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To	Wagga Wagga City Council	Attention	Steven Cook
		Rev	B

### Civitas Stage 3 – Supplementary Solar Assessment Advice

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Dear Steven,

Further to your query regarding the Solar access compliance, we provide the following supplementary information in consideration of the application.

The requirements for Solar access are to be assessed against the Apartment Design Guide (ADG)  
**Section: 4A Solar and daylight access**

The consideration of the Solar access is set out in the Apartment Design Guide as follows:

- The objectives are set out in Clause 4A-1 which state:
  - “To optimise the number of apartments receiving sunlight to habitable rooms, primary windows and private open space”
- The Design Criteria items 1, 2 and 3.
- Design Guidance

MDP architectural drawing DA404 revision DA3 along with the accompanying solar access diagrams and shadow diagrams demonstrate the following outcomes in the summary table below with respect to Solar & Daylight Access

Solar & Daylight Compliance Summary Table

Design Criteria	Description	Applies	Compliance	Comments
1.	Living rooms and private open spaces of at least <b>70%</b> of apartments in a building receive a minimum of <b>2 hours</b> direct sunlight between <b>9am and 3pm</b> at mid-winter in the Sydney Metropolitan Area and in the Newcastle and Wollongong local government areas.	No.	Yes <b>86%</b>	Refer to explanation statement below in <b>Section 2 – 2 Hours versus three Hours</b>
2.	In all other areas, living rooms and private open spaces of at least <b>70%</b> of apartments in a building receive a minimum of <b>3 hours</b> direct sunlight between <b>9am and 3 pm</b> at mid-winter	Yes.	No. <b>59%</b>	Refer to explanation statement in <b>Section 1 – Assessment of Objectives versus numerical compliance</b>
3.	A maximum of <b>15%</b> of apartments in a building receive no direct sunlight between <b>9am and 3 pm</b> at mid-winter	Yes	Yes <b>Max 7%</b>	
<b>Alternative Assessment</b>	<b>70%</b> of apartments in a building receive a minimum of <b>3 hours</b> direct sunlight between <b>8.30am and 4.30pm</b> at mid-winter	Subjective	Yes. <b>76%</b>	Refer to explanation statement in <b>Section 1 – Assessment of Objectives versus numerical compliance</b>

## Compliance Statement

- If the assessment was to be considered through the example design criteria set out in the Apartment Design Guide **Section 4A Solar and daylight access**, it can be seen in the table above that the level of compliance is 59% against Design Criteria 1 of Clause 4A-1 which is below the 70% threshold.
- Whilst this is below the threshold, more importantly, the Development Application achieves all of the objectives of the ADG, for the reasons outlined in the following Sections 1 & 2 , and the proposal merits approval for that reason.

### Section 1 – Assessment of Objectives versus numerical compliance

The assessment of a Development Application for Class 2 projects of three or more storeys under SEPP (Housing) 2021 requires consideration of the design with respect to the NSW Apartment Design Guide (ADG).

The ADG in **Section: 4A Solar and daylight access** sets out Design Criteria which sets benchmarks to assist Councils in the assessment of applications to determine whether proposed developments are suitable for the intended purpose and approval (for that item).

As seen in the compliance table of Page 2 of this advice, the proposed design does not meet the benchmark of DC2 which is for 3 hrs of solar access between 9am & 3pm.

Assessment against this criterion alone is not always appropriate. and, additionally, the Council should assess the application against the Objectives. Achievement of the objectives can occur by numerical compliance, but numerical compliance is not the fundamental matter. It is the underlying merit objectives that are paramount according to the most recent judgement from the Land and Environment Court (LEC) which provides guidance on how the ADG is to be considered in the assessment of applications.

The LEC has considered the issue of how Solar Access is to be assessed in a number of cases. The most relevant and relevant of those is:

[Construction Development Management Services Pty Ltd v City of Sydney](#)

Medium Neutral Citation: Construction Development Management Services Pty Ltd v City of Sydney [2023] NSWLEC 1620

Hearing dates: 29 September and 3 October 2023

Date of orders: 19 October 2023

Decision date: 19 October 2023

Before: Horton C

Commissioner Horton made the following findings in relation to how the Design Criteria can be used for assessment, which we consider should guide the assessment of this application:

**Paragraph 50** cites the commissioner’s assessment of three other cases where ‘assessment for Solar access’ was used as grounds for refusal. Commissioner Horton outlined key aspects of those other three cases that were unique distinctions from the present case. Importantly, the judgement of

those other cases have key findings which are highlighted in the following referenced sections of Hortons judgement in **Paragraph 50**

50 However, having carefully considered the circumstances of each appeal, it would appear the following distinctions can be drawn from the circumstances of this appeal:

- (1) *In Landmark Group Australia Pty Ltd v Council of the City of Sydney [2019] NSWLEC 1338 (Landmark), the Respondent's expert calculated that around 20% of apartments received no sunlight, and may not receive the minimum of 1m<sup>2</sup> of direct sunlight, measured at 1m above the floor for at least 15 minutes. It was found each of these deficits could be remedied by design changes, and the development was capable of full compliance with the design criteria at Part 4A of the ADG. This is distinct from the circumstances of this appeal in three respects;*
  - (a) *Firstly, there are no apartments that fail to receive sunlight. All apartments receive sunlight.*
  - (b) *Secondly, Annexure J of the joint report demonstrates that all apartments receive a minimum of 1m<sup>2</sup> of direct sunlight, measured at 1m above the floor for at least 15 minutes.*
  - (c) *Thirdly, in this case it is commonly held that failure to comply with the design criteria is not a function of design choices made, but of constraints inherent to the site. Put another way, in Landmark, the development was capable of achieving full compliance, but the Applicant chose not to, whereas this development cannot achieve compliance despite attempts to do so.*
- (2) *In Huajun Investments Pty Ltd v City of Canada Bay Council (no 3) (2019) 240 LGERA 230; [2019] NSWLEC 42 (Huajun), the Applicant's expert sought to extend the timeframe in which solar access is permitted as a means to achieve compliance and proposed design changes that the Applicant declined to adopt. Neither of these circumstances align to those in this case. However, it is relevant to record two observations made in Huajun by His Honour {Moore J} as to the weight to be given to ADG provisions:*
  - (a) *At [289], his honour observes "...it is to be observed that this proposal compliance level is not a development standard, and therefore is not to be regarded as immutable."*
  - (b) *At [297], his honour reiterates: "...the Apartment Design Guide guidelines do not have the status of development standards and strict compliance is not, in any fashion, mandated."*
- (3) *Finally, in Modog Pty Limited v North Sydney Council [2018] NSWLEC 120 (Modog), his honour {Moore J} observed that the solar access provided in the circumstances of that case was "a sliver of floor space from, at best, a little above knee-height downward" (at [167]), which was described, with some emphasis, as an unsatisfactory amount of solar access (at [168]), that was, once again, "capable of rectification in a differently designed development proposal" (at [170]).*

The key findings summarised are:

- That the ADG Design Criteria is not a development standard, and additionally not to be regarded as unchangeable.
- Compliance with the ADG guidelines is not strictly mandatory.

This is again reinforced in Commissioner Horton’s Judgement in this case in the highlighted section of **Paragraph 52** as follows:

*51 Having considered the qualitative aspects of solar access of the proposed development, I accept the Applicant’s “100% argument” {ie. that the development provides sunlight to 100% of the apartments}. I do so for the following reasons:*

*(1) While 70% of apartments do not receive the sunlight required by design criteria 1, the criteria is not, of itself, a development standard but one means of achieving the objective at 4A-1 of the ADG.*

The essence of Commissioner Horton’s reasoning is that the design criteria in the ADG Clause 4A-1, is just one way to demonstrate compliance, and that the ADG is a performance-based guide, not a rigorous, "must-tick-the-box" regulation.

**Paragraph 58** of the judgement further emphasises this position as follows:

*58 I note here that it is the objectives of Parts 3 and 4 of the ADG that are the focus of s 29(2)(b)(ii) of the EPA Regulation, and not the design criteria or the design guidance.*

As it is the Design Criteria that stipulates the 2 or 3hr requirement for assessment including the 9am – 3pm time period, and not the objectives, the "2-hour" or "3-hour" figures are not development standards (like height or FSR) that must be strictly met. They are one way to achieve the Objectives (4A-1).

## **HABITABLE ROOMS**

Objective 4A-1 states:

“To optimise the number of apartments receiving sunlight to habitable rooms, primary windows and private open space”

**Habitable rooms** are defined in the glossary of the ADG as follows:

“a room used for normal domestic activities, and includes a bedroom, living room, lounge room, music room, television room, kitchen, dining room, sewing room, study, playroom, family room and sunroom; but excludes a bathroom, laundry, water closet, pantry, walk-in wardrobe, corridor, hallway, lobby, photographic darkroom, clothes-drying room, and other spaces of a specialised nature occupied neither frequently nor for extended periods, as defined by the BCA”

**Primary windows** are defined in the Glossary as follows:

“windows to habitable rooms located on the external wall of a buildings; primary windows may be supplemented by windows in courtyards, skylights, notches and along galleries “

**Private Open Space (POS)** is likewise defined:

“outdoor space located at ground level or on a structure that is within private ownership and provided for the recreational use of residents of the associated apartment”

The term Habitable rooms is a broader definition than the room referenced in the Design Criteria which only refers to Lounge Rooms. In the LEC case above, Commissioner Horton decided that this view of Habitable rooms was acceptable, and led him to support the “100% argument” in **Paragraph 52**, as referenced above.

When considering the fuller approach to "Habitable Room", "Primary windows" and "POS" for this application, the design as submitted achieves sunlight access to 70% of apartments between the hours of 8.30am to 4.30pm.

The hours of 9-3pm are restrictive for this particular development as a function of the geometry of the north-south Axis of the buildings. With the buildings aligned almost to true North, it is not practically achievable to provide the 3 hrs of Sunlight into the apartments within that time period. As the sun approaches midday, the sun is aligned to the façade which renders the ability to achieve the 1sqm of sunlight into a habitable room for the required 15mins impossible. Even if the design was to have projections to attempt to capture the sun at this time on all east and west facades, this would be impractical as it would be self-defeating because those projections would shadow other projections.

Accordingly, we have provided an assessment of the apartments for Solar Access between the hours of 8.30am and 4.30pm which achieves a Solar Access compliance of 76%. Under the “100% proposition” favoured by Commissioner Horton, 93% of apartments receive Direct Solar which is based on the superior design aspects of this application which include:

- The use of extended façade presentations to receive solar on East, West and northern facades to all habitable rooms.
- The quantity and size of the glazing in particular to lounge areas are significantly larger than the ADG contemplates, which also allows for larger aperture opportunities to capture both direct Sunlight and daylight.
- The sizes of the apartments are in excess of the min requirements in the ADG. This has allowed for the improved design options to be employed to capture a higher percentage of direct sunlight.

It is important to note that the “100% argument” did not rely on achieving the required 2hrs of Direct Sunlight, and Commissioner Horton determined this was acceptable given compliance with the Objectives.

## Section 2 – two Hours versus three Hours

We also bring to Council’s consideration the question of whether the 3-hr assessment is relevant and appropriate for this application.

The 2-hour requirement which is reference in Design criteria 1 of Objective 4A-1 is afforded to:

**“The Sydney Metropolitan Area and in the Newcastle and Wollongong local government areas.”**

The relevant question and consideration here are why Newcastle and Wollongong are afforded the 2-hour criteria, and why Wagga Wagga is not afforded this dispensation from 3 hours to 2 hours by virtue of exclusion of reference and therefore is included in the ‘all other areas’ noted in design criteria 2.

Newcastle and Wollongong are identified in the “Six Cities” classification in the Greater Cities Commission Act 2022 to which SEPP (Housing) 2021 applies specific rules to those areas.

They are also classified as "major regional cities", which is a common planning descriptor (of course wagga is the major regional centre of the Riverina area). SEPP (Housing) 2021 identifies Newcastle and Wollongong by including them in specific high-priority geographic categories that grant them the same regulatory status as Sydney.

SEPP (Housing) 2021 Identifies Newcastle and Wollongong as areas **where higher-density housing is prioritized**. For those reasons, Newcastle and Wollongong are afforded the 2-hour solar access dispensation that is applied to the Great Sydney Basin.

At the time of the new SEPP (Housing) 2021, Wagga Wagga was not yet identified as an area for higher residential density intensification under the SEPP and the Greater Cities Commission Act, and as such, is not recognised in the SEPP, or the ADG as an area for higher density housing.

The Council, however, has developed its own intensification strategy. The Wagga Wagga intensification strategy is a key component of the city’s long-term planning (**Wagga Wagga 2050 Community Strategic Plan and the Local Strategic Planning Statement**) to manage population growth, which is expected to reach 85,000 to over 100,000 by 2040–2050. The strategy focuses on intensifying residential and commercial development within existing urban areas—known as "infill development"—to complement new greenfield development on the city's outskirts.

Key aspects of the strategy include:

- Infill and Urban Renewal: Promoting denser housing types, including mixed-use development, to increase housing diversity and density in areas with existing services.
- CBD Intensification: Encouraging higher-density retail and commercial use in the CBD and CBD North through increased Floor Space Ratios (FSRs) to create a more vibrant, walkable, and productive centre.
- Targeted Residential Growth: Focusing redevelopment in key renewal areas to reduce reliance on outward expansion and promote sustainability.
- Special Activation Precinct (SAP): Establishing the Bomen industrial area as a specialized, high-intensity hub for freight, logistics, and manufacturing, supported by Inland Rail, rather than using it for residential expansion.
- Infrastructure Optimization: Using existing infrastructure more efficiently to support a higher population, aimed at reducing the need for new, costly infrastructure in outer areas.

The subject site of this application forms part of the intensification strategy for Wagga Wagga, which is aligned with the objectives of the SEPP (Housing) 2021 policy for achieving higher density housing. Key aspects and relevant background of this site is:

- This subject site underwent a planning proposal which commenced in (Circa) 2018 and was approved by the Council in about 2020, to increase the height limit of the site from 16m to 35m and to allow intensification of the site in line with the Wagga Wagga City Council intensification strategy.
- The planning proposal was based on a masterplan which was to provide a mixed-use development of retail, commercial, Townhouses and Residential Flat Buildings which would be up to 10 storeys in height.

The relevance of these observations to the site and proposed application is:

- The proposed scale of development is consistent with the scale of development that is considered in SEPP (Housing) 2021 for Newcastle and Wollongong as areas where higher-density housing is prioritized.
- The Wagga Wagga City Councils Intensification strategy (Wagga Wagga 2050 Community Strategic Plan) is seeking to achieve similar housing intensification in particular areas, including the subject site, to what the SEPP envisions for Newcastle and Wollongong.

With regards to the ADG and solar access compliance:

- Page 79 of the ADG (Objective 4A-1) specifically separates the state into only two groups:
  - Group A: Sydney Metropolitan Area + Newcastle LGA + Wollongong LGA (2 hours solar required).
  - Group B: All other areas (3 hours solar required).
- In regional “all other areas” it is considered that 3 hours access is more achievable by generally being restricted to much smaller buildings and having larger developable sites. This is not the instance with this site with its approved height and intensification status.
- This site, as noted above, has been identified for intensification which is targeting over 200 apartments on a site that has been rezoned to allow up to 35m in height. This is consistent with many Newcastle and Wollongong development sites, and, indeed, many areas in Sydney.
- Whilst Wagga Wagga currently sits in 'all other areas,' the SEPP and ADG logic for the 2-hour standard is based on urban scale, not just geography. Newcastle and Wollongong are included in the 2-hour bracket because they contain high-density CBDs with heights exceeding 8–10 storeys.
- Since this 9-storey proposal matches the urban intensity and scale of the regional centres listed in Objective 4A-1 of the ADG, the 3-hour 'Regional' rule is an outdated metric for this specific site. We believe that a merit-based assessment aligned with the 'Major City' standard is appropriate for this site.
- The ADG's Design Guidance for Section 4A (page 80) admits that "achieving the design criteria may not be possible on some sites," particularly in dense urban areas where building heights are greater. That is the case here.
- This site is important for the intensification within the regional centre of Wagga Wagga. It will now comprise of a Dense urban development within the broader, lower scale urban regional forms. Accordingly, it requires a site-specific assessment which is appropriate to its scale and density, akin to a major urban centre.

## Summary

For the reasons outlined above, we are of the view that a 2-hour assessment for Solar is appropriate for this site and the apartments should be assessed against the objectives of the ADG.

The reason Wollongong/Newcastle are afforded 2 hours in the Design Criteria is precisely because of their higher density, height limits and urban profiles. With the rezoning to this subject site to allow similar higher density and built forms, the proposed built form of the site has outgrown the three-hour guideline classification and should be assessed under the two-hour metric.

When considering the 2-hour Direct Solar access, we have determined that 86% of apartments achieve Solar Access within the time period of 9am -3pm. This is a superior compliant metric with respect to Design Criteria 1 in Objective 4A-1 and would be very supportable by Council, if the 2-hour metric was to be applied to the site.

## CONCLUSION

Our assessment of the Solar and Daylight access has considered the following:

- The findings of the LEC which take the position, in summary, that:
  - The Design criteria metrics are not mandatory thresholds for assessment. They are designed to aid the achievement of certain objectives.
  - The assessment is to give priority to the objectives over numerical assessment. That is, the numerical criteria are only one way to demonstrate consistency with the objectives.
  - The assessment of Solar access to habitable rooms is a broader application than the design criteria, which only refers to Lounge areas.
- The design achieves Direct Solar Access of 3 hours when considering the geometry and orientation constraints and is assessed under a broader time range which we consider to be acceptable in meeting the requirements of the intent of Direct Solar access for a min requirement of 3 hours.
- We are of the view that the more appropriate assessment is for 2 hours solar access for the reasons provided.
- When assessed against 2-hour criteria, we will exceed the 70% threshold with a 86% level of compliance.
- Our assessment demonstrates that 93% of apartments received direct solar access under the “100% argument” in the referenced court case.
- Only 7% of apartments do not receive direct solar access, which is a far below the threshold of 15% in the design criteria.

### **MDP Architecture**

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