THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EP&D:JWlb120521

12 May 2021

Director, State and Regional Economy
Department of Planning, Industry and Environment
Locked Bag 5022
PARRAMATTA NSW 2124

Dear Sir/Madam,

Varying Development Standards

The Law Society appreciates the opportunity to comment on the Explanation of Intended Effect (EIE), which proposes reforms to clause 4.6 of the *Standard Instrument – Principal Local Environmental Plan* (Standard Instrument LEP). The Law Society's Environmental Planning and Development Committee contributed to this submission.

General comments

Use of Clause 4.6 is ubiquitous in the planning system and we consider that it is essential that any proposed changes to it should be subject to a formal consultation process which includes exhibition of the draft legislation. We reiterate our strong view that all amending instruments should be formally exhibited to ensure the proposed changes have the desired effect and to avoid unintended consequences. We are concerned that there does not appear to be any commitment to exhibiting the draft legislation before it takes effect. Indeed, the EIE, which contains a number of "Discussion Questions" states:

> Feedback is being sought about the intent of the secondary, alternative test and how the aims can be best represented in the clause and implemented in development assessment. The Department will draft and **finalise** the secondary test based on consideration of submissions on the matter. (emphasis added)

Challenges with the current clause

We agree that the current wording of clause 4.6 is unnecessarily convoluted and could be simplified, but we suggest that any change should only be made to improve the clarity of the provision. For example, the proposed development must be considered in terms of the objectives of the zone and the development standard first under clause 4.3 (a)[1] and then, once the applicant has satisfied that arm of the test, the consent authority must be satisfied that the proposed development "will be in the public interest because it is consistent with the

[1] This is one of the justifications for satisfying the "unreasonable or unnecessary in the circumstances of the case" test set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42]-[48] .

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objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out" (clause 4.6 (4) (a) (ii)).

We do not support the introduction of an entirely different test, which introduces new hurdles and concepts for planners, lawyers, Commissioners and Judges to grapple with. We agree that the cases referenced on page 12 of the EIE did create uncertainty, but we submit that this period of uncertainty has been succeeded by a more settled position based on a satisfactory body of case law about how to address a clause 4.6 variation application.

The revised test for variations

The first arm of the revised test, that is, the requirement to meet the objectives of the zone and development standard is a current requirement, so there is no change to that arm of the test, which is generally supported (except for very minor or trivial breaches as discussed below). We suggest that it could be made clearer as to how that consideration forms part of clause 4.6 rather than it being triggered indirectly under the "unreasonable and unnecessary" test in clause 4.6 (3) and then directly under clause 4.6 (4) (a) (ii).

However, we are concerned with the undefined concept of an "improved planning outcome". We think it is important that that concept is defined. We do not support including consideration of economic outcomes in determining whether there is an improved planning outcome. The emphasis should be on public benefit and amenity.

Replacing the test of "sufficient environmental planning grounds" with an "improved planning outcome" test creates uncertainty. We prefer the language of "sufficient environmental planning grounds" because it doesn't suggest a breach can be overcome by adding in othe**r**, unrelated, benefits. The new test also requires the applicant to demonstrate that the contravention of the development standard will result in an improved planning outcome when compared with what would have been achieved if the development standard was not contravened. We query how this balancing act is to be undertaken and suggest that considerable guidance would be required.

The alternative test

We agree that that there may be some very minor or trivial breaches that could be subject to a less onerous regime. It is difficult, for example, to put a percentage limit on the degree of variation from the standard that would allow a minor breach to be excused, because outcomes would differ depending on the scale of the building, land or development. A one percent increase for a high-rise building will involve many more metres of additional building structure than for a single dwelling. But perhaps a "minimal environmental impact" or "minor" test could be used with guidance material about that threshold. This is language that already exists in the Act. However, while we are not necessarily averse to an alternate test for minimal breaches or existing non-compliances, the detail of the proposed legislative change will be vital – and it appears that the Department plans to finalise the drafting of an alternative test based on submissions to this consultation, without further input.

Development standards excluded from variations

We disagree with the proposed removal of clause 4.6(8). That provision has largely (but not entirely) removed the debates about whether a particular provision is a development standard or a prohibition. Our Committee members observe that, in their experience, the sub-clause is not over-used and is, in any event, subject to Ministerial oversight. The EIE provides no concrete examples of the alleged mischief caused by clause 4.6(8). We disagree that it causes confusion in applying clause 4.6.

If the clause is removed, there would need to be further guidance material developed to provide clarity about what are prohibitions as opposed to development standards.

Concurrence

The EIE states that clause 4.6(4)(b) (concurrence of the Planning Secretary) will be removed but is silent as to whether clause 4.6(5) (considerations of Planning Secretary – matter of significance for State or regional planning; public benefit of maintaining the development standard) will be maintained as part of the improved reporting requirements. This requires clarification.

Strengthening reporting and monitoring

We agree there is a need for improved analysis of the use of clause 4.6 but suggest that the problem of collecting suitable data will not be entirely solved by public reporting rather than maintaining a register. Anecdotally, our Committee members are aware of an "audit" carried out some years ago of the clause 4.6 registers at selected metropolitan councils.

Unsurprisingly, those councils with:

- more than one development standard in the applicable LEP
- sloping topography
- opportunities for iconic and harbour views, and
- development pressure due to those views

were branded as "exceptional" and pressured to reduce the number of clause 4.6 requests they allowed. That type of analysis is unhelpful and unlikely to result in a better use of clause 4.6.

We are in favour of consent authorities reporting particulars of clause 4.6 applications to the Department of Planning, Industry and Environment, so that the Department can analyse the information to see if this process discloses transparency or probity concerns. This would also assist with councils that don't have Local Planning Panels.

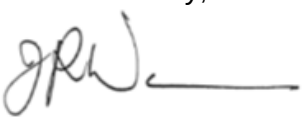
Guidance material

If the proposed changes are proceeded with, we suggest that guidance material should be issued on these topics:

a. The scope of "minor variations" that will be subject to the 'alternative' test under a revised clause 4.
b. How do you demonstrate that the proposed development is consistent with the objectives of the relevant development standard and land use zone
c. Development standards as opposed to prohibitions in Standard Instrument LEPs.

The Law Society appreciates the opportunity to participate in the reform process. If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours faithfully,



Juliana Warner
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