

5/09/2019

General Manager  
Northern Beaches Council

Via Email

Dear Sir/ Madam

Nicole Lennon (btp) Principal

Planik Pty Ltd  
ABN 74 164 697 036  
PO Box 577, Gymea NSW 2227

Mobile: 0402 407 841  
Email: nik@planik.com.au  
planik.com.au

## Clause 4.6 Request to vary the Floor Space Ratio Clause 4.4 of Manly LEP 2013 – Alterations and Additions to existing dwelling at 64 Fairlight Street, Fairlight

### Introduction

This 4.6 variation is to be read in conjunction with the Statement of Environmental Effects for the proposed alterations and additions to the existing dwelling at 64 Fairlight Street, Fairlight.

In particular, the proposal seeks to provide an attic roof level containing a master bedroom and ensuite. Due to the fall of the land from the front boundary to the rear of the site, the proposed additions will not have a significant visual impact above street level. The proposed attic level design incorporates the following:

- Contemporary dormer structures at the rear of the side roof planes recessed from the walls of the floor below to be contained within the existing roof form.
- Attic additions have been designed to appear below the existing roof ridge when viewed from the street and surrounding properties.
- Sufficient floor to ceiling heights and skylights to maximise light into the attic level.

The resulting floor space is slightly above the maximum permitted for this zone, noting the lot is undersized.

Across the building the proposed Gross Floor Area (GFA) is 173.2m<sup>2</sup>. The Floor Space Ratio (FSR) is 0.69:1 when calculated in accordance with Clause 4.1.3.1 of the MDCP 2013 which allows FSR to be calculated against the minimum lot size of the site – 250m<sup>2</sup>. The subject site has an area of 235.4m<sup>2</sup> being an FSR of 0.735:1 when calculated normally.

This 4.6 variation seeks to vary the density provisions contained within the Manly Local Environmental Plan 2013 (MLEP 2013).

The site is located in the R1 General Residential zone. The density provision includes a floor space ratio standard of 0.6:1 as set out on the Manly FSR map sheet \_003.

This submission forms a request to grant an exception to the development standard Floor Space Ratio in clause 4.4 of the MLEP 2013 under clause 4.6 “Exceptions to development standards” of the MLEP 2013. This application breaks down the considerations, justifications and demonstrations required by clause 4.6 in the following sections.

#### **4.6 Exceptions to development standards**

(1) *The objectives of this clause 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.*

*(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.*

*(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 Secretary has been obtained.*

*(5) In deciding whether to grant concurrence, the Secretary must consider:*

*(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*

*(b) the public benefit of maintaining the development standard, and*

*(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

*(6) Not Applicable*

*(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*

*(8) This clause does not allow development consent to be granted for development that would contravene any of the following:*

*(a) a development standard for complying development,*

*(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*

*(c) clause 5.4.*

(ca) clause 6.15,

(cb) a development standard on land to which clause 6.19 applies.

### **Court Principles and Guidance around Application of 4.6 Exceptions**

A number of court cases have assisted to guide expectations and facilitate appropriate application for and justification of the variations sought. Significant cases are cited below and will be drawn upon to assist with this application:

1. In 2007, in the case *Wehbe v Pittwater Council* (CJ Preston) five (5) ways of establishing that compliance was unreasonable or unnecessary was discussed.
  1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Method).*
  2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Method).*
  3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Method).*
  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 (Fourth Method).*
  5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Method).*
2. In 2015, in the case *Four2Five Pty Ltd v Ashfield Council* (C Pearson) and later 2016 *Moskovitch v Waverley Council* (Tuor) it was established that written requests made under clause were required to demonstrate that:
  - a. that compliance was unreasonable or unnecessary in the circumstances of the case to be consistent with the objectives of the development standard (cl4.6 (3)(a)), and
  - b. "sufficient environmental planning grounds (4.6(3)(b)) exist to support the variation.

In 2018, in the case *Initial Action Pty Ltd v Woollahra Municipal Council* (CJ Preston) it was established that Commissioner Smithson had misinterpreted and misapplied cl 4.6 of the Woollahra LEP 2014. In this case, the commissioner herself considered whether compliance was unreasonable or unnecessary rather than determining whether the written request had adequately addressed the matter. In summary the court found that:

*The applicant bears the onus to demonstrate that the matters in cl 4.6(3)(a) and (b) have been adequately addressed in the applicant's written request in order to enable the consent authority, or the Court on appeal, to form the requisite opinion of satisfaction.*

Further, the Commissioner had required that to be considered unreasonable or unnecessary, the non compliance with the standard needed to have a neutral or beneficial effect relative to a development that complied with the standard. CJ Preston said:

*'Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development.... Compliance*

*with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion.*

With reference to sufficient environmental planning grounds CJ Preston further held:

*Clause 4.6 does not directly or indirectly establish this test. The requirement ...is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.'*

### **Development Standard to be Varied – Floor Space Ratio**

This clause 4.6 variation request relates to a departure from a numerical standard set out under clause 4.4 of the MLEP 2013 Floor Space Ratio Map in relation to the specified floor space ratio of 0.6:1.

This development standard relates to the density of the development, clause 4.4 of the MLEP 2013 falls within a scope of a “development standard” as defined under section 4 of the Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act).

Clause 4.4 of the MLEP 2013 contains objectives for buildings proposed in the local government area.

#### **4.4 Floor space ratio**

*(1) The objectives of this clause 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.*

*(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](#).*

#### *Floor Space Statistics*

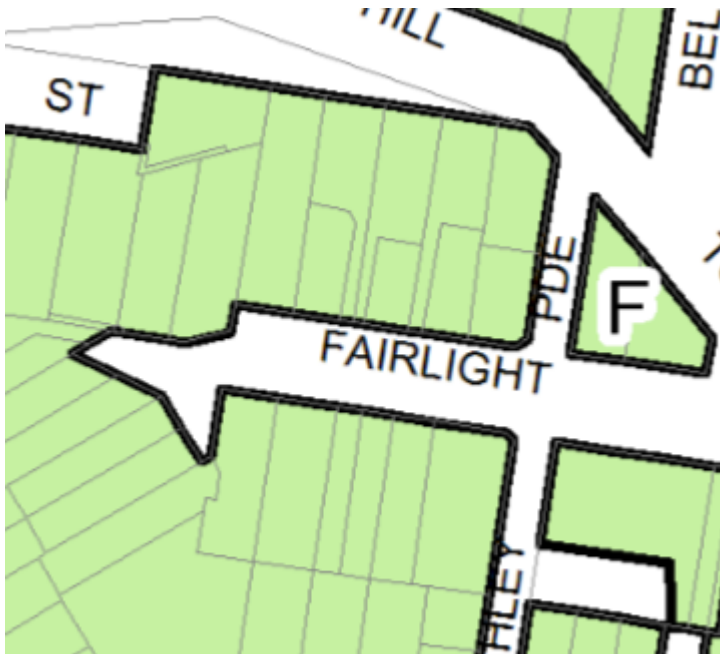
Under clause 4.4 the site has a prescribed maximum floor space ratio of **0.6:1**.

When calculated in accordance with Clause 4.1.3.1 of the MDCP 2013, the site has a maximum floor space ratio of 0.69:1.

- The maximum floor space permitted is 141.3m<sup>2</sup>
- The proposed floor space ratio is 0.735:1 –173.2m<sup>2</sup>.
- The total floor area proposed is thus 31.9m<sup>2</sup> over the floor space ratio standard.
- The floor area results in a floor space ratio of 0.69:1 when measured against the minimum lot size of 250m<sup>2</sup> in accordance with Clause 4.1.3.1 of the MDCP 2013 which identifies the subject site as an undersized lot.

- This represents a 22.5% variation to the floor space ratio standard (0.09:1 variation when measured as an undersized lot).

Refer to Figure 1 below for Floor Space Map noting F is 0.6:1.



**Figure 1** Manly LEP 2013 Floor Space Ratio Map

### **Assessment of the Provisions of Clause 4.6 Exceptions to development standards**

Clause 4.6 of the MLEP 2013 allows for flexibility to be applied to development standards where objectives can be obtained notwithstanding the variation. The mechanics of the clause, the objectives of the floor space ratio standard and a response are all outlined below; however, the main opportunities and justifications for the floor space ratio variation are presented here:

- The proposed additional floor area resulting in a variation is located entirely within the attic level and does not result in an increased building footprint.
- The floor plate within the attic level allows for an additional bedroom and ensuite and is not an overdevelopment of the site.
- The site is zoned R1 General Residential, the proposal conforms to the bulk, scale and rhythm of buildings in the streetscape and therefore, it would not look out of place in the locality.
- The proposal does not result in undue impacts including acoustic and visual privacy, solar access, nor does it interrupt views.

It is noted that the site is identified as an undersized lot pursuant to Clause 4.1.3.1 of the Manly DCP 2013 and when calculated in relation to the minimum lot size of 250m<sup>2</sup> which applies to the site, results only in a variation of 0.09:1. The increase to floor space to this site does not significantly increase the volume of the building.

The site and the surrounding area can support the increased floor space rate, as the primary controls for setbacks are maintained, overshadowing does not adversely affect enjoyment of the private open space areas or the internal living rooms of the neighbouring properties. It should be noted that the site adjoins a double width driveway to its west and a driveway to the east which gives the additional floor area ample space to be absorbed into the setting without impact.

### Clause 4.6.3 (a)(b) - Unreasonable or Unnecessary / Environmental Planning Grounds

Commentary provided below to address the requirements of this clause.

**Table 1** Request to vary development standard 4.4 Floor Space Ratio

Objective	Comment
<p>(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and</p>	<p>The proposal will result in a two storey + attic development as viewed from the street, noting the additional bulk at the attic level will not have a significant impact upon the street being located towards the side roof planes.</p> <p>The volume of the attic level including the minor variation to floor space will produce a bulk and scale that will not offend the rhythm of the streetscape.</p> <p>The proposal is consistent with the objectives of the R1 General Residential zone. In that:</p> <ul style="list-style-type: none"> <li>• To provide for the housing needs of the community.</li> <li>• To provide for a variety of housing types and densities.</li> </ul> <p>The proposed additions meet the key objective of the R1 zone as they have been designed in an attic form that sits within the existing roof form and recessed from the walls of the floor below and is consistent with the varied housing types and densities within the street.</p> <p>Further, the works would provide for the housing needs of the residents of the subject site through the provision of an additional bedroom and ensuite.</p> <p>The overall size of the proposed dwelling is considered modest and not greedy.</p>
<p>(b) that there are sufficient environmental planning grounds to justify contravening the development standard.</p>	<p>There are no significant adverse impacts created by this proposal and in particular the additional 23.4m<sup>2</sup> of floor space at the attic level, which further supports the application of flexibility in this instance.</p> <p>The room sizes, corridor spaces and utility areas are not excessive and setbacks to the existing building are maintained which preserves the amenity of adjoining properties.</p> <p>The proposal represents utilisation of the full volume of a building stepping down the topography of the site to provide an additional bedroom at the attic level to service the residents of the subject site.</p>

### 4.6.4 (i) (ii) - Achieving Consistency with the Objectives of the Standards

#### 4.6 Exceptions to development standards

(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 Secretary has been obtained.

In terms of Clause 4.6 (4)(a)(i) this submission is the written request that address the matters contained required to be considered in subclause (3).

**Table 2** Clause 4.6(4) ii assessment

Objectives for Consideration	Comment
<p>The relevant R1 zone objectives include:</p> <ul style="list-style-type: none"> <li>• To provide for the housing needs of the community.</li> <li>• To provide for a variety of housing types and densities.</li> </ul>	<p>The proposed additions meet the key objective of the R1 zone as they have been designed in an attic form that sits within the existing roof form and recessed from the walls of the floor below and is consistent with the varied housing types and densities within the street. The majority of the proposed works sit within the 8.5m height control. Further, the works would provide for the housing needs of the residents of the subject site through the provision of an additional bedroom and ensuite.</p>
<p>The relevant objectives of the floor space standard include:</p> <p>(a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,</p> <p>(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,</p> <p>(c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,</p> <p>(d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,</p>	<p>The proposed attic addition is consistent with the character of the street which contains a variety of different dwelling typologies including residential flat buildings.</p> <p>The proposal will not increase the existing building footprint and is generally contained within the existing roof form and is therefore not an overdevelopment of the site that would obscure important landscape and townscape features.</p> <p>The proposal maintains an appropriate visual relationship noting the side boundaries adjoin driveways/access handles.</p> <p>Finally, the variation will not adversely impact upon the use or enjoyment of adjoining land in terms of overshadowing and privacy.</p>

**Clause 4.6(5) Considerations**

**4.6 Exceptions to development standards**

- (5) In deciding whether to grant concurrence, the Secretary must consider:
  - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
  - (b) the public benefit of maintaining the development standard, and
  - (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

The matters for consideration in clause 4.6(5) have been addressed in Table 2

**Table 2** Clause 4.5(5) assessment

<b>Matters of Consideration</b>	<b>Comment</b>
(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and	The contravention does not raise any matters of state or regional significance.
(b) the public benefit of maintaining the development standard, and	There is no public benefit in maintaining the standard. The proposal maintains amenity including privacy, overshadowing and views, which the additional floor space does not impact. The relaxation of this standard to the same extent has occurred a number of times in the immediate locality and demonstrates that relaxing the standard is appropriate in the same / similar circumstances presented by this application.
(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.	N/A

### **Conclusion**

The proposed application remains consistent with the objects of Part 1.3 and requirements of Part 4 of The Act. The proposed use is permissible with consent and uses the subject site to its full potential. The proposal will create a development that:

- Conforms with the existing streetscape
- Does not impact the natural environment
- Does not impact views or privacy
- Supports the needs of the residents by providing an additional bedroom and ensuite.
- Promotes the orderly and economic use and development of the land.
- Promotes good design and amenity of the built environment.

The proposal responds to the character and nature of the streetscape and the proposed non-compliance with the density requirement would not result in any significant adverse impacts, as the additional floor space will not impact neighbouring amenity or privacy. Therefore, strict compliance with the floor space ratio standard is considered unreasonable and unnecessary in this case.

Yours Faithfully,



Nicole Lennon

Director

Planik Pty Ltd