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REVIEW OF CLAUSE 4.6 OF THE STANDARD INSTRUMENT LEP EXPLANATION OF INTENDED EFFECTS

MAY 2021

Better Planning Network Inc does not support the majority of the proposed changes in this Review. The focus of the Review should not be based on whether the development industry feels that *"the process for varying development standards has become overly complicated for applicants"*. The process for varying development standards was initiated to provide a reasonable degree of flexibility in the application of development standards.

However developers consistently lodge Variation Requests that are well beyond the concept of minor variations, which is the main reason why they have trouble justifying them, rather than the process of producing one extra document and justifying the reasons for the Variation being *"overly complicated".* A case study will be referenced throughout this submission, providing a classic example of the over reach that developers have come to expect from Clause 4.6 Variation requests.

Part 1 - Executive Summary

- No data or explanation is provided for the supposed *"significant cost burdens for proponents"* in making Clause 4.6 Variation Requests (hereafter called "Variations"). The vast bulk of the Variation documents are standard templates used by applicants' planning consultants. The excerpts on the following page, from the case study, are some of the sections regurgitated from a standard template. The same sections are seen in each of the planner's Variations for different projects.

  The same format is followed by almost every planner in NSW, where the NSW Land and Environment Court planning principles are listed and relevant data simply filled in -

  - Compliance with the development standard is unreasonable or unnecessary because the objective of the development standards are achieved;
  - The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
  - The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
  - The development standard has been virtually abandoned or destroyed by the Council's own decisions;
  - The zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate;
  - Compliance is unreasonable or unnecessary.

  It must be one of the simplest consultants' reports to produce. A paragraph is provided for privacy, visual impact, overshadowing, noise and public benefit and voila, the Variation is done.

3. NSW LAND AND ENVIRONMENT COURT CASE LAW (TESTS)

Several key New South Wales Land and Environment Court (NSW LEC) planning principles and judgements have refined the way variations to development standards are required to be approached.

The correct approach to preparing and dealing with a request under clause 4.6 is neatly summarised by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118:

> *[13] The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. 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.*
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> *[14] The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see Woolworths Ltd v Pallas Newco Pty Ltd (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000] HCA 5 at [28]; Winten Property Group Limited v North Sydney Council (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].*
>
> *[15] The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.*

This clause 4.6 request has been prepared as per the approach set out in *Initial Action Pty Ltd v Woollahra Municipal Council.*

4. COMPLIANCE WITH DEVELOPMENT STANDARDS IS UNREASONABLE OR UNNECESSARY

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* summarised the five common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe v Pittwater Council at [42]-[51].*

These five ways are not exhaustive, and an applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way. These are discussed in the following sections.

5. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* states that the environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient":

> *There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 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 advanced 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: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. 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 cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

6. CONCLUSION

In summary, the proposal is considered appropriate and consistent with the objectives and intent of Clause 4.3 of HLEP 2013. Strict compliance with the WLEP in this case is unreasonable and unnecessary because:

- The proposal is consistent with the objectives of Clause 4.3 and the R2 low density residential zone.
- The potential for adverse privacy and overlooking impacts is considered negligible as a result of specific use of building materials and glazing, coupled with increase boundary setbacks.
- The design responds positively to the site conditions and the surrounding environment.
- The proposal does not raise significant matters of state or regional significance.

For the reasons outlined above, the clause 4.6 request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the height. In the circumstances of this case, flexibility in the application of the height of building development standard should be applied.

RECOMMENDATION: Clause 4.6 Variation Requests should NOT be considered to be *"overly complicated"* or *"significant cost burdens for proponents".*

- BPN concurs with the NSW Independent Commission Against Corruption (ICAC) *"that varying development standards can dilute transparency in the planning system and subsequently open up opportunities for corruption"*. However the proposals contained within this Review will do little if anything to ameliorate those concerns.

  Councils already report their variation decisions and publish them on their websites. Simply getting councils to publish the variation decisions on a different website, the Planning Portal, does nothing whatsoever to diminish the risk of corruption. It might make it a bit easier for DPIE to search its own website instead of those of various councils, but it is considered to be more a case of seen-to-be-doing, rather than an effective corruption control.

RECOMMENDATION: While it is agreed that a central data base is a useful tool for DPIE, it is not a tool that will make much difference to corrupt activities. If these activities can be hidden in Council data, they can be hidden in Planning Portal data.

- BPN does not agree that elevating the importance of LEP objectives of land use zones, over prescriptive LEP development standards, will provide good planning outcomes. Many Councils utilise the most basic objectives provided in the *Standard Instrument LEP*. For instance the only additional objective difference between R2 and R4 zones in the *Standard Instrument LEP* is *"To provide a variety of housing types within a high density residential environment".* These are clearly insufficient, without prescriptive controls, to deliver the best outcomes.

  Zone R2 Low Density Residential

  1 Objectives of zone

  - To provide for the housing needs of the community within a low density residential environment.
  - To enable other land uses that provide facilities or services to meet the day to day needs of residents.

  Zone R4 High Density Residential

  1 Objectives of zone

  - To provide for the housing needs of the community within a high density residential environment.
  - To provide a variety of housing types within a high density residential environment.
  - To enable other land uses that provide facilities or services to meet the day to day needs of residents.

RECOMMENDATION: Objectives and statements about improved outcome alone are not sufficient to ensure good planning outcomes. The NSW Land and Environment Court planning principles must also be incorporated.

- The potential for more spot rezonings being needed should not be used for further increasing "flexibility" for developers. If their development does not meet the development standards for the zone, with just a modicum of flexibility, then the development should not be built on the site, not have the developer seek to obtain a spot rezoning.

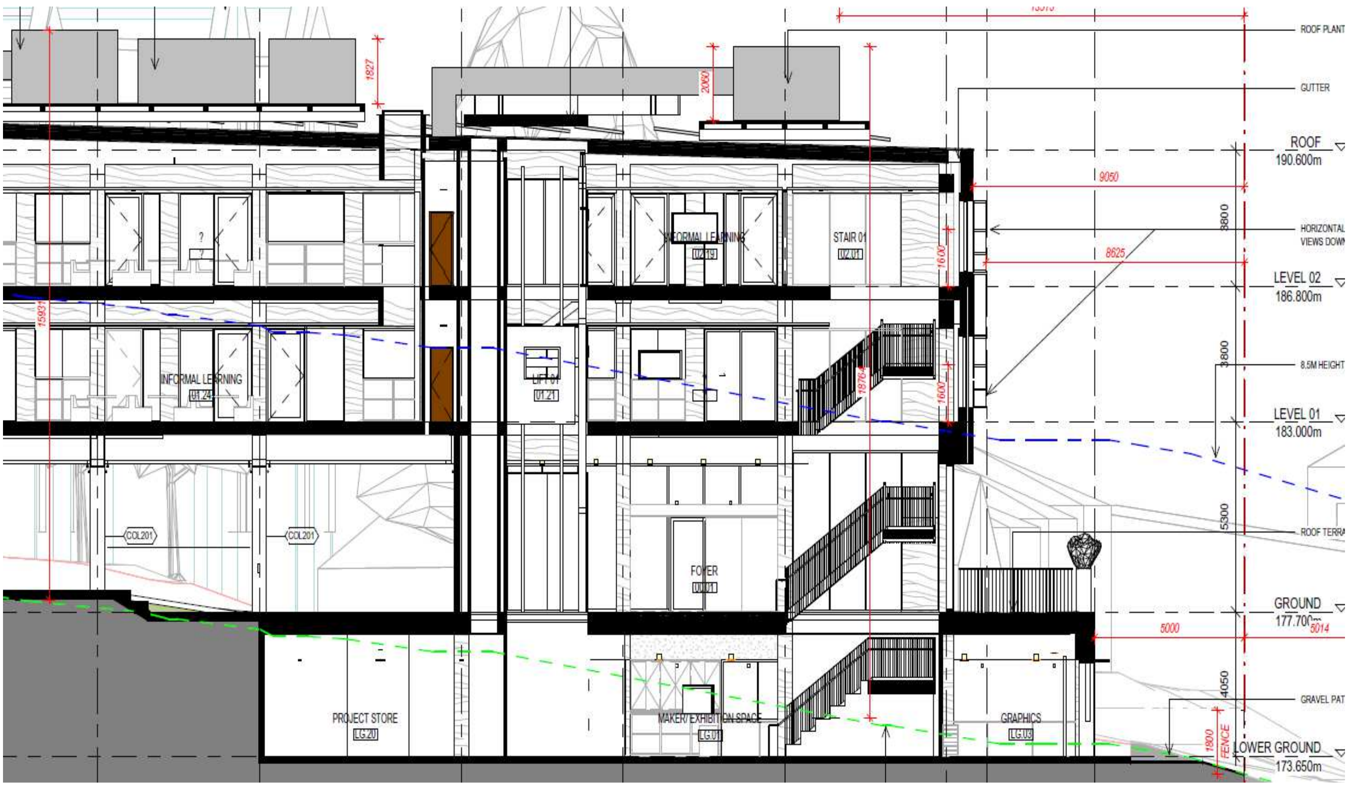
RECOMMENDATION: The threat of more spot rezonings should not be used by developers or DPIE to justify more flexibility in the zones.

- It is definitely NOT considered appropriate to develop *"an alternative test"* for variations that the developer considers to be *"minor"* where the developer considers *"the proposed variation is appropriate due to the particular circumstances of the site"*. The term "minor" will be stretched to include variations that the community considers to be major and developers always say they consider their developments appropriate. They obviously wouldn't say that their development was inappropriate now would they.

  The case study examples provided throughout this submission of the Innovation Hub at Oakhill College in Castle Hill is indicative of what would occur if this *"alternative test"* was introduced. The proposed building is within an R2 Low Density Residential zone with a height limit of 8.5 metres. It is to be build 5 metres from the boundary with residential homes. A Clause 4.6 Variation Request - Height has been made. The height of the building at the facade closest to the homes is 16.95 metres, almost double the permitted height. The height to the top of the roof plant is, according to the plans, 21.6 metres. This is NOT a minor variation.

  The *"particular circumstances of the site"* in this case study, is said by the applicant to be the slope of the land under the footprint of the building. However the site is hectares in size with large areas of flat ground, yet the selection of area for the proposed building is on a steep slope next to residential homes.

  Furthermore, instead of the building following the contour of the slope and stepping down the roofline, the applicant has added another storey while keeping the roofline flat. This adds even more to the height non-compliance. In this case, the *"particular circumstances of the site"* encouraged the applicant to propose a further storey, instead of reducing the non-compliance.



RECOMMENDATION: BPN considers it inappropriate to develop *"an alternative test"* to allow even more ways for developers to circumvent development standards.

Part 2 - Varying Development Standards in NSW

- *"Currently councils have the ability to include additional development standards within their LEP which cannot be varied under clause 4.6",* over and above *"minimum lot size, floor space ratio and building height"*. BPN considers this to be more than reasonable as they are developed by councils in consultation with communities and have been previously approved by DPIE under the LEP amendments Gateway process.

  It is therefore not considered appropriate for DPIE to repeal the consensus agreed upon between the community, a council and DPIE, just because the development industry bleats that it's all too restrictive ie they can't make as much profit.

RECOMMENDATION: The ability of councils to include additional development standards under Clause 4.6.8(c) MUST NOT BE REPEALED.

- This part of the EIE makes the unlikely statement *"In some **exceptional** circumstances, development may achieve planning objectives despite not meeting the required development standards, and accordingly, there is a mechanism within the planning system to allow for these variations".* If the circumstances where Variations were requested were only exceptional circumstances, then this Review would not be needed.

  It is now the norm that developers request far more than is permitted, that is the reason that they feel there are *"delays and cost burdens".* It is precisely because developers submit often ridiculous Variations on most medium to large developments that these delays are caused.

  In the Innovation Hub case study, the Council follows the Standard Instrument LEP for its Objective of the Low Density Residential zone -

  Zone R2 Low Density Residential

  1 Objectives of zone

  - To provide for the housing needs of the community within a low density residential environment.
  - To enable other land uses that provide facilities or services to meet the day to day needs of residents.

  The 21.6 metre high building meets the Objectives of the zone but not the required development standards. Under the proposed changes to Clause 4.6, the applicant could argue that:

  - it is in the **public interest** to have more education space;
  - the **environmental outcome** is improved because 39 trees are being removed and more could have been removed if the building footprint was different;
  - **social outcome** is improved because it serves the education needs of the community;
  - **economic outcome** is improved for the College.

  It is NOT just actual exceptional circumstances that Variations are requested for, it is for a large range of developments where the applicant wants far, far more than is permitted.

RECOMMENDATION: The proposed criteria of Objectives and four "outcomes" will not ensure that only in exceptional circumstances will Variations be requested. It is considered likely that there will be even more Variations requested with the more flexible arrangements, of an even bigger scale.

- As stated on page 4 *"For LGAs where local planning panels are constituted under the Environmental Planning and Assessment Act 1979, DAs are determined by independent and expert planning panels (**in most LGAs**) where the development standard is non-numerical and where contravention of a numerial standard exceeds 10%".*

  It is then stated on page 4, under the heading *SEPP 1 (now repealed)*, that *"The Department has received feedback that the 'unreasonable or unnecessary' test* (established by case law) *has introduced a level of discretion which potentially created opportunities for corruption".*

  This accusation of *"opportunities for corruption"* is considered to be an absolutely disgraceful slur to be made against the reputation of the *"independent and expert"* Planning Panels, the members of which were vetted and approved by the NSW State Government.

  It is to be assumed that this slanderous slur has been made by some in the development industry. DPIE should not have paid any attention to such a self-serving statement, let alone printed it in this EIE. The Planning Panels themselves were created by the NSW State Government to avoid *"opportunities for corruption"* that were potentially occurring in local government, so it is farcical to suggest that the Panels are now in the same position. The ICAC report notes that there is an opportunity to *"improve clause 4.6 be seeking feedback on the appropriate level of flexibility that should be exercised".* Not that there was any suggestion of *"opportunities for corruption"* within Planning Panel processes and decisions.

RECOMMENDATION: This slur must not be considered in any way as being a reason *"to improve clause 4.6".*

RECOMMENDATION: The *"appropriate level of flexibility"* should be VERY LITTLE.

Part 3 - A Case for Change

- The current test - BPN considers the current test under clause 4.6 is NOT too complicated and unclear. The case law of six planning principles determined by the NSW Land and Environment Court can simply be included in DPIE guidelines as principles to be followed. The guideline can also clarify the examples provided in the EIE of demonstrating better outcomes and whether the development is justified on environmental planning grounds.

RECOMMENDATION: The requirements of Clause 4.6 must not be diluted because the development industry purports that it is too complicated.

- The need for greater transparency - Page 5 also states that *"As highlighted in the recent recommendations from the ICAC Operation Dasha investigation report there is a need to support greater integrity, accountability, certainty and transparency in the planning system, particularly in the context of decision making in respect to the granting of variations under clause 4.6"*. However it is considered unlikely that ICAC proposed removing development standards and exclusions agreed by community consultation to ensure "greater integrity" and "transparency".

  That is akin, and just as ridiculous, to saying that to ensure the integrity, certainty and transparency in the application of road rules, that many of the road rules should be repealed. Voila, nobody has to expend time and money in the Court system, because nobody will be breaking the rules because there are none.

RECOMMENDATION: The ICAC recommendations must not be used as an excuse to dilute Clause 4.6.

- <u>Reducing the risk of misuse</u> - This is an absolute classic. Page 6 states *"To reduce red tape and improve assessment timeframes, **a 25% reduction of all concurrence and referrals by mid-2023** is proposed".* However in the paragraph above that statement, the EIE states that there was a MASSIVE number of concurrence applications ... 32 in 2020, and 8 so far in first third of 2021.

  So it appears that **the key action announced by the Premier and Minister for Planning and Public Spaces in July 2020 will remove a whole six (6) concurrence applications to the Department in 2021** and probably even less in 2023. The key action will make little difference to the Department.

  Instead of revoking assumed concurrence, to comply with Operation Dasha's recommendations, councils' reporting of Variations will be published not only on council's websites but also on the Planning Portal. We can see the bad guys shaking in their shoes. If there is corruption it would be just as visible on councils' websites as on the Planning Portal.

RECOMMENDATION: If assumed concurrence is believed to be a corruption issue for councils, then perhaps a better alternative would be that the Planning Panels assume concurrence rather than the councils.

- <u>There are too many exclusions</u> - BPN does NOT agree with the statement that *"The range and nature of exclusions made by consent authorities under this clause has resulted in confusion in the application of the clause and undermines the objectives of the clause to provide an appropriate degree of flexibility in applying certain development standards to development"*.

  Review of the LEPs for the NSROC councils shows that of the eight councils, Hunters Hill, Hornsby, Ku-ring-gai, Lane Cove, Mosman, North Sydney, Ryde and Willoughby, only half had additional exclusions. Of that half, one of those councils,

  - Willoughby, has only one additional exclusion, just for the height of buildings on one site to allow for the transmission tower on the Ausgrid site at Artarmon;
  - Lane Cove has two, one of which is subdivision of dual occupancies;
  - Ryde has three, one is again subdivision of dual occupancies and another in relation to Ryde Town Centre;
  - North Sydney has the most at four, one of which is understandably in relation to Luna Park.

  Surely such simple exclusions is not beyond the understanding of the development industry. As each of the LEPs that do have exclusions are quite specific, they cannot realistically cause "confusion" in anyone proficient in the planning processes. There are quite understandably local situations where the development industry's demands for flexibility are totally inappropriate.

RECOMMENDATION: It is clear that there are NOT too many exclusions from clause 4.6. The ability of councils to include additional development standards under Clause 4.6.8(c) MUST NOT BE REPEALED.

<u>Discussion Questions</u>

- There is a need to retain a concurrence role for oversight. That is what it was introduced to do. Potentially that concurrence could be assumed by the appropriate Planning Panel.

- One of the challenges experienced by the community is the poor quality of Variation request documentation provided by developers to justify Clause 4.6 Variation requests. Using the case study of the Innovation Hub to illustrate this point -

In response to the case law planning principle *"The zoning of the particular land on which the development proposed to be carried out was unreasonable or inappropriate"*, the applicant's Clause 4.6 Variation request responded as follows:

4.5. THE ZONING OF THE PARTICULAR LAND ON WHICH THE DEVELOPMENT IS PROPOSED TO BE CARRIED OUT WAS UNREASONABLE OR INAPPROPRIATE

The objectives of the R2 Low Density Residential zone primarily focus on providing housing in a low-density environment. These are not relevant to the proposal. The relevant objectives are:

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that non-residential land uses are located in a context and setting that minimises impacts on the amenity of a low density residential environment.*
- *To allow for a range of community facilities to be provided to serve the needs of residents, workers and visitors in residential neighbourhoods.*

It is unclear which Local Government Area's LEP R2 Low Density Residential zone Objectives the applicant is referring to. Certainly **it isn't the R2 Objectives of the LGA on which the development is proposed to be carried out**. That LGA uses the Standard Instrument LEP R2 Objectives, which again are:

Zone R2 Low Density Residential

1 Objectives of zone

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.

It appears the 'confused' applicant can't even read the NSW Government website to obtain the correct R2 zone Objectives for the relevant council's LEP for its development.

RECOMMENDATION: Attempting to make Clause 4.6 clearer is pointless when applicants do not even bother to ensure the information in their Variation requests is applicable to the LGA in which the development is proposed.

- Another challenge is the unrealistic justifications provided within Variation requests. Again from the case study, the following was provided in response to another case law. Apart from the lack of spelling proficiency in the heading, the unreasonableness of this response is detailed below.

4.6. UNREASINABLE OR UNNECESSARY

Compliance with the development standard is unreasonable and unnecessary in the circumstances of the application based on the following:

- The proposal is consistent with the objectives of the development standard as provided in clause 4.3 of the HLEP 2013 and the relevant objectives of the R2 low density residential zone.
- The non-compliance does not create unreasonable environmental impacts to the surrounding sensitive land uses, such as overshadowing and privacy.
- The development will deliver improved learning and education spaces for the Oakhill College campus, improving the overall physical appearance and use of the site.
- The design responds to the topography of the site through a stepped design, while providing the required learning space to encourage collaborative learning within the building.

- o The building is 21.6 metres high, directly adjacent to 8.5 metre high residential homes;
- o The proposal removes all of the trees along the boundary with the homes and replaces it with a 4-storey building 5 metres from the boundary. Not one neighbour thinks that it improves the overall physical appearance of the site;
- o The design does not properly respond to the topography of the site because the stepped design provides an extra storey in height, instead of responding by stepping down the height of the building to follow the slope of the site.

The applicant's response does not provide a realistic response to the issues created by the proposed development. Instead a series of spin statements are made to justify the Variation.

RECOMMENDATION: The only way to curtail the unacceptable use of Variation requests to justify unreasonable variations is to apply a maximum numeric limit on contraventions.

Part 4 - Proposed Response for Discussion

- The EIE states that **"the consent authority is the most appropriate body to determine the planning outcomes of a development".**

  This statement is highlighted because it is at the core of all BPN's submissions to DPIE. The consent authority, NOT one-size-fits-all policies and plans, SEPPs etc, are the most appropriate body to determine planning outcomes.

RECOMMENDATION: DPIE should make this statement central to all of its planning policies.

- The revised test for variations - It is proposed that a development be consistent with the following criteria. Each criteria will be addressed separately below.

  1. the objectives of the clause containing the development standard; and
  2. the zone in which the development is proposed; and
  3. the contravention will result in an improved planning outcome; or
  4. an alternative test may be developed to enable flexibility.

  1. Under the proposed new Design and Place SEPP many of the current LEP controls, such as height, floor space ratio, lot size, et al, will be subsumed into the new Design and Place SEPP and associated Urban Design Guide for large developments. Objectives are to be replaced with "Mandatory Matters for Consideration". It is then intended that all LEPs, DCPs, Strategic Plans etc are to be amended to conform with the SEPP and UDG. For the Clause 4.6 Review to then rely first and foremost on objectives that are to be repealed is considered unwise and unreasonable.

  2. DPIE is considering what is in essence a collapse of the LEP zones, similar to the model recently used in the United Kingdom. For the Clause 4.6 Review to then rely heavily on zones that are to be repealed is considered unwise and unreasonable.

  3. As demonstrated on page 4 of this submission, when the criteria for demonstrating an improved outcome are subjective and not prescriptive, the applicant can respond with meaningless justifications that are difficult if not impossible to refuse, as in the case study -

- it is in the **public interest** to have more education space;
- the **environmental outcome** is improved because 39 trees are being removed and more could have been removed if the building footprint was different;
- **social outcome** is improved because it serves the education needs of the community;
- **economic outcome** is improved for the College.

4. The definition of "minor" is problematic for an alternate test when numerical controls are not included or considered.

The onus being on the applicant to demonstrate that the essential criteria has been assessed will not prevent poor justifications that are nearly impossible to refuse without numerical controls.

RECOMMENDATION: The revised test for variations is inadequate for producing good planning outcomes. The six Land and Environment Court planning principles must also be included.

- *"The ICAC Operation Dasha investigation report sought clarification about the concept of maximum exceedance of numeric development standards to increase certainty and promote the integrity of development controls"*.

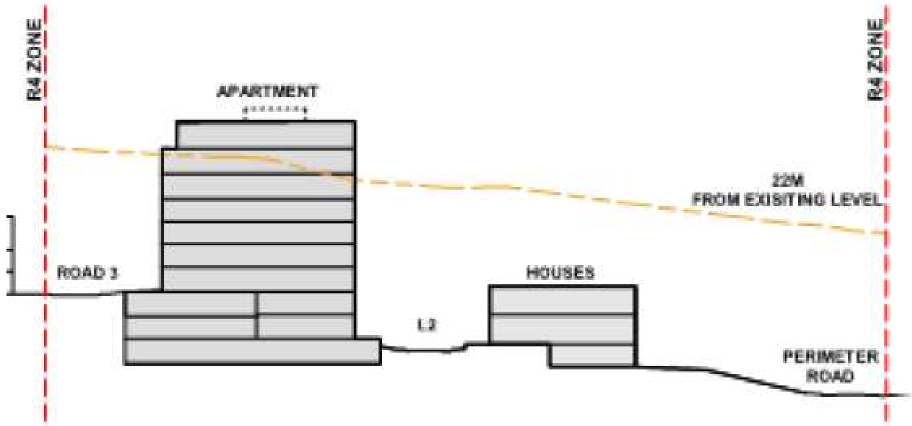
  Better Planning Network supports the use of maximum exceedance of numeric development standards. It is considered to be the ONLY effective method of increasing certainty, promoting integrity and avoiding corruption.

  - Sufficient flexibility and integrity of developments can be achieved by the application of simple numerical controls, instead of relying on convoluted subjective justifications;
  - There would be few circumstances where maximum limits would prevent improved planning outcomes, except in the opinion of the developer.

  Councils are the appropriate body to determine controls which are defined in their LEPs.

RECOMMENDATION: Maximum exceedance numerical controls should be used to strengthen the integrity of developments while providing sufficient flexibility.

- The revised clause 4.6, with more "flexibility" but with no maximum exceedance numerical controls, will NOT empower councils to ensure improved planning outcomes. A second case study is provided below where DPIE set a height limit of 22 metres on a bushland site in West Pennant Hills ie 6 storey units. The developer has stated that they are now considering lodging a Clause 4.6 Variation Request for 30m high units, with the developer's images showing 10 storeys plus roof plant. The council is understandably appalled**. The lack of numerical controls is being used as an alternate to a revised planning proposal.**



Discussion Questions

- No, the proposed changes do NOT address the complexities and challenges encountered applying the current test for variations under clause 4.6. The proposed changes will exacerbate the challenges faced by the community and councils.

- This is because the greater "flexibility" provided to developers, the poorer the planning outcomes for the community. Case studies have been provided in this submission.

- **YES, a maximum numeric limit MUST be considered as the way of defining the scale of the variation possible under clause 4.6.**

  A maximum of 15% or at most 20% exceedance should apply.

  Because there is currently no maximum numeric limit, the Innovation Hub at Castle Hill is able to propose a variation almost over DOUBLE the height limit. Similarly, the bushland units (on a site containing critically endangered ecological communities) are well over 30% higher than originally approved by DPIE.

- The planning outcomes test - As discussed previously in this submission, including in the case study of the Innovation Hub provided, it is NOT considered that the planning outcomes test of public interest or improved environmental, social and economic outcomes, will sufficiently help to reduce misuse of clause 4.6. Where subjective justification is provided, it is almost impossible to refute.

  As an anology, we all accept the fact that the sky is blue. The community wants their sky to be blue. However an applicant could produce a photo of a sunset and provide a subjective opinion that the sky is red, so that's the colour they're going to use for the sky. The only way to ensure the community gets what is expected is to use a numerical colour code like RAL, HTML or even RGB to ensure the community gets blue sky.

RECOMMENDATION: A maximum numeric limit MUST be considered as the way of defining the scale of the variation possible under clause 4.6.

- The alternative test **-** The examples provided of *"variations which cannot demonstrate improved planning outcomes because the variations are of a minor nature and cannot comply due to site specific circumstances"*, instead provide good examples of why this alternative test will NOT work. Each example will be addressed separately below.

  1. a small breach of the height control on a sloping site where measures have been taken to design the building with the topography of the site;

  2. the existing development or build form at the site does not comply, and the proposed development will not extend the existing non-compliance;

  3. the contravention is minor and relates to a small portion of the site, and therefore the environmental impacts of the contravention are minimal or negligible.

  Using the case study of the Innovation Hub at Castle Hill, each of the above three examples were used as justification for the 13.1 metre variation over and above the 8.5 metre height control.

1. As shown on page 4 of this submission, the applicant used the slope of the site to add an additional excavated storey rather than use the slope of the site to reduce the non-compliance. The topography of the site was then touted as the main reason for the non-compliance.

2. The existing development on the site includes the 100 year old De La Salle Building. The applicant is using that building to say that there is an existing non-compliance. But the De La Salle Building was constructed more than half a century before the residential planning controls, including the height control, were introduced. The De La Salle Building is a considerable distance away from the proposed building, not just 5 metres from the boundary with residents.

3. The site is over 18 hectares so the whole building relates to only a small portion of the site. It can be seen from the NSW Government SixMaps image below, that there are other more suitable sites (excluding the four sportsfields) within the site as a whole. Despite being able to position the building elsewhere on the site, where the impacts would be far less, the applicant's Clause 4.6 Variation Request claimed the impacts of the contravention are minimal. The neighbours understandably do not agree.

As pointed out previously in this submission, developers can and will provide reasons to justify any variation, saying *"it is appropriate in the circumstances".* While it is reasonable to provide some flexibility, the amount of flexibility that the proposed alternative test will provide are considered to be unreasonable.

RECOMMENDATION: No secondary alternative test should be provided. The aims of the Review are better provided by maximum exceedance controls.

Discussion questions

- There is an almost unlimited range of excuses that developers use for variations due to the particulars of the site. Slope of land, roof plant is not very visible (from every side of the building!), moving the footprint would remove more trees (shrinking the footprint is never considered), better internal circulation of the building, a redesign would be costly, heritage / visual / character / landscape / overshadowing impacts caused by variation to setback / height controls are not very significant, et al. The list is endless. And those are just the ones used by the case study.
- No, flexibility to the extent that is proposed in this EIE should not be allowed.
- It is not considered correct, nor should it be assumed by DPIE, that an alternate test is needed.

Development Standards excluded from variations

- As detailed in the EIE -

  > Currently under clause 4.6(8) of the Standard Instrument LEP, variations cannot be made to certain provisions including development standards relating to complying development, development standards containing BASIX requirements and clause 5.4. Councils can also include additional development standards that cannot be varied in their own LEPs.
  >
  > It is proposed that councils will no longer be able to exclude provisions from the operation of clause 4.6.
  >
  > A transitional period is proposed, so that the current exclusions in clause 4.6(8) of LEPs will continue to apply for a period of one year from commencement of the clause. This includes exclusions for miscellaneous permissible uses under clause 5.4 and local provisions nominated by the council. At the expiration of the one-year period, exclusions to clause 5.4 and local provisions will no longer apply.

  BPN does NOT support the removal of provisions that can be excluded from the operation of clause 4.6.

  The EIE has already made it clear that DPIE believes -

  "The consent authority is the most appropriate body to determine the planning outcomes of a development".

  The councils should then be considered the most appropriate body to determine the planning controls.

- Councils, the community and DPIE (through the LEP Gateway process) all considered the exemptions under clause 4.6(8) to be appropriate, including clause 5.4. These should not now be removed just because the industry wants even more "flexibility".

  > (8) This clause does not allow development consent to be granted for development that would contravene any of the following—
  >
  > (a) a development standard for complying development,
  >
  > (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004* applies or for the land on which such a building is situated,
  >
  > (c) clause 5.4.
  >
  > **Direction—**
  >
  > Additional exclusions may be added.

- Clause 5.4, controls relating to miscellaneous permissible uses, is currently a compulsory clause of the Standard Instrument LEP. It relates to:

  - the physical size (by square metres or number of people) of a range of businesses; and
  - the size secondary dwellings on land other than land in a rural zone.

  DPIE and councils have long considered these exceptions to be appropriate. It is reiterated that councils are the most appropriate body to determine planning controls. Allowing the development industry to have a large number of Standard Instrument LEP sub-clauses removed, simply because they say they find after so many years that the application is confusing and a cost burden, is not considered to be good planning policy.

  RECOMMENDATION: Clause 4.6(8) must remain the same, including the direction that *"additional exclusions may be added".*

  RECOMMENDATION: That Clause 5.4 NOT be repealed, including sub-clauses (1) through to (10).

5.4 Controls relating to miscellaneous permissible uses [compulsory]

(1) **Bed and breakfast accommodation** If development for the purposes of bed and breakfast accommodation is permitted under this Plan, the accommodation that is provided to guests must consist of no more than [*insert number not less than 3*] bedrooms.

Note—

Any such development that provides for a certain number of guests or rooms may involve a change in the class of building under the *Building Code of Australia*.

(2) **Home businesses** If development for the purposes of a home business is permitted under this Plan, the carrying on of the business must not involve the use of more than [*insert number not less than 30*] square metres of floor area.

(3) **Home industries** If development for the purposes of a home industry is permitted under this Plan, the carrying on of the home industry must not involve the use of more than [*insert number not less than 30*] square metres of floor area.

(4) **Industrial retail outlets** If development for the purposes of an industrial retail outlet is permitted under this Plan, the retail floor area must not exceed—

(a) [*insert number not more than 67*]% of the gross floor area of the industry or rural industry located on the same land as the retail outlet, or

(b) [*insert number not more than 400*] square metres,

whichever is the lesser.

(5) **Farm stay accommodation** If development for the purposes of farm stay accommodation is permitted under this Plan, the accommodation that is provided to guests must consist of no more than [*insert number not less than 3*] bedrooms.

(6) **Kiosks** If development for the purposes of a kiosk is permitted under this Plan, the gross floor area must not exceed [*insert number not less than 10*] square metres.

(7) **Neighbourhood shops** If development for the purposes of a neighbourhood shop is permitted under this Plan, the retail floor area must not exceed [*insert number not less than 80 and not more than 1,000*] square metres.

(7AA) **Neighbourhood supermarkets** If development for the purposes of a neighbourhood supermarket is permitted under this Plan, the gross floor area must not exceed 1,000 square metres.

(8) **Roadside stalls** If development for the purposes of a roadside stall is permitted under this Plan, the gross floor area must not exceed [*insert number not less than 8*] square metres.

(9) **Secondary dwellings on land other than land in a rural zone** If development for the purposes of a secondary dwelling is permitted under this Plan on land other than land in a rural zone, the total floor area of the dwelling, excluding any area used for parking, must not exceed whichever of the following is the greater—

(a) 60 square metres,

(b) [*insert number*]% of the total floor area of the principal dwelling.

(10) **Artisan food and drink industry exclusion** If development for the purposes of an artisan food and drink industry is permitted under this Plan in an industrial or rural zone, the floor area used for retail sales (not including any cafe or restaurant area) must not exceed—

(a) [*insert number not more than 67%*] of the gross floor area of the industry, or

(b) [*insert number not more than 400*] square metres,

whichever is the lesser.

- **The retention of clause 5.4 (9) is of particular importance. There should be NO flexibility in the size of secondary dwellings on land in residential areas.** This clause ensures that secondary dwellings on residential land do not become of a size that could be considered comparable, or close to comparable, with the primary dwelling. Having no numerical exceedance controls would further exacerbate this problem.

RECOMMENDATION: Clause 5.4(9) must not be repealed.

- If DPIE is of the opinion that the current provisions in clause 4.6(8) negate the purpose of clause 4.6 (excerpt below), then complying development and BASIX, which are two of the three provisions, should theoretically also be repealed which would be just as unreasonable as removing the third clause of clause 4.6(8), the inclusion of clause 5.4.

> The current provisions in clause 4.6(8) negate the purpose of clause 4.6, which is to permit flexibility in the application of development standards in exceptional circumstances, where proposed developments can still achieve planning objectives despite not meeting the required development standards.

RECOMMENDATION: Clause 4.6(8) must not have sub-clause (c) removed.

- It is concerning to read the statement below that *"The only exclusions to clause 4.6* ***which will remain****".* This implies that the decision to remove other exclusions, including the whole of clause 5.4, is a foregone conclusion. That defeats the purpose of community consultation and reads as though this will occur regardless of community submissions.

> The only exclusions to clause 4.6 which will remain is the clarification that variations under clause 4.6 cannot be granted for complying development or development standards containing BASIX requirements.

RECOMMENDATION: The development industry's views must NOT take precedence over community views. Community consultation MUST NOT become a box-ticking exercise.

- <u>Strengthened reporting and monitoring to improve transparency, accountability and probity</u> - While it is agreed that reporting on the DPIE Planning Portal is a good idea, it is NOT an effective method of improving probity or reducing the potential risk of corruption. If dodgy dealers can hide Variation approvals from councils' website, they can do the same to the Planning Portal.

RECOMMENDATION: This is considered to be an ineffective tool to improve transparency, accountability and probity. Having concurrence requirements, possibly with Planning Panels, together with numerical exceedance controls are the only effective tools.

<u>Discussion questions</u>

- No, the proposed reporting, monitoring and auditing framework does NOT proved a sufficient level of scrutiny to minimise the risk of misuse of Clause 4.6 Variation Requests (see above recommendation).

Rural Subdivision

- It is agreed that no changes should be made to clause 4.6(6), to ensure land fragmentation is minimised. However the same applies to clause 5.4(9). While in theory large secondary houses would not be permitted to seek a separate title, in effect the result is the same - fragmentation of the lot. Furthermore, it would only be a matter of time before changes are sought to the EP&A Act by the development industry to allow large secondary dwellings to be subdivided from the primary dwelling.

RECOMMENDATION: No changes should be made to clause 4.6(6) and clause 5.4(9) should not be repealed.

Discussion questions

- Guidance material should be developed to explain the six Land and Environment Court planning principles to confused developers.

Part 5 - Benefits (or lack thereof) of the proposed response

- The updated clause 4.6 as proposed is only of benefit to the development industry (the stakeholder). Providing "flexibility" to the developers, removing a whole raft of exclusions, and failing to provide numerical exceedance controls, provides FAR LESS CERTAINTY to the community that DPIE is also supposed to serve.

RECOMMENDATION: Any update to clause 4.6 should provide greater certainty for the community.

- Addressing the development industry's concerns about recent case law by removing more controls, will result if much poorer planning outcomes and is considered poor planning policy. The community has frequently raised concerns that when the NSW Government doesn't like Land and Environment Court or Planning Panel judgements, it simply changes the legislation. THAT is very poor planning policy and undermines the community's confidence in the probity of the planning system itself.

RECOMMENDATION: Guidance materials should be provided clarifying the case law instead of reducing controls.

- It is considered farcical to suggest that removing more controls to enable "flexibility" for proponents (the development industry), will deliver better developments. When did that EVER happen? The objectives of the zones, and indeed the zones themselves in the future, are to be subsumed by a new SEPP and changes from prescriptive to subjective planning.

  Councils will be faced with greater amounts of spin which they are unable to refute. Most councils are likely to give up trying as they will have no controls with which to reign in inappropriate development. The onus will fall on councils who are ill-equipped and under-resourced to challenge professional spin doctors. *"In the public interest"* is usually anything but in its interest.

The sort of woolly, insubstantial factors such as reflecting *"the context of the site"* and the *"unique opportunities of the site"* (excerpt below), is beyond the consideration capability of council staff who are usually 'out-gunned' by professional spinners of wool.

Demonstrating that a proposed development will achieve improved planning outcomes will require applicants to demonstrate such factors as:

- whether the proposal is of a size, scale and design that reflects the context of the site and strategic vision of the area; or
- how the proposal responds to the unique opportunities and constraints of the site.

So called *"responsive development"* only achieves better profit outcomes for the development industry, not better planning outcomes.

RECOMMENDATION: Less wool and more substance is what is required of the planning system to provide tangible benefits to the community, not just to the development industry.

- Creating savings for NSW ratepayers and the community - The proposed changes will create time and cost savings for applicants, full stop. The simple application of numerical exceedance controls would provide time and cost savings for consent authorities and the courts.

RECOMMENDATION: It is reiterated, less controls are NOT the answer to any of the issues except the issue of greater profits for applicants.

- Kaldas Review Recommendations - This final section attempts to explain that the proposed changes are consistent with the Kaldas Review recommendations by -

  - the reporting of variations and reasons for decisions through the NSW Planning Portal. This supports the ePlanning program and promotes probity and transparency in decision making;
  - removing the concurrence requirements under clause 4.6, which will place greater onus on planning panels to consider and determine applications based on the independent planning merit of the proposal;
  - reducing ambiguity by using plain English guidance materials to explain the new tests.

  All of those are excellent recommendations. However not one of those recommendations suggests gutting Clause 4.6 to provide greater flexibility (and profits) for the development industry. The Kaldas Review should not be used as a vehicle for dismantling more development controls at the behest of the development industry.

RECOMMENDATION: Only the three recommendations above should be enacted.

Conclusion

Better Planning Network Inc considers that the proposed changes to Clause 4.6 will not be effective in assessing probity and transparency issues; further removes planning controls from local planning bodies; will result in poorer planning outcomes; and does not satisfactorily address the concerns raised by ICAC Operation Dasha or the Kaldas Review. Only the three Kaldas recommendations above should be enacted, no clauses should be repealed.