



Planning,
Industry &
Environment

IRF21/1542

Gateway determination report – PP-2020-4096

Interpretation of Desired Future Character

August 22



Published by NSW Department of Planning, Industry and Environment

dpien.nsw.gov.au

Title: Gateway determination report – PP-2020-4096

Subtitle: Interpretation of Desired Future Character

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Table 1 Reports and plans supporting the proposal

Relevant reports and plans
Planning Proposal – December 2020
Woollahra Local Planning Panel Report – 19 November 2020
Environmental Planning Committee Report – 30 November 2020
Council Minutes – 14 December 2020

1 Planning Proposal

1.1 Overview and objectives of planning proposal

Table 2 Planning proposal details

LGA	Woollahra
PPA	Woollahra Municipal Council
NAME	Interpretation of Desired Future Character
NUMBER	PP-2020-4096
LEP TO BE AMENDED	Woollahra Local Environmental Plan (LEP) 2014
ADDRESS	Entire LGA
DESCRIPTION	Entire LGA
RECEIVED	21/12/2020
FILE NO.	IRF21/1542
POLITICAL DONATIONS	There are no donations or gifts to disclose and a political donation disclosure is not required
LOBBYIST CODE OF CONDUCT	There have been no meetings or communications with registered lobbyists with respect to this proposal

The planning proposal contains objectives and intended outcomes that explain the intent of the proposal.

The objectives of the planning proposal are to:

- Define the term ‘desired future character’, which is referred to 18 times in the Woollahra LEP 2014 (including aims of plan, zone and clause objectives) – this is to ensure that the meaning and interpretation are defined by the development standards in the LEP and the desired future character statements in the Woollahra Development Control Plan (DCP) 2015
- Reduce ambiguity about the interpretation of ‘desired future character’
- Encourage the consistent application and interpretation of the adopted development standards

The planning proposal contains an ambiguity as to which Woollahra LEP 2014 provisions are intended to be referenced to define ‘desired future character’.

In the discussion on objectives, the proposal states that it is ‘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’ (p. 11).

In the explanation of provisions, the proposal states that its intent will be achieved by ‘expressly stating in the Woollahra LEP 2014 that desired future character is derived from the development standards of Woollahra LEP 2014 and the desired future character provisions of Woollahra DCP

2015' [underlining is our emphasis] (p. 12). Following this, the proposal also states it seeks to 'provide an appropriate statutory relationship between the aims, objectives, development standards and corresponding provisions' [underlining is our emphasis] (p. 13).

In other sections of the proposal, there are references to 'objectives' or 'other provisions' of the Woollahra LEP 2014 and Woollahra DCP 2015. Further, the proposed draft clause provided at **Section 1.2** below, refers to '*relevant aims, objectives and other provisions.*'

The discussion is not cohesive and references to terms such as '*corresponding provision*', '*other provisions*' and '*relevant aims, objectives*', which makes the proposal ambiguous.

1.2 Explanation of provisions

The planning proposal seeks to introduce an additional local provision in the Woollahra LEP 2014 to interpret the term 'desired future character'.

The proposal seeks to include an additional local provision, *6.8 Desired future character* in council's LEP - acknowledging however that this specific drafting would ordinarily be undertaken by the Parliamentary Counsel's Office (PCO) if the proposal proceeds.

Council's proposed draft clause is as follows:

"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 plan in force, but whenever made, under or for the purposes of this instrument."*

The proposed draft additional local provision is very broad, non-specific and appears to capture a range of clauses in the Woollahra LEP. In particular, the phrase 'other provisions of this instrument' is unclear. The draft clause is difficult to interpret and does not appear to relate to desired future character specifically but to cover a wide range of matters addressed by other LEP clauses. This term has not been defined in other LEPs and has not been defined in other LEPs.

1.3 Site description and surrounding area

The planning proposal relates to all land in the Woollahra LGA.

1.4 Mapping

No mapping is required to be amended or produced as part of this planning proposal.

2 Need for the planning proposal

The planning proposal is not the result of a specific study. Council initiated the proposal in response to a decision of the NSW Land and Environment Court (LEC) on 18 August 2020 in *Woollahra Municipal Council v SJD DB2 Pty Ltd [2020] NSWLEC 115*. In this case, Council appealed the LEC Commissioner's decision¹ to grant development consent to a development application (DA) at 28-34 Cross Street, Double Bay (DA617/2017) for the construction of a six-storey shop top housing development.

¹ in *SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112*

The proposal outlines the LEC decision that found that a recently approved development adjoining the aforementioned site and exceeding the height and floor space ratio (FSR) development standards set the desired future character of the area; rather than the LEP objectives and development standards of the Woollahra LEP 2014 or provisions in the Woollahra DCP 2015. The proposal states that the decision *'has identified that there is ambiguity in how the existing provisions relating to desired future character are interpreted.'* As such the proposal states it is needed to clarify and define the term 'desired future character.'

In reviewing the discussion in the planning proposal, it is noted in the judgement of *Woollahra Municipal Council v SJD DB2 Pty Ltd [2020] NSWLEC 115*, paragraph 54 states, among other things, that "... There is no limitation found in the subject matter, scope and purpose of WLEP which would preclude consideration of developments that have been approved and constructed in the neighbourhood or area..."

The planning proposal notes the term 'desired future character' is referenced 18 times in the Woollahra LEP 2014. The term is used in sections including: the aims of the LEP, objectives of certain zones in the Land Use Table and objectives of lot size, height of buildings and floor space ratio development standards.

The Department considers that the planning proposal should not be supported for reasons outlined below.

Ambiguity and inconsistencies in the proposal

The proposal seeks to create a statutory link between the provisions in the Woollahra LEP 2014 containing the term 'desired future character', the LEP development standards and the corresponding desired future character statements in the Woollahra Development Control Plan 2015. However, the proposal is ambiguous as to which provisions in the LEP are intended to be cross referenced in the definition for 'desired future character', as there are inconsistencies in the discussion and draft clause within the proposal, as outlined in section 1.2 above.

Additionally, what is intended to be referenced from the DCP also requires clarification, as there are various references in the proposal to the DCP's '*character statements*', '*corresponding provisions*' and '*local character provisions*'.

It is understood that the proposal seeks to provide a statutory link to the DCP's character statements to enable consideration of streetscape and other factors. However, the draft clause's reference to a DCP "*in force but whenever made*" raises concerns about the relevance and appropriateness of the DCP provisions proposed to be referenced. For instance, a DCP provision which is outdated could be relied upon for the purposes of interpreting desired future character under the proposed draft LEP clause.

Circular argument

The proposal suggests that the development standards in the LEP represent the 'desired future character'. The objectives of the development standards (lot size, height and FSR) are to ensure development is consistent or compatible with the anticipated future character.

Council's approach of defining 'desired future character' by referring to the development standards would appear to constitute a circular argument and there is a risk that this may render the concept of 'desired future character' meaningless. As the intent to achieve 'desired future character' is already embodied in the aims of the LEP and objectives of the relevant zones and development standards, the proposed approach is not considered to be necessary.

Reasonableness of defining desired future character by reference to development standards

The proposed approach to interpreting desired future character appears to require strict compliance with the development standards in the LEP. This would not necessarily result in

a good or reasonable planning outcome and could be unnecessarily restrictive. This issue is explained below.

Implications on the application of Clause 4.6 variation

It would be unreasonable to assume that any development that exceeds the numerical standards would be by default undesirable as each proposal would be determined on its individual merit.

The proposed approach is rigid and does not consider merit assessment of individual development proposals, the application of Clause 4.6 of the LEP that provides for exceptions to development standards, potential bonus provisions under some State Environmental Planning Policies (SEPPs), and/or instances where there are 'existing use rights'.

Temporary assumed concurrence for Council officers to determine certain DAs

The proposed approach to defining 'desired future character' by referring to the development standards would also be problematic where the LEP development standards are significantly different to existing built form.

The Department has granted temporary assumed concurrence for Woollahra Council officers to determine certain development applications with pre-existing non-compliances with the development standards, rather than reporting to a Local Planning Panel as per the Ministerial Direction. These include DAs for existing buildings that already exceed development standards but would only result in minor increase in floor area or height, such as balcony enclosure and other minor works.

Council has requested the concurrence because of the large number of DAs being reported to the Local Planning Panel (LPP) because they have existing non-compliances with development standards. This is a recurring issue and would suggest that the development standards in the LEP in certain instances do not reflect the existing development pattern and may be in need of a review.

This in turn would mean that the interpretation of desired future character by referring to the current development standards may not reflect the best or reasonable planning outcomes. For instance, a minor structure to be constructed in a building with pre-existing non-compliance and exceedance to the height and/or FSR controls may be deemed inconsistent with the desired future character, even when their impact may not be significant.

Department's previous local character policy work

The Department has been considering and outlining the tools available to Councils to incorporate the consideration of local character into strategic planning since 2018. Local character overlays were first identified as a potential mechanism for embedding local character into the planning framework in January 2018 in Planning System Circular PS 18-001 '*respecting and enhancing local character in the planning system*'. In 2019, the Department released a *Local Character and Place Guideline* and Discussion Paper – Local Character Overlays, which further explored a proposed approach for introducing local character overlays into the Standard Instrument LEP.

From 12 November 2020 to 29 January 2021, the Department exhibited an *Explanation of Intended Effect – Local Character Provision* (EIE) for a standardised approach to local character through a proposed local character model clause in the Standard Instrument LEP. The submissions received during the EIE exhibition revealed mixed feedback and consensus could not be reached, as such the introduction of a model clause into the Standard Instrument LEP is not being progressed.

It is noted that the planning proposal does not rely on the approach outlined in the EIE.

Notwithstanding, local character may continue to be considered through DCPs, which better sets the overall context of local areas and provides planning controls that support the vision.

3 Strategic assessment

3.1 District Plan

The site is in the Eastern City District and the Greater Cities Commission (formerly Greater Sydney Commission) released the Eastern City District Plan on 18 March 2018. The plan contains planning priorities and actions to guide the growth of the district while improving its social, economic and environmental assets.

The planning proposal is consistent with the priorities for liveability and sustainability in the plan as outlined below.

The Department is satisfied the planning proposal gives effect to the District Plan in accordance with section 3.8 of the *Environmental Planning and Assessment Act 1979*. The following table includes an assessment of the planning proposal against relevant directions and actions.

Table 3 District Plan assessment

District Plan Priorities	Justification
Planning Priority E6: Creating and renewing great places and local centres, and respecting the District's heritage	The planning proposal is consistent with this Priority as it seeks to provide clarity around the definition of 'desired future character' to strengthen the consideration of local character and desired future character in future developments in the Woollahra LGA. This is currently achieved under council's DCP. Nonetheless, for the reasons outlined above, the proposal is not supported.
Planning Priority E16: Protecting and enhancing scenic and cultural landscapes.	The planning proposal is consistent with this Priority, notably Actions 63 and 64 around identifying, protecting and enhancing views of scenic and cultural landscapes from the public realm. Clarifying 'desired future character' may emphasise the consideration of retaining and enhancing scenic and cultural landscapes as part of future development applications. Nonetheless, as outlined above, the proposal is not supported.

3.2 Local

The proposal states that it is consistent with the following local plans and endorsed strategies. It is also consistent with the strategic direction and objectives, as stated in the table below:

Table 4 Local strategic planning assessment

Local Strategies	Justification
Local Strategic Planning Statement (LSPS)	<p>The planning proposal is consistent with the endorsed Woollahra LSPS as it seeks to encourage future development in accordance with the desired future character of Woollahra’s neighbourhoods and villages. This supports the following Planning Priorities:</p> <ul style="list-style-type: none"> • <i>Planning Priority 4 – Sustaining diverse housing choices in planned locations that enhance our lifestyles and fit in with our local character and scenic landscapes</i> • <i>Planning Priority 6 – Placemaking supports and maintains the local character of our neighbourhoods and villages whilst creating great places for people</i> • <i>Planning Priority 12 – Protecting and enhancing our scenic and cultural landscapes.</i>
Community Strategic Plan (CSP)	<p>The planning proposal is consistent with Council’s CSP for the same reasons above, particularly with strategies within Goal 4: Well-planned neighbourhoods, Goal 5: Liveable Places and Goal 9: Community focused economic development.</p>
Local Housing Strategy (LHS)	<p>Action 12 of the Local Housing Strategy states that Council should continue to progress with the subject planning proposal to interpret the term ‘desired future character’.</p> <p>The Department’s approval of the LHS dated March 2022 requires any planning proposal to establish a local character clause in line with the Department’s proposed framework should not progress until such time when its status becomes clearer. It is acknowledged that the subject planning proposal is different from the local character framework previously exhibited in the EIE. The proposal is not inconsistent with the approval of the LHS.</p>

3.3 Local planning panel (LPP) recommendation

On 19 November 2020, the Woollahra LPP considered a report on the planning proposal for interpretation of the term desired future character and recommended Council proceed with the proposal.

It is noted that one LPP member did not support the proposal on the basis 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.*”

3.4 Section 9.1 Ministerial Directions

The planning proposal is considered to be consistent with all relevant section 9.1 Directions.

3.5 State environmental planning policies (SEPPs)

The planning proposal is considered to be consistent with all relevant SEPPs.

4 Site-specific assessment

4.1 Environmental

The planning proposal is administrative in nature and is not likely to adversely impact on critical habitat areas or threatened species, populations or ecological communities, or their habitats.

4.2 Social and economic

The planning proposal is administrative in nature and is unlikely to result in any adverse social or economic impacts.

4.3 Infrastructure

The provision or funding of state infrastructure is not considered relevant to this planning proposal. There is no infrastructure demand that will result from the planning proposal as it is administrative in nature.

5 Consultation

5.1 Community

The planning proposal is not recommended to proceed to Gateway approval and subsequent public exhibition.

5.2 Agencies

The planning proposal is not supported and so agency consultation is not required.

6 Timeframe

No timeframe is required as the planning proposal is not recommended to proceed.

7 Local plan-making authority

The planning proposal is not recommended to proceed, and so nomination of a local-plan making authority is not required.

8 Assessment Summary

The Department acknowledges the intent of the planning proposal to provide clarity around the term 'desired future character'. However, the planning proposal is **not** supported to proceed for the following reasons:

- The planning proposal does not provide a clear explanation of provisions, as there are ambiguity and inconsistencies as to which provisions in the Woollahra LEP 2014 are intended to be cross referenced in the definition for 'desired future character'. As a result, the proposed approach is difficult to interpret and apply.
- The proposed approach to interpret 'desired future character' by referring to the application of development standards of the Woollahra LEP 2014 is rigid, as it does not consider merit assessment of individual development proposals such as the application of Clause 4.6 of the LEP and/or instances where there are 'existing use rights'.
- The aim of local environmental plan, objectives of certain zones and development standards in the Woollahra LEP 2014 already seek to ensure development is consistent or compatible with the anticipated or expected future character. To define 'desired future character' by referring to these provisions would appear to be circular reasoning and therefore unnecessary.
- The term 'desired future character' is not defined under the *Standard Instrument—Principal Local Environmental Plan* nor has been defined in any other LEP.
- Consideration of local character is better placed in Council's DCP as this sets the overall context of local areas and provides detailed planning controls and principles that support development standards in the LEP.

9 Recommendation

It is recommended the delegate of the Minister determine that the planning proposal should **not** proceed based on reasons in the Assessment Summary (above).



15 August 2022

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24 August 2022

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