

# BACK TO THE FUTURE

## THE WAY FORWARD ON CLAUSE 4.6

### Background

When I started work in my current law firm in or about 1978, the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**) was not in force.

Planning Law was controlled generally by Part XII A of the *Local Government Act 1919*.

Appeals against various decisions went to the Local Government Appeals Tribunal. Most of you, not all, will be too young to remember the old Schedule 7 Provisions, a strict code of Law and, fundamentally, up until the EP&A Act, discretion and flexibility were dirty words in Planning and Local Government.

The EP&A Act introduced by the "Wran Government" ushered in what was thought to be a new broom to the planning system in NSW.

I have extracted and appended some of the quotes from the second reading speech from Hansard (21 November 1979) for your light reading.

The words "positive", "foster investment", "facilitate growth", "flexibility", and "wide discretion" filter through the speech in what was intended to be a "Brave New World".

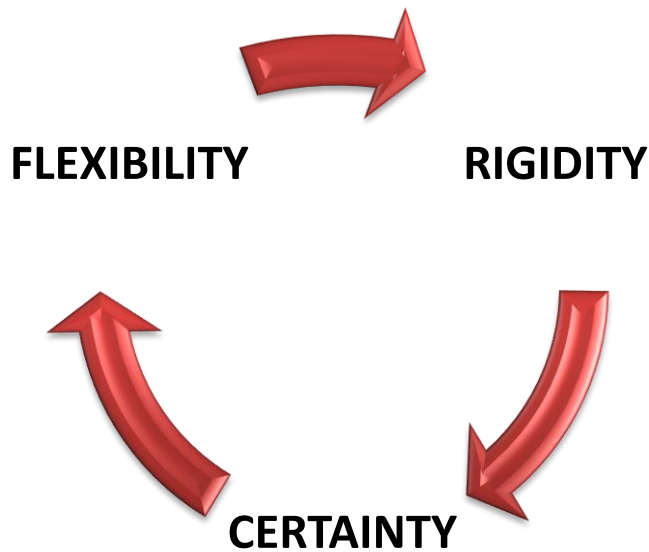
Comparisons were made with the flexibility of the United Kingdom system where there was no statutory zoning to the United States system which was the complete reverse and based on the American distrust of American government decision making.

The third approach was found on the European Continent, and Scandinavia and the Netherlands in particular, where the Central or Local Government acquired land years ahead for the needs of development and used its powers as land owner to achieve outcomes.

State Environmental Planning Policy No. 1 – Development Standards (**SEPP 1**) was the new tool to achieve these outcomes. The aims and objectives of SEPP 1 were clear:

*"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 ... of the Act"*

For over 38 years, and for my entire professional career, there has been this constant battle and tension between the concepts of flexibility, certainty and rigidity in planning with SEPP 1 as the centrepiece of the debate.



### **The Problem**

This is not intended to be a legal paper (which I understand is generally discouraged in this forum) but an analysis of where we are and where to from here which cannot take place without understanding what the Lawyers did to the Wran Government's vision.

There are 100's of cases about SEPP 1 and clause 4.6.

Probably the most concise analysis of the 1980s interpretation of it was done by Cripps J in *Hooker Corporation Pty Ltd v Hornsby Shire Council* (1986) 130 LGERA 428, 441-442:

*"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 the 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"*

That sounds simple doesn't it...

Trouble started brewing when the Court of Appeal handed down the decision in *North Sydney Municipal Council v P D Mayoh Pty Ltd* [No. 2] (1990) 71 LGRA 222 when the Court started defining what was a development standard and drew distinctions between standards and prohibitions. In that case, North Sydney had a provision that restricted residential flat buildings on land zoned Residential 2(c) if a principal building on adjoining land was less than 3 storeys and held that that provision was not a standard. With no development standard breached, SEPP 1 could not be relied upon and RFBs were simply prohibited.

A series of financially beneficial cases to the legal profession followed.

In *Poynting v Strathfield Council* (2001) 116 LGERA 319, where a not dissimilar provision that restricted development on land within the relevant zone to areas not less than 560 square metres was held to be a development standard (luckily consistent with advice provided by the lawyer at the time).

In *Quinn O'Hanlon Architects Pty Ltd v Leichhardt Municipal Council* (1989) 68 LGRA 114, the Court held that the foreshore building line in Balmain was a prohibition and then reversed it on appeal. The number of cases defining the matter are endless. They probably culminated to some extent in the decision of Justice Lloyd in *Winten Property Ltd v North Sydney Council* (2001) 130 LGERA 79.

The Court set a seemingly new test at paragraph 26 as follows:

*In applying the abovementioned judgment, it seems to me that SEPP No 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 s 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? (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 Justice Cripps in the Hooker Corporation case.) Fifth, is the objection well-founded?*

The wheel turned! Flexibility was starting to become a dirty word and Councils started to prescribe provisions in their new Environmental Planning Instruments that worked a way around the concept of a development standard.

Numbers that would have otherwise previously been development standards were incorporated within the definitional portion of the Local Environmental Plan and Councils introduced innumerable objectives into various clauses that made compliance with the objectives almost prohibitive or impossible.

Local Environmental Plans were drafted to circumvent the flexibility that had otherwise been originally contemplated. The Department of Planning acquiesced to Council's incessant cries of outrage against strident development.

Non-compliance with any individual objectives within a zoning or a standard was drafted in a way to make the breach of the objective a mandatory prohibition.

Government elections became very close and various Planning Ministers became scared to upset Regional, County, and Council interests so that Local Environmental Plans became a potpourri of sectional interest drafting to achieve designated Local Council goals. It was a good time to be a Lawyer.

The Chief Judge set about the task of further delineating and assisting interpreters of various standards in the decision of Justice Preston in *Wehbe v Pittwater Council* (2007) 156 LGERA 446.

The critical passages in the *Wehbe* decision are set out at paragraphs 36-52 and are appended for brevity.

Then came clause 4.6 of the standard instrument and the decisions in *Four2Five Pty Ltd v Ashfield* [2015] NSWLEC 90, *Micaul Holdings Pty Ltd v Randwick City Council* [2015] NSWLEC 1386 and *Moskovich v Waverley Council* [2016] NSWLEC 1015 which had been variously interpreted as "toughening up" the interpretation of the 4.6 of the standard instrument and then the loosening of its interpretation by the various Courts.

I personally am of the view that the *Moskovich* decision and *Micaul's* decision are not as pro-flexibility as might otherwise be perceived in the industry, but that could be the subject of much legal debate.

In *Chidiac v Mosman Council* [2015] NSWLEC 1044 then Senior Commissioner, now Justice Moore, wrote a scathing analysis of the Mosman LEP provisions, but then proceeded to ignore the existence of an ugly, old, out of scale, and intrusive building as part of the consideration for variation of an appropriate standard, just as Justice Stein had done in *Brentwood Properties Pty Limited v Mosman Council* (unreported, Land and Environment Court of New South Wales, Justice Stein, 30 March 1994) 20 years before.

Councils deliberately put very low floor space ratios as standards in their LEPs to give them flexibility as to which applications they approve and don't.

One Council Planner put it very succinctly to one of my Partners "We like the current system, it gives us flexibility to approve a development we like, but then we can use the legalism and technicality if there is something we don't like."

"Well that's just great!" Just what the Wran Government originally intended?  
– NOT!! (My daughters would say "Build a bridge Dad!!).

So the situation at the moment is that instruments are being drafted to remove flexibility and to prevent clause 4.6 from coming in to play and applicants are at the beck and call of whether a Council likes a development for whatever reason. If they didn't like it, it couldn't pass the legal thresholds.

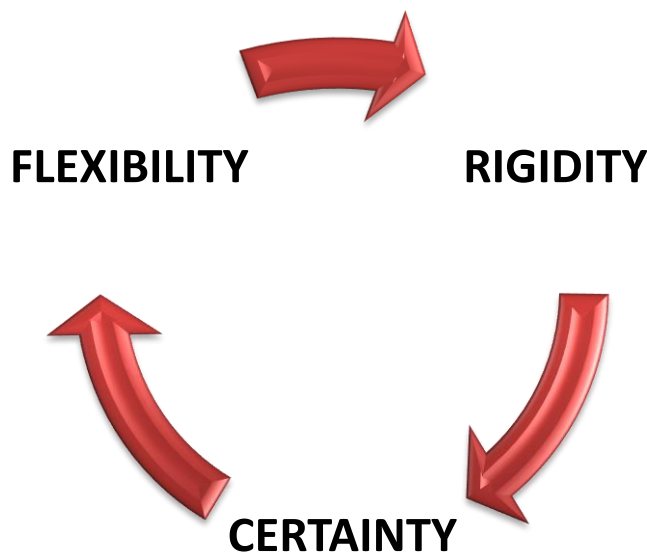
Some Councils have a no more than 10% variation provision (unstated). Recently I was told one Council won't allow 4.6's at all. Some Councils will allow deliberately lower than their FSR Controls, but will allow over 15% variation provided you put in a "Voluntary" Planning Agreement with contributions on Affordable Housing. None of these are merit based.

In some Council LEPs, the Height, FSR, and Envelope restrictions don't coincide, so that a compliance with Height and Envelopes automatically create and exceedance in Floor Space Ratio, or put the other way, compliance with the Floor Space Ratio would prescribe an increase in Height which would otherwise be prohibited.

Some Councils put in their objectives that floor space is a Density Control, others say there can be **NO** impact on amenity at all.

I was involved in a case back in the 1980's called *Waterview Workshops Pty. Limited v Council of Municipality of Leichhardt* (unreported, Land and Environment Court of NSW, Cripps J, October 1988) where Justice Cripps held that, where an LEP proscribes that there be no impact on amenity, that means "no unreasonable impact". This is not an interpretation adopted by many Councils.

**....and round and round we go....**



### **The Solution**

No one is saying that the Council Planner's job is easy, we live in a Country, in a State and in a City that has some of the most valuable property in the world. Developers are greedy, often dictated by how much they have paid for the land. Perhaps everyone is greedy. Developers don't have the monopoly on greed!!

Most of the cases that I'm involved in obtaining an extra 1 square metre of floor space can be worth in the order of \$10,000.00 (or more) on an escalating and exponential scale.

We are spending our time arguing about breezeways and openable corridors, but the standard of preparation of a clause 4.6 variation for a Court proceeding goes far and away above that which would otherwise be required for the normal consideration of any variation as it might appear before a simple Council Development Application.

Just as the Council Officer argues the developers "ambit claim" the Council, when it wants to can use the clause 4.6 to defeat an application that it is satisfied with. The Council can refuse an applicant on legal technical grounds relating to restrictive objectives that, on one version of events, can't be complied with or requires outcomes that have little or no relationship to the actual clause.

Just last week I advised a client relating to the removal or otherwise of a tree in proximity to a basement carpark, but recommended not proceeding to the Land and Environment Court. The reason? Because there was a clause 4.6 variation that had already been conceded by the Council on floor space ratio that I thought was unsustainable in a Court hearing.

A common occurrence.

Sometimes it works itself out at mediation and sometimes it doesn't.

In writing this paper I took the opportunity to write to a half dozen associates in the Legal and Planning fraternity with whom I'm regularly involved.

Some of the observations were as follows:

1. The role of clause 4.6 and s96 Applications is still unsettled and there is currently an argument as at the date of this paper that s96 may have no mechanism for being approved as clause 4.6 may not apply to it.
2. The murky world of VPAs where clause 4.6 is involved should be reassessed.
3. Another approach on standards would be the same as s79C(3a) in relation to DCP's ie: "Consent Authority is to be flexible at applying these provisions and allow reasonable alternative solutions that achieve objectives of the standards."
4. One Planner said "simple language, simple tests, squarely aligned with s5 (the objects) of the Act".
5. Another Planner expressed the view that they rarely saw a cl 4.6 submission that they found compelling and that they invariably are composed of a "tick the box" style of assessment which flows from the Court decision.
6. There is an element of pointlessness about the time, money and effort being spent writing the tick the box style submission.

Consistent with those observations, there seems to be three principles that need to attach to any workable alternative.

1. Councils need to be encouraged and given confidence to have a merits based style of thinking with development applications.
2. There needs to be a removal of some of the aspect of legality around what constitutes an acceptable variation.
3. The community is of the view that standards are there to protect their investment and the environment i.e. better planning outcomes. There has to be maintained a notion of control and community acceptance that goes with it.

Another observation made was that the principles that are deemed to satisfy standards that you find in SEPP Seniors Living and Affordable Housing work quite well – i.e. if you meet a standard the Consent Authority can't refuse. On the other hand, if you don't meet the standard, it just means a Consent Authority must look closer at what impacts are relevant to that control - ie: This is what's generally going to apply and if you meet the standard it is probably going to be ok, but if you want to do something a bit more, then we are going to look at it much more closely no matter what the impacts are.

The Land and Environment Court's Planning Principles work well in this regard (though they are much misinterpreted).

Other suggestions included the following:

1. Take the leg work out of development control to free up time and energy for Planners to think instead of measure, with CAD and 3D Compliance Envelope should be mandatory, so that impacts of non-compliances and breaches of building envelopes can be easily appreciated.
2. Bring DCPs back to basics. The three inch thick DCP's have to stop. ADG Style guide sets out State wide principles of Development Control including material on ESD, Parking, Design, privacy etc, would remove much cost and pain.

I had a small appeal against one Council recently and the contentions that related to a "deemed to satisfy" Affordable Housing Proposal were 31 pages long..... Really???!!!

3. Making it mandatory for Councils to rotate planning staff between strategic planning and development control.

I've always been a great supporter of making Council Officers give evidence in proceedings instead of employing independent people, so they learn and understand the relevance of balance and reasonableness in their decision making.

## Conclusion

The current system and application of clause 4.6 is dangerous.

It encourages favouritism, bias and "picking winners". Over time, this leads to corruption. Money follows power. If you have to go to Court for a clause 4.6 matter, no matter how much you spend, how much effort goes into it, you have absolutely no certainty.

Depending on the nature of the matter, the exercise can cost you \$10's of thousands of dollars and many months delay.

The argument of rigid certainty over a more flexible planning model is an expectation that an LEP standard can anticipate all eventualities and outcomes. It can't and shouldn't be designed to.

The Department of Planning's reaction is that LEPs are flexible because they can be readily changed. The reality is the opposite!

LEPs are a cumbersome, expensive, time consuming thing to change and minor variations should promote an opportunity to vary certain standards on a merit basis.

You all may have different view as to the Planning Panels, but they seem to have been a positive mechanism to permit a more merit based assessment. One suggestion is to allow planning proposals to amend instruments without the need to formally amend an LEP in the current fashion.

This proposal would be like a mid-station method for variations that are not about changing the strategic planning outcomes that form the basis of a Local Environmental Plan's raison d'etre.

A number of years ago I wrote a paper entitled "How to Win a Court Case in The Land and Environment Court". I recommend the paper to you, I will try and get it put on our website. I drafted it and gave it to the then Senior Commissioner of the Land and Environment Court John Roseth to read and review.

John, a very wise man, was so keen to contribute to the paper that he almost rewrote it, much to my chagrin. My tenth point was "whatever you do, get a good Architect".

The Senior Commissioner very politely changed the conclusion at the base of my paper to read words to the effect of "if you obey rule number 10, then you won't have to worry about the other nine."

I think his point is still valid.

Lawyers can draft any clause you want and make it work, but you really have to make up your mind.

**Gary Green**  
**Pikes & Verekers Lawyers**



## ANNEXURE 1

### SECOND READING SPEECH

#### Page 3346

"The eight principal objectives of the bills met with widespread public support. Those objectives are, first, to broaden the scope of planning effectively to embrace economic, social and ecological considerations in the preparation of environmental plans and in development control; second, to provide positive guidelines for the development process, to speed up decision-making, to foster investment and facilitate economic growth; third, to authorise the preparation of different types and forms of environmental plans each respectively designed to deal with State, regional and local planning issues and problems; fourth, to ensure that the State is principally concerned with matters of policy and objectives rather than matters of detailed local land use; fifth, to co-ordinate, especially at a State and regional level, the development programmes of public authorities; sixth, to provide an opportunity for public involvement in the planning process; seventh, to provide for a more simplified administration of the system of planning decision making; and eighth, to provide a system for the assessment of the environmental impacts of proposals that would significantly affect the environment.

#### PAGE 3351

"The deficiencies of existing legislation lie in the following areas: its concept of land use planning is too narrow; its relationship and orientation to local government stifle initiatives for State and regional planning and inevitably involve the State unnecessarily in local planning issues; its failure to demarcate respective responsibilities for State and local government in environmental planning decision-making; its concept of planning instruments is too rigid; its failure to integrate techniques for land use planning with environmental assessment and protection; its failure to give members of the public any meaningful opportunity to participate in planning decision-making; its failure to co-ordinate activities of the public and private sectors involved in the development industry; its failure to provide a uniform and rationalized code for development control, causing unnecessary delays and costs in the development process; and its failure to provide the most appropriate organizational and administrative support at the State level."

#### PAGE 3352

The bills now before the House deliberately seek to overcome all of these deficiencies in the existing legislation by making the following provisions:...

- (a) adopting the comprehensive concept of environmental planning, the nature and content of which is to be understood in the light of clause 5 of the Environmental Planning and Assessment Bill which enunciates the objects of the Act. In essence it involves decision-making for planned development and conservation to achieve economic and social growth within the physical environment's tolerable limits;

- (b) *(enabling plans and policies to be developed at the level of, or from the perspective of, issues or interests of State or regional significance in addition to local significance;*
- ...
- (d) *by enabling a much more flexible approach to be adopted as to the format, content and presentation of planning instruments to overcome what one expert commentator on the Australian planning systems has described as the ordinance and map obsession;*

### **PAGE 3353**

*"Before I leave the existing legislation it seems appropriate to recognize and appreciate the achievements made under it in the pioneering era following its enactment in 1945.*

*At present planning schemes or interim development orders that have been made in accordance with that legislation are in force in more than 95 per cent of all local areas in the State. This is a commendable achievement by the State and local government planning authorities. It must be obvious that these achievements are not designed or intended as lasting or permanent achievements. Plans are only effective when they establish the guidelines and give the direction for planned future change and development. Their time focus must always be the present and the anticipated future. Once they cease to be relevant to present and future needs, they become literally worthless or merely of historical value. Hence the necessity for plans to be flexible, constantly monitored and reviewed. They must indicate the way of planned change.*

*If change is occurring despite the plans, they are irrelevant. Drastically worse results are caused where plans by being outdated actually frustrate or delay desirable or necessary change. Such a result is intolerable and entirely repugnant to the objects of the proposed new legislation."*

### **PAGE 3356**

*To see the bills in other than a purely local context it is necessary to have a short look at the history of planning legislation. The first serious attempt at planning legislation was the 1945 Act in New South Wales, which was modelled upon the English planning legislation of 1932. No serious attempt was made to introduce contemporary legislation in New South Wales for some twenty years after the 1945 enactment, until the Hon. Sir John Fuller undertook the task.*

*The only real alterations could be described as ad hoc reviews, mainly to cope with changes in development patterns as they occurred, or to overcome a problem that had arisen as a result of litigation. When the New South Wales planners commenced their review of planning legislation in New South Wales they had three basic overseas systems to consider in the western world. In the United Kingdom there are no statutory zonings. If a proposal is submitted and is considered desirable, it may be approved. There are no column 5 uses, as we call them in New South Wales, where developments of various types are prohibited. Local authorities are thus provided with a wide discretion. In the United Kingdom there are also regional schemes, but they are purely advisory and do not have the force of law.*

**PAGE 3357**

Generally speaking the United States system is the complete reverse of the flexibility that one finds in the United Kingdom and is based on rigid statutory zones with definitions of permissible uses based upon the American distrust of discretion in decision-making. The third approach is to be found on the Continent, particularly in Scandinavia and the Netherlands where the central or local government acquires land many years ahead of needed development and, using its powers as the landowner, achieves any required development and leases the land to tenants, as in the Australian Capital Territory. The rigid American scheme has the great advantage of certainty but also has the disadvantage, compared with the United Kingdom system, of being overlegalistic, with development applications being often determined by the interpretation of an ordinance rather than on the merits of the proposal.

"One of the major deficiencies in the legislation as highlighted in some of the seminars is that it contains the worst features of both the American and the United Kingdom systems without their corresponding advantages. That is because it contains a combination of the legalistic approach with all its deficiencies and incorporates the components of uncertainty and delay, about which I shall speak more in due course. In saying that in no way do I suggest that there is not a need for a new approach to planning in New South Wales. This need has been highlighted by the fact that, despite the introduction of planning legislation in 1945, there are a number of metropolitan local government areas without a prescribed town plan, and there have been monumental delays in the prescription of local plans. For example, in 1946 Sutherland shire council resolved to prepare a plan which thirty years later had not been prescribed. I have been informed that the Hunters Hill scheme took some twenty three years to be prescribed. The Mosman scheme took twenty two years. The shortest time a plan was with the department for approval was Wyong-nearly five years-and the longest was Rockdale, sixteen years. Against this background, the Environmental Planning and Assessment Bill seeks to provide a three-tier planning scheme with all three plans having the force of law."

## ANNEXURE 2

Extracts from *Wehbe v Pittwater Council* (2007) 156 LGERA 446

### SEPP 1 objection and subdivision

36. This means that in order for the Court, exercising the functions of the consent authority, to have power to grant development consent to the applicant's proposed subdivision, it must uphold the SEPP 1 objection to compliance with cl 11(2) of PLEP. Upholding the SEPP 1 objection is a precondition which must be satisfied before the proposed development of subdivision can be approved on a consideration of the merits: *Winten Property Group Ltd v North Sydney Council* (2001) 130 LGERA 79 at [19], [29], [44]-[45].

### Requirements to uphold a SEPP 1 objection

37. The Court exercising the functions of the consent authority, must be satisfied of three matters before it can 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 Act with or without development consent.
38. First, the Court must be satisfied that "the objection is well founded" (cl 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" (cl 6 of SEPP 1). The requirement in cl 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: see *North Sydney Council v Parlby* (1986) (unreported, Stein J, NSWLEC, 13 November 1986) at 8.
39. Secondly, the Court 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" (cl 7 of SEPP 1). This matter is cumulative with the first matter (it is prefaced by the words in cl 7 of SEPP 1 "and is also"). The aims and objects of SEPP 1 set out in cl 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 Act are to encourage:
- "(1)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,
  - (2)the promotion and coordination of the orderly and economic use of developed land."

40. Thirdly, the Court must be satisfied that a consideration of the matters in cl 8(a) and (b) of SEPP 1 justifies the upholding of the SEPP 1 objection: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100 and *City West Housing Pty Ltd v Sydney City Council* (1999) 110 LGERA 262 at 291. The matters in cl 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.”

41. Although the Court has power to uphold a SEPP 1 objection without the concurrence of the Director-General by reason of s 39(6) of the *Land and Environment Court Act 1979* (NSW), the matters in cl 8(a) and (b) are still relevant when the Court is considering exercising its power: *Fast Buck\$ v Byron Shire Council* at 100 .

### **Ways of establishing that compliance is unreasonable or unnecessary**

42. An objection under SEPP 1 may be well founded and be consistent with the aims set out in cl 3 of the Policy in a variety of ways. The most commonly invoked way 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: see *SCMP Properties Pty Ltd v North Sydney Municipal Council* (1983) 130 LGERA 351 at 379; *Hooker-Rex Estates v Hornsby Shire Council* (1983) (unreported, NSWLEC, No 10506/82, Bignold J, 27 July, 1983) at 16, 18 and 20; *Gergely & Pinter v Woollahra Municipal Council* 52 LGRA 400 at 406-407, 412-413; *Hooker Corporation Pty Ltd v Hornsby Shire Council* (1986) 130 LGERA 438 at 441; *North Sydney Municipal Council v Parlby* at 5 ; *Legal & General Life of Australia Ltd v North Sydney Municipal Council* (1989) 68 LGRA 192 at 202; *Leighton Properties Pty Ltd v North Sydney Council* (1998) 98 LGERA 382 at 386; *Fast Buck\$ v Byron Shire Council* at 97 ; *City West Housing Pty Ltd v Sydney City Council* at 282-283; *Memel Holdings Pty Ltd v Pittwater Council* (2000) 110 LGERA 217 at 220-221; *Winten Property Group Ltd v North Sydney Council* at [25]-[28] and *Design 23 Pty Ltd v Sutherland Shire Council* (2003) 125 LGERA 380 at [20]-[21].

43. The rationale is that 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).

44. 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 Municipal Council v Parlby* at 5 ; *Legal and General Life of Australia Ltd v North Sydney Municipal Council* at 202 ; *Fast Buck\$ v Byron Shire Council* at 97 ; *City West Housing Pty Ltd v Sydney City Council* at 282-283 . Other ways are explained in the authorities.

45. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: *SCMP Properties Pty Limited v North Sydney Municipal Council* at 378-379 ; *North Sydney Municipal Council v Parlby* at 5 .
46. 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: *Hooker-Rex Estates v Hornsby Shire Council* at 18 .
47. A fourth way is to establish that 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: *North Shore Gas v North Shore Municipal Council* (1986) (unreported, NSWLEC, No 1018586, Stein J, 15 September 1986) at 11-12; *Legal and General Life of Australia Ltd v North Sydney Municipal Council* at 202 ; *City West Housing Pty Ltd v Sydney City Council* at [69]-[70] .
48. 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”: *Fast Buck\$ v Byron Shire Council* at 97 .
49. 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 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.
50. However, so expressed, this way is limited. It does not permit of a general inquiry into the appropriateness of the development standard for the zoning. An objection would not be well-founded by an opinion that the development standard is inappropriate in respect of a particular zoning (the consent authority must assume the standard has a purpose): *Hooker Corporation Pty Ltd v Hornsby Shire Council* at 441 ; *North Sydney Municipal Council v Parlby* at 7 ; and *Colvest No 27 Pty Ltd v Hastings Municipal Council* (1988) (unreported, NSWLEC, No 10617/86, Cripps J, 22 March 1988) at 10-11.
51. The dispensing power under SEPP 1 also is not a general planning power to be used as an alternative to the plan making power under Part 3 of the Act to change existing planning provisions. An objection cannot be used as a means to effect general planning changes throughout a local government area (in circumvention of the procedures under Part 3 of the Act): *Hooker-Rex Estates v Hornsby Shire Council* at 22 ; *Gergely & Pinter v Woollahra Municipal Council* at 412 ; *Hooker Corporation Pty Ltd v Hornsby Shire Council* at 442 ; *North Sydney Municipal Council v Parlby* at 7 ; *Colvest No 27 Pty Ltd v Hastings Municipal Council* at 11-12 ; *Legal and General Life of Australia Ltd v North Sydney Municipal Council* at 201-202 (affirmed *Legal & General Life*

*of Australia Ltd v North Sydney Municipal Council* (1990) 69 LGRA 201 at 203, 210); *Fast Buck\$ v Byron Shire Council* at 99 ; *Bowen v Willoughby City Council* [2001] NSWLEC 274 at [113].

52. 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 cl 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 Shire Council* at [26]-[27], [30]-[31], [35] .