



Urban Planning Committee

Agenda: *Urban Planning Committee*

Date: *Monday, 31 January 2005*

Time: *6.00pm*

Outline Of Meeting Protocol & Procedure:

- The Chairperson will call the Meeting to order and ask the Committee/Staff to present apologies or late correspondence.
- The Chairperson will commence the Order of Business as shown in the Index to the Agenda.
- At the beginning of each item the Chairperson will ask whether a member(s) of the public wish to address the Committee.
- If person(s) wish to address the Committee, they are allowed four (4) minutes in which to do so. Please direct comments to the issues at hand.
- If there are persons representing both sides of a matter (eg applicant/objector), the person(s) against the recommendation speak first.
- At the conclusion of the allotted four (4) minutes, the speaker resumes his/her seat and takes no further part in the debate unless specifically called to do so by the Chairperson.
- If there is more than one (1) person wishing to address the Committee from the same side of the debate, the Chairperson will request that where possible a spokesperson be nominated to represent the parties.
- The Chairperson has the discretion whether to continue to accept speakers from the floor.
- After considering any submissions the Committee will debate the matter (if necessary), and arrive at a recommendation (R items which proceed to Full Council) or a resolution (D items for which the Committee has delegated authority).

Delegated Authority (“D” Items):

- To require such investigations, reports or actions as considered necessary in respect of matters contained with the Business Agendas (and as may be limited by specific Council resolutions).
- Confirmation of Minutes of its Meeting.
- Any other matter falling within the responsibility of the Urban Planning Committee and not restricted by the Local Government Act or required to be a Recommendation to Full Council as listed below:

Recommendation only to the Full Council (“R” Items):

- Such matters as are specified in Section 377 of the Local Government Act and within the ambit of the Committee considerations.
- Broad strategic matters, such as:-
 - Town Planning Objectives; and
 - major planning initiatives.
- Matters not within the specified functions of the Committee.
- Matters requiring supplementary votes to Budget.
- Urban Design Plans and Guidelines.
- Local Environment Plans.
- Residential and Commercial Development Control Plans.
- Rezoning applications.
- Heritage Conservation Controls.
- Traffic Management and Planning (Policy) and Approvals.
- Commercial Centres Beautification Plans of Management.
- Matters requiring the expenditure of moneys and in respect of which no Council vote has been made.
- Matters reserved by individual Councillors, in accordance with any Council policy on "safeguards" and substantive changes.

Committee Membership:

7 Councillors

Quorum:

The quorum for a committee meeting is 4 Councillors.

WOOLLAHRA MUNICIPAL COUNCIL

Notice of Meeting

27 January 2005

To: The Mayor, Councillor Rundle, ex-officio
Councillor David Shoebridge (Chair)
John Comino
Christopher Dawson
Keri Huxley
Julian Martin
Isabelle Shapiro
Fiona Sinclair King

Dear Councillors

Urban Planning Committee Meeting – 31 January 2005

In accordance with the provisions of the Local Government Act 1993, I request your attendance at a Meeting of the Council's **Urban Planning Committee** to be held in the **Committee Room, 536 New South Head Road, Double Bay, on Monday 31 January 2005 at 6.00pm.**

Gary James
General Manager

Meeting Agenda

Item	Subject	Pages
1	Leave of Absence and Apologies	
2	Late Correspondence	
3	Declarations of Interest	

Items to be Decided by this Committee using its Delegated Authority

D1	Confirmation of Minutes of Meeting held on 13 December 2004	1
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Items to be Submitted to the Council for Decision with Recommendations from this Committee

R1	Clause 25(2) Woollahra LEP 1995 – 1064.G	2
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Item No: D1 Delegated to Committee
Subject: **Confirmation of Minutes of Meeting held on 13 December 2004**
Author: Les Windle, Manager – Governance
File No: See Council Minutes
Reason for Report: The Minutes of the Meeting of Monday 13 December 2004 were previously circulated. In accordance with the guidelines for Committees' operations it is now necessary that those Minutes be formally taken as read and confirmed.

Recommendation:

That the Minutes of the Urban Planning Committee Meeting of 13 December 2004 be taken as read and confirmed.

Les Windle
Manager - Governance

Item No: R1 Recommendation to Council
Subject: **Clause 25(2) Woollahra LEP 1995**
Author: Chris Bluett - Manager Strategic Planning
File No: 1064.G
Reason for Report: To respond to a decision of the Council made on 13 September 2004.
To respond to legal advice from the Council's lawyers and to issues arising from a recent appeal in the Land and Environment Court relating to Nos.20-22 Roslyndale Avenue, Woollahra.

Recommendation

That a draft local environmental plan be prepared to amend Woollahra LEP 1995 by deleting clause 25(2).

Background

This report arises from two matters involving the interpretation and application of clause 25(2) of Woollahra LEP 1995. The first matter relates to an appeal in the Land and Environment Court against the refusal of development applications for subdivision and for residential development of land known as Nos. 20-22 Roslyndale Avenue, Woollahra. The second matter relates to the recently exhibited Draft Stormwater Management DCP.

Clause 25 – Woollahra LEP 1995

Clause 25 of Woollahra LEP 1995 requires the Council to be satisfied about the provision of water, sewerage and stormwater systems before granting consent to a development application. Clause 25 states:

25. Water, wastewater and stormwater systems

- (1) The Council must not grant consent to the carrying out of development on land or subdivision of land to which this plan applies for the purpose of a habitable building unless it is satisfied that adequate water and sewerage services will be available to the land it is proposed to develop.
- (2) The Council must not grant consent to the carrying out of development on land or the subdivision of land to which this plan applies for any purpose unless it is satisfied that adequate provision **has been made** (emphasis added) for the disposal of stormwater from the land it is proposed to develop.

The key issues with the operation of clause 25(2) are:

- The provision applies to all development, including subdivision, which requires consent.
- The Council must be satisfied that “adequate provision” has been made for the disposal of stormwater **before** it grants consent. That is, the assessment of adequacy cannot be left to a stage after determination through a condition of consent.
- The “provision” can take a number of forms, such as a physical form in the case of pipes, or a legal form, in the case of an easement over land to accommodate the pipes, or both.
- The provision has to be “adequate” in the Council’s mind. This can be a technical assessment regarding the quantum or type of facility, or the nature of the legal arrangement, or both.

- Various arguments have been put in the Court (**annexure 1**) and separately by Brian Preston SC engaged by the Council (**annexure 2**) about the necessity for the physical or legal arrangement, or both if required, to be in place before consent is granted. This matter is discussed in more detail in section 1.2, below.

Whilst one trigger for this report has been the events generated by the development applications and appeals relating to 20-22 Roslyndale Avenue, the issues go beyond those events due to the broad application of clause 25(2) and its consequences for development proposals and for development assessment.

Appeal in Land and Environment Court

In 2004, two appeals were lodged in the Land and Environment Court against the Council's deemed refusal of development applications for residential development of five units and four town houses (DA 4/2004) and for Community Title subdivision (DA 3/2004) of Nos.20-22 Roslyndale Avenue.

The circumstances of the proposal relevant to clause 25(2) are:

- The development scheme proposes to drain stormwater by a gravity pipe system into the Council's drainage system in Wallaroy Road through an existing drainage easement 1.83 metres wide (registered LPI dealing DP 640968).
- The existing drainage easement, which benefits 22 Roslyndale Avenue (Lot 7 DP 9477) and burdens Lot 56 DP 8336, is subject to conditions including the following:

The right herein granted to exist only during the use of Lot 7 DP 9477 for the purposes of a single or dual occupancy.

- Other than the existing drainage easement, no easement has been obtained for the purpose of stormwater drainage of the land that forms the development application site.
- An easement over adjoining land fronting Wallaroy Road is required in order to drain stormwater from the development application site to the Council's drainage system by gravity means.

When filing its statement of issues with the Court, the Council raised the following preliminary question of law for determination by the Court:

Whether the Council or the Court have the power to grant development consent to the proposal having regard to the lack of a relevant downstream drainage easement to dispose of stormwater from the proposed development, given the requirements of clause 25(2) of the Woollahra Local Environmental Plan 1995?

The preliminary point of law was heard in the Court by Bignold J on 3 August 2004 and the judgement was handed down on 9 August 2004 (**annexure 1**).

The competing arguments made to the Court by the legal representatives for the Council and the applicant are summarised in paragraphs 8, 9 and 10 of the judgement.

The judgement addresses both the powers of the Council and the Court to grant development consent in light of the restrictive provisions of clause 25(2) of Woollahra LEP 1995. In the case of the Court, the judgement also refers to the Court's use of section 40 of the *Land and Environment Court Act 1979* to make an order for the creation of an easement, which facilitates the required stormwater drainage for the proposed development.

This report to the Urban Planning Committee does not deal with the Court's powers under section 40 of the *Land and Environment Court Act 1979* or with the conclusions of His Honour about the possible use of section 40 in the appeal for Nos.20-22 Roslyndale Avenue.

For the purposes of this report's recommendation it is only necessary to look at the operation of clause 25(2) and how it affects the granting of consent by the Council to a development application. It follows though, that if clause 25 is amended in the manner suggested in this report, the Court, acting in the role of consent authority, will need to use the amended provision in its consideration of future appeals relating to Woollahra. Accordingly, use of section 40 may not be necessary in similar cases.

His Honour made the following comments in regard to the interpretation and operation of clause 25(2):

12. There is no issue between the parties that cl 25(2) of the LEP precludes the grant of development consent to the two pending development applications unless the Court relevantly "is satisfied that adequate provision has been made for the disposal of stormwater from the land it is proposed to develop".

13. To the extent that the parties are in dispute concerning the precise limits of the reach or ambit of the requirement that there be "adequate provision", I am of the opinion that that requirement in the present cases (which propose the disposal of stormwater via the existing easement over the adjoining property fronting Wallaroy Road) includes consideration of the legal capacity or competence for so utilising the existing easement (in addition to any question of the physical capacity of the existing drainage infrastructure provided in that easement).

14. Upon the assumption that the evidence adduced at the hearing of the appeals will be insufficient (either legally or factually) to enable the Court to conclude that "adequate provision" relevantly has been made for the disposal of stormwater (for example that the evidence satisfies the Court that there is no legal entitlement to utilise the existing easement over the adjoining property for the purpose of disposing of stormwater from the proposed development) my adjudication upon the remainder of the parties' competing arguments is as follows:

- (i) cl 25(2) of the LEP would not be capable of being satisfied by the imposition of a condition of the type suggested by the Applicant, not only because logically the imposition of such a condition requires the grant of development consent and that grant is proscribed by cl 25(2) unless the relevant adequate stormwater provision "has been made", but also because the imposition of the condition necessarily carries the possibility of non-compliance therewith, with the legal consequence that the Court could not be satisfied that adequate provision relevantly "has been made": cf *Hornsby Shire Council v Malcolm* (1986) 60 LGRA (ii) 429 at 442 per Glass JA (with whom Mahoney JA at 443 agreed); and*
- (ii) the power vested in the Court to make an order pursuant to the LEC Act, s 40 upon application being made to it, would be available in the event of Court "determining to grant development consent" to the pending development applications and the making of a s 40 Order would be capable of satisfying the requirements of cl 25(2) of the LEP.*

His Honour answered the question of law in the following manner:

The Court may not grant development consent unless it is satisfied that adequate provision has been made for the disposal of stormwater from the land it is proposed to develop in terms of cl 25(2) of the LEP.

In the present cases where it is proposed to utilise the existing easement over an adjoining property the question of the adequacy of the provision may legitimately include consideration of the legal capacity or competence to utilise the existing easement (in addition to any consideration of its physical capacity).

If on the hearing of the appeals it be held that the existing easement is not legally available for the proposed purpose the requirements of cl 25(2) of the LEP would not be capable of being satisfied by the imposition of a condition of development consent requiring such provision but those requirements would be capable of being satisfied by the making of an order pursuant to the LEC Act, s 40 for the creation of any necessary easement if the Court, on the hearing of those appeals, determines to grant development consent.

On 16 August 2004, the Development Control Committee considered reports on the two development applications. On 30 August 2004, the Council refused both applications, with one of the reasons in each determination being:

The applicant has failed to satisfy Council that adequate provision has been made for the disposal of stormwater pursuant to clause 25(2) of WLEP 1995.

The two appeals were combined to a single appeal (10140 of 2004) against the Council's refusal of the two development applications. The hearing was conducted over four days commencing on 1 November 2004. Judgement has been reserved.

Draft Stormwater Drainage Management DCP

A Draft Stormwater Drainage Management DCP (Draft DCP) has been prepared and was submitted to the Urban Planning Committee on 30 August 2004. At its meeting on 13 September 2004, the Council resolved to place the Draft DCP on public exhibition and also resolved:

- C. *That a further report be prepared regarding the making of a draft local environmental plan to amend clause 25 of Woollahra LEP 1995, which deals with water, wastewater and stormwater systems, so that consent to development applications may be granted upon the Council considering the adequacy of water, sewerage and stormwater drainage systems applying to the land that is proposed to be developed, including compliance with an approved Stormwater Management Plan.*

The Draft DCP includes controls for the connection of stormwater drains on private land to Council's drainage system. It also contains requirements for utility service easements.

Gravity discharge of stormwater to Council's drainage system is the preferred method of stormwater disposal. Exemptions from this method are provided in the case of alterations and additions to existing dwelling-houses.

In circumstances where an easement over an adjoining property is required and the applicant cannot demonstrate that the easement has been secured, the Draft DCP specifies two outcomes for a development application. The first is refusal of the application. The second outcome is the granting of consent subject to a deferred commencement condition which requires the registration of a suitable easement. Based on the recent legal interpretation of clause 25(2) by the Court, the second outcome would not be legally possible. Brian Preston QC has provided advice on this matter. Refer to **annexure 2** and the covering memorandum.

Having regard to the identified constraints of clause 25(2), a fundamental feature of the Draft DCP, namely the use of deferred commencement conditions, would appear to be inoperable. Consequently, an amendment to Woollahra LEP 1995, as foreshadowed by the Council decision of 13 September 2004, is required.

Proposed amendment to Woollahra LEP 1995

Brian Preston QC (**annexure 2**) and Deacons (**annexure 3**) have provided advice on clause 25(2). This advice is circulated on confidential sheets.

The two options available to the Council are to either amend clause 25(2) or delete it. We do not consider the third option of retaining the clause in its current state to be an acceptable one. An amendment to clause 25(2) might take the following form:

- (2) In determining a development application on land to which this plan applies, the Council must consider the provision of stormwater disposal services for the land proposed to be developed as may be relevant to the development the subject of the development application.

The second option, being deletion of the clause, is preferred for a number of reasons that are set out below.

Appropriate consideration exists under section 79C of the Act

We consider clause 25(2) may be deleted without there being any resultant loss in the proper and effective consideration of stormwater disposal from a development site. We say this because section 79C of the Act adequately deals with the assessment of stormwater disposal in four areas by requiring the Council to consider the following matters relevant to development proposals:

- The provisions of any development control plan (section 79C (1)(a)(iii)). The Draft Stormwater Drainage Management Plan, once approved and in force, will be used where relevant to a development proposal under this head of consideration.
- The likely impacts of that development, including environmental impacts on both the natural and built environment, and social and economic impacts in the locality (section 79C(1)(b)).
- The suitability of the site for the development (section 79C(1)(c)).
- The public interest (section 79C(1)(e)).

Conflict with intent of the Act and Regulation regarding options for granting consents

The Act and the *Environmental Planning and Assessment Regulation 2000* (the Regulation) provide for the granting of a deferred commencement consent and a staged development consent.

Section 80(3) of the Act states:

(3) ***“Deferred commencement” consent***

A development consent may be granted subject to a condition that the consent is not to operate until the applicant satisfies the consent authority, in accordance with the regulations, as to any matter specified in the condition. Nothing in this Act prevents a person from doing such things as may be necessary to comply with the condition.

Section 80(4) and (5) state:

(4) ***Staged development***

A development consent may be granted:

- (a) *for the development for which the consent is sought, or*
- (b) *for that development, except for a specified part or aspect of that development, or*
- (c) *for a specified part or aspect of that development.*

- (5) *A development consent referred to in subsection (4) may be granted subject to a condition that the development or the specified part or aspect of the development, or any thing associated with the development or the carrying out of the development, must be the subject of another development consent.*

In both options the Council is obliged to carry out a proper consideration of relevant matters under section 79C prior to granting consent to a development application. It is, however, apparent through sections 80(1), 80(4) and 80(5) that having met the provisions of section 79C the Council may in certain circumstances restrict the operation of a consent until a matter has been carried out to its satisfaction or it can allow development to occur in stages.

Conflict with intent of the Act and the Regulation regarding detail in development applications

The Act and the Regulation do not require detailed construction plans, specifications, and construction methods to be provided and resolved at the development application stage. To do so would remove the need for a construction certificate. Instead, applicants are required to submit information necessary to enable proper assessment under section 79C of the Act. The information required is set out in schedule 1 of the Regulation, which is supplemented by clause 54 of the Regulation. Clause 54 specifies, in part:

Consent authority may request additional information

54(1) A consent authority may request the applicant for development consent to provide it with such additional information about the proposed development as it considers necessary to its proper consideration of the application.

(4) However, the information that a consent authority may request does not include, in relation to building or subdivision work, the information that is required to be attached to an application for a construction certificate.

Note. *The aim of this provision is to ensure that the consent authority does not oblige the applicant to provide these construction details up-front where the applicant may prefer to test the waters first and delay applying for a construction certificate until, or if, development consent is granted.*

The intent to allow resolution of certain development details after consent is granted is also found in the operation of clause 161 of the Regulation which states:

Certifying authorities may be satisfied as to certain matters: section 1090

161 (1) This clause applies to the following matters:

(a) any matter that relates to the form or content of the plans and specifications for the following kind of work to be carried out in connection with the erection of a building or the subdivision of land:

- (i) earthwork,*
 - (ii) road work, including road pavement and road finishing,*
 - (iii) stormwater drainage work,*
 - (iv) landscaping work,*
 - (v) erosion and sedimentation control work,*
 - (vi) excavation work,*
 - (vii) mechanical work,*
 - (viii) structural work,*
 - (ix) hydraulic work,*
 - (x) work associated with driveways and parking bays, including road pavement and road finishing,*
- (b) any matter that relates to the external finish of a building.*

(2) Any requirement of the conditions of a development consent that a consent authority or council is to be satisfied as to a matter to which this clause applies is taken to have been complied with if a certifying authority is satisfied as to that matter.

Preferred option

Whilst clause 25(2) may be amended to remove the requirement for stormwater services as a precondition to granting consent, we do not believe such an amendment will add any material benefit to the assessment of stormwater disposal above the operation of section 79C of the Act. In fact, the amended clause will, at the most, only replicate the consideration required under section 79C, which does not assist in reducing the current multi-layered planning process. Our recommended preference therefore is to delete the clause through an amendment to Woollahra LEP 1995.

Identification of income and expenditure

Preparation of a draft LEP can be undertaken using inhouse resources. All costs associated with the preparation can be taken from the existing 2004-2005 budget.

Conclusion

Interpretation of clause 25(2) of Woollahra LEP 1995 in a recent judgement from Bignold J in the Land and Environment Court has confirmed the operational problems with the clause. With its current construction clause 25(2) produces undesirable consequences for the development assessment process.

In order to ensure the effective operation of the Draft Stormwater Drainage DCP it is also necessary for clause 25(2) to be, at the very least modified, but desirably deleted for the following reasons:

- (a) Section 79C of the Act adequately deals with the assessment of stormwater disposal.
- (b) The Act and Regulation allow the Council to require sufficient information for the proper assessment of a development proposal, which in turn may lead to a conclusion that development is environmentally acceptable and consent may reasonably be granted.
- (c) Measures such as deferred commencement consents and conditions of consent can be used to ensure that adequate stormwater disposal is provided at certain stages of the development process. These measures are legally binding on applicants and their successors.
- (d) Public input to the assessment process is maintained and issues of public concern can still be properly considered.
- (e) Rights under civil law are not diminished.
- (f) The Act and Regulation envisage that construction details can be provided and assessed at the construction certificate stage and therefore do not need to be resolved and in place before development consent is granted.
- (g) It is not practical or reasonable to effectively withhold consent until provisions for services and facilities have been made where:
 - development is permissible with consent and has been properly assessed to be environmentally acceptable
 - sufficient information and facts are available at the time of assessment to conclude that the development is environmentally acceptable and consent can reasonably be granted
 - public input has occurred and issues of public concern have been properly considered
 - the rights of third parties under civil law are not overridden by the granting of consent
 - the consent would be subject to a condition that requires a physical work or a legal arrangement, or both to be carried out, and, in the case of the legal arrangement, to be carried out prior to a construction certificate being issued.
- (h) It avoids matters being determined by the Court.

Chris Bluett
Manager Strategic Planning

Allan Coker
Director Planning and Development

Annexures

1. Land and Environment Court judgement dated 9 August 2004 – preliminary point of law.
2. Advice from Brian Preston QC – circulated on confidential sheets with covering memorandum
3. Advice from Deacons – circulated on confidential sheets with covering memorandum