

REVISED 7 DECEMBER 2018

CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARD – WOLLONGONG LOCAL ENVIRONMENTAL PLAN 2009

DA-2017/730

1. Introduction

Clause 4.6 of Wollongong Local Environmental Plan 2009 allows Council to grant consent for development even though the development contravenes a development standard imposed by the Local Environmental Plan. The objective of this clause is to provide flexibility in applying certain development standards to particular development, and to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Clause 4.6(3)-(5) of Wollongong Local Environmental Plan 2009 states the following:

(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 Secretary has been obtained.*

(5) In deciding whether to grant concurrence, the Secretary 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 Secretary before granting concurrence.*

This clause 4.6 Exception to Development Standard request accompanies revised drawings for Development Application number DA-2017/730 submitted to Wollongong City Council, for the demolition

of existing buildings and ancillary structures and the construction of a mixed use development above basement parking, at 115-117 & 131-141 Keira Street and 2A, 2-6 Thomas Street, Wollongong NSW 2500.

The subject site referred to in the Development Application and this clause 4.6 request is legally described as Lot 1 DP 152849, Lot C DP 65920, Lot 1 DP 510890, Lot B DP 345880, Lot 2 DP 12385, Lot 3 DP 12385, Lot 4 DP 12385, and Lot 2 DP 152849. Figure 1 below provides an aerial photograph and outline of the site.



Figure 1: Subject site (Source: SIX Maps)

This clause 4.6 request seeks to vary the following development standards of Wollongong Local Environmental Plan 2009:

- **Clause 7.13** – Certain land within business zones
- **Clause 8.6** – Building separation within Zone B3 Commercial Core or Zone B4 Mixed Use

This clause 4.6 request has been prepared in accordance with the relevant principles identified in the following NSW Land and Environment Court judgments:

- *Wehbe v Pittwater Council* [2007] NSWLEC 827;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90;
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386; and
- *Moskovich v Waverley Council* [2016] NSWLEC 2015.

2. **Clause 7.13 Certain land within business zones – Wollongong Local Environmental Plan 2009**

2.1 Nature of variation

A request for variation is submitted in relation to the ground floor development on land within business zones standard contained in Clause 7.13 (Ground floor development on land within business zones) of Wollongong Local Environmental Plan 2009.

Clause 7.13 states the following:

7.13 Certain land within business zones

- (1) The objective of this clause is to ensure active uses are provided at the street level to encourage the presence and movement of people.*
- (2) This clause applies to land in Zone B1 Neighbourhood Centre, Zone B2 Local Centre, Zone B3 Commercial Core or Zone B4 Mixed Use, but does not apply to land to which clause 7.19 applies.*
- (3) Development consent must not be granted for development for the purpose of a building on land to which this clause applies unless the consent authority is satisfied that the ground floor of the building:*
 - (a) will not be used for the purpose of residential accommodation, and*
 - (b) will have at least one entrance and at least one other door or window on the front of the building facing the street other than a service lane.*

The subject site is zoned B4 Mixed Use. The proposed development provides residential accommodation, in the form of 8 x 2-storey terraces as shown on the BASEMENT 1 FLOOR PLAN (DWG A12) AND GROUND FLOOR PLAN (DWG A13) fronting "Parsons Lane" which, in part, contravenes the development standard of clause 7.13. Please refer to drawings which illustrates the subject non-compliance.

2.1 Justification for Contravention of the Development Standard

2.1.1 *Clause 4.6(3)(a) – that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case*

In *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston expressed the view that there are five ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy.

The five tests outlined in *Wehbe v Pittwater* [2007] NSW LEC 827 are as follows:

The Five Tests	Comment
1. The objectives of the standard are achieved notwithstanding non-compliance with the standard.	This clause 4.6 Exception to Development Standard examines the objectives of clause 7.13 and demonstrates that the objective of the standard is achieved notwithstanding the non-compliance with the development standard. Please see below for further comment.
2. The underlying objective or purpose of the	The underlying objective of clause 7.13 is to ensure

The Five Tests	Comment
standard is not relevant to the development and therefore compliance is unnecessary.	active uses are provided at street level. The subject residential uses are proposed to front a private service lane and not a public street. Therefore the proposal has no impact upon activation of the ground floor public domain and strict adherence with the development standard is therefore considered to be unnecessary. As set out below, the proposal achieves the objectives of the standard.
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.	The underlying object or purpose of the development standard is to activate the public domain through providing for non-residential land uses at ground level, <i>to ensure active uses are provided at the street level to encourage the presence and movement of people</i> . Given the proposed residential component is located on a private service lane and not within the public domain or public road network, it is considered unreasonable to comply with this development standard, given the site specific circumstances of this case.
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.	This Exception to Development Standard request does not rely on this reason.
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable and unnecessary. That is, the particular parcel of land should not have been included in the particular zone.	This Exception to Development Standard request does not rely on this reason.

Objective of the development standard

The objective of clause 7.13 of Wollongong Local Environmental Plan 2009 is *"to ensure active uses are provided at the street level to encourage the presence and movement of people"*. This clause applies to land in Zone B1 Neighbourhood Centre, Zone B2 Local Centre, Zone B3 Commercial Core or **Zone B4 Mixed Use**, but does not apply to land to which clause 7.19 applies.

The subject site is zoned B4 Mixed Use. The proposed commercial and retail uses will front Thomas Street and Keira Street, with the residential terraces fronting a newly created pedestrian-only laneway, identified as 'Parsons Lane'. 'Parsons Lane' is proposed to be created within the central portion of the site between the proposed mixed use development fronting Thomas Street and existing heritage buildings fronting Keira Street. It is considered that the proposed development is consistent with the clause 7.13

objective by providing “active uses” (commercial tenancies) at street level along Keira Street and Thomas Street. The proposed ground floor residential uses are proposed to be located away from the public street frontages and shall be located within the central portion of the site, where they will not adversely impact upon opportunities to activate the public street frontages. It is considered that the provision of additional residential uses within the central portion of the site would also encourage the presence and movement of people at street level. The presence of residential uses at the centre of the development site, accessed via a private pedestrianised lane would also increase causal surveillance and activation of ‘Parsons Lane’ and surrounding streets.

Based on the above, it is considered that strict adherence to the development standard is unreasonable and unnecessary given the circumstances of this case and that the proposed variation to the *clause 7.13* Certain land within business zones development standard, should be upheld by the relevant consent authority.

2.1.2 *Clause 4.6(3)(b) – that there are sufficient environmental planning grounds to justify contravening the development standard*

It is considered that the proposed development is consistent with the above objectives and provides a development which generally complies with the relevant environmental planning controls, specifically building height and floor space ratio.

2.1.3 *Clause 4.6(4)(a)(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*

An assessment against the objective of the development standard is provided above. The objectives of the B4 Mixed Use zone are as follows:

- **To provide a mixture of compatible land uses.**
The proposal comprises a mixed use development including residential uses in the form of an 8-storey residential flat building fronting Thomas Street, and ground floor commercial uses fronting both Keira and Thomas Street. Both uses are permissible within the B4 Mixed Use zone. In addition, the design of the development ensures that the mixture of uses can effectively co-exist. The proposed development is for a mixed use development and is considered to be consistent with this objective of the B4 Mixed Use zone.
- **To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.**
The subject site’s location is considered to be within an accessible location given the site is situated within Wollongong City Centre and approximately 800 metres from Wollongong Railway Station. The provision of a mixed use development within the Wollongong City Centre is consistent with this objective as it would integrate mixed use development including additional housing supply within the city of Wollongong while also providing additional employment opportunities through the provision of new commercial tenancies. The proposed development is therefore considered to be consistent with this objective of the B4 Mixed Use zone.
- **To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.**
The proposed development provides an additional 84 apartments within the Wollongong City Centre. The increases in population would enhance the viability of the nearby commercial centres. The proposal

includes four commercial tenancies (three fronting Thomas Street and one fronting Keira Street), the areas of which have now been amended to comply with the clause 8.7 maximum 400 m² gross floor area size of shops control within the B4 Mixed Use zone.

Based on the above, the proposed exception to the development standard is considered to be in the public interest.

3. Clause 8.6 – Building separation within Zone B3 Commercial Core or Zone B4 Mixed Use – Wollongong Local Environmental Plan 2009

3.1 Nature of variation

A request for variation is submitted in relation to the building separation within Zone B3 Commercial Core or Zone B4 Mixed Use standard contained in clause 8.6 of Wollongong Local Environmental Plan 2009.

Clause 8.6 states the following:

- (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.*

DWG No. A25 of Section C-C and Section B-B shows the distance separations proposed between the proposed residential units and the existing heritage buildings fronting Kiera Street, would contravene the clause 8.6(3)(b) requirement for a 16 m building separation.

At its closest, proposed Unit #AG01 (a 2-storey terrace) with lower level living areas at RL23.70 is 1.32 m above the floor height of RL22.38 of the closest heritage building which has a 3.22 m separation from the balustrade of #AG01. Unit #AG01 is provided with a 1.8 m high screen fencing to avoid any privacy impact upon the courtyard of the adjoining heritage building below. The distance separation to the glass line of #AG01 is 5.22 m. Due to the level height change between the respective floor levels, and the provision of screen fencing, there is no adverse direct overlooking or privacy impact between the lower level living areas of the proposed units and the heritage building.

Additionally, as can be seen in Section C-C, the non-compliance is resolved at first floor level, as the first floor bedrooms facing 'Parsons Lane' have outlook over the adjacent rooftops of the heritage buildings facing Keira Street towards the street parapet located some 26.58 m away to the east.

It is also noted that the remainder of all other building separations are larger than that proposed for unit #AG01, with:

- #AG02 provided with a 4.3 m separation at BASEMENT 1 LEVEL (DWG A12), with minimum separations achieved at GROUND FLOOR PLAN LEVEL (DWG A13).
- #AG03-#AG08 provided with a 6 m separation at BASEMENT 1 LEVEL (DWG A24 Section A-A), with minimum separations achieved at GROUND FLOOR PLAN LEVEL (DWG A24 Section A-A)).

With regard to how to calculate building separation distances, it is established planning practice (see Apartment Design Guide (ADG) to SEPP 55) to apportion the building separation distances between neighbouring sites, so that one development provides 50% of the required separation within their development lot in the anticipation that future developments on neighbouring lands would also be required to do likewise.

Page 37 of the ADG provides the following:

How to measure building separation

... 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.

This clause 4.6 Exception to Development Standard request therefore seeks to vary the applicable 50% portion of the minimum separation distance required to the lower level only of the 2-storey terraces (#AG01-AG08) facing the private 'Parsons Lane'. It is also noted that the non-compliance is resolved for the first floor of the terraces and units above. Given the proposed development is an infill development, constrained in part by existing heritage buildings that are unlikely to be demolished and redeveloped, and that amenity impacts such as privacy and overlooking are resolved with the provision of appropriate privacy screening devices to windows and fencing, and that adequate solar access is achieved, it is considered unreasonable and unnecessary in the circumstances of this case to require strict adherence to the minimum 16 m building separation.

No building separation to street frontage requirement

It is noted that clause 8.6(2)(a) of Wollongong Local Environmental Plan 2009 requires no separation between neighbouring buildings up to the street frontage height or up to 24 metres above ground. The proposed development however, provides a northern side boundary setback along the Thomas Street frontage of 8.130 m to 9.005 m and a southern side boundary setbacks along the Thomas Street frontage of 9 m. It is noted that other buildings in Thomas Street are not built to boundary, making compliance with the no-separation requirement unachievable. The proposal is considered acceptable in the circumstances of this case as the B4 Mixed Use zone at this location forms a transition zone between the B3 Commercial Core to the west and the R1 Low Density Residential zone (see Figure 2 below) to the east. It would therefore be considered appropriate for the building massing and form to show some building separation as the commercial core transitions into the low density residential zone.

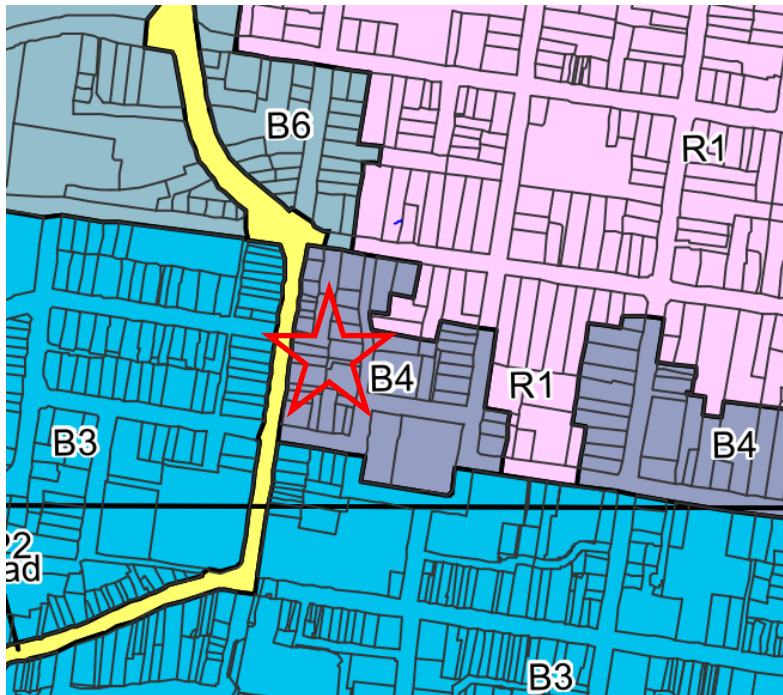


Figure 2 – Extract of Land Use Zoning

Given proposal would not result in any adverse visual appearance, privacy and solar access impacts it is considered unreasonable and unnecessary in the circumstances of this case to require strict adherence to the requirement for no building separation along the street wall height in Thomas Street.

3.1 Justification for Contravention of the Development Standard

3.1.1 *Clause 4.6(3)(a) – that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case*

The Five Tests	Comment
<p>1. The objectives of the standard are achieved notwithstanding non-compliance with the standard.</p>	<p>The objectives of the development standard to ensure sufficient separation for reasons of visual appearance, privacy and solar access are achieved notwithstanding the minor non compliance of the ground and first floor balconies.</p> <p>Notwithstanding the proposals non-compliance with the clause 8.6(3)(b) requirement for a 16 m building separation between habitable parts of the dwelling and neighbouring development, it is considered that the building separation distances are rightfully apportioned equally between neighbouring developments. The proposal's non-compliance with the 8 m separation distance is related to the balcony areas only and that the remainder of the living areas comply at the building line of the ground and first floor balconies.</p>

The Five Tests	Comment
	<p>The proposal's non-compliance with clause 8.6(2)(a) requirement to have no separation between neighbouring buildings up to the street frontage height or up to 24 metres is considered acceptable in this B4 Mixed Use zone location which forms a transition zone between the B3 Commercial Core and the R1 Low Density Residential zone.</p>
<p>2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.</p>	<p>The objective of the development standard is to <i>ensure sufficient separation of buildings for reasons of visual appearance, privacy and solar access</i>. It is considered that the underlying object or purpose is achieved, given the subject site's transition zone location and the particular development's surrounding built form and heritage constraints and opportunities. The resultant development would not result in unacceptable levels of visual appearance, privacy or solar access. Given that adjacent buildings along Thomas Street are also not built to boundary, then strict adherence to the requirement for no-separation of buildings is considered unreasonable and unnecessary.</p>
<p>3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.</p>	<p>It is considered that the objective of facilitating high quality mixed-use developments in a transitional zone, the B4 Mixed Use zone, between the B3 Commercial Core and the R1 Low Density Residential zone would best be served through the approval of the development as proposed. The minor non-compliance with the ground and first floor residential setback to the western boundary and the provision of side boundary setbacks would result in a higher quality outcome for residents and for the public domain at this site which transitions between the higher and lower density zones.</p>
<p>4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.</p>	<p>This Exception to Development Standard request does not rely on this reason.</p>
<p>5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable and unnecessary. That is, the particular parcel of</p>	<p>This Exception to Development Standard request does not rely on this reason.</p>

The Five Tests	Comment
land should not have been included in the particular zone.	

3.1.2 *Clause 4.6(3)(b) – that there are sufficient environmental planning grounds to justify contravening the development standard*

It is considered that the proposed development is consistent with the above objectives and provides a development which generally complies with the relevant environmental planning controls, specifically building height and floor space ratio.

in the public interest because it is consistent with the objectives of the zone and development standards

3.1.3 *Clause 4.6(4)(a)(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*

The proposed development achieves the objective of the development standard. The objectives of the B4 Mixed Use zone are as follows:

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

The proposal comprises a mixed use development including residential uses in the form of an 8-storey residential flat building fronting Thomas Street, and ground floor commercial uses fronting both Keira and Thomas Street. Both uses are permissible within the B4 Mixed Use zone. In addition, the design of the development ensures that the mixture of uses can effectively co-exist. The proposed development is for a mixed use development and is considered to be consistent with this objective of the B4 Mixed Use zone.
- To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.**

The subject site's location is considered to be within an accessible location given the site is situated within Wollongong City Centre and approximately 800 metres from Wollongong Railway Station. The provision of a mixed use development within the Wollongong City Centre is consistent with this objective as it would integrate mixed use development including additional housing supply within the city of Wollongong while also providing additional employment opportunities through the provision of new commercial tenancies. The proposed development is therefore considered to be consistent with this objective of the B4 Mixed Use zone.
- To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.**

The proposed development provides an additional 84 apartments within the Wollongong City Centre. The increases in population would enhance the viability of the nearby commercial centres. The proposal includes four commercial tenancies (three fronting Thomas Street and one fronting Keira Street), the areas of which have now been amended to comply with the clause 8.7 maximum 400 m² gross floor area size of shops control within the B4 Mixed Use zone.

Based on the above, the proposed development is considered to be in the public interest. It is also considered that strict adherence with the development standard would be unreasonable and unnecessary given the circumstances of this case and the proposed variation to clause 8.6 should be supported.