

Explanation of Intended Effect

Amendments to the:

State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 for outdoor dining on private land and at registered clubs; and

Standard Instrument - Principal Local Environmental Plan 2006 to include a new floor space bonus clause for new developments to include music venues

October 2023



Credit: Destination NSW



Acknowledgement of Country

The Department of Planning and Environment acknowledges that it stands on Aboriginal land. We acknowledge the Traditional Custodians of the land and we show our respect for Elders past, present and emerging through thoughtful and collaborative approaches to our work, seeking to demonstrate our ongoing commitment to providing places in which Aboriginal people are included socially, culturally and economically.

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Introduction

This Explanation of Intended Effect (EIE) describes the proposed changes to the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (also known as the Codes SEPP) to support the approval of outdoor dining on private land including registered clubs. It also describes proposed changes to the *Standard Instrument – Principal Local Environmental Plan 2006* (SI LEP) to introduce a floor space/density ‘bonus’ clause for new developments comprising venues that support live music.

Background

The NSW Government made a range of election commitments including to make outdoor dining permanent and measures to support live music. These, together with other commitments, aim to provide communities and creatives across the state with more vibrant, dining, performance and leisure destinations and experiences.

The changes proposed are the start to provide a simpler planning and approval framework to encourage businesses and venues to set up and flourish. They aim to provide certainty for businesses to invest and for councils to have the tools to encourage the development and opportunities that they want to see for their communities. The proposals form part of a broader series of changes over the coming months across government agencies.

Outdoor dining approved as complying development

During the COVID-19 pandemic, the NSW Government introduced temporary state-wide exemptions for outdoor dining on private land and at registered clubs so that these activities could occur without the need for planning approval. These exemptions are due to end on 31 December 2023.

The exemptions allowed businesses to swiftly set up outdoor dining areas and keep trading as COVID-19 safety measures limited the number of people allowed inside venues. This kept people in jobs, helped communities to feel safe, and supported the hospitality industry. Outdoor dining has become increasingly popular with the community, enabled businesses to offer new experiences, revitalised under-used space and drawn people to visit new neighbourhoods.

The NSW Government made an election commitment to permanently relax the rules for outdoor dining to allow food and drink premises to advantage of private space outside their venues. Instead of a full development application (DA) or modification to their current approval, businesses will be able to submit a simpler application to their local council or a private certifier for outdoor dining.

In preparation of exemptions expiring, the Minister proposes to establish a new fast-track approval pathway for outdoor dining at private land and registered clubs. This will include new development standards to balance the needs of businesses whilst maintaining amenity for surrounding residents.

There is no change to the Codes SEPP’s exempt process for businesses using the footpath, road or public open space. These businesses will continue to obtain a permit through their local council.

Floor space bonus to incentivise music venues

As a result of previous lockdown laws in the Sydney CBD and the recent COVID-19 pandemic many music venues in NSW have closed or experienced significant economic losses. To assist in reinvigorating the night-time economy, the NSW Government made an election commitment aimed at encouraging new music venues by offering floor space and density bonuses for new developments that comprise music venues.

To implement the floor space and density bonus initiative, an optional model clause is proposed to be included in the SI LEP. This will give councils the mechanism to undertake strategic planning to identify suitable locations, land uses, and corresponding numerical bonuses if adopting the model clause.



Credit: Don Fuchs

Outdoor dining as complying development

Proposed changes

We are proposing to amend the Codes SEPP to establish a new complying development pathway for outdoor dining on private land and at registered clubs. This will replace the temporary exemption and will be permanently added to Part 5 Industrial and Business Alterations Code. New development standards provide opportunities for businesses to give their customers great dining experiences. Existing standards and the venue's approvals make sure neighbouring residents and surrounding land uses are not negatively impacted.

Objectives and intended outcomes

The exempt pathways for private land and registered clubs were originally intended to be a temporary measure during the pandemic. Currently no assessment is needed for the dining area and the increased area does not allow venues to have more customers. The proposed changes will seek to establish a permanent, fast-tracked approval pathway for businesses. This will allow already approved businesses to provide outdoor dining areas without the need to go through a modification to their development application (DA).

A permanent complying development pathway gives greater certainty for businesses and assurance for surrounding properties that the venue's dining area has been assessed as suitable. Businesses will be able to choose a council or private certifier to carry out the assessment and issue the complying development certificate.

Proposed amendment to the Liquor Regulation 2018

To accompany the exempt development pathway for outdoor dining on private land and at registered clubs, the NSW Government also made it easier for Liquor & Gaming NSW (L&GNSW) to issue temporary liquor licence boundary approvals. These applied to existing licensed premises for outdoor dining areas on private land adjacent to these licensed premises, such as carparks and bowling greens. This streamlined approval pathway for temporary licence approvals will also expire on 31 December 2023.

L&GNSW proposes to make this streamlined pathway permanent, consistent with the final outdoor dining proposals to be included in the Codes SEPP.

L&GNSW has issued 192 approvals for temporary licence boundary changes on private land since the introduction of the temporary liquor licence boundary measure (L&GNSW data current on 13 September 2023). The data includes approvals for all types of licensed premises, including hotels, clubs, small bars, cafes, restaurants and wholesaler/producer. It does not capture outdoor dining for non-licensed premises.

Explanation of changes

The proposed development standards for outdoor dining on private land and at registered clubs are outlined in **Table 1** below along with proposed operational conditions for the dining area.

Table 1: Outdoor dining as complying development on private land and for registered clubs

| Specified development | Development standards | Operational conditions |
|---|--|---|
| <ul style="list-style-type: none"> • Must be undertaken on private land, if the use is associated with lawful food and drink premises such as a restaurant or café, a pub or small bar, a registered club, takeaway food and drink premises and artisan food and drink industry. • Must not be located on rooftops. • Must not include smoking areas or gaming machines. • Must not be in the E5 Heavy Industrial Zone. | <ul style="list-style-type: none"> • Must not restrict any vehicular or pedestrian access to or from the building or land. • Must not be in a car parking space or restrict access to a car parking space. • Must not reduce the existing access for people with a disability. • The total allowable floor area for outdoor dining is calculated as a percentage of the internal gross floor area of the premises, as follows: <ul style="list-style-type: none"> - in an E3 Productivity Support, E4 General Industrial, SP3 Tourist, SP5 Metropolitan Centre or RE2 Private Recreation zone – 100% - in an E1 Local Centre or E2 Commercial Centre – 50% - in a MU1 Mixed Use or any other zone – 25%. | <ul style="list-style-type: none"> • The use of the outdoor dining area must not exceed the hours of operation for the premises it is associated with. |

No change to outdoor dining on the footpath, roads or public open space

The Codes SEPP already allows food and drink premises to provide outdoor dining on the footpath, in the road reserve or public open space as exempt development under Subdivision 20A. This includes cafes, restaurants, pubs and small bars.

No changes are proposed to Subdivision 20A.

Businesses wanting to trade on the footpath or road should apply directly to their local council who will issue an outdoor dining permit under the *Local Government Act 1993* or *Roads Act 1993*.

Businesses wishing to serve alcohol must also apply to Liquor and Gaming NSW to have their liquor licence boundary approved to include their outdoor dining areas.

How have the standards been chosen?

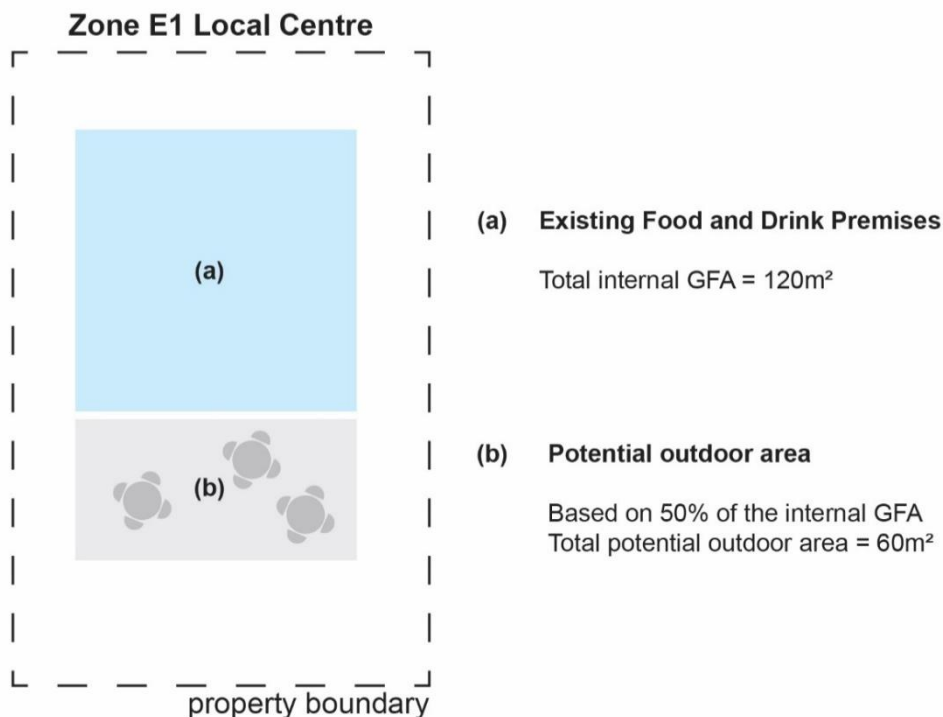
Outdoor dining floor area allowances

The proposed floor area allowances for outdoor dining areas are based on the size of the existing internal floor area of the premises and the land use zone it is located in (as detailed in **Table 1**). These floor area allowances enable appropriately sized outdoor dining areas that are in keeping with the size and capacity of the existing premises, and the objectives and general purpose of the zone.

For example, for a premises in the E1 Local Centre zone the proposed outdoor dining area may be up to 50% of the internal gross floor area (GFA) of the associated premises. This means, if the internal GFA of the existing premises measures 120 square metres, the outdoor dining area may be up to 60 square metres using complying development as illustrated in **Figure 1**.

If a business wanted a larger area, they can apply to council to modify their existing development consent.

Figure 1: Example E1 Local Centre zone allowable outdoor dining area calculation



Potential increase in the number of patrons

The exempt outdoor dining measures do not allow a venue to increase the number of patrons from their current development approval. This was because the COVID-19 measures moved the patrons outside when internal capacity was restricted.

The proposed complying changes allow the number of patrons to increase if the venue remains compliant with standards. [Clause 1.18](#) of the Codes SEPP sets out general requirements for complying development. This clause specifies that for development to be compliant it must meet the provisions of the Building Code of Australia (BCA). The BCA establishes guidelines for sanitary facilities (bathroom facilities), including the number of toilets, urinals and wash basins, that must be

provided based on the patron capacity of a venue. The need to meet the bathroom facilities requirements under the BCA is likely to restrict the capacity of an outdoor dining area, as otherwise the business may need to provide additional toilets to accommodate an increase in patrons.

For example, if a restaurant currently has capacity for 100 people and is seeking approval for an outdoor dining area under this complying development pathway that would increase the capacity of the venue by an additional 20 people, it will need to demonstrate that it has sufficient bathroom facilities at the premises for 120 people. This may mean that additional bathroom facilities would need to be installed at the venue.

No reduction in car parking spaces from outdoor dining

Outdoor dining areas will not be permitted in car parking spaces as complying development. The department acknowledges there may be certain cases where converting car parking spaces into outdoor dining areas may be appropriate, such as in metropolitan areas that benefit from good public transport. However, increased patron numbers may require, under certain council policies and approvals, additional car parking spaces to be provided. To strike a balance, the department proposes to allow an increase in patrons at the premises without the need to provide additional car parking, so long as the existing number of parking spaces at the venue are retained. This restriction aims to ensure there continues to be parking for staff, patrons, deliveries and performers without displacing this demand onto surrounding streets, accessible paths of travel and amenity.

If a business wants to use its car parking spaces for outdoor dining, this may still be possible. It is recommended that businesses speak to their council in the first instance to see what is possible under an existing development consent or whether a new application is required to modify a consent.

Outdoor dining in E5 Heavy Industrial zone is subject to council approval

Outdoor dining will not be permitted in the E5 Heavy Industrial zone as complying development. The restriction is proposed to uphold the objectives of the E5 zone, which include to provide areas for industries that need to be separated from other land uses, and to minimise any adverse effect of industry on other land uses. Given the potential for land use conflict and public safety, it is important that outdoor dining areas associated with existing food and drinks premises in heavy industrial areas are subject to a thorough assessment by the local council.

Outdoor dining on rooftops is subject to council approval

Outdoor dining on rooftops will not be possible as complying development. The restriction aims to ensure staff and patron safety, from such things as falls or the use of space that may not be structurally adequate. Moreover, there is the potential for increased noise or privacy impacts on surrounding properties, and further access and emergency evacuation requirement that may need to be considered. Given the potential risks, it is important that outdoor dining areas on rooftops are subject to a thorough assessment by the local council via a modification to the premises DA. The DA process also allows neighbours to comment on the proposed outdoor dining area.

Smoking areas and gaming machines are excluded for public health

Smoking areas and gaming machines are proposed to be excluded from outdoor dining areas. This restriction aligns with existing NSW Health smoking laws to protect people from harms of second-

hand smoke and vapour while dining. It also aligns with the regulations set by the L&GNSW for gaming machines, where the location of gaming machines must not attract attention of people from outside a licensed premises and should not be easily seen or heard from public areas.

Businesses can operate outdoor dining during normal trading hours

It is proposed that outdoor dining areas can be used during the normal trading hours of the premises. The trading hours will be determined by an existing development consent, complying development certificate, or exempt development provisions. This reflects the government's objective to modernise the going out experience.

Neighbour amenity is protected under existing legislation

The changes allow ongoing dining at suitable existing premises. However, in some instances there is a need to balance the use of private outdoor spaces and neighbouring land uses. Given the variety of potential locations, rather than introducing new measures, it is proposed that potential amenity impacts are managed under existing legislation, such as the *Protection of the Environment Operations Act 1997*.

The outdoor dining complying pathway does not permit building works

The proposed complying development pathway is for the use of the space as outdoor dining only. It does not allow for any building works to occur. However, some alterations or additions to an outdoor area could occur as exempt or complying development under other parts of the Codes SEPP.

Floor space bonus to incentivise music venues

Proposed changes

The Government has made a number of commitments to encourage vibrant and diverse night time activities and support live music. These will be delivered through a range of incentives for live music businesses available in the planning and liquor licence approvals systems. These include trading incentives to stay open longer, a reduction in liquor licence fees and more consistent application of trading hours.

It is proposed to insert a new optional clause into the Standard Instrument LEP that will allow councils to identify a floor space and/or height bonus that can be used in developments that contain music venues. This can be adopted and used by councils to encourage new and existing developments to have creative space built in, whether individually or part of a larger precinct.

Floor space and density bonuses are a feature of the NSW planning system and are already used by some councils to incentivise better planning outcomes. They can be used for design excellence, social housing, heritage conservation, community facilities and other public benefits connected to a private development.

The proposed change is an important first step and will help councils to attract investment in creative spaces, particularly in areas where this may be otherwise priced out by other uses. Councils will use their strategic planning process to identify locations where creative uses are in demand and can take advantage of local opportunities such as access to public transport nodes, or close to education, or other entertainment and recreation facilities. Following consultation with their communities, councils will set the standards for the amount, type and location of facilities. A floor space bonus will make providing the creative space an attractive and feasible proposal for developers including commercial and residential properties.

Objectives and intended outcomes

The arts industry has long called for support and improvements to help provide more venues and revitalise the arts sector. The Government is delivering on this through its election commitments which aim to make new venues more feasible to establish and more certainty in their operations and ability to grow. This is backed by a \$103 million commitment and includes establishing a contemporary music office.

Various planning, liquor licencing, building and sound regulation measures are seen as a barrier to new and small venues from establishing. The process is seen as slow, burdensome and uncertain which is stifling investment and preventing NSW from realising its potential.

The loss, cost and critical shortage of venues and performance space in NSW impacts opportunities for local and grass roots artists and musicians to rehearse, create and perform. There is a lack of suitably sized and equipped venues, which limits overseas acts and regional touring. This diminishes

NSW's ability to attract performers and events, often losing out to other states, and impacts our tourism attractiveness and the businesses this supports.

The objective of the proposed clause is to provide increased opportunities for development that will assist in boosting the NSW live music, entertainment and creative industries.

Explanation of changes

The optional bonus floor space/density clause is proposed to be inserted under Part 5 Miscellaneous provisions of the SI LEP.

Council will determine if they want to incentivise these uses through their strategic planning and in consultation with their communities, for example in their cultural policies and Local Strategic Planning Statements. Councils will also develop the specific criteria and numerical standards for the developments that the clause will apply to based on the outcome of its own strategic planning investigations and findings.

For example, councils may decide that the bonus should be available in certain areas such as Special Entertainment Precincts, in or around transport nodes or other strategic centres where there is a need for greater entertainment, cultural and creative offerings.

The bonus provisions will be set out in a council's local environmental plan and will include details of the extent of the bonuses, the locations where it applies and the benefits it incentivises.

The NSW Government will also explore opportunities to embed cultural space in State Significant Developments to support visitor attraction and increased private investment in the precinct and surrounding areas.

Supporting existing performance and cultural space and building creative space into new developments to support new venues, helps to create diverse precincts and creates or revitalises networks of going-out districts close to commercial, residential and transport hubs.

For the bonus clause to apply to a development, one or more of the following land uses must be proposed as part of the new development.

- **Creative industry** includes a building or place with the principal purpose to produce or demonstrate arts, crafts, design or other creative products, and includes artists' studios, recording studios, and set design and production facilities.
- **Entertainment facility** includes a theatre, cinema, music hall, concert hall, dance hall and the like, but does not include a pub or registered club.
- **Information and education facility** includes a building or place that provides information or education to visitors, and the exhibition or display of items, and includes an art gallery, museum, library, visitor information centre and the like.

The proposed structure, objectives and controls of the clause, are outlined in the table below.

Table 2 Proposed optional SI LEP bonus floor space/density clause

| Clause | Objectives and definitions | Controls |
|---|--|---|
| <p>Additional floor space for certain developments</p> | <p>Objectives may include:</p> <ul style="list-style-type: none"> • to encourage development for entertainment, cultural or creative purposes by allowing additional floor space areas and/or height for certain buildings. • to ensure the additional floor space areas and/or height reflects the desired character of the area, • to minimise adverse impacts on the amenity of the surrounding area, • to strengthen the status of identified precincts as strategic centres for entertainment, cultural and creative purposes. • to enable additional floor space areas and/or height as an incentive for certain developments to contain venues that support live music and performance. • <i>[each council to set out other relevant objectives of the clause specific to that local area]</i> <p><i>Include definitions for creative industry, entertainment facility, information and education facility, and any other relevant terms in the provision.</i></p> | <ul style="list-style-type: none"> • A building may exceed the maximum permissible floor space ratio and/or height <i>[standards to be developed by councils]</i> that is otherwise allowed under the provisions of this LEP if the development includes any of the following land uses: <ul style="list-style-type: none"> i. creative industry ii. entertainment facility iii. information and education facility • The consent authority must be satisfied that the part of the building that is used for one of the purposes above for a minimum period of – <i>[council to insert specific provisions]</i> |