

Clause 4.6 Variation

MINIMUM ALLOTMENT SIZE FOR CO-
LIVING DEVELOPMENT

183 MACQUARIE STREET,
PARRAMATTA

OCTOBER 2022



QUALITY ASSURANCE	
PROJECT:	Clause 4.6 – Minimum allotment size Co-Living
ADDRESS:	<i>Lot A in DP 375159</i>
LOT/DP:	<i>183 Macquarie Street, Parramatta</i>
COUNCIL:	City of Parramatta
AUTHOR:	Think Planners Pty Ltd

Document Management				
Date	Purpose of Issue	Revision	Reviewed	Authorised
7 October 2022	Co-ordination	Draft	BD	BD
13 October 2022	Lodgement Issue	Final	BD	BD

CONTENTS

<u>CLAUSE 4.6 DEPARTURE – MINIMUM ALLOTMENT SIZE</u>	4
BACKGROUND	4
<u>LAND AND ENVIRONMENT CASE LAW</u>	5
<u>ADDRESSING CLAUSE 4.6 PROVISIONS MINIMUM LOT SIZE</u>	6
<u>CONCLUSION</u>	11

CLAUSE 4.6 DEPARTURE – MINIMUM ALLOTMENT SIZE

BACKGROUND

This Clause 4.6 variation has been prepared in support of a development application that seeks approval for the construction of a 12 storey building containing a retail shop and a 'Co-Living' development containing 93 rooms and indoor and outdoor communal spaces at 183 Macquarie Street, Parramatta.

Clause 69(1b) of the Housing SEPP 2021 states that:

69 Standards for co-living housing

(1) Development consent must not be granted for development for the purposes of co-living housing unless the consent authority is satisfied that—

(b) the minimum lot size for the co-living housing is not less than—

(i) for development on land in Zone R2 Low Density Residential—600m², or

(ii) for development on other land—800m², and

The development site has area of 487.3.m² and accordingly seeks to vary this control by 312.7m².

LAND AND ENVIRONMENT CASE LAW

The decision by Chief Judge Preston in a judgement dated 14 August 2018 in the matter of *Initial Action Pty Ltd v Woollahra Council* confirmed that the absence of impact was a suitable means of establishing grounds for a departure and also confirmed that there is no requirement for a development that breaches a numerical standard to achieve a 'better outcome'. However more recent developments in the law in ***RebelMH Neutral Bay Pty Limited v North Canterbury Council* [2019] NSWCA 130** have set out to confirm that the approach taken in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 ('*Al Maha*') is also relevant. In simple terms, *Al Maha* requires that a Clause 4.6 departure will have only adequately addressed Clause 4.6(3) if the consent authority is satisfied the matters have been demonstrated in the Clause 4.6 request itself- rather than forming a view by the consent authority itself. This Clause 4.6 request demonstrates the matters if Clause 4.6 (3).

The key tests or requirements arising from these judgements is that:

- The consent authority be satisfied the proposed development will be in the public interest because it is "consistent with" the objectives of the development standard and zone is not a requirement to "achieve" those objectives. It is a requirement that the development be compatible with the objectives, rather than having to 'achieve' the objectives.
- Establishing 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*.
- When pursuing a clause 4.6 variation request it is appropriate to demonstrate environmental planning grounds that support any variation: and
- The proposal is required to be in 'the public interest'.

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the minimum lot size standards;
- Demonstrating consistency with existing streetscape;
- Demonstrating compliance with objectives of the B4 zone; and
- Satisfying the relevant provisions of Clause 4.6.

This Clause 4.6 Variation request deals with the minimum lot size matters in turn below.

ADDRESSING CLAUSE 4.6 PROVISIONS MINIMUM LOT SIZE

Clause 4.6 of the Parramatta Local Environmental Plan 2011 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

- (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.*

Clause 4.6 does not fetter the consent authority's discretion as to the numerical extent of the departure from the development standard. Each of the relevant provisions of Clause 4.6 are addressed in turn below.

Clause 4.6(3)- Environmental Planning Grounds

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as there are sufficient environmental planning grounds to support the proposed departure to the minimum allotment size for a secondary dwelling given the following:

- The Parramatta LEP does not contain a minimum allotment size for residential flat buildings, commercial buildings, or Mixed Use Development) and this development that does not require a vehicular crossover will appropriately activate the site by providing a commercial promises and co-living development that activates the entire frontage of the site;
- The control applies to sites in a suburban location where a co-living development in a garden setting is warranted. This CBD site where built to edge developments are encouraged is an appropriate size for the development;
- The existing allotment that creates the development site is undersized and is a result of historic subdivisions before the current SEPP came into effect.
- The main intent of the control is to ensure that an appropriately sized site is provided for co-living. The lodgement of a local development application allows Council to consider the merits of the application in terms of site coverage, building height etc;
- The development proposal remains compliant with all other provisions of the LEP (height, FSR), and which indicates the form of development is entirely appropriate for the allotment notwithstanding the departure from the numerical control pertaining to lot size. Therefore, the area and dimensions of the lot are able to accommodate a Mixed Use Development with a co-living component consistent with the key planning controls notwithstanding the proposed departure from the lot size control. The design and scale of the development is therefore site responsive and respects the reduced lot size to deliver an appropriate form of development on the site;
- The development proposes a modest development on an allotment that has been designed to minimise impacts on adjoining properties. The development will not have an unacceptable impact on surrounding properties;
- The proposal provides for an intensity of development that is capable of being serviced by the existing infrastructure;
- The proposal seeks to improve the presentation of the building to the street and have a positive impact in turn upon the character of the locality;
- The subject site is within proximity of local amenities including employment opportunities, educational establishments, public transportation, and recreational activities; and
- The proposed variation to the minimum lot size is not readily perceived when compared with the existing subdivision pattern within the locality.

Underlying Objectives of the Standard - Compliance unreasonable or unnecessary

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control, and the objectives of the zone, are achieved despite the non-compliance to the numerical development standard as set out above, which satisfies Wehbe Test 1.

The objective of the clause is not identified but is assumed to relate to ensuring that an adequately sized allotment is provided for a co-living development.

Notwithstanding the numerical departure the development is considered to be consistent with the intent of the clause as:

- The existing allotment is undersized and are a result of historic subdivisions before the current LEP came into force. A residential flat building could be constructed on the site and given this, it is inconsistent with the Housing SEPP that a diverse form of housing being 'Co-Living' would be unable to be constructed on the same lot area that a RFB or shop top housing development could be;
- The subdivision pattern of the locality is varied with a variety of allotment shapes and sizes existing currently; and
- The Parramatta LEP does not contain a minimum allotment size for residential flat buildings, commercial buildings, or Mixed Use Development) and this development that does not require a vehicular crossover will appropriately activate the site by providing a commercial promises and co-living development that activates the entire frontage of the site.

The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control, however we also note the following additional matters that demonstrate suitable environmental planning grounds exist to justify contravening the development standard and further demonstrates that the minimum lot size departure does not give rise to any environmental impacts, and therefore the proposal is an appropriate design response for the subject site.

Clause 4.6(4)

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3).

As addressed the proposed development is in the public interest as it remains consistent with the objective of the minimum allotment size control.

In addition, the proposal is consistent with the objectives of the B4 zone, insofar as the development is not antipathetic to the zone objectives (per *Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21*). The zone objectives are outlined 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 encourage development that contributes to an active, vibrant and sustainable neighbourhood.*
- *To create opportunities to improve the public domain and pedestrian links.*
- *To support the higher order Zone B3 Commercial Core while providing for the daily commercial needs of the locality.*
- *To protect and enhance the unique qualities and character of special areas within the Parramatta City Centre*

The proposal, despite the numerical noncompliance remains consistent with the zone objectives as:

- The development seeks to provide a commercial premise and co living rooms within the same development in a precinct dominated by Mixed Use Development;
- The development provides a diverse form of housing in a highly accessible area in which residents could walk to study, public transport, jobs, community facilities, shops and government services.
- The development will activate this western precinct of the Parramatta CBD;
- The development will improve passive surveillance of the public domain;
- The development will support the nearby B3 commercial core and increase patronage; and
- The development will facilitate the rejuvenation of a vacant site in the Parramatta CBD.

Clause 4.6(5)

The Secretary (of the Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 18–003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under 64(1) of *the Environmental Planning and Assessment Regulation 2000*.

A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

In addition, the following points are made in relation to this clause:

- a) The contravention of the lot size control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal and unique attributes of the site and interface of the B4 zoned land; and
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the dwelling lot size control is acceptable in the circumstances given the underlying objectives are achieved and it will not set an undesirable precedent for future development within the locality based on the observed building forms in the locality and based on the unique site attributes.

Strict compliance with the prescriptive lot size 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 public benefit of the variation is that it will appropriately facilitate the provision of diverse housing as sought by Council when zoning the land B4 Mixed Use. The design response aligns with the intent of the control and provides for an appropriate relationship to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose. Council is requested to invoke its powers under Clause 4.6 to permit the variation proposed. The objection is well founded and considering the absence of adverse environmental, social, or economic impacts, it is requested that the consent authority support the development proposal.

CONCLUSION

Strict compliance with the prescriptive minimum lot size requirement is unreasonable and unnecessary in the context of the proposal and its 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 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 proposal promotes the economic use and development of the land consistent with its zone and purpose.

The proposal will not have any adverse effect on the surrounding locality and is consistent with the future characterised envisioned for the subject area. The proposal promotes the economic use and development of the land consistent with its zone and purpose. Council is requested to invoke its powers under Clause 4.6 to permit the variation proposed.

The objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that Council support the development including departure to the minimum lot size control.