



## PLANNING SYSTEM

### Local planning

<b>Note</b>	PN 09–001 (replaces PN 08–003)
<b>Date</b>	20 February 2009
<b>Related</b>	Planning circulars PS 09–004, PS 09–005

## Exempt and complying development

The purpose of this practice note is to provide guidance to councils on exempt and complying development controls in new principal local environmental plans (LEPs) as a result of the gazettal of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008.

### Introduction

State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (the Codes SEPP) was gazetted on 12 December 2008, and will commence on 27 February 2009.

Part 2 of the Codes SEPP comprises the General Exempt Development Code. It specifies 40 types of development of minor environmental impact that may be carried out as exempt development without the need for approval under the NSW planning system.

Part 3 of the Codes SEPP contains the first stage of the General Housing Code and specifies how residential developments, including:

- detached single and two storey dwelling houses
- alterations and additions
- other ancillary development, such as swimming pools

can proceed in certain zones on **lots 450 square metres and greater** as complying development.

This practice note sets out what changes are required to comprehensive LEPs that will be gazetted after the Codes SEPP commences.

Planning Circular PS 09–004 outlines the relationship between the Codes SEPP and councils' existing exempt and complying local environmental plans (LEPs) and development control plans (DCPs), the local exclusions and variations process, equivalent zones, implications of the Codes SEPP on comprehensive LEPs, implications for comprehensive LEPs and the effect of the Codes SEPP after 27 February 2009 on councils' exempt development provisions, changes to the Local Development Performance Monitoring Program to monitor the effectiveness of the Codes SEPP, the Education and Training Program and future amendments to the Codes SEPP.

Planning Circular PS 09–005 details the commencement of certain provisions of the *Environmental Planning and Assessment Amendment Act 2008* as they relate to complying development.

For ease of reference the description of the relationship with existing LEPs and DCPs as they relate to exempt and complying development is extracted below.

### Relationship with existing LEPs and DCPs

The relationship between the Codes SEPP and councils' existing exempt and complying development provisions in its LEP or DCP are dealt with under clause 1.9 of the Codes SEPP. These arrangements ensure an orderly and efficient transition to the new State-wide codes and provide for council's existing complying development provisions to continue unaffected for the first 12 months of operation of the Codes SEPP.

Under the arrangements in the Codes SEPP:

- if the same development type<sup>1</sup> is specified as exempt development in the General Exempt Development Code and in the council's existing LEP or DCP, then the Codes SEPP prevails and the development must be carried out in accordance with the General Exempt Development Code
- if the same development type is specified as complying development in the General Housing Code and in the council's LEP or DCP, applicants **can, until 27 February 2010, choose** to use either the provisions in the

<sup>1</sup> Two or more instruments are taken to identify the same development if they specify that development in a zone for the same purpose may be carried out on the same land, even though there may be some differences in the specifications or development standards for that development. For example, deck is a type of development, even if the size of the deck varies in different LEPs or DCPs.

General Housing Code or council's existing complying development provisions as the basis on which to prepare an application for a complying development certificate.

- if the same development type is specified as exempt development in the Exempt Development Code and as complying development in the council's LEP or DCP, applicants **can, until 27 February 2010, choose** to use either the General Exempt Development Code or the council's existing provisions as the basis for being considered and to carry out their development as exempt development
- in the unlikely event that the same development type is specified as complying development in the General Housing Code and as exempt development in the council's LEP or DCP, then the provisions of the Codes SEPP prevails then the development must be carried out as complying development in accordance with the Codes SEPP
- if a LEP or a DCP specifies exempt development or complying development that is **not the same** development type specified as either exempt development or complying development in the either the General Exempt Development Code or the General Housing Code, then the council's existing provisions **will still apply** (the Codes SEPP does not affect their operation) until such time as the Codes SEPP specifies this exempt development or complying development type.

During the transition period between commencement of the Codes SEPP and 27 February 2010 applicants will be required to nominate on their application for a complying development certificate which planning controls they will be relying on.

In circumstances where a complying development type is nominated in a council's LEP or DCP but is not covered by the Codes SEPP then the LEP or DCP provisions will continue to apply **after 27 February 2010** until those development types are covered by future amendments to the Codes SEPP.

The provisions of clause 1.9 of the Codes SEPP apply to LEPs or DCPs made **before or after** the commencement of the Codes SEPP.

Clause 1.9 also applies to exempt and complying development provisions in deemed environmental planning instruments in the same way as it applies to provisions in LEPs and DCPs.

## Plans now being drafted for gazettal after 27 February 2009

All Standard Instrument comprehensive LEPs being drafted for gazettal after 27 February 2009 (including any plans which have been publicly exhibited) must acknowledge the Codes SEPP.

Schedule 2 and Schedule 3 of the plans must not include or replicate the same development types that are covered by the Codes SEPP.

Where an exempt development type is not covered by the Codes SEPP that development type can be included in Schedule 2 of the LEP but the drafting of those provisions must be consistent with the principles of drafting set out in Attachment 1 to this practice note.

To avoid delays in the drafting process, councils should also not include any complying development provisions for development types covered by the Codes SEPP in Schedule 3 of the LEP.

Any further information about what development types can be included in the Schedules can be discussed in more detail with Department of Planning representatives.

## Future codes

Additional complying development codes are proposed, these will be given effect by way of an amendment to the Codes SEPP. Councils should be aware that once the codes are made (or their gazettal is imminent) the drafting of those provisions relating to development types covered by the codes will not be progressed in individual LEPs.

## Further information

A copy of the Codes SEPP, this practice note, the standard instrument and other specific practice notes and planning circulars on using the Standard Instrument, may be accessed on the Department's website at:

<http://www.planning.nsw.gov.au/planningsystem/localplanning.asp>.

For further information about the implementation of the standard instrument or the Codes SEPP, please contact the relevant regional office of the Department.

Office contact details are available from the Department's website at:

<http://www.planning.nsw.gov.au/aboutus/contactus.asp>

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Attachment 1 – Principles for drafting

Attachment 2 – Frequently asked questions

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**Important note:** This 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 note.

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## ATTACHMENT 1—PRINCIPLES FOR DRAFTING

### Exempt and complying development types

The following principles should be applied when nominating exempt and complying development types for the LEP schedules.

- **Avoid subjective terms** such as ‘must not interfere with the amenity of the area’, ‘generally consistent with all relevant requirements’, ‘appropriately lit’, ‘satisfactory surveillance’, ‘structurally adequate’, etc. as they are either ambiguous or require a merit consideration.
- **Avoid blanket exclusions** that prevent types of exempt and complying development being carried out across the local government area. Most issues can be addressed by including appropriate standards in Schedules 2 and 3.
- **Compliance with the BCA** is already covered under clauses 3.1 and 3.2 of the standard instrument and clause 145 of the EP&A Regulations and does not need to be a standard or condition.
- **EP&A Act provisions do not need to be repeated.** For example it is not necessary to have standards stating ‘must comply with the conditions of any development consent’ as either it is not required (for exempt development) or is a requirement of the Act (complying development). BASIX certification is also covered by the Act and does not need to be reproduced.
- **Avoid calling up other legislation or Codes.** It is not necessary to identify requirements from other Acts, Regulations or Codes such as the BCA in the LEP. For example, compliance with the *Food Act 2003* would be certified under that Act. Relevant Acts must be complied with however, reference to such requirements in the LEP are not required.
- **Minimise references to Australian Standards.** References to Australian Standards (AS) should be kept to a minimum. Such AS have been thoroughly assessed through a national process before they are adopted. Where it is necessary to refer to AS, the full reference of the standard with a date is required.
- **Do not include references to DCPs or other policies, or standards that require the opinion of the consent authority.** All relevant criteria should be set out in the schedules. Requirements to comply with ‘all relevant provisions of applicable DCPs’ or other council policies or that require ‘an opinion of the consent authority’ are not appropriate. If, in exceptional circumstances, a reference to another document is needed then a publication/ adoption date must be provided.

- **Additional process requirements should not be included.** Examples include requiring approvals under section 68 of the *Local Government Act 1993* to be obtained prior to a complying development certificate or requiring additional procedures to be undertaken other than those required under the Act or Regulations.
- **Keep notes to a minimum.** While notes can sometimes be of assistance to users, they should be kept to a minimum as they are not part of the instrument, do not have legislative weight, and are often not updated.
- **Development under the Infrastructure SEPP.** It is recommended not to include new or amending provisions for development that is covered by the Infrastructure SEPP (as the SEPP prevails).

### Complying development conditions

Complying development conditions should be set out in Part 2 of Schedule 3. Conditions must relate to the types of development listed in Part 1 of the Schedule and may only be imposed within the powers provided by the EP&A Act for the imposition of conditions.

The principles above also typically apply to the writing of conditions for complying development. In addition to these the following should also be considered.

- **Procedural requirements under the EP&A Act** should not be re-stated, for example, the requirement for a principal certifying authority to be appointed prior to construction is required under section 86 of the EP&A Act, and does not need to be reproduced as a condition. The same applies with respect to critical stage inspections and the issuing of occupation certificates. These might instead be identified in an information brochure (see below).
- **Approvals required under other legislation** should not be listed. For example, driveways, footpaths and kerb crossings are covered by the *Roads Act 1993* and do not need to be reproduced.
- **Standards covered by other legislation** need not be reproduced. For example, the *Swimming Pools Act 1992* provides detailed requirements in relation to swimming pools that do not need to be replicated.
- **Words and expressions defined** in Acts or Regulations do not need to be separately defined in the schedules. For example, ‘property’ as it refers to a strata scheme.
- **Bonds** can only be imposed within the limited power provided by section 80A of the EP&A Act. For example, bonds relating to landscaping are not valid.
- **Occupational health and safety** requirements are generally covered by separate legislation and those matters do not need to be reproduced as conditions.
- **Pollution** (for example burning of waste materials) is covered by the *Protection of the Environment Operations Act 1997* and does not usually need to be addressed through conditions.

## ATTACHMENT 2—FREQUENTLY ASKED QUESTIONS

**Q. Can development types that are not identified as exempt development in the General Exempt Development Code still be included in Schedule 2?**

A. Yes. The Exempt Development Code covers the most common development types that are dealt with as exempt development in LEPs or DCP. Where a development type is not covered by the Exempt Development Code, for example, dog kennels and tennis courts, this type can still be included in Schedule 2.

**Q. Can an applicant build a new dwelling house in a rural zone as complying development under the General Housing Code?**

A. No. The General Housing Code only allows new dwelling houses to be erected as complying development in certain residential zones (Zone R1, R2, R3 or R4) or their equivalent zone under the Standard Instrument.

**Q. Can an applicant do alterations and additions to a dwelling house in a rural zone as complying development under the General Housing Code?**

A. Yes. The General Housing Code does allow alteration and additions to an existing single and two storey dwelling houses in the following zones RU1, RU2, RU3, RU4 or RU5) or their equivalent zone under the Standard Instrument.

**Q. Can an applicant build a new dwelling house as complying development on land zoned R5 (Large Lot Residential) under the General Housing Code?**

A. No. The General Housing Code only allows new dwelling houses to be built in the R1, R2, R3 and R4 zones. Alterations and additions to existing dwelling houses in the R5 zone is permitted.

**Q. What happens if the LEP or DCP makes a development type (for example, bed-and-breakfast accommodation) complying development and the General Exempt Development Code makes it exempt development?**

A. In keeping with the government's undertaking to leave existing council complying development provision unaffected, until 27 February 2010 applicants will be able to choose to either carry out their development as exempt using the General Exempt Development Code or use council's existing provisions to carry out the development as complying.