

Attachment C

**Clause 4.6 Variation Request – Motorcycle
Parking**



7 Franklyn Street & 49-51 Greek Street, Glebe—

Clause 4.6 Variation Statement – July 2021



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INTRODUCTION

Overview

This Clause 4.6 Variation request has been prepared pursuant to Clause 4.6 of Sydney Local Environmental Plan 2012 (**SLEP 2012**) in support of the development application for the new boarding house accommodation at 7 Franklyn Street & 49-51 Greek Street, Glebe (**the site**).

This Clause 4.6 Variation has been submitted in conjunction with the Statement of Environmental Effects (SEE) that assessed the proposed works as described above. The request for variation of the development standard has been prepared in accordance with the requirements of Clause 4.6 of the Sydney LEP 2012 (SLEP 2012) which has the following aims and objectives:

- 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.*

The proposed variations to development standards for the proposed development are in relation to Clause 30(1)(h), the 'minimum motorcycle parking' of the State Environmental Planning Policy (Affordable Rental Housing) 2009

In summary the following variations are proposed:

State Environmental Planning Policy (Affordable Rental Housing) 2009	SEPP Development Standard	Proposed Development Non-Compliance
Clause 30 (1)(h)	Minimum 16 motorcycle spaces	Shortfall of 13 motorcycle spaces

In accordance with Clause 4.6 of the SLEP 2012 Council is required to consider the following:

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 Clause 4.6 Variation request has been prepared in accordance with the aims and objectives contained within Clause 4.6 and the relevant development standards.

This variation request demonstrates that:

- The variation to the development standard is in the public interest because it is consistent with the objectives for the zone and the development standard itself.



- Compliance with the minimum provision of motorcycle parking spaces development standard of the SEPP is unreasonable or unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.

RELEVANT ASSESSMENT FRAMEWORK

This section of the report outlines the environmental planning instruments relevant to the proposed development, including the aims and objectives, of the minimum provision of motorcycle parking spaces control and the assessment framework for seeking a variation to a development standard.

Some relevant planning principles and judgements issued by the Land and Environment Court regarding the assessment of developments seeking exceptions to development standards are also provided.

Sydney Local Environmental Plan 2012

Clause 4.6 of SLEP 2012 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of Clause 4.6 are listed within the LEP as:

(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.

Clause 4.6 provides flexibility in the application of planning provisions by allowing the Consent Authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would satisfy the requirements of clause 4.6.

In determining whether to grant consent for development that contravenes a development standard, Clause 4.6 requires that the Consent Authority consider a written request from the applicant, which demonstrates that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
- There are sufficient environmental planning grounds to justify contravening the development standard.

Furthermore, the Consent Authority must be 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, and the concurrence of the Secretary has been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary consider:

1. Whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
2. The public benefit of maintaining the development standard, and
3. Any other matters required to be taken into consideration by the Secretary before granting concurrence.

[Note: Concurrence is to be assumed as per the applicable planning circular, discussed further below.]

This document forms a Clause 4.6 written request to justify the contravention of the minimum provision of motorcycle parking spaces standard under the SEPP. Also forming part of this request are the architectural drawings that have been submitted in connection with the amended development application. The assessment of the proposed variation has been undertaken in accordance with the requirements of the SLEP 2012, Clause 4.6 Exceptions to Development Standards.

NSW Land and Environment Court: Case Law (Tests)

The following sections of the report provide an assessment of the request to vary the development standards relating to the minimum provision of motorcycle parking spaces in accordance with Clause 4.6 of SLEP 2012. Consideration has been given to the following matters within this assessment:

- *Varying development standards: A Guide*, prepared by the Department of Planning and Infrastructure dated August 2011.
- Relevant planning principles and judgements issued by the Land and Environment Court. The *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 court judgement is the most relevant of recent case law. Justice Preston confirmed (in this judgement):
 - The consent authority must, primarily, be satisfied the applicant's written request adequately addresses the 'unreasonable and unnecessary' and 'sufficient environmental planning grounds' tests:

"that the applicant's written request ... has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ... and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard ..." [15]

- On the grounds for a finding that the strict application of a standard is 'unreasonable or unnecessary' established under *Wehbe v Pittwater Council* [2007] NSWLEC 827:

"The 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 of the ways. It may be sufficient to establish only one way..." [22]

- That, in establishing 'sufficient environmental planning grounds', the focus must be on the contravention and not the development as a whole:

"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" [26]

- That 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:

"Clause 4.6 does not directly or indirectly establish this test. 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 will have a better environmental planning outcome than a development that complies with the development standard." [88]

This clause 4.6 variation has specifically responded to the matters outlined above and demonstrates that the request meets the relevant tests with regard to recent case law.

THE EXTENT OF VARIATION

Relevant Development Standards

The development standards being requested to be varied are Clause 30 (1) (h) of the State Environmental Planning Policy (Affordable Rental Housing) 2009.

1.1 The Standard

Clause 30 (1) (h) of the State Environmental Planning Policy (Affordable Rental Housing) 2009 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'.

1.2 Proposed Variation to Standards

The proposed variations to development standards for the proposed development are in relation to Clause 30 (1) (h) of the State Environmental Planning Policy (Affordable Rental Housing) 2009. In summary the following variations to development standards are proposed:

State Environmental Planning Policy (Affordable Rental Housing) 2009	SEPP Development Standard	Proposed Development Non-Compliance
Clause 30 (1)(h)	Minimum 16 motorcycle spaces	Shortfall of 13 motorcycle spaces

CLAUSE 4.6(4)(A)(II) – WILL THE PROPOSED DEVELOPMENT BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE PARTICULAR STANDARD AND OBJECTIVES FOR DEVELOPMENT WITHIN THE ZONE IN WHICH THE DEVELOPMENT IS PROPOSED TO BE CARRIED OUT?

2. Overview

The proposed development will be in the public interest because it is consistent with the objectives of the motorcycle parking control standard and the zone objectives.

2.1 The Proposal Achieves the Objectives of the Motorcycle Parking Standard

There are no objectives of the motorcycle parking control as listed within Clause 30 (1) (h) of the State Environmental Planning Policy (Affordable Rental Housing) 2009. Therefore, assessment against those objectives is not possible.

2.2 The Proposal Achieves the Objectives of the Zone

The site is currently zoned B2 Local Centre Zone under the Sydney LEP 2012.

The proposed new development is consistent with the B2 zone objectives in that:

To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.

- The Site will provide boarding house accommodation which is well serviced by retail, business and community uses in the surrounding area.

To encourage employment opportunities in accessible locations.

- The Site use will not necessarily encourage employment opportunities, with the exception of the Managers role.

To maximise public transport patronage and encourage walking and cycling.

- The Site's has excellent accessibility to public transport options (including frequent bus services, the existing Central Train Station accessible by pedestrian and bus connection) and access to services, education and employment.
- The provision of 101 bicycle spaces will promote cycling and negate the need for motorcycle parking to be compliant. It should be noted that application of the SEPP criteria for bicycles would require 16 spaces.
- The majority of boarding rooms will be occupied by students of the numerous nearby educational institutions (Sydney University, University of Technology, TAFE College etc). These students do not normally own a motorcycle and any visitors travelling by motorcycle will be able to park in the large adjacent public car park. Any occasional other parking need (e.g. service personnel, delivery) will be satisfied by the available on-street parking in the area or the public parking provided in the adjacent Broadway Shopping Centre.



To allow appropriate residential uses so as to support the vitality of local centres.

- Housing diversity is an issue faced within the Sydney LGA and the proposed development will have a positive social and economic impact by providing low-cost accommodation with excellent access to public transport, retail, education, hospitals and Sydney CBD at a reasonable price point.

CLAUSE 4.6(3)A – COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE

Compliance with the development standard **is** unreasonable or unnecessary in the circumstances of the case.

Clause 4.6(3)(a) requires that this Variation Request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

Such compliance is unreasonable or unnecessary in the circumstances of the case.

In *Wehbe v Pittwater Council* [2007] NSWLEC 827 Preston CJ set-out the five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation:

1. *Establish that compliance with the development standard is unreasonable or unnecessary because **the objectives of the development standard are achieved notwithstanding non-compliance with the standard.***
2. *Establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.*
3. *Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*
4. *Establish that 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. *Establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary".*


In applying the tests of **Wehbe v Pittwater Council** [2007] NSWLEC 827, only one of the above rationales is required to be established. Notwithstanding the proposed variation, as demonstrated in Sections 2.1 and 2.2, the proposed development is consistent with the underlying objectives of the standard for motorcycle parking and the B2 zone of SLEP 2012.

As addressed previously the proposal has demonstrated compliance with the relevant objectives.

Undermining objectives of the EP&A Act

Section 1.3(g) of the Environmental Planning and Assessment Act 1979 (the EP&A Act) says that it is an objective of the legislation:

to promote the orderly and economic use and development of land



Requiring strict compliance with the motorcycle parking control would undermine the achievement of this objective of the legislation. This is because orderly and economic use and development of land is encouraged/supported by permitting development in accordance with the relevant development standards.

This is sufficient, by itself, to establish that requiring strict compliance is unreasonable or unnecessary in the circumstances of the case.

Disproportionate burden on the community

The severity of the burden placed on members of the community (by requiring strict compliance) would be disproportionate to the consequences attributable to the proposed non-compliant development (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 (at [15])).

The adverse consequences by requiring strict compliance have already been outlined. In brief terms, they are:

- an unnecessary reduction in housing supply and housing choice.

It is unreasonable to expect the community to bear these adverse consequences in circumstances where there are no significant adverse impacts from allowing the motorcycle parking contravention.

This is sufficient, by itself, to establish that requiring strict compliance is unreasonable or unnecessary in the circumstances of the case.

CLAUSE 4.6(3)(B) – ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

The proposed development demonstrates that there are sufficient environmental planning grounds in support of the contravention for the following reasons:

- The Site's has excellent accessibility to public transport options including
 - multiple high frequency/high capacity bus services which operate along Parramatta Road/Broadway
 - bus services which operate along Glebe Point Road and City Road
 - the light rail services to the north with a stop at Glebe
 - the rail services at Central Station accessed by walking or connecting bus services
 - There are also a number of "car share" pods in the area and as a consequence of these circumstances the site is regarded as highly accessible to public transport.
- The provision of 101 bicycle spaces will promote cycling and negate the need for motorcycle parking to be compliant. It should be noted that application of the SEPP criteria for bicycles would require 16 spaces.
- The majority of boarding rooms will be occupied by students of the numerous nearby educational institutions (Sydney University, University of Technology, TAFE College etc). These students do not normally own a motorcycle and any visitors travelling by motorcycle will be able to park in the large adjacent public car park. Any occasional other parking need (e.g. service personnel, delivery) will be satisfied by the available on-street parking in the area or the public parking provided in the adjacent Broadway Shopping Centre.
- In light of the proposals contribution to achieving the desired future character of the area, strict compliance with the minimum motorcycle parking provision requirements would serve no material planning purpose, other than numerical compliance with a generic Council control.
- The proposal will add to delivering a mix of well-designed low cost housing that meets the needs of Sydney's growing population and to meet the changing population needs.
- The proposed development will not significantly impact on the amenity of adjoining occupiers.
- The proposal results in the delivery of residential accommodation within easy access of the public transport, retail, employment and services.



CLAUSE 4.6(5)(A) – WOULD NON-COMPLIANCE RAISE ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL PLANNING?

The proposed non-compliance with the motorcycle parking development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

CLAUSE 4.6(5)(B) – IS THERE A PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD?

Overall it is considered that the strict maintenance of the standard in this instance is not in the public interest as the current proposal will result in the delivery of a high-quality residential development and housing stock which achieves the strategic objectives of Council.

CLAUSE 4.6(5)(C) – ARE THERE ANY OTHER MATTERS REQUIRED TO BE TAKEN INTO CONSIDERATION BY THE SECRETARY BEFORE GRANTING CONCURRENCE?

The Planning Circular PS 18-003, issued on 21 February 2018 (Planning Circular), outlines that all consent authorities may assume the Secretary's concurrence under clause 4.6 of the Standard Instrument (Local Environmental Plans) Order 2006 (with some exceptions). The NSLEP is a standard instrument LEP and accordingly, the relevant consent authority may assume the Secretary's concurrence in relation to clause 4.6 (5). This assumed concurrence notice takes effect immediately and applies to pending development applications.

We note that under the Planning Circular this assumed concurrence is subject to some conditions - where the development contravenes a numerical standard by greater than 10%, the Secretary's concurrence may not be assumed by a delegate of council.



CONCLUSION

It is requested that council supports the proposed variation to of Clause 30 (1) (h) of the State Environmental Planning Policy (Affordable Rental Housing) 2009for the following reasons:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.
- There are sufficient environmental planning grounds to justify contravening the development standard.
- The proposed variation allows for the provision of improved residential accommodation, for family housing.
- No unreasonable environmental impacts are introduced as a result of the proposal.
- There is no public benefit in maintaining strict compliance with the standards.