


LOCAL GOVERNMENT, PLANNING AND ENVIRONMENTAL LAW UPDATE

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2018 UPDATES

- **Mandatory local planning panels for all councils in Greater Sydney Region and City of Wollongong and how they operate**

- **Recent cases and changes relating to:**

  -The Standard Local Environmental Plan provisions

  -Infill housing/Boarding houses, seniors living and temporary uses

  -The relevance of objectives in planning instruments

- Conciliation conferences held increased from 899 in 2013 to 1534 in 2017.
- Class 1 planning appeals increased from 521 in 2013 to 1009 in 2017.
- Class 1 matters being finalised at hearing increased from 135 in 2013 to 275 in 2017.
- Class 1 planning appeals constituted 70% of matters commenced in the court.
- 57% of the planning appeals commenced related to deemed refusals i.e where council had not determined the application within the statutory period.
- There were 25 country hearings dominated by hearings in the Tweed Shire.
- The number of planning appeals taking longer than six months to finalise has increased from 14.8% 31 cases in 2013 to 21.5% 124 cases in 2017.

MANDATORY LOCAL PLANNING PANELS

- At a glance:
  - All councils in the Greater Sydney Region and City of Wollongong were required to form local planning panels (formerly known as Independent Hearing and Assessment Panels) by 1 March 2018
  - In the Greater Sydney Region and City of Wollongong, councillors are no longer able to exercise the function of determining any development application or application to modify a development consent under the *EP&A Act*

- In those areas, the function of determining a development application or an application to modify a development consent is exercised by:

  (a) the local planning panel (LPP) , or

  (b) an officer or employee of the council to whom the council delegates those functions, or

  (c) a regional panel on which those functions are conferred under section 23G.

- A LPP also has other functions:

  - to advise the council on any planning proposal that has been prepared or is to be prepared by the council under section 3.33 and that is referred to the panel by the council,

  - to advise the council on any other planning or development matter that is to be determined by the council and that is referred to the panel by the council.

- Section 4.8(3) of the EP&A Act says that the Minister may give directions to councils under section 9.1 (old s117) on the development applications that are to be determined on behalf of the council by the LPP.

1. Conflict of interest

Development for which the applicant or land owner is:

(a) the council,

(b) a councillor,

(c) a member of council staff who is principally involved in the exercise of council's functions under the *Environmental Planning and Assessment Act 1979*,

(d) a member of Parliament (either the Parliament of New South Wales or Parliament of the Commonwealth), or

(e) a relative (within the meaning of the *Local Government Act 1993*) of a person referred to in (b) to (d).

but not development for the following purposes:

(a) internal alterations and additions to any building that is not a heritage item,

(b) advertising signage,

(c) maintenance and restoration of a heritage item, or

(d) minor building structures projecting from the building facade over public land (such as awnings, verandas, bay windows, flagpoles, pipes and services, and sun shading devices).

2. Contentious development

Development that:

(a) in the case of a council having an approved submissions policy – is the subject of the number of submissions set by that policy, or

(b) in any other case – is the subject of 10 or more unique submissions by way of objection.

An ***approved submissions policy*** is a policy prepared by the council and approved by the Secretary of the Department of Planning and Environment which details the circumstances in which a local planning panel or council staff should exercise the consent authority functions of the council, based on the number and nature of submissions received about development.

3. Departure from development standards

Development that contravenes a development standard imposed by an environmental planning instrument by more than 10% or non-numerical development standards.

Note: If the Secretary allows concurrence to be assumed by council staff for contravening development standards, the panel can delegate these applications to council staff to determine.

4. Sensitive development

(a) Designated development.

(b) Development to which *State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development* applies.

(c) Development involving the demolition of a heritage item.

(d) Development for the purposes of new licenced premises, that will require one of the following liquor licences:

  (i) a club licence under the *Registered Clubs Act 1976*,

  (ii) a hotel (general bar) licence under the *Liquor Act 2007*, or

  (iii) an on-premises licence for public entertainment venues under the *Liquor Act 2007*.

(e) Development for the purpose of sex services premises and restricted premises.

(f) Development applications for which the developer has offered to enter into a planning agreement.

- Schedule 2 of the EP&A Act contains provisions with respect to the members and procedure of LPP's.
- According to clause 21(1) of Schedule 2 the procedure for the calling of meetings of the LPP and for the conduct of business at those meetings is, subject to the Act, to be as determined by the planning body.
- Clause 25 of schedule 2 says:

  (2) A planning body (other than the Independent Planning Commission) is required to ***conduct its meetings in public.***

  (3) A planning body is required to ***record meetings conducted in public*** *(whether an audio/video record, an audio record or a transcription record). The record is required to be made publicly available on the website of or used by the planning body.*

  (4) A planning body ***may, if it thinks fit, transact any of its business at a meeting at which members (or some members) participate by telephone or other electronic means****, but only if any member who speaks on a matter before the meeting can be heard by the other members. Any such meeting is taken to be conducted in public if the meeting is recorded and the record made publicly available as required by subclause (3).*
- The LPP may also, if it thinks fit, transact any of its business by the circulation of papers among all the members of the planning body for the time being, and a resolution in writing approved in writing by a majority of those members is taken to be a decision of the planning body.
- The Operational Procedures for the LPP issued by the Minister under section 9.1 of the EP&A Act also include provisions for the meeting procedures of the LPP:

3.3 Meeting procedures

1. The panel may determine detailed procedures for the execution of efficient and effective meetings.
2. The panel is not bound by the rules of evidence and may inquire into and inform itself on any matter, in such manner as it thinks fit, subject to the rules of natural justice and procedural fairness.
3. The panel is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.
4. The panel must give reasonable notice to the public of the times and places of its meetings. This must be through the website used by the panel and may include other mechanisms as appropriate.
5. The panel may:
   a. adjourn the public meeting to deliberate before reconvening for voting and determination, or
   b. close the public meeting for deliberation and/or voting and determination.
6. With a view to discharging its responsibilities in a timely manner, the panel may, in its absolute discretion, but otherwise fairly and consistently, impose time limits on presentations by persons other than members of the panel. Where, there are a large number of objectors with a common interest at any public meeting, the panel may, in its absolute discretion, hear a representative of those persons.
7. The panel shall hold meetings as required to meet panel demands and workloads.
8. Where a quorum for a meeting or other business is not present, the meeting or other business is to be deferred.

- Where the is an appeal to the Land and Environment Court against a determination or decision made by a Sydney district or regional planning panel or a LPP, the council for the area concerned is to be the respondent to the appeal **but is subject to the control and direction of the panel in connection with the conduct of the appeal.**
- However, a LPP can delegate any of its functions to the general manager or other staff of the council (see s 2.20(8)), which would seem to include the "control and direct" function relating to appeals..

The Standard Local Environmental Plan provisions

Calculating floor space ratio

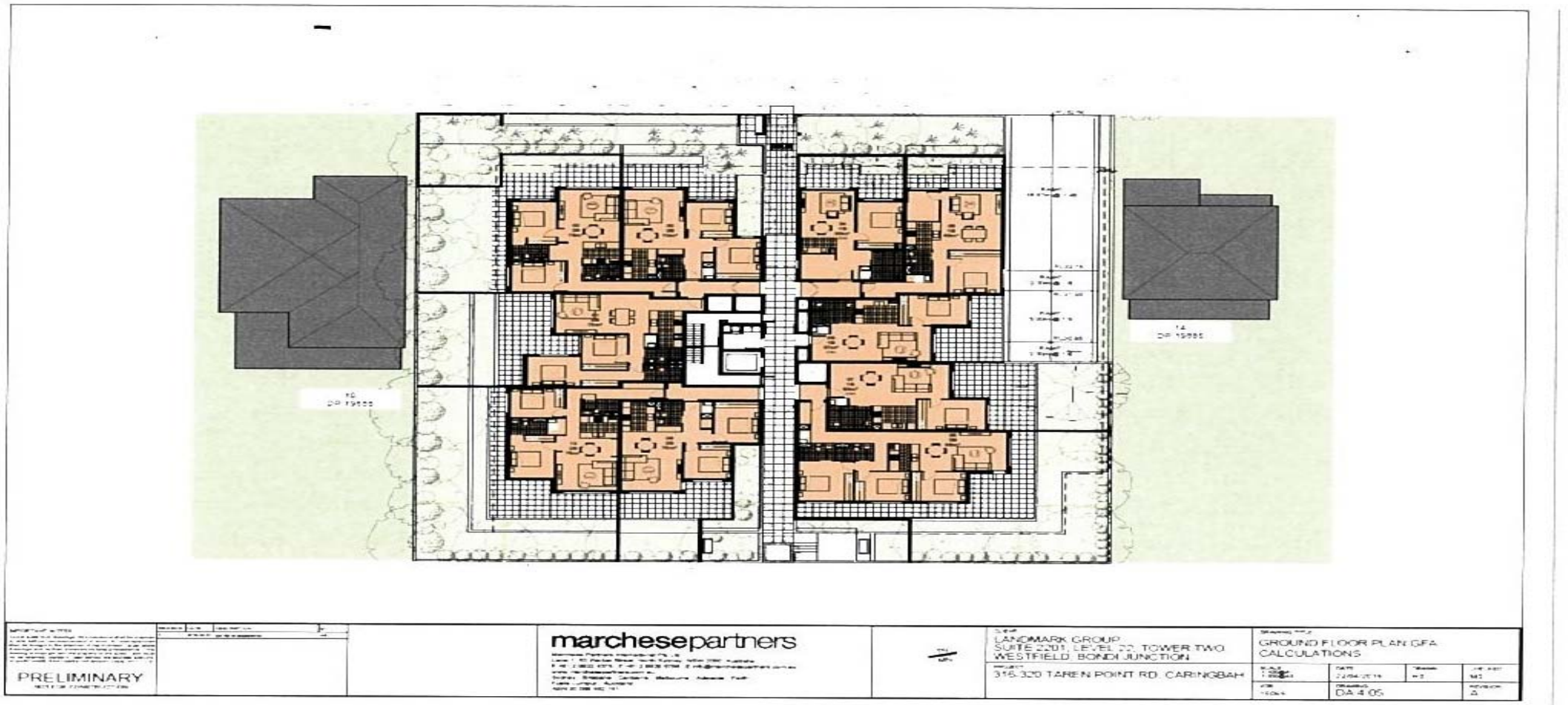

Figure 2 – Applicant's Calculation of GFA – Ground Floor (brown tone)

- In the standard instrument the definition of gross floor area provides:

> *"**gross floor area** means the sum of the **floor area of each floor of a building measured from the internal face of external walls,** or from the internal face of walls separating the building from any other building, measured **at a height of 1.4 metres above the floor**, and includes:…"*

- Is the “breezeway lobby” within the outer face of external enclosing walls?
- In the case of *GGD Danks Street P/L and CR Danks Street P/L v Council of the City of Sydney* [2015] NSWLEC (“Danks case”) Commissioner O’Neill formed the view that the corridor of the building in question did not form part of the gross floor area as it was contained on either side by the external walls of the units on either side of the corridor.
- The Commissioner determined that the external face of the wall cannot be characterised as an internal face because an external wall has a specific function that distinguishes it, that being, weatherproofing. It was said that, the definition of gross floor area must refer to the interior surface of the wall that forms the facade or exterior of a dwelling, being the wall that weatherproofs the interior space, and cannot refer to the exterior surface of the outer wall.
- In circumstances where the corridor would be subject to rain along the gap, the walls containing the corridor were considered by the Commissioner in the Danks case to be external walls, and therefore not included as internal floor space for the purpose of gross floor area and the calculation of the floor space ratio.

- In ***Landmark Group Australia Pty Ltd v Sutherland Shire Council*** [2016] NSWLEC 1577 the Danks case was referred to but it was argued by the Council's planning expert that the "floor" of the building in the plan was the whole of the floor enclosed by the external face of the building, that being the face that surrounds the building footprint and which, notwithstanding articulation, recessing and the like within it, is generally that which presents to the street frontage and to the side and rear boundaries.
- Commissioner Morris summarised the arguments of the experts at paragraphs 35 and 36 as follows:

  "*35. Ms Laidlaw says that although two ends of the breezeway are open above a height of 1000mm (at each floor above ground level) these openings are proportionally insignificant in the context of the total area of the external walls of the building and are properly characterised as an architectural detail of the building, rather than a fundamental element of the building's composition. She says that for breezeways not to be considered as floor area they would be open to the elements by having one full side or two full sides, enclosed by a standard balustrade and topped only by a roof that is sufficient to cover the breezeway itself. She differentiates the proposal as one where both sides are enclosed by walls exceeding 1400mm in height and only the narrow ends of the breezeway open above 1000mm.*"

- Commissioner Morris accepted the argument of the Council that the breezeways were part of the gross floor area and said:

> *"57 I do however recognise that individual circumstances in each case can lead to different outcomes. In Danks Street it would appear that different circumstances applied and that in particular the Commissioner had regard to the fact that the corridor would be wet during inclement weather with rain blown along the gap and the walls containing the corridor functioning as external walls….*
>
> *59 I do not consider the same circumstances apply in this case. I agree with the evidence of Ms Laidlaw that the calculation of GFA required the floor area to be measured from the internal face of external walls and that in this case the external walls accord to the red line detailed in the diagram included at [34]. Whether the area at ground level between the 2m high gates at either end of the building is categorised as a breezeway or corridor is irrelevant to my consideration. The fact of the matter in this case is that the area between these gates is within the internal face of the external walls of the building."*

- In *Ceerose Pty Ltd v Inner West Council* [2017] NSWLEC 1289 Commissioner Dickson took a similar approach to Commissioner Morris in the Landmark case. The Commissioner said at paragraph 60 of the judgment:

  "*60. As detailed in Danks v City of Sydney [31] the definition of gross floor area requires the floor area at each level of the building to be measured at the internal face of the external walls. In the specific design considered by O'Neil, C in the above case, the corridor in question was not enclosed by a wall that acted to weatherproof the building, or that formed a part of the buildings façade. On this basis, and the practical fact that the corridor would be wet during inclement weather, she found it was appropriate to exclude the floor area of the corridor, as it could not be characterised as internal floor space. This is not the case in the current development application where, on the evidence of Mr Darroch, the louvered openings in the end walls of the corridor are proportionally insignificant (Exhibit 2). I concur with the evidence of Mr Darroch and find that the corridors as proposed are properly characterised as internal floor space, and should be included in the calculation of gross floor area.*"

STRATA SUBDIVISION AND MINIMUM SUBDIVISION LOT SIZE

4.1 Minimum subdivision lot size

(1) The objectives of this clause are as follows:

(a) to promote consistent subdivision and development patterns in zones.

(2) This clause applies to a subdivision of any land shown on the Lot Size Map that requires development consent and that is carried out after the commencement of this Plan.

(3) The size of any lot resulting from a subdivision of land to which this clause applies is not to be less than the minimum size shown on the Lot Size Map in relation to that land.

(4) ***This clause <u>does not apply</u> in relation to the subdivision of individual lots in a strata plan or community title scheme.***

Flower v Lane Cove Council [2017] NSWLEC 1135


Henley St
Henley St
Henley St
Barwon Rd
Barwon Rd
345m2
374m2
2 Henley Street
6
27
4
25
23
22A
57
55

DM & Longbow Pty Ltd v Willoughby City Council [2017] NSWLEC 173

"Focusing on the text of cl 4.1(4), the phrase "the subdivision of individual lots in the strata plan" is clear and unambiguous. The object of the action of subdivision is the "individual lots in a strata plan". The subdivision is "of" those lots. Those lots are what is being subdivided. Those "individual lots" must be "in a strata plan". A "strata plan" is "a plan that is registered as a strata plan" (see s 4(1) of the Strata Schemes Development Act 2015). It is a strata plan that is already in existence. If there is no strata plan yet in existence, there can be no individual lots "in a strata plan" that can be subdivided.

4.1 Minimum subdivision lot size

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(2) This clause applies to a subdivision of any land shown on the Lot Size Map that requires development consent and that is carried out after the commencement of this Plan.

(3) The size of any lot resulting from a subdivision of land to which this clause applies is not to be less than the minimum size shown on the Lot Size Map in relation to that land.

(4) This clause does not apply in relation to the subdivision of any land:

(a) by the registration of a strata plan or strata plan of subdivision under the Strata Schemes Development Act 2015, or

(b) by any kind of subdivision under the Community Land Development Act 1989.

4.1A Subdivision of dual occupancies

Despite any other provision of this Plan, development consent must not be granted to the subdivision of land on which a dual occupancy is erected or proposed to be erected if the subdivision would result in the dwellings that comprise the dual occupancy being located on separate lots.

INFILL HOUSING AND BOARDING HOUSES

Katerinis v Canterbury-Bankstown Council [2017] NSWLEC 1479.

*"**accessible area** means land that is within:*

(a) 800 metres walking distance of a public entrance to a railway station or a wharf from which a Sydney Ferries ferry service operates, or

(b) 400 metres walking distance of a public entrance to a light rail station or, in the case of a light rail station with no entrance, 400 metres walking distance of a platform of the light rail station, or

(c) 400 metres walking distance of a bus stop used by a regular bus service (within the meaning of the Passenger Transport Act 1990) that has at least one bus per hour servicing the bus stop between 06.00 and 21.00 each day from Monday to Friday (both days inclusive) and between 08.00 and 18.00 on each Saturday and Sunday."

“rather than it providing standards on how development is to be carried out, cl 10(2) sets a pre-condition for the application of beneficial provisions that change the standards that apply to how development is to be carried out. The clause is the pre-condition, not the standard itself or the varied standards. There is a clear distinction. It is analogous to the zoning map, as it sets the criteria for what standards apply.”

SENIORS LIVING

Principal Healthcare Finance Pty Ltd v Council of the City of Ryde [2016] NSWLEC 153

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26 Location and access to facilities

(1) A consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied, by written evidence, that residents of the proposed development will have access that complies with subclause (2) to:

(a) shops, bank service providers and other retail and commercial services that residents may reasonably require, and

(b) community services and recreation facilities, and

(c) the practice of a general medical practitioner.

(2) Access complies with this clause if:

(a) the facilities and services referred to in subclause (1) are located at a distance of **not more than 400 metres** from the site of the proposed development that is a distance accessible by means of a suitable access pathway and the overall average gradient for the pathway is no more than 1:14, although the following gradients along the pathway are also acceptable:

(i) a gradient of no more than 1:12 for slopes for a maximum of 15 metres at a time,

(ii) a gradient of no more than 1:10 for a maximum length of 5 metres at a time,

(iii) a gradient of no more than 1:8 for distances of no more than 1.5 metres at a time, or...

(1) a consideration of whether the proposed development is prohibited under any circumstances pursuant to cl 26 of SEPP (HSPD) when it is read both in context, and as a whole; and

(2) if it is not so prohibited, a consideration of whether cl 26 of SEPP (HSPD) relevantly specifies a requirement or fixes a standard in relation to an aspect of the proposed development.

TEMPORARY USES

Marshall Rural Pty Limited v Hawkesbury City Council and Ors [2015] NSWLEC 197

2.8 Temporary use of land

(1) The objective of this clause is to provide for the temporary use of land if the use does not compromise future development of the land, or have detrimental economic, social, amenity or environmental effects on the land.

(2) Despite any other provision of this Plan, development consent may be granted for development on land in any zone for a temporary use for a maximum period of 28 days (whether or not consecutive days) in any period of 12 months.

(3) Development consent must not be granted unless the consent authority is satisfied that:

(a) the temporary use will not prejudice the subsequent carrying out of development on the land in accordance with this Plan and any other applicable environmental planning instrument, and

(b) **the temporary use will not adversely impact on any adjoining land or the amenity of the neighbourhood**, and

(c) the temporary use and location of any structures related to the use will not adversely impact on environmental attributes or features of the land, or increase the risk of natural hazards that may affect the land, and

(d) at the end of the temporary use period the land will, as far as is practicable, be restored to the condition in which it was before the commencement of the use

- Justice Moore held that the requirement that the proposal will “not adversely impact” was a “test, cast in absolute terms” reflecting the seriousness with which an application of for a temporary use is required to be assessed and puts a very high hurdle in the path of any such application.

- The question is not whether there is an acceptable impact but whether there is an adverse impact. If the use will have any adverse impact on any adjoining land it cannot be approved as a temporary use under clause 2.8

THE RELEVANCE OF OBJECTIVES IN PLANNING INSTRUMENT PROVISIONS

Barrak v City of Parramatta Council [2018] NSWLEC 67

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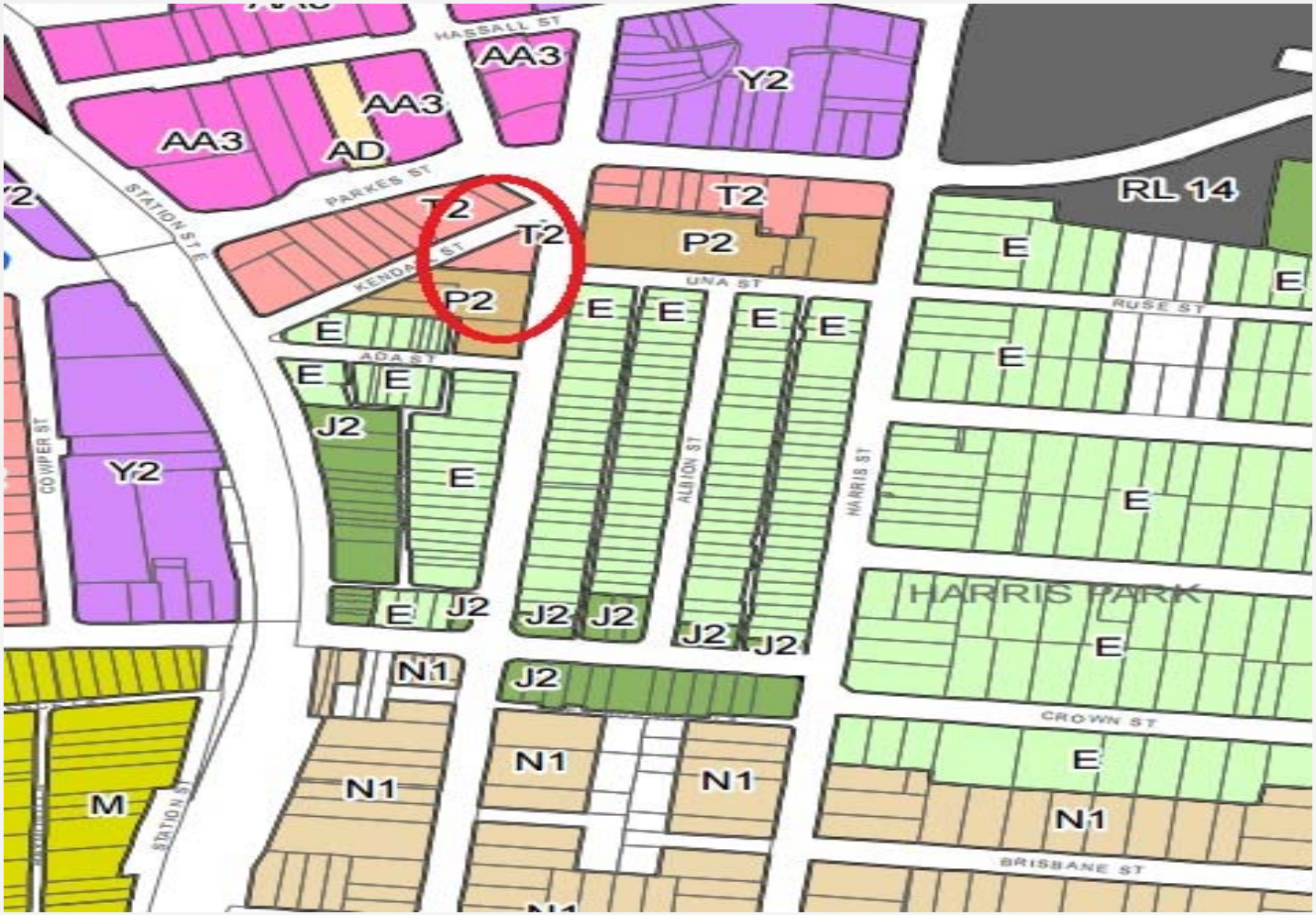

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4.3 Height of buildings

(1) The objectives of this clause are as follows:

a) to nominate heights that will provide a transition in built form and land use intensity within the area covered by this Plan,

b) …,

c) to require the height of future buildings to have regard to heritage sites and their settings,

d) …;

e) to reinforce and respect the existing character and scale of low density residential areas,

f) …

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

The LEP is an environmental planning instrument (a statutorily defined term). The LEP nowhere contains any express prohibition of the consideration of the objectives in clauses in the LEP containing such objectives as frame their operation