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EXCEPTION TO DEVELOPMENT STANDARD VARIATION STATEMENT

Building Separation - Wollongong City Centre

Address: 264-268 Keira Street & 23 Kenny Street, Wollongong

Proposal: Mixed Use Development
Date: December 2019

1.0 Introduction

The purpose of this variation statement is to outline the justification for seeking an exception to the minimum building separation within Zone B3 Commercial Core (being a development standard) contained within the *Wollongong Local Environmental Plan 2009 (WLEP 2009)*. This variation statement has been prepared in consideration of Clause 4.6 and *Part 8 - Clause 8.6(3)(b)* (Minimum building separation) in *WLEP 2009* and the NSW Department of Planning, Infrastructure and Environment's (DPIE) *"Varying development standards: a guide"* (August 2011).

The advice herein relates to an application for the proposed demolition of existing structures and construction of a multi-level mixed use development at 264-268 Keira Street and 23 Kenny Street, Wollongong. In this regard, the proposed development will incorporate the construction of a new fifteen (15) storey building including ground floor commercial space containing one (1) office premises, two (2) retail spaces and (1) café space; five (5) levels of podium residential units supporting a residential tower above, to provide 107 residential apartments; communal space areas; and basement car parking over two (2) levels.

The details of this proposal are shown within the Development Drawings prepared by Brewster Murray (attached to the application), which identifies the proposed building separation in

question.

The proposed development application seeks to provide an appropriate and balanced development/environmental outcome for the subject site, and the Wollongong City Centre area as a whole. In doing so, an exception to a development standard contained within *Wollongong Local Environmental Plan (LEP) 2009* has been adopted. In this regard, the proposed development generally accords with all *LEP* controls, apart from a numerical variation being requested to the building separation development standards contained within *Clause 8.6 Building separation within Zone B3 Commercial Core or Zone B4 Mixed Use*. Hence the purpose of this statement.

The request is in writing to address the relevant provisions within *Clause 4.6*, to demonstrate that strict compliance with the development standard is unreasonable in the circumstances of the case, and that there are sufficient environmental planning grounds to justify the proposed variation sought.

This statement has been prepared in accordance with the NSW Department of Planning Infrastructure (DPI) guideline “*Varying Development Standards: A Guide*” dated August 2011. Applications to vary development standards should also address the ‘five-part test’ established by the NSW Land and Environment Court (LEC) to determine whether the objection is well founded. An assessment of this applicant against the ‘five-part test’ is included in this statement.

2.0 Overview of Clause 4.6

Clause 4.6 provides a framework for varying the applicable development standards under a Local Environmental Plan (LEP).

The objectives of this clause are as follows:-

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

Sub *Clauses (3)(a)* and *(3)(b)* state that development consent must not be granted unless the consent authority has considered a written request from the applicant that seeks to justify the contravention 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 Statement provides a written request seeking to demonstrate 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 based on the following rationale (summary):

- The development largely complies with the numerical standards of the LEP and DCP
- The constraints of the subject site making fully compliant development of this nature impossible to achieve.
- The development is consistent with the objectives of the B3 Commercial Core Zone.

The zone objectives are as follows:

- *To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community;*
- *To encourage appropriate employment opportunities in accessible locations;*
- *To maximise public transport patronage and encourage walking and cycling;*
- *To strengthen the role of the Wollongong city centre as the regional business, retail and cultural centre of the Illawarra region;*
- *To provide for high density residential development within a mixed use development if it:*
 - (a) is in a location that is accessible to public transport, employment, retail, commercial and service facilities, and*
 - (b) contributes to the vitality of the Wollongong city centre.*

The relevant zoning objectives outline a need to strengthen the role of the City Centre by providing for a range of land use activities that support employment and public transport patronage (as above).

The proposed development is both permissible within the B3 zone as a commercial/retail premises and shop top housing, meeting the needs of the community by providing additional residential accommodation within close proximity to the CBD precinct and Wollongong train station.

Such a proposal is in high demand for the immediate area (from a land use perspective) and the site itself is very accessible from a patronage and public transport viewpoint. Thus, the proposed development directly accords with the objectives of this zone.

There are no unreasonable impacts from the proposal, despite this departure and other minor WDCP 2009 variations. With regard to context and setting, Kiera Street itself is characterised by developments of a comparable type and scale (built and approved). The proposed development has demonstrated that a functional building can be provided, including appropriate carparking and access, landscaping and private open space areas, without detrimentally impacting the surrounding properties.

In summary, it is concluded that the development standard is (a) unreasonable or unnecessary in the circumstances of the case.

(3) (b) Assessment of the proposal under the applicable planning controls has determined that besides the proposed variation to building separation requirement and minor WDCP 2009 variations, the development is largely compliant with the applicable controls. However, as demonstrated in this report, the proposed design mitigates any adverse impacts from the reduced building separation. In addition, solar access is not compromised to adjoining lots and amenity, (privacy, visual, acoustic etc.) of the surrounding lots and general area will not be unreasonably impacted by the development.

The proposed building has been designed to respond appropriately to the limitations posed by the site and is considered to be a reasonable development outcome for the site. The proposed

building will not detrimentally impact solar access or visual and acoustic privacy, and is an appropriate urban form that will contribute positively to the streetscape.

In summary it is considered that there are sufficient site specific environmental planning grounds to justify contravening the development standard.

Furthermore sub *Clause 4(a)(i)* and *(ii)* provide that development consent must not be granted 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, and

(b) the concurrence of the secretary has been obtained.

This written request has adequately addressed the matters required to be demonstrated by subclause (3). It is considered that the departure from the minimum building separation requirement, is in the public interest as outlined above in (3) (a) and (3) (b)

In deciding whether concurrence is to be granted or assumed, the following considerations are relevant:-

(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.

It is noted that as of 21 May 2014 Council has assumed concurrence of the Secretary in relation to development applications that contravene development standards.

3.0 Details of the environmental planning instrument, the applicable development standard and proposed variation.

3.1 What is the applicable environmental planning instrument (EPI)?

The *Wollongong Local Environmental Plan 2009 (WLEP 2009)*.

3.2 What is the development standard being varied?

The Building separation within Zone B3 Commercial Core or Zone B4 Mixed Use requirement contained in *Part 8 - Clause 8.6(3)(b)* of the *WLEP 2009* which states:

“(3) Despite subclause (2), if a building contains a dwelling, all habitable parts of the dwelling including any balcony must not be less than:
(b) 16 metres from any other part of any other building...”

In this regard, the design of the proposed development is sited with the built form covering the majority of the site. Its massing adopts a zero lot line to the eastern and western street fronting boundaries and the southern boundary up to 21m (which neighbours an existing commercial buildings built to the common boundary), and a 8.05m setback to the northern boundary which includes an undevelopable area of the property (easement) to be used as an overland flow area in the guise of a cross link between the front and rear of the site. The southern façade is 8.6 metres from any habitable window.

The front of the site facing Keira street is restricted in height and form by a separate clause in Wollongong LEP 2009 (Clause 8.3) Sun plane protection which protects: *specified public open space from excessive overshadowing by restricting the height of buildings*. In this instance, the public open space is MacCabe Park, which is also a locally listed heritage item. The development therefore does not propose any built form within the site beyond 21m to comply with this clause. The rear of the site proposes a 15 storey tower, in single apartment depth.

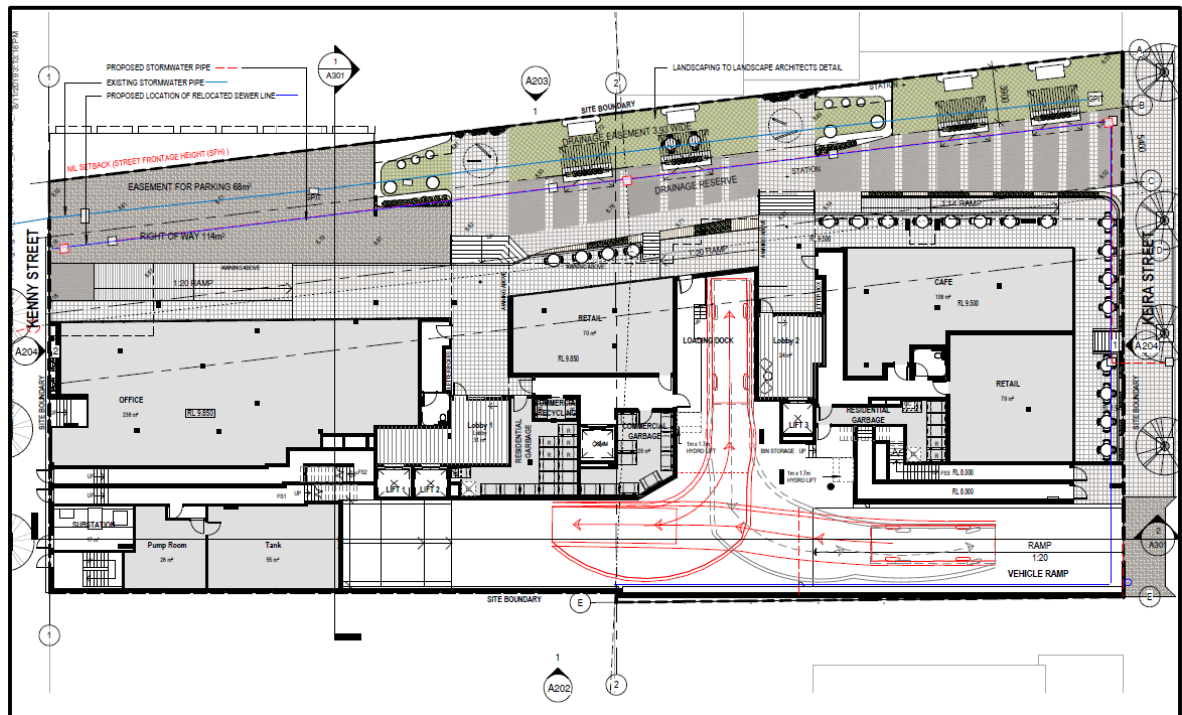


Figure 1: Proposed Site and Ground Floor Plan (*Source: Brewster Murray)

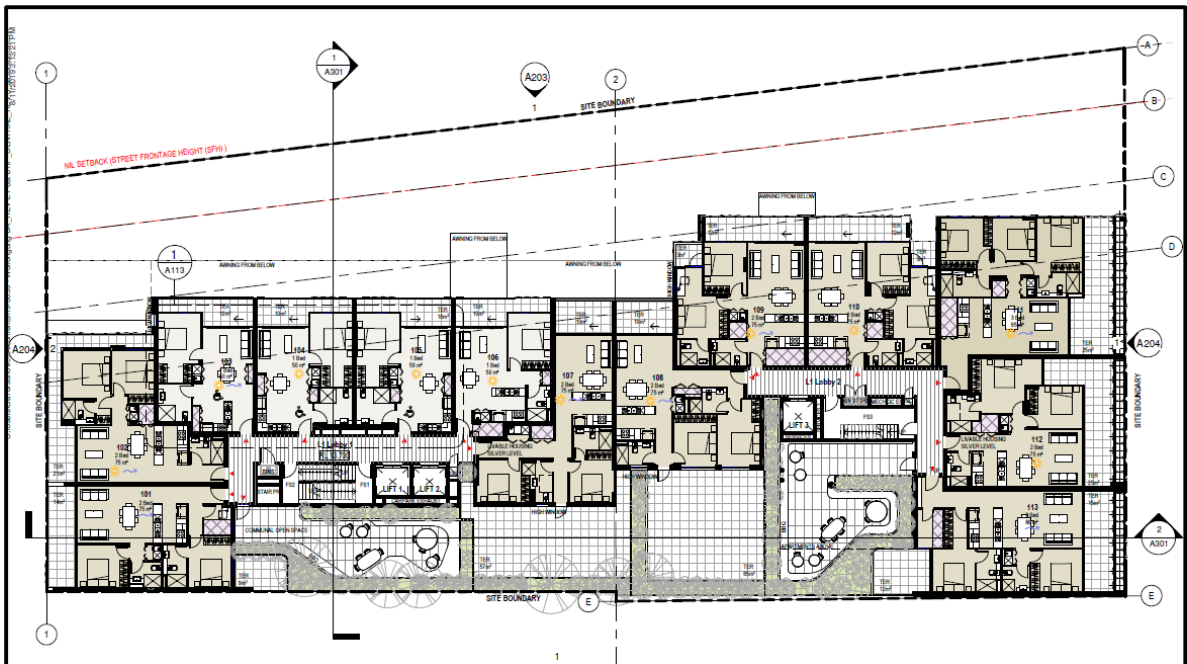


Figure 2: Proposed First Floor Plan (*Source: Brewster Murray)

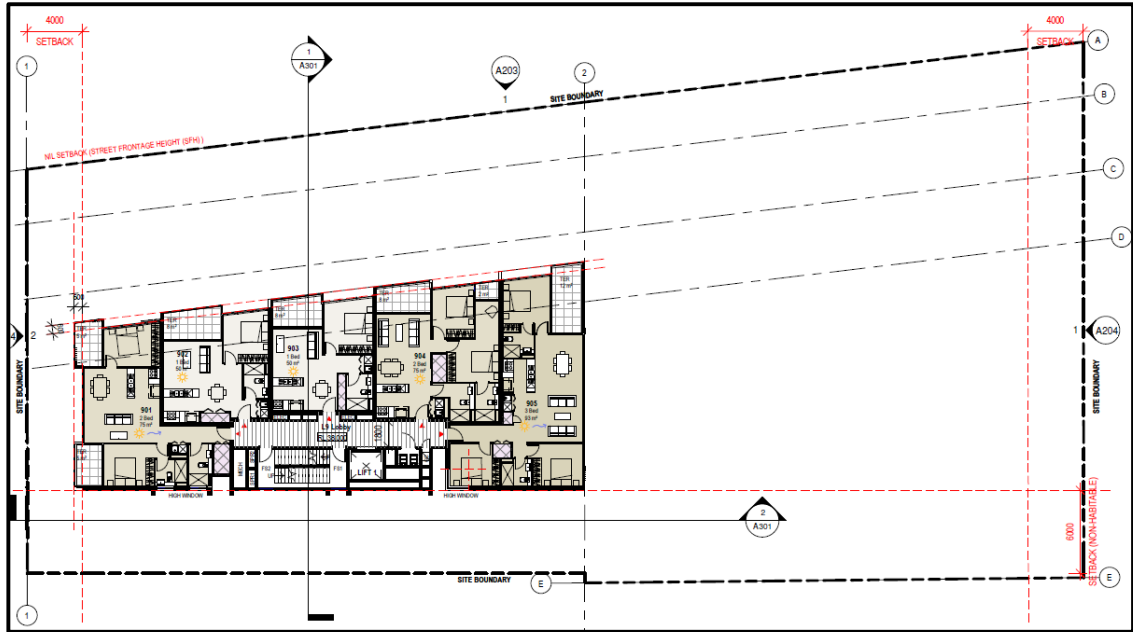


Figure 3: Proposed Level 9 Plan (*Source: Brewster Murray)



Figure 4: 3D perspective (*Source: Brewster Murray)

3.3 What are the objectives of the standard?

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

Further consideration of this objective in relation to the proposed development is provided within the following sections below.

3.4 What is the percentage variation (between the proposal and the EPI)?

The minimum separation distance permitted is 16 metres from any other part of any other building. The application proposes habitable parts of the development situated 8.05m from the northern boundary and 8.6m from the southern boundary.

As such, the proposal exceeds the minimum separation distance permitted by 7.95, which represents a variation of 49.7%.

4.0 Assessment of Proposed Variation

4.1 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Yes, compliance with the development standard is unreasonable in the circumstances.

In *Wehbe v Pittwater Council* [2007] NSWLEC827 (*Wehbe*), Preston CJ identified five (5) ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. While *Wehbe* related to objections pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 because subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

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 judgment 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 with the building separation controls, and accordingly justifies the variation to the building separation control pursuant to the First Way and Forth Way outlined in *Wehbe*, as follows.

Under WLEP 2009, Clause 8.6(3)(b) has the following objectives in relation to the Building

separation development standard: *to ensure sufficient separation of buildings for reasons of visual appearance, privacy and solar access.*

Visual Appearance

The visual appearance of well designed apartment development responds to the existing or future local context, particularly desirable elements and repetitions of the streetscape.

The proposal has made use of quality materials and colours appropriate to the context and surrounding area.

The building facade to Keira Street and Kenny Street emphasise and accentuate parts of the building façade through the use of a similar language 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 addresses 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 focussed and narrowed theory gathered from the development of the building and the surrounding context. The breakdown of a base, middle and top helps to create an aesthetic which will sit comfortably in its surrounding scale and context as well responds to the expected future character of the precinct.

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 constrains posed by the site. The use of materials and colours has also been carried through to help express this language.

Consideration has been made to the southern façade where walls are articulated with texture and pattern to mitigate any blank walls.

Selected quality, modern, durable and environmentally sustainable external finishes ensures 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 facade panels in various shades, masonry render and paint in various shades, 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 noted in the design response shown in the architectural interface treatment to these boundaries (almost as if they were non-habitable type facades). The existing land uses in close proximity are primarily commercial at this stage, to which no significant overlooking privacy impact will be created as a result of the proposal.

The internal layout of the rooms attempt 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 has been supported by a Noise Assessment prepared by JHA Services, which provides a range of acoustic recommendations to ensure the proposed development will comply with the relative sections of the EPA and Council requirements/conditions, and will not create any offensive noise to the surrounding residents.

Solar access

The layout and planning are a direct response to the site orientation. The apartments aspects being used for primary living spaces are orientated north to maximise the main solar collector and main outlook for the development.

The layouts demonstrate grouping of the services and circulation space and secondary living areas on majority of north-eastern façade and is treated architecturally with windows of smaller proportion to gain advantage of the solar access.

This design response has resulted in 96 apartments representing 89% of total proposed apartments receiving 2 or more hour's sunlight to their living spaces.

On this basis, the proposed development has been assessed against each objective contained in clause 8.6(3)(b) of WLEP 2009. Thus, deeming strict compliance in accordance with the First Way is unwarranted in the circumstances of this particular case.

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 approvals have proposed the same variation and have been approved thereby abandoning the development standard:

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-2018/973: 28 Young Street WOLLONGONG NSW 2500

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

Thus, deeming strict compliance with the minimum building separation is unwarranted (Forth Way) in the circumstances of this particular case.

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

“Environmental planning grounds” take their colour from the subject matter, scope and purpose of the Environmental Planning and Assessment Act 1979 (EPA Act), including its objects. The below provide a breakdown of the key environmental planning grounds which support the proposed variation request, including:

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

The building potential is already limited by a height control to the front of the site. Adopting building separation requirements to (potential) dwellings to the north and south on the remainder of the site would mean a large part of the subject site would be excluded from any built form. Logically, restricting a built form envelope by this amount is completely impractical for a City Centre B3 zoned site at this location and, therefore, totally unreasonable to consider in this instance.

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/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 City Centre.

The proposed bulk and scale of this building is considered appropriate for this City Centre 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.

The maintenance of design excellence through the proposed alternate strategy, which has been designed to be a core element of the delivery of the integrated station development outcome.

“In considering whether development to which this clause applies exhibits design excellence, the consent authority must have regard to the following matters:

- (a) whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved,*
- (b) whether the form and external appearance of the proposed development will improve the quality and amenity of the public domain,*
- (c) whether the proposed development detrimentally impacts on view corridors,*
- (d) whether the proposed development detrimentally overshadows an area shown distinctively coloured and numbered on the Sun Plane Protection Map,*
- (e) how the proposed development addresses the following matters:*

- (i) the suitability of the land for development,*
- (ii) existing and proposed uses and use mix,*
- (iii) heritage issues and streetscape constraints,*
- (iv) the location of any tower proposed, having regard to the need to achieve an acceptable relationship with other towers (existing or proposed) on the same site or on neighbouring sites in terms of separation, setbacks, amenity and urban form,*
- (v) bulk, massing and modulation of buildings,*
- (vi) street frontage heights,*
- (vii) environmental impacts such as sustainable design, overshadowing, wind and reflectivity,*
- (viii) the achievement of the principles of ecologically sustainable development,*
- (ix) pedestrian, cycle, vehicular and service access, circulation and requirements,*
- (x) impact on, and any proposed improvements to, the public domain.”*

The architectural design, materials and detailing are of a high standard that is appropriate to the building type and location. The external appearance and form of the development will improve the quality and amenity of the public domain in the immediate vicinity of the site.

The proposal will not unreasonably impact on view corridors given it is below the maximum height limit of 48m allowed to the western side of the site and less than 24m permitted on the eastern side of the site under the *WLEP 2009*. In addition, the proposal will not overshadow the areas shown on the Sun Plane Protection Map.

The land is suitable for the proposed mixed use development and the allocated mix of commercial/residential floor space, given the location of the site on the edge of the City Centre.

The proposal will be compatible with future developments in the immediate vicinity of the site and therefore will enhance the streetscape (which currently contains several older style buildings that are in need of refurbishment or repair, including those situated on the subject site that will be demolished as part of the DA).

The location of the tower and 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, overshadowing, wind and/or reflectivity. Relevant details have been provided in this regard to enable a full assessment (i.e. shadow diagrams, wind report, BASIX certificates etc).

Access to the site has been carefully considered in a variety of forms (i.e. for pedestrians, motorists and cyclists alike), with suitable provisions to allow for

service access and circulation. The proposed development will have a positive impact on the public domain and interface of Keira and Kenny Streets.

This will significantly improve the amenity and character of the blocks/precinct surrounding the location. It will also allow for natural surveillance of the area with regards to the principles of Crime Prevention Through Environmental Design (CPTED).

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

Environmentally sustainable measures incorporated in the development include:

- Building orientates north or northerly aspect to maximise solar gain. 96 apartments represent 89% of total proposed apartments receive 2 or more hour's sunlight to their living spaces.
- Design solution provides effective benefices to cross flow ventilation to most apartments by generating natural cross ventilation through dual aspects and corner orientation of apartments. 66 apartments represent 62% of total proposed apartments are naturally ventilated.
- Maximised planting on terraces;
- Ethically source long lifecycle products and materials;
- Dual flush toilets;
- Rainwater to be used for garden irrigation;
- Taps fitted with water efficient fittings;
- Insulation and sisalation under roof;
- Solar panels at roof level;
- Proposed visitor and residential bicycle parking in compliance with Wollongong Council's Development Control Plan

As above, we acknowledge the proposed development will bring some overshadowing impact upon the neighbouring properties to the south. Practically, due to site orientation it would be almost impossible to redevelop the subject site for anything greater than a few storeys without having any

impact whatsoever. At this point in time, all development to the south is commercially warranted activities, which means no unreasonable loss of residential 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 (almost as if they were non-habitable type facades).

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 attempt 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 has been supported by a Noise Assessment prepared by JHA Services, which provides a range of acoustic recommendations to ensure the proposed development will comply with the relative sections of the EPA and Council requirements/conditions, and will not create any offensive noise to the surrounding residents.

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

4.3 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.

4.4 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*.

5.0 Conclusion

The proposed variation is based on the reasons contained within this request for an exception to the stated *Building separation within Zone B3 Commercial Core or Zone B4 Mixed Use* requirement, being a development standard contained within the *WLEP 2009*. The proposal will not result in any adverse impacts with regards to the amenity of the adjoining properties.

The proposed non-compliance is unlikely to result in any future precedents given the surrounding pattern of development and the combination of zoning and other associated controls currently in place.

In conclusion, the objection is considered to be well founded and compliance with the standard is unreasonable in the circumstances of the case.

Yours faithfully,

MARTIN MORRIS & JONES PTY LTD



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