

## **Clause 4.6 Exceptions to Development Standards – Floor Space Ratio**

### **71 Whistler Street, Manly**

Clause 4.6 of the Manly Local Environmental Plan 2013 (MLEP 2013) permits departures from development standards in certain circumstances. In this case, it is necessary to consider if compliance with the development standard is consistent with the aims of the policy and, in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in section 1.3 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) being:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The aims and objectives of Manly LEP 2013 Clause 4.6 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.*

**Commencing on 1 November 2023** Clause 4.6(3) and (4) of the MLEP 2013, state that development consent, that contravenes a development standard, must not be granted unless the consent authority is satisfied the applicant has demonstrated that:

*(a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

*(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.*

*(4) The consent authority must keep a record of its assessment carried out under subclause (3).*

These matters, along with case law judgements from the NSW Land and Environment Court, are addressed below.

## **1. Environmental Planning Instrument Details (Manly LEP 2013)**

### **1.1 What is the name of the environmental planning instrument that applies to the land?**

Manly Local Environmental Plan 2013

### **1.2 What is the zoning of the land?**

R3 – Medium Density Residential

### **1.3 What are the objectives of the zone?**

- *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.*

#### **1.4 What is the development standard being varied?**

Cl 4.4 – Floor Space Ratio

#### **1.5 Under what clause is the development standard listed in the environmental planning instrument?**

Cl 4.4 of the Manly Local Environmental Plan 2013

#### **1.6 What are the objectives of the development standard?**

*(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.*

#### **1.7 What is the numeric value of the development standard in the environmental planning instrument?**

The numeric value of the FSR development standard applicable to the subject site is 0.75:1, this equates to a maximum floor area of 130.43m<sup>2</sup> for the site area of 173.9m<sup>2</sup>.

#### **1.8 What is proposed numeric value of the development standard in your development application?**

The development proposes a maximum floor area of 156.2m<sup>2</sup> or FSR of 0.9:1.

#### **1.9 What is the percentage variation (between your proposal and the environmental planning instrument)?**

The percentage variation sought is 19.76% or 25.77m<sup>2</sup>.

**Note:** The Manly DCP provides exceptions to floor space ratio for undersized lots. The subject site is an undersized lot, comprising an area of 173.9m<sup>2</sup> and qualifies for consideration as an exception.

In this regard the DCP permits an FSR calculation based on a 250m<sup>2</sup> lot size, which equates to 187.5m<sup>2</sup>. As noted above, the proposed gross floor area is 156.2m<sup>2</sup> resulting in an FSR of 0.62:1 under these provisions, and therefore complies with the provision of the DCP.

## 2. NSW Land and Environment Court Case Law

Several key Land and Environment Court (NSW LEC) judgements have refined the manner in which variations to development standards are required to be approached. The key findings and direction of each of these matters are outlined in the following discussion.

### 2.1 *Wehbe v Pittwater* [2007] NSW LEC 827

The decision of Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827, (expanded on the findings in *Winten v North Sydney Council*), identified 5 ways in which the applicant might establish that compliance with a development standard is unreasonable or unnecessary. It was not suggested that the five ways were the only ways that a development standard could be shown to be unreasonable or unnecessary.

The five ways outlined in *Wehbe* include:

- 1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).*
- 2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).*
- 3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).*
- 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 Way).*
- 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 Way).*

In the Micaul decision Preston CJ confirmed that the requirements mandated by SEPP 1 (as discussed in *Wehbe*) are only relevant in demonstrating that compliance with a development standard is unreasonable or unnecessary for the purpose of Clause 4.6(3)(a).

## **2.2 Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC**

In the matter of *Four2Five Pty Ltd v Ashfield Council [2015] NSW LEC*, initially heard by Commissioner Pearson, upheld on appeal by Justice Pain, it was found that an application under Clause 4.6 to vary a development standard must go beyond the five (5) part test of *Wehbe V Pittwater [2007] NSW LEC 827* and demonstrate the following:

1. Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;
2. That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity);
3. That maintenance of the development standard is unreasonable and unnecessary on the basis of planning merit that goes beyond the consideration of consistency with the objectives of the development standard and/or the land use zone in which the site occurs;
4. All three elements of clause 4.6 have to be met and it is best to have different reasons for each but it is not essential.

## **3 Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7**

In *Randwick City Council v Micaul Holdings*, the Court allowed a departure from development standards, provided the processes required by clause 4.6 are followed, a consent authority has a broad discretion as to whether to allow a departure from development standards under clause 4.6, even where the variation is not justified for site or development specific reasons.

Preston CJ noted that *the Commissioner did not have to be satisfied directly that compliance with each development standard was unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the appellant's written request had adequately addressed the matter in clause 4.6(3)(a) that compliance with each development standard was unreasonable or unnecessary.*

## **4 Zhang v City of Ryde**

Commissioner Brown reiterated that clause 4.6 imposes three preconditions which must be satisfied before the application could be approved:

1. The consent authority must be satisfied that the proposed development will be consistent with the objectives of the zone;
2. The consent authority must be satisfied that the proposed development will be consistent

with the objects of the standard which is not met; and

3. The consent authority must be satisfied that the written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances and there are sufficient environmental planning grounds to justify contravening the development standard.

It is only if all of these conditions are met that consent can be granted to the application, subject to an assessment of the merits of the application.

The Commissioner applied the now familiar approach to determining consistency with zone objectives by considering whether the development was antipathetic to the objectives.

In contrast to *four2five*, the reasons relied on to justify the departure from the standards in this case were not necessarily site specific.

#### **5. Action Pty Ltd v Woollahra Municipal Council [2018]**

In *Action Pty Ltd v Woollahra Municipal Council*, the court demonstrated the correct approach to the consideration of clause 4.6 requests, including that the clause does not require that a development that contravenes a development standard, must have a neutral or better environmental planning outcome than one that does not.

### 3. Consideration

The following section addresses the provisions of clause 4.6 of the MLEP 2013 together with principles established in the NSW Land and Environment Court Case Law outlined above.

**Clause 4.6(3)(A) - Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case (and is a development which complies with the development standard unreasonable or unnecessary in the circumstances of the case)?**

In order to demonstrate that compliance with the development standard is unreasonable or unnecessary, in the circumstances of the case, the Five (5) Part Test established in *Winten v North Sydney Council* and expanded by Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827 is considered:

The five ways outlined in *Wehbe* include:

#### 3.1 Five (5) Part Test - *Wehbe v Pittwater*

##### 1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard (First Way).*

The objectives of the standard are:

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

##### Comment

The proposed development is for the demolition of the existing dwelling and the construction of a new dwelling. The proposed FSR variation is 19.76% or 25.77m<sup>2</sup>, however is compliant with the DCP FSR control for this undersized lot.

The new dwelling remains compatible with the built form in the locality and complies with the building height and number of stories controls. The resulting bulk and scale is of a lesser or consistent scale with surrounding properties and privacy and solar access are retained for both the subject site and adjoining dwellings.

It is considered this objective is met, despite the numerical variation.

*(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 proposed built form and massing will be of a consistent or lesser scale than other

properties in the locality.

The subject site is an undersized lot, comprising an area of 173.9m<sup>2</sup> and qualifies for an exception to FSR provided by the Manly DCP. In this regard the DCP permits an FSR calculation based on a 250m<sup>2</sup> lot size, which equates to 187.5m<sup>2</sup>. As noted above, the proposed gross floor area is 156.2m<sup>2</sup> and therefore complies with the exception permitted by the DCP.

The development proposes a compliant maximum building height and will not obscure any important landscape or townscape features and will not result in any view loss impacts.

It is therefore considered this objective is met, despite the numerical variation.

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

#### Comment

The proposed development is visually appropriate for the locality and remains consistent with other dwellings in Whistler Street. The design of the new dwelling is consistent with other dwellings in the locality and in this regard, the underlying intent of this objective has been satisfied, despite the numerical departure.

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

#### Comment

The proposed variation to floor space ratio does not result in any unreasonable environmental impacts to the amenity of adjoining dwellings. Compliant levels of solar access are maintained despite the proposed variation and there will be no unreasonable impact on views, visual privacy or acoustic privacy. In this regard, the underlying intent of this objective has been satisfied despite the numerical departure.

*(e) to provide for the viability of business zones and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.*

#### Comment

Not relevant as the subject site is no located in a business zone.

**2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way).***

This exception to development standards request does not rely on this reason.

**3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way).***

This exception to development standards request does not rely on this reason.

**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 Way).***

This exception to development standards request does not rely on this reason.

**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 Way).***

This exception to development standards request does not rely on this reason.

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the floor space ratio control pursuant to the First Way outlined in Wehbe.

Thus, it is considered that compliance with Clause 4.6(3)(a) is satisfied.

**3.2 Clause 4.6(3)(B) – Are there sufficient environmental planning grounds to justify contravening the development standard?**

There are sufficient grounds to permit the variation of the development standard. The development has been considered below with particular reference to the Objects of the Environmental Planning and Assessment Act 1979, which are accepted as the best gauge of *environmental planning grounds*. In particular:

**Context**

- The area surrounding the subject site is characterised by 1, 2 and 3 storey residential dwellings and 4-9 storey residential flat buildings with a wide variety of Gross Floor Areas.

- The dwelling proposes a compliant building height and has been designed to provide an FSR compliant with the DCP control for undersized lots,
- Variation to the Manly LEP 2013 Cl. 4.4 FSR, control has been the subject of recent precedent for the following developments:
  - DA2023/0085, 49 Alexander Street Manly, FSR Variation 28.36%,
  - DA2022/2013, 15 Pine Street Manly, FSR Variation 41.9%,
  - DA2022/1216, 69 Ernest Street Balgowlah Heights, FSR Variation 20%,
  - DA2022/1209, 8 Allenby Street Clontarf, FSR Variation 29%,
  - DA2021/2661, 33 Beatrice Street Clontarf, FSR Variation 7.7%,
  - DA2022/1289, 9 Lower Beach Street Balgowlah, FSR Variation 28.2%,
  - DA2021/2390, 29 Monash Crescent Clontarf, FSR Variation 37.1%.
- The setting and context with similar FSR variations recently approved, demonstrates that a varied FSR is reasonable and that it is consistent with clause 1.3(c) and (d).

### **Future Development**

- The proposed development will allow for a new dwelling house, with onsite carparking to be provided on the site,
- This represents an efficient use of an existing residential lot, with all services readily available,
- The built form proposed is consistent with other buildings in the locality and does not result in any unreasonable impacts to neighbouring properties,
- The proposed GFA of 156.2m<sup>2</sup> results in an FSR of 0.9:1 (a variation of 25.77m<sup>2</sup> or 19.76% in relation to the LEP control), however results in a compliant FSR of 0.62:1 in relation to the DCP controls for undersized lots,
- The proposed works will not hinder any future development of the lot demonstrate fulfillment of clause 1.3(a), (b), (c) and (g).

### **Consistent with Zone Objectives**

- The extent of the variation is considered to be in the public interest, as the proposal remains consistent with the objectives of the zone, allowing for additional residential floor space in a residential zone, with a bulk and scale consistent with the locality. Compliance with the FSR standard based on this would be unreasonable, with clause 1.3(c) demonstrated as fulfilled.

### **Natural Environment**

- The development does not require the removal of any native trees,
- The proposal allows for environmental impacts to be minimised, by locating works on

an already disturbed residential lot.

- The natural environment is unaffected by the departure to the development standard and it would be unreasonable for the development to be refused on this basis with CI 1.3(b) satisfied.

### **Social and Economic Welfare**

- The variation to the FSR will have a positive social impact, as it will allow the housing needs of the residents to be met in their current local community. It utilises existing services, satisfying CI1.3(b). Accordingly, refusal of the development based on this reason would be unreasonable.

### **Appropriate Environmental Planning Outcome**

- The new dwelling is not an overdevelopment of the site and satisfies the objectives of the zone and the development standard as is detailed earlier in the report.

The variation to the FSR and the discussion above reflects the unique circumstances for the subject site and proposed development. The proposed development will not present with excessive bulk from the public domain and there is recent precedent of similar variations being accepted by Council.

By supporting this variation, in its current form, it is considered that an appropriate degree of flexibility be applied, which results in a reasonable built form, consistent with developments within the locality.

The sufficient environmental planning grounds stipulated above demonstrate that the proposal aligns with the relevant objects of the EP&A Act i.e. the development is an orderly and economic and development of the land, notwithstanding the FSR variation.

### **Clause 4.15(1)(e) of the *Environmental Planning and Assessment Act 1979***

#### ***Will the proposed development be in the public interest?***

It is considered that the development of a residential flat building on the subject site, does not raise any matters contrary to the public interest.

#### **How would strict compliance hinder the attainment of the objects specified in Section 1.3 of the Act.**

Strict compliance with the standard would hinder the attainment of the objects specified in section 1.3 of the Act

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

Strict numerical compliance with the 0.75:1 FSR development standard would hinder the development for the purpose of *promoting the orderly and economic use and development of land, promoting good design and amenity of the built environment and promoting the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.*

## Conclusion

The proposed development to demolish the existing dwelling and construct a new dwelling house, on land zoned R3 – Medium Density Residential is appropriate and reasonable for the following reasons:

- There is recent precedent for similar variations to Cl 4.4 FSR of the Manly LEP 2013 being accepted by Council,
- The new dwelling will not present with excessive bulk and is of a consistent scale to surrounding properties. The proposal will not result in any unreasonable impacts.

- The works proposed will allow the housing needs of the residents to be met, in their current community,
- The objectives of the R3 zone can be met despite the numerical variation.

Strict numerical compliance is considered to be unnecessary and unreasonable given that the proposed variation sought is consistent with the underlying objectives of the control despite the numerical variation, of which have been reasonably satisfied under the provisions of Clause 4.6. The statement sufficiently demonstrates that compliance with the development standard is both unreasonable and unnecessary in this instance.

The sufficient environmental planning grounds stipulated within this request, demonstrate that the proposal aligns with the relevant objects of the EP&A Act i.e. the development is an orderly and economic and development of the land, notwithstanding the FSR variation.

The proposed variation satisfies the objectives of the zone, underlying intent of Clause 4.6 and Clause 4.4, and therefore the merits of the proposed variation are considered to be worthy of approval.

## Planner Declaration

### Document Control Table

| Document Purpose: | Clause 4.6 Variation Request  |                            |
|-------------------|-------------------------------|----------------------------|
| Date              | Prepared by                   | Approved by                |
| 13/12/23          | Naomi Lyons<br>Senior Planner | Sarah McNeilly<br>Director |

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