
TITLE SECTION 73A AMENDMENT TO GOSFORD LEP 2014 (IR 15559317)

Directorate: Environment and Planning
Business Unit: Integrated Planning

EXECUTIVE SUMMARY

When considering Draft Gosford LEP 2009 (now Gosford LEP 2014) on 31 May 2011 Council resolved that the development controls applying to Terrigal Village Centre in the Gosford Planning Scheme Ordinance be transferred over into the Gosford LEP 2014 (GLEP 2014). A minor wording inconsistency in the GLEP 2014 has resulted in the Council's intent not being able to be fully achieved. The result is that sites of a certain area and frontage potentially would receive less height and/or floor space than Council intended.

Section 73A of the *Environmental Planning and Assessment Act 1979* allows certain types of minor amendments to be made to environmental planning instruments (EPIs) i.e. LEP's, without following the usual procedures for preparing an EPI (particularly public exhibition) under Part 3 of the EP&A Act. This can be used to expedite correction of the wording of the LEP clauses.

The use of Section 73A is considered to be suitable in this instance as it is correcting a 'minor' wording inconsistency in the LEP and reinstating as closely as possible, given the Standard Instrument Template format, the controls which applied to Terrigal prior to GLEP 2014 being made. This will fulfil both Council and community expectations with regard to controls for Terrigal Village Centre. These controls have gone through a rigorous community consultation process.

Planning Circular PS 06-014 relating to Section 73A of the EP&A Act requires that Council make a resolution to prepare a LEP amendment in accordance with section 73A prior to lodging a Section 73A EP&A Act submission with DOP&I.

If supported by Council, staff would undertake communication of the change to the development industry, given there is no requirement for exhibition.

It should be noted that council is also currently commencing a broader review of planning controls, in particular those controls that affect building form, in accordance with Council's resolution of 3 December 2013:

- G Council request the General Manager to report back to Council a review of the new DCP controls in mid 2014 after they have been in place for six months. This report is to include a review of applications that have been lodged since its commencement to ensure the DCP is achieving, in practice, the intent of Council and the new LEP.*

This review is proceeding independently of the Section 73A process. The review of the planning controls will involve members of the development industry, and provide a mechanism to raise issues or concerns they are experiencing with the current GLEP 2014 and GDCP 2013 controls and discuss positive solutions, which may, if appropriate, result in further amendments to planning controls. This review is scheduled to be completed in July, following which it will be reported to Council for consideration prior to a more formal exhibition process.

REPORT

When considering Draft Gosford LEP 2009 (now Gosford LEP 2014) on 31 May 2011 Council resolved the following with regard to Terrigal Village Centre:

K Council reinsert the bonus provisions for the possible addition of a fifth storey to development meeting the required frontage and site area provisions that are contained in the relevant Local Environmental Plan that applies to the Terrigal Town Centre and amend any relevant Local Environmental Plan clauses and maps outlined in recommendations D25 and D26.

The relevant clause in the Gosford Planning Scheme Ordinance (the EPI in effect at the time of Council's resolution) was 49S, in particular 49S(7) and is outlined below:

49S(7) *The development standard for height in the Terrigal Town Centre is as follows.*

The Council is not to grant consent for the erection of any new building or an addition to any existing building where the number of storeys, or the maximum height of external walls, or the maximum height of the building, would be greater than the limits that are specified by the Table below according to the relevant allotment frontage and the area of the development site.

Table

Site Frontage	Site Area	Maximum number of storeys	Maximum height for external walls	Maximum height for the building
<i>Less than 20m</i>	<i>Less than 2000m²</i>	<i>3 storeys</i>	<i>10.0m</i>	<i>11.5m</i>
<i>20m or more</i>	<i>Less than 2000m²</i>	<i>4 storeys</i>	<i>12.75m</i>	<i>14.25m</i>
<i>20m or more</i>	<i>2000m² or greater</i>	<i>5 storeys</i>	<i>15.5m</i>	<i>17m</i>

The way this clause is read, is that where a site meets the requirements set out in Column 1 'and' Column 2, then the remaining three columns would apply, hence three options effectively are available.

Due to the Standard Instrument LEP Template format this clause and the associated table could not be directly imported into the GLEP 2014. The exhibited DLEP was amended in order to try to achieve the intent of Council's resolution whilst still complying with the Standard LEP Template Format. From the time the amended DLEP was submitted to DOP&I to be made, until the plan was made by the Minister, numerous amendments were made as part of the on-going assessment and plan preparation process between the local DOP&I office, DOP&I headquarters, DOP&I legal branch, Parliamentary Counsel and Council staff. This process included various changes to the proposed clauses relating to Terrigal Village Centre.

The wording of the clauses in the Gosford LEP 2014 relating to Terrigal Village which was made by the Minister on 11 February 2014 is, in part, outlined below:

4.3A Exceptions to maximum building height in Terrigal Village Centre

- (3) *Despite clause 4.3 (2), the maximum height of a building on land to which this clause applies is 2.75 metres less than the height shown for that land on the Height of Buildings Map if:*
- (a) the building is on a site area of less than 2,000 square metres, or*
 - (b) the building has a street frontage of less than 20 metres.*

4.4A Town centres and village centres—floor space ratios

- (4) *Despite clause 4.4 (2), the maximum floor space ratio for a building that is on land identified as “Terrigal Village Centre” on the Development Incentives Application Map is 1:1 if:*
- (a) *the building is located on a site area of less than 2,000 square metres,*
 - or*
 - (b) *the building has a street frontage of less than 20 metres.*

Due to a minor wording inconsistency, the inclusion of the word “or” instead of the word “and” at the end of clauses 4.3A(3)(a) and 4.4A(4)(a) relating to Terrigal Village Centre, the clauses do not fulfil the full intent of Council’s resolution. The result is sites of a certain area and frontage potentially receiving less height and floor space than Council intended and was possible under the previous deemed LEP, i.e. Gosford Planning Scheme Ordinance.

Section 73A of the *Environmental Planning and Assessment Act 1979* allows certain types of ‘minor’ amendments to be made to environmental planning instruments (EPIs) without following the usual procedures for preparing an EPI (particularly public exhibition) under Part 3 of the EP&A Act.

Discussions with the local office of the Department of Planning and Infrastructure have indicated that it is appropriate in this instance to lodge a submission for consideration to use Section 73A of the *Environmental Planning and Assessment Act 1979*, to expedite a correction in the wording of the LEP.

Section 73A is considered to be suitable in this instance as it is of a ‘minor’ nature correcting an inconsistency. In doing so the amendment will fulfil both Council and community expectations with regard to controls for Terrigal Village Centre and reinstate as closely as possible, given the Standard Instrument Template format, the controls which applied to Terrigal prior to GLEP 2014 being made. These were controls which had gone through a rigorous community consultation process.

In order to achieve the intent of Council’s resolution of 31/5/11 and correct the minor inconsistency, the clauses should be amended as shown in bold below:

4.3A Exceptions to maximum building height in Terrigal Village Centre

- (3) *Despite clause 4.3 (2), the maximum height of a building on land to which this clause applies is 2.75 metres less than the height shown for that land on the Height of Buildings Map if:*
- (a) *the building is on a site area of less than 2,000 square metres, ~~or~~ and*
 - (b) *the building has a street frontage of less than 20 metres.*

4.4A Town centres and village centres—floor space ratios

- (4) *Despite clause 4.4 (2), the maximum floor space ratio for a building that is on land identified as “Terrigal Village Centre” on the Development Incentives Application Map is 1:1 if:*
- (a) *the building is located on a site area of less than 2,000 square metres, ~~or~~ and*
 - (b) *the building has a street frontage of less than 20 metres.*

CONCLUSION

In its resolution of 31 May 2011, Council was clear in its intention that the development controls relating to the Terrigal Village Centre within the then planning instrument the Gosford Planning Scheme Ordinance be carried over into the Gosford LEP 2014. Due to a minor wording inconsistency in the Gosford LEP 2014 the intent of this resolution is not fully met.

As the amendment sought is of a minor nature, it is recommended that Council lodge a Section 73A EP&A Act submission with DOP&I requesting consideration that the wording of clauses 4.3A(3)(a) and 4.4A(4)(a) be amended as outlined in this report.

FINANCIAL IMPACT STATEMENT

The recommendation does not impact on Council's financial position.

Attachments: Attachment A – Planning Circular – Minor Amendments to local environmental plans using section 73A
Attachment B – Section 73A EP&A Act submission Form

RECOMMENDATION

A Council resolve to prepare an LEP amendment in accordance with section 73A of the *Environmental Planning and Assessment Act 1979* to amend Clauses 4.3A(3)(a) and 4.4A(4)(a) of Gosford Local Environmental Plan 2014 in accordance with the following;

4.3A Exceptions to maximum building height in Terrigal Village Centre

- (3) Despite clause 4.3 (2), the maximum height of a building on land to which this clause applies is 2.75 metres less than the height shown for that land on the Height of Buildings Map if:
- (a) the building is on a site area of less than 2,000 square metres, ~~or~~ and
 - (b) the building has a street frontage of less than 20 metres.

4.4A Town centres and village centres—floor space ratios

- (4) Despite clause 4.4 (2), the maximum floor space ratio for a building that is on land identified as “Terrigal Village Centre” on the Development Incentives Application Map is 1:1 if:
- (a) the building is located on a site area of less than 2,000 square metres, ~~or~~ and
 - (b) the building has a street frontage of less than 20 metres.

B Council notify the Department of Planning and Infrastructure of Council's resolution to prepare an amendment to Gosford Local Environmental Plan 2014 in accordance with Section 73A of the *Environmental Planning and Assessment Act 1979* and forward all the necessary documentation according to their requirements and this report.

ATTACHMENT A - Planning Circular – Minor Amendments to local environmental plans using section 73A



PLANNING circular

PLANNING SYSTEM

Local planning

Circular	PS 06-014
Issued	12 July 2006
Related	

Minor amendments to local environmental plans using section 73A

This circular provides guidance on the process for amending local environmental plans in accordance with section 73A of the *Environmental Planning and Assessment Act 1979*.

Introduction

The 2005 NSW planning reforms included the introduction of section 73A of the *Environmental Planning and Assessment Act 1979* (EP&A Act). Section 73A allows certain types of minor amendments to be made to environmental planning instruments (EPIs) without following the usual procedures for preparing an EPI (particularly public exhibition) under Part 3 of the EP&A Act.

This circular provides guidance on the process to be followed when a council wishes to prepare an amendment to a local environmental plan (LEP) in accordance with section 73A.

What is a section 73A amendment?

Section 73A may be used to prepare a LEP to amend or repeal another LEP to:

- correct an obvious error in the principal instrument such as a misdescription, the inconsistent numbering of provisions, a wrong cross-reference, a spelling error, a grammatical mistake, the insertion of obviously missing words, the removal of obviously unnecessary words or a formatting error,¹ or
- address matters in the principal instrument that are of a consequential, transitional, machinery or other minor nature.

The ability to make an amendment in accordance with section 73A will need to be assessed on the facts of each individual case. While judgement will

need to be exercised in such assessments, the consequence of an amendment being made in accordance with section 73A should be that:

- there is no need for exhibition of the draft instrument (eg public exhibition has previously occurred and gazettal of the section 73A amendment will be sufficient notification), and
- the amendment will not have any material effect 'on-the-ground'.

Types of amendments that might be permitted using section 73A

Some examples of the types of amendments that might be permitted using section 73A are outlined below. (These examples are intended as a guide only and, as mentioned above, proposed amendments will need to be considered on the facts of each individual case.)

- The correction of a minor typographical error would be considered an appropriate amendment to be made in accordance with section 73A(a).
- An amendment to resolve a minor discrepancy between the map and the written instrument would be considered under section 73A(a) as a 'misdescription'.
- An amendment to a LEP to update a reference to the date of adoption of a development control plan (DCP) that contains exempt and complying development controls would be a 'consequential amendment' under section 73A(b) if there is no change to the exempt and complying development controls in the DCP. Such an amendment may arise if:
 - a number of DCPs, including exempt and complying development DCPs, are amalgamated and, as a result, the LEP's

¹ It should be noted that typographical errors in environmental planning instruments may also be corrected through a Statute Law Revision Bill. However, such Bills are only prepared twice a year and, as such, will only be appropriate for local environmental plan amendments that are not urgent. Section 73A amendments can be made at any time.

Department of Planning circular PS 06-014

reference to the exempt and complying development DCPs needs to be changed to a reference to the exempt and complying development controls within the amalgamated DCP, or

- if there is a subsequent amendment to some part of the amalgamated DCP, but not to the exempt and complying development controls within the amalgamated DCP and, as a result, the LEPs reference to the date of adoption of the amalgamated DCP needs to be updated.

Types of amendments that would not be permitted using section 73A

Some examples of LEP amendments that would not be permitted under section 73A are outlined below. As with the examples provided above, these examples are intended as a guide only and proposed amendments will need to be considered on the facts of each individual case.

- A change to a LEP to amend a SEPP or REP would not be permitted by section 73A. This is because such a change would be likely to have policy implications, the effect of which would need to be considered under the usual process for making a LEP under Part 3 of the EP&A Act.
- An amendment to a LEP to change a definition generally would not be permitted under section 73A (except, for example, if the amendment was to correct a spelling error in the definition).
- An amendment to a LEP to adjust zone boundaries would not be permitted under section 73A.

Process for making a section 73A amendment

Amendments can be made using section 73A without complying with the usual process for preparing LEPs under Part 3 of the EP&A Act. While there is nothing to stop council from complying with those processes if it considers it appropriate, council does not have to comply with requirements such as:

- formal notification of the Director General of the council's decision to make the LEP under section 54 of the EP&A Act
- public exhibition of the draft LEP under section 65 of the EP&A Act.

Given that the process for making LEP amendments using section 73A is not encompassed by the EP&A Act or Regulations, the Department will administer a process that comprises the following steps:

1. Council will first need to resolve to prepare a LEP amendment in accordance with section 73A. The resolution should set out:

- why there is a problem
- what needs to be done to rectify the problem
- the proposed amendment
- a statement indicating why the proposed amendment is suitable to be made in accordance with section 73A.

Council should then advise the Department of Planning of the proposed amendment. To do this, council should submit all of the information for the council resolution, set out in accordance with the **attached pro forma Section 73A EP&A Act Submission**. This will serve as a draft report, which can be endorsed by the Department before being provided to the Minister.

2. The Department will check the information submitted by the council and, if it agrees that all the relevant information has been provided and that the proposed amendment is subject to section 73A, the application will be referred to the LEP Review Panel for consideration. The Department's target benchmark for considering section 73A proposals is 15 days.
3. If the LEP Review Panel does not agree that the amendment is subject to section 73A, the Department will inform the council of this in writing. This advice will include reasons why the amendment may not be made in accordance with section 73A and any suggestions for addressing any outstanding issues.
4. If the proposed amendment is considered appropriate for section 73A, the Legal Services Branch of the Department will prepare drafting instructions for the Parliamentary Counsel and request an opinion.
5. Once the Department receives the Parliamentary Counsel's Opinion it will confirm with council that it wishes to proceed with the amendment.
6. The Department will then forward the Parliamentary Counsel's Opinion, along with the report prepared by council in accordance with Step One and endorsed by the Department, to the Minister.
7. The Minister will decide whether to make the plan amendment under section 70 of the EP&A Act and in accordance with section 73A.
8. If the Minister decides to make the plan amendment, public notification will occur through the publication of the amending LEP in the Government Gazette.

ATTACHMENT B - Section 73A EP&A Act submission Form

NSW GOVERNMENT
Department of Planning

DOP file no:

Section 73A EP&A Act Submission**Part A. Council to complete****Subject:**

..... (Insert name of amending LEP)

Report requesting the making of amending local environmental plan under section 70 and section 73A.

Background:

..... (Insert name of council) resolved on,
to amend..... (Insert name of LEP) and to request that the Minister for Planning

make the plan under section 70 and section 73A of the *Environmental Planning and Assessment Act 1979*.

The draft amending plan is attached. (Attach copy of resolution.)

The land to which this amendment applies is.....

..... (Specify area. Attach map if appropriate)

Why there is a need for the amendment:

.....
.....
.....
.....

(Please attach a separate sheet if necessary)

What the amendment does:

.....
.....
.....
.....

(Please attach a separate sheet if necessary)

Why the amending plan is suitable to be made in accordance with section 73A:

.....
.....
.....
.....

(Please attach a separate sheet if necessary)

The council requests that the Minister agree to make draft (Name of amending LEP)

Signed: Date:

Name: Position:

On behalf of: (Name of council)



NSW GOVERNMENT
Department of Planning

DOP file no:

Section 73A EP&A Act submission

Part B. Department of Planning use only

Date of referral to LEP Review Panel: (Insert date)

Department position:

The draft LEP amendment has been considered by the Department and it is satisfied that the amendment can be considered as a minor amendment under section 73A (see advice tagged 'A').

Parliamentary Counsel opinion:

The Parliamentary Counsel has provided an opinion indicating that the plan may legally be made (tagged 'B').

Recommendation:

It is recommended that the Minister:

- (a) under sections 70(1)(a) and (8) and section 73A of the *Environmental Planning and Assessment Act 1979* make tagged 'B')
(Name of LEP)
- (b) authorise the Department to advise council of the Minister's decision.

Date:

Signed: Name:

Position:
for Director-General



NSW GOVERNMENT
Department of Planning

DOP file no:

Section 73A EP&A Act Submission

Part B. Department of Planning use only

Date of referral to LEP Review Panel: (Insert date)

Department position:

The draft LEP amendment has been considered by the Department and it is satisfied that the amendment can be considered as a minor amendment under section 73A (see advice tagged 'A').

Parliamentary Counsel opinion:

The Parliamentary Counsel has provided an opinion indicating that the plan may legally be made (tagged 'B').

Recommendation:

It is recommended that the Minister:

- (a) under sections 70(1)(a) and (8) and section 73A of the *Environmental Planning and Assessment Act 1979* make tagged 'B'
(Name of LEP)
- (b) authorise the Department to advise council of the Minister's decision.

Date:

Signed: Name:

Position:
for Director-General