



CLAUSE 4.6 VARIATION REQUEST – FLOOR SPACE RATIO

29 Shirley Street and 2-4 Milton Street, Byron
Bay

Prepared for
29 SHIRLEY STREET
25 August 2022



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1. INTRODUCTION

This Clause 4.6 Variation Request (the Request) has been prepared on behalf of *29 Shirley Street Pty Ltd* (the Applicant) and accompanies a Development Application (DA) for a development application for Residential Flat Buildings comprising 26 residential apartments at 29 Shirley Street and 2-4 Milton Street, Byron Bay.

The Request seeks an exception from the floor space ratio (FSR) standard prescribed for the development site under clause 4.4 of *Byron Local Environmental Plan 2014* (BLEP (2014)). The variation request is made pursuant to clause 4.6 of BLEP (2014).

This report should be read in conjunction with the Statement of Environmental Effects prepared by Urbis Pty Ltd and dated 2 August 2022.

The following sections of the report include:

- **Section 2:** Description of the site and its local and regional context, including key features relevant to the proposed variation.
- **Section 3:** Brief overview of the proposed development as outlined in further detail within the SEE and accompanying drawings.
- **Section 4:** Identification of the development standard which is proposed to be varied, including the extent of the contravention.
- **Section 5:** Outline of the relevant assessment framework for the variation in accordance with clause 4.6 of the LEP.
- **Section 6:** Detailed assessment and justification of the proposed variation in accordance with the relevant guidelines and relevant planning principles and judgements issued by the Land and Environment Court.
- **Section 7:** Conclusion.

2. SITE CONTEXT

2.1. SITE DESCRIPTION

The site is located at 29 Shirley Street and 2-4 Milton Street, Byron Bay, which sits slightly north of the Byron Bay Town Centre, between Belongil Beach and Shirley Street. Key features of the site are summarised in **Table 1** below, with a Location Plan and Site Aerial shown below in **Figure 1** and **Figure 2** respectively.

Table 1 Site Description

Feature	Description
Street Address	29 Shirley Street, Byron Bay 2 Milton Street, Byron Bay 4 Milton Street, Byron Bay
Legal Description	Lot 8, Section 52 on DP758207 Lot 9, Section 52 on DP758207 Lot 2 on DP582819 Lot 7 on DP841611 Lot 12 on DP1138310 Lot 1 on DP582819 Lot 1 on DP780935 Lot 8 on DP841611 Lot 9 on DP841611 Lot 11 on DP1138310
Site Area	5,937sq.m
Site Dimensions	Shirley Street – 60.345 metres Milton Street – 60 metres Side Boundary (North) – 20.115 metres Side Boundary (West) – 62.095 metres Rear Boundary (Railway Corridor) – 73 metres Side Boundary (East) – 99.19 metres
Easements and Restrictions	Refer to accompanying SEE.
Site Topography	The site has an undulating topography, summarised as follows: North-South: Existing ground level increases from approximately 4.58m ADH at Shirley Street to a high point of 6.6m, decreasing to approximately 6.1AHD at the rear boundary. This results in a site

Feature	Description
Vegetation	<p>difference of approximately 2m between the lowest and highest point on the site.</p> <p>East-West: Existing ground level increase from approximately 4.52AHD at the Milton Street frontage, rising to a high point of 5.76AHD, and falling again to 4.93ADH at the eastern boundary. This results in a difference of approximately 1.2m between the lowest and highest point on the site.</p> <p>The subject site contains a backpackers hostel and short stay accommodation fronting Shirley Street and Milton Street. The remainder of the site is predominantly undeveloped and landscaped with maintained lawns and garden beds. Some scattered trees are present towards the rear of 29 Shirley Street, which also contains a mature fig species.</p>

Figure 1 – Location Plan



Source: Nearmap 2021

Figure 2 – Aerial Photograph of the Site



Source: Nearmap 2021

2.2. EXISTING DEVELOPMENT

such as kitchen and dining areas, car parking area and communal open spaces. There are also two dwellings located to the rear of the site which are currently used for short-term accommodation.

Vehicle access is provided via a crossover from Milton Street, with pedestrian access via the existing footpath from Shirley Street. There are also two existing crossovers providing access to the dwellings at 2 and 4 Milton Street.

2.3. LOCALITY CONTEXT

The site is located within Byron Bay, within the broader Northern New South Wales region, and sits approximately 400 metres from the Byron Bay Town Centre and 5.8km from the Pacific Motorway. The broader context around the subject site is illustrated in **Figure 3** below.

Figure 3 – Regional Context



Source: Nearmap 2021

The site sits along the eastern approach of Shirley Street, which is a key thoroughfare for vehicles travelling into Byron Bay as they exit the Pacific Highway onto Ewingsdale Road.

Within the local context, the site benefits from its proximity to the Byron Bay Town Centre, which includes bus services, retail and restaurant offerings, as well as civic services. The Town Centre is easily accessed via a wide, sealed footpath running along Shirley Street.

Figure 4 – Local Context



Source: Nearmap 2021

Surrounding development includes:

- **North** – immediately north, the site adjoins the rail corridor of the former Casino-Murwillumbah line. The rail corridor is still used by the Byron Bay Train, which is a solar-powered train used largely to connect

tourists from the Elements of Byron Resort to the Byron Town Centre. Beyond the rail corridor, the area transitions to the coastal environment of Belongil Beach and the Pacific Ocean.

- **East** – the site adjoins an existing two-storey Dwelling House, positioned towards the front of the lot. Further east sits a series of two-storey resort, motel and serviced apartment developments, before the character of Shirley Street transitions through civic services, such as an aged care facility and Byron Bay Police Station. Shirley Street continues east, turning into Lawson Street as it enters the Byron Bay Town Centre.
- **South** – immediately south, the site fronts Shirley Street, which adjoins an area of one- to two-storey Dwelling House developments, holiday villas, and medical and allied health uses including the former Byron District Hospital. Further south sits Cumbebin Swamp and associated Nature Reserve
- **West** – the site adjoins the intersection of Shirley Street and Milton Street. West of the subject site and north of Shirley Street is an area largely dominated by two- to three-storey resort and hotel developments. South of Shirley Street sits a cluster of single Dwelling Houses on smaller lots, interspersed by larger lots and resort developments. Further west Shirley Street transitions to Ewingsdale Road, past the Cumbebin Swamp and associated Nature Reserve.

2.4. RECENT APPROVALS

A number of Clause 4.6 approvals seeking variation to floor space ratio have been granted in proximity to the subject site. These approvals create the precedent to consider a variation to these development standards in some circumstances, where appropriate justification is provided.

Table 2 below provides a summary of comparable approvals which have been granted with a Clause 4.6 variation to floor space ratio. This demonstrates that a performance based approach may be taken to floor space ratio standards, where appropriate justification is provided. Of note, the following points of justification have supported successful approval of these variations:

- Floor Space Ratio variations have been approved where the additional FSR is consistent with the standards and intent of the Zone. Up to 10% variation have been justified in this manner.
- Floor Space Ratio variations have been approved where the additional FSR is appropriate for the surroundings, is adequately serviced and will not negatively impact on character or amenity. A 4% variation was justified in this manner.
- Floor Space Ratio variations have been approved where the proposed buildings are consistent in scale to nearby buildings. The additional floor area does not contribute substantially to the bulk or scale of the building. A variation of 9.6% was justified in this manner.

Table 2 – Summary of Approvals

Application Number / Date	Address	Details	Extent of Variation
10.2014.742.2 (16/09/2021)	33 Lawson Street Byron Bay (Lot 8 DP 758207)	Demolition of existing single-storey motel building. Erection of a three (3) storey motel accommodation building plus two (2) levels of basement parking. S4.55 to Modify Consent to include Eight (8) Additional Motel Units, Remove the Ground and Third Floor Swimming Pools, Add a Roof Top Recreation Area comprising a Swimming Pool, Bar and Café.	Building Height >10%, FSR variation 1.6%. <u>Justification for FSR Variation</u> The proposal for additional FSR is consistent with the objectives of the development standard, and do not noticeably change the bulk and scale of the approved building or its consistency with the character of the town centre.
10.2017.160.1	21 Fawcett Street, Brunswick Heads	Residential Flat Building	FSR Variation – 6% <u>Justification for Variation</u> Proposed variation consistent with objectives of standard and zone.
10.2019.616.1 (21/05/2020)	137-139 Jonson Street & 3 Browning Street Byron Bay (Lot 21 DP 247289;	Demolition of existing buildings and the construction of a mixed use development for: <ul style="list-style-type: none"> • Commercial premises • Café 	Building Height 9% Variation Floor Space Ratio 9.6% Variation <u>Justification for Variation</u> The proposed building is consistent in scale to nearby buildings and establishes the desired future

Application Number / Date	Address	Details	Extent of Variation
	Lot 5 DP758207; Lots 60 & 61 DP 1256365))	<ul style="list-style-type: none"> • Shop-top housing • Basement car parking; and • Infrastructure. 	<p>character of the locality consistent with the Byron Bay Town Centre Master Plan.</p> <p>Varying the floor space ratio standard will enable an optimal, landmark, fully integrated development solution for a landmark site.</p> <p>The proposal maximising the 'return' on a large private investment, generating new and sustaining existing employment and achieving positive social and economic outcomes within sound planning and environmental parameters, is therefore considered to be clearly in the public interest.</p>
10.2018.508.1	7 Keats Street Byron Bay (Lot 6 DP7117)	Multi Dwelling Housing	<p>Floor Space Ratio 4% Variation</p> <p><u>Justification for Variation</u></p> <p>The proposed development is consistent with the objectives of the development standard and zone, is appropriate for the surroundings, is adequately serviced and will not negatively impact on character or amenity</p>

3. PROPOSED DEVELOPMENT

The proposed development will deliver an architecturally designed development containing residential dwellings and associated amenities. It comprises:

- Demolition of existing development.
- Erection of a Residential Flat Building, comprising:
 - 26 three-bedroom dwellings distributed across three separate three-storey buildings;
 - Pedestrian entrance from Shirley Street.
 - One basement parking level containing 78 cars (3 per dwelling) with vehicle access from Milton Street.
 - 1,392sq.m of communal open space at the ground level;
 - 1,384sq.m of deep planting on natural ground at ground level;
 - Associated amenities, including two lifts.
- An integrated landscape and communal open space design concept, including:
 - Landscaping of the verge areas, including large shade trees and feature palms;
 - High quality landscaping to private terraces; and
 - Central communal open space containing communal the swimming pool and retention of established Moreton Bay Fig.

A summary of the numeric aspects of the proposal are summarised in **Table 2** below.

Table 3 Numeric Overview of Proposal

Descriptor	Proposed
Land Use Activity	Residential Flat Building
Height of Building	3 storeys Typically 9.2m height
Floor Space Ratio	0.66 (3,562.2sq.m)
Total Communal Space	1,392sq.m
Total Private Open Space (Courtyards and Balconies)	Approx. 4,700sq.m (exceeding the maximum requirement)
Total deep planting on natural ground	1,384sq.m
Percentage of Landscaping	30.5% of site area
Car Parking Spaces	78
Trees being retained	1
Trees being planted	83

The proposed development is organised around three main building forms.

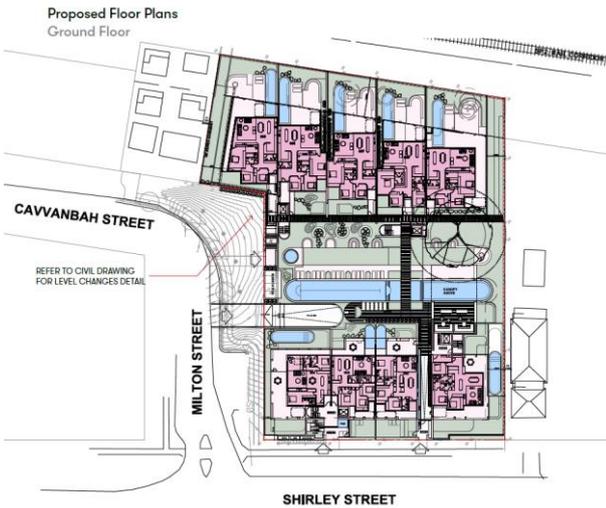
The separation of this built form assists in achieving an exceptional design outcome, where amenity and site responsive design are built form drivers. Specifically, the three tower design assists in maximising natural solar infiltration, cross ventilation, protect privacy and minimise overshadowing, through the following design initiatives:

- Apartments are oriented to have a minimum of 2 facades to allow for cross ventilation;
- Most of the apartments have 3 facades, and the living areas are oriented in different direction to allow more privacy for the residents.
- All apartments can benefit from the North East aspect in the morning.

- All dwellings have a North aspect orientation with at least a secondary façade aspect with one façade with access to the communal areas.
- Apartments are orientated to the views or adjacent street to increase surveillance of the public realm, whilst protecting privacy of adjacent neighbours.
- Proposed development will feature double glazed units and aim for 8 stars environmental certification.

Refer to **Appendix A** - Architectural Package and Error! Reference source not found.below.

Figure 5 - Architectural Plans



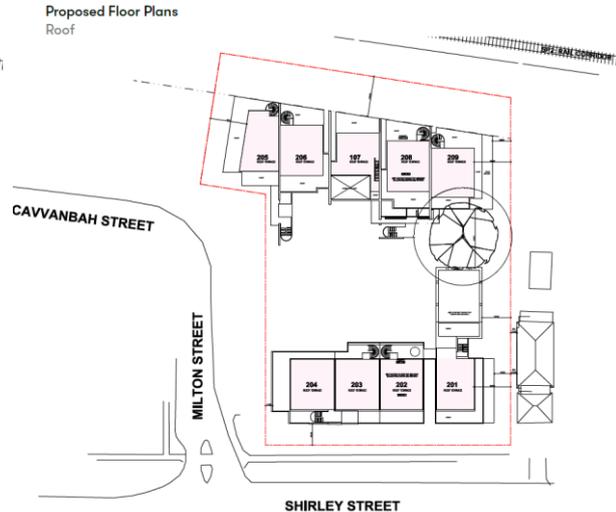
Picture: Ground Floor Plan (Source: Hayball)



Picture: Level 1 Plan (Source: Hayball)



Picture: Level 2 Plan (Source: Hayball)



Picture: Roof Plan (Source: Hayball)

4. VARIATION OF FLOOR SPACE RATIO STANDARD

This section of the report identifies the development standard, which is proposed to be varied, including the extent of the contravention. A detailed justification for the proposed variation is provided in **Section 6** of the report.

4.1. DEVELOPMENT STANDARD

This clause 4.6 request seeks to vary the maximum 0.6:1 FSR building control prescribed within clause 4.4 of BLEP 2014 and the associated Floor Space Ratio Map (refer to map extract **Figure 6**).

Clause 4.4 (2) of BLEP 2014 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.

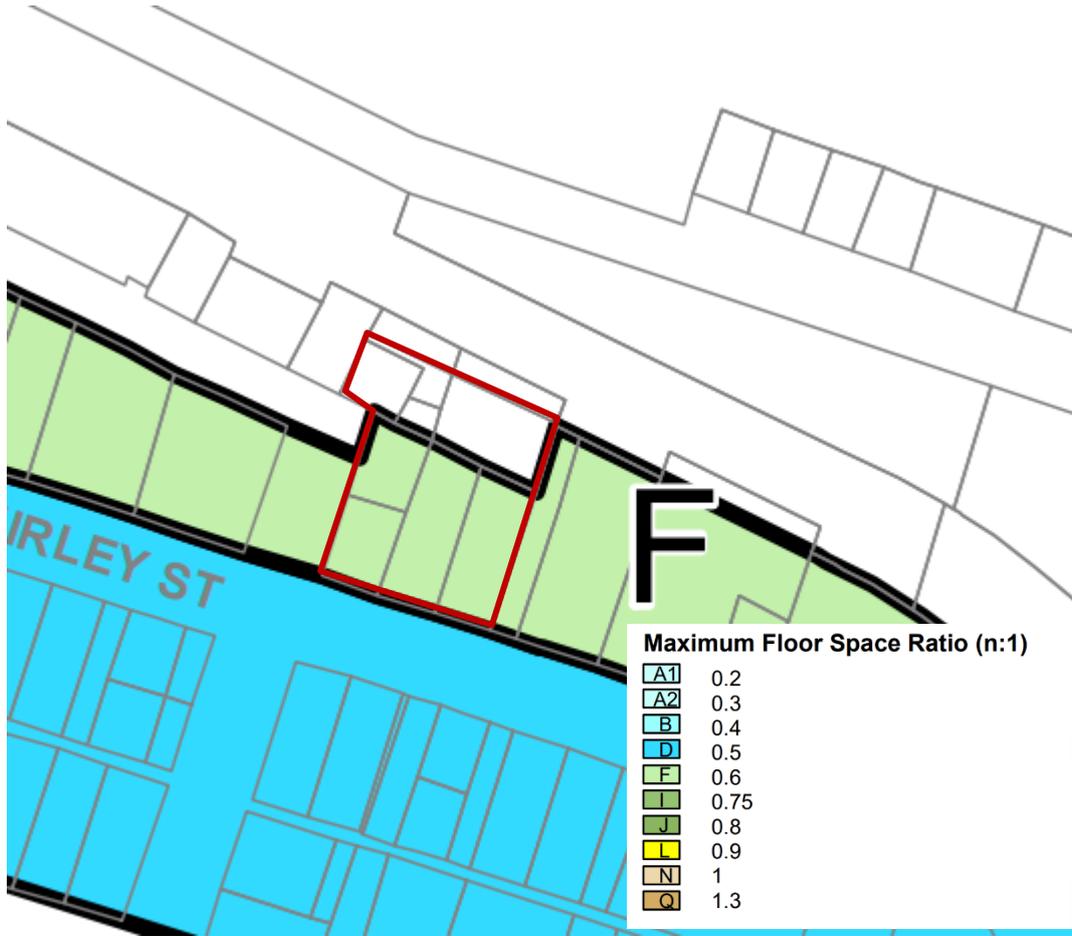
The objectives of the development standard as per subclause 4.4(1) of BLEP 2014 are as follows:

- a) To ensure that new buildings are appropriate in relation to the character, amenity and environment of the locality,*
- b) To enable a diversity of housing types by encouraging low scale medium density housing in suitable locations,*
- c) To provide floor space in the business and industrial zones adequate for the foreseeable future,*
- d) To regulate density of development and generation of vehicular and pedestrian traffic,*
- e) To set out maximum floor space ratios for dual occupancy in certain areas.*

The LEP Dictionary defines Floor Space Ratio (FSR) as follows:

The floor space ratio of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.

Figure 6 - BLEP 2014 Floor Space Ratio Map Extract



Source: BLEP 2014

4.2. PROPOSED VARIATION TO CLAUSE 4.4 FSR

The Site is subject to a Floor Space Ratio of 0.6, which translates to approximately 3,562.2sq.m of developable floor area. The proposed development proposes a total floor area of 3,930.1, being a **FSR of 0.66**. This 10% floor area exceedance is equivalent to an additional 368sq.m of floor area. The FSR has been calculated using a site area of 5,937sq.m.

The proposed departure from the FSR development standard is summarised in **Table 1**.

Table 4 FSR Compliance

	Permitted	Proposed	Difference
Gross Floor Area	3,562.2sq.m	3,930.1sq.m	369sq.m
Floor Space Ratio	0.6	0.66	0.06

5. RELEVANT ASSESSMENT FRAMEWORK

Clause 4.6 of the BLEP (2014) includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 of PLEP are:

- 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.*

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a DA that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6(3) requires that the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development 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.*

Clause 4.6(4)(a) requires the consent authority to be satisfied that the applicant's written request adequately addresses each of the matters listed in clause 4.6(3). The consent authority should also be satisfied that that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which it is proposed to be carried out.

Clause 4.6(4)(b) requires the concurrence of the Secretary to have been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary 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.*

The concurrence of the Secretary can be assumed to have been granted for the purpose of this variation request in accordance with the Department of Planning Circular PS 18–003 'Variations to development standards', dated 21 February 2018. This circular is a notice under section 64(1) of the Environmental Planning and Assessment Regulation 2000 and provides for assumed concurrence. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The Secretary can be assumed to have given concurrence if the matter relates to a Clause 4.6 determinate of a local environmental plan.

This clause 4.6 request demonstrates that compliance with the FSR prescribed for the site in clause 4.4 of BLEP (2014) is unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

In accordance with clause 4.6(3), the applicant requests that the FSR development standard be varied (subject to the applicant's position that such a request should not actually be necessary).

6. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standards relating to the FSR in accordance with clause 4.4 of BLEP.

Detailed consideration has been given to the following matters within this assessment:

- Varying development standards: A Guide, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court.

The following sections of the report provides detailed responses to the key questions required to be addressed within the above documents and clause 4.6 of the LEP.

6.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED? – CLAUSE 4.6(2)

The FSR prescribed by clause 4.4 of BLEP (2014) is a development standard capable of being varied under clause 4.6(2).

The proposed variation is not excluded from the operation of clause 4.6(2) as it does not comprise any of the matters listed within clause 4.6(6) or clause 4.6(8) of BLEP (2014).

6.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE? – CLAUSE 4.6(3)(A)

Historically, the most common way to establish a development standard was unreasonable or unnecessary was by satisfying the first method set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method requires the objectives of the standard are achieved despite the non-compliance with the standard.

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34] the Chief Judge held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This Request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also addresses the third method, that the underlying objective or purpose of the development standard would be undermined, defeated or thwarted if compliance was required with the consequence that compliance is unreasonable (*Initial Action* at [19] and *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]). Again, this method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also seeks to demonstrate the ‘unreasonable and unnecessary’ requirement is met because the burden placed on the community by not permitting the variation would be disproportionate to the non-existent or inconsequential adverse impacts arising from the proposed non-complying development. This disproportion provides sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

- ***The objectives of the standard are achieved notwithstanding non-compliance with the standard*** (the first method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43])

The specific objectives of the FSR standard as specified in clause 4.4 of BLEP (2014) are detailed in Table 5. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 5 - Assessment of consistency with clause 4.4 objectives

Objectives	Assessment
<p>(a) to ensure that new buildings are appropriate in relation to the character, amenity and environment of the locality,</p>	<p>The proposed development is appropriate to the locality in which it is located as it replaces a ageing facility with a contemporary apartment building with exceptional architectural merit and integrated landscaping both within the site and surrounding public realm. The context of the building will more than mitigate any visual impact of the minor additional floor space. Specifically, it is noted that the subject site has a substantial setback to Milton Street, which will incorporate a generous replanting scheme.</p> <p>The site is also a corner lot with limited interfaces with neighbouring properties. Neighbouring properties have been consulted prior to lodgement, with any concerns addressed in the revised development plans.</p> <p>The visual impact of an additional 369sq.m of floorspace will therefore be minimal when viewed from the local street.</p> <p>The proposed built form considers both the current and proposed context and creates a transition of scale across the site that appropriately responds to the undulating ground levels in the surrounding area.</p> <p>The built form is complemented by trees along the boundaries, creating natural edge between the development and its immediate context. Dwellings are also designed to front the adjacent streets providing an appropriate, pedestrian scale address.</p>
<p>(b) to enable a diversity of housing types by encouraging low scale medium density housing in suitable locations,</p>	<p>The built form has been designed with a strong emphasis on creating buildings which sit amongst the existing natural setting of the site.</p> <p>The alignment and orientation of the buildings ensures both the apartments as well as the context will maintain sufficient solar access, comfort and aspect.</p> <p>The built form carefully considers the solar access to the communal open space within the site which receives 50% solar access for 3 hours between 9am and 3pm in mid-winter.</p> <p>The building configurations, core positioning and articulation facilitates sufficient natural ventilation and allows for a mix of apartments types which share equal amenity through sensible space planning and sizing over multiple levels within the buildings.</p> <p>The communal areas are concentrated within the shared ground plane and create a dynamic visual foreground to the apartments which overlook these areas. The spaces encourage social interaction and visual and sensory</p>

Objectives	Assessment
(c) to provide floor space in the business and industrial zones adequate for the foreseeable future,	N/A
(d) to regulate density of development and generation of vehicular and pedestrian traffic,	As demonstrated in the Transport and Traffic report, car parking will be wholly accommodated on the site in a basement with surplus car parking to be provided. There will be no further impact on vehicular and pedestrian traffic resultant from the increased FSR.
(e) to set out maximum floor space ratios for dual occupancy in certain areas.	N/A

The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation report.

- **The underlying object or purpose would be undermined, if compliance was required with the consequence that compliance is unreasonable** (the third method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43] as applied in *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24])

The underlying objectives of the FSR development standard remain relevant and have been achieved as the proposed development has been designed to be compatible with the scale and character of the locality and the standards applicable to the site. Strict compliance with the maximum FSR development standard would be unreasonable and unnecessary, having regard to the circumstances of the proposed development.

The surrounding context has seen developments approved with similar FSR exceedances to that proposed. Of note, the following points of justification have supported successful approval of these variations:

- FSR variations have been approved where the variation not excessive in the context of the immediate streetscape, would not detract from the character of the area, and would not result in unacceptable overshadowing. A 10% variation has been justified in this manner (ref. 10.2019.616.1)
- Previous developments have also demonstrated that FSR is not a robust measure of building bulk and visual impact, with a contextual based approach addressing localised conditions being a superior measure. Measures such as direct consultation with neighbours and specific built form measures provide a more refined approach to building form.
- The proposal retains a suitable scale as viewed from the street frontages and adjoining sites. The scale and dimensions of the site allow for a development of the proposed FSR whilst retaining suitable setbacks to property boundaries and generous areas of open space, recreational opportunities, retention of vegetation, and provision of deep soil zones throughout the site.
- **The burden placed on the community (by requiring strict compliance with the FSR standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant development** (cf *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

The proposal will consolidate several titles within the R3 Medium Density Zone to create a development envelope capable of delivering a well designed and coordinated built form outcome. The proposed minor FSR non-compliance allows for the most efficient use of the development envelope whilst also delivering a scheme with an abundance of private and communal open space areas, without of resulting in any unreasonable impacts for surrounding areas.

Compliance with the FSR standard would result in a reduction to private and communal open space areas, detracting from the quality of the lifestyle offering and dwelling mix offered to the community.

6.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? – CLAUSE 4.6(3)(B)

The Land & Environment Court judgment in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, assists in considering the sufficient environmental planning grounds. Preston J observed:

“...in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and

...there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development”

There is an absence of environmental harm arising from the contravention and positive planning benefits arising from the proposed development as outlined in detail above. These include:

- Consultation with adjoining landowners was undertaken by the proponent to provide the opportunity for concerns to be addressed within the development. This has resulted in multiple changes to the development plans over a 6-month period, and direct engagement with the neighbouring property owners is ongoing to ensure positive planning outcomes are achieved.
- The contravention of the development standard arises as a result of the redistribution of the buildings GFA to create more open space on the ground plane. The non-compliance does not adversely affect the streetscape, character, amenity or solar access of surrounding land. The development is compliant with the intent of the control.
- As the subject site is a corner lot with limited shared boundaries with neighbouring properties, the GFA exceedance does not result in adverse privacy impacts. The proposal has been designed to address the two street frontages and provide surveillance of the former railway reserve to the rear. There are no privacy impacts on the adjoining neighbours properties, and any concerns raised by adjoining landowners during early consultation have been addressed by the proponent.
- Shirley Street is located south of the subject site, and will bear the majority of any overshadowing occurring during the winter months. Shirley Street is a high order road and relatively lower amenity environment. This context demonstrates that overshadowing to sensitive areas as a result of the proposed FSR variation will be minimal, and adequate solar access to the surrounding sites will be maintained by the proposal.
- The area of non-compliance resulting from the FSR breaches will not create any unacceptable visual privacy impacts. This achieved through the high level of compliance with site boundary setbacks and the generous landscaping scheme proposed for the site.
- The increase in FSR results in a built form which is consistent in scale and intensity to approved developments in the area. It will not undermine the character and intent for Byron Bay. The proposed FSR will have negligible material impacts compared to a compliant scheme in terms of built form, overshadowing, view impacts.
- The proposal is a result of broader master planning and is appropriate given its current and future context.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed FSR of buildings non-compliance in this instance.

6.4. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)? – CLAUSE 4.6(4)(A)(I)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3).

Each of the sub-clause (3) matters are comprehensively addressed in this written request, including detailed consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposal and the site, to justify the proposed variation to the development standard.

6.5. IS THE PROPOSED DEVELOPMENT IN THE PUBLIC INTEREST? – CLAUSE 4.6(4)(B)(II)

Clause 4.6(4)(a)(ii) states development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the proposal will be in the public interest because it is consistent with the objectives of the development standard and the objectives for the zone.

The consistency of the development with the objectives of the development standard is demonstrated in **Table 5**. The proposal is also consistent with the land use objectives that apply to the site under BLEP (2014). The site is located within the R3: Medium Density Residential zone. The proposed development is consistent with the relevant land use zone objectives as outlined in **Table 6** below.

Table 6 - Assessment of compliance with land use zone objectives

Objective	Assessment
To provide for the housing needs of the community within a medium density residential environment.	The proposal will provide additional medium density housing options for the growing Byron community which is delivered in a well design architectural form which respects the distinct local character in the area.
To provide a variety of housing types within a medium residential environment.	The Concept proposal will contribute additional housing typologies within the neighbourhood. The proposed development’s non-compliance with the maximum FSR will not impact on the ability for the development to meet the intent of this objective of the zone.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The proposal is for residential uses.

The above table demonstrates the proposed development will be in the public interest notwithstanding the proposed variation to the FSR development standard as 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.

6.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED? – CLAUSE 4.6(4)(B) AND CLAUSE 4.6(5)

The Secretary can be assumed to have concurred to the variation under Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

The matters for consideration under clause 4.6(5) are considered below.

- **Clause 4.6(5)(a) – does contravention of the development standard raise any matter of significance for State or regional environmental planning?**

The proposed non-compliance with the FSR standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

- **Clause 4.6(5)(b) - is there a public benefit of maintaining the planning control standard?**

The proposed development generally achieves the relevant building and development standards for the proposed zone and land use. Whilst there is a proposed technical increase in FSR and height, these variances will have negligible impact on the existing neighbourhood character and amenity of immediately adjacent properties. The proposal will in turn, make efficient use of a consolidated development opportunity to deliver a medium density residential outcome that delivers a lifestyle offering and architectural form which is of the highest distinction. Building form is also organised across the site to provide each dwelling with substantial private open space, whilst also delivering high quality communal open space at ground level in a highly landscaped setting.

There is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.

- **Clause 4.6(5)(c) – are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**

Concurrence can be assumed, however, there are no known additional matters that need to be considered within the assessment of the clause 4.6 variation request prior to granting concurrence, should it be required.

7. CONCLUSION

For the reasons set out in this written request, strict compliance with the Floor Space Ratio development standard contained within clause 4.4 of PLEP is unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation and it is in the public interest to do so.

It is reasonable and appropriate to vary the FSR standard to the extent proposed for the reasons detailed within this submission and as summarised below:

- An additional 10% FSR is required to balance the scale of the buildings across the site.
- The contravention of the development standard arises as a result of the redistribution of the buildings GFA to create more open space on the ground plane and retention of an existing tree.
- The non-compliance does not adversely affect the streetscape, character, amenity or solar access of surrounding land.

For the reasons outlined above, the clause 4.6 request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the standard. In the circumstances of this case, flexibility in the application of the Floor Space Ratio development standard should be applied.

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APPENDIX