

ITEM 4. PREPARATION OF AN AMENDMENT TO SYDNEY LOCAL ENVIRONMENTAL PLAN 2012 UNDER SECTION 73A OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 TO CORRECT MINOR ERRORS

FILE NO: S111882

SUMMARY

This report details proposed minor amendments to *Sydney Local Environmental Plan 2012* (Sydney LEP 2012) under section 73A of the *Environmental Planning and Assessment Act 1979* (EP&A Act) to correct minor errors that occurred in the final drafting of Sydney LEP 2012 prior to it coming into effect.

The proposed amendments relate to minor wording changes in the heritage floor space and design excellence clauses and the operation of affordable housing provisions for certain land in Green Square.

Sydney LEP 2012 came into effect when it was published on the NSW Government legislation website on 14 December 2012. The Sydney LEP 2012 is the result of more than 5 years of review and consolidation of the City of Sydney's planning controls to bring them into one local environmental plan that is also compliant with the NSW Government's Standard Instrument Local Environmental Plan.

The amendments to the heritage floor space clauses are required to ensure that the provisions reflect those in the *Sydney Local Environmental Plan 2005* before it was replaced by Sydney LEP 2012.

The amendment to the design excellence clause is required to ensure clarity around the calculation of additional floor space that is available in both Central Sydney and Green Square when a development proposes certain uses.

The amendment to affordable housing provisions is required to ensure that affordable housing contributions can continue to be levied in areas where the Sydney LEP 2012 does not apply. This includes an area within Green Square known as the Lachlan Precinct which was deferred from the operation of the Sydney LEP 2012 in order to resolve key planning controls of height and floor space ratio owing to late submissions received during the exhibition of the LEP.

This report recommends that Council make a section 73A submission under the EP&A Act to the Department of Planning and Infrastructure for minor amendments to Sydney LEP 2012. Section 73A of the EP&A Act is a mechanism to quickly and simply rectify minor errors in local environmental plans. It is considered to be the most efficient and timely way to correct the errors.

RECOMMENDATION

It is resolved that Council:

- (A) submit a *Section 73A Environmental Planning and Assessment Act Submission* to the Department of Planning and Infrastructure for amendments to *Sydney Local Environmental Plan 2012* to correct minor errors, for the following reasons:

- (i) the insertion of the word 'space' in Clause 6.10(2)(d) in the context of 'total gross floor area' is inconsistent with the definition of 'gross floor area' in the *Sydney Local Environmental Plan 2012* dictionary and will result in unnecessary confusion;
 - (ii) the insertion of the word 'or' after each subclause in Clause 6.11(1) and (2) will result in an inappropriate interpretation of the requirement for allocations and reductions of heritage floor space;
 - (iii) the drafting of Clause 6.11(2)(c) does not reflect Council's policy intent for the discount on heritage floor space for entertainment facilities located in basements of buildings;
 - (iv) the omission of the reference to 'Division 2' in Clause 6.21(7)(b) is inconsistent with the accompanying note and will result in unnecessary confusion; and
 - (v) the repeal of Part 4 Division 3 of the *South Sydney Local Environmental Plan 1998* through Schedule 6 of the *Sydney Local Environmental Plan 2012* has resulted in the affordable housing provisions having no effect on certain land where the *Sydney Local Environmental Plan 2012* does not apply; and
- (B) endorse a section 73A amendment to correct the errors described in clauses (A)(i) to (v) above in *Sydney Local Environmental Plan 2012*.

ATTACHMENTS

Attachment A: Blank Pro-forma Section 73A EP&A Act submission form

BACKGROUND

1. This report details proposed amendments to *Sydney Local Environmental Plan 2012* (Sydney LEP 2012) under section 73A of the Environmental Planning and Assessment Act 1979 (EP&A Act) to correct various minor errors in the drafting of the instrument.
2. Sydney LEP 2012 came into effect when it was published on the NSW Government legislation website on 14 December 2012. The Sydney LEP 2012 is the result of more than 5 years of review and consolidation of the City of Sydney's planning controls to bring them into one local environmental plan that is also compliant with the NSW Government's Standard Instrument Local Environmental Plan.
3. The proposed amendments are regarded as errors as they relate to minor wording changes that affect the heritage floor space and design excellence clauses and the operation of affordable housing provisions in the *South Sydney Local Environmental Plan 1998* in relation to certain land in Green Square where the Sydney LEP 2012 does not apply.
4. Section 73A of the EP&A Act is a mechanism to quickly and simply rectify minor errors in local environmental plans. It is considered to be the most efficient and timely way to correct the errors.

Clauses 6.10 and 6.11 – Heritage Floor Space

5. In Central Sydney, the heritage floor space (HFS) scheme provides an incentive for the conservation and on-going maintenance of heritage buildings. The scheme has existed for over 20 years and it was always Council's intention to reflect the provisions of *Sydney Local Environmental Plan 2005* in Sydney LEP 2012.
6. The drafting of the heritage floor space clauses into Standard Instrument-compliant clauses took many months. The provisions are unique to the City of Sydney and it is essential that the operation of the clauses reflects Council's policy intent and does not undermine the operation of the heritage floor space scheme.
7. Clause 6.10(2) of Sydney LEP 2012 sets out the process by which heritage floor space is created. A minor drafting error has occurred in subclause (2)(d) whereby the word 'space' has been inserted within the term 'total gross floor area'. The insertion of the word 'space' means that the term is inconsistent with the dictionary definition of 'gross floor area' and should be removed.
8. Accordingly, subclause 6.10(2)(d) needs to be amended by deleting the word 'space' as shown in ~~strike~~through below:

"(d) a covenant is registered that prevents development that increases the total gross floor space area of all buildings on the site on which the heritage building is located or that increases the height of the heritage building, and..."
9. Clause 6.11 of Sydney LEP 2012 establishes the circumstances when a development is required to allocate heritage floor space.

10. The intent of subclause 6.11(1) is that each relevant amount of heritage floor space is to be allocated with the total allocation being the sum of (a)(b)(c)(d) and (e), less any discount as relevant. The addition of the word 'or' after subclauses (a) to (d) allows for choice and is therefore incorrect. To ensure subclause 6.11(1) reflects Council's policy intent, the word 'or' after each subclause needs to be deleted.
11. The intent of subclause 6.11(2) is that the consent authority may reduce the amount of heritage floor space required to be allocated under subclause (1) providing certain circumstances are met. The addition of the word 'or' after subclauses (a) and (b) again allows for choice and is therefore incorrect. To ensure subclause 6.11(2) reflects Council's policy intent, the word 'or' after each subclause needs to be deleted.
12. On 2 October 2012, the Department of Planning and Infrastructure issued Council with a copy of the draft Sydney LEP for the purpose of consultation under section 59 of the EP&A Act. The draft received by Council did not contain the word 'or' after any of the subclauses in clause 6.11. The addition of the word 'or' occurred through the final legal drafting.
13. Accordingly, subclauses 6.11(1) and (2) need to be amended deleting the word 'or' as shown in ~~strike~~through below:
 - ~~"6.11 Utilisation of certain additional floor space requires allocation of heritage floor space~~
 - 1) ~~Despite any other provision of this Part, development consent must not be granted to development in respect of a building on land in Central Sydney that utilises any amount of additional floor space specified in paragraph (a), (b) (c), (d) or (e) unless an amount of heritage floor space is allocated to the building in accordance with the relevant paragraph:~~
 - ~~(a) accommodation floor space in respect of a building on land in Area 1, 2 or 3—unless an amount of heritage floor space is allocated to the building that is equal to 50% of the accommodation floor space to be utilised, ~~or~~~~
 - ~~(b) accommodation floor space in respect of a building on land in Area 4 (but only if the accommodation floor space causes the floor space ratio of the building to be greater than 8:1)—unless an amount of heritage floor space is allocated to the building that is equal to 50% of any accommodation floor space to be utilised, ~~or~~~~
 - ~~(c) opportunity site floor space—unless an amount of heritage floor space is allocated to the building that is equal to 50% of the opportunity site floor space to be utilised, ~~or~~~~
 - ~~(d) additional floor space granted by a consent authority under clause 6.21 (7) (b)—unless an amount of heritage floor space is allocated to the building that is equal to 50% of the additional floor space to be utilised, ~~or~~~~

- (e) additional floor space permitted under clause 4.6 in respect of a building that also utilises additional floor space referred to in paragraph (a), (b) (c) or (d)—unless an amount of heritage floor space is allocated to the building that is equal to the additional floor space permitted under that clause.
- 2) The consent authority may reduce the amount of heritage floor space that is required to be allocated to a building under subclause (1) as follows (and in such a case that reduced amount is the amount of heritage floor space that is required to be allocated):
- (a) if the proposed development is the winner of an architectural design competition carried out in accordance with the City of Sydney Competitive Design Policy—the amount of heritage floor space may be reduced by up to 50% or 1,000 square metres, whichever is the lesser, or
- (b) if the development includes any covered or partially covered pedestrian route through the site at street level and the consent authority is satisfied that the pedestrian route provides a vital and publicly accessible link between 2 streets—the amount of heritage floor space may be reduced by up to 50% or 250 square metres, whichever is the lesser, or
- (c) if the development is an alteration or addition to a building that is in existence at the commencement of this Plan (the commencement date) and the additional floor space created by the development does not cause the building to exceed the maximum floor space ratio for the land under Sydney Local Environmental Plan 2005 immediately before the commencement date—the amount of heritage floor space may be reduced by up to 100%.”
14. Clause 6.11(2)(c) of Sydney LEP 2012 allows a discount on heritage floor space for existing buildings under certain circumstances. In the drafting instructions provided by the City to the Department of Planning and Infrastructure, it was requested that only those buildings which have theatres or clubs in the basement should be eligible for the discount on heritage floor space. The resultant clause 6.11(2)(c) goes far beyond what was trying to be achieved and may be used by some developers to avoid having to make any heritage floor space allocation.
15. The intent is that an existing building with a registered club or entertainment facility in its basement should not be penalised by that space pushing the floor space ratio above the threshold for requiring a heritage floor space allocation. The amount of the heritage floor space discount is intended to be equivalent to the area in the basement occupied by the registered club or entertainment facility. It relates to the gross floor area of certain buildings, including the MLC Centre, now exceeding the maximum floor space ratio under Sydney LEP 2012.

16. However, the Standard Instrument definition of gross floor area includes (a) habitable rooms in a basement, and (b) any shop, auditorium, cinema, and the like, in a basement. The change in the definition results in the floor space ratio of certain existing buildings being higher under Sydney LEP 2012 than under *Sydney Local Environmental Plan 2005*. This penalises those that previously benefited under the Sydney Local Environmental Plan 2005 incentive. Since it is not possible to alter the Standard Instrument definition of gross floor area, the clause was proposed to remove the need for a heritage floor space allocation for a registered club or entertainment facility in a basement.
17. The background to this clause is that under *Sydney Local Environmental Plan 2005* the definition of 'Floor Space Area' (applicable to Central Sydney) excludes "*any underground space permanently set aside within the building for ... cinemas, racial halls, historic clubs and theatres for public use and other similar public uses or facilities*". This acts as an 'incentive' for retention or development of such facilities. The definition benefits a number of buildings in Central Sydney.
18. The retention of incentives for clubs, theatres and the like is important. It is consistent with Council's current policies and is intended to compensate for the loss or reduction of other existing incentive provisions. *Sydney Local Environmental Plan 2005* contains incentive clauses which have been capped (for example, opportunity sites) or not included in Sydney LEP 2012 because they are impractical (for example, historic clubs) or because the Standard Instrument cannot accommodate the degree of discretion inherent in them (for example, clause 63 of *Sydney Local Environmental Plan 2005* - significant public benefits).

19. Clause 6.7 of Sydney LEP 2012 allows for additional floor space for the purposes of entertainment facilities or registered clubs whereby that additional floor space does not require the allocation of heritage floor space. In effect, this clause achieves the policy intent of Council and reflects the previous controls under *Sydney Local Environmental Plan 2005*, albeit expressed in a different way.

20. Given the above, it is considered that subclause 6.11(2)(c) of Sydney LEP is not required for the purposes of achieving Council's policy intent. It should be deleted as it may have unintended consequences on the operation of the heritage floor space scheme.

Clause 6.21 – Design Excellence

21. Clause 6.21 sets out the matters the consent authority must have regard for when assessing all development applications in terms of whether or not the development exhibits design excellence. For certain categories of significant development, design excellence must also be demonstrated through a competitive design process.

22. The demonstration of design excellence through a competitive process was introduced into the Central Sydney planning controls in 2000 in *Central Sydney Local Environmental Plan 1996 Amendment No. 8*. This amendment introduced a two stage approval process for development over 55m in height or on a site greater than 1,500 square metres in area. It also provided that the consent authority, in considering whether a development exhibited design excellence, was to consider whether it was the result of a competitive design process. These provisions were carried forward into *Sydney Local Environmental Plan 2005*. Sydney LEP 2012 includes similar provisions, but extends their application to the entire Local Government Area.

23. Clause 6.21(7) of Sydney LEP 2012 establishes an incentive for undertaking a competitive design process, namely, the potential for the consent authority to grant up to an additional 10% height or floor space ratio.
24. Clause 6.21(7)(b) references the additional floor space that is available to certain developments in Central Sydney and Green Square – namely, ‘accommodation floor space’ and ‘community floor space’ respectively. The clause references Division 1 (which details accommodation floor space in Central Sydney) but omits a reference to Division 2 (which details community floor space in Green Square). The note below the subclause contains the correct reference to Division 2, but the words ‘or 2’ need to be added to the clause for consistency.
25. Accordingly, subclause 6.21(7)(b) needs to be amended by inserting the words ‘or 2’ as shown in **bold italics** below:

“(b) an amount of floor space that exceeds the amount permitted as a result of the floor space ratio shown for the land on the Floor Space Ratio Map by up to 10% or, if the building or alteration is eligible for any accommodation floor space or community floor space under Division 1 or 2, by up to 10% plus the sum of that accommodation floor space and community floor space.

Note. Development may exceed the amount permitted by clause 4.4 by more than 10% only in relation to accommodation floor space or community floor space but not in relation to any other form of additional floor space under Division 1 or 2.”

Schedule 6 – Consequential amendment of other planning instruments

26. Schedule 6 of Sydney LEP 2012 sets out the amendments to other environmental planning instruments required because of the provisions of Sydney LEP 2012. Those amendments took effect on the same day that Sydney LEP 2012 commenced, namely, 14 December 2012 and Schedule 6 was repealed on the following day.
27. Schedule 6 repealed the affordable housing provisions in *South Sydney Local Environmental Plan 1998* and instead introduced clause 29A which applies the affordable housing provisions in Sydney LEP 2012 to the Green Square Town Centre. However, a redevelopment area within Green Square, commonly known as the Lachlan Precinct, was deferred from the Sydney LEP 2012 in order to allow for further consideration of matters raised during the public exhibition of the LEP.
28. Schedule 6, 6.2[3] of Sydney LEP 2012 overlooked the fact that the affordable housing provisions in the *South Sydney Local Environmental Plan 1998* still need to apply to certain areas of land that are not included in the Sydney LEP 2012 – namely, the Lachlan Precinct.
29. Accordingly, *South Sydney Local Environmental Plan 1998* needs to be amended so that the affordable housing provisions in Sydney LEP 2012 apply to all land in Green Square.

KEY IMPLICATIONS

Effect of the error

30. The errors have the effect of the clauses in Sydney LEP 2012 not applying to development in the way they were intended. The errors should be corrected as soon as possible because the clauses are not drafted in the way they were intended and do not reflect Council's policy position.

Section 73A Amendment Process

31. Section 73A of the EP&A Act is a mechanism to quickly and simply rectify minor errors in local environmental plans. It is therefore considered to be the most efficient and timely way to correct the error.
32. Amendments can be made using Section 73A without complying with the usual process for planning proposals/making LEPs under the EP&A Act, such as public consultation.
33. It is considered that the amendments to Sydney LEP 2012 described in this report fall within the ambit of section 73A of the EP&A Act.
34. A process for making LEP amendments under 73A is not outlined in the EP&A Act or Regulations. However, *Planning Circular PS 06-014: Minor amendments to local environmental plans using section 73A* requires that Council submit a pro-forma *Section 73A EP&A Act submission* to support the amendment. A blank pro-forma submission form is shown at Attachment A to this report.
35. Should Council endorse the recommendations of this report, a completed submission form will be forwarded to the Minister for Planning and Infrastructure in accordance with the requirements of Planning Circular PS 06-014.
36. Amendments made to a local environmental plan under the provisions of Section 73A of the EP&A Act are not planning proposals; therefore, a resolution from the Central Sydney Planning Committee (CSPC) under Section 39 of the *City of Sydney Act 1988* is not required.

RELEVANT LEGISLATION

37. *The Environmental Planning and Assessment Act 1979 and the Environmental Planning and Assessment Regulation 2000.*

CRITICAL DATES / TIME FRAMES

38. It is important that these amendments progress as quickly as possible so as to ensure the correct interpretation and application of the provisions of Sydney LEP 2012.

PUBLIC CONSULTATION

39. Given that the proposed amendment to Sydney LEP 2012 is to correct minor errors arising from legal drafting, public exhibition of the draft amendment is not required.

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