



60 Bower Street, Manly

**REQUEST FOR VARIATION TO FLOOR SPACE RATIO OF BUILDINGS
DEVELOPMENT STANDARD PURSUANT TO CLAUSE 4.6(3) OF MANLY
LOCAL ENVIRONMENTAL PLAN 2013**

This Clause 4.6 variation relates to a proposal for alterations and additions to units 2 & 5 within the existing flat building on the subject site.

The proposal results in a non-compliance with clause 4.4 of the Manly Local Environmental Plan 202013 (**MLEP**) which relates to floor space ratio (**FSR**). As such, this Clause 4.6 request has been prepared in accordance with Clause 4.6 of the MLEP, which applies to the subject site.

The request demonstrates that compliance with the development standard relating to FSR is unreasonable or unnecessary in the circumstances of the case and establishes that there are sufficient environmental planning grounds to justify contravening the development standard, satisfying clause 4.6(3) of the MLEP.

Based on this Clause 4.6 request, the consent authority can be satisfied that the written request has adequately addressed the matters required to be demonstrated by subclause (3), and that the proposed development will be consistent with the objectives of the FSR development standard.

The nature of the exceedance to the development standard relating to FSR is set out below, followed by consideration of the relevant matters in clause 4.6 of the MLEP.

The NSW Department of Planning, Industry and Environment (DPI&E) provides guidance on how to prepare Clause 4.6 variations; 'Varying development standards: A Guide' (August 2011). This written request to vary the standards is based on the Guide.

Zoning of the site

The site is zoned C3 Environmental Management under the provisions of the MLEP. The objectives of the zone are:

- *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*
- *To provide for a limited range of development that does not have an adverse effect on those values.*
- *To protect tree canopies and provide for low impact residential uses that 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 uses.*

Residential flat buildings are prohibited in the C3 Zone. However, as demonstrated within the Statement of Environmental Effects, the flat building has existed on site for some time and benefits from existing use rights.

The proposal is consistent with the objectives of the zone as it relates to internal works only which will not affect any trees, vegetation or the ecological, scientific, cultural or aesthetic values of the area. Access to the foreshore is unimpeded and the proposal retains the bulk and scale of the building as approved.

Clause 4.4 – Floor Space Ratio

The Standard

The site has an area of 652m².

Clause 4.4 of the MLEP and the associated map prescribe a maximum floor space ratio (FSR) of 0.45:1 (293m²) for this site.

The existing building exceeds the floor space ratio development standard, having a gross floor area of 705.11m², equating to a floor space ratio 1.08:1. This is a numeric variation of 412.11m² and a percentage variation of 140.65%.

The proposal includes alterations to the flat building that result in a reduction in gross floor area within the building of 5.92m² to 699.19m². This equates to a FSR of 1.07:1. This is a numeric variation of 405.79m² and a percentage variation of 138.3%.

In general, the floor area is not changed but simply rearranged. The linking of floor area between units 2 and units 5 by a staircase removing common vertical circulation space and creating void spaces between the two levels.

The Land and Environment Court has held that stairs are inherently “part void” and it is therefore appropriate to calculate them using a hit and miss approach between levels to account for void areas.¹ In this regard, only the stairs at level 1 have been included in the calculation.

We note that while there is a reduction in overall gross floor area, the Department of Planning, Housing & Infrastructure’s (DPHI) *Guide to Varying Development Standards*, requires:

“If an applicant proposes alterations and additions to an existing building that already exceeds a development standard, they still need to submit a written request to vary the development standard, even if the proposed development reduces the extent of the variation.”²

The objectives of Clause 4.4

The objectives of Clause 4.4 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,*

¹ *Keith v Randwick City Council* [2025] NSWLEC 1011 at [31]

² *Guide to Varying Development Standards* (2023), pg. 22

- (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.*

Clause 4.6 – Exceptions to Development Standards

Clause 4.6 of the MLEP allows for exceptions of Development Standards. The objectives of this Clause 4.6 are:

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Clause 4.6(2) provides the power for development consent to be granted even though the development would contravene a development standard, subject to that clause:

- (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 4.6(3) sets out what a clause 4.6 written request seeking to justify a contravention of a development standard must demonstrate in order for consent to be granted for development that contravenes a development standard:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:*
 - (a) *compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *there are sufficient environmental planning grounds to justify contravening the development standard.*

The matters required to be demonstrated under clause 4.6(3) are set out

below as Points 1 and 2.

Clause 4.6(4) requires that Council keep a record of its assessment carried out under Clause 4.6(3).

1. Clause 4.6(3)(a) - Compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case:

In order to assess whether strict compliance with the development standard is unreasonable or unnecessary, a proposal is considered against the following five ways³:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard; or
5. The zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to the land.

These five ways were re-emphasised by the Court⁴. Each 'test' offers a potential way of demonstrating that compliance is unnecessary or unreasonable in a particular circumstance⁵. All tests are separate and not all tests may be applicable in each case. Therefore, not all tests need to be met.

This objection relies on the first method set out above, that compliance with a standard is unreasonable and unnecessary given that the objectives of the standard are met even though the standard is not complied with⁶.

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

³ see *Wehbe v Pittwater Council* [2007] NSWLEC 827

⁴ *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386

⁵ *Mecone Pty Limited v Waverley Council* [2015] NSWLEC 1312

⁶ *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245

Comment: The overall gross floor area of the building is reduced, due to the linking of floor area between units 2 and units 5 by a staircase removes common vertical circulation space and creates void spaces between the two levels.

The changes proposed do not affect the the existing bulk and scale of the building with all works being internal.

The Court had held that desired future character can be construed by looking at factors “including the development standards themselves, but also other factors, including approved development that contravenes the development standard.”⁷ In this instance the desired future character of bulk and scale is construed from the existing building. Following from the findings in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115, the proposed bulk and scale is identical to the existing building and should therefore also be considered compatible with desired future character. Accordingly, the proposal meets objective 1.

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:

Comment: The overall density and bulk of the building is unchanged from the existing situation and the actual gross floor area is marginally reduced. As such, there are no impacts on landscape and townscape features and the development meets objective (b).

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

Comment: The works to floor area are entirely internal and therefore not visible from the public domain. Accordingly, the proposal will not change the visual relationship between the building and the existing character of development and landscaping in the area.

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

Comment: All works proposed are internal and therefore do not lead to any new bulk, scale or massing which might give rise to impacts with regard to solar access or views. The external appearance of the building will not be altered, ensuring no new visual impacts. The alterations and additions will not

⁷ *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 at [63]

result in additional floor area making up noise generating rooms and the proposal does not include new floor area with openings or balconies which overlook adjacent sites. Accordingly, the proposal does not give rise to new amenity impacts and aligns with objective (d).

Objective (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 :

Comment: The proposal does not include any new business activity. As such, the proposal is not inconsistent with objective (e).

2. Clause 4.6(3)(b) - There are sufficient environmental planning grounds to justify contravening the development standard:

The components proposed above the FSR control are:

- 406.19m² of GFA (a reduction of 5.92m² from existing)

In addition to the consistency of the proposal against the FSR objectives (see **Point 2 above**), in my opinion there are sufficient environmental planning grounds to justify contravening the development standard⁸.

1. The variation is reduced

The existing variation is reduced by 5.92m² from the existing situation and is therefore considered to be an improvement. The need to prepare a 4.6 in this instance is entirely due to the requirements set out in the *Guide for Varying Development Standards*, which requires a variation statement to be prepared whenever there are changes to floor area in a non-compliant buildings, even where there is a reduction.

2. The variation does not result in amenity impacts

All works proposed are internal and therefore do not lead to any new bulk, scale or massing which might give rise to impacts with regard to solar access or views. The external appearance of the building will not be altered, ensuring no new visual impacts. The alterations and additions will not result in additional floor area making up noise generating rooms and the proposal does not include new floor area with openings or balconies which overlook adjacent sites.

⁸ see *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [90]

The lack of impact on adjoining properties in terms of solar access, privacy, view loss and visual bulk establishes sufficient planning grounds⁹.

3. Clause 4.6(5)

In the context of the requirements of Clause 4.6(5), it is considered that no matters of State or regional planning significance are raised by the proposed development. Moreover, it is considered that there would be no public benefit in maintaining the particular planning control in question, in the case of this specific development.

Conclusion

The proposal is consistent with the objects of Section 1.3 of the EP& A Act, 1979, which are to encourage development that promotes the social and economic welfare of the community and a better environment, to promote and coordinate orderly and economic use and development of land and to promote good design and amenity of the built environment.

This submission is considered to adequately address the matters required by Clause 4.6 and demonstrates that compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case and that there are sufficient environmental planning grounds to support the variation.

Based on this Clause 4.6 request, the consent authority can be satisfied that the written request has adequately addressed the matters required to be demonstrated by subclause (3), and that the proposed development is consistent with the objectives of the FSR development standard under the MLEP, in which the development is proposed to be carried out.



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⁹ *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [94(c)] and *Randwick City Council v Micaul Holdings Pty Ltd* at [34]