

Attachment D

Clause 4.6 Variation Request - Parking



Request to Vary the Car Parking
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 5-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 5-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 (as amended following lodgement of the DA).

The proposal has less car parking than the required/minimum number of car spaces within Clause 19(2)(e) and (f) 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 car parking non-discretionary development standard within Clause 19(2)(e) and (f) 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

As previously mentioned, Clause 19(2)(e) and (f) of SEPP (Housing) 2021 specifies a non-discretionary development standard(s) related to car parking requirements 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.

Clause 19(2)(e) and (f) of SEPP (Housing) 2021 states:

- (e) the following number of parking spaces for dwellings used for affordable housing—*
 - (i) for each dwelling containing 1 bedroom—at least 0.4 parking spaces,*
 - (ii) for each dwelling containing 2 bedrooms—at least 0.5 parking spaces,*
 - (iii) for each dwelling containing at least 3 bedrooms—at least 1 parking space,*
- (f) the following number of parking spaces for dwellings not used for affordable housing—*
 - (i) for each dwelling containing 1 bedroom—at least 0.5 parking spaces,*
 - (ii) for each dwelling containing 2 bedrooms—at least 1 parking space,*
 - (iii) for each dwelling containing at least 3 bedrooms—at least 1.5 parking spaces,*

The proposal involves retaining four (4) existing units, one of which is to be converted or dedicated to an affordable rental housing unit to be managed by a Community Housing Provider ("CHP") and one new unit/dwelling towards the rear of the site, which is not an affordable rental housing unit (but does provide a form of likely diverse housing which is likely to be relatively affordable).

There are two possible ways to consider and apply the non-discretionary development standard(s) in Clause 19(2)(e) and (f) of SEPP (Housing) 2021, both of which are similar:

1. On the basis of only applying the standards to the new affordable rental housing unit and the two new rear units (as this is where a change is proposed); or
2. On the basis of the development as a whole (namely all 5 units, one of which is for affordable rental housing) before and after the proposal, consistent with estimating the nett change in parking.

While not free from doubt, I prefer the second approach, given: the clause applies to "dwellings used"; the development is one site; the site benefits from facilitative provisions within the SEPP including related to FSR; and some minor works are proposed to the existing building and common areas. This approach is also the most "conservative" in terms of applying the

development standard(s) to the proposal, yet consistent with common approaches to addressing parking demand.

Separately, it is noted that the two new units are studio dwellings, for which there is no applicable car parking rate in Clause 19(2)(f), as the rates only relate to 1, 2 and 3+ bedroom units and not specifically to a studio unit. Again, while not free from doubt, I prefer to apply the one-bedroom rate, given the units do have a bedroom, albeit shared with other living space. This is also conservative. A converse view could be taken there is no applicable rate for a studio unit and as an aside, it is noted that Clause 7.5 of Sydney LEP 2012 does differentiate between studio and 1-bedroom units in terms of parking provision, so this may favour an alternative calculation.

Using the above approaches and the standards in Clause 19(2)(e) and (f) of SEPP (Housing) 2021, the proposal would generate a requirement for:

- 0.4 car spaces for the affordable rental housing unit being “converted”, given it is 1-bedroom; plus
- 0.5 car space for the one new rear one-bedroom unit; and
- 3 car spaces for the remaining 3 existing units.
- Total – 3.9 car spaces (which could be rounded up to 4)

In terms of a comparison to the existing “demand” situation, the 4 existing units would generate theoretical demand for 3.5 spaces (which could also be rounded up to 4 spaces). So the proposal results in a requirement for 0.4 additional spaces, or none if rounding is used.

There is a nett reduction in car parking supply/provision at the site due to the removal of an existing garage off the rear lane, noting this structure appears to provide two car spaces although neither space meets the dimension requirements of the applicable and current Australian Standards. So in terms of nett demand (proposed versus existing) against the SEPP standards for car parking, there is a deficit of either 2.4 car spaces, assuming the site provides two spaces, which is also not free from doubt given they are non-compliant with Australian Standards. If the existing garage is taken to provide for 1 car space, then there is a deficit of either 1.4 car spaces.

As a further side note, under the provisions of SLEP 2012 (Clause 7.5), there is a **maximum** car parking rate of 0.5 car spaces per one-bedroom unit as additionally proposed. There is no differentiation between affordable and non-affordable housing in SLEP 2012 car parking rates. The maximum provision of parking in Council’s LEP is different to the minimum approach in the SEPP.

2. Objectives of Clause 4.6 of SLEP 2012

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

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.

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 relevant 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 20% of all units and exceeding 15% of all units as a percentage of floorspace.

In this instance the relevant objectives cited do not provide much insight into the “thinking behind” the operative car parking standard(s).

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 car parking):

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 car parking contravention for this proposal and the proposal generally:

- (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 a good level of amenity, including cross ventilation, access to sunlight and daylight, unit size, private open space, outlook and locational amenity and convenience. While no parking is provided, the locational advantages of the site to services and public transport options provides alternative high amenity to offset and outweigh non-provision of parking;
- (d) The existing location of parking at the site is unsafe, non-compliant with Australian Standards and not ideal. The removal of parking from the site has traffic and pedestrian safety benefits. There is existing surrounding service and transport infrastructure to support the non-provision of car parking;



- (e) The non-provision of parking does not cause adverse climate or environmental impacts. To the contrary, utilising existing bulk at ground level for accommodation as opposed to parking reduces the environmental impacts compared to providing parking which would otherwise be exempt from GFA calculations;
- (f) The proposed design and removal of existing parking and non-provision of parking appropriately responds to the site and context and will provide an improvement to the locality compared to the current situation;
- (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 car parking development standard(s) 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 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 Car Parking development standard, on this particular site and for this particular development:

- a) The existing parking provision/structure at the site does not meet Australian Standards, is located on a corner which is unsafe and is within a structure that detracts from the Conservation Area of which it is part. Its removal is a positive outcome of the proposal;
- b) The proposed living spaces at ground level in lieu of parking is a better outcome for pedestrians and for real and perceived safety around the site. The site is unusual and unique in that it is located on a corner and providing parking at this site would lead to a compromised outcome in terms of safety and built form;
- c) The proposal complies with the FSR. The non-provision of parking allows accommodation at ground levels as opposed to parking which would otherwise be excluded from FSR calculations yet add greater bulk than that proposed;
- d) The approach taken allows minimised additional bulk while allowing improvements to the setting/surrounds;
- e) The approach of minimising parking provision and no parking is consistent with the strategic approach at the City of Sydney, and the parking standards in SLEP 2012. This is relevant given the SEPP applies to the State and different local approaches can be taken and are justified by changed circumstances, particularly related to locations, service and transport availability;
- f) The site has excellent locational advantages in terms of access to public transport options (particularly bus and ferry options), and proximity to services that mitigates the need for parking or additional parking;
- g) The conversion of one unit to affordable rental housing reduces theoretical car parking demand for that unit under the SEPP parking provisions;
- h) Despite no parking being provided, the amenity of the additional unit will be good overall, 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;

- i) The nett increase in theoretical parking demand is very minor and equivalent to 1 car parking space (depending on how it is calculated and whether rounding is used), excluding the loss of non-compliant parking and not allowing for potential rounding;
- j) Additional bicycle parking spaces are provided with the proposal. None are currently provided. This also supports non-car based travel behaviour, consistent with Council's strategic objectives and ESD principles;
- k) In terms of the Objects of the EPA Act, the proposal, specifically including the non-compliant car parking, 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 and reduced reliance on car use, 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 non-provision of parking allows a modest increase in density appropriate for the site and its context, supporting economic use of land on a well-connected site, with an appropriate use;
 - 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, aided by removal and non-provision of parking, 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(s) related to car parking provision within Clause 19(2)(e) and (f) of *State Environmental Planning Policy (Housing) 2021*.



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