

3-7 River Terrace, Tweed heads

## Clause 4.6 Request – Residential Floor Space Ratio

# CONTENTS

CONTENTS	2
1.1 Introduction	3
1.2 Locality Description	3
1.3 Site Description	5
1.4 Surrounding Development	7
1.5 Clause 4.6 Exceptions to development standards	8
1.6 Development Standard to be varied	8
1.7 Extent of Variation to the Development Standard	11
1.8 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?	11
1.9 Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?	14
1.10 Objectives of Clause 4.6	15
1.11 Conclusion	15

## REQUEST FOR AN EXCEPTION TO THE FLOOR SPACE RATIO DEVELOPMENT STANDARD

**APRIL 2025**

### 1.1 Introduction

This request for an exception to a development standard is submitted in respect of the residential floor space ratio development standard contained within Clause 4.4(2C) of the Tweed City Centre Local Environmental Plan 2012 (TTCLEP). The request relates to an application for a shop-top housing development at 3-7 River Terrace, Tweed Heads and associated landscaping and civil works.

### 1.2 Locality Description

The site is located within the town of Tweed Heads which is the regional capital of the Tweed Shire local government area. Tweed Heads is identified as a major regional centre, with the relevant strategic plans and policies encouraging the delivery of new employment opportunities, increased housing choice, quality urban precincts, and the provision of regional services and functions in the centre.

Tweed Heads is immediately to the south of the NSW and Queensland border and functions as a twin town with Coolangatta immediately to the north. Whilst the character of Coolangatta and the broader Gold Coast is formed by its beachside setting and tall scale buildings, Tweed Heads is alternatively characterised by more modest built form, green spaces and the strong presence of the waterways which embrace with the city including the Tweed River and Terranora Creek.

The Tweed City Centre is divided into a number of character precincts under the Tweed Shire Development Control Plan (TSDCP) 2008 with the site located within the 'North' part of city and specifically within the 'Boat Harbour Precinct' which is described as follows in the TSDCP:

The Boat Harbour Precinct is the southern gateway to Tweed Heads just north of the Boyds Bay Bridge and Terranora Terrace. The precinct has a distinctive character reflective of the former Monastery Hill and the adjoining intimate Boat Harbour which functions as a popular tourist destination and as the boat maintenance area. The objective for this precinct is to promote the maritime theme of the Boat Harbour and provide pedestrian access along the waterfront and to water-based tourist activities. At the land/water interface, low scale commercial activities such as restaurants, cafés and tourist activities and facilities are encouraged.

To make an entry statement as people enter the precinct over the Boyds Bay Bridge landmark buildings up to 13 storeys are encouraged on key sites on northern side of Terranora Terrace and on Monastery Hill and could accommodate a mixture of business and residential uses and tourist accommodation.

A continuation of the mixed retail and residential development from the northern end of the City Centre along Wharf Street is promoted with buildings of eight storeys stepping down to six storeys on the eastern side of Recreation Street. The site is also immediately adjacent to the Tweed River Precinct to the east and the Jack Evans Boat Harbour Precinct to the north.

The Tweed City Centre Local Environmental Plan was gazetted in 2013 with an overarching aim of encouraging the economic revitalisation of the City Centre and promoting employment, residential, recreational, arts, social, cultural and tourism opportunities in Tweed City Centre. This outcome is to be achieved in an ecologically sustainable manner which protects and enhance the vitality, identity and diversity of Tweed City Centre as well as achieving building design excellence.

The site will be the first in the Boat Harbour Precinct to be redeveloped in accordance with the new controls.

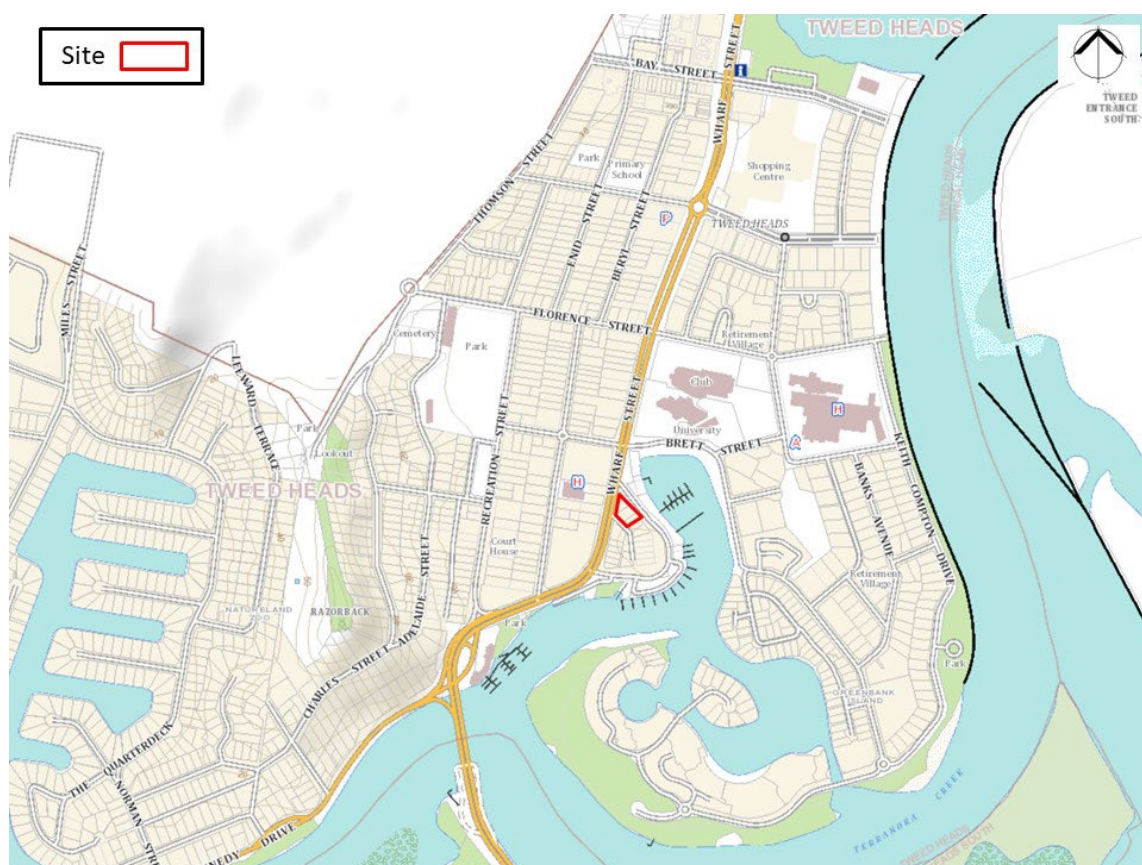


Figure 1:

Site Location (Six Maps 2024)

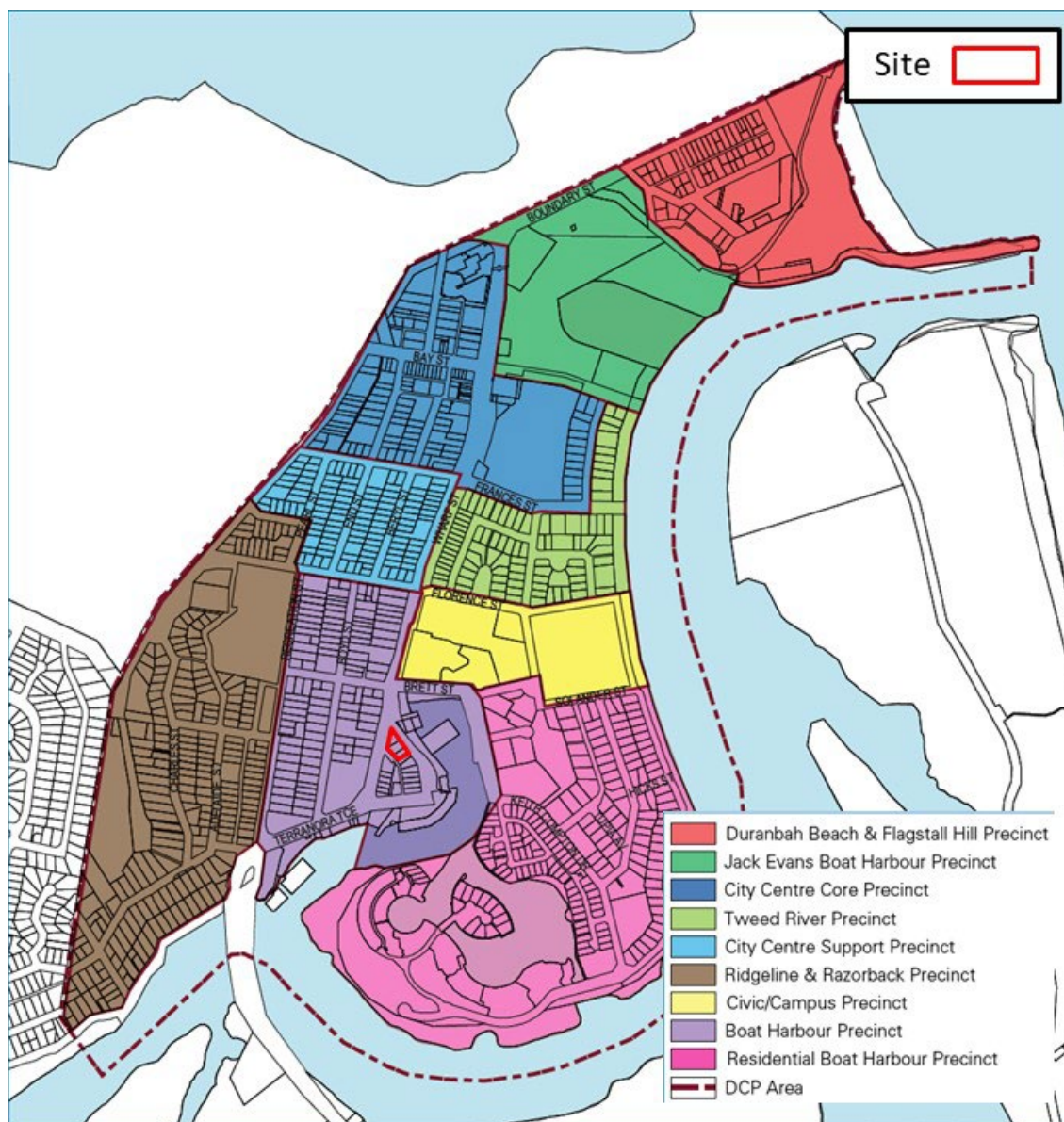


Figure 2:

Tweed City Centre – Character Precincts North

### 1.3 Site Description

The subject site is legally described as Lots 1 and 2 in DP 807977 and Lot 5 in DP9056 and is known as 3, 5 and 7 River Terrace, Tweed Heads Tweed Mall.

The site is located on the eastern side of Wharf Street, between River Terrace to the north and Monastery Lane to the south.

The site is an irregular shaped allotment with a combined area of 1,849 square metres. The site has a frontage of 67.78 metres to River Terrace, 47.05 metres to Wharf Street and 37.61 metres to Monastery Lane.



3 River Terrace is improved by a single storey, weatherboard dwelling with an attached carport and an outbuilding that is attached to the adjoining garage at 5 River Terrace.

5 River Terrace is improved by a two-storey dwelling with a detached garage that is accessed from Monastery Lane.

7 River Terrace is also improved by a two-storey dwelling. Vehicular access is provided to the site from Monastery Lane however there is no carport or garage located to the rear of the site.

The site is located on the northern side of Monastery Hill as the land starts to rise from the intersection of Wharf Street and River Terrace and the intersection of Wharf Street and Monastery Lane. The site has a cross fall of approximately 4.25 metres from the southern corner to the northern corner at the intersection of Wharf Street and River Terrace. The site has a fall of 3.15 metres from the south-east to the north-west along the frontage of the site to Monastery Lane. The land rises steeply within the front setback of the dwelling at 7 River Terrace.

As the land rises from River Terrace to the footprint of the dwellings on the site, views are available to Tweed Marina and beyond.

Landscaping on the site generally consists of low vegetation and medium sized trees in the front setback of each dwelling to River Terrace. An Arborist Report prepared by TPZ Project Arborists identifies 15 trees on the subject site and three trees in the road reserve of River Terrace. The trees on the site consists of a mix of native and exotic species. The tree trees within the road reserve are mature specimens of *Melaleuca quinquenervia* (Broad Leaf Paperbark).

The site is zoned MU1 Mixed Use pursuant to the Tweed City Centre Local Environmental Plan 2012 (TCCLEP). The site forms part of the precinct boundary by River Terrace, Terranora Terrace and Wharf Street, which is identified as a 'Key Site' in TCCLEP.



Figure 3:

Aerial view of the site (Source: Six Maps, Department of Lands 2024)

#### 1.4 Surrounding Development

The site is located within a precinct that is zoned MU1 Mixed Use under the TCCLEP. The zone generally extends along both sides of Wharf Street from the bridge and Tweed Apex Park in the south to Florence Street and the Tweed Heads Bowls Club (which is zoned RE2) to the north. The MU1 zone continues on the eastern side of Wharf Street to Frances Street. The MU1 zone includes land on the western side of River Terraces and land on either side of Monastery Lane.

Land to the north-east of 3 River Terrace is riverfront land that is zoned MU1 Mixed Use and is improved by a single storey, commercial building that is currently used as a fish and chip shop.

Land to the north-east of 5 and 7 River Terrace is zoned W4 Working Waterfront and is currently an at-grade Council car parking that adjoins the northern side of the Tweed Marina.

The adjoining site to the south-east is known as 9 River Terrace and is improved by a two-storey dwelling, with pedestrian access via stairs from River Terrace and rear lane access for vehicles from Monastery Lane. A single storey, triple garage occupies the majority of the site's frontage to Monastery Lane.

Opposite the site, on the south-west side of Monastery Lane is a large allotment known as 100-104 Wharf Street. The allotment has frontage to north Wharf Street and Monastery Lane and vehicular access is provided on Monastery Lane, generally opposite the common boundary of 7 and 9 River Terrace. 100-104 Wharf Street

is currently improved by a two-storey dwelling which has two large advertising signs in the front setback to Wharf Street. The dwelling has a generous, landscaped setback to Monastery Lane.

#### 1.5 Clause 4.6 Exceptions to development standards

Clause 4.6(2) of the TCCLEP provides that development consent may be granted for development even though the development would contravene a development standard imposed by the TCCLEP, or any other environmental planning instrument.

However, clause 4.6(3) states that 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 circumstance of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

In accordance with clause 4.6(3) the applicant requests that the residential floor space ratio development standard be varied.

#### 1.6 Development Standard to be varied

Clause 4.4(2), (2B) and (2C) of the TCCLEP is 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.

(2A) Despite subclause (2), the maximum floor space ratio for a building on a site area that is on land in Zone MU1 Mixed Use for which the maximum floor space ratio is as specified in Column 1 of the Table to this subclause is—

- (a) if the site area is no more than 600 square metres – 1:1, and
- (b) if the site area is more than 600 square metres, but less than 2,000 square metres—the ratio specified opposite that ratio in Column 2 of that Table,

where—

$$Z = (\text{the area of the land in square metres} - 600) / 1400$$

**Table—Maximum FSR in Zone MU1 Mixed Use**

Column 1	Column 2
2.25:1	$(1 + (1.25 \times Z)) : 1$
2.5:1	$(1 + (1.5 \times Z)) : 1$



Column 1	Column 2
2.75:1	$(1 + (1.75 \times Z)):1$
3.25:1	$(1 + (2.25 \times Z)):1$
3.5:1	$(1 + (2.5 \times Z)):1$
4:1	$(1 + (3 \times Z)):1$
4.5:1	$(1 + (3.5 \times Z)):1$

(2C) Despite subclauses (2), (2A) and (2B), the floor space ratio for the residential component of a building that is a mixed-use development that includes shop top housing or serviced apartments is to be calculated as follows–

(a) if the building is in Zone E2 Commercial Centre–

$$[(\text{MaxFSR} \times (\text{NR})/100) + (2 \times \text{R}/100)]:1,$$

(b) if the building is in Zone MU1 Mixed Use–

$$[(\text{MaxFSR} \times (\text{NR})/100) + (2.5 \times \text{R}/100)]:1,$$

where–

**MaxFSR** is the first term of the maximum floor space ratio permitted for the building under either subclause (2), (2A) or (2B).

**NR** is the percentage of the building's floor space to be used for purposes other than shop top housing or serviced apartments.

**R** is the percentage of the building's floor space to be used for the purpose of shop top housing or serviced apartments.

**residential component** means the part of the development used for the purpose of shop top housing or serviced apartments, or both.

(2C) Despite subclauses (2), (2A) and (2B), the floor space ratio for the residential component of a building that is a mixed-use development that includes shop top housing or serviced apartments is to be calculated as follows–

(a) if the building is in Zone E2 Commercial Centre–

$$[(\text{MaxFSR} \times (\text{NR})/100) + (2 \times \text{R}/100)]:1,$$

(b) if the building is in Zone MU1 Mixed Use–

$$[(\text{MaxFSR} \times (\text{NR})/100) + (2.5 \times \text{R}/100)]:1,$$

where—

**MaxFSR** is the first term of the maximum floor space ratio permitted for the building under either subclause (2), (2A) or (2B).

**NR** is the percentage of the building's floor space to be used for purposes other than shop top housing or serviced apartments.

**R** is the percentage of the building's floor space to be used for the purpose of shop top housing or serviced apartments.

**residential component** means the part of the development used for the purpose of shop top housing or serviced apartments, or both.

Clause 4.4(2) of the TCCLEP provides that 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. An FSR of 4.5:1 is shown for the land on the Floor Space Ratio Map.

The site has an area of 1,849 square metres. Based on the formula in Column 2 of subclause (2B), the maximum FSR for the site is 4.12:1. The proposed development has a complying FSR of 3.91:1 and therefore complies with the maximum floor space permitted in accordance with subclause (2B).

Based on the formula provided in in clause 4.4(2C), the residential floor space is 2.604:1 (4,814.77 square metres). Whilst clause (2C) does not frame the residential floor space as a maximum or minimum requirement (as it is in subclause (2), (2A) and (2B)), Council has indicated that they will apply the clause as a maximum FSR. Based on Council's interpretation of Clause 4.4(2C), **the standard to be varied is the standard set out in clause 4.4(2C).**



Figure 4

Extract from the TCCLEP FSR Map

### 1.7 Extent of Variation to the Development Standard

The site has a retail gross floor area (GFA) of 466 square metres and a residential GFA of 6,765 square metres. The residential FSR of the development is 3.66:1. Assuming that the clause is seeking to establish a maximum residential FSR for the site, the proposed development exceeds the maximum residential floor space by 1.06:1 or 1,957.6 square metres.

### 1.8 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was satisfaction of the first test of the five set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

This was re-affirmed in the matter of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [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”.

Whilst it is only necessary to address the first method of the five-part test described in *Wehbe v Pittwater Council* [2007] NSWLEC 827, which alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement, all five tests are addressed below followed by a concluding position which demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case:

**1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;**

The specific objectives of the FSR development standard, as specified in clause 4.4 of the TCCLEP are identified below. A comment on the proposal’s consistency with each objective is also provided.

(a) to define the allowable development density of a site and for particular classes of development,

Clause 4.4(2B) establishes a maximum FSR for the site of 4.12:1. The proposed development has a complying FSR of 3.91:1 and therefore complies with the maximum floor space permitted in accordance with subclause (2B).

Clause 4.4(2C) establishes a floor space ratio for the residential component of a mixed-use development that includes shop top housing. Whilst the residential floorspace exceeds the floor space ratio specified in clause 4.4(2C), the quantum of residential floorspace proposed is appropriate for the following reasons:

- The site is identified in section 8.1.4 of the Tweed Development Control Plan as a location for slim-line, tall building that marks the gateway to the City. The limited size of the floorplates encouraged by the DCP is more suited to residential development than non-residential development.
- It is unnecessary to provide additional non-residential floor space in the development in order to achieve compliance with the DCP requirement for active frontages to be provided along River Terrace and Wharf Street.

(b) to enable an alignment of building scale with the size of a site,

The proposed development is consistent with this objective in that:

- The quantum of residential floor space provided on the site does not result in a building of an excessive scale. As noted above, residential floor space is suited to the tower form that is encouraged on the site by the relevant DCP provisions.
- Compliance with the maximum FSR permitted on the site, demonstrates that the intensity of development on the site, or the amount of floor space on the site, is appropriate for the size of the site.
- All the habitable floor space within the development sits below the maximum height of RL49.5 that is permitted on the site.

(c) to provide flexibility for high quality and innovative building design,

The building design has been developed through a thorough design review process. The design review process was supported as an alternative to the design competition process as a means of achieving design excellence for the development on the site.

The design review panel provided feedback and advice on three occasions throughout the design development phase. The review process has provided a thorough review of all aspects of the design

and has led to the refinement and improvement of the design. The design review process has ensured that the development is both innovative, and of a high quality.

The proposed variation to the residential floor space requirement, has not compromised the ability of the development to deliver an appropriate amount of non-residential floor space on the site, which is necessary to deliver an active frontage to Wharf Street and River Terrace (as is required by the Tweed DCP).

The variation to the residential floor space requirement does not give rise to any inconsistency with the relevant provisions for the Boat Harbour Precinct.

d) to limit the impact of new development on the existing and planned natural and built environment,

The proposed variation to the residential floor space requirement does not result in any impact on the natural or built environment, noting that the overall floor space on the site is lower than permitted in accordance with clause 4.4(2B).

(e) to encourage increased building height and site amalgamation at key locations in the area of Tweed City Centre.

In accordance with Clause 4.4(2) a maximum FSR of 4.5:1 is permitted on the land. Despite Clause 4.4(2), 4.4(2B) requires a reduced FSR for sites that are less than 2,000 square metres in area in order to encourage site amalgamations.

Three allotments are to be amalgamated for the proposed development, resulting in a site area of 1,849 square metres. The site is only 151 square metres smaller than the 2,000 square metres, however the maximum FSR permitted reduces to 4.12:1. The building complies with the maximum FSR permitted for development on the site, despite a reduced FSR applying to the site.

The proposed variation to the residential FSR is unrelated to the provisions of Clause 4.4 that seek to encourage site amalgamation.

The DCP encourages a slim-line tower element on the site. The building height proposed is related to the tower element of the development which is more suitable for a residential use than a non-residential use. In this regard, the proposed variation to the residential floor space control is associated with delivering the built form that is envisaged for the site by the DCP provisions for the precinct.

**2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;**

The underlying objectives and purpose of the residential floor space ratio control is unclear.

The variation to the residential floor space ratio does not hinder the provision of an active ground floor plane. Further, the area, size and dimensions of the non-residential floor space is suited to a range of retail uses and can be adapted to accommodate a variety of tenancy sizes. The quantum of non-residential floor space meets the demand for such uses in the Precinct, particularly given as the site is the first in the precinct to be redeveloped, there is limited demand for non-residential floor space and the feasibility of such space is limited.

**3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;**



As noted above the DCP encourages a slim-line tower element on the site. The building height proposed is related to the tower element of the development which is more suitable for a residential use than a non-residential use. In this regard, the proposed variation to the residential floor space control is associated with delivering the built form that is envisaged for the site by the DCP provisions for the precinct. Requiring compliance with the standard is contrary to the built form that is specifically encouraged by the DCP provisions that set out the desired future character of the precinct.

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 compliance with the standard is unnecessary and unreasonable;**

The development standard has not been abandoned or destroyed by the Council's actions.

5. **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.**

The proposed zoning of the land is reasonable and appropriate.

Strict compliance with the residential floor space standard is unreasonable and unnecessary under the circumstances for the following reasons:

- The proposed development is compliant with, and indeed below, the maximum permissible overall FSR control for the site.
- The proposed development consistent with the TCCLEP objectives for the maximum residential floor space ratio as detailed above.
- The proposed development is consistent with the objectives of the MU1 Mixed Use zone as detailed in the Statement of Environmental Effects that accompanies the application.
- The proposal development provides an appropriate quantum of non-residential uses which properly activates the street frontages.
- As noted above the DCP encourages a slim-line tower element on the site. The tower element of the development which is more suitable for a residential use than a non-residential use. In this regard, the proposed variation to the residential floor space control is associated with delivering the built form that is envisaged for the site by the DCP provisions for the precinct.
- The proposed non-compliance does not result in any material impacts on the amenity of the surrounding properties.
- In the absence of any unreasonable impacts arising from the variation, compliance with the standard is unnecessary and unreasonable.

#### 1.9 **Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?**

The Land & Environment Court matter of *Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018*, provides assistance in relation to the consideration of sufficient environmental planning grounds whereby Preston J observed that:

- 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.

Further guidance is also provided in *Eather v Randwick City Council [2021] NSWLEC 1075* and *Petrovic v Randwick City Council [202] NSW LEC 1242* which indicates that the small departure from the actual numerical standard and the lack of any material impacts are environmental grounds.

The environmental planning grounds that support the proposed variation are as follows:

- The design of the development is the result of an extensive design review process as an alternative to a design competition. A design competition waiver was granted on the basis that a reputable design team had been engaged with demonstrated experience in achieving high quality design outcomes and design excellence. The waiver was also granted on the basis that a staged design review process would result in a more efficient and effective process to ensure design excellence is achieved across each stage of the process. As the design has been the subject of a thorough design review process which was implemented to ensure the development achieves design excellence, it is reasonable to assume that the design incorporates a quantum of non-residential floor space that enables the desired future character of the Southern Boat Harbour precinct to be achieved.
- The proposed variation does not result in any adverse impacts on the amenity of the surrounding properties.

For the reasons given there are sufficient environmental planning grounds to justify contravening the development standard.

#### 1.10 Objectives of Clause 4.6

The specific objectives of Clause 4.6 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.

The development application and clause 4.6 request demonstrate that it is appropriate in this circumstance to provide flexibility in the application of the height of buildings development standard because it will allow for a form of development which is consistent with desired scale of developments in the precinct. The development also does not result in any material impacts on the amenity of the surrounding properties.

#### 1.11 Conclusion

The proposed variation to the residential floor space ratio development standard contained within clause 4.4(2C) of the Tweed Heads City Centre Local Environmental Plan 2012 has been found to be reasonable and appropriate in the circumstances of the case. In addition, there are sufficient environmental planning grounds to justify the variation. In this regard it is reasonable and appropriate to vary the residential floor space ratio development standard to the extent proposed.