

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 7.22 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 7.22 of the PLSEP – Active street frontage	Proposed communal area on the ground floor	N/A

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 applicant's Clause 4.6 variation request makes reference to Reasons 1 and 2 in the *Wehbe* case.

With regard to Reason 1, the applicant's Clause 4.6 Variation request asserts that compliance with Clause 7.22 is unreasonable or unnecessary as the objectives of the standard are achieved notwithstanding non-compliance with the standard. The objective of Clause 7.22 is *to promote uses that attract pedestrian traffic along certain ground floor street frontages*.

A summary of the applicant's demonstration of compliance with this objective is provided below:

- The development still proposes business and retail premises on the ground floor constituting 50.4% of the ground floor to Stockton Street.
- Due to the slope of the site, the finished ground level in the north-eastern corner of the site is 2.065m above the street level restricting accessibility, refer to **Figure 1** below. Due to these constraints, this portion of the site has been utilised for a communal area, landscaping and service equipment.
- The provision of the commercial premises and associated activation promotes pedestrian traffic despite the non-compliance, meeting the objective of the clause.

As noted above, the applicant also makes reference to Reason 2 in the *Wehbe* case, noting that the underlying objective or purpose of the development standard is not relevant to the development.

A summary of the applicant's demonstration that the underlying objective or purpose of the development standard is not relevant to the development is provided below:

- Due to the slope of the site, the ground floor is not at street level, and therefore it is argued that the underlying objective is not relevant to the north-eastern portion of the building's 'ground floor' that comprises the common room and communal open space area, as it is not in fact located on the ground (i.e, with access to the street frontage).

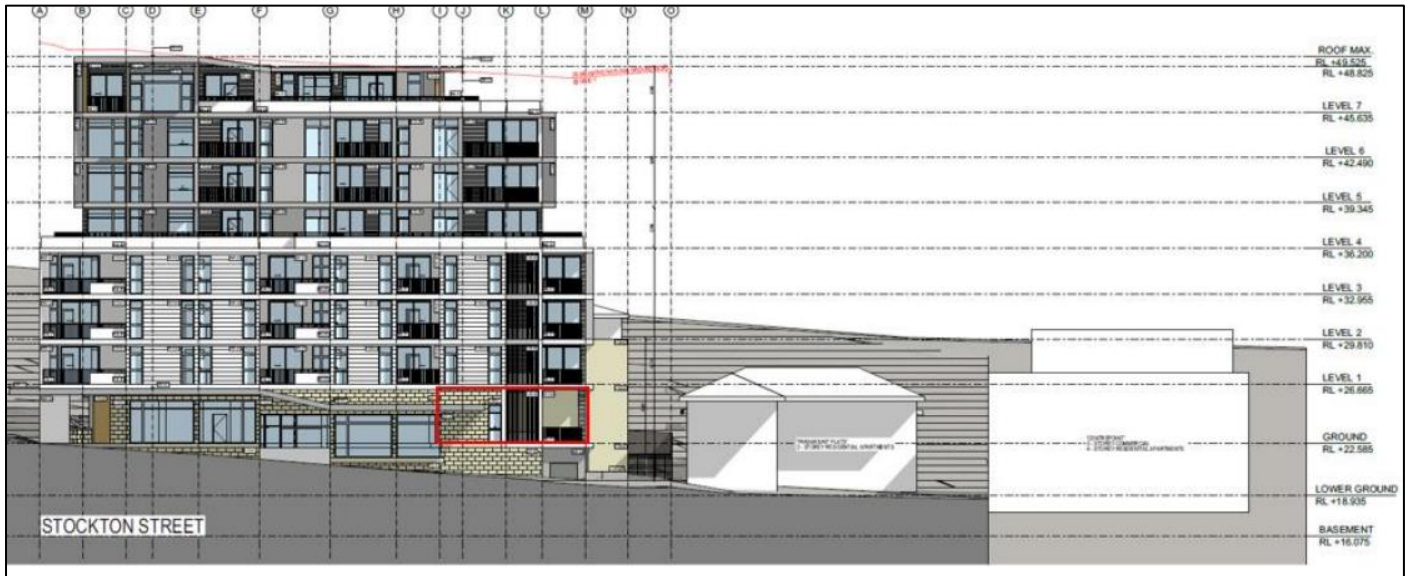


Figure 1. Location of ground floor / area subject to the variation shown in red

Council Assessment

Given the proposed development includes the provision of two business premises on the ground floor fronting Stockton Street, it is considered that the proposal will attract pedestrian traffic along the sites frontage despite the north-eastern corner not being used for a business or retail premises, therefore meeting the objective of the clause. It is also acknowledged that the north-eastern corner of the development is raised from the street level due to the slope of the site and therefore would be unable to provide an active street frontage, even if the space was used for business or retail purposes. The proposed communal open space in this location will also provide some form of activation as well as passive surveillance through use by residents of the development.

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:

- To achieve compliance with the requirements of the clause in placing a retail or business premises on the 'ground floor street frontage' would require the loss of hydrant plant and equipment which are required by relevant construction codes.
- To achieve compliance with the requirements of the clause in placing a retail or business premises on the 'ground floor of the building' in the north-east portion of the building fronting Stockton Street would result in a two-storey premises with a series of steps and ramps, presenting accessibility challenges, and would also impede access to the hydrant

plant and equipment located on the lower ground level which are required by relevant construction codes.

- Presenting an 'active street frontage' for the north-eastern portion of the building fronting Stockton Street would not improve the buildings appropriateness in the context and character of the area.
- Despite the variation, the development is in the public interest as is consistent with the objectives of the zone.

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 proposed variation demonstrates that there are sufficient environmental planning grounds to justify the contravention of the development standard.

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 active street frontage development standard are achieved, notwithstanding the non-compliance and there is sufficient environmental planning grounds to justify the contravention.