



Urban Planning Committee

Agenda: *Urban Planning Committee*

Date: *Monday 12 November 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 not within the specified functions of the Committee.
- Matters requiring supplementary votes to Budget.
- Urban Design Plans and Guidelines.
- Local Environment Plans.
- Residential and Commercial Development Control Plans.
- Rezoning applications.
- Heritage Conservation Controls.
- Traffic Management and Planning (Policy) and Approvals.
- Commercial Centres Beautification Plans of Management.
- Matters requiring the expenditure of moneys and in respect of which no Council vote has been made.
- Matters reserved by individual Councillors in accordance with any Council policy on "safeguards" and substantive changes.

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

8 November 2012

To: His Worship the Mayor, Councillor Andrew Petrie ex-officio
Councillors Greg Levenston (Chair)
Ted Bennett
Luise Elsing
Elena Kirillova
Katherine O'Regan
Matthew Robertson
Toni Zeltzer

Dear Councillors

Urban Planning Committee Meeting – 12 November 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 12 November 2012 at 6.00pm.**

Gary James
General Manager

Additional Information Relating to Committee Matters

Site Inspection

Other Matters

Meeting Agenda

Item	Subject	Pages
1	Leave of Absence and Apologies	
2	Late Correspondence Note Council resolution of 27 June 2011 to read late correspondence in conjunction with the relevant Agenda Item	
3	Declarations of Interest	

Items to be Decided by this Committee using its Delegated Authority

D1	Confirmation of Minutes of Meeting held on 22 October 2012	1
D2	Delivery Program 2009 to 2013 & Operation Plan 2012/13 (DPOP) Quarterly Progress Report September 2012 against Goal 4 – Well Planned Neighbourhood – 1229.G	2

***Note: Annexure 1 distributed Under Separate Cover**

Items to be Submitted to the Council for Decision with Recommendations from this Committee

R1	Woollahra DCP 2003 (Amendment 2) – Loftus over Garages – 1092.G	8
R2	Modification to the Definitions of ‘Height’ & ‘Existing Ground Level’ in the Woollahra Local Environmental Plan 1995 – 1064.G (Amend 74)	56

***Note: Confidential Annexures distributed Under Separate Cover**

R3	Delegation & Independent Reviews Relating to Plan-Making – 885.G	61
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Item No: D1 Delegated to Committee
Subject: **Confirmation of Minutes of Meeting held on 22 October 2012**
Author: Les Windle, Manager – Governance
File No: See Council Minutes
Reason for Report: The Minutes of the Meeting of Monday 22 October 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 22 October 2012 be taken as read and confirmed.

Les Windle
Manager - Governance

Item No: D2 Delegated to Committee

Subject: **Delivery Program 2009 to 2013 & Operational Plan 2012/13 (DPOP)
Quarterly Progress Report September 2012 against Goal 4 - Well
Planned Neighbourhood**

Author: Allan Coker - Director Planning & Development
Chris Bluett - Manager Strategic Planning
Patrick Robinson - Manager Development Control

File No: 1229.G

Reason for Report: To review the status of the Priorities and Actions in Council's Delivery Program 2009 to 2013 and Operational Plan 2012/13 for the three months ending 30 September 2012.

Recommendation:

THAT the September 2012 Quarterly Progress Report on Goal 4 (Well planned neighbourhoods) of Council's Delivery Program 2009 to 2013 and Operational Plan 2012/13 be received and noted.

1. Background:

Council adopted its Delivery Program 2009 to 2013 and Operational Plan 2012/13 (DPOP) in June 2012 in accordance with the Integrated Planning and Reporting Legislation for NSW Local Government. The Delivery Program and Operational Plan are two of the key strategic planning documents that comprise Council's Integrated Planning & Reporting Framework.

It is a requirement under the Integrated Planning & Reporting Legislation that Council report on the progress of its Delivery Program at least every six months. In response to this requirement, and in order to ensure that Council's reporting to the community is transparent, timely and manageable under the legislation, progress reports on the DPOP are presented to Council quarterly for the periods ending 30 September, 31 December, 31 March and 30 June each year.

The framework for quarterly progress reports is consistent with the structure of the Delivery Program and Operational Plan developed around the following interrelated themes and supporting goals:

Theme: Community well-being
Goal 1: A connected and harmonious community.
Goal 2: A supported community.
Goal 3: A creative and vibrant community.

Theme: Quality places and spaces
Goal 4: Well planned neighbourhoods.
Goal 5: Liveable places.
Goal 6: Getting around.

Theme: A healthy environment
Goal 7: Protecting our environment.
Goal 8: Sustainable use of resources.

Theme: Local prosperity

Goal 9: Community focused economic development.

Theme: Community leadership and participation

Goal 10: Working together.

Goal 11: A well-managed Council.

Annexure 1 to this report is Council's Quarterly Progress Report for the period 1 July to 30 September 2012 for Goal 4, being most relevant to the Urban Planning Committee.

Progress comments for all Delivery Program priorities and Operational Plan actions are provided in the tables of **Annexure 1**. Council staff provide updates on these comments on an ongoing basis for internal management purposes, with the comments then collated at the end of the quarter for reporting to Council and the community. Generally, actions included in the Operational Plan relate to the current financial year. However, there are a number of actions that extend beyond June 2013, as indicated in the target date column.

As this is the first quarterly report for 2012/13, the final column in the tables headed "Updated Comments" is blank. In future quarterly reports a tick will appear in this column to indicate that the comments relating to that action have been updated since the previous quarterly report to Council. This will enable Councillors and other readers of the report to easily identify where an action status has been updated.

2. Adopted notices of motion and other decisions of the Council:

To further improve the efficiency and transparency of Council's Integrated Planning and Reporting procedures, notices of motion and other decisions of the Council which are strategic and/or project based are now included as additional actions in the DPOP and reported on through the Quarterly Progress Report.

Adopted notices of motion which are non-strategic in nature, such as placement of an additional agenda item on a meeting or writing a letter to an organisation, will be monitored administratively.

During the period 1 July to 30 September 2012, three new notices of motion have been identified as strategic and/or project-based in nature. Details of these new actions are provided below.

ACTION ARISING FROM A NOTICE OF MOTION	
Action number in 2012/13 Quarterly Progress Report	Action description
4.1.1.33	Prepare a report to the Urban Planning Committee with a view to developing a new vision and masterplan for Oxford Street, Paddington, in particular taking into account the effect on land-use planning arising from technological changes and solutions used in other cities to re-invigorate strip shopping centres as destinations, such as Willoughby Road in Crows Nest. [Refer NOM 09/07/2012].
4.1.1.34	Prepare a report on the NSW Government's Green Paper "A New Planning System for New South Wales" that addresses concerns raised by Councillors. [Refer NOM 23/07/2012].
4.1.1.35	Prepare a draft DCP to amend the Woollahra Heritage Conservation Area DCP to include provisions for loft structures over garages [Refer Council decision 27/08/2012].
4.5.2.2	Report on Council's ability to introduce incentives and a moratorium on Council's fees and charges relating to outdoor dining facilities within the public domain/footpath areas of Double Bay, Oxford Street and Woollahra Commercial Precincts, together with other appropriate local business areas. [Refer NOM 27/08/2012].

3. Development activity

Annexure 2 provides graphical presentations of development activity turnaround times for the March quarter supporting the Progress Comments relevant to Priority 4.1.2 – Deliver high quality and timely development assessment.

4. Conclusion

It is recommended that the September 2012 Quarterly Progress Report on Goal 4 (Well planned neighbourhoods) of Council's Delivery Program 2009 to 2013 and Operational Plan 2012/13, be received and noted.

Chris Bluett
Manager Strategic Planning

Patrick Robinson
Manager Development Control

Allan Coker
Director Planning and Development

Annexures:

- 1 DPOP Quarterly Progress Report September 2012 for Goal 4 (Well planned neighbourhoods) – *distributed separately*
- 2 Graphical presentation of development activity turnaround time for the September quarter.

Item No: R1 Recommendation to Council
Subject: **Woollahra DCP 2003 (Amendment 2) - Lofts over garages**
Author: Sara Reilly Strategic Heritage Officer
File No: 1092.G
Reason for Report: To report on the public exhibition of the Draft Woollahra HCA DCP 2003 (Amendment No. 2) - Lofts over garages
To obtain Council's approval of the Draft Woollahra HCA DCP 2003 (Amendment No. 2) – Lofts over garages

Recommendation:

- A. That the Draft Woollahra HCA DCP 2003 (Amendment No. 2) - Lofts over garages, as contained in **annexure 3** of the report to Urban Planning Committee meeting on 13 November 2012 be approved.
- B. That the Draft Woollahra HCA DCP 2003 (Amendment No. 2) - Lofts over garages comes into effect on the date that notice of the approval is published in the Wentworth Courier.

1. Introduction

The Urban Planning Committee on 13 August 2012 considered a report on various changes to the existing controls for lofts over garages in the Woollahra Heritage Conservation Area. That report which appears at **annexure 1** contains a detailed background to the reasons for preparing the amendments.

The proposed changes include new controls brought over from the Paddington HCA loft controls. They also include a rewording of some of the existing controls to ensure that appropriate locations for lofts are clarified. These changes are necessary to remove an element of ambiguity with the controls, identified in a court case which dealt with a development application in Fullerton Street, Woollahra.

The Committee recommended:

That a draft development control plan be prepared to amend the Woollahra Heritage Conservation Area DCP as set out in section 5.0 of the report to the Urban Planning Committee meeting on 13 August 2012 subject to advice being submitted by staff by way of late correspondence to the Council Meeting on 27 August 2012 addressing the matters discussed at the Committee Meeting, including:

- (i) inclusion of an additional Objective, as the first Objective, in order to protect the amenity of the property, neighbouring properties and public open space, in terms of visual and acoustic privacy and sunlight access.*
- (ii) considering the potential impact of amending Control C13a(d) to include a proviso that permits lofts over multiple space garages if they present as distinctly separate lofts and garages.*

Late correspondence presented to the Council meeting of 27 August 2012 recommended minor amendments to the proposed controls as required by (i) and (ii) above. This correspondence appears at **annexure 2**.

Council then made the following decision on 27 August 2012:

That a draft development control plan be prepared to amend the Woollahra Heritage Conservation Area DCP as set out in section 5.0 of the report to the Urban Planning Committee meeting on 13 August 2012 subject to:

(i) *inclusion of the following objective:*

O1. To protect the amenity of the property, neighbouring properties and public open space in terms of visual

(ii) *control C13(b) being amended to read:*

C13(b) protects the amenity of the property, neighbouring properties and public open space in terms of visual and acoustic privacy and sunlight access.

(iii) *control C13(d) being amended to read:*

C13(d) the maximum width of the loft and single garage is 4.5m and for the loft and double garage is 6m

(iv) *control 13a(d) being amended to read:*

C13a Loft structures will not be permitted:

(d) over a multiple space garage, other than a side by side double garage, in which case a transverse gable form is used.

2. Public exhibition of the draft DCP

In response to Council's decision of 27 August 2012, a draft DCP was prepared. The Draft Woollahra Heritage Conservation Area DCP 2003 (Amendment No. 2) was placed on exhibition from Friday 21 September to Friday 19 October 2012. The public exhibition was carried out in accordance with the *Environmental Planning and Assessment Act 1979* (the Act) and the *Environmental Planning and Assessment Regulation 2000* (the Regulation).

Immediately prior to, and during the exhibition period, there was a weekly notice of the public exhibition in the *Wentworth Courier*. The Draft DCP and supporting material were available on Council's website and in the Customer Service Centre.

There were 35 page views of the material on the website (not including Council staff visits) during the exhibition period.

The exhibition material comprised –

- Explanatory notes
- Draft Woollahra Heritage Conservation Area DCP (Amendment 2)
- Comparison plan
- Woollahra Heritage Conservation Area DCP 2003
- Woollahra LEP 1995
- Council resolution of 11 October 2011
- Report to Urban Planning Committee 13 August 2012

- Late correspondence to Council meeting 27 August 2012
- Council resolution 27 August 2012

Letters advising of the exhibition details and inviting submissions were sent to the Woollahra History and Heritage Society, and to the Queen Street and West Woollahra Association.

3. Submissions

There were no submissions received on the Draft DCP.

4. Conclusion

The Draft DCP has been prepared in response to the resolutions of Council and exhibited as required by the Act and the Regulation. No amendments were made as there were no submissions.

We recommend Council approve the Draft DCP as included as **annexure 3**. If approved, the Draft DCP will come into effect on the date that notice of the approval is published in the Wentworth Courier.

Sara Reilly
Strategic Heritage Officer

Chris Bluett
Manager Strategic Planning

Annexures

1. Report to the Urban Planning Committee on lofts over garages, dated 13 August 2012
2. Late correspondence to Council meeting 27 August 2012
3. Draft Woollahra HCA DCP 2003 (Amendment No. 2) – Lofts over garages as exhibited
4. Comparison plan

Item No: R2 Recommendation to Council
Subject: **Modification to the Definitions of ‘Height’ and ‘Existing Ground Level’ in the Woollahra Local Environmental Plan 1995**
Author: Patrick Robinson – Manger Development Control
File No: 1064.G (Amend. 74)
Reason for Report: To remedy a problem in relation to the interpretation of the definitions of ‘height’ and ‘existing ground level’ in Woollahra LEP 1995.

Recommendation:

- A. That Council resolve to prepare a planning proposal under section 55 of the *Environmental Planning and Assessment Act 1979* (the Act) to amend the definition of ‘height’ and ‘existing ground level’ contained in Schedule 1 of the *Woollahra Local Environmental Plan 1995* (WLEP 1995).
- B. To provide certainty as to how building height is to be measured the planning proposal adopt the definition of ‘height’ and ‘existing ground level’ contained in the *Standard Instrument – Principal Local Environmental Plan*.

1.0 Background

The Woollahra Local Environmental Plan 1995 (WLEP 1995) controls the bulk and scale of development by way of a series of numeric development standards. One of the most significant of those standards is contained in cl 12(1) - *Height of buildings*. The application of that standard is enforced by associated maps as well as particular definitions of ‘height’ and ‘existing ground level’ contained in Schedule 1 of WLEP 1995. Because of the way these definitions interact, uncertainty has arisen as to how height should be measured for the purposes of determining compliance of a development proposal with that height standard.

Development standards should be unambiguous and capable of clear interpretation by any person or authority using that standard to propose or assess a development. In most cases development standards in the WLEP 1995 are clear as to their terms. The interpretation of the height standard has, however, been altered as a result of recent legal advice, which is not in itself disputed (for the purpose of this report we will refer to that as the ‘new interpretation’). That advice, however, turns on the particular construction of the definitions which underpin that standard. Concern is raised that the new interpretation may give rise to unexpected planning outcomes.

For that reason we consider it desirable, from a procedural and an urban planning perspective to review the definition of ‘height’ and ‘existing ground level’ in the WLEP 1995 so that they are clear, unambiguous and continue to support the objectives to that development standard contained in cl 12AA – *Objectives of maximum height development standard*.

2.0 Report

2.1 Planning purpose of development standards

WLEP 1995 contains a series of development standards which are designed to manage development of land in a manner which protects the amenity and natural environment of Woollahra. It is also intended that these key development standards be clear and explicit.¹

Critical development standards in this regard include:

- Cll 10 and 10A and 10B which deal with minimum allotment and frontages for new development
- cll 11AA and 11 which deal with maximum floor space ratio, and
- cll 12AA and 12 which deal with the maximum height of buildings.

Within the hierarchy of development controls in the NSW planning legislation these controls, known as development standards, are to be given considerable legal weight. Indeed Council may only vary such standard once it has formally considered an objection made to that standard by the applicant under State Environmental Planning Policy No.1 (SEPP No.1 objection). In order to determine an application the subject of a SEPP No.1 objection, the Council must form the view, under stringent tests, that the application of that standard is both unreasonable and unnecessary in the circumstances of the case. It is thus of great importance that a development standard is clear and easily interpreted. It is also important that the drafting of the standard deliver the development outcomes set out in the objectives to these standards, and according to community expectations.

The development standards listed above have been in place for some seventeen years and are well understood and have been applied in a consistent manner by Council in its development control functions. However, recently a particular issue has arisen in relation to the interpretation and application of the development standard for height.

2.2 Interpretation of height under the WLEP 1995

Cl 12(1) of the WLEP 1995 states that:

A building shall not be erected on land within a height zone to a height greater than the maximum height shown on the height map as applicable to land within that height zone.

That Clause establishes the statutory standard.

Cl 5 of the WLEP relevantly states:

*In this plan –
(a) the words and expressions listed in Schedule 1 have the meanings given to them in the Schedule*

...

That Clause gives effect to the definitions contained in Schedule 1 of the WLEP 1995.

¹ See Clause (2) of WLEP 1995 aims and objectives

Schedule 1 defines 'height' for the purpose of the development standard as follows:

height in relation to a building, means the greatest distance measured vertically from any point on the building to the existing ground level immediately below that point.

Schedule 1 also provides the definition for 'existing ground level' as follows:

existing ground level means the surveyed level of the ground surface immediately prior to the proposed development and prior to any associated excavation, development or site works (emphasis added).

It is the interaction between the definition of 'height' and that of 'existing ground level' which gives rise to interpretive uncertainty.

2.3 Issues arising from the definition of height

Traditionally the definition of 'height' as informed by the definition for 'existing ground level' has been interpreted to mean that distance between the highest part of the building and the existing ground level *inclusive* of any work previously carried out. That means we have measured height from the ground levels which existed on the site (whether natural or manmade) at the time the application was lodged. We have consistently applied this approach since the commencement of WLEP 1995.

Council recently received legal advice that, in the case of alterations and additions, the words "... *the surveyed level of the ground surface immediately prior to the proposed development and prior to any associated excavation, development or site works*" operates in a manner requiring the measurement of height to *exclude* any associated development. This means we have to measure height excluding associated development such as basements and find existing ground level by other means.

This interpretation gives rise to both practical development control issues, and issues of environmental planning. From a practical perspective, to allow Council officers to properly assess height under the new interpretation applicants are required to submit survey information as to the level of land prior to any development taking place. This requirement becomes particularly problematic where land has been developed for many years and reliable data as to existing ground levels prior to *associated development* being carried out is difficult, if not impossible, to obtain.

Where an applicant, despite *bonafide* effort, is unable to provide survey information prior to *associated development*, we are advised that we may then measure height on the basis of information able to be submitted. That being the case we will then measure height using the traditional interpretation as opposed to the new interpretation. Clearly this is an undesirable situation because it gives rise to issues of both uncertainty, and risk of error in the assessment process.

From an environmental planning perspective, the new interpretation may have the effect of allowing greater height in certain circumstances than was envisaged by the WLEP 1995. As a result, the new interpretation may compromise the effectiveness of the development standard itself. The concern therefore is that the interaction of the two definitions may operate to defeat the stated aims of the Standard in cl 12AA of the WLEP 1995 which are:

- (a) *to minimise impact of new development on existing views of Sydney Harbour, ridgelines, public and private open spaces and views of the Sydney City skyline,*
- (b) *to provide compatibility with the adjoining residential neighbourhood*
- (c) *to safeguard visual privacy of interior and exterior living areas of neighbouring dwellings*
- (d) *to minimise detrimental impacts on existing sunlight access to interior living rooms and exterior open space areas and minimise overshadowing*
- (e) *to maintain the amenity of the public domain by preserving public views of the harbour and surrounding areas and the special qualities of the streetscapes.*

Therefore, in order to support the proper management of development in terms of the foregoing objectives and to ensure certainty in the application of that height standard it is considered appropriate that the definitions underpinning that standard be amended.

2.4 Proposed amendment to the definition of height

As discussed above the principal issue in the application of the WLEP 1995 height standard is found in the definition of ‘existing ground level’. In particular, it is the implications of the words “*surveyed level...immediately prior to the proposed development and prior to any associated excavation, development or site works*”. The words “*and prior to any associated excavation*” on advice operates to exclude any existing excavation in the measurement of height.

As indicated in the previous section, this lack of certainty, and potential distortion of the operation of the standard in terms of planning outcomes is unsatisfactory. For that reason it is proposed to modify these definitions in a manner which will resolve issues of uncertainty and support the expected outcomes of the standard as enunciated by the objectives to the height standard.

To do this it is considered sensible to refer to the definitions contained in the *Standard Instrument – Principal Local Environmental Plan*. The Standard Instrument is the template being used for new Principal LEPs for Councils throughout NSW. We are currently preparing our Principal LEP and are well advanced in the process. Councillors will be informed about this work through a series of briefings sessions commencing 26 November 2012.

The Standard Instrument defines building height as follows:

Building height (or height of building)

Means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns but excluding communication devices antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

The Standard Instrument defines existing ground level as:

Ground level (existing)

Means the existing ground level of a site at any point.

Adopting these definitions in lieu of the current definitions in the WLEP 1995, would resolve the uncertainty which has arisen in relation to proper interpretation of height by:

- a) Clearly identifying that height should be measured from ground level as it is at the time that application is made, and
- b) Promoting a built form outcome envisaged by the objectives of the height development standard

3.0 Conclusion

Whilst the development standards in the WLEP have, and continue to, serve Council well, it has become apparent that the interaction between the definitions of 'height' and 'existing ground level' has given rise to uncertainty as to how height should be measured.

In order to remedy the current unsatisfactory situation it is recommended that Council prepare a planning proposal under the provisions of Section 55 of the *Environmental Planning and Assessment Act 1979* to modify the definition of height and existing ground level in a manner which is consistent with those definitions contained in the *Standard Instrument- Principal Local Environmental Plan*.

Patrick Robinson
Manager – Development Control

Allan Coker
Director – Planning and Development

Annexures: (Distributed separately)

1. Confidential legal advice dated 3 May 2012 from Wilshire Webb Staunton Beattie
2. Confidential Memorandum of Advice dated 3 May 2012 from John Ayling SC

Item No: R3 Recommendation to Council
Subject: **Delegation and independent reviews relating to plan-making**
Author: Chris Bluett - Manager Strategic Planning
File No: 885.G
Reason for Report: To inform Council about new a delegation and independent reviews for plan-making under Part 3 of the *Environmental Planning and Assessment Act 1979*.
To obtain Council's decisions to accept the plan-making delegation.

Recommendation

- A. That the Council inform the Hon Brad Hazzard MP, Minister for Planning and Infrastructure, that it wishes to accept the delegation for the plan-making steps under section 59 of the *Environmental Planning and Assessment Act 1979*.
- B. That the Council delegate to the position of General Manager the functions delegated to the Council by the Minister for Planning and Infrastructure in his instrument of delegation dated 14 October 2012, noting that those delegations will be sub-delegated to the position of Director Planning and Development.

1. Introduction

The Council has received a letter from the Hon. Brad Hazzard MP, Minister for Planning and Infrastructure, advising of his decision to delegate to councils functions under section 59 of the *Environmental Planning and Assessment Act 1979* (the Act) for the making of local environmental plans (LEP) (**annexure 1**). The letter also includes information about steps taken by the Department of Planning and Infrastructure to formalise independent reviews of some decisions by councils and the Department in the plan-making process.

The Minister's decision flows from outcomes to various stages of the NSW Planning System Review, notably public comments received on:

- the issues paper titled *The way ahead for planning in NSW?*, which was released on 11 December 2011; and
- a draft policy statement titled *More local, more accountable plan making*, which was released on 27 March 2012.

We provided detailed submissions on the issues paper and policy statement, which included a suggestion that delegations for plan-making be issued to councils for certain types of LEPS in order to streamline the process.

The Department issued Planning Circular PS 12 -006 on 29 October 2012 explaining the delegation and review processes (**annexure 2**).

2. The local environmental plan process

The plan-making process is contained in Division 4 (LEPs) of Part 3 (Environmental Planning Instruments) of the Act (**annexure 3**). In summary, the process involves:

- Step 1 Council prepares a planning proposal – this sets out the intention and justification for the LEP. (section 55)
- Step 2 The planning proposal is referred to the Minister and reviewed by a delegated committee comprising staff from the Department. The Minister or the Minister’s delegate then makes a determination. This is called the Gateway determination. If the determination allows the proposal to proceed, the determination will set out:
- whether the proposal should be varied,
 - whether community consultation is required and, if so, the period of that consultation;
 - whether a public hearing is required;
 - the times within which stages of the procedure for making the LEP are to be completed. (section 56)
- Step 3 Community consultation required by the determination is carried out. A public hearing may be conducted at this time if required by the determination or by other legislative requirements or by a decision of council.²
- Council considers submissions arising from the community consultation stage and also considers the report from any public hearing. (section 57)
- Step 4 Three options are available at this step.
- The planning proposal may be varied in response to submissions or matters within the public hearing report or for any other reasons. The revised planning proposal is referred the Minister.
 - The planning proposal may be referred to the Minister without any variations.
 - The council may request the Minister to determine that the planning proposal not proceed. (section 58)
- Step 5 The Director-General arranges for the Parliamentary Counsel to draft the LEP. The Minister may:
- approve the LEP with or without variation
 - approve the LEP, but defer a matter from it and specify how the deferred matter is to be resolved
 - decide not to approve the LEP. (section 59)

3. The delegation

3.1 Scope of the delegation

A copy of the instrument of delegation is attached as **annexure 4**. The delegation relates to particular parts of the plan-making process contained in section 59(2), (3) and (4) of the Act which are the responsibility of the Minister. The section 59 stage is the last step of the LEP process contained in Division 4 of the Act (**annexure 3**).

² A public hearing is required under section 29 of the *Local Government Act 1993* where a planning proposal seeks to reclassify land from community land to operational land. Notwithstanding an authorisation from the Department, a council may decide to conduct a public hearing if it receives a submission requesting a hearing and the council considers the issues raised in the submission warrant a hearing.

Section 59 is set out below:

59 Making of local environmental plan by Minister

- (1) The Director-General is to make arrangements for the drafting of any required local environmental plan to give effect to the final proposals of the relevant planning authority. The Director-General is to consult the relevant planning authority, in accordance with the regulations, on the terms of any such draft instrument.
- (2) The Minister may, following completion of community consultation:
 - (a) make a local environmental plan (with or without variation of the proposals submitted by the relevant planning authority) in the terms the Minister considers appropriate, or
 - (b) decide not to make the proposed local environmental plan.
- (3) The Minister may defer the inclusion of a matter in a proposed local environmental plan.
- (4) If the Minister does not make the proposed local environmental plan or defers the inclusion of a matter in a proposed local environmental plan, the Minister may specify which procedures under this Division the relevant planning authority must comply with before the matter is reconsidered by the Minister.

The Minister's delegation will be issued to a council once. Therefore, it is not necessary for the delegation to be reissued by the Minister for each draft LEP. However, the Department will determine through the Gateway process (section 56) whether the delegation can be used for the particular planning proposal being considered.

Subject to written authorisation by the Director-General, which will be issued with a Gateway determination, the delegation will provide councils with authority to:

- make or not make a local environmental plan - section 59(2)
- defer a matter from a local environmental plan - section 59(3)
- specify procedures which must be followed before a deferred matter or a proposed local environmental plan which has not been made are to be reconsidered - section 59(4).

Planning Circular PS 12-006 identifies the types of draft LEPs to which the delegation will routinely be applied following a Gateway determination. These draft LEPs involve:

- alterations to LEP maps,
- matters set down in section 73A of the Act, being:
 - the correction of minor errors in an LEP such as incorrect descriptions, inconsistent numbering of provisions, a wrong cross-reference, a spelling error, a grammatical mistake, the insertion of obviously missing words, the removal of obviously unnecessary words or a formatting error,
 - matters that are of a consequential, transitional, machinery or other minor nature,
 - matters that are not subject to conditions precedent for the making of the LEP because they will not have any significant adverse impact on the environment or adjoining land,
- reclassification of land (this involves the classification of public land as either operational land or community land under the *Local Government Act 1993*),
- heritage LEPs relating to heritage items supported by the Office of Environment and Heritage and an endorsed heritage study,
- spot rezoning which is consistent with an endorsed strategy or surrounding zones or both.

3.2 Accepting the delegation

It will be necessary for Council to make a formal decision to accept the Minister's delegation. The Council will also need to resolve to sub-delegate the delegation to positions within Council. Parts A and B of our recommendation address these matters.

3.3 Implementing the delegation

At the time the Council resolves to prepare a planning proposal it will need to decide whether or not it will make a request to the Director-General to exercise the delegation. Even though the delegation may be exercised, subject to the Director-General's authorisation, the Council may decide for various reasons not to use the delegation. For instance, the Council may decide it will not apply for the delegation in a planning proposal that deals with Council-owned lands.

3.4 Implications of the delegation

We consider the delegation is a major improvement to the plan-making process and will assist with the delivery of certain LEPs in a timely manner. However, it should be noted that contrary to the statement made by the Minister in his covering letter, and despite a council being able to approve certain types of LEPs, we do not consider the delegation has the effect of "returning local planning decisions to local councils and their communities." We say for two reasons.

First, under the old plan-making provisions of the Act, the ultimate decision regarding approval of an LEP resided with the Minister. Additionally, the Department could alter draft plans at various steps of the process. Therefore, councils and their communities were never fully in charge of the plan-making process from its conception to its completion.

Secondly, the new plan-making provisions contained in Division 4 of the Act enable the planning proposals to be varied through a Gateway determination. Furthermore, the Minister may change the Gateway's determination and effectively alter a planning proposal. Under section 56(5) of the Act, the Minister may arrange for a review of the planning proposal by, or with the assistance of, the Planning Assessment Commission or a joint regional planning panel. Additionally, and more broadly, under section 56(7) the Minister may, at any time and without providing reasons, alter a determination made by the Gateway.

With such powers of intervention by the State Government we do not consider planning decisions are being returned to councils and their communities.

4. Independent plan-making review

Two review processes relating to the plan-making process have been formalised. These processes relate to:

- Pre-gateway reviews
- Gateway reviews.

Annexure 5 contains the flow charts for these reviews as set down in the Department's document titled *A guide to preparing local environmental plans*.

4.1 Pre-gateway reviews

The general aspects of these reviews are:

- they may be requested by a proponent such as a developer or landowner –
 - up to 40 days after a council has declined to support the proponent's request to prepare a proposal, or
 - where a council has not indicated support within 90 days after a proponent submitted a request for a proposal, any time after the 90 days have lapsed,
- a request for a review is initially made to the Department and then if considered to have merit, it is sent to the relevant regional planning panel, for consideration,³
- the regional panel provides advice to the Minister on whether a proposal should be submitted for a Gateway determination,
- a council and a proponent will have input to the review at the time the Department considers the merits of the proposal and, if the matter proceeds to the regional panel, when the panel considers the matter.

4.2 Gateway reviews

The general aspects of these reviews are:

- a council or a proponent may request the Minister to review a planning proposal where a Gateway determination does not support a proposal, or requires a proposal to be resubmitted or imposes requirements which the council or proponent consider are unreasonable.
- time periods are set for a request to review the determination
- a request for a review is initially made to the Department and then if considered to have merit, it is sent to the Planning Assessment Commission
- the PAC advises the Minister whether the Gateway determination should be altered
- the Minister decides whether or not the proposal should proceed back to the Gateway and, if so, in what form
- a council and a proponent will have input to the review at various steps of the process.

4.3 Implications of the reviews

The review processes have benefits for both a council and a proponent such as a developer or property owner. However, in our earlier submissions to the Department we raised concern about the ability of proponents to seek reviews. Our submission to the Department on this matter included the following comments:

We do not support the introduction of an independent review which may be requested by a proponent, other than a council, at any stage of the plan-making process. Generally councils already have a process to assess the merits of requests to prepare planning proposals. Such processes are often based on long-established planning practices, reflecting local policy and more recently responding to the current status of Principal LEP preparation.

It is therefore most appropriate that the decision to proceed with a request for a planning proposal is determined solely by the council.

³ In the case of planning proposals dealing with matters in the City of Sydney, the review is carried out by the Planning Assessment Commission.

Furthermore, establishing an independent review process may encourage overzealous and ambitious rezoning requests, given that proponents often see the JRPP and PAC as more lenient than councils. We therefore foresee an increase in requests to prepare planning proposals. This would create a significant amount of work for our planning staff, and unreasonably divert resources away from Council's priority projects.

We also made specific comments about the proposed operational elements of the pre-Gateway and Gateway review processes. Whilst several of our comments have been taken up in the Department's guidelines, the core components of the reviews have not been altered from their original version.

5. Conclusion

We consider the Minister's delegation for plan-making functions under section 59 of the Act have merit and should be accepted.

In regard to the review processes for planning proposals, we consider there are both advantages and disadvantages for Council. It is inevitable that more requests for planning proposals will be made to Council now that review processes have been formalised. As a result, we expect that our resources will be diverted from our key planning projects as we will be required to initially process those proposals within specific timeframes and then defend Council's position where proposals are declined or where aspects of a proposal revised by Council are not accepted by a proponent.

Chris Bluett
Manager Strategic Planning

Allan Coker
Director Planning and Development

Annexures

1. Letter from the Hon Brad Hazzard MP
2. Department of Planning and Infrastructure, 29 Oct. 2012, Planning Circular PS 12-006, *Delegations and independent reviews of plan-making decisions*.
3. *Environmental Planning and Assessment Act 1979* Division 4 – LEPs
4. Instrument of delegation dated 14 October 2012
5. Department of Planning and Infrastructure, October 2012, *A guide to preparing local environmental plans* – attachment 2 and 3

**POLITICAL DONATIONS DECISION MAKING FLOWCHART
FOR THE INFORMATION OF COUNCILLORS**

