

BASIX[®]Certificate

Building Sustainability Index www.basix.nsw.gov.au

Alterations and Additions

Certificate number: A371457_03

This certificate confirms that the proposed development will meet the NSW government's requirements for sustainability, if it is built in accordance with the commitments set out below. Terms used in this certificate, or in the commitments, have the meaning given by the document entitled "BASIX Alterations and Additions Definitions" dated 06/10/2017 published by the Department. This document is available at www.basix.nsw.gov.au

Secretary

Date of issue: Friday, 30, July 2021

To be valid, this certificate must be lodged within 3 months of the date of issue.



Planning,
Industry &
Environment

Description of project

Project address	
Project name	7 Coronation Avenue_03
Street address	7 Coronation Avenue Mosman 2088
Local Government Area	Mosman Municipal Council
Plan type and number	Deposited Plan 316406
Lot number	2
Section number	
Project type	
Dwelling type	Separate dwelling house
Type of alteration and addition	My renovation work is valued at \$50,000 or more, and does not include a pool (and/or spa).

Certificate Prepared by (please complete before submitting to Council or PCA)

Name / Company Name: The House Energy Rating Company of Aust. Pty Ltd

ABN (if applicable): 61495952256

Fixtures and systems	Show on DA Plans	Show on CC/CDC Plans & specs	Certifier Check
Lighting			
The applicant must ensure a minimum of 40% of new or altered light fixtures are fitted with fluorescent, compact fluorescent, or light-emitting-diode (LED) lamps.		✓	✓
Fixtures			
The applicant must ensure new or altered showerheads have a flow rate no greater than 9 litres per minute or a 3 star water rating.		✓	✓
The applicant must ensure new or altered toilets have a flow rate no greater than 4 litres per average flush or a minimum 3 star water rating.		✓	✓
The applicant must ensure new or altered taps have a flow rate no greater than 9 litres per minute or minimum 3 star water rating.		✓	

Construction			Show on DA Plans	Show on CC/CDC Plans & specs	Certifier Check
Insulation requirements					
The applicant must construct the new or altered construction (floor(s), walls, and ceilings/roofs) in accordance with the specifications listed in the table below, except that a) additional insulation is not required where the area of new construction is less than 2m2, b) insulation specified is not required for parts of altered construction where insulation already exists.			✓	✓	✓
Construction	Additional insulation required (R-value)	Other specifications			
concrete slab on ground floor.	nil				

Glazing requirements							Show on DA Plans	Show on CC/CDC Plans & specs	Certifier Check
Windows and glazed doors									
<p>The applicant must install the windows, glazed doors and shading devices, in accordance with the specifications listed in the table below. Relevant overshadowing specifications must be satisfied for each window and glazed door.</p> <p>The following requirements must also be satisfied in relation to each window and glazed door:</p> <p>Each window or glazed door with standard aluminium or timber frames and single clear or toned glass may either match the description, or, have a U-value and a Solar Heat Gain Coefficient (SHGC) no greater than that listed in the table below. Total system U-values and SHGCs must be calculated in accordance with National Fenestration Rating Council (NFRC) conditions.</p>							✓	✓ ✓ ✓	✓ ✓ ✓
Windows and glazed doors glazing requirements									
Window / door no.	Orientation	Area of glass inc. frame (m2)	Overshadowing		Shading device	Frame and glass type			
			Height (m)	Distance (m)					
W01	SE	0.65	0	0	none	standard aluminium, single clear, (or U-value: 7.63, SHGC: 0.75)			
W02	SE	0.65	0	0	none	standard aluminium, single clear, (or U-value: 7.63, SHGC: 0.75)			

Legend
In these commitments, "applicant" means the person carrying out the development.
Commitments identified with a "✔" in the "Show on DA plans" column must be shown on the plans accompanying the development application for the proposed development (if a development application is to be lodged for the proposed development).
Commitments identified with a "✔" in the "Show on CC/CDC plans & specs" column must be shown in the plans and specifications accompanying the application for a construction certificate / complying development certificate for the proposed development.
Commitments identified with a "✔" in the "Certifier check" column must be certified by a certifying authority as having been fulfilled, before a final occupation certificate for the development may be issued.



Clause 4.6 Variation Building Height

Clause 4.3(2) Mosman Local Environmental Plan 2012
Mosman Development Application 8.2020.83
7 Coronation Avenue, Mosman NSW 2088

Purpose

This written request has been prepared in accordance with clause 4.6 of the Mosman Local Environmental Plan 2012 (**'MLEP 2012'**) and accompanies a Development Application (**'DA'**) for alterations and additions to an existing dwelling at 7 Coronation Avenue, Mosman (**'the Site'**).

This is a request to vary the Height of Buildings (**'building height'**) development standard under clause 4.3(2) of the MLEP 2012. Clause 4.3(2) of the MLEP 2012 states: -

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

The Site is identified on the Height of Buildings Map (Sheet HOB_002) as having a maximum permissible height of 8.5 metres.

Extent of Variation

The subject site is identified as having a maximum permissible building height of 8.5m. Building Height is defined under the MLEP 2012 as:-

“building height (or height of building) means—

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,

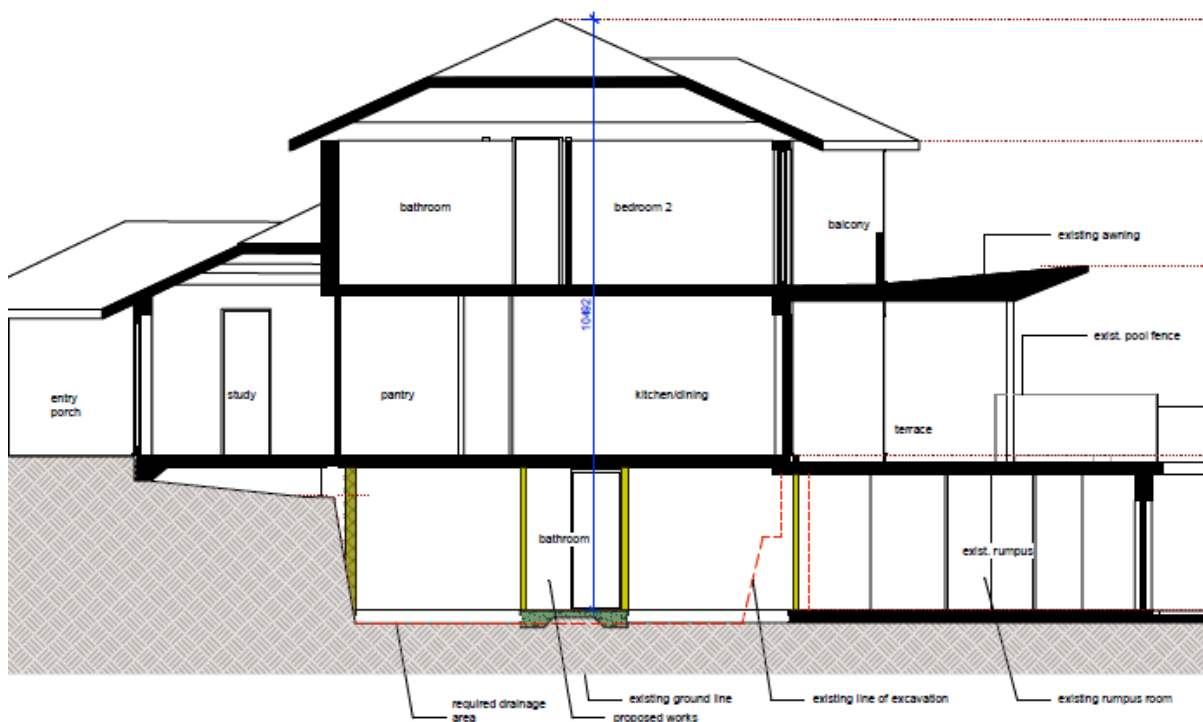
including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

Ground level (existing) is defined under the MLEP 2012 as:-

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

The site has a significant slope down from the southern boundary (front) to the northern boundary (rear) of approximately 4m, which accentuates the height of the building. The exceedance above the maximum building height does not arise from an addition to the top of the dwelling but from proposed works on the lower ground floor. Excavation has been carried out on this level in accordance with Compliance Certificate 012.2019.00000140.001. The existing excavated surface level of the lower ground level is RL 37.020. The proposed development will alter the maximum building height by the installation of a concrete floor resulting in a higher finished floor level ('FFL') on the lower ground floor of RL 37.240. This will lower the maximum height of the building by 220mm.

The resulting maximum building height will be 10.492m as measured directly from the existing roof ridgeline (RL 47.732) to the proposed FFL of the lower ground level (RL 37.240). The variation in the 8.5m maximum height limit after the proposed works is 1.992m ($47.732 - 37.240$) or 23.44% (refer to the blue line on the diagram below and to DA drawing 2.01 Rev C dated 24.08.2021).



This is a technical breach of the building height development standard because: -

1. while post-development the building height will exceed the 8.5m maximum, the proposed works will lower the maximum height of the building by 220mm; and
2. all of the built form visible from outside the dwelling, when measured from the ground levels immediately surrounding the dwelling house, will not exceed the 8.5m maximum height standard.

Introduction

The change in the maximum building height of the dwelling will result from the installation of a new concrete floor to allow for a new stair and hallway, plus a new bathroom on the lower ground floor of the dwelling, which will be contained within the existing footprint of the dwelling (refer to DA drawing 1.01 Rev C dated 24.08.2021). A complete list of the DA drawings relied upon in making this clause 4.6 request is as follows: -

Reference No:	Description	Prepared By	Dated
C.01 Rev B	Cover Page	Third Wave Design	24.08.2021
B.01 Rev C	BASIX Commitments	Third Wave Design	24.08.2021
S.01 Rev B	Site Analysis	Third Wave Design	04.08.2021
1.00 Rev B	Site Plan	Third Wave Design	04.08.2021
1.01 Rev C	Lower Ground Plan	Third Wave Design	24.08.2021
1.02 Rev B	Ground Level Plan	Third Wave Design	04.08.2021
1.03 Rev B	Level 1	Third Wave Design	04.08.2021
1.04 Rev B	Roof Plan	Third Wave Design	04.08.2021
1.06 Rev B	Lower Ground_Extend of Existing Excavation	Third Wave Design	24.08.2021
1.07 Rev A	Ground Level Plan_Landscaping Calculation	Third Wave Design	04.08.2021
2.01 Rev C	Section A	Third Wave Design	24.08.2021
2.02 Rev B	Section Thru Gym_East Boundary)	Third Wave Design	24.08.2021
3.01 Rev B	Elevation South	Third Wave Design	04.08.2021
3.02 Rev B	Elevation West	Third Wave Design	04.08.2021
3.03 Rev B	Elevation North	Third Wave Design	04.08.2021

3.04 Rev C	Elevation East	Third Wave Design	24.08.2021
32884-04	Plan Showing Relative Heights and Features of Lot 2 DP 316406	Frank Mason & Co.	16.12.2020
32884-05	Plan Showing Lower-Level Room and Extend of Existing Excavated Area	Frank Mason & Co.	16.12.2020
A371457_03	BASIX Certificate	The House Energy Rating Company	30.07.2021

All the new work will be within an excavated area within the subfloor space forward of the existing rumpus room. This excavation has been carried out in accordance with Compliance Certificate ('CDC') 012.2019.00000140.001 and are part of works approved under this CDC intended to control stormwater inundation of the lower ground floor of the dwelling. The works approved under the CDC will provide for the disposal of water entering the excavated area, with the intention of preventing inundation of the rumpus room; however, the CDC only provides for single skin block retaining walls and an unfinished floor (which could possibly be gravel) in the excavated area, which will not make the excavated area watertight and will still allow for water to enter and collect in this area prior to disposal via the existing stormwater system.

Problems have arisen in the past with water inundating the lower ground floor and caused damage to furniture and fittings within the rumpus room. To this day, water continues to flow into the lower ground floor long after a rain event causing damp, smell, and the growth of mold in the rumpus room. The Applicants are not encouraged to use this room. They find it necessary to operate a dehumidifier and a fan in the rumpus room for extended periods and are very concerned about the health effects of mold.

The Applicants have no confidence that the works approved under the CDC will eliminate the existing problems with damp, smell, and mold. This is because those approved works will allow for water to continue to enter the excavated area and the probability of that area continuing to remain damp long after a rain event is high. Existing problems with damp, smell and mold are likely to continue.

To eliminate these problems, the proposed development provides for a new double skin wall in the excavated area, with the inner skin wall providing a waterproof barrier (e.g., the use of Dincel panels) surrounding the new accommodation and the installation of a concrete floor. It is intended that water will be collected within the wall cavity and be directed to the existing stormwater system outside the footprint of the dwelling. Carrying out the proposed works and the resultant change

to the maximum building height will provide for the proper maintenance and protection of the dwelling and will protect the health of occupants.

This request demonstrates that there are no environmental impacts as a consequence of this contravention of the building height standard and there are sufficient environmental planning grounds to justify the variation. The development as a whole satisfies the objectives of the R2 *Low Density* zone and is in the public interest. Strict adherence to the building height standard in this instance is therefore unreasonable and unnecessary.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development. As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Rebel MH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]):

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a))
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b))
3. That 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 (Clause 4.6(4))

It is noted that the requirement for the concurrence of the Secretary as required by Clause 4.6(4)(b) has been obtained by Mosman Council (Planning Circular PS 18-003 dated 21 February 2018).

Is Compliance Unreasonable and Unnecessary? – Legal Framework

Several key NSW Land and Environment Court planning principles and judgements have refined the manner in which variations to development standards are required to be approached. The correct approach to preparing and dealing with a request under clause 4.6 is neatly summarised by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118*:

Preston CJ differentiated the consent authority's role in assessing a clause 4.6 written request from its role in assessing the development as a whole – something his Honour referred to as two “positive states of satisfaction”. The first state of satisfaction is “indirect” while the second is “direct”.

The first positive state of satisfaction begs the question, “Does the written request adequately address the matters required to be demonstrated by clause 4.6(3)?” The answer requires that: -

- Compliance with the development standard is unreasonable or unnecessary in the circumstances (cl 4.6(3)(a))
 - This is typically demonstrated through one of the five *Wehbe* (*Wehbe v Pittwater Council (2007) NSW LEC 827*) “methods”. The most commonly used *Wehbe* method is to demonstrate that the objectives of the development standard are achieved, notwithstanding the non-compliance. This requires attention to the wording of the specific objectives of the development standard in the relevant EPI.
- There are sufficient environmental planning grounds to justify non-compliance with the development standard (cl 4.6(3)(b))
 - Many written requests considered by the Court post *Initial Action* have failed because the environmental planning grounds provided in the written request are unrelated to the subject matter, scope, and purpose of the EPA Act.
 - The focus is to be on the specific aspect of the development that does not comply with the development standard, and not on the development as a whole. For example, arguments that promote only the benefits of carrying out the development generally will struggle to withstand scrutiny by consent authorities.
 - Something more is needed that requires identification of grounds particular to the circumstances of the proposed development and demonstrates why the dispensation from compliance with the development standard is called for in any particular instance. A submission that there will be no significant amenity impacts as a result of non-compliance is not, of itself, a reason that justifies the non-compliance.

The second positive state of satisfaction requires the consent authority to consider that the proposed development is in the public interest (clause 4.6(4)(ii)) because it is consistent with:

- the objectives of the development standard; and

- the objectives of the zone.

The consent authority is not limited by the written request and a consent authority has broad discretion to allow a departure from development standards.

This exception to a development standard request is made using the relevant principles used by the Land and Environment Court to demonstrate that compliance with the development standards is unreasonable and unnecessary.

The proposed development achieves the objectives of the building height development standard, notwithstanding the non-compliance; and in summary, there would be no significant difference in the size and scale of the building if the building height is reduced to achieve strict compliance with the numerical standards.

The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

This is the most commonly used of the five ways under *Wehbe* of establishing that compliance is unreasonable or unnecessary. As the site is within the R2 - *Low Density Residential* zone the relevant objectives of the development standard stated in clause 4.3 of MLEP 2012 are:

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

(a) *for development on land in **Zone R2 Low Density Residential** or Zone R3 Medium Density Residential:*

(i) *to share public and private views, and*

(ii) *to minimise the visual impact of buildings particularly when viewed from the harbour and surrounding foreshores, and*

(iii) *to ensure that buildings are compatible with the desired future character of the area in terms of building height and roof form, and*

(iv) *to minimise the adverse effects of bulk and scale of buildings,”*

The variation to the building height development standard will enable the proposal to achieve the above objectives as follows:

Objective (i) - to share public and private views

- There are no identifiable public views that will be impacted by the proposed development.
- The proposed works are on the lower ground floor level of the building and within the existing external walls. The proposed internal works will not interfere with views enjoyed from neighbouring properties or the public domain.

Objective (ii) - to minimise the visual impact of buildings particularly when viewed from the harbour and surrounding foreshores

- The proposed works on the lower ground floor level will not add to the perceptible bulk of the dwelling and will not be able to be seen from Balmoral Beach or the waterway to the north of the Site.

Objective (iii) - to ensure that buildings are compatible with the desired future character of the area in terms of building height and roof form

- The proposed building height exceedance is a technicality. The proposed work resulting is a change to the building height is not discernible when viewed from neighbouring properties or the public domain and will not alter the existing roof form of the dwelling.
- The proposed development will not interfere with the existing dwelling's compatibility with the planning controls for the Balmoral Townscape, under the Mosman Residential Development Control Plan 2012.
- The proposal maintains the existing height and scale of the visible built form, thereby ensuring that the building envelope will continue to contribute to the desired future character of the area.

Objective (iv) - to minimise the adverse effects of bulk and scale of buildings

- The scale and the visual bulk of the building remain unchanged by the proposal.
- The change in building height will not result in any adverse impacts upon neighbouring properties in terms of overlooking, overshadowing or view loss.

The proposal will satisfy the objectives of Clause 4.3 of MLEP 2012 despite the numerical non-compliance.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the Height of Buildings development standard is demonstrated to be unreasonable or unnecessary and the requirements of Clause 4.6(3)(a) have been met by this method alone.

However, because the proposed works are hidden from the view of neighbours and the public, and do not alter the height of the existing roof of the dwelling, it is also reasonable to conclude in accordance with the second method under *Wehbe* that the underlying purpose of the development

standard is not relevant to this development with the consequence that compliance is unnecessary.

Are There Sufficient Environmental Planning Grounds

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

As previously discussed, that part of the development which causes the exceedance of the maximum height standard is limited to the works proposed on the lower ground floor. The environmental planning grounds supporting the exceedance of the building height development standard in this instance are:-

1. The proposed works on the lower ground floor will eliminate existing problems of damp, smell and mold associated with water penetration to this part of the dwelling and the change in building height resulting from the installation of a concrete floor will *"promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants"* (s.1.3 (h)).
2. Accordingly, the proposed works will allow for the lower ground floor of the dwelling to be used without limitation or restriction and the change in building height resulting from the installation of a concrete floor will *"promote the orderly and economic use and development of land"* (s.1.3 (c)).
3. Therefore, the proposed works will encourage the Applicants to use the lower ground floor of the dwelling by providing improved and healthy accommodation and the change in building height resulting from the installation of a concrete floor will not add to the distinguishable bulk or scale of the building or negatively impact upon the privacy and access to sunlight for neighbouring properties. The proposed works will *"promote good design and amenity of the built environment"* (s.1.3 (g)).

Is the Variation in the Public Interest?

Clause 4.6(4)(a)(ii) of the MLEP 2012 requires that the proposal satisfy the objectives of the development standard (demonstrated above) and of the zone.

The proposal is consistent with the objectives of the R2 zone. The objectives of the zone are as follows:

- *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.*
- *To retain the single dwelling character of the environmentally sensitive residential areas of Mosman.*
- *To maintain the general dominance of landscape over built form, particularly on harbour foreshores.*
- *To ensure that sites are of sufficient size to provide for buildings, vehicular and pedestrian access, landscaping and retention of natural topographical features.*
- *To ensure that development is of a height and scale that seeks to achieve the desired future character.*
- *To encourage residential development that maintains or enhances local amenity and, in particular, public and private views.*
- *To minimise the adverse effects of bulk and scale of buildings.*

The proposal will satisfy the above objectives for the following reasons:

1. The proposal provides improved protection of the existing building and improved accommodation and amenity for the occupants of this dwelling house.
2. The proposal retains a single dwelling character when viewed from the street and the balance between landscaping and built form will be unchanged.
3. Development will be carried out on a site that is of sufficient size to provide for the proposal as the additional accommodation will be created within the footprint of the existing building and will not add to visual bulk or alter the apparent scale of development.
4. The proposal maintains the existing height and scale of the visible built form, thereby ensuring that the building envelope will continue to contribute to the desired future character of the area. Development on the site will continue to contribute to a cohesive streetscape in terms of building height and scale, as well as preserve the balance of landscaped area and built form.
5. The proposal provides housing that has regard to local amenity and public and private views.

6. The adverse effects of bulk and scale of buildings are minimised.

In summary, after development the overall bulk and scale of the development will be contained within the existing building footprint and accordingly, the proposed development will be of a bulk and scale that will continue to achieve the desired future character for this locality. The proposal will make a positive contribution to housing stock within Mosman without adverse effects on neighbours in terms of privacy, solar access or views.

The proposed development is consistent with the objectives of the zone, and the proposal is consistent with the objectives of the development standard. According to Clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

State or Regional Environmental Planning Matters

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

Conclusion

This written request under clause 4.6 of MLEP 2012 accompanies the development application for alterations and additions to an existing dwelling house at 7 Coronation Avenue, Mosman. An exception is sought, pursuant to Clause 4.6 of Mosman Local Environmental Plan 2012 to the 8.5m maximum permissible building height prescribed by Clause 4.3(2) of Mosman Local Environmental Plan 2012.

In summary:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard and is consistent with the objectives of the R2 *Low Density Residential* zone;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

The variation represents a technical non-compliance of the standard. The proposed variation to the development standard will not result in any perceptible change to the bulk and scale of the existing dwelling and will not result in any impacts upon neighbouring properties or the public

domain. The variation will enable a well-considered development that addresses the site constraints, streetscape and relevant objectives of the development standard and the R2 *Low Density Residential* zone. The report finds that the variation will not result in unreasonable environmental impacts and in this instance, a variation of the development standard is justified.

The concurrence of the Secretary can also be assumed in accordance with Planning Circular PS 18-003. On this basis, therefore, it is considered appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.



Clause 4.6 Variation

Floor Space Ratio (FSR)

Clause 4.4 Mosman Local Environmental Plan 2012

Mosman Development Application 8.2020.83

7 Coronation Avenue, Mosman NSW 2088

Purpose

This written request has been prepared in accordance with clause 4.6 of the Mosman Local Environmental Plan 2012 (**'MLEP 2012'**) and accompanies a Development Application (**'DA'**) for alterations and additions to an existing dwelling at 7 Coronation Avenue, Mosman (**'the Site'**). This is a request to vary the Floor Space Ratio (**'FSR'**) development standard under clause 4.4 of the MLEP 2012. Clause 4.4(2) of the MLEP 2012 states; -

“(2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.”

The Site is identified on the Floor Space Ratio Map as having a maximum permissible FSR of 0.5:1.

Extent of Variation

Clause 4.5(2) of MLEP 2012 defines “*floor space ratio*” as: -

“(2) The floor space ratio of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.”

Gross Floor Area (GFA) is defined in the Dictionary of the MLEP 2012 as :-

*“**gross floor area** means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes—*

- (a) the area of a mezzanine, and*
- (b) habitable rooms in a basement or an attic, and*
- (c) any shop, auditorium, cinema, and the like, in a basement or attic,*
- but excludes—*
 - (d) any area for common vertical circulation, such as lifts and stairs, and*
 - (e) any basement—*
 - (i) storage, and*
 - (ii) vehicular access, loading areas, garbage and services, and*
 - (f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and*
 - (g) car parking to meet any requirements of the consent authority (including access to that car parking), and*
 - (h) any space used for the loading or unloading of goods (including access to it), and*
 - (i) terraces and balconies with outer walls less than 1.4 metres high, and*
 - (j) voids above a floor at the level of a storey or storey above.”*

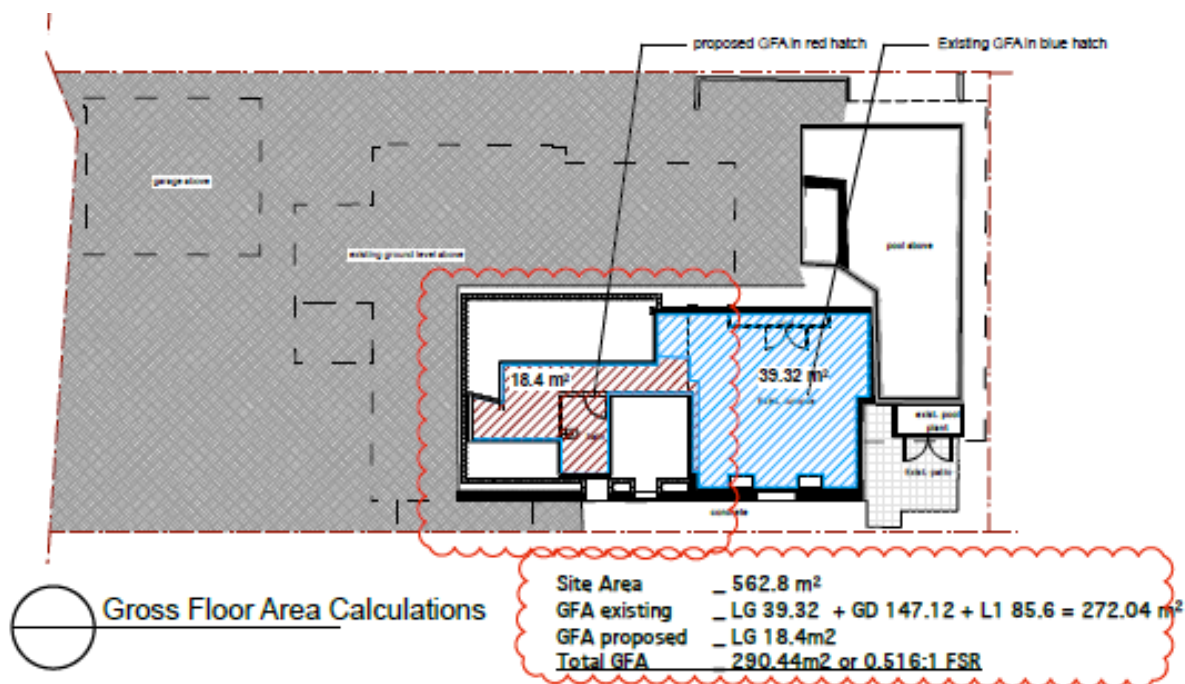
An exception is sought under clause 4.6 of the MLEP 2012 for the following variation (refer to DA drawing C1.01 Rev B dated 24.08.2021): -

- The area of the Site is 562.8m².
- The maximum Gross Floor Area ('GFA') permissible is 281.40m². This equates to the maximum permissible FSR of 0.5:1.
- Existing development on the Site has a GFA of 272.04m². This equates to an FSR of 0.4834:1.
- The proposed development will increase the GFA by 18.4m².
- After completion of the proposed development the GFA on the Site will be 290.44m². This equates to an FSR of 0.5161:1.
- The extent of the variation sought above the maximum 0.5:1 FSR is 9.04m² (290.44m² – 281.40m²) or 3.21%.

Introduction

The 18.4m² increase in GFA will result from the creation of a new stair and hallway, plus a new bathroom on the lower ground floor of the dwelling. The additional floor space will be within the

existing footprint of the dwelling (refer to the diagram below and DA drawing 1.01 Rev C dated 24.08.2021).



A complete list of the DA drawings relied upon in making this clause 4.6 request is as follows: -

Reference No:	Description	Prepared By	Dated
C.01 Rev B	Cover Page	Third Wave Design	24.08.2021
B.01 Rev C	BASIX Commitments	Third Wave Design	24.08.2021
S.01 Rev B	Site Analysis	Third Wave Design	04.08.2021
1.00 Rev B	Site Plan	Third Wave Design	04.08.2021
1.01 Rev C	Lower Ground Plan	Third Wave Design	24.08.2021
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1.06 Rev B	Lower Ground_Extend of Existing Excavation	Third Wave Design	24.08.2021
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2.01 Rev C	Section A	Third Wave Design	24.08.2021
2.02 Rev B	Section Thru Gym_East Boundary)	Third Wave Design	24.08.2021

3.01 Rev B	Elevation South	Third Wave Design	04.08.2021
3.02 Rev B	Elevation West	Third Wave Design	04.08.2021
3.03 Rev B	Elevation North	Third Wave Design	04.08.2021
3.04 Rev C	Elevation East	Third Wave Design	24.08.2021
32884-04	Plan Showing Relative Heights and Features of Lot 2 DP 316406	Frank Mason & Co.	16.12.2020
32884-05	Plan Showing Lower-Level Room and Extend of Existing Excavated Area	Frank Mason & Co.	16.12.2020
A371457_03	BASIX Certificate	The House Energy Rating Company	30.07.2021

All the new GFA will be within an excavated area within the subfloor space forward of the existing rumpus room. This excavation has been carried out in accordance with Compliance Certificate ('CDC') 012.2019.00000140.001 and are part of works approved under this CDC intended to control stormwater inundation of the lower ground floor of the dwelling. The works approved under the CDC will provide for the disposal of water entering the excavated area, with the intention of preventing inundation of the rumpus room; however, the CDC only provides for single skin block retaining walls and an unfinished floor (which could possibly be gravel) in the excavated area, which will not make the excavated area watertight and will still allow for water to enter and collect in this area prior to disposal via the existing stormwater system.

Problems have arisen in the past with water inundating the lower ground floor and caused damage to furniture and fittings within the rumpus room. To this day, water continues to flow into the lower ground floor long after a rain event causing damp, smell, and the growth of mold in the rumpus room. The Applicants are not encouraged to use this room. They find it necessary to operate a dehumidifier and a fan in the rumpus room for extended periods and are very concerned about the health effects of mold.

The Applicants have no confidence that the works approved under the CDC will eliminate the existing problems with damp, smell, and mold. This is because those approved works will allow for water to continue to enter the excavated area and the probability of that area continuing to remain damp long after a rain event is high. Existing problems with damp, smell and mold are likely to continue.

To eliminate these problems, the proposed development provides for a new double skin wall in the excavated area, with the inner skin wall providing a waterproof barrier (e.g., the use of Dincel panels) surrounding the new accommodation and the installation of a concrete floor. It is intended that water will be collected within the wall cavity and be directed to the existing stormwater system

outside the footprint of the dwelling. The construction of the additional GFA will provide for the proper maintenance and protection of the dwelling and will protect the health of occupants.

This request demonstrates that there are no environmental impacts as a consequence of this contravention of the FSR standard and there are sufficient environmental planning grounds to justify the variation. The development as a whole satisfies the objectives of the R2 *Low Density* zone and is in the public interest. Strict adherence to the FSR standard in this instance is therefore unreasonable and unnecessary.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development. As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]):

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [Clause 4.6(3)(a)]
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [Clause 4.6(3)(b)]
3. That 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 [Clause 4.6(4)]

It is noted that the requirement for the concurrence of the Secretary as required by Clause 4.6(4)(b) has been obtained by Mosman Council (Planning Circular PS 18-003 dated 21 February 2018).

Is Compliance Unreasonable and Unnecessary? – Legal Framework

Several key NSW Land and Environment Court planning principles and judgements have refined the manner in which variations to development standards are required to be approached. The correct approach to preparing and dealing with a request under clause 4.6 is neatly summarised by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) NSWLEC 118:

Preston CJ differentiated the consent authority's role in assessing a clause 4.6 written request from its role in assessing the development as a whole – something his Honour referred to as two “positive states of satisfaction”. The first state of satisfaction is “indirect” while the second is “direct”.

The first positive state of satisfaction begs the question, “Does the written request adequately address the matters required to be demonstrated by clause 4.6(3)?” The answer requires that: -

- Compliance with the development standard is unreasonable or unnecessary in the circumstances (cl 4.6(3)(a))
 - This is typically demonstrated through one of the five *Wehbe* (*Wehbe v Pittwater Council* (2007) NSW LEC 827) “methods”. The most commonly used *Wehbe* method is to demonstrate that the objectives of the development standard are achieved, notwithstanding the non-compliance. This requires attention to the wording of the specific objectives of the development standard in the relevant EPI.
- There are sufficient environmental planning grounds to justify non-compliance with the development standard (cl 4.6(3)(b))
 - Many written requests considered by the Court post *Initial Action* have failed because the environmental planning grounds provided in the written request are unrelated to the subject matter, scope and purpose of the EPA Act.
 - The focus is to be on the specific aspect of the development that does not comply with the development standard, and not on the development as a whole. For example, arguments that promote only the benefits of carrying out the development generally will struggle to withstand scrutiny by consent authorities.
 - Something more is needed that requires identification of grounds particular to the circumstances of the proposed development and demonstrates why the dispensation from compliance with the development standard is called for in any particular instance. A submission that there will be no significant amenity impacts as a result of non-compliance is not, of itself, a reason that justifies the non-compliance.

The second positive state of satisfaction requires the consent authority to consider that the proposed development is in the public interest (clause 4.6(4)(ii)) because it is consistent with:

- the objectives of the development standard; and
- the objectives of the zone.

The consent authority is not limited by the written request and a consent authority has broad discretion to allow a departure from development standards.

This exception to a development standard request is made using the relevant principles used by the Land and Environment Court to demonstrate that compliance with the development standards is unreasonable and unnecessary.

The proposed development achieves the objectives of the FSR development standard, notwithstanding the non-compliance; and in summary, there would be no significant difference in the size and scale of the building if the floor space of the building is reduced to achieve strict compliance with the numerical standards.

The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

This is the most commonly used of the five ways under Wehbe of establishing that compliance is unreasonable or unnecessary. The site is within the R2 - *Low Density Residential* zone. Accordingly, the relevant objectives stated in clause 4.4 of MLEP 2012 are:

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

(a) *for development on land in **Zone R2 Low Density Residential** or Zone R3 Medium Density Residential—*

- (i) *to ensure that buildings are compatible with the desired future character of the area in terms of building bulk and scale, and*
- (ii) *to provide a suitable balance between landscaping and built form, and*
- (i) *to minimise the adverse effects of bulk and scale of buildings,*
- (ii) *to limit excavation of sites and retain natural ground levels for the purpose of landscaping and containing urban run-off,*

The variation to the FSR development standard will enable the proposal to achieve the above objectives as follows:

Objective (i) - to ensure that buildings are compatible with the desired future character of the area in terms of building bulk and scale

- The proposed FSR exceedance is a technicality. That part of the dwelling that exceeds the development standard is not discernible when viewed from neighbouring properties or the public domain. The proposed elements that exceed the FSR standard do not contribute to distinguishable bulk or scale of the building.
- The proposed development will not interfere with the existing dwelling's compatibility with the planning controls for the Balmoral Townscape, under the Mosman Residential Development Control Plan 2012.

- The proposal maintains the existing height and scale of the visible built form, thereby ensuring that the building envelope will continue to contribute to the desired future character of the area.
- The proposed new accommodation on the lower ground floor is underneath the existing dwelling and will not add to the perceptible bulk and scale of the dwelling.

Objective (ii) - to provide a suitable balance between landscaping and built form

- The proposed development will not affect the existing landscaping on the Site.
- The proposed additional floor space ensures that the proportion of built and natural features, including buildings, design features, on-site open spaces and landscaping remain unchanged.

Objective (iii) - to minimise the adverse effects of bulk and scale of buildings

- The scale and the visual bulk of the building remain unchanged by the proposal.
- The additional floor space within the dwelling will not result in any adverse impacts upon neighbouring properties in terms of overlooking, overshadowing or view loss.

Objective (iv) - to limit excavation of sites and retain natural ground levels for the purpose of landscaping and containing urban run-off

- The additional floor space is located within an area underneath the existing dwelling and that area has already been excavated. Carrying out the development as proposed will enable the better control of stormwater flowing over this site.

The proposal will therefore satisfy the objectives of Clause 4.4 of MLEP 2012 despite the numerical non-compliance.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the FSR development standard is demonstrated to be unreasonable or unnecessary and the requirements of Clause 4.6(3)(a) have been met on this way alone.

However, because the proposed works are hidden from the view of neighbours and the public, and do not alter the visible bulk and scale of the building, it is also reasonable to conclude in accordance with the second way under *Wehbe* of establishing that compliance is unreasonable or unnecessary, that the underlying purpose of the development standard is not relevant to this development with the consequence that compliance is unnecessary.

Are There Sufficient Environmental Planning Grounds

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

As previously discussed, that part of the development which contravenes the floor space ratio development standard are limited to the works proposed on the lower ground floor. Environmental planning grounds supporting the exceedance of the FSR development standard in this instance advance the objects of the *Environmental Planning and Assessment Act, 1979* in the following way :-

1. The proposed works on the lower ground floor will eliminate existing problems of damp, smell and mold associated with water penetration to this part of the dwelling and the additional FSR will *"promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants"* (s.1.3 (h)).
2. Accordingly, the proposed works will allow for the lower ground floor of the dwelling to be used without limitation or restriction and the additional FSR will *"promote the orderly and economic use and development of land"* (s.1.3 (c)).
3. Therefore, the proposed works will encourage the Applicants to use the lower ground floor of the dwelling by providing improved and healthy accommodation and the additional FSR will not add to the distinguishable bulk or scale of the building or negatively impact upon the privacy and access to sunlight for neighbouring properties. The proposed works will *"promote good design and amenity of the built environment"* (s.1.3 (g)).

Is the Variation in the Public Interest?

Clause 4.6(4)(a)(ii) of the MLEP 2012 requires that the proposal satisfy the objectives of the development standard (demonstrated above) and of the zone.

The proposal is consistent with the objectives of the R2 zone. The objectives of the zone are as follows:

- *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.*

- *To retain the single dwelling character of the environmentally sensitive residential areas of Mosman.*
- *To maintain the general dominance of landscape over built form, particularly on harbour foreshores.*
- *To ensure that sites are of sufficient size to provide for buildings, vehicular and pedestrian access, landscaping and retention of natural topographical features.*
- *To ensure that development is of a height and scale that seeks to achieve the desired future character.*
- *To encourage residential development that maintains or enhances local amenity and, in particular, public and private views.*
- *To minimise the adverse effects of bulk and scale of buildings.*

The proposal will satisfy the above objectives for the following reasons:

1. The proposal provides improved accommodation and amenity for the occupants of this dwelling house.
2. The proposal retains a single dwelling character when viewed from the street and the balance between landscaping and built form will be unchanged.
3. Development will be carried out on a site that is of sufficient size to provide for the proposal as the additional accommodation will be created within the footprint of the existing building and will not add to visual bulk or alter the apparent scale of development.
4. The proposal maintains the existing height and scale of the visible built form, thereby ensuring that the building envelope will continue to contribute to the desired future character of the area. Development on the site will continue to contribute to a cohesive streetscape in terms of building height and scale, as well as preserve the balance of landscaped area and built form.
5. The proposal provides housing that has regard to local amenity and public and private views.
6. The adverse effects of bulk and scale of buildings are minimised. Even if the proposed works were deleted in their entirety, there would be little (other than the new lower ground level windows) change to the outward appearance of the dwelling and the resultant environmental impacts on the streetscape and neighbouring amenity would be the same.

In summary, after development the overall bulk and scale of the development will be contained within the existing building footprint and accordingly, the proposed development will be of a bulk and scale that will continue to achieve the desired future character for this locality. The proposal will make a positive contribution to housing stock within Mosman without adverse effects on neighbours in terms of privacy, solar access or views.

The proposed development is consistent with the objectives of the zone, and the proposal is consistent with the objectives of the development standard. According to Clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

State or Regional Environmental Planning Matters

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

Conclusion

This written request under clause 4.6 of MLEP 2012 accompanies the development application for alterations and additions to an existing dwelling house at 7 Coronation Avenue, Mosman. An exception is sought, pursuant to clause 4.6 of Mosman Local Environmental Plan 2012 to the maximum permissible FSR prescribed by clause 4.4 of Mosman Local Environmental Plan 2012.

In summary:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard and is consistent with the objectives of the R2 *Low Density Residential* zone;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

The variation represents a technical non-compliance of the standard. The proposed variation to the development standard will not result in any perceptible change to the bulk and scale of the existing dwelling and will not result in any impacts upon neighbouring properties or the public domain. The variation will enable a well-considered development that addresses the site constraints, streetscape and relevant objectives of the development standard and the R2 *Low Density Residential* zone. The report finds that the variation will not result in unreasonable environmental impacts and in this instance, a variation of the development standard is justified.

The concurrence of the Secretary can also be assumed in accordance with Planning Circular PS 18-003. On this basis, therefore, it is considered appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.



Clause 4.6 Variation Wall Height

Clause 4.3A(4) Mosman Local Environmental Plan 2012
Mosman Development Application 8.2020.83
7 Coronation Avenue, Mosman NSW 2088

Purpose

This written request has been prepared in accordance with clause 4.6 of the Mosman Local Environmental Plan 2012 ('**MLEP 2012**') and accompanies a Development Application ('**DA**') for alterations and additions to an existing dwelling at 7 Coronation Avenue, Mosman ('**the Site**').

This is a request to vary the Height of Buildings (additional provisions) ('**wall height**') development standard under clause 4.3A (4) of the MLEP 2012. Clause 4.3A (4) of the MLEP 2012 states: -

"(4) A building on land to which this clause applies must not have a wall height, at any point of the building (other than at a chimney, gable end or dormer window), that exceeds 7.2 metres.."

Wall Height is defined under the MLEP 2012 as:-

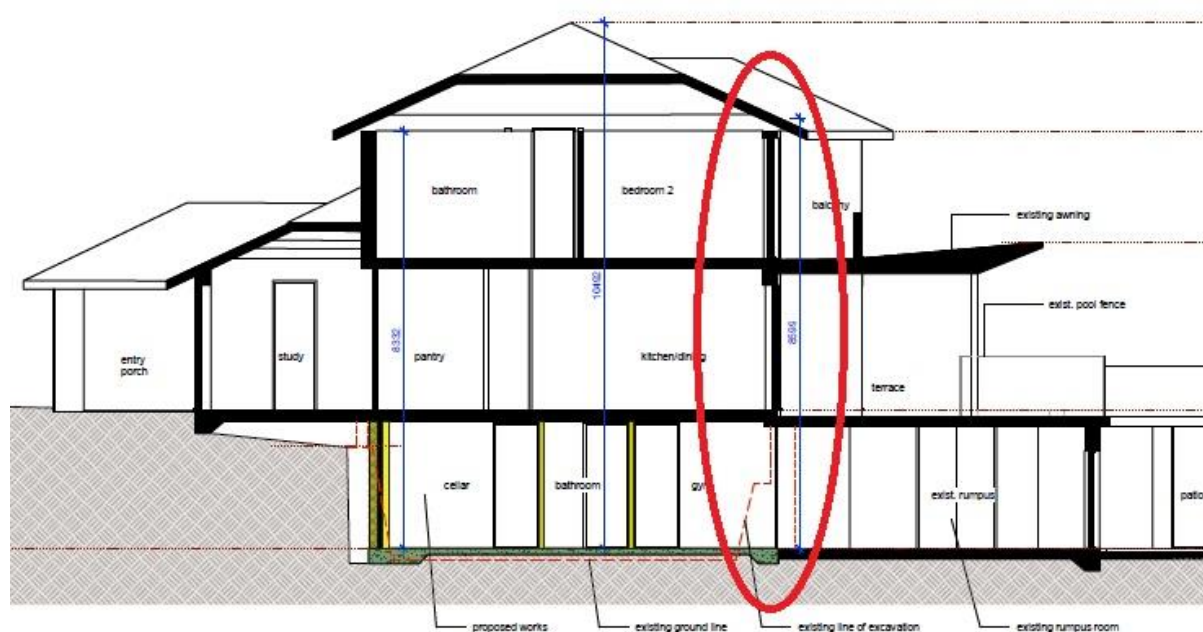
*"**wall height** means the vertical distance between the ground level (existing) and the underside of the eaves at the wall line, parapet or flat roof, whichever is the highest."*

Extent of Variation

The site has a significant slope down from the southern boundary (front) to the northern boundary (rear) of approximately 4m, which accentuates the height of the building. The exceedance above the maximum building height does not arise from an addition to the top of the dwelling but from proposed works on the lower ground floor. Excavation has been carried out on this level in

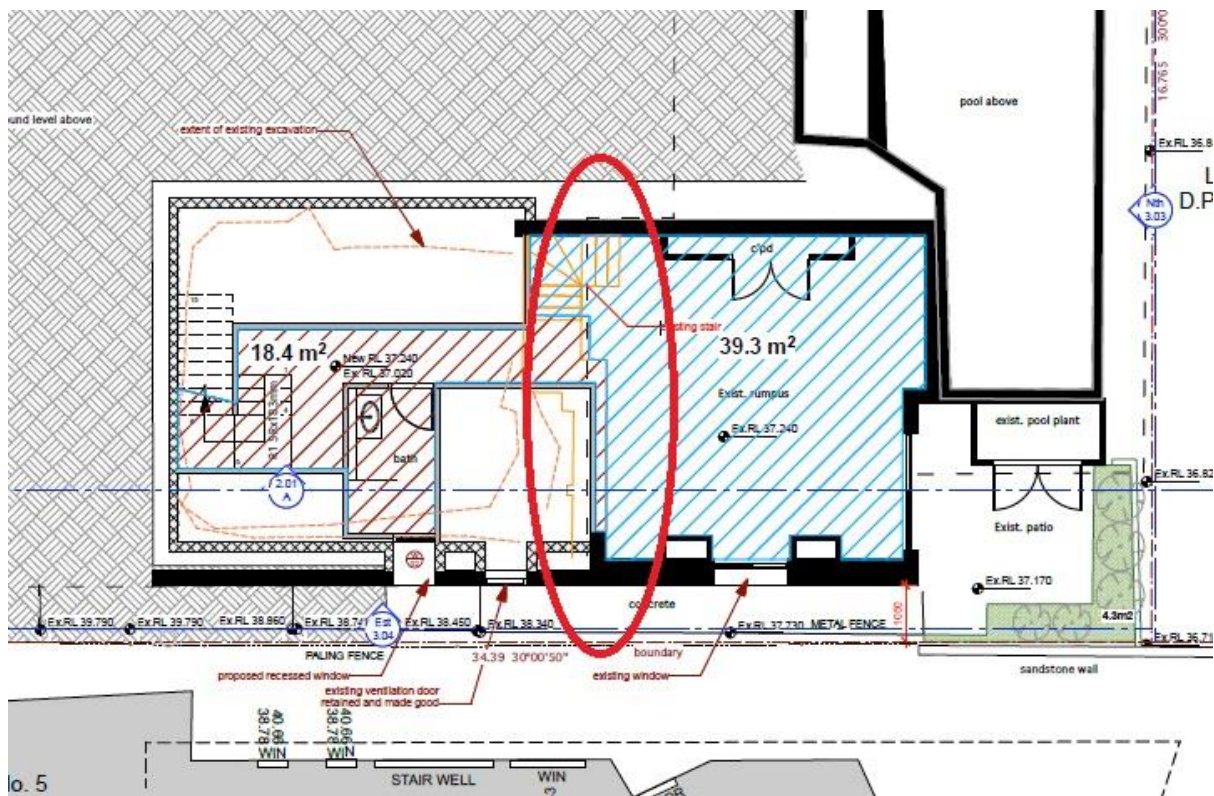
accordance with Compliance Certificate 012.2019.00000140.001. The proposed development will involve minor changes to the excavated area, the construction of new internal and external walls and the installation of a concrete floor. The proposed work will result in the vertical distance between the existing ground level (which is being lowered as per the red dashed line in the sectional detail below to RL 37.24 – refer to DA drawing 2.01 Rev C dated 24.08.2021) and the underside of the eaves at the wall line (RL 45.58).

The resulting wall height will be 8.34m (45.58 – 37.24). The variation in the 7.2m maximum wall height limit after the proposed works is 1.14m or 15.83%.



This is a technical breach of the wall height development standard because: -

1. while post-development the wall height will exceed the 7.2m maximum, the increase results from the construction of a new external wall on the lower ground level (refer to the extract from DA drawing 1.01 Rev C dated 24.08.2021 below) -; and
2. all of the external walls visible from outside the dwelling, when measured from the ground levels immediately surrounding the dwelling house, will not be altered.



Introduction

The change in the maximum wall height of the dwelling will result from the installation of new walls to allow for a new stair and hallway, plus a new bathroom on the lower ground floor of the dwelling, which will be contained within the existing footprint of the dwelling (refer to DA drawing 1.01 Rev C dated 24.08.2021). A complete list of the DA drawings relied upon in making this clause 4.6 request is as follows: -

Reference No:	Description	Prepared By	Dated
C.01 Rev B	Cover Page	Third Wave Design	24.08.2021
B.01 Rev C	BASIX Commitments	Third Wave Design	24.08.2021
S.01 Rev B	Site Analysis	Third Wave Design	04.08.2021
1.00 Rev B	Site Plan	Third Wave Design	04.08.2021
1.01 Rev C	Lower Ground Plan	Third Wave Design	24.08.2021
1.02 Rev B	Ground Level Plan	Third Wave Design	04.08.2021
1.03 Rev B	Level 1	Third Wave Design	04.08.2021
1.04 Rev B	Roof Plan	Third Wave Design	04.08.2021
1.06 Rev B	Lower Ground_Extend of Existing Excavation	Third Wave Design	24.08.2021

1.07 Rev A	Ground Level Plan_Landscaping Calculation	Third Wave Design	04.08.2021
2.01 Rev C	Section A	Third Wave Design	24.08.2021
2.02 Rev B	Section Thru Gym_East Boundary)	Third Wave Design	24.08.2021
3.01 Rev B	Elevation South	Third Wave Design	04.08.2021
3.02 Rev B	Elevation West	Third Wave Design	04.08.2021
3.03 Rev B	Elevation North	Third Wave Design	04.08.2021
3.04 Rev C	Elevation East	Third Wave Design	24.08.2021
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All the new work will be within an excavated area within the subfloor space forward of the existing rumpus room. This excavation has been carried out in accordance with Compliance Certificate ('CDC') 012.2019.00000140.001 and are part of works approved under this CDC intended to control stormwater inundation of the lower ground floor of the dwelling. The works approved under the CDC will provide for the disposal of water entering the excavated area, with the intention of preventing inundation of the rumpus room; however, the CDC only provides for single skin block retaining walls and an unfinished floor (which could possibly be gravel) in the excavated area, which will not make the excavated area watertight and will still allow for water to enter and collect in this area prior to disposal via the existing stormwater system.

Problems have arisen in the past with water inundating the lower ground floor and caused damage to furniture and fittings within the rumpus room. To this day, water continues to flow into the lower ground floor long after a rain event causing damp, smell, and the growth of mold in the rumpus room. The Applicants are not encouraged to use this room. They find it necessary to operate a dehumidifier and a fan in the rumpus room for extended periods and are very concerned about the health effects of mold.

The Applicants have no confidence that the works approved under the CDC will eliminate the existing problems with damp, smell, and mold. This is because those approved works will allow for water to continue to enter the excavated area and the probability of that area continuing to remain damp long after a rain event is high. Existing problems with damp, smell and mold are likely to continue.

To eliminate these problems, the proposed development provides for a new double skin wall in the excavated area, with the inner skin wall providing a waterproof barrier (e.g., the use of Dincel panels) surrounding the new accommodation and the installation of a concrete floor. It is intended that water will be collected within the wall cavity and be directed to the existing stormwater system outside the footprint of the dwelling. Carrying out the proposed works and the resultant change to the maximum wall height will provide for the proper maintenance and protection of the dwelling and will protect the health of occupants.

This request demonstrates that there are no environmental impacts as a consequence of this contravention of the maximum wall height standard and that there are sufficient environmental planning grounds to justify the variation. The development as a whole satisfies the objectives of the R2 *Low Density* zone and is in the public interest. Strict adherence to the wall height standard in this instance is therefore unreasonable and unnecessary.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development. As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

This request has been prepared having regard to the Department of Planning and Environment's *Guidelines to Varying Development Standards* (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Rebel MH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]):

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a))
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b))

3. That 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 (Clause 4.6(4))

It is noted that the requirement for the concurrence of the Secretary as required by Clause 4.6(4)(b) has been obtained by Mosman Council (Planning Circular PS 18-003 dated 21 February 2018).

Is Compliance Unreasonable and Unnecessary? – Legal Framework

Several key NSW LEC planning principles and judgements have refined the manner in which variations to development standards are required to be approached. The correct approach to preparing and dealing with a request under clause 4.6 is neatly summarised by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118*:

Preston CJ differentiated the consent authority's role in assessing a clause 4.6 written request from its role in assessing the development as a whole – something his Honour referred to as two “*positive states of satisfaction*”. The first state of satisfaction is “*indirect*” while the second is “*direct*”.

The first positive state of satisfaction begs the question, “*Does the written request adequately address the matters required to be demonstrated by clause 4.6(3)?*” The answer requires that: -

- Compliance with the development standard is unreasonable or unnecessary in the circumstances (cl 4.6(3)(a))
 - This is typically demonstrated through one of the five *Wehbe* (*Wehbe v Pittwater Council (2007) NSW LEC 827*) “*methods*”. The most commonly used *Wehbe* method is to demonstrate that the objectives of the development standard are achieved, notwithstanding the non-compliance. This requires attention to the wording of the specific objectives of the development standard in the relevant EPI.
- There are sufficient environmental planning grounds to justify non-compliance with the development standard (cl 4.6(3)(b))
 - Many written requests considered by the Court post *Initial Action* have failed because the environmental planning grounds provided in the written request are unrelated to the subject matter, scope, and purpose of the EPA Act.
 - The focus is to be on the specific aspect of the development that does not comply with the development standard, and not on the development as a whole. For example, arguments that promote only the benefits of carrying out the development generally will struggle to withstand scrutiny by consent authorities.
 - Something more is needed that requires identification of grounds particular to the circumstances of the proposed development and demonstrates why the dispensation from compliance with the development standard is called for in any particular instance. A submission that there will be no significant amenity impacts as a result of non-compliance is not, of itself, a reason that justifies the non-compliance.

The second positive state of satisfaction requires the consent authority to consider that the proposed development is in the public interest (clause 4.6(4)(ii)) because it is consistent with:

- the objectives of the development standard; and
- the objectives of the zone.

The consent authority is not limited by the written request and a consent authority has broad discretion to allow a departure from development standards.

This exception to a development standard request is made using the relevant principles used by the Land and Environment Court to demonstrate that compliance with the development standards is unreasonable and unnecessary.

As set out in this request, the objectives of the development standards are achieved, notwithstanding the non-compliance; and in summary, there would be no significant difference in the size and scale of the building if the wall height of the building were reduced to achieve strict compliance with the numerical standards.

The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

This is the most commonly used of the five ways under *Wehbe* of establishing that compliance is unreasonable or unnecessary. However, there are no objectives of the wall height development standard stated in clause 4.3A of the MLEP 2012.

On 1 June 2021, Mosman Council endorsed the Planning Proposal – *Miscellaneous Amendments to amend Mosman Local Environmental Plan 2012*, which has been prepared to meet Council's obligations under sections 3.8(3) and 3.21 of the Environmental Planning and Assessment Act 1979. Council resolved to submit the Planning Proposal to the NSW Department of Planning, Industry and Environment for Gateway determination under section 3.34 of the Environmental Planning and Assessment Act 1979.

This Planning Proposal seeks, amongst other things, to insert wall height objectives for clause 4.3A. In the Officer's report to Council on the Planning Proposal, it is stated that the proposed objectives are designed to be,

"...based on the current objectives for building height in clause 4.3 and reference the importance of sharing public and private views, minimising the adverse effects of bulk and scale of buildings, and encouraging two-storey buildings consistent with desired future character."

Council proposes to include a new subclause (1A) in clause 4.3A containing objectives for wall height, along the lines of the following draft:

- “(a) To share public and private views, and
- (b) To minimise the adverse effects of bulk and scale of buildings, and
- (c) To limit wall height to encourage two storey buildings consistent with the desired future character of the area.”

In the absence of any better objectives of this development standard, these three are addressed as follows. In summary, the variation will enable the proposal to achieve the draft objectives.

Objective (i) - to share public and private views

- The proposed new walls are on the lower ground floor of the building and as there will be with no change to the height of the existing external walls of the dwelling, no identifiable public or private views will be impacted by the breach of the wall height development standard.

Objective (ii) - to minimise the adverse effects of bulk and scale of buildings

- The visual bulk of the building will remain unchanged by the proposed works on the lower ground floor level.
- The proposed alterations and additions will not alter the perceptible height, bulk or scale of the building, and will be appropriate in terms of compatibility with the height, size and scale of surrounding development.

Objective (iii) - to limit wall height to encourage two storey buildings consistent with the desired future character of the area

- The proposed development will not interfere with the existing dwelling's compatibility with the planning controls for the Balmoral Townscape, under the Mosman Residential Development Control Plan 2012, ensuring that the building envelope will continue to contribute to the desired future character of the area.

The proposal will satisfy the draft objectives of Clause 4.3A of MLEP 2012 despite the existing numerical non-compliance.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the wall height development standard is demonstrated to be unreasonable or unnecessary and the requirements of Clause 4.6(3)(a) have been met by this method alone.

However, because the proposed works are effectively hidden from the view of neighbours and the public, it is also reasonable to conclude in accordance with the second method under *Wehbe* that the underlying purpose of the development standard is not relevant to this development with the consequence that compliance is unnecessary.

Are There Sufficient Environmental Planning Grounds

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

As previously discussed, that part of the development which causes the exceedance of the maximum wall height standard is limited to the works proposed on the lower ground floor. The environmental planning grounds supporting the exceedance of the wall height development standard in this instance are:-

1. The proposed works on the lower ground floor will eliminate existing problems of damp, smell and mold associated with water penetration to this part of the dwelling and the change in wall height resulting from the construction of the new external wall will “*promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants*” (s.1.3 (h)).
2. Accordingly, the proposed works will allow for the lower ground floor of the dwelling to be used without limitation or restriction and the change in wall height resulting from the construction of the new external wall will “*promote the orderly and economic use and development of land*” (s.1.3 (c)).
3. Therefore, the proposed works will encourage the Applicants to use the lower ground floor of the dwelling by providing improved and healthy accommodation and the change in wall height resulting from the construction of the new external wall will not add to the distinguishable bulk or scale of the building or negatively impact upon the privacy and access to sunlight for neighbouring properties. The proposed works will “*promote good design and amenity of the built environment*” (s.1.3 (g)).

The proposed development will be contained within the existing building footprint and accordingly, the proposed development will be of a height and scale that will continue to achieve the desired

future character for this locality. The proposal will make a positive contribution to housing stock within Mosman without adverse effects on neighbours in terms of privacy, solar access or views.

Is the Variation in the Public Interest?

Clause 4.6(4)(a)(ii) of the MLEP 2012 requires that the proposal satisfy the draft objectives of the development standard (demonstrated above) and of the zone.

The proposal is consistent with the objectives of the R2 zone. The objectives of the zone are as follows:

- *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.*
- *To retain the single dwelling character of the environmentally sensitive residential areas of Mosman.*
- *To maintain the general dominance of landscape over built form, particularly on harbour foreshores.*
- *To ensure that sites are of sufficient size to provide for buildings, vehicular and pedestrian access, landscaping and retention of natural topographical features.*
- *To ensure that development is of a height and scale that seeks to achieve the desired future character.*
- *To encourage residential development that maintains or enhances local amenity and, in particular, public and private views.*
- *To minimise the adverse effects of bulk and scale of buildings.*

The proposal will satisfy the above objectives for the following reasons:

1. The proposal provides improved protection of the existing building and improved accommodation and amenity for the occupants of this dwelling house.
2. The proposal retains a single dwelling character when viewed from the street and the balance between landscaping and built form will be unchanged.
3. Development will be carried out on a site that is of sufficient size to provide for the proposal as the additional accommodation will be created within the footprint of the existing building and will not add to visual bulk or alter the apparent scale of development.

4. The proposal maintains the existing height and scale of the visible built form, thereby ensuring that the building envelope will continue to contribute to the desired future character of the area. Development on the site will continue to contribute to a cohesive streetscape in terms of building height and scale, as well as preserve the balance of landscaped area and built form.
5. The proposal provides housing that has regard to local amenity and public and private views.
6. The adverse effects of bulk and scale of buildings are minimised.

The proposed development is consistent with the objectives of the zone, and the proposal is consistent with the objectives of the development standard. According to Clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

State or Regional Environmental Planning Matters

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

Conclusion

This written request under clause 4.6 of MLEP 2012 accompanies the development application for alterations and additions to an existing dwelling house at 7 Coronation Avenue, Mosman. An exception is sought, pursuant to Clause 4.6 of Mosman Local Environmental Plan 2012 to the maximum permissible wall height prescribed by Clause 4.3A (4) of Mosman Local Environmental Plan 2012.

In summary:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard and is consistent with the objectives of the R2 *Low Density Residential* zone;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

The variation represents a technical non-compliance of the standard. The proposed variation to the development standard will not result in any perceptible change to the bulk and scale of the

existing dwelling and will not result in any impacts upon neighbouring properties or the public domain. The variation will enable a well-considered development that addresses the site constraints, streetscape and relevant objectives of the development standard and the R2 *Low Density Residential* zone. The report finds that the variation will not result in unreasonable environmental impacts and in this instance, a variation of the development standard is justified.

The concurrence of the Secretary can also be assumed in accordance with Planning Circular PS 18-003. On this basis, therefore, it is considered appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.