



PLANNING PROPOSAL

Exceptions to Development Standards in St Leonards– Building Height

19 September 2013

1 INTRODUCTION

North Sydney Council (Council) has prepared a Planning Proposal to amend North Sydney Local Environmental Plan 2003 (NSLEP 2013).

The proposed amendment seeks to correct an error made by Parliamentary Counsel when it sought to incorporate the provisions of clause 73A to North Sydney Local Environmental Plan 2001 (NSLEP 2001) into NSLEP 2013 when it was first made. In particular, the proposed amendment seeks to reinstate the original restriction to limit the instances when a development can exceed the maximum building height requirements under clause 4.3 of NSLEP 2013 and to require the merit considerations under clause 4.6 of NSLEP 2013 to be satisfied in any such instances.

The Planning Proposal has been prepared in accordance with Section 55 of the Environmental Planning and Assessment Act, 1979 (EP&A Act) and the Department of Planning and Infrastructure's (DoPI) document *"A guide to preparing planning proposals"* (October 2012).

2 SITE LOCALITY

The subject area to which this Planning Proposal relates correlates with Precincts 2 and 3 within the St Leonards / Crows Nest Planning Study area. This area is bound by Albany Street, Chandos Street, Hume Lane, the Pacific Highway and Sergeants Lane, St Leonards and is reflected in Figure 1 below.



Figure 1 – Aerial Photograph

3 BACKGROUND

On 25 June 2012, Council resolved to proceed with a Planning Proposal relating to all land within the St Leonards/Crows Nest Planning Study area. In particular, the Planning Proposal sought to amend NSLEP 2001 so as to limit the use of State Environmental Planning Policy No.1 – Development Standards (SEPP 1) within the St Leonards/Crows Nest Planning Study area in cases where a proposed development breaches the height control. This was intended to limit the ability for developments to be approved beyond the scale and capacity envisaged in the planning controls contained in NSLEP 2001 until such time as the findings of the St Leonards/Crows Nest Planning Study have been appropriately considered.

A Gateway Determination issued by the Department of Planning and Infrastructure (DoPI) enabling the Planning Proposal to be publically exhibited was issued on 11 September 2012. It stated that prior to publicly exhibiting the Planning Proposal, that it be amended such that:

- it only applies to Precincts 2 and 3 of the St Leonards/Crows Nest Planning Study (Land bound by by Albany Street, Chandos Street, Hume Lane, the Pacific Highway and Sergeants Lane, St Leonards); and
- that the application of the Planning Proposal cease to take effect 18 months after the issue of the Gateway Determination.

Council considered a post exhibition report to the Planning Proposal on the 10 December 2012, where in it resolved to forward the Planning Proposal to the DoPI unamended with a request that the Minister for Planning and Infrastructure make the Plan.

NSLEP 2001 (Amendment No. 53) gave effect to the Planning Proposal and was published on the NSW legislation website on 21 June 2013. The relevant provisions are contained within clause 73A of NSLEP 2001, which state:

- (1) *Subject land*
This clause applies to land at St Leonards bounded by Albany Street, Chandos Street, Hume Lane, the Pacific Highway and Sergeants Lane, as shown edged heavy black on the map marked "North Sydney Local Environmental Plan 2001 (Amendment No 53)".
- (2) *Objective*
The specific objective of this clause is to prohibit development that exceeds the maximum height of buildings permitted by this Plan by more than 3 metres.
- (3) *Control*
State Environmental Planning Policy No 1—Development Standards does not apply to a development application for the carrying out of development on land to which this clause applies if the height of a building (excluding plant rooms and other similar structures) proposed by that application on that land will exceed the maximum height permitted by this Plan by more than 3 metres.
- (4) *This clause does not apply to a development application made, but not determined, before the commencement of this clause.*
- (5) *This clause ceases to apply on 11 March 2014.*

Prior to NSLEP 2013 being made, Council had requested that all amendments made to NSLEP 2001, that did not form part of the draft exhibited versions of NSLEP 2013, be incorporated into NSLEP 2013. This was to ensure that recently made amendments to NSLEP 2001 continued to apply under NSLEP 2013 which will eventually replace NSLEP 2001.

NSLEP 2013 was published on the NSW legislation website on 2 August 2013 and comes into force on 13 September 2013, 42 days after its publication.

Prior to the making of NSLEP 2013, Council raised concern with respect to the translation of clause 73A to NSLEP 2001 into NSLEP 2013. On 1 August 2013, the DoPI formally acknowledged that there had been a drafting error in transitioning the intent of Amendment No. 53 to NSLEP 2001 into NSLEP 2013, one day before it was made. The DoPI also advised on this day that Council should prepare a Planning Proposal to rectify the issue.

Council considered a report on the making of NSLEP 2013 on 12 August 2013 at its Legal and Planning Committee where it recommended in part:

2. **THAT** Council prepare a Planning Proposal to amend NSLEP 2013 to ensure that it accurately reflects Amendment [sic - clause] 73A to NSLEP 2001.
3. **THAT** Council grant delegation to the General Manager to endorse the Planning Proposal as required by Recommendation No. 2 above and forward the Planning Proposal to the Minister for Planning and Infrastructure to make the plan pursuant to s.56(1) of the Environmental Planning and Assessment Act 1979.

On 19 August 2013, Council subsequently resolved to adopt the recommendation of the Legal and Planning Committee. A copy of this report and recommendation can be found at Appendix 1.

4 STATUTORY CONTEXT

The relevant provisions of NSLEP 2013 that relate to the Planning Proposal are discussed in the following subsections.

4.1 Height of Buildings

Clause 4.3 to NSLEP 2013 controls the heights of buildings. In particular, subclauses (2) and (2C) relate to controlling building heights on the subject lands and state:

- ...
- (2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*
- ...
- (2C) *Despite subclause (2), development consent may be granted to development on land identified as "Land in St Leonards" on the Exceptions to Development Standards Map if the height of a building (excluding plant rooms and other similar structures) will exceed the maximum height shown for the land on the Height of Buildings Map by no more than 3 metres.*

The relevant excerpt from the Maps showing building height controls within the subject area are shown in Figures 2 and 3.

Subclause 4.3(2C) grants an automatic increase in building height of up to 3m over that permitted in subclause 4.3(2) for limited components of a building.



Figure 1 – NSLEP2013 Height of Buildings Map

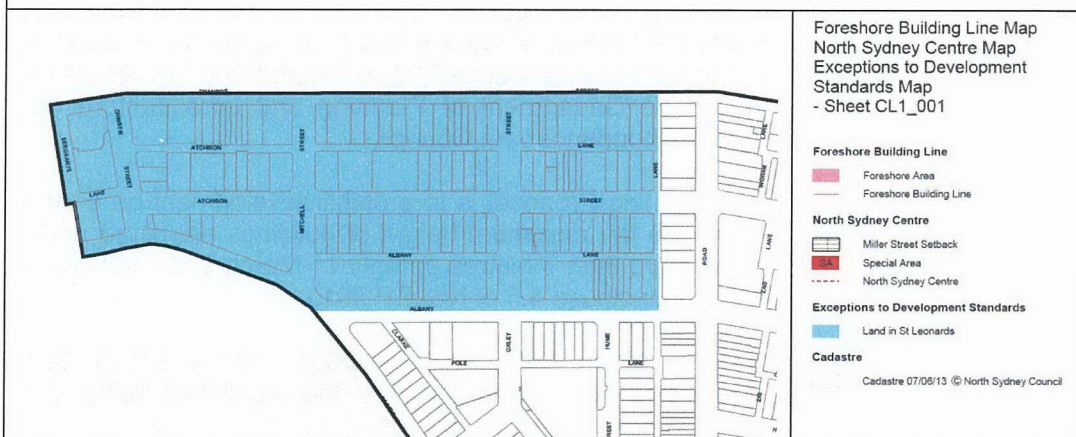


Figure 2 – NSLEP2013 Exceptions to Development Standards Map

4.2 Exceptions to Development Standards

Clause 4.6 of NSLEP 2013 enables applicants to request a variation to a development standard contained within an LEP. This clause provides flexibility in the application of planning controls in circumstances where strict compliance with those controls would, in any particular case, be unreasonable or unnecessary or where there are sufficient environmental planning grounds to justify its breach.

In particular, subclauses 4.6(2), 4.6(8) and 4.6(8A) relate to the application of clause 4.6 on the subject lands and state:

- (1) ...
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) ...
- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following:*
 - (a) *a development standard for complying development,*

- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
 - (c) clause 5.4,
 - (ca) clause 4.3 (2C),
 - (cb) clause 6.3 (2) (a) and (b).
- (8A) Subclause (8) (ca) ceases to apply on 11 March 2014.

Therefore, pursuant to subclause 4.6(8A), an applicant could seek vary (i.e. exceed) the building height requirements under the provisions of clause 4.6 from 11 March 2014.

5 THE PLANNING PROPOSAL

5.1 PART 1: STATEMENT OF OBJECTIVES

The primary purpose of this Planning Proposal is to correct an error made by Parliamentary Counsel during the drafting of NSLEP 2013. In particular, it seeks to amend NSLEP to ensure that the intent of clause 73A to NSLEP 2001 is accurately translated in NSLEP 2013. The Department of Planning and Infrastructure has acknowledged this error in correspondence with Council.

The overall objective of the Planning Proposal is to prohibit development on certain land in St Leonards that exceeds the maximum height of buildings permitted under clause 4.2 of NSLEP 2013 by more than 3 metres up until 11 March 2014, subject to meeting the variation criteria under clause 4.6 of NSLEP 2013.

In translating the provisions of clause 73A to NSLEP 2001 into NSLEP 2013, 2 particular issues arose which saw the original intent of the provisions being lost. These issues are discussed in the following subsections.

5.1.1 Removal of justification requirements for variation

Clause 73A – *Land in St Leonards* to NSLEP 2001 prevents the use of SEPP 1 where a proposed development on certain land in St Leonards seeks to exceed the maximum building height by more than 3m (excluding plant rooms).

Clause 4.6 – *Exceptions to Development Standards* to NSLEP 2013 provides a similar mechanism to that contained under SEPP 1. However, the provisions under NSLEP 2013 do not require developments that exceed the maximum building height controls under 4.3(2), but comply with the variation control under 4.3(2C), to consider the relevant matters under clause 4.6.

The clause as proposed under NSLEP 2013 essentially automatically grants an additional 3m in building height without the requirement to justify its variation from the heights stipulated on the Height of Buildings Map to the LEP.

Therefore, the provisions of NSLEP 2001 clause 73A are not accurately reflected in NSLEP 2013.

Accordingly, it is proposed to amend NSLEP 2013 to ensure that where a variation is sought to the building height control, that variation is limited to a maximum of 3m for

certain aspects of development and that they also must meet the variation requirements under clause 4.6 of NSLEP 2013.

5.1.2 Sunset clause

Subclause 73A(5) states that clause 73A is to cease applying on 11 March 2014. Therefore to correctly translate clause 73A into NSLEP 2013, the sunset clause should have applied to Clause 4.3(2C), not clause 4.6(8)(ca).

As currently drafted, after 11 March 2014, subclause 4.3(2C) will continue to apply and will automatically enable a 3m higher building limit on land within St Leonards that can then be varied pursuant to clause 4.6 of NSLEP 2013. Therefore, this requirement does not reflect the intent of clause 73A to NSLEP 2001.

Accordingly, it is proposed to amend NSLEP 2013 to ensure that the application of clause 4.3(2C) does not apply past 11 March 2014.

5.2 PART 2: EXPLANATIONS OF PROVISIONS

The primary purpose of this Planning Proposal is to amend NSLEP 2013 to ensure that the intent of Amendment No. 53 to NSLEP 2001 is accurately reflected in NSLEP 2013.

The following amendments to NSLEP 2013 are proposed:

1. That subclause 4.3(2C) be deleted in its entirety; and
2. That the words “*clause 4.3(2C)*” to subclause 4.6(8)(ca) be deleted and replaced with “*in relation to land identified as “Land in St Leonards” on the “Exceptions to Development Standards Map”— clause 4.3 (2) by more than 3m (excluding plant rooms and other similar structures)*”.

5.3 PART 3: JUSTIFICATION

The justification for the proposed provisions was previously detailed in the making of NSLEP 2001 (Amendment No.53), which the DoPI has accepted and endorsed.

5.3.1 Section A – Need for the planning proposal

1. *Is the planning proposal a result of any strategic study or report?*

Yes. The Planning Proposal merely seeks to correct a drafting error when the provisions of clause 73A to NSLEP 2001 were incorporated into NSLEP 2013.

The original intent of clause 73A to NSLEP 2001, was to enable a strategic study of the subject area to be undertaken without being compromised by further non-compliant development consents.

This strategic study is currently being undertaken by Council and the proposed amendment to NSLEP 2013 will enable this restriction to apply subject to meeting relevant variation criteria.

2. *Is the planning proposal the best means of achieving the objectives or intended outcomes, or is there a better way?*

Yes. The Planning Proposal merely seeks to correct a drafting error when the provisions of clause 73A to NSLEP 2001 were incorporated into NSLEP 2013.

Failure to correct this error will automatically grant an additional three (3) metres in permissible building height to land in St Leonards with out the benefit of a robust strategic planning process.

5.3.2 Section B – Relationship to strategic planning framework

3. *Is the planning proposal consistent with the objectives and actions of the applicable regional or sub-regional strategy (including the Sydney Metropolitan Strategy and exhibited draft strategies)?*

The *Metropolitan Plan for Sydney 2036* and *draft Inner North Subregional Strategy* apply to the subject lands. These Strategies provide the framework and detail required to guide the preparation of principal local environmental plans. These upper level strategies are generally not intended to inform the assessment of individual development applications.

The Planning Proposal seeks to allow these upper level strategic documents to be considered as part of the St Leonards / Crows Nest Planning Study, which in turn will inform future changes to NSLEP 2013.

It is important that the cumulative impacts of individual non-compliant development consents are not permitted to undermine the upper level strategic objectives for the area.

4. *Is the planning proposal consistent with a council's local strategy or other local strategic plan?*

North Sydney Council Delivery Program 2010/11-2013/14

The North Sydney Council Delivery Program 2010/11-2013/14 (Delivery Program) was prepared in accordance with NSW State Government's Integrated Planning and Reporting Framework requirements. The Delivery Program outlines Council's priorities and service delivery programs over four years, set out under five key Directions.

The directions and goals of the Delivery Program which are relevant to the Planning Proposal are as follows:

Direction: 1 Our Living Environment

Outcomes: 1.5 Public open space, recreation facilities and services that meet community needs

Direction: 2 Our Built Environment

Outcomes: 2.2 Improved mix of land use and quality development through design excellence

Outcomes: 2.6 Improved traffic management

Direction: 3 Our Economic Vitality

Outcomes: 3.1 Diverse, strong, sustainable and vibrant, local economy

Direction: 4 Our Social Vitality

Outcomes: 4.3 Enhanced arts and cultural programs and facilities

Outcomes: 4.10 Improved affordable housing and accommodation

Direction: 5 Our Civic Leadership

Outcomes: 5.5 Council is financially sustainable

The Planning Proposal will allow these directions and outcomes to be pursued in a robust and strategic manner.

5. Is the planning proposal consistent with applicable state environmental planning policies?

There are no State Environmental Planning Policies (SEPPs) that are applicable to Planning Proposal. Furthermore, the Planning Proposal will not prevent the attainment of the objectives to any of the SEPPs.

6. Is the planning proposal consistent with applicable Ministerial Directions (s.117 directions)?

It is considered that the Planning Proposal is consistent with the relevant Directions issued under Section 117(2) of the Act by the Minister to Councils, as demonstrated in TABLE 1.

TABLE 1: Consistency with s.117 Directions		
Direction	Consistency	Comment
1. Employment and Resources		
1.1 Business & Industrial Zones	Yes	The Planning Proposal does not seek to reduce any commercial or industrial zoning under NSLEP 2013. The Planning Proposal will not reduce the level of permissible floor space achievable on the affected lands.
1.2 Rural Zones	N/A	This Direction does not apply as there are no existing rural zones under NSLEP 2013 or proposed under the Planning Proposal
1.3 Mining, Petroleum Production & Extractive Industries	Yes	The Planning Proposal does not seek to alter the permissibility of these types of land uses.
1.4 Oyster Aquaculture	N/A	This Direction does not apply as the Planning Proposal does not propose any changes in land use.
1.5 Rural Lands	N/A	This Direction does not apply as the Planning Proposal does not propose any changes that will affect development in a rural or environmental protection zone.
2 Environmental Heritage		
2.1 Environmental Protection Zones	N/A	This Direction does not apply as the Planning Proposal does not affect land in an environmental protection zone.
2.2 Coastal Protection	N/A	This Direction does not apply as the Planning Proposal does not affect land within a coastal zone.
2.3 Heritage Conservation	Yes	The Planning Proposal does not alter the existing heritage conservation provisions within NSLEP 2013 which already satisfy the requirements of the Direction.
2.4 Recreation Vehicle Areas	N/A	The Planning Proposal does not enable land to be developed for the purposes of a recreational vehicle area.
3 Housing, Infrastructure & Urban Development		
3.1 Residential Zones	Yes	The Planning Proposal does not alter the existing provisions within NSLEP 2013

TABLE 1: Consistency with s.117 Directions		
Direction	Consistency	Comment
		that relate to residential development, which already satisfy the requirements of the Direction.
3.2 Caravan Parks & Manufactured Home Estates	N/A	This Direction does not apply as the Planning Proposal does not seek to permit caravan parks or manufactured home estates under NSLEP 2013.
3.3 Home Occupations	Yes	The Planning Proposal does not alter the existing provisions within NSLEP 2013 that relate to home occupations, which already satisfy the requirements of the Direction.
3.4 Integrating Land Use & Transport	N/A	This Direction does not apply as the Planning Proposal does not seek to amend the zoning of land under NSLEP 2013.
3.5 Development Near Licensed Aerodromes	N/A	This Direction does not apply as the Planning Proposal does not relate to land in the vicinity of a licensed aerodrome.
3.6 Shooting Ranges	N/A	This Direction does not apply as the Planning Proposal does not relate to land in the vicinity of a shooting range.
4 Hazard and Risk		
4.1 Acid Sulfate Soils	N/A	This Direction does not apply as the Planning Proposal does not relate to land affected by Acid Sulfate Soils.
4.2 Mine Subsidence & Unstable Land	N/A	This Direction does not apply as the Planning Proposal does not relate to land affected by mine subsidence nor has it been identified as being unstable land.
4.3 Flood Prone Land	N/A	This Direction does not apply as the Planning Proposal does not relate to land identified as being flood prone land.
4.4 Planning for Bushfire Protection	N/A	This Direction does not apply as the Planning Proposal does not relate to land identified as being bushfire prone land.
5 Regional Planning		
5.1 Implementation of Regional Strategies	N/A	This Direction does not apply as the Planning Proposal does not relate to land affected by one of the identified strategies.
5.2 Sydney Drinking Water Catchment	N/A	This Direction does not apply as the Planning Proposal does not relate to any of the identified LGAs.
5.3 Farmland of State and Regional Significance on the NSW Far North Coast.	N/A	This Direction does not apply as the Planning Proposal does not relate to any of the identified LGAs.
5.4 Commercial and Retail Development along the Pacific Highway, North Coast.	N/A	This Direction does not apply as the Planning Proposal does not relate to any of the identified LGAs.

TABLE 1: Consistency with s.117 Directions		
Direction	Consistency	Comment
5.8 Second Sydney Airport: Badgerys Creek	N/A	This Direction does not apply as the Planning Proposal does not relate to any of the identified LGAs.
6 Local Plan Making		
6.1. Approval & Referral Requirements	Yes	The Planning Proposal does not alter any concurrence, consultation or referral requirements under NSLEP 2013, nor does it identify any development as designated development.
6.2 Reserving Land for Public Purposes	Yes	The Planning Proposal does not create, alter or reduce existing zonings or reservations of land for public purposes..
6.3 Site Specific Provisions	N/A	This Direction does not apply, as it does not allow a particular type of development to be carried out.
7 Metropolitan Planning		
7.1 Implementation of the Metropolitan Plan for Sydney 2036	Yes	Refer to question 4 to Section 5.3.2 of this report.

5.3.3 Section C – Environmental, social and economic impact.

7. Is there any likelihood that critical habitat or threatened species, populations or ecological communities, or their habitats, will be adversely affected as a result of the proposal?

The Planning Proposal relates to land in a densely urbanised area and it is considered unlikely that the Planning Proposal will adversely affect any critical habitat or threatened species, populations or ecological communities, or their habitats.

8. Are there any other likely environmental effects as a result of the planning proposal and how are they proposed to be managed?

The Planning Proposal will enable Council to continue to control the extent to which developments can be approved beyond the scale and capacity envisaged in the current planning controls contained in NSLEP 2013 until such time as the findings of the St Leonards / Crows Nest Planning Study have been considered as originally intended by clause 73A to NSLEP 2001. The Planning Proposal will therefore allow the environmental impacts of increased height and residential capacity to be properly considered as part of a robust strategic planning process.

9. How has the planning proposal adequately addressed any social and economic effects?

The Planning Proposal will enable Council to continue to control the extent to which developments can be approved beyond the scale and capacity envisaged in the current planning controls contained in NSLEP 2013 until such time as the findings of the St Leonards / Crows Nest Planning Study have been considered as originally intended by clause 73A to NSLEP 2001. The Planning Proposal will therefore allow the social and economic effects of

increased height and residential capacity to be properly considered as part of a robust strategic planning process.

5.3.4 Section D – State and Commonwealth interests

10. *Is there adequate public infrastructure for the planning proposal?*

The Planning Proposal will enable Council to continue to control the extent to which developments can be approved beyond the scale and capacity envisaged in the current planning controls contained in NSLEP 2013 until such time as the findings of the St Leonards / Crows Nest Planning Study have been considered as originally intended by clause 73A to NSLEP 2001. The Planning Proposal will therefore allow the public infrastructure requirements associated with increased height and residential capacity to be properly considered as part of a robust strategic planning process.

11. *What are the views of State and Commonwealth public authorities consulted in accordance with the gateway determination?*

The Planning Proposal has not yet been considered by State or Commonwealth public authorities. Views of the State will be gained through the Gateway Determination process.

It is noted that in the making of NSLEP 2001 (Amendment No.53), the associated Planning Proposal was not required to be referred to any public authorities.

5.4 PART 4: COMMUNITY CONSULTATION

Consultation will be undertaken in accordance with the requirements made by the Gateway Determination and Council's guidelines.

The Planning Proposal will allow for community consultation regarding the strategic vision for the area to occur as part of the St Leonards / Crows Nest Planning Study. Without the intervention proposed by the Planning Proposal individual non-compliant development consents will cumulatively impact upon the future of St Leonards without appropriate consultation having occurred.