

# **Enclosure**

**(Reports to  
Council Meetings of 8 March 2005  
and 5 September 2006)**

**for meeting of  
18 September 2007**

**X03/0520**  
**‘The Braes’, 62-68 Grose Street**  
**Leura**

LAND USE MANAGEMENT

Ordinary Meeting, 8/3/05

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**ITEM NO:** 11

**SUBJECT:** SECTION 96 (2) APPLICATION TO MODIFY DEVELOPMENT CONSENT NO. X03/0520/A FOR THE REMOVAL TREES AND ADDITIONAL LANDSCAPING AT 'THE BRAES' LOTS 17, 18, 19, AND 34 DP 5936, LOT 13 AND 53 DP 4565, LOTS 14–18 DP 4303 AND LOT 1 DP 820338, NOS. 62–68 GROSE STREET, LEURA.

**FILE NO:** X03/0520

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**Recommendation:**

*That Development Application No. X03/0520/A for modification of consent for the removal of trees and additional landscaping at 'The Braes', Lot 34 DP 5936, Nos. 62–68 Grose Street, Leura be determined pursuant to Section 80 of the Environmental Planning and Assessment Act 1979 by the granting of consent subject to the amended conditions shown in Attachment 1 to this Report.*

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**Report by Acting Group Manager, Environmental and Customer Services:**

**Reason for report** Development Application No. X03/0520 was approved by Council on 3 October 2003.

In accordance with Council policy, an application seeking to modify a Development Consent that was determined by Council must also be reported to Council for consideration and determination.

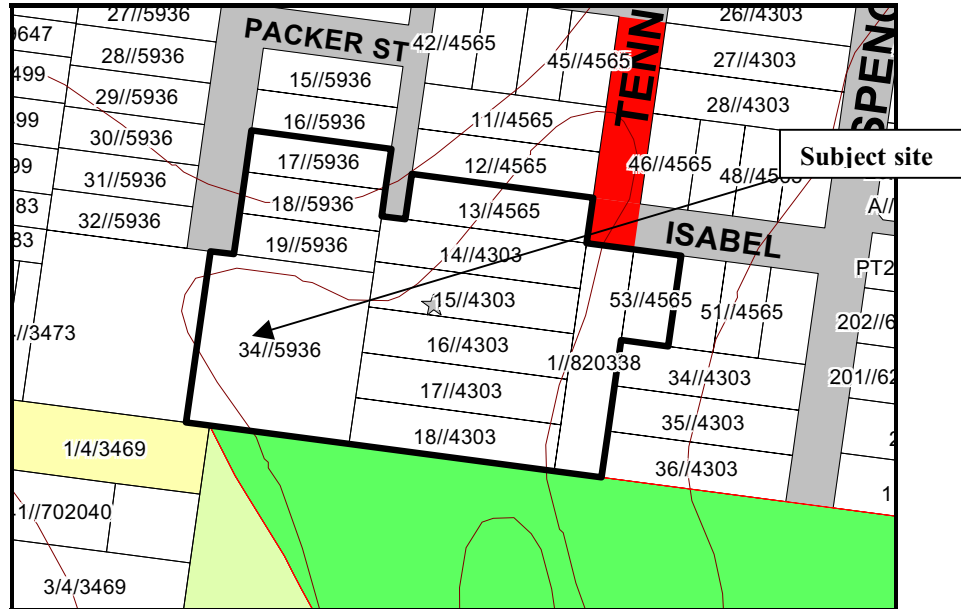
**Applicant/Owner** John V Egan Associates Pty Ltd

**Application lodged** 13 August 2004.

## LAND USE MANAGEMENT

## Item 11 - Ordinary Meeting, 8/3/05

**Property address** 'The Braes' Nos. 62–68 Grose Street, Leura.

**Site description**

The site is located on the eastern side of Grose Street, Leura. The property also has frontages to Isabel Street, Beattie Street and an unmade portion of Tennyson Avenue. The area affected by the proposed modification is adjacent to the site's western property boundary.

The site adjoins Leura Oval and the Blue Mountains National Park to the south, with residential development to the north, west and east. The site has a total area of approximately 21,810m<sup>2</sup> and contains an existing cottage, ancillary structures and gardens. The property is also traversed by two watercourses that converge toward the southern boundary.

**Background**

On 26 February 1996, Council issued approval to demolish the cottage on the property, however this consent subsequently lapsed.

On 23 June 1997, an application was approved for the selected removal or thinning out of a significant number of Radiata pines and other trees on the site. The approval was subsequently renewed on 4 August 1998 and again on 13 August 1999, however a significantly greater number of trees were removed from the south-western portion of the site than was approved. Therefore, on 23 May 2000, the owner was requested to cease further tree removal from the site until development consent was obtained from Council.

LAND USE MANAGEMENT

**Item 11 - Ordinary Meeting, 8/3/05**

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However, further unauthorised works occurred, including the construction of a culvert. Council subsequently issued Orders, which resulted in three (3) further Development Applications being lodged in 2003.

One of those applications was X03/0520, for the removal of 64 trees and additional landscaping works. Council granted consent to this work on 3 October 2003.

**Proposal**

The current proposal is to amend, under Section 96(2) of the *Environmental Planning and Assessment Act, 1979*, the additional landscaping works approved in consent X03/0520 by replacing the approved *Fraxinus rotundiflora ssp. Oxycarea 'Raywood'* (Claret Ash) trees on the western property boundary with *Cupressocyparis leylandii Naylor's Blue* (Leyland Cypress).

The proposed modification plan is provided as Attachment 2 to this Report.

**Development controls**

- Residential Bushland Conservation (Consolidation) zone under Local Environmental Plan 1991 (LEP 1991).
- Partial Residential 2(a1) zone (Lot 17, DP 5936) under Local Environmental Plan No. 4.
- Partial proposed 'Living—Bushland Conservation' zone (Lot 17, DP 5936) under Draft Local Environmental Plan 2002.
- Protected Area-Environmental Constraint Area under LEP 1991.
- Heritage item (LA 25) under LEP 1991.
- State Environmental Planning Policy No. 58 – Protecting Sydney's Water Supply.

**Notification**

The application was notified in the Blue Mountains Gazette, with written notification also sent to adjoining and nearby property owners, as well as to those who made a submission for the original application. The proposed modification was on exhibition between 1 December 2004 and 15 December 2004.

A total of six (6) submissions were received as a result of this notification process, all objecting to the proposal.

The main issues raised in the submissions are discussed in the body of this report. These issues are summarised as follows:

- Overshadowing the living area of the adjacent western dwelling.
- Increased fire hazard.
- Inappropriate alteration of breeze and wind passages.

**LAND USE MANAGEMENT**

**Item 11 - Ordinary Meeting, 8/3/05**

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- Alterations to creek and ground water flows.
- Fragmentation to views of the creek line and valley.
- Unsympathetic to existing landforms and adjoining bushland.
- Detracts from visual amenity of the area.
- Inhibits growth of native gardens due to overshadowing.
- Creates a visually impenetrable barrier of 20-30 metres in height.
- Provides an inappropriate interface with the natural environment, both physically and aesthetically.

**Issues**

Assessment issues—

1. Microclimate and amenity
2. Protection of the watercourse
3. Bushland character
4. Heritage
5. State Environmental Planning Policy No. 58

**Discussion of Issues**

The application has been assessed in accordance with the relevant provisions of the *Environmental Planning and Assessment Act, 1979* (the Act), in particular Section 96(2), Modification of Consents, and Section 79C, Matters for Consideration.

The proposed modification does not alter permissibility of the development under Local Environmental Plan 1991. The proposed change in species of trees planted along the western boundary comprises substantially the same development as that originally approved and can be assessed under Section 96(2) of the Act.

The potential environmental impacts from the proposed modification can be summarised as changed microclimate, decreased residential amenity, and degradation of the watercourse.

**Microclimate and Amenity**

A summary of the proposed Leyland Cypress compared to the approved Claret Ash has been outlined as follows:

Leyland Cypress (proposed):

- a conifer
- grows to an evergreen hedge
- provides denser shade
- reaches an approximate height of 10 metres at maturity

**LAND USE MANAGEMENT**

**Item 11 - Ordinary Meeting, 8/3/05**

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Claret Ash (approved):

- a deciduous species
- has scattered foliage
- provides less dense shade
- reaches an approximate height of 30 metres at maturity

It has been submitted that shadowing to the adjoining (western) property will increase substantially as a result of the Leyland Cypress plantings. Shadow diagrams submitted with an objection letter show that the proposed Leyland Cypress at full growth would cast a shadow over living areas of the adjoining (under construction) dwelling between 8am and 9am in mid-winter. However, this is assuming a height at full growth of 30 metres. The applicant has stated that the proposed species will reach a maximum height of 10 metres over a period of 30 to 40 years. This reduced height is a result of its hybrid nature and site conditions.

On the basis of the 10 metres maximum height, overshadowing will marginally affect the adjacent dwelling, which is located approximately 40 metres west of the proposed trees. The overshadowing will occur by 8am in mid winter but will be clear of the dwelling by 9am. This is not likely to cause a substantial increase in overshadowing of the neighbouring dwelling. The extent of overshadowing is therefore considered reasonable. It will be required as a condition of consent that the proposed trees are maintained at a maximum height of 10 metres.

Whilst shadowing from the Leyland Cypress will have an additional impact on the growth of vegetation directly under the trees, this impact is considered acceptable. The affected areas are primarily located within the subject site and will not adversely affect its identified heritage significance. The most critical zone of vegetation is located in the vicinity of the watercourse traversing the western boundary. The existing consent contains conditions designed to protect this vegetation and the watercourse. The conditions have been appropriately expanded to increase the buffer zone around the watercourse, which will ensure the proper maintenance of an effective riparian buffer and vegetation species.

It has also been submitted that the proposed plantings will block easterly breezes to the adjoining western dwelling. Whilst there will be some variation of wind patterns, it is not considered that this constitutes a significant adverse impact. The adjoining western property does not include original bushland rather is a formed garden with scattered native species and a 40 metres distance between boundary and the dwelling.

Whilst Leyland Cypresses are visually denser than the Claret Ash, they are unlikely to result in a substantial degradation of views from any surrounding public place. The subject trees are along the property's western boundary with views being to the south and south west. The proposed modification will most significantly impact on the views between the subject property and the adjoining western property.

Consideration has been given to whether wider spacing between trees is desirable, however, the trees tend to grow to fill the space they are given, and will form a hedge even if planted 3-5 metres apart.

**LAND USE MANAGEMENT**

**Item 11 - Ordinary Meeting, 8/3/05**

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Overall the impact on views and potential overshadowing is considered minor. The proposal generally complies with the landscape character and amenity provisions of Local Environmental Plan 1991 and is in keeping with the nature of the subject site.

**Protection of the Watercourse**

The watercourse traversing the western property boundary feeds directly into Gordon Falls, with a portion of the area affected by the proposal identified as a Protected Area – Environmental Constraint Area.

In accordance with clause 10.5(da) of Local Environmental Plan 1991, development ancillary to a dwelling is required to have no significant adverse environmental impact on any watercourse, with the proposed modification considered ancillary to a dwelling.

A sufficient riparian buffer of native vegetation has been proposed and will reduce the potential impact of the Leyland Cypress on stream temperature and ecology. In comparison to the Claret Ash, the proposed Leyland Cypress are unlikely to cause any additional alteration to creek and groundwater flow, particularly given the increased setbacks proposed from the watercourse. The existing consent contains a number of conditions designed to protect the watercourse, which will continue to apply to the site.

Council has referred the application to the Department of Infrastructure Planning and Natural Resources (DIPNR), who advise that there is no objection to the proposed modification provided that there is no reduction in the riparian zone to the watercourse.

Conditions of consent shall be included to ensure the maintenance of appropriate riparian zones.

**Bushland Character**

Regeneration of native bushland across the site is not appropriate due to its heritage significance. This is associated with the formal garden character and the use of exotic species at 'The Braes'. Neither Leyland Cypress nor Claret Ashes harmonise with the surrounding bushland, although both are considered in keeping with the historic character of the site.

The previously approved landscape plan allowed the planting of Leyland Cypress along the southern boundary, with the Blue Mountains National Park located directly to the south. The proposed modification will allow the further planting of Leyland Cypress along the western property boundary, which is set back from the National Park area and considered unlikely to have any significant additional impact.

**LAND USE MANAGEMENT**

**Item 11 - Ordinary Meeting, 8/3/05**

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**Heritage**

The site is listed as a heritage item under Local Environmental Plan 1991 (LA025 – The Braes). A Heritage Assessment was completed for the removal of trees and landscaping works (X03/0507) by Patricia Gosling, Heritage Architect (2003). It is concluded that the heritage significance of the property will not be adversely affected by the planting of Leyland Cypress along its western boundary. The proposed modification is wholly contained within an area of the garden that has little identified heritage significance.

The site is also adjacent to a number of other heritage items:

- LA060, Lone Pine Avenue, a war memorial located south of the site and listed under Draft Local Environmental Plan 2002;
- LA002, Lyrebird Dell, listed under Local Environmental Plan 1991;
- Heritage Conservation Area K007, Jamison Valley, listed under Local Environmental Plan 1991 and Local Environmental Plan No. 4.

The proposal is unlikely to impact on the significance of Lyrebird Dell or the Jamison Valley, due to its distance from these areas and the approved buffers associated with the protection of the watercourse.

Lone Pine Avenue is located immediately south of the proposed Leyland Cypress trees. Some objections have stated that the proposed plantings will subject trees in Lone Pine Avenue to increased bush fire risk, threatening the significance of this site. Since bush fire would most likely approach from the south or east, via Jamison Valley, it is unlikely that the proposed modification will significantly increase bush fire threat to this heritage item. However, it shall be included as a condition of consent that a three (3) metre buffer is maintained between the Leyland Cypress trees and the Lone Pine Avenue property.

**State Environmental Planning Policy No. 58.**

The site is located within the Water Supply Catchment Area under SEPP 58. The concurrence of the Sydney Catchment Authority is not required. The development will not increase the flow of stormwater from the site. The proposed modification is considered to have a neutral effect on water quality.

**Conclusion**

The application to change the approved Claret Ash planting along the western boundary to Leyland Cypress has been assessed against the relevant planning controls and considered supportable, subject to the modified conditions of consent included as Attachment 1 to this Report.

## LAND USE MANAGEMENT

**Item 11 - Ordinary Meeting, 8/3/05**

## Attachment 1 – Conditions of consent X03/0520, as amended

**Consent  
(Amended March 2005)**

1. Blue Mountains City Council issues its consent, subject to conditions stated hereunder, in accordance with Section 80A of the Environmental Planning & Assessment Act 1979. Substantial physical commencement of construction is required within 2 years from the date the consent is issued.

To confirm and clarify the terms of consent, the development shall be carried out in accordance with the plans prepared by Patricia Gosling Architecture drawing numbers 1, 2 3 and 4 dated April 2003 as amended in red, with the following additional amendment:

- Delete “Proposed West Boundary Trees: Claret Ash (17 off)”
- Insert “West Boundary Trees: Cupressocyparis leylandii Naylor’s Blue (Leyland Cypress)”

and accompanying supportive documentation, except as otherwise provided or modified by the conditions of this consent.

**Soil and Water  
Management**

2. All exposed earthworks and disturbed areas shall have suitable sediment control measures in place. Such measures shall be installed **prior** to the commencement of works to prevent soil erosion and the transport of sediment off the site during rainfall and runoff. The sediment control measures shall be continually monitored and maintained for the duration of work and for six months after completion. All disturbed areas shall be revegetated.

**Site management**

3. To safeguard the local amenity, reduce noise nuisance and to prevent environmental pollution during the excavation, felling, milling, chipping and grinding:
  - a. Works (including the delivery of materials to and from the property) shall be carried out Monday, Tuesday, Thursday and Friday between 8.30 am to 12 pm and 1 pm to 5 pm, with no operations to occur on any Wednesday, Saturday, Sunday or Public Holidays.

## LAND USE MANAGEMENT

**Item 11 - Ordinary Meeting, 8/3/05**

## Attachment 1 – Conditions of consent X03/0520, as amended

- b. Stockpiles of material shall be stored clear of any drainage path or easement, natural watercourse, footpath, kerb or road surface and shall have measures in place to prevent the movement of such material off site.
- 
- Prescribed plants** 4. No day lilies, white lilies or agapanthus species shall be used in the landscaping of the site.
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- Distance of planting to southern boundary (Amended March 2005)** 5. The Cupressocyparis x leylandii proposed for the southern boundary shall be planted no closer than three (3) metres to the southern boundary. The Leyland Cypress trees proposed for the western property boundary are to be set back from the southern property boundary by at least three (3) metres, to allow separation from Lone Pine Avenue.
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- Temporary access** 6. Temporary access to Lone Pine Avenue is permitted for the purpose of tree felling during tree felling operations approved by this application only.
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- Trees in Grose Street** 7. All Radiata Pine trees and dead trees in Grose Street adjacent to the subject site may also be removed.
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- Disposal of Vegetation** 8. Any vegetation or other material removed from the area of operations shall be disposed of to an appropriate stockpile where the debris cannot be swept away during a flood.
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- Designation of Riparian Zone** 9. A riparian zone as shown on the approved stamped plans should consist of local native plant species, shall be established and maintained along the edge of the watercourse for its entirety within the site (west-east stream).
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- Riparian buffer (Inserted March 2005)** 10. The Leyland Cypress trees along the western property boundary are to be set back from the watercourse by at least six (6) metres from the north bank and at least nine (9) metres from the south bank, to allow a riparian buffer to be established adjacent to the watercourse. The riparian buffer is to be established with native plant species local to the area, consistent with the species approved in the Part 3A Permit issued by the Department of Infrastructure Planning and Natural Resources on 8 March 2004.

## LAND USE MANAGEMENT

**Item 11 - Ordinary Meeting, 8/3/05**

## Attachment 1 – Conditions of consent X03/0520, as amended

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|--|----|--|
| <b>Exotic plant species not to be planted or placed within or near the riparian zone</b> | 11 | No exotic plant species, other than temporary sterile cover crops, are to be planted within the riparian zones on the site.  |
| <b>Use of mulching material</b>  | 12 | Any mulch material used for riparian zone rehabilitation must be free of weed seeds, viable vegetative parts or contaminants.  |
| <b>Landscaping (Inserted March 2005)</b>   | 13 | <p>Landscaping is to ensure that the development contributes to the character of the Blue Mountains and its environmental sustainability.</p> <ul style="list-style-type: none"> <li>• The <i>Cupressocyparis leylandii</i> Naylor's Blue (Leyland Cypress) located to the site's western boundary shall be maintained at a maximum height of 10m.</li> <li>• All plants and landscaping on the site are to be maintained at all times.</li> <li>• Any plants that die or are removed, must be replaced with plants of the same species and of a similar stage of growth.</li> </ul> |
| <b>88B Instrument (Inserted March 2005)</b>  | 14 | To ensure the maintenance of the approved heights, an instrument setting out a Restrictions on Use intended to be created pursuant to Section 88B of the Conveyancing Act 1919 is to be submitted in a form acceptable to Council indicating that the <i>Cupressocyparis leylandii</i> Naylor's Blue (Leyland Cypress) located to the sites western boundary shall be maintained at a maximum height of 10m.   |

Attachment 2—Modification Plan



**ITEM NO:** 9

**SUBJECT:** REVIEW OF DETERMINATION FOR THE MODIFICATION OF DEVELOPMENT CONSENT NO. X03/0520 FOR THE REMOVAL OF TREES AND LANDSCAPING AT 'THE BRAES', LOT 34 DP 5936 AND OTHERS, 62-68 GROSE STREET, LEURA.

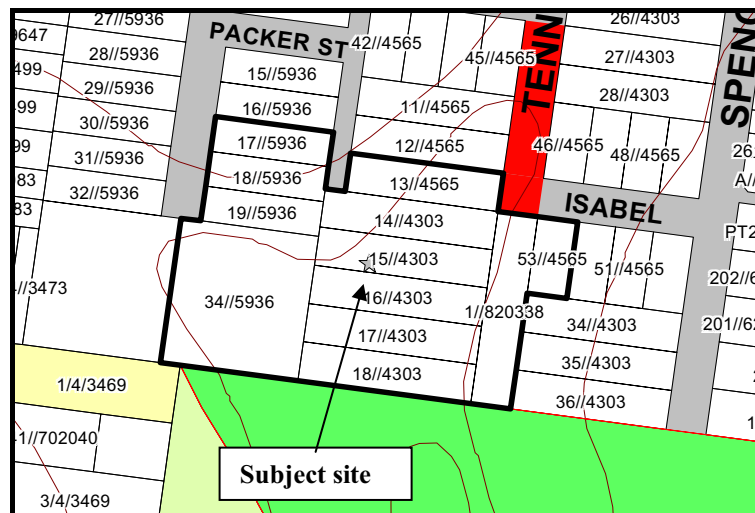
**FILE NO:** X03/0520

**Recommendation:**

*That pursuant to Section 82A (4A)(Review of Determination) of the Act, that the Council determine this application for modification of Development Consent No. X03/0520/A for the removal of trees and additional landscaping at 'The Braes', Lot 34 DP 5936 and others, 62-68 Grose Street, Leura by the granting of consent subject to the amended conditions included as Attachment 1 to this Report.*

**Report by Group Manager, Environmental and Customer Services:**

<b>Reason for report</b>	This review of determination is referred to the Council as the original application was refused by the Council.
<b>Applicant</b>	John V Egan Associates Pty Ltd
<b>Owner</b>	John V Egan Associates Pty Ltd
<b>Application lodged</b>	21 December 2005
<b>Property address</b>	The Braes, 62-68 Grose Street, LEURA



**Site description**

The site is located on the eastern side of Grose Street, Leura, with frontages to Grose Street, Isabel Street, Beattie Street and an unmade portion of Tennyson Avenue. The area affected by the proposed modification is adjacent to the site's western property boundary.

The site adjoins Leura Oval and the Blue Mountains National Park to the south, with residential development to the north, west and east. The site has a total area of approximately 21,810m<sup>2</sup> and contains an existing cottage, ancillary structures and gardens. The property is also traversed by two watercourses that converge toward the south eastern corner of the site.

**Background**

The Council approved Application X03/0520 for the removal of 64 trees and additional landscaping on the site on 3 October 2003. An application was made on 13 August 2004 to modify the consent by replacing the approved *Fraxinus rotundiflora* ssp. *Oxycarea* 'Raywood' (Claret Ash) trees, located along the western boundary of the site, with *Cupressocyparis x leylandii* Naylor's Blue (Naylor's Blue).

This proposed modification was reported to the Council meeting of 8 March 2005 with the recommendation that the application be supported. However, the Council resolved as follows:

*"That Development application X03/0520 for modification of the consent for the removal of trees and additional landscaping at The Braes Lot 34 DP 5936, No 62-68 Grose Street Leura:*

- 1. be refused on the grounds that the line of Leyland cypress along the boundary will adversely impact on the adjoining owner by blocking the access of the easterly breezes in summer and would cause overshadowing in winter and the Leyland Cypress trees are unsuitable for this site due to their excessive scale, and*
- 2. the unauthorised Leyland Cypress trees be removed and replaced with Claret Ash trees, in accordance with the Development Application X03/0520, approved by Council on 3 October 2003."*

(Minute No. 58, 8/3/2005).

A copy of 8 March 2005 Council Report is provided as an Enclosure to this Report.

The present application is for a review of the above determination in accordance with Section 82A of the Environmental Planning and Assessment Act 1979 (the Act).

The applicant has since complied with part of resolution 2 above, by the removal of the Leyland Cypress from the western boundary.

### Proposal

The proposal that is submitted for review, is to modify development consent X03/0520 by replacing the approved *Fraxinus rotundiflora ssp. Oxycarea 'Raywood'* (Claret Ash) trees, located along the western boundary of the site, with a cultivar of the Leyland Cypress, *Cupressocyparis x leylandii Naylor's Blue* (Naylor's Blue).

### Development controls

- Partially Residential Bushland Conservation (Consolidation) zone under Local Environmental Plan 1991 (LEP 1991).
- Partially 'Living—Bushland Conservation' zone (Lot 17, DP 5936) under Local Environmental Plan 2005.
- Protected Area-Environmental Constraint under LEP 1991.
- Heritage item (LA 25) under LEP 1991.
- State Environmental Planning Policy No. 58 – Protecting Sydney's Water Supply.

### Notification

The application was notified in the Blue Mountains Gazette, with written notification also sent to adjoining and nearby property owners. The material submitted for the review was on exhibition between 15 February 2006 and 1 March 2006.

A total of four (4) submissions were received as a result of this notification process, all objecting to the proposal.

The main issues raised in the submissions are discussed in the body of this report, and are summarised as follows:

- Protection of summer breezes to adjoining western property.
- Overshadowing of adjoining western property.
- Mature Leyland Cypress trees grown as a border are ugly.
- The planting will create an impenetrable barrier for fauna corridors.
- The planting will impede natural air-flow along the riparian zone of the creek.
- The planting will produce considerable morning shade.
- Leura has enough inappropriate conifer border plantings.
- The lack of ability to limit height controls.

## REVIEW OF DETERMINATION UNDER SECTION 82A OF THE ACT

### 1.0 ENVIRONMENTAL PLANNING AND ASSESSMENT ACT

The proposed review of determination must be considered in terms of the matters for consideration identified by Section 79C of the Act. That S79C assessment is contained in 8 March 2005 Council Report and remains the relevant in terms of this review.

### 2.0 SUPPORTING STATEMENT

The applicant has made a detailed statement with this application, as well as a further submission in response to objectors concerns.

The applicant's S82A application sets out to address the Council's reasons for refusal, namely that the landscaping amendments requested would be excessive in scale and would impact adversely on the adjoining property to the southwest by reason of overshadowing and blocking of easterly breezes.

The key elements of the applicant's case are that:

- Expert advice with respect to the likely growth habit of the trees in question, demonstrates that hybrid *Cupressocyparis x leylandii Naylor's Blue* (Naylor's Blue) will reach a height more of the order of 7-9metres in the conditions in the Blue Mountains, as opposed to the 20 to 30m argued by the objectors; and
- Shadow diagrams to demonstrate the impact of mature trees of a maximum height of 10m, on the property adjoining to the south west.

More specifically, the points made by the applicant's submission are:

- i. The site is a heritage item with much of its heritage significance arising from the formal landscape features and exotic plantings design by Paul Sorensen.
- ii. The resources committed in time, effort and money to protect and maintain 'The Braes' as a major heritage garden.
- iii. Extensive planting and construction work that is currently occurring on the adjoining western property is adversely impacting on the heritage setting of 'The Braes' and the proposed boundary planting will provide the necessary screening between the subject property and the adjoining property to the west.
- iv. The proposed hedge serves an important function of screening the vegetation from the westerly wind and prolonging the potential propagation and flowering time for plants in this heritage garden setting.
- v. The planting replaces dense plantings of Radiata Pines which had resulted in substantially greater overshadowing to the adjoining western property compared to the proposed replacement.
- vi. A report provided by the horticulturalist at The Braes, references comments from the horticulturalist with the Mt Tomah Botanic Gardens and the owner of Ross Conifers Nursery. This report indicates that, given the expected soil type and conditions of the site, the *Cupressocyparis x leylandii Naylor's Blue* (Naylor's Blue) is expected to reach an approximate height of 7-9 metres.
- vii. Shadow Diagrams submitted with the application, which showed overshadowing by the existing trees on the knoll of The Braes, recent planting of Eucalypts on the adjoining western property and adjacent to the boundary, and the proposed Naylor's Blue. The diagrams demonstrate that the mature shadows cast by the other two identified plantings will be greater than the mature shadow cast by the Naylor's Blue.

It should also be noted that, as indicated in 8 March 2005 Council Report, a Heritage Assessment by Patricia Gosling, Heritage Architect (2003) had concluded that the further planting of Naylor Blue along the western boundary would not affect the heritage significance of the site and this assessment is supported by advice from the Council's Heritage Adviser.

The applicant's submission included a petition of 43 pages and including 602 signatories, supporting the proposed border planting.

The applicant has also requested that a number of the conditions of consent recommended to apply in the report to the Council in March 2005, be amended. The response to this request is provided after the discussion on the merits of the proposal.

### **3.0 NOTIFICATION ISSUES**

#### **3.1 Protection of summer breezes to adjoining western property.**

This issue was raised in response to a statement by the applicant that prevailing winds through most the year are westerly, and therefore the proposed trees impact of the breezes available to the adjoining western property. However, the objector submitted a monthly wind frequency analysis of Katoomba (Murri Street). The analysis, as compiled by the Bureau of Meteorology, indicates that during the summer months the majority of summer winds come from the north east, east or south east. The objector concludes that the proposed planting at The Braes would therefore block the identified summer winds to the adjoining western property.

With respect to the potential impact of the planting on winds reaching the adjoining western property, the following is noted:

- The adjoining dwelling to the west of the subject site is located approximately 37m away from the adjoining boundary and the location of the proposed planting.
- The local topography and vegetation is complex, wind patterns at site level are highly variable and difficult to predict and the wind protection afforded by vegetative screens only applies over a relatively short distance.
- During the summer months (December, January and February) at 12 o'clock an average of 9% of wind comes from the north east and 12% from the east. At 3pm it is 15.6% and 17.6% respectively and at 6pm it is 14.3% and 23.6% respectively.
- The proposed trees are to be maintained at a height of 10 metres and are located on contours that range from approximately 940 metres at the site's north-west corner to approximately 932 metres at the centre of the western boundary. The adjoining western dwelling is approximately located on a contour of 938 metres.
- The location of the planting is unlikely to block the adjoining western dwelling from south-easterly winds and any impact on north-easterly winds reaching the adjoining dwelling is expected to be minor.

Therefore it is considered that the potential for detrimental impact on the winds reaching the adjoining dwelling is minor and should not constitute a reason for refusal.

**3.2 Overshadowing of adjoining western property.**

This issue was addressed in 8 March 2005 Council Report under Microclimate and Amenity, and was assessed using the shadow diagrams prepared by the owner of the adjoining western property. Those shadow diagrams were prepared on the basis of the boundary planting reaching 30m in height and indicated some overshadowing of the adjoining dwelling between 8am and 9am mid winter.

The applicant has now submitted shadow diagrams, based on the proposed 10 metre tree heights, that demonstrates that the impact of **existing trees on The Braes** and of **new planting on the adjoining western property**, will have a greater shadow impact than will the new boundary planting. Notwithstanding that the trees are unlikely to attain a height of greater than 10m, a condition is proposed to ensure that these plantings do not exceed 10m. The applicant's shadow diagrams are therefore considered to be an appropriate representation of the circumstances.

Therefore it is considered that the proposed planting will not cause overshadowing of the adjoining dwelling.

**3.3 Mature Leyland Cypress trees grown as a border are ugly.**

The proposed Naylor Blue and the approved Claret Ash s are considered in keeping with the historic character of the site, whilst the proposed Naylor Blue is also consistent with existing planting on site.

**3.4 The planting will create an impenetrable barrier for fauna corridors, particularly avian fauna.**

There is no basis for this objection.

**3.5 The planting will impede natural air-flow along the riparian zone of the creek.**

This issue is addressed in 8 March 2005 Council Report under Microclimate and Amenity, which refers to the critical zone of vegetation located in the vicinity of the watercourse. The proposed Naylor Blue will have an increased setback from the existing water course compared to the approved Claret Ash planting. (This setback being 6 metres from the northern bank and 9 metres from the southern bank.) It is also considered that the Claret Ash, due to its deciduous nature and leaf structure, is likely to have a greater adverse impact on the aquatic bio-structure of the watercourse.

In addition to the setback of the plants from the critical zone of the watercourse, it will be required as a condition of consent that local native plant species are to be established and maintained along the edge of the watercourse, across the entire site.

**3.6 Leura has enough inappropriate conifer border plantings.**

Irrespective of whether other inappropriate conifer planting exists in Leura generally, the proposed Naylor Blue is considered appropriate as the species is in keeping with the historic character of The Braes and consistent with existing planting on the site.

### 3.7 The lack of ability to limit height controls.

The height control will be included in the conditions of consent, it will also be included on the title of the property as a Public Positive Covenant under Section 88E of the Conveyancing Act 1919. A Public Positive Covenant includes obligations requiring the carrying out of development, within the meaning of the Environmental Planning and Assessment Act 1979, or can impose any term or condition with respect to the failure to perform any such obligation. The Council cannot ensure compliance with a condition of consent, however including it in the conditions of consent and providing a Public Positive Covenant on the site will allow the Council to take appropriate action in the instance of non-compliance with the requirements.

#### **Applicant's request for amendment to recommended conditions**

The applicant has also requested that the following conditions of consent that were recommended to apply in the report to the Council in March 2005, be amended:

- Condition 3 (Site Management), requires works to be limited to business hours on Monday, Tuesday, Thursday and Friday. The applicant requests that this condition be changed to allow work on Wednesday.

*Comment:* It is recommended that the condition be amended to allow work on Wednesdays.

- Condition 5 (Distance of planting to the southern boundary), which calls for the trees to be planted no closer than 3 metres to the southern boundary. The applicant has requested that this be amended to 2 metres.

*Comment:* This condition is based on the potential spread of the tree at the trunk and the desire to keep a separation between the cultivars Naylor's Blue on the site and the Lone Pine Reserve just south of the site. Given the vicinity to the National Park and the cultivar nature of the species, it is considered appropriate to retain this condition.

- Condition 10 (Riparian Buffer) requires the trees be setback from the watercourse by 6 metres to the north and 9 metres to the south. The applicant suggests that this setback negates the screening purpose of the hedge.

*Comment:* This issue is addressed further in the enclosed Council Report of 8 March 2005 as well as in this review. Generally the setback is required to protect the micro biology of the watercourse and is important to retain.

- Condition 13 (88E Instrument). This condition calls for an encumbrance be placed on the title of the site to ensure the approved trees be maintained at a maximum 10 metre height. The applicant considers this requirement to be an unreasonable imposition on a private property owner.

*Comment* The need for the encumbrance is discussed further in the Council Report of 8 March 2005 as well as in this review. Whilst the applicant's submission about the likely height of these trees being limited to 10m is accepted, given that there is some uncertainty it is considered reasonable to secure the outcome by the stipulation of a maximum height on the land title. It is therefore considered appropriate to retain this condition.

#### **CONCLUSION**

It is recommended that the Council determine this application for review of determination under S82A of the Act for the modification of Development Consent No. X03/0520/A for the removal of trees and additional landscaping at 'The Braes', by the granting of consent subject to the amended conditions included as Attachment 1 to this report.

**Attachment 1****Extract of Conditions of consent X03/0520, as amended****Consent***(Amended 5 September 2006)*

- 1 Blue Mountains City Council issues its consent, subject to conditions stated hereunder, in accordance with Section 80A of the Environmental Planning & Assessment Act 1979. Substantial physical commencement of construction is required within 2 years from the date the consent is issued.

To confirm and clarify the terms of consent, the development shall be carried out in accordance with the plans prepared by Patricia Gosling Architecture drawing numbers 1, 2 3 and 4 dated April 2003 as amended in red, with the following additional amendment:

- Delete “Proposed West Boundary Trees: Claret Ash (17 off)”
- Insert “West Boundary Trees: *Cupressocyparis x leylandii* Naylor’s Blue (Naylor’s Blue)”,

and accompanying supportive documentation, except as otherwise provided or modified by the conditions of this consent.

**Site management***(Amended 5 September 2006)*

- 3 To safeguard the local amenity, reduce noise nuisance and to prevent environmental pollution during the excavation, felling, milling, chipping and grinding:
- a) Works (including the delivery of materials to and from the property) shall be carried out Monday to Friday between 8.30am to 12 pm and 1 pm to 5pm, with no operations to occur on any Saturdays, Sunday or Public Holidays.
  - b) Stockpiles of material shall be stored clear of any drainage path or easement, natural watercourse, footpath, kerb or road surface and shall have measures in place to prevent the movement of such material off site..

**Distance of planting to southern boundary***(Amended 5 September 2006)*

- 5 The *Cupressocyparis x leylandii* Naylor’s Blue (Naylor’s Blue) proposed for the southern boundary shall be planted no closer than three (3) metres to the southern boundary.

The *Cupressocyparis x leylandii* Naylor’s Blue (Naylor’s Blue) trees proposed for the western property boundary are to be set back from the southern property boundary by at least three (3) metres, to allow separation from Lone Pine Avenue.

## Attachment 1

## Extract of Conditions of consent X03/0520, as amended

- |  |   |
|--|---|
| <hr/> <p><b>Riparian buffer</b><br/>(Amended 5 September 2006)</p> | <p>10 The <i>Cupressocyparis x leylandii</i> Naylor's Blue (Naylor's Blue) trees along the western property boundary are to be set back from the watercourse by at least six (6) metres from the north bank and at least nine (9) metres from the south bank, to allow a riparian buffer to be established adjacent to the watercourse. The riparian buffer is to be established with native plant species local to the area, consistent with the species approved in the Part 3A Permit issued by the Department of Infrastructure Planning and Natural Resources on 8 March 2004.</p> |
| <hr/> <p><b>Landscaping</b><br/>(Inserted 5 September 2006)</p>    | <p>12 Landscaping is to ensure that the development contributes to the character of the Blue Mountains and its environmental sustainability.</p> <ul style="list-style-type: none"> <li>▪ The <i>Cupressocyparis x leylandii</i> Naylor's Blue (Naylor's Blue) located to the site's western boundary shall be maintained at a maximum height of 10m.</li> <li>▪ All plants and landscaping on the site are to be maintained at all times.</li> <li>▪ Any plants that die or are removed, must be replaced with plants of the same species and of a similar stage of growth.</li> </ul> |
| <hr/> <p><b>88E Instrument</b><br/>(Inserted 5 September 2006)</p> | <p>13 To ensure the maintenance of the approved heights, an instrument setting out a Public Positive Covenant intended to be created pursuant to Section 88E of the Conveyancing Act 1919 is to be submitted in a form acceptable to Council indicating that the <i>Cupressocyparis leylandii</i> Naylor's Blue (Naylor's Blue) located to the sites western boundary shall be maintained at a maximum height of 10m.</p>   |