

**4 GILBERT STREET, MANLY  
CONSTRUCTION OF ALTERATIONS AND ADDITIONS TO EXISTING DWELLING**

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

**For:** Construction of Alterations and Additions to an Existing Dwelling  
**At:** 4 Gilbert Street, Manly  
**Owner:** Mr & Mrs Rosnell  
**Applicant:** Mr & Mrs Rosnell

### **1.0 Introduction**

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

### **2.0 Background**

Clause 4.4 of MLEP sets out the maximum floor space ratio standard as follows:

- (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 Floor Space Ratio Map specifies a maximum floor space ratio of 0.75:1. This equates to a floor area of 128.77m<sup>2</sup> for the subject site.

The proposed dwelling additions provide for a maximum gross floor area of 165.28m<sup>2</sup>. This is a non-compliance of 36.51m or a variation of 28.3%. It is noted that the site has an area of only 171.7m<sup>2</sup>, well below the minimal allotment size of 250m<sup>2</sup>. The site also has benefit of an easement, over No. 5 Eustace Street, for recreation and horticultural purposes. When including the easement area in site area, the proposal would comply with the maximum floor space ratio development standard.

The proposal is considered acceptable and as discussed further within this request, there are sufficient environmental planning grounds to justify contravening the development standard.

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

### **Is Clause 4.4 of the LEP a development standard?**

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

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

- (b) Clause 4.4 relates to the maximum floor space ratio. Accordingly, Clause 4.4 is a development standard.

### **3.0 Purpose of Clause 4.6**

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

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

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

### **4.0 Objectives of Clause 4.6**

The objectives of Clause 4.6 are as follows:

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

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

*Initial Action* involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

*“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”.*

*If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”*

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

Clause 4.6(2) of the LEP provides:

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

Clause 4.4 (the Floor Space Ratio control) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of the LEP.

Clause 4.6(3) of the LEP provides:

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

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

The proposed development does not comply with the maximum floor space ratio development standard pursuant to Clause 4.4 of MLEP which specifies a maximum floor space ratio of 0.75:1. The proposed dwelling additions provide for a maximum gross floor area of 165.28m<sup>2</sup>. This is a non-compliance of 36.51m or a variation of 28.3%. It is noted that the site is undersized allotment. The Manly Development Control Plan (DCP) at clause 4.1.3.1 provides exceptions to FSR for undersized allotments. in this area which states:

*On existing sites in Residential LEP Zones (including E3 & E4) with a site area less than the minimum lot size required on the LEP Lot Size (LSZ) Map, Council may consider exceptions to the maximum FSR under LEP clause 4.6 when both the relevant LEP objectives and the provisions of this DCP are satisfied.*

*The undersized nature of a lot is a matter that Council may consider in determining whether 'compliance with the standard is unreasonable or unnecessary in the circumstances of the case' and 'there is sufficient environment planning grounds to justify contravening the development standard' under LEP clause 4.6(3).*

*The extent of any exception to the LEP FSR development standard pursuant to LEP clause 4.6 in this plan is to be no greater than the achievable FSR for the lot size indicated in Figure 30 - Extent of FSR Variation for Undersized Lots.*

For the subject property the minimum lot size specified in the LEP is 250m<sup>2</sup>. The maximum floor area for a lot with an area of 250m<sup>2</sup> is 187.5m<sup>2</sup> and the proposal complies with this.

The non-compliance with the maximum floor space does not result in any detrimental impacts and is compatible with the character of the existing locality.

Strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

Clause 4.6(4) of MLEP provides:

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

A register has been established to record assessments carried out.

Clause 4.6(5) has been repealed. 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 LEP from the operation of clause 4.6.

The specific objectives of Clause 4.6 are as follows:

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

The development will provide for additions to an existing single detached dwelling house. The non-compliance will not result in any detrimental impacts to the adjoining properties or the character of the locality.

The site is significantly undersized have an area of only 171.1m<sup>2</sup> in an area where the minimum allotment size is 250m<sup>2</sup>. As noted previously when based upon a lot size of 250m<sup>2</sup>, the proposal would comply with the maximum FSR development standard. Further the site has benefit of an easement over the adjoining northern property, No. 5 Eustace Street. This easement is for use of a portion of the site for recreation and horticultural purposes. When including the area of the easement, the site would have an area of 234.42m<sup>2</sup> which would permit a floor area of 175.815m<sup>2</sup>. The proposal would comply with the floor space ratio development standard if the area of the easement was included in site area.

The site is located in portion of Gilbert Street which is characterised by multi storey residential flat buildings. These developments exceed the maximum floor space ratio of 0.75:1 and are significantly larger than the proposed development. The resultant dwelling will provide bulk and scale (and floor area) that is compatible with the existing development in the immediate locality.

The non-compliance results in a development that is compatible with the existing surrounding development in this portion of Manly and which is consistent with the stated Objectives of the R1 General Residential Zone, which are noted as:

- To provide for the housing needs of the community.*
- To provide for a variety of housing types and densities.*
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

## 5.0 The Nature and Extent of the Variation

- 5.1 This request seeks a variation to the maximum floor space ratio development standard contained in Clause 4.4 of MLEP.
- 5.2 Clause 4.4 of MLEP specifies a maximum floor space ratio of 0.75:1 in this area of Manly.
- 5.3 The proposal provides for additions to an existing dwelling including a new upper level.  
The works proposed result in a development that is compatible with the existing surrounding development in this locality.
- 5.4 When including the area of the easement in site area, the proposal would comply with the FSR development standard.
- 5.5 When based on a site area of 250m<sup>2</sup> (the minimum lot size in this locality), the proposal would comply with the FSR development standard.

## 6.0 Relevant Caselaw

- 6.1 In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:
  17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
  18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
  19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46]*

20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51].  
The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

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

1. Is Clause 4.4 of MLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
  - (a) compliance is unreasonable or unnecessary; and
  - (b) there are sufficient environmental planning grounds to justify contravening the development standard



3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of Clause 4.4 and the objectives for development for in the R1 zone?

## **7.0. Request for Variation**

### **7.1 Is compliance with Clause 4.4 unreasonable or unnecessary?**

- (a) This request relies upon the 1st way identified by Preston CJ in *Wehbe*.
- (b) The first way in *Wehbe* is to establish that the objectives of the standard are achieved.
- (c) Each objective of the maximum floor space ratio development standard, as outlined under Clause 4.4, and reasoning why compliance is unreasonable or unnecessary, is set out below:

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

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

The existing streetscape in this portion of Gilbert Street is characterised by multi-storey residential flat buildings, predominantly three storeys. The buildings, which are of a variety of architectural styles, display minimal setbacks to the street frontage and with minimal landscaping.

The proposal will present as a two storey dwelling with lower level garage. The upper level is provided with articulation when viewed from the Gilbert Street and public pedestrian access stair. This is achieved by providing varied setbacks to the new first floor level and retention of the existing ground floor entry porch and skirt roof form. The height of the proposed additions does not exceed the height of the existing developments to the east, No. 2 and 2A Gilbert Street, nor the height of the development immediately opposite the site at No. 13 Gilbert Street and No. 80 West Esplanade.

The proposal achieves this objective.

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

The proposed development complies with the maximum building height development standard (11m) and maximum 3 storeys specified in Council's DCP. The proposal results in a bulk that is compatible with the existing development in this part of Gilbert Street.



The resultant development largely presents as a two storey detached dwelling with the lower level a result of the slope of the site.

The site adjoins a public reserve to the west. Due to the topography of the site and its surrounds, the adjoining reserve is well elevated above the proposed roof form. As such the proposal will obstruct views from the adjoining public reserve nor obstruct view to the public reserve from Gilbert Street.

The proposal achieves this objective.

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

The proposal provides for additions to an existing detached dwelling house. The proposal results in a development that is of a height and scale that is appropriate in this portion of Gilbert Street. The proposal results in a part two storey and part three storey dwelling which is compatible with the existing surrounding development which predominantly incorporates three storey residential flat buildings.

The proposal does not require the removal of any protected vegetation and there is no reduction in the existing soft landscaped area, with all new works located over the existing hard surfaces of the site.

Given the topography of the site and its surrounds, the proposal will not be visible from the adjoining public reserve.

The proposal achieves this objective.

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

The proposed additions will not have a detrimental impact on the use or enjoyment of the adjoining residential land to the east at No. 2 Gilbert Street. The proposal retains all high use living areas on the existing ground floor level, with only bedrooms, bathroom and a study to the new upper level. There is only one window on the upper level eastern elevation and this is a highlight window which does not permit overlooking into the adjoining property.

The orientation of the allotment is such that the proposed addition does not result in any unreasonable overshadowing.

The site adjoins a public reserve to the west, however given the topography of the land, the additions will not be visible from the main part of the public reserve.

The proposal results in a dwelling that presents as a part two and part three storey dwelling which is compatible in this part of Gilbert Street. The works will not impact on the use or enjoyment of the public domain.

The proposal achieves this objective.

*(e) to provide for the viability of Zone E1 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.*

This objective is not relevant to the proposal.

The proposal also achieves the objectives of Clause 4.1.3 Floor Space Ratio of the Manly Development Control Plan as discussed below:

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

The proposal results in a development that presents as a part two and part three storey detached dwelling house. This is compatible with the existing surrounding development in this portion of Gilbert Street which is characterised by multi-storey residential flat buildings with reduced street setbacks and minimal landscaping.

The proposal does not require the removal of any protected vegetation or soft landscaped area. Given the topography of the site and its surrounds the proposal will not obstruct views of the adjoining public reserve.

The proposal achieves this objective.

*To minimise disruption to views to adjacent and nearby development.*

Some surrounding properties enjoy views of Manly Cove and towards the City. The existing dwelling does not have any views given the three storey developments on the southern side of Gilbert Street. Similarly the properties to the rear of the site (to the north) do not enjoy views over the subject site towards the water given the existing development on the southern side of Gilbert Street.

Existing views from the adjoining public reserve will not be impacted by the proposal given the topography and significant fall of the land.

The proposal will not result in the loss of any significant or important views from the public domain or the adjoining properties.

The proposal achieves this objective.

*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.*

Shadow diagrams have been submitted with the application, which demonstrate that the proposal does not result in any unreasonable loss of solar access.

The proposal achieves this objective.

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

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

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”.  
*The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15].**

*Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

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

The site is very small allotment comprising only 171.7m<sup>2</sup> in an area where the minimum allotment size is 250m<sup>2</sup>. When calculating the FSR based upon a minimum allotment size of 250m<sup>2</sup>, the proposal would provide for a FSR of 0.66:1 which would comply with the development standard.

The site has benefit of an easement (identified as 'A' on the survey plan) for the use of recreation and horticultural. This easement for exclusive full and free right of the owners of the subject site (No. 4 Gilbert Street). If the area of easement was included in the site area (i.e. 234.42m<sup>2</sup>) the proposal would provide for a FSR of 0.70:1 which would comply with the development standard.

As the development site (No. 4 Gilbert Street) has exclusive right to the area of the easement, this area should be included in site area for the purpose of floor space ratio.

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

- The proposal provides for additions to an existing dwelling resulting in a building of a height and bulk that is comparable with the existing surrounding development. Therefore, the proposal will promote good design (cl 1.3(g)).
- The proposal provides for an appropriate bulk and scale when viewed from the public domain and surrounding properties and therefore strict compliance is therefore unreasonable.

Further, the proposed works do not have any detrimental impact on the adjoining properties for the following reasons:

- The proposed additions will not have a detrimental impact on the use or enjoyment of the adjoining residential land to the east at No. 2 Gilbert Street. The proposal retains all high use living areas on the existing ground floor level, with only bedrooms, bathroom and a study to the new upper level.

There is only one window on the upper level eastern elevation and this is a highlight window which does not permit overlooking into the adjoining property.

- The orientation of the allotment is such that the proposed addition does not result in any unreasonable overshadowing.
- The site adjoins a public reserve to the west, however given the topography of the land, the additions will not be visible from the main part of the public reserve.

The above environmental planning grounds are not general propositions. They are unique circumstances of the site. Further, the resultant development and in particular the non-compliance with the floor space ratio standard, is compatible with the existing surrounding development.

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

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

The area of non-compliance does not result in any detrimental impact the adjoining properties or the character of the streetscape and immediate locality. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

**7.4 Is the proposed development in the public interest because it is consistent with the objectives of Clause 4.4 and the objectives of the R1 General Residential Zone?**

- (a) Section 4.2 of this written request suggests the 1<sup>st</sup> test in Wehbe is made good by the development.

- (b) Each of the objectives of the R1 General Residential Zone and the reasons why the proposed development is consistent with each objective is set out below.

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

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

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

It is considered that notwithstanding the variation of to the floor space ratio control, the resultant building as proposed will be consistent with the individual Objectives of the R1 General Residential Zone for the following reasons:

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

The subject site currently provides for a small two bedroom dwelling with single bathroom (with combined laundry) which is not suitable for the needs of even a small family. The proposed additions provide for a dwelling of a size that is anticipated in modern times. The resultant development provides for increased amenity and functionality and achieves this objective.

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

The proposal provides additions to the existing detached dwelling house. The site is located within a locality that comprises predominantly multi dwelling developments.

The proposal achieves this objective.

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

This objective is not relevant to the proposal.

Accordingly, it is considered that the site may be further developed with a variation to the prescribed floor space ratio control, whilst maintaining consistency with the zone objectives.

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

(a) Clause 4.6(5) has been repealed.

**8.0 Conclusion**

This development proposed a departure from the maximum floor space ratio development standard, with the proposed works providing for a maximum floor space ratio of 0.96:1.

When including the area of the easement, of which the owners have exclusive and full use of, the proposal would comply with the floor space ratio control.

The extent of the variation to the floor space ratio control does not result in any detrimental impact on the amenity, views and outlook for the neighbouring properties.

This written request to vary to the maximum floor space ratio standard specified in Clause 4.4 of the Manly LEP 2013 adequately demonstrates that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

Strict compliance with the maximum floor space ratio control would be unreasonable and unnecessary in the circumstances of this case.

Natalie Nolan  
DIRECTOR  
NOLAN PLANNING CONSULTANTS