Clause 4.6 Variation

MINIMUM ALLOTMENT SIZE FOR CO-LIVING DEVELOPMENT

183 MACQUARIE STREET, PARRAMATTA

FEBRUARY 2025

QUALITY ASSURANCE	
PROJECT:	Clause 4.6:- Minimum Allotment Size -Co-Living Development
ADDRESS:	183 Macquarie Street, Parramatta
LOT/DP:	Lot A in DP 375159
COUNCIL:	City of Parramatta
AUTHOR:	Think Planners Pty Ltd

Date	*Purpose of Issue*	*Rev*	*Reviewed*	*Authorised*
7 October 2022	Co-Ordination	Draft	BD	BD
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CLAUSE 4.6 DEPARTURE – MINIMUM ALLOTMENT SIZE

BACKGROUND

This Clause 4.6 variation has been prepared in support of a development application that seeks approval for the construction of a 11 storey building containing two levels of commercial/retail premises and a 'Co-Living' development containing 66 accommodation rooms and indoor and outdoor communal spaces at 183 Macquarie Street, Parramatta.

An aerial photograph of the site and its surrounds is provided overleaf.

The Standard to be varied

Clause 69(1)(b)(ii) of the *State Environmental Planning Policy (Housing) 2021* (**Housing SEPP**) states that:

69 Standards for co-living housing
(1) Development consent must not be granted for development for the purposes of co-living housing unless the consent authority is satisfied that—

> *(b) the minimum lot size for the co-living housing is not less than—*
> *(i) for development on land in Zone R2 Low Density Residential—600m^2, or*
> ***(ii) for development on other land—800m^2***
> ***(emphasis added)***

The site is not zoned R2 Low density and as such the minimum lot size control of 800m2 in section 69(1)(b)(ii) of the Housing SEPP applies to the development. The development site has area of 487.3.m2 and accordingly seeks to vary this control by 312.7m2 or a total of 39% of the standard.

The departure is largely a function of the fact that the site is not easily amalgamated with adjoining land parcels given its location within the street block, and also given that the site adjoins an approved and partially constructed Mixed Use Development at 189 Macquarie Street, Parramatta.

Is the standard a development standard?

Development standard are defined under s 1.4 of the *Environmental Planning and Assessment Act 1979 (EPA Act)* as (definition provided in part):

> ***development standards*** means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are

fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of—

(a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,

(b) …

The standard contained in s 69(1)(b)(ii) is a numerical standard contained within an environmental planning instrument that relates to the area of the land on which the development is being carried out. The Court has accepted the use of clause 4.6 to vary the minimum lot size in s 69(1)(b)(ii) of the Housing SEPP in *Hughes v Northern Beaches Council* [2023] NSWLEC 1350 (see [34-47]) and *Charas Developments 2 Pty Ltd v Randwick City Council [*2024] NSWLEC 1367 (see [4(i)]).

The minimum lot size in section 69(1)(b)(ii) is a development standard, capable of being varied by clause 4.6 of the *Parramatta Local Environmental Plan 2011* (**Parramatta LEP**).

Figure 1: Aerial Photograph (source Six Maps 2025)

Subject Site

LAND AND ENVIRONMENT CASE LAW

The decision by Chief Judge Preston in a judgement dated 14 August 2018 in the matter of *Initial Action Pty Ltd v Woollahra Council* confirmed that the absence of impact was a suitable means of establishing grounds for a departure and also confirmed that there is no requirement for a development that breaches a numerical standard to achieve a '*better outcome'.* However more recent developments in the law in ***RebelMH Neutral Bay Pty Limited v North Canterbury Council*** **[2019] NSWCA 130** have set out to confirm that the approach taken in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 ('***Al Maha***') is also relevant. In simple terms, Al Maha requires that a Clause 4.6 departure will have only adequately addressed Clause 4.6(3) if the consent authority is satisfied the matters have been demonstrated in the Clause 4.6 request itself- rather than forming a view by the consent authority itself. This Clause 4.6 request demonstrates the matters if Clause 4.6 (3).

The key tests or requirements arising from these judgements is that:

- The consent authority be satisfied the proposed development will be in the public interest because it is "*consistent with*" the objectives of the development standard and zone is not a requirement to "*achieve*" those objectives. It is a requirement that the development be compatible with the objectives, rather than having to 'achieve' the objectives.

- Establishing that 'compliance with the standard is unreasonable or unnecessary in the circumstances of the case' does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe "test" 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in Wehbe v Pittwater.

- When pursuing a clause 4.6 variation request it is appropriate to demonstrate environmental planning grounds that support any variation: and

- The proposal is required to be in 'the public interest'.

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the minimum lot size standards;

- Demonstrating consistency with existing streetscape;

- Demonstrating compliance with objectives of the B4 zone; and

- Satisfying the relevant provisions of Clause 4.6.

This Clause 4.6 Variation request deals with the minimum lot size matters in turn below.

CLAUSE 4.6 PROVISIONS

Clause 4.6 of the Parramatta Local Environmental Plan 2011 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3:

> *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*
>
> (*Note The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b*

Clause 4.6 does not fetter the consent authority's discretion as to the numerical extent of the departure from the development standard. Each of the relevant provisions of Clause 4.6 are addressed in turn.

How is compliance with the development standard is unreasonable or unnecessary in the circumstances of the case?

In *Wehbe v Pittwater Council* [2007] NSWLEC827 (Wehbe), Preston CJ identified five (5) ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. While Wehbe related to objections 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 because subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see Four2Five at [61] and [62]).

The five (5) ways outlined in Wehbe include:

1. **The objectives of the standard are achieved notwithstanding noncompliance with the standard (First Way)**
2. The underlying objective of purpose of the standard is not relevant to the development and therefore compliance is unnecessary (Second Way)
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (Third Way)
4. 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)
5. 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 request demonstrates, pursuant to the matters in Clause 4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary because the objectives of the standard are achieved irrespective of the non-compliance and accordingly justifies the variation pursuant to the First Way outlined in Wehbe, as follows:

Clause 4.6(3a)- Underlying Objectives of the Standard - Compliance unreasonable or unnecessary

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control, and the objectives of the zone, are achieved despite the non-compliance to the numerical development standard as set out above, which satisfies Wehbe Test 1.

Section 69(1)(b)(ii) of the Housing SEPP does not directly nominate an objective of the minimum lot size control. In *Hughes v Northern beaches Council* at [38] the underlying objective of the standard in s 69(1)(b)(ii) are derived from the principles contained within section 3 of the Housing SEPP. The principles are:

> *(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.*

The development is consistent with the principles/objectives of the Housing SEPP notwithstanding the non-compliance with the numerical lot size standard as:

In respect of principle (a), the site is adjacent to an existing developed site at 189 Macquarie Street and a larger landholding at 12 Charles Street (to the west of the site). The Applicant for the DA has made an offer to purchase the adjacent site (Lot B at 12 Charles Street) which has been rejected by the owner of that property (refer to discussion in the SEE (page 44-45). Accordingly, the site is unable to be increased in area to comply with the standard. Despite this, the site is ideally located for co-living (a diverse form of housing) as it is located in a major centre close to services and within a short walking distance to major transport infrastructure and regionally significant university facilities. The DA seeks consent for purpose built co-living rental

accommodation due to the site's location. The site size and dimensions directly facilitate an efficient layout for co-living development.

In respect of principle (b), the proposal for 'co-living' housing in a location very close to high quality services, university facilities and public transport is suited to housing vulnerable members of the community, and/or key workers. The efficient building floorplate will facilitate a development that provides high quality communal services in a way that is cost effective and more cost effective than other residential options.

In respect of principle (c), the development provides a high level of amenity with private rooms complying with both minimum and maximum floor area requirements, individual kitchen and laundry facilities, and both indoor and outdoor communal open space in a natural environment setting along with study spaces and communal kitchens.

In respect of principle (d), the site is located in the Parramatta CBD, a regionally significant centre, in very close proximity to major transport infrastructure, university facilities, shopping and recreational services. The development makes good use of existing infrastructure and services.

In respect of principle (e), the development is supported by a Section J energy efficiency report that confirms the development implement energy efficiency measures. The location of the development in close proximity to transport services facilitates sustainable forms of transport.

In respect of principle (f), the proposal complies with the height of building standard applicable to the site, and has been designed to complement the streetscape, and the materials and colours of the adjoining development. The development implements a public art strategy and facilitates the renewal of an in-fill site.

In respect of principles (g) and (h), the proposal is neither for short term rental accommodation nor proposed the removal of existing affordable housing.

Underlying objective – to provide an adequately sized site

In addition to the above, the underlying objective of the standard may also relate to ensuring that an adequately sized allotment is provided for a Co-Living development.

Notwithstanding the numerical departure to the standard in s 69(1)(b)(ii), the development is considered to be consistent with the intent of the clause as:

- The existing allotment is the product of historic subdivisions before the Parramatta LEP and the Housing SEPP came into force. Under the LEP, a Mixed Use Development containing residential apartments could be constructed on the site. Given this, it would be inconsistent with the objectives

of the Housing SEPP (set out above) – to promote affordable and diverse forms of housing – if the proposed Co-living development was not permitted, solely due to the site area.

- The site is unable to be amalgamated with adjacent sites (refer to discussion in SEE and offer to adjacent property). In this regard the site is a vacant, inner city site that will be surrounded by future and existing development. The dimensions of the site (being long and rectangular) lend it to providing a highly efficient floor plate for co-living accommodation which permits smaller dwellings sizes and less onerous amenity standards than residential accommodation.

- The development has demonstrated that it can provide a high level of amenity despite not complying with the minimum site area standard. In this regard, all rooms are provided in accordance with the minimum area standards, the development is provided with multiple high quality communal spaces and facilities, units are provided with an outlook and a suitable level of solar access and ventilation.

- The development proposal remains compliant with the FSR provisions within the planning controls and does not vary the LEP Height control which indicates the form of development is entirely appropriate for the allotment notwithstanding the departure from the numerical control pertaining to lot size. Therefore, the area and dimensions of the lot are able to accommodate a Co-Living development consistent with the key planning controls notwithstanding the proposed departure from the lot size control. The design and scale of the development is therefore site responsive and respects the reduced lot size to deliver an appropriate form of development on the site;

- The proposal provides for an intensity of development that is capable of being serviced by the existing infrastructure;

- The subdivision pattern of the locality is varied with a variety of allotment shapes and sizes existing currently and this allotment does not easily amalgamate with adjoining parcels given its orientation and location within the street block.

- The subject site is within proximity of local amenities including employment opportunities, educational establishments, public transportation, and recreational activities; and

The above discussion demonstrates that compliance is unreasonable and unnecessary having regards to the unique circumstances of the case

Clause 4.6(3b)- Environmental Planning Grounds

In accordance with the provisions of this clause it is considered that there are sufficient environmental planning grounds to support the proposed departure to the minimum allotment size given the following:

- The site is a residual, inner city allotment that is bound by an existing development to the east at 189 Macquarie Street and a larger landholding to the west at 12 Charles Street. Amalgamation with the adjoining properties (in order to achieve a larger site area) is not possible due to the existing development on the site to the east and the unwillingness of the adjoining owners to the west to sell. As outlined in the SEE (pages 44 and 45), the applicant has made offers to purchase the adjoining property (Lot B at 12 Charles Street) which has been refused by the owner of that property. The unique site constraints and circumstances, being a residual inner-city site that is not developed and is unable to amalgamate with the adjoining properties, are sufficient to warrant contravening the minimum lot size standard.

- There are further unique and site specific circumstances that restrict the ability of the site to amalgamate with the adjacent land to the west and hence achieve numerical compliance with the standard. The FSR controls the Parramatta City Centre (contained in s 7.3 of the LEP) provide incentives for sites greater than 1000m^2 in area (as opposed to sites less than 1000m^2). In this regard, the adjoining property to the west (Lot B at 12 Charles Street) is part of a larger landholding comprising 2 more allotments (Lot 1 and 2 in DP 129068) with a combined site area of approximately 1334m^2 – as shown in Figure 2 below. If the owner of the adjoining landholding was to sell Lot B to facilitate amalgamation with the subject site, its landholding would fall below 1000m2 (approx. 851m^2), resulting in a lower FSR available to that site. Accordingly, the value attributed to Lot B by its owner is higher than the reasonable market value of the land as a development site to the applicant. This prevents a reasonable prospect of amalgamation for the subject site that would achieve numerical compliance with the standard and is sufficient to warrant contravening the minimum lot size standard.

- The unique site constraints and opportunities, being its inability to amalgamate with adjoining properties yet being located in close proximity to a university, high capacity public transport and major services encourage the redevelopment of the site for a diverse form of housing that is not subject to the more onerous amenity standards associated with residential development (under the Apartment Design Guide). These circumstances encourage the development of a co-living housing development on the site and warrant contravening the minimum lot size standard.

- The development, despite the variation to the minimum lot size control, is consistent with the objectives of the standards and does not result in and adverse impacts as a result of the non-compliance. In this regard, all dwellings are provided in accordance with the minimum areas, provide suitable private facilities as well as communal facilities, provide communal open space in accordance with the requirements of the Housing SEPP and achieve a suitable level of privacy, outlook, solar access and ventilation. Demonstrating consistency with the objectives of a development standard by showing a lack of adverse amenity impacts was accepted as a sufficient environmental planning ground in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34];

- The Parramatta LEP does not contain a minimum allotment size for residential flat buildings, commercial buildings, or Mixed Use Development and this development that does not require a vehicular crossover will appropriately activate the site by providing a commercial promises and co-living development that activates the entire frontage of the site;

- The existing allotment is the product of historic subdivisions before the Parramatta LEP and the Housing SEPP came into force. Under the LEP, a Mixed Use Development containing residential apartments could be constructed on the site. Given this, it would be inconsistent with the objectives of the Housing SEPP (set out above) – to promote affordable and diverse forms of housing – if the proposed Co-living development was not permitted, solely due to the site area.
- The DA furthers the Objects of the Environmental Planning and Assessment Act 1979 set out in Section 1.3:

  The objects of this Act are as follows—

  (c) to promote the orderly and economic use and development of land,
  (d) to promote the delivery and maintenance of affordable housing,

- Promotion of the orderly and economic use of the land was accepted as a sufficient environmental planning ground in *Anagnostou v Wollongong City Council* [2021] NSWLEC 1288 at [53] and *Conrina Living Rosebay Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1689 at [12];

Hence the departure to the development standard furthers the objects of the act and therefore provides suitable environmental planning grounds that satisfies the provisions of Clause 4.6 (3).

Therefore it can be seen that the variation to the lot size has sufficient environmental planning grounds because the variation to the standard enables the site to develop for a higher density residential development form and to deliver affordable housing.

Clause 4.6(4)(a)(ii) - the Public interest

The proposal is consistent with the objectives of the B4 zone. The zone objectives are outlined below

- To provide a mixture of compatible land uses.
- *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.*

• To encourage development that contributes to an active, vibrant and sustainable neighbourhood.
• To create opportunities to improve the public domain and pedestrian links.
• To support the higher order Zone B3 Commercial Core while providing for the daily commercial needs of the locality.
• To protect and enhance the unique qualities and character of special areas within the Parramatta City Centre

The proposal, despite the numerical noncompliance remains consistent with the zone objectives as:

• The development seeks to provide a commercial premise and co living rooms within the same development in a precinct dominated by Mixed Use Development;
• The development provides a diverse form of housing in a highly accessible area in which residents could walk to study, public transport, jobs, community facilities, shops and government services.
• The development will activate this western precinct of the Parramatta CBD;
• The development will improve passive surveillance of the public domain;
• The development will support the nearby B3 commercial core and increase patronage; and
• The development will facilitate the rejuvenation of a vacant site in the Parramatta CBD.

CONCLUSION

Strict compliance with the prescriptive lot size requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts. The public benefit of the variation is that it will appropriately facilitate the provision of diverse housing as sought by Council when zoning the land B4 Mixed Use Development. The design response aligns with the intent of the control and provides for an appropriate relationship to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose. Council is requested to invoke its powers under Clause 4.6 to permit the variation proposed. The objection is well founded and considering the absence of adverse environmental, social, or economic impacts, it is requested that the consent authority support the development proposal.