



**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
Mixed-Use Development (Loading
Area)**

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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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Report prepared for:

The Owners Corporation – Strata Plan 7114

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1. Introduction

The nature and extent of the contravention is as follows:

Requirement	3:1 8,346sqm
Existing	3.47:1 9,644sqm
Proposed	3.51:1 9,772.93sqm
Is the planning control in question a development standard?	Yes
Is the non-compliance with to the clause requirement a numerical/or performance based variation?	Numerical
If numerical enter a % variation to requirement	17.1%

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 E1 – Local Centre (the E1 zone) and the Land Use Table in Part 2 of MLEP 2013 specifies the following objectives for the E1 zone:

- *To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.*
- *To encourage investment in local commercial development that generates employment opportunities and economic growth.*
- *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council’s strategic planning for residential development in the area.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- *To minimise conflict between land uses in the zone and adjoining zones and ensure amenity for the people who live in the local centre in relation to noise, odour, delivery of materials and use of machinery.*
- *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*
- *To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment.*

2.2 Clause 4.4 Floor Space Ratio

Clause 4.4 Floor Space Ratio 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,*
- (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.

(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](#).

(2A) Despite subclause (2), the floor space ratio for a building on land in Zone B2 Local Centre may exceed the maximum floor space ratio allowed under that subclause by up to 0.5:1 if the consent authority is satisfied that at least 50% of the gross floor area of the building will be used for the purpose of commercial premises.

The maximum floor space ratio for the site is 3:1.

Development standards' is defined in section 1.4 of the EP&A Act 1979 as:

*development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which **requirements are specified or standards are fixed** in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:*

(d) the cubic content or floor space of a building,

2.3 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 3:1, 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. The relevant arguments are set out later in this written request.

Clause 4.6(4) of MLEP provides:

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public

interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition of satisfaction requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of MLEP provides:

- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

The proposal is the subject of an assessment through the Development Application process, and therefore the consent authority has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the authority should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. 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) 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 E1 zone?

4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.4 of MLEP2013?

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 1st, 2nd and 4th 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 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 mixed-use development.

The proposal is consistent with the objectives of Clause 4.4, as outlined below:

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

The proposal has been designed to enhance the site facilities with the addition of storage areas for the occupants of the development. The proposal retains the existing building footprint and simply infills existing areas within the loading area and encloses the facades to Central Avenue and Short Street. Therefore, the proposed minor variation is consistent with the intent of the objectives in that the proposal is consistent with the streetscape character and bulk and scale of the area.

The proposed area of concern relates to the part basement / ground floor level in relation to the loading area and services for the occupants of the building. In this regard, the bulk and scale of the building does not change if these areas were included or changed to different uses. The proposed development is consistent with the bulk and scale as existing and therefore compatible with the character of the local centre. The proposal meets 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 proposal is of a density and bulk applicable to the site and does not change existing landscaping within the site, therefore retaining the important landscape features.

The proposal controls building density and bulk with no impact to important landscape and townscape features. The proposal therefore meets this objective.

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

The proposal relates to the infill of an existing area which is derelict and underutilised. The proposal allows for opportunities to enhance the building and remove the eye-sore when viewed across Central Avenue to Short Street. The proposal provides an appropriate visual relationship with the adjoining properties within the local centre zone and the surrounding buildings. The proposal meets this objective.

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

The proposal has been strategically designed by the project architects who have worked with relevant consultants and the clients to achieve a design which meets the needs of the project while maintaining the streetscape (existing and future character), the privacy and amenity of adjoining properties. The proposal will have no adverse impacts on the use or enjoyment of adjoining land and the public domain, therefore the proposal meets this objective.

(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.

The proposal relates to the loading area within an existing mixed-use development. The intention is to utilise space which is underused, not functional and derelict. The proposal enhances the loading area to retain a space for unloading and loading within the site, whilst also allowing storage areas and a builders manager officer. The proposal meets this objective.

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 the variation should be supported and approved.

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:

- The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation report and summarised as follows:
 - The proposal is consistent with the bulk and scale of the existing and desired streetscape character of the area.
 - The proposal provides an infill to an existing derelict area which is within the existing building footprint. The enclosure of the area will ensure articulation and modulation of the east and west façade infills which assists in maintaining an appropriate visual relationship between the proposal and existing developments in the area.
 - The proposal has been strategically designed by the project architects who have worked with relevant consultants and the clients to achieve a design which meets the needs of the project while maintaining the streetscape, the privacy and amenity of adjoining properties.
 - The design proposed represents an increase in GFA which is minor and complies with the building height and relevant setbacks for the site. The GFA variation relates to minor areas in the basement/ground floor relating to the addition of storage space for the building and its occupants.
 - The variation has been reviewed against relevant LEC court principles in regards to FSR, and the proposal is considered suitable in the context of the site and the merit analysis required given the existing scale, adjoining developments and the proposed development.
 - The desired future character of the locality is not jeopardised by the proposal and is consistent with Council’s objectives for this precinct in regards to the E1 Local Centre zone.

- The area of non-compliance does not give rise to any adverse environmental impacts to the amenity of the neighbouring properties. The area of non-compliance does not contribute to any adverse overshadowing impacts to adjoining developments.
- 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):
 - (c) to promote the orderly and economic use and development of land; and*
 - (g) to promote good design and amenity of the built environment,*
 1. In response to (c), the proposal will facilitate the orderly and economic use and development of the land, in a highly appropriate location, in a manner that is desired by the planning controls because it will facilitate new storage facilities for the occupants of the building in an area that is currently derelict and unused. In considering the contrary (refusal of the DA), retention of the building in its current form would not promote the orderly and economic use and development of land in the manner that council's strategic and statutory planning provisions seek. Retention of the building in its current form makes no advancement towards achieving the goal of creating functional development opportunities of run-down sites.
 2. In response to (g) the proposal has been designed to promote good design and amenity of the built environment, noting compliance with the maximum building height control of MLEP2013.

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.

4.4 Is the proposed development in the public interest because it is consistent with the objectives of clause 4.4 and the objectives of the E1 Local Centre zone?

Section 4.2 of this written request demonstrates that the proposed development achieves each of the underlying objectives of clause 4.4. As the proposed development achieves the objectives it follows that the proposed development is also consistent with those objectives.

(b) The objectives of the E1 zone and the reasons why the proposed development is consistent with the objectives are set out below:

The proposed mixed-use development is permissible through Manly LEP 2013, therefore the proposed development is permissible with Council's consent. The proposal is consistent with the objectives of the zone, as supported below:

- The proposal provides storage facilities and a building managers office within the site that will serve the needs of people who live or work in the surrounding neighbourhood.

- The proposal includes a new functional area which encloses the existing area and defines the building frontage for the site.
- The proposal encourages the revitalisation and rehabilitation of the existing site which is run down and in need of new facilities to bring it in line with the needs of the business zone.
- The proposal has building elements updated to create an urban form that relates favourably to the scale and treatment to the neighbouring land uses and the natural environment.
- The proposal is considered to be minor and relates to existing floor and airspace within the loading area with no increase to the existing building footprint.

4.5 Has Council obtained the concurrence of the Director-General?

The Secretary can be assumed to have concurred to the variation under Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

The Secretary can be assumed to have given concurrence as the matter will be determined by the Northern Beaches Local Planning Panel in accordance with the Planning Circular or by the Land & Environment Court of NSW on appeal.

The matters for consideration under clause 4.6(5) are considered below.

4.6 Has the Court considered the matters in clause 4.6(5) of MLEP2013?

(a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the particular site and this design and lot is not readily transferrable to any other site in the immediate locality, wider region of the State and the scale or nature of the proposed development does not trigger requirements for a higher level of assessment. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

(b) As the proposed development is in the public interest because it complies with the objectives of the development standard and the objectives of the zone there is no significant public benefit in maintaining the development standard.

(c) there are no other matters required to be taken into account by the secretary before granting concurrence.

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.