
WOLLONGONG LOCAL ENVIRONMENTAL PLAN (LEP) 2009
CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

APPLICANT'S NAME: Triple One Crown Pty Ltd

SITE ADDRESS: Nos. 111-119 Crown Street, Wollongong

PROPOSAL: Demolition of existing structures and construction of a 12 storey commercial building above basement car parking

1. (i) Name of the applicable planning instrument which specifies the development standard:

Wollongong Local Environmental Plan (LEP) 2009

(ii) The land is zoned:

B3 Commercial Core

(iii) The number of the relevant clause therein:

Clause 4.4A – Floor Space Ratio – Wollongong City Centre

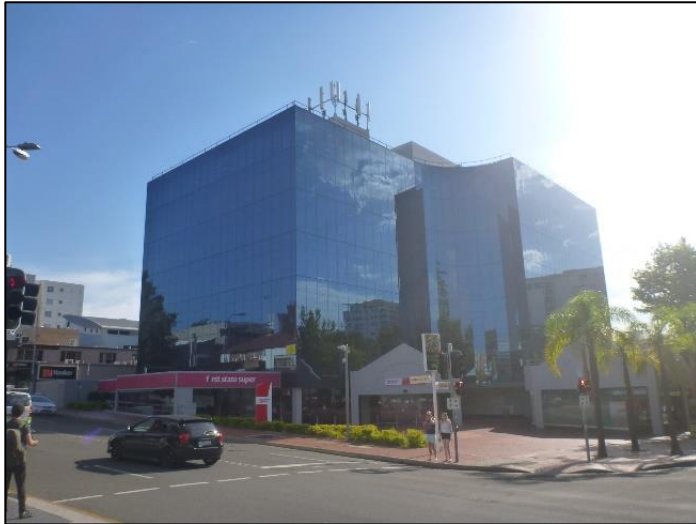
This Clause 4.6 Exception to Development Standards should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by GSA Planning.

2. Context

The subject site is located within the Wollongong Central Business District (CBD), at the eastern gateway to the pedestrianised Crown Street Mall (see Figure 1 on the following page). The proximity to the Wollongong town centre, railway station and major roads has led to the precinct being earmarked for urban renewal.

The relevant planning controls support an emerging high rise commercial character to replace the ageing and inconsistent existing mixed-use development. Examples of the contemporary high density infill development include the new IMB Bank building under construction at No. 47 Burelli Street (see Figure 1 on the following page) and a seven storey building at Nos. 71-77 Crown Street (see Photograph 1 on the following page). The area is in a state of transition and the scale and context of nearby developments have been considered in the proposed building design. In particular, the development has been designed to match the scale and articulation of the adjoining Lang's Corner building (DA-2017/493) which is currently under construction (see Figure 3 on page 4).

By way of background, the proposal is to demolish the existing 2 and 4 storey buildings and construct an 12 storey commercial building containing office space above retail. The proposed building will include 3 basement parking levels and a lower ground floor containing 171 car spaces. The proposed 12 storey contemporary commercial building will have a scale and form that is compatible with Council's height controls as well as other high density developments nearby. The proposal responds to the emerging character along Crown Street Mall and will achieve better outcomes for the site.



Photograph 1: Nos. 71-77 Crown Street



Figure 1: Montage of Approved IMB Bank Building
Source: ADM Architects



Figure 2: Site Plan
Source: SIX Maps

 Subject Site



Figure 3: Photomontage of Approved Development at Lang's Corner, Behind the Subject Site

3. Specify the nature of Development Standard sought to be varied and details of variation:

The floor space ratio (FSR) Map in the LEP prescribes a FSR of 6:1 for the subject site, however the site is subject to additional provisions under Clause 4.4A. Clause 4.4A is consistent with the definition for a development standard under Section 1.4 of the Environmental Planning and Assessment Act 1979 (EPA Act).

The applicant seeks to vary Clause 4.4A in the Wollongong LEP which prescribes FSR for the Wollongong city centre based on a sliding scale incorporating land use and site area. The relevant development standard is contained in Clause 4.4A(3)(b) as follows:

- (3) *For land within Zone B3 Commercial Core with a site area equal to or greater than 800 square metres and less than 2,000 square metres and a street frontage equal to or greater than 20 metres, the maximum floor space ratio for any building on that site is:*
- ...
- (b) *(3.5 + 2.5X):1 —if the building is used only for purposes other than residential purposes, where:*
X is (the site area in square metres – 800)/1200

The subject site has a total site area of 1,706.9m² which provides for a maximum FSR of 5.39:1. The proposal has a total gross floor area (GFA) of 10,120m² which equates to a FSR of 5.93:1, which is a non-compliance of 9.8%. In response to Council feedback at the Design Review Panel (DRP) and pre-Development Application (DA) meetings, the GFA was reduced by 70m².

As indicated, the proposal will be integrated with the approved Lang's Corner building and will present as the same development to the street. Due the Lang's Corner site being above the 2,000m² threshold, Clause 4.4A does not apply and the general FSR of 6:1 applies. This provides for a total GFA of 14,800m². When the FSR is measured across the two sites, the proposal complies on quantum, being almost 1,000m² below the control (see Table 1). If the sites were combined, the proposal would more than 2,000m² below the control (see Table 2).

Table 1: Quantum FSR Calculations			
Provision	Approved Lang's Corner Development	Proposal	Total
FSR Development Standard	6:1	5.39:1	
Approved/Proposed FSR	5.24:1	5.93:1	
Maximum GFA	14,800m ²	9,200m ²	24,000m ²
Proposed GFA	12,927m ²	10,089m ²	23,016m ²
GFA Difference	-1,873m ²	+889m ²	-984m ²

Table 2: Combined FSR Calculations			
Provision	Approved Lang's Corner Development	Proposal	Total
FSR Development Standard	6:1	6:1	6:1
Proposed FSR	5.24:1	5.93:1	5.52:1
Maximum GFA	14,800m ²	10,241m ²	25,042m ²
Proposed GFA	12,927m ²	10,089m ²	23,016m ²
GFA Difference	-1,873m ²	-152m ²	-2,026m ²

Accordingly, the non-compliance is a function of considering the site in isolation, when the building will operate as a fully integrated development with Lang's Corner.

4. Consistency with objectives of Clause 4.6

The objectives of Clause 4.6 seek to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development. In the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC118 (*Initial Action*), Preston CJ notes at [87,90]:

Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development...In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.

However, it is still useful to provide a preliminary assessment against the objectives of the Clause. The objectives of Clause 4.6 and our planning response are as follows:

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

The proposal seeks flexibility in the application of the building separation development standard to the development in the circumstance of this particular case. The proposed building will be integrated with the approved Lang's Corner development. The buildings will provide a similar design and share basement and ground floors. Across the two sites, the total GFA will achieve quantum compliance with the FSR development standard. This ensures the buildings present a bulk and scale which is consistent with what is envisaged by Council's controls. In addition, the proposal incorporates a number of design features which will reduce the perceived scale, especially as viewed from the public domain. These include articulation and stepping back the tower element. Accordingly, the non-compliances will provide for better outcomes both for and from the development.

5. Justification of variation to Development Standard

Clause 4.6(3) outlines that a written request must be made seeking to vary a development standard and that specific matters are to be considered. The Clause is stated, inter alia:

- (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.*

This written request justifies the contravention of the development standard by demonstrating that compliance is unreasonable or unnecessary in these circumstances; and there are sufficient environmental planning grounds to justify the non-compliance. These matters are discussed in the following sections.

5.1 Compliance with the Development Standard is unreasonable and unnecessary in the circumstances of the case

Clause 4.6(3)(a) requires the applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. In *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*), Preston CJ established five potential tests for determining whether a development standard could be considered to be unreasonable or unnecessary. This is further detailed in *Initial Action* where Preston CJ states at [22]:

These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

It is our opinion that the proposal satisfies a number of the five tests established in *Wehbe* and for that reason, the development standard is unreasonable and unnecessary in this instance. The relevant tests will be considered below.

Test 1 - The objectives of the standard are achieved notwithstanding non-compliance with the standard;

It is noted that under Clause 4.6(4)(a)ii, 'achieved' has been replaced by the lesser test of 'consistent'. Despite the non-compliance, the proposal is consistent with the desired high density character of the area. The proposal provides a height, bulk and scale that is generally consistent with that envisaged

by Council's controls. There are no specific objectives for Clause 4.4A of the LEP, however an assessment against the objectives of Clause 4.4 is provided as follows.

Objective - *to provide an appropriate correlation between the size of a site and the extent of any development on that site,*

The proposed FSR is suitable for the size of the site as there are efficiencies from integrating with the approved Lang's Corner development. The proposal does not need to provide the same building separation as would normally be required, as the access cores have been strategically located to align on each level. The proposal will be well articulated and will not appear an overdevelopment of the site.

Objective - *to establish the maximum development density and intensity of land use, taking into account the availability of infrastructure to service that site and the vehicle and pedestrian traffic the development will generate,*

The proposal is ideally located for high density commercial development, given its CBD location near multiple public transport options. The proposal will provide sufficient car parking and services to meet the likely demand. The likely trip generation has been assessed in the Traffic Report, prepared by JN Responsive Engineering, and separately submitted. This report found that the proposal will not have an unreasonable impact on the surrounding street network and is supportable from a traffic and parking point of view. Future occupants are likely to increase pedestrian traffic along the eastern end of the Crown Street Mall, which will assist in revitalising the area in accordance with Council's strategic policies. Accordingly, the proposed FSR is suitable given the availability of infrastructure that services the site.

Objective - *to ensure buildings are compatible with the bulk and scale of the locality.*

The proposal is a similar bulk and scale to the approved Lang's Corner development. The majority of the GFA will be stepped back from the street and will not result in an unreasonable sense of enclosure. The subject site is located in an area undergoing transition towards higher densities in accordance with Council's building envelope controls. Figure 4 on the following page shows the proposal in the context of compliant building envelopes along Crown Street. This shows the proposal is consistent with the desired future character. The comments of the DRP confirm the building will be consistent in the locality, stating, inter alia:

The proposal takes advantage of the desired vision for this part of the town centre by proposing a similar scale development to the one already approved at 95-109 Crown Street (henceforth Lang's Corner). It is the Panel's opinion that the proposal will have a good 'contextual fit' (pending some adjustments to the built form) with the desired future character of the precinct and with the adjacent approved development, which has been facilitated due to the ownership of both sites by a single entity.

Importantly, the proposal will present as a coherent development with the approved Lang's Corner building. Taken together, the buildings provide almost 1,000m² less GFA than what could be achieved by the combined FSR control. Accordingly, the proposal will be consistent with the bulk and scale envisaged for the sites.

Accordingly, in our opinion, the proposal is consistent with the objectives of the FSR development standard and is a suitable scale in the locality.



Figure 4: Axonometric Showing Existing Context and Compliant Future Building Envelopes

Source: ADM Architects

Test 3 - The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.

In our opinion, the development standard's underlying purpose is to encourage infill development which minimises the effects of building bulk on views, loss of privacy, overshadowing and visual intrusion. The proposal is not an overdevelopment of the site and will appear consistent in the locality. Quantum compliance is achieved when the FSR is combined with the neighbouring Lang's Corner development currently under construction. In fact, the two buildings will be almost 1000m² below the development standard. The proposal will appear visually consistent with this building and will integrate at the ground and basement levels. Strict compliance would require a smaller built form on the subject site which would appear out of place against the neighbouring building. This is due to the smaller lot size of the subject site which results in a more restrictive FSR control (5.39:1 rather than 6:1).

Enforcing strict compliance would undermine the underlying purpose by inhibiting the orderly and economic redevelopment of the site in accordance with Object 1(c) of the EPA Act. The FSR is necessary to provide floorplates which will encourage high profile tenants, which will assist in the renewal of the eastern end of Crown Street Mall. In addition, as argued throughout this variation, the additional FSR will not result in significant amenity impacts.

The additional FSR improves the feasibility of a number of design features which promote public domain improvements. This includes the formalisation, activation and lighting of Lois Lane.

Accordingly, enforcing strict compliance would thwart the underlying objective by providing a built form which is inconsistent with the approved neighbouring building. Strict compliance would also limit the capacity of the development to provide quality urban design outcomes. The proposal will present a varied built form, with the majority of the bulk stepped back from the public domain.

5.2 There are sufficient environmental planning grounds to justify contravening the Development Standard

There are a number of environmental planning grounds that justify the additional FSR in this particular circumstance. In addition to compliance with the objectives of the zone and development standard; environmental planning grounds include consistency in the context, acceptable environmental impacts and the urban design benefits of the proposal. These will now be addressed.

Consistency with Context

The proposal is permissible in the B3 Commercial Core Zone and is consistent with the zone objectives. The proposed FSR is also consistent with the surrounding density and scale in the area, which is shown in Section 2 and in the feedback from the DRP. In *Initial Action v Woollahra Municipal Council* [2019] NSWLEC 1097, Commissioner O'Neill states at [42] that:

I am satisfied that justifying the aspect of the development that contravenes the development standard as creating a consistent scale with neighbouring development can properly be described as an environmental planning ground within the meaning identified by His Honour in Initial Action [23], because the quality and form of the immediate built environment of the development site creates unique opportunities and constraints to achieving a good design outcome (see s 1.3(g) of the EPA Act).

The proposed FSR provides a similar bulk and scale to the Lang's Corner building currently under construction. Due to the lot size and the formula based FSR control, strict compliance would result in an inconsistent built form.

Environmental Impacts

Regardless of the FSR non-compliance, the proposal will not result in unacceptable environmental impacts in terms of solar access, views or privacy. This has been addressed in detail in Section 5 of the SEE.

Urban Design Benefits

The proposal provides a superior urban design outcome compared to a strictly compliant development. The FSR facilitates a building that provides significant benefits to the public domain. In particular, the development foregoes the opportunity to develop the western setback in order to formalise and activate Lois Lane. The laneway increases the activated frontage capable of being achieved on the site. The proposed consolidation of vehicular cross overs along Simpson Place and the proposed activation of this street is also a positive urban design outcome at the human scale.

The integration with the Lang's Corner development which is currently under construction provides the opportunity to achieve efficiencies in the design. The proposal will match the podium height, façade detailing and articulation of Lang's Corner to create visual consistency in the streetscape. Rebuilding the façade panels of the Kembla Chambers building and extending these to the rest of the Crown Street frontage provides visual interest at street level and retains the streetscape rhythm created by the panels along Lang's Corner. Collectively, the panels create a natural variation in texture which contrasts well with the more contemporary tower elements behind. This view was shared by the DRP who indicated a positive outcome of the proposal is "continuous podium expression and harmonious and complementary façade expressions..." Similarly, Council's pre-DA minutes state, inter alia:

The retention of the existing 'Kembla Chambers' building is supported to promote the desired 'fine grain' detail of Crown Street mall.

The proposal will not appear an overdevelopment of the site with a range of design features reducing the perceived scale. These include providing an articulated façade with a recessed element to give the appearance of separate built forms. The articulation has been increased in response to Council feedback at the DRP meeting. Although including more FSR, the proposal may in fact appear less bulky in the streetscape than the existing four storey structure which has limited articulation (see Photograph 2).



Photograph 2: Nos. 111-113 Crown Street, part of the subject site, as viewed from the mall

Accordingly, although strictly non-compliant, the building separation contributes to an improved urban design outcome for the site. This is consistent with Object 1.3(g) to the EPA Act which is to promote good design and amenity of the built environment. Further details on the design excellence achieved by the proposal in accordance with Cause 7.18 of the LEP is provided in a submission prepared by ADM Architects and separately submitted.

In our opinion, the non-compliance will not be inconsistent with existing and desired future planning objectives for the locality. For the reasons contained in this application, there are sufficient environmental planning grounds to justify the minor variation to the development standard, as required in Clause 4.6(3)(b).

6. Clause 4.6(4)(a) Requirements

Clause 4.6(4)(a) guides the consent authority's consideration of this Clause 4.6 variation request. It provides that:

- (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*

The applicant submits that the consent authority can and should be satisfied of each of the requirements of Clause 4.6(4)(a), for all the reasons set out in this request, and having regard to the site and locality.

In our opinion the proposal achieves the objectives of the Development Standard, as already demonstrated; and the B3 Commercial Core Zone, as discussed in Section 4.1.1 of the SEE. From this, we consider the proposal is in the public interest and should be supported.

7. Clauses 4.6(4)(b) and 4.6(5) Requirements

Clause 4.6(4)(b) of the LEP requires the concurrence of the Secretary (of the Department of Planning, Industry and Environment) before the Consent Authority can exercise the power to grant development consent for development that contravenes a development standard.

Under Clause 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each Consent Authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6, subject to the conditions in the table in the notice. Since the conditions in the table do not apply in this case, the concurrence of the Secretary can be assumed.

Nevertheless, the matters in Clause 4.6(5) should still be considered when exercising the power to grant development consent for development that contravenes a development standard (*Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at [100] and *Wehbe* at [41]). In deciding whether to grant concurrence, the Secretary is required to consider the following:

- (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.*

The proposal is not considered to raise any matter of significance for State or regional environmental planning. The FSR will enhance the amenity and functionality of the proposed commercial building without significantly impacting neighbouring properties. The public benefit of maintaining the development standard is not considered significant given that, regardless of the non-compliance, the proposal will appear consistent in the streetscape. The FSR facilitates a building that will provide a distinct public benefit, through various urban design and public domain improvements.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted. The non-compliance contributes to a quality development which is consistent with the desired character of the precinct and is, in our opinion, in the public interest.

8. Conclusion

This written request has adequately demonstrated that compliance with the development 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. This is summarised in the compliance matrix prepared in light of *Initial Action* (see Table 3 on the following page).

We are of the opinion that the Consent Authority should be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives of the B3 Commercial Core Zone pursuant to the LEP. On that basis, the request to vary Clause 4.4A should be upheld.

Table 3: Compliance Matrix

Para (Initial Action)	Requirement	Section	Summary	Satisfied
10	Is it a development standard (s.1.4)	1	Yes	
11	What is the development standard	1	Floor Space Ratio	
12	What is the control	1 & 3	5.39:1	
14	First Precondition to Enlivening the Power – Consent authority must form 2 positive opinions:		Both positive opinions can be formed as detailed below.	YES
15, 25	1st Positive Opinion – That the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by Clause 4.6(3). There are two aspects of that requirement.	5	The Clause 4.6 variation has adequately addressed both matters in Clause 4.6(3) by providing a detailed justification in light of the relevant tests and planning considerations.	YES
16-22	First Aspect is Clause 4.6(3)(a) – that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. Common ways are as set out in <i>Wehbe</i> .	5.1	The proposal is consistent with Tests 1 and 3 of <i>Wehbe</i> : <ul style="list-style-type: none"> The objectives of the standard are achieved notwithstanding the non-compliance with the standard; and The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable; 	YES
23-24	Second Aspect is Clause 4.6(3)(b) – The written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be indirectly satisfied under Clause 4.6(4)(a)(i) that the written request has adequately addressed this matter. The environmental planning grounds must be "sufficient" in two respects: <ol style="list-style-type: none"> The environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole. 	5.2	Sufficient environmental planning grounds include, inter alia: <ul style="list-style-type: none"> The proposed FSR facilitates a high density commercial development consistent with the planning objectives of the area; The development will be integrated with the approved Lang's Corner building and will comply on quantum with FSR across the two sites; The proposal complies with the height development standard and matches the scale of the approved Lang's Corner development; The FSR will no result in unacceptable environmental impacts; The FSR is necessary to attract high profile tenants that would stimulate renewal in the area; and The non-compliance facilitates a building that provides significant public benefits through urban domain improvements. 	YES

26-27	2nd Positive Opinion – That the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out.	6	The proposed development is consistent with the objectives of the building separation standard as addressed under Test 1 of <i>Webhe</i> . The proposal is also consistent with the objectives of the B3 Commercial Core Zone, as addressed in the SEE.	YES
28-29	Second Precondition to Enlivening the Power – that the concurrence of the Secretary has been obtained [Clause 4.6(4)(b)]. On appeal, the Court has the power to grant development consent, subject to being satisfied of the relevant matters under Clause 4.6.	7	As the relevant matters for consideration under Clause 4.6 have been satisfied as outlined above, the Council can grant development consent.	YES