

ITEM 5. AMENDMENTS UNDER SECTION 73A TO SYDNEY LOCAL ENVIRONMENTAL PLAN 2012 TO CORRECT MINOR ERRORS**FILE NO: S111882****SUMMARY**

This report is the final step in the process for Council to correct minor errors in *Sydney Local Environmental Plan 2012*, which commenced with a Council resolution in February 2013. Due to their minor nature, the amendments are the subject of a separate process which can progress under Section 73A of the *Environmental Planning and Assessment Act 1979* (the Act).

In February 2013, Council resolved to make a submission to the Minister for Planning and Infrastructure under Section 73A to correct the errors. Section 73A enables expedient correction of minor errors in local environmental plans, without public exhibition.

The Minister issued a Gateway Determination in March 2013 to progress a planning proposal to amend the local environmental plan to make the corrections. The Gateway Determination required no public consultation and that Council exercise the Minister's plan-making functions under Section 59 of the Act. These functions were delegated to Council in December 2012 for the making of minor local environmental plans.

A draft of the amending local environmental plan to enable the corrections, *Sydney Local Environmental Plan 2012 (Amendment No 2)*, is shown at Attachment A to this report. The Office of Parliamentary Counsel has advised that the plan can legally be made.

This report recommends that Council now "make" (or sign-off) the local environmental plan for submission to the Department of Planning and Infrastructure. The Department will then request Parliamentary Counsel to "notify" the plan on the NSW Legislation website. This is the final step in the plan-making process, as established in the Act. The *Sydney Local Environmental Plan (Amendment No 2)* will be in force once it appears on that webpage.

Sydney Local Environmental Plan 2012 came into effect when it was published on the NSW Legislation website on 14 December 2012. It is the result of more than five years of review and consolidation of the City of Sydney's planning controls to bring them into one local environmental plan that is also compliant with the NSW Government's Standard Instrument Local Environmental Plan.

The minor amendments to *Sydney Local Environmental Plan 2012* are required to correct errors that occurred in its final drafting prior to it coming into effect. The amendments relate to minor wording changes in the heritage floor space and design excellence clauses and the operation of affordable housing provisions for certain land in Green Square.

The amendments to the heritage floor space clauses are required to ensure that the provisions reflect those in the *Sydney Local Environmental Plan 2005* before it was replaced by *Sydney Local Environmental Plan 2012*.

The amendment to the design excellence clause is required to ensure clarity around the application of the floor space incentive offered for a competitive design process. This incentive operates in conjunction with other floor space incentives available in Central Sydney and Green Square for the provision of certain uses.

The amendment to the affordable housing provisions is required to ensure that affordable housing contributions can continue to be levied in the Green Square areas excluded from *Sydney Local Environmental Plan 2012*.

RECOMMENDATION

It is resolved that the Central Sydney Planning Committee:

- (A) approve *Sydney Local Environmental Plan 2012 (Amendment No 2)* shown at Attachment A to the subject report for making;
- (B) note the recommendation to the Planning and Development Committee on 22 July 2013 that Council will make *Sydney Local Environmental Plan 2012 (Amendment No 2)*, exercising the Minister for Planning and Infrastructure's delegated plan-making functions under Section 59 of the *Environmental Planning and Assessment Act 1979*; and
- (C) note the recommendation to the Planning and Development Committee on 22 July 2013 that Council will submit *Sydney Local Environmental Plan 2012 (Amendment No 2)* to the Department of Planning and Infrastructure to request notification of the Plan on the New South Wales Legislation website by the Office of Parliamentary Counsel.

ATTACHMENTS

Attachment A: Draft *Sydney Local Environmental Plan 2012 (Amendment No 2)*

Attachment B: Table of Required Amendments to *Sydney Local Environmental Plan 2012* and *South Sydney Local Environmental Plan 1998*

Attachment C: Gateway Determination dated 28 March 2013 and accompanying cover letter and documentation.

Attachment D: Delegated plan making reporting template, completed to July 2013

Attachment E: Formal opinion from Office of Parliamentary Counsel, dated 15 July 2013

BACKGROUND

1. *Sydney Local Environmental Plan 2012* (Sydney LEP 2012) came into effect when it was published on the NSW Legislation website on 14 December 2012. Sydney LEP 2012 is the result of more than five years of review and consolidation of the City of Sydney's planning controls to bring them into one local environmental plan that is also compliant with the NSW Government's Standard Instrument Local Environmental Plan.
2. Prior to Sydney LEP 2012 coming into effect, some minor errors were made in its final drafting. These errors affect the application of the heritage floor space and design excellence clauses in Sydney LEP 2012. They also affect the operation of affordable housing provisions in *South Sydney Local Environmental Plan 1998* (South Sydney LEP 1998) for certain land in Green Square excluded from Sydney LEP 2012.
3. The drafting errors and the amendments required are detailed in the table at **Attachment B** to this report. The errors identified are summarised as follows:
 - (a) Clause 6.10(2)(d) sets out the process by which heritage floor space is created. It refers to "gross floor space area", rather than "gross floor area" as is defined in the Sydney LEP 2012 dictionary. This will result in unnecessary confusion;
 - (b) Clause 6.11(1) establishes the heritage floor space that must be allocated if a development pursues certain types of additional floor space. The clause uses the word "or" after listing each type of additional floor space, implying that they are mutually exclusive. This is incorrect, as more than one type of additional floor space may be pursued at any one time;
 - (c) Clause 6.11(2) is intended to allow a reduction in the amount of heritage floor space required to be allocated under Clause 6.11(1), provided that certain circumstances are met. The final drafting introduced the word "or" between each listed circumstance, implying that they are mutually exclusive. This is incorrect, as more than one circumstance may be met at any one time;
 - (d) Clause 6.11(2)(c) allows a discount on heritage floor space for an existing building where the floorspace was in existence when Sydney LEP commenced. Council's policy intent, as outlined in the City's drafting instructions, was only to allow a discount for specific existing buildings – namely those with theatres or clubs in the basement. Under the Standard Instrument definition of 'gross floor area', the floor space controls in Sydney LEP 2012 capture habitable rooms in basements. This floor space was not captured under the *Sydney Local Environmental Plan 2005* definition of 'floor space area' for Central Sydney. As such, the intention of this subclause was to ensure that an existing building with a registered club or entertainment facility in its basement should not be penalised by that space pushing the floor space ratio above the threshold that requires heritage floor space allocation. The final drafting of the clause captures any existing building, rather than just those with a registered club or entertainment facility in the basement. This may be used by developers to avoid having to make any heritage floor space allocation. An alternative provision in Sydney LEP 2012 (Clause 6.7) achieves Council's policy intent and Clause 6.11(2)(c) is therefore not required;

- (e) Clause 6.21(7) establishes a floor space incentive for undertaking a competitive design process to demonstrate design excellence. The incentive may be combined with “accommodation floor space” in Central Sydney, detailed in Division 1 of the LEP, or “community infrastructure floor space” in Green Square, which is detailed in Division 2. Clause 6.21(7)(b) references Division 1, but omits the reference to Division 2, which needs to be added for clarity; and
 - (f) Schedule 6 of Sydney LEP 2012 amended or repealed various other planning instruments which were replaced by Sydney LEP 2012. Schedule 6, 6.2[3] repealed the Green Square affordable housing provisions in South Sydney LEP 1998, but overlooked the fact that these provisions still need to be able to apply to certain lands excluded from Sydney LEP 2012 – namely the Lachlan Precinct in Waterloo. Accordingly, the affordable housing provisions in South Sydney LEP 1998 need re-instating.
4. Section 73A of the *Environmental Planning and Assessment Act 1979* (the Act) allows minor errors in local environmental plans to be quickly and simply rectified. Given that the relevant clauses were drafted contrary to the way they were intended, publicly exhibited and adopted by Council and the Central Sydney Planning Committee (CSPC), Section 73A is the most expedient way to correct them.
 5. On 25 February 2013, Council resolved to make a Section 73A submission to the Department of Planning and Infrastructure to correct the errors.

KEY IMPLICATIONS

Gateway Determination

6. The Director-General of the Department of Planning and Infrastructure issued a Gateway Determination to enable the amendments to proceed as a planning proposal under Section 73A. The Gateway Determination can be found at **Attachment C** to this report.
7. The Gateway Determination tailors the steps in the plan-making process to the complexity of the proposed amendments. Given their minor nature, in this instance no community consultation or consultation with public authorities is required, and the amendments can progress to be legally drafted by Parliamentary Counsel.
8. To improve the local plan-making process, the Minister for Planning and Infrastructure delegated his plan-making powers under Section 59 of the Act to Council in December 2012.
9. Given the minor nature of the proposed corrections, the Gateway Determination also authorises Council to exercise the delegation of the Minister’s powers to make the local environmental plan and give effect to the amendments.

Heritage Floor Space - Discount for Existing Buildings

10. While supporting the progression of the planning proposal under Section 73A, the proposal to delete subclause 6.11(2)(c), which allows a discount on heritage floor space for existing buildings, was not considered to be minor in nature by the Minister. The Gateway Determination therefore required the removal of this aspect from the planning proposal prior to requesting Parliamentary Counsel to draft the LEP amendment.
11. The heritage floor space amendment will be pursued separately as a future planning proposal.

Drafting of the Instrument

12. In accordance with the Gateway Determination and Section 59(1) of the Act, Council officers have liaised directly with the Office of Parliamentary Counsel to draft the local environmental plan to make the corrections.
13. Parliamentary Counsel has provided a formal opinion that the Plan can be legally made. The draft local environmental Plan, *Sydney Local Environmental Plan (Amendment No 2)*, is shown at **Attachment A** and Parliamentary Counsel's opinion is shown at **Attachment E**.
14. Under the *City of Sydney Act 1998*, the CSPC must approve a planning proposal or LEP for making. If *Sydney Local Environmental Plan (Amendment No 2)* is approved by Council and the CSPC, Council is able to "make" the plan under Section 59(2) of the Act. "Making" a plan is a legal term which signifies the conclusion of the plan preparation process. It is, in effect, the final sign-off required before a local environmental plan can come into effect.

Next Steps

15. If Council endorses the making of the plan, it will be forwarded to the Department of Planning and Infrastructure. The Department will record the date of making by Council and will request Parliamentary Counsel to "notify" the plan on the NSW Legislation website. This is the final step set out under the Act, which gives effect to the amendments.
16. To provide evidence that all necessary steps have been undertaken, Council is required to report to the Department on the processing of delegated local environmental plans. A template for the reporting of this information was included as an attachment to the Gateway Determination.
17. Council officers have provided written advice to the Department regarding the progress of the planning proposal. The Department is satisfied with the progress to date. The finalised reporting template will be submitted to the Department following the making of the plan. The reporting template, as completed to date, is shown at **Attachment D**.

RELEVANT LEGISLATION

18. *Environmental Planning and Assessment Act 1979* and *Environmental Planning and Assessment Regulation 2000*.
19. *City of Sydney Act 1998*.

CRITICAL DATES / TIME FRAMES

20. It is important that these amendments progress as quickly as possible so as to ensure the correct interpretation and application of the provisions of Sydney LEP 2012 and South Sydney LEP 1998.
21. The Gateway Determination stipulates a three month timeframe for completion of the amendment. The timeframes involved in liaising with Parliamentary Counsel to draft the instrument and reporting the LEP back to Council have meant that the process will take longer than three months. Provided that the CSPC approves the LEP amendment and Council resolves to make the LEP in the July meeting cycle, the LEP will be completed within four months of the Gateway Determination. The Department of Planning and Infrastructure has been advised of, and accepts, this anticipated timeframe.

PUBLIC CONSULTATION

22. Given that the proposed amendments to Sydney LEP 2012 are to correct minor errors arising from the final drafting of the LEP, the Gateway Determination did not require consultation with the community or public authorities.

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