

**PRECAUTIONARY OBJECTION 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 THE MANLY
LOCAL ENVIRONMENTAL PLAN 2013**

For: Attached Dual Occupancy
At: 143 Balgowlah Road, Balgowlah
Owner: Nonie Veness & Pasa Saglam
Applicant: Nonie Veness & Pasa Saglam

The subject development application relates to the construction of an attached dual occupancy and the two lot Torrens title subdivision of land at No. 143 Balgowlah Road, Balgowlah (**Site**). The subject property, which has a total lot size of 490.5m², is zoned R1 – General Residential under the Manly Local Environmental Plan 2013.

Development Consent (DA DA2021/1355) for the construction of an attached dual occupancy on the subject site was approved by Council on 12/01/2022. This application seeks to relocate front door and extend entry foyer of both residences increasing the approved floor space ratio and resulting in a minor non-compliance with Clause 4.4 of the LEP. Whilst Clause 4.6 of the LEP does not apply to modification applications a precautionary Clause 4.6 request is provided.

This precautionary Clause 4.6 written request is prepared on the basis of the architectural plans prepared by Scope Architects, Project No. 020001, Revision 2 and dated 02.02.2021.

The proposal seeks approval for a variation to the maximum floor space ratio (**Maximum Floor Space Ratio**) development standard in clause 4.4 of the Manly Local Environmental Plan 2013.

4.4 Maximum subdivision lot size

(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.

The Floor Space Map indicates that the maximum floor space ratio that applies to the Site is 0.6:1.

The proposed amendments result in the following:

Site Area: 490.5m²
Floor Area: 302.9m² or 0.62:1

The following precautionary clause 4.6 written request has been prepared having regard to clauses 4.4 and 4.6 of the Manly Local Environmental Plan 2013 and recent judgments of the Land & Environment Court. It is submitted that the variation is well founded and is worthy of the support of the Council.

1. Objectives of Clause 4.6

The objectives of Clause 4.6 of the LEP are:

- (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 standard to be varied is a Development Standard to which Clause 4.6 applies

Clause 4.4 of the Manly Local Environmental Plan 2013 is contained within Part 4 which is titled Development Standards to be complied with. It is also considered that the wording of the clause is consistent with previous decisions of the Land & Environment Court in relation to matters which constitute development standards.

It is also noted that clause 4.4 does not contain a provision which specifically excludes the application of clause 4.6 and vice a versa.

On this basis it is considered that clause 4.4 is a development standard for which clause 4.6 applies.

3. Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case

Sub-clause 4.6(3) sets out the matters that must be demonstrated by a written request seeking to justify a contravention of the relevant development standard (that is not expressly excluded from the operation of clause 4.6 Manly Local Environmental Plan 2013):

(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.

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ set out five justifications to demonstrate that compliance with a development standard is unreasonable or unnecessary. These include:

- The objectives of the development standard are achieved notwithstanding non-compliance with the standard.
- The underlying objective or purpose of the standard is not relevant to the development.
- The underlying objective or purpose would be defeated or thwarted if compliance was required.
- The standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and/or
- The zoning of the land was unreasonable or inappropriate such that the standards for that zoning are also unreasonable or unnecessary.

The objectives of the Maximum Floor Space Ratio standard are set out in clause 4.4(1) of Manly Local Environmental Plan 2013 and 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.*

Compliance with the Maximum Floor Space standard is unreasonable or unnecessary in the circumstances because the objectives of the standard are achieved notwithstanding the non-compliance, in light of the following:

- a. The proposed modifications do not result in any additional bulk or scale. The reconfiguration of the front entry of each dwelling is located beneath the existing roof form and is provided with a setback to the street greater than the approved garage. The changes are minimal and will not be discernible from the streetscape. The front façade continues to provide an articulated façade with varied setbacks and roof overhang.
- b. The minor changes are located within the approved footprint and beneath the existing roof form and as such does not have any impact on existing vegetation or important townscape features.
- c. The proposed modifications do not have any impact on the adjoining development with existing side setbacks maintained and the only changes relating to the entry area which is centrally located.
- d. The reconfiguration of the front entries do not have any impact on the adjoining of the adjoining land or public domain. Ample setback is retained to the adjoining development and streetscape.
- e. The site is not located within a business zone and therefore objective (e) does not apply.

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

The proposed development promotes the objectives identified in the Environmental Planning and Assessment Act 1979 section 1.3 in that the proposal will provide for the “promote the orderly and economic use of the land” and “good design and amenity of the built environment”. In this regard the reconfigured front entry will provide a more useable and functional pedestrian entry with sufficient area of storage of everyday items.

Accordingly, the proposal promotes the objectives of the Environmental Planning and Assessment Act 1979 and there are also sufficient environmental planning grounds to justify the contravention of the Maximum Floor Space standard, which include:

- The non-compliance is very minor being only 8.6m² or a variation of 2.9%.
- The proposal is in the public interest as it has been demonstrated above that the proposal is consistent with the objectives for development in the zone and the objectives of the lot size development standard.
- The proposal will ensure the orderly and economic use of the land. The proposal enables the construction of two dwellings, to increase the housing stock and provide an alternative form of housing in the locality.
- The proposal provides for good design and amenity for the occupants by providing for a functional entry with greater width and sufficient area for storage of everyday items.

- The proposed amendments are very minor and are located within the approved footprint, beneath the approved roof form and behind the approved front setback. The amendments will not have any impact on the streetscape, character of the locality or the adjoining properties.

5. Is the proposed development 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.

The proposed development is consistent with the objectives of the Minimum Lot Size development standard, which is demonstrated in the analysis above.

The proposed development is also consistent with the R1 General Residential Zone objectives in Manly Local Environmental Plan 2013.

The objectives for the R1 – General Residential 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.*

In relation to the above objectives for the R1 – General Residential zone the proposal is consistent with those objectives given that:

1. The proposal as approved provides for the housing needs of the community via the creation of an additional dwelling on its own Torrens title allotment. The minor alteration does not impact on the housing needs of the community.
2. The proposed modifications do not alter the approved housing type or dwelling density.
3. Objective 3 does not apply to the proposal.

As the proposal is consistent with the objectives of the Minimum Lot Size development standard and the objectives of the R1 General Residential Zone the proposed development is considered to be in the public interest in satisfaction of clause 4.6(4)(a)(ii).

6. Whether contravention of the development standard raises any matter of significance for state or regional environmental planning.

Sub-clause 4.6(4) requires that the consent authority is satisfied that the concurrence of the Planning Secretary has been obtained and sub-clause 4.6(5) enumerates matters that the Planning Secretary must consider in deciding whether to grant concurrence.

The Planning Secretary has given written notice dated 5 May 2020, attached to the Planning Circular PS 20-002, that the Planning Secretary's concurrence may be "assumed" for exceptions to development standards, subject to certain conditions contained in the notice. One circumstance where the Planning Secretary's concurrence cannot be assumed is where the development contravenes a numerical standard by greater than 10%.

The non-compliance with the Maximum Floor Space Ratio development standard for proposal is only 2.9%. This is no impediment to the granting of consent.

Further, it is my opinion that contravention of the standard does not raise any matters of significance for State or Regional environmental planning and there is no identifiable public benefit in maintaining the development standard.

7. Conclusion

This written request justifies the proposed variation to the Maximum Lot Size development standard in the terms required under clause 4.6 of Manly Local Environmental Plan 2013. In summary, the proposed variation in relation to the non-compliant floor space ratio is justified for the following reasons:

- The proposal will not result in any adverse streetscape impacts.
- The proposal will not result in any impacts upon existing trees and vegetation and will not result in any tree loss.
- The proposal will not result in any additional overshadowing of adjoining properties.
- The proposal will not result in any visual or acoustic impacts upon adjoining properties.
- The proposal will not result in any loss of outlook for any adjoining properties.
- The proposal will continue to provide for a built form which is compatible with the surrounding locality.

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