


Department of Planning and Environment

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# Guide to Varying Development Standards

November 2023



# Acknowledgement of Country

The Department of Planning and Environment acknowledges that it stands on Aboriginal land. We acknowledge the Traditional Custodians of the land, and we show our respect for Elders past, present and emerging through thoughtful and collaborative approaches to our work, seeking to demonstrate our ongoing commitment to providing places in which Aboriginal people are included socially, culturally and economically.

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Guide to Varying Development Standards

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# Introduction

The Standard Instrument – Principal Local Environmental Plan (Standard Instrument LEP) and other environmental planning instruments set out development standards that must be met before a consent authority, such as a local council, can grant development consent to a development application (DA). Clause 4.6 of the Standard Instrument LEP allows consent authorities to grant consent to development that contravenes one or more development standards.

Clause 4.6 provides flexibility in the application of development standards. However, confusion around the application of clause 4.6 has contributed to delays, cost burdens and litigation for applicants and councils.

In response, we have amended clause 4.6 – and similar provisions in non-standard local environmental plans (LEPs) and state environmental planning policies (SEPPs) – to simplify requirements and to make the clause easier to interpret.

We have also made changes to reporting requirements for councils and the approach that the Department of Planning and Environment will take to monitoring and auditing variations decisions. This is to ensure there is appropriate probity, accountability and transparency to maintain confidence in the planning system.

This guide is in 2 parts:

**Part A** clarifies requirements for preparing, assessing and determining requests to vary development standards.

**Part B** sets out the monitoring and reporting framework and replaces the planning circular PS 20-002.

# A

Part A: Preparing and  
assessing variation  
requests

# 1 Overview

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## 1.1 Purpose

Part A of this guide clarifies requirements for preparing, assessing and determining requests to vary development standards. It aims to:

- explain the tests in clause 4.6 of the Standard Instrument LEP
- clarify how to prepare and assess a variation request, including applying the tests
- identify the circumstances in which clause 4.6 does and does not apply.

Any references to clause 4.6 of the Standard Instrument LEP equally apply to equivalent clauses in non-standard LEPs and SEPPs.

We expect applicants – including planning consultants, developers and landowners – and consent authorities to use this guide to navigate the requirements of clause 4.6 and to determine when clause 4.6 does and does not apply.

Chapter 3 of this guide aims to assist applicants when preparing written requests to vary a development standard. Chapter 4 aims to assist consent authorities when assessing and determining those requests.

This guide is based on current case law and the intended application of the most recent changes to clause 4.6. Future court decisions may change the interpretation and application of the clause. This guide will be subject to regular review to reflect changes arising from court decisions.

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## 1.2 NSW planning framework

The NSW planning system shapes the state's towns and landscapes. The planning system is underpinned by strategic analysis and implemented through statutory instruments and development standards and controls.

The key planning legislation is the *Environmental Planning and Assessment Act 1979* (EP&A Act), which sets out the laws under which planning in NSW takes place. The EP&A Act is supported by environmental planning instruments.

Environmental planning instruments are statutory documents that contain development standards and other planning controls to meet the objects of the EP&A Act. They include LEPs, SEPPs and deemed environmental planning instruments, such as planning scheme ordinances and interim development orders.

View the objects of the [EP&A Act \(section 1.3\)](#)

Environmental planning instruments allow councils and other consent authorities to manage land use and determine how development is carried out. The instruments generally contain land use zones, development standards and other provisions for a range of development types and planning matters.

SEPPs apply to all of NSW or specific areas within NSW. LEPs apply to local government areas. Both instruments guide planning decisions made by councils and other consent authorities.

Clause 4.6 of the Standard Instrument LEP only applies to development standards in environmental planning instruments. It does not apply to other planning controls such as prohibitions.

Development control plans are local guidelines that support the relevant LEP. Development control plans are not environmental planning instruments. Clause 4.6 does not apply to development control plans.

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## 1.3 Development standards

Clause 4.6 of the Standard Instrument LEP applies to development standards, as defined in the EP&A Act.

View the EP&A Act definition of [development standards \(section 1.4\)](#)

Development standards are provisions of an environmental planning instrument or the Environmental Planning and Assessment Regulation 2021 (EP&A Regulation) which relate to the carrying out of development and specify requirements or fix standards in respect of any aspect of the development.

Generally, development standards either set numerical values or contain non-numerical requirements or criteria relating to the design and carrying out of development in certain circumstances.

Environmental planning instruments that use the Standard Instrument LEP format – and many other environmental planning instruments – contain development standards.

**Numerical** development standards use numbers to specify requirements (often minimum or maximum requirements) for measuring components of a site and/or development. Examples are minimum lot size requirements or building height limits.

**Non-numerical** development standards generally contain criteria or matters that need to be satisfied. These standards are typically found in the local provisions of a LEP and vary between LEPs.

Some development standards contain a mix of numerical and non-numerical standards.

### 1.3.1 Flexibility when applying development standards

In most cases development should comply with development standards that apply to a site. These standards have been set to ensure zone objectives are met, preserve the amenity of the site and mitigate unacceptable impacts on the environment and surrounding land uses. In some

circumstances, rigidly applying predetermined development standards is not always the best way to achieve good planning outcomes.

Clause 4.6 is the mechanism for varying development standards. It provides a degree of flexibility in circumstances where environmental planning objectives can be satisfied despite not meeting the required development standard.

Clause 4.6 variation requests are only required for DAs. A clause 4.6 variation request is not required for modification applications<sup>1</sup> and cannot be used to vary development standards for complying development.<sup>2</sup>

To vary a development standard, an applicant must formally lodge a document (also known as a written request) justifying the variation. This request forms part of the package of information lodged with a DA.

Clause 4.6 allows a consent authority to grant consent to a development that contravenes a development standard if the consent authority is satisfied that the applicant has demonstrated that:

- compliance with the development standard is unreasonable or unnecessary in the circumstances
- there are sufficient environmental planning grounds to justify the contravention of the development standard.

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<sup>1</sup> *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468, 481 (Mason P).

<sup>2</sup> Standard Instrument LEP cl 4.6(8)(a).



## 2 Provisions of clause 4.6

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This chapter discusses the key elements of clause 4.6 of the Standard Instrument LEP and its statutory framework. It outlines the obligations on the applicant, assessment officer and consent authority in preparing and considering the written request to vary a development standard.

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### 2.1 Revising clause 4.6

Clause 4.6 of the Standard Instrument LEP was revised in November 2023, as were equivalent clauses in non-standard LEPs and SEPPs. The changes:

- retain the existing ‘unreasonable and unnecessary’ and ‘sufficient environmental planning grounds’ tests in clause 4.6(3)
- require the applicant and consent authority to consider the same tests, retained in clause 4.6(3)
- require the consent authority to be satisfied that the matters in clause 4.6(3) have been demonstrated
- remove the need for the consent authority to be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the zone – this will avoid duplication of tests and matters for consideration covered by other relevant statutory provisions
- remove the Planning Secretary’s concurrence requirements, replacing them with a new monitoring and reporting framework.

The requirement for a document to accompany a DA has now been explicitly set out in section 35B(2) of the EP&A Regulation (see Chapter 3.1 of this guide). This document (written request) must set out the grounds on which the applicant seeks to demonstrate the ‘unreasonable and unnecessary’ and ‘sufficient environmental planning grounds’ tests.

Clause 4.6 of the Standard Instrument LEP now reads:

#### **4.6 Exceptions to development standards**

(1) The objectives of this clause are as follows –

- a. to provide an appropriate degree of flexibility in applying certain development standards to particular development,
- b. to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that –

- a. compliance with the development standard is unreasonable or unnecessary in the circumstances, and
- b. there are sufficient environmental planning grounds to justify the contravention of the development standard.

**Note** – *The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).*

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

(5) (Repealed)

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if –

- a. the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
- b. 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.

(7) (Repealed)

(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,
- d. clause 5.5.

*Direction* – *Additional exclusions may be added.*

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## 2.2 Role of objectives in clause 4.6

The objectives of clause 4.6 of the Standard Instrument LEP outline the clause's function and purpose.

A written request does not need to include an assessment against the objectives of clause 4.6. For example, a development that contravenes a development standard does not have to achieve better outcomes for and from development.<sup>3</sup>

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## 2.3 Granting development consent

Clause 4.6(2) allows a consent authority to grant development consent to a development that contravenes a development standard.

Clause 4.6 can be used to vary development standards in the relevant LEP, or any other environmental planning instrument. This means that development standards contained in a SEPP can be varied through the provisions of clause 4.6 in a LEP.

Some SEPPs contain sections equivalent to clause 4.6. In these cases, a written request to vary a development standard would be made under the relevant section in the SEPP.

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## 2.4 Obligations in clause 4.6(3)(a) and (b)

The consent authority must be satisfied that the applicant for development consent has demonstrated that:

- compliance with the development standard is unreasonable or unnecessary in the circumstances (cl 4.6(3)(a))
- that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)).

This places the responsibility on the applicant to demonstrate that they have understood the requirements of the provision and have prepared a written request that adequately addresses the provisions.

These provisions are examined in detail in the following sections.

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## 2.5 The 'unreasonable or unnecessary' test

With respect to clause 4.6(3)(a), the common ways to establish whether compliance with the development standard is unreasonable or unnecessary is known as the '5-part test' or the 'Wehbe test' (from the case of *Wehbe v Pittwater Council* [2007] NSWLEC 827).

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<sup>3</sup> *Initial Action Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [89]–[90] (*'Initial Action'*).

The test can be summarised as follows:<sup>4</sup>

Compliance with the development standard is unreasonable or unnecessary if the:

1. objectives of the development standard are achieved notwithstanding the non-compliance
2. underlying objective or purpose is not relevant to the development
3. underlying objective or purpose would be defeated or thwarted if compliance was required
4. development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard
5. zoning of the land on which the development is proposed was unreasonable or inappropriate.

The *Wehbe* test lists 5 common ways clause 4.6(3)(a) can be addressed but is not exhaustive.<sup>5</sup> Additionally, an applicant only needs to satisfy at least one part of the *Wehbe* test, not all 5 parts. When addressing the test, the arguments must remain factual, relevant to the area of non-compliance and consistent.

With respect to point 4 of the test, the applicant must provide analysis of relevant council decisions and actions. A council varying the same development standard in a small number of circumstances is unlikely to be sufficient to establish virtual abandonment or destruction.

For point 5, the applicant must establish that the zoning is unreasonable or inappropriate so that the development standard appropriate for the zone is unreasonable or unnecessary. This relates to the land and the circumstances of the case. Compliance with the development standard is unreasonable or unnecessary not because the standard is inappropriate to the zoning, but rather because the zoning of the specific piece of land is unreasonable and/or inappropriate.<sup>6</sup>

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## 2.6 Environmental planning grounds

The term 'environmental planning grounds', while not defined in the EP&A Act or the Standard Instrument – Principal Local Environmental Plan, refer to grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in section 1.3 of the EP&A Act.<sup>7</sup> The scope of environmental planning grounds is wide<sup>8</sup> as exemplified by the court decisions in this area.

Sufficient environmental planning grounds need to be established by the facts of the request. The request must justify the contravention of the development standard, not simply promote the benefits of the development.<sup>9</sup> The grounds must:

- be sufficient to justify the contravention
- focus on the aspect of the development that contravenes the development standard, not the development as a whole.

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<sup>4</sup> *Initial Action* at [16], summarising *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [42]–[51] ('*Wehbe*').

<sup>5</sup> *Initial Action* (n 3) at [22].

<sup>6</sup> *Wehbe* (n 4) at [49].

<sup>7</sup> *Initial Action* (n 3) at [23].

<sup>8</sup> *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [10]

<sup>9</sup> *Initial Action* at [24].

Environmental planning grounds may not be sufficient to justify the contravention of a development standard if the variation results in unsatisfactory planning outcomes.

Avoiding adverse impacts may constitute sufficient environmental planning grounds as it promotes 'good design and amenity of the built environment'<sup>10</sup> – one of the objects of the EP&A Act. However, the lack of impact must be specific to the non-compliance to justify the breach.

Other examples of environmental planning grounds include:

- dealing with the unique circumstances of the site such as historical excavation of basements or swimming pools
- achieving consistency with the streetscape and existing built form
- responding to flood planning levels
- responding to topography
- improving public benefit
- achieving equal or better amenity outcomes (solar access, privacy, views/outlook)
- being consistent with the prevailing subdivision pattern
- conserving built and cultural heritage values
- protecting or avoiding impacts to an area of environmental or biodiversity value.

In all cases, the justification must be specific to the aspect of the development that is the subject of the proposed contravention. Importantly, environmental planning grounds which justify the contravention of a development standard in one case may not justify contravention in another.

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<sup>10</sup> *WZSydney Pty Ltd v Ku-ring-gai Municipal Council* [2023] NSWLEC 1065 at [78].

# 3 Applying to vary a development standard

This chapter is for applicants and discusses how to prepare variation requests that meet the requirements of clause 4.6.

## 3.1 Written request requirements

There is no automatic right to vary a development standard. An applicant wishing to lodge a DA that proposes to vary a development standard must do so via a written request.

Clause 35B of the EP&A Regulation now explicitly requires a DA to be accompanied by a document (the written request) that sets out the grounds on which an applicant seeks to demonstrate that:

- compliance with the development standard is unreasonable or unnecessary in the circumstances
- there are sufficient environmental planning grounds to justify the contravention of the development standard.

The written request is a standalone document lodged with the DA. It can also be an appendix to a statement of environmental effects.

### Checklist for written requests

- The control to which the variation relates must be a development standard as defined in the EP&A Act.
- If the variation relates to the subdivision of land, the variation must be consistent with any relevant limits identified in clause 4.6(6) of the Standard Instrument LEP.
- The development standard being varied must not be specifically excluded from the operation of clause 4.6. Exclusions are listed in clause 4.6(8) and in some circumstances, within the development standard.
- The written request must be lodged as part of the DA.
- The written request must satisfy the 2 tests set out in clause 4.6(3):
  - clause 4.6(3)(a) – compliance with the development standard is unreasonable and unnecessary in the circumstances
  - clause 4.6(3)(b) – there are sufficient environmental planning grounds to justify contravention of the development standard.
- The written request must include sufficient information for the consent authority to understand the relevant aspects of the proposed development and the totality of the proposed variation to the development standard.

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## 3.2 Preparing the written request

The written request must be factual and include justification specific to the variation being sought to allow the consent authority to exercise its regulatory role in assessing the DA.

### 3.2.1 Structure and matters to be addressed

The written request should:

- identify the development site
- describe the proposed development
- note the relevant environmental planning instrument and zoning of the site
- identify the development standard that the applicant is seeking to vary
- identify aspects of the proposed development that contravene the development standard (including where there is more than one aspect of a development that contravenes the development standard), including:
  - where these aspects occur or are located within the site
  - the extent of variation associated with each
- include an assessment of the proposed variation against the relevant tests in clause 4.6(3)(a) and (b).

#### Setting out the proposed variation

It is best practice to use diagrams and tables to identify exceedances of a development standard and support these with text. For example, if a development contravenes a building height development standard, the request should note the standard in the relevant LEP and include a diagram showing the height breach.

In this example, the written request would identify the:

- building height limit in the relevant LEP
- specific aspects of the development where the breach occurs (roof/parapet/shade structure on rooftop)
- extent of the variation in metres and as a percentage.

A written request does not need to be prepared by a professional. However, town planning consultants, legal representatives, architects or other built environment professionals can help with the process. **Appendix B** of this guide provides a template for a clause 4.6 written request and includes guidance for applicants. The template is also available in a word format on the department's website.

### 3.2.2 General advice

In constructing arguments, the applicant must be aware that although there are no numerical limits to the degree of a variation, a development standard can only be varied if the tests in clauses 4.6(3)(a) and (b) have been met to the satisfaction of the consent authority.

Clause 4.6 should not be used as an alternative to the strategic planning powers under Part 3 of the EP&A Act. Clause 4.6 cannot be used to effect general planning changes throughout a local government area.<sup>11</sup> If clause 4.6 is used as an alternative to a rezoning, the strategic studies typically required to justify a planning proposal may not be undertaken, and broader considerations such as consistency with state and regional planning strategies may not be considered. It is recommended that an applicant discuss any clause 4.6 variation with the relevant consent authority prior to lodging the variation.

The written request should use language consistent with clause 4.6 and address each element separately.<sup>12</sup> Avoid paraphrasing so as not to make a legal error.

### 3.2.3 Reference to case law

Appendix A: Relevant case law of this guide lists relevant legal cases.

While case law surrounding clause 4.6 (and its predecessor, known as State Environmental Planning Policy No 1 – Development Standards or SEPP 1) is extensive, not all cases remain relevant. Development appeals are treated on their merits, so a finding in one case will not necessarily result in the same finding in another case.

The person preparing the written request should be familiar with the relevant case law as it provides a framework for the written request. However, pages of discussion on case law in the request is not needed. This does not help demonstrate compliance with clauses 4.6(3)(a) and (b).

However, you can refer to and rely on a judicial interpretation of a particular phrase or clause (such as the *Wehbe* test). This is addressed in the template in Appendix B.

### 3.2.4 Development standards without objectives

If a development standard does not have an objective, the written request must establish, through research and an understanding of the background to the standard, the environmental planning outcome the standard is seeking to achieve.

As the standard is read as part of the whole environmental planning instrument, reference to how the instrument addresses similar provisions in other zones, or the zone objectives in which the development is proposed<sup>13</sup>, may be necessary. Reference to planning practice, background information or other environmental planning instruments may help to understand the standard's purpose. For example, floor space ratio is a control of density and built form.

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<sup>11</sup> *Wehbe* (n 4) at [51].

<sup>12</sup> *Bringham v Canterbury-Bankstown Council* [2018] NSWLEC 1406 at [42].

<sup>13</sup> *Malton Road Development Pty Ltd v Hornsby Shire Council* [2018] NSWLEC 1265 at [44]



### 3.2.5 Development contravening more than one standard

A DA proposing to vary more than one development standard requires separate written requests for each variation. This avoids legal errors or generalisations. Each written request must address the relevant tests in clause 4.6(3) and provide justification for each variation.

### 3.2.6 Dos and Don'ts when preparing a variation request

Do:

- address the test in clause 4.6(3) – these are the matters of which the consent authority must be satisfied before granting consent
- use the template as a guide for format and structure
- prepare the written request as a standalone document that is separate to the statement of environmental effects (may be in an appendix) and other DA documentation
- separate each matter in each subclause into sections under different headings and subheadings
- include relevant diagrams, if possible, to support the written justification
- provide justifications and reasons that are specific to the proposed variation
- only state the facts when addressing the impacts of the proposed variation.

Do not:

- summarise each case relating to clause 4.6 or SEPP 1
- use generalisations about the development, such as listing the overall potential benefits or outcomes of the development
- include economic feasibility or commercial gain as a reason to justify a variation
- state that a development standard has been abandoned unless it can be supported with evidence.

# 4 Consideration of variations by consent authorities

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This chapter is for consent authorities and discusses how to consider a variation request.

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## 4.1 Consent authorities for variation requests

Clause 4.6 allows a consent authority to grant consent to a DA that contravenes a development standard, unless the standard is specifically excluded from the operation of the clause.

The consent authority will depend on the:

- local government area within which the development is located
- development type
- development standard being varied
- extent of variation.

The relevant determining authorities for DAs that contravene a development standard is summarised in Table 1. Certain ministerial directions and SEPPs determine the consent authority for a DA subject to a clause 4.6 request, based on specific referral criteria.

For example, a council may grant consent under delegated authority to a development that contravenes a development standard where the proposed extent of variation is 10% or less. Where the extent of variation is greater than 10%, the relevant local planning panel<sup>14</sup> will determine the DA in metropolitan areas. In regional areas, the elected council should have the function of determining the DA.

State Environmental Planning Policy (Planning Systems) 2021 (SEPP (Planning Systems) 2021) sets out the referral criteria for DAs to be determined by the relevant Sydney district or regional planning panel, as well as those that are to be determined by the Minister for Planning (or delegate). Additionally, section 4.5(c) of the EP&A Act outlines the circumstances where a public authority may be the consent authority for a DA.

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<sup>14</sup> Section 9.1 Ministerial Direction – Local Planning Panels Direction: Development Applications and Applications to Modify Development Consents.

Table 1: Consent authorities for DAs

| Level of development               | Development type  | Extent of variation – numerical development standard | Extent of variation – non-numerical development standard | Function of determining the DA   |
|------------------------------------|---|--|--|--|
| Local development                  | All   | Less than 10%  | N/A  | Council (under delegation)   |
| Local development                  | All   | 10% or more  | Any  | Local planning panel <sup>15</sup> /Council (elected)                      |
| Local development                  | Dwelling houses, dual occupancies and attached dwellings    | More than 25%  | Any  | Local planning panel (applies to City of Sydney only) <sup>16</sup>        |
| Regionally significant development | All - see Schedule 6 of SEPP (Planning Systems) 2021        | Any  | Any  | Relevant Sydney district or regional planning panel                        |
| State significant development      | All<br>See Schedules 1 to 2 of SEPP (Planning Systems) 2021 | Any  | Any  | Independent Planning Commission or the Minister for Planning (or delegate) |

## 4.2 Assessment and determination procedures

A consent authority must assess a written request to vary a development standard by applying the relevant tests in clause 4.6(3) of the Standard Instrument LEP.

### 4.2.1 Key matters for consideration

Under clause 4.6(3), the consent authority must be satisfied the applicant for development consent has demonstrated that:

- compliance with the development standard is unreasonable or unnecessary in the circumstances
- there are sufficient environmental planning grounds to justify the contravention of the development standard.

<sup>15</sup> Local planning panels are currently established in Greater Sydney, Wollongong, Wingecarribee and the Central Coast.

<sup>16</sup> In some cases, the relevant local planning panel can delegate DAs involving a request to vary a development standard to council staff for determination.

Clause 35B of the EP&A Regulation requires the applicant to prepare a document (written request) that sets out the grounds on which these matters are demonstrated.

In considering the request, the consent authority must:

- understand the provisions of clause 4.6
- understand the relevant case law
- understand how the ‘unreasonable and unnecessary’ test may be satisfied
- consider what ‘environmental planning grounds’ may involve
- ensure there is sufficient, accurate material in the submission to allow them to understand the degree of variation and where it is.

### Key considerations

The consent authority should be able to answer the following questions:

- Is the planning control being varied a development standard?
- What are the objectives of the standard?
- If the standard does not contain objectives, what is its purpose, why was it introduced and how is it applied?
- Does the written request demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances (*Wehbe* test)?
- What part of the *Wehbe* test is being used to justify the variation? Or is the variation otherwise justified?
- Does the written request demonstrate sufficient environmental planning grounds to justify the variation to the development standard being proposed?
- What are the environmental planning grounds being argued?
- Are the environmental planning grounds particular to the relevant aspect of the proposed development?

In considering the written request, clause 4.6(3) requires the consent authority to evaluate whether the applicant has demonstrated the matters in clause 4.6(3)(a) and 4.6(3)(b). Accordingly, whether variation of a development standard is justified, will depend on the information contained in an applicant’s written request.

The consent authority’s assessment report must adequately document consideration of the written request. In this regard, ‘being satisfied’ means the assessment officer has undertaken a critical review of the written request and has expressed their considerations and determination in writing.

This includes:

- determining that the provision being varied is a development standard
- being satisfied that the written request is accurate, for example that it has:
- correct references to the LEP and relevant objectives

- correct calculation and identification of the area of and extent of the variation
- in the case of a proposed height variation, a check of how ground level is identified
- being satisfied that the written request demonstrates where the variation is, whether compliance has been argued to be unreasonable or unnecessary, whether environmental planning grounds have been argued and are specific, and whether those arguments are supported or not.

In summary, the consent authority must be satisfied that the matters in clause 4.6(3)(a) and 4.6(3)(b) have been demonstrated in the written request.

### Why we have removed the public interest test

Clause 4.6 used to require that the consent authority be satisfied that 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.

This has been removed as it replicated existing requirements:

- The objectives of the development standard are generally considered as part of the ‘unreasonable and unnecessary’ test.
- The objectives of the zone are already a consideration under section 4.15(1)(a)(i) of the EP&A Act and clause 2.3 of the Standard Instrument LEP.
- The public interest more broadly is a consideration under section 4.15(1)(e) of the EP&A Act.

## 4.2.2 Cumulative impacts

In determining a DA involving variations to development standards, a consent authority may also consider the potential cumulative impacts of any previous and potential variations. This is considered under section 4.15 of the EP&A Act and is not necessarily required to satisfy clause 4.6.

Continued variation to development standards approved incrementally over time may undermine planning objectives relating to the site or local area.

A consent authority should consider any cumulative effects of similar approvals of a variation and whether further approval would result in an unacceptable planning outcome for the site as part of the broader assessment of the DA.

In some cases, the way certain development standards and objectives are drafted may contribute to frequent variations, potentially resulting in cumulative impacts. Councils should, as part of their 5-yearly reviews of the LEPs, ensure that development standards have not unreasonably restricted better planning outcomes, either because the standards are no longer fit for purpose or the objectives do not capture the preferred planning outcomes.<sup>17</sup>

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<sup>17</sup> EP&A Act s 3.21.

# 5 Variations for different types of applications

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This chapter discusses how clause 4.6 applies to different types of development.

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## 5.1 Existing development that contravenes development standards

It is not uncommon for existing buildings or structures to contravene or exceed current development standards. This can occur when the building:

- is constructed before the current development standard has come into force or has been updated
- has been subject to consent under which non-compliance with the relevant development standard was approved.

If an applicant proposes alterations and additions to an existing building that already exceeds a development standard, they still need to submit a written request to vary the development standard, even if the proposed development reduces the extent of the variation.

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## 5.2 Subdivision

### 5.2.1 Variations to minimum lot size in certain rural and conservation zones

Clause 2.6 of the Standard Instrument LEP identifies that development consent is needed to subdivide land. Subdivisions are subject to development standards such as minimum subdivision lot size. These requirements may be varied under clause 4.6. However, the extent to which they may be varied is limited by clause 4.6(6), which limits variations of subdivision of certain rural land.

Similar limitations are also included in non-standard LEPs and SEPPs.

Clause 4.6(6) prevents a consent authority from granting consent to an application for subdivision in rural zones that will create a lot that is equal to or less than 90% of the relevant minimum lot size development standard. This means that a minimum lot size development standard can only be varied to a maximum of 10% in those zones.

### **Clause 4.6(6) of the Standard Instrument LEP**

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if –

- a. the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
- b. 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.

## **5.2.2 Subdivision for primary production**

In accordance with clause 4.2 of the Standard Instrument LEP, if an applicant proposes to subdivide land in the RU1, RU2, RU3, RU4 or RU6 zones for primary production, they do not have to prepare a clause 4.6 written request to support a lot size less than the minimum permitted by the instrument.

However, this only applies:

- in the specified zones
- to subdivisions for the purposes of primary production
- where there is no existing dwelling that would be situated on the resulting lot.

A dwelling (including a rural worker's dwelling) cannot be erected on the lot.

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## **5.3 Existing use rights**

### **5.3.1 Development on land with existing use rights**

Existing use rights allow land uses to continue despite changes to planning legislation, such as where the land use becomes prohibited or now requires consent because of new or amended planning controls. Section 163 of the EP&A Regulation allows an existing use (with development consent) to be:

- enlarged, expanded, intensified, altered, extended or rebuilt for another use provided that certain conditions are met
- changed to another use if that use is permissible
- changed from commercial and light industrial use to other prohibited uses in limited circumstances.

Case law has established that development standards continue to apply to land with existing use rights if an applicant is seeking development consent to carry out one of the activities permitted in section 163.<sup>18</sup>

If that DA involves a variation to a development standard in the relevant environmental planning instrument, then the development will be subject to clause 4.6 and a written request is required.

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## 5.4 Non-discretionary development standards

Non-discretionary development standards are defined in section 4.15(6)(b) of the EP&A Act as ‘development standards that are identified in an environmental planning instrument or a regulation as non-discretionary development standards’. A clause will explicitly state if it is a non-discretionary development standard.

Non-discretionary development standards are standards that, if complied with, prevent consent authorities from:

- taking the non-discretionary development standard into further consideration in determining the DA
- refusing the DA on the grounds that the development does not comply with those standards
- imposing a condition of consent that has the same, or substantially the same, effect as the standard but is more onerous than the standard.<sup>19</sup>

If a development does not comply with a non-discretionary development standard, section 4.15(3) of the EP&A Act allows the consent authority to apply clause 4.6 (or an equivalent provision) when considering and determining the development. The application of clause 4.6 will depend on the drafting of the non-discretionary development standard.

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<sup>18</sup> *Iris Diversified Property Ltd v Randwick City Council* [2010] NSWLEC 58; *Cracknell & Lonergan Architects Pty Ltd v Leichhardt Municipal Council* [2012] NSWLEC 194.

<sup>19</sup> EP&A Act s 4.15(2).



# 6 When clause 4.6 does not apply

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This chapter discusses specific circumstances when clause 4.6 does not apply.

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## 6.1 Modification applications

Sections 4.55 and 4.56 of the EP&A Act enable a consent authority to modify an existing development consent. This allows an applicant to change a development consent without the need for a new consent.

Modification applications commonly seek to make physical or operational changes to a development, to alter or delete a condition of consent or to correct an error in a consent. A modification application may be lodged before a building is constructed, during construction or once the building is operational.

To modify a consent, a consent authority must be satisfied that the development, as modified, remains substantially the same development<sup>20</sup> as originally approved, except in cases involving minor errors, misdescriptions or miscalculations.

Clause 4.6 applies to applications for development consent, not applications to modify consents already granted. Therefore, a modification application that would result in a development that contravenes a development standard does not require submission of a clause 4.6 written request.

However, the requirement of satisfying the tests in sections 4.55 and 4.56 of the EP&A Act remains, ensuring an appropriate level of assessment is undertaken, including where variation to a development standard is sought or pre-existing.

Modification applications submitted under section 4.55(2) that contravene a development standard by more than 10% must be referred to the relevant local planning panel for determination.

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## 6.2 Specific clauses

### 6.2.1 Development near zone boundaries – clause 5.3

Clause 5.3 of the Standard Instrument LEP relates to development near zone boundaries and applies to land within a specified distance of a boundary between any 2 zones. Clause 5.3(5) states that the clause does not prescribe a development standard that can be varied under clause 4.6. Non-compliance with the clause means the development must be refused.

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<sup>20</sup> EP&A Act s 4.55.

## 6.2.2 Architectural roof features – clause 5.6

Clause 5.6 of the Standard Instrument LEP relates to architectural roof features. It allows a consent authority to approve a development containing an architectural roof feature that exceeds or causes a building to exceed the building height in clause 4.3 without the need for a written request to vary the standard.

Before granting consent, the consent authority must be satisfied the criteria identified in clause 5.6(3) is met. If the proposal does not satisfy the criteria, a written request under clause 4.6 is required.

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## 6.3 Building information certificates and unauthorised works

Division 6.7 of the EP&A Act relates to building information certificates. A building information certificate is typically applied for when properties are being sold or when unauthorised building works have been carried out. It prevents councils from giving an order or undertaking civil proceedings in relation to matters that existed before the certificate was issued. A building information certificate is generally the only option available to regulate building work that has been carried out unlawfully.

Clause 4.6 expressly regulates whether development consent may be granted. Accordingly, the provisions of clause 4.6 do not apply to development that is the subject of a building information certificate application.

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## 6.4 Exclusions to clause 4.6

Clause 4.6(2) and clause 4.6(8) of the Standard Instrument LEP provide a mechanism to exclude a development standard from the operation of clause 4.6. This means that the clause containing the development standard cannot be varied and any non-compliance must result in a development being refused.

Clause 4.6(8) of the Standard Instrument LEP identifies provisions that cannot be varied. This includes development standards relating to complying development, BASIX requirements and clause 5.4 and clause 5.5 of the Standard Instrument LEP. A clause 4.6(8) equivalent is also included in some non-standard LEPs and SEPPs.

These are the only development standards mandated to be excluded from the operation of clause 4.6. Councils may, in some circumstances, identify additional development standards within a LEP as exclusions in clause 4.6(8). These circumstances are identified in the section 9.1 ministerial direction 'Exclusion of Development Standards from Variation' and the 'Guide to exclusions from clause 4.6 of the Standard Instrument'.

# B

Part B: Monitoring and reporting framework

# 7 Overview

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## 7.1 Purpose

Part B of this guide sets out councils' reporting obligations where an applicant seeks to vary a development standard. It also explains how the department will monitor and audit the use of clause 4.6 of the Standard Instrument LEP to increase transparency, accountability and probity in planning. It replaces the requirements in Planning Circular PS 20-002, which no longer apply.

## 7.2 Background

Strong ongoing monitoring and regular audits of planning decisions are important to ensure transparency and minimise the risk of corruption when varying development standards. The department has had in place a comprehensive monitoring and reporting framework for clause 4.6 variations for several years to maintain transparency and accountability. This has included:

- quarterly reporting to the department by councils on variations approved and to the elected council on variations approved under delegation
- requiring councils to establish and maintain online public registers of all variations approved
- the requirement for concurrence of the Planning Secretary for a variation
- routine audits of councils to confirm they have met procedural and reporting requirements and have the correct delegations in place.

In recent years, there have been changes to how variations are assessed, how variations data is captured and consideration of the most effective monitoring approach. For example:

- where constituted, local planning panels are now responsible for determining DAs with larger departures from development standards
- it is mandatory to use the NSW Planning Portal for lodging, assessing and determining DAs, and reporting on other planning matters
- concurrence is now largely assumed, so it doesn't have the oversight function it was originally intended to have
- the Independent Commission Against Corruption recommended auditing variations in a more targeted and consistent way.

In response to these changes, the department has removed the need for the Secretary's concurrence and manual reporting requirements and developed a strengthened monitoring and reporting framework.

# 8 Procedural and reporting requirements

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## 8.1 NSW Planning Portal

The NSW Planning Portal is an integral part of the clause 4.6 monitoring and reporting framework. When lodging a DA that proposes a variation to a development standard, the applicant must complete the relevant fields in the NSW Planning Portal and upload their written request. Following lodgement, the consent authority must update the numerical variations data (such as the extent of the variation) in the NSW Planning Portal. This will ensure it is accurate and consistent with any amendments that occur during the assessment.

When determining a DA, a consent authority must complete the relevant fields in the NSW Planning Portal for the variation request. Section 90A of the EP&A Regulation now requires councils to provide reasons for approving or refusing a contravention of a development standard through the NSW Planning Portal as soon as practicable after the determination of the DA. This includes entering the reasons for approval or refusal of a variation request where a DA has been determined by a local, regional or district planning panel. It does not apply to decisions the Land and Environment Court makes on appeal.

Gathering accurate data will help improve the transparency, accountability and probity of consent authorities and support any audit on the use of clause 4.6.

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## 8.2 Variations register

A publicly available online register of all DAs with variation requests lodged and determined is available on the NSW Planning Portal. The register displays data from the planning portal, including the:

- planning application number and the council's DA number
- local government area and address
- land use type and development description
- zoning of land
- lodgement and determination date
- instrument and development standard subject to variation
- proposed and approved variation
- determination and consent authority
- reasons for approval or refusal of the variation.

Capturing data in the online DA service means councils no longer have to maintain and report their own registers, duplicating data. As the variations register is publicly available, council staff will no longer need to report quarterly on variations approved under delegation to the elected council.

Councils should maintain their online variations register for variations determined before 1 November 2023.

With the removal of separate reporting requirements and the introduction of the variation register, we expect councils to ensure that data entered through the NSW Planning Portal is accurate and complete.

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## 8.3 Determination authority for certain variations where there is no local planning panel

Chapter 4 of Part A of this guide identifies the relevant consent authority for DAs that are subject to variations to development standards.

For councils that do not have a local planning panel, the full council must determine a DA if it:

- proposes a variation that will result in development that contravenes a development standard in an environmental planning instrument by 10% or more, or
- contravenes a non-numerical development standard.

The only exception is if the application is regionally significant development, which a regional planning panel will determine. This means these DAs must not be determined by a delegate of the council.

This requirement ensures that the elected council considers larger variations, so they receive greater public scrutiny than decisions made by council staff under delegation.

### Summary of procedural and reporting requirements

- A council must ensure that the NSW Planning Portal is updated with accurate variations data when a DA that proposes a variation to development standards is lodged, assessed and determined. This includes reviewing and updating information submitted by an applicant that is no longer accurate at the time of determination and entering the reasons for refusing or approving the variation.
- If a DA includes a variation that:
  - will result in development that contravenes a development standard in an environmental planning instrument by 10% or more or
  - contravenes a non-numerical development standard,

the full council must determine the DA unless the development is to be determined by a local or regional planning panel.

- Councils are to maintain their online variations register for variations determined before 1 November 2023.

# 9 Monitoring and auditing

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## 9.1 Active monitoring

To ensure the integrity and transparency of the planning system in determining applications using clause 4.6, the department will actively monitor all variation requests processed and determined through the NSW Planning Portal.

The department will review if councils are:

- providing accurate clause 4.6 data through the NSW Planning Portal
- providing reasons for approval/refusal through the NSW Planning Portal
- reporting applications to the correct determining authority (for example, the local planning panel, regional planning panel)
- approving the erection of dwellings on lots less than 90% of the minimum lot size in rural and conservation zones

For more significant variations, the department will review assessment and decision-making processes to confirm compliance with the requirements of clause 4.6.

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## 9.2 Audits

The department will continue to carry out periodic audits or reviews to ensure that councils are complying with the process and reporting requirements in clause 4.6 of the Standard Instrument LEP and this guide. The department will audit councils at regular intervals, at least every 2 years and annually if possible.

Periodically auditing councils enables the department to:

- ensure the ongoing transparency and integrity of the planning system on the variation of development standards
- increase audited councils' awareness of the importance of properly using and reporting on clause 4.6 matters
- assess if development standards are being regularly varied by a council and may require review
- detect any anomalies, such as exceeding delegations or data discrepancies
- detect any concerning trends, such as an increase in the approval of undersized rural allotments
- identify areas where the department could provide more guidance and advice on the application of clause 4.6, and

- provide assurance that the variations process is operating effectively.

Regular audits will provide oversight, make sure processes are operating effectively and detect any improper conduct.

There are 2 types of periodic audits– standard and thematic. Standard audits will capture a sample of councils and DAs across the state based on risk. Thematic audits may focus on a particular geographical area, type of control or trend that the department has identified through active monitoring.

The department might also carry out special audits where it has identified a specific issue that requires immediate review.

### **9.2.1 Matters the department will examine in an audit or review**

The department will review the following procedural and reporting requirements in an audit:

- whether all proposed variations to development standards have been received as written requests prepared by the applicant, and ensuring that the written request addresses the matters that must be addressed by clause 4.6
- whether council's decision-making is consistent, reasonable and justifiable
- whether the consent authority has assessed all factors that must be addressed in the written application and kept a record of its assessment
- if the development exceeds a numerical standard by more than 10% or the variation is to a non-numerical standard, whether these applications have been determined by council's local planning panel or full council where there is no local planning panel
- whether a council has provided accurate data for all DAs proposing variations to development standards through the NSW Planning Portal, including clear reasons for approving or refusing a variation.



## 9.2.2 Standard periodic audits

### Council selection for standard periodic audits

The department will select councils to audit based on risk. We will consider auditing councils that meet multiple criteria in table 2.

Table 2. Council audit selection criteria

| Criteria                            | Description   |
|-------------------------------------|---|
| Number of councils                  | <ul style="list-style-type: none"><li>A minimum of 15 councils should be selected for audit</li></ul>   |
| Geographic spread                   | <ul style="list-style-type: none"><li>Of the 15 councils selected for audit, a minimum of 5 regional councils should be selected</li></ul>  |
| Volume of reported variations       | <ul style="list-style-type: none"><li>Councils that have determined higher numbers of variations, in total, or as a proportion of their total DAs determined, per financial year</li><li>Councils that are varying the same clauses more frequently</li><li>The proportion of variations that were less than 10% and the proportion that were over 10%</li></ul>                        |
| Quality of NSW Planning Portal data | <ul style="list-style-type: none"><li>Councils that are routinely submitting incomplete and/or inaccurate clause 4.6 data through the NSW Planning Portal</li></ul>   |
| Previous audit                      | <ul style="list-style-type: none"><li>Councils that were found to have issues with clause 4.6 procedural or reporting requirements in the previous audit,</li><li>Councils that have been audited during the previous audit cycle, and were found to be compliant with the procedural and reporting requirements of clause 4.6, should not be audited in the subsequent cycle</li></ul> |
| Complaints of misuse of clause 4.6  | <ul style="list-style-type: none"><li>Councils/DAs that have been the subject of complaints to the Office of Local Government, NSW Ombudsman and the Independent Commission Against Corruption.</li></ul>   |

### Types of applications the department will review for standard periodic audits

Audits will focus on DAs:

- that have greater significance in size, scale, cost of works and public interest (for example, developments with cost of works exceeding \$10 million)
- that include larger variations (for example, variations exceeding 10%)
- that include variations involving the erection of dwellings on lots less than 90% of the minimum lot size in rural and conservation zones
- where incomplete and/or inaccurate clause 4.6 data was submitted through the NSW Planning Portal

- with a higher risk of misuse of clause 4.6 (for example, DAs where council is the applicant and/or owner)
- that are varying more than one development standard
- where the consent authority approved a greater variation than recommended by planning staff or departed from staff recommendations in another way
- where the decision makers declared a conflict of interest (for example, panel members, councillors or council staff).

### 9.2.3 Thematic periodic audits

The department may do a thematic audit as an alternative to a standard audit. These types of audits will focus on specific issues or trends that emerge through active monitoring. For example, if monitoring identifies that there is an increase in the approval of undersized rural allotments, the audit might focus on those councils and DAs to identify any systemic issues. The department may use this approach when the department is aware of a particular issue or trend that requires more focused analysis.

### 9.2.4 Special audits

The department may do a special audit in exceptional circumstances, where there are significant concerns with a council's use of the variation mechanism or a specific decision to vary a development standard. Special audits can be done on an individual DA or on a council's overall performance. The department will do these outside of the periodic audit process as needed.

### 9.2.5 Local audit and risk committees

Councils should also consider including matters relating to clause 4.6 variations in the audit cycles of local audit and risk committees. The audit and risk committee could consider if:

- the council has established appropriate delegations and is following them in relation to clause 4.6
- the applicant has submitted an adequate clause 4.6 written request and if this has addressed the matters under clause 4.6(3)(a) and (b)
- council has completed its assessment report in full and has assessed the variation under clause 4.6(3)(a) and (b) appropriately
- council has remediated issues identified in a previous audit and has implemented the recommendations
- council's decision-making is consistent, reasonable and justifiable.

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## 9.3 Variations report

The department will prepare and publish a report on the use of clause 4.6 variations annually. This will analyse variation trends and statistics. We will base the report on data from the NSW Planning Portal for all DAs with variations in the reporting period and the findings of any periodic audits.

The report will include the:

- number of clause 4.6 variations approved (across NSW and per council)
- number of clause 4.6 variations refused (across NSW and per council)
- environmental planning instruments (EPIs) most frequently subject to clause 4.6 variations
- land uses most frequently subject to clause 4.6 variations
- consent authorities (Council, Local Planning Panels, Regional Planning Panels) determining clause 4.6 variations
- development standards most frequently varied (across NSW and per council)
- changes in variations between years
- number of major variations by council
- variations received by a council relative to the recency of its planning instrument
- outcomes of any clause 4.6 audits.

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## 9.4 Unsatisfactory performance framework

Division 9.1 of the EP&A Act outlines a range of ministerial enforcement powers. Section 9.6 of the EP&A Act allows the minister to appoint a planning administrator (or a regional panel) to exercise some or all of the consent authority functions of a council in certain circumstances. This can be done if the minister believes that the council has failed to comply with its obligations under the planning legislation or if the council's performance is unsatisfactory in dealing with planning and development matters.

The unsatisfactory performance provisions will only be considered as a last resort if a council has not adequately responded to the findings of an audit and:

- is consistently approving an unreasonably high volume of variations that would have the effect of abandoning a development standard
- refuses or fails to take active steps to amend or improve a standard that has been frequently varied
- consistently fails to refer a DA to the correct determining authority or
- consistently fails to provide reasons for a decision relating to clause 4.6 in NSW Planning Portal and comply with other record keeping requirements.

The department will work with audited councils to help improve internal processes and the implementation of any recommendations from an audit report.

# Appendix A: Relevant case law

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## Approach to clause 4.6

- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245
- *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61
- *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130

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## Unreasonable and unnecessary

- *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46
- *Wehbe v Pittwater Council* [2007] NSWLEC 827
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7

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## Environmental planning grounds

- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118
- *WZSydney Pty Ltd v Ku-ring-gai Municipal Council* [2023] NSWLEC 1065

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## Structure of written request

- *Bringham v Canterbury-Bankstown Council* [2018] NSWLEC 1406

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## Importance of written request

- *Denny v Optus Mobile Pty Ltd* [2023] NSWLEC 27

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## Development standards

- *Strathfield Municipal Council v Poynting* [2001] NSWCA 270
- *Elimatta Pty Ltd v Read and Anor* [2021] NSWLEC 75
- *Blue Mountains City Council v Laurence Browning Pty Ltd* [2006] NSWCA 331
- *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde* [2016] NSWLEC 153

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## Existing use rights

- *Iris Diversified Property Ltd v Randwick City Council* [2010] NSWLEC 58
- Cracknell & Lonergan Architects Pty Ltd v Leichhardt Municipal Council* [2012] NSWLEC 194

# Appendix B: Written request template

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Request to vary clause [\_\_\_\_\_] in [LEP/SEPP]

Address:

Date:

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## Site and proposed development

1. Describe the site.

2. Describe the proposed development.

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## Planning instrument, development standard and proposed variation

3. What is the environmental planning instrument/s you are seeking to vary?

4. What is the site's zoning?

**5. Identify the development standard to be varied.**

*Please identify the name of the development standard being varied (for example, minimum lot size, floor space ratio, height of building), its relevant environmental planning instrument clause and the objectives of the development standard.*

**6. Identify the type of development standard.**

*Please identify if the development standard you are seeking to vary is numeric or non-numeric. For more guidance, see Part A, Chapter 1.3 of this guide.*

**7. What is the numeric value of the development standard in the environmental planning instrument?**

*This should be specific and address all non-compliance. Please see the relevant environmental planning instrument to determine the numeric value of the development standard for your site.*

**8. What is the difference between the existing and proposed numeric values? What is the percentage variation (between the proposal and the environmental planning instrument)?**

*For example: The proposal exceeds the maximum \_\_\_\_\_ development standard by \_\_\_\_\_, which is a percentage variation of \_\_\_%.*

**9. Visual representation of the proposed variation (if relevant)**

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## Justification for the proposed variation

### 10. How is compliance with the development standard unreasonable or unnecessary in the circumstances of this particular case?

*There are 5 common ways that compliance with a development standard may be demonstrated to be unreasonable or unnecessary (items a to e). An applicant must satisfy at least one. This list is not exhaustive – there may be other ways available.*

a) Are the objectives of the development standard achieved notwithstanding the non-compliance? *(Give details if applicable)*

b) Are the underlying objectives or purpose of the development standard not relevant to the development? *(Give details if applicable)*

c) Would the underlying objective or purpose be defeated or thwarted if compliance was required? *(Give details if applicable)*

Has the development standard been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard? *(Give details if applicable)*

e) Is the zoning of the land unreasonable or inappropriate so that the development standard is also unreasonable or unnecessary? *(Give details if applicable)*



**11. Are there sufficient environmental planning grounds to justify contravening the development standard?**

*Note: Environmental planning grounds are matters that relate to the subject matter, scope and purpose of the EP&A Act including the Act's objects (see Part A, Chapter 2.6 of this guide). They must relate to the aspect of the proposed development that contravenes the development standard and not simply promote the benefits of the development as a whole. You must provide substantive justification as to why the contravening the development standard is acceptable.*

**12. Is there any other relevant information relating to justifying a variation of the development standard? (If required)**

Please provide any other information that you feel is relevant in justifying your proposed variation to the development standard.