



**ANGEL PLACE
LEVEL 8, 123 PITT STREET
SYDNEY NSW 2000**

URBIS.COM.AU
Urbis Pty Ltd
ABN 50 105 256 228

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Nigel Lamb
Senior Assessment Planner
Wollongong City Council
Via email: nlamb@wollongong.nsw.gov.au

Dear Nigel,

CLAUSE 4.6 VARIATION REQUEST | WARRAWONG COMMUNITY CENTRE AND LIBRARY

1. INTRODUCTION

This Clause 4.6 Variation Request ('the Request') has been prepared on behalf of Wollongong City Council ('the applicant') and accompanies a Development Application ('DA') for new district level multi-function community facility and library at 7-9 Greene Street and 54-68 King Street, Warrawong 2502.

The Request seeks an exception from the development standard prescribed for the site under clause 7.13 of *Wollongong Local Environmental Plan 2009* (WLEP 2009). The variation request is made pursuant to clause 4.6 of (WLEP 2009).

This report should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Urbis Pty Ltd and dated 18 October 2021.

The following sections of the report include:

- **Section 2:** description of the site and its local and regional context, including key features relevant to the proposed variation.
- **Section 3:** brief overview of the proposed development as outlined in further detail within the SEE and accompanying drawings.
- **Section 4:** identification of the development standard which is proposed to be varied, including the extent of the contravention.
- **Section 5:** outline of the relevant assessment framework for the variation in accordance with clause 4.6 of the LEP.
- **Section 6:** detailed assessment and justification of the proposed variation in accordance with the relevant guidelines and relevant planning principles and judgements issued by the Land and Environment Court.
- **Section 7:** summary and conclusion

2. SITE CONTEXT

2.1. SITE DESCRIPTION

The site is located at 7-9 Greene Street and 54-68 King Street, Warrawong and is legally described as Lot 1 DP 394881, Lot 1 DP515419 and Lots 37 to 42 DP 18875 (See Figure 1). The site is within the Warrawong Town Centre within the Wollongong Local Government Area (LGA).

The key features of the site are summarised in the following table.

Table 1 Site Description

Feature	Description
Street Address	7-9 Greene Street and 54-68 King Street, Warrawong 2502
Legal Description	Lot 1 in Deposited Plan 394881, Lot 1 in Deposited Plan 515419 and Lots 37, 38, 39, 40, 41, 42 in Deposited Plan 18875
Site Area	4232sqm
Site Topography	The site generally falls from the north west (RL 7.40m) to the south east (RL 4.90m) with an average grade across the site of approximately 2.5%.
Vegetation	The site currently accommodates five (5) trees of low value on the Greene Street Frontage. No other vegetation exists on the site.
Hydrology	The site has restricted development activities due to moderate to severe flooding.

2.2. EXISTING DEVELOPMENT

The site is within the Warrawong Town Centre within the Wollongong Local Government Area (LGA). The site currently consists of:

- Two storey retail premises fronting King Street with associated rear car parking and loading facilities. A number of these premises have ceased operation and have been vacated for a considerable period. This is primarily due to the operation of Warrawong Plaza which has seen increase economic competition. The proposed development will result in the demolition of these existing building structures.
- Existing community centre and library with rear car park. Five trees and bench seating exist in front of the community centre adjacent to Greene Street.
- A laneway, known as 127 Laneway (Cowper Laneway). This lane provides rear and loading access to the existing properties.
- The existing site contains 11 car parking spaces associated with the existing community centre (two spaces dedicated to Warrawong Residents Forum (WRF), two spaces dedicated to Illawarra

Legal Centre and one space dedicated to van usage), three line-marked spaces to the rear of 58 King Street and other informal parking areas associated with other retail areas on King Street.

Figure 1 – Site Aerial



Source: Urbis

2.3. LOCALITY CONTEXT

Warrawong is located approximately 85km south of metropolitan Sydney, on the NSW south coast. Warrawong is surrounded by natural features including Lake Illawarra to the south, the Pacific Ocean to the east and the Illawarra Escarpment to the west. In the immediate vicinity of the site the following land uses can be found:

North: Greene Street is immediately north of the site. On the opposite side of Greene Street is medium density residential areas and associated open space owned by NSW Land and Housing, with low density residential areas beyond this. Montgomery Avenue with BP Service Station are further north. Chemist Warehouse is on north-eastern side of King Street.

West: Immediately adjacent to the site is Barnardos Australia, a social services organisation. Further west is low density residential areas and Port Kembla Hospital with access via Greene Street. Further northwest are the education establishments including Warrawong Primary School and Warrawong High School. The residential suburbs of Lake Heights and Berkeley are further west via Northcliffe Drive.

South: Cowper Street is south of the site and runs perpendicular to King Street. South-east is Warrawong Plaza approximately 250m from the site. Kully Bay Oval and Wentworth Park are further south with Kemblawarra Primary School and the existing library south-east via King Street.

East: East of the site is King Street which runs in a north to south direction. On the opposite side of King Street are retail premises, beyond this is a low-density residential area with access via Montgomery Avenue and Shellharbour Road. Warrawong Plaza is south-east. This has a number of retail premises including Big W, Coles, Rebel and Target.

Figure 2 – Surrounding Context



Source: Urbis

3. PROPOSED DEVELOPMENT

This Clause 4.6 Variation Request has been prepared to accompany a DA for the construction of a new district level multi-function community facility and library.

A detailed description of the proposed development is provided in the Statement of Environmental Effects prepared by Urbis Pty Ltd and dated 18 October 2021. The proposal is also detailed within the architectural, engineering and landscape drawings that form part of the DA.

A summary of the key features of the proposed development is provided below:

- A new district library split between ground level, level 1 and level 2;
- A food and drink premise (café) at ground floor level;
- Community centre with lounge, community rooms, kitchen, amenities and office space on ground floor;
- Illawarra Legal Centre on level 2;

- Approximately 200 seat community hall on level 2;
- At-grade car parking for 34 cars, including two accessible spaces;
- A landscaped forecourt area to the west of the building between the car park and the entry;
- Associated toilets; and
- External screened waste enclosure and provision for servicing from the repositioned laneway.

4. VARIATION OF CLAUSE 7.13 STANDARD

This section of the report identifies the development standard which is proposed to be varied, including the extent of the contravention. A detailed justification for the proposed variation is provided in **Section 6** of the report.

4.1. DEVELOPMENT STANDARD

Clause 7.13 Certain land within business zones is detailed below:

7.13 Certain land within business zones

(1) The objective of this clause is to ensure active uses are provided at the street level to encourage the presence and movement of people.

(2) This clause applies to land in Zone B1 Neighbourhood Centre, Zone B2 Local Centre, Zone B3 Commercial Core or Zone B4 Mixed Use, but does not apply to land to which clause 7.19 applies.

(3) Development consent must not be granted for development for the purpose of a building on land to which this clause applies unless the consent authority is satisfied that the ground floor of the building—

(a) will not be used for the purpose of residential accommodation, and

(b) will have at least one entrance and at least one other door or window on the front of the building facing the street other than a service lane.

4.2. PROPOSED VARIATION TO CLAUSE 7.13

This request seeks to contravene clause 7.13 (2) (b) as the proposed development will not have *at least one* entrance to King Street. The proposed development does not have any entrances facing the street.

The proposal still achieves the objective of the clause as it provides active community uses at the street level to encourage the presence and movement of people. Although the entrance is not strictly or directly off the street, it is highly visible from the street and activates the neighbourhood. The proposed development also satisfies all other components of the clause as it will not be used for residential accommodation and will have *at least one* window on the front of the building facing the King Street. This is achieved through large picture windows along King Street.

5. RELEVANT ASSESSMENT FRAMEWORK

Clause 4.6 of WLEP 2009 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of clause 4.6 of WLEP 2009 are:

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

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a DA that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, clause 4.6(3) requires that the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development 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.

Clause 4.6(4)(a) requires the consent authority to be satisfied that the applicant's written request adequately addresses each of the matters listed in clause 4.6(3). The consent authority should also be satisfied that that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which it is proposed to be carried out.

Clause 4.6(4)(b) requires the concurrence of the Secretary to have been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
- (b) the public benefit of maintaining the development standard, and
- (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

The concurrence of the Secretary can be assumed to have been granted for the purpose of this variation request in accordance with the Department of Planning Circular PS 18-003 'Variations to development standards', dated 21 February 2018. This circular is a notice under section 64(1) of the Environmental Planning and Assessment Regulation 2000 and provides for assumed concurrence. A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The Secretary can be assumed to have given concurrence if the matter is determined by an independent hearing and assessment panel or a Sydney district or regional planning panel in accordance with the Planning Circular.

This clause 4.6 request demonstrates that compliance with the development standard prescribed for the site in clause 7.13 of WLEP 2009 is unreasonable and unnecessary, that there are sufficient environmental planning grounds to justify the requested variation and that the approval of the variation is in the public interest because it is consistent with the development standard and zone objectives.

In accordance with clause 4.6(3), the applicant requests that the Clause 7.13 development standard be varied (subject to the applicant's position that such a request should not actually be necessary).

6. ASSESSMENT OF CLAUSE 4.6 VARIATION

The following sections of the report provide a comprehensive assessment of the request to vary the development standards relating to the development standard in accordance with clause 7.13 of WLEP 2009.

Detailed consideration has been given to the following matters within this assessment:

- Varying development standards: A Guide, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court.

The following sections of the report provides detailed responses to the key questions required to be addressed within the above documents and clause 4.6 of the LEP.

6.1. IS THE PLANNING CONTROL A DEVELOPMENT STANDARD THAT CAN BE VARIED? – CLAUSE 4.6(2)

The development standard prescribed by clause 7.13 of WLEP 2009 is a development standard capable of being varied under clause 4.6(2) of WLEP 2009.

The proposed variation is not excluded from the operation of clause 4.6(2) as it does not comprise any of the matters listed within clause 4.6(6) or clause 4.6(8) of WLEP 2009.

6.2. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE? – CLAUSE 4.6(3)(A)

Historically, the most common way to establish a development standard was unreasonable or unnecessary was by satisfying the first method set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method requires the objectives of the standard are achieved despite the non-compliance with the standard.

This was recently re-affirmed by the Chief Judge in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [16]-[17]. Similarly, in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34] the Chief Judge held that “establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary”.

This Request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also addresses the third method, that the underlying objective or purpose of the development standard would be undermined, defeated or thwarted if compliance was required with the consequence that compliance is unreasonable (*Initial Action* at [19] and *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]). Again, this method alone is sufficient to satisfy the ‘unreasonable and unnecessary’ requirement.

The Request also seeks to demonstrate the ‘unreasonable and unnecessary’ requirement is met because the burden placed on the community by not permitting the variation would be disproportionate to the non-existent or inconsequential adverse impacts arising from the proposed non-complying development. This disproportion provides sufficient grounds to establish unreasonableness (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

- ***The objectives of the standard are achieved notwithstanding non-compliance with the standard*** (the first method in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[43])

The specific objectives of the development standard as specified in clause 7.13 of WLEP 2009 are detailed in **Table 2** below. An assessment of the consistency of the proposed development with each of the objectives is also provided.

Table 2 Assessment of Consistency with Clause 7.13 Objectives

Objectives	Assessment
(1) The objective of this clause is to ensure active uses are provided at the street level to encourage the presence and movement of people.	<p>The objective of the clause is achieved by the proposal through the expansive windows inviting the community into the open space at the rear. In addition, the clause is aimed towards retail and commercial premises, whereas this is a significant civic building with different design constraints.</p> <p>The intent of the fully transparent / glazed wall to the foyer is to visually indicate the entry foyer and allow passers-by on King Street to see the entry doors on the opposite side of the building. This focuses community activity on the public plaza and community veranda away from the noise pollution of King Street.</p> <p>In addition, the higher ground floor level within the building (between 1m and 1.5m above pavement level at the laneway) is set to mitigate flood risk.</p> <p>Importantly, FJMT outline that community centres and libraries benefit greatly from interconnection with open space. This not only provides expanded and complementary uses but also safe and secure entry and exit from the building, particularly for children and the elderly encouraging movement and people. FJMT outline that an entry / exit onto King Street was viewed as unsafe by project stakeholders given the limited setback and high traffic volumes.</p>

The objectives of the development standard are achieved, notwithstanding the non-compliance with the standard in the circumstances described in this variation report.

- ***The underlying object or purpose would be undermined, if compliance was required with the consequence that compliance is unreasonable*** (the third method in *Wehbe v Pittwater*

Council [2007] NSWLEC 827 [42]-[43] as applied in Linfield Developments Pty Ltd v Cumberland Council [2019] NSWLEC 131 at [24])

The relevant objective of the B3 Commercial Core zone include:

- *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.*

The proposed development is consistent with the objectives of the zone by providing district level community facilities serving the needs of the local and wider community. The proposal through the open space encourages walking and cycling.

Full height glazing to entry foyer and lounge space with clear views to entry doors on west. It is noted significant change in level between street and freeboard level at ground floor, limits the ability to provide an entry via King Street.

An entry / exit onto King Street was viewed as unsafe by the project team given the limited (zero) setback and high traffic noise issues relating to doors opening to an arterial road were considered in choice of entry location.

- **The burden placed on the community (by requiring strict compliance with the standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant development** (cf Botany Bay City Council v Saab Corp [2011] NSWCA 308 at [15]).

Strict compliance with the standard would result in safety and flooding impacts.

Entries within flood areas can be greatly impacted by flood levels and freeboard requirements. Egress from King Street will not be possible during flood events. The change in level between the freeboard ground level and King Street pavement is significant and would require an additional 300mm freeboard. As such, any entry will require a complex array of ramps and stairs detracting from the entry experience. This compares to shop fronts which have greater dispensation to connect at footpath level (below flood) which cannot be directly applied to a significant civic building.

FJMT outline that community centres and libraries benefit greatly from interconnection with open space. This not only provides expanded and complementary uses but also safe and secure entry and exit from the building, particularly for children and the elderly. FJMT outline that an entry / exit onto King Street was viewed as unsafe by project stakeholders given the limited setback and high traffic. Therefore, compliance with the standard would be disproportionate to consequences attributable to the proposed non-compliant development.

6.3. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD? – CLAUSE 4.6(3)(B)

The Land & Environment Court judgment in Initial Action Pty Ltd v Woollahra Council [2018] NSWLEC 2018, assists in considering the sufficient environmental planning grounds. Preston J observed:

“...in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole; and

...there is no basis in Clause 4.6 to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development”

There is an absence of environmental harm arising from the contravention and positive planning benefits arising from the proposed development as outlined in detail above. These include:

- The proposal allows for depth in landscaping and articulation of the picture windows on the King Street frontage while providing a minimal setback.
- Noise issues relating to doors opening to an arterial road were considered in the proposed entry location.
- King Street elevation balances visual activation, offering multiple clear sight lines into the facility, with the need to mitigate the effects of flooding and noise.
- Full height glazing to entry foyer and lounge space with clear views to entry doors on west. It is noted significant change in level between street and freeboard level at ground floor, limits the ability to provide an entry via King Street.
- Activation of King Street / Greene Street corner with large full height windows to children's area, framing the corner, consistent with the Warrawong Master Plan.
- An entry / exit onto King Street was viewed as unsafe by the project team given the limited (zero) setback and high traffic noise issues relating to doors opening to an arterial road were considered in choice of entry location.
- Entry to the building on the western side from the public plaza which provides safe and secure entry and exit from the building, particularly for children and the elderly and avoids flood constraints associated with any entry via King Street.

Based on the above, it has been demonstrated that there are sufficient environmental planning grounds to justify the proposed development standard non-compliance in this instance.

Figure 3 Proposed Built form



The signage on the building will reinforce the building's gateway presence on the corner of King and Greene Streets. Corner and Greene Street signage will assist in wayfinding to the entry



Greene Street address for building, plaza and carpark reinforces way finding with further reinforcement of Cowper Lane connection visibly linking Cowper Street and Greene Street



Clear wayfinding to the entry is provided by the southern laneway canopy



Full height glazing to entry foyer and lounge space with clear views to entry doors on west. Shown with landscape turned off. Note significant change in level between street and freeboard level at Ground Floor



Full height glazing to entry foyer and lounge space with clear views to entry doors on west. Shown with landscape turned off



Full height glazing to entry foyer and lounge space with clear views activity within



View of Entry Foyer looking out to King Street



Activation of King Street / Greene Street Corner with large full height windows to children's area



Activation of King Street / Greene Street Corner with large full height windows to children

Source: FJMT

6.4. HAS THE WRITTEN REQUEST ADEQUATELY ADDRESSED THE MATTERS IN SUB-CLAUSE (3)? – CLAUSE 4.6(4)(A)(I)

Clause 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

Each of the sub-clause (3) matters are comprehensively addressed in this written request, including detailed consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. The written request also provides sufficient environmental planning grounds, including matters specific to the proposal and the site, to justify the proposed variation to the development standard.

6.5. IS THE PROPOSED DEVELOPMENT IN THE PUBLIC INTEREST? – CLAUSE 4.6(4)(B)(II)

Clause 4.6(4)(a)(ii) states development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the proposal will be in the public interest because it is consistent with the objectives of the development standard and the objectives for the zone.

The consistency of the development with the objectives of the development standard is demonstrated in Table 2 above. The proposal is also consistent with the land use objectives that apply to the site under WLEP 2009. The site is located within the B3 Commercial Core zone. The proposed development is consistent with the relevant land use zone objectives as outlined in Table 3 below.

Table 3 Assessment of Compliance with Land Use Zone Objectives

Objective	Assessment
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.	<p>This is a civic building which expresses different form and architecture to retail and business premises associated with main street shops.</p> <p>Full height glazing to entry foyer and lounge space with clear views to entry doors on west are provided to King Street.</p> <p>It is noted significant change in level between street and freeboard level at ground floor, limits the ability to provide an entry via King Street.</p>
To encourage appropriate employment opportunities in accessible locations.	The proposal provides employment opportunities in an accessible location.
To maximise public transport patronage and encourage walking and cycling.	The western entry encourages walking and cycling via the public plaza and is removed from the safety risks along King Street.
To strengthen the role of the Wollongong city centre as the regional business, retail and cultural centre of the Illawarra region.	The community centre and library will provide a cultural centre in the Illawarra region.

6.6. HAS THE CONCURRENCE OF THE PLANNING SECRETARY BEEN OBTAINED? – CLAUSE 4.6(4)(B) AND CLAUSE 4.6(5)

The Secretary can be assumed to have concurred to the variation under Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 64(1) of the *Environmental Planning and Assessment Regulation 2000*.

The Secretary can be assumed to have given concurrence as the matter will be determined by an independent hearing and assessment panel or a Sydney district or regional planning panel in accordance with the Planning Circular.

The matters for consideration under clause 4.6(5) are considered below.

- **Clause 4.6(5)(a) – does contravention of the development standard raise any matter of significance for State or regional environmental planning?**

The proposed non-compliance with the development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

- **Clause 4.6(5)(b) - is there a public benefit of maintaining the planning control standard?**

The proposed development achieves the objectives of the development standard and the land use zone objectives despite the technical non-compliance:

- Entry to the building on the western side from the public plaza which provides safe and secure entry and exit from the building, particularly for children and the elderly and avoids flood constraints associated with any entry via King Street.
- The proposal allows for depth in landscaping and articulation of the picture windows on the King Street frontage while providing a minimal setback. Entry / exit onto King Street was viewed as unsafe by project stakeholders given the limited (zero) setback and high traffic. Noise issues relating to doors opening to an arterial road were considered in the proposed entry location.
- King Street elevation balances visual activation, offering multiple clear sight lines into the facility,

There is no material impact or benefit associated with strict adherence to the development standard and there is no compelling reason or public benefit derived from maintenance of the standard.

- **Clause 4.6(5)(c) – are there any other matters required to be taken into consideration by the Secretary before granting concurrence?**

Concurrence can be assumed, however, there are no known additional matters that need to be considered within the assessment of the clause 4.6 variation request prior to granting concurrence, should it be required.

7. CONCLUSION

For the reasons set out in this written request, strict compliance with the development standard contained within clause 7.13 of WLEP 2009 is unreasonable and unnecessary in the circumstances of the case. Further, there are sufficient environmental planning grounds to justify the proposed variation and it is in the public interest to do so.

It is reasonable and appropriate to vary the development standard to the extent proposed for the reasons detailed within this submission and as summarised below:

- This is a civic building which expresses different form and architecture to retail and business premises associated with main street shops.
- The proposal only results in a minor non-compliance to the clause by not providing entry to King Street due to pedestrian and child safety, noise and flooding risks.
- The proposal maintains full height glazing to entry foyer and lounge space with clear views to entry doors on west, consistent with the clause.
- The significant change in level between street and freeboard level at ground floor, limits the ability to provide an entry via King Street.

For the reasons outlined above, the clause 4.6 request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the standard. In the circumstances of this case, flexibility in the application of the development standard should be applied.

Kind regards,

A handwritten signature in black ink, appearing to read "Joseph Arnott".

Joseph Arnott
Senior Consultant
+61 2 8424 5125
jarnott@urbis.com.au