

Clause 4.6 Variation to the Landscaped area requirement SEPP (Housing) 2021

4A TERMINAL PLACE AND GLADSTONE STREET,
MERRYLANDS

SITE 2 AMENDING DA:
BUILDINGS B, C, D

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CLAUSE 4.6 VARIATION REQUEST

INTRODUCTION

This Cl.4.6 supports an **amending DA** to make alterations and additions to an approved mixed use development at 4-4A Terminal Place and Gladstone Street, Merrylands (subject site), which increases the dwellings by a total of 146 units, taking the overall yield to 449 units. The subject site is part of the broader Block D Neil Street Precinct associated with the Cumberland Development Control Plan 2021.

The DA was approved on 13 June 2024 by the Sydney Central City Planning Panel and is for:

Construction of three (3) buildings (B, C & D) ranging in height from 12 to 17 storeys and comprising of six (6) neighbourhood shops and 303 residential units over six (6) levels of basement parking with associated site works.

This Development Application seeks to:

Amend the approved DA (as amended) by making alterations and additions to facilitate the delivery of a minimum of 15% affordable housing for a period of 15 years, with the building height and FSR using the bonus provisions under State Environmental Planning Policy (Housing) 2021, with an associated increase in units by 146. The proposal seeks to deliver three levels of basement parking, updated dwelling mix, provide 73 affordable housing units in Block C, 8 affordable housing units in Level 3 of Block D, with all units in Block B (174 units) delivered as build to sell and 194 units in Block D provided as Build to Rent housing.

Specifically, the proposal seeks to deliver a total of 146 new dwellings. Within Block B the additional yield is 48 units, with the remaining balance of 98 units provided over blocks C (+30) and D (+68). Existing apartments in Block D are already approved and comply with ADG design standards, meaning this change reflects a desire to hold rather than sell apartments. Furthermore, the additional units delivered as BTR in also built to ADG design standards, meaning that they are capable in the future as being delivered as market housing.

This increases the overall yield to 449 units.

The request seeks to vary the development standard for **minimum landscaped area** for in-fill affordable housing developments under Cl.19(2)(b)(ii) of *State Environmental Planning Policy (Housing) 2021* (Housing SEPP). This Clause 4.6 variation request demonstrates that:

- The landscape non-compliance is a technical non-compliance given that 2,036.37m² of landscaping is provided on site, which is 33% of the site area.

- It is unreasonable and unnecessary to comply with the development standard in this instance;
- environmental planning grounds demonstrate that it is reasonable to vary the development standard
- The proposal meets the intent of the landscape area control and is consistent with relevant State Environmental Planning Policies
- The proposal is consistent with the objectives of Cl.4.6 in that the facilitation of the variation will deliver better outcomes for and from the development through the provision of much needed affordable housing supply within an accessible location.
- The proposal is consistent with the likely future character of the Town Centre outlined in adopted council masterplans.

Despite the minor non-compliance with the numerical landscape area standard, the minor departure assists in the delivery of affordable housing, consistent with the following Objects of the Environmental Planning and Assessment Act 1979:

(d) to promote the delivery and maintenance of affordable housing,

(g) to promote good design and amenity of the built environment,

The objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal and apply the flexibility within Cl.4.6 of Cumberland LEP 2021 to the landscape area standard of the Housing SEPP 2021 at Cl.19 (2) (b), given a better outcome is achieved for and from the development.

The objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal.

The site

The subject site is located at 4-4A Terminal Place and Gladstone Street, Merrylands and is legally defined as Lot 2 in DP1217412, Lot 1 in DP229589 & Lot 1 in DP1173048.

Situated within the north-eastern edges of Merrylands Town Centre and located within Block D associated with the Neil Steet Precinct, the parent allotment is legally described as Lot 1 DP 229589 and Lot 2 DP 1217412 and is a large land holding of approximately 1.6Ha in total and contains a variety of land zones and intended future uses.

It is noted that this DA only relates to part of the site known as 'Site 2' which is addressed further in this statement, with a DA for Site 1 current with Council for assessment.

The aerial extract and photographs of the locality provide context to the parent allotment, noting that the Stage 2 only relates to the southern and western portion of the site – as reflected in the aerial photograph below.



Figure 1 The Subject site in its context (Spatial Collaboration Portal)

PLANNING INSTRUMENT TO BE VARIED

This Clause 4.6 Variation Request seeks to vary *State Environmental Planning Policy (Housing) 2021*

Under the Cumberland LEP 2021, Stage 2 is zoning R4 – High Density Residential, noting that '*Residential Flat Buildings*' and '*shop top housing*' are permitted with consent within the R4 zone. As Shop top housing and residential flat buildings are permitted in the zone, in-fill affordable housing and Built-to-rent housing are with consent via Chapter 2 Division 1 and Part 4 of the Housing SEPP 2021.

DEVELOPMENT STANDARD TO BE VARIED

The Clause 4.6 Variation Request relates to the minimum landscaped area requirement of Cl.19(2)(b)(ii) of *State Environmental Planning Policy (Housing) 2021*. This is a numeric non-discretionary development standard that stipulates a minimum landscaped area, being the lesser amount of 35m² per dwelling or 30% of the site area. An extract of the clause states:

19 Non-discretionary development standards—the Act, s 4.15

2) *The following are non-discretionary development standards in relation to the residential development to which this division applies—*

b) a minimum landscaped area that is the lesser of:

- i) 35m² per dwelling, or*
- ii) 30% of the site area,*

The site has an area of 6155.7m². Clause 19(2)(b)(ii) requires 30% of the site as landscaped area for in-fill affordable housing and this is equivalent to 1,846.71m².

The proposal as shown in the landscape plans provides for 2,036.37m² of landscape area, which complies. This includes landscaping at ground level and above ground level including to communal open spaces.

However it is noted that Council have calculated that the proposal provides 793.2m² of landscape area and that accordingly this Cl.4.6 Variation request is provided to address what is a technical non-compliance.

In this regard, the proposal provides **793.2m²** of the site as landscaped area (12.8%), which is a variation by **decreasing** the landscape area by **87%% or 1,053.51m²**.

It is noted that the amending DA does not make any change to the landscape area, relative to what has already been approved.

Furthermore landscaping is provided across the entire precinct, which land to be dedicated to Council as a public park.

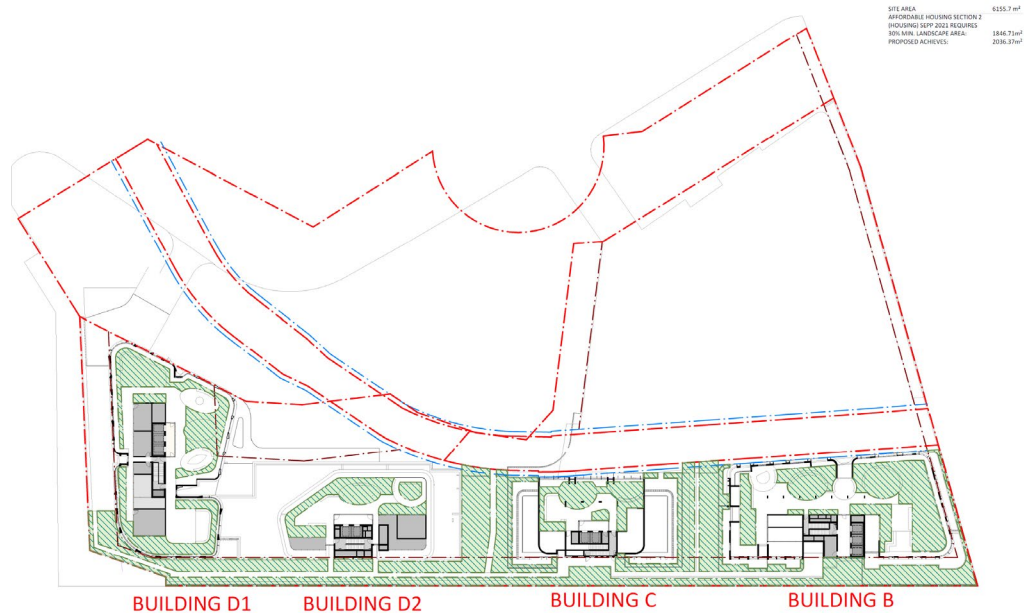


Figure 2 The Subject site and its landscape areas which equal 33% of the site area.

OBJECTIVES OF THE STANDARD

Cl.15A includes a single objective that applies to the infill affordable housing division of the Housing SEPP 2021. The objective is:

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 object of Cl.19 is as follows:

(1) The object of this section is to identify development standards for particular matters relating to development for the purposes of in-fill affordable housing that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.

Neither objective within Cl.15 nor Cl.19 has a particular reference to the internal area of an apartment. It is noted that Cl.19 provides an administrative task in advising a consent authority that if identified standards are complied with, then a more onerous standard cannot be applied.

There is no specific objective for landscape area, other than identifying the non-discretionary standard at Cl.2(b).

JUSTIFICATION OF THE PROPOSED VARIATION

Cl.4.6 of the LEP

Clause 4.6 of Cumberland LEP 2021 provides that development consent may be granted for development even though the development would contravene a development standard. The objectives of clause 4.6 are:

- 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.*

The operative provisions of the clause are as follows:

- 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.*

This document has been prepared in accordance with section 35B of the *Environmental Planning and Assessment Regulation 2021* to address the above requirements.

The key tests or requirements arising under clause 4.6 are as follows:

- 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*.
- There are planning grounds to warrant the departure, and these planning grounds are clearly articulated as reasons in arriving at a decision.

An earlier version of clause 4.6, prior to its amendment on 1 November 2023, contained an additional requirement that the development be “in the public interest”, including 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”.

This requirement is no longer expressly relevant to clause 4.6 variation requests.

Relevant Case Law

Clause 4.6(3)(a) emphasises the need for the proponent to demonstrate how the relevant development standard is unreasonable or unnecessary in the circumstances. The ways in which compliance with a development standard may be held to be “unreasonable or unnecessary” are well established. In *Wehbe v Pittwater Council* [2007] NSWLEC 827 (Wehbe), Preston CJ provided a non-exhaustive list through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary.

While *Wehbe* related to objections made pursuant to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), in *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action) the Court held that the common ways of demonstrating that compliance with a development standard is unreasonable or unnecessary as outlined in *Wehbe* are equally applicable to clause 4.6. Further, in *Initial Action* the Court confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore, this must be considered when evaluating the merit of the landscape departure. The five common methods for demonstrating that compliance with a development standard is unreasonable or unnecessary as outlined in *Wehbe* are:

- 1) Demonstrating that the objectives of the development standard is achieved, despite the noncompliance [42]
- 2) Establishing that the underlying objective or purpose is not relevant and compliance is therefore unnecessary [45]
- 3) Showing that the underlying objective or purpose would be defeated or thwarted if compliance required, confirming that compliance is unreasonable [46]
- 4) Establishing that the standard has been virtually abandoned or destroyed through council’s own actions. Therefore given council’s granting of consents that depart from the standard, compliance is unnecessary and unreasonable [47]
- 5) Demonstrating that the zoning of the land is unreasonable or inappropriate, meaning that compliance with the development standard is also unreasonable or unnecessary [48]

In addition a recent judgement in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore this must be considered when evaluating the merit of the landscape departure.

This Cl.4.6 Request applies principle 1 of Wehbe.

The Variation and Design Response

The proposal as shown in the landscape plans provides for 2,036.37m² of landscape area, which complies. This includes landscaping at ground level and above ground level including to communal open spaces.

However it is noted that Council have calculated that the proposal provides 793.2m² of landscape area and that accordingly this Cl.4.6 Variation request is provided.

In this regard, the proposal provides **793.2m²** of the site as landscaped area (12.8%), which is a variation by **decreasing** the landscape area by **87%% or 1,053.51m²**.

It is noted that the amending DA does not make any change to the landscape area, relative to what has already been approved

Clause 4.6(3) - Compliance Unreasonable and Unnecessary

In accordance with the provisions of Cl.4.6(3)(a) it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as:

- The landscape non-compliance is a technical non-compliance given that 2,036.37m² of landscaping is provided on site, which is 33% of the site area.
- There is no specific objective for the landscape area standard, nor in the in-fill affordable housing practice note (December 2023) is landscaping discussed, including a reason for the development standard.
- The proposal is consistent with the Principles of The Housing SEPP 2021, in particular:
 - o Principle A through the provision of diverse housing types
 - o Principle B through providing 81 affordable housing units, consistent with the requirements of Part 2, Division 1 of the Housing SEPP 2021
 - o Principle C by providing apartments that comply with ADG design criteria, along with high quality areas of public domain

- Principle D by increasing the housing within an accessible location, making use of existing and planned infrastructure and services.
 - Principle E through providing high quality areas of landscaped communal open spaces, private open spaces and landscaped public domain,
 - Principle F through providing additional yield that is consistent with the desired future character of the Merrylands Town Centre, as established in its Master Plans and LEP development standards.
 - Principle H by providing 81 affordable rental homes in an area with high need as articulated in Council's Housing Strategy.
- The proposal provides more than 15% affordable housing and is consistent with Objective 15A, despite the technical departure from the landscape standard, noting that the existing approved landscaped area at ground level has been retained unchanged.
 - Importantly, the proposal will be in keeping with the character of new apartments delivered in the area, including those that apply the infill affordable housing provisions of the Housing SEPP 2021.
 - Further, the proposal has been to provide an attractive public domain and communal open spaces on the site, noting its R4 High Density Residential zoning and town centre context.
 - The footprint of the building has been established by the Original Approved DA which is under construction. The proposal continues to provide for high quality landscaping across the building and on the site itself, making a significant contribution to environmental sustainability and water management, along with exceptional amenity for users of the public domain and also private and communal areas.
 - The proposal is part of an overall development which will dedicate land to council for a public park of over 4,000m²

In Wehbe it was set out that compliance can be considered unreasonable or unnecessary where:

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

There is no specific objective to the standard, rather a single objective to the division, and this is considered below for completeness.

Objectives	Discussion
<i>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.</i>	The proposal provides a total of 81 units for dedication as affordable housing. This meets the objective of the division, and therefore the technical departure from the landscaped area is considered appropriate, noting that in practical terms 33% of the site is landscaped area.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable.

Sufficient Environmental Planning Grounds & Design Response

In Initial Action, 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.

The following points demonstrate that sufficiently environmental planning grounds exist to justify contravening the landscaped area development standard and further demonstrates that the landscaped area departure does not give rise to any environmental impacts. Council can be satisfied that the proposal is an appropriate design response for the subject site for the following reasons:

- The landscape non-compliance is a technical non-compliance given that 2,036.37m² of landscaping is provided on site, which is 33% of the site area.
- The site is part of a larger development with the footprint already established and with a significant area of land being dedicated to council as a public park.
- The non-compliance with the development standard will not result in any adverse environmental impacts to surrounding developments, or the amenity that they currently have, or their future development potential. Despite the technical non-compliance, there is no resulting detrimental impact on privacy, overshadowing, or traffic impacts.
- There is no specific objective for landscaped area under the Housing SEPP 2021, however, as shown in this application, the proposal does not represent an overdevelopment of the site when considered against other planning controls.

- The proposal is consistent with the intent of the In-fill Affordable Housing provisions of the housing SEPP by providing at least 15% of the GFA as affordable housing, despite the technical departure from the landscaped area development standard.
- Overall, the minor departure enables a better design outcome, consistent with the following Objects of the Environmental Planning and Assessment Act 1979:

(d) to promote the delivery and maintenance of affordable housing,

(g) to promote good design and amenity of the built environment,

Therefore, the current proposal is a preferred outcome from an environmental planning perspective and demonstrates that there is merit in varying the landscaped area standard to deliver affordable rental housing and achieve a better design response on the site which demonstrates sufficient environmental planning grounds to support the departure.

CONCLUSION

Strict compliance with the prescriptive landscaped area 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 design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties.

The objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal.