



# LEP practice note

## PLANNING SYSTEM

### Local planning

<b>Note</b>	PN 08-003
<b>Date</b>	5 August 2008
<b>Related</b>	

# Transitional arrangements for 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) with reference to the State development codes.

## Introduction

The Department of Planning is currently preparing a State environmental planning policy (SEPP) to give legal effect to a series of State-wide exempt and complying codes for certain types of residential and commercial development.

The proposed State-wide codes will be implemented in stages. During implementation, the State-wide codes will operate side by side with council's exempt and complying development provisions. Councils preparing principal LEPs should be aware of the draft codes and consider the most appropriate measures to progress their LEP.

Also, through the work the Department has done with councils and Parliamentary Counsel's Office (PCO) in completing new principal plans that adopt the Standard Instrument, it has become apparent that a disproportionate amount of time and resources is being committed to the drafting of exempt and complying schedules.

This practice note provides guidance to enable councils to avoid expending resources unnecessarily in drafting the exempt and complying schedules during the rollout of the codes. This practice note also outlines the approach the Department requires councils to take with respect to exempt and complying schedules.

## Standard Instrument provisions

The following standard instrument provisions cover exempt and complying development.

### Clause 3.1 Exempt development

The purpose of this clause is to enable councils to specify exempt development in Schedule 2.

General requirements for exempt development are set out in the clause.

### Clause 3.2 Complying development

The purpose of this clause is to enable councils to specify complying development in Schedule 3. General requirements for complying development are set out in the clause.

### Clause 3.3 Environmentally sensitive areas excluded

This clause specifies the environmentally sensitive areas where exempt or complying development must not be carried out.

A direction allows councils to add areas to the list. However this should only be done where it is appropriate for all types of exempt and complying development to be excluded (see discussion of 'blanket exclusions' below).

### Schedule 2 Exempt development

This schedule allows councils to list the types of development that are exempt where they comply with specified standards.

Filming, rainwater tanks and satellite TV dishes are mandatory exempt development. These are to be included in councils' LEPs as stated in the standard instrument unless suitable alternative development standards are specified.

Councils can develop alternative provisions for these included development types provided that the provisions are not more restrictive than those in the direction in Schedule 2 (which are replicated from SEPP 4 – Development without Consent and Miscellaneous Complying Development).

### Schedule 3 Complying development

Part 1 of Schedule 3 lists the types of development that are complying development.

Councils should set out complying development certificate conditions as Part 2 of the schedule.

### General requirements for exempt and complying development

The first few principal standard instrument LEPs have required the Department, PCO and the relevant councils to spend considerable time revising proposed exempt and complying development schedules. In order to build on this experience, the Department prefers councils adopt schedules already settled by PCO in the following manner:

- Councils select both schedules from one of the exhibited or gazetted LEPs, appropriate to council's requirements.
- Minor amendments including edited numerical values and minor simple clarifications may be made but instructed separately to the Department so as to be identifiable from the settled schedules.
- Council can either provide instructions by listing these simple changes or, alternatively, council annotates directly a printed version of the schedules. In both cases, Council is to advise which principal LEP's schedules are being annotated.

This approach would avoid most drafting errors and reduce drafting and reviewing time including that by councils, the Department and PCO.

Only under exceptional circumstances should council contemplate drafting new schedules. Council would need to identify to the Department why the local government area is sufficiently different from those with exhibited plans. Prior to commencing the drafting of these schedules council must obtain the agreement of the Department.

Councils should recognise that drafting unique schedules requires significant expenditure of resources on additional work. Delays of up to two to three months are likely.

Councils should avoid additional time spent reviewing and redrafting exempt and complying development controls for their principal LEP by ensuring all proposed exempt and complying controls are in accordance with the principles for content and format outlined in this practice note.

### Types of development

A wide range of minor development types should be provided for as part of exempt and complying development schedules.

A list of minor development types that should be considered is set out at Attachment 1.

Generally an exempt development type should be accompanied by a similar complying development type. For example, structures such as decks and sheds, included as exempt development, could be identified as complying development once they have exceeded their exempt development threshold.

Where a type of development is not covered by the codes, that development can still be included in the relevant schedule to the Standard Instrument; but the drafting of those provisions must be consistent with the principles of drafting set out in this practice note.

### Format of schedules

Councils should follow the format of the exempt and complying schedules from one of the exhibited principal LEPs under the Standard Instrument. For further information of these plans contact the Department of Planning's regional offices.

Tables should not be used.

Where possible, councils should group items under key headings (as shown in Attachments 1 and 2) and then provide relevant criteria for each item.

### Standards for exempt and complying development

The standards and conditions for exempt and complying criteria and development standards must be concise, unambiguous and able to be quantified, where values apply.

A clear 'Yes' or 'No' answer must be able to be given as to whether or not development standards are satisfied.

This is because there is no merit assessment procedure – proposals are assessed by a certifier in the case of complying development, or self-assessed in the case of exempt development.

### Principles for drafting

The following principles should be applied when reviewing exempt and complying development 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 all 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 for specific types of development (rather than excluding all types). Typical 'blanket exclusions' that should not be applied to all exempt and complying include:

- *Flood prone land*: development not involving building in a floodway or intensification of use can still occur, for example, internal fitouts, satellite TV dishes, flagpoles, letter boxes etc.
- *Bushfire prone land*: development including swimming pools, internal fitouts, flagpoles and other development that comply with AS 3959.
- *Land near an easement or sewer*: minor development that does not involve the construction of new buildings or structures over the easement or sewer can still occur, for example change of use, certain types of fences and driveways etc.
- *Heritage items and conservation areas*: development such as letterboxes, flagpoles, change of use of commercial premises etc can be considered.
- **Compliance with the Building Code of Australia (BCA)** is already covered under clauses 3.1 and 3.2 of the standard instrument and clause 145 of the Environmental Planning and Assessment (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 EP&A Act (complying development). BASIX certification is also covered by the EP&A Act and does not need to be reproduced.
- **Avoid calling up other legislation.** It is not necessary to identify requirements from other Acts and Regulations in the LEP. For example, compliance with the *Food Act 2003* would be certified under that Act. Relevant Acts must be complied with however, references 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. There is also no need to refer separately to individual AS if these are covered by the BCA, as applicable standards are called up in the building code. 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 development control plans (DCPs) or other policies.** Relevant criteria should be set out in the schedules. Requirements to comply with ‘all relevant provisions of applicable DCPs’ or other council policies are not appropriate. This is because any document so referenced takes

on the status of subordinate legislation (as part of the LEP) and must be subject to the same procedures for amendment as the other LEP controls. 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 notification procedures to those allowed under the Act.
- **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.

## 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.

## Principles for drafting

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 restated, 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 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.

### Additional information for applications and households

Many of the inappropriate or potentially invalid existing standards and conditions for exempt and complying have been written with the aim of educating users about procedural requirements under the EP&A Act, approvals required under other legislation, or other council policies regarding use and management.

Although these cannot be legally imposed as standards or conditions for development, they could be included in a separate information brochure to assist applicants. Councils may wish to consider preparing such a document to inform their residents about procedural and local policy requirements relating to the carrying out of development in their local government area.

### Transitional arrangements with Code implementation

During implementation of the State-wide development codes, councils are strongly advised to adopt schedules already settled by PCO as the State-wide codes will operate side-by-side with councils' exempt and complying development provisions.

Once the complying development codes have been finalised, the SEPP giving legal effect to the codes will be amended to provide that where types of development are covered by the codes, council's exempt and complying development provisions will have no effect.

Where a type of development is not covered by the codes, that development can still be included in the relevant exempt and/or complying schedule to the Standard Instrument; but the drafting of those provisions must be consistent with the principles of drafting set out in this circular.

Further details of the transitional arrangements for the codes will be outlined in a future practice note. Councils should also be aware that once the final codes are made (or their gazettal is imminent) the drafting of those provisions covered by the codes will not be progressed to speed up the drafting time of the comprehensive LEPs.

### Further information

A copy of 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/lo calplanning.asp>.

Authorised by:

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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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DOP 08\_004

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## ATTACHMENT 1

### Exempt development types— examples for which criteria could be set out in Schedule 2

#### Additions/alterations to a dwelling

- aerials
- antenna and microwave antennae
- awnings
- balconies
- canopies and storm blinds
- decks
- external alterations involving repairs or renovations
- gates and roller doors
- glazed areas and external doors
- internal building work not involving structural alterations
- re-cladding roof and walls
- roof ventilators
- roof windows
- satellite dishes
- security grills and shutters
- skylights
- solar energy heaters / systems
- solar panels
- windows

#### Ancillary development to a dwelling

- aviaries
- barbecues
- cabanas/gazebos
- carports
- Christmas decorations
- clothes lines/hoist
- compost heaps
- cubby houses and play equipment
- driveways and pathways
- earthworks (excavation and filling)
- electricity poles/posts
- fences
- flagpoles
- garages
- garage sales
- garden sheds
- greenhouses
- letterboxes
- pergolas
- rainwater tanks
- retaining walls
- satellite TV dishes
- sheds
- shade structures

- water features and ponds

#### Swimming pools and associated works

- spa pools
- swimming pools
- pump enclosures
- pool fencing and decking

#### Change of use

- business premises
- light industry
- office premises
- places of public worship
- retail premises

#### Commercial development

- automatic teller machines
- drop down blinds over footpath
- filming
- footpath dining
- internal fitouts
- outdoor eating areas

#### Signage

- advertising structures and advertisements
- building identification signs
- business identification signs
- community notices and banners
- inflatable signage (balloons and blimps)
- replacement and temporary signage
- signage on bus shelters
- public signage

#### Rural development

- earthworks (excavation and filling)
- dams
- farm buildings (including sheds, silos, stables)
- stockyards
- windmills

#### Public works and events\*

- bollards
- staircases
- community events
- public art

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\* Note. SEPP (Infrastructure) 2007 identifies a range of public works as exempt development or development not requiring consent. These should not be replicated in LEPs.

## ATTACHMENT 2

### Complying development types— examples for which criteria could be set out in Schedule 3

#### **Dwelling houses and ancillary development\***

- erection of dwelling house
- additions and extensions to dwelling houses
- bed and breakfast accommodation
- retaining walls

#### **Commercial and industrial development\***

- business and retail changes of use (requiring building alterations/fitouts and a change in classification of the building under the BCA)
- extension within roof space/internal alterations to residential, industrial and commercial premises
- construction of small new industrial buildings and commercial/retail buildings

#### **Other development\***

- carports and garages
- decks
- dormer windows
- farm buildings
- outbuildings
- sheds and other ancillary buildings
- signage
- strata subdivision
- swimming pools
- temporary structures

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\* Note. For development types not covered under exempt.