



EDYG

# Clause 4.6 Variation Request

Clause 7.4 – Non-Residential Floor Space  
1-9 Marquet Street, Rhodes

Submitted to Deicorp  
on behalf of Gyde Consulting

13 February 2025

[gyde.com.au](http://gyde.com.au)

## Acknowledgment of Country



**Towards Harmony by Aboriginal Artist Adam Laws**

Gyde Consulting acknowledges and pays respect to Aboriginal and Torres Strait Islander peoples past, present, Traditional Custodians and Elders of this nation and the cultural, spiritual and educational practices of Aboriginal and Torres Strait Islander people. We recognise the deep and ongoing connections to Country – the land, water and sky – and the memories, knowledge and diverse values of past and contemporary Aboriginal and Torres Strait communities.

Gyde is committed to learning from Aboriginal and Torres Strait Islander people in the work we do across the country.

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## Glossary and Abbreviations

| Term/Acronym    | Description                                            |
|-----------------|--------------------------------------------------------|
| AS              | Australian Standards                                   |
| BCA             | Building Code of Australia                             |
| BC Act          | <i>Biodiversity Conservation Act 2016</i>              |
| CEMP            | Construction Environmental Management Plan             |
| Council         | Canada Bay Council                                     |
| CPTED           | Crime Prevention through Environmental Design          |
| DA              | Development Application                                |
| DCP             | Development Control Plan                               |
| EP&A Act        | <i>Environmental Planning and Assessment Act 1979</i>  |
| The Regulations | Environmental Planning and Assessment Regulations 2021 |
| ESD             | Ecologically Sustainable Development                   |
| FSR             | Floor Space Ratio                                      |
| GFA             | Gross Floor Area                                       |
| INP             | Industrial Noise Policy                                |
| LALC            | Local Aboriginal Land Council                          |
| LEP             | Local Environmental Plan                               |
| LGA             | Local Government Area                                  |
| NCC             | National Construction Code                             |
| SEPP            | State Environmental Planning Policy                    |
| WSUD            | Water Sensitive Urban Design                           |

# 1. Introduction

This is a formal request that has been prepared in accordance with Clause 4.6 of the *Canada Bay Local Environmental Plan 2013* (CBLEP 2013) to justify a variation to the minimum non-residential floor space development standard prescribed by Clause 7.4 of the CBLEP 2013. This variation request forms part of a State Significant Development Application (SSDA) submitted to the NSW Department of Planning, Housing and Infrastructure (DPHI) for a mixed-use development including in-fill affordable housing, which is located at 1-9 Marquet Street, Rhodes (the **site**).

This request should be read in conjunction with the documents submitted in support of the SSDA including the Environmental Impact Statement (EIS) prepared by Gyde (2024) and the architectural drawings prepared by FK. These documents form part of the request.

The proposed works involve the following:

- Construction of 6 basement levels to provide vehicular access via Marquet Street.
- Construction of a 42 storey mixed-use building comprising:
  - Podium containing 22 residential apartments and 14 retail tenancies from the ground floor to level 3
  - Tower containing 252 residential apartments from level 1 to level 41
  - Communal open spaces on ground floor, level 1 and level 4
- A through site link adjacent to the eastern boundary of the site, connecting Mary Street to Rhodes Central to the north
- Landscape works including tree replacement

Clause 7.4 of the CBLEP 2013 stipulates a minimum non-residential floor space in Rhodes Precinct of 16.4%, for individual proposals. The non-residential component of the proposed development is 13.2% of the total GFA which represents a minor non-compliance of 3.2%. The departure from the standard is illustrated in Section 3 (Extent of variation) of this Request.

However, importantly this is a result of the additional residential height and FSR bonus afforded by the Housing SEPP provisions. That is, the non-residential floor space proposed as part of the SSDA, is equivalent to the quantity of non-residential floor space required by Clause 7.4 of the CBLEP 2013.

The In-fill Affordable Housing height bonus of 24.8%, as per Chapter 2, Part 2, Division 1, Section 16(3) of the Housing SEPP, has been applied to the proposed development which results in a permissible height of 141.024m and maximum permissible FSR of 10.27:1 (although, only 9.84:1 is proposed). This has resulted in an additional 5,695sqm of GFA compared to the scheme approved according to Development Consent 2023/0181. The proposed non-residential component of the development has decreased by 5sqm from the scheme referenced in Development Consent 2023/0181, and therefore remains largely unchanged. The proposal's design has also been endorsed by the applicable Design Integrity Panel (DIP).

The objectives of Clause 4.6 are to provide an appropriate level of flexibility in applying a certain development standard to particular development, and to achieve better outcomes for and from development, by allowing flexibility in particular circumstances.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (November 2023) and various recent decision in the New South Wales (NSW) Land and Environmental Court (LEC) and the NSW Court of Appeals (Appeals Court).

By exercising the flexibility sought in this Clause 4.6 request, a better outcome is achieved by the development as follows:

- The proposed ground floor retail space activates Marquet Street and Mary Street and encourages a diversity of uses within the area.

- The development is contextually appropriate and provides a scale and form of development that is compatible with surrounding developments and one that is predicted under the State strategic and statutory planning initiatives and the underpinning strategic framework that supports the CBLEP 2013 provisions. The overall development will be compatible with the emerging character of the Rhodes Station Gateway West Precinct.
- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development.
- The proposed development will contribute to the viability and attractiveness of Rhodes Central, as envisaged by the Rhodes Place Strategy 2021.
- The proposal promotes the orderly and economic use and development of land through the redevelopment of underutilised sites for an appropriate mixed-use development. There will be a substantial uplift in both housing and employment generation on the site and locality, which aligns with the desired future character expected within the Rhodes Station Gateway West Precinct.
- The proposal will revitalise the existing site and improve the public domain with the provision of new retail space and a through-site link providing access to Rhodes Central. Importantly, the proposed development exhibits design excellence as confirmed by the applicable DIP.

It is therefore considered appropriate in this circumstance to vary the development standard.

## 2. Standard to be Varied

The standard that is proposed to be varied is the minimum non-residential floorspace development standard under Clause 7.4 of the CBLEP 2013.

Clause 7.4 of the CBLEP 2013 states the following:

(1) *The minimum percentage of the gross floor area of a building on land in the Rhodes Precinct that must be used for non-residential purposes for development consent to be granted to development in relation to the building is specified on the Non-residential Floor Space Map.*

(2) *In this clause—*

**non-residential purposes** means purposes other than the following—

- (a) residential accommodation, excluding seniors housing,
- (b) serviced apartments, but only if there are, or as a result of the development will be, fewer than 50 serviced apartments on the land,
- (c) car parks,
- (d) telecommunications facilities.

The minimum non-residential floor space in Rhodes Precinct is set out in Clause 7.4 of the CBLEP 2013 and is depicted in the following Non-residential Floor Space Map:



Figure 1: Extract of Non-residential Floor Space Map, site outlined in red (Source: NSW Legislation)

The minimum non-residential floor space as per this development standard, pursuant to the CBLEP 2013, is 16.4%. The development standard to be varied is not excluded from the operation of Clause 4.6 of the CBLEP 2013.

### 3. Extent of Variation

The CBLEP 2013 defines non-residential purposes as:

*non-residential purposes means purposes other than the following—*

- (a) residential accommodation, excluding seniors housing,*
- (b) serviced apartments, but only if there are, or as a result of the development will be, fewer than 50 serviced apartments on the land,*
- (c) car parks,*
- (d) telecommunications facilities.*

In accordance with the CBLEP 2013 definition for determining non-residential floorspace, the proposed development has a non-residential floorspace of 3,796sqm (13.2% of total GFA). As stated in the introduction of this request, this equates to a maximum variation of 3.2% (910.31sqm) from the minimum non-residential floor space standard.

Importantly, this is a result of the additional residential height and FSR bonus afforded by the Housing SEPP provisions. That is, the non-residential floor space proposed as part of the SSDA, is equivalent to the quantity of non-residential floor space required by Clause 7.4 of the CBLEP 2013.

The In-fill Affordable Housing height bonus of 24.8%, as per Chapter 2, Part 2, Division 1, Section 16(3) of the Housing SEPP, has been applied to the proposed development which results in a permissible height of 141.024m and permissible FSR of 10.27:1. This has resulted in an additional 5,695sqm of GFA compared to the scheme approved according to Development Consent 2023/0181.

The development approved under DA2023/0181 complied with Clause 7.4 of the CBLEP 2013 by providing 16.5% (3,801 sqm) of non-residential floor space. The proposed non-residential component of the proposed SSDA has decreased slightly by 5sqm from Development Consent 2023/0181 but remains largely unchanged.

## 4. Unreasonable or Unnecessary

In this section it is demonstrated 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 CBLEP 2013.

The Court held that there are at least five (5) different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. See *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*).

The five (5) ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; (First Test)
2. The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary; (Second Test)
3. The objectives would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; (Third Test)
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granted consents departing from the standard hence the standard is unreasonable and unnecessary; (Fourth Test) and
5. The zoning of the land is unreasonable or inappropriate. (Fifth Test)

It is sufficient to demonstrate only one of these ways to satisfy Clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]).

Nonetheless, we have considered each of the ways as follows.

### 4.1 The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Clause 7.4 of the CBLEP 2013 does not have any specified objectives. The following table therefore considers whether the objectives of the MU1 Zone (which significantly relate to non-residential floor space uses) are achieved notwithstanding the proposed variation (First Test under *Wehbe*).

Table 1 Consistency with Objectives of Clause 7.4

| Objective                                                                                                                   | Demonstration                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
|-----------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. The objectives of the MU1 zone are as follows –                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities. | <p>The proposed development provides 3,796sqm of non-residential floor space, comprising of retail space accessed from Marquet Street and Mary Street. This will encourage a diversity of retail uses within the Rhodes Precinct which will complement business and office uses in the area and generate employment opportunities.</p> <p>The proposed non-residential component remains largely unchanged from that approved under DA2023/0181 which provided 16.5% non-residential floor space of the total GFA and therefore was compliant with Clause 7.4 of the CBLEP 2013. The minor non-compliance of 3.2% (910.31sqm) in the proposed development is as a result of additional height and GFA bonuses enabled by the Housing SEPP. Despite an increase in residential GFA compared to the previously approved DA scheme, the non-residential element remains largely unchanged and is still considered to meet this objective of the MU1 zone.</p> |

| Objective                                                                                                                                                                                 | Demonstration                                                                                                                                                                                                                                                                                                                           |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces. | The proposal provides active street frontage at ground level to Marquet Street and Mary Street. The creation of the eastern connection laneway opens the development up making it more accessible to pedestrian traffic. Functionable spaces that pedestrians can utilise and interact in create a new vibrant area to the streetscape. |
| To minimise conflict between land uses within this zone and land uses within adjoining zones.                                                                                             | Surrounding land uses are MU1 Mixed Use, and this proposal is compatible with the surrounding land uses. The development provides a range of uses that minimises conflict with adjoining zones, as well as providing a new connectivity between the urban landscape and green spaces in the vicinity.                                   |
| To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.                                                                            | The ground floor retail uses satisfy this objective, and no residential uses are proposed on the ground floor other than the pedestrian residential lobby required for access to apartments                                                                                                                                             |

As demonstrated in Table 1 above, the objectives of the MU1 zone are achieved notwithstanding the proposed variation. The above sections have demonstrated that compliance with the minimum non-residential floor space is unnecessary in the circumstances of the case. The presumed principal purpose of Clause 7.4 of the CBLEP 2013 is to deliver non-residential uses within the Rhodes Precinct to generate employment opportunities, enable active street frontages and encourage vibrant, diverse streets. These objectives are still achieved despite the additional residential floorspace provided (from that approved under DA2023/0181) and the outcomes of the proposed non-residential floorspace remains the same for the Rhodes Precinct, despite a minor 3.2% non-compliance to the development standard.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the minimum non-residential floor space development standard is demonstrated to be unreasonable or unnecessary and the requirements of Clause 4.6(3)(a) have been met on this way alone.

## **4.2 The underlying objectives or purpose is not relevant to the development with the consequence that compliance is unnecessary.**

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

## **4.3 The objective would be defeated or thwarted if compliance was required with the consequent that compliance is unreasonable.**

The objective is not considered to be defeated or thwarted in this case and so this reason is not relied upon.

**4.4      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.**

The development standard has not been abandoned by Council's own actions and so this reason is not relied upon.

**4.5      The zoning of the land is unreasonable or inappropriate.**

The zoning of the land is reasonable and appropriate and therefore is not relied upon.

## 5. Sufficient Environmental Planning Grounds

In *Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 118*, 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, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*, Plain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site. The environmental planning ground to justify the departure of the minimum non-residential floor space development standard are as follows:

- The non-compliance is minor and is only a result of an increase in residential floor space (from DA2023/0181) allowed by the Housing SEPP. That is, the quantity of commercial floor space required by the CBLEP 2013 under a typical DA scheme, is provided by the SSDA.
- The proposed development is consistent with the Rhodes Place Strategy 2021 and does not raise any matter of significance for State or regional planning. Specifically, the proposed development will contribute to the viability and attractiveness of Rhodes Central, as envisaged by the Rhodes Place Strategy 2021.
- The development is contextually appropriate and provides a scale and form of development that is compatible with surrounding developments and one that is predicted under the State strategic and statutory planning initiatives and the underpinning strategic framework that supports the CBLEP 2013 provisions. The overall development will be compatible with the emerging character of the Rhodes Station Gateway West Precinct. The development therefore provides an exemplary response to desired future character that is envisaged for the locality and is consistent with the desired future character objectives for the precinct.
- There will be no unreasonable impacts on the residential amenity of neighbouring properties because of the non-residential floor space non-compliance. The proposed ground floor retail space activates Marquet Street and Mary Street and encourages a diversity of uses within the area.
- The proposed development achieves the objects in Section 1.3 of the EP&A Act, specifically:
  - The development facilitates a high quality environmentally, socially, and economically sustainable development by providing much needed, well-designed residential, commercial and retail floor space in an appropriate and highly accessible location. This will positively encourage sustainable modes of transport and increase employment opportunities locally.
  - The proposal promotes the orderly and economic use and development of land through the redevelopment of underutilised sites for an appropriate mixed-use development. There will be a substantial uplift in both housing and employment generation on the site and locality, which aligns with the desired future character expected within the Rhodes Station Gateway West Precinct.
  - The development will deliver residential accommodation which will provide housing for the wider Canada Bay LGA community. The development is well placed to maximise the benefits of residential accommodation, being close to the Rhodes Station, providing access to the wider Sydney region.
  - The proposal will revitalise the existing site and improve the public domain with the provision of new retail space and a through-site link providing access to Rhodes Central. Importantly, the proposed development exhibits design excellence.
  - The proposal will enable employment opportunities of a retail and commercial nature in particular.

For completeness, we note that the size of the variation is not in itself, a material consideration as whether the variation should be allowed. There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6: *GM Architects Pty Ltd v Strathfield Council [2016] NSWLEC 1216 at [85]*. In short, Clause 4.6 is a performance-based control, so it is possible (and not uncommon) for variations to be approved in the right circumstances.

## 6. Conclusion

This Clause 4.6 variation request demonstrates 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 and specifically in that the proposal delivers largely the same non-residential floor space than that approved under DA2023/0181. The minor non-compliance is simply a result of an increase in residential GFA as allowed by the Housing SEPP.
- The development achieves the underlying objective of the development standard and is consistent with the objectives of the MU1 Mixed Use Zone. Specifically, the retail floorspace will generate employment opportunities, enable active street frontages on Marquet and Mary Street and will encourage vibrant, diverse streets in accordance with the character of an area.
- The proposed development responds to the NSW Governments strategic and statutory planning initiatives to encourage private developers to boost diversity of housing choice and deliver more market housing.
- It has been determined, by the relevant DIP, that the proposal exhibits design excellence.

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