

Clause 4.6 - Exceptions to Development Standards

Proposed Semi-Detached Dwellings - 35 Pine Street, Manly

Variation to Clause 4.3 - Height of Buildings

The proposed development will result in a built form which has a height in excess of the maximum 8.5m height of building control as required by Clause 4.3 of the Manly Local Environmental Plan 2013.

The existing building erected upon the site currently has a height of 11.61m.

The proposal does not seek to increase this height with the proposed alterations and additions either contained within the existing roof form or having a height equivalent to or lower than the existing building.

The maximum height of the proposed rear addition is 8.5m.

Given that the proposal does not strictly comply with the maximum height control of 8.5m as required by Clause 4.3 of the Manly LEP 2013 and in order for consent to be granted to the proposal a variation pursuant to Clause 4.6 of the LEP is required.

This Clause 4.6 variation has been prepared having regard to the recent decisions of the Land & Environment Court.

It is submitted that the variation is well founded and is worthy of the support of the Council.

The following is an assessment of the proposed variation against the requirements of Clause 4.6.

1. What are the objectives of Clause 4.6 and is the proposal consistent with them.

The objectives of Clause 4.6 of the LEP 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.*

It is my opinion, as is demonstrated by the responses to the questions below, that the proposed variation is consistent with the objectives of this clause.

2. Is the standard to be varied a Development Standard to which Clause 4.6 applies.

Clause 4.3 is contained within Part 4 of the LEP and which is titled Principal Development Standards. It is also considered that the wording of the Clause is consistent with previous decisions of the Land & Environment Court of NSW in relation to matters which constitute development standards.

It is also noted that Clause 4.3 does not contain a provision which specifically excludes the application of Clause 4.6.

On this basis, it is considered that Clause 4.3 is a development standard for which Clause 4.6 applies.

3. Is compliance with the development standard unreasonable or unnecessary in the circumstances of this case.

Sub-clause 4.6(3) sets out the matters that must be demonstrated by a written request seeking to justify a contravention of the relevant development standard (that is not expressly excluded from the operation of clause 4.6 under Manly Local Environmental Plan 2013):

- (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.*

In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ set out five justifications that may be used to demonstrate that compliance with a development standard is unreasonable or unnecessary:

- The objectives of the development standard are achieved notwithstanding non-compliance with the standard.
- The underlying objective or purpose of the standard is not relevant to the development.
- The underlying objective or purpose would be defeated or thwarted if compliance was required.
- The standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and/or
- The zoning of the land was unreasonable or inappropriate such that the standards for that zoning are also unreasonable or unnecessary.

It is submitted that the first justification is applicable in this instance.

The following assessment of the proposal is provided against the objectives of Clause 4.3 of the LEP.

(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,

The proposal does not seek to alter the existing roof form of the existing building as it currently presents to the streetscape. The existing roof form will remain the dominant roof form upon the site.

(b) to control the bulk and scale of buildings,

The proposal will result in a reduction in the existing bulk and scale (FSR) of the existing building.

(c) to minimise disruption to the following—

(i) views to nearby residential development from public spaces (including the harbour and foreshores),

The proposal will not result in a reduction in views to nearby residential development from public spaces.

(ii) views from nearby residential development to public spaces (including the harbour and foreshores),

The proposal will not result in a loss of views to any adjoining properties.

(iii) views between public spaces (including the harbour and foreshores),

The proposal will not result in a reduction in views between public places.

(d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,

It is my opinion based upon the accompanying shadow diagrams that the proposal will not result in any unreasonable increase in overshadowing or reduction in solar access to the adjoining properties.

- (e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

Not Applicable.

On this basis, it is my opinion that strict compliance with the standard is unreasonable and unnecessary in the circumstances of this case.

4. Are there sufficient environmental planning grounds to justify contravening the development standard.

It is considered that a contravention of the development standard is justified in the circumstances of this case for the following reasons:

1. The existing backpacker's accommodation building currently has a height of 11.61m which exceeds the maximum 8.5m building height as required by Clause 4.3 of the LEP.
2. The proposed alterations and additions have been designed so as to be contained either within the existing roof form or to have a height no higher than the existing ridge.
3. The proposed new rear building additions do not exceed the maximum 8.5m building height as required by Clause 4.3 of the LEP.
4. The proposal will not result in any additional negative impacts on the privacy or amenity of the adjoining properties to the east and west.
5. The proposal provides an opportunity for the existing backpacker accommodation to be replaced with a more sympathetic land use.

5. Is the proposed development 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.

The proposed development is in my opinion in the public interest because it will provide for the cessation of the existing backpacker' accommodation use upon the site and will provide for the high quality conversion of the existing building to a pair of semi-detached dwellings in a manner which will make a positive contribution to the built form character of the locality. The proposal is considered to be otherwise compliant with the requirements of the LEP, the applicable zone objectives and the objectives of the particular standard.

The following assessment is provided in relation to the proposals relationship to the objectives for the R1 - General Residential zone and which 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.*

Comment

The proposal seeks to provide for alterations and additions to the existing building erected upon the subject site as part of an application which includes a change of use to permit a pair of semi-detached dwellings. The proposal is, therefore considered to be consistent with these objectives.

The proposal as detailed in response to Question 3 is considered to be consistent with the objectives of Clause 4.3 - Height of Buildings.

6. Whether contravention of the development standard raises any matter of significance for state or regional environmental planning.

It is my opinion that contravention of the standard does not raise any matters of significance for State or Regional environmental planning.

7. What is the public benefit of maintaining the development standard.

It is my opinion that there is no public benefit in maintaining the development standard in this instance, given the high quality of the proposal, the proposed change of use from backpacker's accommodation to a semi-detached dwellings and the absence of any unreasonable detrimental impacts.

Conclusion

It is therefore my opinion based upon the content of this submission that a variation of the height requirements of Clause 4.3 of the Manly LEP 2013 is appropriate in this instance.

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