



PLANNING SYSTEM

Local planning

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| Related | LEP preparation guidance notes 2004-1 & 2 EP&A Act and Regulation Note Dec 2000 DUAP letter to councils 21 December 1999 |

Reports by the Director General under section 69 of the EP&A Act

This Circular provides councils with advice on the Director-General's requirements for reporting to the Minister under section 69 of the *Environmental Planning and Assessment Act 1979*, and clarifies the circumstances under which amending plans may be prepared.

Introduction

Councils are able to use delegations to provide the Director-General's report on a draft local environmental plan (LEP) under section 69 of the Act directly to the Minister. The delegations will be reviewed to accommodate the standardisation of planning instruments. In the interim, the delegations issued in 1997 continue to apply.

Preparation of new instruments and amendments of existing LEPs

One of the major planning reforms is to make local environmental plans the primary instrument including all mandatory development controls. To achieve a single plan for each local government area, both the department and councils will need to direct effort to strategic planning and preparation of new instruments.

Councils are requested to avoid, where possible, resolving to prepare minor amendments to existing plans. There will be instances, however, where Councils can justify preparing a draft amending plan in advance of the new standard instrument.

Examples of such exceptions include the following:

- the amendment is to facilitate an employment generating activity
- existing provisions jeopardise or undermine State government policy
- the amendment implements agreed strategic direction for development in the area, including land release or preservation of strategic corridors
- council has completed strategic work and delays in implementing recommendations would be unreasonable and inefficient.

When notifying the Director-General under section 54 of the intention to prepare an amending plan, councils will need to demonstrate the need for any proposed amendments. Any LEP amendment will also need to be consistent with the standard template as far as possible, to facilitate consolidation into the new instrument.

Local councils should not impose a moratorium on rezoning, and instead should assess proposals on a case by case basis on their merits, in consultation with the DIPNR regional office. The preference is for minor amendments to LEPs that fall outside the above criteria to be incorporated into the process for the new comprehensive LEP.

Note that the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005*, when it commences, will introduce a process enabling correction of errors and omissions from plans without complying with all provisions of Part 3. If councils have minor amendments that fit the criteria, the department will administer a process entailing council notification of the proposed amendment, and, on the department agreeing that it is minor in nature, a report to the Minister.

A future practice note will provide further detailed guidance on the need to comply with the standard local environmental plan template and transitional arrangements under the Reform Act.

Quality Improvement

To improve and maintain the quality of reporting to the Minister this Circular sets out a number of points which councils need to ensure are covered adequately in section 69 submissions.

A format for a section 69 report prepared under delegation is attached to this Circular. The format covers the requirements of section 68(4) and section 69. Particular attention should be paid to the following points, which have been common weaknesses in recent reporting:

Clear statement of what the draft plan does and why it has been prepared

Begin with a clear, plain English statement, in the Summary section, of what the draft plan will do and why it was necessary to prepare it. A statement such as ‘to rezone the land’ is not sufficient.

Maps showing location and existing zoning

Provide information in the report on the current zoning of the land (refer to the model format) and a map identifying the land to which the draft plan applies, the existing zoning, and the zoning of the surrounding land. Attach an additional map indicating the general location of the land, in the context of the local government area.

Submissions

Identify the main issues raised in submissions received from members of the public (attach copies). This section of the report also documents council’s response and conclusions concerning the main issues raised in submissions.

Views of public authorities

Report public authorities’ comments on the draft plan, together with an account of how those comments have been addressed. Note that if there is an unresolved objection to the draft LEP made by a public authority, council should seek to resolve the matter and may contact the department’s regional office for assistance. If the matter remains unresolved, council may not use its delegation — the draft LEP must be forwarded to the department for the preparation of a report to the Minister.

Alterations to the draft plan after exhibition

Briefly identify any alterations made to the plan after exhibition, the reason for the changes, and whether or not the draft plan was re-exhibited.

It is established practice that the draft plan submitted to the Minister is consistent with the section 54 notification to the Director-General, both in terms of the subject matter of the draft LEP and of the land to which the draft plan applies. If a council alters a draft plan after exhibition, it must consider whether the plan requires re-exhibition. The Court has recognised (*John Lenton Brown v Blue Mountains Council*, the Minister for Urban Affairs and Planning & Anor) that section 68 of the Environmental Planning and Assessment Act allows significant alterations to be made to a draft plan without the plan being re-exhibited. However, where a plan is changed significantly, it may pass the point where it is so altered that it becomes a different plan from the one first exhibited, and cannot be said to be the result of the process under Part 3 of the Act. It must then be re-exhibited.

In making changes to a draft plan under section 68, councils should also be aware that there may be a

need to consult with public authorities who will or may be affected by the altered draft plan.

Whether the draft LEP is inconsistent with SEPPs, REPs or section 117 directions

Section 69(a) requires the Director-General to report on whether a draft plan is inconsistent with any State environmental planning policy (SEPP), regional environmental plan (REP) or section 117 direction relevant to the land. Note that if a draft LEP is inconsistent with a SEPP or REP, council may not exercise delegations under section 69 and the draft plan must be forwarded to the department for the preparation of a report to the Minister. When exercising delegations, councils must state in the section 69 report that the draft plan is not inconsistent with SEPPs and REPs. Any inconsistency with section 117 directions must be identified and justified.

Note that councils are required to place on exhibition a copy of the relevant SEPPs, REPs and section 117 directions, together with a statement identifying which SEPPs, REPs and section 117 directions substantially govern the operation of the draft LEP.

New section 117 directions

New section 117 directions will be issued when the Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005 commences. Under the new provisions, a direction may require draft plans to be strictly consistent or substantially consistent with the terms of the direction, or provide for circumstances in which an inconsistency can be justified.

This represents a departure from the existing position where a plan can be inconsistent with a section 117 direction if the inconsistency can be justified. When the Reform Act commences and new directions are issued, councils preparing draft LEPs should ensure that their draft plans are consistent with new directions where this is required.

In some instances, draft plans already in preparation may need to be amended and re-exhibited to comply with new section 117 directions.

Advice on compliance with sections 66 and 67

A statement is required under section 69(c) to inform the Minister whether council has complied with the provisions of sections 66, 67 and 68 for public involvement in the preparation of the draft LEP.

Relationship of the draft plan to section 117 directions and other instruments

Section 69(d) requires the Director-General to report on the relationship between the draft plan and relevant section 117 directions and other proposed and existing environmental planning instruments.

Section 71 determination

The section 71 determination made on 17 January 1983 has been revoked. Note that the determination made in conjunction with section 117 direction G22 on 17 February 1986 remains in force until the Reform Act commences, revoking section 71. This direction governs the format, structure and subject

matter of draft local environmental plans prepared under delegation.

Alteration, creation or removal of Regional Open Space, Special Use or Major Roads reservations or zones

Section 117 direction G3(ii) requires the approval of both the relevant public authority and the Minister when a draft LEP proposes to create, alter or remove an existing reservation or zoning for Regional/County Open Space, Special Use or Main, County or Arterial Roads. Written agreement from the relevant public authority must be provided in the documentation supporting the draft plan. The section 69 report needs to draw the matter to the Minister's attention and to include a recommendation for approval.

Advice of the Heritage Council

In preparing a draft LEP, councils must comply with Part 5 of the *Heritage Act 1977*. Consultation with the Heritage Council early in the plan preparation process will minimise the need to re-exhibit plans to meet its requirements.

Under section 83 of the Heritage Act, the Minister must seek and have regard to the opinion of the Heritage Council before considering whether to make a plan containing a provision which affects land to which an Interim Heritage Order or listing on the State Heritage Register applies. *The section 69 report must therefore include a section to inform the Minister of the views of the Heritage Council where this is relevant.*

Councils should consult the Heritage Council under section 83 by sending a copy of the draft final plan (after Parliamentary Counsel's Opinion has been obtained). A copy of the Heritage Council's advice must be provided with the section 69 report.

LEP maps

Council delegates need to ensure that maps submitted for the Minister's approval as part of a plan do not have the word 'draft' in their title, and also that the name of the plan on the map and other matters identified on the map, such as zones, match the description in the written instrument.

Maps rezoning land are to be coloured if the principal instrument is coloured. However, when a draft plan does not rezone land, but a map is used to identify land for another purpose (eg an additional use), the map identifying the land may be black and white and not coloured to represent the underlying zoning.

Reclassification of council land

Where this is relevant, the report must briefly set out the council's interest in the land, any conflicts of interest, issues raised in any relevant submissions and an explanation of how these issues have been addressed or resolved (see Best Practice Guideline 'LEPs and Council Land' (Department of Urban Affairs and Planning, January 1997).

Additional matters to be addressed when the Governor's approval is required.

The Governor's approval is required for the extinguishment of public reserve status and other interests in land which a council proposes to

reclassify from 'community' to 'operational' status under the *Local Government Act 1993*. In such cases councils need to cover the additional matters shown in the attached section 69 report format.

Council must provide the additional information exhibited in accordance with the Best Practice Guideline 'LEPs and Council Land' and the report of the public hearing into reclassification, so that the Minister is informed of any public reserve and/or other third party property interests (eg trust, covenant, easement) that is proposed to be extinguished upon the making of such a draft LEP.

Advice on development applications or matters before the Court

Provide advice on development applications and/or appeals affected by the draft plan, including an explanation of how the applications are affected.

Savings provisions

Councils should consider whether a draft plan needs to include a savings provision to cover any development applications affected by the draft plan and/or matters before the Court.

References to the Minister

Reports should refer to 'the Minister', rather than using personal pronouns.

Report to be signed by delegate

Delegates must check that the section 69 report meets the requirements of the Act and follows the advice provided by the department where relevant. The delegate is required to sign the report.

Return of inadequate reports

Both the Minister and Director-General expect a high standard of reporting from councils and the department. Section 69 reports which do not meet the requirements set out above and in the attached section 69 format will be returned for improvements to be made.

Further advice

Please contact your DIPNR regional office if you need further advice on preparing section 69 reports.

This circular should be read in conjunction with guidance on the plan preparation process which may be found in previous circular letters on the department's website.

Authorised by:

Alice Spizzo
Executive Director, Office of the 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.

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