Urban Taskforce
AUSTRALIA

23 August 2011

Mr Sam Haddad
Director-General
NSW Department of Planning and Infrastructure
GPO Box 39
Sydney NSW 2001

Dear Mr Haddad

Re: *Varying development standards: A Guide - August 2011*

I refer you to the above document, published by the NSW Department of Planning and Infrastructure last Friday.

The publication of this document, in final form, without consultation, is most disappointing. It suggests that the Department of Planning and Infrastructure is not as committed to a substantive engagement with industry as we had been led to believe.

This document will make the development process more difficult for two reasons.

Firstly, it misstates the law in key respects, thus causing confusion amongst consent authorities and applicants alike.

Secondly, and more seriously, in lays down new policy guidance, that has the potential to fundamentally alter the traditional application of SEPP 1.

The document is deeply worrying, because it stumbles across an extremely important and sensitive area in environmental planning and assessment. Wittingly, or unwittingly, it complicates the application of both *State Environmental Planning Policy No 1—Development Standards* ("SEPP 1") clause 4.6 of the Standard Instrument set out in the *Standard Instrument (Local Environmental Plans) Order 2006* ("the Standard Instrument"). It will certainly mean development standards will be even more inflexible and NSW will experience even more difficulties in achieving its urban development aspirations.

Frankly, we are left at a loss. How can the Department have adopted this document, outside of the comprehensive planning review now underway? Why would the Department have wanted to make it even more difficult for consent authorities to carry out genuine merit assessments between now, and when the new planning system commences in 2013? What purpose does it serve to undermine an arrangement that has been in place since the planning system began in 1980, with new dictates?

This step simply wasn't necessary. Since 2007, participants in the NSW planning system have benefited from an excellent guide to the application to SEPP 1 in the form of a judgment by the Justice Preston, Chief Jude of the Land and Environment Court. The decision is known as *Wehbe v Pittwater Council*.[1] It has been cited or applied on 51 separate judgments of the Land and Environment Court since it was made in 2007. It has served an important information resource for many thousands of development applicants over the last four years.

[1] [2007] NSWLEC 827.

Urban Taskforce Australia Ltd. ABN: 21 102 685 174 | GPO Box 5396 Sydney NSW 2001
T 612 9238 3955 | F 612 9222 9122 | Level 12, 32 Martin Place Sydney NSW | Level 6, 39 London Circuit, Canberra ACT
admin@urbantaskforce.com.au | www.urbantaskforce.com.au

The Department's new guide clearly seeks to undermine *Wehbe v Pittwater Council* by seeking to raise new heads of consideration when applying SEPP 1 and the more recent clause 4.6. The guide has clearly been prepared to exploit a 2003 the NSW Court of Appeal decision declaring that environmental planning instruments are not the only documents that can be used to block new development, and that a consent authority is able to refuse permissible development by referring to a wide range of material outside the formal planning processes on "public interest" grounds.[2]

This new 22 page guide will join the more than 1,060 existing Department of Planning and Infrastructure policy documents regulating development in the state.[3]

The balance of this letter will deal with specific provisions in the guide.

1. **<u>The new policy statement asserting that SEPP 1 and clause 4.6 are only to be invoked in "exceptional" circumstances will reduce the ability for genuine merit assessment</u>**

   In its first paragraph the guide says that:

   > The planning system provides flexibility to allow ... [planning] objectives to still be met by varying development standards *in exceptional cases* (emphasis added).[4]

   It reinforces this point later in the document:

   > *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 (emphasis added). [5]

   The requirement that a case must be "exceptional" is new. It is not set out in the *State Environmental Planning Policy No 1—Development Standards* ("SEPP 1"), nor is it in clause 4.6 of the standard instrument included in the *Standard Instrument (Local Environmental Plans) Order 2006* ("the Standard Instrument"). It does not appear in *Wehbe v Pittwater Council.*

   Wehbe v Pittwater Council lays down the requirements that must be followed if an objection under SEPP 1 is to be upheld:

   > First, the Court must be satisfied that "the objection is well founded" ... 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" .... The requirement ... 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 ...
   >
   > Secondly, the Court must be of the opinion that "granting of consent to that development application is consistent with the aims of this Policy ..." .... This matter is cumulative with the first matter .... The aims and objects of SEPP 1 ... 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 ...[certain] objects specified in... the Act". ...
   >
   > Thirdly, the Court must be satisfied that a consideration of the matters [relating to Director-General's concurrence] .... justifies the upholding of the SEPP 1 objection.... The matters ... 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.[6]

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[2] *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195 [81].
[3] The Department's own document, listing all 1,060 policy documents, is available here: <http://urbantaskforce.com.au/attachment.php?id=4088>. The Department has created more such documents since they prepared this list.
[4] NSW Department of Planning and Infrastructure, *Varying development standards: A Guide* (2011) 2.
[5] Ibid 3.

This is a multi-layered regime that contains all the safeguards any reasonable person could hope for. Imposing an additional policy overlay that declares that the case must be "exceptional" is completely unnecessary and unnecessary complicates what is already a difficult process.

This change will reduce development activity. **There will be less flexibility for individual development proposals to be assessed on their own merits, and rigid pre-determined local council controls, set in the abstract without the context offered by actual proposals, will become an even greater barrier to good development.**

2. <u>Guidance on cumulative effects ignore the limitations laid down by the courts</u>

The guide says that:

> 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. [7]

This statement ignores the existing body of jurisprudence on cumulative impacts. In order for cumulative impacts to be considered, the impacts must be relevant and there must be some clear statutory basis for their consideration.

It <u>is</u> legitimate to reject a development application when:

- it is objectionable on its own merits; and
- there is "more than just a possibility" of later development applications of the same type.[8]

However, a development proposal <u>cannot</u> be refused when:

- it is unobjectionable in its own right; or
- there is only a "mere chance" that similar development applications may be made in the future.

Cumulative impacts can be important when dealing with the principle of "intergenerational equity".[9] When this occurs there *is* a need to consider cumulative effects if:

- no single event could be said to have such a significant impact that it would irretrievably harm a particular environment; and
- cumulatively, activities *would* harm the environment.[10]

There may also be specific provisions in environmental planning instruments that may compel consideration of cumulative impacts.[11]

The advice to councils to consider cumulative impacts fails to take heed of the important limitations to such consideration identified by the Land and Environment Court. On the issue of cumulative impacts, the guide leads council authorities, applicants and objectors into error. This leads to more confusion and more money wasted in the courts.

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[6] *Wehbe v Pittwater Council* [2007] NSWLEC 827 [38]-[40].
[7] NSW Department of Planning and Infrastructure, *Varying development standards: A Guide* (2011) 9.
[8] *Emmott v Ku-ring-gai Municipal Council* (1954) 3 LGRA 177, 182 (Sugerman J); *Goldin and Another v Minister for Transport* [2002] NSWLEC 75 [34].
[9] *Gray v Minister for Planning and Others* [2006] NSWLEC 720; *Minister for Planning v Walker and Others* [2008] NSWCA 224 [56]-[63] (Hodgson J).
[10] Ibid.
[11] See for example *Tweed Local Environmental Plan*, cl 8(1)(c), *Hastings Point Progress Association Inc v Tweed Shire Council and Anor; Hastings Point Progress Association Inc v Tweed Shire Council and Ors* [2008] NSWLEC 219 [4].

3. Councils are urged not to take into account draft plans for the purposes of varying development standards, but remain free to refuse development based on possible future restrictions

The guide says that:

> 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 policymaking tool and the distinction needs to be kept clearly in mind.[12]

This guidance is very strange - and introduces a curious lack of balance to the development assessment system. Councils frequently refuse development consent to otherwise permissible development, on the basis of prohibitions or restrictions in draft plans that have yet to be enacted. Why shouldn't it not the other way around, where development that is permitted already, but restricted by out-of-date development standards, can be approved based on foreshadowed development standards via SEPP 1 or clause 4.6?

If the fact that there is "no guarantee that a draft instrument will proceed to finalisation" is a reason to keep a development standard rigid, why is a draft environmental planning instruments listed as a mandatory consideration under the Act?[13]

Furthermore, where does this assertion that a SEPP is an "administrative" not a "policy-making" tool come from? And what relevance does it have to the variation of development standards based on a draft LEP? **A draft LEP that is or has been the subject of public consultation under the Act is a policy-making tool and - whether we like it or not - guides decisions made on individual development applications.** When SEPP 1 or clause 4.6 are being used in response to a draft LEP, it is the draft LEP that is the policy-making tool, with SEPP 1 and clause 4.6 merely being the vehicles for the policy intention to be achieved.

If the Department wish to remove draft LEPs as a consideration in development assessment, they need to be balanced about it, and remove them as a basis to block development proposals too.

4. Restrictions on existing use expansion are not justified

The guide says that:

> The [SEPP 1 or clause 4.6] Policy should not be used to allow expansion of existing uses in a way which is substantially inconsistent with the intentions of the zone. [14]

Why? As we detailed above, the intentions of the zone have no particular relevance to SEPP 1; it is usually the intention of the development standard being varied that is important. In relation to clause 4.6, there is already a requirement that the consent authority must be satisfied that proposed development will be consistent with the objectives for development within the zone.[15]

The guide attempts to impose new restrictions on SEPP 1, and misstates the consent authority's obligations under clause 4.6.

5. The guide misrepresents the circumstances in which a SEPP 1 objection can be upheld

The guide says that:

> 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,

[12] NSW Department of Planning and Infrastructure, *Varying development standards: A Guide* (2011) 9.
[13] *Environmental Planning and Assessment Act 1979* s 79C(1)(a)(ii).
[14] NSW Department of Planning and Infrastructure, *Varying development standards: A Guide* (2011) 10.
[15] cl 4.6(4)(a)(ii).

> strict compliance with the standard would be deemed to be unreasonable and unnecessary and council could approve a variation.[16]

If this is an attempt to summarise the current state of the law it is wrong and grossly incomplete. Justice Preston explained the current law clearly in *Wehbe v Pittwater Council*:

> 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 ...[17]

Note that Justice Preston made no reference to the "broader planning objectives for the locality". There is no reason why he should have. Such an additional layer of consideration would only complicate matters. As Justice Preston said:

> 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).[18]

It seems that the guide is seeking to extend the provisions of clause 4.6(4)(a)(ii) of the Standard Instrument to SEPP 1. This provision *does* require that "the proposed development ... be ... consistent with ... the objectives for development within the zone ...". However no such equivalent provision exists in SEPP 1.

The suggested application form to vary a development standard (appendix 3) has also been prepared on the assumption that the requirements for clause 4.6 and SEPP 1 are the same, when they are clearly different.

The guide also misleadingly refers to a "five part test", said to be imposed by the Land and Environment Court. In the guide the phrase appears in quotation marks, as if the Court has adopted this terminology, but in fact, no court case has included this phrase. The expression appears to have been created by the Department, not the Court.

The phrase "five part test" is misleading because it implies that each of the 'five parts' of the so-called test must be satisfied in order to vary a development standard. In fact, just one of the five nominated matters may, by itself, be a reason to vary a development standard.[19]

6. <u>The guide fails to acknowledge that councils only need to consider state and regional planning considerations when they have "assumed concurrence"</u>

The guide says that:

> 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.[20]

There *is* an obligation for the Director-General to give consideration to such matters.[21] A council will only have an obligation to consider such matters if the Director-General has advised them that concurrence may be assumed, on the basis that such matters are considered by the council.[22]

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[16] NSW Department of Planning and Infrastructure, *Varying development standards: A Guide* (2011) 3.
[17] *Wehbe v Pittwater Council* [2007] NSWLEC 827 [42].
[18] Ibid [43].
[19] Ibid[43]-[48].
[20] NSW Department of Planning and Infrastructure, *Varying development standards: A Guide* (2011) 5.
[21] Standard Instrument cl 4.6(5); *State Environmental Planning Policy No 1—Development Standards* cl 8.
[22] *Environmental Planning and Assessment Regulation 2000* cl 64.

This needs to be made much clearer. For example, if this is a condition of the grant of assumed concurrence it needs to be clearly stated. Furthermore, **in circumstances where there is no assumed concurrence, consideration of these matters is for the Director-General, not the local council.**

7. <u>The guide gives the wrong advice on the relationship between SEPP 1 and non-discretionary development standards</u>

The guide says that:

> SEPP 1 ... applies ... to any development standard that is not a 'non-discretionary development standard'.[23]

This is not correct. If a development proposal satisfies a "non-discretionary development standard" it means that the consent authority:

- is not entitled to take the standard into further consideration in determining the development application;
- must not refuse the application on the ground that the development does not comply with the standard; and
- must not impose a condition of consent that has the same, or substantially the same, effect as the standards but is more onerous than that standard.[24]

However, **a development proposal <u>does not have to comply</u> with a non-discretionary development standard in order to be approved.** As the Act says

> a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard.[25]

Given the:

- lack of consultation;
- poor policy advice; and
- many legal errors,

we ask that you to withdraw the document *Varying development standards: A Guide - August 2011* as a matter of urgency.

We would welcome the opportunity to discuss our concerns with you.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer

[23] NSW Department of Planning and Infrastructure, *Varying development standards: A Guide* (2011) 3.
[24] *Environmental Planning and Assessment Act 1979* s 79C(2).
[25] *Environmental Planning and Assessment Act 1979* s 79C(3)(b).