Protocol for the Planning Secretary's step-in powers

For integrated development and concurrence authority for certain developments

The Planning Secretary's 'step-in' powers include:

1. acting on behalf of an approval body for integrated development under Division 4.8 of the NSW *Environmental Planning and Assessment Act 1979* (EP&A Act) and Division 3 of Part 3 to the Environmental Planning and Assessment Regulation 2021 (EP&A Regulation)
2. acting as a concurrence authority for certain development requiring concurrence under section 4.3 of State Environmental Planning Policy (Planning Systems) 2021 (Planning Systems SEPP).

The step-in powers help prevent delays in the assessment of development applications. The step-in powers are operationalised by the Planning Delivery Unit (PDU) in the Department of Planning and Environment. The PDU is a central point to resolve blockages in the planning system for industry, councils and other government agencies.

Integrated development

Integrated development is development that requires approval from a NSW Government agency (also called an approval body) before a determination can be made by the local council or other consent authority (the consent authority).

Section 4.47(4A) of the EP&A Act authorises the Planning Secretary to act on behalf of an approval body to inform the consent authority whether or not it will grant the approval sought or the general terms of its approval (GTA).

The Planning Secretary may choose to use the power to step-in when:

- the approval body has failed to inform the council as the consent authority whether or not to grant or refuse the approval sought and the GTA within the GTA assessment period
- there is an inconsistency identified by council as the consent authority in the GTA of two or more approval bodies. This means compliance with a GTA of one approval body would not be possible without breaching a GTA of another approval body
- the approval body has not given written notice to council as the consent authority within the relevant assessment period set by section 46(4) of the EP&A Regulation of whether or not to grant or refuse the approval or the GTA.

The Secretary's assessment requirements for development requiring general terms of approval (SARs) are prescribed by the EP&A Regulation and should be read in conjunction with this document. The SARs set out the matters that the Planning Secretary should consider when acting

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on behalf of an approval body. The SARs are published on the Planning Portal and may be amended by the Planning Secretary if required.

Development requiring concurrence

Under section 3.18(2) of the EP&A Act, where consent is required for development, an environmental planning instrument may provide that a development application (DA) shall not be granted except with the concurrence of a minister or public authority (concurrence authority) specified in the environmental planning instrument to the carrying out of the development.

Section 4.3 of the Planning Systems SEPP authorises the Planning Secretary to act as a concurrence authority for certain development under nominated State environmental planning policies. The Planning Secretary may elect to be the concurrence authority if an agency whose concurrence is required fails to inform the consent authority of their decision regarding concurrence within the relevant times allowed in the EP&A Regulation. The relevant consent authority may continue to decide whether to grant concurrence to the development until the Planning Secretary gives written notice to the consent authority of their decision.

Protocol purpose

The purpose of this protocol is to:

- provide clarity about when the Planning Secretary's involvement takes place
- outline the process for the use of the Planning Secretary's step-in powers and application of the SARs
- outline the principles for effective working relationships between the department and NSW Government agencies
- encourage timely processing of integrated development applications and applications requiring concurrence through improved communications, proactive consideration of issues, and transparent and effective inter-agency procedures.

Protocol application

This protocol applies to:

- integrated development applications where a council is the consent authority[1] or where the approval body is also a concurrence authority (s.4.51, EP&A Act)
- development that requires concurrence.

Attachment A lists approval bodies and concurrence authorities (referred to generally in this protocol as 'agencies'). Attachment B outlines the approvals and concurrences in detail.

While the PDU may assist with progressing referrals for advice from other government agencies, this protocol does not apply to that scenario.

[1] This is because the SARs only apply in these circumstances as of May 2020.

Protocol outcomes

The intended outcomes of this protocol are to create:

- robust and clear decision-making pathways
- the use of consistent processes and practices by government agencies
- a fair and transparent process for resolving disputes and delays
- a reduction in the time taken by the government to process requests for its advice
- collaborative work practices between government agencies
- ways for the NSW Government to proactively deal with councils and applicants.

Roles and responsibilities

Department

When applying this protocol, the department will:

- determine whether to issue general terms of approval and/or concurrence where the step-in powers apply
- determine whether the assessment clock should be turned back on, where a request for information has been made outside the criteria specified in the SARs
- implement the issues resolution process where agencies' general terms of approval, concurrence or consultation advice are in dispute (i.e. cannot be concurrently implemented)
- facilitate an amendment to the technical requirements listed in the SARs in a timely and orderly manner, where an agency requires this.

Approval bodies and concurrence authorities

When acting as an approval body or concurrence authority, agencies will:

- process requests for general terms of approval, concurrence or consultation advice as required and within the relevant timeframes
- for integrated development and where the Planning Secretary acts on behalf of an approval body, have regard to the SARs in its assessment
- participate positively in any issues resolution process to seek a constructive outcome
- consider all reasonable requests to review its advice to address errors, omissions or oversights
- issue general terms of approval or concurrence requirements that are clear and concise.

Planning Secretary

Where a negotiated outcome cannot be reached in the dispute resolution process, the Planning Secretary will issue a final whole of government advice having regard to the SARs.

When the Planning Secretary's step-in powers will be used

The Planning Secretary may only use the step-in powers in the circumstances set out by the legislation described in the initial section of this document. The intent is that the step-in powers will be used as a last resort and only after the consent authority has taken adequate steps to resolve any outstanding issues with a relevant approval body or a concurrence authority. The protocol applies when an applicant, consent authority or the PDU requests the Planning Secretary to use the step-in powers.

How the Planning Secretary will use the step-in power

Attachment C summarises how the Planning Secretary will exercise the step-in powers.

A request to use the Planning Secretary's step-in powers is submitted to or initiated by the PDU.

The PDU on behalf of the Planning Secretary will initially seek a resolution with the relevant agency or consent authority by identifying whether a decision from the agency is imminent or unlikely to be received. If a decision is unlikely to be received, the PDU will:

- consider whether the complexity of issues being assessed warrants a longer timeframe for assessment by the agency
- seek evidence to demonstrate the consent authority and approval body/concurrence authority have genuinely attempted to resolve the issues. Evidence may include records of phone discussions, meeting minutes or written correspondence between the consent authority and approval body/concurrence authority
- apply case management to attempt to resolve the issue on behalf of the consent authority.

If the issue cannot be resolved, the PDU will determine if the department has capacity and expertise to assess the matter (e.g. resources, specialist capability).

If a resolution cannot be met, the PDU is to assess if the request has merit.

If the PDU determines the request does not have merit, the PDU will refuse the request and notify the relevant consent authority, approval body or concurrence body.

If the PDU determines the request does have merit, the PDU is to provide as soon as practicable:

- a written notice to the consent authority and approval body of the recommended general terms of approval (GTAs) in relation to integrated development
- a written notice of election to the consent authority to act as concurrence authority.

The written notice will provide the approval body or concurrence authority 14 days to provide written advice and can request the step-in power not be used or be deferred for a set period. Advice may include input on GTA's/concurrence conditions. Any request to defer must provide reasons why the extension is required and the anticipated date that a response will be provided. The approval body or concurrence authority is required to inform applicants of the request to not intervene. This must include the reasons for the delay and the anticipated date that a response will be provided.

The PDU will then provide a recommendation to the Planning Secretary including any agency advice, recommended GTAs/concurrence conditions and an assessment of the SARs in relation to integrated development.

The Planning Secretary decide to approve or refuse the GTA or concurrence. The PDU (on behalf of the Planning Secretary) is then required to give written notice, including GTAs or concurrence conditions to the relevant consent authority and approval body as soon as practicable.

The consent authority should refer any queries regarding this notification directly to the PDU.

The consent authority remains ultimately responsible for deciding whether to grant development consent (with or without conditions) or refuse a DA. While the consent authority cannot approve the development during the Secretary's assessment period before receiving the Planning Secretary's advice, it may refuse the DA at any time. If the consent authority refuses to grant development consent before the expiration of the Secretary's assessment period, the consent authority must notify the Planning Secretary in writing as soon as possible after the determination.

Matters the Planning Secretary must consider

Integrated development

When exercising the step-in power for integrated development, the Planning Secretary must have regard to the SARs (s.4.47(4A)(b), EP&A Act). The SARs is a statutory document prescribed by the EP&A Regulation and is published on the Planning Portal. The SARs contains the matters the Planning Secretary must consider, including the relevant legislation and the technical and assessment requirements for the approvals. Attachment D summarises the step-in process described in the SARs.

Where two or more approval bodies are proposing conflicting GTAs, the Planning Secretary is to consider the guidance principles contained in the SARs and weigh up those conflicting matters.

Concurrences

When exercising the legislative step-in power for concurrences the Planning Secretary is required to consider the specific considerations in the relevant environmental planning instrument (s 4.3(3) of the Planning Systems SEPP).

Commencement and review

This protocol is effective from the date of publishing and operates until the protocol is revised or terminated. The department will review, update or terminate the protocol as required, and with appropriate consultation with stakeholders.

Attachment A – Application of the protocol

This protocol applies to approval bodies and concurrence authorities in the NSW planning system, including but not limited to the following - or their current equivalents:

- Department of Planning and Environment
  - Environment Protection Authority
  - Environment & Heritage
  - Natural Resources Access Regulator
  - Property NSW
- Transport for NSW
  - NSW Trains
  - Roads and Maritime Services
  - State Transit
  - Sydney Trains
  - Sydney Metro
- Ausgrid
- Transgrid
- Endeavour Energy
- Essential Energy
- WaterNSW
- Sydney Water Corporation
- Marine Estate Management Authority
- Department of Primary Industries
  - Fisheries
  - Water
  - Lands
- NSW Rural Fire Service
- Subsidence Advisory NSW
- Department of Premier and Cabinet (Heritage NSW)

Attachment B – Approvals and concurrences where the step-in power may be used

Integrated development

Table 1. Approvals for integrated development

NSW Act	Provision	Approval
Coal Mine Subsidence Compensation Act 2017	s 22	Approval to alter or erect improvements, or to subdivide land, within a mine subsidence district
Fisheries Management Act 1994	s 144	Aquaculture permit
Fisheries Management Act	s 201	Permit to carry out dredging or reclamation work
Fisheries Management Act	s 205	Permit to cut, remove, damage or destroy marine vegetation on public water land or an aquaculture lease, or on the foreshore of any such land or lease
Fisheries Management Act	s 219	Permit to set a net, netting or other material, or construct or alter a dam, floodgate, causeway or weir, or otherwise create an obstruction, across or within a bay, inlet, river or creek, or across or around a flat
Heritage Act 1977	s 58	Approval in respect of the doing or carrying out of an act, matter or thing referred to in s 57 (1)
Mining Act 1992	ss 63, 64	Grant of mining lease
National Parks and Wildlife Act 1974	s 90	Grant of Aboriginal heritage impact permit
Petroleum (Onshore) Act 1991	s 16	Grant of production lease
Protection of the Environment Operations Act 1997	ss 43 (a), 47 and 55	Environment protection licence to authorise carrying out of scheduled development work at any premises
Protection of the Environment Operations Act	ss 43 (b), 48 and 55	Environment protection licence to authorise carrying out of scheduled activities at any premises (excluding any activity described as a 'waste activity' but including any activity described as a 'waste facility')
Protection of the Environment Operations Act	ss 43 (d), 55 and 122	Environment protection licences to control carrying out of non-scheduled activities for the purposes of regulating water pollution resulting from the activity

NSW Act	Provision	Approval
Roads Act 1993	s 138	Consent to erect a structure or carry out a work in, on or over a public road, dig up or disturb the surface of a public road, remove or interfere with a structure, work or tree on a public road, pump water into a public road from any land adjoining the road, or connect a road (whether public or private) to a classified road
Rural Fires Act 1997	s 100B	Authorisation under section 100B in respect of bush fire safety of subdivision of land that could lawfully be used for residential or rural residential purposes or development of land for special fire protection purposes
Water Management Act 2000	ss 89, 90, 91	Water use approval, water management work approval or activity approval under Part 3 of Chapter 3

Development requiring concurrence

Table 2. Development requiring concurrence from another body or agency

Environmental planning instrument	Provision	Approval
Environmental Planning Policy (Transport and Infrastructure 2021)	ss 2.96, 2.98, 2.100	The following development requires the concurrence of a rail authority: • Development that involves a new level crossing, the conversion of a private access road across a level crossing into a public road, or a likely significant increase in the total number of vehicles or the number of trucks using a level crossing as a result of the development. • Development involving the penetration of ground to the depth of at least 2m below existing ground level on land: – within, below or above a rail corridor – within 25m (measured horizontally) of: ○ a rail corridor ○ the ground directly below a rail corridor ○ the ground directly above an underground rail corridor. • Development on "Zone A" land on a rail corridors map that has a capital investment value (CIV) of more than $200,000. • Development on "Zone B" land on a rail corridors map that involves the penetration of ground to a depth of at least 2m below existing ground level or has a CIV of more than $200,000 and involves the erection of a structure that is 10 or more metres high, or an increase in the height of a structure that is more than 10m.

Environmental planning instrument	Provision	Approval
State Environmental Planning Policy (Transport and Infrastructure 2021)	s 2.117	Certain development on land reserved for the purposes of a classified road (before the land is declared to be a classified road) that may require the concurrence of Transport NSW (TfNSW): • subdivision that results in the creation of additional lot with dwelling entitlements • development with a CIV greater than $185,000 • development for the purpose of dwellings that are, or any other building that is, to be held under strata title.
State Environmental Planning Policy (Transport and Infrastructure) 2021	s 3.22	Development for the purpose of a centre-based child care facility if: • the floor area of the building or place does not comply with regulation 107 (indoor unencumbered space requirements) of the Education and Care Services National Regulations (ECSN Regulations) • the outdoor space requirements for the building or place do not comply with regulation 108 (outdoor unencumbered space requirements) of ECSN Regulations. The development also requires concurrence of the Regulatory Authority.
State Environmental Planning Policy (Biodiversity and Conservation) 2021	s 8.9	Development under Part 4 of the EP&A Act on land that is in the Sydney drinking water catchment requiring concurrence of the Regulatory Authority.
State Environmental Planning Policy (Precincts – Central River City) 2021	s 3.19	Development for previously permitted uses of land and where the relevant public authority referred to s 3.20 of State Environmental Planning Policy (Precincts – Central River City) 2021 may be required to acquire the land is required to grant concurrence to the proposed development.
State Environmental Planning Policy (Precincts – Central River City) 2021	s 6.10 of Appendix 7 (Alex Avenue and Riverstone Precinct Plan 2010)	For the purpose of the Alex Avenue and Riverstone Plan 2010, development of land within or adjacent to the specifically mentioned public transport corridor requiring the concurrence of TfNSW.

Attachment C –Process for using the Planning Secretary's step-in powers

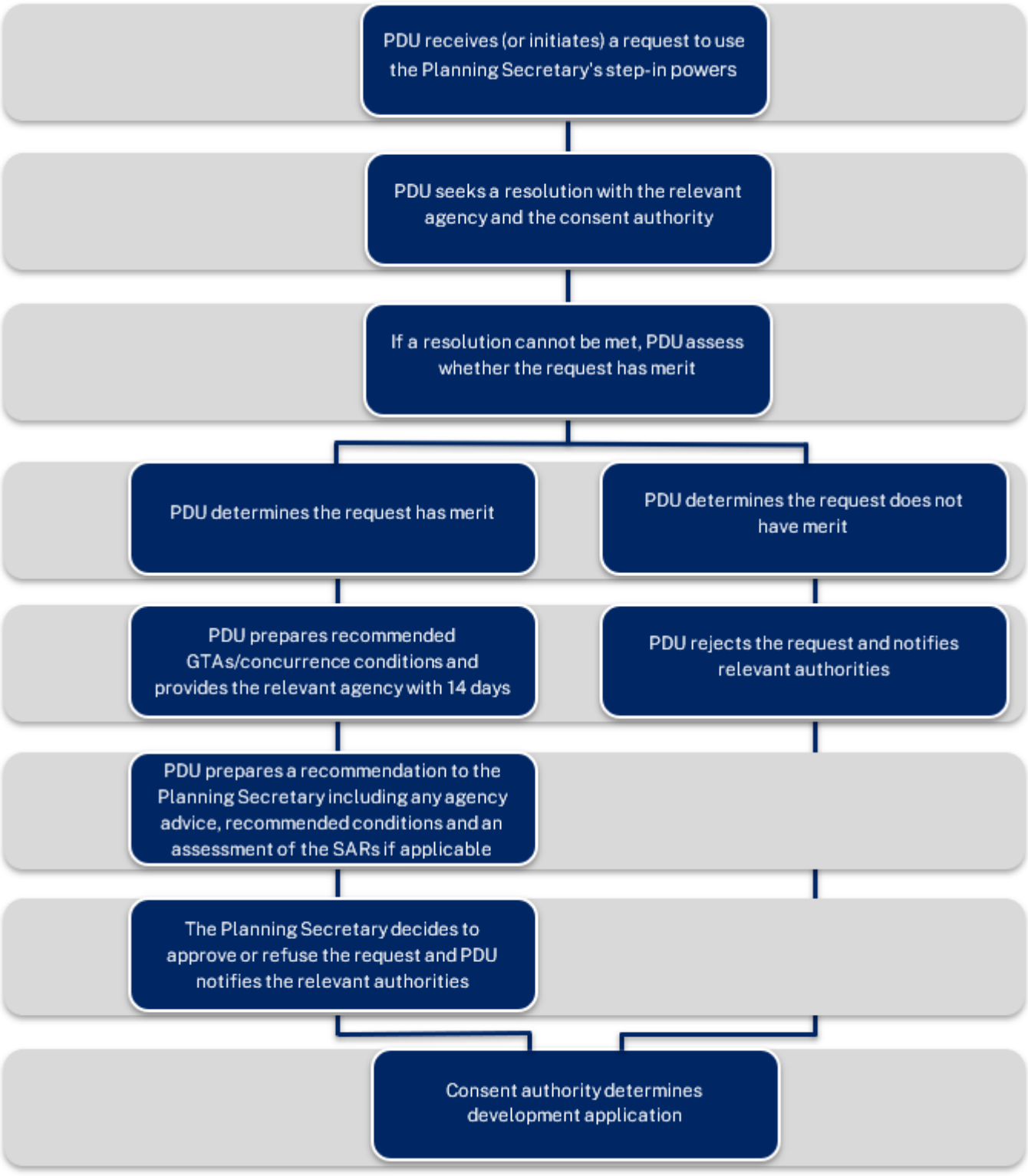

Figure 1. Flowchart diagram summarising the process of the Planning Secretary's step-in powers

Attachment D – Summary of the SARs process

When exercising the step-in power, the Planning Secretary must take into consideration the assessment requirements specified for each approval in Part 2 of the SARs. At present, this process applies only to local development for which council is the consent authority. The process is summarised below.

Stage 1 – Identify the approval

The Planning Secretary will consider the basis upon which an approval is required. As part of this, the Secretary undertakes the following:

1. Review the request and any material that was provided to the approval body and identify the approval that is sought.
2. Identify who the approval body is and consider their role under the relevant legislation.

Stage 2 – Obtain the information needed for the assessment

The Planning Secretary will determine what information is required to make the decision. As part of this, the Planning Secretary will undertake the following:

3. Look at the relevant legislation and identify the general legislative requirement.
4. Determine what information is required, including key policies, publications and guidelines.
5. Compare the information that has been provided against the information generally required and then determine whether it is possible to make the decision in the circumstances. If not, the Planning Secretary should consider whether additional information should be obtained from either the applicant, agency or the consent authority.

Stage 3 – Make the decision

The Planning Secretary will follow the process that the approval body generally follows when making the decision. As part of this the Planning Secretary will go through the following step:

6. Consider the information available together with any relevant policies and guidelines and determine whether to grant an approval.

Stage 4 – Give general terms of approval

The following steps apply:

7. Once the Planning Secretary has considered all of the information provided and any relevant policies and guidelines under Step 6, the Secretary must decide whether to grant the approval sought, or whether it should be refused.
8. Where the Planning Secretary determines to grant approval, the Secretary must consider whether to grant it unconditionally or subject to conditions. If a conditional approval is to be granted, the reasons for the imposition of these conditions should be stated.

Glossary

Applicant means an applicant for development consent where general terms of approval or concurrence is required in accordance with the EP&A Act.

Approval means a consent, licence, permit, permission or any form of authorisation.

Approval body has the same meaning as that given to the term in section 4.45 of the EP&A Act.

Concurrence authority has the same meaning as in the Environmental Planning and Assessment Regulation 2021.

Consent authority means the consent authority for a development application as designated in accordance with Part 4, Division 4.2 of the EP&A Act.

Department means the Department of Planning and Environment.

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

EP&A Regulation means the Environmental Planning and Assessment Regulation 2021.

GTA assessment period is the period of 21 or 40 days prescribed by section 45(1) of the Regulation as the period within which the approval body must notify its decision to the consent authority[2].

Integrated development is defined in section 4.46 of the EP&A Act.

Planning Secretary means the Secretary of the department responsible for planning matters (currently the Department of Planning and Environment).

SARs means Secretary's Assessment Requirements for Development Requiring General Terms of Approval.

[2] This period may be extended by the operation of Division 4 of Part 4 to the Regulation.