

## **CLAUSE 4.6 WRITTEN REQUEST TO VARY THE FLOOR SPACE RATIO DEVELOPMENT STANDARD**

### **1 CLAUSE 4.6 REQUEST**

Clause 4.6 of the *Byron Local Environmental Plan 2014* (BLEP 2014) aims to provide an appropriate degree of flexibility in applying certain development standards, including the floor space ratio control, to achieve better outcomes that are in the public interest.

This written request is made to Byron Shire Council (BSC) and seeks variation to the floor space ratio control of the BLEP 2014 in regard to a restaurant proposed in DA No. 2022.165.1 in the Level 1 basement car park of the development approved in DA No. 2019.616.1 located at 139 Jonson St Byron Bay.

In accordance with the statutory requirements this Clause 4.6 request:

1. identifies the development standard to be varied (**Section 5.4**)
2. identifies the extent of the variation sought (**Section 5.8**)
3. establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances (**Section 5.10**)
4. demonstrates that there are sufficient environmental planning grounds to justify the variation (**Section 5.14**)
5. demonstrates such that the consent authority can be satisfied that the proposal is in the public interest because it is consistent with the objectives of the standard and the objectives for development within the B2 zone (**Sections 5.5 & 5.14**) and
6. provides an assessment of the matters required to consider before Council grants consent (**Sections 5.5, 5.11 & 5.12**) namely:
  - a. whether the 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 Council before granting consent.

Accordingly, development consent can be granted to the proposal despite the proposed deviation of the development standard because, pursuant to clause 4.6(4)(a), Council can be satisfied that:

1. this written request has reasonably addressed the matters required to be demonstrated by Clause 4.6(3) and
2. the proposed development will be in the public interest because it is permissible in the zone, consistent with the objectives for development within the zone and consistent with the objectives of the standard and.

This report should be read in conjunction with the Development Application (DA) Statement of Environmental Effects (SEE).

### **2 LAND**

The land the subject of the DA is identified is known as Lot 29 DP 1270920 – 139 Jonson St Byron Bay NSW and has an area of 2,834.9m<sup>2</sup>.

### 3 PROPOSED AND APPROVED DEVELOPMENT

The proposed development is for the change of use of an approved storage area in the basement (Level 1) car park to a restaurant.

The circumstances and reasons for the change of use are that the storage area at the time of approval of DA No. 2019.616.1 and subsequent modification (DA No. 2019.616.2) was intended to be used by the ground floor commercial tenancies as storage (clothing, packaging, shop fittings and the like) in a convenient location below their shops and restaurants.

The Landowner (JD Property Group Pty Ltd) and the Real Estate Agent offered the storage area to each of the 10 tenants that have leased premises in the building, however they were advised that none of the tenants wished to lease this storage area because of the changes in the nature of retailing (retailers preferring a just in time inventory management system rather than incurring storage costs) and that a number of the tenants would retain their existing storage units in the industrial estate.

Given there is no commercial demand for the storage area it had become redundant, rather than leave the storage area un-utilised the Landowner seeks that the area be used as a restaurant to ensure a viable use of the space can be achieved.

The approved development is for; *'demolition of existing buildings and construction of a mixed use development'*.

The approved mixed use development (DA No. 2019.616.1, 27 May 2020) comprised:

1. The demolition of the 4 dwellings, ancillary buildings and removal of vegetation on the land,
2. The erection of 2 buildings either side of a central courtyard / plaza on a 2 level basement car park which comprise;
  - Building No. 1 (north) – a 3 storey building containing:
    - Ground level – café / restaurant (gfa 120m<sup>2</sup>), commercial premises (gfa 310.9m<sup>2</sup>), retail premises (gfa 300.4m<sup>2</sup>), managers office (gfa 20m<sup>2</sup>), end of trip facilities (gfa 7m<sup>2</sup>), storage and toilet facilities (gfa 40m<sup>2</sup>) and internal circulation (stairs & lifts)
    - Level 1 – 7 shop top houses (gfa 633.8m<sup>2</sup>)
    - Level 2 – 7 shop top houses (gfa 633.8m<sup>2</sup>)
  - Building No. 2 (south) – a 3 storey building containing:
    - Ground level – commercial premises (gfa 478.5m<sup>2</sup>), retail premises (gfa 313.6m<sup>2</sup>), a goods and services loading / unloading area with vehicular access onto Ruskin Ln. and internal circulation (stairs & lifts)
    - Level 1 – 7 shop top houses (gfa 592.1m<sup>2</sup>)
    - Level 2 – 7 shop top houses (gfa 592.1m<sup>2</sup>)
  - On-site car parking for 125 cars comprising:
    - Basement No. 1 – 58 car spaces (2 spaces provided for disabled and 2 spaces provided for electric car charging), 8 motorcycle bays, bicycle racks for 15 bikes and electric bike charging station and internal circulation (stairs & lifts) and
    - Basement No. 2 – 67 car spaces (4 spaces provided for disabled), 8 motorcycle bays and internal circulation (stairs & lifts)

3. Provision of ancillary landscaping and infrastructure (the proposed development) and
4. Strata subdivision.

Byron Shire Council (BSC) approved on 20 Nov. 2020 a s. 4.55(1A) Application (DA No. 10.2019.616.2) to:

1. modifying the layout of the 2 level basement car park within the development
2. make minor amendments to Conditions No. 1, No. 6, No. 15, No. 17, No. 21, No. 24, No. 27, No. 36, No. 42 and No. 70.
3. adjust the levels of the approved development 300mm to provide for the constructed levels of the by-pass roundabout at the corner of Jonson and Browning Sts
4. make minor modifications to the layout of the ground floor commercial and upper residential shop top houses and roof and
5. extend the central lift in Building No. 1 to the roof and incorporate a covered lift over-run and lobby.

BSC approved on 5 Aug. 2021 a s. 4.55(2) Application (DA No. 10.2019.616.3) to:

1. provide a resident recreation area including swimming pool, amenities, gardens and landscaping on the roof of Building No. 1
2. include an additional external podium planter / landscape bed at the north-western corner of Building No. 1 on Level 1 and
3. show the location of 2 photovoltaic arrays on the roof of Building No. 2.

BSC approved on 7 Jan. 2022 a s. 4.55(2) Application (DA No. 10.2019.616.4) to:

1. modify the layout and uses of a number of approved retail premises on the ground floor of the approved development to restaurants / cafes
2. change the use of an approved retail premises to hairdresser salon (business premises)
3. change the use of an approved commercial premises to retail premises (shop)
4. change the use of part of an approved commercial premises to a recreation facility (indoor) [Gymnasium and Pilates studio] and
5. modify the central courtyard to provide better access and visibility to the recreation facility (indoor).

BSC approved on 8 Sept. 2022 a s. 4.55(1A) Application (DA No. 10.2019.616.5) to:

- change the hours of operation for the approved recreation facility (indoor) [Gymnasium and Pilates studio]
- change of use of a 17m<sup>2</sup> plant room (obsolete to requirements) to commercial floor space
- provide additional mechanical risers / ducts / ventilation shafts from the ground floor ceiling to the roof to service the café and restaurants
- reposition the roof top pool toilet to enable the provision of a service area for the mechanical risers / ducts / ventilation shafts to be located near the lift over-run and
- relocate the air conditioning condenser from the roof of the northern building to the roof of the southern building.

The following provides a summary of the development as approved and subsequently modified and floor space ratio. It should be noted that all the modifications that impact on floor space ratio are internal to the development and have been made to make it more functionally practical and efficient.

An objection to vary the floor space ratio development standard was supported by BSC for DA No. 10.2019.616.1. The land has an area of 2,835m<sup>2</sup> and the sum of the floor plan areas of the buildings in the development was 4,042.2m<sup>2</sup> which was a floor space ratio of 1.425 : 1 and 357m<sup>2</sup> (9.6%) greater than the floor space ratio of 1.3 : 1 or 3,685.4m<sup>2</sup> permitted.

In the s. 4.55(1A) Application, DA No. 10.2019.616.2, the floor plan area of the ground floor reduced by approx. 58.6m<sup>2</sup> and area of the upper floors increased by 38.4m<sup>2</sup>. The sum of the floor plan areas of the buildings in the development as a consequence of those changes was 4,028.6m<sup>2</sup> which was a floor space ratio of 1.421 : 1 and 343.2m<sup>2</sup> (9.3%) greater than the floor space ratio of 1.3 : 1 or 3,685.4m<sup>2</sup> permitted.

In the s. 4.55(2) Application, DA No. 10.2019.616.3, the floor plan area increased by approx. 11m<sup>2</sup>, as a consequence of providing a small amenities room for the roof top facility. The sum of the floor plan areas of the buildings in the development as a consequence was 4,039.6m<sup>2</sup> which was a floor space ratio of 1.424 : 1 and 354.2m<sup>2</sup> (9.6%) greater than the floor space ratio of 1.3 : 1 or 3,685.4m<sup>2</sup> permitted.

In the s. 4.55(2) Application, DA No. 10.2019.616.4, there was a minor increase (5.6m<sup>2</sup>) to the approved floor space ratio of the development proposed as a consequence of changing the layout of Tenancy No. G1 'into' the central courtyard. The sum of the floor plan areas of the buildings in the development as a consequence was 4,045.2m<sup>2</sup> which was a floor space ratio of 1.426 : 1 and 359.8m<sup>2</sup> (9.7%) greater than the floor space ratio of 1.3 : 1 or 3,685.4m<sup>2</sup> permitted.

As a consequence of DA No. 10.2019.616.4 the floor plan area of the approved and modified development was slightly more (3m<sup>2</sup>) than that originally approved.

In the s. 4.55(1A) Application, DA No. 10.2019.616.5, the change of use of a ground floor plant room to commercial premises added 17m<sup>2</sup> to the approved floor space ratio of the development. The sum of the floor plan areas of the buildings in the development as a consequence was 4,062.2m<sup>2</sup> which was a floor space ratio of 1.432 : 1 and 376.8m<sup>2</sup> (10.2%) greater than the floor space ratio of 1.3 : 1 or 3,685.4m<sup>2</sup> permitted.

As a consequence of DA No. 10.2019.616.5 the floor plan area of the approved and modified development was 20m<sup>2</sup> more than that originally approved.

The proposed change of use of the storage room to restaurant adds 158.7m<sup>2</sup> to the approved floor space ratio of the development.

The sum of the floor plan areas of the buildings is 4,220.9m<sup>2</sup> which is a floor space ratio of 1.488 : 1 and 535.5m<sup>2</sup> (14.5%) greater than the floor space ratio of 1.3 : 1 or 3,685.4m<sup>2</sup> permitted by Clauses 4.4 and 4.5 (and Map FSR\_003CC) of the BLEP 2014.

Following concerns expressed by BSC in regard to floor space ratio an audit of the floor plan areas 'as built' has been undertaken to confirm the areas. The audit shows that the development has a gross floor plan area of 4,036.4m<sup>2</sup> which is 25.8m<sup>2</sup> less than that documented in the four (4) s. 4.55 applications approved by Council. Refer to Section 4.5.

#### **4 CONSIDERATIONS**

The following addresses the considerations identified in Appendix No. 3 of the Department of Planning and Infrastructure guidelines titled, '*Varying development standards: A Guide August 2011*' in regard the floor space ratio under the BLEP 2014.

Council staff pursuant to the Dept. of Planning Circular PS08-014 (14 Nov. 2008) can determine a DA if the variation to the development standard is not greater than 10%, otherwise the DA is to be determined by Council. The variation to the development standard is 14.5% and DA must be reported to Council for determination.

#### **4.1 WHAT IS THE NAME OF THE ENVIRONMENTAL PLANNING INSTRUMENT THAT APPLIES TO THE LAND?**

The local environmental planning instrument applying to the land and proposed development is the *Byron Local Environmental Plan 2014* (BLEP 2014).

#### **4.2 WHAT IS THE ZONING OF THE LAND?**

The land is zoned B2-Local centre under the BLEP 2014.

#### **4.3 WHAT ARE THE OBJECTIVES OF THE ZONE?**

The following provides comments on the consistency of the proposed development with the objectives (identified in *italics*) of the B2 zone.

- *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.*

##### Comment

The proposed development provides a unique business and entertainment service (restaurant) in a redundant storage area.

- *To encourage employment opportunities in accessible locations.*

##### Comment

The proposed development will create employment opportunities.

- *To maximise public transport patronage and encourage walking and cycling.*

##### Comment

The land is located adjoining public transport routes and is within comfortable walking distance of the centre of Byron Bay.

- *To encourage vibrant centres by allowing residential and tourist and visitor accommodation above commercial premises.*

##### Comment

Not applicable to the DA.

The proposed development is entirely consistent with the relevant objectives and is permissible in the B2 zone.

#### **4.4 WHAT IS THE DEVELOPMENT STANDARD BEING VARIED?**

The development standard being varied relates to the maximum floor space ratio (gross floor plan area to site area) of a development in the B2-Local centre zone.

#### **4.5 UNDER WHAT CLAUSE IS THE DEVELOPMENT STANDARD LISTED IN THE ENVIRONMENTAL PLANNING INSTRUMENT?**

The development standard for floor space ratio is expressed in Clauses 4.4 and 4.5 which is further defined in the BLEP 2014 Dictionary and shown on the FSR Map No. 003CC.

Clauses 4.4 and 4.5 state:

##### **4.4 Floor space ratio**

(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.*

(2A) *Despite subclause (2), the maximum floor space ratio for dual occupancies on land in Zone R2 Low Density Residential is 0.5:1.*

The following provides comments on the consistency of the proposed development with the objectives (identified in *italics*) of Clause 4.4.

(a) *to ensure that new buildings are appropriate in relation to the character, amenity and environment of the locality,*

Comment

The area proposed to be used as the restaurant is within the approved development and its basement car park. There is no change to the exterior fabric, character, bulk or scale of the approved development.

(b) *to enable a diversity of housing types by encouraging low scale medium density housing in suitable locations,*

Comment

Not applicable to the DA.

(c) *to provide floor space in the business and industrial zones adequate for the foreseeable future,*

Comment

The proposed development provides an additional 158.7m<sup>2</sup> of commercial floor space for a purpose permissible in the B2 zone.

(d) *to regulate density of development and generation of vehicular and pedestrian traffic,*

Comment

The traffic generated by the proposal can be satisfactorily provided for internally and by the DA approved changes to the public road infrastructure.

(e) *to set out maximum floor space ratios for dual occupancy in certain areas.*

Comment

Not applicable to the DA.

The proposed development is entirely consistent with the relevant objectives for floor space ratio.

#### 4.5 Calculation of floor space ratio and site area

(1) *Objectives The objectives of this clause are as follows:*

- (a) *to define floor space ratio,*
- (b) *to set out rules for the calculation of the site area of development for the purpose of applying permitted floor space ratios, including rules to:*
  - (i) *prevent the inclusion in the site area of an area that has no significant development being carried out on it, and*
  - (ii) *prevent the inclusion in the site area of an area that has already been included as part of a site area to maximise floor space area in another building, and*
  - (iii) *require community land and public places to be dealt with separately.*

*(2) Definition of “floor space ratio” 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.*

*(3) Site area In determining the site area of proposed development for the purpose of applying a floor space ratio, the site area is taken to be:*

*(a) if the proposed development is to be carried out on only one lot, the area of that lot, or*

*(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.*

*In addition, subclauses (4)–(7) apply to the calculation of site area for the purposes of applying a floor space ratio to proposed development.*

*(4) Exclusions from site area The following land must be excluded from the site area:*

*(a) land on which the proposed development is prohibited, whether under this Plan or any other law,*

*(b) community land or a public place (except as provided by subclause (7)).*

*(5) Strata subdivisions The area of a lot that is wholly or partly on top of another or others in a strata subdivision is to be included in the calculation of the site area only to the extent that it does not overlap with another lot already included in the site area calculation.*

*(6) Only significant development to be included The site area for proposed development must not include a lot additional to a lot or lots on which the development is being carried out unless the proposed development includes significant development on that additional lot.*

*(7) Certain public land to be separately considered For the purpose of applying a floor space ratio to any proposed development on, above or below community land or a public place, the site area must only include an area that is on, above or below that community land or public place, and is occupied or physically affected by the proposed development, and may not include any other area on which the proposed development is to be carried out.*

*(8) Existing buildings The gross floor area of any existing or proposed buildings within the vertical projection (above or below ground) of the boundaries of a site is to be included in the calculation of the total floor space for the purposes of applying a floor space ratio, whether or not the proposed development relates to all of the buildings.*

*(9) Covenants to prevent “double dipping” When development consent is granted to development on a site comprised of 2 or more lots, a condition of the consent may require a covenant to be registered that prevents the creation of floor area on a lot (the restricted lot) if the consent authority is satisfied that an equivalent quantity of floor area will be created on another lot only because the site included the restricted lot.*

*(10) Covenants affect consolidated sites If:*

*(a) a covenant of the kind referred to in subclause (9) applies to any land (affected land), and*

*(b) proposed development relates to the affected land and other land that together comprise the site of the proposed development,*

*the maximum amount of floor area allowed on the other land by the floor space ratio fixed for the site by this Plan is reduced by the quantity of floor space area the covenant prevents being created on the affected land.*

*(11) Definition In this clause, public place has the same meaning as it has in the Local Government Act 1993.*

Gross floor area is defined as:

*the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes:*

- (a) the area of a mezzanine, and*
- (b) habitable rooms in a basement or an attic, and*
- (c) any shop, auditorium, cinema, and the like, in a basement or attic,*  
*but excludes:*
  - (d) any area for common vertical circulation, such as lifts and stairs, and*
  - (e) any basement:*
    - (i) storage, and*
    - (ii) vehicular access, loading areas, garbage and services, and*
  - (f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and*
  - (g) car parking to meet any requirements of the consent authority (including access to that car parking), and*
  - (h) any space used for the loading or unloading of goods (including access to it), and*
  - (i) terraces and balconies with outer walls less than 1.4 metres high, and*
  - (j) voids above a floor at the level of a storey or storey above.*

The calculation of floor space ratio has been in accordance with Clause 4.5.

The FSR Map No. 003CC shows that the land is in 'area Q' for which the floor space ratio is 1.3 : 1.

The land has an area of 2,834.9m<sup>2</sup>, therefore the permissible gross floor plan area is 3,685.4m<sup>2</sup> (1.3 x 2,834.9m<sup>2</sup>).

As a consequence of DA No. 10.2019.616.5 the approved development has a floor plan area of 4,062.2m<sup>2</sup> which is a floor space ratio of 1.432 : 1 and which is 376.8m<sup>2</sup> (10.2%) greater than the floor space ratio of 1.3 : 1 or 3,685.4m<sup>2</sup> permitted.

The floor plan area of the approved and modified (DA No. 10.2019.616.5) development is 20m<sup>2</sup> more than that originally approved in DA No. 10.2019.616.1.

An audit of the floor plan areas 'as built' has been undertaken to confirm those areas.



The following tables identify the 'as built' floor plan areas.

#### **Floor plan areas – ground floor**

<b>Tenancy / approved use</b>	<b>Area (m<sup>2</sup>)</b>
G1A – commercial premises	87.0
G1B – recreation facility (indoor) / gym & yoga)	231.1
G2 – retail premises (mens clothing shop)	105.4
G3 – retail premises (womens clothing shop)	105.4
G4 – retail premises (mens and womens clothing shop)	95.5
G5 & G6 – restaurant	182.6
G7 & G8 – restaurant	228.1
G9 – restaurant	97.3
G10 – proposed restaurant entrance	29.9
G11 – business premises (hairstylist)	60.4
G12 & G13 – retail premises (shop)	237.9
Managers office	10.7
Toilets and end of trip facilities	82.3
<b>Total</b>	<b>1,553.5</b>

#### **Floor plan areas – levels 1, 2 & 3**

<b>Buildings</b>	<b>Area (m<sup>2</sup>)</b>
<b>Building No. 1 (north)</b>	
Level 1 - 7 shop top houses	618.9
Level 2 - 7 shop top houses	618.9
Rooftop pool amenities	7.7
<b>Building No. 2 (south)</b>	
Level 1 - 7 shop top houses	618.7
Level 2 - 7 shop top houses	618.7
<b>Total</b>	<b>2,482.9</b>

The 'as built' audit of floor plan areas shows that the development has a gross floor plan area 25.8m<sup>2</sup> less than that documented.

The 'as built' audit of floor plan areas shows that the sum of the floor plan areas of the buildings in the development is 4,036.4m<sup>2</sup> which was a floor space ratio of 1.423 : 1 and 351m<sup>2</sup> (9.5%) greater than the floor space ratio of 1.3 : 1 or 3,685.4m<sup>2</sup> permitted.

The proposed change of use of the storage room to restaurant adds 158.7m<sup>2</sup> to the approved floor space ratio of the development.

The sum of the floor plan areas of the buildings will be 4,195.1m<sup>2</sup> which is a floor space ratio of 1.479 : 1 and 509.7m<sup>2</sup> (13.8%) greater than the floor space ratio of 1.3 : 1 or 3,685.4m<sup>2</sup> permitted by Clauses 4.4 and 4.5 (and Map FSR\_003CC) of the BLEP 2014.

Variation from strict compliance with the 1.3 : 1 development standard is requested given the circumstances of the departure as set below.

#### **4.6 WHAT ARE THE OBJECTIVES OF DEVELOPMENT STANDARD?**

Refer to Section 4.5.

#### **4.7 WHAT IS THE NUMERICAL VALUE OF THE DEVELOPMENT STANDARD IN THE ENVIRONMENTAL PLANNING INSTRUMENT?**

The numerical value of the development standard is 1.3 : 1.

Clause 4.4 is a numerical standard which does not have particular regard to the individual characteristics and circumstances of the approved and proposed development.

**4.8 WHAT IS THE PROPOSED NUMERICAL VALUE OF THE DEVELOPMENT STANDARD IN YOUR DEVELOPMENT APPLICATION?**

The numerical value of the development standard of the proposed development is 1.479 : 1.

**4.9 WHAT IS THE PERCENTAGE VARIATION (BETWEEN YOUR PROPOSAL AND THE ENVIRONMENTAL PLANNING INSTRUMENT)?**

The percentage variation is 13.8% greater than that permitted by Clauses 4.4 and 4.5.

**4.10 HOW IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THIS PARTICULAR CASE?**

The proposed floor space ratio is justifiable having regard to the merit and circumstances of the approved development and DA.

Strict compliance with the development standard is unreasonable and unnecessary in this particular case because of the following circumstances and reasons.

1. The DA is consistent with the objectives of the B2 zone and proposes a use that is permissible in the zone.
2. The DA is consistent with the objectives for floor space ratio.
3. The DA does not raise any matter of significance for State or regional planning.
4. The floor space ratio sets a theoretical maximum floor plan capacity on the land without having regard to the overall integrated nature and integrity of the design of the overall development. Providing some flexibility in floor space ratio ensures the merits of a proposal are considered and design integrity is fulfilled and public interest maintained.
5. Exceeding the floor space ratio does not change the height, scale, bulk or density of the approved development.
6. There will be no loss of amenity or excessive or unreasonable shadowing of the open space areas of adjoining lands, within the development or the public domain.
7. It will not be evident to a person either standing in either Jonson or Browning Sts. or Ruskin Ln. that the floor plan area of the development is 13.8% greater than otherwise permitted.
8. The proposed use is compatible with the overall approved and established uses in the building.
9. The proposed development will not change or diminish the existing character of the locality as there is no change to the design of the approved development which makes a positive contribution to the streetscape.
10. Approval of the proposed development does not create any apparent adverse impacts on the social, environmental and economic environment of land in the zone and locality and is a positive planning outcome.

#### **4.11 HOW WOULD STRICT COMPLIANCE HINDER THE ATTAINMENT OF THE OBJECTS SPECIFIED IN SECTION 5(a)(i) AND (ii) OF THE ACT?**

The DA SEE and this report demonstrate that:

1. The proposed development is a new innovative and diverse product type which is a permissible use in the B2 zone and which requires in the instance some flexibility in the application of the numerical development standard for floor space ratio.
2. The proposed development is an orderly and economic use of an approved development that has a high capital value.
3. Strict compliance with the development standard for floor space ratio if strictly applied to the proposed development would hinder the objectives of the Act as the Landowner would not be able to change the use of an unwanted and surplus storage area as proposed.

#### **4.12 IS THE DEVELOPMENT STANDARD A PERFORMANCE BASED CONTROL? Give details.**

The development standard for floor space ratio is a performance based control as the objectives within BLEP 2014 enable a development in the B2 zone provided it:

- is appropriate in relation to the character, amenity and environment of the locality and
- the density of the development does not generate excessive vehicular and pedestrian traffic.

The objectives within BLEP 2014 also seek to provide floor space in the business and industrial zones adequate for the foreseeable future.

The proposed use is appropriate and consistent with the character, amenity and environment of the approved development. Vehicular traffic likely to be generated is not excessive and will not exceed the capacity of the local network.

#### **Additional matters to address**

There are no additional matters relating to the request to vary compliance with the standards.

#### **4.13 WOULD STRICT COMPLIANCE WITH THE STANDARD, IN YOUR PARTICULAR CASE, WOULD BE UNREASONABLE OR UNNECESSARY? WHY?**

The DA SEE and evidence above demonstrates that strict compliance with the development standard for floor space ratio is unreasonable and unnecessary, simply because it would prevent the proposed development without regard to the circumstances and merits of the approved development and proposal.

#### **4.14 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? Give details**

The above demonstrates that there are sufficient environmental planning grounds, in the circumstances particular to the approved / established and proposed development, to justify departure from the development standard.

In summary the environmental planning grounds justifying the proposed development are:

1. The proposed use is consistent with the zoning of the land and does not change the height, scale, size, character, bulk and mass of the approved development.
2. All necessary public and private infrastructure services are or can be provided to the proposed development and there will be no unreasonable increase in demand on those services.
3. There will be no substantive or adverse impacts on the environment neither of the land nor to the amenity of adjoining lands or the locality.
4. The result will be a land uses that is permissible and consistent with the objectives of the B2 zone.

5. The proposed development is consistent with all other relevant local environmental planning controls of the BLEP 2014 and does not raise any matter of significance for state or regional planning.
6. Approval of the proposed development does not create any apparent adverse social, environmental and economic impacts in the zone and on development in the locality.

## **5 NSW LAND AND ENVIRONMENT COURT 'FIVE PART TEST' CONSIDERATIONS**

The following provides an evaluation of the variation to the development standard having regard to the 'five part test' established by the NSW Land and Environment Court.

### **5.1 The objectives of the standard are achieved notwithstanding non-compliance with the standard.**

The relevant objectives of the development standard for floor space ratio within Clauses 4.4 and 4.5 in the BLEP 2014 are identified above.

The floor space ratio of the proposed development at 1.479 : 1 is greater than 1.3 : 1 and is therefore not strictly consistent with Clauses 4.4 and 4.5.

Flexibility of the development standard allows the Landowner to proceed with a development that otherwise reasonably complies with other local and State planning controls.

### **5.2 The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.**

The underlying purpose of the development standard for floor space ratio is not relevant having regard to the circumstances and that the development otherwise reasonably achieves and complies with other local environmental planning controls.

### **5.3 The underlying object of purposes would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.**

The underlying purpose of the proposed development would be defeated if strict compliance with the development standard was required. Therefore in the circumstances compliance is unreasonable.

### **5.4 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.**

This is unknown and for Council's consideration.

### **5.5 The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.**

The NSW Land and Environment Court has established a planning principle in regard use of floor space ratio and the consideration of land use 'compatibility' in a suburban context. Refer to *Salanitro-Chafei v Ashfield Council* [2005] NSWLEC 366.

The Court determined consideration of the following tests:

- *Are the proposal's physical impacts on surrounding development acceptable? The physical impacts include constraints on the development potential of surrounding sites.*
- *Is the proposal's appearance in harmony with the buildings around it and the character of the street?*

The proposed development has no visual impact and is compatible with the approved uses within the existing development which is part of the character of the immediate urban environment.

The land is zoned for the proposed use and the proposal has no impact on the character of the locality.

In *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*), Preston CJ of the Court identified five ways in which an applicant might establish that compliance with a development standard is unreasonable **or** unnecessary. It was not suggested that the five ways were the only ways that a development standard could be shown to be unreasonable or unnecessary. Nor does the development need to demonstrate satisfaction of more than one of five ways outlined.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP No. 1 (see *Four2Five* at [61] and [62]).

The five ways outlined in *Wehbe* include:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Way**).
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Way**).
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Way**).
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 (**Fourth Way**).
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 (**Fifth Way**).

This Clause 4.6 variation requests establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly which justifies the variation to the floor space ratio control pursuant to the First Way outlined in *Wehbe*.

In the recent judgment in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 the Chief Judge upheld the Commissioner's approval of large variations to height and FSR controls on appeal. The Judge noted that under Clause 4.6, the consent authority (in that case, the Court) did not have to be directly satisfied that compliance with the development standard was unreasonable or unnecessary but that the applicant's written request adequately addresses (*our emphasis*) the matters in clause 4.6(3)(a) that compliance with each development standard is unreasonable or unnecessary.

## **6 REQUEST FOR VARIATION TO THE DEVELOPMENT STANDARD**

Flexibility in the application of the floor space ratio standard is considered to be fully justified and warranted.

Varying the floor space ratio standard will enable a use consistent with the overall 'theme' and character of the approved development. The proposal generates new and sustaining

employment and achieves positive social and economic outcomes within sound planning and environmental parameters and is therefore considered to be clearly in the public interest.

The rigid application of the floor space ratio standard would prevent a reasonable and positive outcome from being achieved and is considered to be a negligent planning response to this unique proposal.

BSC's consent, pursuant to Clause 4.6 to vary strict compliance with Clauses 4.4 and 4.5 of the BLEP 2014 is respectfully requested.