

Attachment D

Clause 4.6 Variation - Motorcycle Parking

20 January 2021

Clause 4.6 Variation to Development Standard

Property Description:	39-41 Sophia Street, Surry Hills
Development:	Mixed-use development – Retail premises & Boarding House
Development Standard:	Motorcycle Parking Spaces

Introduction

This is a clause 4.6 variation to support the development application for a 4 storey mixed-use development – retail premises & boarding house. This clause 4.6 seeks a variation to the motor cycle parking spaces development standard contained in clause 30(1)(h) of *State Environmental Planning Policy (Affordable Rental Housing) 2009*. (SEPP – ARH).

Clause 30(1)(h) of SEPP – ARH states:

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

The development proposal contains 10 boarding rooms and to meet clause 30(1)(h) 2 motorcycle parking spaces are required.

The application to vary the development standard – floor space ratio incorporates the relevant principles in the following judgements:

1. ***Winten Property Group Limited v North Sydney Council*** (2001) 130 LGERA 79;
2. ***Wehbe v Pittwater Council*** (2007) 156 LGERA 446 (“**Wehbe**”);
3. ***Four2Five Pty Ltd v Ashfield Council*** [2015] NSWLEC 1009; and
4. ***Initial Action Pty Ltd v Woollahra Municipal Council*** [2018] NSWLEC 118.

The recent judgement by Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 clarified the correct approach to Clause 4.6 variation requests, including that:

“The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better

environmental planning outcome than a development that complies with the development standard.” [88]

Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court.

Matters required to be demonstrated under clause 4.6(3) of the LEP

Compliance with the development standard is unreasonable or unnecessary in this particular case

Pursuant to clause 4.6(3)(a) of the LEP, the variation to the motorcycle parking control is acceptable in the circumstances of this case and compliance with the control is considered unreasonable and unnecessary because the proposed mixed-use development is consistent with the aims of SEPP – ARH 2009, notwithstanding the variation to the control at clause 30(1)(h).

• **Aims of SEPP – ARH 2009**

The aims of this Policy 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.*

The proposed development meets the aims of SEPP – ARH 2009 (notwithstanding non-compliance with the standard) based on the following assessment:

3(a) – The boarding house development contributes to the provision of affordable rental housing.

3(b) – The development application contributes to the delivery of affordable housing with the application of an FSR bonus pursuant to clause 29(1)(C) of SEPP – ARH.

3(c) – The development proposal does not result in a loss of existing affordable rental housing.

3(d) – As addressed above the development proposal does not result in the loss of existing affordable housing and contributes to the provision of new affordable rental housing.

3(e) – Not applicable.

3(f) – The proposed boarding house contributes to the provision of housing choice and housing affordability within the B4 – Mixed Use zone that is within the catchment of existing services and public transport.

3(g) – Not applicable.

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

Pain J held in *Four2Five vs Ashfield Council* [2015] NSWLEC 90 that to satisfy clause 4.6(3)(b), a clause 4.6 variation must do more than demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate that there are other environmental planning grounds that justify contravening the development standard, preferably being grounds that are specific to the site.

Pursuant to clause 4.6(3)(b) of the LEP, there are sufficient environmental planning grounds to justify the variation to the motorcycle parking control because:

- The site is well serviced by public transport being 450m walking distance from Central Railway Station and the Light Rail, and bus services operating on Elizabeth Street. The development promotes the use of public transport.
- The development proposal promotes the use of bicycles with the provision of 3 on-site bicycle spaces in accordance with clause 30(1)(h) of SEPP – ARH 2009.
- The ground floor of the development, without the allocation of motorcycle parking, can be designed without an active street frontage to Kippax Street and Sophia Street, with a residential entry from Sophia Street.
- The proposed development meets the relevant objects of the Environmental Planning and Assessment Act, 1979 as follows:
 - 1.3(c) – the proposal is an orderly and economic use of the site with a contemporary built form that is compatibility with the desired future character of the locality,
 - 1.3(d) – the proposed mixed-use development includes a 10 x room boarding house development which contributes to the provision of affordable rental housing within close proximity to employment and services,
 - 1.3(f) – the proposal has been designed in a contemporary form that is consistent with surrounding development and will not have a significant

- adverse impact upon the nearby heritage items and heritage conservation area,
 - 1.3(g) – the proposed mixed-use development presents a suitable design outcome for the subject site being a 4 storey form that sits comfortably within the streetscape,
 - 1.3(g) – the proposed boarding rooms have been designed to achieve good residential amenity including natural light and ventilation.
- The proposed development meets the relevant aims of the *Sydney LEP 2012* as follows:
 - 2(e) – the proposed mixed-use development includes a 10 x room boarding house development which contributes to the provision of affordable rental housing within close proximity to employment and services,
 - 2(g) – the proposed mixed-use development is located within close proximity to transport services and promotes active transportation including cycling and walking.

Clause 4.6 (4)(a)(i) – The consent authority is satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3)

As demonstrated above, the proposed development has satisfied the matters required to be demonstrated in Clause 4.6(3) by providing a written request that demonstrates:

1. Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, by establishing that the objectives of the development standard are achieved notwithstanding the non-compliance.
2. The environmental planning grounds relied on are sufficient to justify the development standard.

In accordance with the findings of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the Consent Authority under Clause 4.6(4)(a)(i) must only be satisfied that the request addresses Clause 4.6(3). Under Clause 4.6(4)(a)(i) the Consent Authority is not to determine in their opinion whether the request satisfies the requirements of Clause 4.6(3)(a) and (b), just that the request has been made and that these items have demonstrated.

The relevant items in Clause 4.6(3) have been demonstrated above.

The proposed development is in the public interest

In relation to clause 4.6(4)(a)(ii) of the LEP, the proposed mixed-use development is in the public interest because it is consistent with the for development in the B4 Mixed Use zone in accordance with the planning assessment provided as follows:

Objective	Consistency
<i>To provide a mixture of compatible land uses.</i>	The proposal includes a retail premises providing for a compatible retail component within the development that is compatible with the boarding house proposed above.
<i>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.</i>	The proposal integrates retail and residential land uses and is located within close proximity to public transport being 450m walking distance from Central Railway Station, encouraging active transport.
<i>To ensure uses support the viability of centres.</i>	The proposal will contribute to the viability of the Surry Hills Central locality.

The request for a degree of flexibility in numeric compliance with the motorcycle parking control is acceptable for the proposed boarding house development on the subject site that is within the catchment of public transport and existing services/facilities.

For these reasons, the proposal and the variation does not undermine the integrity of the motorcycle parking development standard and aims of SEPP – ARH 2009, as well as the zoning objectives which have been adopted by Council as being in the public interest.

The concurrence of the Secretary

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.

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 likely to raise any matter of significance for State or regional environmental planning. As addressed above the non-compliance with the motor cycle standard is considered to be in the public interest because the proposed development is consistent with the aims of SEPP – ARH 2009 and the objectives of the B4 – Mixed Use zone.

The public benefit of maintaining the development standard is not considered significant because the site is within the catchment of public transport ensuring the proposal will not result in unreasonable demand on public transport without motorcycle parking.

Accordingly, the proposal is consistent with the matters required to be taken into consideration before concurrence can be granted under clause 4.6(5) of the LEP. The exceedance of the standard will not result in adverse amenity impacts and is in the public interest.

Conclusion

The development proposal has a variation to the motorcycle parking control contained in Clause 30(1)(h) of SEPP – ARH and the variation to the motor cycle parking is acceptable noting the site is within the catchment of public transport and services reducing demand for motorcycles.

The variation to the motorcycle parking does not attempt to affect the planning outcome for the broader locality; rather the location of the site encourages the uses of public transport and walking to facilities and services.

In my opinion, the application to vary the motorcycle parking control is well founded and as addressed the development meets the aims of SEPP – ARH 2009 and achieves an acceptable outcome for the subject site that is in the public interest. In accordance with the environmental planning grounds addressed in this clause 4.6 variation, the motorcycle parking can be supported.

Chapman Planning Pty Ltd