

Clause 4.6 Variation Request

Building Separation

Crown Street, Wollongong

Submitted to the Department of Planning, Housing and Infrastructure
on behalf of Wollongong Developments No.8 Pty Ltd

SSD-76440958



Prepared by Ethos Urban, a Colliers Company.

17 September 2025 | 2240280



'Gura Bulga'

Liz Belanjee Cameron

'Gura Bulga' – translates to Warm Green Country. Representing New South Wales.



'Dagura Buumarri'

Liz Belanjee Cameron

'Dagura Buumarri' – translates to Cold Brown Country. Representing Victoria.



'Gadalung Djarri'

Liz Belanjee Cameron

'Gadalung Djarri' – translates to Hot Red Country. Representing Queensland.

Ethos Urban acknowledges the Traditional Custodians of Country throughout Australia and recognises their continuing connection to land, waters and culture.

We pay our respects to their Elders past, present and emerging.

In supporting the Uluru Statement from the Heart, we walk with Aboriginal and Torres Strait Islander people in a movement of the Australian people for a better future.

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1.0 Introduction

1.1 Overview

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of Wollongong Developments No.8 Pty Ltd (the Applicant). It is submitted to the Department of Planning, Housing and Infrastructure (DPHI) in support of a state significant development application (SSDA), identified as SSD-76440958, for a proposed shop top housing development including infill affordable housing as well as a hotel and commercial development (the proposed development) on land at 221-291 Crown Street, 216-238 Keira Street and 86-90 Burelli Street, Wollongong (the site).

Clause 4.6 of the Wollongong Local Environmental Plan 2009 (Wollongong LEP 2009) enables DPHI to grant consent for development even though the development contravenes a development standard. This Clause 4.6 Variation Request relates to the development standard for building separation within the E2 Commercial Centre zone under Clause 8.6 of the Wollongong LEP 2009 and should be read in conjunction with the Environmental Impact Statement (EIS) prepared by Ethos Urban and associated appendices.

The objectives of clause 4.6 are to provide an appropriate degree of flexibility in applying certain development standards, and to achieve better outcomes for and from development by allowing flexibility in particular circumstances. Clause 4.6(3) requires that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances (clause 4.6(3)(a)), and
- There are sufficient environmental planning grounds to justify the contravention of the development standard (clause 4.6(3)(b)).

This document demonstrates that compliance with the building separation development standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the development standard. As such, this document satisfies the provisions of clause 35B(2) of the Environmental Planning and Assessment Regulation 2021 (EP&A Regulation).

This clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the building separation development standard, the proposed development:

- Achieves the objectives of Clause 8.6 of the Wollongong LEP 2009 by:
 - Improving the visual appearance of the development by breaking up the massing within the podium.
 - Carefully considering privacy impacts and responding through design measures such as building orientation and façade treatment.
 - Ensuring that dwellings receive a high degree of solar access, consistent with the Apartment Design Guide controls.
- There are sufficient environmental planning grounds to justify the contravention, including the fact that the proposed development:
 - Responds to the character and setting of the development by improving the ground plane's response to the nearby heritage context.
 - Delivers significant improvements to through site permeability by providing two new pedestrian links through the city block that the site occupies.
 - Achieves a high degree of amenity in terms of solar access, ventilation and ensures no negative harm is created from a visual impact perspective.

The consent authority can therefore be satisfied that this Clause 4.6 Variation Request has demonstrated the matters in clause 4.6(3) of the Wollongong LEP 2009 and may grant development consent notwithstanding the contravention of the height of building development standard.

Accordingly, the State Significant Development Application (SSDA) may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the Wollongong LEP 2009.

1.2 Legal Guidance

The Land and Environment Court has established a set of factors to guide assessment of whether a variation to development standards should be approved. The original approach was set out in the judgment of Justice Lloyd in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89 in relation to variations lodged under State Environmental Planning Policy 1 – Development Standards (SEPP 1). This approach was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*). While these cases referred to the former SEPP 1, the analysis remains relevant to the application of Clause 4.6(3)(a). Further guidance on Clause 4.6 of the Standard Instrument has been provided by the Land and Environment Court in a number of decisions, including:

- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
- *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386; and
- *Moskovich v Waverley Council* [2016] NSWLEC 1015.

In accordance with the above requirements, this Clause 4.6 variation request:

- Identifies the site and proposed development (**Section 2.0**);
- Identifies the development standard to be varied (**Section 3.0**);
- Establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (**Section 4.0**); and
- Demonstrates there are sufficient environmental planning grounds to justify the contravention (**Section 5.0**).

2.0 Site and Proposed Development

2.1 Site Description

The site is situated at 221-291 Crown Street, 216-238 Keira Street and 86-90 Burelli Street, Wollongong, within the Wollongong Local Government Area (LGA). It spans across seventeen (17) different properties (as identified in **Table 1**) and has an approximate area of 13,088m². The site is adjacent to the Wollongong Central shopping centre, a major regional retail hub, and is approximately 280m from the Wollongong Train Station which provides connection within Wollongong and to the Sydney CBD. An aerial image of the site is provided in **Figure 1** and a site locational map is provided in **Figure 2**.

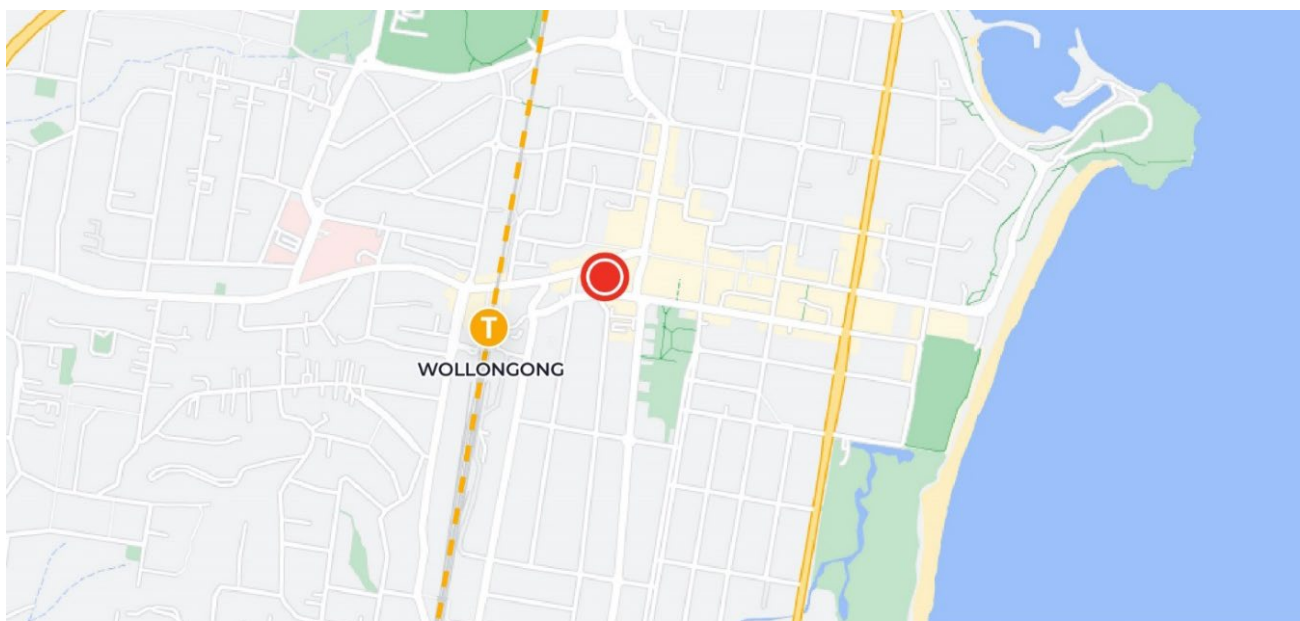


 The Site

 NOT TO SCALE

Figure 1 Site aerial

Source: Nearmap, edits by Ethos Urban



 The Site

 NOT TO SCALE

Figure 2 Site location and context

Source: Nearmap, edits by Ethos Urban

Table 1 Legal Description of Site

Legal Description	Address
Lot 1 in DP 112417	216-222 Keira Street
Lot 100 in DP 774957	226-230 Keira Street
Lot 9 in DP 551157	232-234 Keira Street
Lot 8 in DP 546125	236-238 Keira Street
Lot 1 in DP 88455	86 Burelli Street
Lot 4 in DP 17979	
Lot 5 in DP 17979	
Lot B in DP 395330	90 Burelli Street
Lot 1 in DP 220513	221-229 Crown Street
Lot 3 in DP 17979	231 Crown Street
Lot 2 in DP 17979	233-235 Crown Street
Lot 1 in DP 17979	
Lot 7 in DP 878243	237-241 Crown Street
Lot 1 in DP 1135333	243-251 Crown Street
Lot 1 in DP 226374	253-259 Crown Street
Lot 1 in DP 183348	
Lot 2 in DP 226374	
Lot 3 in DP 319452	261 Crown Street
Lot 2 in DP 319452	269-271 Crown Street
Lot 1 in DP 319452	
Lot 2 in DP 181570	273-279 Crown Street
Lot 1 in DP 1116034	
Lot 1 in DP 82673	281-291 Crown Street
Lot 1 in DP 117019	
Lot 1 in DP 927806	281-291 Burelli Street
Lot 1 in DP 1198873	
Lot 1 in DP 1087986	

2.1.1 Existing Development

The site contains several existing buildings that range in scale and significance. Along the Crown Street frontage of the site there are a mix of uses including, retail, shop top housing, a café and a medical centre with buildings typically extending to two (2) or three (3) storeys. Similarly, along the Kiera Street frontage the range of uses include, retail, shop top housing and a restaurant. On the corner of Crown Street and Kiera Street is an office building extending to six (6) storeys and on the corner of Kiera Street and Burelli Street is the Grand Hotel which extends to three (3) storeys. In the centre of the site, there is a car park with access from the south via Burelli Street.

The western part of the site contains a heritage listed item of local significance, the former Marcus Clark Building which is occupied by Spotlight for retail use. It is noted that the Grand Hotel is not a heritage item.

2.1.2 Surrounding Development

The site is located within the Wollongong City Centre and is predominantly surrounded by retail development. Specifically, the surrounding context includes the following:

North

The site is bounded by Crown Street. Beyond this, the area is characterised by other commercial and retail development, with Wollongong Central shopping mall being located across Crown Street towards the north and northwest.

East

Directly east of the site is Keira Street. Wollongong Central shopping mall is also located to the east of the site, which comprises of large-scale retail developments and a pedestrian walkway along Crown Street.

South

Burelli Street is located directly south of the site. Wollongong Central is also located towards the south of the site across the road. Additionally, the space also acts as a rooftop carpark. Other small scale retail development and the Illawarra Mental Health Services can also be found to the south of the site. MacCabe Park is located to the site's southeast and acts as the main green open space within the town centre, it is located approximately 50m southeast of the existing Grand Hotel on the site.

West

To the site's west is a small-scale retail development located on the opposite side of Atchison Street, while residential apartments are located further to the west on the opposite side of Station Street. The South Coast Private Hospital is located to the site's southwest, with the rail line and Wollongong Station situated further west of the site. The rail line transports passengers within Greater Wollongong and towards Sydney.

2.2 Description of the Proposed Development

The Applicant will seek development consent under ‘Division 4.7 – State Significant Development’ of the Environmental Planning and Assessment Act 1979 (EP&A Act) for design, construction and operation of the proposed mixed use shop top housing, hotel and commercial development.

Specifically, this SSDA seeks approval for:

- Demolition of existing structures on the site, retention of heritage facades, tree removal and site excavation for new basement.
- Construction of a new mixed-use development consisting of:
 - Four residential towers, ranging from 16 to 38 storeys and comprising 546 apartments including:
 - Approx. 414 market apartments.
 - Approx. 132 affordable apartments.
 - Residential lobbies and podium.
 - Communal open space.
 - A 10-storey commercial office building, an 8-storey hotel comprising 166 rooms, and numerous retail tenancies (including a supermarket) consisting of:
 - 10,009 sqm of commercial GFA.
 - 8,793 sqm of hotel GFA.
 - 3,781 sqm of retail GFA.
 - 1,510 sqm of retail supermarket GFA.
- Car, motorcycle and bicycle parking for residents, workers and visitors across two basement levels, mezzanine, lower ground and levels 1 and 2 including:
 - 774 car parking spaces, including:
 - 547 residential spaces (including accessible spaces).
 - 49 residential visitor spaces.
 - 63 commercial/retail/residential visitor spaces.
 - 25 commercial/retail (staff) spaces.
 - 10 hotel (staff only) spaces.
 - 80 retail (supermarket) spaces.
 - Five (5) loading bays.
 - 320 bicycle parking spaces.
 - 47 motorcycle parking spaces.
- New public open space including a new public plaza.
- Associated landscaping and public domain works.

2.2.1 Key Project Area

The key project details regard the proposal are outlined in **Table 2** below.

Table 2 Key Project Details

Component	Description		
Proposed Land Uses	Residential (shop-top housing), retail, commercial and hotel uses		
Legal Description	Lot 1 in DP 112417	Lot 3 in DP 17979	Lot 2 in DP 319452
	Lot 100 in DP 774957	Lot 2 in DP 17979	Lot 1 in DP 319452
	Lot 9 in DP 551157	Lot 1 in DP 17979	Lot 2 in DP 181570
	Lot 8 in DP 546125	Lot 7 in DP 878243	Lot 1 in DP 1116034
	Lot 1 in DP 88455	Lot 1 in DP 1135333	Lot 1 in DP 82673
	Lot 4 in DP 17979	Lot 1 in DP 226374	Lot 1 in DP 117019
	Lot 5 in DP 17979	Lot 1 in DP 183348	Lot 1 in DP 927806

Component	Description		
	Lot B in DP 395330	Lot 2 in DP 226374	Lot 1 in DP 1198873
	Lot 1 in DP 220513	Lot 3 in DP 319452	Lot 1 in DP 1087986
Site Area	13,088m²		
Gross Floor Area	- Residential: 52,796m² - Non-residential GFA: 24,093 m² - Commercial: 10,009m² - Retail: 3,781m² - Retail Supermarket: 1,510 m² - Hotel: 8,793m² Total: 76,889m²		
Floor Space Ratio	5.87:1		
Building Height	- Building 01: 129.6m (RL 147.4) (38 storeys) - Building 2.1: 57.7m (RL 81.7) (16 storeys) - Building 2.2: 86.5m (RL 102.9) (24 storeys) - Building 2.3: 67.5m (RL 81.5) (17 storeys) - Building 03: 54.65m (RL 77.3) (16 storeys) - Commercial: 51.9m (RL 70.1) (10 storeys) - Hotel: 39.1m (RL 54.3) (8 storeys) <i>*building heights in metres are measured vertically from the lowest point of the ground floor level to the highest point of the building</i>		
Boundary Setbacks	<u>Ground Floor</u> Building 1: - Partial 6m setback to Burelli Street 0m setback to all other boundaries Building 2.1, 2.2 and 2.3: 6m setback to Burelli Street 3m setback to Crown Street Building 3: 3m - 10.4m at Crown Street Commercial: 10.4m - 11.9m setback to Crown Street Hotel: 0m setback and partial 9.9m and 9.4m setback to Burelli Street	<u>Above Podium Level</u> Building 1: 10.7m - 20.6m setback to Crown Street 3m setback to Atchison Street 0.9m - 3.7m setback to Burelli Street Building 2.1: 8.5m setback to Crown Street Building 2.2: 6.6m setback to Burelli Street Building 2.3: 6m setback to Burelli Street Building 3: 3.1m - 10.3m setback to Crown Street Commercial: 10.4m - 11.9m setback to Crown Street Hotel: 2.3m setback to Keira Street 1m - 2.1m setback to Burelli Street	
Building Separation	11.5m between Building 01 and Building 2.1 7.5m between Building 2.1 and Building 2.2 17.2m between Building 2.1 and Building 2.3 14.4m between Building 2.3 and Building 03 21.6m between Building 03 to Commercial Building 2.5m between Commercial Building and Hotel 22.2m between Hotel and Building 2.3		
Apartments	<u>Market Housing</u> 1 Bedroom: 106 2 Bedroom: 218 3 Bedroom: 87	<u>Affordable Housing</u> 1 Bedroom: 57 2 Bedroom: 72 3 Bedroom: 3	

Component	Description
	4 Bedroom: 3 Total: 414 units Total: 132 units
Hotel Rooms	166
Vehicle Access	Two (2) vehicular access points are located at Burelli Street providing separate access for cars and trucks/service vehicles. The proposal will retain the approved car park access via integration with the existing signal intersection of Burelli Street, Kenny Street and Findlay Place. A separate service vehicle access will be provided further east on Burelli Street.
Car Spaces	- Residential: 547 spaces (incl. accessible spaces) - Residential Visitors: 49 spaces - Commercial/Retail/Residential Visitor: 63 spaces - Commercial/Retail (staff): 25 spaces - Hotel (staff only): 10 spaces - Retail (supermarket): 80 spaces Total: 774 Spaces
Motorcycle Spaces	47 spaces
Bicycle Spaces	- Resident Spaces: 182 - Resident Visitor Spaces: 46 - Retail Staff Spaces: 69 - Retail Visitor Spaces: 19 - Retail (Supermarket) Employee Spaces: 2 - Retail (Supermarket) Visitor Spaces: 2 - Total: 320 Spaces
Communal Open Space	4,460m ² (34%)
Landscaped Area	- Ground Floor: 951.18m² - Rooftops Coverage: 1,765.67m² Total: 2,716.85m² (20.7% of overall site area)
Deep Soil Area	971m ² (7.4%)
Trees	23 existing trees 17 trees to be removed (<i>note the consented scheme granted the removal of 14</i>) - Six (6) trees to be retained 208 new trees to be planted
Construction Hours	- Monday to Friday: 7:00am to 6:00pm - Saturdays: 7:00am to 5:00pm - No work on Sunday and Public Holidays
Operational Hours	Commercial / Retail and Hotel: Subject to separate future approvals at fit
Construction Jobs	Estimated 1,213 jobs
Operational Jobs	- Post Construction: Estimated 107 FTE jobs - Commercial: 667 FTE jobs (<i>*based on 1 per 15m²</i>) - Retail: 108 FTE jobs (<i>*based on 1 per 35m²</i>) - Retail Supermarket: 23 FTE jobs (<i>*based on 1 per 67m²</i>) - Hotel: 40 FTE jobs Total: Estimated 945 FTE jobs <i>* NSW CPA - 2023 Guidance used for estimated employment</i>

Component	Description
Demolition and Earthworks	The proposal will involve the demolition of existing structures on the site, retention of heritage facades, tree removal and site excavation for new basement. An estimated 101,585.8m ³ of excavated material is anticipated from the proposed excavation works.
Signage	No signage is proposed. Subject to future approvals.
Infrastructure and Servicing	The following utilities will service the site: • Electricity • Telecommunication • Gas • Water • Sewerage
Staging	The development would be developed in two stages: • Stage 1: All proposed works, including demolition and site preparation works (excluding existing Spotlight building works) • Stage 2: Existing Spotlight building works
Estimated Development Cost	\$275,784,396 (excluding GST). Refer to the Estimated Development Cost (EDC) Report prepared by Archi-QS at Appendix F .

3.0 Development Standard to be Varied

3.1 Is the Planning Control in Question a Development Standard?

The building separation control in Clause 8.6 of the Wollongong LEP 2009 is a development standard in accordance with the definition of that term in section 1.4(d) of the EP&A Act.

3.2 Relevant Development Standard

This Clause 4.6 variation request seeks to justify contravention of the development standard set out in clause 8.6 of the Wollongong LEP 2009. Clause 8.6 states the following:

8.6 Building separation within Zone E2 Commercial Centre or Zone MU1 Mixed Use

- (1) *The objective of this clause is to ensure sufficient separation of buildings for reasons of visual appearance, privacy and solar access.*
- (2) *Buildings on land within Zone E2 Commercial Centre or MU1 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.*
- (5) *In this clause—*
street frontage height *means the height of that part of a building that is built to the street alignment.*

The site is within the E2 Commercial Centre zone, as such it is land to which clause 8.6 applies.

3.3 Variation Sought

3.3.1 Building Separation for Commercial Uses (Non-Dwellings)

Clause 8.6(2) applies to portions of the building which don't feature dwellings. The proposed development includes one feature which seek to vary the development standard for building separation between commercial (non-dwelling uses). This variation to the commercial component relates to the building separation on the ground level and podium form as discussed below.

Podium Level

Clause 8.6(2)(a) applies to buildings up to the street frontage height or 24m above ground level (whichever is lesser) and requires no separation between neighbouring buildings.

The proposed podiums include street frontages less than 24m in height and therefore Clause 8.6(2)(a) applies to the podium levels. This control requires no building separation between non-dwelling uses lower than the street frontage height.

The podium includes breaks between the buildings to promote permeability through the creation of two through-site links. As the project involves the redevelopment of an entire city block, increased permeability throughout the site is required and has been subject to review and agreement with the State Design Review Panel (SDRP). The break in the street wall also assists in breaking up the massing and providing visual relief at the ground level. Accordingly, a continuous street wall (which is the intent of the clause) cannot be reasonably achieved as part of the development if there is to be a significant contribution toward new public open space and enhanced permeability and connectivity through the site.

The podium levels include an eastern and western through site link that are physically separated and vary the 0m building separation development standard under 8.6(2)(a). The width of the eastern through-site link varies by approximately between 17.5m and 33m and the width of the western through site link is approximately 7.5m as shown in **Figure 3** and **Figure 4** respectively.

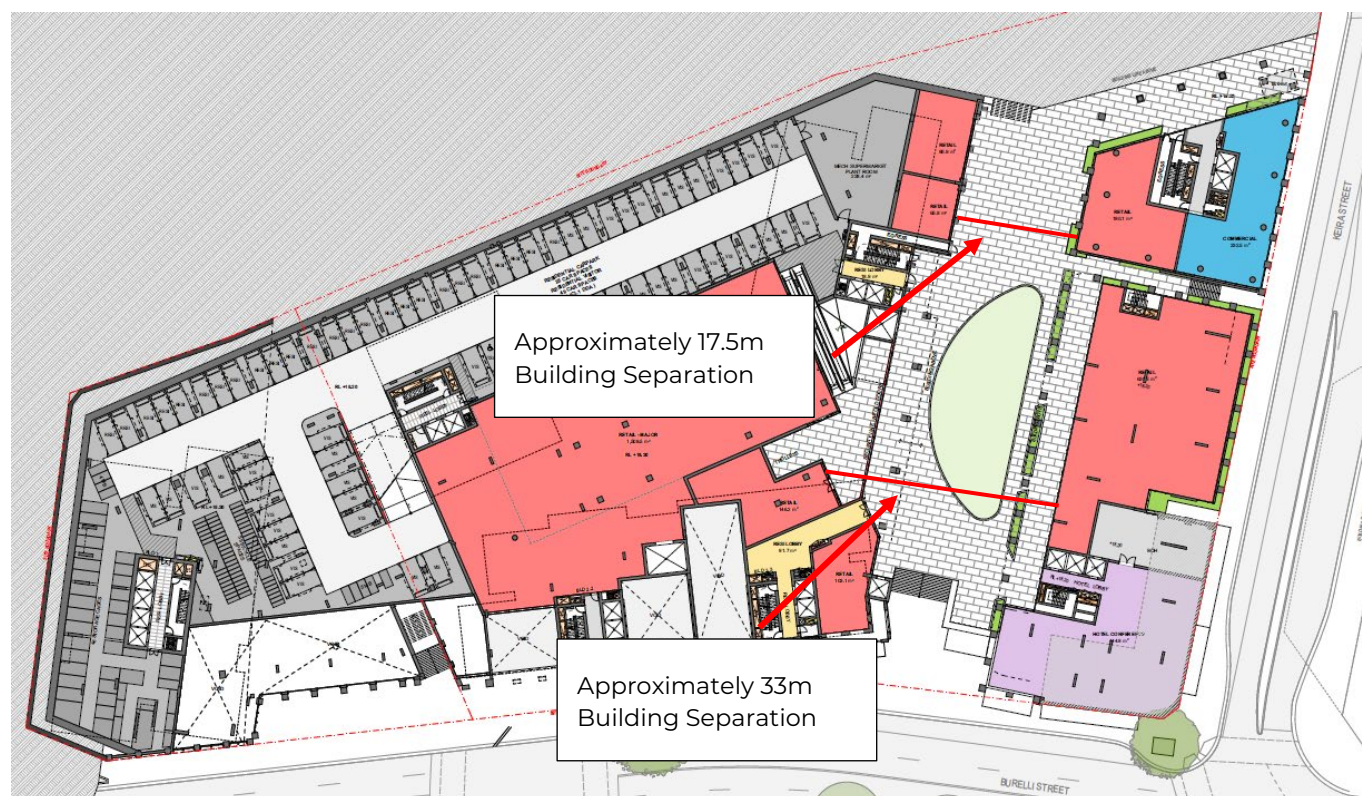


Figure 3 Eastern Through-Site Link Separation Distance on Lower Ground Level

Source: DKO, annotated by Ethos Urban

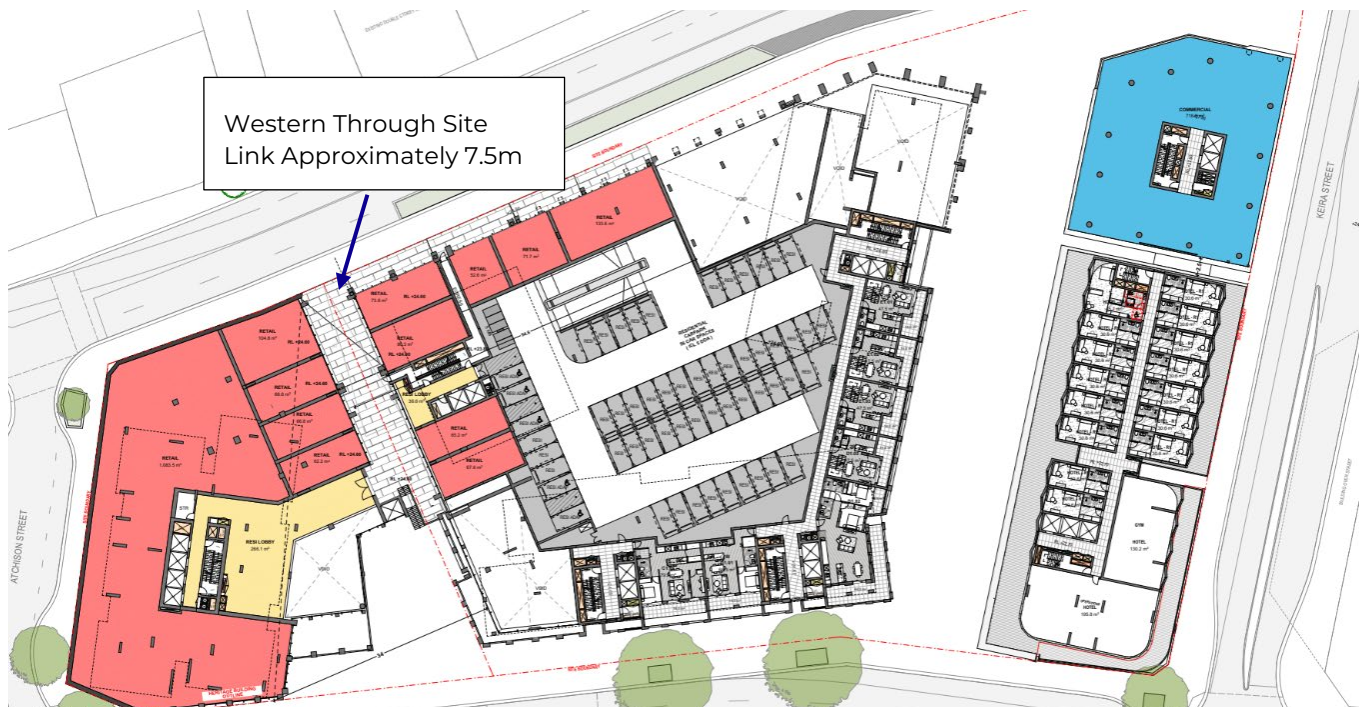


Figure 4 Western Through-Site Link Separation Distance on Level 1

Source: DKO, annotated by Ethos Urban

3.3.2 Building Separation for Dwellings

Building separation for dwellings are controlled by Clause 8.6(3) as replicated below.

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 areas of reduced building separation are summarised in **Table 3** and further discussed below. Extracts of the Architectural Plans which feature a variation to the relevant building separation control is shown throughout **Figure 5 - Figure 10**.

Table 3 Summary of Reduced Building Separation for Dwelling Uses

Building	Adjoining Building	Level	Approx. Minimum Distance	LEP Control
Hotel Building (dwelling)	Commercial Building (non-dwelling)	1-9	2.5m	16m
Building 2.1 (dwelling)	Building 1 (non-dwelling)	3	11.5m	16m
	Building 2.2 (dwelling)	3	7.5m	20m
	Building 2.2 (dwelling)	4 - 17	8.9m	20m
	Building 2.3 (dwelling)	4 - 17	17.2m	20m
Building 2.3 (dwelling)	Building 3 (dwelling)	3 – 16	14.4m	20m
	Building 2.2 (dwelling)	17	7.5m	20m

Hotel Building and Commercial Building

The hotel building features a building separation of 2.5m to the adjoining commercial building. To prevent privacy impacts, the hotel use will not feature any openings or windows towards the commercial building and the hotel building is not orientated towards the commercial building which achieves protection of outlook for hotel occupiers and addresses potential privacy impacts.

Building 2.1 and Building 1

At Level 3, there is approximately 11.5m of separation distance between the main bedroom in Unit B3.01 in Building 2.1 and the commercial use in Building 1. This portion of the building will be visually separated by mature planting between the two buildings. Additionally, the main bedroom has been designed to feature multiple points of outlook to promote views to other aspects.

Above Level 3, Building 1 is recessed inwards and the building separation is greater than 20m which complies with the relevant development control.

Building 2.1 and Building 2.2

At Level 3, the building separation distance between Unit B3.03 in Building 2.1 and Unit C3.02 in Building 2.2 is approximately 7.5m. However, the northern façade of Unit C3.02 which faces Unit 3.03 does not include any openings and presents as a solid wall. It is acknowledged that there is a window along the northern façade Unit C3.02 but this only serves a storage area which will not result in an adverse privacy impact.

Above Level 3, a building separation of approximately 11m is achieved between the lounge room in Unit 03 in Building 2.1 and the second bedroom in Unit 2 in Building 2.2. Notwithstanding the above, the buildings are orientated to prevent direct views into adjoining buildings. The southern façade of Building 2.1 and the northern façade of Building 2.2 primarily includes non-transparent material and both facades will include privacy glazing to mitigate any potential privacy or overlooking impacts.

Building 2.1 and Building 2.3

Above Level 3, there is a building separation distance of approximately 17.2m between Building 2.1 and Building 2.3. However, Building 2.1 and Building 2.3 are orientated to prevent direct views. Additionally, the southern façade of Building 2.1 and the northern façade of Building 2.3 involve non transparent material and privacy film to glazing which limits the ability for residents to view into neighbouring apartments.

Building 2.3 and Building 3

Building 2.3 features a building separation distance of approximately 14.4m to Building 3 between levels 3-16. However, Building 2.3 and Building 3 are orientated to prevent direct views. Additionally, the northern façade of Building 2.3 and the southern façade of Building 3 involve non transparent material and privacy film to glazing which limits the ability for residents to view into neighbouring apartments.

Building 2.3 and Building 2.2

At Level 17, a break in building massing is introduced which results in a building separation distance of approximately 7.5m between Buildings 2.3 and 2.2. Between the two facades, only one opening is provided, which is the window from the kitchen of Unit 17.03. The adjoining façade features a blank wall to prevent privacy impacts. The window allows for improved solar access to Unit 17.03.



Figure 5 Building Separation Between Hotel Building and Commercial Building

Source: DKO

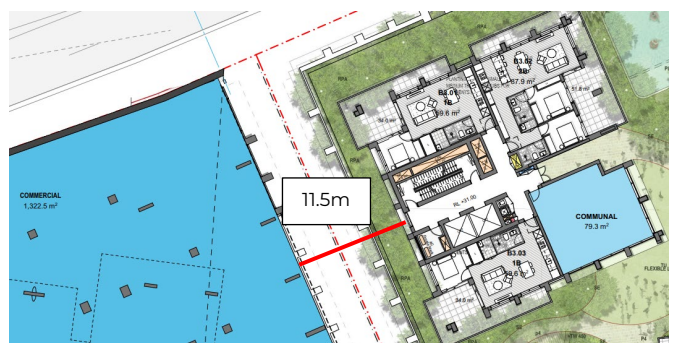


Figure 6 Building Separation Between Building 1 and Building 2.1 on Level 3

Source: DKO

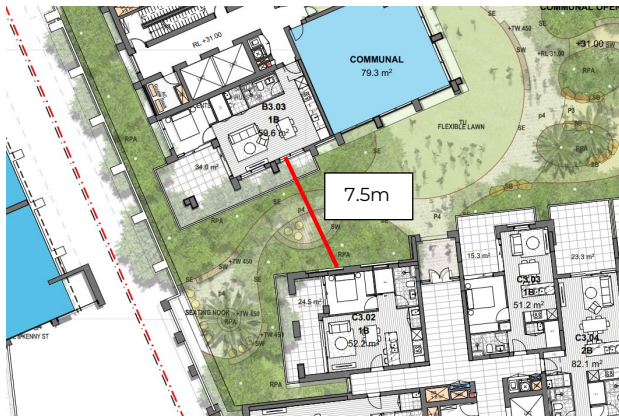


Figure 7 Building Separation Between Building 2.1 and Building 2.2 on Level 3

Source: DKO

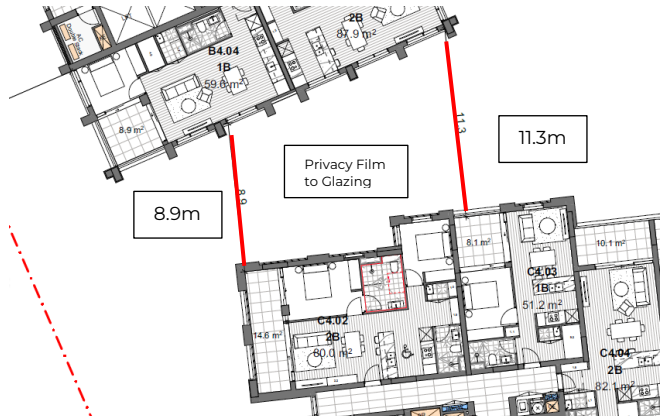


Figure 8 Building Separation Between Building 2.1 and Building 2.2 above Level 3

Source: DKO

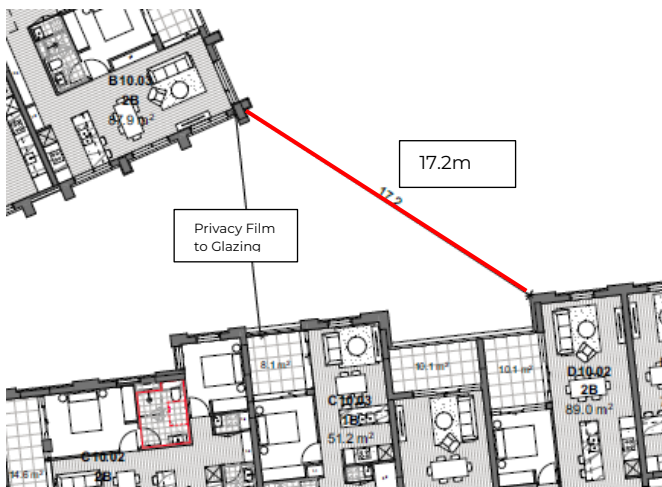


Figure 9 Building Separation Between Building 2.1 and Building 2.3

Source: DKO



Figure 10 Building Separation Between Building 2.3 and Building 3

Source: DKO

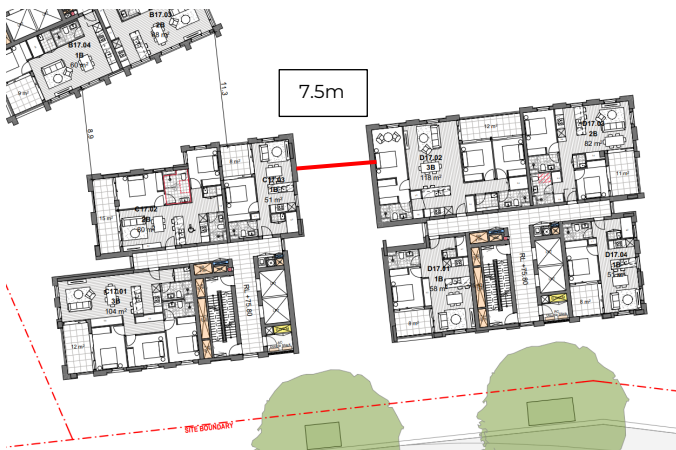


Figure 11 Building Separation Between Building 2.2 and Building 2.3

Source: DKO

4.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Wollongong LEP 2009 provides that:

4.6 Exceptions to development standards

(3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:*

- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
- (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827 (*Wehbe*);
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (*Four2Five*); and
3. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*).

The relevant matters contained in clause 4.6 of the Wollongong LEP 2009, with respect to the building separation development standard, are each addressed below, including with regard to these decisions.

4.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made 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 where subclause 4.6(3)(a) uses similar language to clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the Wollongong LEP 2009 is essentially the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request.

The five methods outlined in *Wehbe* include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
- 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 Method**).
- 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 Method**).

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the building separation development standard pursuant to the First Method.

4.1.1 The objectives of the standard are achieved notwithstanding non-compliance with the standard

The objective of the development standards contained in clause 8.6 of the Wollongong LEP 2009 is:

“to ensure sufficient separation of buildings for reasons of visual appearance, privacy and solar access”

The single objective places an emphasis on visual appearance, privacy and solar access. These components are assessed in relation to the proposed development below.

Visual Appearance

At ground level, the non-compliance with building separation enables the creation of a generous new public plaza and through-site links which improve permeability and pedestrian amenity throughout the site. At ground level and towards the higher levels above the podium, the breaks between the building also provide visual relief, adding interest to the townscape design when compared to a consistent street wall and allowing for greater architectural expression and diversity across the street block.

Privacy

The proposed development has been carefully designed so that the internal layout ensures there are no significant privacy impacts where reduced separation distances are proposed. Where necessary, buildings are designed to have windows orientated in a way to prevent direct privacy impacts or will feature a privacy film along the glazing. Accordingly, the response to upholding privacy measures is reasonably dealt with through design measures.

Solar Access

Notwithstanding the areas of non-compliance in relation to the building setback control in the Wollongong LEP 2009, the proposed dwellings continue to achieve adequate solar access. As required under the ADG, a minimum of 70% of units must receive more than 2 hours of solar access during the Winter Solstice. The proposed development achieves 72% and complies with the minimum control. Additionally, the ADG requires no more than 15% of units to receive no solar access during the Winter Solstice. The proposed development only involves 3.6% of units receiving no solar access and complies with this control.

4.1.2 Conclusion on clause 4.6(3)(a)

The above section demonstrates that compliance with the building separation development standard under Clause 8.6 of the Wollongong LEP 2009 is unreasonable or unnecessary in the circumstances of the case. The objectives of the development standard in the Wollongong LEP 2009 are achieved by the proposed development, notwithstanding the variation to the building separation development standard in favour of a reasonable development which is consistent with the building separation objectives and ADG controls. Further, the above section demonstrates that the contravention of the development standard enables a high quality built form that includes generous new public space, through-site links and improved diversity in architectural expression whilst retaining strong solar and privacy amenity.

4.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the Wollongong LEP 2009 requires the consent authority to be satisfied the applicant has demonstrated that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site at [60].

There are sufficient environmental planning grounds to justify contravention of the building separation development standard in this specific instance, as described below.

- **Character and Setting**

- The contravention to the relevant building separation development standard at the ground level responds to the desired character and setting of the development. The Wollongong LEP 2009 controls envision a continuous, 0m setback street wall wrapping around the entire block. This Wollongong LEP 2009 control does not respond to the desired character of Crown Street being historically significant and compatible with a lower scale nature. The breaks in the building, resulting in the deviation to the building separation development standard, reduce the concentration of massing on Crown Street and provide visual breaks and relief between the buildings.

- **Improved Permeability**

- As outlined above, the building separation on the ground floor/podium enable the incorporation of new public spaces that significantly improve permeability through the site and the Wollongong CBD more broadly. Given the project involves the redevelopment of an entire city block, improved permeability throughout the site is warranted to contribute towards an improved public domain and pedestrian experience.

- **Amenity**

- Notwithstanding the contravention of the building separation development standard, the proposed development continues to comply with the relevant solar access and ventilation control under the ADG.
- The reduced building separation does not generate any significant negative impact in terms of visual impact.

4.2.1 Conclusion on clause 4.6(3)(b)

For the reasons mentioned above, there are sufficient environmental planning grounds to justify the contravention of the building separation development standard. The proposed development demonstrates an absence of environmental harm from building separation contravention and promotes strong internal and external amenity as well as improved permeability throughout the site.

5.0 Conclusion

The assessment above demonstrates that compliance with the building separation development standard contained in Clause 8.6 of the Wollongong LEP 2009 is unreasonable and unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify the contravention. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allows for a better outcome in planning terms.

This clause 4.6 variation demonstrates that, notwithstanding the non-compliance with the building separation development standard, the proposed development:

- Achieves the objectives of Clause 8.6 of the Wollongong LEP 2009 by:
 - Improving the visual appearance of the development by breaking up the massing within the podium.
 - Carefully considering privacy impacts and responding through design measures such as building orientation and façade treatment
 - Ensuring dwellings receive a high degree of solar access, consistent with the Apartment Design Guide controls.
- There are sufficient environmental planning grounds to justify the contravention, including:
 - Responding to the character and setting of the development by improving the ground plane's respond to the nearby heritage context.
 - Increasing permeability throughout the site which is warranted given the project involves the redevelopment of an entire city block.
 - Achieving a high degree of amenity in terms of solar access, ventilation and ensures no negative harm is created from a visual impact perspective.

The consent authority can therefore be satisfied that this Clause 4.6 Variation Request has demonstrated the matters in clause 4.6(3) of the Wollongong LEP 2009 and may grant development consent notwithstanding the contravention of the building separation development standard.