

ITEM NO: 16

SUBJECT: DEVELOPMENT APPLICATION NO. X/580/2005 FOR THE DEVELOPMENT OF A RETAIL PLANT NURSERY IN CONJUNCTION WITH THE FRUIT BARN DEVELOPMENT L 9 DP 656879, 731-733 GREAT WESTERN HIGHWAY, FAULCONBRIDGE.

FILE NO: X/580/2005

Recommendation:

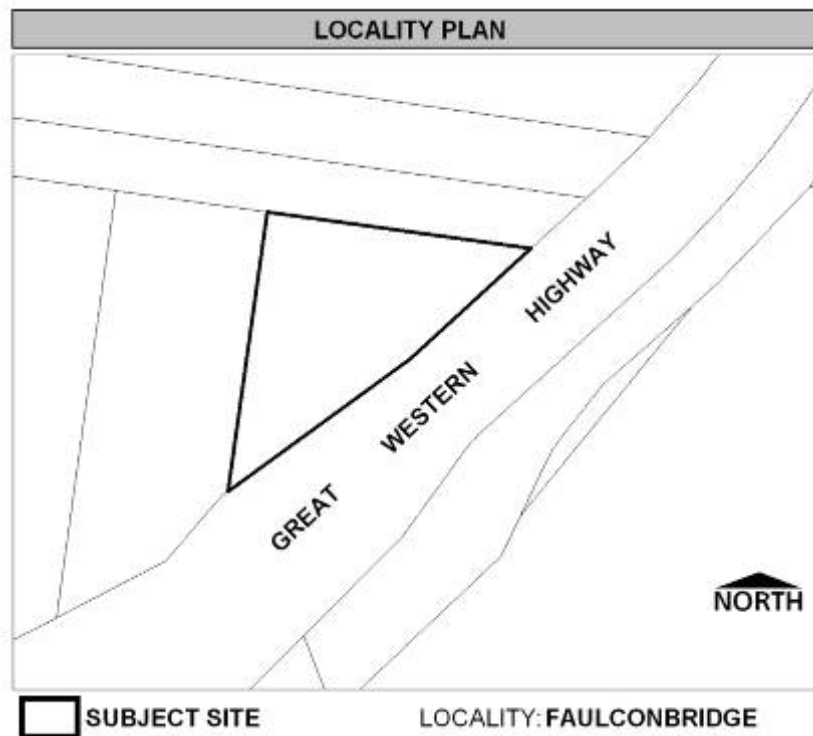
That the Development Application No. X/580/2005 for the development of a retail plant nursery in conjunction with the existing Fruit Barn on L 9 DP 656879, 731-733 Great Western Highway, Faulconbridge be determined pursuant to S.80 of the Environmental Planning and Assessment Act 1979 by refusing consent to the application for the reasons that:

1. *The retail plant nursery development does not comply with the Principal Development Area provisions of Blue Mountains LEP 1991 with respect to:*
 - a. *The setbacks from the front and side boundary of the site which are substantially less than the minimum of 15 metres as set out under Clause 30.3(c);*
 - b. *The area of the development exceeds the maximum Principal Development Area of 2000 square metres as set out in Clause 30.3(a);*
 - c. *The proposed screen planting is insufficient in depth and scale and is not indigenous vegetation as required by Clause 30.5(b).*
2. *The development does not comply with the objectives of the Bushland Conservation zone of Blue Mountains LEP 1991, in that it does not:*
 - a. *Avoid ribbon development, conserve and enhance the views and vistas of natural bushland obtained from the Great Western Highway (Clause 6.2(b));*
 - b. *ensure that the siting of the development and the landscaping proposed for the development are appropriate for and harmonise with bushland character of the area (Clause 6.2(c));*
 - c. *encourage landscaping and regeneration of natural bushland in areas of sparse canopy cover (Clause 6.2(f)).*
3. *The SEPP 1 objection is not well founded in that it has not demonstrated that strict compliance with the standards is unreasonable and unnecessary.*
4. *The proposed display of plants and related retail plant nursery goods, in front of the building and forward of the alignment of the existing building, is prohibited by Clause 10.10(b)(i) LEP 1991.*
5. *The intensification, enlargement or expansion of the existing use by the incorporation of additional retail activity on the site cannot be supported because it relies upon the use of the Fruit Barn and associated site facilities for purposes such as access, parking, loading and unloading, which facilities are currently inadequate for the approved retail activity because they have not been installed and operated in accordance with the development consent applying to the existing use, or some alternative acceptable arrangement.*

6. *The site ingress and egress, car parking, loading and unloading and pedestrian management facilities are inadequate and unsafe.*
7. *Part of the current car parking and access arrangements are located within the Great Western Highway road reserve which is contrary to the requirements of the Better Living DCP.*
8. *The proposed additional retail activity is an overdevelopment of the site, the extent, siting and design of which is inappropriate and will promote ribbon development along the Great Western Highway and will not enhance the visual quality of this major corridor.*
9. *The applicant's arguments, that the need for improved private economic returns should outweigh any perceived inadequacy in relation to planning outcomes, are not agreed, particularly as it relates to the enhancement of the visual quality of the Great Western Highway and the safety of the community.*

Report by Group Manager, Environmental and Customer Services:

Reason for report	Called up by Councillors. This application is now before the Land and Environment Court on appeal against the deemed refusal and there is a need for the Council direction.
Applicant	Innovation Planning Australia (Formerly Ian Maher & Assocs)
Owner	Mr A Todarello and Mrs M T Todarello
Application lodged	07-Jun-2005
Property address	731-733 Great Western Highway, FAULCONBRIDGE NSW 2776



Site context and description

The subject site is located on the northern side of the Great Western Highway approximately two and a half kilometres west of St Georges Crescent where some of the commercial activity of Falconbridge is located. The highway at the frontage of the site is four lanes. There is a U turn bay on the highway nearby to the south west of the site. National Park and bushland characterises the land fronting the highway to the west as far as the village of Woodford.

Adjoining the subject site is a small cluster of development comprised of the following:

- A 2 storey brick dwelling is located on a separate allotment immediately south west of the subject site, apparently used in conjunction with the subject site as indicated by the configuration of fencing between the allotments.
- A dwelling adjoins the site immediately to the north east.
- A short section of bushland fronts the highway for approximately 120m before another commercial site.

The locality is otherwise characterised by the railway corridor on the south eastern side, partially screened by remnant bushland and landscaping, with National Park and bushland reserves beyond.

The site has an area of 6183m² and a frontage to the Highway of approximately 150m. The south western most portion of the site has been fenced with chain wire and is operating as an

unauthorised retail outlet for pots and landscape materials. The whole of this fenced portion of the site was originally the subject of this application (1200m² in area). In August 2007 the application was amended to identify a lesser area for the retail plant nursery (850m² in area), although the larger area continues to be used for the pot and landscape retail and display. The application does not indicate when this current unlawful use will cease.

The site contains a fruit barn and associated hard stand in front and beside that building. The hardstand is used for vehicular and pedestrian access, car parking, display of plants and other goods for sale, and related storage areas. The car parking and driveway, foot paving and loading/unloading areas are not defined and operate in an unstructured way with vehicles and pedestrians moving through parked vehicles to circulate within and through the site.

There are several ingress/ egress points which are unformed. The hardstand in front of the building extends into the Highway corridor and the grassed area beyond is often used for car parking. The Great Western Highway road reserve has been appropriated by the Fruit Barn development up to a depth of approximately 8-10m inclusive of a narrow landscaping strip that was originally proposed to improve the presentation of the site.

The car parking is not line marked, therefore the number of spaces provided are difficult to estimate but a parking survey for the applicant states that a peak demand on Saturday mornings of 31 cars has been recorded. From inspection of the site it is most likely that that survey would have included the cars parked within the Great Western Highway road reserve. Stacked parking is often a feature of the arrangements on the site.

The traffic and parking report concludes that the development is operating in an acceptable way in terms of driveway sight distance traffic generation, on site manoeuvring and car parking provision.

A review of the plans and current approval for the development indicates that onsite parking for 35 cars is required and can be achieved on the site, but currently part of the area approved as car parking is fenced off and is used for the display of goods related to the unlawful pot and landscaping supplies retail.

A transmission line and easement for electricity provision (construction and maintenance of transmission lines) exists on the site. The storage and display of pots extends across and beyond the area of site affected by the easement. A letter from

the electricity authority in whose favour the easement operates, advised in 1986 that the easement could be used for car parking and landscape purposes provided that a number of conditions were observed, including that access was available at all times to personnel of the Electricity Commission and that trees and shrubs may be planted in the easement provided that they grow a maximum of 4m in height. No recent correspondence on this issue has been provided by the applicant in support of the application.

Background

The site has an extensive development history of approvals, non compliance, refusal and amendments since its inception in 1965. The present and current consents for the site are B78/1054 and Development application 3569 granted on the 19 June 1985. The following summarises this development history:

- 1965** Application for the conduct of a roadside stall (to sell the produce described in the application) approved by the Council meeting of 13.10.65. Roadside stalls were permissible where the produce grown on the land is sold from the stall.
- 1970-1975** Application received for an existing shade house for storage and sale of plants. Application refused on the 23.4.70 and 18.3.75. Use continued.
- 1977** Fruit House roadside stall destroyed by fire. Rebuilding of the stall granted approval on the 18.4.78.
- 1983** Application seeking a 24% increase in floor area, legalising sale of plants. Application approved by the Council on 29.8.83 (DAs 3106(i) and 3110(ii)) subject to conditions about car parking, non external display/storage, establishment of landscaping.
- 1984** Further application (3569) for extension to the building including cool room, increasing floor space by 83%, when limit under the Act/Regulations to expansion of existing use was 10%.
- 1985** Application approved by council under SEPP 1 and against objections of Dept of Urban and Regional Planning on 19.6.85. (Approval No. 3569) This remains the relevant consent for the current development other than some changes under the building approval to approved configuration of the parking spaces and landscaping, and the further consent relating to the retention of the illegal fill, issued in 1992.(173/92)

- 1991** In November 1991 the Council investigated illegal filling of the area to the rear of the site.
- 1992** Application (173/92) lodged for illegal fill – approved 29.7.92 subject to revegetation of the area.
- 1996** Application lodged for the erection of a large shed; applicant advised of outstanding conditions with regards to approvals Nos. 3569 and 173/92. On 16 December application was refused. Various compliance actions by the Council between 1996 – 2000.
- 2000** Application lodged on 21 January 2000 for a new storage area to the rear of the existing shed, reconfiguration of access and car parking. This application was approved on the 1 June 2000. This consent subsequently lapsed. The RTA required work to improve safety of the access arrangements and a design was approved by the RTA which shows, amongst other things, deceleration and merging lanes and depicts all of the car parking and driveway access confined to the site, consistent with this and the previous 1985 consent, No 3569.
- 2004** Notice of order issued 25 June 2004 for illegal use of the site for sale of pots, fertilizers etc – meeting was held advising that a DA be lodged to assess the proposal.
- 2005** DA lodged 7 June 2005 (X/580/2005) for ‘Expansion of Existing use to include sale of pots and landscape supplies’- DA claimed that both existing use rights status and permissible with consent status applied to the proposal- something which was not clarified by the applicants until mid 2007.
- 2005** Penalty Infringement Notice issued on the 24 June 2005. Court appearance 21 September 2005 as PIN was issued following the lodgement of the present DA.
- 2006** Jan 2006 a draft report and recommendation for refusal prepared for the DA X/580/2005 for expansion of existing use- not endorsed because of concerns that existing use arguments were not clearly addressed.
- 2006** Meetings with applicant and owner to discuss and clarify proposal and existing use rights versus permissibility arguments and to review potential for alternative proposal to improve the quality of the outcome.
- 2007** March 2007 and June 2007 council staff did not support proposed alternative schemes for the site

and in August 2007 amended application submitted.

2007

Council responded to a complaint regarding storage of goods in the driveway and car parking areas by directing that the materials be removed and stored appropriately.

Amended Proposal

The development application, as reflected in the amendment made on 21 August 2007, seeks approval for a retail plant nursery of approximately 850m² in the south western portion of the site. This area is less than the total area currently being used for the unauthorised sale of pots and plants. (The survey plan by John N. Brown Lenton & Co P/L shows weldmesh fence enclosing the area currently used for the pot and plant retail and which extends to the gates shown at the south western frontage of building).

The area of 850m² is generally that area shown as 'Retail pots and landscape supplies' on the plan titled 'Existing Site Plan' by Adrian Winton Architects, dated Feb 2006. That title is incorrect. The area used for the retail sale of pots and landscape supplies covers a much larger area extending to the east. The existing area utilised for display of pots, landscaping supplies and some plants appears to be of the order of 1200m², the area which was nominated in the DA as originally submitted.

The current proposal states that products for sale will primarily be planter pots, but will also include plants, potting mix and fertiliser and that products that are currently displayed outside the nominated area will be displayed within the approved area only.

The retail plant nursery will be served by the facilities in the existing building, together with driveway and car parking that serves the fruit barn. The plans indicate that plants will continue to be displayed in front of the fruit barn. The car parking layout is not shown, other than to show, on the landscaping plan, an area within the Great Western Highway identified as 'Existing Parking area'.

The landscaping plan and the site plan are contradictory with respect to the strip of grassed land in the highway reserve that is currently used for car parking. On 10 October 2007, the consultants Innovation Planning, confirmed that it is the intent of the applicant /owner that this area remain as car parking, as shown on the landscaping plan, and not be converted to 'Landscaping' as shown on the site DA plans. The consultants state that the owner, Mr and Mrs Todarello, advise that the RTA has agreed to that area being used for car parking. No such agreement is known to the Council and would in any case be

contrary to the current development consent applying to the existing development and to the Council's role as landowner of the road reserve.

The Statement Of Environmental Effects indicates that no additional parking will be provided. The application relies upon the Traffic Report submitted by Traffic Solutions Pty Ltd, which concludes that the existing ingress and egress and car parking are satisfactory and that there is 'ample hardstand' to cater for the manoeuvring and unloading of a small rigid truck and parking of 31 cars.

The most recent plans continue to show plant display area in front of the Fruit Barn, suggesting that the display of plants inside the new retail plant nursery will be an addition to the existing display area.

The landscaping plan was amended by the addition of a 2 metre wide landscaping strip within the current pot retail area on the inside of the chain wire fence. Hedge plants of unspecified height are proposed, being 'Photinia Red Robin'.

A SEPP 1 objection was submitted with the amended application, which was lodged in late August 2007, objecting to the development standards specified under the Principal Development Area provisions, cl 30.3(a) - maximum total area and 30.3(c) – boundary setbacks. The SEPP 1 objection is addressed in detail in the body of the report but in brief, the basis for the objection is that the front landscaping strip will screen the development and no new buildings are introduced therefore bulk and scale is not affected. The objectives of the zone are said to be met because no bushland is to be cleared and landscaping of the retail plant nursery will screen the development.

The applicant contends that the proposal will reverse a decline in an existing business by diversifying which will assist in the continuation of a long term business of the Blue Mountains.

The application does not contain any substantial information that attempts to demonstrate how and where existing use rights apply to the site.

Plans are provided as Attachment (2) to this Report.

Notification

The proposal was notified by letter to affected property owners and was advertised in the Blue Mountains Gazette, with notification commencing on the 29th July 2005 and concluding on 13th July 2005. No submissions were received.

Issues The application has been assessed in accordance with the provisions of the Environmental Planning and Assessment Act 1979 (as amended), in particular the Section 79C Matters for Consideration. The following assessment issues are of relevance:

- 1) Statutory environmental planning instruments and DCP– review of compliance – LEP 1991, SREP 20, Better Living
- 2) Permissibility of the development
- 3) Relationship to existing use
- 4) Non compliance with LEP 1991 and an objection pursuant to State Environmental Planning Policy No 1 -Development Standards
- 5) Car parking and vehicular access/circulation
- 6) Social and Economic impact

1. STATUTORY INSTRUMENTS AND DEVELOPMENT CONTROL PLANS

Compliance Table: Local Environmental Plan 1991

Clause	Standard	Proposed	Compliance
Clause 3.1 and 3.2	<p>Primary objectives for the City & sandstone ridge</p> <ul style="list-style-type: none"> • Urban Containment • Economic development • Maintain Blue Mountains character, particularly from highway and railway 	<p>The proposal seeks to further expand a commercial use outside of the commercial centres of the Blue Mountains.</p> <p>The existing use and the proposal is visually prominent and of poor quality, has inadequate landscaping and is not in character with Blue Mountains.</p> <p>Economic enterprises should be sympathetic to the Blue Mountains character.</p>	No.
Clause. 6.2	<p>Objectives of Bushland Conservation zone: (see body of report for details)</p> <ul style="list-style-type: none"> - conserve the natural bushland character of the landscape. - avoid ribbon development, - enhance vistas 	<p>The proposal does not comply with the objectives of the zone. The proposal presents as an intensive commercial development that is visually intrusive. Most recent landscaping plans submitted by the applicant improve the potential for screening using a hedge but this is not consistent with bushland character nor is hedge in scale with transmission lines and site and highway expanse.</p> <p>High visibility of the business has been promoted, opportunities not taken to introduce some elements of planting consistent with desired bushland character, rather</p>	<p>No.</p> <p>See discussion of SEPP 1 objection</p>

	of natural bushland -encourage landscaping and regeneration of natural bushland.	commercialisation of the full lot frontage has been maximised.	
Clause. 9	Permissibility	The site is zoned Bushland Conservation. Retail plant nurseries are permissible with consent, shops, bulky goods retail are not permissible within the zone.	See separate discussion
Clause. 10.2(c)	Access – no additional access off a classified road	No additional access points are sought. The existing access ways are unformed, with multiple access points, from the GWH to the site in contravention of the current approval for the site. . The proposal was referred to the RTA which offered no objection on the basis that no additional access points were proposed and on the condition that that swept paths for larger vehicles must be adequate. (The previous approval by the RTA for development on this site in 2000 required the construction of acceleration and deceleration lanes.)	The existing and proposed arrangements are inadequate and do not conform with current consent.
Clause. 10.4(c)	Design and character Landscaping to be provided so as to reduce visual impact of development and to be provided by species characteristic of the locality.	The proposal is highly visible from the Great Western Highway, is unattractive and has very inadequate landscaping. The land to the rear of the development provides an alternative location for such development that is more in keeping with the desired character. Opportunities do exist to improve onsite landscaping both in respect to implementation of improvements to the existing car parking area, to comply with previous consents, and in respect of the proposed pot and plant retail area.	No.
Clause 10.9	Building site cover	The new development does not contain any buildings so building site cover does not apply	N/A
Clause 10.10	Storage, Sale, Display of Goods prohibited between road alignment and principal	The sale, display and storage of goods between the road alignment and the building is prohibited. The amended proposal inserts a narrow hedge along the highway frontage and argues that all	No.

	building, other than a roadside stall	goods displayed will now be screened. It is noted that the plans submitted as part of the application still show plant display in front of the main building.	
Clause 13	Advertising Signs are limited to one sign having area no greater than 0.7sqm	Advertising on this site is currently excessive and of poor quality. Any approval for this site would require substantial reduction and control of advertising. Advertising is not specifically addressed by the application but it can be anticipated that there will be demands to maintain a substantial advertising presence commensurate with the intensity and size of the development. Advertising in this location will further undermine attempts to improve the visual quality of the development.	N/A to current DA
Clause 30	Principal Development Area- -max 2000m ² -min setbacks 15m -indigenous planting to screen the site	<p>The Notional Development Area for the site is also 6183m². The existing developed area is of the order of 5300m². Making allowance for exclusion of rear grassed area as bushfire hazard reduction as per cl 30.2(b), the existing Principal Development Area (PDA) (not including the balance of the unauthorised pot sale area) is approximately 3200m². The additional area of PDA attributable to new use is approximately 800m², taking total PDA to approximately 4000m². The development will therefore further exceed the PDA to a significant extent (exceeds standard by 100% as opposed to current exceedence of 60%).</p> <p>Amended landscaping plan provides minimal front boundary setback of approximately 2 metres, planted with a hedge of photinia, with a narrow strip of principally low growing shrubs, in the highway reserve against the fence. At the far western corner a triangle of slightly greater width accommodates 3 additional shrubs to 3m in height. No boundary setbacks are proposed to the side boundaries other than the existing narrow planting strip on northern side boundary of approx 3m wide for a distance of 20m.</p>	No. See separate discussion

Sydney Regional Environmental Plan No. 20: Hawkesbury Nepean River

The subject site is within the Grose River sub catchment. The proposed works are unlikely to have a significant detrimental impact on the water quality within the subcatchment. However it is noted that the use of the site for the storage of pots prevents revegetation of the site which would improve stormwater flows.

Development Control Plan – Better Living

The proposal is considered to be inconsistent with the following parts of the Better Living DCP:

C2.2 Landscaping

The DCP requires that landscape character is to be complemented, indigenous vegetation to be given priority. The objectives of the Bushland Conservation zone and the related PDA requirements in the LEP establish that it is the bushland character which is to be enhanced in this location.

The latest landscaping plan proposes:

- Along the frontage of the pot and plant retail area, the photinia hedge and a mixture of low growing and medium shrubs, in a narrow strip some 2-3m wide in total, including approximately 0.6m on the road reserve for the Great Western Highway.
- A strip of low growing plants separating the area used for car parking within the Great Western Highway road reserve, from the balance of the Great Western Highway road reserve.

This scheme does not comply with the DCP and, as noted in the table above, it also does not comply with the LEP.

Opportunities to improve the way in which the site presents in the context of the Highway corridor have not been identified or incorporated by this proposal. There is no canopy planting anywhere within the frontage of the site and indigenous species are not prominent.

The southwest section of the site outside the area affected by the transmission easement, provides an opportunity for canopy planting of indigenous trees which would enhance the bushland character of the area and provide planting more in scale with the large expanse of the site, the highway and the electricity pylon.

E 4.9 Vehicular access and parking

The DCP details a number of requirements in relation to car parking and access, including:

- All car parking to be provided onsite, at rates in accordance with Table 4 in Section E.4.9.
- Car parking is not to be located in the front setback unless screened by dense planting.
- Car parking is to be constructed and designed so as to comply with AS 2890.1 unless otherwise specified.
- On main roads, driveways are to have a maximum width of 4 metres and there should only be one access point unless otherwise proven.

These requirements were generally applied to the development via the existing consent (approval No. 3569) but the required work has not been installed and/or maintained. The existing arrangements do not meet the required standards and are unsafe.

As originally lodged the current development application stated that a total of 31 spaces would be required under the DCP, being the amount generated by the existing Fruit Barn approved floorspace and the additional retail plant nursery required under the Better Living DCP. With the reduced area of retail plant nursery, and assuming that the other retail activity and display area is confined within the building, as per the approvals, the amended application identifies a car parking requirement of 28 spaces under the DCP.

The application does not deal with use of the site by coaches. Coaches have been observed at the site from time to time and the plans approved in 2000 contained designated coach parking.

See discussion under item 5.

2. PERMISSIBILITY

The proposal seeks to legitimise development on a new part of the site, a part which was not included in previous applications and consents, granted for what is now prohibited development, being the Fruit Barn ('shop').

The DA has not provided a clear description of those areas of the site where existing uses have lawfully been established.

During the early assessment of this application concerns were expressed as to whether the proposed development was a 'retail plant nursery' or a 'shop'. The former is permissible with consent. Doubt arose as to the appropriateness of that characterisation because the original application was not clear whether the retail sale of plants was a feature of the proposal. The term "retail plant nursery" is defined in the Dictionary to LEP 1991 as follows:

"retail plant nursery means a building or place used for either the propagation or sale by retail, or sale by retail, of plants, whether or not landscape supplies (including earth products) and other landscape and horticultural products are also sold."

Following its amendment, the application states that the sale of planter pots is the principal item, but that plants will also be sold. The proportion of the new retail activity comprised of the retail sale of plants as described in the application, would not be sufficient to characterise the new retail development as the permissible use of *retail plant nursery*. On the several occasions that the site has been inspected, there have been plants displayed in the area currently containing pots, in addition to the plants displayed illegally in front of the Fruit Barn building. It may be the case that the applicant can increase the retail sale of plants as a proportion of activity so as to properly address the permissibility issue. Any grant of consent would be accompanied by enforcement of the current consent and conditions would require the removal of the unauthorised plant display in front of the fruit barn and the dedication of that area where plants are currently illegally displayed as formal car parking, pedestrian access and landscaped area in accordance with approved plans.

If the proposal cannot be properly characterised as a '*retail plant nursery*' then the proposal is one that needs to be assessed in accordance with the existing use provisions of the Act.

3. RELATIONSHIP TO EXISTING USE

The relevant consents for the existing development were issued in the early to mid 1980's and were accompanied by stamped plans that permitted some extension of the building to include a cool room, coverage of plant sales display area and delivery dock. S106(b) Environmental Planning and Assessment Act 1979 relevantly defines an existing use as the use of a building, work or land:

- i). for which development consent was granted before commencement of a provision of an environmental planning instrument having the effect of prohibiting that use, and
- ii). that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse.

There is no dispute between the Council and the owners about the fact that the site has continued to operate for purposes which include the purposes for which the Council granted consent. However, in order to agree that existing use rights apply to current operation the Council must agree that the use has 'been carried out in accordance with the terms of the consent and to such an extent as to ensure that development consent would not lapse.'

It has previously been agreed by the Council that existing use rights apply to use of part of the site for a fruit barn and retail sales of plants housed within the building. Dispute does arise in relation to the way in which that consent has been implemented over the years and the way in which the site continues to operate. The major concerns relate to:

- the failure of the owners to complete the development and operate the site with respect to the car parking, landscaping and access in accordance with the development consent;
- the use of the area within the building that was originally approved for plant sales, as a further extension of the fruit and vegetable shop, effectively further intensifying the 'shop' component beyond that approved
- the display of plants (and other items at various times) in front of the building in the area approved as part of the car park, effectively displacing the car parking into the Great Western Highway at busy times;
- the display of goods for sale across other areas of the site that were approved for car parking, landscaping and access purposes, or which are part of the Great Western Highway;
- the display and sale of goods not included in the original consents;
- the construction of driveway/hardstand in the highway corridor;
- the extensive displays of illegal signs.

Those matters have been the subject of ongoing actions by the Council to seek compliance. The lodgement of this DA is a response by the applicant to the ongoing action by the Council to secure compliance with the development consents issued in relation to this site.

It has been agreed that the Fruit Barn has existing use rights as set out in consent (No 3569). It is not agreed that the parking, access, retail display and landscaping areas as proposed in the current development application, are consistent with the approved plans, which confer existing use rights upon the Fruit Barn. The continuing appropriation of areas of site originally approved for the car parking, access and landscaping, for the display of goods for retail and for advertising signs, represents a continuing unauthorised intensification and extension of the approved use, which the applicant now seeks to legitimise by gaining approval for the development as it currently operates.

The new application should reflect the operational development consent unless approval is actively sought to amend that approved layout. Even as amended, the DA fails to either demonstrate that existing use applies to the layout now proposed or, alternatively, to identify those elements of the original consent that the application seeks to vary. The application is silent in this regard, and in effect seeks to simply displace earlier requirements with this new and deficient proposal, particularly as it applies to access and car parking and the utilisation of the highway corridor as part of the development site.

Whilst the application proposes the addition of a new permissible use on the site, it also represents an intensification of an existing use (in so much as an existing use is assumed to apply given the non compliance with the development consent), in that it relies on the existing

car parking and related access arrangements. As the car parking, access and landscaping arrangements are not properly installed and operated, the intensification of the use of these inadequate facilities is not appropriate.

Alternatively, as discussed in the preceding item on 'Permissibility', if the proposal is not one that can be properly characterised as a '*retail plant nursery*', then it is one of the types of retail uses that are prohibited under LEP 1991. The proposal would then require the consent of the Council for the purpose of an enlargement, expansion or intensification of an existing use in accordance with clause 42 of the *Environmental Planning and Assessment Regulation 2000*. In that circumstance, the development standards contained in LEP 1991 cannot have the effect of prohibiting the development. Whilst the non compliance with the development standards are not in themselves a bar to the grant of consent, the merits of the proposal including the impacts arising from that non compliance, are proper considerations for the Council and in this instance, as described elsewhere in the report, those impacts are such that refusal of the application is recommended. In brief, the key adverse impacts arising from the enlargement and expansion of the existing use arising from the proposal as described in this application include:

- the further commercialisation of this site in the Bushland Conservation zone, is contrary to the plan and zone objectives which are designed to promote urban containment, avoid ribbon development, protect and enhance the visual quality of the main transport corridor and protect and enhance the bushland character of the corridor;
- the prominence of the existing use is exacerbated by the proposed expansion, and the way that it is located on the site, so as to commit the full or near full frontage of the site to retail activity;
- the industrial character and poor visual quality of the site is promoted, rather than improved by this development;
- the access, parking, manoeuvring and landscaping areas on the site as it currently operates, are not consistent with the current consent and are unsafe and inadequate for the purpose of the approved existing use and for an expansion of that existing use.

It is considered that in these circumstances, an enlargement or expansion of the existing use to more than double the current approved area of retail activity cannot be recommended for approval.

4. NON COMPLIANCE WITH LEP 1991 – OBJECTION PURSUANT TO STATE ENVIRONMENTAL PLANNING POLICY NO 1- DEVELOPMENT STANDARDS

The existing development is inconsistent with the aims and provisions of LEP 1991. To the extent that it has been lawfully established, it has existing use rights.

The table identifies that the development is non-compliant with LEP 1991 with respect to the LEP objectives (cl 3), the zone objectives (cl 6.2), design and character (cl 10.4) storage and display of goods (cl 10.10) and the principal development area size, configuration and landscaping/screening (Cl 30).

The non-compliance with the Principal Development Area (PDA) provisions requires the variation of those provisions if the application is to be supported. The applicant has submitted an objection pursuant to State Planning Environmental Policy No 1- Development Standards.(SEPP 1 objection).

State Planning Policy No 1- Development Standards

In order to grant consent on the basis of an objection lodged by the applicant pursuant to SEPP 1, the Council must be satisfied that that objection is well founded and that the granting of consent would be consistent with the aims of the SEPP 1 as set out in Clause 3.

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 a 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.

Decisions in the courts have established certain tests and questions, the application of which provides a consent authority with a valid basis for determining whether or not an objection to the strict compliance with a planning control pursuant to SEPP 1, should be upheld. (*Hooker Corporation Pty Ltd v Hornsby Shire the Council NSWLEC 2 June 1986, unreported; Winten Property Group v North Sydney the Council NSWLEC 46*)

In brief the approach requires the consideration of the following:

- Whether the planning control which is sought to be varied, is a ‘development standard’ as defined by the *Environmental Planning and Assessment Act 1979* (‘the Act’).
- In order to be satisfied that the applicant’s SEPP 1 objection is well founded, the objection must demonstrate by reference to the underlying purpose of the development standard, that it is unreasonable or unnecessary to comply with the standard in the circumstances of the case. It is not sufficient for the applicant merely to point to an absence of environmental harm in order to found that objection.
- The Council must also consider whether strict compliance with a development standard would tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the Act. Those objects are:

5(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,*

The relevant development standards, which this application seeks to vary, are part of an integrated framework of the planning controls which provide the context for determining the underlying purpose of the relevant development standards. LEP 1991 also provides the basis for interpreting how the objects of the Act (referenced as a basis for assessing SEPP 1 objections), are given expression at the local government and community level.

Relevant Planning Framework in the Blue Mountains

Before proceeding to describe and evaluate the applicant’s SEPP 1 objection, the planning framework for the Blue Mountains, as it relates to the questions before the Council, will be outlined.

Blue Mountains LEP 1991 is one of two parent environmental planning instruments applying to the City. LEP 1991 predominantly applies to the non urban and urban fringe areas of the City and it was preceded by a comprehensive environmental planning study. It is within that context that the LEP specifies objectives for the City in general and for the Bushland Conservation zone in particular.

The objectives for the City as a whole and the additional objectives for the Blue Mountains Ridge are contained in clauses 3.1 and 3.2 respectively, of LEP 1991. Of particular relevance to this application are the following objectives:

“3.1(a) Maintain the unique character of the City

To identify and protect the Blue Mountains’ natural and cultural heritage, and the distinctive character and amenity of local communities;to recognize and the importance of the Blue Mountains National Park as a setting for the City.”

“3.1(b) Urban Containment

To concentrate and contain the spread of urban development.”

“3.1(f) Economic Development and Employment

To encourage tourism and other economic enterprises and the creation of employment opportunities which are sympathetic to the Blue Mountains’ character, and promote long term sustainability in the use of resources”.

“3.2(a) To maintain and enhance the nature bushland buffer zones between towns.

.....

3.2(h) to maintain the character of the Mountains when viewed from the Great Western Highway and Great Western Railway line and reduce advertising signs on these routes.”

The objectives of the Bushland Conservation zone are consistent with and flow from those City wide objectives and they are central to the evaluation of the SEPP 1 objection. The BC zone objectives are listed in full as follows:

Bushland Conservation objectives Clause 6.2:

- a. To conserve the natural bushland character of the landscape surrounding the existing urban areas of the city and minimise the visual impact of development on the landscape, particularly when viewed from Blue Mountains National Park.*
- b. To protect natural bushland buffers between towns, to avoid ribbon development and to conserve and enhance the views and vistas of natural bushland obtained from the Great Western Highway.*
- c. To ensure that the form and siting of buildings, colours, landscaping and building materials are appropriate for and harmonise with bushland character of the areas.*
- d. To provide only for development that utilises and retains natural bushland on the site as an important feature of the development.*
- e. To ensure that development in bushfire prone areas is carried out so that effective bushfire management can be implemented within the property boundaries with appropriate environmental controls.*
- f. To encourage landscaping and regeneration of natural bushland in areas of sparse canopy cover.*

It is notable that the protection and enhancement of the natural bushland and the visual character of the non urban areas of the City, including in particular the Highway corridor, are consistent themes within most of the objectives. The relevance and importance of these objectives has been further emphasised by the recent City Strategy '*Towards a Sustainable Blue Mountains*'. Other levels of government have also responded to the unique setting for the City, with the listing of the surrounding National Parks on the register of World Heritage sites and the RTA management and design strategies directed specifically at protecting and enhancing the character of Blue Mountains as part of the upgrade of the Great Western Highway.

LEP 1991 purposefully gives the planning objectives strong weight. Clause 9.3 provides that the Council shall not grant consent to development unless the development complies with the objectives of the plan and the objectives of the zone. The Council has deliberately imposed a strong test in LEP 1991, seeking compliance with objectives, rather than the more common test that development must be 'consistent with' or 'not inconsistent' with objectives.

The land use table and the special provisions of LEP 1991 are designed to deliver those objectives. The Bushland Conservation zone is comprised of relatively large lots, predominantly residential in character but also containing a range of non residential uses that are not permitted in the other more residential zones, retail plant nurseries being one such use.

Most retail and more intensive related commercial development is not permitted within LEP 1991, consistent with the predominantly non urban areas governed by the instrument and the urban containment objectives of that instrument.

Nearly all of the LEP 1991 provisions called up in the compliance table in this report are directed at protecting or enhancing character, promoting urban containment and providing restricted development opportunities that are consistent with those outcomes. Those provisions deliberately and purposefully apply to non residential developments. The restrictions apply to limit the nature, extent, design and siting of development to that which enables and encourages planning outcomes consistent with the planning objectives. The Principal Development Area requirements set out in Clause 30 are one such key provision. Those provisions are directed in particular to limiting the extent of all aspects of development (other than certain exempted items), not simply the extent of buildings, thereby delivering opportunities for retention and enhancement of bushland character and ensuring that non residential development is limited in scale to that consistent with the non urban setting.

Applicant's Objection pursuant to State Planning Environmental Policy No 1-Development Standards.

The applicant's submission puts the arguments for their SEPP 1 objection in the following way.

1. Identifies the development standard/s to be varied as follows: The applicant's SEPP 1 objection identifies the following ways in which the development is non compliant with LEP 1991 development standards:

- a) Cl 30.3(a) prescribes a max area of Principal Development Area (PDA) of 2000m² for the site and the existing hardstand taken together with the Fruit Barn building has a total area of 2700m², 700m² over the prescribed maximum. The addition of the plant nursery will increase the area of PDA to 3550m², 1550m² greater than the prescribed maximum.

b) Cl 30.3(b) (sic, the correct sub clause reference is 30.3(c)) prescribes minimum boundary setbacks of 15m for the site. The existing hardstand area is already non compliant, as the driveways extend over the boundary of the site. The retail plant nursery will have a setback of 2m from the front boundary, containing landscaping, but no buildings or structures.

2. Identifies the underlying objective of the standard as follows: The applicant states that there is no objective for the standard in the LEP and cites several cases, before concluding that the objective of the standard is unclear. The judgement in *Gospel Trust v BMCC* is cited thus ‘...Obviously one of the underlying purposes for the development standard is to limit the development area.’ The submission then goes on to quote the planner for the BMCC stating that the object is also more particularly to limit non residential development to the maximum PDA area which at that time was 2500m² regardless of the how large a lot was. Because that upper limit was subsequently amended to 5000m² maximum PDA for lots having an area of minimum 2ha, the applicant’s submission states that the objective of the limit to PDA is unclear.

The submission does not attempt to identify or discuss the underlying objective with respect to the boundary setback requirement of 15m.

3. Explains how development will attain the objectives of the standard as follows: The submission states that it addresses this question, based upon an assumption that the underlying objective is to contain the development area to a size appropriate to residential development, and then concludes that as the development is not for residential purposes, the underlying objective is irrelevant. The submission then makes the following statements:

- No buildings are introduced so bulk and scale is not altered, the driveways and hardstand are unaltered in the existing development, the paving and display of goods in the plant nursery site are irrelevant to visual bulk and the perceived scale of the development. Storage of goods is not expected to reach a height greater than the existing fence.
- The Fruit Barn is of similar scale to a house, albeit with parking in front.
- The same logic applies to the setback requirements- i.e. no need to reduce scale and visible bulk as the development is not bulky and will be screened by landscaping.

4. Identifies non compliance with planning objectives for the locality as follows: The submission lists an abbreviated version of the objectives for the BC zone, noting that sub clauses b., d. and f. are not relevant as the site is already cleared and no bushland will be affected. The submission states that the visual amenity and bushland character of the site will be improved by the landscaping proposals and the limited vegetation is seen to be in keeping with the high bush fire hazard applying to the site.

5. Explains why strict compliance with the development standard is unnecessary and unreasonable and or would hinder the attainment of the objectives under s5(a)(i) and (ii) EPA Act 1979 in the following way:

- It is unreasonable to comply with the standards because the proposal is compatible with the size of residential development, it does not add to the visual bulk of the development. Much of the PDA is hardstand which does not contribute to visual bulk

of the development on the site. If the hardstand area was excluded from the PDA calculations, then the PDA would be reduced to 1400m², comprised of the Fruit Barn building of 600m² and the area of the retail nursery of 850m² would comply with the PDA maximum area requirement.

- It is in theory impossible to achieve the front setback requirement because the need for driveways to be located in that setback; and
- Without the additional business generated by the nursery, the Fruit Barn would become economically unviable to the owners, which in turn would be detrimental to the social and economic welfare of the village of Faulconbridge (reduced business expenditure, local employment and customer choice). Strict compliance would make it extremely difficult to use the land in an orderly and economic manner.

Evaluation by the Council of the Objection pursuant to State Planning Environmental Policy No 1- Development Standards

The introduction to this item sets out the key considerations for a consent authority when determining whether an objection to SEPP 1 should be supported.

The applicant's arguments will be assessed in light of those considerations.

- Whether the planning control which is sought to be varied, is a 'development standard' as defined by the *Environmental Planning and Assessment Act 1979* ('the Act').

It is agreed that the Principal Development Area (PDA) provisions sought to be varied by the applicant pursuant to SEPP 1 are development standards. However, the SEPP 1 objection fails to identify all of the relevant standards with which the development does not comply.

- The objection does not identify that the landscaping does not comply with cl 30.5(b), which requires the planting of indigenous vegetation which will achieve screening of the development from outside the lot.
- The 'Existing Site Plan' for the proposal shows goods displayed in front of the existing Fruit Barn building in the approximate location where plants are currently displayed for sale. The display and retail sale of plants from in the front of the building is not approved under the relevant consent and that arrangement therefore does not have existing use rights. The display of goods is prohibited by clause 10.10(b) between a road alignment and the principal building. The application also proposes the retail plant nursery set back only 2m from the front boundary. The existing building is setback a distance varying between 11 and 12 metres. The display of any goods in the retail plant nursery or which is not authorised under the existing use rights, is therefore, on its face, prohibited under clause 10.10(b)(i), particularly as the SEPP 1 objection does not address the requirement.

The SEPP 1 objection is also deficient in that it does not correctly identify the extent of the non compliance. The departure from the standard as described in the compliance table in relation to clause 30 is considered to be more correct. However the calculations prepared by both the applicant and the Council show that there is a significant increase in the extent to which the additional development on the site will exceed the development standard.

- Whether the objection has demonstrated by reference to the underlying purpose of the development standard, that it is unreasonable or unnecessary to comply with the standard in the circumstances of the case.

The SEPP 1 objection fails to demonstrate that compliance with the development standards is unreasonable or unnecessary because it fails to address the underlying objective of the PDA standards, which is to limit the area of a site that is able to be developed in order to promote compliance with the objectives of the zone.

A brief response to each of the applicant's principal arguments is as follows:

- The objection does not define and address the underlying objective correctly, by choosing to reject the underlying purpose correctly identified in Talbot's judgement for the *Gospel Trust*, in favour of assuming only that the underlying objective is to contain development area to a size appropriate to residential development, then arguing that as the subject development is not residential, the underlying objective is irrelevant and compliance unnecessary. This error leads to largely irrelevant argument with respect to the case put in the SEPP 1 Objection. The PDA standards apply purposefully to the BC zone and the variety of permissible uses therein.
- The objection does not identify nor address the underlying objective of the PDA and related standards to limit economic enterprises outside the urban areas and to ensure that those which do occur are sympathetic to the Blue Mountains character. The approval of this development application would see the full frontage of this site developed, so exacerbating the promoting ribbon development and the prominence of the existing non conforming use and generating a substantial further increase in retail activity, neither of which comply with the planning objectives for the City.
- The case for the SEPP 1 objection to the PDA maximum area and minimum setback standards focuses upon arguments that bulk and scale of the existing development will not alter, as no new buildings are introduced to the site and the paving and display of goods in the retail plant nursery is irrelevant to the perceived scale of the development. The Fruit Barn is said to be similar in scale to a house, albeit with parking in front. These arguments are invalid on a number of counts.
 - Inappropriate scale does not relate solely to buildings nor is it only created by the size of structures and spaces. The greater influence is about such factors as how those structures and spaces are perceived and factors that influence perception of scale include building form and detailing, arrangements within and to space, the relationship of vertical and horizontal proportions of buildings and their spaces and the relationship to the viewer.
 - In the case of the current application, the large open expanse of hardstand, surrounding the Fruit Barn building and the transmission pylon, present as an alienating large scale space, contrary to the objectives of the planning instrument. The approval of the balance of the site frontage as currently proposed will add to horizontal proportions and will do nothing to change the essentially industrial character of this site to one more consistent with, and evocative of, the bushland character sought by the planning objectives and the PDA standards.
 - The applicant's argument that the bulk and scale of the existing development will not alter as the result of this application is not a

justification for the SEPP 1 variation. The planning objectives require enhancement of the bushland character, not simply protection of character.

- The application fails to identify the need to provide for some planting of similarly large scale (both in mass and height) that will be more in proportion with the space and the form of the existing structures and so improve the visual quality of site. The instrument also requires that that planting be comprised of indigenous species so as to enhance the desired bushland character.
 - The applicant displays a lack of understanding the of PDA purpose by the argument in the submission that “If the hardstand area was excluded from the PDA calculations, then the PDA would be reduced to 1400m², comprised of the Fruit Barn building of 600m² and the area of the retail nursery of 850m² would comply with the PDA maximum area requirement.” The PDA aims to restrict and manage all elements of the building footprint, not simply the built elements.
- The Council must also consider whether strict compliance with a development standard would tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the Act. Those objects are:

5(a) to encourage:

- (iii) 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,*
- (iv) the promotion and co-ordination of the orderly and economic use and development of land,*

The introduction to this section of the report outlined the key elements of the planning framework put in place by the Council to ensure proper management in accordance with these objects of the Act.

The applicant argues that the development is not inconsistent with any planning objectives for the locality. That argument is invalid for the following reasons:

- the objection does not identify and address relevant aspects of the objectives such as:
 - concentrate and contain the spread of urban development
 - avoid ribbon development
 - enhance the views and vistas from the Great Western Highway
 - maintain and enhance the natural bushland buffer zones between towns
 - encourage economic enterprises that are sympathetic to the Blue Mountains character
 - encourage regeneration of natural bushland in areas of sparse canopy cover.
- The discussion towards the end of this report on Social and Economic Impact identifies the significance of the relevant objectives in the Blue Mountains context and the potential implications of undermining those objectives.
- The applicant has adopted an inappropriate test, the LEP calls for compliance with objectives not simply a lack of inconsistency with those objectives. Ultimately the test is whether compliance with the development standard

would tend to hinder the attainment of the relevant objects of the Act. This discussion has described how the current application actively undermines the outcomes sought by the planning instrument and by the planning objects that it serves. The applicant's arguments that private economic return should outweigh those planning outcomes is not justified.

In essence, Bushland Conservation zone aims to limit development so that it is subservient to the bushland setting and does not exceed the capability of Blue Mountains landscapes. Therefore there are strict limits on the extent of the total development footprint - not simply the building coverage, and an emphasis on maintaining substantial setbacks from all lot boundaries and the retention and promotion of bushland in those setbacks. The objectives of the standard apply to both residential and non residential development.

The SEPP 1 objection focuses inappropriately upon the fact that the visual impact of the development is acceptable because the existing building will not be extended and there will be a photinia hedge which will screen the nursery element. In no way does the application demonstrate that a site responsive design is proposed that seeks to incorporate such opportunities which do exist for more appropriate landscaped buffers consistent with the intent of PDA area limits and boundary setbacks and type of vegetation.

The landscaping proposed is inappropriate in composition and is too small in scale to provide an appropriate visual relationship with the highway corridor and the transmission lines. The fact that there are existing uses on the site which do not comply with PDA requirements, is not a justification to simply set aside the planning objectives for the locality and to not seek opportunities to improve the compliance of the development with the planning objectives as they relate to the new development the subject of this application.

Existing use rights do not justify the further erosion of the visual quality and the safety of this major road corridor by an extension of development across the full frontage of this site.

In conclusion, the SEPP 1 objection is not considered to be well founded in that it has not addressed the underlying objectives of the standards and has not demonstrated that compliance with those standards would tend to hinder the attainment of the relevant objects of the Act.

5. VEHICULAR TRAFFIC ACCESS AND PARKING:

This development relies upon the same car parking, access, loading and unloading as that which serves the existing Fruit Barn development.

The fruit barn was approved on the basis that 35 car parking spaces would be provided in an approved configuration. That configuration was finally approved as part of the Building Approval that followed the grant of consent No 3569. The hardstand surrounding the fruit barn has been constructed in a configuration approximating that depicted in the approved plans, except that it encroaches by some 4-5 metres into the Great Western Highway road

reserve. The current DA seeks to increase the amount of development activity that relies on these existing arrangements.

Parking and traffic survey: The application contains a traffic report. The plans submitted to the Council with the application do not identify the location of car parking areas on the site nor the areas where cars were parked at the time the site was surveyed. The landscaping plans do label part of the Great Western Highway as 'Existing Parking Area' for the development. Approximately 8-10 cars can be parked in that area so labelled, on the grass verge next to the driveway. Cars have been parked in this location on the several occasions that the site has been visited and that area in the Great Western Highway reserve would appear to be required in order to accommodate the 31 cars surveyed by the consultant when he identified peak Saturday demand.

The applicant and the traffic study contend that there is adequate hard stand area on site to accommodate 31 cars. However that statement is not helpful as:

- only part of the hardstand previously approved as car parking is used for that purpose. A large portion of the hardstand has been fenced off and incorporated into the area being used illegally for retail sale of landscape supplies and pots. Other parts of the existing hardstand area are currently used as display for landscaping supplies and plants. Less than one half of the hardstand area previously approved as car parking, is now available for car parking on a regular basis;
- that part of the existing hardstand constructed within the highway road reserve is not consistent with the plans previously approved by the Council, and should be removed as part of providing safe access to the site.

Under the current circumstances (and there is nothing in the proposal to indicate whether and how that would change) the site does not have adequate or safe car parking. Car parking is currently provided in the road reserve and within the front setback and is not, nor is it proposed to be, adequately screened from the street. The site does not comply with the Council's Better Living DCP requirements as noted in Item 1 of the evaluation.

The existing car parking and access arrangements are informal and unstructured. They spill onto the highway and utilise multiple, poorly formed access points. Car parking spaces are not line marked and sign posted as required. There are no clear entry and exit signs to the site and the driveways have not been upgraded to make the current development safe. Pedestrians are not provided with safe lines of travel through what can be a busy site. The loading and unloading area coincides with pedestrian and display area and is not clearly designated.

In summary, the site does not meet the standards for the previously approved level of development. The site is not suitable for the intensification of activity generated by the addition of further retail activity. Any proposal to grant consent to additional development on this site would need to be subject to a major upgrade of the existing car parking, access and landscaping arrangements to an acceptable level. The application is therefore recommended for refusal.

6. SOCIAL & ECONOMIC IMPACTS IN THE LOCALITY

Protecting and enhancing the character and quality of the experience gained when travelling on the Great Western Highway is a priority of Local and State Government in the Blue Mountains. This aim is nominated as a priority in the Council strategic plans, the local

environmental plans and State Government management and design plans for the Great Western Highway.

The tourism industry is a key driver of the local economy and tourism relies upon the quality of the Blue Mountains experience. The listing of Blue Mountains on the register of World Heritage sites reinforces the importance of protecting and enhancing the visual quality of the Great Western Highway.

The development described in the proposal, which is currently operating without authorisation, has an adverse impact on the visual quality of the Great Western Highway in this high visibility location set apart from the village of Faulconbridge. The development does not respond to the planning objectives applying to the site, which aim to enhance the corridor. Instead the development diminishes those opportunities. The ingress and egress points, onsite parking and pedestrian arrangements are inadequate and unsafe.

The further intensification of this commercial site, located outside of the established centres and in isolation on a major highway, undermines the objective of consolidating commercial development in accessible locations and protecting the safe function of the Highway corridor. The applicant argues that employment benefits and private economic returns outweigh these considerations. On balance, a minor expansion of an existing use in such a location, whilst not desirable in social and economic terms, is not considered to be determinative, provided that expansion is rendered safe and steps taken to enhance the visual presentation of the site.

Conclusion

Existing use rights apply to some aspects of the existing development and to the extent that this is the case, Division 10 (Existing Uses) of Part 4 of the Environmental Planning and Assessment Act is relevant.

The addition of the permissible use of 'retail plant nursery' requires consent as does the intensification of the existing use, whereby the retail plant nursery utilises the site infrastructure provided by the existing use.

Any application for additional development on the site should, at a minimum, ensure the proper implementation of the ongoing operational consent upon which it relies. This DA does not identify works that will occur to bring the existing development into conformity with the original consent, or seek to justify amendments or modifications to that consent as may be necessary to reflect current circumstances. Rather it seeks to regularise unauthorised work and the misappropriation of the highway corridor that has previously occurred in order to support an unauthorised expansion of the retail activities on the site.

The series of applications approved through the 1960's and 1980's, permitted the original road side stall to be developed into a very much larger fruit and vegetable shop than the Council first contemplated. The development also enjoys a consent to sell some plants. The consent under which the development operates provides for 35 car parking spaces, driveways, and related access ways, all contained on the middle and north eastern side of the site. This report details some of the ways in which the current operation of the site fails to comply with that original consent. The issue of non-compliance is relevant to the current application because the current DA relies upon the existing development and represents an intensification of that existing development. That intensification is not supported given the inadequacies in the existing arrangements.

The most recent development application is recommended for refusal. The application provides for more than a doubling of the existing approved retail area on the site. It will also result in almost the entire frontage of the site being utilised for retail purposes. The application seeks to regularise the illegal expansion of the existing site activities into the highway corridor. The application makes no concessions to the objectives of the instrument and zone, which in this location primarily seek to enhance the visual quality and bushland character of the highway corridor. It would be appropriate that at minimum, all of the site to the south west of the transmission easement be planted with indigenous vegetation including canopy trees. Such an approach would be consistent with the intent of the planning instrument for this zone and the history of the site's development. Such a response to the planning objectives could and should be expected as part of any case to develop this site, whether that be by expanding and intensifying existing use or by the addition of a new permissible use.

The limits placed upon the extent and siting of development by the Principal Development Area standards specified in LEP 1991 seek to secure these outcomes. The application to develop a retail plant nursery as a new permissible use on the site is subject to those development standards. In seeking to justify the SEPP 1 variation from the standards contained in the Principal Development Area provisions, the application does not identify the underlying objectives of those standards and does not propose a design response which could improve the way in which the site development (existing and proposed) delivers outcomes sought by the planning instrument. The SEPP 1 objection is therefore not well founded and does not support a decision by the Council to approve the development application for the retail plant nursery.

If no steps are taken by the applicant to substantially increase the proportion of the sale of plants that comprise the total of the new retail activity, then development cannot properly be characterised as a '*retail plant nursery*'. The proposal must then be considered by the Council as an application for the enlargement, expansion or intensification of the existing use. In that case, whilst the non compliance with the development standards are not in themselves a bar to the grant of consent, the impacts arising from that non compliance are proper considerations for the Council and in this instance, as described in the report, those impacts are such that refusal of the application is recommended.

An approval of the application in its current form would not provide for safe or appropriate supporting infrastructure for the whole of the existing development as it potentially undermines the effect of the current consent which requires that safe ingress, egress, car parking and pedestrian movement be provided on the site. Any proposal to support the development of further retail activities on this site should ensure that appropriate on site infrastructure is provided.

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Attachment 1 – Plans

