Guideline for Councils using delegated powers to Prepare LEPs involving land that is or was previously owned or controlled by council.
SECTION ONE – INTRODUCTION

1.1 REASONS FOR THIS GUIDELINE

Instances where a council proposes to change the planning controls that apply to land in which it has or has had an interest present an unusual situation. In many cases Council will be both regulator acting in the interest of the community, and entrepreneur seeking to maximise the benefit realised from a community asset. These dual roles may give rise to a real conflict of interest or the appearance that council is affording itself special treatment. While both roles are legitimate, council must make sure that its decisions as regulator are not biased by its financial interests in property.

The mere fact that council is both applicant and decision maker is sufficient to create an appearance of unfairness and to erode the community’s confidence in the planning process.

Council has a responsibility to ensure that any proposal is objectively assessed. It is important that the community sees proper procedures being followed and balanced, consistent assessment of environmental, social and economic considerations in these situations.

As a hypothetical example, consider the following:

Ten years ago council carried out and published a retail centre study. The study identified key sites which should be held for major development or re-development in the future.

Two years after the study was adopted, council bought one of the key vacant sites and made it temporarily available to address a shortfall in public car parking.

The time is now right for the site to be developed for retail/residential use and council has entered into an agreement with a developer which ensures public car parking will be provided as part of a new development.

Council prepared a draft LEP to rezone the land from its original residential zone to the mixed use zone in place throughout the retail centre. The controls and urban design principles covering adjoining sites will apply to council’s land.

Even based on this brief description, the council’s actions appear reasonable. A different impression may be gained by local residents who hear through ‘the grapevine’ that council is going to rezone the community’s land, close the public car park, sell the land to a big developer to build a retail/residential tower and make $1.3million profit.

The aim of this guideline is to make the planning process open to public scrutiny by ensuring that all relevant information is available in situations such as the one described above. Through this the community can develop confidence that fair, proper processes have been followed and that council has managed its conflicting interests satisfactorily.

1.2 DELEGATION

Section 23 of the Environmental Planning and Assessment act 1979 (the Act) allows the Director-General of the Department of Urban Affairs and Planning to delegate certain planning powers to councils. At present the Director-General delegates to some councils the ability to exercise local
environmental plan (LEP) preparation powers under s.65 and s.69 of the Act.

A report released by the Independent Commission Against Corruption in 1992 highlighted several instances where councils did not satisfactorily deal with a conflict of interest between their roles as regulator and developer. This prompted the Director-General to withdraw delegated powers for LEPs involving land that is owned or controlled by a council or was owned or controlled by a council where any aspect of the LEP was the subject of an undertaking between council and the purchaser. This prompted the Director-General to withdraw delegated powers for LEPs involving land that is owned or controlled by a council or was owned or controlled by a council where any aspect of the LEP was the subject of an undertaking between council and the purchaser.

The Director-General has now reinstated delegated powers, confident that this guideline will assist councils to administer the LEP making process in a fair and responsible manner. The guideline is intended to assist by ensuring that conflicts of interest are disclosed and resolved in an accountable and open manner. Where councils’ actions are fair and reasonable, the decision process will be seen to be impartial.

In exceptional circumstances a council or the Director-General still may decide that it is not appropriate for a council to exercise delegated LEP making powers (further information in Section 3.).

1.3 STATUS OF THIS GUIDELINE

This guideline is referred to in the instrument of delegation issued by the Director-General regarding powers under s.65 and s.69 of the Act. Councils are allowed to exercise their powers in the preparation of LEPs that apply to land that is owned or controlled Council, or was owned or controlled by Council and is the subject of an undertaking between council and the purchaser (referred to from here on as council land), if they comply with this guideline.

This guideline does not replace the requirements in the Act concerning the preparation and exhibition of LEPs. The guideline adds detail and specifies several additional requirements where a council wishes to use its delegated powers to prepare an LEP that applies to council land.

On 22 November 1990 the Department issued Department of Planning Circular No. C18 titled Processes for the Rezoning of Council Assets for Disposal. That Circular addresses rezoning of council owned land generally and is advisory only.

This guideline has a focus on matters concerning the exercise of delegated powers and must be followed when delegation is used. Both provide consistent advice on a number of common issues, and the additional information in the earlier Circular still may be of assistance to councils in some cases.

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SECTION 2 – REQUIREMENTS

2.1 EXHIBITIONS

When a council exhibits a draft LEP (in accordance with s.66 of the Act) that applies to council land this guideline requires additional information to be included.

The aim of this is to make clear Council’s interest in the land and the reasons why the draft plan is being prepared. This makes the plan preparation process more open and allows the community to assess proposals with a full appreciation of all relevant information.

Consistent with this aim, information must be exhibited in a clear manner. Information must be detailed enough to be informative, without being overwhelming.

The following information must be included in the material displayed during exhibition:

2.1.1 Statement of Council’s Interest

A written statement must be provided which describes Council’s interest in the land. This should include information such as:

- The nature of the Council’s interest in the land (e.g. Council has a 30 year lease over the site, Council owns the land freehold);

- When Council first acquired an interest in the land;

- Why Council acquired an interest in the land (e.g. for an extension to the adjoining park, Council was given responsibility for the land by a State authority);

- How Council acquired its interest in the land (e.g. the land was purchased, through s.94); and

- For land previously owned or controlled by Council, whether any aspect of the LEP formed part of the agreement to dispose of the land, and the terms of any such agreement.

2.1.2 Purpose of the draft LEP

A written statement must be provided explaining why Council is preparing the draft plan. A statement such as “to rezone the land” is not sufficient. The following must be addressed:

- Why the draft LEP is being prepared (e.g. to facilitate growth of a commercial centre, to provide opportunities for higher density residential development near a railway station, to allow a child care centre in an open space zone);

- How the draft plan will affect planning controls (e.g. change a residential zoning to commercial, introduce heritage controls); and

- What prompted preparation of the draft LEP (e.g. the findings of a residential development strategy, a request from an affected land owner, Council’s intention to dispose of the land.).
2.1.3 Anticipated development

Knowing what type of development may result from a change in planning controls helps everyone interested in the draft LEP understand how they will be affected in real life. This allows people to make more constructive comments than they otherwise might. The following must be addressed:

- What actual physical or operational changes may result? A change to the maximum floor space ratio, for example, may not mean very much to most people. It would be more helpful to explain that the change will create an opportunity for several additional storeys of development on the site, subject to assessment and approval in accordance with Council’s controls and policies;

- Is the draft LEP being prepared to permit a particular proposal? If so, any available details of the proposal should be included in the exhibition.

2.1.4 Financial Implications

While any change in planning controls will have some effect on land values, there will be instances where Council or another party stands to make a substantial financial gain or loss as a result of making an LEP.

In some cases the increase in land value resulting from an LEP may be one of the reasons why council has decided to prepare the LEP. Council may have even made an agreement for the sale or lease of the land conditional on the controls being changed.

The community should be aware of the financial implications of a change in planning controls, especially when they are more than a minor consequence of the change. While it may be inappropriate to make known all financial details (in the interest of protecting commercial advantage) council must at least provide an indication of the magnitude of any financial gains or losses.

Council could indicate the magnitude of value that will be added to the land by comparing current and likely future land value (e.g. the land is currently valued at $100m², nearby land zoned for commercial development is valued at between $200 and $250m²).

Where an agreement for lease or sale of the land has been made, council must at least state that this is the case and provide basic details of the agreement. Information on the terms of the agreement should be made available where possible.

2.1.5 Guideline

A copy of this guideline must be included in the exhibition. This helps the public understand why certain information has been exhibited and to check that all relevant information has been made available.

2.2 NOTIFICATION

After the LEP has been made or a decision taken not to proceed with the draft LEP, everyone who made a written submission must be notified in writing. Notification must be sent within 14 days of the decision and must include an
explanation of how the issues raised in the submission were addressed and the reasons for council’s decision.

2.3 MONITORING

Although the Director-General has delegated certain powers to councils, she retains a responsibility to make sure that the LEP making system operates satisfactorily. To provide for monitoring, the following is required of councils:

- A copy of all written material to be exhibited must be included with Council’s s.64 submission;

- Where LEPS are prepared using s.69 delegated powers: a section must be added to the s.69 report to the Minister briefly setting out Council’s interest in the land, any conflict of interest, issues raised in any relevant submissions, and an explanation of how these issues have been addressed or resolved;

- Where the s.69 report will be prepared by the Director-General: a copy of the final report submitted to Council (or where this report does not include the matters listed in the previous point – a report dealing with these matters) must be included in the s.68(4) submissions.

Regional Manager will monitor councils’ compliance on an ongoing basis. A full review of the operation of this guideline will be carried out 12 months after delegation is reinstated, with the involvement of the Local Government Liaison Committee.

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