

NOLAN PLANNING CONSULTANTS

WRITTEN REQUEST PURSUANT TO CLAUSE 4.6 OF MANLY LOCAL ENVIRONMENTAL PLAN 2013

58 ALEXANDER STREET, MANLY

PROPOSED DWELLING ALTERATIONS AND ADDITIONS

For: Dwelling Alterations and Additions
At: 58 Alexander Street, Manly
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 as described in Clause 4.4 of the Manly Local Environmental Plan 2013 (MLEP 2013).

2.0 Background

Clause 4.4 restricts the maximum floor space ratio and refers to the FSR noted within the “*Floor Space Ratio Map*.”

The maximum FSR for this locality is 0.6:1 and is considered to be a development standard as defined by Section 4 of the Environmental Planning and Assessment Act.

The proposed dwelling additions will provide for a floor space of 168.1m² or 0.607:1 which exceeds Council’s maximum floor space by 1.9m² or 1.1% and therefore does not comply with this control.

The controls of Clause 4.4 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

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 LEP should be assessed. These cases are taken into consideration in this request for variation.

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In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 118* have been considered 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 development will achieve a better outcome in this instance as the site will provide for the construction additions to an existing dwelling, which are 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.*

The proposal will provide for the construction dwelling additions/alterations to provide for increased amenity for the site's occupants.

The new works maintain a bulk and scale which is in keeping with the extent of surrounding development, with a consistent palette of materials and finishes, in order to provide for high quality development that will enhance and complement the locality.

The floor space ratio is exceeded by 1.9m² which is negligible. Notwithstanding the non-compliance with the maximum floor space, the new works will provide an attractive residential development that will add positively to the character and function of the local residential neighbourhood.

The proposed additions have been located to mitigate any adverse impacts of overshadowing and loss of view towards any neighbouring properties.

The development will not see any unreasonable impacts on view sharing.

5.0 Onus on Applicant

Clause 4.6(3) provides that:

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.*

This written request has been prepared to support our contention that the development adequately responds to the provisions of 4.6(3)(a) & (b) above.

6.0 Justification of Proposed Variation

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 11* *Samadi v Council of the City of Sydney [2014] NSWLEC 1199*.

Paragraph 27 of the Samadi 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)).

Precondition 1 - Consistency with zone objectives

The site is located in the R1 General Residential Zone. The objectives of the R1 zone 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.*

Comments

It is considered that notwithstanding the extent of the non-compliance with the maximum floor space ratio (1.9m²), the proposed dwelling additions 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 R1 General Residential Zone contemplates residential uses on the land. The housing needs of the community are appropriately provided for in this instance through the proposed dwelling additions which will provide form an appropriate level of family accommodation and in a form which respect the predominant bulk and scale of the surrounding dwellings.

The development will see a very minor noncompliance with the floor space control of only 1.9m². This non-compliance is negligible and will not be discernible. The additions have been designed to respect the character of the locality with the two storey addition located behind the front roof form.

These design features with complementary external finishes will ensure the development minimises the visual impact when viewed from the surrounding public and private areas.

The proposal will be consistent with and complement the existing single dwelling housing (including attached dwellings).

The compatible form and scale of the dwelling additions will meet the housing needs of the community within a single dwelling house which is a permissible use in this residential zone.

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

The proposal provides additions to an existing semi-detached dwelling house. The additions are located behind the front roof form to maintain the character of the locality.

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

The development does not suggest any alternate land uses and this Objective is not directly relevant to the subject single residential proposal.

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

Precondition 2 - Consistency with the objectives of the standard

The objectives of Clause 4.4 are articulated at Clause 4.4(1):

- (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.*

Comments

Despite the minor variation to the maximum floor space ratio, the proposed alterations and additions are considered to be in keeping with the relevant Objectives of Clause 4.4 for the following reasons:

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

The Objective of Clause 4.4 (1)(a) seeks to ensure buildings, by virtue of their bulk and scale are consistent with the desired future streetscape character of the locality.

The surrounding area is predominantly characterised by a mix of single and two storey dwellings both detached and semi-detached.

The proposal seeks to accommodate additional floor area to meet the needs of the occupants. The additions have been designed with the additions located behind the front roof form to minimise disruption to the streetscape. The additions are not dominant in the streetscape and are compatible with other two storey additions.

Further the non-compliance of only 1.9m² is very minor and amending the plans to comply would not serve any purpose or be discernible from the streetscape.

The proposed external colour and materials palette utilises finishes to complement the existing dwelling and the surrounding locality and assists in reducing bulk and scale is further minimised.

(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 proposed additions are located behind the front roof form. The additions do not obscure any important landscape or townscape features. Reduction to comply with the floor space ratio control would not serve any purpose.

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

The proposed additions are located behind the front roof form and provide for a setback ranging from 1.175m and 1.5m to the eastern side boundary. This setback ensures an appropriate visual separation to the adjoining built form. The proposed additions are located over the existing building footprint and do not require the removal of any vegetation.

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

The proposed additions have been designed to minimise impacts to the adjoining properties. This has been achieved by retaining all high use areas on the ground floor and only bedrooms and bathrooms to the upper level. Further, the proposal provides for only highlight windows to the upper side elevation to prevent overlooking. Given the north south orientation of the allotment the proposal will continue to maintain appropriate solar access to the adjoining properties. The proposed additions do not impact on the use/enjoyment of the adjoining 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 site is not within a business zone therefore, this objective does not apply.

Despite the variation to the floor space ratio control which is considered to be negligible (1.9m²), the proposal is generally consistent with the bulk and scale of existing development in the locality.

Accordingly, we are of the view that the proposal is consistent with the objectives of the development standard.

Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

It is unreasonable and unnecessary to require strict compliance with the development standard as the proposal provides for the construction of the dwelling additions.

Council's controls in Clause 4.4 provide a maximum floor space ratio of 0.6:1. The proposal provides for a floor space ratio of 0.607:1, which represents a non-compliance of only 1.9m².

It is considered that the proposal achieves the Objectives of Clause 4.4 and that the development is justified in this instance for the following reasons:

- The development will maintain a compatible scale relationship with the existing residential development in the area. Development within Alexander Street has a wide range of architectural styles and given the variety in the scale of this development, the proposal will be consistent with surrounding development and will not adversely affect the streetscape.
- The proposed modest additions to the dwelling will maintain amenity and appropriate solar access for the subject site and neighbouring properties.
- The proposed additions are located over the existing footprint and do not require the removal of any vegetation.
- The non-compliance is only 1.9m² and requiring strict compliance would not serve any benefit nor be discernible.

In the *Wehbe* judgment (*Wehbe v Pittwater Council [2007] NSWLEC 827*), Preston CJ expressed the view that there are 5 different ways in which a SEPP 1 Objection may be well founded, and that approval of the Objection may be consistent with the aims of the policy.

These 5 questions may be usefully applied to the consideration of Clause 4.6 variations: -

1. *the objectives of the standard are achieved notwithstanding non-compliance with the standard;*

Comment: Yes. Refer to comments under 'Justification of Proposed Variation' above which discusses the achievement of the objectives of the standard.

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

Comment: It is considered that the purpose of the standard is relevant, but the purpose is satisfied.

3. *the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

Comment: Compliance does not defeat the underlying object of the standard development; however, compliance would prevent the approval of an otherwise supportable development.

Furthermore, it is noted that development standards are not intended to be applied in an absolute manner; which is evidenced by clause 4.6 (1)(a) and (b).

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;*

Comment: Whilst it is not suggested that Council has abandoned its control, variations to the maximum floor space ratio control have been granted in the immediate vicinity, where Council has considered it appropriate to do so for development that meets the objectives of the zone. In this instance it is considered that the proposed development appropriately addresses the zone objectives and is worthy of the support of Council.

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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Comment: The development standard is applicable to and appropriate to the zone.

For the above reasons, it would therefore be unreasonable and unnecessary to cause strict compliance with the standard.

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

Council's controls in Clause 4.4 provide a maximum floor space ratio of 0.6:1 for the subject development.

The proposed dwelling additions will provide a floor space ratio of 06.07:1 or a 1.9m²/1.1% variation to the control.

The development is justified in this instance for the following reasons:

- The works will present a very minor variation to the floor space ratio control. Notwithstanding the non-compliance is considered to be compatible with the form and nature of the surrounding development.
- The proposal is consistent with the character of development in the locality.
- The development will maintain a compatible scale relationship with the existing residential development in the area. Development in the vicinity has a wide range of architectural styles and the given the variety in the scale of development, this proposal will reflect a positive contribution to its streetscape.

- The proposed new works do not present any unreasonable additional impacts in terms of view loss for neighbours, or bulk and scale.
- The proposed development is considered to promote good sustainable design and enhance the residential amenity of the buildings' occupants and the immediate area, which is consistent with the Objective 1.3 (g) of the EPA Act which is a suitable environmental planning ground which justifies the flexible application of the development standard.

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 space ratio.

In the recent 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does **not** mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are "sufficient environmental planning grounds to justify contravening the development standard", it is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The recent appeal of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant's written document itself, and in the Commissioner's assessment of it). In February of this year the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the *Four2Five v Ashfield* decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligation is to be satisfied that "the applicant's written request has adequately addressed ...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard." He held that this means:

"the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause

(3)(a) that compliance with each development standard is unreasonable or unnecessary”.

Accordingly, when assessed against the relevant Objects of the Environmental Planning & Assessment Act 1979, (NSW) outlined in s1.3, 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:

- The resultant dwelling which is compatible in scale to its surrounding neighbours, which promotes the orderly & economic use of the land.
- Similarly, the proposed development will provide for an appropriate level of family accommodation and improved amenity within a built form which is compatible with the streetscape of Alexanders Street, which also promotes the orderly and economic use of the land.
- The proposal is considered to promote good design and amenity to the local built environment as appropriate views, solar access and privacy will be maintained for the neighbouring properties.

The above are the environmental planning grounds which are the circumstance which are particular to the development which merit a variation to the development standard.

7.0 Conclusion

This development proposes a departure from the maximum floor space ratio control, with the proposed dwelling additions to provide a maximum floor space ratio of 0.607:1.

This objection to the maximum floor space ratio control specified in Clause 4.3 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 would be unreasonable and unnecessary in the circumstances of this case.

Natalie Nolan
Town Planner