

15 October 2012

Director, Planning Operations Coordination
NSW Department of Planning & Infrastructure
GPO Box 39 SYDNEY NSW 2001

By email: c/o jared.char@planning.nsw.gov.au

Dear Director,

**Draft practice note on Schedule 1 in the Standard Instrument
(Additional Permitted Uses)**

EDO NSW welcomes the opportunity for public consultation on the *Draft practice note on Schedule 1 in the Standard Instrument (Additional Permitted Uses)*. As a community legal centre specialising public interest environment and planning law, EDO NSW has engaged extensively on practical application of NSW planning laws.

We note that the purpose of the draft practice note is 'to provide guidance to councils on including additional permitted uses for particular land through Schedule 1 of local environmental plans (LEPs) under the Standard Instrument.'¹ The effect of clause 2.5 and Schedule 1 of the Standard Instrument is to permit development or activities on a particular site which would otherwise be prohibited by the site's zoning.

EDO NSW agrees that the use of Schedule 1 should be minimised to ensure the integrity of area-wide land use zoning.² However, the draft practice note does not include specific factors that councils must consider, or demonstrate, to justify there are 'exceptional circumstances' that warrant the use of Schedule 1. Such key considerations should include: that listing of land under Schedule 1 must not result in adverse environmental impacts.

We submit that the practice note should:

- require that Schedule 1 be applied in a way that avoids and minimises impacts on the environment, amenity, health and safety;
- prohibit the use of Schedule 1 to authorise hazardous, offensive and extractive industries that may adversely affect surrounding land; and
- require appropriate public consultation on proposals for additional permitted uses.

¹ Draft practice note, p 1. The Department's website elsewhere states: 'LEP practice notes and planning circulars provide guidance to councils on issues relating to the implementation of the standard instrument, SEPPs, REPs, regional, metropolitan and draft subregional strategies. Councils should read and apply the advice in the published practice notes and planning circulars when preparing LEPs.' (See <http://www.planning.nsw.gov.au/lep-practice-notes-and-planning-circulars>, accessed October 2012.)

² See Draft Practice Note, 'Schedule 1 should only be used in exceptional circumstances', p 1; and FAQs to the Draft Practice Note, 'Why should schedule 1 not be used extensively?', p 1.

The proposed draft practice note

The draft practice note is a very brief document. In summary, the draft:

- states that LEP Schedule 1 should only be used in exceptional circumstances (giving some details and an example of alternative options);
- sets out four basic principles for councils to apply which considering additional permitted uses – covering land identification, terminology, the identification of development standards on relevant maps and the minimisation of other conditions;
- notes that, in addition to describing land and development in Schedule 1, councils may voluntarily identify relevant land on an Additional Permitted Uses (**APU**) Map;
- encourages councils to liaise with the Department's regional planning teams to 'ensure all relevant options are considered and discussed, and that claims for exceptional circumstances can be justified.' (p 2)

The Department has also issued a two-page *Frequently Asked Questions (FAQ)* document (September 2012) to assist this consultation, although the status of this document is unclear.

Preventing adverse environmental impacts

We submit that the practice note should state, or require, that Schedule 1 be applied in a way that avoids adverse environmental impacts.

The draft practice note states Schedule 1 should only be used in 'exceptional circumstances' where 'the intended outcome is adequately justified'. However, nothing in the draft (or clause 2.5 of the Standard Instrument) requires that development permitted under Schedule 1:

- must *not have an adverse impact* on surrounding environmental qualities, amenity, health and safety; or
- must *minimise* any adverse impact of the development on surrounding land uses.

These issues could (but may not necessarily) be dealt with in relevant zone objectives,³ which must be considered when determining a development application. We also note that the Standard Instrument itself applies such limitations when consenting to the *temporary use* of land, under optional clause 2.8(3).⁴ In the absence of such specifics in clause 2.5, the practice note should include similar safeguards to guide councils and reassure the community regarding the use of Schedule 1.

Specific concerns around hazardous and related uses

In addition to requirements to protect environmental and related values, the practice note should *explicitly exclude* hazardous, offensive or extractive industry from being an additional permitted use under Schedule 1 of an LEP.⁵

³ See for example, *Lane Cove LEP 2009*, zone objectives for 'IN4 – Working Waterfront'.

⁴ Clause 2.8(3): *Development consent must not be granted unless the consent authority is satisfied that: ...*
(b) *the temporary use will not adversely impact on any adjoining land or the amenity of the neighbourhood;*
(c) *the temporary use and location of any structures related to the use will not adversely impact on environmental attributes or features of the land, or increase the risk of natural hazards that may affect the land'...*

⁵ The Dictionary to the Standard Instrument LEP defines 'hazardous industry' as follows (see also other terms):
hazardous industry means a building or place used to carry out an industrial activity that would, when carried out and when all measures proposed to reduce or minimise its impact on the locality have been employed (including, for example, measures to isolate the activity from existing or likely future development on other land in the locality), pose a significant risk in the locality:
(a) to human health, life or property, or

We are concerned that Schedule 1 could be used to permit additional hazardous or similar uses that may have adverse impacts on (or be incompatible with) surrounding amenity, safety and environmental values, noting that the FAQs include a 'hazardous use' example.⁶ At a minimum, the practice note should *exclude* the use of Schedule 1 for hazardous, offensive and extractive industry where this could adversely affect surrounding land, either through direct or cumulative impacts.

The hazardous use example given in the FAQ document refers to an 'isolated, poorly serviced' site. However, as noted, the draft practice note does not refer to, or require, avoidance of adverse environmental or other impacts on surrounding land and zones (whether or not the site is 'isolated'). Further qualification is necessary to prevent this.

EDO NSW is currently dealing with a proposal for the expanded use of the Shell Terminal at Gore Bay (Greenwich), in circumstances where the zoning for the site prohibits 'hazardous industry'. The potential use of Schedule 1 to allow additional 'hazardous' uses raises significant environmental and amenity concerns in circumstances such as this.

Other issues and clarifications

Consultation

The draft practice note should state that councils must consult publicly on proposals to allow land use under Schedule 1, particularly if the proposal was not otherwise consulted on under existing LEP consultation requirements.⁷ Consultation information should note that such development is otherwise prohibited by the site's zoning; note whether or not consent is to be required, and why; and describe the exceptional circumstances that the council believes apply. Councils should include details of the consultation they have conducted in any application for additional permitted use.

Consent

Clause 2.5 of the Standard Instrument states that development identified in Schedule 1 may be carried out with development consent, or without (if the Schedule so provides). The draft practice note could usefully include guidance on when it may be appropriate for councils to allow development in Schedule 1 with or without consent (for example, with regard to potential environmental impacts).

Conditions

Clause 2.5 also states that development in Schedule 1 may be carried out in accordance with the conditions specified in that Schedule. The draft practice note could clarify the statement (in its fourth listed principle) that 'Other conditions [aside from development standards] are to be minimised.' The rationale for this position could also be explained.

(b) to the biophysical environment.

Note. Hazardous industries are a type of **heavy industry** – see the definition of that term in this Dictionary.

⁶ The FAQ document (accompanying the draft practice note) gives an example of 'a proponent seek[ing] to have a hazardous storage facility permitted on an isolated, poorly serviced, 40ha site to facilitate the expansion of an existing fireworks factory' – which would otherwise be prohibited in the site's current zoning. One of the reasons noted for allowing the use of Schedule 1 in this example is that other options 'would result in lengthy delays to the proposal... jeopardising the ongoing operation of the business.'

⁷ For example, Section 57(1) of the Environmental Planning and Assessment Act 1979 states: (1) *Before consideration is given to the making of a local environmental plan, the relevant planning authority must consult the community in accordance with the community consultation requirements for the proposed instrument. ...*

FAQs

The role of the FAQ document, once the draft practice note is finalised, is not clear. Subject to the concern about permitting hazardous uses, noted above, we believe there is merit in including the FAQs (or the additional information they contain) in the draft practice note itself. This would provide further context and guidance for the public and local councils.

Interaction with NSW planning review, and risks of incremental changes in the interim

The draft practice note does not indicate whether it takes into account the proposed changes to overhaul the NSW planning system over the coming year, or how this future interaction is contemplated.

EDO NSW appreciates that the wholesale reforms will necessarily take time to finalise and implement. However, we are concerned at certain interim reform measures that have recently been announced. This includes policies to accelerate growth centre development and reduce protections for riparian corridors, biodiversity and Aboriginal cultural heritage;⁸ changes to coastal management;⁹ and the announcement that Catchment Management Authorities will be disbanded, with these and other agencies to be replaced with 'Local Land Services'.¹⁰

These announcements have not involved sufficient, if any, public consultation; and by pre-empting broader reforms, these incremental reforms can have the effect of reducing public confidence, understanding and certainty in relation to the planning system.

As a general point, we therefore submit that any interim proposals for reform should deal with the issue of their interaction with the new planning system; and involve sufficient public consultation to improve policy-making, public confidence and community buy-in.

If you would like to discuss any aspect of this submission further, please contact me on (02) 9262 6989 or by email at rachel.walmsley@edonsw.org.au.

Yours sincerely,
EDO NSW



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⁸ Department of Planning & Infrastructure, Planning Circular *PS 12-003 Initiatives to improve housing supply*, 6 June 2012.

⁹ The Hon Chris Hartcher MP, Minister for Resources and Energy, "NSW moves ahead on coastal management", media release, 8 September 2012.

¹⁰ The Hon Katrina Hodgkinson MP, Minister for Primary Industries, "Local Land Services to transform service delivery to NSW farmers and landowners", media release, 4 October 2012.