

Attachment 1, Clause 4.6 variation - Exception to Development Standards- Residential development- first floor additions to an existing dwelling house at 21 Pine Street, Manly, 2095 (Lot 1 in DP 936960).

Introduction

Clause 4.1 (2) of Manly Local Environmental Plan 2013 (MLEP 13) prescribes a floor space ratio size for a building on any land.

The land in question has a site area of 202.2 sq.m

The maximum floor space ratio permitted for the development site is 0.6:1.

The maximum floor space is **121.32 sq.m**

The existing floor area of the cottage building is 96sq.m.

The proposed new first floor addition is 41sq.m.

The total floor area is **137sq.m** and exceeds the maximum floor space ratio permitted by 15.68 sq.m or **8%**.

It is recognised the development site is a local heritage item in a Victorian architectural period and was built prior to Council's controls being adopted.

Council's DCP provides insight in dealing with floor space ratio and may consider an exception to floor space ratio under MLEP 13 in relation to determining an Application for consent to erect a building on land upon which there is a building which is an item of the environmental heritage where the conservation of the item depends on allowing the exception and the development does not adversely impact on the significance of the heritage item.

In this regard, when calculating the floor space of the development, Council may consider excluding the floor space of the item of the environmental heritage when considering an exception to the LEP standard.

We believe that the works are necessary to improve amenity, preserve the heritage value of the property and to allow the damaged façade to be prepared as part of the site works. If Council sees eye to eye to this approach, then the existing floor space would be discounted. The legal mechanism of doing the Variation relates to the provisions of Clause 4.6.

In recognition of this, an objection pursuant to Clause 4.6 of the MLEP 13, seeking for a dispensation to the maximum floor space ratio control is requested.

Clause 4.6 of the MLEP 13 details exceptions to development standards and includes objectives which seek to:

(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.*

(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.

(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.*

(4) 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 Director-General has been obtained.*

(5) In deciding whether to grant concurrence, the Director-General must consider:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*

(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

The proposed additions and increased floor area contravene the maximum floor area contained within MLEP 13.

This written request seeks to justify the contravention of the standard pursuant to Clause 4.6 of the MLEP 13.

Variation sought

Floor space ratio control

MLEP 13 prescribes a floor space ratio of 0.6:1 for the site, and the maximum floor space is **121.32 sq.m.**

The existing floor area of the cottage building is 96sq.m.

The proposed new first floor addition is 41sq.m.

The total floor area is **137sq.m.**

In recognition of this, an objection is submitted pursuant to Clause 4.6 of MLEP 13.

The degree of the non-compliance equates to 15.68 sq.m or **8%.**

Written justifications for the contravention of the development standard

Pursuant to clause 4.6(3) of MLEP 13 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) of MLEP 13, also states:

(4) 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 Director-General has been obtained.

In relation to the matters required to be demonstrated by subclause (3) there are various ways that may be invoked to establish that compliance with a development standard is unreasonable or unnecessary, as discussed by various case studies.

Chief Justice Preston of the NSW Land and Environment Court in the case of *Wehbe v Pittwater Council* [2007] NSWLEC 827 is used as back ground information.

Although the *Wehbe* case was decided in relation to State Environmental Planning Policy No 1— Development Standards ("SEPP 1") and not clause 4.6 of GLEP 14, it remains of some assistance in relation to identifying the ways in which an applicant may demonstrate that compliance with development standards is unreasonable or unnecessary in the circumstances of the case.

This case is applied in this circumstance, as it better fits the predicament of a heritage item and Council's guidelines for conservation highlights the need to discount the existing floor areas of the heritage item.

The existing cottage of a Victoria architectural period predates any minimum lot size controls and along with any of the minimum lot size requirements.

It would be unreasonable to impose a floor space ratio control on a parcel of land which is less than half of the minimum lot size and to a heritage cottage.

In the *Wehbe* case, Justice Preston said the most commonly invoked way to establish that compliance with a development standard is unreasonable or unnecessary is to demonstrate that the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSW LEC 7 Preston CJ noted at paragraph 7 that development consent cannot be granted for development that contravenes a development standard unless the consent authority:

- *Considers the cl 4.6 objections (the requirement-in cl 4.6(3)); and*
- *Was satisfied that, first, the cl 4.6 objections adequately addressed the matters required to be demonstrated by cl 4.6(3) (the requirement in cl 4.6(4)(a)(i)) and, second, the development will be in the public interest because it is consistent with the*

objectives of the height standard and the FSR standard and the objectives for development within the R3 zone in which the development is proposed to be carried out (the requirement in cl 4.6(4)(a)(ii)).

In *Moskovich v Waverley Council* [2016] NSWLEC 1015, Commissioner Tour reflected on the recent decisions considering *Four2Five* and said:

- *Clause 4.6(3)(a) is similar to clause 6 of SEPP 1 and the Wehbe ways of establishing compliance are equally appropriate [at 50]. One of the most common ways is because the objectives of the development standard are achieved - as per Preston CJ in Wehbe at 42-43.*
- *Whereas clause 4.6(4)(a)(ii) has different wording and is focused on consistency with objectives of a standard. One is achieving, the other is consistency. Consequently, a consideration of consistency with the objectives of the standard required under clause 4.6(4)(a)(i0) to determine whether noncompliance with the standard would be in the public interest is different to consideration of achievement of the objectives of the standard under clause 4.6(3). The latter being more onerous requires additional considerations such as the matters outlined in Wehbe at 70-76. Such as consideration of whether the proposed development would achieve the objectives of the standard to an equal or better degree than a development that complied with the standard.*
- *Establishing compliance with the standard is unnecessary or unreasonable in 4.6(3)(a) may also be based on "tests" 2-5 in Wehbe either instead of achieving the objectives of the standard (Wehbe test 1) or in addition to that test. The list in Wehbe is not exhaustive but is a summary of the case law as to how "unreasonable or unnecessary" has been addressed to the meet the requirements of SEPP 1.*
- *It is best if the written request also addresses the considerations in the granting of concurrence under clause 4.6(5).*

More recently, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ has further clarified the correct approach to the consideration of clause 4.6 requests including that the clause does not require that a development that contravenes a development standard must have a neutral or better environmental planning outcome than one that does not.

The objectives of the **floor space ratio** control are set out in Clause 4.4(1) (a) to (b) of MLEP 13 as follows:

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

Assessment:

The departure of 8% is below 10% which has been accepted the industry rule of thumb.

In this case, the dispensation is viewed negligible and the building design concept results in a satisfactory level of residential amenity.

The bulk and scale of the first-floor addition is consistent with the neighbouring dwelling and is a desired streetscape character to allow the preservation and conservation of the cottage.

Should the addition not occur, the cottage would not be consistent with the existing and neighbouring properties which have had a level of amenity improvements.

The variation will not result in additional impacts on the amenity of adjoining properties greater than what a complying development would.

The ability to develop the site to comply in all respects with Council's LEP and DCP are not apparent as it would be unreasonable to impose a floor space ratio control on a parcel of land which is less than half of the minimum lot size and to a heritage cottage that predates any controls. The heritage cottage should not in any noticeable way be prejudiced by the exceedance to the floor space ratio and is a moderate outcome from a heritage assessment.

(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,

Assessment:

The density and bulk considerations are unnecessary and unreasonable for the heritage cottage. From a design point and heritage angle, the proposed first floor is recessed from the heritage fabric and the cottage contains its charm and character. No development on the first floor would be out of character.

The offsetting of the first floor will have a limited visual impact on the streetscape and will permit a clear visual separation between the ground level cottage at the building line and the new first floor addition and reduces the potential for the new first floor to dominate or overwhelm the front component of the cottage and there are no obstructions to landscape and townscape features.

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

Assessment:

The proposed first floor addition provides a positive visual relationship with the four heritage cottages, where three of the cottages have had alterations and additions to the existing building envelopes to improve residential amenity. These alterations have set the existing and desired character.

The new addition at the rear is designed so it appears as new but respects the fabric and tonal qualities and features of the cottage

The landscape area of the site does not change as a result of the first-floor additions. All additions are located within the existing ground floor footprint and behind the existing rear building line.

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

Assessment:

In close vicinity, this section of the streetscape is characterized by various forms of residential housing and immediately adjoining properties are heritage listed that consist in 2 groups of semi-detached dwellings and a free-standing dwelling from the streetscape. These dwellings are also sited on narrow lots and have had some form of additions and alterations to improve residential amenity for the home occupiers.

Given the master bedroom windows are to be screened as showed on the architectural drawings, the proposed side setback from the western side boundary of 0.95 metres which is further recessed from the ground zero lot wall along with the rectangular and hipped form modulation, this ensures that the proposal would not result in any unreasonable amenity impact.

There are no detrimental environmental impacts on the use or enjoyment of adjoining land by way of any privacy compromises, solar access is maintained and there are no view corridors to be affected.

From the public domain, the cottage is not visible from Smith Street and the first floor is to sit higher than the ridgeline of the adjoining property at 23 Pine Street. The proposed development will not further reduce the current visual penetration into the property from Smith Street or Pine Street and this is viewed as a moderate change and is related to the topographical nature of the site.

- (e) *to provide for the viability of business zones 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.*

Assessment:

N/A.

Consistency with the zone objectives of Manly Local Environmental Plan 2013

The subject site is zoned R1- General Residential under Manly Local Environmental Plan 2013.

Assessment:

The development proposal satisfies the objectives of Manly Local Environmental Plan 2013 whereby the alterations and additions are a permissible form of development.

The development provides a highly desirable and low-density form of housing that meets the community needs.

Approval of the additions still provides a low scale and appropriate form of housing and is one of the preferred varieties of housing types for the locality.

Therefore, the proposal does not result in any circumstance that would be contrary to those objectives.

Some relaxation is necessary given the sites heritage listing, and under the heritage conservation clauses and Clause 5.10 (10) Conservation incentives of MLEP 13, also states:

The consent authority may grant consent to development for any purpose of a building that is a heritage item or of the land on which such a building is erected, or for any purpose on an Aboriginal place of heritage significance, even though development for that purpose would otherwise not be allowed by this Plan, if the consent authority is satisfied that:

- (a) the conservation of the heritage item or Aboriginal place of heritage significance is facilitated by the granting of consent, and*
- (b) the proposed development is in accordance with a heritage management document that has been approved by the consent authority, and*
- (c) the consent to the proposed development would require that all necessary conservation work identified in the heritage management document is carried out, and*
- (d) the proposed development would not adversely affect the heritage significance of the heritage item, including its setting, or the heritage significance of the Aboriginal place of heritage significance, and*
- (e) the proposed development would not have any significant adverse effect on the amenity of the surrounding area.*

Assessment:

A Statement of Heritage Impact assesses the key heritage considerations and is consistent with these objects.

There are no known archaeological deposits over this site, and no excavation is proposed and thus there is no impact.

Other recommendations in lieu of a conservation management plan/specification for the project works is presented and may form as specifications for the project works or conditions of development consent.

Consistency with State and Regional planning policies

Assessment:

The variation to the minimum lot size for dual occupancies allows for the orderly and economic use of land as envisaged by the Environmental Planning and Assessment Act, 1979.

The variation allows for a better planning outcome

Assessment:

The variation to the floor space ratio is insignificant and does not compromise the residential quality and presentation of the heritage cottage to the public domain.

This approach is desirable in the context of this application and is considered a better planning outcome.

There are sufficient environmental grounds to permit the variation

Assessment:

The variation to the floor space ratio is insignificant in nature and the land in question is an existing small residential landholding where a heritage cottage is found and preserved with the exception of a damaged common fire blade wall.

From a streetscape point of view, the new first floor addition is of an appropriate form, architectural rhythm and scale and the cottage will continue to provide the visual element which sets the historic context and low scale and traditional form of the five cottages.

There are no detrimental impacts, and neither are there impacts upon the conservation area.

The proposed additions are consistent with the similarly constructed addition for the neighbouring property and architectural intent.

The variation is in the public interest and will not have unreasonable impact on amenity of the area where the design of the additions is compatible with the streetscape in terms of bulk, scale and mass and meets the Council LEP and DCP objectives with respect to heritage conservation.

Assessment:

No circumstances have been identified to indicate that the proposal would not be in the public interest.

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

Yes, this written request demonstrates that the land in question is an existing narrow lot and Torrens title residential landholding and categorised as a built-up area.

The dispensation sought justifies contravening the development standard and approval would be compatible with the established built forms.

The architectural language for the new addition is in harmony and unlikely to distract of the original features of the dwelling façade at Pine Street and is consistent with the character of neighbouring dwellings that are of a 1 and 2 storey-built form on a neighbouring heritage property and is consistent with the heritage conservation strategy to preserve the cottage identified by Clause 5.10 (10).

Does the Council have delegation to exercise the concurrence function of the Director-General of the Department of Planning and Infrastructure for development that contravenes a development standard? If so:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard.

In response to the above it is noted:

Pursuant to the Notification of assumed concurrence of the Director-General under clause 4.6(4) (and the former clause 24(4)) of the Standard Instrument contained in Planning Circular PS 08–003 (dated 9 May 2008), the concurrence of the Director-General of the Department of Planning and Infrastructure under clause 4.6(4)(b) of Manly Local Environmental Plan 2013 may be assumed to the granting of development consent to the development that contravenes the development standards for floor space ratio in clause 4.1 B(2)(a) of MLEP 2013;

The proposed development and variation from the development standard does not raise any matters of significance for State or regional environmental planning; and

Variation from the adherence to the numerical floor space ratio standard will be not be detrimental to the orderly use of the site and there is no public benefit in maintaining the development standard in this instance.

Conclusion

We consider that the 8% degree of flexibility from the floor space ratio can be applied under Clauses 4.6 subclause 1(a) of MLEP 2013 as the development site is an existing residential allotment and heritage cottage and some form of flexibility needs to be applied given this feature.

It is recognised the development site is a local heritage item in a Victorian architectural period and was built prior to Council's controls being adopted.

Approval of the first-floor additions would result in a built form on an existing small residential parcel of land that is compatible with the established built form pattern at Pine Street.

Amalgamation with adjoining sites would be an unreasonable burden for the landowner who can carry out orderly development of the site and as intended by the local zoning and heritage conservation incentives.

The non-compliance is minor, and the proposal is compliant in all other matters and does not result in any adverse impacts on the amenity of adjoining residents.

The building design concept does not adversely impact neighbouring properties and the overall bulk, scale, massing and height is consistent with the other housing in proximity to the site.

It is evident, the 8% dispensation allows for a better outcome under Clause 4.6 subclause 1(b) of MLEP 2013.

Approval relating to the minor non-compliance of 8% is less than other departures granted by Council in the past and approval will not create an undesirable precedent.

The repair works for the front façade/common fire wall meet the intent of Clause 5.10 (10) Conservation incentives of MLEP 13 and other recommendations in lieu of a conservation management plan/specification for the project works is presented.

We consider that compliance with the development standard is unreasonable and unnecessary in this case and that there are sufficient environmental planning grounds to justify the minor contravention from the development standard under Clauses 4.6 subclause 3(a) and (b) of MLEP 2013.

Therefore, the written justifications for contravening the floor space ratio standard is well founded and worthy of support.

This Clause 4.6 variation is forwarded to Council in support of the development proposal for improvement works by way of first floor additions to an existing attached dwelling/cottage at 21 Pine Street, Manly, and this request be looked upon favourably by Council.

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Dated: 21 May 2019