58 ALEXANDER STREET, MANLY
CARPORT STRUCTURE ANCILLARY TO EXISTING SEMI-DETACHED DWELLING

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

For: Detached Carport Structure Ancillary to an Existing Semi-Detached Dwelling
At: 58 Alexander Street, Manly
Owner: Mr & Mrs Ravesteijn
Applicant: Mr & Mrs Ravesteijn

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 development standard as described in Clause 4.4 of the Manly Local Environmental Plan 2013 (MLEP 2013).

2.0 Background

Clause 4.4 of MLEP sets out the maximum floor space ratio of a building as follows:

(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 specifies a maximum FSR of 0.6:1.

The proposed alterations and additions to the existing dwelling house provides for a floor space ratio of 0.679:1. This is a non-compliance of 21.79m^2 or a variation of 13.1%.

The proposal is considered acceptable and as discussed further within this request, there are sufficient environmental planning grounds to justify contravening the development standard.

The controls of Clause 4.3 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

Is Clause 4.3 of the LEP a development standard?

(a) The definition of "development standard" in clause 1.4 of the EP&A Act means standards fixed in respect of an aspect of the development and includes:

"(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,."

(b) Clause 4.4 relates to the maximum floor space ratio of a building. Accordingly, Clause 4.4 is a development standard.

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 Standard Instrument 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 relied on 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 decision of Chief Justice Preston in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in ***RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 at [1], [4] & [51]*** where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

"In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In
particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard "achieve better outcomes for and from development".
If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of the LEP provides:

> *(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.*

Clause 4.4 (the Maximum Floor Space Ratio Control) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of the LEP.

Clause 4.6(3) of the LEP provides:

> *(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.*

The proposed development does not comply with the maximum floor space ratio development standard pursuant to Clause 4.4 of MLEP which specifies a maximum floor space ratio of 0.6:1 in this area of Manly Council.

The proposed detached carport and storage ancillary to the existing semi-detached dwelling will result in a floor space ratio of 0.679:1, resulting in a non-compliance of 21.79m^2 or a variation of 13.1%.

The non-compliance with the floor space ratio controls is a result of providing a storage space within the roof form, with the storage included in the definition of gross floor area. The existing dwelling is modest and there is very little storage currently on site. The site is constrained being identified as flood prone land and as such the carport cannot be enclosed to enable additional storage, hence the storage level above.

Strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

Clause 4.6(4) of MLEP provides:

> *(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 Planning Secretary has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority.

The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b).

The second precondition requires the consent authority to be satisfied that that the concurrence of the Planning Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 21 February 2018, attached to the

Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of the LEP provides:

> *(5) In deciding whether to grant concurrence, the Secretary 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 Secretary before granting concurrence.*

Council has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), and should consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude Clause 4.3 of the LEP from the operation of clause 4.6.

The specific 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 allow for much needed storage on site, where it cannot be provided within the ground level of the carport (due to flood restrictions). The non-compliance results in a development that is compatible with the existing surrounding development in this portion of Rolfe Street and 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.*

5.0 The Nature and Extent of the Variation

5.1 This request seeks a variation to the maximum floor space ratio standard contained in Clause 4.4 of MLEP.

5.2 Clause 4.4 of MLEP specifies a maximum floor space ratio of 0.6:1 in this area of Manly.

5.3 The proposal provides for construction of a detached carport structure with storage over and associated works ancillary to the existing semi-detached dwelling. The works proposed result in a development that is compatible with the existing surrounding development in this portion of Rolfe Street. The non-compliance is a result of the flood status of the property and need to provide a secure storage area on site that is compatible with the form of the existing surrounding development.

6.0 Relevant Caselaw

6.1 In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

> *17. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
> *18. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
> *19. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46]*
> *20. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard*

is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*

22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

6.2 The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is Clause 4.4 of MLEP a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

   (a) compliance is unreasonable or unnecessary; and

   (b) there are sufficient environmental planning grounds to justify contravening the development standard

3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of Clause 4.4 and the objectives for development for in the R1 zone?

4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes Clause 4.4 of MLEP?

7.0. Request for Variation

7.1 Is compliance with Clause 4.4 unreasonable or unnecessary?

(a) This request relies upon the 1st way identified by Preston CJ in Wehbe.

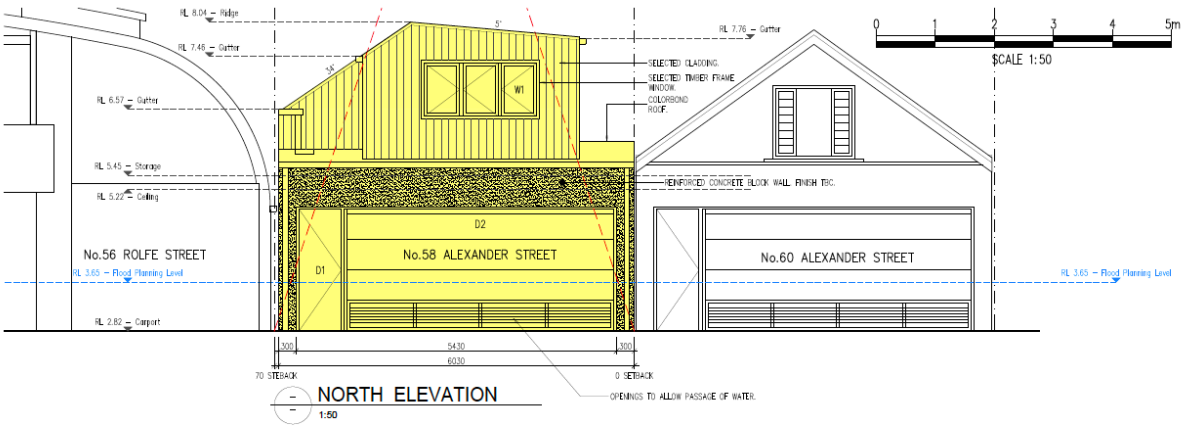
(b) The first way in Wehbe is to establish that the objectives of the standard are achieved.

(c) Each objective of the maximum floor space ratio development standard, as outlined under Clause 4.4, and reasoning why compliance is unreasonable or unnecessary, is set out below:

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

The proposed works are not visible from Alexander Street and therefore there is no impact on this existing streetscape.

The proposed works are located to the rear of the site and front Rolfe Street. Rolfe Street is currently characterised as a service lane with the majority of properties comprising parking structures of one and two storeys with nil setbacks to Rolfe Street. The proposed development, which incorporates a carport structure with storage above is compatible with the established streetscape. The upper level is appropriately setback from the Rolfe Street frontage and the side boundaries. The architectural plans provide for a Rolfe Street streetscape view demonstrating that the proposal provides an appropriate outcome for the site.



(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,

The site is relatively level and the proposed works will not obstruct any landscape or townscape features.

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

The proposal provides an appropriate relationship to the adjoining property and character of the area. The upper level is well articulated on all facades to minimise bulk and scale and ensure sufficient separation to the adjoining properties. There is a consistent form of development in this portion of Rolfe Street with the ground level of the parking structures provided with nil setbacks to both side boundaries and the street frontage.

The proposal does not require the removal of any protected vegetation and has been designed to ensure the retention of the existing street tree in Rolfe Street. The proposal will not disrupt the lansdscape character of the area.

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

The proposed carport structure, and in particular the non-compliance with the floor space ratio controls, will not result in adverse environmental impacts. The carport and storage structure is a non-habitable structure with no windows on the upper side elevations and therefore will not reduce privacy of the adjoining properties. Shadow diagrams have been provided which indicate only minimal additional shadow. The proposal complies with Council's controls in this regard. The proposal will not have any adverse impacts on the public domain.

(e) to provide for the viability of Zone E1 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.

This objective is not relevant to the proposal.

The non-compliance with the floor space ratio control is a result of requiring sufficient storage on site. The carport is an open style structure that is not secure or weatherproof and cannot be used for storage/ To provide a fully enclosed garage that could be utilised for storage would require an increased floor level to comply with the flood levels. This would be well elevated and complying vehicular access could not be achieved without impact on the Council's road reserve.

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

In Initial Action the Court found at [23]-[24] that:

> *23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
>
> *24. The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard".*
> *The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

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

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal seeks to provide off street parking and secure and weatherproof storage on site. The site is affected by flooding and as such the carport structure cannot be fully enclosed at ground floor level, thereby requiring additional storage above. The parking and storage area as proposed promotes the orderly & economic use of the land (cl 1.3(c)).
- The carport and storage structure has been designed to complement the existing character of this portion of Rolfe Street

and does not reduce the amenity of the adjoining properties. Therefore, the proposal will promote good design (cl 1.3(g)).

- The proposal provides for an appropriate bulk and scale that when viewed from Rolfe Street is compatible with the existing surrounding development and strict compliance is therefore unreasonable.

Further, the proposed works do not have any detrimental impact on the adjoining properties for the following reasons:

- The proposed structure is non-habitable and does not provide for any windows on the side elevations of the upper level. Therefore, the proposal does not reduce the current level of privacy provided to the adjoining properties.
- The site is orientated north south and shadow diagrams have been provided indicating only minimal additional shadow.
- The proposal does not require the removal of any protected vegetation and the landscaped character of the locality is retained.
- All collected stormwater will be discharged to the existing stormwater system. The proposal will not result in any additional stormwater runoff to the adjoining properties.

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the flood restrictions which prohibits a secure garage/storage area at ground level. Further, the resultant development is compatible within the immediate locality which is characterised by large parking structures with nil setbacks to the street frontage.

It is noted that in *Initial Action,* the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

The area of non-compliance does not result in any detrimental impact and provides for secure storage area. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

7.4 Is the proposed development in the public interest because it is consistent with the objectives of Clause 4.4 and the objectives of the R1 General Residential Zone?

(a) Section 4.2 of this written request suggests the 1st test in Wehbe is made good by the development.

(b) Each of the objectives of the R1 General Residential Zone and the reasons why the proposed development is consistent with each objective is set out below.

I have had regard for the principles established by Preston CJ in *Nessdee Pty Limited v Orange City Council [2017] NSWLEC 158* where it was found at paragraph 18 that the first objective of the zone established the range of principal values to be considered in the zone.

Preston CJ also found that "*The second objective is declaratory: the limited range of development that is permitted without or with consent in the Land Use Table is taken to be development that does not have an adverse effect on the values, including the aesthetic values, of the area. That is to say, the limited range of development specified is not inherently incompatible with the objectives of the zone".*

In response to *Nessdee,* I have provided the following review of the zone objectives:

It is considered that notwithstanding the variation of to the floor space ratio control, the resultant building as proposed will be consistent with the individual Objectives of the R1 General Residential Zone for the following reasons:

- ***To provide for the housing needs of the community.***

  The proposal provides for a detached carport and storage structure. Secure weatherproof storage is required to suit the residents and there is currently very limited storage on site. As detailed previously, the proposal, and in particular the area of non-compliance, does not result in any loss of amenity to the adjoining properties.

The non-compliance is a result providing for a roof form that is consistent with the roof form of the existing dwelling. A complying roof form results in a built form that is not appropriately balanced and destroys the architectural character.

- ***To provide for a variety of housing types and densities.***

  The proposal provides for works ancillary to an existing semi-detached dwelling. Semi-detached dwellings are a permissible use in the zone and the proposed works are compatible.

- ***To enable other land uses that provide facilities or services to meet the day to day needs of residents.***

  This objective is not relative to the proposal.

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

7.5 Has council obtained the concurrence of the Director-General?

The Council can assume the concurrence of the Director-General with regards to this clause 4.6 variation.

7.6 Has the Council considered the matters in clause 4.6(5) of MLEP?

(a) Clause 4.6(5) has been repealed.

8.0 Conclusion

This development proposed a departure from the maximum floor space ratio development standard, with the proposed works providing for a floor space ratio of 0.679:1.

The non-compliance is a result providing for secure weatherproof storage on site to service the existing dwelling. Given the flood restrictions the carport structure cannot be fully enclosed to serve as a secure and weatherproof storage area.

The extent of the variation to the floor space ratio control does not result in any significant impact on the amenity, views and outlook for the neighbouring properties.

This written request to vary to the maximum floor space ratio standard specified in Clause 4.4 of the Manly LEP 2013 adequately demonstrates that 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.

Natalie Nolan
Town Planner