



Environmental Defenders Office

How to have your say in land-use planning in NSW

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What is this factsheet about?

This factsheet outlines what land use-planning is, the public's rights to participate in land-use planning in NSW, and the strategic importance of public engagement. It will be useful for anyone who wants to comment on an environmental planning instrument such as a State Environmental Planning Policy or a Local Environmental Plan.

Outline

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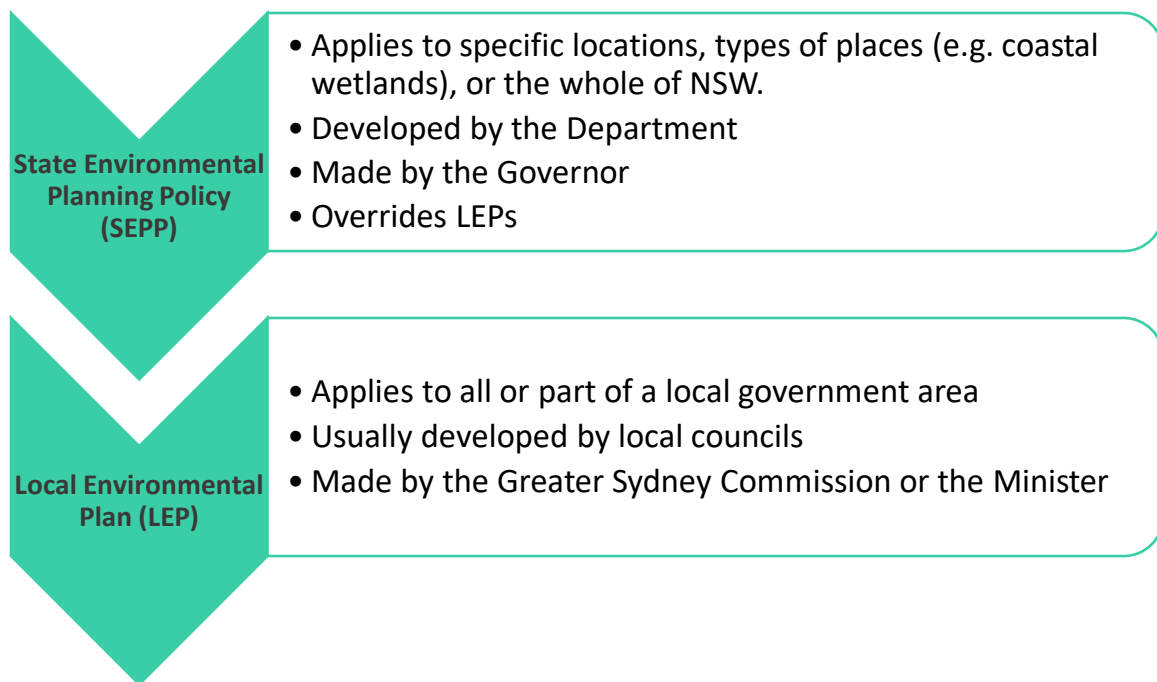
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Overview

Land-use planning regulates the types of developments and activities that can occur on land. Land-use planning is regulated by environmental planning instruments (**EPIs**), which specify which land is suitable for development (and the kinds of developments that can occur) and which land should be set aside for environmental and other purposes.

In NSW, the main law regulating land use is the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**), which is overseen by the NSW Department of Planning and Environment (**the Department**).

The EP&A Act allows two types of EPIs to be made: ¹



It is important to have a say about proposed EPIs as they determine how land can be used in an area for many years. It can be more strategic to have your say on EPIs rather than individual development applications because EPIs determine which development can go where and include important development standards that shape how our communities look and feel.

This factsheet will explain how SEPPs and LEPs work, and how the public can have a say.

Visit: The [NSW Legislation Register](#) to view the full text of SEPPs and LEPs. Click on 'in force' and browse alphabetically under 'Environmental Planning Instruments'.

State Environmental Planning Policies

What is a SEPP?

State Environment Planning Policies (**SEPPs**) are environmental planning instruments that address planning issues within the State. They cover specific locations, types of places (e.g. coastal wetlands) or the whole of NSW.

Visit: The Department's [website](#) to learn more about each of the SEPPs.

¹ *Environmental Planning and Assessment Act 1979* (NSW) s 3.13 (**EP&A Act**).

The practical effect of a SEPP is often to give decision-making power to the Minister (or the Independent Planning Commission). SEPPs can put additional restrictions on some types of development or allow certain types of development even where local controls prohibit it.

Visit: The NSW Legislation Register's [In force legislation](#) page and search alphabetically under 'Environmental Planning Instruments' for the list of SEPPs. SEPPs will be under 'S'.

Your right to comment

There are no legal requirements to consult the public before making or changing a SEPP.

The Minister can choose to publicise an 'Explanation of the Intended Effect' of a proposed SEPP.² This is a document that explains what the SEPP is trying to achieve and how it will go about it.

The Minister may seek public submissions on the explanation of intended effect and set a time within which public submissions must be made.³

Public comments on proposed SEPPs are therefore based on an explanation of the SEPP rather than a draft of the SEPP itself.

Visit: The Department's [Planning Portal](#) to view proposed SEPPs on public display.

When commenting on a proposed SEPP, it is important to indicate whether you support or object to the intended effect of the SEPP, and why. It can also be useful to include recommendations (what you want to happen). For example, should the SEPP be made as proposed, abandoned, or made subject to certain changes?

Your right to challenge

Any person can challenge the legal validity of a SEPP in the Land and Environment Court of NSW (**LEC**).⁴ The person challenging the SEPP must argue that the SEPP is not legal because it was not made according to the law – e.g. the correct procedure was not followed in the making of the SEPP. Any legal challenge to the validity of a SEPP must be commenced in the LEC within 3 months of the SEPP being made.⁵

² EP&A Act, s 3.30.

³ Department of Planning, Industry and Environment, *Community Participation Plan* (2019) p. 21 <https://www.planning.nsw.gov.au/About-Us/Our-Work/Our-Community-Participation-Plan>.

⁴ EP&A Act, s 4.59.

⁵ *Ibid*, s 3.27.

It is not possible to challenge the merits of a SEPP, meaning you cannot argue that provisions in the SEPP amount to bad planning decisions. You also cannot challenge a SEPP on the grounds that it may lead to harm to the environment or other poor planning outcomes.

Read: EDO factsheet on the **Land and Environment Court of NSW** for more information.

Local Environmental Plans

What are LEPs?

LEPs apply either to all or part of a local government area. All land, whether privately owned, leased or publicly owned, is subject to the controls set out in the applicable LEP so it is a very important instrument.

LEPs guide planning decisions for local government areas by allocating 'zones' to different parcels of land. For example, residential, industrial and environmental conservation zones.

While LEPs are a key planning document, it is important to remember that their provisions can be overridden by SEPPs so they are not the final word on what kind of development is allowed in each zone.

Visit: The NSW Legislation Register's [In force legislation](#) page and search alphabetically under 'Environmental Planning Instruments'. For example, the LEP for Bega will be under 'B'.

Standard Instrument

There is a 'standard instrument' which is a template outlining the form and content that all LEPs must adopt. The Standard Instrument indicates whether each provision in the template is compulsory or optional. Councils can tailor the standard instrument to their local government area but must not depart from the compulsory provisions and can only choose from the standard zones.

The Standard Instrument contains the following key provisions:

- 35 different **zones** that are grouped together under 8 broad headings: rural, residential, business, industrial, special purpose, recreation, environment protection and waterway zones. The council must choose from these zones and cannot create any new zones.

- The **Land Use Table** sets out the objectives of each zone and the types of development that are:
 - Permitted without consent
 - Permitted with consent, or
 - Prohibited.
- **Optional and compulsory clauses** – There are a range of other clauses that are either optional or compulsory. These cover matters such as:
 - Exempt and complying development
 - Development standards
 - Classification of council land (as either community or operational land)
 - Heritage conservation
 - Bush fire hazard reduction.

Process for making or changing a LEP

Before a LEP can be made or changed, the relevant planning authority (usually the local council) must prepare a **planning proposal** which explains the intended effect of the LEP and the justification for it. This can include any relevant maps showing the intended zoning, and the details of how the authority proposes to carry out community consultation.⁶

This planning proposal is then given to the Minister.⁷ The Minister (or their delegate) makes an early upfront decision about whether to support the planning proposal. This is called a gateway determination. The gateway determination will specify whether any studies need to be done to support the proposal, such as heritage or environmental impact assessments, flood reports, and infrastructure reports.

A planning proposal can be for a completely new LEP, or for a **spot rezoning** – which changes the zoning of certain land through an amendment to the LEP. A spot rezoning usually aims to increase the development potential of a site and is usually proposed in response to a particular development proposal (at the request of the developer).

Your right to comment

If the planning proposal is supported by the Minister, the next step is usually community consultation. The Minister decides whether community consultation is required.

If community consultation is required, the planning authority must publicise the planning proposal and any supporting documents or studies. These will be exhibited via the relevant council's website and the NSW Government Planning Portal.

⁶ EP&A Act, s 3.33.

⁷ Ibid, s 3.34(1).

Visit: The Department's [Planning Portal](#) to view planning proposals on public display.

The planning proposal must be made public for 28 days, unless the Minister specifies otherwise in the gateway determination.⁸ During this time, any person may make a submission about the planning proposal.⁹

The planning authority will decide whether to make these submissions public or keep them confidential.

Read: EDO factsheet on **Submissions, Letters and Petitions** for guidance on how to write a submission.

What to look for when commenting on LEPs

Commenting on planning proposals basically involves reading the proposal and determining whether you agree with its aims and objectives. It also requires looking at the proposed land-use planning provisions and considering whether these can achieve the stated aims and objectives of the planning proposal.

The planning proposal will indicate (via maps) how certain land is proposed to be zoned. It should then explain the objectives of the zones and what sorts of developments are permitted and prohibited in the zones.

The key question to ask yourself is whether the proposed zone is suitable for that piece of land.

Remember, the council is applying a standard instrument. It can only add developments to the permitted uses for a particular zone, not remove them. So, if the Standard Instrument allows for a type of development under a zone and you think that type of development is inappropriate for the land, you cannot ask council to remove that type of development from the zone. However, you can suggest that council applies a more suitable zone.

Further questions to consider when commenting on a planning proposal include:

- Are riparian areas, catchments and waterways appropriately protected?
- Have environmental zones been appropriately applied?
- Has flood prone land been appropriately zoned?
- Has prime agricultural land been appropriately zoned – i.e. for agricultural and not residential uses?
- Are lot sizes appropriate? These will affect the density of the area.
- Has public land been reclassified?

⁸ EP&A Act, sch 1, cl 4.

⁹ Ibid, s 3.34 and sch 1, cl 15.

- Has bushfire risk been adequately dealt with?
- Is heritage protected?
- Has climate change been considered?
- Will the LEP reflect the Local Strategic Planning Statement?

Local Strategic Planning Statements are prepared by each local council and set out:

- The basis for strategic planning in the area, having regard to economic, social and environmental matters
- The planning priorities for the area that are consistent with any applicable strategic plan (regional or district)
- The actions required for achieving those planning priorities, and
- Provisions for reporting on the implementation of those actions.

Visit: NSW Planning Portal [website](#) for more information on Local Strategic Planning Statements and to view the Statements.

When commenting on a planning proposal, it is important to indicate whether you support or object to the intended effect of the planning proposal, and why. It can also be useful to include recommendations (what you want to happen). For example, should the planning proposal be made as proposed, abandoned, or made subject to certain changes?

A person who makes a written submission can request that the relevant planning authority arrange a public hearing on the issues raised in their submission. It is up to the relevant planning authority to decide whether to hold a public hearing, based on whether it thinks the issues raised in the submission are significant enough to warrant the hearing.¹⁰ It may also hold a public hearing on any issue on its own initiative.¹¹

If variations are made to the LEP after public submissions are received further community consultation is not mandatory. However, there is a limit to how much the planning proposal can change after community consultation.¹²

Your right to challenge

The legal validity of a LEP can be challenged by any person in the LEC¹³ within 3 months of the LEP being published.¹⁴ The person challenging the LEP must argue that the LEP is not legal because it was not made according to the law – e.g. the correct procedure was not followed in the making of the LEP.

¹⁰ EP&A Act, s 3.34 (e).

¹¹ Ibid, s 3.34(e).

¹² *Ryan v Minister for Planning* [2015] NSWLEC 88.

¹³ EP&A Act, s 4.59.

¹⁴ Ibid, s 3.27.

You cannot challenge the merits of the LEP, which means you cannot argue that provisions in the LEP amount to bad planning decisions. You also cannot challenge a LEP on the grounds that it may lead to harm to the environment or other poor planning outcomes.

It is important to note that a successful legal challenge to a LEP does not guarantee a better outcome in the long run. The Court can set aside a LEP that has been improperly made. However, this can result in the planning authority making another LEP the same as the one set aside, this time following the correct procedures.

Case study: Successful challenge to a LEP

EDO represented Mr Michael Ryan, an Aboriginal Elder, in his legal challenge to the making of a LEP which rezoned land on the North Lismore Plateau to allow for urban expansion development.

The LEP rezoned land that is ecologically and culturally significant.

The draft LEP presented for public consultation promised large areas of the land would be protected for environmental conservation and restoration. When the final LEP became law these protections had been completely removed by the Minister's delegate.

The Court held that 'the absence of environmental protection zonings in the final LEP fundamentally altered the nature of the proposal as a whole,' and therefore the final LEP was not a 'product of the process' for making LEPs set out in the law.¹⁵

Read: EDO factsheet on the **NSW Land and Environment Court** for more information about the Court and its procedures.

¹⁵ *Ryan v Minister for Planning* [2015] NSWLEC 88.

Glossary

Key terms used in this factsheet:

Department means the NSW Department of Planning and Environment

EP&A Act means the *Environmental Planning and Assessment Act 1979 (NSW)*

EPI means an environmental planning instrument, which includes SEPPs and LEPs

LEC means the Land and Environment Court of NSW

LEP means a local environmental plan

Minister means the Minister for Planning

SEPP means a *State Environmental Planning Policy*

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