

# **VARIATION TO DEVELOPMENT STANDARD (CLAUSE 4.6) REPORT**

**PORT STEPHENS LEP 2013**

**CLAUSE 7.22 – ACTIVE STREET FRONTAGES**

**38 STOCKTON STREET, NELSON BAY, NSW, 2315**

**(781/-/DP802108) AND**

**8A TOMAREE STREET, NELSON BAY, NSW, 2315**

**(782/-/DP802108)**

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## EXECUTIVE SUMMARY

Perception Planning have prepared this submission because of a requested variation to a development standard, at 38 Stockton Street, Nelson Bay, NSW, 2315 (781/-/DP802108) and 8A Tomaree Street, Nelson Bay, NSW, 2315 (782/-/DP802108), referred to as '**the site**' for the purpose of this submission.

The proposed development comprises the construction of a Residential Flat Building (10 storeys comprising 48 units, communal courtyard and pool and basement parking), three commercial premises and associated strata subdivision.

Clause 7.22 of the Port Stephens Local Environmental Plan 2013 ('**PSLEP**') requires the following:

- (a) all premises that face the street on the ground floor of the building will be used for the purposes of business premises or retail premises, and*
- (b) those premises will have active street frontages.*

In response to design and construction requirements on a sloping site, the north-east portion of the ground floor comprises a common room and communal open space area for use by residents of the building. Whilst it is noted that this use is not permitted under the Clause upon strict interpretation of the reference to 'ground floor', it is argued that this portion of 'ground level' as named on the proposed plans is not in fact located on the ground (i.e, with access to the street), due to its finished floor level being 2.065m above the existing ground level.

Clause 4.6 of the PSLEP provides for an appropriate degree of flexibility in applying certain development standards to achieve better planning outcomes. This report demonstrates that the proposed development should not be refused because of a variation to the active street frontage of the ground floor, and inability to provide a business or retail premises for the full extent of Stockton Street due to topographical and design challenges.

It is our view that the overall design of the development is consistent with the intent of the clause and therefore enables the objectives of the PSLEP to be satisfied.

## TERMS AND ABBREVIATIONS

EP&A Act	Environmental Planning & Assessment Act 1979
EPI	Environmental Planning Instrument
DA	Development Application
LGA	Local Government Area
PSLEP	Port Stephens Local Environmental Plan
SEPP	State Environmental Planning Policy
SEE	Statement of Environmental Effects

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# SITE AND PROPOSED DEVELOPMENT

## 1. Describe the site.

The site comprises two parcels of land located at 38 Stockton Street and 8A Tomaree Street, Nelson Bay (**Figure 1**), which is situated within the Port Stephens Local Government Area (LGA). Access to the site is currently maintained from Stockton and Tomaree Street. It is noted that the site is currently used informally as off-street carparking. The site is a corner lot with a combined frontage measuring approximately 98m in length.

**Figure 1:** Locality Plan (WGA, 2025)



The site is located within walking distance to the centre and business precinct, accessible via Stockton Street. The Nelson Bay centre consists of large and smaller speciality shops and facilities, including banks, post office, supermarkets, doctors and health practitioners, convenience stores, restaurants and entertainment.

The site is currently zoned E1 – Local Centre under the PSLEP and is located on the southern fringe of the Nelson Bay Town Centre (classified as the E1 Zone) measuring a combined 2262m<sup>2</sup> in size. The southern boundary of the site directly adjoins land zoned R3 with all other boundaries adjoining similarly zoned E1 land. Adjoining the site includes the following development types:

- existing 4 storey Bayview Apartments to the south,
- existing 2 storey commercial and office building at 35 Stockton Street to the east,
- existing 2 storey residential flat building at 8 Tomaree Street and adjoining similar residential development to the north including 10 Tomaree Street,
- existing 2 storey residential development to the north with multi-storey development located further north incorporating commercial premises and a Woolworths shopping centre including parking.



The site is currently clear of any structures with minimal vegetation located to the west of the site along the boundary. DA16-2015-616-1 resulted in the demolition of the existing service station and associated remediation of the site which has been implemented on site. The site falls diagonally toward the north-eastern boundary from the eastern boundary. It is noted that Tomaree Street naturally inclines to the east with Stockton Street sloping to the Nelson Bay town centre to the north (see **PHOTO 1** below).

**Photo 1:** Looking towards site from corner of Stockton and Tomaree Street



## **2. Describe the proposed development.**

Key features of the proposed development include:

1. Construction of a 10-storey residential flat building including 48 residential units
2. Two business premises with a combined area of 158.5m<sup>2</sup> with frontage to Stockton Street on the ground floor
3. One retail premises measuring 22.4m<sup>2</sup> with frontage to Tomaree Street
4. 83 on-site car parking spaces across three levels, with 59 allocated to residents, 17 allocated to visitors and 6 spaces associated with the ground floor commercial tenancies. One accessible space is also proposed within the commercial parking on the ground level.
5. Strata subdivision of the Units and associated common property
6. Site works, installation of services and landscaping throughout each level.

Clause 7.22 – Active Street Frontages of the PSLEP applies to the site, and development fronting Stockton Street (eastern boundary) only, as shown in **FIGURE 2** below.

**Figure 2:** Active Street frontage map (ePlanning Spatial Viewer, 2025)





# PLANNING INSTRUMENT, DEVELOPMENT STANDARD AND PROPOSED VARIATION

## 3. What is the environmental planning instrument/s you are seeking to vary

Port Stephens Local Environmental Plan 2013

## 4. What is the site's zoning

E1 – Local Centre

## 5. Identify the development standard to be varied

- *What is the development standard being varied?*

Active street frontages

- *What clause is the development standard listed in the EPI?*

Clause 7.22 – Active street frontages

- *What are the objectives of the development standard?*

The objective of clause 7.22 is to promote uses that attract pedestrian traffic along certain ground floor street frontages.

## 6. Identify the type of development standard

The development standard is performance based.

## 7. What is the numeric value of the development standard in the environmental planning instrument?

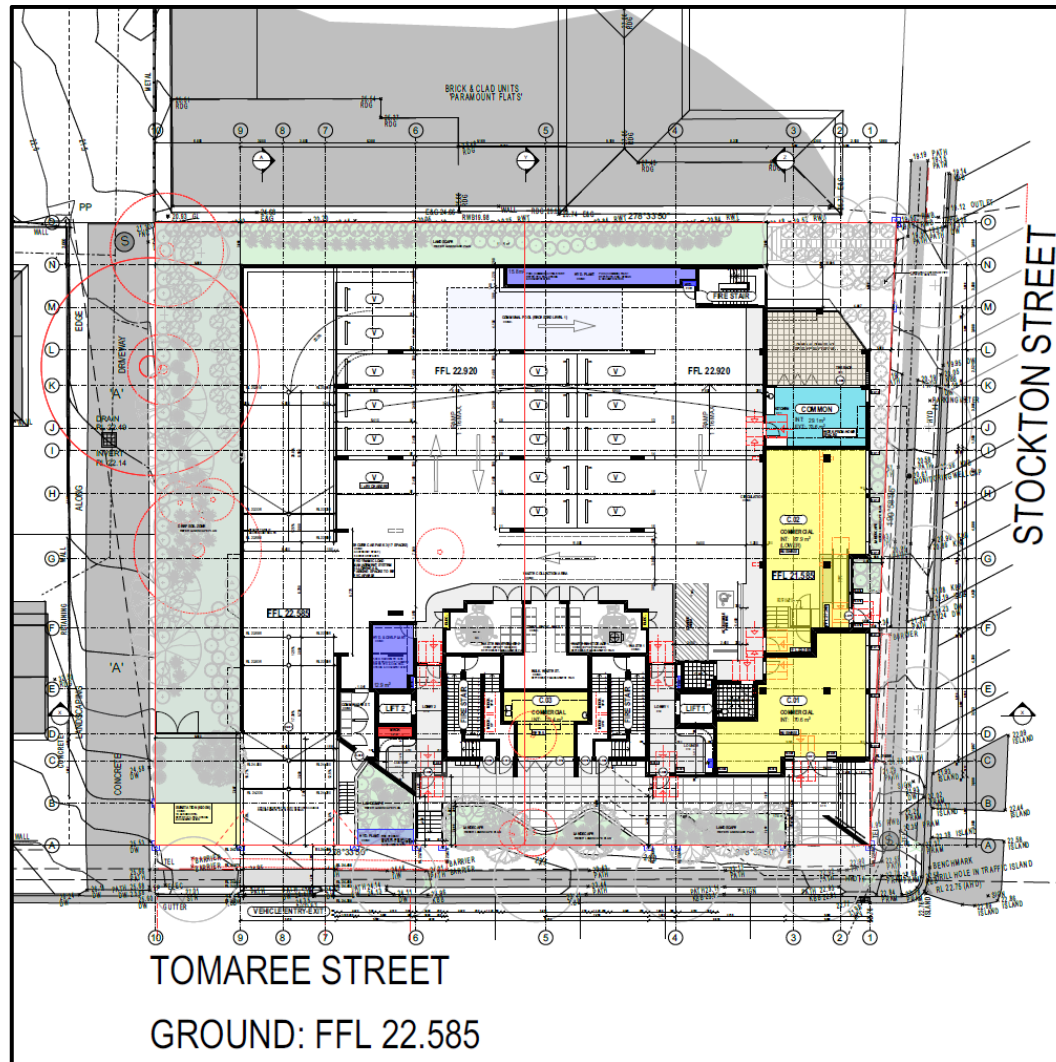
Not applicable – the development standard is non-numeric.

## 8. What is the difference between the existing and proposed numeric values? What is the percentage variation (between the proposal and the environmental planning instrument)?

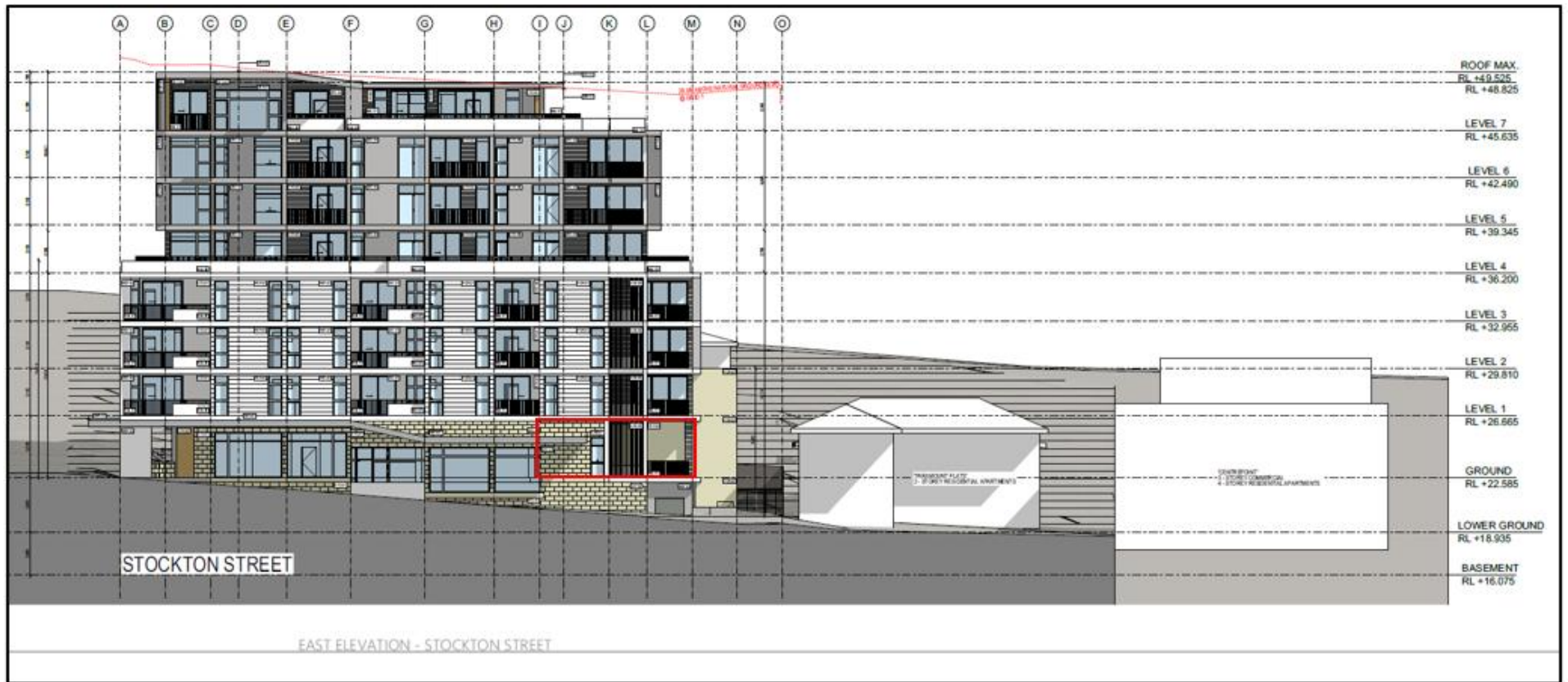
Not applicable – the development standard is non-numeric.

## 9. Visual representation of the proposed variation

**Figure 3:** Ground level of the building (BHS, dwg A-A102, 2025)



**Figure 4:** East Elevation of the building fronting Stockton Street (BHS, dwg: A-A501, 2025)



# JUSTIFICATION FOR THE PROPOSED VARIATION

## 10. How is compliance with the development standard unreasonable or unnecessary in the circumstances of this particular case?

There are five common ways that compliance with a development standard may be demonstrated to be unreasonable or unnecessary (items a to e), in accordance with the Five Part Test (*Wehbe vs Pittwater Council*). The five possible ways and associated assessment are set out in **TABLE 1** below. Two of them are relevant in this case.

**Table 1:** Development standard compliance assessment

<p><i>a) Are the objectives of the development standard achieved notwithstanding the non-compliance?</i></p>
<p>The first way is to demonstrate that the objectives of the development 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.</p> <p>Business and retail premises space constitutes 50.4% of the ground floor frontage (22.205m lineal) to Stockton Street (coloured yellow in <b>FIGURE 3</b> above), accessible from the street frontage. However, along the Stockton Street frontage, the slope of the site results in a finished ground floor level of 2.065m above the street level frontage towards the north-eastern corner (as outlined in <b>Figure 4</b>) therefore restricting accessibility. These remaining areas on the 'ground floor' are utilised for communal space, landscaped areas, fire egress and plant / equipment.</p> <p>The provision of the commercial premises and associated activation promotes pedestrian traffic, achieves the objective of the development standard notwithstanding the non-compliance relating to the areas not specified for business or retail premises on the 'ground floor'.</p>
<p><i>b) Are the underlying objectives or purpose of the development standard not relevant to the development?</i></p>
<p>As detailed above, the site slopes from the southern boundary (Tomaree Street) down the eastern frontage of the building fronting Stockton Street, to the northern boundary of the site.</p> <p>In response to design and construction requirements on a sloping site, as shown in <b>FIGURE 4</b> above, the north-eastern portion of the ground floor comprises a common room and communal open space area (coloured blue in <b>FIGURE 3</b> above) for use by residents of the building. The Lower Ground Floor directly beneath, is directly accessible from Stockton Street. This level incorporates plant and hydraulic equipment and fire evacuation staircase to support the overall use and function of the residential flat building, in accordance with applicable legislation and construction codes. This location is also not the 'ground floor' of the building, due to the slope of the site.</p> <p>The objective of Clause 7.22 is to promote uses that attract pedestrian traffic along certain ground floor street frontages. The underlying objective is not relevant to the north-eastern portion of the building's 'ground floor' that comprises the common room and communal</p>

open space area, as it is not in fact located on the ground (i.e, with access to the street frontage), due to its finished floor level being 2.065m above the existing ground level and street frontage. Pedestrian traffic is therefore not achievable in this location of the building from the street.

Thus, strict compliance with the standard would be unnecessary in the circumstance of this case.

*c) Would the underlying objective or purpose be defeated or thwarted if compliance was required? (Give details if applicable)*

N/A – Not relevant in this case.

*d) Has the development standard been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard?*

N/A – Not relevant in this case.

*e) Is the zoning of the land unreasonable or inappropriate so that the development standard is also unreasonable or unnecessary?*

N/A – Not relevant in this case.

### **11. Are there sufficient environmental planning grounds to justify contravening the development standard?**

Environmental planning grounds that justify contravening the development standard are detailed below.

#### Architectural Design

- To achieve compliance with the requirements of the clause in placing a retail or business premises on the 'ground floor street frontage' (pursuant to 7.22(1)) 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' (pursuant to 7.22(2)), 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, given the remainder of the frontage on the ground floor comprises an active street frontage with the inclusion of three commercial premises.

### Zone objectives and public interest

- The land use zone at the date of this Report is E1 Local Centre. The objectives of the zone include:
  - *To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.*
  - *To encourage investment in local commercial development that generates employment opportunities and economic growth.*
  - *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.*
  - *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*

Despite the variation, the development is in the public interest as is consistent with the above-mentioned objectives, through providing business, retail, community and other non-residential land uses on the ground floor of buildings.

### **12. Is there any other relevant information relating to justifying a variation of the development standard? (If required)**

No further information is applicable.

## **CONCLUSION**

In summary, through this Clause 4.6 analysis it has been found that;

- Strict adherence to the active street frontage standard would be unreasonable and unnecessary in the circumstances of the case, due to the sloping topography of the site and location of ground floor of the building.
- The proposed design is appropriate when considering it in relation to the Stockton Street frontage and attracts pedestrian traffic to the accessible portions of the ground floor of the building from Stockton Street.
- Despite of the variation, the proposed development will achieve the objectives of the development standard and the objectives of the relevant land use zone being E1 – Local Centre.
- The proposed development provides an appropriate response to the context of the site and its location within Nelson Bay, fronting Stockton Street.
- There are negligible environmental or social impacts as a result of the proposed variation.