

**Submission  
No 33**

## **INQUIRY INTO ECONOMIC DEVELOPMENT IN ABORIGINAL COMMUNITIES**

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**Planning &  
Environment**

# **Submission to the inquiry into economic development in Aboriginal communities**

**Planning rules governing the use of land  
owned by Aboriginal Land Councils**

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## 1. Introduction – The NSW planning system

The core of the planning system is its range of legislative and policy tools administered by State and local government. Responsibility for planning is therefore shared between the two jurisdictions with both undertaking roles in development assessment, plan making, developing policy and providing guidance to various users within the system.

An important outcome of having an effective and efficient planning system is to provide certainty to a range of stakeholders (often with competing interests), such as the community, developers and government. The Department of Planning and Environment works closely with local councils and other stakeholders to support the administration of the planning system.

The Department of Planning and Environment will continue to look for opportunities within the current planning framework to respond to emerging planning challenges facing regional and metropolitan areas, and to provide additional support and flexibility where suitable.

## 2. Planning rules

There are various strategic and statutory planning documents at each level of government that give the planning system a clear strategic purpose. The principal legislation governing the planning system is the *Environmental Planning and Assessment Act 1979*.

Some of the most important elements of the planning system are:

- *Strategic Plans*: prepared to plan for our future population's needs for housing, jobs, infrastructure and a healthy environment.
- *Local Environmental Plans and Development Control Plans*: prepared and administered by local councils to control what can and can't happen on land in a particular area as well as setting the considerations for the assessment of development proposals.
- *State Environmental Planning Policies*: ranging from policy documents through to detailed development controls for particular areas or types of development. These policies allow a consistent approach to important State planning issues.
- *Development assessment*: involves assessing development applications submitted to a consent authority, generally the local council, for a specified land use or development. Development will fall into one of the following three categories:
  - development that does not need consent;
  - development that needs consent; and
  - development that is prohibited.
- *Guidance*: Guidelines and the Department's new e-Planning framework give guidance to development assessment processes and can be used by applicants and local councils.

State Environmental Planning Policies (SEPPs) and Local Environmental Plans (LEPs) are collectively referred to as environmental planning instruments. The primary function of an environmental planning instrument is to specify the kind of development permitted in an area. LEPs deal with the local government area, whilst SEPPs can deal with specific locations, types of places (e.g. coastal wetlands), or the whole of NSW.

These elements are further discussed below.

## **2.1 Local Environment Plans and Development Control Plans**

Each local government area has an LEP to guide development and protect natural resources such as waterways and heritage within local government areas. LEPs are prepared by local Councils, in consultation with their community and approved by the Minister for Planning (or their delegate), or in Sydney, the Greater Sydney Commission.

### Gateway plan-making process

LEPs start with a planning proposal for a change to the planning rules for a site, a precinct, or an entire local government area. In most cases this is initiated by a local council, but anyone is able to submit an application to change planning controls.

The steps in the Gateway process are:

1. The planning proposal is prepared by the relevant authority, usually the local council. However, the Minister can appoint the Secretary of the Department of Planning and Environment or a joint regional planning panel to be the relevant planning authority.
2. The Minister (or delegate) decides whether the planning proposal can proceed, taking into account the need for variation, further studies, public consultation, public hearings, agency consultation and time frames. Conditions reflecting the importance of the above considerations are usually applied and the proposal may be modified to meet these requirements. At this stage it is also determined whether the relevant council is able to finalise the LEP as the Minister's delegate.
3. The proposal is publicly exhibited to enable community consultation. A request for a public hearing may be made.
4. The relevant planning authority reviews and assesses public submissions and amends the proposal if appropriate.
5. Parliamentary Counsel prepares a draft local environmental plan.
6. The LEP is finalised when the Minister (or delegate) approves the local environmental plan for publication on the NSW legislation website.

Please note the Greater Sydney Commission adopts the role of the Minister for all proposals within Metropolitan areas.

### Gateway review processes

In the interests of fairness and accountability, two review mechanisms were introduced in October 2012 for the gateway process. These reviews provide fairness and accountability to the process by allowing an independent body to review some decisions by councils and the Department.

*Rezoning reviews* (formally pre-Gateway reviews): may be requested by a proponent if a local council has not supported, or made a decision within 90 days, on a planning proposal. These reviews are informed by advice from independent panels such as joint regional planning panels in regional areas, or the Sydney Planning Panel in Metropolitan areas (from July 2016).

*Gateway reviews*: the decision of the Gateway, or conditions contained in the Gateway determination, can be reviewed on request of a local council or proponent before community consultation on the proposal has commenced.

## Standard Instrument Local Environmental Plans (LEP)

The Standard Instrument LEP Program was initiated in 2006 to create a common language and structure for LEPs. Commonly known as the Standard Instrument LEP, or the LEP template, the Program was designed to simplify the plan making system in NSW.

All councils across the State now have a Standard Instrument LEP in place.

## Development Control Plans

Development Control Plans (DCPs) specify the detailed development controls for developments permitted under an LEP. They are council policies and not environmental planning instruments. Nevertheless, a consent authority must take a DCP into account when assessing and making decisions about development applications.

### **2.2 State Environmental Planning Policies**

There are approximately 66 State policies of Regional or State significance that outline the NSW Government's approach to dealing with planning issues. State policies are made by the Governor on the recommendations of the Minister for Planning and updated as required. State Environmental Planning Policies (SEPPs) specify planning controls for certain areas and/or types of development. They can also identify:

- the development assessment system that applies to developments (for example whether a development is exempt or complying development, or whether a development application is required)
- the type of environmental assessment that is required (for example whether an environmental impact statement is required).

The government is currently undertaking a review of existing SEPPs to consider if they are still necessary and how they can be improved. The review's aim is to reduce duplication and make the system simpler while ensuring existing standards are maintained. Stage 1 of this Review is nearing completion.

Overall the review of the SEPPs is in line with the government's drive to streamline regulatory frameworks and create a clear and transparent planning system.

### **2.3 Development assessment process**

For all developments an environmental assessment of the impacts of the development is needed. The level of assessment varies according to the size, scale and location of the development. There are a number of different planning approval pathways in NSW. The size and scale of the development will determine which assessment pathway is appropriate.

Many types of minor home renovations and small building projects such as the erection of a carport, balcony, deck or garden shed don't need a planning or building approval under the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (Codes SEPP). These types of projects are called exempt development. As long as the building project meets specific development standards and land requirements, no planning or building approval is needed.

Other straightforward, low impact residential, commercial and industrial developments that do require planning approval may qualify for a fast track approval process known as complying development under the Codes SEPP. If the application meets specific standards and land requirements a complying development certificate (CDC) can be obtained through local councils or an accredited certifier without the need for a full development application.

Local development is the most common type of development in NSW, with projects ranging from home extensions to medium sized commercial, retail and industrial developments. A development is considered local development if a local environmental plan (LEP) or State environmental planning policy (SEPP) states that development consent is required before the development can take place.

For all local development, consents are issued by the consent authority. This is usually the local council, but can sometimes be the Minister for Planning if a SEPP specifies the Minister as the consent authority.

Regional development needs to be notified and assessed by a local council, and is then determined by the relevant Joint Regional Planning Panel. Regional development includes:

- development with a capital investment value (CIV) over \$20 million
- development with a CIV over \$5 million that is council related, lodged by or on behalf of the Crown (State of NSW), private infrastructure and community facilities, or eco-tourist facilities
- extractive industries, waste facilities and marinas that are designated development
- certain coastal subdivisions
- development with a CIV between \$10 million and \$20 million that is referred to the regional panel by the applicant after 120 days
- Crown development applications (with a CIV under \$5 million) referred to the regional panel by the applicant or local council after 70 days from lodgement as undetermined. This includes development applications where recommended conditions are in dispute.

Designated Development refers to developments that are high-impact (for example likely to generate pollution) or are located in or near an environmentally sensitive area (for example a wetland). An environmental impact statement is required for designated development and third parties can appeal against a decision to grant consent. Development can be listed in the *Environmental Planning & Assessment Regulation 2000* as designated development. An LEP or SEPP can declare certain types of development to be designated. Examples include chemical factories, large marinas, quarries and sewerage treatment works.

For integrated development, approval must be obtained from other public authorities before consent can be granted. The consent authority must refer the development application to the relevant agency and incorporate the agency's general terms of approval. Integrated development applications are triggered by the requirement for a permit listed in s 91 of the *Environmental Planning and Assessment Act 1979*, and examples include an aquaculture permit, mining lease, pollution licence, and Aboriginal heritage impact permit.

Some forms of development must be advertised and the consent authority must give the public notice of the development application. Advertised development includes:

- Integrated development
- Development affecting threatened species which requires a species impact statement

- Some aquaculture development

The notification period for advertised development is 14 days, or 30 days for integrated development and threatened species development.

Some types of development are deemed to have State significance due to the size, economic value or potential impacts that a development may have. Development that is State significant development (SSD) is identified in the State and Regional Development SEPP and includes:

- new educational establishments, hospitals and correctional centres
- chemical and other manufacturing
- mining and extraction operations
- tourist and recreation facilities
- some port facilities
- waste management facilities
- energy generating facilities.

A development proposal for any of the identified development types is SSD if it is over a certain size; is located in a sensitive environmental area; or will exceed a specific capital investment

In addition, development on identified sites such as Sydney Olympic Park, Darling Harbour, the Bays Precinct and Barangaroo are State significant development.

State Significant Infrastructure (SSI) includes major transport and services development that have a wider significance and impact than on just the local area. Types of State significant infrastructure identified in the State and Regional Development SEPP include:

- Rail infrastructure
- Road infrastructure
- Water storage and treatment plants
- Wharf and boating facilities
- Pipelines
- Certain development in National Parks.

A development proposal for any of the identified development types is SSI if it is over a certain size; is located in a sensitive environmental area; and would exceed a specific capital investment.

Part 3A development – Part 3A of the *Environmental Planning and Assessment Act 1979* was repealed in 2011 and new projects are no longer accepted under in the Part 3A assessment system. However, modifications to applications previously approved under Part 3A are still accepted.

Development without consent is identified within an environmental planning instrument, other than the Codes SEPP, and does not require development before work can start. This includes some low impact or routine activities such as home businesses in a residential zone, environmental protection works in an environmental conservation zone, or markets in a public recreation zone. The Local Environmental Plan and/or State Environmental Planning Policies that apply to the area or activity list all developments that are "permitted without consent". However, some of these developments (or activities) may still need a licence, permit or other approval from a public authority and may need to undergo an environmental assessment before approval can be given.

## **2.4 Guidance**

### Guidelines

The Department prepares explanatory guidelines and best practice documents to assist its stakeholders, such as local councils, developers and the community, on navigating various aspects of the NSW planning system. Many of our documents provide guidance on the process for landowners to appropriately develop their land, and the opportunities for interested parties to engage in these processes.

### ePlanning Framework

The ePlanning program is improving access to the NSW planning system, making it more transparent and easier to use. ePlanning is transforming the traditional paper-based and face-to-face interactions to an online environment where people can access planning services from anywhere at any time.

The program includes online tools to help with planning and development in NSW. The Department is also working on a range of activities to make application tracking available in more local government areas. Application tracking gives people the ability to view and track the progress of development applications online. The Department collaborated with software vendors to develop a consistent approach for application tracking systems across NSW.

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