Changes related to clause 4.6 of the Standard Instrument

This document answers frequently asked questions about changes related to clause 4.6 of the Standard Instrument

When did the changes commence?

The changes were made on 15 September 2023 and commenced on 1 November 2023.

The delay in commencement was to allow councils and applicants time to prepare.

The changes apply only to development applications lodged after 1 November 2023. Any development applications lodged but not determined on 1 November 2023 will continue to be assessed under the previous clause.

Why has clause 4.6 been amended?

An explanation of intended effect (EIE) was exhibited in 2021 to propose amendments to clause 4.6. The EIE explained the key issues with clause 4.6, including its complexity, significant cost burdens for proponents, and resourcing implications for councils and the courts. There were also concerns that clause 4.6 can dilute transparency in the planning system and present opportunities for corruption.

What legislative amendments have been made?

Three legislative amendments have been made to deliver the clause 4.6 reforms:

- an amendment to the Standard Instrument LEP Order (Amending Order)
- an amendment of *Environmental Planning and Assessment Regulation 2021* (Regulation Amendment)
- amendments to environmental planning instruments through the *State Environmental Planning Policy Amendment (Exceptions to Development Standards) 2023* (Amending SEPP).

What is included in the Amending Order?

The Amending Order has made the following key changes to clause 4.6:

- Clause 4.6(3) now requires the applicant and consent authority to consider the same matters when seeking and determining a variation to a development standard. The consent authority must now be satisfied that the applicant has demonstrated that:
    - compliance with the development standard is unreasonable or unnecessary in the circumstances, and
    - there are sufficient environmental planning grounds to justify the contravention of the development standard.

- the consent authority no longer needs 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
- the Secretary's concurrence is no longer required

By updating the Standard Instrument Order, all Standard Instrument Local Environmental Plans across NSW will automatically include the amended clause 4.6.

What is included in the Regulation Amendment?

The Regulation Amendment will introduce requirements for written requests and reporting variations to the Planning Secretary.

Section 35B of the *Environmental Planning & Assessment Regulation 2021* (EP&A Regulation) requires a development application (DA) which seeks to vary a development standard to be accompanied by a document (known as a "written request") that addresses the test of clause 4.6(3) and (4). This is not a new requirement but reinforces the previous requirement for a written request that used to be in clause 4.6.

As part of the new monitoring and reporting framework, section 90A of the EP&A Regulation now requires councils to provide the council's, Local Planning Panel's or Sydney district or Regional Planning Panel's reasons for approving or refusing the contravention of the development standard to the Planning Secretary through the NSW Planning Portal. Section 90A does not apply to variations determined by the Land and Environment Court on appeal.

What is included in the Amending SEPP?

The Amending SEPP has inserted the same changes that have been made to clause 4.6 into non-standard local environmental plans and relevant State Environmental Planning Policies. It will ensure that any clauses that allow for exceptions to development standards are consistent.

Savings and transitional clauses have also been inserted into the non-standard local environmental plans and precincts SEPPs (see below).

Why has the public interest test been removed?

Clause 4.6 of the Standard Instrument LEP previously required 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 particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

This requirement has been removed as it duplicates existing considerations when determining a development application or considering a variation request.

Consideration of the zone objectives and public interest is already required when assessing a development application in:

- clause 2.3 of the Standard Instrument LEP, and
- section 4.15(1)(e) of the *Environmental Planning and Assessment Act, 1979* (EP&A Act).

Consideration of the objectives of the standard can be relevant to demonstrating that compliance with a development standard is unreasonable or unnecessary in the circumstances (from the case of *Wehbe v Pittwater Council* [2007] NSWLEC 827).

Removing these duplicative requirements will result in fewer components of the test and simplify the application of clause 4.6.

Is a written request still required?

Yes. Applicants are still required to provide a written request to accompany a development application (DA) that seeks to contravene a development standard. This requirement is now included in Section 35B of the EP&A Regulation 2021. Within the updated clause, the written request is now referred to as a "document", however the purpose remains the same.

Is the Planning Secretary's concurrence still required to vary a development standard?

No. The Secretary's concurrence no longer needs to be obtained before the determination of a development application with a variation to development standard. Since the introduction of clause 4.6, the department now processes a very minimal number of concurrence applications on the erection of dwellings on undersized rural lots. This will no longer be necessary.

Enhanced reporting requirements for local councils through the NSW Planning Portal including providing reasons for decisions will enable an appropriate level of oversight, transparency and accountability.

The section 9.1 Ministerial Direction to Local Planning Panels has also been updated to remove the reference to the need for Secretary's concurrence for variations for consistency.

Do the changes apply only to Standard Instrument Local Environmental Plans?

No. The changes also apply to any State Environmental Planning Policies (SEPPs) and non-standard Local Environmental Plans that have clause 4.6 or an equivalent clause.

Are any changes proposed for rural subdivision minimum lot size provisions?

No. The current restrictions on minimum lot size standards for subdivision in certain rural, environmental and large lot residential zones have been retained.

Subdivision in these zones needs to be managed carefully to prevent valuable agricultural land being made unproductive by being fragmented into numerous small lots. The creation of small rural 'lifestyle' lots can also cause land use conflict between new residents and existing agricultural operations on larger neighbouring lots. These issues are described in more detail in the 'Right to Farm Policy' produced by the Department of Primary Industries.

How will the savings and transitional arrangements work?

Any DA under assessment but not finally determined on 1 November 2023 will be determined using the previous clause 4.6 requirements.

Concurrence can continue to be assumed for these DAs as the Assumed Concurrence Notice that is attached to Planning Circular 20-002 remains in force to ensure transitional DAs can continue to be determined under the previous arrangements.

Changes to reporting requirements

What changes have been made to the NSW Planning Portal?

The NSW Planning Portal has been updated to reflect the clause 4.6 reforms and to provide more transparency on the use of this mechanism across the state. This includes a public register that displays all variations requests in NSW – both under assessment and determined. The information obtained from the NSW Planning Portal will update the variations register and provide the public with up-to-date information about clause 4.6 requests.

How will the changes affect council reporting requirements?

From 1 November 2023 councils no longer need to submit quarterly reports to the department detailing variation requests. This information will be extracted directly from the NSW Planning Portal to reduce the administrative burden on councils.

This change makes it increasingly important that councils update the NSW Planning Portal with accurate information. This includes updating the details of the variation requests, such as the numerical values, at different stages of the assessment process. Councils also need to update the data if the DA is determined under delegated authority, by the elected council, by a planning panel or the Land and Environment Court.

To enable a smooth transition, the final variations reporting should cover all variations determined from July to the end of October 2023. The department will provide further information about this transition to councils.

Do councils need to keep historical variations registers available online?

The variations register on the NSW Planning Portal shows only variations under assessment (but not determined) as at 1 November 2023 and determinations made after 1 November 2023.

Historical variations reports on council websites should be maintained, as this information will not be available on the variations register.

Do council staff still need to report development applications with larger variations to the elected council for determination?

Yes. Where there is no Local Planning Panel, council staff should continue to report DAs with proposed variations over 10% to their elected council for determination. This will provide for additional oversight and transparency when varying development standards.

Do council staff still need to report variations determined to the elected council on a quarterly basis?

No. Planning Circular PS 20-002 has been repealed so it is no longer necessary to report determined variations to the elected council on a quarterly basis.

This information is now available on the NSW Planning Portal

How does the variations register work?

The variation register is a publicly accessible page on the NSW Planning Portal that displays all variations requests across NSW. It will display the most up-to-date information from the NSW Planning Portal. Users will be able to see all variation requests under assessment and/or determined from 1 November 2023 across the state and for each council.

How will the NSW Planning Portal support transparency in the variations system?

The ongoing implementation of the NSW Government's ePlanning Program provides opportunities for reporting on variations to be integrated as part of the development assessment process through the NSW Planning Portal.

Capturing key information for all variation requests made through the Portal, including reasons for approval or refusal, will allow this information to be made more readily available to the public and reduce administrative duplication for local councils in the current reporting arrangements. The department will continue to monitor the volume and nature of variations across NSW using this information to inform regular policy review.

Will there be a new practice note setting out the changes to the monitoring and reporting obligations?

No. The new monitoring and reporting obligations are contained in Part B of the Guide to Varying Development Standards (see below).

Will the department continue to audit councils' use of the variations mechanism?

Yes. Periodic audits will be carried out to ensure councils are complying with process and reporting requirements contained in clause 4.6 of the Standard Instrument LEP and Part B of the Guide to Varying Development Standards.

Guidance material

Is there updated guidance material?

Yes. The Guide to Varying Development Standards is available on the department's website. .

The guide is in 2 parts:

Part A provides guidance on the preparation and assessment of variations requests:

- providing background on development standards and the variations framework
- detailing how to apply to vary a development standard and the matters to be addressed
- explaining how variation requests should be considered by consent authorities and provide assessment guidance
- detailing how clause 4.6 applies to various types of applications
- identifying relevant case law

Part B outlines the monitoring and reporting framework in place of PS 20-002 providing information on:

- council reporting obligations under the monitoring and reporting framework
- the approach the department will take to monitoring, auditing and reporting on variations.

An updated written request template has also been included to assist applicants. An editable version of the template is available on the department's website.

The Guide to Varying Development Standards will be updated regularly to account for new caselaw and changes in the NSW planning system.

Exclusions to clause 4.6

What is an exclusion to clause 4.6?

Clause 4.6 includes a mechanism that allows a development standard to be excluded from variation. This means the development standard must be strictly applied and cannot be varied using the flexibility provided by clause 4.6.

What changes have been made to clause 4.6 exclusions?

The department recognises the importance of exclusions to clause 4.6 and has provided guidance on what constitutes an appropriate exclusion. This can be found in the Guide to Exclusions from clause 4.6 of the Standard Instrument.

The guide outlines the types of standards that may be supported by the department in a planning proposal to create a clause 4.6 exclusions. The department will assess all exclusion planning proposals on a case-by-case basis.

Why have these changes been made?

The nature and range of current exclusions under clause 4.6(8) has resulted in inconsistences and confusion in the application of the clause. Having too many exclusions can undermine the objectives of clause 4.6 to provide an appropriate degree of flexibility in applying certain development standards to development.

The department has addressed these issues through a new section 9.1 Ministerial Direction Exclusion of Development Standards from Variation, which is supported by the Guide to Exclusions from clause 4.6 of the Standard Instrument.

What is the role of the new s9.1 ministerial direction for new exclusions?

The new section 9.1 Ministerial Direction Exclusion of Development Standards from Variation commenced on 1 November 2023 along with the other changes to clause 4.6. The ministerial direction requires a planning proposal authority to consider the Guide to Exclusions from clause 4.6 of the Standard Instrument when preparing a planning proposal for a new exclusion or alteration of an exclusion.

New planning proposals need to be consistent with part 2 of the Guide to Exclusions from clause 4.6 of the Standard Instrument or need approval of the Planning Secretary.

This will minimise the number of new exclusions and provide greater consistency.

Does the new framework apply to existing exclusions?

No. The new exclusions framework applies only to a planning proposal seeking to create a new exclusion or amend an existing exclusion to clause 4.6.

When a council is determining whether their LEPs should be updated (in accordance with section 3.21(2) of the EP&A Act), a council should consider whether a development standard that has been excluded from variation, should continue to be excluded or have the exclusion removed.

When did the exclusions framework commence?

The new 9.1 direction and Guide to Exclusions from clause 4.6 of the Standard Instrument commenced on 1 November 2023, along with the other changes to clause 4.6. It only applies to planning proposals submitted for Gateway Determination after 1 November 2023.