

12 May 2021

Luke Walton
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NSW Department of Planning, Industry and Environment
Locked Bag 5022, Parramatta NSW 2124

Via Planning Portal and by email: variationsreview@planning.nsw.gov.au

Dear Luke,

Re: Explanation of Intended Effect in relation to “Varying Development Standards: A Case for Change”

The Urban Development Institute of Australia, NSW (UDIA) is the leading industry body representing the interests of the urban development sector and has over 500 member companies in NSW. UDIA NSW advocates for the creation of Liveable, Affordable and Connected Smart Cities.

UDIA appreciates the opportunity to respond to the Explanation of Intended Effect in relation to “Varying Development Standards: A Case for Change” (EIE).

Executive Summary

UDIA is supportive of the flexibility that clause 4.6 (cl. 4.6) of the *Standard Instrument – Principal Local Environmental Plan* (SILEP) provides and agrees that it is worthwhile reviewing the approach, and whether it is achieving the desired goals and could it be improved.

We note that the EIE mentions a commitment by the NSW Government to a planning system that is:

- Simple to use
- Easy to understand
- Promotes strategic planning and integrity
- Reduces risk of corruption

We have kept this in mind in preparing our response.

Overall, UDIA considers that case law on clause 4.6 is now largely settled as a result of the decision in *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130. The EIE’s proposed change introduces a new test to demonstrate an improved planning outcome. We note that the recently exhibited EIE to the Design and Place SEPP refers to amending clause 4.6 as proposed here and says that state or council design review panels may be involved in determining the improved outcome. UDIA opposes the proposed change, on the basis it would only create more uncertainty and lack of understanding throughout the planning system.

Our submission offers examples from our members’ experience where adjustments to clause 4.6 would be justified, as well as recommendations to improve the utilisation of clause 4.6 where appropriate.

In summary, UDIA makes the following recommendations:

- 1. The exclusions under clause 4.6(8) should be removed.**
- 2. Consent authorities should be required to publicly report reasons for their clause 4.6 decisions in the interests of transparency and probity.**
- 3. We consider that case law on clause 4.6 is now largely settled, such that the proposed change should not be adopted as it will create more uncertainty and a lack of understanding.**
- 4. Additional flexibility for minimal or minor breaches should be pursued.**
- 5. Guidelines should be made in relation to the requirement for consistency with objectives, including a template clause 4.6 and on drafting of objectives in planning instruments.**
- 6. Any revised wording of clause 4.6 should be placed on public exhibition along with draft guidelines, before the amendments are made.**
- 7. Savings provisions should be imposed to give certainty as to the regime that applies to those applications already lodged and a transitional period should apply to give notice of the new regime before it comes into force.**

ICAC Report

The EIE notes concerns arising from the Independent Commission Against Corruption (ICAC) "Investigation into the conduct of Councillors of the former Canterbury City Council and Others" dated March 2021 (ICAC Report). However, many of the suggestions in the EIE do not arise directly when considering in detail the circumstances that led to the ICAC Report.

Whilst the ICAC report notes that "an audit... into the use of clause 4.6 between 2012 and 2016 recorded 'significant concerns at the lack of rigor and consistency in the assessment of variations at the former Canterbury Council'", this is not necessarily the case with all local Councils. We also note that during the period of consideration in the ICAC Report, Canterbury Council had an Independent Hearing and Assessment Panel (IHAP) and IHAPs did not determine development applications but made recommendations only. As such their recommendations could be (and were) overturned or lessened by a subsequent Council resolution. IHAPS have now been replaced by Local Planning Panels (LPP).

We submit that all instances where there were concerns with clause 4.6 objections in the ICAC Report, they would have been overcome with a LPP because the IHAP's recommendations were not followed and LPP decisions are now binding. However, as noted in the ICAC Report, LPP's are not mandatory for all Councils. Nevertheless, with increased reporting now in place of granted clause 4.6 objections (particularly those by Councils with no LPP), Department of Planning, Industry and Environment (DPIE or the Department) and the community can monitor their use.

UDIA notes that whilst the Department prepares a panel of members for Councils to draw LPP members from, LPP members themselves are appointed by the Director of Planning of the Council. Some LPP members draw their sole source of income from being on LPP panels. LPP members could be more inclined to generally concur with Council's assessment recommendation to renew their appointments on panels. Consideration should be given to ensuring how this perception or corruption risk can be addressed.

Status of Case Law Is Not Unclear

UDIA submits that contrary to page 12 of the EIE, case law is not unclear ever since the Court of Appeal *Rebel MH* decision. In UDIA's view, many Councils and applicants are aware of the significant principles that apply, and these provide guidance in lieu of Departmental documents. Over time the case law has developed which has added rigour to the process which would be of no value with a change in approach. Some key principles derived from case law are:

- The written request must do more than follow the process. The outcome must also demonstrate or justify the contravention. *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130.
- 'Adequate' request does not mean a 'low bar' (threshold): *Four2 Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 per Pain J at [31].
- The common test to justify why it is unreasonable or unnecessary to comply with a development standard are the five *Wehbe* tests:
 - Objectives of the standard are achieved notwithstanding non-compliance [para 17].
 - The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary [para 18]
 - The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable [para 19]
 - The standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance is unnecessary or unreasonable [para 20]
 - Zoning of the particular land on which the development is proposed was unreasonable or inappropriate so that the development standard was unreasonable or unnecessary [para 21]

- There is no requirement that the contravention be of a neutral or beneficial effect relative to a development that complies [para 85 and 87 *Initial Action*].
- There is no requirement that the grounds are unique to the site *Hansimikali v Bayside Council* [2019] NSWLEC 1353.
- The grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature, and environmental planning grounds is a phrase of wide generality (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]) as they refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects of the Act (*Initial Action* at [23]).
- The environmental planning grounds relied upon must be sufficient to justify contravening the development standard and the focus is on the aspect of the development that contravenes the development standard, not the development as a whole (*Initial Action* at [24]).

Many if not all the above case law principles are consistent with the EIE and are appropriate principles.

PART 3 – A Case for Change

UDIA responds to the following Discussion Questions as set out below.

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, there is no current need to retain a concurrence role.

Councils already have delegation from DPIE to consider development applications (DAs) that propose variations by up to 10%. DAs for variations greater than 10% or where the variation is to a non-numerical standard are referred to the LPP for consideration and determination.

The LPPs were introduced to ensure increased probity and accountability. They consist of a chair and two independent experts appointed by council from a Minister-endorsed pool of independent qualified people, plus a community representative.

Reporting and then auditing by DPIE of decisions made by councils or panels is sufficient oversight.

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

UDIA members report the following challenges to the current clause 4.6 controls:

- Limitation of the ability to use clause 4.6 objections for particular development standards, e.g., distance to an urban zone for Seniors Housing, flood levels, roof top features, setbacks, bus setdowns within properties for all hotels in Sydney central business district, upgrade of a building to the current Building Code of Australia (BCA).
- Some development standards lack objectives, making it difficult to demonstrate consistency with the objectives of the control, e.g., motorcycle parking in the Affordable Rental Housing State Environment Planning Policy (SEPP) and many of the clause 4.6(8) exclusions.
- Some objectives in LEPs are written in a way that prevent any flexibility whatsoever because of the wording used, e.g., “to minimise” or “prevent” for example, “overshadowing” where the increased overshadowing may have no impact because it is onto a roof or onto existing shadow.
- Where strict compliance with the objectives is required even though the development will alleviate the issue, e.g., the site has been partially excavated and there are step level changes that create material existing ground level differences, but when the site is developed, through excavation, they would be imperceptible.

- Where Council has clearly abandoned the control, but the environmental planning grounds were not adequate: *Universal Property Group Pty Ltd v Penrith City Council* [2020] NSWLEC 1040.
- Where the proposal meets all of Council's development control plan (DCP) controls on solar access and the Apartment Design Guide (ADG) controls but doesn't "preserve solar amenity" being an objective of the control – such that it could still be refused on the basis of a clause 4.6 request.
- Where the proposal meets the principles in clause 5.10 for heritage sites but can't meet the clause 4.6 controls. Clause 5.10.10 should be an alternative test for breaches of development standards for heritage items.
- Where a building has existing use rights, but in its current form breaches development standards and on a renewal of the building a clause 4.6 is required but can't be met because of the objectives. See *Made Property Group Pty Limited v North Sydney Council* [2020] NSWLEC 1332 (29 July 2020).
- Where alterations and additions are sought to an existing building that already breaches the height control and the changes made make no material difference to the existing breach.

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

There is a lack of analysis supporting the EIE. Explanation of current reporting and auditing results of clause 4.6 objections should be presented as part of the consultation rather than querying continuance generally. UDIA members recall that in 2015 when clause 4.6 replaced SEPP 1 that the data from the prior 2 years revealed:

- Only a very small proportion of applications seek to vary a development standard (3.18%).
- 85% of objections related to 4 development standards: FSR, height of buildings, landscaped area, and minimum lot size.
- FSR and building height are the most commonly varied standard.
- Development standards are most commonly varied in the context of alterations and additions, followed by new multi-unit residential.

DPIE should publish the data it has on the use of clause 4.6 for the past 3 years with an analysis broken down by type of development, development standard breached, percentage breach, decision maker and LGA. If some Councils are regularly refusing or approving clause 4.6s, then the reasons should be further considered to ascertain whether the controls are inadequate, not up to date or there are probity concerns.

The UDIA considers:

- That it is worthwhile analysing existing case law and whether there is an advantage in maintaining the current regime because of the certainty it currently provides.
- In adopting new LEPs, DPIE should have a process to ensure that the objectives of the development standard are appropriate and allow flexibility but with performance objectives. We note that there are no suggested or mandatory wording in the Standard Instrument. There should be some guidance to assist councils.
- DPIE should allow bypassing the clause 4.6 test (including test #1 in the EIE (see below)) where the exceedance is minor (see comments on alternative test below).
- DPIE should allow clause 5.10(10) to be used as an alternative basis to breach a development standard.

Clause 4.6 was introduced with the SILEP and replaced SEPP 1. At the time of its introduction, clause 4.6 was supported by the guideline *Varying development standards: A Guide* (the Guide) prepared by the then Department of Planning (August 2011). The Guide states that the aim of clause 4.6 is to provide an appropriate degree of flexibility in applying certain development standards to particular development and to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The Guide also included a template application form (Appendix 3) to be used by applicants in providing grounds for a variation to the development standards. At the time of its release, the Guide was a valuable document that provided advice to both applicants and councils on clause 4.6.

An updated Guide, reflecting the principles and tests of the current case law relating to clause 4.6, and including a standard clause 4.6 template document would be of greater benefit to both applicants and councils than a proposed revision to the clause, would ensure that there is a consistent approach with respect to the submission of requests to vary a development standard, and would ensure that all councils assess the variations consistently.

PART 4 – Proposed Response for Discussion

UDIA notes that the proposal in the EIE is that an applicant will be required to demonstrate the following essential criteria in order to vary a development standard (numbered by UDIA):

1. That the proposed development is consistent with:
 - The objectives of the clause containing the development standard;
 - The zone in which the development is proposed to be carried out (**#1 test**); **and**

2. a) 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; (**#2a test**) **or**

b) 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 circumstance of the site and the proposal (**#2b test**).

UDIA supports the #1 test because this is consistent with current requirements and is an appropriate measure. UDIA notes that the # 1 test is already required under the public interest test and we support this continuation for most clause 4.6 applications, except where the exceedance is truly minor (see below). UDIA considers that for very minor changes, consistency cannot always be achieved and that the #2b test (above) should be sufficient without the need to satisfy the #1 test.

The EIE notes that “development standards have been created to reflect and maintain optimal planning outcomes for an area”. It is UDIA members’ experience that when the standards are set, a Council cannot possibly factor in or anticipate future site-specific issues or how adjacent development alters the existing character or ability to comply. The use of #2b test as the sole test could be for truly minor exceedances where the impact is minimal or barely perceptible. As acknowledged by the Court of Appeal in *Fastbuck\$ v Byron Shire Council* (1999) 103 LGERA 94; [1999] NSWCA 19 at [9], (where the departure was 1%) a modest departure from a development standard is a basis upon which compliance with the standard can be seen to be unreasonable or unnecessary. UDIA considers that in such circumstances, the requirement to also satisfy the #1 test by completing a large application/request should not be required.

UDIA does not support the #2a test. The EIE notes that the proposed changes aim to clarify that a clause 4.6 application should only be granted in exceptional circumstances where there is an improved planning outcome. This is far too restrictive because the development standard may be either wrong, outdated or irrelevant to the DA and the land use in the first place. It is also not consistent with current case law which expressly provides that the outcome does not need to be better. Chief Justice Preston said in *Initial Action* at [90]:

In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.

The EIE does not adequately explain how it is to be “better”. Is the better outcome just in relation to the exceedance or overall? If for example the site is a heritage site and the exceedance is to preserve heritage from an economic perspective, we query whether that falls within a better planning outcome because the economic benefits do not always strictly relate to the exceedance. We note that this is particularly difficult for FSR exceedances because it is often difficult to say where the exceedance is in the building.

The proposed new test states that the applicant will be required to demonstrate how the contravention will result in an improved planning outcome when compared with what would have been achieved if the development standard was not contravened. This is highly subjective, will result in additional work by applicants having to present a complying (of which there would be many) and non-complying proposal, and potential delays in the assessment process.

The comparison to a compliant scheme could result in a need for multiple scenarios to be tested, because there is often not one way to design a building on a site. This is too costly and will result in significant delays. For example, where a clause 4.6 dispensation is sought for ground floor levels at building entries which are to remain unchanged in a heritage listed building which forms part of a larger DA where the council-required flood levels have increased, the impact of complying is significant and would change the whole design.

The new proposed #2a test does not explain how the criteria are to be weighed and whether the satisfaction of the test is an objective or subjective test. If it is objective, then it could expose decisions on DAs to more legal challenges. If it is subjective, then guidance needs to be given about how this test is to operate.

UDIA considers the phraseology of “sufficiency” and “justification” in the current clause 4.6 is more appropriate than a “better planning outcome” which suggests that planning and environmental outcomes can be traded. UDIA responds to the following Discussion Questions as set out below.

Do you think that 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 case studies and practical examples.

As detailed in this submission, UDIA does not consider that the new test does cater for the complexities encountered by our members. The alternative test has some merit because where it is of minimal environmental impact or a trivial change, there should not be a need to complete a lengthy clause 4.6 objection request, including one that assesses consistency with objectives.

The new #2a test fails to acknowledge that often there is a balancing act required between maintenance of compliance with the control, achieving the objectives of the standard and the zone- and site-specific circumstances. The test as proposed does not allow sufficient flexibility because of the strict requirement to meet the objectives of the control and the zone and to achieve a better planning outcome.

The test assumes rigour has gone into the strategic planning that created the controls. What if the height controls have not considered site level detail on existing ground level, such that two sites next to each other have the same height limit but different ground conditions? The outcome may not be better, but it is probably unreasonable or unnecessary to require full compliance.

The proposed changes will not address the complexities around the assessment of requests for variations to development standards and does not provide certainty to industry with respect to varying development standards.

The proposed changes entirely redefine the intent of clause 4.6 by removing the common law test of justifying why it is unreasonable or unnecessary to comply with a development standard. The proposed new test broadens the scope of clause 4.6 to enable applicants to consciously propose a non-complying proposal. The current sufficiency of the environmental planning grounds test makes it clear that the breach itself has to be justified and that a developer cannot 'buy' the breach by proposing other planning benefits such as affordable housing unrelated to the breach.

To test how the new policy may work, we have considered some Court approvals of clause 4.6 objections:

- where the height breach is completely internal to the site, but is more than minor, why is it that that height has to have a better planning outcome when the impacts are not perceived externally. See *Sybele Christopher v Mosman Council* [2020] NSWLEC 1140
- height increases caused by lift overrun to a roof top communal terrace where privacy impacts were managed: *Jinyan Group (Australia) Pty Ltd v Parramatta City Council* [2020] NSWLEC 1212. Whilst it could be argued the roof terrace is a better planning outcome providing communal open space and equitable access thereto, if a neighbour complains of aural (not overlooking) privacy issues, how is that planning outcome to be weighed against the design improvements?
- Floor space ratio (FSR) exceedance with a better presentation and built form outcome *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583; *Artazan Property Group Pty Ltd v Inner West Council* [2019] NSWLEC 1555.

There should be a streamlined pathway for the alternative or "minor" breach. This should be subject to clear guidelines about what is minimal. Given councils or panels will be making the decision on what is minimal (like they do for section 4.55 applications), the decision should not be able to be appealed; however, if a council refuses to treat a minor breach as such, the applicant should be able to refer it to the panel for a decision even if it is below the threshold for delegation. We do not consider a % criteria should be applied and that even for example, a 12% breach due to site topography that has no material external impact, could be approved under this alternative path. It could also apply to where alterations and additions are sought to an existing building that already breaches a development standard and the changes made make no material difference to the existing breach.

As explained elsewhere in this submission, the new #2a test has deficiencies and further detail is required as to how that balancing act would occur before it could be supported.

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

No. UDIA does not support a maximum numeric limit because each site is different and has its own constraints. A "one size fits all" limit may result in unnecessary limitations. We are aware of approvals of exceedances that are in the order of 100% and yet these were not contentious at the time; whereas we are sure for different sites and different developments, a 100% exceedance would not be acceptable and considered a change worthy of a strategic planning review. In addition, translating the breach to percentages has limitations because if the requirement is to provide, for example, car parking at 2 spaces, then the breach will always be 50% or 100% in round numbers.

The aim of clause 4.6 is to provide an appropriate degree of flexibility in applying certain development standards to particular development and we consider that a numeric cap does not provide sufficient flexibility.

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

Examples of where flexibility is required and particularly where the tests proposed in the EIE are inadequate include:

- Adaptive reuse of existing buildings and conversion. Where the built form exists and the height and/or FSR is exceeded, it can be difficult to necessarily comply with the objectives of the zone and height standard because there may be an existing impact such as shadow which could be reduced if the building is demolished. The #2a test in the EIE would not apply because the EIE requires the #1 test to be met regardless.
- Where the site is an isolated site. See *Mackenzie Architects International Pty Ltd v Ku-ring-gai Council* [2020] NSWLEC 1276
- Where the height limits don't factor in flood levels.
- In the 50% upgrade rule under the BCA, 50% is not defined (i.e. does it include floor area, services, building value, etc.?).
- Heritage items that need more flexibility. Clause 5.10(10) could be used as an alternative basis to breach a development standard.

We submit that the exceptions to clause 4.6(8) should be removed except for complying development or development standards containing BASIX requirements. However, it should be replaced with guidance about which controls in the SILEP are prohibitions versus development standards.

To what extent should flexibility be allowed in such circumstances? How can this intention be captured in an alternative test?

An alternative test which provides a simplified process for truly minor variations to a development standard would be welcomed.

Clarity should be provided as to what is considered to be "variations of a minor nature" to ensure transparency and consistent application of the alternative test through guidance. UDIA submits that placing a numerical limit would be difficult because it depends on the scale of the development. However, there are existing concepts in the Act such as "minor modification" and "minimal environmental impact" that could be adopted.

We agree that the following variations could be included as part of the alternative test:

- A breach of the height control on a sloping site where measures have been taken to design the building with the topography of the site, and the breach does not result in a breach of the FSR control (where there is one).
- A minor breach of the height control where the development is designed to provide roof articulation and to incorporate minor intrusions of lift overruns and other required plant (but not the majority of the plant).
- The existing development does not comply with the development standard and the proposed development does not increase the extent of variation of the non-compliance.
- A minor breach of a minimum lot size control where the majority of the lots in the locality comply (being a residual or isolated lot).

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?

Yes, in addition to planning panels.

We have no objection, and support the proposal to strengthen the existing reporting requirements by requiring councils to publicly publish their reasons for granting or refusing a clause 4.6 application on the NSW Planning Portal.

Reporting requirements should be consistent and clearly stated in a Guideline or Practice Note. To provide greater transparency, it is suggested that the Local Planning Panel decision, including the reason for supporting or not supporting the variation, be included as part of the reporting documentation.

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

The following matters should be included in any consideration:

- The number of upheld clause 4.6 requests
- The percentage exceedances
- Whether it was a breach that was likely to significantly increase developer gain (such as FSR breaches)
- Whether the request was upheld by a panel
- Whether the request was approved contrary to advice of a panel

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?

UDIA encourages the development and release of guidance material to support the roll out of the new clause 4.6, and also encourages that existing Guidelines, Practice Notes and other related documentation are repealed to avoid confusion. There should be a separate guiding document for applicants and consent authorities.

The guidance material for applicants should include a standardised template document which is to be used by applicants in submitting a request for a cl. 4.6 variation. This will ensure that there is consistency. It should also be specified that the request for the variation be prepared by a suitably qualified person. It should be made clear that it is possible to cross-reference the other DA material rather than repeating it.

The guidance material should be updated regularly to ensure that any planning principles or tests established by the Land and Environment Court are incorporated.

Guidance material should be prepared on:

- What does “consistency” with objectives mean? Does it require strict compliance or not be anti-pathetic to those objectives? See the Acting Commissioner’s Clay consideration in *Jeffrey v Canterbury Bankstown Council*, 25 November 2020:

*Before turning to identify the material both before the Council and the court, directed to compliance with cl 11(3) of LEP 1987, it is necessary to address the meaning of “consistent” when used in the subclause. In *Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1991) 74 LGRA 185 Clarke JA stated that, in the context of the provisions there being considered, the paragraph was intended to prohibit “antipathetic development”. Subsequently, that meaning was attributed to provisions of local environmental plans requiring development to be “consistent” with identified objectives (*Schaffer Corporation Ltd v Council of the City of Hawkesbury* (1992) 77 LGRA 21; *Mackenzie v Warringah Council* [2002] NSWLEC 131 at [98] and the cases there cited). More recently, the ordinary*

meaning of “consistent” has been applied to such provisions. In *Gillespies v Warringah Council* [2002] NSWLEC 224; 124 LGERA 147, Bignold J considered the meaning of the word in the context of planning instruments requiring the opinion by a consent authority that a proposed development be “consistent with the zone objectives”. In that context, his Honour considered at [70] that the word “consistent” should assume its ordinary meaning and should not be confined to the notion of a proposed development that is “not antipathetic” to a zone objective. 43 According to the Macquarie Dictionary (on-line) that meaning is: “1. agreeing or accordant; compatible; not self-opposed or self-contradictory.” It seems to me that, in the present context, it is appropriate to regard “consistent” as being synonymous with “compatible” (*Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190 at [45]).”

Importantly, his Honour said that consistent is synonymous with compatible.

More recently, in *Cranswick-Smith v Council of the City of Sydney* [2020] NSWLEC 1082, Commissioner O’Neill addressed the meaning of consistent in the context of considering a cl 4.6 objection. The learned Commissioner observed as follows at [50]:

“The applicant submitted that the proposal need only be “not antipathetic” to the zone objectives and relevant height of buildings development standard objectives to be consistent with those objectives, citing Pearlman CJ’s decision in *Schaffer Corporation Ltd v Hawkesbury City Council* (1992) 77 LGRA 21 (“Schaffer”). Bignold J in *Gillespies v Warringah Council* (2002) 124 LGERA 147; [2002] NSWLEC 224 [165] overturned the “antipathetic” test in *Schaffer* and held that the meaning of “consistent” in relation to the clause he was construing (being consistent with a zone objective) assumed its ordinary and natural meaning and that meaning was not confined to the notion of the proposed development “not being antipathetic” to the desired future character of the locality. I adopt the same ordinary and natural meaning of “consistent” in relation to the requirement under cl 4.6(4)(a)(ii) of LEP 2012 that development consent must not be granted for development that contravenes a development standard unless I am satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the height of buildings development standard.”

O’Neill C preferred the approach of Bignold J in *Gillespies v Warringah Council* (2002) 124 LGERA 147; [2002] NSWLEC 224 rather than the antipathetic test in *Schaffer*. The learned Commissioner took the same approach as Craig J in *Friends of Malua Bay*.

I agree. In my opinion the word “consistent” is a word which attracts its ordinary meaning, a synonym of which is “compatible”. To utilise a phrase such as “not antipathetic” has a tendency to divert from the requirement of the language to find a positive outcome – consistency – rather than not find a negative outcome – antipathetic.

Accordingly, I proceed using the ordinary meaning of the word “consistency” in determining whether this proposed development is consistent with the relevant objective of the zone.

- The (non-legalistic) approach to be taken to the application and words in the LEP. We note the following words said by Commissioner Horton in *Staldone Rosedale Pty Ltd v Lane Cove Council*, “I accept the Applicant’s submission that a written request, prepared by a town planning expert, and not a legal practitioner, may employ language that relies on terms of broad application in the discipline of town planning that may, at times, fail to align precisely with a meaning preferred by parliamentary counsel or defined in an environmental planning instrument.”
- Drafting of objectives for Councils in LEPS which should focus on the goal of setting for example, height limits, not just to minimise or set heights. That is, the objectives should explain the *underlying purpose* of a numerical control rather than just being a general statement that reinforces the numerical control itself. In most cases the *underlying purpose* should be the avoidance or reduction of a particular impact that may otherwise occur if the control did not exist.

- What objectives can be ignored, e.g., “establish building heights ...” or “to minimise x”. For example, in *Falamaki v Council of the City of Ryde* the goal of to “achieve planned residential density in certain zones” could be ignored because that was a repeat of the FSR standard. Similarly, Preston CJ considered development standard objectives of this kind in *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 (*Baron*) and found the type of objective to be “explanatory of the purpose of the ... development standard” (*Baron* at [32]). As put by Preston CJ (*Baron* at [49]), this first objective explains the means used to achieve the ends nominated in the second and third objectives and therefore did not need to be addressed.
- Identifying objectives when there aren’t any.
- What are development standards amenable to a clause 4.6 in a standard instrument.

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

Guidance material should be reviewed every 5 years or where there are significant case law changes.

Conclusion

UDIA appreciates the opportunity to offer our comments to the review of clause 4.6 of the Standard Instrument LEP. We urge the Department to place proposed changes and any guidance material on public exhibition prior to adoption. We look forward to continuing to engage with the Department on this important topic.

Should you have questions about any matter in our submission or wish to schedule a follow up meeting, please contact Elizabeth York, UDIA NSW Regional Manager, at eyork@udiansw.com.au or 0434 914 901.

Yours sincerely,



Steve Mann
Chief Executive
UDIA NSW