



19 December 2012

Ashley Aubrey
Regional Director
Western Region
Department of Planning and Infrastructure
PO Box 58
DUBBO NSW 2830

Correspondence to:

The General Manager
PO Box 21

Mathoura NSW 2710

Administration / General Enquiries:

☎ (03) 5884 3302

📠 (03) 5884 3417

Engineering / Building & Planning:

☎ (03) 5884 3400

📠 (03) 5884 3417

email:

admin@murray.nsw.gov.au

website:

www.murray.nsw.gov.au

Head Office:

21-25 Conargo Street
Mathoura NSW 2710

Branch Office:

6 Meninya Street
Moama NSW 2731

Dear Ashley,

RE: Planning Proposal to amend Murray Local Environmental Plan (LEP) 2011: Clause 7.4(2)- Development on River Front Areas

Reference is made to the above.

In accordance with Clause 56(1) of the *Environmental Planning and Assessment Act 1979* please find attached a 'planning proposal' prepared by Murray Shire Council.

The planning proposal seeks to amend Murray LEP 2011. The objective of the 'planning proposal' is to;
provide flexibility in respect to development permitted within 'river front areas'

Recent, legal advice (attached) obtained by Council has concluded that Clause 7.4(2) contains 'prohibitions' which restricts Council consenting to development within 'river front areas' even where the provision is deemed to be unreasonable or unnecessary. It should also be noted that Council has concerns with other 'prohibitions' contained within the LEP instrument (ie: 7.6(4)(a)) concerning development along river. Development along rivers is invariably specific to the site and it is pertinent that flexibility be provided within the planning system to respond to circumstances of the case.

This issue was discussed at the recent RAMROC Planners Group meeting held in Albury on 12 December 2012 which you were at attendance. At this meeting it was agreed that the issue affected a number of Councils in the region and that RAMROC would formally raise this issue with the Department of Planning and Infrastructure. However, due to the significant impact this provision has within the Murray Shire, Council has resolved to submit a 'planning proposal' to have the clause amended.

As part of the 'planning proposal' Council would also like to rectify an error in the current LEP instrument and insert the 'Edward River' into relevant clauses referring to rivers within Murray Shire.

Council respectfully requests that the 'planning proposal' be considered under the 'gateway system' and that Council be advised of the 'gateway determination' at the earliest opportunity.

Should you require any further information please contact Council's Town Planner, Liam Wilkinson on 03 5884 3400.

Yours faithfully

A handwritten signature in black ink, appearing to read 'G. Murdoch', with a stylized, looped initial 'G'.

Greg Murdoch
General Manager

LW

Murray Shire Council

Planning Proposal to amend Murray LEP 2011

'Clause 7.4 (2) Development on River Front Areas'

Part 1 - Objectives or Intended Outcomes

The primary objective of this planning proposal is to;

- provide flexibility in respect to development permitted within 'river front areas'

The current clause (7.4(2)) in Murray LEP 2011 relating to development on river front areas prohibits all development that is not stipulated within the clause. This does not provide the flexibility to consent to development where in the circumstances of the case, compliance with this provision is unreasonable or unnecessary. This flexibility was provided under the previous instrument Murray LEP 1989 where the river set back clause was considered to be a 'development standard' and capable of being varied.

The secondary objective of this planning proposal is to;

- insert the 'Edward River' into relevant clauses and definitions with the Murray LEP 2011

The 'Edward River' was mistakenly omitted from these clauses and definitions when the Murray LEP 2011 was made.

Part 2 - Explanation of Provisions

The proposal seeks an amendment to 'Clause 7.4 Development on River Front Areas'. Particularly, the planning proposal seeks to amend Clause 7.4(2) which prohibits all development that is not stipulated within the clause being consented to on a 'river front area'. Clause 7.4 of Murray LEP 2011 states;

7.4 Development on river front areas

- (1) The objectives of this clause are as follows:*
 - (a) to support natural riverine processes, including the migration of the Murray and Wakool Rivers' channels,*
 - (b) to protect and improve the bed and bank stability of those rivers,*
 - (c) to maintain and improve the water quality of those rivers,*
 - (d) to protect the amenity, scenic landscape values and cultural heritage of those rivers and to protect public access to their riverine corridors,*
 - (e) to conserve and protect the riverine corridors of those rivers, including wildlife habitat.*
- (2) Despite any other provision of this Plan, development consent may only be granted to development on land in a river front area for the following purposes:*
 - (a) boat building and repair facilities, boat launching ramps, boat sheds, charter and tourism boating facilities or marinas,*

- (b) *the extension or alteration of an existing building that is wholly or partly in the river front area, but only if the extension or alteration is to be located no closer to the river bank than the existing building,*
 - (c) *environmental protection works,*
 - (d) *extensive agriculture and intensive plant agriculture,*
 - (e) *environmental facilities, recreation areas and recreation facilities (outdoors),*
 - (f) *water recreation structures.*
- (3) *Development consent must not be granted under subclause (2) unless the consent authority is satisfied of the following:*
 - (a) *that the appearance of the development, from both the river concerned and the river front area, will be compatible with the surrounding area,*
 - (b) *that the development is not likely to cause environmental harm, including (but not limited to) the following:*
 - (i) *pollution or siltation of the river concerned,*
 - (ii) *any adverse effect on surrounding uses, riverine habitat, wetland areas or flora or fauna habitats,*
 - (iii) *any adverse effect on drainage patterns,*
 - (c) *that the development is likely to cause only minimal visual disturbance to the existing landscape,*
 - (d) *that continuous public access, and opportunities to provide continuous public access, along the river front and to the river concerned are not likely to be compromised,*
 - (e) *that any historic, scientific, cultural, social archaeological, architectural, natural or aesthetic significance of the land on which the development is to be carried out and of surrounding land is to be maintained.*

The definition of 'river front area' is included in the Murray LEP 2011 dictionary;

river front area means:

- (a) *in Zone RU5 Village, Zone R1 General Residential, Zone R2 Low Density Residential, Zone R5 Large Lot Residential, Zone SP3 Tourism and Zone B2 Local Centre—the land within 40m of the top of the bank of the Murray or Wakool River, or*
- (b) *in Zone RU1 Primary Production, Zone RU3 Forestry and Zone E3 Environmental Management—the land within 100m of the top of the bank of the Murray or Wakool River.*

Council has obtained its own legal advice in respect whether sub clause 7.4(2) constitutes a 'prohibition' or a 'development standard'. The advice concluded; *Clause 7.4(2)(b) is, in the writers opinion, a development standard for the reasons set out above. However, sub-clauses 7.4(2)(a), (c), (d), (e) and (f) are prohibitions.*

The advice provided practical examples of where the application of this clause would be problematic to certain forms of development. For instance, the following examples will contravene Clause 7.4:

- *A development application for a new dwelling on an allotment that is above the minimum lot size for a dwelling or an existing holding, but is entirely within the defined river front area. It is theoretically possible that Council may have approved subdivisions creating allotments that may not have a building envelope for a dwelling other than within the river front area; and*
- *A development application for a swimming pool anywhere within a river front area despite an existing dwelling already been within a river front area. This may result in an applicant having to construct a new swimming pool a significant distance from their existing dwelling.*

Other areas where this clause could be problematic include;

- development of minor structures such as sheds, shelters and amenity buildings within existing caravan parks/tourist facilities located partly or wholly within a river front area,
- development for ancillary detached structures such as carports and sheds ancillary to existing dwellings located within a river front area,
- development of a new building where the siting of the new building will be less environmentally constrained or have less environmental impact if it is located within a river front area as opposed to outside it or the rebuilding of an existing building located within a river front area on a new site within the river front area even if the environmental impacts of the building are minimised by the new site,
- development of a new building in other circumstances where it is located within the river front area but it is unnecessary that the provision apply because the building will be located behind existing development such as roads or buildings,
- development for a 'change of use' for a building located within a river front area that is not for a purpose listed in Clause 7.4(2) or permitted by 'existing use' provisions under the Regulations.

Under the previous instrument (Murray LEP 1989) it was considered that, river set back provision contained within Clause 30- Development Along Rivers was capable of variation via a SEPP 1 objection in circumstances where the provision was deemed to unreasonable or unnecessary.

It is a significant concern to Council that the same flexibility is not afforded to the river set back provision under Murray LEP 2011 to enable development to proceed in circumstances where the provision is deemed to be unreasonable or unnecessary and can be justified on environmental planning grounds in the circumstance of the case. It is of particular concern when the river set back in rural areas has been increased from 60m to 100m effectively capturing significant amounts of existing development within river front areas. It is estimated that there are approximately 100 existing dwellings and between 15-20 tourist establishments located within the 'river front area', and are therefore affected by this issue.

As such Council has resolved to;

support an amendment to its LEP to provide some alternate direction to the Council by rewording Clause 7.4(2) through the "gateway process" in

order to make a development standard capable of variation by application of Clause 4.6 of the LEP in limited circumstance

The planning proposal also seeks to insert the 'Edward River' into;

- Clause 7.4 (1)(a)
- Clause 7.5 (1)(a)
- Clause 7.6 'title'
- Clause 7.6 (1)(a)
- Clause 7.6 (2)
- Clause 7.6 (4)(a)
- Clause 7.6 'note'
- Dictionary definition of 'river front area'

The 'Edward River' is a significant river located within Murray Shire however it was mistakenly omitted from these clauses when the LEP document was drafted. The 'Edward River' was included in a similar definition under Murray LEP 1989.

Part 3 - Justification

Section A - Need for the planning proposal.

1. Is the planning proposal a result of any strategic study or report?

The 'planning proposal' is not the result of any strategic study. The 'planning proposal' is the result of legal advice obtained by Council in respect to the interpretation of Clause 7.4(2) of Murray LEP 2011 which concluded that the clause is a 'prohibition' rather than a 'development standard'.

2. Is the planning proposal the best means of achieving the objectives or intended outcomes, or is there a better way?

Yes, the intended outcome requires an amendment to Murray LEP 2011 to ensure that the subject clause is not a 'prohibition'.

It is possible for some development to rely of 'existing use rights' under the provisions of the *Environmental Planning and Assessment Act 1979* and its Regulations however such 'existing use rights' do not provide for all circumstances where the provision is unnecessary or unreasonable and there are sufficient environmental planning grounds to support the development.

Therefore, it is necessary for Clause 7.4(2) to be amended.

3. Is there a net community benefit?

Yes, there is a net community benefit achieved by enabling flexibility to Clause 7.4(2) of Murray LEP 2011 in circumstances where the provision is unnecessary or unreasonable. This will assist in providing better planning outcomes, which is of benefit to the community.

Section B - Relationship to strategic planning framework.

4. Is the planning proposal consistent with the objectives and actions contained within the applicable regional or sub-regional strategy (including the Sydney Metropolitan Strategy and exhibited draft strategies)?

The relevant clause was contained within the draft Murray Regional strategy. Although the 'planning proposal' seeks to amend this clause it is considered that the proposal remains consistent with the principles of this strategy. However, it is understood that this regional strategy is being re-drafted. No other strategies apply.

5. Is the planning proposal consistent with the local council's Community Strategic Plan, or other local strategic plan?

The proposal is consistent with Murray Shire's Community Strategic Plan and Strategic Land Use Plan (SLUP). The Murray Shire Community Strategic Plan focuses on creating an enhanced natural environment which is to be delivered through 'environmental planning'. This 'planning proposal' will not be detrimental or inconsistent with this objective. Murray Shires Strategic Land Use Plan recognises the importance of rivers in the Shire and proposes the adoption of land use controls via an LEP and DCP to protect the rivers and their immediate environs in the Shire. The strategy suggests the controls should reflect the principles of *Murray Regional Environmental Plan No. 2—Riverine Land (Deemed SEPP)*. The 'planning proposal' is consistent with the principles contained within *Murray Regional Environmental Plan No. 2—Riverine Land* which states that buildings 'should be set well back from the bank of the Murray River'. The planning proposal maintains this principle however aims to provide greater flexibility in respect to this setback, consistent with this principle.

6. Is the planning proposal consistent with applicable state environmental planning policies?

The following state environmental planning policies are considered applicable to this planning proposal and are summarised below.

SEPP 1- Development Standards- Although this SEPP does not strictly apply to this planning proposal the purpose of the SEPP is relevant. The objective of this policy is 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.

This SEPP was used to vary the building setback from rivers under Murray LEP 1989 in circumstances where the setback was deemed to be unreasonable or unnecessary. The 'planning proposal' is consistent with this SEPP as it aims to

afford the same ability to the river setbacks under Murray LEP 2011 using Clause 4.6 of Murray LEP 2011 which has a similar objective to this SEPP.

Murray REP 2- Riverine Land- The 'planning proposal' is consistent with this plan. Clause 14: Building Setbacks of *Murray REP 2- Riverine Land* states;

(2) Building setback

All buildings outside land zoned for urban purposes under a local environmental plan should be set well back from the bank of the River Murray. The only exceptions are buildings dependent on a location adjacent to the River Murray.

(3) Objectives of building setback

The objectives of siting buildings away from the River Murray are to:

- maintain and improve water quality,*
- minimise hazard risk and the redistributive effect on floodwater associated with the erection of buildings on the floodplain,*
- protect the scenic landscape of the riverine corridor,*
- improve bank stability, and*
- conserve wildlife habitat.*

The 'planning proposal' is consistent with these controls as it seeks to maintain a setback for development from the Murray River however aims to provide flexibility as to the application of the setback in circumstances where the setback is unreasonable or unnecessary. The 'planning proposal' remains consistent with the objectives of this clause as similar considerations are to be retained in the LEP clause.

SEPP (Rural Lands) 2008- The 'planning proposal' is not inconsistent with the principles contained within this SEPP.

7. Is the planning proposal consistent with applicable Ministerial Directions (s.117 directions)?

The following ministerial directions are considered applicable to this planning proposal and are summarised below.

1.2 Rural Zones- The 'planning proposal' is consistent with this direction as it does not rezone any rural land or propose an increase to the permissible density of rural land.

1.5 Rural Land- The 'planning proposal' is consistent with this direction as it is not inconsistent with the SEPP (Rural Lands) 2008.

2.1 Environment Protection Zones- The 'planning proposal' is consistent with this direction. The 'planning proposal' does not seek to remove or reduce provisions that facilitate the protection and conservation of environmentally sensitive areas or relate to land identified for environmental protection.

The planning proposal does aim to provide flexibility in respect to the river setback provisions in circumstances where this provision is unreasonable or unnecessary. In such circumstances, the outcome achieved by providing the flexibility is likely to minimise environmental impact or have negligible impact. Such variations are required to be justified on environmental planning grounds. Therefore, the river setback provision would not likely be considered unreasonable or unnecessary in circumstances where the development will have an effect on the environment. Further, considerations (sub-clause 7.4(3)(b)) in respect to the effect of the development on the environment will remain within the clause. As such it is considered that the 'planning proposal' will not reduce environmental protection standards.

2.3 Heritage Conservation- The 'planning proposal' is consistent with this direction as it does not affect any provisions that facilitate the conservation of heritage items or Aboriginal objects/sites.

2.4 Recreation Vehicle Areas- The 'planning proposal' is consistent with this direction.

3.1 Residential Zones- The 'planning proposal' is consistent with this direction.

3.2 Caravan Parks and Manufactured Home Estates- The 'planning proposal' is consistent with this direction.

3.3 Home Occupations- The 'planning proposal' is consistent with this direction.

3.4 Integrating Land Use and Transport- The 'planning proposal' is consistent with this direction as it does not propose a change to the land zone.

6.1 Approval and Referral Requirements- The 'planning proposal' is consistent with this direction. The 'planning proposal' will not result in the applicable clause (7.4 of Murray LEP 2011) containing a provision requiring concurrence. However, the outcome of the proposal may be that Clause 4.6 could be used to provide flexibility in respect to the application of Clause 7.4 of Murray LEP 2011. Clause 4.6 does require the concurrence of the Director-General which may result in an increase in concurrences required although Council currently has delegated concurrence for the majority of circumstances. Council would in respect to this provision be comfortable in having this concurrence delegated if preferred.

6.2 Reserving Land for Public Purposes- The 'planning proposal' is consistent with this direction.

Section C - Environmental, social and economic impact.

8. Is there any likelihood that critical habitat or threatened species, populations or ecological communities, or their habitats, will be adversely affected as a result of the proposal?

The 'planning proposal' is not likely to have an impact on critical habitat or threatened species, populations or ecological communities, or their habitats. The 'planning proposal' aims to provide flexibility to the application of river set back provision in circumstances where it is unreasonable or unnecessary. Such a circumstance would not likely occur where a development would impact upon threatened species. Further, considerations (sub-clause 7.4(3)(b)(ii)) in respect to the effect of the development on riverine habitat, flora and fauna habitats will remain within the clause.

9. Are there any other likely environmental effects as a result of the planning proposal and how are they proposed to be managed?

The 'planning proposal' is not expected to have any further detrimental environmental effects. The planning proposal aims to provide flexibility in respect to river setback provisions in circumstance where this clause is unreasonable or unnecessary. In such circumstances, the outcome achieved by providing the flexibility is likely to minimise environmental impact or have negligible impact. Such variations are required to be justified on environmental planning grounds. Therefore, the river setback provision would not likely be considered unreasonable or unnecessary in circumstances where the development will have an effect on the environment. Further, considerations (sub-clause 7.4(3)(b)) in respect to the effect of the development on the environment will remain within the clause.

10. How has the planning proposal adequately addressed any social and economic effects?

The 'planning proposal' aims to provide flexibility in respect to river setback provisions in circumstance where this clause is unreasonable or unnecessary which will have a positive social and economic effects in such circumstances.

Section D - State and Commonwealth interests.

11. Is there adequate public infrastructure for the planning proposal?

The planning proposal does not require any public infrastructure.

12. What are the views of State and Commonwealth public authorities consulted in accordance with the gateway determination?

Council will take into account the views of any public authorities required to be consulted.

Part 4 – Community Consultation

In accordance with '*a guide to preparing local environmental plans*', Council does not consider the 'planning proposal' to be low impact given the implications of this 'planning proposal' on the community. As such Council proposes to exhibit the proposal for 28 days in accordance with the guide. Council does not propose to hold a public hearing in respect to this 'planning proposal'.

ATTACHMENTS

- 1: Council Resolution to prepare 'planning proposal'
- 2: Council Report discussing Clause 7.4 issues

ATTACHMENT 1- Council Resolution

COMMITTEE OF THE WHOLE OF COUNCIL

302

RESOLVED (Crs Pocklington/Anderson) that as provided by Section 10A(2), Subsections (a) and (d)(iii) of the Local Government Act 1993, being personnel matters concerning particular individuals (other than councillors); and commercial information of a confidential nature that would, if disclosed reveal a trade secret, Council move into Committee of the Whole of Council at 2:05pm.

**GENERAL MANAGER'S
CONFIDENTIAL REPORT****CLAUSE 1. INFORMAL REVIEW OF GENERAL MANAGER'S PERFORMANCE**

RECOMMENDED (Crs Moon/Burke) that:

1. Council provide input on the performance of the General Manager for the period May to November 2012 at the meeting; and
2. The General Manager arrange for a Performance Management Course for Councillors to be held in early 2013.

CLAUSE 2. MURRAY SHIRE 2013 AUSTRALIA DAY AWARDS NOMINATIONS

The recipients of the Murray Shire 2013 Australia Day Awards are embargoed until the announcements on Australia Day.

**DIRECTOR OF ENVIRONMENTAL SERVICES
CONFIDENTIAL REPORT****CLAUSE 1. MOAMA SENIOR CITIZENS COMMUNITY CENTRE –
CONTRACT No. 07/12**

RECOMMENDED (Crs Sharp/Anderson) that:

1. Council accept the Tender from Jeff Robertson Construction for the Social Support Room, Martin Street, Moama for the lump sum value of \$82,100.00; and
2. The awarding of the Tender be subject to confirmation from the Aging Disability and Community Services Department that the surplus funding can be utilised to undertake this project, as detailed in Council's correspondence dated 31 October 2012.

**CLAUSE 2. MURRAY LOCAL ENVIRONMENTAL PLAN 2011 –
CLAUSE 7.4 (DEVELOPMENT ON RIVER FRONT AREAS)**

RECOMMENDED (Crs Pocklington/Murphy) that:

1. Council support an amendment to its LEP to provide some alternate direction to the Council by rewording Clause 7.4(2) through the "gateway process" in order to make a development standard capable of

variation by application of Clause 4.6 of the LEP in limited circumstance; and

2. Council staff raise this matter with surrounding Councils as a joint approach to the Department of Planning through the RAMROC Planning Forum.

FOR: Councillors Anderson, Burke, Moon, Mulcahy, Murphy, Pocklington, Sharp and Weyrich

AGAINST: Nil

ADOPTION

- 303 **RESOLVED (Crs Pocklington/Murphy)** that Council move into Open Council at 2.17pm

The General Manager, on behalf of the Mayor, advised the decisions of the Committee of the Whole of Council in Open Council, other than the Australia Day Awards, as they would be embargoed until the announcements on Australia Day.

- 304 **RESOLVED (Crs Pocklington/Murphy)** that the recommendations of the Committee of the Whole of Council be adopted.

REPORTS FROM OFFICERS

GENERAL MANAGER'S REPORT

CLAUSE 1. APPEALS AND DONATIONS

Information noted.

CLAUSE 2. ECHUCA REGIONAL HEALTH

Information noted.

CLAUSE 3. JOHN WILLIAMS MP – MEMBER FOR MURRAY-DARLING

Information noted.

CLAUSE 4. ANNUAL REPORT 2011/2012

Information noted.

CLAUSE 5. DRAFT CODE OF MEETING PRACTICE

- 305 **RESOLVED (Crs Pocklington/Moon)** that Council adopt the Code of Meeting Practice.

ATTACHMENT 2- Council Report

The tendered amount varied from \$82,100.00 to \$146,484.00, noting that the architect had estimated that the proposed works would cost in the vicinity of \$84,253.36 to construct.

Both companies would be able to complete the works in a timely and professional manner. Therefore based on price the preferred submission would be that as submitted by Jeff Robertson Construction.

Recommendation

1. That Council accept the Tender from Jeff Robertson Construction for the Social Support Room, Martin Street, Moama for the lump sum value of \$82,100.00; and
2. That the awarding of the Tender be subject to confirmation from the Aging Disability and Community Services Department that the surplus funding can be utilised to undertake this project as detailed in Council's correspondence dated 31 October 2012.

CLAUSE 2. MURRAY LOCAL ENVIRONMENTAL PLAN 2011 – CLAUSE 7.4 (DEVELOPMENT ON RIVER FRONT AREAS)

Introduction

Murray Shire adopted a new Local Environmental Plan in 2011 which details the planning requirements applicable for the Murray Shire. Included in the LEP is Clause 7.4 – Development on River Front Areas, which stipulates the setback requirements for all structure from the “high bank” of the Murray River.

In reviewing this Clause, staff questioned whether it was a “development standard” or a “prohibition”, which would in turn determine if this Clause could be varied in justified circumstances through Clause 4.6 of the LEP. Due to the complexity of this matter, legal advice was obtained to clarify the situation.

Background/History

Prior to the implementation of the 2011 Local Environmental Plan, Council's Planning Department was guided by the 1989 Local Environmental Plan for the assessment of development applications.

In the 1989 LEP, Clause 30 stipulated the requirements for development along the river front or setback requirements from the river. The relevant section of this clause has been included below:

“30 Development along rivers

- (2) The Council shall not consent to an application to erect a building on land comprising:*
- (a) a bed of a river, or*
 - (b) land within Zone No 1 (a) or 1 (c) and being within 60 metres of any bank of the river,*
- unless, in the opinion of the Council, the building:*

- (c) is ancillary to the use of that land for the purpose of a recreation area, or*
- (d) is to be used for the purpose of fisheries, irrigation works (including the pumping and treatment of water for private domestic consumption), marinas, utility installations or the servicing of vessels or sea planes."*

During an assessment process for an application of a development adjacent to the river, Council sought a legal opinion as to whether this Clause was a "development standard" of a "prohibition". The advice sought indicated that this Clause was in fact a "development standard" and could therefore be varied through a SEPP 1 process. This required the applicant to justify the setback requirements under this Clause as being unreasonable or unnecessary.

With the introduction of the 2011 LEP the river setback requirement was replaced with Clause 7.4. It is emphasised that this Clause was a "model clause" that the Department of Planning structured and required to be implemented within the LEP. That is, Council was not permitted to vary this Clause at the time of developing and adopting the LEP.

The relevant section of Clause 7.4 of the 2011 LEP is as follows:

"7.4 Development on river front areas

- (2) Despite any other provision of this Plan, development consent may only be granted to development on land in a river front area for the following purposes:*
 - (a) boat building and repair facilities, boat launching ramps, boat sheds, charter and tourism boating facilities or marinas,*
 - (b) the extension or alteration of an existing building that is wholly or partly in the river front area, but only if the extension or alteration is to be located no closer to the river bank than the existing building,*
 - (c) environmental protection works,*
 - (d) extensive agriculture and intensive plant agriculture,*
 - (e) environmental facilities, recreation areas and recreation facilities (outdoors),*
 - (f) water recreation structures.*
- (3) Development consent must not be granted under subclause (2) unless the consent authority is satisfied of the following:*
 - (a) that the appearance of the development, from both the river concerned and the river front area, will be compatible with the surrounding area,*
 - (b) that the development is not likely to cause environmental harm, including (but not limited to) the following:*
 - (i) pollution or siltation of the river concerned,*
 - (ii) any adverse effect on surrounding uses, riverine habitat, wetland areas or flora or fauna habitats,*
 - (iii) any adverse effect on drainage patterns,*
 - (c) that the development is likely to cause only minimal visual disturbance to the existing landscape,*
 - (d) that continuous public access, and opportunities to provide continuous public access, along the river front and to the river concerned are not likely to be compromised,*
 - (e) that any historic, scientific, cultural, social archaeological, architectural, natural or aesthetic significance of the land on which the development is to be carried out and of surrounding land is to be maintained."*

In discussions with neighbouring Council's that have or are considering this clause within the respective LEP's, questions were raised as to whether this Clause in its current format was a "development standard" or a "prohibition" and the implications that such could have for assessing applications for structures within the setback limits.

Discussion

As indicated above, staff have sought and obtained legal advice in respect to the status of Clause 7.4 on the LEP 2011. The advice indicates that the *Environmental Planning & Assessment Act 1979 (EPA Act)* defines development standard at Section 4.

The interpretation of clauses and assessment of whether they constitute a development standard or prohibition is often a complex task and subject to frequent litigation. One of the leading cases is that of *Strathfield Municipal Council v Poynting [2001] 116 LGERA 319* which establishes a two-step process commonly relied upon in subsequent cases. The two-step process is as follows:

1. *First, identify if the control prohibits the development in question "under any circumstances";*
2. *Second, ask whether the provision "specifies a requirement or fixed a standard in relation to an aspect of the (non-prohibited) development."*

Previous advice on Clause 30 of the LEP 1989 - River Setback in relation to the question of development standards verses prohibition when assessing the setback provisions of the former Murray LEP indicated such was a development standard.

Therefore, an applicant had the potential to request that this setback requirement be altered subject to meeting specific requirements under SEPP 1. In general, there was the potential for structures to be built within the 60m setback requirement from the river if this development standard could be deemed as unreasonable or unnecessary.

As an example, this process was utilised where there may have been an existing dwelling, constructed prior to 1989 and within 60m of the river and the property owner requested to construct a new shed, swimming pool or similar. If it was deemed unreasonable to require these ancillary structures to be positioned 60m from the river, Council could permit these structures to be constructed within the setback requirement subject to such being positioned behind the existing building line.

Clause 7.4 of the 2011 LEP is divided into 3 subclauses, with subclause 7.4(1) simply listing the objectives. Whereas 7.4(2) and 7.4(3) state as follows:

"7.4 Development on river front areas

- (2) *Despite any other provision of this Plan, development consent may only be granted to development on land in a river front area for the following purposes:*
 - (a) *boat building and repair facilities, boat launching ramps, boat sheds, charter and tourism boating facilities or marinas,*
 - (b) *the extension or alteration of an existing building that is wholly or partly in the river front area, but only if the extension or alteration is to be located no closer to the river bank than the existing building,*

- (c) *environmental protection works,*
- (d) *extensive agriculture and intensive plant agriculture,*
- (e) *environmental facilities, recreation areas and recreation facilities (outdoors),*
- (f) *water recreation structures.*
- (3) *Development consent must not be granted under subclause (2) unless the consent authority is satisfied of the following:*
 - (a) *that the appearance of the development, from both the river concerned and the river front area, will be compatible with the surrounding area,*
 - (b) *that the development is not likely to cause environmental harm, including (but not limited to) the following:*
 - (i) *pollution or siltation of the river concerned,*
 - (ii) *any adverse effect on surrounding uses, riverine habitat, wetland areas or flora or fauna habitats,*
 - (iii) *any adverse effect on drainage patterns,*
 - (c) *that the development is likely to cause only minimal visual disturbance to the existing landscape,*
 - (d) *that continuous public access, and opportunities to provide continuous public access, along the river front and to the river concerned are not likely to be compromised,*
 - (e) *that any historic, scientific, cultural, social archaeological, architectural, natural or aesthetic significance of the land on which the development is to be carried out and of surrounding land is to be maintained."*

By applying previous legal cases (*Poynting test and Abnostino*), Clause 7.4(2) stipulates that "development consent may only be granted to developments on land in a river front area" upon satisfaction of one of the subclauses (a)-(f). In other words, if none of the subclauses 2(a)-(f) can be satisfied, then the proposed development cannot be granted consent.

With respect to subclauses 2(a),(c),(d),(e) and (f), each are defined terms of the LEP and are therefore deemed to be prohibitions. In contrast, subclause 2(b) does not refer to a defined term, but rather an "extension or alteration of an existing building".

Therefore, Council's legal advice is that 7.4(2)(b) does not constitute a prohibition as it does not prohibit development under any circumstance. Rather it imposes a requirement that if any development of the described nature is to occur it must only occur under the prescribed circumstances (i.e. – no closer to the river bank than the existing building).

In response to the above advice, Clause 4.6 is able to be utilised to request a variation to the development standard identified within clause 7.4(2)(b) only.

Practical Issues with the Application of Clause 7.4

As indicated above, the application of Clause 7.4 is problematic to certain forms of development. For instance, the following examples will contravene Clause 7.4:

- A development application for a new dwelling on an allotment that is above the minimum lot size for a dwelling, but is entirely within the defined river front area. It is theoretically possible that Council may have approved subdivisions creating allotments that may not have a building envelope for a dwelling other than within the river front area; and

- A development application for a swimming pool anywhere within a river front area despite an existing dwelling already been within a river front area. This may result in an applicant having to construct a new swimming pool a significant distance from their existing dwelling.

The above are two examples only, but there are numerous potential anomalies with the application of Clause 7.4. Staff have either had initial discussions with developers/land owners or have received development applications that will not be permitted as a result of Clause 7.4.

Conclusion

Due to the complex nature in determining whether a clause from the LEP is either a "development standard" or a "prohibition" staff sought a legal opinion in relation to the status of Clause 7.4 of the Murray LEP 2011.

The advice received indicated that Clause 7.4(2)(b) was in fact a "development standard" and Clause 7.4(2)(a)(c)(d)(e) & (f) are "prohibitions". Clause 7.4 in its current format will potentially have significant implications on development, in particular ancillary development within river front areas.

As this clause was a standard clause developed by and required to be inserted into the LEP by the Department of Planning, Council should seek to vary such through a planning proposal.

Recommendation

1. That Council support an amendment to its LEP to provide some alternate direction to the Council by rewording Clause 7.4(2) through the "gateway process" in order to make a development standard capable of variation by application of Clause 4.6 of the LEP in limited circumstance; and
2. That Council staff raise this matter with surrounding Councils as a joint approach to the Department of Planning through the RAMROC Planning Forum.

Simon Arkinstall

Director of Environmental Services