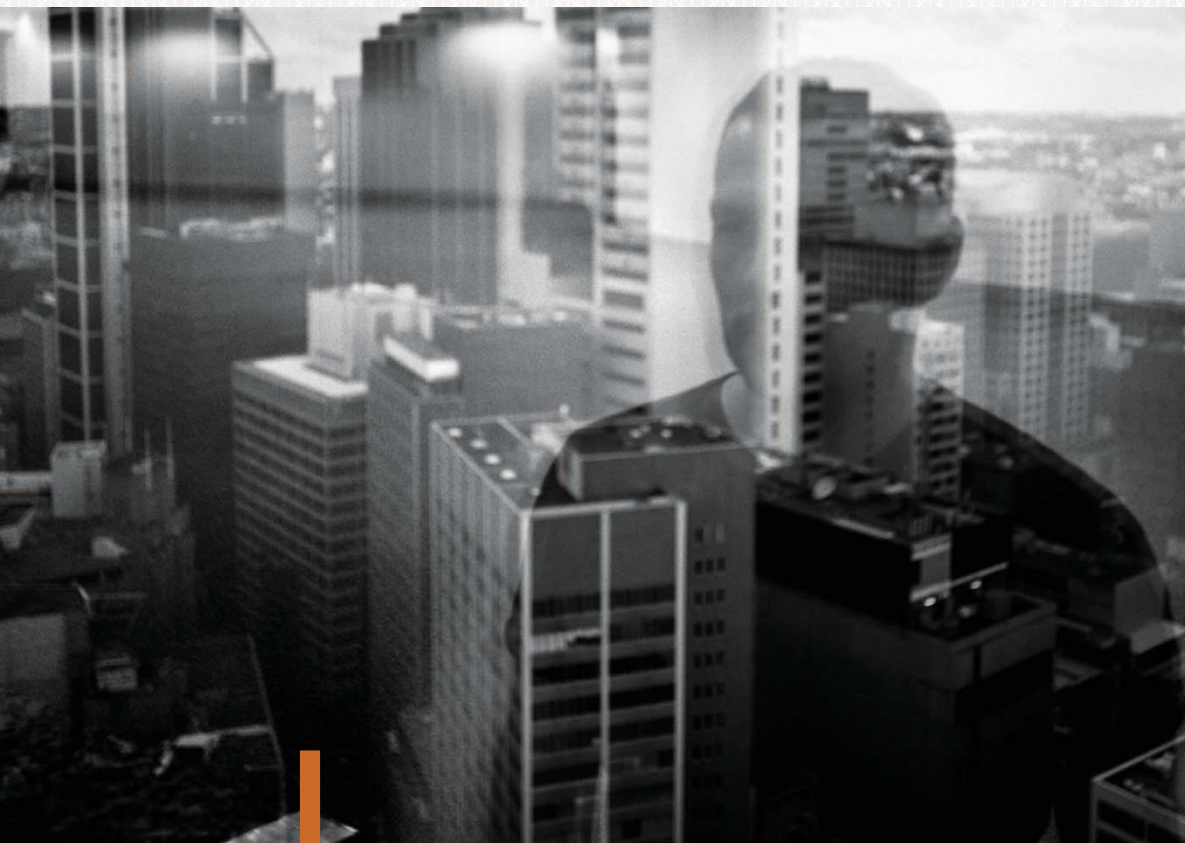




Planning Proposal

Amendment to Clause 4.4A and Clause 6.6 in Hurstville Local Environmental Plan 2012

Submitted to Department of Planning and Environment
On Behalf of Hurstville Council

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Draft A	23/03/15	SB	DR	David Ryan BTP(Hons), Dip Law(SAB), Grad Dip Leg Prac, MPIA, CPP
Draft B	02/04/15	AK	DR	
For Council meeting	27/04/15	DR	DR	

This document is preliminary unless approved by a Director of City Plan Strategy & Development

CERTIFICATION

This report has been authorised by City Plan Strategy & Development, with input from a number of other expert consultants, on behalf of the Client. The accuracy of the information contained herein is to the best of our knowledge not false or misleading. The comments have been based upon information and facts that were correct at the time of writing this report.

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Table of Contents

Section A - Overview.....	1
1. Introduction.....	1
2. Background.....	2
Section B - Planning Proposals.....	3
3. Part 1 - Objectives and the Intended Outcomes.....	3
3.1 Objectives of the Planning Proposal	3
4. Part 2 - Explanation of the provisions.....	4
5. Part 3 - Justification	6
5.1 Need for a Planning Proposal	6
5.1.1 Is the PP a result of any strategic study or report?	6
5.1.2 Is the Planning Proposal the best means of achieving the objectives or intended outcomes, or is there a better way?	6
5.2 Relationship to Strategic Planning Framework	7
5.2.1 Is the planning proposal consistent with the objectives and actions contained within the applicable region or sub regional strategy (including the Sydney Metropolitan Strategy and exhibited draft strategies)?.....	7
5.2.2 Is the planning proposal consistent with the council's local strategy or other local strategy plan?.....	7
5.2.3 Is the planning proposal consistent with applicable state environmental planning policies?	8
5.2.4 Is the planning proposal consistent with the applicable Ministerial directions (s.117 directions)?	10
5.3 Environmental, Social and Economic Impact.....	13
5.3.1 Is there any likelihood that critical habitat or threatened species will be adversely affected as a result of the proposal?	13
5.3.2 Are there any other likely environmental effects as a result of the planning proposal and how are they proposed to be managed?	13
5.3.3 Has the planning proposal adequately addressed any social and economic effects?13	
5.4 State and Commonwealth Interests	14
5.4.1 Is there adequate public infrastructure for the planning proposal? .	14
5.4.2 What are the views of state and Commonwealth public authorities consulted in accordance with the Gateway determination?	14
6. Part 4 - Mapping.....	15
7. Part 5 - Community Consultation	16
8. Part 6 - Project Timeline	17
9. Conclusion.....	18

Section A - Overview

1. Introduction

This Planning Proposal (PP) has been prepared by City Plan Strategy and Development Pty Ltd on behalf of Hurstville City Council.

This PP explains the intended effect of, and justification for, the repeal of Clause 4.4A and the proposed amendment to Clause 6.6 of the Hurstville Local Environmental Plan (HLEP) 2012. It has been prepared in accordance with Section 55 of the Environmental Planning and Assessment Act, 1979 (EP&A Act) and the relevant Department of Planning Guidelines including "A Guide to Preparing Local Environmental Plans" and "A Guide to Preparing Planning Proposals".

This PP seeks to repeal Clause 4.4A and amend Clause 6.6. The aim of the amendments are to ensure that the LEP is not inconsistent with the provisions of State Environmental Planning Policy (Affordable Rental Housing) 2009 and SEPP (Housing for Seniors or People with a Disability) 2004 in terms of maintaining its requirement for a reasonable amount of non-residential development within the B1 and B2 zones.

2. Background

The current Hurstville LEP 2012 took effect on 7 December 2012 and applies to all land in the Hurstville local government area, except land identified as the Hurstville City Centre, to which the Hurstville LEP 1994 and the draft Hurstville LEP (Hurstville City Centre) 2012 apply.

Prior to the coming into operation of Hurstville LEP 2012, there was a similar minimum numerical requirement on the amount of non-residential floor space within business zones. It was formerly 1:1. The Draft LEP was exhibited inclusive of Clause 4.4A in its current terms with the intention of maintaining the integrity of the business zones consistent with the aims of those zones to serve the needs of people who live or work in the surrounding areas. Through the public exhibition process, no submissions were received on this Clause and the LEP was gazetted accordingly.

In the decision *Badaoui v Hurstville City Council* in March 2015 (LEC10559/14), the Court held that Clause 4.4A of Hurstville LEP 2012 did not apply to a proposed boarding house development in the B1 Neighbourhood Centre zone because it was deemed to be inconsistent with clause 30 SEPP (Affordable Rental Housing) 2009.

During the course of the Court proceedings questions were raised as to the evidence base supporting the FSR requirement under Clause 4.4A.

Council now seeks to amend the Hurstville LEP 2012 in order to clarify and reinforce the original intention of limiting the location and extent of non-residential floor space in the business zones and overcoming any inconsistency with SEPP (ARH) 2009 and SEPP (Housing for Seniors or People with a Disability) 2004 in this regard.

Section B - Planning Proposals

3. Part 1 - Objectives and the Intended Outcomes

3.1 Objectives of the Planning Proposal

- To maintain the integrity of the B1 and B2 zones as described in the objectives of those zones by requiring an appropriate amount of non-residential development, inclusive of active street frontages, in all development in those zones; and
- To avoid any inconsistency with SEPP (ARH) 2009 and SEPP (Housing for Seniors) to clarify that the relevant clauses in those SEPPs restricting ground level residential uses apply to the B1 and B2 zones.

4. Part 2 - Explanation of the provisions

It is proposed that Clause 4.4A be repealed.

Current Clause 4.4A	Proposed amendment to Clause 4.4A
(1) Despite clause 4.4, development consent must not be granted for development on land in Zone B1 Neighbourhood Centre or Zone B2 Local Centre, unless the non-residential floor space ratio is at least 0.5:1 (2) In this clause, non-residential floor space ratio means the ratio of the gross floor area of that part of a building used or proposed to be used for any purpose other than a residential purposed in a building on the site to the site area.	Repeal clause.

It is also proposed to amend Clause 6.6 - Active Street Frontages, as follows.

Current Clause 6.6	Proposed Amendment to Clause 6.6
(1) The objective of this clause is to promote uses that attract pedestrian traffic along certain ground floor street frontages in Zone B2 Local Centre. (2) This clause applies to land identified as "Active street frontage" on the Active Street Frontages Map. (3) Development consent must not be granted to the erection of a building, or a change of use of a building, on land to which this clause applies unless the consent authority is satisfied that the building will have an active street frontage after its erection or change of use. (4) Despite subclause (3), an active street frontage is not required for any part of a building that faces a service lane or is used for any of the following: (a) entrances and lobbies (including as part of mixed use development), (b) access for fire services, (c) vehicular access. (5) In this clause, a building has an active street frontage if all premises on the ground floor of the building facing the street are used for the purposes of business premises or retail premises.	(1) The objectives of this clause are: (a) to promote uses that attract pedestrian traffic along certain ground floor street frontages in Zone B1 Neighbourhood Centre and Zone B2 Local Centre. (b) to ensure adequate non-residential floor space is provided to satisfy the objectives of Zone B1 Neighbourhood Centre or Zone B2 Local Centre. (2) (Delete) (3) Development consent must not be granted to the erection of a building, or a change of use of a building, unless the consent authority is satisfied that the building will have an active street frontage after its erection or change of use. (4) Despite subclause (3), an active street frontage is not required for any part of a building that faces a service lane or is used for any of the following: (a) entrances and lobbies (including as part of mixed use development), (b) access for fire services, (c) vehicular access. (5) In this clause, a building has an active street frontage if: (a) all premises on the ground floor of the building facing the street on land identified as "Active street frontage" on the Active Street



	Frontage Map are used for the purposes of business premises or retail premises; and (b) all premises on the ground floor of the building facing the street on any other land in Zone B1 Neighbourhood Centre or Zone B2 Local Centre are used for non-residential purposes.
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5. Part 3 - Justification

5.1 Need for a Planning Proposal

5.1.1 Is the PP a result of any strategic study or report?

The PP is not a result of any strategic study or report. The PP has been prepared in response to the Land and Environment Court proceedings in *Badaoui v Hurstville Council* (LEC10559/14).

In *Badaoui*, the Court held that there is an inconsistency between Clause 4.4A of the HLEP 2012 and SEPP (Affordable Rental Housing) 2009. As a consequence, Clause 4.4A of the HLEP 2012 has no effect in relation to boarding house development under the SEPP.

Council's lawyers HWL Ebsworth, have reviewed the judgement and has recommended Council consider:

- *"Redrafting of Clause 4.4A - the clause is unclear as it does not itself require the provision of non-residential floor space and the wording is ambiguous;*
- *A requirement that the location of non-residential floor space be provided at street frontage of ground level;*
- *Consideration of the Affordable Rental Housing SEPP and implications of inconsistency principle with clauses of the LEP."*

It is noted that there is a similar clause (Clause 19) in SEPP (Housing for Seniors or People with a Disability) 2004 (SEPP (Housing for Seniors)), that may establish a similar situation in relation to permitting a seniors' housing development without a non-residential component.

During the course of the *Badaoui* proceedings, questions were raised as to the evidence base supporting the FSR requirement under Clause 4.4A. Council's planning department considers that in the absence of a robust evidence base, it may be difficult to uphold a numerical standard such as this in the face of well-argued requests for variations.

Clause 6.6 in the HLEP has a complementary objective in terms of maintaining the integrity of certain key streets in Zone B2 Local Centre zoned areas.

Therefore, in order achieve a more robust and effective mechanism to realise the objectives of all business zones within the Hurstville LGA, this PP proposes to repeal Clause 4.4A and to amend Clause 6.6 in the manner described in the Schedule to Part 2.

The amendment to Clause 6.6, which confirms that there should be no substantive residential development on the ground floor of premises in the business zones, overcomes any inconsistencies with the above identified Clauses of the SEPPs and enables full effect to be given to the LEP clause.

These amendments, which assist in clarifying and simplifying the provisions of the HLEP, should in turn assist in streamlining Council's development assessment processes and making them less prone to successful technical legal challenges.

5.1.2 Is the Planning Proposal the best means of achieving the objectives or intended outcomes, or is there a better way?

The judgement in *Badaoui* demonstrated that it is problematic to seek to uphold the planning intent of Clause 4.4A through the development control mechanisms available under Part 4 of the Act. Consequently, the only way to ensure these intentions are upheld is by amending the HLEP 2012 accordingly.

5.2 Relationship to Strategic Planning Framework

5.2.1 Is the planning proposal consistent with the objectives and actions contained within the applicable region or sub regional strategy (including the Sydney Metropolitan Strategy and exhibited draft strategies)?

The PP is consistent with the State Government's *A Plan for Growing Sydney* (Metro Strategy), particularly in terms of the following principles:

- *Increasing housing close to centres and stations makes it easier to walk or cycle to shops or services; travel to work or other centres; reduces traffic congestion; and makes our neighbourhood more community oriented;*
- *Making it easy to get to centres and offering a range of services at centres makes them a focal point for the community and increases prospects for economic growth and job creation.*

Whilst these principles are directed at housing and transport, achieving the stated outcomes relies on having viable and vital community centres which those communities can readily access.

The Draft South Subregional Strategy sets directions and actions for the implementation of the previous Metropolitan Strategy, however at this stage has not been formally repealed and as such is still a consideration for this PP.

The PP is consistent with the Draft South Subregional Strategy, most particularly with the following specific outcome in Section B, Centres and Corridors:

- *In preparation of Principal LEPs councils will reflect the subregional structure plan through identifying sufficient area of appropriate zones for retail activity. Retail will be located primarily in commercial core and mixed use zones in centres.*

Most B1 and B2 zoned lands in Hurstville LGA are identified as centres under the Draft South Subregional Strategy.

In preparing Council's Draft HLEP 2012, effect was given to this specific outcome through the mechanism of Clause 4.4A, which required a minimum amount of non-residential development (including retail).

The court's subsequent decision potentially undermines this approach and it will therefore be consistent with the Draft Strategy to clarify and restore the original intention.

5.2.2 Is the planning proposal consistent with the council's local strategy or other local strategy plan?

As indicated, Council's local strategy, consistent with Metropolitan and Draft Subregional Strategies, has been to seek to maintain and strengthen the role of business centres as community foci for retail, business and community uses.

The relevant objectives of the B1 and B2 zones, respectively, in the HLEP 2012 are:

- *To provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood (B1 zone).*
- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area (B2 zone).*

Clause 4.4A was included in the LEP to give clear and quantifiable statutory expression to these objectives.

The court's subsequent decision potentially undermines this approach and it will therefore be consistent with the Council's local strategy to clarify and restore the original intention of the clause.

5.2.3 Is the planning proposal consistent with applicable state environmental planning policies?

The PP is consistent with the applicable State Environmental Planning Policies in the table below.

Table 2: Consistency with state environmental planning policies (SEPPs)

SEPP Title	Consistency	Comment
1. Development Standards Consistent	N/A	Not applicable
14.Coastal Wetlands	N/A	Not applicable
15.Rural Landsharing Communities	N/A	Not applicable
19.Bushland in Urban Areas	N/A	Not applicable
21.Caravan Parks	N/A	Not applicable
22.Shops and Commercial Premises	N/A	Not applicable
26.Littoral Rainforests	N/A	Not applicable
29.Western Sydney Recreation Area	N/A	Not applicable
30.Intensive Agriculture	N/A	Not applicable
32.Urban Consolidation (Redevelopment of Urban Land)	Yes	Not applicable
33.Hazardous and Offensive Development Complex	N/A	Not applicable
36.Manufactured Home Estates	N/A	Not applicable
39.Spitt Island Bird Habitat	N/A	Not applicable
41.Casino Entertainment	N/A	Not applicable
44.Koala Habitat Protection	N/A	Not applicable
47.Moore Park Showground	N/A	Not applicable
50.Canal Estate Development	N/A	Not applicable
52.Farm Dams, Drought Relief and Other Works	N/A	Not applicable

53. Metropolitan Residential Development	N/A	Not applicable
55. Remediation of Land	N/A	Not applicable
59. Central Western Sydney Economic and Employment Area	N/A	Not applicable
60. Exempt and Complying Development	N/A	Not applicable
62. Sustainable Aquaculture	N/A	Not applicable
64. Advertising and Signage	N/A	Not applicable
65. Design Quality of Residential Flat Development	N/A	Not applicable
70. Affordable Housing (Revised Schemes)	N/A	Not applicable
71. Coastal Protection	N/A	Not applicable
SEPP (Building Sustainability Index: BASIX) 2004	N/A	Not applicable
SEPP (Housing for Seniors or People with a Disability) 2004	Yes	The PP is consistent with the relevant provisions of the SEPP and clarifies that Clause 19 applies to commercial centres in Hurstville.
SEPP (Major Projects) 2005	N/A	Not applicable
SEPP (Sydney Region Growth Centres) 2006	N/A	Not applicable
SEPP (Infrastructure) 2007	N/A	Not applicable
SEPP (Kosciuszko National Park-Alpine Resorts) 2007	N/A	Not applicable
SEPP (Mining, Petroleum Production and Extractive Industries) 2007	N/A	Not applicable
SEPP (Temporary Structures and Places of Public Entertainment) 2007	N/A	Not applicable

SEPP (Exempt and Complying Development Codes) 2008	N/A	Not applicable.
SEPP (Rural Lands) 2008	N/A	Not applicable
SEPP (Western Sydney Parklands) 2009	N/A	Not applicable
SEPP (Affordable Rental Housing) 2009	Yes	The PP is consistent with the relevant provisions of the SEPP and clarifies that Clause 30(1)(g) applies to commercial centres in Hurstville..

There are no deemed State Environmental Planning Policies (former Regional Environmental Plans (REPs)) applicable to the PP.

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

It is considered that the PP is consistent with the relevant Directions issued under Section 117(2) of the Act by the Minister to Councils, as demonstrated in the assessment of the following:

Table 3: Consistency with S117 Ministerial Directions

Direction Title	Consistency	Comment
Employment and Resources		
1.1 Business and Industrial Zones	Consistent	In seeking to maintain the integrity of the B1 and B2 zones by a requirement for active, non-residential street frontages, this PP is consistent with the objectives of this direction, which are to: (1) encourage employment growth in suitable locations, (2) protect employment land in business and industrial zones, and (3) support the viability of identified strategic centres.
1.2 Rural Zones	N/A	Not applicable
1.3 Mining, Petroleum Production and Extractive Industries	N/A	Not applicable
1.4 Oyster Aquaculture	N/A	Not applicable
1.5 Rural Lands	N/A	Not applicable
Environment and Heritage		
2.1 Environment Protection Zones	N/A	Not applicable
2.2 Coastal Protection	N/A	Not applicable
2.3 Heritage Conservation	N/A	Not applicable
2.4 Recreation Vehicle Areas	N/A	Not applicable
Housing, Infrastructure and Urban Development		
3.1 Residential zones	N/A	Not applicable
3.2 Caravan Parks and Manufactured Home Estates	N/A	Not applicable
3.3 Home Occupations	N/A	Not applicable
3.4 Integrating land use and transport	N/A	Not applicable
3.5 Development Near Licensed Aerodromes	N/A	Not applicable
3.6 Shooting Ranges	N/A	Not applicable
Hazard and Risk		
4.1 Acid sulphate soils	N/A	Not applicable

4.2 Mine Subsidence and Unstable Land	N/A	Not applicable
4.3 Flood Prone Land	N/A	Not applicable
4.4 Planning for Bushfire Protection	N/A	Not applicable
Regional Planning		
5.1 Implementation of Regional Strategies	N/A	Not applicable
5.2 Sydney Drinking Water Catchments	N/A	Not applicable
5.3 Farmland of State and Regional Significance on the NSW Far North Coast	N/A	Not applicable
5.4 Commercial and Retail Development along the Pacific Highway, North Coast	N/A	Not applicable
5.5 Second Sydney Airport: Badgerys Creek	N/A	Not applicable
Local Plan Making		
6.1 Approval and Referral Requirements	Consistent	
6.2 Reserving Land for Public Purposes	N/A	Not applicable
6.3 Site Specific Provisions	N/A	Not applicable
Metropolitan Planning		
7.1 Implementation of the Metropolitan Plan for Sydney 2036	Consistent	See Section 5.2.1 of this PP.

5.3 Environmental, Social and Economic Impact

5.3.1 Is there any likelihood that critical habitat or threatened species will be adversely affected as a result of the proposal?

Given the proposal only seeks to clarify, not change, the intent of the current LEP as it relates to non-residential uses in B1 and B2 zones, there would be no likely effects on critical habitat or threatened species.

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

Given the proposal only seeks to clarify, not change, the intent of the current LEP as it relates to non-residential uses in B1 and B2 zones, it is not anticipated that there will be any adverse environmental effects.

5.3.3 Has the planning proposal adequately addressed any social and economic effects?

The proposal seeks to confirm the intention of the current LEP to maintain the integrity of B1 and B2 zones by providing retail, business and community uses that serve the needs of their surrounding communities. Consequently, the proposal should have positive social and economic effects by:

- Ensuring adequate supplies of retail, business and community floor space within Business Zones to meet local demands;
- Ensuring street activation within the Business Zones to enhance their attractiveness, vibrancy and economic performance; and
- Improving access to retail and other services for the social benefit of surrounding communities.

5.4 State and Commonwealth Interests

5.4.1 Is there adequate public infrastructure for the planning proposal?

The administrative nature of the proposal means it has no public infrastructure implications.

5.4.2 What are the views of state and Commonwealth public authorities consulted in accordance with the Gateway determination?

This section of the PP will be completed following the gateway determination which identifies which State and Commonwealth Public Authorities are to be consulted.



6. Part 4 - Mapping

There are no mapping amendments required by this PP.

7. Part 5 - Community Consultation

This PP is considered to be of a type that falls within the definition of a '*low impact Planning Proposal*¹' as set out in the Department of Planning and Environment's 'A guide to preparing local environmental plans'. Therefore, it is likely to be on exhibition for a minimum period of 14 days.

The community will be notified of the commencement of the exhibition period via a notice in a local newspaper and via a notice on Hurstville Council's website. The written notice will: -

- Give a brief description of the objectives or intended outcomes of the PP;
- Indicate the land affected by the PP;
- State where and when the PP can be inspected;
- Give the name and address of the RPA for the receipt of any submissions; and
- Indicate the last date for submissions.

During the exhibition period, the following material will be made available for inspection: -

- The PP, in the form approved for community consultation by the Director General of Planning and Infrastructure; and
- The Gateway determination.

¹ Low impact planning proposal means a planning proposal that in the opinion of the person making the Gateway determination is consistent with the pattern of surrounding land use zones and/or land uses, is consistent with the strategic planning framework, presents no issues with regard to infrastructure servicing, is not a principle LEP, and does not reclassify public land.

8. Part 6 - Project Timeline

The anticipated timeline for the PP is identified below.

Anticipated Project Timeline		Proposed Date(s)
1	Commencement date (date of Gateway determination)	TBA
2	Timeframe for the completion of required technical information	TBA
3	Timeframe for government agency consultation (pre and post exhibition as required by Gateway determination)	TBA
4	Commencement and completion dates for public exhibition period	TBA
5	Dates for public hearing (if required)	TBA
6	Timeframe for consideration of submissions	TBA
7	Timeframe for the consideration of a proposal post exhibition	TBA
8	Drafting of instrument with Parliamentary Counsel's Office in consultation with Council. Parliamentary Counsel issue Legal Opinion that plan can be made.	TBA
9	Date of submission to Planning and Environment to notify plan on legislation website	TBA

9. Conclusion

This Planning Proposal on behalf of Hurstville Council is to repeal the current Clause 4.4A and amend Clause 6.6 of HLEP 2012 in order to clarify and maintain the original intention of the LEP to ensure an appropriate presence of non-residential floor space is maintained in B1 and B2 zoned land and to clarify the relationship with SEPP (Affordable Rental Housing) 2009 and SEPP (Housing for Seniors) 2004.

The Planning Proposal: -

- Is consistent with the Metro Strategy and Draft Sub-regional Strategy principles;
- Is consistent with relevant SEPPs and Ministerial Directions; and
- Advances the public interest by promoting positive social and economic outcomes without the likelihood of generating any adverse environmental outcomes.

In summary, there are appropriate planning reasons to support the proposed amendments to HLEP 2012.