

Item No: D1
Subject: **PLANNING PROPOSAL - INTERPRETATION OF DESIRED FUTURE CHARACTER IN WOOLLAHRA LEP 2014.**
Author: Kelly McKellar, Acting Team Leader Strategic Planner
Approvers: Anne White, Manager - Strategic Planning
Nick Economou, Acting Director Planning & Development
File No: 20/204925
Reason for Report: To seek the advice of the Woollahra Local Planning Panel in relation to a planning proposal to clarify the interpretation of desired future character as contained in various aims and objectives of the Woollahra LEP 2014.

Recommendation:

THAT the Woollahra Local Planning Panel advises Council to proceed with the planning proposal (at **Annexure 1**) to amend the *Woollahra Local Environmental Plan 2014* to introduce provisions clarifying the interpretation of desired future character.

1. Reason for report to the Woollahra Local Planning Panel

This report seeks the advice of the Woollahra Local Planning Panel (Woollahra LPP) on a planning proposal to amend the *Woollahra Local Environmental Plan 2014* (Woollahra LEP 2014) to introduce provisions which will clarify the interpretation of desired future character as contained in various aims and objectives of the Woollahra LEP 2014.

On 27 September 2018, the Minister for Planning issued a Local Planning Panel Direction – Planning Proposals:

- *A Council to whom this direction applies is required to refer all planning proposals to be prepared after 1 June 2018 to the local planning panel for advice, unless the council's general manager determines that the planning proposal relates to:*
 - a) *the correction of an obvious error in a local environmental plan*
 - b) *matters that are of a consequential, transitional, machinery or other minor nature, or*
 - c) *matters that council's general manager considers will not have any significant adverse impact on the environment or adjoining land.*
- *When a planning proposal is referred to the panel, it must be accompanied by an assessment report prepared by council staff setting out recommendations, including whether or not the planning proposal should proceed.*
- *A proposal is to be referred to the local planning panel before it is forwarded to the Minister under section 3.34 of the Environmental Planning and Assessment Act 1979 (the Act).*

In this case, the planning proposal is required to be referred to the Woollahra LPP because the General Manager has not made a determination in regard to items (a), (b) or (c), above.

2. Background

A recent decision in the NSW Land and Environment Court (LEC) approved a six storey mixed-use development at 28-34 Cross St, Double Bay (DA617/2017). This decision has implications for the interpretation of the term desired future character as used in the Woollahra LEP 2014 and the *Woollahra Development Control Plan 2015* (Woollahra DCP 2015).

In this case, the Applicant successfully argued that rather than the provisions in Woollahra LEP 2014 and Woollahra DCP 2015, the recent approvals for six storey development on adjoining land set the desired future character. Council unsuccessfully appealed this decision (s56A Appeal). Copies of the LEC decisions are contained in **Annexures 2 and 3** of this report.

Relevant to this planning proposal are the following findings (see **Annexure 3**):

- The term ‘desired future character’ is not defined in the Woollahra LEP 2014 [52].
- A DCP cannot be used to interpret the provisions of an LEP unless the LEP expressly refers to the provisions of the DCP for that purpose [46].
- The Woollahra LEP 2014 does not refer to Woollahra DCP 2015 to define the term desired future character [46].
- The Commissioner was not obliged to interpret the term desired future character in Woollahra LEP 2014 by reference to the Woollahra DCP 2015 [46].
- The drafter of the Woollahra LEP 2014 has not confirmed that the interpretation of desired future character is influenced by zoning, permitted and prohibited development and development standards [54].
- Where the term desired future character is not defined, the matters that may be taken into account in evaluating what is the desired future character are not defined [54].
- There is no provision which prevents approved and constructed development being considered as part of the evolving local character and accordingly the desired future character of an area [54].

On 6 October 2020, Council’s Environmental Planning Committee (EPC) considered a report on the LEC findings and its potential implications on Council’s place-based planning approach. A copy of the report is attached in **Annexure 4**. Additionally, the Double Bay Residents Association made a submission to Council in relation to this matter dated 27 August 2020 which was attached to the EPC report (see **Annexure 5**).

On 26 October 2020, Council resolved:

- THAT a planning proposal be prepared to amend references to desired future character in Woollahra LEP 2014 so that the meaning and interpretation of desired future character (across all parts of the municipality) is defined and cross referenced.*
- THAT the planning proposal be referred to the Woollahra Local Planning Panel for advice.*
- THAT the advice of the Woollahra Local Planning Panel be reported to the Environmental Planning Committee.*

At this meeting, Council considered late correspondence from staff containing confidential legal advice about this matter (see **Annexure 6 - Confidential**).

Accordingly, staff have prepared a planning proposal which seeks to amend the Woollahra LEP 2014 to clarify the interpretation of desired future character as contained in various aims and objectives.

3. Planning Proposal

Consistent with Council's resolution of 26 October 2020, a planning proposal has been prepared to amend Woollahra LEP 2014 (see **Annexure 1**). The planning proposal seeks to amend Woollahra LEP 2014 by inserting an additional local provision into *Part 6 Additional local provisions* to define desired future character.

3.1. Planning Proposal structure

The planning proposal has been prepared in accordance with section 3.33 of the *Environmental Planning and Assessment Act 1979* (the Act) and the two documents prepared by the formerly named NSW Department of Planning and Environment titled *A Guide to Preparing Planning Proposals* (December 2018) and *A Guide to Preparing Local Environmental Plans* (December 2018).

The planning proposal satisfies the requirements of section 3.33 of the Act as it includes:

- A statement of the objectives or intended outcome of the amendment to Woollahra LEP 2014.
- An explanation of the provisions that are to be included in the amendment to Woollahra LEP 2014.
- The justification for the objectives, outcomes and provisions and the process for their implementation.
- Details of the community consultation that is to be undertaken.

3.2. Objective of amendment to Woollahra LEP 2014

The term desired future character is used 18 times in Woollahra LEP 2014 across the aims of the plan, zone and clause objectives. The objective of the planning proposal is to define the term desired future character to ensure that the meaning and interpretation is defined by other provisions of both the Woollahra LEP 2014 and Woollahra DCP 2015.

Doing so will re-establish Council's place-based planning approach and the intent of the original drafting of Woollahra LEP 2014 and Woollahra DCP 2015.

Accordingly, this planning proposal seeks to amend the Woollahra LEP 2014 to create a statutory link between the provisions containing the term desired future character, the LEP development standards, and the corresponding desired future character statements in the Woollahra DCP 2015.

The proposed amendment will reduce ambiguity about the interpretation of desired future character, and encourages the consistent application and interpretation of the adopted development standards and controls. This will help to ensure that development achieves the desired future character of the area and provides consistent and transparent planning outcomes.

3.3. Explanation of provisions

The planning proposal seeks to amend Woollahra LEP 2014 by inserting an additional local provision into *Part 6 Additional local provisions* to define desired future character. While it is acknowledged that this the local provision will be subject to drafting by the Parliamentary Counsel's Office, the additional local provision may be similar to the following:

6.8 Desired future character

- (1) *In this instrument, a reference to desired future character of the area, neighbourhood, zone or attribute of same, means the character prescribed in relation to that area, neighbourhood, zone or attribute by:*
- (a) the relevant aims, objectives and other provisions of this instrument; and*
 - (b) to the extent not inconsistent, a development control in force, but whenever made, under or for the purposes of this instrument.*

3.4. Relationship to strategic planning framework

The planning proposal is broadly consistent with the strategic planning framework including the *Greater Sydney Region Plan: A Metropolis of Three Cities* (2018), *Eastern City District Plan* (2018), *Woollahra Local Strategic Planning Statement 2020* (Woollahra LSPS 2020), *Woollahra 2030* and the relevant SEPPs and Section 9.1 Ministerial Directions. Consistency with the strategic planning framework is discussed in the justification section of the planning proposal (**Annexure 1**).

Notably, the planning proposal will give effect to Woollahra LSPS 2020 by strengthening the link between desired future character and the development standards of the Woollahra LEP 2014 and corresponding provisions of the Woollahra DCP 2015. This will encourage future development consistent with the desired future character of Woollahra's neighbourhoods and villages.

4. Conclusion






This report seeks the advice of the Woollahra LPP on a planning proposal to introduce provisions which will clarify the interpretation of desired future character as contained in various aims and objectives of the Woollahra LEP 2014.

A recent decision of the LEC found that recently approved adjoining development set the desired future character of the area, rather than the objectives and development standards of the Woollahra LEP 2014 or provisions in the Woollahra DCP 2015. This is inconsistent with Council's place-based planning approach and the intent of the original drafting of the Woollahra LEP 2014 and Woollahra DCP 2015.

The planning proposal seeks to maintain the integrity of our planning controls as a consequence of the Court's interpretation.

We recommend that the Woollahra LPP advise Council to proceed with the planning proposal at **Annexure 1** to define desired future character to ensure that its meaning and interpretation is taken as that which is defined in other provisions of the Woollahra LEP 2014 and Woollahra DCP 2015.

Annexures

1. Planning Proposal (annexures removed) [↓](#) 
2. SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112 [↓](#) 
3. Woollahra Municipal Council v SJD DB2 Pty Ltd [2020] NSWLEC 115 [↓](#) 
4. EPC Report 6 October 2020 (annexures removed) [↓](#) 
5. Submission from Double Bay Residents Association 27 August 2020 [↓](#) 
6. Confidential Late Correspondence to Council 26 October 2020 (*circulated under separate cover*) - **Confidential**