

APPENDIX 1

CLAUSE 4.6 TO CLAUSE 4.4 OF MANLY LEP 2013 EXCEPTIONS TO DEVELOPMENT STANDARDS – **FSR VARIATION**

Demolition of existing structures and construction of a new 2-storey dwelling

at

30 MACMILLAN STREET, MANLY

SUBMITTED TO

NORTHERN BEACHES COUNCIL

PREPARED BY

ABC PLANNING PTY LTD

DECEMBER 2020

MANLY LEP 2013 - CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARDS

This Clause 4.6 submission has been prepared to accompany the Statement of Environmental Effects submitted to Northern Beaches Council by ABC Planning Pty Ltd for the proposed demolition of the existing structures and construction of a new 2-storey dwelling at 30 MacMillan Street, Manly.

Clause 4.6 of the Manly LEP 2013 allows the consent authority to grant consent for development even though the development contravenes a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in applying certain development standards.

This Clause 4.6 variation request takes into account the relevant aspects of the Land and Environment Court judgement in *Initial Action Pty Ltd v Woollahra Council [2017] NSWLEC 1734*, as revised by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130*.

Clause 4.6 Exceptions to development standards

- (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.*
- (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.*
- (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.*
- (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 Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

Development Standard to be Varied

The proposal seeks a variation to the development standard contained within Clause 4.4 of the Manly LEP 2013 - maximum FSR of 0.45:1 (202.14sqm) demonstrated on the extract of the Manly LEP 2013 FSR map below.

The proposed dwelling has an FSR of 0.48:1 (214sqm), representing a 0.03:1 (5.87%; 11.86sqm) variation to the FSR development standard.



Figure 52: Manly LEP 2013 FSR Map

Justification for Contravention of the Development Standard

This written request is considered to justify the contravention of the development standard and addresses the matters required to be demonstrated by clause 4.6(3), of which there are two aspects. Both aspects are addressed below:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

Assessment: It is considered that strict compliance with the development standard for FSR on the site is unreasonable and unnecessary in the circumstances for the following reasons:

- The proposal complies with the objectives of the development standard and the R2 Low Density Residential zone, indicated in the assessment at **Table 1** below.
- The proposed built form is compatible with the size of the subject site and is consistent and compatible with the existing and desired future character of the local area which seeks to retain predominantly low density residential accommodation. The proposal provides a development that is of a similar scale to the surrounding 2-storey dwellings.

- The proposal provides a high level of internal amenity as demonstrated by compliance with the LEP building height development standard and the DCP sunlight access, overshadowing, dwelling density, dwelling size, storey height, front setback, habitable window setbacks, open space, landscaping and private open space controls.
- The proposed additional floor space provides a building with a good level of building separation, access, landscaping, privacy, plus natural lighting and ventilation for both the new development and adjoining properties. This is demonstrated by the proposal complying with the relevant DCP controls listed above.

The proposed additional FSR does not generate any unreasonable privacy impacts. The proposed works have been designed and sited to ensure adequate visual and acoustic privacy between the subject dwelling and the adjoining dwellings. The proposal has considered the location of the development on the site, the internal layout and the building materials used. The proposed new dwelling has appropriate setbacks thereby providing adequate separation from the adjoining properties. The living areas are located on the ground floor and orientated to the front garden area. A side courtyard and pool have been provided on the eastern part of the site. Privacy screening will be provided along the eastern boundary of the pool. Windows have been appropriately sited and designed to minimise any potential overlooking. Privacy screening has been provided to the windows on the eastern side elevation and highlight windows have been provided on the eastern and western side elevations. The proposal does not include first floor balconies. The day to day usage of the dwelling is unlikely to generate any unreasonable acoustic impacts noting that all living and the primary private open space area are confined to the ground level. The pool pump is to be housed in an acoustic box to avoid acoustic impacts to properties. An acoustic fence will be provided along the northern boundary of the site, separating Frenchs Forest Road. Refer to the Acoustic Report prepared by PKA Acoustic Consulting submitted with this application.

- The proposed additional FSR does not generate any unreasonable overshadowing impacts. As demonstrated on the accompanying shadow diagrams, due to the north-south orientation of the site, the proposed development will not result in any adverse overshadowing impacts to the adjoining properties.
- The bulk and scale of the proposal will not adversely impact on any existing significant views from surrounding properties or the public domain. It is reiterated that the proposed built form is below the height control for the site.
- The proposal will improve the visual appearance of the site by replacing the existing outdated dwelling with a contemporary dwelling that incorporates modulation and a varied palette of materials. Refer to the extract of the photomontage of the proposed development below. The proposed development provides an articulated building form that minimises perceived bulk and scale impacts when viewed from the surrounds of the site.
- The proposal provides a high-quality landscape design that includes the planting of a variety of trees, shrubs, climbers and groundcovers that will soften the built form. The proposal also includes a green roof above the garage. Refer to the Landscape Plan prepared by Dangar Barin Smith Landscape Design submitted with this application.
- Removal of the excess FSR from the site would only serve to reduce the internal amenity of the dwelling and the extent of bedroom accommodation.

- Removal of the excess FSR is also deemed to be unnecessary given the compatible nature of the height, bulk and scale of the development surrounding the site.
- It would be unreasonable and unnecessary to remove the excess FSR, given that the proposal complies with the building height development standard (8.5m) and outperforms the DCP requirements for open space (control 55%; proposal 58.6%) and landscaping (control 35%; proposed (55%).
- There are no internal amenity grounds that would determine that the additional FSR should not be granted. The internal performance of the proposed dwelling is high, reiterating that the proposal meets the majority of the DCP requirements.
- Notwithstanding the numeric departure, the lack of external impacts and consistency with the scale of the built form in the surrounding area confirms that the intensity of development is appropriate for the site.
- Overall, the design and FSR of the proposed development ensure that the proposal is compatible with the existing and deaired future character of the area and provides for excellent internal amenity whilst also preserving external amenity to surrounding properties in a reasonable manner.
- In this context, it is considered that the additional FSR sought by the proposal would not be overbearing in the streetscape and will sit comfortably alongside the surrounding residential dwellings. A reduction of the proposed FSR would provide for a negligible benefit to the streetscape and would significantly reduce the amenity of the development.
- It is therefore considered that the proposed FSR represents a reasonable and appropriate design response and that that the development standard is unnecessary in the particular circumstances of this site and its context.



Figure 53: Extract of the photomontage of the proposed development demonstrating the high quality of the proposed development

Despite the non-compliance, the proposal achieves the objectives of the development standard and the zoning, as demonstrated in the following table:

Table 4: Assessment against the Objectives of the Development Standard and Land Use zone

Consistency with the objectives of the FSR standard in the LEP	
Objectives	Assessment
<i>(a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,</i>	The proposed built form and associated FSR is compatible with the size of the subject site and is consistent and compatible with the existing and desired future character of the local area which seeks to retain predominantly low density residential accommodation. The proposal provides a development that is of a similar scale to the surrounding 2-storey dwellings.
<i>(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,</i>	The proposed built form and associated FSR is compatible with the size of the subject site and complies with the DCP controls for dwelling density and dwelling size. The proposal will not obscure important landscape and townscape features.
<i>(c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,</i>	The proposal (inclusive of the additional FSR) will improve the visual appearance of the site by replacing the existing outdated dwelling with a contemporary dwelling that incorporates modulation and a varied palette of materials. Refer to the extract of the photomontage of the proposed development above. The proposed development provides an articulated building form that minimises perceived bulk and scale impacts when viewed from the surrounds of the site. The proposal provides a high-level landscape design that includes the planting of a variety of trees, shrubs, climbers and groundcovers that will soften the built form. The proposal also includes a green roof above the garage. Refer to the Landscape Plan prepared by Dangar Barin Smith Landscape Design submitted with this application.
<i>(d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain</i>	The proposal and associated FSR will not result in any unreasonable amenity impacts to the adjoining land and the public domain in terms of privacy, overshadowing and view loss as follows: <u>Privacy:</u> The proposed additional FSR does not generate any unreasonable privacy impacts. The proposed works have been designed and sited to ensure adequate visual and acoustic privacy between the subject dwelling and the adjoining dwellings. The proposal has considered the location of the development on the site, the internal layout and the building materials used. The proposed new dwelling has appropriate setbacks thereby providing adequate separation from the adjoining properties. The living areas are located on the ground floor and orientated to the front garden area. A side courtyard and pool have been provided on the eastern part of the site. Privacy screening will be provided along the eastern boundary of the pool. Windows have been appropriately sited and

	<p>designed to minimise any potential overlooking. Privacy screening has been provided to the windows on the eastern side elevation and highlight windows have been provided on the eastern and western side elevations. The proposal does not include first floor balconies. The day to day usage of the dwelling is unlikely to generate any unreasonable acoustic impacts noting that all living and the primary private open space area are confined to the ground level. The pool pump is to be housed in an acoustic box to avoid acoustic impacts to properties. An acoustic fence will be provided along the northern boundary of the site, separating Frenchs Forest Road. Refer to the Acoustic Report prepared by PKA Acoustic Consulting submitted with this application.</p> <p><u>Overshadowing:</u> The proposed additional FSR does not generate any unreasonable overshadowing impacts. As demonstrated on the accompanying shadow diagrams, due to the north-south orientation of the site, the proposed development will not result in any adverse overshadowing impacts to the adjoining properties.</p> <p><u>Views:</u> The bulk and scale of the proposal will not adversely impact on any existing significant views from surrounding properties or the public domain. It is reiterated that the proposed built form is below the height control for the site.</p>
<i>(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.</i>	Not applicable – the subject site is zoned R2 Low Density Residential and the proposal includes the construction of a new dwelling.
Consistency with the objectives of the R2 Low Density Residential zone	
Objectives	Assessment
<ul style="list-style-type: none"> <i>To provide for the housing needs of the community within a low density residential environment.</i> <i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i> 	<p>The proposal FSR variation doesn't compromise the ability of the proposal meeting the objectives of the R2 zone.</p> <p>The proposed new dwelling and associated FSR allows for housing needs to be provided in the community within a low density residential environment.</p> <p>The proposal will not inhibit other land uses from providing facilities or services to meet the day to day needs of residents.</p> <p>It is therefore considered that the proposed development satisfies the zone objectives, notwithstanding the FSR variation.</p>

Based on the above assessment, it is considered that strict compliance with the LEP building FSR standard is unreasonable and unnecessary in this instance.

(b) that there are sufficient environmental planning grounds to justify contravening the development standard

The assessment under the unreasonable and unnecessary section of this Clause 4.6 variation demonstrates that there are sufficient environmental grounds to permit the variation in this instance.

Given the consistency of the proposal against the zone objectives and FSR objectives (see **Table 1** above), there are sufficient environmental planning grounds to justify contravening the development standard.

In this regard, it is reiterated that the proposed FSR variation is not responsible for any streetscape, overshadowing, privacy, view, or visual bulk impacts.

The proposal will provide a suitable design and suitable amenity in terms of the built environment and represents the orderly and economic use and development of land, which are identified as objects of the Act (Section 1.3 of the EP&A Act, 1979). The building envelope and design of the proposal responds appropriately to the unique opportunities and constraints of the site.

Reduction in the FSR will not result in improved amenity for adjoining properties. The lack of impact on adjoining properties in terms of solar access, privacy, view loss and visual bulk establishes sufficient planning grounds (refer to *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [94(c)] and *Randwick City Council v Micaul Holdings Pty Ltd* at [34]).

Based on the above points, it is considered that there are sufficient environmental planning grounds to permit the FSR variation in this instance.

Other Matters for Consideration

4(a)(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

Assessment: The above assessment demonstrates that the proposed FSR satisfies the objectives of the FSR standard and the R2 Low Density Residential zone.

Furthermore, it is considered that the variation does not raise any matters of public interest as there are no public views or detrimental streetscape outcomes associated with the FSR variation.

The development is in the public interest given the proposed FSR variation allows for the demolition of the existing outdated dwelling and construction of a contemporary dwelling with excellent internal amenity, in an accessible location, being in close proximity to public transport and local services.

Given that the proposal is consistent with the desired future character for the area nominated by the specific controls in the LEP and DCP, and that there are no adverse or unreasonable impacts to the broader community, it is considered that there are no public interest matters which would prevent a variation to the FSR control.

(5) In deciding whether to grant concurrence, the Director-General must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning

Assessment: The proposed FSR variation allows for the orderly and economic use of land as envisaged by the *Environmental Planning and Assessment Act, 1979*.

The proposed FSR variation allows for achievement of a compatible building envelope without creating a development with overbearing height, bulk or scale and without compromising the desired future character of the locality. The proposed FSR is therefore consistent with the State and Regional Policies, particularly urban consolidation principals which seek to provide additional height and density near transport and established services.

Concurrence

The Secretary's concurrence under clause 4.6(4) of the LEP has been delegated to the Council by written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018. That concurrence may also be assumed by the Court pursuant to s39(6) of the Land and Environment Court Act.

(b) the public benefit of maintaining the development standard

Assessment: There is no public benefit in maintaining the FSR standard given the limited amenity impacts associated with the development and the positive streetscape outcome that would arise from the redevelopment of the subject site.

(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

Assessment: There are not considered to be any additional matters to consider beyond those discussed above.

Generally as to concurrence, for the reasons outlined above – and particularly having regard to the site specific nature of this clause 4.6 variation request – there is nothing about this proposed FSR variation that raises any matter of significance for State or regional environmental planning, nor is there any broad public benefit in maintaining the development standard on this site. There are no other relevant matters requested to be taken into consideration before granting concurrence.

Conclusion

For reasons mentioned herein, this Clause 4.6 variation is forwarded in support of the development proposal at 30 MacMillan Street, Manly and is requested to be looked upon favourably by the consent authority.