



Variations to Development Standards

What are Development Standards?

The term 'Development Standards' is defined in the *Environmental Planning and Assessment Act 1979*. They are provisions in environmental planning instruments, such as Council's *Local Environmental Plan 2014* (LEP 2014), which guide development to be carried out in accordance with particular requirements.

Development standards can be numerical, such as maximum building heights or minimum lot sizes, be performance-based, require compliance with a particular condition, or require facilities to be provided in association with certain development.

Why have Development Standards?

Development Standards are a means of achieving an environmental planning objective. Some developments may achieve planning objectives despite not meeting the required Development Standards. The planning system provides flexibility to allow these objectives to be met by varying Development Standards in exceptional cases.

How do I vary a Development Standard?

'Clause 4.6 – Exceptions to Development Standards of LEP 2014' enables exceptions to Development Standards. A written request seeking to justify a variation of a Development Standard can be made to a consent authority under Clause 4.6.

In most circumstances, Council is the consent authority. However, there may be circumstances where other bodies such as a Regional Planning Panel, are the consent authority. For the purpose of this fact sheet, Council will be referred to as the consent authority.

What matters are considered in a Clause 4.6 Variation?

The written request must demonstrate in the first instance that:

- compliance with the Development Standard is unreasonable or unnecessary in the particular case;
- there are sufficient environmental planning grounds to justify contravening the Development Standard; and
- the proposed development will be in the public interest because it is consistent with the objectives of the particular Development Standard and the objectives of the zone in which the development is to be carried out.

Assessing whether compliance with a Development Standard is unreasonable or unnecessary

To assess whether compliance with a Development Standard is unreasonable or unnecessary, the NSW Land and Environment Court established a "five part test".

This test requires that:

1. the objectives of the Standard are achieved notwithstanding non-compliance with the Standard;
2. the underlying objective or purpose of the Standard is not relevant to the development and therefore compliance is unnecessary;
3. the underlying objective or purpose would be defeated or thwarted if compliance is required and therefore compliance is unreasonable;
4. the Development Standard has been virtually abandoned or destroyed by the Council's own decisions in granting consents that depart from the Standard and hence compliance with the Standard is unnecessary and unreasonable;

5. The zoning of the particular land on which the development is proposed is unreasonable or inappropriate so that the Development Standard, (which is appropriate for the zoning), is also unreasonable or unnecessary as it is applied to that land, and that compliance with the Standard in the circumstances of the case will also be unreasonable or unnecessary.

Not all of the above must be satisfied in each circumstance.

It is the applicant's responsibility to ensure their written request has adequately addressed that compliance with the Development Standard is unreasonable or unnecessary in the particular case.

Justifying there are sufficient environmental planning grounds to vary a Development Standard

To assess whether there are sufficient environmental planning grounds to justify varying a Development Standard, it is first necessary to determine what "environmental planning grounds" are. These grounds relate to the subject matter, scope and purpose of the *Environmental Assessment and Planning Act 1979*, including the objects in Section 1.3 of the Act. These objects relate to:

- the social and economic welfare of the community;
- the management of the State's natural and other resources;
- ecologically sustainable development;
- the orderly and economic use of land;
- the delivery and maintenance of affordable housing;
- the protection of the environment, including flora and fauna and their communities and habitats;
- the sustainable management of built and cultural heritage;
- the design and amenity of the built environment;
- the construction and maintenance of buildings;
- the sharing of responsibility for environmental planning; and
- community participation in environmental planning and assessment.

The onus is on the applicant to demonstrate that the aspect of the development that varies the Development Standard (not the development as a whole) is justified on environmental planning grounds.

Whether the proposed development will be in the public interest

It is Council's responsibility to determine whether the proposed development will be in the public interest because it is consistent with the objectives of the Development Standard and the objectives of the zone.

Where a Development Standard cannot be varied

Exempt or complying development provisions cannot be varied. The predetermined Development Standards for complying development cannot be varied using a Clause 4.6 variation.

Variations cannot be used for the subdivision of land in rural or environmental zones that will result in:

- two or more lots less than the minimum area specified for the land; or
- any lot less than 90 per cent of the minimum area specified for the land.

Clause 4.6 does not apply to BASIX certificates.

In addition, variations to a Development Standard cannot be made to the following clauses of LEP 2014:

- Clause 2.8 Temporary use of land;
- Clause 5.4 Controls relating to miscellaneous permissible uses;
- Clause 6.1 Arrangements for designated State public infrastructure; or
- Clause 6.2 Public utility infrastructure.

Making an application to vary a Development Standard

Any request to vary a Development Standard must be in writing, lodged with the development application and justify the variation.

Due to the complex nature, including legal and technical requirements, of some variations, you are recommended to engage a suitably qualified professional town planner to prepare the submission.

Who assesses the variation to a Development Standard?

In most cases, Council officers will assess the variation to the Development Standard. Council has delegation from the NSW Department of Planning and Environment to assess and determine most variations.

Variations more than 10 per cent of a numerical development standard, or variations to a performance based Development Standard must be determined by the elected Council.

In circumstances, including rural or environmental dwellings on undersized lots, or rural or environmental subdivision of land requiring a variation, Council will assess the variation and provide a report to the Department of Planning and Environment. Concurrence from the Department of Planning and Environment will be required for these proposals.

Where Council has assumed concurrence, Council needs to be satisfied that it has considered:

- whether non-compliance with the Development Standard raises any matter of significance for State or regional environmental planning; and
- the public benefit of maintaining the development standard.

Further information on variations to Development Standards is contained in planning system circular PS 17-006 '*Variations to development standards*' on the NSW Department of Planning and Environment's website.

Important notes

There is no automatic right to vary a Development Standard.

Clause 4.6 places the onus on the applicant to provide a written justification for the variation to the Development Standard through the development application process.

Lodgement of a development application

Submission of a development application and accompanying Clause 4.6 variation request must be accompanied by the development application fee.

Fee estimates can be obtained by calling us on 4921 0333.

Need help?

If you have any questions, please contact Council's Duty Planner on 4921 0333 or email dutyplanner@lakemac.nsw.gov.au.

Disclaimer

This fact sheet provides a summary of key elements of varying a Development Standard. Any person using this document must do so on the basis that, not every scenario and issue can be addressed, and discussion with Council should be undertaken. This document is subject to change without notice.

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