and kitchen with butlers pantry, extension of existing balcony and new privacy screening and planter box, and internal stairs. Access to new passenger lift.

The proposed external finishes comprise painted rendered walls & colorbond roofing. The proposed external finishes for the new development will match existing dwelling.

The proposal does not seek the removal of any significant vegetation.

The development indices for the site are:

Site Area	470.4m ²
Permissible FSR	0.4:1 or 188.16m ²
Existing FSR	0.58:1 or 275m ²
Proposed FSR	0.669:1 or 315m ²
Required Open Space/Landscape	60% open space – 282.24m ² /40% landscaped area – 112.96m ²
Proposed Open Space	61% or 287m ² (Unchanged)
Proposed Landscape	64.4% or 185m ² (Unchanged)

6.0 Zoning and Development Controls

6.1 State Environmental Planning Policy (Coastal Management) 2018

The subject site has been identified as being within the coastal zone and therefore SEPP (Coastal Management) 2018 is applicable to the proposed development.

The stated Aim of the Policy under Clause 3 is to:

The aim of this Policy is to promote an integrated and co-ordinated approach to land use planning in the coastal zone in a manner consistent with the objects of the Coastal Management Act 2016, including the management objectives for each coastal management area, by:

- (a) managing development in the coastal zone and protecting the environmental assets of the coast, and*
- (b) establishing a framework for land use planning to guide decision-making in the coastal zone, and*
- (c) mapping the 4 coastal management areas that comprise the NSW coastal zone for the purpose of the definitions in the Coastal Management Act 2016.*

The Coastal Management Act 2016 states within **Clause 3**:

The **objects** set out in **Clause 3** of the Coastal Management Act 2016 are:

- (a) to protect and enhance natural coastal processes and coastal environmental values including natural character, scenic value, biological diversity and ecosystem integrity and resilience, and*
- (b) to support the social and cultural values of the coastal zone and maintain public access, amenity, use and safety, and*
- (c) to acknowledge Aboriginal peoples' spiritual, social, customary and economic use of the coastal zone, and*
- (d) to recognise the coastal zone as a vital economic zone and to support sustainable coastal economies, and*
- (e) to facilitate ecologically sustainable development in the coastal zone and promote sustainable land use planning decision-making, and*
- (f) to mitigate current and future risks from coastal hazards, taking into account the effects of climate change, and*
- (g) to recognise that the local and regional scale effects of coastal processes, and the inherently ambulatory and dynamic nature of the shoreline, may result in the loss of coastal land to the sea (including estuaries and other arms of the sea), and to manage coastal use and development accordingly, and*
- (h) to promote integrated and co-ordinated coastal planning, management and reporting, and*
- (i) to encourage and promote plans and strategies to improve the resilience of coastal assets to the impacts of an uncertain climate future including impacts of extreme storm events, and*
- (j) to ensure co-ordination of the policies and activities of government and public authorities relating to the coastal zone and to facilitate the proper integration of their management activities, and*

- (k) to support public participation in coastal management and planning and greater public awareness, education and understanding of coastal processes and management actions, and*
- (l) to facilitate the identification of land in the coastal zone for acquisition by public or local authorities in order to promote the protection, enhancement, maintenance and restoration of the environment of the coastal zone, and*
- (m) to support the objects of the Marine Estate Management Act 2016.*

It is submitted that the assessment detailed under the Statement of Environmental Effects suggests that the proposed development is consistent with the objects of the SEPP (Coastal Management) 2018, as set out in Clause 3 of the Coastal Management Act 2016.

Whilst the site is within the Coastal Environment Area and Coastal Use Area, Clause 13 and 14 do not apply to development as it is within the State Regional Environmental Planning Policy (Sydney Harbour Catchment) 2005.

The matters for consideration under Division 5 of SEPP (Coastal Management) 2018 are:

15 Development in coastal zone generally—development not to increase risk of coastal hazards

Development consent must not be granted to development on land within the coastal zone unless the consent authority is satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that land or other land.

The proposal provides for the construction of alterations and additions to an existing dwelling. The proposed new works are largely contained within the proximity of the existing building and do not require significant disturbance to the site and are not considered to increase the risk of coastal hazards for the subject property or adjoining land.

The assessment has concluded that the proposed development is consistent with the matters for consideration under the SEPP (Coastal Management) 2018.

6.2 Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005

The subject site is located such that this proposal requires consideration against the provisions of State Regional Environmental Planning Policy (Sydney Harbour Catchment) 2005 (SREP 2005).

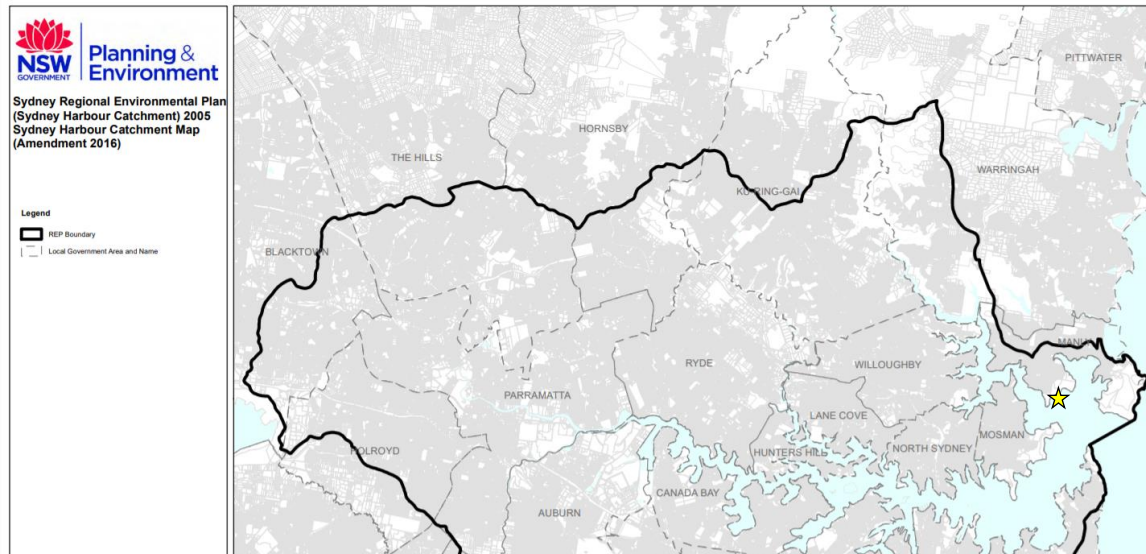


Fig 7: Extract from SH SREP

The proposed works are assessed against the requirements of this Policy as follows.

The subject site is located within the Sydney Harbour Catchment, however it is not identified as being within the Foreshores and Waterways Area.

The site does not adjoin any “Strategic Foreshore Sites”.

Clause 13 provides the planning principles for land within the Sydney Harbour Catchment and these are noted as:

- (a) *development is to protect and, where practicable, improve the hydrological, ecological and geomorphological processes on which the health of the catchment depends,*
- (b) *the natural assets of the catchment are to be maintained and, where feasible, restored for their scenic and cultural values and their biodiversity and geodiversity,*
- (c) *decisions with respect to the development of land are to take account of the cumulative environmental impact of development within the catchment,*
- (d) *action is to be taken to achieve the targets set out in Water Quality and River Flow Interim Environmental Objectives: Guidelines for Water Management: Sydney Harbour and Parramatta River Catchment (published in October 1999 by the Environment Protection Authority), such action to be consistent with the guidelines set out in Australian Water Quality Guidelines for Fresh and Marine Waters (published in November 2000 by the Australian and New Zealand Environment and Conservation Council),*

- (e) development in the Sydney Harbour Catchment is to protect the functioning of natural drainage systems on floodplains and comply with the guidelines set out in the document titled Floodplain Development Manual 2005 (published in April 2005 by the Department),*
- (f) development that is visible from the waterways or foreshores is to maintain, protect and enhance the unique visual qualities of Sydney Harbour,*
- (g) the number of publicly accessible vantage points for viewing Sydney Harbour should be increased,*
- (h) development is to improve the water quality of urban run-off, reduce the quantity and frequency of urban run-off, prevent the risk of increased flooding and conserve water,*
 - (i) action is to be taken to achieve the objectives and targets set out in the Sydney Harbour Catchment Blueprint, as published in February 2003 by the then Department of Land and Water Conservation,*
 - (j) development is to protect and, if practicable, rehabilitate watercourses, wetlands, riparian corridors, remnant native vegetation and ecological connectivity within the catchment,*
- (k) development is to protect and, if practicable, rehabilitate land from current and future urban salinity processes, and prevent or restore land degradation and reduced water quality resulting from urban salinity,*
- (l) development is to avoid or minimise disturbance of acid sulfate soils in accordance with the Acid Sulfate Soil Manual, as published in 1988 by the Acid Sulfate Soils Management Advisory Committee.*

As the proposal is seeking to provide for additions and alterations to an existing dwelling, with minimal site disturbance, the proposal is considered to be consistent with the relevant aims of the Clause.

The works are largely contained within the existing built footprint and as such, the stormwater characteristics of the site will be generally unchanged, with no increased stormwater loading to the public foreshore or waterway.

Clause 14 provides the planning principles for land within the Foreshores and Waterways area. The relevant principles are discussed below:

- (a) development should protect, maintain and enhance the natural assets and unique environmental qualities of Sydney Harbour and its islands and foreshores*

Comment: The proposed works are mostly within the footprint of the existing dwelling. Given the reasonable separation from the foreshore area, it is not considered that there will be any significant impact on the natural assets or unique environmental qualities of Sydney Harbour and foreshores.

- (b) public access to and along the foreshore should be increased, maintained and improved, while minimising its impact on watercourses, wetlands, riparian lands and remnant vegetation*

Comment: The proposed works are wholly within private property and do not result in the removal or detrimental impact on any natural assets of the catchment. The extent of existing

public access to the foreshore will not be unreasonably diminished as a result of the proposed works.

- (c) access to and from the waterways should be increased, maintained and improved for public recreational purposes (such as swimming, fishing and boating), while minimising its impact on watercourses, wetlands, riparian lands and remnant vegetation.*

Comment: As discussed, the proposed works are wholly on private property and do not result in the removal or detrimental impact on any natural assets of the catchment. The extent of existing public access to the foreshore will not be unreasonably diminished as a result of the proposed works.

- (d) development along the foreshore and waterways should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands and foreshores*

Comment: The proposed works will see alterations and additions to an existing dwelling which will complement existing neighbouring dwellings by being at a similar height and scale to the surrounding development along Barrabooka Street, and will not detract from the natural assets of the harbour locality.

The proposal will respect and complement the bulk and scale of the existing dwelling and is complementary to the existing development in the locality.

- (e) adequate provision should be made for the retention of foreshore land to meet existing and future demand for working harbour uses*

Comment: As discussed, the proposed works are wholly on private property and do not result in the removal or detrimental impact on any natural assets of the catchment. The proposal will not impact on the working function of the Harbour waters.

- (f) public access along foreshore land should be provided on land used for industrial or commercial maritime purposes where such access does not interfere with the use of the land for those purposes*

Comment: N/A to the proposed residential use.

- (g) the use of foreshore land adjacent to land used for industrial or commercial maritime purposes should be compatible with those purposes*

Comment: N/A to the proposed residential use.

- (h) water-based public transport (such as ferries) should be encouraged to link with land-based public transport (such as buses and trains) at appropriate public spaces along the waterfront*

Comment: N/A to the proposed residential use.

- (i) the provision and use of public boating facilities along the waterfront should be encouraged.*

Comment: N/A to the proposed residential use.

Part 3, Division 2 details the *Matters for Consideration* to be considered by the consent authority in the assessment of a proposal within the land subject to SREP 2005. As the works seek consent for alterations and additions to the existing dwelling, which are well removed from the waterfront, the following Clauses of Division 2 are considered to be relevant to the proposal.

Clause 20 - General requires that Council take into consideration the Division prior to granting consent.

Clause 21 - Biodiversity, ecology and environment protection

The matters to be taken into consideration in relation to biodiversity, ecology and environment protection are as follows:

- (a) development should have a neutral or beneficial effect on the quality of water entering the waterways,*
- (b) development should protect and enhance terrestrial and aquatic species, populations and ecological communities and, in particular, should avoid physical damage and shading of aquatic vegetation (such as seagrass, saltmarsh and algal and mangrove communities),*
- (c) development should promote ecological connectivity between neighbouring areas of aquatic vegetation (such as seagrass, saltmarsh and algal and mangrove communities),*
- (d) development should avoid indirect impacts on aquatic vegetation (such as changes to flow, current and wave action and changes to water quality) as a result of increased access,*
- (e) development should protect and reinstate natural intertidal foreshore areas, natural landforms and native vegetation,*
- (f) development should retain, rehabilitate and restore riparian land,*
- (g) development on land adjoining wetlands should maintain and enhance the ecological integrity of the wetlands and, where possible, should provide a vegetative buffer to protect the wetlands,*
- (h) the cumulative environmental impact of development,*
- (i) whether sediments in the waterway adjacent to the development are contaminated, and what means will minimise their disturbance.*

As the works will not have any physical impact on the waterway or the land adjoining the waterfront, the proposal is considered to be reasonable. No significant vegetation is to be removed to facilitate the construction.

The proposal is considered to have a neutral effect on the waterway.

22 Public access to, and use of, foreshores and waterways

The proposed works will not have any direct effect on the public use of the waterfront and will not diminish the public's ability to have access to and utilise the waterway.

23 Maintenance of a working harbour

The proposal will not have any impact on the harbour and will not affect the principles encouraging the maintenance of the harbour as a functional, working harbour.

24 Interrelationship of waterway and foreshore uses

The proposed works will not impact on the relationship between the public land and the waterway. The proposal is not inconsistent with the identified principles within Clause 24.

25 Foreshore and waterways scenic quality

The matters to be taken into consideration in relation to the maintenance, protection and enhancement of the scenic quality of foreshores and waterways are as follows:

- (a) the scale, form, design and siting of any building should be based on an analysis of:
 - (i) the land on which it is to be erected, and*
 - (ii) the adjoining land, and*
 - (iii) the likely future character of the locality,**
- (b) development should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands, foreshores and tributaries,*
- (c) the cumulative impact of water-based development should not detract from the character of the waterways and adjoining foreshores.*

The bulk and scale of the proposed works is compatible with the surrounding development along Barrabooka Street and due to the modest form will not have any detrimental impact on the visual qualities of the harbour and the foreshore area. The continued residential use of the land is a characteristic of the area and the anticipated future character of this locality.

26 Maintenance, protection and enhancement of views

By observing the objectives of Council's maximum height controls and allowing for views to and from the public spaces, the proposal will not have any detrimental effects on views to and from Sydney Harbour or the waterway.

27 Boat storage facilities

The proposed works are within private land and will not have any impact on boat storage facilities in the locality.

There are no other provisions of SREP (Sydney Harbour Catchment) 2005 that applies to the proposed development. It is considered that the proposal complies with SREP (Sydney Harbour Catchment) 2005.

6.2.1 Sydney Harbour Foreshores Area Development Control Plan

The Plan applies to all development proposals within the Foreshores and Waterways Area identified in SREP (Sydney Harbour Catchment) 2005 (refer to the Foreshores and Waterways Area map). It principally relates to the waterway and adjoining land identified on the maps accompanying this plan. The subject site is located within a foreshore area identified on the map and therefore the DCP applies to the proposed development.

As noted below in the extract of Map 15, the site is within the area defined as “Open Forest Type “B” & Woodland Area.” The site is above the waterfront

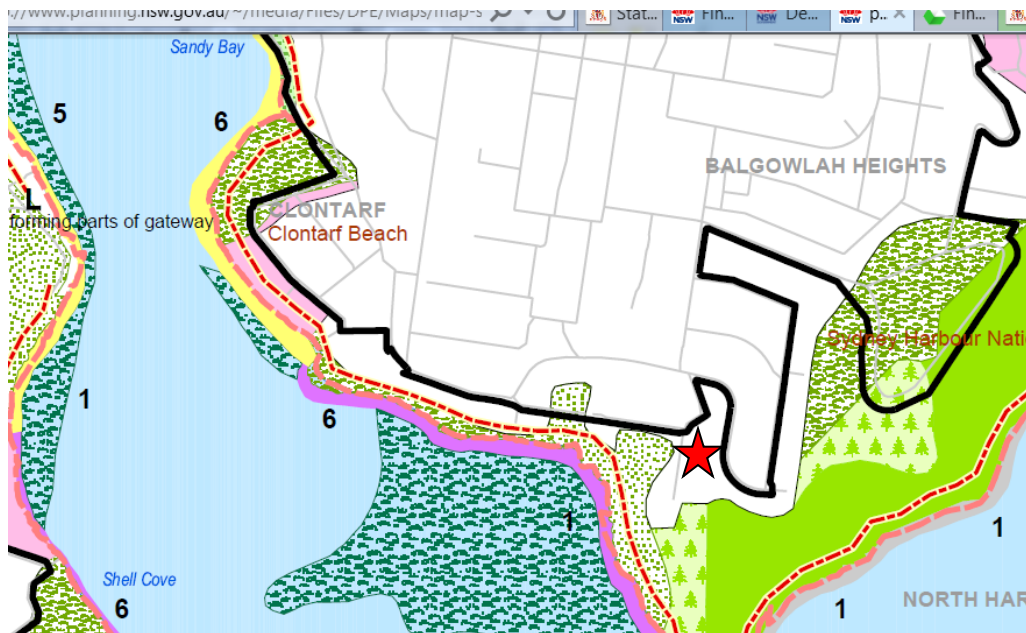


Fig 8: Extract of Map 15 – Ecological Communities & Landscape Characters

Given that the works are not immediately adjacent to the waterway and are wholly within the private land, it is considered that the proposal achieves the performance criteria of the DCP for the following reasons:

- The proposal does not result in the removal of any significant vegetation.
- The proposal does not alter the natural features (e.g rock outcrops) of the existing waterway.
- The proposal will not introduce exotic plant species.
- The proposal does not result in any removal of the existing foreshore vegetation.
- The proposal will not alter the landscaped character of the foreshore area.

Part 3 Landscape Assessment

The site is within the unmapped area and adjoins the Landscape Character 1 locality. It is considered that the proposal achieves the stated Performance Criteria for the Landscape Character 1 Category for the following reasons:

- The proposal does not result in any removal of the existing foreshore vegetation.
- The proposal will not alter the landscaped character of the foreshore area, as the garden areas are unchanged, with the existing perimeter screening surrounding the lower portion of the site.
- The proposed development is provided with a substantial setback from the waterway and will be substantially screened from any view from the waterway.

Part 4 Water Based and Land/Water Interface Developments

The proposed development is not defined as Water Based or Land/Water Interface Development and as such this part does not apply to the proposed development.

Part 5 Land Based Development

This part provides design guidelines for land based development. The proposed development is considered to be defined as Land Based Development. The following clauses of this Part apply to the proposed development:

Clause 5.4 Built Form

This clause requires that buildings and other structures should generally be of a sympathetic design to their surroundings. It is considered that this has been achieved for the following reasons:

- The proposed development is not prominently viewed from the waterway and is similar in scale and form to the surrounding development.
- The proposal maintains the development's setback to the foreshore.

There are no other provisions of the DCP that apply to the proposed development.

6.3 State Environmental Planning Policy No. 55 – Remediation of Land

SEPP 55 – Remediation of Land and in particular Clause 7(1)(a) suggests that a consent authority must not grant consent to the carrying out of any development on land unless it has considered whether the land is contaminated.

Given the history of residential use of the land, the site is not considered to be subject to contamination and further investigation is not required at this stage.

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

The proposal has been designed to respect the water, thermal and energy standards required by BASIX. A BASIX certificate has been submitted with the development application.

6.5 Manly Local Environmental Plan 2013

The land is zoned C3 Environmental Management under the provisions of the MLEP 2013.



Fig 9: Extract of Manly Local Environmental Plan 2013 Zoning Map

The development of and use of the land for residential purposes is consistent with the objectives of the C3 Environmental Management, which are noted over as:

- *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*
- *To provide for a limited range of development that does not have an adverse effect on those values.*
- *To protect tree canopies and provide for low impact residential uses that does not dominate the natural scenic qualities of the foreshore.*
- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*
- *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*
- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

It is considered that the proposed additions and alterations to the existing dwelling will achieve the zone objectives and are consistent with the established character of the surrounding locality for the following reasons:

- The proposal will be consistent with and complement the existing detached style housing within the locality.
- The proposed development respects the scale and form of other dwellings in the vicinity and therefore complements the locality.
- The setbacks are compatible with the existing surrounding development.
- The site is utilised as housing and will continue to maintain the residential use.
- The works will provide for alterations and additions to an existing dwelling which will maintain the residential scale and character of the locality.
- The proposal will maintain an appropriate level of amenity to the adjoining properties.
- The proposal does not unreasonably obstruct any significant views from private property or the public domain.
- As detailed in this report the proposal maintains appropriate solar access to the surrounding properties.

Clause 4.3 – Height of buildings

The dictionary supplement to the LEP notes building height to be:

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 building height limit for development in this portion of Clontarf is 8.5m. The proposed new works to the existing dwelling will present a maximum building height of approximately 10.18m to the proposed first floor western balcony roof cover which does not comply with this control. The new works will not exceed the existing maximum ridge level of the dwelling.

Accordingly, a submission has been prepared pursuant to Clause 4.6 and accompanies this statement.

Clause 4.4 – Floor space ratio

A maximum floor space ratio control of 0.4:1 is required for development in this locality. The proposal provides a floor space ratio of 0.667:1, which does not meet this provision.

Accordingly, the proposal is accompanied by a Clause 4.6 submission in support of the variation. It is noted that under the provisions of Clause 4.1.3.1 of Manly Development Control Plan 2013 Amendment 14, an exception to the FSR control can be considered for undersized allotments, when the development is considered to suitably address the relevant LEP objectives and DCP provisions.

In this instance, the FSR can be calculated based on a minimum lot size of 750m² (Area “U” on LSZ Map). On this basis, the proposal presents a revised FSR calculation of 0.418:1, which is marginally

in excess of the FSR control. The design and its merits are discussed within the Clause 4.6 submission which is included as an appendix to this statement.

Clause 6.2 – Earthworks

The proposal will require excavation to accommodate the new works at the lower level. A Preliminary Geotechnical Assessment has been prepared by Ascent Geotechnical Consulting, Reference No. AG20182, dated 3 August 2020.

Subject to compliance with the recommendations contained within the Geotechnical Assessment, the proposal will satisfy the provisions of this clause.

All works will be carried out under the supervision and direction of a Structural Engineer and will be managed to ensure that the amenity and safety of the subject and neighbouring dwellings will be protected.

Clause 6.4 – Stormwater management

The proposal meets the objectives of the clause as stated below in that:

- (a) is designed to maximise the use of water permeable surfaces on the land having regard to the soil characteristics affecting on-site infiltration of water, and*
- (b) includes, if practicable, on-site stormwater retention for use as an alternative supply to mains water, groundwater or river water, and*
- (c) avoids any significant adverse impacts of stormwater runoff on adjoining properties, native bushland and receiving waters, or if that impact cannot be reasonably avoided, minimises and mitigates the impact.*

The new roof areas will be connected to the existing stormwater system which directs roofwater partly to the street gutter in Barrabooka Street, with the balance dispersed within the rear, Western portion of the site..

Clause 6.5 – Terrestrial biodiversity

The proposal meets the objectives of the clause as stated below in that:

- (a) protecting native fauna and flora, and*
- (b) protecting the ecological processes necessary for their continued existence, and*
- (c) encouraging the conservation and recovery of native fauna and flora and their habitats.*

The proposed works are largely contained within the existing building footprint. The proposal will not require the removal of any significant vegetation, and maintains a generous area of soft landscaping.

The proposal is not considered to result in any adverse impacts for native flora and fauna, and is considered to be in keeping with the provisions of this clause.

Clause 6.8 – Landslide risk

The site is identified on Council's DCP mapping as being within Area G2 on the Landslip Hazard Map.

The proposal will require excavation to accommodate the new works at the lower level. Accordingly, a Preliminary Geotechnical Assessment has been prepared by Ascent Geotechnical Consulting, Reference No. AG20182, dated 3 August 2020.

Subject to compliance with the recommendations contained within the Geotechnical Assessment, the proposal will satisfy the provisions of this clause.

All works will be carried out under the supervision and direction of a Structural Engineer and will be managed to ensure that the amenity and safety of the subject and neighbouring dwellings will be protected.

Clause 6.9 – Foreshore scenic protection area

Clause 6.9 relates to development within the Foreshore Scenic Protection Area and notes within (3):

- 3) *Development consent must not be granted to development on land to which this clause applies unless the consent authority has considered the following matters:*
- (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,*
 - (b) measures to protect and improve scenic qualities of the coastline,*
 - (c) suitability of development given its type, location and design and its relationship with and impact on the foreshore,*
 - (d) measures to reduce the potential for conflict between land-based and water-based coastal activities.*

In this regard, it is considered that the proposal is suitable in the Foreshore Scenic Protection area, as the works will respect the height, scale and form of the surrounding residential development and the existing development on the site.

There are no other clauses of the MLEP 2013 that are considered to be relevant to the proposed development.

It is considered that the proposal achieves the requirements of the MLEP.

6.5 Manly Development Control Plan 2013

Council's DCP Development Control Plan 2013 – Amendment 14 provides the primary control for development within the area.

The DA submission will address the Council's submission requirements outlined in Part 2 – Process.

The primary areas which are applicable to the proposed works are detailed within Part 3 – General Principles of Development & Part 4 – Development Controls and Development Types.

Clause 3.1.1 Streetscape (Residential Areas)

It is suggested that the proposed additions and alterations to the existing dwelling, which will not substantially alter the bulk and scale of the existing dwelling, will enhance the street view of the site.

The intended outcomes are noted as:

- i) *complement the predominant building form, distinct building character, building material and finishes and architectural style in the locality;*
- ii) *ensure the bulk and design of development does not detract from the scenic amenity of the area (see also paragraph 3.4 Amenity) when viewed from surrounding public and private land;*
- iii) *maintain building heights at a compatible scale with adjacent development particularly at the street frontage and building alignment, whilst also having regard to the LEP height standard and the controls of this plan concerning wall and roof height and the number of storeys;*
- iv) *avoid elevated structures constructed on extended columns that dominate adjoining sites such as elevated open space terraces, pools, driveways and the like. See also paragraph 4.1.8 Development on Sloping Sites and paragraph 4.1.9 Swimming Pools, Spas and Water Features;*
- v) *address and compliment the built form and style any heritage property in the vicinity to preserve the integrity of the item and its setting. See also paragraph 3.2 Heritage Considerations;*
- vi) *visually improve existing streetscapes through innovative design solutions; and*
- vii) *Incorporate building materials and finishes complementing those dominant in the locality. The use of plantation and/or recycled timbers in construction and finishes is encouraged. See also paragraph 3.5.7 Building Construction and Design*

The proposal will see the construction of alterations and additions to the existing dwelling.

The proposed works will not see any substantial increase to the bulk and scale of the dwelling as viewed from the streetscape, and the existing maximum ridgeline of the dwelling is maintained (RL 59.79m).

The new works are complementary to the existing locality and the surrounding development. The proposal is in keeping with the character of the Barrabooka Street streetscape, and is therefore worthy of Council's support.

Clause 3.3 Landscaping

The proposed new works will maintain the available area of soft landscaping within the site. The new works will present an appropriate form and footprint, which is appropriately set back from the street, side and rear boundaries.

The existing landscaping on site will continue to minimise overlooking to neighbouring properties.

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

The objectives of the clause are noted as:

- | | |
|---------------------|---|
| <i>Objective 1)</i> | <i>To protect the amenity of existing and future residents and minimise the impact of new development, including alterations and additions, on privacy, views, solar access and general amenity of adjoining and nearby properties.</i> |
| <i>Objective 2)</i> | <i>To maximise the provision of open space for recreational needs of the occupier and provide privacy and shade.</i> |

It is suggested that the works will achieve these objectives as:

- The proposal will provide for the addition of privacy screening to the rear balconies at the ground and first floor levels which minimises opportunities for overlooking to neighbouring dwellings. The existing side-facing windows are maintained and the existing privacy currently enjoyed by neighbouring properties is considered to remain unchanged.
- The proposed additions will not see any substantial change to the solar access currently received by the neighbouring properties.
- The proposed additions to the existing dwelling will not increase the existing maximum ridge height of the dwelling.

Clause 3.5 Sustainability

A BASIX Certificate has been prepared to support the new works and confirm that the additions will achieve the appropriate thermal performance criteria.

Clause 3.7 Stormwater Management

The new roof areas will be connected to the proposed stormwater system which directs roofwater partly to the street gutter in Barrabooka Street, with the rear, western portion of the roof dispersed within the rear yard of the site.

Part 4 – Residential Development Controls**Site Area 470.4m² - Density Sub Zone D9 (1150m² per lot)****Compliance Table**

Control	Required	Proposed	Compliance
Clause 4.1.1 Residential Density & Subdivision	Density Area D9 – 1 dwelling per 1150m ²	Site area 470.4m ²	Yes – existing site and dimensions are unchanged
Clause 4.1.2 Height of Buildings	Maximum height – 8.5m	Maximum height of new works – 10.385m	No – refer to Clause 4.6 submission
	Wall height – 7.2m	Max wall height approx. 9.45m (northern elevation). Existing wall height remains unchanged.	N/A – unchanged
	Max two storeys	Max three storeys (existing)	N/A – unchanged
	Roof height – 2.5m above wall height	New roof 1.75m above wall height.	Yes
Clause 4.1.13 Floor Space Ratio (FSR)	0.4:1	Proposed FSR 0.667:1 It is noted that under the provisions of Clause 4.1.3.1 of Manly Development Control Plan 2013 Amendment 14, an exception to the FSR control can be considered for undersized allotments, when the development is considered to suitably address the relevant LEP objectives and DCP provisions. In this instance, the FSR can be calculated based on a minimum lot size of 750m ²	No – refer to Clause 4.6 submission

Control	Required	Proposed	Compliance
		(Area "U" on LSZ Map). On this basis, the proposal presents a revised FSR calculation of 0.418:1, which presents a minor variation to the FSR control. The design and its merits are discussed within the Clause 4.6 submission which is included as an appendix to this statement.	
Clause 4.1.4 Setbacks (front, side and rear)	<u>Front</u> a) Relate to neighbouring sites and the prevailing building lines or 6m c) Projections into the front setback may be accepted for unenclosed balconies, roof eaves, sun-hoods, chimneys, meter boxes and the like, where no adverse impact on the streetscape or adjoining properties is demonstrated to Council's satisfaction.	Existing front setback remains unchanged.	Yes
Side Boundary setback – 1/3 of wall height	<u>Side</u> Northern side - 1/3 x 9.45m = 3.15m Southern side - 1/3 x 8.5m = 2.8m	The proposed minor addition at the first floor level will stand 1.095m and 1.07m from the northern and southern side setbacks respectively.	Yes – on merit

Control	Required	Proposed	Compliance
Rear setback – 8m		The new works follow the existing side setbacks of the dwelling, and are not considered to result in any adverse impacts for neighbouring properties. The proposed side setbacks are therefore deemed worthy of support. N/A – no change to existing rear setback	N/A
Clause 4.1.5 Open space and Landscaping	Area OS 4 Open space: Min 60% site area Landscaping: 40% of open space	Proposed open space – unchanged Proposed soft open space – 61% or 287m² - Unchanged The objectives of this control are as follows: • <i>To retain and augment important landscape features and vegetation including remnant populations of native flora and fauna.</i> • <i>To maximise soft landscaped areas and open space at ground level, encourage appropriate tree planting and the maintenance of existing vegetation and bushland.</i> • <i>To maintain and enhance the amenity (including sunlight, privacy and views) of the site, the streetscape and the surrounding area.</i> • <i>To maximise water infiltration on-site with porous landscaped areas and surfaces and</i>	Yes – on merit

Control	Required	Proposed	Compliance
		<i>minimise stormwater runoff.</i> <i>To minimise the spread of weeds and the degradation of private and public open space.</i> <i>To maximise wildlife habitat and the potential for wildlife corridors.</i> Whilst the site does not comply with the soft landscaped area control, the proposal will maintain the increase the available area of soft landscaping, with the new works located within the building footprint. The existing site landscaping softens the built form of the development, and the landscaped area is considered appropriate in this instance.	
Clause 4.1.6 Parking	Min 2 spaces	Parking for two cars will be maintained in the existing garage.	Yes

Clause 4.1.6.4 Vehicular Access	a) All vehicles should enter and leave the site in a forward direction. b) Vehicular access and parking for buildings with more than 1 dwelling is to be consolidated within one location, unless an alternative layout/design would better reflect the streetscape or the building form. c) Vision of vehicles entering and leaving the site must not be impaired by structures or landscaping. d) Particular attention should be given to separating pedestrian entries and vehicular crossings for safety.	The proposal will retain the existing driveway which will continue to provide access to the existing garage.	Yes
Clause 4.1.6.6 Tandem, Stacked and Mechanical Parking Areas	The design location and management of parking facilities involving tandem, stacked and mechanical parking (including car stackers, turntables, car lifts or other automated parking systems) must consider the equitable access and distribution of	N/A – existing double garage maintained.	N/A

	parking spaces to all occupants and visitors to the building. In this regard: a) all parking spaces in any tandem or stacked arrangement are to be allocated to the same dwelling/strata unit and must not be used as visitors parking; and b) where the proposed development involves a tandem, stacked and mechanical parking arrangement which necessitates more than one parking space being attributed to a single dwelling unit under paragraph i) above; Council must be satisfied that sufficient parking spaces are reasonably allocated to all other dwelling units within the development.		
Clause 4.1.7 First Floor and Roof Additions	a) First floor additions must complement the architectural style of the ground floor and where possible retain existing roof forms. Notwithstanding	Existing first floor level maintained.	N/A

	setback provisions, the addition may follow the existing ground floor wall setbacks providing adjoining properties are not adversely impacted by overshadowing, view loss or privacy issues. b) The dwelling and the form of alterations and additions must retain the existing scale and character of the street and should not degrade the amenity of surrounding residences or the aesthetic quality of Manly. In this regard, it may be preferable that the addition be confined to the rear of the premises or be contained within the roof structure.		
Clause 4.1.8 Development on Sloping Sites	<i>Area G2</i> The applicant should complete Council's Checklist for Preliminary Assessment of Site Conditions (Landslip) at Schedule 11 of this plan to determine whether a Site Stability Report is required.	The proposal will require excavation to accommodate the new works at the lower level. Accordingly, a Preliminary Geotechnical Assessment has been prepared by Ascent Geotechnical Consulting, Reference No. AG20182, dated 3 August 2020.	Yes

		Subject to compliance with the recommendations contained within the Geotechnical Assessment, the proposal will satisfy the provisions of this clause. All works will be carried out under the supervision and direction of a Structural Engineer and will be managed to ensure that the amenity and safety of the subject and neighbouring dwellings will be protected.	
Clause 4.1.9 Swimming pools, spas and Water features	Height above ground not more than 1m Setback of outer edge of pool concourse from side and rear boundaries must be at least 1m with water line being at least 1.5m from the boundary Pool not to exceed 30% of total open space	Existing pool maintained.	N/A
Clause 4.1.10 Fencing	Freestanding walls and fences between the front street boundary and the building are to be no more than 1m	No new fencing proposed.	N/A

	high above ground level at any point. Transparent fences permitted up to 1.5m in height.		
--	---	--	--

7.0 Matters for Consideration under Section 4.15 of The Environmental Planning and Assessment Act, 1979

7.1 The provisions of any environmental planning instrument

The proposal is subject to the provisions of the Manly Local Environmental Plan 2013 and the relevant supporting Council policies. It is considered that the provisions of this environmental planning instrument have been satisfactorily addressed within this report and that the proposal achieves compliance with its provisions.

There are no other environmental planning instruments applying to the site.

7.2 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 Planning 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 instruments applying to the land.

7.3 Any development control plan

The development has been designed to comply with the requirements of Council's Manly Development Control Plan 2013.

It is considered that the proposed design respects the aims and objectives of the DCP however we note that the Environmental Planning and Assessment Amendment Act 2012 No 93 (Amendment Act) which received assent on 21 November 2012 commenced on 1 March 2013.

Key amongst the amendments are requirements to interpret DCPs flexibly and to allow reasonable alternative solutions to achieve the objectives of DCP standards.

The new section 3.42 provides that the 'principal purpose' of DCPs is to 'provide guidance' on:-

- giving effect to the aims of any applicable environmental planning instrument
- facilitating permissible development
- achieving the objectives of the relevant land zones.

The key amendment is the insertion of section 4.15(3A) which:

- prevents the consent authority requiring more onerous standards than a DCP provides,
- requires the consent authority to be 'flexible' and allow 'reasonable alternative solutions' in applying DCP provisions with which a development application does not comply,
- limits the consent authority's consideration of the DCP to the development application (preventing consideration of previous or future applications of the DCP).

We request that Council applies considered flexibility where the application seeks variations to numerical development controls in the DCP as justified in this report. In particular we consider that the variation to the side setback control is a reasonable alternative solution to compliance

where the site conditions result in a challenge to designing for new development which fully respects the criteria.

It is considered that the proposed design respects the desired character objectives of the DCP in that it reinforces the existing residential character of the area and is compatible with the existing uses in the vicinity.

7.4 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

No matters of relevance are raised in regard to the proposed development.

7.5 The regulations (to the extent that they prescribe matters for the purposes of this paragraph),

No matters of relevance are raised in regard to the proposed development.

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

It is considered that the proposal, which seeks consent for proposed alterations and additions to the existing dwelling, will not unreasonably impact upon the amenity of adjoining properties or upon the character of the surrounding area. It is considered that the resultant development is compatible with and will complement the residential character of the area.

The proposal is considered to be well designed having regard to the relevant provisions of the Council's MLEP 2013 and Council's Codes and Policies, in particular the Manly DCP 2013.

7.7 The suitability of the site for the development

The subject land is currently zoned C3 Environmental Management under the Manly Local Environmental Plan 2013 and is considered suitable for the proposed development.

7.8 Any submissions made in accordance with this Act or the regulations

This is a matter for Council in the consideration of this proposal.

7.9 The public interest

The proposal will not impact upon the environment, the character of the locality or upon the amenity of adjoining properties and is therefore considered to be within the public interest.

8.0 Conclusion

The principal objective of this development is to provide for the proposed construction of alterations and additions to the existing dwelling, which respects and complements the site's location.

It is considered that the proposed works satisfy the stated objectives of Council's Development Controls. By maintaining our neighbours amenity and by complementing the existing style and character of the surrounding locality, the stated objectives have been satisfied.

As the proposed development will not have any significant impact on the environment, scenic quality of the area or the amenity of the adjoining allotments, the issue of Development Consent under the delegation of Council is requested.

VAUGHAN MILLIGAN

Town Planner

Grad. Dip. Urban and Regional Planning (UNE)

Appendices:

Clause 4.6 Submission – Maximum Building Height
Clause 4.6 Submission – Floor Space Ratio

APPENDIX 1
CLAUSE 4.6 – MAXIMUM BUILDING HEIGHT

**WRITTEN SUBMISSION PURSUANT TO CLAUSE 4.6 OF
MANLY LOCAL ENVIRONMENTAL PLAN 2013**

13 BARRABOOKA STREET, CLONTARF

ADDITIONS AND ALTERATIONS TO AN EXISTING DWELLING

**VARIATION OF A DEVELOPMENT STANDARD RELATING TO COUNCIL'S MAXIMUM BUILDING
HEIGHT CONTROL AS DETAILED IN CLAUSE 4.3 OF THE
MANLY LOCAL ENVIRONMENTAL PLAN 2013**

For: Additions and alterations to an existing dwelling
At: 13 Barrabooka Street, Clontarf
Owner: Ian & Lisa Dunn
Applicant: Ian & Lisa Dunn
C/- Vaughan Milligan Development Consulting Pty Ltd

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Manly Local Environmental Plan 2013. In this regard, it is requested Council support a variation with respect to compliance with the maximum height of a building as described in Clause 4.3 of the Manly Local Environmental Plan 2013 (MLEP 2013).

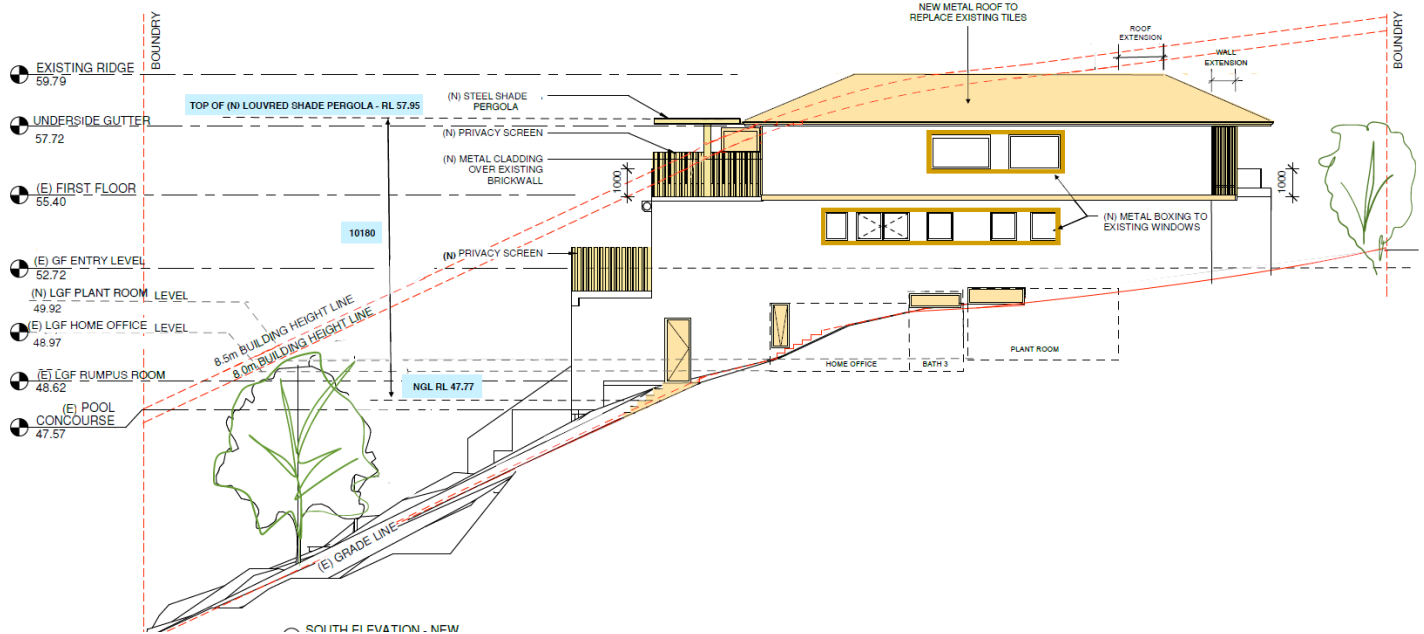
2.0 Background

Clause 4.3 restricts the maximum height of a building within this area of the Clontarf locality and refers to the height control noted within the *"Height of Buildings Map."*

The relevant maximum height of the building in this locality is 8.5m and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The proposal will not see any change to the existing maximum height of the dwelling.

The new works are up to 10.18m in height above the existing ground level to the new pergola element over the western terrace at the first floor level and results in a non-compliance of 1.88m or 19.76% to the control, as noted in Figure 8.



**Fig 8: Sections elevation indicating proposed roof exceeding Council's height of buildings control
(Source: R Squared Studios Pty Ltd)**

Is clause 4.3 of MLEP a development standard?

- (a) The definition of “development standard” in clause 1.4 of the EP&A Act means standards fixed in respect of an aspect of a development and includes:

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

- (b) Clause 4.3 relates to the maximum height of a building. Accordingly, clause 4.3 is a development standard.

3.0 Purpose of Clause 4.6

The Manly Local Environmental Plan 2013 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the Standard Instrument is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the Standard Instrument should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council* [2018] NSWLEC 118 have been relied on in this request for a variation to the development standard.

4.0 Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

- (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 cl 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 provides:

- (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.*

Clause 4.3 (the height of a building standard) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of MLEP.

Clause 4.6(3) of MLEP provides:

(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.

The proposed development does not comply with the maximum height of a building development standard pursuant to clause 4.3 of MLEP which specifies a maximum building height of 8.5m. As a consequence of the site's slope and the existing built form the proposal will present a maximum height of 10.18m.

In the circumstances of this case, 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 provides:

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

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

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

(b) the concurrence of the Planning Secretary has been obtained.

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 Planning Secretary (of the Department of Planning and the Environment) has been obtained.

Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of MLEP provides:

- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

Council has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), and should consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

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 4.4 of MLEP from the operation of clause 4.6.

The specific objectives of Clause 4.6 are as follows:

- (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 development will achieve a better outcome in this instance as the site will provide for the construction of alterations and additions to an existing dwelling, which is consistent with the stated Objectives of the C3 Environmental Management Zone, which are noted as:

- *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*
- *To provide for a limited range of development that does not have an adverse effect on those values.*

- *To protect tree canopies and provide for low impact residential uses that does not dominate the natural scenic qualities of the foreshore.*
- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*
- *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*
- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

The proposal will provide for the construction of alterations and additions to an existing dwelling to provide for increased amenity for the site's occupants.

The new works maintain a bulk and scale which is in keeping with the extent of surrounding development, with a consistent palette of materials and finishes, in order to provide for high quality development that will enhance and complement the locality.

The proposal will not exceed the existing ridge level of the current dwelling.

Notwithstanding the minor non-compliance with the maximum height of 1.68m or 10.18m in overall height, the new works will provide attractive alterations and additions to a residential development that will add positively to the character and function of the local residential neighbourhood. It is noted that the proposal will maintain a consistent character with the built form of nearby properties.

The proposed alterations and additions will not see any adverse impacts on the views enjoyed by neighbouring properties.

The works will not see any adverse impacts on the solar access enjoyed by adjoining dwellings.

The general bulk and scale of the dwelling as viewed from the public areas in Barrabooka Street and from the surrounding private properties will be largely maintained.

5.0 The Nature and Extent of the Variation

- 5.1 This request seeks a variation to the maximum height of a building development standard contained in clause 4.3 of MLEP.
- 5.2 Clause 4.3 of MLEP specifies a maximum building height of 8.5m for development in this part of Clontarf.
- 5.3 The proposed alterations and additions to the dwelling will present a maximum height of 10.18m or a non-compliance of 1.68m or a variation to the control of 19.76%.

The proposal will not see any alteration to the existing maximum ridge level of the dwelling.

6.0 Relevant Caselaw

6.1 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:

17. *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].*
18. *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].*
19. *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].*
20. *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].*
21. *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.*
22. *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.

6.2 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 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 and the objectives for development for in the R2 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 4.4 of MLEP?

7.0. Request for Variation

7.1 Is compliance with clause 4.3 unreasonable or unnecessary?

- (a) This request relies upon the 1st way identified by Preston CJ in *Wehbe*.
- (b) The first way in *Wehbe* is to establish that the objectives of the standard are achieved.
- (c) Each objective of the maximum building height standard and reasoning why compliance is unreasonable or unnecessary is set out below:

(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,

The Objective of Clause 4.3 (1)(a) seeks to ensure buildings, by virtue of their height and scale are consistent with the desired future streetscape character of the locality.

The surrounding area is predominantly characterised by two – three storey development.

The proposal seeks to accommodate the additions within a contemporary building form, with the slope of the site towards the rear resulting in a portion of the pergola being up to 10.18m in height above the existing ground level.

The overall building height respects the surrounding character and the design seeks to minimise the visual impact through the retention of the existing maximum ridge height.

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

The proposed additions and alterations to the existing dwelling will not result in any unreasonable impacts on adjoining properties in terms of views, privacy or overshadowing.

Further, the modulation of the front façade and building elevations where visible from the public domain minimises the visual impact of the development.

The proposal presents a compatible height and scale to the surrounding development and the articulation to the building facades and low pitch roof form will suitably distribute the bulk of the new floor area.

(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),***

Due to the general slope of the site towards the west, the adjoining properties on the western side of Barrabooka Street enjoy views towards The Spit and Mosman.

The proposal will provide for a low profile roof form which will allow for suitable views to be maintained through and over the site.

Views from the surrounding public spaces are not adversely affected.

(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,

As the proposal will see the construction of alterations and additions to an existing dwelling, the shadow analysis prepared by R Squared Studios Pty Ltd details the proposed shadow impacts.

The assessment confirms that the proposed alterations and additions will not result in any change to the existing solar access available to neighbouring 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.

The bulk and scale of the existing dwelling is largely unchanged.

The proposal is intended to reflect the predominant scale and form of the surrounding development in Barrabooka Street and will reflect the existing single dwelling uses in the vicinity.

The proposal will not require the removal of any significant vegetation, and maintains a suitable area of soft landscaping.

7.2 Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. *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.*
24. *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].*

There are sufficient environmental planning grounds to justify contravening the development standard.

The low pitch roof form maintains modulation and architectural relief to the building’s facade, and distributes any sense of visual bulk.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposed alterations and additions introduce modulation and architectural relief to the building's facade, without seeing any substantial increase to the building's bulk, which promotes good design and improves the amenity of the built environment (1.3(g)).
- The proposed addition will maintain the general bulk and scale of the existing surrounding dwellings and maintains architectural consistency with the prevailing development pattern which promotes the orderly & economic use of the land (cl 1.3(c)).
- Similarly, the proposed additional floor area will provide for improved amenity within a built form which is compatible with the streetscape of Barrabooka Street which also promotes the orderly and economic use of the land (cl 1.3(c)).
- The proposed new works which exceed the maximum building height control will not exceed the ridge height of the existing dwelling and are considered to promote good design and enhance the residential amenity of the buildings' occupants and the immediate area, by providing solar protection to the existing open terrace from the main living level which is consistent with the Objective 1.3 (g) of the EPA Act.
- The alterations demonstrate good design and improves the amenity of the built environment by creating improved and functional living area and also maintains the amenity of the existing dwelling house and neighbours in terms of views by largely maintaining the existing roof form which will reduce the impact on the views and outlook for the uphill properties and limit overshadowing impacts to the property to the south of the site (cl 1.3(g)).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the provision of a building that provides sufficient floor area for future occupants whilst reducing the maximum building height and manages the bulk and scale and maintains views over and past the building from the public and private domain.

These are not simply benefits of the development as a whole, but are benefits emanating from the breach of the floor space ratio control.

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning

grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

7.3 Is the proposed development in the public interest because it is consistent with the objectives of clause 4.4 and the objectives of the C3 Environmental Management zone?

- (a) Section 4.2 of this written request suggests the 1st test in Wehbe is made good by the development.
- (b) Each of the objectives of the C3 Environmental Management zone and the reasons why the proposed development is consistent with each objective is set out below.

I have had regard for the principles established by Preston CJ in *Nessdee Pty Limited v Orange City Council [2017] NSWLEC 158* where it was found at paragraph 18 that the first objective of the zone established the range of principal values to be considered in the zone.

Preston CJ found also that *“The second objective is declaratory: the limited range of development that is permitted without or with consent in the Land Use Table is taken to be development that does not have an adverse effect on the values, including the aesthetic values, of the area. That is to say, the limited range of development specified is not inherently incompatible with the objectives of the zone”*.

In response to *Nessdee*, I have provided the following review of the zone objectives:

It is considered that notwithstanding the considered form of the proposed additions which maintain the existing overall height of 10.18m, the proposed alterations and additions to the existing dwelling will be consistent with the individual Objectives of the C3 Environmental Management zone for the following reasons:

- ***To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.***

The proposal provides for alterations and additions to an existing dwelling which are largely contained within the existing building footprint and will not see the removal of any significant vegetation.

The majority of the site will be retained for soft landscaping.

The proposal will not detract from the special ecological values of the site and locality.

- ***To provide for a limited range of development that does not have an adverse effect on those values.***

The modest alterations and additions to the existing dwelling are modest in bulk and scale and comprise complementary colours and finishes, and will not result in any adverse impacts of the ecological values of the locality.

- ***To protect tree canopies and provide for low impact residential uses that does not dominate the natural scenic qualities of the foreshore.***

The proposal will not require the removal of any significant vegetation. The landscaped character of the site is maintained.

The proposal is not considered to detract from the scenic qualities of the nearby foreshore.

- ***To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.***

The subject site is well separated from the foreshore, and will not impact the existing bushland along the foreshore. The modest extent of the new works and complementary external finishes will ensure that the development is not prominently viewed within the locality.

- ***To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.***

Noted. The site maintains property boundaries which are capable of accommodating future plantings.

The existing stormwater arrangements will be maintained.

- ***To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.***

The proposed new works will not exceed the ridge height of the existing dwelling, and maintain consistency with the two and three storey scale of existing surrounding development.

The proposed development will follow the sloping topography of the site, and will not require the removal of any significant vegetation.

7.4 Has council obtained the concurrence of the Director-General?

The Council can assume the concurrence of the Director-General with regards to this clause 4.6 variation.

7.5 Has the Council considered the matters in clause 4.6(5) of MLEP?

- (a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed additions to the dwelling house for the particular site and this design is not readily transferrable to any other site in the immediate locality, wider region of the State and the scale or nature of the proposed development does not trigger requirements for a higher level of assessment.
- (b) As the proposed development is in the public interest because it complies with the objectives of the development standard and the objectives of the zone there is no significant public benefit in maintaining the development standard.
- (c) there are no other matters required to be taken into account by the secretary before granting concurrence.

8.0 Conclusion

This development proposes a departure from the maximum height of a building control, with the proposed additions to the existing dwelling to provide for a new pergola over the existing west facing first floor terrace, which is accessible directly from the main living areas and to a height of 10.18m above existing ground level,.

The proposal will not see any change to the existing maximum ridge level of the current dwelling.

Accordingly, we are of the view that the proposal is consistent with the objectives of the development standard.

In summary, the proposal satisfies all of the requirements of clause 4.6 of MLEP 2013 and the exception to the development standard is reasonable and appropriate in the circumstances of the case.

A handwritten signature in black ink, reading "Vaughan Milligan". The signature is written in a cursive, flowing style.

VAUGHAN MILLIGAN

Town Planner

APPENDIX 2

CLAUSE 4.6 – FLOOR SPACE RATIO

**WRITTEN SUBMISSION PURSUANT TO CLAUSE 4.6 OF
MANLY LOCAL ENVIRONMENTAL PLAN 2013**

13 BARRABOOKA STREET, CLONTARF

ADDITIONS AND ALTERATIONS TO AN EXISTING DWELLING

**VARIATION OF A DEVELOPMENT STANDARD RELATING TO COUNCIL'S FLOOR SPACE RATIO
CONTROL AS DETAILED IN CLAUSE 4.4 OF THE
MANLY LOCAL ENVIRONMENTAL PLAN 2013**

For: Additions and alterations to an existing dwelling
At: 13 Barrabooka Street, Clontarf
Owner: Ian & Lisa Dunn
Applicant: Ian & Lisa Dunn
C/- Vaughan Milligan Development Consulting Pty Ltd

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Manly Local Environmental Plan 2013. In this regard, it is requested Council support a variation with respect to compliance with the maximum floor space ratio development standard as described in Clause 4.4 of the Manly Local Environmental Plan 2013 (MLEP 2013).

2.0 Background

Clause 4.4 restricts the maximum floor space area control within this area of the Clontarf locality and refers to the floor space ratio noted within the "*Floor Space Ratio Map*."

The relevant maximum floor space control in this locality is 0.4:1 or for this site with an area of 470.4m², the maximum gross floor area is 188.16m² and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The existing dwelling on the site presents a gross floor area of 275m² or 0.58:1.

The proposed development will see an increase in the total floor area of 39m² when compared to the existing floor area, to a maximum of floor area of 315m² or 0.669:1, and therefore presents a variation of 126.84m² or 67.1% to the control.

Notably, the extent of the new floor area (40m² of the proposed new floor area) will be within the existing lower ground floor level and excavated below the current dwelling)) with the result that the existing bulk and scale of the building when viewed from neighbouring properties or the surrounding public areas is largely unchanged.

The controls of Clause 4.4 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

It is noted that the Council's Manly Development Control Plan 2013 Amendment 14 and in particular Clause 4.1.3.1 provides exceptions to the FSR control where the lot is less than minimum required lot size under Council's LEP Lot Size Map and the development satisfied the LEP Objectives and the DCP provisions.

In this instance the required minimum lot size in the locality is 1150m², with the DCP permitting a variation to a minimum lot size of 750m² and when calculated against this required lot size, the permissible floor area is 300m². The proposed development will present a total floor area of 315m² or a FSR of 0.42:1, which is marginally in excess of the control when assessed against the minimum lot size in the locality.

Is clause 4.4 of MLEP a development standard?

- (a) The definition of "development standard" in clause 1.4 of the EP&A Act means standard is fixed in respect of an aspect of a development and include:

"(d) the cubic content of floor space of a building."

- (b) Clause 4.4 relates to floor space of a building. Accordingly, clause 4.4 is a development standard.

3.0 Purpose of Clause 4.6

The Manly Local Environmental Plan 2013 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the Standard Instrument is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the Standard Instrument should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council* [2018] NSWLEC 118 have been relied on in this request for a variation to the development standard.

4.0 Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

- (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 cl 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 provides:

- (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.*

Clause 4.4 (the FSR development standard) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of MLEP.

Clause 4.6(3) of MLEP provides:

- (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.*

The proposed development does not comply with the FSR development standard pursuant to clause 4.4 of MLEP which specifies an FSR of 0.4:1 however as the proposal will only result in a

minor increase in the floor area of 40m² in total with the new floor area at the lowest floor level and within the building undercroft, 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 provides:

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

(a) the consent authority is satisfied that:

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

(b) the concurrence of the Planning Secretary has been obtained.

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 Planning Secretary (of the Department of Planning and the Environment) has been obtained.

Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of MLEP provides:

(5) In deciding whether to grant concurrence, the Secretary must consider:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*

- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

Council has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), and should consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

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 4.4 of MLEP from the operation of clause 4.6.

The specific objectives of Clause 4.6 are as follows:

- (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 development will achieve a better outcome in this instance as the site will provide for the construction of alterations and additions to an existing dwelling, which is consistent with the stated Objectives of the C3 Environmental Management Zone, which are noted as:

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

The proposal will provide for the construction of alterations and additions to an existing dwelling to provide for increased amenity for the site's occupants.

The new works maintain a bulk and scale which is in keeping with the extent of surrounding development, with a consistent palette of materials and finishes, in order to provide for high quality development that will enhance and complement the locality.

The proposal will not exceed the existing ridge level of the current dwelling.

Notwithstanding the non-compliance with the maximum floor space ratio, together with the fact that the development will result in only a modest total increase in the gross floor area of 39m² with only 1m² increase above the ground and first floor levels, the new works will provide attractive alterations and additions to a residential development that will add positively to the character and function of the local residential neighbourhood. It is noted that the proposal will maintain a consistent character with the built form of nearby properties.

The proposed alterations and additions will not see any adverse impacts on the views enjoyed by neighbouring properties.

The works will not see any adverse impacts on the solar access enjoyed by adjoining dwellings.

The general bulk and scale of the dwelling as viewed from the public areas in Barrabooka Street from the surrounding private properties will be largely maintained.

5.0 The Nature and Extent of the Variation

- 5.1 This request seeks a variation to the FSR development standard contained in clause 4.4 of MLEP.
- 5.2 Clause 4.4 of MLEP specifies an allowable gross floor area for a site in this part of Clontarf of 0.4:1 or for this site, the allowable gross floor area is 188.16m².
- 5.3 The subject site has an area of 470.4m².
- 5.4 The existing dwelling has a gross floor area of 275m² or FSR of 0.58:1. The proposal has a calculable gross floor area of 315m² or FSR of 0.667:1. The proposal will see a minor increase in the floor area of only 40m², which is within the building undercroft and is not visible from Barrabooka Street
- 5.4 The total non-compliance with the FSR control is 126.84m² or 66.9%.
- 5.5 When assessed against a minimum lot area of 750m², the proposal presents an FSR of 0.42:1, which is a reduced extent of non-compliance with the maximum floor space ratio control.

6.0 Relevant Caselaw

- 6.1 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:

- 17. *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].*
- 18. *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].*

19. *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].*
20. *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].*
21. *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.*
22. *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.*

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

1. Is clause 4.4 of MLEP 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 4.4 and the objectives for development for in the C3 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 4.4 of MLEP?

7.0. Request for Variation

7.1 Is compliance with clause 4.4 unreasonable or unnecessary?

- (a) This request relies upon the 1st way identified by Preston CJ in *Wehbe*.
- (b) The first way in *Wehbe* is to establish that the objectives of the standard are achieved.
- (c) Each objective of the FSR standard and reasoning why compliance is unreasonable or unnecessary is set out below:

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

The objective of Clause 4.4(1)(a) seeks to ensure buildings, by virtue of their height and scale are consistent with the desired future streetscape character of the locality.

The proposal provides for alterations and additions to an existing dwelling which are intended to provide for a development outcome that benefits the surrounding neighbours by maintaining existing view sharing opportunities.

The contemporary building form with a low profile roof and earthy external finishes are considered to suitably reduce the visual bulk of the dwelling.

Further, the modulation of the front façade, together with the retention of the existing side setbacks and recessive external finishes will ensure the development minimises the visual impact when viewed from the surrounding public and private areas.

The proposal will be consistent with and complement the existing detached style single dwelling housing within the locality and as such, will not be a visually dominant element in the area.

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

The proposal will not see the loss of any significant vegetation. The built footprint of the

existing dwelling remains largely unchanged, and is therefore not considered to result in any adverse effects on the scenic qualities of the foreshore.

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

The site is considered to be sufficient to provide for the proposed works, with the dimensions of the lot to be unchanged.

The proposal will retain an appropriate area of soft landscaping, and the site will maintain an appropriate balance between the landscaping and the built form.

On the basis that the proposal maintains the majority of the existing landscaped area, the site is considered to maintain an appropriate balance between the site's landscaping and the built form.

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

The proposed works are wholly contained within the site and will not result in any adverse impacts for any adjoining land.

(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 site is not located within a business zone and by providing for the construction of alterations and additions to an existing dwelling, is not contrary to the viability of any local business activity.

7.2 Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. *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.*
24. *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]

There are sufficient environmental planning grounds to justify contravening the development standard.

The low pitch roof form further introduces modulation and architectural relief to the building's facade, which further distributes any sense of visual bulk.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposed alterations and additions introduce modulation and architectural relief to the building's facade, without seeing any substantial increase to the building's bulk, which promotes good design and improves the amenity of the built environment (1.3(g)).
- The proposed addition will maintain the general bulk and scale of the existing surrounding dwellings and maintains architectural consistency with the prevailing development pattern which promotes the orderly & economic use of the land (cl 1.3(c)).
- Similarly, the proposed additional floor area will provide for improved amenity within a built form which is compatible with the streetscape of Barrabooka Street which also promotes the orderly and economic use of the land (cl 1.3(c)).
- The proposed new works which exceed the gross floor area control and FSR standard of 0.4:1 are considered to promote good design and enhance the residential amenity of the buildings' occupants and the immediate area, which is consistent with the Objective 1.3 (g) of the EPA Act.
- The alterations demonstrate good design and improves the amenity of the built environment by creating improved and functional living area and also maintains the amenity of the existing dwelling house and neighbours in terms of views by maintaining the existing overall ridge height, with a sympathetic roof form which will reduce the impact on the views and outlook for uphill properties and limit overshadowing impacts to the property to the south of the site (cl 1.3(g)).

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the provision of a building that provides sufficient floor area for future occupants and manages the bulk and scale and maintains views over and past the building from the public and private domain.

These are not simply benefits of the development as a whole, but are benefits emanating from the breach of the floor space ratio control.

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

7.3 Is the proposed development in the public interest because it is consistent with the objectives of clause 4.4 and the objectives of the C3 Environmental Management zone?

- (a) Section 4.2 of this written request suggests the 1st test in *Wehbe* is made good by the development.
- (b) Each of the objectives of the C3 Environmental Management zone and the reasons why the proposed development is consistent with each objective is set out below.

I have had regard for the principles established by Preston CJ in *Nessdee Pty Limited v Orange City Council* [2017] NSWLEC 158 where it was found at paragraph 18 that the first objective of the zone established the range of principal values to be considered in the zone.

Preston CJ found also that "*The second objective is declaratory: the limited range of development that is permitted without or with consent in the Land Use Table is taken to be development that does not have an adverse effect on the values, including the aesthetic values, of the area. That is to say, the limited range of development specified is not inherently incompatible with the objectives of the zone*".

In response to *Nessdee*, I have provided the following review of the zone objectives:

It is considered that notwithstanding the compatible form of the proposed additions which see a minor increase in the gross floor area of 6m², the proposed alterations and additions to the existing dwelling will be consistent with the individual Objectives of the C3 Environmental Management Zone for the following reasons:

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

As found in *Nessdee*, this objective is considered to establish the principal values to be considered in the zone.

Dwelling houses are a permissible form within the Land Use table and is considered to be specified development that is not inherently incompatible with the objectives of the zone.

The C3 Environmental Management Zone contemplates low density residential uses on the land. The housing needs of the community are appropriately provided for in this instance through the proposed alterations and additions to an existing dwelling which will provide for an appropriate level of amenity and in a form, and respect the predominant bulk and scale of the surrounding dwellings.

The development will see a modest increase in the total floor area of 39m², of which are significant majority (38m²) is located within the existing lower ground floor level and is provided through further excavation beneath the dwelling. The proposal will not exceed the existing overall ridge height of the dwelling, and will see a reduction in the general bulk and scale in comparison to the previously approved development.

The non-compliance, which results from the extent of the existing floor areas and the provision of new additional floor area to meet the requirements of the owners will improve the amenity for the buildings' owners by providing new living spaces in a form which complements the architectural style and scale of the surrounding development.

The compatible form and scale of the alterations and additions will meet the housing needs of the community within a single dwelling house which is a permissible use in this environmentally sensitive zone.

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

The subject proposal relates to a residential dwelling and this provision is therefore not relevant.

7.4 Has council obtained the concurrence of the Director-General?

The Council can assume the concurrence of the Director-General with regards to this clause 4.6 variation.

7.5 Has the Council considered the matters in clause 4.6(5) of MLEP?

- (a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed additions to the dwelling house for the particular site and this design is not readily transferrable to any other site in the immediate locality, wider region of the State and the scale or nature of the proposed development does not trigger requirements for a higher level of assessment.
- (b) As the proposed development is in the public interest because it complies with the objectives of the development standard and the objectives of the zone there is no significant public benefit in maintaining the development standard.
- (c) there are no other matters required to be taken into account by the secretary before granting concurrence.

8.0 Conclusion

This development proposes a departure from the maximum floor space ratio control, with the proposed additions to the existing dwelling to provide a maximum floor space ratio of 0.669:1.

As discussed, it is noted that the Council's Manly Development Control Plan 2013 Amendment 14 and in particular Clause 4.1.3.1 provides exceptions to the FSR control where the lot is undersized and is less than minimum required lot size under Council's LEP Lot Size Map and the development satisfied the LEP Objectives and the DCP provisions.

In this instance the required minimum lot size in the locality is 750m² and when calculated against this required lot size, the development prescribes a FSR of 0.42:1, which presents a substantially lesser variation to the FSR control. Compliance with this control is constrained by the extent of the existing dwelling.

Accordingly, we are of the view that the proposal is consistent with the objectives of the development standard.

In summary, the proposal satisfies all of the requirements of clause 4.6 of MLEP 2013 and the exception to the development standard is reasonable and appropriate in the circumstances of the case.

A handwritten signature in black ink, reading "Vaughan Milligan". The signature is written in a cursive, flowing style.

VAUGHAN MILLIGAN

Town Planner