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The General Manager
Northern Beaches Council
1 Belgrave Street
MANLY NSW 2095

Dear Sir/Madam,

89 Cutler Road, Clontarf

Clause 4.6: Exceptions to Development Standards

Floor Space Ratio (Clause 4.4) –Manly Local Environmental Plan 2013

1. Introduction

Clause 4.4 of Manly Local Environmental Plan (MLEP) 2013 relates to the maximum floor space ratio (FSR) requirements and states that “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 stipulates that the maximum FSR for 89 Cutler Road, Clontarf is 0.4:1.

The architectural plans submitted with the Development Application at 89 Cutler Road, Clontarf for the “alterations and additions to existing dwelling” indicate that the proposed development has a GFA of 199.26 square metres, and a subsequent floor space ratio (FSR) 0.52:1, resulting in a 30% variation to the development standard and non-compliance of 45.98 square metres.

The proposal is of a reasonable scale and provides a high quality and durable dwelling house development which assists to meet the high demand for housing needs in the Clontarf locality. The development is commensurate in scale and character with other properties in the streetscape. The variation results in the substantial increase in amenity for the subject site without producing any adverse impacts on the privacy, views, solar access and overall amenity of surrounding properties.

2. Clause 4.6

An application to vary a development standard can be made under Clause 4.6 of MLEP 2013.

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

Clause 4.6(3) specifies that:

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.

Clause 4.6(4) specifies that:

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.

These matters are considered below.

3. Justification of proposed variance

Samadi v Council of the City of Sydney [2014] NSWLEC 1199 provides jurisdictional guidance on the assessment of variations under Clause 4.6.

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)).’

4. Precondition 1 – Consistency with zone objectives

The land is located in the E3 – Environmental Management zone under the Manly Local Environmental Plan 2013.

The objectives of the zone are:

- *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*
- *To provide for a limited range of development that does not have an adverse effect on those values.*
- *To protect tree canopies and provide for low impact residential uses that does not dominate the natural scenic qualities of the foreshore.*
- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*
- *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*
- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

The proposed development is for house alterations and additions in an appropriate and acceptable scale. The proposal does not impact upon the areas of special ecological, scientific, cultural or aesthetic values. The subject site remains to be used as a residential dwelling house and the proposal does not increase the number of dwelling. No trees will be removed as a result of the proposal. Instead, new landscaping area and planters will be added to introduce a higher variety of

flora species onsite. The proposed height and bulk of the building has been carefully designed that it will pose nominal impact to the existing vegetation, topography and surrounding land uses.

The variation to the floor space ratio does not render the development incompatible with the zone objectives, in accordance with the approach of the former Chief Judge, Justice Pearlman in *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21, in Paragraph [27]:

‘The guiding principle, then, is that a development will be generally consistent with the objectives, if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, nor even that it is compatible.’

5. Precondition 2 – Consistency with the objectives of the standard

The objectives of the floor space ratio controls as specified in Clause 4.4 are:

- 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.*

The variation is supportable in relation to the aforementioned objectives.

Objective (a) – The proposed bulk and scale of the development is considered to be acceptable and consistent with the existing streetscape. Due to the sloping nature of the site and the fact that most proposed alterations take place behind the front façade, the new works would not impact the streetscape as they are screened by the building façade. The only new changes visible to the street are the new privacy screens and the new concrete slab. These changes are minimal and do not impact the presentation of the building to Cutler Road.

Objective (b) – The building density and bulk are regulated to minimise the impact of new developments to important landscape and townscape features. It is understood that the building height and FSR does not comply with the controls as stipulated in MLEP 2013. However, the site constraints should be considered when assessing the noncompliance. The site slopes from the

street to the rear of the property by approximately 10 metres. In order to support the building, structural walls are to be erected to ensure the structural soundness of the dwelling. The noncompliance does not result in any adverse impacts to the surrounding landscape or important townscape features.

Objective (c) – The proposal is considered compatible with its context as:

- The development is consistent with the scale and character of development in the locality. The bulk and scale of the development is reasonable and does not visually dominate neighbouring properties.
- The proposed 30% variation from the maximum FSR is minor in comparison to nearby sites. The below table demonstrates that properties within the same locality with E3 – Environmental Management zoning who exceed their maximum FSR, as stipulated by Clause 4.4 of the MLEP 2013. This highlights that the area is characterised by similar densities to that of the proposal.

Site address	Extent of Variation from Maximum FSR
98 Cutler Road, Clontarf	115%
88 Cutler Road, Clontarf	70%
74 Cutler Road, Clontarf	52.5%
65 Cutler Road, Clontarf	42.5%
92 Cutler Road, Clontarf	12.5%
79 Cutler Road, Clontarf	10%
77 Cutler Road, Clontarf	7.5%

Table 1 – Nearby R3 – Medium Density Residential zoned properties with approved maximum FSR variation. Information derived from the Planning Register 2013 – 2018 available on Waverley Council's website.

Objective (d) – The development results in no unreasonable adverse impacts on adjoining properties. The development does not impact any neighbouring residential developments in relation to solar access or privacy. There is no view loss impact. Subsequently the development does not detract from the desired future character of the locality.

Objective (e) – Not applicable.

6. Precondition 3 – To consider a written request that demonstrates that compliance with the development standards is unreasonable or unnecessary in the circumstance of the case.

Wehbe vs Pittwater Council [2007] NSWLEC 827 establishes the five-part test for determining whether strict compliance with the development standard is deemed unnecessary or unreasonable. These five ways have recently been re-emphasised in the *FouR3Give Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 cases, by Commissioner Morris in *Mecone Pty Limited v Waverley Council* [2015] NSWLEC 1312 and by Commissioner Tuor in *Moskovich v Waverley Council* [2016] NSWLEC 1015. This approach has recently been upheld in the case of *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386. An appeal on a point of law against this decision by Randwick Council was dismissed by Commissioner Morris on 19 February 2016: *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7.

In the decision of *Wehbe vs Pittwater Council*, Preston CJ established the five ways in which an objection has been well founded and that approval of the objection may be consistent with the aims of the policy:

- ‘the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
- the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
- the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
- 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; and
- the zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in that case would also be unreasonable or unnecessary.’

It is noted that each ‘test’ offers a potential way of demonstrating that compliance is unnecessary or unreasonable in each case. Therefore, not all tests need to be met.

Test	Comment
1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard	Yes — The development meets the objectives of the development standard demonstrated in part 5 of this document.
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary	Not applicable — The purpose of the standard is relevant.

3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable	Not applicable — Compliance does not defeat the underlying object of the standard development; however, compliance would prevent the approval of an otherwise supportable development and prevent the site to better meet the zoning objectives as discussed in part 4 of this document.
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	Not applicable — the development standards of FSR cover a wide area and whilst they are not appropriate to this site, they are appropriate to other sites elsewhere in the locality. There are numerous instances where consents departing from the standard have been approved and others where the standards have been upheld. This is more an indication of the inappropriateness of particular standards to some sites rather than a comment on Council's actions.
5. The zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in that case would also be unreasonable or unnecessary.'	Not applicable — The zoning of the site is not considered to be inappropriate.

Application of the above tests thus demonstrate that strict numerical compliance is unreasonable and unnecessary for this proposal. The proposal satisfies the zone and development standard objectives and therefore strict compliance with the standard is not required in order to achieve compliance with the objectives.

Strict compliance would result in an inflexible application of policy. It does not serve any purpose that should outweigh the positive outcomes of the development and therefore a better planning outcome overall.

The proposed development is consistent with the provisions of orderly and economic development of land, in that it proposes to provide additional indoor space for the dwelling under a logical arrangement. The dwelling house additions are acceptable and reasonable given that the proposal does not impact upon the privacy or overshadows nearby properties' living area.

8. 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

This report is the written request demonstrating that there are sufficient environmental planning grounds to justify deviation from the development standard.

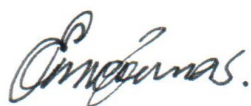
The development has been designed to complement the existing scale and character of surrounding development. The proposal seeks to provide a logical and reasonable land use that will not compromise the amenity of surrounding dwellings. The proposed additions are minor in nature and does not overshadow or result in overlooking of nearby dwellings living area. The nature of the application is to provide a better internal arrangement of the subject dwelling with some associate building upgrades that will pose nominal impact to the natural environment and the biodiversity significance of the area.

The above is considered to represent sufficient environmental planning grounds to justify the contravention of the development standard. It has been demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of this case, and thus the resultant development will be in the public interest.

9. Conclusion

The proposal seeks a variation to the floor space ratio development standard prescribed in Clause 4.4 of Manly Local Environmental Plan 2013.

This submission is considered to adequately address the matters required by Clause 4.6. The proposal meets the assessment criteria set out in Clause 4.6 (3) (a) and (b) and (4) (a). As demonstrated, strict compliance with the prescribed floor space ratio development standard is unreasonable and unnecessary in the circumstances of the case. The proposal is in the public interest because it is consistent with the objectives of the E3 Environmental Management zone and the objectives for Floor Space Ratio standard. There are thus sufficient environmental planning grounds to justify the non-compliance.



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