

# GYDE

## Clause 4.4 Request - Floor Space Ratio

Manly Local Environmental Plan 2013

Unit 1 63 – 67 The Corso, Manly

submitted to Northern Beaches Council on behalf of Initium Management

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## 1. EXECUTIVE SUMMARY

This is a written request prepared in accordance with clause 4.6 of the Manly Local Environmental Plan 2015 to justify a variation to the Floor Space Ratio (FSR) development standard. The request relates to a development application (DA) for a change of the use of Unit 1 / 63-67 The Corso, Manly (Lot 1 SP 67337)(the site) to a pub and live entertainment venue, building works and business identification signage.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying certain development standards to particular development, and to achieve better outcomes for, and from, development by allowing flexibility in particular circumstances.

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application, and accordingly we respectfully submit that Council ought to be satisfied that this variation request addresses all of the matters required by clause 4.6(3). As such, it would be appropriate to exercise the flexibility provided by clause 4.6 in the circumstances of this application.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various recent decisions in the New South Wales Land and Environment Court (LEC) and New South Wales Court of Appeal (Appeals Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130) and *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)]; and
3. That the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard and the objectives for development within the zone in which the development is proposed to be carried out [clause 4.6(4)].

This request considers that compliance with the FSR development standard is unreasonable and unnecessary in the circumstances of the proposed development because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The requirement to comply with the development standard is unreasonable and unnecessary in the circumstances as the proposed additional GFA is minor in area and is located within the existing building envelope. There is therefore no change in the buildings bulk and scale.

In addition, this variation demonstrates that there is a lack of adverse environmental impacts, consistency with the relevant objects of the *Environmental Planning and Assessment Act 1979* and is consistent with the relevant aims of the MLEP 2013.

This request also addresses the requirement for concurrence of the Secretary as required by Clause 4.6(4)(b). It is therefore considered appropriate in these circumstances to grant the clause 4.6 variation request.

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## 2. STANDARD TO BE VARIED

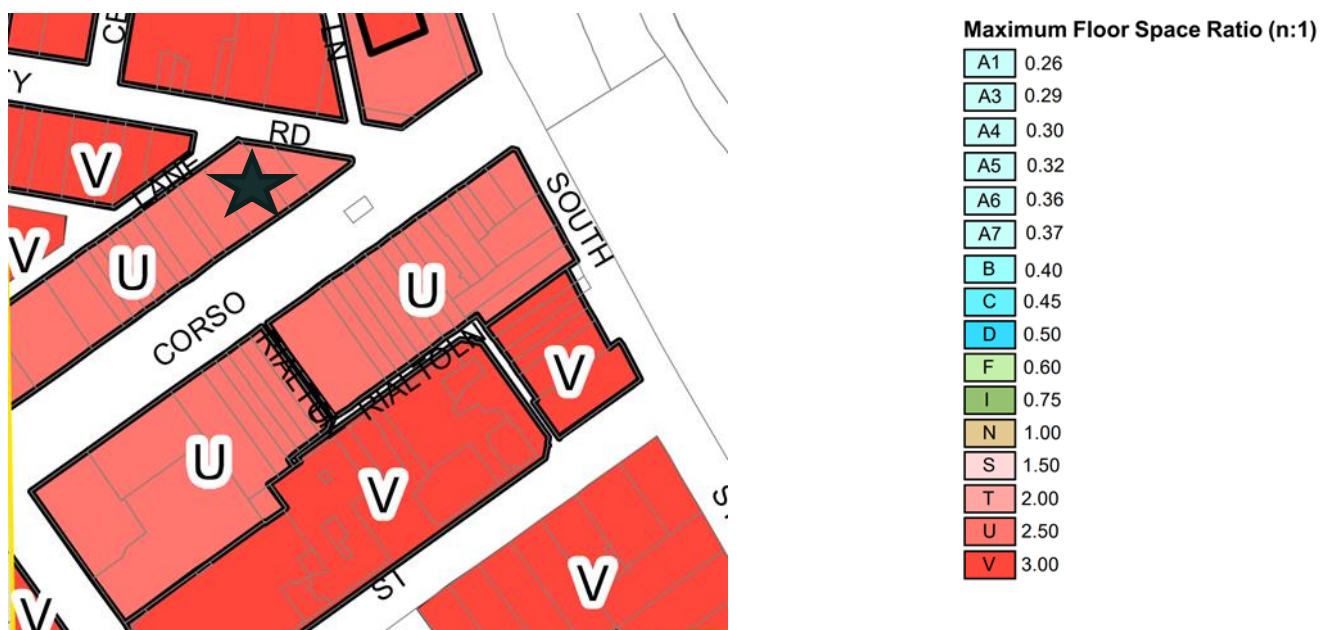
The standard that is proposed to be varied is the Floor Space Ratio development standard which is set out in clause 4.4 of the Manly Local Environmental Plan 2013 (MLEP) as follows:

### 4.3 Floor Space Ratio

(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 site is in an area designated as "U" on the FSR map and a 2.5:1 FSR control applies (Refer to **Error! Reference source not found.** below).

Figure 1: Extract MLEP 2013 – FSR map (Source: NSW legislation)



The development standard to be varied is not identified under sub-clause 4.6(8). Therefore, it is not excluded from the operation of clause 4.6 of the LEP.

### 3. EXTENT OF VARIATION

#### 3.1. Proposed Height Exceedances

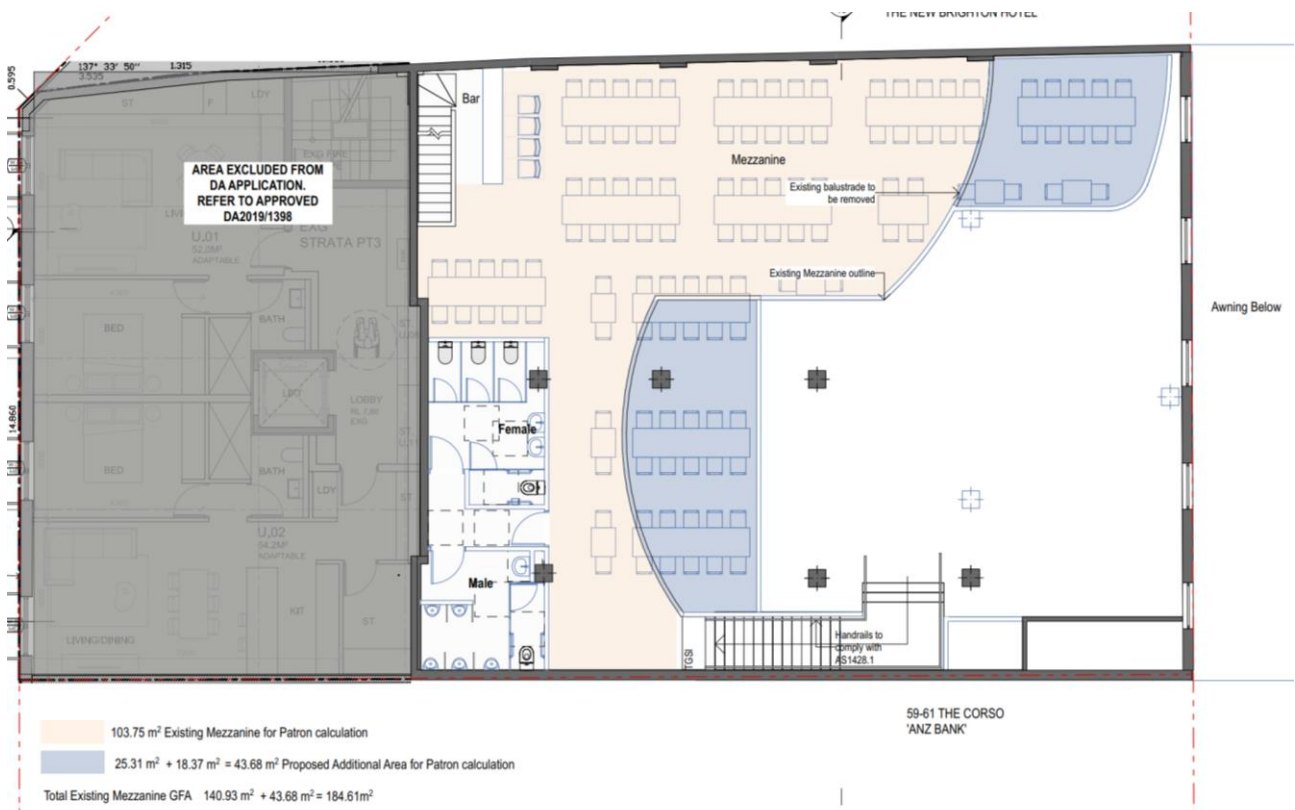
Clause 4.4(2) of the MLEP prescribes a maximum FSR of 2.5:1 on the subject site.

The site has area of 490.3m<sup>2</sup> and the existing building (all strata lots) contains 1255.7m<sup>2</sup> of gross floor area. The site as existing therefore has a FSR of 2.56:1, exceeding the FSR development standard.

It is proposed as part of the subject development application to increase the gross floor area by 43.7m<sup>2</sup>. This would increase the total gross floor area on the site to 1,299.4m<sup>2</sup>, which equates to a FSR of 2.65:1.

The proposed additional floor area is located on the mezzanine level of Unit 1. It is located entirely within the envelope of the existing building. The additional floor area is shown in blue in

Figure 2: Proposed mezzanine level (Source: Grain Architects)



## 4. UNREASONABLE OR UNNECESSARY

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by clause 4.6(3)(a) of the LEP.

The Court has held that there are at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. See *Wehbe v Pittwater Council* [2007] NSWLEC 827 (Wehbe).

The five ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; (First Test)
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary; (Second Test)
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; (Third Test)
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; (Fourth Test) and
5. The zoning of the land is unreasonable or inappropriate. (Fifth Test)

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

Nonetheless, we have considered each of the ways as follows.

### 4.1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The following table considers whether the objectives of the development standard are achieved notwithstanding the proposed variation (First test under Wehbe).

Table 1 Consistency with Objectives of Clause 4.3 of WLEP.

OBJECTIVE	DISCUSSION
<b>4.4 Floor Space Ratio buildings</b>	
(1) The objectives of this clause are as follows—	
(a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character	The proposed additional GFA is located within the existing building envelope and as such it does not result in any change in bulk and scale, nor alter the buildings relationship to the streetscape.
(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	The proposed additional GFA is located within the existing building envelope and as such does not result in any obstruction of any landscape or townscape features.

OBJECTIVE	DISCUSSION
(c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,	The proposed additional GFA is located within the existing building envelope and does not change the buildings visual relationship to the area.
(d) to ensure an appropriate height transition between new buildings and heritage items.	The proposed additional GFA does not result in any change to the height of the building.
(d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain	The proposed additional GFA is located within the existing building envelope and will not impact on the enjoyment of adjoining lands.
(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.	The proposed development will renew an existing commercial space within the Corso, contribute jobs and helping to growth the Manly economy.

As demonstrated in Table 1 above, the objectives of the FSRdevelopment standard are achieved notwithstanding the proposed variation.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the Height of building development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

For the sake of completeness, the other recognised ways are considered as follows.

**4.2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;**

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

**4.3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;**

This basis is not relied upon.



**4.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary;**

The standard has not to our knowledge been abandoned by Council actions in this case and so this reason is not relied upon.

**4.5. The zoning of the land is unreasonable or inappropriate.**

The zoning of the land is reasonable and appropriate and is therefore not relied upon.

## 5. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The environmental planning grounds to justify the departure of the Height of Building standard are as follows:

- **Object 1.3(a) of the EP&A Act** - The proposed variation to the height of building development standard assists in promoting "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" as it will renew and reuse an existing building, maximising the social and economic benefits that can be derived from it.
- **Object 1.3(c) and 1.3(d) of the EP&A Act** - The development assists in promoting "the orderly and economic use of land" by using land that contains built infrastructure and services.
- Importantly, the variation to the FSR development standard does not result in any amenity impacts to the Corso or adjoining properties.

For the reasons contained in this application there are sufficient environmental grounds to justify the variation to the development standard, as required in Clause 4.6(3)(b).

## 6. PUBLIC INTEREST

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. This is required by clause 4.6(4)(a)(ii) of the LEP.

In section 4 it was demonstrated that the proposed development overall achieves the objectives of the development standard notwithstanding the variation of the development standard (see comments under "public interest" in Table 1).

The table below considers whether the proposal is also consistent with the objectives of the zone.

*Table 2 Consistency with B2 Local Centre zone objectives*

OBJECTIVES OF B2 LOCAL CENTRE ZONE	DISCUSSION
<ul style="list-style-type: none"> <li>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.</li> </ul>	<p>The proposed development is for a Hard Rock Live Café. Hard Rock is a globally recognised brand, whose offering is highly attractive to locals and tourists.</p>
<ul style="list-style-type: none"> <li>To encourage employment opportunities in accessible locations.</li> </ul>	<p>The proposed development will generate 20 new jobs.</p>
<ul style="list-style-type: none"> <li>To maximise public transport patronage and encourage walking and cycling.</li> </ul>	<p>The proposed development does not propose any on-site parking. Patrons will be encouraged to access the site via public transport.</p>
<ul style="list-style-type: none"> <li>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.</li> </ul>	<p>The proposed additional floor space does not result in any adverse amenity impacts.</p>

As demonstrated in Table 2, the proposal is consistent with the objectives of the zone and in Section 4 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

## 7. STATE OR REGIONAL ENVIRONMENTAL PLANNING

This section considers whether contravention of the development standard raises any matter of significance for State or regional environmental planning, the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by clause 4.6(5).

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application.

As demonstrated already, the proposal is consistent with the objectives of the zone and the objectives of the development standard and in our opinion, there are no additional matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application.

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence.

## 8. CONCLUSION

This submission requests a variation, under clause 4.6 of the Manly *Local Environmental Plan 2013*, to the FSR development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- The development achieves the objectives of the development standard (Webhe Test 1) and is consistent with the objectives of the B2 Zone;
- There are sufficient environmental planning grounds to justify the contravention;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

The consent authority can be satisfied to the above and that the development achieves the objectives of the development standard and is consistent with the objectives of the B2 Zone notwithstanding non-compliance with the height of buildings standard and is in the public interest.

The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 18-003.

On this basis, therefore, it is appropriate to exercise the flexibility provided by clause 4.6 in the circumstances of this application.