

Supplementary Submission Clause 4.6 Variation – Height of Building

180 Unit Shop Top Housing
at corner of
Erina St & Henry Parry Drive, Gosford

Property:

Lot 1 DP 550047

Lots 2 – 5 DP 19484

122 – 124 Erina Street East,
Gosford

Applicant:

Oracle Estates Pty Ltd

Date:

May 2015

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document control sheet

Issue No.	Amendment	Date	Prepared By	Checked By
A	Draft to AC	1 May 2015	SVD	AC
B	Draft, with AC amends for legal review	3 May 2015	SVD	AC
C	Final to Council	4 May 2015	AC	PH

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1.0 Introduction

The Applicant seeks to construct a 180 unit shop top housing development at 122-124, Erina Street, Gosford which exceeds the maximum incentive building height of 39m prescribed by Clause 8.9 – *Development Incentives* of the Gosford Local Environmental Plan (LEP) 2014. For this reason, the applicant seeks to use Clause 4.6 of the LEP to enable Council to approve an exception to this development standard.

This request is made pursuant to Clause 4.6 of the LEP, and justifies why compliance with Clause 8.9 of the LEP is unnecessary in the circumstances of the case, and demonstrates that there are sufficient environmental planning grounds to justify approval of an exception to the development standard.

This request also explains how the proposed development will, despite exceeding the building height limit, be in the public interest given that it will continue to be consistent with the objectives of the Height of Buildings standard (Clause 4.3 and 8.9), the objectives of the Gosford City Centre provisions (Part 8) and the objectives of the *B3 Commercial Core Zone* in which the development is proposed to be situated.

Taking the above into consideration, it is felt that the exception proposed to the development standard raises no matter of significance for State or regional environmental planning, and there is no public benefit in maintaining the development standard in this particular case. Most importantly it will not create a state wide precedent.

To satisfy the above, the following request has been prepared in accordance with the NSW Planning & Infrastructure guideline “*Varying development standards: A Guide*” and includes other information deemed necessary to make a considered assessment of the proposal.

2.0 Background

The need for the exception to the development standard outlined above and discussed in further detail below, has arisen due to a number of factors, with the primary considerations being the site constraints and a need to create a viable project.

The slope of the site, and the approved development to the north of the site have driven the design which has resulted in a proposal which avoids excessive bulk through incorporating two towers and thereby ensuring a more graceful approach to the development, and one which complies with the SEPP 65 design requirements.

An integral part of the design process was to ensure that the prominent corner location of the site was suitably acknowledged and accommodated in terms of materials, facade treatments and design elements. For this reason, the proposal has been architecturally designed to achieve a level of excellence and amenity which will set a high standard for future development within the Gosford City Centre.

The delivery of such outcomes has an economic cost which needs to be justified, and which subsequently gives rise to the need for a higher development yield on the site. Whilst such yields could have been achieved through a squat building form, the benefits of increasing height rather than bulk have been adopted as being the preferable route in terms of amenity, design excellence, view retention and public domain relationships. Furthermore, despite the extent of the variation being sought with regards to building height, the development has a corresponding floor space ratio of 4.75:1 - significantly below the allowable floor space ratio of 6.175:1. This is an important factor for consideration.

The overarching design criteria for the development are consistent with the recently adopted "*Gosford City Centre Statement of Strategic Intent*", which was adopted by Council at the December 9th 2014 Council meeting.

The "*Statement of Strategic Intent*" was prepared for Council as a response to the considerable interest sparked in the development of the City Centre as a result of the "Bonus Incentives" in the LEP. In reviewing the applications lodged for development in the City Centre, it was noted that many of these designs were more reflective of newer trends in development and design within city centres. These designs typically involved building heights in excess of the LEP controls – even taking into account the 30% bonus provisions.

Council recognise that it currently has the potential to facilitate a successful revitalisation of the City Centre, and recognise that in order to not miss this opportunity, a new approach to building design is required. The "*Statement of Strategic Intent*" therefore, recognises and encourages alternate building forms not previously fostered within Gosford Council.

The alternate building forms discussed in the Council Strategy specifically nominate podium and tower construction as a more appropriate response to the development of a city centre. The document outlines several of the advantages of this design response, including greater solar access, decreased impact on views, avoidance of excessive bulk, and the greater opportunities for fine grain podiums at a human scale.

In light of the background outlined above, the applicant seeks to rely on Clause 4.6 to enable Council to vary the height development standards depicted under Clause 8.9 and 4.3(2) of the LEP.

3.0 Description of the Planning Instrument, Development Standard and Proposed Variation

3.1 WHAT IS THE NAME OF THE ENVIRONMENTAL PLANNING INSTRUMENT THAT APPLIES TO THE LAND?

The proposed development and subject land is required to comply with Gosford Local Environmental Plan 2014 (LEP).

3.2 WHAT IS THE ZONING OF TO THE LAND?

The subject site is located within the *B3 Commercial Core Zone*.

3.3 WHAT ARE THE OBJECTIVES OF THE ZONE?

The objectives within the B3 Commercial Core Zone are as follows:

- *To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community.*
- *To encourage appropriate employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To strengthen the role of Gosford City Centre as the regional business, retail and cultural centre of the Central Coast.*
- *To encourage a diverse and compatible range of activities, including commercial and retail development, cultural and entertainment facilities, tourism, leisure and recreation facilities and social, education and health services.*
- *To provide for residential uses if compatible with neighbouring uses and employment opportunities.*
- *To create opportunities to improve the public domain and pedestrian links throughout Gosford City Centre.*
- *To provide for the retention and creation of view corridors.*
- *To protect and enhance the scenic quality and character of Gosford City Centre.*

3.4 WHAT IS THE DEVELOPMENT STANDARD BEING VARIED? E.G. FSR, HEIGHT, LOT SIZE

Council's Height of Building Map identifies a maximum height for buildings on the subject site as being 30m. Given the location of the site within the Gosford City Centre however, it is afforded a 30% bonus pursuant to the provisions of Clause 8.9 of the LEP which brings the maximum height up to 39m. This request made pursuant to Clause 4.6 relates to Clause 8.9(3)(a) of the LEP.

3.5 IS THE DEVELOPMENT STANDARD A PERFORMANCE BASED CONTROL? GIVE DETAILS.

The development standard in CI 8.9 (3)(a) of the LEP is not a performance based control. The maximum building height development standard is a numerical control.

3.6 UNDER WHAT CLAUSE IS THE DEVELOPMENT STANDARD LISTED IN THE ENVIRONMENTAL PLANNING INSTRUMENT?

Clause 4.3 of the LEP provides:

4.3(2) The height of a building on any land is not to exceed the maximum height shown for the land on the [Height of Buildings Map](#).

***Note.** Clauses 4.3A, 4.6, 5.6, 7.7 and 8.9 provide exceptions to the maximum height shown for the relevant land on the [Height of Buildings Map](#) in certain circumstances.*

The subject site is shown on Council's Height of Building Map as having a maximum building height of 30m.

Given the location of the site within the Gosford City Centre however, the provisions of Clause 8.9 – *Development Incentives* apply which add a further 30% to this height as follows:

8.9(3) Development consent may be granted for the erection of a building on land to which this clause applies if the building:

- (a) will not exceed the maximum height shown for the land on the [Height of Buildings Map](#) by more than 30%; and*
- (b) will not exceed the maximum floor space ratio shown for the land on the Floor Space Ratio Map by more than 30%.*

Taking the above into consideration, the proposal seeks to vary the maximum bonus height provisions provided for under Clause 8.9(3)(a) by 12.8m within the Tower One (South) and 1m within Tower Two (North).

3.7 WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

The objective behind Clause 8.9 is as follows:

- (1) The objective of this clause is to provide incentives for development on land in Gosford City Centre.*

It is also pertinent to investigate the objectives behind Clause 4.3 which state:

- (a) to establish maximum height limits for buildings,*
- (b) to permit building heights that encourage high quality urban form,*
- (c) to ensure that buildings and public areas continue to receive satisfactory exposure to sky and sunlight,*
- (d) to nominate heights that will provide an appropriate transition in built form and land use intensity,*
- (e) to ensure that taller buildings are located appropriately in relation to view corridors and view impacts and in a manner that is complementary to the natural topography of the area,*
- (f) to protect public open space from excessive overshadowing and to allow views to identify natural topographical features.*

Finally, it is relevant to assess the proposed variation against the objectives of Part 8 of the LEP which include:

- (a) to promote the economic and social revitalisation of Gosford City Centre,*
- (b) to strengthen the regional position of Gosford City Centre as a multi-functional and innovative centre for commerce, education, health care, culture and the arts, while creating a highly liveable urban space with design excellence in all elements of its built and natural environments,*
- (c) to protect and enhance the vitality, identity and diversity of Gosford City Centre,*
- (d) to promote employment, residential, recreational and tourism opportunities in Gosford City Centre,*
- (e) to encourage responsible management, development and conservation of natural and man-made resources and to ensure that Gosford City Centre achieves sustainable social, economic and environmental outcomes,*
- (f) to protect and enhance the environmentally sensitive areas and natural and cultural heritage of Gosford City Centre for the benefit of present and future generations,*
- (g) to help create a mixed use place, with activity during the day and throughout the evening, so that Gosford City Centre is safe, attractive and efficient for, and inclusive of, its local population and visitors alike,*
- (h) to enhance the Gosford waterfront,*
- (i) to provide direct, convenient and safe pedestrian links between Gosford City Centre and the Gosford waterfront.*

How the proposed development addresses all of the above is discussed in further detail below.

3.8 WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE ENVIRONMENTAL PLANNING INSTRUMENT?

The numerical value of the maximum building height provided for under Clause 8.9(3)(a) is 39m, being 30% above the height control initially nominated under Clause 4.3. In this regard, building height means the “*vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like*”.

3.9 WHAT IS THE PROPOSED NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE DEVELOPMENT APPLICATION?

Based on the above definition of building height, the proposed development requests a maximum height of 51.8m for Tower 1 (South Tower) and 40m for Tower 2 (North Tower).

3.10 WHAT IS THE PERCENTAGE VARIATION (BETWEEN THE PROPOSAL AND THE ENVIRONMENTAL PLANNING INSTRUMENT)?

The following table highlights the variation sought from Council with regards to Clause 8.9(3)(a):

	<i>Tower One (South)</i>	<i>Tower Two (North)</i>
<i>Max Height under Cl 8.9(3)(a)</i>	39m	39m
<i>Proposed Height</i>	51.8m	40m
<i>Variation</i>	12.8m - 33%	1m - 2.6%

4.0 Assessment of the Proposed Variation

4.1 CLAUSE 4.6

Clause 4.6 of the LEP is as follows:

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

- (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.*

(2) 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.

(3) 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*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

(4) Development consent must not be granted for development that contravenes a development standard unless:

- (a) the consent authority is satisfied that:
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and**
- (b) the concurrence of the Director-General has been obtained.*

(5) In deciding whether to grant concurrence, the Director-General must consider:

- (a) whether 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 the Director-General before granting concurrence.*

Clause 4.6 requires that a written request from the applicant must be made to Council that seeks to justify the contravention of the development standard by adequately demonstrating:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

Furthermore, Council must be satisfied that the proposed development will be in the public interest because it is consistent with:

- the objectives of the particular standard and
- the objectives for development within the B3 *Commercial Core Zone*.

Finally, the concurrence of the Director-General of the Department of Planning (DG) must be obtained. It is understood that Council has delegated authority from the DG in this regard.

In deciding whether to grant concurrence, Council must consider whether contravention of the development standard raises any matter of significance for State or regional environmental planning; the public benefit of maintaining the development standard; and any other matters required to be taken into consideration by the Director-General before granting concurrence. In this regard, no "other matters" have been highlighted during the assessment of the proposal which require consideration under sub clause (5)(c).

The following assessment has been undertaken in accordance the requirements of Clause 4.6. In this regard it is noted that Clause 4.6 is essentially the equivalent of SEPP 1 where matters to be considered were detailed in the Department of Planning's (now Department of Planning and Environment) Circular No. B1 (Guideline) which states: -

"If the development is not only consistent with the underlying purpose of the Standard, but also with the broader Planning Objectives of the locality, strict compliance with the Standard would be unnecessary and unreasonable".

In *Winten Property Group Limited v North Sydney Council* (2001) NSWLEC 46 Justice Lloyd sets out the following five part test for considering SEPP No. 1 Objections:

- *Is the planning control in question a development standard;*
- *What is the underlying object or purpose of the standard;*
- *Is compliance with the development standard consistent with the aims of the Policy, 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 EP&A Act 1979;*
- *Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;*
- *Is a development which complies with the development standard unreasonable or unnecessary; and*
- *Is the objection well founded?*

In accordance with the Guideline, this assessment also addresses the relevant test established by the NSW Land and Environment Court in the decision of Chief Judge Preston in *Wehbe v Pittwater Council* [2007] NSWLEC 827 to determine whether compliance with a development standard is unreasonable or unnecessary based on the following:

- Is compliance with the development standard unreasonable or unnecessary because the objective of the development standard are achieved notwithstanding non-compliance with the standard?

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

In the circumstances of this case, strict numerical compliance is unreasonable or unnecessary because the proposal and the varied building height is consistent with the objective of Clause 8.9 as demonstrated below:

Clause 8.9
Objective/Comment
<i>(1) The objective of this clause is to provide incentives for development on land in Gosford City Centre.</i>
<p>In allowing for the proposal to be built to the additional height proposed, the incentive for development will be facilitated. In order for the proposal to be commercially viable, additional units are required which take the building over the height limit.</p> <p>It is worth noting that the site has remained in its current vacant state for many years, and it was not until the current incentives were applied that any significant interest in development was shown by the industry. Despite having a limit themselves (30%), the incentives were an acceptance by Council that incentives regarding height and FSR were required.</p> <p>In light of the above, it is considered that the proposed variation in no way hinders the attainment of this objective, as it acts to further encourage investment and development within the City Centre. Accordingly, the application of the numeric control specified within this clause is unwarranted in this case, given that the objectives of the clause will more readily be attained than should the building be required to reduce its height and therefore unit yield.</p> <p>Although an adequate unit yield could be achieved with a lower building height, this will result in a development of an inferior design with significant additional bulk at street level.</p>

As discussed above, it is also relevant to assess the building height variation against the objectives of Clause 4.3 and Part 8 of the LEP. Again, it is considered that in the circumstances of this case, strict numerical compliance is unreasonable or unnecessary because the proposal and the varied building height is still consistent with these objectives as demonstrated below:

Clause 4.3

Objective/Comment

(a) to establish maximum height limits for buildings,

This is considered more of an introductory statement within the objectives rather than one which describes a particular aim to be achieved through the application of the development standard. This objective is best considered in conjunction with the others rather than on its own.

(b) to permit building heights that encourage high quality urban form,

This objective is also considered as more of an introductory statement, however it appears to be based on an underlying assumption that only buildings of a specific height are capable of offering a high quality urban form.

Although the proposed development exceeds the maximum height limit there is no doubt that it is an example of a high quality urban form which will encourage design excellence and also set a similar standard of development in the Gosford City Centre.

(c) to ensure that buildings and public areas continue to receive satisfactory exposure to sky and sunlight,

This objective is relevant to this discussion in two ways. The first is in the consideration of the overshadowing impacts associated with the works; and the second is how an approved building to the north has driven the need for the increased height of the southern tower.

The location of the subject site is such that the primary overshadowing impact will be over the Imperial Shopping Centre which is immediately to the south. This building is a two storey brick 'box', with no windows on the northern elevation, and no means of achieving any solar benefit. With this in mind, a building of compliant height would have the same impact in terms of overshadowing in this regard.

Any overshadowing to the site to the west (also zoned B3) must be considered in light of the surrounding topography, and the proximity to the Rumbalara Reserve to the east. This elevated and heavily vegetated land to the east already limits the amount of solar access available to the site to the west. In any case, the site to the west would be overshadowed by the development even if it were limited to the 39m height allowable under the LEP.

The proposed height will not result in any overshadowing to Kibble Park or William Street Plaza to the south.

The second way in which this objective is relevant is that the building approved (not yet constructed) to the north of the subject site does not fully comply with the setback requirements under SEPP 65, and in doing so, has limited the potential for any building in the northern part of the subject site to satisfy the minimum SEPP 65 requirement for solar access to units.

It is for this reason that the proposal seeks to incorporate more of the units within the southern tower – so as to ensure the overall development complies with the SEPP 65 requirement for solar access to 70% of the units.

As demonstrated above, the proposed height variation does not reduce the degree to which the proposal satisfies the objective of this clause. Additionally, the need for the proposed variation has been driven by the need to satisfy solar access for the subject proposal, and the impacts of a non-compliant building approved to the north of the site.

Based on the consideration of this objective, it is proposed that compliance with the development standard is unnecessary, as the proposed height does not hinder the objective being realised, and ensures that the subject proposal is itself able to comply with solar access requirements. Furthermore, the proposed design incorporating two towers allows for better solar sharing than does one building of compliant height across the whole site.

(d) to nominate heights that will provide an appropriate transition in built form and land use intensity,

A close review of the Height of Buildings map reveals that the maximum heights prescribed within the Gosford City Centre do not reflect the standard format of “more height at the centre, with lower heights radiating out”. Instead, a typical east – west cross section of the map shows the prescribed heights appearing to be much more random, with heights of 72m – 36m – 24m – 48m – 30m. Based on these observations, it is not clear that the current height maps are based on providing for transitions in built form.

Apart from this observation, the key consideration is the surrounding topography. The subject site is at the base of the Henry Parry Drive where it rises to the north. To the east, the land rises again toward Rumbalara Reserve, with its substantial forest vegetation. These factors ensure that the proposed building will not dominate the visual landscape, as it will still be well below the level of the surrounding landscape.

The photographs below illustrate the extent to which the existing topography is such a factor in the consideration of this point. Photograph 1 below is taken from Henry Parry Drive, looking north to the signalised intersection. This demonstrates the south westerly fall across the site, and the extent of the slope along the Henry Parry Drive frontage.



Photograph 1

Photograph 2 below is taken from the Henry Parry Drive frontage, showing the nature of the land immediately opposite, which rises steeply to the east, and is heavily vegetated.



Photograph 2

It is also noted from the Height of Buildings Map that the area immediately to the west of the site is able to be developed to a height of 36m, and the area to the south – encompassing the Imperial Shopping Centre can be developed to a height of 48m. These heights – which exceed the 30m applicable to the site (not allowing for the 30% variation) – ensure that the transition to the subject site, with the proposed building at the varied height, will be eased.

The two primary factors identified above, being the existing topography, and the allowable heights to adjoining areas, allow for the site to be developed to the height proposed, while still achieving the nominated transition. Accordingly, the application of the development standard is not warranted in this instance.

(e) to ensure that taller buildings are located appropriately in relation to view corridors and view impacts and in a manner that is complementary to the natural topography of the area

Figure 2.14 within the Gosford City Centre DCP (below) nominates significant views which are to be protected. From a review of this plan, it is apparent that the proposal will not impact on any of these significant view corridors.

The views from Kibble Park are either to the east or to the west of the proposal, and any view from within Kibble Park directly over the subject site would already be obstructed by the Imperial Shopping Centre, which as discussed previously, is able to be developed to a height of 48m.

To illustrate the fact that the site would not impact on any views from Kibble Park, the photograph below is taken from the eastern side of Henry Parry Drive, with the Park out of shot, and to the left. As demonstrated, the Imperial Shopping Centre completely blocks any view to the north, and the existing development higher up on Henry Parry Drive (and additional development approved and not yet constructed) are the dominant features behind the subject site.



Photograph 3

The views to the ridgeline – as nominated in the extract below are taken from such a relatively lower level, that the subject proposal would not be visible at all from this point.

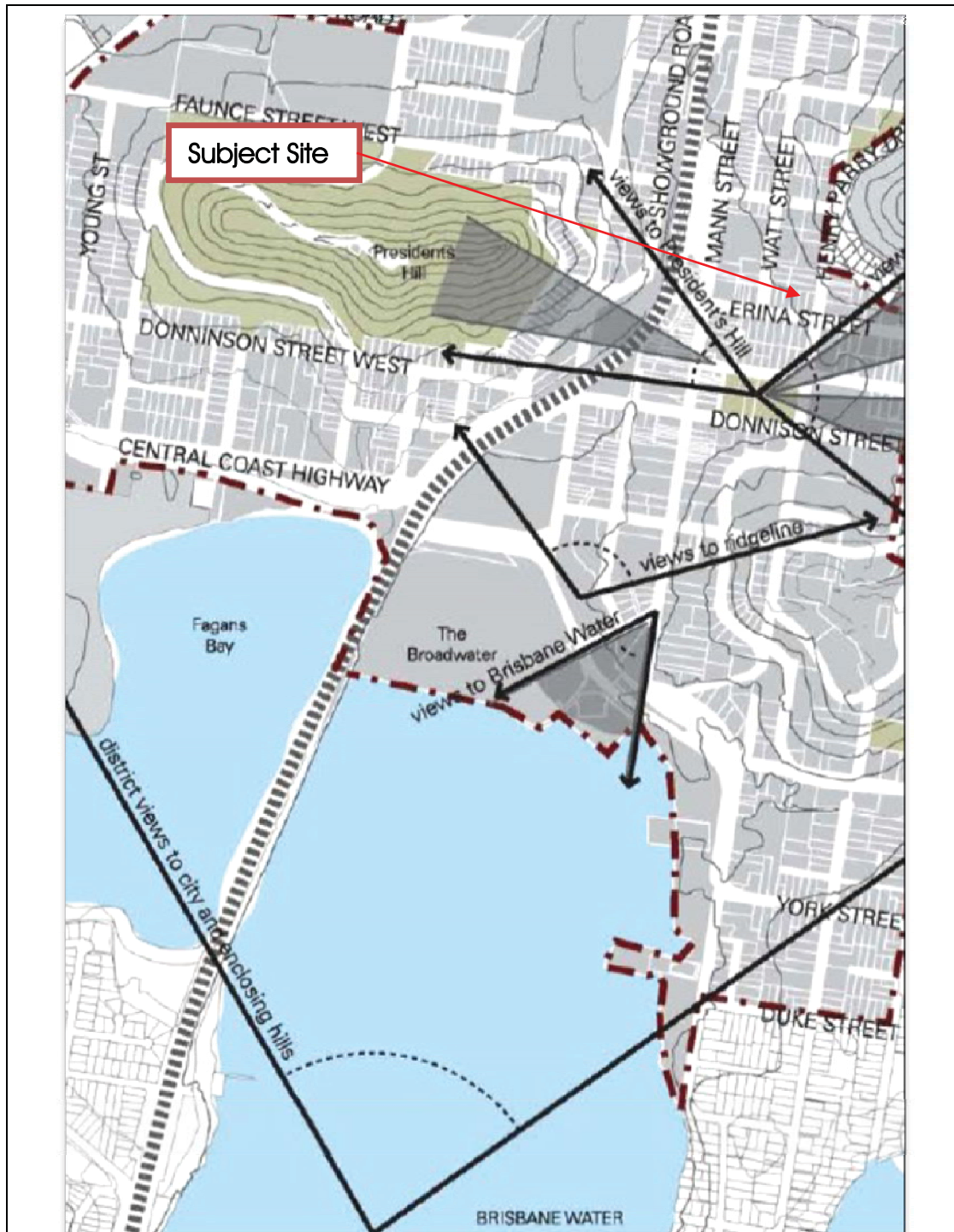


Figure 1

As to the question of building heights being complimentary to the natural topography of the area and as discussed above, the natural topography of the site, and the area in general is such that the proposal is not only governed by it, but also sits well within the natural topography of the local area.

The above responses all point to the fact that the application of the development standard is in this case not warranted as the objective is being met.

(f) to protect public open space from excessive overshadowing and to allow views to identify natural topographical features.

As outlined in the discussion on objective (c) above, the proposal causes no overshadowing to Kibble Park or the William Street Plaza. The bulk of the shadow from the proposal will fall across the roof of The Imperial Shopping Centre, which as previously outlined, has not been designed with any passive solar gains in mind.

On the question of views to natural topographical features, the proposal will have no greater impact on any views than it would if the maximum height of 39m were observed. Further, and as discussed previously, the views identified to be protected within the Gosford City Centre DCP are not impacted by the proposal.

Part 8

Objective/Comment

(a) to promote the economic and social revitalisation of Gosford City Centre,

The proposed development does not hinder the attainment of the objective to promote the economic and social revitalisation of Gosford City Centre. The proposed scale of the development contributes significantly to the economic revitalisation of Gosford by creating an effective 'book end' to the city centre, which adopts high quality architectural expression, and effectively activates the street corner.

As discussed above, the height of the two towers is closely connected to achieving an economically viable development. The height also contributes to a high quality architectural response through two slender forms rather than through the use of one large squat building.

It is noted that the recently adopted "Statement of Strategic Intent" refers to the Department of Planning and Environment "Urban Feasibility Model". This model is used to develop a detailed assessment of development capacity and viability/feasibility under the new LEP's. The model has been run for the Gosford City Centre, and has found that the baseline LEP controls provide potential for 16,474 additional units in the City Centre – of which only 19% are feasible to develop. When the bonus incentives under the LEP are included, the number of additional units increases to 20,266, of which 26% are economically viable.

These figures demonstrate that under the current controls, there is a high probability for many potential developments to not eventuate in the current economic climate. The danger is that owners will simply continue to land bank, or at best, attempt to sell sites with development consent. The scenarios described here are not consistent with the promotion of the "economic and social revitalisation of Gosford City centre".

Taking the above into consideration, there is nothing about the proposed development, particularly its built form and associated height which hinders the attainment of this objective; rather it satisfies the objective over a building of compliant height.

(b) to strengthen the regional position of Gosford City Centre as a multi-functional and innovative centre for commerce, education, health care, culture and the arts, while creating a highly liveable urban space with design excellence in all elements of its built and natural environments,

The proposed development creates a rational mix of uses given its edge location within the B3 Zone. For this reason, and given its close proximity to the train station, Gosford Hospital, the planned Newcastle University facility within the City Centre, and the remainder of the City Centre itself, the towers provide predominantly residential units; however maintain an active and lively ground floor along Erina Street.

In considering this objective, the significance of Councils *Statement of Strategic Intent* is crucial. Part 3.4 of that document, titled "*Need for Redefined Core*" outlines the case for extending the existing B4 zone to the north of the site, down to the south so as to include the subject site. The document notes that "*Peripheral areas of B3 zoned land abutting Henry Parry Drive seem to be poorly located for core commercial uses, with a lack of street address, relatively poor vehicular and pedestrian accessibility and connectivity to the central core area*". Crucially, the B4 zone permits "*residential accommodation*" as defined within the LEP, whereas the B3 zone does not.

Council's Statement of Strategic Intent therefore, has already noted the constraints which were recognised during the development phase of this project, and advises a highest and best use more consistent with that which is proposed.

As discussed above, one driver for the height of the development is to achieve the solar access requirements of SEPP 65 – these being created to ensure a minimum level of liveability is maintained in new unit buildings. With this in mind, the height variation more readily achieves this objective than would a complying building.

(c) to protect and enhance the vitality, identity and diversity of Gosford City Centre,

This site and the surrounding area, in general, have languished for many years becoming somewhat of an eyesore. The proposed development will not only revitalise this site but it will have a flow on effect through increased activity to the area in general. The increased height of the proposed towers will in no way reduce the achievement of this objective. As outlined in section (b) above, Council's Statement of Strategic Intent suggests rezoning of the site to B4, outlining how such a change would more effectively "*create more viable development opportunities to encourage redevelopment that will build on Gosford's role as a regional capital*".

(d) to promote employment, residential, recreational and tourism opportunities in Gosford City Centre,

In allowing for the proposal to be built to the additional height proposed, the project will be economically viable and as such realistically likely to go ahead. The construction of a development of this scale will have significant employment benefits and these will continue through the ongoing management and maintenance of the building.

Enforcing the 39m height limit will reduce unit yield result in a building of inferior design and therefore reduce the likelihood of proceeding with the development.

In light of the above, it is considered that the proposed variation in no way hinders the attainment of this objective, as it acts to further encourage investment and development within the City Centre.

(e) to encourage responsible management, development and conservation of natural and man-made resources and to ensure that Gosford City Centre achieves sustainable social, economic and environmental outcomes,

The intensity and associated height of the development will contribute to employment generation in the city centre, providing employment generating uses and residential accommodation within walking distance to Gosford Train Station.

In addition to this, the 180 residential dwellings have been designed in accordance with SEPP 65, the objectives of which include “*providing sustainable housing in social and environmental terms*”, and to “*minimise the consumption of energy from non-renewable resources, to conserve the environment and to reduce greenhouse gas emissions*”.

The proposal is also consistent with Council’s Statement of Strategic Intent in terms of built form and use of the site within the context of the City Centre and that documents suggested highest and best use for the site.

Increasing the height of the towers was a major factor so as to achieve SEPP 65 standards and therefore the development as proposed meets this objective more so than one which does not.

(f) to protect and enhance the environmentally sensitive areas and natural and cultural heritage of Gosford City Centre for the benefit of present and future generations,

The site possesses no environmentally sensitive areas or natural/cultural heritage aspects worth preserving for future generations. Instead, it has become an overgrown eyesore, containing only a few dilapidated sheds.

The only natural heritage aspect to the site is the vegetated ridgeline of Rumbalara Reserve to the east. As discussed above, the proposed height will have no additional impact on this than would a building which complies with the height controls. The proposed development, particularly its associated height and design, will however revitalise this site and this will have a significant benefit for present and future generations.

(g) to help create a mixed use place, with activity during the day and throughout the evening, so that Gosford City Centre is safe, attractive and efficient for, and inclusive of, its local population and visitors alike,

The site is located at the outer limits of the B3 zone in an area generally dominated by older style buildings, with the rear of the Imperial Shopping Centre currently being the dominant feature at this end of the street. The proposed building will provide a focal point for the street, and the corner site, which has never been provided before.

The site will in itself become a destination for residents and for customers, which will in turn activate what is currently an ignored area of the City Centre. The proposed height of the towers is not considered to hinder the attainment of this objective, and will instead, contribute to its attainment.

As noted elsewhere, Council's Statement of Strategic Intent notes that the subject site and several around it are constrained in terms of an effective commercial use, and suggests the extension of the B4 zone to cover the site. The proposed use, and the height of the proposed buildings are considered to be consistent with the reasons outlined this statement of Strategic Intent document for such an adjustment to the City Centre.

(h) to enhance the Gosford waterfront,

The additional height of the proposed development will not have any adverse overshadowing effects on Gosford waterfront. Additionally, it will not impact on any views gained from or to this point given the topography and existing and approved buildings within the area. Both towers will still ensure that the vegetated ridgeline continues as the dominant feature within the area and as such the proposed height of the towers is not considered to hinder the attainment of this objective.

(i) to provide direct, convenient and safe pedestrian links between Gosford City Centre and the Gosford waterfront.

Tower 1 provides an active retail use along the ground floor which incorporates a fluid indoor/outdoor treatment extending around the street corner. This treatment enhances the pedestrian amenity along Erina Street heading towards the city centre and eventually through to the waterfront. The additional height, being well set back from the buildings podium level, has no bearing on the developments ability to achieve this control.

Further to the above and as previously stated, Council must also be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the B3 *Commercial Core Zone*. This is demonstrated within the following table:

B3 Commercial Core Zone
Objective/Comment
<i>To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community.</i>
<p>The proportion of retail/commercial to residential uses within the building was discussed with Council during the initial stages of development, where it was noted that the location of the site on the outer edge of the B3 zone allowed for a more considered view of the relative mix.</p> <p>In considering this objective, the significance of Councils <i>Statement of Strategic Intent</i> is once again, crucial. Part 3.4 of the Statement, titled "<i>Need for Redefined Core</i>" outlines the case for extending the existing B4 zone to the north of the site, down to the south so as to include the subject site.</p>

The document notes that *"Peripheral areas of B3 zoned land abutting Henry Parry Drive seem to be poorly located for core commercial uses, with a lack of street address, relatively poor vehicular and pedestrian accessibility and connectivity to the central core area". Crucially, the B4 zone permits "residential accommodation" as defined within the LEP, whereas the B3 zone does not.*

In this regard, it is considered appropriate to have a more dominant residential use.

Regardless of this fact, the proposed height in no way hinders the way in which the development accords with this objective.

To encourage appropriate employment opportunities in accessible locations.

The proposed intensity and height of the development contributes to employment generation in the centre by creating a viable product and one which is likely to be constructed. The residential aspect of the development once built, will provide a work force within walking distance to the majority of employment generating uses within the centre as well as those further afield through close connections to the train station.

As previously discussed, Council's Statement of Strategic Intent notes the limitations of the site for commercial uses, suggesting the extension of the adjoining B4 zone to cover the site.

Reducing the height of the towers will have a dramatic impact on the ability of the development to achieve this objective in that it is likely to tip its viability to the point of not going ahead – leaving the site stagnant and non-productive. The proposed development contributes significantly to the attainment of this objective and the scale and height is key to this contribution.

To maximise public transport patronage and encourage walking and cycling.

The variation to the height will allow more people to live and use the available public infrastructure within the City Centre – particularly the Gosford Train Station. Once constructed, the building, and the manner in which it complements the City Centre will also encourage walking and add to the social fabric of Gosford through its use of a fluid retail ground floor. The building itself will act as an attractor for pedestrians, providing a retail and residential destination where there is currently nothing.

The proposed height variation will facilitate a higher yield for the site, thereby promoting the maximum realisation of the public transport and pedestrian opportunities within the City Centre. Accordingly, the proposal is considered to be consistent with this objective.

To strengthen the role of Gosford City Centre as the regional business, retail and cultural centre of the Central Coast.

The proposed development with its superior design and increased residential density is fully consistent with strengthening the role of Gosford City Centre as the regional business, retail and cultural centre.

<p>The proposed height variation is consistent with this objective.</p>
<p><i>To encourage a diverse and compatible range of activities, including commercial and retail development, cultural and entertainment facilities, tourism, leisure and recreation facilities and social, education and health services.</i></p>
<p>As discussed above, the mix of uses incorporated into the development has been largely swayed towards residential, with a small component of retail on the ground floor of Tower 1 to ensure an active and vibrant street front as a frontage is presented. This mix is a deliberate response to the characteristics of the site such as topography and proximity to the train station as well as its location on the edge of the B3 Zone.</p> <p>As outlined previously, the proposed building typology is consistent with the Council adopted Statement of Strategic intent, which recommends a B4 zone for the site in response to the limitations associated with the topography, and location on the periphery of the B3 zone.</p> <p>With this in mind, reducing the height of the towers would in no way more readily achieve this objective.</p>
<p><i>To provide for residential uses if compatible with neighbouring uses and employment opportunities.</i></p>
<p>The development has concentrated on providing a large number of residential units within an area on the edge of the B3 Zone, which is within close proximity to public open space to the east and a sufficient distance from the core of the city centre and its associated conflicting amenity impacts.</p> <p>The location of the site, within close proximity to the Gosford Railway Station; Gosford Hospital, Gosford Council; the planned Newcastle University facility within the City Centre, and planned Government office buildings, speaks to a significant demand for residential accommodation in the area.</p> <p>As outlined previously, the proposed building typology is consistent with the Council adopted Statement of Strategic intent, which recommends a B4 zone for the site in response to the limitations associated with the topography, and location on the periphery of the B3 zone.</p> <p>Taking advantage of this location for residential uses is achieved through the additional height and as such further achieves this objective than would a building of compliant height.</p>
<p><i>To create opportunities to improve the public domain and pedestrian links throughout Gosford City Centre.</i></p>
<p>The primary impact on the public domain anticipated with the proposal is the activation of the Erina Street frontage. Currently, this end of Erina Street is at best a neglected wasteland, serving purely as a thoroughfare between Mann Street and the commercial sites on Henry Parry Drive. The area has no aesthetic appeal, and has no attractor in terms of street amenity. The proposal will reverse the current situation, providing a destination point for people, both in terms of the residents, and in terms of people visiting the retail premises.</p>

Beyond the improved street aesthetic, the proposal will define the corner, which has significant potential to become a book end for this portion of the B3 zone. It is considered that this proposal achieves that potential.

Extreme grades along Henry Parry Drive are not conducive to pedestrians, and as such this frontage has not been afforded a commercial/retail use. This design element is once again consistent with the findings of Council's Statement of Strategic Intent.

Pedestrian links along this frontage are also constrained on the opposite side of Henry Parry Drive where similar grades are apparent. Based on these constraints, it is considered that the area of the site nominated for the commercial/retail use is the only part where such a use would be viable and able to constructively improve pedestrian links and the public domain.

Reducing the building height along this frontage will have no bearing on the developments ability to achieve this objective.

To provide for the retention and creation of view corridors.

As discussed above, there are no significant view corridors which are impacted by the proposal. The location of the site at the north eastern extent of the B3 zone, and adjacent to 7(c2) land (deferred matter) puts it at the outer limits of where any views to the water or of the surrounding ridges may be achieved.

It is noted that Fig 2.14 within Chapter 4.1 of the Gosford DCP nominates specific views which are to be protected. Based upon the relative distance from the nominated view points, and the type of existing buildings between the proposal and these view points, each of these views are not impacted by the proposal or its additional height.

To protect and enhance the scenic quality and character of Gosford City Centre.

The subject development incorporates two slender tower elements, setback from the podium level allowing for an increase in height without over dominating the feel of the building as it is felt at a human scale. Furthermore, the tower design was selected as it allows a more slender built form, one which minimises overshadowing and view loss.

Once again, these design elements are consistent with the recommendations contained in the Council adopted Statement of Strategic Intent.

The proposed height variation does not detract from the scenic quality and character of Gosford City Centre – rather, it significantly enhances it by ensuring a viable development on a long vacant and overgrown parcel of land. Quite simply the development is a significant improvement to the aesthetics of the area.

4.3 HOW WOULD STRICT COMPLIANCE HINDER THE ATTAINMENT OF THE OBJECTS SPECIFIED IN SECTION 5(A)(I) AND (II) OF THE ACT?

The objects set down in Section 5(a)(i) and (ii) are as follows:

"to encourage

(i) The proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.

(ii) The promotion and coordination of the orderly and economic use and development of land..."

Two of the primary concerns in the development of land are the economics of the proposal and the regulatory controls which apply to the development. The proposed yield is required in order for the project to be commercially viable. Accordingly, if the yield is not achieved, then the return on the investment will be insufficient, and the project will not proceed.

In designing a proposal which achieves the required yield, the relevant regulatory requirements are the second driver of the final product. In the case of the type of development proposed, SEPP 65 is a primary control, dealing with issues relating to solar access, thermal comfort, and architectural design.

As outlined previously, the building approved on the site to the north (not yet constructed), does not comply with the setbacks specified in SEPP 65. The result of this non-conformance is that proposed Tower two (northern tower) is compromised in terms of solar access to all but some of the higher units.

In light of the constraints imposed on the site by the approved building to the north, the only way in which the proposal, as a whole, is able to comply with the SEPP 65 requirement for at least 70% of units achieving the minimum solar access requirements, is to place the majority of the units within Tower one (southern tower). The proposal has been designed with this constraint in mind, and attempt to achieve a balance between the two towers. It is not considered appropriate to make Tower two the taller of the two buildings, as it is situated higher on the site than Tower one.

Were Tower two to be the higher element, then this would cause excessive overshadowing to the remainder of the site, thus eliminating solar access potential for Tower one; and would result in an excessively high building, out of context with the area in general.

Each of the scenarios outlined above are considered to be contrary to the *"proper management, development and conservation of natural and artificial resources...for the purpose of promoting the social and economic welfare of the community..."*; and the *"orderly and economic use of land"*.

The question therefore of whether strict compliance with the clauses under consideration would hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act is answered in the affirmative.

Strict compliance with the maximum height control would have the potential to impact on the viability of the project to the point where it would not occur; or result in a bulky built form which would not achieve the desired vibrant future character of the city centre.

4.4 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

It is considered that sufficient planning grounds exist to support the proposed variation. This assertion is based on the arguments outlined above, which demonstrate that the aims of the standard will still be achieved, with the primary aims being to avoid overshadowing to public open space areas; ensure adequate solar access to adjoining sites; and to ensure building heights are appropriate to the site and do not impact on significant views.

Other matters to be noted in this context include:

- The proposal remains consistent with the objectives of the zone and the Gosford City Centre objectives of Part 8, despite the developments non-compliance in terms of building height.
- The proposal remains consistent with the objectives of the height standard – both Clause 8.9 and 4.3 – again, despite its non-compliance.
- Non-compliance with the standard does not contribute to adverse environmental, social or economic impacts.
- It is desirable for the development to be more intense given its well serviced location and proximity to services such as the train station.
- The variation to the building height development standard will allow for the provision of additional residential floor space without exceeding the FSR controls and as such continuing to comply with Council's desired intensity for this portion of the city centre.
- The scale and form of the slim tower development, along with the building typology is in line Council's Statement of Strategic Intent.
- The development promotes the Environmental Planning and Assessment Act's objective of the orderly and economic development by ensuring that the project is commercially viable and will actually proceed.
- The additional height facilitates the delivery of a standard of development consistent with Council's vision for the City Centre.

4.5 IS THE VARIATION WELL FOUNDED?

For reasons outlined in the preceding sections of this submission, the variation to the height limit is well founded as compliance with the standard is unreasonable or unnecessary and the development does not contravene the objects specified within 5(a)(i) and (ii) of the Act; the objectives of the B3 *Commercial Core Zone*; the objectives of the Gosford City Centre provisions within Part 8; and the objectives surrounding the building height standard itself.

The variation to the building height facilitates the delivery of a superior design located at a prominent corner book-end location – a location which demands a development of the highest quality in terms of design, finishes, and amenity provided both to future residents and interface with the public domain. The variation to the building height facilitates the delivery of these positive urban outcomes in a manner that does not result in adverse impacts.

Taking the above into consideration, strict compliance with the building height standard would be unreasonable and unnecessary in the circumstances of the case as it would hinder the viability and delivery of the better outcomes for the development and for the public in general.

4.6 IS THE DEVELOPMENT IN THE PUBLIC INTEREST?

As stated previously, Clause 4.6(4)(a)(iii) requires that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out. An assessment against the zone objectives and the objectives of the development standard has been thoroughly explored above, and based on these assessments, it can be concluded that the proposed variation, and the building which will result, is in the public interest.

This position is further enhanced upon consideration of Councils Statement of Strategic Intent, which sets out clear directions for future development within the City Centre – all of which are encapsulated within the proposal.

In summary, the proposal represents an opportunity to create a key building within the context of the Gosford City Centre. Currently, the subject site is a vacant wasteland with no street appeal. The proposal will serve to activate the street frontage, and hopefully be another step toward the much needed revitalisation of the Gosford City Centre. It will make a significant positive contribution to the aesthetics of the area particularly on street frontages and will begin the revisitation of the local area.

5.0 Clause 4.6 vs Planning proposal

There is no legislation or environmental planning instrument which limits the extent to which a variation under Clause 4.6 to the building height standard can apply.

Clause 4.6 is similar to the provisions required under *State Environmental Planning Policy No 1 - Development Standards* (SEPP 1) where the Court of Appeal considered the issue in *Legal and General Life v North Sydney Municipal Council* (1990) 69 LGR 201. Here, North Sydney Council had approved a SEPP 1 objection, and the decision was subject to third party legal challenge. The applicable floor space ratio control was 3.5:1, but - as a consequence of upholding the SEPP 1 objection - the approved floor space ratio was 15:1 (a variation to floor space of 329%). The applicable height control was five storeys whereas the approved height was 17 storeys (a variation of 240%).

Clause 4.6 of the LEP is similar in terms to SEPP 1 in that there are no explicit provisions that make necessary for a consent authority to decide whether the variation is minor. With this in mind, there is no implicit constraint on the degree to which a consent authority may depart from a numerical standard.

Two recent examples that illustrate the wide range of commonplace numerical variations to development standards under clause 4.6 include:

- On 30 October 2014, the Sydney East Joint Regional Planning Panel granted development consent for a 14 storey mixed use development on land at 6-16 Parramatta Road Homebush (Reference 2014SYE053- Strathfield - 2014/066). In this decision, the panel, with the apparent benefit of advice from senior counsel, approved a floor space ratio variation of 24%.
- On 14 January 2014, in *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003, the Land and Environment Court granted development consent to a three storey shop top housing development in Woolloomooloo. In this decision, the Court, approved a floor space ratio variation of 187%.

In terms of the proposed development, the variation to the building height standard sought is only 33% and as such would appear to be appropriately dealt with under Clause 4.6.

Further to the above, a development proposal that is not consistent with either the objectives of the development standard, or the objectives of the zone, expressly cannot be approved through the reliance on Clause 4.6. If this were the case, the proposal would be inconsistent with the intention of the zone and would be more appropriately applied for following a planning proposal.

With regard to the subject development, it has been consistently provided that the proposal, including its respective height, achieves the objectives of the B3 zone as well as the Part 8 Gosford City Centre objectives and finally the building height control objectives, and for this reason it is able to be approved through the flexible provisions afforded by Clause 4.6.

6.0 Conclusion

Council is committed to the revitalisation of the Gosford City Centre and the Waterfront. These areas have languished for many years with no development occurring, and even worse, have been declining. The subject site is a case in point. For many years, this site has remained vacant apart from a number of sheds occupied by industrial / mechanical operations. The site has become an overgrown eyesore, when it has the potential to become a vibrant part of the revitalisation of the City Centre.

In the context of the above, the Clause 4.6 provisions within the LEP are a means of implementing positive planning outcomes for a development or area. They are available to Councils and Joint Regional Planning Panels to approve appropriate development which whilst not complying with a LEP numerical standard, nonetheless achieves the objectives of the zone.

In this regard, the proposal to vary building height is considered appropriate in the context and circumstances of the site as it will positively contribute to the vibrancy of the "future Gosford". Conversely, a development strictly complying with the numerical standard would have significantly reduced positive social or economic impacts. A strictly complying development providing the required unit yield would have an inferior design quality and poor amenity both internally for the residents and the external public surrounds. It would have limited positive impact on the local area.

As stated in this submission, it is noted that the drivers for this design response have predominantly been external factors (topography, adjoining approvals), and that the proposed FSR is well below the maximum permissible level for the site.

The additional height will allow this significant book end development to occur, with resultant social and economic benefits and with no additional environmental consequences.

This submission satisfies the provisions of clause 4.6 of the LEP as it has been demonstrated that:

- Compliance with the building height development standard is both unnecessary and unreasonable in the circumstances of this particular case;
- There are sufficient environmental planning grounds to justify contravening the development standard; and,
- The proposed development, with the varied building height, will be in the public interest because
 - it is consistent with the objectives of the particular standard – both clauses 8.9 and clause 4.3 of the LEP;
 - it is consistent with the B3 *Commercial Core* objectives;
 - it is consistent with the Part 8 Gosford City Centre objectives; and
 - it is consistent with the objectives of Clause 4.6. of the LEP. In particular, it will support the provision of superior amenity and will achieve better outcomes that otherwise would not be achieved by a compliant building.

Taking the above into consideration, it is hoped that proposal will be viewed by Council and the Joint Regional Planning Panel as one which will contribute in a positive way to the much needed reactivation of the Gosford City Centre, in part through its proposed building height.