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Port Stephens Council

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Objection to draft policy on Exceptions to Development Standards (file no PSC2007-1204V3)

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Introduction

TRRA Inc. submits that this policy in its current form is not 'fit for purpose' and should be withdrawn, completely revised, and re-exhibited. If adopted in its current form, it would signal to applicants for Development Approval an almost complete surrender by Council of any intention to enforce compliance with development standards anywhere in Port Stephens.

While this policy has emerged from a community debate about building heights and densities in Nelson Bay, it is important to recognise that the policy would

apply *throughout Port Stephens and to all development standards* – not just height and floor space ratios, but also to a wide range of other LEP principal standards such as minimum subdivision and lot sizes, restrictions on dwelling houses in rural and environmental zones, and perhaps also to standards in Regulations such as building codes, and to detailed requirements in the Development Control Plan (DCP) including setback and overshadowing controls, limits on tree clearance and minimum parking provision.

The precise application of the policy to both LEP and non-LEP development standards needs to be clarified in the policy.

Failure to properly advertise the draft policy

The draft policy was initially placed on public exhibition only as part of the review of the Nelson Bay Town and Foreshore Strategy, despite the fact that the policy will have broad application across Port Stephens. It was not possible for interested parties to find the document independently of the Nelson Bay Strategy. When this was pointed out to Council, a separate link was put on the website under 'What's on exhibition' but there was no new public notice or advertised in the Examiner until the 29th March, only one week prior to submissions closing.

We submit that on procedural grounds alone the policy must be properly re-advertised.

Legal context

In the NSW planning system, Council Local Environmental Plans (LEPs) are required to include a standard clause 'Exceptions to development standards (clause 4.6[1]). It is open to Councils to add additional sub-clauses elaborating on their approach to 'Exceptions'[2]. Port Stephens Council chose to include only the minimum 8 standard sub-clauses in its LEP 2013[3], and until now has had no formal written policy on the application of the clause.

The then NSW Department of Planning & Infrastructure issued guidance on the use of Clause 4.6 in 2011: ***Varying development standards: A Guide, August 2011. (****The* ***Guide).*** Point 3 in the draft Policy Statement refers to this *Guide* as the basis for assessment of variation applications.

[1] We are aware that the Environmental Planning and Assessment Act (EPA Act) has recently been amended and has been re-numbered. We have not been able to ascertain if the re-numbering carries over to the standard LEP clauses. In this Objection we have therefore used the terminology and numbering in place until recently, and rely on Council to interpret the application of our submissions to any new terminology or references.

[2] 'Direction: Additional exclusions may be added' – Standard Instrument Clause 4.6 at Appendix 1 of the *Guide*

[3] with only one small addition to sub-clause 8

The *Guide* clearly states :

> 'The planning system provides flexibility to allow these objectives to still be met by varying development standards ***in exceptional cases*** ' (***our emphasis***). (p2)

The Guide also makes the point that Councils are:

> 'required to take into consideration … the public benefit of maintaining the planning controls adopted by the environmental planning instrument' (p2)

It is clear that the State Government intends that clause 4.6 should be used judiciously and that there should be a clear presumption in favour of maintaining development standards.

The Guide makes reference to the 'five part test' established by the NSW Land and Environment Courts in relation to the use of Clause 4.6 (*Guide*, p6). Four of the five 'tests' generally support a narrow use of the Clause. The other test (part 4) allows applicants to argue that:

> 'the development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard'.

Unfortunately, recent consents by Port Stephens Council for major height variations in Nelson Bay could provide future applicants with a strong case, and several recent and pending DAs have made exactly that argument.

However, TRRA submits that it is not too late to repair this damage by adopting a much stricter policy for application of Clause 4.6 in future. This would allow it to argue, in any appeal against refusal, that Council had, after and in response to community consultation, drawn a line under past decisions and now intends to more strictly enforce compliance with development standards. A stricter policy would provide Council with a defence against claims based on part 4 of the five-part test, as well as a sounder basis for refusing other significant variations which did not meet the other 4 tests (see below under the 'Repeated variations…' heading).

In November 2017, the Department of Planning and Environment published a *Report on the audit of council use of State Environmental Planning Policy No.1 – Development Standards and clause 4.6 of the Standard Instrument Local Environmental Plan*.

Twelve Councils across the state were audited, the results can be found at: http://www.planning.nsw.gov.au/Plans-for-your-area/Local-Planning-and-Zoning/~/media/2A85D0336A99403A9F8E0B3B0A100251.ashx

From the results it is clear that most Councils are only using Clause 4.6 for height and density variations of less than 10%, with a number of around 20 to 30%, the highest being 50%.

Clearly the approval by Port Stephens Council of DA 2016-631 (11-13 Church St, Nelson Bay) of an apartment building with a height variation of over 100% is totally out of kilter with the rest of the State. In contrast, the current DA 2018-147, ironically from the same developer, is a good example of an appropriate use of clause 4.6, where a persuasive case is made for a modest 9% height variation.

Following the audit the Department issued a Planning Circular PS 17-006, with a number of instructions. The draft Policy only references earlier Circulars which have been replaced by 17-006. We refer below to the instructions in this Circular, where applicable.

Other context – financial windfalls resulting from variation approvals

This policy also needs to be seen in the context that approval of any variation from a development standard represents a free gift of monetary value to landowners and/or developers. In the market for land and property, prices adjust to reflect the constraints imposed by development standards embodied in Local Environmental Plans (LEPs), Development Control Plans (DCPs) and other rules such as building standards.

To the extent that local Councils, as consent authorities, approve variations to those development standards in their LEPs and DCPs, this gives the applicant a 'windfall' gain (applications for tougher standards leading to a loss of value are unlikely!). We draw attention to a 2017 Sydney Morning Herald report on exactly this issue in the Canterbury area of Sydney.[4]

Given this context, it is reasonable for ratepayers to expect that their local Council should be very circumspect in approving variations, and in relation to significant variations, only doing so in *rare circumstances* where strong arguments can be made. Consistent with the State government guidance, such arguments may be based on 'impracticability'; on the need to 'trade off' competing objectives or on overall public interest. TRRA accepts that it will sometimes be appropriate to grant variation applications based on these criteria.

[4] See https://www.smh.com.au/national/nsw/a-local-council-a-developer-and-an-empty-block-of-land-worth-50m-20170123-gtx2ji.html

Comment on text of the draft policy

Objectives

In 'context and background' Council has paraphrased the objective as:

> 'Clause 4.6 aims to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for and from development in [paticular] circumstances.'

Leaving aside the spelling error, this appears to be a deliberate departure from the text of the State government Guide which refers to '**exceptional**' circumstances (*Guide*, page 1).

The Policy Statement appears to set only limited objectives:

> 'This policy aims to create opportunities for greater transparency and community participation when decisions are made to vary development standards and to achieve better decision making through robust assessments.'

While transparency and participation are commendable objectives, they are surely secondary to the main purpose of an Exceptions policy which should be to set out clearly Council's criteria for assessing applications for variations from development standards.

Those criteria should be designed to ensure that, in line with the law and State government policy, variations are only approved in exceptional circumstances, where:

> 'compliance with [that] development standard is unreasonable or unnecessary in the circumstances of the case' (*Guide*, page 2) or
>
> 'where 'strict compliance would hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act'. (*Guide*, Appendix 2)

Selective content

The Policy Statement largely just re-states elements of Clause 4.6, but selectively, in that it omits the various exclusions in sub-clauses (6) and (8). If the Policy is to re-state or summarise Clause 4.6 it should reflect all sub-clauses.

Notification and advertising of variation applications

Point 2 in the Policy Statement states that:

> 'Council will exhibit the Clause 4.6 Variation Form accompanying a Development Application when advertising or notifying an Application'.

However, the value of this provision will depend on its interaction with the provisions in the Port Stephens DCP that set out when DAs will be notified and/or advertised. (Part A12). Many DAs are not notified to neighbours and even fewer are publicly advertised.

While it may not be proportionate to require *all* DAs which include a Clause 4.6 variation application to be advertised, we submit that the policy should set some clear thresholds. Particularly in relation to applications for variations from building height or density standards, we submit that most such applications should trigger notification and advertising, even where that would not otherwise be required under Part A12 of the DCP.

Peer review and full Council consideration

Following the Department of Planning audit in 2017, the Department issued a Planning Circular PS 17-006, which includes the following instruction:

> 'Councils are notified that only a full council can assume the Secretary's concurrence where the variation to a numerical standard is greater than 10%, or the variation is to a non-numerical standard. The determination of such applications cannot be made by individual council officers unless the Secretary has agreed to vary this requirement for a specific council. In all other circumstances, individual council officers may assume the Secretary's concurrence.'

As it stands, Point 4 in the draft policy allows for a variation of 10% without any form of review even within the planning section – this would have the effect for example of a 10 storey height limit as proposed for Nelson Bay becoming in effect a 11 storey limit without even any peer review.

We submit that the policy should require that proposed approval of any Clause 4.6 variation should be peer reviewed. It should also set criteria for referral of significant variations, with all applications for greater than 10% variation of numerical standards (which should be rare) to be presented to full Council, in line with the guidance in Circular PS 17-006.

Repeated variation applications should trigger a review of the development standards

The Guide states:

> 'Councils should consider whether the cumulative effect of similar approvals will undermine the objective of the development standard or the planning objectives for the zone. If the council considers that the decision should be made not to approve others like it [missing text?].
>
> 'If the development standard is clearly inappropriate in general terms, the council should review its planning controls by means of a local environmental plan. The new Standard Instrument LEPs which are being prepared by councils should include a review of any development standards that are the subject of frequent [variation] applications.' (p9)

Point 6 in the draft policy goes some way towards this. However, we submit that rather than the permissive and even encouraging approach to variation applications taken in the draft policy, Council should adopt a strict policy that also advises applicants seeking major variations to submit planning proposals for changes to the relevant development standards, such as for re-zoning or changes to height limits. These proposals would then be subject to the Gateway process and involve a guaranteed high level of transparency and public consultation.

We draw Council's attention to a 2016 Land and Environment Court judgement, as reported by the Sydney Morning Herald:

> 'In December 2016, the NSW Land and Environment Court Judge Susan O'Neill delivered a stern verdict on the generous application of clause 4.6 to subvert height restrictions, throwing out a bid by Kolpos Pty Ltd to add an extra two floors to his two, six-storey apartment blocks between 418-426 Canterbury Road. "If it is council's intention to increase the height of buildings along the Canterbury Road corridor, then the proper mechanism for doing so is a planning proposal," Judge O'Neill said."'[5]

We note that this damning judgement related to an application for only a 30% height variation – Port Stephens Council has already approved height variations of more than 50% and in the recent case of the Ascent Apartments at 11-13 Church St, Nelson Bay, of more than 100%.

[5] SMH 2 February 2017 - https://www.smh.com.au/national/nsw/a-local-council-a-developer-and-an-empty-block-of-land-worth-50m-20170123-gtx2ji.html

Reporting

Point 5 in the draft policy loosely implements the advice in the Guide and instruction in Planning Circular 17-006 about reporting (p1), but should expressly commit to the online reporting and regular reporting to Council required by the Circular. We note that the Council's Register of Registers lists as available a register of approved variations to the public but we cannot find any online link.

Conclusion

On the multiple grounds set out above, the current draft policy is manifestly not 'fit for purpose' and must be withdrawn, revised and re-exhibited to reflect both the intent of the legislation and State government guidance, and the clear desire of the Port Stephens community to have Council strictly enforce development standards, with a very high bar for approval of significant variations.

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