

VARIATION OF A DEVELOPMENT STANDARD REGARDING THE MAXIMUM FLOOR AREA REQUIRED BY CLAUSE 4.4 OF THE MANLY LOCAL ENVIRONMENTAL PLAN 2013

For: Proposed Additions to Detached Garage
At: 39a Cutler Road, Clontarf
Applicant: Mr & Mrs Chadban

Introduction

This Clause 4.6 variation is a written request to vary a development standard to support a development application for construction of additions to an existing detached garage at **39A Cutler Road, Clontarf**.

The specified maximum floor area for the site under Clause 4.4 of the Manly Local Environmental Plan 2013 (the LEP) is 0.4:1.

The development proposes a departure from this numerical standard and proposes a maximum floor area of 257.3m² or 0.545:1.

The floor area requirement is identified as a development standard which requires a variation under Clause 4.6 of the Manly Local Environmental Plan 2013 (the LEP) to enable the granting of consent to the development application.

4.4 Floor Space Ratio

- (1) *The objectives of this clause are as follows—*
- (a) *to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*
 - (b) *to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,*
 - (c) *to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*
 - (d) *to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,*
 - (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.*
- (2) *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 indicated that the maximum floor space ratio that applies to the site is 0.4:1.

The proposal results in a maximum floor space ratio of 0.545:1, a non-compliance of 68.5m² or a 36% variation.

It is noted that the proposed building envelope has been approved under DA2018/1674 and this application merely seeks to change the approved use. An extract of both the approved plans and proposed plans depicting the building envelopes are depicted below.

This 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 and Environment Court. It is concluded that the variation is well founded.

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 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 and is titled Development Standards to be complied with. I am of the opinion that the wording of the clause is consistent with previous decisions of the Land & Environment Court in relation to matters which constitute development standards.

Clause 4.3 does not contain a provision which specifically excludes the application of clause 4.6 and vice versa.

I consider that clause 4.4 is a development standard to which clause 4.6 applies.

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:

(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 *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC118, Preston CJ sets out ways to demonstrate that compliance with a development standard is unreasonable or unnecessary, although he emphasised that his list was not exhaustive. 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 or*
- *The zoning of the land was unreasonable or inappropriate such that the standards for that zoning are also unreasonable or unnecessary.*

The proposal provides additions to the existing detached garage that are consistent with the development previously approved (DA2018/1674). The proposal is compatible with the existing surrounding development in the immediate vicinity. The resultant bulk is compatible with the existing surrounding development which is characterised by two and three storey dwellings.

It is unreasonable and unnecessary to require strict compliance with the development standard given the existing surrounding development and the circumstances of the site. In this regard the Manly Development Control Plan at '4.1.3.1 Exceptions to FSR for Undersized Lots' provides:

On existing sites in Residential LEP Zones (including E3 & E4) with a site area less than the minimum lot size required on the LEP Lot Size (LSZ) Map, Council may consider exceptions to the maximum FSR under LEP clause 4.6 when both the relevant LEP objectives and the provisions of this DCP are satisfied. See LEP clause 4.6(4)(a).

The undersized nature of a lot is a matter that Council may consider in determining whether 'compliance with the standard is unreasonable or unnecessary in the circumstances of the case' and 'there is sufficient environment planning grounds to justify contravening the development standard' under LEP clause 4.6(3). a) The extent of any exception to the LEP FSR development standard pursuant to LEP clause 4.6 in this plan is to be no greater than the achievable FSR for the lot size indicated in Figure 30 - Extent of FSR Variation for Undersized Lots

The subject is identified as within 'R' on the Lot Size Map which requires a minimum allotment size of 750m² and as such the DCP permits a variation with the calculation of FSR based upon a lot size of 750m². In this regard based upon a lot size of 750m² the maximum floor space is 300m². The proposal provides for a maximum floor area of 257.3m² which complies.

The objectives of the Floor Space Ratio standard are set out in clause 4.4(1) of Manly Local Environmental Plan 2013:

- to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*
- to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,*
- 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.*

The proposal provides for additions to an existing detached garage. Due to the slope of the site, existing vegetation and the wide road verge the subject site is not visible from the street. The proposed works will not have any impact on the streetscape. The proposal is consistent with objective (a).

The proposal provides for a structure that presents as two storeys as viewed from the front elevation. The development does not obscure any landscape or townscape features. The proposal complies with objective (b).

The proposal provides for side setbacks of at least 900mm to ensure appropriate visual separation. As noted above the proposal is not visible from the streetscape. The proposal complies with objective (c).

The proposal will not have adverse impacts on the adjoining land or the public domain. As noted above the proposal will not be visible from the public domain as it is well screened from the street by the slope, vegetation and wide road verge. The proposal will not have adverse impacts on the adjoining properties. This has been achieved by locating only an ancillary living area on the ground floor and an office/study on the upper level. The proposal does not result in any unreasonable solar access. The proposal complies with objective (d).

Objective (e) is not applicable.

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

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.

In this regard the following has been considered: -

- The non-compliance is a direct result of the reduced allotment size. Strict compliance would hinder any further development of the site and not enable the property to be developed in a way that is compatible with the existing surrounding development.
- The proposed envelope/footprint has been previously approved (DA2018/1674) and this consent remains valid. This application does not seek to further increase the approved FSR, rather it seeks to change the use from a secondary dwelling to a studio. The proposed floor area has been approved under DA2018/1674, and this application does not alter the approved floor area.

- The proposal does not result in any unreasonable loss of privacy or solar access to the adjoining properties.

When having regard to the above, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for maximum floor area.

The existing surrounding development and the desired architectural outcome combine to produce a meritorious development despite the minor numerical variation to the floor area requirement.

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 Buildings development standard, which is demonstrated in the analysis in section 3.

The proposed development is also consistent with the R2 Low Density Residential Zone objectives in Manly Local Environmental Plan 2013.

The objectives of the R2 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.*

Comments

The development proposal includes the construction of alterations/additions to an existing garage. The proposal is considered to meet the objectives of the R2 zone for the following reasons:

- Providing minor alterations to the existing detached garage to provide for a additions ancillary to an existing dwelling which are permissible in this zone.
- Retaining the existing amenity to the surrounding residences.
- Providing a development that is compatible in terms of bulk, scale and height to surrounding properties.

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.

The non-compliance with the Floor Space Ratio does not require the concurrence of the Planning Secretary. This is no impediment to the grant of consent by the Council.

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.

CONCLUSION

The development proposes a departure from the maximum floor area development standard. The proposal produces an appropriate development outcome. The variation to the floor area is a direct result of the reduced allotment size. The DCP specifically indicates that variation to the FSR Development Standard can be sought where the allotment size is below the minimum required by the LEP, as is the case in this instance. This non-compliance will not result in any detrimental impact to the surrounding properties or the character of the locality. Furthermore, the overall design is of good architectural quality and the development satisfies the zone objectives and the objectives of the development standard. The proposal is not visible from the street and provides for a bulk and scale that is compatible with the existing surrounding development.

As there is no material impact on adjoining properties or the public domain arising from the variation to the floor area development standard and the objectives of the control are satisfied, it is considered that strict compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.

Therefore, we request that council support the variation on the basis that there are sufficient environmental planning grounds to justify a variance to the development standard.

Natalie Nolan

Grad Dip (Urban & Regional Planning) Ba App Sci (Env Health)

Nolan Planning Consultants

April 2022