



# Varying development standards: A Guide

August 2011

The NSW planning system provides flexibility in planning controls by providing the ability for a council to vary development standards in certain circumstances. This Guide will assist applicants to vary development standards where appropriate as well as councils in determining applications.

## Introduction

Development standards are a means to achieving an environmental planning objective and can be numerical or performance based. Some developments may achieve planning objectives despite not meeting the required development standards. The planning system provides flexibility to allow these objectives to still be met by varying development standards in exceptional cases.

If someone wishes to vary a development standard contained within an environmental planning instrument, their development application is to be supported by a written application that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case. This guide outlines matters that need to be considered in these applications.

This guide is to also assist council when determining applications to vary development standards where they are required to take into consideration whether the non-compliance with the development standard raises any matter of significance for State or regional environmental planning, and the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

Further advice and assistance is available from the Regional Offices of the Department of Planning & Infrastructure. Throughout these guidelines reference is made to various functions exercised by the Director-General. However, the first point of contact in relation to varying a development standard should always be the local Regional Office.

## How are development standards varied?

The NSW planning system currently has two mechanisms that provide the ability to vary development standards contained within environmental planning instruments:

- Clause 4.6 of the Standard Instrument Local Environment Plan (SI LEP); and
- State Environment Planning Policy No 1 – Development Standards (SEPP1).

Both Clause 4.6 and SEPP 1 provide flexibility in the application of planning controls by allowing councils to approve a development

application that does not comply with a development standard where this can be shown that compliance is unreasonable or unnecessary.

### Clause 4.6

In new local environmental plans (in the Standard Instrument format), clause 4.6 *Exception to development standards (compulsory)* replaces SEPP 1. The Standard Local Environmental Plan incorporates many State environmental planning policies, including SEPP 1. SEPP 1 does not apply to land to which a Standard Instrument LEP applies as Clause 4.6 provides for exceptions to development standards (see **Appendix 1**).

If your council has recently adopted a Local Environmental Plan (LEP) that was prepared under the standard instrument (known as a Standard Instrument LEP), an application to vary a development standard can be made under Clause 4.6. This clause was modeled along the lines of SEPP 1 but with some differences. It aims to provide an appropriate degree of flexibility in applying certain development standards to particular development and to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Clause 4.6 also requires the concurrence of the Director-General to be obtained prior to the granting of consent for development that contravenes a development standard (see section on Concurrence below).

Clause 4.6 is not to be used in Rural or Environmental zones to allow subdivision of land that will result in 2 or more lots less than the minimum area specified for such lots by a development standard, or the subdivision of land that will result in any lot less than 90% of the minimum area specified for such lots by a development standard in the following SI zones: Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Rural Small Holdings, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.

## SEPP 1

SEPP 1 (see **Appendix 2**) applies where council has an existing LEP that was not prepared through the Standard Instrument and to any development standard that is not a 'non-discretionary development standard'. In its 25 years of operation, it has been a valuable planning tool for allowing flexibility.

A consent authority may not grant consent to a development application to subject to a SEPP 1 application, except with the concurrence of the Director-General of Planning & Infrastructure. Consent authorities have broad delegation from the Director-General to assume concurrence in respect of SEPP 1 applications. The main exception is an application to subdivide land zoned rural or non-urban where permissibility of residential accommodation development is linked to the subdivision standard (see section on Concurrence below).

## What is an environmental planning instrument?

Environmental Planning Instruments (EPIs) are made under the *Environmental Planning and Assessment Act 1979* (EP&A Act) and guide development through mandatory legal requirements on a wide range of issues. Provisions within EPIs are not able to be varied by a council under delegation without the concurrence of the Director General. In exceptional cases, SEPP 1 or Clause 4.6 for Standard Instrument LEPs permits these standards to be relaxed or varied where a case is justified on planning grounds.

EPIs can include:

- State Environmental Planning Policies (SEPPs)
- Deemed SEPPs
- Local Environmental Plans (LEPs)
- Deemed EPIs

Most variations relate to the development standards contained within a Local Environmental Plan (LEP), which is the primary document to guide planning decisions for local government areas. Through zoning and development controls, they allow councils and other consent authorities to manage the ways in which land is used.

## What are 'Standard Instrument LEPs'?

In 2006, the NSW Government gazetted the Standard Instrument Order which set out a template for preparing new LEPs. Since then many councils in NSW have prepared a Standard Instrument LEP which introduces consistency of approach for terminology, zoning and principal development standards. Councils are able to include localised planning objectives and provisions specific to their area where justified and consistent with the mandatory provisions of the template, as well as determine zoning, additional land uses, heritage items, and principal development standards such as height, floor space ratio and minimum lot sizes.

SEPP 1 will be retained until all council have new SI LEPs in place. When this occurs, there will be no need for SEPP 1 to exist and it will be repealed.

## What are development standards?

The term 'development standards' is defined in the *Environmental Planning and Assessment Act 1979*. They are provisions in environmental planning instruments that guide development to be carried out in accordance with particular requirements under certain circumstances, such as minimum building heights in residential areas. They can be numerical or may require compliance with a particular condition or require facilities to be provided in association with certain development.

The Standard Instrument LEPs include Principal Development Standards being minimum lot sizes, height and floor space ratio. Development standards in non-Standard Instrument LEPs include both numerical and non-numerical standards and will vary between each council area.

A proposed variation to a development standard may, in some circumstances, achieve the underlying purpose of the standard as much as one which complies. If the development is not only consistent with the underlying purpose of the standard, but also with the broader planning objectives for the locality, strict compliance with the standard would be deemed to be unreasonable and unnecessary and council could approve a variation.

It is important to note that even if a development standard is met, it does not guarantee that it will be approved. All development applications are to be assessed on a merits basis and as such may be refused despite development standards being met.

## Making an application to vary a development standard

If an applicant wishes to vary a development standard in an environmental planning instrument, they can formally lodge a written application justifying the variation along with their development application to council. Applicants may use the form (at **Appendix 3**) or a letter to justify the variation to the development standards. This Guide also contains details of the information applicants are required to submit to the council to assist council assess development applications and associated applications to vary a standard.

Because of the nature of such variation to a development standard, an applicant may wish to engage a professional to prepare your submission, someone who is aware of the legal and technical requirements. A professional may be, for example, a town planning consultant, an architect or similar. To locate a suitable professional, applicants may wish to contact the relevant industry association (Planning Institute of Australia, Australian Institute of Architects or similar).

The applicant and their consultant may wish to have a pre-development application meeting with a council development assessment officers to discuss the development proposal and any proposed development standard variations. The council officer may be able to provide some information on whether the type of proposed variation has previously been considered by council, and in general terms how similar types of variations have been viewed by council. In addition, the council officer may be able to offer some general information regarding the size of the proposed variation and how similar size variations have been viewed by council in the past.

It is important to note that there is no automatic right to vary a development standard. SEPP 1 and Clause 4.6 places the onus on the applicant to provide a written justification for the variation to the development standard through application.

Applicants should also make themselves aware of the 'five part test' outlined on page 5.

### Matters to address in an application

When applicants lodge development applications and associated applications to vary a development standard, they must give grounds of objection to the development standard. Variation of a development standard may be justified where it is consistent with the objectives that the relevant environmental planning instrument is attempting to achieve. The application must:

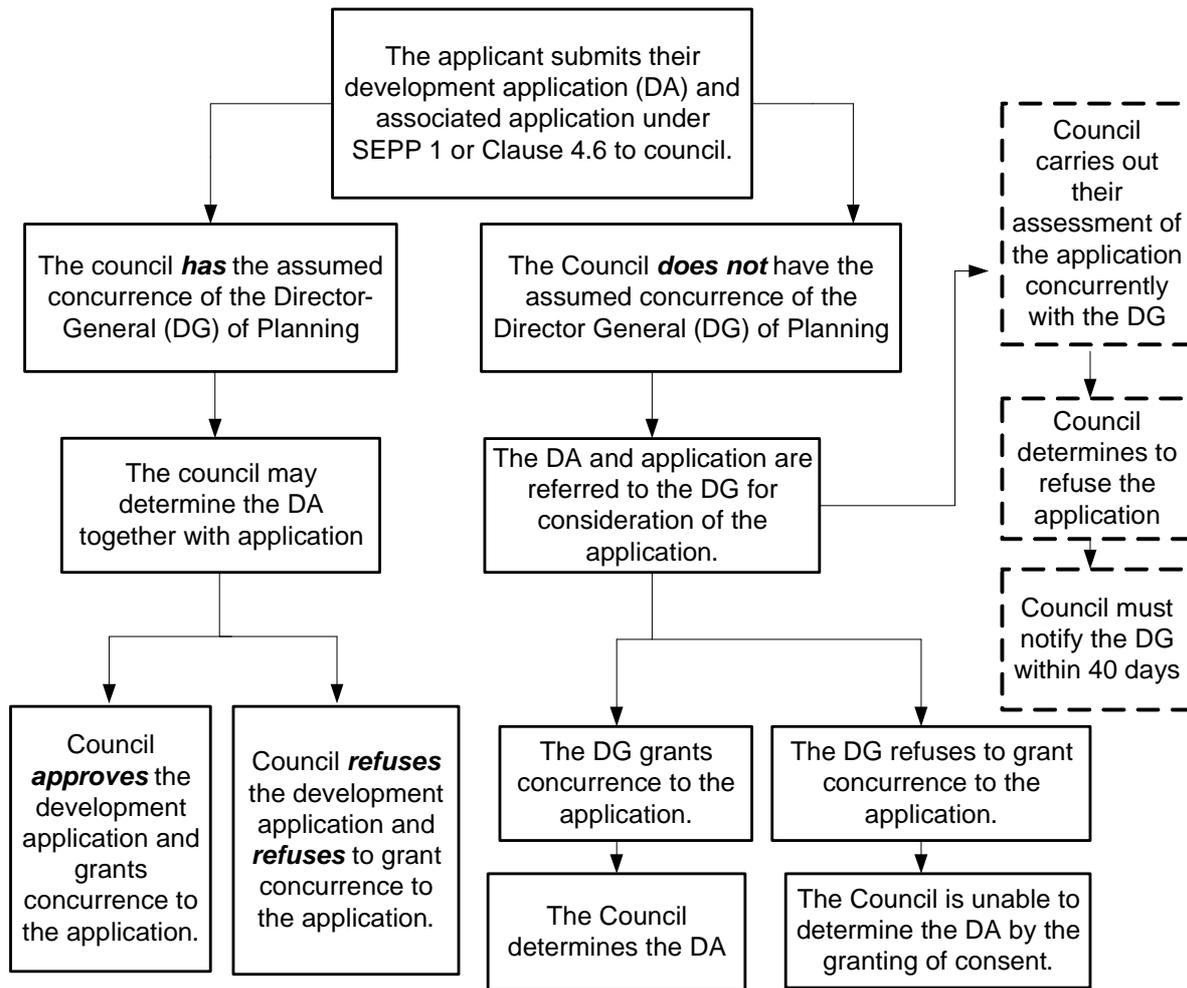
- address whether strict compliance with the standard, in the particular case, would be unreasonable or unnecessary and why, and
- demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard.

Refer to the Application Form at **Appendix 3**.

## What does the application process involve?

Councils may determine development applications with associated applications to vary development standards only where they have assumed concurrence (see section on Concurrence below). Where councils do not have assumed concurrence, they must refer the SEPP 1 application to the Director-General of Planning & Infrastructure for consideration and determination, and if concurrence is granted, then the council may consider and determine a development application.

Section 79B of the *Environmental Planning and Assessment Act 1979* (EP&A Act) sets out the procedure for determining development applications with concurrence requirements such as SEPP 1 or Clause 4.6 applications. The process is shown below.



## Consideration of applications by councils

In deciding whether to approve a development application and associated application to vary a standard, council must consider whether non-compliance with the development standard raises any matter of significance for State and regional planning, and the public benefit of maintaining the planning controls adopted by the environmental planning instrument. As part of the consideration, council should examine whether the proposed development is consistent with the State, regional or local planning objectives for the locality, and, in particular, the underlying objective of the standard.

### Consideration of Clause 8 in SEPP 1

Clause 8 requires council to assess whether non-compliance with the development standard raises any matter of significance for State and regional planning, and the public benefit of maintaining the planning controls adopted by the environmental planning instrument. Councils must furnish written evidence that they had considered the matters referred to in clause 8 of SEPP 1 in their assessment of an application.

**The ‘five part test’**

Written applications to vary development standards will not only address the above matters but may also address matters set out in the ‘five part test’ established by the NSW Land and Environment Court. Councils may choose to not only use the principles of Clause 4.6 and SEPP1 but also this five part test.

Court cases dealing with applications to vary development standards resulted in the Land and Environment Court setting out a five part test for consent authorities to consider when assessing an application to vary a standard to determine whether the objection to the development standards is well founded:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. the development standard has been virtually abandoned or destroyed by the council’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;
5. the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

***What objectives should council consider when assessing applications?***

The planning objectives for certain land generally identified in State (Metropolitan and Regional Strategies) and more specifically in local environmental planning instruments. Objectives may relate to the purpose of the zone and intended strategic land use direction, or they may be set out in local provisions addressing matters such as residential amenity, heritage conservation, riparian corridor protection etc.

The planning objectives of a development standard are usually stated in the relevant clause, as well as being interpreted within the context of the whole EPI. For example, a floor space ratio for commercial development in a business zone is designed to indicate the desired scale of development for business, office and retail purposes. It reflects the intended regional and local distribution of commercial space and the capacity of the transport system to service the area.

The planning objectives for a locality may overlap to some extent with the objective of the development standard, but are likely to include a broader range of considerations than those attached to the development standard. In some cases, to assist councils in identifying matters of State or regional importance, councils have been notified directly by the Department’s regional offices concerning the standards regarded as having State or regional significance in their region.

***What objectives should councils consider where council has a Standard Instrument LEP?***

Some councils may have implemented a new Standard Instrument LEP or may be preparing a Standard Instrument LEP. When assessing applications for varying development standards under Clause 4.6 of the Standard Instrument, council should take into account both the mandatory zone objectives as well as any additional objectives. Mandatory (core) zone objectives are included in the Standard Instrument to ensure consistency in how zones are applied across NSW and reflect the intended strategic land use direction. Councils when preparing their Standard Instrument LEPs can apply additional LEP zone objectives relevant to their locality which clearly articulate what additional goals are intended to be achieved in the zone, provided they support the core objectives.

Councils should also take into consideration mandatory or added objectives set out in clauses contained in Part 4 of the SI – *Principal Development Standards*. The objectives of these clauses explain the intention of planning tools to be used to achieve the overall objectives of the zone. The hierarchy of policy intention is established from the overarching *Aims of the Plan* (SI Clause 1.2), zone objectives, land use table and the objectives in SI clauses setting out development standards (see [PN 09-005](#)).

## Concurrence of the Director-General to vary development standards

An environmental planning instrument may provide that consent cannot be given by a local council unless the Director-General or Minister grants concurrence and therefore agrees to the granting of consent. Where the council is satisfied that the application to vary a development standard is well founded and wishes to grant consent to that development application, it may, with the concurrence of the Director-General, grant consent to that development application.

### **Assumed concurrence under SEPP 1**

In March 1989, councils were advised by Circular B1 that they may assume the Director-General of Planning & Infrastructure's concurrence under SEPP 1 in relation to all development applications, with the following exceptions:

- (a) To erect a dwelling on an allotment of land zoned rural or non-urban or within the zones listed in Schedule A to Circular B1 (see **Appendix 4**);
- (b) To subdivide land which is zoned rural or non-urban or within the zones listed in Schedule A to this Circular B1 (see **Appendix 4**);

Councils may assume the Director-General's concurrence under SEPP 1 in relation to these applications but only if:

- (i) Only one allotment does not comply with the minimum area; and
- (ii) That allotment has an area equal to or greater than 90 percent of the minimum area specified in the development standard.

### **Concurrence required from Director-General under SEPP 1**

The *EP&A Regulation* contains provisions setting out the requirements for all development applications which have a concurrence requirement. Concurrence from the Director-General is required if a development application and associated SEPP 1 application is for the types of developments listed in (a) and (b) above and does not comply with (i) or (ii) above.

In these circumstances, the council must forward a copy of the development application and associated SEPP 1 application to the

Department of Planning & Infrastructure (to the relevant Regional Team) for consideration by the Director-General (or delegate) within 2 days of receiving the DA.

The Director-General then either grants concurrence (with or without conditions) or refuses concurrence. The Department of Planning & Infrastructure must advise the council (within 40 days of receiving the SEPP 1 application) of the Director-General's decision on the SEPP 1 application. However, the council may refuse the DA prior to the 40-day concurrence period, if so, the council must advise the Department of Planning & Infrastructure of the determination.

Where a council has been separately notified since 26 April 1985 of a modification to or revocation of the assumed concurrence arrangements described above, that modification or revocation continues to apply. If in doubt, councils should contact the Department of Planning & Infrastructure Regional Team.

### **Boundary adjustments**

In August 1991, the Director-General advised councils of additional assumed concurrence arrangements under section 81 of the *EP&A Act* relating to boundary adjustments.

The Director-General's concurrence may be assumed in respect of development applications with associated SEPP 1 applications for boundary adjustments between two existing allotments where both are already below the minimum allotment size for the zone, subject to the following conditions:

- (a) that no additional allotments are created;
- (b) that no additional housing entitlement is created and;
- (c) the council is satisfied that any existing or potential agricultural use of the land will not be compromised

### **Assumed concurrence under the Standard Instrument**

In May 2008, the Planning Circular PS 08-003 advised councils that arrangements for the Director-General's concurrence can be assumed in respect of any environmental planning instrument that adopts clause 4.6 of the Standard Instrument or similar clause, which provide for exceptions to development standards. Notification of this is in the box below.

#### **Notification of assumed concurrence of the Director-General under clause 4.6(4) (and the former clause 24(4)) of the Standard Instrument**

- (1) Under clause 64 of the Environmental Planning and Assessment Regulation 2000, council is notified that it may assume the Director-General's concurrence for exceptions to development standards, subject to paragraphs (2) and (3), in respect of all applications made under:
- (a) clause 4.6 (or the former clause 24, or any future amended version of this clause) of the Standard Instrument (Local Environmental Plans) Order 2006, or
- (b) any other clause that is based on a substantially similar format and has a substantially similar effect to the clause described in (1)(a), where such a clause is adopted in an environmental planning instrument to provide for exceptions to development standards.
- (2) Council may assume the Director-General's concurrence in respect of an application to vary a development standard relating to the minimum lot size for the erection of a dwelling on land zoned RU1, RU2, RU3, RU4, RU6, R5, E2, E3 or E4 (or equivalent zone) only if:
- (a) only one allotment does not comply with the minimum area, and
- (b) that allotment has an area equal to or greater than 90% of the minimum area specified in the development standard.
- (3) This notification may be varied or revoked by further written notice provided by the Director-General.

Local environmental plans that adopt the Standard Instrument will repeal the application of SEPP 1 for the land to which the plan applies. To avoid any doubt, Planning Circular PS 08-003 provides that the above notification

does not vary existing notifications to councils for assumed concurrence of the Director-General in respect of applications under SEPP 1.

### **Rural subdivision and the Standard instrument**

It should be noted, that Clause 4.6 of the Standard Instrument LEP states:

- (6) Consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Rural Small Holdings, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 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.

This means, variations to these development standards, greater than those set out above, cannot be approved by Council.

### **Boundary adjustments in LEPs under the Standard Instrument**

Clause 2.6 Subdivision – consent requirements – (Please note: proposed to be amended in early 2011) provides that a minor realignment of boundaries that does not create additional lots or the opportunity for additional dwellings or lots that are smaller than the minimum size shown on the Lot Size Map in relation to the land concerned, is a development for which consent is not required.

### **What should councils send to the Department when seeking concurrence under SEPP 1?**

For matters where the Director-General's assumed concurrence has been given, councils will have to seek the Director-General's concurrence on a case by case basis. When seeking the Director-General's concurrence to the use of SEPP 1, councils are required to provide all the information necessary to enable a decision to be made. This includes:

- a copy of the development application,
- a copy of the report to the council, and
- a copy of the applicant's objection pursuant to clause 6 of SEPP 1.

If the SEPP 1 application is supported by the Director-General (or his delegate) then the Director-General grants concurrence, and advises council. Then the council may not determine the development application by the granting of consent.

If the SEPP 1 application is not supported by the Director-General, the Director-General refuses concurrence and advises council. Then the council is unable to grant consent and must determine the application by refusing consent.

If any further clarification or advice is required either on the broad interpretation of the Policy or on matters of State or regional significance, councils should contact the Department's regional office for their area.

## What are council's reporting requirements?

In November 2008, Planning Circular PS 08-14 advised councils that all development applications with SEPP 1 applications with variations greater than 10% must be reporting to council for determination. This was in response to the findings of the Independent Commission Against Corruption investigation into corruption allegations affecting Wollongong City Council.

Councils were required, amongst other things, to:

- Require all development applications where there has been a variation greater than 10% in standards under SEPP 1 to be determined by full council (rather than general manager or nominated staff member); and
- Provide a report to each council meeting on the development applications determined where there had been a variation in standards under SEPP 1.

A small number of councils have obtained limited exemptions to the reporting requirements outlined in (a) by making a written application to the Department of Planning & Infrastructure. These limited exemptions have related to a specific

development type and specific development standard. In addition, as part of the limited exemption, these councils are required to review these specific development types and associated specific development standards as part of the preparation of their new Standard Instrument LEP. These limited exemptions have only been supported in cases where there has been a clearly demonstrated need for and benefit from an exemption.

## Effects of varying development standards

In addition to the legislative requirements outlined above, there are additional matters that councils should be aware of when assessing and determining variations to development standards.

### *Cumulative effects*

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.

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 SEPP 1 applications.

### *Consideration when preparing a Standard Instrument LEP*

Where a local environmental plan is being prepared under the Standard Instrument LEP, councils should be cautious in using SEPP 1 on the basis of the draft plan, since there is no guarantee that a draft instrument will proceed to finalisation. Repeated application of the Policy under these circumstances can bring about a de facto amendment to the plan. The policy is an administrative rather than a policy-making tool and the distinction needs to be kept clearly in mind.

### *Standards involving existing uses*

Special care needs to be taken when dealing with development applications to extend more than 10% in the floor space of the premises associated with the existing use, as specified

in Clause 41 of the *Environmental Planning and Assessment Regulation 2000 (EP&A Regulation)*. The underlying purpose of these provisions is to prevent excessive expansion of existing uses and to permit gradual and controlled adaptation of these uses to those which are compatible with the zoning. The Policy should not be used to allow expansion of existing uses in a way which is substantially inconsistent with the intentions of the zone.

## Monitoring the use of SEPP 1 & Clause 4.6

In October 1989, the Department's Circular B1 requested that councils monitor the use of the Director Generals' assumed concurrence under SEPP 1 on a quarterly basis. In May 2008, Planning Circular PS 08-003 reminded councils to keep accurate records of the use of SEPP 1 and clause 4.6 of the Standard Instrument (or similar provision). An updated reporting form was provided (see **Appendix 6**).

The quarterly reports on SEPP 1 usage are required for the quarters ending March, June, September and December each year. Quarterly reports are to be emailed to [developmentstandards@planning.nsw.gov.au](mailto:developmentstandards@planning.nsw.gov.au). The Department intends to integrate reporting of SEPP 1 usage into the Local Development Performance Monitor.

In response to the findings of an Independent Commission Against Corruption (ICAC) investigation into corruption allegations affecting Wollongong City Council, all NSW councils were advised through Planning Circular PS 08-014 *Reporting variations to development standards* that they were required to adopt a number of additional reporting measures in respect of their SEPP 1 usage and that the Department would be undertaking a number of random audits on such matters. Those measures provide increased transparency and accountability in the making of SEPP 1 decisions.

Monitoring of councils' SEPP 1 returns helps the Department to check whether councils are keeping accurate records of the use of SEPP 1, to assess whether any particular development standards are being regularly varied by a council and may require review, and to detect anomalies (e.g. exceeding of delegations) if they are occurring. In addition, councils are required, amongst other things, to

establish a register of development applications determined with variations in standards under SEPP 1; and make the register available to the public on the council's website.

In 2009, four councils were drawn at random to be audited by the Department: Blue Mountains, Byron, Tenterfield, and Wingecarribee Councils. The audit found that the four councils mostly followed due process in making the SEPP 1 decisions that were audited, although each had some inadequacies in their reporting and/or administrative procedures. A summary can be found at [www.planning.nsw.gov.au](http://www.planning.nsw.gov.au).

## Other information

### Complying development

SEPP 1 does not apply to complying development. This means that predetermined development standards for complying development cannot be varied using a SEPP 1 application.

SI Clause 4.6(8)(a) also excludes a development standard for complying development from the application of this clause.

### SEPP 1 and Joint Regional Planning Panels

In May 2010, Circular PS 10-009 *Joint Regional Planning Panels – Review and Changes* advised councils that the Joint Regional Planning Panels Operational Procedures now provide information regarding the determination of DAs by a regional panel and consideration of associated SEPP 1 applications.

Obtaining concurrence from the Director General to the SEPP 1 application is a matter for the relevant council. However, where concurrence is assumed there are no additional procedural requirements for council to follow.

As the consent authority, it will be a matter for the regional panel to determine that a SEPP 1 objection is well founded and to form the opinion that granting consent is consistent with the aims of SEPP 1.

## Further information

If you are an applicant, enquiries regarding the use of SEPP 1 or the application of SI Clause 4.6 *Exceptions to development standards* should be directed to your local council. Councils with enquiries should direct them to their relevant Department of Planning Regional Team.

General information on the NSW planning system can be found at [www.planning.nsw.gov.au](http://www.planning.nsw.gov.au)

## Definitions

**Act** (or **EP&A Act**) means the *Environmental Planning and Assessment Act 1979*.

**development control plan** (or **DCP**) has the same meaning as in the EP&A Act and means a development control plan made, or taken to have been made, under Division 6 of Part 3 and in force.

**development standards** has the same meaning as in the EP&A Act and 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:

- (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.

**Environmental planning instrument** has the same meaning as in the EP&A Act and means an environmental planning instrument (including a SEPP or LEP but not including a DCP) made, or taken to have been made, under Part 3 and in force.

**local environmental plan** (or **LEP**)— see section 24 (2) of the EP&A Act.

### **Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act 1979 (extract)**

5 The objects of this Act are:

(a) 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 co-ordination of the orderly and economic use and development of land,

**State environmental planning policy** (or **SEPP**) see section 24 (2) of EP&A Act.

## Source Documents

Department of Planning, Additional assumed concurrence arrangements under section 81 of the *Environmental Planning and Assessment Act 1979*, relating to boundary adjustments proposed for the Director's concurrence under State Environmental Planning Policy No. 1 – Development Standards.

Department of Urban Affairs and Planning, Circular No. B1 State Environmental Planning Policy No. 1 – Development Standards. Issued 17 March 1989.

Department of Planning, Planning Circular PS 08-003, *Variations to development standards*. Issued 9 May 2008.

Department of Planning, Planning Circular PS 08-014, *Reporting variations to development standards*.

Department of Planning, Use of State Environmental Planning Policy No. 1: *Development Standards in Rural Areas*.

*Environmental Planning and Assessment Act 1979*.

*Environmental Planning and Assessment Regulation 2000*.

Standard Instrument – Local Environmental Plan.

State Environmental Planning Policy No. 1 – Development Standards.

*Wehbe v Pittwater Council* [2007] NSWLEC 827 (21 December 2007).

## Appendix 1: Clause 4.6

### Exceptions to development standards [compulsory]

- (1) The objectives of this clause are:
- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and
  - (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.
- (2) Consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.
- (3) Consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:
- (a) that compliance with the development standard 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.
- (4) Consent must not be granted for development that contravenes a development standard unless:
- (a) the consent authority is satisfied that:
    - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), 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 Director-General has been obtained.
- (5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.
- (6) Consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Rural Small Holdings, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 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.
- (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).
- (8) This clause does not allow consent to be granted for development that would contravene any of the following:
- (a) a development standard for complying development,
  - (b) 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 applies or for the land on which such a building is situated,
  - (c) clause 5.4.

**Direction. Additional exclusions may be added.**

## Appendix 2: SEPP 1

### State Environmental Planning Policy No 1—Development Standards

#### 1 Name of Policy

This State environmental planning policy may be cited as State Environmental Planning Policy No 1—Development Standards (hereinafter referred to as **the Policy**).

#### 2 Definitions

In this Policy, except in so far as the context or subject-matter otherwise indicates or requires:

**Act** means the Environmental Planning and Assessment Act 1979.

**development application** includes an application for consent referred to in clause 7 (1) of the Miscellaneous Acts (Planning) Savings and Transitional Provisions Regulation 1980.

**development standards** has the meaning ascribed thereto in section 4 (1) of the Act.

#### 3 Aims, objectives etc

This Policy provides 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.

#### 4 Application of Policy

(1) This Policy applies to the State, except as provided by this clause.

(2) This Policy does not apply to the land shown edged heavy black and shaded on the map marked “State Environmental Planning Policy No 1—Development Standards (Amendment No 5)” deposited in the head office of the Department of Planning and copies of which are deposited in the office of Wollongong City Council.

#### 4A Policy does not apply to complying development

This Policy does not apply to complying development.

#### 5 Relationship to other environmental planning instruments

This policy prevails over any inconsistency between it and any other environmental planning instrument, whenever made.

#### 6 Making of applications

Where development could, but for any development standard, be carried out under the Act (either with or without the necessity for consent under the Act being obtained therefore) 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.

#### 7 Consent may be granted

Where the consent authority is satisfied that the objection is well founded and is also 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, 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.

#### 8 Concurrence

The matters which shall be taken into consideration in deciding whether concurrence should be granted 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.

#### 9 Objections under s 342NA etc

An objection made or purporting to have been made under section 342NA, or 342VA of the Local Government Act 1919 at any time before this Policy takes effect, not being an objection which had prior to 1 September 1980 been referred to the Local Government Appeals Tribunal, shall be deemed to be an objection referred to in clause 6.

## Appendix 3: Application Form to vary a development standard

### Written application providing grounds for variation to development standards

To be submitted together with the development application (refer to EP&A Regulation 2000 Schedule 1 Forms).

1. What is the name of the environmental planning instrument that applies to the land?

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2. What is the zoning of the land?

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3. What are the objectives of the zone?

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4. What is the development standard being varied? e.g. FSR, height, lot size

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5. Under what clause is the development standard listed in the environmental planning instrument?

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6. What are the objectives of the development standard?

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7. What is the numeric value of the development standard in the environmental planning instrument?

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8. What is proposed numeric value of the development standard in your development application?

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9. What is the percentage variation (between your proposal and the environmental planning instrument)?

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**10. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?**

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**11. How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act.**

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**Note:** If more than one development standard is varied, an application will be needed for each variation (eg FSR and height).

**12. Is the development standard a performance based control? Give details.**

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**Additional matters to address**

*As outlined in "Varying Development Standards: A Guide" there are other additional matters that applicants should address when applying to vary a development standard.*

**13. Would strict compliance with the standard, in your particular case, would be unreasonable or unnecessary? Why?**

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**14. Are there sufficient environmental planning grounds to justify contravening the development standard? Give details.**

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## Appendix 4 Schedule 1 Circular B1

### Schedule A

Land which, under an environmental planning instrument, is within one of the following zones:

- (a) Environment protection
- (b) Environmental protection
- (c) Rural environment protection
- (d) Rural environmental protection
- (e) Coastal lands protection
- (f) Coastal lands acquisition
- (g) Special Uses (water catchment)
- (h) Municipality of Camden – I.D.O. No. 7, Zone Nos. 7(a) and 7(b) Scenic protection Area
- (i) City of Campbelltown –
  - I.D.O. No. 13, Zone No. 7(b) Scenic Protection Area
  - I.D.O. No. 14, Zone Nos. 7(a) and 7(b) Scenic Protection Area
  - I.D.O. No. 21, Zone Nos. 7(c) and 7(d) Scenic Protection Area
  - I.D.O. No. 23, Zone No. 7(c) Scenic Protection
  - I.D.O. No. 24, Zone Nos. 7(c) and 7(f) Scenic Protection Area
  - I.D.O. No. 25, Zone Nos. 7(a) and 7(d) Scenic Protection
  - I.D.O. No. 27, Zone Nos. 7(d1) and 7(d6) Scenic Protection
  - I.D.O. No. 28, Zone Nos. 7(c) Scenic Protection Area
- (j) City of Gosford – I.D.O. No. 122, Zone No. 7(a) Conservation
- (k) City of Lismore – I.D.O. No.40, Zone No. 5(c) Special; Uses (Flood Liable)
- (l) Shire of Richmond River – L.E.P. No. 3, Zone No. 6(c) Open Space (Waterfront Recreation and Open Space)
- (m) Shire of Wyong – I.D.O. No.58, Zone No. 7(a) Conservation.

## Appendix 5: Additional considerations for rural development applications – Does not apply to Standard Instrument LEPs

### APPLICATIONS FOR RURAL SUBDIVISION OR ERECTION OF A DWELLING HOUSE IN A RURAL ZONE

In rural areas, most development applications with associated SEPP 1 applications relate to varying development standards that set:

- (a) the minimum area required to allow the subdivision of land; or
- (b) the minimum area required for the erection of a dwelling house in a rural zone.

The minimum area varies from one rural zone to another, and from one council area to another. You will need to identify the particular standard that applies in your case by reading the environmental planning instrument, typically the councils local environmental plan. Should you need any assistance with the councils local environmental plan, please contact your local council in the first instance.

This guide sets out what you must cover in your SEPP 1 application. In addition, a variation to a development standard may also be justified where it can be shown that the proposal for subdivision or erection of a dwelling house is consistent with the existing development pattern for the area and that the necessary services are available.

The use of SEPP 1 may be justified to create a boundary adjustment between allotments which are less than the minimum standard subdivision area. It may also be used to allow a subdivision or dwelling associated with a viable rural enterprise. In this case, the supportive views of NSW Agriculture and Fisheries would assist the application.

An example of a situation where the use of the SEPP 1 might be justified, are in cases where the proposal:

- is clearly consistent with the development pattern of the area.

Examples of situations where the use of the SEPP 1 might not be justified, are in cases where the proposal:

- is clearly inconsistent with the development pattern of the area;
- is based solely on the case of a 'natural' subdivision, where a property is divided by a road or a watercourse;
- would result in an unreasonable demand on services;
- is located on land subject to high environmental hazard – flood, coastal erosion, landslip, bushfire, etc;
- conflicts with existing agricultural practices in the area;
- give rise to an additional dwelling entitlement; or
- would result in fragmentation of rural land with possible adverse economic impacts and inefficiencies in rural productivity.

The following information will help both the council, and the Director General of Planning, to determine your application.

- What is the zoning of your land?
- What are the aims and objectives of the zone where your land is? (Ask council.)
- How is your proposal consistent with these?
- What development standard needs to be varied? What is the reason for the standard? (Again ask council.) Is it important that the standard be maintained?
- Is your application to subdivide land, or to build a dwelling house, or both? This needs to be stated on your application to avoid any misunderstanding or the need for a second application.
- What is the pattern of subdivision and the location of dwelling houses in the locality? (A map of the area showing the size of holdings and locations of houses within 2km will make this clear.) How does your proposal conform to the existing pattern?
- Where is your land located in relation to the nearest town which provides services?

- Is sewage or water supply available to your land? If not is your land suitable for on site sewage disposal?
- Is rainfall adequate to collect potable roof water for domestic use?
- Is overground or bore water available to meet other needs (e.g. bushfire fighting, stock etc)
- What is the condition of the road to the proposed lot or house? Are there any special access problems?
- Is the means of access to the land from a State highway, main road or local road?
- What will be the effect of your proposal on the agricultural potential of the land? (An opinion from a recognised agricultural expert of the NSW Agriculture & Fisheries might help with this.) What sort of agricultural activities are currently being carried out on your land? How will the land be used in the future?
- Are there nearby agricultural uses which could be in conflict with your proposal? (Examples of this are the use of aerial agricultural sprays or the close location of a piggery, cattle feed lot or abattoir.)
- Does your land have high bush fire risk, soil slip/erosion or flooding/ drainage problems?
- Does the proposal give rise to an additional dwelling entitlement?
- Is your proposal consistent with all relevant State environmental planning policies and any regional plan? (Ask your council)

In certain instances, your SEPP 1 application will be referred to the Department of Planning for consideration by the Director General of Planning. If the Director General grants concurrence, then council may determine your development application (see Section 5.3)

#### **CONSIDERATION OF RURAL DEVELOPMENT APPLICATIONS**

The council must be satisfied that the SEPP 1 application accompanying the development application satisfies the general requirements for SEPP 1 applications (see Section 5.1.1). In addition, councils should also refer to the advice to applicants regarding additional considerations for rural development applications with accompanying SEPP 1 applications (see Section 4.3).

In certain instances, after council has determined the development application and associated SEPP 1 application, the council will have to refer the SEPP 1 application to the Department of Planning for the Director General's concurrence (see Section 6)

**Appendix 6: Reporting Form****General Council Data****COUNCIL INFORMATION**

Council name	
Contact name	
Phone	
Email	
Start date	
End date	
Please enter NIL for no variations under SEPP1 or Clause 4.6	

