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Written Request Providing Grounds for Variation to FSR Development Standard Pursuant to Clause 4.6 of Manly Local Environmental Plan 2013

D/2021/0017 – Subdivision of Lot 1 of DP590711 at 19-23 The Corso

Introduction

This written request has been prepared in respect of Clause 4.6 of Manly Local Environmental Plan 2013 (*the LEP*) to accompany a Development Application to subdivide Lot 1 in DP590711 at 19-23 The Corso, separating the four storey mixed use building at 19-21 The Corso (19-21) and the approved two storey pub at 23 The Corso (23). No work is proposed as part of the Application.

The Development Application seeks a variation to the development standard provided at Clause 4.4 of the LEP, being Floor Space Ratio (FSR). Under Clause 4.4 of the LEP, the FSR development standard for 19-21 and 23 is 2.5:1.

Clause 4.4(2A) allows an additional FSR of 0.5:1 for sites where at least 50% of the GFA will be used for the purpose of commercial premises. Therefore a maximum FSR of 3:1 is potentially available for 23.

Calculations for the existing mixed use building at 19-21 The Corso and approved pub (not constructed) at 23 The Corso, already exceeds the 2.5:1 FSR standard under the LEP with a FSR of 2.59:1 (1356.84 sqm GFA), an exceedance of 0.09:1 (46.84 sqm GFA). The exceedance is lower in the existing calculations as 19-21 The Corso takes advantage of the less developed 23 The Corso.

The proposed subdivision application will result in an increase of FSR for 19-21 The Corso. With an existing Site Area of 382.1sqm and a GFA of 1088sqm, the FSR will come to 2.84:1, an exceedance of 0.34:1 for 19-21 with no works proposed.

We note that a separate Development Application (DA2020/1711) that sought alterations and additions to the existing building at 19-21 has been approved on 7 April 2021.

The proposed subdivision application will result in a further increase of FSR for 19-21 The Corso. With a Site Area of 382.1sqm and a GFA of 1097sqm, the FSR will come to 2.87:1, an exceedance of 0.37:1.

For 23 The Corso, the subdivision will result in a site area of 141.5sqm and an approved GFA of 268.84sqm. The FSR of 23 The Corso is therefore 1.89:1, under the permitted maximum FSR of 3:1.

19-21 The Corso therefore results in an overall exceedance of the standard by 0.37:1 (14.9%).

The subdivision application is consistent with the Clause 1.3(c) of the Environmental Planning and Assessment Act 1979 (*the EP&A Act*) to promote the orderly and economic use and development of land.

By approving the subdivision application for 19-21 and 23, the physically separate buildings with different land uses can be managed independently, and allow for tailored management for each heritage listed building.

With the FSR breach carried from historic approvals of the locally heritage listed shop top housing development predating the current FSR controls, approving the subdivision application will remove this burden for the buildings should there be any further planning applications.

The subdivision application is of no interest to the public and is capable of improving management for both buildings. With benefits far outweighing the costs, there is no reason to refuse the proposed subdivision application.

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.*

This document constitutes the written request referred to in Clause 4.6(3) in relation to the Development Application's proposed variation to the FSR development standard.

It is noted that the NSW Department of Planning and Environment 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 FSR development standard is based on the DP&E's Guide.

This written request has also been prepared having regard to the recent judgment of the Chief Justice of the Land and Environment Court 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]).

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..."

Written Request

As stated above, when measured in accordance with the definition in the LEP, the existing building on the site already exceeds the 2.5:1 FSR standard under the LEP with a FSR of 2.59:1 (1356.84sqm GFA), an exceedance of 0.09:1 (46.84 sqm GFA) across two buildings at 19-23 The Corso.

No work is proposed as part of the Application. The proposed subdivision application will result in an increase of FSR for 19-21 The Corso. With an existing Site Area of 382.1sqm and a GFA of 1088sqm, the FSR will come to 2.84:1, an exceedance of 0.34:1 for 19-21.

The proposed subdivision application will result in a further increase of FSR for 19-21 The Corso. With a Site Area of 382.1sqm and a GFA of 1097sqm, the FSR will come to 2.87:1, an exceedance of 0.37:1.

19-21 The Corso therefore results in an overall exceedance of the standard by 0.37:1 (14.9%), depending on the order of determination.

23 The Corso will result in a site area of 141.5sqm and an approved GFA of 268.84sqm. The FSR of 23 The Corso is therefore 1.89:1, under the permitted maximum FSR of 3:1.

The increase in the FSR of the proposed development results from the subdivision of 19-21 The Corso and 23 The Corso.

The subdivision application is consistent with the Clause 1.3(c) of the Environmental Planning and Assessment Act 1979 (*the EP&A Act*) to promote the orderly and economic use and development of land. By approving the subdivision application for 19-21 and 23, the physically separate buildings with different land uses can be managed independently, and therefore allow for more appropriate management of the heritage listed Ivanhoe Hotel adjacent to 19-23.

As the FSR breach arises from historic approvals of the 19-23 of the locally heritage listed shop top housing development and predates the current FSR controls, approving the subdivision application will remove this burden for 23 in further planning applications.

Based on the foregoing, the subdivision application is at no cost to the public and can improve management of the separate buildings. With benefits far outweighs the costs, there is no reason to refuse the proposed subdivision application.

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.



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 FSR development standard.

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

The development standard is listed under clause 4.4 of the LEP.

6. What are the objectives of the development standard?

The objectives of clause 4.4 are:

- (a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*
- (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,*
- (c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*
- (d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,*
- (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.*

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

The numeric value of the FSR development standard is 2.5:1 at 19-21 The Corso, with an additional 0.5:1 (resulting in 3:1) for 23 The Corso as at least 50% of the GFA is used for commercial purposes.

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

The maximum numeric value proposed is 2.87:1, equating to an additional FSR of 0.37:1.

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

The percentage variation is 14.9%.

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 the FSR 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 4.4(1)(a) - to ensure the bulk and scale of development is consistent with the existing and desired streetscape character

Objective 4.4(1)(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

Objective 4.4(1)(c) - to maintain an appropriate visual relationship between new development and the existing character and landscape of the area

The bulk and scale of the proposed development, including the proposed FSR variation, is considered to be acceptable in its context and would not give rise to unacceptable impacts on the existing streetscape, townscape or character of the area as it reflects the existing situation in terms of the existing building bulk, scale and density on the site.

As noted above, the existing buildings already exceed the FSR standard with a FSR of 2.59:1 as 19-21 takes advantage of the comparatively underdeveloped 23. With no works proposed, the subdivision application will increase to 2.87:1 (minor increase of 9sqm).

The change in the GFA/FSR compared with the existing building results from the subdivision of the two building at 19-21 and 23.

The addition 9sqm is due to the internal alterations within the building, being the removal of stairs at the Ground and First Floors. There is no change in the external built form or its bulk and scale compared with the existing situation in both situations.

The Application, including the FSR variation, does not involve any change to the existing bulk and scale of the building as viewed from the street as the existing built form is maintained and the existing relationship of building 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.

With the FSR breach carried from historic approvals of the locally heritage listed shop top housing development predating the current FSR controls, approving the subdivision application will remove this burden for the buildings should there be any further planning applications.

There is no change to the visibility and visual prominence of the parts of the building in excess of the FSR standard 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.

Based on the foregoing, the subdivision application is at no cost to the public and is capable of improving management of both buildings. With benefits far outweighing the costs, there is no reason to refuse the proposed subdivision application.

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 FSR 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 there will be no works to the buildings, therefore maintaining the existing parking, character of locality, pedestrian movement, townscape design and townscape qualities.

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

Local role of the site

The Application maintains the local role of the site as no work is proposed. The proposal maintains the existing built form relationship with adjoining development and public spaces.

Townscape Principles Map

The proposed development is consistent with the Townscape Principles map as it relates to the subject site by maintaining 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 there is no work proposed as part of the Application.

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

General Character

No work is proposed as part of the Application therefore has no impact on the general character of the Town Centre Conservation Area.

The Corso

The proposed development is consistent with the guidelines for The Corso 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;
- no change is proposed to the existing building;
- 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;



- a new building is not proposed;
- windows and balconies open to the street;
- there is no existing arcade through the site;
- the shopfront to The Corso occupies most of the width of the frontage to maximise activity.
- the shop front is existing on the site;

Accordingly, despite the FSR variation of the proposed development, the bulk and scale of development is consistent with the existing and desired streetscape character, will not obscure important landscape and townscape features and maintains an appropriate visual relationship between new development and the existing character and landscape of the area.

Objective 4.4(1)(d) - to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain

The proposed FSR variation will not result in any additional adverse impacts on the amenity of surrounding properties or the public domain in terms of privacy, overshadowing/solar access or view loss/disruption as there is no proposed work.

Objective 4.4(1)(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 FSR variation will have no impact on the viability of the business zone.

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

As well as achieving the objectives of clause 4.3 as demonstrated above, the proposal 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 FSR variation does not impact on 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?

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. The proposal will have no impact on the existing surrounding development, the heritage significance of the building and neighbouring development and continue to make a positive contribution to the character of the streetscape and the locality.

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.

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

The subdivision application is consistent with the Clause 1.3(c) of the Environmental Planning and Assessment Act 1979 (*the EP&A Act*) to promote the orderly and economic use and development of land.

By approving the subdivision application for 19-21 and 23, the physically separate buildings with different land uses can be managed independently, and allow for tailored management for each heritage listed building.

With the FSR breach carried from historic approvals of the locally heritage listed shop top housing development predating the current FSR controls, approving the subdivision application will remove this burden for the buildings should there be any further planning applications.

There is no public interest in requiring compliance with the relevant FSR standard on the basis that doing so 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 to provide 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 subdivision application is of no interest to the public and is capable of improving management for both buildings. With benefits far outweighing the costs, there is no reason to refuse the proposed subdivision application.

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

The FSR development standard is a performance based control as the control contains objectives which 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 FSR development standard applicable to the site, being:

- The existing development on the site involves a breach of the FSR standard. The additional breach of 0.34:1 or 0.37:1 (if determined post DA/2020/1711) for 19-21 is due to the proposed subdivision intensifying the FSR. The FSR for 23 will be reduced to 1.89:1.
- There is no change in the form, bulk and scale of the existing building associated with the breach of the FSR standard.
- The bulk and scale of the proposed development, including the proposed FSR variation, are consistent with the existing and desired streetscape character, will have no impact on the important landscape and townscape features and continue to maintain an appropriate visual relationship between new development, the existing character and landscape of the area.
- The proposed development, including the FSR variation, is consistent with the townscape objectives and design principles for the Manly Town Centre and The Corso.
- The proposed development, including the FSR 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.
- The FSR 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, bulk or form is proposed.
- The proposed development, including the FSR 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, it is considered that there are more than sufficient environmental planning grounds to justify the variation on the basis that compliance with the FSR 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 FSR standard and the objectives of the B2 zone.

In the context of the other requirements of Clause 4.6, it is considered that 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 continue to contribute to a good environment by maintaining a built form which respects the scale and definition of the existing 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 FSR development standard, the proposed development is considered to meet the relevant objectives of the standard and the objectives of the B2 zone.