

**Item No:** C0219 Item 7

**Subject:** **AMENDMENT TO ASHFIELD LEP 2013 - HERITAGE CONSERVATION CLAUSES**

Council at its meeting on 11 December 2018 resolved that the matter be deferred to the meeting to be held on 12 February 2019.

**Prepared By:** Con Colot - Senior Strategic Planner & Projects

**Authorised By:** David Birds - Group Manager Strategic Planning

### **SUMMARY**

This report seeks Council approval to carry out “housekeeping amendments” to the Ashfield Local Environmental Plan (ALEP) 2013 to delete an exempt development clause in Schedule 2 which applies to external building works within Heritage Conservation Areas and to Heritage Items. This is in order to resolve misinterpretation of the clause and prevent potential adverse work being carried out without Council approval to these places which is incompatible with their heritage significance. The existing clause 5.10 of ALEP 2013 will be able to be continued to be used for carrying out minor work without requiring development consent.

Given the proposed amendment to the ALEP 2013 it is also proposed to make an amendment to subdivision clause 4.1A to ensure Heritage Items have an allotment configuration which is consistent with their heritage significance by having the required open space curtilage setting and lot size.

The report proposes Council forwards the Planning Proposal for the above to the Department of Planning and Environment and seeks delegation to become the Planning Proposal Authority for the making of the ALEP 2013 amendments.

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### **RECOMMENDATION**

#### **THAT:**

- 1 The attached Planning Proposal for amendments to the Ashfield Local Environmental Plan 2013, Schedule 2 - Exempt Development as indicated in the report be forwarded to the Minister for Planning for a Gateway Determination in accordance with the Environmental Planning and Assessment Act 1979;**
  - 2 The Department of Planning and Environment be requested to delegate the plan making functions for the Planning Proposal to Council to be made the Planning Proposal Authority;**
  - 3 Following receipt of a Gateway Determination, the Planning Proposal in the form required and supporting documentation be placed on public exhibition by Council for a minimum of 28 days and public authorities be consulted in accordance with the Determination; and**
  - 4 A report be presented to Council on completion of the public exhibition which will address submissions received.**
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### **BACKGROUND**

Before the Ashfield Local Environmental Plan 2013 (ALEP) the Ashfield Local Environmental Plan 1985 required development consent for all external alterations to buildings and sites within Heritage Conservation Areas (HCAs) and to Heritage Items (HIs). For very simple works

the Ashfield LEP 1985 contained a clause that enabled Council to issue letters to building owners permitting such work to be carried out without requiring development consent - such as painting or minor repairs.

The exhibition of the draft ALEP, as part of the strategy of the former Ashfield Council, included an "exempt development" clause for minor alterations to external parts of buildings in HCAs and HIs. Exempt development allows work to be carried out without development approval by Council. This was in the context that there were 30 new HCAs being proposed, many additional HIs, and this initiative responded to community concerns that newly affected building owners should be able to carry out "minor work" without delay.

The Council drafted and exhibited ALEP exempt development clause is contained in **Attachment 1**. It had been carefully worded to ensure that it strictly applied to "minor work" and adequately described such work. For example: painting already approved painted surfaces with the same colour (e.g. fences), replacing gutters with the same type and colour, making repairs to existing rendered surfaces by reinstating what was already there, or making repairs to building components such as windows or paving or fences.

However without prior feedback or notice being given to the former Ashfield Council the ALEP 2013 was gazetted in December 2013 with the exempt development clause having been significantly redrafted by Parliamentary Counsel. This resulted in the deletion of the key restrictions and limitations contained in the exhibited Council version for minor alterations that would have fully protected the significance of those places. The following clause was included in the LEP in Schedule 2 that allows exempt development to exteriors of buildings within Heritage Conservation Areas and Heritage Items where they are classed as "minor alterations":

**ALEP 2013**

**Exempt Development, Schedule 2:**

***Minor alterations (external) to buildings comprising heritage items or in a heritage conservation area***

*Must only involve one or more of the following:*

- (a) painting, plastering or cement rendering,*
- (b) the repair or replacement of a non-structural wall or roof cladding,*
- (c) the replacement or maintenance of downpipes or roof guttering,*
- (d) other non-structural alterations involving plumbing, electrical works, attaching fittings, restoration and decorative work.*

In January 2014 Council officers contacted the Department of Planning of Environment (DPE) and highlighted problems with the wording imposed in the LEP and the potential ambiguous interpretation given the removal of the of the Council version of the description of the works and reliance on the term "minor".

DPE responded they would not correct this and that Council should advise the public that it only applied to "minor development" as loosely defined in the Environmental Planning and Assessment Act 1979 at the time, and for Council officers to determine what "minor development" constituted on a case by case basis. This was noted but for cautionary reasons the former Ashfield Council Planning and Environment Department insisted in the majority of cases that development applications be lodged, with the Council policy being not to charge any development application fee.

Former Ashfield Council was aware of the need to amend the ALEP 2013 to address the situation. To partly address this until such time as there was an ALEP amendment, provisions were put in the Inner West Development Control Plan 2016 (process commenced earlier in

2015 and applies to Ashfield area) in Part E1 – 1.4 to provide a definition of “minor development”, however this does not provide certainty for this process. As a result of the Council amalgamation in May 2016 the ALEP amendment has been included on the list of projects to undertake. It has also been highlighted by Development Assessment and Regulatory Services that the ALEP amendment is required to ensure there is certainty and clear rules about what the procedures are for carrying out minor alterations without development consent, and to avoid legal disputes.

Significantly an alternate current pathway exists to enable minor alterations by property owners without a Development Application which is in Clause 5.10 of the ALEP 2013 described below.

### **Need for Planning Proposal**

#### Deletion of Schedule 2 - Exempt Development clause applying to HCAs and HIs

Noting the very sensitive nature of HCAs and HIs it is necessary to ensure there is no misinterpretation or misapplication of the ALEP 2013 exemption clause, and that external alterations are carried out appropriately in accordance with the necessary heritage conservation design details. It is therefore proposed that the above “exempt development” clause be deleted from the Ashfield LEP 2013. In place of this Council will be able to continue to assist property owners to carry out minor work alterations by utilising the provisions of Clause 5.10 (3) of the Ashfield LEP 2013 as explained below.

Clause 5.10 (3) of the Ashfield LEP 2013 below enables property owners to seek an exemption from any requirements for a development application and approval by submitting a letter (or email) to Council with supporting material. As explained earlier this was a previous practise of the former Ashfield Council. For example if there was a historic fence or parts of a building that needed to be repainted or to have repair work, a property owner would submit a short descriptive letter and photograph indicating the colour. Council would then simply respond by letter (or email) that the described work was satisfactory and did not require approval.

#### **ALEP 2013**

##### **5.10 Heritage conservation**

##### **(3) When consent not required**

*However, development consent under this clause is not required if:*

- (a) the applicant has notified the consent authority of the proposed development and the consent authority has advised the applicant in writing before any work is carried out that it is satisfied that the proposed development:*
  - (i) is of a minor nature or is for the maintenance of the heritage item, Aboriginal object, Aboriginal place of heritage significance or archaeological site or a building, work, relic, tree or place within the heritage conservation area, and*
  - (ii) would not adversely affect the heritage significance of the heritage item, Aboriginal object, Aboriginal place, archaeological site or heritage conservation area*

To assist with the use and implementation of the above clause it is recommended Council develops a policy that provides clear guidance on procedures, the “minor work” it applies to, acceptable design criteria and documentation standards. This policy should be produced in collaboration with Council’s Heritage Adviser. Use and reference of numerous Ashfield area specific documents will also be able to be relied on, such as main street paint schemes for existing town centres, architectural detailing for houses and particular building styles and

building components (fences, gates, verandahs etc). Council officers would also provide a report and draft policy document for Council's consideration.

Council should also note that it has resolved (July 2017) to pursue a nomination proposal to list the Haberfield Conservation Area as a pre-eminent example of the Garden Suburb on the State Heritage Register. In this context it is important that the above ALEP 2013 clause anomalies be addressed to demonstrate that adequate controls are in place as this will be one of the considerations by the Office of Environment and Heritage for the listing.

#### Heritage Items and appropriate lot size

Clause 4.1A of the Ashfield LEP 2013 below was an initiative of the former Ashfield Council to increase housing supply and choice by enabling torrens title subdivision of house lots to permit semi-detached houses (i.e. one house attached to the other with a common wall), such as 500 sqm house lots divided into two lots. This was to occur within approx. 200 m of the train line so as to be within close vicinity to public transport with those locations being on "Area 1" on the Ashfield LEP 2013 Lot Size map. It was not intended that Clause 4.1A apply to HCAs or HIs.

The Ashfield LEP 2013 contains a significant omission in Clause 4.1A (below) with this clause not containing a prohibition on Heritage Item properties being able to have small lot torrens title subdivision for detached houses down to 200 sqm. Many of the HIs affected in "Area 1" are in zones where detached housing is not permissible, e.g. being parks or schools. However there are some properties in "Area 1" where the land use zoning permits detached housing. For HIs small lot subdivision cannot be consistent with the heritage significance of their site. HIs need to have the required open space curtilage setting, lot size and lot boundary position in relation to the heritage item building.

Council should use this Ashfield LEP 2013 amendment opportunity to correct this situation by adding reference to a heritage item in clause (2) below as indicated in **bold underline**. This would make it fully consistent with established Heritage Conservation practice.

#### *4.1A Exceptions to minimum subdivision lot size for certain residential development*

- (1) The objective of this clause is to encourage housing diversity without adversely affecting residential amenity.*
- (2) Despite clause 4.1 (3), development consent may be granted to the subdivision of land identified as "Area 1" on the Lot Size Map that is not within a heritage conservation area, **and that is not a heritage item**, if:*
  - (a) each lot resulting from the subdivision will be at least 200 square metres, and*
  - (b) a semi-detached dwelling is or will be located on each lot, and*
  - (c) each lot will have a minimum street frontage of 7 metres.*
- (3) Despite clause 4.1 (3), development consent may be granted to the subdivision of land identified as "Area 2" on the Lot Size Map if:*
  - (a) each lot resulting from the subdivision will be used for the purpose of a dwelling house, and*
  - (b) each lot resulting from the subdivision will be at least 174 square metres, but will not exceed 450 square metres, and*
  - (c) the total number of lots on that land will not exceed 11.*

A Planning Proposal document for the above is contained in **Attachment 2** to enable Council to proceed with the LEP amendments.

## FINANCIAL IMPLICATIONS

## OTHER STAFF COMMENTS

Council's long standing Heritage adviser for the former Ashfield Council area has been heavily involved in development assessments, has been consulted and advises he supports the amendments. Council's General Counsel has been consulted in the preparation of this proposal.

The General Manager has determined that pursuant to the *Local Planning Panel Directions – Planning Proposals* that the LEP amendment is of minor significance - as contained in **Attachment 3** and procedurally this enables Council to seek a Gateway Determination.

## PUBLIC CONSULTATION

Not applicable at this stage. Public consultation will occur after Gateway Determination.

## CONCLUSION

Ashfield LEP 2013 should delete in Schedule 2 - Exempt Development, the clause - "*Minor alterations (external) to buildings comprising heritage items or in a heritage conservation area*" as recommended in the report in order to adequately protect the heritage significance of those places.

Council should develop a policy document outlining which works can be carried without Council approval in accordance with Clause 5.10 (3) of the Ashfield LEP and procedures for this to assist property owners to make minor external alterations without development consent. This policy document should be produced in collaboration with Council's heritage adviser. Council officers should then provide a report and draft document for Council's approval.

Clause 4.1A (2) of the Ashfield LEP 2013 should be amended to delete reference to Heritage Items having small lot torrens title subdivision as indicated in the report.

## ATTACHMENTS

1. Draft ALEP 2012 Exempt Development Clause
2. Planning Proposal
3. General Manager Declaration

# Attachment 1

## Draft Ashfield LEP 2012- Schedule 2 Exemption Clause- as drafted by Ashfield Council and exhibited at Section 65 stage.

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### **Building alterations (external) – heritage conservation areas and heritage items**

(non-structural external works including downpipes and roof guttering and non-structural alterations to the exterior of a building such as re-roofing, plumbing, electrical works, repairing cement rendering, recladding not including walls, painting, attaching fittings, restoration and decorative work).

#### **(i) Miscellaneous works**

##### **Development Standards**

Alterations must be to buildings that have been lawfully constructed; and

- (a) alterations must not involve the making of, or the alteration to the size of, any opening in the roof of a building or any opening in an external wall, such as a doorway or window; and
- (b) must not drain stormwater on to adjoining properties; and
- (c) existing materials must be replaced with similar materials; and
- (d) reclassing of roofs must not require works that affect the load bearing capacity of walls or roofs; and
- (e) recladding of roofs must not involve altering the roof pitch or form; and
- (f) must not impede any existing fire exits or paths of travel to a fire exit; and
- (g) all work involving removal of asbestos cement and lead contaminated paint must comply with Workcover Authority guidelines and must not cause soil or air contamination; and
- (h) must not involve the rendering of surfaces not already rendered including stone, face brickwork or tiles; and
- (i) must not involve the removal of slates or tiles, other than slates or tiles that are being repaired or replace with new slates or tiles in the same material and which are a similar pattern style, colour and external finish; and
- (j) must not involve a change of material type, profile or texture; and
- (k) must not involve removal of render or plaster; and
- (l) must not involve painting of traditionally unpainted surfaces of face brick, stone, slate and tiles; and must not involve re-cladding of walls; and must not involve the re-sheeting of roofs except where a traditional corrugated profile sheet in galvanised steel/zincalume/colorbond (unpainted or mid to dark grey or a traditional heritage colour) replaces an existing sheet metal or corrugated asbestos sheet roof and is installed in accordance with manufacturer's specification; and
- (m) replacement downpipes and guttering must be a traditional colour and original profile consistent with the style of the building; and paint colours and their placement must be appropriate to the original style of the property or conform with a Council approved scheme if available.

#### **(ii) Windows, glazed areas & external doors (replacement)**

- (a) no reduction in the area provided for light and ventilation is permitted and structural support members cannot be removed; and
  - (b) materials comply with AS1288 glass in buildings – selection and installation, and AS 2208 safety glazing materials for use in buildings (human impact conditions); and
  - (c) the area provided for light and ventilation is not reduced and structural support members cannot be removed; and
  - (d) replacement does not involve increases in size relocation; and
  - (e) no roller shutters or metal screens are permitted; and
  - (f) obscure glazing must be replaced with similar obscure glazing so as not to impact on the privacy of neighbouring properties; and
  - (g) must not change window or door opening appearance; and
  - (h) must replace like with like or be of style, profile and materials consistent with the period of original construction of the building; and
  - (i) original intact leadlight glazing and glazing bars are retained; and
  - (j) any damaged original leadlight glazing is replaced with the same materials.
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# Attachment 3

## Proposed amendment to Ashfield Local Environmental Plan 2013 and Local Planning Panels Direction – Planning Proposals

### Inner West Council General Manager declaration.

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#### 1.0 Details of Proposed LEP amendments.

Proposed amendments to the Ashfield Local Environmental Plan 2013:

1.1 Delete in Schedule 2 - Exempt Development, clause :

*Minor alterations (external) to buildings comprising heritage items or in a heritage conservation area*

*Must only involve one or more of the following:*

- (a) painting, plastering or cement rendering,*
- (b) the repair or replacement of a non-structural wall or roof cladding,*
- (c) the replacement or maintenance of downpipes or roof guttering,*
- (d) other non-structural alterations involving plumbing, electrical works, attaching fittings, restoration and decorative work.*

1.2 Adding reference to a "heritage item" in the clause **4.1A (2)** as indicated in bold underline below:

*4.1A Exceptions to minimum subdivision lot size for certain residential development*

- (1) The objective of this clause is to encourage housing diversity without adversely affecting residential amenity.*
- (2) Despite clause 4.1 (3), development consent may be granted to the subdivision of land identified as "Area 1" on the Lot Size Map that is not within a heritage conservation area, **and that is not a heritage item**, if:*
  - (a) each lot resulting from the subdivision will be at least 200 square metres, and*
  - (b) a semi-detached dwelling is or will be located on each lot, and*
  - (c) each lot will have a minimum street frontage of 7 metres.*
- (3) Despite clause 4.1 (3), development consent may be granted to the subdivision of land identified as "Area 2" on the Lot Size Map if:*
  - (a) each lot resulting from the subdivision will be used for the purpose of a dwelling house, and*
  - (b) each lot resulting from the subdivision will be at least 174 square metres, but will not exceed 450 square metres, and*
  - (c) the total number of lots on that land will not exceed 11.*

## 2.0 Local Planning Panels Direction

Pursuant to Section 9.1 of the Environmental Planning and Assessment Act 1979 the "Local Planning Panels Direction – Planning Proposals" applies for amendments to a Local Environmental Plan.

Clause (c) below of the Direction may be applied so as to not require any referral to the Local Planning Panel constituted for the Council area.

### LOCAL PLANNING PANELS DIRECTION – PLANNING PROPOSALS

I, the Minister for Planning, give the following direction under section 9.1 of the *Environmental Planning and Assessment Act 1979*.

Minister for Planning

Dated: 23/2/2018

#### Objective

The objective of this direction is to identify the types of planning proposals that are to be advised on by local planning panels on behalf of councils in the Greater Sydney Region and Wollongong.

#### Application

This direction applies to a council that has constituted a local planning panel under the *Environmental Planning and Assessment Act 1979*, other than the council of the City of Sydney.

#### Direction

A council to whom this direction applies is required to refer all planning proposals to be prepared after 1 June 2018 to the local planning panel for advice, unless the council's general manager determines that the planning proposal relates to:

- (a) the correction of an obvious error in a local environmental plan,
- (b) matters that are of a consequential, transitional, machinery or other minor nature, or
- (c) matters that council's general manager considers will not have any significant adverse impact on the environment or adjoining land.

A proposal is to be referred to the local planning panel before it is forwarded to the Minister under section 3.34 of the *Environmental Planning and Assessment Act 1979*.

This direction takes effect on 1 June 2018 and applies to planning proposals prepared, but not submitted to the Minister, before 1 June 2018.



### 3.0 General Manager Declaration

I consider that Direction (c) applies to deletion of the exempt development clause of the Ashfield Local Environmental Plan 2013 identified in 1.1 above for the following reasons:

- The amendment seeks to correct an error as the clause content does not reflect the intent of the clause and provide the protections as originally drafted by Council, and it does not identify what minor works are.
- Deletion of the clause does not result in any adverse impact on the environment or adjoining land. Deletion of the subject exempt clause will ensure that there will not be a situation where works are carried out which are incompatible with the heritage significance of Heritage Conservation Areas and Heritage Items.
- Deletion of the clause does not result in any conflict with any other existing Planning Instruments, including the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008.

I consider that Direction (c) applies to amendment of clause 4.1A (2) of the Ashfield Local Environmental Plan as identified in 1.2 above for the following reasons:

- The amendment seeks to correct an error in the content of the current clause 4.1A (2) omitting to make reference to heritage items being excluded from the effect of subclause (3).
- Amendment of the clause does not result in any adverse impact on the environment or adjoining land. It ensures the allotment subdivision configuration is consistent with the heritage significance of the site by having the required open space curtilage setting and size in relation to the heritage item building.

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Rik Hart  
Interim General Manager Inner West Council

22/11/18  
Date