

Attachment 11 – SEPP1 Objection – Active Street Frontages

PERTH
SYDNEY

12 November 2009

Blue Mountain City Council
Administration Centre
2-6 Civic Place
KATOOMBA NSW 2780

ATTN: MR WILL LANGEVAD



TOWN PLANNING
AND URBAN DESIGN

Re: DEVELOPMENT APPLICATION NO. X/821/2009 DEVELOPMENT
APPLICATION FOR RETAIL DEVELOPMENT AND LAND SUBDIVISION – 152-160
LEURA MALL AND VARIOUS OTHER COUNCIL OWNED PARCELS – SEPP 1
OBJECTION TO ACTIVE STREET FRONTAGES

Dear Mr Langevad,

1.0 INTRODUCTION

To further assist with the consideration of the proposed development and the variation sought under the provision of Clause 4(1)(b)(i) of Schedule 1 under the Blue Mountains Local Environmental Plan 2005 the following is a formal objection under the provisions of State Environmental Planning Policy No. 1 – Development Standard (SEPP 1 Objection):

This objection under State Environmental Planning Policy No. 1 – Development Standards (SEPP 1) has been prepared in relation to a proposed development involving a retail development at 152-160 Leura Mall, Leura, and associated parcels of land pursuant to the provisions of Clause 4(1)(b)(i) of Schedule 1 of the Blue Mountains Local Environmental Plan 2005 (BLEP 2005). This SEPP 1 objection relates to a non-compliance with BLEP 2005 in regard to active street frontages.

1.1 The Provisions of SEPP 1

SEPP 1 – Development Standards is a State Policy mechanism available to applicants to seek variation of development standards contained within an environmental planning instrument.

Clause 3 of the Policy details the Aims and Objectives of the Policy and provides as follows:

3 Aims, objectives etc

This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act.

The relevant objects of Clause 5 of the *Environmental Planning and Assessment Act, 1979* are:

5 Objects

The objects of this Act are:

(a) to encourage:

SYDNEY OFFICE

Suite 304, 21 Berry Street
North Sydney NSW 2060

PO Box 1612

North Sydney NSW 2060

Telephone +61 2 9925 0444

Facsimile +61 2 9925 0055

www.tpgnsw.com.au

The Planning Group NSW Pty Ltd

ABN 90 100 209 265

(i) the proper management, development and conservation of natural and

artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

(ii) the promotion and co-ordination of the orderly and economic use and development of land,

...

Clause 6 of SEPP 1 incorporates the mechanism for the making of a SEPP 1 objection and provides as follows:

6 Making of applications

Where development could, but for any development standard, be carried out under the Act (either with or without the necessity for consent under the Act being obtained therefore) the person intending to carry out that development may make a development application in respect of that development, supported by a written objection that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case, and specifying the grounds of that objection.

The SEPP 1 objection is made in accordance with the provisions of Clause 6. Clause 7 of SEPP 1 provides the discretion and power to the Consent Authority to support a SEPP 1 objection and grant development consent and provides:

7 Consent may be granted

Where the consent authority is satisfied that the objection is well founded and is also of the opinion that granting of consent to that development application is consistent with the aims of this Policy as set out in clause 3, it may, with the concurrence of the Director, grant consent to that development application notwithstanding the development standard the subject of the objection referred to in clause 6.

1.2 Circular B1 from the Department of Planning

In accordance with the notification given under Clause 12 of Circular B1 from the Department of Planning, the consent authority may assume the Directors concurrence to an objection pursuant to the provisions of SEPP 1 in these particular circumstances.

2.0 IS THE PLANNING CONTROL IN QUESTION A DEVELOPMENT STANDARD?

2.1 Environmental Planning Instrument

The Environmental Planning Instrument to which this objection relates is the Blue Mountain LEP 2005.

2.2 Development Standard to be Varied

The development standard to which this objection relates is Clause 3(1)(b) of Schedule 1 under the Blue Mountains LEP 2005, which contains provisions relating to building envelopes in the Leura Precinct VTC-LE01—Leura Mall Precinct.

Clause 4(1)(b)(i) sets an "active street frontage" for development in the Leura Precinct VTC-LE01—Leura Mall Precinct, as follows:



4 Design considerations

(1) Active street frontages

- (a) The existing continuity of retail and other businesses facing Leura Mall, Megalong Street or Railway Parade is to be maintained.
- (b) On properties with secondary frontages to a public place:
 - (i) new retail or other businesses are to be promoted along at least 50 per cent of ground level frontages to public carparks, side streets and laneways, and
 - (ii) balconies or extensive windows, or both, facing the public place are to be incorporated in all storeys above the ground storey.

(2) Built form and finishes

- (a) The appearance of traditional mainstreet shop terraces facing all principal street frontages is to be promoted. In particular:
 - (i) a diverse range of narrow shop fronts is to be encouraged, and
 - (ii) continuous awnings or balconies, or both, are to be provided, and
 - (iii) external walls are to be designed as a composition of masonry "piers" with contrasting panels of windows or painted wall finishes, or both.
- (b) All visible facades should be in a form and display finishes that are consistent with or complementary to the architectural character of existing mainstreet shop-terraces dating from the Edwardian-era or the Inter-War period.
- (c) On properties that currently support two-storey traditional shop terraces, future development should retain and renovate the principal shop front structure plus the adjoining rooms.
- (d) In the case of development on large allotments:
 - (i) floorspace should be distributed into well-articulated structures that are composed of separate wings or interconnected buildings, and
 - (ii) each building or wing should be capped by a gently-pitched roof, and
 - (iii) each building should be surrounded by garden courtyards that provide space for canopy trees planted to frame individual buildings.
- (e) On-site parking areas:
 - (i) shall be accessed only from the rear or side of buildings via existing public carparks, laneways or secondary streets, and
 - (ii) should be partially concealed behind retail or other business floorspace.

(3) Pedestrian amenity and safety

- (a) The existing pedestrian network should be expanded by promoting new retail frontages surrounding the public carparks or facing side streets and laneways.
- (b) Existing levels of sunlight available throughout public places and community gathering spots during midwinter between 10am and 2pm are to be retained.
- (c) Continuous weather protection is to be provided along all public frontages in the form of awnings or overhanging balconies.



(d) *Passive surveillance of all public places is to be promoted by:*

- (i) *ensuring appropriate orientation of shops, offices and dwellings, and*
- (ii) *incorporating appropriate design of ground floor walls and structures to provide unobstructed sight lines through publicly places.*

(4) Parking and vehicle access

Parking shall be provided in accordance with the relevant part of the Council's Better Living DCP.

The definitions as contained within the Blue Mountains LEP 2005 specifically include "active street frontage", which states:

active street frontage means a street frontage with interactive spaces between the building frontage and adjacent footpaths, road reserves or other public spaces that:

- (a) *provide interesting stimuli and activity for pedestrians to observe, thereby enhancing their experience of the village or town centre, or*
- (b) *enhance pedestrian safety and amenity through the provision of casual surveillance afforded by occupants.*

The design of the proposed development includes a frontage along its eastern boundary to a public car park and along its southern boundary a frontage to a public car park.

The design includes the provision of windows and an entry/exit door at its southern elevation (frontage along the southern boundary to the public car park) which is considered given its design to enable for an "active street frontage" for more than 50% of its ground level frontage. The frontage of the development to its eastern boundary includes the access into the basement parking area which goes below ground level.

As such, the proposed development breaches the 50% active street frontage in relation to its eastern boundary, and does not comply with the provisions of Clause 4(1)(b)(i) of the Blue Mountains LEP 2005.

The provisions of SEPP 1 are applicable to development standards prescribed under and Environmental Planning Instrument pursuant to the *Environmental Planning and Assessment Act, 1979*.

2.3 Definition of Development Standards

"Development Standards" has the following definition under Section 4(1) of the *Environmental Planning and Assessment Act (EP&A Act)*:

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a) *the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) *the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) *the cubic content or floor space of a building,*



- (e) the intensity or density of the use of any land, building or work,*
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) the volume, nature and type of traffic generated by the development,*
- (i) road patterns,*
- (j) drainage,*
- (k) the carrying out of earthworks,*
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) the provision of services, facilities and amenities demanded by development,*
- (n) the emission of pollution and means for its prevention or control or mitigation, and*
- (o) such other matters as may be prescribed.*

This SEPP 1 objection relates to a departure from the numerical standard prescribed under Clause 4(1)(b)(i) of Schedule 1 of the BLEP 2005. It is considered that Clause 4(1)(b)(i) of Schedule 1 of the BLEP 2005 is a development standard and not a 'prohibition' in respect of development.

3.0 WHAT IS THE UNDERLYING OBJECT OR PURPOSE OF THE STANDARD?

There are no stated objectives to Clause 4(1)(b)(i), and therefore it is considered that the underlying objectives of the standard include:

- (a) to provide for visual interest to elevations which front a public place or street, and*
- (b) to minimise the visual impact of buildings when viewed from adjoining properties.*

4.0 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD CONSISTENT WITH THE AIMS OF THE POLICY, AND IN PARTICULAR DOES COMPLIANCE WITH THE DEVELOPMENT STANDARD TEND TO HINDER THE ATTAINMENT OF THE OBJECTS SPECIFIED IN SECTION 5(A)(I) AND (II) OF THE EP&A ACT?

4.1 Compliance with the Development Standard

The proposed development is consistent with those objectives:

- the design of the proposed development provides for visual interest to the eastern elevation with the introduction of climbing plants as shown on the landscape drawing;
- the use of the space immediately to the east of the eastern elevation is to access the basement parking area and therefore the provision of pedestrian access in this location has been removed to ensure safety for all users;
- alternate means of providing surveillance are proposed with the retail development by way of CCTV and the like;
- the proposed development at its eastern elevation includes provision of a loading dock, to service the development which has been designed so

as to enable a truck to stand wholly on the site and as such a setback has been provided; and

- the eastern frontage of the development does provide for a small degree of activation associated with its usage being access into the basement parking area (visual observation) and the loading dock facilities but this is not for greater than 50% of the elevation.

Therefore, it is requested that the street activation pursuant to Clause 4(1)(b)(i) to the Blue Mountains LEP 2005, be varied to permit the proposed development. It is acknowledged that the proposed development seeks a variation to the numerical breach of the building envelope applying to the site. Notwithstanding the numerical breach, it is considered that the proposal satisfies the underlying objectives of the control for the following reasons:

4.2 Justification for Proposed Variations

Clause 4(1)(b)(i) of Schedule 1 of the Blue Mountains LEP 2005 does not include any stated objectives to the development standard.

It would not be orderly or economic development for the retail development to provide for pedestrian access along 50% of the eastern elevation due to the use of the immediately adjoining land being for the purposes of access to the basement parking area and the need to protect the safety of pedestrian users.

It would also not be orderly or economic for the design of the retail development to accommodate windows along this elevation due to the needs associated with the internal fit-out of the food store.

5.0 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

Strict application of the standard is considered to be unreasonable and unnecessary in the current circumstance for the following reasons:

- The portion of the building where the breach occurs does not affect adjoining properties;
- The portion where the breach occurs does not necessitate the provision of 50% active frontage as other frontages of the development perform this function;
- The design of the proposed development is such that opportunities for active street frontages have been maximised at greater than 50% to Leura Mall and the portion along the southern elevation, which are considered to have off-set the inability to provide for such an outcome to the eastern elevation;
- The breach of the control is not considered to restrict the future development potential of adjoining properties.

For these reasons it is considered that strict application of this standard is unreasonable and unnecessary in this circumstance.

6.0 IS THE OBJECTION WELL FOUNDED?

It is further noted that the NSW Land and Environment Court has expanded the considerations of SEPP 1 established by Lloyd J, in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89, who posed five questions to be addressed in SEPP 1 objections, as follows:

- 1 Is the planning control in question a development standard?
- 2 What is the underlying object or purpose of the standard?
- 3 Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development

standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP & A Act?

- 4 (a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?
- (b) Is a development which complies with the development standard unreasonable or unnecessary?
- 5 Is the objection well founded?

These have been addressed above previously in this SEPP 1 objection.

In the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston rephrased the test with a new test as follows:

1. The applicant must satisfy the consent authority that "the objection is well founded" and compliance with the development standard is unreasonable and unnecessary in the circumstances of the case;
2. The consent authority must be of the opinion that granting consent to the development application would be consistent with the policy's aim of providing flexibility in the application of planning controls where strict compliance with those controls would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act 1979; and
3. It is also important to consider:
 - (a) whether non-compliance with the development standard raises any matter of significance for State or regional planning; and
 - (b) the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

Preston CJ then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;
5. the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

These questions are addressed below:

QUESTION 1 Is the objection well founded?

For the reasons set out in the following questions 2A, 2B and 3, the proposed departure from the building envelope is well founded.

It is considered that the objection is well founded as the stated objective of the control can be achieved despite non-compliance with the standards. This is discussed in detail below. As such, this SEPP 1 is consistent with the first method to demonstrate that the SEPP 1 is well founded as established by Preston CJ above.

QUESTION 2(A) *Is the granting of consistent with the policy's aim of providing flexibility in the application of the planning control where strict compliance with the control would be unreasonable and unnecessary?*

The aims and objectives of SEPP 1 will not be hindered by this proposal. It is noted that Clause 3 provides for flexibility in the application of a planning control where it can be demonstrated that strict compliance is unreasonable and unnecessary. Clause 3 states:

3 Aims, objectives etc

This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a)(i) and (ii) of the Act.

Compliance with the development standard is unreasonable and unnecessary as:

- The cause of non-compliance with the development standard is as a result of providing for a safe environment to access the basement parking area and to enable a well planned internal fit-out of the food store.
- The development does not adversely impact on the amenity of adjoining properties.
- The matters raised in Section 5 of this SEPP 1 establish the reasons why compliance is unreasonable and unnecessary

A development which complies with the development standard is unreasonable and unnecessary as in the circumstances of this case, and in particular its location, it would be uneconomic to comply as, the proponent has undertaken a number of public domain improvements, provided for a public benefit in the reconfiguration of a public car parking and additional parking on-site, sought to provide for appropriate streetscapes/road reserves for pedestrian friendly usage, and therefore the project would not proceed.

QUESTION 2(B) *Or hinder the attainment of the objects in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act 1979?*

Section 5(a)(i) and (ii) of the *Environmental Planning and Assessment Act 1979* provides:

The objects of this Act are:

- (a) *to encourage:*
 - (i) *the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,*
 - (ii) *the promotion and co-ordination of the orderly and economic use and development of land,*

Compliance with the development standard of building envelope would hinder attainment of the EP&A Act's object to promote orderly and economic use and development of the Land.

QUESTION 3 are the objectives of the standard achieved notwithstanding non-compliance with the standard?

The provisions of Clause 4(1)(b)(i) do not include specific objectives. However the underlying objectives have been addressed previously in this SEPP 1. Each of the underlying objectives of the control will be achieved by the proposed development.

6.0 CONCLUSION

It is considered that the objection to the strict application of the development in this instance has been demonstrated to be unreasonable and unnecessary given that the development will provide for an adequate level of amenity, the proposed development is consistent with the underlying objectives of the standard and is generally consistent the desired future character for Leura. The proposed development will result in economic and social benefits to the community of Leura.

The proposed development satisfies the SEPP 1 tests established by the Land and Environment Court.

For the reasons set out above, the proposed departure from the development standard is well founded.

Compliance with the development standard is therefore unreasonable in the circumstances of the case, and refusal of the development application on this ground is not warranted.

We trust this information will assist Council in finalising the assessment of the DA.

Should you have any queries or require clarification on any matters please do not hesitate to contact Aidan Murphy on 8885 1170 or the undersigned on 0488 221082.

Yours sincerely

THE PLANNING GROUP NSW PTY LTD



Marian Higgins
(Principal Planner)



Attachment 12 – SEPP1 Objection – Building Envelope

PERTH
SYDNEY

12 November 2009

Blue Mountain City Council
Administration Centre
2-6 Civic Place
KATOOMBA NSW 2780

ATTN: MR WILL LANGEVAD



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RE: DEVELOPMENT APPLICATION NO. X/821/2009 DEVELOPMENT
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LEURA MALL AND VARIOUS OTHER COUNCIL OWNED PARCELS – SEPP 1
OBJECTION TO BUILDING ENVELOPE

Dear Mr Langevad,

1.0 INTRODUCTION

To further assist with the consideration of the proposed development and the variation sought under the provision of Clause 3(1)(b) of Schedule 1 under the Blue Mountains Local Environmental Plan 2005 the following is a formal objection under the provisions of State Environmental Planning Policy No. 1 – Development Standard (SEPP 1 Objection):

This objection under State Environmental Planning Policy No. 1 – Development Standards (SEPP 1) has been prepared in relation to a proposed development involving a retail development at 152-160 Leura Mall, Leura, and associated parcels of land pursuant to the provisions of Clause 3(1)(b) of Schedule 1 of the Blue Mountains Local Environmental Plan 2005 (BLEP 2005). This SEPP 1 objection relates to a non-compliance with BLEP 2005 in regard to building envelope.

1.1 The Provisions of SEPP 1

SEPP 1 – Development Standards is a State Policy mechanism available to applicants to seek variation of development standards contained within an environmental planning instrument.

Clause 3 of the Policy details the Aims and Objectives of the Policy and provides as follows:

3 Aims, objectives etc

This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act.

The relevant objects of Clause 5 of the *Environmental Planning and Assessment Act, 1979* are:

5 Objects

The objects of this Act are:

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SYDNEY OFFICE

Suite 304, 21 Berry Street
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PO Box 1612
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Telephone +61 2 9925 0444
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artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

(ii) the promotion and co-ordination of the orderly and economic use and development of land,

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Clause 6 of SEPP 1 incorporates the mechanism for the making of a SEPP 1 objection and provides as follows:

6 Making of applications

Where development could, but for any development standard, be carried out under the Act (either with or without the necessity for consent under the Act being obtained therefore) the person intending to carry out that development may make a development application in respect of that development, supported by a written objection that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case, and specifying the grounds of that objection.

The SEPP 1 objection is made in accordance with the provisions of Clause 6. Clause 7 of SEPP 1 provides the discretion and power to the Consent Authority to support a SEPP 1 objection and grant development consent and provides:

7 Consent may be granted

Where the consent authority is satisfied that the objection is well founded and is also of the opinion that granting of consent to that development application is consistent with the aims of this Policy as set out in clause 3, it may, with the concurrence of the Director, grant consent to that development application notwithstanding the development standard the subject of the objection referred to in clause 6.

1.2 Circular B1 from the Department of Planning

In accordance with the notification given under Clause 12 of Circular B1 from the Department of Planning, the consent authority may assume the Directors concurrence to an objection pursuant to the provisions of SEPP 1 in these particular circumstances.

2.0 IS THE PLANNING CONTROL IN QUESTION A DEVELOPMENT STANDARD?

2.1 Environmental Planning Instrument

The Environmental Planning Instrument to which this objection relates is the Blue Mountain LEP 2005.

2.2 Development Standard to be Varied

The development standard to which this objection relates is Clause 3(1)(b) of Schedule 1 under the Blue Mountains LEP 2005, which contains provisions relating to building envelopes in the Leura Precinct VTC-LE01—Leura Mall Precinct.

Clause 3(1)(b) sets a building envelope for development in the Leura Precinct VTC-LE01—Leura Mall Precinct, as follows:



...

3 Building envelope

(1) Building height

- (a) Buildings shall not exceed a maximum building height of 12 metres.
- (b) External walls fronting a public place shall be contained within a building envelope projected at 30 degrees from a height of 7.5 metres above any boundary or boundaries to that public place.

...

The definitions contained within the Blue Mountains LEP 2005 includes building height as follows:

building height means the distance measured in metres vertically from the highest point of the roof to the finished ground level immediately below that point.

Based on this definition the design of the building complies with the maximum building height permitted.

The definitions as contained within the Blue Mountains LEP 2005 do not specifically include building envelope. As such, the building envelope has been taken to require a "splay" at 30 degrees at a height above 7.5m to every boundary which if breached a SEPP 1 objection would be required to enable Council to consider the proposed development.

The design of the proposed development includes a zero setback for all walls to the boundaries of the site. The design includes a setback at the rear elevation to the lift overrun however this setback encroaches the 30 degree splay above a height of 7.5m at the boundary. The amended design is such that the lift shaft while having been lowered in height by 1m, results in an angle of approximately 46 degrees above a height of 7.5m at the eastern boundary. No setback in relation to the southern boundary is proposed and therefore the development also breaches the 30 degree splay at this point. As such, the proposed development breaches the building envelope in relation to the lift shaft from the eastern and southern boundaries, and does not comply with the provisions of Clause 3(1)(b) of the Blue Mountains LEP 2005.

The provisions of SEPP 1 are applicable to development standards prescribed under and Environmental Planning Instrument pursuant to the *Environmental Planning and Assessment Act, 1979*.

2.3 Definition of Development Standards

"Development Standards" has the following definition under Section 4(1) of the *Environmental Planning and Assessment Act (EP&A Act)*:

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
- (b) the proportion or percentage of the area of a site which a building or work may occupy,



- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,
- (d) the cubic content or floor space of a building,
- (e) the intensity or density of the use of any land, building or work,
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,
- (h) the volume, nature and type of traffic generated by the development,
- (i) road patterns,
- (j) drainage,
- (k) the carrying out of earthworks,
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,
- (m) the provision of services, facilities and amenities demanded by development,
- (n) the emission of pollution and means for its prevention or control or mitigation, and
- (o) such other matters as may be prescribed.

This SEPP 1 objection relates to a departure from the numerical standard prescribed under Clause 3(1)(b) of Schedule 1 of the BLEP 2005. It is considered that Clause 3(1)(b) of Schedule 1 of the BLEP 2005 is a development standard and not a 'prohibition' in respect of development.

3.0 WHAT IS THE UNDERLYING OBJECT OR PURPOSE OF THE STANDARD?

There are no stated objectives to Clause 3(1)(b), and therefore it is considered that the underlying objectives of the standard include:

- (a) to protect public and private views, and
- (b) to minimise the visual impact of buildings when viewed from adjoining properties, and
- (c) to ensure buildings resulting from new development are compatible with existing buildings in terms of height and roof form, and
- (d) to minimise the effects of bulk and scale of buildings arising from new development in existing urban heritage areas.

4.0 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD CONSISTENT WITH THE AIMS OF THE POLICY, AND IN PARTICULAR DOES COMPLIANCE WITH THE DEVELOPMENT STANDARD TEND TO HINDER THE ATTAINMENT OF THE OBJECTS SPECIFIED IN SECTION 5(A)(I) AND (II) OF THE EP & A ACT?

4.1 Compliance with the Development Standard

The proposed development is consistent with those objectives:

- the design of the proposed development protects public and private views;

- the visual impact of the proposed development is minimised, given it includes a basement car parking level to minimise its extent above ground and the location of the breach is remote from adjoining properties and buildings;
- the proposed development is compatible with existing buildings in the vicinity with respect to height and number of storeys; and
- the design of the proposed development has been specifically to minimise the effects of bulk and scale and protect the heritage of the locality.

Therefore, it is requested that the building envelope pursuant to Clause 3(1)(b) to the Blue Mountains LEP 2005, be varied to permit the proposed development. It is acknowledged that the proposed development seeks a variation to the numerical breach of the building envelope applying to the site. Notwithstanding the numerical breach, it is considered that the proposal satisfies the underlying objectives of the control for the following reasons:

4.2 Justification for Proposed Variations

Clause 3(1)(b) of Schedule 1 of the Blue Mountains LEP 2005 does not include any stated objectives to the development standard.

It would not be orderly or economic development to lower the lift shaft further as this would not enable the entry point to the building to be readily identifiable as a landmark for way-finding from within the car parking area, and given the lack of adverse impact of the proposed development, especially from its south-eastern corner, which is the area of non-compliance.

The design at the south-eastern corner will not cause the building to be inconsistent or incompatible with other buildings in its vicinity in terms of height, bulk, scale or visual impact.

5.0 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

Strict application of the standard is considered to be unreasonable and unnecessary in the current circumstance for the following reasons:

- The portion of the building where the breach occurs is minor;
- The portion of the building where the breach occurs does not affect adjoining properties as it is on the portion of the building which is farthest from nearby buildings at the south-east corner;
- The portion where the breach occurs does not affect views from other properties;
- The design of the proposed development is such as to minimise the effects of bulk and scale;
- The proposed development is consistent in building height and number of storeys of a number of buildings in the immediate locality, when viewed from all frontages;
- The location of breach assists in providing persons using the council at-grade parking area with a readily identifiable position in which to traverse (way-finding) to access the entry of the proposed development;
- The proposed development has been amended to seek greater compliance with the building envelope control as it applies to the eastern boundary; and
- The breach of the control is not considered to restrict the future development potential of adjoining properties.

For these reasons it is considered that strict application of this standard is unreasonable and unnecessary in this circumstance.

6.0 IS THE OBJECTION WELL FOUNDED?

It is further noted that the NSW Land and Environment Court has expanded the considerations of SEPP 1 established by Lloyd J, in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89, who posed five questions to be addressed in SEPP 1 objections, as follows:

- 1 Is the planning control in question a development standard?
- 2 What is the underlying object or purpose of the standard?
- 3 Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP & A Act?
- 4
 - (a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?
 - (b) Is a development which complies with the development standard unreasonable or unnecessary?
- 5 Is the objection well founded?

These have been addressed above previously in this SEPP 1 objection.

In the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston rephrased the test with a new test as follows:

1. The applicant must satisfy the consent authority that "the objection is well founded" and compliance with the development standard is unreasonable and unnecessary in the circumstances of the case;
2. The consent authority must be of the opinion that granting consent to the development application would be consistent with the policy's aim of providing flexibility in the application of planning controls where strict compliance with those controls would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act 1979; and
3. It is also important to consider:
 - (a) whether non-compliance with the development standard raises any matter of significance for State or regional planning; and
 - (b) the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

Preston CJ then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the



standard and hence compliance with the standard is unnecessary and unreasonable;

5. the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

These questions are addressed below:

QUESTION 1 *Is the objection well founded?*

For the reasons set out in the following questions 2A, 2B and 3, the proposed departure from the building envelope is well founded.

It is considered that the objection is well founded as the stated objective of the control can be achieved despite non-compliance with the standards. This is discussed in detail below. As such, this SEPP 1 is consistent with the first method to demonstrate that the SEPP 1 is well founded as established by Preston CJ above.

QUESTION 2(A) *Is the granting of consistent with the policy's aim of providing flexibility in the application of the planning control where strict compliance with the control would be unreasonable and unnecessary?*

The aims and objectives of SEPP 1 will not be hindered by this proposal. It is noted that Clause 3 provides for flexibility in the application of a planning control where it can be demonstrated that strict compliance is unreasonable and unnecessary. Clause 3 states:

3 *Aims, objectives etc*

This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act.

Compliance with the development standard is unreasonable and unnecessary as:

- The cause of non-compliance with the development standard is as a result of providing for a way-finding mechanism and landmark at the south-east corner of the development, which does not adversely impact on the amenity of adjoining properties.
- The matters raised in Section 5 of this SEPP 1 establish the reasons why compliance is unreasonable and unnecessary

A development which complies with the development standard is unreasonable and unnecessary as in the circumstances of this case, and in particular its location, it would be uneconomic to comply as, the proponent has undertaken a number of public domain improvements, provided for a public benefit in the reconfiguration of a public car parking and additional parking on-site, sought to provide for appropriate streetscapes/road reserves for pedestrian friendly usage, and therefore the project would not proceed.

QUESTION 2(B) *Or hinder the attainment of the objects in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act 1979?*



Section 5(a)(i) and (ii) of the *Environmental Planning and Assessment Act 1979* provides:

The objects of this Act are:

- (a) *to encourage:*
 - (i) *the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,*
 - (ii) *the promotion and co-ordination of the orderly and economic use and development of land,*

Compliance with the development standard of building envelope would hinder attainment of the EP&A Act's object to promote orderly and economic use and development of the Land.

QUESTION 3 *are the objectives of the standard achieved notwithstanding non-compliance with the standard?*

The provisions of Clause 3(1)(b) do not include specific objectives. However the underlying objectives have been addressed previously in this SEPP 1. Each of the underlying objectives of the control will be achieved by the proposed development.

6.0 CONCLUSION

It is considered that the objection to the strict application of the development in this instance has been demonstrated to be unreasonable and unnecessary given that the development will provide for an adequate level of amenity, the proposed development is consistent with the underlying objectives of the standard and the desired future strategic vision for Leura. The proposed development will result in economic and social benefits to the community of Leura.

The proposed development satisfies the SEPP 1 tests established by the Land and Environment Court.

For the reasons set out above, the proposed departure from the development standard is well founded.

Compliance with the development standard is therefore unreasonable in the circumstances of the case, and refusal of the development application on this ground is not warranted.

We trust this information will assist Council in finalising the assessment of the DA.

Should you have any queries or require clarification on any matters please do not hesitate to contact Aidan Murphy on 8885 1170 or the undersigned on 0488 221082.

Yours sincerely

THE PLANNING GROUP NSW PTY LTD



Marian Higgins
(Principal Planner)

