Urban Planning Committee

Agenda: *Urban Planning Committee*

Date: *Monday 13 February 2012*

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).

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 <u>not</u> 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.

Delegated Authority ("D" Items)

- To require such investigations, reports or actions as considered necessary in respect of matters contained within the Business Agendas (and as may be limited by specific Council resolutions).
- Confirmation of the Minutes of its Meetings.
- 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 above.
- Statutory reviews of Council's Delivery Program and Operational Plan.

Committee Membership:	7 Councillors
Quorum:	The quorum for a committee meeting is 4 Councillors.

WOOLLAHRA MUNICIPAL COUNCIL

Notice of Meeting

9 February 2012

To: Her Worship The Mayor, Councillor Susan Wynne ex-officio
Councillors Malcolm Young (Chair)
Chris Howe
Sean Carmichael
Lucienne Edelman
Nicola Grieve
Ian Plater
David Shoebridge

Dear Councillors

Urban Planning Committee Meeting – 13 February 2012

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 **Thornton Room (Committee Room), 536 New South Head Road, Double Bay, on Monday 13 February 2012 at 6.00pm.**

Gary James
General Manager

Additional Information Relating to Committee Matters

Site Inspection

Other Matters

Meeting Agenda

Item No: D1 Delegated to Committee

Subject: **Confirmation of Minutes of Meeting held on 30 January 2012**

Author: Les Windle, Manager – Governance

File No: See Council Minutes

Reason for Report: The Minutes of the Meeting of Monday 30 January 2012 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 30 January 2012 be taken as read and confirmed.

Les Windle
Manager - Governance

Item No:	R1 Recommendation to Council
Subject:	**Response to the Issues Paper of the NSW Planning System Review**
Author:	Allan Coker – Director Planning and Development; Chris Bluett , Manager Strategic Planning; Patrick Robinson – Manager Development Control; Timothy Tuxford, Manager, Compliance
File No:	885.G
Reason for Report:	1. To provide Council with an overview of the important issues for consideration in the review of the NSW planning system. 2. To enable the Council to make a submission on the planning system review.

Recommendations:

1. That Council make a submission to *the Issues Paper of the NSW Planning System Review*, December 2011, in accordance with the comments and observations made in the report to the Urban Planning Committee on 13 February 2012 and consistent with the key points summarised in annexure 4 to this report.

2. That the recommendation of the Urban Planning Committee be referred to Council as a matter of urgency because the closing date for submissions is 17 February 2012.

1. INTRODUCTION:

The NSW Planning System Review has been commissioned by the NSW Government to advise on a new planning system for the State and a new legislative planning framework to replace the *Environmental Planning and Assessment Act* 1979 (the Act).

A paper titled, *"The Way Ahead for Planning in NSW, Issues Paper of the NSW Planning System Review"* was released in December 2011. It provides a summary of the issues identified in stakeholder consultation across the State during 2011. The consultation was undertaken by Mr Tim Moore and Mr Ron Dyer to fulfil the first two terms of reference set by the NSW Government for review of the NSW planning system. The two terms of reference are:

1. Consult widely with stakeholder groups and communities throughout the State to identify the issues that require consideration in developing a new planning system.
2. To consider stakeholder and community submissions on issues identified during the consultation process.

The full Terms of Reference for the review are attached as annexure 1.

In response to the first term of reference Mr Moore and Mr Dyer conducted 91 community forums, held over 60 stakeholder group meetings and read more than 300 submissions.

The issues paper summarises the matters raised during consultations. It does not make recommendations as to the form or structure of a new or modified planning system. Arising from each issue the paper raises a number of questions which are grouped under the following categories:

A: A New Planning System: What should the underlying principles be?
B: Key elements, Structure and Objectives of a New Planning System
C: Making Plans
D: Development Proposals and Assessment
E: Appeals and Reviews; Enforcement and Compliance
F: Implementation of the New Planning System.

In total the paper poses 238 questions. These range from very specific questions about process to very broad questions about planning objectives, consent arrangements and how we should measure our planning performance. Due to the large number of complex issues which are raised in the issues paper this report does not address every issue. This is because we do not think it will be possible for the committee or Council to work through the issues in their entirety in the time that is available. The closing date for submissions is Friday 17 February 2012. It is for this reason we have focussed on the issues which are important to Woollahra across our three functional areas; Strategic Planning, Development Control and Compliance. We have recommended that the matter be dealt with as a matter of urgency at the Council meeting to be held on 13 February 2012 so that a submission can be made by the 17 February 2012 deadline.

On 30 January 2012, following consideration of recommendations from the Corporate and Works Committee in relation to *Destination 2036 – Draft Action Plan*, Council resolved as follows:

> *That Council note that Council will be preparing a submission on the Issues Paper of the NSW Planning System Review – December 2011 and that a report on the submission will be submitted to the Urban Planning Committee Meeting on 13 February 2012 with the recommendation of the Urban Planning Committee being referred to the Council Meeting on the same evening as a Matter of Urgency to allow Council to lodge the submission prior to the closing date of 17 February 2012.*

To assist in linking our comments to the specific questions and issues in the Issues Paper we have included references to the list of feedback questions. The full list of feedback questions is attached as annexure 2.

2. STRATEGIC PLANNING

2.1 Underlying Principles

A1. What should the objectives of the new planning legislation be?

The issues paper indicates that throughout the community forums there was a widespread desire for the new planning system to be:

- Simple, accountable and transparent, and
- Written in plain English

These are principles with which we strongly agree.

It also emerged during consultation that little concern was expressed about the objects contained in section 5 of the current Act. These are attached as annexure 3.

In summary, the existing objects are in three parts:

1. To *encourage*:

    - The proper management, development and conservation of natural and artificial resources
    - Orderly and economic use and development of land
    - Protection, provision and co-ordination of communication and utility services
    - The provision of land for public purposes
    - Provision and co-ordination of community services and facilities
    - Protection of the environment
    - Ecologically sustainable development
    - Provision and maintenance of affordable housing

2. To *promote* the sharing of responsibilities for environmental planning between different levels of government.

3. To *provide* increased opportunity for public involvement and participation in environmental planning and assessment.

We consider that these objects provide a good balance between protecting and enhancing both the natural and built environments and allowing appropriate economic development. We do not think that the objects of the Act need to be fundamentally rethought. Our submission should therefore support the retention of the objects which are contained in the current Act. In particular, the current objects should not be 'watered down' to give emphasis to economic development over the protection and enhancement of the natural and built environments.

2.2 Planning Proposals/LEPs

C24. How can amendments to plans be processed more quickly?

This can be achieved by reintroducing delegations to councils which are based on the type of planning proposal and the outcomes of various stages of the planning process. For example:

- proposals which deal with errata or minor errors in existing LEPs could be handled solely by a council.
- proposals which do not generate any submissions following the community consultation stage could be fast tracked without further referral to the gateway.

C28. Should some individual rezonings not require any merit consideration at a State level?

The Department of Planning and Infrastructure (DOPI) gateway process can be cumbersome and add to processing times. It can also result in inconsistent responses from different parts of the Department. For example, prior to submitting a planning proposal a council can work closely with the Department's regional office to discuss solutions to a planning problem. After submitting the planning proposal, which is based on discussions with the regional office, another arm of the Department, which is involved with the gateway determination, can form a different view to the regional office and modify the planning proposal to a point where the proposal is inconsistent with the council's intentions.

The gateway process introduces an element of uncertainty in the new planning proposal process which was not evident in the draft LEP process. To remove uncertainty and avoid delays in the process, the role of the gateway in providing comment on planning proposals which have been signed off by the regional office should be reviewed so that officers of the Department who have dealt with Councils in the lead up to the submission of a planning proposal are involved in the gateway process.

2.3 State Environmental Planning Policies (SEPPs)

C18. Should there be State environmental Planning Policies? If so, should they be in a single document? Or should they be provisions in a local environmental plan?

The complex overlay of State and local planning provisions can result in several planning instruments applying to one parcel of land, in some cases with complex arrangements to deal with inconsistencies between plans. The consequence is that the system becomes very difficult for 'Mum and Dad' applicants to find out what planning rules apply. While it is broadly accepted that a State government should have the power to implement its State and regional planning objectives the current arrangement with State plans overriding local plans produces a planning system of considerable complexity.

The number of State Policies should be reduced and if the NSW system is to be significantly simplified State policies should amend local plans rather than 'sit on top' of them. This would remove potential conflicts between State and local provisions and bring relevant State policies into a single document. While this will create additional workload for the State it will greatly improve and simplify the administration of the system for end users.

Exempt and complying development provisions are spread across nineteen SEPPs. Whilst some of these SEPPs are relevant to sites or areas, others apply to the whole State. The current arrangement of exempt and complying development provisions is multi-layered, complex and difficult to interpret, even for planning practitioners. The arrangement needs to be reviewed and simplified.

As a starting point, exempt and complying development provisions which are applicable to the whole State should be consolidated within a single SEPP. In the case of other provisions which apply to sites or areas, notations could be provided in each SEPP to clarify whether other exempt and complying provisions also apply.

Consideration should also be given to providing clearer interpretation in order to break down the heavily legalistic structure and language of the SEPPs. Regular cross references to the Standard Instrument definitions do not assist and add to the complexity of the process.

a. <u>Pubic Participation in the making of SEPPs</u>

C19. Should there be statutory public participation requirements when drafting SEPPs?

Under the current legislative framework SEPPs do not have to be publicly exhibited before they are made. In the past, major State policy documents and amendments to State policy documents which have broad public application have been introduced without an opportunity for public input. For example, amendments to SEPP *(Exempt and Complying Development Codes)* 2008 have been introduced without public exhibition despite those amendments applying across the State.

Because of their status, there should be a mandatory requirement to place all SEPPs, including amending SEPPs, on public exhibition, unless it can be demonstrated that it is not be in the public interest to do so.

2.5 Principal LEPs and the Standard Instrument

There are no specific questions in the issues paper about the standard instrument. However, this document is having a major impact on the form and content of LEPs and many councils have experienced difficulties in applying the standard instrument provisions to adequately address local issues. A Woollahra example is the proposed land use changes to William Street Paddington. In this case Council's objectives for a limited boutique retailing precinct cannot be accommodated within the standard business zones of the standard instrument. In this context it is argued that the planning system should provide greater flexibility for local provisions within principal LEPs.

Until recently the Department has given little recognition of allowing local provisions within new principal LEPs. Councils have had to argue strongly, with significant research and evidence, to get local provisions to achieve desired local outcomes. Some local provisions have been placed within LEPs to address particular planning issues, respond to legal matters and facilitate development but these have to be hard fought for and take up considerable time and resources.

There is merit in standardising certain elements of LEPs. However, removal of local planning provisions which have proven value is poor planning practice.

The establishment of a local planning panel by the Department to review the standard instrument is welcome. However, minutes from the two meetings of the Panel held so far show an intention to focus on broader issues which affect a larger number of councils. This could pose a problem for councils seeking to introduce local provisions which are more or less unique to their area. It is unclear whether regional offices will need to obtain approval from the local planning panel for these minor types of local planning provisions.

3. DEVELOPMENT CONTROL

3.1 Principal Issues Pertaining to Development Control

It has been 14 years since the Act has been reviewed. That review led to the *Environmental Planning and Assessment Bill* (1997), commonly referred to as the 'Integrated Development Reforms'.

Prior to those reforms planning in NSW was jointly regulated by the EPA Act and the *Local Government Act* 1993 (LGA). The then EPA Act provided for development to be assessed in a more conceptual manner by a council via a development application (DA) whilst the LGA provided for councils to make decisions on the more detailed building control matters via the Building Application (BA).

The 1998 EPA Act altered this regime, consolidating all development control processes under Part 4 (s.79C) of the EPA Act, and opened up building control to private sector certification. Other changes included the introduction of integrated approval mechanisms and the creation of exempt and complying provisions for the certification of developments likely to give rise to moderate or minor environmental consequences.

Unsurprisingly, because building processes were not entirely controlled by councils the unintended consequence of the 1998 amendments was that councils generally did not relegate modest development to the exempt and complying provisions. Quite reasonably councils were concerned that they could no longer predict the ultimate development outcome due to the introduction of private certification.

Consequently, since 1998 almost all development, irrespective of its scale or environmental consequences (or lack thereof), now proceeds through the evaluation regime under s.79C of the Act. For example, prior to 1998 a routine building matter, such as the construction of, or extensions to, a dwelling-house, provided they were not in a heritage conservation area or scenic foreshore protection area, could be dealt with in a relatively rapid manner as a BA. Under the current regime routine development must now proceed through a full DA process.

Further, because councils no longer control the building approvals process, the detailed information required by councils to determine a development proposal has increased substantially since 1998. Effectively, councils now require building quality plans and specifications to process any DA.

The results of these changes have been greater up-front costs to applicants, a highly complex system for councils to administer and multiple modification requests under s.96 once a determination has been made due to inevitable post determination design refinements.

Fundamentally, the current Act fails to allow councils to sensibly administer development control because it effectively channels all development, including routine building works into an assessment regime under s.79C (formerly s90) of the Act, which was never designed to accommodate such matters. Because of this councils are often required to produce extensive assessment reports for swimming pools and single storey rear extensions to dwelling-houses. That level of assessment is now disproportional to the form and potential impacts of development proposed.

Therefore, the primary issue that needs to be addressed in the NSW Planning System Review, from a development control perspective, is to design evaluation criteria which relevantly relates to the form, scale, and likely environmental consequences of a development proposal. The simplest and most effective way of doing that is to remove private certification of building works and return to a merit based building approval stage.

If, however, the system of private certification is to continue then the new planning system should be realistic and recognise that councils will continue to require an assessment role in most development. Therefore, rather than continue to attempt mandating a ‘quasi’ BA system through increasingly complex complying and exempt development SEPPs, the new planning system should move away from the ‘one size’ fits all evaluation criteria of s.79C.

Thus, the overriding matter for any review of the planning system must be to recognise the adverse implications of the 1998 amendments to the EPAA and develop a range, or streaming of evaluation criteria for different forms of development. This will allow councils to apply appropriate levels of assessment to different development categories based on the complexity, public interest and likely environmental consequences of a development proposal. If this is not done, it is highly unlikely that the objectives of the planning review, being a faster more transparent and easily understood planning system, will be achieved.

3.2 Development Control questions relevant to Council

D1. How should development be categorised?

This question relates to a common concern expressed that there are currently nine (9) categories of development under the Act and that these categories create unnecessary complexity. It was suggested that development categories might be simplified by grouping them into 'streams' which relate to the level of assessment likely to be required for each category. The Planning Institute of Australia (PIA) suggested the following categories:

- *Assessable* - development which departs from applicable numeric development controls.
- *Certifiable* – development which fully complies with applicable development controls and would be open to private certification.
- *Exempt development* – minor development that neither requires assessment or certification subject to predetermined criteria.
- *Prohibited development* – development which may not be approved.

The categories proposed by the PIA are consistent with the recommendations of the Development Assessment Forum (DAF)[1] and would bring the NSW system more in line with the approach taken in other states.

D3. What type or category of development, if any, should be identified as regionally significant to be determined by a body other than Council

Although there was general support for regionally significant development, issues were commonly raised regarding the criteria for that category. Opinion was divided on this topic within certain groups. Some speakers advocated that councils be given discretion to refer politically controversial development to the Joint Regional Planning Panels (JRPP), irrespective of its category. Other groups considered that regionally significant development should only be defined as such if there are real regional implications/impacts of such development.

Our view is that development should only be defined as being of State or regional significance if there are demonstrated implications/impacts for the State or a region and that all State and regional development should be identified in one document or in one place within the new Act.

D4. What development should be exempt from approval and what development should be able to be certified as complying

Submissions from rural areas overwhelmingly supported exempt and complying provisions. Metropolitan groups were more in favour of restricting these provisions in areas of high conservation significance and other sensitive locations such as scenic foreshore protection areas. Therefore, there should not be a 'one size fits all' State approach to exempt and complying development.

The Department of Planning and Infrastructure (DOPI) needs to do much more work on this issue so that a more tailored approach can be introduced to reflect the different planning priorities and circumstances of city, regional and rural councils.

[1] The Development Assessment Forum (DAF) is an independent think tank and advisory forum of government, industry, and the professions, which develops and recommends leading practices for planning systems and development assessment in Australia.

D5. How should councils be allowed local expansions to any list of exempt and complying development?

Overlapping State and local provisions introduce considerable complexity and potential conflicts in interpretation. Therefore, it is better to have one system but one which is better tailored to the needs of different councils.

D8. Should there be an automatic approval (certification) of a proposal if all development standards are satisfied?

Developer groups and the PIA suggested that compliant development should be automatically approved by certification rather than by merit assessment. Other submissions resisted this proposition because they considered controls are targets as opposed to entitlements.
In order to provide councils with added incentive to process applications quickly it was suggested that deemed refusals should be converted to 'deemed approvals'. In this way after a certain time frame an application would be automatically approved if Council had not determined it.

Were this type of provision placed in the Act the Council would be less likely to engage in time consuming negotiations with applicants to achieve positive outcomes. Rather, in order to safeguard the environment, the Council would move quickly to refuse a development proposal in the first instance if an application was not supported from an environmental planning view point. That process may add to the cost burden to the applicant because it may ultimately take more time than a negotiated outcome which may not be achievable within a deemed approval period.

The only positive aspect to such a system would be that applicants would be less likely to submit 'ambit claim' style applications to Council. This proposal is not supported.
D23. How can the application process be simplified?

Concern was raised that since the Act was altered in 1998 to permit private certification, councils have sought more detailed information with DAs including 'construction detail' plans. It was suggested that the system could be simplified by permitting 'concept DAs' with only a building footprint, envelope and use. A second, 'construction approval application', which would contain more detailed specification, would then be submitted.

It is unclear from the Issues Paper, however, if such a system would permit the 'construction approval applications' to be privately certified. If that were the intention, we do not support that level of uncertainty in the first application unless there was a requirement that Council were the approval authority for the second application.

It is also noted that existing provisions under s.83B of the Act facilitate a two staged approach. However, in our experience these provisions for staged consents are rarely used.

The following initiatives are required to substantially simplify the DA process:

- All assessment criteria in the Act should be in one place
- Different assessment criteria should apply, appropriate to the potential impacts and scale of proposed developments, including more limited criteria for single houses and for their alterations and additions
- To remedy the current complex multi-layered system SEPPs should amend rather than overlay LEPs
- All exempt and complying development criteria should be in one document

- All consent arrangements should be in one location
- All concurrence and assumed concurrence provisions should be in one place.

D25. What public notification requirements should there be for development applications?

A number of suggestions were made which included making notification uniform under the Act and prescribing different notification periods dependent on the complexity of applications.

We support this approach, subject to such arrangements being developed in consultation with local government.

D27. Should deemed approvals take the place of deemed refusals?

Concern was raised that obtaining development consent took too long and that 'deemed approvals' should be introduced to replace deemed refusals. This would provide greater incentive for councils to provide a faster turnaround time.

We do not support this idea because:

- It is likely to result in the approval of inappropriate development
- There are many reasons why applications take time to process and councils should not have to deal with the consequences of inappropriate development due to such arrangements
- Councils will not negotiate with applicants to achieve better outcomes if there is the threat of a deemed approval.

D29. If an application partially satisfies the requirements for complying development, should it be assessed only on those matters that are non-complying?

This suggestion primarily responds to developer concerns that a development should not need to proceed through the full s.79C (evaluation) regime under the Act where only a component of the development falls outside the complying development criteria.

There may be processing benefits in the suggestion that routine developments which almost satisfy complying development criteria should only be assessed in terms of those non-complying elements. This is because the assessment would be focussed on the non-complying elements.

However, there may be difficulties and therefore conflicts in determining the non-complying element/s if the complying development provisions are not clearly enunciated.

D36. How should the integrity of an environmental impact statement be guaranteed?

Concerns were raised in regard to the independence of the assessments made by consultants who submit professional statements with development applications.

A number of suggestions were made in relation to actual or perceived partiality of consultants acting on behalf of an applicant. These included establishing an accreditation register through to requiring additional fees so that Council could fund mandatory consultant peer reviews.

Our experience echoes the concerns expressed in the issues paper. Statements of environmental effects have to be carefully scrutinised by staff to separate fact from fiction. This is because the authors of these statements are paid by applicants to present their proposals in the most favourable light.

There is merit in a mandatory accreditation system for consultants but the most important change needs to be the introduction of a Code of Conduct to which all planning consultants must abide. The Code of Conduct should be similar to the *Expert Witness Code of Conduct under the NSW Uniform Civil Procedures Rules* 2005. This code makes it clear that the overriding duty of the witness in the Court is to assist the Court. Likewise, the consultant's Code of Conduct must state that it is the duty of the author of all SEEs and EISs to assist the council in a non-partisan manner. Further, the Code should require the authors to certify their work as being in compliance with the Code.

D38. What changes, expansions or additions should be made to the assessment criteria in the Planning Act?

Numerous suggestions were made as to what should be expanded or further defined in s.79C - *Evaluation* of the EPAA. These included:

- Defining the public interest.
- Allowing a consideration on project viability when assessing departures from a control.
- Allowing the potential impact on nearby property values to be a consideration.
- Considering likely cumulative impacts.
- Providing for carbon accounting.
- Providing that the broader public benefit must be considered in assessing more localised impacts.

There is merit in many of the suggestions which seek to expand the matters which the Council may consider when evaluating a development proposal under s.79C - *Evaluation*. However, prior to s.79C being expanded it is important to refine the evaluation criteria of development under the Act in a way that more appropriately aligns with the nature, complexity and potential impact of the development being assessed. As discussed above, under the current s.79C regime the same range of considerations must be brought to the evaluation of a multi-storey mixed use building or designated development as a single-storey rear extension to a dwelling-house in a suburban environment.

It is, for example, quite reasonable to introduce a requirement that matters such as 'cumulative impact' be a consideration where a new mine proposal is being considered in Muswellbrook in the Hunter Valley. That same consideration would be far less sensible if applied to say a residential flat building in a 2(b) zone in Edgecliff where that consideration must have been made in the plan making process which zoned the land 2(b) in the first instance.

Prior to any detailed consideration of how a new evaluation section should be expanded, redefined or indeed contracted, it is important that the evaluation section be 'tailored' so that considerations being applied to specific classes of development are commensurate with their complexity and their likely environmental impact.

D48. Should objections to complying with a development standard remain (SEPP 1 Objections)?

Certain groups considered that the current tests applied by councils (which have arisen as a result of various court decisions) are complex and onerous. Other groups considered that any relaxation of development standards should not be permitted in any circumstances.

It is considered that the current tests applied under *Winton Property Group Limited v North Sydney Council* [2001] NSWLEC 46 as refined by *Wehbe v Pittwater Council* [2007] NSWLEC 827, are reasonable and set an appropriate rigour around the consideration of a development which seeks to depart from a development standard. It would be inappropriate to relax these tests or reduce the weight given to numerical controls contained in a statutory instrument.

Equally, it would be unreasonable to introduce a rigid application of statutory controls such that they could not be varied under any circumstances, as was suggested. It is a well-founded planning tenet that sites will have innate constraints and opportunities such that strict application of a development standard will not always be reasonable. Hence, introducing such rigidity into the planning system would represent poor land use and development control practice.

Issues do however arise in respect to the operation of Director General's concurrence in relation to SEPP 1 (which is the source of power for the consent authority to vary a development standard) and many other state policies (SEPPs) and regional instruments (REPs). These assumed concurrences under clause 64 of the *Environmental Planning and Assessment Regulations 2000* (the Regulation) may be granted by written notice to the consent authority, which may or may not be made by Departmental Circular. That notice may or may not contain qualifications for the use of that concurrence.

As it currently stands, the Regulation does not prescribe that the DOPl hold a single register of assumed concurrence provisions together with their individual qualifications. Introducing such a requirement would avoid the current practice of providing assumed concurrence in multiple documents, with multiple amendments in different documents. Thus, it is considered that DOPI should be required by the Regulation to maintain and publish a single document with all assumed concurrences and the qualifications to them. This would assist to simplify the development control process and reduce Council's risk exposure.

D56. What are appropriate performance standards by which council efficiency can be measured in relation to development assessment?

The issue raised was that the current 'league table' model was inadequate where tables are published showing the time taken to deal with development applications. This is because these tables do not take into account the nature or complexity of proposals.

Underlying the issue of performance measurement in development control are the two competing pressures that face most councils in that function. They are; (i) effective and efficient development control processing, which is published in a 'league table format' by the DOPI and (ii) excellence in terms of development outcomes on the ground.

The DOPI, since 2005, and prior to that the Department of Local Government (DLG), have traditionally measured the performance of a council's development control functions based on gross processing times. This type of measurement has never fully captured the council's performance in terms of the community expectations. Nonetheless, because of the yearly publication of the '*Local Development Performance Monitor*' by the DOPI many councils avoid protracted negotiations with developers which might lead to better outcomes because the additional time taken to do this may reflect poorly on their 'turnaround' times.

This Council resists such pressure, and regularly seeks positive outcomes at the risk of being embarrassed publicly for having higher turnaround times. Consequently, this form of performance measurement fails to promote a planning system which delivers quality planning outcomes.

That system of performance monitoring is also contrary to the 'amber light' approach adopted by the Court in *Riordans Consulting Surveryors Pty Ltd v Lismore City Council* [2010] NSWLEC133 in which the Court asks itself the following questions:

1. *On merit, is the application capable of being approved as applied for? If this question is answered in the affirmative, I must then proceed to approve the proposal.*

2. *If I were to conclude that it is not capable of being approved as applied for, I do not automatically refuse the proposal. In the alternative to refusal, I then proceed to address a second question; "Is the proposal capable of being given development consent within the scope of the present application, but with amendments or changes that are defined by me with sufficient precision as to be incorporated in either plans or in conditions of consent". If this second question is answered in the affirmative, I should then proceed to specify the amendments or changes; require their incorporation in the proposal; and approve the proposal as so modified.*

3. *However, if this question is answered in the negative, I am obliged to proceed to reject the proposal and dismiss the appeal."*

Whilst it is acknowledged that there are no broadly accepted outcome indicators for measuring the quality of planning outcomes in development control, a new planning system should introduce mechanisms which avoid penalising a council for resolving planning issues by negotiating outcomes with applicants and submitters.

Clause 54 of the Regulation provides that:

…

(ii) 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 considerations.

…

Clause 109 of the Regulation provides that:

…

(iii) Any day that occurs between the date of a consent authority's request for additional information under clause 54 … is not to be taken into consideration in calculating the number of days in any of the assessment periods.

The interrelationship between these two clauses is commonly referred to as the 'stop the clock' provisions. These provisions are used in calculating such matters as 'deemed refusal periods' after which an applicant may appeal to the Court. Yet stop the clock periods are not accommodated in the yearly *Local Development Performance Monitor*. That document primarily focuses on 'gross mean processing times', which excludes stop the clock times when drawing up 'worst performing' council lists.

Any new planning system should encourage the 'amber light' approach to development control whilst, of course, continuing to monitor council performance in terms of its administration, final assessment and determination of applications.

Encouraging a greater focus on 'development outcomes' could be facilitated relatively simply by:

1. Altering the terms of clause 54 of the Regulation by introducing a 'negotiation' period where a council may specify issues with a development proposal and invite the applicant to modify their proposal to overcome those issues. That 'negotiation' period would need to be enacted by correspondence within, say 28 days of an application being made and would then be excluded from processing periods.

2. That the Department alter its annual comparative analysis of council's performance to focus upon the statutory processing times as prescribed by clause 109 of the Regulations, generally known as 'net mean turnaround times'.

This type of performance measurement would allow the Department to monitor State wide processing times whilst allowing councils to facilitate a positive outcome approach in its development control processes, without being publicly criticised for that in formal performance monitoring.

D58. How should concurrence and other approvals be speeded up in the assessment process?

Certain forums raised concern that delays in obtaining approvals from State authorities could be improved by setting a 'deemed concurrence' time period combined with developing standard minimum conditions of consent.

Council's experience with approval authorities where a development is prescribed as Integrated Development under the Act is that in the majority of cases general terms of approval are granted subject to standard conditions of consent. On that basis it is considered that a deemed concurrence provision within the integrated planning regime would be useful in terms of streamlining the current process. A deemed concurrence provision should of course be accompanied by a requirement that approval bodies publish standard minimum conditions of consent which would be applied to any consent issued on the basis that deemed concurrence.

D64. Should there be a standardised model instrument of delegation?

It was suggested that a 'model instrument' of delegations should be promoted.

In most reviews of delegation conducted by State Government instrumentalities such as the ICAC, it has been held that delegations should be related to issues of likely public interest arising from particular classes of development. The difficulty in establishing a model instrument of delegation relates to the diversity of local issues which prevail in different local government areas. For example; a development of a dwelling-house in an outer metropolitan area such as Fairfield City Council may give rise to negligible public interest, whereas a dwelling-house in Watsons Bay may give rise to substantive public interest issues. Consequently, any model delegation may well be developed as a guide, but should not be mandatory.

D79. Should aggregation of multiple proposals to bring them within the jurisdiction of a JRPP be banned if, separately, they would not satisfy the jurisdictional threshold?

Concern was expressed that an applicant may aggregate the cost of several distinct and separate proposals, as separate sites, owned by the same proponent. This enabled the aggregate project cost to be elevated above the threshold for council determination and resulted in the proposal being determined by the JRPP.

This is a policy matter and minds will differ as to whether or not this is acceptable practice. The issue from a development control perspective is that the Act currently provides one vehicle for the granting of development consent, that being a development application. How that application is constituted is, in general terms, a matter for the applicant. Any mechanism which seeks to prescribe the form of a development proposal in terms of the DA *per se* could add to the complexity to the planning system rather than simplify it.

D80. Should an elected council have the right to pass a resolution to supplement or contradict the assessment report to the Joint Regional Planning Panel?

Concern was raised that there may be circumstances where the elected council might form a different view to that expressed in a recommendation to an assessment report. In such cases an elected council should be entitled to make a supplementary or contrary assessment report. Under current JRPP arrangements councils have a right to form a view on the merit of a DA which is different from the view contained in the staff assessment report. Woollahra recently exercised this right in its consideration of the DA for 33 Cross Street, Double Bay. That right should not be extinguished by the new planning system.

However, the system does not facilitate a Council sourcing a second assessment report if it disagrees with the staff assessment report. This is because current procedures require the staff assessment report to be provided to the JRPP immediately it has been completed. Following receipt of the assessment report matters are then considered and determined by the JRPP.

D82. Should elected councillors make any decisions about any development proposal

The contention was put that the role of councillors should be to set the strategic planning framework for development but should not be involved in the determination of any type of development application. A contrary view was that councillors are elected precisely for this decision making.

This is a perennial question and is a policy rather than a development control matter.

Notwithstanding the general view of recent investigations into local government decision making is that routine matters likely to give rise to local impacts should be dealt with under delegation by staff, whereas matters of broader public interest should be determined by elected councillors. Each local government area will, of course, vary in their view in defining the public interest. Nonetheless, this criterion has provided a good foundation for this Council when it designed its current instrument of delegation. On this basis we do not support the contention that no development application should be determined by elected councillors.

D86. Should there be a range of standard conditions of consent incorporated in development approvals?

This issue was raised in relation to the expectation of certain interest groups that a new planning system must provide greater consistency for determinations across the State.

It is acknowledged that standard conditions in areas of similar built environments can vary between local government areas and there may be benefit in producing a model conditions set. Having said that standard conditions will vary significantly between rural and inner urban councils. Further, certain standard conditions, such as those relating to construction management plans or noise attenuation restrictions, may need to be more rigorous in a densely populated area given the more constrained allotment patterns and congested local road networks in the inner city as opposed to an outer urban area.

Thus, although in principle a model set of standard conditions is supported, in practice it is unclear how such a model would be designed. At minimum it would be necessary to design multiple sets, possibly based on the existing 11 Department of Local Government Classes of Local Government areas (which group similar councils for reporting purposes). Should that be the basis for a model standard conditions set there may be benefit. However, some doubt arises as to whether that benefit justifies the significant effort entailed in developing those standard condition sets.

D114.Should the substantially commenced test for ensuring the ongoing validity of development consent be retained?

It was suggested that a more stringent test should be applied such that would guarantee that development would proceed to completion within a reasonable timeframe.
The principal issue for Council is that partially completed sites have adverse impacts on the built environment if they are left in that state for protracted time periods. Thus, there is merit in considering mechanisms that require reasonable levels of development activity to ensure that a development proceeds to completion in a reasonable timeframe.

The difficulty lies in legislatively designing such a mechanism. For example, any legal mechanism requiring 'completion' as well as 'commencement' would need to balance the expectation of the community who are often concerned at the 'blight' effect of a partially completed development, against issues of genuine hardship on the part of the developer or builder. It is envisaged that there may be complex issues related to equity and procedural fairness that would need to be resolved should a new planning system contemplate a 'completion' requirement.

More importantly, in relation to commencement provisions under the EPAA, from a development control perspective any new planning system should clearly define precisely what does and does not constitute physical commencement.

D128.Should there be a guide prepared to explain to councillors what their roles are in the development proposal assessment and determination process and how it is appropriate that they fulfil that role?

Whilst there was general agreement that such a guide be produced, there was considerable disagreement as to the value of that guide depending on whether or not the speaker believed that councillors should have a determining role for DAs or should be confined to a policy development setting process.

Nevertheless, a guide may be beneficial and could supplement other documents such as Codes of Conduct and induction training that is provided for councillors upon their election.

D133.What fees should councils receive for development application fees and how often should those fees be reviewed?

Concern was raised in many groups that the fees for lodging a development application do not reflect the true cost to Council of providing a development control service.

The fees that Council can charge for the lodgement of a development or associated application are governed by the Regulation, and they are reviewed very infrequently.

In the 14 years since the Act was last comprehensively reviewed the development control process has become increasingly complex, with the assessment and reporting requirements for a development application continually escalating in terms of resource requirements. Certainly application fees have not, for many years, reflected the cost to councils of processing applications.

It is considered that fees should be comprehensively reviewed as a result of any change to the planning system with a view to ensuring that the statutory fees and charges correlate to the actual cost to councils in processing applications. In addition, the Regulation should require a mandatory annual review of fees and charges by the Department. At a minimum provision should be made in the regulation permitting councils to adjust fees based on movement in the Consumer Price Index (CPI).

4. COMPLIANCE

Of the 238 questions raised in the Issues Paper, approximately 33 questions have been identified as matters of relevance to the Compliance Section, including issues relating to private certification. The following specific questions are considered of key relevance to Woollahra and warrant comment.

4.1 Complying Development

A15. Should any changes be made to complying development and the process of approving it?

Like much of the existing Planning System in New South Wales, the exempt and complying provisions are far too complex. It is always argued that the aim of identifying development that can be undertaken as either exempt or complying development is to make life easier and simpler for the 'Mums and Dads'. However, there is no certainty with the current provisions and too much is open to interpretation. Consequently, different interpretations of exempt and complying development provisions have resulted in legal proceedings being initiated by Council.

The State Government's target that 50% of all development proposals should be able to be dealt with as complying development is arbitrary and does not ensure that the exempt and complying provisions are clear, concise and easy to understand. This is paramount to ensuring certainty but is unlikely to be achieved with a 'one size fits all' approach across the State.

As such, it is considered that the 50% target should be dropped and only matters that require no interpretation or no merit assessment be included in the exempt and complying provisions of any *State Environmental Planning Policy* (SEPP).

Furthermore, the general provisions of the SEPP used to determine if development is exempt or complying have to be simplified so that everyone can interpret the requirements the same way without the need to refer to a multitude of documents.

A better way to implement the exempt and complying requirements is to allow councils to identify what development should be exempt and complying in their areas, rather than a State-wide approach.

4.2 Private Certification

A16. What changes should be made to the private certification system?

D117. Should private certifiers have their role expanded and, if so, into what areas?

D119. Should certifiers be required to provide a copy of the construction plans that they have certified (as being generally consistent with the development approval) to the council to enable the council to compare the two sets of plans?

D119. Should certifiers be required to provide a copy of the construction plans that they have certified (as being generally consistent with the development approval) to the council to enable the council to compare the two sets of plans?

D121. What statutory compensation rights, if any, should neighbours have against a certifier who approves unauthorised works that have a material adverse impact on a neighbouring property?

D122. Should construction plans be required to be completely the same as the development approval and not permitted to be varied by a private certifier for construction purposes?

D126. Should a certifier issuing a Final Occupation Certificate be required to certify that the completed development has been carried out in accordance with the development consent?

The Issues Paper correctly identifies that there is widespread dissatisfaction with the current system of private certification in NSW within the community and local councils. From a council perspective, it is considered that the only way to rectify the private certification system is to abolish it. However, the Issues Paper clearly indicates that this is not an option stating the following;

> *"….limited enthusiasm was expressed for a return to a council-only inspection and certification system.*
>
> *As a consequence, this discussion paper does not advance for consideration any question as to whether or not a private certification system should be abandoned*."

Therefore, it is necessary to consider what changes can be made to the current system to make it better. In this regard, all certifiers need to be made more accountable to the community and they must be required to respond to all community enquiries in a timely and professional manner. At present, they can far too easily 'pass-the-buck' to councils.

Accordingly, the types of changes that need to be considered include the following;

1. The role of the private certifier needs to be more clearly defined and needs to be promoted by the Government in the wider community. Simply the public need to know what they can expect from a private certifier.

2. Certifiers should have a statutory duty to report matters to Council that may be beyond the scope of the consent that they are responsible for including unauthorised work and unfenced swimming pools.

With councils no longer directly involved in a majority of building sites, there are matters that councils would have previously detected and actioned during their building inspections that can be overlooked by the certifier. It would be a significant benefit to the community if there was a requirement to have private certifiers act as the 'eyes and ears' of councils so serious issues can be addressed.

3. More certainty is required and the development consent must take precedence over any certificate issued by a certifier. Development consents follow a thorough assessment process and include direct community consultation and input. Therefore, the actions of a certifier must never be able to inadvertently amend a development consent.

   The community expects that what was approved at the development consent stage is what will be built – no more not less.

   It is not sufficient for the construction certificate plans to be "*generally consistent with the development approval"*, it is necessary for the certifier to verify that the construction certificate plans accord with the development consent and no additional works have been approved. This should be the principal role of the certifier, who is an accredited and qualified professional. It is inappropriate to shift that responsibility back to councils unless the entire certification approval process is abolished.

   For development consents to be provided precedence over the construction certificate drawings it will be necessary for the new planning system to closely review the current effects of;

   (a) Section 80(12) of the *Environmental Planning & Assessment Act* 1979 - stating that a construction certificate forms part of a development consent; and
   (b) Clause 161 of the *Environmental Planning & Assessment Regulation 2000* - listing the matters that certifying authorities can consider.

   Where there are discrepancies identified between a development consent and a construction certificate, the Council should not be precluded from issuing Notices and Orders or commencing legal proceedings to ensure the works are undertaken in accordance with the development consent and not the construction certificate. It should not be necessary to commence proceedings to invalidate the entire construction certificate.

   Under such circumstances, certifiers may be liable to civil damages if they have approved or permitted works to be undertaken that were not in accordance with the development consent.

4. Certifiers must be required to ensure that all works are completed in accordance with the development consent before they are permitted to issue a final occupation certificate.

   Presently, the statutory obligation on the certifier is to simply confirm that a development consent has been issued. There is no statutory obligation to certify that the works have been completed in accordance with the development consent and all development consent conditions.

5. Certifiers should be required to issue 'Notices of Intention to Give an Order'(NOI's) to remedy breaches of development consents that are more robust and permit Council to immediately proceed to Order on consideration of any representations. Too many times certifiers serve NOI's in general terms stating simply that the work is to be carried out in accordance with the applicable development consent and Council is required to reissue a more specific NOI to ensure it can be enforced.

6. The nominated critical stage inspections need to be expanded to include all major stages of construction. While certifiers should be permitted to rely on certificates from suitably qualified professionals such as structural engineers and hydraulic engineers, they should still be required to undertake inspections at all stages of the development to ensure works are proceeding in accordance with the development consent.

   With the current regime of critical stage inspections, departures from the development consent are not detected until it is too late and then the matter is handed to councils to try and remedy the problem.

A17. How can private certifiers be made more accountable?

To make private certifiers more accountable the role of private certifiers needs to be clearly defined and must take into account the expectations of the community, not simply developers.

Once the role is more clearly defined the current complaints system of the Building Professionals Board (BPB) needs to be simplified to allow the community to more readily express their concerns and dissatisfaction with a certifier. The current BPB complaints system discourages the community from raising genuine concerns because of the extent of documentation that is required to be provided when a complaint is lodged. As such, real issues are not being addressed when they are occurring and this in-turn has the potential to lead to the escalation of a problem.

Simple matters such as a private certifier's failure to respond to enquiries or return telephone calls must be able to be reported to the BPB or another appropriate authority and the BPB or other authority must be able to issue a direction to a private certifier requiring them to act in accordance with the identified standard.

4.3 Dealing with unauthorised work

D18. Should there be a single application to the council to obtain permission to use an unauthorised structure?

D109. Should any modification be able to be approved retrospectively after the work has been done?

D110. If so, should retrospective approval be confined only to minor changes and not more substantial ones? Should this be the case even if major changes leave the development substantially the same development as the one originally approved?

Under question D18 the Issues Paper limits its consideration to how should someone obtain permission to "*use an unauthorised structure"* and accepts, without question, that the appropriate way to regularise the unauthorised structure is via a building certificate. However, it is considered that a building certificate, which is known as a 'certificate of non-action' is not the best mechanism for regularising unauthorised work for the following reasons;

1. There is no statutory requirement for a building certificate to be lodged for unauthorised work;
2. A building certificate only lasts for seven (7) years after which time Council can serve Notices and Orders to have the unauthorised work removed;
3. A building certificate does not follow the same statutory assessment process as a development application and is not required to be notified to neighbouring properties; and
4. Conditions are unable to be imposed on a building certificate.

Accordingly, it is strongly recommended that the revised planning system should introduce the need to apply for retrospective development consent for unauthorised work. Such consents could also permit the question of use to be addressed as raised by question D18 of the Issues Paper.

Any new provisions would need to make it mandatory for a development application to be lodged for unauthorised works and this could be enforced by introducing a new Order type. The new Order would need to require the lodgement of a development application to permit the proper statutory assessment of the illegal works that were carried out without development consent where prior development consent was required.

Any new Order for this purpose should be applied in a similar manner to the current Order 19 – 'Cease work order' contained in Section 121B of the Act, without the need for a 'Notice of Intention to Give an Order'. Councils need to be able to act swiftly on these matters so the community can be confident that their concerns will be considered.

Where there is a development consent and unauthorised work is undertaken in relation to that consent, retrospective approval can currently be sought by seeking a modification of the consent pursuant to Section 96 of the Act. There are benefits in such practice remaining, however, there must be an onus to require the lodgement of the Section 96 application to ensure a full assessment is undertaken. The provisions suggested above would apply equally to this form of authorised work.

With regard to question D110, the issue would be whether or not the unauthorised work would result in the development being substantially the same, which determines whether or not the matter could be considered as a Section 96 application or if a new development application is required. Either way, for the reasons identified above, unauthorised work should be required to be assessed pursuant to the development application process.

4.4 Bonds and Securities

D91. Should new planning legislation make it possible to impose performance bonds or sureties unrelated to the protection of public assets?

D92. If so, should there be any restrictions on the reasons for which such bonds or sureties could be required?

With regard to the above questions the Issues Paper states the following;

> "*At present, the imposition of conditions requiring financial performance bonds is limited. It is confined to financial bonds or sureties to ensure the protection of public assets such as footpaths, roads or street trees.*
>
> *During the course of the community forums, discussion took place about imposing bonds or financial sureties on developments in the broad public interest but not relating to protection of public assets.*

This concept arose in two distinct contexts.

The first was where a developer may have had an unsatisfactory performance history of compliance with development conditions. In this case, rectification costs might fall on an innocent landholder or, potentially, on a local council. Or, rectification of noncompliance or non-performance may not be able to be funded readily.

The second arose during the discussion, at a number of consultation forums, of what was perceived to be the differing treatment of mine sites and wind farms. Bonds or sureties are required for rehabilitation for mine sites. However, there is presently no ability to impose conditions to guarantee that wind farm turbines and infrastructure will be dismantled and rehabilitated when the wind farm ceases operating."

It is considered that performance bonds and sureties should extend to matters beyond the protection of public assets and could apply to the following;

1. protection of significant trees on private property;
2. protection of significant heritage items on private property;
3. completion of landscaping on major developments that is required to protect the amenity of neighbouring properties or to enhance the public domain; and
4. general completion of major developments.

4.4 Part 4A Certificates

D94. If there is to be a more concept based development application process, should councils have the power to impose conditions on construction approvals?

The discussion in the Issues Paper with regard to the above question is confused and draws a distinction between councils and private certifiers in relation to construction approvals. However the more pertinent question in relation to this matter is whether or not conditions should be permitted to be imposed on construction certificates in general.

The current practice of not being able to impose conditions on construction certificates largely came about with the abolishment of building applications. The quality of construction approvals since that time has not improved.

The ability to impose conditions on construction certificates would;

1. permit key issues to be highlighted and drawn to the attention of the builder and the Principal Certifying Authority;
2. simplify the process of correcting minor departures shown on the construction plans. Note: under the current system minor departures could result in the refusal of a construction certificate application if amended plans are not submitted in a timely manner;
3. improve the clarity of the construction certificate documentation; and
4. improve processing times of construction certificate applications.

D125. Should Interim Occupation Certificates have a maximum time specified and, if so, how much should this be?

Section 109M of the Act states generally that a person must not commence occupation or use of a building (within the meaning of section 109H) unless "*an occupation certificate*" has been issued, including an Interim Occupation Certificate. Therefore, the current Act has no statutory obligation for a development to be completed.

Accordingly, any new planning system should limit the circumstances in which an Interim Occupation Certificate can be issued and require a Final Occupation Certificate to be issued within a reasonable period of time, say 3 months, after any Interim Occupation Certificate has been issued.

Also, the current provision in Section 109M of the Act that states the Section does not apply to "*the occupation or use of a new building at any time after the expiration of 12 months after the date on which the building was first occupied or used*" should not be included in any new legislation. Just because a building has been occupied without an Occupation Certificate for more than 12 months should not preclude the requirement for such a certificate or prevent such a breach from being identified as an offence.

4.5 Notices and Orders

E13. What new orders should there be or what changes are needed to the present orders?

As identified by the Issues Paper, councils currently have the power to issue a wide range of orders to control, rectify or prevent the impact of illegal or unapproved development, to protect the community.

Nevertheless, the following amendments should be included in any Orders regime within a new planning system;

1. Where there are discrepancies between a construction certificate and a development consent, the development consent is to take precedence and Council should have the power to issue an Order to require that all works are undertaken in accordance with the development consent and not the inconsistent construction certificate.
2. If the new planning system accepts that the development consent will take precedence over the construction certificate there will be circumstances where it will be necessary to issue an Order to require compliance with the construction certificate, especially if conditions are permitted to be imposed on construction certificates.
3. An Order type requiring the submission of a development application or complying development certificate (as applicable), where unauthorised works have been undertaken without consent, where prior consent was required.
4. An Order type requiring the disposal of roof water and/or stormwater in accordance with Council's adopted stormwater management plan or the like where other land, or a building on the land or other land, is being damaged or is likely to be damaged.
5. The current provisions of Sections 121ZR and 121ZS of the *Environmental Planning & Assessment Act 1979* that relate to 'Brothel Closure Orders' should be extended to include actions against unauthorised boarding houses, backpackers accommodation, houses let in lodgings etc. This change would permit Orders to be issued based on circumstantial evidence and result in more effective enforcement proceedings including the disconnection of utilities, where appropriate.

E14. How can enforcement be made easier and cheaper for consent authorities?

The following suggestions contained in the Issues Paper to address this question are supported;

1. Provide statutory protection that would mean an Order could not be challenged because of technical drafting defects if the intention was clear.
2. Councils should be able to recover, from a private certifier, the costs incurred for any inspection and enforcement action if the certifier has approved or certified the unauthorised work.

Currently there is an anomaly between Sections 127(5) and 127(5A) of the *Environmental Planning & Assessment Act 1979.* The current provisions read as follows;

> *"(5) Proceedings for an offence against this Act or the regulations may be commenced not later than 2 years after the offence was alleged to be committed.*
>
> *(5A) However, proceedings for any such offence may also be commenced within, but not later than, 2 years after the date on which evidence of the alleged offence first came to the attention of an authorised officer within the meaning of Division 2C of Part 6."*

Section 127(5) applies to council officers while 127(5A) applies to authorised officers of the Department and not council officers.

As council officers are not always the appointed Principal Certifying Authority they are no longer in the position to readily know when offences have been committed against the Act. Accordingly, it is recommended the new planning system removes this anomaly to assist councils.

4.6 Powers of Officers

E20. Should council compliance officers be given rights of entry and inspection and of access to official databases for compliance and enforcement inspections under planning legislation on the same basis as they have such rights under the Local Government Act?

The Issues Paper identifies that there is an inconsistency between the *Local Government Act 1993* and the *Environmental Planning & Assessment Act 1979* with regard to this issue stating the following;

> "*At the present time, council compliance officers undertaking inspections to see if unapproved or illegal development has taken place do not have any right of entry to enter into and inspect a property or development for this purpose. They are also unable to access external databases, such as vehicle registration databases, for this purpose.*
>
> *However, council compliance officers do have rights of entry available under the Local Government Act 1993 for other enforcement or compliance inspection purposes.*"

Ensuring consistency between the various Acts is imperative and any provisions that make the investigation of alleged offences less cumbersome must be supported. Too many times Council's Compliance Officers know that an offence has been committed but do not have the statutory capability to obtain sufficient evidence for a successful prosecution.

5. THE NEXT STEPS

Mr Moore and Mr Dyer, in accordance with part two of their Terms of Reference, are required to consider stakeholder and community submissions on the 238 issues identified during the consultation process. They are also required to examine interstate and overseas planning systems to ensure that relevant best practice options are considered for inclusion in a new planning system for NSW.

Once these processes have been completed a working group with Mr Moore and Mr Dyer will produce a Green Paper which will recommend a statutory framework and implementation measures for a new planning system that satisfies the requirements set out in parts 4 and 5 of the Terms of Reference. It is anticipated that the Green paper will be published no later than the end of April 2012 so that draft legislation may be considered for the Spring session of Parliament. It is anticipated that there will be a further opportunity to comment on the proposed system when the Green Paper is released.

6. CONCLUSION

The NSW Government has embarked on an ambitious project to completely review and replace the NSW planning system. The 1979 Act is almost 33 years old, it has been amended many times since it commenced operation and successive amendments have increased its complexity in day to day administration. There is a broad consensus in the planning profession that the Act should be replaced with a new Act which is simple, accountable and transparent. In this process it will be important that the strong environmental planning objects of the existing Act are maintained and not 'watered down' in the interests of efficiency or economic development.

A submission, consistent with the comments and observations made in this report should be made to the NSW Planning System Review. An outline of the key points proposed to be included in that submission is attached as annexure 4.

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Manager Compliance

Patrick Robinson
Manager Development Control

Allan Coker
Director Planning & Development

Annexures:

1. Planning System Review Terms of Reference
2. List of Feedback Questions from the Issues Paper of the NSW Planning System Review
3. The Objects of the *Environmental Planning and Assessment Act* 1979
4. Submission Outline.

Item No: R2 Recommendation to Council

Subject: **Planning proposal - William Street Paddington**

Author: Chris Bluett - Manager Strategic Planning
File No: 1064.G (Am 63)
Reason for Report: To inform Council of issues relating to the progress of a planning proposal for William Street Paddington.
To obtain direction from Council on options for pursing the planning proposal.

Recommendation

A. That Council inform the Deputy Director-General Plan Making and Urban Renewal that it strongly opposes the changes made to the planning proposal for William Street, Paddington, and the likely longer term rezoning suggestions made by the Department of Planning and Infrastructure because they substantially alter the Council's intended planning approach for William Street and the local area.

B. That Council advise the Department of Infrastructure and Planning that it would like to discuss options for retaining the Council's original planning proposal for William Street, Paddington, particularly in the context of discussions occurring with the Local Planning Panel.

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1. Background

During the past three years the Council has considered numerous reports containing options for allowing additional non-residential uses[2] on land within William Street Paddington which is zoned Residential 2(a). The reports were prepared in response to the unlawful commencement of retail uses within a number of William Street's residential buildings.

In the course of developing the options, we held discussions with the regional officers of the Department of Planning and Infrastructure and also obtained legal advice on the content of planning provisions which could be contained in amendments to Woollahra LEP 1995. The process also included public exhibition of three draft LEP options.[3] These options maintained the Residential 2(a) zone but differed in the following manner:

Option 1 - allowed the additional land uses to occur in all residentially zoned buildings in William Street, but only on the ground floor, with the upper floor being used for associated storage and offices or residential purposes.[4]

Option 2 - allowed the additional land uses to occur in only those properties identified by survey on 15 August 2008 as having unlawful uses.[5] The additional uses were not restricted to the ground floor.

[2] The additional land uses were fashion shops, shoe shops, jewellery shops, health and beauty shops, florists and artists' studios. These were the unlawful uses identified during surveys of William Street.
[3] The exhibition was not a formal exhibition under the Environmental Planning and Assessment Act 1979.
[4] The properties in option 1 were 12 to 42, 48-94, 3-43 and 45-63 William Street.
[5] The properties in options 2 and 3 were 32, 34, 36, 40, 50, 52, 64, 70, 76, 78, 80, 84, and 3, 5, 9, 11, 15, 17, 19, 21, 23, 53 and 59 William Street.

Option 3 – allowed the additional land uses to occur in only those properties identified by survey on 15 August 2008 as having unlawful uses. The additional uses were restricted to the ground floor, whilst the upper floor could be used for associated storage and offices or residential purposes.

The majority of responses to the exhibition (67%) supported option 1.

Following a report to the Urban Planning Committee on 8 February 2010 at which the findings of the survey were considered, legal advice was sought on the content of the proposed LEP provisions.

With the legal advice in hand, and mindful of the community responses, the Council made the following decision on 22 March 2010:

A. That a draft local environmental plan be prepared incorporating the William Street matter deferred from Woollahra LEP 1995 (Amendment 60). The draft LEP will amend Woollahra LEP 1995 by including a provision that:

   (i) applies to land known as Nos. 12 to 42, Nos. 48-94, Nos. 3 to 43 and Nos. 45-63 William Street, Paddington.
   (ii) allows with consent on the ground floor of a building on the land referred to in (i), the additional uses of fashion shops, shoe shops, jewellery shops, health and beauty shops, florists and artists' studios. The upper floor of these buildings maybe used for associated storage and offices or residential purposes.
   (iii) allows only development that does not involve the removal of internal party walls, internal common walls, external common walls and dividing fences between attached terrace buildings, whether or not those buildings are on separate allotments.
   (iv) allows the provisions of clause 30 of Woollahra LEP 1995 to prevail for those properties in (i) that satisfy the criteria of the clause prior to the commencement of the additional use provisions.
   (v) prohibits the operation of clause 30 for William Street properties that gain consent under the additional use provisions.

B. That the definition of *Ground Floor Non-Residential Development* be amended in the following manner:

   - That the word "include" be replaced with "have associated with".

A copy of the proposed draft LEP upon which the Council's decision is based, and which was contained in a report to the Urban Planning Committee meeting on 8 March 2010, is provided in **annexure 1**. The draft LEP shows changes from a previous version following advice from Council's lawyers.

For the benefit of Councillors, an explanation of the draft LEP's content as set out in the Council's decision of 22 March 2010 is provided below.

(i) Applies to land known as Nos. 12 to 42, Nos. 48-94, Nos. 3 to 43 and Nos. 45-63 William Street, Paddington.

These properties represent all lands with William Street addresses which are currently zoned Residential 2(a). The decision to apply the draft LEP to the extended list of properties rather than the short list of properties identified with unlawful uses in August 2008 reflects the responses obtained during the public exhibition of the three draft LEP options. It also provides an element of equity for property owners in William Street.

(ii) Allows with consent on the ground floor of a building on the land referred to in (i), the additional uses of fashion shops, shoe shops, jewellery shops, health and beauty shops, florists and artists' studios. The upper floor of these buildings maybe used for associated storage and offices or residential purposes.

Surveys of William Street identified a range of unlawful uses which largely fell within the six listed categories. These uses had established a particular low key, niche character for William Street. Whilst acknowledging this character, the Council also sought to minimise the impact of retail uses in William Street. This was to be achieved by restricting the uses to those nominated and limiting their occupation to the ground floor of the buildings. Storage and office uses associated with the ground floor use could be carried out on the first floor.

(iii) Allows only development that does not involve the removal of internal party walls, internal common walls, external common walls and dividing fences between attached terrace buildings, whether or not those buildings are on separate allotments.

This requirement sought to maintain the small scale and low key nature of the shops within the terraces by preventing amalgamation of buildings through demolition of common walls and fences.

(iv) Allows the provisions of clause 30 of Woollahra LEP 1995 to prevail for those properties in (i) that satisfy the criteria of the clause prior to the commencement of the additional use provisions.

(v) Prohibits the operation of clause 30 for William Street properties that gain consent under the additional use provisions.

Clause 30 of Woollahra LEP 1995 applies to residential zones within heritage conservation areas and enables buildings to be used for certain non-residential uses provided two criteria are satisfied:

(a) the whole or part of the building has a history of a lawfully commenced non-residential use, whether or not that use was discontinued, abandoned or interrupted; and
(b) the whole or part of the building was originally lawfully constructed with a non-residential design or was lawfully altered or adapted to a non-residential design.

The non-residential uses listed in clause 30 are "commercial premises (not being a brothel), community facilities, artisans' studios, educational establishments, public buildings and shops."

Commercial premises are defined in Schedule 1 of Woollahra LEP 1995 as:

> A building or place used as an office or for other business or commercial purposes, but does not include a building or place elsewhere specifically defined in this Schedule or a building or place used for a purpose elsewhere specifically defined in this Schedule.

Shop is defined as:

> A building or place used for the purpose of selling, exposing or offering for sale by retail, goods, merchandise or materials, but does not include a building or place elsewhere specifically defined in this Schedule, or a building or place used for a purpose elsewhere specifically defined in this Schedule.

Clause 30 allows a broader range of non-residential uses compared with the proposed draft LEP use. In particular, under clause 30 the type of shop is not restricted.

A number of properties in William Street have the benefit of the clause 30 provisions because of their non-residential design coupled with a history of non-residential use. It is intended that those properties retain the benefit of clause 30.

However, the draft LEP provisions could allow residential properties to obtain the benefit of the broad non-residential uses available under clause 30. This would defeat the intention of the draft LEP to limit land uses to the short listed, low key uses. To overcome this possibility the draft LEP would include a provision prohibiting the operation of clause 30 for those properties that gain consent under the additional use provisions.

In summary, the Council's intentions for William Street were:

- To retain the residential zone applying to the majority of properties.
- To acknowledge the boutique, low key retail nature of William Street, despite the manner in which that character had evolved largely through unlawful use of premises.
- To minimise the impact of additional retail uses.

2. Preparation of a planning proposal

A planning proposal incorporating the Council's decision of 22 March 2010 was prepared and sent to the Department of Planning and Infrastructure on 30 April 2010.[6] Numerous discussions were held with members of the Department's regional office and plan making section over the next two months. The discussions focused on two matters:

(i) the restrictive nature of the proposal; and
(ii) whether the proposed controls could be eventually taken up in the Woollahra Principal LEP using the Standard Instrument template.

Whilst we received support from the Department's regional office, the plan making section continually raised questions about why limited land uses were being proposed, how those uses would be implemented in the Woollahra Principal LEP and why restrictions were being placed on the use of clause 30. In particular, it was apparent the planning proposal was being assessed against its ability to be integrated with the Standard Instrument which is used as the template for principal LEP across the State.

Despite responding in detail to the Department's questions, the Deputy Director-General Plan Making and Urban Renewal eventually issued a determination which amended the planning proposal in two significant ways:

(i) It removed the five retail uses and replaced them with the single term "shop".
(ii) It allowed the provisions of clause 30 to continue to apply to lands.

A copy of the determination is provided as **annexure 2**.

The impacts of these changes are twofold. First, there would be no restrictions on the type of permissible shop which might be established with consent in the nominated properties. Second, once development consents had been issued for the shops it would be possible for the premises to be used for other non-residential uses, with consent, through the clause 30 provisions.

[6] Under changes to the plan making process of the *Environmental Planning and Assessment Act 1979* a planning proposal is now the first stage of preparing a local environmental plan.

We raised concern with the Department about the impacts of the amendments on the Council's planning proposal. We have been informed by the Department's regional office that:

- The five retail land uses were not permitted because of their unnecessarily restrictive nature.
- Permitting "shops" will not likely create any additional environmental impacts and will allow land owners to respond appropriately to changing market conditions.
- The planning proposal did not adequately justify why the proposed non-residential uses, once approved, should not be able to take advantage of the provisions of clause 30.

The regional office also mentioned that listing of large numbers of additional permitted uses in a schedule rather than in a land use table was considered to be a sub-zone. Presumably this interpretation arises because the additional uses would also apply to a large number of properties rather than a single property.

The practice of applying numerous additional land uses to multiple properties is not preferred by the Parliamentary Counsel. Curiously, the amendments made by the Deputy Director-General would result in a much larger range of additional permitted uses which might also be considered to be a sub-zone.

Despite this, the regional office was prepared to support the Council's additional uses as an interim measure. However, such support would clearly be contrary to the Deputy Director-General's determination and therefore we doubt whether the regional office's support could be relied upon.

In the longer term the regional office considered a business zone was appropriate on the basis that the retail uses in William Street are at least as intensive as those in the Glenmore Road Business Neighbourhood 3(c) zone.

The Business Neighbourhood 3(c) zone allows many non-residential uses including cafes, commercial premises, community facilities, medical centres, shops and restaurants. Mixed development comprising residential and non-residential uses is also permissible. However, dwelling houses are prohibited which means that all current dwelling houses would become non-conforming uses thereby creating existing use rights.

The Business Neighbourhood 3(c) land use zone will be converted to the B4 Mixed Use in the Council's Principal LEP. Within the B4 Mixed Use zone the following uses are mandated through the Standard Instrument:

> Boarding houses; Child care centres; Commercial premises; Community facilities; Educational establishments; Entertainment facilities; Function centres; Hotel or motel accommodation; Information and education facilities; Medical centres; Passenger transport facilities; Recreation facilities (indoor); Registered clubs; Respite day care centres; Restricted premises; Seniors housing; Shop top housing.

In the Standard Instrument commercial premises comprise business premises, office premises and retail premises. The latter uses include bulky goods premises, food and drink premises (including restaurants and cafes), garden centres and shops. Shop top housing is permissible. Dwelling houses may be added as a local use.

Rezoning William Street to a business zone is a substantial expansion to the Council's planning objectives for the area. Furthermore, it was not an option presented to the community for comment as part of the Council's preparation of a preferred draft LEP.

The amendment made by the Deputy Director-General and the long term option promoted by the regional office are inconsistent with the Council's intentions for William Street as expressed in the decision of 27 March 2010. Accordingly, we do not consider the amended planning proposal should be advanced unless the Council is prepared to accept the Department's amendments.

3. Further discussions with Department

3.1 Meetings with Department staff

We have held a number of meetings with the Department's regional office and members of the principal LEP unit in order to see how the William Street planning proposal might be retained in its original form. Our meetings have also addressed how a provision similar to clause 30, which is also considered by the Department to be a sub-zone, can be taken up within the Woollahra Principal LEP.

The strict and inflexible nature of the Standard Instrument is proving to be a barrier, not only for our requests, but for other councils who are attempting to retain local provisions. Whilst the Department has been reluctant to make widespread changes, it has introduced a number of standard local provisions. Generally, these provisions have a common application to many council areas.

3.2 Local Planning Panel

In recent months the Department's approach has been more receptive to local requests. This is partly reflected in the creation of the Local Planning Panel which meets to consider improvements to the Standard Instrument program. As part of this role, the Panel will consider issues with the standard clauses, definitions and policies. The Panel will also consider opportunities for flexible provisions and provisions which reflect local conditions.

The Panel has held three meetings, the second and third of which occurred on 17 November and 15 December 2011. At those two meetings the issue of sub-zones was discussed. The Department's policy position was outlined in the minutes of the meeting on 17 November 2011 as being:

> This is a legal and policy issue. There is a Direction to clause 2.1 (the list of 35 land use zones that councils can choose from) of the SI Order that states "Additional zones or subzones are not to be prescribed". As a general principle, the Department's policy position is that, for reasons of clarity and transparency, land use permissibility should be limited to the land use tables and, in exceptional circumstances, Schedule 1. LSB [Legal Services Branch] and PC [Parliamentary Counsel] have provided examples of what, in their view, constitutes a subzone. A very clear example is where the land use table permits a particular use but a subsequent local provision or map purports to prohibit such a use in certain circumstances. This issue may be able to be addressed by simply defining what the Department sees as a subzone and / or removing the Direction from the SI Order. There is a view that the Direction to clause 2.1 was only ever intended to prevent councils from inserting entirely new land use zones at their discretion.

The Panel's recommendation from the meeting on 17 November 2011 was "that the Department provide further clarification about what constitutes a sub-zone, including examples, relevant policy background and information from the Department's Legal Services Branch." A report containing this information was considered by the Panel at its meeting on 15 December 2012.

Recommendations from the meeting on 15 December 2012 are not available at this time because they have been sent to the Director-General for review prior to a report being submitted to the Minister. The report presented to the Panel is also not available but is likely to be made available once a decision is made by the Minister.

3.3 Council's intentions regarding amended planning proposal

In our last meeting with the Department's regional office on 14 December 2011 we were asked to clarify whether Council wished to proceed with the planning proposal. At that time we mentioned how the substantial changes made to the proposal by the Deputy Director-General were inconsistent with the Council's planning intentions for William Street. We indicated a formal response would be sought from Council.

We also mentioned Council's desire to work with the Department to find a way of incorporating the current clause 30 provisions within the Woollahra Principal LEP.

4. William Street master plan

On 14 December 2009 the Council adopted a notice of motion from Councillors Medcraft and Petrie which was as follows:

> That a report be made to the appropriate committee on developing a vision and master plan for William Street, Paddington.

The Council has identified its vision for William Street in a number of ways. Foremost, the Council seeks to conserve William Street as part of the Paddington Heritage Conservation Area. This is achieved through the conservation policy set out in Woollahra LEP 1995 and the Paddington HCA Development Control Plan.

In terms of land use planning William Street is seen as a mixed residential and low key retail street. This element of the vision is expressed firstly in the current land use controls which allow residential uses and non-residential uses in purpose built or legally converted business premises. Recently, through the planning proposal submitted to the Department of Planning and Infrastructure, the Council aims to broaden this vision to allow a small number of boutique retail uses.

A master plan would embrace the land use planning and heritage conservation visions and might also include streetscape and infrastructure improvements. In response to representations from business owners, Technical Services is considering proposals for infrastructure works in William Street. This consideration is being undertaken in the context of identifying and prioritising works throughout all business centres within the Municipality. It is proposed to bring a report to the Corporate and Works Committee in the coming months.

5. Conclusion

The William Street planning proposal is essentially a local planning matter which unfortunately has been caught in the new State-wide plan making process. Consequently, Council's proposal is being assessed at a State level against broad-based planning strategies which seek to deliver a standardised one size fits all result. The ability to consider local planning issues is being lost because of the overarching State-wide objectives.

There is some indication that local planning provisions will be given more favourable consideration than previously occurred when the Standard Instrument template was first introduced. In this light, we consider the Council should maintain its position for William Street and continue discussions with the Department, particularly in view of options which might arise through considerations by the Local Planning Panel.

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Allan Coker
Director Planning and Development

Annexures

1. Draft LEP presented to Urban Planning Committee on 8 March 2010.
2. Letter from Department of Planning dated 16 June 2010 containing gateway determination for planning proposal.

POLITICAL DONATIONS DECISION MAKING FLOWCHART FOR THE INFORMATION OF COUNCILLORS