Urban Taskforce
AUSTRALIA

The Urban Taskforce represents Australia's most prominent property developers and equity financiers. We provide a forum for people involved in the development and planning of the urban environments to engage in constructive dialogue with government and the community.

12th May 2021

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Online submission

Varying Development Standards: A Case for Change

Dear Luke

I write in relation to the *Explanation of Intended Effects (EIE) changes to Clause 4.6 of the Standard Instrument LEP (the EIE)* prepared by the Department of Planning, Industry and Environment (DPIE), for comment until 12th May 2021.

The Urban Taskforce wrote to DPIE in January 2020 expressing our members' concerns with Land and Environment Court's interpretation, in various cases of Clause 4.6 and making some considered suggestions on how the drafting of the Clause could be improved to make the varying of development standards less complicated and less contentious for proponents and decision makers. The Urban Taskforce acknowledges DPIE's release of a policy proposition in response to our representations.

Clause 4.6 of the Standard Instrument was intended to provide a mechanism for flexibility, in an otherwise increasingly codified planning system. The intention being - to offer a reasonable opportunity for proponents to demonstrate that the outcome was consistent with the objectives of the relevant controls, notwithstanding a breach of those controls and to ensure that a better planning outcome was being achieved (being the objective of clause 4.6).

The removal of clause 4.6(8) is ***strongly supported*** by the Urban Taskforce as it responds to the need for greater flexibility and remove the current arrangement of some Councils 'picking and choosing' their favoured development standards that, for whatever reason, are excluded from Clause 4.6 variations. This change will allow for greater consistency of local planning frameworks across the State, which will potentially assist industry in making investment decisions.

Importantly, the removal of clause 4.6(8) by effectively allowing for development standards to be varied for complying development, is consistent with DPIE's efforts to extend the scope of complying development and is also very much welcomed.

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Notwithstanding the above support, some of the other proposed changes to clause 4.6 will act to further complicate decision-making on variations.

The Urban Taskforce response to the relevant questions posed in the EIE are detailed below.

A Case for Change

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?

No. The operation of the concurrence requirement to date shows that this has been underutilised and ineffective. Accordingly, ***Urban Taskforce recommends*** the requirement for Secretary concurrence on Clause 4.6 variations be removed.

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?

Urban Taskforce was key to initiating this review. The key is to consider the best legislative or regulatory mechanism to enable a flexible planning system. Some Urban Taskforce members suggest that the remit of the EIE is too narrow and instead a broader discussion, beyond that relating to clause 4.6, is needed. The view is supported by a significant stream of academic literature that supports a merit-based assessment approach to planning controls.

Urban Taskforce is of the view that SEPP 1, the very first to be introduced following the enactment of the EP&A Act in 1979, gave practical effect to this philosophy. There should be a mechanism within the planning system which enables any development control in a SEPP or LEP to be set aside, as long as the non-compliance can be justified on merit and there is a lack of material impact.

The Revised Test for Variations

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?

The revised test is a step in the right direction in the reference to the need to demonstrate "planning benefit".

However, the positives of the reference to a "planning benefit" is compromised through the clause itself defining what needs to be taken into account in the consideration of a "planning benefit" being "*public interest, environmental outcomes, social outcomes and economic outcomes***."**

By including the "public interest" – the logical question is to who is the public? Will the variation be considered in terms of the interests of all those in the State, in the

LGA or, as is often the case in many councils, will a decision on the public interest be determined by one or a handful of objectors? 'Public interest' is best served by consideration of environmental outcomes, social outcomes and economic outcomes.

Further, the existing requirement that the applicant needs to demonstrate that "it is unreasonable or unnecessary to comply with" the development standard is proposed to be removed. This will make it more challenging for applicants to justify (and therefore to even seek) a variation from development standards, irrespective of the whether the variation will deliver an improved outcome.

Urban Taskforce recommends, that in the re-drafting of Clause 4.6, references to the "public interest" be deleted and the reference to "it is unreasonable or unnecessary to comply with" the development standard be retained.

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

As with any large organisation, Urban Taskforce members at times offer differing views on issues. Some Urban Taskforce members presented the view that, in the interest of simplicity, there should be a numeric limit. While other members were adamant that Clause 4.6 should be focussed on delivering planning benefit and were highly critical of some councils still referring to the historical notion of a 10% cap.

A number of case studies were provided that support the view that any numeric limit would be arbitrary and work against a merit based assessment.

For example, larger master planned sites may have one or a number of buildings that exceed height plane requirements. The numeric non-compliances can result from providing a mixture of built forms (and in the case of residential housing diversity - with development types ranging from towers to lower scale townhouses) and/or numerous design competitions and review. In one of the examples presented the non-compliance (approved by the Central Sydney Planning Committee) amounted to a 27.7% increase but was determined to be an appropriate planning outcome.

The majority of Urban Taskforce members are of the view that any numeric limit to the allowable scale of variations under Clause 4.6 would be arbitrary and contrary to the intention of being a mechanism for flexibility.

Accordingly, ***Urban Taskforce recommends*** there should be no maximum numeric limit under Clause 4.6 merit test.

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 is 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?

Urban Taskforce members have provided examples of approved variations to development standards that have resulted in no impacts on adjoining properties. These often relate to non-compliances with height and/or setbacks standards that come about due to:

- Screening or architectural features (often at the request of design review panels)
- Sloping sites
- Lift wells

While these can result in a departure from the standard, there is no material impact, sometimes no material improvement to planning outcome (so needs to be captured by Clause 4.6) and no resulting increase in development yield.

The ***Urban Taskforce recommends*** that the current Clause 4.6 be amended by:

- Removing Cl. 4.6(8) as proposed in the EIE

- Amending Cl. 4.6 (3), so it reads as follows:

  > Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—
  > (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and/or
  > (b) that there is sufficient planning benefit to justify contravening the development standard.

- Amending Cl 4.6 (4) <u>to delete reference to the public benefit</u> (and concurrence as proposed in the EIE), so it reads as follows:

  > (4) Development consent must not be granted for development that contravenes a development
  > standard unless the consent authority is satisfied that —

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
(ii) the proposed development 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 proposed drafting focuses on planning benefit and the meeting of the objectives of the zone and the development standard. Such an amendment allows consideration of variations to focus on planning outcome so as to facilitate development that responds to the planning intention of the site and surrounds to be considered, irrespective of any arbitrary numeric limits or the objections of a few.

Strengthened reporting and monitoring to improve transparency, accountability and probity

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?

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?

The ICAC has not exposed anything greater than one Council, a few elected Councillors and some low-level property developers abusing the process. They were caught out. It is important not to over-react. The flexibility availed by a functional Clause 4.6 is critical to the success of the Planning System.

That said, the Urban Taskforce acknowledges that in providing greater flexibility in the application and consideration of Clause 4.6 the Government must also be cognisant of the findings of the ICAC's Operation Dasha that also highlighted the need for greater transparency in the decision-making process. However, efforts to address the concerns raised by the ICAC should be targeted to where risk of material impact actually exists.

In this regard, the **Urban Taskforce recommends** that every effort should be made to avoid a costly and cumbersome new bureaucratic reporting, monitoring and

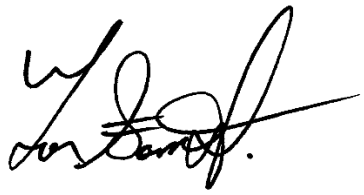
auditing process for all Clause 4.6 variations. Urban Taskforce proposes a two-pronged determination pathway be developed where:

- Clause 4.6 variations with no increase to development yield – are determined by Council officers, and
- Clause 4.6 variations that do increase development yield (increase in floor space) are determined by the Local Planning Panel.

Further, to assist panels in making merit based decisions on and councils in 'streaming' the determination pathway for variations, guidance materials for consent authorities should be prepared based on historical DA and ICAC investigation case studies with suggested probity prompts and considerations in processing Clause 4.6 variation requests.

The Urban Taskforce is always willing to work closely with the Government to provide a development industry perspective on proposed policy and planning changes, particularly in the context of delivery much needed improvements to the NSW Planning System.

Yours sincerely



Tom Forrest
Chief Executive Officer

Table 1:
Summary of Urban Taskforce recommendations

	Urban Taskforce recommendation
1.	***Urban Taskforce recommends*** the requirement for Secretary concurrence on Clause 4.6 variations be removed.
2.	***Urban Taskforce recommends***, that in the re-drafting of Clause 4.6, references to the "public interest" be deleted and the reference to "it is unreasonable or unnecessary to comply with" the development standard be retained.
3.	***Urban Taskforce recommends*** there should be no maximum numeric limit under Clause 4.6 merit test.
4.	The ***Urban Taskforce recommends*** that the current Clause 4.6 be amended by: • Removing Cl. 4.6(8) as proposed in the EIE • Amending Cl. 4.6 (3), so it reads as follows: Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating— (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and/or (b) that there is sufficient planning benefit to justify contravening the development standard. • Amending Cl 4.6 (4) to delete reference to the public benefit (and concurrence as proposed in the EIE), so it reads as follows: (4) Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that — (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and (ii) the proposed development 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.
5.	**Urban Taskforce recommends** that every effort should be made to avoid a costly and cumbersome new bureaucratic reporting, monitoring and auditing

	process for all Clause 4.6 variations. Urban Taskforce proposes a two-pronged determination pathway be developed where: • Clause 4.6 variations with no increase to development yield – are determined by Council officers, and • Clause 4.6 variations that do increase development yield (increase in floor space) are determined by the Local Planning Panel.