Is the need for a neutral or better outcome a requirement for success with respect to clause 4.6?

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In a recent decision in the Land and Environment Court, the Court has given further clarification to the type of consideration that needs to be given to clause 4.6 of a standard instrument LEP.

The significant decision was given in the case *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 where Preston CJ clarified the appropriate approach to the consideration of clause 4.6. The importance of this judgement is that the clause 4.6 submission **does not** require that developments that do not comply with the applicable development standard to have a **neutral** or **better** environmental planning outcome than a development that does not.

By way of background – a "Clause 4.6" is a standard instrument in a LEP that permits a consent authority to grant development consent for a development that would contravene a development standard where the consent authority is satisfied of the following two standards;

1. A written request from the applicant adequately demonstrating that the compliance with the development standard is unreasonable or unnecessary and that there is sufficient environmental planning grounds to justify the contravention
2. The proposed development will be in the public interest because it is consistent with the objectives of the development standard and the objectives for the development within the relevant zone

In this case, the Applicant filed a development application for consent for a residential flat building that did not comply with the relevant development standard for height under the *Woollahra Local Environmental Plan 2014* (**WLEP**).

Originally, the applicant filed a written request under clause 4.6 of the WLEP seeking to justify the need for development to exceed the limits of the WLEP. In the first instance, Commissioner Smithson heard the appeal and found that the contravention of the WLEP was not justified therefore the written application was refused.

Upon appeal to Preston CJ of the LEC, His Honor found that the Commissioner had incorrectly applied the test in both clause 4.6(4)(a)(i) and clause 4.6 (4)(a)(ii).

1. Clause 4.6(4)(a)(i) – With respect to this clause, the Commissioner erred in that she *directly* determined the matters referred in the clause 4.6 submission. Namely, that she *herself* considered that the applicant's contravention of the WLEP was unreasonable, rather than determining whether the applicant's written submission had adequately addressed the matters in question. Secondly, the Commissioner erred in that she deemed that in order that compliance with WLEP to be considered unreasonable or unnecessary the contravention of the standard needed to have a neutral or beneficial

effect relative to a development that complied with the standard.

2. Clause 4.6(4)(a)(ii) – With respect to this clause, the Commissioner erred in taking into account the *public interest* when determining whether or not the written submission adequately justified the lack of compliance with the WLEP.

This decision demonstrates the importance of a proper analysis of the reasons behind a clause 4.6 written request, as well as ensuring (from the applicants view) that the request is 'adequate' in the way it addresses the relevant contravention of the development standard. Furthermore, it rejects the notion that a clause 4.6 submission does not necessarily need to result in a neutral or better outcome than a development that would comply with the standard in question.