

T820212261



1 Introduction

This report comprises a Clause 4.6 Variation Statement for the proposed nine (9) storey commercial building to be located at 72-76 Crown Street Wollongong on two allotments which are formally described as Lot 1 in DP127333 and Lot B in DP153923. In particular it considers non-compliance of the proposal with 'Clause 4.3 – Height of Buildings' of Wollongong Local Environmental Plan 2009 (WLEP).

This report amends the previously submitted Clause 4.6 Variation Statement to reflect the changed building height.

This report contains the following section:

- Section 2 – Description of Clause 4.6 of WLEP as relevant to the proposal.
- Section 3 – Description of Clause 4.3 of WLEP as relevant to the proposal.
- Section 4 – Discussion of compliance of the proposal with Clause 4.3.
- Section 5 – An Exception to Development Standard Report, compiled according to legislative and common law requirements, and including justification for the variation.
- Section 6 - Conclusions

2 Clause 4.6 of WLEP 2009

Clause 4.6 'Exceptions to Development Standards' of Wollongong Local Environmental Plan 2009 provides the opportunity to contravene a development standard with approval of the consent authority and concurrence by the Director-General.

A development standard is defined by the Environmental Planning and Assessment Act, 1979 as:

"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".

The objectives of Clause 4.6 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.*

This statement is provided in order to justify a variation to Clause 4.3 'Height of Buildings' under the following provisions of WLEP 2009, in accordance with Clause 4.6 of that Plan, as the application of this requirement is considered unreasonable or unnecessary for this particular development:

3 Clause 4.3 Height of Buildings

The objectives of Clause 4.3 of WLEP 2009 are:

- (a) *to establish the maximum height limit in which buildings can be designed and floor space can be achieved,*
- (b) *to permit building heights that encourage high quality urban form,*
- (c) *to ensure buildings and public areas continue to have views of the sky and receive exposure to sunlight.*

Clause 4.3(2) requires that "The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map".

The WLEP 2009 'Height of Buildings' map (as shown in Figure 3-1) specifies that a maximum building height of 32 metres applies to the subject land. 'Building height (or height of building)' is defined within WLEP 2009

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as "the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like".

Figure 3-1 Extract of WLEP 2009 'Height of Buildings' Map showing 32m height limit (in red) which applies to the subject site



4 Discussion of Compliance with Clause 4.3 of WLEP 2009

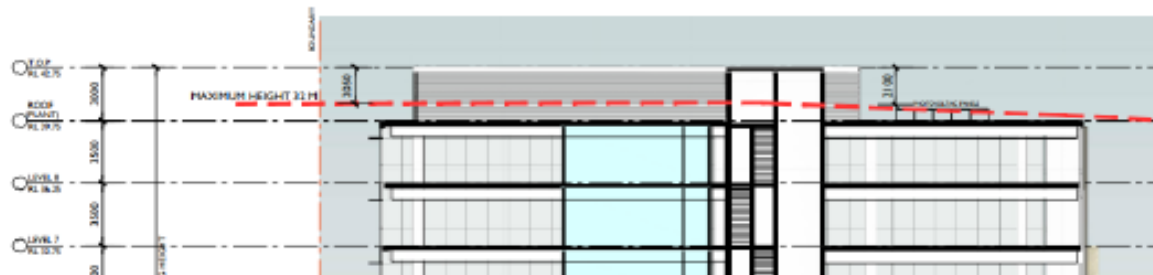
The development application seeks approval for the construction of a nine (9) storey new commercial premises, comprising:

- > eight (8) levels of office space above a ground floor lobby and retail spaces;
- > one (1) level comprising a plant room, at the top of the building; and
- > five (5) levels of basement parking.

The maximum proposed height of the development is 34.05m (measured from natural ground level to top of roof plant room). As demonstrated in Figure 4-1, the non compliance is limited to part of the plant room, which exceeds the permissible 32m height by 2.050m to 2.1m.

The revised plans have now reduced the height by 7.95m, through a reduction in floor to ceiling heights. Previously the building was 39.95m high with the exceedance being between 3.92m and 7.95m over the permitted building height.

Figure 4-1 Extent of variation to height controls, depicted by the red line



5 Clause 4.6 - Exceptions to Development Standards Report

Clause 4.3 of WLEP 2009 contains development standards in the form of building heights. A written justification for the proposed variation to the required building height is therefore required in accordance with Clause 4.6. Error! Reference source not found. below outlines how the proposal relates to the provisions of Clause 4.6 as it applies to the contravened development standards in Clause 4.3 of the WLEP.

As indicated above, this Statement seeks variation to the permitted 32m building height to allow for an overall height (from Ground Level to top of Plant Room) of 34.05m.

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 5-1 Compliance with WLEP 2009 - Contravention of Clause 4.3 Height of Buildings

Compliance with WLEP 2009 - Contravention of Clause 4.3 Building Height	
Clause 4.6 Exceptions to Development Standards	Response/Justification
<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 in relation to the application of the height control for the proposed development so that a better outcome is achieved for the site. The particular circumstances for this are as follows:</p> <ul style="list-style-type: none"> > The proposed development seeks to reposition the building mass from the lower levels to allow for retention of the heritage footprint and to ensure that the heritage listed building becomes a focal point in the East Crown Street precinct. The NSW Heritage Council's listing for this property reads as follows (Ref: pg 29 Revised Heritage Assessment, Robert C. Lee): <i>"The shops at 72-76 Crown Street are of significance for Wollongong for historical, aesthetic and reasons of representativeness. The item is aesthetically distinguished and locally rare example of Victorian Classicist shop, virtually intact above awning level, and makes a major contribution to the streetscape, enhanced in unison with other historical buildings in its vicinity. The building is representative of late Victorian commercial buildings, a visible reminder of the prosperity of the 1880s and one of the few remaining buildings of this period."</i> > While the expansive ground floor forecourt proposed in the previous submitted design has been replaced with a two storey commercial building fronting Crown Street, the transfer of building mass to the upper position of the building is still required. This is needed to accommodate the increased setbacks from Crown Street, in addition to an area required for plant for a commercial building (located on top level). > Specifically, the positioning of building mass at the upper level is a result of the need to adhere to the requirements of Chapter D13: Wollongong City Centre Special Character Area: East Crown Street which specifies a setback of at least 10m at the third storey and above on the northern side of the street (to maintain winter sunlight to the street). > The positioning of floor space will provide for an improved design outcome which places emphasis on the heritage building as the dominant street level element and which positions new building work behind and above this element. > While the building still exceeds the maximum the height exceedance, this is significantly less than the previous design iteration and the exceptional design outcome achieved through repositioning of this building mass warrants individual consideration of an appropriate height for the building.

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	<p>> The non-compliant portion (plant level only) is set back 28m from Crown Street and hence will largely not be visible from the public domain in particular the Crown Street frontage, as demonstrated in Figure 5-2.</p> <p>Figure 5-2 Artists impression of the proposed development showing that the Rooftop Level which exceeds the height limit will not be visible from Crown Street (Ref: ADM Dwg A-006).</p>  <p>Flexibility is therefore sought with respect to the application of the building height standards to promote an improved streetscape outcome, achieved through retention and effective display of the heritage item.</p> <p>Justified</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>(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and</p>	<p>(3) This table comprises the written request seeking to justify the contravention of the height development standard.</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.</i></p> <p><i>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><i>The underlying objective or purpose is not relevant to the development</i></p> <p>This is not applicable as the objective of the Development Standard is relevant to the development (and has been satisfied – see below in this table). It is the numerical standard itself that is not relevant to the development having regard to the particular site circumstances.</p> <p><i>That the objective would be defeated or thwarted if compliance was required.</i></p>

	<p>Objective (b) of Clause 4.3 of WLEP 2009 seeks to "permit building heights that encourage high quality urban form". It is considered that this objective would be defeated or thwarted if compliance with the building height control was required. Namely, compliance would necessitate reinstatement of floor area to the lower levels of the building, potentially in the void space adjacent to the heritage building or through a reduction in the 10m upper level setback to Crown Street, both of which have been provided to emphasise the streetscape and historic qualities of the listed heritage building on the site.</p> <p>The non-compliance is limited to only part of the top level that accommodates rooftop plant. This will not be visible from the street and does not have any anticipated adverse impacts which would detract from high quality urban form.</p> <p><i>That the development standard has been virtually abandoned or destroyed by the Council's own actions in departing from the standard</i></p> <p>The standard has not been abandoned or destroyed.</p> <p><i>The zoning of the land is unreasonable or inappropriate.</i></p> <p>The zoning of the land is appropriate, however as mentioned above, the numerical development standard applicable by Clause 4.3 for building height is not.</p> <p><u>Overall:</u></p> <p>Having regard to the above Wehbe categories, the only applicable criteria in demonstrating that compliance with the applicable 32m height standard is considered to be unreasonable and unnecessary in the circumstances of the case is that the objective would be defeated or thwarted if compliance was required.</p> <p>Compliance with the standard would be contrary to the objective of the height control as it would not encourage high quality urban form, due to the likelihood that a redistribution of bulk to the lower levels of the building would be necessary to achieve the permitted FSR if the height exceedance was not supported.</p> <p>Provided and Justified</p>
<p>(b) that there are sufficient environmental planning grounds to justify contravening the development standard.</p>	<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 particular to the development in the Clause 4.6 objection.</i></p> <p>The contravention of the building height standard is considered to be satisfactory having regard to environmental planning grounds, focusing on the retention and celebration of the heritage listed building on the site. This is reinforced within the Amended Heritage Assessment prepared by Robert C. Lee which confirms the following:</p> <ul style="list-style-type: none"> > <i>The proposed development will incorporate the heritage item into the design of the proposal, therefore maintaining the original scale of the current building and integrating it with the new commercial building. The original juxtaposition in relation to surrounding buildings, including adjacent heritage items, will be maintained and the curtilage will be sufficient to maintain an interpretation of the significance of the item. The higher building will be constructed behind and incorporate the heritage item into part of its fabric</i> > <i>The proposed architectural form of the new building will incorporate the existing heritage item within the overall development. The existing building will sit within a void, created on the west and north sides of the heritage item at the ground, first and second floors of the new building and in so doing will result in the existing building becoming a "feature" within the development. The form, proportions and fenestration of the existing building will be maintained.</i> > <i>The incorporation of the heritage item into the proposed building will consolidate the existing character of the street and develop a focal point within the precinct as well as establishing spatial links in the surrounding precinct. Additionally, the proposal will bring to the precinct expanded commercial activity that will be integrated into the existing mixed commercial and residential buildings. The late 19th century Victorian</i>

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	<p><i>shop fronts will become an important part of the new development and surrounding streetscape as required by the development control plan.</i></p> <ul style="list-style-type: none"> > <i>The height of the proposed building has been reduced and its form has been modified, this results in less of an impact on the subject heritage item and other nearby heritage items and public spaces.</i> > <i>The reduction of the height from that first proposal has reduced any possible impact on existing properties located in Crown Street and the Wollongong Arts Centre...</i> <p>Other environmental planning grounds: The heritage grounds demonstrated above, in addition to commentary elsewhere in this Statement confirm there are no likely adverse visual or overshadowing impacts resulting from the proposed height building height that exceeds 32m.</p> <p>On this basis it is considered that there are sufficient environmental planning grounds to justify the design outcome which is facilitated by the height exceedance.</p> <p>Justified</p>
<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>	
<p>(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</p>	<p>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 height requirements.</p> <p>Satisfied</p>
<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> <ul style="list-style-type: none"> (a) to establish the maximum height limit in which buildings can be designed and floor space can be achieved, (b) to permit building heights that encourage high quality urban form, (c) to ensure buildings and public areas continue to have views of the sky and receive exposure to sunlight. <p>The objectives of the B3 Commercial Core zone are:</p>	<p>Despite the exceedance of the allowable 32m height, the proposed development is in the public interest as it meets the objectives of the height development standard as:</p> <ul style="list-style-type: none"> > The development will integrate effectively within the locality, where a 48m maximum height limit is applied on the southern side of Crown Street. This level of integration is demonstrated in the Contextual Analysis prepared by ADM Architects, an extract of which is contained in Figure 5-3.

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- *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 region.*
- *To provide for high density residential development within a mixed use development if it—*
 - (a) *is in a location that is accessible to public transport, employment, retail, commercial and service facilities, and*
 - (b) *contributes to the vitality of the Wollongong city centre.*

Figure 5-3 Extract of Contextual Analysis (Dwg A-004) prepared by ADM Architects showing effective integration despite the height exceedance of the proposed building



The accompanying plans illustrate that the increased height provides an appropriate outcome and does not result in any unacceptable impact in terms of visual impact, disruption of views, loss of privacy or any other adverse impacts than if the maximum allowable height (32m) was met.

Specifically, the Shadow Analysis prepared by ADM Architects (Drawing A-301 and A304) shows the shadow cast by the proposed building (in black) and the shadow cast as a result of the additional building height (in red). This analysis demonstrates that a lower, compliant building would only marginally reduce the extent of overshadowing on June 21 to:

- (i) a minor strip of land within the Town Hall Place 'right of way' access and rear car park of 91 Crown Street (occupied by Heard McEwan Lawyers) at 9am; and
- (ii) a small slither of the western edge of the footpath at the NW corner of Corimal and Crown Streets (ie. west of 'Coffee Club' tenancy of the mixed use building). It is noted that this comprises area designated for future road widening.

There are no altered impacts at other times, as the vast majority of shadow cast due to the height exceedance is concentrated over commercial properties on the southern side of the street. Further, footpath dining areas on Crown Street and Civic Plaza will not be impacted by additional overshadowing as a result of the height exceedance.

Views are discussed at Error! Reference source not found. of the submitted Statement of Environmental Effects prepared by Cardno. The development does not detract from views to a significant extent more than can be reasonably anticipated given its inner city location. The building is located within a cluster of

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	<p>similar level development focused on the Kembla, Corrimal, Market and Crown Street city block which already limits views towards the ocean and foreshore.</p> <p>Further, the development will clearly achieve the objectives of the B3 Commercial Core zone as it will strengthen the role of Wollongong as a regional centre by providing additional 'A' grade office accommodation in a location which has been earmarked for this purpose.</p> <p>The proposed development will provide much needed commercial office space in the Wollongong City Centre, contributing to what is currently dominated by residential and small business uses. This will encourage new businesses, increasing the employment opportunities and workforce population. This will have flow on effects for the economy and street activity / vitality. These will strengthen the role of Wollongong as a centre of regional business.</p> <p>The site contains bike storage and end of trip facilities, and is located in close proximity to bus and train networks, thus maximising public transport opportunities.</p> <p>Justified</p>
(c) <i>the concurrence of the Director-General has been obtained.</i>	<p>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).</p> <p>Addressed</p>
(5) <i>In deciding whether to grant concurrence, the Director-General must consider:</i>	
(a) <i>whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and</i>	<p>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.</p> <p>Addressed</p>
(b) <i>the public benefit of maintaining the development standard, and</i>	<p>There is no public benefit by maintaining the development standard, as there are no identifiable adverse impacts to approval being granted to the submitted design. If the maximum allowable height of 32m were met, the desired heritage and streetscape outcomes would not be achieved or a loss of valuable commercial floor space at the upper level would be required with no measurable visual, environmental or public benefit.</p> <p>Justified</p>
(c) <i>any other matters required to be taken into consideration by the Director-General before granting concurrence.</i>	<p>It is considered that there are no environmental planning considerations that would hinder the Director-General from providing concurrence.</p> <p>Addressed</p>

5.2 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 LEP (Height of Buildings) is justified and should be given concurrence to.

The building has been redesigned to lower the building to minimise the non-compliance with the 32m height limit. The maximum proposed height of the development is now 34.05m (measured from natural ground level to top of roof plant room). The non compliance is limited to part of the plant room, which exceeds the permissible 32m height by 2.050m to 2.1m.

This variation has demonstrated that, while the expansive ground floor forecourt proposed in the previous submitted design has been replaced with a two storey commercial building fronting Crown Street, the optimal

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desired outcome still necessitates transfer of building mass to the upper levels of the buildings, with this design outcome facilitated by the building height variation. The additional building height sought is needed to accommodate the increased setbacks from Crown Street, in addition to the minimum area required for plant for a commercial building (located on top level).

The exceptional design outcome achieved through repositioning of this building mass warrants individual consideration of an appropriate height for the building. This is because the non-compliant portion (plant level only) is set back 26m from Crown Street and hence will largely not be visible from the public domain in particular the Crown Street frontage. In addition, there are no other adverse impacts resulting from the increased building height proposed.

As confirmed by the excerpts provided in this Statement from the Heritage Assessment, the design (including consideration of proposed height) provides a development which is not just sympathetic to the heritage value of the site, but actively emphasises and celebrates the heritage character of the precinct, by making it a focal point of the streetscape. The design delivers a contemporary office building that fully utilises its inner city setting, but which is sensitive to the heritage value of the site, its surrounds and the heritage value of the precinct.

Variation to the 32m height limits to achieve this optimal design outcome will allow for more effective achievement of the zone objectives, will facilitate urban renewal and will result in an appropriate environmental, planning and architectural outcome. On this basis support for the variation to the building height standard is sought.