

State Environmental Planning Policy No 1 - Development Standards (SEPP 1) and Clause 4.6 of the Standard Instrument LEP

A briefing session presented by Dr Ian Ellis-Jones¹

Introduction and overview

State Environmental Planning Policy No. 1 -- Development Standards ('SEPP 1'), which now only applies in areas which have not adopted standard instrument LEPs, has the stated aim of providing flexibility in the application of the planning controls operating by virtue of development standards where strict compliance with those standards would, in any particular case, be '*unreasonable or unnecessary*' or tend to hinder the attainment of the objects specified in s.5(a)(i) and (ii) of the *Environmental Planning and Assessment Act 1979* (NSW) (the 'EPA Act') (clause 3).

SEPP 1 prevails over any inconsistency between it and any other environmental planning instrument, whenever made (clause 5).

Clause 6 of SEPP 1 provides that where a development could, but for any development standard be carried out, the person intending to carry out that development may make a development application in respect of that development, supported by a written objection that compliance with that development standard 'is unreasonable or unnecessary in the circumstances of the case and specifying the grounds of that objection'.

Where the consent authority is satisfied---note: that means 'reasonably satisfied' in law---that the objection is well founded and is also of the opinion that granting of

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consent to that development application is consistent with the aims of the Policy, as set out in clause 3, it may (with the concurrence of the Director) grant consent to that development application notwithstanding the development standard the subject of the objection referred to in clause 6 (clause 7). The reference to the concurrence of the Director does not deprive the NSW Land and Environment Court of jurisdiction since s.39(6) of the *Land and Environment Court Act 1979* (NSW) enables the Court in an appeal to determine the appeal notwithstanding the absence of such concurrence.

The onus is on the applicant for consent to show that compliance with one or more specified development standards would be ‘unreasonable or unnecessary’ in the particular circumstances of the case.²

One way---the ‘most commonly invoked way’³---of demonstrating that compliance with a provision is unnecessary is to show that the underlying object or purpose of the provision would still be satisfied by the carrying out of the proposed activity.⁴

However, although other approaches are available [see below], it is not sufficient for the applicant merely to show that compliance with the provision would cause hardship or inconvenience.⁵

Clause 4.6 of the Standard Instrument Local Environmental Plan (‘SILEP’) contains a similar, but not identical, mechanism to that contained in SEPP 1. The clause makes provision for the making of a ‘written request’ (cf ‘written objection’, cl. 6, SEPP 1) from the applicant that seeks to justify the contravention of one or more specified development standards by demonstrating:

² See *Gergely & Pinter v Woollahra MC* (1984) 52 LGRA 440.

³ *Wehbe v Pittwater CI* [2007] NSWLEC 827 per Preston CJ at [42].

⁴ See *SCMP Properties Pty Ltd v North Sydney MC* (1983) 130 LGERA 351 at 379.

⁵ See *Ansell International v Fairfield CC* (1985) 15 APA 69; *Davidson v Nambucca SC* (1976) 3 LGATR 404.

- (a) that compliance with the development standard(s) is unreasonable or unnecessary in the circumstances of the case, and
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard(s) (see cl. 4.6(3)).

In order for Council to have power (jurisdiction) to grant development consent to an applicant's proposed development where an objection under SEPP 1 or written request under cl. 4.6 of SILEP is required, Council must *validly* uphold the SEPP 1 objection or written request under cl. 4.6 of SILEP, as the case may be, to compliance with the specified development standard(s). Indeed, upholding the SEPP 1 objection is an essential precondition which must be satisfied before the proposed development can be approved on a consideration of the merits.⁶

What is a 'development standard'?

The provision must be a 'development standard' (see definition of 'development standards' in s 4(1) of the EPA Act) before the dispensational power conferred by the policy is available.⁷

The expression 'development standards' is defined in section 4(1) of the EPA Act as follows:

'development standards' means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

⁶ See *Winten Property Group Ltd v North Sydney Council* [2001] NSWLEC 46; (2001) 130 LGERA 79 at 87-88 [19], 90 [29], 92 [44]-93 [45]; *Wehbe v Pittwater CI* [2007] NSWLEC 827 at [36].

⁷ See, eg, *Woollahra MC v Carr* (1985) 62 LGRA 263; *Quinn O'Hanlon Architects Pty Ltd v Leichhardt MC* (1989) 68 LGRA 114; *North Sydney MC v P D Mayoh Pty Ltd (No. 2)* (1990) 71 LGRA 222.

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
- (b) the proportion or percentage of the area of a site which a building or work may occupy,
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,
- (d) the cubic content or floor space of a building,
- (e) the intensity or density of the use of any land, building or work,
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,
- (h) the volume, nature and type of traffic generated by the development,
- (i) road patterns,
- (j) drainage,
- (k) the carrying out of earthworks,
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,
- (m) the provision of services, facilities and amenities demanded by development,
- (n) the emission of pollution and means for its prevention or control or mitigation, and
- (o) such other matters as may be prescribed.

The key elements of a development standard are as follows;

1. It must be a *provision of an EPI⁸ or the regulations* made under the EPA Act (thus excluding, among other things, a DCP).
2. The provision must be one 'in relation to' the carrying out of *development*.
3. The provision must be one by or under which one or more *requirements* are specified, or one or more *standards* are fixed, in respect of any *aspect* of that development.

⁸ A development control plan (DCP) is not an EPI. However, by virtue of s.79C(3A)(b) of the EPA Act, if a DCP contains provisions that relate to the development that is the subject of a development application (DA), and those provisions set 'standards' with respect to an aspect of the development and the DA does not comply with those standards, the consent authority is to be flexible in applying those provisions and must allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development. (Note. The expression 'standards' is defined in s.79C(3A) to include performance criteria.) See, eg, *Catalina Island Pty Limited v Pittwater CI* [2014] NSWLEC 1125 in which the Court concluded that it was not possible for the objectives of the DCP to be met by the plans brought forward by the applicant, nor on any possible alternatives brought before the Court during submissions. Therefore, the appeal was dismissed and the DA refused.

4. The aspects of the development include, but are not limited to, requirements or standards in respect of any one or more of the various matters specified in paragraphs (a) to (o) of the definition of 'development standards' in s.4(1).

As Clarke JA pointed out in *North Sydney MC v P D Mayoh (No. 2)*, supra at 236:

'There is ... a great difference between a clause which prohibits the carrying out of a particular development on identified land and one fixing requirements to be complied with in carrying out that development.'

Thus, if a provision of a regulation or local policy purports to prohibit the carrying out of a certain activity (for which an approval is required) otherwise than by way of a requirement specified or standard fixed in respect of some aspect of the activity which, *ex hypothesi*, must be 'external' to that aspect of the development, then, arguably, no question of compliance or non-compliance arises.⁹ For example, it is not easy to construe a provision preventing the council from granting consent unless it is 'satisfied' as to the existence of certain 'intrinsic' (ie non-external) matters as one that is concerned with 'the details' of the activity proposed to be carried out or the 'standards' to be observed in the carrying out of it.¹⁰

In *Franklins Limited v Penrith CC* [1999] NSWCA 134 the NSW Court of Appeal had to consider cl 32(2) of *Penrith Local Environmental Plan No 231* which permitted a person, with the consent of the council, to carry out development for the purposes of a wholesale and retail warehouse on land to which the clause applied 'but only if' the council was 'satisfied' that not less than 60 percent of the goods sold from the land would be resold by retail after being removed from the land. At [23] Stein JA (Powell and Giles JJA agreeing) noted that the above mentioned provision had the effect that the subject development was prohibited unless the council formed the opinion required by the subclause. At [28] his Honour stated:

⁹ See *Woollahra MC v Carr* (1985) 62 LGRA 263.

¹⁰ See *North Sydney MC v P D Mayoh (No. 2)* (1990) 71 LGRA 222.

‘... What is here involved is a question of power. If the pre-condition in cl 32(2) was not satisfied, then Council had no power to grant consent. The existence of the mental state of satisfaction is an ‘essential condition’ or preliminary to the exercise of the power, *Craig v South Australia* (1995) 184 CLR 163 at 179 and *Timbarra Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8 per Spigelman CJ at paras 42 and 94. Accordingly, the Land and Environment Court and this court on appeal can review whether the Council held the requisite satisfaction. ...’

Nevertheless, the legal position can vary where there is available, either in the enabling statute or in some other statute or statutory instrument, a statutory facility that would operate to alleviate or obviate the need for strict compliance with what might otherwise involve a jurisdictional fact situation.¹¹ In the *Franklins* case the issue before the reviewing court was simply whether the necessary statutory precondition had been satisfied. However, in *Wingecarribee Shire Council v Pancho Properties Pty Ltd* (2001) 117 LGERA 104 the NSW Court of Appeal was called upon to determine whether 2 provisions of *Wingecarribee Local Environmental Plan 1989* (viz cl 13(3) and (4)) were ‘development standards’ within the meaning of the EPA Act. If they were development standards, then the person seeking to carry out the development could lodge with the consent authority a written objection under SEPP 1 that compliance with those development standards was unreasonable or unnecessary in the circumstances of the case, specifying the grounds of that objection.

The first provision permitted the erection, with consent, of a dwelling-house ‘but only if’ the land had an area of not less than 40 hectares. The second provision provided that not more than 2 additional dwelling-houses could, with consent, be erected on

¹¹ A jurisdictional fact is some fact which has to exist as a condition precedent, or essential prerequisite, for the decision maker to exercise its jurisdiction: see *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 and *Timbarra Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8. See also I Ellis-Jones, ‘The “Jurisdictional Fact Doctrine” in NSW Local Government and Environmental Planning Law’ (2006) 12 LGLJ 16.

certain land having an area not less than 40 hectares if the council was 'satisfied' as to certain specified matters. Giles JA (Heydon JA and Young CJ in Eq agreeing) concluded that the 2 provisions were development standards amenable to objection under SEPP 1.¹² In the view of the court, although the provisions were worded in prohibitory terms they were regulatory of otherwise permitted development and did not amount to 'absolute prohibitions'. The Court applied *Strathfield MC v Poynting*¹³ [1999] NSWCA 134 in which Giles JA (Heydon JA and Young JA in Eq agreeing) said:

'If the provision does not prohibit the development in question under any circumstances, and the development is permissible in circumstances expressed in the provision (whether positively or negatively, see the forms of provision earlier stated), in most instances the provision will specify a requirement or fix a standard in respect of an aspect of the development. ...',¹⁴

In *Schroders Australia Property Management Ltd v Shoalhaven CC* [2001] NSWCA 74¹⁵, the NSW Court of Appeal was called upon to consider the construction of cl 9(3) of *Shoalhaven Local Environment Plan 1985* which provided that the council shall not grant consent to the carrying out of development on or of land to which this

¹² This had also been the view of the primary judge (Talbot J): see *Pancho Properties Pty Ltd v Wingecarribee SC* (1999) 110 LGERA 352. The decision of Lloyd J in *Dixon v Wingecarribee SC* (1999) 103 LGERA 103, in which his Honour held that the very same provision was not a development standard, must now be considered to be wrong.

¹³ In *Poynting* the court determined that a provision in a planning scheme ordinance, which stated that a single dwelling as well as certain other specified forms of residential development 'must not be erected' on certain land having an area of less than a certain specified amount or a width of less than a certain specified amount, was not a prohibition but a development standard amenable to objection under SEPP 1.

¹⁴ (2001) 116 LGERA 319 at [98]. See also *Woollahra MC v Carr* (1987) 62 LGRA 263, *Kruf v Warringah SC* (LEC, Holland J, 15 December 1988, unreported), *Quinn O'Hanlon Architects Pty Ltd v Leichhardt MC* (1989) 68 LGRA 114, *North Sydney MC v P D Mayoh Pty Ltd [No 2]* (1990) 71 LGRA 222, *Bell v Shellharbour MC* (1993) 78 LGERA 429, *Scott Revay & Unn v Warringah CI* (1995) 88 LGERA 1, *Dixon v Wingecarribee SC* (1999) 103 LGERA 103, *Bowen v Willoughby CC* (2000) 108 LGERA 149, *Fencott Drive Pty Ltd v Lake Macquarie CC* (2000) 110 LGERA 318, *Tobin v Shoalhaven CC* (2001) 113 LGERA 350, *Lowy v Land & Environment Court of NSW* (2002) 123 LGERA 179, and *Georgakis v North Sydney CI* (2004) 140 LGERA 379.

¹⁵ Although not a case on whether or not a particular provision was amenable to objection under SEPP 1, the decision in *Schroders* is relevant to the question of whether a provision of the kind in question is capable of being a development standard.

plan applied unless the council was of the opinion that the carrying out of the development was consistent with the objectives of the zone within which the development is proposed to be carried out. Ipp AJA (Spigelman CJ and Sheller JA agreeing) stated (at [7]):

‘Part of the site of the development was zoned 3(g) under the LEP. Hence, it was a condition precedent to a valid grant of consent that the Council form an opinion that the development was consistent with the objectives of the 3(g) zone. A failure to form such an opinion would result in the grant being invalid: *Franklins Limited v Penrith City Council* [1999] NSWCA 134.’

In *Agostino v Penrith CC* [2010] NSWCA 20 the council refused a development application for alterations and additions to an existing fruit and vegetable store which were intended to increase its gross floor area from 150 sq m to 765 sq m. The site was in a rural zone and a fruit and vegetable store would have been prohibited altogether, but for cl. 41 of the relevantly applicable LEP. Clause 41 was a site specific provision. Clause 41(3) provided: ‘Notwithstanding any other provision of this plan, a person may, with the consent of the council, carry out development on land to which this clause applies for the purposes of a fruit and vegetable store with a maximum floor area of 150 sq m.’

The issue was whether the 150 sq m restriction was a development standard that could be varied under SEPP 1, or a prohibition that could not be varied. The NSW Court of Appeal made it clear that an LEP provision could be a prohibition even though it does not appear in the zoning or land use table. The key question is whether the restriction on development (in *Agostino* the 150 sq m floor area cap) is an **essential** condition in determining whether the particular development proposed is permissible. That question needs to be answered by considering both the principle underlying the LEP and the LEP’s structure and provisions. In *Agostino* the Court concluded that the 150 sq m cap **was** an essential condition as to the permissibility

of the development and was therefore **not** a development standard capable of variation under SEPP 1.

In rough terms, a restriction is more likely to be a prohibition if it **defines** the land use that is said to be permissible, **and** development of that general nature is **only** permissible because of the LEP clause that employs the definition.

In *Huang v Hurstville CC (No. 2)* [2011] NSWLEC 151 the *Agostino* approach was applied. In that case there was a general prohibition on sex services premises. However, there was a special clause that permitted sex services 'only if' certain requirements were met. These requirements prevented sex service premises near or within view of any educational establishment, place of public worship or hospital, or any place frequented by children. Pain J in the NSW Land and Environment Court said the requirements were *not* development standards because the list of restrictions effectively **defined** the land use that was to be permitted.

Regrettably, the position is by no means free from doubt and it will be interesting to see how the court interprets the section.

The procedure to be followed as respects SEPP 1

Council, as consent authority, **must** be *satisfied* of the following three matters before it can *lawfully* uphold the SEPP 1 objection and grant development consent to a development application for development that could, but for a development standard, be carried out under the EPA Act with or without development consent:

- first, is the objection well founded?
- secondly, would the granting of consent to the development application be consistent with the aims of SEPP 1?
- thirdly, is Council *satisfied* that a consideration of the matters in clause 8(a)

and (b) of SEPP 1 justifies the upholding of the SEPP 1 objection?

I will deal with each of those three matters *seriatim*.

1. Is the objection well founded?

First, Council must be *satisfied* that ‘the objection is well founded’ (clause 7 of SEPP 1). The objection is to be in writing, be an objection ‘that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case’, and specify ‘the grounds of that objection’ (clause 6 of SEPP 1).

The requirement in clause 7 of SEPP 1 that the consent authority be *satisfied* that the objection is well-founded, places an onus on the applicant making the objection to so satisfy the consent authority.¹⁶ Now, where the existence of jurisdiction, or the exercise of jurisdiction, or both, is conditional upon the existence of the formation of a subjective opinion (i.e. is ‘satisfied’ or ‘of the opinion’), if the opinion or state of satisfaction actually formed is incorrectly based in law, then the necessary opinion or state of satisfaction does not exist. In the landmark and oft-cited High Court of Australia case of *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 Latham CJ, with whom the other members of the High Court agreed, said (at 430 and 432 respectively):

‘Where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts.’

Further:

‘If the opinion which was in fact formed was reached by taking into account

¹⁶ See *North Sydney MC v Parlby*, unreported, LEC No. 10613 of 1985, 13 November 1986, Stein J, p 8.

irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.’

In other words, a superior court (relevantly, the Land and Environment Court), in judicial review proceedings, will enquire into the *reasonableness* of Council’s state of satisfaction or purported satisfaction (in the *Wednesbury* sense of ‘manifest unreasonableness’¹⁷).

In addition, Council’s decision on such a matter can still be reviewed for jurisdictional error where Council either rejects probative material, or makes a decision unsupported by the probative material, *in such a way* as to indicate that Council misunderstood the test it had to apply in determining matters going to jurisdiction (viz the matters referred to in cl. 6 and 7 of SEPP 1). **Note.** Material has probative value to the extent to which the material could rationally affect the proper planning assessment of the probability of the existence of the particular matter or fact in issue.

The judgment of Cripps J in *Hooker Corporation Pty Limited v Hornsby SC* (NSWLEC, 2 June 1986, unreported) has been described as the *locus classicus* (that is, a classic statement) of the approach to be taken when considering an objection under SEPP 1 (see, eg, the judgment of Talbot J in *Memel Holdings Pty Limited v Pittwater CI* [2000] NSWLEC 206; (2000) 110 LGERA 217 at 220). In the *Hooker Corporation* case Cripps J said (at 6):

¹⁷ See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; see also *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 64 per Spigelman CJ. An administrative decision is ‘manifestly unreasonable’ in the *Wednesbury* sense if no reasonable decision-maker, otherwise properly acting within the four corners of its jurisdiction (i.e. powers), could ever have reached the decision in question. Expressed a little differently, a manifestly unreasonable decision is one which is ‘verging on an absurdity’: see *Legal & General Life of Australia Ltd v North Sydney MC* (1989) 68 LGRA 192 per Cripps CJ.

'It has been established by a series of decisions in this Court that generally in order to maintain an objection that compliance with a standard is unreasonable or unnecessary, it is first necessary to discern the underlying object or purpose of the standard. To found an objection it is then necessary to satisfy the Court that compliance with the standard is unnecessary or unreasonable in the circumstances of the case. Although the court has urged a generous application of SEPP No. 1 and has repeatedly declined to attempt exhaustively to define the limits of the dispensing power and, in particular, what is embraced by the expression 'circumstances of the case', it is now established that it is not sufficient merely to point to what is described as an absence of environmental harm to found an objection. Furthermore, the objection is not advanced, in my opinion, by an opinion that the development standard is inappropriate in respect of a particular zoning. The Court must assume a development standard in a planning instrument has a purpose. ... Furthermore it is now established that although the discretion conferred by SEPP No. 1 is not to be given a restricted meaning and its application is not to be confined to those limits set by other tribunals in respect of other legislation, it is not to be used as a means to effect general planning changes throughout a municipality such as are contemplated by the plan making procedures set out in Part III of the Environmental Planning and Assessment Act.'

In *Winten Property Group Limited v North Sydney CI* [2001] NSWLEC 46 Lloyd J said (at [26]):

'In applying the above-mentioned judgment, it seems to me that SEPP 1 requires answers to a number of questions (not necessarily in the following order). *First*, is the planning control in question a development standard? *Second*, what is the underlying object or purpose of the standard? *Third*, is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act? *Fourth*, is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? *Fifth*, is the objection is well founded? In relation to

the fourth question, it seems to me that one must also look to see whether a development which complies with the development standard is unreasonable or unnecessary, as noted by Cripps J in the *Hooker Corporation* case.'

In *Memel Holdings Pty Limited v Pittwater CI* [2000] NSWLEC 206; (2000) 110 LGERA 217 Talbot J said (at 221):

'The failure to identify the objectives of the development standard and then to consider whether, in the light of those objectives, it was unreasonable or unnecessary to apply the development standard in the subject case means that the Senior Commissioner fell into legal error on a matter which was fundamental to the ultimate decision.'

Thus, any SEPP 1 objection which fails to identify the objectives of the development standard and then consider whether, in the light of those objectives, it is unreasonable or unnecessary to apply the development standard in the subject case is legally inadequate. If Council were to purport to consider that the objection was well founded (cf cl. 7 of SEPP 1) Council would be falling into legal error on a matter which would be fundamental to the ultimate decision to grant development consent. The result? A null and void consent.

2. Would the granting of consent to the development application be consistent with the aims of SEPP 1?

Secondly, Council must be of the opinion that 'granting of consent to that development application is consistent with the aims of this Policy as set out in clause 3' (clause 7 of SEPP 1). This matter is cumulative with the first matter (it is prefaced by the words in clause 7 of SEPP 1 'and is also'). The aims and objects of SEPP 1 set out in clause 3 are to provide 'flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or

unnecessary or tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the Act'. The last mentioned objects in s.5(a)(i) and (ii) of the EPA Act are to encourage:

'(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

(ii) the promotion and coordination of the orderly and economic use of developed land[.]'

3. Is Council satisfied that a consideration of the matters in clause 8(a) and (b) of SEPP 1 justifies the upholding of the SEPP 1 objection?

Thirdly, Council must be *satisfied* that a consideration of the matters in clause 8(a) and (b) of SEPP 1 justifies the upholding of the SEPP 1 objection.¹⁸ The matters in clause 8(a) and (b) are:

'(a) whether non-compliance with the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the planning controls adopted by the environmental planning instrument'.

The long-standing 5-part test

¹⁸ See *Fastbuck\$ v Byron SC* [1999] NSWCA 19; (1999) 103 LGERA 94 at 100 and *City West Housing Pty Ltd v Sydney CC* [1999] NSWLEC 246; (1999) 110 LGERA 262 at 291.

The long-standing 5 part test was set out in *Winten Property v North Sydney* (2001) 130 LGERA 79:

1. Is the planning control in question a development standard?
2. If so, what is the underlying object or purpose of the standard?
3. Is compliance with the standard consistent with the aims of the policy, and in particular, does compliance with the standard tend to hinder the attainment of the objects specified in s.5(a)(i) and (ii) of the EPA Act?
4. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? (A related question is: would a development which complies with the standard be unreasonable or unnecessary?)
5. Is the objection well founded?

A new 5-part test? (Well, not exactly – more like 5 different ways in which a SEPP 1 objection may be well founded)

However, in *Wehbe v Pittwater Council* [2007] NSW LEC 827 Preston CJ set out a new 5 part test, and rephrased the assessment process as follows:

1. The applicant must satisfy the consent authority that 'the objection is well founded', and compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.
2. The consent authority must be of the opinion that granting consent to the development application would be consistent with the policy's aim of providing flexibility in the application of planning controls where strict compliance with

those controls would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in s.5(a)(i) and (ii) of the EPA Act.

3. It is also important to consider:

- a. whether non-compliance with the development standard raises any matter of significance for State or regional planning; and
- b. the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

According to Preston CJ, an objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of (5 different) ways.¹⁹

It is not necessary for an applicant to justify its proposal in more than one of the following ways. However, having said that, one or more of the ways set out below may not be appropriate in any given case. Each case is different.

Five different ways of establishing that compliance is unreasonable or unnecessary

Note. Much of what follows is also relevant to the consideration of a written request made under cl. 4.6 of SILEP.

1. Compliance is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard

¹⁹ See *Wehbe v Pittwater CI* [2007] NSWLEC 827 per Preston CJ at [42]-[48].

The **first** and ‘most commonly invoked way’ (per Preston CJ) is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.²⁰

Rationale

- Development standards are not ends in themselves but means of achieving ends.
- The ends are environmental or planning objectives.
- Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved.
- However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).

However, although this way is commonly invoked, it is not the only way to establish that compliance with a development standard is unreasonable or unnecessary: *North Sydney MC v Parlby*, unreported, LEC No 10613 of 1985, 13 November 1986, Stein J at p 5; *Legal and General Life of Australia Ltd v North Sydney MC* (1989) 68 LGRA 192 at 202; *Fast Buck\$ v Byron SC* [1999] NSWCA 19; (1999) 103 LGERA 94 at 97;

²⁰ See *SCMP Properties Pty Limited v North Sydney MC* (1983) 130 LGERA 351 at 379; *Hooker-Rex Estates v Hornsby SC*, unreported, LEC No 10506 of 1982, 27 July 1983, Bignold J, pp 16, 18 and 20; *Gergely & Pinter v Woollahra MC* (1984) 52 LGRA 400 at 406-407, 412-413; *Hooker Corporation Pty Limited v Hornsby SC* (1986) 130 LGRA 438 at 441; *North Sydney MC v Parlby*, unreported, LEC No 10613 of 1985, 13 November 1986, Stein J at p 5; *Legal and General Life of Australia Ltd v North Sydney MC* (1989) 68 LGRA 192 at 202; *Leighton Properties Pty Ltd v North Sydney CI* (1998) 98 LGERA 382 at 386; *Fast Buck\$ v Byron SC* [1999] NSWCA 19; (1999) 103 LGERA 94 at 97; *City West Housing Pty Ltd v Sydney CC* [1999] NSWLEC 246; (1999) 110 LGERA 262 at 282-283; *Memel Holdings Pty Ltd v Pittwater CI* [2000] NSWLEC 206; (2000) 110 LGERA 217 at 220-221; *Winten Property Group Ltd v North Sydney CI* [2001] NSWLEC 46; (2001) 130 LGERA 79 at 88[25]- 89[28] and *Design 23 Pty Ltd v Sutherland SC* [2003] NSWLEC 90; (2003) 125 LGERA 380 at 387 [20]-[21].

City West Housing Pty Ltd v Sydney CC [1999] NSWLEC 246; (1999) 110 LGERA 262 at 282-283. Other ways are explained in the authorities.

2. The underlying objective or purpose of the development standard is not relevant to the development with the consequence that compliance is unnecessary

A **second** way is to establish that the underlying objective or purpose of the particular development standard is not relevant to the development with the consequence that compliance is unnecessary.²¹

3. The underlying objective or purpose of the development standard would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable

A **third** way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.²²

²¹ See *SCMP Properties Pty Limited v North Sydney MC* (1983) 130 LGERA 351 at 378-379; *North Sydney MC v Parlby*, unreported, LEC No. 10613 of 1985, 13 November 1986, Stein J at p 5.

²² See *Hooker-Rex Estates v Hornsby SC*, unreported, LEC No 10506 of 1982, 27 July 1983, Bignold J at p 18.

4. The development standard has been virtually abandoned or destroyed by Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable

A **fourth** way is to establish that the development standard has been virtually abandoned or destroyed by Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.²³

5. The zoning of the particular land was unreasonable or inappropriate with the consequence that a development standard appropriate for that zoning is also unreasonable or unnecessary as it applies to that land, and that compliance with the standard in the particular case would also be unreasonable or unnecessary

A **fifth** way is to establish that 'the zoning of particular land' was 'unreasonable or inappropriate' so that 'a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land' and that 'compliance with the standard in that case would also be unreasonable or unnecessary.'²⁴

However, care needs to be taken not to expand this fifth way of establishing that compliance is unreasonable or unnecessary beyond its limits. It is focused on 'particular land' and the circumstances of the case. Compliance with the development standard is unreasonable or unnecessary not because the standard is inappropriate to the zoning, but rather because the zoning of the particular land is found to be unreasonable or inappropriate. If the particular land should not have been included in the particular zone, the standard would not have applied, and the

²³ *North Shore Gas Co. Pty Ltd v North Sydney MC*, unreported, LEC No. 10185 of 1986, 15 September 1986, Stein J at pp 11-12; *Legal and General Life of Australia Ltd v North Sydney MC* (1989) 68 LGRA 192 at 202; *City West Housing Pty Ltd v Sydney CC* [1999] NSWLEC 246; (1999) 110 LGERA 262 at 282 [69]-283 [70].

²⁴ See *Fast Buck\$ v Byron SC* [1999] NSWCA 19; (1999) 103 LGERA 94 at 97.

proposed development would not have had to comply with that standard. To require compliance with the standard in these circumstances would be unreasonable or unnecessary.

Would granting consent be consistent with the aims of SEPP 1?

The requirement that the consent authority form the opinion that granting consent to the development application is consistent with the aims of SEPP 1 as set out in clause 3 (one of which is the promotion and coordination of the orderly and economic use and development of land) makes it relevant 'to consider whether consent to the particular development application encourages what may be summarised as considered and planned development' or conversely may hinder a strategic approach to planning and development: *Fast Buck\$ v Byron SC* [1999] NSWCA 19; (1999) 103 LGERA 94 at 100 [26]-[27], 101 [30]-[31], [35].

Clause 4.6 the Standard Instrument Local Environmental Plan

Introduction

Clause 4.6 of the Standard Instrument Local Environmental Plan ('SILEP') contains a similar, but not identical, mechanism to that contained in SEPP 1. The clause makes provision for the making of a 'written request' (cf 'written objection', cl. 6, SEPP 1) from the applicant that 'seeks to justify' [sic] the contravention of one or more specified development standards (but *not* any of the ones referred to in subclause (8)) by demonstrating:

- (a) that compliance with the development standard(s) is 'unreasonable or unnecessary in the circumstances of the case' (cf cl. 6, SEPP1), and

- (b) that there are sufficient environmental planning grounds to justify contravening the development standard(s) (see cl. 4.6(3)).

The written request must '**seek to justify**' the contravention of the development standard, by demonstrating, firstly, that compliance with them is unreasonable or unnecessary in the circumstances, and secondly, that there are sufficient environmental planning grounds to justify contravening the development standard. The words 'seek to justify', refer to a real, proper and genuine attempt by the applicant for consent to justify departure from the standards by demonstrating those two matters. Whether that justification is sufficient depends on whether those matters are in fact demonstrated. It is the role of the decision maker to whom the justification is addressed to determine that issue, otherwise the words 'seek to justify' would be otiose.

In the normatively neutral sense, to '**justify**' means 'to confirm or support by ... evidence' (8 *Oxford English Dictionary* 329 (2d ed. 1989)). In this context, evidence means **probative material** that would be considered sufficient in all the circumstances by a responsible and reasonable consent authority. As previously mentioned, material has probative value to the extent to which the material could rationally affect the proper planning assessment of the probability of the existence of the particular matter or fact in issue.

Development consent must not be granted for development that contravenes a development standard unless:

- (a) Council is satisfied (that is, *reasonably* satisfied; cf cl. 7, SEPP 1) that:

- (i) the applicant's written request has 'adequately addressed' the matters required to be demonstrated by cl. 4.6(3) (cf cl. 7, SEPP 1: 'objection is well founded'), and
 - (ii) 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, and
- (b) the concurrence of the Secretary has been obtained (cf cl. 8, Sepp 1). (Clause 4.6(4).)

In deciding whether to grant concurrence, the Secretary must consider:

- (a) whether contravention of the development standard raises 'any matter of significance for State or regional environmental planning', and
- (b) the 'public benefit of maintaining the development standard', and
- (c) any other matters required to be taken into consideration by the Secretary before granting concurrence. (Clause 4.6(5).)

The procedure to be followed as respects cl. 4.6 of SILEP

So, here are the matters that must be addressed in Council's consideration of any written request under cl. 4.6 of SILEP:

1. Has the applicant 'justified' its written request?

First, has the applicant **justified** its written request that the contravention of one or more specified development standards (but *not* any of the ones referred to in subclause (8)) by **demonstrating**, by probative material and on the basis of acceptable planning principles and the like:

(b) that compliance with the development standard(s) is ‘**unreasonable or unnecessary** in the circumstances of the case’?

(b) that there are sufficient environmental planning grounds to justify contravening the development standard(s)?

Insofar as the requirement that the applicant demonstrate that compliance with the development standard(s) is ‘**unreasonable or unnecessary** in the circumstances of the case’ (cl. 4.6(3)(a); cf cl. 6, SEPP1) is concerned, the five ways of establishing in a SEPP 1 objection that compliance is unreasonable or unnecessary would appear to be relevantly applicable to a written request made under clause 4.6 of SILEP.

2. Is Council satisfied of the following matters?

Secondly, is Council **satisfied** (that is, *reasonably* satisfied) that:

(a) the applicant’s written request has ‘**adequately addressed**’ the matters required to be demonstrated by cl. 4.6(3)?

(b) 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?

3. Has the concurrence of the Secretary has been obtained?

Thirdly, and finally, has the concurrence of the Secretary has been obtained?

Development consent **must not be granted** for development that contravenes a development standard unless the questions set out in '2' and '3' immediately above are, and are capable of being, correctly answered in the particular case.

Is a Written Request under Clause 4.6 More Onerous to Establish than under SEPP 1?

In two respects, the answer is generally 'yes'. A recent case in the Land and Environment Court also shows that applicants need to carefully frame their objections to ensure they comply with the particular requirements of clause 4.6 which differ in important respects from those under SEPP 1.

Under SEPP 1 (which, as mentioned above, now only applies in areas which have not adopted standard instrument LEPs), it is sufficient, in order to establish that the application of a development standard is unreasonable or unnecessary in the circumstances of the case, to show that the development achieves the objectives of the development standard.²⁵

There are, however, other ways that that requirement can be satisfied, and those other ways have already been discussed.

However, the NSW Land and Environment Court decision in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 tended to suggest that merely showing that the development achieves the objectives of the development standard was insufficient to justify that a development is unreasonable or unnecessary in the circumstances of

²⁵ See *Wehbe v Pittwater CI* [2007] NSWLEC 827 at [42].

the case for the purposes of an objection under clause 4.6, (and 4.6(3)(a) in particular). (See, nevertheless, the discussion below with respect to the NSW Court of Appeal decision in *Four2Five*.²⁶)

Further, the requirement in cl. 4.6(3)(b) to justify that there are sufficient environmental planning grounds for the variation, may well require identification of grounds *particular to the circumstances of the proposed development* – as opposed merely to grounds that would apply to any similar development on the site or in the vicinity.

The Court's decision in *Four2Five* is interesting because the starting point was that Commissioner Pearson was satisfied²⁷ that the mixed use development proposed was, despite the breach of the relevant development standard, in the public interest within the meaning of cl. 4.6(4)(a)(ii) because it was consistent with the objectives of the particular standard and the objectives for development within the zone. Under SEPP 1 this would have been almost the end of the enquiry. However, Pain J upheld²⁸ Commissioner's Pearson's decision that the written request further needed to justify under clause 4.6(3)(a) that the development standard was unreasonable or unnecessary on grounds *other than* that the development achieved the objectives of the development standard.

This was because consistency with objectives of the standard and the zone in which the development was proposed to be carried out were, so the Court held, already a separate matter that the consent authority was required to be satisfied of under cl. 4.6(4)(a)(ii): at [34].

If so, the meaning of 'unreasonable or unnecessary' in cl. 4.6(3)(a) must necessarily have been intended to exclude that matter. As a result, the

²⁶ See *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248.

²⁷ See *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.

²⁸ See *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90.

meaning of that phrase in cl. 4.6 differs from its meaning in SEPP 1. In cl. 4.6 it is a narrower concept.

Pain J also found no error in the exercise of the Commissioner's discretion in finding that the environmental planning grounds relied upon by the applicant were insufficient for the purposes of justifying the objection under cl4.6(3)(b). In that regard, the applicant had relied upon:

- public benefits arising from the additional housing and employment opportunities that would be delivered by the development, noting (at p 5) the close proximity to Ashfield railway station, major regional road networks and the Ashfield town centre;
- access to areas of employment, educational facilities, entertainment and open space;
- provision of increased employment opportunities through the ground floor retail/business space; and
- an increase in the available housing stock.

However, Commissioner Pearson had held that these were *not* matters particular to the circumstances of the proposed development, but merely grounds that would apply to any similar development for mixed use development on the site or in the vicinity.

The Commissioner found (at [60]) that to accept such matters as 'sufficient' would not promote the 'proper and orderly development of land as contemplated by the controls applicable to the B4 zoned land' which was an objective of the EPA Act (see s.5(a)(ii)) and therefore assumed to be an environmental planning ground counting or weighing against the objection.

NSW Court of Appeal decision in *Four2Five*

The Land and Environment Court's decision in *Four2Five* proved not to be the final word on the matter.

On 20 August 2015 the NSW Court of Appeal handed down an *ex tempore* judgment refusing leave to appeal against the Land and Environment Court's decision.²⁹ In so doing, the Court of Appeal upheld Commissioner Pearson's original decision in regard to clause 4.6 of the SILEP but interpreted the approach taken by the Commissioner differently to the approach taken Pain J. In doing so, the Court of Appeal's decision largely confines Commissioner Pearson's decision to the particular facts of that case and the particular exercise of discretion by the Commissioner.

Firstly, Leeming JA (with whom Meagher JA agreed) did not agree that Commissioner Pearson's decision in *Four2Five*³⁰ proceeded on the basis that establishing that compliance with a standard is unreasonable or unnecessary in clause 4.6(3)(a) of the SILEP must necessarily exclude consideration of consistency with the objectives of the development standard and the objectives for development in the zone. Rather, Leeming JA considered that Commissioner Pearson's decision was that 'consistency with objectives remained relevant, but not exclusively so'.³¹

Secondly, while Leeming JA found no error in the approach taken by the Commissioner in relation to her dissatisfaction with the environmental planning grounds relied upon, that was a matter for the Commissioner on the facts of the particular case and not a general principle. Leeming JA said:³²

It is sufficient to state that no error, and certainly no error of law, is disclosed in the Commissioner's reasoning at [[2015] NSWLEC 1009 at] 60] reproduced above. It is clear that the Commissioner approached the question of power posed by subclause

²⁹ See *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248.

³⁰ See [2015] NSWLEC 1009.

³¹ [2015] NSWCA 248 at [16].

³² [2015] NSWCA 248 at [15].

(3)(b) on the basis that merely pointing to the benefits from additional housing and employment opportunities delivered by the development was not sufficient to constitute environmental planning grounds to justify contravening the development standards in this case. That does not give rise to a question of law.

So far as may be gleaned, proposed ground three asserts that the Commissioner approached the question of satisfaction in relation to subclause 3(a) on the basis that regard could only be had to matters other than those referred to in cl 4.6(4)(a)(ii). Two things may be said about this ground. First, *it is not apparent that the Commissioner did proceed on that basis*. Her reference in [62] to "additional ways of establishing that compliance is unreasonable or unnecessary in the circumstances of the case" accepts that *matters of consistency with objectives of development standards remain relevant, but not exclusively so*. Secondly, as the primary judge noted at [3], success on this ground alone would not result in the appeal being upheld. That is because the Commissioner was not satisfied as to either of the matters in subclause (3).³³

In other words, Leeming JA considered that Commissioner Pearson's decision on the facts of the case before her was that consistency with objectives remained relevant, but not exclusively so, to clause 4.6(3)(a) of the SILEP.

Moskovitch v Waverley Council

More recently, the NSW Land and Environment Court applied the Court of Appeal's approach in *Moskovitch v Waverley Council*³⁴ apparently confirming a greater flexibility.

The parties, and it appears the learned commissioner,³⁵ agreed that the question of 'sufficient environmental planning grounds' (cf. cl 4.6(3)(b) of the SILEP) was one of fact and that there were no specific limitations on the Court exercising its discretion

³³ Emphasis added.

³⁴ [2016] NSWLEC 1015.

³⁵ Tuor C.

as to the satisfaction as to that matter under clause 4.6(4)(a)(i) of the SILEP, subject to the usual constraints on the exercise of administrative power. Furthermore, it was agreed that, in light of the NSW Court of Appeals decision in *Four2Five* consistency with the objectives of the standard remained relevant to the question of whether compliance with the development standard was unreasonable or unnecessary in the circumstances of the case (cf. cl 4.6(3)(a) of the SILEP), but not exclusively so.

The applicant's clause 4.6 written request, which the commissioner upheld, sought to vary the floor space ratio development standard on the grounds that:

- compliance with the development standard was unreasonable or unnecessary in the circumstances of the case as required by clause 4.6(3)(a) of the SILEP because the relevant objectives of the standard were met by the proposal and would not be achieved or would be thwarted by a complying development, and
- there were sufficient environmental planning grounds for the variance because of the lack of environmental impact of the development and the environmental benefits of the replacement of two residential flat buildings with poor amenity.

Implications of the NSW Court of Appeal decision in *Four2Five*

It is clear that establishing a clause 4.6 objection does involve an additional hurdle for an applicant to satisfy the consent authority as to the sufficiency of the environmental planning grounds. However, consistency with objectives remains relevant, but not exclusively so, to the question posed by clause 4.6(3)(a) of the SILEP, contrary to what had been held to be the case in the Land and Environment Court.

The approach taken by Commissioner Pearson in *Four2Five* seems to be just one approach on the particular facts in that case. There was no error in that approach but other commissioners and consent authorities alike have a broad discretion as to the approach to take.

The NSW Court of Appeal decision in *Four2Five* indicates that the consent authority has a very broad discretion in which to assess whether the environmental planning grounds for a departure from a development are sufficient in any particular case.

The main implications of the decision in *Four2Five* for the consideration and determination of written requests under clause 4.6 are as follows:

1. As already mentioned, merely showing that the development achieves the objectives of the development standard despite the contravention of the development standard may in some cases be sufficient to justify that a development is unreasonable or unnecessary in the circumstances of the case. In other cases, more will be required.
2. If an applicant wishes to rely only on the assertion that as its proposed development would achieve the objectives of the development standard despite the contravention of the development standard, that is sufficient to justify that the proposed development is unreasonable or unnecessary in the circumstances of the case, then the burden of satisfying the consent authority that that is indeed the case is by no means a light one.
3. It would still seem to be preferable, but not obligatory, for an applicant to show in its written request that the application of the particular development standard is unreasonable or unnecessary not merely because the development is consistent with the zone objectives.

4. In all cases, an applicant must show in its written request sufficient grounds *particular to the development* in the objection. It is not easy to identify what those matters are likely to be, but it would appear that an applicant will need to be able to show that the breach or other specific aspects of the development outweigh the countervailing objective that controls ought generally to be observed.

The decision in *Four2Five* has put the barrier to a successful objection considerably higher than it is under SEPP 1.

The 'bottom line'

Here is the bottom line. The making of a SEPP 1 objection or a written request under clause 4.6 of the SILEP is *not* a mere formality. As already mentioned, in order for Council to have power (jurisdiction) to grant development consent to the applicant's proposed development, Council must *validly* uphold the SEPP 1 objection (or written request under cl. 4.6 of the SILEP) to compliance with the specified development standard(s).

In other words, upholding the SEPP 1 objection is an essential precondition (analogous to a 'jurisdictional fact' situation) which must be satisfied **before** the proposed development can be approved on a consideration of the merits.³⁶

See also *Lane Cove CI v Orca Partners Management Pty Ltd (No 2)* [2015] NSWLEC 52 (2 April 2015) in which it was stated, among other things, that the written request itself that seeks to justify one or more specified contraventions by demonstrating the relevant matters is not in itself a necessary pre-condition

³⁶ See *Winten Property Group Ltd v North Sydney Council* [2001] NSWLEC 46; (2001) 130 LGERA 79 at 87-88 [19], 90 [29], 92 [44]-93 [45]; *Wehbe v Pittwater CI* [2007] NSWLEC 827 at [36].

(analogous 'jurisdictional fact') to the exercise of the power. However, upholding the SEPP 1 objection---an act of Council's---is, as already mentioned, an **essential precondition** (analogous to a 'jurisdictional fact' situation) which must be satisfied **before** the proposed development can be approved on a consideration of the merits.

In the event that Council were to purport to uphold a SEPP 1 objection/written request under cl. 4.6 of the SILEP in circumstances where no reasonable consent authority, properly acting within the 'four corners' of its powers, could have upheld the particular objection/request, Council would be making a jurisdictional error that would result in the development consent purportedly granted being a nullity.³⁷

Never forget this---although the onus is on the applicant for consent to show that compliance with one or more specified development standards would be 'unreasonable or unnecessary' in the particular circumstances of the case (see *Gergely & Pinter v Woollahra MC* (1984) 52 LGRA 440), it is COUNCIL, the consent authority, that must ensure as a matter of jurisdiction that it has before it a SEPP 1 objection/written request under cl. 4.6 of the SILEP that is *legally capable* of being upheld **before** Council proceeds to make a decision that the proposed development can be approved on a consideration of the merits.

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³⁷ See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; see also *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 64 per Spigelman CJ.