2 Clause 4.6 variation request - Floor space ratio

2.1 Introduction

This clause 4.6 variation has been prepared with respect to a proposed new dwelling at 55 Bower Street, Manly, having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe)* at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *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.

2.2 Manly Local Environmental Plan 2013 (MLEP 2013)

2.2.1 Clause 4.4 – Floor Space Ratio

Pursuant to Clause 4.4 of MLEP 2013, the floor space ratio of development on the subject land is not to exceed 0.45:1. The objectives of this control 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.

In accordance with the provisions of clause 4.5(2) of MLEP 2013, floor space ratio is defined as follows:

> *The **floor space ratio** of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.*

The proposed development has a gross floor area 343m². Based on the area of site (696.5m²), the proposal has a floor space ratio of 0.49:1. This represents a variation of 29.6m² or 9.5%.

2.2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP 2013 provides:

> *The objectives of this clause are:*

(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 clause 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 MLEP 2013 provides:

> *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.*

This clause applies to the floor space ratio development standard in clause 4.4 of MLEP 2013.

Clause 4.6(3) of MLEP 2013 provides:

> *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 development standard at clause 4.4 of MLEP 2013 which specifies a maximum floor space ratio of 0.45:1. 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 2013 provides:

> *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 Planning 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 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]).

In Planning Circular PS20-002 dated 5th May 2020, it was advised that consent authorities can assume the Secretary's concurrence to vary development standards pursuant to clause 4.6 except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

Following advice received from the Department of Planning, Industry & Environment (letter dated 2 November 2021), development applications for Class 1 buildings (single dwelling houses) with a Clause 4.6 variation greater than 10% to building height within the Warringah Local Environment Plan 2011, Manly Local Environment Plan 2013 and Pittwater Local Environment Plan 2014 and floor space ratio under the Manly Local Environment Plan 2013, may be determined by Council staff under delegation in accordance with Council procedures.

Clause 4.6(5), which relates to matters that must be considered by the Secretary in deciding whether to grant concurrence is not relevant, as the Council has the authority to determine this matter. 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 MLEP 2013 from the operation of clause 4.6.

2.3 Relevant Case Law

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:

> *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].*
>
> *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].*
>
> *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].*
>
> *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].*
>
> *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.

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.

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 2013 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 of MLEP 2013 and the objectives for development for in the 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 MLEP 2013?

2.4 Request for variation

2.4.1 Is clause 4.4 of MLEP 2013 a development standard?

The definition of "development standard" at clause 1.4 of the EP&A Act includes a provision 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,

Clause 4.4 of MLEP 2013 prescribes a bulk and scale provision that seeks to control the floor space ratio of certain development. Accordingly, clause 4.4 of MLEP 2013 is a development standard.

2.4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. The first approach is relevant in this instance, being that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the floor space ratio development standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

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

Comment: The proposed new dwelling is well articulated, with a height, bulk and scale that is appropriately responsive to that of surrounding and nearby development. As shown in Figures 1 and 2, the massing of the building is consistent and compatible with that of other development along Bower Street.

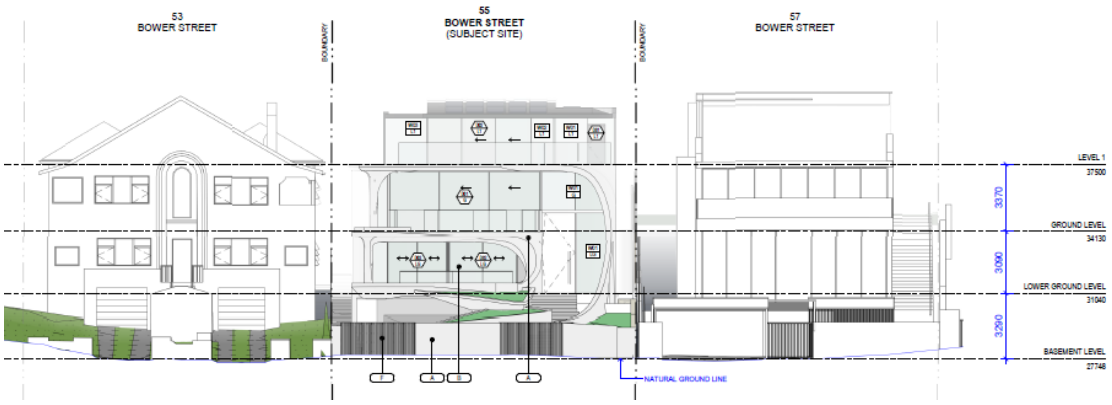

Figure 1: Extract of North Elevation

Figure 2: Photomontage by Squillace

Squillace, the project architects, have undertaken detailed analysis of the floor space ratio of surrounding and nearby development within the C3 Environmental Management zone and subject to the same 0.45:1 floor space ratio development standard approved by Council in the past 10 years, being development approved under the provisions of MLEP 2013. In this respect, it is relevant to note that 13 of 18 recent approvals issued in relation to dwelling houses have exceeded the 0.45:1 floor space ratio to varying degrees, to a maximum of 0.9:1 at 56 Bower Street.

With this in mind, Council can be reasonably satisfied that the bulk and scale of the proposed development, as expressed as a floor space ratio, is consistent with the existing and desired character of the area.

(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,*

Comment: As demonstrated in the View Montages in the accompanying Design Report by Squillace, the proposed development will not result in any unreasonable impacts upon views. Views to the ocean, to Manly Beach and coastline will be appropriately maintained from dwellings on the opposite side of Montpelier Place, including No's. 13, 14, 15, 16, 17, and 18. Furthermore, as the proposal involves the removal of exempt palms, views from upslope properties will be significantly enhanced, to facilitate an uninterrupted view of the coastline.

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

Comment: Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments*, most observers would not find the proposed development offensive, jarring or unsympathetic in a streetscape context or as viewed from the adjoining properties.

The proposed development is compatible with the existing streetscape of both Bower Street and Montpelier Place, and the character of the wider C3 Environmental Management Zone.

Furthermore, despite non-compliance with the maximum FSR prescribed, the proposed development achieves consistency with the landscaped area controls of MDCP 2013, enabling the provision of a high-quality landscaped solution for the site.

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

Comment: The proposed development does not result in any unreasonable impacts upon neighbouring properties with regards to overshadowing, visual or acoustic privacy. The proposed built form is highly articulated, by virtue of recessed elements, varied setbacks, differing materials and landscaping, and will not be overly dominant as seen from the street or adjoining properties. The non-compliant FSR does not detract from consistency with 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.*

Comment: Not Applicable.

Consistency with zone objectives

The subject property is zoned C3 Environmental Management pursuant to MLEP 2013. The developments consistency with the stated objectives of the C3 zone is as follows:

- *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*

  Comment: The proposed development will not result in any adverse impacts upon the ecological or aesthetic values of the area. Rather the proposed development provides a high quality architecturally designed dwelling house that positively responds to the attributes of the site, with an enhancement of landscaping to restore habitat for local fauna.

- *To provide for a limited range of development that does not have an adverse effect on those values.*

  Comment: The proposal is for a single dwelling house, being one of the few development typologies permitted on the site.

- *To protect tree canopies and provide for low impact residential uses that does not dominate the natural scenic qualities of the foreshore.*

Comment: Tree removal within the site is limited to exotic species, with the proposal resulting in a significant enhancement of landscaping, as demonstrated on the accompanying Landscape Plans. The proposed development is of low impact, is of a form and scale that is compatible with surrounding development, that will not be seen to be visually dominant in its context.

- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*

  Comment: The proposed development does not result in any impacts upon nearby foreshores, significant geological features or bushland. The existing site is free of any significant vegetation or bushland and is highly disturbed.

- *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*

  Comment: The site is not in immediate proximity to the foreshore. Nonetheless, Council can be satisfied that stormwater will be appropriately managed on the site, in accordance with Council's Water Management Policy.

- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

  Comment: The resultant height and bulk of the dwelling is consistent with that of adjoining development along Bower Street. The proposal responds the natural topography of the site and does not impact on any existing vegetation in the area.

The non-compliant development, as it relates to floor space ratio, demonstrates consistency with objectives of the zone and the floor space ratio development standard objectives. Adopting the first option in *Wehbe,* strict compliance with the floor space ratio development standard has been demonstrated to be unreasonable and unnecessary in the circumstances of this application.

2.4.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In *Initial Action* the Court found at [23]-[25] that:

> *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.*

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].

Sufficient environmental planning grounds

Ground 1 – Superior architectural design

The apparent size of the proposed development will be compatible with dwellings in the visual catchment of the site, which features a number of buildings of significantly greater bulk and scale. The building is of exceptional design quality with the variation facilitating a floor space that provides for contextual built form compatibility, consistent with Objectives 1.3(c) and (g) of the Act.

There is no specific portion of the floor plan that can be pinpointed as attributing to the non-compliance, nor any area that warrants redesign or amendment due to impacts to adjoining dwellings.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments*, most observers would not find the proposed development offensive, jarring or unsympathetic as seen from adjoining properties or as viewed from the waterway. The proposed development is compatible with other development in the visual catchment of the site, and the character of the wider C3 Environmental Management Zone.

Ground 2 – Established Precedence

As demonstrated on the Map of Neighbouring FSR (DA-531) by Squillace, Council has regularly approved variations to the floor space ratio development standard prescribed by MLEP 2013 along Bower Street, with 13 of the 18 most recent approvals involving variations to the floor space ratio development standard to differing degrees.

As established in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 and *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115, and as reinforced in *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021], adjacent development which also exceeds the floor space ratio control should be considered when determining desired future character.

With a floor space ratio of 0.49:1, the proposed development is entirely consistent and compatible with the bulk and scale of surrounding development, which seemingly range between 0.45:1 ad 0.9:1.

Support of a variation generally consistent with the 13 recent development consents issued by Council in Bower Street alone, is consistent with Object 1(c) of the EP&A Act, in so far as it reflects the orderly development of the land and promotes consistency in Council's decision making process.

Overall, there are sufficient environmental planning grounds to justify contravening the development standard.

2.4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.4 and the objectives of the C3 Environmental Management zone

The consent authority needs to be satisfied that the proposed development will be in the public interest. A development is said to be in the public interest if it is consistent with the objectives of the particular standard to be varied and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

> *The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it 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.*
>
> *It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).*

As demonstrated in this request, the proposed development 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.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest.

2.4.5 Secretary's concurrence

In Planning Circular PS20-002 dated 5th May 2020, it was advised that consent authorities can assume the Secretary's concurrence to vary development standards pursuant to clause 4.6 except in the circumstances set out below:

- Lot size standards for rural dwellings;

- Variations exceeding 10%; and
- Variations to non-numerical development standards.

Following advice received from the Department of Planning, Industry & Environment (letter dated 2 November 2021) applications for Class 1 buildings (single dwelling houses) with a Clause 4.6 variation greater than 10% to floor space ratio under the Manly Local Environment Plan 2013, may be determined by Council staff under delegation in accordance with Council procedures. Consistent with Council's DDP Charter, the DDP can assume concurrence in this instance.

2.5 Conclusion

Pursuant to clause 4.6(4)(a) of MLEP 2013, the consent authority can be satisfied that this written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

(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.

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a floor space ratio variation in this instance.

Boston Blyth Fleming Pty Limited

Greg Boston

B Urb & Reg Plan (UNE) MPIA

Director