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**Amended Written Request under Clause 4.6  
Exceptions to Development Standards of  
Manly Local Environmental Plan 2013 – DA  
2021/0129**

**Lot 1 DP 1125216, No 107 Frenchs Forest Road,  
SEAFORTH**

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Prepared For:



Prepared By:



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## 1. Introduction

A development application DA 2021/0129 was lodged with Northern Beaches Council for the demolition of the existing dwelling and the construction of a two-storey dwelling at 107 Frenchs Forest Road, SEAFORTH. By letter dated 17 June 2021, the Council requested amendments to the plans to essentially reduce the floor area of the proposed dwelling and required a revised Clause 4.6 variation request to justify that the proposal was in the public interest.

This amended report is based on amended plans submitted to Council and comprises a written request from the Applicant under clause 4.6 of Manly Local Environmental Plan 2013 ("LEP 2013") that seeks to justify the contravention by the new Proposed Development of the development standard for the floor space ratio (FSR) under clause 4.4 of LEP 2013. Clause 4.4(2) states:

*(2) 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.*

Based on an FSR of 0.45:1, the floor area of the dwelling should be 163.17m<sup>2</sup>. The floor area of the dwelling is 184.92m<sup>2</sup>, which equates to an FSR of 0.51:1 or 21.75m<sup>2</sup> more than that permitted by Clause 4.4. If based on Clause 4.1.3.1 of the DCP, which we have requested in the Clause 4.6 Variation Request be considered for the matters raised in this request and based on the reference to the clause below, the floor area is 3.63m<sup>2</sup> above the 0.50:1, which equates to an FSR of 0.51:1. In terms of the above, at 0.45:1 the percentage variation is 13.3% and at 0.50:1, it is 2%. As the percentage of non-compliance is greater than 10%, based on 0.45:1, the application must be considered by the Planning Panel.

### 1.1 STATUTORY OBLIGATIONS OF THE APPLICANT AND COUNCIL

The authority established within a judgement in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, provides that a Cl4.6 variation need not establish that a development containing a variation provides a better or even neutral outcome for a development site compared with that which would be provided by a compliant development.

In light of this judgement, it is necessary to distinguish between the obligations of the applicant, and the obligations of Council. The applicant must address the matters required by cl4.6(3). Note however that for completeness and to assist Council in its assessment, this variation request has addressed cl4.6(3) and 4.6(4).

The consent authority need only be satisfied of the matters required within 4.6(4)(a), namely that the applicant has adequately addressed 4.6(3), and that the development is consistent with the objectives of the standard and the objectives of the zone.

The *Initial Action* judgement states that "the consent authority, or the Court on appeal, does not have to directly form the opinion of satisfaction regarding the matters in cl4.6(3)(a) and (b), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl4.6(3)(a) and (b)".

The independent role for the consent authority is therefore to determine whether the proposed development will be consistent with the objectives of the standard and the objectives of the zone.

This involves a consideration of the “development” in its entirety, not just the proposed variation. It is clear that the development meets the objectives of the standard and of the zone as discussed throughout this written request.

The responsibilities of the applicant had earlier been clarified within *Four2Five Pty Ltd v Ashfield Council* (2015) NSWCA 248. In addressing clause 4.6(3), the applicant must establish reasons that the variation should be supported, aside from the consistency of the development with the objectives of the standard and the objectives of the zone.

In *Wehbe V Pittwater Council* (2007) NSW LEC 827, Preston CJ set out the following 5 different ways in which an objection (variation) may be well founded:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore 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 and hence compliance with the standard is unnecessary and unreasonable;*
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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

It is generally understood that Clause 4.6(3) can be satisfied if it is established that a development satisfies one or more of points 2-5 above. The information contained within this written request directly addresses the third and fourth reason within the list above.

Note that although this request is structured to address 4.6(3) and 4.6(4)(a)(ii) individually, the report should be read in its entirety as fulfilling the applicant’s obligations under 4.6(3).

Subclause (2) applies to the existing lot. It would be noted that development consent may be granted if the lot size is greater than 500m<sup>2</sup>. The existing lot has an area of 362.59m<sup>2</sup>. However, in respect of the Clause 4.6 request, essentially whilst Clause 4.1(2) & (3) is titled ‘minimum lot size’ the contents of the clause do not actually restrict development if under 500m<sup>2</sup>. Clause 4.1(2) & (3) is a permissive clause, not a restrictive clause and the title does not prevail over the particulars.

The remainder of this report seeks to demonstrate that compliance with Clause 4.4 of MLEP 2015 is both unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard in this instance and that the proposal is in the public interest.

Clause 4.6(4) of MLEP 2013 states:

- (4) *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 Director-General has been obtained.

It is considered that the public interest is better served as a consequence of the variation to the development standard of MLEP 2013 due to the area on non-compliance having regard to the public benefit of increased setbacks occasioned by the amended development proposal.

This report has been prepared to support a variation to the development standard of Clause 4.4 of Manly Local Environmental Plan 2013 (MLEP 2013). The submission should be read in conjunction with the Statement of Environmental Effects (SoEE) prepared by this firm.

The maximum FSR shown for the Floor Space Ratio Map referred to in clause 4.4(2) of LEP 2013 is 0.45:1 as shown on the extract of Map - Sheet FSR\_001 below in **Figure 1**.

**FIGURE 1 - FLOOR SPACE MAP**



The floor area of the dwelling is 184.92m<sup>2</sup> or 0.51:1. The proposed development proposes a floor space ratio greater than 0.45:1 provided by Clause 4.4. However, in accordance with Subclause 4.1.3.1, addressed below, a 0.50:1 applies. The variation in this instance is 2.0%. As stated above in Section 1, based on an FSR of 0.45:1, the floor area of the dwelling should be 163.17m<sup>2</sup>. The floor area of the dwelling is 184.92m<sup>2</sup>, which equates to an FSR of 0.51:1 or 21.75m<sup>2</sup> more than that permitted by Clause 4.4. If based on Clause 4.1.3.1 of the DCP, which we have requested in the Clause 4.6 Variation Request be considered based on the reference to the clause and other matters addressed in this request. The floor area is 3.63m<sup>2</sup> above the 0.50:1, which equates to an FSR of 0.51:1. In terms of the above, at 0.45:1 the percentage variation is 13.3% and at 0.50:1, it is 2%. As the percentage of non-compliance is greater than 10%, when based on 0.45:1, the application must be considered by the Planning Panel.

Whilst this is a DCP provision and not subject to a Clause 4.6 variation request, nonetheless the Council has recognised that under certain circumstances, such as this proposal where the lot size has been reduced due to road widening, a more flexible approach should be considered for such lots. As such a variation is sought under 'Clause 4.6 - Exceptions to development standards' under MLEP 2013.

As noted above, the subject property is an undersized allotment. Subclause 4.1.3.1 of Manly Development Control Plan 2013 provides under the heading of **Exceptions to FSR for undersized lots** provides:

**The undersized nature of a lot is a matter that Council may consider in determining whether 'compliance with the standard is unreasonable or unnecessary in the circumstances of the case' and 'there is sufficient environment planning grounds to justify contravening the development standard' under LEP clause 4.6(3).**

- a) **The extent of any exception to the LEP FSR development standard pursuant to LEP clause 4.6 in this plan is to be no greater than the achievable FSR for the lot size indicated in Figure 30.**

The lot falls under Area I of the LEP Lot Size Map, which is based on 500m<sup>2</sup> lot size/site area. On this basis, under the LEP with an FSR of 0.45:1, the allowable FSR is 181.29m<sup>2</sup>. The proposed dwelling has a floor area of 184.92m<sup>2</sup>, which is 3.63m<sup>2</sup> over the allowable FSR or an FSR of 0.51:1, which is slightly more than the 50% control by 2.0%. However, as stated above, the proposed dwelling has a floor area of 21.75m<sup>2</sup> more than permitted by a 0.45:1 FSR control under Clause 4.4 of the LEP, which equates to a variation of 13.3%. It would be noted that to reduce the floor area of the dwelling below that previously submitted, there have been increased side and rear boundary setbacks proposed. These setbacks have increased the amenity for adjoining neighbours and more importantly reduced the bulk and scale of the dwelling.

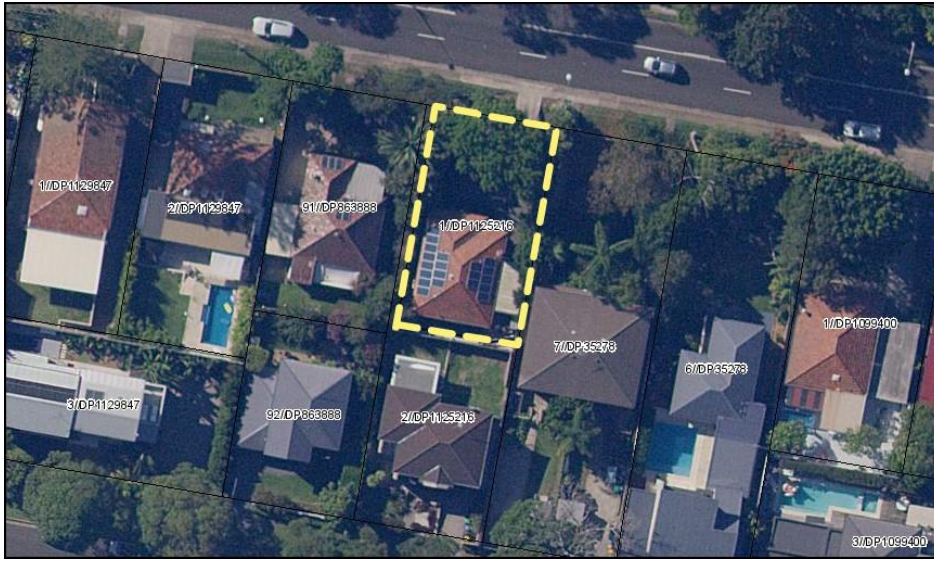
In particular, the side boundaries have increased for the first storey to provide greater separation with neighbours and generally compliant with the DCP controls. The rear setback has also increased, noting the current setback from the rear neighbour is 2.31m, whilst the proposal is a 8.032m to the first floor.

The rear setback could be increased if the Council reduced the front setback. It is noted that the DCP control for front setbacks requires dwellings to respect the existing setbacks. It would be noted from Figure 2 below that there is no consistent front setback, however, the proposed dwelling has observed a setback that is consistent with the DCP.

## 1.2 THE SUBJECT LAND

The land the subject of this variation request is known as Lot 1 DP 1125216, No 107 Frenchs Forest Road, SEAFORTH (refer to Figure 2 below).

FIGURE 2 – SITE CONTEXT



### 1.3 PROPOSED DEVELOPMENT

The demolition of the existing dwelling on the Site and the erection of a new two-storey dwelling on the Site ("Proposed Development"). Further details of the development are provided in Section 3.1 of the Statement of Environmental Effects prepared by this firm and accompany this report.

### 1.4 ZONING

The site falls within the R2 Low Density Residential zone under Manly Local Environmental Plan 2013.

## 2 Provisions of Clause 4.6 – Exceptions to Development Standards

Clause 4.6 of the LEP 2013 operates as a precondition to the exercise of power to grant consent and unless a consent authority is satisfied that the precondition has been met, consent cannot be granted to a proposed development that contravenes development standards. Two positive opinions of satisfaction under clause 4.6(4)(a)(i) and (ii) must be made as stated in Section 2.1 below.

### 2.1 CLAUSE 4.6(4)(A)(i) – ADEQUATE ADDRESS OF MATTERS UNDER CLAUSE 4.6(3)

In response to cl. 4.6(3) two matters must be addressed:

- A. that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case; and
- B. that there are sufficient environmental planning grounds to justify contravening the

development standard.

**(A) Compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.**

It is noted that the objectives of the floor space ratio under Clause 4.4(1) 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.

These objectives are addressed in the request for variation, as required by recent decisions of the Land & Environment Court in Section 4.

These objectives are achieved notwithstanding the breach of the standard, making it unnecessary to apply the floor space ratio. The above objectives are addressed:

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

**Comment:** The amended proposed development is a conventional pitch roof design that is proposed to be constructed of various materials. The front and rear facades of the dwelling are suitably articulated and the longer eastern side wall is indented to minimise bulk and scale impacts. The side boundary setbacks have now been increased to be slightly less than the combined [requirement of 3.8m under the DCP control at 3.6m. The DCP requires a 1.9m setback from each side boundary for the first floor, whilst the proposal is for 1.8m setbacks and therefore marginal in terms of overall compliance.](#) As stated in the amended SoEE, the increase in the side boundary setbacks has resulted in a decrease in floor area of the dwelling.

The increase in setbacks has resulted in the bulk and scale of the dwelling being reduced with setbacks that are slightly less than that permitted by the DCP control. In this regard, the combined setback required by the DCP is 3.8m; whilst the proposal is for 3.6m. In our opinion, the setbacks are not inconsistent with the setbacks within the area and do not detract from the streetscape. It would be noted that the setbacks are based on a formula of height and therefore setbacks would vary depending on the height of dwellings.

The streetscape character is also variable, with front fences or landscaping dominating the streetscape. The design of front fences varies in height from low fencing to high fencing and materials. The landscape character is also variable to the extent that it could be stated that there is no discernible rhythm or theme of character. The colour scheme of dwellings and materials do not provide cues to the character of the street. The road is long and rises and the streetscape can

only be appreciated by pedestrians.

On the basis of the design and materials used, the development will be in keeping with the bulk and scale of the surrounding area. The proposed dwelling will make a positive contribution to the streetscape of Frenchs Forest Road and is in keeping with the low density residential character 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,**

**Comment:** The proposal marginally exceeds the dwelling density of the site, as addressed in this amended variation request and the SoEE prepared by this firm. However, given the relatively small allotment size of 362.59m<sup>2</sup> and width of the property, there is justification to support the variation on the basis of the suitably articulated facades and use of lightweight materials. The proposal will not obscure any important landscape or townscape features. The increase in setbacks also provides a view corridor along the side boundaries.

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

**Comment:** The proposed 2 storey dwelling exhibits architectural merit and is in keeping with the existing and envisaged low density character of the area. As stated above, the character of the area will evolve over the years as older dwelling stock is replaced by new modern dwellings and the existing streetscape character is one that is highly variable, with no consistency that would provide a built form character. A variation in architectural treatment is evident in the street.

As demonstrated in the Statement of Environmental Effects prepared by this firm, the development is generally compliant with the LEP and DCP. The property has been recognised as an undersized lot and the Council has provided flexibility in the DCP control to allow, subject to a written request under Clause 4.6, variations to this particular standard.

Obviously, the Council could not look at each lot that was undersized when preparing the minimum lot size map and moreover the floor space ratio map to provide different controls and hence 'blanket' floor space ratio controls to whole areas. However, the provision in the DCP looks at setting aside the 'blanket' control and provide a sliding scale for a range of lot sizes. This is a fair planning outcome for such lots and in our opinion is a planning outcome that provides flexibility for Council to assess applications that may not be in strict compliance with planning controls.

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

**Comment:** The proposal will not have any adverse environmental impacts upon the use or enjoyment of adjoining properties or the public domain, as discussed in the Statement of Environmental Effects. The amended plan provides a development that is essentially compliant with the planning controls and provides a greater setback and therefore improved amenity for adjoining residents.

**(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:** Non-applicable.

Having regard to all of the above, it is our opinion that compliance with the floor space ratio standard is unnecessary in the circumstances of the case as the development meets the objectives of that standard and the zone objectives, as described in this written variation request.

Compliance with the development standard is both unreasonable and unnecessary in this case given the fact that the property and the size of the lot already exist. The potential site development is in keeping with the existing character that has occurred in the immediate area having regard to the zoning of the land.

It is also relevant that, as a general principle, the highest and best economic use of land which has been identified as appropriate for residential development, will conversely act to preserve the character of the area, particularly having regard to the setting of the area and adjoining developments.

Having regard to the above we consider that the approach taken serves the objects of the Act of promoting the orderly and economic use of land, with a development that provides for housing close to services and facilities in the immediate area.

It is not considered that a variation to the development standard in these circumstances would act as a general planning change more appropriately dealt with under *Part 3* of the *Environmental Planning & Assessment Act 1979*.

## 2.2 CLAUSE 4.6(1) - OBJECTIVES

The objectives of clause 4.6(1) 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.

Subclause 2 essentially provides for Council to grant development consent for a development that would contravene a development standard. Subclause 3 has the same requirement that a written request must be received objecting to the particular development standard.

The proposed variation to Clause 4.4 is considered to be consistent with the objectives of the exception clause. In this regard, given the specific circumstances of the site a better and more appropriate outcome for the proposed dwelling is achieved by allowing flexibility to the development standard, in this particular circumstance, also noting the comments above regarding Subclause 4.1.3.1 of the DCP.

## 2.3 REQUIREMENTS OF EXCEPTION UNDER CLAUSE 4.6

Clause 4.6(2) & (3) of MLEP 2013 states:

- (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.*

- (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.*

This report seeks to demonstrate that compliance with Clause 4.4 of MLEP 2013 is both unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard in this particular instance.

In our opinion, strict compliance with the development standard is *unreasonable or unnecessary* for the reasons espoused in this report, as required to be addressed by the above L&EC decisions.

The surrounding area is characterised by predominantly residential development of various eras and built forms. The character of the area has evolved into different forms of residential development, particularly as various town planning policies have changed over the years. The proposed development is therefore consistent with the character of the area, being located in a transitional area, where older style dwellings are being replaced with new contemporary dwellings, which has occurred at No 109 Frenchs Forest Road.

In instances, such as this proposal on an undersized lot, a 0.45:1 FSR significantly reduces the dwelling size and persons are redeveloping houses on the basis of either achieving the required FSR under the LEP, obviously on larger lots, or in this case building a reasonable sized family home on a smaller lot. The sizes of houses in the area are generally large and a house of this size would not be out of character with the streetscape. This also needs to be put into context with the cost of land and redeveloping.

Given the fact that the general character of the area, was carefully considered during the preparation of the proposal, the coordination of the orderly and economic use and development of the land will most appropriately be achieved by supporting variations to the relevant development standards, noting the non-compliance with the standard.

It is also relevant that, as a general principle, the highest and best economic use of land which has been identified as appropriate for residential development, will conversely act to preserve the character of the area. Having regard to the above we consider that the approach taken serves the objects of the Act of promoting the orderly and economic use of land.

### 3 Objectives of Development Standards

#### 3.1 CLAUSE 4.4 – FLOOR SPACE RATIO

Clause 4.4 is a development standard that may only be varied if the application is accompanied by a written request that adequately addresses the required matters.

The basis of this report is to demonstrate that the FSR requirement of 0.45:1 is unreasonable considering the specific circumstances of this case is not appropriate given the desired future

character of the locality and the minimal adverse environmental impacts including amenity impacts on neighbouring residential properties resulting from the proposed development.

On this basis, the opportunity is available to highlight that visual significance through the proposed building's siting and the general high quality building design, and as stated above, to comply with clause 4.4(2).

It has been demonstrated that the proposed amended dwelling has been designed to take into consideration its surroundings and "fit in" with the streetscape. Therefore, restricting the FSR is unreasonable and unnecessary for the proposed development and Council has recognized that there does need to be a control that applies to undersized lots.

It is also considered that the subject development will present a high-quality urban form, having regard to existing development in the area. It is noted that the Council has approved the redevelopment of No 109 Frenchs Forest Road, which does not comply with the FSR control. The variation for this property was slightly different, as this property is larger (405m<sup>2</sup>) and has a wider frontage. Therefore, the variation was in this instance less than 10%.

#### 4 Justification for Non-Compliance with the Development Standards

##### 4.1 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (CLAUSE 4.6(3)(A))?

Compliance with the development standards under Clause 4.4 is both unreasonable and unnecessary in this case given that the characteristics of the site and the circumstances of the proposed building to allow for the proposed FSR.

In *Wehbe v Pittwater Council* (2007) NSW LEC 827, Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary.

The judgement goes on to state that:

*The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved.*

*However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).*

The potential site development is in keeping with the existing character and the form of development that has occurred in the immediate area having regard to the R2 zone applicable to the site and sites in the immediate area.

In addition, the proposed streetscape when viewed from various locations will provide variety and interest. What is achieved by permitting the proposed development is a streetscape that has various architectural elements, but generally consistent heights, setbacks and scale.

Having regard to all of the above, it is our opinion that compliance with the floor space ratio development standard is unnecessary in the circumstances of the case as the development meets

the objectives of that standard and the zone objectives, as described at Part 3 of this written variation request. On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

#### **4.2 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD (CLAUSE 4.6(3)(B))?**

**(B) that there are sufficient environmental planning grounds to justify contravening the development standard.**

Having regard to the objectives of the *Environmental Planning and Assessment Act 1979* sufficient environmental planning grounds exist in this case to justify breaching the floor space ratio control for a dwelling house. In particular the objects under section 1.3(a), (b), (c), (g) and (h) are pursued by this development. The objective seeking orderly and economic development of land is clearly supported by approval of this development.

Part of the environmental planning grounds in this matter arise from the fact that this is an existing lot that cannot be increased in size to meet the standard due to part of the lot being acquired for road widening purposes.

A larger lot (say 500m<sup>2</sup>), in our opinion, would have reasonably met the FSR control. But the subject lot is 137.4m<sup>2</sup> less than the minimum lot size.

Clause 4.6(3)(b) requires that the written request to vary a development standard demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard. In order to demonstrate that there are sufficient environmental planning grounds to justify varying the development standard and to satisfy objective (1)(b) of Clause 4.6 by demonstrating that the proposed variation allows for a better outcome for and from the development. The following discussion is provided:

- The discussion provided throughout this variation request demonstrates that the existing lot size will not result in any adverse environmental impacts, in terms of amenity impacts, nor will there be any adverse streetscape impacts given the nature of the departure. It is submitted that there are sufficient environmental planning grounds to support the variation.

The FSR requirements under LEP 2013 are, in the circumstances of this matter, unreasonable and unnecessary, as discussed in this submission, being an existing lot. The site is zoned for a dwelling house, with a lot size control of 500m<sup>2</sup>.

Exceedance of the FSR control is therefore not a prohibition, but more relating to development that may be developed in residential zones, with lot size controls restricting development on lots less than 500m<sup>2</sup>. The zoning of the land clearly envisages a dwelling house to be constructed on the property.

**(C) In addition, under cl 4.6(4)(a)(ii) of the LEP, the consent authority must also be satisfied that:**

- (1) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and with the objectives for the development within the zone in which the development is proposed to be carried out.

In terms of the public interest, it is considered that the reduction of the floor area of the dwelling as a result of the increase by side and rear setbacks is in the public interest and is consistent with the objectives of Clause 4.4 and the R2 Low Density Residential zone under MLEP 2013. It is considered that strict maintenance of the standard in this instance is not in the public interest, as the proposal will result in the public benefit by delivering a dwelling that is essentially compliant with all other requirements of the MLEP 2013 and MDCP 2013, as addressed in the SoEE prepared by this firm. In addition, the property is an undersized lot that has been recognised by Council planning controls to allow variations due to the lot size.

As stated above, whilst Clause 4.1.1.3 of MDCP 2013 is not a development for which Clause 4.6 of MLEP 2013 applies, nonetheless the clause in the MLEP recognises that there will be instances of non-compliance and that consideration under the clause is a matter for consideration in any variation request.

In the judgement within Initial Action, Preston CJ indicated that a consent authority only needs to be satisfied that an applicant has adequately addressed the matters within clause 4.6(3), and that, pursuant to 4.6(4)(a)(ii), the development is consistent with the objectives of the standard and consistent with the objectives of the zone. Although not strictly required, this variation has addressed the reasons that the development satisfies 4.6(4)(a)(ii).

It is also evident that the existing locality referred to within the objectives, is eclectic and is not characterised by any particular homogenous built form. It is also evident that developments in the area occupy various footprints, lot sizes and lot frontages.

Having regard to the objectives of the *Environmental Planning and Assessment Act 1979* sufficient environmental planning grounds exist in this case to justify breaching the FSR standard, in particular the fact that this is an existing property that has a portion of the front part of the property acquired for road widening purposes. In particular the objects under section 1.3(a), (b), (c), (g) and (h) are pursued by this development.

The objectives of the standard and the zone are addressed above under heading A.

In addition the public interest is well served by a dwelling constructed on the land to replace an older style dwelling that is probably nearing its 'used by date'.

It is considered that this represents an individual response which Clause 4.6 was intended to be available to set aside compliance with the generic controls as unreasonable or unnecessary in the circumstances of this particular case.

## 5 Conclusion

Having regard to the judgement in *Wehbe*, the objectives of the *Environmental Planning and Assessment Act 1979*, the objectives of the zone and the objectives of the standard, sufficient environmental planning grounds exist in this case to justify breaching the floor space ratio control.

Having regard to the objectives of the *Environmental Planning and Assessment Act 1979* sufficient environmental planning grounds exist in this case to justify breaching the floor space ratio control. In particular the objects under section 1.3(a), (b), (c), (g) and (h) are pursued by this development. The objective seeking orderly and economic development of land is clearly

supported by approval of this development.

Given that the constraints of the land were carefully considered during the preparation of the proposal, the coordination of the orderly and economic use and development of the land will most appropriately be achieved by supporting variations to the relevant development standard.

It is considered that this case represents an individual circumstance in which Clause 4.6 was intended to be available to set aside compliance with unreasonable or unnecessary development standards.

It is considered that the variation to the development standard contained in Clause 4.4 of MLEP 2013 should be supported, because it is consistent with Clause 4.6, the objects of the EPA & A Act, the relevant aims and objectives of MLEP 2013 and the R2 Low Density Residential zone and would appear to create a negligible impact on the natural environment and the landscape character of the area.

The authority within the judgement in Initial Action has reaffirmed that the role for the consent authority is to determine whether the proposed development will be consistent with the objectives of the standard and the objectives of the zone. This involves a consideration of the “development” in its entirety, not just the proposed variation. It is clear that the development meets the objectives of the standard and of the zone.

Notably, the development is compatible with the height, bulk and scale of the existing character of the development within this established residential area, as discussed above.

This written request has demonstrated that compliance with the standard in this instance would be unnecessary and unreasonable and that there are environmental planning grounds to justify the contravention of the development standard. Given the above, it is considered that the requirements of Clause 4.6 have been satisfied and that the variation to the floor space ratio development standard can be approved.