Varying Development Standards: A Case for Change

Explanation of Intended Effect

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The Department of Planning, Industry and Environment welcomes your feedback during the public exhibition of this Explanation of Intended Effect. Your feedback will help us better understand the views of the community and inform the next stages of the project.

This document is being exhibited in line with the department's Community Participation Plan.

To make a submission please go to www.planningportal.nsw.gov.au/variations-review and complete the submission form and associated privacy and political donation declarations.

Your submission can either be typed, uploaded as a separate document, or lodged via post to:

Director, State and Regional Economy
Department of Planning, Industry and Environment
4 Parramatta Square
12 Darcy Street, PARRAMATTA (Locked Bag 5022), NSW 2150

All submissions will be made public in line with our objective to promote an open and transparent planning system. If you do not want your name published, please state this clearly at the top of your submission.

To find out more, please visit www.planning.nsw.gov.au/variations-review.

Acknowledgment of Country

The Department of Planning, Industry and Environment acknowledges the Traditional Owners and Custodians of the land on which we live and work and pays respect to Elders past, present and future.

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Part 1 - Executive Summary

Clause 4.6 of the Standard Instrument - Principal Local Environmental Plan (Standard Instrument LEP) provides flexibility in the application of development standards in certain circumstances.

Development standards are a means of achieving an environmental planning objective and can be numerical or performance based. Some developments may achieve desirable planning outcomes despite not meeting the required development standards. Clause 4.6 provides flexibility to allow these objectives to be met by varying development standards in certain cases.

Feedback has been received that the process for varying development standards has become overly complicated for applicants and consent authorities. Uncertainty around the application of clause 4.6 to vary development standards has also resulted in significant cost burdens for proponents, and resourcing implications for local councils and the courts. As outlined in the recent NSW Independent Commission Against Corruption (ICAC) *Investigation into the conduct of councillors of the former Canterbury City Council and others* (Operation Dasha), there are also concerns that varying development standards can dilute transparency in the planning system and subsequently open up opportunities for corruption.

The NSW Government is committed to a planning system that is simple to use; easy to understand; promotes strategic planning and integrity; and reduces the risk of corruption. As part of this commitment, the Department of Planning, Industry and Environment (the Department) is seeking feedback on how to improve the way clause 4.6 operates and provide certainty to councils and industry.

This Explanation of Intended Effect (EIE) outlines the case for change and the Department's proposed changes to respond to the known issues. The EIE also seeks feedback on proposed measures to increase transparency, accountability and probity by strengthening council reporting requirements on variation decisions, in line with ICAC Operation Dasha recommendations.

A revised clause 4.6 elevates the importance of ensuring the planning decisions deliver the best outcomes that are consistent with the objectives of the land use zone and development standard. Without this flexibility, more spot rezonings are likely to be needed.

The proposed revised clause 4.6 will ensure that applications to vary development standards have a greater focus on the planning outcomes of the proposed development and are consistent with the strategic context of the site. The proposed revised clause 4.6 gives weight to the relevant planning objectives that have been developed by councils in consultation with communities and ensures variations are considered in that context.

Under the proposed revised clause 4.6, the consent authority must be directly satisfied that the applicant's written request demonstrates the following essential criteria in order to vary a development standard:

- the proposed development is consistent with the objectives of the relevant development standard and land use zone; and
- 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.

If appropriate, an alternative test may be developed to enable 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. Feedback is being sought to inform the development of this alternative test.

The proposed revised clause will also provide greater flexibility and transparency by removing the exclusions under clause 4.6(8) and requiring consent authorities to publicly report reasons for their decisions.

Strengthened reporting requirements and a new monitoring and auditing framework for variations are proposed which will further enhance transparency, probity and accountability for councils across NSW.

We are also seeking feedback on the proposed amendments, and what type of guidance material would be required to provide a clear understanding and application of the new test.

Part 2 - Varying Development Standards in NSW

Environmental Planning Instruments (EPIs), such as Local Environmental Plans (LEPs) and State Environmental Planning Policies (SEPPs) contain development standards that regulate the type, size and scale of development that can be approved. These standards cover different aspects of a proposed development – such as minimum lot size, floor space ratio and building height.

It is generally recognised that rigid adherence to pre-determined development standards can sometimes lead to an inferior result. In some exceptional circumstances, developments 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.

This current mechanism within the NSW planning system is clause 4.6 of the Standard Instrument LEP. The clause allows an appropriate degree of flexibility to be applied to development standards.

Most variations relate to development standards in an LEP, which is the primary document to guide planning decisions for local government areas (LGAs). Development standards and zoning allow councils and other consent authorities to manage the way land is used.

In 2006, a common format and structure for LEPs began to be rolled out across all LGAs – known as the Standard Instrument LEP. The Standard Instrument LEP is the template on which each LEP must be based and contains mandatory clauses that must be used in every LEP and optional clauses that may or may not be included. Clause 4.6 is a mandatory clause that appears in every Standard Instrument LEP. Currently, councils have the ability to include additional development standards within their LEP which cannot be varied under clause 4.6 (under clause 4.6(8)).

Clause 4.6 of the Standard Instrument Local Environmental Plan

In NSW, an applicant who wishes to vary a development standard in the Standard Instrument LEP can formally lodge a written clause 4.6 application, justifying the variation, along with the development application (DA).

Clause 4.6 allows the consent authority (usually the local council) to approve an application, in the exceptional circumstance where a development does not meet the development standard but is able to achieve the underlying purpose of that standard. Prior to approving the variation, the council must be satisfied that certain conditions of the development are met. Currently, the conditions are:

- the provision is a development standard that has not been specifically excluded from the operation of clause 4.6 (clause 4.6(8));
- the consent authority is satisfied that:
    - the applicant's written request has adequately addressed the matters under clause 4.6(3) (clause 4.6(4)(a)(i)); and
    - the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out (clause 4.6(4)(a)(ii)); and
- the Secretary has granted concurrence for the development that contravenes a development standard (clause 4.6(4)(b)).

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 numerical standard exceeds 10%. These panels are required to consider the planning merits of the variation request. In financial year 2018-19, 47.6% of DAs were made and determined in LGAs where a local planning panel was operational.

SEPP 1 (now repealed)

SEPP 1 was a longstanding policy which was established in 1980 to enable the variation of development standards in LEPs and SEPPs. Under SEPP 1, an applicant must justify that compliance with the development standard is unreasonable or unnecessary.

The determination of whether a standard is unreasonable or unnecessary has been established in the case law.[1] Case law establishes common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary*:*

1. the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. the underlying objective or purpose of the development standard is not relevant to the development, so compliance is unnecessary;
3. the underlying objective or purpose would be defeated or thwarted if compliance was required, with the consequence that compliance is unreasonable;
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 or unreasonable; or
5. the zoning of the site was unreasonable or inappropriate, so the development standard was also unreasonable or unnecessary and hence compliance with the standard is unnecessary and unreasonable. That is, the particular parcel of land should not have been included in the particular zone.

Once the Standard Instrument LEP was introduced in 2006, SEPP 1 shared a similar function to clause 4.6 of the Standard Instrument LEP, however SEPP 1 could only be used to vary development standards in LEPs which were not Standard Instrument LEPs.

When SEPP 1 was repealed on 31 January 2020, comparable provisions to clause 4.6 of the Standard Instrument LEP were transferred into older LEPs and some older SEPPs, through *State Environmental Planning Policy Amendment (Repeal of Operational SEPPs) 2019*. The 'unreasonable or unnecessary' test to vary development standards is currently contained within clause 4.6 of the Standard Instrument LEP and now applies across all relevant EPIs.

The Department has received feedback that the 'unreasonable or unnecessary' test has introduced a level of discretion which potentially created opportunities for corruption. As noted in the ICAC Operation Dasha investigation report, an opportunity now exists to improve clause 4.6 by seeking feedback on the appropriate level of flexibility that should be exercised to obtain a variation, so that it is used fairly and in the interests of the broader community.

[1] *Wehbe v Pittwater Council [2007] NSWLEC 827*; see also *Winten Property v North Sydney [2001] NSWLEC 46.*

Part 3 - A Case for Change

The NSW Government is committed to ensuring the NSW planning system is transparent, accountable, easy to use and understand.

The Department has received feedback from stakeholders that there are several issues with how clause 4.6 has been interpreted over time and applied in practice. This feedback has indicated that the application of clause 4.6 has become overly complicated and difficult to apply. The effect of this has resulted in a convoluted and unclear application of clause 4.6, resulting in delays and cost burdens for applicants and councils in the DA process as well as increasing the risk of corruption in the planning system.

The ICAC Operation Dasha investigation report clearly outlines the concerns that varying development standards can dilute transparency in the planning system and subsequently open up opportunities for corruption. There is an opportunity to strengthen council reporting requirements under clause 4.6 in a way which will enhance transparency, accountability and probity, in line with ICAC recommendations.

Key issues identified include the following concerns:

The current test under clause 4.6 is too complicated and unclear

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

In addition, the Department has received feedback that there is uncertainty in respect to the current test in clause 4.6 – for example, it is unclear whether a request to vary a development standard is required to demonstrate that better outcomes are achieved for, and from, the development by varying the development standard. Another example is whether applications to vary a development standard should outline why the aspect or element of the development that contravenes the development standard is justified on environmental planning grounds.

The need for greater transparency in the decision-making process

Development standards are designed and applied to regulate the type, size and scale of development that can be approved. These 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.

Local councils are currently required under clause 4.6 to fulfil certain procedural and reporting requirements when development standards are being varied, including to:

- maintain and publish a register of all variations to development standards; and
- report variations to the Department on a quarterly basis.

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.

The ongoing implementation of the NSW Government's ePlanning Program provides contemporary opportunities for variations reporting to be integrated through the NSW Planning Portal as part of the development assessment process. There is a need for regular publication and monitoring of the use of clause 4.6 to establish effective safeguards to minimise the risk of corruption. The opportunity to capture all applications for variations made through the Portal will allow information to be made more readily available to the public and reduce administrative burden for local councils. Further detail is provided in Part 4 of this EIE.

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

The NSW ICAC's Operation Dasha investigation report outlines the importance of a robust and well-functioning oversight mechanism for variations and has recommended that the Department review the concept of assumed concurrence given it can be used as a de facto plan making process.

Clause 4.6(4)(b) requires consent authorities to obtain the concurrence of the Planning Secretary prior to granting consent for development which contravenes a development standard. The concurrence requirements were originally introduced under clause 4.6 to ensure that there was an appropriate level of oversight and accountability in the decision-making process for varying development standards. When the concurrence requirement was established in the 1980s the Department had a more supervisory role. This role has changed over time as councils are empowered and resourced to undertake the assessment of local and regionally significant development.

The Department does not have data on the number of DAs that have relied on an assumed concurrence. According to NSW Planning Portal data, the Department has only received eight concurrence applications to date in 2021 and 32 in 2020. In its current form, the concurrence mechanism does not encourage accountability as the vast majority of concurrences are assumed, limiting opportunities for oversight and safeguards against the misuse of variations.

The removal of concurrence and referrals from the planning system is a key action under the Planning Reform Action Plan, announced by the Premier and Minister for Planning and Public Spaces in July 2020. To reduce red tape and improve assessment timeframes, a 25% reduction of all concurrence and referrals by mid-2023 is proposed. It is impractical for the existing assumed concurrence to be revoked. Revoking it would lead to longer DA processing times, increasing costs for applicants and adding complexity and uncertainty in the planning system. There would also be increased resource and administrative burden for councils and the Department.

A more contemporary and effective approach to better mitigate corruption risk is to raise the threat of detection by increasing and strengthening reporting requirements on the NSW Planning Portal, as well as introducing mechanisms to facilitate ongoing monitoring and risk-based audits. These mechanisms are outlined in the proposed response in Part 4 of this EIE.

The implementation of the NSW Government's ePlanning Program and ongoing updates to the Planning Portal to capture information on DAs involving variations will enable enhanced reporting, improved oversight, transparency and accountability in decisions made by consent authorities regarding the granting of variations.

There are too many exclusions from clause 4.6

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, BASIX and clause 5.4. Councils can also include additional development standards that cannot be varied in their own LEPs.

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.

Discussion Questions

Removing concurrence will have practical and planning benefits. Is there a need to retain a **concurrence** role for oversight of clause 4.6 to reduce risk of corruption?

What other challenges have you experienced with the current clause 4.6?

What further issues would you like to see addressed as part of this review?

Part 4 - Proposed Response for Discussion

In response to the issues above, the proposed changes to clause 4.6 of the Standard Instrument LEP aims to clarify the requirements for varying development standards and recognises that the consent authority is the most appropriate body to determine the planning outcomes of a development. The proposed changes aim to clarify that a clause 4.6 application should only be granted in exceptional circumstances when an improved planning outcome can be demonstrated with evidence.

The revised test for variations

It is proposed that an applicant will be required to demonstrate the following essential criteria in order to vary a development standard:

- that the proposed development is consistent with:
    - the objectives of the clause containing the development standard; and
    - the zone in which the development is proposed to be carried out; **and**
- 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**
- an alternative test may be developed to enable 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.

The onus will be on the applicant to demonstrate that the essential criteria has been addressed, and the consent authority must be satisfied that the essential criteria has been demonstrated. This aspect of the test is critical as it clearly gives weight to and ensures that variations are considered in the context of the zone and development control objectives that apply.

Development standards have been created to reflect and maintain optimal planning outcomes for an area. It follows that the key aim of a revised clause is to establish improved planning outcomes by creating an outcomes-based test which is robust, transparent, easy to apply and establishes greater integrity and accountability in the planning system.

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. A maximum numeric limit on contraventions is not considered appropriate for the variations system for the following reasons:

- sufficient flexibility and integrity of developments can be achieved without a mandated limit; and
- there may be circumstances where maximum limits would preclude the achievement of improved planning outcomes that are in the public interest when compared to the outcome that would have been achieved if it had complied.

It is intended that a revised clause 4.6 will empower councils to ensure that development standards should only be contravened in circumstances where there is an improved planning outcome, or where the proposed variation is appropriate due to the particular circumstances of the site and the proposal. In this regard, the variations system will not enable opportunities for it to be used as an alternative to a planning proposal.

Discussion Questions

Do you think the proposed changes address the complexities and challenges you have encountered when applying the current test for variations under clause 4.6?

Why or why not? Include any case studies and practical examples.

Should a maximum numeric limit be considered as a way of defining the scale of the variation possible under clause 4.6?

The planning outcomes test

The planning outcomes test aims to capture developments where a better outcome can be achieved by varying a development standard. An applicant is required to justify that the contravention of the development standard results in an improved planning outcome when compared with what would have been achieved if the development standard was not contravened having regard to any:

- public interest;
- improved environmental outcomes;
- improved social outcomes; and
- improved economic outcomes.

The aim is to ensure that sufficient information is given to the consent authority to make decisions on whether a development fits in with the site's strategic and contextual environment.

This test will help reduce misuse of clause 4.6 by focusing on variations which establish a better planning outcome. It recognises the value of consent authorities' specialised knowledge as to what will achieve great planning outcomes for their specific area. The criterion also requires applicants to provide sufficient information so that assessments can be undertaken in a transparent and timely manner.

The alternative test

The Department may include an alternative test to ensure that flexibility can be applied when an improved planning outcome cannot be demonstrated, but the variation is appropriate in the circumstances because its impact is negligible.

The secondary test would aim to capture variations which cannot demonstrate improved planning outcomes because the variations are of a minor nature and cannot comply due to site specific circumstances, for example:

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

In some instances, it may not be possible to demonstrate an improved outcome so this alternative test is provided. The Department acknowledges that often planning controls are set at a strategic level - not site by site or ground truthed - and therefore it is reasonable to provide some flexibility. Minor variations should be acceptable except for instances where it results in a worse planning outcome.

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.

Discussion Questions

We welcome feedback to inform the development of an alternative test to ensure that flexibility can be applied when an improved planning outcome cannot be demonstrated, because the variation minor in nature and appropriate in the circumstances.

Are there any further examples you have experienced where a variation should be granted due to the circumstances of the particulate site? Or due to the minor nature of the variation?

To what extent should flexibility be allowed in such circumstances?

How can this intention be captured in an alternative test?

Development standards excluded from variations

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.

This transitional period is intended to provide councils with the opportunity to review development standards and related objectives and progress planning proposals if necessary. If better planning outcomes can be demonstrated, then variations may be granted to these provisions which were previously excluded from clause 4.6.

Consent authorities retain the ability to determine variations by assessing them against the essential criteria. If better planning outcomes can be demonstrated to the satisfaction of the consent authority, then variations can be granted.

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.

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.

Strengthened reporting and monitoring to improve transparency, accountability and probity

Currently, clause 4.6(7) requires consent authorities to keep a record of its assessment of the factors required to be addressed in the applicant's justification. There is a need to further safeguard against misuse of clause 4.6 by improving accountability and transparency in deciding variation applications as outlined in the recent ICAC Operation Dasha investigation report

To promote transparency, it is proposed that the existing reporting requirements be strengthened by requiring councils to publicly publish their reasons for granting or refusing a clause 4.6 application on the NSW Planning Portal. This is consistent with the recent ICAC recommendations to increase transparency, accountability and probity.

Requiring reporting on variations to be made publicly available, including reasons for accepting a variation request or refusing a variation request will allow for improved analysis of the volume and

nature of variations including any trends or issues that might emerge. This reduces the risk of corruption by increasing the threat of detection.

Currently, clause 4.6(4)(b) requires consent authorities to obtain the concurrence of the Planning Secretary prior to making a determination to vary a development standard. As discussed in Part 3, a more contemporary response is to replace the concurrence requirements with more robust reporting requirements to improve accountability and safeguards.

As recommended by the ICAC's Operation Dasha investigation report, a monitoring and auditing framework will be implemented by the Department based on variation information provided by consent authorities through the NSW Planning Portal, including:

- regular monitoring of variation decisions including review of reasons for decisions and the extent and nature of variations;
- regular auditing of variations across all LGAs and publication of a report summarising audit findings; and
- investigation of variations with larger exceedance, frequently varied development standards and unusual variations with potential penalties for consent authorities where misuse is established.

The Department's auditing standards and practices are currently being reviewed to better utilise information obtained through ePlanning to achieve its oversight objectives and reduce the risk of corruption in development assessment. Detailed and real time information on variations will provide an evidence base to support ongoing strategic planning undertaken with councils to review planning controls contained within LEPs, where required.

The Department will also work with councils to determine how to integrate clause 4.6 variations into the cycle of audits conducted by the audit and risk committees of councils.

Expert and merit-based decision making will be maintained for significant variation requests through Independent Planning Panels who continue to determine applications involving departures as outlined in the Local Planning Panels Direction.

The proposed removal of the concurrence requirements in clause 4.6 will also reduce red tape and enable timely assessment of DAs in line with the Department's Planning Reform Action Plan which is working to reduce concurrences and referral requests across the NSW planning system by 25%.

Discussion Questions

Do you think the proposed reporting, monitoring and auditing framework provides an appropriate level of scrutiny of variations and will minimise the risk of misuse?

What matters should the Department consider in developing the risk based auditing framework?

Rural Subdivision

Currently, clause 4.6(6) states that development consent must not be granted under this clause for a subdivision of land in Rural and Environmental Zones if:

- the subdivision will result in two or more lots of less than the minimum area specified for such lots by a development standard; or
- the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

The intent of this provision is to minimise land fragmentation. No changes are proposed to this part of the clause.

Guidance Material

The Department proposes to release a range of guidance materials to support the roll out of the new clause 4.6. This will outline the changes, the tests and how the clause should be applied for various development types and contexts and will be regularly reviewed and updated.

Discussion Questions

ICAC has recommended that the Department prepare guidelines that consider the criteria for assessing variations to development standards and establish a clear process for regular review.

What type of guidance material (for applicants or consent authorities) should be developed?

What are appropriate triggers for a review of any guidance material?

Part 5 - Benefits of the proposed response

An updated clause 4.6 will address stakeholder feedback and provide certainty for applicants and councils. A clearer, more transparent mechanism to vary development standards contributes to a simpler, more accessible and easier to understand planning system.

Clarifying the assessment requirements

The proposed changes aim to address current stakeholder concerns that the current tests under clause 4.6 are unclear in light of recent case law.[2]

Improved transparency through enhanced reporting will reduce the risk of corruption

Updates to the NSW Planning Portal and new reporting requirements under the proposed clause will enable the following types of information to be captured for all variations:

- site details including location and LGA;
- relevant development standard and land use zone;
- nature and extent of the variation request;
- reasons for approval or refusal of the request to vary the development standard including assessment and consideration of the criteria; and
- whether the application was determined by the local council, a planning panel or the courts.

Councils will be required to report their decisions on variation requests on the NSW Planning Portal, including reasons for granting a variation request and reasons for refusing a variation request. This will introduce a level of rigor by requiring consent authorities to make their assessment and justify their decision with evidence.

The Department will continue to monitor the volume and nature of variations across NSW using this information to inform regular policy review. The enhanced reporting requirements provide the opportunity for timely, coordinated and regular monitoring to support a robust program of risk based audits.

Enabling responsive development that achieves better planning outcomes

The proposed changes will allow flexibility for councils and proponents to better deliver development that respond to the context of the site, notwithstanding strict numeric development standards.

A clause 4.6 variation can be supported provided an applicant is able to demonstrate that the development is consistent with the objectives of the clause containing the relevant standard, the objectives of the relevant zone, and that the variation results in improved planning outcomes.

“Planning outcome” will be defined in the clause to be an outcome in the public interest and results in better environmental, social and economic outcomes. The onus is on the applicant to demonstrate a better planning outcome on balance, ensuring councils are equipped to appropriately determine when a variation is justified and appropriate, reducing the risk of misuse.

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.

[2] Relevant Land and Environment Court cases that have been bought to the attention of the Department include:
Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7
Gejo Pty Ltd v Canterbury-Bankstown Council [2017] NSWLEC 1712
Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118
Rebel MH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130.

Creating savings for NSW ratepayers and the community

The proposed changes to clause 4.6 will create time and cost savings for applicants, consent authorities and the courts by potentially reducing the number of appeals to the Land and Environment Court. By doing this, less time will be spent on clause 4.6 appeals by the court, councils and applicants. Additionally, private costs will be reduced such as the cost associated with the preparation of DAs and court appeals.

Additionally, a clearly defined test will save applicants and consent authorities time and money as it will be more obvious when a clause 4.6 variation can be justified.

Kaldas Review Recommendations

The Kaldas Review of Governance in the NSW Planning System (Kaldas Review) was commissioned to provide a review of governance across the planning system following the significant reforms that were made to the NSW planning system in 2018.

The proposed review of varying development standards seeks to align with recommendations of the Kaldas Review through:

- 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.

Next Steps

We want your feedback to ensure amendments to clause 4.6 and related guidance material address the current issues with the clause. Key questions to consider are captured in the Discussion Questions throughout this EIE.