

Clause 4.6 written request -
Variation to clause 6.7 (Active
street frontage) of Ku-ring-gai
Local Environmental Plan 2015
7-9 Merriwa Street, Gordon

Prepared for
Giles Tribe Architects
November 2024



Mecone acknowledges the Traditional Custodians of the land on where this project is undertaken and across the Mecone offices that this report is prepared, paying respect to the Elders past and present. We recognise the ongoing connection of Aboriginal and Torres Strait Islander peoples to land, waters, and culture.

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Revision	Revision date	Status	Authorised: Name & Signature	
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* This document is for discussion purposes only unless signed and dated by the persons identified. This document has been reviewed by the Project Director.

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1 Introduction

The Development Application (DA) for 7-9 Merriwa Street, Gordon (the site) seeks approval for mixed-use building comprising of 27 residential apartments and three commercial tenancies, civil works (including basement car parking), landscaping and tree removal.

As a result of a design that responds to locality-specific requirements within the Ku-ring-gai Development Control Plan (KDCP) and site topography, the placement of residential accommodation and car parking on the ground floor of the development, creates a technical variation to clause 6.7(3) of the *Ku-ring-gai Local Environmental Plan 2015* (KLEP 2015).

The site is unusual in that it is a 'parallel' allotment with two street frontages, being Merriwa Street to the south and Fitzsimons Lane to the north. Due to the area's topography (which generally slopes downhill in a north-to-south direction), those two road frontages are situated at substantially different levels. To both account for that slope and to address KDCP design requirements for sites within the G4 Precinct within the Gordon Local Centre the design provides a built form that:

- 'Steps' habitable parts of the proposed development (refer to **figure 1**), creating a building form that situates:
 - The ground floor at/close to the levels of the lower Merriwa Street frontage, and,
 - The fourth floor close to the levels of the higher Fitzsimons Lane frontage,
- Places primary active (i.e. commercial) uses on the fourth floor of the building addressing Fitzsimons Lane, and
- A ground floor (addressing Merriwa Street) that (except for common lobbies) contains residential uses and car parking.

It is subsequently the placement of the apartments and parking on the ground floor that creates the proposed variation to clause 6.7(3) of the KLEP 2015.

This written variation request has been prepared in response to a request from Council to justify the contravention of clause 6.7(3) of the KLEP 2015, with regard to the specific circumstances of this proposal. It is submitted that permitting the proposed variation to clause 6.7(3) will allow for development consistent with that sought within the locality and improved planning outcomes at the site.



2 Site description

The subject site comprises of a single allotment that is legally identified as Lot 2 in Deposited Plan 566663, and has an address of 7-9 Merriwa Street, Gordon. The site is located within the Ku-ring-gai Government Area (LGA) and is located within the MU1 Mixed Use zone on the northwest side of the Gordon local centre.

The subject site is a dual frontage 'parallel allotment' that it is located on the north-western side of Merriwa Street and the southern side of Fitzsimon Lane. It is an irregularly shaped allotment with an area of approximately 2,786.6m², which features a large rear-to-front downhill slope with elevational changes between the two road frontages approximately 10.1-11.1 metres. The construction of existing development (undertaken in the mid-1970s) has significantly modified the topography of the site by cutting into the slope to enable the construction of a part five- and-six-storey commercial building with a five-storey semi-basement carpark between the commercial building and the Fitzsimons Lane frontage. Driveways run up both side setbacks from the Merriwa Street frontage to the aforementioned carpark.

The remainder of the site is landscaped, with numerous large (i.e. 20+ metre) trees within the Merriwa Street setback area.

There is a small separate parcel (Lot 1, DP 566663) that does not form part of the subject site but is encompassed by the subject site's Merriwa Street setback; development on that site contains a small substation.

3 Proposed development

Pursuant to Section 4.16 of the *Environmental Planning and Assessment Act 1979* (EP&A Act), consent is sought for the demolition of all existing structures and the construction of an eight storey (plus basement and rooftop terrace) mixed use development comprising of residential apartments and commercial tenancies.

An overview of the works being proposed is as follows:

- demolition of all structures of the site
- the construction of a mixed-use development, which will comprise of a single building and is proposed to contain:
 - 27 residential apartments, including:
 - One x two-bedroom apartment
 - 13 x three-bedroom apartments
 - 13 x four-bedroom apartments
 - three commercial tenancies, which will address the Fitzsimons Lane frontage
 - a rooftop communal open space area
- civil works (including stormwater and services)
- landscape works (including the removal of 12 trees)
- the provision of new onsite utilities and connections
- Strata subdivision.

The use of the proposed commercial tenancies will be subject to separate proposals following approval of this development application.

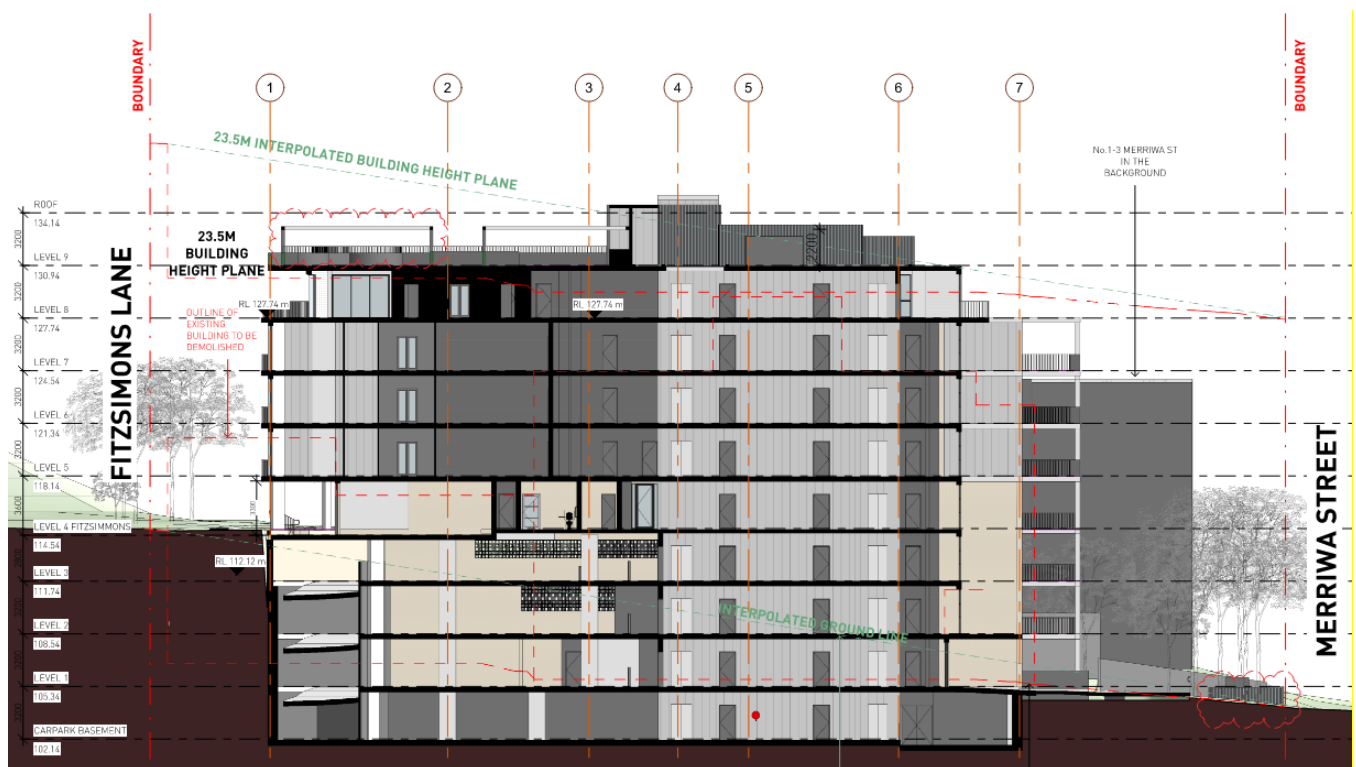


Figure 1: An extract of the proposed section plans, showing the proposed development's relation to the sloped topography (both existing and extrapolated) of the site.

Source: Giles Tribe, 2024

Due to the significantly sloped topography of the site, habitable levels within the building will be stepped (refer to **figure 1** above). The carpark and associated facilities (such as residential storage, etc.) will comprise of both a single level basement below the proposed building, and three carpark levels (located on Levels 1, 2 and 3) that will be located below the northern part of the proposed building.

Due to the substantially different levels to the front and rear of the site and resultant stepping of habitable parts of the building (refer to **figure 1**), street-level parts of the development fronting the public domain are as follows:

- the ground level of the development addressing Merriwa Street will contain residential apartments and a common residential lobby (vehicular access facilities are provided via a ramp down to the proposed basement level)
- the fourth level of the development addressing Fitzsimons Lane will contain the three commercial tenancies, a shared residential/commercial lobby and a common accessway to bicycle storage.

Refer to **figures 2** and **3** below for photomontages of the proposed development, as viewed from the two adjoining road frontages.



Figure 2: A photomontage of the proposed development, as viewed from the southwest within the Merriwa Street frontage.

Source: Luda Studios, 2024



Figure 3: A photomontage of the proposed development, as viewed from the northwest within the Fitzsimons Lane frontage.

Source: Luda Studios, 2024

4 Relevant planning instrument, development standard and proposed variations

4.1 Environmental Planning Instrument to be varied

The Environmental Planning Instrument (EPI) to be varied is the *Ku-ring-gai Local Environmental Plan 2015* (KLEP 2015).

4.2 Site zoning

The site is zoned as an MU1 mixed use zone. Refer to **figure 4** below for an extract of the LEP land zoning map.

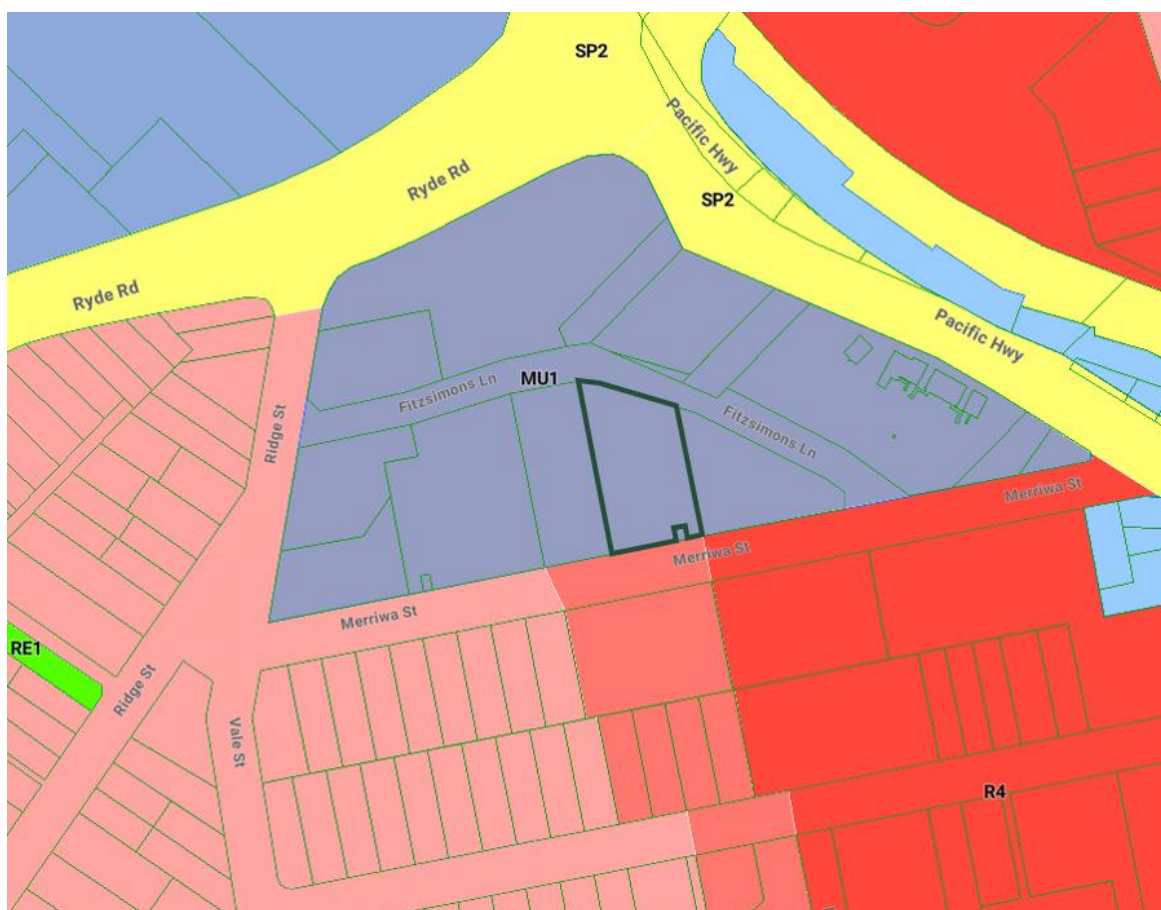


Figure 4: An extract of the KLEP 2015 land zoning map. The site is denoted by the dark green border.
Source: Mecone Mosaic, 2024



4.3 Development standard to be varied

The development standard to be varied is clause 6.7(3) (Active street frontages in Zones E1 and MU1) of the KLEP 2015. For reference, clause 6.7 in its entirety provides the following:

6.7 Active street frontages in Zones E1 and MU1

- (1) The objective of this clause is to promote uses that attract pedestrian traffic along ground floor street frontages in Zone E1 Local Centre or Zone MU1 Mixed Use.*
- (2) This clause applies to land in Zone E1 Local Centre or Zone MU1 Mixed Use.*
- (3) Development consent must not be granted for the erection of a building, or a change of use of a building, on land to which this clause applies unless the consent authority is satisfied that after its erection or change of use the ground floor of the building—*
 - (a) will not be used for the purposes of residential accommodation or a car park or to provide ancillary car parking spaces, and*
 - (b) will consist of design elements that encourage interaction and flow between the inside of the building and the external public areas of the building, and*
 - (c) will be used for purposes that encourage the movement and flow of people between the internal and the external public areas of the building.*
- (4) Subclause (3)(b) does not apply to any part of the building that—*
 - (a) faces a service lane and the consent authority is satisfied does not require active street frontages, or*
 - (b) is used for 1 or more of the following purposes—*
 - (i) a lobby for a commercial, residential, serviced apartment or hotel component of the building,*
 - (ii) access for fire services,*
 - (iii) vehicular access.*

Pursuant to clause 6.7(3), the ground floor of developments within the subject MU1 Mixed Use zone:

- are not permitted to be used for residential accommodation or a carpark that provides ancillary car parking spaces
- will contain elements that encourages interaction and flow between internal areas of the building and external public areas
- will be used for purposes that encourages the movement and flow between internal areas of the building and external public areas.

While exclusions to clause 6.7(3)(b) as prescribed by clause 6.7(4) of the KLEP 2015 are noted, such exclusions only apply to portions of the ground floor that provide a common lobby(s) servicing residential and commercial components of the building. As such, the exclusions pursuant to clause 6.7(4) of the KLEP 2015 do not cover other parts of the ground floor that contains residential accommodation and car parking.

Noting that the proposal does not seek a variation to a numerical requirement, the proposed variation to clause 6.7(3) of the KLEP is therefore considered to be a variation to a non-numerical development standard.

Further, clause 6.7 of the KLEP 2015 is not one that is subject to the provisions of clause 4.6(8) of the KLEP 2015.



4.4 Details of proposed active street frontage variation

As indicated within Section 4.3 above, Clause 6.7(3) provides that the ground floor level of proposed development within the MU1 zone cannot be used for the purpose of:

- residential accommodation
- a car park
- to provide ancillary car parking spaces.

The variation to clause 6.7(3) of the KLEP 2015 is subsequently caused as a result of the proposed development providing the following on the ground floor:

- residential accommodation in the form of two (2) residential apartments
- part of the proposed multi-level carpark.
 - proposed parking facilities are to cater for car parking rates in accordance with the DCP, and as such it is submitted that the ground floor (nor any other part of the building) of the development does not provide for ancillary parking.



5 Assessment

5.1 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

In *Wehbe V Pittwater Council (2007)* 156 LGERA 446 (Wehbe), Preston CJ set out the following 5 different ways in which an objection (variation) may be well founded and under which a proponent could demonstrate that compliance with a development standard is unreasonable or unnecessary as per clause 4.6(3)(a)).

For reference, the five ways in which a variation may be well founded are listed as follows:

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

It is generally understood that Clause 4.6(3) can be satisfied if it is established that a development satisfies one or more of the above scenarios. In this instance, the first and third points have been investigated and is considered to be well founded for the proposed development.

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard

The objective of the active street frontage development standard pursuant to clause 6.7(1) of the KLEP 2015 is provided below, with a response as to how that objective is achieved notwithstanding noncompliance with the standard:

- (a) *The objective of this clause is to promote uses that attract pedestrian traffic along ground floor street frontages in Zone E1 Local Centre or Zone MU1 Mixed Use.*

Mecone comment:

The subject site is located within Precinct G4 of the Gordon Local Centre as prescribed by Section 14D.1 of the KDCP (refer to **figure 5**).

Section 14D.10 (Precinct G4), control 7 of the DCP requires that buildings be designed in accordance with KDCP figure 14D.10-5 (see **figure 6**). For the subject site, this provides that development on the subject site is to provide the following:

- a principal active street frontage¹ to Fitzsimons Lane wherever possible
- a supporting active frontage² on the Merriwa Street frontage.

Further, control 10 within Section 14D.10 of the DCP requires that sites with dual frontages to Merriwa Street and Fitzsimons Lane are to provide vehicular access and servicing from Merriwa Street.

Such requirements are in support of the planned future character of the locality as prescribed by Section 14D.10 of the DCP, specifically that “...*Fitzsimons Lane has potential to become a smaller scale street with active uses, including small retail facilities, cafes or corner stores where they meet the needs of employees and residents in the precinct.*”



Figure 6: Figure 14D.10-5 within Section 14D.1 (Gordon Local Centre Context) from the KDCP. The site is denoted by the dark green border.

Source: Ku-ring-gai Council, 2024

The proposed development has subsequently been designed in accordance with such requirements, with a built form that orients the proposed commercial tenancies so that they address the Fitzsimons Lane frontage (as with other development on other sites with frontages to both Merriwa Street and Fitzsimons Lane), with supporting facilities (such as vehicular access) located on the Merriwa Street frontage.

Despite the proposed noncompliance (i.e. placement of residences and car parking on the ground level), the development will provide for uses that will attract pedestrian traffic within the Fitzsimons Lane frontage. Further, despite being located on Level 4, due to substantial height differences between the two road frontages, the commercial tenancies are likely to be perceived by observers within Fitzsimons Lane as being located at ground level (refer to **figure 3**).

¹ The KDCP defines a 'principal active frontage' as being “...located on primary streets within the centres and supports a wide variety of uses and activities on the ground floor and has a very open and public presence (i.e. windows and doors).”

² The KDCP defines a 'supporting active frontage' as being “...located on primary streets or secondary streets or lanes. This frontage will support active uses at ground level however it is acknowledged that vehicle and service access will be a requirement.”



Further, while the development will provide for residences at ground level, the Merriwa Street frontage of the proposed development will still provide features that include:

- highly visible pedestrian entryways and access pathways from the public domain
- common areas within the Merriwa Road frontage
- balconies forward of the building façade on the Merriwa Street frontage.

In addition to providing active and passive surveillance of the public domain, such features would still attract residential pedestrian activity along the Merriwa Street frontage. Anticipated pedestrian movements to/from the site via the Merriwa Street frontage (and any associated streetscape activation) is also anticipated to occur in a manner that is consistent with the surrounding area, which provides for residential uses that address the Merriwa Street frontage. This includes existing and approved mixed use and residential developments to the west of the site at 11-15 and 17-23 Merriwa Street.

It is therefore submitted that the proposal is consistent with this objective.

3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

While the objective of the standard “...is to promote uses that attract pedestrian traffic along ground floor street frontages...” within the MU1 zone, we note that the objective does not state that it is intended to apply to all street frontages within the MU1 zone. We also note that:

- the planned future character for Precinct G4 (which envisions Fitzsimons Lane having “...potential to become a smaller scale street with active uses, including small retail facilities, cafes or corner stores where they meet the needs of employees and residents in the precinct.”)
- development controls seek (amongst other requirements) for development on sites between Merriwa Street and Fitzsimons Lane to provide:
 - primary active uses within the Fitzsimons Street
 - both larger (i.e. 12 metre) building setbacks to Merriwa Street and smaller (i.e. three-metre) setbacks to Fitzsimons Lane.

Further, we note that mixed use developments approved at 11-15³ and 17-23 Merriwa Street did not include any ground floor commercial uses that address the Merriwa Street frontage.

Noting the above and that the Merriwa Street frontage addresses residential areas (including an R3 medium density residential zone on the southern side of Merriwa Street), we submit that there is an

³ While those approvals were subject to the provisions of the since-repealed *Ku-ring-gal Local Environmental Plan (Local Centres) 2012* (KLEP LC 2012), they were subject to the provisions of clause 6.6 (Ground floor development in business zones), which had similar requirements to those of clause 6.7 of the KLEP 2015. Further, the approval of DA0447/14 at 11-15 Merriwa Street (which like the subject DA was for a single mixed-use building) was subject to a written variation request pursuant to clause 4.6 of the KLEP LC 2012, as (like the subject DA) it provided for residences and car parking on the ground floor that addressed the Merriwa Street frontage.



underlying objective and/or intention for development on sites fronting both Merriwa Street and Fitzsimons Lane to provide:

- Higher levels of streetscape activation within Fitzsimons Lane, and
- Greater setbacks and access driveways within Merriwa Street, both of which (in combination with other requirements such as deep soil and landscape space) are generally not conducive to the creation of highly active frontages, since any such uses to be incorporated of the building would be set well back from the road frontage behind landscaped areas, thereby reducing their visibility and ability to activate the streetscape.

We therefore submit that to require compliance with clause 6.7(3) of the KLEP 2015 would not facilitate suitable streetscape activation both on this particular site and within MU1 zoned areas between Merriwa Street and Fitzsimons Lane. Compliance with the clause:

- would subsequently defeat or thwart the underlying objective of the clause, which is to facilitate primary active uses within Fitzsimons Lane
- is therefore unreasonable in the circumstances of this particular proposal.

5.2 Clause 4.6(3)(b) –Environmental planning grounds to justify contravention of the development standard

In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 the Court found at [23]-[25] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*
25. *The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

In this regard, we submit that there are numerous and substantive environmental planning grounds to justify the proposed contraventions of the active building frontage development standard, and are detailed below.



Responsiveness to site conditions and inability of the site and locality to provide an active street frontage within Merriwa Street

As detailed within Section 5.1 of this written request (see above), the design of the building and the subsequent placement of:

- residential and carpark uses on the ground floor
- active commercial uses on the fourth floor

are responses to both locality/site specific development controls applying to the site and the somewhat unique topographical conditions that affect the site.

DCP controls applying to Precinct G4 and more specifically sites with frontages to both Merriwa Street and Fitzsimons Lane require that primary active uses like those proposed be located so that they front Fitzsimons Lane. As the levels of the Fitzsimons Lane frontage are significantly (i.e. approximately 10-11 metres) higher than the Merriwa Street frontage, it is not possible however to locate such primary uses on the ground floor of the proposed development, thus their siting on the building's fourth floor.

While locality-specific development controls do not prohibit primary use (i.e. commercial) activities on the Merriwa Street frontage, they do establish much larger (i.e. 12 metre) setback requirements than the minimum three-metre setback requirements applying to Fitzsimons Lane. Any non-residential uses fronting Merriwa Street would therefore be required to be set back significantly from that road frontage and would be at least partially obscured by landscaping; such outcomes are not conducive to activating that streetscape. Further, due to the:

- proposed length of the building (a result of the site's dimensions and topography)
- sloped and heavily modified topography of the site

the placement of land uses (other than residential areas and car parking) further to the north on the ground floor would result in such uses being:

- recessed behind the Merriwa Street frontage
- subject to perpetual mid-winter overshadowing and very poor amenity.

In addition to the ground floor being unable to provide attractive operating environments for other land uses, surrounding development (both existing and as approved) that addresses Merriwa Street is of a predominately residential nature. Such an environment (which is unlikely to change in the foreseeable future) is unlikely to promote significant amounts of passing pedestrian traffic to support active commercial activities addressing that frontage.

With regard to the above, it is submitted that the current design (which situates primary active uses on the fourth floor (rather than the ground floor), provides for better street activation outcomes than a design undertaken in accordance with clause 6.7 of the KLEP 2015.

Consistency with intended centre character

As detailed above, intended character outcomes for Precinct G4 within the Gordon Local Centre include the intention for Fitzsimons Lane to become a smaller scale street with active uses, including small retail facilities, cafes or corner stores where they meet the needs of employees and residents in the precinct. Development of sites with multiple road frontages (including those between Merriwa Street and



Fitzsimons Lane) have facilitated such outcomes, noting that approvals at 11-15 Merriwa Street and 17-23 Merriwa Street have provided for:

- commercial land-use activities at/close to street level along the Fitzsimons Lane frontage
- residential accommodation fronting the Merriwa Street frontage.

The proposed development will provide for streetscape activation activities that are both consistent with the intended character outcomes of the precinct and earlier approvals on those aforementioned sites⁴. As such, approval of the variation that is the subject of this written request will not establish a development precedent within the area.

No significant or unreasonable impacts on the public domain or surrounding sites

The proposed variation relates primarily to the use of the ground floor of the proposed development. Given that the proposed variation would not fundamentally alter the appearance or form of the proposed development, it will not:

- give rise to incongruent or adverse streetscape impacts
- affect compliance with principal development standards (i.e. building height, Floor Space Ratio (FSR), etc.), and as such will not adversely affect surrounding areas, in terms of overshadowing, visual privacy and the like.

Further, it is submitted that if the proposed variation were supported, the development's Merriwa Street frontage will (except for common access areas) comprise entirely of residential apartments. Such a land use will be consistent with existing and approved development frontages on surrounding sites, which except for 1 Merriwa Street, comprises almost entirely of residences. Support for the proposed variation will therefore not give rise to adverse environmental impacts (such as noise) following the occupation of the building.

For the reasons outlined above, it is evident that there are sufficient substantive environmental planning grounds which justify contravening the active building frontage development standard.

⁴ Development on the site at 1 Merriwa Street does not contain a mixed-use premises, as development on that site comprises of a commercial premises (an office building) that was constructed in 2006-2007.



6 Conclusion

Having regard to the provisions within both clauses 6.7(3) and 4.6 of the KLEP 2015, we have formed the considered opinion that:

- the contextually responsive development is consistent with the objective of active street frontage development standard pursuant to clause 6.7(1) of the KLEP 2015
- the application does not propose a variation to a clause that is subject to the application of clause 4.6(8) of the KLEP 2015
- there are sufficient environmental planning grounds to justify contravening the development standard
- That having regard to a) and b), compliance with the active street frontage development standard is unreasonable or unnecessary in the circumstances of the case.

Pursuant to clause 4.6(3) of the KLEP 2015, the consent authority can therefore be satisfied that the applicant's written request has adequately 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.*

In conclusion, we believe that despite the proposed variation, the proposed contravention of clause 6.7(3) of the KLEP 2015 will provide for a superior planning and design outcome (particularly in the context of the local area) when compared to alternative and more compliant options. Further, we have formed the considered opinion that there is no statutory or environmental planning impediment to the approval of residential accommodation and car parking on the proposed building's ground level in this particular instance.

As this written request has satisfied statutory requirements pursuant to clause 4.6 of the KLEP 2015, the proposed variation to the active street frontage development standard can be approved.



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