CLAUSE 4.6 VARIATION STATEMENT

Demolition of all existing buildings and structures and the construction of a seventeen (17) storey mixed use building.

43-45 Atchison Street & 40-46 Kenny Street,
WOLLONGONG

Prepared for: Wollongong Invest Land No.3 Pty Ltd

REF: M200032
DATE: 12 October 2021

Clause 4.6 variation statement – building separation (clause 8.6)

1. INTRODUCTION

This Variation Statement has been prepared in accordance with Clause 4.6 of Wollongong Local Environmental Plan (WLEP) 2009 to accompany an application for demolition of all existing buildings and structures and the construction of a seventeen (17) storey mixed use building at Nos. 43-45 Atchison Street & 40-46 Kenny Street, Wollongong ('the site').

2. BUILDING SEPARATION STANDARD

Clause 8.6 of WLEP 2009 prescribes the minimum building separation for developments in Zone B3 or B4 within Wollongong CBD. It is therefore applicable to the proposed development. Clause 8.6 states the following:

> *"(2) Buildings on land within Zone B3 Commercial Core or B4 Mixed Use 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.*
>
> *(4) For the purposes of this clause, a separate tower or other raised part of the same building is taken to be a separate building."*

3. PROPOSED VARIATION

The proposed development provides compliant setbacks to the northern boundary for the street wall height (Ground and Level 1) and up to 45m in height (Levels 3 to 13). However, the development only provides a minimum separation of 12m (west tower) to the northern boundary on Levels 14 to 17.

Pursuant to Clause 8.6(2)(c), 28m building separation is required above 45m in height. As such, the separation to the northern boundary is non-compliant by 2m (where 14m to the boundary is required). This equates to a maximum numerical variation of 2m and a maximum percentage variation of 14.3%.

The building separation control is a "development standard" to which exceptions can be granted pursuant to clause 4.6 of the LEP.

4. OBJECTIVES AND PROVISIONS OF CLAUSE 4.6

The objectives and provisions of clause 4.6 are as follows:

4.6 Exceptions to development standards

(1) The objectives of this clause are as follows—

(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.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless—

(a) the consent authority is satisfied that—

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning Secretary must 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 Planning Secretary before granting concurrence.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4,

(ca) clause 4.2A, 6.1 or 8.3.

(8A) (Repealed)

It is noted that Clause 8.6 is not "expressly excluded" from the operation of Clause 4.6.

Objective 1(a) of clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of subclauses 4.6(3) & (4) in order to demonstrate to Council that the exception sought is consistent with the exercise of "an appropriate degree of flexibility" in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in subclause 4.6(6).

Objective 1(b) of Clause 4.6 is addressed later in this request.

5. THAT COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (CLAUSE 4.6(3)(a))

In Wehbe V Pittwater Council (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:

> *"An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."*

The judgement goes on to state that:

> *"The rationale is that development standards are not 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 achieved anyway) and unreasonable (no purpose would be served)."*

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- *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;*
- *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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (paragraph 16), Preston CJ makes reference to *Wehbe* and states:

> *"…Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary."*

Compliance with the building separation development standard is considered to be unreasonable and unnecessary as the objectives of that standard are achieved for the reasons set out in this statement. For the same reasons, the objection is considered to be well-founded as per the first method underlined above.

Notably, under Clause 4.6(4)(a)(ii) a consent authority must now be satisfied that the contravention of a development standard 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. Clause 4.6(4)(a)(ii) is addressed in Section 7 below.

6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS (CLAUSE 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* (paragraph 24) states:

> *"The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31]."*

The following environmental planning grounds are submitted to justify contravening the minimum building separation:

1. The proposed building separation of habitable rooms and balconies within proposed residential apartments is compliant with the building separation requirements outlined in Part 3F of the ADG,

where 24m separation is required between habitable rooms/balconies at Level 8 and above. Furthermore, the separation is compliant with that prescribed under Clause 8.6(3) of WLEP 2019, which requires 20m separation to be provided between habitable parts of proposed dwellings and those on another site.

2. The proposed non-compliances with Clause 8.6 in respect of the shared northern boundary are only applicable to the western tower. As illustrated earlier in this statement, the vast majority of both towers are compliant with the required setbacks to the northern boundary,. with the only numerical non-compliance occurring above 45m for the western tower.

3. The scale and form of the proposed development is largely consistent with the approved development under DA-2016/1354 and is consistent with the scale and form of other recent developments approved in the Wollongong CBD. As such, despite the numerical non-compliance relating to building separation will not result in a development that out of character with the emerging character of this part of the CBD.

4. The proposal provides for a floor space ratio which complies with the maximum permitted under Clause 4.4A of WLEP 2009 and accordingly, the building separation non-compliance is not associated with additional density beyond what is expected by the controls or planned for the locality.

5. It is considered that there is an absence of any impact of the proposed non-compliance on the amenity of the environmental values of the locality, the amenity of future building occupants and on area character. Specifically:

    a. the extent of the non-compliance creates no additional adverse overshadowing to adjoining properties, with all neighbouring properties provided with compliant levels of solar access as prescribed by WDCP 2009;

    b. the building separation non-compliance does not result in any additional privacy impacts. The area of non-compliance relates to apartment balconies and habitable rooms that are separated from one another or neighbouring sites compliant with the requirements of Part 3F of the ADG. Part 3F relates solely to visual privacy and thus, the proposed separation will ensure that the levels of visual privacy enjoyed by the proposed apartments and adjoining properties is satisfactory; and

    c. the building separation does not result in any additional view loss. No iconic or scenic views are provided through the site and the proposed development will not result in any loss of views or outlook when compared to a building with a compliant building setbacks.

6. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

    a. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for residential uses (1.3(c));

b. The proposed developed promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118,* Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

> *"86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*
>
> *87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard."*

As outlined above and despite the variation only needing to demonstrate a sufficient environmental planning outcome, the proposal will provide for a better planning outcome than a strictly compliant development due to the enhanced occupant amenity and visual appearance, as outlined previously.

7. Clause 4.6(4)(a)

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 4 above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in 8a below). Clause 4.6(3)(b) is addressed in Section 6 above.

The second opinion of satisfaction, in clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 8 below.

8. 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 (CLAUSE 4.6(4((a)(ii))

8a. Objectives of Development Standard

The objective of clause 8.6 is as follows:

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

In order to address the requirements of Subclause 4.6(4)(a)(ii), the objective of Clause 8.6 is addressed below.

Objective (1): "*to ensure sufficient separation of buildings for reasons of visual appearance, privacy and solar access.*"

In terms of visual appearance, the proposed development provides a compliant FSR and height (other than for the Zone B6 part of the site) and is generally consistent with the setback requirements of the ADG. As such, despite the building separation non-compliance, the proposed development achieves a scale and form that is reasonably expected by the planning controls that apply to the site and is consistent with the emerging future character of the streetscape and Wollongong CBD.

With regards to privacy, the proposed development provides building setbacks (other than for the podium COS) that are compliant with the requirements of Part 3F of the ADG. The objective of Part 3F states the following:

> *"Adequate building separation distances are shared equitably between neighbouring sites, to achieve reasonable levels of external and internal visual privacy"*

Given that the development is compliant with the design criteria under Part 3F relating to building separation (above 9 storeys) to the northern boundary and between the two proposed residential towers, it follows that acceptable levels of visual privacy are provided, consistent with SEPP 65 and the ADG which is an adopted State planning policy.

Shadow diagrams and views from the sun diagrams have been submitted with the application and demonstrate that neighbouring properties will not be unduly overshadowed by the proposed development, despite the building separation non-compliance. Furthermore, it is demonstrated that 192 (70%) of the proposed apartments will receive at least 2 hours of direct sunlight between 9am to 3pm on 21 June. This is compliant with the requirements of Part 4A of the ADG relating to solar access.

Thus, despite the numerical non-compliance, the proposed development is therefore consistent with the objective of the building separation development standard, providing a suitable scale and form that is compatible with the emerging character of the locality whilst ensure that satisfactory levels of visual privacy and solar access are achieved for both the proposed and neighbouring developments.

8b. Objectives of the Zone

Clause 4.6(4)(a)(ii) also requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The part of the development that is non-compliant with the building separation controls is located within Zone B3. The objectives of the Zone B3 Metropolitan Centre 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 proposed development is consistent with the objectives of Zone B3 in that:

- The proposal will provide a mixture of compatible retail, community and residential land uses suitable for the local and wider community;
- The commercial and early education employment opportunities will complement the community needs in a highly accessible location;
- The site is located a five minute walking distance from Wollongong Railway station and bus interchange. The site is also walking distance to Wollongong city centre and associated services;
- The development will set a precedent for the southern sector of the Wollongong business core, attracting further business and retail development;
- The site is within a five minute walk from the Wollongong bus and rail interchange and Crown Street Mall which is a hub for employment, retail and essential services;
- The site will encourage and set a precedence for active streets and retail/commercial opportunities to the southern end of the Wollongong CBD, replacing the current warehousing with development that will contribute to the vitality of the centre;
- The proposed development will not give rise to any adverse impacts on the amenity of neighbouring occupants or the wider locality in general; and
- The development provides the compliant amounts of car and bicycle parking and will not give rise to adverse levels of traffic generation or impacts on the local road and transport network.

In light of the above, the building separation variation does not contravene any objectives for the zone and for that reason the proposed variation is acceptable.

9. THE CONCURRENCE OF THE SECRETARY HAS BEEN OBTAINED (CLAUSE 4.6(4)(b))

The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice, attached to the Planning Circular PS 18-003 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

10. WETHER CONTRAVENTION OF THE DEVELOPMENT STANDARD RAISES ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING (CLAUSE 4.6 (5)(a))

Contravention of the building separation development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

11. THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD (CLAUSE 4.6(5)(b))

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the minimum building separation. As such there is no public benefit in maintaining strict compliance with the development standard. Whilst the proposed minimum building separation is non-compliant with the minimum prescribed for the site by a maximum of 2m (14.3%), the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.

12. CONCLUSION

This written request has been prepared in relation to the proposed variation to the building separation development standard contained in WLEP 2009.

Having regard to all of the above, it is our opinion that compliance with the building separation development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.