Application of clause 4.6 of the Standard Instrument – An Analysis of Recent Case Law

Introduction

The Standard Instrument (Local Environmental Plans) Order 2006 was introduced in 2006 so as to create a common format and content for local environmental plans in NSW. All 152 Local Government authorities in NSW have now adopted local environmental plans based on the Standard Instrument.¹

Clause 4.6 of the Standard Instrument allows a consent authority to grant consent to a proposed development “even though the development would contravene a development standard”. In circumstances where it applies, clause 4.6 replaces the power previously found in State Environmental Planning Policy No. 1 – Development Standards.

We are now starting to see cases come before the Land and Environment Court challenging the application of clause 4.6. This short article reviews three of those cases, with a view to establishing the threshold is for a well-founded clause 4.6 variation request.

Summary of Clause 4.6 of the Standard Instrument

Clause 4.6 of the Standard Instrument enables development consent to be granted to a development even though the development would contravene a development standard. The consent may only be granted if:

- the applicant has prepared a written request demonstrating that (clause 4.6(3)):
  
  - compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
  
  - there are sufficient environmental planning grounds to justify contravening the development standard; and

- the consent authority is satisfied that (clause 4.6(4)):

¹ www.planning.nsw.gov.au/plans-for-your-area
• the applicant’s written request has adequately addressed the matters required to be demonstrated by clause 4.6(3), and

• the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

The following three decisions of the Land and Environment Court focus on the degree to which a consent authority may be satisfied about the matters in clause 4.6. Two (Four2Five and Micaul) are appeals against development consents granted by two separate Commissioners of the Court in merit appeals. The third (Moskovich) is a decision of a Commissioner of the Court in a merit appeal.

**Four2Five Pty Ltd v Ashfield Council** [2015] NSWLEC 9

*Four2Five* is a decision of Justice Pain in an appeal against a decision of Commissioner Pearson to refuse a request under clause 4.6 of the *Ashfield LEP 2013* to vary a development standard relating to the height of a building.

In the original decision Commissioner Pearson refused the request to vary the standard, principally on the basis that:

• the claimed additional housing and employment opportunities arising from the proposal were not sufficient environmental planning grounds as required by clause 4.6(3)(b) of LEP 2013 because they were *not particular to the site*;

• the obligation on the applicant to demonstrate that compliance with the standard was unreasonable or unnecessary had to be fulfilled *separately* to the obligation to demonstrate that the proposed was consistency with the objectives of the standard, which Four2Five failed to do.

Four2Five appealed the Commissioner’s decision, essentially arguing that the Commissioner set the bar for a well-founded variation request too high.

The Court dismissed Four2Five’s appeal and endorsed the Commissioner’s approach to clause 4.6 of Ashfield LEP 2013. On the first ground of appeal the Court held that the Commissioner had a broad discretion under clause 4.6(4)(a)(i) and that there was *no specific limitation on that discretion*. The Commissioner was entitled to require the variation request to identify circumstances particular to the site.

On the second ground of appeal, the Court held that Commissioner was correct in requiring the variation request to demonstrate consistency with the objectives of the standard in *addition to* consistency with the objectives of the standard and zone.

Arguably the decision in *Four2Five* sets a high threshold for a successful clause 4.6 variation, a threshold which is higher than the former SEPP 1. However on closer analysis, the finding that there is no specific limitation on the consent authority’s discretion under clause 4.6(4) suggests that the threshold may vary from case to case, depending on the views of the consent authority. Commissioner Pearson chose to set a high bar in *Four2Five*. 
**Moskovich v Waverley Council [2016] NSWLEC 1015**

*Moskovich v Waverley Council* concerned an application to demolish two existing residential flat buildings and construct a single residential flat building on a site within zone R3 Medium Density Residential under *Waverley LEP 2012*. The application sought to vary the floor space ratio (“FSR”) applying to the site.

Moskovich submitted that compliance with the FSR standard was unreasonable and unnecessary because the design achieved the objectives of the standard and the R3 zone, in a way that addressed the particular circumstances of the site, and resulted in a better streetscape and internal and external amenity outcome than a complying development.

Moskovich further submitted that there were “sufficient environmental planning grounds” to justify the contravention because the proposal would replace two aging poorly designed residential flat buildings with a high quality RFB with exceptional internal and external amenity outcomes.

The Court approved the application and in doing so agreed with Moskovich’s justification for the FSR variation. Consistent with the decision in *Four2Five* the Court agreed that the public interest test (in cl 4.6(4)(a)(ii)) is different to the “unreasonable or unnecessary in the circumstances of the case” test (in cl 4.6(3)(a)). The Court said that “the latter, being more onerous, would require additional considerations such as the matters outlined by Preston CJ in *Wehbe* at [70-76]”. The Court found that additional reasons applied in this case.

In *Moskovich* the Court adopted the high threshold endorsed by the Court in *Four2Five* and found that Moskovich’s variation request met that standard.

**Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7**

*Micaul* is a decision of the Chief Judge of the Land and Environment Court in an appeal against a decision of Commissioner Morris to uphold a request under clause 4.6 of the *Randwick LEP 2012* to vary development standards relating to the height and FSR of a building.

The Council claimed that the Commissioner failed to be satisfied about the requirements in clause 4.6(4), or alternatively failed to give adequate reasons. The Council also claimed that the Commissioner failed to consider a requirement of a Development Control Plan. Essentially the Council argued that the Commissioner set the bar too low for the clause 4.6 variation request.

The Court dismissed the appeal and in doing so endorsed the Commissioner’s approach to clause 4.6. The Court held that the Commissioner had set out the correct tests under clause 4.6 and expressly stated in the judgement that she was satisfied the proposal satisfied those tests. The degree of satisfaction required under clause 4.6(4) was a matter for the Commissioner.

The Chief Judge observed in his judgement at [39] that clause 4.6(4) of the Standard Instrument **does not** require the consent authority to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant’s written request has adequately addressed those matters. This lessens the force of the Court’s earlier judgement in *Four2Five* that a variation request
must demonstrate consistency with the objectives of the standard in addition to consistency with the objectives of the standard and zone.

The decision in Micaul is an example of discretion at work. The principal circumstances that Commissioner Morris found to justify the variation to height and FSR was the location of the site at the low point of the locality, its proximity to larger RFBs that would not comply with the building height development standard and its flood affectation. Presumably this was not the only site in the locality having those characteristics, and yet the Commissioner was satisfied that the variation was justified.

This is by no means a criticism of the Commissioner’s reasons, but an example of how the satisfaction threshold may vary from decision maker to decision maker.

**Conclusion**

The principles that emerge from the decisions in Four2Five, Moskovich and Micaul can be summarised as follows:

a) clause 4.6 is different to SEPP 1 and the principles established in relation to SEPP 1 do not apply precisely to clause 4.6;

b) the consent authority has a broad discretion under clause 4.6(4) as to the degree of satisfaction required by that clause; the threshold may be as high as requiring the reasons for the variation to be particular to the development site, or as broad as circumstances that might apply to a number of sites;

c) the consent authority will not exceed its power under clause 4.6 if it identifies the matters in clause 4.6 about which the consent authority must be satisfied, undertakes an analysis of those matters as they apply to the application and concludes (giving reasons) that the application satisfies those matters; and

d) the task of demonstrating invalidity of a decision under clause 4.6 of the Standard Instrument is an onerous one.

This article is not intended to be legal advice. For further information about this case note or any planning law advice or representation in the Land and Environment Court, please contact Planning Law Solutions.

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