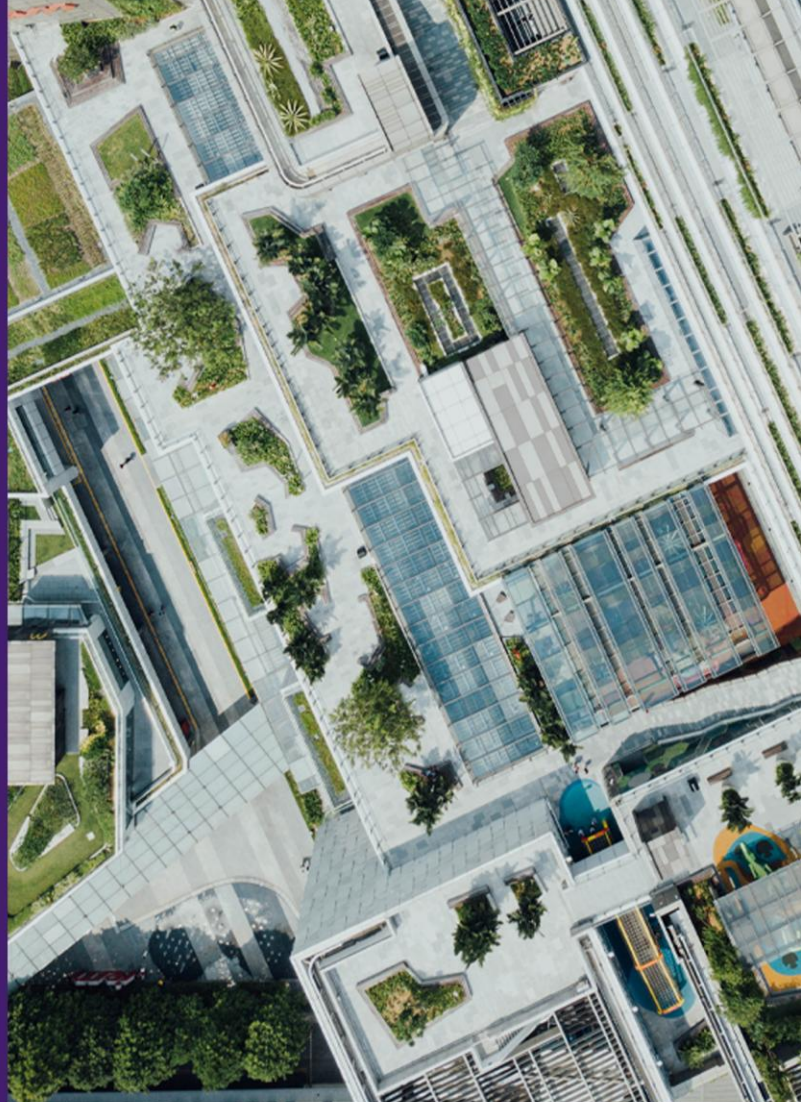


Attachment E

Clause 4.6 Variation Request – Minimum Car Spaces



98-106 Kippax Street, Surry Hills NSW 2010

Clause 4.6 Variation Request – Car Parking

On behalf of ISL Property
Investments Management Pty Ltd

23 January 2026

The Planning Studio acknowledges the traditional custodians of the lands + waters of Australia, particularly the Gadigal People on whose traditional lands our office is located, and pay our respects to Elders past, present + emerging. We deeply respect the enduring Connection to Country + culture of Aboriginal and Torres Strait Islander peoples and are committed to walk alongside, listen + learn with community as we plan for equitable, sustainable, generous, and connected places. Always was, Always will be.

Project Director

Harjeet Spence

Contributors

Kate Bartlett (Director)

Harjeet Spence (Associate Director)

Revision	Revision Date	Status	Authorised	
			Name	Signature
V1	13 January 2026	Draft	Harjeet Spence	
V2	23 January 2026	Final	Harjeet Spence	

* 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

The Planning Studio
Suite 305, 84 Pitt Street
Sydney, NSW 2000
info@theplanningstudio.com.au

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1 Introduction

This precautionary Clause 4.6 Variation Request seeks to allow a variation to the car parking non-discretionary development standard in SEPP (Housing) 2021 associated with the Development Application at 98-106 Kippax Street, Surry Hills NSW 2010 (the site).

The DA seeks approval for the partial retention of the existing contributory commercial building and construction of an 8-storey shop top housing development with retail tenancies on the ground floor levels, one level of basement carparking, 35 residential units (including 7 dual key units) with affordable housing units and associated landscaping, specifically:

- Partial retention of the existing contributory commercial building occupying the site. The existing external walls, vaulted slabs, columns and ground level ramp on Sophia Street and Waterloo Street will be retained across the lower ground floor / ground floor / first floor level;
- Excavation of the site to accommodate one basement level;
- The basement level will comprise of:
 - 18 spaces, including seven (7) double car stackers, two (2) accessible spaces and two (2) standard spaces;
 - Car lift;
 - Two (2) motorcycle spaces;
 - Residential storage area; and
 - Building services.
- Lower ground floor level to include two (2) retail tenancies, loading dock, car lift, substation, bicycle storage, residential storage, waste storage and plant rooms;
- Ground floor level includes one retail tenancy, residential lobby entry and building services.
- Levels 1 - 7 comprise 35 residential units (six (6) dual key units being allocated to affordable housing):
 - 3 x studio;
 - 8 x 1-bedroom;
 - 20 x 2-bedrooms (including 7 dual key units); and
 - 4 x 3-bedrooms.
- Rooftop communal open space with landscaping and plant equipment

The development is seeking to utilise the affordable housing provisions under Chapter 2, Part 2, Division 1 (In-fill affordable housing) under State Environmental Planning Policy (Housing) 2021 (Housing SEPP), which can deliver up to an additional 30% of Floor Space Ratio (FSR) and Building Height, subject to delivery of affordable housing dwellings for a minimum of 15 years.

This Clause 4.6 Variation Request is submitted to accompany an amended development proposal submitted to Council in response to Council's RFI request issued on 21 October 2025.



The Clause 4.6 Variation Request seeks to vary the car parking non-discretionary development standard under Clause 19 of the Housing SEPP. It is noted that this Clause 4.6 Variation Request has been prepared on the request of Council as a precaution. However, it is noted that a non-discretionary standard within the SEPP allows the Council, as a consent authority, to exercise its discretion on how they administer the non-discretionary standard.

This Clause 4.6 Variation Request demonstrates that, notwithstanding the car parking not meeting the minimum standard within the SEPP, the proposed development:

- Demonstrates that strict compliance with the standard is unreasonable or unnecessary as the development satisfies the in-fill affordable housing objectives within Chapter 2, Part 2, Division 1, Clause 15A of the Housing SEPP and car parking objectives within Sydney Local Environmental Plan 2012 (SLEP), as the Housing SEPP does not prescribe development standard objectives; and
- Will deliver a development that is appropriate for its context and achieves compliance with the car parking requirements prescribed under SLEP 2012, despite the numerical breach to the non-discretionary development standard in Clause 19 of the Housing SEPP; and
- Therefore, has sufficient environmental planning grounds to permit the variation.

As a result, the DA may be approved as proposed in accordance with the flexibility afforded under Clause 4.6 of the SLEP 2012 and Clause 19 of the Housing SEPP.

2 Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the SLEP 2012 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

The SLEP2012 Clause 4.6 Exceptions to development standards of the reads as follows:

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 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.*
4. *The consent authority must keep a record of its assessment carried out under subclause (3).*



3 The Development Standard to be varied

This Clause 4.6 Variation Request has been prepared in a written format, seeking to justify the variation to the following non-discretionary development standard.

3.1 Housing SEPP 2021 – Clause 19

Clause 19(1) of Housing SEPP prescribes minimum non-discretionary standards for infill affordable housing, if complied with, prevent the consent authority from requiring more onerous standards. The standards must not necessarily be achieved in all cases but rather they provide thresholds that, if met, cannot be used as reasons to refuse an application.

Clause 19(2)(e)&(f) of the Housing SEPP prescribes the following non-discretionary car parking requirements for the proposed development:

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

(e) the following number of parking spaces for dwellings used for affordable housing—

(i) for each dwelling containing 1 bedroom—at least 0.4 parking spaces,

(ii) for each dwelling containing 2 bedrooms—at least 0.5 parking spaces,

(iii) for each dwelling containing at least 3 bedrooms— at least 1 parking space,

(f) the following number of parking spaces for dwellings not used for affordable housing—

(i) for each dwelling containing 1 bedroom—at least 0.5 parking spaces,

(ii) for each dwelling containing 2 bedrooms—at least 1 parking space,

(iii) for each dwelling containing at least 3 bedrooms—at least 1.5 parking spaces."

Based on the above SEPP requirements, the proposal is required to provide 30 car spaces for the residential component (4 car spaces for the affordable units and 26 car spaces for the non-affordable units). The SEPP does not prescribe requirements for the retail component.

In addition to the above, it should also be noted that Part 7, Division 1, Clause 7.5 of SLEP 2012 also prescribes the following car parking requirements for the residential component:

*(1) The **maximum (emphasis added)** number of car parking spaces for residential flat buildings, dual occupancies and multi dwelling housing is as follows—*

"(a) on land in category A—

(i) for each studio dwelling—0.1 spaces, and

(ii) for each 1 bedroom dwelling—0.3 spaces, and

(iii) for each 2 bedroom dwelling—0.7 spaces, and

(iv) for each 3 or more bedroom dwelling—1 space,"

Part 7, Division 1, Clause 7.7 of SLEP 2012 also prescribes the following car parking requirements for the retail component:

"(2) The maximum number of car parking spaces for a building used for the purposes of retail premises is as follows—



(d) if the building is on land in category D and has a floor space ratio greater than 3.5:1, the following formula is to be used—

$$M = (G \times A) \div (50 \times T)$$

where—

M is the maximum number of parking spaces, and

G is the gross floor area of all retail premises in the building in square metres, and

A is the site area in square metres, and

T is the total gross floor area of all buildings on the site in square metres”

Based on the above requirements, the development is permitted to provide 19 car spaces for the residential component and two (2) spaces for the retail component, totalling 21 car spaces. However, Council’s long-standing LEP parking controls operate as a maximum (not a minimum), with an applicant theoretically being permitted to provide 0 parking spaces should they choose.

The purpose of the Housing SEPP non-discretionary standard is to prevent Council requiring a more onerous standard on the development. Given that SLEP2012 does not prescribe a more onerous standard, the SLEP2012 standard should be applied.

It is also noted that Part 3.11 of Sydney Development Control Plan (SDCP) 2012 prescribes that the development provide 2 motorcycle car spaces and 35 bicycle spaces for the residential component.

4 Extent of Variation to the Development Standard

The development provides 18 car spaces within a basement level consisting of 16 car spaces for the residential component and two (2) car spaces for the retail component. The development amounts to a non-compliance of 14 car spaces or 46% with the Housing SEPP car parking requirements for the residential component.

Despite the above, the development complies with the SLEP 2012 car parking maximums and proposes 2 motorcycle spaces and 35 bicycle spaces for the residential component in accordance with SDCP.

5 Assessment

5.1 Clause 4.6(3)(a) – compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

Compliance with the car parking non-discretionary development standard is unreasonable and unnecessary as the development achieves compliance with in-fill affordable housing division objectives within Chapter 2, Part 2, Division 1, Clause 15A of the Housing SEPP and the car parking objectives, and standards, applying to the land under Part 7, Division 1, Clause 7.1 of SLEP 2012, notwithstanding non-compliance with the numerical standard under the Housing SEPP (Wehbe 1# test).

In this instance the in-fill affordable housing objectives within Division 1 of the Housing SEPP and car parking objectives contained in Part 7 of SLEP are considered as the Housing SEPP does not prescribe objectives for the car parking non-discretionary development standard.



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.

Furthermore, *Preston CJ in Wehbe v Pittwater Council (2007) 156 LGERA 446 [42]–[51]* outlined five common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable and unnecessary which are summarised below:

- Test 1: The objectives of the standard are achieved notwithstanding non-compliance with the standard;
- Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- Test 3: The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
- Test 4: The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable; or
- Test 5: The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

These five ways to demonstrate that compliance is unreasonable or unnecessary are not exhaustive, and it may be sufficient to establish only one way.

With respect to the subject application, we consider that the proposed development meets the requirements of Wehbe Test #1 and therefore compliance with the development standard is unreasonable and unnecessary when considered holistically with the development outcome being sought.

5.2 Objectives of the standard are achieved notwithstanding non-compliance with the standard (Wehbe#1)

The Housing SEPP does not prescribe objectives for the non-discretionary development standard, and in the absence of objectives for the standard, the in-fill affordable housing objectives within Division 1 of the Housing SEPP and the car parking objectives contained in Part 7 of SLEP are to be considered.

5.2.1 Division 1 - Infill Affordable Housing Objectives of the Housing SEPP

The proposal will be in the public interest as it meets the infill affordable housing division objectives within Division 1, Clause 15A of the SEPP as follows:

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 development proposes the construction of a shop top housing development which contains 35 residential units (including 7 dual key units) of which six (6) dual key units will be allocated as affordable housing for a period of 15 years. The affordable housing component amounts to a total of 575.4m², which amounts to 16% of the overall GFA, consistent with the Housing SEPP.



The affordable housing component will be managed and operated by EchoRealty, a registered community housing provider based in Parramatta with operations in New South Wales, Australian Capital Territory and Victoria. It is the largest provider of affordable housing in Australia and forms part of the Evolve Housing Group, who boasts a successful track record in managing community housing assets for over 30 years.

The proposed development will facilitate an increase in housing diversity and the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households within the Sydney City local government area. The non-compliance with the car parking non-discretionary development standard should not prevent the provision of affordable housing within the area.

5.2.2 Car Parking Objectives under SLEP 2012

The proposal will be in the public interest as it meets the car parking objectives as follows:

Objective (a) to identify the maximum number of car parking spaces that may be provided to service particular uses of land.

The development provides 18 car spaces within a basement level consisting of 16 car spaces for the residential component and two (2) car spaces for the retail component. The proposed car parking satisfies the numerical car parking maximums prescribed under SLEP2012. The development amounts to a 14 car spaces or 46% non-compliance with the Housing SEPP car parking requirements for the residential component. However, the Housing SEPP car parking requirements is a non-discretionary standard to prevent Council requiring a more onerous standard. Given that SLEP2012 does not prescribe a more onerous standard, the LEP maximum standard should be applied, consistent with this objective.

Objective (b) to minimise the amount of vehicular traffic generated because of proposed development.

The residential component of the proposed development generates a greater demand for car parking under the non-discretionary development standards of the Housing SEPP, with the requirement of 30 car spaces. As compared to the SLEP2012 requirements which generates a demand of 19 car spaces for the residential component. In this case, the LEP car parking provisions should be applied, as it minimises the amount of traffic generated by the development.

The application of the SLEP2012 requirements (a lesser requirement) is also considered appropriate, as the site is located in a highly accessible area with Central Station and Central Chalmers Tram Stop approximately 300m to the east. There are also several bus routes on Foveaux Street and Elizabeth Street that service the area and provide connections to Central and CBD.

5.3 Clause 4.6(3)(b) - There are sufficient Environmental Planning Grounds to Justify Contravening the Development Standard

Clause 4.6(3)(b) of the SLEP 2012 requires that the consent authority be satisfied that the applicant's written request has adequately demonstrated that:

There are sufficient environmental planning grounds to justify contravening the development standard.

The environmental planning grounds relied on in the written request under Clause 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect



of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Turland v Wingecarribee Shire Council [2018] NSWLEC 1511* and *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*), also 'Rebel MH' and 'Baron' (2019).

The environmental planning grounds relied upon to justify the departure of the development standard in the circumstances of the proposal are considered sufficient and specific to the site and the proposed contravention.

The development provides 18 car spaces within a basement level consisting of 16 car spaces for the residential component and two (2) car spaces for the retail component. The proposed car parking satisfies the numerical car parking requirements prescribed under SLEP. Whilst the development amounts to a 14 car spaces or 46% non-compliance with the Housing SEPP car parking requirements for the residential component.

As confirmed in **Section 3** of this report, the Housing SEPP and SLEP2012 both prescribe car parking requirements for the residential component of the development. The purpose of the Housing SEPP non-discretionary standard is to prevent Council requiring a more onerous standard. Given that SLEP2012 does not prescribe a more onerous standard, the LEP car parking requirements should be applied as it is more applicable to the site given its highly accessible location.

Further, given the LEP maximums cannot be exceeded under Clause 4.6 of the SLEP2012, it is uncertain if the higher parking rate in the Housing SEPP could even be applied to the development given it would then cause an exceedance under another EPI (being the SLEP2012), that legally cannot be varied. This is a particular environmental planning ground relevant to the proposed parking variation from the Housing SEPP.

The site is in an ideal location for the scale and density of the proposed development, as it is located in close proximity to Central Station and the dynamic heart of Surry Hills, which offers ample public transport options and amenities. The proposed development is designed to integrate sensitively and intelligently with its immediate surroundings and evolving urban context of Surry Hills by partially retaining the existing contributory building and adaptively reusing it to provide a high standard of in-fill affordable housing within the area.

Given the site's high-density Surry Hills location and the proposal seeking to retain significant building elements of the contributory building it is also not feasibly possible to achieve compliance with the Housing SEPP car parking non-discretionary standards. To achieve compliance, extensive excavated basement levels would be required that would compromise the current adaptive reuse outcome of the site and contrary to the heritage objectives of SLEP and SDCP.

Requiring strict compliance with the Housing SEPP provisions is also contrary to Council's Sustainable Transport Policy which focuses on creating a green, connected city by prioritising walking, cycling, and public transport over private cars. To uphold this vision, the development encourages other modes of transport with the provision of motorcycle and bicycle spaces in accordance with the requirements of SDCP 2012 along with the public transport modes available in the area.

Despite the non-compliance with the SEPP the development is considered to provide a high-quality outcome that will deliver much needed affordable housing for the local area with high quality living environment for residents by maximising solar amenity, visual and



acoustic privacy and diverse landscaping features whilst encourage growth of the local economy with ground floor retail uses.

For the reasons discussed above, it is contended that there are sufficient environmental planning grounds to justify the contravention to the development standard in the circumstances of the case.

6 Conclusion

The assessment above confirms that compliance with the car parking for the non-discretionary development standard under Clause 19 of Housing SEPP is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the contravention to the development standard.

This Clause 4.6 variation request demonstrates that notwithstanding the non-compliance with the car parking non-discretionary development standard, the proposal:

- Achieves the In-fill affordable housing division objectives within Chapter 2, Part 2, Division 1, Clause 15A of the Housing SEPP in the absence of the development standard objectives under the SEPP;
- Achieves the car parking objectives within Part 7 of SLEP2012 in the absence of the development standard objectives under the Housing SEPP;
- Delivers a development that is appropriate for its context being high density accessible area and achieves compliance with the car parking provisions of SLEP therefore has sufficient environmental planning grounds to permit the variation; and
- Compliance with the development standard is unreasonable or unnecessary in the circumstances of this proposal.

