

STATEMENT OF ENVIRONMENTAL EFFECTS

10 KANGAROO STREET, MANLY

**CONSTRUCTION OF ALTERATIONS AND ADDITIONS TO
AN EXISTING DWELLING**

**PREPARED ON BEHALF OF
Mr Peter Littleboy**

DECEMBER 2020

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1. INTRODUCTION

This application seeks approval for the construction of alterations and additions to an existing dwelling on Lot 4 in DP 6100 which is known as **No. 10 Kangaroo Street, Manly**.

In preparation of this development application consideration has been given to the following:

- Environmental Planning & Assessment Act, 1979.
- Manly Local Environmental Plan 2013.
- Manly Development Control Plan 2013.

The following details and documents have been relied upon in the preparation of this document:

- Survey Plan prepared by Geomat Engineering Pty Ltd, Drawing No. 1784, Revision 1 and dated 4/11/20.
- Architectural Plans prepared by Du Plessis + Du Plessis Architects, Issue. 1 and dated 3/12/2020.
- BASIX Certificate A402482_02 and issued 18 December 2020.
- Preliminary Landslip Assessment prepared by Crozier Geotechnical Consultants, Project No. 2020-246 and dated 30 November 2020.
- Landscape Plan prepared by Space Landscape Designs, Project No. 201821, Revision C and dated 17/12/2020.
- Stormwater Management Plans prepared by NB Consulting Engineers, Job No. 201191, Issue A and dated 17/12/2020.
- View Impact Analysis prepared Du Plessis + Du Plessis Architects, Drawing No. WA.001 and dated 03/12/2020.
- Shadow Diagrams prepared by Deneb Design, Ref No. 1764, Version 1 and dated 15.12.2020.

This Statement describes the subject site and the surrounding area, together with the relevant planning controls and policies relating to the site and the type of development proposed. It provides an assessment of the proposed development against the heads of consideration as set out in Section 4.15 of the Environmental Planning and Assessment Act 1979. As a result of that assessment it is concluded that the development of the site in the manner proposed is considered to be acceptable and is worthy of the support of the Council.

3. SITE DESCRIPTION AND LOCALITY

The site is identified as Lot 4 in DP 6100 which is known as No. 10 Kangaroo Street, Manly. The site is a rectangular shaped allotment located on the northern side of Kangaroo Street. The site has an area of 411m². The sites southern boundary has a frontage of 12.19m to Kangaroo Street, with the northern boundary having a frontage of 12.19 to Pine Street. The locality is depicted in the following map:



Site Location Map

The property slopes from Kangaroo Street (RL26.91) towards the Pine Street (RL20.78) with a total fall of more than 6m. The dwelling is located centrally on the site. The existing dwelling is part two and part three storey and constructed of external brickwork with a metal roof with parapet. Two single detached garages are located forward of the dwelling and adjacent to the boundary fronting Kangaroo Street. A masonry wall extends between the two garages.

The site is depicted in the following photographs:



View of Site from Kangaroo Street

The existing surrounding development comprises predominantly multi storey dwellings with some residential flat buildings interspersed. The existing surrounding development is depicted in the following aerial photograph:



Aerial Photograph of Locality

4. THE DEVELOPMENT PROPOSAL

This proposal seeks approval for the construction of alterations and additions to the existing dwelling. The additions are to be constructed of rendered and painted brickwork and metal roof with minimal fall with existing parapet height retained.

The works are summarised below:

Lower Floor:

- Reconfigure internal layout to relocated internal stair.
- Create small addition on eastern side to accommodate new stair location.
- New bifold doors to northern elevation of bedroom to replace window.

Middle Floor:

- Reconfigure internal layout to provide for four bedrooms, bathrooms, conservatory and laundry.
- Provide new art store beneath front garden. A new external stair will provide access from the front garden to this lower garden level.
- Provide new spa.

Upper Floor:

- New pedestrian path and entry bridge to dwelling.
- Small addition to front northwest corner of dwelling.
- Internal reconfiguration.
- New garage doors to street frontage.
- New bi fold doors to garage 2, west elevation.

The proposal will also provide for the demolition of the existing brick fence on the Kangaroo Street frontage and for the construction of a new open style palisade fence and gate. The front setback to Kangaroo Street is currently hard surface and the proposal will remove this and provide for a new lawn area.

The proposal results in the following development indices:

Site Area:	411m ²
Existing FSR:	277.7m ² or 0.67:1
Proposed FSR:	277m ² or 0.67:1
Existing Open Space:	240.1m ² or 58.5
Proposed Open Space:	251.6m ² or 61%
Existing Soft Landscape:	48m ² or 19.4% of required open space.
Proposed Soft Landscape:	95m ² or 38.5% of required open space

5 ZONING & DEVELOPMENT CONTROLS

The proposed development is identified as development requiring the consent of the Council under the provisions of the Environmental Planning and Assessment Act 1979, as amended. The following is an assessment of the proposal against the relevant provisions of the Act and all of the relevant planning instruments and policies of Manly Council.

5.1 Planning for Bushfire Protection 2006

The subject site is not identified as bushfire prone land on Council's Bushfire Prone Land Map and therefore the provisions of Planning for Bushfire Protection do not apply to the proposed development.

5.2 Manly Local Environmental 2013



Extract of Zoning Map

The subject site is zoned R1 General Density Residential. The objectives of the R2 Zone are as follows:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

It is considered that the proposed development achieves these objectives by:

- Providing additions/alterations to an existing dwelling which is permissible in this zone.

Dwelling alterations and additions are permissible use in the R1 General Density Residential zone with the consent of Council.

The following numerical standards are applicable to the proposed development:

Clause	Development Standard	Proposal	Compliance
Clause 4.3 Height	8.5m	9.9m	Clause 4.6 included in Appendix A.
Clause 4.4 Floor Space Ratio	0.6:1	277m ² or 0.61:1	Clause 4.6 included in Appendix B.

There are no other specific clauses that specifically relate to the proposed development.

4.3 Manly Residential Development Control Plan 2013

The Manly DCP 2013 applies to all land where the LEP applies. Therefore, the DCP applies to the subject development.

Part 3

Part 3 provides general principles applying to all development and Part 4 outlines development controls for specific forms of development including residential. The relevant provisions of **Part 3** are summarised below:

Clause 3.1.1 – Streetscape (Residential Areas)

The site is located on the northern side of Kangaroo Street with the rear (northern) boundary fronting Pine Street. When viewed from Kangaroo Street, the proposal will continue to present as a single level dwelling with detached garaging forward. The proposed amendments will not result in any additional bulk or scale when viewed from Kangaroo Street, however the new finishes and fencing will improve the aesthetics of the property as viewed from the public domain.

Clause 3.3 - Landscaping

The works do not require the removal of any vegetation and there is no reduction of existing landscaped areas.

Clause 3.4 - Amenity (Views, Overshadowing, Overlooking/Privacy, Noise)

The objectives of the clause are noted as:

- Objective 1) To protect the amenity of existing and future residents and minimise the impact of new development, including alterations and additions, on privacy, views, solar access and general amenity of adjoining and nearby properties.*
- Objective 2) To maximise the provision of open space for recreational needs of the occupier and provide privacy and shade.*

It is suggested that the works will achieve these objectives as:

- The proposal provides for alterations to the existing dwelling. The majority of works are within the existing building envelope and the proposal does result in any unreasonable bulk or scale.
- The proposal does not obstruct any views from surrounding properties or from the public domain. It is noted that the proposal provides for an overall reduction in building height to the rear.
- The materials and finishes are compatible with the existing surrounding development and will not detract from the character of the locality.
- The proposed additions will not result in any loss of privacy to the surrounding properties. This has been achieved through the considered location of windows and privacy screening.

Clause 3.7 - Stormwater Management

The proposal does not provide for any new roof form and will not result in additional runoff. All collected stormwater will continue to be connected to the existing system which discharges to the street gutter in accordance with Council controls.

Part 4

The following numerical provisions of **Part 4** are considered relevant to the proposal:

Clause/ Design Element	DCP Requirement	Compliance/Comments
Residential Density & Subdivision	Density Area D3 – 1 dwelling per 250m ²	Yes The site has an area of 411m and does not increase residential density nor propose subdivision.
Floor Space Ratio	Refer to LEP 0.6:1	Not Applicable – no change
Wall Height	Height – 8.0m	See Clause 4.6 variation (maximum height) in Appendix A .
Number of Storeys	Two Storeys	No change to number of storeys.
Roof Height	2.5m above wall height	Not applicable
Parapet Height: 600mm above wall height.	600mm above wall height	Yes
Maximum Roof Pitch	35°	Not applicable
Building Setbacks	<p>Front Setback – Min. 6.0 metres or consistent with neighbouring.</p> <p>Secondary setback – same as side boundary setback</p> <p>Side Setback – 1/3 of the height of wall.</p>	<p>The proposed works do not encroach the existing setbacks to either Kangaroo Street or Pine Street.</p> <p>Not Applicable.</p> <p>The proposal generally retains the setbacks currently provided to the existing dwelling. The proposal provides for a small addition to the front southwest corner of the dwelling. This element provides for a setback of 1.405m to the south western boundary.</p>

Clause/ Design Element	DCP Requirement	Compliance/Comments
	Rear Setback – Minimum 8.0 metres Setback to RE1 Zoned Land – 8.0 metres.	<p>This setback is considered appropriate in this instance for the following reasons:</p> <ul style="list-style-type: none"> • The additions are setback to be consistent with the existing dwelling. • The addition is for a WC and pantry. These are not high use living areas, rather they are service areas. • This addition provides for only one window which is to an ensuite and will not result in a loss of privacy. • Shadow diagrams have been prepared which demonstrate that the proposal results in negligible additional shadowing. • The proposal does not result in any unreasonable bulk or scale. When viewed from the public domain the proposed additions will not be dominant. The proposal will continue to present as a single level building from Kangaroo Street. <p>Yes Works do not encroach existing rear setback.</p>
Landscaping/Open Space	<p>Open Space Area 4: Minimum total open space: 60% of site area.</p> <p>Minimum soft open space as % of total open space: 40%</p> <p>Minimum number of endemic trees: 4</p>	<p>Yes</p> <p>The proposal provides for a total open space of 251.6m² or 61% of the site which complies with this clause. The proposal results in an increase in open space. Whilst the proposal does not comply with the minimum soft landscaped area the proposal increases landscaped area from 48m² to 95m².</p>

Clause/ Design Element	DCP Requirement	Compliance/Comments
	<p>Private open space to be directly accessible from living areas. Minimum dimension 3m. Minimum area of 18m².</p>	<p>The proposal does not require the removal of any vegetation.</p> <p>Yes The proposal will continue provide access to the rear yard, with a balcony adjacent to the main internal living area.</p>
Parking and Access	<p>Minimum 2 Spaces per Dwelling.</p> <p>Garages/carports shall be sited so as to not dominate the street frontage through the use of appropriate materials.</p> <p>Carports forward of the building line shall be open on all sides. Maximum width of structures forward of the building line is 6.2m or 50% of site width whichever is the greater.</p>	<p>Yes Existing garaging for two cars is being retained.</p>
First Floor Additions	<p>Additions may follow the existing ground floor wall setbacks providing adjoining properties are not adversely impacted by overshadowing, view loss or privacy issues.</p> <p>Must retain the existing scale and character of the street and should not degrade the amenity of surrounding residences</p>	<p>Yes The proposed additions to the upper level provide for setbacks to follow the existing dwelling. The small addition provides for only a WC and pantry which are not high use rooms and will not result in any loss of privacy.</p> <p>The additions will not be prominent in the streetscape with the remaining dwelling presenting as a single level dwelling from Kangaroo Street.</p>

Clause/ Design Element	DCP Requirement	Compliance/Comments
Fences	Maximum height 1.0m for solid Maximum height 1.5m where at least 30% is transparent.	Yes The proposal provides for a new palisade style slat fence to replace the existing fencing. The proposal will provide for a more open streetscape.

There are no other provisions of the Manly DCP that apply to the proposed development.

6. EP & A ACT - SECTION 4.15

The Provisions of any Environmental Planning Instruments

The proposal is subject to the provisions of the Manly Local Environmental Plan 2013 and the Manly DCP 2013. It is considered that the provisions of these documents have been satisfactorily addressed within this report.

There are no other environmental planning instruments applying to the site.

The Likely Impacts of the Development

It is considered that the development will provide for alterations/additions to an existing dwelling without detrimentally impacting on the character of the area. The proposal does not result in the removal of any vegetation. The design of the proposal is such that they do not result in any unreasonable loss of privacy.

The Suitability of the Site for the Development

The subject site is zoned R1 General Residential and the construction of alterations and additions to an existing dwelling house is permissible with the consent of Council. The resultant development is of a bulk and scale that is consistent with existing surrounding developments. The proposal does not result in the removal of any significant vegetation.

For these reasons it is considered that the site is suitable for the proposed development.

The Public Interest

It is considered that the proposal is in the public interest in that it will provide for an upgrade of the existing dwelling and is consistent with other development in this locality without unreasonably impacting the amenity of the adjoining properties or the public domain.

7. CONCLUSION

This application seeks approval for the construction of alterations and additions to an existing dwelling. As demonstrated in this report the proposal is consistent with the aims and objectives of the Manly Local Environmental Plan 2013 and the Manly DCP 2013. A Clause 4.6 Variation has been included for the non-compliance with building height and FSR controls and it is requested that the Council consent to these variations. The proposal does not have any detrimental impact on the amenity of the adjoining properties or the character of the locality.

It is therefore considered that the proposed of alterations/additions to an existing dwelling upon land at **No. 10 Kangaroo Street, Manly** is worthy of the consent of Council.

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December 2020

APPENDIX A

OBJECTION PURSUANT TO CLAUSE 4.6 OF MANLY LOCAL ENVIRONMENTAL PLAN 2013

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

For: Dwelling Additions/Alterations
At: 10 Kangaroo Street, Manly
Owner: Mr Peter Littleboy
Applicant: Mr Peter Littleboy

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 building height as described in Clause 4.3 of the Manly Local Environmental Plan 2013 (MLEP 2013).

2.0 Background

Clause 4.3 restricts the height of a building within this area of the Manly locality and refers to the maximum height noted within the “*Height of Buildings Map*.”

The *Height of Building Map* identifies the site as being within the 8.5m maximum height limit.

This clause is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The proposed additions provide for a maximum height of approximately 9.455m which does not comply with the numerical standards of this clause. The proposal represents a maximum non-compliance of 0.955m or a 11.2% variation. It is noted the proposal results in a reduction of overall height.

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

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, and*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The development will achieve a better outcome in this instance as the additions result in a reduction of the existing building height. The change to the roof form at the rear of the dwelling reduces the existing roof height by 330mm. Requiring strict compliance with the building height control would prohibit any alteration to the existing dwelling including the proposed reduction in height. It is considered that the proposal is consistent with the objectives of Clause 4.6.

5.0 Onus on Applicant

Clause 4.6(3) provides that:

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.*

This submission has been prepared to support our contention that the development adequately responds to the provisions of 4.6(3)(a) & (b) above.

6.0 Justification of Proposed Variation

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 11* & *Samadi v Council of the City of Sydney [2014] NSWLEC 1199*.

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)).

Precondition 1 - Consistency with zone objectives

The site is located in the R1 General Residential Zone. The objectives of the R1 zone are noted as:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Comments

It is considered that notwithstanding the extent of the non-compliance with the maximum building height control the proposed additions to the existing dwelling will be consistent with the individual Objectives of the R1 Low Density Residential zone for the following reasons:

The proposal provides for alterations and additions to an existing detached dwelling. The proposal does not provide for additional housing and retains the low-density residential environment.

The proposal reduces the overall maximum height and therefore the proposal is an improvement.

Accordingly, it is considered that the site may be further developed with a variation to the prescribed maximum building height control, whilst maintaining consistency with the zone objectives.

Precondition 2 - Consistency with the objectives of the standard

The objectives of Clause 4.3 are articulated at Clause 4.3 (1):

- (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.*

It is considered that the objectives have been achieved for the following reasons:

- The proposed additions are relatively minor and do not increase the existing height of the dwelling. The resultant development will continue to present as a part single and part two storey dwelling when viewed from Kangaroo Street and the public domain. This is consistent with the prevailing building height and the desired streetscape character. The proposal increases the existing landscaped area. The proposal achieves objective (a).
- The proposal does not result in additional bulk or scale. Rather the proposal seeks to improve the existing aesthetics of the building. The proposal will reduce existing building height to the rear and the proposal does not extend above existing building height. The proposal maintains boundary setbacks and increases landscaping on site to assist in minimising bulk and scale. Further the proposed external finishes will improve aesthetics and provide architectural relief. The proposal achieves objective (b).
- A View Analysis has been prepared which indicates that the proposal will not disrupt or obstruct any water or significant views. The proposal complies with objective (c).
- Shadow diagrams have been prepared which demonstrate negligible overshadowing. The proposal achieves objective (d).

Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

It is unreasonable and unnecessary to require strict compliance with the development standard as the proposal provides for additions and alterations to an existing dwelling house, which result in a reduction in the overall height. The rear portion of the dwelling does not comply with the height controls and this application reduces this non-compliance.

In the *Wehbe* judgment (*Wehbe v Warringah Council* [2007] NSWLEC 827), Preston CJ expressed the view that there are 5 different ways in which a SEPP 1 Objection may be well founded and that approval of the Objection may be consistent with the aims of the policy. These 5 questions may be usefully applied to the consideration of Clause 4.6 variations: -

1. *the objectives of the standard are achieved notwithstanding non-compliance with the standard;*

Comment: Yes. Refer to comments under 'Justification of Proposed Variation' above which discusses the achievement of the objectives of the standard.

2. *the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

Comment: It is considered that the purpose of the standard is relevant but the purpose is satisfied.

3. *the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

Comment: Compliance does not defeat the underlying object of the standard development; however, compliance would prevent the approval of an otherwise supportable development.

Furthermore, it is noted that development standards are not intended to be applied in an absolute manner; which is evidenced by clause 4.6 (1)(a) and (b).

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;*

Comment: Not applicable.

5. *the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Comment: The development standard is applicable to and appropriate to the zone.

For the above reasons it would therefore be unreasonable and unnecessary to cause strict compliance with the standard.

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

Due to the existing overall building height and sloping topography of the site, a portion of the proposed additions will exceed the maximum height required by Clause 4.3. However, the proposed additions reduce the existing building height.

The development is justified in this instance for the following reasons:

- The proposal provides for a reduction in the existing building height and as such the proposal provides for an improvement.
- Compliance with the height control is constrained by the height of the building and sloping topography of the site.
- The development does not result in a significant bulk when viewed from either the street or the neighbouring properties.
- The proposal does not obstruct any views from surrounding properties.

Having regard to the above, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for maximum building height.

In the recent 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does **not** mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are "sufficient environmental planning grounds to justify contravening the development standard", it is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether each and every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant's written document itself, and in the Commissioner's assessment of it). In February of this year the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligation is to be satisfied that "the applicant's written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard." He held that this means:

“the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant’s written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary”.

Accordingly, when assessed against the relevant Objects of the Environmental Planning & Assessment Act 1979, (NSW) outlined in s1.3, the following environmental planning grounds are considered to be sufficient to allow Council to be satisfied that a variation to the development standard can be supported:

- The proposal provides for additions to an existing dwelling. The site has a significant slope and the existing dwelling exceeds the maximum height control of the Manly LEP.
- The proposal does not have any detrimental impacts on the adjoining properties. Further amenity to surrounding properties should be improved with the incorporation of screens and additional landscaping.
- The proposal is considered to promote good design and amenity to the local built environment as appropriate amenity, solar access, views and privacy will be maintained for the neighbouring properties.

The above are the environmental planning grounds which are the circumstances which are particular to the development which merit a variation to the development standard.

7.0 Conclusion

This development proposed a departure from the maximum building height development standard.

This variation occurs as a result of the height of the existing building and sloping topography of the site.

This written request to vary the maximum building height specified in Clause 4.3 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.

Strict compliance with the maximum building height control would be unreasonable and unnecessary in the circumstances of this case.

Natalie Nolan
NOLAN PLANNING CONSULTANTS

APPENDIX B

OBJECTION PURSUANT TO CLAUSE 4.6 OF MANLY LOCAL ENVIRONMENTAL PLAN 2013

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

For: Dwelling Additions/Alterations
At: 10 Kangaroo Street, Manly
Owner: Mr Peter Littleboy
Applicant: Mr Peter Littleboy

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).

2.0 Background

Clause 4.4 restricts the floor space ratio of a building within this area of the Manly locality and refers to the maximum floor space noted within the “*Floor Space Ratio Map*.”

The *Floor Space Ratio Map* provides for a maximum FSR of 0.6:1 for the subject site.

This clause is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The proposed additions provide for a maximum FSR of 277m² or 0.67:1 which does not comply with the numerical standards of this clause. The proposal represents a maximum non-compliance of 30m² or a 12.16% variation. It is noted that the proposal provides for a reduction of the existing floor space of 0.7m².

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

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, and*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The development will achieve a better outcome in this instance as the site will provide for alterations and additions to an existing dwelling development which is consistent with the stated Objectives of the R1 General Residential Zone, which are noted as:

- To provide for the housing needs of the community.*
- To provide for a variety of housing types and densities.*
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

As sought by the zone objectives, the proposal will provide for alterations and additions to an existing single detached dwelling which is compatible with the surrounding residential environment.

The proposal provides for additions and alterations to improve the architectural character of the existing dwelling in order to provide for high quality development that will enhance and complement the locality.

Notwithstanding the non-compliance with the maximum floor space, the new works will provide an attractive residential development that will add positively to the character and function of the local residential neighbourhood. It is further noted that the proposal results in a reduction of the existing floor space.

5.0 Onus on Applicant

Clause 4.6(3) provides that:

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.*

This submission has been prepared to support our contention that the development adequately responds to the provisions of 4.6(3)(a) & (b) above.

6.0 Justification of Proposed Variation

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 11* & *Samadi v Council of the City of Sydney [2014] NSWLEC 1199*.

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)).

Precondition 1 - Consistency with zone objectives

The site is located in the R1 General Residential Zone. The objectives of the R1 zone are noted as:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Comments

It is considered that notwithstanding the extent of the non-compliance with the maximum floor space ratio control the proposed additions to the existing dwelling will be consistent with the individual Objectives of the R1 Low Density Residential zone for the following reasons:

The proposal provides for alterations and additions to an existing detached dwelling to meet the needs of the occupants. The proposal reduces the existing floor space ratio.

The proposal does not provide for additional housing and retains the character of the existing residential environment. The existing locality is characterised by large multi-storey dwellings comprising a variety of architectural styles.

Accordingly, it is considered that the site may be further developed with a variation to the prescribed maximum floor space ratio controls, whilst maintaining consistency with the zone objectives.

Precondition 2 - Consistency with the objectives of the standard

The objectives of Clause 4.4 are articulated at Clause 4.4 (1):

- (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 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.*

It is considered that the objectives have been achieved for the following reasons:

- The proposal reduces the existing gross floor area of 0.7m² which conjunction with the external finishes and reduction in overall height will reduce the existing bulk and scale of the existing development on site. The resultant dwelling is consistent with the existing and desired streetscape character. The proposal achieves objective (a).
- The proposed works do not obscure any important landscape or townscape features. This is achieved by reducing floor space and reducing existing height. The proposal achieves objective (b).
- The proposal maintains an appropriate visual relationship between new development and the existing character of the landscape. The proposed additions/alterations generally maintain existing setbacks and improve landscaping on site. The proposal achieves objective (c).
- A View Analysis has been submitted which depicts that the proposal does not obstruct any significant views from adjoining land or public space. The proposal through the considered location of windows and screens will ensure that the amenity of the adjoining properties is maintained. The proposal does not result in any unreasonable overshadowing. The proposal achieves objective (d).
- Objective (e) is not applicable.

Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

It is unreasonable and unnecessary to require strict compliance with the development standard as the proposal provides for additions and alterations to an existing dwelling house, which are constrained by the reduced lot size.

In the *Wehbe* judgment (*Wehbe v Warringah Council* [2007] NSWLEC 827), Preston CJ expressed the view that there are 5 different ways in which a SEPP 1 Objection may be well founded and that approval of the Objection may be consistent with the aims of the policy. These 5 questions may be usefully applied to the consideration of Clause 4.6 variations: -

6. *the objectives of the standard are achieved notwithstanding non-compliance with the standard;*

Comment: Yes. Refer to comments under 'Justification of Proposed Variation' above which discusses the achievement of the objectives of the standard.

7. *the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

Comment: It is considered that the purpose of the standard is relevant but the purpose is satisfied.

8. *the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

Comment: Compliance does not defeat the underlying object of the standard development; however, compliance would prevent the approval of an otherwise supportable development.

Furthermore, it is noted that development standards are not intended to be applied in an absolute manner; which is evidenced by clause 4.6 (1)(a) and (b).

9. *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;*

Comment: Not applicable.

10. *the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Comment: The development standard is applicable to and appropriate to the zone.

For the above reasons it would therefore be unreasonable and unnecessary to cause strict compliance with the standard.

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

Due to the reduced allotment size, the proposed additions will exceed the maximum floor space ratio required by Clause 4.3.4

The development is justified in this instance for the following reasons:

- The development does not result in additional bulk when viewed from either the street or the neighbouring properties.
- The development will maintain a compatible scale relationship with the existing residential development in the area. Development in the vicinity has a wide range of architectural styles and the given the variety in the scale of development, this proposal will reflect a positive contribution to its streetscape.
- The proposal does not result in the loss of any views.

Having regard to the above, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for maximum building floor space ratio.

In the recent 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does **not** mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are "sufficient environmental planning grounds to justify contravening the development standard", it is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether each and every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant's written document itself, and in the Commissioner's assessment of it). In February of this year the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligation is to be satisfied that "the applicant's written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard." He held that this means:

"the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary".

Accordingly, when assessed against the relevant Objects of the Environmental Planning & Assessment Act 1979, (NSW) outlined in s1.3, the following environmental planning grounds are considered to be sufficient to allow Council to be satisfied that a variation to the development standard can be supported:

- The proposal provides for additions to an existing dwelling. The proposal provides for a reduction in the existing floor area.
- The non-compliance does not result in any unreasonable impacts.
- The proposed development will provide for an appropriate level of family accommodation and improved amenity within a built form which is compatible with the streetscape of Kangaroo Street, which also promotes the orderly and economic use of the land.
- The proposal is considered to promote good design and amenity to the local built environment as appropriate amenity, solar access and privacy will be maintained for the neighbouring properties.

The above are the environmental planning grounds which are the circumstances which are particular to the development which merit a variation to the development standard.

7.0 Conclusion

This development proposed a departure from the maximum floor space development standard. It is noted that the proposal reduces the existing floor area of the existing dwelling on site.

This variation occurs as a result of an existing non-complying dwelling.

This written request to vary 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.

Strict compliance with the maximum floor space ratio control would be unreasonable and unnecessary in the circumstances of this case.

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