

the Penrith Local Environmental Plan that have implications for the City of the Blue Mountains, as discussed in the report.

Upon being PUT to the Meeting, the MOTION was CARRIED, the vote being UNANIMOUS:

For	Against
Councillors	Councillors
Myles	
Gibbs	
Mays	
Searle	
Van der Kley	
Luchetti	
McLaren	
McCallum	
Greenhill	
Creed	

MINUTE NO. 30

27. 11/191673. Current Status of Outstanding Permissibility Issues – 171 Lurline Street, Katoomba

The meeting was addressed by: Amanda Hamilton-Hersey

A MOTION was MOVED by Councillors Mays and McLaren:

1. That Council notes this report; and
2. That Council endorses Option 2, which allows Yindi Day Spa to continue operating at 171 Lurline Street Katoomba, until the review of LEP 1991 is complete.

Upon being PUT to the Meeting, the MOTION was CARRIED, the vote being:

For	Against
Councillors	Councillors
Myles	Gibbs
Mays	
Searle	
Van der Kley	
Luchetti	
McLaren	
McCallum	
Greenhill	
Creed	

MINUTE NO. 31

28. 12/2553. Development Application No. X/747/2011 for a two storey Trade Training Building on Lot 10 DP 1071527, Lot 1 DP 1134493 and Lot 1 DP 1134511, Wycliffe Christian School, 133-137 Rickard Road, Warrimoo

A MOTION was MOVED by Councillors Greenhill and Creed:

ITEM NO: 27

SUBJECT: CURRENT STATUS OF OUTSTANDING PERMISSIBILITY ISSUES – 171 LURLINE STREET, KATOOMBA

FILE NO: F06747 - 11/191673

Delivery Program Link

Principal Activity: Built Environment - Using Land

Service: Land Use Management

Project: Assess and improve development

Recommendations:

1. *That the Council note this report; and*
 2. *That in an endeavour to progress the issue, the proprietor of 171 Lurline Street be invited to make an application for the preparation of a Draft Local Environmental Plan consistent with Option 4 herein, and subject to the applicant agreeing that the fee payment schedule for the rezoning will be as follows;*
 - a. *Stage 1: \$5,000-To be paid at the time of lodgement of the Planning Proposal*
 - b. *Stage 2: \$5,000-To be paid at upon resolution by the Minister for Planning that the proposal will proceed through the Gateway*
 - c. *Stage 3: \$6,068-To be paid at conclusion of the community consultation period and prior to preparation of draft local environmental plan.*
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Report by Director, Development, Health & Customer Services:

Reason for report

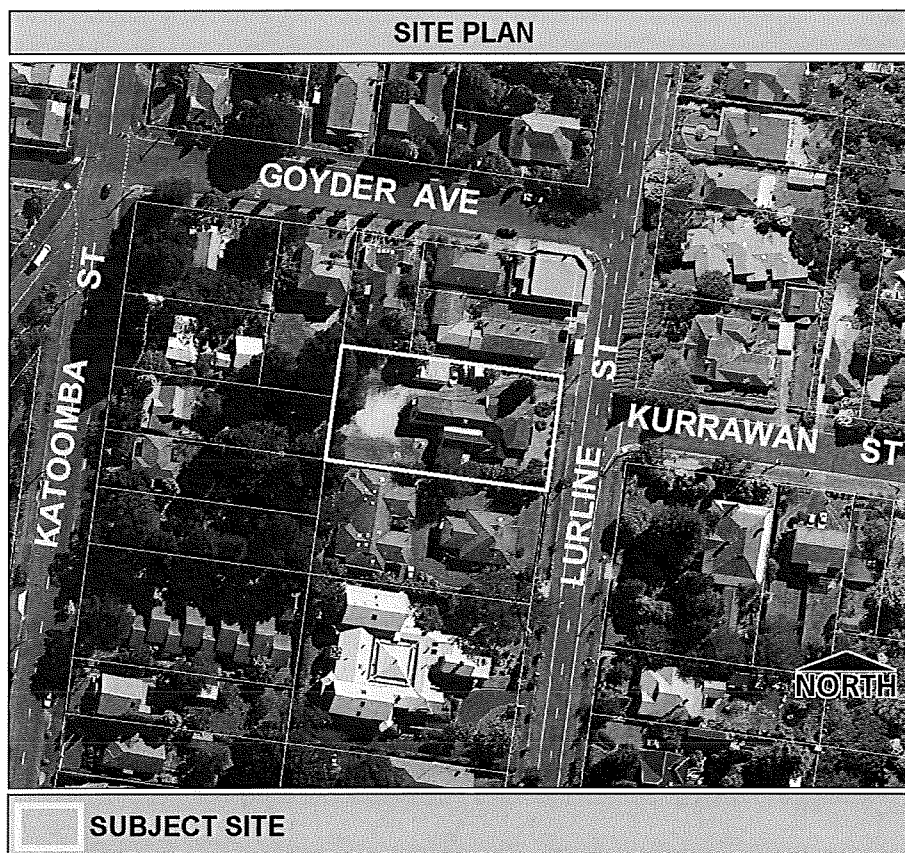
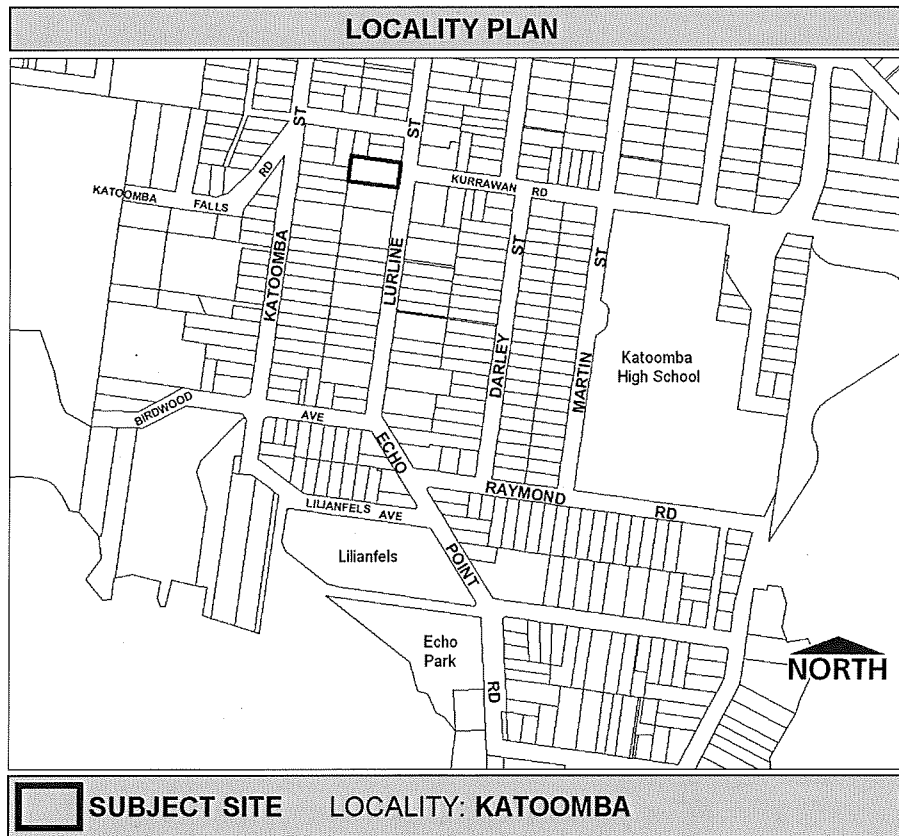
At its Ordinary Meeting of the Council on 22 November 2011, it was resolved:

That the Council receives a report on the current status of outstanding permissibility and zoning issues, if any, at 171 Lurline Street Katoomba, Lot No 27.

[Min No 491]

The report provides background to the outstanding issues, a detailed description of options available to the Council in relation to the current illegal use, and the potential implications for each of these options.

The site and locality plan for 171 Lurline Street, Katoomba follows below:



BackgroundAction to date regarding operation of the illegal use

Prior to the purchase of 171 Lurline Street Katoomba by the current operator (and consistently since April 2010) Council staff have provided advice that the establishment of a day spa at this location would be regarded as '*commercial premises*' or '*recreation facility*' and that each of these land uses are prohibited in the Village – Tourist zone under Blue Mountains LEP 2005 (LEP 2005). Staff also provided advice about the zones and circumstances in which such development would be permissible. This included advice on the permissibility of a day spa as *commercial premises* within the Village Town Centre zone and the suggestion that premises within this zone be investigated for suitability. Further, guidance regarding the potential for the day spa use to be considered ancillary to a tourist accommodation development (should the use form part of a guesthouse or hotel), was also provided. There are examples of other day spas operating lawfully in both Village Town Centre zones or as an ancillary component of tourist accommodation.

Notwithstanding this advice, the proprietor purchased the property and has been operating a day spa at the site without Council consent. Consequently, the proprietor has been requested to make a submission as to why the Council should not, in exercising its duty to implement the LEP, require the use to cease. As part of that submission the proprietor was invited to address her previously stated intent to make a formal application to have the LEP amended to permit the use in that location.

A site inspection was undertaken on 25th October 2011 during which the issues related to the illegal use, the requirement for an amendment to LEP 2005, and the process by which this would be achieved (via a planning proposal under Section 55 of the *EP&A Act 1979*) were explained.

On 21 November 2011, the proprietor indicated via email, her intention to request that the matter of the illegal operation of Yindi Day Spa be held over until the review of LEP 1991 and its amalgamation with LEP 2005 is complete, on the assumption that the permissible uses within the Village-Tourist zone may be reviewed.

Options to resolve the illegal operation of Yindi Day Spa at 171 Lurline St, KatoombaOption 1: Require that the current operation of Yindi Day Spa cease

In exercising its duty to implement the planning framework and in considering the strong counsel provided to the proprietor prior to her purchase of 171 Lurline St, Council could require the current use to cease.

Option 2: Allow the operation of Yindi Day Spa until the review of LEP 1991 is complete

As referred to above, the proprietor has expressed her intention to continue the illegal operation of Yindi Day Spa pending the completion of the LEP 1991 review, and its integration into LEP 2005. This is not an acceptable option. The estimated timeframe for the completion of this review is approximately 2-3 years or longer. To support the continuance of a known non-permissible use for this extended period, outside the parameters of the local planning instrument, is not considered appropriate. It is fundamental that regularisation be achieved in a timely manner, such that the administration of regulatory powers is fair and equitable for all land owners and the credibility of the Council's LEP is not undermined.

Option 3: Investigate an amendment to the Village-Tourist zone (as part of the review of LEP 2005 or independently)

This option would require an amendment to LEP 2005 such that either '*commercial premises*' or '*recreation facility*' is included as a permissible use within the Village-Tourist zone.

It is acknowledged that the operation of a day spa is compatible with and complimentary to other businesses located along Lurline Street. These businesses include bed & breakfasts, refreshment rooms and other accommodation / tourist businesses which are permitted in the Village-Tourist zone. Whilst the actual day spa use would be consistent with these surrounding uses, there are reservations about introducing 'commercial premises' into this predominantly residential zone. The reason for this is that 'commercial premises' acts as a default land use under LEP 2005, which encompasses uses as diverse as car washes, crematoria, commercial offices, funeral homes or in fact any business use not specifically captured elsewhere in the LEP. For this reason, 'commercial premises' are confined to the town centres and the Employment – General zone. The inclusion of the 'commercial premises' use as presently defined across the entire Village Tourist zone would be difficult to support. Importantly, including such a use in this zone should be coupled with a review of all the related definitions under LEP 2005, with a view to aligning these definitions with those found within the State Government's Standard Instrument LEP.

Such an amendment to the Village-Tourist zone (either as part of the LEP 2005 review or independently) would require comprehensive analysis and thereby a likely protracted timeframe. Such a delay is unlikely to be acceptable, given the importance of regularising the ongoing unauthorised and prohibited operation.

Option 4: Site Specific Amendment to LEP 2005

A practical option is a site specific amendment to LEP 2005. A Planning Proposal would be prepared under Section 55 of the *E&A Act 1979 (as amended)*. The intent of the Planning Proposal would be to allow the operation of a 'day spa' at 171 Lurline Street. This would be achieved through the inclusion of the site within Schedule 8-Additional Land Uses of LEP 2005, and thereby the inclusion of '*commercial premise*' as a permissible land use on the subject site only.

Consultation has been undertaken with the Department of Planning and Infrastructure to determine the best way to progress this Planning Proposal. The results of this consultation are detailed below.

Consultation - Department of Planning and Infrastructure

The broader application of the *commercial premises* land use within the Village Tourist zone is not considered an appropriate option. In this context (and as described above) the comprehensive assessment required for the inclusion of this use within the Village Tourist zone is not currently part of the LEP 2005 review. Further, it would not result in a timely resolution of the current illegal use.

Despite a stated preference for a broader amendment to the Village Tourist zone to include the *recreation facility* or *commercial premises* land use, the Department of Planning and Infrastructure has advised that with presentation of the reasons outlined above, it would be appropriate to consider the inclusion of the site within Schedule 8-Additional Land Uses of LEP 2005. The inclusion of 171 Lurline Street within Schedule 8 would permit the day spa (under the '*commercial premises*' definition) with consent, at that site only.

It is noted that this advice does not provide surety that the Planning Proposal will be supported by the Department.

Further, should the Council and the Minister for Planning amend LEP 2005 to make the use (that is '*commercial premises*') permissible with consent, it will then be necessary for a development application to be lodged seeking consent for this use.

Fees and Charges for the Preparation of Draft Local Environmental Plans

An additional issue is the payment of the rezoning application fees. The proprietor has stated that her current financial situation will prevent her from paying the application fees at lodgement, and has requested that a payment plan be made available.

The application fee (as adopted by the Council for 2011/2012) for the preparation of a Draft Local Environmental Plan where an environmental study is not required is **\$16,068**. The first stage fee for the application is **\$5,000**. This fee would be paid at the time of lodgement and would cover the cost of preparation of a Planning Proposal for the consideration of Council. Subsequent payments would be made progressively, should the draft LEP progress.

The applicant would need to understand that the Draft LEP will not progress to the subsequent stages without the payment of the balance of fees. The fees would be staged as follows:

Stage 1: \$5,000 – To be paid at the time of lodgement of the Planning Proposal

This portion of the fee will cover the cost of preparing the Planning Proposal to explain the effect or and justification for the plan. The Planning Proposal will then be submitted to the Department of Planning and Infrastructure for determination.

Stage 2: \$5,000 – To be paid at upon resolution by the Planning Minister that the proposal will proceed through the Gateway

The Minister determines if the Planning Proposal is to proceed. The Gateway acts as a checkpoint to ensure that the proposal is justified before further studies are done and resources are allocated to the preparation of a plan. A community consultation process is also determined at this time. Consultation occurs with relevant public authorities and, if necessary, the proposal is varied.

It must be noted that failure to pay this second stage fee, will result in the Planning Proposal being stalled. Given that the Department of Planning and Infrastructure now requires different stages of the process to be completed within specified timeframes, should the required fees not be paid, the Planning Proposal may not continue. This would result in a re-submission when the required fees have been paid, which is likely to incur additional costs.

Stage 3: \$6,068 – To be paid at the conclusion of the community consultation period and prior to the preparation of the Draft Local Environmental Plan

The Planning Proposal is publicly exhibited for a period of between 14 and 28 days, and any submissions received are considered by Council and may require variation to the Planning Proposal.

The stage 3 fee would be required at the conclusion of the consultation / assessment of submissions phase and prior to the preparation of the Draft Local Environmental Plan. The final Planning Proposal is then re-submitted to the Department of Planning and Infrastructure.

It is important to note that support has already been extended by the Council to the proprietor in an attempt to achieve a resolution of this issue. Significantly, Council staff (rather than a planning consultant engaged by the proprietor) will be preparing the Planning Proposal should the application proceed. This alone represents a saving to the applicant of some \$5,000 - \$10,000.

The site specific nature of the proposed LEP amendment (enabling the *commercial premises* use within the Village Tourist zone, at 171 Lurline Street only) and the proposed preparation of the Planning Proposal by Council staff are noteworthy considerations for the recovery of Council's costs.

Sustainability Assessment

Following is a general assessment of the potential Social, Environmental, Economic and Governance impacts should a site specific amendment to LEP 2005 be undertaken.

Effects	Positive	Negative
Environmental	Negligible.	Negligible
Social	The provision of local employment opportunities The provision of a tourism related service compatible with surrounding local businesses.	Nil
Economic	Enable the continuance of a local business which provides local employment, and contributes to the local and tourist economy within the Blue Mountains.	Council may not be able to recover the cost of preparation of the Draft LEP.
Governance	The LEP amendment (and subsequent development application) would enable Yindi Day Spa to operate legally at the site.	A site specific amendment does not enable similar uses within the Village Tourist zone.

Financial implications for the Council

The proposed LEP amendment does not raise any obvious financial implications for the Council.

The applicant would be required to pay the scheduled rezoning fees, to be staged as outlined above. The Council would incur the cost (or part thereof) of the preparation of a Draft LEP amendment should the applicant be unable pay these fees, or if the Council resolves to provide a fee subsidy. Associated risks are discussed below.

Legal and risk management issues for the Council

There are no perceived legal issues for Council in relation to proceeding with a potential site specific amendment to LEP 2005 as such.

However, with consideration for the issues outlined within this report, it is necessary that action be taken to regularise the current illegal use, and that this action be carried out in a timely manner. Allowing the current use to continue for an extended period (for example while waiting for completion of the LEP 1991/LEP 2005 review) poses a risk for Council in being able to clearly demonstrate a consistent regulatory approach, which promotes equity with other land owners.

Additionally, the proprietor's stated financial hardship in relation to the payment of scheduled fees, poses a risk to the successful completion of the gateway process under Section 55 of the *EP&A Act 1979 (as amended)*. The stated financial concerns of the proprietor should be viewed against the comprehensive advice Council provided to the operator prior to the purchase of 171 Lurline Street; and be appropriately weighed against the necessity for regularising the current use.

There is a reasonable risk that the proposed Draft LEP process could be stalled at various stages by failure by the applicant to pay the scheduled fees. This would place Council in a difficult position with regard to cost recovery and the potential to achieve a timely resolution to the continuing illegal use.

Conclusion

This report has provided the background and current status of the issues related to the illegal operation of Yindi Day Spa at 171 Lurline Street, Katoomba. The options presented above and consultation with the Department of Planning and Infrastructure identify a site specific amendment to LEP 2005 as the most practical option. It is acknowledged that a more general amendment to the Village Tourist zone to permit the *commercial premises* use may need to be investigated over the longer term, and preferably in conjunction with a review of related definitions under LEP 2005. However, in view of the considerable timeframe and scope of such an amendment, it is not considered a suitable resolution to the present issue. The site specific amendment would permit the *commercial premises* use at 171 Lurline Street, Katoomba and enable the legalisation of the current operation of the day spa business at the site.

As stated within this report, it is essential that this plan amendment occur in a timely manner to ensure Council can clearly demonstrate a reliable regulatory approach, which exhibits equity for all land owners and other business operators. Coupled with this is the need to achieve an acceptable solution to the issue of the payment of scheduled fees, to ensure the Planning Proposal process, once commenced, is not impeded.

AUTHOR: Kim Barrett, Area Town Planner

AUTHORISERS: Lee Morgan, Director, Development, Health & Customer Services
Will Langevad, Manager, Development and Planning Services

Does this paper need to go to a briefing session OR have Ward Councillors been briefed?: No

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