



PLANNING PROPOSAL

Exceptions to Development Standards in St Leonards– Building Height

3 July 2014

1 INTRODUCTION

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

The proposed amendment seeks to reactivate the restriction formerly imposed by clause 4.6(8)(ca) to NSLEP 2013 which limits the use of the clause to vary the maximum building height for land in St Leonards by more than 3 metres. This clause ceased to apply on 11 March 2014.

In particular, the proposed amendment seeks to achieve this by removing clause 4.6(8A) in its entirety, thereby reactivating the original restriction under clause 4.6(8)(ca) which ceased to apply on 11 March 2014. The purpose of the amendment is 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 until such time that the St Leonards/Crows Nest Planning Study for Precincts 2 and 3 is completed.

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 Environment's (DPE) 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 North Sydney Local Environmental Plan 2001 (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 DPE 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 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.

The intent behind the second condition was that it was anticipated that the Planning Study for St Leonards / Crows Nest would have been completed and thereby providing strategic direction for the area.

The Planning Proposal was subsequently amended and placed on public exhibition. 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 DPE unamended with a request that the Minister for Planning and Infrastructure make the Plan.

On 21 June 2013, Amendment No. 53 to NSLEP 2001 was published on the NSW Legislation website which gave effect to the Planning Proposal. The amendment was contained within clause 73A to NSLEP 2001.

On 2 August 2013, NSLEP 2013 was made through its publication on the NSW Legislation website and came into force on the 13 September 2013. At Council's request, the DPE incorporated all amendments made to NSLEP 2001 that did not form part of the draft exhibited versions of NSLEP 2013, into NSLEP 2013 (including Amendment No. 53). However, the original intent of clause 73A to NSLEP 2001 was not accurately translated to NSLEP 2013.

On 1 August 2013, the DPE formally acknowledged that there had been a drafting error in translating the intent of Amendment No. 53 to NSLEP 2001 into NSLEP 2013, one day before it was made. Essentially, the error automatically granted 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 from 11 March 2014. The DPE also advised on this day that Council should prepare a Planning Proposal to rectify the issue.

Council subsequently considered a report at its Legal and Planning Committee on 12 August 2013, to rectify the drafting error and it was resolved to recommend 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 18 August 2013, Council resolved to adopt the recommendations of the Legal and Planning Committee and accordingly, forwarded the Planning Proposal to the DPE on 13 September 2013 requesting a Gateway Determination.

On 31 October 2013 a Gateway Determination was issued by the DPE allowing the Planning Proposal to proceed unamended subject to the following conditions:

1. *No community consultation is required under sections 56(2)(c) and 57 of the EP&A Act.*
2. *No consultation is required with public authorities under section 56(2)(d) of the EP&A Act.*
3. *A public hearing is not required to be held into the matter by any person or body under section 56(2)(e) of the EP&A Act. This does not discharge Council from any obligation it may otherwise have to conduct a public hearing (for example, in response to a submission or if reclassifying land).*
4. *The timeframe for completing the LEP is to be 6 months from the week following the date of the gateway determination.*

On 18 November 2013, Amendment No 2 to NSLEP 2013 was published on the NSW Legislation website which gave effect to the Planning Proposal.

Council has yet to complete the Planning Study for Precincts 2 and 3, having only recently received a grant from DPE to assist in its completion on 24 February 2014 – roughly two weeks before the sunset clause date. It is anticipated that the Planning Study for Precinct 2 will be completed by the end of 2014 and Precinct 3 in 2015. Accordingly, Council is currently in a period where no restrictions are being placed on the use of clause of 4.6, meaning developers will potentially be able to push the current built form envelope without the benefit of the comprehensive studies being completed.

In response to discussions with the DPE in relation to this matter at its February 2014 quarterly meeting, a letter from Council dated 12 March 2014 was sent to DPE requesting support for the reactivation of the restriction until such time as the studies have been completed. Council received a response from the DPE on 8 May 2014 agreeing to the pursuing of a Planning Proposal to implement the policy position. The letter also stated that the DPE would assist in implementing the planning proposal in a timely manner.

4 STATUTORY CONTEXT

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

4.1 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) *in relation to land identified as “Land in St Leonards” on the Exceptions to Development Standards Map – clause 4.3(2) by more than 3 metres (excluding plant rooms and similar structures)*
 - (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 has been able to seek a variation (i.e. exceed) the building height requirements beyond 3m under the provisions of clause 4.6 since 11 March 2014 without the benefit of the Planning Study findings.

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

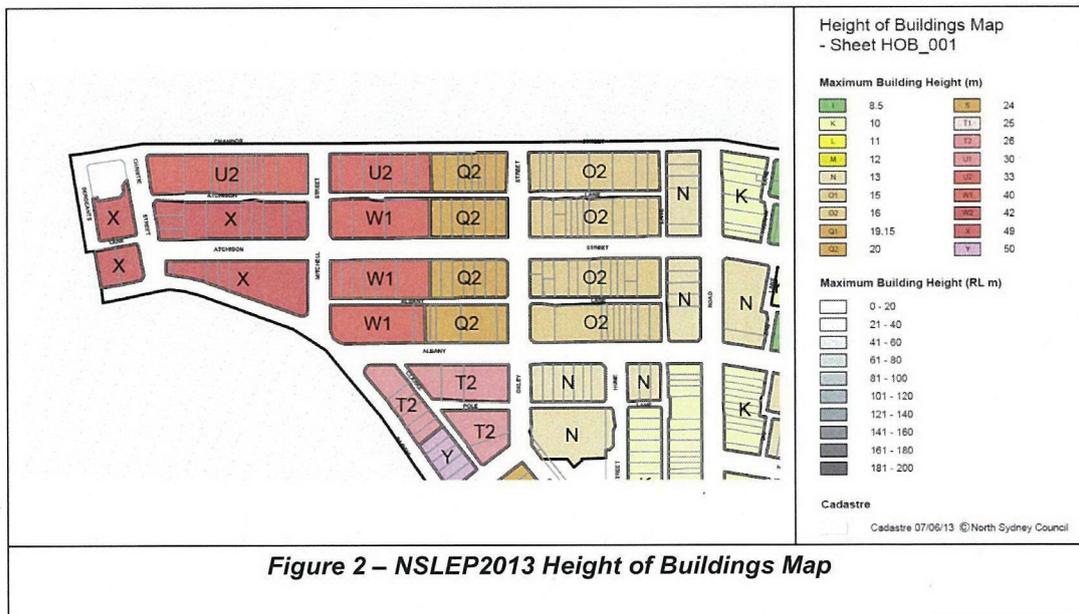
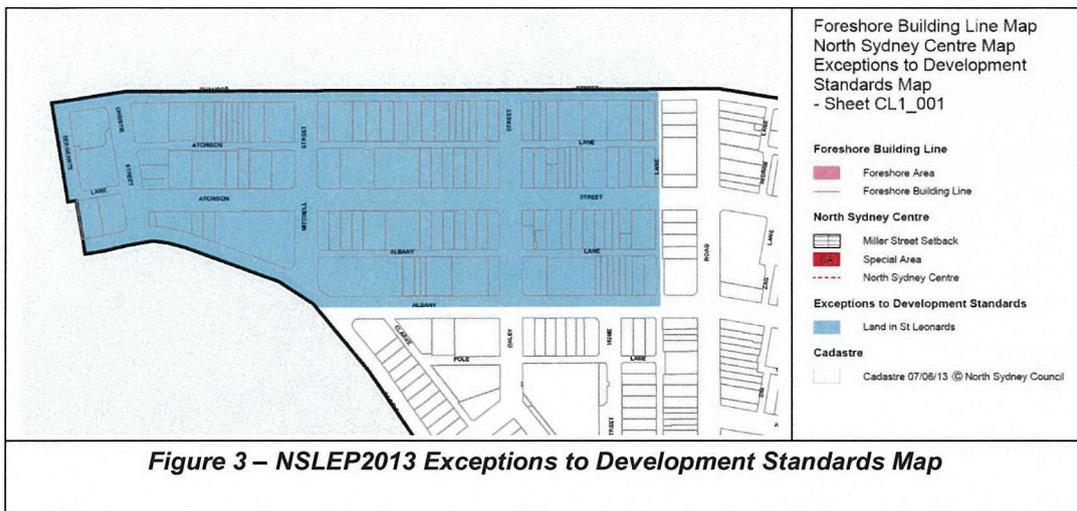


Figure 2 – NSLEP2013 Height of Buildings Map



5 THE PLANNING PROPOSAL

5.1 PART 1: STATEMENT OF OBJECTIVES

The primary purpose of this Planning Proposal is to reactivate the restriction of clause 4.6(8)(ca) which limits the use of the clause to vary the maximum building height for land in St Leonards by more than 3 metres which ceased to apply on 11 March 2014. 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 until such time that the St Leonards/Crows Nest Planning Study for Precincts 2 and 3 is completed.

5.2 PART 2: EXPLANATIONS OF PROVISIONS

The primary purpose of this Planning Proposal is to amend NSLEP 2013 to ensure that the restrictions of subclause 4.6(8)(ca) that applied prior to 11 March 2014 are reinstated until Council has completed the St Leonards/Crows Nest Planning Study for Precincts 2 and 3.

The intent of the Planning Proposal is proposed to be met by deleting subclause 4.6(8A) to NSLEP 2013 in its entirety. This clause current states:

(8A) Subclause (8)(ca) ceases to apply on 11 March 2014

Upon completion of each Planning Study for Precincts 2 and 3, Council will then seek to lodge a subsequent Planning Proposal to amend the Exceptions to Development Standards Map to NSLEP 2013 to exclude those areas for which comprehensive strategic plans have been completed.

5.3 PART 3: JUSTIFICATION

The justification for the proposed provisions was previously detailed in the making of NSLEP 2001 (Amendment No.53) and NSLEP 2013 (Amendment No.2), which the DPE 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 original intent of clause 4.6(8)(ca) to NSLEP 2013, was to enable a strategic study of the subject area to be undertaken without being compromised by development consents allowing building heights beyond existing controls.

This strategic study is currently being undertaken by Council and the DPE has only recently granted funding to assist in its completion. The proposed amendment to NSLEP 2013 will enable this restriction to continue 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 seeks to reactivate a previous restriction which ceased to apply from 11 March 2014. Failure to reactivate this restriction would potentially allow developers to exceed the maximum building height requirements on land in St Leonards by more than 3 metres without the benefit of a robust strategic planning process.

The intent of the amendment could be achieved in one of three ways, which are outlined in the following subsections.

Option 1:

Option 1 involves the deletion of clause 4.6(8A) as outlined in section 5.2 of this report. This is the preferred option.

The intent of Option 1 provides a level of clarity as to when the restriction applies, but will require a longer implementation period, given that a Planning Proposal is required to be submitted to amend the Exceptions to Development Standards Map each time that the Planning Study has been completed for each Precinct. However the timing is inconsequential given that the strategic direction for the locality will have been set.

Option 2:

Option 2 involves the replacement of clause 4.6(8A) as follows:

(8A) Subclause (8)(ca) ceases to apply on the day that Council adopts the recommendations of the completed St Leonards/Crows Nest Planning Study for Precincts 2 and 3.

The intent of Option 2 provides less clarity as it is reliant on an applicant knowing when the Planning Studies have been completed. However, its implementation, will be quicker as it will not result in the need for an immediate amendment to the LEP.

Option 3:

Option 3 involves the amendment of 4.6(8A) to reflect a new sunset clause date.

The intent of Option 3 provides clarity as to when the restriction applies but, given the ongoing issues caused by the inclusion of a sunset clause, is not likely to reflect the intentions of the proposal.

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.

As with previous amendments, this 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 continue to not be 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 Community Strategic Plan 2013-2023

The North Sydney Council Community Strategic Plan 2013-2023 was prepared in accordance with Integrated Planning and Reporting legislation. The plan identifies the community's main priorities and aspirations for its future and plans strategies for achieving these 'outcomes'. For its part in putting the Community Strategic Plan into practice, Council has prepared the North Sydney Council Delivery Program 2013/14 – 2016/17.

North Sydney Council Delivery Program 2013/14- 2016/17

The North Sydney Council Delivery Program 2013/14- 2016/17 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 continue to 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 the 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 remains consistent with the relevant Directions issued under Section 117(2) of the Act by the Minister to Councils, as demonstrated in TABLE 1.

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.

TABLE 1: Consistency with s.117 Directions		
Direction	Consistency	Comment
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 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.

TABLE 1: Consistency with s.117 Directions		
Direction	Consistency	Comment
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.
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. 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. 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.

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.