

Attachment 1 Clause 4.6 Request for Variation to Clause 4.4 Floor Space Ratio of Manly Local Environmental Plan 2013

1. INTRODUCTION

This is a formal written request that has been prepared in accordance with Clause 4.6 of the Manly Local Environmental Plan 2013 to support an amended development application submitted to Northern Beaches Council for alteration and additions to the existing heritage listed dwelling at 18 Margaret Street, Fairlight.

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, by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application, not only would the variation be in the public interest because it satisfies objectives of the subject R1 General Residential Zone and the standard, but it would also result in a better planning outcome and diversity of activities in accordance with the zone objectives.

The development standard that this request seeks approval to vary is the Floor Space Ratio control in Clause 4.4 of the Manly LEP 2013 (MLEP 2013). It is acknowledged that the maximum Floor Space Ratio prescribed for this site according to the MLEP 2013 is 2:1. This request seeks to vary / request exception to a proposed maximum of 2.707:1.

Cl 4.6(2) states that development consent may be granted for development even though the development would contravene a development standard. However, this does not apply to a development standard that is expressly excluded under cl 4.6(8) of the MLEP 2013. The maximum Floor Space Ratio development standard is not identified under subclause 4.6(8) and therefore is not specifically excluded from the operation of Cl 4.6 of MLEP 2013.

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

In Sections 3, 4 and 5 of this request, flexibility is justified in this case in terms of the matters explicitly required by clause 4.6 to be addressed in a written request from the applicant. In Sections 6 and 7, additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 or the assumed concurrence of the Secretary is addressed.

2. NSW LAND AND ENVIRONMENT COURT: CASE LAW (TESTS)

Planning principles and judgements issued by the Land and Environment Court (NSW LEC) provide guidance in relation to requests to vary a development standard under clause 4.6 of the MLEP 2013. The case law that has been considered in the preparation of this clause 4.6 request are as follows:

- Winten v North Sydney Council
- Wehbe v Pittwater [2007] NSW LEC 827
- Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC
- Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC
- Moskovich v Waverley Council [2016] NSWLEC 1015

- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118

Winten v North Sydney Council

The decision of Justice Lloyd in Winten v North Sydney Council established the basis on which the former Department of Planning and Infrastructure's Guidelines for varying development standards was formulated. Initially this applied to State Environmental Planning Policy – Development Standards (SEPP 1) and was subsequently updated to address clause 4.6 of the Standard Instrument templates. These principles for assessment and determination of applications to vary development standards are relevant and include:

- Is the planning control in question a development standard?
- What is the underlying object or purpose of the standard?
- Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the Environmental Planning & Assessment Act 1979 (EP&A Act)?
- Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case (and is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case); and
- Is the objection well founded?

Wehbe v Pittwater [2007] NSW LEC 827

The decision of Justice Preston in Wehbe v Pittwater [2007] NSW LEC 827 expanded on the findings in Winten v North Sydney Council and established the five (5) part test to determine whether compliance with a development standard is unreasonable or unnecessary considering the following questions:

- Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives?
- Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary?
- Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable?
- Has Council by its own actions, abandoned or destroyed the development standard, by granting consents that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or
- Is the "zoning of particular land" unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable?

Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC

More recently in the matter of Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of Wehbe V Pittwater [2007] NSW LEC 827 and demonstrate the following:

- Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;

- That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
- That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs; and
- All three elements of clause 4.6 have to be met and it is best to have different reasons for each, but it is not essential.

Randwick City Council v Micaul Holdings Pty Ltd [2016] NSW LEC 7

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSW LEC 7 Preston CJ noted at paragraph 7 that development consent cannot be granted for development that contravenes a development standard unless the consent authority:

- Considers the cl 4.6 objections (the requirement in cl 4.6(3)); and
- Was satisfied that, first, the cl 4.6 objections adequately addressed the matters required to be demonstrated by cl 4.6(3) (the requirement in cl 4.6(4)(a)(i)) and, second, the development will be in the public interest because it is consistent with the objectives of the height standard and the FSR standard and the objectives for development within the R3 zone in which the development is proposed to be carried out (the requirement in cl 4.6(4)(a)(ii)).

The consent authority does not have to be directly satisfied that compliance with each development standard is unreasonable or unnecessary in the circumstances of case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matters in 4.6(3)(a) and (b). In this respect he also noted that in assessing whether compliance with the development standards was unreasonable or unnecessary an established test is consistency with the objectives of the standard and the absence of environmental harm.

Moskovich v Waverley Council [2016] NSWLEC 1015

Commissioner Tour reflected on the recent *Four2Five* decisions and said:

- Clause 4.6(3)(a) is similar to clause 6 of SEPP 1 and the *Wehbe* ways of establishing compliance are equally appropriate [at 50]. One of the most common ways is because the objectives of the development standard are achieved – as per Preston CJ in *Wehbe* at 42-43.
- Whereas clause 4.6(4)(a)(ii) has different wording and is focused on consistency with objectives of a standard. One is achieving, the other is consistency. Consequently, a consideration of consistency with the objectives of the standard required under clause 4.6(4)(a)(ii) to determine whether non-compliance with the standard would be in the public interest is different to consideration of achievement of the objectives of the standard under clause 4.6(3). The latter being more onerous requires additional considerations such as the matters outlined in *Wehbe* at 70-76. Such as consideration of whether the proposed development would achieve the objectives of the standard to an equal or better degree than a development that complied with the standard.

Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118

Most recently, in reflecting upon recent case law regarding clause 4.6 variation requests, Chief Judge Preston confirmed (in this judgement):

- The consent authority must, primarily, be satisfied the applicant's written request adequately addresses the 'unreasonable and unnecessary' and 'sufficient environmental planning grounds' tests:

"that the applicant's written request ... has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ... and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard ..." [15]

- On the 'Five Part Test' established under *Wehbe v Pittwater Council* [2007] NSWLEC 827:

"The 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..." [22]

- That clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development:

"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." [88]

This clause 4.6 variation has specifically responded to the matters outlined above and demonstrates that the request meets the relevant tests with regard to recent case law.

3. EXTENT AND ASSESSMENT OF VARIATION

Site

This submission is made in support of a Development Application (DA) for alterations to the existing dwelling

The subject site is known as 18 Margaret Street, Fairlight 2094. The real property description is Lot 1 in DP953749. It is located in vicinity of the waterfront property located north of Fairlight and Delwood Beach. The site is occupied by a two-storey residential dwelling in a low to medium density residential street. From Margaret Street, the building presents only as single building with roof additions. The site is surrounded by other low-density residential dwellings to the south and 2 storey, 4 unit walk up building to the north. This Dwelling is a heritage listed property and forms part of a group of Heritage listed buildings on either side of Margaret Street including the trees which line the street.

1. What is the name of the environmental planning instrument that applies to the land?

Manly Local Environmental Plan 2013

2. What is the zoning of the land?

R1 – General Residential

3. What are the objectives of the zone?

Zone R1 General Residential

1 Objectives of zone

- *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.*

4. What is the development standard being varied? e.g. FSR, height, lot size

Clause 4.4 Floor Space Ratio

5. Under what clause is the development standard listed in the environmental planning instrument? (emphasis added)

Clause 4.4 Floor Space Ratio

6. What are the objectives of the development standard?

4.4 Floor space ratio

(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,*
- (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,*
- (c) to maintain 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,*
- (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.*

7. What is the numeric value of the development standard in the environmental planning instrument?

0.6 : 1

8. What is proposed numeric value of the development standard in your development application?

0.69 : 1

9. What is the percentage variation (between your proposal and the environmental planning instrument)?

15% variation above the floor space ratio development standard requirement.

10. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

The proposal satisfies the zone (R1 General Residential) and development standard objectives and therefore strict compliance with the standard is not required in order to achieve compliance with the objectives.

With regard to the objectives of the R1 Zone:

- The proposal maintains/improves upon an existing heritage listed dwelling for the local area .*
- The proposal will not adversely intensify the land uses upon the site.*
- The dwelling is a compatible to the site and zone intents.*
- The additional bedroom within the attic level requires additional height to accommodate a BCA compliant ceiling. The additional height is not highly perceptible from the public domain or the street and would not impact upon the streetscape presentation of the dwelling.*
- The proposal conforms to the bulk, scale and rhythm of buildings in the locality and has been designed to be read as a contemporary attic addition.*

With regard to the objectives of Clause 4.4:

- The works occur within the existing principle floors and the building and the existing area created by the generous floor to ceiling height of the existing building.*
- The works do not any new perceptible bulk and scale to the building.*
- The additions will not impact the outlook from surrounding buildings*
- The building remains consistent in height, bulk and scale to other recent developments in the area.*
- The proposal will not detract from the established character of the streetscape or retained significance of the heritage item.*
- The proposal will maintain the commercial character of the area and introduce flexibility in future uses in the building.*
- The new structure and use will not result in any adverse or no material impacts to views, privacy and solar access.*
- There is no material alteration to the level of impact of the building to the local scenic qualities of the Sydney Metropolitan environment.*

In the circumstances where there are sound environmental and site-specific reasons with lack or impact to adjoining premises as a result of the breach, it is considered unreasonable and unnecessary to rigidly

apply the control and consequently the exception to the development standard under Clause 4.6 can be considered acceptable.

11. How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act.

Strict compliance with the control would not promote the co-ordination of the orderly development, and renewal of existing development. The works do not adversely impact upon the established character of the building and settings on the street.

12. Is the development standard a performance-based control? Give details.

Whilst the development standard is prescriptive numeric standard, variation to the control is able to be considered pursuant to Clause 4.6 of MLEP 2013 and subject to the developments performance against the stated objectives of the Clause and R1 General Residential zone.

13. Would strict compliance with the standard, in your particular case, would be unreasonable or unnecessary? Why?

The given the general lack of impact arising from the repairs and considerations of the non-compliance against the stated objectives of the R1 General Residential Zone and Clause 4.4 objectives, requiring full compliance when there is no alteration to existing levels of amenity and no adverse impacts to the local area, it is considered to be unreasonable in the circumstances. The development demonstrably improves upon the existing site conditions without detrimental impacts to the significance, established setting of the building and results in acceptable impacts to adjoining properties.

As noted above in the objective analysis, the breach of the standard allows a built form that will not detract from the existing or desired future character of the surrounding area, particularly the buildings that are located on the adjoining properties or recent approvals in the area.

From an objective standpoint, the proposed development will not offend any of the objectives of the Development Standard or objectives of the zone.

14. Are there sufficient environmental planning grounds to justify contravening the development standard? Give details.

For the reasons as detailed in this Clause 4.6 Request for variation to the development standard statement and also for the further reasons included in the general statement of environmental effects which demonstrate a lack of adverse or ongoing impact arising out of the revised building which is the subject of this application. Ample ground exists for Council to be able to favourably consider the additional area and endorse the proposal in accordance with this clause.

The following environmental planning grounds justify the breach of the standard and are summarised as follows:

- *The proposal does not result in unacceptable solar impacts nor does it interrupt views.*

- *The site is flanked by a driveway to the north and a driveway to the south. The additional space around the building creates space for the height to be accepted without impact.*
- *The proposed contemporary attic addition allows for the interpretation of the original roof form and does not dominate the existing dwelling. The over additional FSR elements does not contain any windows and will not introduce any opportunities for overlooking.*
- *The site and the surrounding locality can support the increased height, as the primary controls for setbacks are generally maintained, and the proposal would not unreasonably overshadow or present a bulk and scale impact upon surrounding adjoining properties.*
- *The proposed non-compliance does not generally result in any adverse environmental impacts, when compared to a development that would be wholly compliant the maximum FSR standard;*
- *The building would be manifestly underutilised in terms of usable floor area, if fully realised on the current footprint.*
- *The variation of the standard allows for a development that is consistent with the established and desired future character of the area,*
- *The proposed non-compliance is minor and will not be noticeable to the general public,*
- *The variation of the FSR standard does not result in significant additional bulk and scale or overshadowing from the proposal and will not have adverse impact on adjoining existing and future potential developments,*
- *Compliance with the standard would be incongruous with the recent approvals in the area and desired future built form character in the surrounding area,*
- *The proposed structure and use is designed with regard to building modulation, orientation and window positioning as to consider the aural and visual privacy of surrounding buildings.*
- *The proposal would not result in an improved planning outcome than if strict compliance were to be achieved.*

4. CONCLUSION

This request for variation statement demonstrates, as required by Clause 4.6 of the Manly Local Environmental Plan 2013, that:

- *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 both the objectives of the R1 General Residential Zone and Clause 4.4 Floor Space Ratio clauses of MLEP 2013.*
- *The proposed development, notwithstanding the variation, is in the public interest with there being no public benefit in maintaining strict adherence to the standard; and*
- *The variation does not raise any matter of State or Regional Significance.*
- *The proposed non-compliance does not generally result in any additional environmental impacts.*

Based on the reasons outlined above, it is considered that maintaining strict compliance with the development standard would be unreasonable and unnecessary in the circumstances of the case and thus, not be in the public interest. Accordingly, it is concluded that this clause 4.6 request is well founded

and that the particular circumstances of the case warrant flexibility in the application of the FSR development standard.