

**Clause 4.6 - Exceptions to Development Standards
Proposed Residential Flat Development - 30 Fairlight Street, Fairlight**

Variation to Clause 4.4 - Floor Space Ratio

The proposal seeks approval for the demolition of the sites existing single dwelling house and swimming pool followed by the construction of a residential flat building. The proposed residential flat building is to comprise a three (3) storey building erected over a single level of basement carparking. A total of five (5) apartments will be contained within the proposed building.

The proposed development will result in a built form which, by definition, has a total floor area of 776m² and which results in a floor space ratio (FSR) of 0.9:1.

The maximum permissible FSR for the subject site pursuant to Clause 4.4 of the Manly LEP 2017 is 0.75:1. The proposal therefore exceeds the applicable control by 0.15:1 or 20%.

Given that the proposal does not comply with the maximum floor space ratio of 0.75:1 as required by Clause 4.4 of the Manly LEP 2013 and in order for consent to be granted to the proposal, a variation pursuant to Clause 4.6 of the LEP is required.

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

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

This variation has been prepared having regard to the following documentation:

- Amended Architectural Plans prepared by DKO Architecture (NSW) P/L, Project No. 00012781, Revision B and dated 27/6/22.
- View Impact Assessment prepared by Architectural Images and dated 22/6/22.

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

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

The objectives of Clause 4.6 of the LEP are:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

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

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

Clause 4.4 is contained within Part 4 of the LEP and which is titled Principal Development Standards. It is also considered that the wording of the Clause is consistent with previous decisions of the Land & Environment Court of NSW in relation to matters which constitute development standards.

It is also noted that Clause 4.4 does not contain a provision which specifically excludes the application of Clause 4.6.

On this basis, it is considered that Clause 4.4 is a development standard for which Clause 4.6 applies.

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

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

- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—*
 - (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

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

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

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

The following assessment of the proposal is provided against the objectives of Clause 4.4 of the Manly LEP 2013.

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

It is my opinion that the proposed development despite the floor space ratio non-compliance does provide for a bulk and scale of development which is consistent with the existing and desired streetscape character.

In forming this opinion, it is submitted that:

1. The proposal provides for the construction of a residential flat building which is permissible within the R1 - General Residential zone and which is consistent with the predominant form of development located in the vicinity of the subject site.
2. The proposal provides for a three (3) storey residential flat building which sits comfortably below the 11m height of building control applicable to the subject site under Clause 4.3 of the Manly LEP.
3. The proposal is provided with a front setback at all levels which is responsive to the requirements of Clause 4.1.4.1 of the Manly DCP. The proposed front setbacks which increase with building height have regard to the prevailing setbacks of adjoining development and allow for both the introduction and provision of landscaping, which will make a positive contribution to the streetscape of the locality.

4. The proposal is provided with side boundary setbacks which comply with the prescriptive requirements of Clause 4.1.4.2 of the Manly DCP.
5. The proposal provides for a high quality architecturally designed building which in conjunction with the proposed materials and finishes and landscaping will make a positive contribution to the streetscape character of the locality.

The proposal is therefore considered to satisfy this objective.

(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,

In response to this objective reference is made to the View Impact Assessment prepared by Architectural Images and dated 22/6/22.

It is submitted that this document demonstrates that the proposal will not obscure important landscape and townscape features from the adjoining properties.

It is also my opinion that the proposal will not obscure important landscape and townscape features from the public domain.

The proposal is therefore considered to satisfy this objective.

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

It is my opinion that the proposal will result in a built form which provides for an appropriate visual relationship between new development and the existing character and landscape of the area.

This has been achieved through the provision of compliant building setbacks, a high-quality design including the proposed schedule of finishes together with the provision of extensive landscaping at all levels of the development and which incorporates a combination of deep soil planting, podium and planter box planting.

It is considered that the proposed landscaping will complement and enhance the landscape character of the locality.

The proposal is therefore considered to satisfy this objective.

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

It is my opinion that the proposal will not result in any adverse environmental impacts on the use or enjoyment of adjoining land and the public domain.

This is particularly the case in relation to a loss of privacy and overshadowing.

The proposal is therefore considered to satisfy this objective.

(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.

Whilst not strictly applicable to the subject site, the proposal will result in an additional four (4) dwellings upon the site and which will be occupied by persons who will no doubt utilise the existing businesses and services available within the nearby local centres.

The proposal is therefore considered to satisfy this objective.

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

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

It is considered that a contravention of the development standard is justified on environmental planning grounds for the following reasons:

1. The proposal provides for a built form which is otherwise compliant with all other Council controls, particularly those relating to height of building and setbacks.
2. The proposal will not result in any detrimental impacts upon adjoining properties.
3. The proposal will not result in any unreasonable impacts upon the streetscape or character of the surrounding area.
4. The proposal is located within an area which contains a number of examples of buildings which exceed the current height and FSR controls.
5. The proposal provides for a high quality architecturally designed building which in conjunction with the proposed materials and finishes and landscaping will make a positive contribution to the streetscape character of the locality.

6. The proposal will result in a built form which is compatible with the character of the surrounding area.

On the basis of the above it is my opinion that there are sufficient environmental planning grounds to justify contravening the development standard.

- 5. Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.**

The proposed development is in my opinion in the public interest because it will provide for the construction of a new residential flat development upon the site which will make a positive contribution to the built form character of the locality and which will not result in any unreasonable impacts. The proposal will also provide for the orderly and economic development of the site in accordance with the objects of the Act.

The proposal is considered to be otherwise compliant with the requirements of the LEP, the applicable zone objectives and the objectives of the particular standard.

The following assessment is provided in relation to the proposal's relationship to the objectives for the R1 - General Residential zone and which are:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Comment

The proposal which seeks to replace the existing single dwelling currently erected upon the site with a new residential flat building containing five (5) dwellings will in my opinion assist in providing for the housing needs of the community.

Whilst all of the proposed dwellings contain 3 bedrooms it is noted that they comprise apartments having 3 distinct characteristics (garden units, balcony units and a penthouse unit) and which assist in the objective of providing for a variety of housing types.

The final objective is not applicable to a residential development.

The proposal as detailed in response to Question 3 of this variation is considered to be consistent with the objectives of Clause 4.4 - Floor Space Ratio.

The proposal is therefore considered to be in the public interest.

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

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

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

It is my opinion that there is no public benefit in maintaining the development standard in this instance, given the high quality of the proposal and the absence of any unreasonable detrimental impacts.

Conclusion

It is therefore my opinion based upon the content of this submission that a variation of the floor space ratio requirement of Clause 4.4 of the Manly LEP 2013 is appropriate in this instance.

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