



**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 – addition of  
split-level residential apartment and two  
cold shells within existing building  
envelope**

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**This report has been prepared to support a Development Application under the *Environmental Planning and Assessment Act 1979*.**

**Report prepared by:**

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**Report prepared for:**

The Owners Corporation – Strata Plan 7114

**13 September 2024**

***Disclaimer***

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## 1. Introduction

The nature and extent of the contravention is as follows:

<b>Requirement</b>	3:1 8,346sqm
<b>Existing</b>	3.47:1 9,644sqm
<b>Proposed</b>	3.525:1 9,809.15sqm (additional 165.15sqm)
<b>Approved under DA2023/1358</b>	3.51:1 9,773sqm (additional 129sqm)
<b>Is the planning control in question a development standard?</b>	Yes
<b>Is the non-compliance with to the clause requirement a numerical/or performance based variation?</b>	Numerical
<b>If numerical enter a % variation to requirement</b>	17.5%

### 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—*

- to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*
- 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) The consent authority must keep a record of its assessment carried out under subclause (3).*

Clause 4.6(5) of MLEP has been repealed and is not applicable.

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?

#### **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 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> 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 in our opinion 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 additional non-compliant floor space is located within the established building envelope and to that extent will not contribute to the bulk and scale of the existing mixed-use building. The maintenance of the long-established building bulk and scale will ensure that the proposed works, although non-compliant with the FSR standard, are consistent with 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 within the existing building envelope 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 location of the additional non-compliant floor space on the site will ensure the maintenance of an appropriate visual relationship with the existing character and landscape of the area noting that the building footprint is not increased and there is no impact on any landscaping. Accordingly, this objective is satisfied notwithstanding the non-compliant FSR proposed.

*(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.

#### *View impacts*

Having undertaken a wide-ranging site view I have formed the considered opinion that the additional non-compliant floor space has been designed, located and constrained to minimise disruption of views to nearby residential development from surrounding public spaces. In fact, I was unable to identify any public space from which views to nearby residential development will be adversely impacted as a consequence of the additional non-compliant floor space proposed. Having inspected the site, the void areas which will be infilled and its immediate surrounds I have formed the considered opinion that the additional non-compliant floor space will not give rise to any unacceptable view impacts from surrounding properties with view impacts clearly minimised.

#### *Visual privacy*

Given the maintenance of the established spatial relationship between surrounding development the additional non-compliant floor space will not give rise to any unacceptable visual privacy impacts.

#### *Shadowing impacts*

As the additional non-compliant floor space is located within the established building envelope it will not give rise to any additional shadowing impact to any surrounding public or private land.

We have formed the considered opinion that the additional non-compliant floor space minimises adverse environmental impacts on the use and enjoyment of adjoining land and the public domain and accordingly this objective is satisfied notwithstanding the non-compliant FSR proposed.

*(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.*

This objective is not applicable to the proposal.

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 relevant setbacks for the site. The GFA variation relates to existing “horizontal” void areas.
  - 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.

### **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.