

## APPENDIX B – CLAUSE 4.6 VARIATION – FLOOR SPACE RATIO

### SUBMISSION PURSUANT TO CLAUSE 4.6 OF THE MANLY LOCAL ENVIRONMENTAL PLAN 2013

#### VARIATION OF DEVELOPMENT STANDARD REGARDING THE MAXIMUM FLOOR SPACE RATIO PRESCRIBED BY CLAUSE 4.4 OF THE MANLY LOCAL ENVIRONMENTAL PLAN 2013

**For:** Alterations/Additions to existing Semi-Detached Dwellings  
**At:** 21 Parkview Road, Fairlight  
**Applicant:** Robinson Jolly (Laura Robinson)

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#### Introduction

This Clause 4.6 variation is a written request to vary a development standard to support a development application for construction of alterations and additions to an existing semi-detached dwelling at **21 Parkview Road, Fairlight**.

The specified maximum floor space ratio under Clause 4.4 of the Manly Local Environmental Plan 2013 (the LEP) is 0.6:1. The development proposes a departure from this numerical standard and proposes a maximum floor space of **178m<sup>2</sup> or 0.70:1**.

This floor space ratio requirement is identified as a development standard which requires a variation under Clause 4.6 of the Manly Local Environmental Plan 2013 (the LEP) to enable the granting of consent to the development application.

#### PURPOSE OF CLAUSE 4.6

The Standard Instrument LEP contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the Standard Instrument 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.

#### 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.*

## 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.*

## JUSTIFICATION OF PROPOSED VARIANCE

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument should be assessed in *Samadi v Council of the City of Sydney* [2014] NSWLEC 1199.

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.*

- 1. 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)).*
- 2. 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)).*
- 3. 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)).*
- 4. 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)).*

### 1. Consistency with zone objectives

The land is located in the R1 General Residential Zone. The objectives of the R1 zone are:-

- 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

The development proposal includes the construction of alterations and additions to an existing semi-detached dwelling. The proposal is considered to meet the objectives of the R1 zone for the following reasons:

- The proposal provides for additions/alterations to an existing semi-detached detached dwelling to meet the needs of the owners.
- The additions/alterations retain the semi-detached dwelling and does not result in unreasonable bulk or scale when viewed from the street or the adjoining property.

## 2. Consistency with the objectives of the standard

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

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

## Comments

The proposal provides for additions to the existing semi- dwelling. The proposed additions are located at the rear of the dwelling and designed to retain the single storey façade. As a result there is minimal impact on the streetscape. The pitched roof compliments the dwelling at number 17 and new development on the corner of Parkview and Cecil street, along with the other cottage style dwellings along Parkview Road.

The existing streetscape along Parkview towards Griffith provides for large variety of building forms, including single dwellings, semi-detached dwellings and large residential flat buildings. The proposal achieves compliance with this objective. This section of Parkview (only 2 houses away) has a FSR of 0.75:1.

Both 6 Cecil street and neighbouring 23 Parkview both have an FSR of 0.73:1, setting a precedent of the area.

- (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,*

## Comments

The proposed additions are located at the rear of the existing dwelling and do not obstruct/obscure any important landscape or townscape features. The proposal achieves compliance with this objective.

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

## Comments

The existing surrounding development comprises a variety of building forms and heights. The location of the additions at the rear of the existing dwelling ensures the existing single storey presentation to the street is retained. The proposal provides for appropriate setbacks to the southern side boundary, with the new upper level setback of 2m to ensure visual separation and minimise bulk and scale as viewed from the adjoining property.

The proposal retains soft landscaping where feasible and allows for new hardstand parking to reduce the pressure of street parking.

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

#### Comments

The proposal will not adversely impact on the enjoyment of the adjoining land or the public domain. The proposed additions are designed and orientated to ensure there is very little overlooking of the adjoining southern property. Shadow diagrams depicted with the application indicate that the adjoining southern property will continue to receive at least 3 hours solar access to at least 50% of its private open space on the winter solstice (no change to the existing in the rear yard). There are no adverse impacts on the use/enjoyment of the public domain. The proposal complies with this objective.

- (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

This objective does not apply.

### **3. To a consider 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 given the limited site area and the existing surrounding development which includes a number of large dwellings and residential flat buildings.

The additions are located at the rear of the existing dwelling and retains the single storey front facade. The proposal does not result in any unreasonable impacts on the adjoining properties or the character of locality as depicted and detailed in this submission and the Statement of Environmental Effects.

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

### **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**

The primary issue is whether or not there are sufficient environmental planning grounds particular to the site to allow the variation to the floor space ratio development standard.

The 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 each and 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.

The appeal of *Grundy v Waverley Council [2016] NSWLEC 1526 (2016)* is also to be considered. Due to the site, the design of the proposal demonstrates compliance of accommodating a residential building of the height, bulk and scale proposed without being, in any way, inconsistent with the existing streetscape or existing character of the locality. The proposal therefore satisfies objective (c) of cl 4.4. Even though the proposal seeks a variation of the maximum FSR development standard, the proposed development is now fully compliant with the front and side boundary setback controls, as well as the minimum landscaped area requirements. Depending on the adopted interpretation of the definition of ground level (existing), the proposed development may also be compliant with the height control.

The proposed development is consistent with cl 4.6(4)(a)(ii) and consequently 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.

Accordingly in regards to the proposed development at 21 Parkview Road, 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 proposal does not result in any loss of privacy nor an unreasonable loss of solar access to the adjoining properties.
- The existing surrounding development comprises a mixture of single detached dwellings, semi-detached dwellings and large residential flat buildings. The resultant development is compatible with the existing surrounding development.

When 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.

The existing surrounding development and the desired architectural outcome combine to produce a meritorious development despite the numerical variation to the floor space ratio standard.

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 Variance' 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:** Not applicable.

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.

## CONCLUSION

The development proposes a departure from the maximum floor space ratio. The proposal produces an appropriate development outcome. The variation to the floorspace ratio is this location is considered appropriate given the existing surrounding development including large dwellings and residential flat buildings, and the recent development at number 23 Parkview exceeding FSR, sitting at 0.70:1. Furthermore, the additions satisfy the zone objectives and the objectives of the development standard.

As there is no unreasonable impact on adjoining properties or the public domain arising from the variation to the floor space ratio development standard and the objectives of the control are satisfied, it is considered that strict compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.

Therefore, we request that council support the variation on the basis that there are sufficient environmental planning grounds to justify a variance to the development standard.

Thank you for your consideration.

Laura Robinson  
Robinson Jolly