

# **Attachment C**

<b>Clause 4.6 Variation Request - Lot Size</b>
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Request to Vary the Minimum Lot Size  
Standard under Clause 4.6 of S.L.E.P.  
2012: 56A Allen Street, Glebe

Rear alterations and additions to an  
existing 4-unit residential flat building,  
to a 6-unit Residential Flat Building,  
including 1 Affordable Rental Housing  
unit

## Introduction

This written contravention request supports a development application (DA), for rear alterations and additions to an existing 4-unit residential flat building, resulting in a 6-unit residential flat building, including 1 Affordable Rental Housing unit, at No. 56A Allen Street, Glebe. It should be read in conjunction with the Statement of Environmental Effects by Perica and Associates Urban Planning Pty Ltd, plans by Antonio Caminiti Architect and the information submitted with the DA.

The proposal is within a site which has a site area under the minimum 450sqm development standard within Clause 19(2)(a) of *State Environmental Planning Policy (Housing) 2021* ("SEPP (Housing) 2021"). This is expressed as a "non-discretionary" development standard, meaning that if compliance is achieved, then the matter cannot be taken into further consideration or refused on that ground, by virtue of Section 4.15(2) of the Environmental Planning and Assessment Act 1979 (EPA Act 1979). However, conversely, Section 4.15(3) of the EPA Act 1979 also provides that:

- (3) *If an environmental planning instrument or a regulation contains non-discretionary development standards and development the subject of a development application does not comply with those standards—*
  - (a) *subsection (2) does not apply and the discretion of the consent authority under this section and section 4.16 is not limited as referred to in that subsection, and*
  - (b) *a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard.*

In reference to subclause (b) above, Clause 4.6 of *Sydney Local Environmental Plan 2012* ("SLEP 2012") allows flexibility in the application of a development standard. Accordingly, the provisions of Clause 4.6 of SLEP 2012 can be utilised in considering a contravention of the minimum lot size non-discretionary development standard within Clause 19(2)(a) of SEPP (Housing) 2021.

Clause 4.6 of SLEP 2012 relevantly states:

### **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 to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*

- (a) *compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
- (b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*
- (4) –(8)... [not relevant to this case]

## 1. Identifying and quantifying the non-compliance

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As previously mentioned, Clause 19(2)(a) of SEPP (Housing) 2021 specifies a non-discretionary development standard of a minimum lot size of 450sqm for a Development Application ("DA") to which Part 2, Division 1 of that SEPP (related to In-fill affordable housing), applies. This is applicable to the subject DA, as outlined in Statement of Environmental Effects by Perica and Associates Urban Planning Pty Ltd.

The subject site is located on a corner and has a surveyed site area of 314.5sqm. This is 135.5sqm less than the 450sqm minimum site area, equating to 30.12%.

## 2. Objectives of Clause 4.6 of SLEP 2012

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The objectives of Clause 4.6 of SLEP 2012 are:

- (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.*

There has been some legal debate about the requirement to specifically address these objectives. On one hand, the objectives are not explicitly required to be addressed or specifically considered (as typically occurs in zone objectives), and compliance with the objectives of the Clause could be read to arise when compliance with the operative provisions of the Clause are met, being the sub-clauses that follow the objectives. In other words, the objectives state what complying with the operative provisions would achieve. On the other hand, if this was the case then the objectives would have no work to do.

This matter was considered and determined in a judgement by the Chief Justice of the Land and Environment Court of NSW in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*. That judgement held that the objectives of Clause 4.6 do not need to be specifically considered, and specifically should not be read to compel comparison with a complying development proposal.

Accordingly, compliance with the objectives of Clause 4.6 can be assumed if the operative provisions and thresholds of Clause 4.6 are met. The objectives state what the operative clauses are designed to do.

### 3. Clause 4.6 (3)(a) and 3(b) of SLEP 2012

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Clause 4.6(3) of SLEP 2012 states:

- (3) *Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—*
- (a) *compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
  - (b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*

The following responds to these provisions.

#### ***(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances [of the case]***

The submission and consideration of Objections under State Environmental Planning Policy No. 1 ("SEPP 1 Objection") and the issue of compliance being "unreasonable or unnecessary" was well summarised in the Land and Environment Court judgement *Wehbe v Pittwater Council* [2007] NSWLEC 827 ("the Wehbe case"). While that judgement applied to SEPP 1 Objections and not Clause 4.6 Contravention requests, the approach in that case has been consistently accepted in subsequent court cases related to Clause 4.6 Variation Requests and in town planning practice.

The onus lies upon the applicant to demonstrate this in a written request (being this submission) and that requiring compliance with the particular standard would be unnecessary or unreasonable. In this regard, the Wehbe case outlined 5 possible ways to demonstrate whether compliance would be unnecessary or unreasonable, by establishing:

- i. Compliance with the underlying objectives of the standard being breached, notwithstanding the numerical non-compliance; or
- ii. That the objectives of the standard are not relevant to the proposal; or
- iii. Requiring compliance with the development standard would "thwart" the achievement of the objectives of that standard; or
- iv. The development standard in question has been "virtually abandoned" by the Council; or
- v. The zoning of the land is not appropriate for the site and therefore the associated standards are not appropriate (with some qualifications).

Pathway (i) above is applied in this instance.

It is noted there are no provisions or objectives related to minimum allotment size in Sydney LEP 2012.

In terms of the objectives of the standard, two (2) objectives are relevant to consider, being contained in both Clause 19(1) of SEPP (Housing) 2021, and Clause 15A of SEPP (Housing) 2021, given the first is within the applicable clause containing the applicable development standard and the latter is an objective of the Part of the SEPP containing the development standard. These objectives state respectively:

*19(1) The object of this section is to identify development standards for particular matters relating to residential development under this division that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.*

*15A The objective of this division is to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.*

The following responds to these objectives:

- a) The first objective above within Clause 19 of the SEPP is not relevant as the proposal does not comply with the development standard, and the objective is stated as more of an operational provision.
- b) In terms of the second objective above within Clause 15A of the SEPP, the proposal is wholly consistent with this objective, as the proposal does facilitate the delivery of new in-fill affordable housing, given the proposal includes an affordable rental housing unit, to be managed by a Community Housing Provider ("CHP"), being 16.67% of all units or 18.3% as a percentage of floorspace.

In this instance the relevant objectives cited do not provide much insight into the "thinking behind" the operative site area provision/standard.

Clause 3 of SEPP (Housing) provides Principles of the whole SEPP. As these are expressed as principles and not objectives, they are not strictly relevant in terms of the application of the "Wehbe case" and it is legally arguable whether they are relevant in terms of a contravention request under Clause 4.6 of SLEP 2012 in this instance. However, these principles do provide some elaboration of broad principles and following provisions within the SEPP and a response if given, as below (as relevant to site area):

### **3 Principles of Policy**

The principles of this Policy are as follows—

- (a) enabling the development of diverse housing types, including purpose-built rental housing,*
- (b) encouraging the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability,*
- (c) ensuring new housing development provides residents with a reasonable level of amenity,*
- (d) promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,*

- (e) minimising adverse climate and environmental impacts of new housing development,*
- (f) reinforcing the importance of designing housing in a way that reflects and enhances its locality,*
- (g) supporting short-term rental accommodation as a home-sharing activity and contributor to local economies, while managing the social and environmental impacts from this use,*
- (h) mitigating the loss of existing affordable rental housing.*

In response to the above, in terms of the specific issue of the site area contravention for this proposal:

- (a) The proposal provides diverse housing types and rental housing;
- (b) The proposal includes a rental housing unit to be managed by a Community Housing Provider ("CHP");
- (c) Residents of existing and proposed new units are provided with good amenity, including cross ventilation, access to sunlight and daylight, unit size, private open space, outlook and locational amenity and convenience;
- (d) The existing site contains a Residential Flat Building ("RFB") and is serviced by utilities, able to be augmented to support the proposal, and is well located in an inner-city area, with very good access to services and public transport options;
- (e) No adverse climate impacts are anticipated and environmental impacts are acceptable. The specific nature of the site helps mitigate external impacts by the proposal being located on a corner, with frontage to a public street or lane on three sides of the site;
- (f) The proposed design appropriately responds to the site and context, guided by an expert heritage adviser (given the site is in a Conservation Area) and will provide an improvement to the locality compared to the current situation. The proposed additions are two storeys, being a specific height nominated for the site within Council's Development control Plan and the overall scale relative to the site and surrounds are acceptable;
- (g) This is not applicable to the proposal given short term rental is not proposed. However, this is not compromised elsewhere;
- (h) The proposal results in an increase in affordable rental housing.

So, the proposal is consistent with the principles of the SEPP as contained in Clause 3 of SEPP (Housing) 2021.

In summary, the proposal is wholly consistent with the objectives of the development standard and using the accepted approach in *Wehbe v Pittwater Council* [2007] NSWLEC 827, compliance with the minimum site area development standard in SEPP (Housing) 2021 can be considered unnecessary or unreasonable.



**(b) there are sufficient environmental planning grounds to justify the contravention of the development standard**

The case *Four2Five v Ashfield Council* [2015] NSWLEC 1009, NSWLEC 90, NSWCA 248 raises the issue that the grounds should relate to a site and specific proposal, rather than generic reasons.

The case *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 highlighted that:

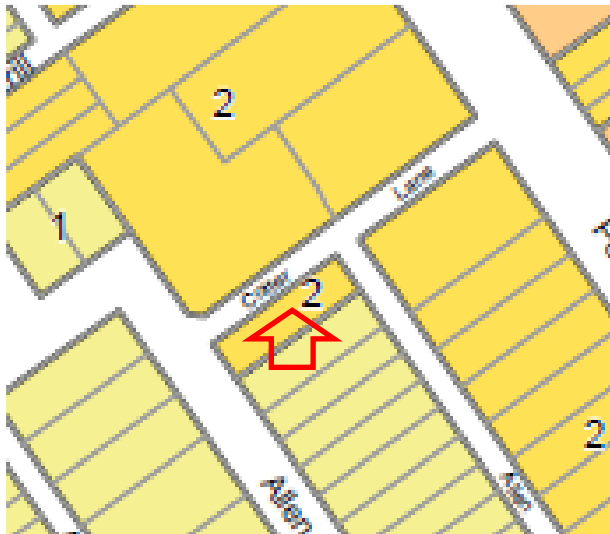
1. The term “*environmental planning grounds*” is not defined and would include the objects of the EPA Act (Section 1.3);
2. The grounds must relate to the contravention of the development standard in question, not the whole development; and
3. The consent authority must indirectly be satisfied the applicant’s written request provides sufficient environmental planning grounds, not directly form an opinion about there being sufficient environmental planning grounds to justify the contravention.

Also, given the term “*environmental planning grounds*” is wide in its nature, context and understanding, and given the Objects of the EPA Act 1979 give effect to all other planning instruments, DCPs and wide assessment criteria, a wide appreciation of the term is warranted.

In this context, the following environmental planning grounds are given to justify the proposed contravention of the Building Height development standard, on this particular site and for this particular development:

- a) The site already contains a Residential Flat Building of 4 units and the proposal is for a modest extension to provide two extra studio units on a site with a pre-existing RFB;
- b) The site is unusual and unique in that it is located on a corner, with three of the 4 sides of the site having frontage to a public road or public laneways. The space provided by the road and laneway frontages helps mitigate potential environmental impacts and provides some design flexibility, despite the site size;
- c) The corner site location minimises the interface with other sites, with the site only sharing one boundary with another privately-owned site;
- d) The nature of the site and setting of the locality favours building to the street/lane edges for the extension, while the two-storey form is consistent with the scale envisaged for the site within Council’s Development Control Plan, so the scale is appropriate for the site;





**Figure 3 – SDCP 2012 Extract (Number of Storeys)**

- e) Apart from the context, there are a number of sound environmental planning reasons to support a two-storey form as proposed on the site, namely:
  - The unique corner location, surrounded by two lanes and larger blank walls directly to the east;
  - The second level helps provide passive surveillance to the adjoining public domain/lanes;
  - The rear addition is complementary to the building design, massing, shape, roof form and materials of the existing building on the site.
- f) The proposed additional built form is modest, with the proposal replacing an existing garage structure, with the scale of the proposal being designed to suit to the site size, proportions and characteristics. The height and form have been modulated for visual interest and articulation, combined with high-quality materials;
- g) The surrounds are comprised of higher building forms, particularly to the north, north-east and east, such that the resulting built form is not inconsistent with the surrounds. The context of the site and surrounds is in transition from the north and the east, and the height and form is contextually appropriate, while also reinforcing the land form;
- h) The area contains a mix of building types on varying site sizes, including on smaller sites;
- i) The City of Sydney does not have minimum allotment size development standards and the location and setting of the site suits the proposal;
- j) The proposal meets key development standards relative to the site size and site generally, including the maximum FSR, building height, private open space and deep soil area;
- k) The amenity of the two additional units will be good, with good access to light and solar access, cross ventilation, reasonable ceiling heights, well-sized and oriented private open space, reasonable outlook and excellent locational amenity;

- l) The proposal incorporates an additional affordable rental housing unit, as well as diversity of housing choice, yet in a constrained way suited to the site characteristics;
- m) The proposal achieves an acceptable heritage outcome, with guidance and support from a Heritage practitioner and HIS;
- n) In terms of the Objects of the EPA Act, the proposal, specifically including the non-compliant site size, is consistent with the following Objects of the Act:
  - i. *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations* – noting the design facilitates high amenity on the site yet with acceptable impacts upon others, and provides a social benefit of an affordable rental housing unit managed by a CHP and diverse housing choice for the new units;
  - ii. *to promote the orderly and economic use and development of land* – noting the modest compliant increase in density represents economic use of land on a well-connected site, with an appropriate existing and proposed use permissible in the zone;
  - iii. *to promote the sustainable management of built and cultural heritage* – noting an appropriate heritage outcome for the site; and
  - iv. *to promote good design and amenity of the built environment* – due to the quality of the design and for the same reasons above.

For all the reasons given in this written request, the proposal should be approved and is justified, notwithstanding the numerical non-compliance with the non-discretionary development standard related to the minimum lot size within Clause 19(2)(a) of *State Environmental Planning Policy (Housing) 2021*.



Jason Perica  
Director