

LEXOLOGY®



New pathway for local councils to reduce redevelopment potential

Mills Oakley

Australia | January 26 2021

The NSW government is proposing two new complementary measures that may effectively down-zone (reduce redevelopment potential in) some localities in Sydney and NSW.

Firstly, the government has released the legal detail on its plan to entrench consideration of 'local character' in local environmental plans across the state.

Secondly, the government proposals will also allow local councils to seek permanent exclusions from the *Low Rise Housing Diversity Code* when proposing new 'local character areas'.

New statutory 'local character areas'

In recent years, the NSW government has legislated to introduce multiple new layers into the planning system, including:

- statutory region-wide and district plans (prepared by the Greater Sydney Commission); and
- 'local strategic planning statements' (prepared by local councils).

The government is now proposing a new additional statutory layer — 'local character statements'. These documents will sit **outside** the existing system of development control plans (DCPs), but will nonetheless be directly recognised in local environmental plans (LEPs). (Did anyone say, 'simpler planning system'? Not right now, it seems.)

The government has released a draft 'local character clause' for public comment that is proposed for insertion into the 'standard instrument'. The 'standard instrument' is the legal template on which all modern LEPs are based.

Local council-prepared 'local character statements' will specify a 'local character' and 'desired future character' for a 'local character area'. The 'local character area' will be identified in a new statutory map that will sit alongside existing maps, such as the zoning map.

A consent authority will not be able to grant development consent in a 'local character area' unless it has taken the 'local character statement' for the land into account.

The government says that local character 'is not solely concerned with preservation, but instead provides a way to plan for how a place will respond to a growing population, while retaining and enhancing its distinctive character'.

The regime will be optional (for local councils). Perhaps this is unsurprising. If preparation of local character statements is given priority, for many local councils it would have to come at the expense of other planning priorities.

If a local council wants to take advantage of this new regime, it will need to prepare a 'local character statement' and a new map showing 'local character areas'. These will then need to be submitted to the Planning Department as a planning proposal (for a 'gateway determination'). The usual process for an LEP change would then apply.

Exclusion from the *Low Rise Housing Diversity Code*

As part of the proposed policy change, the Government is also saying that there will be new opportunity for local councils to gain permanent exclusions from the *Low Rise Housing Diversity Code*.

The Government is proposing to amend the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* to allow for 'exclusion zones'. Complying development will no longer be able to be carried out under the *Low Rise Housing Diversity Code* in these exclusion zones.

A local council will be able to progress a draft local character statement and a proposal to exclude the *Low Rise Housing Diversity Code* **concurrently**.

This could be a major motivator for some local councils to de-prioritise other things and instead focus on preparing 'local character statements'.

The government says that before it approves an exclusion from the *Low Rise Housing Diversity Code* the local council will need to demonstrate that housing needs of the community can still be met (without that type of complying development).

The government says that it will not allow a local government areas or the entire area of a given land use zone to be excluded on a wholesale basis.

A down-zoning in some areas?

In some instances, this may be tantamount to a downzoning, even though there may be no technical change in the zone or numerical planning controls.

The introduction of a statutory 'local character area map' is a form of quasi-zoning. In addition to the standard zoning of an area, such a map can be established:

- across several zones in the same precinct; or
- in part of a single larger zone.

This can work against the zoning of the land. This is because development that would have otherwise been acceptable (under the standard application of the zone) may be regarded as unacceptable because it is mapped in a 'local character area'.

In the past the Planning Department has supported the use of such 'overlay' maps (in LEPs) when they are to manage matters of public health, safety, risk and hazard. Examples include drinking water catchments, flooding, coastal risk areas and steep land. In the Department's 2015 *Northern Councils E Zone Review* it said that such matters were 'fundamental' and therefore **could** be in LEPs.

However, the same report **rejected** the idea that a 'scenic protection' overlay (analogous to an overlay designed to protect a particular character) should be the subject of a LEP. The 2015 report said that: 'The Department maintains its position that scenic protection is a matter best assessed and managed at development application stage, when details of a proposal are assessed and appropriate conditions can be imposed'.

The 2015 report said that measures for 'scenic protection' were more appropriate for a DCP, rather than a LEP. This was significant because rules in a DCP have a lessor status than rules in a LEP.

The Government's new approach will be to give the same statutory emphasis to the protection of character in an 'exceptional' and 'significant' local area that it gives to 'fundamental' matters such as public health, safety, risk and hazard.

In short, the new system of 'local character areas' may be used by some local councils as a vehicle to effectively reduce the development potential of land — without any formal change to a zoning or numerical LEP controls.

The bottom-line

The challenge posed by this latest proposal is that — even when a locality would superficially be able to deliver development via numerical controls (height, floor space, etc) — numerical controls may not **actually** be achieved due to the mapping of ‘local character areas’.

This issue **can** be overcome through careful and diligent supervision by the Planning Department when local character statements are submitted for gateway determination. However, this will require a consistently assertive approach by the Department. In the past, at times, this kind of effort has been difficult for the Department to sustain.

The government has invited submissions, but they must be made by 29 January 2021.

Mills Oakley - Aaron Gadiel

Powered by
LEXOLOGY.