

# **Attachment K**

**Clause 4.6 Variation Request – Motorcycle  
Parking**

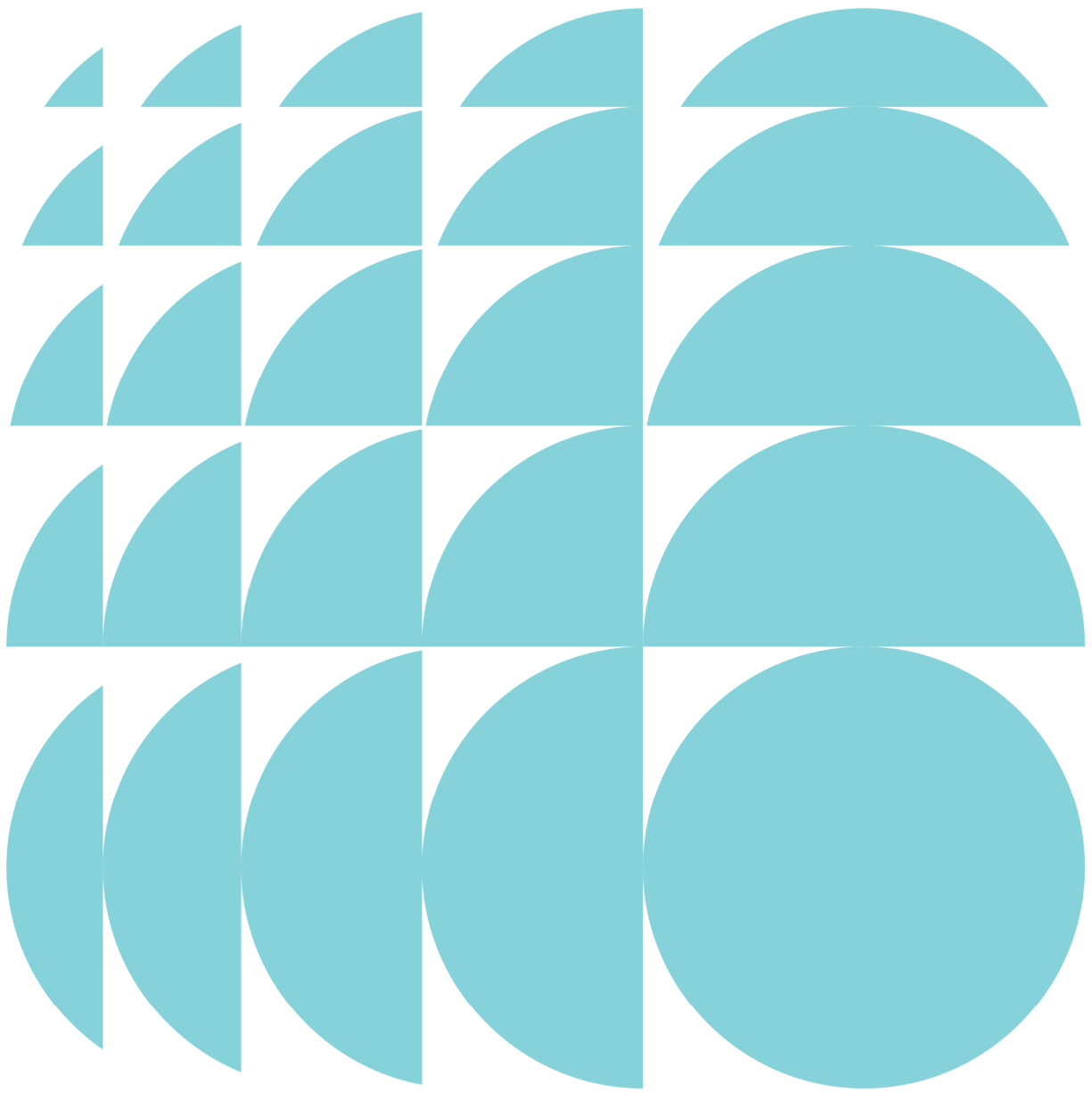
# ETHOS URBAN

## Clause 4.6 Variation - Motorcycle Parking

422-424 Cleveland Street, Surry Hills

Submitted to City of Sydney Council  
On behalf of Pyrafount No. 6 Pty Ltd

4 September 2020 | 2190997



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## 1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of Pyrafont No. 6 Pty Ltd. It is submitted to the City of Sydney Council (the Council) in support of a development application (DA) for the redevelopment of 422-424 Cleveland Street, Surry Hills (the site) which involves:

- Restoration of the existing intact fabric and façade of ‘The Kirk’ building;
- Partial demolition works centred around the rear of the building, including the demolition of the dilapidated timber framed rear extension to The Kirk and outhouse to the north of the existing building which is currently in disrepair;
- Renovation and fit-out of The Kirk community hall (former church hall), including replacement of the temporary rear wall with a new fire-rated rear wall, the installation of a new stage area, and a new mezzanine above the northern end of the hall;
- Use of the site as a boarding house, café, and community/entertainment venue.
- Construction of a new six (6) level building extension, including basement, at the rear northern end of the site with full integration with the existing building, comprising:
  - A new basement with co-working/workshop, amenities, bicycle parking and building servicing uses.
  - New café and foyer, motorcycle and bicycle parking, loading dock, and garbage room on the ground floor.
  - A further four (4) levels of boarding house accommodation across thirty (30) rooms, inclusive of two (2) accessible rooms, two (2) artist-in-residence rooms with attached common artists’ studios, one (1) building manager’s room, and a laundry area.
  - Associated vertical circulation including two (2) sets of fire stairs, single elevator, and lobby areas; and
- The proposed hours of operation for the community hall are:
  - Monday – Saturday: 7am – midnight
  - Sunday: 7am - 10pm
- The proposed hours of operation of the ground floor café are:
  - Monday – Saturday: 8am – 12am
  - Sunday: 8am – 10pm
- Associated landscaping works, including new tiled paving over the existing High Holborn Street carriageway outside the entrance of the new café.

Clause 30(1)(h) of the *State Environmental Planning Policy (Affordable Residential Housing) 2009 (SEPP ARH)* specifies a rate of one (1) motorcycle parking space per five (5) boarding house rooms. On this basis the scheme would be required to provide a total of six (6) motorcycle parking spaces. This request seeks a variation of the development standard for motorcycle parking under the SEPP ARH such that the scheme would provide three (3) motorcycle parking spaces (therefore a variation of three less spaces).

Clause 4.6 of the *Sydney Local Environmental Plan 2012 (Sydney LEP 2012)* enables the Council to grant consent for development even though the development contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

This clause 4.6 variation has been prepared to address the variation of the development standard for motorcycle parking under clause 30(1)(h) of the SEPP ARH and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban dated 17 September 2020.

This clause 4.6 variation request demonstrates that compliance with the motorcycle parking development standard of the SEPP ARH is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravention of the standard. Notwithstanding the variation to the motorcycle parking development standard, the proposed development:

- Achieves the objectives of the SEPP ARH by providing a 30 bedroom boarding house, with an over provision of bicycle parking spaces to offset the non-compliance with the motorcycle parking development standard, thereby encouraging more sustainable forms of transport.
- Is in the public interest because it is consistent with the objectives of both the development standard and the B4 Mixed Use Zone.
- Is consistent with the Greater Sydney Regional Plan, District Plan and Council's strategic planning policies and does not raise any matter of significance for State or regional planning.

Therefore, the consent authority can be satisfied that there is sufficient justification for the variation to the motorcycle parking development standard, as proposed in accordance with the flexibility allowed under Clause 4.6 of the Sydney LEP 2012.

## 2.0 Development Standard to be Varied

### 2.1 Is the Planning Control in Question a Development Standard?

The motorcycle parking control in clause 30(1)(h) of the SEPP ARH is a development standard.

### 2.2 Relevant Development Standard

This clause 4.6 variation request seeks to justify variation from the development standard for motorcycle parking set out in the SEPP ARH. Under clause 30(1)(h) of the SEPP ARH, the relevant rate is one (1) motorcycle parking space per five (5) boarding house rooms. The exact clause of the SEPP ARH is replicated below.

#### 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—

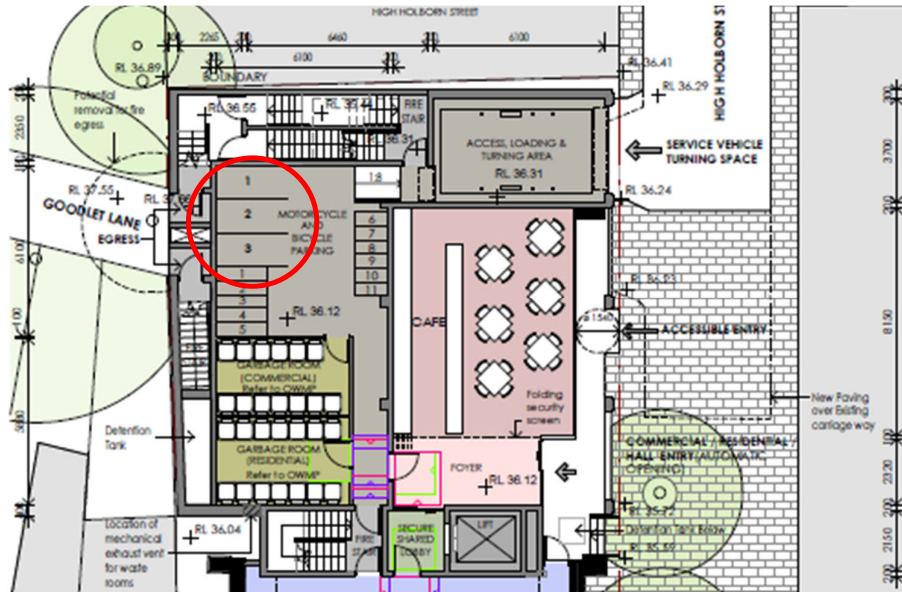
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**(h) at least one parking space will be provided for a bicycle, and one will be provided for a motorcycle, for every 5 boarding rooms.**

- (2) Subclause (1) does not apply to development for the purposes of minor alterations or additions to an existing boarding house.

### 2.3 Variation Sought

The scheme proposes a total of 30 boarding house rooms. Therefore, six (6) motorcycle parking spaces are required to be provided in order to achieve compliance with the development standard set out in the SEPP ARH. The proposal includes three (3) motorcycle parking spaces at the ground floor level as shown in **Figure 1** below. This comprises provision of 50% of the requirement set under clause 30(1)(h) of the SEPP ARH.



**Figure 1** Provision of Motorcycle Parking (circled in red)

Source: JSA Studio

### 3.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Sydney LEP 2012 provides that:

#### 4.6 Exceptions to development standards

- (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.*

Furthermore, clause 4.6(4)(a) of the Sydney LEP 2012 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, and*
  - (b) *the concurrence of the Secretary has been obtained.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council [2007] NSW LEC 827; and*
2. *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009.*
3. *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 (Initial Action); and*
4. *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245 (Al Maha).*

#### 3.1 Role of the consent authority

The role of the consent authority (Council in this instance) in considering this request for a clause 4.6 variation has been explained by the NSW Court of Appeal in *Initial Action* and in *Al Maha*. These cases have clarified that the consent authority needs to be satisfied in relation to two matters:

- that the applicant's request has adequately addressed the matters in in clause 4.6(4)(a)(i); and
- that the proposed development will be in the public interest because of its consistency with the objectives of the development standard and the zone objectives.

The Council is required to form these two opinions first before it considers the merits of the proposal and it can only consider the merits of the DA if it forms the required satisfaction in relation to the matters. In particular, the Council needs to be satisfied that there are proper planning grounds to grant consent and that the contravention of the standard is justified. This report provides the basis for the Council to reach this level of satisfaction.

The relevant matters contained in clause 4.6 of the Sydney LEP 2012, with respect to the motorcycle parking development standard of the SEPP ARH, are each addressed below, including with regard to the above decisions.



### 3.2 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class, i.e. there may be other ways.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of the now repealed SEPP 1 (see *Four2Five* at [61] and [62]; *Initial Action* at [16]).

As the language used in subclause 4.6(3)(a) of the Sydney LEP 2012 is the same as the language used in clause 6 of previous SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request. The five ways outlined in *Wehbe* are:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Way**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Way**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Way**).
- 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 (**Fourth Way**).
- 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 (**Fifth Way**).

This clause 4.6 variation request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances because the relevant objectives of the SEPP ARH and the Sydney LEP 2012 are achieved notwithstanding the variation from the standard (the First Way).

#### 3.2.1 The underlying objectives or purposes of the development standard

Clause 30 of the SEPP ARH does not specify objectives in connection to the motorcycle development standards for boarding houses. It follows that the overall objectives of the SEPP ARH are:

- (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.*

#### 3.2.2 The objectives of the standard are achieved notwithstanding non-compliance with the standard

The objectives of the SEPP ARH are achieved notwithstanding non-compliance with the motorcycle parking standard - the development will provide a new 30 bedroom boarding house in a well serviced location.

### 3.3 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the Sydney LEP 2012 requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site. In this instance the relevant aspect of the development is the provision of only three (3) motorcycle parking spaces which does not strictly meet the requirements of the development standard where six (6) spaces are required.

There are sufficient environmental planning grounds to justify contravention of the motorcycle parking development standard in this specific instance, as described below:

- The proposed variation to motorcycle parking spaces is offset by the over provision of bicycle parking spaces (18 proposed in total). 11 bicycle parking spaces would be provided at ground floor level, and a further 7 bicycle parking spaces would be provided at basement level. The benefit of increased bicycle parking spaces at ground floor level, with easy access to the street outweighs the lack of motorcycle parking and supports active and sustainable transportation.
- The site is located within a highly accessible area on Cleveland Street, opposite bus stops with six (6) bus routes running approximately every two minutes either direction: into the CBD, Marrickville, or out to the eastern suburbs. It is approximately a 5-minute walk from Surry Hills light rail station with services running every 5-10 minutes into the CBD or to Randwick or Kingsford. The site is also a 15 minute walk from both Central train station. In terms of cycling, the site is approximately 40m from Crown Street which is a designated cycle route.
- Strict compliance with the motorcycle parking development standard would result in the reallocation of ground floor space, such that there would be a loss of bicycle parking spaces at ground floor level. This would result in reduced amenity for occupants using bikes and minimise opportunities for active and sustainable transportation. Alternatively, it would result in a reduced commercial (café) floorspace to the ground floor which would impact on the viability of providing this space, and potential loss of active frontage along the pedestrianised portion of High Holborn Street.

#### Consistency with Objects of the EP&A Act

In *Initial Action*, the Court stated that the phrase “environmental planning grounds” is not defined but would refer grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in section 1.3 of the Act. While this does not necessarily require that the proposed development should be consistent with the objects of the Act, nevertheless, we consider the proposed development is broadly consistent with each object, notwithstanding the proposed variation of the motorcycle parking development standard.

#### 3.3.1 Conclusion on clause 4.6(3)(b)

For the reasons above, there are sufficient environmental planning grounds to justify the contravention of the motorcycle parking development standard, as it promotes good design and amenity of the built environment (objective 1.3(g) of the *Environmental Planning and Assessment Act 1979*).

### 3.4 Clause 4.6(4)(a)(i): The applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3)

This written request adequately and comprehensively addresses the matters required to be demonstrated by subclause (3).

### 3.5 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

In *Initial Action* at [27], it was held that it is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. The proposal is in the public interest because it is consistent with the objectives of the development standard and the objectives of the zone.

#### Consistency Caselaw

Consistency has been defined throughout caselaw including the following Land and Environment Court cases:

- *Addenbrooke v Woollahra Municipal Council* [2008] NSWLEC 190
- *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21
- *Raassis v Randwick City Council* [2019] NSWLEC 1040
- *Abrams v Council of City of Sydney* [2018] NSWLEC 1648
- *Kingsland Developments v Parramatta Council* [2018] NSWLEC 1241
- *Dem Gillespies v Warringah Council* (2002) 124 LGERA 147

In these cases, consistency is considered to be different to that of 'achievement'. The term 'consistent' has been considered in a judgements of the Court in relation to zone objectives and has been interpreted to mean "compatible" or "capable of existing together in harmony" (*Dem Gillespies v Warringah Council* (2002) 124 LGERA 147; *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190) or "not being antipathetic" (*Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21). Whichever interpretation is adopted the test of "consistency" is less onerous than that of "achievement".

#### 3.5.1 Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the motorcycle parking development standard, for the reasons discussed in **Section 3.2.2** of this report.

#### 3.5.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the B4 Mixed Use Zone, as demonstrated below.

##### ***To Provide a Mixture of Compatible Land Uses***

The proposed development will provide a mix of land uses, including community hall/event space, a café, and a boarding house. These uses are compatible with each other, and more broadly with the surrounding context, and can be serviced and operated without conflict.

##### ***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***

The site is in an accessible location on Cleveland Street, close to bus stops which serve six (6) bus routes that run frequently between the city centre and eastern suburbs. A bus stop that serves routes running into the City Centre is located directly outside of the site. The site is a 5-minute walk to Surry Hills light rail station, and a 15-minute walk to Central Station. 18 bicycle parking spaces are proposed for use by residents, employees, and visitors to the site in accordance with the requirements of the Sydney Development Control Plan 2012. The provision of reduced motorcycle parking is not antipathetic to this objective.

##### ***To ensure uses support the viability of centres***

The proposed development will provide a total of 30 residential boarding rooms, a 164m<sup>2</sup> flexible creative/community hall space and a 74m<sup>2</sup> café. This range of uses will improve active frontages in the locality and expand creative, cultural and retail (employment) floorspace that will support the viability of Surry Hills. The reduction of motorcycle vehicle traffic can only contribute to the improved pedestrian activation of centres, through reduced traffic.

### 3.6 Other Matters for Consideration

Under clause 4.6(5), in deciding whether to grant concurrence, the Secretary must consider the following matters:

- (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.*

These matters are addressed in detail below.

#### 3.6.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation of the motorcycle parking development standard does not raise any matter of significance for State or regional planning. We do note, however, that the proposal is consistent with the Greater Sydney Regional Plan – A Metropolis of Three Cities and the District Plan in that it:

- Contributes to the social connectivity of the City of Sydney local government area through the provision of an active streetscape and includes a community floorspace and retail offering. The reduction in motorcycle parking ensures these functions are not compromised by taking up further spaces with this parking.
- Is well located for access to public transport and the inner Central Sydney and therefore the reduction in motorcycle parking is justified and supportable.
- Will not negatively impact any heritage items.
- Will contribute to the generation of jobs during both the construction and operational stages.
- Will be consistent with Sydney 2030 and the Local Strategic Planning Statements (LSPS) by reducing motorcycle parking and increasing provision for bicycle parking which is a more sustainable form of active transport

#### 3.6.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard

There is no public benefit in maintaining the numerical motorcycle parking development standard in this instance. There is public benefit in terms of active and sustainable transport in allowing the variation. As outlined in **Section 3.33** above, there are sufficient environmental planning grounds to warrant contravention of the development standard and it is therefore considered to be in the public interest for the variation to be supported in this case.

#### 3.6.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Director-General before granting concurrence.

There are no other matters required to be taken into consideration.

## 4.0 Conclusion

The assessment above demonstrates that compliance with the motorcycle parking development standard contained in clause 30 of the SEPP ARH is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, while also allowing for a positive outcome in planning terms.

This clause 4.6 variation request demonstrates that, notwithstanding the non-compliance with the motorcycle parking development standard, the proposed development:

- Achieves the objectives of the SEPP ARH as the development will provide a 30 bedroom boarding house in a well-located position of the City of Sydney local government area. The variation from the motorcycle parking

development standard is equivalent to half of the required space, but will be offset by the overprovision of bicycle parking spaces which encourages an alternative and active/sustainable mode of transportation.

- Is in the public interest because it is consistent with the objectives of both the development standard and the B4 Mixed Use Zone.
- Is consistent with the Greater Sydney Regional Plan, District Plan and City of Sydney Strategic policies and does not raise any matter of significance for State or regional planning

Therefore, the consent authority can be satisfied that there is sufficient justification for the variation to the motorcycle parking development standard as proposed in accordance with the flexibility allowed under Clause 4.6 of the Sydney LEP 2012.