

Wollongong Local Environmental Plan 2009
Written Request for variation under Clause 4.6
Exceptions to Development Standards - DA
2016/1373

Lot 1 DP 1202226, No 38 Atchison Street,
Wollongong

Prepared For:



Prepared By:



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Contents

1. INTRODUCTION	3
1.1 BACKGROUND.....	3
1.2 THE SUBJECT LAND	3
1.3 ZONING	3
2 PROVISIONS OF CLAUSE 4.6 – EXCEPTIONS TO DEVELOPMENT STANDARDS	4
2.1 CLAUSE 4.6(1) - OBJECTIVES	4
2.2 REQUIREMENTS OF EXCEPTION UNDER CLAUSE 4.6	4
2.3 REQUIREMENTS OF CONSENT AUTHORITY UNDER CLAUSE 4.6	4
FIGURE 1 – SETBACK SCENARIOS.....	5
3 GROUNDS OF OBJECTION TO THE DEVELOPMENT STANDARD.....	6
3.1 MATTERS FOR CONSIDERATION RELATING TO VARIATIONS IN GENERAL	6
3.2 REASONS FOR SUPPORT	7
FIGURE 2 – POTENTIAL HEIGHTS OF BUILDINGS.....	8
3.3 MATTERS TO BE ADDRESSED IN ASSESSMENT OF A VARIATION – THE FIVE ‘WINTEN’ TESTS	8
3.4 IS THE PLANNING CONTROL IN QUESTION A DEVELOPMENT STANDARD?	9
3.5 THE OBJECTIVE OF THE DEVELOPMENT STANDARD	9
4 DETAILS OF DEVELOPMENT STANDARD TO HAVE EXCEPTION FROM.....	10
4.1 CLAUSE 8.6	10
TABLE 1 – HEIGHT AND SETBACK COMPLIANCE	11
5 OBJECTIVES OF DEVELOPMENT STANDARDS	11
5.1 CLAUSE 8.6	11
6 JUSTIFICATION FOR NON-COMPLIANCE WITH THE DEVELOPMENT STANDARDS	13
6.1 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (CLAUSE 4.6(3)(A))?	13
6.2 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD (CLAUSE 4.6(3)(B))?	14
7 CONCLUSION	14

1. Introduction

1.1 BACKGROUND

This report is based on plans submitted to Wollongong City Council and comprises a written request from the applicant under Clause 4.6 to support a variation to the development standard of Clause 8.6 of *Wollongong Local Environmental Plan 2009* (WLEP 2009), in respect of building separation.

The proposed mixed use, commercial premises and residential apartment building (DA 2016/1373) proposes setbacks less than that provided by Clause 8.6 in respect of the northern setback. As such a variation is sought under 'Clause 4.6 - Exceptions to development standards' under WLEP 2009. The submission should be read in conjunction with the Statement of Environmental Effects (SoEE) prepared by this firm. Clause 8.6 provides:

- (1) The objective of this clause is to ensure sufficient separation of buildings for reasons of visual appearance, privacy and solar access.
- (2) Buildings on land within Zone B3 Commercial Core or B4 Mixed Use must be erected so that:
 - (a) there is no separation between neighbouring buildings up to the street frontage height of the relevant building or up to 24 metres above ground level whichever is the lesser, and
 - (b) there is a distance of at least 12 metres from any other building above the street frontage height and less than 45 metres above ground level, and
 - (c) there is a distance of at least 28 metres from any other building at 45 metres or higher above ground level.
- (3) Despite subclause (2), if a building contains a dwelling, all habitable parts of the dwelling including any balcony must not be less than:
 - (a) 20 metres from any habitable part of a dwelling contained in any other building, and
 - (b) 16 metres from any other part of any other building.
- (4) For the purposes of this clause, a separate tower or other raised part of the same building is taken to be a separate building.
- (5) In this clause:

street frontage height means the height of that part of a building that is built to the street alignment.

1.2 THE SUBJECT LAND

The land the subject of this objection is known as Lot 1 DP 1202226, No 38 Atchison Street, Wollongong.

1.3 ZONING

The site falls within the B3 Commercial Core zone under *Wollongong Local Environmental Plan 2009*. The proposed development (DA 2016/1373) for a mixed use (commercial premises and shop top apartments) is permissible with the consent of Council under the zoning of the subject land.

2 Provisions of Clause 4.6 – Exceptions to Development Standards

In this regard clause 4.6 allows Council to use its discretion for buildings that do not comply with certain development standards contained with an LEP and is essentially the same as a SEPP 1 objection to the 'development standard'.

2.1 CLAUSE 4.6(1) - OBJECTIVES

The objectives of clause 4.6(1) are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Subclause 2 essentially provides for Council to grant development consent for a development that would contravene a development standard. Subclause 3 has the same requirements as a SEPP 1 objection in that a written request must be received objecting to the particular development standard.

The proposed variation to Clause 8.6 is considered to be consistent with the objectives of the exception clause. In this regard, given the specific circumstances of the site a better and more appropriate outcome for the proposed development is achieved by allowing flexibility to the development standard, in this particular circumstance.

2.2 REQUIREMENTS OF EXCEPTION UNDER CLAUSE 4.6

Clause 4.6(2) & (3) of WLEP 2009 states:

- (2) *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) *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.*

This report seeks to demonstrate that compliance with Clause 8.6 of WLEP 2009 is both unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard in this instance.

2.3 REQUIREMENTS OF CONSENT AUTHORITY UNDER CLAUSE 4.6

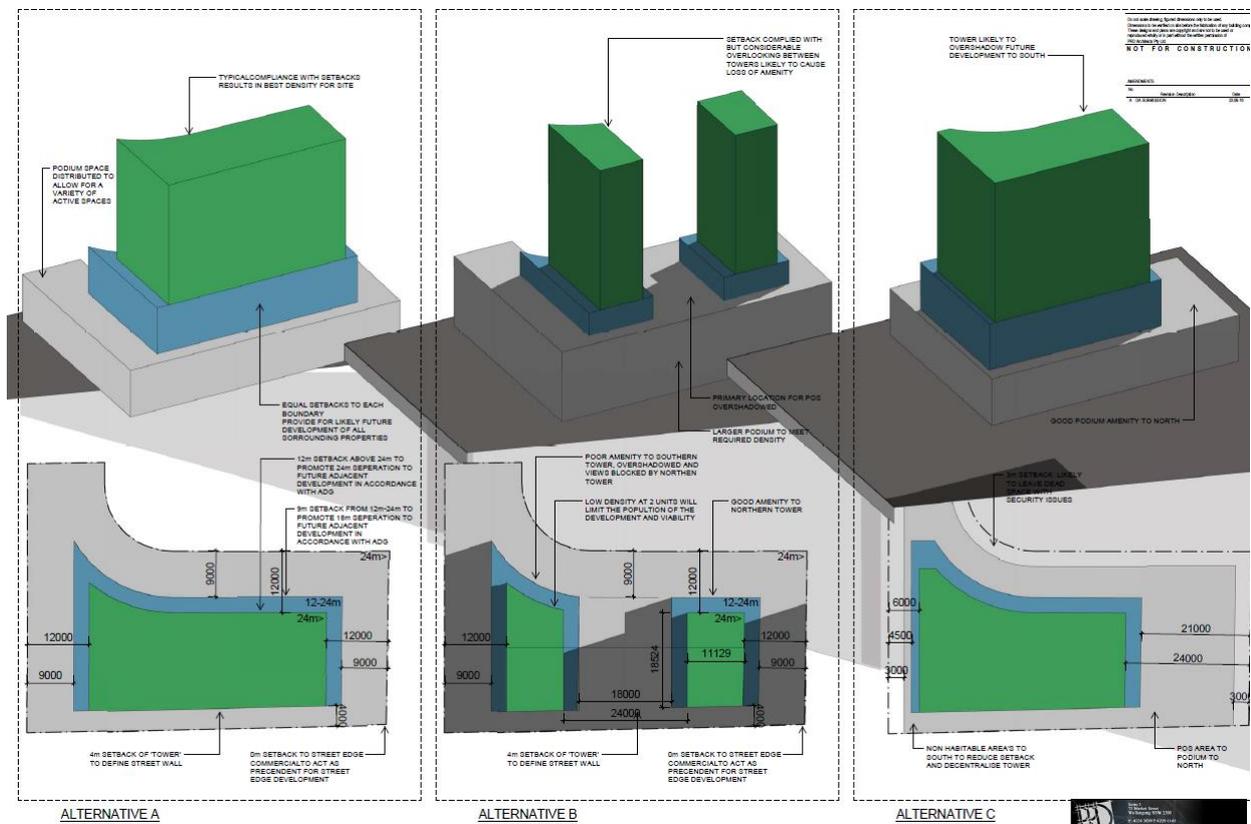
Clause 4.6(4), (6) & (8) of WLEP 2009 states:

- (4) *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.

It is considered that the public interest is better served as a consequence of the variation of the development standard of WLEP 2009 due to the constraints imposed by the development on the adjoining property to the north. Clearly the public interest is providing residential accommodation for the growing population close to all amenities and services that are available in Wollongong. Various scenarios were tested in respect of the form of development that could take place with compliant setbacks (refer to **Figure 1** below).

FIGURE 1 - SETBACK SCENARIOS



It would be noted that the separation distances relate to the number of metres above street level. At the commercial level, there are no side or rear boundary setbacks (6.3m), as required by Clause 8.6(2)(a). On level 2, the residential component of the development commences. At levels 2 & 3 (12.8m) the building is setback 2.232m from the northern boundary, 12.347m from western boundary and 6.12m from southern boundary. At levels 4-5 (19m), the northern setback is 2.716m and 12m southern boundary. Level 6 (22.1m), the northern setback is 7.6m; whilst southern maintains 12m. From levels 7-12 (40.1m), a 12m setback applies to these boundaries. Level 13 (43.1m), 12m and 15.027m respectively. Levels 14-16 (52.1m), 18.970m and 15.077m, respectively. Level 17 (55.1m), setbacks are 18.97m and 15.077m; whilst level 18 (59m) is the common room area and setbacks are 33.2m and 18.9m.

Setbacks compliance with the height requirement is addressed below in **Table 1**.

In Sections 3, 4 and 5 of this report it is demonstrated that the proposal is consistent with the objectives of the B3 Commercial Core zone.

- (8) *This clause does not allow consent to be granted for development that would contravene any of the following:*
- (a) *a development standard for complying development,*
 - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) *clause 5.4,*
 - (ca) *clause 4.2A, 6.1 or 8.3.*

The proposed development will not contravene a development standard for complying development nor will it contravene any commitment set out in the BASIX Certificate that has been issued for the proposed residential component on the site. Further the proposed development will not contravene any of the above Clause of WLEP 2009.

3 Grounds of Objection to the Development Standard

3.1 MATTERS FOR CONSIDERATION RELATING TO VARIATIONS IN GENERAL

The relevant matters for determination and consideration of the variation are:

- i) Determination of the underlying object or purpose of the development standard. It must be assumed that a development standard in a planning instrument has a purpose.
- ii) Whether compliance with the standard is consistent with the aims and objectives 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.
- iii) Whether the objection demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. To point to an absence of environmental harm occasioned by the application, which is the subject of the objection, is not sufficient. Nor should a Clause 4.6 variation be used as a means of effecting general planning changes which are contemplated in *Part 3* of the Act.
- iv) Whether the objection is well founded.

In the matter of *Wehbe v Pittwater Council* (156 LGERA 446-465 at 457) Preston J sets out the various ways in which a departure from development standards may be justified, i.e.

- 1 by establishing that the objectives of the standard are satisfied;
- 2 by establishing that the objective of the standard is not relevant in the particular case;
- 3 by establishing that the objective of the standard would be defeated;

- 4 by establishing that the standard has been abandoned; and
- 5 by establishing that the zoning of the land is inappropriate.

We note the recent decision of the Land & Environment Court in the matter of Four2Five Pty Ltd V Ashfield Council (2015) NSWLEC 90, which indicates that merely showing that the development achieves the objectives of the development standard 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. This aspect will be addressed in this report.

3.2 REASONS FOR SUPPORT

The objects of the Act are:

a) To encourage:

- i. The proper management, development and conservation of natural and man-made resources, including agricultural land, natural areas, forests, minerals, 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 co-ordination of the orderly and economic use and development of land.

In our opinion, strict compliance with the development standard is *unreasonable or unnecessary* for the reasons espoused in this report, as required to be addressed by the above L&EC decision.

The surrounding area is characterised by predominantly commercial buildings of various heights and built forms. Some single storey buildings and taller. Some buildings are bulky in footprint; whilst others have a very small footprint. The character of the area has evolved into different forms of to suit the particular development proposal. The proposed development is therefore consistent with the character of the area, being located in a commercial area. **Figure 2** below depicts the potential development of properties within the immediate area.

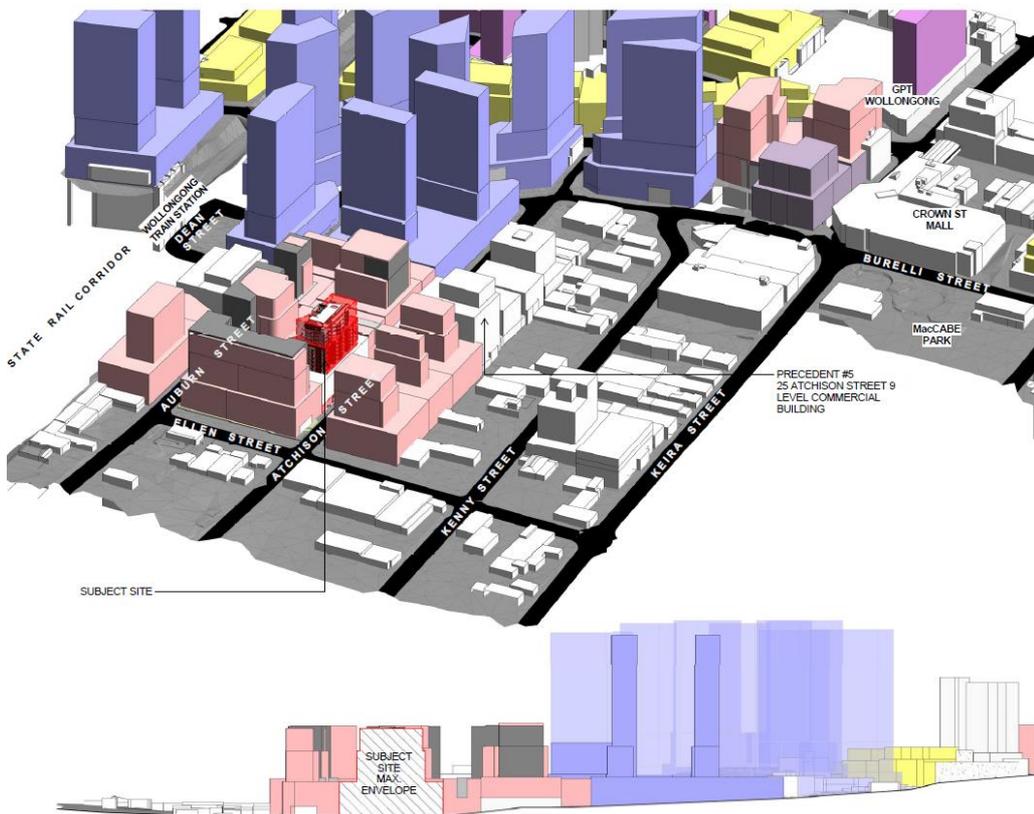
Given that the constraints of the land, as well as the general character of the area, were carefully considered during the preparation of the proposal, the coordination of the orderly and economic use and development of the land will most appropriately be achieved by supporting variations to the relevant development standards.

It is also relevant that, as a general principle, the highest and best economic use of land which has been identified as appropriate for mixed use development, will conversely act to preserve the character of the area.

Having regard to the above we consider that the approach taken serves the objects of the Act of promoting the orderly and economic use of land.

It is not considered that a variation to the development standard in these circumstances would act as a general planning change more appropriately dealt with under *Part 3* of the *Environmental Planning & Assessment Act 1979*. **Table 1** below provides a compliance assessment of the requirements of Clause 8.6.

FIGURE 2 – POTENTIAL HEIGHTS OF BUILDINGS



It is considered that this case represents an individual circumstance in which Clause 4.6 was intended to be available to set aside compliance with unreasonable or unnecessary development standards that do not have a significant impact on adjoining developments.

3.3 MATTERS TO BE ADDRESSED IN ASSESSMENT OF A VARIATION – THE FIVE ‘WINTEN’ TESTS

The Winten Test is considered to be relevant to the consideration of Clause 4.6, even though they relate to a SEPP 1 objection. The relevant matters for determination and consideration of the SEPP 1 objection are:

- ii) Is the planning control in question a development standard?
- iii) What is the underlying purpose of the development standard?
- iv) 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?
- v) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? In responding to this question, it should be determined whether a development which complies with the development standard is unreasonable or unnecessary.
- vi) Is the objection well founded?

3.4 IS THE PLANNING CONTROL IN QUESTION A DEVELOPMENT STANDARD?

The EP&A Act defines development standards as:

"development standards" means 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.

We are of the opinion that the provisions of Clause 8.6 is a *development standard* as defined by the EP&A Act, being a standard fixed in respect of *the area, shape or frontage of any land, the dimensions of any land, distance of any land, building*, being standard (a) and standard (c) being *the height, density, design* of a building.

3.5 THE OBJECTIVE OF THE DEVELOPMENT STANDARD

This aspect is addressed in this amended report below in Section 4 and discussed below.

Question (i)

It has already been shown above that the planning control is a development standard, so the answer is **YES**.

Question (ii)

This matter has been addressed above, so the answer is **YES**.

Question (iii)

The aims and objectives of the Policy are to provide "... flexibility in the application of planning controls" and the proposed development is seeking just that, a greater flexibility to the building height control provisions in respect of setbacks.

Compliance with the development standard does not mean a proposed development would necessarily be consistent with the aims and objectives of Clause 4.6.

The development as proposed is consistent with the objectives of the development standard. Accordingly the answer is **YES**.

Question (iv)

The answer is **YES**.

Question (v)

Given the extent of the justification and, most importantly, given that the environmental and amenity impacts of the development are not significant, then the request for variation is considered to be well founded. The answer is **YES**.

4 Details of Development Standard to have exception from

4.1 CLAUSE 8.6

Clause 8.6 Building Separation is a development standard which may only be varied if a development application is accompanied by a written request that adequately addresses the required matters in Clause 4.6(3), in respect of building separation.

Clause 8.6 Building Separation states:

- (2) Buildings on land within Zone B3 Commercial Core or B4 Mixed Use must be erected so that:
 - (a) there is no separation between neighbouring buildings up to the street frontage height of the relevant building or up to 24 metres above ground level whichever is the lesser, and
 - (b) there is a distance of at least 12 metres from any other building above the street frontage height and less than 45 metres above ground level, and
 - (c) there is a distance of at least 28 metres from any other building at 45 metres or higher above ground level.

- (3) Despite subclause (2), if a building contains a dwelling, all habitable parts of the dwelling including any balcony must not be less than:
- (a) 20 metres from any habitable part of a dwelling contained in any other building, and
 - (b) 16 metres from any other part of any other building.
- (4) For the purposes of this clause, a separate tower or other raised part of the same building is taken to be a separate building.

The basis of this report is to demonstrate that the above setback requirement is unreasonable considering the specific circumstances of this case. And therefore is not appropriate given the desired future character of the locality and the minimal adverse environmental impacts including amenity impacts on potential neighbouring residential properties resulting from the proposed residential component. This report also needs to be read in conjunction with the submitted plans and detailed above in Section 2.1.

TABLE 1 - HEIGHT AND SETBACK COMPLIANCE

Height	Setback Required	Setback Proposed	Compliance
Ground level or height up to 24m, whichever is the lesser	Zero	Zero for commercial component	Yes
Height up to 45m	12m	No commercial component	Yes
45m of higher	28m	No commercial component	Yes
Containing dwelling	20m to dwelling in any other building	2.232m northern & 6.12m southern at minimum distance (Levels 2 & 3)	No
Containing dwelling	16m to any other building	As above	No

In respect of the above, the reasons to support the variation are provided below in Sections 5.1 & 6.

5 Objectives of Development Standards

5.1 CLAUSE 8.6

- (1) *The objective of this clause is to ensure minimum sufficient separation of buildings for reasons of visual appearance, privacy and solar access.*

Comment

The objective is to require separation to provide visual appearance, privacy and solar access. The site is located in a street block that has been identified in WLEP 2009 for this form and height of development and as such is essential to the desired future redevelopment of the locality. The subject site has a contextual relationship with existing and future developments in the immediate area, as depicted in **Figure 2**.

As such, the proposed residential apartment building component is considered to maintain an appropriate complementary visual relationship with the desired existing and future character of the area as intended under WLEP 2009. An indicative impression of the bulk and scale of a compliant building is seen above in **Figure 1**. As can be seen from the concept plan, to meet the requirements of this clause is depicted in the three alternatives. Alternative C would result in a building being 'pushed' to the southern boundary, and this is a direct result of the building to the north when constructed, noting the provisions of Clause 8.6 now differ to the requirements of the Apartment Design Guidelines (ADGs) of SEPP 65, which was amended in July 2016. The amended SEPP and accompanying ADGs have a different criteria to that of Clause 8.6. Notwithstanding, the provisions of this Clause need to be addressed.

Obviously, it constrains the form of development that can occur on the subject property. This has resulted in a building that provides essentially a zero setback to the adjoining future building to the north and to ensure that issues such as privacy and overshadowing have been minimised. Clearly any building that is several storeys high and located on the northern side of a development will have impacts. The test is whether these impacts are significant to warranted refusal having regard to the outcomes expected by the zoning of the land, which permits buildings up to 60m.

It would be noted that at the various levels on the northern side, windows have been minimised and only to allow sunlight into the bedrooms on that side of the building. In addition the private open space area on balconies, has privacy screens in place to address the above objective, essentially creating a blank wall to this façade.

In terms of the adjoining southern residential properties, the area is zoned B3 Commercial Core under WLEP 2009 which permits a 60 metre height limit in the locality and consistent with Council's desired future character for high rise residential development.

On account of a combination of the site's location, surrounding development and the building design, the proposed residential flat building component is not considered to give rise to significant privacy impacts. Due to separation being compliant with SEPP 65 for the building to the south and at higher levels for the future building to the north, privacy is considered to be reasonably retained and would not give rise to significant visual privacy impacts that are out of the ordinary for medium and high density living.

Indeed there are no privacy impacts on the building to the north, as there are essentially no windows on the northern façade and balconies have been designed to respect the location of potential future balconies on the adjoining development. In most cases privacy screens have been provided to the building and has been setback to respect privacy issues on adjoining developments.

The proposed residential flat building has been intentionally designed so as to minimise any significant overshadowing impacts and loss of solar access to the adjoining southern properties as much as possible, noting that a building 60m high located on the northern side has to have impacts, regardless of setbacks.

It is noted that other medium density residential flat buildings along Atchison Street have overshadowing impacts upon one another that arise as a result of the height requirement. While there is certainly a solar access impact as a consequence of the proposal, the design, location and orientation of the site mitigates, as best can be achieved these solar access issues.

6 Justification for Non-Compliance with the Development Standards

6.1 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (CLAUSE 4.6(3)(A))?

Compliance with the development standard under Clause 8.6 is both unreasonable and unnecessary in this case given that the characteristics of the site and the circumstances of the proposed residential apartment building to allow for the proposed setbacks. The potential site development is in keeping with the existing character and the form of development that has occurred and will occur in the future in the immediate area having regard to the zone applicable to the site and the adjoining sites and the height of buildings provided by the LEP. The built form desired by Council and established within the “Desired Future Character Statement” is evident in existing development and planned development.

The proposed development is considered reasonable for the following reasons:

- The proposed residential flat building component has been carefully designed to minimise adverse amenity impacts on adjoining properties. Careful site responsive design has ensured that the technical non-compliance with the setback and street frontage proposed does not give rise to significant amenity impacts for the immediate locality;
- The setbacks are generally consistent with SEPP 65 and the ADGs;
- As discussed above, the proposed building is consistent with the objectives of Clause 8.6 of WLEP 2009; and
- The site is highly constrained by existing development and if a reduction in the setback is not granted, then the site has a far different development potential having regard to the zoning of the land and the heights permitted under the LEP.

In addition, the proposed streetscape when viewed from various locations will provide variety and interest. What is achieved by permitting the proposed development is a streetscape that has various architectural elements, but generally consistent heights, when adjoining properties are developed to their potential, as shown on the plans that accompanied the application.

There will also be a variety of building materials used on the proposed building to complement the future streetscape and to provide active street fronts along Atchison Street, which forms an integral component of the Wollongong Town Centre.

In our opinion, the best planning practice should recognise these constraints and respond to the opportunity to value add to this infill development by going beyond basic numerical compliance checking, and consider broader structural and urban design frameworks. On this basis, the opportunity is available to consider variations through the proposed building’s siting and the general high quality building design, and as stated above, to comply with Clause 8.6.

This opportunity is better served, in our view, by the proposed height of the building, which supports its location and yet at the same time does not unreasonably interfere with existing view corridors than one constructing a building of lesser height and greater setbacks, particularly having regard to the heights that will be achieved with developments to the south, north and west.

6.2 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD (CLAUSE 4.6(3)(B))?

There are considered to be sufficient environmental planning grounds to justify contravening the building separation development standard. These are as follows:

- The design of the proposed residential flat building component is generally consistent with applicable planning controls contained WLEP 2009 and WDCP 2009, and also SEPP 65 and the Residential Apartment Design Guideline.
- The height, boundary setbacks, depth and length of levels, deep soil landscaping, car parking, dwelling mix and solar access are generally compliant with development standards and controls in WLEP 2009 and WDCP 2009 that are applicable to the site.
- The proposed building has been amended following consultation with Council planning officers and the Council Design Review Panel, resulting in significant amendments that reduced building bulk and scale and made the proposal more consistent with Council's planning controls and desired future character for the locality. In this regard, the proposal has been designed to minimise amenity impacts such as overshadowing, visual privacy and bulk and scale on the adjoining properties.
- The articulated contemporary design makes use of attractive vertical and horizontal building elements while also varying the material, finishes and colours of the building's facade. This provides visual interest when viewing the development from the public domain and ensures that the proposed residential flat building will make a positive contribution to the redevelopment of the locality and the Wollongong City Centre generally.

7 Conclusion

It has been demonstrated above, that the development is one that satisfies the objectives of Clause 8.6 and that Council can use its discretion under Clause 4.6 to vary the setback requirement.

Given that the constraints of the land were carefully considered during the preparation of the proposal, the coordination of the orderly and economic use and development of the land will most appropriately be achieved by supporting variations to the relevant development standards.

It is also relevant that, as a general principle, the highest and best economic use of land which has been identified as appropriate for residential development, will conversely act to preserve the character of the area.

Having regard to the above we consider that the approach taken serves the objects of the Act of promoting the orderly and economic use of land.

It is not considered that a variation to the development standard in these circumstances would act as a general planning change more appropriately dealt with under *Part 3* of the *Environmental Planning & Assessment Act 1979*.

It is considered that this case represents an individual circumstance in which Clause 4.6 was intended to be available to set aside compliance with unreasonable or unnecessary development standards.

It is considered that the variation to the development standard contained in Clause 8.6 of WLEP 2009 should be supported, because it is consistent with Clause 4.6, the objects of the EPA Act, the relevant aims and objectives of WLEP 2009 and the B3 Commercial Core zone and would appear to create a negligible impact on the natural environment and the landscape character of the area, noting compliance with SEPP 65 and the ADGs.

Michael Brown

A handwritten signature in black ink, appearing to read 'M. Brown', written in a cursive style.

Director Michael Brown Planning Strategies Pty Ltd