



environmental defender's office new south wales

Submission on the Draft Standard Instrument (Local Environmental Plans) Order 2005

4th November 2005

The EDO Mission Statement

To empower the community to protect the environment through law, recognising:

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *that the EDO has an obligation to provide representation in important matters in response to community needs as well as areas the EDO considers to be important for law reform*
- ◆ *the importance of indigenous involvement in protection of the environment.*

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Submission – Draft LEP Template
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Submission on the Draft Standard Instrument (Local Environmental Plans) Order 2005

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide comment on the Draft Standard Instrument (Local Environmental Plans) Order 2005.¹

As previously submitted, the EDO broadly supports the standardisation of LEPs and planning definitions across NSW. There are obvious benefits of a uniform and consistent system for the delivery of land use controls by including all mandatory requirements in LEPs. Consistency of terminology, and linkages with updated SEPPs will also help clarify requirements for both developers and the community. The clarification of the hierarchy of planning instruments is also strongly supported.

We note that there have been some improvements made in this version of the template, such as further detail on mandatory compulsory and optional provisions, and the retention of zone objectives. EDO strongly supports the inclusion of clear zone objectives.

This submission responds to a number of the questions posed by the Department of Planning, and additional issues of concern. These relate to:

1. Format

- Structure
- Consistency of drafting

2. Zones

- Environmental protection zones
- Rural investigation zones
- Special Area Zones
- Zone boundary provision
- Zone Objectives
- Additional comments

3. Land use controls

- Land use matrix/table
- Permitted and prohibited uses

4. Mapping

- Mapping overlays

5. Provisions

- Compulsory and Optional provisions
 - Tree Preservation orders
 - Acquisition and compensation
 - Heritage conservation
 - Bushfire hazard reduction
- Additional matters
 - Public notification

6. Definitions

¹ For further detail please refer to our previous submission on the Discussion Paper: Standard provisions for local environment plans in NSW, November 2004. This submission can be found at www.edo.org.au/edonsw/site/pdf/Model_LEP_submission.pdf.

7. Other issues

1. *Format*

1.1 *The Standard LEP provides a standard format for councils to use in the preparation of their LEPs. Is the proposed format logical and easy to use?*

Structure

The EDO submits that the draft format is relatively user-friendly. However there are some drafting issues that could be improved. For example, instead of Part 4 “Miscellaneous Provisions”, it may be clearer to group the development standards in a separate part. Development standards are currently located throughout the document, in relation to different issues, which could be confusing.

Consistency of drafting

The current draft would be more logical and user-friendly if it included more consistent drafting of provisions and terminology. Currently, similar instructions are worded differently (for example clauses 25(4), 28(3) and 32(4)); and in some clauses sub-headings are used (for example regarding heritage in clause 48), but not in others.

Some further examples of drafting inconsistencies and irregularities are as follows:

- In clause 34(3) regarding development in the coastal zone, the pre-conditions for consent after listed after the general considerations (ie, logically subclause (3) should go before (2)).
- In clause 40, the preconditions in subclause (4) should go before the matters the Council must be satisfied of in subclause (3).
- In clause 41 regarding acid sulphate soils, subclauses (6)(a) and (b) should be redrafted to apply to works involving disturbance of *less* than one tonne of soil, and are *not* likely to lower the water table; and inserted into subclause (4) which already deals with situations where consent is not required.
- In clause 44, the “minor nature” exception in (4) should be incorporated into (2) regarding excavation or filling of land.
- In clause 46, sub-clause (9) should be inserted into sub-clause (2) alongside the exemption for land covered by the *Native Vegetation Act 2003*.

Consistency in the format of pre-conditions, considerations and decision-making requirements will make the document more logical and easier to follow.

2. *Zones*

2.1 *Twenty-five standard zones are proposed. Does the range of zones address expected planning needs for the State?*

As noted in our previous submission, the template is, amongst other things, premised on the desire for standardisation and consistency of approach. The EDO supports this endeavour. Planning, however, is perennially faced with the dilemma of balancing future planning needs with existing uses (or past planning decisions).

Fixed and limited zones can rarely achieve this balance (as recent experience with land use conflicts in both urban and urban-rural contexts has exemplified). The need for a consistent approach must therefore be balanced with the need for flexibility and a way of balancing both future needs and existing uses.

It is submitted that this can be best achieved in two ways. First, by having a more layered (and sensitive) set of primary and secondary Zones. The traditional and dichotomous zoning structure has arguably given rise to numerous land use conflicts in recent years. It is not clear that the secondary zoning categories contained in the current draft template will properly achieve the balance required. It may be that Environment Protection and Rural zones need to be broken down into more discrete elements. Rural Councils such as Wollondilly and Dubbo have used numerous zoning categories to more subtly delineate between different land uses, thus seeking to avoid having inconsistent uses in conflict. The ability to do this should be incorporated into the template.

Second, objectives can aid in giving more precision and rigour to planning decisions, where the zoning categories are ambiguous and/or broad. Clearly detailed mandatory core objectives (as are generally included at present) used in conjunction with optional objectives could provide an alternative option to proliferation of sub-zones, and help to clarify the tailored purpose of a zone specific to a local area.

These issues are discussed further below.

Environmental Protection zones

The EDO submits that the proposed environmental protection zones as drafted, will not adequately address expected planning needs for the State.

The Conservation Zone in the land use matrix adopts a lowest common denominator approach, with very few mandatory prohibited land uses. In fact, the regional and local open space zones have more land-use prohibitions than the conservation zone. EDO notes that under this model Councils have discretion to fill in the blanks and add more prohibited uses, and indeed more permissible uses. The minimum prohibitions in the table set the standard of development control low, and provide no incentive for Councils to comprehensively protect these zones.

The EDO submits that more detail is required to enable Councils to more appropriately design development controls. This could be done by use of the land use table (as opposed to the matrix), with a clear statement about the role of objectives; a core environmental protection objective; and a detailed list of sub-category objectives that could be adopted by Councils where relevant.

For example, complementary to the core environmental protection objective, could be a list of objectives applicable to specific zone attributes such as: wetlands, littoral rainforest, escarpment, threatened species etc. Councils could adopt these where applicable (and conversely “not adopt” where not relevant to the locality). Enhancing the role of objectives in this way both clarifies and strengthens parameters for development control in sensitive areas, and avoids the proliferation of environmental protection sub-zones that would otherwise be required to address the inadequacies of a general “one size fits all” zone.

The alternative is to create a larger number of environmental protection zones, including a conservation zone where most land uses are prohibited (acquisition is discussed below), and an environmental zone where certain development is permitted, such as a bushland living zone (for example, in the Blue Mountains).

Balancing these considerations, the EDO submits that an additional zone (ie, created by dividing conservation into a strict conservation zone with most development prohibited and an intermediate conservation zone permitting certain developments, such as a bushland living zone), plus the use of optional objectives in relation to relevant zone features, should be incorporated into the template to ensure that environmental protection zoning adequately addresses the conservation planning needs of the State.

Rural Investigation zones

Investigation zones should be deleted. As currently drafted, the rural investigation zone provision contains an internal contradiction between development and conservation. Land should remain zoned as rural until investigations are complete, and then zoned for conservation or development as appropriate. Decisions about such areas should be made at the regional and local strategic planning stage of developing the new LEPs. Comprehensive strategic planning should negate the need for an intermediate investigation zone for development speculation. An investigation zone would not provide any certainty to local communities or property owners.

The EDO submits that there should be sunset clauses on current investigation zones, as the category should be phased out.

Special Area Zones

A “catch-all” zoning that is intended to cover additional land uses that are not provided for by other zones, must contain environmental safeguards. Further detail is required as to what constitutes “additional development that will not detract from existing development or have an adverse impact on surrounding land” (in subclause (1)(d)). As noted, there are inconsistencies throughout the document in terms of the tests to be applied to determine the impact of a proposed development, for example “development that will not detract”, or “adverse impact” instead of a requirement to consider “significant impact.” This introduces yet another unclear standard of impact to be considered.

The template does not provide sufficient detail (in the objectives) as to why this zone category is necessary. Most land uses will already be permissible under one of the 25 standard zones. As noted in relation to Rural Investigation zones, comprehensive strategic planning should negate the need for special area zones.

The EDO submits that infrastructure zones should not be allowed in sensitive environmental areas.

Zone boundaries

The zone boundary provision should not apply where the neighbouring zone in question is an environment protection zone. This clause has the potential to seriously

undermine important buffers that exist on zone boundaries currently, in relation to both rural residential and environmental protection zones. Conservation and environment protection zones should be specifically listed in clause 43(3).

Subclause 43(4)(a) requires the consent authority to be satisfied that “the development is not inconsistent with the objectives for development in both zones.” This is nonsensical as zone objectives will often (or at least sometimes) be in conflict. There is no mechanism for resolving such conflict included in the template.

Clear and accurate strategic planning at the zoning stage should help obviate the need for this provision. It should only have very limited application to existing split zone blocks.

Zone objectives

As noted EDO strongly supports having clear objectives listed for each zone. We submit that there needs to be a clear general compulsory provision included in the template to clarify the role of zone objectives.

There needs to be consistency of drafting in relation to objectives. In the current draft some objectives are simply stated, some require decisions to “be consistent with the objectives”, some require satisfaction that the development will “contribute to achieving the zone objectives.” Moreover, clause 10(2) states that consent authorities are to “have regard to zone objectives” in determining a development application. There needs to be clarification of the role of objectives, and clear drafting to reflect this. For environment protection zones in particular, it would be appropriate to mandate that Councils must only approve developments that are consistent with the zone objectives, and must not approve developments that are not consistent with zone objectives.

The qualification on the rural/residential objective in clause 10(4)(a) “while preserving environmentally sensitive locations and the scenic quality of the area” should also apply to the other residential zones.

Other zoning comments:

- Agricultural and rural small holdings should not be collapsed into 1 category as the land use/lifestyle of the two zones can differ widely.
- A distinction should be made between the objectives and relevant land uses and development for natural waterways, and waterways for recreation/navigation.

3. Land use controls

3.1 Should the standard method in which councils permit or prohibit land uses in their area be through a Land Use Matrix or a Land Use Table?

The EDO submits that a land use table is preferable to a land use matrix. A table allows zone objectives to be expressed fully, and more detail to be included. The matrix simplifies this categorisation and achieves a lowest common denominator outcome, for example in relation to conservation zones where very few land uses attract a mandatory “x.”

With regard to the provisions establishing the land use table, there is a drafting error in

section 12 (3). The section should read “Development within a zone that is not referred to in the land use matrix/table may be [permitted with or without consent or prohibited].”

3.2 The Department has mandated a number of permitted and prohibited land uses in certain zones (as shown in the Land Use Matrix). Are the land uses permitted or prohibited appropriate in each zone?

In relation to the conservation zone, the draft matrix does not include enough specific prohibitions. The number of blank boxes left for Councils to determine consent requirements has the potential to undermine the goal of standardising zones.

These zones must have a greater list of prohibited land uses to effectively meet their conservation objectives. The current matrix potentially allows agriculture, commercial premises, forestry, offices and many more diverse land uses in conservation zones. This is not appropriate.

The EDO submits that Councils should have the ability to prohibit permitted uses in zones if they strategically identify the need for tighter environmental controls.

3.3 Are there other land uses that the Department should ensure are either permitted or prohibited in certain zones?

As noted above, the list of prohibited activities should be expanded for conservation zones. The prohibitions should also be more clearly specified and increased in agricultural and small holdings zones. While we recognise that some flexibility is essential, the scope for discretion in the draft template could result in neighbouring Councils having identical zone names and core activities, but completely different zones in practice if one Council added substantially to the permitted developments list.

4. Mapping

4.1 Do the standard mapping symbols and colours meet the mapping requirements of councils?

No comment.

4.2 Additional map layers are proposed for building height, floor space ratio, building site coverage, lot size, foreshore building line, and flood prone land. Will these maps make clearer what rules apply to a certain piece of land?

There is a lack of detail in the template regarding the ongoing use of mapping overlays to identify planning limitations. The Planning Institute of Australia has identified this in relation to: flood hazards, bushfire hazards, water supply catchment areas, buffer zones around airports, and endangered ecological communities.²

The current Kiama LEP contains a mechanism enabling the mapping of high conservation value (HCV) land. This mapping overlay has been effective in ensuring

² Draft Submission page 2, as circulated at the Planning Reference Group meeting, 2nd November 2005, at DNR.

inappropriate development is not approved in these areas. This mechanism will be lost in current template, unless it is specifically retained as a permissible mapping overlay.³

Similarly, the current template is unclear as to how the mapping mechanism under SEPP 44 will be applied for the strategic protection of koala habitat. This should be clarified.

5. Provisions

5.1 Mandatory provisions provided by the Standard LEP are identified as being either 'compulsory' or 'optional' for councils to incorporate into their LEPs. Are there any provisions listed as compulsory in the Standard LEP that should be optional or vice versa?

Tree preservation orders

It has been suggested that these are not relevant across the state, in particular in western NSW. Consistent with our previous submission, the EDO recommends that these orders be compulsory. However, we recommend that the provision be reviewed and amended to be a “Vegetation Protection Order” and thus clarify concerns over how “tree” is defined by different Councils. For the purpose of these orders, vegetation should include native vegetation and non-native trees of heritage or community significance (as are covered in some existing TPOs).

Acquisition and Compensation

Our previous submission called for an acquisition provision that standardises and clearly sets out the law and procedures, as the issue of “upzoning” has risen to increasing prominence recently. The EDO has fielded several inquiries from members of the public and Councillors regarding the circumstances in which acquisition (and compensation) is required.

We note the inclusion of clause 51 in the draft template. We submit that the zones that can be listed under the provision be limited, and that the current legal position with regard to acquisition and compensation should continue in relation to all other zones. A summary of the current position is provided below.

The *Environmental Planning and Assessment Act 1979 (EP&A Act)* establishes where compensation may be required. The first is where a development consent is revoked or modified; the second is where land is reserved for certain purposes.⁴

First, under the *EP&A Act*, the Director-General and councils have the power to revoke or modify the granting of a development consent in limited circumstances. Revocation or modification must be in writing. The terms under which a revocation or modification can be made are quite narrow; a revocation or modification may be done ‘at any time it appears...having regard to draft [relevant planning instruments]...that the

³ See clause 37 Kiama Local Environment Plan 1996 <http://www.kiama.nsw.gov.au/>

⁴ NSW has enacted legislation that provides the primary framework for when compensation will be payable in circumstances where the State or its agencies acquires private property. The *Land Acquisition (Just Terms Compensation) Act 1991* deals with the mechanics of compensation in NSW.

development...should not be carried out or completed' (section 96A(1)). In other words, if a council is seeking to amend the planning controls that apply to an area of land, for example by rezoning the land, and a development which has the benefit of development consent, but which has not been commenced or completed is inconsistent with the proposed new zoning, the council can revoke the consent, but will be required to compensate the holder of the development consent for its loss of the development rights associated with the consent.

Before revoking or modifying the consent, the Director-General or council must give affected parties the opportunity to show cause why the change should not be effected (section 96A(3)).

An 'aggrieved person' is entitled to recover compensation (from either the Government or council) in a limited context. Such compensation are only for "sunk costs" and do not extend to future losses. Specifically, compensation is only for expenses incurred pursuant to the consent during the period between the date on which the consent becomes effective and the date of service of the "show cause" notice under section 96A(3) and which have been rendered abortive by the change (section 96A(7)). Consents granted by the Minister or by the Land and Environment Court are not subject to compensation provisions (section 96A(9)).

Second, reservation of land of land for a public purpose by an LEP must be in accordance with Part 3 of the *EP&A Act*, and for the purpose of achieving the objects of the Act.⁵ If an environmental planning instrument reserves land for use exclusively for a purpose referred to in section 26(1)(c) being for a public reserve, national park or other public purpose, section 27 of the *EP&A Act* provides that that environmental planning instrument shall make provision for or with respect to the acquisition of that land by the Council.⁶

Therefore, compensation will only be payable by a local council in two very limited circumstances; if it revokes or modifies a development consent in association with amendments to an environmental planning instrument; and if it acquires land for a public purpose. In circumstances where a council wishes to rezone the land for a purposes other than a public purpose (usually the zone 6 categories) then no compensation will be payable. Therefore, if council has a zoning scheme in place in its primary environmental planning instrument which has environmental protection zones that apply to private land (usually zone 7) then it can, subject to complying with the requirements of Part 3 of the *EP&A Act*, rezone the land without paying compensation.

The primary reason why compensation is not available in these circumstances is that the *EP&A Act* provides a "safety net" for the continuation of lawfully commenced uses of land through existing use rights.

Heritage Conservation

⁵ Section 24, and see section 5 Objects.

⁶ Section 26(c)(1) provides: (c) reserving land for use for the purposes of open space, a public place or public reserve within the meaning of the *Local Government Act 1993*, a national park or other land reserved or dedicated under the *National Parks and Wildlife Act 1974*, a public cemetery, a public hospital, a public railway, a public school or any other purpose that is prescribed as a public purpose for the purposes of this section."

The EDO supports the objectives contained in clause 48 regarding Heritage Conservation. However, this provision contains certain tests and standards such as “minor nature (clause 3(a)(i)); “not adversely affect” (clause 3(a)(ii)); and “acceptable impact” (clause 4). These set a low threshold.

These need to be clearly defined, and it would be preferable to use accepted wording for tests of significant impact that are supported by a body of jurisprudence. The EDO submits that the test should be that the heritage significance is maintained or improved.

Bushfire hazard reduction

Clause 55 is drafted very broadly specifying that any bushfire hazard reduction can be undertaken on any land without consent. This should apply to hazard reduction in accordance with RFS Guidelines, and not to open slather clearing. The provision should explicitly refer to the *Rural Fires Act 1997* in the provision (not just in the note and the dictionary section).

5.2 Are there any additional matters that need to be addressed?

Public notification provision

Our previous submission recommended that clear public consultation provisions be included in Part 1. The EDO would strongly support the inclusion of a mandatory standard provision outlining notification requirements for development applications.

Further detail on public notification could also be included elsewhere in the template. For example, clause 26, regarding the mandatory classification and reclassification of land, should include specific reference to community consultation processes that are required.

6. Definitions

6.1 Are there any additional terms that should be included in the Dictionary?

As noted at the Planning Reference Group meeting on 2nd November, there are a number of inconsistencies in terminology employed in the dictionary section. For example, “dwelling”, “building”, “structure” and “facility” are used with similar meanings. These should be standardised where possible.

The definition of ecologically sustainable development should be reproduced in full in the dictionary section.

“Environmentally sensitive area of state significance” should include the coastal zone as well as coastal waters. This section should also include koala habitat.

There is no definition of threatened species or critical habitat in the dictionary section. These should be included by full reference to the *Threatened Species Conservation Act 1995*.

7. Other issues

Coordination of Plans

The EDO supports recent changes to clarify the hierarchy of plans, and the consolidation of relevant planning controls and instruments relevant to a site. However, we would like to see further detail and guidance provided in relation to the following issues:

- The interaction of the template with state environmental planning policies that are not yet incorporated, for example SEPP 44;
- Incorporation of regional strategy objectives into the template;
- Information on how local strategic planning will be conducted prior to the LEP amendment (over the next 2-5 years), and how the community will be involved in the strategic planning process;
- A guideline on the interaction of the template with existing DCPs; and
- Further detail on how Biodiversity Certification will be given legal effect and will be integrated into the LEP amendment process.

The EDO also strongly supports ongoing assistance and resources being provided by the Department of Planning to Councils to assist in development of their LEPs.

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