

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); three (3) commercial offices; and seventeen (17) affordable rental dwellings (boarding house), including a manager's 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(h) of the SEPP ARH, relating to the provision of motor cycle parking 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 Motorcycle Parking

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) *at least one parking space will be provided for a bicycle, and one will be provided for a motorcycle, for every 5 boarding rooms.*
7. The proposal provides seventeen bicycle spaces to services the affordable housing component of the development, which exceeds the minimum required number of spaces, being 3.2.
8. The proposal does not provide any motorcycle spaces, resulting in a shortfall of 3.2 spaces.



Non-Compliance with Motor Cycle Parking

9. Provision has not been made for motor cycle parking within the development due to the constrained layout of the site.
10. The site has a total area 233.7m², with an angled frontage of 8.44m to the property boundary. Perpendicular to the boundary, the site only has an actual width of 6.4m.
11. Neither on-site car parking, nor motorcycle parking, is proposed as there is no reasonable or feasible opportunity to provide vehicular access to the site.
12. Even if vehicular access was permitted to a classified road (which would not be supported by TfNSW, as advised by the Council in the pre-DA minutes, PLM 2020/0271, Page 11), even at the narrowest opening to any basement parking provision, this would erode the character of the streetscape along Pittwater Road and significantly compromise pedestrian safety.
13. Further, the cost of building a basement car park for the benefit of three motor cycle spaces is cost prohibitive once factors of vehicular ramps and sufficient head heights were provided. This is a cost that would otherwise be passed on through the development, thus compromising the ability to provide affordable rental housing, which forms the predominant basis of this application. It is a cost that is otherwise passed on to the end user.
14. Given the site constraints, the alternative opportunity to significantly increase bicycle parking is more cost effective, having regard to the site constraints and practicalities with a provision that is four times what is otherwise required in accordance with the SEPP ARH. Coupled with the proximity of the site to the B-Line bus route, which provides regional bus services, as well as more immediate services within the locality, the proximity and frequency of these services means that the strategic location of the site provides significant opportunity for residents of the development to rely upon public transport, without needing to rely upon private means.
15. A Green Travel Plan accompanies the application to promote alternative transport means to and from the site.

The Context and Future Character

What is the character of the locality?

16. 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.

17. As it relates to compliance with the character of the Dee Why Town Centre, pertaining to the matter of motor cycle parking, the key relevant objectives and associated provisions are as follows:

Streetscape & Public Domain Objectives

- Prioritise pedestrian, cycling and public transport users.
- Improve access for people of all ages and abilities
- Activate the public domain and create lively, attractive public spaces.

Pedestrian Connections – Requirements

2. Pedestrian connections must be designed to:

- a. Be accessible and safe
- b. Reduce conflicts between pedestrians and other transport modes
- c. Improve safety for pedestrians in high-risk zones (e.g. vehicle crossovers, public car parks).

Requirements - Retail Activation

1. Active uses must be provided adjacent to the public domain, including streets, open space, pedestrian accessways and laneways.
2. Active frontages are to contribute to the liveliness and vitality of the area by maximising entries or display windows to shops and/or food and drink premises or other uses, customer service areas and activities which provide pedestrian interest and interaction and casual surveillance of the public domain.

Traffic & Parking Objectives

- To encourage walking, cycling, public transport and car sharing.
- To encourage integrated basement car parking areas with shared access in suitable locations.
- To reduce overall building bulk and scale (particularly within podiums) by locating parking underground.
- To ensure the security of residential parking

18. Of the aforementioned provisions, the key aspects are as follows:
 - promote alternative transport forms other than motorised private vehicles
 - ensure an activated public domain that is pedestrian friendly and enhances the exposure of openings to the street frontage to maximise pedestrian permeability;
 - ensure that car parking is not visible.
19. These aspects combine to derive the character of the Town Centre and seek to ensure that reliance on public transport, cycling and walking is encouraged which, in this case, goes hand in glove with



the provision of an activated retail ground floor that encourages and enhances pedestrian activity on the doorstep of regular bus services. The provision of a vehicular entry point would compromise these outcomes.

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

20. The proposed outcome, without the provision of motorcycle parking, which could only be provided if the streetscape was intercepted with a vehicular crossing, provides a compatible response with the desired future character of the Dee Why Town Centre.
21. The ground floor plane provides safe pedestrian entry on a constrained site and enables an extensive degree of activation despite this narrow frontage, with a shared building lobby and café offering.
22. To disturb this opportunity by providing a vehicular access point for the purpose of accessing motor cycling parking, regardless of where it may be provided in the building, would erode the desired future character for this section of the Dee Why Town Centre.
23. Further, the implementation of such access and parking would potentially reduce opportunities for reliance on alternative transport forms, which is a key focus of the objectives that seek to prioritise pedestrian, cycling and public transport users. The introduction of a vehicular access point would also compromise pedestrian safety in close proximity to bus stops which would also potentially affect the ability for all user groups to utilise these due to a potential conflict with pedestrian movements around entry to public transport and a vehicular access point.

Does the proposed development make for a good design?

24. 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, pedestrian safety and vitality, to provide pedestrian interest to street frontages.
25. This is further reinforced by the site's location proximate to bus services and associated stops, which will provide an activated frontage, as opposed to one dominated by vehicular access points for the sake of three motorcycle spaces.

Variation to a Development Standard

26. 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:*



- (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) *.....*
- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) *– (o)*

27. Being a provision of the SEPP in relation to the carrying out of development, under which a requirement is fixed in respect to the provision of motorcycle parking, clause 30(h) is a development standard.
28. 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.
29. 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

30. This request is comprehensive in its discussion of whether compliance with the zone 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.
31. There are no express objectives pertaining to motor cycle provision.



Clause 4.6(3)(a) Unnecessary or unreasonable

32. 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.
33. 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.
34. 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))

35. There is no objective for the development standard for motorcycle parking provision.

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

36. 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
37. 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.



38. The proposed development is consistent with the zone objectives, despite not being provided with motorcycle parking as set out below.
39. 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.*

40. The proposed development is consistent with the relevant objectives, as it relates to the provision of motorcycle parking, for the following reasons:
 - The highly constrained width of the Site means that car parking cannot be accommodated within the building. At only 8.4m wide, and 6.4m wide at the point where this would be incorporated into the building design, there is insufficient width to accommodate a driveway that would access parking (either at, or below, ground). Given this constraint, a key priority for redevelopment of this Site has been to focus on the provision of space for on-site bicycle parking with a detailed system of wall racks proposed on the first floor and providing seventeen spaces.
 - The Site is located on the B-Line bus service, with a bus service heading south-west along Pittwater Road, less than 50m from the Site, and a service heading north-east along Pittwater Road, on the opposing side of the street, less than 100m walk. Localised bus service stops are also located directly in front of the Site. Therefore, the range of uses that are proposed on the Site make this highly accessible in terms of alternative transport modes, such as cycling, while also being highly accessible in terms of public transport services. The range of services is set out in the Traffic and Parking Report and identifies that there are more than twenty (20) bus services per hour connecting Dee Why to the CBD, such that *The site is assessed to benefit from excellent*



access to a ready public transport network. Therefore, the site is deemed suitable for the incorporation of non-private vehicle-based travel planning strategy.

- 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 design of the building, despite its narrow frontage and constraints for building services (e.g., fire hydrant, ramp for waste and a hydrant and booster pump room), all of which require direct street front access, provides along its remaining available frontage, an entry space to a shared lobby, which is also serviced by a food and drink premises, to enhance the degree of activation to Pittwater Road, which is a primary and classified road servicing the locality and further afield. The composition of this frontage, with a double door opening, creates a human scale to this section of Pittwater Road and, given its proximity to the B-Line bus stop, provides an appropriate location for a food and drink premises to service this section of the roadway and enhance localised activation at street level. This is a far superior response than were the frontage compromised by a vehicle crossover to access motorcycle parking.

The degree of activation is heightened by the void space provided to the building opening that enables a sense of light to this space such that it is inviting when viewed from the street and not seen as a small enclosure, despite the limited size of the available opening. The sense of space that is created by this void will also create a degree of safety due to the sense of openness and light that is created, again which could not otherwise be achieved in the event that a vehicular driveway was proposed for the purpose of motorcycle parking that would otherwise erode the space at the ground level interface.

41. The proposed development will therefore be consistent with the zone objectives, despite an inability to provide on-site motorcycle parking.
42. 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))?

43. 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).

44. 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.”

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

- The proposal satisfies the objectives of the B4 zone.
- The shortage of motor cycle spaces is significantly offset by the provision of bicycle spaces, which well exceeds the requirements set out in the SEPP.
- The physical constraints of the site make it impossible to provide parking below ground level, which is a desired outcome under the DCP controls. The limited width of the site precludes this arrangement on a standalone basis.
- Even if access were achievable from adjoining sites, the extent of excavation required to accommodate such parking would be an unnecessary cost impost which would result in this cost being passed on to the occupants of the building, thus eroding the opportunity to maintain the residential component of this development for affordable housing purposes.
- The nature of transport methods encouraged as a result of non-provision of motor cycle parking is entirely consistent with the controls contained in the LEP and DCP which seek to encourage the use of public transport, walking and cycling.
- The reduction of private transport usage will result in a lesser degree of environmental impact, particularly as it relates to air pollution.
- The site’s proximity to public transport, in conjunction with its immediate access to facilities and services, results in a lesser dependency for reliance on private transport due to the availability of these elements in such close proximity to the site.

46. Private transport ownership is generally less of an importance to persons seeking accommodation within affordable housing developments due to their economic circumstances and the availability of this otherwise results in an unnecessary price increase to accommodation that reduces its affordability.



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

47. 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

48. 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 standard's 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)."

49. As demonstrated in this Request, the proposed development will comprehensively achieve the objectives of the B4 zone.
50. The focus of the development on alternative transport means is consistent with the expectations of the community, that are embedded in the planning instruments, which focus on the use of alternative transport forms, which result in improved environmental outcomes.
51. 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.
52. Accordingly, the Council can be satisfied that it is in the public interest to vary the standard for the purpose of this development application.

