

1. Updated Clause 4.6 variation request - Floor space ratio

Proposed dwelling house

20 Beatty Street, Balgowlah Heights

1.1 Introduction

This updated clause 4.6 variation request has been prepared in relation to the Revision D plans prepared by BJB Architects.

This clause 4.6 variation has been prepared with respect to a proposed new dwelling at 55 Bower Street, Manly, having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *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.

1.2 Manly Local Environmental Plan 2013 (MLEP 2013)

1.2.1 Clause 4.4 – Floor Space Ratio

Pursuant to Clause 4.4 of MLEP 2013, the floor space ratio of development on the subject land is not to exceed 0.4:1. The objectives of this control 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.*

In accordance with the provisions of clause 4.5(2) of MLEP 2013, floor space ratio is defined as follows:

*The **floor space ratio** of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.*

The accompanying plans nominate a gross floor area of 385.6m², resulting in a FSR of 0.45:1, representative of a variation to the development standard of 47m² or 13.8%.

1.2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP 2013 provides:

The objectives of this clause are:

- (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 decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“*Initial Action*”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by clause 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner. At [90] of *Initial Action* the Court held that:

“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of MLEP 2013 provides:

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.

This clause applies to the floor space ratio development standard in clause 4.4 of MLEP 2013.

Clause 4.6(3) of MLEP 2013 provides:

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.*

The proposed development does not comply with the floor space ratio development standard at clause 4.4 of MLEP 2013 which specifies a maximum floor space ratio of 0.4:1. However, strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

1.3 Request for variation

1.3.1 Is clause 4.4 of MLEP 2013 a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes a provision of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (d) *the cubic content or floor space of a building,*

Clause 4.4 of MLEP 2013 prescribes a bulk and scale provision that seeks to control the floor space ratio of certain development. Accordingly, clause 4.4 of MLEP 2013 is a development standard.

1.3.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. The first approach is relevant in this instance, being that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the floor space ratio development standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

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

Comment: The proposed dwelling is set back between 10.534m and 26.042m from the splayed front boundary with the relatively wide road reserve at the frontage of the site occupied by dense landscaping with landscaping within the subject site also providing substantial screening to the proposed dwelling.

In this regard, the proposed dwelling house will be screened to a significant extent as viewed from the street with the two storey form and setbacks proposed ensuring that it will not be perceived as inappropriate or jarring in streetscape contact.

The proposed new dwelling is well articulated, with a height, bulk and scale that is appropriately responsive to that of surrounding and nearby development. As shown in Figures 1 the massing of the building is consistent and compatible with that of other development along Beatty Street.



Figure 1: Extract of Front Elevation

I have undertaken an analysis of the floor space ratio of surrounding and nearby development within the site's visual catchment and subject to the same 0.4:1 floor space ratio development standard approved by Council in the past 9 years, being development approved under the provisions of MLEP 2013 and to the extent that information is available on Council's DA Tracker. This information is detailed in Figure 2 over page.

With this in mind, Council can be reasonably satisfied that the bulk and scale of the proposed development, as expressed as a floor space ratio, is consistent with the existing and desired character of the area. This objective is achieved notwithstanding the FSR non-compliance proposed.

With a floor space ratio of 0.5:1, the proposed development is entirely consistent and compatible with the bulk and scale of surrounding development, which seemingly range between 0.4:1 and 0.57:1.

20 BEATTY STREET, BALGOWLAH HEIGHTS

Adjoining property DA (with documentation available)

- No. 8B:** Approved DA 2022
 - increased FSR to 0.48:1
- No. 11:** Approved DA 2023
 - increased FSR 0.476:1
- No. 13:** Approved DA 2020
 - increased FSR 0.57:1
 - increased max building height of 9.58m
- No. 14A:** Approved DA 2020
 - increase FSR to 0.46:1
 - increase max. height of 9.34m
- No 19:** Approved Da 2015
 - increased FSR 0.53:1
 - increased building height to 9.7m
- No. 24A:** Approved DA 2022
 - increased FSR to 0.5:1 on provision that existing FSR was above council allowance
 - increased max. height of 13.54m
- No. 26:** Refusal. Non compliance with bldg height control, visual character + impact on privacy, views and outlooks of neighbouring properties.
- No. 28:** Approved DA 2019. No Change to FSR
- No. 31:** Approved DA 2022. No change to FSR, building height
- No.34:** Approved DA 2019
 - increased FSR 0.53: 1
 - increased max. height of 9.138

- No. 20 Fisher (15 Beatty):** Approved DA 2021
 - increased FSR 0.438:1
 - increased max. building height to 8.9m



Figure 2: Approved FSR Analysis

- (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: Having inspected the site and its immediate surrounds to identify potential view lines across the site I am satisfied that the building, by virtue of its density and bulk will not obscure important landscape and townscape features. This objective is achieved notwithstanding the FSR non-compliance proposed.

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

Comment: Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments*, most observers would not find the proposed development offensive, jarring or unsympathetic in a streetscape context or as viewed from the adjoining properties.

The proposed development is compatible with the existing streetscape and the character of the wider R2 Low Density Residential zone.

Furthermore, despite non-compliance with the maximum FSR prescribed, the proposed development achieves consistency with the landscaped area controls of MDCP 2013, enabling the provision of a high-quality landscaped solution for the site.

This objective is achieved notwithstanding the FSR non-compliance proposed.

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

Comment: The proposed development does not result in any unreasonable impacts upon neighbouring properties with regards to overshadowing, visual or acoustic privacy. The proposed built form is highly articulated, by virtue of recessed elements, varied setbacks, differing materials and landscaping, and will not be overly dominant as seen from the street or adjoining properties. The non-compliant FSR does not detract from consistency 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.*

Comment: Not Applicable.

The non-compliant development, as it relates to floor space ratio, demonstrates consistency with objectives of the zone and the floor space ratio development standard objectives. Adopting the first option in *Wehbe*, strict compliance with the floor space ratio development standard has been demonstrated to be unreasonable and unnecessary in the circumstances of this application.

1.3.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In *Initial Action* the Court found at [23]-[25] that:

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.

The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient environmental planning grounds

Ground 1 – Superior architectural design

The apparent size of the proposed development will be compatible with dwellings in the visual catchment of the site, which features a number of buildings of significantly greater bulk and scale. The building is of exceptional design quality with the variation facilitating a floor space that provides for contextual built form compatibility, consistent with Objectives 1.3(c) and (g) of the Act.

There is no specific portion of the floor plan that can be pinpointed as attributing to the non-compliance, nor any area that warrants redesign or amendment due to impacts to adjoining dwellings.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments*, most observers would not find the proposed development offensive, jarring or unsympathetic as seen from adjoining properties or as viewed from the waterway. The proposed development is compatible with other development in the visual catchment of the site, and the character of the wider R2 Low Density Residential zone.

Ground 2 – Established Precedence

As demonstrated in this request, Council has regularly approved variations to the floor space ratio development standard prescribed by MLEP 2013 along Bower Street involving variations to the floor space ratio development standard to differing degrees.

As established in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 and *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115, and as reinforced in *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021], adjacent development which also exceeds the floor space ratio control should be considered when determining desired future character.

With a floor space ratio of 0.45:1, the proposed development is entirely consistent and compatible with the bulk and scale of surrounding development, which seemingly range between 0.4:1 and 0.57:1.

Support of a variation generally consistent with recent development consents issued by Council within the sites visual catchment is consistent with Object 1(c) of the EP&A Act, in so far as it reflects the orderly development of the land and promotes consistency in Council's decision making process.

Overall, there are sufficient environmental planning grounds to justify contravening the development standard.

1.4 Conclusion

Pursuant to clause 4.6(4)(a) of MLEP 2013, the consent authority can be satisfied that this written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (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.*

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a floor space ratio variation in this instance.

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Director

26.9.24