THE LAW SOCIETY OF NEW SOUTH WALES
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Submission on the *Review of Clause 4.6 of the Standard Instrument Local Environmental Plan*

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The NSW Young Lawyers Environment and Planning Committee (**Committee**) make the following submission in response to the '*Review of Clause 4.6 of the Standard Instrument – Principal Local Environmental Plan'* Explanation of Intended Effect (**EIE**).

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

NSW Young Lawyers accepts the science and wide-ranging effects of climate change, including as outlined by the United Nations Intergovernmental Panel on Climate Change in its leading expert reports. NSW Young Lawyers considers that Australia has the ability and a responsibility to rapidly reduce emissions and actively help to keep the world's emissions within its remaining 'carbon budget'.

NSW Young Lawyers recognises that there is a climate emergency, posing an unprecedented challenge for human rights and the rule of law. In order for there to be intergenerational equity and climate justice, as well as interspecies equity and ecological sustainability, the law needs to enable and require Australia to rapidly decrease CO_2 (and other greenhouse gas) emissions and to be legally accountable for their adverse contributions to the impacts of climate change.

The NSW Young Lawyers Environment and Planning Committee comprises of a group of approximately 250 members interested in our natural and built environment. The Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

Introduction

The Committee welcomes the opportunity to comment on Parts 3 and 4 of the Explanation of Intended Effect **(EIE)** for the proposed amendments to Clause 4.6 of the Standard Instrument – Principal Local Environmental Plan **(Standard Instrument).**

Summary of Recommendations

1. That the revised Clause 4.6 retains reference to the 'unreasonable or unnecessary to comply with' test that assists a development applicant proponent in justifying its Clause 4.6 Request.

2. That, in accordance with Recommendations 10 and 11 of the ICAC Report, the role of the Planning Secretary's concurrence is retained without any reduction in scope as it will provide a level of assurance that Clause 4.6 Requests are upheld or rejected consistently and reduce the risk of corruption. The use of the NSW Planning Portal to monitor the upholding of Clause 4.6 Requests by various Councils is strongly encouraged.

3. That rather than introducing a new test in Clause 4.6, a standardised template for Clause 4.6 Requests should be promulgated.

4. That the proposed alternative test should ensure there are clear criteria for its application supported by guidance material that clearly defines what is acceptable as a "minor variation" to establish certainty for the community and avoid unnecessary complexities that lead to increased litigation.

5. That an anti-corruption framework be implemented to promote transparent actions of councillors concerning Clause 4.6 Requests. The Committee advocates for clear, reformulated guidelines to be created for concurrence, reporting and auditing measures to minimise corruption risks.

6. That guidance material is needed for applicants or consent authorities to satisfy requirements for Clause 4.6 Request.

Part 3 – Complexities and Challenges of Current Test

Whether the proposed changes address the complexities and challenges of the current test

1. The Committee concurs with the findings of the NSW Independent Commission Against Corruption (**ICAC**) 'Investigation into the conduct of Councillors of the former Canterbury City Council and others', known as 'Operation Dasha' (**ICAC Report**)[1] that relate specifically to the complexity of the current process of seeking to vary one or more of the principal development standards set out in Part 4 of the Standard Instrument by way of Clause 4.6 (**Clause 4.6 Request**) and the myriad challenges that development application (**DA**) proponents face when preparing a Clause 4.6 Request.

[1] NSW Independent Commission Against Corruption (ICAC) *Investigation Into The Conduct Of Councillors of the Former Canterbury City Council and Others* (Operation Dasha) (March 2021).

2. The Committee has first-hand experience in the process of drafting a Clause 4.6 Request prior to and now following the seminal decision of *Initial Action Pty Ltd v Woollahra Municipal Council* (***Initial Action***).[2] Multiple DAs before the Land and Environment Court (**Court**) on appeal have been dismissed on the basis of a failure to comply with an overly formulaic and unnecessarily rigorous process arising out of *Initial Action.* This is made more complex by subsequent decisions (for example, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130).[3]

3. The rationale behind the process of judicial consideration of a Clause 4.6 Request (and the consideration that a consent authority must now give to a Clause 4.6 Request due to the authorities referred to at [2] above) is, on its face, sound. A consent authority (and the Court on appeal) must be satisfied that the matters to be demonstrated in Clause 4.6(3) of the Standard Instrument are adequately addressed rather than merely adverted to, as a development standard is a limitation on development that has been arrived at after careful consideration of the subject area (albeit not each specific parcel of land, hence the utility of a Clause 4.6 Request).

4. However, the Committee is concerned that the proposed changes to the test to be applied to a Clause 4.6 Request (discussed in the Committee's response to Part 4 of the EIE below) may not only make it more difficult for Clause 4.6 Requests to be upheld, but those variations from the development standards in Part 4 of the Standard Instrument may not result in improved environmental outcomes in practice.

5. Presently, the test requires the DA proponent to adequately address the justification to contravene a development standard by demonstrating that compliance is either unreasonable or unnecessary, and that there are sufficient environmental planning grounds justifying that contravention. As noted above, the Committee is aware of many otherwise meritorious DAs that fail to meet the two-part test at Clause 4.6(3)(a) and (b), in addition to failing to satisfy the consent authority that the objectives of the standard and zone will still be achieved.

6. By changing the test to instead require the DA proponent to prove that the contravention will result in an improved planning outcome in addition to satisfying the objectives of the standard and the zone might have the result of closing off a number of reasons for which a Clause 4.6 Request might presently be upheld. The Committee notes that there are competing decisions by Commissioners of the Court on what constitutes 'sufficient environmental planning grounds' in relation to whether these grounds might only remotely relate to 'environmental planning grounds'. The removal of this reference may well make the operation of cl 4.6 less flexible.

7. The proposed change that would require the consent authority to consider the public interest, environmental, social and economic outcomes in determining whether an improved planning outcome has been reached has eliminated the requirement for the consent authority to consider whether

[2] *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256.
[3] *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61; *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

compliance with the relevant development standard was unreasonable or unnecessary, in the first instance.

8. In an attempt to streamline the Clause 4.6 Request process and to reduce the complexities and challenges of the current test, it appears that the Department is removing that preliminary justification for a DA proponent to seek to vary a development standard. For example, a site with a steep topography that reasonably and necessarily requires a non-compliance with the prevailing height of building standard in Part 4 of the Standard Instrument (the equivalent of such a provision being found in the relevant *Local Environmental Plan*) may well now not be able to be the subject of a Clause 4.6 Request.

9. While the Committee commends the Department's desire to streamline and simplify the test for upholding or rejecting a Clause 4.6 Request, this simplification process cannot and should not eliminate the 'unreasonable or unnecessary' test set out in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [42]–[51] given the importance that this part of the test plays in the initial justification for a DA proponent to lodge a Clause 4.6 Request in the first place.

Recommendation 1: That the revised Clause 4.6 retain reference to the 'unreasonable or unnecessary to comply with' test that assists a DA proponent in justifying its Clause 4.6 Request.

Part 3 – Concurrence Role

Whether the role of concurrence should be retained

10. The Committee submits that the role of concurrence should be retained by the Planning Secretary to promote consistent decision-making and reduce the risk of corruption unless and until a more contemporary and effective approach to reduce the risk of corruption is implemented.

11. At present, a condition for approving variation under Clause 4.6 Request requires the Planning Secretary to grant concurrence for the development that contravenes a development standard under Clause 4.6(4)(b) of the Standard Instrument. Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Planning Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6 subject to specific conditions (**Ministerial Notice**).

12. The Committee agrees with the EIE that theoretically the current assumed concurrence regime allows for an appropriate level of oversight and accountability in the decision-making process for varying development standards, but notes that the Ministerial Notice currently grants assumed concurrence to Councils (and Local Planning Panels) for the vast majority of contentions Clause 4.6 requests.

13. While this appears advantageous, as noted in the EIE, the Department has only received eight concurrence applications to date in 2021 and 32 in 2020 and accordingly, the concurrence mechanism which was to ensure a desired outcome for oversight and accountability, has not been achieved.

14. Following the completion of the ICAC Report, a considerable risk of corruption under the current process was highlighted, which found that Councillors have been able to misuse concurrence under the current framework which allowed for poor control, management and ignorance of concurrence requirements.

15. The Committee submits that the Planning Secretary's concurrence role should be retained to ensure consistent decision making processes and maintain public confidence in the outcome of applications. Concurrence provides a measure to reduce the risk of corruption unless a more contemporary and effective approach to mitigating corruption risks is implemented. That is, increasing and strengthening reporting requirements on the NSW Planning Portal as well as introducing alternative mechanisms for ongoing monitoring and corruption risk audits.

Recommendation 2: That, in accordance with Recommendations 10 and 11 of the ICAC Report, the role of the Planning Secretary's concurrence is retained without any reduction in scope as it will provide a level of assurance that Clause 4.6 Requests are upheld or rejected consistently and reduce the risk of corruption. The use of the NSW Planning Portal to monitor the upholding of Clause 4.6 Requests by various Councils is strongly encouraged.

Part 4 – The Planning Outcomes Test

Proposed reforms do not make law clearer or less complicated

16. The Committee submits and agrees with the Department's sentiment that Clause 4.6 of the Standard LEP should fulfil its stated objectives as clearly and concisely as possible to avoid unnecessary expenses associated with the preparation of development applications and inconsistency in the decision making of local government authorities and other decision makers.

17. The Committee notes the Department provides the proposed reforms will make the law governing assessment and approval of exceptions to development standards clearer and reduce the number of decisions that are appealed. However, in their current form, the reforms do not make the law any clearer. On the contrary, they add at least two elements of uncertainty and complexity to the law by the introduction of the concept of 'improved planning outcome'.

18. Firstly, the meaning of 'environmental', 'social' and 'economic' outcomes is unclear, as is the nexus of those terms with the 'public interest'.

19. Under the existing test, a consent authority must be directly satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the Standard LEP and it is does not contravene the development objectives in the relevant zone. The new test does not limit the consent authority's consideration of the public interest to these matters and therefore, the term 'public interest' is likely to confer a broad and ambulatory power on the consent authority.

20. This conferral of a broader discretionary power on local government authorities occurs in circumstances where no direction is given as to the meaning or relative importance of mandatory relevant considerations (i.e. environmental, social and economic outcomes). Indeed, it is not stated expressly whether environmental, social and economic considerations are to be integrated in a manner that facilitates and adheres to the principles of ecologically sustainable development.

21. Ultimately, the consequence would be that local government authorities are subject to less direction and their decisions are less amenable to judicial review. This is a curious outcome for a reform that has been partly inspired by the findings of ICAC in relation to the risks of unsupervised decision making by councils.

22. Secondly, the Committee submits that even if the meaning and relative importance of the environmental, social and economic outcomes were clear, the perspective from which these outcomes are to be measured remains uncertain.

23. The Department's intention is that consent authorities are enabled to make decisions on whether a development 'fits in with the site's strategic and contextual environment'. In doing this, the reform relies on consent authorities specialised knowledge as to what will achieve great planning outcomes for their specific area.

24. However, nothing about the proposed test or the explanatory materials hitherto provided describes the extent of the area for which outcomes are to be assessed. An applicant will be unaware as to whether they must provide evidence about the 'environmental', 'social' and 'economic' impacts of the proposed contravention on the development itself, the development's site, the site's immediate neighbours, the broader neighbourhood within the local government area, or the public more broadly.

25. This ambiguity exacerbates the uncertainty described above and is likely to result in confusion for developers and members of the community who have an interest in the acceptance or refusal of the approval of a contravention of a development standard.

26. The Committee submits that the feature of the proposed planning outcome test is that it appears to prescribe a higher threshold for the approval of a contravention of a development standard than what currently exists.

27. In its current form, Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development.[4]

28. The new test would be more onerous than its incumbent insofar as a contravention of a development standard with which compliance is considered unreasonable or unnecessary under the current test

[4] *Initial Action* (n 2) at [87].

would not be permitted under the new test unless its proponent could satisfy a consent authority that the contravention is beneficial relative to a compliant development.

29. It is possible to envisage a contravention that would be permissible under the current test but would not be permitted under either the proposed Planning Outcomes test or the proposed 'alternative test' (discussed below) because its proponent could not prove that it is beneficial and because it would not be a minor variation for the purposes of the 'alternative test'(leaving aside the ambiguity of the term 'minor variation' which is discussed by the Committee below).

30. The imposition of a less flexible test in this respect appears at odds with the objective stated in Clause 4.6(1)(a), which is "to provide an appropriate degree of flexibility in applying certain development standards to particular development".

31. The Department's position in the EIE and the community sentiment regarding Clause 4.6 indicates exasperation at the burden associated with preparing a written request under the Clause, and frustration with local consent authorities tendency to refuse approval of variations, or make decisions inconsistent with other authorities or their own precedents.

32. However, rather than introducing a new test that is replete with new ambiguities, a more prudent approach would be to introduce a standardised template for applicants to use when preparing a written request. This should allow the proponent to identify the beneficiary from the improved planning outcomes test including whether it is the proponent, the neighbour or the surrounding environment.

33. Such a template would reduce applicants' expenses, encourage uniformity of approach among the various consent authorities and make development material more readily intelligible to the general public and persons with a special interest in the assessment of a particular development.

Recommendation 3: Rather than introducing a new test in Clause 4.6, a standardised template for Clause 4.6 objections should be promulgated.

Part 4 – The Alternative Test

Development of an alternative test to ensure that flexibility can be applied when an improved planning outcome cannot be demonstrated

34. The Committee generally welcomes the concept of an alternative test as a method of creating flexibility in the planning process when an improved planning outcome cannot be demonstrated, provided the variation is appropriate in the circumstances and any impact is negligible. However, the Committee raises its concerns about the absence of detail provided regarding what this alternative test would entail. Additionally, the Committee is concerned that having two tests, the planning outcomes test and the alternative test, may introduce additional complexity and controversy to the variation process.

35. The Committee acknowledges the intentions of the Department in introducing the alternative test to ensure flexibility can be applied when an improved planning outcome cannot be demonstrated but

only where the variation is appropriate in the circumstances due to a negligible impact. The EIE proposal is that minor variations should be acceptable except in instances where it would result in a worse planning outcome.

36. Clear drafting on any alternative test criteria, with a particular emphasis on the definition and extent of minor variations permissible, will be required to establish certainty and clarity of planning principles and to avoid unnecessary complexity. The EIE provides sparse detail as to the structure of the proposed alternative test, citing only three limited examples. However, the Committee notes that any alternative test should not weaken the intent of the improved planning outcomes test or other planning obligations, that is, the alternative test should be maintained as just that, an alternative.

37. Clear guidance material addressing what types or forms of variations could be considered minor and therefore acceptable under the alternative test will be required to ensure clarity for applicants, councils and the community. Clear guidance material is also likely to reduce the risk of an increased volume of litigation in relation to alternative test decisions considered unfavourable by relevant parties. If possible, the guidance material should indicate expectations of what may or may not be acceptable as a minor variation within individual land use zones. Although this may seem at odds with the notion of "flexibility", such guidance is likely to provide clarity and consistency (of both expectations and outcomes) to any application of the alternative test.

38. In line with the proposed measures to increase transparency, accountability and probity by strengthening council reporting requirements on variation decisions set out in the EIE, the Committee recommends that planning decisions involving the application of the alternative test should be specifically included in the revised reporting requirements. This will assist the Department to establish a baseline for acceptable minor variations which could then inform future reforms to the alternative test (if required), and limit opportunities for the alternative test to open up opportunities for corruption and exploitation of the planning system.

Recommendation 4: The proposed alternative test should ensure there are clear criteria for its application supported by guidance material that clearly defines what is acceptable as a "minor variation" to establish certainty for the community and avoid unnecessary complexities that lead to increased litigation.

Part 4 – Appropriate Level of Scrutiny

Whether the proposed reporting, monitoring and auditing framework provides an appropriate level of scrutiny of variations and will minimize the risk of misuse

39. The Committee submits that retaining and strengthening concurrence will minimise misuse. However, this is not solely sufficient to deal with the threat of corruption. Action must be taken to reduce the existing risks of misuse and corruption associated with Clause 4.6.

40. The Committee supports the Department's proposal to require councils to publish their reasons for granting or refusing a Clause 4.6 Request on the Planning Portal. This will promote transparency and consistency in decision-making. It will also enable potential developers to weigh up the prospects of their application and understand what may be required for an application to be granted.

41. In its current form, there is little auditing that occurs after development approval is granted to ensure that approval is given free from corruption or undue bias. The Department has indicated that this is done at random.[5] The Committee acknowledges the Department's proposal to implement 'monitoring, auditing and reporting framework' and regular monitoring and auditing. However, the Committee is not of the view that strengthening auditing requirements abrogates the need for concurrence. With respect to auditing, the Committee believes that further measures must be taken.

42. In conjunction with Recommendations 14 and 15 of the ICAC Report, the Committee endorses the recommendation that a new auditing framework is clearly defined. The outcomes and reasons provided by Councils on Clause 4.6 Requests should be analysed for trends in approvals or refusals to highlight any possible misuse. The outcome of audits and any observations and recommendations should be made available.

43. The Committee also supports the ICAC Report aim to reduce possible corruption and misuse of Clause 4.6 by councillors. Specifically, the introduction of measures to enhance the transparency of the actions of councillors. This may include recordkeeping of staff involvement with Clause 4.6 Requests, and reports to be conducted across local consent authorities. Additionally, consideration of these applications should be assigned to councillors at random (in circumstances where they are not determined by an internal development panel or, if the DA meets the relevant criteria, by the local planning panel), to minimise the crossover for any existing relationships between developers and councillors.

Recommendation 5: That an anti-corruption framework be implemented to promote transparent actions of councillors concerning Clause 4.6 Request. The Committee advocates for clear, reformulated guidelines to be created for concurrence, reporting and auditing measures to minimise corruption risks.

Part 4 – Guidance Material

Guidance material is needed for applicants and consent authorities

44. The Committee welcomes and supports the view that guidance material is needed for applicants and consent authorities to satisfy Clause 4.6 Request requirements.

[5] NSW Government, Planning and Environment, *Planning circular, Varying Development Standards,* (21 February 2018), 2.

45. The Committee submits that a standard template should be included in any guidance material to be prepared. This is to incorporate all matters which must be addressed by the Applicant in order to adequately satisfy the new test for variations under Clause 4.6 Request, in addition to sample responses which clarify the type of the responses which may address these.

46. The Committee submits that the lack of any standard template or structure for Clause 4.6 Requests that is widely adopted by applicants renders the consent authority's task of assessing the adequacy of written requests more challenging. This has led to a range of Clause 4.6 Requests being prepared which vary significantly in terms of their quality, some of which fail to address basic matters in a clear, logical and cohesive manner. The Committee believes it is not a valuable use of resources particularly when the consent authority would be spending undue time searching for written requests that address a particular matter which requires the consent authority's consideration. From the Applicant's perspective, the aid of a template and sample responses would clarify the matters required to be addressed in the Clause 4.6 Request.

47. Despite the provision of a standard template being recommended, the ability for an Applicant to deviate from the standard template where considered necessary or appropriate should be retained.

Recommendation 6: That guidance material is needed for applicants and consent authorities to satisfy the requirements of Clause 4.6.

Concluding Comments

NSW Young Lawyers and the Committees thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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