

Variation to Floor Space Ratio

Clause 4.6 Objection to Clause 4.4 – Floor Space Ratio under Byron Local Environmental Plan 2014 concerning a Mixed use development – commercial premises and shop top housing at 9 Fingal Street Brunswick Heads

Introduction

I, Stephen Connelly, of PLANNERS NORTH, 6 Porter Street, Byron Bay, on behalf of Vanfam Investments Pty Ltd, object under Clause 4.6 Byron Local Environmental Plan 2014 ("BLEP14") to the Development Standard relating to the Floor Space Ratio at Clause 4.4 of BLEP14.

The numeric value of the standard being varied is 0.75:1. The numeric value of the development is 0.77:1, being a percentage value of the proposed variation of 2.7%.

I contend for the reasons set out following that the Development Standard prescribed at Clause 4.4 of BLEP14 is unreasonable and unnecessary in the circumstances of the subject case. Further, I am of the view that the proposed development raises no matters of adverse significance in Local, Regional or State terms and no public benefit will result from the maintenance of the subject standard in this case.

Structure of Objection

This objection:

- defines the relevant development standard;
- describes the variation proposed;
- provides justification for the exemption;
- reviews the proposal with respect to the guidance provided by *Wehbe v Pittwater Council*;
- reviews the proposal in light of the guidance provided by *Winten Developments v North Sydney Council*;
- examines considerations relevant to the public Interest and State and regional planning significance; and
- provides a summary justification of the objection.

1. Development Standard

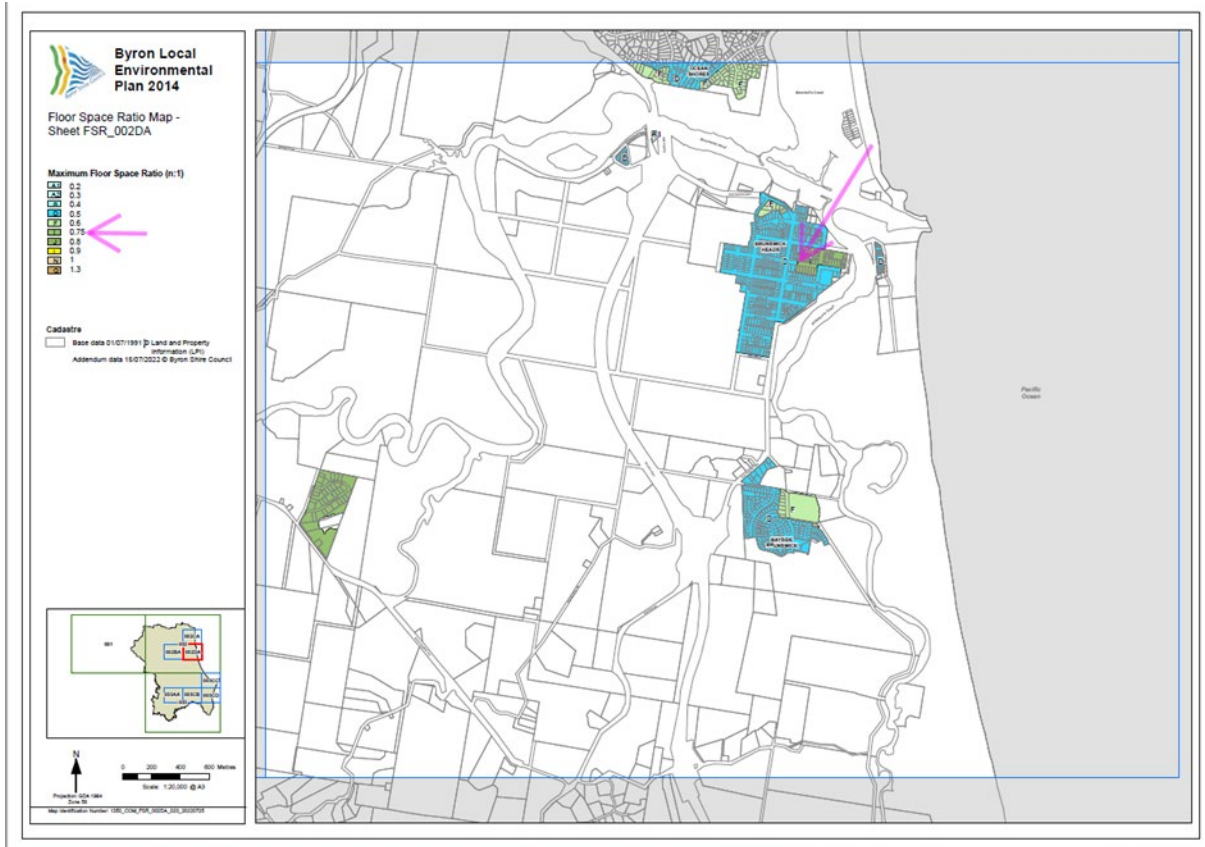
Pursuant to Clause 4.6 of the BLEP14, this objection seeks to vary the Floor Space Ratio standard stipulated in BLEP14 Clause 4.4. That clause states:

"4.4(1) The objectives of this clause are as follows—

(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 relevant Floor Space Ratio Map (FSR_002DA) of the BLEP14 is shown below. It specifies a 0.75:1 Floor Space Ratio for the site.

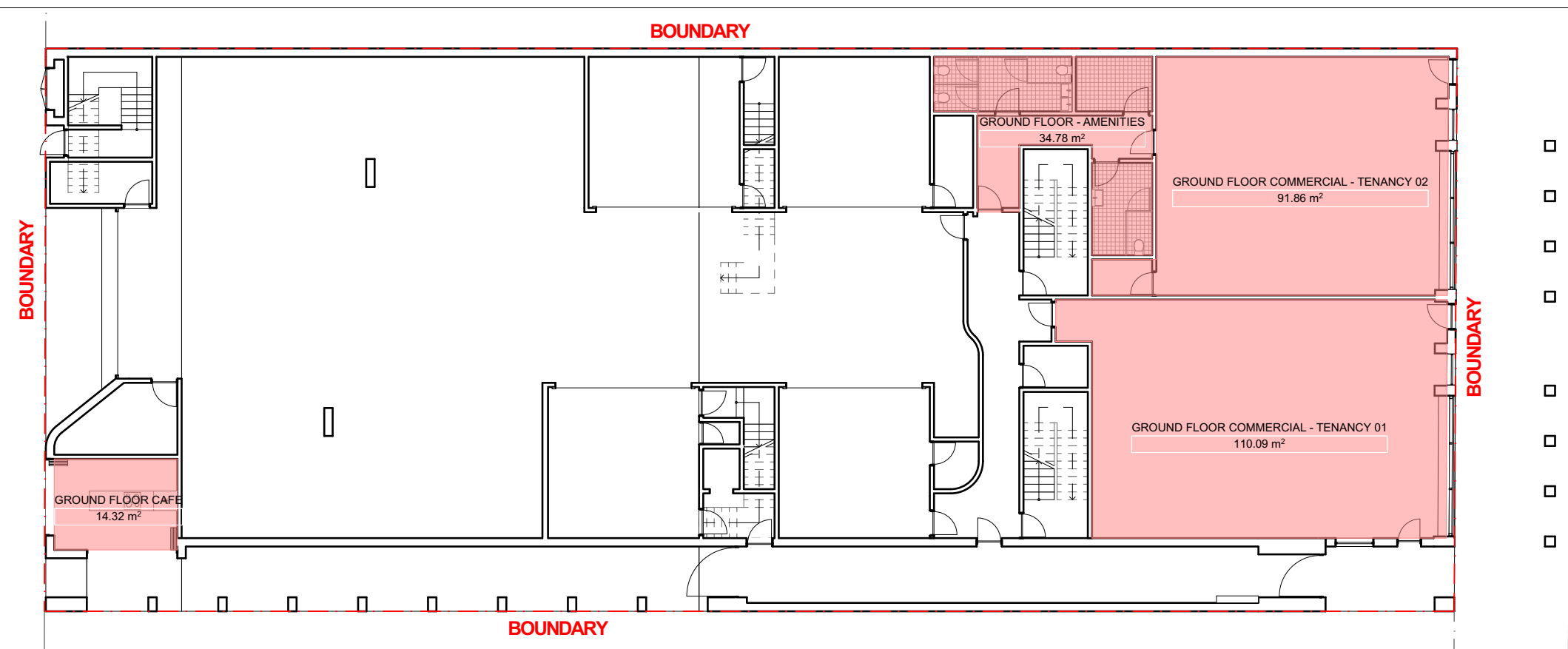
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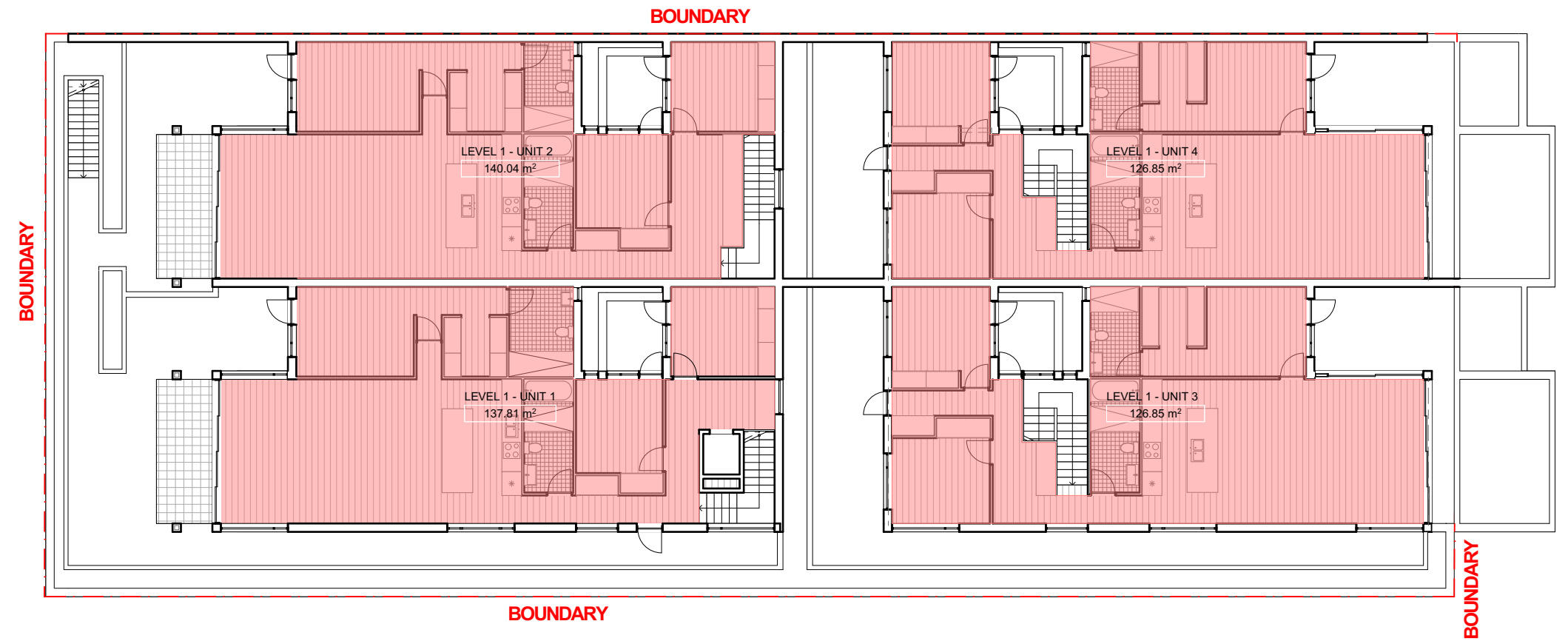
2. Variation Proposed

The plans on the following pages show how the Gross Floor Space in the building has been calculated strictly in accordance with the definition in BLEP14. The dispensation sought involves about a 2.7% variation to the development standard, being about 22.1m² of Gross Floor Space.

The planning purpose of a Floor Space Ratio is to control the bulk of buildings. Because of the nature of the site with commercial buildings with zero side boundary setbacks on either side, the "bulk" is not perceptible by any viewer of the building from the street system or in the locality.



1 AREA CALCULATION - GROUND FLOOR
1:200



2 AREA CALCULATION - FIRST FLOOR
1:200

GFA	Area
GROUND FLOOR - AMENITIES	34.78
GROUND FLOOR CAFE	14.32
GROUND FLOOR COMMERCIAL - TENANCY 01	110.09
GROUND FLOOR COMMERCIAL - TENANCY 02	91.86
LEVEL 1 - UNIT 1	137.81
LEVEL 1 - UNIT 2	140.04
LEVEL 1 - UNIT 3	126.85
LEVEL 1 - UNIT 4	126.85
	782.60 m ²

SITE AREA	1014 m ²
FSR	0.772:1

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3. Justification for The Exception

The following provides the justification with regards to the objectives of Clause 4.4 of BLEP14:

"4.4(1) The objectives of this clause 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.
- (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."

Comment:

The building has been designed to appropriately relate to existing development on the surrounding land and the height complements the streetscape and character of the area. As illustrated in the elevation below, the site sits comfortably as a transition between a 3 storey building and a single level building.



Extract from the Architectural Plan showing street elevation.

Compliance with Clause 4.6 BLEP14

With respect to Clause 4.6 of BLEP14 we have below recited the provisions and provided Development Application specific comments in relation to each of those provisions.

- (1) 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.

Comment:

The building height standards are not excluded from the operation of this clause.

- (2) 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:

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(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

Comment:

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case for the following reasons:-

1. The degree of variation is minor;
2. Strict compliance will have little impact on the perceived built form as viewed from the streetscape and surrounding area; and
3. The proposed variation will have no impact on the apparent bulk or intensity of the development.

Given the above-described aspects, I submit that strict compliance with the Floor Space Ratio control in BLEP14 is unreasonable and unnecessary and strict compliance with those standards would, in any particular case, tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Environmental Planning and Assessment Act 1979 (the Act).

Clause 4.6 of the BLEP14 allows a proponent to seek approval from the Council for consent to be granted to an application that contravenes a development standard. The proposed development generally complies with all other provisions of BLEP14 and will create a minimal impact on the locality and its surroundings.

The consistency with the objectives of Cl. 4.4 Floor Space Ratio as described above satisfies the "Wehbe test" and the absence of any environmental impacts, demonstrates that strict compliance with the building height standard is both unreasonable and unnecessary in this instance.

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

It is considered that the positive social impacts delivered by the proposal, particularly the "bolt hole" café, provide strong environmental planning grounds to justify contravening the development standard especially having regard to the increase in Floor Space Ratio is so very minor, and it has no implications whatsoever in terms of apparent bulk and scale of the development.

(4) Development consent must not be granted unless:

(a) the consent authority is satisfied that:

(i) the written request has addressed sub clause (3)

Comment

This document is our formal written request.

(ii) the proposed development is in the public Interest (consistent with the objectives of the standard and the zone)

Comment

In terms of the public Interest and the proposal being consistent with the objectives of clause 4.4 as well as the objective of the zone.

The objectives of the Zone E1 Local Centre 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 encourage vibrant centres by allowing residential and tourist and visitor accommodation above commercial premises.

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The proposal provides for retail and business uses at a low density by vibrant format. Further, it provides employment opportunities in an accessible location and is well within the height for the site. In my view, it is consistent with the Zone E1 Local Centre Zone Objectives for this land.

(b) the concurrence of the Secretary has been obtained.

Comment

We understand that the Council enjoys assumed concurrence from the Planning Secretary in relation to this matter.

(5) *The Secretary must consider:*

(a) *whether contravention raises any matter of significance for State or regional environmental planning.*

Comment

An examination of the project against relevant strategies raises no issues of State or Regional planning significance. The development is consistent with the objectives and aspirations set out in the North Coast Regional Plan 2041, particularly provisions:

- Objective 1: to provide well located homes to meet demand;
- Objective 11: to support centres and coordinate the supply of well-located employment land; and
- Objective 20: celebrate local character.

4. Wehbe v Pittwater Council

In his decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827, Preston CJ expressed the view that there are five different ways in which an objection may be well-founded and that approval of the objection may be consistent with the aims of the policy.

Those five tests are considered in the table below.

<i>(i) The objectives of the standard are achieved notwithstanding non-compliance with the standard</i>	<p>The BLEP14 Clause 4.4 Floor Space Ratio provisions are as follows:</p> <p>"4.4(1) The objectives of this clause are as follows—</p> <p>(a) to ensure that new buildings are appropriate in relation to the character, amenity and environment of the locality,</p> <p>(b) to enable a diversity of housing types by encouraging low scale medium density housing in suitable locations,</p> <p>(c) to provide floor space in the business and industrial zones adequate for the foreseeable future,</p> <p>(d) to regulate density of development and generation of vehicular and pedestrian traffic,</p> <p>(e) to set out maximum floor space ratios for dual occupancy in certain areas.</p> <p>(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."</p>
<i>(ii) the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary</i>	<p>Not applicable. The underlying objective or purpose of the standard is relevant to the development and is achieved as outlined in (i) above.</p>

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<i>(iii) the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable</i>	Not applicable. The underlying object or purpose of the standard would not be defeated or thwarted if compliance was required.
<i>(iv) the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable; and</i>	This objection to development standards request does not rely on this reason
<i>(v) the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.</i>	This objection to development standards request does not rely on this reason.

5. **Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46**

The exception to development standards request is assessed below against the accepted test for the assessment of development standard variation established by Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46.

<i>A Is the planning control in question a development standard?</i>	Yes, Clause 4.4 of BLEP14 is a development standard.
<i>B What is the underlying object or purpose of the standard?</i>	<p>The objectives of this clause are as follows:</p> <ul style="list-style-type: none"> <i>(a) to ensure that new buildings are appropriate in relation to the character, amenity and environment of the locality,</i> <i>(b) to enable a diversity of housing types by encouraging low scale medium density housing in suitable locations,</i> <i>(c) to provide floor space in the business and industrial zones adequate for the foreseeable future,</i> <i>(d) to regulate density of development and generation of vehicular and pedestrian traffic,</i> <i>(e) to set out maximum floor space ratios for dual occupancy in certain areas.</i>
<i>C Is compliance with the development standard unnecessary or unreasonable in the circumstances of the case?</i>	<p>Compliance with the development standard is unnecessary or unreasonable in the circumstances of the case because:</p> <ul style="list-style-type: none"> • The proposed noncompliance is of such a minor nature as to not raise any issues in relation to impacts on the streetscape or surrounding development. • The proposal sits comfortably within the existing streetscape and surrounding area and is consistent with the existing built form.

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<p><i>D. Is compliance with the development standard consistent with the aims of the Policy (to provide flexibility in the application of development standards); and, in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act, 1979?</i></p>	<p>The arguments contained in this Clause 4.6 variation support the case to allow flexibility in the application of the standard.</p> <p>The non compliance with the development standard allows for an orderly use of the land and has been designed with consideration to the desired future character of the area. Additionally, the Objects of the Act are satisfied as:</p> <ul style="list-style-type: none"> • The departure from the Floor Space Ratio control in BLEP14 will have no negative consequences in terms of the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment; and • The departure from the Floor Space Ratio control in BLEP14 allows for the orderly and economic use of the site in a manner which otherwise achieves the outcomes and objectives of the relevant planning controls.
<p><i>E. Is the objection well founded?</i></p>	<p>Having regard to the considerations of <i>Wehbe v Pittwater Council [2007] NSW LEC 827</i>, I submit that the proposed variation is well founded.</p>

6. Public Interest and matters of State or Regional significance

Clause 4.6 exception to development standards request and the accompanying plans and technical reports contained within the SEE demonstrate the public advantages of developing the site. In summary, the proposal is in the public interest because:

- Strict compliance to the Floor Space Ratio control will not materially impact on the bulk or scale of the proposed development nor its relationship to the existing streetscape.
- Optimum utilisation of the site, which is consistent with the Council plans and strategies for Brunswick Heads.
- No unreasonable public disadvantages have been identified as it has been demonstrated that any environmental or other impacts associated with the development are minimal and/or can be adequately managed.

Matters of State or Regional Significance

The non-compliance with CI 4.4 Floor Space Ratio standard does not raise matters of significance for State or regional planning. The proposed development is consistent with the aspirations of the North Coast Regional Plan 2041.

The public benefit of maintaining the standard

There is no public benefit in maintaining strict compliance with the development standard in this instance. On the contrary, the general public will benefit in the increase of the supply of affordable housing in the area.

7. Summary Justification

A summary of the matters set out in Clause 4.6 exceptions to development standards request to vary the height control of the proposal is provided as follows:

- The proposed degree of non-compliance is minor;

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- The project is consistent with the general bulk, height and scale of development in the locality; and
- The proposed variations satisfy the tests and considerations established in *Wehbe v Pittwater Council* [2007] NSW LEC 82 and *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46;

In summary, compliance with the development standard restricting the FSR is unreasonable and unnecessary. This is because the objectives of the development standard can still be achieved, notwithstanding non-compliance. The development standard is not an end in itself but rather a means of achieving desired outcomes.

The consent authority is therefore urged to support this Clause 4.6 objection.



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