

Variation to the Development Standard for Floor Space Ratio (FSR), pursuant to clause 4.6 of the Manly Local Environmental Plan 2013 (MLEP) 19-27 The Corso, Manly

This request to vary the permitted gross floor area for retail purposes is lodged in conjunction with the development application (DA) DA2022/1526, for 19-23, 25 and 27 The Corso, Manly. The request is lodged having regard to cl. 4.6 of the MLEP 2013, which allows for a development standard to be varied. The DA seeks to vary cl. 6.16 of the MLEP for the permitted amount on retail space on the site.

This variation addresses the extent of retail floor space which occupies the site that exceeds 1,000m², as permitted by cl. 6.16 of the LEP that deals with Gross floor area in Zone B2.

Existing and Proposed Gross Floor Area

The existing retail premises occupying the site has a gross floor area (GFA) of 1,560.88m². The proposed retail GFA is 1,540.2m². While the GFA is to be reduced in the existing building, it does not fall below the threshold established by cl. 6.16, which states at subclause (3):

Development consent must not be granted for development on land to which this clause applies if the gross floor area of any retail premises on the land would exceed 1,000 square metres.

The existing non-compliance with cl. 6.16 is historical and will remain, despite being reduced, in association with this application.

The Site

The site is located at 19-23, 25 and 27 The Corso, Manly and is legally described as Strata Plan 12989, Lot 1 and 2 in Deposited Plan 877793. The site has a total area of 1,143.7m².

The Development Application

The development application is as set out in the Statement of Environmental Effects.

The Development Standard

Cl. 4.4 of the MLEP 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.

The permitted FSR is 2.5:1.

The proposed FSR is 2.17:1. The proposal therefore complies with cl. 4.4 of the MLEP.

However, it is cl. 6.16 which is offended by the proposed development, with a GFA greater than 1,000m².



Definitions

The Dictionary to the WLEP provides the following in relation to how the gross floor area is to be measured:

gross floor area means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes—

(a) the area of a mezzanine, and

(b) habitable rooms in a basement or an attic, and

(c) any shop, auditorium, cinema, and the like, in a basement or attic,

but excludes—

(d) any area for common vertical circulation, such as lifts and stairs, and

(e) any basement—

(i) storage, and

(ii) vehicular access, loading areas, garbage and services, and

(f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and

(g) car parking to meet any requirements of the consent authority (including access to that car parking), and

(h) any space used for the loading or unloading of goods (including access to it), and

(i) terraces and balconies with outer walls less than 1.4 metres high, and

(j) voids above a floor at the level of a storey or storey above.

The Proposal's Non-Compliance with the Gross Floor Area

The permitted GFA for retail space is 1,000m². The existing GFA is 1,560.88m² and the proposed retail GFA is 1,540.2m². Therefore, the existing building exceeds the amount of retail space permitted by cl. 6.16, both in the existing and proposed circumstances.

Variation to the Development Standards

Clause 4.6(3) of the MLEP states:

(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.

These matters are addressed below.

(a) that compliance with the development standard is unreasonable or unnecessary

The common approaches for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. Cases such as *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, *Randwick Council v Micaul Holdings Pty Ltd* [2017] NSWLEC 7 and, most recently, *Initial Action*, have confirmed that adopting the *Wehbe* principles remains an appropriate approach.

There are five alternatives set out in *Wehbe*, but only one need be satisfied as provided in the table below.

Table 1: The *Wehbe* Principles

The objective of the development standard is achieved notwithstanding non-compliance with the standard	In this case, the objective of the development standard is achieved, notwithstanding non-compliance with the standard.
The underlying objective or purpose of the development standard is not relevant	Not applicable
The underlying objective or purpose would be defeated or thwarted if compliance was required	Not applicable
The standard has been abandoned or destroyed	In this case, the standard has been abandoned, given that there is an existing, non-compliant gross floor area.
The zoning of the land was unreasonable or inappropriate such that the standards for the zoning are unreasonable or unnecessary.	Not applicable

Achievement of the objectives of the development standards

The objective of cl. 6.16 is as follows:

- (1) *The objective of this clause is to provide for the viability of Zone B2 Local Centre and encourage the development, expansion and diversity of business activities, that will contribute to the economic growth, retention of local services and employment opportunities in local centres.*

The existing and proposed GFA that exceed the maximum permitted are entirely consistent with the above objective, as the works will continue the diversity of business activity and enhance the economic contribution that this site provides, in the context of the Manly Town Centre. The reconfiguration of the GFA (despite the minor reduction), will enhance the viability of the premise and aid the diversity of business activity within the existing building. This will also provide for continued employment opportunities in a venue which is proposed to be renovated to meet the desired standards for a premises of this type and in this location.

Therefore, despite exceeding the maximum permitted retail space, the objective of this clause is upheld.



Abandonment of the development standard

The limitation on retail space for this site has been abandoned, given its continued use for a retail purpose that has continued for some time, pre-dating the prescriptive control around GFA.

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

There are sufficient environmental planning grounds, despite non-compliance with cl. 6.16 as:

- there is no change to the building envelope that would otherwise adversely impact the amenity or solar enjoyment of properties neighbouring the site
- the affected parts of the building will enhance the activation of the premises to the streetscape, providing an active composition to the Town Centre to aid the vibrancy of this
- there is no visible evidence of the non-compliant retail area of the building that would otherwise offend the streetscape or context of the site, nor any discernible impacts to the surrounds
- the non-compliant retail GFA does not alter any views within the vicinity of the site, nor does it alter any existing landscape characteristics
- the public domain surrounding the site will be enhanced with the quantum of GFA that will allow for visible activation to the context, as well as direct overlooking which will assist to ensure public safety through opportunities for passive surveillance.

On balance, the proposed GFA breach achieves a planning purpose by continuing the use of the premises for a retail purpose as desired in this location. The planning purpose of cl. 6.16 is achieved by promoting the continued diversity of retail offering that this site provides to the precinct, as well as aiding the continued economic growth of the premises and extending continued employment opportunities, particularly for those proximate to the site.

Therefore, having regard to the above, there are sufficient environmental planning grounds to permit variation to cl. 6.16.

The Public Interest

Clause 4.6(4) states as follows:

(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*



The next element that the Council needs to be satisfied with to vary the development standard is that the proposed development will be in the public interest if the standard is varied because it is consistent with the zone objectives.

Table 2: Compliance with the zone objectives

1 Objectives of zone	Comment
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.	The GFA accommodated on the site allows for a diversity of retail use within an existing venue that serves the needs of people who live in, work in and visit the area. The site has a long-standing position in the hospitality space of Manly that is consistent with this zone objective, as part of the B2 Local Centre zone.
To encourage employment opportunities in accessible locations.	The proposed uses will continue to provide local employment within the area, if anything which is promoted by a GFA that exceeds that permitted by cl. 6.16, therefore entirely fulfilling this objective.
To maximise public transport patronage and encourage walking and cycling.	There is no car parking proposed to service that part of the site that exceeds the permitted GFA, or indeed any car parking at all. Therefore, the site continues to promote the maximisation of public transport, 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.	The additional GFA that exceeds cl. 6.16 and is, in fact, less than the existing GFA exists without resulting in adverse amenity impacts on surrounding properties and is suitably mitigated based on the consultant advice accompanying this application.

Therefore, the proposed development will comprehensively meet the objectives of cl. 6.16 and the zone objectives.

Accordingly, the Council can be satisfied that it is in the public interest to vary cl. 6.16 for the purpose of this DA. The implementation of the development, despite the exceedance of GFA, will ensure that existing resources are utilized without placing undue pressure on the surrounding environment, both natural and built, while complying with the relevant objectives and producing a better outcome for the development, due to its own site constraints.

Secretary's concurrence

By Planning Circular dated 21 February 2018, the Secretary of the Department of Planning & Environment advised that consent authorities can assume concurrence to clause 4.6 requests except in the circumstances set out below:

- Lot size standards for rural dwellings
- Variations exceeding 10%; and
- Variations to non-numerical development standards.



The Circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP processes and determinations are subjected to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

Conclusion

The development application does not comply with cl. 6.16 of the MLEP. However, the proposal achieves the requirements of cl.4.6 of the MLEP, which allows for variation.

The variation to the development standard should therefore be supported by the consent authority in the circumstances of the case.

ⁱ ground level (existing) means the existing level of a site at any point

