

DRAFT

Schedule 1 Additional Permitted Uses

The purpose of this practice note is to provide guidance to councils on including additional permitted uses for particular land through Schedule 1 of local environmental plans (LEPs) under the Standard Instrument.

Introduction

The Standard Instrument adopts a land use zone-based format for identifying permitted and prohibited and uses. Any uses permitted within the Land Use Table are applicable to the entire zone it relates to.

Clause 2.5 of the Standard Instrument Order allows councils to permit additional uses for particular land. These uses are permitted in addition to those identified in the LEP Land Use Table or other planning instruments such as the Infrastructure SEPP for that site only.

Additional permitted uses for particular land are to be inserted in Schedule 1 of the LEP.

Schedule 1 should only be used in exceptional circumstances

For reasons of clarity, land use permissibility should preferably be controlled by the zones and the Land Use Table.

Where this is not possible and the intended outcome is adequately justified by council, the use of Schedule 1 may be acceptable.

Additional listings in the LEP Schedule 1 should be minimised and should only proceed where council can demonstrate that there is no other acceptable solution to progress the matter.

For example, council should not use Schedule 1 where rezoning via a planning proposal or adoption of a development Control Plan can achieve the same outcome. In most cases a site could be rezoned to facilitate the use or the particular use could be included in the zone land use table to permit it in that zone across the local government area.

Principles for drafting Schedule 1

The following principles should be applied when considering including additional permitted uses in the LEP Schedule 1:

- Clearly identify the land affected including the address, lot and DP numbers.
- Entries are to be listed by alphabetical order of suburb and then by street name and number, where possible.
- Only use terms included in Land Use Table Direction 5 in the Standard Instrument Order.
- Development standards should be identified on the relevant maps where applicable (e.g. FSR/height/lot size). Other conditions are to be minimised.

Councils can map additional permitted uses

While this is not compulsory, councils may choose to identify the land where additional permitted uses apply on an Additional Permitted Uses Map (APU Map).

In some situations, it may actually be preferable to have the relevant land identified on an APU Map, e.g. if part of a lot is subject to the additional use.

Even if additional permitted uses are mapped, a description of the development and land affected in LEP Schedule 1 is still required to meet Clause 2.5 of the Standard Instrument.

Further information

Councils are encouraged to liaise with the relevant regional planning teams of the department before proceeding with a proposal to list an item in Schedule 1 of an LEP. This will ensure all relevant options are considered and discussed, and that claims for exceptional circumstances can be justified.

A copy of this practice note, the Standard Instrument, and other specific practice notes and planning circulars on using the Standard Instrument, can be accessed on the department's website:
<http://www.planning.nsw.gov.au/LocalPlanning>

The current version of the Standard Instrument Order is available on the NSW Parliamentary Counsel's office website: www.legislation.nsw.gov.au under 'Browse A-Z In Force'.

If you have further enquiries, please contact the department's Information Centre on ph: 02 9228 6333 or email: information@planning.nsw.gov.au.

Authorised by:

Important note: This practice note does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this practice note.

State of New South Wales through the Department of Planning & Infrastructure www.planning.nsw.gov.au

Disclaimer: While every reasonable effort has been made to ensure that this document is correct at the time of publication, the State of New South Wales, its agencies and employees, disclaim any and all liability to any person in respect of anything or the consequences of anything done or omitted to be done in reliance upon the whole or part of this document.

Circular	PS 12-006
Issued	29 October 2012
Related	

Delegations and independent reviews of plan-making decisions

The purpose of this circular is to advise councils and the public about new delegations and independent reviews related to plan-making under Part 3 of the *Environmental Planning and Assessment Act 1979*.

Introduction

Two changes have been put in place to improve plan-making processes under Part 3 of the *Environmental Planning and Assessment Act 1979* (the Act). These changes come into effect on 2 November 2012 and will increase transparency, provide greater certainty, and increase councils' roles and responsibilities in plan making, by:

- delegating the making of some local environmental plans (LEPs) to councils, and
- allowing for independent reviews of some council and departmental decisions in the plan making process.

LEP delegations

The making of some LEPs will now be delegated back to councils, in keeping with the government's commitment to return local planning powers to local councils and their communities.

The Minister has delegated the following plan-making powers to councils:

- to make – and determine not to make – an LEP under section 59(2), and (3) of the EP&A Act
- to defer inclusion of certain matters in an LEP under section 59(3) and
- to identify which matters must be considered and which stages of the plan-making process must be carried out again prior to resubmission (section 59(4)) if the council defers the proposal or if a matter is deferred from the LEP.

The changes will give local councils responsibility for LEPs of local significance and streamline the processing of their LEPs by removing duplicative steps in the making of these LEPs.

The delegations will operate in respect of a draft LEP on receipt by council of a Written Authorisation to Exercise Delegation (the Authorisation). The Authorisation will be issued to councils as part of the Gateway determination.

When submitting a planning proposal, councils will be required to identify whether they wish to exercise the Authorisation for each planning proposal.

Delegation will be routinely issued for particular types of LEPs (see below). However, any other draft LEP that the Gateway determines is of local significance will also be delegated to councils.

LEPs to be routinely delegated

The following types of draft LEPs will routinely be delegated to councils to prepare and make following a Gateway determination that the planning proposal can proceed:

- mapping alterations
- section 73A matters (e.g. amending references to documents/agencies, minor errors and anomalies)
- reclassifications of land
- heritage LEPs related to specific local heritage items supported by an Office of Environment and Heritage endorsed study
- spot rezoning consistent with an endorsed strategy and/or surrounding zones, and
- other matters of local significance as determined by the Gateway.

Issue of delegations

Section 23 of the Act allows the Minister and the Director-General to delegate functions to a council and/or an officer or employee of a council. The department has written to all councils advising that

plan making powers are to be delegated under section 23 of the Act. A council is to formally accept the delegation before the department will issue an Authorisation in respect of any individual draft LEP.

If a council chooses to accept the delegation, it may sub-delegate the function to an officer within council (usually the general manager or planning director) who will exercise the delegation. If a council chooses to sub-delegate the function, the council should advise the department at the same time it accepts the delegation. When submitting a planning proposal to the gateway a council should advise the department whether the council or an officer will be exercising the delegated function.

Section 381 of the *Local Government Act 1993*

requires that such functions cannot be delegated to:

- a) the general manager, except with the approval of the council, or
- b) an employee of the council, except with the approval of the council and the general manager.

Councils must comply with the conditions of the Authorisation in exercising their delegation. If a condition of the Authorisation cannot be complied with council must not exercise the delegation and must advise the department immediately.

Drafting and notifying delegated LEPs

Under section 59(1) of the Act the department currently requests the Office of the Parliamentary Counsel (PCO) to draft the legal instrument that gives effect to a planning proposal. However, when a planning proposal is delegated, the council will now deliver its instructions directly to PCO electronically. The council will concurrently copy the instructions to the department for monitoring and reporting only. The council will then deal directly with PCO to negotiate and agree the final wording of the instrument, prior to making the LEP.

When a plan is made, the department currently requests PCO to 'notify' the plan on the NSW Legislation webpage. The day the plan is notified on that webpage is the day the LEP becomes effective. This process will continue. When a council has made an LEP it will be forwarded to the department. The department will request notification through PCO and will record the dates of making by the council and notification on the NSW Legislation web page.

Reporting requirements

Councils will be required to report to the department on processing times for delegated LEPs (e.g. exhibition dates, dates of council resolution and/or delegated decisions to proceed with the planning proposal after exhibition, request for drafting, making of plan, and forwarding to department to arrange notification).

A template for the reporting of this information has been prepared and is provided on the department's

website at <http://www.planning.nsw.gov.au/statelaws/0102665>. Councils will be required to submit this completed template with each LEP at the time a request is made to the department to notify the plan. Councils are also required to provide written advice to the relevant regional office of the dates as they occur to ensure that the department's publicly accessible LEP Tracking System remains up to date.

Independent Reviews

To increase transparency and accountability in the Part 3 plan-making process, the government has formalised two existing administrative review processes:

- **Pre-gateway reviews** – which may be requested by a proponent before a planning proposal has been submitted to the department for a Gateway determination. These reviews are informed by advice from joint regional planning panels (regional panels) or the Planning Assessment Commission (PAC), and
- **Gateway reviews** – which may be requested by a council or proponent following a Gateway determination, but before community consultation on the planning proposal has commenced. These reviews are informed by advice from the PAC.

These reviews will allow councils and proponents to have decisions in relation to proposed amendments to LEPs reconsidered, by providing an opportunity for an independent body to give advice on such proposals.

An amendment to the Environmental Planning and Assessment Regulation 2000 (the Regulation) has been made to require councils to notify proponents of certain matters and to charge proponents fees for reviews.

This circular provides a summary of the review mechanisms. Detailed guidance for councils and proponents is provided within *A guide to preparing local environmental plans*.

Pre-Gateway reviews

When a review may be requested

If a proponent (e.g. developer, landowner) has requested that a council prepare a planning proposal for a proposed instrument, the proponent may ask for a pre-Gateway review if:

- a) the council has notified the proponent that the request to prepare a planning proposal is not supported, or
- b) the council has failed to indicate its support 90 days after the proponent submitted a request, accompanied by the required information.

The Regulation requires councils to notify a proponent when the council determines that it will not prepare a planning proposal. The proponent of the proposed instrument then has 40 days to request that the

relevant regional panel review the proposal. Where a council has not made a determination after 90 days, the proponent may request a review any time after the 90 days has lapsed.

A guide to preparing local environmental plans sets out lodgement requirements, including fees and information a proponent must provide to the department in order for a review to be undertaken. It also sets out strategic and site-specific eligibility criteria that must be met in order for a proposal to be eligible for review by the regional panel.

Review and determination

The relevant regional panel will review all eligible proposals forwarded to it by the department. In the City of Sydney local government area, the PAC will undertake the review.

A guide to preparing local environmental plans sets out what matters the regional panel/PAC will take into consideration when reviewing the proposal.

The regional panel/PAC will provide advice on whether it would recommend to the Minister that the proposed instrument should be submitted for a determination under section 56 of the Act (Gateway determination).

The Minister's final decision will be informed by the regional panel's or PAC's advice, and the views of the department, council and proponent.

For proposals that are to proceed, further work may still be required by the proponent before the proposal complies with section 55 of the Act in relation to submitting a planning proposal for Gateway determination.

Further details on these procedures are outlined in *A guide to preparing local environmental plans*.

Exclusions – Pre-Gateway Reviews

A proponent who has requested council to prepare a planning proposal prior to the date this circular was issued may seek a review if the supporting information accompanying the request is still current (i.e. less than two years old).

A review request accompanied by information that is more than two years old will not normally be considered.

Gateway reviews

When a review may be requested

A council or proponent may request the Minister (or delegate) to alter a Gateway determination, when a Gateway determination is made that:

- a) the planning proposal should not proceed
- b) the planning proposal should be resubmitted to the Gateway, or
- c) imposes requirements (other than consultation requirements) or makes variations to the proposal that the council or proponent thinks should be reconsidered.

If the Gateway determination is either to not proceed or to resubmit the planning proposal, the council or proponent has 40 days from being notified by the department to request a review.

If the Gateway determination is to proceed with the planning proposal but imposes conditions that the council or proponent considers inappropriate, the council or proponent has 14 days from being notified by the department to indicate their intent to request a review. The council or proponent would then have 40 days to formally apply for a Gateway review.

A guide to preparing local environmental plans sets out lodgement requirements, including information the council or proponent must provide for a Gateway review to be undertaken.

Review and determination

The PAC will provide advice on whether the original Gateway determination should be altered, giving consideration to the council or proponent's submission and the reasons given for the original Gateway determination.

The Minister's final decision on whether to alter the Gateway determination will be informed by the PAC's advice, and the views of the council and proponent.

Further details on these procedures are outlined in *A guide to preparing local environmental plans*.

Further information

The Environmental Planning and Assessment Regulation 2000 has been amended to require councils to notify proponents of certain plan-making matters and to charge proponents fees for reviews. The regulation is called the Environmental Planning and Assessment Amendment (Reviews) Regulation 2012.

A guide to preparing local environmental plans provides advice on the various stages in the plan-making process including details of the stages for pre-Gateway reviews, the review of Gateway determinations and the delegation of plan-making functions to councils. The guide has been updated throughout with the main changes relating to:

- delegation procedures
- guidance on the plan making process
- guidance on the procedures for independent review.

A guide to preparing planning proposals, issued under section 55(3) of the Act, provides advice on the preparation and content of planning proposals. The guide has been updated throughout with the main changes relating to:

- guidance on the level of information to be required for planning proposals together with the inclusion of an information checklist for planning proposals
- advice regarding pre-lodgement meetings

- the introduction of 'part 6 – project timeline' and discussion of requirements and procedures
- guidance on mapping requirements and procedures.

Copies of the Environmental Planning and Assessment Regulation 2000 are available online at <http://www.legislation.nsw.gov.au/>.

Copies of *A guide to preparing local environmental plans* and *A guide to preparing planning proposals* are available on the department's website <http://www.planning.nsw.gov.au/>.

The department has developed a number of template documents to assist councils preparing delegated LEPs. Councils will be able to access these templates and use them to ensure that the key statutory requirements of the plan-making process have been complied with. These templates are available for download from the department's website at: <http://www.planning.nsw.gov.au/galleries/process>

For further information please contact the Department of Planning & Infrastructure's information centre on 1300 305 695.

Department of Planning & Infrastructure circulars are available from <http://www.planning.nsw.gov.au/circulars>

Authorised by:

Sam Haddad
Director-General

Important note: This circular does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this circular.

© State of New South Wales through the Department of Planning & Infrastructure
www.planning.nsw.gov.au

Disclaimer: While every reasonable effort has been made to ensure that this document is correct at the time of publication, the State of New South Wales, its agencies and employees, disclaim any and all liability to any person in respect of anything or the consequences of anything done or omitted to be done in reliance upon the whole or any part of this document.