

7.1.1. Clause 4.6 Variation Request – Private Car Accommodation – Seniors SEPP

A Clause 4.6 variation request is required to be submitted with the revised proposal. Please refer below for consideration of the key matters under Clause 4.6.

**Clause 4.6(3)(a) – Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case**

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by Clause 4.6(3)(a). The standard referred to is set out below.

*Schedule 3 Standards concerning accessibility and useability for hostels and self-contained dwellings*

*Clause 41 (1))*

*Part 1 Standards applying to hostels and self-contained dwellings*

*5 Private car accommodation*

*If car parking (not being car parking for employees) is provided—*

*(a) car parking spaces must comply with the requirements for parking for persons with a disability set out in AS 2890, and*

Whilst the above clause is open to interpretation, the strictest interpretation is that 100% of spaces are to be designed to be accessible in accordance with the standard.

The Court has held that there are at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary. See *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*).

The five ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; (First Test)
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary; (Second Test)
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; (Third Test)
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 the standard is unreasonable and unnecessary; (Fourth Test) and
5. The zoning of the land is unreasonable or inappropriate. (Fifth Test)

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] and *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]. Nonetheless, we have considered each of the ways as follows.

- *The objectives of the development standard are achieved notwithstanding non-compliance with the standard.*

We rely on this reason. There are no explicit objectives of the private car accommodation standard. However, they may be inferred. This is discussed and responded to in detail under the “public interest” section of this written request. Refer to that section for further detail.

- *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

We do not rely on this reason.

- *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

The underlying objective of purpose of the standard is to ensure that there is adequate accessible parking for self-contained dwellings/ILUs within a seniors living development.

A strict interpretation of the development standard implies that any car parking space proposed for the ILUs (for residents) is required to be accessible, by virtue of stating that it must comply with the requirements for parking for persons with a disability set out in Australian Standard (AS) 2890.

Requiring 100% of parking spaces to be accessible is not only onerous but is not considered to be necessary to meet demand, nor feasible. We also understand there is no accessible car parking requirement under the Building Code of Australia for the proposed Class 2 ILUs. The proposed accessible car parking provision for the ILUs has been determined on the basis of anticipated demand by Uniting (and precedent set in other seniors accommodation developments) and is considered by the Access Consultant, to be appropriate for the development. Given this, it is reasonable to determine that the underlying object of purpose of the standard is met and therefore, strict compliance is unnecessary and would be unreasonable. Refer to the Access Report at Appendix I.

- *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;*

We do not rely on this reason.

- *The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

We do not rely on this reason.

**Clause 4.6(3)(b) – Sufficient environmental planning grounds to justify contravening the development standard**

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The environmental planning grounds to justify the departure of the private car accommodation standard are as follows:

- Object 1.3(a) of the EP&A Act - The proposed variation to the private car accommodation standard assists in promoting "the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources". In essence, a requirement for all ILU spaces to be accessible would not only match the demand generated for such spaces as advised by Uniting, but also, would require additional carparking on the site, resulting in more environmental impacts (excavation and/or loss of open space).
- Object 1.3(c) and 1.3(d) of the EP&A Act - The development assists in promoting "the orderly and economic use of land". As above, it is not considered to be a practical use of land (whether at grade or below ground) to facilitate the space required to provide 100% accessible spaces given there is not the demand for it, as advised by Uniting.
- In the specific circumstances of this case, we note that the proposed parking provision far exceeds the "standard that cannot be used to refuse consent" parking provision under Clause 50(h)(ii). This provision states that consent cannot be refused on the basis of parking if 1 car space is provided for every 5 dwellings. If strict compliance was achieved with no additional parking being provided above this threshold, a total of 37.2 car parking spaces would be provided and would be required to be accessible per Schedule 3 (Clause 5(a)). However, these figures are not reflective of the actual demand expected to be generated, as advised by Uniting and supported by the project Access Consultant.
- For the proposed development's 186 ILUs/ALAs, 155 car spaces are proposed of which 15 of these spaces (10%) are identified to comprise accessible parking spaces. Therefore, the non-compliance with the private car parking standard has arisen because the Applicant has decided to provide more car parking than stipulated under Clause 50(h)(ii) of the Seniors SEPP to ensure demand will be met and limit any potential overflow to the surrounding street network, as well as the expected demand (market research and resident presence) for accessible spaces. In essence, the corollary of proposing a parking provision that will meet anticipated demand is a non-compliance with the requirement in Schedule 3 for additional accessible car parking.
- Further to the above, we note that the project Access Consultant has provided the following supplementary justification for the variation:
  - *The proposed carparking provision across the development, including for the ILUs (as relevant to this clause) is well in excess of the minimum requirements of the SEPP.*
  - *There is widespread confusion regarding carparking in SEPP developments. SEPP was released when AS2890.1 (2004) was applicable. Within AS2890.1 (2004), it is stated that for carparking for people with disabilities, AS2890.1(1993) Clause 2.4.5 should be adopted (AS2890.6 Carparking or People with Disabilities was pending publication). Further, SEPP Clause 3: Interpretation specifically states AS 2890 Part 1 as the applicable standard.*
  - *Whilst accessible carparking is nominated within each carparking area, other spaces designed as "standard" spaces that will enable adaption to the current AS2890.6 (2009) arrangement through the provision of appropriate line marking. Due to the surplus of required carparking (with regard to SEPP requirements for*

social housing providers), we (the Access Consultant) consider that the current arrangement of carparking is fit-for-purpose. Carparking can be allocated to ILUs specific to the individual need of the residents. The quantum and design of parking enables flexibility in both configuration and allocation of carparking for the residents.

- Further to the above, the requirement for the capability of 5% of carparking to be increased to 3800mm wide, can be met through the provision of spaces in the AS2890.6 configuration.
  - Moreover, it should be noted that “accessible” carparking spaces are designed to enable wheelchair access. Statistically, the requirement for all carparking within a SEPP Seniors development to be accessible is not conducive to current disability standards. Approximately 18% of the population have a disability, 4.4% of these people use a wheelchair, representing less than 1% of the total population.
  - In our experience, seniors projects have had varied approaches to carparking – from full compliance with current version of AS2890.6 to the provision of 3.2m wide spaces to the provision of standard carparking spaces with allocated accessible carparking (as in this instance). For this development, where the ILUs are not privately owned, there is flexibility in the provision of carparking. There is the ability to provide the thirty-eight (38) required carparking spaces in an accessible arrangement if needed by the residents (refer Figure 29 below).
  - As such, it is our professional opinion that the resident carparking proposed within the development is fit-for-purpose and is capable of meeting the individual needs for the residents.
- In addition to the above discussion, as identified within alternate parking demonstration Figure 29 below, achieving compliance with the delivery of 38 “accessible” carparking spaces could be achieved, however this would result in a net loss of 12 standard car parking spaces. As outlined above, in the Applicant’s experience, the delivery of the 38 “accessible” carparking spaces is not reflection of the requirements or needs of the proposed development.

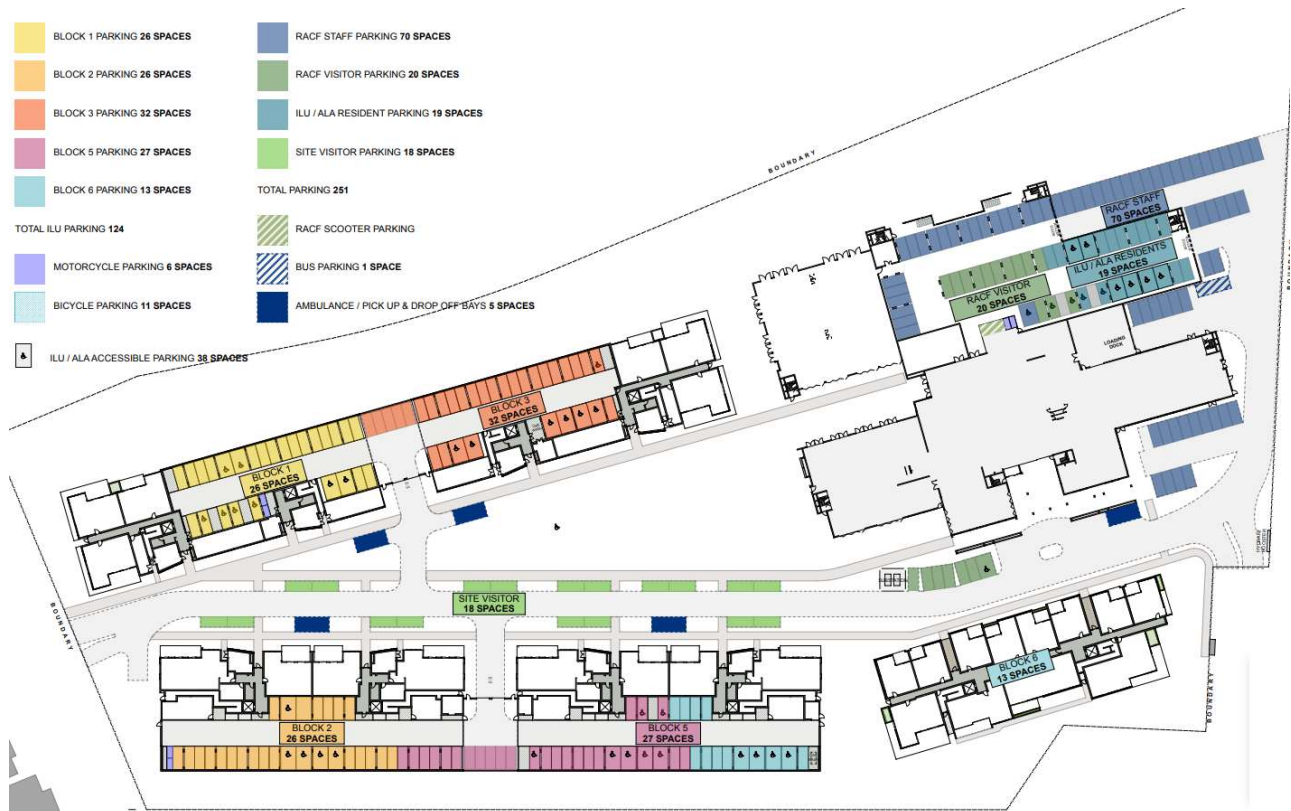


Figure 29 Alternate Parking demonstration identifying the delivery of 38 accessible parking spaces (Source, CKDS)

- Importantly, the variation to the private car accommodation standard does not result in any amenity impacts to the site or surrounds. Again, as noted, full compliance with such an onerous design standard would result in a need for the parking areas of the development to be increased substantially to accommodate 100% accessible parking spaces for the ILUs. This would either necessitate a reduction in landscaped/open space or basement parking below the current proposed parking levels. This would be a very poor outcome from a social, environmental and economic perspective. Particularly when Uniting has advised that the proposed accessible parking provision is sufficient to meet anticipated demand and “fit for purpose” as confirmed by the Access Consultant.

In addition, legal advice (Appendix ZA) was sought from Allen’s as to need for a Clause 4.6 variation and the appropriateness of the variation.

For the reasons set out above, there are sufficient environmental grounds to justify the variation to the development standard, as required in Clause 4.6(3)(b).

**Clause 4.6(4)(a)(i) – The written request has adequately addressed the matters required to be demonstrated by subclause (3)**

We consider the above constitutes an appropriate written request that adequately addresses the matters outlined in subclause 3 above.

**Clause 4.6(4)(a)(ii) – Public interest**

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless 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. Refer below.

Objectives of the Standard

The Seniors SEPP provides no instruction on the intent of the private car accommodation standard and does not otherwise nominate any objectives to underpin the intent of the standard. In the first instance, it is therefore appropriate to consider the aims of the Seniors SEPP, prescribed under Clause 2(1) to determine whether the proposed non-compliance results in any inconsistency with these aims.

**Clause 2(1)(a) - Aims of the Policy**

*This clause states:*

*(1) This Policy aims to encourage the provision of housing (including residential care facilities) that will:*

- (a) increase the supply and diversity of residences that meet the needs of seniors or people with a disability, and*
- (b) make efficient use of existing infrastructure and services, and*
- (c) be of good design*

**Response**

The subject DA seeks to increase the supply of seniors accommodation in a locality that has increasing numbers of older people. The site is within an established urban area, reducing pressure for release of non-urban land at the periphery.

The requirement for all spaces to comply and be accessible would add to development costs, potentially causing a reduction in the provision of seniors (and affordable) accommodation and would thus be in conflict with the aim to encourage the provision of housing.

The proposal, which meets the parking demands of the development, is consistent with this aim.

The suitability of the design is demonstrated in this report and elsewhere in the accompanying plans and reports prepared by the broader project team.

**Inferred Underlying Objective**

Again, as noted earlier, it is appropriate to "infer" that the underlying objective of the standard is to ensure that adequate accessible car parking is provided for residents of independent living units in a seniors living development.

**Response:**

The underlying objective of the standard is achieved, with adequate accessible parking provided on-site to meet the demands determined by Uniting and the project Access Consultant. Refer to the Access Report at Appendix I.

For the reasons outlined above, the "inferred" objectives of the standard are achieved notwithstanding the non-compliance.

#### Objectives of the Zones

The site is primarily zoned R1 but with a small R2 portion at 1 Harbour Street. The objectives of the zones, where relevant, are addressed below.

Table 5 Consideration of Zone Objectives

Zone Objectives	Comment	Consistent?
<b>Zone R1 General Residential</b> <b>1 Objectives of zone</b> <ul style="list-style-type: none"> <li>To provide for the housing needs of the community.</li> <li>To provide for a variety of housing types and densities.</li> <li>To enable other land uses that provide facilities or services to meet the day to day needs of residents.</li> <li>To promote "walkable" neighbourhoods.</li> <li>To ensure that development is compatible with the scale and character of the local area and complements the existing streetscape.</li> </ul>	<ul style="list-style-type: none"> <li>The proposed development will provide additional housing to meet the demands for aged care accommodation in the Central Coast and broader community.</li> <li>The proposed development provides a variety of housing types.</li> <li>The proposed development provides ancillary on-site support services to meet the day to day needs to residents on the site.</li> <li>The proposed development promotes a "walkable" neighbourhood through footpath upgrades external to the site and the generous pedestrian linkages through the development.</li> <li>The revised proposal suitably transitions to the sensitive interfaces to the east and south and is compatible with the surrounds. Further, it is considered to complement the existing streetscapes through high quality architectural finishes and importantly, generous landscaping to ensure the development is situated within a landscape context suitable for the area.</li> </ul> <p>Notwithstanding all of the above, the non-compliance with the private car accommodation standard does not result in any impact on the ability for the proposal to be consistent with these objectives, where relevant.</p>	Yes
<b>Zone R2 Low Density Residential</b> <b>1 Objectives of zone</b> <ul style="list-style-type: none"> <li>To provide for the housing needs of the community within a low density residential environment.</li> </ul>	<ul style="list-style-type: none"> <li>The part of the development on the limited R2 zoned part of the site at 1 Harbour Street comprises 2 storeys in height and a scale to the streetscape that is compatible with the low density residential environment to the east and north-east similarly zoned R2. The character of the built form on the R2 zoned part of the site is compatible with a low</li> </ul>	Yes



<ul style="list-style-type: none"><li>• To enable other land uses that provide facilities or services to meet the day to day needs of residents.</li><li>• To maintain and enhance the residential amenity and character of the surrounding area.</li><li>• To provide a residential character commensurate with a low density residential environment.</li></ul>	<ul style="list-style-type: none"><li>• density residential environment.</li><li>• There are no other land uses on the R2 zoned part of the site. As above, ancillary on-site support services are provided internally within the site for residents.</li></ul> <p>Notwithstanding all of the above, the non-compliance with the private car accommodation standard does not result in any impact on the ability for the proposal to be consistent with these objectives, where relevant.</p>	
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As can be seen above, the provision of accessible parking and specifically, the non-compliance with the private car accommodation standard in the Seniors SEPP, will not result in any conflict with and is consistent with the above zone objectives.

#### **Other Matters**

In addition to the above, having regard to the other matters in Clause 4.6, we note:

- Cl 4.6(5)(a) – We have not identified any outcome which would be prejudicial to planning matters of State or Regional significance that would result as a consequence of varying the development standard as proposed by this revised proposal.
- Cl 4.6(5)(b) – There is no public benefit in maintaining strict compliance with the development standard given that there are no adverse impacts that will result from the breach of the standard, whilst the provision of additional high quality seniors housing in the area is advantageous.

#### **Is the variation well founded?**

This Clause 4.6 variation request is well founded as it demonstrates, as required by Clause 4.6, that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development.
- There are sufficient environmental planning grounds to justify the contravention.
- The development is consistent with the inferred objectives of the development standard and the objectives of the zones, notwithstanding the variation and is therefore in the public interest.
- There is no public benefit in maintaining the standard.
- The contravention does not raise any matter of State or Regional significance.
- The application of Clause 4.6 to allow flexibility in the application of development standards would be achieved together with a better planning outcome.

The variation is therefore considered appropriate in the circumstances of the case.