



Revised Clause 4.6 Variation Request

Floor Space Ratio
(Clause 4.4) Rockdale LEP 2011

130-140 Princes Highway & 7 Charles Street, Arncliffe

Submitted to Bayside Council
On Behalf of Combined Projects (Wickham Street) Pty Ltd

NOVEMBER 2019

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		Prepared by Stephen Kerr <i>Executive Director</i>	Verified by Stephen Kerr <i>Executive Director</i>

Certification

This report has been authorised by City Plan Strategy & Development P/L, with input from a number of other expert consultants. To the best of our knowledge the accuracy of the information contained herein is neither false nor misleading. The comments have been based upon information and facts that were correct at the time of writing.

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Figure 2: Extract of revised site plan (Source: Architecture & Building Works)7


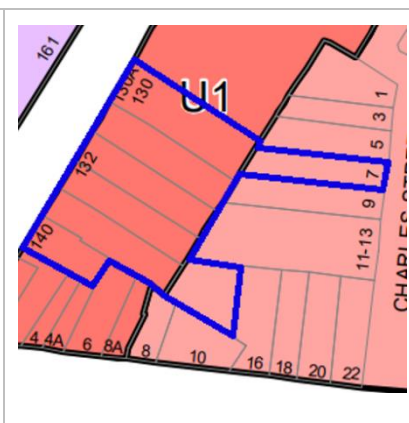
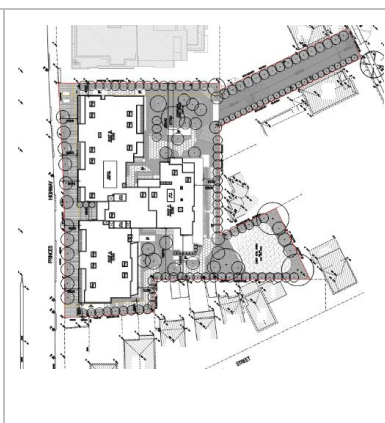
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1. EXECUTIVE SUMMARY

The development standard that this request seeks to vary is the Floor Space Ratio standard in Clause 4.4(2) of the RLEP 2011. An FSR of 2.5:1 applies to Lots 1 and 20 – 23, whilst 2.2:1 applies to Lots 50 and 52.

Lots 1 and 20 – 23 are within a B4 – Mixed Use zone, while Lots 50 and 52 are within a R4 – High Density Residential zone. As will be detailed below, the exception relates to that part of the site within the R4 zone only.

		
Site Area with Lots and DPs	RLEP 2011 FSR Map	Proposed Site Plan

The proposal achieves an overall FSR of 2.43:1 when calculated in accordance with Clause 4.5 of the RLEP 2011. Clearly the FSR standard applicable to Lots 1 and Lots 20 – 23 are complied with. The proposal does not, however, comply with the 2.2:1 standard applicable to Lots 50 and 52. Effectively all bulk, scale, and gross floor area (GFA) is proposed on Lots 1 and Lots 20 – 23 (i.e. that part of the site affected by the 2.5:1 FSR standard). Lots 50 and 52 contain a driveway, communal open space, landscaping and boundary fencing only. The variation is, therefore, acceptable given all bulk, scale and GFA is proposed on Lots 1 and Lots 20 – 23, and the FSR standard applicable to these lots is complied with.

The proposal does not exceed the maximum allowable GFA permitted on the site. Specifically, Lots 1 and Lots 20 – 23 achieve a combined site area of 4736.14m² in area. With an FSR of 2.5:1, this equates to a permitted GFA of 11,840.35m². The combined site area of Lots 50 and 52 is 1305.6m², which permits a maximum GFA of 2,872.1m² according to the applicable 2.2:1 FSR standard. The combined maximum allowable GFA, therefore, is 14,710.5m². The DA proposes a compliant overall GFA of 14,702m².

A variation request is required because Lots 50 – 52 form part of the development site, and such lots are subject to the 2.2:1 standard, whereas the proposal achieves 2.43:1. The exception request is, therefore, arguably of a technical nature only.

A better planning outcome is achieved for a from the proposal, despite the exception, given all building bulk is concentrated on Lots 1 and Lots 20 – 23. Specifically, amenity related impacts which would normally be associated with development on Lots 50 – 52 are avoided. The concentration of GFA on Lots 1 and 20 – 23 also allows for a consolidated communal open space on Lot 52 for the benefit of the proposal's residents.

2. INTRODUCTION

This is a written request that has been prepared in accordance with clause 4.6 of the *Rockdale Local Environmental Plan 2011* (LEP). It has been prepared in support of a Development Application (DA) submitted to Bayside Council for a proposed 10 storey mixed use development at 130 - 140 Princes Highway and 7 Charles Street, Arncliffe (site).

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

The following request will demonstrate that by exercising the flexibility afforded by Clause 4.6, in the particular circumstances of this application, not only would the variation be in the public interest because it satisfies the relevant objectives of the R4 High Density Residential zones and the standard, but it would also result in a better planning outcome.

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

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

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

This request is structured to explicitly address the matters required to be addressed by the applicant under Clause 4.6(3) (a) and (b) for which the consent authority must be indirectly satisfied according to *Preston J in Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018. This request also addresses the matters in Sections 4.6 (4) and (5) regarding which the consent authority and delegate of the Secretary must directly form their own opinion of satisfaction.

3. EXTENT OF VARIATION

This request specifically seeks to vary the maximum FSR standard that applies to the site in accordance with Clause 4.4 of the LEP.

Relevantly, clause 4.4(2) states:

*“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.” (emphasis added)*

As shown in Figure 1 below, there are two floor space ratios applying to the land which comprises the site.

The two floor space ratios correspond with the two land use Zones that apply to the site. On the land zoned B4 (which has a frontage to the Princes Highway) the floor space ratio is 2.5:1. On the land zoned R4 (which generally has a frontage to Charles Street) the floor space ratio is 2.2:1.

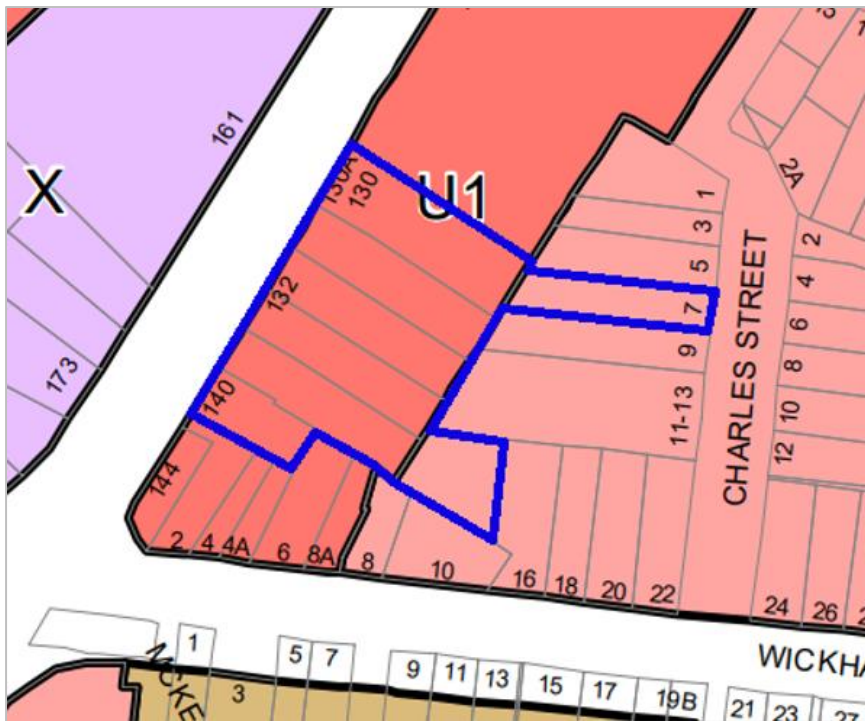


Figure 1 - Floor Space Ratio Map extract, subject site outlined in blue (Source: RLEP 2011)

In accordance with clause 4.4(2), therefore, the floor space ratio applying to the various allotments which comprise the site is as follows:

Table 1 - Allotments and corresponding floor space ratio

Street address	Lot and DP	Floor space ratio
130 Princes Highway	Lot 1 in DP 314129	2.5:1
132 Princes Highway	Lot 1 in DP126737	2.5:1
132 Princes Highway	Lot 20 in DP 1228044	2.5:1
132 Princes Highway	Lot 21 in DP 1228044	2.5:1
132 Princes Highway	Lot 22 in DP 1228044	2.5:1
140 Princes Highway	Lot 23 in DP 1228044	2.5:1
7 Charles Street	Lot 50 DP 1228056	2.2:1
132 Princes Highway	Lot 52 DP 1228056	2.2:1

The methodology for calculating the floor space ratio for the development is set out in clause 4.5 of the LEP.

Clause 4.5(2) defines floor space ratio as:

*“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.”*

Clause 4.5(3) then explains how the site area is to be calculated as follows:

“In determining the site area of proposed development for the purpose of applying a floor space ratio, the site area is taken to be—

....

(b) if the proposed development is to be carried out on 2 or more lots, the area of any lot on which the development is proposed to be carried out that has at least one common boundary with another lot on which the development is being carried out.”

Given that the development is proposed to be carried out on all of the allotments identified in Table 1 above, and they all have a common boundary with another lot on which the development is to be carried out, the floor space ratio is calculated for the whole of the development site.

Calculated in accordance with clause 4.5, the floor space ratio of the development proposal, therefore, is **2.43:1**.

As demonstrated in Table 2 below, the floor space ratio for the development site as a whole is marginally less than the permitted floor space ratio when averaged according to the land area of the different floor space ratio standards applying to the site.

Table 2 - Average floor space ratio

Zone	Area	Floor space ratio	Permissible GFA
B4	4736.1m ²	2.5:1	11,840.25m ²
R4	1,305.6m ²	2.2:1	2,872.32m ²
Total	6,041.7m ²	2.435:1	14,712.57m ²

As noted above, however, while the floor space ratio is calculated for the site as a whole in accordance with clause 4.5(3), it is then applied in accordance with clause 4.4(2) to individual parcels of land according to the floor space ratio map.

As a consequence, the floor space ratio is below the 2.5:1 maximum permitted on the land zoned B4; however, it exceeds the 2.2:1 maximum permitted on the land zone R4.

The extent of the variation, therefore, is **0.23:1**, or a variation to the 2.2:1 floor space ratio development standard of **10.4%** - notwithstanding that the site as a whole contains no more gross floor area than contemplated by the LEP.

The variation is technical in nature and anomalous in so much as the development proposal does not exceed the intensity of development envisaged under the planning controls for the site as a whole, and for that part of the site where the proposal exceeds the permitted FSR, ironically there are no buildings.

4. COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THIS CASE. [cl.4.6 (3)(a)]

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

The Court has held that there at least five different ways, and possibly more, in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC).

As discussed below, strict compliance with the standard is unreasonable or unnecessary in the circumstances of this application because the development nonetheless achieves the objectives of the standard.

4.1. Achieves the objectives of the standard

Compliance with the FSR development standard is unreasonable or unnecessary in the circumstances of this case because, as explained in **Table 1** (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard¹

Table 3: Achievement of Development Standard Objectives.

Objective	Discussion
<i>to establish the maximum development density and intensity of land use, accounting for the availability of infrastructure and generation of vehicular and pedestrian traffic, in order to achieve the desired future character of Rockdale</i>	Given the proposal complies with FSR standards, on a site by site basis, it can be concluded that the proposal does not exceed the development density envisaged for the locality. Subsequently, the proposal satisfies the objective.
<i>to minimise adverse environmental effects on the use or enjoyment of adjoining properties</i>	The DA includes various studies, assessments and statements confirming that the proposal minimises adverse environmental effects on the use or enjoyment of adjoining properties. Such documents conclude that the proposal is permissible, satisfies the relevant objectives of the subject B4 and R4 land use zone, is substantially compliant with relevant development standards, and is substantially consistent with the Apartment

¹ In *Wehbe v Pittwater Council* [2007] NSWLEC 827 Preston CJ identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established. Although the decision concerned SEPP 1, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii). The 5 ways in *Wehbe* are: 1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; 2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary; 3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; 4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or 5. The zoning of the land is unreasonable or inappropriate.

Objective	Discussion
	<p>Design Guideline (ADG) as well as the Bayside West Recommended Urban Design Principles, which have since been converted into a Development Control Plan (DCP).</p> <p>It is worth specifically noting that the proposal complies with the separation guidelines contained in the ADG, except for a small portion of the proposal's north eastern elevation. This level of compliance confirms that the proposal minimises overlooking impacts, as well as excessive bulk and scale.</p> <p>The majority of the proposal complies with the RLEP 2011 Height of Building development standard. This level of compliance confirms bulk and scale potential impacts are minimised.</p> <p>Similarly, the proposal complies with controls for deep soil, communal open space, as well as street level activation, further confirming that impacts are minimised.</p> <p>It is also worth noting that as the proposal effectively avoids building envelopes on Lots 50 and 52, it thereby generates greater separation between future development on adjoining lots. Greater separation is strongly associated with minimising a variety of potential environmental effects.</p>
<p><i>to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing or likely to undergo a substantial transformation.</i></p>	<p>The subject site and broader locality formed part of the Arncliffe and Bayside Precinct Plan. This plan included a strategic review and concluded that the locality is capable of mixed use development as well as substantially greater density. The RLEP 2011 was amended in 2018 to incorporate the outcomes of the Precinct Planning. In this case, both the site and its broader locality are likely to experience substantial transformation and this objective is, therefore, not relevant.</p>

5. THERE ARE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE STANDARD. [cl. 4.6(3)(b)]

In this section we demonstrate that there are sufficient environmental planning grounds to justify contravening the FSR development standard as required by clause 4.6(3)(b) of the LEP.

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard.

In this instance it is difficult to identify the aspect of the development which contravenes the standard because there are no buildings proposed on the land on which the technical variation occurs.

More broadly, however, there are sufficient environmental planning grounds to justify the variation in our opinion noting that:

- The distribution of the building mass toward the Princes Highway maximises the amenity of the the residentially zoned land at the rear which for the most part is occupied by generous areas of landscaped open space.
- The proposal promotes objects (c) and (g) of the Environmental Planning & Assessment Act being the orderly and economic use and development of land and good design and amenity of the built environment.

6. THE PROPOSAL WILL BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE STANDARD AND THE OBJECTIVES OF THE ZONE. [cl.4.6(4)(a)(ii)]

In **Section 3** (above), it was demonstrated that the proposal is consistent² with the objectives of the development standard. The proposal is also consistent with the objectives of the R4 – High Density Residential zone as explained in **Table 4** (below). This request acknowledged earlier that both the B4 – Mixed Use and R4 – High Density Residential land use zones apply to the entire development site. However, this exception request relates to Lots 50 and 52, which are within the R4 land use zone only. In this case, only the R4 land use zone objectives are considered below.

Table 4: Consistency with R4 Zone Objectives.

Objective	Discussion
R4 High Density Residential	
<i>To provide for the housing needs of the community within a high density residential environment.</i>	<p>The use of Lot 50 for vehicular access purposes, and Lot 52 for common open spaces, optimises the number of dwellings which can be achieved on Lots 1 and Lots 20 – 23. In this case, 191 dwellings are proposed on these lots.</p> <p>In effect, Lot 50 and 52 enable the delivery of what would be considered a high density development on Lots 1 and Lot 20 – 23.</p> <p>Whilst Lot 50 and 52 are proposed for vehicular access and communal open space purposes, this does not inhibit other adjoining lots also zoned R4 from achieving high density developments. Sufficient space remains on all lots adjoining either Lot 50 or 52 to accommodate a high density form of redevelopment.</p>
<i>To provide a variety of housing types within a high density residential environment.</i>	<p>The use of Lots 50 and 52 for vehicular access and communal open space allows for the development of a mixed use development at Lots 1 and 20 – 23 which includes a variety of 1, 2 and 3 bedroom dwellings. Further, the delivery of a variety of housing types on lots adjoining Lot 50 and 52 is not inhibited because of their use for vehicular access or communal open space purposes. More than ample space remains on those adjoining lots to accommodate a redevelopment which is high</p>

² In *Dem Gillespies v Warringah Council* [2002] LGERA 147 and *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC the term 'consistent' was interpreted to mean 'compatible' or 'capable of existing together in harmony'

	density in nature and includes a variety of housing types.
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</i>	<p>The use of Lots 50 and 52 for either vehicular access purposes or communal open space enables residents of the proposed 182 dwellings to meet their day to day needs for active outdoor space and accessibility.</p> <p>Furthermore, the variance does not preclude the development of other uses which meet the daily needs of residents in the area.</p>

As can be seen from **Table 3** in **Section 3** and **Table 4** in **Section 5**, the proposal is consistent with the objectives of the standard and the objectives of the R4 zone, and is therefore considered to be in the public interest.

**7. CONTRAVENTION OF THE DEVELOPMENT STANDARD DOES NOT
RAISE ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL
ENVIRONMENTAL PLANNING. [cl. 4.6(5)(a)]**

Varying the development standard as proposed by this application, will not result in any outcome which would be prejudicial to planning matters of state or regional significance. This is largely because the proposal does not exceed the maximum GFA permitted on the development site.

8. THERE IS NO PUBLIC BENEFIT OF MAINTAINING THE STANDARD. [cl. 4.6(5)(b)]

There is no public benefit³ in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the FSR standard. Rather, there are better outcomes for and from the development as a result of the variation sought.

As stated earlier, the variation is arguably technical in nature only, given the FSR on a site by site basis is complied with. The total allowable GFA for the entire development site, is also not breached.

Given the above, we conclude that there is no benefit in maintaining strict application of the standard.

³ *Ex Gratia P/L v Dungog Council* (NSWLEC 148) established that the question that needs to be answered to establish whether there is a public benefit is "whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development"

9. CONCLUSION

This Clause 4.6 variation request demonstrates, as required by Clause 4.6 of the *Rockdale Local Environmental Plan 2011*, that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard and is consistent with the objectives of the R4 High Density Residential Zone and Clause 4.4 of the RLEP 2011;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

As stated earlier, the non-compliance is of a technical nature only given the proposal does not exceed the maximum GFA permitted for the entire development site.

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