

Item No: R5 Recommendation to Council
Subject: **ADVICE OF THE WOOLLAHRA LOCAL PLANNING PANEL - PLANNING PROPOSAL - INTERPRETATION OF DESIRED FUTURE CHARACTER IN WOOLLAHRA LEP 2014**
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Approvers: Anne White, Manager - Strategic Planning
Nick Economou, Acting Director Planning & Development
File No: 20/206632
Reason for Report: To give Council the advice of the Woollahra Local Planning Panel. To obtain Council's approval to proceed with a planning proposal to amend the Woollahra Local Environmental Plan 2014 to introduce provisions clarifying the interpretation of desired future character.

Recommendation:

- A. THAT Council note the advice provided by the Woollahra Local Planning Panel on 19 November 2020.
- B. THAT the planning proposal, as contained in **Annexure 1** of the report to the Environmental Planning Committee on 30 November 2020, be forwarded to the Department of Planning, Industry and Environment requesting a gateway determination to allow public exhibition.
- C. THAT Council request the Minister for Planning and Public Spaces (or delegate) authorise Council as the local plan-making authority in relation to the planning proposal to make the local environmental plan under section 3.36 of the *Environmental Planning and Assessment Act 1979*.

1. 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 Local Environmental Plan 2014* (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).

Relevant to this planning proposal are the following findings of the LEC:

- 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].

The LEC's interpretation 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.

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 at **Annexure 2**.

On 26 October 2020, Council considered late correspondence from staff containing confidential legal advice about this matter (see **Annexure 3 - Confidential**) and 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.*

2. Planning Proposal

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

2.1. 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.

2.2. 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.

2.3. 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. 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 framework is discussed in the justification section of the planning proposal (see **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. Woollahra Local Planning Panel advice

The planning proposal was referred to the Woollahra Local Planning Panel (Woollahra LPP) on 19 November 2020 for advice. The Panel provided the following advice to Council:

Reason for decision:

The majority of the panel supported that the planning proposal proceed to Gateway for the reasons set out in the Council officer's report.

Mr Colman did not support the proposal on the basis that he considers that the concept of 'Desired Future Character' should be presented to stakeholders for discussion as to its value in the development control process, and further as to whether or not the concept itself should be enshrined in law.

Advice:

*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.*

As a consequence of this advice, the planning proposal contains no amendments other than to insert the advice of the Woollahra LPP.

5. Next steps

Subject to the Council's decision, the planning proposal will be referred to the DPIE for a gateway determination. This will allow the planning proposal to be placed on public exhibition.

The public exhibition of the planning proposal will be undertaken in accordance with the requirements of the *Environmental Planning and Assessment Act 1979* (the Act), the *Environmental Planning and Assessment Regulation 2000*, the relevant DPIE guidelines, and the gateway determination.

Public notification of the exhibition will comprise:

- A weekly notice in the Wentworth Courier for the duration of the exhibition period (if a hardcopy is being published).
- A notice on Council's website.
- Notifications to local community and business groups, adjoining councils and relevant state agencies.

To streamline the plan-making process, the Minister may delegate local plan-making power to Council for routine matters. In this case, Council may request authorisation to exercise the functions of the Minister to make an LEP under section 3.36 of the Act. Part C of the recommendation for this report deals with this request. After public exhibition, the planning proposal and submissions received will be reported to Council.

6. Conclusion



In a recent decision, 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.

This report provides the advice of the Woollahra LPP on a planning proposal to amend the Woollahra LEP 2014 to clarify the interpretation of the term desired future character. The term desired future character occurs 18 times in the Woollahra LEP 2014.

The planning proposal seeks to maintain the integrity of Council's planning controls as a consequence of a recent decision of the LEC.

On 19 November 2020, the Woollahra LPP provided advice to Council that it supports proceeding with the planning proposal. We recommend that Council resolve to proceed with the planning proposal and that it is submitted to the DPIE requesting a gateway determination to allow public exhibition.

Annexures

1. Planning Proposal (annexures removed) [↓](#) 
2. Environmental Planning Committee report - 6 October 2020 (annexures removed) [↓](#) 
3. Confidential Late Correspondence to Council 26 October 2020 (*circulated under separate cover*) - **Confidential**