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CLAUSE 4.6 VARIATION – BUILDING HEIGHT
CLAUSE 4.3 MANLY LOCAL ENVIRONMENTAL PLAN 2013
ALTERATIONS AND ADDITIONS TO A RESIDENTIAL FLAT BUILDING
87-88 NORTH STEYNE, MANLY

1. BACKGROUND

This Clause 4.6 variation is a written request to vary a development standard to support a development application for alterations and additions to a residential flat building at **87-88 North Steyne, Manly**. The specific purpose of the alterations is to allow more natural light into the living spaces of each individual unit as well as creating an aesthetically pleasant façade that will modernise the apartment and facilitate wider views, particularly adding amenity to the balconies facing Manly Beach.

The proposed works include: -

- Demolition of all the existing concrete and metal balustrades for all 24 apartment units, as well as the installation of new frameless glass balustrades for all balconies (900mm in height), supported by stainless steel posts.

The proposed balcony balustrades will be commensurate in height and location with the existing balcony balustrades, therefore will not increase the existing building height. The applicable development standard for the height of buildings in the R3- Medium Density Residential Zone is **13m**. The highest point of the proposed balcony balustrades on the eighth floor will exceed the 13m limit by **9.8m** which represents 75% when expressed as a percentage however, the existing building height is **25.6m** high which is 96% over the development standard. The proposed balustrades will be commensurate in height and location as the existing concrete balcony balustrades.

This building height is identified as a development standard which requires a variation under Clause 4.6 of the Manly Local Environmental Plan 2013 (the LEP) to enable the granting of consent to the development application.

Environmental Planning Grounds Relied Upon

The term 'environmental planning grounds' is not defined and may be interpreted with wide scope as has been the practice of the Land and Environment Court. The environmental planning grounds supporting variation are on the basis of: -

- Compatibility with the character and amenity of the area. The proposed balcony balustrades do not change the floor plates and internal building configuration, and will be commensurate in height and location of the existing concrete balcony balustrade. The glass balustrade will also increase the natural light into the living areas of each unit as an added amenity. The proposal complements the character of the locality with similar neighbouring apartments having already adopted the use of glass balustrade, as seen in 84-85 North Steyne and 89 North Steyne, thus the proposal aligns appropriately with the distinct building character of the neighbourhood.
- Achievement of an appropriate and supportable bulk and scale for the building. The height of the proposed balcony balustrade is lower than the height of the existing approved residential flat building, and will be in the same location as the existing.

The request will now further expand on the identified environmental planning grounds.



Figure 1 – Photomontage of the proposed glass frame balustrades.



Figure 2 – Proposed East Elevation

2. IS THE STANDARD A DEVELOPMENT STANDARD?

Subject to Clause 4.3 of the Manly Local Environmental Plan 2013 (the LEP), Clause 4.3(2) provides:

- 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.

A development standard is defined in Section 1.4 of the Environmental Planning and Assessment Act 1979 ("EPA Act") to mean:

"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:

- a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
- b) the proportion or percentage of the area of a site which a building or work may occupy,

- c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,
- d) the cubic content or floor space of a building,
- e) the intensity or density of the use of any land, building or work,
- f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,
- g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,
- h) the volume, nature and type of traffic generated by the development,
- i) road patterns,
- j) drainage,
- k) the carrying out of earthworks,
- l) the effects of development on patterns of wind, sunlight, daylight or shadows,
- m) the provision of services, facilities and amenities demanded by development,
- n) the emission of pollution and means for its prevention or control or mitigation, and
- o) such other matters as may be prescribed.”

The height of buildings control falls under subsection (c); therefore, the control is a development standard and Clause 4.6 of the Manly Local Environmental Plan 2013 is applicable.

3. CLAUSE 4.6 OF THE MANLY LOCAL ENVIRONMENTAL PLAN 2013

The Standard Instrument LEP contains its own variations clause (Clause 4.6) to allow the variation of development standards. Clause 4.6 of the Standard Instrument is similar in tenor to the former State Environmental Planning Policy No. 1; however, the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) and case law suggests a similar approach to SEPP 1 may be taken in part.

There is abundant judicial guidance on how variations under Clause 4.6 variations should be assessed. Some of these cases are taken into consideration in this request for variation.

While it is not necessary to refer to case law, we do so as it has become customary in sustaining requests under Clause 4.6.

4. THE ONUS ON THE APPLICANT

Under Clause 4.6(3)(a), it is the onus of the applicant to demonstrate: -

- 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 the case of *Samadi v Council of the City of Sydney* [2014] NSWLEC 1199.

Paragraph 27 of the judgement states: -

Clause 4.6 of LEP 2013 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

Precondition 1 - Consistency with zone objectives

The land is located in the R3 – Medium Density Residential zone. The objectives of the R3 zone are: -

- To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To encourage the revitalisation of residential areas by rehabilitation and suitable redevelopment.
- To encourage the provision and retention of tourist accommodation that enhances the role of Manly as an international tourist destination.

The resultant development will remain a residential flat building which is the predominant building form associated with R3 Medium density zone. The proposal for alterations and additions to the residential flat building are consistent with the third and fifth objectives. The first, second, and fourth objective are not relevant as they apply to redevelopments. The proposed alterations are very minor

in nature and the bulk and scale of the existing residential flat building will not be altered under this application.

The proposed balcony balustrades with a variation of 9.8m is as per existing approved residential flat building. The proposal will not increase the overall building height or height of balustrades for each individual unit.

Precondition 2 - Consistency with the objectives of the standard

The objectives of Clause 4.3 are articulated at Clause 4.3(1): -

- 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.

Objective (a) and (b) is concerned with compatibility with the topographic landscape, building height and character of the area. In this regard, it is noted that the existing building is higher than 13m (25.6m) and the height of the proposed balustrades will be 22.8m which is 2.8m below the ridge height of the roof.

As the height of the proposed balustrade is less than the height of the existing dwelling, the resulting development will be visually compatible with the existing residential flat building and therefore the character of the area. The proposed glass balustrades will be commensurate in height and location of the existing balustrades. The quantum of change overall is considered to be minor as there will be no increase in bulk or scale to the existing residential flat building, therefore the proposal will be visually subservient to the existing and neighbouring buildings.

Objective (c) is concerned with the disruption of views to neighbouring properties and between public spaces. The proposed glass balustrade which will surround the balcony edges will create an aesthetically pleasant façade that will modernise the apartment and facilitate wider views, particularly adding amenity to the balconies facing Manly Beach. The proposed glass balustrade will not distract from the scenic amenity of Manly Beach and its surrounds. It may improve the appearance of the building which is important as it is in close proximity to the beach's shoreline, making the apartment appear modern and sleeker, blending in with the newer apartments on the street.

As the development will be occurring on the property, specifically the individual balconies per unit, the neighbouring properties views to Manly Beach will be retained.

Objective (d) relates to maintaining adequate solar access to private open space areas and habitable rooms. Currently the balconies are used by many residents as suitable clothes drying areas. The current concrete balustrade surrounding each balcony will not allow for the same permeation of sunlight as the propose glass balustrades. Glass balustrades will also increase the natural light into the living areas of each unit as an added amenity.

The proposed works do not interfere with local amenity in terms of shadow impact, privacy or overlooking or unreasonable bulk and scale. The general bulk and scale of the building is already established – only a small component of the residential flat building will be changed. The residential flat building forms a part of the existing local character. The proposal does not change the general built form of the residential flat building.

Objective (e) is not applicable as the subject site is not in a recreation or environmental protection zone.

For the above reasons, I am of the view that the variation requested and the resultant development is consistent with the objectives of the development standard and an appropriate degree of flexibility is warranted. Consequently, I conclude that strict compliance with the development standard is unreasonable and unnecessary.

Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

It is the onus of the Council to form an opinion of satisfaction that the written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

For the reasons detailed in this request, I am of the opinion that Council may form the necessary opinion of satisfaction that there are sufficient environmental planning grounds to support a variation.

By contrast, a compliant proposal would not allow the upgrade of the lift in the manner intended.

Further, given that the development satisfies the objectives of the zone and the development standard, numerical compliance is considered unreasonable and unnecessary in the circumstances of the case.

Precondition 4 – To consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court [or consent authority] finding that the matters required to be demonstrated have been adequately addressed

According to recent caselaw, Council is required to be satisfied that there are sufficient environmental planning grounds to support a variation to a development standard. Satisfaction as to sufficient environmental planning grounds is a matter for the Council to determine and need not be site specific. The term ‘environmental planning grounds’ is not defined and may be interpreted with wide scope.

In addition to the environmental planning grounds detailed under Preconditions 1 and 2, I provide the following comments: -

- Even though environmental planning grounds need not be site specific, in this instance the existing residential flat building is over the 13m height limit. There is inevitable difficulty in strict compliance with the building height standard which must be taken into account when considering the nature of the proposed departure.
- A compliant proposal would unreasonably prevent the installation of balcony balustrades on the fifth to eight floor which is required for safety reasons when residents occupy the balcony space.
- To ameliorate the visual impact of the height variance, the selected frameless glass balustrade aligns with the distinct building character of the neighbourhood like 84-85 North Steyne and 89 North Steyne.

For the above reasons, it is considered there are sufficient environmental planning grounds to justify a variation to the building height development standard.

In the ‘Four2Five’ judgement (Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90), Pearson C, outlined in her judgement that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but expressly noted that the Commissioner’s decision on that point (that she was not

“satisfied” because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does not mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are “sufficient environmental planning grounds to justify contravening the development standard” is something that can be assessed on a case-by-case basis and is for the consent authority to determine for itself.

The more recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether each and every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant’s written document itself, and in the Commissioner’s assessment of it). In February 2017, the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner’s approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority’s obligation is to be satisfied that “the applicant’s written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard.” He held that this means (emphasis added):

“the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant’s written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary”.

However, in the judgement of *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, there was further clarification of the construction of Clause 4.6. The Court asserted that:-

“... in order for a consent authority to be satisfied that an applicant’s written request has “adequately addressed” the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i)).”

This is consistent with a previous judgment in *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, where on appeal of a commissioner’s decision, the Court affirmed at [78]

that “The request cannot ‘adequately’ address the matters required to be demonstrated by cl 4.6(3) if it does not in fact demonstrate the matters”.

Accordingly, in regard to the proposed variation to the building height, it is considered that this Clause 4.6 request has in fact demonstrated sufficient environmental planning grounds for Council to be satisfied that the request is adequate and to allow appropriate flexibility.

There is also no requirement under Clause 4.6 or case law that a non-compliant development must demonstrate a better planning outcome. (Initial Action Pty Ltd v Woollahra Municipal Council (2018). Refer also to Section 5 below.

Additionally, under (Initial Action Pty Ltd v Woollahra Municipal Council (2018) at [24], the Chief Judge stated that “The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole”. It is considered that this request is consistent with this aspect of the judgment as it does not rely on promotion of the benefits of the development.

According to the relevant case law, there are other common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised in *Wehbe v Pittwater Council* (2007).

The five tests under *Wehbe* are tabulated below. Only one of the tests needs to be satisfied. Consideration of a variation is not limited to these tests – they are simply the most common ways invoked in considering whether compliance is unreasonable or unnecessary.

Test	Comments
1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard.	<p>The objectives of the development standard are satisfied. Refer to discussion under Precondition 2.</p> <p>The objectives of the standard are concerned with the achievement of compatibility with the character, amenity and landform of the area. I conclude that the proposed building height is appropriate as it results in a built form that is compatible with the character, amenity and landform area.</p>

	<p>The residential flat building will retain its compatible contextual relationship the site and neighbouring properties.</p> <p>The application demonstrates that objectives of the standard are achieved through the qualitative design outcomes rather than a strict numerical approach.</p>
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;	The objective of the development standard is considered to be relevant to the development however the objective is achieved and strict compliant is unreasonable and unnecessary.
3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;	Not applicable — Compliance does not defeat the underlying object of the standard development; however, compliance would prevent the approval of an otherwise supportable development and prevent the site to better meet the zoning objectives as discussed in part 4 of this document.
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;	Not applicable — the development standards of maximum building height cover a wide area and whilst they are not appropriate to this site, they are appropriate to other sites elsewhere in the locality. There are numerous instances where consents departing from the standard have been approved and others where the standards have been upheld. This is more an indication of the inappropriateness of particular standards to some sites rather than a comment on Council's actions. The development standard has not been abandoned.
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	The zoning of the land is appropriate for the development standard.

should not have been included in the particular zone.	
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5. THE ONUS ON THE CONSENT AUTHORITY

Pursuant to Cl.4.6(4)(a), the Council must form the positive opinion of satisfaction that the applicant's written request has adequately addressed both of the matters required to be demonstrated by Clause 4.6(3)(a) and (b) and that 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. (*Initial Action Pty Ltd v Woollahra Municipal Council* (2018)).

In assisting the consent authority in forming its opinion of satisfaction as to the public interest test under Cl.4.6(4)(a)(ii), I refer to the discussion concerning objectives for development within the zone in which the development is proposed to be carried out. The objectives and comments are provided under Precondition 2 at Page 6.

The resulting development continues to improve the amenity for the residents in a medium-density residential environment and the built form is compatible with established local character and amenity.

We maintain that the variation to the building height does not result in development that is incompatible with the environmental character of the locality. The proposal demonstrates harmony with the relevant zone objectives, the objectives of the standard and satisfies the public interest test.

6. CONCLUSION


The purpose of the application is to allow for improved amenity to the balconies facing Manly Beach. presentation of the site to the street and improve aesthetic quality of the streetscape.

The alterations and additions to the residential flat building necessitate a height increase beyond the prescribed 13m however, the proposal will be commensurate in height and location of the existing balcony balustrades. The numerical extent of the non-compliance is 75%, as per existing balcony balustrade.

As development standards tend to be strictly numerical in nature, they fail to take into consideration the nature of the development, any site constraints, or qualitative aspects of the development or of the particular circumstances of the case. Clause 4.6 of the standard instrument LEP allows such an analysis to be carried out.

It has been demonstrated in this request that strict compliance with the development standard is both unreasonable and unnecessary and that there are sufficient environmental planning grounds to allow Council to form the opinion of satisfaction that this written request has adequately addressed the matters required to be demonstrated by Cl.4.6(3)(a) and (b).

Therefore, I request that council support the variation on the basis that this Clause 4.6 variation demonstrates that strict compliance with the development standard is both unreasonable and unnecessary and that there are sufficient environmental planning grounds to justify a variation to the development standard.



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