



**Four Towns  
Planning**

*Planning and property consultant*

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

**VARIATION OF A DEVELOPMENT  
STANDARD REGARDING THE MAXIMUM  
FLOOR SPACE RATIO AS DETAILED IN  
CLAUSE 4.4 OF MANLY LOCAL  
ENVIRONMENTAL PLAN 2013**

**Alterations and Additions to Existing  
Dwelling House, Swimming Pool and  
Associated Works**

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Balgowlah Heights NSW 2093**

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**This report has been prepared to support a Development Application under the *Environmental Planning and Assessment Act 1979*.**

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***Disclaimer***

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## 1. Introduction

The nature and extent of the contravention is as follows:

<b>Requirement</b>	0.4:1 243.88sqm
<b>Proposed</b>	0.459:1 279.54sqm
<b>Manly DCP Control 4.1.3 Allowance</b>	0.4:1 (based on 750sqm) 300sqm
<b>Is the planning control in question a development standard?</b>	Yes
<b>Is the non-compliance with to the clause requirement a numerical/or performance based variation?</b>	Numerical
<b>If numerical enter a % variation to requirement</b>	14.62%

### Manly Local Environmental Plan 2013 (“MLEP”)

#### 2.1 Clause 2.2 and the Land Use Table

Clause 2.2 and the Land Zoning Map provide that the subject site is zoned R1 – General Density Residential (the R1 zone) and the Land Use Table in Part 2 of MLEP 2013 specifies the following objectives for the R1 zone:

- **To provide for the housing needs of the community**

Comment: The proposed development is for alterations and additions to an existing dwelling which enhances the functionality of the dwelling. The proposal will ensure a high-quality dwelling which contributes to the ongoing provision of housing in the Balgowlah Heights area.

- **To provide for a variety of housing types and densities.**

Comment: The proposed development retains the existing use of the site which provides a variety of housing types in the area.

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

Comment: Not applicable – the proposal is for a permissible residential land use on the site.

#### 2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP provides:

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

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

The latest authority in relation to the operation of clause 4.6 is the decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“*Initial Action*”). *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 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 floor space ratio standard pursuant to clause 4.4 of the Manly Local Environmental Plan 2013 which specifies a floor space ratio of 0.4:1, however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard. In part, the variation is acceptable on the basis of the Control 4.1.3 within MDCP. The relevant arguments are set out later in this written request.

Clause 4.6(4) of MLEP provides:

- (4) *The consent authority must keep a record of its assessment carried out under subclause (3).*

Clause 4.6(5) of MLEP has been repealed and is not applicable.

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) has been repealed. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.4 of the MLEP2013 from the operation of clause 4.6.

### **3. Relevant Caselaw**

The grounds of objection are based upon the various tests of the recent judgements in the *NSW Land and Environment Court Case Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827, Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61, and RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130.*

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 MLEP2013 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) are there sufficient environmental planning grounds to justify contravening the development standard?

### **4. Request for Variation**

#### **4.1 Is clause 4.4 of MLEP2013 a development standard?**

- (a) The definition of “development standard” in clause 1.4 of the EP&A Act includes:

“(d) *the cubic content or floor space of a building*”
- (b) Clause 4.4 relates to the floor space ratio or floor space of a building. Accordingly, clause 4.4 is a development standard.

#### **4.2 Is compliance with clause 4.4 unreasonable or unnecessary?**

- (a) This request relies upon the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> ways identified by Preston CJ in *Wehbe*.
- (b) The first way in *Wehbe* is to establish that the objectives of the standard are achieved. The second way in *Wehbe* is to establish that an objective is not relevant to the development. The fourth way in *Wehbe* is to establish that the development standard has been abandoned by Council’s own actions in approving development that does not comply with the standard.
- (c) Each objective of the standard and reasoning why compliance is unreasonable or unnecessary is set out below. Firstly, an analysis of the objectives is provided:

In determining a merits-based assessment for the floor space ratio of the development due consideration has been given to the above objectives and the planning principles set by the Land and

Environment Court of NSW, Planning Principle – floor space ratio (Salanitro-Chafei V Ashfield Council (2005) NSWLEC 366) and Project Venture Developments v Pittwater Council (2005) NSW LEC 91).

It is acknowledged that the purpose of Clause 4.6 is to provide an appropriate degree of flexibility in applying certain development standards. In this regard the FSR of the site should be assessed on a greater numerical figure, noting the sites constraints and the unique nature of the locality in a varying degree of development types. Given the proposed application is in our opinion minor and consistent with similar approvals granted in the area, Council's assessment should be focused on this numerical allowance as opposed to the variation to the specific standard. By providing flexibility in this regard, the subject proposal is capable of achieving a better development and design outcome which adequately caters for the existing residential development.

The site has a maximum FSR provision of 0.4:1 (243.88sqm). It has been determined that the proposal, results in a total gross floor area on the site of 279.54sqm. This represents a floor space ratio of 0.459:1 and therefore a non-compliance with the FSR standard by 35.66sqm or 14.62%. I note that clause 4.1.3 of Manly Development Control Plan 2013 contains FSR exemption provisions applicable to land where the site area is less than the minimum Lot size required on the LEP Lot size map provided the relevant LEP objectives and the provisions of the DCP are satisfied.

The Lot size map identifies the subject site as being in sub zone "R" in which a minimum lot size of 750sqm is required. The site having an area of only 609.7sqm is well below the minimum lot size provision and accordingly the clause 4.1.3 Manly DCP FSR variation provisions apply.

Clause 4.1.3.1 states that the extent of any exception to the LEP FSR development standard pursuant to clause 4.6 of the LEP is to be no greater than the achievable gross floor area for the lot indicated in Figure 30 of the DCP. We confirm that pursuant to Figure 30 the calculation of FSR is to be based on a site area of 750sqm with an achievable gross floor area of 300sqm.

In this regard, the 279.54sqm of gross floor area proposed, representing an FSR of 0.37272:1 (based on 750sqm), achieves full compliance with the exceptions afforded under section 4.1.3.1 of the MDCP for undersized allotments.

A review of the objectives of Clause 4.4 (and also Manly DCP 4.1.3.1) has been undertaken 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 are compatible with the height and scale of surrounding and nearby development. The surrounding area varies in size, bulk and scale, ranging from one to two storeys in height and varying setbacks.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191, I have formed the considered opinion that most observers would not find the bulk and scale of the proposed development, as viewed from Mulgowrie Crescent, to be offensive, jarring or unsympathetic in a streetscape context. This objective is satisfied, notwithstanding the non-compliant FSR proposed, as the bulk and scale of development is consistent with the existing and desired streetscape character.

This objective is achieved as the bulk and scale of development is entirely consistent with the existing and desired streetscape character.

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

The proposal has been designed to achieve full compliance with the exceptions afforded under section 4.1.3.1 of the MDCP for undersized allotments. We note that Objective 1 of the DCP provision, which relates to establishing building density and bulk, as reflected by FSR, in relation to site area (undersized allotments) is similar to this LEP objective namely:

*Objective 1) To ensure the scale of development does not obscure important landscape features.*

As previously indicated the proposed FSR complies with the DCP numerical FSR control applicable to undersized allotments and is therefore deemed to comply with this objective. I am satisfied that the proposal, notwithstanding the FSR non-compliance, achieves this objective as the building density and bulk, in relation to a site area, satisfies Objective 1 of the clause 4.1.3.1 DCP provision applicable to undersized allotments, with the development not obscuring any important landscape features.

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

The proposal enhances the existing visual relationship between new development and the existing character of the area. The proposal has been designed to the desired character of the area while creating its own “image” and “identity for the area”. The proposal is consistent with the height, bulk and scale of existing dwellings along Mulgowrie Crescent, noting the one (1) to three (3) storey nature of the streetscape.

It is noted that this objective is the same as the primary purpose/objective outlined at clause 4.1.3 of the DCP as confirmed in the note such provision namely:

*Note: FSR is a development standard contained in the LEP and LEP objectives at clause 4.4(1) apply. In particular, Objectives in this plan support the purposes of the LEP in relation to maintaining appropriate visual relationships between new development and the existing character and landscape of an area as follows:*

*Objective 1) To ensure the scale of development does not obscure important landscape features.*

*Objective 2) To minimise disruption to views to adjacent and nearby development.*

*Objective 3) To allow adequate sunlight to penetrate both the private open spaces within the development site and private open spaces and windows to the living spaces of adjacent residential development.*

As the proposed GFA/FSR achieves full compliance with the exceptions afforded under section 4.1.3.1 of the MDCP for undersized allotments; therefore, it is also “deemed to comply” with the associated objectives as outlined which, if complied with, demonstrate the maintenance of an appropriate visual relationships between new development and the existing character and landscape of an area. That said, it has previously been determined that the proposal achieves objective (a) of the clause 4.4 MLEP FSR standard namely to ensure the bulk and scale of development is consistent with the existing and desired streetscape character. Accordingly, I am satisfied that the development, notwithstanding the FSR non-compliance, maintains an appropriate visual relationship between new development and the existing built form character of the area.

In relation to landscape character, the application does not require the removal of any significant trees or vegetation and the proposal has been designed to maximise opportunities for open space and landscaping where possible that are functional and integrate with the layout of the proposed development. An appropriate visual relationship between new development and the existing landscape of the area is maintained.

I am satisfied that the development, notwithstanding its FSR non-compliance, achieves the objective as it maintains an appropriate visual relationship between new development and the existing character and landscape of the area.

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

In responding to this objective, I have adopted views, privacy, solar access and visual amenity as environmental factors which contribute to the use and enjoyment of adjoining public and private land.

The proposal will not result in any impacts on the use or enjoyment of neighbouring properties or the public areas adjoining the site. It is my professional opinion that the proposal provides a functional building footprint which ensures the amenity and privacy of adjoining properties is maintained.

### **Privacy**

Having regard to clause 4.1.3.1 Manly DCP FSR provisions, which inform the 279.54sqm of gross floor area proposed, representing an FSR of 0.37272:1 (based on 750sqm), this complies with the DCP variation provision applicable to undersized allotments. We note that the privacy objectives at clause 3.4.2 are also referenced in relation to these provisions namely:

#### *3.4.2 Privacy and Security*

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

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

As previously indicated, the proposed FSR complies with the DCP numerical FSR control applicable to undersized allotments and is therefore deemed to comply with the clause 3.4.2 privacy objectives to the extent that it can be demonstrated that the development minimises loss of privacy to adjacent and nearby development.

Given adequate spatial separation is maintained between the balance of surrounding properties, and the primary orientation of living areas to the south, I am satisfied that the design, although non-compliant with the FSR standard, minimises adverse environmental impacts in terms of privacy and therefore achieves this objective.

### **Solar access**

The accompanying shadow diagrams DA18 to DA20 demonstrate that the building, although non-compliant with the FSR standard, will not give rise to any unacceptable shadowing impact to the primary living and open space areas of the adjoining residential properties with compliant levels of solar access maintained.

### **Visual amenity/ building bulk and scale**

As indicated in response to objective (a), I have formed the considered opinion that the bulk and scale of the building is contextually appropriate with the floor space appropriately distributed across the site to achieve acceptable streetscape and residential amenity outcomes.

It is my considered opinion that the building, notwithstanding the FSR non-compliance, achieves the objective through skilful design that minimises adverse environmental impacts on the use and enjoyment of adjoining land and the public domain.



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

Not applicable.

Having regard to the above, the proposed building form which is non-compliant with the FSR standard will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the FSR standard. Given the developments consistency with the objectives of the FSR standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

It is our professional opinion that the building by virtue of its height, bulk and scale, is consistent with the locality and desired character of the area. We have formed the considered opinion that the project is a sympathetic design and development with a bulk and scale consistent with the existing and future character of the area. The proposal is not offensive, or unsympathetic in a streetscape context nor the context from Mulgowrie Crescent.

As outlined above, the proposed development is consistent with the underlying objectives of the FSR standard, notwithstanding the proposed variation, and therefore compliance with the control is unreasonable and unnecessary and therefore the variation can be supported by Northern Beaches Council.

#### **4.3 Are there sufficient environmental planning grounds to justify contravening the development standard?**

There are sufficient environmental planning grounds to justify contravening the development standard. Whilst there is no requirement that the development comply with the objectives set out in clause 4.6(1) it is relevant to note that objective (b) provides:

*“to achieve better outcomes **for and from** development by allowing flexibility in particular circumstances.”*

It should be noted at the outset that in *Initial Action* the Court held that it is incorrect to hold that the lack of adverse impact on adjoining properties is not a sufficient ground justifying the development contravening the development standard when one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse impacts.

There is an absence of environmental harm arising from the contravention and positive planning benefits arising from the proposed development as outlined in detail above. From a planning perspective, there is sufficient grounds to justify the variation to the FSR development standard for the following reasons:

##### **Manly Development Control Plan – Control 4.1.3**

- Clause 4.1.3 of Manly Development Control Plan 2013 contains FSR exemption provisions applicable to land where the site area is less than the minimum Lot size required on the LEP Lot size map provided the relevant LEP objectives and the provisions of the DCP are satisfied.
- The Lot size map identifies the subject site as being in sub zone “R” in which a minimum lot size of 750sqm is required. The site having an area of only 609.7sqm is well below the minimum lot size provision and accordingly the clause 4.1.3 Manly DCP FSR variation provisions apply.

- Clause 4.1.3.1 states that the extent of any exception to the LEP FSR development standard pursuant to clause 4.6 of the LEP is to be no greater than the achievable gross floor area for the lot indicated in Figure 30 of the DCP. We confirm that pursuant to Figure 30 the calculation of FSR is to be based on a site area of 750sqm with an achievable gross floor area of 300sqm.
- In this regard, the 279.54sqm of gross floor area proposed, representing an FSR of 0.37272:1 (based on 750sqm), achieves full compliance with the exceptions afforded under section 4.1.3.1 of the MDCP for undersized allotments.

#### **Context**

- The area surrounding the subject site is characterised by 1 to 3 storey dwellings, with varying front side, and rear setbacks.
- The proposed alterations and additions to the existing dwelling have been designed to remain consistent with the character of the locality, despite the variation to FSR, through design, architectural features and complimentary materials and colour choices.
- Variation to the Manly LEP 2013 Cl. 4.4 FSR, control has been the subject of recent precedent for the following developments:
  - DA2024/0229 – 21 Vista Avenue Balgowlah Heights – 0.495:1 – 23.8% variation
  - DA2022/2223 – 20 Bareena Drive Balgowlah Heights – 0.48:1 – 20% variation
  - DA2021/2022 – 15 Mulgowrie Crescent – 0.49:1 – 23.43% variation
  - DA2021/1222 – 12 Bareena Drive Balgowlah Heights – 0.45:1 – 12% variation
  - DA2020/0936 – 11 Bareena Drive Balgowlah Heights – 0.44:1 – 11.5% variation
- The setting and context with similar FSR variations recently approved, demonstrates that a varied FSR is reasonable and that it is consistent with clause 1.3(c) and (d) of EPA Act.

#### **Future Development**

- The proposed alterations and additions will allow for the provision of a modern floor plan, with refurbished and improved internal spaces.
- The minor addition to that existing is retained within the existing building footprint, does not reduce landscaping and cannot be viewed from the street.
- This represents an efficient use of an existing developed site, with all services readily available.
- The built form proposed is relatively consistent with the existing dwelling and other buildings in the locality,
- Based on the above, the proposed variation is consistent with what one would expect through a small lot and the variation allowances of MDCP.
- The proposed works will not hinder any future development of the lot,
- The alterations proposed demonstrate fulfillment of clause 1.3 (c) and (g).

#### **Consistent with Zone Objectives**

- The extent of the variation is considered to be in the public interest, as the proposal remains consistent with the objectives of the zone, allowing for additional residential floor space in a residential zone, with a bulk and scale consistent the locality. Compliance with the FSR standard based on this would be unreasonable, with clause 1.3(c) of EPA Act demonstrated as fulfilled.

#### **Natural Environment**

- The proposed development allows for the current and future housing needs of the residents to be met, without developing a greenfield site, representing an efficient use of existing developed land.

- The natural environment is unaffected by the departure to the development standard and it would be unreasonable for the development to be refused on this basis with Cl 1.3(b) EPA Act satisfied.

#### **Social and Economic Welfare**

- The variation to the FSR will have a positive social impact, as it will allow the housing needs of the residents to be met in their current local community, including the ability to work from home in the dedicated home offices. It utilises existing services, satisfying Cl1.3(b) EPA Act. Accordingly, refusal of the development based on this reason would be unreasonable.

#### **Appropriate Environmental Planning Outcome**

- The development proposed is not an overdevelopment of the site and satisfies the objectives of the zone and the development standard as is detailed earlier in the report.

Having regard to *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, and further to the proposal's consistency with the above strategic and statutory environmental planning provisions, the proposal is consistent with the following objectives under Section 1.3 of the Environmental Planning and Assessment Act 1979 (the Act):

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

The above environmental planning grounds are not general propositions, they are unique circumstances to the proposed development. These are not simply benefits of the development as a whole, but are benefits emanating from the breach of the floor space ratio.

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.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed floor space ratio non-compliance in this instance.

**Summary**

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