

## Appendix 1: Clause 4.6 Exceptions to Development Standards Report

### 1 Clause 8.6 Provisions (Building Separation)

The proposed development consists of a seven level (Block B) to 14 level (Block A) mixed use building, with two levels of basement parking and an overall height of 47.97m (to top of lift overrun), 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.*

West and South: To the west and south the required separation distances are met. To the west, the Woolworths parking structure is situated in excess of 16m from the proposed development due to the separation provided by Kembla Street. To the south, the IRT Seniors Living development (Parkside, Pioneer Place) is situated in excess of 20m from the proposed development due to the separation provided by Stewart Street.

North and East: For the purpose of considering separation only buildings to the north and east of the site are relevant, being the only buildings which are potentially situated within the separation distances referenced in Clause 8.6. Directly adjoining the site to the north is the recently approved 7 storey commercial building which will be occupied by the IMB. To the northeast is a 6 storey commercial building ('Corporate Square') and also adjoining the south-eastern corner of the property is a substation that gains access from Lot 301 DP 709353 fronting Stewart Street.

The proposed development contains commercial functions at Ground Level and Level 1 and residential uses at Levels 2-13 and hence subclause (3) is applicable, which requires a 16m to 20m separation from other buildings. Further, subclause (2) requires that there be no separation between neighbouring buildings up to the street frontage height.

### 2 Variation to Clause 8.6 Building Separation within B3 Commercial Core Zone

The proposed building is required to have:

- A zero separation to neighbouring buildings to the north and east up to street frontage height (ie Ground Level and Level 1); and
- 16m separation between buildings to the north (commercial buildings with no dwellings) at Levels 2-13 and east (single storey Sacred Heart Church) at Levels 2-7.

**Table 1** confirms the manner in which such levels of the building will comply with clauses 8.6(2)(a) and 8.6(3)(b).

**Table 1: Compliance with Clause 8.6 of WLEP 2009**

Level	Functions	Height	Relevant Clause	Separation Distance required	Separation Distance provided	Compliance
<b>Separation to North (to IMB and Corporate Square)</b>						
Ground & Level 1	Commercial and Carpark	Below street frontage height/24m	8.6(2)(a)	Nil	Generally nil setback to carpark and 11m setback to northern commercial space.	<b>Variation sought</b> (to allow increased separation beyond the nil required)
Levels 2 - 13	Residential	Above street frontage height	8.6(3)(b)	16m	14.26m setback to IMB building (10.54m setback for proposed development + 3.97m for IMB), which is less than the required 16m separation. Separation to Corporate Square is compliant.	<b>Variation sought</b> to IMB
<b>Separation to East (Sacred Heart Church)</b>						
Ground & Level 1	Commercial	Below street frontage height/24m	8.6(2)(a)	Nil	Nil setback at the NE corner of the site, increasing to 3.4m to the Ground Level service area in the SE corner of the site on the Stewart St frontage.	<b>Variation sought</b> (to allow increased separation beyond the nil required)
Levels 2 - 7	Residential and Rooftop Communal Open Space	Above street frontage height/24m	8.6(3)(b)	Nil	Approx. 25m setback to the Sacred Heart Church, which exceeds the required 16m separation.	<b>Complies</b>

### 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 Clause 8.6 of WLEP 2009, primarily as the building does not provide the required zero setbacks to the northern and eastern boundaries at Ground and Level 1. Minor variation is also sought to the required 16m separation between the proposed building and the adjacent IMB building to the north, which is currently under construction, to allow for a 14.51m separation. 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 2: Compliance with WLEP 2009 - Contravention of Clause 8.6 Building Separation in the B3 Commercial Core 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>	<ul style="list-style-type: none"> <li>Flexibility is sought for the application of the building separation requirements for Ground Level and Level 1 of the proposed building to both the north and east, to allow for increased setbacks beyond the nil setbacks which are required. Further, variation is sought to allow for reduced separation (from 16m to 14.51m) between Levels 2 to 7 of the proposed building and the Sacred Heart Church to the east. The particular circumstances for this are as follows:</li> </ul> <p><b>Northern Separation:</b>  <u>Ground &amp; Level 1:</u></p> <ul style="list-style-type: none"> <li>The building is the second stage of redevelopment of the land which extends from Stewart Street in the south, Kembla Street in the west</li> </ul>	Justified

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	<p>and Burelli Street in the north which will contain the IMB headquarters (under construction) and the proposed mixed use development. To the northern boundary a zero setback is not achieved for the full length of the wall at the Ground &amp; First Floor Level due to the positioning of the combined access driveway, which necessitates a setback to the boundary of approximately 5.9m (minimum). The positioning of this driveway has been approved and is appropriate as it provides the greatest distance from the Burelli and Kembala Street intersection.</p> <ul style="list-style-type: none"> <li>The proposed development will be located adjacent to 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. Hence, this building will replicate this streetscape character and will promote a street character commensurate with the existing precinct.</li> </ul> <p><u>Levels 2-13:</u></p> <ul style="list-style-type: none"> <li>At Levels 2-13 the proposed development contains dwellings and is required to provide a 16m separation to the commercial (IMB) building to the north. A 14.26m separation is provided. Whilst marginally less than the separation required, it is noted that at Levels 2-7 of the proposed mixed use building contains fixed louvres (oriented NW) on corner northern balconies. Where there are north-facing windows of the eastern units, these do not have a direct interface with windows of the IMB building and they are partially screened by a solid 'false balustrade'. Therefore, application of the 12m separation distance requirement, specified by clause 8.6(2)(b) is considered appropriate as privacy issues have been appropriately addressed. The 12m distance has been specified by this clause to ensure that appropriate spatial separation is provided, with the proposed building providing separation in excess of this requirement, at 14.73m.</li> <li>It is further noted that at Levels 8-13 of the proposed mixed use building there is no direct interface with the IMB building to the north, which is only 7 storeys in height.</li> </ul> <p><b>Eastern Separation</b></p> <ul style="list-style-type: none"> <li>At the Ground Level &amp; Level 1 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.</li> <li>The Ground and Level 1 of the carpark wall and upper level commercial space is also marginally skewed from the boundary on this elevation, due to the angle of this boundary.</li> <li>The absence of a zero setback up to street frontage height is considered appropriate on this elevation, as the site directly adjoins an accessway and a carpark to the east, with a church and restaurant/function centre beyond - none of which provide the zero setback. This provides a streetscape character in Stewart Street which is distinctly different from that evident in the core commercial area of Crown Street.</li> </ul>	
(2) <i>Consent may, subject to this clause, be granted for development even though the development may contravene a development</i>	This subclause is not relevant to the subject proposal.	N/A

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Clause 8.6 Exceptions to Development Standards	Response/Justification	Consistent/ Complies
<p>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.</p>		
<p>(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:</p>	<p>This table comprises the written request seeking to justify the contravention of the building separation development standard.</p>	<p>Provided</p>
<p>(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and</p>	<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><b><i>The underlying objective or purpose is not relevant to the development</i></b> This is not applicable as the objective of the Development Standard is relevant to the development (and has been satisfied).</p> <p><b><i>That the objective would be defeated or thwarted if compliance was required</i></b> 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 north and east at ground Level and Level 1. Specifically, a zero setback to the north would not allow for continued use of a share driveway arrangement. A zero setback to the west would not reflect the existing streetscape pattern nor allow for appropriate placement of service areas. Further, a nil separation to the east would result in a 2 storey blank wall when viewed from the Sacred Heart Church to the east, which would not meet the objective of the clause with respect to visual appearance. Separation between the IMB building and the lower levels of the proposed development, whilst marginally below the required 16m (at 14.51m), provides appropriate spatial separation between the buildings and adequately addresses sunlight access and privacy requirements. A total of 75% of apartments will achieve a minimum of 2 hours of sunlight as required by the Apartment Design Guide.</p> <p><b><i>That the development standard has been virtually abandoned or destroyed by the Council's own actions in departing from the standard</i></b> 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</p>	<p>Justified</p>

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Clause 8.6 Exceptions to Development Standards	Response/Justification	Consistent/ Complies
	<p>to this standard based on site specific conditions and desired streetscape outcomes.</p> <p><b>The zoning of the land is unreasonable or inappropriate.</b> The zoning of the land is appropriate.</p> <p><b>Overall:</b> Compliance with the applicable building separation distances are considered to be unreasonable and unnecessary in the circumstances of 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 adjacent to the corporate/governance precinct and within the Stewart Street streetscape. Further, variation will allow for appropriate placement of the driveway and has regard to the approved development of the site to the north.</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 Church to the east and the Stewart St and Kembla Street frontages.</p>	Justified
(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	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
(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><u>Wollongong LEP 2009:</u></b>  <b><u>Objectives of the Standard</u></b> "to ensure sufficient separation of buildings for reasons of visual appearance, privacy and solar access".  <b><u>Objectives of the Zones</u></b> • To provide a wide range of retail, business, office, entertainment, community and other suitable land uses	<p>Despite the variation, 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"> <li>Provides a suitable built form which reflects the streetscape pattern in this precinct.</li> <li>Provides a suitable urban massing particularly along the Stewart Street road corridor.</li> <li>Will allow for the use of the approved combined driveway on the Kembla Street frontage which was sited to allow for separation from intersections.</li> <li>Adequately addresses privacy and overshadowing considerations with respect to the proposed residential units.</li> </ul> <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"> <li>Provide commercial spaces at Ground and Level 1, to meet the demand for high quality retail/commercial space in the Wollongong</li> </ul>	Justified

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<b>Clause 8.6 Exceptions to Development Standards</b>	<b>Response/Justification</b>	<b>Consistent/ Complies</b>
<p>that serve the needs of the local and wider community.</p> <ul style="list-style-type: none"> <li>To encourage appropriate employment opportunities in accessible locations.</li> <li>To maximise public transport patronage and encourage walking and cycling.</li> <li>To strengthen the role of the Wollongong city centre as the regional business, retail and cultural centre of the Illawarra region.</li> <li>To provide for high density residential development within a mixed use development if it:</li> <li>is in a location that is accessible to public transport, employment, retail, commercial and service facilities, and</li> <li>contributes to the vitality of the Wollongong city centre.</li> </ul>	<p>City Centre.</p> <ul style="list-style-type: none"> <li>Provides for additional residential accommodation in a high density setting with access to public transport and a broad range of services.</li> </ul> <p>Overall, the development of the site as proposed will facilitate the 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> <p>(b) encourage economic and business development to increase employment opportunities,</p> <p>(f) conserve and enhance heritage,</p> <p>(g) ensure that development is consistent with the constraints of the land and can be appropriately serviced by infrastructure.</p>	
(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>There is no measurable built form benefit which would be achieved by adhering to the separation requirements, which would necessitate a continuous street wall at the two lower levels of the building. 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>Further, the reduced separation to the IMB building to the north, which is approximately 1.5m less than that required, continues to provide appropriate spatial separation of in excess of 12m and has address privacy concerns through design solutions.</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 lower levels of the development. The proposed separation distances are considered to be acceptable to provide the desired massing and spatial separation in this 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	It is considered that there are no environmental planning considerations that would hinder the Director-General from providing concurrence.	Addressed

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<i>by the Director-General before granting concurrence.</i>		

#### 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 at ground and Level 1, which exceed the specified nil separation, will result in an improved building form outcome, when considering building massing and spatial separation adjacent to the civic/governance precinct. Further, the minor variation to the 16m separation to the IMB building (to the north) at Levels 2-7 of the proposed mixed use building has been addressed through appropriate design solutions (such as louvres and blank walls) to address privacy considerations. 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.