

Attachment B

**Clause 4.6 Variation Request – Motorcycle
Parking**

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General Manager
City of Sydney
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CLAUSE 4.6 VARIATION (MOTORCYCLE PARKING) IN RELATION TO THE CO-LIVING (BOARDING HOUSE) DEVELOPMENT AT 23 HUGHES STREET, POTTS POINT

1. INTRODUCTION

The following Clause 4.6 Variation request has been prepared on behalf of Australian Urban Projects Pty Ltd in support of the proposed variation to motorcycle parking requirements pursuant to Clause 30(1)(h) of State Environmental Planning Policy (Affordable Rental Housing) 2009 in relation to the proposed co-living (boarding house) development at 23 Hughes Street, Potts Point.

Clause 30(1)(h) of the ARH SEPP relates to provision of bicycle and motorcycle parking. The clause requires the provision of one bicycle and one motorcycle space per five boarding rooms.

The proposed twenty room boarding house development generates demand for five bicycle and five motorcycle spaces. The development provides six bicycle spaces and complies with the ARH SEPP in this regard, however no motorcycle spaces are provided, which contravenes the development standard.

The proposal seeks flexibility in the application of the motorcycle parking development standard to the development in the circumstance of this particular case as the subject site is exceptionally well serviced by public and active transport networks.

The site is located within the Potts Point Heritage Conservation Area and, in order to retain as much existing building fabric as possible, motorcycle parking cannot be provided on the site.

The proposal provides much needed affordable housing near the Sydney CBD and utilising the site efficiently for accommodation is considered more desirable than motorcycle spaces.

It is noted that no car spaces are required as Council is trying to reduce vehicle dependency.

This Clause 4.6 Exception to Development Standards has been prepared in accordance with the most recent case law and in our opinion, the variation achieves the objectives of the zone, the Council parking requirements and the Affordable Housing SEPP provisions, and has demonstrated there are sufficient environmental planning grounds.

This written request justifies the contravention of the development standard by demonstrating that compliance is unreasonable or unnecessary in these circumstances; and there are sufficient environmental planning grounds to justify the non-compliance.

2. CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

Clause 4.6 Exceptions to Development Standards of the SLEP 2012 provides a mechanism by which a development standard can be varied.

The objectives of Clause 4.6 seek to provide appropriate flexibility to the application of development standards in order to achieve better planning outcomes both for the development and from the development.

In the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] 236 LGERA 256 (Initial Action), Preston CJ notes at [87] and [90]:

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...In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.

The objectives of this clause as outlined in Clause 4.6(1) 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.

Clause 4.6(2) provides 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.

The NSW Land and Environment Court decisions of *Wehbe v Pittwater Council* (2007) LGERA 446; and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 provide assistance on the approach to justifying a contravention to a development standard.

3. CLAUSE 4.6(3)(A): UNREASONABLE OR UNNECESSARY

The case of *Wehbe* provides examples of how a variation to a development standard can be shown to be unreasonable or unnecessary (as required by clause 4.6(3)(a)). In *Wehbe v Pittwater Council* (2007) 156 LGERA 446 (*Wehbe*), Preston CJ established five potential tests for determining whether a development standard could be considered unreasonable or unnecessary. This is further detailed in *Initial Action* where Preston CJ states at [22]:

These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

Although this case related to a variation of development standards under SEPP 1, it has been adopted as being of continuing relevance to variations under clause 4.6.

The examples provided in *Wehbe* are:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary

3. The underlying object or purpose of the standard would be defeated or thwarted if compliance was required and therefore compliance is unreasonable
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

3.1 The Objectives of the Standard are Achieved Notwithstanding Non-compliance with the Standard

The standard the applicant seeks to vary is Clause 30(1)(h) in State Environmental Planning Policy (Affordable Rental Housing) 2009.

Clause 30 Standards for boarding houses states:

30 Standards for boarding houses

- (1) A consent authority must not consent to development to which this Division applies unless it is satisfied of each of the following—
 - (a) if a boarding house has 5 or more boarding rooms, at least one communal living room will be provided,
 - (b) no boarding room will have a gross floor area (excluding any area used for the purposes of private kitchen or bathroom facilities) of more than 25 square metres,
 - (c) no boarding room will be occupied by more than 2 adult lodgers,
 - (d) adequate bathroom and kitchen facilities will be available within the boarding house for the use of each lodger,
 - (e) if the boarding house has capacity to accommodate 20 or more lodgers, a boarding room or on site dwelling will be provided for a boarding house manager,
 - (f) (Repealed)
 - (g) if the boarding house is on land zoned primarily for commercial purposes, no part of the ground floor of the boarding house that fronts a street will be used for residential purposes unless another environmental planning instrument permits such a use,
 - (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.
- (2) Subclause (1) does not apply to development for the purposes of minor alterations or additions to an existing boarding house.

The Affordable Housing SEPP does not contain specific objectives relating to the provision of motorcycle parking. The aims of the Affordable Housing SEPP are also not considered to be directly relevant to the provision of motorcycle parking.

The aims of the policy pertain to the provision, delivery and retention of affordable housing. The proposal will contribute to meeting the high demand for affordable housing in the area by providing 20 new boarding house rooms.

While the Affordable Housing SEPP does not contain specific aims or objectives relating to motorcycle parking, the SEPP is geared toward reducing reliance on cars, and encouraging use of bicycles, motorbikes and public transport.

The proposal includes bicycle parking in excess of the SEPP requirement.

It is considered that the site is located in an 'accessible area' for the purposes of the ARH SEPP, being less than 400m from a bus stop. The nearest bus stop is located less than 100m away on Macleay Street and the nearest train station, Kings Cross Train Station, being located less than 500m away.

Furthermore, the site is within walking distance of a variety of shops, restaurants, educational institutions and residential support services.

Accordingly, the site is in an ideal location for student accommodation and will enhance the efficiency of existing transport infrastructure and services.

On the basis of the site's connectivity to public transport, and the provisions for bicycle parking, residents of the proposed boarding house will have adequate transport options available.

3.2 The Underlying Objective or Purpose would be Defeated or Thwarted if Compliance was Required and Therefore Compliance is Unreasonable

While the Affordable Housing SEPP does not contain specific aims or objectives relating to motorcycle parking, the SEPP is geared toward reducing reliance on cars, and encouraging use of bicycles, motorbikes and public transport, ultimately providing affordable housing options in accessible location.

Enforcing strict compliance would require substantial demolition of the original heritage significant building and an extensive redesign of the existing building.

The financial burden of undertaking these works would make the provision of a boarding house unviable and thwart the underlying objective of providing affordable accommodation.

In addition, the design parameters are constrained by the existing building, requiring substantial demolition. This would be inconsistent with the objectives of the Potts Point Heritage Conservation Area and the current attempt to retain as much of the existing built form as possible.

The Sydney LEP 2012 also provides maximum rather than minimum car parking provisions, with the underlying objective of reducing car dependency and encouraging the use of public transport. The subject site is ideally located near existing public transport networks and provides compliant bicycle spaces. Providing motorcycle spaces when car spaces are discouraged would thwart the underlying objective of encouraging public and active transport.

3.3 Consistency with the Zone Objectives

The proposed building form is consistent with the objectives of the R1 General Density Residential zone, as follows:

- To provide for the housing needs of the community.

The proposed boarding house development will provide more affordable housing options in the Potts Point locality and provide for the high housing needs of the community in a highly sought after area in close proximity to a number of services, public transport options and the Sydney CBD.

- To provide for a variety of housing types and densities.

The proposal will add to the variety of housing types in the area and will be below the maximum permissible FSR and height for the site. The proposal will provide a type of transition from the higher density residential flat building further up Hughes Street to the terrace style housing further down Hughes Street.

- To enable other land uses that provide facilities or services to meet the day to day needs of residents.

Not applicable.

- To maintain the existing land use pattern of predominantly residential uses.

The proposal will not alter the existing land use pattern and will add to the type of and nature of residential uses in the area.

4. 4.6(3)(B): SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY THE CONTRAVENTION

There are a number of environmental planning grounds that justify not providing motorcycle parking on the site in this instance.

As previously outlined, the proposal is consistent with the objectives of the Affordable Housing SEPP, which is the provision and retention of affordable rental housing.

The site is also within an area that is highly connected by public transport and is within close proximity to a range of businesses.

The proposal complies with the bicycle parking requirements and will encourage active and public transport usage.

In addition, the site is located within the Potts Point Heritage Conservation Area and the proposal seeks to retain as much of the existing building fabric as possible. Any attempt to provide motorcycle parking would require the demolition of parts of the original building, contrary to the heritage conservation provisions.

The objects identified correlate to Objects 1.3(c) and (d) in the current EPA Act which state:

(c) to promote the orderly and economic use and development of land,

(d) to promote the delivery and maintenance of affordable housing,

The shortfall does not result in significant adverse impacts on adjoining development or the locality in general

Overall, it is considered that the non-compliance will not be inconsistent with existing and desired future planning objectives for the locality. For the reasons contained in this application, there are sufficient environmental planning grounds to justify the minor variation to the development standard, as required in Clause 4.6(3)(b).

5. 4.6(4)(A)(II): THE PUBLIC INTEREST

Clause 4.6(4)(a)(ii) requires that consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied 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”.

The proposed development is consistent with the objectives of the Affordable Housing SEPP development standard, and the objectives of the zone, for the reasons discussed above.

6. 4.6(1): OBJECTIVES OF CLAUSE 4.6

The proposed variation to the motorcycle parking standard, for the reasons explained above, is clearly consistent with the objectives of clause 4.6, which 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.

7. SECRETARY’S CONCURRENCE

Clause 4.6(4)(b) of the SLEP 2012 requires the concurrence of the Secretary (of the Department of Planning, Industry and Environment) before the consent authority can exercise the power to grant development consent for development that contravenes a development standard.

Under Clause 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary’s concurrence for exceptions to development standards in respect of applications made under Clause 4.6, subject to the conditions in the table in the notice. Since the conditions in the table do not apply in this case, the concurrence of the Secretary can be assumed.

Nevertheless, the matters in Clause 4.6(5) should still be considered when exercising the power to grant development consent for development that contravenes a development standard (*Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at [100] and *Wehbe* at [41]). In deciding whether to grant concurrence, the Secretary is required to consider the following:

- 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.

The proposal is not considered to raise any matter of significance for State or regional environmental planning.

The motorcycle parking non-compliance will facilitate an enhanced design and encourage the use of public and active transport, without adversely impacting neighbouring properties.

The public benefit of maintaining the development standard is not considered significant given that, regardless of the non-compliance, the proposal will be well serviced by existing public and active transport networks.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted. The non-compliance contributes to a quality development which is consistent with the desired character of the precinct and is, in our opinion, in the public interest.

There are no other relevant matters required to be taken into account by the Secretary.

8. CONCLUSION

This written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard.

We are of the opinion that the consent authority should be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the Affordable Housing SEPP and the development objectives of the R1 General Residential zone pursuant to the SLEP 2012.

On that basis, the request to vary Clause 30(1)(h) of the Affordable SEPP should be upheld.

Should you have any queries or require clarification on any matters please do not hesitate to contact me on 0414402203.

Yours sincerely,



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