Classification and reclassification of public land through a local environmental plan

The purpose of this practice note is to update guidance on classifying and reclassifying public land through a local environmental plan (LEP). This practice note emphasises the need for councils to demonstrate strategic and site specific merit, includes a comprehensive information checklist and clarifies issues arising for public reserves and interests in land. It should be read in conjunction with A guide to preparing local environmental plans and A guide to preparing planning proposals.

Classification of public land

Public land is managed under the Local Government Act 1993 (LG Act) based on its classification. All public land must be classified as either community land or operational land (LG Act ss.25, 26).

- **Community** land – is land council makes available for use by the general public, for example, parks, reserves or sports grounds.
- **Operational** land – is land which facilitates the functions of council, and may not be open to the general public, for example, a works depot or council garage.

What is public land?

Public land is defined in the LG Act as any land (including a public reserve) vested in, or under council control. Exceptions include a public road, land to which the Crown Lands Act 1989 applies, a common, land subject to the Trustees of Schools of Arts Enabling Act 1902 or a regional park under the National Parks and Wildlife Act 1974.

Why classify public land?

The purpose of classification is to identify clearly that land made available for use by the general public (community) and that land which need not (operational). How public land is classified determines the ease or difficulty a council can have dealings in public land, including its sale, leasing or licensing. It also provides for transparency in council’s strategic asset management or disposal of public land.

Community land must not be sold, exchanged or otherwise disposed of by a council. It can be leased, but there are restrictions on the grant of leases and licences, and also on the way community land can be used. A plan of management (PoM), adopted by council, is required for all community land, and details the specific uses and management of the land.

There are no special restrictions on council powers to manage, develop, dispose, or change the nature and use of operational land.

How is public land classified or reclassified?

Depending on circumstances, this is undertaken by either:

- council resolution under ss.31, 32, or 33 (through LG Act s.27(2)), or
- an LEP under the Environmental Planning and Assessment Act (through LG Act s.27(1)).

Councils are encouraged to classify or reclassify land by council resolution where suitable.

Classification of public land occurs when it is first acquired by a council and classified as either community or operational.

Reclassification of public land occurs when its classification is changed from community to operational, or from operational to community.
Reclassification through an LEP

Classification and reclassification of public land through an LEP is subject to both the local planning process in the EP&A Act and the public land management requirements of the LG Act.

A planning proposal to classify or reclassify public land, will need to be prepared in accordance with this practice note and the additional matters specified in Attachment 1 to this practice note.

Reclassification through an LEP is the mechanism with which council can remove any public reserve status applying to land, as well as any interests affecting all or part of public land (LG Act s.30).

It is critical that all interests are identified upfront as part of any planning proposal. If public land is reclassified from community to operational, without relevant interests being identified and discharged, then the land will need to be reclassified back to community (usually by council resolution under LG Act s.331) before being reclassified in a new planning proposal to operational, to explicitly discharge any interests.

While a reclassification proposal to remove the public reserve status of land and/or discharge interests may not necessarily result in the immediate sale or disposal of the land, the community should be aware the public land in question is no longer protected under the LG Act from potential future sale once it has been reclassified to operational.

Councils should obtain their own advice when proposing to discharge any interests and be aware that this may attract a claim for compensation under the Land Acquisition (Just Terms Compensation) Act 1991.

Where land has been dedicated to council by a State agency for a particular purpose and a trust exists, it is advisable for council to seek the views of that agency prior to council commencing any planning proposal affecting the land.

Interests in land refers to property ownership as well as rights and privileges affecting land, such as leasehold, easements, covenants and mortgages.

For the purpose of reclassification through an LEP, ‘interests’ means trusts, estates, dedications, conditions, restrictions and covenants affecting the land.

A legal owner of land may not be the only person with an interest in the land. For example, one person may have the benefit of an easement for services, such as water, electricity or sewerage over someone else’s land.

Certain interests are registered on title to ensure they are on record and cannot be disregarded if sold to a new owner. An electronic title search is generally conducted to determine the land owner, correct land description and the type of interests which may affect the land.

Standard Instrument LEP requirements

Clause 5.2—Classification and reclassification of public land in Standard Instrument LEPs enables councils to classify or reclassify public land as operational land or community land in accordance with the LG Act. The land to be reclassified or classified is described in Schedule 4 of the LEP.

Schedule 4 is not to refer to any land already classified or reclassified.

Where there is no public land to be classified, or reclassified, through a principal LEP (i.e. the LEP applies to the whole of a local government area), Schedule 4 will appear blank.

Note: At a later stage council may lodge a planning proposal to remove previous listings in Schedule 4. This will not affect the classification status of these parcels of land.

Department assessment

A proposal to classify or reclassify public land through an LEP must have planning merit. The Department will undertake an assessment to determine whether the proposal demonstrates strategic and site specific merit.

Community consultation

Planning proposals to reclassify public land are to be publicly exhibited for at least 28 days. A copy of this practice note is to be included in the public exhibition materials.
Public hearings

Councils must hold a public hearing when reclassifying public land from community to operational (EP&A Act s.57 & LG Act s.29). This gives the community an opportunity to expand on written submissions and discuss issues with an independent person in a public forum.

After the exhibition period has ended, at least 21 days public notice is to be given before the hearing. This allows the person chairing the hearing sufficient time to consider written submissions and all issues raised.

There are specific requirements for the independence of the person chairing the hearing, their preparation of a public hearing report and council making the report publicly available (LG Act s.47G).

Governor's approval

The Governor's approval is required when a reclassification proposal seeks to remove any public reserve status and/or discharge any interests affecting public land (s.30).

When a council reports back to the Department on the community consultation undertaken and requests the Department make the LEP, the Department will arrange legal drafting of the LEP, including recommending the Governor approve the provisions before the LEP can be legally made.

Where the Governor’s approval is required, the council’s report accompanying the final planning proposal must address:

- council’s interests in the land;
- whether the land is a ‘public reserve’;
- the effect of the reclassification, including loss of open space, any discharge of interests, and/or removal of public reserve status;
- the strategic and site specific merits of the reclassification and evidence to support this;
- any current use of the land, and whether uses are authorised or unauthorised;
- how funds obtained from any future sale of the land will be used;
- the dates the planning proposal was publicly exhibited and when the public hearing was held;
- issues raised in any relevant submissions made by public authorities and the community;
- an explanation of how written and verbal submissions were addressed or resolved; and
- the public hearing report and council resolution.

Authorisation of delegation

Local plan making functions are now largely delegated to councils.

A Written Authorisation to Exercise Delegation is issued to a council as part of the Gateway determination. However, where an LEP requires the Governor’s approval, this council delegation cannot be issued. In this instance, the council must request the Department make the LEP.

A decision to classify or reclassify public land cannot be sub-delegated by council to the general manager or any other person or body (LG Act s.377(1)(l)).

Background

On July 1, 1993 when the LG Act commenced, the following land under council ownership or control, was automatically classified as community land:

- land comprising a public reserve,
- land subject to a trust for a public purpose,
- land dedicated as a condition of consent under s.94 of the EP&A Act,
- land reserved, zoned or otherwise designated for use under an environmental planning instrument as open space,

Councils must keep a register of land under their ownership or control (LG Act s.53) and anybody can apply to a council to obtain a certificate of classification (LG Act s.54).

Further information

A copy of this practice note, A guide to preparing planning proposals and A guide to preparing local environmental plans is available at: http://www.planning.nsw.gov.au

For further information, please contact the Department of Planning and Environment’s Information Centre by one of the following:

Tel: 1300 305 695
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Authorised by:
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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.

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ATTACHMENT 1 – INFORMATION
CHECKLIST FOR PROPOSALS TO
CLASSIFY OR RECLASSIFY PUBLIC
LAND THROUGH AN LEP

The process for plan-making under the EP&A Act is
detailed in A guide to preparing planning proposals
and A guide to preparing local environmental plans.

Importantly, A guide to preparing local environmental
plans contains the Secretary’s requirements for
matters that must be addressed in the justification of
all planning proposals to reclassify public land.
Councillors must ensure the Secretary’s requirements
are addressed.

Councillors must also comply with any obligations under
the LG Act when classifying or reclassifying public
land. More information on this can be found in Practice
Note No. 1 - Public Land Management (Department of
Local Government, 2000).

All planning proposals classifying or reclassifying
public land must address the following matters for
Gateway consideration. These are in addition to the
requirements for all planning proposals under section
55(a) – (e) of the EP&A Act (and further explained in A
guide to preparing planning proposals and A guide to
preparing local environmental plans).

- the current and proposed classification of the
  land;
- whether the land is a ‘public reserve’ (defined
  in the LG Act);
- the strategic and site specific merits of the
  reclassification and evidence to support this;
- whether the planning proposal is the result of a
  strategic study or report;
- whether the planning proposal is consistent
  with council’s community plan or other local
  strategic plan;
- a summary of council’s interests in the land,
  including:
  - how and when the land was first acquired
    (e.g. was it dedicated, donated, provided as
    part of a subdivision for public open space or
    other purpose, or a developer contribution)
  - if council does not own the land, the land
    owner’s consent;
  - the nature of any trusts, dedications etc;
- whether an interest in land is proposed to be
  discharged, and if so, an explanation of the
  reasons why;
- the effect of the reclassification (including, the
  loss of public open space, the land ceases to
  be a public reserve or particular interests will
  be discharged);
- evidence of public reserve status or relevant
  interests, or lack thereof applying to the land
  (e.g. electronic title searches, notice in a
  Government Gazette, trust documents);
- current use(s) of the land, and whether uses
  are authorised or unauthorised;
- current or proposed lease or agreements
  applying to the land, together with their
duration, terms and controls;
- current or proposed business dealings (e.g.
  agreement for the sale or lease of the land, the
  basic details of any such agreement and if
  relevant, when council intends to realise its
  asset, either immediately after
  rezoning/reclassification or at a later time);
- any rezoning associated with the
  reclassification (if yes, need to demonstrate
  consistency with an endorsed Plan of
  Management or strategy);
- how council may or will benefit financially, and
  how these funds will be used;
- how council will ensure funds remain available
to fund proposed open space sites or
improvements referred to in justifying the
reclassification, if relevant to the proposal;
- a Land Reclassification (part lots) Map, in
  accordance with any standard technical
  requirements for spatial datasets and maps, if
  land to be reclassified does not apply to the
  whole lot; and
- preliminary comments by a relevant
government agency, including an agency that
dedicated the land to council, if applicable.