

69 Albermarle Street, Newtown – Alterations and Additions

Clause 4.6 Variation Statement – April 2022



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INTRODUCTION

Overview

This Clause 4.6 Variation request has been prepared pursuant to Clause 4.6 of Marrickville Local Environmental Plan 2011 (**MLEP 2011**) in support of the development application for the alterations to the dwelling at 69 Albermarle Street, Newtown (**the site**) which exceeds the maximum FSR as a result of an existing non-compliance, and as a result of the provision of a new upper floor storage area above the proposed garage.

This Clause 4.6 Variation has been submitted in conjunction with the Statement of Environmental Effects (SEE) that assessed the proposed alterations and additions as described above. The request for variation of the development standard has been prepared in accordance with the requirements of Clause 4.6 of the Marrickville LEP 2011 which has the following aims and objectives:

- 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.*

The proposed variations to development standards for the proposed development are in relation to Clause 4.4 Floor Space Ratio of the MLEP 2011. In summary the following variations are proposed:

Marrickville LEP 2011 Clause	MLEP 2011 Development Standard	Existing FSR	Proposed Development Non-Compliance	% of Variation
Clause 4.4 floor Space Ratio	Maximum FSR 0.6:1	0.68:1 (13% variation)	The proposal results in a maximum FSR of 0.75:1	25% Variation to LEP Standard as per existing

In accordance with Clause 4.6 of the MLEP 2011 Council is required to consider the following:


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.*

This Clause 4.6 Variation request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards.

This variation request demonstrates that:

- The variation to the development standard is in the public interest because it is consistent with the objectives for the zone and the development standard itself.

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- Compliance with the FSR development standard is unreasonable or unnecessary in the circumstances of the case.

There are sufficient environmental planning grounds to justify contravening the development standard.



RELEVANT ASSESSMENT FRAMEWORK

This section of the report outlines the environmental planning instruments relevant to the proposed development modifications, including the aims and objectives, maximum FSR control and the assessment framework for seeking a variation to a development standard.

Some relevant planning principles and judgements issued by the Land and Environment Court regarding the assessment of developments seeking exceptions to development standards are also provided.

Marrickville Local Environmental Plan 2011

Clause 4.6 of MLEP 2011 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of Clause 4.6 are listed within the LEP as:

(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.

Clause 4.6 provides flexibility in the application of planning provisions by allowing the Consent Authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would satisfy the requirements of clause 4.6.

In determining whether to grant consent for development that contravenes a development standard, Clause 4.6 requires that the Consent Authority consider a written request from the applicant, which demonstrates that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
- There are sufficient environmental planning grounds to justify contravening the development standard.

Furthermore, the Consent Authority must be satisfied that 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, and the concurrence of the Secretary has been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

1. Whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
2. The public benefit of maintaining the development standard, and
3. Any other matters required to be taken into consideration by the Secretary before granting concurrence.

[Note: Concurrence is to be assumed as per the applicable planning circular, discussed further below.]

This document forms a Clause 4.6 written request to justify the contravention of the FSR development standard in Clause 4.4. Also forming part of this request are the architectural drawings that have been submitted in connection with the modified development application. The assessment of the proposed variations has been undertaken in accordance with the requirements of the MLEP 2011, Clause 4.6 Exceptions to Development Standards.

NSW Land and Environment Court: Case Law (Tests)

The following sections of the report provide an assessment of the request to vary the development standards relating to the maximum FSR in accordance with Clause 4.6 of MLEP 2011. Consideration has been given to the following matters within this assessment:

- *Varying development standards: A Guide*, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court. The *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 court judgement is the most relevant of recent case law. Justice Preston confirmed (in this judgement):
 - The consent authority must, primarily, be satisfied the applicant's written request adequately addresses the 'unreasonable and unnecessary' and 'sufficient environmental planning grounds' tests:

"that the applicant's written request ... has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ... and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard ..." [15]

- On the grounds for a finding that the strict application of a standard is 'unreasonable or unnecessary' established under *Wehbe v Pittwater Council* [2007] NSWLEC 827:

"The 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..." [22]

- That, in establishing 'sufficient environmental planning grounds', the focus must be on the contravention and not the development as a whole:

"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" [26]

- That clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development:

"Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard will have a better environmental planning outcome than a development that complies with the development standard." [88]

This clause 4.6 variation has specifically responded to the matters outlined above and demonstrates that the request meets the relevant tests with regard to recent case law.

THE EXTENT OF VARIATION

Relevant Development Standards

The development standards being requested to be varied are Clause 4.4 Floor Space Ratio of the MLEP 2011.

1.1 The FSR Standard

Clause 4.4 (2) of the MLEP 2011 states:

(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.

Floor Space Ratio (FSR) means:

The **floor space ratio** of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.

1.2 Proposed Variation to Standards

The proposed variations to development standards for the proposed development are in relation to Clause 4.4 Floor Space Ratio of the MLEP 2011. In summary the following variations to development standards are proposed:

Marrickville LEP 2011 Clause	MLEP 2011 Development Standard	Existing FSR	Proposed Development Non-Compliance	% of Variation
Clause 4.4 floor Space Ratio	Maximum FSR 0.6:1	0.68:1 (13% variation)	The proposal results in a maximum FSR of 0.75:1	25% Variation to LEP Standard as per existing

CLAUSE 4.6(4)(A)(II) – WILL THE PROPOSED DEVELOPMENT BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE PARTICULAR STANDARD AND OBJECTIVES FOR DEVELOPMENT WITHIN THE ZONE IN WHICH THE DEVELOPMENT IS PROPOSED TO BE CARRIED OUT?

2. Overview

The proposed development will be in the public interest because it is consistent with the objectives of the FSR control standard and the zone objectives.

2.1 The Proposal Achieves the Objectives of the FSR Standard

The objectives of the Clause 4.4 FSR standard of the MLEP 2011 are as follows:

- (a) to establish the maximum floor space ratio,*
- (b) to control building density and bulk in relation to the site area in order to achieve the desired future character for different areas,*
- (c) to minimise adverse environmental impacts on adjoining properties and the public domain.*

Notwithstanding the proposed variation to the standard, the proposed modification to the development is nevertheless consistent with these objectives:

- (a) to establish the maximum floor space ratio,*
 - The maximum floor space ratio for the site is 0.6:1 under the MLEP 2011. The proposed FSR for the site is 0.75:1 which is a result of the existing non compliance and proposed first floor storage above the garage.
- (b) to control building density and bulk in relation to the site area in order to achieve the desired future character for different areas,*
 - The proposal does not result in a building that is higher than the existing building.
 - The proposed building envelope is consistent with the existing building envelope on site and that of the adjoining dwellings and other similar development.
 - The bulk and scale proposed is largely consistent with the existing building on site and remains within the bulk of the building and overall envelope of the building is not affected.
 - The garage and storage above as proposed forms part of the desired future character of the area and is consistent with this objective. Despite the non-compliance with the development standard, the proposed new built form will comply with the desired future character of the area.
 - The proposal is consistent with this style of residential building which is common for residential areas.
 - The proposed building provides an appropriate height, bulk and scale to the site.
 - The proposal gives provision of a building that is compatible with the surrounding residential land uses.
 - The scale of the development and its typology is considered to be appropriate for the site and the surrounding area and meets the needs of the local residents and the wider Sydney metropolitan area.
 - The proposed design of the development achieves an appropriate built form in that it enhances the appearance of the building from public domain, and maintains the character of the streetscape.
 - In light of the proposals contribution to achieving the desired future character of the area, a reduction of gross floor area would serve no material planning purpose, other than numerical compliance with a generic Council control.



(c) *to minimise adverse environmental impacts on adjoining properties and the public domain.*

- The proposed design of the development achieves an appropriate built form in that it enhances the public domain, maintains the character of the streetscape, along with providing good internal amenity and outlook.
- The proposal will maintain and enhance the residential amenity of the surrounding dwellings including their current levels of solar access, visual and acoustic privacy, and ventilation.
- The proposal will enhance the existing open space on the site and give provision of a new landscaped garden for the benefit of residents.
- The new works are generally consistent with the existing building line setbacks of neighbouring properties.
- The new building works has limited opportunity to overlook neighbouring habitable rooms.
- No impacts from the proposed new building additions are anticipated to neighbouring amenity, including to views enjoyed by neighbours.
- The bulk of the additional floor space is contained within the proposed studio.

2.2 The Proposal Achieves the Objectives of the Zone

The site is currently zoned R2 Low Density Residential under the Marrickville LEP 2011. The proposed development results in an improved dwelling house on site, and is therefore considered permissible within the R2 zone, as outlined in the accompanying SEE.

The proposed alterations and additions are consistent with the R2 zone objectives in that:

- *To provide for the housing needs of the community within a low density residential environment.*
 - The proposal will add to delivering a mix of well-designed housing that meets the needs of Sydney's growing population by improving the quality of dwellings to meet the changing population.
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
 - The proposed use of the garage gives provision of improved on site parking that is compatible with some of the surrounding residential land uses and provides for the continued use of the site as a residential allotment.
 - The scale of the development and its typology is considered to be appropriate for the site and the surrounding area and meets the needs of the local residents and the wider Sydney metropolitan area.

CLAUSE 4.6(3)A – COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE

Compliance with the development standard **is** unreasonable or unnecessary in the circumstances of the case.

Clause 4.6(3)(a) requires that this Variation Request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

Such compliance is unreasonable or unnecessary in the circumstances of the case.

In *Wehbe v Pittwater Council* [2007] NSWLEC 827 Preston CJ set-out the five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation:

1. *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.***
2. *Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.*
3. *Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*
4. *Establish that 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.*
5. *Establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary".*


In applying the tests of **Wehbe v Pittwater Council** [2007] NSWLEC 827, only one of the above rationales is required to be established. Notwithstanding the proposed variation, as demonstrated in Sections 2.1 and 2.2, the proposed development is consistent with the underlying objectives of the standard for FSR and the R2 zone of MLEP 2011.

As addressed previously the proposal has demonstrated compliance with the relevant objectives of Clause 4.4 of the Marrickville LEP 2011.

Undermining objectives of the EP&A Act

Section 1.3(g) of the Environmental Planning and Assessment Act 1979 (the EP&A Act) says that it is an objective of the legislation:

to promote the orderly and economic use and development of land



Requiring strict compliance with the FSR control would undermine the achievement of this objective of the legislation. This is because orderly and economic use and development of land is encouraged/supported by permitting development in accordance with the relevant development standards.

This is sufficient, by itself, to establish that requiring strict compliance is unreasonable or unnecessary in the circumstances of the case.

Disproportionate burden on the community

The severity of the burden placed on members of the community (by requiring strict compliance) would be disproportionate to the consequences attributable to the proposed non-compliant development (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 (at [15])).

The adverse consequences by requiring strict compliance have already been outlined. In brief terms, they are:

- an unnecessary reduction in housing supply and housing choice.

It is unreasonable to expect the community to bear these adverse consequences in circumstances where there are no significant adverse impacts from allowing the FSR contravention.

This is sufficient, by itself, to establish that requiring strict compliance is unreasonable or unnecessary in the circumstances of the case.



CLAUSE 4.6(3)(B) – ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

The proposed development demonstrates that there are sufficient environmental planning grounds in support of the contravention for the following reasons:

- The FSR contravention is a result of an existing non-compliance, and as a result of the provision of a new upper floor storage area above the proposed garage. The upper level storage area has been designed in accordance with feedback from the applicants and Council's heritage specialists to present a better design outcome for the site.
- The new garage structure does not add unreasonable or visually perceptible bulk to the development, and meets the desired future character of the site and locality.
- The proposal maintains the minimum car parking requirements as per DA 89/98.
- The primary dwelling is suitably maintained as the prominent and significant heritage item on site.
- The proposed maximum FSR for the site of 0.75:1 is appropriate for an R2 Low Density Residential zone that primarily consists of residential development.
- It is noted that the current dwelling already exceeds the maximum FSR (currently 0.68:1) and the proposal will not add significant scale or bulk to the site.
- The proposed building envelope is consistent with the existing building envelope of the adjoining buildings and other similar development.
- The bulk and scale of the proposal is consistent with this style of residential building which is common for residential areas.
- The proposed building form provides an appropriate height, bulk and scale to the site.
- In light of the proposals contribution to achieving the desired future character of the area, a reduction of gross floor area would serve no material planning purpose, other than seeking numerical compliance with a generic Council control.
- The proposal will add to delivering a mix of well-designed housing that meets the needs of Sydney's growing population through the provision of unique dwellings to meet the changing population needs.
- The proposed development will not significantly impact on the amenity of adjoining occupiers.
- The proposed development will not result in any unreasonable privacy intrusion or loss of daylight access to adjacent properties, and maintains adjoining developments views.
- The new works improve the appearance of the building in the Heritage Conservation Area and the streetscape.



CLAUSE 4.6(5)(A) – WOULD NON-COMPLIANCE RAISE ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL PLANNING?

The proposed non-compliance with the maximum FSR development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

CLAUSE 4.6(5)(B) – IS THERE A PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD?

Overall, it is considered that the strict maintenance of the standard in this instance is not in the public interest as the current proposal will result in the delivery of a high-quality residential development and housing stock which achieves the strategic objectives of Council.

CLAUSE 4.6(5)(C) – ARE THERE ANY OTHER MATTERS REQUIRED TO BE TAKEN INTO CONSIDERATION BY THE SECRETARY BEFORE GRANTING CONCURRENCE?

The Planning Circular PS 18-003, issued on 21 February 2018 (Planning Circular), outlines that all consent authorities may assume the Secretary's concurrence under clause 4.6 of the Standard Instrument (Local Environmental Plans) Order 2006 (with some exceptions). The MLEP is a standard instrument LEP and accordingly, the relevant consent authority may assume the Secretary's concurrence in relation to clause 4.6 (5). This assumed concurrence notice takes effect immediately and applies to pending development applications.

We note that under the Planning Circular this assumed concurrence is subject to some conditions - where the development contravenes a numerical standard by greater than 10%, the Secretary's concurrence may not be assumed by a delegate of council. This restriction however does not apply to decisions made by a local planning panel, as they are not legally delegates. The proposed development will be assessed by a local planning panel, and as such the 10% limit does not apply.



CONCLUSION

It is requested that council supports the proposed variation to Clause 4.4 of the MLEP 2011 for the following reasons:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.
- The proposed variation allows for the provision of improved residential accommodation, for family housing.
- No unreasonable environmental impacts are introduced as a result of the proposal.
- There is no public benefit in maintaining strict compliance with the standards.