

## CLAUSE OBJECTIVES AND EXCLUSIONS

### Clause 4.6 – Exceptions to Development Standards

#### Clause 4.6(1) – Clause Objectives

Clause 4.6 provides a mechanism to vary development standards prescribed within Port Stephens Local Environmental Plan (PSLEP) 2013.

The objectives of the clause are as follows:

- a) *To provide an appropriate degree of flexibility applying certain development standards to particular development.*
- b) *To achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

#### Clause 4.6(2) – Exclusions to the operation of clause 4.6

Development consent may be granted even though the development would contravene a development standard imposed by the PSLEP, unless the development standard is expressly excluded under Clause 4.6(8). Clause 7.24 is not excluded from the operation of Clause 4.6, and therefore the proposed variation has been considered below.

## PROPOSED VARIATION REQUEST

The development application includes a written request to vary a development standard(s) in the PSLEP 2013. The written request is made in accordance with Section 35B of the Environmental Planning and Assessment regulation 2021.

The relevant development standard(s) and the extent of the proposed variation(s) is:

Development Standard	Proposed Variation	Extent of Variation (%)
Clause 7.24 of the PLSEP – 5,500m <sup>2</sup> of GFA	439m <sup>2</sup>	7.98%

## ASSESSMENT

### Clause 4.6(3) – Request to vary development standards

#### Clause 4.6(3)(a) – Compliance is unreasonable or unnecessary

Clause 4.6(3)(a) provides that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances.

In *Wehbe v Pittwater Council* (2007) LEC 827 (*Wehbe*), Chief Justice Preston identified five ways in which a request to vary a development standard may be determined to be well founded. These reasons include:

1. *The objectives of the development standard are achieved notwithstanding non-compliance with the standard,*
2. *The underlying objective or purpose of the development standard is not relevant to the development,*
3. *The objective or purpose of the development standard would be defeated or thwarted if compliance was required,*
4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard, and*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable or unnecessary as applied to the land.*

The Clause 4.6 request makes reference the *Wehbe* case, specifically to Reason 1.

The applicant's Clause 4.6 Variation request asserts that compliance with the numerical component of Clause 7.24 is unreasonable or unnecessary as the objectives of the standard are achieved notwithstanding non-compliance with the standard. The objective of Clause 7.24 is *to ensure that the size and range of uses on land to which this clause applies are consistent with the hierarchy of centres within Port Stephens.*

The request notes that the objectives are achieved as:

- The extent of the variation relates only to circulation areas within the building which do not accommodate any commercial uses but rather help to link and provide access to the other tenancies within compact building footprint.
- The extent of the commercial premises on the site responds to the needs for a local shopping centre in the area.
- The ground floor area limit was set under the Planning Proposal to facilitate a viable commercial centre to meet the demand, while remaining subservient to a larger town centre anticipated at Stockton. The exceedance is insignificant to the scale of commercial development on the site and is not likely to detract of the functioning of existing and potential future centres.

### Council Assessment

The objective of Clause 7.24 is *to ensure that the size and range of uses on land to which this clause applies are consistent with the hierarchy of centres within Port Stephens.*

As noted within the applicant's Clause 4.6 variation request, the GFA limit was included as a part of the Planning Proposal to ensure that the commercial development on the subject site would be viable without impacting the potential for a potential larger scale commercial centre in Stockton.

The GFA exceedance is considered to be inconsequential to the provision of a larger commercial centre compared to that of a compliant development as:

- The exceedance is largely symptomatic of the chosen design, being a compact commercial centre with internal connections to each premises and as a result increasing the footprint of the development.
- The actual commercial floor areas within each tenancy do not exceed the floor area limit and therefore, the proposed exceedance is not considered likely to impact on the co-existence of the proposed commercial centre and that of a larger one in Stockton and therefore being consistent with the hierarchy of centres. It should be noted that there has been no Planning Proposal or Development Application lodged, for a larger commercial centre in Stockton.

Based on the above, it is considered that the proposal satisfies clause 4.6(3)(a).

## **Clause 4.6(3)(b) – Sufficient environmental planning grounds**

Clause 4.6(3)(b) provides that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that there are sufficient environmental planning grounds to justify the contravention of the development standard.

The applicant's Clause 4.6 request notes that there is sufficient environmental planning grounds to contravene the development standard as:

- The additional GFA is not significant enough to increase the bulk or scale of the development.
- The additional GFA does not support any commercial activities that would generate traffic or intensify the use of the land resulting in no additional environmental impacts as a result.
- The compact built form has allowed for disturbance of vegetation to be minimised and achieves a better planning outcome.

The applicant contends that the potential environmental planning benefits justify the contravention of the development standard.

### Council Assessment

It is considered that the applicant's assessment of the GFA breach demonstrates that there are sufficient environmental planning grounds to justify the contravention of the development standard. Notwithstanding, the following is also noted:

- The proposed GFA exceedance does not result in a building that is inconsistent with the desired streetscape character compared to that of a compliant development.
- A compliant building in terms of GFA would not result in a materially different scale development and therefore impacts would likely remain the same or similar.



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- The GFA does not result in additional adverse amenity impacts relating to noise, visual impact or overshadowing, rather it is likely to improve a shoppers experience given each premises will be able to be accessed internally.

## CONCLUSION

The proposed development is considered to be consistent with the objectives of Clause 4.6 given it will achieve better outcomes for and from the development in these particular circumstances as the objectives of the height development standard are achieved, notwithstanding the non-compliance and there is sufficient environmental planning grounds to justify the contravention.