

**Clause 4.6 Exceptions to Development Standards**  
**Floor Space Ratio**  
**135 Seaforth Crescent, Seaforth**

**1. Introduction**

Clause 4.6 of the Manly Local Environmental Plan 2013 (MLEP 2013) permits departures from development standards in certain circumstances. In this case, it is necessary to consider if compliance with the development standard is consistent with the aims of the policy and, in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in section 1.3 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) being:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The aims and objectives of Manly LEP 2013 Clause 4.6 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.*

Under Clause 4.6(3) and (4) of the MLEP 2013, consent for a development that contravenes a development standard must not be granted unless the consent authority is satisfied that:

*(3)(a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

*(3)(b) there are sufficient environmental planning grounds to justify contravening the development standard.*

*(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,*

These matters, along with case law judgements from the NSW Land and Environment Court, are addressed below.

## **2. Environmental Planning Instrument Details (Manly LEP 2013)**

### **2.1 What is the name of the environmental planning instrument that applies to the land?**

Manly Local Environmental Plan 2013

### **2.2 What is the zoning of the land?**

R2 Low Density Residential

### **2.3 What are the objectives of the zone?**

- *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.*

## **2.4 What is the development standard being varied?**

CI 4.4 – Floor Space Ratio

## **2.5 Under what clause is the development standard listed in the environmental planning instrument?**

CI 4.4 of the Manly Local Environmental Plan 2013

## **2.6 What are the objectives of the development standard?**

*The objectives of this clause 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.*

## **2.7 What is the numeric value of the development standard in the environmental planning instrument?**

The numeric value of the Floor Space Ratio development standard applicable to the subject site is a maximum of 0.4:1.

## **2.8 What is proposed numeric value of the development standard in your development application?**

The development proposes a maximum FSR of 0.439:1.

## **2.9 What is the percentage variation (between your proposal and the environmental planning instrument)?**

The percentage variation between the proposal and the environmental planning instrument is 8.1% or 21.11 m<sup>2</sup>.

### 3. NSW Land and Environment Court Case Law

Several key Land and Environment Court (NSW LEC) judgements have refined the manner in which variations to development standards are required to be approached. The key findings and direction of each of these matters are outlined in the following discussion.

#### 3.1 *Wehbe v Pittwater* [2007] NSW LEC 827

The decision of Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827, (expanded on the findings in *Winten v North Sydney Council*), identified 5 ways in which the applicant might establish that compliance with a development standard is unreasonable or unnecessary. It was not suggested that the five ways were the only ways that a development standard could be shown to be unreasonable or unnecessary.

The five ways outlined in *Wehbe* include:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).*
4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (Fourth Way).*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Way).*

In the *Micaul* decision Preston CJ confirmed that the requirements mandated by SEPP 1 (as discussed in *Wehbe*) are only relevant in demonstrating that compliance with a development standard is unreasonable or unnecessary for the purpose of Clause 4.6(3)(a).

### 3.2 Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC

In the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

1. Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;
2. That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
3. That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs;
4. All three elements of clause 4.6 have to be met and it is best to have different reasons for each, but it is not essential.

### 3.3 Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7

In *Randwick City Council v Micaul Holdings*, the Court allowed a departure from development standards, provided the processes required by clause 4.6 are followed, a consent authority has a broad discretion as to whether to allow a departure from development standards under clause 4.6, even where the variation is not justified for site or development specific reasons.

Preston CJ noted that *the Commissioner did not have to be satisfied directly that compliance with each development standard was unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the appellant's written request had adequately addressed the matter in clause 4.6(3)(a) that compliance with each development standard was unreasonable or unnecessary.*

### 3.4 Zhang v City of Ryde

Commissioner Brown reiterated that clause 4.6 imposes three preconditions which must be satisfied before the application could be approved:

1. The consent authority must be satisfied that the proposed development will be consistent with the objectives of the zone;
2. The consent authority must be satisfied that the proposed development will be consistent with the objects of the standard which is not met; and
3. The consent authority must be satisfied that the written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the

circumstances and there are sufficient environmental planning grounds to justify contravening the development standard.

It is only if all of these conditions are met that consent can be granted to the application, subject to an assessment of the merits of the application.

The Commissioner applied the now familiar approach to determining consistency with zone objectives by considering whether the development was antipathetic to the objectives.

In contrast to *four2five*, the reasons relied on to justify the departure from the standards in this case were not necessarily site specific.

### **3.5 Action Pty Ltd v Woollahra Municipal Council [2018]**

In *Action Pty Ltd v Woollahra Municipal Council*, the court demonstrated the correct approach to the consideration of clause 4.6 requests, including that the clause does not require that a development that contravenes a development standard, must have a neutral or better environmental planning outcome than one that does not.

## **4. Consideration**

The following section addresses the provisions of clause 4.6 of the MLEP 2013 together with principles established in the NSW Land and Environment Court Case Law outlined above.

**Clause 4.6(3)(A) - Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case (and is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case)?**

In order to demonstrate that compliance with the development standard is unreasonable or unnecessary, in the circumstances of the case, the Five (5) Part Test established in *Winten v North Sydney Council* and expanded by Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827 is considered:

The five ways outlined in *Wehbe* include:

### **4.1 Five (5) Part Test - *Wehbe v Pittwater***

- 1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).***

The objectives of the standard are:

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

Comment

The variation is the result of works in undercroft and subfloor areas and has no impact on the streetscape character of the site.

Accordingly, the variation is consistent with surrounding development, being hidden from view and allowing for improved use of an existing space. It is considered this objective is met, despite the numerical variation.

***(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

The variation is contained within undercroft areas which already sit within the built form. The enclosure of these spaces has a negligible impact on bulk and does not impact any landscape features or the townscape.

The proposed development will not present with excessive bulk from the public domain or to neighbours due to the sloping topography of the site and surrounding area, due to the small area of variation and the hidden/central location of the variation.

It is considered this objective is met, despite the numerical variation.

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

Comment

The proposed variation in FSR has no impact on the existing character and landscape of the area being contained within the existing built form.

It is therefore considered this objective is met, despite the numerical variation.

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

Comment

The proposed variation to FSR does not result in any adverse impacts for the neighbouring sites, with the small additional area of gross floor area, not easily visible from adjoining sites or the

public domain. Despite the FSR variation sought, it is considered the underlying objective of this clause has been satisfied.

***(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

N/A

#### ***2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).***

This exception to development standards request does not rely on this reason.

#### ***3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).***

This exception to development standards request does not rely on this reason.

#### ***4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (Fourth Way).***

This exception to development standards request does not rely on this reason.

#### ***5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Way).***

This exception to development standards request does not rely on this reason.

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the FSR of buildings control pursuant to the First Way outlined in Wehbe.

Thus, it is considered that compliance with Clause 4.6(3)(a) is satisfied.

#### **4.2 Clause 4.6(3)(B) – Are there sufficient environmental planning grounds to justify contravening the development standard?**



There are sufficient environmental planning grounds to permit the variation of the development standard. The development has been considered below with particular reference to the Objects of the Environmental Planning and Assessment Act 1979, which are accepted as the best gauge of *environmental planning grounds*.

In particular:

#### **Detail of Variation**

- The proposed variation to the FSR control is minor at just 8.1% or 21.11 m<sup>2</sup>. It is for a very limited area where it is not visible from the street or easily for side neighbours. The apparent bulk through the variation is negligible and not to the detriment of the apparent scale of the dwelling from any point satisfying Cl1.3(g).
- The small variation to the FSR occurs within undercroft and sub-floor areas.

#### **Neighbour Amenity**

Fulfillment of each of the criteria below demonstrates a development satisfying Cl1.3(g).

- Solar access impacts as a result of the FSR variation are negligible with neighbours having similar bulk adjoining. Accordingly, compliance with the development standard based on this would be unreasonable.
- The small variation has no impact on privacy for neighbours, being confined primarily for storage spaces.

#### **Design and Streetscape Appeal**

- Strict numerical compliance with the FSR control would not result in a better urban design outcome and the street view would be unchanged. Compliance with the development standard based on this would be unreasonable.
- The proposed development will not present with excessive bulk from the public domain with the sloping topography of the site and location of the undercroft areas resulting in the new storage areas being hidden from view satisfying Cl1.3(g). The streetscape appeal is unaffected by the small variation to the FSR standard, and it would be unreasonable to require compliance with development standard based on this.

### **Consistent with Zone Objectives**

- The extent of the variation is considered to be in the public interest as the proposal remains consistent with the objectives of the zone ensuring that appropriate and reasonable housing suitable for the local community is proposed. Compliance with the development standard based on this would be unreasonable.

### **Natural Environment**

- The inclusion of the small FSR variation to facilitate enclosure of the undercroft spaces has no impact on the natural environment. The small variation sits within the built form and will not result in any impact to the existing natural components of the site or neighbourhood. No landscape area is lost or impacted through the minor variation satisfying Cl1.3(b). The natural environment is unaffected by the small departure from the development standard, and it would be unreasonable for the development to be refused on this basis.

### **Environmentally Sustainable Development**

- The proposal represents an environmentally sustainable design allowing for extension of the life on an existing dwelling satisfying Cl1.3(f). Compliance with the development standard based on this would be unreasonable.

### **Social and economic welfare**

- The small variation to the FSR as detailed above will have no social impacts for the site or local area satisfying Cl1.3(b) and accordingly refusal of the development based on this reason would be unreasonable.
- The small variation to the FSR as detailed above will have no economic impacts for the site or the local area satisfying Cl1.3(b) and accordingly refusal of the development based on this reason would be unreasonable.

### **Appropriate Environmental Planning Outcome**

- The development proposed is not an overdevelopment of the site and satisfies the objectives of the zone and the development standard as is detailed earlier in the report.

- The variation does not result in a building bulk beyond that which is found in the immediate context. The small variation will be compatible within the context in which it sits and is reasonable in the circumstances of the case satisfying Cl1.3(c). Compliance with the development standard based on this would be unreasonable.
- Removal of the non-compliance would not result in alter the perceived bulk and scale due to the minor nature, siting and topography.

The variation confined to the undercroft areas is minor and the discussion above reflects the unique circumstances for the subject site and proposed development, including an assurance of reasonable bulk and scale and retention of amenity. These are not simply benefits of the development as a whole, but are a direct result of the breach of the maximum FSR control.

The sufficient environmental planning grounds stipulated above demonstrate that the proposal aligns with the relevant objects of the EP&A Act i.e., the development is an orderly and economic and development of the land, notwithstanding the FSR variation.

**4.3 Clause 4.6(4)(A)(ii) – Will the proposed development be in the public interest because it is consistent with the objectives of the particular standard and objectives for development within the zone which the development is proposed to be carried out.**

The proposed development is consistent with the objectives of the standard (see Cl 4.6(3)(A). An assessment of consistency with the objectives of the Zone is provided below:

**Zone – R2 Low Density Residential**

**Objectives of zone**

- *To provide for the housing needs of the community within a low density residential environment.*

Consistent. The proposal is for alterations and additions to an existing dwelling and will provide additional floor area and storage space for the residents.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Not relevant. The proposal is for alterations and additions to a residential dwelling.

Despite the proposal seeking an exception to the FSR clause, the bulk and scale of the building will have minimal effects as it represents a minor exceedance confined to the undercroft spaces and is consistent with surrounding development.

The proposed development is not contrary to the public interest, because it is consistent with the objectives of the standard (see Cl 4.6(3)(A)) and objectives for development within the zone.

**Clause 4.6(5)(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning,**

The non-compliance will not raise any matter of State or Regional Significance.

**Clause 4.6(5)(b) the public benefit of maintaining the development standard,**

The proposed development is not contrary to the public interest, accordingly there can be no quantifiable or perceived public benefit in maintaining the standard. The variation is reasonable, with the vast majority of the development easily complying and small component where the variation is sought not easily visible from any viewpoint.

**Clause 4.6(5)(c) any other matters required to be taken into consideration by the Secretary before granting concurrence**

**How would strict compliance hinder the attainment of the objects specified in Section 1.3 of the Act.**

Strict compliance with the standard would hinder the attainment of the objects specified in section 1.3 of the Act

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*

*(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*

*(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*

*(j) to provide increased opportunity for community participation in environmental planning and assessment.*

As proposed the development allows for all of the above objects to be achieved. In particular it is noted that there is no social or economic impact other than the benefit of a small amount of employment through the works which will be undertaken.

The upgrade and redevelopment of an existing dwelling to an improved standard is a positive environmentally sustainable result.

The development proposed a good design which is achieved partly through the minor development standard variation.

Strict compliance with the FSR development standard would hinder the development for the purpose of *promoting the orderly and economic use and development of land, promoting good design and amenity of the built environment and promoting the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.*

## **Conclusion**

The proposed development is for alterations and additions to an existing dwelling on land zoned R2 – Low Density Residential.

As stated above the proposed non-compliance is minor with only 8.1% or 21.11 m<sup>2</sup> sought. The variation does not result in any unreasonable impacts and is largely the result of taking into account the slope of the site and working within the constraints of adding to an existing dwelling. It is of a very limited area and located at the rear and within the existing footprint, resulting in it not being easily visible from any location, and appearing appropriate and consistent from those areas where it may be viewed.

The proposed development will present as unchanged to the streetscapes and does not present with excessive bulk in comparison to surrounding properties. There will not be any view loss and solar access is fully compliant with Council controls. Amenity is retained for all neighbours.

Strict numerical compliance is considered to be unnecessary and unreasonable given that the proposed variation sought is consistent with the underlying objectives of the control despite the numerical variation, of which have been reasonably satisfied under the provisions of Clause

4.6.

The statement sufficiently demonstrates that compliance with the development standard is both unreasonable and unnecessary in this instance.

The sufficient environmental planning grounds stipulated within this request, demonstrate that the proposal aligns with the relevant objects of the EP&A Act i.e. the development is an orderly and economic and development of the land, notwithstanding the FSR variation.

The proposed variation satisfies the objectives of the zone, underlying intent of Clause 4.6 and Clause 4.4, and therefore the merits of the proposed variation are considered to be worthy of approval.