

Memorandum

Deferred Item 3.3 – Development Determination Panel – Meeting of 27 July 2022

To: DDP Panel Members

Cc: Rodney Piggott – Acting Executive Manager Development Assessments

From: Jordan Davies – Principal Planner

Date: 25 October 2022

Subject: Deferral of DA2021/2390 – 29 Monash Crescent, Clontarf – Review of submissions following notification of amended plans

Record Number: 2022/675112

Dear Panel Members,

This memo addresses the outstanding recommendations following the deferral of Item 3.3 at the DDP meeting on 27 July 2022. A previous memo has been provided by Maxwell Duncan, dated 16 September 2022, which advises the Panel of the receipt of amended plans which were submitted in response to the deferral of Item 3.3 at the DDP Meeting on 27 July 2022.

The memo dated 16 September 2022 addresses how the plans have responded to recommendation 1 (a) – (e) and recommendation 2 of the DDP referral which required the submission of an amended Clause 4.6. The memo confirms the applicant has adhered to the recommended design changes by the DDP.

This second memo addresses the remaining recommendations made by the DDP which include re-notification and consideration of the amended plans, updated Clause 4.6 variation request and any subsequent submissions.

The recommendations of the DDP numbered 3 to 6 are addressed below:

3. The additional information is to be submitted within 14 days from the date the minutes are posted on the website.

Comment: The additional information was submitted on 14 September 2022, which was in excess of 14 days (approximately 35 days after the DDP minutes were released). However, Council will accept and consider the additional information notwithstanding the time frame was exceeded.

4. The application will be re-notified for 14 days, to allow interested persons to view the additional information and make any further submissions on the application.

Comment: The amended application was renotified for a period of 14 days from 29 September to 13 October 2022. Two (2) submissions were received from the adjoining properties 27 and 31 Monash Crescent.

5. The Assessment Officer is to carry out an assessment of the Clause 4.6 variation, the amendments to the plans and any new submissions, and provide a Supplementary report addressing these.

Comment: The memo dated 16 October 2022 prepared by Maxwell Duncan has assessed the amended plans in response to the recommended changes 1 (a)-(e) by the DDP and confirms the changes to the plans are in accordance the recommendations of the DDP.

An amended Clause 4.6 variation request has been submitted in support of the amended plans.

An assessment of the Clause 4.6 Variation is carried out below.

Description of non-compliance:

Development Standard:	Floor Space Ratio (Clause 4.4)
Requirement:	FSR 0.4:1
Proposed	FSR 0.5:1
Percentage variation to requirement	25% variation

Assessment of request to vary a development standard:

The following assessment of the variation to Clause 4.4 – Floor space ratio development standard has taken into consideration the recent judgement contained within 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.

Clause 4.6 Exceptions to development standards:

(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.

Comment:

Clause 4.4 - Floor space ratio development standard is not 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) 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 Secretary has been obtained.

Clause 4.6 (4)(a)(i) (Justification) assessment:

Clause 4.6 (4)(a)(i) requires the consent authority to be satisfied that the applicant's written request, seeking to justify the contravention of the development standard, has adequately addressed the matters required to be demonstrated by cl 4.6(3). There are two separate matters for consideration contained within cl 4.6(3) and these are addressed as follows:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

Comment:

The Applicant has provided an updated written request for the variation to Clause 4.4 - Floor space ratio which has accurately described the quantum of floor space within the proposal. The applicant has detailed the use of the plant room and it is considered the size shown on the plans reasonable for the plant equipment necessary for the development, therefore, the basement plant room excluded from the GFA in accordance with the definition under the MLEP 2013. The Applicant's written requests have demonstrated that the objectives of the development standard are achieved, notwithstanding the non-compliance with the development standard.

In doing so, the Applicant's written request has adequately demonstrated that compliance with the development standards is unreasonable or unnecessary in the circumstances of this case as required by cl 4.6(3)(a).

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

Comment:

In the matter of Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Preston CJ provides the following guidance (para 23) to inform the consent authority's finding that the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard:

'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.'

s 1.3 of the EPA Act reads as follows:

1.3 Objects of Act (cf previous s 5)

The objects of this Act 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,*
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The applicants written requests argue, in part:

The proposal is permissible in the E3 Environmental Management Zone; is consistent with the zone objectives; and with the surrounding density and scale in the area. The proposal satisfies the 'unreasonable and unnecessary' Test 1 established by the Court in Wehbe.

This report demonstrates that the proposed additional FSR is compatible with the existing and desired future character of the area. The proposal's built form complies with the key building envelope standards and controls, including the LEP building height standard, to ensure it does not dominate the streetscape. The works result in a dwelling compatible with nearby existing and approved development, including Nos. 21 to 27, and No. 31 Monash Crescent, as well as dwellings opposite the site at No. 34 and 36 Monash Crescent. Therefore, the proposed height, bulk and scale will provide consistency in scale and transition in the built form along Monash Crescent.

Nearby approvals that have contravened the LEP FSR standard but are similarly on undersized lots and comply with the relevant FSR DCP control, includes a new detached two storey dwelling at No. 9 Monash Crescent, Clontarf. Despite the 0.4:1

FSR standard, Council approved the dwelling with an FSR of 0.56:1 as it complies with the additional permitted floor space as per Clause 4.1.3.1 of the DCP, and its objectives.

Through its thoughtful design, the proposal integrates seamlessly with the foreshore, public domain and surrounding residential development in the area. Compliance with the FSR standard would result in a substantial reduction to the residential floorspace on the site, in an area with predominantly high-quality, two storey residential dwellings. This does not result in a better planning outcome. Additionally, it has been demonstrated that the proposal has been thoughtfully designed to maintain ample levels of amenity to surrounding development, in terms of views, solar access, and privacy.

Strict compliance would not result in a better outcome for development. It would force a building on the site to be incompatible with the overall bulk and scale of adjoining and nearby existing and approved developments, which would be discordant in the streetscape and when viewed from the foreshore. Strict compliance would also prevent the size and quality of residential accommodation on the site, which will reduce internal amenity for residents.

Flexibility in this circumstance will provide a better outcome from development. The proposed additional FSR allows the built form to be compatible in the Monash Crescent streetscape and provides consistency with the desired future character of the area. The proposal improves the site in accordance with Object (c) of the Environmental Planning and Assessment Act 1979, to “promote the orderly and economic use and development of land”. The proposal is an elegant and well-designed response to the site and surrounding foreshore setting.

Accordingly, in our opinion, the additional FSR is compatible with existing and desired future planning objectives for the locality. For the reasons contained in this application, there are sufficient environmental planning grounds to justify the minor variation to the development standard in the circumstances of this case, as required in Clause 4.6(3)(b).

Comment from Council on planning grounds:

It is noted that the percentage of the variation is particularly high when considered against the requirements of the MLEP 2013 (25% and 0.5:1 FSR). However, the Manly DCP contains a specific provision that considers circumstances like this on ‘undersized allotments’ and allows the FSR to be based on a 750sqm lot which would permit up to 300sqm of floor space. The control acknowledges that the nature and size of an undersized allotment, including the constraints due to the size of the lot, can be used as an ‘environmental planning ground’ to warrant departure from the development standard. The applicant has referenced this DCP control in their justification which is considered to fall within the scope of objective (c) and (g) of the EPA Act, with the proposal resulting in a built form outcome compatible with the surrounding properties along Monash Crescent, whilst not having unreasonable impacts on the built or natural environment.

In this regard, the applicant’s written request has demonstrated that the proposed development is an orderly and economic use and development of the land, and that the structure is of a good design that will reasonably protect and improve the amenity of

the surrounding built environment, therefore satisfying cls 1.3 (c) and (g) of the EPA Act.

Therefore, the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standards as required by cl 4.6 (3)(b).

Therefore, Council is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3).

Clause 4.6 (4)(a)(ii) (Public Interest) assessment:

cl 4.6 (4)(a)(ii) requires the consent authority to be satisfied that:

(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

Comment:

In considering whether or not the proposed development will be in the public interest, consideration must be given to the underlying objectives of the Floor Space Ratio development standard and the objectives of the C3 Environmental Management zone.

An assessment against these objectives is provided below.

Objectives of development standard

The underlying objectives of the standard, pursuant to Clause 4.4 – 'Floor space ratio' of the MLEP 2013 are:

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

Comment: The overall bulk and scale of the development has been assessed as consistent with the surrounding character of Monash Crescent. It will not significantly alter the existing streetscape and will be compatible in the street setting.

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,

Comment: The proposal will not obscure any important townscape features. The proposal is consistent with the variations envisaged by the Clause 4.1.3.1 MDCP in relation to undersized lots with regard to floor space.

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

Comment: The proposal will maintain the street character presenting as a two storey building (with garage under) which is consistent with the two storey pattern of development on the street. The visual relationship with the surrounding area will not be significantly altered.

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

Comment: The proposal will not have any significant adverse impacts on the use or enjoyment of adjoining land and the public domain. It has been detailed within the original assessment report, together with the recommended amendments to the plans as required by the DDP, to result in a reasonable outcome in terms of amenity for adjoining properties.

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.

Comment: N/A

Conclusion:

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the Clause 4.4 Floor Space Ratio.

Zone objectives

The underlying objectives of the C3 Environmental Management zone are:

- *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*

Comment: The proposal has been designed with a well-articulated façade and integrated landscaping to present to the foreshore area in way that is compatible with the surrounding properties. The proposal will not change foreshore processes or result in loss of any significant vegetation.

- *To provide for a limited range of development that does not have an adverse effect on those values.*

Comment: The proposal is for a dwelling house, which is a permissible use in the zone.

- *To protect tree canopies and provide for low impact residential uses that does not dominate the natural scenic qualities of the foreshore.*

Comment: The proposal does not result in removal of any significant canopy trees and results in a quantum of landscaped area suitable for new landscaping on the site to compliment the area. The proposal does not change the build form outcome to the extent that it comes to dominate the natural scenic qualities of the foreshore.

- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*

Comment: The development will have no significant adverse impacts on nearby foreshores, significant geological features or bushland, including loss of natural

vegetation. The area available for landscape planting in the rear setback is suitable to enhance the landscape setting of the site.

- *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*

Comment: The proposal introduces an appropriate quantum of landscaping to provide for new trees within the rear setback fronting the foreshore. The design of the building is an appropriate response to the character of the area and dwellings along Monash Crescent. Council's stormwater engineer and coast and catchment team are satisfied the proposal will not have a detrimental impact on the ecological characteristics of the area or water quality.

- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

Comment: The overall height and bulk of the building compatible with the surrounding developments along Monash Crescent. Sufficient area is provided around the perimeter of the building to provide landscaping to enhance the site and the proposal does not remove any significant trees.

Conclusion:

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the C3 Environmental Management zone.

Clause 4.6 (4)(b) (Concurrence of the Secretary) assessment:

cl. 4.6(4)(b) requires the concurrence of the Secretary to be obtained in order for development consent to be granted.

Planning Circular PS20-002 dated 5 May 2020, as issued by the NSW Department of Planning, advises that the concurrence of the Secretary may be assumed for exceptions to development standards under environmental planning instruments that adopt Clause 4.6 of the Standard Instrument. In this regard, given the consistency of the variation to the objectives of the zone, and in accordance with correspondence from the Deputy Secretary on 2 November 2021, Council staff under the delegation of the Development Determination Panel, may assume the concurrence of the Secretary for variations to the Height of building and Floor space ratio Development Standards associated with a single dwelling house (Class 1 building).

Assessment of Submissions

During the notification period two (2) submissions were received regarding the amended plans. The submissions were from the adjoining properties at 27 and 31 Monash Crescent. Both submissions advised that the amended plans addressed a number of the previous issues raised and added the following comments for Council's consideration regarding the latest set of plans submitted in response to the DDP deferral:

- *We just had one issue to clarify which refers to the selection of the 2 new Syzygium paniculatum to be planted on our adjoining rear boundary fence*

(which some species of that plant can apparently grow too much greater than 6-20 metres) to therefore remove the rest of our afternoon sun all year, defeating the purpose of scaling back setbacks etc. We are assuming the plants are chosen as a hedge plant and will (as per the plan comments) be maintained at a trimmed and hedged height of circa 2m level with the new privacy screen?

Comment: The applicant has responded to this submission by providing an amended Landscaping Plan (LP 01, Revision E dated 20/10/2022) to amend the species of tree planting along the southern boundary to include a different variation of Lilly Pilly (*Syzygium wilsonii ssp wilsonii*) which is capable of reaching a mature height of 2m. This will ensure privacy at the ground level is maintained whilst not resulting in adverse overshadowing. It is recommended Condition 1 be amended to include reference to the updated landscape plan.

The amended plans show a new pebble and succulent roof at the rear over the ground floor level. The detail of this planting is not included on the landscape plan Drawing LP01 prepared by Mariko Fraser Landscape and access to this space is not indicated. The amended plans also show that a metal and timber sunshade is proposed along part of the northern and western elevations, however, the detailing is not very clear.

We respectfully request that any planting on the roof be low level and that the sunshade remains an open structure and uncovered, so these elements do not further impinge on the view lines available from No. 31. We also request that Council ensures the pebble and succulent roof is a non-trafficable area, which can be done by way of condition of consent.

Comment: The applicant has responded to this submission by providing an amended plan to propose a pebble roof only for the western roof portion and this will therefore not result in any further view impacts as a result of landscaping on the roof. Sheet DA01 and DA04 has been revised to include 'Issue E' showing this as pebble roof.

Council does not consider it necessary to condition that the roof is 'non-trafficable' as the area is clearly labelled 'roof.' Any use of the area for the purpose of a terrace/balcony would not be consistent with the approved plans and would be in breach of the consent.

In response to the concerns regarding the sunshade structure, the applicant has provided an additional photomontage showing the alignment of the sunshade structure relative to the southern windows of 31 Monash Crescent. The plans show this to be an open and lightweight structure that provide shading of the western windows, without adding additional building bulk (Figure 1). The photomontage (Figure 2) shows how the view from 31 Monash will be unaffected as a result of the shade structure.

Based on the detailing on the plans it is not considered necessary to impose further conditions.

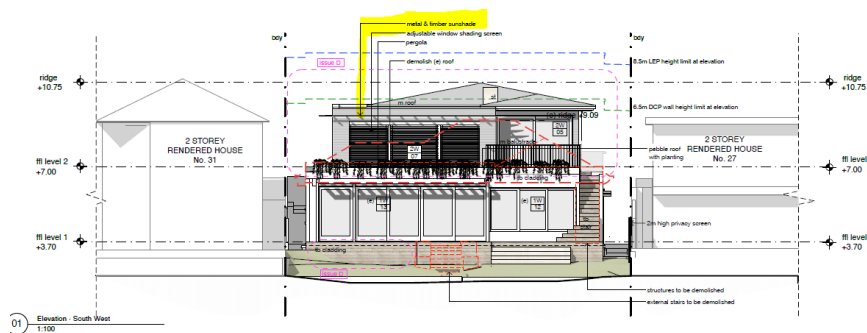


Figure 1 – Identification of the shade structure on the western elevation.

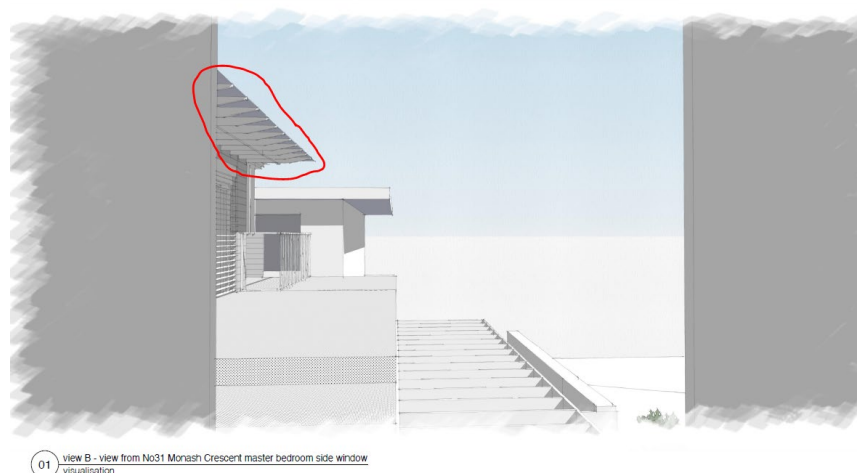


Figure 2 – Photomontage provide by the applicant from 31 Monash Crescent.

6. The Panel will then consider the applicants Clause 4.6 variation, the amended plans, any submissions received in response to the re-notification, the Supplementary Report by the Assessment Officer, and make a determination.

Comment: The Clause 4.6 request, amended plans and submissions are now referred to the panel together with the memo dated 16 September 2022 and this memo dated 18 October 2022.

Recommendation

That Northern Beaches Council as the consent authority vary clause 4.4 Floor Space Ratio development standards pursuant to clause 4.6 of the MLEP 2013 as the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) and the proposed development will be in the public interest and is consistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

Council's has undertaken assessment of the amended plans and information following the deferral of Item 3.3. The amendments to the plans are consistent with the changes recommended by the DDP and the amended plans address the last two (2) submissions in a satisfactory way. As a result of the assessment contained within this addendum report, along with the memo dated 16 September and the original assessment report, it is recommended that the application is approved, subject to the

below amended to Condition 1 and the conditions contained within the original assessment report.

- i. As a result of the proposed revised drawings, it is recommended that Condition 1 – Approved Plans and Supporting Documentation for both DA2021/2313 be amended as follows:

Condition 1 – Approved Plans and Supporting Documentation

The development must be carried out in compliance (except as amended by any other condition of consent) with the following:

a) Approved Plans

Architectural Plans - Endorsed with Council's stamp		
Drawing No.	Dated	Prepared By
DA 01/ Issue E	19 October 2022	Campbell architecture
DA 02/ Issue D	9 September 2022	Campbell architecture
DA 03/ Issue D	19 October 2022	Campbell architecture
DA 04/ Issue E	9 September 2022	Campbell architecture
DA 05/ Issue D	9 September 2022	Campbell architecture
DA 06/ Issue D	9 September 2022	Campbell architecture
DA 07/ Issue D	9 September 2022	Campbell architecture
DA 08/ Issue D	9 September 2022	Campbell architecture
DA 09/ Issue D	9 September 2022	Campbell architecture
DA 10/ Issue D	9 September 2022	Campbell architecture
DA 22/ Issue D	9 September 2022	Campbell architecture

Reports / Documentation – All recommendations and requirements contained within:		
Report No. / Page No. / Section No.	Dated	Prepared By
Flood Risk Management Plan/ Issue B	16 February 2022	SGC
BASIX Certificate No. A432666_03	9 September 2022	Campbell Architecture
Flora and Fauna Assessment Report	November 2021	Narla Environmental
Geotechnical Investigation	November 2021	Grozier Geotechnical Consultants

- b) Any plans and / or documentation submitted to satisfy the Conditions of this consent. The development is to be undertaken generally in accordance with the following:

Landscape Plans

Drawing No.	Dated	Prepared By
LP 01/ Revision E	20 October 2022	Mariko Fraser
LP 02/ Revision D	September 2022	Mariko Fraser

Waste Management Plan		
Drawing No/Title.	Dated	Prepared By
Waste Management Plan	9 November 2021	Hugh Campbell

In the event of any inconsistency between conditions of this consent and the drawings/documents referred to above, the conditions of this consent will prevail.

Reason: To ensure the work is carried out in accordance with the determination of Council and approved plans.