

CLAUSE 4.6 – MLEP 2013 – FLOOR SPACE RATIO

39 HEALTHCLIFF CRESCENT, BALGOWLAH HEIGHTS

**WRITTEN REQUEST PURSUANT TO CLAUSE 4.6 OF MANLY LOCAL
ENVIRONMENTAL PLAN 2013**

MARCH 2014

39 HEATHCLIFF CRESCENT, BALGOWLAH HEIGHTS

**PROPOSED CONSTRUCTION OF DWELLING ALTERATIONS AND ADDITIONS AND
SWIMMING POOL**

**VARIATION OF A DEVELOPMENT STANDARD REGARDING COUNCIL'S MAXIMUM
FLOOR SPACE RATIO AS DETAILED IN CLAUSE 4.4 OF THE MANLY
LOCAL ENVIRONMENTAL PLAN 2013**

For: Proposed construction of dwelling alterations and additions and swimming pool
At: 39 Heathcliff Crescent, Balgowlah Heights
Applicant: Mr & Mrs Delaney

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Manly Local Environmental Plan 2013. In this regard, it is requested Council support a variation with respect to compliance with the maximum floor space ratio as described in Clause 4.4 of the Manly Local Environmental Plan 2013 (MLEP 2013).

The relevant maximum floor space ratio in this locality is 0.45:1 (277.83m²) and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The proposal dwelling alterations/additions will have a maximum floor space ratio of 0.47:1 (291.9m²) which exceeds the floor space control by 14.07m² or 5.06%. Compliance with this control is considered unnecessary given that the proposal does not result in any detrimental impact to the adjoining properties or character of the streetscape and does not result in unreasonable bulk or scale.

1.1 Manly Local Environmental Plan 2013 ("MLEP")

1.1.1 Clause 2.2 and the Land Use Table

Clause 2.2 and the Land Zoning Map provide that the subject site is zoned R2 – Low Density Residential and the Land Use Table in Part 2 of MLEP 2013 specifies the following objectives for the R2 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.*

The proposed development is for the purpose alterations/additions to an existing dwelling house and ancillary swimming pool s a permissible use in the R2 Low Density zone and achieves the stated objectives.

1.1.2 Clause 4.4 – Floor Space Ratio

Clause 4.4 of MLEP sets out the maximum floor space ratio as follows:

- (1) *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 Zone E1 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.*

The maximum floor space ratio applying to the site is 0.45:1.

1.1.3 The Dictionary to MLEP operates via clause 1.4 of MLEP. The Dictionary defines “gross floor area” as:

gross floor area means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes—

- (a) *the area of a mezzanine, and*
- (b) *habitable rooms in a basement or an attic, and*
- (c) *any shop, auditorium, cinema, and the like, in a basement or attic, but excludes—*
 - (d) *any area for common vertical circulation, such as lifts and stairs, and*
 - (e) *any basement—*
 - (i) *storage, and*
 - (ii) *vehicular access, loading areas, garbage and services, and*
 - (f) *plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and*
 - (g) *car parking to meet any requirements of the consent authority (including access to that car parking), and*
 - (h) *any space used for the loading or unloading of goods (including access to it), and*
 - (i) *terraces and balconies with outer walls less than 1.4 metres high, and*
 - (j) *voids above a floor at the level of a storey or storey above.*

Is clause 4.4 of MLEP 2013 a development standard?

- (a) The definition of “development standard” in clause 1.4 of the EP&A Act means standards fixed in respect of an aspect of a development and includes:

“(c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*”

- (b) Clause 4.4 relates to the maximum floor space ratio of a building. Accordingly, clause 4.4 is a development standard as defined in the Environmental Planning and Assessment Act, 1979.

3.0 Purpose of Clause 4.6

The Manly Local Environmental Plan 2013 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP 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) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the LEP should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council* [2018] NSWLEC 118 have been considered in this request for a variation to the development standard.

4.0 Objectives of Clause 4.6

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 decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in ***RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51]** where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

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 the LEP 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 (the Floor Space Ratio control) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of the LEP.

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 maximum floor space control development standard pursuant to clause 4.4 of MLEP which specifies a maximum floor space ratio of 277.43m² or 0.45:1 for the subject site. The additions to the existing dwelling will result in a maximum floor space ratio of 0.47:1 (291.9m²) which exceeds the floor space control by 14.07m² or 5.06%.

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.

Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(4) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation

Clause 4.6(6) relates to subdivision and is not relevant to the development.

Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.4 of MLEP from the operation of clause 4.6.

5.0 The Nature and Extent of the Variation

- 5.1 This request seeks a variation to the maximum floor space ratio standard contained in clause 4.4 of MLEP.
- 5.2 Clause 4.4 of MLEP specifies a maximum floor space ratio of 0.45:1 for the subject site.
- 5.3 The proposed additions seek to seek additions to the existing dwelling and will provide for a floor space ratio of 0.47:1 (291.9m²) which exceeds the floor space control by 14.07m² or 5.06% and therefore does not comply with this control.

The breach of the floor space ratio control is a result of a ground floor addition, which is located behind the existing front building line and not prominent in the streetscape or when viewed from the adjoining properties.

As discussed in this submission, it is considered that the proposal is reasonable notwithstanding the breach the floor space control and this will be discussed further within this submission.

6.0 Relevant Caselaw

- 6.1 In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:
 - 17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
 - 18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
 - 19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*

20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
 21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
 22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*
- 6.2 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 MLEP 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
 3. Is the consent authority satisfied that the proposed development will be consistent with the objectives of clause 4.4 and the objectives for development for in the R2 zone?
 4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

7.0. Request for Variation

7.1 Is compliance with clause 4.3 unreasonable or unnecessary?

- (a) This request relies upon the 1st way identified by Preston CJ in *Wehbe*.
- (b) The first way in *Wehbe* is to establish that the objectives of the standard are achieved.
- (c) Each objective of the maximum floor space ratio standard and reasoning why compliance is unreasonable or unnecessary is set out below:

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

This portion of Heathcliff Crescent is characterised by predominantly two storey dwellings with no particular architectural style. The proposed additions are single storey and well setback (12.395m) from the street frontage. The additions will not be prominent in the street and will be well screened by proposed vegetation as depicted in the landscape plan submitted with this application. The additions are minor and do not result in unreasonable bulk or scale when viewed from the street.

The proposal achieves 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 additions are single storey and located behind the front building line and setback 12.395m to the street frontage. The additions are provided with a side setback consistent with the existing dwelling on site (to the rear of the proposed works). Being single storey and not exceeding the height of the existing dwelling component to the rear, ensures that the non-compliance with the floor space control does not obscure any important landscape or townscape feature.

The proposal complies with this objective.

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

The proposal provides for a setback of 1.05m to the sites northern boundary. This setback complies with the requirements of Council's DCP, is consistent with the setback provided to the existing dwelling on site and is compatible with the existing surrounding and adjoining development. As the proposed addition is consistent with the existing setback to the northern boundary, the visual relationship to the adjoining development is considered appropriate. The additional floor area is over an existing terrace and will not require the removal of any vegetation and therefore does not impact on the landscaped character of the locality. Further, the proposal provides for a landscape plan which provides for landscaping within the front setback to enhance the landscaped character of the locality.

The proposal achieves this objective.

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

The proposed additions and in particular the area of non-compliance with the floor space ratio controls does not have a detrimental impact on the adjoining properties. The proposed additional floor area is at ground level over an existing terrace located on the northern side of the dwelling and as such there is no detrimental impact on the adjoining southern property at No. 37 Heathcliff Crescent.

In relation to potential impacts to the adjoining northern property, No. 41 Heathcliff Crescent, the following is provided:

Views

The proposed works are located at ground level and do not exceed the height of the existing single storey element to the rear. The location and single storey design of the additions ensures that there is no impact of existing views from the adjoining property. It is noted that there are no window openings serving habitable areas on the ground floor of No. 41 Heathcliff Crescent, the adjacent to the proposed works, with all high use living areas of No. 41 Heathcliff Crescent located on the upper level and well separated from the proposed works.

The proposal does not have any impact on existing views from adjoining properties.

Loss of Privacy

The additional floor area is located at ground level and does not provide for any windows on the side elevations. The addition replaces an existing terrace with full height openings. The proposed additions will improve privacy to the adjoining property.

Overshadowing

The additional floor area is located at ground level and adjacent to the northern boundary. The proposal will not result in additional overshadowing.

Visual Intrusion

The proposal provides for a single storey addition. As such the proposal will not be prominent when viewed from the adjoining property.

The proposal achieves this objective and the non-compliance in summary serves to improve privacy to the subject and adjoining properties.

- (e) to provide for the viability of Zone E1 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.**

The site is zoned R2 Low Density Residential and therefore this objective does not apply to the proposal.

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

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. 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: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

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

The particular element of the development which breaches the floor space ratio development standard, is single storey and is located over an existing terrace. The enclosure of the terrace also improves both visual and acoustic privacy, noting that this area is currently open to the elements.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposed additions will maintain the general bulk and scale of the existing surrounding newer dwellings and maintains architectural compatibility with the prevailing development pattern which promotes the orderly & economic use of the land (cl 1.3(c)).
- Similarly, the proposed development will provide for improved amenity through the inclusion provision of additional floor area without any openings on the side elevations and which replaces an open terrace. As such the proposal is compatible with development in the surrounding area, which promotes the orderly and economic use of the land (cl 1.3(c)).
- The proposed additions area located over the existing footprint to minimize impacts on the natural environment. The location of additional floor area over the existing ground level terrace ensures the protection of the environment, which is consistent with the Objective 1.3 (e)
- The proposed new development is considered to promote good design and enhance the residential amenity of the building's occupants and the immediate area, which is consistent with the Objective 1.3 (g).
- The proposed development improves the amenity of the occupants of the subject site and respects surrounding properties by locating the development where it will not obstruct any views across the site and will maintain the views from the site (1.3(g)).

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 maximum floor space ratio control.

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

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.

7.3 Is the proposed development consistent with the objectives of clause 4.4 and the objectives of the C4 Environmental Living Zone?

- (a) Section 4.2 of this written request suggests the five part test in Wehbe is made good by the development.
- (b) Each of the objectives of the R2 Low Density and the reasons why the proposed development is consistent with each objective is set out below.

I have had regard for the principles established by Preston CJ in *Nessdee Pty Limited v Orange City Council [2017] NSWLEC 158* where it was found at paragraph 18 that the first objective of the zone established the range of principal values to be considered in the zone.

Preston CJ found also that *"The second objective is declaratory: the limited range of development that is permitted without or with consent in the Land Use Table is taken to be development that does not have an adverse effect on the values, including the aesthetic values, of the area. That is to say, the limited range of development specified is not inherently incompatible with the objectives of the zone"*.

In response to *Nessdee*, I have provided the following review of the zone objectives:

It is considered that notwithstanding the breach of the maximum floor space ratio, the proposed alterations will be consistent with the individual Objectives of the R2 Low Density Residential zone for the following reasons:

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

The proposed additions are single storey and do not result in discernible additional bulk and scale. The proposal maintains the low density residential environment. The minor non-compliance with the floor space ratio control ensures housing needs are met in the low density residential environment.

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

This objective is not relevant to the proposal.

7.4 Has the Council obtained the concurrence of the Director-General?

The Council can assume the concurrence of the Director-General with regards to this clause 4.6 variation.

7.5 Has the Council considered the matters in clause 4.6(5) of MLEP?

- (a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed dwelling alterations/additions for the particular site and this design is not readily transferrable to any other site in the immediate locality, wider region of the State and the scale or nature of the proposed development does not trigger requirements for a higher level of assessment.
- (b) As the proposed development complies with the objectives of the development standard and the objectives of the zone there is no significant public benefit in maintaining the development standard.
- (c) there are no other matters required to be taken into account by the secretary before granting concurrence.

8.0 Conclusion

This development proposes a departure from the maximum floor space ratio control, with the proposed dwelling alterations to provide a maximum floor space ratio of 0.47:1.

As discussed, the floor space is attributed to the enclosure of an existing terrace which improves privacy to the subject and adjoining properties and does not result in unreasonable bulk or scale nor any detrimental impacts.

This written request to vary to the maximum floor space ratio specified in Clause 4.4 of the Manly LEP 2013 adequately demonstrates that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

In summary, the proposal satisfies all of the requirements of clause 4.6 of MLEP 2013 and the exception to the development standard is reasonable and appropriate in the circumstances of the case.

Natalie Nolan
Town Planner