GPL Planning

Clause 4.6 variation request to the ‘floor space ratio’ development standard under Manly Local Environmental Plan 2013

19 Manly Road, Seaforth

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1. INTRODUCTION

This statement relates to a development application to undertake alterations and first-floor additions to an existing single-storey dwelling house at No.19 Manly Road, Seaforth (the subject site) and seeks a variation to a development standard prescribed by the Manly Local Environmental Plan 2013.

A variation is sought pursuant to Clause 4.6 under the Manly LEP in relation to the "***floor space ratio***" development standard applicable to the subject development site, being 0.4:1, pursuant to Clause 4.4(2) under the Manly LEP.

This request has been prepared in accordance with the Department of Planning & Environment (DP&E) Guideline *Varying Development Standards: A Guide, August 2011* and has incorporated the relevant principles identified in the following judgements:

1. *Ex Gratia P/L v Dungog Council (NSWLEC 148)*
2. *Wehbe v Pittwater Council [2007] NSWLEC 827*
3. *Botany Bay City Council v Saab Corp* [2011] NSWCA 308
4. *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC*
5. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 ('Four2Five No 1')*
6. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*
7. *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 ('Four2Five No 3')*

In this report, we have explained how flexibility is justified in this case in terms of the matters explicitly required by Clause 4.6.

This report also addresses additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 and the assumed concurrence of the Secretary.

2. WHAT IS THE ENVIRONMENTAL PLANNING INSTRUMENT (EPI) THAT APPLIES TO THE LAND?

The Environmental Planning Instrument (EPI) to which this variation relates is the Manly Local Environmental Plan 2013.

3. WHAT IS THE ZONING OF THE LAND?

In accordance with Clause 2.2 of the WLEP the site is zoned R2 – Low Density Residential.

4. WHAT ARE THE OBJECTIVES OF THE ZONE?

The land use table under the Manly LEP provides the following objectives for the R2 zone:

- *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.*

The proposal meets the relevant objectives for development in the R2 zone, it will maintain the provision of low-density housing which meets the needs of the community in a residential environment and which comprises a consistent form of residential density.

5. WHAT IS THE DEVELOPMENT STANDARD BEING VARIED?

The development standard being varied is the "floor space ratio" standard.

6. UNDER WHAT CLAUSE IS THE DEVELOPMENT STANDARD LISTED IN THE EPI?

The development standard being varied is prescribed under Clause 4.4(2) of the Manly LEP. An extract is below:

> *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.*

In accordance with Floor Space Ratio Map, the subject site falls within “Area B” which permits a maximum floor space ratio of 0.4:1 (or 250.4m^2).

7. WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

The objectives of the development standard are set out below:

(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.

8. WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD?

Clause 4.4(2) restricts the "floor space ratio" for a dwelling house to a maximum of 0.4:1m.

9. WHAT IS THE PROPOSED NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE DA AND THE VARIATION SOUGHT?

As noted above, clause 4.4(2) restricts the "floor pace ratio" for a dwelling house to a maximum of 0.4:1. The maximum floor space ratio of the building being sought under this DA is 0.48:1.

The maximum variation being sought is 51m^2 (or 20%).

10. MATTERS TO BE CONSIDERED UNDER CLAUSE 4.6.

The objectives and provisions of clause 4.6 are as follows:

"***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.

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

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

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

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

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Director-General has been obtained.

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

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

(b) the public benefit of maintaining the development standard, and

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

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

***Note.** When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition or Zone R5 Large Lot Residential.*

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(ca) clause 6.15,

(cb) a development standard on land to which clause 6.19 applies.

The development standard in clause 4.4A(b) is not "expressly excluded" from the operation of clause 4.6.

Objective 1(a) of clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8).

This submission will address the requirements of subclauses 4.6(3) and (4) in order to demonstrate that the exception sought is consistent with the exercise of "*an appropriate degree of flexibility*" in applying the development standard, and, is therefore consistent with objective 1(a). In this regard, it is noted that the extent of the discretion afforded by subclause 4.6(2) is not numerically limited as compared with the development standards referred to in subclause 4.6(6).

The balance of this request will be divided into the following sections, each dealing with the nominated aspect of clause 4.6:

- compliance is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a));
- consistency with the development standard objectives and the zone objectives (clause 4.6(4)(a)(ii)); and
- sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)).

10.1 Compliance is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a))

In *Wehbe V Pittwater Council (2007) NSW LEC 827* Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

> " *An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The 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."*

However, in *Four2Five v Ashfield Council* [2015] NSWLEC 90, the Land and Environment Court said that whether something was 'unreasonable or unnecessary' is now addressed specifically in clause 4.6(4)(a)(ii), with separate attention required to the question of whether compliance is unreasonable or unnecessary.

Under *Micaul Holdings Pty Limited v Randwick City Council (2015)*, it was stated that the consent authority needs to be satisfied that the written request adequately demonstrates that the strict compliance with the standard is unreasonable or unnecessary in the circumstances of the case. The consent authority also needs to be satisfied that the development will be 'consistent' with the objectives of the zone and development standard.

Consequently, while the objectives of the standard are achieved despite its non-compliance, this request goes further, it seeks to demonstrate that requiring strict adherence to the standard would be 'unreasonable or unnecessary' for reasons that are additional to mere consistency with the development standard.

Preston CJ in the *Wehbe V Pittwater Council* judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
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;*
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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Additionally, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308, the Court of Appeal said that a requirement may be unreasonable when '*the severity of the burden placed on the applicant is disproportionate to the consequences attributable to the proposed development*" (at paragraph 15).

Having regard to all of the above, the five ways described in *Wehbe* are therefore appropriately considered in this context, as follows:

10.1.1 *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*

The objectives of the standard are set out in **Section 7** of this statement. A response to each of the objectives is provided below:

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

The areas of the building that exceeds the floor space standard have been setback from the rear elevation of the building and are sited within the maximum permissible height requirements of the LEP. Contextually, the proposed built element which exceeds the development standard does not contribute to an excessive bulk or scale and is entirely consistent with the existing and desired future character of this part of the Saforth which consists of enlarged two-three storey residential buildings. The proposed variation of the standard does not affect achievement or consistency with this objective.

(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 parts of the building that are above the FSR standard are suitably setback from the relevant property boundaries and are generally sited on top of the footprint of the existing building. Therefore, these elements do not contribute to perceivable bulk as viewed from the adjoining properties or the public domain and the proposal maintains a scale as anticipated for the area. The proposed variation of the standard does not affect achievement or consistency with this objective.

The height of buildings control together with the floor space ratio control are a development standard which are a numerical measure of development density.

While the proposal results in an exceedance of the “floor space ratio” only, the proposal remains otherwise entirely compliant with the maximum height of buildings control under cl.4.3(2) of the Manly LEP which is 8.5m.

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

As noted above,

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

The additional proposed floor space of approximately 7m^2 will not contribute towards an undesirable environmental amenity of neighbouring properties. The siting and location of the additional floor space will not result in an adverse impact upon the amenity of the broader locality.

(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.

N/A – the subject site is located within an existing residential zone.

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

We do not rely on this reason. The underlying objective or purpose of the standard is relevant to the development and is achieved.

10.1.3 *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

We do not rely on this reason.

10.1.4 *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;*

We do not rely on this reason.

10.1.5 *The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

We do not rely on this reason.

10.2 Sufficient environmental planning grounds to justify the contravention (clause 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, as discussed above, it is considered that there is an absence of any significant adverse impacts of the proposed non-compliance upon the amenity currently enjoyed in neighbouring properties, or, upon the character of the area and upon the amenity therein.

In *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* Preston CJ stated in paragraph 34

> "…. *establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary*."

On “planning grounds” and in order to satisfy that the proposal meets objective 1(b) of clause 4.6, in that allowing flexibility in the particular circumstances of this development will achieve “*a better outcome for and from development*”, as previously discussed:

- the development allows for the use of the site for low density housing;
- it will enhance the existing streetscape;
- it will maintain the amenity for future occupants of the site and minimise impacts upon adjoining properties;
- the proposal maintains an overall finished built form which is appropriate for the site and accordingly the floor space breach is not associated with an excessive built form; and
- flexibility in this instance will allow for the site to be developed with no discernible impacts beyond a fully compliant scheme.

Returning to Clause 4.6(3)(a), in *Wehbe V Pittwater Council (2007) NSW LEC 827* Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

> “ *An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The 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.”*

The judgement goes on to state that:

> *“ The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”*

Having regard to all of the above, it is our opinion that compliance with the “floor space” development standard is unnecessary in the circumstances of this case for the following reasons:

- The overall height of the proposal remains compliant with clause 4.3(2) of the Manly LEP and fulfils all of the application objectives under clause 4.3(1);
- The additional non-compliant floor space is sited within the existing approved footprint and bulk of the dwelling which will have an acceptable impact upon adjoining properties and as viewed from adjoining properties and the public domain; and
- The proposal fulfils the objectives of that standard and the zone objectives as previously described herein.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of clause 4.6(3) are satisfied.

10.3 Is the variation in the public interest?

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless 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.

The objectives of the zones, as demonstrated above, as well as the objectives for the standard, have been adequately satisfied where relevant. Therefore, the variation to the floor space ratio standard is considered to be in the public interest.

10.4 Matters of state or regional significance (cl. 4.6(5)(a))

There is no prejudice to planning matters of State or Regional significance resulting from varying the development standard as proposed by this application.

10.5 The public benefit of maintaining the standard (cl. 4.6(5)(b))

Pursuant to *Ex Gratia P/L v Dungog Council (NSWLEC 148),* the question that needs to be answered is "*whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development*".

There is no public benefit in maintaining strict compliance with the development standard in this case given that there are no unreasonable impacts that will result from the variation to the floor space ratio standard and hence there are no public disadvantages.

We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will have an overall public benefit.

11. CONCLUSION

As demonstrated above, the development proposal will be in the public interest because it is consistent with the objectives of the floor space ratio standard and the objectives of the R2 zone.

In the context of other requirements of Clause 4.6, there are no matters of State or regional planning significance which are raised by the proposed development.

This written request for variation of the development standard has considered the sufficiency of environmental planning grounds to justify the variation on the basis that compliance with the standard would be unreasonable and unnecessary in the circumstances of this particular case.

Despite the proposal's non-compliance with the maximum floor space ratio, the proposed development meets the objectives of the standard and the objectives of the R2 zone. The proposed development will remain compatible with the surrounding low-density residential land uses and will remain consistent with the desired future character of the surrounding area.

Accordingly, for the reasons stated herein, a request is made that the consent authority approve the variation to the "floor space ratio" development standard as it currently applies to the site.

If you require any additional information or clarification of any maters raised in this response, please contact the Applicant in the first instance or George Lloyd at GPL Panning on 0423 128 131.

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