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The General Manager
Northern Beaches Council
725 Pittwater Road
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Dear Sir/Madam,

13 Cumberland Avenue, Collaroy

Clause 4.6: Exceptions to Development Standards

Floor Space Ratio (Clause 4.4) – Warringah Local Environmental Plan 2011

Maximum Floor Area of Secondary Dwelling (Clause 6.10) - Warringah Local Environmental Plan 2011

1. Introduction

Clause 4.4 of Warringah Local Environmental Plan (WLEP) 2011 relates to the maximum **floor space ratio (FSR)** requirements and states that “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 Floor Space Ratio map stipulates that the maximum FSR for 13 Cumberland Avenue, Collaroy is 0.5:1.

The architectural plans submitted with the Development Application at 13 Cumberland Avenue, Collaroy for the “change of use of the lower ground floor to an attached secondary dwelling with internal alterations and additions” indicate that the proposed development has a Gross Floor Area (GFA) of 280.39 square metres, and a subsequent floor space ratio (FSR) of 0.4:1, resulting in a compliant FSR.

The SEPP (Affordable Rental Housing) 2009 states within Clause 22 (b) that, “*the total floor area of the secondary dwelling is no more than 60 square metres or, if a greater floor area is permitted in respect of a secondary dwelling on the land under another environmental planning instrument, that greater floor area.*” Although the SEPP outlines the maximum floor area of secondary dwelling to be 60sqm, the provision of WLEP stipulates the floor area of secondary dwelling to be 75sqm. The floor area of the secondary dwelling measures 96.5sqm resulting in a 28.6% variation to the development standard and non-compliance of 21.5m² the area is entirely located within the building footprint of the existing dwelling and does not propose to extend beyond the existing building envelope. Clause 6.10

(3.b) states that development consent may be granted for development for the purposes of a secondary dwelling on land to which the following applies; “the consent authority is satisfied that the secondary dwelling will be located entirely within an existing principal dwelling that contains no other secondary dwelling.”

The proposal is of a reasonable scale and provides a high quality and durable secondary dwelling development which assists to meet the high demand for additional housing in the Collaroy locality. The development is commensurate in scale and character with other properties in the streetscape, and does not propose to alter the existing building footprint or envelope of the current dwelling. The variation results in the substantial increase in amenity for the subject site without producing any adverse impacts on the privacy, views, solar access and overall amenity of surrounding properties.

2. Clause 4.6

An application to vary a development standard can be made under Clause 4.6 of WLEP 2011.

The objectives of 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.

Clause 4.6(3) specifies that:

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.

Clause 4.6(4) specifies that:

Development consent must not be granted for development that contravenes a development standard unless:

- (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), and
 - (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, and
- (b) the concurrence of the Secretary has been obtained.

These matters are considered below.

3. Justification of proposed variance

Samadi v Council of the City of Sydney [2014] NSWLEC 1199 provides jurisdictional guidance on the assessment of variations under Clause 4.6.

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)).'

4. Precondition 1 – Consistency with zone objectives

The land is located in the R2 – Low Density Residential zone under the Waverley Local Environmental Plan 2012.

The objectives of the zone are:

- *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.*
- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

The development is compatible with the zone objectives as it provides high quality residential accommodation to the Warringah locality.

The variation to the maximum permissible floor space of a secondary dwelling does not render the development incompatible with the zone objectives, in accordance with the approach of the former Chief Judge, Justice Pearlman in *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21, in Paragraph [27]:

'The guiding principle, then, is that a development will be generally consistent with the objectives, if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, nor even that it is compatible.'

5. Clause 6.10

An application to vary a development standard for secondary dwelling houses are to be made under Clause 6.10 of WLEP 2011.

Clause 6.10 specifies that:

(1) The objective of this clause is to ensure that secondary dwellings on land to which this clause applies are of low impact and without adverse effects on the specific ecological, social and aesthetic values of the land.

(2) This clause applies to land in the following zones—

- (a) Zone R2 Low Density Residential,*
- (b) Zone R3 Medium Density Residential.*

(3) Despite clause 5.4(9), development consent may be granted for development for the purposes of a secondary dwelling on land to which this clause applies if—

- (a) the total floor area of the secondary dwelling does not exceed 75 square metres, and*
- (b) the consent authority is satisfied that the secondary dwelling will be located entirely within an existing principal dwelling that contains no other secondary dwelling.*

The proposed development does not seek to extend the existing building gross floor area. The secondary dwelling will be located within the existing building footprint of the lower ground floor. The

site does not contain any other secondary dwellings and ensures that all activity within the proposed secondary dwelling will not impact on the habitability of the existing primary dwelling or surrounding properties.

6. Precondition 2 – Consistency with the objectives of the standard

The objectives of the floor space ratio controls as specified in Clause 4.4 are:

(1) The objectives of this clause are as follows—

- (a) to limit the intensity of development and associated traffic generation so that they are commensurate with the capacity of existing and planned infrastructure, including transport infrastructure,*
- (b) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,*
- (c) to ensure that buildings, by virtue of their bulk and scale, are consistent with the desired character of the locality,*
- (d) to manage the visual impact of development when viewed from public spaces,*
- (e) to maximise solar access and amenity for public areas.*

The variation is supportable in relation to the aforementioned objectives.

Objective (a) – The proposed development will not impact on any existing traffic generation of the surrounding locality as it does not seek to extend beyond the existing building footprint of the building.

Objective (b) – The FSR and building floor space ratio development standards together set the parameters for the scale and density of development and its resultant impact on the streetscape and surrounding developments. The proposed secondary dwelling design is of a reasonable scale with articulatory details mitigating any bulk impact and accommodating to the needs of residential accommodation within the surrounding area.

Objective (c) – The proposal is considered compatible with its context as:

- The development is consistent with the height, scale and character of development in the locality. The bulk and scale of the development is reasonable and does not visually dominate neighbouring properties.
- The proposed 28.6% variation from the maximum FSR is minor in comparison to nearby sites. The below table demonstrates that properties within the same locality with R2 – Low Density Residential zoning who exceed their maximum FSR for secondary dwellings. This highlights that the area is characterised by similar densities to that of the proposal.

Site address	Extent of Variation from Maximum FSR
39A Cutler Road, Clontarf	34.44%

Table 1 – Nearby R2 – Low Density Residential zoned properties with approved maximum secondary dwelling floorspace variation. Information derived from the Planning Register (2013 – 2021) available on Northern Beaches Council's website.

Objective (d) – The development results in no unreasonable adverse impacts on adjoining properties. The development does not impact any neighbouring residential developments in relation to solar access or privacy. There is no view loss impact. Subsequently the development does not detract from the desired future character of the locality.

Objective (e) - The proposed development is not visible from any public will not have any adverse impact on existing public areas.

7. Precondition 3 – To consider a written request that demonstrates that compliance with the development standards is unreasonable or unnecessary in the circumstance of the case.

Wehbe vs Pittwater Council [2007] NSWLEC 827 establishes the five-part test for determining whether strict compliance with the development standard is deemed unnecessary or unreasonable. These five ways have recently been re-emphasised in the *Four2Give Pty Ltd v Ashfield Council [2015]* NSELEC 1009 cases, by Commissioner Morris in *Mecone Pty Limited v Waverley Council [2015]* NSWLEC 1312 and by Commissioner Tuor in *Moskovich v Waverley Council [2016]* NSWLEC 1015. This approach has recently been upheld in the case of *Micaul Holdings Pty Limited v Randwick City Council [2015]* NSWLEC 1386. An appeal on a point of law against this decision by Randwick Council was dismissed by Commissioner Morris on 19 February 2016: *Randwick City Council v Micaul Holdings Pty Ltd [2016]* NSWLEC 7.

In the decision of *Wehbe vs Pittwater Council*, Preston CJ established the five ways in which an objection has been well founded and that approval of the objection may be consistent with the aims of the policy:

- 'the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
- the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
- the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;

- 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; and
- 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 that land and that compliance with the standard in that case would also be unreasonable or unnecessary.'

It is noted that each 'test' offers a potential way of demonstrating that compliance is unnecessary or unreasonable in each case. Therefore, not all tests need to be met.

Test	Comment
1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard	Yes — The development meets the objectives of the development standard demonstrated in part 5 of this document.
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary	Not applicable — The purpose of the standard is relevant.
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 FSR 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.
5. The zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary	Not applicable — The zoning of the site is not considered to be inappropriate.

as it applied to that land and that compliance with the standard in that case would also be unreasonable or unnecessary.'	
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Application of the above tests thus demonstrate that strict numerical compliance is unreasonable and unnecessary for this proposal. The proposal satisfies the zone and development standard objectives and therefore strict compliance with the standard is not required in order to achieve compliance with the objectives.

Strict compliance would result in an inflexible application of policy. It does not serve any purpose that should outweigh the positive outcomes of the development and therefore a better planning outcome overall.

The proposed development is consistent with the provisions of orderly and economic development of land, in that it proposes to provide additional housing in a manner which meets the objectives of applicable controls. The secondary dwelling development over its economic life is consistent with the promotion and coordination of the orderly use and development of land.

8. 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

This report is the written request demonstrating that there are sufficient environmental planning grounds to justify deviation from the development standard.

The development has been designed to complement the existing scale and character of surrounding development. The proposal does not seek to alter the existing height, bulk or floor space ratio of the existing dwelling. The proposal will integrate seamlessly with the existing streetscape and does not result in adverse amenity impacts on adjoining properties in the way of bulk impact, shadow impact or privacy loss.

The above is considered to represent sufficient environmental planning grounds to justify the contravention of the development standard. It has been demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of this case, and thus the resultant development will be in the public interest.

9. Conclusion

The proposal seeks a variation to the floor space ratio development standard prescribed in Clause 4.4 of Warringah Local Environmental Plan 2011.

This submission is considered to adequately address the matters required by Clause 4.6. The proposal meets the assessment criteria set out in Clause 4.6 (3) (a) and (b) and (4) (a). As demonstrated, strict compliance with the prescribed floor space ratio development standard is unreasonable and unnecessary in the circumstances of the case. The proposal is in the public interest because it is consistent with the objectives of the R2 - Low Density Residential zone and the objectives for Floor Space Ratio standard. There are thus sufficient environmental planning grounds to justify the non-compliance.



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