

Attachment C

**Clause 4.6 Variation Request – Motorcycle
Parking**

**SEPP (AFFORDABLE
RENTAL HOUSING) 2009
Clause 4.6 Exceptions to
Development Standards –
Motorcycle Parking**

Proposed nine room boarding house development at

**Nos. 397-399 Harris
Street, Ultimo**

Prepared for:

Edsring Property Maintenance Pty Ltd
Suite 232, 1 Katherine Street
Chatswood NSW 2067

Prepared by:

GSA PLANNING

Urban Design, Environmental & Traffic Planners
(A.B.N 18 003 667 963)

95 Paddington Street, Paddington NSW 2021

p: 02 9362 3364

e: info@gsaplanning.com.au

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**STATE ENVIRONMENTAL PLANNING POLICY (AFFORDABLE RENTAL HOUSING) 2009
CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS**

APPLICANT'S NAME: Edsring Property Maintenance Pty Ltd

SITE ADDRESS: Nos. 397-399 Harris Street, Ultimo

PROPOSAL: Nine room boarding house development

1. (i) Name of the applicable planning instrument which specifies the development standard:

State Environmental Planning Policy (Affordable Rental Housing) 2009 ('ARH SEPP')

(ii) The land is zoned:

B4 Mixed Use under the Sydney Local Environmental Plan (LEP) 2012

(iii) The number of the relevant clause therein:

Clause 30(1)(h) is stated as follows:

(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.

This Clause 4.6 Exception to Development Standards should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by GSA Planning

2. Overview

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 and the ARH SEPP, and has demonstrated there are sufficient environmental planning grounds

3. Specify the nature of Development Standard sought to be varied and details of variation:

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 nine room boarding house development generates demand for two bicycle and two motorcycle spaces.

The development provides two bicycle spaces and complies with the ARH SEPP in this regard, however no motorcycle spaces, which contravenes the development standard.

4. Applicability of Clause 4.6

Clause 4.6(2) of the LEP states that it is applicable to a development standard "imposed by this or any other environmental planning instrument". The ARH SEPP is an environmental planning instrument and therefore Clause 30(1)(h) is a development standard which can be varied pursuant to Clause 4.6 of the LEP.

5. Consistency with Objectives of Clause 4.6

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.

However, it is still useful to provide a preliminary assessment against the objectives of the Clause. The objectives of Clause 4.6 and our planning response are as follows:

- Objective (a)* *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- Objective (b)* *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

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 Ultimo Heritage Conservation Area (HCA) 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. The proposal provides compliant bicycle parking spaces.

6. Justification of Variation to Development Standard

Clause 4.6(3) outlines that a written request must be made seeking to vary a development standard and that specific matters are to be considered. The Clause states, inter alia:

- (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.*

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. These matters are discussed in the following sections.

6.1 Compliance with the Development Standard is Unreasonable and Unnecessary in the Circumstances of the Case

Clause 4.6(3)(a) requires the applicant to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. 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.

It is our opinion that the proposal satisfies a number of the five tests established in *Wehbe* and for that reason, the development standard is unreasonable and unnecessary in this instance. The relevant tests will be considered below.

Test 1 - The objectives of the standard are achieved notwithstanding non-compliance with the standard;

The ARH SEPP does not contain specific objectives relating to the provision of motorcycle parking. The aims of the ARH SEPP are also not, in our opinion, 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 9 boarding house rooms catering for 12 lodgers.

While the ARH SEPP does not contain specific aims/objectives pertaining 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, which complies with the ARH SEPP, and in our opinion satisfies the demand. 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 directly across the road on Harris Street and services route No. 501 providing regular access to Central Station. This provides access to the wider Sydney train network. It is also noted that the likely demographic should be comfortable utilising these public transport links.

Furthermore, the site is within walking distance of a variety of shops, restaurants, educational institutions and residential support services. This includes a variety of commercial and retail services along Harris Street. 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.

Test 3 - The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

While there are no objectives for the motorcycle parking development standard, in our opinion, the underlying purpose of the ARH SEPP generally, and the standard specifically, is to provide affordable house in accessible locations.

Enforcing strict compliance would require a substantial 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. In order to provide motorcycle parking which does not require access through the pedestrian accessway, a substantial

redesign would be necessary. This would be inconsistent with the objectives of the Ultimo Heritage Conservation Area and the current attempt to retain as much of the existing built form as possible.

The Sydney Development Control Plan (DCP) 2012 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.

6.2 There are Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

There are several environmental planning grounds that justify not providing motorcycle parking in this instance. As discussed, the proposal is consistent with the primary objective of the ARH SEPP which is the provision and retention of affordable rental housing. The subject site is also within an area that is highly connected by public transport and is within close proximity to a range of businesses that provide support services to residential development. The proposal complies with the bicycle parking requirements and will encourage active and public transport usage. Further environmental planning grounds include an improved design outcome and maintaining amenity for neighbours. These will now be discussed.

The site constraints prevent the provision of additional street access. These constraints include the proximity to the intersection, the speed of traffic along Harris Street and the change in levels along Fig Street. As additional street openings are not possible, any motorcycle parking would need to utilise the same access corridor as will be used by lodgers, which could have adverse safety and amenity implications. Accordingly, to enforce motorcycle parking would compromise access throughout the development, and would be inconsistent with Object (g) of the EPA Act which is promote good design and amenity of the built environment. As the development is located within a Heritage Conservation Area (HCA) and the proposal seeks to retain as much of the existing building fabric as possible, there are less opportunities for a redesign to accommodate motorcycle parking.

Council has granted numerous consents for boarding house developments without motorcycle parking, especially in well-connected localities. In particular, Council has approved a previous 12-room boarding house development on the subject site without a motorcycle space (D/2013/1634). The eight room boarding house development operating next door at Nos. 401-403 Harris Street (D/2011/1055) also does not provide any motorcycle parking. This was addressed in the Council Officer's Report as follows:

The lack of provision for motorcycle parking is acceptable given the small scale nature of this boarding house.

The proposal is for only one more room and one more lodger than the operational boarding house next door. Accordingly, this assessment remains valid.

It is our opinion that the shortfall in motorcycle spaces is the result of improving operational provisions of the site within a limited area, including accessibility and waste management and improving amenity on the site. Providing motorcycle parking under the ARH SEPP would impact on the provision of amenity/operational components of the development. In any event, on-street parking is available in the direct vicinity of the site.

The Council Officer's Report for the approved boarding house development on the site (D/2013/1634) also indicated that, despite a shortfall in motorcycle parking, the boarding house use was consistent with other objects of the EPA Act as follows:

Parking is not a requirement of Council instead it promotes and engages with more sustainable transit, including walking. The SEPP 1 objection [for motorbike parking] is approved on the basis that it is consistent with the aims of the policy set out in Clause 3 and it is unreasonable given there is no parallel Council requirement and that the application is consistent with Objects 5(i) and 5(ii) of the Environmental Planning and Assessment Act 1979.

This assessment remains valid as the proposal is for the same use and also retains as much of the existing building as possible. 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. In fact, a reduction in vehicular noise down a driveway (or pedestrian walkway) in close proximity to residential developments is desirable in respect of aural privacy.

Accordingly, in our opinion, 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).

7. Clause 4.6(4)(a) Requirements

Clause 4.6(4)(a) guides the consent authority's consideration of this Clause 4.6 variation request. It provides that:

- (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*

The applicant submits that the consent authority can be satisfied of each of the requirements of Clause 4.6(4)(a), for all the reasons set out in this request, and having regard to the site and locality.

In our opinion, the proposal is consistent with the underlying objective of the ARH SEPP (in lieu of any specific development standard objectives), as already demonstrated; and the B4 Mixed Use Zone, as discussed below:

Objective: *To provide a mixture of compatible land uses.*

Response: The proposal contributes to the mixture of land uses within the mixed use zone. The proposal adjoins another boarding house and is therefore a compatible use. Other uses in the mixed use zone include retail, business and residential. The land use can be provided, notwithstanding the shortfall in motorcycle spaces.

Objective: *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.*

Response: The subject site is ideally located for a boarding house use, being within walking distance of a number of shops, educational institutions, restaurants and services.

There is a bus stop across the road providing access to Central Station and the wider Sydney Train network. The proposal will also provide compliant bicycle parking which will encourage active transport, with designated cycle paths in the vicinity. The subject site complies with the accessibility provisions of the ARH SEPP. The absence of motorcycle parking is only likely to further encourage use of more sustainable modes of transport.

Objective: *To ensure uses support the viability of centres.*

Response: The proposal will revitalise the subject site and provide accommodation for up to 12 lodgers. This is likely to bring a social and economic benefit to the area, contributing to the ongoing viability of the mixed use area. The shortfall in motorcycle spaces will not affect the viable of centres.

From this, we consider the proposal is in the public interest and should be supported.

8. Clauses 4.6(4)(b) and 4.6(5) Requirements

Clause 4.6(4)(b) of the LEP 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.

9. 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. This is summarised in the compliance matrix prepared in light of *Initial Action* (see Table 1 on the following page).

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 ARH SEPP and the development objectives of the B4 Mixed Use Zone pursuant to the LEP. On that basis, the request to vary Clause 30(1)(h) of the ARH SEPP should be upheld.

Table 1: Compliance Matrix

| Para (Initial Action) | Requirement | Section of this Report | Summary | Satisfied |
|-----------------------------|--|------------------------------|---|-----------|
| 10 | Is it a development standard (s.1.4) | 1 | Yes | |
| 11 | What is the development standard | 1 | Clause 30(1)(h) of the ARH SEPP | |
| 12 | What is the control | 1 & 2 | One bicycle and motorcycle space per five boarding rooms | |
| 14 | First Precondition to Enlivening the Power – Consent authority must form 2 positive opinions: | | Both positive opinions can be formed as detailed below. | YES |
| 15, 25 | 1st Positive Opinion – That the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by Clause 4.6(3). There are two aspects of that requirement. | 6 | The Clause 4.6 variation has adequately addressed both matters in Clause 4.6(3) by providing a detailed justification in light of the relevant tests and planning considerations. | YES |
| 16-22 | First Aspect is Clause 4.6(3)(a) - That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. Common ways are as set out in <i>Wehbe</i> . | 6.1 | The proposal satisfies Tests 1 and 3 of <i>Wehbe</i> : <ul style="list-style-type: none"> The objectives of the standard are achieved notwithstanding the non-compliance with the standard; The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable; | YES |
| 23-24 | Second Aspect is Clause 4.6(3)(b) – The written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under Clause 4.6(4)(a)(i) that the written request has adequately addressed this matter. The environmental planning grounds must be "sufficient" in two respects: <ol style="list-style-type: none"> The environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole. | 6.2 | Sufficient environmental planning grounds include, inter alia: <ul style="list-style-type: none"> The proposal remains consistent with the underlying aims and objectives of the ARH SEPP; The subject site is well located near public and active transport networks; The proposal complies with the bicycle parking provisions; The site is located within an HCA, making large scale works to the existing building undesirable; The small scale of the proposed operation; The proposal provides an improved design, amenity and safety outcome for lodgers; and The shortfall in motorcycle parking will not result in amenity impacts for neighbouring developments. | YES |
| 26-27 | 2nd Positive Opinion – That the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. | 7 | There are no objectives for the motorcycle parking development standard. The proposal is also consistent with the objectives of the B4 Mixed Use Zone. | YES |

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|-------|---|---|--|-----|
| 28-29 | Second Precondition to Enlivening the Power – That the concurrence of the Secretary has been obtained [Clause 4.6(4)(b)]. On appeal, the Court has the power to grant development consent, subject to being satisfied of the relevant matters under Clause 4.6. | 8 | As the relevant matters for consideration under Clause 4.6 have been satisfied as outlined above, the Council can grant development consent. | YES |
|-------|---|---|--|-----|

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