



Land and Environment Court
New South Wales

Case Name: Baillie Wines Pty Ltd v Camden Council

Medium Neutral Citation: [2026] NSWLEC 1333

Hearing Date(s): 11-13 August 2025

Date of Orders: 05 June 2026

Decision Date: 5 June 2026

Jurisdiction: Class 1

Before: Gray C

Decision: The Court orders that:
(1) The appeal is dismissed.
(2) The development application 2023/710/1 for the use of existing structures and the carrying out of works at 40 Cobbitty Road, Cobbitty, is determined by refusal of consent.
(3) The exhibits are returned, except for Exhibits A, B, C and K, which are retained.

Catchwords: APPEAL – development application – farm gate premises – farm stay accommodation – permissibility – whether there will be a commercial farm – definition of commercial farm – meaning of primary production business – rural industry – definition of agricultural production business – whether brewery is an agricultural production business

Legislation Cited: Biodiversity Conservation Act 2016 (NSW)
Biosecurity Act 2015 (NSW), ss 22-23
Environmental Planning and Assessment Act 1979 (NSW), ss 8.7, 8.15
Income Tax Assessment Act 1997 (Cth), s 995.1
Land and Environment Court Act 1979 (NSW), s 39
Local Government Act 1993 (NSW)
Pesticides Act 1999 (NSW), s 10

Camden Local Environmental Plan 2010, cll 5.21, 5.24, 5.25, Dictionary
Environmental Planning and Assessment Regulation 2021 (NSW), ss 37, 38
Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2021 (NSW)
State Environmental Planning Policy (Biodiversity and Conservation) 2021
State Environmental Planning Policy (Exempt and Complying Development Codes) 2008, s 2.32J
Standard Instrument (Local Environmental Plans) Amendment (Agritourism) Order 2022

Cases Cited:

Baulkham Hills Shire Council v O'Donnell (1990) 69 LGRA 404
Chamwell Pty Limited v Strathfield Council (2007) 151 LGERA 400; [2007] NSWLEC 114
Friends of Pryor Park Incorporated v Ryde Council [1995] NSWLEC 160
Interslice Pty Ltd v CCA Investments – Bass Hill Pty Ltd [2025] NSWCA 175
Ku-ring-gai Council v Bunnings Properties (2019) 236 LGERA 35; Pty Ltd [2019] NSWCA 28
Macquarie International Health Clinic Pty Ltd v University of Sydney (1998) 98 LGERA 218
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 184 CLR 355
Shire of Perth v O'Keefe (1964) 110 CLR 529
Tang v Kiama Municipal Council [2019] NSWLEC 1464
Tweed Shire Council v Cooke [2023] NSWLEC 73

Texts Cited:

Camden Council Development Control Plan
Explanation of Intended Effect for Agritourism and Small-Scale Agriculture Development (2021)

Category:

Principal judgment

Parties:

Baillie Wines Pty Ltd (Applicant)
Camden Council (Respondent)

Representation:

Counsel:
J Lazarus SC; J Smith (Applicant)
N Eastman SC (Respondent)

Solicitors:
Foundation Law Group (Applicant)
Holding Redlich (Respondent)

File Number(s): 2024/00253639

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** Historically, the land at 40 Cobbitty Road, Cobbitty, has been used as a winery. There are a range of existing buildings on the land, and its cellar door premises has an approval dating back to 1975 and a liquor licence dating back to 1950. Baillie Wines Pty Ltd (Baillie) seeks development consent for the use of existing buildings for the purpose of farm gate premises, the use of existing concrete pads for farm stay accommodation, as well as alterations and additions to the existing buildings on the land. It lodged a development application with Camden Council (the Council) which was refused on 21 May 2024. Baillie appeals against that determination, pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act).
- 2 At the commencement of the hearing, the Court exercised its functions, pursuant to s 39(2) of the *Land and Environment Court Act 1979* (NSW) (LEC Act), to approve an application for an amendment to the development application pursuant to ss 37 and 38 of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation 2021). Following the hearing, at my direction, the parties provided an agreed description of the proposed development as amended (which I have marked as Ex K). The proposed development is described as being for “works and use of the property for the purpose of farm gate premises, farm stay accommodation, agricultural produce industry and intensive plant agriculture”, and can be summarised as including:
 - The use of the existing sheds for food and drink services with a proposed gross floor area (GFA) of 617m²;
 - Alterations and additions to existing sheds so that they comply with the Building Code of Australia, and accommodate a wine tasting area, bar, indoor and outdoor seating area, kitchen for food preparation, wine barrel storage and parts and equipment storage areas, brewery, wine making area, two fire pits

and ancillary spaces including bathrooms, children's gaming room and staff rooms;

- Use of seven existing concrete pads, a driveway servicing those pads, and two water tanks and pumps, for the purpose of farm stay accommodation;
- The construction of a range of associated buildings and structures including a foyer to connect the cellar door building to the existing sheds, a petting zoo and outdoor playground, roadworks and parking to accommodate 129 car spaces (with an overflow car park with 65 car spaces), four vehicle access points onto Cobbitty Road, and an on-site loading area;
- The use of the land for intensive plant agriculture for the grapes, hops and market garden.

- 3 The proposed development retains the cellar door premises, and the residential use of the second storey of the cellar door building.
- 4 The proposed operating hours are 8am to 12am, Friday and Saturday (with no alcohol served before 10am) and 10am to 10pm on Sundays. The proposed development seeks a maximum of 200 patrons at one time, with a maximum of 100 patrons for the farm gate premises. The inference is that the other 100 patrons are those using the existing cellar door premises.
- 5 The Council remains opposed to the grant of development consent, on the basis that the food and drink service does not meet the definition of the permissible use 'farm gate premises' and is therefore prohibited on the site. The Council contends that the proper characterisation of the use is either as a 'food and drink premises' or 'artisan food and drink industry', which are both prohibited on the site. The Council's position is also that the proposed accommodation does not meet the definition of farm stay accommodation in that it is not "on a commercial farm".
- 6 Having considered the definitions of each land use, I have determined that neither the proposed food and drink service, nor the proposed accommodation, meet the definitional requirement for farm gate premises and farm stay accommodation to be "on a commercial farm". This is because the site is not intended for the carrying on of a primary production business. In addition, the range of food and drink offerings at the proposed food and drink service goes beyond the provision of "agricultural products predominantly from the farm" so, for that reason also, the proposed use is not a farm gate premises. Instead, it is a food and drink premises or artisan food and drink industry, which is

prohibited on the site. I have therefore decided to refuse the development application. My reasons for reaching these conclusions are set out in detail below.

The site and the locality

- 7 The site is legally described as Lot A in DP 346371 and is known as 40 Cobbitty Road, Cobbitty. It has a site area of 10.27ha and is generally triangular in shape, with a 430m frontage to Cobbitty Road to the north, a frontage of approximately 450m to the Nepean River to the south-west and an eastern side boundary of 592m. The land falls toward the Nepean River.
- 8 The riparian vegetation along the Nepean River interface is environmentally sensitive land, containing the listed endangered ecological community known as River-Flat Eucalypt Forest.
- 9 The surrounding locality contains a range of large lot residential dwellings as well as agricultural land uses. The site is bounded to the north and the east by land used by the University of Sydney for research programs associated with School of Life and Environmental Science and the Sydney School of Veterinary Science. The lot to the east is a biosecurity zone to ensure the prevention of unauthorised public and University access and stop the spread of cereal diseases such as rust.

Planning framework

- 10 The site is zoned RU1 Primary Production under the Camden Local Environmental Plan 2010 (CLEP). The objectives of the RU1 zone are as follows:
 - To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.
 - To encourage diversity in primary industry enterprises and systems appropriate for the area.
 - To minimise the fragmentation and alienation of resource lands.
 - To minimise conflict between land uses within this zone and land uses within adjoining zones.
 - To permit non-agricultural uses (including tourism-related uses) that are compatible with the agricultural, environmental and conservation values of the land.
 - To maintain the rural landscape character of the land.

- 11 Farm stay accommodation and cellar door premises are both nominated permissible uses in the RU1 zone, and farm gate premises is an innominate permissible use. Commercial premises and industries are both nominated prohibited uses in the zone, and commercial premises includes food and drink premises.
- 12 The definitions of cellar door premises, farm stay accommodation, and farm gate premises are contained in the Dictionary to the CLEP, and are as follows:

cellar door premises means a building or place that is used to sell wine by retail and that is situated on land on which there is a commercial vineyard, and where most of the wine offered for sale is produced in a winery situated on that land or is produced predominantly from grapes grown in the surrounding area.

Note— Cellar door premises are a type of farm gate premises—see the definition of that term in this Dictionary.

farm gate premises—

(a) means a building or place—

(i) on a commercial farm, and

(ii) ancillary to the farm, and

(iii) used to provide visitors to the farm, on a commercial basis, with agricultural products predominantly from the farm, supplemented by products from other farms in the region, or with services or activities related to the products, including the following—

(A) processing, packaging and sale of the products, but not the processing of animals,

(B) the preparation and serving, on a retail basis, of food and drink to people for consumption on the premises, whether or not liquor, take away meals and drinks or entertainment are also provided,

(C) tastings or workshops,

(D) the provision of information or education related to the products, and

(b) includes cellar door premises.

Note— Farm gate premises are a type of agritourism—see the definition of that term in this Dictionary.

farm stay accommodation means a building or place—

(a) on a commercial farm, and

(b) ancillary to the farm, and

(c) used to provide temporary accommodation to paying guests of the farm, including in buildings or moveable dwellings.

Note— Farm stay accommodation is a type of tourist and visitor accommodation—see the definition of that term in this Dictionary.

- 13 In addition, cll 5.24 and 5.25 of the CLEP contain specific provisions regarding these land use types. They provide:

5.24 Farm stay accommodation

(1) The objectives of this clause are as follows—

- (a) to diversify the uses of agricultural land without adversely impacting the principal use of the land for primary production,
- (b) to balance the impact of tourism and related commercial uses with the use of land for primary production, the environment, scenic values, infrastructure and adjoining land uses,
- (c) to minimise the impacts of development on surrounding rural or other sensitive land uses.

(2) Development consent must not be granted to development for the purposes of farm stay accommodation on a landholding unless the consent authority is satisfied all buildings or manufactured homes used to accommodate guests on the landholding will be—

- (a) on the same lot as an existing lawful dwelling house, or
- (b) on a lot of a size not less than the minimum lot size for a dwelling house to be permitted on the lot under an environmental planning instrument applying to the land.

(3) Subclause (2) does not apply if the development is a change of use of an existing dwelling to farm stay accommodation.

(4) Development consent must not be granted to development for the purposes of farm stay accommodation on land unless the consent authority has considered—

(a) whether the development will result in noise or pollution that will have a significant adverse impact on the following on or near the land—

- (i) residential accommodation,
- (ii) primary production operations,
- (iii) other land uses, and

(b) whether the development will have a significant adverse impact on the following on or near the land—

- (i) the visual amenity or heritage or scenic values,
- (ii) native or significant flora or fauna,
- (iii) water quality,
- (iv) traffic,
- (v) the safety of persons, and

- (c) whether the development is on bush fire prone land or flood prone land, and
- (d) the suitability of the land for the development, and
- (e) the compatibility of the development with nearby land uses.

5.25 Farm gate premises

(1) The objectives of this clause are as follows—

- (a) to allow for tourism and related commercial uses on land used principally for primary production at a scale that does not adversely affect the principal use of the land for primary production,
- (b) to balance the impact of tourism and related commercial uses with the use of land for primary production, the environment, scenic values, infrastructure and adjoining land uses,
- (c) to minimise the impacts of development on surrounding rural or other sensitive land uses.

(2) Development consent must not be granted to development for the purposes of farm gate premises on land unless the consent authority has considered—

(a) whether the development will result in noise or pollution that will have a significant adverse impact on the following on or near the land—

- (i) residential accommodation,
- (ii) primary production operations,
- (iii) other land uses, and

(b) whether the development will have a significant adverse impact on the following on or near the land—

- (i) the visual amenity or heritage or scenic values,
- (ii) native or significant flora or fauna,
- (iii) water quality,
- (iv) traffic,
- (v) the safety of persons, and

(c) whether the development is on bush fire prone land or flood prone land, and

- (d) the suitability of the land for the proposed development, and
- (e) the compatibility of the development with nearby land uses.

- 14 The land is partially mapped on the biodiversity values map pursuant to the *Biodiversity Conservation Act 2016* (NSW), as well as containing bushfire prone land and as containing land of local significance in the Hawkesbury Nepean Riverine Scenic Area under the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP BC).

- 15 The Camden Council Development Control Plan (CDCP) also applies to the site, and at Section 6.2 of Part 2, contains controls concerning rural land uses.

The development history of the site

- 16 On 1 January 1950, an on-site liquor licence was issued. On 19 September 1975, an amendment was made to Interim Development Order No.7 concerning the Municipality of Camden, to insert a clause that allowed the use of the site for “selling by wholesale and/or retail, wine manufactured on that land, including wine blended and/or bottled on the premises”.
- 17 In 1975, a building application for a wine licence and barbeque areas, including for 15 car parking spaces, was approved. In 1978, a building application for a cool room was approved. A liquor producer/wholesale licence was issued on 17 June 1982.
- 18 Further building applications were granted in 1989 and 1992 for a brick fence, a storage area and a storage building. A further building application was approved in 1993 for the construction of an awning and brick wall for a new storage building.
- 19 Complying Development Certificate 2022/2298/1 was issued on 1 December 2022 by a private certifier for alterations and additions to the existing dwelling (the CDC). Separate proceedings have been commenced in Class 4 of the Court’s jurisdiction concerning the validity of the CDC and the carrying out of works on the site that the Council says are unauthorised. Those proceedings have been adjourned pending the outcome of this appeal. Further, the riparian vegetation along the Nepean River, where the vegetation is mapped as having biodiversity values, has been removed without development consent or other approval. This area is proposed to be revegetated in accordance with the Vegetation Management Plan dated May 2025, which forms part of the development application documents.

Objector evidence

- 20 The development application was notified between 19 January 2024 and 1 February 2024. One written submission was received, on behalf of the University of Sydney. In addition, a representative of the University attended the site inspection and made an oral submission at the commencement of the

hearing. The issues raised in the written and oral submission can be summarised as follows:

- Biodiversity risks with the rust research carried out on the adjacent site;
- Adverse impacts on areas of high biodiversity value;
- The proposed uses are prohibited; and
- The intensification of non-agricultural land uses is contrary to the objectives of the zone and erodes primary production agricultural land uses.

- 21 In relation to the biosecurity risks arising from either the use of pesticides on the adjoining University site, or from the spread of rust from the rust research, the Court is entitled to assume that both the pesticide use and the rust research will be carried out lawfully. Section 10 of the *Pesticides Act 1999* (NSW) creates an offence if pesticide injures a person or damages a property, and biosecurity risks associated with the rust research are required to be managed pursuant to ss 22-23 of the *Biosecurity Act 2015* (NSW).
- 22 The remaining issues are examined in my consideration of the contentions below.

The expert evidence

Town planning and agronomy

- 23 Expert evidence on issues concerning town planning and agronomy was given in a joint report prepared by Mr Michael Brown, a town planner engaged by Baillie, Mr Paul Baguley, an agronomist engaged by Baillie, Mr Andrew Duggan, a town planner engaged by the Council, and Mr Malcolm Frick, an agronomist engaged by the Council. Mr Brown, Mr Baguley, Mr Duggan and Mr Frick also gave oral evidence in court.
- 24 They agree that the agricultural product to be provided to visitors to the farm is grapes, in the form of wine, but that no wine will be produced from agricultural products from the land until the third year of operation. Mr Brown considers that there is sufficient wine in storage to supply wine for three years until production starts again. They also agree that after the third year of operation, some products from the market garden may be used in preparation of meals.
- 25 They disagree as to whether the food and drink service area can be characterised as a 'farm gate premises', including whether the farm gate

premises is ancillary to the farm and whether the food and drink offerings meet the definition of providing visitors with “agricultural products predominantly from the farm”.

- 26 Whilst these experts agree that the drying and processing/grinding of hops is a rural industry, they disagree as to the characterisation of the brewery, including whether it can be characterised as a light industry, rural industry or a cellar door premises.
- 27 Further, they disagree as to whether the seven pads for movable dwellings can meet the definition of ‘farm stay accommodation’.
- 28 Their evidence is considered in more detail below.

Flooding and wastewater

- 29 Expert evidence on flooding and wastewater was given in a joint report prepared by Mr Anthony Barthelmess and Mr Logan Starkey, who are civil engineers engaged by Baillie, Dr Brett Phillips, a civil engineer engaged by the Council, and Ms Reshmi Rekha Karan, the Council’s environmental health officer.
- 30 The experts agree that the flood function of the land is preserved and that the proposed development has negligible impacts on flooding. Further, in relation to wastewater management, the experts agree that the proposed on-site sewage management system is adequate and ensures that sewage and effluent will be excluded from identified environmental features. In particular, the wastewater services for the farm stay, as well as the on-site sewage management system, will be appropriately located outside of the floodway and offset from the river.

Acoustic impacts

- 31 Expert evidence on acoustic impacts was given in a joint report by Mr Michael Allan, an engineer specialising in acoustic design, engaged by Baillie, and Ms Vanessa Luck, an environmental health officer employed by the Council.
- 32 Mr Allan and Ms Luck agree that the applicable noise criteria is met for all receivers, subject to upgraded glazing on a number of areas, which can be required by agreed conditions of consent.

The contentions that are now resolved

- 33 As a result of the amendments to the proposed development, and the evidence of the experts, the Council now agrees that the following contentions are resolved.

Flooding and waterways (contention 2)

- 34 In its Amended Statement of Facts and Contentions, the Council contends that Baillie has not demonstrated that the Court, exercising the functions of the consent authority, can be satisfied of the matters required by cl 5.21(2) concerning flooding. The Council contends that Baillie has not demonstrated that the proposed development is compatible with the flood function and behaviour on the site, has not taken into account the projected changes as a result of climate change, or that there are appropriate measures to manage risk to life in the event of a flood.
- 35 The Council now agrees that this contention is resolved, based on the agreement of the experts and subject to agreed conditions of consent. As set out above, Mr Barthelmess, Mr Starkey, Dr Phillips and Ms Karan agree that the flood function of the land is preserved and that the proposed development has negligible impacts on flooding. Further, they agree that, to deal with safe evacuation in the event of a flood, a condition of consent is required in order to compel the preparation of a Flood Emergency Response Plan (FERP) with the minimum details that they have agreed upon. Further, they have agreed upon a condition that requires an access track north-east of the southernmost farm stay site location, and a requirement that the FERP deal with a means to relocate vehicles/caravans from the farm stay sites to higher ground if the owners are not on site at the time that the FERP is triggered.
- 36 I accept the expert evidence and the parties' agreed position that this contention is resolved and is no longer in issue. Based on the evidence and the draft FERP attached to the joint report, I am satisfied of the matters in cl 5.21(2) of the CLEP.

Wastewater (contention 3)

- 37 The Council contends that the proposed development is reliant on a wastewater system that is inconsistent with the Council's Onsite Sewage

Management Policy P2.0199.1, and with the NSW Environment and Health Guidelines.

- 38 Mr Barthelmess, Mr Starkey, Dr Phillips and Ms Karan agree that, based on the updated Wastewater report, the wastewater services will be appropriately located outside of the floodway and offset from the river, and can be managed with conditions of development consent, which are agreed. In particular, the agreed conditions require that the as-built on-site sewage management system be certified that it is flood-proof to the 1% annual exceedance probability event, will be subject to quarterly inspections, and, following the inundation of the site that exceeds the surface level of any components, will be inspected to confirm that it remains undamaged and fit to return to regular use. As such, the Council agrees, and I accept, that this contention is resolved.

Acoustics (contentions 4 and 12)

- 39 The Council also contends, in its Amended Statement of Facts and Contentions, that the acoustic impacts of the proposed development will not be acceptable on the existing dual occupancy on the site.
- 40 Based on the evidence of the acoustic experts, the Council agrees that this contention is now resolved. Subject to the imposition of agreed conditions of consent concerning glazing on some openings, Mr Allan and Ms Luck agree that the applicable noise criteria can be met for all receivers. Those conditions have been incorporated in the agreed conditions of consent. Accordingly, the Council accepts, and I agree, that this contention is now resolved and there remains no issue in dispute concerning the acoustic impact of the proposed development.

Is the proposed development permissible on the site? (Contention 1)

- 41 The proposed development is described in the parties' agreed description (Ex K) as being "for the purposes of farm gate premises, farm stay accommodation, agricultural produce industry and intensive plant agriculture".
- 42 As set out above, farm stay accommodation is a nominated permissible use in the RU1 Primary Production zone. The same is true of rural industries, which is a category into which an agricultural produce industry falls.

- 43 With respect to farm gate premises, this is not a nominated use in the land use table for the RU1 zone. Commercial premises are a nominated prohibited use in the zone, and, by definition in the Dictionary to the CLEP, include retail premises. By its definition in the CLEP, retail premises includes ‘food and drink premises’ but expressly excludes farm gate premises. ‘Food and drink premises’ is a defined use, and includes a restaurant or café. Again, a ‘restaurant or café’ is a defined use in the Dictionary to the CLEP. Both ‘farm gate premises’ and an ‘artisan food and drink industry’ are carve outs in the definition of ‘restaurant or café’. An ‘artisan food and drink industry’ is a defined term, and falls within a type of light industry. Light industry, as a type of industry, is prohibited in the RU1 Primary Production zone. This means that ‘farm gate premises’ is an innominate permissible use in the zone, whereas all other forms of food and drink premises are prohibited, as is an artisan food and drink industry.
- 44 For the proposed development to be permissible on the site, the purpose of the intended uses must be characterised as uses that are permissible. That is, the proposed food and drink service area must meet the definition of ‘farm gate premises’ and the proposed accommodation must meet the definition of ‘farm stay accommodation’ under the CLEP. Further, if the brewery is a separate and independent use, it is permissible if it meets the definition of an ‘agricultural produce industry’.
- 45 The definitions of ‘farm gate premises’ and ‘farm stay accommodation’, which are set out above at [12], both require that they are “on a commercial farm” and “ancillary to the farm”. A commercial farm is also defined in the Dictionary to the CLEP, as follows:

commercial farm means a farm on which agriculture is undertaken that is—

(a) on land categorised as farmland under the *Local Government Act 1993*, section 515, or

(b) a primary production business within the meaning of the *Income Tax Assessment Act 1997* of the Commonwealth, or part of a primary production business, including a business that—

(i) was a primary production business, and

(ii) has temporarily ceased to be a primary production business because of a natural disaster, including a drought, flood or bush fire.

- 46 At the time of the hearing, the land was not categorised as farmland under the *Local Government Act 1993* (NSW), although an application had been made to the Council for that categorisation. That application was refused by the Council, the reasons for which were communicated in an email to Mr Baillie on 1 August 2025.
- 47 The definition of ‘agricultural produce industry’, which is relied upon by Baillie for the permissibility of the brewery, is as follows:

agricultural produce industry means a building or place used for the handling, treating, processing or packing, for commercial purposes, of produce from agriculture (including dairy products, seeds, fruit, vegetables or other plant material), and includes wineries, flour mills, cotton seed oil plants, cotton gins, feed mills, cheese and butter factories, and juicing or canning plants, but does not include a livestock processing industry.

Note. Agricultural produce industries are a type of rural industry—see the definition of that term in this Dictionary.

- 48 Further, ‘intensive plant agriculture’ is a nominated permissible use on the site, and is defined in the Dictionary to the CLEP as including viticulture and horticulture. These terms are defined as follows:

horticulture means the cultivation of fruits, vegetables, mushrooms, nuts, cut flowers and foliage and nursery products for commercial purposes, but does not include a plant nursery, turf farming or viticulture.

viticulture means the cultivation of grapes for use in the commercial production of fresh or dried fruit or wine.

The Council contends that the proposed uses are not permissible

- 49 The Council contends that the uses proposed in the development application do not meet the definition of ‘farm gate premises’ and ‘farm stay accommodation’, and are therefore not uses that are permissible on the site. The Council submits that the proposed food and drink services element of the proposed development is instead either a ‘food and drink premises’ which is a form of commercial premises and is prohibited on the site, or an artisan food and drink industry, which is a type of light industry which is also prohibited on the site. Its position is also that the brewery is not a separate and independent use, and that it is instead part of the food and drink premises or artisan food and drink industry, and that, even if it was a separate and independent use, it does not meet the definition of an agricultural produce industry.

- 50 In relation to the proposed farm gate premises and the farm stay accommodation, the Council submits, firstly, that there is not in existence at present a 'commercial farm' that meets the definitional requirements under the CLEP. The Council argues that a commercial farm must already be in existence and be operating as "a primary production business" for the definitional requirement of "on a commercial farm" to be met for both food and drink premises and farm stay accommodation. The Council makes a number of submissions in support of this point. It argues that the words 'commercial farm' cannot be concerned with a prospective use, in circumstances where it is not a land use found in any of the land use tables, where the 'farmland' classification requirements under the *Local Government Act* concerns a dominant use for farming with a 'significant and substantial commercial purpose or character' and where the definition of a primary production business in the *Income Tax Assessment Act 1997* (Cth) concerns an entitlement to claim deductions for the carrying on of a business. Further, the Council submits that another indicia that the commercial farm must be in existence, is that the definition in (b)(ii) allows for a primary production business to have been "temporarily ceased to be a primary production business because of a natural disaster...".
- 51 The Council submits that this definitional requirement has not been met, as there is no commercial purpose or character at the site presently. Instead, there is merely an intention to cultivate grapes for wine and hops for the brewery. The Council submits that the present circumstances are readily distinguishable from those in *Tang v Kiama Municipal Council* [2019] NSWLEC 1464, where a different definition of 'farm stay accommodation' was considered and the prospective use of the site as a working farm was considered adequate.
- 52 The Council alternatively submits that, even if what is proposed can be considered, the Court ought not accept that the definition of commercial farm is met by the proposed operations. It submits that it cannot be a primary production business within the meaning of the *Income Tax Assessment Act*, given that the product relied upon by Baillie is the manufactured product (and therefore not the primary product).

- 53 Secondly, with respect to the food and drink service, even if it could be established that the proposed use is “on a commercial farm”, the Council submits that what is proposed is not ancillary to a commercial farm. The Council relies on the evidence in the Sustainability and Profitability Report (Ex B, Tab 3) that indicates that profit and loss are calculated at an estimated 15% of production being processed and sold at wholesale rates, and 85% of production being processed and sold by the glass through proposed on-site facilities (the food and drink service offerings). The Council submits that, having regard to the farm operations and the food and drink offerings, it is the latter that is the dominant use.
- 54 Thirdly, the Council submits that the proposed food and drink service area does not meet the third aspect of the definition of farm gate premises, which requires it to be “used to provide visitors to the farm, on a commercial basis, with agricultural products predominantly from the farm, supplemented by products from other farms in the region”. Whilst the site will produce wine and hops, and there will be a small produce garden, the produce garden is not sufficient to service the food aspect of the food and drink premises, the hops are not the predominant agricultural produce in the beer, and the breadth of the food offerings goes beyond something that is the provision of “agricultural products predominantly from the farm, supplemented by products from other farms”.
- 55 With respect to Baillie’s position that the food and drink services could be considered as “services or activities related to the products”, the Council submits that the reference to “the products” must be understood as being a reference to the “agricultural products predominantly from the farm”, and that “services or activities related” to those products are required to relate to the products predominantly from the farm.
- 56 The Council points out that the “including” in (A)-(D) of clause (iii) of the definition relates to both agricultural products, as well as services or activities, and submits that the food and drink services in (B) must be understood to relate to the agricultural products predominantly from the farm.

- 57 Further, although a 'cellar door premises' is a type of farm gate premises, the Council submits that the food and drink offerings go beyond a cellar door premises by selling more than wine.
- 58 In relation to the brewery, the Council submits that this is not a separate and independent use. The Council relies on the decision of the Court in *Tweed Shire Council v Cooke* [2023] NSWLEC 73, in which the Court concluded that the activities carried out on the land could not be characterised as two separate activities, but that the growing of hemp and its subsequent processing were part of a single purpose, which was the selling of the hemp-infused products. In the same way, the Council submits that the brewery aspect of the proposed development could not be considered a separate use, but is instead directed at providing beer for customers of the food and drink service.
- 59 Even if the brewery could be considered as a separate and independent use, the Council submits that it does not meet definition of 'agricultural produce industry'. This is because, relying on the evidence of Mr Duggan, the processing of "produce from agriculture" involves something that remains a form of the original agricultural produce albeit processed into an alternate structure or configuration. As he states, "wine is effectively liquid grapes, flour is crushed wheat, juice is crushed/squeezed fruit, cotton seed oil is cooked and pressed cotton seed etc" (Ex 6, par 36). In contrast, his evidence is that beer is a transformational product from multiple ingredients including wheat/barley, hops and yeast, and is made of 90-95% water.
- 60 The Council submits that the proposed food and drink service, including the brewery aspect, is instead a type of food and drink premises, or is an artisan food and drink industry. These uses are defined as follows:

artisan food and drink industry means a building or place the principal purpose of which is the making or manufacture of boutique, artisan or craft food or drink products only. It must also include at least one of the following—

- (a) a retail area for the sale of the products,
- (b) the preparation and serving, on a retail basis, of food and drink to people for consumption on the premises, whether or not liquor, take away meals and drinks or entertainment are also provided,
- (c) facilities for holding tastings, tours or workshops.

food and drink premises means premises that are used for the preparation and retail sale of food or drink (or both) for immediate consumption on or off the premises, and includes any of the following—

- (a) a restaurant or cafe,
- (b) take away food and drink premises,
- (c) a pub,
- (d) a small bar.

restaurant or cafe means a building or place the principal purpose of which is the preparation and serving, on a retail basis, of food and drink to people for consumption on the premises, whether or not liquor, take away meals and drinks or entertainment are also provided, but does not include the preparation and serving of food and drink to people that occurs as part of—

- (a) an artisan food and drink industry, or
- (b) farm gate premises.

- 61 The Council submits that, if the Court does not accept that the proposed food and drink service is a farm gate premises, then it has all the hallmarks of being a food and drink premises, or, if the brewery aspect is sufficiently dominant, an artisan food and drink industry. On either characterisation, the proposed food and drink service is prohibited on the site.
- 62 The Council acknowledges that, with respect to the farm stay accommodation, if I am satisfied that either there is a commercial farm in existence, or that it is sufficient that there will be a commercial farm in existence, the farm stay accommodation meets the other definitional requirements for it to be ancillary to the commercial farm and “used to provide temporary accommodation to paying guests of the farm”. Further, if I accept the Council’s position that the definitional requirements for farm stay accommodation are not met, the Council suggests that the accommodation may be permissible as a caravan park or camping ground, but notes these uses have separate regulatory regimes and requirements.

The applicant’s position that the proposed uses are permissible

- 63 Baillie points out that the proposed development includes three uses that are the subject of permissibility issues as raised by the Council: the proposed farm stay accommodation, the proposed farm gate premises, and the micro-brewery, which Baillie submits is a rural industry.

- 64 In relation to the farm gate premises, Baillie refers to the introduction of ‘farm gate premises’ and other new land use terms including ‘agritourism’ on 1 December 2022 pursuant to the Standard Instrument (Local Environmental Plans) Amendment (Agritourism) Order 2022. Further, the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (SEPP ECDC) was amended to permit farm gate premises as exempt development, subject to a number of specifications, including that “the number of visitors, excluding visitors participating in fruit and produce picking, to all farm gate premises on the landholding at any one time must not be more than 100” (s 2.32J(h)). Baillie relies on the Explanation of Intended Effect for Agritourism and Small-Scale Agriculture Development (2021), which refers to the “scope for the planning framework to better support farmers’ ability to innovate and diversify from purely primary production to other forms of value adding or complementary agribusiness”. Baillie therefore submits that the definition of ‘farm gate premises’ should be understood as being facultative.
- 65 Baillie’s position is that there is, both presently and as planned, a commercial farm operating on the site. It relies on the statement of evidence of its accountant, Mr Hogan, who applies Taxation Ruling 97/11 to explain why he reaches the opinion that there is currently a primary production business being carried out within the meaning of the *Income Tax Assessment Act*. For the current use of the farm, Mr Hogan refers to historic tax returns and stock sale invoices, to demonstrate that there is maintenance of animals that has been ongoing for several years and that this activity is profitable, recurring and carried out in a businesslike manner in accordance with industry standards. With respect to the proposed future use of the farm, Mr Hogan refers to the prospective production of over 13,000L of wine each year, the profitability of the activity, its commercial scale and forecast commercial sales. Baillie also relies on the evidence of Mr Tim Baillie that there has been significant expenditure by Baillie to maintain the site, establish additional irrigation, update fencing and other infrastructure, prepare the soil, and plant 400 vines, with a view to expand the growing of grapes to 8000 vines over the next 12 months. Based on this evidence, Baillie submits that the activities carried out on site presently, and as proposed in the development application, meet the definition

of a 'primary production business' that would satisfy the requirements for there being a commercial farm on the site.

- 66 Baillie also accepts the Council's proposed conditions, which require evidence of the establishment and operation of the commercial farm to be provided to the Council prior to the use for the purpose of farm gate premises or farm stay accommodation. In this regard, Baillie relies on the decision in *Tang v Kiama Municipal Council* [2019] NSWLEC 1464, in which the Court, as presently constituted, found that, with respect to farm stay accommodation defined by reference to a working farm, "the existence of a working farm is not required prior to the grant of development consent" (at [63]). Relevantly, I stated that:

"Whilst, by definition, the farm stay accommodation depends on the existence of a working farm, that working farm need not be in existence at the time of the grant of development consent. Instead, I need to be satisfied that *what is proposed*, that is, the prospective use, is accommodation on a working farm. This means that I ought to be satisfied that there is a working farm that is likely to be in existence at the time that development for the purpose of the accommodation is carried out, otherwise what is proposed could not be "on a working farm". The risk that the accommodation commences operation without a working farm and the use is therefore not farm stay accommodation, does not affect the permissibility of the proposed farm stay accommodation and is not relevant to whether consent should be granted for the farm stay accommodation.

This is analogous to development for the purpose of shop top housing, which is defined as "one or more dwellings located above ground floor retail premises or business premises". There must therefore be "ground floor retail or business premises" above which the dwellings are located, but those premises need not have been constructed by the time of the grant of consent (see, for example, *Hrsto v Canterbury City Council* (No 2) (2014) 204 LGERA 148; [2014] NSWLEC 121). Further, the risk that the ground floor use may not eventuate to contain any "retail or business", which means that the dwellings would no longer meet the definition of "shop top housing", is not relevant to the permissibility of what is proposed."

- 67 Baillie submits that the Council's position that the commercial farm has to be operating at the time of the grant of development consent would require the Court to read in or imply the word "existing" into paragraph (b) of the "commercial farm" definition, which is not an appropriate approach to statutory construction.
- 68 Alternatively, Baillie relies on the natural disaster limb of the definition of commercial farm. That is, Baillie says that, if the Court finds that the commercial farm needs to be in existence and is not satisfied of the same

concerning the site's present operations, it relies on the fact that it was a primary production business that ceased to operate because of drought conditions that occurred in 2017 to 2019. Baillie relies on the evidence of Mr Baguley in that respect.

- 69 Baillie's position is also that the both the farm stay accommodation and the farm gate premises are 'ancillary' to the commercial farm, in satisfaction of (ii) of each definition. Baillie acknowledges that the question of whether a use is 'ancillary' is a question of fact and degree in all the circumstances. In considering the meaning of 'ancillary', Baillie relies on the decisions of the Court of Appeal in *Baulkham Hills Shire Council v O'Donnell* (1990) 69 LGRA 404, *Macquarie International Health Clinic Pty Ltd v University of Sydney* (1998) 98 LGRA 218 and *Interslice Pty Ltd v CCA Investments – Bass Hill Pty Ltd* [2025] NSWCA 175 and submits that an ancillary use need not be subordinate or subservient, but can be something that is supplemental. Having regard to the statutory context, Baillie submits that 'ancillary' refers to permissible activities which may or may not have any direct connection with the physical farming activities, and must be construed by reference to the permissible forms of development contemplated by (a)(iii) of the definition of farm gate premises.
- 70 Baillie submits, that with respect to the proposed food and drink service, it is ancillary to the commercial farm because there is an operational link or connection between the preparation and serving of food and drink to people for consumption on the premises and the agricultural products produced by the commercial farm. It submits that the food and drink offerings are dependant on the production of wine on the farm, and the food will supplement the wine, as made clear by the wine pairing menu. As the Plan of Management limits the serving of food and drink in the farm gate premises to 8am to 12am Friday to Saturday, and 8am to 10pm on Sunday, Baillie submits that the overall consumption of wine from the farm by the farm gate premises is clearly subordinate to the cellar door retail sales and is of lesser importance, and therefore secondary to, the operation of the commercial farm. It also relies on the Profit/Loss Estimate Summary, and calculates that the proposed food and

drink service will consume only 22.39% of the current wine on hand and 35.27% of the wine to be produced in the future.

- 71 Baillie also submits that the footprint of the farm gate premises is commensurate with a size and scale that is ancillary to the commercial farm, being limited to 100 people, consistent with the requirements concerning exempt development for farm gate premises in the SEPP ECDC.
- 72 Baillie's position is also that the requirement for the produce to be "predominantly from the farm" is met by the proposed food and drink services, and that it would be erroneous to interpret the definition of 'farm gate premises' as requiring that all the food and drink in (B) must be sourced from agricultural products predominantly from the farm supplemented by other regional produce. Baillie points out that, within the words of the chapeau to (iii) of the definition, the building or place can be used to provide visitors with agricultural products predominantly from the farm (supplemented by products from other farms in the region) or "with services or activities related to the products". It relies on *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 184 CLR 355; [1998] HCA 28 as authority for the proposition that the words "related to" are "extremely wide", merely requiring "the existence of a connection or association" (at [87]). Baillie therefore submits that, so long as the food and drink offering in para (a)(iii)(B) of the definition "relates to" the relevant agricultural products (i.e. predominantly from the farm supplemented by regional produce), this aspect of the definition of "farm gate premises" is satisfied.
- 73 Baillie submits that the wine pairing menu demonstrates that this aspect of the definition is met. Baillie submits that the wine, which is the agricultural product, is wholly sourced from the farm, and the menu makes it clear that the food to be served has the necessary connection or association with the wine from the farm. Whilst the food and drink services will not merely serve wine, it is intended that the wine is the focus of those services. Baillie submits that no farm could ever provide a farm gate premises on the Council's narrow construction of "predominantly", and that it is sufficient that the wine supplied at the food and drink service is predominantly from the vineyard and the

remaining food items on the menu are supplemented by products from other farms in the region. Baillie relies on the analogy of a farm gate premises serving apple pies from an apple farm, and says that the Council's interpretation of the definition of farm gate premises would prevent it from serving tea, coffee or ice-cream without also having dairy cattle and coffee beans at the farm to provide for the same.

- 74 Having satisfied the definition of “farm gate premises”, which is permissible on the site, Baillie submits that it is legally irrelevant if the use could also be characterised as “food and drink premises” or “artisan food and drink industry” (relying on *Friends of Pryor Park Incorporated v Ryde Council* [1995] NSWLEC 160).
- 75 Baillie relies on the brewery and self-service beer kegs in the food and drink services to be characterised as ‘agricultural produce industry’ and therefore ‘rural industry’ for its permissibility. Baillie relies on the evidence of Mr Baguley that beer is made from malted wheat or barley, hops, yeast and water, and submits that the malted grains and the hops are “produce from agriculture”, such that these products are handled, treated and processed at the brewery in order to make beer. Baillie submits that this is adequate to meet the definition of agricultural produce industry. It submits that this is no different from wine, where the agricultural product is processed into wine by crushing the grapes, adding various chemicals and undergoing a process. In relation to beer, Baillie says that it is the hops and malt that are processed into the finished product in the brewery, thus meeting the definition of an agricultural produce industry. Baillie submits that it is irrelevant that hops comprises only 1% of the ingredients of beer.

Understanding the proposed uses

- 76 Whilst the proposed development is described in the parties' agreed document (Ex K) as being “for the purposes of farm gate premises, farm stay accommodation, agricultural produce industry and intensive plant agriculture”, such a description is at risk of falling foul of dividing a proposal into its component activities, rather than considering what end is served by the proposed activities. It is well established that, in planning law, use must be for

a purpose, and that the purpose is the end to which land is seen to serve (*Shire of Perth v O'Keefe* (1964) 110 CLR 529; [1964] HCA 37 at 534-535).

The characterisation of the purpose of the proposed use should be done “at a level of generality which is necessary and sufficient to cover the individual activities, transactions or processes carried on, not in terms of the detailed activities, transactions or processes” (*Chamwell Pty Limited v Strathfield Council* (2007) 151 LGERA 400; [2007] NSWLEC 114 at [36]).

77 The site already benefits from consent for the purpose of the winery and cellar door premises. It is Baillie’s position that part of the premises will remain a cellar door premises, and the additional, new use is a second farm gate premises that is not a cellar door premises. The areas to be used for each use are shown on plan PR 10G (Ex C, Tab 4), and the parties have agreed to separate patron limits (see the proposed condition 2.5(5)). However, the two areas do not appear to be separately managed through the Plans of Management (Ex B, Tab 4 and Ex C, Tab 6), such that it is unclear how they are separate and independent uses. Nevertheless, in determining permissibility, I consider the farm gate premises as proposed, which includes the food and drink service area marked as farm gate on plan PR 10G, the self-serve beer taps and the servery area.

78 With respect to the brewery, which Baillie contends is an agricultural produce industry, there is little information that supports it being a separate and independent use from the food and drink services sought to be approved as a farm gate premises. It is immediately adjacent to, and within the same building as, the food and drink service area, the wine making area, the kitchen that services the food and drink service area, and the self-serve beer taps. In the Supplementary Statement of Environmental Effects (Ex B, Tab 1, pp 45 and 53), the brewery is described as forming part of the farm gate premises. It describes the intended operation as follows (p 48):

“The proposed farm gate premises will consist of indoor seating and an outdoor alfresco covered area, including a children’s indoor play area...

A kitchen will provide meals for adults and children. The brewery will make craft beer on the premises, from hops grown on the Site and off Site. Other local craft beer, wine and spirits will be offered to the public.”

- 79 The Revised Plan of Management similarly describes the intended use as follows (after listing the land use terms used in the CLEP) (Ex C, Tab 6):

“The building will comprise dining areas (seating for 100 persons in the farm gate premises), tasting room (seating 45 persons). One hundred and ninety-four (194) onsite carparking spaces are provided...

The Venue as a destination shall offer patrons a distinct alternative to the current offerings currently existing within the local and broader community and create a safe and stylish environment in which to facilitate first class amenities to the local and business environment in a rustic setting that reflects the nostalgic and heritage aspects of the use of property as a winery from 1975.

Persons attending the Venue will be able to view the micro-brewery inside an enclosed space within the Venue and watch craft beer being brewed, whilst dining or having a beverage. The cellar door will provide a comfortable place to taste and buy bottled wines.”

- 80 The town planners and agronomists do not engage with the question of whether the brewery is a separate and independent use. Mr Baguley’s evidence is that “the Cellar door will be stockholder of both wines and beer”, and “[t]he consumption of beer and wine by can and glass is based on 85% of sales coming through the cellar door” (Ex 6, par 165). However, to the extent that the existing cellar door premises will continue to operate separately, the definition of cellar door premises does not extend beyond the provision of wine, and the brewery is sought as part of the second farm gate premises (Ex B, Tab 1, pp 45 and 53).
- 81 Similarly, the intensive plant agriculture, which is described as being part of the development application and includes the growing of hops (horticulture) and of grapes (viticulture), does not appear to be a separate and independent use of the site. The same can be said for the agricultural produce industry into which category the winery falls. All of the end product of the agriculture, and the agricultural produce industry for the making of the wine, is intended to be used for the purpose of either wine or beer, at least 85% of which will be sold in the cellar door premises and the food and drink services. Mr Baguley’s evidence was that even the remaining 15% would most likely be sold through the cellar door (Tcpt 12/08/25, p 52). Consistent with the decision of the Court in *Tweed Shire Council v Cooke*, these activities cannot be characterised as separate uses but instead serve the purpose of the sale of the final product through either the new food and drink services, or the existing cellar door premises.

- 82 The proposed accommodation, that Ballie says is farm stay accommodation, is clearly a separate and independent use from what is proposed for the food and drink services.
- 83 In the present development application, I consider that the purpose of the proposed uses are the food and drink services that Baillie says is a farm gate premises, and the accommodation that it says is farm stay accommodation. The other activities described by Ballie, including the brewery, the agricultural produce industry and the intensive plant agriculture, are for the purpose of the food and drink services (although some of the intensive plant agriculture and agricultural produce industry may also be for the purpose of the existing cellar door premises).
- 84 In considering the application for development consent, I must be satisfied that the uses proposed in the development application are for a purpose that is permissible with development consent. Given that the purpose of the proposed development is the food and drink services and the accommodation, those uses must meet the definition of the permissible uses 'farm gate premises' and 'farm stay accommodation'.

The requirement for a commercial farm

- 85 As a development consent is granted for a prospective use, I need to be satisfied that the definitional elements of the proposed use will be met on the carrying out of that use. Consistent with the reasoning in *Tang v Kiama Municipal Council*, there need not be a commercial farm in operation prior to the grant of development consent for a farm stay accommodation or a farm gate premises. With respect to the proposed uses the subject of these proceedings, I must be satisfied that what is proposed will meet the definitional requirements of 'farm gate premises' and 'farm stay accommodation' so as to be permissible on the site. This means that the use must be proposed to be "on a commercial farm" and "ancillary to the farm", and, as proposed, must meet the third aspect of the relevant definition.
- 86 The fact that a 'commercial farm' is not a land use in the land use table is not relevant. I am also not persuaded by any of the Council's other submissions concerning a requirement for a current and established commercial farm at the

time of the grant of consent. The fundamental point is that a use sought in a development application is prospective, and must meet the definitional requirements based on what is proposed.

- 87 This does not mean that, to meet the definition of either use, it would be adequate for the commercial farm to be aspirational. I consider that, to establish that the prospective use will be “on a commercial farm” and “ancillary to the farm”, some form of objective and tangible evidence is required of the continued operation of, or preparatory or other steps taken toward the imminent operation of, the primary production business as described in (b) of the definition of ‘commercial farm’.
- 88 Further, whilst both the definitions of ‘farm gate premises’ and ‘farm stay accommodation’ require that they are “on a commercial farm” and “ancillary to the farm”, a distinguishing feature of those definitions is how the provided service relates to the farm. Whereas the farm stay accommodation need only provide temporary accommodation to “paying guests of the farm”, the farm gate premises must provide visitors “with agricultural products predominantly from the farm” or services or activities related to those products. That is, for the farm gate premises, the commercial farm referred to in (a)(i) must produce the primary products used for the agricultural products in (a)(iii). The reference to “agricultural products” suggests that, as part of the farm gate premises, the agricultural produce from the farm can go through a process (such as in a winery) to produce a product.
- 89 As set out above, in the CLEP, the definition of ‘commercial farm’ is a farm on which agriculture is undertaken that is “a primary production business within the meaning of the *Income Tax Assessment Act 1997* of the Commonwealth, or part of a primary production business...”. Agriculture is defined as follows:

agriculture means any of the following—

- (aaa) agritourism,
- (a) aquaculture,
- (b) extensive agriculture,
- (c) intensive livestock agriculture,
- (d) intensive plant agriculture.

- 90 The definition of primary production business pursuant to s 995.1 of the *Income Tax Assessment Act* is as follows:

“primary production business” you carry on a primary production business if you carry on a business of:

- (a) cultivating or propagating plants, fungi or their products or parts (including seeds, spores, bulbs and similar things), in any physical environment; or
- (b) maintaining animals for the purpose of selling them or their bodily produce (including natural increase); or
- (c) manufacturing dairy produce from raw material that you produced; or
- (d) conducting operations relating directly to taking or catching fish, turtles, dugong, beche-de-mer, crustaceans or aquatic molluscs; or
- (e) conducting operations relating directly to taking or culturing pearls or pearl shell; or
- (f) planting or tending trees in a plantation or forest that are intended to be felled; or
- (g) felling trees in a plantation or forest; or
- (h) transporting trees, or parts of trees, that you felled in a plantation or forest to the place:
 - (i) where they are first to be milled or processed; or
 - (ii) from which they are to be transported to the place where they are first to be milled or processed.

- 91 Section 995.1 of the *Income Tax Assessment Act* defines “business” to include “any profession, trade, employment, vocation or calling, but does not include occupation as an employee”. The meaning of “carry on a business” is not separately defined, but is informed by a range of established principles from case law.

- 92 To meet the definition of ‘commercial farm’, the first requirement is that it is a farm on which agriculture is undertaken. This appears to be concerned with the activity on the farm, rather than the purpose of the use. ‘Viticulture’ is the cultivation of grapes for use in the commercial production of wine, and is a type of agriculture. Similarly, the keeping or breeding of cattle and sheep is ‘intensive livestock agriculture’ which is a type of agriculture.

- 93 The second requirement to meet the definition of ‘commercial farm’ is that the agriculture that is undertaken is a primary production business or part of a primary production business. This requires the agriculture to be a “business of”

one of the types of products listed in s 995.1 of the *Income Tax Assessment Act*.

There is no commercial farm in the proposed development

- 94 Having considered the facts before the Court, the development proposed, and the relevant definitions in the CLEP and the *Income Tax Assessment Act*, I form the view that there is no ‘commercial farm’ that can be relied upon by Baillie to meet the first limb of the definitions of farm stay accommodation and farm gate premises.
- 95 Whilst the site is, and is intended to be, a farm on which the activity of agriculture is undertaken, in the form of viticulture, it is not a primary production business within the meaning of the *Income Tax Assessment Act*.
- 96 To be carrying out a primary production business in accordance with the definition, you must “carry on a business of... (a) cultivating or propagating plants, fungi or their products or parts”. That is, the business must be one that relates to the primary product of the plants, such as its fruit or flower. The activity that amounts to the carrying on of a business must relate to the ‘cultivating or propagating’, as distinct from relating to the subsequent, secondary product that comes as a result of a process applied to the primary product of the cultivating or propagating.
- 97 In the present proceedings, the intended activity of viticulture meets the description of ‘cultivating or propagating plants, fungi or their products or parts’. However, the carrying out of viticulture, of itself, is insufficient to meet the definition of a primary production business. The “carrying on a business of primary production” must involve activities that amount to a business concerning that viticulture. There is no such business intended for the produce. The grapes are not intended for sale or for a commercial purpose. Instead, the intention is to use all of the produce for the making of a secondary product, wine, which will be sold commercially, either processed and sold at wholesale rates, or sold by the glass through on-site facilities. The wine is an agricultural product, but it is not a product from a primary production business. Put simply, the intended business activities relate to the wine making rather than the wine grape growing, and it is only if they relate to the latter would it be a primary

production business. Accordingly, I accept the Council's submission that, even as proposed, the site does not meet the definition of 'commercial farm' as there is no primary production business within the meaning of the *Income Tax Assessment Act*, because the product intended to be produced on the site and relied upon by Baillie for profitability is the manufactured product.

98 Neither the evidence of Mr Baguley nor the statement of Mr Hogan dissuade me from this conclusion. Mr Baguley's evidence, in both the joint report and the Sustainability and Profitability Report, focusses only on the description of "cultivating and propagating plants, fungi or their products or parts" instead of describing any business relating to those primary products. Mr Hogan's statement (Ex C, Tab 10) also provides little support that there will be a primary production business being carried out. Whilst he acknowledges that the business activity is the "the growing of grapes" (pp 2, 10) he then refers to wine production to determine profitability, scale of activity and intended commercial sales.

99 Similarly, the intended growing of hops is an activity that is agriculture, in that it is horticulture, another type of intensive plant agriculture. This too meets the description of "cultivating or propagating plants, fungi or their products or parts", but there is no business activity in relation to the hops itself that would be sufficient to constitute a primary production business. Instead, the projected figures for the hops (Ex B, Tab 2) demonstrates that the entire hops fruit produce will be used as an ingredient in the beer manufacturing process that will take place on the site. The business carried on therefore relates to the sale of the manufactured product, and is not a primary production business.

100 The market garden is not a primary production business, for similar reasons. The entire produce for the market garden is intended for use on the site in the making of food for the food and drink service, and is not intended for a primary production business.

101 Further, whilst the keeping or breeding of cattle and sheep is 'intensive livestock agriculture' which is a type of agriculture, and the evidence of the purchase and sale of the cattle in tax returns (Ex C, Tab 10) is sufficient to establish a primary production business, this business is not intended to

continue in the proposed development. Instead, having regard to the plans for the site (Ex C, Tabs 3 and 4), the whole of the site is intended for either vegetation, the vineyard and the proposed uses, without any remaining area that could be used for intensive livestock agriculture. I accept the evidence of Mr Frick in that respect. Whilst Mr Baguley relies on there being an area of 2.66ha suitable for grazing, this includes the area for the accommodation and the area illegally cleared, which is required to be replanted in accordance with the Vegetation Management Plan. There are therefore no opportunities for animals to graze on the site in the proposed development. Therefore, even relying on the past purchase and sale of cattle is not sufficient to establish that there will be a commercial farm to satisfy the first limb of the definition of farm stay accommodation or farm gate premises.

- 102 In addition, I am not satisfied, on the evidence before the Court, that the site meets the third limb at (b)(ii) of the definition of ‘commercial farm’ in the CLEP, being a business that “has temporarily ceased to be a primary production business because of a natural disaster, including a drought, flood or bush fire”. Whilst there is evidence that the site has contained vineyards since 2002, and has been producing wine since approval to do so in 1975, there is no evidence of business activities relating to the growing of grapes until the tax returns furnished from 2022 to 2025. The ‘natural disaster’ relied upon by Mr Baguley predates these tax returns.
- 103 For those reasons, neither the proposed accommodation nor the proposed food and drink services meet the first limb of the definition of the use sought, as neither are proposed to be “on a commercial farm”. This is sufficient to disqualify each of the proposed uses from falling within the permissible uses of ‘farm stay accommodation’ and ‘farm gate premises’.
- 104 Having reached the above conclusion, it is apparent that there is no utility in considering whether the proposed food and drink service is one that will be “ancillary to the commercial farm”, as there is no commercial farm to which it could be ancillary.

The food and drink service goes beyond providing agricultural products predominantly from the farm

- 105 Even if I had been satisfied that the proposed food and drink service is “on a commercial farm”, I consider that, based on the evidence before the Court, it goes beyond providing “agricultural products predominantly from the farm, supplemented by products from other farms in the region”.
- 106 The reference to “the farm” must be a reference to the commercial farm in (i) and (ii) of the definition. If I had been satisfied that there was a business associated with the growing of the wine grapes, then, as agreed by the experts, the relevant agricultural product is the wine.
- 107 In addition to the provision of the wine, the proposed food and drink service intends to sell beer from the brewery, including in self-serve beer taps. It also intends to sell spirits from off-site.
- 108 I do not accept Baillie’s position that beer is an agricultural product. The experts agree that it is a product manufactured by a brewing process using malt, water, hops and yeast. I accept the evidence of Mr Duggan that this manufacturing process is such that the provision of beer, which comprises mostly water and is a transformational product using a number of ingredients, is not the product of agriculture. Further, I accept the evidence of Mr Frick that the beer is not an agricultural product predominantly from the farm, as the hops constitutes less than 1% of the total inputs into the production of beer.
- 109 In terms of the food offerings, Baillie has paired a wide variety of food offerings to its different wines (Ex C, Tab 8). These include light meals as well as main meals such as nachos, barramundi, steaks, a burger, brisket pie and bolognaise. It is agreed by Mr Baguley that the products from the market garden are not sufficient to provide the produce for all of the food offerings (Ex 6, par 42). The beef products refer to beef “raised on our family farm in Cobbitty”, but it is not apparent from the menu what this “family farm” is, whereas supplier names are given for a range of other produce, to demonstrate that the products are from other farms in the region. Most of the food is therefore sourced from off the farm.

- 110 To meet the description of providing “agricultural products predominantly from the farm, supplemented by products from other farms in the region”, the “products from other farms in the region” must be supplementary to the provision of the wine, which is the agricultural product from the farm. I do not accept that this is met on the facts of this case. Instead, I accept the evidence of Mr Duggan that the scope of the food offering and the provision of other alcohol products (beyond the wine) goes beyond something that can be described as supplementary to the provision of the agricultural product. The food offerings include a range of main meals (in addition to light meals), and the beer offering is not ordinarily one that would be considered supplementary to wine.
- 111 Contrary to the submissions advanced on behalf of Ballie, I am not assisted by the alternative clause in the chapeau concerning the provision of “services or activities related to the products”. As “the products” are the agricultural products predominantly from the farm, being the wine, I consider that the provision of the breadth of food and drink offerings proposed are not “services or activities related to the products”. The offering of a range of main meals unrelated to the product (e.g. a burger) is not a service or activity “related to the products”. A recommendation through a pairing menu is not sufficient to establish that the main meal is “related to” the wine.
- 112 Further, given the use of the word “including”, the inclusion of the descriptions in (A) to (D) of (iii) to the definition of ‘farm gate premises’ does not avoid the requirement embedded in the chapeau of (iii). That is, the mere fact that the proposed development meets the description of “the preparation and serving, on a retail basis, of food and drink to people for consumption on the premises” in (B) is insufficient to satisfy the definition of farm gate premises. It must also satisfy the description in the chapeau in (iii). I have found that the proposed food and drink service does not do so. This reason is another basis upon which the proposed food and drink service does not meet the definition of a ‘farm gate premises’.

The proposed brewery is neither a separate use nor a rural industry

- 113 As set out above at [83], I consider that the proposed brewery forms part of the proposed food and drink service. I do not accept that the brewery is a separate use that falls within the definition of a rural industry.
- 114 Firstly, based on the evidence before the Court, summarised at [78]-[80], the proposed brewery is described as being within the same area in which the dining is taking place. On the evidence, the beer that is produced is intended to be sold through the food and drink service. The brewery is intended to be viewed by those dining in the food and drink service, the self-service beer taps are contained within what is sought and described as the farm gate premises, and the brewery is in the same building as the food and drink service. Whilst Mr Baguley makes reference to wholesale sales through the cellar door premises, such sales would go beyond the definition of the permissible use of cellar door premises. I therefore accept the Council's submission that the brewery is not a separate use, but is instead directed at providing beer for customers of the food and drink service.
- 115 Secondly, even if it could be considered a separate use, I do not accept Baillie's position that the brewery is an agricultural produce industry. It is not "a building or place used for the handling, treating, processing or packing, for commercial purposes, of produce from agriculture", as it does not handle, treat, process or pack produce from agriculture. Instead, it creates or manufactures a new product (beer) from a number of ingredients. Contrary to the submissions made on behalf of Baillie, the manufacture (or crafting) of beer is completely different from an agricultural produce industry in the form of a winery, which applies a process to the grapes to produce a grape product. In that respect, I accept the evidence of Mr Duggan that the processing of 'produce from agriculture' contemplated by the definition of agricultural produce industry is something that remains a form of the primary agricultural product. The brewery does not do so, and instead creates a new product.
- 116 Having found that the proposed food and drink service is not permissible as a farm gate premises, the proposed brewery is not permissible as a component activity within that farm gate premises. Further, even if it a separate use, the

brewery is not permissible as a separate and permissible use of rural industry, as it does not meet the definition of an agricultural produce industry.

- 117 I accept the evidence of Mr Duggan that the brewery is an industrial activity, in the form of a light industry, which is prohibited on the site. 'Light industry' and 'industrial activity' are defined as follows:

light industry means a building or place used to carry out an industrial activity that does not interfere with the amenity of the neighbourhood by reason of noise, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or oil, or otherwise, and includes any of the following—

- (a) high technology industry,
- (b) home industry,
- (c) artisan food and drink industry,
- (d) creative industry.

industrial activity means the manufacturing, production, assembling, altering, formulating, repairing, renovating, ornamenting, finishing, cleaning, washing, dismantling, transforming, processing, recycling, adapting or servicing of, or the research and development of, any goods, substances, food, products or articles for commercial purposes, and includes any storage or transportation associated with any such activity.

- 118 The manufacturing of beer meets the definition of an industrial activity, by the manufacturing or transforming of substances or products for commercial purposes. Therefore, if the brewery is a separate and independent use, it is either for the purpose of 'light industry' simpliciter, or is a form of light industry as an 'artisan food and drink industry' as explained below. On either characterisation, the brewery is prohibited on the site.

The proposed food and drink service is prohibited

- 119 I find that the food and drink service is appropriately characterised as a food and drink premises, and is therefore prohibited on the site. Alternatively, it could be characterised as an artisan food and drink industry, which is similarly prohibited.

- 120 I consider that the characterisation of the food and drink service as for the purpose of a 'food and drink premises' is sufficiently broad to capture all of the individual activities that are proposed to take place within the existing sheds, in the area marked as the so-called 'farm gate premises' on plan PR 10G (Ex C, Tab 4) and the adjacent kitchen, wine making and brewery facilities. The

definition of 'food and drink premises' is set out at [60], and includes a restaurant, which means "a building or place the principal purpose of which is the preparation and serving, on a retail basis, of food and drink to people for consumption on the premises". The purpose of the activities within that area, including the kitchen and brewery, are for that purpose of "the preparation and serving" of food and drink to those on the premises. This is supported by the focus on the service of food and drink in the Revised Plan of Management, together with the wine pairing menu and the self-service kegs. A food and drink premises is a type of commercial premises, which is a nominated prohibited use on the site.

- 121 Whilst I favour the characterisation of the food and drink service element of the proposed development as a food and drink premises, it could alternatively be characterised as an artisan food and drink industry. As set out above at [60], an 'artisan food and drink industry' is "a building or place the principal purpose of which is the making or manufacture of boutique, artisan or craft food or drink products only". It must also include at least one additional element, which includes, at (b), "the preparation and serving, on a retail basis, of food and drink to people for consumption on the premises". A large area of the existing sheds comprises the brewery area, used for the manufacture of a craft drink product, beer. This area is around 13m x 13m (Plan 06 G), and is intended to manufacture 72,400 cartons of beer each year. The wine making area is also proposed within the existing sheds, which is intended to produce 13,267L of wine a year by the fifth year of operation. Given the significant quantity of craft beer to be produced, this could be considered the principal purpose of the building, which would cause the food and drink service area and associated kitchen and brewery to be characterised as an artisan food and drink industry, and therefore prohibited as a type of industry.
- 122 For the above reasons, I find that the food and drink service and associated areas are for the purpose of a prohibited use, as they are a food and drink premises in the form of a restaurant. If I am wrong on this point, they could alternatively be considered as being for the purpose of an artisan food and drink industry, which is similarly prohibited.

123 Whilst some of the wine making activities within the building are for the purpose of the cellar door premises, which already exists and is permissible on the site, the proposed wine making area is not readily severable from the food and drink premises so as to approve the wine making area in the manner proposed.

The proposed accommodation should be refused

124 As set out above, I find that the proposed accommodation does not meet the definition of the permissible use of ‘farm stay accommodation’ as it is not “on a commercial farm”.

125 The Council conceded that the accommodation use is severable from the other proposed uses, and could be permissible as a caravan park or camping ground. However, that is not how the proposed development is presently framed, and, as the Council points out, separate regulatory requirements apply under the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2021 (NSW). The Court does not have the power to consider development that is not the subject of the development application (*Ku-ring-gai Council v Bunnings Properties* (2019) 236 LGERA 35; Pty Ltd [2019] NSWCA 28 at [202]). Accordingly, the development application with respect to the proposed accommodation should also be refused.

Costs of the amendment to the development application

126 On 12 August 2025, the Court exercised its functions, pursuant to s 39(2) of the LEC Act, to agree to an application for an amendment to a development application. The amendments are set out in detail in the affidavit of Ms Megan Trotter dated 6 August 2025.

127 Section 8.15(3) of the EPA Act compels the Court to make an order for the payment of the costs of the Council that are thrown away as a result of the amendment of the application, other than where the amendment is a minor amendment. At the time of the hearing, no agreement was reached between the parties as to whether the amendments were the making of a minor amendment or not.

128 Having reviewed the amendments, I consider that they are largely matters of detail around the proposed development, such as clarification around what structures are existing, detail on the odour and air quality, and changes to details in the Plan of Management, the stormwater management plan and the food and drink menu. There are only minor amendments to matters that form part of what is proposed, such as the relocation of waste points, the changes to flood measures and the Flood Emergency Response Plan. Further, the new information concerning the primary production business is information that supports the development application, rather than amending the development application. Accordingly, I accept Baillie's position that the amendments made in the amendment to the development application on 12 August 2025 were a minor amendment, such that no order is required to be made pursuant to s 8.15(3) of the EPA Act.

The outcome of the appeal

129 Neither the proposed food and drink service, nor the proposed accommodation, meet the definitional requirement for farm gate premises and farm stay accommodation to be "on a commercial farm". As set out above, this is because the site is not intended for the carrying on of a primary production business.

130 I have instead determined that the proposed development is for the purpose of a food and drink premises, which is prohibited on the site. Similarly, the brewery is prohibited on the site, either as part of the prohibited use for the purpose of the food and drink premises, or as a separate prohibited use for the purpose of light industry.

131 In relation to the proposed accommodation, it does not meet the definition of the permissible use of farm gate accommodation, and is not otherwise framed as seeking another use that is permissible on the site.

132 The development application, although described as being for farm gate premises, farm stay accommodation, agricultural produce industry and intensive plant agriculture, is properly characterised as being for the purpose of, firstly, the prohibited use of food and drink premises and secondly, accommodation that does not meet the description of farm stay

accommodation. The development application should therefore be determined by the refusal of consent.

133 The Court orders that:

- (1) The appeal is dismissed.
- (2) The development application 2023/710/1 for the use of existing structures and the carrying out of works at 40 Cobbitty Road, Cobbitty, is determined by refusal of consent.
- (3) The exhibits are returned, except for Exhibits A, B, C and K, which are retained.

J Gray

Commissioner of the Court

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