LOCAL GOVERNMENT NSW

Submission in response to the Review of clause 4.6 of the Standard Instrument LEP – *Varying Development Standards: Explanation of Intended Effect*

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Opening

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

LGNSW welcomes the opportunity to make a submission on the review of clause 4.6 of the Standard Instrument Local Environmental Plan (SILEP), as outlined in the NSW Department of Planning and Environment's (DPIE) *Varying Development Standards: A Case for Change Explanation of Intended Effects* (EIE). This submission has been informed by detailed feedback from a broad spectrum of councils across the state.

This is a draft submission awaiting review by LGNSW's Board. Any amendments will be forwarded in due course.

As an overarching comment, LGNSW wishes to emphasise the sector's full support for a planning system that is easy to understand, promotes strategic planning and integrity, is transparent and reduces the risk of corruption. Further, councils acknowledge the difficulties and complexities in the application of clause 4.6 of the Standard Instrument LEP and generally support DPIE's initiative to review and revise this clause with the aim of improving how it operates.

The most pressing concern for local government in this particular reform is the proposed **removal of the exclusions in clause 4.6(8) – councils are unanimously opposed to this proposal**. Regarding other aspects proposed in the EIE, there are some varied opinions, as discussed in this submission.

LGNSW also highlights another critical concern of councils which relates to where this reform fits within the raft of planning reforms currently being considered. It is acknowledged that the proposed changes are intended to allow flexibility for councils and proponents to better deliver development that responds to the context of the site, but as this submission highlights, there is **concern that certain aspects of what is proposed in this EIE will in fact do the reverse and undermine councils' strategic plans**.

Current Proposals

DPIE has published an EIE for proposed amendments to clause 4.6 in the Standard Instrument LEP which covers 'Exceptions to Development Standards'. The changes are discussed in *Explanation of Intended Effects: Varying Development Standards: A Case for Change*.

According to the EIE, the changes are in response to the recent release of the Independent Commission Against Corruption (ICAC) report on Operation Dasha. There were 7 recommendations in that report related to changing clause 4.6 of all LEPs. The proposed changes include rewording of the clause to make it simpler while keeping similar considerations, maintaining concurrences, and potentially introducing an alternative test.

The following proposed modifications to clause 4.6 are recommended in the EIE:

- Proposed changes to simplify the text of the clause, while maintaining the key planning considerations;
- Introducing an alternative test for consideration of minor variations of clause 4.6;
- Removing the concurrence of the Planning Secretary to variations currently required under clause 4.6(4)(b);
- Removal of exclusions to clause 4.6(8) in Standard Instrument LEPs;
- A 12-month transitional period for councils to review previously excluded numerical development standards and provide objectives. Following this period, if better planning outcomes can be demonstrated by applicants, variations may be granted to all provisions previously excluded under clause 4.6(8); and
- increasing reporting requirements of councils.

The EIE also proposes additional reporting and monitoring by councils and release of guidance materials to support implementation of the new clause 4.6.

General comments on process and proposed amendments

LGNSW policy position

One of the twelve fundamental principles of LGNSW, the overarching values that guide advocacy on behalf of the local government sector, sets our position on planning processes. It states:

> *Local government is best placed to lead and influence local and regional planning processes according to the needs and expectations of local communities.*

Councils support an efficient, fair, and locally led planning system that is easy to understand, promotes strategic planning and integrity, is transparent and reduces the risk of corruption. Decisions of successive state governments have gradually diminished councils' and communities' authority to determine what and how development occurs in their local areas. Restoring community-led planning powers to local government is a longstanding advocacy priority for LGNSW.

Position 7.8 of the LGNSW Policy Platform states:

> *Reforms to the planning system to include a fundamental review of its primary purpose and work to improve its efficiency and effectiveness, by consolidating state policies and local plans in local planning instruments, streamlining plan-making and development assessment and ensuring councils have adequate powers to implement provisions.*[1]

LGNSW advocates for a planning system that ensures the voice of local communities is heard through local government retaining control over the determination of locally appropriate development. It is a long-held position of the local government sector that local planning powers must not be overridden by State plans and policies.

Councils acknowledge the difficulties and complexities in the application of clause 4.6 of the SILEP and generally welcome a review of this clause with the aim of improving how it operates. However, councils are unanimously opposed to the proposed removal of the exclusions in clause 4.6(8).

The Case for change

The EIE states that the changes are in response to the recent Independent Commission Against Corruption (ICAC) report on Operation Dasha. The ICAC report made seven recommendations to DPIE in relation to changes to clause 4.6.

The EIE refers to Operation Dasha as follows:

> *The Department has received feedback that the 'unreasonable or unnecessary' test has introduced a level of discretion which potentially created opportunities for corruption.*[2]
>
> *As highlighted in the recent recommendations from the ICAC Operation Dasha investigation report there is a need to support greater integrity, accountability, certainty*

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[1] Local Government NSW, *Policy Platform*, April 2021, available at: https://www.lgnsw.org.au/Public/Policy/Policy_Platform.aspx
[2] EIE, p 4

and transparency in the planning system, particularly in the context of decision making in respect to the granting of variations under clause 4.6.[3]

Reducing the risk of the misuse of clause 4.6 should be a priority
The NSW ICAC's Operation Dasha investigation report outlines the importance of a robust and well-functioning oversight mechanism for variations and has recommended that the Department review the concept of assumed concurrence given it can be used as a de facto plan making process.[4]

The recommendations essentially suggested the Department take a leadership role in a number of areas, requiring it to be pro-active. However, the EIE proposes to remove the requirement for the concurrence of the Planning Secretary, on the basis of "reducing red tape"[5]. LGNSW questions whether this represents removal of a potentially important safeguard against corruption and is in fact a lessening of the Department's role.

Importantly for councils, the EIE proposes that in place of this oversight/concurrence role by the Planning Secretary, councils' existing reporting requirements be expanded by requiring them "to publicly publish their reasons for granting or refusing a clause 4.6 application on the NSW Planning Portal"[6]. The EIE argues the removal of the concurrence requirements in clause 4.6 will "enable timely assessment of DAs in line with the Department's Planning Reform Action Plan". While this may streamline the process for the department and the proponent, it adds additional burdens on councils.

Feedback from some councils is that the EIE has not provided a strong or clear justification for why clause 4.6 needs to be reviewed or changed. For example, the proposed expansion in the scope of clause 4.6 variation - which will result from the removal of council exclusions - was **not a recommendation** of the ICAC Operation Dasha report. It contradicts the ICAC finding that DPIE should consider **reducing** the application of clause 4.6, including *'the circumstances in which the application of both maximum height of building development standards and maximum floor space ratio (FSR) development standards should be mandatory in LEPs'*.

Consultation and timeframe

The planning reform agenda is concerningly congested and compressed, with unworkable timeframes that do not allow for suitable consideration of matters by elected councillors. It is concerning for LGNSW that the timeframes do not enable these significant reform proposals to be reported to the elected Council for a formal view or resolution.

Further, the timeframes do not take into consideration the significant resource implications needed for council staff to undertake meaningful reviews of draft policies. This is concerning from a resourcing perspective but more importantly for local democracy, it impedes meaningful dialogue with councils and DPIE on all the reforms. Most concerning for LGNSW, it seriously limits councils' ability to determine appropriate controls for their local areas that represent community views.

[3] EIE, p 5
[4] EIE, p 6
[5] EIE, p 6
[6] EIE, p 9

Specific comments on proposals

Specific comments on key reforms proposed are outlined below.

Revised test for variations

The EIE states “the Department has received feedback that the ‘unreasonable or unnecessary’ has introduced a level of discretion which potentially created opportunities for corruption”[7].

It also states:

> *It is intended that a revised clause 4.6 will empower councils to ensure that development standards should only be contravened in circumstances where there is an improved planning outcome, or where the proposed variation is appropriate due to the particular circumstances of the site and the proposal. In this regard, the variations system will not enable opportunities for it to be used as an alternative to a planning proposal.*[8]

Councils have expressed a range of views about the proposed revised test for variations, but there is an overwhelming consensus that the changes proposed in the EIE for the revised test do not provide sufficient detail and may not necessarily provide certainty about how the clause should be applied.

Everyone would probably agree that a ‘better planning outcome’ is desirable but the risk is that this phrase will be interpreted differently by each user of the planning system, depending on whether they are a planner (either working in a council or as a consultant to a developer), a development proponent who is seeking to achieve viability for the development and maximise profit or the community who rightfully questions how buildings can end up being bigger and higher than what was originally exhibited with the planning proposal.

While there is some support for the intent of a revised test that is based on ‘improved planning outcomes’, councils question how this will be measured and assessed. A few key points are made below for consideration:

- The proposed ‘improved planning outcomes’ test may not draw in the broader strategic or contextual environment for the development.
- The test does not explicitly consider whether a particular variation might set unwanted precedents which would undermine the intent of the development standard.
- There is a risk that economic outcomes may be argued to justify a non-compliant development based on employment generation or construction investment or similar positive economic outcomes. While these are desirable benefits, they are unrelated to built form outcomes and may be to the detriment of environmental or social outcomes.
- Justifying the contravention will result in an improved planning outcome may lead to departures to development standards being justified on the basis of development feasibility (improved economic outcomes) or on the basis that the development is providing affordable housing (social outcomes). These arguments are likely to be raised and will lead to greater use of clause 4.6.

[7] EIE, p 8
[8] EIE, 11

- Who is the planning outcome improved for? A variation may result in a worse outcome for neighbours, but an improved outcome for the development itself.
- Risks associated with clause 4.6 variations being used as a de facto plan making process will remain and the stated intent of the proposed reforms will not be realised.

As currently proposed, there is no limit on the scope of a clause 4.6 contravention, in circumstances where there is an '…*improved planning outcome, or where the proposed variation is appropriate due to the particular circumstances of the site and the proposal'.* Given many aspects of the 'revised test' are already part of Clause 4.6 (e.g. consistency with the objectives of the clause containing the development standard and the zone objectives), concern is raised that the proposed changes may not provide the necessary certainty about how the clause should be applied.

Some councils have also raised the questions of how to deal with variations to applications for modifications of consent. The requirement to justify departures to development standards under clause 4.6 only applies when development is granted, not when a modification application is made. Consent authorities cannot apply clause 4.6 to section 4.55 applications. While the 'substantially the same' test pursuant to 4.55 applications remains, it is not uncommon for development applications (DAs) to be approved without a 4.6 variation, only for 4.55 applications to be submitted that include departures to development standards, but without the requirement to address clause 4.6. Some councils have commented that the same rules should apply to departures from development standards, irrespective of whether it is the original consent or a modification.

***Recommendation 1**: Any proposed new 'test' would require a clear and concise set of criteria on the circumstances in which variations will be subject to either the 'revised test' or the 'alternative test'.*

***Recommendation 2**: That DPIE consider the whether clause 4.6 should apply to variations on applications for modifications of consent.*

The alternative test

The EIE has suggested that an 'alternative test' may be appropriate in the case of minor variations, but there is no detail as to what this test would entail and having two tests may add additional complexity and uncertainty

Minor contraventions to a development standard are difficult to define and this may vary from one location to another, between metropolitan and regional areas. What might be considered 'minor' to one community may be significant in another local government area. Similarly, a 'minor' contravention for one development type (eg residential flat building or commercial development) may be seen as significant for other development types (such as dwelling houses).

***Recommendation 3**: In considering the idea of a 'minor variation' definition, there needs to be specific definitions to differentiate between different development classes.*

Removal of clause 4.6(8) exclusions

Currently under clause 4.6(8) of the Standard Instrument LEP, variations cannot be made to certain provisions including development standards relating to complying development, development standards containing BASIX requirements and clause 5.4. Councils can also include additional development standards that cannot be varied in their own LEPs.

The EIE states there are "too many exclusions" under clause 4.6(8) which results in confusion for applicants and reduces flexibility. The EIE proposes that councils will no longer be able to exclude provisions from the operation of clause 4.6.

LGNSW and councils are unanimously opposed to this proposal and collectively question its justification**.** Many councils have LEP clauses which exclude the use of clause 4.6 to obtain variations to certain development standards. (A list of examples is provided at Attachment 1.)

Councils base their exclusions under clause 4.6(8) on detailed strategic planning, including consultation with the community. They provide clarity for developers, residents and council officers as to which development standards can be varied and which are non-discretionary. Removing them would undermine the detailed work that has been undertaken.

The proposal to open up the number of controls which could be varied, and not prescribe limits for how much, and how many variations can be requested and approved, raises serious questions about the role of LEP controls, and whether communities can continue to have confidence and trust in the planning system.

Key implications for councils of this proposal are that it:

- Could result in more development applications being required to be reported to Local Planning Panels (LPP), in light of the existing delegated authority it has been granted to determine applications subject to clause 4.6 variation.
- Is likely that variations will not be supported by councils' planning assessment staff, given the critical importance of maintaining the integrity of the controls currently excluded from clause 4.6 variation, resulting in an increased number of appeals to the NSW Land and Environment Court (LEC).

The many risks in creating precedents, cumulative impacts, and reducing the integrity of the planning controls are not adequately addressed in the EIE.

Recommendation 4*: The proposed removal of exclusions under clause 4.6(8) should not proceed and councils must be permitted to continue to exclude relevant standards from the application of clause 4.6 in appropriate circumstances in their LEPs.*

Strengthened reporting and monitoring to improve transparency, accountability and probity

The EIS establishes that councils will be required to publish reasons for granting or refusing a request to vary a development standard, and to also prepare additional reports on planning decisions with respect to development standard variations.

The EIS justifies this proposal on its recommendation to remove the requirement for concurrence of the Planning Secretary, on the basis of "reducing red tape"[9]. This raises the question as to whether this represents removal of a potentially important safeguard against corruption and a *lessening* of the Department's role.

Importantly for councils, the EIE proposes that in place of this oversight/concurrence role by the Planning Secretary, councils' existing reporting requirements be expanded by requiring them "to publicly publish their reasons for granting or refusing a clause 4.6 application on the NSW Planning Portal"[10]. The EIE argues the removal of the concurrence requirements in clause 4.6 will "enable timely assessment of DAs in line with the Department's Planning Reform Action Plan". While this may streamline the process for the department and the proponent, it adds additional burdens on councils.

***Recommendation 5**: DPIE should reconsider the proposal to require councils to do additional reporting on clause 4.6 variations in lieu of removing the Planning Secretary concurrence, and look at ways to use the NSW Planning Portal to collect the necessary information without burdening councils by additional reporting requirements.*

Guidance Material

Councils support the proposal for DPIE to prepare guidance material for proponents who prepare clause 4.6 variation requests and to assist planning authorities who are tasked with assessing variations to development standards.

If there is concern that exemptions to the provisions of clause 4.6 are being abused, this can be more appropriately addressed during the planning proposal phase of place-based master planning or preparation of clear and concise guidelines for when the use of exemptions is appropriate. This is considered a more appropriate solution than retrospective removal of existing exemptions, with or without a transition period.

ICAC also recommended new guidelines establishing clear criteria for assessing variations be prepared by DPIE, however these have not been prepared, or released, for comment.

***Recommendation 6**: That prior to any changes being made to clause 4.6, DPIE develop, in consultation with councils, new guidelines with clear criteria for assessing variations and that these are released for public comment.*

[9] EIE, p 6
[10] EIE, p 9

Recommendations

In summary, LGNSW makes the following recommendations:

Recommendation 1: Any proposed new 'test' would require a clear and concise set of criteria on the circumstances in which variations will be subject to either the 'revised test' or the 'alternative test'.

Recommendation 2: That DPIE consider the whether clause 4.6 should apply to variations on applications for modifications of consent.

Recommendation 3: In considering the idea of a 'minor variation' definition, there needs to be specific definitions to differentiate between different development classes.

Recommendation 4: The proposed removal of exclusions under clause 4.6(8) should not proceed and councils must be permitted to continue to exclude relevant standards from the application of clause 4.6 in appropriate circumstances in their LEPs.

Recommendation 5: DPIE should reconsider the proposal to require councils to do additional reporting on clause 4.6 variations in lieu of removing the Planning Secretary concurrence, and look at ways to use the NSW Planning Portal to collect the necessary information without burdening councils by additional reporting requirements.

Recommendation 6: That prior to any changes being made to clause 4.6, DPIE develop, in consultation with councils, new guidelines with clear criteria for assessing variations and that these are released for public comment.

* * *

LGNSW would welcome the opportunity to assist with further information during this review to ensure the views of local government are considered.

To discuss this submission further, please contact LGNSW Strategy Manager, Planning at jane.partridge@lgnsw.org.au or on 02 9242 4093.

Attachment 1 – Examples of exclusions used in LEPs

Council	Examples of how councils use clause 4.6(8) exclusions
Blue Mountains	**Blue Mountains LEP 2015, currently utilises Clause 4.6(8) to ensure numeric controls are not varied in the following areas:** • Clause 4.1E: The area of land available that is suitable for a dwelling house in the subdivision of environmentally zoned land • Clause 4.1G: Lot consolidation in certain environmental zones • Clause 6.26: Maximum area for neighbourhood shop, and neighbourhood supermarkets • Clause 5.4: Maximum floor area for secondary dwellings, industrial retail outlets and other miscellaneous development • Clause 6.25: Limiting extension of dwelling houses into E2 Environmental Conservation zoned land The clause currently provides a strong test for variation that balances flexibility with ensuring appropriate planning outcomes. Further the current requirement refers development applications seeking a significant variation to the Local Planning Panel adding transparency to the process. Key environmental controls, LEP 2015 • Clause 6.25 allow some flexibility for development to extend into E2 Environmental Conservation zoned land. • Remaining land in the Blue Mountains is increasingly constrained and the most environmentally sensitive land is often the most desirable for development due to views or outlook. Currently, LEP controls, with clause 4.6(8) a backstop, allow flexibility whilst maintaining appropriate consideration of environmental values.
Canada Bay	**Canada Bay LEP 2013** *Development standards excluded from variations* • Clause 4.6 - Development standards relating to foreshore building lines and active street frontages - these baseline requirements should be fixed and should not be subject to “flexibility” or variation on a case by case basis. • The LEPs excludes relevant standards from the application of clause 4.6 in appropriate circumstances.
City of Sydney Council	**City of Sydney LEP 2012,** currently utilises Clause 4.6 (8) to ensure provisions that cannot be varied as outlined below: • Heritage floor space – award eligibility, and when HFS allocations are required • Sun access planes – sun protection to important public spaces in Central Sydney

	• Site specific planning controls – resulting from planning proposals to vary controls • Tower clusters (proposed) – maximum 50% bonus for design excellence and meeting the intent of the draft Central Sydney Planning Strategy Guideline • Car parking - maximum car parking rates set for development within the Local Government Area (LGA), including Central Sydney • Building heights - existing building height limits within the Circular Quay and Macquarie Street Special Character Areas • Wind affected balconies - allows exclusion of balconies on residential towers from the calculation of gross floor area and floor space ratio above 30 metres height • Numerical controls relating to miscellaneous permissible uses - including maximum gross floor area rates for uses such as industrial retail outlets, neighbourhood shops and supermarkets, and artisan food and drink industries • Below ground development in Zone RE1 - ensures subterranean development under public land is consistent with recreational uses at ground level These exclusions apply to a small number of the City's planning controls but are regarded as critical. The controls have been subject to community consultation and detailed planning assessment, review and testing. Variations are regarded as resulting in worse planning outcomes.
Cumberland City	The Auburn, Holroyd and Parramatta LEPs currently apply to Cumberland. Clause 4.6(8) ensures numeric controls are not varied offering residents and Council Officers clarity as to what development standards can be varied and which are non-discretionary, for example: • Under all 3 LEP's any development standards under Clause 5.4 – "Controls relating to miscellaneous permissible uses" cannot be varied due to the operation of Clause 4.6(8). These miscellaneous permissible land uses currently serve to manage the impacts of those uses upon the locality and work well from both the community and Council perspective. • Secondary dwellings are restricted to 60sqm in area and this standard cannot be varied in the 3 plans by operation of Clause 4.6(8), offering clarity for both the community and Council.
Hornsby Shire Council	**Hornsby LEP 2013** currently utilises Clause 4.6(8) to exclude Clause 5.4 Controls relating to miscellaneous permissible uses. This clause enables councils to insert numerical standards for certain types of development to reflect the characteristics of a local government area. The numerical controls form part of the definition of the land use. This can be demonstrated in the definition for secondary dwelling in the rural zone which specifies a total floor area of the dwelling which must not be exceeded. If this definition could be contravened, then there would be resultant uncertainty as to when the proposed land use ceased being defined as a secondary dwelling and would then satisfy the definition for dwelling house resulting in potential prohibited land uses such as dual occupancy or multi dwelling housing.

	The provisions within clause 5.4 of the LEP set the scale of appropriate development for a use that would not ordinarily be permitted in the applicable zone. Deletion of the clause 4.6(8) would act as a de facto rezoning for the miscellaneous permissible uses.
Lane Cove	**Lane Cove** If clause 4.6 exclusions are removed, this will have a detrimental impact on Part 7 of Council's Local Environmental Plan for St Leonards South. This is directly against the specific recommendation made by the Design Charette for the area and the Department of Planning's own finalisation report on the Planning Proposal for St Leonards South. The strategic planning for the St Leonards Planning Proposal was designed to avoid requests for Clause 4.6 variations by including a height buffer into the final LEP Height of Buildings. This 'height buffer' accounted for any likely variations due to irregular or steep topography, basement protrusions, and lift overruns. In this regard, exclusions from Clause 4.6 Variations should remain in place for proposed development at St Leonards South. Given the considerable and substantial strategic planning work which included the Design Charette, Department of Planning and Council, flexibility on the delivery of public infrastructure is not appropriate as it may result in the infrastructure not being delivered at all. In this instance, it has been considered appropriate to mandate compliance with not only the building heights and FSRs but also provision of public benefits by both the Design Charette and the Department of Planning.
Penrith City Council	**Penrith** Council currently excludes provisions in its LEP from operating under clause 4.6 for specific planning-based outcomes as outlined below: • Clause 5.4 – the development standards in this clause control the size and scale of certain permissible land uses, which are generally ancillary to either the principal use of the land (e.g. a home business or home industry on a residential property) or in a location that supports the primary uses in the zone (e.g. neighbourhood shop providing for the day-to-day needs of the people who live in a residential area). The ability to vary these standards should not be allowed to ensure the character and amenity of these areas is protected and certainty is provided. If clause 5.4 is removed, the definitions of these uses should be reviewed to reflect their size and scale, noting that the definition of these uses currently refers to clause 5.4. • Clauses 7.7 and 7.17 – the development standards in these clauses generally relate to minimum lot sizes for dwellings in rural areas that are not connected to a reticulated sewerage system. Allowing these standards to be varied could potentially lead to poor environmental outcomes, particularly on a cumulative basis. Clause 4.6 may be used to justify a variation on an individual basis but does not take into account the cumulative impact of varying these standards. • Clauses 7.21, 7.24 and Part 9 – the development standards in these clauses seek to manage the form, density and scale of development at Twin Creeks,

	Sydney Science Park and Penrith Panthers. The ability to vary these standards should not be allowed to ensure the nature of development intended in these areas is maintained. • Clause 8.4(5) – the development standards in this clause relate to floor space ratios and building heights in the Penrith City Centre. This exclusion was recently added to clause 4.6, as part of the Phase 1 review of Penrith LEP 2010 and sought to prevent a development from seeking a variation to a standard more than once if that development was already seeking a variation allowed by the design excellence provisions in clause 8.4. For this reason, the removal of this exclusion is opposed. • Support the removal of exclusions relating to clauses 6.1 and 6.2. These clauses relate to the provision of State public infrastructure and public utility infrastructure in urban release areas and operate as either a precondition to consent or a prohibition.
Willoughby	**Willoughby LEP 2020,** currently utilises Clause 4.6 to ensure numeric controls are not varied in specific areas for example: • Clause 4.6 includes a clause preventing the variation of height at Gore Hill, Artarmon. The clause limits heights in the proximity to the transmission tower located in Gore Hill. Broadcast Australia (Australian Broadcasting Cooperation (ABC) advised taller buildings on that site would interfere with transmissions with implications beyond the Willoughby local government area. Therefore, Council objects to the deletion of this clause.