



Planning,
Industry &
Environment

Report on the follow-up audit of council use of clause 4.6 of the
Standard Instrument Local Environmental Plan

Follow-up of 2016 Audit Report

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Introduction

In 2008 the Independent Commission Against Corruption (ICAC) investigated corruption allegations related to Wollongong City Council. A recommendation of ICAC's investigation was that the Department of Planning commence monitoring the use of the Secretary of the Department of Planning and Environment's assumed concurrence for State Environmental Planning Policy 1 - Development Standards (SEPP 1) and clause 4.6. of the Standard Instrument - Principal Local Environmental Plan (SILEP) by councils in the determination of applications. Both SEPP 1 and clause 4.6 allow councils to consider and approve a proposal that does not comply with numerical development standards, in certain circumstances, without the need to seek the concurrence of the Secretary of the Department of Planning and Environment.

In 2008 a planning circular (*PS08-014 Reporting variations to development standards*) was published by the Department of Planning. The circular outlined the reporting and administrative requirements councils were to implement in relation to their use of the Secretary's assumed concurrence. The requirements related to reporting of decisions, providing readily accessible online information on council's use of the assumed concurrence power and the quarterly reporting of its use of the clause 4.6 variations to the Department of Planning. The measures increased transparency and accountability in making decisions involving the use of SEPP 1 or clause 4.6.

The Department of Planning, Industry and Environment has undertaken periodic audits of council records from across the state since 2008 to identify whether councils are complying with the reporting and administrative requirements outlined in the planning circular. The Secretary may withdraw the ability for a council to assume concurrence to determine applications with a variation in a development standard where that council is not meeting the reporting and administrative requirements set out in the planning circular.

In 2016 an audit of 12 councils from across NSW was completed with the final report being issued in November 2017. The report noted certain issues relating to reporting and procedural requirements in seven councils. Following the audit those councils were advised of the issues identified along with recommendations and actions to address the issues. The councils were also advised that a subsequent follow-up audit would be conducted to monitor progress with the implementation of the actions and to confirm if council is operating in accordance with the requirements of the planning circular.

This report provides the outcomes from the follow up audit of the ten councils in which issues were identified in the 2016 audit.

Background

Clause 4.6 of the Standard Instrument – Principal Local Environmental Plan provides for flexibility in the application of discretionary development standards by a determining authority (such as a council) when considering a development application. Clause 4.6 is a mandatory provision included in all Standard Instrument local environmental plans. The clause allows the determining authority to consider development proposals that do not meet a numerical value or standard associated with a development standard but that may provide a site-specific development solution that meets the intent of the objectives of a development standard and that may provide for the same or a better development outcome. The Secretary has delegated the ability for councils to determine applications requiring the use of clause 4.6 to councils when determining an application in respect of most types of development.

Clause 4.6 also permits an applicant to object to development standard(s) on the grounds that the standard(s) are unreasonable, unnecessary or would result in poor planning outcomes. When the consent authority is satisfied the objection under clause 4.6 is well founded it may, with the concurrence of the Secretary, grant consent to that development application notwithstanding the subject development standard.

Councils are required to undertake the following procedural and reporting requirements when development standards are being varied:

- proposed variations to development standards cannot be considered without a written application objecting to the development standard and dealing with the matters required to be addressed by the relevant instrument;
- a publicly available online register of all variations to development standards approved by the consent authority or its delegates is to be established and maintained. This register must include the development application number and description, the property address, the standard to be varied and the extent of the variation;
- a report of all variations approved (including under delegation) must be submitted to developmentstandards@planning.nsw.gov.au within 4 weeks of the end of each quarter (i.e. March, June, September and December) in the form provided by the Department; and
- a report of all variations approved under delegation from a council must be provided to a meeting of the council at least once each quarter.

The Department has been monitoring council quarterly clause 4.6 returns since June 2008. Councils were advised in an updated planning circular *PS18-003 Variations to development standards* that the Department would continue to undertake random audits on councils' use of the Secretary's assumed concurrence.

In 2016 the Department conducted an audit of twelve (12) NSW councils regarding the use of the Secretary's assumed concurrence to vary development standards through clause 4.6 Exceptions to Development Standards and State Environmental Planning Policy No.1 (SEPP1) – Development Standards. The twelve councils audited were:

- Central Coast
- Dungog Shire
- Eurobodalla Shire
- Georges River
- MidCoast Council
- Bathurst Regional
- Murray River
- Port Macquarie-Hastings
- Shellharbour City
- Sutherland Shire
- Tamworth Regional
- Blue Mountains City

Summary Findings - 2016 audit report

A report on the audit process issued in November 2017 noted several instances where councils had not met the reporting or other administrative requirements associated with the use of clause 4.6 and SEPP1. The issues identified included:

- variations of greater than 10% were not being determined by a full council;
- councils were not publishing a register detailing their use of clause 4.6 variations on council websites;
- councils were not submitting accurate quarterly reports to the Department for review and publishing on the Department's website;
- internal delegations register/policies had not been updated to reference the specific requirements of compliance with clause 4.6 by some councils;
- councils could not provide evidence of written applications being submitted by the proponent to support a request for a variation in all instances as required; and
- there was no evidence of consideration of matters required under clause 8 of SEPP 1 or clause 4.6(5) when using the Secretary's assumed concurrence.

Ten of the twelve audited councils did not meet the requirements of the Secretary's assumed concurrence under clause 4.6 of the Standard Instrument.

The audit report recommended that a follow up audit of those councils be completed in 2018 to monitor if measures to address the identified issues had been implemented. Bathurst Regional Council and Blue Mountain City Council did not require further action arising from the 2016 audit.

Process - 2016 Follow-up Audit

The ten councils subject to the follow-up audit were advised in writing on 24 August 2018 that an audit would be undertaken in September 2018 to confirm if the required actions identified in the 2016 audit have been implemented.

The following councils were subject to the follow-up audit:

- Central Coast
- Dungog Shire
- Eurobodalla Shire
- Georges River
- MidCoast Council
- Murray River
- Port Macquarie-Hastings
- Shellharbour City
- Sutherland Shire
- Tamworth Regional

Scope of audit and objectives

The objective of the follow-up audit is to determine if the ten councils in which issues were identified in the 2016 audit had implemented measures to address the recommendations of the 2016 audit. Only those issues identified in the 2016 audit were reviewed in the follow up audit.

Methodology

For the review of variation decisions, five development applications were selected from the period 1 December 2017 to 30 June 2018. This period is after councils were notified of the issues identified in the 2016 audit and covers two quarterly reporting periods, providing councils with reasonable time to review and implement measures where issues related to procedural and reporting matters had been identified.

The five decisions to be reviewed were selected on the basis of:

- an equal number of decisions (where possible) from each applicable quarter of the financial year; and
- every third development application listed on the relevant quarterly report was picked until the required number of decisions was selected. Auditors were able to identify development applications to be reviewed starting from either the top or the bottom of the quarterly report, or
- where five or fewer decisions were made for the year, all decisions were audited.

One of the matters raised with several councils audited in 2016 was that "the matters specified in clause 4.6(5) must be considered when assuming the Secretary's concurrence." It has since been determined that clause 4.6(5) is a matter for the Secretary and not a matter for councils to consider. Therefore, compliance with this recommendation was no longer a relevant matter to consider as part of the follow-up audits.

The follow-up audit was conducted by Department staff appointed by the Secretary under section 9.14 of the *Environmental Planning and Assessment Act 1979*.

As the follow-up audit was related to issues identified in the original audit, the methodology adopted and information reviewed for each council was tailored to address whether the recommendations made by the Department in the 2016 Audit had been implemented. In some cases, the issues related to the availability and publication of information and in those instances the follow-up audit was generally conducted as a desk top assessment. However, where issues had been identified across several reporting and procedural requirements, the review process covered a variety of actions including reviewing council's on-line development application register to confirm information is provided in a timely and efficient manner and requesting information be provided to the Department.

Results - 2016 Follow-up Audit

The results of the follow-up audit are summarised in Table 1 – Results: 2016 Follow-up Audit on the following pages.

In summary, the following results were identified through the follow-up audit process:

- Where the issue related to maintaining an online register of approved variations, five out of eight identified councils had addressed this issue at the time of the follow-up audit.
- Where the issue related to variations of more than 10% being considered by full council, two out of three identified councils had addressed this issue at the time of the follow-up audit.
- Of the two councils where the identified issue related to having appropriate and up to date internal processes in place, both councils had addressed this issue at the time of the follow-up audit.
- Where the issue related to submitting quarterly reports to the Department in a timely manner, three out of four councils identified had addressed this issue at the time of the follow-up audit.

Table 1 – Results: 2016 Follow up Audit

COUNCIL	2016 AUDIT ISSUE	2018 AUDIT RESULTS	2018 AUDIT FINDINGS	RECOMMENDED ACTION
Central Coast	Variations of greater than 10% are to be determined only by full council	During part of the audit period, variations of greater than 10% were not determined by full Council.	Although Central Coast Council staff approved variations of greater than 10% during the audit period, this practice changed following the issue of Planning Circular PS17-006 on 15 December 2017. Decisions on variations greater than 10% reviewed after December 2017 were correctly approved by full Council.	<ul style="list-style-type: none"> • Council should be advised in writing of the outcome of the follow up audit. • No further action is required in relation to the 2016 audit.
Dungog Shire	A register of clause 4.6 variations is to be made available on council's website	An online register of approved clause 4.6 variations to development standards is not publicly available.	Discussions with council staff indicate that resourcing and technical issues may have delayed development and implementation of the online register. Records indicate that Council has not approved a clause 4.6 variation since July 2016, which may also be a contributory factor in delaying implementation.	<ul style="list-style-type: none"> • Council should be advised in writing of the outcome of the follow up audit. • To ensure council complies with the reporting requirements associated with using clause 4.6 it is recommended that the Department's Hunter Region team work with council to resolve issues associated with development and implementation of an online register of approvals. • Council should be advised of a three-month timeframe to implement the online register, after which the Department will undertake a further audit.
Eurobodalla Shire	A register of clause 4.6 variations is to be made available on council's website	An online register of approved clause 4.6 variations to development standards is not publicly available.	Council staff advised in discussions during the follow-up audit that they understood an online register would be developed as part	<ul style="list-style-type: none"> • Council should be advised in writing of the outcome of the follow up audit.

			<p>of an update of council's computer and IT systems being delivered by an external consultant.</p> <p>However, council staff subsequently confirmed that this is not part of the scope of work for the current project and the delivery of an online register will need to be considered separately.</p>	<ul style="list-style-type: none"> To ensure council complies with the reporting requirements associated with using clause 4.6 it is recommended that the Department's Southern Region team work with council to resolve issues associated with development and implementation of an online register of approvals. Council be advised of a three-month timeframe to implement the online register, after which the Department will undertake a further audit.
Georges River	Quarterly reporting to the Department must be submitted in a timely manner	The four most recent quarterly reports were all submitted within 4 weeks.	Council has complied with the action identified in the 2016 audit.	<ul style="list-style-type: none"> Council should be advised in writing of the outcome of the follow up audit process, and of the requirement to keep its online register of approved clause 4.6 variations up to date in line with <i>Planning Circular PS 18-003 Variations to development standards</i>. Council should be advised of a three month timeframe to update the online register, after which the Department will undertake a further audit.
	Variations of greater than 10% are to be determined by full council	All audited variations of greater than 10% were determined by either the Georges River IHAP or the Georges River Local Planning Panel.	Council has complied with the action identified in the 2016 audit.	
	A register of clause 4.6 variations is to be made available on council's website	Council has established an online register of approved clause 4.6 variations. However, the register has not been kept up to date and at the time of the audit did not include the last two quarters.	Council has partially complied with the action identified in the 2016 audit.	
Mid Coast	A register of clause 4.6 variations is to be made available on council's website	An online register of approved clause 4.6 variations to development standards is not publicly available.	Council has not complied with the action identified in the 2016 audit.	

	Variations of greater than 10% are to be determined by full council	Between 1 December 2017 and 30 June 2018, one of the three development applications with variations greater than 10% was determined by a Planning Manager and not full council	Council has not complied with the action identified in the 2016 audit.	<ul style="list-style-type: none"> • Council should be advised in writing of the outcome of the follow up audit. • To ensure council complies with the reporting requirements associated with using clause 4.6 it is recommended that the Department's Hunter Region team work with council to resolve issues associated with development and implementation of an online register of approvals. • Council should be advised of a three month timeframe to implement the online register, after which the Department will undertake a further audit.
	A written request must be submitted by the proponent to support a variation under clause 4.6 / SEPP1	Between 1 December 2017 and 30 June 2018, the three development applications with variations greater than 10% included written requests	Council has complied with the action identified in the 2016 audit.	
Murray River	Quarterly reporting to the Department must be submitted in a timely manner	1 st to 3 rd quarter reports were submitted on time to the Department. However, the fourth quarter (June) report remained outstanding at the time of the audit.	During the fourth quarter there were no variation decisions made by Council. Some councils may not be aware that a "nil" return is required to be lodged in this circumstance as the circular requires "a report of all variations <i>approved</i> " to be submitted and does not detail the requirement where no variations are approved.	<ul style="list-style-type: none"> • Council should be advised in writing of the outcome of the follow up audit and that if no variations are approved during a quarter, a 'nil' return must be submitted to the Department.
	A register of clause 4.6 variations is to be made available on council's website	A register of approved variations to development standards is available on council's website.	Council has complied with the action identified in the 2016 audit.	
Port Macquarie-Hastings	Council's internal delegations are to be updated to reference clause 4.6	Internal delegations updated to reference clause 4.6	Council has complied with the action identified in the 2016 audit.	<ul style="list-style-type: none"> • Council should be advised in writing of the outcome of the follow up audit.

				<ul style="list-style-type: none"> No further action is required in relation to the 2016 audit.
Shellharbour City	Quarterly reporting to the Department must be submitted in a timely manner	Council has submitted its 2017/2018 reports in a timely manner. Council has implemented internal procedures to ensure that quarterly reports continue to be submitted in a timely manner.	Council has complied with the action identified in the 2016 audit.	<ul style="list-style-type: none"> Council should be advised in writing of the outcome of the follow up audit. No further action is required in relation to the 2016 audit.
	A register of clause 4.6 variations is to be made available on council's website	A register of variations to development standards is available on council's website.	Council has complied with the action identified in the 2016 audit.	
Sutherland	Quarterly reporting to the Department must be submitted in a timely manner	All quarterly reports were submitted within the required timeframe.	Council has complied with the action identified in the 2016 audit.	<ul style="list-style-type: none"> Council should be advised in writing of the outcome of the follow up audit. No further action is required in relation to the 2016 audit.
	A register of clause 4.6 variations is to be made available on council's website	A register of variations to development standards is available on council's website.	Council has complied with the action identified in the 2016 audit.	
Tamworth Regional	A register of clause 4.6 variations is to be made available on council's website	A register of variations to development standards is available on council's website.	Council has complied with the action identified in the 2016 audit.	<ul style="list-style-type: none"> Council should be advised in writing of the outcome of the follow up audit. No further action is required in relation to the 2016 audit.
	Variations of greater than 10% are to be determined only by full council	No applications during the audit period involved variations greater than 10%	Council has complied with the action identified in the 2016 audit.	
	Quarterly reporting is to be accurate when submitted to the Department	Accurate quarterly reporting has been submitted to the Department.	Council has complied with the action identified in the 2016 audit.	
	Council's internal delegations are to be updated to reference clause 4.6	Council's delegations have been updated to reference clause 4.6	Council has complied with the action identified in the 2016 audit.	

Conclusion and recommendation

Councils where no follow-up is required

For the following seven councils, no further follow up work is recommended:

- Port Macquarie-Hastings Council
- Shellharbour City Council
- Georges River Council
- Sutherland Council
- Tamworth Council
- Central Coast Council
- Murray River Council

Each council should be advised in writing of the outcomes of the audit process. In addition, Georges River Council should be advised to regularly update its online register and Murray River Council should be advised of the requirement for a 'nil' return.

Councils where further follow-up is required

The following councils have not adequately implemented the recommendations of the 2016 audit:

- **Eurobodalla Shire Council** has not established an online register.
- **Mid Coast Council** has not established an online register and at least one decision involving a variation of over 10% was made by staff and not the Council as is required in PS18-003.
- **Dungog Council** has not established an online register although it is noted that Council has not approved any variation requests in the period from the 2016 audit to the follow up audit in 2018.

Recommendation

It is recommended that the Department write letters to those councils that have not fully implemented the actions arising from the 2016 audit, reminding them of the outstanding issues and setting a three-month timeframe in which to address the remaining matters.