Attachment E

Clause 4.6 Variation Request – Solar Access

16 July 2025

Request to Contravene the Solar Access Development Standard under Clause 4.6 of S.L.E.P. 2012 –

56A Allen Street, Glebe

(Alterations and Additions)

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. These plans include revised plans lodged after the submission of the DA, which resulted in the loss of one unit and various other changes to respond to and address issues raised by Council during assessment of the DA.

The proposal has less solar access than the required/minimum within Clause 19(2)(d) 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 solar access non-discretionary development standard within Clause 19(2)(d) 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)(d) of SEPP (Housing) 2021 specifies a non-discretionary development standard(s) related to solar access 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, and remains applicable after amendments to the DA after lodgement.

Clause 19(d) of SEPP (Housing) 2021 states:

(d) living rooms and private open spaces in at least 70% of the dwellings receive at least 3 hours of direct solar access between 9am and 3pm at mid-winter.

This is taken to mean 3 hours of sunlight in midwinter to both private open space and living rooms. Private open space in turn is taken to include both ground level private open space/courtyards and balconies.

The architect has calculated compliance with the above development standard, represented in the table below (using the design guidance in the Apartment Design Guide in terms of measurement of solar access, even though that is not applicable here, given the standard has been sourced from that document).

	Living Room	Private Open Space	Comment
	Solar Access (Hrs)	Solar Access (Hrs)	
Unit 1 (Ground Floor)	3.0	0.0	
Unit 2 (First Floor)	5.0	N/A	No available POS
Unit 3 (First Floor)	5.0	N/A	No available POS
Unit 4 (Ground Floor)	0.0	0.0	Living Room oriented South
Unit 5	3.0	5.0	Balcony POS

It should be noted that the above table includes the 4 existing units (Units 1-4 above). These units are retained, with no internal changes and very minor changes to external areas. However, as the DA is for alterations and additions, it is appropriate and legally necessary to include these units, notwithstanding the minor scope works relative to the existing building/open space.

As can be seen:

- More than 70% (80%) of units comply with the Living room solar access. So, the only non-compliance with Clause 19(d) of SEPP (Housing) 2021 relates to Private Open Space;
- The only new unit receives full compliance with the living room and private open space solar requirements of the relevant/subject development standard;
- The percentage of overall compliance is improved by the proposal.

2. Objectives of Clause 4.6 of WLEP 2014

The objectives of Clause 4.6 of WLEP 2014 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 was 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 recently 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 (of appropriate flexibility and better outcomes) 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 WLEP 2014

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

The submission and consideration of previous 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:

I. 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.

II. 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 solar access 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 solar access):

> ***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 as relevant to solar access and amenity, in terms of the specific issue of the solar access 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;

(e) The location of the new unit provides thoughtful and appropriate solar access to key living and outdoor areas, while also considering and balancing the impacts of solar access to neighbours, including by the location of private open space between the existing building and new addition; and

(f) The form, materials and design is consistent with the locality.

Other principles above are not compromised by the proposal. In terms of any "assumed" or "unstated" objectives of the solar access development standard, these cannot be guessed. But it is important to note that the proposal and design, while appropriately responding to the site constraints and balancing other environmental considerations, has sought to maximise solar access, particularly for the new additional unit/dwelling to the rear.

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 solar access 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 Solar Access development standard, on this particular site and for this particular development:

a) The solar access requirements for the proposed additional unit/dwelling is achieved, and the non-compliance only relates to the existing 4 units, which remain unchanged in terms of solar access;

b) For the existing 4 units, more than 70% receive the requisite solar access to Living Rooms, and do not comply with private open space solar access (none having private open space, only communal open space to the south of the building);

c) The retention of existing units and building represents sound site planning and is consistent with principles of ESD, retaining a built asset in a well-connected inner-city area, while allowing a modest increase in density to support a growing city and additional affordable housing, consistent with the objectives of the environmental planning instrument containing the relevant development standard;

d) The proposal and design, while appropriately responding to the site constraints and balancing other environmental considerations, has sought to maximise solar access, particularly for the new additional unit/dwelling to the rear;

e) The overall building percentage compliance wit the solar access development standard is improved by the proposal;

f) The overall massing is consistent with other key standards regulating form (FSR, height, setbacks) and the proposal has been amended to reasonably reduce overshadowing to a southern neighbour, to allow sharing of solar access on a site with challenging orientation;

g) Solar access is one component of amenity and the overall amenity of the dwellings is high, including solar access to living spaces;

h) Reasonable changes have been undertaken as part of the proposal to the existing rear southern side open space area to maximise use and amenity it affords to existing units, by designating such space as private open space for two of the units (as suggested by Council);

i) In terms of the Objects of the EPA Act, the proposal, specifically including the non-compliant solar access, 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 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 of a detracting garage and replacement with a dwelling having good solar access, 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 solar access to private open space within Clause 19(2)(d) of *State Environmental Planning Policy (Housing) 2021*.

Jason Perica
Director