

Clause 4.6 variation request relating to active street frontage

Gosford Alive Concept / Stage 1 Development Application (SSD_9813)

Prepared for
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1 Introduction

This Clause 4.6 Variation Request supports a State significant concept development application (DA) submitted to the Department of Planning, Industry and Environment (DPIE) for the Gosford Alive development located at 136-148 Donnison Street, Gosford.

This report has been prepared to request a variation to the active frontages standard in clause 8.6 of State Environmental Planning Policy (Gosford City Centre) 2018 (Gosford City Centre SEPP).

The request is being made pursuant to clause 4.6 of Gosford City Centre SEPP.

2 Clause 4.6 Exceptions to development standards

Clause 4.6 of the Gosford City Centre SEPP aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development. The clause enables a variation to the Active Street Frontage standard to be approved upon consideration of a written request from the applicant that justifies the contravention in accordance with the particulars of Clause 4.6.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- that the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case
- that the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard
- that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

The consent authority's satisfaction as to those matters must be informed by the objectives, which are:

1. to provide flexibility in the application of the relevant control, and
2. to achieve better outcomes for and from development.

The Land and Environment Court has established questions to be addressed in variations to developments standards lodged under State Environmental Planning Policy 1 – Development Standards (**SEPP 1**) through the judgment of Justice Lloyd, in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89. The test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827 (**Wehbe**).

An additional principle was established in the decision by Commissioner Pearson in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (**Four2Five**) which was upheld by Pain J on appeal. A further recent judgement by Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 clarified the correct approach to Clause 4.6 variation requests, including that:

"The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard." [88]

Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court.

Clause 4.6 of the Gosford City Centre SEPP reads:

Clause 4.6 Exceptions to development standards

(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.*

(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.*

(3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*

(a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

(b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

(4) *Development consent must not be granted for development that contravenes a development standard unless:*

(a) *the consent authority is satisfied that:*

(i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

(ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

(b) *the concurrence of the Director-General has been obtained.*

(5) *In deciding whether to grant concurrence, the Director-General must consider:*

(a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*

(b) *the public benefit of maintaining the development standard, and*

(c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

3 Development standard to be varied

The standard in Gosford City Centre SEPP to be varied is clause 8.6 (Active street frontages), which states:

- (1) Development consent must not be granted to the erection of a building, or the change of use of a building, on land identified as "Active street frontage" on the Active Street Frontages Map unless the consent authority is satisfied that the building will have an active street frontage after its erection or change of use.
- (2) Despite subclause (1), an active street frontage is not required for any part of a building that is used for any of the following:
 - a. entrances and lobbies (including as part of mixed use development),
 - b. access for fire services,
 - c. access for a back street or service lane,
 - d. vehicular access.

As identified on the Active Street Frontages Map (extract at Figure 1 below), the site is required to have an active frontage along Henry Parry Drive and Donnison Street.

Notably, the SEPP does not define "active street frontage". In general however, the term is used to describe a frontage featuring a mix of commercial uses and (if relevant) residential entries. Under the Gosford City Centre SEPP, the standard simply requires that the consent authority be "*satisfied that the building will have an active street frontage*". The Gosford City Centre DCP 2018 (GCCDCP 2018) does however provide more guidance regarding the application of active street frontages within the Gosford City Centre.

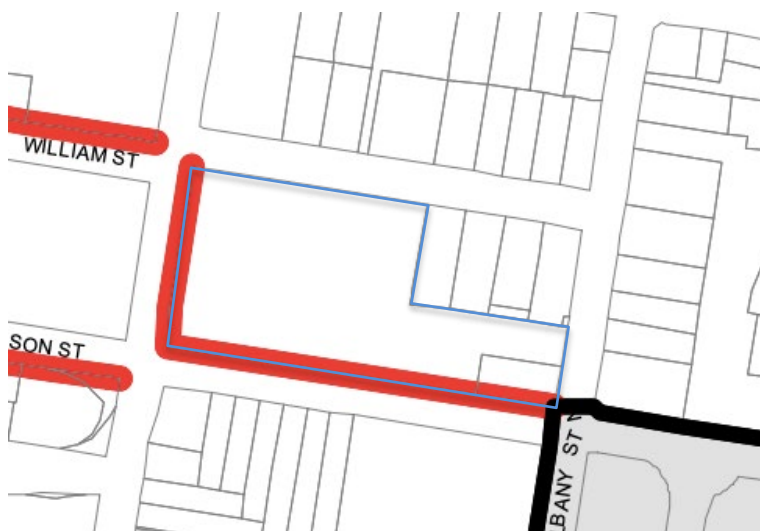


Figure 1 – Active Street Frontages Map (subject site outlined in blue)
Source: Gosford City Centre SEPP

4 Extent of variation to the development standard

This chapter provides a numerical assessment of the extent to which clause 8.6 is varied.

For the purposes of this numerical assessment, it has been taken that the wording of the clause intends for the entirety of the Donnison Street frontage to be 'activated', excluding those uses specified in subclause 2 (entrances and lobbies, access for fire services, access for a back street or service lane, and vehicular access).

The plans for approval at **Appendix 1** of the EIS indicate potential for full activation along Henry Parry Drive and partial activation along Donnison Street. In particular, the 195m long frontage to Donnison Street provides approximately:

- 145m of 'active' space or uses that are otherwise explicitly not required to be activated as per clause 8.6(2), comprising:
 - 65m of commercial/retail space at the Henry Parry Drive and Albany Street North ends of the street
 - 24m of vehicular access inclusive of the 18m access to the central lane (north-south through site link)
 - 56m of residential entrances and lobbies.
- 50m of carpark frontage.

In this sense, only the 50m carpark frontage is technically non-compliant with the clause. This represents just over 25% of the 195m long frontage length and indicates that the vast majority of the Donnison Street frontage (75%) is compliant with the clause.

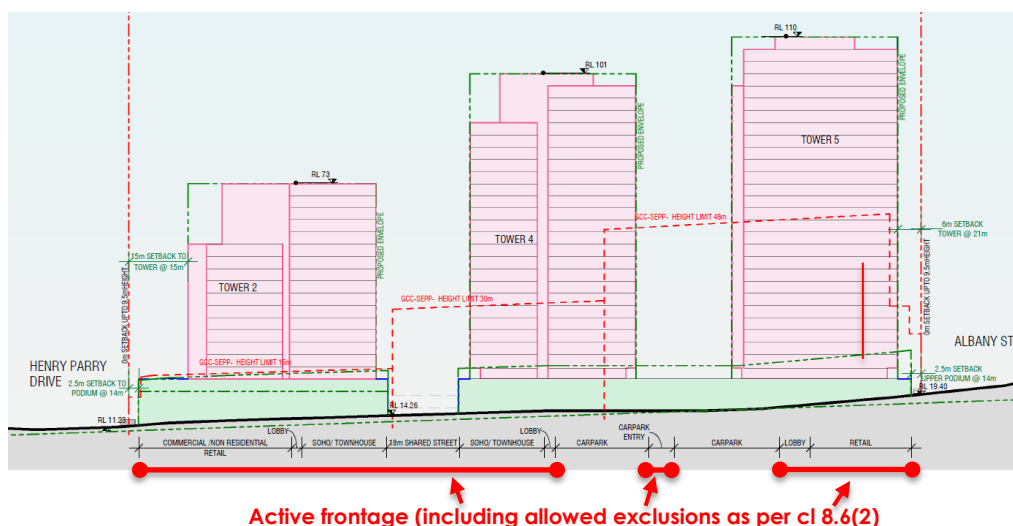


Figure 2 – Level 5 floor plan extract from example scheme
Source: Buchan

5 Assessment

Clause 4.6(3)(a) – Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case

Compliance with the active street frontage standard is considered unreasonable and unnecessary given the following circumstances of this case:

- The proposal provides for a well-activated street frontage despite not technically achieving active uses along the entire frontage. Commercial uses and residential entries are provided along most of the frontage, and active space is interspersed with the inactive resulting in both ends of the street and the middle of the development being activated.

Coupled with the through-site link, this ensures pedestrian activity and activation along the entirety of Donnison Street despite the portions of car parking facade.

- The site's Donnison Street frontage is quite long at approximately 190m, and it would be unreasonable to require this single development to activate the entirety of this frontage, nor the entirety of the street in general to be activated.

In particular, Donnison Street has no major trip generator or attractor at its eastern end, and as such is not a pedestrian thoroughfare. This is not anticipated to change in the future given the limited availability of major development sites on Albany Street N, which in itself effectively marks the end of the Gosford City Centre and the beginning of Rumbalara Reserve.

As such, a long stretch of commercial/retail uses along Donnison Street is not feasible and may detract from the overall vision for the Gosford City Centre if enforcement resulted in a number of vacant tenancies.

- The proposed aboveground car parking, which is the primary cause of the variation to the standard, is a practical response to geotechnical constraints.

The project's geotechnical assessment (at Appendix 7 of the EIS package) identified a relatively shallow groundwater table at around +2m AHD, which has significant constraints for deep excavations. A general desire to provide active frontages in line with the intent of the control has been balanced against these constraints.

- The active frontage is consistent with the active frontage controls in the Gosford City Centre DCP (section 5.2.3(1)), which identifies Henry Parry Drive as the "primary active street frontage" (see Figure 3 below).

The DCP acknowledges that Henry Parry Drive should be activated by retail and commercial uses, whilst Donnison Street should be activated by "*multiple lobby and residential entries*" (which is broadly achieved by the proposal).

- The variation would not change the overall nature of the development as a residential-dominant mixed use development with supplementary retail.



Figure 3 – GCCDCP 2018 Streetscape summary including active street frontages
Source: GCCDCP 2018

Clause 4.6(3)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

There are sufficient environmental planning grounds for contravening the standard as outlined below:

- The areas of non-compliance are a result of the physical characteristics of the site, as geotechnical conditions have resulted in a need to raise the car parking above ground.
As discussed in the section above, the shallow depth of the groundwater table has significant constraints for deep excavations and has led to an intent to limit the extent of excavation undertaken at this site.
- The extent of activation provided is also a result of the location of the site. It would not be economical to activate the entirety of this façade through more 'typical' activation such as retail, as there is limited foot traffic in this portion of the Gosford City Centre as discussed in the section above.
- The inactive portion of the frontage would not necessarily cause any significant adverse visual impacts. At the detailed DA stage, the car park façade can be treated with screening or other design elements in order to minimise visual impacts on the public domain.

Clause 4.6(4)(a)(ii) - Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out?

In the court case *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Commissioner Pearson stipulates that the consent authority is to be satisfied the proposed development will be in the public interest because it is consistent with:

- a) *the objectives of the particular standard, and*
- b) *the objectives for development within the zone in which the development is proposed to be carried out.*

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, the Chief Judge observed in his judgement at [39] that 4.6(4) of the Standard instrument does not require the consent authority to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly be satisfied that the applicant's written request has adequately addressed those matters.

Consistency with development standard objectives

The particular development standard in this case is clause 8.6 of Gosford City Centre SEPP (Active frontages). There are no objectives for this clause, and therefore it is not possible to provide an assessment on this matter. However, it is assumed that the objectives of this standard would align with those for the "Active street frontages and street address" controls of the GCCDCP 2018 (section 5.2.3). These have been assessed below.

| Objective | Consistency |
|---|--|
| A. Ensure frontages are pedestrian oriented and of high quality design to add vitality to streets. | The proposal in whole provides for appropriately pedestrian-oriented frontages. High quality landscaping outcomes, as detailed under Appendix 2 of the EIS Package, will further add to the vitality of the surrounding streets of the development. |
| B. Provide continuity of shops along streets and lanes within the City Centre and other identified locations. | A continuity of shops/commercial premises is provided along Henry Parry Drive, as deemed appropriate given the prominence of this street and its identification as being the 'primary active frontage' within the GCCDCP 2018. |
| C. To promote pedestrian activity and the vibrancy of Gosford. | The development as a whole promotes pedestrian activity and a vibrant, active locality. This will be achieved through a combination of ground floor lobbies, entrances, commercial and retail premises, landscaping, and a shared through site link. |
| D. To provide excellent pedestrian experience in the public domain. | Through high quality design and landscaping, the proposal provides for an overall excellent pedestrian experience along Henry Parry Drive and Donnison Street. |

| Objective | Consistency |
|---|--|
| E. To promote active and safe streets in the Gosford City Centre. | The development's provision of new residential premises coupled with ground floor retail/commercial floorspace will increase the number of pedestrians on surrounding streets as well as visibility of surrounding activity. |
| F. To provide buildings with clear address and direct access to the street. | The development as a whole will have a clear address and provide for street activation through the provision of multiple ground floor lobbies and entrances. |
| G. To promote commercial and retail uses in Gosford. | The proposal provides for an appropriate provision of commercial floorspace in the context of its location within the Gosford CBD. |

Consistency with B4 Mixed Use zone objectives

The proposed development's consistency with the B4 Mixed Use zone objectives is outlined in the table below.

| Objective | Consistency |
|--|--|
| To provide a mixture of compatible land uses. | The proposal provides for a compatible mixture of compatible uses including residential and commercial (with potential for retail, business or office premises). |
| To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling. | The proposal provides for residential and commercial uses in an accessible location—in the Gosford City Centre approximately 600m from Gosford Station. |
| To encourage a diverse and compatible range of activities, including commercial and retail development, cultural and entertainment facilities, tourism, leisure and recreation facilities, social, education and health services and higher density residential development. | The proposal provides for commercial and high density development that will contribute to a diverse range of activity in the city centre. |
| To allow development in Point Frederick to take advantage of and retain view corridors while avoiding a continuous built edge along the waterfront. | NA—The development is not located at Point Frederick. |
| To create opportunities to improve the public domain and pedestrian links of Gosford City Centre. | The proposal provides significant opportunity for enhancement of the public domain through provision of a publicly accessible north-south pedestrian link and significant street activation along Henry Parry Drive and Donnison Street. |

| Objective | Consistency |
|--|--|
| To enliven the Gosford waterfront by allowing a wide range of commercial, retail and residential activities immediately adjacent to it and increase opportunities for more interaction between public and private domains. | NA—The proposal is not located along the waterfront. |
| To protect and enhance the scenic qualities and character of Gosford City Centre. | The proposal has been designed to sit comfortably within the topographical context and maintain key view corridors to Rumbalara ridgeline. |

6 Matters of significance for State or regional environmental planning

The variations to the active street frontage standard do not raise any matter of State or regional planning significance.

7 Conclusion

This written request justifies the proposed active frontage variation in the terms required under clause 4.6 of Gosford City Centre SEPP and demonstrates that the proposal to provide partial activation of Donnison Street is acceptable. In summary, the variation is justified in that:

- strict compliance with the standard is unreasonable and unnecessary
- there are sufficient environmental planning grounds for the contravention
- it is in the public interest because it is consistent with the objectives the B4 Mixed Use zone and provides for significant activation of the Donnison Street frontage despite technical non-compliance with the standard
- there are no matters of State or regional planning significance and no notable public benefits in maintaining the active frontage standard in this case.