

1 Clause 4.6 variation request – Commercial Floor Space

1.1 Introduction

This clause 4.6 variation has been prepared with respect to a proposed shop top housing development at 35-43 Belgrave Street, Manly, having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

1.2 Manly Local Environmental Plan 2013 (MLEP 2013)

1.2.1 Clause 6.16(3) – Commercial Floor Space

Pursuant to Clause 6.16(3) of MLEP 2013, consent must not be granted to development on land identified as “Gross Floor Area for Certain Commercial Premises” on the Key Sites Map of MLEP 2013 unless the consent authority is satisfied that at least 25% of the gross floor area of the building will be used as commercial premises.

The objective of this control is to provide for the viability of the land to which this clause applies and encourage the development, expansion and diversity of business activities, that will contribute to economic growth, retention of local services and employment opportunities in local centres.

The proposed development provides a total of 512m² of retail floor space, being 16.4% of the gross floor area of the building. The non-compliance is representative of a 270.5m² or 34.6% variation to the minimum commercial floor space requirement prescribed.

1.2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of MLEP 2013 provides:

The objectives of this clause 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.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“*Initial Action*”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by clause 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner. At [90] of *Initial Action* the Court held that:

“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of MLEP 2013 provides:

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.

This clause applies to the commercial floor space development standard in clause 6.16(3) of MLEP 2013.

Clause 4.6(3) of MLEP 2013 provides:

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.*

The proposed development does not comply with the commercial floor space development standard at clause 6.16(3) of MLEP 2013 which specifies that a minimum of 25% of the gross floor area of a new development is to be used as commercial premises. However, strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of MLEP 2013 provides:

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 Planning Secretary has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority.

The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]). The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]).

The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

The 'Variations to development standards' Planning Circular issued by the NSW Department of Planning, Industry and Investment on 5 May 2020 confirms that the Secretary's concurrence can be assumed by the Local Planning Panel for applications involving contravention of a numerical development standard by more than 10%.

Clause 4.6(5), which relates to matters that must be considered by the Secretary in deciding whether to grant concurrence is not relevant, as the Council has the authority to determine this matter. Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 6.16(3) of MLEP 2013 from the operation of clause 4.6.

1.3 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 6.16(3) of MLEP 2013 a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 6.16(3) of MLEP 2013 and the objectives for development in the zone?

4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 6.16(3) of MLEP 2013?

1.4 Request for variation

1.4.1 Is clause 6.16(3) of MLEP 2013 a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes a provision of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (b) *the proportion or percentage of the area of a site which a building or work may occupy*

Clause 6.16(3) of MLEP 2013 prescribes a minimum percentage for commercial floor space on the site. Accordingly, clause 6.16(3) of MLEP 2013 is a development standard.

1.4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first approach is relevant in this instance, being that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the commercial floor space development standard

An assessment as to the consistency of the proposal when assessed against the objective of the standard is as follows:

- (a) *to provide for the viability of the land to which this clause applies and encourage the development, expansion and diversity of business activities, that will contribute to economic growth, retention of local services and employment opportunities in local centres.*

Comment: The proposed development has been designed to maximise commercial floor space on the ground floor, occupying all available floor area not required to accommodate vehicular and pedestrian access to the site, internal circulation and services associated with the use and management of the shop top housing development. The commercial floor space is strategically located to maximise street

activation, with the vehicular and pedestrian access points on the lower order street (Whistler Street).

The site is in a superior location, with a high level of pedestrian activity along all three frontages. The ground floor is ideally suited to retail premises, that will positively contribute to the range of business activities undertaken throughout the Manly Town Centre. Whilst inconsistent with the 25% requirement of clause 6.16(3) of MLEP 2013, the proposed development will revitalise the subject site, with 447m² of high-quality retail floor space that will stimulate economic growth and provide employment opportunities.

As such, the proposed non-compliance does not detract from consistency with the objective of this clause.

Consistency with zone objectives

The subject property is zoned E1 Local Centre pursuant to MLEP 2013. The developments consistency with the stated objectives of the E1 zone is as follows:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*

Comment: The proposed development provides 512m² of retail floor space to contribute to the existing range of retail, business, entertainment and community uses within the Manly Town Centre.

- *To encourage investment in local commercial development that generates employment opportunities and economic growth.*

Comment: The proposed development represents a significant investment in the revitalisation of the site, generating employment opportunities and economic growth as a consequence of the ground floor retail tenancies, in addition to the management and maintenance of the upper floor residential apartments.

- *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.*

Comment: The proposed development provides high-quality residential apartments on a site that is perfectly suited for increased residential development. Future residents of the proposed development will contribute to the vibrancy of the Manly Town Centre.

- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*

Comment: The proposed development provides retail tenancies on the ground floor, strategically oriented with maximum presentation to Belgrave Street and Raglan Street, with primary residential access and service arrangements from Whistler Street, to minimise disruption to the primary street frontages.

- *To minimise conflict between land uses in the zone and adjoining zones and ensure amenity for the people who live in the local centre in relation to noise, odour, delivery of materials and use of machinery.*

Comment: The proposed development is informed by a detailed site analysis, which confirms that there are no adjoining or nearby land uses that cause conflict in relation to the residential floor space proposed. Furthermore, the development has been designed to ensure acceptable noise levels for all residences in light of the ground floor retail tenancies and traffic noise associated with Belgrave Street (as confirmed in the accompanying Acoustic Report).

- *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*

Comment: The proposal includes four retail tenancies on the ground floor presenting to Belgrave Street, Raglan Street, and the northern end of Whistler Street, with a total retail floor space of 512m². The retail spaces are designed with large, glazed frontages, strategically designed planters, high ceilings and projecting awnings to maximise activation and amenity along the footpath and at street level in general. The proposal has also been designed with the residential access, driveway access and service areas to Whistler Street, which acts as more of a rear laneway, to maximise retail presence along the higher order streets.

- *To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment.*

Comment: The proposed development appropriately responds to the scale and form of surrounding and nearby development throughout the town centre, most notably that of recent approvals at 21 Belgrave Street, 26 Whistler Street and 21 Whistler Street (which immediately adjoins the site).

It is noted that the FSR development standard is the primary control to limit the bulk and scale of development in the Manly Town Centre, and in this regard, the proposal is maintained below the maximum prescribed.

The non-compliant development, as it relates to the percentage of commercial floor space, demonstrates consistency with objectives of the zone and the development standard. Adopting the first option in *Wehbe*, strict compliance with the commercial floor space development standard has been demonstrated to be unreasonable and unnecessary in the circumstances of this application.

1.4.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In *Initial Action* the Court found at [23]-[25] that:

As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see

Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.

The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient environmental planning grounds

Ground 1 – Unreasonable impacts upon the design and function of the proposed development

To achieve a compliant percentage of commercial floor space, the development would be required to include commercial premises in the basement or at the first floor of the development, which would be disadvantageous for the following reasons:

- Commercial floor space has a higher parking rate requirement under the provisions of MDCP 2013, generating a greater demand for off-street parking degree and intensifying the proposed non-compliance. The incorporation of commercial floor space specifically within the basement would further reduce the provision of off-street parking as a consequence of both the increased demand and the reduction in physical floor space for parking. In this respect, the addition of a third basement level is considered to be unviable noting the relatively high water table throughout the Manly Town Centre.
- The incorporation of commercial floor space at another level of the building generates the need for a separate commercial lobby and lift, which would erode more usable retail floor space on the ground level.
- The incorporation of commercial floor space on the first floor would necessitate an increase to the height of the building, noting the requirement for higher ceilings for commercial premises. Further, noting that the required additional commercial floor space would not cover an entire level, it may create conflict with the residential apartments at the same level with regard to acoustics, space management, safety and security.
- The incorporation of commercial floor space in the basement would necessitate additional excavation to achieve appropriate ceiling heights, with likely further reduction

to the highly desirable ground floor retail floor space in order to provide appropriate amenity (ie: light and ventilation).

Ground 2 – Consistency with recent development

The proposal is consistent with recent approvals issued with respect to adjoining and nearby development, where commercial floor space is limited to the ground floor of the development and variations to the 25% minimum requirement were supported by Council, including those at:

- 21 Whistler Street, with 152m² or 18.7% of commercial floor space, and
- 21 Belgrave Street, with 471m² or 16% of commercial floor space.

Council's acceptance of the proposed variation will ensure the orderly and economic development of the site, in so far as it will ensure conformity with the commercial outcomes established by other existing development within the immediate catchment of the site, consistent with Objective 1.3(c) of the EP&A Act.

Ground 3 – Objectives of the control and the E1 zone

There is no requirement in either MLEP 2013 or MDCP 2013 that specifically requires the provision of commercial floor space in the basement or at upper levels of a shop top housing development. However, it is noted that one objective of the E1 zone specifically encourages business, retail, community and other non-residential land uses on the ground floor of buildings.

As the required area of commercial floor space is set as a percentage of the overall GFA of the development, the proposed development would be able to achieve compliance if the residential component of the development was reduced. However, reducing the residential component of the development for the sake of compliance with this control would not provide a greater degree of consistency with the objective of the clause itself. Further, it could be said to detract from the objectives of the E1 zone, as a reduction in residential floor space does not encourage the development of business activities on the site, nor does it encourage residential development to contribute to the vibrancy and activity of Manly Town Centre.

Ground 4 – Superior Design

The proposed development maximizes the provision of retail floor space on the ground floor of the development, with street activation of all three street frontages. The retail spaces are limited in depth, with generous internal ceiling heights and a high degree of natural light, ensuring superior levels of amenity for future tenants and visitors to the premises.

The building has been designed to respond to the individual context of the site, with the variation to the commercial floor space requirement of clause 6.16(3) of MLEP 2013 facilitating an outcome which affords the best built form and amenity outcome for both the retail tenancies and the residential apartments above. The proposal provides an appropriate quantum of commercial floor space with superior amenity and high exposure, promoting both the orderly and economic use and development of the land and the good design and amenity of the built form (Objectives 1.3(c) and (g) of the EP&A Act).

Overall, there are sufficient environmental planning grounds to justify contravening the development standard.

1.4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 6.16(3) and the objectives of the E1 Local Centre Zone

The consent authority needs to be satisfied that the proposed development will be in the public interest. A development is said to be in the public interest if it is consistent with the objectives of the particular standard to be varied and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

As demonstrated in this request, the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest.

1.4.5 Secretary's concurrence

The 'Variations to development standards' Planning Circular issued by the NSW Department of Planning, Industry and Investment on 5 May 2020 confirms that the Secretary's concurrence can be assumed by the Local Planning Panel for applications involving contravention of a numerical development standard by more than 10%.

1.5 Conclusion

Pursuant to clause 4.6(4)(a) of MLEP 2013, the consent authority can be satisfied that this written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (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.*

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a variation to the commercial floor space development standard in this instance.

Boston Blyth Fleming Pty Limited



Greg Boston

B Urb & Reg Plan (UNE) MPIA

Director