

ITEM 14. POST EXHIBITION - MILLERS POINT HERITAGE CONSERVATION AREA - AMENDMENT TO PLANNING CONTROLS**FILE NO: S122551****SUMMARY**

The Millers Point Heritage conservation area is one of the most significant urban places in NSW and the City of Sydney Council area. The degree of heritage recognition and protection is unprecedented, with the conservation area, and almost all properties comprising it, listed on both the NSW State Heritage Register and the *Sydney Local Environmental Plan 2012*.

This report describes the outcomes of the public exhibition of draft planning controls for Millers Point and recommends Council and the Central Sydney Planning Committee (CSPC) approve the planning proposal for making as a local environmental plan.

The planning proposal was initially prepared in response to the Government's decision to sell its properties in Millers Point and the NSW Heritage Council's request for the City to review the planning controls for Millers Point. This request was based on the concern that the existing 2:1 floor space ratio control (FSR) and 9 metre building height control could enable development inconsistent with the area's heritage significance.

The planning proposal sought to replace these controls with height and density controls to conserve the significance of the area. The exhibited controls set the existing building height and FSR as the maximum and allowed additions to heritage items, subject to consideration of an endorsed conservation management plan and other heritage impacts. The existing development potential of buildings that are not heritage items is retained.

Council and the CSPC approved the planning proposal on 3 November 2014 and 30 October 2014, respectively, for submission for a gateway determination to publicly exhibit the proposed amendments. The gateway determination issued by the NSW Department of Planning and Environment supported the intention to protect the heritage significance and conservation values of Millers Point, but requested further justification to support the amendments. A revised planning proposal explaining why heritage impacts could not be managed through other controls and the effect on private buildings and non-heritage items was approved for resubmission by Council and the CSPC in March 2016.

On 24 November 2016, the Department of Planning and Environment issued a gateway determination allowing public exhibition of the planning proposal. The gateway determination is at Attachment D. The gateway determination required the proposal to be amended prior to public exhibition to allow the consent authority to consider variations to the maximum height or gross floor area of a building under clause 4.6.

The planning proposal and draft Development Control Plan were exhibited for 28 days from 6 February to 7 March 2017. The City received a total of 12 submissions. A submission was received from the NSW Heritage Council in support of the proposals. Eleven submissions were received from local residents, with two in support, including the Millers Point Residents' Action Group and a local church. Other submissions raised issues relating to loss of development potential, justification for the controls, updating and endorsement of conservation plans and consultation. These issues are discussed in the body of the report and a summary of submissions is included at Attachment E.

Post-exhibition changes are recommended to the planning proposal in response to submissions and further consideration by the City. The recommended changes are to:

- delete the proposed FSR control that sets the existing building floor space as the maximum and instead have no FSR control on heritage items in the area. This is a simplified approach that removes the existing excessive 2:1 FSR, which conflicts with heritage controls, and instead promotes merit assessment on a case-by-case basis against the heritage controls and any endorsed conservation plan;
- amend the requirement to assess a proposal for additions against an endorsed conservation plan, which may have locked some proponents out of the application process, so that an endorsed plan will be considered, where applicable. If no endorsed plan is applicable, proposed additions will be considered against the LEP and DCP heritage controls and site-specific heritage assessments;
- allow for endorsed conservation plans that have passed their expiry date to still be considered, provided they remain relevant, having regard to any changes to the heritage item and their consistency with the conservation plan; and
- amend the draft DCP so that it is consistent with the above changes to the planning proposal.

If approved, the City will request the Department of Planning and Environment to prepare the amendment to the local environmental plan. The local environmental plan will come into effect when it is published on the NSW Legislation website. The development control plan will come into effect at the same time.

RECOMMENDATION

It is resolved that:

- (A) the Central Sydney Planning Committee note the matters raised in response to the public exhibition and public authority consultation of *Planning Proposal: Sydney Local Environmental Plan 2012 – Millers Point* and draft *Sydney Development Control Plan 2012 – Millers Point Amendment*, as shown at Attachment E to the subject report;
- (B) the Central Sydney Planning Committee approve the amended *Planning Proposal: Sydney Local Environmental Plan 2012 – Millers Point*, as shown at Attachment A to the subject report, and request the Greater Sydney Commission to make as a local environmental plan under section 59 of the *Environmental Planning and Assessment Act 1979*;
- (C) the Central Sydney Planning Committee note the recommendation to Council's Planning and Development Committee on 27 November 2017 that Council approve the amended *Sydney Development Control Plan 2012 – Millers Point Amendment*, as shown at Attachment B to the subject report, noting that the approved development control plan will come into effect on the date of publication of the subject local environmental plan; and
- (D) the Central Sydney Planning Committee note the recommendation to Council's Planning and Development Committee on 27 November 2017 that authority be delegated to the Chief Executive Officer to amend the planning proposal and development control plan to correct any minor errors or omissions prior to the finalisation of the local environmental plan.

ATTACHMENTS

Attachment A: Planning Proposal: Sydney Local Environmental Plan 2012 – Millers Point, November 2017. (Post-exhibition changes shown with ~~strike-through~~ (deletions) and ***bold italics*** (additions)).

Attachment B: Draft Sydney Development Control Plan 2012 – Millers Point Amendment, November 2017. (Minor post-exhibition changes shown with ~~strike-through~~ (deletions) and ***bold italics*** (additions)).

Attachment C: Resolution of Council of 21 March 2016 and Resolution of the Central Sydney Planning Committee 17 March 2016

Attachment D: Gateway determination, 24 November 2016

Attachment E: Summary of submissions

BACKGROUND

1. This report seeks Central Sydney Planning Committee (CSPC) approval of a planning proposal for the amendment of the Millers Point planning controls. The planning proposal, at Attachment A, seeks to amend *Sydney Local Environmental Plan 2012* (the LEP). The draft DCP at Attachment B, seeks to amend *Sydney Development Control Plan 2012* (the DCP).

Significance of Millers Point

2. The Millers Point Heritage Conservation Area is one of the most significant urban places in NSW and the City of Sydney Council area. It is an intact residential and maritime precinct of outstanding state and most extensive national significance as a Government Corporate town, probably one of the first in Australia.
3. The area is listed as a conservation area on the NSW State Heritage Register and the LEP. In addition to the area listing, almost all properties are also listed as individual heritage items on the State Heritage Register and the LEP. This unprecedented degree of listing reflects the very high significance of the conservation area.

Planning proposal – process to date

4. On 19 March 2014, the NSW Government announced the sale of 293 government owned properties, including heritage listed items in the Millers Point Heritage Conservation Area. The NSW Heritage Council wrote to the City on 8 July 2014 requesting the urgent review of the planning controls for Millers Point under the LEP and DCP to ensure future development maintains the heritage significance of the area and individual properties.
5. The City prepared a planning proposal, in consultation with the NSW Heritage Council and NSW Department of Family and Community Services, to amend the LEP floor space ratio and height controls to ensure the significance of Millers Point is protected from unsympathetic development.
6. The planning proposal was approved by Council and the Central Sydney Planning Committee (CSPC) on 3 November 2014 and 30 October 2014, respectively, for the submission of a request for gateway determination to publicly exhibit the planning proposal.
7. The NSW Department of Planning and Environment provided a gateway determination which supported the principle of conserving the significance of Millers Point and requested further justification to support the amendments. In accordance with the gateway determination, the City revised the planning proposal to explain why heritage impacts cannot be managed through other controls and the effect on privately owned buildings or buildings that are not heritage items.
8. Council and the CSPC approved the revised draft planning proposal and draft DCP amendment for public exhibition on 21 March 2016 and 17 March 2016, respectively. The Council and CSPC resolutions are at Attachment C.

9. The Department of Planning and Environment issued a gateway determination setting out the requirements for public exhibition on 24 November 2016. The gateway determination is at Attachment D. The gateway determination required Council to amend the planning proposal to allow the consent authority to consider variations to the maximum height or gross floor area of a building under clause 4.6.
10. The planning proposal was publicly exhibited with the draft DCP in accordance with the gateway determination from 6 February to 7 March 2017.

Current planning controls and the need for change

11. The current planning controls in the Sydney LEP 2012 apply a maximum floor space ratio (FSR) of 2:1 and a maximum building height of 9 metres across the Millers Point Conservation Area. These controls were originally set in the mid-1990s when an additional control was in place which limited the floor space for a heritage item to the existing floor space.
12. The FSR control conflicts with the intended State and local planning and heritage outcomes for Millers Point. The current controls enable development inconsistent with the heritage significance of Millers Point and the conservation plans endorsed by the NSW Heritage Council and applying to the properties when they were sold. Many properties exceed the 9m height control and the FSR control is much higher than other less significant conservation areas in the city.
13. The planning proposal seeks to remove the conflict in the LEP controls, promote the unique heritage significance of Millers Point, and provide greater certainty for proponents and the community.

Exhibited controls

14. The proposed changes to the LEP, as sought by the exhibited planning proposal, included:
 - (a) the removal of the existing FSR and height controls;
 - (b) setting the existing height and floor space of a building as the maximum;
 - (c) allowing variations to the maximum for heritage items, subject to consideration of a conservation plan (endorsed by the Heritage Council where it is for a state heritage item) and impacts on the item and area; and
 - (d) allowing variations to the maximum FSR for buildings that are not heritage items up to a maximum 2:1 FSR, subject to consideration of the impacts on the area and nearby items.
15. The proposed changes to Sydney DCP 2012, as sought by the draft DCP include amendments to:
 - (a) the Millers Point Locality Statement in Section 2 of Sydney DCP to be consistent with the statement of significance for the Millers Point Heritage Conservation Area. The amendment recognises the significance of Millers Point as a substantially intact residential and maritime precinct with unique characteristics and architectural diversity, but highly consistent townscape;

- (b) add new principles to require development to respect the significance of the conservation area and be consistent with an endorsed Conservation plan; and
- (c) the Building Contributions Map in Sydney DCP to identify buildings within the Millers Point Heritage Conservation Area as contributory, neutral or detracting.

Public exhibition

16. The planning proposal and draft DCP were exhibited from 6 February 2016 to 7 March 2017. Relevant documents were made available for viewing at the One Stop Shop and on the Sydney Your Say website. The exhibition was advertised in the Central Sydney newspaper, The Sydney Morning Herald and through the City's website and the Sydney Your Say e-newsletter.
17. The City sent approximately 370 letters to the property owners and residents to notify them of the public exhibition. A notification letter was forwarded to the NSW Land and Housing Corporation, as landowner for over 200 properties.
18. The City received a total of 12 submissions following public exhibition. This comprised one submission from the Heritage Council, and 11 submissions from individual local residents, including the Millers Point Residents' Action Group and a local church. Following public exhibition, City staff held two meetings with submitters to discuss their concerns and potential post-exhibition changes.
19. All of the issues raised in submissions and the City's response are summarised at Attachment E. Key issues raised in submissions are discussed later in the report. Post-exhibition changes are proposed to the planning proposal and the draft DCP as a result of submissions received.

Public authority consultation

20. The City also consulted the NSW Office of Environment and Heritage and the NSW Department of Community Services, in accordance with the gateway determination.

Issues arising from public exhibition

Justification for the proposals

21. A common concern raised in submissions is that the controls are too restrictive and are not applied to other State listed heritage items or conservation areas in the city.
22. The proposed planning controls for Millers Point are different to other conservation areas because of the very high level of integrity and significance of the conservation area. The precinct is also unique because of its history of Government ownership, and its current transition from public housing into private ownership.
23. The planning proposal was prepared at the request of the NSW Heritage Council after the announcement of the sale of Government properties in March 2014. This request was made because the Heritage Council considered that the existing controls enabled development inconsistent with the heritage significance of the site. The City then demonstrated the potential impact to heritage items and the conservation area if development was carried out to the maximum allowed under the controls.

24. The planning controls for Millers Point in the Sydney LEP 2005 limited the floor space of heritage items to the existing building and enabled development to exceed the existing floor space if heritage criteria were met. Due to the restrictions of the Government's standard instrument LEP template, these controls were not able to be translated into the current LEP. This resulted in a maximum floor space of 2:1 being applied to all Millers Point properties, regardless of heritage significance. The controls were not changed at this time because development was not expected while most properties were in government ownership. The planning proposal provides the opportunity to reinstate an approach similar to that which applied in the Sydney LEP 2005.

Loss of development potential and complexity

25. Submitters are concerned about the loss of development potential from the removal of the 2:1 FSR control. Submitters say that setting the existing height and floor space of a building as the maximum will limit the ability to upgrade and adaptively reuse properties. Some submitters say that there is no risk in property owners building up to the maximum FSR.
26. The planning proposal demonstrates the need to change the FSR control as it conflicts with the State and local heritage objectives and controls, would impact on the significance of the area if maximised and is significantly greater than FSR controls for less significant conservation areas, generally set between 1:1 and 1.5:1.
27. The current FSR and height controls create a perception of development potential which cannot be realised through the planning system. The 2:1 FSR, if applied in the absence of other controls in the LEP, would enable a scale of development which could undermine the significance of heritage items and the conservation area. While the planning proposal does not prevent development, it aligns the development standards with the intent of the heritage listings and conservation plan.
28. The conservation plans endorsed by the NSW Heritage Council, and applicable to the properties at the time they were sold, identify areas of potential change to existing building envelopes, which are significantly less than the 2:1 FSR. These conservation plans guide the Heritage Council and the City when assessing proposals. Purchasers of properties in Millers Point were made aware of conservation plans at the point of sale.
29. Submissions raise concerns about the complexity of the proposed controls and how the proposed maximum floor space, being the existing building, would work with the requirement to consider the conservation plan.
30. In the exhibited proposal, two controls apply in the consideration of applications to increase floor space in a heritage item: a maximum floor space standard set as the existing floor space; and heritage considerations, including a conservation plan.
31. An FSR control describes how much floor space is permitted on a site, but does not indicate where it should be located or how it should be arranged. This can be a problem in heritage areas where the arrangement of floor space can have significant impacts on the built form.
32. An endorsed conservation plan which provides guidance on works and areas for potential future development which are acceptable to the NSW Heritage Council, is a more effective guidance on the nature of additions, than a blanket FSR control.

33. Post-exhibition changes propose to remove the FSR control that sets the existing building floor space as the maximum and instead have no FSR control on heritage items in the area. This is a simplified approach that removes the excessive 2:1 FSR, which conflicts with existing heritage controls, and instead promotes site-specific merit assessment against the heritage controls in the LEP and DCP and any endorsed conservation plan. This approach is similar to that applied in other state listed conservation areas in NSW, such as Catherine Hill Bay and Braidwood, and other locally listed conservation areas like Paddington in Woollahra.
34. As the FSR control for heritage properties will be removed, the opportunity for the Council to consider variations will be limited to maximum height only.
35. The FSR of 2:1 will be retained for the five non-heritage properties in the conservation area.

Requirement for an endorsed conservation plan

36. Submissions raise concerns about the requirement for conservation plans to be endorsed, because the *Heritage Act 1977* does not require endorsement and owners may be restricted from having an application approved. Other concerns are raised by 99 year leaseholders about the costs of obtaining an endorsed conservation plan. Some 99 year leaseholders did not purchase their properties with a conservation plan endorsed by the NSW Heritage Council.
37. The exhibited controls only allow development consent to be granted if an endorsed conservation plan has been considered. Property owners without an endorsed conservation plan would not be able to have a development application for an addition approved and would have to obtain one at their own cost.
38. Section 38A of the *Heritage Act 1977* allows the Heritage Council to endorse a conservation plan, if requested, however, does not require the Heritage Council to endorse a plan. If the Heritage Council stops endorsing conservation plans, a proponent could be restricted from having reasonable additions approved under the exhibited controls.
39. It is not the intention of the planning proposal to exclude individuals from the planning process or create onerous costs for applicants. Further, there is complexity in having a planning control which depends on the activities of an external agency.
40. As a result, post-exhibition amendments are proposed to allow consideration of ‘any’ endorsed conservation plan. This wording reflects the similar provision for the Heritage Council in section 62(c1) of the *Heritage Act 1977*, which requires the Heritage Council to consider any endorsed conservation plan when assessing proposals. This post-exhibition change will allow a property owner who does not have an endorsed conservation plan to lodge a development application. A minor post-exhibition change is proposed to the draft DCP amendment to reflect this wording.

41. An application which is not accompanied by an endorsed conservation plan will be required to include a full assessment of the impact of the proposals on the heritage item and conservation area. This application will be required to make the same case for development, and be subjected to the same level of scrutiny by the City and the NSW Heritage Council, as an application accompanied by an endorsed conservation plan. Under clause 5.10(6) of the LEP the City can also request the submission of a conservation management plan, however, this plan will not have to be endorsed by the Heritage Council.
42. Although applications without a conservation plan will be considered, an endorsed conservation plan will minimise uncertainty about the development permissible for a heritage item by providing better guidance and carry greater weight.

Validity of an endorsed conservation plan

43. Submissions also raise concerns about the costs of updating a conservation plan every five years and that a proponent could be restricted from having a reasonable application for an addition to a property approved if a plan has expired but is otherwise relevant.
44. A conservation plan should be updated to reflect additions and ensure that the consent authority has the appropriate information before it when assessing an application for further works. A conservation plan is not required to be considered for an application for alterations where no additional floor space is proposed.
45. Endorsed conservation plans have an expiry period of five years, which in practice indicates when these documents should be reviewed by the NSW Heritage Council. The exhibited controls only allow grant of development consent if an endorsed conservation plan has been considered. This has been interpreted as a conservation plan that has not expired or been reviewed.
46. Issues have been raised in submissions that the five year validity of an endorsed plan may not be sufficient to allow for the preparation of a development application for additions to a heritage property. This could be the case when a conservation plan has been prepared prior to the sale of a property. If the endorsement of the conservation plan expires before a development application is lodged, a property owner will incur the cost of having the plan re-endorsed before applying for an initial addition or significant works.
47. Post-exhibition amendments are proposed which will allow the consent authority to consider an endorsed conservation plan that has expired but is still relevant having regard to the extent of changes to the item and whether that change has been consistent with the conservation plan. For the purposes of enabling assessment of any subsequent applications, the endorsed conservation plan will need to be updated to reflect the new works.

Notification of properties

48. Concerns have been raised in submissions that the City has not consulted with property owners in Millers Point prior to the public exhibition of the planning proposal. Property owners state that the first time they were aware of the proposals was when the proposals were publicly exhibited, which was after the purchase of their property.

49. The City has followed the NSW Government's established process for obtaining approval to place a planning proposal on public exhibition. A gateway determination from the Minister or Department of Planning and Environment determines when consultation on a planning proposal can proceed and whether further studies are required.
50. Although the Millers Point Planning Proposal was originally reported to Council and the CSPC on 3 November 2014 and 30 October 2014, respectively, seeking approval to request a gateway determination, a final determination was not received until 24 November 2016. The first gateway determination requested further justification of the proposals and revised proposals were reported again to Council (via the Planning and Development Committee on 15 March 2016) and the CSPC on 17 March 2016 before a period of reconsideration by the Department of Planning.
51. A section 149 certificate is available to the public prior to the purchase of a property and provides information about the zoning of a property, including the relevant state, regional and local planning controls. Proposed changes to planning controls are not included on section 149 certificates until proposals are publicly exhibited. If purchasers were not aware of the reports to the Planning and Development Committee in October 2014 and March 2016, they would not have been aware of the proposals by the City until the notification of the proposals on 6 February 2017. Owners were notified about the draft controls by letter to the address the City has on its records, as well as a letter to the property. A letter was also sent to NSW Family and Community Services, who was the registered owner of the properties yet to be sold.
52. The City has undertaken consultation on the planning proposal with the NSW Family and Community Services as landowner since 2014. When these proposals were first reported to Council in October 2014 and the CSPC in November 2014, the NSW Government retained ownership of the majority of its properties.

Public authority submissions

NSW Heritage Council

53. The planning proposal was prepared in response to a request from the NSW Heritage Council. The carrying out of works to State-listed heritage properties is integrated development, and both the City and the NSW Heritage Council consider and determine applications. City staff have developed the planning proposal in close consultation with staff from the NSW Office of Environment and Heritage.
54. The NSW Heritage Council made a submission in support of the proposals. The submission states that the amendments to the controls are supported because they protect the heritage significance of Millers Point by ensuring that the existing built form and scale is retained with appropriate new development that is sympathetic to the heritage item and conservation area. The proposed controls and the introduction of conservation plans as a matter for consideration during the City's assessment process will align decisions under the *Environmental Planning and Assessment Act 1979* and the *Heritage Act 1977*.
55. The Heritage Council supports the proposed updates to the Millers Point locality statement and principles in the Sydney Development Control Plan 2012 because they will provide additional guidance for development proposals and the retention of the character and built form of the Millers Point Conservation Area.

56. City staff presented options for post-exhibition changes to the planning proposal to the meeting of the Heritage Council's Millers Point Sub-Committee on 17 August 2017. The Sub-Committee confirmed their support for the post-exhibition changes on the basis of the need for objectives and controls that protect the special significance of Millers Point.

NSW Department of Family and Community Services

57. The City consulted with the NSW Department of Family and Community Services as the landowner of properties in Millers Point during the preparation of the planning proposal. The Department has not lodged a submission to the exhibited planning proposal. Since the exhibition period, City staff have met with staff of the Department to explain the proposal and potential post-exhibition changes.

KEY IMPLICATIONS

Strategic Alignment - Sustainable Sydney 2030 Vision

58. *Sustainable Sydney 2030* is a vision for the sustainable development of the City to 2030 and beyond. It includes 10 strategic directions to guide the future of the City, as well as 10 targets against which to measure progress.
59. This report is aligned with the following Sustainable Sydney 2030 strategic direction 9 - Sustainable Development, Renewal and Design. Action 9.3.4 is to protect the heritage values of objects, buildings, places and landscapes. The proposed amendment to the height controls and removal of the floor space controls will protect the heritage significance of the Millers Point Heritage Conservation Area and the heritage items consistent with the state and local heritage listings.

SOCIAL / CULTURAL / COMMUNITY

60. The heritage listings identify Millers Point as having a very high level of heritage significance and being of important cultural value to the people of NSW and the local area. This planning proposal will help conserve the heritage significance and cultural value of Millers Point.

RELEVANT LEGISLATION

61. *Environmental Planning and Assessment Act 1979* and *Environmental Planning and Assessment Regulation 2000*.
62. On 27 January 2016, the *Greater Sydney Commission Act 2015* commenced. It makes several amendments to the *Environmental Planning and Assessment Act 1979*, including removing the ability of the Minister for Planning to make an LEP and giving this responsibility to the Greater Sydney Commission. Under the new legislation, the Greater Sydney Commission will be responsible for making the LEP amendment sought by the planning proposal.

CRITICAL DATES / TIME FRAMES

63. The Gateway Determination of 24 November 2016 requires that the amendment to Sydney LEP 2012 is completed within 12 months.
64. The Council has not been given delegation to make the local environmental plan because the proposal involves a significant number of public buildings.

65. If approved by Council and the CSPC, the planning proposal will be forwarded to the Department of Planning and Environment with a request to draft and publish the LEP.
66. Given the progress of the NSW Government's sales program, the City intends to liaise closely with the Department of Environment and Planning and the Greater Sydney Planning Commission to facilitate their efficient consideration of the Planning Proposal and timely drafting of the LEP.
67. The amendment to Sydney DCP 2012 will come into effect on the same day as the amendment to Sydney LEP 2012.

GRAHAM JAHN, AM

Director City Planning, Development and Transport

(Julie Prentice, Specialist Planner)