

Department of Planning and Environment

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Guide to exclusions from clause 4.6 of the Standard Instrument

For proponents, councils and departmental staff

November 2023



Acknowledgement of Country

The Department of Planning and Environment acknowledges that it stands on Aboriginal land. We acknowledge the Traditional Custodians of the land and we show our respect for Elders past, present and emerging through thoughtful and collaborative approaches to our work, seeking to demonstrate our ongoing commitment to providing places in which Aboriginal people are included socially, culturally and economically.

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Guide to exclusions from clause 4.6 of the Standard Instrument

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1 Introduction

This guide is for people who prepare and assess planning proposals, including proponents, councils and the department.

1.1 What is clause 4.6 of the Standard Instrument?

The *Standard Instrument – Principal Local Environmental Plan* (Standard Instrument LEP) and other environmental planning instruments set out development standards that a development application must meet. Clause 4.6 of the Standard Instrument LEP allows consent authorities, such as councils, to grant consent to development that contravenes one or more development standards.

Clause 4.6 gives flexibility when applying development standards, which are defined in the *Environmental Planning and Assessment Act 1979* (EP&A Act). The standards help to achieve environmental planning objectives and can be either numeric (such as maximum building heights, maximum floor space ratio or minimum lot sizes) or non-numeric. Non-numeric standards are typically found in local provisions and relate to specific local matters. These may vary from local environmental plan to local environmental plan.

Clause 4.6(8) of the Standard Instrument LEP has a mechanism to exclude a development standard from the operation of clause 4.6, meaning that the excluded standard cannot be varied.

Since the introduction of the Standard Instrument LEP, the approach to considering these exclusions in local environmental plans has been inconsistent. Overuse of exclusions also undermines the primary objective of clause 4.6, which is to provide an appropriate degree of flexibility. Accordingly, amending clause 4.6(8) of the Standard Instrument LEP to exclude development standards from variation should be done sparingly, consistently and in limited circumstances.

Within this guide, any reference to clause 4.6 of the Standard Instrument LEP also applies to equivalent clauses in non-standard instrument local environmental plans and state environmental planning policies.

1.2 Purpose of this guide

This guide aims to:

- set clear criteria to identify when development standards may be excluded from variation under clause 4.6 of the Standard Instrument LEP (or an equivalent provision of any other environmental planning instrument)
- encourage a more consistent application of clause 4.6(8) of the Standard Instrument LEP (or an equivalent provision of any other environmental planning instrument).

The guide supports the section 9.1 ministerial direction ‘*Exclusion of Development Standards from Variation*’. The direction requires:

- a planning proposal authority to take this guide into account
- a planning proposal to be consistent with the criteria in Part 2 of this guide when proposing a new exclusion or amending an existing one to clause 4.6.

Any planning proposal that is not consistent with Part 2 of this guide requires the approval of the Planning Secretary (Secretary of the NSW Department of Planning and Environment).

1.3 How to consider a request for a development standard to be excluded from clause 4.6

If a planning proposal seeks to exclude a development standard from variation under clause 4.6 of the Standard Instrument LEP, it must identify:

- the proposed or existing development standards that it seeks to exclude from the operation of clause 4.6 of the Standard Instrument LEP
- the purpose of the exclusion, including any benefits to the public that arise as a direct result of the exclusion
- any consequential/adverse impacts if the development standard is not excluded.

The department recommends that the scoping proposal identifies any request for a development standard to be excluded from clause 4.6 and that this is discussed with us as part of the pre-lodgement stage (see section 1, stage 1 of the *Local Environmental Plan Making Guideline* dated August 2023)

The department will consider the request as part of the [Gateway determination](#), or when finalising a planning proposal if the exclusion arises after the Gateway stage. The planning proposal authority will consider if the exclusion is consistent with the ministerial direction and the criteria in this guide.

Case-by-case evaluation

We evaluate exclusions to clause 4.6 on a case-by-case basis. Consistency with this guide does not guarantee that a development standard will be excluded from variation under clause 4.6.

There may also be cases when a proposed exclusion is inconsistent with the criteria but is justifiable. In these situations, the planning proposal authority must get the approval of the Planning Secretary (or their delegate) for the proposed exclusion.

In both cases, the planning proposal authority must justify why a development standard should be excluded from variation.

2 Criteria for exclusions

A planning proposal may seek to exclude a development standard from variation under clause 4.6 of the Standard Instrument LEP if it is consistent with the criteria listed in this section.

Some of the types of development standards below have been historically excluded from variation under clause 4.6 in existing local environmental plans. It can be difficult to determine if some of these clauses are development standards or prohibitions because of the complex case law on this issue.

To avoid any doubt, these types of clauses may continue to be excluded from variation. This will preserve existing practice and ensure these requirements are not avoided through a variation.

2.1 Development standards relating to planning processes

2.1.1 Arrangements for designated state public infrastructure

These development standards relate to the arrangements for designated state public infrastructure, which means public facilities or services that are generally provided or financed by the State and includes:

- State and regional roads,
- bus interchanges and bus lanes,
- land required for regional open space, and
- land required for social infrastructure and facilities (such as land for schools, hospitals, emergency services and justice purposes)

Generally, these development standards require satisfactory arrangements to be made for the provision of designated State public infrastructure. This must be done before an urban release area is subdivided. These development standards aim to ensure that land within an urban release area can accommodate future development and the infrastructure needs arising from increased density.

Excluding these development standards from variation ensures that suitable infrastructure is provided. It also ensures that government authorities are not burdened by the cost of infrastructure associated with development and avoids the potential for cost-shifting.

2.1.2 Provision of public utility infrastructure and essential services

These development standards detail requirements for providing public utility infrastructure in urban release areas, or undeveloped rural areas, such as the:

- supply of water
- supply of electricity
- disposal and management of sewage.

These development standards require suitable arrangements for providing public utility infrastructure and essential services. This must be done before development consent is granted.

Excluding these development standards from variation ensures that suitable services are provided. It also ensures that government authorities are not burdened by the cost of infrastructure associated with development and avoids the potential for cost-shifting.

2.2 Exclusions relating to public benefit

2.2.1 Protection of public spaces and significant public view corridors

These development standards contain requirements that either restrict or limit the overshadowing of public spaces and/or protect significant public view corridors.

The standards are a safeguard against the cumulative impact of variations – ensuring that public spaces are protected from additional overshadowing or that public view corridors are not obstructed. They prevent the cumulative impact of small encroachments.

A proposal to exclude these development standards from variation under clause 4.6 of the Standard Instrument LEP (or an equivalent provision of any other environmental planning instrument) must meet the requirements under section 1.3 of this document. The proposal should also be:

- supported by detailed studies
- subject to community consultation
- linked to the protection of public spaces and/or significant public view corridors.

2.2.2 Site-specific and precinct-specific controls that provide public benefits

Site-specific and precinct-specific planning proposals may be informed by detailed analysis and community consultation. The proposals may be expressed in changes to zoning, building height, floor space ratio and other development standards. Generally, these controls should not be excluded from variation under clause 4.6 of the Standard Instrument LEP (or an equivalent provision of any other environmental planning instrument).

However, development standards that allow additional development potential above a baseline development standard to facilitate a public benefit (i.e. bonus/incentive provisions) may be acceptable to exclude from variation to ensure appropriate planning outcomes are achieved.

A proposal to exclude these development standards from clause 4.6 of the Standard Instrument LEP (or an equivalent provision of any other environmental planning instrument) must meet the requirements under section 1.3 of this document. The proposal should also be:

- supported by detailed studies recommending the approach
- subject to community consultation
- linked to the provision of a specific public benefit.

Examples include bonus height and floor space ratio controls that incentivise provision of the following, on the site subject to development:

- roads, cycleways, footpaths and through-site pedestrian links
- community facilities, libraries and health services facilities
- public open space
- affordable housing, social housing and a mix of dwelling types to provide housing choice for different demographics
- sustainable outcomes that exceed minimum BASIX (Building Sustainability Index) requirements
- lot amalgamation in particular zones.

2.2.3 Site-specific and precinct-specific controls to protect non-residential floor space

Development standards that maintain the amount of non-residential floor space in employment or mixed use zones may also be excluded from variation under clause 4.6 of the Standard Instrument LEP (or an equivalent provision of any other environmental planning instrument). This is to ensure land uses that generate employment (such as retail, business and commercial uses) are maintained in city centres.

2.3 Other exclusions

2.3.1 Clauses allowing exemptions from rural subdivision standards, or requiring minimum lot sizes in rural and regional areas

Development standards for minimum subdivision lot sizes should not be excluded from variation under clause 4.6 of the Standard Instrument LEP (or an equivalent provision of any other environmental planning instrument). The only exceptions to this are development standards in rural and/or conservation zones that:

- provide exceptions to minimum lot size controls for certain development types in rural and conservation zones, or
- provide exceptions to minimum lot size controls for specific subdivision types (for example, strata title, community title) in certain rural and conservation zones, or
- address subdivision across split zones.

These standards aim to give consent authorities flexibility when considering additional uses and different subdivision patterns in rural and regional areas. They also aim to protect the character of rural areas, minimise unplanned rural residential development and avoid land fragmentation and land use conflicts.

Subdivision of land

Clause 4.6(6) of the Standard Instrument LEP states that development consent must not be granted for a subdivision of land in zones:

- RU1 Primary Production
- RU2 Rural Landscape
- RU3 Forestry
- RU4 Primary Production Small Lots
- RU6 Transition
- R5 Large Lot Residential
- C2 Environmental Conservation
- C3 Environmental Management
- C4 Environmental Living

if the subdivision will result in:

- 2 or more lots of less than the minimum area specified for such lots by a development standard, or
- at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

2.3.2 Clauses relating to hazard or risk

Although these controls are not widely excluded from variation under clause 4.6 of the Standard Instrument LEP (or an equivalent provision within any other environmental planning instrument), they may become more prevalent as planning for hazard or risk evolves. These development standards relate to reducing hazard or risk from natural disasters, such as flooding, bushfires and landslides. These should be excluded from clause 4.6 as they address matters of risk to life and property.

2.4 Ongoing review of exclusions

From time to time, councils must decide if they should update their local environmental plans (in keeping with section 3.21(2) of the EP&A Act). When councils are deciding this, we encourage them to also consider if they should continue to exclude a development standard or remove the exclusion.

3 When not to support an exclusion

Part 2 of this guide outlines the types of development standards that may be excluded from variation under clause 4.6 of the Standard Instrument LEP (or an equivalent provision of any other environmental planning instrument). Generally, other types of development standards should not be considered or supported for inclusion in clause 4.6(8). The following examples – while not exhaustive – should not be considered as exclusions to clause 4.6.

3.1 Precedent based on existing exclusions

Since the introduction of the Standard Instrument LEP, exclusions to clause 4.6 have not been applied consistently. The fact that a particular type of development standard has been excluded before should not be used to justify excluding it in the future, unless that type of exclusion is listed in Part 2 of this guide. Existing exclusions should not be used as a precedent to justify future ones.

3.2 Baseline development standards

It should be possible to vary development standards imposed by the Standard Instrument LEP, including building height, floor space ratio and minimum lot size, under clause 4.6 of the Standard Instrument LEP (or an equivalent provision of any other environmental planning instrument). This ensures there is the right amount of flexibility on a case-by-case basis. Authorities should not use exclusions unreasonably, as that undermines the flexibility of clause 4.6 of the Standard Instrument LEP (or an equivalent provision of any other environmental planning instrument).

3.3 Clauses that are not development standards

Clause 4.6 of the Standard Instrument LEP (or an equivalent provision of any other environmental planning instrument) applies to a development standard – not to a prohibition.

Development standards are defined in the EP&A Act and are provisions of an EPI or the *Environmental Planning and Assessment Regulation 2021* that specify requirements or fix standards in respect of any aspect of carrying out development

A prohibition precludes the granting of development consent unless certain criteria have been met and cannot be varied.

Seek legal advice if there is any doubt about whether a clause is a development standard or a prohibition.

For further information, please contact the relevant Planning and Land Use Strategy team in the Department of Planning and Environment at information@planning.nsw.gov.au.