

Agenda Report

Council Resolution Item

Action is required from the Council Meeting on **02 September 2014** as per the Resolution outlined below.

EP/41 Mosman Local Environmental Plan 2012 and Mosman Residential Development Control Plan 2012 - Amendment (EP)

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MOSPLAN REF: BE.01

REPORT BY: **Manager Urban Planning**

SUMMARY

Report on the public exhibition of proposed amendments to Mosman Local Environmental Plan 2012 and Mosman Residential Development Control Plan 2012, including insertion of new local clauses for wall height, number of storeys and landscaped area in the LEP.

OFFICER'S RECOMMENDATION

The Manager Urban Planning recommends that:

1. In relation to Mosman Local Environmental Plan 2012:
 - a. Council adopt the revised Planning Proposal attached to this report in accordance with section 58(1) of the *Environmental Planning and Assessment Act 1979* to amend objectives for the R2 Low Density residential zone, height of buildings and floor space ratio clauses, and include new local clauses for wall height, number of storeys and landscaped area in the LEP
 - b. Council forward the revised Planning Proposal to the NSW Department of Planning and Environment; instruct the NSW Parliamentary Counsel to draft the legal instrument; then make the plan under its delegation and notify the NSW Department of Planning and Environment accordingly consistent with LEP making procedure
2. In relation to Mosman Residential Development Control Plan 2012:
 - a. Council adopt the amendments as publicly exhibited (listed as follows) in accordance with clause 21(1) of the *Environmental Planning and Assessment Regulation 2000*:
 - i. Omit objective O1 and planning control P1 in Part 4.2 Siting and Scale relating to maximum wall height and maximum number of storeys of development
 - ii. Omit objectives O1, O2 and O3 and planning control P1 in Part 4.4 Landscaping relating to minimum landscaped area of a site
 - iii. In objective O3 in Part 5.10 Transport, Access and Parking, replace the word “off” with the word “on”

- b. Council give public notice in the Mosman Daily of its decision to amend the DCP, noting that the amendments will come into effect on the date that related amendments to Mosman Local Environmental Plan 2012 come into effect; and forward a copy of the amended DCP to the NSW Department of Planning and Environment.

REPORT

Background

On 1 April 2014 Council considered a report on a Planning Proposal to amend Mosman Local Environmental Plan 2012 (the LEP) in the following manner:

1. Amend objectives for the R2 Low Density Residential zone, clause 4.3 Height of buildings and clause 4.4 Floor space ratio, to strengthen objectives and for consistency within the LEP.
2. Include new local clauses in the LEP for maximum wall height, maximum number of storeys and minimum landscaped area, to reinforce fundamental controls which have defined the character of housing in Mosman for over 20 years.

Council resolved that the Planning Proposal be endorsed and referred to the former NSW Planning and Infrastructure for gateway determination under section 56 of the *Environmental Planning and Assessment Act 1979* (the Act). A gateway determination to proceed with the Planning Proposal was issued by the NSW Department of Planning and Environment (the Department) on 14 May 2014.

On 3 June 2014 Council considered a report on amendments to Mosman Residential Development Control Plan 2012 (the DCP) to meet objectives and planning controls relating to maximum wall height, maximum number of storeys and minimum landscaped area (given their proposed inclusion in the LEP), and correct a minor typographical error. Council resolved to amend the DCP and concurrently exhibit the proposed amendments with those proposed for the LEP.

Public exhibition

The proposed amendments were publicly exhibited for 28 days from 12 June - 10 July 2014 at Council's offices, Mosman Library and on Council's website. The exhibition was publicly notified in the Mosman Daily on 12 and 19 June 2014, and in the Mosman Now Newsletter (Winter Edition 2014) distributed to all Mosman residents.

The exhibition was undertaken in accordance with the gateway determination issued by the Department, sections 56(2)(c) and 57 of the Act, and clause 18 of the *Environmental Planning and Assessment Regulation 2000* (the Regulation).

Council received four submissions. Support for the proposed amendments is given in one submission, however concern is raised in three submissions about the wording of some proposed amendments and the information that was exhibited. Copies of submissions received are attached to this report. Issues raised in submissions are outlined below (in *italics*) and a response is provided to each issue.

Issues raised in submissions

A. R2 zone, height of buildings and FSR objectives

- *In regard to the R2 zone objectives, it is not possible for development to “achieve” desired future character; using the word “achieves” does not allow flexibility (in respect of clause 4.6 Exceptions to development standards)*

Comment: The following amendment to an R2 zone objective (replacing the word “complements” with “achieves”) was exhibited:

To ensure that development is of a height and scale that ~~complements~~ *achieves* the desired future character.

Use of the word “achieves” is aspirational, however there is some merit in amending the word to “seeks to achieve” so that development would have to at least work towards achieving the desired future character. Section 58(1) of the Act allows Council to vary a Planning Proposal as a consequence of its consideration of a submission. It is recommended that this further amendment be made as shown below. This is supported by Council’s solicitors.

To ensure that development is of a height and scale that ~~complements~~ *seeks to achieve* the desired future character.

- *In regard to the R2 zone objectives, “enhances” means improves, and it is unreasonable to expect a development to improve the local area*

Comment: The following amendment to an R2 zone objective (replacing the words “has regard to” with “enhances”) was exhibited:

To encourage residential development that ~~has regard to~~ *enhances* local amenity and, in particular, public and private views

Use of the word “enhances” may be difficult to achieve where local amenity is already high, and it may be more reasonable to instead use the words “maintains or enhances” so that as a minimum there would be an objective to do no harm. It is recommended that this further amendment be made, as shown below, under section 58(1) of the Act. This is supported by Council’s solicitors.

To encourage residential development that ~~has regard to~~ *maintains or enhances* local amenity and, in particular, public and private views

- *Use of the word “particularly” in the clause 4.3 objectives dramatically changes the meaning of this objective such that visual impact must be minimised from all viewpoints (e.g. neighbours) and not just from the foreshores*

Comment: The following amendment to a height of buildings objective (adding the word “particularly”) was exhibited:

To minimise the visual impact of buildings *particularly* when viewed from the harbour and surrounding foreshores

Including “particularly” in this objective is a deliberate amendment and corrects what was considered to be a shortcoming in that visual impact (which should reasonably be considered from all viewpoints) is confined only to views from the harbour and the surrounding foreshore in the current objectives. This is appropriate; no further amendment is recommended.

- *Public exhibition documentation lacked information about the difference in legal requirements and effect on developments of new objectives for the R2 zone and clause 4.4*

Comment: Under section 79C of the Act, the provisions of any environmental planning instrument (i.e. LEP) must be considered in the assessment of a development application. Objectives are not development standards and compliance with them is always measured against the circumstances of each case to the extent that is reasonable.

The following new objective for the R2 zone was exhibited:

To minimise the adverse effects of bulk and scale of buildings

This new objective is currently in the LEP as an objective for the height of buildings and floor space ratio clauses and is currently a consideration in most development applications. The effect on development by inclusion of this objective for the R2 zone would likely be minimal.

A new objective for the floor space ratio clause is also proposed:

To limit excavation of sites and retain natural ground levels for the purpose of landscaping and containing urban run-off

This new objective relating to limiting excavation is proposed in response to the standardised definition of "gross floor area" in the Standard Instrument which may result in greater excavation of sites (as basement storage, garbage, service areas and the like are excluded from gross floor area calculations). The effect on development would be limiting excessive excavation of sites. This objective was included in the former Mosman LEP 1998.

B. Wall height and number of storeys

- *Wall Height should be proposed as a separate local provision to Building Height (i.e. placed in the 6.x series of clauses, and not included as a subclause to clause 4.3)*

Comment: The appropriate location of this clause within the Standard Instrument LEP format is a matter for the Parliamentary Counsel Office (PCO) to advise when it drafts the legal instrument. The LEP plan making process typically involves the public exhibition of only a plain-English explanation of proposed amendments to an LEP, and following this, the legal instrument would be drafted by the PCO. However, in this instance the Department requested that Council exhibit the proposed wording of clauses with the Planning Proposal. This was stated in the public exhibition documentation and it was also stated that the proposed amendments are in draft only and may be subject to amendment once submitted to PCO.

- *The proposed new local clause refers to "Council" where it seems "Consent Authority" may be more appropriate*

Comment: Refer to above comments in relation to the PCO.

- *The definition of "wall height" needs to be introduced into the LEP standard definitions. One key purpose of the Standardised Instrument is standardised definitions. Council needs to liaise with NSW Planning to have an agreed definition of Wall Height adopted*

Comment: A definition of "wall height" is proposed to be included in the LEP within the wall height clause as this definition does not exist in the Standard Instrument Dictionary. It is a matter for the Department to advise whether it will apply this definition State-wide (by inclusion in the Dictionary) or allow it to be a local objective only. In issuing gateway approval to proceed with this Planning Proposal, the Department raised no issue with Council's proposal to include this definition in the LEP.

- *Public exhibition documentation lacked detail as to why these clauses are proposed to be transferred from the DCP to the LEP, what the legal effect would be, and what the effect on developments would be*

Comment: The reason for transferring local clauses for wall height and number of storeys from the DCP to the LEP was explained in the Planning Proposal that was exhibited, specifically in Part 3 Justification.

Under section 79C of the Act, the provisions of any environmental planning instrument (i.e. LEP) and DCP need to be considered in the assessment of a development application, however in the hierarchy of planning documents an LEP has greater statutory weight than a DCP. The exhibited Planning Proposal identified that within the LEP, these clauses are proposed to be development standards, meaning that development consent could not be granted for development that contravenes the standard unless an application is made under clause 4.6 of the LEP to vary the standard. The effect on development would be higher level assessment to ensure compliance with the provisions (refer to discussion in this report under “Issues raised in submissions: other” regarding the economic cost of the Planning Proposal).

- *Council should also codify situations where it has already identified a higher development intensity is permitted. For example, under the 1998 LEP council submitted to MDAP a report supporting a three storey building because the corresponding part of the Clifton Gardens townscape was largely three storeys. Council should incorporate these exceptions into the LEP to increase efficiency and certainty of processing*

Comment: It is possible for Council to include a local provision within the LEP to allow an exception to development standards in certain circumstances. At the Council Meeting on 19 February 2013 Council considered a Planning Proposal to include a clause within the LEP to provide some flexibility in the application of the height and floor space ratio controls for dwelling houses and semi-detached dwellings in certain circumstances, to reduce the need for applications to be made under clause 4.6 of the LEP to vary these standards. Council resolved that the matter be deferred and reconsidered while Council engages in a public consultation on the planning process. A further report on this matter will be prepared for Council’s consideration shortly.

C. Landscaped area

- *It is unclear why larger blocks need to provide for an increasing amount of landscape. Historical precedent is insufficient. A paper studying and justifying the appropriate landscape standard and how it would vary with block size (and width) seems reasonable*

Comment: This study has been undertaken. The Mosman Urban Design Study was commissioned in 1990 in response to growing pressure for change resulting from State Government initiatives on urban consolidation and development trends, and concern that the special townscape and landscape qualities of Mosman would be threatened. The study, carried out by McDonald McPhee Pty Limited (Brian McDonald) in association with Craig Burton and Penelope Pike, formed the basis of the planning controls for Mosman’s residential areas, including controls for landscaped area.

The study recognised that, in Mosman, landscaped area is a major influence on urban form and the character of townscapes and concluded that it is essential that its provision be related to site area, not building area, with a larger percentage of landscaped area to be provided on large lots in the former 2(a2) zone – located on waterfront land and steeply sloping land leading to the harbour – given the high visual prominence of such land. Adequate building area would still be available on larger sites.

- *The precedents listed in the Planning Proposal (such as Hunters Hill LEP) are not directly relevant to the amendments Mosman is proposing. Council should resubmit its Planning Proposal to NSW Planning with an appropriate group of precedents that correspond to the manner in which Mosman council seeks to apply merit based assessments*

Comment: There are a limited number of precedents for the inclusion of wall height, number of storeys and landscaped area clauses in NSW council LEPs prepared under the Standard Instrument. Appendix B of the Planning Proposal lists 17 such precedents. Council has been issued with gateway approval from the Department to proceed with this Planning Proposal, and further review of precedents is unwarranted.

- *The exhibition documentation does not convey that proposed changes effectively combine the existing R2 Low Density Residential and R3 Medium Density Residential zones irrespective of whether the site contains single or multiple dwellings, and amend the existing two floor space ratio ranges limiting them to multiple dwellings only*

Comment: The minimum landscaped area required under the former Mosman LEP 1998 was, for development resulting in one dwelling per lot, a percentage of the gross floor area of the site. When the clause was transferred into the DCP in 2012, this method of calculation was changed to be the same as that for medium density dwellings, that is, to be based on a percentage of the site area. Inadvertently, in making this change, the amount of landscaped area required for particular land (lots less than 500m² in area, zoned R3 Medium Density Residential, occupied by one dwelling) was altered, and this is proposed to be corrected.

- *Conversion of the landscaped area formula to a step function will create winners and losers, depending on the area of the property concerned. It is not clear why this is proposed when the formula approach is simple and straightforward*

Comment: The Planning Proposal notes that the formula and sliding scale graph for landscaped area currently contained in the DCP would likely need to be converted to a numerical standard – for example, 35% if the site area is at least 500m² but less than 650m² – however the intention is that this reflect as best as possible the existing requirement. The PCO will advise Council which approach is appropriate when drafting the legal instrument. There is limited precedent for a landscaped area clause in other council LEPs or State policies, and none use a formula. A numerical standard (such as that exhibited) is used in State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 to set out requirements for landscaped area for complying development, and it may be Council must use a similar approach.

- *The public exhibition documentation lacked detail as to why this clause is proposed to be transferred from the DCP to the LEP, what the legal effect would be, and what the effect on developments would be*

Comment: Refer to response given above to similar comment in relation to clauses for wall height and number of storeys. The landscaped area clause would not be a development standard in the LEP, meaning that variation of the numerical requirement can be considered subject to achieving the stated objectives without the need to submit an application under clause 4.6 of the LEP to vary the standard.

D. Other issues raised in submissions

- *In its Planning Proposal Council claims there will be no social or economic costs associated with the policy. This seems unlikely. Suggested economic costs are:*
 - *the reduction in development potential and associated economic activity from introducing the controls as proposed vs retaining the existing controls*

- *the increased cost of referrals to MDAP when variations are sought in excess of 10% (council's delegated authority), the increased time for processing applications that need to be assessed by MDAP, and the increased cost of operating MDAP itself*

Comment: Planning objectives and controls for wall height, number of storeys and landscaped area have applied in Mosman for over 20 years. For the last two years these controls have resided in the DCP as a result of the Department's Standard Instrument policy, however prior to this, for 18 years the controls were contained in Mosman's LEPs. This Planning Proposal seeks to reinstate these controls in the LEP, and there is unlikely to be any reduction in development potential and associated economic activity as a result. Equally, the proposed amendments to the R2 zone, height of buildings and floor space ratio objectives would be unlikely to result in economic costs to development.

The exhibited Planning Proposal identified that wall height and number of storeys clauses would be included in the LEP as development standards. As a result, any development application involving a variation of more than 10 per cent to either of these development standards would be referred to the Mosman Development Assessment Panel (MDAP) for determination (MDAP Charter 6 May 2014). The likely impact this would have on MDAP workload and costs has been considered as outlined below.

All development applications determined by Council in 2011 have been reviewed. This 12 month period was selected as during this time maximum wall height and number of storeys clauses were included in the former Mosman LEP 1998 as development standards, and so comparisons can be made as to the likely additional workload to result by re-inclusion of these controls as development standards in Mosman LEP 2012. The key findings are as follows:

- During this period, 275 development applications were determined. Of these, 99 applications had a SEPP 1 variation (now known as a clause 4.6 variation) to a development standard in the LEP, with 47 seeking a variation to wall height or number of storeys (17 per cent of applications determined).
- Considering these 47 applications and the current MDAP delegations, 38 applications would have been referred to MDAP on the basis of other triggers (e.g. variation to building height or floor space ratio; or unresolved objections), leaving only seven applications that would have been referred on MDAP solely on the basis of variation to wall height or number of storeys.
- Any application that proposes the addition of a third storey to a dwelling would always necessitate referral to MDAP for determination as it results in a 50 per cent variation to the development standard. This is a commonly sought variation (45 of the 99 applications seeking variation) given Mosman's topography where, for example, a third storey may be proposed within the existing foundation space of a building which would not add to bulk or building height.
- Wall height is an important measure of building bulk, and the extent of variation sought to this development standard can vary depending on topography, building design and other factors. During 2011, only two applications would have been referred to MDAP solely on the basis of variation to the wall height development standard.

Having regard to the above review of applications, it is recommended that:

- The number of storeys clause be included in the LEP to add weight to its importance in shaping the built environment, however the clause should be drafted in a similar way to the landscaping clause and not as a development standard requiring a clause 4.6 exception

- The wall height clause be included in the LEP as a development standard, and it is reasonable to conclude that this would not significantly contribute to the workload of MDAP or costs or processing time associated with this
- *The usual time frame associated with LEP changes is 12-18 months. The savings provision adopted ought to reflect NSW Planning policy and allow the degree of certainty of timeframe implied by the NSW Planning policy (i.e. minimum 12 months).*

Comment: The gateway approval issued by the Department instructed that the timeframe for completing the LEP is six months, that is, by November 2014. Council is on track to achieve this. To allow a degree of certainty in the preparation and lodgement of development applications, it is intended that a savings provision be included for the proposed amendments, that is, the amendments would only apply to development applications lodged with Council on or after the day the amendments come into effect. Until this time, the Planning Proposal must be considered in the assessment of development applications pursuant to section 79C(1)(a)(ii) of the Act, as it is a “proposed instrument that is or has been the subject of public consultation under the Act”.

- *A Public Hearing to discuss these issues might be appropriate*

Comment: The gateway approval issued by the Department instructed that a public hearing is not required to be held into this Planning Proposal by any person or body under section 56(2)(e) of the Act, however that this does not discharge Council from any obligation it may otherwise have to conduct a public hearing. Section 57(5) of the Act provides that if:

- (a) a person making a submission so requests
 - (b) the relevant planning authority considers that the issues raised in a submission are of such significance that they should be the subject of a hearing
- the relevant planning authority is to arrange a public hearing on the issues raised in the submission.

It is not considered that holding a public hearing is necessary. The issues raised in submissions are not of such significance that they should be the subject of a public hearing.

Other matters

Review of DCP clauses proposed to be transferred to the LEP has revealed some inconsistencies with the Standard Instrument (relating to sentence structure and mandated definitions) which will need to be rectified. The final wording of content to be included in the LEP is a matter for the PCO to advise when it drafts the legal instrument, however the following amendments are recommended. These will not substantially change the intent or meaning of the clauses. Section 58(1) of the Act allows Council to vary a Planning Proposal as a consequence of its consideration of a submission, report or for any other reason.

Wall height –

The ‘wall height’ definition should be revised to be consistent with means of measuring “building height” as defined in the Standard Instrument (i.e. from the ground level up) which will improve clarity of the definition. It should also be made clear that wall height is measured to the underside (not the top) of the eaves as shown in explanatory diagrams in the DCP.

The exhibited definition of wall height (currently in the DCP) was:

The **wall height** of a building means the vertical distance between the top of the eaves at the wall line (excluding dormer windows that are no more than 25% of the width of the roof plane and gable ends), parapet or flat roof (not including a chimney) whichever is the highest, and the ground level (existing) immediately below that point.

It is recommended that this be amended to:

The **wall height** of a building means the vertical distance between the ground level (existing) and the underside of the eaves at the wall line, parapet or flat roof (not including a chimney) whichever is the highest, but excluding dormer windows that are no more than 25% of the width of the roof plane and gable ends.

Number of storeys –

The clause relating to maximum number of storeys references that an additional storey may be allowed in the attic roof space of existing and new buildings as follows:

- (3) For all residential zoned land to which a maximum building height of 8.5 metres applies as shown on the Height of Buildings Map, the following also applies:
 - (a) a maximum wall height of 7.2 metres; and
 - (b) a maximum of two storeys (above ground level (existing)). Council may allow an additional storey in the attic roof space of existing and new buildings, or in the foundation space of existing buildings, provided that the building height and bulk is of an appropriate form and scale.

This is currently contained in the DCP, and was carried across from the former Mosman LEP 1998. However the Standard Instrument definition of 'storey' does not include an attic. This anomaly needs to be rectified by omitting the words "in the attic roof space of existing and new buildings" from the clause to be included in the LEP. Council would continue to allow the attic roof space of existing and new buildings to be occupied as habitable space, provided that the building height and bulk is of an appropriate form and scale.

Conclusion

It is recommended that Council proceed with finalising the Planning Proposal to amend Mosman LEP 2012 with the following changes:

1. Revised wording of R2 zone objectives
2. Further explanation of the implications of the proposed LEP amendments
3. Revised wording of wall height definition
4. Revised wording of number of storeys clause
5. Inclusion of number of storeys clause in the LEP but not as a development standard requiring a clause 4.6 exception

An explanation for these changes is given in this report and in the revised Planning Proposal which is attached to this report.

Next Steps

Pursuant to section 58 of the Act, Council may vary a Planning Proposal as a consequence of its consideration of a submission, report or for any other reason. A revised Planning Proposal is required to be forwarded to the NSW Department of Planning and Environment, and further community consultation is not required unless the Department so directs with a revised gateway determination.

In accordance with LEP plan making procedure, Council is required to instruct the NSW Parliamentary Counsel to draft the legal instrument. Once this has been obtained, Council has been granted delegation to exercise the Minister for Planning's function under section 59 of the Act to make the plan. The LEP amendments will come into effect once notified on the NSW Government legislation website.

It is also recommended that Council adopt amendments to the Mosman Residential DCP 2012 as publicly exhibited in accordance with clause 21(1) of the Regulation, with the DCP amendments to come into effect on the same date that the LEP amendments come into effect. Council must give public notice of its decision in a local newspaper within 28 days after the decision is made and provide the NSW Department of Planning and Environment with a copy of the amended DCPs (in accordance with clauses 21(2) and (4), and 25AB of the Regulation).

The amendments would only apply to development applications lodged with Council on or after the day the amendments come into effect, by virtue of the savings provisions proposed. This will allow a degree of certainty for applicants in the preparation and lodgement of development applications.

Recommendation endorsed by Director Environment and Planning

ATTACHMENTS

Minute Book Attachments

- Revised Planning Proposal
 - Submissions received in response to public exhibition
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COUNCIL RESOLUTION

Motion Menzies/Moline

That the Officer's Recommendation be adopted.

CARRIED UNANIMOUSLY