

APPENDIX A

Additional Supporting Points/Information

(Mentioned under Attachment 4 – Evaluation criteria for the delegation of plan making functions)

Additional Supporting Points/Information:

Council Minutes Item No: IP1215 Item 2 IPES Meeting 1 December 2015 (Trim doc: 144497.15)

Council Minutes Item No: IP0416 Item 2 IPES Meeting 5 April 2016 (Trim doc: 40491.16)

Introduction

This planning proposal seeks Gateway approval to amend Marrickville Local Environmental Plan 2011 (MLEP 2011) to amend the planning controls relating to limited residential accommodation in the B7 Business Park zone and in mixed use developments in certain key sites and Masterplan Areas.

At its meetings on 1 December 2015 and 5 April 2016 the former Marrickville Council considered reports which recommended that Council resolve to prepare a draft Planning Proposal to make a number of amendments to Marrickville Local Environmental Plan 2011. The proposed amendments were referred to as Draft Marrickville Local Environmental Plan 2011 (Amendment No. 4).

Two of those amendments recommended related to:

- i. Residential accommodation in the B7 Business Park zone; and
- ii. Residential accommodation in mixed use developments in certain key sites and Masterplan Areas.

Extracts from the reports considered by Council in relation to those matters are reproduced below:

i. Residential accommodation in the B7 Business Park zone

“Clause 6.13 Dwellings and residential flat buildings in Zone B7 Business Park

Clause 6.13 of MLEP 2011 reads as follows:

6.13 Dwellings and residential flat buildings in Zone B7 Business Park

- (1) The objective of this clause is to provide for limited residential development for small scale live-work enterprises, to assist in the revitalisation of employment areas and to provide a transition between adjoining land use zones.
- (2) This clause applies to land in Zone B7 Business Park.
- (3) Development consent must not be granted to development for the purpose of a dwelling or a residential flat building on land to which this clause applies unless the consent authority is satisfied that the development is part of a mixed use development that includes business premises or office premises or light industry on the ground floor.

The following types of “*residential accommodation*” are permitted in the B7 Business Park zone under MLEP 2011:

- *Dwelling houses* (under Clause 6.11, but only purpose built dwelling houses existing on the land that were erected before the commencement of MLEP 2011);

- *Residential flat buildings (under Clause 6.13, but only as “part of a mixed use development that includes business premises or office premises or light industry on the ground floor”); and*
- *Shop top housing.*

Part of the objective of the clause is “to provide for limited residential development for small scale live-work enterprises”. Under the provisions of the clause the only limiting factor on the residential development in the B7 Business Park zone is that the residential development has to be “part of a mixed use development that includes business premises or office premises or light industry on the ground floor.”

The objective of the clause refers to “small scale live-work enterprises”, a term not specifically defined or used elsewhere in the instrument.

MDCP 2011 supplements the provisions of MLEP 2011 and provides more detailed provisions to guide future development including some provisions which place restrictions, or limitations, on residential development in the B7 Business Park zone. Those controls are primarily contained in Part 6 – Industrial Development of MDCP 2011 and include:

- C78** *The area of the premises used for small scale creative industries must not exceed 300m² of gross floor area.*
- C87** *Dwellings (including live/work studios) must not be an individual lot in a strata plan or community title scheme.*
- C88** *A minimum of 60% of the total gross floor area must be used for non-residential purposes.”*

It is unclear as to whether the small scale work enterprises referred to in the objective are the “small scale creative industries” referred to in C78 above. It is also open to interpretation as to whether the term “premises” in the subject control relates to each individual “small scale creative industry” or the combined area of all small scale creative industries, when more than one creative industry is located within the premises.

MLEP 2011 and MDCP 2011 came into effect in December 2011. The instruments were made before the State Government brought in amendments to the EP&A Act 1979 introducing a further matter for consideration under Section 79C of the Act in the assessment of applications relating to the provisions contained in DCPs. The amendment came into effect on 1 March 2013. The new matter for consideration reads as follows:

(3A) Development control plans

If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority:

- (a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards - is not to require more onerous standards with respect to that aspect of the development, and*
- (b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards - is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development, and*
- (c) may consider those provisions only in connection with the assessment of that development application.*

The following points are made in relation to the B7 Business Park zone:

- The B7 Business Park zone is an employment zone.
- The land is primarily intended to be used for employment purposes with a minor residential component that allows people to live and work on the same site.

- Limited residential development permitted in zone (maximum percentage of residential permitted = 40% of GFA).
- The residential limit was originally in the LEP but was required to be placed in DCP as part of the original Gateway determination for MLEP 2011.
- 186 properties (or parts of properties) are zoned B7 Business Park under MLEP 2011.
- 60 of those properties zoned B7 Business Park are located in the St Peters Triangle.
- No land zoned B7 Business Park is located on the Key Sites Map.
- Nearly all of the land zoned B7 Business Park is located in an ANEF Contour of 25 or greater.

The provisions in MLEP 2011 relating to the B7 Business Park zone are an innovative feature of the LEP intended to support creative and innovative industries and to assist in revitalising some industrial areas by allowing small scale opportunities for people to live and work in one place.

The Australian Centre of Excellence for Local Government Discussion Paper "Creative Councils for Creative Communities" (July 2015) provides good background to the issue and the development of the controls.

"Marrickville Council has also recognised the role played by creative industries in establishing the area's unique character and is increasing local employment opportunities through the Marrickville Urban Strategy that includes the aim of supporting creative and innovative industries (Marrickville Council 2007). The council recognised that creative industries, often operating as start-up micro businesses, are highly sensitive to price increases and that renewal of industrial areas posed a threat to the ability of creative industries to operate as land values increased. The council attempted to minimise these impacts by identifying ways in which planning controls could be used to support existing creative industries and encourage new ones as part of the development of the 'Marrickville Local Environmental Plan 2011'.

Accordingly, the council developed a definition for creative industries, and identified areas suitable for their operation. Once defined, creative industries were identified as an appropriate land use buffer between traditional heavy industrial areas and residential development, and were identified as being suited to light industrial areas in the Marrickville LGA, which are largely situated adjacent to residential development.

Business development zones were also identified as locations suitable for live-work enterprises and were considered to have the potential to help reduce the costs of creative industries, maintain active street frontages and, in some cases, promote the adaptive reuse of existing buildings....." (pages 7 and 8)

Council's website includes a section on "Creative Industries" which reads as follows:

"Marrickville Council's Local Environmental Plan 2011 recognises that the Marrickville area is the centre of Sydney's independent arts scene and is home to many artists, studios, commercial art galleries, artist-run initiatives, theatres and festivals.

The LEP includes a 'B7 Business Park' zone that has the objective of providing for creative industries such as the arts, technology, production and design sectors. It is an employment zone that permits limited residential development in conjunction with employment uses at the ground floor.

The 'IN2 Light Industrial' zone will allow for certain creative industries which take the form of business premises or office premises in the arts, technology, production and design sectors.

The creative industries provided for include:

- audio-visual, media and digital media
- advertising

- *craft, visual arts and Indigenous arts*
- *design*
- *film and television*
- *music*
- *publishing*
- *performing arts*
- *cultural heritage institutions*

The B7 Business Park zone also permits creative industries such as those referred to above permitted in the IN2 Light Industrial zone.

A review was undertaken of the B7 Business Park zoning provisions of a number of other Council's LEPs prepared under the Standard Instrument. Council's B7 Business Park zoning provisions are unique in terms of what residential accommodation is permitted within the zone. Most of the environmental planning instruments of other Councils reviewed listed "*residential accommodation*" as "*Prohibited*" in the Land Use Table for the B7 Business Park zone. Where residential accommodation was permitted it was limited to a single dwelling. For example Clause 6.12 of Leichhardt Local Environmental Plan 2013 permits development for the purpose of a dwelling where the "*dwelling is part of a mixed use development that includes office premises or light industries on the ground floor*" and "*the dwelling and ground floor premises will be occupied by the same person or persons*". The objective of the subject clause "*is to provide for ancillary residential accommodation for small-scale live-work enterprises, to assist in the revitalisation of employment areas and to provide a transition between adjoining land use zones*". "*Shop top housing*" is listed as "*Prohibited*" in the Land Use Table for the zone.

The provisions in MLEP 2011 relating to the B7 Business Park zone are unique when compared to other Council's environmental planning instruments.

The changes recommended to Clause 6.13 in the original report were as follows:

"6.13 Dwellings and residential flat buildings in Zone B7 Business Park

- (1) *The objective of this clause is to provide for limited residential development for small scale live-work enterprises, to assist in the revitalisation of employment areas and to provide a transition between adjoining land use zones.*
- (2) *This clause applies to land in Zone B7 Business Park.*
- (3) *Development consent must not be granted to development for the purpose of a dwelling or a residential flat building on land to which this clause applies unless the consent authority is satisfied that:*
 - (a) *no part of the ground floor of the development that fronts a street will be used for residential purposes (excluding access, car parking and waste storage),*
 - (b) *a minimum of 60% of the total gross floor area of the development is to be used for non residential purposes."*

In reporting back on the Councillor Conference, officers were requested to examine ways to incorporate changes to the proposed amendment to clarify what constitutes gross floor area used for "non-residential purposes".

An additional matter could be included in Clause 6.13 specifying that amenities such as kitchen and bathrooms associated with the work area of any live/work occupancy may be excluded from the residential floor area of the development. Other changes could be made to the clause to make it more user friendly and easier to understand.

As standalone residential development is prohibited in the zone, a provision could be included in the clause to the effect that the residential development is required to be part of a mixed use

development that includes a non-residential use permitted in zone. A provision could also be included that a dwelling permitted under the clause can't be on a separate lot (in accordance with Control **C87** in Part 6 – Industrial Development of MDCP 2011). That provision could read:

“Dwellings permitted by this clause as part of a mixed use development must be on the same title as the non-residential use and must not be on an individual lot in a strata plan or an individual lot in a community title scheme.”

Control C87 in Part 6 – Industrial Development of MDCP 2011 reads as follows:

“C87 Dwellings (including live/work studios) must not be an individual lot in a strata plan or community title scheme.”

It should be noted that the control was originally in the LEP but the Department required the clause to be placed in the DCP. Accordingly, the recommended amendment is not a policy change from current provisions.

The following revised recommendation incorporates the matters raised above:

Recommendation L-6.13: That Clause 6.13 of MLEP 2011 be amended to read as follows:

“6.13 Dwellings and residential flat buildings in Zone B7 Business Park

- (1) *The objective of this clause is to provide for limited residential development in association with non-residential uses permitted in Zone B7 Business Park, including small scale live-work enterprises, to assist in the revitalisation of employment areas and to provide a transition between adjoining land use zones.*
- (2) *This clause applies to land in Zone B7 Business Park.*
- (3) *Development consent must not be granted to development for the purpose of a dwelling or a residential flat building on land to which this clause applies unless the consent authority is satisfied that:*
 - (a) *the residential development is part of a mixed use development that includes a non-residential use permitted in Zone B7 Business Park,*
 - (b) *no part of the ground floor of the development that fronts a street will be used for residential purposes (excluding access, car parking and waste storage),*
 - (c) *a minimum of 60% of the total gross floor area of the development is to be used for non-residential purposes.*
- (4) *For the purposes of determining the percentage of the total gross floor area of the development used for non-residential purposes under Clause (3) (c), area(s) used for amenities, such as kitchen and bathroom facilities, in conjunction with the non-residential use(s), do not constitute gross floor area used for residential purposes.*
- (5) *Dwellings permitted by this clause as part of a mixed use development must be on the same title as the non-residential use and must not be on an individual lot in a strata plan or an individual lot in a community title scheme.”*

ii. Residential accommodation in mixed use developments in certain key sites and Masterplan Areas

“New Clause – Mixed Use Developments in certain key sites and Masterplanned Areas

Limited residential accommodation is permitted with consent, as part of a mixed use development, under Council's planning controls on certain land identified on the Key Sites Maps and in certain Masterplan Areas.

The provisions limiting the extent residential development permitted on such land are contained in the Strategic Context controls in Part 9 of Marrickville Development Control Plan 2011.

Those provisions are as follows:

Part 9.8 Enmore North and Newtown Central Precinct

9.8.5.1 76 Wilford Street, Newtown

"C4 The residential component of the development must be no greater than 70 percent of the total gross floor area."

Part 9.25 St Peters Triangle Precinct

9.25.6 Precinct-specific planning controls

"To manage mixed use development along the Princes Highway and May Street the following controls apply."

C2 On land coloured blue and identified as "E" on the MLEP 2011 Key Sites Map, residential accommodation is permitted with consent but only as part of a mixed use development where the residential component comprises a maximum of 80% of the total gross floor area.

C3 On land coloured blue and identified as "F" or "G" on the MLEP 2011 Key Sites Map, residential accommodation is permitted with consent but only as part of a mixed use development where the residential component comprises a maximum of 60% of the total gross floor area.

C4 On land coloured blue and identified as "H" on the MLEP 2011 Key Sites Map development is permitted with consent for the purpose of:

- i. Retail premises which, in total, does not comprise more than 30% of the total gross floor area; and*
- ii. Residential accommodation which, in total, does not comprise more than 30% of the total gross floor area."*

Part 9.45 McGill Street Precinct

9.45.7 Future land use

"In the B5 Business Development zone located along Old Canterbury Road residential use is permitted subject to the following control which ensures that business and office uses remain a viable component of development within the precinct."

C6 Residential development is permitted with consent but only as part of a mixed use development where the residential component comprises a maximum of 60% of the total gross floor area."

NB The B5 Business Development zoned land along Old Canterbury Road, Lewisham referred to above, is land identified as "A" on the Key Sites Map.

No development has taken place on the property 76 Wilford Street, Newtown or on the land coloured blue and identified "E" or "G" on the MLEP 2011 Key Sites Map, and limited development has taken place on the land coloured blue and identified "F" or "H" on the MLEP 2011 Key Sites Map.

Much development has taken place/ or has been approved/ or development applications lodged but yet to be determined in the McGill Street Precinct, including the B5 Business Development zoned land along Old Canterbury Road, Lewisham (i.e. the land coloured blue and identified "A" on the MLEP 2011 Key Sites Map.

In relation to amending its planning documents, Council needs to be mindful of decisions it has made and the resulting precedents it has set since the coming into effect of MLEP 2011 and MDCP 2011. Of particular relevance in relation to the McGill Street Precinct, is the decision Council made on 13 August 2013, in relation to an application under Section 96 of the Environmental Planning and Assessment Act, relating to the property 120A-120B Old Canterbury Road, Lewisham which sought approval to change of use of Level 1 of that development from commercial to residential.

The report considered by Council recommended refusal of the application for a number of reasons including:

- "1. The proposed development is contrary to Part 9.45.7 of Marrickville Development Control Plan 2011, proposing a land use mix of 80 per cent residential and 20 per cent non-residential that is inconsistent with the desired future character of the McGill Street Precinct."*

Council approved the application. Council's action in approving that application which departed from the maximum residential component controls in MDCP 2011 has made the application of these provisions for other land subject to these provisions in the McGill Street Precinct unenforceable.

It should be noted however that the McGill Street Precinct has a different locational context than the other areas referred to above. Accordingly, without a planning argument that justifies abandoning these provisions elsewhere it is appropriate that the maximum residential components in those other areas be retained.

Recommendation L-6.16:

That the following clause titled "Clause 6.16 Residential accommodation, as part of a mixed use development, on certain land identified on the Key Sites Maps and in certain Masterplan Areas" be inserted in MLEP 2011 at the end of Clause 6.15:

6.16 Residential accommodation, as part of a mixed use development, on certain land identified on the Key Sites Maps and in certain Masterplan Areas

- (1) The objective of this clause is to limit the density of residential development in certain business zones to ensure an appropriate proportion of residential accommodation as part of mixed use developments on that land.
- (2) This clause applies to the following land:
 - (a) on land identified as "E" on the Key Sites Map,
 - (b) on land identified as "F" on the Key Sites Map,
 - (c) on land identified as "G" on the Key Sites Map,
 - (d) on land identified as "H" on the Key Sites Map,
 - (e) land at 76 Wilford Street, Newtown, being Lot 1, DP 617685.
- (3) Development consent must not be granted to development for the purpose of residential accommodation on land to which this clause applies unless the consent authority is satisfied that:
 - (a) no part of the ground floor of the development that fronts a street will be used for residential purposes (excluding access, car parking and waste storage),

- (b) the percentage of the total gross floor area of the development to be used for non residential purposes is not less than:
- (i) 20% on land identified as "E" on the Key Sites Map,
 - (ii) 40% on land identified as "F" or "G" on the Key Sites Map,
 - (iii) 70% on land identified as "H" on the Key Sites Map,
 - (iv) 30% on land at 76 Wilford Street, Newtown, being Lot 1, DP 617685."