

**APPENDIX B – CLAUSE 4.6 VARIATION
VARIATION OF A DEVELOPMENT STANDARD REGARDING THE MAXIMUM
BUILDING HEIGHT REQUIRED BY CLAUSE 4.3 OF THE MANLY LOCAL
ENVIRONMENTAL PLAN 2015**

For: Proposed New Dwelling
At: 54 Golf Parade, Manly
Applicant: Mr Jeremy Rawson

Introduction

This objection is made pursuant to the Clause 4.6 of Manly Local Environmental Plan 2013. This variation is a written request for Council's support a variance to a development application for the construction of a new 2 storey dwelling at **54 Golf Parade, Manly**.

The specified maximum building height under Clause 4.3 (1) of the Manly Local Environmental Plan 2013 (the LEP) is restricted to 8.5m. Due to Flood Controls for the site, the development is proposing a maximum height of 9.693m

The controls of the Clause 4.3 development standards requires a variation under Clause 4.6 of the Manly Local Environmental Plan 2013 (the LEP) to permit the granting of consent to the development application.

PURPOSE OF CLAUSE 4.6

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

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

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 development will achieve a better outcome in this instance as the site will provide for construction of a new secondary dwelling, 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.*

As required by the zone objectives, the proposal will provide for the construction of a two storey dwelling. Notwithstanding the non-compliance, the design aesthetically adds to the existing character of the neighbourhood whilst providing for the general residential requirements.

ONUS ON APPLICANT

Clause 4.6(3) provides that:-

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.*

JUSTIFICATION OF PROPOSED VARIANCE

There is jurisdictional guidance on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Samadi v Council of the City of Sydney [2014] NSWLEC 1199*.

Paragraph 27 of the judgement states:-

Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a

written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)).

The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

Precondition 1 - Consistency with zone objectives

The land is located in the R1 – Low Density Residential Zone. The objectives of the R1 zone are:-

- *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.*

Comments

The development proposal provides for the construction of a new dwelling maintaining the general residential environment. The development provides a 2 storey dwelling which adds to the existing character of the neighbourhood whilst providing for the general residential requirements.

Accordingly, the proposal can achieve the zone objectives notwithstanding the maximum height non-compliance.

Precondition 2 - Consistency with the objectives of the standard

The objectives of Clause 4.3 are articulated at Clause 4.3(1):-

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

Comments

The proposal provides for the construction of a new dwelling that is compatible with the existing surrounding development in terms of height. The proposal provides for a reasonable-pitched roof form of 25 degrees which is compatible with more recent developments in the locality. The overall height is affected by the Flood Management controls and the required Flood Planning Level of 3.65m AHD, which is approximately 1.65m above the NGL. The proposal has ceiling heights of 2,750mm and 2,600mm which is not considered excessive and is consistent with the prevailing neighbourhood. The proposal achieves this objective.

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

Comments

It is considered that the proposal adequately addresses this objective by providing for a new dwelling that is well articulated and modulated. The front and secondary façade provides for substantial articulation through the use varied setbacks, gables and change in external finishes. The use of modulation limits the impact overall size and bulk. The proposal is generally consistent with the height and scale of the locality, which is generally 2 storey dwellings.

- (c) *to minimise disruption to the following:*
(i) *views to nearby residential development from public spaces (including the harbour and foreshores),*

- (ii) views from nearby residential development to public spaces (including the harbour and foreshores),*
- (iii) views between public spaces (including the harbour and foreshores),*

Comments

The proposal does not obstruct any significant views from the adjoining properties. It is noted that the properties do not currently enjoy any views due to the natural topography and as such the proposal will not have any impact on these properties in terms of views. The proposal thereby achieves compliance with this objective.

- (d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*

Comments

Given the orientation of the allotments on this portion of Golf Parade being North-South, all properties receive very shadowing as. Shadow diagrams have been prepared which demonstrate that at least 2 hours of solar access is maintained to the private open space and living room windows on the winter solstice. The proposal complies with this objective.

- (e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

Comments

This objective does not apply.

For the above reasons, we are of the view that the variation requested and the resultant development is consistent with the objectives of the development standard.

Precondition 3 - To consider written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

It is unreasonable and unnecessary to require strict compliance with the development standard given the pre-determined Flood Planning Levels. The majority of the non-compliance is a result of the required FFL of 3.65 AHD. Given that the proposal has non-excessive ceiling heights and roof pitch, it can be argued that the non-compliance solely due to the mitigating flood measures. The proposal results in a dwelling that is compatible with the adjoining properties and reducing the proposal to ensure strict compliance would not serve any benefit to the adjoining properties or when viewed from the streetscape.

For the above reasons, it would therefore be unreasonable and unnecessary to cause strict compliance with the standard.

Precondition 4 – To consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court [or consent authority] finding that the matters required to be demonstrated have been adequately addressed

When having regard to the above, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for maximum building height.

The existing surrounding development and the desired architectural outcome combine to produce a meritorious development despite the minor numerical variation to the building height standard.

In the recent 'Four2Five' judgement (Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90), Pearson C outlined that a Clause 4.6 variation necessitates recognition of grounds that are unique to the circumstances to the proposed development. Which is to imply that that simply meeting the objectives of the zone is insufficient to justify a Clause 4.6 variation.

Staying with the 'Four2Five' judgement, a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but explicitly noted that the Commissioner's decision on that point was simply a discretionary (subjective) opinion. It does not mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are "sufficient environmental planning grounds to justify contravening the development standard", it is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

Taking into consideration the more recent case of *Randwick City Council vs Micaul Holdings Pty Ltd [2016]*, the council mounted an appeal against the original Clause 4.6 determination, producing advanced arguments detailing that the applicant failed to thoroughly justify the non-compliances in the LEP, and that the commissioner failed to adequately assess the Clause 4.6 variance. In February 2018 the Chief judge dismissed the appeal on the basis that the previous ruling had not faulted in its assessment and determination of the variances to the FSR and height controls.

With reference to the Four2Five v Ashfield case once more, the judge, although falling short of overturning the judgement in Four2Five's favour, did raise an

important discussion point that the consent authorities obligation is to be satisfied that ... "The applicant's written request has adequately addressed ... that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ... and that there are sufficient environmental planning grounds to justify contravening the development standard." He reiterated this again:

"the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary".

In regards to the proposed development at 54 Golf Parade, the following environmental planning grounds are considered to be sufficient to allow Council to be satisfied that a variation to the development standard can be supported:-

In this regard the following has been considered: -

- The non-compliance is a direct result of the Flood Planning Controls.
- The proposal does not result in any loss of privacy or solar access to the adjoining properties.
- The proposal retains existing views from adjoining properties.

CONCLUSION

The development proposes a departure from the maximum building height control.

The proposal produces an appropriate development outcome. The variation to the control occurs due to the Flood Controls required for Flood Risk Management.

As there is no material impact on adjoining properties or the public domain arising from the variation to the building height development standard and the objectives of the control are satisfied, it is considered that strict compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.

This objection to the maximum building height specified in Clause 4.3 of the Manly LEP 2013 adequately demonstrates that the objectives of the standard will be met.

Therefore, we request that council support the variation on the basis that there are sufficient environmental planning grounds to justify a variance to the development standard.

Nicholas Rawson

Town Planner
October 2019