

'Without Prejudice'  
SEPP 1 OBJECTION TO COMPLIANCE WITH  
BUILDING HEIGHT PLANE

156 – 158 PACIFIC HWY,  
NORTH SYDNEY

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Prepared by:



LJB Urban Planning Pty Limited

## 1.0 INTRODUCTION

- 1.1 This State Environmental Planning Policy No.1 - Development Standards (SEPP 1) objection has been prepared by LJB Urban Planning Pty Ltd on behalf of Luxcon Developments Pty Ltd.
- 1.2 It is submitted to North Sydney Council in support of a Development Application for demolition of the existing building and erection of a 10 storey mixed use building containing 404m2 of retail floor space, 40 residential apartments and three levels of basement carparking for 31 vehicles.
- 1.3 This submission provides justification to the proposed variation to Clause 30 of North Sydney LEP 2001 which specifies a building height plane applies to Brown Lane.
- 1.4 The provisions of Clause 30 do not apply to the subject application, as the controls in the North Sydney Town Centre prevail to the extent of any in-consistency. This position has been confirmed by legal advice submitted with the DA.
- 1.5 Notwithstanding this, a without prejudice SEPP 1 objection is submitted.
- 1.6 This SEPP 1 Objection should be read in conjunction with the Statement of Environmental Effects prepared by LJB Urban Planning Pty Ltd dated July 2011 accompanying the DA.



## 2.0 SEPP 1 FRAMEWORK

- 2.1 SEPP 1 was introduced in 1980 to allow flexibility in the application of numeric development standards. It enables Councils to vary a statutory development standard where strict compliance with that standard is shown to be unreasonable or unnecessary.
- 2.2 Clause 8 of the Policy sets out other criteria for assessing SEPP 1 objections where it states:
- "the matters that shall be taken into consideration in deciding whether concurrence should be granted are –
- a. Whether non-compliance with the development application raises any matter of significance for State or regional environmental planning; and
  - b. the public benefit of maintaining the planning controls adopted by the environmental planning instrument."
- 2.3 The Department of Planning's 'Guidelines For the Use of State Environmental Planning Policy No. 1' states that:
- "As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some circumstances achieve the underlying purpose of the standard as much as one which complies. In many cases the variation will be numerically small and in other cases it may be numerically large, but nevertheless be consistent with the purpose of the standard....
- In deciding whether to consent to a development application the Council should test ... whether the proposed development is consistent with the State, regional or local planning objectives for the locality, and in particular the underlying objective of the standard.
- If the development is not only consistent with the underlying purpose of the standard, but also with the broader planning objectives of the locality, strict compliance with the standard would be unnecessary and unreasonable."
- 2.4 In considering whether to grant its discretion under SEPP 1 to vary a development standard, the consent authority must give consideration to whether compliance with the development standards would be unreasonable or unnecessary in the circumstances of the particular case.
- 2.5 The objective of the zoning and the purpose of the relevant development standard, are relevant considerations in determining whether compliance with that standard would be unreasonable or unnecessary.
- 2.6 A SEPP 1 objection will be well founded if it has shown that the underlying purpose of the development standard is satisfied by the proposed development.

### 3.0 IS THE PLANNING CONTROL A DEVELOPMENT STANDARD ?

3.1 The planning control is a development standard under North Sydney Local Environmental Plan 2001.

3.1 This submission objects to the following standard:

#### 30 Building Height Plane

- (2) A building must not be erected in the Mixed use zone, on land that adjoins or is adjacent to land within a residential or open space zone, if any part of the building will exceed a building height plane:
  - (c) Commencing 3.5 metres above existing ground level, and projected at an angle of 45 degrees, from the centre of any road which separates the land from land within the residential C zone.

### 4.0 WHAT IS THE UNDERLYING PURPOSE OF THE STANDARD

4.1 Subclause 30(1) provides the objectives for the Building Height Plane. The objectives are:

- a) ensure compatibility between development in the mixed use zone and adjoining residential or open space zones, and
- b) minimise adverse effects on land in adjoining residential or open space zones in relation to ventilation, views, building separation, solar access, light, and avoid over shadowing of windows, landscaped areas, courtyards, roof decks, balconies and the like.



## 5.0 PROPOSED VARIATION TO THE STANDARD

- 5.1 It is requested that North Sydney Council vary clause 30(2)(c) of North Sydney LEP 2001 to enable non-compliance with the Building Height Plane requirements.
- 5.2 However, as noted previously legal advice has been obtained by Wilshire Webb Staunton Beattie confirms the position that the building height plane has no application to the site.
- 5.3 The reason being that Clause 30 is inconsistent with Clause 28D of the LEP with the consequence, as mandated by Clause 28A, that Clause 28D must prevail to the point that Clause 30 has no application. In addition, the legal advice confirms that no SEPP 1 objection is required.
- 5.4 Notwithstanding this, a 'without prejudice' objection is submitted.

## 6.0 IS COMPLIANCE WITH THE STANDARD CONSISTENT WITH THE AIMS OF THE POLICY & DOES THE STANDARD TEND TO HINDER THE ATTAINMENT OF THE OBJECTS SPECIFIED IN s.5(a)(i) and (ii) of the EPA Act.

- 6.1 The aims and objectives of SEPP 1 are:

"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."
- 6.2 The objects of the act provide for the proper management and development of land to promote the social and economic welfare of the community. It promotes the orderly and economic use and development of land as compliance with the standard would make the development unviable.
- 6.3 The subject development provides a high quality development that enables the orderly and economic development of land in a manner that is appropriate in the North Sydney Town Centre.
- 6.4 The development will make a substantial contribution to the area, promoting the social and economic welfare of the community.
- 6.5 Furthermore, the scope of SEPP 1, has been considered in detail in recent court cases. In particular In *Wehbe v Pittwater Council* [2007] NSWLEC 827, Preston CJ identified matters to be considered in a SEPP 1 objection:

- 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 relevant 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.

6.6 Preston CJ then expressed the view that there are five 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 noncompliance 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.

6.7 The above 5 tests will be addressed below:

1. The objectives of the standard are achieved notwithstanding noncompliance with the standard;

6.8 The objectives of the Building Height Plane development standard are:

- a) ensure compatibility between development in the mixed use zone and adjoining residential or open space zones, and



- b) minimise adverse effects on land in adjoining residential or open space zones in relation to ventilation, views, building separation, solar access, light, and avoid over shadowing of windows, landscaped areas, courtyards, roof decks, balconies and the like.
- 6.9 The development proposes a mixed use development. Retail uses will address the highway frontage and residential uses above. The predominant residential use is highly compatible with the adjacent residential area.
- 6.10 The proposed development achieves an appropriate transition to the adjoining residential land to minimise adverse effects. This is achieved by the following:
- Three levels of the building have been removed and the height of the uppermost storey is approximately RL 106.53. This reduces the overall massing and scale of the building adjacent to the residential areas.
  - A 1.5m setback has been provided to the laneway.
  - The podium height at the lane has been reduced to RL 91.5.
  - A weighted setback in excess of 4 metres is provided above the podium. An additional 2.5 metre setback is proposed at levels 8 & 9.
  - The combination of the laneway setback and setback above the podium provides an appropriate transition to Doohat Ave.
- 6.11 Furthermore the development maintains appropriate levels of solar access and light to adjacent buildings in the residential zone due to its overall height and increasing setbacks.
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- 6.12 The underlying objectives and purposes of the BHP control remain relevant to the proposed development. The proposed development is consistent with the objectives of the BHP control.
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
- 6.13 The proposed development is consistent with the aims and objectives of SEPP 1 to the extent that compliance with the FSR control would hinder compliance with the objects of the Act.
- 6.14 The objects of the act provide for the proper management and development of land to promote the social and economic welfare of the community. It promotes the orderly and economic use and development of land as compliance with the standard would make the development unviable.

- 6.15 The subject development provides a high quality development that enables the orderly and economic development of land in a manner that is appropriate in the North Sydney Town Centre. The development will make a substantial contribution to the area, promoting the social and economic welfare of the community. The site provides an opportunity for a high quality mixed use development consistent with the desired future character of the North Sydney Town Centre.
- 6.16 The new apartments will offer excellent amenity for future residents and the design embodies energy efficient measures and affords excellent views. This application represents an appropriate form of development that will improve the streetscape and be an asset to North Sydney.
- 6.17 In the circumstances of this development, the underlying objectives would be thwarted if compliance was required.
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.
- 6.18 The BHP development standard has not been abandoned or destroyed, however there are multiple examples of similar circumstances where the variation to the BHP control has been approved. Specifically, Council approved a variation to the BHP control for a previous development on part of this site.
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.
- 6.19 The site is zoned Mixed Use pursuant to North Sydney LEP 2001. The proposed development is permissible with development consent. The development is consistent with the objectives of the zone and therefore the land zoning is not considered unreasonable or inappropriate.



## 7.0 IS COMPLIANCE WITH THE STANDARD UNREASONABLE AND UNNECESSARY IN THE CIRCUMSTANCES?

7.1 In the circumstances of this development application, strict compliance with Clause 30 of North Sydney LEP is unreasonable and unnecessary for the following reasons:

### Compliance with objectives of BHP controls

7.1.1 As stated above, the objectives of the Building Height Plane development standard are:

- a) ensure compatibility between development in the mixed use zone and adjoining residential or open space zones, and
- b) minimise adverse effects on land in adjoining residential or open space zones in relation to ventilation, views, building separation, solar access, light, and avoid over shadowing of windows, landscaped areas, courtyards, roof decks, balconies and the like.

7.1.2 The development proposes a mixed use development. Retail uses will address the highway frontage and residential uses above. The predominant residential use is highly compatible with the adjacent residential area.

7.1.3 The proposed development achieves an appropriate transition to the adjoining residential land to minimise adverse effects. This is achieved by the following:

- Three levels of the building have been removed and the height of the uppermost storey is approximately RL 106.53. This reduces the overall massing and scale of the building adjacent to the residential areas.
- A 1.5m setback has been provided to the laneway.
- The podium height at the lane has been reduced to RL 91.5.
- A weighted setback in excess of 4 metres is provided above the podium. An additional 2.5 metre setback is proposed at levels 8 & 9.
- The combination of the laneway setback and setback above the podium provides an appropriate transition to Doohat Ave.

7.1.4 Furthermore the development maintains appropriate levels of solar access and light to adjacent buildings in the residential zone due to its overall height and increasing setbacks.



- 7.1.5 It is therefore considered that the development maintains compliance with the objectives of the Building Height plane control.

Is not contrary to any matters of State or Regional planning significance

- 7.1.6 The proposed variation to the development standard does not raise any matters of significance for state or regional planning. The variation is also not contrary to any state policy of ministerial directive.
- 7.2 Due to the reasons stated above, it is concluded that compliance with the standard is unreasonable and unnecessary in the circumstances.



## 8.0 CONCLUSION

8.1 It is concluded that the non-compliance with the Building Height Plane control contained in Clause 30 of North Sydney LEP 2001 is acceptable in the circumstances of this case for the following reasons:

- The non-compliance enables compliance with the objects and purpose of the Environmental Planning & Assessment Act 1979
- The non-compliance satisfies the 'five test' criteria established in *Wehbe v Pittwater Council* [2007] NSWLEC 827
- The development complies with the objectives of the Building Height Plane Control and provides an appropriate transition to the adjacent residential zone.
- The non-compliance is not contrary to any matter of state or regional planning significance.
- Compliance with the standard is considered unreasonable and unnecessary in the circumstances of this application.

