

State Environmental Planning Policy (Affordable Rental Housing) 2009

Clause 4.6: Exception to Development Standards

882A Pittwater Road, Dee Why

The Development Application

1. This report relates to a development application that seeks consent for consent for demolition of existing buildings and structures and the erection of a nine-storey building which will contain one (1) retail premises (food and drink premises); two (2) commercial offices; and nineteen (19) affordable rental dwellings (boarding house), and a manager's office/residence. Ancillary elements will include on-site storage and bicycle parking facilities, as well as communal open space areas.
2. The site is located at 882A Pittwater Road, Dee Why (the *site*) and legally described as Lot B in Deposited Plan 389449.
3. The Environmental Planning Instrument to which this variation relates is State Environmental Planning Policy (Affordable Rental Housing 2009 (SEPP ARH).
4. The site is located in the B4 Mixed Use Zone, pursuant to Clause 2.2 of the Warringah Local Environmental Plan 2011 (LEP) and the proposed use of the site is permissible with development consent.
5. The purpose of this report is to seek a variation to the development standard at cl. 30(1)(b) of the SEPP ARH, relating to the size of boarding rooms and is to be read in conjunction with the Statement of Environmental Effects (SEE) accompanying the development application.

The Variation Sought

The Development Standard for Boarding Room Size

6. Clause 30 of the SEPP provides Standards for boarding houses and states as follows:
 - (1) *A consent authority must not consent to development to which this Division applies unless it is satisfied of each of the following—*
 - (h) *no boarding room will have a gross floor area (excluding any area used for the purposes of private kitchen or bathroom facilities) of more than 25 square metres.*
7. The proposal provides one boarding room, Room 5.01, which is 45.2 square metres in area (37.5 square metres excluding kitchen and bathroom facilities) and thus exceeds the development standard for room size.



Non-Compliance with Boarding Room Size

9. One boarding room within the proposed development exceeds the permitted boarding room size, by 16.1m². This is the result of discussions with the Design Sustainability Advisory Panel (DSAP) on 7 October 2021, which suggests that the, then, layout of boarding room 5.01 was questionable, providing a *complicated and contrived* internal layout.
10. To overcome these concerns, the boarding rooms were consolidated into one room, to provide a simplified layout, benefiting from a larger living space, while not increasing the provision of bedrooms on the site, such that the impact of the development is, in any way increased, instead being reduced over the original development application.

The Context and Future Character

What is the character of the locality?

11. Character is what makes a neighbourhood distinctive and represents the identity of a place. To this end, Section G.1 of the Warringah Development Control Plan 2011 (the DCP) provides the following character statement:

The Dee Why Town Centre will be characterised by community, retail, commercial and residential uses. The vision for Dee Why Town Centre identified in the 2013 Masterplan is as follows: “Dee Why will be home to a thriving cosmopolitan community who cherish their past, celebrate its unique and engaging vibe and embrace its bold commitment to urban sustainability. It will be a place of both energy and refuge, a city at the beach, with a distinctive modern urban identity.”

The North District Plan 2018 identifies Dee Why Town Centre as a mixed-use area that offers a vibrant local night-time economy. It outlines actions that are interpreted as objectives within this section of the DCP.

The desired character for the Dee Why Town Centre is further defined by objectives within this Development Control Plan.

12. As it relates to compliance with the character of the Dee Why Town Centre, the size of the boarding room will not compromise the cosmopolitan community of Dee Why, while continuing the project's commitment to urban sustainability in terms of overall building design.
13. The boarding room size retains the mixed-use character of the development and enhances the internal living space, particularly with a greater frontage to the northern elevation occupied by only one dwelling, such that there are improved external living spaces attached to one room, along with a larger internal area that enhances the amenity of this room and diversifies the accommodation mix within the development.



Is the proposal consistent/compatible with the objectives of locality /character of the Dee Why Town Centre?

14. The proposed outcome, with one boarding room being larger than the remainder of the development does not alter the exterior composition of the building, nor the internal amenity thus provides a compatible response with the desired future character of the Dee Why Town Centre.
15. There are no changes to the ground floor plane or commercial component of the development that otherwise alter the degree of activation to the street frontage, despite the narrow width of the site, with the shared building lobby and café by retained.
16. The composition of the balcony which comprises the whole of the building frontage provides opportunity for both activation and passive surveillance to Pittwater Road, consistent with the character of the locality.

Does the proposed development make for a good design?

17. From an architectural and urban design perspective, the proposed development will achieve a good design outcome as it accords with the desired future character and its associated objectives regarding activation, articulation to building form and provides a strong interest to the street frontage.
18. Internally, the larger boarding room enhances the internal amenity of this over the original design, in particular, thus enhancing the amenity of the living spaces, while providing a strong opportunity for an external area attached to the room. The open plan layout and flexibility of space ensures that a good internal design is achieved.

Variation to a Development Standard

19. A development standard is defined in s1.4 of the EP & A Act as follows:

***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: ...*

(d) the intensity or density of the use of any land, building or work ...

20. Being a provision of the SEPP in relation to the carrying out of development, under which a requirement is fixed in respect to the size of a boarding room, clause 30(1)(b) is a development standard.
21. As noted by the Chief Judge of the Land & Environment Court of NSW in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, [**Initial Action**], clause 4.6 is facultative in permitting a consent authority to grant consent for development even though that development



would contravene a development standard imposed by an environmental planning instrument. However, clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.

22. In order for the consent authority to grant a variation to the development standard, there is no express provisions contained in the SEPP ARH, similar to the LEP, that provide the means for which a development standard may be varied. To that end, the principles of clause 4.6 of the LEP are relied on and require that the consent authority must be satisfied that:

- compliance with the development standard is unnecessary or unreasonable in the circumstances of the case and
- there are sufficient environmental planning grounds to justify contravening the development standard
- the proposed development will be in the public interest because it is consistent with the objectives of the standard and zone; and
- the concurrence of the Secretary has been obtained.

Clause 4.6(4)(a)(i) - Whether request adequately addresses requirements

23. This request is comprehensive in its discussion of whether compliance with the development standard is unreasonable or unnecessary because the development will comply with the zone objectives and whether there are sufficient environment planning grounds for varying the standard. Both issues are discussed below.

24. There are no express objectives pertaining to motor cycle provision.

Clause 4.6(3)(a) Unnecessary or unreasonable

25. The common approaches for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827. Cases such as *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, *Randwick Council v Micaul Holdings Pty Ltd* [2017] NSWLEC 7 and, most recently, *Initial Action*, have confirmed that adopting the *Wehbe* principles remains an appropriate approach.

26. The first option and the applicable in this case, is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

27. Set out below is an extract from the judgement in *Wehbe* that explains the rationale for adopting this approach in the context of clause 4.6.

The rationale is that development standards are not ends in themselves but means of achieving ends...The ends are environmental or planning objectives. Compliance with a



development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)

Assessment of the Proposed Variation

Consistency with objectives of the standard (clause 4.6.4(a)(ii))

28. There is no objective for the development standard for the size of boarding rooms.

Consistency with Zone Objectives – clause 4.6(4)(a)(ii)

29. In relation to whether a proposal is consistent with the objectives of a zone, the test for consistency is set out in *Coffs Harbour Environment Centre v Coffs Harbour City Council (1991) 74 LGRA 185* (the Coffs Harbour case). The principles for determining what is meant by consistent are as follows:

- a development that is consistent with zone objectives does not need to promote the objective concerned strictly, but also encompasses development which may be complementary or ancillary to development and promotes the objective concerned; and
- a development is not consistent with zone objectives if it is antipathetic development to those objectives, irrespective of whether efforts have been made to minimise the extent to which it is antipathetic

30. Thus, development will be consistent with zone objectives if it is not antipathetic to them. It is not necessary to show that the development promotes, or is ancillary to, those objectives, nor even show it is compatible, *Schaffer Corporation v Hawkesbury City Council (19s92) 77 LGRA 21*.

31. The proposed development is consistent with the zone objectives, despite providing one room within the development that exceeds the maximum room size.

32. The Objectives of the B4 Zone are reproduced 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 reinforce the role of Dee Why as the major centre in the sub-region by the treatment of public spaces, the scale and intensity of development, the focus of civic activity and the arrangement of land uses.*
- *To promote building design that creates active building fronts, contributes to the life of streets and public spaces and creates environments that are appropriate to human scale as well as being comfortable, interesting and safe.*



- *To promote a land use pattern that is characterised by shops, restaurants and business premises on the ground floor and housing and offices on the upper floors of buildings.*
- *To encourage site amalgamations to facilitate new development and to facilitate the provision of car parking below ground.*

33. The proposed development is consistent with the relevant objectives, as it relates to the size of one boarding room, for the following reasons:

- The development continues the mixed use nature of the development despite the oversized room and this additional space would only otherwise be used for a similar purpose given its position in the building.
- The size of the boarding room does not hinder the integration of the residential use of the site in this accessible location and residents of this boarding room will be able to maximise the use of public transport, walking and cycling, taking advantage of the on-site bicycle provision and proximity to the bus services which are located in front of the site.
- The scale and intensity of development on this Site is commensurate to its immediate context, particularly having regard to its limited geometry, thus ensuring that the scale and intensity of development thereon, is consistent with that achieved on adjoining properties, to create a consistent and compatible urban form with the streetscape, without compromising public space or civic activity. The larger room size the subject of this cl 4.6 request does not, in any way impede achieving this objective.
- The design of the of the boarding room provides an external open area that will enhance the activation to the street frontage given its size and will contribute ot the activity of the primary elevation of the built form.
- Despite the oversized boarding room, the provision of housing remains on the upper floor of the buildings.

34. The proposed development will therefore be consistent with the zone objectives, despite the provision of one boarding room exceeding the maximum size.

35. Given the circumstances of the case, the provision of strict numerical compliance would be unreasonable on the basis that the proposed development achieves compliance with the objectives of the zone.

Environmental Planning Grounds to Justify Contravening the Development Standards (clause 4.6(3)(b))?

36. The second element of clause 4.6(3) on which the Court must be satisfied is that there are sufficient environmental planning grounds to justify contravening the development standard. The environmental planning grounds relate to the subject matter, scope and purpose of the



Environmental Planning & Assessment Act [EP&A Act] including the objects of the EP&A Act (*Wehbe* para 23).

37. As Preston CJ explains in *Wehbe*:

“.. the focus of clause 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole. Second the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under clause 4.6(a)(i) that the written request has adequately addressed the matter.”

38. The environmental planning grounds which support departure from the development standards are as follows:

- The proposal satisfies the objectives of the B4 zone.
- The provision of an oversized room enhances both the internal and external amenity of this room within the development and provides a different product to the market, thus enhancing the vibrancy and vitality of the Dee Why Town Centre
- The provision of an oversized boarding room is of no consequence in terms of impacts to adjoining properties in relation to solar access, overshadowing, acoustic or visual privacy or any other such matter that may otherwise compromise an adjoining site.

Matters of state or regional significance (cl. 4.6(5)(a))

39. There is no prejudice to planning matters of Regional significance resulting from varying the development standard as proposed by this application. The contravention of the development standard in this case does not raise an issue of State or regional planning significance as it relates to local and contextual conditions. The variation sought is responding to the nature of a control applied across an area that supports viable use of the site while being sympathetic to the character of the locality and surrounding uses.

Is the proposed variation in the public interest?

Clause 4.6(a)(ii) – Public Interest

40. The fourth element that the Council needs to be satisfied with in order to vary the development standard is that the proposed development will be in the public interest if the standard is varied because it is consistent with the standards and zone’s objectives. Preston CJ in *Initial Action* (para 27) described the relevant test for this requirement as follows:



“The matter in cl 4.6(a)(ii) with which the consent authority or the Court on appeal must be satisfied is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purpose of clause 4.6(4)(a)(ii).”

41. As demonstrated in this Request, the proposed development will comprehensively achieve the objectives of the B4 zone.
42. The focus of the development as a whole is to provide an alternative form of accommodation to the market place and the oversized boarding room, despite non-compliance will further enhance the level of diversity afforded with an internal composition and layout that results in improved environmental outcomes.
43. The provision of affordable accommodation within a Town Centre location is well within the public interest, in a location that is highly accessible to transport, facilities and services, meeting a demand generated in a location where there is a higher proportion of the population in industries where accessibility to employment is often limited on a convenient and affordable basis.
44. Accordingly, the Council can be satisfied that it is in the public interest to vary the standard for the purpose of this development application.

