

Additional Item



Item No: 2.10
Title: 82A Review of DA/47050/2015 - 49 Masons Road, Point Frederick
Department: Environment and Planning

23 November 2016 Ordinary Council Meeting

D12533857

Summary:

An application under s. 82A of the Environmental Planning and Assessment Act 1979 (EP&A Act) has been received for a review Council's refusal of Development Application 47050/2015 for a residential flat building and demolition of existing structures.

This report recommends that Council determine that review by confirming the refusal of DA/47050/2015.

| | |
|------------------------|--|
| Applicant | Silver Stallion Pty Ltd |
| Owner | Silver Stallion Pty Ltd |
| Application Number | 47050/2015 |
| Description of Land | LOT: 4 DP: 327014, 49 Masons Parade Point Frederick |
| Proposed Development | 82A Residential Flat Building & Demolition of Existing Structures |
| Zoning | B4 Mixed Use. |
| Site Area | 1012m ² |
| Relevant Legislation | <ol style="list-style-type: none">1. Environmental Planning & Assessment Act 1979 - Section 79C2. Gosford Local Environmental Plan 2014 (GLEP 2014)3. Gosford Development Control Plan 2013 (DCP 2013)4. State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development5. State Environmental Planning Policy (BASIX) |
| Existing Use | Former Chinese restaurant |
| Value of Works | \$9,049,480.00 |
| Integrated development | No |

Recommendation:

- 1 That Council refuse the application under s. 82A of the Environmental Planning and Assessment Act 1979 for review of the determination of Development Application No 47050/2015 for a Residential Flat Building & Demolition of Existing Structures on Lot 4 DP 327014, 49 Masons Parade Point Frederick, for the following reasons:**

- a) *The proposed development exceeds the maximum floor space ratio for the site under clause 8.3 of Gosford Local Environmental Plan 2014.*
- b) *The submission under clause 4.6 of Gosford Local Environmental Plan 2014 is not well founded, with adherence to the development standard is both reasonable and necessary in this case.*
- c) *The proposed development does not meet the Design Excellence requirements of clause 8.5 of Gosford Local Environmental Plan 2014;*
- d) *The proposal development does not comply with the side setbacks advised under Gosford Development Control Plan 2013*
- e) *The proposal does not provide adequate car parking on site in accordance with the requirements of Gosford Development Control Plan 2013, Roads Maritime Services standards, or AS 2890.1:2004 Off Street Car Parking.*
- f) *The proposed development does not comply with State Environmental Planning Policy 65 in relation to side setbacks, building separation and overshadowing of the adjoining properties;*
- g) *The proposed development will likely have an adverse impact on the future development potential of the northern adjoining property;*
- h) *The proposed development will have an adverse impact on the streetscape in the area;*
- i) *The proposed development does not make appropriate provision for waste management and collection as recommended in the Gosford Development Control Plan 2013.*

2 That Council notify those who made written submissions of Council's decision.

Background

On 11 March 2016 the former Gosford City Council resolved to refuse Development Application number 47050/2015, which proposed the demolition of existing structures and the erection of a residential flat building on the site. The former Council gave the following reasons for that refusal:

- 1 The proposal exceeds the maximum height limit for the site under Gosford LEP 2014,
- 2 The proposal does not meet the Design Excellence requirements of clause 8.5 of Gosford DCP 2014,
- 3 The proposal does not comply with the side setback, rear setback or site coverage requirements of Gosford DCP 2013,
- 4 The proposal does not comply with SEPP 65 in relation to building separation and overshadowing of the adjoining properties,
- 5 The proposal will have an adverse overshadowing impact on the adjoining properties located to the south,
- 6 The proposal will have an adverse impact on the privacy of adjoining properties,

- 7 The proposal will have an adverse impact on the amenity and outlook of adjoining properties,
- 8 The proposal is inconsistent with the streetscape and future development in the area,
- 9 The proposal will, as a result of non-compliance with planning controls, have an adverse impact on views from adjoining properties,
- 10 The proposal has not satisfactorily addressed the requirements for waste management and collection in accordance with Gosford DCP 2013, and
- 11 Approval of the proposal is not in the public interest.

That refusal was in respect to proposed development that consisted of the following elements:

- A total of 23 units,
- 4 storeys at the front of the site in Building A with 6 Units (1 x 1 bedroom, 4 x 2 bedroom, and 1 x 3 bedroom),
- 6 stories at the rear of the site in building B with 17 units (2 x 1 bedroom, and 15 x 2 bedroom),
- 2 basement levels of car parking containing 28 car spaces (including 4 disabled spaces), 12 bicycle spaces, and nil motorcycle spaces,
- A height of 20.2 m (0.7m or 3.5% above height limit),
- A Floor Space Ratio (FSR) of 2.0:1,
- A street setback of 2.5m,
- Nil side setbacks,
- A rear setback of 6m-6.3m,
- 6% deep soil planting,
- Access to the basement car parking levels via a single car lift.



Figure 1: Previous design under 47050/2015 (refused on 11 March 2016)

The applicant commenced appeal proceedings in the Land and Environment Court against the refusal of DA/47050/2015. On 8 September 2016, the applicant also lodged an application under section 82A of the EP&A Act seeking a review of the former Council's refusal of the proposal. On 12 October 2016, the applicant lodged amended plans and a submission under clause 4.6 of Gosford Local Environmental Plan 2014 to the variation to FSR.

The Site

The site is on the eastern side of Masons Parade, Point Frederick, and contains a former Chinese restaurant building. The site has an area of 1,012m² and street frontage of 14.986m to Masons Parade. There is a large camphor laurel tree on the site which would be removed as part of the proposed development.



Figure 2: Aerial Photograph, subject site highlighted blue

Surrounding Development

The site is highly visible from the Central Coast Highway. To the west is The Central Coast Highway and Gosford waterfront containing the Gosford Olympic pool and car parking area.

To the south of the site is an existing 4 storey residential flat development. To the north along Masons Parade is the Brisbane Water Legacy site and a number of restaurants. Adjoining land to the east contains a residential flat development facing York Street.

Land to the east and south generally contains residential development consisting of a mix of dwelling types ranging from single houses to residential flat buildings. The area is in transition to higher density residential development.



Figure 3: Street view looking east along Masons Parade

The Proposed Development

The amended plans propose an altered format of development which has the following features:

| Proposed under amended 82A plans | Comparison to previous refused proposal |
|--|--|
| A total of 25 units | Increased by 2 units from previous 23 units |
| 5 storeys at the front of the site in Building A with 1 x 1 bedroom and 6 x 2 bedroom, and 1 x 3 bedroom units | Increased by 1 storey |
| 5 storeys at the rear of the site in Building B with 17 x 2 bedroom units | Reduced by 1 storey |
| 2 basement levels of car parking containing 26 car spaces including 4 disabled spaces and bicycle parking | Onsite parking reduced by 2 parking spaces |
| Height of 15m | Decreased from 20.2m |
| FSR of 2.19:1 | Increased by 0.19:1 from previous 2:1 |
| Street setback of 2m and greater | Decreased by 0.5m |
| Nil side setbacks with "green walls" | Nil side setbacks |
| Rear setback of 7m-9m | Increased rear setback by 1m |
| Access to the basement car parking levels via a single car lift | No change |
| A water feature added to the front façade | No water feature |



Figure 4: S82A Amended Proposed Plan

Applicant's Response to Reasons for Refusal

The applicant has provided a response to each of the grounds for refusal which have been summarised as follows:

1. The proposal exceeds the maximum height limit for the site under Gosford Local Environmental Plan (GLEP 2014)

Applicant's Submission:

The subject site is located within the Gosford City Centre Development Incentive Area where up until 2nd April 2016, Clause 8.9 provided a 30% bonus FSR and height incentive bringing the maximum building height to 19.5m. The amended proposal has been reduced in height by one (1) storey down to approximately 16m height with the exception of a stairwell on the front building which is at 18.6m; both being below the maximum height.

Council Comment: The bonus height and FSR provisions under clause 8.9 of GLEP 2014 applied to the site when the application was lodged. Clause 8.9 expired on 2 April 2016 and is not currently applicable.

It is noted that Council is currently progressing a planning proposal which seeks to extend the application of the bonus provisions under clause 8.9 to all applications lodged before 2 April 2016. This planning proposal is scheduled to be placed on public exhibition on 25 November 2016 and as such is not a deemed instrument for consideration under Section 79C.

Irrespective, it is considered that the design of the development and related impacts are not supportable. The possible reinstatement of the bonus provisions for height and FSR would not resolve the various merits problems.

The current height limit under clause 4.3 of GLEP 2014 is 15m. The S82A amended plans have a height of 15m and now comply with the height limit. The stairwell at the rear of the front building has been retained but complies with the height limit.

2. The proposal does not meet the Design Excellence requirements of clause 8.5 of Gosford DCP 2014;

Applicant's Submission:

There is no Clause 8.5 within the Development Control Plan (DCP) and so it is assumed that Council mean GLEP 2014. The following section highlights how the amended proposal adheres to the provisions of Clause 8.5.

Clause 8.5 Design Excellence

- (1) *The objective of this clause is to deliver the highest standard of architectural and urban design.*

The building has been designed by CKDS Architecture, renowned architects who have designed numerous high quality buildings throughout Gosford, Sydney and Newcastle. In addition to this, the amendments proposed have come about through close consultation with two international architects. The building now displays elements of individuality, particularly through its modulation, variety of building materials and façade treatment, specifically the inclusion of "green walls"; all elements which could only be described as "high quality". Subclause (2) and (3) provide further direction with regards to how the amended development adheres to this objective.

- (2) *Development consent must not be granted to development involving the construction of a new building or external alterations to an existing building in Gosford City Centre unless the consent authority considers that the development exhibits design excellence.*

Discussed above and below.

- (3) *In considering whether development exhibits design excellence, the consent authority must have regard to the following matters:*

- (a) *whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved*

The amended design now incorporates greater articulation along the side walls, a larger deep soil landscape area, reduced height, stepping of the front façade as well as the inclusion of a water feature. All these added features are considered to add

to the quality of design as well as providing appropriate detailing in line with this objective.

- (b) *whether the form and external appearance of the proposed development will improve the quality and amenity of the public domain,*

With the exception of the building to the south, the site is located within an area generally dominated by older style brick "walk-up" flat buildings and as such, has an aged feel to it. The amended building design will bring architectural interest to the street and its architectural style will complement the existing development to the south. There is no doubt the amendments described above, along with replacing the existing vacant Chinese restaurant, will "improve the quality and amenity of the public domain".

- (c) *whether the proposed development detrimentally impacts on view corridors,*

*The development will incorporate two (2) separate buildings to allow for partial views through the centre of the site across the side boundary, to the units to the south. In addition to this, the development will require the removal of the existing mature trees which at present blocks some of these views in any event. A full view analysis assessment against the view sharing principles in *Tenacity Consulting v Warringah [2004] NSWLEC 140* was provided within the Statement of Environmental Effects (SEE) lodged with the original Development Application (DA). This assessment is still relevant for the amended proposal which concluded that the proposed development achieves a fair level of view sharing.*

The amended proposal, given it now complies with all LEP and DCP building envelope requirements, is now even more consistent with the principle of view sharing.

- (d) *whether the proposed development detrimentally overshadows Kibble Park, William Street Plaza, Burns Park and the waterfront open space adjoining The Broadwater,*

N/A – The development is not located near these areas.

- (e) *any relevant requirements of applicable development control plans, DCP 2013*

contains numerous requirements which were addressed in full within the compliance table located within the SEE under the original DA. The amended proposal now complies with all of these controls including all setbacks; site coverage, articulated wall treatments etc. Specific DCP controls are discussed in further detail below.

(f) *how the proposed development addresses the following matters:*

(i) *the suitability of the land for development,*

The suitability of the site for development is one which was taken into consideration by Council at the time of zoning and inclusion of the site within the Gosford City Centre. The use of the site as a residential flat building is entirely appropriate and the architectural design is considered to be modern and refreshing.

(ii) *existing and proposed uses and use mix,*

The proposed residential use of the site is permissible and consistent with the majority of the surrounding area.

(iii) *heritage issues and streetscape constraints,*

There are no heritage issues associated with the proposal. In terms of streetscape constraints, the site incorporates only a small street frontage, however this has been delicately treated to provide maximum amenity to the streetscape and Brisbane Water beyond.

(iv) *the location of any tower proposed, having regard to the need to achieve an acceptable relationship with other towers (existing or proposed) on the same site or on neighbouring sites in terms of separation, setbacks, amenity and urban form,*

The proposal does not incorporate tower style development.

(v) *bulk, massing and modulation of buildings,*

The development has been split into two (2) buildings in line with this objective. Had the development been designed as one (1) building, which would also continue to achieve the LEP and DCP building envelop controls, it would have had a far greater impact on the amenity of the adjoining development to the south. CKDS have recognised the site constraints and adjoining building and designed a development which balances the expectations of both the developer and the neighbour. The amended proposal has now gone further and added to this by increasing the deep soil area, reducing the site coverage, adding additional visual interest to the side wall facades; and stepping of the front facade. All of these aspects combine to provide a building with appropriate bulk, massing and modulation for the site.

- (vi) *street frontage heights,*

The first two (2) levels of the building have been setback in accordance with the 2-2.5m street frontage heights. From this point onwards, the building has been stepped back by 900mm increments in order to reduce its dominance to Masons Parade.

- (vii) *environmental impacts such as sustainable design, overshadowing, wind and reflectivity,*

The development meets BASIX requirements and therefore can be considered to be of a sustainable design. No concerns surrounding wind or reflectivity have been raised by Council and so it can be assumed that these too are acceptable. The development will overshadow some of the units within the adjoining development to the south. This has been reduced through the amended proposal and is less than a compliant development in the form of one (1) continuous structure, rather than two (2).

- (viii) *the achievement of the principles of ecologically sustainable development, with particular emphasis on water saving and recycling,*

The proposal aims to capture and reuse rain water and is considered to achieve this point.

- (ix) *pedestrian, cycle, vehicular and service access, circulation and requirements,*

It is considered that the proposal meets, or can meet all aspects of the above requirement.

- (x) *the impact on, and any proposed improvements to, the public domain.*

It is considered that the proposal represents an improvement to the public domain in that the site will be transformed from a vacant Chinese take-away to an architecturally designed residential flat building. This will enhance the streetscape amenity as well as improving the use of the open space along Brisbane Water Drive. This has been further improved through the proposed façade changes which now break-up the large sections of brick along the northern and southern elevations and step back the upper levels along the front to give a lower form appearance to the street.

Council Comments

Clause 8.5 Design Excellence is a provision of the GLEP 2014 and not the GDCP 2013.

It is considered the proposal does not comply with the design excellence provisions of clause 8.5 of GLEP for the following reasons;

- The proposal contains a significant variation to the FSR and side setbacks. In combination, this results in an overdevelopment of the site. The proposed development has bulk and scale which is considered out of character for the area and visually dominant.
- The development results in unacceptable shadow and privacy impacts on adjoining development. The nil side setbacks dominate the adjoining properties, impacting on the amenity of private open spaces.
- The proposed means of access to the site by a single car lift is inadequate to serve ... units, and does not allow safe and efficient vehicular movement on the site.
- The nil side setbacks impact on future development on the adjoining land to the north and existing development to the south. This will require any future development on the adjoining sites to be setback further from the side boundary to achieve adequate building separation.
- The proposal does not provide any deep soil planting within the front setback or adequate landscaping to the front façade. As such the development does not promote a good quality streetscape, does not provide any tree planting to break down the bulk and scale of the proposal, particularly when viewed from the Gosford waterfront and The Central Coast Highway.
- The reason that the proposal is replacing the existing Chinese restaurant is not relevant to Clause 8.5 Design Excellence.

3. The proposal does not comply with the side setback, rear setback or site coverage requirements of Gosford DCP 2013

Applicant's Submission:

Side Setback

DCP 4.1.2.5.a states:

The minimum building setbacks from the front, side and rear property boundaries are specified in the following table and illustrated in Figures 2.6 to 2.8.

The subject site is located within the B4 Mixed Use Zone where the table provides the following for residential development:

| Minimum setback distance from property boundary | | | | |
|---|-------------------------|-----------------|------|------|
| Zone | Setback condition | Front | Side | Rear |
| Mixed Use | Residential uses | | | |
| | up to 12m height# | Street setback† | 3m | 6m |
| | - non-habitable rooms | Street setback† | 6m | 6m |
| | - habitable rooms | | | |
| | Residential uses | | | |
| | up to 12-24m height# | 6m | 4.5m | 6m |
| | - non-habitable rooms | 6m | 9m | 9m |
| | - habitable rooms | | | |

* Setback occurs at street frontage height (i.e. only one setback allowable).

notwithstanding the associated side setback controls, buildings are permitted to build to the side lot boundary (i.e. 0m side setback up to relevant street frontage height) in the Mixed Use Zone where windows to habitable and non-habitable rooms are placed to face the front or rear of the lot.

† refer to Figure 2.1 specific street alignment and street setbacks.

Figure 5: Extract of DCP setback table

As the windows to both habitable and non-habitable rooms have been placed to face the front and rear of the site, the development has the ability to develop to the side boundary. The amended proposal is setback 0m to both side boundaries in accordance with this control. As this setback is only allowed up to the relevant street frontage height (10.5m-16m), the amended proposal, through the removal of the top level, now fully complies with the side setback requirements.

Further to the above, it is noted that Council's Assessment Report provides the following with regards to applying the zero side setback:

"The DCP does allow for some zero side setbacks to be considered in the B4 Mixed Use zone up to the 'street frontage height' which is 10.5m to 16m building height. The capacity for such zero setbacks is considered to be limited however, and would be suited to commercial uses on B4 zoned land close to the commercial core, ie along Mann Street, where adjoining sites are also built to the side boundary for commercial development or are likely to be in the future. In the case of the subject land however, the site is on the fringe of the City Centre, and while zoned B4 Mixed Use, the proposed development and adjoining development is residential in nature, and therefore the zero side setback capacity in the DCP is not considered to be applicable to the subject application."

In response to the above, it is pointed out that the 0m side setbacks specifically applies only to "residential uses", not commercial. Council have consistently misinterpreted this control, evidenced by the sections underlined within the above statement.

In addition to this, nowhere in the DCP does it state that the zero side setback applies in only "some" circumstances. It is quite clear in stating that residential development in the mixed use zone has a minimum side setback of 0m. It is not up to Council under the DA assessment process to determine where this is or isn't appropriate, as this decision was made at the time the DCP was created and when the zoning was allocated to the site.

Rear Setback

DCP 4.1.2.5 provides a rear setback requirement of 6m for both habitable and non-habitable rooms up to 12m in height, and 6m to non-habitable and 9m to habitable between 12m and 24m. The amended proposal now complies with these controls by removing the top level and removing the bedroom balconies from the fourth floor to achieve the 9m setback from the rear boundary.

Site Coverage

DCP 4.1.2.7 provides a maximum site coverage of 60% for residential buildings within the B4 Mixed Use Zone. The amended proposal has a site coverage of only 54.5% in line with this control.

Taking the above into consideration, the amended proposal now fully complies with the DCP setback and site coverage requirements.

Council Comments:

The GDCP 2013 requires a side setback of 3m for non-habitable rooms and of 6m for habitable rooms. There is scope given to reduce the side of the setback which is also subject to other considerations such as overshadowing, views and amenity under the GDCP 2013 and section 79C of the *Environmental Planning & Assessment Act*.

The proposal does not meet the side setback requirements of 3m for non-habitable rooms and of 6m for habitable rooms under GDCP 2013. The proposal provides a 4 storey wall set at a zero side setback to both side boundaries which does not step in or step away from the boundary.

In considering the merits of the proposal it is required to consider the relevant objectives of the GDCP 2013 setback provision, which are:

- *to ensure an appropriate level of amenity for building occupants in terms of daylight, outlook, view sharing, ventilation, wind mitigation, and privacy.*
- *to achieve usable and pleasant streets and public domain areas in terms of wind mitigation and daylight access*

The proposal is not considered to provide for an appropriate level of amenity for adjoining occupants in terms of daylight, outlook, view sharing, ventilation, wind mitigation, and privacy, nor for users of the public domain and is therefore considered inconsistent with the relevant GDCP 2013 objectives.

The proposal also does not comply with *State Environmental Planning Policy 65 Design Quality of Residential Apartment Development* (SEPP 65) building separation requirements in relation to the existing units to the south and impacts on future development potential of adjoining allotments due to building separation requirements.

From the assessment it is evident the non-compliance with side setbacks would result in adverse impacts on the adjoining properties, in relation to overshadowing and amenity, and would result in large visually dominant walls which are not in keeping with the scale and character of development in the locality.

The site is located on the fringe of the Gosford City Centre, and while zoned B4 Mixed Use, the proposed development and adjoining development is currently predominantly residential in nature. The built form in the locality is considered to be in transition toward higher density developments. However it is important to recognise that the area is not an established mixed use precinct, and has a dominant residential character. Built forms including zero side setbacks can be considered appropriate in areas with commercial developments, extensive street walls and high density podium and tower developments, however it is less acceptable within predominately residential areas due to amenity impacts and in this case the zero setbacks are not supported.

The rear setback of 7m for the built form with a height of up to 12m, and 9m for built form with a height of up to 12m complies with the GDCP 2013. The site coverage of 54% also complies with the GDCP 2013.

4. The proposal does not comply with SEPP 65 in relation to building separation and overshadowing of the adjoining properties;

Applicant's Submission:

Building Separation

Whilst it is acknowledged that Objective 3B-2 of the SEPP 65 Apartment Design Guide (ADG) requires that overshadowing of neighbouring properties is minimised; as "building separation" is not listed under Clause 6A of the SEPP; the 0m setback provided for under the DCP overrules these requirements.

Overshadowing

Section 4A of the ADG provides solar and daylight access design criteria requirements applicable only to new development, not adjoining development.

Council Comments:

The proposed development will result in inadequate building separation with the adjoining sites to the north and south, and does not comply with the provisions of GDCP 2013 and the ADG. This is due to the proposed nil side setbacks for the proposed development.

The proposed built form would directly overshadow the neighbouring property to the south. The extent of this impact could be reduced if the built form was setback in accordance with the provisions of the GDCP 2013 and ADG.

Section 2F of the ADG states: *"where applying separation to buildings on adjoining sites, apply half the minimum separation distance measured to the boundary. This distributes the building separation equally between sites."*

In relation to residential developments the ADG requires a minimum building separation distance of 6m to be shared across the boundary. The proposed nil setback does not achieve this separation. If the building were to be approved with a zero setback this would impact on the development potential of the surrounding allotments as the building separation requirements would be unequally applied.

5. The proposal will have an adverse overshadowing impact on the adjoining properties located to the south;

Applicant's Submission:

Based on the shadow studies for the neighbouring property, the amended proposal will still overshadow some of the units on the property to the south; however, less than a complying development within one (1) building. A shadow analysis of the proposed situation and an alternate DCP complying situation will be forwarded under separate cover.

Further to the above, Council must respect the fact that a site which has been allocated a B4 Mixed Use Zone within the City Centre, where a zero side setback and 19.5m height limit is allowed, will have unavoidable overshadowing impacts on developments to the south. This is the consequence of developing within a high density area and should not be relied upon to refuse the application, when all other matters have been addressed.

Council Comments:

The proposed development results in shadowing to the neighbouring property to the south throughout the morning and afternoon on 21 June.

The height limit is 15m and the proposal does not comply with the side setbacks required. This increases the shadow impact on the southern adjoining site to a greater extent than a complying development would. The fact the land is zoned B4 Mixed Use does not excuse the resultant shadow impact or make it less relevant. The proposal could have a better design that reflects the site constraints and FSR and have less impact on the adjoining development and its principle open space areas.

The overshadowing impacts of the development are considered unreasonable. (Refer reason for refusal f)

6. The proposal will have an adverse impact on the privacy of adjoining properties;

Applicant's Submission:

The development has been amended to remove the rounded walls as well as the bedroom balconies from the front building so that there will be no ability to overlook adjoining properties. In addition to this, the roof top terraces have been setback from the edge of the building and will be screened with vegetation to remove any possibility of overlooking from this vantage point.

Council Comments:

The amended proposal addresses the impact on privacy of the adjoining developments. Balconies have been set back from the side boundary and screens can be provided if necessary. However the bedrooms on the side boundary setback have windows on or near the side boundary which would permit overlooking of the adjoining developments. This could be mitigated by glazed windows or non-opening windows, however this would prevent or reduce light and ventilation to such habitable rooms. Privacy from bedrooms is not as critical as privacy from/to living areas.

The revised design is considered to have adequately addressed privacy concerns.

7. The proposal will have an adverse impact on the amenity and outlook of adjoining properties;

Applicant's Submission:

The amended proposal will have an impact on the outlook of the adjoining properties but only across the side boundary where the view is already partially blocked by a large tree within the centre of the site. Given that the views impacted are across a side boundary and due to the fact that the building now complies with DCP and LEP controls, the development is considered to achieve a fair level of view sharing as dictated by Tenacity Consulting v Warringah.

Council Comments:

The reduction in height and setting back of the top floor reduces the impact on the amenity and outlook of adjoining properties. The southern adjoining development is 3 storeys with a penthouse unit as the 4th level. The amended proposal is now appear as 4 storeys with the 5th level set back from the front, side and rear boundaries.

From the assessment it is evident the non-compliance with side setbacks would result in adverse impacts on the adjoining properties, in relation to overshadowing and amenity, and would result in large visually dominant walls which are not in keeping with the scale and character of development in the locality.

The revised plans have also resulted in increased bulk. The floor space on the site, has increased by 0.19:1 from previous 2:1 which impacts on the amenity and outlook of the neighbourhood.

Windows no longer directly face the adjoining sites, however they continue to provide angled views across them thereby resulting in visual privacy conflicts.

The amended proposal has not reduce acoustic privacy conflicts. Section 4H-1 Design Guidance of the ADG seeks to ensure "Adequate building separation is provided within the development and from neighbouring buildings/adjacent uses."

No details on the noise impact of the car lift have been provided.

8. The proposal is inconsistent with the streetscape and future development in the area;

Applicant's Submission:

The amended proposal is now considered to be consistent with the streetscape through the incorporation of greater articulation and façade materials along the sides as well as by stepping the building back from the front so that its visual presence is reduced at a pedestrian level. Furthermore, it is considered that the amended development will also consistent with the streetscape and future development in the area given that all allotments along Masons Parade are located within the same zone and have the same FSR and building height control. The future development of this area is likely to take full advantage of the height and FSR as well as the ability to have a zero side setback and as such, be of a similar scale to the proposed.

Council Comments:

The reduction in height of the rear building results in an improved outcome in terms of bulk, privacy, shadowing and amenity within the rear components of the development. It is noted however that the front building has been increased in height with the addition of one storey which increases the scale and perception of bulk of the development when viewed from the public domain.

The FSR of the development exceeds that required under clause 8.3(2) of the GLEP (2:1). This results in a building with a bulk and scale which is inconsistent with the:

- planning controls which establish desired future character,
- existing development in the locality, and
- constraints of the site.
-

It is considered that the development will result in unacceptable impacts in terms of bulk and scale.

Future development of the area is likely to be consistent with the FSR and size of sites to be developed.

9. The proposal will, as a result of non compliance with planning controls, have an adverse impact on views from adjoining properties;

Applicant's submission:

The proposal has now been amended to comply with all planning controls. Furthermore, any impact on the views gained from the adjoining properties towards Brisbane Water, will occur only across the side boundary where they are already partially block by a large tree. Had the development been designed as one (1) continuous building, rather than two (2), this would also be substantially worse. Using the planning principle set under Tenacity v Warringah, the amended proposal has a fair level of view sharing.

Council Comments:

The view sharing principles established by the Land & Environment Court, state that views lost as a result of a complying development, across a side boundary, are not reasonably expected to be retained. The views from the units on the southern adjoining site would be improved by the provision of any setback or compliance with side setbacks. That is a design which was compliant with the setback provisions would reduce the impact on view loss and achieve better view sharing.

10. The proposal has not satisfactorily addressed the requirements for waste management and collection in accordance with Gosford DCP 2013;

Applicant's Submission:

It is noted, that Council's Assessment Report states:

"Council's Team Leader Waste Services has assessed the application and waste management arrangements may be able to be addressed, subject to appropriate approvals and conditions from relevant parties including RMS, WorkCover, Council's Engineers as well as Council's Waste Contractor."

Based on the above, we would like work with Council's Waste Services Department to come to a suitable arrangement.

Council Comments:

GDCP 2013 requires development of greater than 18 residential units to provide an on-site waste storage point accessible by the waste collection vehicle. GDCP 2013 further requires the waste vehicle to enter and exit the site in a forward direction and not impede general access to, from or within the site.

The proposal relies on bulk waste bins located in the basement car parking area. As a waste collection vehicle cannot access the site, the waste bins will have to be taken via the single car lift and placed in the street on collection day. This needs to be within an allocated area in which car parking is not permitted.

This reduces the space available for on-street car parking which is in high demand in the locality. This will cause impacts to traffic safety, parking and amenity of the area, particularly the visual impact from the Gosford waterfront.

The proposed development will have an unacceptable impact on health and amenity of occupants of the site and adjoining sites due to inadequate waste management. In this regard there is insufficient space provided for servicing the development with waste collection services.

11 Approval of the proposal is not in the public interest

Applicant's submission:

Replacing the current derelict site along the waterfront in the manner proposed, through a building which incorporates design elements from numerous renowned architects, is considered to be entirely in the public interest. Furthermore, the development will result in approximately \$9 million in local job opportunities which will stem from its construction. Similarly, the flow on effect from the expenditure of future residents, estimated to be approximately \$3 million, will give a significant boost to the revenue of local business/cafes etc. around waterfront. In summary, through the amendments proposed, the development now achieves all Council LEP and DCP controls and is therefore unquestionably in the public interest.

Council Comments:

There are direct benefits of providing additional investment, which drives local jobs and the economy. Council is particularly supportive of new development, which improves the built form and amenity of the area. The proposed development does not however comply with the requirements of the GLEP 2014 and GDCP 2013, and the non-compliances result in impacts to the public and private domain.

It is noted that a good design would still achieve the same outcome in respect of the former restaurant and employment generation.

Submissions from Public Authorities

The application was referred to the NSW Roads & Maritime Services (RMS). The RMS advise that it has no objections to the proposal as it is considered there will be no significant impact on the nearby state road network subject to conditions requiring;

- All vehicles to enter and leave in a forward direction.
- Adequate provisions to be made for the storage of queued vehicles in Masons Parade.
- All works at the cost of the developer.

These matters could be imposed as conditions of consent and would require the imposition of parking restrictions in Masons Parade.

Internal Consultation

The application was referred to the following officers;

Council's Architect

Proposal is not supported for the following reasons;

- Nil side setbacks create an inappropriately scaled building that visually overpowers adjoining sites. This results in overshadowing to the existing development to the south.
- Nil side setbacks will restrict future development of land on the northern side (Legacy site) and result in inadequate building separation between existing and future development on adjoining sites and this development.
- Nil side setbacks result in visual and acoustic privacy and impact amenity of adjoining residents.
- The proposal exceeds the density permitted by about twice.
- Inadequate location of deep soil planting/landscaping in the rear setback area.
- The proposed green side walls on the side boundary are impractical to establish and maintain.
- Windows to bedrooms on the nil side setback face adjoining sites and have adverse amenity impacts between developments.
- The proposed continuous 2m to 3m high continuous wall 56m long on both side boundaries at ground level which further emphasizes the unsuitable scale of the building.

Waste Management Assessment Officer

Not supported as bulk bins would have to be transported to, and placed in street for collection. This reduces available car parking in the street and creates an unsafe situation for pedestrians and other road users.

There is inadequate street frontage for 240/360L bins due to the number that would be required. The proposal does not comply with the requirements of GDCP 2013 and does not provide a safe and practical servicing solution under the Work Health and Safety Act 2011.

Planning Comment

The amended plans provide for bulk bins which must be taken to, and left in the street for collection the night before collection day. This will create an unsafe and unsightly situation in this prime location opposite the Gosford waterfront. The option available to the applicant is to reduce the number of units to less than 18 so that 240L/360L bins could be utilised.

The proposed development will have an unacceptable impact on health and amenity of occupants of the site and adjoining sites due to inadequate waste management. In this regard there is insufficient space provided for servicing the development with waste collection services.

Tree Assessment Officer

No objections to Tree removal.

Development Engineer

No objections. Conditions of consent provided.

Environment Officer

No environmental issues

Any Submissions from the public

The application was notified in accordance with GDCP Chapter 7.3 Public Notification of Development Applications commencing on 28 October 2016 and finishing on 18 November 2016.

128 public submissions were received in relation to the application. Approximately 50% of the submissions support the proposal and approximately 50% of the submissions object to the proposal. A number of the issues raised in the submissions have been addressed earlier in this report. The remaining issues pertaining to various concerns were addressed in the assessment of the application pursuant to the heads of consideration contained within Section 79C of the *Environmental Planning and Assessment Act 1979*.

A summary of the submissions are detailed below.

In Support of the Application

The proposal is supported and should be approved. This is a beautiful modern building which will bring life to the area and be of benefit to local businesses. It will be a landmark. It will replace the existing restaurant which has been abandoned. The eco green walls and water features suit the area. The development is in tune with the future plans for the area.

Comment

The proposal exceeds the height limit, FSR, and does not comply with the building setbacks required. It is an overdevelopment of the site and should be reduced in height and bulk, and the floorplate reduced so as to mitigate the impact on adjoining sites. The submissions in support of the proposal are not adjoining residents, but are from other suburbs or cities.

Non Compliance with Development Controls

The proposal exceeds the height and FSR under the GLEP 2014 and is an overdevelopment of the site due to the extremely small site area and width. The density is unacceptable.

Comment

The amended plans comply with the height but exceed the maximum FSR of 1:1 permitted by 119%. The proposal is not suitable for the width and size of the site.

The proposal does not comply with side setbacks and site coverage. The building form adversely impacts ventilation, daylight access, privacy, acoustic amenity and view sharing of neighbours.

Comment

The amended proposal now complies with site coverage, but not side setbacks. The nil side setbacks are a 100% variation to that required under the GDGP 2013 for residential development. This impacts the amenity of adjoining residents as well as the development potential of adjoining land to the north.

The amended proposal does not meet the design excellence requirements of clause 8.5 of the LEP. The design fails to make use of good architectural design practices such as setbacks, and external materials and façade treatments.

Comment

The proposal appears as a 5 storey building from the Gosford waterfront with most of the narrow frontage needed for vehicular and pedestrian access. The use of side green walls will pose a problem particularly given there is no space to maintain and replace the plantings. In any case the green walls are located on a wall with a nil setback which intrudes onto the adjoining properties.

The loss of sunlight and excessive overshadowing of adjoining units to the south.

Comment

While the proposal complies with the height limit, the reduction in side setbacks results in a greater additional shadow impact on the southern adjoining site than if the setbacks complied with the GDCP 2013. Therefore the shadow impact is unreasonable.

The proposal impacts adjoining privacy.

Comment

The amended plans provide privacy screens on the ends of balconies and the only windows on the side are to bedrooms. Therefore privacy impacts are not considered significant.

The proposal will result in the loss of high value water views from adjoining units.

Comment

The water views to Brisbane Water is the valued view, which is obtained across the side boundary. In accordance with view sharing principles established by the Land & Environment Court, views across the sides of properties are much more difficult to retain. As such any views across the side boundary should not be expected to be able to be retained if those views are impacted by a compliant development.

In accordance with principles for view sharing, the design could be improved by the provision of side setbacks which would reduce the view loss from adjoining units. The proposed building is over bearing and out of scale in terms of bulk, mass, separation, modulation and articulation.

Comment

The bulk and mass of the building is out of scale and is beyond the planning provisions which apply to the site. Given the narrow width of the site, the non compliance is considered to result in an over development of the site.

Inadequate space for collection of waste bins.

Comment

The development requires the use of bulk bins which will have to be taken to the street for collection. The site does not provide any access for waste collection vehicles to access the site. This will result in bulk waste bins being placed in the street on the day of collection. This will also take up valuable kerbside parking spaces as well as being unsightly on land highly visible from the Gosford waterfront and is considered an inadequate waste management arrangement.

The proposal will impact traffic flow and add to congestion in this location.

Comment

The amended proposal has reduced parking provided within the development by two spaces. The proposal provides for a total of 26 parking spaces, including 2 small car spaces. The planning controls require 28 full sized spaces to serve the development. This would add to the amount of on-street parking in the locality.

The placing of waste bulk bins in the street, and standing space for vehicles entering the site, will reduce parking and street turning movements. This will impact traffic and pedestrian safety.

The proposal is not consistent with SEPP 65 - Design Quality of Residential Flat Buildings.

Comment

It is noted that the application is not consistent with all the provisions of SEPP 65. Councils Architect has assessed the proposal under SEPP 65 and does not support the design due to nil setbacks and impacts on adjoining properties.

The amended plans have not addressed the previous objections or concerns.

Comment

The amended plans are an improvement to the plans previously refused by the former Gosford Council. The height has been reduced, however the number of units has been increased and the proposal still has nil side setbacks and excessive density, bulk and scale for the site in this location. Substantial concerns remain in relation to the proposal.

Ecologically Sustainable Principles

The proposal has been assessed having regard to ecologically sustainable development principles and is considered to be consistent with the principles.

The proposed development is considered to incorporate satisfactory stormwater, drainage and erosion control and the retention of vegetation where possible and is unlikely to have any significant adverse impacts on the environment and will not decrease environmental quality for future generations. The proposal does not result in the disturbance of any endangered flora or fauna habitats and is unlikely to significantly affect fluvial environments.

Climate Change

The potential impacts of climate change on the proposed development have been considered by Council as part of its assessment of the application.

This assessment has included consideration of such matters as potential rise in sea level; potential for more intense and/or frequent extreme weather conditions including storm events, bushfires, drought, flood and coastal erosion; as well as how the proposed development may cope, combat, withstand these potential impacts. The proposed development is considered satisfactory in relation to climate change.

Assessment

Having regard for the matters for consideration detailed in Section 79C of the *Environmental Planning and Assessment Act 1979* and other statutory requirements, Council's policies and Section 149 Certificate details, the assessment has identified the following key issues, which are elaborated upon for Council's information. Any tables relating to plans or policies are provided as an attachment.

Gosford Local Environmental Plan 2014

The land is zoned B4 Mixed Use under GLEP 2014. The proposal is defined as a residential flat building and is permissible within the zone.

The objectives of the zone are:

- *To provide a mixture of compatible land uses.*
- *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.*
- *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.*
- *To allow development in Point Frederick to take advantage of and retain view corridors while avoiding a continuous built edge along the waterfront.*
- *To create opportunities to improve the public domain and pedestrian links of Gosford City Centre.*
- *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.*
- *To protect and enhance the scenic qualities and character of Gosford City Centre.*

It is considered that the nature of the proposal is generally consistent with the stated objectives, by providing higher density housing in the City Centre area, in a location that has good access to public transport and is in within walking distance from the commercial core and Gosford Waterfront. The site is an isolated east-west oriented parcel of narrow dimensions which make development of a residential flat building challenging.

It is considered however that the proposed zero side setbacks provide a continuous wall of development that is not counterbalanced by a better design outcome on the site overall. The result is a development which exceeds the capacity of the site and is an overdevelopment with impacts on adjoining sites and the streetscape which are out of character with existing and likely future development in this location.

Principal Development Standards

Following is a summary of the relevant development standards under GLEP 2014 and how the proposal responds to those standards:

| Gosford LEP 2014 | Required | Proposed | Compliance |
|---------------------------------|----------|----------|--|
| Cl 4.3 Height | 15m | 15m | Yes |
| Cl 4.4 Floor Space Ratio | 2.0:1 | 2.19:1 | No- refer comments below. Variation 9.5% |
| Clause 8.3(2) Floor space ratio | 1:1 | 2.19:1 | No-refer comments below. Variation 119% |

Variation to Development Standards

The mapped FSR under clause 4.4 for the area is a maximum of 2:1. However as the site has a frontage of less than 24m, the maximum FSR under clause 8.3(2) is reduced to 1:1.

This development proposes a FSR of 1.19:1 or a variation 119% to the FSR development standard.

The applicant has lodged a submission under clause 4.6 to the maximum FSR dated October 2016. In summary, the submission contends that adherence to the development standard is unreasonable or unnecessary. A copy of the applicant's submission is included in attachment 1.

Council Assessment.

Clause 4.6 exception to development standards requires consideration of the following:

1. *Has the applicant submitted a written request 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?*

Comment

Clause 4.6 (2) – exceptions to development standards allows development consent to be granted even though the development would contravene a development standard imposed by GLEP 2014, or any other environmental planning instrument.

Clause 4.6(1) stipulates the following objectives:

- (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."*

Clauses 4.6(3) and 4.6(4), which sets out the tests for establishing if the variation is 'well founded', requires the consent authority to be satisfied:

- that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- that there are sufficient environmental planning grounds to justify contravening the development standard;
- 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;
- whether contravention of the development standard raises any matter of significance for State or regional environmental planning;
- the public benefit of maintaining the development standard;
- any other matters.

In addition, approaches to justify a contravention to a development standard are demonstrated in case law taken from decisions of the Land and Environment Court and the NSW Court of Appeal in: *Whebe v Pittwater Council* [2007] NSWLEC 827; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009; *Moskovitch v Waverley Council* [2016] NSWLEC 1015 and *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 and have been considered in the assessment.

The applicant's written submission contends that the proposal complies with the zone and development standards objectives, and that the design is appropriate for the site. The applicant contends that as the site is greater than 1000m² that a higher FSR is permitted and not constrained by the width of the site being less than 24m.

The submission is not considered to be well founded. The narrow width of the site, being about 15m, results in vehicular and pedestrian access taking up a significant frontage of the site, and the development relies on nil side setbacks to achieve the density and number of units proposed.

The argument that the adjoining sites will not be redeveloped is not agreed with. The proposed nil setbacks will restrict development on the adjoining sites if approved.

Clause 8.3 restricts FSR relative to lot size and width. While the objectives of clause 8.3 are not stated within the GLEP 2014, it can be assumed that the aim of relating FSR to lot size and width is to encourage consolidation to provide for a better development outcome. Therefore approval of this proposal will not encourage consolidation and will directly impact on the viability of future adjoining development.

The nil side setback on the southern side result in shadow, privacy, and high walls which impact the existing adjoining development.

The applicant's referral to Council approving similar developments is not agreed with. The subject application has been assessed on its merits and in consideration of the relevant legislation and policy. The additional FSR of the development contributes to bulk and scale of the development and in combination with other factors it is considered that the design results in an overdevelopment of the site. The development is not considered of significant merit to support the extent of variation proposed.

Adherence to the FSR development standard is reasonable and necessary in this case, and there are not sufficient environmental planning grounds to justify contravening the development standard.

2. *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?*

Comment

The objectives of the B4 Mixed Use zone are;

- *To provide a mixture of compatible land uses.*
- *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.*

- *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.*
- *To allow development in Point Frederick to take advantage of and retain view corridors while avoiding a continuous built edge along the waterfront.*

- *To create opportunities to improve the public domain and pedestrian links of Gosford City Centre.*
- *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.*
- *To protect and enhance the scenic qualities and character of Gosford City Centre.*

The decision in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 indicates, that merely showing that the development achieves the objectives of the development standard and the zone objectives will be insufficient to justify that a development is unreasonable or unnecessary in the circumstances of the case for the purposes of an objection under Clause 4.6, (and 4.6(3)(a) in particular).

In addition, the consent authority must also be satisfied that there are other “sufficient environmental planning grounds to justify contravening the development standard”. The requirement in cl 4.6(3)(b) to justify that there are sufficient environmental planning grounds for the variation, may well require identification of grounds particular to the circumstances of the proposed development. The Commissioner held that it was not sufficient to point to generic planning benefits such as the provision of additional housing stock, rather something more specific to that particular site and development was required. It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the decision but expressly noted that the Commissioner’s decision on that point was simply a discretionary (subjective) opinion which was a matter for her alone to decide.

It does not mean that clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are “sufficient environmental planning grounds to justify contravening the development standard” is something that can be assessed on a case by case basis.

Two recent decisions of the Land and Environment Court have emphatically demonstrated that DAs for larger and/or taller developments can and should be approved where they can be justified on their merits. Both DAs were approved by using clause 4.6 of the relevant LEP to vary the applicable height and FSR controls, to achieve outcomes that the Court accepted were sensible, well-justified, and ultimately **better than** a compliant (smaller) scheme on those particular sites.

In Moskovich v Waverley Council [2016], some important principles that arise from the decision are:

- The requirement that the consent authority be personally satisfied the proposed development will be in the public interest because it is “consistent with” the objectives of the development standard and zone is not a requirement to “achieve” those objectives. It is a requirement that the development be ‘compatible’ with them or ‘capable of existing together in harmony’.
- Establishing that ‘compliance with the standard is unreasonable or unnecessary in the circumstances of the case’ does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe “test” 1). Other methods are available, for example that the relevant objectives of the standard would not be achieved or would be thwarted by a complying development (Wehbe “test” 3).
- It is always best, when pursuing a clause 4.6 variation request, to demonstrate how the proposal achieves a better outcome than a complying scheme.

In Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7, the Chief Judge observed in his judgement at [39] that clause 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 by being satisfied that the applicant's written request has adequately addressed those matters. This lessens the force of the Court's earlier judgement in *Four2Five* that a variation request must demonstrate consistency with the objectives of the standard in addition to consistency with the objectives of the standard and zone. The decision means that the consent authority must be satisfied that the applicant's written 4.6 variation request has adequately addressed everything necessary in clause 4.6(3), rather than the consent authority being "satisfied directly" as to each of those matters.

It is not considered the applicant's submission has addressed the requirements of Clause 4.6(3) as it has not demonstrated that compliance is unreasonable or unnecessary and that there are planning grounds to support the variation.

In this case, the proposal complies with the general objectives of the B4 Mixed Use zone. It provides additional residential development on the fringe of the Gosford City Centre, on a main road and near the Gosford waterfront. However a less dense development, with side setbacks, would result in a better planning outcome for this site. A less dense development would require less car parking and waste storage and be more in keeping with existing and likely future development in this location. A reduced scale development would provide for additional space for setbacks, deep soil planting and appropriate waste management arrangements. As such the proposal is not considered to be supportable.

3. *Has the concurrence of the Director-General has been obtained?*

Comment

Under Planning Circular PS 08-033 issued 9 May 2008 Council may assume the concurrence of the Director-General when considering exceptions to development standards under clause 4.6. Council is therefore able to approve the variation.

The submission under clause 4.6 is not considered well founded and not supported as the variation to the FSR development standard, combined with nil site setbacks, is unreasonable due to the additional environmental impacts on the adjoining sites.

Environmental & Coastal Considerations

Coastal Zone

State Environmental Planning Policy No.71 – Coastal Protection does not apply to the land, however the provisions of Clause 5.5 GLEP 2014 require Council to consider matters in relation to the Coastal Zone. These matters have been considered in the assessment of this application and are considered consistent with the stated aims and objectives.

Acid Sulfate Soils

This land has been identified as being affected by the Acid Sulfate Soils Map (Class 5) and is within 500m of other classed areas, triggering the requirement for an acid sulfate soil management plan. A plan has been submitted which indicates that material to be excavated will, to a certain extent, comprise of acid sulfate soils. Subject to the treatment of these soils in accordance with the acid sulfate soil management plan (normally conditioned), the matters contained in Clause 7.1 of GLEP 2014 would be satisfied.

Climate Change and Sea Level Rise

Climate change and sea level rise have been considered in the assessment of this application, and a sea level rise factor is included in Council's flood planning level. Refusal of this application is not warranted on the grounds of climate change and sea level rise.

Flooding

This land has been classified as being under a "flood planning level" of RL 2.4m AHD. The site has levels in the order of RL 1.4m AHD - RL 2.7m AHD, and the minimum floor levels of the proposed units (ground floor) are RL 2.45m AHD which would satisfy the flood planning level requirement. The proposed driveway crest level is 1.95m AHD and the application proposes a raiseable flood barrier in front of the car lift that can rise to the required RL 2.40m AHD level if required. The use of similar flood barriers has been consented to in Terrigal and Gosford CBDs.

Subject to the proposed minimum floor level, and the provision of a raiseable flood barrier to the car park as proposed, the development would be satisfactory in respect to Clause 7.2 of GLEP 2014.

Design Excellence

The requirements for design excellence in Clause 8.5 of GLEP 2014 have been considered in the assessment of the application. While the proposal has architectural merit for some elements of the buildings, the proposed zero side setbacks and large blank walls does not meet the design excellence requirements of the LEP in the following ways:

- the zero side setbacks of this scale are not appropriate given the nature and location of the building in an area on the fringe of the City Centre which is not intended to be built 'wall to wall' (cl.8.5(3)(a));
- the provision of large blank walls on the boundary will not improve the quality and amenity of the public domain, particularly when viewed from Dane Drive (Central Coast Highway) and the Brisbane Water foreshore (cl.8.5(3)(b)) While the amended plans provide a "green wall on the sides, no details have been provided how such planting could be established and maintained. Therefore it is highly unlikely that the green wall would remain and the side walls revert back to blank walls or would become unsightly;
- the proposal does not meet a number of GDCP 2013 requirements relating to side setbacks and building separation, leading to adverse overshadowing and amenity impacts on the adjoining property to the south (cl.8.5(3)(e)); and

- the design does not adequately respond to the site constraints of a narrow property with residential units located to the south, and provides inadequate side setbacks leading to overshadowing and amenity impacts (cl.8.5(3)(f)).

In summary the development is not considered to be a fully resolved design which demonstrates design excellence.

Gosford Development Control Plan 2013

Chapter 4.1 of GDCP 2013 is relevant to the application.

The land is located in the Mixed Use (City Edge) character area, and the proposed use complies with the intended character by providing higher density housing and mixed use development within a walkable distance of the commercial core. Elements of the building's design however are inconsistent with the future character and streetscape for the area, as expressed through GDCP 2013 controls, and as detailed in the assessment report.

Attachment 2 includes the GDCP 2013 compliance table.

Side Setbacks

As detailed in the table above, the proposal does not meet the side setback requirements under GDCP 2013. The proposal has a zero side setback to both side boundaries for a 4 storey building, and the GDCP 2013 requirement is for a stepped 3m setback for a non-habitable room, which is also subject to other considerations such as overshadowing, views and amenity.

The objective of the GDCP 2013 relative to setback requirements is:

- *to ensure an appropriate level of amenity for building occupants in terms of daylight, outlook, view sharing, ventilation, wind mitigation, and privacy.*
- *to achieve usable and pleasant streets and public domain areas in terms of wind mitigation and daylight access*

The proposed impacts on daylight, views, ventilation, outlook and wind mitigation is not considered to achieve the objectives.

The proposed side setbacks also do not comply with SEPP 65 building separation requirements between the proposed development and the adjoining units to the south.

From the assessment it is evident that the non-compliance with side setbacks would result in adverse impacts on the adjoining properties, in relation to overshadowing and amenity, and would result in large walls which are not in keeping with the intended development or streetscape of the area. The proposed green side walls would not be achievable with a nil side setback without intruding onto the adjoining site.

These impacts are addressed in more detail below.

The GDCP 2013 does allow for some zero side setbacks to be considered in the B4 Mixed Use zone up to the 'street frontage height' which is 10.5m to 16m building height. The capacity for such zero setbacks is considered to be limited however, and would be suited to commercial uses on B4 Mixed Use zoned land close to the commercial core, ie along Mann Street, where adjoining sites are also built to the side boundary for commercial development or are likely to be in the future. In the case of the subject land however, the site is on the fringe of the City Centre, and while zoned B4 Mixed Use, the proposed development and adjoining development is residential in nature, and therefore the zero side setback capacity in the GDCP 2013 is not considered to be applicable to the subject application.

Deep Soil Planting

The proposal does not comply with the requirements of GDCP 2013, but complies with the ADG (SEPP 65). Under the ADG, the minimum dimension is 3m and 7% of the site allocated for deep soil planting. The proposal complies with the ADG, however the deep soil planting is located in the rear setback area. The ADG identifies deep soil planting should be located in increased front and side setbacks.

Building Exterior

The reduction in height has resulted in improvements to the external building appearance. While the nil side setbacks are proposed to be softened by "green walls", no details have been provided how this can be established and maintained. Such an improvement would be even greater with side setbacks to the lower levels as well as the top level.

The zero setbacks provides a sheer A storey wall to the neighbouring properties which substantially impact their outlook and views.

Car Parking and AS 2890

Under GDCP the amended proposal with 25 units requires 35 car spaces. The proposal provides 26 spaces, however 2 of the spaces are unable to be reasonably accessed for forward entry and exit.

Under SEPP 65, the RMS Guidelines for Traffic Generating Developments are applicable and would require the following parking for the site being zoned B4 Mixed Use in the Gosford City Centre (as a "metropolitan sub-regional centre").

| Unit Type | Rate | Spaces |
|------------------|----------------------|-------------------------|
| 1 bedroom (1) | 0.6 spaces per unit | 0.6 |
| 2 bedroom (23) | 0.9 spaces per unit | 20.7 |
| 3 bedroom (1) | 1.4 spaces per unit | 1.4 |
| Visitor | 1 spaces per 5 units | 5 |
| Total | | 27.7 = 28 spaces |

The proposal would therefore also not meet the RMS car parking requirements. The reduction in car parking under the RMS guidelines is based on the site having good access to bus services. The site is in close proximity to bus services as well as within walking distance of the Gosford Waterfront and Commercial Core. However on-street parking is in high demand with the nearby retail and recreation uses along the Gosford waterfront. The proposed parking total of 26 spaces, including 2 small car spaces, is deficient in parking spaces and considered to be inadequate for the development.

Car parking spaces within the two basement levels could not be accessed so that vehicles enter and leave in a forward direction. In addition, car spaces 2 and 3 on each basement level could not be accessed from the car lift with the turning path of a B85 car. These spaces therefore would need to be widened, or one space on each level provided for a turning bay, resulting in a further reduction in the number of car spaces provided.

The use of a car lift to serve 2 basement car levels is unorthodox, but required due to the narrow width of the site. The applicant has provided supporting detail in relation to car queuing, storage and likely wait times, and this is considered to be acceptable. RMS has also considered the arrangements, having regard to queuing impacts on surrounding roads, and no objection has been raised, subject to conditions. It is noted that the potential queuing of vehicles in Masons Parade waiting to enter the car lift will give rise to the need for parking restrictions in the cul-de-sac so that waiting vehicles can turn around in order to queue, as is proposed in the applicant's queuing proposal. This results in further reduction of on-street parking in the locality. It is noted that on-street parking is a premium in the locality.

The use of a single car lift for access by both cars and for movement of bulk waste bins will result in cars/bins being locked in the basement in times of breakdown of the car lift.

The deficiency of on-site parking, combined with the loss of kerb side parking required for vehicles waiting to enter the site, plus placement of bulk bins in the street, results in the development creating an external impact on the road system and adjoining properties. This is undesirable in a highly visible location opposite the Gosford waterfront.

Context and setting

The site is across the road from Brisbane Water and Councils waterfront parklands and so is in a visually prominent location. The proposed development is of a height anticipated by the development controls, however is over the FSR and proposes zero side setbacks which result in the development appearing to have excessive bulk.

Built Environment

The site is located at the outer edges of the Gosford City Centre within the B4 Mixed Use zone. The area is generally residential in character, which is transitioning to include developments of higher density and introducing a greater mix of uses. The proposed building height is compliant with the development standards for the area. The building will however impact on views due to the zero side setbacks on both sides.

Access and Transport

Due to the constraints of the site in size and width, the proposal includes a vehicle lift to access the basement parking areas. This will result in delays and queueing in peak times. Parking is in high demand in the area, due to the area being in close proximity to the Gosford City Centre. This development will result in loss of onstreet parking spaces. The proposal is also noted to be deficient in onsite parking provided within the development.

Natural Environment

The site is currently a developed site. The natural environment will be maintained, through the development. Matters such as dust, sediment and water quality impacts during construction could be adequately managed through conditions if consent was proposed.

Suitability of the Site for the Development

The site is zoned B4 Mixed Use which permits RFB's. The site is suitable for this type of development, however, the scale of development is too large for the size of the site. The zero setbacks, constrained access, impacts on views, overshadowing, and bulk are indicative that the development is too large for the site. The proposal is considered to be an over development of the site.

Other Matters for Consideration**Development Contributions**

The land is zoned B4 Mixed Use and is subject to the Gosford City Centre S94A contributions plan. As the application was lodged on 30 January 2015, a contribution rate of 2% would be applicable as per previous resolutions of the former Gosford Council.

Conclusion:

This section 82A review application has been assessed under the heads of consideration of section 79C of the *Environmental Planning & Assessment Act, 1979* and all relevant instruments and policies.

The proposal has reduced the height and parking, but increased the number of units within the development. The proposal exceeds the maximum FSR, and does not comply with side setbacks required under GDCP 2013 and the ADG.

The clause 4.6 submission is not considered well founded and the proposed development does not result in a better planning outcome due to the variations. The variation to FSR and side setbacks have an impact on existing and likely future development on adjoining sites and are not supported.

The location of deep soil planting at the rear of the site does not achieve the aim of deep soil planting which should be planted in the front or side setback areas to reduce the extent of walls/facades.

The proposal does not provide adequate car parking on site as required by either Councils GDCP 2013 or the ADG under SEPP 65. The deficiency of on-site car parking will result in additional demand for on-street parking which is undesirable in this location due to the close proximity of businesses and the Gosford waterfront.

The external impact is increased by the need to place bulk waste bins in the street for collection, further impacting street parking and road capacity.

The objections to the proposal were mainly from adjoining owners/residents and the issues raised are relevant and could not be addressed by conditions of consent.

The variations proposed have been assessed, and in combination, it is considered that the design results in an overdevelopment of the site.

Accordingly, it is considered that the application be **refused** pursuant to Section 80(1)(b) of the Environmental Planning and Assessment Act, 1979.

Attachments

- | | | |
|----------|----------------------------------|-----------|
| 1 | Applicants Clause 4.6 submission | D12535792 |
| 2 | Compliance Table | D12536021 |

Planning

Working Beyond Expectations

ADW JOHNSON PTY LIMITED

ABN 62 129 445 398

Central Coast
5 Pioneer Avenue
Tuggerah NSW 2259
Ph. 02 4305 4300
Fax. 02 4305 4399
coast@adwjohnson.com.au

Hunter Region
7/335 Hillsborough Road,
Warners Bay NSW 2282
Ph. 02 4978 5100
Fax. 02 4978 5199
hunter@adwjohnson.com.au

Clause 4.6 Variation to FSR or Lot Width

Residential Flat Building

Property:
49 Masons Parade, Point Frederick
Lot 4 DP1327014

Applicant:
Silver Stallion Pty Ltd

Date:
October 2016



Project Management • Town Planning • Engineering • Surveying
Visualisation • Economic Analysis • Social Impact • Urban Planning

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Document Control Sheet

| Issue No. | Amendment | Date | Prepared By | Checked By |
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Limitations Statement

This report has been prepared in accordance with and for the purposes outlined in the scope of services agreed between ADW Johnson Pty Ltd and the Client. It has been prepared based on the information supplied by the Client, as well as investigation undertaken by ADW Johnson and the sub-consultants engaged by the Client for the project.

Unless otherwise specified in this report, information and advice received from external parties during the course of this project was not independently verified. However, any such information was, in our opinion, deemed to be current and relevant prior to its use. Whilst all reasonable skill, diligence and care have been taken to provide accurate information and appropriate recommendations, it is not warranted or guaranteed and no responsibility or liability for any information, opinion or commentary contained herein or for any consequences of its use will be accepted by ADW Johnson or by any person involved in the preparation of this assessment and report.

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1.0 Introduction

1.1 PROPOSED DEVELOPMENT

The applicant seeks to construct a residential flat building comprising 25 units within two (2) buildings. Both buildings comprise five (5) storeys above ground level at a height of 15m or less and will be highly modulated and superbly architecturally treated to soften both buildings' facades (see Figure 1).



Figure 1: Proposed Development Perspective (Source: CKDS)

Overall, the development comprises 2,221m², which represents a floor space ratio (FSR) of 2.19:1. This development is a further amendment to that lodged on 8th September 2016 and a copy of the amended plans was forwarded to Council on 12th October 2016.

The proponent seeks to develop the site to provide an economically viable outcome within the constraints of the allotment whilst also respecting the amenity, views, privacy and solar access of the adjoining development.

1.2 SUBJECT SITE

The site is a rectangular piece of land with a road frontage of 15m to Masons Parade and a depth of approximately 67m.

The site is located within the Gosford City Centre, in an area which contains a mix of medium density housing. To the south of the site at No. 43 exists a modern four (4) storey residential flat building, and to the north at No. 51-57 exists Brisbane Water Legacy; a vast expanse of land covering over a hectare and supporting unit and dwelling accommodation for enrolled dependants.

2.0 Background

2.1 HISTORY

DA 47050/2015 was lodged on 30th January 2016 for a residential flat building comprising 27 units within two (2) buildings. Both buildings comprised six (6) storeys above ground level at a height slightly over 19.5m and a FSR of 2.28:1 (see Figure 2).



Figure 2: Original Development Perspective (Source: CKDS)

The development was lodged using the incentive bonus provisions provided for under Clause 8.9 of the Gosford Local Environment Plan 2014 which states:

8.9 Development incentives

- (1) The objective of this clause is to provide incentives for development on land in Gosford City Centre.
- (2) This clause applies to land identified as "Gosford City Centre" on the [Development Incentives Application Map](#).
- (3) Development consent may be granted for the erection of a building on land to which this clause applies if the building:
 - (a) will not exceed the maximum height shown for the land on the [Height of Buildings Map](#) by more than 30%, and
 - (b) will not exceed the maximum floor space ratio shown for the land on the [Floor Space Ratio Map](#) by more than 30%.
- (4) This clause ceases to apply 12 months after the commencement of Gosford Local Environmental Plan 2014 (Amendment No 12).

Amendment No 12 of the LEP came into force on 2nd April 2015 and as such, applies until 2nd April 2016. In the circumstances of the subject development, this allows for a building height of 19.5m and FSR of 2.6:1.

During the assessment, Council advised that they would not support development in its current form and requested that amendments be made to address various concerns.

Subsequently, the applicant made amendments which for the most part removed two (2) storeys within the western building but which kept the height of the eastern building at slightly over 19.5m (see Figure 3).

Despite the significant amendment, Council refused DA 47050/2015 on 11th March 2016, citing 11 reasons against the development.



Figure 3: Refused Development Perspective (Source: CKDS)

On 8th September 2016, amended plans were lodged with Council as part of a Section 82A review request which responded to the 11 reasons for refusal. The amended plans proposed to construct a residential flat building comprising 24 units within two (2) buildings of five (5) storeys, but with a maximum height of 18.65m through the stairs to the roof top garden, with a majority height of 16m, and a FSR of 2.24:1 (see Figure 4).



Figure 4: Section 82A Review Development Perspective (Source: CKDS)



2.2 WINGECARRIBEE SHIRE COUNCIL V DE ANGELIS NSWCA 189

On 26th September 2016, Council's Assessing Officer advised ADW Johnson, that a recent Court of Appeal decision [Wingecarribee Shire Council v De Angelis NSWCA 189] meant that the development could no longer access the 30% height and FSR bonus incentive provisions provided for under Clause 8.9 as the date for such ended on 2nd April 2016. For this reason, the applicant was advised that in order to assess the development at hand, Council required a Clause 4.6 Request to be lodged with the Section 82A Review given that the development exceeded the standard ("non-incentive bonus") height and FSR being 15m and 1:1 respectively.

A review of the findings in Wingecarribee Shire Council v De Angelis NSWCA 189 has found that the case involved was vastly different to the proposed. In summary, the development involved, was for a mixed use retail and residential development which at the time of lodgement was a permissible development under the *Wingecarribee Local Environmental Plan 2010* (being a Standard Instrument LEP) but by the time the application was determined, an amending LEP (Amendment No. 38) had the effect of prohibiting the development.

The Land and Environment Court found in *De Angelis v Wingecarribee Shire Council NSWLEC 1*, that the savings provisions within the relevant LEP had the effect of ensuring that the law applicable to the development, was the law in force at the time of lodgement; a position most Councils across the State were/are abiding by. The Court of Appeal however, overturned this finding, stating that the savings provisions within the *Wingecarribee LEP 2010* were not applicable to an amendment to a Standard Instrument LEP. The consequences of this finding have the effect of giving Councils the ability to lodge amendments to LEP's following the lodgement of developments, in order to make them prohibited and thus refuse them.

Whilst, the above finding is acknowledged, its relevance to the subject development is questioned; with the following points being made:

1. DA 47050/2015 was lodged and determined before 2nd April 2016 and thus does not need to rely on the savings provisions to access the 30% bonus;
2. DA 47050/2015 is a permissible form of development both prior to and following 2nd April 2016. The case involved surrounded permissibility not development standards;
3. The subject Section 82A application is a review of a decision which was made by 2nd April 2016, not a new application; and
4. Council has determined numerous developments which have relied upon the bonus provisions since 2nd April 2016 without a Clause 4.6 Request. These would be invalid consents should Council choose to interpret the Court of Appeals decision as applying to a development standard rather than a prohibition.

Taking the above into consideration, it is ADW Johnson's firm position that the bonus provisions apply to DA 47050/2015 and to the subject Section 82A Review.



2.3 CURRENT PROPOSED DEVELOPMENT

Despite the discussion provided within Section 2.2, the applicant has always been willing to work with Council to facilitate an approval for the site. With that said, even further amendments have been made as illustrated within Section 1.1 to bring the development below the non-incentive bonus height (15m). Unfortunately, despite the design changes which have reduced the building height, the FSR is still above the non-incentive bonus of 1:1.

The proposed development now comprises the following elements:

- Construction of two (2) five (5) storey residential flat buildings accommodating 25 units; and
- Two (2) levels of basement parking accommodating 26 car spaces and accessed via a car lift from the Masons Parade frontage.

In addition to the above, its design has also been amended from that lodged on 8th September 2016 in the following ways:

- Smart slabs have been adopted to incorporate services within the slab and reduce the floor to floor height from 3.2m to 2.9m;
- Removal of the fifth floor stairs and terrace;
- The overall height of the development has come down from 18.6m to 15m
- The FSR has reduced from 2.24:1 to 2.19:1;
- The mix of apartments has been improved from (1 x 1 bed + 23 x 2 bed) to (1 x 1 bed + 23 x 2 bed + 1 x 3 bed); and
- The penthouse level (Level 4) now steps in off the side boundary by 2.4m.

The proposed development continues to comply with the following planning controls:

| Control | | Proposed | Complies |
|--|---|----------------------------------|------------|
| <i>Height (LEP)</i> | Bonus - 19.5m Standard – 15m | 15m | Yes Yes |
| <i>FSR (LEP)</i> | Bonus - 2.6:1 Standard – 1:1 | 2.19:1 | Yes No* |
| <i>Parking (SEPP 65)</i> <i>0.6 per 1 bedroom</i> <i>0.9 per 2 bedroom</i> <i>Visitor 1 per 5 units</i> | 26 spaces | 26 spaces | Yes |
| <i>Site Coverage (DCP)</i> | 60% (608m ²) | 54% | Yes |
| <i>Deep Soils (SEPP 65)</i> <i>Site 650m²-1,500m²</i> | 7% (71m ²) Min dimension: 3m | 7.9% (80m ²) 4.6m | Yes Yes |
| <i>Front setback (DCP)</i> <i>Up to 16m</i> | 2-2.5m | 2m stepping back to 6m | Yes |
| <i>Front setback (DCP)</i> <i>16m-24m</i> | 6m | N/A | N/A |
| <i>Side setback (DCP)</i> <i>Up to 16m</i> | Ground to Level 4: 0m | Ground to L3 = 0m L4 = 2.4m | Yes |
| <i>Side setback (DCP)</i> <i>16m-24m</i> | Level 5 Non-habitable: 4.5m | N/A | N/A |
| <i>Rear setback (DCP)</i> <i>Up to 12m</i> | Ground to Level 3: 6m | 7m | Yes |



| | | | |
|-------------------------------|---|-------------|-----|
| Rear setback (DCP) 12m-24m | Level 4 & 5 Non-habitable: 6m Habitable: 9m | Bedroom: 9m | Yes |
|-------------------------------|---|-------------|-----|

*Again, whilst it is contended whether or not the bonus provisions apply, a Clause 4.6 Request has nonetheless been prepared for Council to facilitate the approval of the current Section 82A Review.

The need to vary the FSR has arisen due to the superior architectural design which has been adopted across the development. An integral part of the design process was to ensure that the site's prominent location and northern position to the adjoining site to the south was suitably acknowledged and accommodated for in terms of modulation, materials, facade treatments and design elements. For this reason, the proposal has been architecturally designed with a level of excellence and amenity not currently seen within Point Frederick. The delivery of such outcomes, particularly the separation of the development into two (2) buildings and therefore the requirement to provide two (2) lift towers along with the two (2) levels of basement parking, has an economic cost which necessitates a certain return on investment to make it viable. This return is gained in the form of floor space.

In light of the background outlined above, the applicant seeks to use Clause 4.6 to enable Council to vary one (1) of two (2) possible controls; either the FSR development standard depicted under Clause 8.3(2)(b) or the lot width development standard depicted under Clause 8.3(1)(a).



3.0 Description of the Planning Instrument, Development Standard and Proposed Variation

3.1 WHAT IS THE NAME OF THE ENVIRONMENTAL PLANNING INSTRUMENT THAT APPLIES TO THE LAND?

The proposed development and subject land is required to comply with Gosford Local Environmental Plan 2014.

3.2 WHAT IS THE ZONING OF THE LAND?

The subject site is located within the *B4 Mixed Use Zone*.

3.3 WHAT ARE THE OBJECTIVES OF THE ZONE?

The relevant objectives within the *B4 Mixed Use Zone* are as follows:

- *To provide a mixture of compatible land uses.*
- *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.*
- *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.*
- *To allow development in Point Frederick to take advantage of and retain view corridors while avoiding a continuous built edge along the waterfront.*
- *To create opportunities to improve the public domain and pedestrian links of Gosford City Centre.*
- *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.*
- *To protect and enhance the scenic qualities and character of Gosford City Centre.*

3.4 WHAT IS THE DEVELOPMENT STANDARD BEING VARIED? E.G. FSR, HEIGHT, LOT SIZE

Development standard is defined as follows under the EP&A Act:

development standards mean provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) the cubic content or floor space of a building,*
- (e) the intensity or density of the use of any land, building or work,*



- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,
- (h) the volume, nature and type of traffic generated by the development,
- (i) road patterns,
- (j) drainage,
- (k) the carrying out of earthworks,
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,
- (m) the provision of services, facilities and amenities demanded by development,
- (n) the emission of pollution and means for its prevention or control or mitigation, and
- (o) such other matters as may be prescribed.

Based on the above definition, the subject site is in the unique position of being dictated by two (2) different development standards, both which have an impact on the applicable FSR. For this reason, the development can either vary the FSR control or the Lot Width control.

3.5 IS THE DEVELOPMENT STANDARD A PERFORMANCE BASED CONTROL? GIVE DETAILS.

No, as discussed above the FSR and lot width development standards are numerical controls.

3.6 UNDER WHAT CLAUSE IS THE DEVELOPMENT STANDARD LISTED IN THE ENVIRONMENTAL PLANNING INSTRUMENT?

FSR

Under Clause 8.3(2)(b) of the LEP, the maximum FSR for development on the sites within the Gosford City Centre which have a lot width less than 24m and which are mapped as having an FSR of 2:1 (see Figure 5) have a reduced FSR of 1:1.

8.3 Floor space ratio

- (2) If a building on land in a zone specified in the Table to this subclause and for which the maximum floor space ratio on the [Floor Space Ratio Map](#) is as specified in Column 1 of that Table for that zone is:
- (a) on a site area of less than 1,000 square metres, or
 - (b) has no street frontage greater than 24 metres,

the maximum floor space ratio for the building is the ratio specified opposite that ratio in Column 2 of that Table.

Column 1

Column 2

Zone B4 Mixed Use, Zone B6 Enterprise Corridor, Zone SP1 Special Activities

2:1 or less

1:1

Adopting the 30% incentive applied under Clause 8.9 brings this up to 2.6:1, as this clause refers to the mapped FSR not the FSR depicted within Clause 8.3(2)(b). As Council have advised that the bonus provisions are not applicable to the subject development however (a position which is still contended), the applicable FSR under Clause 8.3(2)(b) is 1:1.

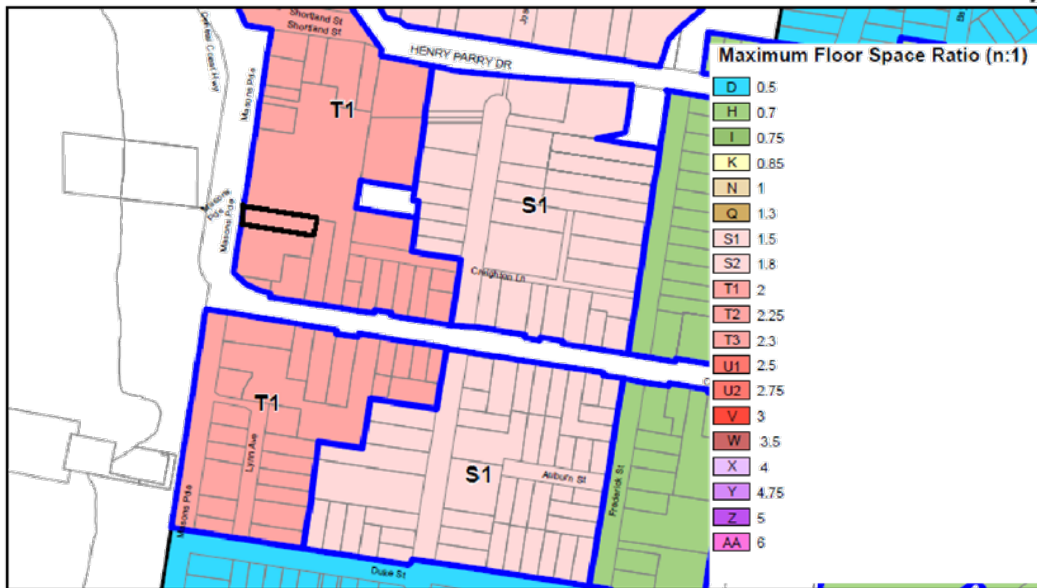


Figure 5: FSR Map (Source: Gosford LEP Maps)

Lot Width

As an alternate position, the development can instead request a variation to the lot width required under Clause 8.3(1)(a) which states:

8.3 Floor space ratio

(1) The maximum floor space ratio for a building is:

- (a) if the building is on a site area of at least 1,000 square metres, but less than 1,500 square metres and has a street frontage of at least 24 metres—3:1, or

The area of the site is between 1,000m² and 1,500m² but has a lot width of 15m. A variation to this lot width, allows the development to access a FSR of 3:1.

Summary

Taking the above into consideration, the proposal can seek to vary either the maximum FSR provisions provided for under Clause 8.3(2)(b) or the minimum lot width provisions provided for under Clause 8.3(1)(a).

3.7 WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

There are no specific objectives behind Clause 8.3 and so it would be reasonable to consider the objectives behind Part 8 which state:

- (a) to promote the economic and social revitalisation of Gosford City Centre,
- (b) to strengthen the regional position of Gosford City Centre as a multi-functional and innovative centre for commerce, education, health care, culture and the arts, while creating a highly liveable urban space with design excellence in all elements of its built and natural environments,
- (c) to protect and enhance the vitality, identity and diversity of Gosford City Centre,
- (d) to promote employment, residential, recreational and tourism opportunities in Gosford City Centre,



- (e) to encourage responsible management, development and conservation of natural and man-made resources and to ensure that Gosford City Centre achieves sustainable social, economic and environmental outcomes,
- (f) to protect and enhance the environmentally sensitive areas and natural and cultural heritage of Gosford City Centre for the benefit of present and future generations,
- (g) to help create a mixed use place, with activity during the day and throughout the evening, so that Gosford City Centre is safe, attractive and efficient for, and inclusive of, its local population and visitors alike,
- (h) to enhance the Gosford waterfront,
- (i) to provide direct, convenient and safe pedestrian links between Gosford City Centre and the Gosford waterfront.

It would also be reasonable to consider the objectives behind Clause 4.4 which state:

4.4 Floor Space Ratio

(1) The objectives of this clause are as follows:

- (a) to establish standards for the maximum development density and intensity of land use,
- (b) to control building density and bulk in relation to site area in order to achieve the desired future character for different locations,
- (c) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,
- (d) to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing, and are not likely to undergo, a substantial transformation,
- (e) to provide an appropriate correlation between the size of a site and the extent of any development on that site,
- (f) to facilitate design excellence by ensuring the extent of floor space in building envelopes leaves generous space for the articulation and modulation of design,
- (g) to ensure that the floor space ratio of buildings on land in Zone R1 General Residential reflects Council's desired building envelope,
- (h) to encourage lot amalgamation and new development forms in Zone R1 General Residential with car parking below ground level.

How the proposed development addresses all of the above is discussed in further detail below.

3.8 WHAT IS THE NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE ENVIRONMENTAL PLANNING INSTRUMENT?

FSR

The numeric value of the maximum FSR provided for under Clause 8.3(2)(b) is 1:1. In this regard, FSR is defined within the LEP as the "ratio of the gross floor area of all buildings within the site to the site area".

Furthermore, gross floor area is defined within the LEP as "the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes:

- (a) the area of a mezzanine, and



- (b) habitable rooms in a basement or an attic, and
 (c) any shop, auditorium, cinema, and the like, in a basement or attic, but excludes:
- i. any area for common vertical circulation, such as lifts and stairs, and
 - ii. any basement:
 - i. storage, and
 - ii. vehicular access, loading areas, garbage and services, and
 - iii. plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and
 - iv. car parking to meet any requirements of the consent authority (including access to that car parking), and
 - v. any space used for the loading or unloading of goods (including access to it), and
 - vi. terraces and balconies with outer walls less than 1.4 metres high, and
 - vii. voids above a floor at the level of a storey or storey above".

Lot Width

The numeric value of the minimum lot width to access a FSR of 3:1 is 24m.

3.9 WHAT IS THE PROPOSED NUMERIC VALUE OF THE DEVELOPMENT STANDARD IN THE DEVELOPMENT APPLICATION?

FSR

Based on the above definition of gross floor area (GFA), the following table highlights the proposed maximum FSR:

| | Site Area (sqm.) | GFA (sqm.) | FSR |
|-------|------------------|------------|--------|
| Total | 1,013 | 2,221 | 2.19:1 |

Lot Width

Based on the survey width of the subject site, the proposed minimum lot width is 15m.

3.10 WHAT IS THE PERCENTAGE VARIATION (BETWEEN THE PROPOSAL AND THE ENVIRONMENTAL PLANNING INSTRUMENT)?

FSR

The following table highlights the variation sought from Council with regards to Clause 8.3(2)(b):

| Proposed FSR | Max FSR under CI 8.3(2)(b) | Variation |
|--------------|----------------------------|----------------------------|
| 2.19:1 | 1:1 | 1,208m ² (119%) |

Lot Width

The following table highlights the variation sought from Council with regards to Clause 8.3(1)(a):

| Proposed Lot Width | Min Lot Width under CI 8.3(1)(a) | Variation |
|--------------------|----------------------------------|-----------|
| 15 | 24m | 9m (60%) |



4.0 Assessment of the Proposed Variation

4.1 CLAUSE 4.6

Clause 4.6 of Gosford LEP 2014 states the following:

- (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.*

Clause 4.6 requires that a written request from the applicant must be made to Council that seeks to justify the contravention of the development standard by adequately 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.*



Furthermore, Council must be satisfied 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 B4 Mixed Use Zone.

Finally, the concurrence of the Director-General (DG) must be obtained. It is assumed that Council enjoys delegated authority of the DG in this regard.

In deciding whether to grant concurrence, Council must consider whether contravention of the development standard raises any matter of significance for state or regional environmental planning, and the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the DG before granting concurrence. In this regard, no "other matters" have been highlighted which require consideration under subclause (5)(c).

The following assessment has been undertaken in accordance the requirements of Clause 4.6. In this regard, it is noted that Clause 4.6 is generally equivalent to SEPP 1 where matters to be considered were detailed in the Department of Planning's (now Department of Planning and Environment) Circular No. B1 which states: -

"If the development is not only consistent with the underlying purpose of the Standard, but also with the broader Planning Objectives of the locality, strict compliance with the Standard would be unnecessary and unreasonable".

In *Winten Property v North Sydney* (2001) NSWLEC 46 Justice Lloyd sets out the following five (5) part test for considering SEPP No. 1 Objections:

- *Is the planning control in question a development standard;*
- *What is the underlying object or purpose of the standard;*
- *Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act 1979;*
- *Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;*
- *Is a development which complies with the development standard unreasonable or unnecessary; and*
- *Is the objection well founded.*

In accordance with the Guideline, this assessment also addresses the relevant test established by the NSW Land and Environment Court in the decision of Justice Preston in *Wehbe v Pittwater* [2007] NSW LEC 827 to determine whether compliance with a development standard is unreasonable or unnecessary based on the following:

- Is compliance with the development standard unreasonable or unnecessary because the objective of the development standard are achieved notwithstanding non-compliance with the standard.



4.2 HOW IS STRICT COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THIS PARTICULAR CASE?

In the circumstances of this case, strict numerical compliance is unreasonable or unnecessary because the proposal and the varied FSR or lot width are consistent with the objectives of Part 8 as demonstrated below:

| Part 8 |
|--|
| Objective/ Comment |
| <p><i>(a) to promote the economic and social revitalisation of Gosford City Centre,</i></p> <p>The proposed development does not hinder the attainment of the objective to promote the economic and social revitalisation of Gosford City Centre. In fact, this objective has been a leading driver in the design, including the FSR and the need to develop the site which has a width of 15m, on its own.</p> <p>It is understood that numerous controls and objectives within the LEP promote amalgamation of sites; however this is prohibitive in this case given the nature of the adjoining sites to the north and south. In this respect, the site to the north (No. 51-57/ Lot 51 DP 732632) encompasses a vast expanse of land covering over a hectare and supports unit and dwelling accommodation associated with Brisbane Water Legacy. The size of the site would allow for significant development to occur independently of adjoining lots and as such, amalgamating with the subject site would not make commercial sense for this land owner. The site to the south (No. 43/ SP 84147) encompasses an existing modern residential flat building. The existing built form of this site would prevent any meaningful development outcomes from amalgamation. Taking this into consideration, the site and adjoining sites are not suited to amalgamation and as such it is necessary to develop the subject 15m wide site to its maximum potential.</p> <p>Taking the above into consideration, there is nothing about the proposed development, particularly its FSR or lot width which hinders the attainment of this objective; rather it further satisfies it over a compliant building.</p> |
| <p><i>(b) to strengthen the regional position of Gosford City Centre as a multi-functional and innovative centre for commerce, education, health care, culture and the arts, while creating a highly liveable urban space with design excellence in all elements of its built and natural environments,</i></p> <p>The proposed development provides for 25 additional residential units within a mixed use area, opposite Brisbane Water and the Olympic swimming pool and along a frequent public transport route. Developing the site in the manner proposed only strengthens the attainment of this objective.</p> <p>Further to the above, a development which is confined to the controls in question would be unlikely to be developed at all given its limited viability and this pushes developers on to cheaper sites located away from the city centre. For all of these reasons, forcing compliance in this regard would fall significantly short of providing a development which would strengthen the regional position of Gosford City Centre.</p> |
| <p><i>(c) to protect and enhance the vitality, identity and diversity of Gosford City Centre,</i></p> <p>This objective is about enhancement of the city, and facilitating a new era of investment and activity. In this regard, this site has languished for many years and was purchased by the proponent for re-development following Council's adoption of the 30% bonus FSR and height provisions. As was the case for multiple developments within the City Centre, the timeframe given for the bonus provisions was to encourage the <u>lodgement</u> of development applications.</p> |



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| <p>For this reason, Council had a flood of applications being lodged prior to 2nd April 2016. Should Council adopt the strategy that this date is based on determination not lodgement, a number of existing approved developments would now be invalid and numerous existing DA's still with Council would lose the ability to use this bonus. This position would erode the confidence in Central Coast Council and in particular the Gosford City Centre. Regardless of this fact, if Council chose to proceed with this position, allowing the subject development (and many others currently in Council) to vary the FSR or lot width control, will ensure that the attainment of this objective can still be realised.</p> |
| <p><i>(d) to promote employment, residential, recreational and tourism opportunities in Gosford City Centre,</i></p> |
| <p>In allowing for the proposal to be built in the manner proposed, the project will be economically viable and as such, realistically likely to go ahead. The construction of a development of this scale will have significant employment benefits and these will continue through the ongoing management and maintenance of the building. Enforcing the LEP controls will significantly reduce unit yield and therefore the attractiveness to proceed to the next step (construction).</p> <p>In light of the above, it is considered that the proposed building FSR or lot width variations in no way hinder the attainment of this objective, as it acts to promote Gosford and thereby further encourage investment and development within the City Centre.</p> |
| <p><i>(e) to encourage responsible management, development and conservation of natural and man-made resources and to ensure that Gosford City Centre achieves sustainable social, economic and environmental outcomes,</i></p> |
| <p>The intensity and associated FSR of the development will create demand for services within the city core and will provide residential accommodation within walking distance to a regular bus service.</p> <p>In addition to this, the development has been designed to achieve BASIX targets and is in accordance with State Environmental Planning Policy 65 – <i>Design Quality of Residential Flat Buildings</i>, the objectives of which include “providing sustainable housing in social and environmental terms”, and to “minimise the consumption of energy from non-renewable resources, to conserve the environment and to reduce greenhouse gas emissions”.</p> <p>Allowing a variation to either the FSR or lot width control will compensate for a superior design and build to be achieved, and so on balance, in terms of the ESD principles, the proposed development meets this objective more so than one which is complying.</p> |
| <p><i>(f) to protect and enhance the environmentally sensitive areas and natural and cultural heritage of Gosford City Centre for the benefit of present and future generations,</i></p> |
| <p>The site possess no environmentally sensitive areas and so developing it in the manner proposed reduces the pressure to develop less suited sites which may be covered in significant vegetation, bushfire prone etc.</p> <p>Natural heritage aspects of the site in this regard include the water views of Brisbane Water. The proposed development takes full advantage of these and has even been designed to allow views across the side boundary from the neighbouring property (despite such views being found as difficult to retain).</p> |
| <p><i>(g) to help create a mixed use place, with activity during the day and throughout the evening, so that Gosford City Centre is safe, attractive and efficient for, and inclusive of, its local population and visitors alike,</i></p> |
| <p><i>(h) to enhance the Gosford waterfront,</i></p> |



(i) to provide direct, convenient and safe pedestrian links between Gosford City Centre and the Gosford waterfront.

Given the site's ideal position opposite the waterfront, there is no argument which could suggest that developing in it the manner proposed would achieve these objectives less so than a compliant design.

The proposed building will add to this growth and improved streetscape environment. The improvement of this currently dilapidated property will bring a sense of pride and safety to the area and this in turn will encourage walkability, activation and patronage of businesses within the city core and open spaces along the waterfront. The proposed FSR or lot width are not considered to hinder the attainment of these objectives given that the upper levels of the building have been setback from the street in order to maintain a human scale. Furthermore, restricting the development to these controls reduces potential return on investment which will drastically reduce the quality of the build.

In the circumstances of this case, strict numerical compliance is unreasonable or unnecessary because the proposal and the varied FSR or lot width are consistent with the objectives of Clause 4.4 as demonstrated below:

| Clause 4.4 |
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| Objective/Comment |
| <p><i>(a) to establish standards for the maximum development density and intensity of land use,</i></p> <p>This is considered more of an introductory statement within the objectives, rather than one (1) which describes a particular aim to be achieved through the application of the development standard. This objective is best considered in conjunction with the others rather than on its own. It is worth noting however, that the proposed development would not be varying the FSR controls had it been able to access the development incentive bonus of 30%. With this in mind, the intensity of the land use was obviously still accounted for within the LEP and the scale of the proposed development.</p> <p>In addition to the above, it is noted that had the site been located outside of the City Centre and not required to address Part 8, its FSR would have been 2:1 and the development would have a variation of less than 10%. This is completely contradictory to the intention of the city centre provisions which were to boost investment and development within Gosford over sites outside of this area.</p> |
| <p><i>(b) to control building density and bulk in relation to site area in order to achieve the desired future character for different locations</i></p> <p>Had the proponent had the ability to purchase 9m (width) of the adjoining site, the applicable FSR would jump from 1:1 to 4:1 (based on lot area increasing to over 2,000m²). This 400% increase for only 600m² of additional land is ludicrous and completely contrary to this objective given that proportionately, that much increased GFA has no actual bearing on the character of the area but merely the lot width of the site.</p> <p>In terms of the FSR control, had Council deemed that the 30% bonus applied to the lodgement date and not the determination date, the development could access a FSR of 2.6:1 not 1:1. Again, this jump in allowable GFA has nothing to do with character of an area but rather time and time has no bearing on the physical manifestation of development.</p> |



(c) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,

The development has been designed within two (2) buildings (as opposed to one (1)) for the specific reason of reducing impacts on the adjoining property to the south. By providing open space between the two (2) buildings, filtered views towards Brisbane Water can continue to be gained and greater solar access is also provided. Had the development been designed as one (1) building, it could reduce its GFA by removing the double up of lobbies and access areas and it could also reduce its cost through removing the double up of services, particularly lifts and therefore it could reduce its yield. With that said, the fact that the development has been meticulously designed to add modulation through two (2) buildings works to its detriment in terms of meeting the controls.

With the site being a relatively small allotment within a mixed use zone presents conflicting issues in the need to create a scale of development which fits in to the City Centre ethos without detrimentally impacting on the character of the area or surrounding properties. It is considered that the design of the building results in a perfect balance between these two (2) opposing forces by still producing a viable product but without being presented as one bulky building.

Were the development to reduce its FSR to comply, its finish and modulation would be eroded and it would have a considerably worse impact on the southern neighbour in terms of view loss, overshadowing and general amenity.

In terms of the public domain, the proposed design incorporates a visually appealing mixed material palette, including a green wall, glass panelling along with wooden and masonry façade and balcony treatments. In addition to this, the front façade of the building has been stepped to present a more human scale at the pedestrian level, and a silent water feature adorns the centre of the front elevation to grab the eye and enhance the current drab non-active street presentation.

All of the above treatments come at a significant cost, and these need to be offset by gaining saleable residential floor space. Had the development not applied any of the above design elements, it could afford to reduce its FSR to a complying level but with a significantly less desirable design and greater environmental impacts. Based on these facts, it is considered that the application of the FSR limitation or lot width is not warranted in this case.

(d) to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing, and are not likely to undergo, a substantial transformation,

As evidenced by numerous plans for the Gosford City Centre in recent years, it is abundantly clear that the City Centre is set to undergo a substantial transformation. Despite this, given the site's location adjacent to an existing relatively modern development, it is necessary to ensure that the proposed development will continue to respect this site. In this regard, and as mentioned above, had the development been designed within one (1) building, its cost to construct would be vastly reduced and its corresponding yield and FSR could also decrease. The applicant has however, chosen to modulate the development to provide a softened façade to the southern neighbour, despite this modulation pushing up costs as well as unusable FSR. Taking this design into consideration, it is clear that the proposed development more consistently achieves this objective that would one within one building.



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| <i>(e) to provide an appropriate correlation between the size of a site and the extent of any development on that site,</i> |
| As discussed above, had the site been 600m ² larger through the purchase of 9m of the northern property, its allowable FSR would jump up by 400%. Similarly, had the site been further away from the city centre, its FSR would be 2:1 not 1:1; or had Council decided that the 30% bonus applied, it would have an FSR of 2.6:1. All of these reasons point to the fact that this objective is fundamentally not achieved by restricting the development to an FSR of 1:1 as it does not represent an appropriate or reasonable correlation. |
| <i>(f) to facilitate design excellence by ensuring the extent of floor space in building envelopes leaves generous space for the articulation and modulation of design,</i> |
| As discussed above, by designing the development as two (2) separate buildings rather than one (1), significant levels of articulation and modulation of design can be achieved; however, they result in a variation to the allowable FSR. Had the development been designed as one (1) building, it would have achieved the FSR requirements, however would have removed the large central courtyard which significantly opens up the site. Similarly, had it had access to an additional 9m of width, the development could have more than double in size. It is also noted that the development meets all setback requirements as well as the deep soil landscaping area and site coverage. It is these building envelope controls which dictate articulation and modulation over FSR or lot width controls. |
| <i>(g) to ensure that the floor space ratio of buildings on land in Zone R1 General Residential reflects Council's desired building envelope,</i> |
| N/A |
| <i>(h) to encourage lot amalgamation and new development forms in Zone R1 General Residential with car parking below ground level.</i> |
| N/A |

Finally, Council must also be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the *B4 Mixed Use Zone*. This is demonstrated within the following table:

| B4 Mixed Use Development |
|---|
| Objective/Comment |
| <i>To provide a mixture of compatible land uses.</i> |
| The proposed residential flat building development, comprising 25 units, is ideally suited to the surrounding residential and community open space land uses in the area. The proximity of the units to the open space along Brisbane Water and Gosford Olympic Swimming Pool will encourage greater use of these facilities which will consequently bring vibrancy to this end of Gosford City Centre. |
| The fact that the development exceeds the FSR or doesn't meet the lot width requirement has no bearing on the ability of the development to achieve this objective. Were it restricted to an FSR of 1:1, its construction costs would need to reduce substantially and this would remove many aspects of the architectural excellence of the design, particularly its modulation, water feature and interesting mixed building materials. The fact that the development is of such high quality will attract a socio-economic group of residents with disposal income. This is considered to be ideal in a mixed use City Centre environment. |



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| <p><i>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.</i></p> |
| <p>Similar to the above objective, the design of the building will attract residents who have the ability to take full advantage of the surrounding businesses. For reasons mentioned above, reducing the GFA of the building could be achieved through a less spectacular design which in turn would be less suitable to the City Centre location. Furthermore, that fact that the design of the building has been able to incorporate such a high level of architecture will ensure that its presence along Masons Parade is a positive one (1) and one (1) which would improve the public domain and enhance the walkability of the neighbourhood. With this in mind, the proposed development contributes significantly to the attainment of this objective and its FSR is key to this contribution.</p> |
| <p><i>To allow development in Point Frederick to take advantage of and retain view corridors while avoiding a continuous built edge along the waterfront.</i></p> |
| <p>The proposed development, comprising two (2) separate buildings, has been designed to take into account the slim nature of the site to ensure the existing residents to the south can still obtain partial views of Brisbane Water and the Gosford jetty. Balconies have been provided on most of the units which will allow residents of the subject development to gain partial views to these areas as well. Had the design only been encompassed within one (1) building but with a compliant FSR, less residents to the south, and on the subject site, would have access to the views stipulated within the objective.</p> <p>In terms of the built edge, given that the site has only a small road frontage it is not in a position to allow for a continuous built edge along the waterfront and the FSR variation has no impact in this regard.</p> |
| <p><i>To create opportunities to improve the public domain and pedestrian links of Gosford City Centre.</i></p> |
| <p>The design of the building is somewhat of an eye catcher, stemming from the fact that it has been developed in consultation with a number of International Architects. As a result, the development presents a modern and progressive building on a site which at present contains a dilapidated and vacant Chinese restaurant. This consequently adds to the character of the area and the improvement of the public domain and pedestrian feel. It is also the reason behind the need to gain a certain unit yield which consequently pushes the FSR of the development over the control.</p> |
| <p><i>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.</i></p> |
| <p>This has been addressed through the above objectives. Fundamentally, the FSR or lot width variation in no way deplete the development's ability to enliven the waterfront.</p> |
| <p><i>To protect and enhance the scenic qualities and character of Gosford City Centre.</i></p> |
| <p>The site as present acts as something of a "missing tooth" along Masons Parade and the site's development backdrop in general. The proposed residential development, factoring in its superior architectural design, will by far and away improve the current scenic quality of the property. Were the development restricted to a FSR of 1:1, it would still act as somewhat of a missing tooth and a wasted opportunity in this ideal location.</p> |

Taking the above into consideration, the proposed residential flat building is considered to more consistently achieve the objectives of the B4 Mixed Use Zone than would a building of compliant FSR or lot width.



4.3 HOW WOULD STRICT COMPLIANCE HINDER THE ATTAINMENT OF THE OBJECTS SPECIFIED IN SECTION 5(A)(I) AND (II) OF THE ACT?

The objects set down in Section 5(a)(i) and (ii) are as follows:

“to encourage:

- (i) The proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*
- (ii) The promotion and coordination of the orderly and economic use and development of land...”*

Two (2) of the primary concerns in the development of land are the economics of the proposal; and the regulatory controls applicable. In this case, the proposed yield and subsequent FSR are required in order to offset the costs associated with the high quality architectural façade treatments, the building modulation and the incorporation of two levels of basement parking. Accordingly, if the yield is not achieved, then the return on the investment will be insufficient, and the project will not commence. Support for this is seen in the Department of Planning and Environment’s “Urban Feasibility Model” which was run for the Gosford City Centre and which found that the baseline LEP controls provide potential for 16,474 additional units—of which only 19% were feasible to develop. This is far from being consistent with the promotion of the “social and economic welfare of the community”.

The significant design excellence which has been afforded to the development and the need to provide a viable product has meant that additional residential floor space is required in order to obtain a feasible unit yield.

The fact that the Council has now elected to adopt the findings of *Wingecaribee Shire Council v De Angelis* which referred to permissibility not a development standard, is the very antithesis of “proper management”, “promoting the social and economic welfare of the community” and “orderly and economic use of land”. Billions of dollars have been invested into the City Centre based on the assumption that development applications lodge before 2nd April 2016 could access a 30% height and FSR bonus. This is pivotal to the subject site, as had these bonuses not applied, the FSR dropped from 2.6:1 down to 1:1; more than halving the GFA yield.

Removing the bonus provision retrospectively, following the significant region wide investment, will erode the confidence of the Council and push developers elsewhere. This is fundamentally against the very objects of the Act which override LEP provisions.

Taking the above into consideration, containing the proposed development to the FSR or lot width control will be drastically inconsistent with the promotion of the *“proper management, development and conservation of natural and artificial resources...for the purpose of promoting the social and economic welfare of the community...”*; and the *“orderly and economic use of land”*.

The question therefore of whether strict compliance with the clauses under consideration would hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act is answered in the affirmative.



Strict compliance with the maximum FSR control or minimum lot width would have the potential to impact on the viability of the project to the point where the site would not have been purchased in the first place. Any redesign under these parameters will result in a substandard development; a wasted opportunity in a climate where the Central Coast is set to accommodate significant population growth; and greater impacts to adjoining residents and the public domain.

In addition to the above, other factors to be considered in the contexts of the objects of the Act include:

- Had the site been located outside of the City Centre it could have access an FSR of 2:1 (representing less than a 10% variation);
- Had Council not taken well over a year to determine the application, a resolution and suitable design (such as the proposed) could have been accommodated within the timeframe of the 30% bonus provisions;
- Had the site been 9m wider it could have accessed a 400% increase in FSR; the drastic drop to 1:1 is considered unreasonable when there are no opportunities either side of the property to amalgamate;
- Council has already approved a number of developments after 2 April 2016 which rely on the 30% bonus; this gives an unfair advantage over developers who have invested just as much capital but which are now penalized retrospectively.

4.4 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

It is considered that sufficient planning ground exist to support the proposed FSR or lot width variation. This assertion is based on the arguments outlined above, which demonstrate that the aims of the standard and Part 8, being to promote the economic and social revitalisation of Gosford City Centre; control building bulk; minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain; maintain an appropriate visual relationship between existing areas; and to facilitate design excellence, are comprehensively achieved through the proposed built form.

Other matters to be noted in this context include:

- The proposal remains consistent with the objectives of the zone and the Gosford City Centre objectives of Part 8, despite the developments non-compliance in terms of FSR or lot width;
- The proposal remains consistent with the objectives of the FSR standard (Clause 4.4), despite its non-compliance;
- Non-compliance with the standard does not contribute to adverse environmental, social or economic impacts;
- It is desirable for the development to be more intense given its well serviced location and proximity to services such as the bus stops which adjoin the site;
- The development promotes the Act's objective of the orderly and economic development by ensuring that the project is commercially viable and will actually proceed.



4.5 IS THE VARIATION WELL FOUNDED?

Yes, for reasons outlined in the preceding sections of this submission, the variation to the FSR or lot width limit is well founded as compliance with the standard is unreasonable or unnecessary as the development does not contravene the objects specified within 5(a)(i) and (ii) of the Act, the objectives of the B4 Zone, and the objectives surrounding the FSR standard and Part 8.

4.6 IS THE DEVELOPMENT IN THE PUBLIC'S INTEREST?

As stated previously, Clause 4.6(4)(a)(ii) requires that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied 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. An assessment against the zone objectives and the objectives of the development standards and Part 8 have been thoroughly explored above.

In summary, the proposal represents an opportunity to continue Council's intention of redefining the Gosford City Centre. Currently, the subject site is underutilised containing a dilapidated vacant Chinese restaurant with no street appeal. The proposal will serve to activate the street frontage, bring pride to the area, and hopefully be another step toward the revitalisation of the Gosford City Centre.

Conversely, refusal of the development based on the findings of *Wingecaribee Shire Council v De Angelis*, will not only destroy the confidence of the proponent but all developers which currently have applications with Council relying on the bonus provisions. This drastic erosion of confidence will have detrimental impacts on the region as the loss of investment will not only ruin the subject development, but developers' ability in general to continue investing in the region. This is far from being in the public's interest particularly surrounding today's release of the Central Coast Regional Plan which targets significant population growth.



5.0 Clause 4.6 Variation Extent

There is no legislation or environmental planning instrument which limits the extent to which a variation under Clause 4.6 to a development standard can apply.

Clause 4.6 is similar to the provisions required under *State Environmental Planning Policy No 1 - Development Standards* (SEPP 1) where the Court of Appeal considered the issue in *Legal and General Life v North Sydney Municipal Council* (1990) 69 LGRA 201. Here, North Sydney Council had approved a SEPP 1 objection and the decision was subject to third party legal challenge. The applicable floor space ratio control was 3.5:1, but - as a consequence of upholding the SEPP 1 objection - the approved floor space ratio was 15:1 (a variation to floor space of 329%). The applicable height control was five (5) storeys whereas the approved height was 17 storeys (a variation of 240%).

Clause 4.6 of the LEP is similar in terms to SEPP 1 in that there are no explicit provisions that make necessary for a consent authority to decide whether the variation is minor. With this in mind, there is no implicit constraint on the degree to which a consent authority may depart from a numerical standard.

Four (4) recent examples that illustrate the wide range of commonplace numerical variations to development standards under clause 4.6 include:

- On 14th January 2014, in *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003, the Land and Environment Court granted development consent to a three (3) storey shop top housing development in Woolloomooloo. In this decision, the Court, approved a floor space ratio variation of 187%.
- On 14th May 2015, the Hunter & Central Coast Joint Regional Planning Panel granted development consent for a 180 unit shop top housing development on land at 138, 140, 142 Henry Parry Drive Gosford (Reference 2014HCC025DA- Gosford - 46274/2014). In this decision, the panel approved a building height variation of 33%.
- On 14th May 2015, the Hunter & Central Coast Joint Regional Planning Panel granted development consent for a 26 and 28 storey mixed use tower development on land at 110, 114, 116, 118A Mann Street and 108 Donnison Street Gosford (Reference 2014HCC023DA- Gosford - 46256/2014). In this decision, the panel approved a FSR variation of 85.9% and a building height variation of 46%.
- On 5th December 2015, the Hunter & Central Coast Joint Regional Planning Panel granted development consent for the Waterside development on Mann Street (Reference 2015HCC002 Gosford DA47046/2015). In this decision, the panel approved a building height variation of 211%.

In addition to the above, Council approved DA48710 on 5th May 2016 for 20 units relying on the bonus provisions on a site of less than 1,000m². The development had an FSR of 2.35:1; however given the date of determination, based on Council's stance regarding *Wingecarribee Shire Council v De Angelis*, the variation was actually 135%. This scenario is repeated for DA49031 approved on 15th August 2016 for 20 units with an FSR of 2:1 and a variation therefore of 100%. These examples, are identical to the subject development.

The variation to the FSR standard sought is 119%. Alternatively, the variation to the lot width is only 60%. This proposal therefore is not out of context with previous approvals, and as such, could be appropriately dealt with under Clause 4.6.



Further to the above, a development proposal that is not consistent with either the objectives of the development standard, or the objectives of the zone, expressly cannot be approved through the reliance on Clause 4.6. If this were the case, the proposal would be inconsistent with the intention of the zone and would be more appropriately applied for following a planning proposal.

With regards to the subject development, it has been consistently provided that the proposal, including its respective FSR and lot width, achieve the objectives of the B4 zone as well as the Part 8 Gosford City Centre objectives and finally the FSR control objectives, and for this reason it is able to be approved through the flexible provisions afforded by Clause 4.6.



6.0 Conclusion

Gosford City Centre is undergoing rapid and timely change given its decades of stagnancy. The purchase of the site by the applicant and the proposed development is a result of the changing attitudes of Council and its progressive vision for the future. At the same time, the applicant respects Council's previous concerns regarding the original development and as such has gone to great lengths and expense to overcome these. In this regard, the site's configuration is acknowledged, as are the neighbouring properties and the public domain, through the significant modulation and architectural treatment adopted. The applicant could achieve a greater return on the purchase of this allotment with a compliant FSR, had a far less architecturally sound design been chosen. This however, is not the sole driver behind the project, with the applicant preferring to develop an iconic building.

As discussed above, the Council's position on the Court of Appeal decision from *Wingecarribee Shire Council v De Angelis NSWCA 189* is contested. Regardless, the applicant in good faith has prepared the subject Clause 4.6 at the request of Council as a demonstration that they are willing to negotiate the current review application and avoid continuing the Class 1 appeal. With that said, it is still our firm belief that the site can access a FSR of 2.6:1 and a building height of 19.5m. The development however, is far below these parameters yet continues to provide all the elements of design excellence required of applications proposing to access the 30% bonus incentives.

In summary, whilst the proposed development does not comply with the FSR prescribed by Clause 8.3(2)(b), or the lot width prescribed by Clause 8.3(1)(a) of the LEP, it nevertheless meets the underlying objectives of the standard and Part 8 and the planning objectives for the B4 Mixed Use Zone and as such is considered to meet the requirements of Clause 4.6 of the LEP.

Attachment 2-DCP Compliance Table.

| Development Control | Required | Proposed | Compliance |
|--|---|--|--|
| 4.1.2.2 Building to street alignment and street setback | Min. 2m to max. 2.5m | 2m to 6m | Generally complies. The proposal is considered to meet the intent of the standard. |
| 4.1.2.3 Street Frontage Heights | Street frontage height between 10.5m to 16m required, upper levels then setback | Building is 5 storeys (15m) at the front elevation | Yes. |
| 4.1.2.4 Building Depth & Bulk | Maximum floor plate above 16m - 750m ² . Maximum building depth (excluding balconies) – 24m | Not applicable | Yes |
| 4.1.2.5 Side Setback (up to 12m height) | Non-habitable - 3m min. Habitable - 6m min. | 0m | No, refer to assessment below |
| 4.1.2.5 Side Setback (above 12m height) | Non-habitable – 4.5m min. Habitable - 9m min. | 0m-2.4m | No, refer to assessment below |
| 4.1.2.5 Rear Setback (up to 12m height) | Non-habitable - 6m min. Habitable - 6m min. | 6m | Yes |
| 4.1.2.5 Rear Setback (above 12m height) | Non-habitable - 6m min. Habitable - 9m min. | 9m | Yes |
| 4.1.2.7 Site Cover | 60% max (B4 Zone, residential use) | 54% | Yes |
| 4.1.2.7 Deep Soil Zones | 15% min. Min. Dimension 6m | 7% Dimensions are generally 4.6m x 15m. | No, refer to assessment below |
| 4.1.2.10 View Corridors | Protect significant view corridors (Figure 2.14) | The site is not located in a “no encroachment” view corridor and will not impact on any significant view corridor. | Yes |
| 4.1.3.3 Street Address | Street Address Required Direct front door access for ground floor units | Provided Direct front door access is not provided for the ground level unit, however this is reasonable given the change in level from the street, and the front unit provides a suitable elevation and presentation to the street. | Yes Considered acceptable |
| 4.1.3.5 CPTED Principles | Address Safer by Design | CPED Assessment and recommended strategies submitted | Yes |
| 4.1.3.7 Vehicle Access Width | Max. 2.7m width (or up to 5.4m wide for safety reasons) | 3.5m Note: changes would be required for a wider entry to accommodate a passing vehicle exiting the car lift and an entering vehicle | No, however is minor variation, and of a reasonable width |

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| 4.1.3.9 Building Exteriors | Various – see cl 4.1.3.9 | The front elevation meets the requirements and provides a good architectural standard and articulation. The large walls on the side elevations, even with the proposed “green Wall” do not provide an appropriate design response to nearby development, or from public areas in a highly visible location. | No in relation to side elevations, refer to assessment below |
| 4.1.4.2 Pedestrian Access and Mobility | Building Entry Points - Clearly visible from street | Entries are visible | Yes |
| | Design for disabled persons | Access report provided and proposal is able to comply with BCA requirements | Yes |
| | Barrier free access to not less than 20% of dwellings | | |
| | At least 1 main pedestrian entrance with convenient barrier frees access to ground floor | | |
| | Continuous access paths of travel from all public roads | Not shown, but able to be conditioned | Yes |
| Access paths of durable materials (slip resistant materials, tactile surfaces and contrasting colours) | | | |
| 4.1.4.3 Vehicle Footpath Crossings and Vehicular Driveways and Manoeuvring | Located 6m min. from the perpendicular of any intersection | >6m | Yes |
| | Minimum driveway setback 1.5m from side boundary | 0.25m | No, however could be addressed by limiting landscaping along the side elevation to maintain sight distances. |
| | Enter and leave in forward direction | Complies, through use of a car lift. However 2 of the basement car parking spaces could not achieve this requirement. | No, but 24 of the 26 spaces can achieve this requirement. |
| | Compliance with Council's standard Vehicle Entrance Design & subject to Roads Act approval | Reviewed by Council engineers and relevant conditions applied | Yes |
| | Compliance with AS2890.1 | Can comply | Yes |
| | Use semi-pervious materials for driveways open car spaces | No external driveways or parking spaces are proposed. | N/A |
| 4.1.4.4 On-Site Parking | 1 space/1-bed (1 unit) = 1 1.2 space/ 2-bed (23 units) = 27.6 1.5 space/3-bed (1 unit) = 1.5 Visitor parking (0.2 per unit) =5 Total = 35 spaces | 26 spaces, noting that 2 spaces potentially do not allow vehicles to enter and leave in a forward direction. | No, refer to assessment below Note: under SEPP65 the RMS parking requirements can apply, however the proposal also does not meet these requirements |
| | Disability accessible car parking not less than 10% = 2.8 spaces | 4 spaces | Yes |
| | Motorcycle parking – 1 space per 15 units = 2 spaces | Not provided, although use could be made of one of the car spaces with access issues | Able to comply |
| | Bicycle Parking Residents – 1 space per 3 dwellings = 8 spaces Bicycle Parking Visitors - 1 visitor space per 12 dwellings = 2 spaces Total = 10 spaces | 12 spaces | Yes |
| | Provided car parking wholly underground unless unique site conditions prevent achievement. | Wholly underground | Yes |

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|---|---|---|---|
| | Parking above ground min floor to ceiling height 2.8m | N/A | N/A |
| | Compliance with AS2890.1 | Able to comply | No- refer to assessment below. |
| | Min 4% or min 2 spaces designated disable spaces | Complies | Yes |
| | Uncovered parking areas are prohibited | Wholly underground | Yes |
| | Bicycle parking secure and accessible with weather protection | Undercover area provided, can be secured | Yes |
| | Mail boxes in one location, integrated into a wall, similar building materials and secure and of sufficient size | Can be conditioned | Yes |
| 4.1.4.5 Site Facilities | Locate ancillary structures (e.g. satellite dish and air conditioning units) away from street. Integrated into roofscape design. One master antenna per residential apartment buildings. | Can be conditioned | Yes |
| | Size, location and handling procedures for all waste to Satisfaction of Council's Waste & Emergency Staff | There are issues with waste management and collection – with bulk bins proposed to be transported by car lift, and being presented on the street. | Unresolved issue – refer waste comments |
| | Waste storage not to impact on neighbours in terms of noise, and be screened from the public and neighbouring properties | | |
| | Waste storage area well lit, easily accessible and on level grade, free of obstructions | | |
| | Waste storage area behind main building setback and facade | | |
| 4.1.4.5 Fire & Emergency Vehicles | Compliance with Fire Brigades Code of Practice – Building Construction – NSWFB Vehicle Requirements | Access available from Masons Parade | Considered acceptable and fire safety would be considered at a CC stage. |
| 4.1.5.2 Energy Efficiency and Conservation | Compliance with BASIX | BASIX certificate supplied, and will be assessed in detail at the CC stage | Yes |
| 4.1.5.3 Water Conservation | Efficient best practice management of water resources | OSD is provided and will be used for internal and external uses. The proposal does not provide a 3 rd pipe system however Council has not been requiring this for City Centre developments. | Yes |
| 4.1.5.4 Reflectivity | Not result in glare, not exceed 20% | Complies | Yes |
| 4.1.5.5 Wind Mitigation | Wind Effects Report for buildings over 14m | Not provided, however building is only partly above 14m | No, however is considered acceptable |
| 4.1.5.6 Waste and Recycling | Length of storage area 0.65 x no of bins Width of storage area 2.5m min. SEPP 65 & RFDC | Proposed waste storage has been assessed by Council's waste management assessment officer | No- see comments below |
| 4.1.6.2 Housing Choice & Mix | 1 bed units 10% min to max 25% 2 Bed not more than 75% | 1 bed 4% 2 bed 92% 3 bed 4% | No, minor variation required for % of 1 & 2 bedroom units, but is considered to be a suitable mix for the location |

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|--------------------|--|---|--|
| | 15% of dwellings (for sites with slope less 20%) capable of adaption for disabled or elderly residents = 3.6 accessible dwellings | Not stated | Yes-can be conditioned |
| | Where possible provide adaptable dwelling on the ground level | Not possible given, however lift access provided | Considered acceptable |
| | Application to be accompanied by an Access Consultant report | Not provided | No, however proposal is able to comply with BCA and access requirements |
| | Car parking to adaptable dwelling to comply with AS | Able to comply | Yes |
| 4.1.6.3 Storage | 7.5m ³ for 1 bed units 10m ³ for 2 bed units 12.5m ³ for 3 bed units Min 50% of required storage areas within dwelling | Storage to be provided for each apartment within the apartment and able to comply | Able to comply |