Property Council of Australia
ABN 13 00847 4422

Level 1, 11 Barrack Street
Sydney NSW 2000

T. +61 2 9033 1900
E. nsw@propertycouncil.com.au

propertycouncil.com.au
@propertycouncil

Australia's property industry
Creating for Generations

16 May 2020

Ms Leah Schramm
Director, State and Regional Economy
Department of Planning, Industry and Environment
Locked Bag 5022
PARRAMATTA NSW 2150

Dear Ms Schramm,

Review of Clause 4.6 of Standard Instrument

The Property Council of Australia welcomes the opportunity to provide comments on the Explanation of Intended Effects (EIE) for the Review of Clause 4.6 of the Standard Instrument.

As Australia's peak representative of the property and construction industry, the Property Council's members include investors, owners, managers and developers of property across all asset classes. The following comments are provided for your consideration.

Having regard to the proposed package of changes, the Property Council does not support the introduction of a new test to determine the merits of varying a development standard. We do however, support the other changes proposed by the Department that are intended to improve the transparency, accountability and probity regarding the use of this variation mechanism. We believe the probity, transparency and accountability measures can be implemented without removing the fundamental intent of the clause – to provide flexibility in an otherwise often inflexible planning system.

Should you have any questions regarding the content of this submission, please contact Troy Loveday, NSW Policy Manager, on 0414 265 152 or tloveday@propertycouncil.com.au
Yours sincerely

Yours sincerely

Jane Fitzgerald
NSW Executive Director
Property Council of Australia

Submission to Department of Planning, Industry and Environment

Review of Clause 4.6 - Varying Development Standards

14 May 2021

1.0 Introduction

The Property Council welcomes the opportunity to address matters raised in the Explanation of Intended Effect (EIE) titled *Varying Development Standards: A Case for Change*.

The origins of the proposal stem from feedback received by the Department regarding the process of varying development standards and recommendations from the Independent Commission Against Corruption (ICAC) investigation into the conduct of the former Canterbury City Council. Based on these concerns, the Department is now seeking feedback on measures intended to increase transparency, accountability and probity regarding the use of clause 4.6.

ICAC made six (6) recommendations regarding clause 4.6 of which one of those is specifically addressed by this proposal:

- ***Recommendation 12: That the DPIE prepares and, following a period of public consultation, make public new guidelines on varying development standards for councils that consider the criteria for assessing variations to development standards that are acceptable to clause 4.6.***

This submission has been prepared in to address concerns with the content of the Department's paper issued as a response to Recommendation 12.

Given the importance of clause 4.6 within the NSW planning system, it is important that any changes proposed are well considered and address any systemic issues regarding the use of this mechanism by local government and other decision makers.

2.0 Background

The current clause 4.6 of the Standard Instrument – Principal Local Environmental Plan is a compulsory clause that must be included in every local council's principal LEP. The origin of this clause goes back more than 40 years, to October 1980, with the introduction of *State Environmental Planning Policy No. 1 – Development Standards* that provided flexibility in the application of planning controls and development standards where strict compliance with those standards would be unreasonable or unnecessary or tend to hinder the objectives of the *Environmental Planning and Assessment Act 1979*.

The Department has issued several planning circulars that have been intended to provide guidance to proponents and consent authorities regarding the use of clause 4.6. In May 2020, the Department issued a new planning circular (PS 20-002) to replace earlier advice issued in 2018. This circular was specifically targeted towards consent authorities and the use of the Secretary's assumed concurrence arrangements.

The procedures surrounding the use of clause 4.6 (and SEPP 1) have been the subject of more than 40 years of legal interpretation and caselaw within the NSW Land and Environment Court. There have been several significant cases that have been considered by the Court that now form the basis for testing the merits of a clause 4.6 variation by assessment planners and the Court itself. These include:

- *Winten Property Group Ltd v North Sydney Council (2001),*
- *Wehbe v Pittwater Council (2007),*
- *Initial Action Pty Limited v Woollahra Municipal Council (2018),*
- *Al Maha Pty Limited v Huajun Investments Pty Limited (2018),*
- *Baron Corporation Pty Limited v Council of the City of Sydney (2019),*
- *RebelMH Neutral Bay Pty Limited v North Sydney Council (2019); and*
- *SJDB82 Pty Limited v Woollahra Municipal Council (2020)*.

These provide useful guidance around the decision-making process for consideration of clause 4.6 variations.

3.0 Case for change

Part 3 of the EIE details the Department's case for change and considers a number of key issues that have been identified as concerns. These include:

3.1 The current test under clause 4.6 is too complicated and unclear

The EIE has suggested that the test in clause 4.6 has become too complicated, as evidenced by the growing body of case law pertaining to it, including ongoing questions relating to whether a consent authority is required to be directly satisfied that the requirements of clause 4.6 have been met.

Property Council response: The Property Council does not disagree that the use of clause 4.6 has become complicated and that a substantial body of caselaw has been developed. This is a reflection of the importance of the process for variation to a development standard within a local environmental plan. We would argue that any replacement test would also be complicated and contested and would also generate a body of caselaw to determine the appropriateness of arguments to support variations. We do not agree that sufficient justification has been made to support the case for change.

3.2 The need for greater transparency in the decision-making process

The EIE has suggested that development standards play a critical role in the NSW planning system by giving effect to strategic plans and providing certainty to the community about what type of development is appropriate in an area. A number of safeguards have been put in place to ensure certain procedural and reporting requirements regarding the use of clause 4.6 are followed. It is the Department's view that there is a need to support greater integrity, certainty and transparency in the planning system. For this reason, there will be greater use of the ePlanning system to provide for regular publication and monitoring of the use of clause 4.6.

Property Council response: The Property Council supports greater transparency regarding the use of clause 4.6 and application of the ePlanning process to achieve this outcome.

3.3 Reducing the risk of the misuse of clause 4.6 should be a priority

The EIE has picked up on the ICAC investigation report which places considerable importance on a robust and well-functioning oversight mechanism for variations.

The Department is proposing to move away from the current use of assumed concurrence for clause 4.6 variations and in its place develop a more contemporary and effective approach to better mitigate corruption risks which would involve increasing and strengthening the reporting requirements on the NSW Planning Portal as well as ongoing monitoring and risk-based audits.

Property Council response: The Property Council fully supports the changes proposed to the current assumed concurrence arrangements and for better use of the reporting and monitoring capability within the ePlanning framework.

4.0 Revised test for variations

Part 4 of the EIE sets out the proposed changes to clause 4.6 of the Standard Instrument LEP with the aim of clarifying the requirements for varying development standards.

The Department has, based on the case for change set out above, proposed reforming clause 4.6 to only allow variations in exceptional circumstances when an improved planning outcome can be demonstrated with evidence.

4.1 The revised test for variations

The following test has been proposed for variations to development standards;

1	That the proposed development is consistent with:(a) the objectives of the clause containing the development standard, and (b) the zone in which the development is proposed to be carried out **AND**
2	The contravention will result in an improved planning outcome when compared with what would have been achieved if the development standard was not contravened. In deciding whether a contravention of a development standard will result in an improved planning outcome, the consent authority is to consider the public interest, environmental outcomes, social outcomes and economic outcomes **OR**
3	An alternative test may be developed to ensure flexibility to be applied in situations where the variation is so minor that it is difficult to demonstrate an improved planning outcome, but the proposed variation is appropriate due to the particular circumstances of the site and the proposal. The Department welcomes feedback on this proposed element which will assist in developing this alternative test.

Property Council response: The Property Council does not support the proposedchanges to the current test for the following reasons.

The present test for using clause 4.6 has been in use by the NSW planning system for more than 40 years. Years of caselaw from the Land and Environment Court provides guidance to proponents and consent authorities regarding how clause 4.6 should be interpreted and applied. Although the Department is proposing the introduction of a new test, there will be a need for the Court to provide guidance regarding interpretation of its component parts and how it should be applied by consent authorities.

It is concerning that the Minister's view of clause 4.6 is that it *"has been overused by many and abused by some"*. The nature of clause 4.6 and the test for its use mitigate against its abuse. Most consent authorities have strictly applied the test during consideration of development applications and acted conservatively when granting approval to variations. Thus we cannot agree with the position expressed by the Minister that clause 4.6 has been overused and abused. In fact, more Council assessment reports prepared for the consideration of consent authorities provide considerable detail about why a development standard should or should not be varied. This has traditionally been a matter most development planners treat with a very high degree of importance. An unintended consequence of this reform could actually be an increase in site-specific planning proposals to make minor changes to LEP height and density controls to enable development to proceed.

The new test being proposed above differs significantly from the current test and therefore the related body of case law. The requirement to provide an "**improved planning outcome**" may create as much complication and uncertainty as it is attempting to solve. Although the reform has been described as "*providing a clearer and more robust test for varying development standards*", it may be more difficult to prove that an improved planning outcome will result. There may be a number of outcomes from a variation to a development standard and they may have differing impacts. For example, part of the roof of a dwelling house may exceed the relevant height limit as part of the roof may have been lowered to preserve a significant view

corridor for a neighbour. Together the retention of an existing view for one neighbour may be an improved planning outcome but a small increase in overshadowing of another neighbour may be a worse planning outcome. In this case there should be a net improvement.

Another issue with the test could be when a variation to a development standard may result in several outcome types, including those described in the EIE (ie, environmental, social and economic). Is it not clear if these are to be regarded as having equal value or if a positive social outcome is more important than reduced economic and environmental outcomes. There is also the question of "whom" the better planning outcome is for which may be the site, the adjacent site, the general locality or the broader public. There may be instances where some consent authorities decide to place greater importance on environmental outcomes and less weight to economic and social. This would be a matter for further clarification by the Department and may require interpretation by the Court.

There are many reasons why a development proposal may not comply with a numerical standard set out in a local environmental plan, in many of those situations the characteristics of the site have required its use. For example, the development of steeply sloping sites, construction of lift overruns or rooftop communal open space may all involve minor variations to the LEP height standard. Clause 4.6 provides the opportunity for design flexibility and allows for development to respond to site constraints. It is critical that these minor variations continue to be allowed as they have minor environmental impact and allow for consideration of appropriate development proposals.

However, should the new test as proposed be adopted, we would need further clarification about the operation of the alternative test for very minor variations. As there will always be a need for such a mechanism. Our concerns regarding this part of the proposal are:

- In some parts of the EIE it talks about negligible impact where there is a minor variation and in others minor. There is a very material difference between negligible and minor and this needs clarification,
- The examples used for the secondary alternative test are very open to interpretation and will need further clarification,
- The Department refers to situations where strategic planning has failed and there may be a misalignment of standard and this is where the minor test could be appropriate – we consider this to be a suitable situation to use of this process but it would need supporting guidance.
- Where there is a qualitative alternative test, it will be open to interpretation. The only way of providing some clarity and certainty would be to impose a numerical limit for the size of a variation.

4.2 Development standards excluded from variations

The EIE released by the Department for public consultation has indicated that the current arrangements that allow a council to exclude certain development standards from being varied from clause 4.6 will cease. The Department is proposing a 12-month transitional period following the introduction of the new clause to allow councils to review development standards, related objectives and progress planning proposals if necessary.

Existing exclusions relating to complying development and BASIX requirements will remain.

Property Council response: The Property Council supports the proposal to remove exclusions from clause 4.6.

Many councils have identified multiple development standards that cannot be varied. For example, the City of Sydney has used clause 4.6(8) of *Sydney Local Environmental Plan 2012* to restrict more than twenty (20) development standards from variation. North Sydney Council has used clause 4.6(8) of *North Sydney Local Environmental Plan 2013* to restrict more than five (5) development standards from variation.

We support this proposal as these restrictions discourage flexibility and innovative design outcomes.

4.3 Strengthened reporting and monitoring to improve transparency, accountability and probity.

The EIE released by the Department for public consultation has indicated there is a need to further safeguard against misuse of clause 4.6 by improving accountability and transparency in deciding variation applications.

This will be achieved through the implementation of several measures that include strengthening the existing reporting requirements regarding the use of clause 4.6 and requiring councils to publish their reasons for granting or refusing a clause 4.6 application on the NSW Planning Portal.

Property Council response: The Property Council fully supports the adoption of these new requirements that are aimed at improving transparency, accountability and probity concerning the use of clause 4.6.

4.4 Guidance material

The EIE released by the Department for public consultation indicates that a suite of guidance materials will be released to provide support the roll out of the new clause 4.6.

These materials will outline the changes, the tests and how the clause should be applied for various development types and contexts and those materials will be regularly reviewed and updated.

Property Council response: The Property Council supports the development and release of practical guidance material that will be useful for both proponents in the preparation of clause 4.6 variations and by consent authorities as they consider clause 4.6 applications made with development applications.

We recommend that any new guidance material is placed on public exhibition for comment prior to it being made. Any new guidance material should:

- Include clarity around relevance of any key caselaw,
- Include clear intent of each component of clause 4.6,
- Be updated regularly by the Department, and
- Be supplemented by training of decision makers.

5.0 Conclusion

The Property Council does not support the proposed changes to clause 4.6 of the Standard Instrument – Principal Local Environmental Plan as set out within the EIE.

It is vitally important that the planning system retains a mechanism for varying development standards. In the absence of such a mechanism, a number of unintended consequences may result including more planning proposals that allow for development applications to conform with the relevant LEP. We do not support a proposal that would reduce the opportunity for clause 4.6 variations and result in more site-specific planning proposals.

Given the considerable volume of caselaw that has been developed over the past 40 years, the introduction of a different, new test to be applied to clause 4.6 applications is not supported. We do not support the view that the new test will reduce the complexity and provide improved clarity about its use.

The other changes included in the package of reforms, specifically the removal of exemptions to the use of clause 4.6 and the provision of additional guidance and oversight will provide a better outcome in terms of why and how development standards are varied. We support these elements of the package.

On balance, the package of reforms to clause 4.6 is unlikely to provide a significant improvement to the development assessment process. We do support the introduction of better checks and balances in the use of clause 4.6 but are unable to support the introduction of a new test.