

Attachment C

**Clause 4.6 Variation Request – Motorcycle
Parking**



13 February 2020



Request to Vary the Motorcycle
Standard under Clause 4.6 of S.L.E.P.
2012 –

21 Kellett Street, Potts Point, a.k.a 15
Ward Avenue

(New Generation Boarding House)



Introduction

This statement supports a development application (DA) for a 5-6 storey “new generation” boarding house development application including 6 rooms, associated demolition of the existing building/garage and associated works at the site known as 21 Kellett Street, Potts Point. It should be read in conjunction with the Statement of Environmental Effects by Perica and Associates Urban Planning Pty Ltd to which it is attached, plans by DesignInc and the information submitted with the DA.

The proposal complies with all development standards in State Environmental Planning Policy (Affordable Rental Housing) 2009 (“the SEPP”), except for minimum motorcycle parking in Clause 30(1)(h) of the SEPP.

SEPP 1 (Development Standards) does not apply to land which Sydney Local Environmental Plan 2012 (SLEP 2012) applies. Therefore any variations to development standards must be via Clause 4.6 of SLEP 2012, which relevantly states:

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 Director-General has been obtained.
- (5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.
- (6) –(8)... [not relevant]

1. Identifying and quantifying the non-compliance

Clause 30(1)(h) of *State Environmental Planning Policy (Affordable Rental Housing) 2009* requires the provision of at least one parking space for a motorcycle for every 5 boarding rooms. This equates to a required provision of 1.6 motorcycle parking spaces. None are provided. Four (4) bicycle spaces are provided.

2. Objectives of Clause 4.6 of SLEP 2012

The objectives of Clause 4.6 of SLEP 2012 are:

- (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.

There was some legal debate about the requirement to specifically address these objectives. On one hand, the objectives are not explicitly required to be addressed or specifically considered (as typically occurs in zone objectives), and compliance with the objectives of the Clause could be read to arise when compliance with the operative provisions of the Clause are met, being the sub-clauses that follow the objectives. In other words, the objectives state what complying with the operative provisions would achieve. On the other hand, if this was the case then the objectives would have no work to do.

This matter was recently considered and determined in a judgement by the chief justice of the Land and Environment Court of NSW in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*. That case held that the objectives of Clause 4.6 do not need to be considered, and specifically should not be read to compel comparison with a complying development proposal.

Accordingly, compliance with the objectives of Clause 4.6 (of appropriate flexibility and better outcomes) can be assumed if the operative provisions and thresholds of Clause 4.6 are met. The objectives state what the operative clauses are designed to do.

3. Clause 4.6 (3)(a) and 3(b) of SLEP 2012

Clause 4.6(3) of SLEP 2012 states:

- (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*

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

The submission and consideration of Objections under State Environmental Planning Policy No. 1 ("SEPP 1 Objection") and the issue of compliance being "unreasonable or unnecessary" was well summarised in the Land and Environment Court judgement *Wehbe v Pittwater Council* [2007] NSWLEC 827 ("the Wehbe case"). While that judgement applied to SEPP 1 Objections and not Clause 4.6 Variation requests, the approach in that case has been accepted in subsequent court cases related to Clause 4.6 Variation Requests.

The onus lies upon the applicant to demonstrate this in a written request (being this submission) and that requiring compliance with the particular standard would be unnecessary or unreasonable. In this regard, the Wehbe case outlined 5 possible ways to demonstrate whether compliance would be unnecessary or unreasonable, by establishing:

- i. Compliance with the underlying objectives of the standard being breached, notwithstanding the numerical non-compliance; or
- ii. That the objectives of the standard are not relevant to the proposal; or
- iii. Requiring compliance with the development standard would "thwart" the achievement of the objectives of that standard; or
- iv. The development standard in question has been "virtually abandoned" by the Council; or
- v. The zoning of the land is not appropriate for the site and therefore the associated standards are not appropriate (with some qualifications).

This written request does not rely on a case related to pathways 2-5 above. However, it is noted that variations to parking controls (or no provision of parking) is common in the City of Sydney, and this is a relevant consideration.

This written request does argue compliance with underlying objectives of the standard in question are achieved, to the extent they are able to be adduced.

In terms of the objectives of the standard, unfortunately *State Environmental Planning Policy (Affordable Rental Housing) 2009* – “the SEPP” - does not provide specific planning objectives for the motorcycle development standard in question. There are no objectives within Clause 30 of the SEPP, nor objectives for Division 3 of the SEPP (dealing with Boarding Houses).

In this regard, it is considered appropriate to consider the overall aims of the SEPP. Clause 3 of the SEPP has the following aims:

- (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.*

The following responds to these aims and objectives:

- (a) This is not an operative objective. A consistent approach is not necessarily thwarted despite non-compliance with a standard. The SEPP provides a consistent regime, which may be varied as appropriate to achieve sound planning outcomes.
- (b) The proposal will achieve the delivery of new affordable and appropriate rental housing, suited to the particular site.
- (c) The objective relating to retaining existing affordable housing is not applicable to the proposal.
- (d) The proposal involves the development of new housing encouraged by the SEPP (a boarding house).
- (e) The proposed use is not one for which a community housing provider or not-for-profit organisation will be involved. This objective is not tailored for boarding house development.
- (f) This objective is achieved, by providing additional rental housing close to places of work (such in the adjoining B2 Local Centre zoning and along Darlinghurst Road, as encouraged by the Council's DCP). The site is located close to places of work.



- (g) The proposal does not cater for homeless or those requiring support services (such as may occur in group homes facilitated by the SEPP). Despite this, the objective is not thwarted by the proposal.

In summary, where objectives of the SEPP are relevant to the type of housing provided, the proposal is consistent with these objectives. Where the objectives are not relevant or tailored to the type of housing proposed (i.e. other housing facilitated by the SEPP), the proposal does not thwart or hinder the attainment of these objectives.

While not relevant to the motorcycle provision development standard in the SEPP, it is appropriate to consider the objectives relating to parking generally in the Council Local Environmental Plan, being *Sydney Local Environmental Plan 2012* ("SLEP 2012").

These parking objectives are outlined in Clause 7.1(1) of SLEP 2012, being:

- (a) *to identify the maximum number of car parking spaces that may be provided to service particular uses of land, and*
- (b) *to minimise the amount of vehicular traffic generated because of proposed development.*

The proposal is consistent with these objectives being below the maximum, and as the non-provision of motorcycle parking (together with Council's policy not to allow resident parking scheme access) means that vehicular traffic will be minimised and use of public transport and cycling encouraged.

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

The case *Four2Five v Ashfield Council [2015] NSWLEC 1009, NSWLEC 90, NSWCA 248* raises the issue that the grounds should relate to a site and specific proposal, rather than generic reasons.

The case *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* highlighted that:

1. The term "environmental planning grounds" is not defined and would include the objects of the EPA Act (Section 1.3);
2. The grounds must relate to the contravention of the development standard in question, not the whole development; and
3. The consent authority must indirectly be satisfied the applicant's written request provides sufficient environmental planning grounds, not directly form an opinion about there being sufficient environmental planning grounds to justify the contravention.

In this context, the following environmental planning grounds are given to justify the proposed contravention of the motorcycle parking standard, on this particular site and for this particular development:



- a) The site is small and on a corner location. The provision of motorcycle parking would entail a driveway crossing which is not appropriate for the site, would compromise pedestrian and vehicular safety and would compromise the ground level interface and integration with the public domain, which is discouraged by the Council;
- b) An alternative form of parking is provided, being bicycle parking. This is provided at a rate that is greater than both the combined motorcycle parking rate (1.2 spaces) and bicycle parking rate (1.2 spaces) within the same development standard in question. This is an appropriate form of travel for the building occupants, especially noting the inner city location of the site;
- c) The site has very good access to services, jobs and public transport, reducing the need for motorcycle parking, compared to sites further removed from such core assets;
- d) The site is located within the City of Sydney Local Government Area where the provision of parking rates are maxima and Council often approves development with less than the maximum parking being provided (or none at all) as an effective way of encouraging alternative forms of travel behaviour, such as public transport, cycling and walking. This is appropriate for the most urbanised LGA in the State and a high density area like Potts Point;
- e) In terms of the Objects of the EPA Act, the proposed non-provision of motorcycle parking is consistent with the following Objects of the Act:
 - i. *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations* – noting that encouraging use of walking, cycling and public transport, as opposed to motorcycles, will reduce emissions from such motorcycles, better health for users and greater likelihood to use local services and goods, supporting the local community.
 - ii. *to promote the orderly and economic use and development of land* – noting not providing a driveway crossing on this small corner site is rational and orderly.
 - iii. *to promote the delivery and maintenance of affordable housing* – noting the delivery of affordable housing is aided by not providing motorcycle parking, due to the limited site area (63sqm) and limited space within the ground floor, which would compromise other essential elements needed for the affordable housing provided.
 - iv. *to promote the sustainable management of built and cultural heritage* – noting a driveway and vehicular opening for motorcycle parking is likely to have adverse streetscape and public domain impacts, and diminish the qualities of the Heritage Conservation Area of which the site is part;
 - v. *to promote good design and amenity of the built environment* – for the same reasons in (iv) above; and

- vi. *to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants – as the emissions from motorcycle parking in a small enclosed space may compromise the health and safety of occupants.*

4. Clause 4.6(4) of SLEP 2012

Clause 4.6(4) of SLEP 2012 states:

- (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 Secretary has been obtained*

These are matters for the consent authority to be satisfied (as opposed to the applicant justifying as in Clause 4.6(3)). Despite this, further commentary is given to assist the consent authority in its deliberations.

Clause 4.6(4)(a)(i) has been addressed in the previous Section of this written request.

The objectives of the standard have also been addressed in the previous Section of this written request.

In terms of the zone objectives, the site is zoned Mixed Use B4 in SLEP 2012. Boarding houses are specifically permitted with development consent.

It is important to note that in terms of Clause 4.6(4)(a)(ii) the consistency with the objectives of the standard and zone relate to the whole development, not merely the contravention itself

The objectives of this zone are:

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*
- *To ensure uses support the viability of centres*

The proposal is consistent with these zone objectives, noting:

- The proposal provides an appropriate use for the site and a diversity of housing choice for the wider area, yet complementing the diverse nature of the area.

It was interesting to note in the HIS that in 1900 all of the housing in Kellett Street were boarding houses, except Nos. 1 and 19. The site and area has traditionally been associated with boarding house provision;

- The site is well-connected to public transport, jobs and services, to encourage use of public transport, walking and cycling (to a degree that is arguably the most suitable to achieve this objective, further enhanced by not providing on-site parking).

The non-provision of carparking helps to achieve this objective, as does the over-provision of bicycle parking.

The pedestrian environment is improved by activation of the ground floor (which is currently blank to Ward Avenue and subject to consistent dumping of rubbish – see below):



and

- The use and density on the site will support surrounding and wider centres, without providing any direct competing uses to those commercial and retail uses encouraged in centres.

The density complies with the FSR standard, while the height proposed also indirectly assists in the density to support centres, by allowing the provision of accommodation at the lower levels.

The proposal is entirely consistent with the zone objectives applying to the site.

Clause 4.6(4)(b) – Concurrence of the Secretary

Concurrence of the Secretary is not required.

4. Clause 4.6(5) of SLEP 2012

Clause 4.6(5) of SLEP 2012 states:

- (5) *In deciding whether to grant concurrence, the 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 Secretary before granting concurrence.*

In these regard, the City of Sydney is understood to have delegation from the Secretary for the Department of Planning and Environment to consider and decide upon Clause 4.6 Variation Requests.

In terms of Clause 4.6(5) (a)-(c), the following response is given;

- (a) No matter of significance for State or Regional environmental planning arises or is compromised by the non-compliance;
- (b) The integrity of the development standard will not be compromised by granting approval, noting the site-specific and proposal-specific considerations in this instance, which should not give rise to universal precedence elsewhere. In the circumstances of this application, there is no public benefit of marinating the development standard. To the contrary: for the environmental planning reasons outlined in this written request; and given the consistency with the objectives of the development standard (as adduced) and B4 zone, allowing the motorcycle parking contravention will provide a public benefit in this instance;
- (c) There are no other known required or nominated matters by the Secretary to be taken into account.

For all the reasons given in this written request, the proposal should be approved and is justified, notwithstanding the numerical non-compliance with the motorcycle standard in *State Environmental Planning Policy (Affordable Rental Housing) 2009*.



Jason Perica
Director