

6-8 John Street and 13B Church Avenue, Mascot

Clause 4.6 variation to Motorcycle parking in the ARH SEPP

On behalf of
Iglu Pty Ltd
October 2019



Project Director

Kate Bartlett

Contributors

Michael Hanisch

Camilla Firman

* This document is for discussion purposes only unless signed and dated by the persons identified. This document has been reviewed by the Project Director.

Contact

Mecone

Level 12, 179 Elizabeth Street
Sydney, New South Wales 2000

info@mecone.com.au
mecone.com.au

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Table of Contents

1	Introduction.....	1
2	Clause 4.6 Exceptions to Development Standards.....	1
3	The Development Standard to be varied	3
4	Extent of variation to the development standard	3
5	Objectives of the standard	3
6	Objectives of the zone	3
7	Assessment	3
8	Any matters of significance for State or regional environmental planning	8
9	Conclusion to variation to motorcycle parking standard.....	8

1 Introduction

The Development Application (DA) for 6-8 John Street and 13B Church Avenue, Mascot (subject site) proposes a new boarding house which will be used for the exclusive purpose of student accommodation. This Clause 4.6 variation under the Botany Bay Local Environmental Plan 2013 (BBLEP 2013) seeks to vary the Development Standard in Clause 30 (1)(h) Motorcycle parking control in the State Environmental Planning Policy (Affordable Rental Housing) 2009 (ARH SEPP) in pursuit of an enhanced planning outcome at the site.

2 Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the BBLEP 2013 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 enables a variation to any development standard to be approved upon consideration of a written request from the applicant that justifies the contravention in accordance with Clause 4.6.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard;
- That 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.

The consent authority's satisfaction as to those matters must be informed by the objectives, which are:

1. To provide flexibility in the application of the relevant control; and
2. To achieve better outcomes for and from development.

The *Land and Environment Court* has established questions to be addressed in variations to developments standards lodged under *State Environmental Planning Policy 1 – Development Standards* (SEPP 1) through the judgment of Justice Lloyd, in *Winten Property Group Ltd v North Sydney Council [2001] 130 LGERA 79 at 89*. The test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council [2007] NSW LEC 827 (Wehbe)*.

An additional principle was established in the decision by Commissioner Pearson in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (Four2Five)* which was upheld by Pain J on appeal. A further recent judgement by Preston in *Initial Action 3 Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* clarified the correct approach to Clause 4.6 variation requests, including that:

“The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a

better environmental planning outcome than a development that complies with the development standard." [88]

Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court.

Clause 4.6 of the BBLEP 2013 reads as follows:

Clause 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 for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is **unreasonable or unnecessary in the circumstances of the case**, and*
 - (b) *that there **are sufficient environmental planning grounds to justify contravening the development standard.***
 - (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *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**, and*
 - (b) *the concurrence of the Secretary has been obtained.*
 - (5) *In deciding whether to grant concurrence, the Secretary must consider:*
 - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*
- (emphasis added)

...

3 The Development Standard to be varied

The development standard to be varied is Clause 30 (1)(h) Motorcycle parking control in the ARH SEPP. Clause 30 (1)(h) of the ARH SEPP stipulates that at least one (1) motorcycle space is provided for every 5 boarding rooms.

4 Extent of variation to the development standard

The proposal is required to provide a total of 87 motorcycle spaces (with a total of 435 boarding rooms) under the ARH SEPP. However, the proposal will not provide any motorcycle spaces.

5 Objectives of the standard

There are no stated objectives associated with the control or Clause 30 in general. However, it is considered that the purpose of Clause 30 of the SEPP is to ensure that boarding houses are compatible with their context, provide adequate facilities for occupants and do not result in any adverse impacts to the surrounding area, including traffic impacts.

6 Objectives of the zone

The objectives of the **B4 Mixed use zone** under the BBLEP 2013 are as follows:

- 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.

7 Assessment

Where Clause 4.6(2) permits a consent authority to grant development consent for a development even though that development would contravene a development standard, the consent authority can only grant approval if the applicant has adequately demonstrated satisfaction of the matters in Clause 4.6(3) and the preconditions in Clause 4.6(4) have been satisfied.

Clause 4.6(3)(a) - Is Compliance with the development standard unreasonable or unnecessary in the circumstances of the case

Compliance with the Development Standard within Clause 30 (1)(h) of the SEPP (ARH) 2009 is unreasonable and unnecessary given the following circumstances of this case:

- As detailed in *Williams v Ku-ring-gai Municipal Council [2017] NSWLEC 1098*, *Wehbe v Pittwater Council [2007] NSWLEC 827 at [44]–[48]*, a number of approaches could be used to establish that compliance with a development standard is unreasonable or unnecessary. **Wehbe Test 1**, as described in *Williams*, are relevant for the subject site:
 - **Wehbe Test 1** - *the objectives of the standard are achieved notwithstanding non-compliance with the standard;*

As previously outlined, there is no specific objectives provided for Clause 30 of the ARH SEPP. Despite this, in the case of the proposed development, there are several circumstances which indicate that the objectives of the standard and zone are

achieved notwithstanding non-compliance with the motorcycle parking requirement:

- The proposed development is consistent with the B4 Mixed use zone objectives as described above and places the new residents within easy walking distance of local shops and services, reducing their need for ownership and storage of any form of vehicle;
- The proposal will aligns with the objectives of BBLEP2013 and will promote the use of public transport, walking and cycling because the site is highly accessible with Mascot train station and multiple bus services (along Coward Street, Bourke Street and Gardeners Road) in close proximity, providing easy access to tertiary institutions such as universities that are also located within easy walking distance to train stations and bus stops;
- It is considered that the future tenants (being students) would not rely on motorcycles for transport due to cost and ownership constraints and would rely instead on cheaper forms of transport (being public transport, cycling and walking) which is consistent with the proponent's experiences at its other facilities currently operating in Sydney, Melbourne and Brisbane;
- The contravention of the motorcycle parking requirement does not raise any matter of State or regional planning significance. In contrast, the absence of motorcycle and car parking aligns with Bayside Council's views on local transport planning priorities, *'to minimise car parking in areas which have good access to public transport to promote sustainable transport'* and the Mascot Station precinct objective to *'encourage increased use of public transport, walking and cycling and reduce reliance on cars'*.
- There is no public benefit in maintaining the standard in the circumstances of the case as explained below.

Therefore, strict compliance with the motorcycle parking requirement would be unreasonable and unnecessary in the circumstances.

Clause 4.6(3)(b) - Are there sufficient environmental planning grounds to justify contravening the development standard?

As discussed above, Pain J held in *Four2Five vs Ashfield Council [2015] NSWLEC 90* that to satisfy clause 4.6(3)(b), a clause 4.6 variation must do more than demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate that there are other environmental planning grounds that justify contravening the development standard, preferably being grounds that are specific to the site.

Pain J also held that in order for a clause 4.6 variation to be accepted, seeking to justify the contravention is insufficient - the consent authority must be satisfied that clause 4.6(3)(a) and (b) have been properly addressed. On appeal, Leeming JA in *Four2Five vs Ashfield Council [2015] NSWCA 248* acknowledged Pain J's approach, but did not necessarily endorse it, instead re-stating Pain J and saying:

"matters of consistency with objectives of development standards remain relevant, but not exclusively so."

Further recent findings by Preston in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* also found that:

"The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard." [88]

There are sufficient environmental planning grounds to justify contravening the development standard as the proposed development allows for the promotion and co-ordination of the orderly and economic use and development of the land in the following ways:

- The development is for a purpose built facility for student accommodation. The students that attend these facilities are generally not local and travel from other locations including overseas. As the student accommodation is not their permanent place of residence, the students do not have private vehicles or motorcycles. The facility is sited purposely close to local services and public transport to ensure that the students have access to a range of needs without the reliance on private transport.
- The proposal is supported by a Green Travel Plan prepared by Varga Traffic Planning (**Appendix 16**). The Green Travel Plan aims to;
 - Reduce dependence on private cars;
 - Improve pedestrian and cycling facilities;
 - Promote public transport and car sharing;
 - Reduce congestion in the local area.

After reviewing the context of the site and the use of the site by students, the Plan proposes a number of key actions to meet strategic directions related to aligning land use planning and transport planning, including the reduction in the need for private vehicle ownership. These actions include;

- Considering a subsidy for staff and students travelling via public transport;
 - Provision of transport information notice boards and other mechanisms to make employees and students aware of travel options;
 - Utilisation of car share facilities;
 - Restricting off street parking of cars and motorbikes to nil;
 - Provision of end of trip facilities;
 - Establish walking and cycling groups for students and staff;
 - Providing travel access guide to staff and students as part of an induction package and regularly review/update this information to ensure it is up to date.
- The development will create a 'better planning outcome' given it will promote the use of more sustainable forms of transport including public transport, cycling and walking and is consistent with Council's approach to traffic and parking, which is to reduce private vehicle trips within the LGA;

- The proposal will also provide sufficient bicycle parking which surpasses ARH SEPP minimum requirements;
- The proposal will not create any additional traffic generation to the surrounding road network given no car parking spaces and no motorcycle spaces are provided;
- The proposal will not significantly impact upon the amenity of the adjoining neighbours, whereas encouraging motorcycle use by the residents of the proposed development would result in additional noise impacts on neighbours;
- If the proposal was to incorporate 87 motorcycle spaces (as per the requirement) this would reduce the private open space for the courtyard, amenities and reduce deep soil landscaping; and,
- Strict compliance with the motorcycle parking requirement would hinder the attainment of the objectives of the *Environment and Planning Assessment Act 1979 (the Act)* and would not result in the orderly and economic use and development of land.

Clause 4.6(4)(a) Consideration of matters by Consent Authority

The preconditions that must be satisfied in the opinion of the Consent Authority before consent can be given are detailed in Clause 4.6(4)(a). These preconditions are discussed in more detail below.

Clause 4.6(4)(a)(i) - the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)

As demonstrated above, the proposed development has satisfied the matters required to be demonstrated in Clause 4.6(3) by providing a written request that demonstrates;

- Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, by establishing that the objectives of the development standard are achieved notwithstanding the non-compliance (**Wehbe Test 1**).
- The environmental planning grounds relied on are sufficient to justify the development standard.

In accordance with the findings of Commissioner Preston in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, the Consent Authority under Clause 4.6(4)(a)(i) must only be satisfied that the request addresses Clause 4.6(3).

Under Clause 4.6(4)(a)(i) the Consent Authority is not to determine in their opinion whether the request satisfies the requirements of Clause 4.6(3)(a) and (b), just that the request has been made and that these items have been demonstrated.

Clause 4.6(4)(a)(ii) - 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

It is demonstrated below that the proposed development will be in the public interest because it fulfils the following objectives:

The objectives of the particular standard:

It is reiterated that there are no stated objectives associated with the control or Clause 30 in general. However, it is considered that the purpose of Clause 30 of the SEPP is to ensure that boarding houses are compatible with their context, provide adequate facilities for occupants and do not result in any adverse impacts to the surrounding area, including traffic impacts.

The objectives for development within the zone in which the development is proposed to be carried out.

This falls within the **B4 Mixed Use** zone and the relevant objectives are addressed below;

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

The proposed development includes a use that is permitted with consent in the zone, which will contribute to the diversity of residential uses in the surrounding locality. Furthermore, the proposed development will include student accommodation within walking distance of the Mascot Local Centre and Mascot train station. The future occupants will be patrons of and potentially work in the local centre, strengthening the local economy.

- **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.**

- The proposed development facilitates a high-quality built form at the subject site that integrates with the surrounding built form and responds appropriately to the topography and context of the site and the objectives of the zone. The development facilitates solely for the accommodation of students.
- The proposed development will support the continued operation and future growth of businesses within the B4 Mixed Use zone. The proposal introduces a new, permitted use into the Mascot Station Precinct, which will contribute to the continued operation and development of the surrounding diverse uses.
- The student residents will be within walking distance to employment opportunities in the Mascot Local Centre and nearby Green Square Town Centre.
- The proposed development will be located in an accessible location which is in proximity to Mascot train station and a number of bus services which will maximise public transport patronage.
- The proposal also incorporates appropriate bicycle parking provisions. The provision of no motorcycle parking will encourage the use of more sustainable forms of transport such as walking and cycling and supports this objective and vision to encourage interaction within the community and its services.
- Providing private motorcycle parking spaces would actively reduce public transport patronage and discourage walking and cycling.

Taking into consideration the above the proposed development serves the public interest, as it is consistent with the objectives of the development standard and the B4 Mixed Use zone.

Furthermore, there is no significant benefit in maintaining the motorcycle parking requirements given the proposal facilitates a significantly better planning outcome with improved amenity and better environmental impacts.

8 Any matters of significance for State or regional environmental planning

The development provides an opportunity for an appropriate planning response which aligns with the visions in place and within the Greater Sydney Commissions' Eastern City District Plan. The proposed development will add to the diversity of uses provided within Mascot Station Precinct and reinforce the role of the Local Centre. The contravention with the motorcycle parking standard does not raise any matter of State or regional planning significance.

9 Conclusion to variation to motorcycle parking standard

This is a written request for an exception to the motorcycle parking standard under Clause 4.6 of the BBLEP 2013. It justifies the contravention to the motorcycle parking requirement set by the ARH SEPP, and in particular demonstrates that the proposal provides a significantly better planning outcome with no significant adverse environmental impacts, and therefore in the circumstances of the case:

- Compliance with the motorcycle standard is unreasonable and unnecessary;
- There are sufficient environmental planning grounds for the contravention;
- It is in the public interest in being consistent with the objectives of the zone;
and
- There are no matters of State or regional planning significance and no public benefits in maintaining the motorcycle standard in this case.



mecone

Level 12, 179 Elizabeth St
Sydney, NSW, 2000

info@mecone.com.au
mecone.com.au