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WRITTEN REQUEST PROVIDING GROUNDS FOR VARIATION TO HEIGHT DEVELOPMENT STANDARD PURSUANT TO CLAUSE 4.6 OF MANLY LEP 2013

PART OF 19-23 THE CORSO, MANLY

CONSERVATION WORKS, REFURBISHMENT AND ALTERATIONS TO EXISTING RETAIL PREMISES AND SHOP TOP HOUSING AT 19-21 THE CORSO, MANLY

Context – Clause 4.6 of Manly LEP 2013

This written request has been prepared in respect of Clause 4.6 of Manly LEP 2013 (the LEP) to accompany a Development Application for conservation works, refurbishment and alterations to the existing shop top housing and ground floor retail building at 19-21 The Corso, Manly which forms part of the site at 19-23 The Corso.

No works are proposed to the existing two (2) storey shop building at No. 23 The Corso as part of the subject proposal.

The Development Application seeks a variation to the development standard contained within Clause 4.3 of the LEP – maximum building height of 10m.

The existing building already exceeds the 10m height standard with a height of 15.585m to the top of the front parapet to The Corso (RL 21.645). No change is proposed to this existing maximum height.

The proposed works do not involve any increase in the height of any part of the building. When measured in accordance with the definition in the LEP, the proposed works have a maximum height of 14.32m (from Ground floor level to the existing roof level (RL 20.38)).

The existing building height represents a variation of 5.585m or 56% from the numerical standard in the LEP.

The proposed works represent a variation of 4.32m or 43% from the numerical standard in the LEP.

Clause 4.6 of the LEP provides:

- (1) *The objectives of this clause are as follows:*
 - (a) *to provide **an appropriate degree of flexibility** in applying certain development standards to **particular development**,*
 - (b) *to achieve **better outcomes** for and from development by allowing **flexibility in particular circumstances**.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is **unreasonable or unnecessary in the circumstances of the case**, and*
 - (b) *that there are **sufficient environmental planning grounds** to justify contravening the development standard.*
- (4) *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.*
- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
 - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

[Our emphasis in **bold**]

This document constitutes the written request referred to in Clause 4.6(3) in relation to the proposal's variation to the height development standard.

It is noted that the NSW Department of Planning and Environment (**DP&E**) provides guidance on how to prepare clause 4.6 variations in the form of *Varying development standards: A Guide* (August 2011). This written request to vary the standard is based on the DP&E's Guide.

This written request has also been prepared having regard to the recent judgment in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 (Initial Action)*. At paragraphs 17 – 21 of *Initial Action*, Preston CJ confirmed the findings in *Wehbe v Pittwater Council [2007] NSWLEC 827 (Wehbe)*, regarding the available avenues to establish that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case (in accordance with the test provided by cl 4.6(3)(a) of the LEP) including:

- Establishing that the objectives of the development standard are achieved notwithstanding non-compliance with the standard: (*Initial Action* at [17]);
- Establishing that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary (*Initial Action* at [19]);
- Establishing that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: (*Initial Action* at [19]); and
- Establishing that the development standard has been virtually abandoned or destroyed by the Council’s own decisions in granting development consents that depart from the standard and hence compliance is unnecessary and unreasonable: (*Initial Action* at [20]).

Further, Preston CJ found in *Initial Action*, at paragraphs 87 and 88, in the context of Clauses 4.6(3)(a) and (b) 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...”*

*...The requirement in Clause 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 have a better environmental planning outcome than a development that complies with the development standard...**”*

[Our emphasis in **bold**].

Written Request

As stated above, and as set out in the Statement of Environmental Effects dated December 2020 (the SEE), when measured in accordance with the definition in the LEP, the existing building already exceeds the 10m height standard with a height of 15.585m to the top of the front parapet to The Corso. In the context of the 10m height standard, the whole of the Third Floor of the existing building is above the height control.

No change is proposed to the existing maximum building height.

As also noted above, the proposed works do not involve any increase in the height of any part of the building. When measured in accordance with the definition in the LEP, the proposed works have a maximum height of 14.32m (from Ground Floor level to the existing roof level).

The proposed works therefore exceed the 10m standard by up to 4.32m.

The questions set out in the DP&E’s Guide are addressed below.

1. What is the name of the environmental planning instrument that applies to the land?

Manly Local Environmental Plan 2013 (the LEP).

2. What is the zoning of the land?

The zoning of the land is B2 Local Centre.

3. What are the objectives of the zone?

The objectives of the B2 zone are:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To minimise conflict between land uses in the zone and adjoining zones and ensure amenity for the people who live in the local centre in relation to noise, odour, delivery of materials and use of machinery.*

4. What is the development standard being varied?

The development standard being varied is the height of buildings development standard.

5. Under what Clause is the development standard listed in the environmental planning instrument?

The development standard is listed under clause 4.3 of the LEP.

6. What are the objectives of the development standard?

The objectives of clause 4.3 are:

- a) *to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,*
- b) *to control the bulk and scale of buildings,*
- c) *to minimise disruption to the following:*
 - (i) *views to nearby residential development from public spaces (including the harbour and foreshores),*
 - (ii) *views from nearby residential development to public spaces (including the harbour and foreshores),*
 - (iii) *views between public spaces (including the harbour and foreshores),*
- d) *to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,*
- e) *to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.*

7. What is the numeric value of the development standard in the environmental planning instrument?

The numeric value of the development standard in the LEP is 10m.

8. What is the proposed numeric value of the development standard in your development application?

The maximum numeric value of the proposed variation from the development standard is 14.32m.

9. What is the percentage variation (between your proposal and the environmental planning instrument)?

The percentage variation at its highest point above existing ground level is 43%.

10. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

In the circumstances of the case, it is considered that strict compliance with the height of buildings development standard applicable to the site is unreasonable and unnecessary for the following reasons:

A. The objectives of the development standard are achieved notwithstanding non-compliance with the standard (cl 4.6(3)(a), cl 4.6(4)(ii) and *Initial Action* at [17])

Objective 4.3(1)(a) - to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality

Objective 4.3(1)(b) - to control the bulk and scale of buildings

Assessment:

The height, bulk and scale of the proposed development, including the proposed height variation, is considered to be acceptable in its context as it reflects the existing situation in terms of the existing building height at 19-21 The Corso, the topographic landscape and prevailing building heights and is consistent with Council's townscape objectives for the Manly Town Centre.

As noted above, the existing building at 19-21 The Corso already exceeds the height standard with a height of 15.585m to the existing parapet to The Corso (RL 21.645).

The proposed works do not alter the existing height of any part of the existing building. When measured in accordance with the definition in the LEP, the proposed works have a height of 14.32m to the existing roof level (RL 20.38).

The proposal, including the height variation, does not involve any change to the existing bulk and scale of the building as viewed from the street as the existing height of all built elements is maintained and the existing relationship of building heights and forms in the streetscape. The proposed development will therefore be compatible with the adjoining development, the streetscapes of The Corso and Market Place and will maintain the amenity of the public domain.

There is no change to the visibility and visual prominence of the parts of the building over the height limit when viewed from the public domain and there is no change to the existing streetscape/townscape character of the building as viewed from The Corso and Market Place.

Desired Future Streetscape Character

The desired future streetscape character of the subject building is set out in Manly DCP 2013 which contains townscape objectives and provisions for local and neighbourhood centres in Section 3.1, townscape provisions for Manly Town Centre in Section 4.2.5.1 and character provisions for Manly Town Centre Heritage Conservation Area and The Corso in Section 5.1.

The proposed development, including the proposed height variation, is considered to be consistent with these provisions, as follows.

Manly DCP Townscape Objectives and Provisions

The townscape objectives of the DCP are as follows:

- Objective 4) To ensure that all parking provision is designed and sited to respond to and respect the prevailing townscape.*
- Objective 5) To assist in maintaining the character of the locality.*
- Objective 6) To recognise the importance of pedestrian movements and townscape design in the strengthening and promotion of retail centres.*
- Objective 7) To minimise negative visual impact, in particular at the arterial road entry points into the Council area and the former Manly Council area, so as to promote townscape qualities.*

The proposal is consistent with the above objectives, in that:

- no parking exists on the site and none is now proposed;
- the proposed development maintains the character of the locality by proposing conservation works, refurbishment and alterations to the existing building, including the height variation, which:
 - maintain the existing built form, bulk and scale of the existing building as viewed from the public domain;
 - do not exceed the existing maximum building height or other existing heights of parts of the building;
 - do not change the visual prominence of the building when viewed from the public domain to maintain the existing streetscape character; and
 - include the retention and upgrade of the existing building, including its façades to The Corso and Market Place, in a manner consistent with its heritage significance.
- it recognises the importance of pedestrian movement and townscape design in strengthening and promoting Manly Town Centre by:
 - maintaining and increasing the active frontage to The Corso and increasing the level of activation to Market Place;
 - by refurbishing the existing awning to The Corso and providing a new awning to Market Place to improve pedestrian amenity; and
 - by improving the appearance of the existing building from both streets through the upgrade and refurbishment of the street front façades;
- it minimises negative visual impacts to promote townscape qualities with improvements in the appearance and condition of the building as a result of the proposed works with no change in the existing built form.

The proposal, including the height variation, is consistent with the applicable townscape provisions of the DCP, as follows.

Local role of the site

The proposal generally maintains the local role of the site as no changes are proposed to the overall form and scale of the building as viewed from The Corso and Market Place. The proposal maintains the existing built form relationship with adjoining development and public spaces.

No changes are proposed to the street frontage façade to The Corso which is to be retained and conserved in accordance with the HIS (see **Appendix 4**) which will enhance the appearance of the building within the heritage item of The Corso. The proposed alterations to the rear façade will contribute to the presentation of the building to Market Place, will improve the amenity of the rear units and will have a satisfactory heritage impact.

Townscape Principles Map

The proposed development is consistent with the Townscape Principles map as it relates to the subject site by maintaining and improving the existing important vistas along The Corso and from Darley Road towards the site.

Design Details

The proposal is consistent with the relevant design details controls in that:

- as set out in the HIS (see **Appendix 4**) the proposal is complementary to adjacent buildings and the wider conservation area in terms of the design detailing of the façades. As noted above, no changes are proposed to the façade to The Corso which is to be conserved and refurbished;
- no change is proposed to the height of the building and no change is proposed to floor levels within the building, apart from the provision of ramps within the rear Ground Floor;
- the materials, textures and original colours of the existing building are to be retained or reinstated where there is sufficient available evidence;
- the proposal maintains the architectural style of the existing building fabric;
- no change is proposed to the existing building footprint;
- the proposal will not give rise to any additional overshadowing or adverse wind effects as no change is proposed to the height and form of the building;
- the proposal will improve the appearance of the side walls of the building, to the extent that they are visible, through the proposed refurbishment and removal of external services;
- the Ground Floor has level access from The Corso and Market Place with internal ramps within the entry from Market Place;
- retail space occupies the majority of the width of the building frontage to The Corso, with the remainder occupied by the residential entry;
- street numbering will be provided as required; and
- the proposal includes internal ducting for water supply, waste and mechanical exhaust to the existing units. The retail area air-conditioning plant will be housed within a re-purposed terrace level communal laundry rather than reinstated on the roof.

Manly DCP Character Provisions for Manly Town Centre Heritage Conservation Area and The Corso

General Character

The proposal, including the height variation, is consistent with the general character of the Town Centre Conservation Area as set out in the DCP (see also **Appendix 4** to the SEE) in that it involves alterations and upgrade to an existing building which:

- maintain the existing scale of the street frontage façades;
- is built to the property boundaries to The Corso and Market Place;
- provides a good level of pedestrian amenity afforded by the existing and proposed footpath awnings; and
- contributes to the range of architectural styles in the area.

The Corso

The proposed development is consistent with the guidelines for The Corso (see also **Appendix 4** in the SEE), in that:

- the existing building at 19-21 The Corso, which is part of the group heritage item on The Corso, is to be conserved, not redeveloped;
- the importance of internal changes is recognised in the approach to the design of the proposed development as detailed in the submitted HIS (see **Appendix 4**);
- no change is proposed to the existing building height or built form;
- the parapet to The Corso will continue to be read against the sky;
- there are no critical views to be kept open to or through the site;
- no change is proposed to the existing subdivision pattern;
- a new building is not proposed;
- windows and balconies open to the street;
- there is no existing arcade through the site;
- the existing footpath awning to The Corso façade is to be refurbished. A new awning is proposed to the Market Place façade as required;
- the shopfront to The Corso occupies most of the width of the frontage to maximise activity. Roller shutters are not proposed;
- the shop front is existing on the site;
- the proposal will utilise external colours that are appropriate for the type and age of the building. The original external colours will be re-instated if there is sufficient evidence on-site;
- transmission of noise into the dwellings will be controlled through the use of appropriate glazing within replacement windows and doors to the existing units;
- external details for plant, exhausts, ducts etc. are designed to be part of the overall building structure;
- the proposal will contribute to the presentation of the building to Market Place through the upgrade of the rear façade and will improve casual surveillance of Market Place through the proposed changes to the rear façade; and
- the site specific controls in Schedule 6 to the DCP state in relation to 21 The Corso *redesign the two ground level entrance doors to the upper floors to give a more substantial appearance, with transparent glazing (to increase connection with street) and solid returns*. The proposed development removes the eastern ground level door to the upper floors from the front elevation as that access is redundant due to the

separation of the subject building from No. 23, adjoining. That door is converted to a shop window and forms part of the retail frontage of the building. The proposal upgrades the second, western door to the residential lobby with a new glass panelled door with hood over and tiled entry surround consistent with the requirements.

In addition, the proposed height variation is an appropriate response to the heritage significance of the site and the streetscape of The Corso (see **Appendix 4** to the SEE).

Accordingly, the height variation of the proposed development is consistent with the above objectives as it is consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality and it maintains the existing bulk and scale of the building on the site when viewed from the public domain.

Objective 4.3(1)(c) - to minimise disruption to the following:

- (i) views to nearby residential development from public spaces (including the harbour and foreshores),***
- (ii) views from nearby residential development to public spaces (including the harbour and foreshores),***
- (iii) views between public spaces (including the harbour and foreshores),***

Assessment:

The proposed height variation will not result in any impact on views to, from or between public places and nearby residential development. As noted above, there is no increase in the height variation compared with the height of the existing building and no change to the existing built form.

Accordingly, the height variation of the proposed development minimises disruption to views to, from and between public spaces and nearby residential development.

Objective 4.3(1)(d) - to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings

Assessment:

The proposed height variation will not result in any adverse impacts on the public domain or residential properties in terms of overshadowing/solar access.

The proposal does not give rise to any additional overshadowing as no change is proposed to the height and form of the building.

Accordingly, the proposed height variation will maintain solar access to public and private open spaces and will maintain adequate sunlight access to private open spaces and to habitable rooms of any adjacent dwellings.

Objective 4.3(1)(e) - to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses

Assessment:

This objective is not applicable to the subject proposal as the site is not within a recreation or environmental protection zone.

B. Consistency with the objectives of the B2 Local Centre zone (cl 4.6(4)(a)(ii))

Assessment:

As well as achieving the applicable objectives of clause 4.3 as demonstrated above, the proposal, including the height variation, is also in the public interest as it is consistent with the relevant objectives of the B2 Local Centre zone in that:

- it contributes to the range of retail uses in the zone that serve the needs of people who live in, work in and visit the local area, including existing and future residents of the subject building;
- it provides for employment opportunities in a highly accessible location through the non-residential floor space which exceeds Council's minimum floor space for such uses;
- it maximises public transport patronage and encourages walking and cycling with residential development in a highly accessible, walkable location without private car parking; and
- it minimises conflict between land uses in the zone and adjoining zones and ensures amenity for the people who live in the local centre by maintaining the existing land use mix on the site.

It is therefore considered that the proposed height of buildings variation does not compromise the ability of the Development Application to satisfy the relevant B2 Local Centre zone objectives. The Development Application must therefore be considered to be in the public interest.

11. *How would strict compliance hinder the attainment of the objects specified in Section 1.3(a) and (c) of the Act?*

Compliance with the relevant height standard would hinder the attainment of the objects of section 1.3(a) and (c) of the Act, which are 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, in addition to promoting and coordinating orderly and economic use and development of land.

The proposal satisfies the zone and development standard objectives and therefore strict compliance with the standard is not required in order to achieve compliance with the objectives. Strict compliance would result in an inflexible application of policy. It does not serve any purpose that should outweigh the positive outcomes of the development and therefore a better planning outcome overall.

The development as proposed, including the height variation, is consistent with the provisions of orderly and economic development as it relates to an existing building already exceeding the height standard and provides for the upgrade and refurbishment of the existing building in a manner which responds appropriately to existing surrounding development, the heritage significance of the building and neighbouring development and which will make a positive contribution to the character of the streetscape and the locality.

In this regard, the proposal also meets the object of the Act with respect to good design and amenity of the built environment.

12. *Is the development standard a performance based control? Give Details.*

The building height development standard is a performance based control as the control contains objectives to which compliance with the standard is targeted to achieve.

13. *Would strict compliance with the standard, in your particular case, be unreasonable or unnecessary? Why?*

This matter is addressed in detail above in the answer to Question 10. Strict compliance would result in an inflexible application of policy. It does not serve any purpose that should outweigh the positive outcomes of the development.

The development is consistent with the provisions of orderly and economic development and good design and amenity of the built environment.

14. *Are there sufficient environmental planning grounds to justify contravening the development standard? Give details.* (cl 4.6(3)(b) and *Initial Action* at [24])

There are sufficient environmental planning grounds to support the variation to the height of buildings development standard applicable to the site, being:

- There is no change in the existing maximum height or form of the building on the site which already exceeds the height standard.
- The proposed height variation is consistent with the existing development on the site and is lower than the existing maximum building height.
- There is no change in the bulk and scale of the existing building associated with the breach of the height standard .
- The proposed development, including the height variation, is consistent with the townscape objectives and design principles for the Manly Town Centre and The Corso.
- The proposed development, including the height variation, is consistent with the heritage significance of the site, as part of The Corso heritage item, and the wider Manly Town Centre Conservation Area as detailed in the submitted HIS (see **Appendix 4** to the SEE).
- The height variation will not give rise to any adverse amenity impacts on surrounding development in terms of overshadowing, loss of solar access or loss of views as no change in building height or form is proposed.
- The proposed development, including the height variation, achieves compliance with the relevant underlying objectives of the standard and the objectives of the zone.

The above factors confirm that there are sufficient environmental planning grounds to justify the variation and that the Clause 4.6 variation request is well-founded.

Summary

Accordingly, there are more than sufficient environmental planning grounds to justify the variation of the height standard on the basis that compliance with the standard would be unreasonable and unnecessary in the circumstances of this particular case. As demonstrated above, the proposed development will be in the public interest because it is consistent with the objectives of the height standard and the objectives of the B2 zone.

In the context of the other requirements of Clause 4.6, no matters of State or regional planning significance are raised by the proposed development. Moreover, it is considered that there would be no public benefit in maintaining the particular planning control in question, in the case of this specific development.

The proposal also meets the objects of the EP&A Act with respect to good design and amenity of the built environment and will contribute to a better environment by upgrading and refurbishing the existing heritage building consistent with streetscape and townscape qualities.

This request is considered to adequately address the matters required by Clause 4.6 and demonstrates that compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case.

Despite the proposal's non-compliance with the height development standard, the proposed development is considered to meet the objectives of the standard and the objectives of the B2 zone.