



184 Pittwater Road, Manly

**REQUEST FOR VARIATION TO FLOOR SPACE RATIO DEVELOPMENT
STANDARD PURSUANT TO CLAUSE 4.6(3) OF MANLY LEP 2013**

This Clause 4.6 variation relates to a proposal for alterations and additions to the existing dual occupancy developments to create a single dwelling on each lot.

The proposed alterations and additions include the following:

- Demolishing the rear part of the Ground Floor of the existing building and constructing a rear Ground Floor addition
- Reconfiguring the layout of the Ground Floor
- Converting the sunrooms at the front of the Ground Floor into front porches
- Constructing a First Floor addition
- Installing a skylight above the void area / internal stairs of each dwelling
- Demolishing the existing single garage at the rear of Lot 1 (northern lot) and constructing a single hardstand parking space with access from Pacific Lane
- Constructing a single hardstand parking space at the rear of Lot 2 (southern lot) with access from Pacific Lane
- Constructing new rear fencing with vehicle entry gates
- Constructing a swimming pool and deck area at the rear of each lot

The proposal results in a non-compliance with clause 4.4 of the *Manly Local Environmental Plan 2013 (MLEP)* which relates to floor space ratio (**FSR**). As such, this Clause 4.6 request has been prepared in accordance with Clause 4.6 of the *Manly Local Environmental Plan 2013*, which applies to the subject site.

The request demonstrates that compliance with the development standard relating to FSR is unreasonable or unnecessary in the circumstances of the case and establishes that there are sufficient environmental planning grounds to justify contravening the development standard, satisfying clause 4.6(3) of the MLEP.

Based on this Clause 4.6 request, the consent authority can be satisfied that the written request has adequately addressed the matters required to be demonstrated by subclause (3), and that the proposed development will be in the public interest because it is consistent with the objectives of the FSR development standard and the objectives for development within the R3 – Medium density residential zone under the MLEP, in which the development is proposed to be carried out.

The nature of the exceedance to the development standard relating to FSR is set out below, followed by consideration of the relevant matters in clause 4.6 of the MLEP.

The NSW Department of Planning, Industry and Environment (DPI&E) provides guidance on how to prepare Clause 4.6 variations; 'Varying development standards: A Guide' (August 2011). This written request to vary the standards is based on the Guide.

Zoning of the site

The zoning of the land is R3 – Medium density residential. The objectives of the R3 zone are:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To encourage the revitalisation of residential areas by rehabilitation and suitable redevelopment.*
- *To encourage the provision and retention of tourist accommodation that enhances the role of Manly as an international tourist destination.*

Clause 4.4 – Floor Space Ratio

The Standard

Lot 1 has a site has of 270.3m² and Lot 2 has a site area of 250m².

Clause 4.4 of MLEP prescribes a maximum FSR of 0.6:1.

The proposal includes alterations and additions to each of the existing dual occupancy developments to create a single dwelling on each lot.

The proposed works on Lot 1 (northern lot) result in an FSR 0.62:1 (170m²). The proposed works on Lot 2 (southern lot) result in an FSR of 0.62:1 (156m²), providing a non-compliance with this control. The percentage variation is 4.8% for Lot 1 and 4% for Lot 2.

Refer to the table below:

	Site Area	FSR Control	Proposed FSR	FSR Non-compliance
Lot 1 (northern lot)	270.3m ²	0.6:1 (162.18m ²)	0.62:1 (170m ²)	4.8% (7.82m ²)
Lot 2 (southern lot)	250m ²	0.6:1 (150m ²)	0.62:1 (156m ²)	4% (6m ²)

The objectives of Clause 4.4

The objectives of Clause 4.4 are as follows:

- (a) *to ensure that residential accommodation:*
 - (i) *is compatible with the desired future character of the area in relation to building bulk, form and scale, and*
 - (ii) *provides a suitable balance between landscaped areas and the built form, and*
 - (iii) *minimises the impact of the bulk and scale of buildings,*
- (b) *to ensure that non-residential development is compatible with the desired future character of the area in relation to building bulk, form and scale.*

Clause 4.6 - Exceptions to Development Standards

Clause 4.6 of the MLEP allows for exceptions of Development Standards. The objectives of this Clause 4.6 are:

- (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(2) provides the power for development consent to be granted even though the development would contravene a development standard, subject to that clause:

- (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.*

Clause 4.6(3) sets out what a clause 4.6 written request seeking to justify a contravention of a development standard must demonstrate in order for consent to be granted for development that contravenes a development standard:

- (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*

Clause 4.6(4) sets out the matters which a consent authority must be satisfied of in order to grant consent to a development that contravenes a development standard:

- (4) *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.*

This document constitutes the written request referred to in Clause 4.6(3) in relation to the proposal's breach of the FSR development standard and

provides the necessary information for the consent authority to be satisfied of the matters in clause 4.6(4).

The matters required to be demonstrated under clause 4.6(3) are set out below as Points 1 and 2.

1. Clause 4.6(3)(a) - Compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case:

In order to assess whether strict compliance with the development standard is unreasonable or unnecessary, a proposal is considered against the following five ways¹:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that 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; or
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 the land.

These five ways were re-emphasised by the Court². Each 'test' offers a potential way of demonstrating that compliance is unnecessary or unreasonable in a particular circumstance³. All tests are separate and not all tests may not be applicable in each case. Therefore, not all tests need to be met.

This objection relies on the first test set out above, that compliance with a standard is unreasonable and unnecessary given that the objectives of the standard are met even though the standard is not complied with⁴.

Compliance with the objectives of the FSR standard is addressed under **Point 4 below**.

¹ see *Wehbe v Pittwater Council* [2007] NSWLEC 827

² *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386

³ *Mecone Pty Limited v Waverley Council* [2015] NSWLEC 1312

⁴ *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245

The following points are raised:

- Compliance with the development standard is unreasonable and unnecessary as the proposed building height and bulk is of an appropriate form and scale and is compatible with surrounding development and the desired future character for the locality.
- The proposal is considered to be responsive to the character and context of the area and will provide for a high quality urban design outcome and heritage outcome. The proposed works are suitably scaled and located to minimise visual bulk impacts when viewed from the adjoining sites and to not detract from the streetscape.
- The development results in 2 x 2-storey dwellings, which is compatible with the bulk and height of the surrounding 2-storey dwellings.
- The proposal has a maximum building height of 7.5m which is below the 8.5m building height development standard for the site.
- The front of the existing dwellings is generally retained. The proposal includes a rear Ground Floor addition, converting the sunrooms at the front of the Ground Floor into front porches and constructing a First Floor addition. The First Floor addition is located at the rear of the dwelling and recessed from the Ground Floor below. The proposal retains the existing roof form of the front of the dwelling.
- The proposal will not alter the front setback of the existing building on the site. The front setback will continue to be consistent with the prevailing building line.
- The side setbacks of the Ground Floor rear addition are consistent with the existing side setbacks of the dwelling and align with the side setbacks of the front part of the building. The side setbacks of the First Floor comply with the DCP side setback control.
- The proposal incorporates articulated facades to reduce the perceived bulk of the development and to create proportions consistent within the streetscape.
- The minor FSR non-compliance (4.8% for Lot 1 and 4% for Lot 2) will be indiscernible from the streetscape and from surrounding properties.
- The proposed works will maintain the predominance of soft landscaped areas on the site and complies with the DCP landscaped area and private open space area requirements.

- Exceedance of the FSR control will not create additional building bulk that results in unreasonable environmental amenity impacts in terms of overshadowing, loss of views, loss of privacy or loss of visual amenity and a reduction in this bulk would not create additional benefit for adjoining properties or the locality.
- The proposed works have been designed to maximise sunlight and daylight received to the main living areas and private open space areas of the subject dwellings and adjoining dwellings to maximise amenity and energy efficiency. The proposed First Floor addition has been positioned and designed to not cause unreasonable overshadowing to the adjoining properties. As demonstrated on the accompanying shadow diagrams, the windows of the adjoining dwelling to the south are currently overshadowed. The proposal will therefore not reduce solar access to the windows of the adjoining buildings. The proposal will result in additional overshadowing to the rear private open space area of the adjoining dwelling to the south from approximately 1pm onwards.
- The proposed works will not adversely impact on any existing significant views from surrounding properties or the public domain. It is reiterated that the proposed built form is below the height control for the site.
- The proposed works have been designed and sited to ensure adequate visual and acoustic privacy between the subject dwelling and the adjoining dwellings. The proposal has considered the location of the development on the site, the internal layout and the building materials used. The proposal has appropriate setbacks thereby providing adequate separation from the adjoining properties. The living areas are located on the ground floor and orientated to the front garden area and rear private open space area. Windows have been appropriately sited and designed to minimise any potential overlooking. The first floor balconies are orientated to the rear, are limited in size and suitably screened.

2. Clause 4.6(3)(b) - There are sufficient environmental planning grounds to justify contravening the development standard:

Given the consistency of the proposal against the zone objectives and FSR objectives (see **Point 4 below regarding both**), in my opinion there are sufficient environmental planning grounds to justify contravening the development standard⁵.

⁵ see *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [90]

The components proposed above the FSR control are:

- Lot 1: 5.82m² of GFA
- Lot 1: 6m² of GFA

There are sufficient environmental planning grounds that the proposed FSR can be achieved without adverse impacts for the following reasons:

- Overall, the proposed building height and bulk is of an appropriate form and scale and is compatible with surrounding development and the desired future character for the locality.
- The proposal is considered to be responsive to the character and context of the area and will provide for a high quality urban design outcome and heritage outcome. The proposed works are suitably scaled and located to minimise visual bulk impacts when viewed from the adjoining sites and to not detract from the streetscape.
- The development results in 2 x 2-storey dwellings, which is compatible with the bulk and height of the surrounding 2-storey dwellings.
- The proposal has a maximum building height of 7.5m which is below the 8.5m building height development standard for the site.
- The front of the existing dwellings is generally retained. The proposal includes a rear Ground Floor addition, converting the sunrooms at the front of the Ground Floor into front porches and constructing a First Floor addition. The First Floor addition is located at the rear of the dwelling and recessed from the Ground Floor below. The proposal retains the existing roof form of the front of the dwelling.
- The proposal will not alter the front setback of the existing building on the site. The front setback will continue to be consistent with the prevailing building line.
- The side setbacks of the Ground Floor rear addition are consistent with the existing side setbacks of the dwelling and align with the side setbacks of the front part of the building. The side setbacks of the First Floor comply with the DCP side setback control.
- The proposal incorporates articulated facades to reduce the perceived bulk of the development and to create proportions consistent within the streetscape.

- The minor FSR non-compliance (4.8% for Lot 1 and 4% for Lot 2) will be indiscernible from the streetscape and from surrounding properties.
- The proposed works will maintain the predominance of soft landscaped areas on the site and complies with the DCP landscaped area and private open space area requirements.
- Exceedance of the FSR control will not create additional building bulk that results in unreasonable environmental amenity impacts in terms of overshadowing, loss of views, loss of privacy or loss of visual amenity and a reduction in this bulk would not create additional benefit for adjoining properties or the locality.
 - The proposed works have been designed to maximise sunlight and daylight received to the main living areas and private open space areas of the subject dwellings and adjoining dwellings to maximise amenity and energy efficiency. The proposed First Floor addition has been positioned and designed to not cause unreasonable overshadowing to the adjoining properties. As demonstrated on the accompanying shadow diagrams, the windows of the adjoining dwelling to the south are currently overshadowed. The proposal will therefore not reduce solar access to the windows of the adjoining buildings. The proposal will result in additional overshadowing to the rear private open space area of the adjoining dwelling to the south from approximately 1pm onwards.
 - The proposed works will not adversely impact on any existing significant views from surrounding properties or the public domain. It is reiterated that the proposed built form is below the height control for the site.
 - The proposed works have been designed and sited to ensure adequate visual and acoustic privacy between the subject dwelling and the adjoining dwellings. The proposal has considered the location of the development on the site, the internal layout and the building materials used. The proposal has appropriate setbacks thereby providing adequate separation from the adjoining properties. The living areas are located on the ground floor and orientated to the front garden area and rear private open space area. Windows have been appropriately sited and designed to minimise any potential overlooking. The first floor balconies are orientated to the rear, are limited in size and suitably screened.

The proposal will provide a suitable design and of suitable amenity in terms of the built environment and represents the orderly and economic use and development of land, which are identified as objects of the Act (Section 1.3 of

the EP&A Act, 1979) and the building envelope and design of the proposal responds appropriately to the unique opportunities and constraints of the site.

The aspect of the development that breaches the FSR control can be justified as the proposal provides a compatible scale with neighbouring development. This can be described as an environmental planning ground because the quality and form of the immediate built environment of the development site creates unique opportunities and constraints to achieving a good design outcome⁶.

3. Clause 4.6(4)(a)(i) - The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3):

Based on the above, the written request adequately addresses the matters referred to above by Clause 4.6(3).

4. Clause 4.6(4)(a)(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:

Objectives of the Standard

The proposal will be in the public interest as it meets the objectives of the FSR development standard as follows:

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

Comment: The proposed building height and bulk is of an appropriate form and scale and is compatible with surrounding development and the desired streetscape character.

The development results in 2 x 2-storey dwellings, which is compatible with the bulk and height of the surrounding 2-storey dwellings.

The front of the existing dwellings is generally retained. The proposal includes a rear Ground Floor addition, converting the sunrooms at the front of the Ground Floor into front porches and constructing a First Floor addition. The First Floor addition is located at the rear of the dwelling and recessed from the Ground Floor below. The proposal retains the existing roof form of the front of the dwelling.

⁶ *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 1097 at [42]

The proposal will not alter the front setback of the existing building on the site. The front setback will continue to be consistent with the prevailing building line.

The side setbacks of the Ground Floor rear addition are consistent with the existing side setbacks of the dwelling and align with the side setbacks of the front part of the building. The side setbacks of the First Floor comply with the DCP side setback control.

The proposal incorporates articulated facades to reduce the perceived bulk of the development and to create proportions consistent within the streetscape.

Objective (b) seeks 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: The proposal has a maximum building height of 7.5m which is below the 8.5m building height development standard for the site.

The minor FSR non-compliance (4.8% for Lot 1 and 4% for Lot 2) will be indiscernible from the streetscape and from surrounding properties.

The proposed works will maintain the predominance of soft landscaped areas on the site and complies with the DCP landscaped area and private open space area requirements.

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

Comment: The proposal is considered to be responsive to the character and context of the area and will provide for a high quality urban design and heritage outcome. The proposed works are suitably scaled and located to minimise visual bulk impacts when viewed from the adjoining sites and to not detract from the streetscape.

The development results in 2 x 2-storey dwellings, which is compatible with the bulk and height of the surrounding 2-storey dwellings. The proposal has a maximum building height of 7.5m which is below the 8.5m building height development standard for the site.

The minor FSR non-compliance (4.8% for Lot 1 and 4% for Lot 2) will be indiscernible from the streetscape and from surrounding properties.

The front of the existing dwellings is generally retained. The First Floor addition is located at the rear of the dwelling and recessed from the Ground

Floor below. The proposal retains the existing roof form of the front of the dwelling.

The proposal will not alter the front setback of the existing building on the site.

The proposed works will maintain the predominance of soft landscaped areas on the site and complies with the DCP landscaped area and private open space area requirements.

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

Comment: Exceedance of the FSR control will not create additional building bulk that results in unreasonable environmental amenity impacts in terms of overshadowing, loss of views, loss of privacy or loss of visual amenity as detailed below:

- **Overshadowing:** The proposed works have been designed to maximise sunlight and daylight received to the main living areas and private open space areas of the subject dwellings and adjoining dwellings to maximise amenity and energy efficiency. The proposed First Floor addition has been positioned and designed to not cause unreasonable overshadowing to the adjoining properties. As demonstrated on the accompanying shadow diagrams, the windows of the adjoining dwelling to the south are currently overshadowed. The proposal will therefore not reduce solar access to the windows of the adjoining buildings. The proposal will result in additional overshadowing to the rear private open space area of the adjoining dwelling to the south from approximately 1pm onwards.
- **Views:** The proposed works will not adversely impact on any existing significant views from surrounding properties or the public domain. It is reiterated that the proposed built form is below the height control for the site.
- **Privacy:** The proposed works have been designed and sited to ensure adequate visual and acoustic privacy between the subject dwelling and the adjoining dwellings. The proposal has considered the location of the development on the site, the internal layout and the building materials used. The proposal has appropriate setbacks thereby providing adequate separation from the adjoining properties. The living areas are located on the ground floor and orientated to the front garden area and rear private open space area. Windows have been appropriately sited and designed to minimise any potential overlooking.

The first floor balconies are orientated to the rear, are limited in size and suitably screened.

Objective (e) seeks 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 subject site is located in the R3 Medium Density Residential zone.

Objectives of the Zone

The zoning of the land is R3 Medium Density Residential. The objectives of the R3 zone are:

- *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To encourage the revitalisation of residential areas by rehabilitation and suitable redevelopment.*
- *To encourage the provision and retention of tourist accommodation that enhances the role of Manly as an international tourist destination.*

The proposal is consistent with the objectives of the zone in that it will continue to provide for the housing needs of the community within a medium density residential environment and will not inhibit other land uses that provide facilities or services to meet the day to day needs of residents.

As demonstrated above, the proposed development will be in the public interest because it is consistent with the objectives of the FSR development standard and the objectives of the R3 zone.

The above demonstrates that compliance with the control is unreasonable and unnecessary in the circumstances of this case.

5. Clause 4.6(4)(b) and Clause 4.6(5) – the concurrence of the Planning Secretary has been obtained

Concurrence of the Planning Secretary is taken to have been obtained as a result of written notice dated 5 May 2020 attached to the Planning Circular PS 20-002.

6. Clause 4.6(5)

In the context of the requirements of Clause 4.6(5), it is considered that no matters of State or regional planning significance are raised by the proposed development. Moreover, it is considered that there would be no public benefit in maintaining the particular planning control in question, in the case of this specific development.

Conclusion

The consistency of the development with the zone objectives and the objectives of the FSR standard together with the absence of adverse impacts arising establish that there are sufficient grounds to support the variation from the development standard and confirm that it is unreasonable and unnecessary for the development to comply. This therefore demonstrates sufficient environmental planning grounds to justify contravening the standard.

In addition, the resultant development will be in the public interest as it complies with the objectives of the zone and the objectives of the development standard.

The proposal is consistent with the objects of Section 1.3 of the EP& A Act, 1979, which are to encourage development that promotes the social and economic welfare of the community and a better environment, to promote and coordinate orderly and economic use and development of land and to promote good design and amenity of the built environment.

This submission is considered to adequately address the matters required by Clause 4.6 of the LEP and demonstrates that compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case and there are sufficient environmental planning grounds to support the variation.

Based on this Clause 4.6 request, the consent authority can be satisfied that the written request has adequately addressed the matters required to be demonstrated by subclause (3), and that the proposed development will be in the public interest because it is consistent with the objectives of the FSR development standard and the objectives for development within the R3 – Medium density residential zone under the MLEP, in which the development is proposed to be carried out.



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