

DA-2022/714 37-39 Burelli Street Wollongong

Attachment 2 Clause 4.6 statement



Appendix A – LEP Variations

Introduction

This Clause 4.6 Variation Request has been prepared to support a development application under Division 4.3 of the Environmental Planning and Assessment (EP&A) Act 1979, for Mixed use Development at Lot 402 DP 715513, 37 - 39 Burelli Street. This request satisfies the requirements of Clause 4.6 of the Wollongong Local Environmental Plan 2009 in demonstrating that:

- 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 Variation Request is seeking to vary Clause 8.6 of Wollongong Local Environmental Plan 2009 (WLEP 2009) and should be read in conjunction with the architectural plans provided with the Development Application.

This variation has been prepared in accordance with the NSW Department of Planning Infrastructure (DPI) guideline "Varying Development Standards: A Guide" dated August 2011 and addresses the 'five-part test' established by the NSW Land and Environment Court (LEC) to determine whether the objection is well founded.

Subject land

The subject site is located in the eastern precinct of the Wollongong City Centre area, on the corner of Burelli Street and Corrimal Street. The area to be redeveloped includes Lot 402 DP 715513. The site is a fairly regular allotment of 2010m².

It is situated at the south-west corner of the intersection of Burelli Street and Corrimal Street, which is a high profile intersection within the CBD. Burelli Street is the civic focus of Wollongong, containing many of the city's cultural and civic buildings. This is envisaged to become the civic and commercial spine under the Urban Design Framework. The subject site, at the corner of Burelli and Corrimal Streets, is located at a key point within this spine, providing a prime opportunity for street scape activation.

Burelli and Crown Streets serve as the primary east-west connectors of Wollongong; Burelli as the civic / commercial spine and Crown as the retail spine, anchored by the mall. Burelli is targeted as a tree lined street, providing an appealing boulevard condition. Transport nodes are distributed along Burelli, providing good urban connectivity. Parks are located in the vicinity, providing breaks in the urban grain.

The property is benefited by notable boundary lengths to these street frontages, with approximately 30.53 metres available to Burelli Street and some 57 metres available to Corrimal Street. The site has little slope of note being fairly flat throughout.



The land currently contains a single storey commercial building occupied by a car sales premises, associated yard and vehicle repairs. The site at present is relatively devoid of any significant vegetation, having small grass and garden beds surrounding periphery of the site.

Vehicle and pedestrian access is currently available to the site from both street frontages, with an existing vehicle crossover from Burelli Street adjacent to the north-west corner, and mid site vehicle crossover access to Corrimal Street.

Applicable Environmental Planning Instrument

The applicable Environmental Planning Instrument subject to this Variation Request is the Wollongong Local Environmental Plan 2009,

Wollongong Local Environmental Plan 2009

Wollongong Local Environmental Plan 2009 (WLEP 2009) provides the key development standards applicable to the development and includes the aims and objectives for the development within the Wollongong Local Government Area. In particular, this Variation Request is seeking to vary the development standard Clause 8.6 of Wollongong Local Environmental Plan 2009 (WLEP 2009).

Objectives of the Development Standard

To satisfy the requirements of Clause 8.6 and demonstrate that compliance with the standard is unreasonable or unnecessary, it is important to understand the intent and objectives of the development standard being varied.

(1) The objective of this clause is to ensure sufficient separation of buildings for reasons of visual appearance, privacy and solar access.

Description of the Variation

This Clause seeks to ensure sufficient separation of buildings for visual appearance, privacy and solar access reasons. In accordance with *sub-clause 2 and 3*, buildings on land within Zone B3 Commercial Core must be erected so that:

*"...(a) there is no separation between neighbouring buildings up 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.*

(3) 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..."*

The site is located in Zone B3 Commercial Core and the development provides no separation between neighbouring buildings up to the street frontage height. This is compliant with Clause 8.6(2)(a).



A minimum distance of 16m is proposed between the adjoining site to the west from the street frontage height up to 45 metres height above ground. This is compliant with Clause 8.6(2)(b) and (3)(b) which requires a building setback of 8 metres to achieve a 16 metre building separation.

At the southern edge, a 6 metre setback is proposed from the balcony edge, it is noted that the area of land on the southern adjoining lot is vacant and therefore the control infers that a minimum 8m setback should be achieved from habitable parts of a dwelling on the subject site up to 45 metres with the adjoining commercial (car park) development. In this regard, the 6 metre building separation is continued above to provide a consistent urban form and building lines throughout and complies. Therefore, the development falls short of the minimum building separation requirement contained in Clause 8.6(3)(b) to which this Clause 4.6 variation is requested.

The variation exceedance equates to a 25% (or 2 metres) shortfall between the street frontage height and up to 45 metres height at the southern boundary.

How is compliance with the development standard is unreasonable or unnecessary in the circumstances of the case?

In *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*), Chief Justice Preston stated that "[D]evelopment standards are not an ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieving anyway) and unreasonable (no purpose would be served)".

Preston CJ identified five (5) ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary.

The five (5) ways outlined in *Wehbe* include:

- 1. The objectives of the standard are achieved notwithstanding noncompliance with the standard (First Way)*
- 2. The underlying objective of purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way)*
- 3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way)*
- 4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (Fourth Way)*
- 5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (Fifth Way).*



Additionally, of note, in the judgement in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 the Chief Judge upheld the Commissioner's approval of large variations to height and FSR controls on appeal. He noted that under Clause 4.6, the consent authority (in that case, the Court) did not have to be directly satisfied that compliance with the standard was unreasonable or unnecessary, rather that the applicant's written request adequately addresses the matters in Clause 4.6(3)(a) that compliance with each development standard is unreasonable or unnecessary.

In this regard, this written request establishes and adequately addresses the matters in clause 4.6(3)(a) that compliance with each development standard is unreasonable or unnecessary because the objectives of the standard are achieved irrespective of the non-compliance and accordingly justifies the variation pursuant to the **First Way** and **Forth Way** outlined in *Wehbe*, as follows.

Objective of the Development Standard:

Under WLEP 2009, Clause 8.6 has the following objectives in relation to the Building separation within Zone B3 Commercial Core or Zone B4 Mixed Use development standard:

- (1) The objective of this clause is to ensure sufficient separation of buildings for reasons of visual appearance, privacy and solar access.*

Visual Appearance

The proposal incorporates attractive and well-considered architectural design, materials and details which reflect the proposed high-quality mixed use development. The visual appearance of the proposed development responds to the existing and future local context, particularly in desirable elements and repetitions of the streetscape.

The building facade to Burelli and Corrimal Streets emphasises and accentuate parts of the elevation to achieve a cohesive building outcome and understand the theory and principles behind the design. Changes in colour and façade materials help to articulate the podium and address street frontage with appropriate proportions.

The theory and principles to the aesthetics of the building design have arrived from a multiple of stimulants and ideas culminating in a focused and narrowed design outcome, which is based on the existing developments within the surrounding context. The design of the development incorporates a substantial setback from the western boundary, adjoining the existing civic building in order to achieve the minimum setback and building separation controls. The substantial setback has resulted in the building footprint above podium level being condensed and located as far east and south of the site. The eastern and southern boundaries adjoin public land – being Corrimal Street to the east, and Council owned land to the south. It is noted that the section of the Council owned land to the south is devoid of any existing development, the existing multi storey car park is located further west on the site and will be perpendicular with the proposed development. This is illustrated on the Contextual Analysis Plan completed by ADM Architects. On this basis, given the extent of substantial development across this site to the south (Council admin building and multi-deck car park), it



is questionable as to whether this immediate vacant area south of the building interface can actually be developed at all.

Developing the constraints and opportunities of the site has allowed the building to move and transform from the active to a sense of the building's simplicity and nature. The language of the building's facades has been carried through responding to the site forces, orientation and constraints posed by the site. The use of materials and colours has also been carried through to help express this language.

The overall envelope is an appropriate design and scale which reflects the site's constraints and permissible yield in terms of GFA and building height enabled by WLEP 2009 (which is compliant). The breakdown of the podium and tower help to create an aesthetic quality which will sit comfortably in its surrounding scale and context, as well respond to the developments existing and newly constructed.

Consideration has been made to all façades where walls are articulated with texture and pattern to mitigate any blank walls. Various window elements have been used to each elevation to create visual interest to these edges, when viewed from various angles surrounding.

Selected quality, modern, durable and environmentally sustainable external finishes ensure the proposed development enhances the amenity of the local area. Carefully selected colours sympathetic to the visual composition of neighbouring developments maintains and responds appropriately to the current and desired future character of the precinct. The materials selected such as several of types of glazing, textured feature walls have provided the building with a high quality, low maintenance external façade that contributes positively to the visual presentation of the development.

Privacy

Privacy has been considered specifically in the design response shown in the architectural interface treatment to these corresponding side boundaries to the southern elevation. Effectively this façade interface to the south has been treated as a non-habitable interface, ensuring that the reduced building separation will not have any impacts within regards to privacy.

The internal layout of the rooms attempts to minimise overlooking with the careful location of window and door openings, whilst the size of external balconies also help maintain such visual separation. Acoustic privacy for future visitors and neighbouring land uses has also been taken into account, with the proposed development being designed to limit noise intrusion into adjoining properties through the use of appropriate building materials and associated noise control treatments.

The proposed development will result in the redevelopment of the central portion of the wider street block. The surrounding site's have been taken into consideration in the design of this development and are represented on the architectural plans by ADM Architects.

Notwithstanding, the building intrusions into the southern side setbacks are a direct design response with the intent to allow the site to respond to the demand for housing in the area, whilst supporting Wollongong Councils objectives for built form within the City Centre.

Through smart design treatments responding to habitable versus non-habitable interfaces, the proposed building separation largely complies with the minimum required separation distances identified within the SEPP 65 Apartment Design Guide, to achieve reasonable levels of external and internal visual privacy. This Apartment Design Guide provides greater detail on how residential development proposals can meet these principles through good design and planning practice, which has reduced permitted building separation criteria compared to WLEP 2009. For the most part the proposed development is consistent with much of the ADG criteria, when considering the non-habitable southern faced interface treatment proposed to ensure appropriate levels of all round privacy are achieved.

The proposal is generally consistent with the separation distances outlined in the ADG, which prevail pursuant to SEPP 65 as a higher order planning instrument to the LEP.

Solar access

The layout and tower design are a direct response to the site's orientation. The apartments aspects being used for primary living spaces are orientated east and north where possible to maximise the main solar collectors during morning and afternoon and main outlook for the development.

The layouts demonstrate grouping of the services and circulation space and living areas throughout encompassing a western edge that is treated architecturally with high-level and pop-out windows of smaller proportion to gain advantage of the solar access still (but at the same time limit privacy interface issues).

A SEPP 65 Compliance table has been provided by ADM Architecture and is attached to the DA submission package for Council's consideration. The compliance table demonstrates exceedance of the minimum standard for solar access for the proposed residential apartments. The SEPP 65 assessment and architectural plans also demonstrate that 100% of the upper level communal open space area will receive the required solar access. Thus, adequate area of communal open space is provided to enhance residential amenity and provide good opportunities for landscaping.

In terms of overshadowing immediately south, the shadow diagrams prepared by ADM show reasonable levels of solar access is retained to the southern vacant portion through the morning and afternoon periods of the winter solstice. Given the permitted high density provisions in this area and the B3 Commercial Core zoning, overshadowing through the middle of the day from this site (as due north) is inevitable and not unreasonable.

On this basis, the proposed development has been assessed against each objective contained in Clause 8.6 of WLEP 2009. Thus, deeming strict compliance with these building separation values is unwarranted in the circumstances of this particular case.

Development Standard Abandoned:

In relation to the Fourth Way – *"The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (Fourth Way)"* – it is noted that the following DAs did proposed variations to the building separation development standards, and were approved by Council accordingly:

DA-2016/969: 48 Bank Street WOLLONGONG NSW 2500

Demolition of existing structures and construction of shop top housing comprising ground floor commercial and six residential levels with basement parking

DA-2017/1462: 47 Burelli Street WOLLONGONG NSW 2500

Demolition of all structures, and the construction of a seven (7) storey office building for IMB bank with two basement car parking levels for 89 car parking spaces

DA-2017/493: Langs Building 95-109 Crown Street WOLLONGONG NSW 2500 Commercial - demolition of existing building and construction of new commercial premises comprising of offices and retail tenancies

DA-2017/730: 131-135 Keira Street WOLLONGONG NSW 2500

Demolition of existing buildings and ancillary structures and the construction of a mixed use development above basement parking

DA-2018/1638: 71-77 Kembla Street WOLLONGONG

Mixed use development - fourteen (14) storey building comprising of one hundred and two (102) residential units and eight (8) commercial tenancies over two (2) levels of basement parking

DA-2018/973: 28 Young Street WOLLONGONG

Residential - demolition of existing structures and construction of a 15 storey mixed use development comprising seven (7) commercial tenancies, 64 residential apartments and car parking for 90 vehicles

DA-2019/1122: 20-26 Young Street WOLLONGONG

Demolition of existing structures and construction of a 15 storey mixed use development comprising 60 residential units, six (6) commercial tenancies and parking for 89 vehicles

DA-2019/779: 80 Market Street WOLLONGONG

Commercial - demolition of existing structures and construction of a six (6) storey development

DA-2019/1123: 35 Atchison Street WOLLONGONG

Demolition of existing structures and construction of a 14 storey mixed use development comprising 50 residential units, one (1) ground floor commercial tenancy and two levels of basement parking

DA-2020/1465: 15-19 Crown Street WOLLONGONG

Mixed use development - construction of a 13 storey residential flat building over a ground level commercial premise and one (1) level of basement parking

DA-2020/1292: 46 Crown Street WOLLONGONG

Demolition of existing structures and construction of a mixed use development

DA-2020/80: 290-294 Keira Street WOLLONGONG

Demolition of existing structures and construction of a seven (7) storey mixed use development comprising 34 residential units and two (2) commercial tenancies with 50 parking spaces

DA-2019/1231: 111-113 Crown Street WOLLONGONG

Demolition of existing structures and construction of A-Grade office building above retail and basement parking

The above is an indication of some of the recent developments where a variation to Clause 8.6 has been supported by Council, as per Council's Clause 4.6 Variation Register. It is reasonable to suggest that the above DAs were considered on merit and specific to the circumstances of the particular case, without Council totally abandoning the development standard altogether.

However, it must also be acknowledged that this development standard, by virtue of how often it has been varied, could also be considered discarded or less critical from a planning consideration perspective. Thus, deeming strict compliance with the minimum building separation is unwarranted (Forth Way) in the circumstances of this particular case.

Are there sufficient environmental planning grounds to justify contravening the development standard?

Yes, there are sufficient environmental planning grounds in the circumstances of the case to justify contravening the development standard. These include:

The unique circumstances at the site which warrant the provision of reduced setback:

Adopting building separation requirements to dwellings to the south would mean a minor part of the subject site would be excluded from any built form with the non-compliance not materially noticeable from a compliant situation. Precedence regarding this planning ground has recently been set by the approved developments noted above which sought to vary the same control and were subsequently approved. The building separation proposed is consistent with the State-based ADG non-habitable building separation criteria, which in our opinion should prevail in this instance.

In addition, the area of the site whilst vacant, may not be developable given the extent of significant built form already through the remainder of the neighbouring site (Council admin building and multi-deck car park).

Therefore logically, restricting a built form envelope by this amount is completely impractical for a B3 zoned Commercial Core site at this location and, therefore, totally unreasonable, given the precedence to consider in this instance.

The southern site will still be able to achieve the maximum permitted FSR building forms and at the same time still achieve reasonable building separation if it was ever to be redeveloped in the future (given the site and expanse of the property).

The proposed building form does not result in any significant adverse impacts and achieves a good urban development outcome for the site:

The building intrusions into the side and rear setbacks are a direct design response with the intent to allow the site to respond to the demand for housing in the area, whilst supporting Wollongong Councils objectives for built form within the B3 zoned Commercial Core.

The proposed bulk and scale of this building is considered appropriate for this location and will not detrimentally affect the visual appearance of the area (in fact it will substantially improve an aged part of the city, which is undergoing change with other similar scale redevelopments occurring nearby). The overall height and form of the development is consistent with expected future desired character strategies for the area. Stepping the building in a few metres more above podium level, in our view, would diminish the opportunity for a good urban development outcome from a visual aesthetic perspective. The proposed setback / building separation to the south is considered appropriate given the Council-owned property to the rear contains an existing multi-storey development, which is perpendicular to the footprint of the proposed development, and the vacant section to the immediate south of the subject site is unlikely to be developed for any other purpose.

The proposal incorporates attractive and well-considered architectural design, materials and details which reflect the proposed high-quality residential development inclusive of ground floor commercial use. The proposal involves well-articulated façades with the incorporation of a single tower building envelope featuring defined building lines to minimise bulk (and avoid a 'wedding cake' look). The proposal will deliver good internal amenity for prospective residents and commercial occupants.


Again, the adjoining site is still able to achieve their maximum permitted FSR building forms and at the same time still achieve reasonable building separation.

The architectural design, materials and detailing are of a high standard that is appropriate to the building type and location. The form and external appearance of the development will improve the quality and amenity of the public domain in the immediate vicinity of the site, particularly as the site is situated in a visually prominent location along Burelli and Corrimal Streets.

The external details have been carefully considered with the designer of the development undertaking a comprehensive site analysis not only in terms of built form but also materials to ensure that the development, will integrate with the existing setting but also provide a benchmark for future development in the area.

The proposal will impact on existing view corridors to the north given that the proposal involves the construction of a fifteen (15) storey development in place of the existing development. However, these impacts are essentially unavoidable due to the orientation and location of adjoining development, without effectively sterilising the site.

The proposal has been designed to comply with key planning controls considering the constraints of the site and the adjoining sites.



The land is suitable for the proposed development and is compatible with the surrounding commercial and residential uses. The proposal will not have a detrimental impact on any environmental heritage items and will make a positive contribution to the streetscape.

The proposed bulk, massing and modulation of the building is acceptable and does not result in any unreasonable loss of amenity to any of the adjoining properties. The proposed street frontage heights are considered appropriate having regard to the surrounding context and scale of development.

The proposal will have no significant adverse environmental impacts in terms of sustainability, wind and/or reflectivity. Overshadowing and solar access has been addressed in detail by the designers of the development and relevant details have been provided in this regard to enable a full assessment (i.e., shadow diagrams, BASIX, etc).

Access to the site has been carefully considered in a variety of forms (i.e., for pedestrians, motorists, and cyclists alike), to ensure suitable provisions for service access and circulation. The proposed development will have a positive impact on the public domain.

The delivery of a development outcome which does not result in any adverse environmental impacts

We acknowledge the proposed development will bring some overshadowing impact upon the neighbouring properties to the south and south-east, however, such developments include car parks and restaurant premises and there is no residential amenity lost. The existing developments will still receive sufficient solar access as shown in the shadow analysis diagrams which means no unreasonable loss of amenity will be created as a result of the proposal.

The reduced building separation is deemed reasonable and acceptable due to the reduced impacts to privacy and overlooking, created specifically by responsive architectural interface treatment to these boundaries.

The development has been specifically designed to provide a suitable environment for all future inhabitants of the dwellings, whilst respecting the considerations of adjoining land uses. The internal layout of the rooms attempts to minimise overlooking with the careful location of window and door openings, whilst the size of external balconies also help maintain such visual separation.

Overall, it is evident from the above commentary if there are sufficient planning grounds to justify contravening the building separation development standards identified. To this end, strict compliance with the numerical development standards is both unwarranted, unreasonable, and unnecessary in this instance.

Is the proposed development in the public interest because it is consistent with the underlying intent of the development standard and the objectives for development in the zone

Yes, the proposal will provide for high density residential development within a mixed use development, that is in a location that is accessible to public transport, employment, retail, commercial and service facilities, and contributes to the vitality of the Wollongong city centre.

Does contravening the development standard raise any matters of significance for the State or regional environmental planning?

No, contravening the development standard in this case does not raise any matters of State or Regional planning significance.

Is the objection well founded?

For the reasons outlined in the previous sections above, the objection is considered to be well founded in this particular instance. Granting an exception to the development standard can therefore be supported in the circumstances of the case.

The proposed development will be consistent with the outcomes envisaged in the zoning and policy framework. The development is also compatible with the relevant objectives specified in Section 1.3 of the EPAA 1979.

Conclusion

This Clause 4.6 Variation Request has been prepared to support a development application for a Mixed-use Building at Lot 402 DP 715513, 37 - 39 Burelli Street, Wollongong.

This request satisfies the requirements of Clause 4.6 of the Wollongong Local Environmental Plan 2009 (WLEP 2009) and demonstrates that compliance with the standard is both unreasonable and unnecessary, and that there are sufficient environmental planning grounds to justify varying the standard in this instance.