

**Clause 4.6 - Exception to Maximum Height of Building Development Standard  
Proposed Modifications to CDC Approved Dwelling House and Associated Works  
15 Princess Promenade, Seaforth**

The subject development application seeks approval for the modification of a new dwelling house and associated works approved via a Complying Development Certificate (CDC) upon land at 15 Princess, Promenade, Seaforth (**Site**). The subject property, which has a total lot size of 1,353m<sup>2</sup>, is zoned R2 - Low Density Residential under the Manly Local Environmental Plan 2013.

By way of background, it is advised that Complying Development Certificate 22-044-CDC was previously issued in relation to the site by Prince Certifiers on the 18th November 2022. That CDC approved the Demolition of Existing Structures and Construction of a Two Storey Dwelling House and Inground Swimming Pool. It is understood that the demolition and building works associated with the CDC approved new dwelling have commenced upon the site.

Relevant to this application it is advised that the carrying out of works associated with the construction of the new dwelling have resulted in the alteration (excavation) of the existing ground level. In accordance with the provisions of the Manly LEP, for the purposes of this application, the new excavated ground level becomes the existing ground level and results in the height of building of the proposed modification exceeding the 8.5m height control required by Clause 4.3 of the LEP.

This application does not seek to raise or lower the CDC approved building envelope.

It is noted that had the site not recently been excavated that the proposal would comply with the requirements of Clause 4.3 of the LEP.

It is advised that by definition the application proposes a maximum building height of 10.47m which represents a 1.97m or 23.18% variation. This is on the basis of a new excavated ground level of RL 60.18 and a maximum building height of RL 70.65.

It is therefore submitted that a technical non-compliance exists in relation to Clause 4.3 of the Manly LEP and as such a Clause 4.6 submission is required.

It is noted that in ordinary (if original development was approved via a Development Application) circumstances that this amending DA would be regarded as a S4.55 Modification and a Clause 4.6 variation would not be required.

This Clause 4.6 written request is prepared on the basis of the architectural plans prepared by All Australian Architecture.

Clause 4.3 of the Manly LEP states that:

#### **4.3 Height of Buildings**

*(1) The objectives of this clause are as follows—*

*(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*

*(b) to control the bulk and scale of buildings,*

*(c) to minimise disruption to the following—*

*(i) views to nearby residential development from public spaces (including the harbour and foreshores),*

*(ii) views from nearby residential development to public spaces (including the harbour and foreshores),*

*(iii) views between public spaces (including the harbour and foreshores),*

*(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*

*(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

*(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

The Height of Buildings Map indicates that the maximum height of buildings that applies to the Site and therefore to the proposal is **8.5m**.

The following Clause 4.6 written request has been prepared having regard to Clauses 4.3 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.*

It is submitted that the circumstances of this matter warrant the application of a degree of flexibility having regard to the matters detailed below.

### **2. The standard to be varied is a Development Standard to which Clause 4.6 applies**

Clause 4.3 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 4.3 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 4.3 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 under 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 first reason is considered to be relevant to this application.

The objectives of the Height of Buildings standard are set out in clause 4.3(1) of Manly Local Environmental Plan 2013 and are as follows:

*(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*

*(b) to control the bulk and scale of buildings,*

*(c) to minimise disruption to the following—*

*(i) views to nearby residential development from public spaces (including the harbour and foreshores),*

*(ii) views from nearby residential development to public spaces (including the harbour and foreshores),*

*(iii) views between public spaces (including the harbour and foreshores),*

*(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*

*(e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

Firstly, compliance with the Height of Buildings 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 proposal will not result the loss of any significant public or private views.
- b. The dwelling will not be visible from the harbour or the surrounding foreshores.
- c. The proposal is compatible with the desired character of the area. The proposed dwelling sits comfortably within the streetscape in terms of height and roof form.
- d. With respect to bulk and scale, the proposal provides for a new part two and three storey dwelling which is compatible with the existing surrounding development. The dwelling is well articulated through the use of varied setbacks, balconies and architectural relief.
- e. The proposed new dwelling is consistent with the maximum FSR control under clause 4.4 of Manly Local Environmental Plan 2013.
- f. The proposal will not result in any unreasonable impacts upon the amenity of the adjoining properties particularly in relation to visual and acoustic privacy and overshadowing as a result of the proposed building height or the resultant development.
- g. It is submitted that whilst the proposal does not comply with the numerical requirements of this clause, that the proposal will nevertheless provide for a compatible form of development and will present to the street in a manner consistent with the existing streetscape.

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

The non-compliance with the Height of Buildings development standard is a direct result of the carrying out of works associated with the construction of the approved new dwelling and which have resulted in the alteration (excavation) of the existing ground level. In accordance with the provisions of the Manly LEP, for the purposes of this application, the new excavated ground level becomes the existing ground level and results in the height of building of the proposed modification exceeding the 8.5m height control required by Clause 4.3 of the LEP.

It is noted that had the site not recently been excavated that the proposal would comply with the requirements of Clause 4.3 of the LEP.

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 “good design and amenity of the built environment” and “the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.”

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 Height of Building standard, which include:

- The proposed non-compliance is a direct result of the recent excavation of the site as part of the erection of a new dwelling in accordance with CDC 22-044-CDC.
- The proposal is compatible with the desired character of the area. The proposed dwelling sits comfortably within the streetscape in terms of height and roof form.

**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 Height of Building development standard, which is demonstrated in the analysis in section 3, above.

The proposed development is also consistent with the R2 Low Density Residential Zone objectives in Manly Local Environmental Plan 2013.

The objectives for the R2 - Low Density Residential zone are:

- *To provide for the housing needs of the community within a low density residential environment.*
- *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 R2 - Low Density Residential zone the proposal is consistent with those objectives given that the proposal provides for the housing needs of the community within a low density residential environment. The proposal provides for a detached dwelling house that is compatible with the existing low density residential development.

As the proposal is consistent with the objectives of the Height of buildings development standard and the objectives of the R2 Low Density 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.**

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 Clause 4.3 - the Height of Buildings 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 building height is justified for the following reasons:

- The proposal will not result in any adverse streetscape impacts.
- The proposal will not result in any unreasonable visual or acoustic impacts and overshadowing upon adjoining properties.
- The proposal will not result in an unreasonable loss of outlook for any adjoining properties.
- The proposal will provide for a built form which is compatible with the surrounding locality.



Andrew Minto  
Graduate Diploma (Urban & Regional Planning), Associate Diploma (Health & Building Surveying). MPIA.  
MINTO PLANNING SERVICES PTY LTD  
30<sup>th</sup> March 2023