Clause 4.6 variation - Exception to Development Standards

Property: 15 O'Donnell Avenue, Greenacre

Development: Regularise the use of the x 2 existing enclosed alfresco space as an outbuilding for habitable and non-habitable purposes

Introduction

Clause 4.6 of Canterbury Bankstown Local Environmental Plan 2023 (CBLEP 23) allows Council to permit consent for development even though any proposal seeks a dispensation from a development standard that may apply.

Clause 4.6 also requires that a consent authority may be satisfied before granting consent to a development that contravenes a development standard in CBLEP 23:

- The applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

- The applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard.

Assistance on the approach to justifying a contravention to a development standard is taken from legal decisions of the Land and Environment Court of NSW in the following cases:

1. Wehbe v Pittwater Council [2007] NSWLEC 827;
2. Four2Five Pty Ltd v Ashfield Council [2013] NSWLEC 1009;
3. Micaul Holdings Pty Limited v Randwick City Council [2013] NSWLEC 1386; and
4. Moskovich v Waverley Council [2016] NSWLEC 1015.

With respect to the matters above, this Clause 4.6 request outlines the departure sought to the Floor space ratio control and establishes that compliance with this development standard is unreasonable and unnecessary in the circumstances of this case.

It also demonstrates that there are enough environmental planning grounds to justify the contravention and provides an assessment of the matters the Council is required to consider in the development assessment process.

The Development Standard to be Varied

The development standard that is sought to be varied as part of this application is Clause 4.4 of CBLEP 23, relating to the Floor space ratio, and reads:

(1) The objectives of this clause are as follows—

(a) to establish the bulk and maximum density of development consistent with the character, amenity and capacity of the area in which the development will be located,

(b) to ensure the bulk of non-residential development in or adjoining a residential zone is compatible with the prevailing suburban character and amenity of the residential zone,

(c) to encourage lot consolidations in commercial centres to facilitate higher quality built form and urban design outcomes,

(d) to establish the maximum floor space available for development, taking into account the availability of infrastructure and the generation of vehicular and pedestrian traffic,

(e) to provide a suitable balance between landscaping and built form in residential areas.

(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.

The Floor Space Ratio Map specified in subclause 2, specifies a maximum Floor space ratio of 0.5:1.

The Proposed Variations

CBLEP 23 requirement	Subject site	Variation
0.5:1	Total site area: 720.8 sq.m Maximum floor space permitted: 360.4 sq.m Existing improvements breakdown- Dual occupancy: 360.14 sq.m Outbuildings: (42.56 sq.m x 2) = 85.12sq.m Total floor space = 445.26 sq.m	Exceedance of 84.86 sq.m or 23.5% variation

Justification for Contravention of the Development Standard

Clause 4.6 of CBLEP 23 states:

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

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court and the NSW Court of Appeal in:

- Wehbe v Pittwater Council [2007] NSW LEC 827; and
- Four2Five Pty Ltd v Ashfield Council [2013] NSWLEC 1009.

The relevant matters contained in Clause 4.6 of the CBLEP 23, with respect to the Floor space ratio development standard, are each addressed below, including regarding these decisions.

Clause 4.6(3)(a): Compliance with the development standard is unreasonable and/or unnecessary in the circumstances of the particular case

In Wehbe, Preston CJ of the Land and Environment Court provided some assistance by outlining five main ways in which a variation to a development standard had been shown as unreasonable or unnecessary.

While Wehbe related to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see Four2Five at [61] and [62]).

As the language used in subclause 4.6(3)(a) is the same as the language used in Clause 6 of SEPP 1, the principles contained in Wehbe are of assistance to this clause 4.6 variation request.

The five methods outlined in Wehbe include:

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).

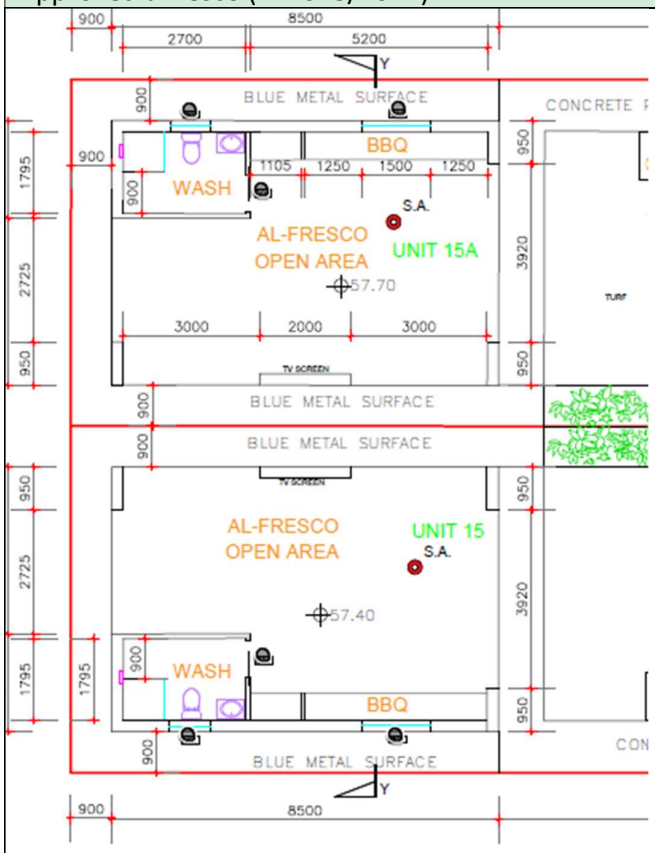
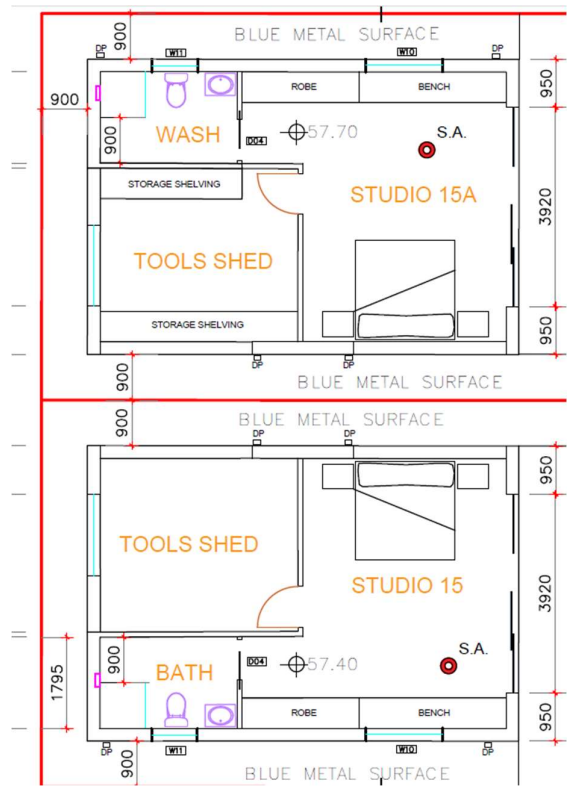
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Method).

The 'Fourth Way' is of assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary.

Our Opinion on the Fourth Method

We understand that Council approved x 2 outbuildings with a floor plate of 42.56 sq.m each or a total of 85.12 sq.m which has caused the spill over.

Taking into account the comparison of approved floor plate and the as built floor plate below, we see little difference to the floor space.

Approved alfresco (DA-648/2022)	As built (infill walls)
	

We observe that Council approved the alfresco to be predominantly enclosed and covered and by doing so, the floor space that was defined by the floor plate was already exceeded and could not be discounted from the definition of gross floor area when the proposal was approved under DA-648/2022.

I cannot determine the development assessment officers thinking at the time of assessment, but to me it resembles floor space, and the extent of enclosure is significant and could not have been discounted.

Whether it is clear to anyone upon reading this, we say whether the alfresco was enclosed by infill walls or not, the outcome is the same in our view as the structure was already predominantly enclosed by walls and the infill walls which occurred make no material difference. The end result is the same floor plate, and I have not been told anything else.

On these observations, we form the opinion that Council moved away from applying the floor space area controls by its own actions and compliance is unnecessary and unreasonable.

It appears to us when we consider aesthetic grounds, the proposal results in a neutral outcome and there is no difference in characterisation of the approved alfresco and as built outbuilding, as they remain of a low-density nature.

In addition, we do not see any reason why the outbuildings should be demolished as we feel from a visual impact assessment, the development results in a neutral outcome and there is no difference to characterisation.

Of interest we observe that the earlier consent DA-648/2022, did not specify any conditions of use or preventing the use as one would expect.

We have given consideration to the consent, we say that Conditions 7.1 and 7.2 were imposed to deal with 'void' areas and 'storage' areas, however the consent is silent on the alfresco areas.

Other productive observations we make is we feel that the enclosed walls do not raise any additional bulk or scale considerations, as the rear yard falls within a private domain setting in which the buildings are found and this in turn results in good visual absorption characteristics.

We say that whether the outbuilding is an alfresco, garden shed or studio, the nature of the building is low impact, and characterisation remains of a low residential nature and the envelope was already approved by the Council and at face value, the outbuildings are rather more enclosed rather than being unclosed with walls.

From a lay person's terms and with someone looking over the fence line, they would see the envelope, roof profile, geometry and shape is the same and whether there are infill walls or not, the environmental impact is a neutral outcome.

We would simply conclude that the floor space ratio controls were not applied at the time of granting consent, as the rear alfresco areas were already predominantly enclosed and this built form was apparent, and the additional infill walls which occurred on visual intrusion considerations do not result in an inferior townscape or are antipathetic in creating a consistent scale for a townscape or neighbourhood is an environmental planning ground.

We say that Council approved the additional floor space by abandoning the planning controls, and the approach on the earlier consent does not stipulate barriers such as conditions of consent or similar controlling the use of the former alfresco area.

On face value, we say that the floor space was already exceeded, and the infill works make no material difference, and we can rely on the Fourth Method.

And, we would say that it would be fitting to adopt this approach for the outbuilding and the characterisation of the immediate area would remain low density residential housing set within a low-density zone and in our view the proposal would not alter the character of the wider setting because of the noncompliance.

In our view, we cannot say the proposal will provide a positive or beneficial outcome, and that rather the proposal on balance would result in a neutral outcome which is acceptable to justify contravention of the standard.

Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

There are sufficient environmental planning grounds to justify a flexible approach to the application of the Floor space ratio as Council abandoned the application of the controls to begin with and cannot be ignored.

Conclusion on Clause 4.6(3)(b)

Considering the above, we feel that there are no environmental planning grounds that warrant maintaining and/or enforcing the Floor space ratio standard in this case.

There are clear and justifiable environmental planning merits which justify the application of flexibility allowed by Clause 4.6 as it is important to consider the past consent in terms of the enclosed walls that were approved as these are unique circumstances.

Conclusion

For reasons mentioned herein, the proposed development satisfies the provisions of Clauses 4.6(3) and (4) of CBLEP 23 despite the outbuildings exceeding the Floor space ratio control upon the proper assessment of floor space areas.

In all, we feel that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

From our point of view, the land use is to remain low density in nature and whether the alfresco consists of enclosed walls as approved or by additional enclosed walls post approval, we say the floor area is the same as at the time of approval, the floor plate was already approved floor space and could not have been discounted as not being the case.

We also observe this street is not one that is within a character statement and neither has special qualities in that regard, and we can say the street is very much undergoing a change, and the use of the outbuildings would not affect the streetscape given where these buildings are situated in the private domain.

We have given consideration about the building envelope, with or without walls, the location of the outbuildings, the setting, scale and height, and there are no detrimental impacts to the streetscape, and that the property has good physical absorption properties to the rear domain.

The outbuilding is not of great architectural quality, however, given the location/setting, it should be respected despite this because the as built building remains visually consistent in scale and height with neighbouring development and the existing dual occupancy found on the land which is an environmental planning ground.

The proposal would not alter the character of the wider setting of the locality despite the exceedance with the Floor space ratio standard itself and would result in a neutral outcome which is acceptable to justify contravention of the standard because in our view, we cannot say the proposal will provide a positive or beneficial outcome.

As we have said, we need to give consideration to the consent issued in the past and we feel there are sufficient environmental planning grounds to justify contravening the development standard in this instance as it would appear to us the Council abandoned the control in the first instance by granting consent to allow the outbuilding to contain enclosed walls, and at that point it was already Floor space that could not be discounted, and Council abandoned the interpretation of the control and it was done so by its own actions.

That is why we feel the variation may be given and from the streetscape or private domain, the retention of the outbuildings will not be an aberration.

On this basis of my reasons, we feel this Clause 4.6 variation may be looked upon favourably by Council and the proposal proposed be approved.

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Dated: 11 December 2024