



DESIGN COLLABORATIVE Pty Limited

ABN 36 002 126 954
ACN 002 126 954

Town Planning and Liquor Licensing Consultants

www.designcollaborative.com.au

Managing Director

J Lidis
BTP (UNSW)
MPIA

Director

David Rippingill
BEP (WSU)
Juris Doctor (UNE)
RPIA

Consultant

G W Smith
BSurv (QLD)
MCP (MIT)
MPIA (Life Fellow)
MIS Aust
MRTPI
FAPI

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WRITTEN REQUEST PROVIDING GROUNDS FOR VARIATION TO THE FSR DEVELOPMENT STANDARD PURSUANT TO CLAUSE 4.6(3) OF MANLY LEP 2013

DEVELOPMENT APPLICATION FOR A CHANGE OF USE FROM SHOP TO PUB AT 19-23 AND ASSOCIATED WORKS TO INCORPORATE 19-23 THE CORSO AS PART OF THE IVANHOE HOTEL AT 19-31 THE CORSO, MANLY

Context – Clause 4.6 of Manly LEP 2013

This written request has been prepared in respect of Clause 4.6 of the Manly Local Environmental Plan 2012 (*the LEP*) to accompany Development Application No. DA2019/0574 for change of use to a pub, alterations and additions to the premises, fitout and signage at 19-23 The Corso Manly and follows the principles set out in *Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC118 (Initial Action)*.

The Development Application seeks a variation to the development standard contained within clause 4.4 of the LEP – maximum floor space ratio (*FSR*) of 2.5:1, and up to a maximum of 3:1 within B2 zone if more than 50% of the FSR is for commercial use.

The proposed FSR represents a variation of 0.28:1 or 11.2% 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*. 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 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...”.

Written Request

The existing building on the site already exceeds the maximum FSR of 2.5:1 under the LEP with a FSR of 2.66:1 (1397sqm GFA), an exceedance of 0.16:1 (87sqm GFA).

DA 2019/0512 was lodged on 23 May 2019 for alterations and additions to the existing shop top housing building at 19-21 The Corso, Manly. That Application results in a total increase of the existing FSR to 2.78:1 (1456.9sqm GFA), an increase of 59.9sqm GFA (0.12:1) compared with the existing situation. The above application has submitted a separate written request to address the increase in floorspace and therefore should not be confused.

The calculations have taken into consideration the proposed FSR of DA 2019/0512 as if it has been approved. In total, the Application involves an exceedance of the FSR standard of 2.5:1 by 0.28:1 (147sqm or 11.2%).

However, that Application, the subject of this cl. 4.6 variation request, consisting of the commercial component at ground floor and first floor of 19-23 The Corso, will only result in a total increase of 4.85sqm GFA. The majority of the increase of floorspace are for the residential component at 19-21 The Corso which has been addressed in detail in both the Statement of Environmental Effects and Written Request submitted with DA 2019/0512.

The increase in the FSR of the Application results from the minor extension at the rear of the building in order to provide better accessible facilities and match the façade of the adjoining building for increased public safety to Market Lane.

The questions set out in the DP&I's Guide are addressed below.

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

Manly Local Environmental Plan 2012.

2. What is the zoning of the land?

B2 Local Centre.

3. What are the objectives of the zone?

The objectives of the B2 zone are:

- a) *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.***
- b) *To encourage employment opportunities in accessible locations.*
- c) *To maximise public transport patronage and encourage walking and cycling.*
- d) *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.*

[Our emphasis in **bold**]

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 this clause are as follows:

- 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?

Maximum FSR 2.5:1, up to a maximum FSR of 3:1 within B2 zone if more than 50% of the FSR is for commercial use.

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

The proposed FSR is 2.78:1

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

The percentage variation is 11.2%.

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

In the circumstances of the case, strict numerical compliance would be unreasonable or unnecessary due to the matters set out below.

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])

The relevant objective of the FSR development standard are as follows:

4.4 Floor space ratio

(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,*
- (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.*

The assessment below addresses the cl. 4.4 (1)(a) to (e).

Assessment

Both the zone and FSR objectives in the LEP encourages commercial development within the B2 local centre, which is especially important as the Hotel is located within the Town Centre of Manly, which is also a well-known tourist attraction. The Application seeks a change of use from a shop to pub and the works associated to incorporate 19-23 The Corso with the existing Ivanhoe Hotel at 25-31 The Corso.

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. The existing building already exceeds the FSR standard with a FSR of 2.67:1. The proposal represents a minor increase (59.9 sqm GFA) from the existing situation with a FSR of 2.78:1.

As mentioned above, the majority of the increased floor space is related to the residential component at 19-21 The Corso. The non-compliance of the FSR has been also addressed in both the Statement of Environmental Effects and a written request that accompanies the Development Application (DA 2019/0512) lodged with Council on 23 May 2019.

In total, the Application involves an exceedance of the FSR standard of 2.5:1 by 0.28:1 (147sqm or 11.2%).

The Application, consisting of the commercial component at ground floor and first floor of 19-23 The Corso, will only result in a total increase of 4.85sqm GFA. The majority (55.05sqm) of the increase in floorspace is as a result of the residential component at 19-21 The Corso which has been addressed in detail in both the Statement of Environmental Effects and Written Request submitted with DA 2019/0512.

The proposed FSR variation relates to the proposed additions to the rear of the building on both ground and first floor that contribute to an additional 4.85sqm of floorspace. The works include extending the rear to match the wall of the adjoining building. The increase in floorspace provides for a new accessible facility within the Hotel, and also provides a clear sightline and better lighting at the rear, which increases surveillance and therefore deters any potential anti-social behaviour. The new entrance to the proposed gaming room would also reduce opportunities for crime as it would be well used. Furthermore, it is considered that the proposed uniform rear at Market Place would be more visual appealing to pedestrians and passing traffic.



Figure 1: Existing Street view of the rear (Source: Google)

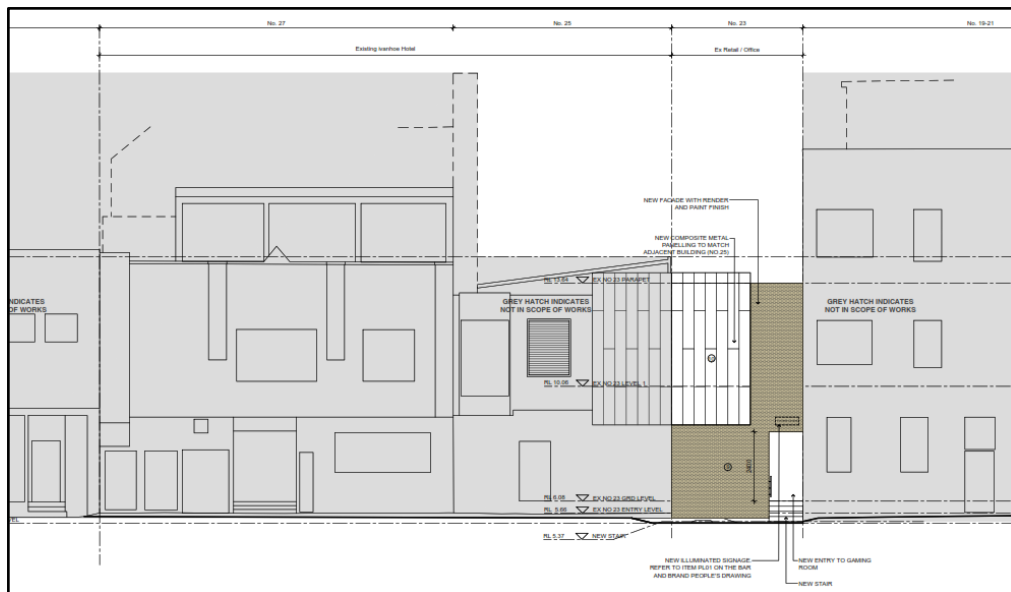


Figure 2: Proposed Elevation (view from Market Place) (Source: Paul Kelly Design)

Figure 1 shows the Subject Site (currently Chemist Warehouse). It is seen in the image above that the rear wall of the shop does not align with any of the adjoining buildings. The existing Hotel at 25 The Corso is on the left and 19-21 The Corso is on the right.

Figure 2 shows the proposed extension of the rear wall that matches the adjoining buildings.

The consistent rear for the Hotel maintains the overall bulk and scale of the existing building.

The control for building density and bulk is to ensure that the development does not obscure important landscape and townscape features.

From the figures above, the extension would not impact on any townscape features as the proposed extension will be consistent with the adjoining building therefore have no impact on important townscape features.

When viewed from the side, all pedestrians will have a clear sight of vision of the entrances. When viewed directly from the rear in Market Place, the proposed FSR variation associated with the Hotel will not be visible and the Application maintain the existing maximum height, bulk and scale.

The proposed extension would appear as a logical extension of the existing built form, compatible with its height, scale and bulk. The materials and finishes will be consistent with the existing Hotel in accordance with height requirements, the proposed darker colours will ensure that the proposed extension and FSR variation, where visible, are visually recessive.

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:

- no parking exists on the site and none is now proposed;

- the proposed development maintains the character of the locality by proposing alterations and additions to the existing building, including the FSR variation, which:
 - maintain the overall built form, bulk and scale of the existing building as viewed from the public domain;
 - do not exceed the existing maximum building height;
 - are sited and designed to minimise their visual prominence 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.
- 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 through a new entry to the Hotel;
 - 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 through the siting and design of the proposed additions to minimise their visual prominence from the public domain.

The proposal, including the FSR 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 minimal changes are proposed to the overall form and scale of the building as viewed from The Corso and Market Place. The proposed minimal extension of less than 5sqm would only be visible from the side elevations over the roofs of neighbouring buildings; they would not be visible in direct views from these frontages. The Application maintains the existing built form relationship with adjoining development and public spaces.

While the proposed extension to 23 The Corso and associated FSR variation, would be visible from higher surrounding vantage points (eg. Whistler car park upper levels), it is considered satisfactory as it is below the existing maximum height of the building and its visual bulk and visibility from Market Place is minimised through its setbacks and height, as noted above.

The proposed modifications to the rear façade to Market Place are compatible with the use and location of the building and satisfactory from a heritage perspective.

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 accompanying the Development Application, the extension is of a minor nature and is consistent with the remainder of the Market Place facades;
- no change is proposed to the overall maximum height of the building.
- the materials, textures and colours of the existing building are to be compatible with the adjoining Hotel;
- the Application will not give rise to any significant additional overshadowing or adverse wind effects as minimal change is proposed to the form of the building;
- the Application will improve the appearance of the rear walls of the building; and
- the Ground Floor has level access from The Corso and Market Place with an internal ramp within the entry from Market Place.

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

General Character

The Application, including the FSR variation is consistent with the general character of the Town Centre Conservation Area as set out in the DCP that it involves alterations and additions 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; and
- contributes to the range of architectural styles in the area.

The Corso

The proposed development is consistent with the guidelines for The Corso, in that:

- the proposed extension is sited to the rear of the building;
- the parapet to The Corso will continue to be read against the sky as the proposed works are below the parapet height;
- 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;
- the proposed development does not result in any increase in the overall maximum height of the existing building;
- the existing footpath awning to The Corso façade is to be upgraded to be consistent with the Hotel awning;

- the shopfront to The Corso occupies the width of the frontage to maximise activity. Roller shutters are not proposed.
- the Application will have consistent and compatible external colours as with the Hotel;
- the proposed works will contribute to the presentation of the building to Market Place and will improve casual surveillance of Market Place through the proposed changes to the rear façade; and
- the proposed extension will remove an unnecessary corner and reduce the opportunities for crime.

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.

The proposed FSR variation will not result in significant adverse impacts on the amenity of surrounding properties or the public domain in terms of privacy, overshadowing/solar access or view loss/disruption.

Sunlight Access and Overshadowing

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

It is noted that those areas are likely to already be subject to overshadowing by existing neighbouring buildings and, taking into account that existing impact, the Application will have no additional impact.

In addition, as the only change to its form, bulk or massing is at the rear of the existing building, the proposal will not result in any additional overshadowing of The Corso

Further, the proposal will not result in additional overshadowing of any residential development.

Privacy

The proposed FSR variation will not result in a loss of visual privacy to any neighbouring developments. The units at 19-21 have their primary outlook over The Corso and Market Place. Where they also have windows facing the side boundaries, all windows have views over the roof of the building.

The proposed FSR variation will not result in a loss of aural privacy to any neighbouring developments. Noise from the Hotel is considered in the assessment undertaken in the preparation of the Acoustic Report. That Report recommends

that acoustic absorption is fitted along the shaft walls on all sides. The Report states that satisfactory levels will be achievable through the acoustic treatments.

The Application will comply with the recommendations of the Acoustic Report and, therefore, it will not result in a loss of acoustic privacy to surrounding properties.

Views

The proposed FSR variation will not result in any significant impact on views. As noted above, the FSR variation does not exceed the existing maximum height of the building to The Corso and the extension are of a lesser height designed to have minimal visual prominence from the public domain. To the extent that the FSR variation would be visible from the rear of the site, the extension and the FSR variation are designed to be compatible with the bulk and scale of the existing building.

The proposed extension to the rear of both ground and first floor extends approximately 2m to rear boundary line of the lot. While there are taller residential developments to the west that may enjoy views over the subject site, the proposed development, including the FSR variation, would have a marginal impact on those views given its limited additional bulk.

The proposed additions, and the FSR variation, would also be visible from the upper levels of the Whistler Car Park to the north of the site. However, it would not disrupt views from this vantage point as it does not exceed the existing maximum height of the building as set by the parapet to The Corso.

Accordingly, the FSR variation will not result in adverse environmental impacts on the use or enjoyment of adjoining land and the public domain by way of loss of privacy, overshadowing or loss of views.

The proposed FSR variation will have no effect on the viability of the business zone.

The proposed development will continue to provide a food and drink premises at the ground floor level that enables the Application to contribute to the economic growth, retention of local services and employment opportunities in the centre.

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,

- it provides for employment opportunities in a highly accessible location through the non-residential floor space proposed;
- it maximises public transport patronage and encourages walking and cycling through the continued provision of a food and drink premises in a highly accessible, walkable location without the provision of 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. In particular, it includes design measures to meet applicable acoustic criteria to ensure the operation of the Hotel would not have any demonstrable adverse impact on neighbouring residential units.

It is therefore considered that the proposed FSR 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 5 (a)(i) and (ii) of the Act?

Compliance with the standard would hinder the attainment of the objects of Section 5(a)(i) and (ii) of the Act, which are to encourage development that promotes the social and economic welfare of the community and a better environment, and to promote and coordinate orderly and economic use and development of land.

The Application 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 is consistent with the provisions of orderly and economic development as it relates to an existing building already exceeding the FSR standard and provides for the upgrade and refurbishment of that building in a manner which is consistent with underlying intent of Council's controls, which responds appropriately to existing development in the site context and which will make a positive contribution to the character of the streetscape and the locality.

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 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?

The matter is addressed above in the 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.

14. Are there sufficient environmental planning grounds to justify contravening the development standard? Give details.

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 now proposed is minor at 0.12:1 (59.9sqm GFA). This has included the additional breach for a separate application DA as it was lodged prior to this Application. The commercial component of the breach is minimal at 4.85sqm GFA.
- The bulk and scale impacts associated with the breach of the FSR standard are addressed by the proposed development through the siting and design of the Application to minimise its visual prominence from the public domain and to maintain the existing townscape views of the site from The Corso and Market Place.
- The bulk and scale of the proposed development, including the proposed FSR variation, are consistent with the existing and desired streetscape character, will not obscure important landscape and townscape features and maintain an appropriate visual relationship between new development and 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.
- The proposed development, including the FSR variation, will have an acceptable impact on the heritage significance of the Heritage Items and Town Centre Conservation Area as detailed in the HIS.
- The FSR variation will not give rise to any significant adverse amenity impacts on the surrounding development in terms of overshadowing, loss of solar access, loss of privacy, loss of views or noise.
- The proposed development, including the FSR variation, achieves compliance with the relevant underlying objectives of the standard and 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

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

In the context of 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.

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

Despite the Application'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 and accordingly the request is capable of being supported.