



WHAT ARE DEVELOPMENT STANDARDS?

The term 'development standards' is defined in the *Environmental Planning and Assessment Act 1979* (The Act). 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.

WHAT IS THE PURPOSE OF DEVELOPMENT STANDARDS?

Development standards are a means of achieving an environmental planning objective. Some developments may achieve environmental 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.

The Environmental Planning and Assessment Regulation 2021 requires a development application (DA) for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant demonstrates that:

- a. compliance with the development standard is unreasonable or unnecessary in the circumstances, and
- b. there are sufficient environmental planning grounds to justify the contravention of the development standard.

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.

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. objectives of the development standard are achieved notwithstanding the non-compliance
2. underlying objective or purpose is not relevant to the development
3. underlying objective or purpose would be defeated or thwarted if compliance was required
4. development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard
5. zoning of the land on which the development is proposed was unreasonable or inappropriate.

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 Act, including the objects in Section 1.3.

Sufficient environmental planning grounds need to be established by the facts of the request. The request must justify the contravention of the development standard, not simply promote the benefits of the development. The grounds must:

- be sufficient to justify the contravention
- focus on the aspect of the development that contravenes the development standard, not the development as a whole.

Examples of environmental planning grounds include:

- dealing with the unique circumstances of the site such as historical excavation of basements or swimming pools
- achieving consistency with the streetscape and existing built form
- responding to flood planning levels
- responding to topography
- improving public benefit
- achieving equal or better amenity outcomes (solar access, privacy, views/outlook)
- being consistent with the prevailing subdivision pattern
- conserving built and cultural heritage values
- protecting or avoiding impacts to an area of environmental or biodiversity value

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

WHERE A DEVELOPMENT STANDARD CANNOT BE VARIED

Clause 4.6 does not apply to the following:

- a development standard for complying development under *State Environmental Planning Policy (Exempt and Complying Development) 2008*
- a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004* or *State Environmental Planning Policy (Sustainable Buildings) 2022* applies or for the land on which such a building is situated
- a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition,

Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

- a. the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
 - b. the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.
- Clause 2.8 Temporary use of land under the LEP 2014
 - Clause 5.4 Controls relating to miscellaneous permissible uses under the LEP 2014
 - Clause 5.5 Controls relating to secondary dwellings on land in a rural zone
 - Clause 6.2 Public utility infrastructure.

MAKING AN APPLICATION TO VARY A DEVELOPMENT STANDARD

Any request to vary a development standard must be accompanied by a document (the written request) that sets out the grounds on which an applicant seeks to demonstrate that:

- compliance with the development standard is unreasonable or unnecessary in the circumstances
- there are sufficient environmental planning grounds to justify the contravention of the development standard.

The written request is a standalone document lodged with the DA. It can also be an appendix to a statement of environmental effects.

The written request should:

- identify the development standard that the applicant is seeking to vary
- identify aspects of the proposed development that contravene the development standard (including where there is more than one aspect of a development that contravenes the development standard), including:
 - where these aspects occur or are located within the site
 - the extent of variation associated with each
- include an assessment of the proposed variation against the relevant tests in clause 4.6(3)(a) and (b).



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, Housing and Infrastructure (DPHI) to assess and determine 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.

Further information on variations to development standards is contained in the [Variations Review](#) page on the NSW DPHI 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 **02 4921 0333**.

NEED HELP?

If you have any questions, please contact Council's Duty Planner on **02 4921 0333** or email council@lakemac.nsw.gov.au with "Variation to development standards" in the subject line.

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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