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Public Land Management

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CONTENTS

1. PUBLIC LAND MANAGEMENT - INTRODUCTION

A new regime for the management of public land owned or controlled by councils was introduced on 1 July 1993 with the commencement of the Local Government Act 1993.

The Act replaced outdated provisions governing the use and alienability of certain council land, generally known as 'reserves'. The Act emphasises a council's responsibility to actively manage land and to involve the community in developing a strategy for management. Councils should by now be familiar with the requirements of the public land management provisions.

Changes to the legislation, made by the Local Government Amendment (Community Land Management) Act 1998, together with court decisions since 1993 have led to the revision of this Practice Note. The Department has prepared this Practice Note to assist councils in their management of public land under the Act. However, this is not intended to be a substitute for reading the provisions of the Act or the Regulations themselves.

The Practice Note focuses on the requirements of the Local Government Act ("the Act") and related issues. The Act provides the common foundation for each council to apply specific management strategies to public land, as seen fit.

The Department welcomes comments on the Practice Note. Comments can be sent to dlg@dlg.nsw.gov.au or to the Director General, Department of Local Government, Locked Bag 1500, BANKSTOWN NSW 2200.

2. CLASSIFICATION OF PUBLIC LAND

2.1 What is public land?

Public land is defined (in the Dictionary to the Act) to mean any land (including a public reserve) vested in or under the control of the council. ("Public reserve" is also defined in the Dictionary.) However, public land does not include:

a) a road; or
b) land to which the Crown Lands Act 1989 applies (includes land that council controls but which is owned by the Crown)
c) a common; or
d) land subject to the Trustees of Schools of Arts Enabling Act 1902
e) a regional park under the National Parks and Wildlife Act 1974.

2.2 Classification of public land

All public land must be classified by council as either "**community**" or "**operational**" land (ss.25 – 26). The main effect of classification is to restrict the alienation and use of the land. "Operational" land has no special restrictions other than those that may apply to any piece of land.

Community land is different. Classification as community land reflects the importance of the land to the community because of its use or special features. Generally, it is land intended for public access and use, or where other restrictions applying to the land create some obligation to maintain public access (such as a trust deed, or dedication under section 94 of the Environmental Planning and Assessment Act 1979). This gives rise to the restrictions in the Act, intended to preserve the qualities of the land. Community land:

- cannot be sold
- cannot be leased, licenced or any other estate granted over the land for more than 21 years
- must have a plan of management prepared for it.

How is public land classified?

Public land is initially classified by one of the following means:

1. by resolution of council, prior to or when the land is acquired; or
2. by a Local Environmental Plan ("LEP") prepared under the EP&A Act 1979; or
3. by operation of the Local Government Act –
    a. applies to certain land controlled by council at 1 July 1993, or
    b. where council has since acquired land and there is no resolution to classify the land;

The most common way in which to initially classify land is by resolution of council. It is unlikely an LEP will be used for initial classification.

Classification by resolution

Any public land that is acquired by or vested in council after 1 July 1993 may be classified by resolution of council. Land must be classified on or before its acquisition by council (s.31(2)). If not, the land is automatically classified as community (s.31(2)). In practical terms, this means that council should classify land before acquisition. If land is formally acquired between council meetings, it is too late to classify the land at the next meeting if it is intended that the land be operational.

A council must give public notice of a proposed resolution to classify public land as either operational or community land. A period of at least 28 days for public submissions must be given (s.34). This requirement also applies to land that the council is intending to acquire, but has not yet finally purchased (with one exception explained in s.34(4)).

Classification by LEP

A council may also classify land by an LEP on or prior to its acquisition by council (s.27), but this is not often done. The normal procedures of making an LEP under the Environmental Planning and Assessment Act 1979 (EP&A Act) apply. Again, if council does not classify the land (through an LEP) before acquiring it, the land is automatically classified as community land.

Classification by operation of the Act – land controlled by council on 1 July 1993

On July 1, 1993 certain public land that was vested in, or under the control of council, was automatically classified as community land. This land is set out in clause 6(2) of Schedule 7 to the Act:

Land "subject to a trust for a public purpose"

Under cl.6(2), Schedule 7, land is automatically classified as community if it is land "subject to a trust for public purposes". This term was widely interpreted by the High Court in Bathurst City Council –v- PWC Properties Pty Limited (30 September 1998, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). Councils have been advised that they may need to review the classification of land held on 1 July 1993 as a result (Departmental Circular 96/65, December 1996).

In the Bathurst case, car-parking land that Council had classified as operational was held to have been automatically classified as community land, because it was land "subject to a trust for public purposes". Council could therefore not sell the land for redevelopment until an LEP had been made reclassifying the land. The trust arose because land had been transferred to Council as a condition of development consent for car-parking purposes in lieu of a car parking cash contribution. However the case is not limited to car parking arrangements.

A “trust” was held to include governmental responsibilities for a piece of land that restrict the freedom of a government to deal with the land. This is wider than a “trust” in a technical legal sense and was termed a “statutory trust”.

Where a statutory trust exists where land has been given to council by a State Government agency for use for a particular purpose, it is advisable to seek the views of that agency prior to council commencing any action affecting the land.

3. RECLASSIFICATION OF PUBLIC LAND

Classification of land may become inappropriate for many reasons. Reclassification from community to operational land will remove the restrictions that apply to community land under the Act and may also remove other restrictions on the land.

3.1 Reclassification from operational to community land

This may be carried out by resolution (s.33). A council must give at least 28 days public notice of the proposed resolution to allow for public submissions (s.34).

3.2 Reclassification from community to operational land

There are 2 ways to reclassify community land:

1. by an LEP
2. by resolution, but only if certain conditions are met.

Reclassification via LEP

Most community land will need to be reclassified through an LEP. The procedures under the EP&A Act will apply to the making of the LEP, but in addition, a public hearing under section 68 of the EP&A Act must be held (s.29). The procedures for public hearings are set out below.

In relation to LEPs that will reclassify land, the Department of Urban Affairs and Planning (DUAP) has advised that the council should state in its s.54 notification to DUAP under the EP&A Act that the proposed draft will reclassify land. Council must also indicate the purpose of the draft LEP (to reclassify land) when it forwards its submission to DUAP under s.64. If council is to reclassify land that has been given to it by a State agency for a particular purpose, then s.62 of the EP&A Act requires a council to consult with the agency. The outcome should be included in any report back to the Director General of DUAP under the EP&A Act.

If the draft LEP proposes to reclassify public land and also extinguish any restrictions, trusts etc applying to the land then further procedures are required as explained below.

Removing restrictions on community land

Council has the ability to explicitly remove any restrictions on the use of community land when the land is reclassified through an LEP (s.30). For example, an LEP may remove the public reserve status of the land.

From 1 January 1999 new procedures apply under s.30 in order to discharge restrictions. An LEP must have a specific clause discharging the land from any trusts, dedications, or other limitations upon reclassification. The land will not be free until such a clause is inserted into the LEP and the LEP commences. In addition, the Governor must approve of the making of any LEP that removes any restrictions.

The Minister for Urban Affairs and Planning has taken on responsibility for seeking the Governor's approval to any LEP clause that removes restrictions on community land. Council is required to provide the following information to the Director-General of DUAP, either in its "s.68 submission" to the Director General or, where council exercises delegated powers under s.69, in its "s.69 report":

1. the nature of trusts, dedications or other interests or restrictions applying to the land and whether the land is a public reserve (defined in the Dictionary to the Local Government Act);
2. the reason for council reclassifying the land eg to sell the land or enter into a long term lease;
3. the effect of reclassification, ie, extinguishment of trusts etc applying to the land and/or the land ceasing to be a public reserve.

DUAP is also currently reviewing the use of delegated powers by councils and DUAP's 1997 Best Practice Guidelines "LEPs and Council Land" as these may relate to LEPs that reclassify council land. Councils will be informed by DUAP of any changes to the delegations or to the Best Practice Guidelines by letter.

The Parliamentary Counsel has provided informal model clauses for a hypothetical LEP seeking to reclassify public land and remove any restrictions. This is included in Appendix 2 for council's information and assistance.

The new procedures do not apply to any draft LEP that has had a certificate issued under section 65 of the EP&A Act (authorising it for public exhibition) before 1 January 1999.

The conduct of the public hearing required to make an LEP reclassifying land is governed both by the EP&A Act and by the Local Government Act. Notice of the details of the hearing arrangement is required by clause 13, Environmental Planning and Assessment Regulation 1994. Section 47G of the Local Government Act also applies to public hearings conducted under the EP&A Act (see below).

Reclassification by resolution

This only applies to "section 94 land", and only where certain conditions are met. Under section 32, council may resolve to reclassify certain land dedicated in accordance with a condition imposed under section 94 of the EP&A Act, (whether dedicated before or after July 1, 1993). A council may resolve that "section 94 land" is unsuitable for its purpose, on account of its size, shape, topography or location or the difficulty of providing public access to it (s.32). It may then reclassify that land as operational through resolution, rather than LEP. Section 94 land that does not fall within this description must be reclassified by LEP.

Prior to a resolution to reclassify "section 94 land", a council must hold a public hearing into the proposed reclassification (s.29(2)), and also give at least 28 days public notice of the proposed resolution, with the opportunity to make submissions (s.32(4)).

3.3 Public consultation when classifying or reclassifying public land

The requirements of the Act are set out below:

Process	Public consultation requirements
Classification by resolution	public notice of proposed resolution (s.34(1))
Classification by LEP	usual processes under EP&A Act apply
Reclassification by resolution – operational to community land	public notice of proposed resolution (s.34(1))
Reclassification by resolution – section 94 land	public hearing (s.29(2)), public notice of proposed resolution (s.32(4))
Reclassification by LEP	usual processes under EP&A Act apply, plus public hearing under s.68 EP&A Act (s.29(1))

When public notice is required, council must give at least 28 days for public submissions to be made. Council must take these submissions into account when making a final determination.

From 1 January 1999, new requirements apply to the holding of any public hearing (see s.47G). When a public hearing is required, including a public hearing into the reclassification of land under s.68, EP&A Act, council must appoint a person that is independent of council to preside at the hearing. Specifically, that person must not be a councillor or employee of the council, nor have held either of those positions in the last 5 years. Councils will therefore no longer be able to consider the general manager or other staff of council to preside at the public hearing. The report by the person presiding at the hearing must be made public within 4 days of being received by the council.

Many councils complain of a poor response from the public during consultation. This may be in part due to the description of the land in council's public notices. Nominating land by lot and DP number only does not adequately explain the land to the public. The land should be described in an accessible way, such as by name ("Ewen Park") and/or street location ("cnr of Park and River Streets"). Inclusion of a map showing the location of the land may also be useful. Technical, legal descriptions may defeat the purpose of public consultation and may result in difficulties further on when the public is made aware of council's intentions too late.

The Department of Urban Affairs and Planning have also stressed the same concerns in relation to LEPs that reclassify land to operational, which are being exhibited under the EP&A Act. That Department also recommends that maps should be prominently displayed not only when the draft LEP is on display, but also during the lead up to the public hearing. Note that DUAP's Best Practice Guidelines "LEPs and Council Land" require additional information discussing the proposed reclassification to be exhibited with the draft LEP, regardless of whether or not council intends to exercise s.69 delegation powers. This additional information may also be useful to be exhibited in the lead up to the public hearing.

4 PLANS OF MANAGEMENT

4.1 General Matters

Plans of management must be prepared for all community land. They are not only required under the Act but are an essential management tool. Plans of management:

- are written by council in consultation with the community
- identify the important features of the land (eg natural significance, sportsground)
- clarify how council will manage the land, and in particular
- indicate how the land may be used or developed, eg leasing.

Experience since the commencement of the Act in 1993 has shown that a few councils still have difficulty in understanding the necessity for adequate plans of management. Court decisions have assisted in the interpretation of the Act and have demonstrated the consequences of misunderstanding the requirements.

This Practice Note aims to assist with the requirements for plans of management set out in the Local Government Act. Substantial management issues for public land are dealt with in other publications, including the "Land Management Manual" (1993) published by Manidis Roberts Consultants and the then Department of Conservation and Land Management (now Department of Land and Water Conservation). Chapter 5 of that Manual was revised and issued separately in 1996. Council should also refer, where relevant, to DUAP's "Urban Bushland Management Guidelines" (1991). (These Guidelines are currently being reviewed by DUAP.) Plans of management do not have to be lengthy documents. The provisions of the Act can be dealt with simply and succinctly. Council may of course add additional information where appropriate. An outline of a plan of management addressing the minimum requirements of the Act is included as Appendix 1.

4.2 Why prepare a plan of management?

Apart from the benefits of properly managing community land, there are legal requirements under the Act. A council must prepare a plan of management for community land (s.36). A plan of management may apply to one or more areas of community land (a 'generic' plan) or to just one area (a 'specific' plan). Councils are free to determine whether a generic or specific plan of management will be prepared for its community land, with a few exceptions. Sections 36A-36D require specific plans of management to be prepared for certain pieces of community land:

- land declared to be "critical habitat" under the Threatened Species Conservation Act 1995 (s.36A)
- land directly affected by a recovery plan or threat abatement plan under the TSC Act (s.36B)
- land declared by council to contain 'significant natural features' (s.36C)
- land declared by council to contain an 'area of cultural significance' (s.36D).

The specific requirements for these types of community land are discussed in more detail later in the Practice Note.

Until a plan of management for community land is adopted the nature and use of the land must not be changed (s.44). This means that council cannot carry out new development on the land. It also means that council cannot grant a lease, licence or other estate over the land until a plan of management is in place.

4.3 Plans of management and other laws affecting the land

Plans of management cannot override regulations or Acts. Council must comply with all relevant laws that apply to the use of the community land, in addition to the plan of management. For example, this includes other parts of the Local Government Act, Threatened Species Conservation Act 1995, Fisheries Management Act 1994, and the Environmental Planning and Assessment Act.

Plans of management cannot override, or replace, or stand in the place of planning instruments such as LEPs. Plans of management and LEPs are separate documents that have different functions and are made under different Acts. An LEP is the broader planning document which reflects the policy of council about the types of development that can be carried out on all land in the council's area. The plan of management should be consistent with the LEP. It will further detail the particular uses of the piece of community land, consistent with the permissible uses for that land under the LEP.

LEPs that refer to the Local Government Act 1919

Council should note a transitional provision, inserted by the Local Government Amendment (Community Land Management) Act 1998, that applies to certain LEPs and their relationship to plans of management. The provision, clause 44, Schedule 8, Local Government Act, commenced on 1 January 1999. The clause applies to community land where:

- an LEP was in force on 30 June 1993 and continues to be in force
- the land subsequently became community land
- the LEP permits the carrying out of development for the purposes specified in Division 2 or 3 of Part 13 of the Local Government Act 1919.

As a result of transitional arrangements, the references to the 1919 Act in any LEP are taken to refer to the public land provisions of the 1993 Act. The 1993 Act does not specify the permissible uses of public land, leaving this to a plan of management, whereas the 1919 Act did spell out the permissible uses of reserve and park land. As a result, LEPs which refer to Part 13 of the 1919 Act now leave the determination of permissible uses under the LEP to a council's plan of management.

It is inappropriate for broader planning issues to be left to the plan of management stage. Therefore, clause 44 now provides that a plan of management applying to such land cannot permit the carrying out of development that was prohibited prior to 1 July 1993, or which was permitted with consent prior to 1 July to be now carried out without planning consent. Council will need to amend its LEP to remove the reference to the 1919 Act in order to avoid this result.

4.4 Contents of plans of management

Minimum requirements

The minimum requirements under the Act are that a plan of management must:

- categorise the land in accordance with s.36(4) and (5)
- contain objectives for the management of the land
- contain performance targets
- specify the means of achieving the objectives and performance targets
- specify how achievement of the objectives and performance targets is to be assessed (s.36(3)).

These requirements have been discussed in Seaton –v- Mosman Municipal Council (1996) 93 LGERA 1. The Court of Appeal held that the ordinary dictionary definitions apply, that is:

- an "objective" is "an end towards which efforts are directed"
- a "performance target" is "an objective or goal to be performed".

For plans that are specific to one area of land made after 1 January 1999, the plan must also:

- describe the condition of the land as at the adoption of the plan
- describe the buildings on the land as at adoption
- describe the use of the buildings and the land as at adoption
- state the purposes for which the land will be allowed to be used, and the scale and intensity of that use (s.36(3A)).

For plans in existence on 1 January 1999 that refer only to one piece of land, council had until 1 January 2000 to amend the plan to include these provisions (cl.40, Schedule 8, Local Government Act). The amended plan need only describe the condition of the land and buildings etc as at the date of adoption of the amended plan, rather than as at the date of adoption of the initial plan.

Additional matters

The Act specifies that other matters may be included in a plan, depending on council's intentions for the land:

- an 'express authorisation' for leases, licences or other estates that may be granted over the land. Leases etc may not be granted unless there is an express authorisation in a plan (s.46). Council may also specify any other conditions to apply to leases etc
- leases, licences or other estates that will only be granted following a tender process (s.46A)
- activities that require the prior approval of the council before being carried out on the land (s.36(3)). These activities are listed in Part D, section 68. Council may have also dealt with these approvals more particularly under a local approvals policy. If so, council should cross reference the plan of management with the local approvals policy, or include the relevant material in the plan of management.

Additional matters where land is not owned by council

The Act requires that, where the council controls but does not own land, a plan must:

- identify the owner of the land
- state whether the land is subject to any trust, estate, interest, dedication, condition, restriction or covenant
- state whether the use or management of the land is subject to any condition or restriction imposed by the owner
- include any provisions that may properly be required by the person who owns the land
- not contain provisions inconsistent with the owner's requirements (s.37).

4.5 Categorisation of Community Land

Community land must be categorised according to the list in s.36(4). The categories reflect land use and/or describe the physical characteristics of the land. Categorisation is intended to focus council's attention on the essential nature of the land and how that may best be managed. For this reason also, if land is categorised as a "natural area" it must be further categorised according to the type of area – see s.36(5). Note that certain community land is automatically categorised under the Act, for example if it is affected by threatened species requirements land is categorised as a natural area (see below).

Guidelines for council to assist in categorisation are provided in the Local Government (General) Regulation (cls.10 - 19). Council must have regard to the guidelines in determining a category (cl.9) but are not required to adopt any category merely because the land fits the description in the guidelines. Council should look at all the circumstances of the land in making a decision as to categorisation. For example, a piece of land may seem to satisfy the guidelines for more than one category. Council has a discretion in this case to look at the land in context, taking into account all relevant material before determining a category. It is important that council be able to justify any decision.

Also, council may have a piece of community land, parts of which may be best managed as different categories, for example a piece of land with remnant bushland in one part and children's play equipment in another. Council is able to categorise the land as part "natural area – bushland" and part "park". It is strongly recommended that the land in each category not overlap. Overlapping categories may cause conflict in management objectives and will create confusion in the minds of council staff and the community. In this case the Local Government (General) Regulation requires that council "clearly identify" where each category applies on a map of the land, contained in the plan of management (cl.21). Council is not required to formally subdivide or survey the land in order to do so.

The initial determination of categorisation of community land will assist in clarifying the objectives of council and the community for that land. It may be that, using the above example, that the play equipment is sited close enough to the remnant bushland that it compromises the objectives of a "natural area" classification, through potential damage to the bush. Consideration could then be given to moving the equipment or otherwise managing the area with this in mind. (See DUAP's "Urban Bushland Management Guidelines" or contact other councils for ideas.)

The guideline provisions came into force on 1 January 1999 and therefore do not apply to any land categorised before that date. That is, council is not required to have categorised land before 1 January, 1999, in accordance with the guidelines.

Once land is categorised, core objectives for each category are provided in the Act (ss.36E – N). These apply automatically to the land, regardless of the content of a plan of management. The core objectives came into force on 1 January 1999, and apply to all plans existing at that time. ***Council must review its plans of management to determine whether they comply with the core objectives. The review must be completed by 31 December 2000 (cl.23, Local Government (General) Regulation).*** As a result of the review, council may need to alter some categories and plans.

For plans adopted after 1 January 1999, council should incorporate the core objectives into the plan at draft stage. Other objectives may, of course, be included in the plan. Once included, the core objectives must then have a means of achievement and assessment, as required by s.36.

Any plan of management that is inconsistent with the core objectives after 31 December 2000 is invalid to the extent of the inconsistency (cl.23(3), Local Government (General) Regulation).

Significance of categorisation

Categorisation of community land has always been an effective way in which to focus on the essential aspects of each area of land. Amendments made to the Act by the Local Government Amendment (Community Land Management) Act 1998 (in force on 1 January 1999) have strengthened the role of categorisation and its impact on the management of the land.

First, community land must be managed in accordance with the core objectives for the relevant category. They apply as a result of the legislation and are not optional. Other objectives may be nominated by council, but neither these nor any other part of a plan of management should be inconsistent with the core objectives. As stated above, any part of a plan of management that is inconsistent with the core objectives is invalid.

For example, the core objectives for 'natural area – bushland' are aimed at preserving and restoring the vegetation and landforms of the land. A court (as the ultimate arbiter) may determine that an objective to develop the tourism potential of the land may be inconsistent with the core objectives, based on the particular facts in the case, such as the size and sensitivity of the land and the scale of potential development.

Second, a council may only grant a lease, licence or other estate in community land if the purpose of the grant is consistent with the core objectives for the category. This applies regardless of the actual authorisation for leases etc contained in a plan of management. See below for further discussion on leasing.

4.6 Community land affected by threatened species laws

The Threatened Species Conservation Act 1995 aims to prevent native species in NSW from becoming extinct and to secure their recovery in nature. The Act seeks to achieve this aim through a number of mechanisms that involve impact assessment, recovery planning, preserving habitat and reducing key threats to species. The measures in the Act may affect public land owned or controlled by council. The Threatened Species Conservation Act works in conjunction with a number of other Acts including the National Parks and Wildlife Act 1974 and the EP&A Act.

The Fisheries Management Act 1994 operates in the same way in relation to marine life and habitat. Councils may be affected, particularly in relation to freshwater habitat. The Ministers administering those Acts may affect land in certain ways, such as through the declaration of critical habitat and the preparation of plans under those Acts. Responsibilities for land owners follow from that.

The Local Government Act was amended from 1 January 1999 to integrate the management of community land with threatened species laws, in particular the preparation of plans of management. Council must still comply with the full range of threatened species laws independently of the Local Government Act. However, the amendments to the Act make it easier to do so. The provisions apply when community land is declared as:

- ***"critical habitat"*** – is a formal classification of land under the Threatened Species Act, and listed in a register kept by the Director-General of the National Parks and Wildlife Service. It is land which comprises the habitat of an endangered species, population or an ecological community. The land must be critical to the survival of the species, population or ecological community. In relation to the Fisheries Management Act, "critical habitat" means an area that is occupied or periodically or occasionally occupied by fish or marine vegetation. "Fish" is defined under that Act to mean "marine, estuarine or freshwater fish or other aquatic animal life at any stage of their life history whether alive or dead". The definition does not include mammals, reptiles, birds and amphibians. The Department understands that there is no "critical habitat" under either Act currently declared (as at January, 2000).

- ***land directly affected by a "recovery plan"*** – a plan to promote the recovery of an endangered species, population or ecological community to a position of viability in nature. A number of recovery plans under the Threatened Species Act have been made.

- ***land directly affected by a "threat abatement plan***"- a plan to manage "key threatening processes" so as to abate, ameliorate or eliminate adverse affects on threatened species, populations or ecological communities. The Department is not aware of any "threat abatement plans" that have been made (as at January, 2000).

If community land is affected in any of these ways, the following applies:

- the land cannot be dealt with under a generic plan. The land must have its own plan of management (s.36A(2)/ s.36B(3))

- the plan must state how the land is affected under the Acts – ie declared "critical habitat" or affected by "recovery plan" or "threat abatement plan" (s.36A(3)(a)/ s.36B(4)(a))

- the land must be categorised as a natural area (s.36A(3)(b)/ s.36B(4)(b))

- objectives for the management of the land, as required under s.36, must be consistent with the objects of the Threatened Species Conservation Act or the Fisheries Management Act (s.36A(3)(c)/ s.36B(4)(c))

- the plan must incorporate the core objectives prescribed for a natural area (s.36A(3)(c)/ s.36B(3)(c))

- the draft plan must be forwarded to the Director General of National Parks and Wildlife or the Director of NSW Fisheries and must incorporate any requirements made by either person (s.36A(3)(d)/ s.36B(4)(d))

- no change in the use of the land is permitted until a plan of management has been adopted that meets the above requirements

- no lease or licence can be granted until a plan of management is in place. (Leases etc that are in place before the land was affected by threatened species laws can continue to operate).

When land is affected under threatened species laws, existing specific plans of management will need to be changed, to comply with the provisions listed above. No change in the use of the land, and no new lease or licence can be granted until the plan of management is amended to comply with these requirements. (There is a limited exception to this in s.36A(4)(c)).

Generic plans that applied to the land cease to apply once land is affected by threatened species laws. A new, specific, plan of management must be prepared that complies with the requirements. No change in the use of the land and no new lease or licence can be granted until the plan of management is made.

Consultation and notification of threatened species plans

Councils are required to be consulted by the relevant agency (National Parks and Wildlife Service or NSW Fisheries) when a draft recovery plan or threat abatement plan is made or a declaration of critical habitat is proposed that will affect public land. In practice, the National Parks and Wildlife Service and NSW Fisheries have indicated that their policy is to involve land holders at an early stage of consideration of any proposed plan or declaration of critical habitat.

In relation to fisheries issues, councils may be responsible for the land or waters that are affected by marine threatened species laws. NSW Fisheries has also indicated that council management of its public land may have an important impact on marine habitat, even if council does not control that habitat. As a result, it is anticipated that individual councils will be invited to participate in processes to protect marine habitat by NSW Fisheries. If council does not own or control marine habitat, the legal requirements of the Local Government Act discussed above will not apply. However, the spirit of the law may point to some changes in management of community land to protect marine habitat that council does not control.

Remember that the Threatened Species Conservation Act and the Fisheries Management Act contain requirements that may apply to all land owners, irrespective of any action under the Local Government Act. ***Council must comply with the Threatened Species Act and the Fisheries Management Act in addition to the Local Government Act.***

For further information on threatened species requirements under the Threatened Species Conservation Act 1995 or the Fisheries Management Act 1994, please contact:

Threatened Species Unit
National Parks and Wildlife Service
43 Bridge Street
Hurstville 2220
Ph: (02) 9585 6444 (main switch)

NSW Fisheries
Threatened Species Unit
Port Stephens Research Centre
Private Bag 1
Nelson Bay 2315
Ph: (02) 4982 1232

The National Parks and Wildlife Service has also published "*Threatened Species Management Information Circular No.4: Critical Habitat Identification and Declaration*" December 1996. This was sent to all councils by the NPWS.

4.7 Community land containing "significant natural features"

The Act gives council the ability to declare land as containing "significant natural features" that warrant protection (s.36C). The particular features are listed in s.36C. Such a resolution is not a determination of a category, but a step prior to categorisation. The decision to declare land in this way is at the discretion of the council.

If land has been declared to contain "significant natural features":

- the land cannot be dealt with under a generic plan. The land must have its own plan of management (s.36C(2))
- the plan must state why the land is declared to contain significant natural features (s.36C(3)(a))
- the land is automatically categorised as a natural area (s.36C(3)(b))
- objectives and performance targets for the management of the land must be designed to protect the area and its features (s.36C(3)(c)).
- the plan must incorporate the core objectives prescribed for a natural area (s.36C)(3)(c))
- no change in the use of the land is permitted until a plan of management has been adopted that meets the above requirements
- no lease or licence can be granted until a plan of management is in place. (Leases etc that are in place before the land was affected by the council resolution can continue to operate).

When land is included in a resolution under s.36C, existing specific plans of management will need to be changed to comply with the provisions listed above. No change in the use of the land, and no new lease or licence can be granted until the plan of management is amended to comply with these requirements. (There is a limited exception to this in s.36C(4)(c)).

Generic plans that applied to the land cease to apply once a resolution is made. A new, specific, plan of management must be prepared that complies with the requirements. No change in the use of the land and no new lease or licence can be granted until the plan of management is made.

Given that changes to a plan of management will be required following a resolution, it may be more efficient for a plan to be altered or a new one drafted prior to a formal resolution to declare land containing significant natural features. Council could initially resolve that its intention is to declare land after the preparation of a draft plan of management and community consultation. This allows council to fully canvas public opinion and develop an appropriate plan, which could come into effect at the time of the resolution to declare land as containing "significant natural features".

4.8 Community land declared as an "area of cultural significance"

As with resolutions regarding significant natural features, council has the ability to declare land as an "area of cultural significance" (s.36D). This is not a determination of a category, but a step prior to categorisation.

This is linked to the addition of a new category of community land also called an "area of cultural significance". The provisions recognise that there may be important cultural or historic features on community land that have special meaning to the community. These could include memorials, obelisks, buildings or remains, gardens, places where historic events took place and so on. The land may be culturally significant because of Aboriginal links, and this is also covered under section 36D. Aboriginal issues will require some sensitivity (see below).

The decision to declare land as culturally significant is at the discretion of the council. The provisions regarding cultural significance came into effect on 1 January 1999 and council is not required to assess its community land held on that date to determine whether any land should be categorised instead as culturally significant. However, it is within the spirit of the Act that culturally significant areas should be declared and categorised as such.

If land has been declared to be an "area of cultural significance":

- the land cannot be dealt with under a generic plan. The land must have its own plan of management (s.36D(2))
- the plan must state that the land is declared to be of cultural significance (s.36D(3)(a))
- the land must be categorised as an area of cultural significance (s.36D(3)(b))

- the plan must incorporate the core objectives prescribed for an area of cultural significance (s.36D(3)(c))
- the plan must incorporate any requirements of the Director General of National Parks and Wildlife. (The NPWS is responsible for sites of significance to aboriginal peoples.) (s.36D(3)(d))
- no change in the use of the land is permitted until a plan of management has been adopted that meets the above requirements
- no lease or licence can be granted until a plan of management is in place. (Leases etc that are in place before the land was affected by the council resolution can continue to operate).

When land is included in a resolution under s.36D, existing specific plans of management will need to be changed to comply with the provisions listed above. No change in the use of the land, and no new lease or licence can be granted until the plan of management is amended to comply with these requirements. (There is a limited exception to this in s.36D(4)(c)).

Generic plans that applied to the land cease to apply once a resolution is made. A new, specific, plan of management must be prepared that complies with the requirements. No change in the use of the land and no new lease or licence can be granted until the plan of management is made.

Given that changes to a plan of management will be required following a resolution, it may be more efficient for a plan of management to be altered or a new one drafted prior to a formal resolution. Council could initially resolve that its intention is to declare land as culturally significant following the preparation of a draft plan of management and community consultation. An appropriate plan of management can then be developed and could come into effect at the time of the formal resolution to declare land as culturally significant.

Special requirements for land of aboriginal significance

There are special requirements when community land is significant to the aboriginal community. Clause 20 of the Local Government (General Regulation) requires councils to request submissions as to whether the land is of Aboriginal significance from the Aboriginal community traditionally associated with that land. A procedure for giving notice is set out in that clause.

Council is required to consult before a decision is made as to whether the land is of Aboriginal significance, and therefore of cultural significance under s.36D.

Note that a council may also categorise land as culturally significant, without going first through the steps under s.36D, that is by specifying a category in a draft plan of management. If so, council must still engage in the same consultation under cl.20 before preparing a draft plan of management if the reason for categorisation is that land is of Aboriginal significance.

Consultation under cl.20 is also separate to the broader public consultation required once a draft plan of management has been prepared. It would clearly be desirable to obtain the assistance of the traditional Aboriginal community, as identified through the initial consultation, during this process as well, to determine effective management strategies for relevant land.

What land may be of aboriginal significance?

Land that may be of aboriginal significance is set out in clause 13 of the Regulation. This is broader than land on which physical evidence of Aboriginal occupation exists. It includes land that may be important to traditional or contemporary culture or land that contains European settlement that is of significance to Aboriginal peoples (eg old mission buildings, cemetaries, camping places, buildings where important events occurred).

Aboriginal cultural significance is intrinsically linked to natural heritage, particularly in traditional cultures. Many areas that are significant for natural values will also be significant to Aboriginal peoples. Therefore, where council is developing a plan of management for a natural area, aboriginal significance may need also to be considered. Management of the natural environment will be essential to the effective management of the Aboriginal values tied to the land. Where land may be of Aboriginal significance, the community land needs to be comprehensively assessed for all values and these need to be dealt with in a plan of management.

Who are Aboriginal people 'traditionally associated' with the land?

Clause 20 of the Regulation sets out the minimum notification requirements for council to identify and consult with Aboriginal people traditionally associated with the community land. These are;

- written notice to the Local Aboriginal Land Council
- advertisement in a Statewide newspaper primarily concerned with Aboriginal issues
- placement of a notice on the land itself.

While this is intended to be a practicable and effective means of consultation, there are other avenues that council may pursue if having difficulty in identifying relevant Aboriginal communities.

It is important to be aware that the Aboriginal people living locally may not represent those that are 'traditionally associated' with the land. Consequently the Local Aboriginal Land Council (which represents the local aboriginal residents) may not represent the views of the appropriate community. Native title claimants, elder organisations and other local Aboriginal organisations may all be able to assist. Agencies that may be able to assist in identifying communities traditionally associated with the land include;

- Native Title Tribunal – information on native title claimants and contact details for those claimants
- Native Title Unit, NSW Aboriginal Land Council – native title claimants and other relevant groups
- Registrar, Aboriginal Land Rights Act, NSW Department of Aboriginal Affairs – aboriginal owners listed on the Register under that Act
- Department of Aboriginal Affairs – contact groups and other resources

- Registrar of Aboriginal Heritage, National Parks and Wildlife Service – aboriginal sites identified under national parks legislation.

Aboriginal people associated with the land are the primary source of knowledge about the land. Secondary sources such as academic research could be used to complement this knowledge.

Process of consultation

Disclosure of information by Aboriginal people of their beliefs and values can be an infringement of their laws and customs and could have serious consequences on the person or community disclosing such knowledge. Thus Aboriginal people may be reluctant to disclose knowledge unless an area is immediately threatened with destruction. Traditional laws of Aboriginal people govern the way knowledge is conveyed to others. Therefore, different individuals within the community may have varying levels of knowledge depending on factors such as descent, kinship, age, gender and seniority.

In complying with clause 20 of the Regulation council could consider receiving oral rather than, or in addition to, written submissions. Oral history is a legitimate source of information and evidence and offers a culturally appropriate and accessible forum through which Aboriginal people may express themselves.

The Department of Aboriginal Affairs has provided suggestions for the way in which consultation with Aboriginal groups could be handled:

Consultation principles

- allow flexibility re timeframes, locations and objectives
- allocate adequate time
- remain neutral
- state who you are, your qualifications, the nature and role of your position in the consultation process
- plain English communication – do not use jargon
- understand the limitations of consultation
- facilitate discussion
- promise only what you can provide
- be honest about what the council wants to achieve
- allow frustration to be vented but do not accept personal abuse
- seek points of agreement

- seek resolution in areas of disagreement or articulation of disagreement
- seek cooperation of all parties concerned
- seek the best option for the community
- respect the views of all parties

Arranging consultations

- identify appropriate groups/people but remain flexible in who can participate
- advance notice of pending consultation
- adequate notice to the organisation/community of any meeting (one month or more)
- separate meetings for different groups if issues are not similar or there is friction between the groups
- information in plain English to be distributed before the meeting
- information should include a description of the proposal, the process of the proposal including timeframes, the consultation methodology, avenues for Aboriginal input in the process, list of all organisations involved in the consultation process (Aboriginal and non-Aboriginal)
- make people feel comfortable – provide food and drink as it shows commitment to consultation process
- Provide feedback on process to organisations including how the information has been incorporated into the proposal

Ongoing management

It may be appropriate to provide an ongoing process for Aboriginal involvement in management of heritage issues in the identified area. The incorporation and accommodation of Aboriginal peoples' diverse skills, knowledge and experience in management can provide significant assistance.

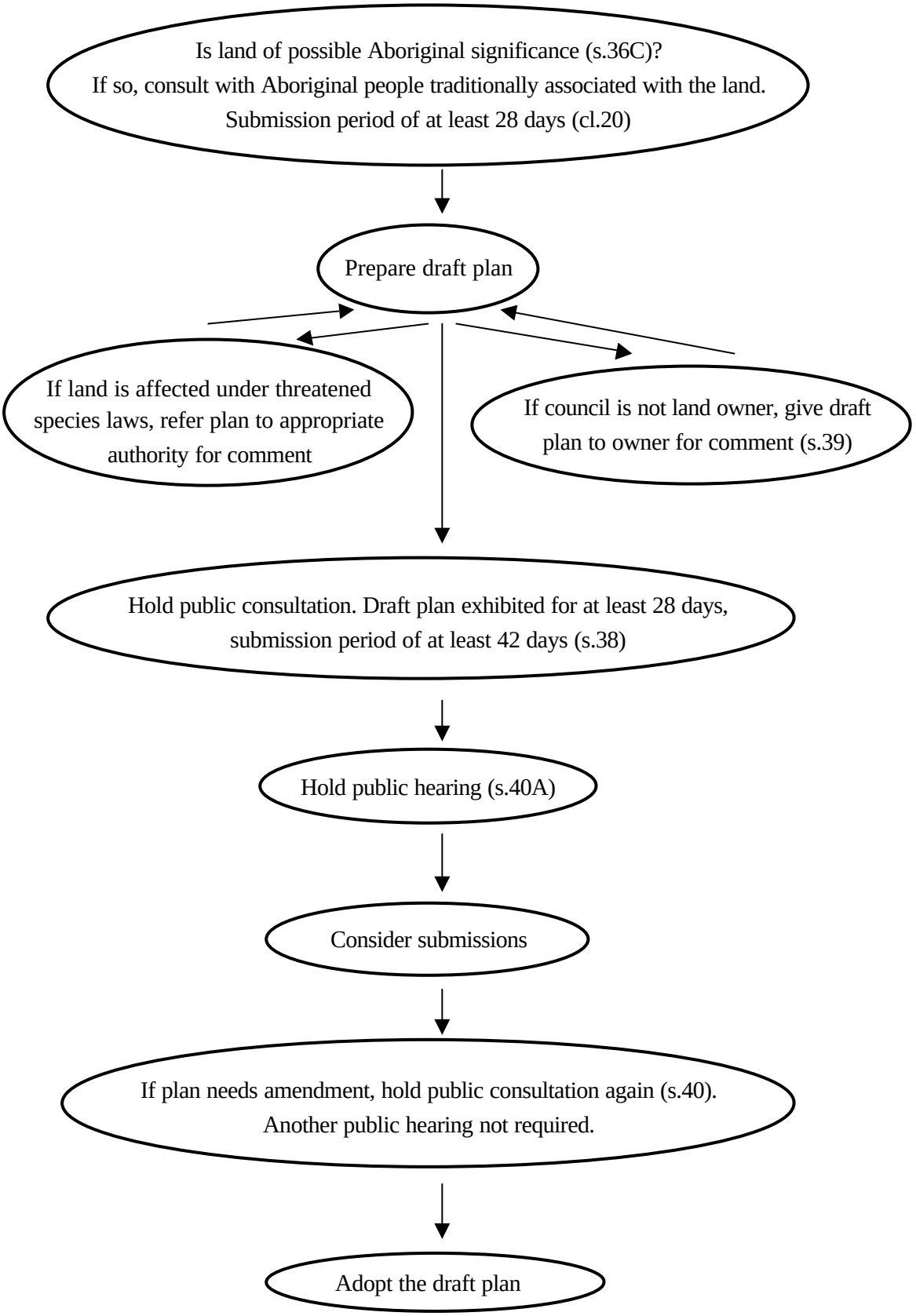
4.9 Public consultation in preparing plans of management

There are a number of ways in which the public can become involved in drafting plans of management. Council must provide these opportunities under the Act. The consequences of not providing for public involvement are:

- reduced acceptance of a plan of management, and possible conflict with council
- possible court action and a declaration that a plan of management, and any leases granted under the plan, are legally invalid.

The steps involved in public consultation are set out below. These are the minimum steps required under the Act. Council may choose to involve the community in other ways as well, such as in the preparation of the draft plan of management. The public also have a right to inspect and purchase plans and can apply to the council for a certificate indicating the classification of any public land.

PUBLIC CONSULTATION IN PREPARING NEW PLANS OF MANAGEMENT



5. LEASING, LICENSING AND THE GRANTING OF OTHER ESTATES OVER COMMUNITY LAND

Community land is classified because of its importance to the community. It is generally set aside for the public to enjoy. Leasing and other forms of alienation limit the ability of the public to use that land. The land is reserved for the exclusive use of one group or one person. Other matters may also arise, but this is at the core of the issues involved in the leasing etc. of community land.

The Local Government Act contains important restrictions on the ability of council to grant leases, licences and other estates over community land. This is coupled with requirements for public consultation to make sure that council takes community views into account.

5.1 Plans of management and leasing, licensing and granting other estates

Council may only grant a lease, licence or other estate if:

- ***the plan of management expressly authorises the lease etc. AND***
- ***the purpose of the lease etc is consistent with the core objectives for the category of land (s.46(2)) AND***
- ***the lease etc is for a purpose listed in section 46(1)(b).***

"Other estates"

The term "estate" is wide and includes many other rights over land that can be granted. The technical legal meaning is found in the Interpretation Act 1987, section 21 - "estate includes interest, charge, right, title, claim, demand, lien and encumbrance whether at law or in equity." A common example in local government is the grant of easements.

The term "other estates" was inserted on 1 January 1999. This means that all grants of all estates after this date, (not just leases and licences) must:

- be expressly authorised in a plan of management, and
- be consistent with the core objectives for the land and
- be for a purpose permitted under the Act.

Requests for easements for rights of way over community land to access private property should be carefully checked against the legislation to ensure that the easement is authorised, is for a purpose permitted under s.46(1)(b) and is consistent with the core objectives. While an easement may not be available, it is of course open to council to pursue other avenues to resolve access issues.

Express authorisation

A plan of management does not need to name a particular lessee etc in order to authorise a lease. It must contain a statement of authorisation that is wide enough to apply to the particular lease proposal. Council can limit the purpose of any lease, the type of potential lessee, and the facilities that will be leased. Hypothetical examples are discussed below.

Example 1:

"This plan of management authorises the lease, licence or grant of any other estate over the DLG Park for sporting and auxiliary purposes".

This could allow the lease of the community land to sporting clubs, schools etc for training, competitive matches. If the park includes changerooms and pavilions then these could be specifically included in any lease as well.

Question whether the authorisation is wide enough to allow a sporting club to operate a restaurant/ entertainment venue, for example. The issue would be whether "sporting and auxiliary purposes" authorises such a use. If a venue or other commercial use is contemplated by council, it should be included in a plan of management, in order to remove doubt about any authorisation and to properly inform the public.

Example 2:

"This plan of management authorises the leasing, licensing or granting of any other estate over the park, and any buildings on the park for any community purpose as determined by council."

This is a wide authorisation, but still limited to 'community purpose'. Again, authorisation may not be sufficient to allow a private business to lease the land for purely profit-making purposes.

It is important to provide a clear statement of authorisation, which can be easily understood by any person reading the plan of management. This reduces the likelihood of confusion and legal challenge. Examples of 'authorisations' that may not be clear follow below. They are based on actual authorisations from some plans of management.

Example 3:

"This plan of management –
expressly authorises the lease or licence or grant of any other estate over community land as follows:
DLG Hall to enable the use thereof as outlined under "use" above and in accordance with the Heritage Plan dated 1 January 1999 and prepared by DLG Pty Limited".

The authorisation is similar to that discussed in Seaton –v- The Council of the Municipality of Mosman (1996) 93 LGERA 1. The Court of Appeal in that case had to go to some effort to understand the clause. It suggested that the authorisation may be too vague or uncertain to have any meaning, but this was not discussed any further.

Example 4:

"Over time, leases and licences have been issued to sporting clubs for the use of the Park. It is however not intended that the park be alienated from general community use. It should be noted that leases and licences will include a clause covering the behaviour of sporting clubs using the park."

It is not at all clear what is intended by this statement. There is an indication that leases etc have been granted in the past, but this is not an adequate "authorisation" for any future licences etc. There is also a statement about the conditions under which future leases may be granted, but again this is not a clear "authorisation".

Consistency with core objectives

A lease etc must be authorised in a plan of management AND be for purposes consistent with the core objectives for the category of land.

Categorisation is therefore key to the management of community land. Categorisation will determine the core objectives for the land and the core objectives are essential to determining the ways in which community land may be alienated. This is particularly relevant in relation to natural areas where the core objectives of the category are to preserve and enhance the natural qualities of the land. Leasing etc should be carefully considered in these areas to determine potential compatibility of any lease with the core objectives.

The requirement that a lease etc be consistent with the core objectives came into force on 1 January 1999. Leases etc formally signed before that date do not need to comply and may continue until the end of their term.

Permitted purposes for leases, licences and other estates

A lease etc must be authorised in a plan of management AND be for a purpose consistent with the core objectives for the category of land AND be for a purpose listed in section 46(1)(b). A lease that is authorised by a plan, but which is not for a permitted purpose, is invalid under the Local Government Act.

The permitted purposes are listed in s.46(1)(b):

- short term, casual purposes prescribed in cl.24, Local Government (General) Regulation
- residential housing, where housing owned by council
- underground pipes etc to council-owned housing
- activities appropriate to the current and future needs of the community in relation to a number of wide public purposes, including public recreation and social welfare
- public roads.

Note that the requirement that a lease etc be for a purpose listed in s.46 came into force on 1 January 1999. Leases etc formally signed before that date do not need to comply and may continue until the end of their term.

Leases etc for public utilities

Leases, licences and other estates granted for the provision of public utilities and ancillary works do not need to be expressly authorised by a plan of management, or consistent with the core objectives, or be for a purpose listed in s.46(1)(b). Council is authorised by s.46(1)(a) to grant such estates (eg easements) without complying with the provisions applying to other purposes.

Leases etc of land categorised as a natural area

Special limitations apply to the alienation of natural areas, because of their environmental sensitivity. Council may only grant a lease of a structure/building or a lease to build a structure for the purposes listed in s.47B. These are limited to structures that assist in the public enjoyment of the land, such as walkways, kiosks (but not restaurants), amenities and the like.

Other provisions dealing with leasing etc

A number of amendments to the Act relating to leasing etc of community land commenced on 1 January 1999:

- council must call tenders for leases etc over 5 years, unless the lease etc is to be granted to a non-profit organisation, (s.46A).
- subleases are only allowable for the same purpose as the original lease, except for a handful of exceptions listed in cl.26, Local Government (General) Regulation. For example, the lease of a building to a sporting club for holding events/lessons/training cannot be subleased by the sporting club for public meetings, or markets (s.47C)
- council may only grant exclusive occupation of community land through a lease, licence or other estate. Council cannot bypass the Act by signing a 'management agreement' for example (s.47D)
- council cannot avoid the 21 year limit on leasing etc by including certain other terms in the lease (s.47(10))
- certain developments on community land must be determined by the council itself rather than by staff under delegated authority (s.47E).

5.2 Leases, licences and other estates of 5 years or less (section 47A)

Once a lease, licence or other estate complies with s.46 (explained above), council may move to grant particular estates to individuals. In doing so, council must:

- give public notice of the proposal
- place a notice of the proposal on the land
- notify owners adjoining the land
- notify persons living in the vicinity of the land if the council believes that the land "is the primary focus of the person's enjoyment of community land" (eg by letterbox drop)
- consider submissions made about the proposal.

The Minister can "call in" a lease etc of 5 years or less, so that a council is prevented from entering into any agreement unless the Minister gives approval. The Minister may require the more detailed procedures of s.47(5) – (9) to apply to the proposal. Approval for the council to grant the lease etc is then given by the Minister in the same way as for leases over 5 years.

Section 47A commenced on 1 January 1999.

5.3 Leases for terms of 5 to 21 years (section 47)

Council may only grant leases, licences and other estates over community land for terms up to 21 years. For leases between 5 and 21 years council must:

- give public notice of the proposal
- place a notice of the proposal on the land
- notify owners adjoining the land
- notify persons living in the vicinity of the land if the council believes that the land "is the primary focus of the person's enjoyment of community land"
- consider submissions made about the proposal
- refer the proposal to the Minister for Local Government if council has received an objection to the proposal.

If an objection has been received, the council cannot grant the lease etc but must refer the proposal to the Minister for approval.

5.4 Procedure for requesting the Minister's consent

Under s.47, council must forward certain information to the Minister so that a proposal may be considered. A checklist is set out below. The Minister cannot assess or approve any application until the right information is provided.

Checklist for lease approvals under section 47

✔ *A copy of the plan of management applying to the land.*

The plan of management must authorise the lease etc being proposed. This most basic of requirements has been overlooked by some councils.

✔ *Details of all objections received and a statement setting out, for each objection, the council's decision and the reasons for its decision.*

Attaching staff reports to council meetings may not be sufficient to satisfy this requirement if it is not clear what the objections have been and what council's position is on them.

✔ *A statement setting out all the facts concerning the proposal to grant the lease, licence or other estate.*

Relevant facts include:

- how the proposal arose
- how the lessee/licensee was decided upon
- previous dealings with the proposed lessee/licensee. Has council made any commitments to the lessee/licensee, such as signing a deed etc?
- information about the lessee/licensee – profit or non-profit, its purpose, business, history in the area
- any previous lease etc arrangements over the community land in question.

✔ *A copy of the newspaper notice of the proposal.*

It is important that in all notices, council gives the same date for the closing of submissions. If notices are published on different days and each notice states submissions close 28 days after publication of the notice, then this may give different closing days. Following Wingecarribee Shire Council –v- Minister for Local Government [1975] 2 NSWLR 779, different closing dates may make the public notice procedures invalid, and jeopardise the proposal.

✔ *A statement setting out the terms, conditions, restrictions and covenants proposed to be included in the lease, licence or other estate.*

A copy of the proposed lease etc, if available, is sufficient.

✔ *A statement setting out the manner in which and the extent to which the public interest would, in the councils' opinion, be affected by the granting of the proposed lease, licence or other estate, including the manner in which and the extent to which the needs of the area with respect to community land would, in the council's opinion, be adversely affected by the granting of the proposed lease, licence or other estate.*

This effectively asks council to consider all the elements of public interest in granting the lease, licence or other estate. It must consider both the advantages and disadvantages of the proposal. A copy of staff reports to council will not necessarily contain this information.

5.5 A note about commercial arrangements involving community land

Community land can be used for commercial operations, provided the requirements of the Local Government Act have been met. These steps include proper categorisation of the land and consistency with the core objectives, development of a plan of management and consultation with the public (including a public hearing). These have been discussed in this Practice Note.

Ultimately, it is for the council to judge what is desirable and appropriate development on community land, but the alienation of a public asset for commercial use should be approached cautiously. Some businesses may enhance the amenity of the land, for example, kiosks or recreation facilities. However, what may be fitting on one piece of land may not be suitable on another. Council has the difficult task of balancing all the competing factors.

The issues become more complex when larger operations on community land are discussed. These may involve council in an entrepreneurial role, facilitating the development. Council should be very wary of undertaking this role in relation to community land. There is an inherent conflict of interest between the role of council in managing community land and as 'entrepreneur'. The case of Noroton Holdings Pty Limited –v- Friends of Katoomba Falls Creek Valley Incorporated (1998) 98 LGERA 335, gives some guidance on this.

In that case the Blue Mountains City Council had signed a Deed with a developer, Noroton Holdings, to construct a hotel and residential development on part of an existing public golf course. The developer was also to upgrade the golf course and refurbish the clubhouse. The land was all categorised as community land. In the deed Council undertook to sell the necessary parts of the community land to the developer and Noroton agreed to undertake the development. It was recognised that rezoning of the land under the Local Environmental Plan was also required.

The deed was signed prior to any of the statutory steps being undertaken to rezone or allow the sale of the community land. An environmental study was required as part of the rezoning. The community land needed to be reclassified to operational land through an LEP to enable sale and a public hearing was therefore also required.

It became clear during these processes that part of the land was environmentally sensitive and that there was significant community opposition. Council was therefore placed in a great deal of difficulty. It had the statutory discretion to prevent the development from continuing but was bound under a commercial arrangement to progress the plans. Council tried to resolve the conflict in a way that the Court held was invalid. That is, the LEP reclassifying the land and the subsequent development consent were held to be not legally made.

The case illustrates the conflict of interest that arises where council takes a clear commercial interest in the use of community land. A council cannot 'fetter its discretion' in the exercise of statutory powers. Council is bound to carry out its role of managing community land, including the proper assessment of proposals to use community land and commercial arrangements cannot affect this.

If council does pre-empt processes under the Local Government Act by making commitments to a private operator, it may be liable to pay compensation to that operator if it later decides not to go ahead with the development.

6. Other issues

6.1 Use of community land for roads

Public roads may be created in a number of ways, either by council or by other agencies over various types of land, including community land. Section 47F places some restrictions on the dedication of public roads over existing community land and came into force on 1 January 1999. If council is to dedicate land as a public road under section 10 of the Roads Act 1993, then it is limited in doing so if the land affected is community land. Section 47F(1) details the restrictions, but note that section 47F(2) goes on to allow road widening works, and other minor road works authorised by a plan of management.

As a result, at the time a plan of management is being drafted, council should consider whether road works may affect the land, and include appropriate provision in the plan. Alternatively, if an existing plan does not have a provision, or the kind of road works contemplated are not allowable on community land in any case under s.47F, then council must consider reclassifying the land to operational land in order to carry out the works.

6.2 Amending and revoking plans of management

Council can amend plans of management at any time. Any amendment is regarded as another plan of management and so must be put on public exhibition in the same way (s.40). Council is not required to hold a public hearing when preparing an amending plan of management unless the plan will re-categorise the land (s.40A).

Council may revoke a plan of management at any time. However, councils are required to have a plan of management for each piece of community land, so a plan should only be revoked when another may take its place.

Remember that a plan of management is automatically revoked if it is a generic plan when:

- the land is affected by a declaration of critical habitat or inclusion in a plan under threatened species laws (s.36A, s.36B), or
- the land is declared by council to contain significant natural features under s.36C; or
- the land is declared by council to be of cultural significance under s.36D.

A plan of management will cease to apply to land when:

- it is reclassified to operational, or
- the owner of the land (not being the council) sells the land; or
- the council ceases to control the land (ie, if council is not the owner)

6.3 Specific and generic plans of management

Council has the discretion in most cases to prepare a specific plan of management for the area or a generic plan that applies to more than one piece of land. As a result of amendments, from 1 January 1999, generic plans of management cannot be made for:

- land declared as critical habitat, or directly affected by a threat abatement plan or a recovery plan under threatened species laws
- land declared by council to contain significant natural features
- land declared by council to be of cultural significance.

Generic plans will be entirely appropriate in many cases, for example in dealing with children's playgrounds or other pieces of land that contain similar facilities with similar management issues. Natural areas may not be so appropriate for generic plans, given that there may be issues unique to each piece of land, based on the character of the land, surrounding development, community expectations and so on. This does not prevent council from including common clauses or paragraphs in specific plans of management.

Alternatively, council could make a specific plan that incorporated another document that contained common provisions used in other specific plans. For example, council could make a brief site specific plan for each piece of land categorised as natural area. This plan must contain all the requirements of a plan of management, but these could be covered by reference to other documents such as "Management objectives – natural areas", "Rehabilitation strategies – natural areas" and so on. Council must make sure that all the requirements of the Local Government Act are covered and that it is clear what documents apply, and whether there is any qualification to these in the individual plan of management. All documents referred to in a plan of management should be displayed at the same time as the draft plan is being exhibited and should be publicly available in the same way as the plan itself.

6.4 Relationship of Local Government Act to other Acts

There are many pieces of legislation that may be relevant to the management of community land, depending on the circumstances. Some have already been mentioned (eg threatened species laws). Those that may be more generally relevant to community land management are listed below:

- **Crown Lands Act 1989**. Land to which the Crown Lands Act applies is excluded from the definition of "public land" under the Local Government Act. That is, community land will not be land to which the Crown Lands Act applies. However, there are similar management issues involved where council manages Crown land, either under a reserve trust or otherwise. Crown reserves may need a plan of management under the Crown Lands Act. Crown land may often include bushland or other undeveloped

land and may share a boundary with community land. Crown land may itself be required to have a plan of management under the Crown Lands Act. Sections of that Act deal with the interaction of the Act with the Local Government Act and the public land provisions in particular. Contact the Department of Land and Water Conservation for more details, and on the ways in which Council may integrate the management practices for both community and Crown land.

- **Environmental Planning and Assessment Act 1989** and State Environmental Planning Policies made under the Act

- **Threatened Species Conservation Act 1995**

- **Fisheries Management Act 1994**

APPENDIX 1 - SAMPLE FORM OF A PLAN OF MANAGEMENT

This sample outline of a plan of management is intended as a guide only. It is one of a range of ways in which council can develop a plan of management that complies with the Act. Many councils have developed innovative and informative plans which can be used as models. This model is intended to ensure that the minimum requirements of the Act have been met.

Council should also think about sharing its own or using the expertise of other councils to develop model plans for particular categories of community land. Such plans can then be used by individual councils, rather than each council having to develop its own plan in isolation. This also enhances regional consistency in the management of community land.

There are particular requirements in the Act that apply only if the plan of management is specific or generic, or where council is not the owner. These variations are identified. Council can also include other, optional, information to assist the public in understanding the management of the land. Ideas for additional information are included at the end of this sample plan.

Plan of Management for X Land
X Council
X Date of Adoption

1. Land covered under this Plan of Management

Council can simply state "this plan of management applies to x land." ***If the plan is generic***, Council could state "this plan of management applies to all x land (eg playgrounds, sportsgrounds, all land classified as …) in Council's area. Each piece or parcel of land covered by this plan is listed below (or in a Schedule)."

2. Category and classification of land

Council could state "the land is classified as community land under the Local Government Act. The land is categorised as x under the Act." ***If the plan is generic***, Council could state that "all the pieces of land covered by this plan are categorised as x.

If the land is declared as land containing significant natural features under s.36C: Council must state this in the plan of management. It must also include the reasons why the land was declared under s.36C.

For example, Council could state "the land has been declared by Council under s.36C of the Local Government Act as land containing significant natural features. The declaration was made because the land contains important geological formations including cliffs that give clear views over the DLG valley".

3. Owner of the land

Council could state simply "the land is owned by Council".

If the land is owned by another: Council could state "the land is owned by x and is held by council under (specify how council holds the land, and timeframe)." The plan must also go on to state any restriction, covenant, trust etc applying to the land. It must state whether the use or management of the land is subject to any condition imposed by the owner (s.37).

4. Management of the land.

Council could state that "the land is managed according to the objectives and methods set out below." Section 36(3) requires the following, as a minimum, be included:

Management Issues	s.36(3)(b) **Objectives and Performance Targets**	s.36(3)(c) **Means of achievement of objectives**	s.36(3)(d) **Manner of assessment of performance**
Broad issues can be listed here eg: "landscaping, equipment/facilities, traffic management, neighbour amenity".	Council must list all the core objectives that apply to the land under the Act. Council can also list other objectives that are consistent with these.	List practical steps that will be taken to achieve the objectives, eg; "design wheelchair friendly paths".	List practical measures of assessment eg: "assess useability of park by disabled through surveys, observation."

If the plan applies only to one piece of land (ie a specific plan): Section 36(3A)(a) requires the plan to include -

"4(1) Condition of the land and structures on adoption of the plan"

A description need only be brief, but it should be accurate.

For example, in relation to a park council could state that "At the date of adoption of this plan, grass cover in the park was generally good. Some areas within the children's playground area are poorly covered, as a result of frequent use. Trees and garden beds are thriving and in good condition. The amenities block is 20 years old and, while structurally sound, the toilet facilities are aging and in only fair condition. The children's play equipment is structurally sound and in good condition and complies with Australian Standards (where relevant)." A diagram showing the basic layout of the natural and built elements could be included.

If the land is classified as a natural area, the condition of the land will be important to the management of the land. Council can only know of vandalism, erosion, dieback of plants etc, unless there is an initial reference point of description of the land. A description of the land could include details of weed infestation, pollution on the land, health of the vegetation, erosion and so on. The description need only be brief.

"4(2) Use of the land and structures at the date of adoption of the plan"

Once again, only a brief note of the current usage is required. This should include details of current lease/ licence or other arrangements for the use of the land.

If the land is affected by threatened species laws: Council must state that the land is so affected. That is, council will need to state that:

"4(3) Threatened Species Laws"

"Land covered by this plan of management has been declared as 'critical habitat' under the Threatened Species Conservation Act 1995 (or the Fisheries Management Act 1994), because of the population of x on the land"
OR
"Land covered by this plan of management is directly affected by a recovery plan under the Threatened Species Conservation Act 1995 (or the Fisheries Management Act 1994)"
OR
"Land covered by this plan of management is directly affected by a threat abatement plan under the Threatened Species Conservation Act 1995 (or the Fisheries Management Act 1994)".

Council could also go on to explain that it has responsibilities under the relevant threatened species Act to manage the land in accordance with that Act. These are in addition to the matters in the plan of management. If the land is affected by a recovery or threat abatement plan it may be helpful to state that a copy of the plan is available from Council, or the National Parks and Wildlife Service.

5. Future use of the land

Council could include a general statement about its intentions for the future use of the land, the types of activities contemplated and so on.

If the plan is a specific plan: Council must include a statement of the purpose of any permitted future use and development of the land (s.36(3A)(b)). It must also describe the scale and intensity of the permitted use:

"5(1) Future use and development of the land"

The statement does not need to be long, but it will be binding on council once included, so any statement should be well thought out. A statement will apply to the activities of Council on the land as well as any other person (eg under a lease).

A statement of permissible purposes and intensity of use will be closely related to any authorisation of leasing etc that council includes in a plan. An authorisation of leasing applies specifically to the use of community land by others apart from Council. The statement under this heading and any authorisation should be consistent with each other.

For example, in relation to a park, council could state "the park will be used in future for general community recreation, with public right of access to all outdoor areas. Council will permit the erection of an amenities block and/or kiosk, if appropriate. Outdoor seating at the kiosk is permitted, provided no more than 20 seats are erected."

6. Leases, licences and other estates.

If council is going to consider granting leases etc, it must include an authorisation in the plan of management. Council's authorisation should cover:

- the type of arrangement authorised –ie, council may authorise leases and/or licences and/or other estates
- the land or facilities to be covered – ie, council may allow leasing etc of all or some of the land and facilities
- the purpose for which leasing etc will be granted – council may choose to allow leasing for community purposes, business purposes, or more limited purposes such as sports or child care facilities.

Any authorisation should be consistent with a statement required in specific plans of management about the permissible future development of the land (see above).

6(1) Tendering for leases, licences and other estates.

Section 46A requires a council to tender for leases etc of community land over 5 years, unless the lease etc is to be granted to a non-profit organisation. In addition, council may choose to nominate other leases etc which will only be entered into after a tender process (s.46A). This is optional for councils.

For example, council may state that " leases, licences and other estates granted for the purposes of …… will be granted only after a tender process in accordance with the Local Government Act 1993".

7. Approvals for activities on the land

Section 68, Part D, of the Act requires approvals issued by Council for certain activities on community land. Council may choose to list these approvals here. Cross reference may also be made to any Local Approvals Policy that applies.

8. Other information that could be included

Council may include other information in a plan of management where desired, for example:

- history of the land and its use
- previous studies of the land or other background information
- any relevant council policies
- control of activities on the land such as through signs under s.632, Local Government Act
- relevant zoning and land use restrictions under the Environmental Planning and Assessment Act 1979
- the impact of any other Acts on the management of the land
- how the land is managed in practice – through a council committee, council officers etc
- contact details for any further information on the community land

APPENDIX 2 – INFORMAL MODEL LEP CLAUSE TO RECLASSIFY PUBLIC LAND AND REMOVE RESTRICTIONS

This model is provided as a guide to councils of the way in which an LEP could be drafted to comply with section 30. The draft has been prepared by the Parliamentary Counsel's Office.

Classification or reclassification of public land as operational land

(1) The public land described in Schedule 1 is classified, or reclassified as operational land for the purposes of the Local Government Act 1993.

(2) In accordance with section 30 of the Local Government Act 1993, a parcel of land described in Part 2 of Schedule 1, to the extent that it is a public reserve, ceases to be a public reserve on the commencement of the relevant amending plan and, by the operation of that plan, is discharged from any trusts, estates, interests, dedications, conditions, restrictions and covenants affecting the land or any part of the land, except for:

  (a) any reservations that except land out of a Crown grant relating to the land; and

  (b) reservations of minerals (within the meaning of the Crown Lands Act 1989).

(3) Before the relevant amending plan that inserted the description of a parcel of land into Part 2 of Schedule 1 was made, the Governor approved of subclause (2) applying to the land.

(4) In this clause, *the relevant amending plan*, in relation to a parcel of land described in Part 2 of Schedule 1, is the local environmental plan cited at the end of the description of the parcel.

(5) Land described in Part 1 of Schedule 1 is not affected by the amendments made by the Local Government Amendment (Community Land Management) Act 1998 to section 30 of the Local Government Act 1993.

Schedule 1 Classification or reclassification of public land as operational land

Part 1

describes land classified or reclassified as operational land prior to 1 January 1999 (ie commencement of the Local Government Amendment (Community Land Management) Act 1998. The LEPs reclassifying this land and removing any restrictions did not need the Governor's approval.

Part 2

describes land that was classified or reclassified as operational land since 1 January 1999.