

Memo

To: Development Determination Panel

From: Alex Keller - Principal Planner

Date: 25 May 2021

Subject: DA2020/1585 Construction of a dwelling house – Clause 4.6
Variation - Floor Space Ratio – Manly Local Environmental Plan
(LEP) 2013

Record Number: 2021/374394

Purpose

The purpose of this Memo is to address the Assessment Report details (including the Development Standards Compliance Table) regarding the variation to the Floor Space Ratio (FSR) with respect to the stated compliance with Clause 4.1.3.1 of the *Exceptions to FSR for Undersized Lots of the Manly Development Control Plan*.

A detailed Clause 4.6 assessment is provided to address the Manly LEP non-compliance in respect of “Area B” and exceptions permitted by the sub-zone “Area U” regarding the applicable FSR for the Manly planning controls.

Background

On existing sites in certain 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 Manly LEP Clause 4.6 when both the relevant LEP objectives and the provisions of the Manly DCP are satisfied.

In this case the Manly LEP requires compliance with 0.4:1 FSR based on the actual site area of 626.8sqm which limits the proposed dwelling floor area to 250.72sqm. The amended design has a floor area of 300sqm and therefore under the LEP varies the FSR by 49.28sqm or 19.6% with an FSR of 0.47:1 for the existing lot size.

Pursuant to Clause 4.1.3.1 the proposal complies with the FSR numerical exception allowed for area “U” based on a 750sqm lot size category being 0.4:1 ratio that allows 300sqm floor area.

Assessment

4.6 Variation to Floor Space Ratio

Description of non-compliance:

Development standard:	0.4:1 (Existing site area of 626.8sqm)
Requirement:	250.72 sqm
Proposed:	0:47:1m (300sqm)
Percentage variation to requirement:	19.6%

Assessment of request to vary a development standard:

The following assessment of the variation to Clause 4.4 - Floor space ratio development standard, has taken into consideration the recent judgement contained within *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

Clause 4.6 Exceptions to development standards:

(1) The objectives of this clause are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

Comment:

Clause 4.4 - Floor space ratio development standard is not expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

(4) Development consent must not be granted for development that contravenes a development standard unless:

- (a) the consent authority is satisfied that:*
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) the proposed development will be in the public interest because it is consistent with*

*the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and
(b) the concurrence of the Secretary has been obtained.*

Clause 4.6 (4)(a)(i) (Justification) assessment:

Clause 4.6 (4)(a)(i) requires the consent authority to be satisfied that the applicant's written request, seeking to justify the contravention of the development standard, has adequately addressed the matters required to be demonstrated by cl 4.6(3). There are two separate matters for consideration contained within cl 4.6(3) and these are addressed as follows:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

Comment:

The Applicant's written request (attached to this report as an Appendix) has demonstrated that the objectives of the development standard are achieved, notwithstanding the non-compliance with the development standard.

In doing so, the Applicant's written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by cl 4.6(3)(a).

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

Comment:

In the matter of *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ provides the following guidance (para 23) to inform the consent authority's finding that the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard:

'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.'

s 1.3 of the EPA Act reads as follows:

1.3 Objects of Act (cf previous s 5)

The objects of this Act are as follows:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental*

planning and assessment,

(c) to promote the orderly and economic use and development of land,

(d) to promote the delivery and maintenance of affordable housing,

(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,

(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),

(g) to promote good design and amenity of the built environment,

(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,

(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,

(j) to provide increased opportunity for community participation in environmental planning and assessment.

The applicant's written request argues, in part:

- *“Section 4.1.3.1 of the Manly DCP 2013, there are exceptions that states an extent of FSR Variation for Undersized Lot which the calculation of FSR for the subject site within the subzone “U” on the LEP LSZ map is based on 750m² lot size and consequently allows for a maximum GFA of 300sqm which the proposal has been amended to comply with by increased side setbacks and reducing the mass of the building.
The proposed FSR is compatible with the site and context of the locality whilst the proposed built form is considered to be reasonable when compared with substantially larger homes, including those opposite the subject site.*
- *Council has endorsed similar FSR under the same planning regime .such as at 47 Castle Circuit, within the same subzone identified as “U” on the LEP LSZ map, and similar site constraints.*
- *The additional FSR does not create a building that dominates the site or the foreshore area with the wide public reserve to the west (foreshore reserve) and east (road reserve) and deep soils zones are kept around the lower slopes of the building.*
- *In this regard, the applicant's written request has demonstrated that the proposed development is an orderly and economic use and development of the land, and that the structure is of a good design that will reasonably protect and improve the amenity of the surrounding built environment, therefore satisfying cls 1.3 (c) and (g) of the EPA Act.*
- *The proposed FSR variation is not considered to be responsible for any unreasonable bulk or scale impacts.*
- *The FSR deviation is well integrated into the high-quality, articulated design of the proposal and ensures that the built form will contribute positively to the locality*
- *The FSR is associated with an architectural solution that is cohesive and responsive to the substantial gradient of the site whilst being consistent with surrounding properties and correspondent to the corner nature of the site.*
- *The proposed FSR variation is not responsible for any unreasonable adverse impacts to surrounding properties in regard to overshadowing, privacy and view loss.*
- *the proposal has reduced the gross floor area since the Pre-DA stage, particularly on the upper storey whilst also reducing the open terraces and non trafficable roofs in all levels.”*

Therefore, the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development

standard as required by cl 4.6 (3)(b).

Consideration and comment:

- The proposal have been amended in response to submission issues and further detailed assessment considerations made with regard to the Manly DCP and LEP. The subject land is a corner site with a moderately steep slope (including existing excavation) that influence the design response such as floor levels, side and front setbacks, building footprint and future amenity considerations.
- Pursuant to Clause 4.1.3.1 of the DCP the proposal complies with the FSR numerical exception allowed for area "U" based on a 750sqm lot size category being 0:4:1 ratio that allows 300sqm floor area.
- The proposed FSR variation to the LEP standard is considered to be inconsequential under the development control plan standard compliance and is also justified on the basis that a significant proportion of the building is excavated into the hillside whilst the stepped form of the dwelling is compatible with the nature of the surrounding properties.
- The revised design has reduced the FSR by increasing setbacks particularly to the southern boundary, which allows for extending the ground level open space, spatial separation, less bulk, improved privacy and solar access and also increasing the deep soil area.
- The non-compliance to the FSR will not result in the loss of views or outlook from any surrounding public or private place due to the steep topography and westerly aspect adjacent a bushland reserve.
- The non-compliance with the FSR does not have a material impact on tree clearing or bushfire protection due to the Flame Zone category of the site or landscape amenity of the Sydney Harbour Foreshore area.

Therefore, Council is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3).

Clause 4.6 (4)(a)(ii) (Public Interest) assessment:

cl 4.6 (4)(a)(ii) requires the consent authority to be satisfied that:

(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

Comment:

In considering whether or not the proposed development will be in the public interest, consideration must be given to the underlying objectives of the Height of Buildings development standard and the objectives of the R2 Low Density Residential zone. In addressing the public interest the submissions received have been considered including the initial submission and late submission from No.58 Castle Circuit.

Submission issues raised concerning FSR including associated concerns regarding height, number of storey, open space, street setback, rear setback, garage parking, swimming pool, and earthworks are addressed with the report and assessment details. No additional conditions are recommended to those included with the assessment report to the DDP.

An assessment against these objectives is provided below.

Objectives of development standard

The underlying objectives of the standard, pursuant to Clause 4.4 – ‘Floor space ratio’ of the MLEP 2013 are:

(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,

Comment:

The proposed façade has a 1-storey scale, which is well below the permissible height limit of 8.5m, since the road alignment is much higher than the garage level of the building. Whilst occupying approximately 40% of the length of the front boundaries the location of garages and entry points above living areas is a common feature for properties on the low side of the road for very steep land. The floor area distribution of the proposed dwelling allows for retention of water views and is compatible with the sensitive nature of the locality.

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,

Comment:

The proposed FSR does not preclude the development to be sympathetic with the existing bushland and harbour scenic area within the locality. The proposed density and bulk do not dominate the subject site and allow for an integrated landscaping, whilst protecting water views from surrounding properties and public areas.

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

Comment:

The development presents a well articulated built form and includes balconies and non-trafficable garden roofs. Additionally, the proposal includes a high-quality landscaping which assist to ensure a positive visual relationship between the dwelling house and existing character and landscape of the foreshore area. External materials and landscaping selections are responsive to the Flame Zone bushfire protection requirements and therefore the building relies on internal amenity and balcony space more than other properties where flatter urban land exists. The natural site levels and landscape zones will be restored with new native planting and ground covers to replace the existing invasive plants on the site.

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

Comment:

The FSR 0:4:1 variation to the actual site area will not be responsible for any unreasonable loss of privacy, loss of water views or depreciation of amenities and it is noted it complies with the FSR variation allowance prescribed by the DCP for "Area U".

The proposed dwelling will retain adequate level of solar access to the southern neighbour.

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.

Comment:

This objective is not applicable to the dwelling house as the land is not in a business zone.

Zone objectives

The underlying objectives of the R2 Low Density Residential zone are:

- ***To provide for the housing needs of the community within a low-density residential environment.***

Comment:

The FSR variation does not offend this objective of the zone in that the use of the remains, for detached housing in a low density environment, and is provided within a landscape setting that is compatible with the height, density, and site constraints that influence the pattern of surrounding development.

It is considered that the development satisfies this objective.

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

Comment:

This clause is not relevant to the proposal as no other (non-residential services or facilities) are proposed.

It is considered that the development satisfies this objective.

Conclusion:

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the R2 Low Density Residential zone.

Clause 4.6 (4)(b) (Concurrence of the Secretary) assessment:

Clause 4.6(4)(b) requires the concurrence of the Secretary to be obtained in order for development consent to be granted.

Planning Circular PS 18-003 dated 21 February 2018, as issued by the NSW Department of Planning, advises that the concurrence of the Secretary may be assumed for exceptions to development standards under environmental planning instruments that adopt *Clause 4.6 of the Standard Instrument*.

In this regard, given the consistency of the variation to the objectives of the zone, and in accordance with correspondence from the Deputy Secretary on 24 May 2019, Council staff under the delegation of the *Development Determination Panel*, may assume the concurrence of the Secretary for variations to the Floor space ratio Development Standard associated with a single dwelling house (Class 1 building).

Recommendation:

The Development Determination Plan include consideration of the above assessment of the floor space ratio with the determination of development application No.DA2020/1585 for the construction of a dwelling house and swimming pool at No.60 Castle Circuit, Seaforth.