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#### CLAUSE 4.6 VARIATION REQUEST

Commercial Premises (Neighbourhood Shopping Centre) including Medical Centre, Signage, Sewer Extension and Demolition

42 Fullerton Cove Road  
Fullerton Cove NSW  
Lot 14 DP 258848

For  
Canaan PD 2 Pty Ltd

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Project	Clause 4.6 variation request Commercial Premises (Neighbourhood Shopping Centre) including Medical Centre, Signage, Sewer Extension and Demolition
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Certification	<i>I hereby certify that this assessment has been prepared in accordance with the requirement of the Environmental Planning &amp; Assessment Act 1979 and its associated Regulations and Guidelines. I certify that to the best of my knowledge the information contained within this report is neither false nor misleading.</i>
Signature	
Reviewer	Geoffrey Rock Director/Development Services Manager
Signature	

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## TABLE OF CONTENTS

1.	INTRODUCTION .....	4
2.	SITE DETAILS AND REZONING BACKGROUND .....	4
3.	PROPOSED DEVELOPMENT .....	5
4.	DEVELOPMENT STANDARD TO BE VARIED .....	8
5.	EXTENT OF NON-COMPLIANCE .....	8
6.	CLAUSE 4.6 ASSESSMENT .....	8
7.	CONCLUSION .....	11

## 1. INTRODUCTION

Monteath & Powys Pty Ltd has been engaged by Canaan PD 2 Pty Ltd to prepare a request pursuant to Clause 4.6 of *Port Stephens Local Environmental Plan 2013* (LEP) to vary the gross floor area limit for commercial uses on Lot 14 DP 258848, 42 Fullerton Cove Road, Fullerton Cove.

A development application for the demolition of the existing structures on the site and construction of a mixed-use building comprising commercial uses, a bottle shop and a medical centre, along with signage and other ancillary works is currently under assessment by Port Stephens Council as a Regionally Significant Development.

Clause 7.24(3) of the LEP limits gross floor area (GFA) of commercial premises and neighbourhood supermarkets on the site to 5500m<sup>2</sup>. In applying this control to the proposal, the circulation spaces within the proposed commercial building were excluded from the GFA calculations. However, in a meeting with the Central Coast Regional Planning Panel (RPP) on 13 November 2024, it was determined that internal circulation areas needed to be included in the GFA calculations which resulted in an exceedance in the GFA specified in clause 7.24(3) by 439m<sup>2</sup> or 7.98%. Accordingly, this clause 4.6 variation request is submitted to seek a variation to the development standard under clause 7.24(3) by demonstrating strict compliance is unreasonable or unnecessary in this circumstance and that there are sufficient environmental planning grounds to justify the deviation.

## 2. SITE DETAILS AND REZONING BACKGROUND

The site is a corner lot at the intersection of Fullerton Cove Road and Nelson Bay Road. It has an area of approximately 6.86 hectares with primary frontage and access to Fullerton Cove Road.

Surrounding uses include residential developments amongst rural and conservation lands. Retirement villages and caravan parks are located to the west and south of the site. On the eastern side of the site, across Nelson Bay Road is the Fern Bay residential development, and the suburb of Stockton is located approximately 8km to the south.

Fern Bay and Fullerton Cove are currently serviced by an IGA supermarket in Stockton, and a general store approximately 14km to the north of the site, in Salt Ash. Both these facilities are within a 15-minute car ride or 30-minute bus ride, though public transport is limited. The Stockton supermarket covers around 600 m<sup>2</sup> mainly catering to local convenience needs, and the Salt Ash store spans about 450m<sup>2</sup>, primarily serving top-up needs. The localities of Stockton, Fern Bay and Fullerton Cove are currently underserved by commercial facilities.

In October 2022, the site was rezoned from RU2 Rural Landscape to E1 Local Centre and C2 Environmental Conservation, to facilitate the development of a local shopping centre through Amendment 41 to the LEP. The rezoning proposal was informed by the commercial lands studies and market analysis undertaken by Hill PDA which identified the need for a local shopping centre to service the current and projected population needs.



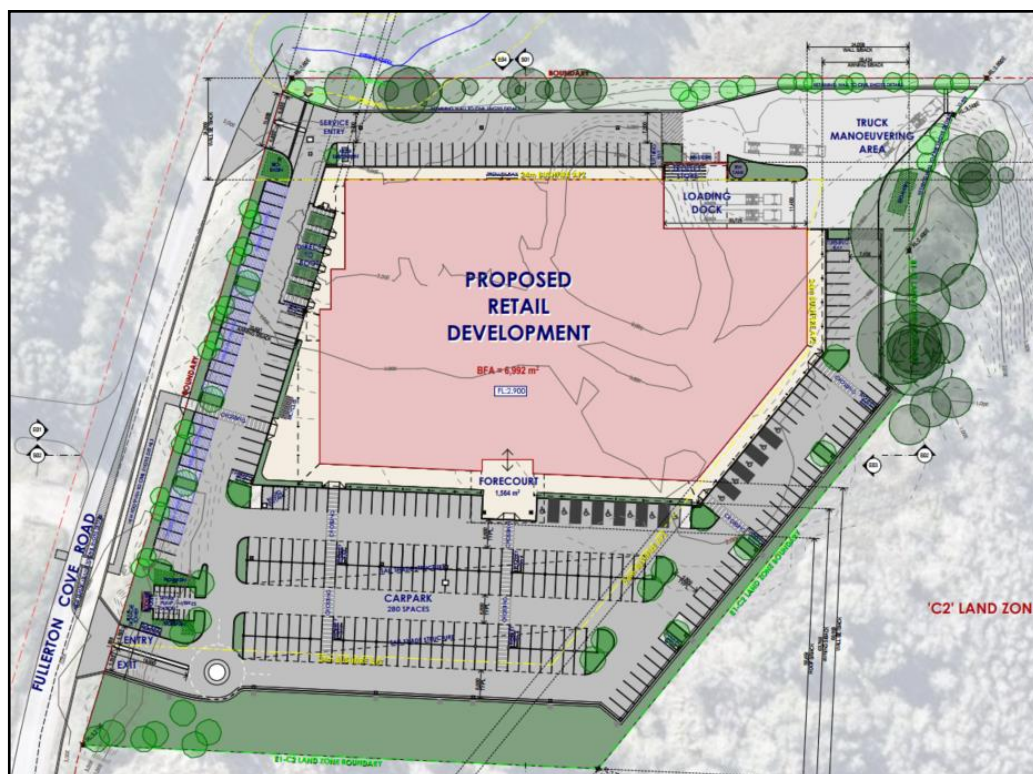
While the site was considered ideal for a local shopping centre, the study also identified Stockton as the preferred location for the development of a town centre in the future. On this basis, a GFA limit was placed on the commercial development on the site to allow a viable local centre that meets the needs of the communities without jeopardising the development of Stockton town centre in the future. The prescribed limit of 5500m<sup>2</sup> was considered appropriate to support a full format supermarket and other commercial uses.

### 3. PROPOSED DEVELOPMENT

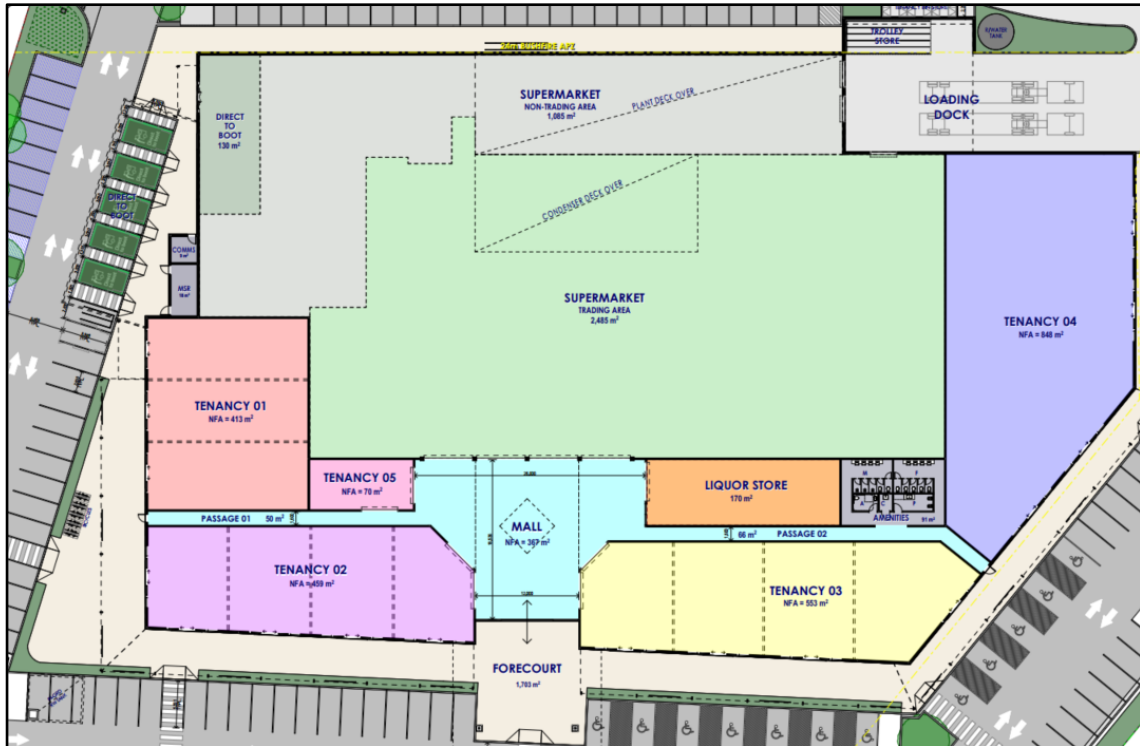
The proposed development involves commercial premises (neighbourhood shopping centre), a medical centre, signage, sewer extension and demolition over the site. The proposed Site Plan and Ground Floor Plan are provided in **Figures 1** and **2**.

As shown in the architectural plans, the building is laid out such that it is surrounded by car parking spaces and accessible from all four sides via a perimeter walkway. The main vehicular entrance to the shopping centre is through a driveway on the south-western side, while a second access point is proposed on the north-west side for service vehicles.

The supermarket, being the anchor tenant, is located towards the rear of the building and accessed via an internal circulation area. A bottle shop and a smaller commercial tenancy are also located internally on either side of the supermarket entrance. The remaining tenancies have external facing shopfronts, with direct access from the walkway around the building.

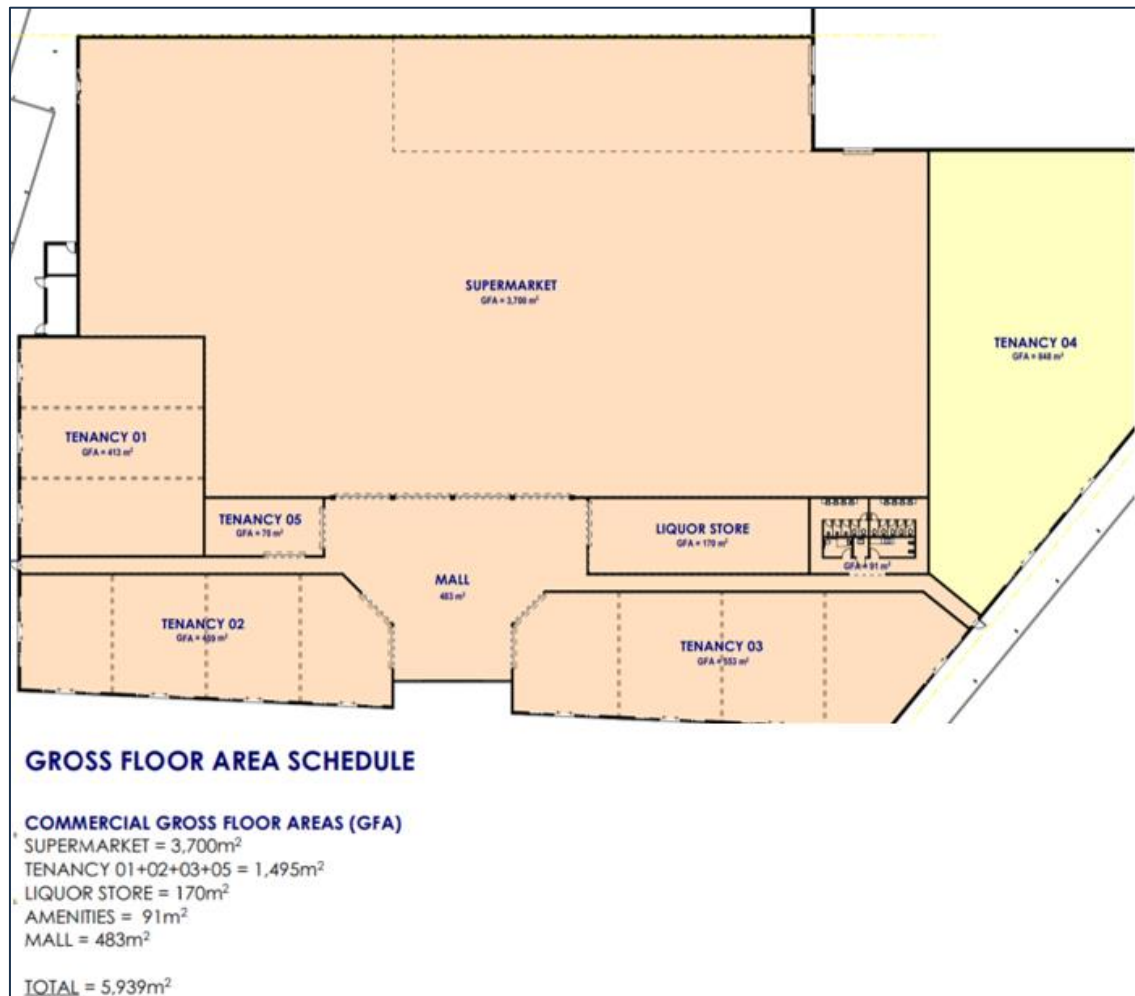


**Figure 1** – Proposed Site Plan (Source: EJE Architecture)



**Figure 2** – Ground Floor Plan (Source: EJE Architecture)

Apart from the medical centre in Tenancy 04, all other tenancies are intended for commercial purposes. The total GFA of the supermarket and the commercial tenancies, including the circulation areas (mall) and amenities is 5939m<sup>2</sup> (refer **Figure 3**) implying an exceedance of 439m<sup>2</sup> above maximum limit of 5500m<sup>2</sup> in clause 7.24(3) of the LEP. This variation is attributed to the internal circulation space (indicated as mall in **Figure 3**) connecting the internal tenancies and the amenities.



**Figure 3** – Gross Floor Area Schedule (Source – EJE Architecture)

#### 4. DEVELOPMENT STANDARD TO BE VARIED

Clause 7.24 of the LEP places restrictions on the maximum gross floor area of commercial premises and neighbourhood supermarkets on the site, as provided below:

*7.24 Maximum gross floor area for commercial premises and neighbourhood supermarkets at Fullerton Cove*

- (1) The objective of this clause 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.*
- (2) This clause applies to Lot 14, DP 258848, 42 Fullerton Cove Road, Fullerton Cove.*
- (3) Development consent must not be granted for development for the purposes of commercial premises or neighbourhood supermarkets on land to which this clause applies unless the consent authority is satisfied the combined gross floor area of all commercial premises and neighbourhood supermarkets on the land will not exceed 5,500m<sup>2</sup>.*

This clause was introduced with the rezoning of the site from RU2 Rural Landscape to E1 Local Centre and C2 Environmental Conservation in October 2022. The prescribed GFA of 5500m<sup>2</sup> was considered adequate to provide a full-line supermarket and other commercial services to the localities of Fullerton Cove, Stockton and Fern Bay where adequate shopping facilities for day-to-day needs are currently not available. This GFA limit is intended to control the scale of commercial development on the site to protect the hierarchy and functioning of centres within the LGA.

#### 5. EXTENT OF NON-COMPLIANCE

The proposed GFA of the supermarket and the commercial tenancies exceed the limit of 5500m<sup>2</sup> by 439m<sup>2</sup> or 7.98%. As mentioned previously, this is due to the proposed building layout with an internal circulation area 483m<sup>2</sup>.

#### 6. CLAUSE 4.6 ASSESSMENT

##### ***Clause 4.6 Exceptions to development standards***

Clause 4.6 of the LEP provides flexibility in applying development standards in particular circumstances where the deviation can be justified, provided the preconditions in clause 4.6(4) are met. This assessment addresses the requirements in clause 4.6 incorporating relevant interpretations from NSW Land and Environment Court (LEC) judgments, where required.



**(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.

The objectives are noted. Clarification on the interpretation of the above objectives is provided in the judgment of *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action). It confirms that these objectives are not preconditions for the approval of a clause 4.6 variation. Rather, they are the objectives of clause 4.6 itself, and not objectives that must be satisfied by a development for the variation to be supported.

**(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.**

Section 1.4 of the *Environmental Planning and Assessment Act 1979* defines 'the cubic content or floor space of a building' as a development standard. Accordingly, the GFA control in 7.24(3) is considered as a development standard rather than a prohibition. Further it is noted that clause 7.24 is not excluded from the operation of clause 4.6, (refer to comments under clause 4.6(8)). Therefore, a consent can be granted despite the contravention of the development standard, provided the requirements set out under clause 4.6(4) are met.

**(4) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—**

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

Note—

*The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).*

The proposal satisfies the above preconditions for justifying the deviation from the development as detailed below:

**Compliance is unreasonable and unnecessary** – The extent of variation in this instance relates to the spaces used for circulation within the building. While these spaces are captured in the GFA definition, they do not accommodate any additional commercial use. As such the scale and hierarchy of the commercial centre permitted on the site are not impacted by the proposed variation.

The proposed design achieves a compact building footprint by clustering the commercial spaces which requires connecting circulation spines. The increase in Gross Floor Area (GFA) is due to the internal circulation areas linking the internal tenancies and the amenities area.

Additionally, the judgment in *Wehbe v Pittwater Council [2007] NSWLEC 827* establishes that a development standard can be considered unreasonable and unnecessary if it can be demonstrated that the objectives of the standard are still met despite non-compliance. This is one of the five 'Wehbe tests,' which is commonly used to satisfy the requirement under clause 4.6(4)a.

In this case, the proposal demonstrates that the objectives of the development standard are met despite the deviation, fulfilling the Wehbe test. The objective of clause 7.24 is to ensure that the size and range of commercial uses and supermarkets on the site are consistent with the hierarchy of centres within Port Stephens LGA. As mentioned previously, this proposal responds to an identified need for a local shopping centre in the area. The existing IGA in Stockton and the general store in Salt Ash are not capable of meeting the current needs of the residents in these localities.

The GFA limit on the site was set such that it facilitates a viable commercial centre to meet the demand, while remaining subservient to the town centre anticipated at Stockton. The proposed exceedance of 7.98% is insignificant to change the scale of commercial activity permitted on the site. The commercial development on the site will serve as a local centre, catering to the essential needs of the local communities without detracting from the functioning of existing and future centres in the LGA. Therefore, it is considered that strict compliance with the development standard is unreasonable and unnecessary in this circumstance.

**Sufficient environmental planning grounds** – The additional Gross Floor Area (GFA) resulting from the non-compliance is not significant enough to increase the scale or bulk of the development. It does not support any additional commercial activities that would generate increased traffic or intensify land use on the site. As a result, no adverse environmental impacts are anticipated on the site or surrounding uses due to the proposed exceedance.

A compact built form incorporating internal circulation areas has been adopted for the design to minimise the extent of disturbance and achieve better planning outcomes on the site.

Despite the non-compliance, the development is consistent with the objectives of the Environmental Planning and Assessment Act 1979, as it facilitates the orderly development of land, offering a high amenity built form while minimising disturbance to surrounding vegetation and conservation areas.

The development aligns with the objectives of the E1 Local Centre zone by providing a range of retail services to meet the community's needs and generating employment opportunities, all without undermining the viability of existing or future centres.

Given no adverse environmental impacts from the proposed variation, there is sufficient environmental planning grounds to support the proposed GFA.

***(8) This clause does not allow development consent to be granted for development that would contravene any of the following—***

- (a) a development standard for complying development,*
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
- (c) clause 5.4,*
  - (caa) clause 5.5,*
  - (ca) clause 6.2.*

Neither this application nor the development standard under clause 7.24 contravenes the provisions of this clause.

## **7. CONCLUSION**

An assessment of the proposed variation to the GFA limit in Clause 7.24(3), in accordance with the requirements under Clause 4.6, has demonstrated that the proposed non-compliance is minimal and does not contravene the objectives of the development standard. Given the minor scale of the exceedance and its negligible impact on building bulk and site activities, no adverse effects are anticipated from the proposed exceedance.

The development aligns with the objectives of the standard to be varied in Clause 7.24(3) and the objectives of the E1 Local Centre zoning of the land. The minor increase in GFA does not alter the scale of commercial development on the site to the extent that it would undermine the function of existing and future centres in the LGA. Moreover, compliance with the GFA does not enhance the environmental, amenity, or strategic planning outcomes for the site. The proposal achieves an orderly development with positive planning outcomes, despite the relatively minor departure from the GFA limit.

For these reasons, the request to vary the development standard is considered well justified, and strict compliance with the development standards would be unreasonable and unnecessary given the circumstances and scale of the proposed deviation.

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