

Attachment D

**Clause 4.6 Variation Request – Communal
Open Space**

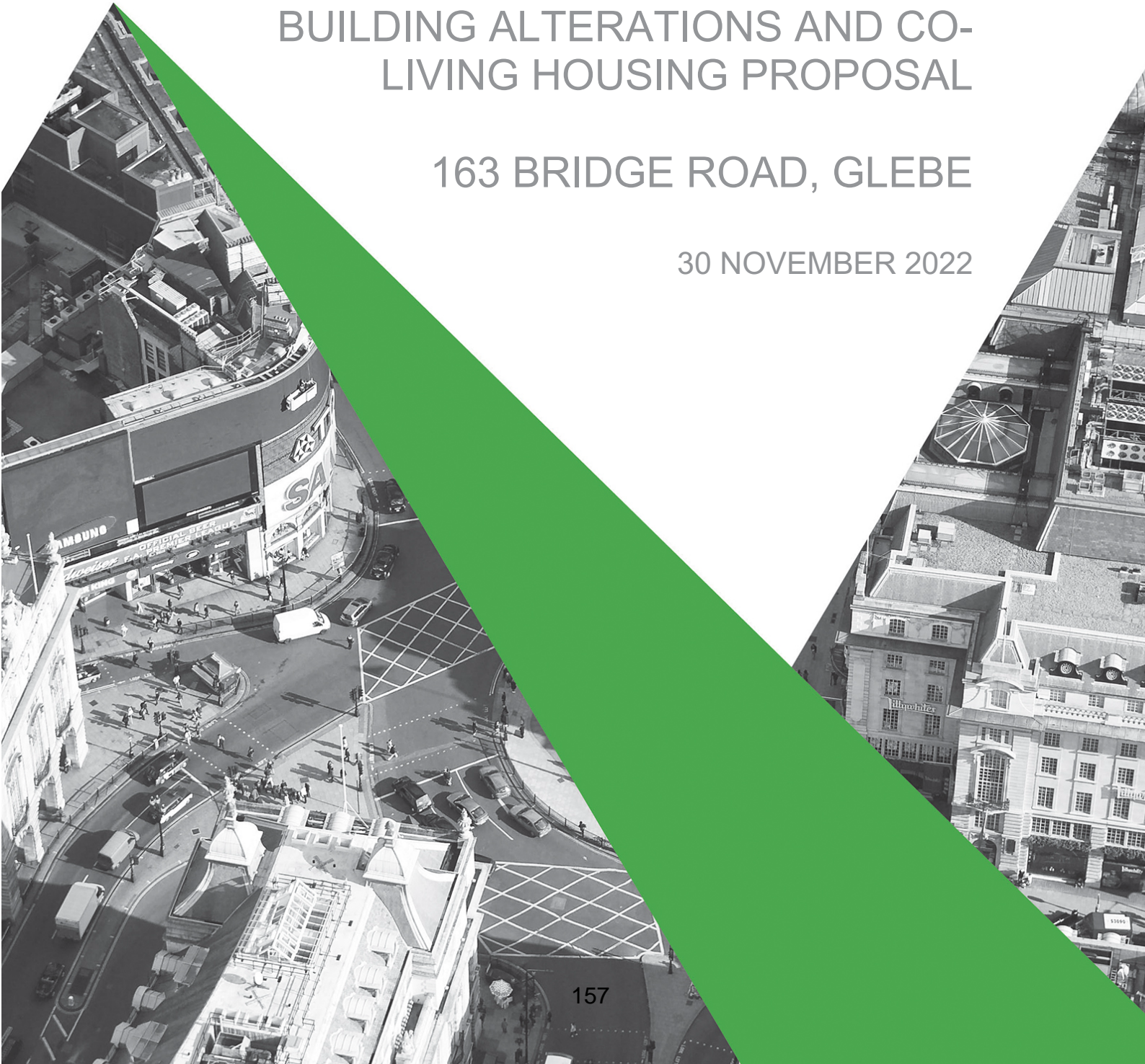


Clause 4.6 Communal Open Space

BUILDING ALTERATIONS AND CO-
LIVING HOUSING PROPOSAL

163 BRIDGE ROAD, GLEBE

30 NOVEMBER 2022



CONTENTS

BACKGROUND AND VARIATION TO THE STANDARD	3
JUSTIFICATION FOR VARIATION OF THE DEVELOPMENT STANDARD	5
RELEVANT CASE LAW	6
CLAUSE 4.6(3)(A): COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE	7
THE OBJECTIVES OF THE STANDARD ARE ACHIEVED NOTWITHSTANDING NON-COMPLIANCE WITH THE STANDARD	8
CLAUSE 4.6(3)(B): SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD	9
CLAUSE 4.6(4)- PUBLIC INTEREST AND OBJECTIVES OF THE ZONE	10
CLAUSE 4.6(5)	11
CONCLUSION	12

BACKGROUND AND VARIATION TO THE STANDARD

This variation statement has been prepared in accordance with Clause 4.6 of the *Sydney Local Environmental Plan 2012* to accompany a development application for alterations to an existing Church Hall building that facilitates a new co-living component.

The works are largely internal and the site is part of a broader site that contains a child care component with associated carpark in addition to the church hall. Some new external works provide for additional communal open space areas for the proposal.

It is noted that Clause 68 of State Environmental Planning Policy (Housing) 2021 sets out a series of 'non-discretionary' development standards including those relating to communal living areas and communal open space. The relevant aspects are reproduced below:

68 Non-discretionary development standards—the Act, s 4.15

(1) *The object of this section is to identify development standards for particular matters relating to development for the purposes of co-living housing that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.*

(2) *The following are non-discretionary development standards in relation to development for the purposes of co-living housing—*

(c) *for co-living housing containing more than 6 private rooms—*

(i) *a total of at least 30m² of communal living area plus at least a further 2m² for each private room in excess of 6 private rooms*

(d) *communal open spaces—*

(i) *with a total area of at least 20% of the site area, and*

(ii) *each with minimum dimensions of 3m,*

Based on these standards the proposal requires:

- 44m² of communal living areas (based on the 13 rooms)
- 144m² of common open space (based on site area of 720sqm being the part of the site on which the development is proposed).

The proposal adopts:

- 57m² of communal living rooms (across 2 levels) which exceeds the 44m² by 13m² or 29%
- Communal open space of 90m² at the ground floor and 26m² at the roof terrace for a total of 116m². This is short by 28m² or 19.4%. The roof terrace area is also 11m x 2.33m in dimension because it occupies an existing part of the building and this is short 665mm or 22% if this is taken to mean that all areas must be 3m in dimension. This is physically impossible at L2 given the existing building but as shown the roof terrace contains a BBQ and seating areas.
- There is also a 'shared' outdoor area facing Woolley Street that is 94m² that can be used by residents and users of the Church hall.

Therefore the proposal presents a variation to Clause 68(2)(d)(i) by 19.4% and varies the 3m minimum dimension in Clause 68(2)(d)(ii) to the L2 communal area by 22%.

If excluding the whole roof terrace because of the <3m dimension the extent of common open space presents a variation of 37.5%.

Based on feedback from Council a Clause 4.6 variation is necessary given the proposal varies the non-discretionary development standard.

The position of the applicant is that:

- There is more than the minimum communal internal rooms which offsets the minor departure (noting 29% more indoor areas than the minimum)
- The proposal is limited to the confines of this part of the site hence there is no ability to provide greater areas for communal open space without taking away further area from the church hall shared area fronting Woolley Street.
- The extent of communal open space areas is sufficient for a co-living development of 13 rooms.
- The width of the roof terrace at 2.33m is functional and useable as a common area as designed and it cannot be physically increased given the building is existing and the location of existing walls that must be retained.

JUSTIFICATION FOR VARIATION OF THE DEVELOPMENT STANDARD

Clause 4.6 of the *SLEPP2012* enables the consent authority the ability to grant development consent for development that proposes a variation to a development standard provided the matters set out in Clause 4.6 are satisfied. This Clause aims to provide an appropriate degree of flexibility in applying certain development standards to particular circumstances. The objectives and provisions of Clause 4.6 are as follows:

“4.6 Exceptions to development standards

- (1) *The objectives of this clause are as follows—*
 - (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.*
- (2) *Development 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. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (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.*
- (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 Planning Secretary has been obtained.*
- (5) *In deciding whether to grant concurrence, the Planning 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 Planning Secretary before granting concurrence.*

RELEVANT CASE LAW

This statement has been prepared with regard to the latest decisions of the NSW Land and Environment Court in relation to Clause 4.6 and the proper approach to justifying a variation of a development standard, including:

- a) *Wehbe v Pittwater Council* [2007] 156 LGERA 446; [2007] NSWLEC 827;
- b) *Four2Five Pty Ltd v Ashfield Council* [2007] 156 LGERA 446; [2015] NSWLEC 90 ;
- c) *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118;
- d) *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130; and
- e) *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112.

There are also a number of other NSW Land and Environment Court cases that are relevant, including *Micaul Holdings Pty Ltd v Randwick City Council* [2015] NSWLEC 1386 and *Moskovich v Waverley Council* [2016] NSWLEC 1015, as well as *Zhang and anor v Council of the City of Ryde* [2016] NSWLEC 1179.

Importantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ held at paragraphs [87] and [90]:

87. ...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...

...

90. In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause.

These matters are discussed in the following sections

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

In *Wehbe v Pittwater* [2007] NSWLEC 827 (**'Wehbe'**), Preston CJ identified a variety of ways in which it could be established demonstrated that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. This list is not exhaustive. It states, inter alia:

"An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to 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."

While *Wehbe* related to objections made to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the reasoning can be similarly applied to variations made under Clause 4.6 of the standard instrument.

The judgement goes on to state that:

"The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."

Preston CJ in the judgement then expressed the view that there are at least 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows :

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- *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;*
- *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 that*

would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

It is sufficient to demonstrate **only one** of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22], *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

THE OBJECTIVES OF THE STANDARD ARE ACHIEVED NOTWITHSTANDING NON-COMPLIANCE WITH THE STANDARD

This Clause 4.6 variation statement establishes that compliance with the minimum communal open space development standard is considered unreasonable or unnecessary in the circumstances of the proposed development because the underlying objectives of the standard are achieved despite the non-compliance with the numerical standard.

Whilst the underlying objectives are not expressly stated in Clause 68 of the Housing SEPP 2021 it is clearly the case that the objective is to provide sufficient communal open space (indoor and outdoor) for lodgers.

The standard for communal outdoor space fails to respond to the size of a particular development proposal (i.e. it is not proportionate to the number of lodgers) and simply adopts a 20% of site area control.

For a development of a modest size, being 13 rooms, that form part of an existing building uses for a church hall, means that a numerical standard of 20% is unreasonable.

The variation to the standard is unreasonable and unnecessary because:

- There is more than the minimum communal internal rooms which offsets the minor departure (noting 29% more indoor areas than the minimum)
- Given the Co-Living is on Level 1 and 2 indoor areas are more important than outdoor areas so an oversizing of communal indoor rooms offsets the reduced communal outdoor areas.
- The site contains a building of heritage significance and hence there is limited ability to 'retrofit' the building to contain a greater terrace at the upper level to achieve strict compliance.
- The proposal is limited to the confines of this part of the site hence there is no ability to provide greater areas for communal open space without taking away further area from the church hall shared area fronting Woolley Street.
- The extent of communal open space areas is sufficient for a co-living development of 13 rooms.

- The width of the roof terrace at 2.33m is functional and useable as a common area as designed and it cannot be physically increased given the building is existing and the location of existing walls that must be retained.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances.

The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control. This also satisfies Wehbe Test 1.

CLAUSE 4.6(3)(B): SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

Clause 4.6(3)(b) of the *SLEP 2012* requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard.

The following factors demonstrate that sufficient environmental planning grounds exist to justify the proposed variation to the communal area standard. It is reminded at the outset that as confirmed by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [24], 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 :

- There is more than the minimum communal internal rooms which offsets the minor departure (noting 29% more indoor areas than the minimum)
- Given the Co-Living is on Level 1 and 2 indoor areas are more important than outdoor areas so an oversizing of communal indoor rooms offsets the reduced communal outdoor areas.
- The site contains a building of heritage significance and hence there is limited ability to 'retrofit' the building to contain a greater terrace at the upper level to achieve strict compliance.
- The proposal is limited to the confines of this part of the site hence there is no ability to provide greater areas for communal open space without taking away further area from the church hall shared area fronting Woolley Street.
- The extent of communal open space areas is sufficient for a co-living development of 13 rooms on a site with multiple uses. The 116m² provided equates to approximately 9sqm of communal open space per room which is considered sufficient for the future residents.
- The width of the roof terrace at 2.33m is functional and useable as a common area as designed and it cannot be physically increased given the building is existing and the location of existing walls that must be retained for heritage reasons and structural reasons.

- The variation to the communal open space standard enables the 'Objects' of the *EP&A Act* to be achieved, specifically:
 - (c) *to promote the orderly and economic use and development of land,*
 - (d) *to promote the delivery and maintenance of affordable housing,*

The above discussion demonstrates that there are sufficient environmental planning grounds to justify the proposed variation to the minimum communal open space standard.

CLAUSE 4.6(4)- PUBLIC INTEREST AND OBJECTIVES OF THE ZONE

The relevant objectives are prescribed as:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To maintain the existing land use pattern of predominantly residential uses.*

The proposal is consistent with the objectives of the zone, providing for increased housing supply of affordable housing and contributes to a variety of housing types and densities.

Further the proposal maintains and enhances the use of the parish hall.

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3). As addressed the proposed development is in the public interest as it remains consistent with the objectives of the communal open space control.

CLAUSE 4.6(5)

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 18– 003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under clause 64(1) of the Environmental Planning and Assessment Regulation 2000.

A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

CONCLUSION

Strict compliance with the prescriptive communal open space requirement is unreasonable and unnecessary in the context of the proposal and its circumstances.

The proposal will not have any adverse effect on the surrounding locality, which will be characterised by residential development of comparable height and character. The proposal promotes the economic use and development of the land consistent with its zone and purpose.

The variation is well founded and demonstrates the relevant matters set out under Clause 4.6 having regard to the provisions of Clause 4.6 and recent case law and taking into account the absence of adverse environmental, social or economic impacts,

it is requested that Council and the planning panel support the development proposal.