

SUBJECT: R0001/10 - 23B Macpherson Street, Warriewood - Draft Pittwater LEP Amendment No. 94

Meeting: Planning an Integrated Built Environment Committee **Date:** 18 April 2011

STRATEGY: Land Use & Development

ACTION: Coordinate land use planning component of land release

PURPOSE OF REPORT

On 15 November 2010, Council resolved to adopt the exhibited Planning Proposal to amend the *Pittwater Local Environmental Plan 1993* (Pittwater LEP) by inserting floor space requirements, and to seek the gazettal of Draft Pittwater Local Environmental Plan (Amendment No. 94) (R0001/10). The purpose of this report is to inform Council of the status of the LEP Amendment.

This report also intends to inform Council of the most recent Development Application (DA) lodged for 23B Macpherson Street, Warriewood.

1.0 BACKGROUND

1.1 At its meeting of 19 April 2010, Council was informed of advice from Mallesons (dated 25 March 2010) pertaining to the (inter alia) ‘...opportunities of inserting into the LEP that any size over 2,222 square metres of the Focal Neighbourhood Centre is prohibited’.

Based on the advice received from Mallesons, Council staff prepared a Planning Proposal to provide for a limited scale Focal Neighbourhood Centre at 23B Macpherson, Warriewood, in conjunction with a draft amendment to the Pittwater 21 DCP.

1.2 On 18 July 2010 a Gateway Determination was issued, making clear the required changes to the Planning Proposal. The Gateway Determination supported Council’s intention to progress an LEP amendment to impose a floor space limitation on any retail tenancy on the site, however it agreed with only part of Council’s Planning Proposal. The key issues involved:

- Removing reference to the minimum floor space requirement (855m²);
- Adding a transitional clause; and
- Retaining the existing definition of “neighbourhood shop” in the Pittwater LEP.

Councillors were advised of the requirements of the Gateway Determination in memos dated 28 June and 29 July 2010.

1.3 The Planning Proposal was publicly exhibited between 28 July 2010 and 26 August 2010.

The outcome of the public exhibition was reported to Council on 15 November 2010, upon which Council resolved to progress the statutory rezoning process by forwarding the Planning Proposal to the Department of Planning for drafting the amendment to the Pittwater LEP, and subsequent gazettal. This was undertaken on 24 November 2010.

2.0 DRAFT AMENDMENT TO THE PITTWATER LEP (DRAFT LEP) PREPARED BY PARLIAMENTARY COUNSEL

2.1 On 22 March 2011, Council received correspondence from the Department of Planning (**ATTACHMENT 1**) advising 'A final version of the draft LEP has been prepared by Parliamentary Counsel's Office...'. The draft LEP was attached, however the Department advised that:

'The draft LEP was provided to Council...on a confidential basis for the purpose of consultation under Section 59 of the Environmental Planning & Assessment Act 1979.'

2.2 Council's adopted Planning Proposal, submitted to the Department on 24 November 2011, reads as follows:

a. amend Division 7A Warriewood Valley Urban Land Release, by inserting a new subclause after Clause 30B (4) as follows;

"(5) The Council must not grant consent for development on land within Warriewood Valley for the purposes of neighbourhood shops where the total combined retail floor space area is above 2,222m²."

b. amend Schedule 11, Part 2 Zone objectives of the Warriewood Valley Urban Land Release, Zone 2(f) (Urban Purposes – Mixed Residential) to include additional objective as follows;

"(d) to provide opportunities for a focal neighbourhood centre with a limited overall retail floor space area of 2,222m² and that large individual premises exceeding 800m² (for example, large supermarkets) in Warriewood are generally not supported."

c. insert a new clause as follows:

"If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had been exhibited but had not commenced."

2.3 The draft LEP is consistent with the intention of Council's adopted Planning Proposal to secure a limited scale Focal Neighbourhood Centre by inserting a maximum total floor space of 2,222m². It does not however, include the objective to limit the maximum floor space of individual retail tenancies to 800m².

2.4 The Department's letter of 22 March 2011 states:

'I note the view of Council Officers that the draft LEP is significantly different from the planning proposal approved for community consultation, particularly with regard to the objective relating to discouraging individual neighbourhood shops over 800sqm in size. During the drafting process, Parliamentary Counsel advised that the objective included in the Planning Proposal was too specific in relation to size to be included verbatim in the draft instrument.

Alternative approaches to drafting the instrument were considered, however, these approaches were found to be inappropriate. The inclusion of the "800 sqm" provision as a control rather than an objective would make the LEP more restrictive than intended in the Planning Proposal.

The inclusion of words in the objective to the effect that "large individual premises are generally not supported" is also unsatisfactory because it is ambiguous and would be difficult to apply.

Planning Proposals explain the intended effect of the proposed LEP and the justification for making it. In light of the above, it is considered that the draft LEP reflects as closely as possible the intended outcome described in the planning proposal. The inclusion of objective (d) and the reference to other controls (including Council's DCP) provide further clarification of the intended land uses for the site. The definitions of "neighbourhood shop" and "restaurant" (the only permissible commercial uses on the site) provides a further mechanism for ensuring development is of a limited scale."

- 2.5 Given the difference between the draft LEP and Council's adopted Planning Proposal, Council officers advised the Department (on 31 March 2011) that they did not support the draft LEP as prepared and provided to Council on 22 March 2011.
- 2.6 Notwithstanding this, the Department advised that as consultation with Council had occurred, they would proceed to finalise the draft LEP noting that Council does not support the removal of the 800m² size provision from the objectives of the 2(f) zone.

Consultation with Council is a statutory requirement. Council's agreement or concurrence to the draft LEP however is not necessary under Section 59 of the *Environmental Planning & Assessment Act 1979* (EP&A Act).

3.0 DCP AMENDMENT TO CONTROL C6.15 (WARRIEWOOD VALLEY LAND RELEASE AREA FOCAL NEIGHBOURHOOD CENTRE)

- 3.1 At its meeting of 15 November 2010, Council also adopted an amendment to Control C6.15 of the Pittwater 21 DCP (**ATTACHMENT 2**), concurrent to adoption of the Planning Proposal.

The DCP amendment intends to ensure consistency with the adopted Planning Proposal (and the adopted *Warriewood Valley Planning Framework 2010*), and to ensure certainty relevant to the anticipated Focal Neighbourhood Centre.

The amendment to Control C6.15:

- makes it clear that only small shops and not large supermarkets are intended for the Focal Neighbourhood Centre;
- specifies the maximum floor space of any individual retail tenancy (800m²); and
- specifies 23B Macpherson Street, Warriewood as the nominated site for the anticipated Focal Neighbourhood Centre.

- 3.2 The amendment to Control C6.15 will come into force on the same date that the draft LEP comes into effect, and retains the individual tenancy criteria, notwithstanding that the LEP may not contain the 800m² criteria.

4.0 NEW DEVELOPMENT APPLICATION (DA) FOR 23B MACPHERSON STREET, WARRIEWOOD

- 4.1 On 24 March 2011, a DA was lodged by Warriewood Properties Pty Ltd seeking to construct an Affordable Housing development on the subject site (N0085/11).

The DA is Integrated Development and comprises:

- 46 residential dwellings in the form of attached dwellings/townhouses (23 to be maintained for the purpose of affordable rental housing for 10 years);

- A Focal Neighbourhood Centre with a retail floorspace of 510m²;
- A private road, associated infrastructure and creekline corridor works; and
- Subdivision.

4.2 The estimated cost of works is \$12.4M. The DA will be determined by the Sydney East Joint Regional Planning Panel (**JRPP**). It is currently on public exhibition (2 April to 4 May 2011).

5.0 WAY FORWARD

5.1 The Department of Planning has advised that the draft LEP will proceed noting that Council does not support the removal of the 800m² tenancy size provision from the draft LEP.

Accordingly, the draft LEP will come into force once it is gazetted and notified on the NSW Legislation website.

It is recommended that Council write to the Department of Planning advising that Council seeks reinstatement of the 800m² size provision in the draft LEP.

6.0 SUSTAINABILITY ASSESSMENT

6.1 Supporting & Connecting our Community (Social)

6.1.1 Progressing the plan-making process to permit a limited scale retail facility on this site will bring to fruition development of the site as originally planned, which is supported by several studies undertaken for the Warriewood Valley Land Release and includes the relevant planning strategy for the area – the *Warriewood Valley Planning Framework 2010*.

This will not only enable the completion of Sector 8, it will also contribute to the provision for a retail facility limited to serving the daily shopping needs of, and providing a focal point/social hub for, the residents of Warriewood Valley.

6.2 Valuing & Caring for our Natural Environment (Environmental)

6.2.1 The LEP will contribute to limiting the size of any future retail development on this site, which will help to limit the scale of likely impacts of such a development, including impacts on the natural environment, and economic and social impacts in the locality.

The development opportunities that will be made possible on the subject site will seek to introduce initiatives that aim to reduce our ecological footprint and protect our biodiversity.

6.3 Enhancing our Working & Learning (Economic)

6.3.1 Progressing the plan-making process to permit a limited scale retail facility on this site will bring to fruition development of the site as originally planned, which is supported by several studies undertaken for the Warriewood Valley Release Area and includes the relevant planning strategy for the area – the *Warriewood Valley Planning Framework 2010*.

The development opportunities that will be made possible on the subject site will facilitate local business and employment opportunities.

6.4 Leading an Effective & Collaborative Council (Governance)

6.4.1 Community consultation has been undertaken as part of the process to date, and further participation will be undertaken at the development application stage to ensure that decision-making is collaborative, ethical, accountable, and transparent.

6.5 Integrating our Built Environment (Infrastructure)

6.5.1 The development opportunity being provided on this site is an integral part of the Warriewood Valley Release Area as a site that is spatially central to the built form, open space areas, including the district park, and the Warriewood Valley community.

The subject site is also easily accessible by vehicles, being located on Macpherson Street, and is linked to the pedestrian and cyclist network established for the Valley. This will enhance the viability of any future retail facility on the site and will enhance the liveability and amenity of the residents in Warriewood Valley.

7.0 EXECUTIVE SUMMARY

- 7.1 On 15 November 2010, Council resolved to progress the statutory rezoning process to amend the Pittwater LEP to incorporate floor space requirements relevant to the Focal Neighbourhood Centre anticipated for 23B Macpherson Street, Warriewood. The Planning Proposal was subsequently sent to the Department of Planning for drafting the amendment and for subsequent gazettal. This was undertaken on 24 November 2011.
- 7.2 On 22 March 2011, Council received correspondence from the Department of Planning (**ATTACHMENT 1**) advising '*A final version of the draft LEP has been prepared by Parliamentary Counsel's Office...*' The draft LEP is consistent with the intention of Council's adopted Planning Proposal to secure a limited scale Focal Neighbourhood Centre by inserting a maximum total floor space of 2,222m². It does not however include the objective to limit the maximum floor space of individual retail tenancies to 800m².
- 7.3 Given the difference between the draft LEP and Council's adopted Planning Proposal, Council officers advised the Department (on 31 March 2011) that they did not support the draft LEP without the 800m² requirement.
- 7.4 Notwithstanding this, the Department have advised that they would proceed to finalise the draft LEP noting Council's concerns.
- 7.5 The adopted amendment to Control C6.15 of the Pittwater 21 DCP (proceeding concurrent to the LEP amendment) will retain the individual tenancy size control and will come into force on the same date that the draft LEP comes into effect (being the date it appears on the NSW Legislation website).
- 7.6 On 24 March 2011, a DA was lodged by Warriewood Properties Pty Ltd seeking to construct an Affordable Housing development on the subject site (N0085/11). As the estimated cost of works is \$12.4M, the DA will be determined by the Sydney East Joint Regional Planning Panel (JRPP). It is currently on public exhibition (2 April to 4 May 2011).
- 7.7 It is recommended that Council write to the Department of Planning advising that the Draft LEP proposed to be gazetted does not fully reflect Council's original intentions as expressed in the adopted Planning Proposal as well as the Gateway Determination issued by the Department and seek reinstatement of the 800m² standard.

RECOMMENDATION

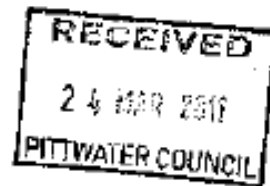
1. That the report be noted
2. That Council advise the Department of Planning that the draft LEP, as altered by the Parliamentary Counsel by removal of the 800m² size provision, is contrary to the Council's original intentions as expressed in the adopted Planning Proposal and seek reinstatement of the 800m² individual tenancy standard.

Report prepared by
Kelly Wilkinson - Senior Planner (Land Release)

Lindsay Dyce
MANAGER – PLANNING AND ASSESSMENT



Planning



Mr Mark Ferguson
 General Manager
 Pittwater Council
 PO Box 882
 MONA VALE NSW 1660

Attention: Kelly Wilkinson

Dear Mr Ferguson

Subject: Pittwater Local Environmental Plan 1993 (Amendment No 94)

I refer to Council's letter dated 24 February 2011, and a further email on 16 March 2011, concerning the preparation of the draft Pittwater Local Environmental Plan 1993 (Am No 94) ('draft LEP').

A final version of the draft LEP has been prepared by Parliamentary Counsel's Office and is attached for your information. The draft LEP was provided to Council in an email dated 14 March 2011, on a confidential basis for the purpose of consultation under section 59 of the *Environmental Planning and Assessment Act 1979*.

I note that Council officers are intending to submit the draft plan to the Council meeting on 14 April. I would like to advise you that legal professional privilege would be waived if the draft plan is discussed in an open session of Council or appears in Council's business papers. I am also concerned that the submission of the draft plan to the Council meeting will further delay the finalisation of the plan which has now exceeded the target date of 26 January 2011, as specified in the gateway determination.

I note the view of Council officers that the draft LEP is significantly different from the planning proposal approved for community consultation, particularly with regard to the objective relating to discouraging individual neighbourhood shops over 800sqm in size. During the drafting process, Parliamentary Counsel advised that the objective included in the Planning Proposal was too specific in relation to size to be included verbatim in the draft instrument.

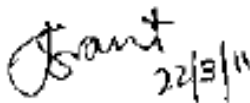
Alternative approaches to drafting the instrument were considered, however, these approaches were found to be inappropriate. The inclusion of the "800 sqm" provision as a control rather than an objective would make the LEP more restrictive than intended in the Planning Proposal. The inclusion of words in the objective to the effect that "large individual premises are generally not supported" is also unsatisfactory because it is ambiguous and would be difficult to apply.

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The Department is proceeding to finalise the draft plan under section 59 of the *Environmental Planning and Assessment Act 1979*. Should you require any further information in relation to this matter, please contact Nathan Herborn on (02) 9228 6451 or email nathan.herborn@planning.nsw.gov.au.

Yours sincerely



Juliet Grant
Regional Director
Sydney Region East

DRAFT Pittwater 21 DCP**C6.15 Warriewood Valley Land Release Area Focal Neighbourhood Centre****Land to which this control applies**

- Land identified as being within the Warriewood Valley Land Release Area – P21 DCP-BCMDCP055

Uses to which this control applies

- Warriewood Valley Sector Development/Subdivision

Outcomes

The local convenience retail needs of the incoming population are met without disturbing the established retail hierarchy. (S)

A focal point in the Valley that links local services and facilities, including local retailing, public open space, public transport, and community facilities. (S)

Car dependency is reduced and other modes of transport encouraged. (En)

A sense of community and place. (S)

Controls

A focal neighbourhood centre is to be established on 23B Macpherson Street, Warriewood. This location is spatially central to the incoming residential population, industrial/commercial areas and school located in the Valley, and is within reasonable walking and cycling distance of most residents and employees in Warriewood Valley. Macpherson Street is also the primary vehicular and public transport route through the Valley along which medium density residential development is concentrated.

The focal neighbourhood centre is to incorporate an overall retail floor space area between 855m² and 2,222m² comprising a number of small shops or restaurants, each with an area of no greater than 800m² to meet the retail convenience needs of the incoming population (such as a small general store, post office shop, ATM, internet coffee shop etc. but not a large supermarket). The retail potential in Warriewood Valley is limited to this size to maintain the established retail hierarchy given nearby established retail/commercial centres at Mona Vale and Warriewood Square.

The focal neighbourhood centre must be linked to public transport nodes and the pedestrian and cyclist network, and if possible, to the district park and/or community facilities. This will enable the majority of residents and people employed in Warriewood Valley to walk or cycle to the local shops, public transport and services. This will also enhance the viability of the neighbourhood centre as a focal point in the Valley. Reduced dependence on the car is encouraged.

The opportunity exists for shop-top housing to be incorporated with the retail facilities within the neighbourhood centre.

Safety and security are to be considered in the design of the centre.

Carparking for the centre is to be in accordance with this DCP.

Requirements under the *Disability Discrimination Act 1992* and this DCP must also be considered in the design of the centre.

Variations

Nil.

Advisory Notes

For background information refer to

Warriewood Valley Planning Framework 2010

Hill PDA 2006 peer review assessment of Leyshon Retail Demand Assessment of Warriewood Valley (2006) *Warriewood Sector 8 Masterplan Cnr Garden and Macpherson Street, prepared for Pittwater Council*