

**VARIATION OF A DEVELOPMENT STANDARD REGARDING THE SPECIAL
HEIGHT PROVISIONS AS DETAILED IN CLAUSE 4.3A OF THE MANLY
LOCAL ENVIRONMENTAL PLAN 2013**

For: Additions & Alterations to Existing Dwelling
At: 39 Seaforth Crescent, Seaforth
Owner: Mr R. Thomson & Ms P. Robetson-Gregg
Applicant: Mr R. Thomson & Ms P. Robetson-Gregg

The subject development application relates to the construction of alterations and additions to an existing dwelling upon land at No. 39 Seaforth Crescent, Seaforth (**Site**).

The proposal provides for a new flue to service the proposed gas fireplace. The flue has a maximum height of RL42.220.

Therefore, the proposal seeks approval for a variation to the **Special Height Provisions** development standard in clause 4.3A of the Manly Local Environmental Plan 2013.

4.3A Special Height Provisions

- (1) The objective of this clause is to maintain public views to Sydney Harbour from street level on local roads above steeply sloping sites on certain land.*
- (2) Despite clause 4.3 (2), the height of a building on a lot identified as "Special height provisions" on the Height of Buildings Map must not exceed the height of the highest point of the road adjoining the centre point of the lot boundary that adjoins the road that is the frontage to that lot.*

The survey depicts the road adjoining the centre point of the lot boundary with a level of approximately RL41.44. The flue has a height of RL42.22, the remainder of the additions complies with this clause.

The following clause 4.6 written request has been prepared having regard to clauses 4.3A 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 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. The standard to be varied is a Development Standard to which Clause 4.6 applies

Clause 4.3A 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 4.3A 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 4.3A 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 objective of the Special Height Provisions standard are set out in clause 4.3A(1) of Manly Local Environmental Plan 2013 and are as follows:

The objective of this clause is to maintain public views to Sydney Harbour from street level on local roads above steeply sloping sites on certain land.

Compliance with the Special Height Provisions 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 non-compliance relates only to the flue. The flue height is designed to comply with the height of relevant standards and legislation. This minor element will not obstruct any significant view of the harbour given the minor nature of the element.

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”.

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 Special Height Provisions standard, which include:

- The non-compliance relates only to the flue. The flue height is determined by the relevant standards and a flue could not be provided that complies with this clause.
- The non-compliance relates only to the minor element of the flue. All the additions comply with the Special Height Provisions.

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 Special Height Provisions development standard, which is demonstrated in the analysis above.

The proposed development is also consistent with the C3 Environmental Management Zone objectives in Manly Local Environmental Plan 2013.

The objectives for the C3 Environmental Management zone are:

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

- *To provide for a limited range of development that does not have an adverse effect on those values.*
- *To protect tree canopies and provide for low impact residential uses that does not dominate the natural scenic qualities of the foreshore.*
- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*
- *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.*
- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses*

In relation to the above objectives for the C3 Environmental Management zone the proposal is consistent with those objectives given that:

1. The area of non-compliance relates only to the flue. The flue is located within the existing footprint and does not have any impact on the ecological, scientific, cultural or aesthetic values of the site or the locality.
2. The flue does not have any impact on existing vegetation or the natural scenic qualities of the foreshore.
3. The flue does not impact on the foreshore, bushland or natural vegetation.

As the proposal is consistent with the objectives of the Special Height Provisions development standard and the objectives of the C3 Environmental Management 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% and such applications are required to be deferred to the Local Planning Panel.

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 Special Height Provisions 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 special height provisions 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.

Natalie Nolan
Graduate Diploma (Urban & Regional Planning)
Ba App Sci (Env Health & Bldg).