

7 Clause 4.6 Exceptions to Development Standards Report

7.1 Clause 8.6 Provisions (Building Separation)

The proposed development consists of a seven (7) level commercial building (Ground to Level 6), with two levels of basement parking and an overall height of 32.42m (to top of parapet), located in the B3 Commercial Core zone. Therefore, the provisions of Clause 8.6, apply, which relates to separation distances between the proposed building and adjacent buildings.

Clause 8.6 (Building Separation within Zone B3 Commercial Core or Zone B4 Mixed Use) states the following:

- (5) The objective of this clause is to ensure sufficient separation of buildings for reasons of visual appearance, privacy and solar access.
- (6) 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 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.
- (7) 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.
- (8) For the purposes of this clause, a separate tower or other raised part of the same building is taken to be a separate building.

For the purpose of considering separation, only buildings to the east and south of the site are relevant, being the only buildings which are potentially situated within the separation distances referenced in Clause 8.6. Building on the opposite side of Burelli Street (to the north) and on the opposite side of Kembla Street (to the west) are situated at a greater distance than that required by Clause 8.6, having regard to the 32.42m height of the proposed building. Directly adjoining the site to the east is a 6 storey commercial building ('Corporate Square') and to the immediate south is a two storey building also owned by City investments Pty Ltd, which is occupied by 'Mission Australia'. Also adjoining the south-eastern corner of the property is a substation that gains access from Lot 301 DP 709353 fronting Stewart Street.

There are no residential uses contained in the proposed building and there is only one building proposed on the site, hence subclauses (3) and (4) are not applicable. Subclause (2) requires that there be no separation between neighbouring buildings up to the street frontage height or up to 24m above ground level (whichever is lesser), with a 12m separation distance required above this level. It is noted that the site which houses Mission Australia (Lot 502 DP 845275) is under the same ownership and this land and is to be redeveloped in the near future. The separation distances between the future building (which will contain dwellings) and the office building will be considered in accordance with subclause (3) at the time of lodgement of the proposed mixed use building, however the proposed design has had regard to such.

7.2 Variation to Clause 8.6 Building Separation within B3 Commercial Core Zone

The proposed building has a maximum overall height of 32.42m (as shown on Dwg A-205) measured to the top of the parapet fronting Burelli Street. Therefore the building is required to have:

- A zero separation to neighbouring buildings to the east and south up to street frontage height (ie up to 24m, being Ground Level to Level 5); and

- 12m separation between buildings to the east and south, for any part of the proposed building which is between 24m and 32.42m in height (ie Level 6).

Table 5 confirms the manner in which such levels of the building will comply with clauses 8.6(2)(a) and 8.6(2)(b).

Table 5: Compliance with Clause 8.6 of WLEP 2009

Level	Functions	Height	Relevant Clause	Separation Distance required	Separation Distance provided	Compliance
Separation to East (to Corporate Square)						
Ground	Commercial	Below street frontage height/24m	8.6(2)(a)	Nil	Nil setback to boundary for the majority of the ground floor level, with 3.1m setback to service panels.	Principally complies
Levels 1 - 5	Commercial	Below street frontage height/24m	8.6(2)(a)	Nil	3.1m setback to boundary, which exceeds the required nil separation.	Variation sought (to allow increased setback to boundary of 3.1m)
Level 6	Commercial	Above street frontage height/24m	8.6(2)(b)	Min 12m	3.1m setback to the boundary. This equates to approx 10.6m separation to Corporate Square based on 7.5m setback of this building, which is less than the 12m required separation.	Variation sought (to allow decreased separation of approx 10.6m)
Separation to South (Mission Australia)						
Ground	Commercial	Below street frontage height/24m	8.6(2)(a)	Nil	Setback of between nil to approx 5.5m for the majority of the Ground Floor Level, which exceeds the required nil separation.	Variation sought (to allow increased setback of approx 5.5m)
Levels 1 - 5	Commercial	Below street frontage height/24m	8.6(2)(a)	Nil	3.79m setback to the boundary, which exceeds the required nil separation.	Variation sought (to allow increased setback to boundary of 3.79m)
Level 6	Commercial	Above street frontage height/24m	8.6(2)(b)	Min 12m	3.1 to 6.0m setback to the boundary, which, combined with the approximate 20m setback of Mission Australia, is compliant with the required 12m separation.	Complies

7.3 Variation to Clause 8.6 Building Separation within B3 Commercial Core Zone

The following Clause 4.6 Exceptions to Development Standards Variation Report has therefore been prepared, seeking variation to the requirements of Cause 8.6 of WLEP 2009, primarily as the building does not provide the required zero setbacks where the building is up to 24m in height. Minor variation is also sought to the required 12m separation between Level 6 of the proposed building and the adjacent Corporate Square to the east. In preparing this statement, consideration has been given to Land and Environment Court Judgements *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (and appeal at NSWLEC 90) and *Wehbe v Pittwater Council* [2007] NSWLEC 827, namely that the objection is well founded, that compliance with the standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

Table 6: Compliance with WLEP 2009 - Contravention of Clause 8.6 Building Separation in the B4 Mixed Use Zone		
Clause 8.6 Exceptions to Development Standards	Response/Justification	Consistent/ Complies
<p>(1) Objectives</p> <p>a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and</p> <p>b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.</p>	<p>Flexibility is sought for the application of the building separation requirements for Ground Level to Level 5 of the proposed building to both the east and south, to allow for increased setbacks beyond the nil setbacks which are required. Further, variation is sought to allow for reduced separation (from 12m to approx 10.6m) between Level 6 of the proposed building and the Corporate Square building to the east.</p> <p>The particular circumstances for this are as follows:</p> <p>Eastern Separation:</p> <ul style="list-style-type: none"> The building is located within a governance/civic precinct where buildings such as the Wollongong City Council Chambers, Corporate Square and the Illawarra Performing Arts Centre (IPAC) do not have zero boundary setbacks and do not present a continuous street wall to Burelli Street. Hence, it is appropriate for this building, which is to contain a banking function, to replicate this streetscape character and to provide setbacks to boundaries at the upper levels of the building. Accordingly, at Level 1-5 the building provides a 3.1m setback to the east, which exceeds the nil setback specified by this clause. However, this setback is appropriate as it will promote a street character commensurate with the existing precinct. A 3.1m setback to the eastern boundary is also provided at Level 6 of the building, consistent with the setback at Levels 1-5. As this level exceeds 24m in height (and street frontage height), a 12m separation is technically required between buildings under clause 8.6(2)(b). When considering the approximately 7.5m setback of Corporate Square a total building separation of 10.6m is provided, marginally below the 12m. This variation is considered to be justified having regard to the need to provide an improved built form outcome, which would not be achieved if 'stepping in' of the building on the eastern facade at Level 6 was required. It is considered that the presentation of one continuous setback for the eastern wall will provide a more desirable outcome when the building is viewed from the forecourt area of Corporate Square. At the Ground Floor Level of the building, a zero setback to the boundary is generally achieved with the exception of the area where a 3.1m setback is provided to the eastern boundary to accommodate doors of the service panels. This is supported by the need to ensure that servicing areas are not directly visible from Burelli Street. <p>Southern Separation</p> <ul style="list-style-type: none"> To the southern boundary a zero setback is not achieved for the full length of the wall at the Ground Floor Level due to the positioning of the combined access driveway, which necessitates a setback to the boundary of approximately 5.5m. The positioning of this driveway is appropriate to provide the greatest distance from the Burelli and Kembla Street intersection. At Levels 1-5 of the building the required nil separation is also not provided as the building will not extend over the driveway at the upper levels. A setback of (generally) 3.79m is provided having regard to the need to provide future separation to the proposed mixed use development on the 'Mission Australia' site, which is in the same ownership. The separation distances between the future building (which will contain dwellings) and the office building will be considered in accordance with subclause (3) at the time of lodgement of the proposed mixed use building, however the proposed building has regard to such. It is noted that subclause (3) will require increased separation distances, as the proposed building to the south is intended to contain residential functions. Hence, the current proposal has been setback from the southern boundary in anticipation of the separation which will be required. 	Justified
<p>(2) Consent may, subject to this clause, be granted for development even though the development may contravene a development</p>	<p>This subclause is not relevant to the subject proposal.</p>	N/A

Table 6: Compliance with WLEP 2009 - Contravention of Clause 8.6 Building Separation in the B4 Mixed Use Zone		
Clause 8.6 Exceptions to Development Standards	Response/Justification	Consistent/ Complies
<i>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.</i>		
(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:	This table comprises the written request seeking to justify the contravention of the building separation development standard.	Provided
(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and	<p><i>In Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009, para 61, Commissioner Person summarises the considerations from Wehbe v Pittwater Council [2007] NSWLEC 827 at [42] per Preston CJ, and notes in para 62 that clause 4.6 can be considered in a similar way to that of SEPP 1. In Wehbe at [44]-[48] Preston CJ identified other ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary, namely that the underlying objective or purpose is not relevant to the development; that the objective would be defeated or thwarted if compliance was required; that the development standard has been virtually abandoned or destroyed by the Council's own actions in departing from the standard; or that the zoning of the land is unreasonable or inappropriate.</i></p> <p>A response to each of these approaches is therefore provided as it relates to the current proposal:</p> <p>The underlying objective or purpose is not relevant to the development This is not applicable as the objective of the Development Standard is relevant to the development (and has been satisfied).</p> <p>That the objective would be defeated or thwarted if compliance was required The objective of this clause is to ensure sufficient separation of buildings for reasons of visual appearance, privacy and solar access. It is considered that compliance with the standards of Clause 8.6 would be defeated if adherence was required, as this would result in reduced separation between buildings to the south and east. Specifically, a reduced level of sunlight access would be provided to the eastern windows of the Corporate Square building and would potentially impact on the level of sunlight access into any future residences to the south. Further, a nil separation to the east would result in a 7 storey blank wall when viewed from the forecourt of Corporate Square which would not meet the objective of the clause with respect to visual appearance.</p> <p>That the development standard has been virtually abandoned or destroyed by the Council's own actions in departing from the standard The standard contained in clause 8.6 of WLEP 2009 has not been abandoned by Council, but the level of flexibility afforded by this control has produced a range of built form outcomes within the city centre. Council has in a number of instances adopted a merits based approach to this standard based on site specific conditions and desired streetscape outcomes.</p> <p>The zoning of the land is unreasonable or inappropriate. The zoning of the land is appropriate.</p> <p>Overall: Compliance with the applicable building separation distances are considered to be unreasonable and unnecessary in the circumstances of</p>	Justified

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	<p>the case as the variations provide the opportunity for an alternative (and satisfactory) site planning and built form outcome to that anticipated by the formal planning controls (as demonstrated below).</p> <p>The building separation requirements, whilst appropriate where a continuous street wall is required, will not allow for building placement which reflects the positioning of buildings within this corporate/governance precinct. Further, variation will allow for appropriate placement of the driveway and has regard to the intended future development of the site to the south.</p>	
(b) that there are sufficient environmental planning grounds to justify contravening the development standard.	<p><i>In Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009, Commissioner Person determined that it is necessary for applicants to show sufficient grounds <u>particular to the development</u> in the Clause 4.6 objection.</i></p> <p>In this regard it is noted that the reduced separation distances will provide an appropriate built form outcome, which focuses on the separation between buildings to promote individual identities. Further the separation distance provided will allow for appropriate massing of buildings and will promote a desirable visual outcome, particularly when the building is viewed from the forecourt area of Corporate Square.</p>	Justified
<p>(4) Consent must not be granted for development that contravenes a development standard unless:</p> <p>(a) the consent authority is satisfied that:</p>		
(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and	This Variation statement provides a discussion in support of the justification for varying the development standards as indicated in (3) above. In our opinion, there is sufficient justification provided to support a variation to the building separation requirements.	Satisfied
<p>(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</p> <p><u>Wollongong LEP 2009:</u></p> <p><u>Objectives of the Standard</u></p> <p>"to ensure sufficient separation of buildings for reasons of visual appearance, privacy and solar access".</p> <p><u>Objectives of the Zones</u></p> <ul style="list-style-type: none"> To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community. To encourage appropriate employment opportunities in accessible locations. To maximise public transport patronage and encourage walking and cycling. To strengthen the role of the Wollongong city centre as the regional business, retail and cultural centre of the Illawarra 	<p>Despite the variation (and generally exceedence of the nil separation distances), the proposed development will be in the public interest as it still meets the objectives of the clause 8.6 as it:</p> <ul style="list-style-type: none"> Provides a suitable built form which reflects the streetscape pattern in this corporate precinct. Provides a suitable urban massing particularly along the Burelli Street road corridor. Will allow for the placement of the driveway on the Kembla Street frontage to preserve the character of the Burelli Street streetscape and allow for separation from the intersection. Has regard to the need for increased separation to the future mixed use development to the south. The increased setbacks to the southern boundary at the Ground Floor to Level 5 of the building will also facilitate an improved level of solar access to the future mixed use building to the south. Similarly, the increased separation which is provided to Corporate Square at Ground Level to Level 5 will allow for increased sunlight access into the eastern windows of Corporate Square. <p>Hence the proposed development achieves the objective of the building separation development standard.</p> <p>The proposed development is also consistent with the objectives of the B3 Commercial Core zone as it will:</p> <ul style="list-style-type: none"> Provide an 'A' grade office building, to meet the demand for high quality office accommodation in the Wollongong City Centre. Provide for banking use to support employment opportunities in a highly accessible inner city location. Will strengthen the role of the City by providing a headquarters for the IMB Bank. Provides retail/commercial uses in close proximity to the existing transport infrastructure (bus, rail, cycling). <p>Overall, the development of the site as proposed will facilitate the</p>	Justified

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<p>region.</p> <ul style="list-style-type: none"> To provide for high density residential development within a mixed use development if it: is in a location that is accessible to public transport, employment, retail, commercial and service facilities, and contributes to the vitality of the Wollongong city centre. 	<p>ongoing viability and economic development of the Wollongong City Centre and hence is in the public interest with development of a strategic site.</p> <p>Furthermore, it is considered that the proposed development meets the majority of the Aims of WLEP 2009 [Clause 1.2(2)] as follows:</p> <ul style="list-style-type: none"> (b) encourage economic and business development to increase employment opportunities, (f) conserve and enhance heritage, (g) ensure that development is consistent with the constraints of the land and can be appropriately serviced by infrastructure. 	
(c) the concurrence of the Director-General has been obtained.	Council will need to consult with the Department of Planning and Infrastructure as to whether the concurrence of the DG can be assumed in accordance with Planning Circular PS 08-003-Variations to Development Standards (Department of Planning, May 2008).	Addressed
(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	The contravention of this development standard does not raise any matter of significance for state or regional environmental planning. Refer to further discussion below in this table.	
(b) the public benefit of maintaining the development standard, and	<p>The development is located in the civic precinct of the Wollongong City Centre and there is no measurable built form benefit which would be achieved by adhering to the separation requirements, which would necessitate a continuous street wall. Whilst appropriate in other streets in the B3 zone (such as Crown Street) the nil setback requirements up to the street frontage height is inappropriate in this location and does not reflect the existing, nor desired, streetscape.</p> <p>There will be no measurable public benefit by adhering to the separation distance requirements of Clause 8.6, particularly as they place an arguably undesirable separation requirement on the development. The proposed separation distances are considered to be acceptable to provide the desired massing and spatial separation in the civic/governance precinct.</p> <p>Hence, the proposed development will not raise any matter of state or regional planning significance.</p>	
(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.	It is considered that there are no environmental planning considerations that would hinder the Director-General from providing concurrence.	Addressed

7.4 Conclusion

This Statement has addressed the provisions of Clause 4.6 of Wollongong LEP 2009 and demonstrates that the variation sought to the development standards of the Clause 8.6 of WLEP (Building Separation) are justifiable and should be given concurrence to, on the basis of the unique site circumstances and achievement of environmental planning outcomes. The varied building separation, which generally exceed the specified nil separation, will result in an improved building form outcome, when considering building massing and spatial separation in this civic/governance precinct. The proposed development is consistent with Council's vision for the Wollongong City Centre and the existing and desired streetscape outcome for Burelli Street. On this basis, strict compliance with the building separation controls of WLEP 2009 is considered unnecessary.