

APPENDIX B

Clause 4.6 Variation Request

APPENDICES

Clause 4.6 Objection to Clause 4.4 – Floor Space Ratio Byron Local Environmental Plan 2014 (BLEP14)

Introduction

I, Kate Singleton, of PLANNERS NORTH, 6 Porter Street, Byron Bay on behalf of EW & AM Pearce, N & RG Hunt & Daygage Ptd Ltd CAN 073 510 666 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.

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.

This objection is to be considered in conjunction with the Statement of Environmental Effects (SEE) published for Lot 2 DP 1206972, No. 2-10 Bangalow Road, Byron Bay.

Structure of Objection

This objection:

- 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.

Clause 4.6 Objection

Development Standard

Pursuant to Clause 4.6 of the BLEP14, this objection seeks to vary the floor space ratio standard stipulated in Clause 4.4 that states:

4.4 Floor space ratio

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

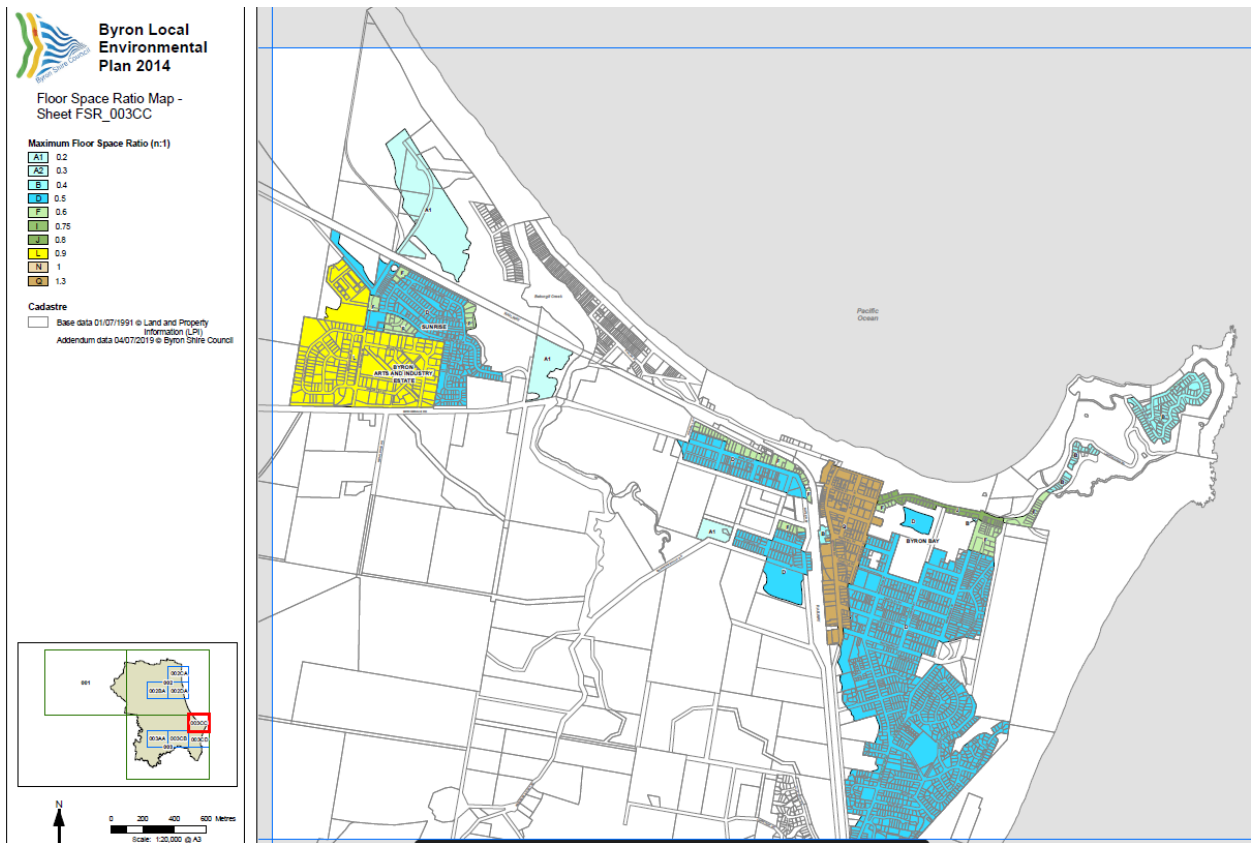
- (a) *to ensure that new buildings are appropriate in relation to the character, amenity and environment of the locality,*
- (b) *to enable a diversity of housing types by encouraging low scale medium density housing in suitable locations,*
- (c) *to provide floor space in the business and industrial 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 relevant portion of the Floor Space Ratio Map (FSR_003CC) of the BLEP14 is shown below. It specifies a maximum floor space ratio of 0.5:1 for the site.

APPENDICES



Justification for the exception and matters for consideration

Compliance to Clause 4.6 BLEP14

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

(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.*

Comment:

The proposed new buildings are appropriate in relation to the character, amenity and environment of the locality. The buildings have been designed to appropriately relate to existing development on the site and surrounding land. The density of the development exceeds the maximum floor space ratio by 0.014:1 in comparison to the approved and commenced scheme which was granted a density bonus to enable an FSR of 0.562:1 on the basis of the provision of affordable housing.

- (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 floor space ratio standards are not excluded from the operation of this clause.

APPENDICES

(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:

(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, comprising an increase in of 53.9m² of floor area above that approved in the commenced scheme.
2. Strict compliance will have little impact on the building as viewed from the streetscape and surrounding area.
3. The proposed variation will have no impact on the bulk or intensity of the development.
4. The proposed variation will provide improved facilities and amenities for residents.

As noted in the Statement of Environmental Effects the current approved scheme for the site provides for an FSR of 0.562:1. The approved scheme was granted a 'density bonus' given the provision of substantial affordable housing opportunities on the subject land.

The proposal seeks to increase the GFA by 53.9m² in comparison to the approved scheme. This area generally comprises an increase to the community building provided for residents, (40.5m²). The proposal will result in a GFA of 2266.9m² representing an FSR of 0.576:1 based on a site area of 3936m².

It is submitted that the increase in GFA is minimal having regard for the improved amenity provided by the increase. Further, it is noted that the proposal provides for an additional six (6) boarding house rooms. The proposed development is considered likely to result in significant positive social impacts enabling key workers to be housed at an affordable rent within walking distance to the Byron Bay town centre.

The proposal provides for the same number of dwellings and the new community centre/ manager's residence and kitchen / café for residents as are approved under the existing development approval, namely five (5) existing dwellings with four (4) new dwellings a new community centre / manager's residence. All but one of the buildings are sited behind existing dwellings fronting Bangalow Road. The proposed variation will not impact on the streetscape of the bulk or scale of the development.

Given the above described aspects, I submit that strict compliance with the floor space ratio of 0.5:1 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. As outlined in this SEE, the proposed development complies with all other standards of BLEP14 and BDCP 2014 will create a minimal impact on the locality and its surrounds.

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 provide sufficient environmental planning grounds to justify contravening the development standard particularly having regard to the increase in GFA which is largely associated with improved communal facilities for residents of the boarding houses.

APPENDICES

(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 Appendix 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 following is provided.

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.

Comment:

The proposed development is consistent with ensuring that new buildings are appropriate in regard to character, amenity and the environment of the locality. The existing buildings fronting Bangalow Road are retained with only one (1) additional building provided on this frontage being a building located on land that was on a separate title prior to the commencement of the development on the site under the current approved scheme. The remainder of the buildings are sited to the rear of the site and do not present to the streetscape of Bangalow Road. The proposal will provide a significant increase in the diversity of housing type provided within close proximity to Byron Bay town centre. It is submitted that the variation to the 0.5:1 development standard is appropriate given the opportunity to provide for affordable rental housing opportunities in Byron Bay town centre. For the same reasons that approval to a variation of the FSR development standard was granted by Council under the current development approval.

The objectives of the R2 Low Density Residential Zone are:

Zone R2 Low Density Residential

1 Objectives of zone

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

2 Permitted without consent

Environmental protection works; Home-based child care; Home occupations

3 Permitted with consent

APPENDICES

Attached dwellings; Bed and breakfast accommodation; Boarding houses; Business identification signs; Dual occupancies; Dwelling houses; Group homes; Health consulting rooms; Home industries; Multi dwelling housing; Neighbourhood shops; Roads; Seniors housing; Any other development not specified in item 2 or 4

4 Prohibited

Agriculture; Air transport facilities; Airstrips; Amusement centres; Animal boarding or training establishments; Biosolids treatment facilities; Boat building and repair facilities; Boat launching ramps; Boat sheds; Camping grounds; Car parks; Caravan parks; Cemeteries; Charter and tourism boating facilities; Commercial premises; Correctional centres; Crematoria; Depots; Eco-tourist facilities; Electricity generating works; Entertainment facilities; Exhibition villages; Extractive industries; Farm buildings; Forestry; Freight transport facilities; Function centres; Health services facilities; Heavy industrial storage establishments; Helipads; Highway service centres; Home occupations (sex services); Industrial retail outlets; Industrial training facilities; Industries; Information and education facilities; Jetties; Marinas; Mooring pens; Moorings; Mortuaries; Open cut mining; Passenger transport facilities; Public administration buildings; Recreation facilities (indoor); Recreation facilities (major); Recreation facilities (outdoor); Registered clubs; Research stations; Residential accommodation; Residential care facilities; Restricted premises; Rural industries; Service stations; Sewage treatment plants; Sex services premises; Signage; Storage premises; Tourist and visitor accommodation; Transport depots; Truck depots; Vehicle body repair workshops; Vehicle repair stations; Veterinary hospitals; Warehouse or distribution centres; Waste or resource management facilities; Water recreation structures; Water recycling facilities; Water supply systems; Wharf or boating facilities; Wholesale supplies

Comment:

The proposal is entirely consistent with providing for the housing needs of the community within a low density residential environment. The site adjoins existing medium density development and is located within walking distance to Byron Bay town centre. The proposal provides for the housing needs of those presently not able to secure affordable rental accommodation near the town centre.

(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 2036, particularly provisions:

- Direction 14: Provide great places to live and work;
- Direction 15: Develop healthy, safe, socially engaged and well-connected communities; and
- Direction 20: Maintain the region's distinctive built character

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.

APPENDICES

<p>(i) <i>The objectives of the standard are achieved notwithstanding non-compliance with the standard</i></p>	<p>The BLEP14 Clause 4.4 FSR and corresponding responses are as follows:</p> <p>4.4 Floor space ratio</p> <p>(1) <i>The objectives of this clause are as follows:</i></p> <p>(a) <i>to ensure that new buildings are appropriate in relation to the character, amenity and environment of the locality,</i></p> <p>(b) <i>to enable a diversity of housing types by encouraging low scale medium density housing in suitable locations,</i></p> <p>(c) <i>to provide floor space in the business and industrial zones adequate for the foreseeable future,</i></p> <p>(d) <i>to regulate density of development and generation of vehicular and pedestrian traffic,</i></p> <p>(e) <i>to set out maximum floor space ratios for dual occupancy in certain areas.</i></p> <p>(2) <i>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.</i></p> <p>(2A) <i>Despite subclause (2), the maximum floor space ratio for dual occupancies on land in Zone R2 Low Density Residential is 0.5:1.</i></p> <p>The proposed development is consistent with ensuring that new buildings are appropriate in regard to character, amenity and the environment of the locality. The proposed buildings fronting Bangalow Road are retained with only one (1) additional building provided on this frontage. The remainder of the buildings are sited to the rear of the site and do not present to the streetscape of Bangalow Road. The proposal will provide significant increase in the diversity of housing type provided within close proximity to Byron Bay town centre. It is submitted that the variation to the 0.5:1 development standard is appropriate given the opportunity to provide for affordable rental housing housing opportunities in Byron Bay town centre.</p> <p>The proposed variation is consistent with the concept of a floor space ratio bonus applied to existing approved scheme for the site.</p>
<p>(ii) <i>the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary</i></p>	<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>
<p>(iii) <i>the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable</i></p>	<p>Not applicable. The underlying object or purpose of the standard would not be defeated or thwarted if compliance was required.</p>

APPENDICES

(iv) <i>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
(v) <i>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.

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, Cl. 4.4(2) 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> <p>(1) <i>The objectives of this clause are as follows:</i></p> <p>(a) <i>to ensure that new buildings are appropriate in relation to the character, amenity and environment of the locality,</i></p> <p>(b) <i>to enable a diversity of housing types by encouraging low scale medium density housing in suitable locations,</i></p> <p>(c) <i>to provide floor space in the business and industrial zones adequate for the foreseeable future,</i></p> <p>(d) <i>to regulate density of development and generation of vehicular and pedestrian traffic,</i></p> <p>(e) <i>to set out maximum floor space ratios for dual occupancy in certain areas.</i></p>
<i>C Is compliance with the development standard unnecessary or unreasonable in the circumstances of the case?</i>	<p>Compliance with the development standard unnecessary or unreasonable in the circumstances of the case because:</p> <ul style="list-style-type: none"> The proposed non complying is of such a minor nature as to not raise any issues in relation to impacts on the streetscape or surrounding development. The project otherwise complies with the relevant planning controls, including building height, parking etc. The proposal sits comfortably within the existing streetscape and surrounding area and is consistent with the proposed built form.
<i>D. Is compliance with the development standard consistent with the aims of the Policy (to</i>	The arguments contained in this Clause 4.6 variation support the case to allow flexibility in the application of the standard.



**PLANNERS
NORTH**

APPENDICES

<p><i>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 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 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>As my Clause 4.6 exception to development standards request appropriately addresses <i>Wehbe v Pittwater Council</i> [2007] NSW LEC 827, I submit that the proposed variation is well founded..</p>

Public interest and matters of State or regional significance

Is the proposal in the public interest?

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:

- Strict compliance to the floor space ratio control will not impact on the bulk or scale of the proposed development not its relationship to the existing streetscape.
- The proposed variation provides for an improved outcome in terms of community facilities in comparison to the approved and commenced scheme.
- Optimum utilisation of the site which is consistent with the Council plans and strategies for Byron Bay.
- The project will provide for affordable housing for key workers within walking distance to Byron Bay town centre.
- 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 2036*.

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.

Summary justification

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

- The proposed degree of non compliance is minor having regard for the approved scheme and the improved amenity afforded by the proposal variation.
- The project is consistent with the general bulk, height and scale of development in the locality.



**PLANNERS
NORTH**

APPENDICES

- 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 floor space ratio 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.



Kate Singleton RPIA
Partnership Principal
PLANNERS NORTH