

**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 Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80], *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23]).

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 Cand dated 27/6/22.
- Amended Landscape Plans prepared by Black Beetle, Job No. BB 1294, Issue 05 and dated 29/6/22.
- 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 sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a).

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. Of the 14 developments located on the northern side of Fairlight Street between Woods Parade to the west and George Street to the east, 9 (64%) of the properties comprise of multi-dwelling/residential flat developments.
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. The proposed building will have a maximum height of building of 10.12m as detailed on Drawing No. DA400.
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. Clause 4.1.4.1 requires that front setbacks must relate to the front building line of neighbouring properties and the prevailing building lines in the immediate vicinity and that where building lines are neither consistent nor established, a minimum 6m front setback generally applies.

The adjoining property to the west of the site is identified as 32 Fairlight Street and supports a single dwelling house. The dwelling is located approximately one storey above the adjoining footpath level and is provided with a setback of approximately 7.5m from the front boundary.

The adjoining residential flat building to the east of the site (26 Fairlight Street) is provided with a front setback of approximately 10m.

The proposal is provided with front setbacks which increase with building height. The proposed front setbacks are:

- Basement Level - 4m
- Ground Floor Level - 4m to the terrace planter and 10.7m to the glass line.
- Level 1 - 7.43m to the terrace planter and 10.7m to the glass line.
- Level 2 - 7.43m to the terrace planter and 14.7m to the glass line.

It is my opinion that the proposed setbacks are both responsive to the setback of the existing single dwelling at 28 Fairlight Street in that the bulk of the proposal has a front setback equal to or greater than the existing single dwelling on that property.

Importantly, the proposed basement (street level) setback will replace the existing zero setback triple garage and pedestrian entry with a 4m building setback, the majority of which is to be provided as deep soil landscaping.

The landscape plan proposes a cheese tree (10m at maturity) centrally located in the front setback with a variety of shrubs (1-3m at maturity) in both the deep soil and on slab planters. The rear setback provides for a deep soil area of 83mm² (5.3m x 15.6m dimensions) where 6 trees and palm trees are proposed to contribute to the landscaped character of the area.

The spill over plants provided in the terrace/balcony planters will be integrated into the architecture and will achieve an appropriate balance between built form and landscaping.

- 4 The level 2 plan (top floor) has an unseen setback of at least 6m from the 1 level below and an additional 7.5m setback from Fairlight Street. This apartment together with the entire building is also set back on the other elevations which responds to the DCP controls and is consistent with the desired future character.
- 5 The proposal is provided with side boundary setbacks which comply with the prescriptive requirements of Clause 4.1.4.2 and the objectives of the Manly DCP.

In relation to the required side boundary setbacks, Clause 4.1.4.2 of the DCP requires that a side setback equal to one-third of the wall height is to be provided. The proposal as detailed on Drawing No. DA401 to DA 404 complies with this requirement.

- 6 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.

In relation to the character of the area it is submitted that the predominant form of development located in the vicinity is viewed from a location on the opposite side of Fairlight Street looking back towards the site. The adjoining properties to its east and west are predominantly of residential flat buildings both fronting Fairlight Street and located further up the hill to the north, east and west. The existing residential flat buildings are of varying heights, scale and architecture and have varying setbacks. The other distinguishing feature of the locality is a mix of landscape treatments to the individual properties and which includes landscaped front setbacks and landscaped side and rear setbacks including a number of tall palm trees and Norfolk Island Pines.

The proposed built form of the development is compliant with both the prescriptive requirements of the Council as well as the objectives of those controls.

It is also my opinion that the proposal provides for a landscape outcome consistent with the DCP requirements of the Council as well as the prevailing character.

The landscape plan proposes a cheese tree (10m at maturity) centrally located in the front setback with a variety of shrubs (1-3m at maturity) in both the deep soil and on slab planters. The rear setback provides for a deep soil area of 83mm² (5.3m x 15.6m dimensions) where 6 trees and palm trees are proposed to contribute to the landscaped character of the area.

The spill over plants provided in the terrace/balcony planters will be integrated into the architecture and will achieve an appropriate balance between built form and landscaping.

7. The proposed development has been designed to respond to the surrounding built form and has purposefully located GFA away from the part of the site which would have an impact on the amenity of surrounding properties and also to reduce the presentation of bulk and scale of the proposed building in the streetscape.

The reduced impacts demonstrate that a compatible relationship is achieved despite the proposed variation to FSR, and it does not affect consistency or achievement of this objective.

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,

It is my opinion the building density is different to bulk. You could have 3 large apartments or 6 smaller apartments. The objective is to ensure the building envelope does not obscure views to the harbour or Manly CBD.

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.

Specifically, the view loss assessment related to the following properties.

- Unit 3, 1 Berry Avenue, Fairlight
- Unit 4, 1 Berry Avenue, Fairlight
- Unit 2, 1 Berry Avenue, Fairlight
- Unit 7, 2-3 Berry Avenue, Fairlight
- Unit 3C, 28 Woods Avenue, Fairlight

These properties were all nominated by the Council.

It is advised that:

1. All of the nominated properties have an existing view which either includes a view (to varying degrees) of part of Sydney Harbour or a view of part of Sydney Harbour and South Head.
2. None of the nominated properties will have their existing view of part of Sydney Harbour or a view of part of Sydney Harbour and South Head, reduced by the proposed development.

On the basis of the above a detailed assessment against the principles established in *Tenacity Consulting v Warringah Council* is not considered to be warranted.

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.

As previously identified, the character of the area it is submitted that the existing character as viewed from a location on the opposite side of Fairlight Street and looking towards the site and to its east and west in my opinion is dominated by a prevalence of residential flat buildings both fronting Fairlight Street and located further up the hill to the north, east and west. The existing residential flat buildings are of varying heights, scale and architecture and have varying setbacks. The other distinguishing feature of the locality is a mix of landscape treatments to the individual properties and which includes landscaped front setbacks and landscaped side and rear setbacks including a number of tall palm trees and Norfolk Island Pines.

The proposed built form as described in the points above is compliant with both the prescriptive requirements of the Council as well as the objectives of those controls. The proposal also incorporates a range of robust, maintenance free, high-quality materials including curved formed concrete walls and feature elements, face brickwork and metal slatted screens.

It is also my opinion that the proposal provides for a landscape outcome consistent with the requirements of the Council as well as the prevailing character.

The landscape plan proposes a cheese tree (10m at maturity) centrally located in the front setback with a variety of shrubs (1-3m at maturity) in both the deep soil and on slab planters. The rear setback provides for a deep soil area of 83m² (5.3m x 15.6m dimensions) where 6 trees and palm trees are proposed to contribute to the landscaped character of the area.

The spill over plants provided in the terrace/balcony planters will be integrated into the architecture and will achieve an appropriate balance between built form and landscaping.

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 unreasonable adverse environmental impacts on the use or enjoyment of adjoining land and the public domain.

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

In relation to overshadowing reference is made to Architectural Drawing No. DA501 to DA501i. Whilst the proposal will result in some additional overshadowing of the two adjoining properties it is considered that both properties will continue to receive satisfactory solar access. It is my opinion that any reduction in solar access is acceptable having regard to the zoning of the land and which permits residential flat development and the proposal having a building height and setbacks which comply with the requirements of the Council.

It is also my opinion that the proposal will not result in unreasonable privacy impact to the adjoining properties having regard to the considered location and design of all windows, particularly those in the western side elevation.

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.

For completeness, this request also seeks to demonstrate that the "unreasonable and unnecessary" requirement is met because the burden placed on the community by not permitting the contravention would be disproportionate to the adverse consequences attributable to the proposed noncompliant development.

This disproportion is, in itself, sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

Compliance with the development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

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

The environmental planning grounds to justify the departure of the named standard are as set out in the preceding sections in detail. They can be summarised as follows:

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, including overshadowing.
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 appears to contain a number of examples of buildings which exceed the current height and FSR controls. This opinion is based upon a visual assessment of the surrounding development having regard to the number of storeys of those buildings and an assessment of the building footprint relative to their site area.
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. It promotes good design and amenity of the built environment, resulting in improved urban design and amenity considerations for both the local community and the future occupants of the building.
6. The proposal will, by the design, facilitate the redevelopment of No 32 in accordance with the existing controls for a residential flat building.
7. The proposal will result in a built form which is compatible with the existing and desired character of the surrounding area.

- 8 The proposed development has distributed GFA in a way which responds to the adjoining/adjacent properties to provide an appropriate built form relationship to these properties and maintain amenity between the properties. This promotes the orderly and economic use and development of the land.
9. Compliance with the development standard(s) would be unreasonable and unnecessary in the circumstances of this development as it is consistent with the objectives of the development standard(s) and the objectives of the R1 zone, notwithstanding the contravention.

The proposal is also considered to be consistent with the applicable objects of the Environmental Planning and Assessment Act 1979 contained at Section 1.3 and which are as follows:

(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,

It is my opinion that the replacement of an existing single dwelling with a modern residential flat building which will contain 5 dwellings and which will be constructed so as to comply with current building and energy efficiency standards is development which satisfies this objective.

(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,

The proposal is considered to facilitate ecologically sustainable development as detailed by the proposal's compliance with BASIX.

The proposal will also provide for the urban renewal of the subject site and provide an opportunity for an additional four households to enjoy this highly desirable location.

(c) to promote the orderly and economic use and development of land,

The proposal is considered to provide for the orderly and economic use and development of land via the replacement of an existing single dwelling with a modern residential flat building which will contain 5 dwellings in a highly sought after location.

(d) to promote the delivery and maintenance of affordable housing,

Not applicable to this proposal.

(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,

It is my understanding that there are no threatened species or endangered ecological communities located upon or directly adjoining the subject site.

(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),

It is not considered that there is any heritage applicable to the subject site.

(g) to promote good design and amenity of the built environment,

The proposal in my opinion will provide for a high quality, architecturally designed development which incorporates a range of high quality and robust, maintenance free building materials.

It is also my opinion as has been previously discussed that the proposal will not result in any unreasonable overshadowing, loss of privacy or loss of views to the adjoining or nearby properties.

The proposal is therefore considered to satisfy this objective.

(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,

The proposal has been designed and will be constructed so as to comply with all applicable standards relating to the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants.

The proposal has also been designed so as to incorporate a range of high quality, robust and maintenance free building materials which respond to the site's exposed coastal location.

(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,

Not applicable to this submission.

- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

Not applicable to this submission.

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 as, the proposal is consistent with the objectives of the zone and the objectives of the development standard, there is no public benefit in maintaining the development standard in this instance also given the high quality of the proposal and the absence of any unreasonable detrimental impacts.

8. Matters required to be taken into consideration by the Planning Secretary before granting concurrence.

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation consistent with Department of Planning Circular PS 18-003 'Variations to development standards', dated 21 February 2018. This circular is a notice under 64(1) of the Environmental Planning and Assessment Regulation 2000.

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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