



Clause 4.6 Exceptions to Development Standards Variation

(Clause 6.10 – Limited development on foreshore area)

Address: 8 Addison Road Manly NSW

Ref: 23022 Rev 1.

1. Background

This submission is prepared pursuant to Clause 4.6 of *Manly Local Environmental Plan ('MLEP') 2013* and seeks a variation to the '*Limited development on foreshore area*' development standard.

The proposal involves environmental protection works to address erosion and stabilise a coastal rock shelf located upon common property of a residential strata apartment building.

The works, if not approved, would result in the rock shelf collapsing into the sea with consequential negative impacts upon ecological habitat, human health (safety), loss of foreshore public land and poor scenic amenity.

This application has been prepared in accordance with the 'NSW Department of Planning and Infrastructure' (DP&I) guideline *Varying development standards: A Guide, August 2011*, and the 'NSW Department of Planning and Environment' (DPE) Planning Circular *Varying Development Standards PS 20-002*.

From the Planning Circular 'Varying Development Standards' PS 20-002

Assumed concurrence conditions

Numerical and non-numerical development standards

The Secretary's concurrence may not be assumed by a delegate of council if:

- *the development contravenes a numerical standard by greater than 10%; or*
- ***the variation is to a non-numerical standard.***

...In all other circumstances, delegates of a consent authority may assume the Secretary's concurrence in accordance with the attached written notice.

The development standard proposed to be varied is a non-numerical Standard thus the Local Council being the Consent Authority cannot assume that they hold the concurrence of the Secretary.

The application should be referred to the Northern Beaches Local Planning Panel as having the necessary authority to approve the variation sought herewith.

2. Description of the planning instrument, development standard and proposed variation

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

Manly Local Environment Plan 2013 (MLEP 2013).

2.2 What is the zoning of the land?

The zoning of the land that is the subject of the development application is *C4: Environmental Living*.

2.3 What are the objectives of the zone?

The objectives of the *C4: Environmental Living* zone are:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*
- *To ensure that residential development does not have an adverse effect on those values.*
- *To protect tree canopies and ensure that new development 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 use.*

2.4 What is the development standard being varied?

The development standard being varied is the '*Limited development on foreshore area*' development standard.

The site is identified on MLEP 2013 'Foreshore building line' map FBL_004 as having restricted development within the foreshore zone:

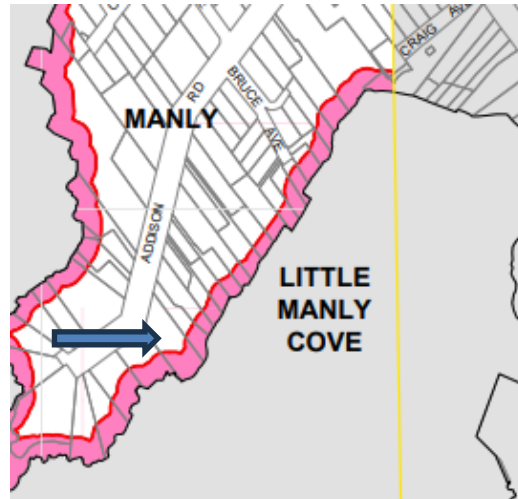


Figure 1 - extract from Sheet FBL_004

2.5 Is the development standard a performance-based control?

No. The '*Limited development on foreshore area*' development standard is a non-numerical control.

2.6 Under what clause is the development standard listed in the environmental planning instrument?

The development standard is listed in MLEP 2013 under clause 6.10 '*Limited development on foreshore area*'.

The development standard is described as flows:

- (2) *Development consent must not be granted to development on land in the foreshore area except for the following purposes—*
- (a) *the extension, alteration or rebuilding of an existing building wholly or partly in the foreshore area,*
 - (b) *the erection of a building in the foreshore area, if the levels, depth or other exceptional features of the site make it appropriate to do so,*
 - (c) *boat sheds, sea retaining walls, wharves, slipways, jetties, waterway access stairs, swimming pools, fences, cycleways, walking trails, picnic facilities or other recreation facilities (outdoors).*

The construction of masonry blade walls to support an eroding rock shelf is defined as 'environmental protection works' and as such is not for a 'building' or other structure as described in and captured by cl.6.10(2)(c).

2.7 What are the objectives of the development standard?

The objectives of clause 6.10 are:

(1) The objective of this clause is to ensure that development in the foreshore area will not impact on natural foreshore processes or affect the significance and amenity of the area.

2.8 What is the numeric value of the development standard in the environmental planning instrument?

Not applicable. The standard is non-numerical.

2.9 What is proposed numeric value of the development standard in your development application?

Not applicable. The standard is non-numerical.

2.10 What is the percentage variation (between your proposal and the environmental planning instrument)?

Not applicable. The standard is non-numerical.

3. Assessment of the Proposed Variation

3.1 Overview

Clause 4.6 Exceptions to Development Standards provides the methodology for varying development standards applying under a local environmental plan.

Subclause 4.6(3)(a) and 4.6(3)(b) requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

4.6(3)(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

In addition, the 4.6(4)(i) requires that development consent must not be granted for a development that contravenes a development standard unless the:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3),

An assessment and justification of the '*Limited development on foreshore area*' variation is provided hereunder in accordance the requirements of Clause 4.6. In addition, this variation has also been prepared in accordance with the Guidelines, which identifies matters to be addressed in an application to vary a development standard. The matters identified in the Guideline are consistent with the SEPP 1 objection principles identified in *Winten v North Sydney Council* outlined below:

- 1. Is the planning control in question a development standard;*
- 2. What is the underlying object or purpose of the standard;*

3. *Is compliance with the development standard 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 5(a)(i) and (ii) of the EP&A Act 1979;*
4. *Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;*
5. *Is a development which complies with the development standard unreasonable or unnecessary; and*
6. *Is the objection well founded.*

In accordance with the Guideline, the assessment also addresses the ‘five-part test’ established by the NSW Land and Environment Court. The five-part test was established in *Wehbe V Pittwater [2007] NSW LEC 827* to determine whether compliance with a development standard is unreasonable or unnecessary based on the following:

1. *Would the proposal, despite numerical non-compliance, be consistent with the relevant environmental or planning objectives¹;*
2. *Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;*
3. *Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;*
4. *Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or*
5. *Is the “zoning of particular land” unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.*

¹ Note – the Planning Principle references the previous EP&A Act 1979. This Application has considered the amended Act for which the relevant Objects are now to be found at s.1.3.

3.2 How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

The provision of strict compliance would be unreasonable due to the following:

1. Despite the noncompliance with the *'Limited development on foreshore area'* the proposal is consistent with the Objectives of the *C4: Environmental Living zone*, as demonstrated in the following:

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*

The proposal is for environmental protection works associated with an existing residential development; the implementation of the proposed works do not increase the density of residential development.

The proposal is consistent with Objective 1.

- *To ensure that residential development does not have an adverse effect on those values.*

The specific intent of the environmental protection works is to reinforce an eroding rock shelf that forms part of the scenic and ecological values of the land, thus the works are a positive environmental outcome.

The proposal is consistent with Objective 2.

- *To protect tree canopies and ensure that new development does not dominate the natural scenic qualities of the foreshore.*

The proposal has no impact upon tree canopies and has been designed to blend in with the existing rock face by cladding the brick piers with natural sandstone.

The proposal is not in conflict with Objective 3.

- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*

The proposal has no impact upon bushland, nor does it lead to loss of natural vegetation.

The proposal is not in conflict with Objective 4.

- *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.*

There is no vegetation upon the foreshore site that is affected by the proposal. The minor maintenance works are to be carried out in accordance with a future 'Construction Environmental Management Plan' (CEMP) to ensure there is no uncontrolled discharge of pollutants into the Harbour and water quality is maintained.

The proposal is not in conflict with Objective 5.

- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land use.*

The height of the masonry blade walls is the minimum required to support the rock shelf and subject to the geotechnical engineer's instructions and structural engineering design. The outcome of the works is that the existing topography will be supported and maintained.

The proposal is consistent with Objective 6.

2. The proposal remains consistent with the objectives of the '*Limited development on foreshore area*' standard outlined in subclause 6.10 despite the non-compliance, as is demonstrated below:

(1) The objective of this clause is to ensure that development in the foreshore area will not impact on natural foreshore processes or affect the significance and amenity of the area.

The environmental protection works has a positive impact upon the significance and amenity of the area by stabilising an eroding rock shelf that would, if allowed to collapse as a result of natural processes, potentially causing significant environmental damage, instability to the apartment building that occupies the land above the rock escarpment, and limiting public access to the area due to safety concerns.

3.3 How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act².

The objects of the Act are set down in Section 1.3(a) to (j) of which the relevant clauses are as follows:

(c) to promote the orderly and economic use and development of land,

(g) to promote good design and amenity of the built environment,

Compliance with the standard would be contrary to the objects of section 1.3 of the Act, which are to encourage development that promotes the orderly and economic use and development of land and to encourage good design and amenity in buildings.

The proposal provides for essential but minimally intrusive measures to be installed to stabilise ongoing erosion of a natural rock feature, in an environmentally sensitive location. The maintenance works respond to the opportunities and constraints of the site in an orderly and economic manner.

Strict compliance with the development standard would not provide a measurable public benefit, nor is it required in order to achieve compliance with the objectives.

² Now s.1.3 of the amended EP&A Act 1979

3.4 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?

A development that strictly complies with the '*Limited development on foreshore area*' standard is unreasonable or unnecessary in this circumstance for the following reasons:

- The environmental protection works, if not approved, would result in the rock shelf collapsing into the sea with consequential serious negative impacts for public safety, ecology and foreshore access.
- The works do not dominant the natural environment and have minimal visual presentation to the public realm.
- The need for the works has been identified by Council and communicated to the previous owners of SP 36940.
- The works are identical to other environmental protection works previously approved by Council and installed to coastal properties to the east of the subject site.
- There is no impact upon solar access, privacy or view loss for any adjoining neighbour or the public realm as a direct result of the works.

3.5 Are there sufficient environmental planning grounds to justify contravening the development standard?

Yes. In the circumstances of the case, there are sufficient planning grounds to justify contravening the development standard being:

- The proposal satisfies the objectives of the *C4 Environmental living zone* and the Objectives of the Foreshore building line standards as described in Section 3.2 above.
- The non-compliance with the standard does not contribute to unacceptable adverse environmental impacts, but rather protects and enhances these values.

- The variation offers an opportunity to provide long-term land stability to help maintain the existing site topography.
- The non-compliance with the standard does not result in the erection of a structure that is out of character with the sensitive coastal location.
- The development as proposed is consistent with the provisions of orderly and economic development.

3.6 Is the variation well founded?

The submission is considered to be well founded for the following reasons:

- The proposed works are modest and visually subordinate to the landscape.
- The development is consistent with Council's DCP controls and there are no unreasonable amenity, density or streetscape impacts that result from the breach.
- The proposal is a practical balance between planning controls. Strict compliance would not materially change the proposal nor result in a better outcome.
- The proposal provides for: orderly and economic development of land, environmental protection, and stabilises the grounds of an existing residential apartment building.
- The development is consistent with the objective of Clause 4.6, to provide flexibility. The merits have been demonstrated and a better planning outcome is achieved.
- The proposal upholds the objectives of the zoning and Clause 6.10.
- The breach is a non-numerical standard and can be approved by delegation to the Northern Beaches Local Planning Panel.

4. Conclusion

Development standards are provided as a means of achieving planning outcomes for an individual development, site or area.

The requested variation to the '*Limited development on foreshore area*' is considered appropriate to the context and circumstances of the site and does not result in a scale of development that is unsympathetic with the existing or intended future character of this coastal location within the Northern Beaches LGA.

Should compliance with the non-numerical standard be enforced it would prevent essential environmental protection works from proceeding, potentially compromising the safety and amenity of adjoining neighbours and the public domain, this being an undesirable environmental outcome and contrary to the MLEP objectives.

This submission satisfies the provisions of cl. 4.6 of MLEP 2013 as it has been demonstrated that compliance with the Foreshore building line development standard is both unnecessary and unreasonable in the circumstances of this case and there are sufficient planning grounds to justify contravening the standard.

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