

Attachment C

**Clause 4.6 Variation Request – Motorbike
Parking**

Clause 4.6 Variation to Clause 4.3 to Motorcycle Development Standard Pursuant to Clause 30(1)(H) of State Environmental Planning Policy (Affordable Rental Housing) 2009

The subject proposal seeks to undertake alterations and additions to the existing boarding house and will retain the existing situation in terms of providing no motorcycle parking. One new boarding room is proposed increasing the requirement from 2 spaces to 2.2 motorcycle spaces for the boarding house under Clause 30(1)(H) of State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH).

This Clause 4.6 variation provides an assessment of the proposal against the four tests set that have recently been re-emphasised by in *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386 by Commissioner Morris. This judgment summarised the requirements of cl4.6 as follows:

58. This imposes a number of tests, the first that compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case, the second that there are sufficient environmental planning grounds to justify contravening the development standard, the third that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) and the fourth, that 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. In addition, satisfaction of those matters that must be considered by the Secretary in determining whether concurrence should be granted is required.

Clause 4.6 – Exceptions to Development Standards

Clause 30(1)(H) of State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH) would require 0.2 motorcycle space in relation to the proposed boarding room and 3 spaces for the total boarding house.

Clause 4.6 of the Sydney Local Environmental Plan 2012 allows for exceptions of Development Standards. The objectives of this Clause 4.6 are:

- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (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) *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 Director-General has been obtained.*

This document constitutes the written request referred to in Clause 4.6(3) in relation to the proposal's breach of the motorcycle parking development standard.

The NSW Department of Planning and Infrastructure (DP&I) provides guidance on how to prepare Clause 4.6 variations; 'Varying development standards: A Guide' (August 2011). This written request to vary the standards is based on the DP&I's Guide.



Clause 30(1)(h) of State Environmental Planning Policy (Affordable Rental Housing) 2009 – Motorcycle parking

This Clause states

(1) A consent authority must not consent to development to which this Division applies unless it is satisfied of each of the following:

(h) at least one parking space will be provided for a bicycle, and one will be provided for a motorcycle, for every 5 boarding rooms.

One additional boarding room is now proposed requiring 0.2 additional motorcycle spaces and bringing the total requirement to 2.2 spaces (rounded up to 3). Whilst a motorcycle space could be provided on site, this is considered unwarranted in the circumstances leading to unnecessary disruption to the front yard, inability to provide bicycle parking and pedestrian safety concerns.

The questions contained in the DP&I's Guide are addressed below.

1. What is the name of the environmental planning instrument that applies to the land?

Sydney Local Environmental Plan 2012 (the LEP).

2. What is the zoning of the land?

The zoning of the land is R1 General Residential.

3. What are the objectives of the zone?

The objectives of the R1 zone are:

- *To provide for the housing needs of the communities.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or serves to meet the day to day needs of residents.*
- *To maintain the existing land use pattern predominantly residential uses.*

4. What is the development standard being varied?

The development standard being varied is the motorcycle parking development standard.



5. Under what Clause is the development standard listed in the environmental planning instrument?

The development standard is listed under Clause 30(1)(h) of State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH).

6. What are the objectives of the development standard?

Clause 30 of the SEPP ARH does not include any objectives. However, the aims of the SEPP are as follows:

- (a) *to provide a consistent planning regime for the provision of affordable rental housing,*
- (b) *to facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards,*
- (c) *to facilitate the retention and mitigate the loss of existing affordable rental housing,*
- (d) *to employ a balanced approach between obligations for retaining and mitigating the loss of existing affordable rental housing, and incentives for the development of new affordable rental housing,*
- (e) *to facilitate an expanded role for not-for-profit-providers of affordable rental housing,*
- (f) *to support local business centres by providing affordable rental housing for workers close to places of work,*
- (g) *to facilitate the development of housing for the homeless and other disadvantaged people who may require support services, including group homes and supportive accommodation.*

Additionally, Clause 30A of the SEPP ARH: “Character of local area” is relevant. This states:

A consent authority must not consent to development to which this Division applies unless it has taken into consideration whether the design of the development is compatible with the character of the local area.

7. What is the numeric value of the development standard in the environmental planning instrument?



The numeric value of the development standard is provide and additional 0.2 motorcycle space for the boarding house.

8. What is the proposed numeric value of the development standard in your development application?

It is proposed to provide no motorbike space as per the existing situation on the site.

9. What is the percentage variation (between your proposal and the environmental planning instrument)?

The percentage variation is (minus) 2%.

10. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

In order to assess whether strict compliance with the development standard is unreasonable or unnecessary in this particular case, the proposal is considered against the five ways of demonstrating that compliance with a development standard is unreasonable or unnecessary, as set out by Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

These five ways have recently been re-emphasised by Commission Morris in *Mecone Pty Limited v Waverley Council* [2015] NSWLEC 1312. It is noted that each 'test' offers a potential way of demonstrating that compliance is unnecessary or unreasonable in a particular circumstance. All tests are separate and not all tests may be applicable in each case. Therefore not all tests need to be met.

1. Compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case:

The provision of no motorcycle parking would result in a better environmental outcome in terms of streetscape impacts and is therefore relevant to apply the flexibility available under clause 4.6 to vary the standard.

It would be unreasonable and unnecessary to provide motor cycle parking as provision of such parking would be contrary to the zone objectives and would result in the development not being compatible with the character of the area. In this case, no motorcycle parking would better achieve the zone objectives and would be consistent with the underlying objectives of the development standard.



2. There are sufficient environmental planning grounds to justify contravening the development standard:

Whilst a motorcycle space could be provided within the front setback of the site, this is considered unwarranted in the circumstances leading to unnecessary disruption to the front yard and pedestrian access way. Provision of a motorcycle space in this location may be contrary to Clause 30A of the SEPP: “Character of local area”.

This would also result in the loss of bicycle parking within the front setback.

Parking (including motorcycle parking) is, furthermore, not considered appropriate or warranted in the circumstances of this case as:

- Motorbike parking to the front setback would raise pedestrian safety issues;
- The site is within an accessible area, being
 - Less than 800 metres walking distance of a train station
 - Less than 400 metres walking distance of several bus routes serving destinations
- There are cycle routes marked throughout the area
- The site is well serviced by Go Get car share pods
- The site is less than 400m walk from a major regional shopping centre

3. The applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3):

This has been provided above in Points 1 and 2 above and Point 4 below.

4. 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:

The proposal will comply with the objectives of the SEPP ARH, as the proposal will facilitate the retention of and improved delivery of affordable rental housing on this site, whilst protecting the character of the local area.

The proposal will comply with the objectives of the zone as:



- The proposal will enable provision of increased and improved affordable housing within this residential environment.
- The improved and extended boarding house would provide a greater variety of housing types within this residential environment.
- The proposal will maintain the existing land use pattern of predominately residential uses.

11. How would strict compliance hinder the attainment of the objects specified in Section 1.3 of the Act?

Compliance with the standard would hinder the attainment of the objects of section 1.3 of the Act, which are to encourage development that promotes the social and economic welfare of the community and a better environment, to promote and coordinate orderly and economic use and development of land and to promote the delivery and maintenance of affordable housing.

The proposal satisfies the zone and development standard objectives and therefore strict compliance with the standard is not required in order to achieve compliance with the objectives.

Strict compliance would result in an inflexible application of policy. It does not serve any purpose that should outweigh the positive outcomes of the development and therefore a better planning outcome overall.

The proposed development is consistent with the provisions of orderly and economic development of land, in that it proposes to improve the existing boarding house with a high level of design and amenity, in a manner, which meets the objectives of applicable controls. This improved residential accommodation over its economic life is consistent with the promotion and coordination of the orderly use and development of land.

12. Is the development standard a performance based control? Give Details.

The motorcycle parking development standard is a performance based control as the control contains objectives within the SEPP ARH to which compliance with the standard is targeted to achieve.

13. Would strict compliance with the standard, in your particular case, be unreasonable or unnecessary? Why?

As discussed above it is considered that strict compliance, in this particular case, would result in an inflexible application of policy given the capacity of the site to provide improved affordable residential accommodation in an appropriate location, whilst protecting streetscape character.



Strict compliance, in this particular case, does not serve any purpose that should outweigh the positive outcomes of the development with respect to affordable housing provision.

The proposed development is consistent with the provisions of orderly and economic development.

14. Are there sufficient environmental planning grounds to justify contravening the development standard? Give details:

In the circumstances of the case, the provision of strict numerical compliance would be unreasonable for the reasons advanced above.

The proposal can be achieved without motorcycle parking and without adverse impacts. The development as proposed fits contextually with the site and streetscape. In the circumstances of the case, there are sufficient planning grounds to justify contravening the development standard

The above is considered to represent sufficient environmental planning grounds to justify contravening the development standard and as such compliance with the development standard is unreasonable or unnecessary in the circumstances of this case. The resultant development will therefore be in the public interest.

When considered alongside the lack of adverse environmental impacts arising from the non-compliance, overall a variation to the control would result in a better outcome in accordance with Clause 4.6(b) of the LEP.

As such the proposal meets the assessment criteria set out in Clause 4.6(3) (a) and (b) and (4)(a)(ii).

Conclusion

Pursuant to clause 4.6(2), Council has the power to permit a variation to the building height standard provided that:

1. Council has considered a written request that demonstrates that:
 - 1.1. Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a));
 - 1.2. There are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)).

2. Council is satisfied that the written request has adequately addressed those matters (cl 4.6(4)(a)(i)).
3. Council is satisfied that the proposed development will be in the public interest because it is consistent with:
 - 3.1. The objectives of the standard in question; and
 - 3.2. The objectives of the zone (cl 4.6(4)(a)(ii)).
4. The Council may assume the required Director-General's concurrence (cl 4.6(4)(b)) provided that the Council has considered:
 - 4.1. whether contravention of the development standard raises any matter of significance for State or regional environmental planning, (cl 4.6(5)(a)) and
 - 4.2. the public benefit of maintaining the development standard, (cl 4.6(5)(b)) and
 - 4.3. any other matters required to be taken into consideration by the Director-General before granting concurrence. (cl 4.6(5)(c)).

All of the provisions of clause 4.6(2) have been satisfied as follows noting that this is a written request for the purposes of cl4.6(3):

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)):

The proposal is considered to be reasonable for the following reasons:

- Motorcycle parking in the front yard is unnecessary and undesirable in this location.
- The character of the local area would be better protected without motorcycle parking in the front yard.
- The provision of motorcycle parking in the front yard could pose a risk to pedestrians.
- The site is well serviced by public transport.

The proposed development achieves compliance with the relevant underlying objectives of the standard and the objectives of the zone.

There are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)):

This document has considered that there are more than sufficient environmental planning grounds to justify the variation on the basis that the

proposal is satisfactory in terms of visual amenity, streetscape character, pedestrian safety and parking provision.

Council is satisfied that the written request has adequately addressed those matters (cl 4.6(4)(a)(i)):

The written request adequately addresses the matters referred to above by Clause 4.6(3).

Council is satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard in question and the objectives of the zone (cl 4.6(4)(a)(ii)):

As demonstrated above, the proposed development will be in the public interest because it is consistent with the objectives of the zone and the standard.

Contravention of the development standard does not raise any matter of significance for State or regional environmental planning, (cl 4.6(5)(a)):

No matters of State or regional planning significance are raised by the proposed development.

There is not a public benefit in maintaining the development standard, (cl 4.6(5)(b)):

There would be no public benefit in maintaining the development standard in terms of visual amenity, streetscape character, pedestrian safety and parking provision.

Any other matters required to be taken into consideration by the Director-General before granting concurrence. (cl 4.6(5)(c)):

There are no applicable additional matters.

This written request is considered to adequately address the matters required by Clause 4.6 and demonstrates that compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case and that there are sufficient environmental planning grounds to justify contravening the development standard.