

**VARIATION OF A DEVELOPMENT STANDARD REGARDING THE MAXIMUM
HEIGHT OF BUILDING AS DETAILED IN CLAUSE 4.3 OF THE MANLY
LOCAL ENVIRONMENTAL PLAN 2013**

For: Additions & Alterations to Existing Dwelling
At: 39 Seaforth Crescent, Seaforth
Owner: Mr R. Thomson & Ms P. Robetson-Gregg
Applicant: Mr R. Thomson & Ms P. Robetson-Gregg

The subject development application relates to the construction of alterations and additions to an existing dwelling upon land at No. 39 Seaforth Crescent, Seaforth (**Site**).

The proposal provides for a maximum height of 11.19m as measured to the new window (replacing a door) on the upper level eastern elevation and 12.21m to the flue for the new gas fireplace.

Therefore, the proposal seeks approval for a variation to the **Height of Building** development standard in clause 4.3 of the Manly Local Environmental Plan 2013.

4.3 Height of Buildings

(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.*

(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.

The Height of Building Map indicates that the maximum height of building that applies to the Site is 8.5m.

The following clause 4.6 written request has been prepared having regard to clauses 4.3 and 4.6 of the Manly Local Environmental Plan 2013 and recent judgments of the Land & Environment Court. It is submitted that the variation is well founded and is worthy of the support of the Council.

1. Objectives of Clause 4.6

The objectives of Clause 4.6 of the LEP 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.*

2. The standard to be varied is a Development Standard to which Clause 4.6 applies

Clause 4.3 of the Manly Local Environmental Plan 2013 is contained within Part 4 which is titled Development Standards to be complied with. It is also considered that the wording of the clause is consistent with previous decisions of the Land & Environment Court in relation to matters which constitute development standards.

It is also noted that clause 4.3 does not contain a provision which specifically excludes the application of clause 4.6 and vice a versa.

On this basis it is considered that clause 4.3 is a development standard for which clause 4.6 applies.

3. Compliance with the development standard is unreasonable or unnecessary in the circumstances of this case

Sub-clause 4.6(3) sets out the matters that must be demonstrated by a written request seeking to justify a contravention of the relevant development standard (that is not expressly excluded from the operation of clause 4.6 Manly Local Environmental Plan 2013):

(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.

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ set out five justifications to demonstrate that compliance with a development standard is unreasonable or unnecessary. These include:

- The objectives of the development standard are achieved notwithstanding non-compliance with the standard.
- The underlying objective or purpose of the standard is not relevant to the development.
- The underlying objective or purpose would be defeated or thwarted if compliance was required.
- The standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and/or
- The zoning of the land was unreasonable or inappropriate such that the standards for that zoning are also unreasonable or unnecessary.

The objectives of the Maximum Height of Building standard are set out in clause 4.3(1) of Manly Local Environmental Plan 2013 and 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.*

Compliance with the Height of Building standard is unreasonable or unnecessary in the circumstances because the objectives of the standard are achieved notwithstanding the non-compliance, in light of the following:

- a. The proposed modifications do not increase the overall height of the building, with the exception of the flue. The works to the dwelling are below the existing roof form. The new flue is required to meet the Australian Standards and relevant controls for fireplaces. The works to the dwelling will not be visible from the street and have no impact on the streetscape. The flue is minor ancillary element and will not have a detrimental impact on the streetscape.
- b. The proposal does not result in any perceived additional bulk, with new work to the dwelling beneath the existing roof form and within the existing footprint.

The alterations are well setback from all boundaries and surrounding dwellings.

- c. The proposed additions which are located beneath the existing dwelling will not obstruct existing views from the street, public domain or adjoining views. The flue is a minor structure which does not obstruct views from the adjoining properties or the streetscape.
- d. The proposed additions are located beneath the existing roof form and will not result in any additional overshadowing to the adjoining properties or the public domain.
- e. The proposed additions do not result in the removal of or impact on any existing vegetation. The additions do not alter the existing topography of the site and do not conflict with the bushland or surrounding properties.

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

The proposed development promotes the objectives identified in the Environmental Planning and Assessment Act 1979 section 1.3 in that the proposal will provide for the “promote the orderly and economic use of the land” and “good design and amenity of the built environment”. In this regard the proposed works, with the exception of the flue, are located within the existing footprint and below the existing roof form. Therefore the proposed additions do not alter the existing height.

Accordingly, the proposal promotes the objectives of the Environmental Planning and Assessment Act 1979 and there are also sufficient environmental planning grounds to justify the contravention of the Height of Building standard, which include:

- The additions/alterations to the dwelling house are located beneath the existing roof form and requiring strict compliance would prohibit any further work to the upper level of the existing dwelling. The alterations and additions do not extend above the height of the existing dwelling.
- The flue height is required to meet the requirements of the Australian Standard and relevant standards/legislation.

5. Is the proposed development 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.

The proposed development is consistent with the objectives of the Height of Building development standard, which is demonstrated in the analysis above.

The proposed development is also consistent with the C3 Environmental Management Zone objectives in Manly Local Environmental Plan 2013.

The objectives for the C3 Environmental Management 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*

In relation to the above objectives for the C3 Environmental Management zone the proposal is consistent with those objectives given that:

1. The proposed works are located within the existing footprint and does not impact on any existing ecological, scientific, cultural or aesthetic values.
2. The proposal does not require the removal of or impact on any vegetation with all works within the existing footprint. The works are minor and will not dominate the natural scenic qualities of the foreshore.
3. The development is well setback from the foreshore and natural bushland. The additions do not impact on geological features or vegetation.
4. The works are not within proximity of the foreshore and does not result in additional stormwater runoff.
5. The resultant development is compatible with the existing surrounding development.

As the proposal is consistent with the objectives of the Height of Building development standard and the objectives of the C3 Environmental Management Zone the proposed development is considered to be in the public interest in satisfaction of clause 4.6(4)(a)(ii).

6. Whether contravention of the development standard raises any matter of significance for state or regional environmental planning.

Sub-clause 4.6(4) requires that the consent authority is satisfied that the concurrence of the Planning Secretary has been obtained and sub-clause 4.6(5) enumerates matters that the Planning Secretary must consider in deciding whether to grant concurrence.

The Planning Secretary has given written notice dated 5 May 2020, attached to the Planning Circular PS 20-002, that the Planning Secretary's concurrence may be "assumed" for exceptions to development standards, subject to certain conditions contained in the notice. One circumstance where the Planning Secretary's concurrence cannot be assumed is where the development contravenes a numerical standard by greater than 10% and such applications are required to be deferred to the Local Planning Panel.

Further, it is my opinion that contravention of the standard does not raise any matters of significance for State or Regional environmental planning and there is no identifiable public benefit in maintaining the development standard.

7. Conclusion

This written request justifies the proposed variation to the Height of Building development standard in the terms required under clause 4.6 of Manly Local Environmental Plan 2013. In summary, the proposed variation in relation to the non-compliant height of building is justified for the following reasons:

- The proposal will not result in any adverse streetscape impacts.
- The proposal will not result in any impacts upon existing trees and vegetation and will not result in any tree loss.
- The proposal will not result in any additional overshadowing of adjoining properties.
- The proposal will not result in any visual or acoustic impacts upon adjoining properties.
- The proposal will not result in any loss of outlook for any adjoining properties.
- The proposal will continue to provide for a built form which is compatible with the surrounding locality.

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